

JUDGMENT SHEET

ISLAMABAD HIGH COURT, ISLAMABAD, **JUDICIAL DEPARTMENT**

Criminal Revision No.83/2018

Amal Nawaz v. The State & another

P.S.L.A. No.04/2019

Amal Nawaz v. The State & another

P.S.L.A. No.20/2019

Amal Nawaz v. The State & others

and

Diary No.3051/2019

Amal Nawaz vs. The State

Petitioner by: Malik Irfan Asif, Advocate.

Respondents by: Mr. Najeeb Ullah Khan, Advocate for Respondent
No.2
Mr. Hasnain Haider Thaheem, State Counsel.
Ashraf, S.I./I.O., P.S. Golra Sharif, Islamabad.

Date of Decision: 21.07.2020.

MOHSIN AKHTAR KAYANI, J: Through this single judgment, I intend to decide the captioned criminal revision petition along with P.S.L.As. arising out of case FIR No.248, dated 01.09.2011, under Section 302, 109, 34 PPC, P.S. Golra Sharif, Islamabad.

2. Through the captioned criminal revision petition, the petitioner has called in question order of the learned Additional Sessions Judge (West), Islamabad, dated 12.10.2018, whereby direction for carrying out of proceedings in private complaint, rather in criminal case FIR No.248/2011, has been passed. Likewise, through the captioned P.S.L.As. the petitioner/applicant has assailed orders of the learned trial Court, dated 01.04.2019 and 26.06.2017, whereby respondents/accused persons have been acquitted in a private complaint and above referred case FIR No.248/2011. Similarly, the petitioner also filed an application under Section 439 Cr.P.C. r/w Section 435 Cr.P.C. in the captioned Crl. Revision No.83/2018 seeking stay of proceedings of the learned trial Court,

though the office has raised objection on the filing of said application and fixed the same before this Court as Diary case.

3. Brief and consolidated facts referred in the captioned criminal revision petition as well as in the P.S.L.As. are that on the complaint filed by the petitioner the case FIR No.248/2011 has been registered against respondents i.e. Safdar Zaman, Mir Zaman and Aamir on the allegations of having murdered petitioner's son namely Roshan Nawaz. Later on, the petitioner on knowing that six (06) other accused persons namely Muhammad Isal, Gul, Sheikh Farooq, Rizwan, Azad Khan and Zahid Ullah were also involved in the commission of offence nominated them through supplementary statement, but the police has not recorded the version of petitioner. Accordingly, feeling dissatisfied with the investigation being carried out by the police, the petitioner filed private complaint against the aforesaid six (06) accused persons, but to no avail as the said accused persons were declared proclaimed offender. However, accused Mir Zaman and Aamir opted to face trial, whereby the learned trial Court tried them in the complaint, rather in the challan case, and acquitted them of the charge vide impugned order dated 20.06.2017. Similarly, the learned trial Court, vide impugned order dated 12.10.2018, also directed to proceed against the other accused i.e. Safdar Zaman (Respondent No.2) in private complaint, rather in the challan case. Whereafter, the said accused person was acquitted of the charge in private complaint and in case FIR No.248/2011 vide the impugned judgment dated 01.04.2019. Hence, the captioned criminal revision petition and P.S.L.As.

4. Learned counsel for petitioner/applicant contends that the learned trial Court has misinterpreted the law and pronouncement of the apex Court in passing the impugned orders/judgment; that the learned trial Court has not appreciated the fact that Respondent No.2 (Safdar Zaman) has not been nominated in private complaint, therefore, order for carrying out of proceedings in criminal complaint against said respondent is illegal; that the learned trial

Court has wrongly exercised jurisdiction vested in it while passing the impugned order/judgment and has acted with material irregularities; that the impugned orders/judgment are patently illegal, factually incorrect and suffer from legal perversity as they have been passed in a slipshod manner and without proper application of judicial mind, therefore, instant criminal revision petition as well as the P.S.L.As may kindly be accepted, impugned orders/judgment may be set-aside and direction to the learned trial Court may be issued to proceed in challan case.

