

**JUDGMENT SHEET**  
**IN THE ISLAMABAD HIGH COURT**  
**ISLAMABAD**

CASE NO. : CRL. APP. NO.247-2019

Nasir Mehmood alias Thipru

Vs.

The State

CASE NO. : CRL. APP. NO.112-2014

Ghulam Murtaza

Vs.

The State

CASE NO. : JAIL APPEAL NO.253-2019

Nasir Mehmood alias Thipru

Vs.

The State

CASE NO. : CRIMINAL APPEAL NO.120-2014

Asif Saeed

Vs.

Ghulam Murtaza

CASE NO. : CRIMINAL APPEAL NO.256-2019

Atif Saeed

Vs.

Nasir Mehmood alias Thipru & Another

CASE NO. : MURDER REFERENCE NO.14-2019

The State

Vs.

Nasir Mehmood alias Thipru

**Appellants by : Malik Waheed Anjum, Advocate (Crl. App. No.247-2019)**

**Ch. Zafar Ali Warriach, Advocate along with appellant (Crl. App. No.112-2014)**

**Sardar Shabbir Hussain, Rao Abdur Rahim, & Ch. Shahid Mehmood, Advocates (Crl. App. Nos.120-2014 & 256-2019)**

**Respondents by : Sardar Shabbir Hussain, Rao Abdur Rahim, & Ch. Shahid Mehmood, Advocates**

**Mr. Majid Rasheed Khan, State Counsel**

**Date of hearing : 22.06.2021**

**AAMER FAROOQ J.** This judgment shall decide the above mentioned appeal along with Criminal Appeal No.112-2014, Jail Appeal No.253-2019, Murder Reference No.14-2019, Criminal Appeal No.120-2019 and Criminal Appeal No.256-2019, as they have arisen out of same FIR.

Crl. App. No.247-2019 etc.

2. Nasir Mehmood alias thipru was indicted in case FIR No.99 dated 31.08.2011 under sections 302/324/34 and 337-F(ii) PPC registered with Police Station Nilore, Islamabad; he was convicted for offence under section 302 PPC causing death of one Muhammad Saeed Anwar, however, he was acquitted of the charges under sections 324/34/337-F(ii) PPC; with respect to the conviction, was awarded capital punishment vide judgment dated 03.07.2019 passed by learned Additional Sessions Judge-IV/Judge MCTC, Islamabad-East. He filed appeal against conviction (Crl. App. No.247-2019) as well as Jail Appeal No.253-2019 and Murder Reference No.14-2019 sent by the learned trial court for confirmation of the death sentence. The complainant filed appeal against acquittal of Nasir Mehmood alias Thipru with respect to the charges under section 337(F-ii), 324/34 PPC (Crl. App. No.256-2019).

3. Ghulam Murtaza also faced trial under the above mentioned FIR for the offences mentioned therein; he was acquitted of the charges under section 302 PPC but was convicted for offence under section 324/34 & 337-F(ii) PPC and was awarded punishment of three years imprisonment along with daman vide judgment dated 22.11.2014 passed by learned Additional Sessions Judge-II, East-Islamabad; he filed appeal (Crl. App. No.112-2014) against his conviction, whereas the complainant filed appeal against his acquittal i.e. Crl. App. No.120-2014.

4. The case of the prosecution against Nasir Mehmood alias thipru as well as Ghulam Murtaza is that on 31.08.2011 at about 5:50 p.m., they along with another, drove to the shop of complainant in black Corolla car and fired at Muhammad Saeed (father of complainant). The first shot was missed; the second shot landed on the lower abdomen of the deceased and the third shot on the left ear, whereas complainant Muhammad Atif Saeed tried to intercept Ghulam Murtaza who scuffled with him and inflicted injury on his right palm causing a wound. The deceased Muhammad Saeed Anwar was rushed to the hospital, where he succumbed to the injuries.

