Dying Declaration guidelines

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CERTIFICATE OF THE HIGH COURT OF SINDH, KARACHI

Criminal Jail Appeal No-453 of 2020

Muhammad Kamran

Vs.

State

HIGH COURT OF SINDH

Composition of Bench. *Single.*

Mr. Justice Mohammad Karim Khan Agha

Dates of hearing : 17-10-2024

Decided on : 24-10-2024

(a) Judgment approved for Reporting *Yes*

CERTIFICATE.

Certified that the judgment */Order is based upon or enunciates a principle of law */decides a question of law which is of first impression/distinguishes/. Over-rules/ reverses/explains a previous decision.

* Strike out whichever is not applicable.

NOTE: - (i) This slip is only to be used when some action is to be taken.

(ii) If the slip is used, the Reader must attach it to the top of the first page of the judgment.

(iii) Reader must ask the Judge writing the Judgment whether the Judgment is approved for reporting.

(iv) Those directions which are not to be used should be deleted.

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IN THE HIGH COURT OF SINDH AT KARACHI.

Crl. Jail Appeal No. 453 Of 2020.

Muhammad Kamran s/o Nousher
Muslim, adult, presently
confined in Central Prison,
Karachi.....Appellant in person.

Versus

The state.....Respondent.

Sessions Case NO.1218/2019.
FIR No.206/2019
Sections.302 PPC.
PS. Steel Town.Karachi.

APPEAL UNDER SECTION 410 CR.P.C.

Honourable Sir,

Being aggrieved and dis-satisfied with impugned judgement dated 24.02.2020, passed by Mr. Shahid Ahmed Awan, Learned 3rd Additional Sessions Judge Karachi, Malir, (Model Criminal Trial Court) in Sessions Case number mentioned above re: The State Vs. Muhammad Kamran s/o Nousher, being outcome of FIR number mentioned above , Police Station Steel Town, Karachi, under sections 302 PPC.

Whereby convicting and sentencing the Appellant/ accused by awarding him **life Imprisonment** under section 302 (b) PPC and to pay compensation of Rs.10,00,000/-to legal heirs of deceased in view of section 544-A Cr.P.C.

Benefit of section 382 (b) Cr.P.C was also extended.

The Appellant/accused in person has come in appeal before this Honourable Court with a prayer that this Honourable Court may be pleased to call for the R&Ps of aforesaid Sessions case, peruse the same, so also the impugned judgement and may further be pleased after hearing and satisfying itself as to the legality, propriety and maintainability of the impugned judgement be pleased to accept this appeal and may further be pleased as a consequence to set-aside the impugned judgement and the conviction awarded to the appellant and this Honourable Court may further be pleased to acquit him from the charged offence, inter-alia on consideration of following facts and grounds:-

Copy of the impugned judgement in Sessions Case No.1218/2019 is annexed herewith and marked as 'A'

FACTS.

Facts of the prosecution case as per FIR are that the complainant is resident of Mureed Gabol Goth Pipri Bin Qasim Malir, Karachi. On 10.05.2019 the son of the complainant namely Ejaz Ali who was working as mechanic near Shahbaz Petrol Pump and due to this accused Kamran and his companion used to issue threats to his son for closing the work of mechanic else he would be murdered. On same day, at about 1130 hours the complainant received a call from the cell phone of his son namely Ejaz Ali bearing No. 0303-2015307 and the person disclosed his name as Muhammad Alam who told that the son of the complainant was assaulted by knife with intention to commit murder by one Kamran and his companion Aslam and Hafeez and they are shifting him to Al-Khidmat Hospital for treatment and requested to come there

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IN THE HIGH COURT OF SINDH AT KARACHI

Present:
Mr. Justice Mohammad Karim Khan Agha

CRL. JAIL APPEAL NO.453 OF 2020

Appellant:	Muhammad Kamran s/o. Nousher through M/s. Iftikhar Ahmed Shah, Raja Zeeshan and Shahmeer Memon, Advocates
Respondent:	The State through M/s. Muhammad Iqbal Awan, Addl. Prosecutor General, Sindh and Mumtaz Ali Shah, Assistant Prosecutor General Sindh.
Date of Hearing:	17.10.2024
Date of Announcement:	24.10.2024

JUDGMENT

Mohammad Karim Khan Agha, J: Appellant Muhammad Kamran was tried in the Model Criminal Trial Court/Additional Sessions Judge-II Malir Karachi in Sessions Case No. 1218 of 2019 in respect of Crime No. 206 of 2019 registered under Section 302 P.P.C. at P.S. Steel Town, Karachi and after a full-fledged trial vide judgment dated 24.02.2020 he was convicted under section 302(b) P.P.C. and sentenced to suffer imprisonment for life. He was also directed to pay fine of Rs.10,00,000/- to the legal heirs of the deceased under Section 544-A Cr.PC and in case of default in payment he shall further undergo simple imprisonment of six months. Benefit of section 382-B Cr.P.C. was extended to the appellant.

