

IN THE PESHAWAR HIGH COURT,
PESHAWAR,
[Judicial Department]

Cr.A. No.993-P/2023
With Murder Reference No.11-P/2023

Gul Roz alias Meena s/o Shamroz,
r/o Tehkal Bala Peshawar.

Appellant (s)

VERSUS

The State etc

Respondent (s)

For Appellant (s) :-	<u>Barrister Rokhan Nafees Shafi.</u>
For State :-	<u>Mr. Muhammad Nisar AAG.</u>
For complainant :-	<u>Barrister Amirullah Khan Chamkani.</u>
Date of hearing:	<u>28.11.2023</u>

JUDGMENT

ISHTIAQ IBRAHIM, J.- At a trial held by learned Additional Sessions Judge-XII Peshawar, ("Trial Court"), in case FIR No.481 dated 10.06.2017, registered under sections 302, 324 and 34 PPC, at Police Station Tehkal Peshawar, Gul Roz alias Meena ("appellant"), having been found guilty has been convicted and sentenced vide judgment dated 23.05.2023 ("impugned judgment") as under:-

Under Section 302 (b) PPC:- Death as Ta'azir on three counts and to pay rupees two millions to legal heirs of deceased in terms of section 544-A Cr.P.C. and in default thereof to further undergo six months simple imprisonment.

Under Section 324 PPC:- To undergo 10 years rigorous imprisonment on two counts and to pay Rs.50,000/- as fine and in default

thereof to further undergo six months simple imprisonment.

Under Section 148 PPC:- To undergo two years simple imprisonment and to pay Rs.50,000/- as fine.

Benefit of Section 382-B Cr.P.C. has been extended to the appellant.

2. Appellant-convict has preferred the instant appeal against his conviction and sentences, whereas, learned Trial Court has sent **Murder Reference No. 11-P of 2023** for confirmation of death sentence of the convict.

3. As both the matters are the outcome of one and the same judgment of the learned Trial Court, therefore, we propose to decide and answer the same through this single judgment.

4. The prosecution's case as unfolded in First Information Report ("FIR") Exh.Pw.6/1 is that on 10.06.2017 at 2015 hours, Shakeel Khan complainant (PW.11), in company of dead bodies of Raj Wali, Jehanzeb and Aurangzeb, the deceased, respectively, reported to Noor Haider Khan SHO (PW.13), in casualty of KTH Peshawar to the effect that on the fateful day i.e. 10.06.2017, before *Aftari* time, he along with his uncle Raj Wali and cousins Jehanzeb and Aurangzeb was present near his house at *Kankary* road when at 2015 hours, appellant Gul Roz alias Meena accompanied by Zahid, Saqib, Wajid and Haroon

(absconding co-accused), duly armed with firearms came there and opened indiscriminate firing at them, as a result, the above named three deceased got hit, out of whom Raj Wali and Jehanzeb succumbed to injuries on the way to hospital while Aurangzeb deceased breath his last in the hospital, whereas, he (complainant) and PW Asghar Khan marically escaped unhurt. An altercation prior between Raj Wali deceased and absconding co-accused Zahid and Saqib prior to the occurrence has been advanced as a motive behind the occurrence. Report of the complainant was reduced into writing in the shape of Murasila Exh.PA by Noor Haider Khan SHO (PW.13), who also prepared injury sheets and inquest reports of the three deceased which are Exh.PW.13/1 to Exh.PW.13/6 and shifted their dead bodies to the mortuary for postmortem examination under the escort of constables Shahab No.4613, Dastar Ali No.359 and Tasleem No.817, while he sent the Murasila to Police Station on the basis of which FIR Exh.PW.6/1 was registered against the appellant and absconding co-accused.

