

Stereo. HCJDA 38
JUDGMENT SHEET
LAHORE HIGH COURT
BAHAWALPUR BENCH, BAHAWALPUR
JUDICIAL DEPARTMENT

Criminal Revision No. 37/2023

Asfandyar and others

Vs.

The State and another

JUDGMENT

Date of hearing:	11.10.2023
For the Petitioners:	Mr Muhammad Aslam Khan, Advocate.
For the State:	Rao Riaz Ahmad Khan, Deputy Prosecutor General.
Amicus curiae:	Syed Zeeshan Haider, Advocate.

Tariq Saleem Sheikh, J. – On 5.6.2021, around 7:00 a.m., Khadim Hussain/ASI was on patrol with other police officials near the NP/28 Bridge in Mauza Walana. During their patrol, he received information via a ‘15 Call’ that the family of Tahira, daughter of Qamar Din, suspected her of having illicit relations with Ehsan Khaliq, son of Khaliq Dad. Consequently, Petitioners No.3 and 5 (Allah Yar and Sibghat Ullah) and Respondents No.4 to 6 (Ejaz Ahmad, Amanullah, and Daud) murdered both of them and then threw Ehsan Khaliq’s body in the canal. Upon receiving this information, Khadim Hussain/ASI and other officials hurried to the canal. They retrieved Ehsan’s corpse and prepared his injuries statement. Then, Khadim Hussain/ASI reported the incident to Police Station Ahmadpur Lama, District Rahimyar Khan, on which FIR No.233/2021 dated 5.6.2021 was registered under sections 302, 311, 148, and 149 PPC. Later, Tahira Bibi’s body was found in Sanjarpur Ahmad Wah.

2. During the investigation, the police discovered that on the night of 4th June 2021, nine persons, namely Asfandyar, Asad Yar, Allah

Yar, Ahmad Yar, Sibghat Ullah (the Petitioners), and Ejaz Ahmad, Amanullah, Daud, and Summar Walana, abducted Ehsan Khaliq and Tahira within the jurisdiction of Police Station Ahmadpur Lama. Subsequently, they murdered them and threw their bodies in the Wah Canal. The report under section 173 Cr.P.C. was submitted accordingly. The Additional Sessions Judge framed the charge against them. They pleaded not guilty.

3. On 15.1.2022, Respondent No.3 (Qamar Din, father of Tahira deceased) filed a private complaint titled "*Qamar Din v. Sikandar and 06 others*". He stated that Ehsan was his relative who developed illicit relations with his daughter Tahira. On 5.6.2021, when he was away from his house, Ehsan, Sikandar, Abid Hussain, Muhammad Qasim and Sajid, along with 8/10 unidentified persons, abducted Tahira at gunpoint and sped on motorcycles. Her cries drew three members of his family to the scene, including Ghulam Muhammad, Qadir Dina and Gul Jahan. They chased the accused who resorted to aerial firing to scare them away but they continued to follow them. The accused took Tahira to the Ahmad Wah Canal, where Qasim (Respondent No.11) strangled her. When Ehsan tried to intervene, Sajid raised a *lalkara* that he should also be killed along with Tahira for bringing disgrace to the family's honour. Qasim tossed the semi-unconscious Tahira into the canal, while Sikandar and Abid throttled Ehsan to death. Subsequently, the accused disposed of his body into the canal and fled. The Additional Sessions Judge summoned Sikandar etc. to face trial and indicted them on 7.1.2023.

4. On 27.5.2022, Respondent No.11 (Muhammad Qasim) being dissatisfied with the police investigation of FIR No. 233/2021, filed a private complaint against Allah Yar and eight others (including Ahmad Yar, Sibghat Ullah, Asad Yar, Asfandyar, Amanullah, Ejaz, Daud, and Muhammad Yar Walana). This complaint, titled "*Muhammad Qasim v. Allah Yar etc.*", mirrored the narrative of the State case (which is also called the "*challan case*") and cited the same witnesses as mentioned therein. Notably, it omitted Summar Walana and introduced Muhammad Yar Walana as an additional accused.