2. The brief facts of the case, as per FIR are that the complainant is resident of Mureed Gabol Goth Pipri Bin Qasim Malir, Karachi. On 10.05.2019 the son of the complainant namely Ejaz Ali who was working as mechanic near Shahbaz Petrol Pump and due to this accused Kamran and his companion used to issue threats to his son for closing the work of mechanic else he would be murdered. On same day, at about 1130 hours the complainant received a call from the cell phone of his son namely Ejaz Ali bearing No.0303-2015307 and the person disclosed his name as Muhammad Alam who told that the son of the complainant was assaulted by knife with intention to commit murder by one Kamran and his companion Aslam and Hafeez and they are shifting him to Al-

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Khidmat Hospital for treatment and requested him to come there urgently. When, the complainant reached to Al-Khidmat Hospital, doctor gave first aid and suggested to shift the patient at Jinnah Hospital Karachi (JPMC), where the complainant himself through ambulance shifted his son to Jinnah Hospital but the injured was expired due to such injuries, hence the instant FIR was registered.

3. After completion of investigation I.O. submitted charge sheet against the accused persons to which the appellant plead not guilty and claimed trial.

4. The prosecution in order to prove its case examined 9 witnesses and exhibited various documents and other items. The statement of accused was recorded under Section 342 Cr.P.C in which he denied all the allegations leveled against him. He, however, did not give evidence on oath or call any DW in support of his defence case.

5. After hearing the parties and appreciating the evidence on record the trial court convicted the appellant and sentenced him as stated earlier in this judgment and hence, the appellant has filed this appeal against his conviction. The co-accused was acquitted based on a lack of evidence and no appeal against acquittal has been filed.

6. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the impugned judgment passed by the trial court and, therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

7. Learned counsel for the appellant has contended that the FIR was lodged after a delay of 12 hours which has not been adequately explained; that the dying declaration of the deceased whereby he implicated the appellant in the offence cannot be safely relied upon; that this is not a case of last seen evidence; that there are material contradictions in the evidence of the witnesses which renders their evidence unreliable; the appellants identification is in doubt and the recovered knife was foisted on the appellant by the police and that for any or all of the above reasons the appellant should be acquitted of the charge by being extended the benefit of the doubt. In support of his contentions he has placed reliance on the cases of **Basharat Ali v. Muhammad Safdar** (2017 SCMR 1601), **Muhammad Asif v. The State** (2017 SCMR 486), **Mst. Zahida Bibi v The State** (PLD 2006 SC 255), **Imtiaz alias Taj v. The State** (2018 SCMR 344) and **Tariq Pervez v The State** (1995 SCMR 1345).

8. On the other hand learned APG appearing on behalf of the State has fully supported the impugned judgment and contended that the appeal is without merit and should be dismissed. He has contended that the dying declaration whereby the deceased implicated the appellant in the murder can be safely relied upon which is corroborated by the last seen evidence and the recovery of the murder weapon (knife) on the appellant's pointation. In support of his contentions he has placed reliance on the cases of **Fayyaz Ahmad v. The State** (2017 SCMR 2026), **Muhammad Abid v. The State** (PLD 2018 SC 813), **Muhammad Ashraf Khan Tareen v. The State** (1996 SCMR 1747), **Abdul Khaliq v. The State** (2021 SCMR 325), **Majeed v. The State** (2010 SCMR 55), **Muhammad Nadeem alias Deemi v. The State** (2011 SCMR 872) and **Muhammad Ilyas v. The State** (2011 SCMR 460).

9. I have heard the arguments of the learned counsel for the parties, gone through the entire evidence which has been read out by the appellant's counsel, and the impugned judgment with their able assistance and have considered the relevant law including the case law cited at the bar.

10. At the outset based on the prosecution evidence, especially the medical evidence and the blood stained earth found at the crime scene I find that the prosecution has proved beyond a reasonable doubt that on 10.05.2019 at 11.30am hours Aijaz Ali (the deceased) was stabbed to death at Gulshan-e-Hadeed Double road, Muslim Road coach bus Ada opposite Shahbaz petrol pump Karachi. This fact is not disputed by the parties.