5. On 10.06.2017 at 09.15 PM, Dr. Muhammad Kabir (PW.10), conducted postmortem examination on the dead body of Aurangzeb deceased and found the following injuries on his person:-

1. Firearm entry on right outer chest
0.5 x 0.5 cm, 21 cm from midline, 8 cm above costal margin.
2. Firearm exit on left front abdomen
1x1 cm, 8 cm from mid line, 2 cm below costal margin.
3. Firearm entry on right front arm 0.5 x 0.5 cm, 10 cm below shoulder.
4. Firearm exit on right inner arm 1x1 cm, 12 cm below axilla.
5. Firearm entry on left outer neck 0.5 x 0.5 cm, 8 cm from mid line, 4 cm above clavicle.
6. Firearm exit on left back chest 1x1 cm, 10 cm from mid line, 06 cm below top of shoulder.
7. Fire arm lacerated wound on right back abdomen 2x1 cm, 07 cm from mid line, 8 cm below costal margin.

Opinion: According to his opinion the deceased died due to injuries to right and left lung, stomach and small intestine due to firearm.

On the same day at 8.00 PM also conducted autopsy on the dead body of Raj Wali deceased and found the following injuries on his body:-

1. A group of two firearm entries left out neck each 0.5 x 0.5 cm collectively, 5x4 cm, 3 cm below ear, 8 cm from mid line.
2. A group of two firearm entries left front chest each 0.5 x 0.5 cm collectively, 6x5 cm, 7 cm from mid line, 4 cm below clavicle.
3. Firearm entry left out chest 0.5 x 0.5, 20 cm from mid line, 3 cm below axilla.
4. Firearm exit left front abdomen 1x1 cm, 5 cm below costal margin, 06 cm from mid line.
5. A group of two firearm exit right side face each 1x1 cm collectively, 06 x 5 cm one is 3

cm outer to eye, other is 4 cm in front of middle part of ear.

6. Firearm exit left back abdomen 1x1 cm, 9 cm from mid line, 12 cm below costal margin.
7. Firearm exit right front lower abdomen 1x1 cm, 12 cm from mid line, 2 cm above anterior superior iliac spine.
8. Firearm lacerated wound left inner knee 2x1 cm.
9. Firearm lacerated wound left knuckle of forth finger.

Opinion: According to his opinion the deceased died due to injuries to his brain, left lung, small and large intestines due to firearm.

On the same day at 8.30 PM Dr. Muhammad Kabir also conducted autopsy on the dead body of Jehanzeb deceased and found the following injuries on his body:-

1. Firearm entry left outer neck 0.5 x 0.5 cm, 9 cm from mid line, 04 cm above clavicle.
2. Firearm left front shoulder 0.5 x 0.5 cm.
3. Firearm entry left front arm 0.5 x 0.5 cm, 10 cm below shoulder.
4. Fire arm exit left inner arm 1x1 cm, 11 cm below axilla.
5. Firearm exit left back chest 1x1 cm, 04 cm from mid line 8cm above costal margin.
6. Firearm exit left front chest 1x1 cm, 2 cm from mid line, 5 above costal margin.
7. Firearm entry right outer wrist 0.5 x 0.5 cm.
8. Firearm exit right inner wrist 1x1 cm.

Opinion: According to his opinion the deceased died due to injuries to left lung and major blood vessels on the left side of the neck due to firearm.

6. Fazal Rabi Inspector (PW.14) conducted investigation in the case, who after registration of the FIR, proceeded to the spot and prepared site plan Exh.PB on the pointation of eyewitnesses. During spot inspection, he secured bloodstained soil from the places of the three deceased vide recovery memos Exh.PW.7/1, Exh.PW.7/2 and Exh.PW.7/4, took into possession 6 empties of 30 bore from point-A and 3 empties of the same bore from Point-B vide recovery memos Exh.PW.7/3 and Exh.PW.7/5, respectively, in presence of its marginal witnesses. Vide recovery memos Exh.PW.7/6 and Exh.PW.7/7 and Exh.PW.7/8 he took into possession the last worn bloodstained garments of the three deceased in presence of its marginal witnesses, recorded statements of the PWs under section 161 Cr.P.C, sent the empties and bloodstained articles to the FSL, reports whereof are Exh.PZ and Exh.PZ/1. As the accused were avoiding their lawful arrest, therefore, he applied for initiation of proceedings under sections 204 and 87 Cr.P.C., placed on file postmortem reports of the deceased, prepared list of legal heirs of the deceased and after completion of investigation handed over case file to SHO, who submitted challan under section 512 Cr.P.C. against the accused.