5. On 1.10.2022, relying upon *Nur Elahi v. The State* (PLD 1966 SC 708), the Petitioners made an application before the Additional Sessions Judge praying that the proceedings in the challan case and the private complaint titled “*Muhammad Qasim v. Allah Yar etc.*” be held in abeyance till the final decision of the private complaint titled “*Qamar Din v. Sikandar etc.*”. The Additional Sessions Judge dismissed that application by order dated 7.1.2023. He held that *Nur Elahi*’s case did not apply to the facts and circumstances of the present case and directed that both the complaints and the challan case proceed side by side.

6. This revision petition under section 439 Cr.P.C. read with section 435 Cr.P.C. is directed against the above-mentioned order dated 7.1.2023.

7. This Court appointed Syed Zeeshan Haider, Advocate, as an *amicus curiae*. He argued that in the landmark *Nur Elahi* case, the Supreme Court of Pakistan settled the procedure for dealing with situations where there is a challan case and a private complaint arising from the same occurrence. However, he pointed out that the aforesaid case does not cover all possible scenarios involving different versions of the incident. It does not propose automatic prioritization of a private complaint in all eventualities because such an approach would contradict the letter and spirit of the law. Mr Haider submitted that individuals frequently file private complaints with ulterior motives. Taking advantage of the fact that the defence cannot present its case during proceedings under section 204 Cr.P.C., they often secure summonses for the accused. Then, exploiting the *Nur Elahi* precedent, they attempt to halt the proceedings of the challan/police case which obstructs the dispensation of justice.

8. Mr Haider argued that there are three versions of the occurrence in the present case – the challan case and two private complaints. These versions cannot be consolidated into one trial and must be tried independently. The challan case and Qasim’s private complaint differ significantly. In the challan case, police have also charged Summar, while Qasim has not mentioned him and has included Muhammad Yar Walana among the accused. On the other hand, Qamar Din’s private

complaint is a counter version introduced by the accused in the challan case. Mr Haider maintained that the Additional Sessions Judge had rightly concluded that the principle established by the Supreme Court in *Nur Elahi* is inapplicable to the current situation. According to Mr Haider, the Petitioners in the present case want their complaint to be heard and decided first. This request is a classic example of how the *Nur Elahi* case is misinterpreted, and a party can exploit it to impede the smooth functioning of the legal system.

Opinion

9. The Code of Criminal Procedure, 1898, does not explicitly outline the procedure for conducting a trial when there is a *challan* case and a private complaint related to the same offence.¹ Judicial precedents have addressed this lacunae. In ***Nur Elahi v. The State*** (PLD 1966 SC 708), a man named Muzaffar Piracha was murdered. The FIR mentioned Ch. Zafar-ul-Haq, Ikram-ul-Haq, and Nawaz-ul-Haq as the alleged perpetrators. However, after an investigation, the police charged one Ch. Ikram and Banarass. They mentioned Ch. Zafar-ul-Haq and his son, Nawaz-ul-Haq, in Column No.2 of the challan, implying that no case had been established against them. Dissatisfied, the complainant, *Nur Elahi*, filed a complaint in which he repeated his version of the occurrence described in the original FIR. This situation raised the question of how to proceed with the trial of these two cases. The Supreme Court of Pakistan ruled that a fair procedure would entail the trial judge first taking up the complaint case. During this trial, the judge may call witnesses mentioned in the police challan as court witnesses under section 540-A Cr.P.C., if they had not already been examined on behalf of the complainant. This would enable both parties to cross-examine these witnesses, consolidating all relevant evidence into a single trial. The accused persons would also have the opportunity to present their defence evidence. As a result, the judge would be able to make an informed decision based on a thorough review of the evidence presented by the parties. If the trial results in a conviction, the Public Prosecutor would decide whether to withdraw the prosecution in the *challan* case, with the

¹ When there are two versions of the same incident, some Judges compendiously call them “case and counter case” and others as “cross cases”.

court's permission, as per section 494 Cr.P.C. It would be easy for him to make such a decision after going through all the evidence produced in the first trial. If the said trial ends in an acquittal, the Public Prosecutor might still consider whether the evidence adduced in the first trial had significantly weakened the police version, justifying a withdrawal of the prosecution. If not, the second trial would proceed to its normal conclusion, and both parties can make use of the material brought on record by cross-examining the relevant witnesses, as permitted by law.

