

Judgment Sheet

IN THE PESHAWAR HIGH COURT,
PESHAWAR.

JUDICIAL DEPARTMENT

Cr.A No. 561-P of 2015.

With

Murder Reference No.13-P/2015

JUDGMENT

Date of hearing.....06.09.2017.....

Appellant(s)...(Naseer Ahmed alias Nazir Ahmed) by Syed Abdul Fayaz and Mr. Bashir Ahmed Khan Advocates.

Respondent(s)/State by Mian Arshad Jan, AAG along with Mst.Hameeda Bibi (mother of the deceased Yasir)



QALANDAR ALI KHAN, J:- Having been convicted under Sections 302/34 PPC read with 7 (A) ATA, 1997 and sentenced to death, and also convicted under Sections 324/34 PPC read with Section 7 (b) ATA and sentenced to ten years R.I and fine of Rs. 100000/- and in default

to further one month S.I, and further convicted under Section 353/34 PPC read with Section 7 (h) of ATA, 1997 and sentenced to three years R.I and a fine of Rs.100000/- and in default to further one month S.I, and also convicted under Section 15 AA read with Section 7 ATA 1997 to three years R.I and fine of Rs.100000/- and in default to further one month S.I, the appellant, Nasir Ahmed alias Nazir Ahmed, preferred this appeal against the aforementioned convictions and sentences awarded to him in case FIR No.788 dated 21.10.2014 under Sections 302/324/353/34 PPC read with 7 ATA and Section 15 AA, Police Station Pahari Pura, Peshawar, by the learned Special Judge, Anti Terrorism Court-I, Peshawar vide the impugned judgment dated 22.09.2015.

2. The case against the convict-appellant and other four co-accused was initiated on the report of complainant/Sajid Khan ASI, Incharge Police Post Pakha Ghulam, who dispatched a murasila from the Police Post to P.S Pahari

Pura, wherein, he narrated the occurrence by reporting that he along with Yasir and Imtiaz constables was present at Badhu Samar Bagh road near Shamal Bridge when four persons on two motorcycles came from *Chargu Kalay* Side, and the moment they were signaled to stop, they opened fire on the police party thereby causing firearm injuries to constable Yasir. According to the FIR, the police party also retaliated and opened fire on the accused, causing firearm injuries to three out of four accused, while their fourth companion made good his escape from the spot on the motorcycle. The names of three injured accused arrested on the spot were Naeem alias Naeemay son of Ghulam Sadique resident of *Chargu Kalay*, from whose possession a 30 bore pistol along with a magazine containing two loaded live rounds were recovered, Riaz alias *Badabaray* son of Niaz Muhammad resident of Badaber, from whose possession a 30 bore pistol along with magazine containing one

loaded rounds was recovered; and the convict-appellant, from whose possession a 30 bore pistol along with magazine containing two loaded live rounds of 30 bore were recovered. A Motorcycle belonging to accused Riaz alias *Badabaray* was taken into possession by the police in damaged condition. The name of the fleeing accused was ascertained as Maamoor Shah alias *Mamooray* son of Aslam Shah resident of Samar Bagh. The complainant also came to know that the accused named in the FIR were proclaimed offenders in case registered in P.S Faqir Abad vide FIR No.580 dated 21.07.2014 under Sections 387/506 PPC read with Section 7 ATA. On the receipt of murasila in the Police Station, the case was registered vide FIR No.788 dated 21.10.2014 in P.S Pahari Pura, Peshawar, under Sections 302/324/353/34 PPC read with Section 7 ATA and Section 15 AA.

3. The record would show that accused Riaz and Naeem lateron succumbed to the

injuries sustained by them during the encounter, while absconding accused Maamoor alias *Mamooray* was also killed in a police encounter, leaving the appellant as the lone surviving accused to face trial under the above said charges.

4. The postmortem examination of deceased constable and medical examination of the injured appellant were conducted, and site plan was prepared, after spot inspection, by the I.O, during which, 15 empty shells of 30 bore were recovered from the places assigned in the site plan to the accused and 35 empty shells of 7.62 bore were recovered from the places assigned in the site plan to the police party. The P.M report showed six firearm injuries on the body of the deceased constable Yasir, but of the same size and dimension of 1 x 1 cm. The medical report of the appellant also showed couple of firearm injuries on his body. In the site plan prepared by the I.O; after spot inspection, deceased accused Naeem was

assigned point No.6 and he was shown to have fired at deceased constable Yasir and caused him firearm injury. The site plan does not show any recovery of empty shells from the place assigned to the appellant, except blood stained earth recovered from that place. After recording statements of the PWs, collection of evidence, and completion of investigation, challan was submitted to the trial Court, where formal charge was framed against the appellant under the aforementioned sections of law, to which he pleaded not guilty and claimed trial.

5. During trial, the prosecution produced and relied upon the statements of as many as 15 PWs including Dr. Akram Alam, Medical Officer (PW.2); who examined the injured appellant; Sajid ASI (PW.6), complainant; Dr. Salim Ullah (PW.10), who conducted autopsy of the dead body of deceased constable Yasir SPO No.250; constable (retired) Arsalan (PW.11), marginal witness to the recovery memos; and, last but

not the least, Murad Khan Inspector/I.O (PW.15).