7. On arrest of the appellant and completion of investigation, challan was submitted against him before the learned trial Court, where he was formally charge sheeted to which he pleaded not guilty and claimed trial. To prove its case, the prosecution examined as many as fourteen witnesses and after closure of the prosecution's evidence, statement of the appellant was recorded under section 342 Cr.P.C., wherein he denied the prosecution's allegation and professed his innocence. He, however, neither wished to be examined on oath under section 340(2) Cr.P.C. nor opted to produce evidence in defence. On conclusion of trial, the learned trial Court, after hearing both the sides convicted and sentenced the appellant as mentioned above, hence, this appeal and Murder Reference.

8. We have heard the exhaustive arguments of learned counsel for the parties and worthy AAG for the State advanced at the bar and perused the record and evidence with their valuable assistance.

9. It appears from record that the unfortunate incident of killing three persons has taken place at 1848 hours (*before Aftari*) in the Holy month of Ramadan at Kakray road near the house of complainant Shakeel (PW.11), which has been reported by him with promptitude at 2015 hours in the

casualty of KTH Peshawar. In his report, complainant has categorically stated that besides him the incident was also witnessed by Asghar Khan (PW.12). At the time of making report, PW Asghar Khan was present with him and he has verified his report. The occurrence being reported with promptitude eliminates the possibility of consultation and deliberation on the part of the complainant in making report. Similarly, being a broad daylight occurrence, taken place little before *Aftari*, and the parties being co-villagers as well as close relative; there is no chance of misidentification. Ocular account in this case has been furnished by complainant Shakeel (PW.11) and Asghar Khan (PW.12). The former while appearing as PW.11 deposed as under:-

“Stated that deceased Raj Wali, Jehanzeb and Aurangzeb were my paternal uncles. PW Asghar Khan is my first paternal cousin.

Absconding accused Zahid and Saqib are my first paternal cousins whereas absconding accused Haroon, Wajid are the brothers of accused facing trial Gul Roz and also my relatives.

On the day of occurrence, I along with PW Asghar Khan and deceased Raj Wali, Hehanzeb and Aurangzeb were present on the spot. In the meanwhile, accused facing trial Gul Roz along with the above named absconding accused while

armed with deadly weapons arrived at the spot and on seeing us, they started firing upon us, as a result of which all the three deceased named above sustained injuries, whereas, I an PW Asghar escaped unhurt. After the occurrence, we shifted the three injured to hospital but deceased Raj Wali and Jehanzeb succumbed to their injuries on the way whereas deceased Aurangzeb died in the hospital. PW Asghar Khan and other present thereby are the eyewitnesses of the occurrence. Motive behind the occurrence was that before Aftari altercation took place between my uncle Raj Wali deceased and accused Zahid and Saqib. In the hospital I lodged report in the shape of Murasila. I signed the same as token of its correctness. My report was also verified by PW Asghar Khan. Thereafter the dead bodies of the deceased were sent to the mortuary for PM examination. I charge the accused for commission of the offence. Later on, at my instance the site plan was also prepared by the Investigation Officer”.

In cross-examination he stated that his house is situated at a distance of 10 paces from the crime spot; that it is correctly recorded in his report that occurrence had taken place a bit earlier than Aftari; that he was not separately fired by the accused rather all of them were fired collectively by the accused; that firing continued for second; that he and PW Asghar

were standing near the deceased; that the site plan was correctly prepared at his instance. He denied the suggestions of the defence that he was not present at the spot at the time of occurrence.

10. Another eyewitness Asghar Khan while appearing as PW.12 deposed as under:-

“Stated that deceased Raj Wali, Jehanzeb and Aurangzeb were my paternal uncles. Complainant Shakeel is my first paternal cousin.