10. Kaikaus J. authored a separate opinion in *Nur Elahi*, dissenting from the above approach. He held that the two proceedings should be consolidated and that there should be a single hearing, that the whole evidence be produced before the Sessions Court and then a decision recorded.

11. In *Muhammad Sadiq v. The State and another* (PLD 1971 SC 713), the Sessions Judge concluded the trial of a State/challan case under sections 148, 302, 307, 149, PPC and scheduled a date to deliver his judgment. Simultaneously, a Magistrate of the First Class was conducting the trial of a counter complaint case filed by one of the accused in the challan case, which stemmed from the same incident. Against this backdrop, the accused in the challan case applied under section 561-A Cr.P.C. for restraining the Court of Sessions from announcing judgment in the challan case until the proceedings of the complaint case had concluded. The High Court acceded to this prayer and stayed the announcement of the judgment by the Sessions Judge. The Supreme Court noted that the Code is silent about the procedure for the trial of counter-cases arising from the same occurrence. Although it is a common practice to try such counter-cases concurrently before the same court until their conclusion and to deliver judgments in both cases simultaneously, it is not an absolute rule that must always be followed. The facts and circumstances of a particular case may warrant a different procedure for the ends of justice. The Supreme Court accepted the appeal, set aside the High Court's order and directed the Sessions Judge to pronounce the judgment.

12. In Zulfikar Ali Bhutto v. The State (PLD 1979 SC 53), the appellant contended that his trial was vitiated because the complaint case should have been tried before the challan case as per the ruling in *Nur Elahi's* case. The Supreme Court held that the two cases had fundamentally distinct circumstances. They were not “cross cases” in the typical sense of that term. Consequently, it ruled that the procedure outlined in *Nur Elahi* did not need to be followed invariably. The relevant excerpt from page 77 is reproduced below:

“57. In the instant case, the version is the same which is not the feature in the above-cited case; and as for the accused cited in the complaint case, the appellant is common in both cases, whereas Masood Mahmood, who would have also been an accused in the challan case has been granted pardon and examined as an approver. Saeed Ahmad Khan is a witness in the challan case, while Rao Abdur Rashid is neither a witness nor an accused in that case, and it may be stated that the complainant has not implicated either of them as accused in his evidence in the challan case. Therefore, there was no necessity for a separate trial of the two cases when technically speaking, there were neither two sets of accused nor different versions nor any additional evidence to be examined by the complainant. It was only to avoid prejudice to the complainant that a particular procedure was devised in the reported case of *Nur Elahi*, but to say that invariably it should be followed even if the facts are distinguishable is not correct, as it does not amount to a declaration of law. Having held so, we might also point out that the objection to the trial, if any, should have been taken before the trial Bench, and not having done so, it is too late in the day to urge that it has caused prejudice to the appellant when factually none is shown.”

13. In Aziz Begum v. Muhammad Khushdil and another (PLD 1981 Karachi 141), the Sindh High Court ruled that in every case where there is a direct complaint and a separate charge, it is not mandatory to proceed with them consecutively. The guiding criterion is whether there are competing versions. If there are, the *Nur Elahi* case would be applicable. In other situations, however, separate trials are unnecessary because they would result in inconsistent judgments and waste public resources.

14. In Raja Khushbakhtur Rehman and another v. The State (1985 SCMR 1314), the Supreme Court stated that *Nur Elahi* does not lay down any inflexible rule that the complaint case must always be tried first. A second trial may not be necessary if the version and the accused are the same in both the complaint and the challan cases.

