

IN THE PESHAWAR HIGH COURT,
PESHAWAR.
JUDICIAL DEPARTMENT

Criminal Appeal No.247-P of 2021

Rab Nawaz s/o Shehbaz Khan r/o Janak Shakardara, Kohat.

Appellant (s)

VERSUS

1. The State.
2. Saidan Gul s/o Khetab Gul r/o Janak Shakardara, Kohat.

Respondent (s)

For Appellant:-	<u>Mr. Hussain Ali, Advocate.</u>
For State:-	<u>Mr. Niaz Muhammad, AAG.</u>
For complainant:-	<u>Dr. Ameer Ajam Khattak & Sadiq Nawaz</u> <u>Khattak, Advocates.</u>
Date of hearing:-	<u>21.09.2022</u>

JUDGMENT

ISHTIAQ IBRAHIM, J.- At a trial held by learned Judge Model Criminal Trial Court/Additional Sessions Judge-II, Kohat, accused/appellant Rab Nawaz, having been found guilty of committing murder of Nazar Gul, Mst.Mumtaz Begum and for causing injuries to one Attq-ur-Rehman and an attempt at the life of complainant Saidan Gul vide judgment dated 22.02.2021, in case F.I.R No.116 dated 06.06.2011 under sections 302/324/34 PPC, Police station, Shakardara, Kohat, was convicted and sentenced as under:-

Under Section 302 (b) PPC:- To undergo imprisonment for life as Tazir on two counts and to pay fine of Rs.500,000/- as compensation to the legal heirs of both the deceased u/s 544-A Cr.P.C, in default to undergo simple imprisonment for a period of six months.

Under Section 324 PPC:- To undergo seven years RI and to pay fine of Rs.50,000/-, in default to suffer 03 months SI.

Under Section 337-D PPC:- To undergo seven R.I and to pay Arsh to the tune of Rs.925,784/- (1/3rd of Diyat amount i.e 2,777,353/-).

Under Section 334 PPC r/w 337-T PPC:- To undergo seven years RI and to Arsh to the tune of Rs.833,205/- (277,735/- being 1/10th of the Diyat amount).

Benefit of section 382-B Cr.P.C was extended the convict-appellant. It was also ordered that all the sentences shall run concurrently.

2. Through the instant appeal, the convict has questioned his conviction and sentences, whereas complainant party has filed connected Criminal Revision No.60-P/2021, seeking enhancement of sentence of the convict from life imprisonment to penalty of death on two counts, as provided for the offence under section 302 PPC.

3. Since both the matters are emanating from one and the same judgment of the learned trial court,

therefore, we propose to decide the same through this single judgment.


4. The prosecution case as unfolded in the FIR Ex.PA are that on 06.6.2011, Shaukat Saleem SHO of P.S, Shakardara received information that two dead bodies and one injured had been brought to the Civil Hospital, Shakardara from village Janak. Upon the information, he rushed to emergency room of Civil Hospital where the dead bodies of deceased Nazar Gul and Mst.Mumtaz Begum along with one injured Attq-ur-Rehman were lying there. Complainant/injured Saidan Gul reported the matter to the police to the effect that on the day of occurrence he along with his deceased brother Nazar Gul were present on the thoroughfare near the house of Zar Janan, meanwhile, accused Amal Khan and Rab Nawaz sons of Shehbaz Khan and Mushtaq s/o Resham Khan duly armed with firearms came there and started firing upon them with the intention to commit their *Qatl-e-Amd*. Due to the firing of Amal Khan, his brother Nazar Gul got hit and died on the spot whereas the complainant escaped unhurt. That accused Mushtaq and Rab Nawaz also started firing at Ateeq-ur-Rehman and Mst.Mumtaz Begum, who were present in the house of Zar Janan with the intention to commit their *Qatl-e-Amd*, resultantly from the firing of accused Mushtaq, Mst.

Mumtaz Begum got hit and died on the spot while from the firing of accused Rab Nawaz, Ateeq-ur-Rehman sustained firearm injuries. After commission of offence the accused decamped from the spot. Motive behind the occurrence was stated to be blood feud.