Absconding accused Zahid and Saqib are my first paternal cousins whereas absconding accused Haroon, Wajid are brothers of accused facing trial Gul Roz and also my relatives.

On the day and time of occurrence, I along with complainant Shakeel and deceased Raj Wali, Jehanzeb and Aurangzeb were present on the spot when in the meanwhile accused facing trial Gul Goz along with above named absconding accused while duly armed with deadly weapons arrived at the spot and on seeing us they started firing on us, as a result of which all the three deceased named above sustained injuries whereas I and Shakeel escaped unhurt. After the occurrence, we shifted the three injured to hospital but deceased Raj Wali and Jehanzeb succumbed to their injuries on the way whereas deceased Aurangzeb died in the hospital. Motive behind the occurrence was that before Aftari, altercation took place between uncle deceased Raj Wali and absconding accused Zahid and Saqib. Thereafter the dead bodies were shifted to the mortuary for postmortem examination. My statement was recorded under section 161 Cr.P.C. by the police. I charge the accused for commission of the offence.

Except confronting PW Asghar Khan with the suggestions that he was not present at the spot at the time of occurrence and that he has advanced a false motive behind the occurrence, no other material question has been put to him in his cross-examination by the defence.

11. Perusal of the testimony of the eyewitnesses would reveal that they are consistent and have corroborated each other on all material particulars of the incident, such as the day, date, time and place of occurrence as well as the mode and manner in which the occurrence has taken place. They are also consistent on motive. Despite their cross-examination, nothing beneficial to defence or adverse to the prosecution could be extracted from their mouths. Defence has failed to shatter their testimony and make their presence at the spot at the time of occurrence doubtful. Undeniably, the occurrence has taken place in the holy month of Ramadan before Aftari. Houses of the eyewitnesses are situated in close proximity of the crime spot. As a general practice and tradition, people reached home for *Aftari*, and male members of the house usually remain outside near their house waiting for the *aftari* time, therefore, presence of the eyewitnesses at the spot a bit prior to Aftari is quite

natural and appealable to prudent mind. Both the eyewitnesses have reasonably explained their presence at the spot. Admittedly, there was no previous enmity between the parties, therefore, question of substitution or false implication does not appeal to a prudent mind.

12. Arguments of learned counsel for the appellant the eyewitnesses despite being in close proximity of the deceased, have not sustained any scratch, therefore, their presence at the spot at the time of occurrence is highly doubtful, is unpersuasive, for the reason that motive behind the crime was an altercation between Raj Wali deceased and absconding co-accused Zahid and Saqib, therefore, it is quite appealable to a prudent mind that complainant and PW Asghar Khan were not the first target of the accused. Even otherwise, Honourable Supreme Court in a judgment rendered in case titled, “Noor Muhammad vs the State and another”, (PLJ 2006 SC 177), has held that:-

“There could not be a presumption or rule that all the persons under attack from fire-arms ought to have received injuries and the fact that some of them had not received injuries would not make their presence at the place and time of incident doubtful.”

Similarly, in case titled, **Noor Muhammad Vs the State and another**” (2006 SCMR 1958), the honble Supreme Court has dealt with the identical issue in Para No.9 of the judgment which is reproduced below:-

“Relative to the contention that presence of two eyewitnesses namely Niaz Muhammad and Pervez Khan is highly doubtful as in spite of indiscriminate firing by the petitioner and two absconding accused they did not receive any injury is without any substance. It is not the first case of its kind wherein some of the persons who were under attack by the opposite party did not receive any firearm injury whereas others received one or more than one firearm injuries. There cannot be a presumption or rule that all the persons who were under attack from firearms ought to have received injuries and the mere fact that some of them did not receive injuries would not make their presence at the place and time of incident doubtful. This contention is also devoid of force and is repelled. In support of the above proposition judgment in the case of Mehboob Sultan and 02 others vs the State 2001 SCMR 163 is referred.”