5. Conversely, learned counsel for respondents opposed the filing of captioned criminal revision petition and P.S.L.As on the grounds that the learned trial Court has rightly appreciated the record in line with the available evidence and passed the impugned orders/judgment; that complaint/petitioner is not a witness of last seen and as such, the alleged witnesses of last seen have not been produced in the witness box to testify against the respondents/accused persons; that any confession during investigation under custody before police is not relevant under the law and is inadmissible; that evidence brought on record by the complainant is full of contradictions and no chain has been established to link the accused persons with the commission of offence, therefore, captioned criminal revision petition and P.S.L.As may be dismissed.

6. Arguments heard, record perused.

7. Perusal of record reveals that criminal case FIR No.248, dated 01.09.2011, under Section 302/109/34 PPC, P.S. Golra Sharif, Islamabad has been lodged on the complaint of the petitioner Amal Nawaz against his real nephew Safdar Zaman and his friend Aamir having allegations therein that the said accused persons visited his house and accompanied his son Roshan Nawaz on his motorcycle bearing registration GAG-728, Honda 125, at about 5 p.m. in the evening. The petitioner/complainant on knowing that dead body of his son (Roshan Nawaz) is lying on the unmetalled road (کچا رستہ) near Dhok Darek Mori

visited the spot along with Aqil ur Rehman and Muhammad Khan, where they found the dead body of his son smeared in blood next to his motorcycle. The non-presence of his nephew Safdar Nawaz and his friend Aamir at the spot made the petitioner to believe that his son was murdered by Safdar Zaman and his friend Aamir by making fires shot. The motive behind the murder is the alleged abduction of Sajila Zaman (niece) by deceased Roshan Nawaz about nine months ago. The police visited the site, received complaint and registered the case FIR No.248/2011.

8. CW-7 Dr. Farrukh Kamal/MLO conducted autopsy of the dead body in hospital and referred two injuries i.e., entry wound of 7x3 c.m. star shaped wound 1 c.m. above from left ear and exit wound of 1x1 c.m., 4 c.m. back and above from right ear on skull. CW-7 Dr. Farrukh Kamal/MLO has opined that deceased died due to firearm injury, which caused rupture of scalp, membranes of the brain, brain and fractured scalp, which caused the death. In this regard, postmortem report (Exh.CW-7/A/1-6) along with pictorial diagram have been submitted on record.

9. The Investigating Officer of this case i.e. CW-11 Muhammad Aslam visited the place of occurrence and recorded oral statement of petitioner/complainant, which was reduced into writing by him in shape of complaint vide Exh.CW-11/A and transmitted the same to Police Station through Muhammad Nawaz/Constable for registration of FIR. He also prepared the recovery memo Exh.CW-1/B of black color wallet P1, registration book of motorcycle [GAG-728] P2 and cash amount of Rs.30 P3/1-3, which were recovered from the dead body. The Investigating Officer has prepared the unscaled site plan Exh.CW-11/C and secured blood through cotton vide recovery memo Exh.CW-1/C and has also taken into possession an empty of .30 bore pistol P7 through recovery memo Exh.CW-1/D, motorcycle [GAG-728] through Exh.CW-1/E and recorded the statements of witnesses. The dead body

was handed over to the complainant and site plan was prepared through draftsman on 08.09.2011. The Investigating Officer also transmitted the bloodstained cotton and empty of .30 bore pistol to Forensic Science Laboratory, Lahore for chemical analysis and got warrant of arrest issued for the arrest of accused persons, but the warrants remained un-served and he after completion of investigation submitted report under Section 173 Cr.P.C. by declaring respondents as accused after found them guilty.

10. The accused Safdar Zaman, remained fugitive from law for almost seven years i.e. from the date of occurrence till 19.04.2018 when he applied for his pre arrest bail before learned Additional Sessions Judge, which was confirmed vide order dated 04.05.2018, however same was recalled by this Court on 17.07.2018 through Criminal Miscellaneous Petition No.404/BC/2018.