5. After completion of investigation, initially *challan* u/s 512 Cr.P.C was submitted against all the accused and they were declared proclaimed offenders. Later on co-accused Amal Khan was arrested, who faced trial and vide judgment dated 11.03.2015 he was acquitted. Appeal was filed against his acquittal but the same was abated for reason that he was murdered during that period. More-so, he was acquitted through separate trial and the appeal was not heard on merit, therefore, that acquittal will not have any bearing on the fate of the present case. In this regard reliance is placed on the judgment of this Court rendered in **"HAYATULLAH V. ALI ABBAS and another"** (2018 YLR Note 43) wherein it is held that;

"Before dilating upon the merits of the present case first we would like to discuss, the main grounds of prosecution case, that evidence against co-accused namely Saifullah was believed and his Cr.A. No.50/2010 was dismissed, vide judgment dated 01.06.2011, by this court and leave to appeal was also refused in Jail petition No.48 of 2012 by the apex Court vide order dated 18.12.2012. Law has provided holding independent trial to each

accused, whenever he is arrested. Court is under obligation to assess the evidence led by the prosecution independently, without being influenced from acquittal or conviction of co-accused, whose trial was conducted earlier. Rationale behind holding of fresh trial would be a futile exercise, if courts subscribe to the result of trial conducted earlier. Our view is fortified by seeking guidance from the judgment rendered by this court in case of "Zalav Mir v. The State" (1997 PCr.LJ 510) and "Sher Akbar v. Mst. Sajida and another" (2011 YLR 1014), wherein this Court has dealt almost similar situation and has rendered judgments different to those earlier discussed"




6. After arrest of accused/appellant Rab Nawaz and completion of investigation, supplementary *challan* was submitted against him before the learned trial court; where he was tried and ultimately convicted and sentenced by the learned trial Court vide impugned judgment as mentioned in the preceding paragraph.

7. Arguments heard and record of the case was perused.

8. The complainant Saidan Gul (PW-8) had charged accused/appellant Rab Nawaz and Mushtaq alongwith co-accused Amal Khan (acquitted) for the murder of his brother Nazar Gul, Mst. Mumtaz Begum, injuries sustained by Atteq-ur-Rehman and for ineffective firing upon him. Admittedly the occurrence had taken place at 17:00 hours while the report was lodged at 20:00 hours with a delay of 03 hours.

According to the murasila and site plan the occurrence had taken place near the house of Zar Janan at thoroughfare of Village Janak. Shaukat Saleem Ex-Inspector appeared before the Court as PW-2, who scribed the report of the complainant. PW-2 in his cross examination stated that the distance between the place of occurrence and hospital is about 35/36 kilometers. In the present occurrence two persons namely Nazar Gul and Mst. Mumtaz Gegum have lost their lives while Attiq-ur-Rehman was injured, it would have been spent considerable time in making preparations for shifting the deceased and injured to the hospital. By considering the facts of the present case in our view the delay would be immaterial and is of no benefit to the appellant. Dr. Arshad Sohail appeared before the Court and recorded his statement as PW-10. According to the statement of PW-10, he conducted autopsy on the dead body of the deceased Nazar Gul at 20:00 hours while probable time between death and post mortem is mentioned as 03 hours which corresponds with the time of occurrence as stated in the FIR i.e. 17:00 hours. Similarly, autopsy of Mst. Mumtaz Begum was conducted at 11:00 PM and the time between death and post mortem is mentioned as within 06 hours which also confirms the time of

occurrence as mentioned in the report of the complainant.



9. Complainant Saidan Gul was examined as (PW-8), who reiterated the same narration as mentioned in the report. Ateeq-ur-Rehman, injured/eyewitness was examined as (PW-9), who supported the version of the complainant and his presence on the spot at the time of occurrence. They were subjected to thorough and intense cross examination, but no material contradictions came to surface to cast doubt on the prosecution version. Nothing favorable to the appellant/accused was brought on the record and there is no reason for false implication has been suggested. The presence of the complainant and injured/eyewitness along with the deceased has been proved and they can be well regarded as reliable witnesses and even their evidence by itself alone is sufficient without any independent corroboration. Medical Officers were examined as PW-10 & PW-12 who have given the details of injuries caused to the deceased as well to the injured. The medical evidence fully supports the version of complainant.

10. So far as the recoveries in the case are concerned, Wali Sher Khan, Inspector/Investigation Officer (PW-4) has secured blood stained pebbles (Ex.P-1) from the place of deceased Nazar Gul and 05

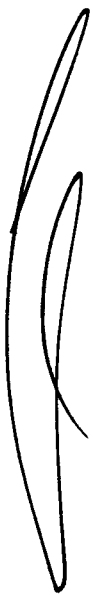
empties of 7.62 bore (Ex.P-2) from the places of accused, recovered blood stained earth EX.P-3 from the place of deceased Mst. Mumtaz Begum and injured Ateeq-ur-Rehman (Ex.P-4), and 12 empties of 7.62 bore Ex.P-5 lying in scattered position from near the place of accused Mushtaq and Rab Nawaz. PW-4 has sent the blood stained articles and recovered empties to the FSL and received the FSL report Ex.PA and Ex.PZ/1. According to the FSL report the crime empties were found to be fired from different weapons which further strengthen the prosecution case. The above recoveries shown in the site plan fully supports the ocular account.