15. In *Rashid Ahmad v. Asghar Ali and others* (PLD 1986 SC 737), the High Court determined that the principle laid down in *Nur Elahi* would apply because the versions in the complaint and the challan case were different, and the sets of accused in the two cases were also not the same. The Supreme Court upheld the ruling and added that *Zulfikar Ali Bhutto v. The State* (PLD 1979 SC 53) and *Raja Khushbakhtur Rehman and another v. The State* (1985 SCMR 1314) have not modified the principle established in *Nur Elahi*.

16. In *Karim Bakhsh v. Zulfiqar and others* (1997 SCMR 334), the private complaint and the FIR contained the same allegations. The Supreme Court ruled that the two cases need not be tried separately in these circumstances. The High Court had erred in relying on *Nur Elahi*.

17. The above-mentioned judgments show that the procedure outlined in the *Nur Elahi* case is generally recommended. Nevertheless, some situations may require a departure from it. These can be categorized into two distinct groups: (a) cases where there are two prosecution versions regarding the same incident but entirely or partially different from the one reported earlier through the first information report, and (b) cases where there are different versions of the same incident by rival parties. I take the opportunity to glean the guiding principles from the decisions rendered over time. As regards the first category, these are as follows:

- i) Where the party lodging the FIR also files a private complaint containing the same allegations against the same set of accused persons, the trial court will try the complaint case first and put the challan case on hold until its decision.²
- ii) Whenever the facts or circumstances allow, cross-cases involving two different versions of the same incident and two distinct sets of accused must be tried together in the same court. The rationale is that if the two cases giving different accounts of the same incident are not tried concurrently, there is a considerable risk of conflicting judgements.³
- iii) Where the complaint case is instituted after the FIR is lodged and not only there are differences in the names of some of the accused, but at least one person mentioned in the FIR as an accused is excluded and replaced by another individual, the complaint case must be taken up first for trial as stipulated in *Nur Elahi*. This is particularly essential when the two sets of allegations made in the said two cases regarding

² *Niaz Ahmed v. Hasrat Mahmood and others* (PLD 2016 SC 70).

³ *Abdul Rehman Bajwa v. Sultan and others* (PLD 1981 SC 522 : PLJ 1981 SC 895).

the weapons used and the roles ascribed to the various accused are materially different.⁴

iv) When the persons nominated as accused in the private complaint are the same as those named in the FIR, the trial court has the authority to summon the individuals listed in Column No. 2 of the report filed by the police under section 173 Cr.P.C. However, if the police introduce a new individual as an accused who has not been mentioned by the complainant in the private complaint, the procedure recommended in the *Nur Elahi* case is the most suitable approach. In simpler terms, if, during an investigation, the police include or exclude any accused in the report under section 173 Cr.P.C., but the complainant adheres to their initial version, then the proceedings in the private complaint should be prioritized and completed first, while the challan case should be put on hold as directed in *Nur Elahi*.⁵

v) While a consolidated trial of challan and complaint cases is not recommended, the Supreme Court will not interfere with the order of acquittal recorded by the trial court and High Court if such a trial did not cause a failure of justice (due to the unworthy and unreliable evidence available with prosecution), and the complainant did not object to it before the trial court.⁶

18. Now, let's consider the second classification. If the rival parties advance different versions of the same incident through cross-cases and such different versions contain different sets of accused persons, the trial of such cases is to be held simultaneously and side by side. The same court must hear and decide them to avoid conflicting judgments.⁷

19. There may be instances where the private complaint is instituted by one of the accused persons in the challan case rather than the original complainant party, with different versions, separate sets of witnesses, and different accused. In *Abdul Shакoor v. The State* (2012 PCrLJ 231), this Court held that in such a situation, the principle laid down in *Nur Elahi* to try the private complaint and challan case sequentially need not be followed. The two cases should instead be proceeded side by side.

20. In *Kamran v. The State and others* (2016 PCr.LJ Note 34), two private complaints regarding the same occurrence featuring the same accused and identical sets of witnesses were filed. This Court ruled that

⁴ *Syed Muhammad Hussain Shah v. Abdul Hamid and others* (1981 SCMR 361).