11. During the trial, proceedings under Section 512 Cr.P.C. were initiated against Safdar Zaman (Respondent No.2) on the basis of proclamations, referred as Exh.PB, Exh.PC and Exh.PD. Whereas, the petitioner has filed a private complaint on 19.03.2013 before the Illaqa Magistrate, which was sent up to the learned Sessions Judge (West), Islamabad on 20.03.2013 and entrusted to the learned Additional Sessions Judge (West), Islamabad. The petitioner has introduced six other accused persons in private complaint namely Muhammad Isal, Gul son of Kher Amat, Sheikh Farooq son of Khan Amir, Rizwan son of Gul, Asad Khan son of Noordad Khan, and Zaif Ullah son of Azad Khan, all resident of District Karak, KPK. The process was issued by the learned Trial Court, even non bailable warrants were issued but not a single accused person was arrested. The learned Trial Court has summoned the prosecution evidence in absentia, however two accused persons i.e. Amir Iqbal (nominated accused in FIR) and one Mir Zaman was arrested and charge was framed, whereas both the accused persons were acquitted of the challan case as well as of the private complaint

case on 20.06.2017, same was assailed by the petitioner through the captioned P.S.L.A. No.20/2019.

12. During pendency of above matter, Respondent No.2 Safdar Zaman was arrested and final report under Section 173 Cr.P.C. has been filed before the Court, however the complaint filed by the petitioner along with challan case has been taken up, whereafter 13 CWs were recorded in addition to the testimony of petitioner, who appeared as PW-1, whereafter Safdar Zaman (Respondent No.2) recorded his statement under Section 342 Cr.P.C. and the learned Trial Court acquitted the respondents, vide impugned judgment dated 01.04.2019 by the learned Sessions Judge (West), Islamabad, which has been assailed through captioned P.S.L.A. No.4 of 2019.

13. Besides the above referred two P.S.L.As the petitioner has also assailed an interlocutory order dated 12.10.2018, whereby he contends that proceedings against Safdar Zaman (Respondent No.2) shall be conducted in challan case instead of complaint case, whereby his request was turned down vide order dated 12.10.2018 by the learned Sessions Judge (West), Islamabad, which resulted into acquittal of Safdar Zaman in complaint case through the impugned order.

As such, when the final judgment has also been passed in the complaint case and Safdar Zaman was acquitted, the captioned Crl. Revision No.83/2018 becomes infructuous.

14. The petitioner has been confronted regarding any illegality committed by the learned Trial Court in both the judgment/order of acquittal, whereby Safdar Zaman (Respondent No.2) and other co-accused persons have been acquitted in the murder of Roshan Nawaz (deceased), whereupon the petitioner contends that he has produced the evidence of last seen and recovery witnesses to establish the chain of evidence against the respondents/accused persons.

15. Perusal of evidence reveals that CW-1 Aqil ur Rehman joined the investigation in this case and witnessed the personal belongings of the deceased

i.e. wallet P1, registration book of motorcycle P2 and cash P3. He also witnessed the recovery of one empty of .30 bore pistol, which was taken into possession by the Investigating Officer.

16. Muhammad Nawaz Gondal, the then duty officer of P.S. Golra Sharif appeared as CW-3, who recorded the case FIR No.248/2011 (Exh.CW-3/A) on the instructions of CW-11 Muhammad Aslam/I.O.

17. CW-4 Muhammad Yasir/Constable is related to transmission of an empty of .30 bore pistol and bloodstained cotton to the office of Chemical Examiner, Lahore and Forensic Science Laboratory, Lahore.

18. CW-5 Alamgir Khan/S.I. prepared the above referred parcels and handed over same to Muhammad Yasir/Constable, vide Road Certificate No.3535/11.

19. CW-6 Muhammad Amir/Constable remain associated for execution of arrest warrants, referred as CW-6/A-C, who confirmed that remaining accused persons have shifted to Waziristan.

