IN THE PESHAWAR HIGH COURT, PESHAWAR

(Judicial Department)

Cr.A No.628-P of 2021

Nasir etc
Vs
The State etc

JUDGMENT

For Appellants: Syed Mubashir Shah Advocate

For complainant: Mr. Sajid Khan Advocate

For State: Muhammad Inam Khan Yousafzai, AAG

Date of hearing: **21.12.2022**

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SAHIBZADA ASADULLAH, J.--- The appellants Nasir, Haneef, and Abid through the instant criminal appeal have assailed judgment dated 23.06.2021, passed by the learned Additional Sessions Judge-III / Model Criminal Trial Court, District Swabi in case FIR No.256 dated 24.03.2019 under sections 302/324/34 PPC of Police Station Kalu Khan, District Swabi, whereby, they were convicted and sentenced as under:

i. **Under section 302(b)/34 PPC, to imprisonment for life as *Tazir* with fine of Rs.8,00,000/- as compensation to the legal heirs of each deceased within the meaning of section 544-A Cr.PC or in default whereof to undergo six months S.I. each; and**

ii. **Under section 324/34 PPC, to one year R.I. with fine of Rs.20,000/- or in default thereof, to suffer two months S.I each. Benefit under**

section 382-B Cr.P.C P.P.C was also extended to the appellants and the sentences were ordered to run concurrently.

2. The transient facts as unfolded in the first information report are that Bismillah Jan S.I. on receiving information regarding the occurrence rushed to the casualty of Civil Hospital Kalu Khan on 24.03.2019 at 09:15 hours, where complainant Mudasir Shah brought the dead bodies of his brother namely Islam Shah and his uncle namely Shah Said and lodged a report to the effect that on the fateful day, he alongwith his brother Islam Shah, uncles Shah Said and Syed Anwar Shah left their village Ismaila for Mohallah Khawar Ghadi; on reaching near Masjid Mustafa, Khawar Ghadi, at about 08:30 AM, their co-villagers, namely, Nasir, Haneef, and Abid (present appellants) appeared duly armed with firearms and started firing, through their respective weapons, at them in order to commit their Qatl-i-Amd, due to which, his brother Islam Shah and uncle Shah Said got hit and died on the spot, while he alongwith uncle Syed Anwar Shah escaped unhurt; that besides him, the occurrence was witnessed by Syed Anwar Shah. Motive behind the occurrence is alleged that a day earlier to the occurrence, the present appellants had beaten his uncles Said Anwar Shah and Muhammad Qader. The report of the complainant reduced in shape of Murasila Ex.PA/1 which was sent to the PS for registration of the

case, on the basis of which, the instant case FIR was registered against the appellants.

3. On completion of investigation and arrest of accused / appellants, complete challan was submitted against them, where at the commencement of trial, the prosecution produced and examined as many as 12 witnesses. On close of prosecution evidence, statements of appellants were recorded under section 342 Cr.P.C, wherein they professed innocence and false implication, however, neither they opted to be examined on oath as provided under section 340(2) Cr.P.C nor wished to produce defence evidence. After hearing arguments, the learned trial Court vide the impugned judgment, convicted and sentenced the appellants as mentioned above. Hence, the instant criminal appeal against the judgment of conviction.

4. Arguments heard and record scanned through.

5. The tragic incident led to the death of two innocent souls, whose dead bodies were shifted from the spot to Civil Hospital Kalu Khan, where the matter was reported. The injury sheets and inquest reports were prepared and the report was penned down in the shape of Murasila. After doing the needful, the dead bodies were sent to the doctor for postmortem examination. The investigating officer after receiving copy of the FIR, visited the spot and on pointation of the eye witnesses, prepared the site plan. During spot

inspection, the investigating officer collected blood through cotton from respective places of the deceased and also took into possession two empties of 9mm bore, three empties of .30 bore and six empties of 7.62 bore, from the place of incident. The collected empties were sent to the firearms expert to ascertain as to whether the same were fired from one or different weapons. The firearms expert after putting the empties to the test of chemical examination, opined that the two empties of 9mm bore were fired from different weapons, three empties of .30 bore were also fired from different weapons and in respect of six empties of 7.62 bore, the opinion was also received to have been fired from different weapons. It is pertinent to mention that soon after the occurrence, two of the appellants i.e. Hanif and Abid volunteered their arrest on 02.04.2019, whereas, the appellant Nasir was arrested after an alleged encounter between him and the police officials in which respect case FIR No.409 dated 18.05.2019 with Police Station Kalu Khan was registered. The appellant was disarmed and from his personal possession, the Kalashnikov alongwith two chargers and a bandolier were recovered. The appellants faced trial and on conclusion of the trial, they were convicted and sentenced as stated above. Feeling disgruntled, the appellants approached this Court through the instant criminal appeal.