5. Malik Waheed Anjum, Advocate Supreme Court, appearing on behalf of Nasir Mehmood alias Thipru, *inter alia* contended that prosecution failed to prove its case beyond reasonable doubt. In this behalf, it was contended

that forensic report Exb.PJJ recovery of empties from the scene of crime did not match with the pistol recovered from the appellant. It was contended that Malik Aamer Shehzad (Draftsman), appearing for PW-1, has not indicated any ocular account or eye-witnesses in the site plan which he had prepared on the statement of the complainant. It was further submitted that allegedly, empties recovered from the scene of crime and the weapon recovered from the appellant, were sent at the same time, which under the law, is not tenable. It was further contended that as per the evidence of Dr. Farrukh Kamal (PW-9), there were four bullet injuries, however, with respect to injury marked as No.3, there is a mild blackening, whereas no such blackening is seen at injury No.1, meaning thereby that the assailant was moving, however, ocular account and the eye-witnesses do not state so in their evidence. It was further contended that in the cross-examination, PW-9 admitted that blackening, on one of the injuries, means that assailant was moving. He also argued that abscondance of the appellant *per se* does not establish his guilt that goes on to show his conduct, which is inconsequential for determination guilt of the accused. It is added that prosecution has failed to establish its motive as alleged in the FIR; that killing took place due to earlier acrimony between deceased and Nasir Mehmood on account of delay in depositing credit in the cell phone of Nasir Mehmood through easy load. It was submitted that empties allegedly were recovered but were never sent for forensic examination but were only sent in 2016 and there is no justification for delay in this behalf. He also argued that ocular account again is not creditworthy inasmuch as complainant has alleged that injury was inflicted on his palm through *churri*, however, the medical report suggests that lacerated wound has been caused through a blunt instrument; even recovery of *churri* is not trustworthy inasmuch as it was recovered after three weeks from the alleged incident from the bushes next to a public thoroughfare.

6. Ch. Zafar Ali Warriach, Advocate, appearing for the appellant Ghulam Murtaza, *inter alia* contended that under the facts and circumstances, the conviction of appellant is not sustainable inasmuch as the medical opinion suggests that injury was caused by a blunt instrument, whereas it is the case

of the prosecution that same was done by *churri*. It was contended that introduction of the eye-witnesses is an afterthought inasmuch as in the site plan no eye-witness has been shown.

7. Sardar Shabbir Hussain, Advocate, appearing for the complainant, while responding to the appeal against conviction and appeal against acquittal, *inter alia* contended that prosecution has proved its case beyond reasonable doubt; that Nasir Mehmood alias thipru as well as Ghulam Murtaza had common intention which fact has not been taken into account by learned trial court. It was further contended that ocular account, stated by the complainants Atif Saeed and Aamir Saeed, has withstood the test of cross-examination and the defence has not been able to shatter the same through testimony. It was submitted that the fact that forensic report is in negative in the case of Nasir Mehmood or the medical opinion is that the injury is caused by a blunt weapon, is immaterial, whereas the ocular account is immaculate; he defended the convictions and also argued that acquittal be reversed and conviction be recorded. In support of his arguments, learned counsel placed reliance on case reported as 'Mumraiz Vs. The State' (2011 SCMR 1153). He also contended that conviction can be made on the testimony of the solitary witness if the same is found reliable by the court. Reliance was placed on case reported as 'Allah Buksh Vs. Shami' (1980 PLD SC 225). The said absondance goes against Nasir Mehmood. Reliance was placed on case reported as 'Mst. Dur Naz and other Vs. The State' (2005 SCMR 1906). He also argued that parties had common intention and ought to have been punished with respect to death offences. Reliance was placed on case reported as 'Haji Ali Shan Vs. The State' (NLR 2002 Criminal 402). It was also submitted that Ghulam Murtaz failed to prove his defence qua being at work place.