20. CW-7 Dr. Farrukh Kamal/MLO has confirmed the cause of death as of firearm injury above the left ear.

21. CW-8 Muhammad Riaz Noon/ASI received a parcel said to have contained .30 bore pistol to be kept in Malkhana for safe custody, which he later on handed over to Kifayat Ullah/HC for onward transmission to the FSL, Lahore.

22. CW-9 Amir Shahzad/Draftsman prepared site plan of place of occurrence Exh.CW-9/A and handed over it to the Investigating Officer.

23. CW-10 Niaz Muhammad/ASI arrested the accused Safdar Zaman on 17.07.2018 when his bail was recalled by this Court.

24. The petitioner/complainant recorded his statement as PW-1 and acknowledged the following facts.

- a) *I received information that my son Roshan Nawaz was lying in pool of blood near Dharaik Mohari. By reaching at my house I inquired from my family members namely Sajila Zaman, Akbar Nawaz and*

Sultan Bibi about Roshan Nawaz whereupon I was informed that Roshan Nawaz had left to house with accused Safdar Zaman and Aamir for picnic on motorcycle of Roshan Nawaz.

- b) I nominated accused Safdar Zaman present in the court and Aamir as main perpetrator whereas while accused persons Gul son of Khair Amad, Rizwan son of Gul, Shehikh Farooq son of Khan Aamer, Muhammad Esal son of Kher Amad, Zahid Ullah son of Azad Khan, Azad Khan son of Noordad Khan for hatching the conspiracy of committing murder of my son with accused Mir Zaman, Aamir and Safdar Zaman.*
- c) On 29.07.2018 I joined investigation with Muhammad Ashraf/S.I. who was interrogating accused Safdar Zaman in his room who during investigation that he could get the pistol recovered by leading the police party upon which Safdar Zaman was taken upon a private vehicle and he took the police party to village Dharaik Mohari, where he made the vehicle stop and by entering into a shed like house and pointing out the place where he statedly kept the pistol by removing the blocks, took the pistol with his own hands and handed the same over to Muhammad Ashraf/S.I. who unloaded the pistol P8 upon which three live bullets came out P-9/1-3.*
- d) On 30.07.2018 I again joined the investigation with Muhammad Ashraf/S.I. who was interrogating accused Safdar Zaman in his room during the investigation accused Safdar Zaman present in the court in presence of Kifayat Ullah recorded his confessional statement which was secured through USB P-10 which was taken into possession by the IO through recovery memo Exh.PW-1/C.*
- e) The motive of occurrence was that accused Mir Zaman had leveled allegation that deceased abducted his daughter namely Sajeela Zaman. Although the matter of fact that she had taken shelter in our house and due to this reason, the accused persons had committed murder of my son.*

25. During the course of cross-examination, petitioner/PW-1 acknowledged that he has not mentioned the names of family members namely Sultana Bibi, Sajila Nawaz and Akbar Nawaz, who had informed him that deceased left in company of Safdar Zaman and Aamir. He also acknowledged that he has not incorporated the names of Safdar Zaman and Aamir and Mir Zaman in private complaint Exh.PW-1/D, but those have been mentioned in body of complaint. Similarly, he also admitted that there is no eyewitness of occurrence, however he contends that his family members have last seen the deceased alive in company of accused persons. The house/place of recovery had no boundary wall, neither

its rooms have any door/gate nor the petitioner is able to tell the number of rooms in said house of recovery.

26. The above referred petitioner being star witness of this case has been investigated by CW-11 Muhammad Aslam/I.O. at the initial stage, who acknowledged that there is no eyewitness in the instant case nor the complainant has made any complaint against him due to his non-satisfaction of the investigation.