6. The record was scanned through with valuable assistance of learned counsel for the appellants, the learned Additional Advocate General assisted by learned counsel for the complainant, to know as to whether the learned trial Court was justified in handing down the impugned judgment and as to whether the learned trial Court could appreciate the available record, more particularly, the recorded statements of the witnesses. True that on one hand, two persons lost their lives, but equally true that on the other, three accused are charged for the death of the deceased, so this Court is to see as to whether the prosecution succeeded in bringing home guilt against the appellants, that too, through trustworthy and confidence inspiring evidence, as this Court is under the obligation to re-assess and to re-appreciate the already assessed evidence, so that miscarriage of justice could be avoided.

7. The points for determination before this Court are, as to whether the witnesses were present on the spot at the time of incident and in the hospital, alongwith the dead bodies, when the matter was reported; as to whether the incident occurred in the mode, manner and at the stated time; as to whether the motive brought on record has been established through confidence inspiring and trustworthy evidence and as to whether the prosecution could succeed in bringing home guilt against the appellants.

8. The incident occurred in a thoroughfare leading from village Ismaila to village Khawar Ghadi and it is also evident from the site plan that the house of the appellants falls in the way while proceeding from village Ismaila to village Khawar Ghadi. The site plan depicts that when the complainant party reached to the place of incident, the appellants also attracted to the spot and started indiscriminate firing, which led to the death of the deceased. This is interesting to note that early in the morning, the deceased, the complainant, and the eyewitness planned to visit the house of one Faheem Akbar to purchase a cow and per statements of the witnesses, they reached to his house at 07:45 hours where they spent some 20 minutes in negotiation, but they could not succeed in purchasing the cow, so they left back for their houses. This is for the prosecution to tell that when apart from the complainant, the eye witness and the deceased, no other person had participated in planning a visit to the house of the cow dealer, then how the accused / appellants came to know that the deceased and complainant would come to the spot at the stated time. The site plan further depicts that the house of the accused is situated at a considerable distance from the place where the incident occurred, then it is for the prosecution to answer that how and why the accused / appellants came towards the place of incident by covering a

considerable distance, as the complainant party was to pass through their house and in that eventuality, the accused / appellants would have easily executed the plan. This troubles again the judicial mind of this Court that when the complainant side noticed the coming of the accused / appellants towards them, that too, duly armed, then what precluded them from taking shelter or to rescue themselves from the wrath of the accused / appellants, despite the fact that few days earlier, the parties had scuffled with each other, in which respect, Naqal Mad No.9 dated 23.03.2019 with Police Post Itham was incorporated, where the complainant Muhammad Qader and PW Anwar Shah had allegedly received injuries at the hands of the accused / appellant Nasir Khan. The said episode has been termed to be the basis of the present incident. We are yet to know that when in the earlier episode, one Muhammad Muqaddar and PW Anwar Shah got injured, that too, at the hands of the accused / appellant Nasir Khan, then what led the accused / appellants to kill the deceased, as in the previous episode, it was the complainant party, who suffered, and it was the complainant party to retaliate, to balance the sides. Another interesting aspect of the case is, that none of the deceased was a party to the previous episode and even, the complainant of the present case does not find mention in the very report. This is for the prosecution to tell that when in

the previous round, only Muhammad Qader and PW Syed Anwar Shah were the parties, then why PW Anwar Shah was not targeted, as he was the prime target. This is yet to be answered that when accused / appellant Nasir was the only person, who got engaged with the complainant side earlier, then what led the remaining appellants to join hands with him. We are yet to test the veracity of Naqal Mad No.9 dated 23.03.2019 as to whether the same was incorporated on 23.03.2019 or that it was fabricated with the sole purpose to strengthen the prosecution case. This is astonishing that complainant of the daily diary No.9 and PW Syed Anwar Shah received injuries at the hands of the accused / appellant Nasir, on 20.03.2019, but the matter was not reported on the very day, rather the report was made on 23.03.2019, when allegedly, the accused / appellant extended threats of dire consequences to them. If the complainant was desirous to report the matter regarding physical assault on him, then he would have reported the matter on 20.03.2019 and not on 23.03.2019 and in that eventuality, both the witnesses would have opted for their medical examination, but on one hand, the matter was delayed till 23.03.2019 and on the other, the injured did not opt to be examined by a doctor regarding the nature of injuries caused. The conduct displayed by the witnesses / injured of Naqal Mad No.9 has twisted the prosecution case

to a greater extent and we cannot restrain ourselves from declaring the same as a suspect document, which cannot be pressed into service to favour the prosecution.