6. After prosecution closed its evidence, the appellant was examined under Section 342 Cr.PC. He refuted charges leveled against him by the prosecution, but declined to be examined on oath within the meaning of Section 340 (2) Cr.PC or produce defence. After hearing arguments of learned prosecutor for the State and learned defence counsel, the learned Judge, Anti Terrorism Court-I, Peshawar, rendered the impugned judgment dated 22.09.2015, whereby, he convicted and sentenced the appellant to the penalties as mentioned hereinabove; hence appeal by the convict-appellant, and murder reference by the learned trial Court.

7. Arguments of learned counsel for the convict-appellant and learned AAG, also on behalf of mother of deceased constable, heard; and record perused.

8. There can possibly be no two opinions that for awarding death penalty to an accused, a learned trial Court must examine and appreciate the evidence with great care and cautious, especially when the victim is a police officer and evidence of the prosecution also comprise testimony of the police officers, with no corroboration from an independent source.

9. In this case, the complainant/ASI is the sole eye witness who was produced by the prosecution in support of its case, and constable Imtiaz, who was allegedly the other surviving eye witness after death of the other member of the police party namely Yasir, accompanying the complainant/ASI at the time of occurrence, was abandoned by the prosecution. It is noteworthy that the complainant/ASI did not receive even a scratch in the encounter ensuing after alleged indiscriminate firing by four persons ridding on two motorcycles. It is, indeed, something beyond comprehension that only one member of the police party i.e.

constable Yasir received multiple firearm injuries, causing his death; but the complainant/ASI and other member of the police party namely, Imtiaz escaped unhurt and did not receive a single scratch despite the fact that they were in the close proximity of both the deceased and accused i.e. from minimum 1 to maximum 9 paces. Besides, the FIR shows that four persons ridding two motorcycles and coming from *Chargu Kalay* side opened fire on the police party the moment they were signaled to stop, without any indication in the FIR that they first got down from the motorcycles and then started firing at the police party. In the site plan the I.O omitted to show this fact, in support of the FIR, but in his statement before the Court the I.O, Murad Khan Inspector (PW15) admitted this fact that presence of all the accused had been shown on the plain ground and not on the motorcycles; which, obviously, is contrary to the version given in the FIR, showing firing on

the police party by the accused straight from their motorcycles.

10. It is case of the prosecution that the accused were armed with pistols while the police personnel were equipped with Kalashnikov i.e. 7.62 bore rifles; but nothing has been brought on the record shwoing issuance of the official rifles of 7.62 bore to members of the police party, neither such rifles were taken into possession by the I.O nor even 35 empty shells of 7.62 bore, recovered by the I.O from the places assigned in the site plan to the police party, were sent to the firearm expert for opinion whether the same were fired from one or more weapons. It is, indeed, noteworthy that deceased constable Yasir was also in possession of a 30 bore pistol, but that pistol has not been accounted for, as only three 30 bore pistols were allegedly recovered from the three injured accused including the appellant. The failure on the part of the I.O to bring on record proof of the fact that the recovered pistols belonged to

the appellant and other deceased accused, would certainly cast doubt on the case of prosecution against the appellant.

11. The FIR shows simultaneous firing by all the four accused named in the FIR, but the complainant/ASI improved his statement before the Court by saying that deceased constable Yasir was hit with the firing of the appellant. Moreover, in the *murasila*, the complainant/ASI mentioned the accused named in the FIR, including the appellant, as proclaimed offenders in a criminal case of Police Station, Faqir Abad, vide FIR No.580 dated 21.07.2014 under Sections 387/506 PPC read with Section 7 ATA; but the complainant/ASI and also the I.O had to admit this fact that the appellant was not nominated either in the aforementioned case of Police Station Faqir Abad or in any other case of Police Station Pahari Pura. This belies the assertion of the prosecution that the accused including the appellant, were proclaimed offenders, rather

makes the entire version of opening unprovoked indiscriminate firing by the accused doubtful.

12. The medical/PM reports of the deceased and the appellant, then injured, showing no charring/tattooing marks on the persons of either of the two inspite of the fact that they had been shown at a close distance of two paces from each other also created noticeable dent in the case of prosecution. The testimony of Medical Officer (PW.2) further compounded the mystery by admitting in his statement that he had not given dimension of fire arm injuries on the body of the appellant, neither he could say whether the appellant sustained injuries from the front or back side. He, nevertheless, stated that entry wound No.2 was on the back side of the body of the appellant, though he had not specified about the other fire arm injuries.

13. The complainant/ASI claimed to have taken shelter behind a wall near the place of occurrence at the time of occurrence, but no

such wall has been shown in the site plan. Moreover, the I.O admitted this fact that there is an unexplained delay of 9 days in sending the recovered pistols and empties to FSL for opinion, thus marring the chances of report of FSL with regard to the pistols and empties recovered from the spot becoming credible piece of evidence against the appellant.

14. Having scanned through the record and evidence made available by the prosecution, we found nothing on record which could lead the learned trial Court to convict the appellant and award him death penalty. Therefore, the appeal is accepted, the conviction and sentences awarded to the appellant are set aside, and he is acquitted of the charges while extending him the benefit of doubt. Consequently, the appellant be set at liberty, if not required in any other case.

15. Murder Reference NO.13-P/2015 sent by the learned trial Court for confirmation of the sentence is answered in the negative.

Announced.
06.09.2017.
(Ayub)

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