

Judgment Sheet

**IN THE PESHAWAR HIGH COURT,
PESHAWAR**
Judicial Department

J.Cr.A No. 1147-P/2021

Naik Awaz & Umer Zaman Vs the State

Date of hearing: 03.08.2022.

Appellants by: Mr. Astaghfirullah, Advocate

State by: Mr. Niaz Muhammad, AAG.

Complainant by: Mr. Shabir Hussain Gigyani,
Advocate.

JUDGMENT

SHAHID KHAN, J. The subject judgment shall

dispose of the criminal appeal of
convicts/appellants, Naik Awaz & Umer Zaman
coupled with the Criminal Revision No.212-P/2021
under section 439 Cr.P.C for enhancement of the
sentences of life imprisonment awarded to the
convicts/appellants, in respect of case vide FIR
No.72, dated 29.01.2013, under section
302/324/148/149 PPC registered in Police Station
Pabbi (Nowshera).

2. The case of the prosecution in a small
compass is that complainant reported the event to
Karim Dad Khan ASI, duty police officer at
casualty department, Civil Hospital, Pabbi
(Nowshera) to the effect that on the fateful date,
day & time, he with his relatives, namely, Masher
Khan, Haji Bahadur, Shah Nawaz were present near

the shop of Chaman Khan. Naik Awaz s/o Taj Muhammad, Umer, Abdullah, Zakir Khan sons of Naik Awaz and Taj Muhammad s/o Aseem Khan duly armed came there and started firing upon them through their respective weapons with intention to kill them. As a result of their firing, the complainant Umer Daraz, Masher Khan & Haji Bahadur were hit and injured seriously while Shah Nawaz escaped unhurt. Mashar Khan succumbed to his injuries and died in the hospital. Motive for the occurrence was disclosed as altercation, on and a day prior to the occurrence.

3. As accused neither surrendered nor got arrested, whereas, their arrest was attempted through their warrant of arrest u/s 204 Cr.P.C followed by their proclamation notice u/s 87 Cr.P.C, as such, case against them was sent up for trial within the meaning of section 512 Cr.P.C.

4. On arrest of the accused/convicts/appellants Naik Awaz & Umer Zaman, followed by completion of the investigation, their supplementary challan was drawn and sent up for trial to the Court of competent jurisdiction.

5. The learned trial Court confronted the accused/convicts/appellants with the set of allegations against them through charge sheet to which they pleaded not guilty and claimed trial.

6. The prosecution in order to establish guilt of the accused/convicts/appellants placed reliance on the testimonies of Nine (09) witnesses, whereafter, statement of the accused/convicts/appellants were recorded, wherein, they professed their innocence. The learned Trial Court, after conclusion of trial, found the appellants/accused guilty of the charges and, while recording their conviction, sentenced them u/s 302 (b) PPC read with section 149 PPC and awarded with sentence of rigors imprisonment for life on two counts, for the murder of both the deceased namely Masher Khan and Haji Bahadur. They were also sentenced to pay compensation amounting to Rs:500,000/- (Five hundred thousand rupees/Five lac) in respect of both the deceased to their legal heirs u/s 544-A Cr.P.C and in case of default in payment of compensation, the same shall be recovered as arrears of land revenue from their person and estate of accused facing trial.

7. Likewise, charge against the accused/appellants in respect of section 324 PPC r/w section 149 PPC was also found to have been proved followed by conviction & sentence u/s 324 r/w 149 PPC, rigors imprisonment for ten (10) years with fine in the sum of Rs: 100,000/- (one hundred thousand/one lac), in default simple imprisonment for three (03) months.

8. Similarly, case u/s 337-F (v) PPC r/w 149 PPC was also found to have been proved against the accused/appellants, as such, the accused/appellants were also convicted & sentenced u/s 337-F (v) PPC r/w section 149 PPC, for Daman with amount of Rs:100,000/- in lump sum with three (03) years imprisonment.

9. Likewise, case against the accused/appellants u/s 148 r/w section 149 PPC has also been found to have been proved successfully, followed by conviction & sentence for three (03) years imprisonment. All the punishment were found to shall run concurrently and benefit of section 382-B Cr.P.C was extended accordingly.

10. Feeling aggrieved, the appellants/convicts have called in question their convictions & sentences through the instant appeal before this Court.

11. Likewise, Umer Daraz (complainant) also sought enhancement/modification of sentences of the appellants-accused as death.