Again in case titled, “Nasir alias Nasiree and another vs the State and another” (2021 SCMR 1614), the Hon’ble supreme Court has ruled that:-

“Survival of Shahbaz Ahmed (PW.1) unscathed during the assault, by itself, cannot imply his absence from the scene and as such does not undermine his status as a witness worthy of credence; a closely related resident of the locality, his encounter with the deceased and the injured in the neighbourhood, does not raise eyebrow;; steps taken by him after the incident are in consonance with the investigative details and thus confirmatory to his presence. A somewhat lengthy cross-examination failed to tremor his testimony, substantially in line with the ocular account furnished by two other witnesses that included an injured as well”.

13. At the cost of repetition, eyewitnesses produced by the prosecution has no reason to falsely implicate the appellant in a case of three murders and spare the real culprits of their beloved. Recovery of blood stained soil from the places of the three deceased; their last worn bloodstained garments and positive Serologist report Exh.PZ/1 in respect thereof,

corroborate the ocular account furnished by complainant and PW Asghar Khan. Similarly, 09 empties of 30 bore shown recovered from the spot by the Investigation Officer were sent to the FSL and as per FSL report Exh.PZ, the same have been fired from different 30 bore weapon. This circumstantial piece of evidence also corroborates the ocular account. Medical evidence has been furnished by Dr. Kabir (PW.10), according to his opinion the three deceased met their unnatural death due to firearm injuries, also supports the ocular account of the prosecution's case.

14. No doubt, eyewitnesses, Shakeel (PW.11) and Aghar Khan (PW.12) are close relatives of the three deceased but at the same time they are also the relatives of the accused. Both have furnished straightforward and confidence inspiring ocular evidence of the occurrence corroborated by strong circumstantial pieces of evidence and supported by medical evidence, therefore, on the sole ground of their close association with the deceased, their testimony cannot be discarded. In case titled, **"Noor Muhammad vs the State and another"**, (PLJ 2006 SC 177), the august supreme court has ruled that:-

"Mere relationship or close association of prosecution witnesses with the deceased, in absence of hostility, animosity or any

other motive to depose falsely would not be sufficient to hold them as interested witnesses and their testimony would not be discarded on such ground."

15. On reappraisal of evidence, we have arrived to an irresistible conclusion that prosecution has proved guilt of the appellant through cogent and confidence inspiring ocular account corroborated and supported by circumstantial and medical evidence. The learned trial Court while appreciating the evidence in its true perspective has arrived at a right conclusion by holding the appellant guilty of the offence to which no exception can be taken. However, the matter of sentence awarded by the learned trial court to the appellant under section 302(b) PPC, requires serious consideration. Admittedly, total five accused including the appellant are charged for indiscriminate firing at the complainant party as a result three persons have lost their lives. It is uncertain as to fire shots of which of the five accused proved fatal. Similarly, as per report Exh.PA and testimony of the eyewitnesses motive behind the occurrence was an altercation between Raj Wali deceased and absconding co-accused Zahid and Saqib, therefore, taking the above aspects as mitigating circumstances, we deem it appropriate and in the interest of justice

that sentence of imprisonment for life on three counts under section 302(b) PPC, if awarded to the appellant, would meet the ends of justice.

16. Accordingly, conviction of the appellant under section 302(b) PPC is maintained, however, his sentence of death on three counts as Taz'zir is reduced/converted to imprisonment for life on three counts as Ta'azir. The amount of compensation and period of sentence in default thereof is maintained. Similarly, conviction and sentences of the appellant under sections 324 and 148 PPC are also maintained. All the substantive sentences of imprisonment shall run concurrently. Benefit of Section 382-B Cr.P.C. is extended to the appellant.

17. On conversion of death sentence of the appellant to imprisonment for life on three counts under section 302(b) PPC, Murder Reference No.11-P of 2023, is answered in the Negative.

Announced:
28.11.2023
M.Siraj Afridi CS

Senior Puisne Judge

JUDGE

DB of Hon'ble Mr. Justice Ishtiaq Ibrahim senior Puisne Judge