11. The only question left before me therefore is who stabbed and murdered the deceased at the said time, date and location?

12. After my reassessment of the evidence I find that the prosecution has **NOT** proved beyond a reasonable doubt the charge against the appellant for which he was convicted keeping in view that each criminal case is based on its own particular facts, circumstances and evidence for the following reasons.

(a) The FIR was lodged by the complainant/father of the deceased after a delay of 12 hours however I do not find such delay to be particularly relevant as such delay has been fully explained. This is because although the deceased was seriously injured at the crime scene he did not die immediately, instead he was taken to the local Al Khidmat hospital where the complainant reached and then transferred to JPMC hospital where he died en route and after his body was handed over to the complainant who took the body home and after completion of police formalities then lodged

the FIR. As such delay in lodging the FIR is not fatal to the prosecution case although its contents as will be discussed later might be very detriment to the prosecution case. In this respect reliance is placed on the case of **Muhammad Nadeem alias Deemi v. The State** (2011 SCMR 872)

(b) I find that the prosecution's case rests almost exclusively on (a) the dying declaration which the deceased made to the complainant in the ambulance en route to JPMC and (b) so called last scene evidence each of which I will deal in detail with below;

Guidelines for the law on relying on a dying declaration were set out in the case of ***Majeed v. State*** (2010 SCMR 55) where it was held as under:-

> *"7. The evidence of P.Ws.3, 4 and 7 reveals that when they reached on the fire-arm reports they found the deceased Mir Shandad lying dead while Mujeeb-ur-Rehman was alive but lying in injured condition who disclosed that the appellant Majeed and Ismail had fired at them. P.W.7 apart from naming the above two persons also named Naseer and Bashir. All these three witnesses were cross-examined but nothing came on record to discredit their evidence. No serious effort was made to challenge their statement on the question of dying declaration. From the evidence it has been established beyond any shadow of doubt that deceased Mujeeb-ur-Rehman made dying declaration immediately after the incident, eliminating the possibility of influence etc. before the witnesses making the appellant responsible as one of the accused for causing them injuries. It is a well-settled principle of law that if dying declaration is made even before a private person, is free from influence and the persons before whom such dying declaration was made was examined then it becomes substantive piece of evidence and for that no corroboration is required and such declaration can be made basis of conviction.* ***This Court gave following guiding principles for relying upon the dying declaration in the case of Farmanullah v. Qadeem Khan 2001 SCMR 1474.***
>
> *(i) There is no specified forum before whom such declaration is required to made.*
>
> *(ii) There is no bar that it cannot be made before a private person.*
>
> *(iii) There is no legal requirement that the declaration must be read over or it must be signed by its maker.*
>
> *(iv) It should be influence free.*
>
> *(v) In order to prove such declaration the person by whom it was recorded should be examined.*
>
> *(vi) Such declaration becomes substantive evidence when it is proved that it was made by the deceased.*
>
> *(vii) Corroboration of a dying declaration is not a rule of law, but requirement of prudence.*
>
> *(viii) Such declaration when proved by cogent evidence can be made a basis for conviction."*

In essence there is no hard and fast rule whether a dying declaration can be believed and can be safely relied upon. Much will depend upon the particular facts and circumstances of the case. In this respect reliance is placed on the case of **Ms Zahida Bibi** (Supra)

For the following reasons I place no reliance on the dying declaration of the deceased:

(i) The incident occurred on 10.05.2019 at about 11.30am in broad day light when the deceased was found seriously injured by his co-workers PW 3 Muhammed Razzaq and PW 4 Allah Noor. The deceased however was conscious throughout but he did not personally tell either of these witnesses that the appellant had stabbed him. He remained conscious until his death a number of hours later yet did not reveal to the police, nurses or Dr's that the appellant had stabbed him.

(ii) Instead after being taken from the wardat to Al Kidmat Hopsital and then referred to JPMC the deceased according to the evidence of the complainant gave his dying declaration to the complainant alone in the ambulance on the way to the JPMC. Once at the JPMC he did not tell any police officer, Dr or any other person that the appellant had stabbed him. He died a few hours after reaching the JPMC. I find this fact inexplicable. Why would an injured but conscious man not immediately tell the persons who discovered him at the wardat, the police who took him from the wardat to the Al Kidman hospital and the Dr's at the hospital the identity of who had in fact stabbed him. This would have been the key question on all these people's mind especially the police yet the deceased did not mention to any of them, even after he was transferred to JPMC, that the appellant had stabbed him but only told his father alone in the ambulance en route to JPMC. I find that such conduct does not appeal to logic reason or common sense.