⁵ *Mumtaz and others v. Mansoor Ahmad and another* (1984 SCMR 221).

⁶ *Niaz Ahmed v. Hasrat Mahmood and others* (PLD 2016 SC 70).

⁷ *Muhammad Sadiq v. The State and another* (PLD 1971 SC 713), *Abdul Rehman Bajwa v. Sultan and others* (PLD 1981 SC 522), *Rashid Ahmad v. Asghar Ali etc.* (PLD 1986 SC 37) and *Mst. Rasool Bibi v. The State and another* (2000 SCMR 641), *Niaz Ahmed v. Hasrat Mahmood and others* (PLD 2016 SC 70).

the Sessions Judge should have consolidated these cases instead of holding separate trials. Additionally, it rejected the suggestion of the respondents' counsel that the proceedings in one of the cases should be stayed because it could potentially prejudice the second complainant. There was a possibility that the complainant from the first complaint may not call the other complainant as a witness in court.

21. Let's now turn to the case at hand. FIR No. 233/2021 dated 5.6.2021 was registered at the instance of a police officer, Khadim Hussain/ASI, rather than a private party because of some unique circumstances. During the investigation, the police found that nine persons, including Asfandyar, Asad Yar, Allah Yar, Ahmad Yar, Sibghat Ullah (the Petitioners) and Ejaz Ahmad, Amanullah, Daud and Summar Walana, abducted Ehsan Khalil and Tahira from within the remit of Police Station Ahmadpur Lama. Subsequently, they murdered them and threw their bodies in the Wah Canal. The report under section 173 Cr.P.C. was submitted accordingly. Respondent No.11, a legal heir of one of the deceased, filed the private complaint titled: "*Muhammad Qasim v. Allah Yar etc.*" against Allah Yar and eight others (including Ahmad Yar, Sibghat Ullah, Asad Yar, Asfandyar, Amanullah, Ejaz, Daud, and Muhammad Yar Walana). Respondent No.11 adopted the same version and, excluding the formal witnesses, cited the same witnesses as mentioned in the challan case but named Muhammad Yar Walana as an additional accused. Notably, Summar Walana was not an accused in this private complaint. Given the principles discussed above, in my opinion, the procedure outlined by the Supreme Court in *Nur Elahi* should be followed. The said private complaint must be taken up first, and the challan case should be kept dormant. I rely upon *Mumtaz and others v. Mansoor Ahmad and another* (1984 SCMR 221).

22. The Additional Sessions Judge has expressed concern in the impugned order dated 7.1.2023 that if the proceedings of the State case are stayed, what would be the fate of accused Summar Walana, who has been indicted in the State case but Respondent No.11 (Qasim) has not named him in his private complaint. *Nur Elahi's* case provides a comprehensive response to this issue. Refer to paragraph 9 of this judgment.

23. Respondent No.3 has filed a private complaint titled “*Qamar Din v. Sikandar and 06 others*” which gives an entirely different version of the occurrence. In fact, it is a counter-version of the challan case and Qasim’s private complaint. This complaint must be tried alongside the complaint titled “*Muhammad Qasim v. Allah Yar etc.*” by the same court until their conclusion, and the judgment in each case should be delivered concurrently.

24. Today, when this petition was taken up for hearing, Mr Muhammad Aslam Khan, Advocate, stated that he wanted to withdraw it. His request cannot be entertained because this Court has a statutory duty to ensure that the lower courts conduct proceedings in accordance with the law. It can exercise revisional powers, even *suo motu*, when it comes to its notice that they have not done so. The present case calls for the exercise of that power. Hence, the impugned order dated 7.1.2023 is set aside, and the Additional Sessions Judge is directed to proceed according to the observations made in paragraphs 21 to 23.

25. **Disposed of.**

(Tariq Saleem Sheikh)
Judge

Naeem

Approved for reporting

Judge