9. The complainant and the eye witness were examined as PW-07 and PW-08. The complainant when appeared before the trial court, disclosed the events in the following manner; that on the day of incident, he alongwith the deceased and the eye witness left their houses for village Khawar Ghadi to purchase a cow from one Faheem Akbar; that when they reached near Masjid Mustafa, the accused / appellants arrived duly armed and started firing at them, which resulted in death of the deceased; that soon after the incident, the dead bodies were shifted to the hospital and the matter was reported. In his examination in chief, he could not explain that what weapons the accused / appellants were having in possession and even, while reporting the matter, despite the fact that he claimed acquaintance with different types of weapons. He was thoroughly cross examined on material aspects of the case, where he disclosed that on the day of incident, he got up early in the morning, performed his Fajar prayer and thereafter, took his breakfast. He confirmed that though, he owns a grocery shop in village Khawar Ghadi, but on the day of incident, he did not opt to go there, rather he alongwith the deceased and the eye witness planned to

purchase a cow from one Faheem Akbar and that for that purpose, all the four left their houses, and the unfortunate incident occurred. This is astonishing that four persons grouped together to purchase a cow and for the very purpose, they visited the house of the cow dealer, but neither the statement of the cow dealer was recorded nor any independent witness was produced in that respect. As the very purpose of their presence on the place of incident was their coming back from the house of the cow dealer, then this aspect of the case was of much importance for the prosecution to prove, but both the complainant and the investigating officer overlooked this material aspect of the case, which is a determining factor to establish the presence of all the four at the place of incident. When the prosecution failed to prove its purpose, then this court lurks no doubt in mind that the presence of the complainant and eye witness is not established from the record.

10. The site plan depicts the respective places of the assailants and the complainant party and also, the inter se distances between the accused / appellants and the deceased. The record tells that the accused / appellants, at the time of incident, were present at a distance of 24 feet from the complainant party and the complainant and the eye witness were at a distance of less than 05 feet from the deceased. This is for the prosecution to tell that when the

assailants were present at a shorter distance, duly armed with sophisticated weapons, what precluded them to kill the complainant and the eye witness as well, despite the fact that the eye witness Syed Anwar Shah was the prime target. Both the witnesses i.e. the complainant and the eye witness admitted that the accused / appellants fired at them 10 / 15 fire shots respectively, but they escaped unhurt. When the accused / appellants had the intention to kill the complainant and the eye witness as well, and when 30 fire shots in all were made on them, then how the witnesses escaped unhurt despite the fact that there was no shelter available to them and even, they did not opt to take shelter. The site plan further tells and so admitted by the investigating officer, that the complainant and the eye witness, at the time of incident, were present at point No.3 & 4, well within the firing range of the accused / appellants, but even then, they did not receive a single firearm injury. The manner in which the fire was made and the distance between the assailants and the complainant party has created dents in the prosecution case. The presence of the eye witnesses has further been belied by the fact that both of the witnesses stated that all the accused fired a single fire shot over the deceased Islam Shah, but astonishingly, a single firearm injury was found on the body of the deceased, but none of the witness could tell with accuracy

that whose fire shot proved effective. The record further tells that both the deceased received a single firearm injury on their bodies, one on his forehead, whereas, the other, on the lateral aspect of his thigh. Had all the three accused, duly armed with weapons, fired at the complainant party, then the deceased would have received multiple firearm injuries, but the case is otherwise. The attending circumstances of the present case help us in forming an opinion that the incident did not occur in the mode and in the manner. In case titled ***"Rafaat Shah Vs The State" (2022 PCr.LJ Note 39 Balochistan)*** it was held that:

> ***"The mode and manner of the occurrence itself by the prosecution is not appealable to the prudent mind, therefore, it was highly unsafe to rely on the statement of both these witnesses to maintain conviction and sentence of the accused on a capital charge."***