11. Moving on to the motive of the prosecution in the case regarding the involvement of the appellant in the commissions of the offence. As per record, the complainant Saidan Gul (PW-8) in his report in the shape of murasila has stated motive behind the occurrence as blood feud between the parties and thereby accused committed the offence. Therefore, stance of prosecution with regard to motive has been fully proved by the prosecution. Moreover, the learned trial Court has also given proper ground for lesser sentence. In view of above, the prosecution has proved the guilt of the appellant through cogent and confidence inspiring ocular/direct evidence.

12. The core question for determination before this Court is that when the appellant was charged by the complainant for firing at injured Ateeq-ur-Rehman (PW-9) only, the dead/acquitted co-accused Amal Khan and absconding co-accused Mushtaq were assigned the role of firing at the deceased Nazar Gul and Mst. Mumtaz Begum respectively. The learned trial Court had convicted the appellant under all the heads by holding that he has shared common intention and is liable for the death of both the deceased while firing at them was not attributed to the appellant. It is a matter of record that the occurrence had taken place in a thoroughfare in front of the house of one Zar Janan which is neither the place of residence of the complainant party nor that of the accused. It appears that the parties had confronted each other per chance at the relevant time and thereafter the tragedy occurred. Whether in such like circumstances the prosecution has been able to prove the community of common intention of the appellant with the co-accused named above. More-so, the owner of the house Zar Janan who was relative of the complainant was abandoned by the prosecution. In addition to that, it is also in the evidence that the house of the complainant party is visible and they can see each other from their respective houses. Had this been a preplanned murder

then the accused could have done it in some other place and time. In this regard reliance is placed on the judgment of case titled "PANDURANG, TUKIA AND BHILLIA v. The STATE OF HYDERABAD" {PLD 1956 Supreme Court (India) 176} wherein it is held that;



"Now in the case of section 34 we think it is well established that a common intention presupposes prior concert. It requires a pre-arranged plan because before a man can be vicariously convicted for the criminal act of another, the act must have been done in furtherance of the common intention of them all. Mahbub Shah v. King-Emperor (1). Accordingly there must have been a prior meeting of minds. Several persons can simultaneously attack a man and each can have the same intention, namely the intention to kill, and each can individually inflict a separate fatal blow and yet none would have the common intention required by the section because there was no prior meeting of minds to form a pre-arranged plan. In a case like that, each would be individually liable for whatever injury he caused but none could be vicariously convicted for the act of any of the others; and if the prosecution cannot prove that his separate blow was a fatal one he cannot be convicted of the murder however clearly an intention to kill could be proved in his case: Barendra Kumar Ghosh v. King-Emperor (1) and Mahbub Shah v. King Emperor (supra). As their Lordships say in the latter case, "the partition which divides their bounds is often very thin: nevertheless, the distinction is real and substantial, and if overlooked will result in miscarriage of justice."

(Emphasis provided)

13. Moreover, care must be taken not to confuse same or similar intention with common intention; the partition which divides their bounds is often very thin; nevertheless, the distinction is real and substantial, and if overlooked will result in miscarriage of justice. In their Lordship's view, the inference of common intention within the meaning of the term in Section 34 should never be reached unless it is a necessary inference deducible from the circumstances of the case. It must be shown that the criminal act was done by one of the accused persons in furtherance of the common intention of all. 'Common intention' within the meaning of the section implies a pre-arranged plan, and to convict the accused of an offence applying the section it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan. Therefore, the findings of the learned trial Court by holding the accused vicariously liable for the act of his co-accused i.e. for the murder of Nazar Gul and Mst. Mumtaz Begum is not inconsonance with the provision of section 34 Cr.P.C, hence we hold that the evidence to that extent has not been properly appreciated by the learned trial Court.

14. In view of above, the accused is held liable for the injury caused by him to injured Ateeq-ur-Rehman (PW-9), therefore, his conviction and sentence under

section 324/337-D/334 PPC r/w section 337-T PPC is maintained while he is acquitted of the charges of *qatl-il-amd* of deceased Nazar Gul and Mst. Mumtaz Begum. Benefit of section 382-B Cr.P.C is extended to the convict-appellant. All the substantive sentences shall run concurrently.

15. So far as the revision petition No.60-P/2021 is concerned, the conviction and sentence of the appellant awarded by the learned trial Court is maintained by this Court to the extent of section 324/337-D/334 PPC r/w section 337-T PPC for the injuries caused to injured Ateeq-ur-Rehman while he has been acquitted of the charges of *qatl-il-amd* of deceased Nazar Gul and Mst. Mumtaz Begum, therefore, the revision petition for enhancement of the sentence has become infructuous and the same is dismissed.

Announced.

21.09.2022.


JUDGE


JUDGE

(D.B) Hon'ble Mr. Justice Lal Jan Khattak and Hon'ble Mr. Justice Ishtiaq Ibrahim.