(iii) **Most significantly**, the complainant lodged his FIR about 12 hours after his son/deceased had given him his dying declaration yet there is no mention in the FIR of his son's/deceased dying declaration. Again I find this completely inexplicable. How could the complainant forgotten to have mentioned such important fact, if not the key fact in this case, just a few hours later when he lodged his FIR. Instead he nominates three separate person's in the FIR based on hearsay evidence of one Muhammed Alam who did not give evidence two of whom were not named in the dying delcaration. Once again, I find that such conduct does not appeal to logic reason or common sense.

(iv) **Again significantly** in his S.342 Cr.PC statement no question was put to the appellant that the deceased made a dying declaration which implicated the appellant in the death of the deceased yet the trial court placed reliance on the deceased's dying declaration. It is well settled by now that all the evidence must be put to the accused at the time of his recording his S.342 Cr.PC statement and any evidence which is not put to him and has a chance to explain cannot be used to lead to the conviction of the accused and must be discarded. In this respect reliance is placed on the case of **Imtiaz alias Taj** (Supra)

The key piece of evidence against the accused was the dying declaration of the deceased which I have discarded for the reasons mentioned above so what other evidence remains against the accused.

(v) Having excluded the dying declaration from consideration since there was no eye witness to the murder the other piece of evidence against the appellant is so called last seen evidence and as such the case is based on **circumstantial evidence** which the court must view with great care and caution. In this respect reliance is placed on the case of **Azeem Khan V Mujahid Khan** (2016 SCMR 274) which held as under;

"In cases of circumstantial evidence, the Courts are to take extraordinary care and caution before relying on the same. Circumstantial evidence, even if supported by defective or inadequate evidence, cannot be made basis for conviction on a capital charge. More particularly, when there are indications of design in the preparation of a case or introducing any piece of fabricated evidence, the Court should always be mindful to take extraordinary precautions, so that the possibility of it being deliberately misled into false inference and patently wrong conclusion is to be ruled out, therefore hard and fast rules should be applied for carefully and narrowly examining circumstantial evidence in such cases because chances of fabricating such evidence are always there. To justify the inference of guilt of an accused person, the circumstantial evidence must be of a quality to be incompatible with the innocence of the accused. If such circumstantial evidence is not of that standard and quality, it would be highly dangerous to rely upon the same by awarding capital punishment. The better and safe course would be not to rely upon it in securing the ends of justice."

(d) Likewise in the case of **Fayyaz Ahmed V State** (2017 SCMR 2026) the great care and caution in which circumstantial evidence needed to be scrutinized was emphasized especially when dealing with a capital case in the following terms;

"To believe or rely on circumstantial evidence, the well settled and deeply entrenched principle is, that it is imperative for the Prosecution to provide all links in chain an unbroken one, where one end of the same touches the dead body and the other the neck of the accused. The present case is of such a nature where many links are missing in the chain.

To carry conviction on a capital charge it is essential that courts have to deeply scrutinize the circumstantial evidence because fabricating of such evidence is not uncommon as we have noticed in some cases thus, very minute and narrow examination of the same is necessary to secure the ends of justice and that the Prosecution has to establish the case beyond all reasonable doubts, resting on circumstantial evidence. "Reasonable Doubt" does not mean any doubt but it must be accompanied by such reasons, sufficient to persuade a judicial mind for placing reliance on it. If it is short of such standard, it is better to discard the same so that an innocent person might not be sent to gallows. To draw an inference of guilt from such evidence, the Court has to apply its judicial mind with deep thought and with extra care and caution and whenever there are one or some indications, showing the design of the Prosecution of manufacturing and preparation of a case, the Courts have to show reluctance to believe it unless it is judicially satisfied about the guilt of accused person and the required chain is made out without missing link, otherwise at random reliance on such evidence would result in failure of justice".

It may also be kept in mind that sometimes the investigating agency collects circumstantial evidence seems apparently believable however, if the strict standards of scrutiny are applied there would appear many cracks and doubts in the

same which are always inherent therein and in that case Courts have to discard and disbelieve the same." (bold added)

Turning to the circumstantial evidence in terms of last seen evidence. The test for last seen evidence has been set out in the following cases in the following terms;

In **Fayyaz's case** (Supra) at P.2030 at Para 7 it was held as under regarding last seen evidence;