8. Learned State Counsel supported the arguments by learned counsel for the complainant and argued that prosecution has proved its case beyond reasonable doubt. Reliance was placed on cases reported as 'Syed Hamid Mukhtar Shah Vs. Muhammad Azam and 2-ohters' (2005 SCMR 427), 'Hameed Khan alias Hameedai Vs. Ashraf Shah and another' (2002 SCMR 1155), 'Nizamuddin Vs. The State' (2010 SCMR 1752), 'Muhammad Ehsan Vs.

The State' (2006 SCMR 1857) and 'Saeed and 2-others Vs. The State' (2003 SCMR 747).

9. Arguments advanced by learned counsel for the parties have been heard and the documents, placed on record, examined with their able assistance.

10. The gist of prosecution's case has been stated hereinabove therefore its reproduction is not required, however, it is pertinent to observe that two separate trials were conducted due to abscondance of Nasir Mehmood. Ghulam Murtaza was tried first and was convicted and acquitted vide judgment dated 22.11.2014. The prosecution, in order to prove its case against Ghulam Murtaza, led evidence of Dr. Farrukh Kamal (PW-3), Aatif Saeed and Aamir Saeed (PW-7 & PW-8), Muhammad Shafique, SI (PW-1), Muti ur Rehman (PW-9). Documentary evidence was also exhibited in the form of FIR (Exh-A), MLR of Aatif Saeed (Exh.PW-2), post mortem report of Muhammad Saeed Anwar (Exh.PW-3/1-6), inquest report of Muhammad Saeed Anwar (Exh.PW-3/3-4), recovery memo of blood stained soil (Exh.PW-8/1), recovery memo of empties (Exh.PW-8/2), recovery memo of *churri* (Exh.PW9/2), recovery memo of black Corolla (Exh.PW9/3), recovery memo of last worn clothes of deceased (Exh.PW10/1) and scaled site plan (Exh.PW5/1).

11. It is the case of the prosecution against Ghulam Murtaza that he inflicted injury on the right palm of Aatif Saeed with *churri* which was recovered from the bushes. It is evident from recovery memo of *churri* (Exh.PW-9/2) that same was recovered on 21.09.2011 i.e. after three weeks of the commission of crime from the bushes adjacent to a road and the same was recovered from a public thoroughfare, hence the recovery is not reliable..Even-otherwise, it is stated that recovery was blood stained and it was human blood, however, the blood on the *churri* was not got matched with one of the complainant to establish the veracity of the prosecution account. Moreover, the statement of Dr. Shazia Nazir, CMO (PW-11) clearly establishes that the wound, on the palm of the complainant, was caused through a blunt weapon and could not have been caused by a sharp

weapon like *churri* or similar object. The prosecution made no effort to clarify the referred anomaly.

12. The prosecution has also argued that Ghulam Murtaza and Nasir Mehmood had common intention, however, nothing was given in evidence to substantiate that Ghulam Murtaza was present in the alleged feud between deceased and Nasir Mehmood, even the site plan drafted by Malik Aamir Shehzad (PW-5), on the instructions of complainant, shows that Nasir Mehmood and the deceased were at a distance from Ghulam Murtaza and the complainant and nothing has been stated that Ghulam Murtaza also made a charge at the deceased. The eye-witnesses are also not clear as to the role of Ghulam Murtaza when he alighted from the car. There is also no evidence as to with whom the feud regarding delay in easy load had taken place.

13. In the prosecution story, it has been alleged that Nasir Mahmood made fires and the complainant and other eye-witnesses ran away and saved themselves and then tried to intercept the assailant Ghulam Murtaza and Nasir Mehmood all the time did not fire at the complainant to save his co-accused. The evidence tendered by the prosecution, in the facts and circumstances, neither establishes inflicting of injuries by Ghulam Murtaza on the complainant nor having common intention with Nasir Mehmood for killing Muhammad Saeed.

14. In so far as Nasir Mehmood is concerned, though he remained absconder yet prosecution failed to prove case against him. As noted, the eye-witness again, is not trustworthy and does not show any eye-witness other than the complainant in the scaled site plan, however, in the FIR, Aamir Saeed has been shown as eye-witness but his presence at the scene is not clear and does not show from which place, he witnessed the offence or what efforts, he made to save his father.