11. The presence of the complainant and the eye witness is a circumstance which does not find support from record of the case, as in case of indiscriminate firing, there was no occasion for the witnesses to survive and there was no hurdle in the way of the appellants to eliminate the complainant side. The complainant during cross

examination disclosed that it was he who shifted the dead bodies to the cot and his hands were besmeared with blood, but the investigating officer did not mention the same, which further creates doubt in respect of the presence of the complainant at the time of incident and the shifting of dead bodies to the cot. We are yet to know that out of the deceased, one received firearm injury on the lateral aspect of his thigh and he lost his life because of excessive bleeding. When the witnesses were available on the spot and the hospital was lying in the close proximity, what stopped them from rushing the deceased to the hospital to save his life. This particular circumstance is a factor which cannot be left unnoticed, rather it tells regarding the unnatural conduct displayed by the witnesses and at the same time is another determining factor regarding the presence of witnesses on the spot at the time of incident. The presence of the eye-witness is shrouded in mystery, as despite his presence in the hospital, he did not verify the report of the complainant, rather a person, who was neither the eye-witness of the incident nor present on the spot, verified the report and the conduct displayed by the eye-witness is not only unnatural, but also makes his presence doubtful. This is interesting to note that neither the complainant nor the eye-witness identified the dead-bodies before the police at the time of report and before the doctor

at the time of postmortem examination, rather two other witnesses belonging to different places opted to identify the dead-bodies. The absence of the complainant and the eye-witness in the columns of identification both in the inquest and the postmortem reports is a circumstance that has damaged the prosecution case beyond repair.

12. The medical evidence is in conflict with the eye-witness account, as on one hand the deceased received single firearm injury with the dimension of .5x.5 cm, with its exit as 1x1 cm each, which suggests that the same was the doing of one person, that too, with one weapon. The seat of injury on one of the deceased is on lateral aspect of the thigh which further contradicts the stance of the witnesses, as the witnesses disclosed that they were proceeding towards north, when the accused / appellants attracted to the spot from the northern side and started firing at them, then in that eventuality, the deceased would have received an entry wound on the front of his thigh, which further belied the stance of the witnesses. True that medical evidence is confirmatory in nature and in case of confidence inspiring eye-witness account, the same plays a little role to upset the prosecution case, but equally true that when the prosecution case is suffering from inherent defects, then in that eventuality, the medical evidence gains much importance, which, under no circumstances, can be

ignored. The dimensions of injuries and the number of accused charged has put a question mark over the integrity/veracity of the witnesses and this particular aspect of the case creeps down to the root. Furthermore, the net has been thrown wide and all the active male members of the family have been enroped, that too, for two injuries caused having the same dimension. Wisdom could also be derived from the judgment of this Court reported as ***2014 MLD 446 Peshawar "Amir Vs The State"*** where the factum of commission of offence being an act not commensurating with the number of accused charged was considered against the prosecution. There is no denial of the fact that when Court comes to a conclusion that the number of accused has been exaggerated, then extra care and caution is required to be taken while appraising the evidence. In this respect, wisdom can be derived from the judgment rendered by the Apex Court in case titled ***"Muhammad Zaman Vs The State and others" (2014 SCMR 749)*** wherein it was held that:

> ***"The number of assailants in the circumstances of the case appears to have been exaggerated. It seems that most of the persons including the respondents have been charged because of previous enmity. The tragedy may have been enacted by***

Mukhtar who has gone into hiding or Munawar who has been acquitted because the deceased Shabbir was alleged to have illicit relations with their sister, but many who have no visible nexus with this part of the story have also been roped in. It is so because it is customary in this part of the country to throw wide the net of implication to rope in all those who could possibly pursue the case or do something to save the skin of the one who is innocent or who is actually responsible for the commission of the crime. The Court, therefore, is required to exercise much greater care and circumspection while appraising evidence."

13. In another case, reported as ***"Malik Aamir Sultan and 02 others Vs The State and another" (2018 MLD 1635),*** it was held that:

"The number of injuries does not commensurate with the number of accused party. More so, all the injuries bear one and the same dimension. It reflects that it is the job of one person but in order to throw the net wide, the number of accused has been exaggerated as three brothers and two unknown accused have been charged. The empties recovered were not sent in order to

ascertain whether the same were fired from one or different weapons. What was the reason that this opinion was not sought by the Investigating Officer, the answer of that is not available on the record of the case and it can be presumed that the Investigating Officer was conscious of the fact that number of the accused has been exaggerated and if such report is sought, that would be detrimental to the case of the prosecution. Thus, there is element of concealment and exaggeration as well which further nullifies the mode and manner as set out by the prosecution."

14. As on one hand, the ocular account is not worthy of credence and on the other, the medical evidence runs in conflict with the statements of the witnesses, then this Court is not hesitant to hold that the conflict between the two has yielded favourable results to the appellants. In case titled ***"Bashir Muhammad Khan Vs The State" (2022 SCMR 986),*** it was held that:

"The medical evidence is inconsistent with the ocular account as regards injury No. 3 on the right hip of the deceased is concerned, which in-fact was an exit wound but according to the prosecution

witnesses of ocular account the same was an entry wound in these circumstances, a dent in the prosecution's case has been created, benefit of which must be given to the appellant. It is a settled law that single circumstance creating reasonable doubt in a prudent mind about the guilt of accused makes him entitled to its benefits, not as a matter of grace and concession but as a matter of right. The conviction must be based on unimpeachable; trustworthy and reliable evidence. Any doubt arising in prosecution's case is to be resolved in favour of the accused and burden of proof is always on prosecution to prove its case beyond reasonable shadow of doubt. However, as discussed above, in the present case the prosecution has failed to prove its case beyond any reasonable shadow of doubt."