> **"The last seen evidence is one of such categories of evidence. In this category of cases some fundamental principles must be followed and the Prosecution is under-legal obligation to fulfill the same, some of which may be cited below:-**
>
> (i) There must be cogent reasons that the deceased in normal and ordinary course was supposed to accompany the accused and those reasons must be palpable and prima facie furnished by the Prosecution.
>
> (ii) **The proximity of the crime scene plays a vital role because if within a short distance the deceased is done to death then, ordinarily the inference would be that he did not part ways or separated from the accused** and onus in this regard would shift to the accused to furnish those circumstances under which, the deceased left him and parted ways in the course of transit.
>
> (iii) **The timing of that the deceased was last seen with the accused and subsequently his murder, must be reasonably close to each other to exclude any possibility of the deceased getting away from the accused or the accused getting away from him.**
>
> (iv) There must be some reasons and objects on account of which the deceased accompanied the accused for accomplishment of the same towards a particular destination, otherwise giving company by the deceased to the accused would become a question mark.
>
> (v) Additionally there must be some motive on the part of the accused to kill the deceased otherwise the Prosecution has to furnish evidence that it was during the transit that something happened abnormal or unpleasant which motivated the accused in killing the deceased.
>
> (vi) The quick reporting of the matter without any undue delay is essential, otherwise the prosecution story would become doubtful for the reason that the story of last seen was tailored or designed falsely, involving accused person.
>
> **Beside the above, circumstantial evidence of last seen must be corroborated by independent**

evidence, coming from unimpeachable source because uncorroborated last seen evidence is a weak type of evidence in cases involving capital punishment.

(vii) The recovery of the crime weapon from the accused and the opinion of the expert must be carried out in a transparent and fair manner to exclude all possible doubts, which may arise if it is not done in a proper and fair manner.

(viii) The Court has also to seriously consider that whether the deceased was having any contributory role in the cause of his death inviting the trouble, if it was not a pre-planned and calculated murder."(Bold added)

In the later case of **Muhammed Abid V State** (PLD 2018 SC 813) which delved further into the doctrine of "last seen together" evidence it was held as under at P.817 Para 6:

> "The foundation of the "last seen together" theory is based on principles of probability and cause and connection and requires 1. cogent reasons that the deceased in normal and ordinary course was supposed to accompany the accused. 2. proximity of the crime scene. 3. small time gap between the sighting and crime. 4. no possibility of third person interference 5. motive 6. time of death of victim. The circumstance of last seen together does not by itself necessarily lead to the inference that it was the accused who committed the crime. **There must be something more establishing connectivity between the accused and the crime**" (bold added).

Returning to the case in hand.

(a) In fact there is no last seen evidence. This is because no witness actually saw the deceased with the appellant before the incident. Instead the witnesses say that they saw the appellant running away after they were shown where the deceased was lying injured. It was not unusual for the appellant to be in the vicinity as he worked for the same bus company as the deceased and the witnesses who found the injured deceased which was near their place of work. So simply to conclude that because the deceased was seen running away that he committed the crime is not sustainable in law.

(b) The witnesses who saw the appellant running away do not say how far away he was from them and whether they saw him from the back or the front so there might even be some doubt about the identity of the appellant. Furthermore, according to the evidence the witnesses found the injured deceased after the body was pointed out to them after the deceased had been stabbed and was lying injured so it is unclear how long the witnesses were shown the injured body after the deceased was stabbed. It is does not appeal to logic, commonsense and reason that if the appellant had stabbed the deceased and seriously injured him that he would just hang around the crime scene. He would have made his escape good before the body was found.

(c) None of the witnesses who gave evidence in respect of the last seen evidence are named in the FIR and they all gave their A.161 Cr.PC statements 4 to 5 days after the incident which also brings their evidence into doubt due to such long delay in recording their so called eye witness S.161 Cr.PC statements.

(d) The prosecution has not proved through any evidence the motive as to why the appellant would murder the deceased.

(e) As such I do not find that this case meets the legal requirements of circumstantial evidence and/or last seen evidence which in any event must be corroborated by evidence from an unimpeachable source which is not available in this case.

(f) Even the recovery of the murder weapon (knife) is in doubt. Whilst some witnesses state in their evidence that it was recovered at the wardat other witnesses (police) state in their evidence that immediately after they arrested the appellant on the same day he lead the police on his pointation to a hotel where he had hidden the murder weapon from where it was recovered which appears to be a material contradiction when placed in juxta position with the other evidence on record.

13. Based upon the above discussion I find that there are doubts in the prosecution case and thus by extending the benefit of the doubt to the appellant I hereby acquit him of the charge and set aside the impugned judgment and allow the appeal. The appellant shall be released unless he is wanted in any other custody case.

JUDGE 24/10/24