27. Similarly, the last Investigating Officer i.e. CW-13 Muhammad Ashraf/S.I. investigated Safdar Zaman/Respondent No.2 and contended that on disclosure of said accused he along with CW-12 Kifayat Ullah got recovered the weapon of offence P8 having inscription of "Cal 30 Bore Mauser Made China by Noring Co." along with three live bullets Exh.CW-9/1-3. He also stated that respondent Safdar Zaman recorded his confession, which was converted into USB (P10) and secured Exh.PW1/C. He admitted that place of recovery was abandoned since 2010 and structure of house was owned by one Khaliq Mehmood, who was neither inquired nor investigated. The place of recovery has neither any boundary wall, nor outer gate, as acknowledged by the Investigating Officer and same was easily accessible to everyone.

28. The last witness of recovery is CW-12 Kifayat Ullah/HC, who joined the investigation and witnessed the recovery.

29. While considering the entire evidence of this case, the prosecution has alleged that one Roshan Nawaz (deceased) was allegedly murdered by Safdar Zaman (respondent No.2) and his co-accused Aamir on the conspiracy and instigation of other six accused persons (P.Os) on 01.09.2011, when the petitioner Amal Nawaz father of deceased had seen the dead body of deceased, which was lying in a pool of blood on a path at Mouza Darek Mori, as per inquest report Exh.PB one firearm injury having entry wound at the upper side of left ear was visible and exit wound on the other side. The petitioner lodged the complaint

and directly nominated Safdar Zaman and his friend Aamir in the alleged murder of deceased through Exh.CW-3/A and Exh.PA/2. The petitioner/complainant has narrated the motive in the FIR on the day of occurrence, whereby he categorically stated that:

"وچر عنادیہ ہے کہ قریباً 9 ماہ قبل میرا بیٹا روشن نواز میری بیٹی سہیلا زمان کو گاؤں سے بھگا کر ساتھ لایا ہے۔"

30. Prima facie, the entire case rests upon circumstantial evidence and the evidence of last seen, as such, in case of latter scenario, it is necessary to justify the proximity of date and time of the witnesses of last seen through cogent evidence of having seen the deceased alive in company of alleged accused persons. Reliance is placed upon 2019 SCMR 1220 (Sadi Ahmad vs. The State). As per said dictum, in absence of such requirement of law the conviction on capital charge could not be made. Evidently, the petitioner/complainant acknowledged that he was informed by his family members namely Sultan Bibi, Sajila Zaman and Akbar Nawaz, "*that deceased had left the house in company of accused Safdar Zaman and Aamir*", but the petitioner has not referred these three witnesses in the FIR nor referred the same in his private complaint, even he referred these witnesses for the first time in his testimony recorded on 13.03.2019. On the other hand, the said three witnesses were never produced before the Court to substantiate the chain of last seen.

31. The other important element set up by the petitioner as well as by the prosecution in this case is the recovery of pistol P8 i.e. alleged weapon of offence used by Safdar Zaman in the commission of murder of deceased, which was recovered from an open place having no gate and in fact is an abandoned house, even otherwise, the recovery was made after seven long years, which itself is not justifiable as belated recovery losses its evidentiary value as also held in 2017 SCMR 1976 (Amanat Ali vs. The State) and 2014 SCMR 1349 (Malik Muhammad Aslam vs. The State). Furthermore, the Investigating Officer and CW-13 Muhammad Ashraf/S.I. being the witness of recovery acknowledged that the

place of recovery was accessible to everyone, which was owned by one Khaliq Mehmood, who has not been associated in the investigation. The place of recovery having been no boundary wall or outer gate made it accessible to everyone and such fact belies the recovery. Reliance is placed upon the case law reported as 2017 SCMR 564 (Arshad Khan Vs. The State.)

32. Another important piece of evidence relating to the pistol P8 with the recovered crime empty is that same has not been confirmed by the forensic experts in their report Exh.PE, dated 28.09.2018, whereby the conclusion referred in the said report of Punjab Forensic Science Agency reads that:

"Because of differences in individual characteristics the item C1 cartridge case could not have been fired in the item P1 pistol."

As such, no useful purpose could be achieved through the said report of PSFA to connect Safdar Zaman/accused with the crime empty found next to the dead body on 01.09.2011 as the same has not been matched due to differences in the individual characters.