12. Arguments heard and record gone through with the able assistance of learned counsel for the parties.

13. In view of the submissions at the bar and record made available, presence of the complainant party on the scene of occurrence at the fateful time is alleged to be on account of

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routine gossip. Close perusal of the site plan Exh.PB would transpire that the members of the complainant party including the deceased have been shown at a considerable distance from each other, whereas, in case of informal conversation or gossip, members of the subject company are supposed to be close & well connected so that they can communicate their respective chat easily. But the in between distance of the victims so reflected in the site plan Exh.PB, prima facie not so close to mutually communicate the gossip. Other than it, shops and residence of Asif & Chaman do figure in the site plan Exh.PB but instead of the same the complainant party opted for gossip on the main road highlighted in the site plan. Likewise, the investigation officer on his visit to the scene of occurrence could not have highlighted in his preliminarily investigation report/site plan either the seating arrangement of the members of the complainant party nor the seating articles as chairs & cots have been highlighted in the site plan. Strong presumption can no way be ruled out that the same being have not been highlighted/disclosed to the investigation officer, therefore, it does not figure at all in the investigation and the subject infirmity touch the roots of the prosecution's case.



14. In the circumstances, where proper and safe place as Hujra of Muhammad Akbar/shops and residence of Asif/Chaman do exist, presence of the victims and PWs in a thoroughfare and that too for chatting & gossiping, whereof, neither the seating arrangement is part of the investigation nor the investigation officer has highlighted in his investigation report/site plan the seating articles as chairs & cots. It is hard to believe the very presence of the complainant at the fateful time as the reason of his presence is not appealing to a prudent mind coupled with the culture & tradition of locality on the ground that the so called gossiping in the thoroughfare is avoided in Patanic culture.



15. The record speaks loud & clear about the oral altercation between the parties did occur a day prior to the fateful event followed by get together of the complainant party almost in the same vicinity for the same purpose is not appealing to the prudent & sensible mind. Other than it, age group of the complainant, deceased and eyewitnesses being more than 45 to 62 years, prima facie more than mature and in Patanic culture gossiping in the thoroughfares of such an aged group person is rear.

16. Site plan Exh.PB speak of the hujra of Muhammad Akbar near the scene of

occurrence, therefore, there was no occasion at all for the deceased and PWs to opt for chatting in the thoroughfare when a hujra does exist quite close to the scene of occurrence.

17. Complainant Umer Daraz, an injured victim on his shifting to hospital has examined by the Medical Officer followed by report/remarks on his injury sheet as Exh.PW6/2. The subject report speaks loud & clear about his injury as "*firearm injury on is left thigh*", however, it has been categorically observed that the patient (complainant), disoriented in time & place. It is hard fact that as a result of the subject injury heavy blood loss can occur for the reason of major blood vessels located around, therefore, the observation of the medical officer regarding the physical status as disoriented in time & place is of paramount consideration. Likewise, the duty police officer/Incharge casualty Civil Hospital, Pabbi (Nowshera) while drafting the report of the complainant could not be able to procure proper fitness certificate from the Medical Officer as due endorsement on the Murasila at least in terms that the complainant is *well oriented in time & place and fit to communicate his version safely*. Not to obtain the subject observation from the Medical Officer either on a Murasila or through a proper endorsement, left behind scope for the preposition

that the report in question may not be the version of the complainant because of the severity of his injury.

18. Other than the above, name of Shah Nawaz does figure in the calendar of the witnesses and his presence is reflected in site plan Exh.PB at point No.4. Needless to highlight PW Shah Nawaz is brother of the victims, deceased Haji Bahadur and Mashar Khan, during the investigation he has been associated and his account has been recorded u/s 161 Cr.P.C but for the reason best known to the prosecution he has not been examined in support of the case. Strong presumption can no way be ruled out that the subject star witness of the prosecution and brother/closely related to the deceased Haji Bahadur and Mashar Khan being not supporting the prosecution's case, therefore, his account has not been furnished at all. So, in the situation, adverse inference under Article 129(g), Qanun-e-Shahadat Order 1984 can be safely drawn. Even otherwise, in the situation legal inference could also be drawn that if the said witness had entered into the witness box then he would not have supported the prosecution case.

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Qanun-e-Shahadat (10 of 1984)

---Article 129 (g)---Withholding of best evidence---scope---If best possible evidence is

withheld, it's on production will react against the prosecution with an adverse inference.