15. The investigating officer after collecting empties from the spot, sent the same to the office of firearms expert to ascertain as to whether the same were fired from one or different weapons. The laboratory report was received, where all the empties were opined to have been fired from different weapons. As in the episode, three accused are charged for effective fire shots and empties of different

calibers were collected from the spot, then in case of different weapons, an inference can be drawn that more than three weapons were used in the episode and in such eventuality, possibility cannot be excluded that not only the accused, but the complainant side fired as well. The suppression of facts on part of the prosecution is another circumstance which tilts the balance. True that laboratory report is not a corroborative piece of evidence, rather a circumstance which can be pressed into service, only and only, when either the prosecution succeeds or fails in respect of its story. As in the instant case, the ocular account is in conflict with the report tendered by the laboratory, so the importance of this document cannot be ignored and as such, it can be pressed into service not for the benefit of the prosecution, but for the benefit of the accused / appellants and this evidence has further created dents in the prosecution case.

16. The motive was alleged that a few days earlier, the accused / appellant Nasir physically assaulted one Muhammad Qadir and PW Syed Anwar Shah, which matter was reported in the shape of daily diary No.09, dated 23.03.2019, but on one hand, no independent witness was produced in that respect, whereas, on the other, the complainant and injured witness were physically assaulted on 20.03.2019, but the matter was reported on 23.03.2019.

The record further tells that while making the report in the shape of daily diary, both the witnesses did not opt for their medical examination and as such, their this option has created mystery regarding the earlier episode. The daily diary so entered has lost its efficacy and its contents has confirmed that the document was fabricated with the sole purpose to help the prosecution and as such, this document can be termed as a suspect document, which cannot be taken into consideration. When the very document has lost its veracity, then the same cannot be taken into consideration and we are constrained to hold that the prosecution failed to prove the motive. As the motive was between PW Syed Anwar Shah, Muhammad Qadir and the accused/ appellant Nasir, so we failed to understand that what led the remaining accused to participate in the incident. Had this been the motive, then the deceased had nothing to do with the same and in that eventuality, the prime target would have been the eye-witness. The attending circumstances of the present case tell nothing, but that the prosecution could not establish the alleged motive and as such, it is the prosecution to suffer. True that absence or weakness of motive is no ground for dislodging the prosecution case, but equally true that when motive is the sole purpose for committing the offence then failure on the part of the prosecution to prove the same would react

against the prosecution and the present case is no exception. In case titled ***"Muhammad Ilyas Vs Ishfaq alias Munshi and others (2022 YLR 1620)***, it was held that:

> ***"It is well settled that once a motive is set up it is imperative for the prosecution to prove the same. On failure whereof adverse inference can be dawn against the prosecution. Reference is made to the cases of Muhammad Khan v. Zakir Hussain PLD 1995 SC 590 and Hakim Ali v .The State 1971 SCMR 432."***

17. The record tells that two of the accused surrendered to the local police after few days of the incident and that their this conduct is a circumstance, which tells a lot of their innocence. There is no denial of the fact that in the incident, two persons lost their lives; had the accused / appellants i.e. Abid and Hanif, been guilty, then under no circumstances they would have surrendered to the local police. This aspect of the case coupled with the inherent defects in the prosecution story has created a room for the accused / appellants and the benefit of doubt has accrued to them, which the learned trial Court failed to appreciate.

18. The cumulative effect of what has been stated above leads this Court nowhere, but to hold that the prosecution could not succeed in bringing home guilt against the appellants and that the impugned judgment is suffering from inherent defects, which calls for interference. The learned trial judge while appreciating the available record misdirected himself both in law and on facts of the case. We, therefore, allow this appeal and set aside the impugned judgment. The appellants are acquitted of the charges, they shall be released forthwith, if not required to be detained in connection with any other criminal case.

19. The above are the detailed reasons for our short order of even date.

Announced
21.12.2022
(Ghafoor Zaman/Steno)

Signed on:
30.12.2022

JUDGE

JUDGE

(DB)
Hon'ble Mr. Justice Lal Jan Khattak
Hon'ble Mr. Justice Sahibzada Asadullah