15. The empties recovered allegedly from the place of occurrence as well as the weapon was sent together for forensic examination and in the report Exh.PJJ, they did not match. Likewise, there is no justification for the prosecution to retain the empties for so long and not sending them for forensic. The referred facts cast doubt on the prosecution's case. Reliance is

placed on cases reported as 'Muhammad Bilal Vs. The State' (2021 YLR 1252), 'Muhammad Rameez Vs. The State' (2021 YLR 1173) and 'Shahzada Khan Vs. The State' (2020 YLR 1048).

16. The statement of Dr. Farrukh Kamal, who appeared in the trial of Nasir Mahmood as PW-9, clearly indicates that injury No.3 in the postmortem report has blackening, whereas injury No.1 does not have that, meaning thereby that assailant was moving which does not find mention in the statement of accused. Hence, there is contradiction in ocular account and medical evidence and the same taints the ocular account. Reliance is placed on cases reported as 'Abid Hussain Vs. The State' (2020 MLD 1785), 'Ali Sher Vs. The State' (2008 SCMR 707), 'Zafar Vs. The State' (2021 YLR 1918) and 'Raiyet Ali Vs. The State' (2020 YLR 1813).

17. No evidence has been led by the prosecution to establish motive about earlier acrimony between deceased and Nasir Mehmood. Though the eye witnesses have stated that reason for killing of their father is delay in easy load in earlier part of the day yet no details were mentioned as to with whom Nasir Mehmood argument had taken place or who was present at the relevant time. Even, no complaint was filed with police with respect to the said episode. One tainted piece of evidence taints the other, where such is the case, the principle '*Falsus in uno, falsus in omnibus*', shall apply. Reliance is placed on cases reported as 'Muhammad Anwar Vs. The State' (2021 YLR 1346) and 'Muhammad Ali Vs. The State' (2021 P.Cr.LJ 373).

18. Moreover, Nasir Mehmood remained an absconder for considerable period of time. Mere abscondance of an accused does not establish guilt of an accused. Abscondance is a relevant fact and can be used as corroborative evidence but cannot be read in isolation. Reliance is placed on cases reported as 'Hussain Ali Vs. The State' (2021 YLR N 78) and 'Fazal Wahab Vs. The State' (2021 YLR N 6).

19. In view of above facts and circumstances, the prosecution has failed to prove its case beyond reasonable doubt and there are gaps/lacunas in its case.

Crl. App. No.247-2019 etc.

20. There is no cavil with the principles laid down in the cases cited by learned counsel for the complainant, however, they are not applicable in the facts and circumstances of instant case.

21. For what has been stated above, Crl. App. No.247-2019 is allowed and conviction recorded for offence under section 302 PPC in the case of Nasir Mehmood alias thipru is set aside. Since the Crl. App. No.112-2014 is being decided, Jail Appeal No.253-2019 has become infructuous and is disposed of accordingly; Murder Reference No.14-2019 is answered in 'negative'. Crl. App. No.120-2014 and Crl. App. No.256-2019 filed by the complainant are without merit and are accordingly dismissed. The appellant be released forthwith if not required in any other case.

22. In so far as Ghulam Murtaza is concerned, the conviction recorded against him under section 324/34 & 337-F(ii) PPC is not tenable hence is set aside and the appeal (Crl. App. No.112-2014) is allowed. No justification was made out by the complainant for interference in the acquittal recorded by the learned trial court for offence under section 302 PPC against Ghulam Murtaza.

23. In view of foregoing, both the appellants Ghulam Murtaza and Nasir Mehmood are acquitted of the charges.

24. Since Ghulam Murtaza is already on bail, his surety is discharged.

**(CHIEF JUSTICE)**

**(AAMER FAROOQ)  
JUDGE**

Announced in Open Court on 20.09.2021

**(CHIEF JUSTICE)**

**JUDGE**