2006 SCMR 1846

Penal Code (XLV of 1860)---

*---S. 302 (b)/34---Prosecution---Misconduct---
Withholding a material witness---Effect---Non-
production of most natural and material witness of
occurrence, would strongly lead to an inference of
prosecutorial misconduct, which would not only be
considered a source of undue advantage for
prosecution but also an act of suppression of
material facts causing prejudice to accused.*

Qanun-e-Shahadat (10 of 1984)---

*---Art. 129 (g)---Criminal trial---Withholding
natural witness---Presumption---Act of
withholding of most natural and material witness
of occurrence would create an impression that had
such witness been brought into witness box, he
might not have supported the prosecution---
Prosecution, in such eventuality must not in a
position to avoid the consequences.*

19. It is transparent from the record that in the first information report Umer Daraz (complainant) reported the event against five persons Naik Awaz, Umer Zaman (convicted accused), Abdullah, Zakir Khan and Taj Muhammad (absconding accused) have been nominated for the commission of offence to the effect that as a result of fire shots of the aforesaid accused Mashar Khan and Haji Bahadur, Umer Daraz were hit and injured whereas the eyewitness

Shah Nawaz made his good escape. On this score, the occurrence is attributed to five assailants armed with lethal weapons but the number of empties secured from the scene of occurrence are eleven in number of 7.62 bore. The event being alleged to be outcome of five persons but nothing as such has been brought on record as to whose shots proved fatal. Likewise, the crime empties secured from the scene of occurrence have not been sent to FSL so as to verify the factum as to have been fired from a single or multiple weapons of offence. To ignore the subject circumstantial and supporting evidence, it is a matter of grave concern.



20. The assailants/convicts/appellants and the complainant party are being co-villagers and well known to each other, as such, the element of misidentification can safely be excluded. The respondent/complainant party alleged to be present on the spot and as a result of altercation (second time), the appellants/assailants with their co-accomplices duly armed, after another oral altercation at the fateful time followed by the tragic incident. The complainant party to justify its presence on the scene of occurrence has posed to be busy in gossiping but the site plan falsifies the subject stance as the in-between distance does not support the subject version.

21. Similarly motive for the occurrence so highlighted at the first instance followed by the evidence during the trial as oral altercation between the parties at the scene of occurrence is not strong enough as to amount to brutal murder of two persons.

22. From perusal of the case evidence, we conclude that the prosecution witnesses were not telling the actual truth rather posing themselves to the principle of '*falsus in uno, falsus in omnibus*' meaning thereby "false in one thing, false in everything. Believing such assailable evidence by the Court of law would be definitely against the administration of criminal justice resulting into judicial death of an innocent accused.

23. The crux of afore-mentioned discussion is that either the prosecution witnesses were not present on the spot or they are not telling the truth. Prosecution has miserably failed to build any nexus of the accused-appellants with the commission of the offence. We are forfeited by the case law reported in PLJ 2019 SC (Criminal Cases) 265.

24. The above discussion has led this Court to believe that the learned trial court has erred in appreciating the case evidence in its true perspective. It has been held, time and again by the superior courts, that a slightest doubt occurs in the

prosecution case is sufficient to grant acquittal to an accused. For giving the benefit of doubt, it is not necessary that there should be many circumstances creating doubts. Single circumstance creating reasonable doubt in the prudent mind about the guilt of accused makes him entitled to its benefit, not a matter of grace in concession, but as a matter of right. Reliance could be placed on 2009 SCMR 230, 2011 SCMR 664, 2011 SCMR 646, 1984 PLD SC 433, 2012 MLD 1358, 2007 SCMR 1825, 2008 P.Cr.L.J 376, 1994 PLD Peshawar 114, 2012 PLD Peshawar 01, 1999 P.Cr.L.J 1087, 1997 SCMR 449, 2011 SCMR 820 & 2006 P.Cr.L.J SC 1002. The conclusions drawn by the learned trial Court are not borne out of the case evidence, therefore, the impugned judgment is not sustainable.

25. For what has been discussed above and while extending the benefit of doubt to the appellants, the instant appeal is allowed, the impugned judgment is set aside and the appellants are acquitted of the charge levelled against them. They be set at liberty forthwith, if not required to be detained in any other case.

26. Consequent upon acceptance of the Criminal Appeal No/J. Cr.A No.1147-P/2021 and acquittal of appellants-convict namely Naik Zaman

& Umer Zaman, Criminal Revision No.212-P/2021
by petitioner Umer Daraz for enhancement of the
sentences is dismissed.

27. Above are the reasons of short order
of even date.



JUDGE



JUDGE

Announced
03.08.2022

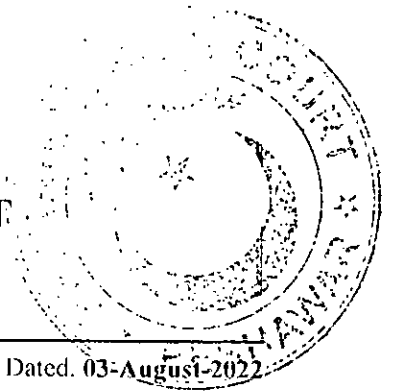
Nadir SSS

DB Mr. Justice Ishtiaq Ibrahim JJ & Mr. Justice Shahid Khan JJ.