33. The petitioner put much emphasis on the confessional statement of respondent Safdar Zaman recorded by the Investigating Officer through Exh.P10 (USB), whereby the Investigating Officer acknowledged that he recorded the confessional statement on 30.07.2018 during interrogation of Safdar Zaman. The respondent side has raised objection in the Trial Court that portion of statement of accused is not admissible in evidence and said objection has been sustained by the learned Trial Court at that time, hence such piece of evidence has already been discarded and even not to be called as evidence under the law, therefore, there is no need to further discuss the status of USB.

34. Lastly, I have gone through the motive part brought on record by the petitioner, but surprisingly he has not produced any evidence qua verification of his motive part, even no independent witness has been produced nor the said Sajila Zaman was produced in the Trial Court to corroborate motive for the

murder of deceased. Surprisingly, the petitioner/complainant has changed his motive part while appearing in the court from the version recorded in the FIR.

35. I have also gone through the statement of Safdar Zaman/Respondent No.2 recorded under Section 342 Cr.P.C., who has denied the entire occurrence.

36. Keeping in view the above discussion, there is no denial to proposition that it is the case of blind murder, which rests upon circumstantial evidence, although not a single piece of evidence available on record connects Safdar Zaman or any other accused person with the alleged murder of deceased Roshan Nawaz. The pistol P8 has not been matched with crime empty recovered from the place of occurrence near the dead body, even the witnesses of last seen were not produced by the petitioner in the trial nor even at the investigation stage.

37. In view of above position, the impugned judgment/orders of the acquittal of respondents are fully justified having no illegality therein. On the other hand, the legal question raised by the petitioner that it is his choice to prosecute Safdar Zaman through State case despite filing of his private complaint is not justiciable in the light of case reported as PLD 1966 SC 708 (Nur Elahi vs. The State). The petitioner/complainant has taken a somersault after registration of his initial FIR, where he nominated two accused persons on the information disclosed by his family members that deceased had gone to picnic with accused Safdar Zaman and Aamir, but later on he nominated six more accused persons in private complaint without referring the principal accused. Such contradictory stances create a huge doubt in entire case and the learned Trial Court has rightly followed the spirit of *Nur Elahi supra* that complaint has to be taken up first and prosecution witnesses listed in police challan has to be examined as court witnesses and as such, the learned Trial Court has rightly rejected the request of petitioner for prosecuting Safdar Zaman in challan case during pendency of complaint. Even otherwise, the learned Trial Court has examined 13 CWs and also recorded the version of petitioner/complainant, on the basis of which the

challan as well as private complaint has been decided through a common judgment. The plea raised by the petitioner for separate trial after dismissal of his complaint is not justiciable and no illegality has been observed in the instant case.

38. In view of abovementioned discussion, there is no cavil to proposition that entire prosecution case as well as case of petitioner rests upon no evidence in the eyes of law and creates doubt/suspicion, which could not be made basis of conviction, as such, every doubt has to be considered in favour of the accused person, therefore, while relying upon the golden rule as well as the maxim that it is better than that ten guilty persons be acquitted, rather one innocent person be convicted, as also held in case reported as PLD 2002 SC 1048 (Ayub Masih vs. The State). Similarly, on sayings of the Holy Prophet (PBUH) that mistake of Qazi/Judge in releasing of a criminal is better than his mistake of punishing an innocent. Reliance is placed upon PLD 1973 SC 418 (State vs. Mushtaq Ahmad).

39. In view of above, since no illegality has been observed in the impugned orders/judgment, it is not a fit case to grant leave to appeal to the petitioner as it amounts to further wastage of precious time of the Court, therefore, the captioned P.S.L.A. No.4/2019 and P.S.L.A. No.20/2019 are hereby **DISMISSED**, whereas the captioned Criminal Revision No.83/2018 stands **DISMISSED** and Diary No.3051/2019 has become infructuous and, therefore, is hereby **DISMISSED**.

(MOHSIN AKHTAR KAYANI)
JUDGE

Khalid Z.