The
PESHAWAR HIGH COURT
Peshawar

Ph: No. 091-9210149-58



No. 56336 (1)/1073/2022/DEC

Dated: 03-August-2022

From

Additional Registrar (J),
Peshawar High Court,
Peshawar.

To

THE DISTRICT & SESSION JUDGE NOWSHERA

Subject: Life Imprisonment Cr.A 1147/2021 Title: Naik Nawaz & others VS State & other (FIR No.72 Dated 29-Jan-13 U/S 302/324/148/149 PPC PS, Pabbi) Nowshera.

RELEASE ORDER.

Accused/Appellants (1) Naik Awaz s/o Taj Muhammad (2) Umar Zaman s/o Naik Awaz, Both r/o Spin Khak, Tehsil Pabbi, District Nowshera.
Date of hearing on 03.08.2022.

DB. Mr. Justice Ishtiaq Ibrahim & Mr. Justice Shahid Khan.

Previous History of the Case.

Convicted & sentenced (1) u/s 302 (b) PPC r/with S 149 PPC to suffer Life Imprisonment RI each on two counts and to pay Rs. 500,000/- as compensation to the LR's of the deceased u/s 544-A Cr.P.C, or in default the same shall be recovered as arrear of land revenue. (2) u/s 324/149 PPC to suffer Ten years RI with fine of Rs. 100,000/-each or in default to further suffer 03 months SI each. (3) u/s 337-F(v)/149 PPC to pay Daman Rs. 100,000/- each and also sentenced for 03 years RI each. (4) u/s 148/149 PPC to suffer 03 years RI each. All the sentences shall run concurrently. Benefit of Section 382- B Cr.P.C was extended to the accused by Mr. Tufail Ahmad, Addl: Sessions Judge-III/Judge MCTC, Nowshera, vide order dated 24.11.2021.

High Court Order: (Operative Part only).

For the reasons to be recorded later, instant appeal is allowed, conviction & sentences awarded to the appellants Naik Awaz & Umer Zaman by the learned Additional Sessions Judge-III/MCTC, Nowshera, vide judgment, dated 24.11.2021 in case FIR No. 72 dated 29.01.2013 under sections 302/324/148/149 PPC Police Station, Pabbi (Nowshera), are set aside. Accused Naik Awaz & Umer Zaman are acquitted of the charges leveled against them. They be set at liberty forthwith, if not required to be detained in any other case.

Copy of order is attached herewith.

Direction. As per order mentioned above.

Additional Registrar (J)
Peshawar High Court
Peshawar.

3/8/22

3/8/22

**IN THE PESHAWAR HIGH COURT,
PESHAWAR**

Judicial Department

J.Cr.A No. 1147-P/2021

Naik Awaz & Umer Zaman Vs the State

Date of hearing: 03.08.2022.

Appellants by: Mr. Astaghfirullah, Advocate

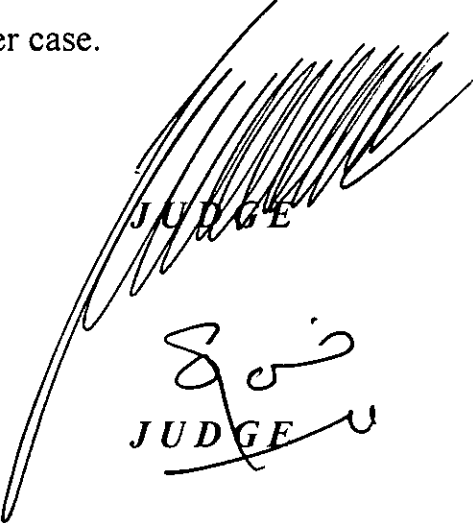
State by: Mr. Niaz Muhammad, AAG.

Complainant by: Mr. Shabir Hussain Gigyani, Advocate.

ORDER

SHAHID KHAN, J. For the reasons to be recorded latter, instant appeal is allowed, conviction & sentences awarded to the appellants Naik Awaz & Umer Zaman by the learned Additional Sessions Judge-III/MCTC, Nowshera, vide judgment, dated 24.11.2021 in case FIR No.72, dated 29.01.2013 under sections 302/324/148/149 PPC Police Station, Pabbi (Nowshera), are set aside. Accused Naik Awaz & Umer Zaman are acquitted of the charges leveled against them. They be set at liberty forthwith, if, not required to be detained in any other case.

Announced on;
03.08.2022


JUDGE