

HCJDA-38
JUDGMENT SHEET
IN THE LAHORE HIGH COURT
MULTAN BENCH MULTAN
JUDICIAL DEPARTMENT

Criminal Appeal No.1577 of 2019

Muhammad Nawaz alias Nazi & another
Versus
The State

J U D G M E N T

<u>Date of Hearing:</u>	20.01.2022
<u>Appellants by:</u>	Mr. Qasim Ali Advocate
<u>State by:</u>	Ms. Asmat Parveen Deputy District Public Prosecutor

This criminal appeal filed through Superintendent Central Jail, Multan by Muhammad Nawaz alias Nazi and Muhammad Yasin alias Cheehma/both real brothers (*appellants*) is directed against judgment dated 30.10.2019 passed by the learned Additional Sessions Judge, Khanewal on the basis of which they were convicted under Section 302(b) PPC¹ and sentenced to life imprisonment each with direction to pay an amount of Rs.100000/- (*one lac*) each as compensation in terms of Section 544-A Cr.P.C² to the legal heirs of deceased. Benefit of Section 382-B³ Cr.P.C was extended to both the appellants.

2. The convictions are outcome of case FIR⁴ No.94 (*PA/I*) recorded on 15.03.2016 under Sections 302/148/149 PPC at Police Station Kohna district Khanewal on the complaint of Furqan (*not produced being died*).

¹ Pakistan Penal Code (XLV of 1860)

² Code of Criminal Procedure (V of 1898)

³ The period a convict has already suffered inside the jail

⁴ First Information Report

3. Facts of the case are that on 15.03.2016 while appearing in Police Station, Furqan/complainant submitted an application (PA), where he maintained that on 15.03.2016 at about 05:15 pm, Nasir Ali (*deceased*) while standing in front of his house situated at Lakkar Mandi Khanewal, was busy in conversation on his mobile; he/complainant along with Ghulam Farid (Pw-8) and Musharraf Ali (Pw-7) were also present there and busy in discussion; all of a sudden there emerged Muhammad Yasin alias Cheehma, Muhammad Nawaz alias Nazi (*appellants*), Raees alias Billa (PO)⁵ and two unknown persons; all assailants were armed with 30-bore pistols; Muhammad Yasin alias Cheehma made a fire which hit on the left arm of Nasir Ali and went through and through; he fired second shot that hit on the left side of chest of Nasir and he fell down on the ground; thereafter, Muhammad Nawaz alias Nazi pressed the trigger and fire hit on the right hand of Nasir Ali that too went through and through; fourth fire in series came out from the pistol of Muhammad Nawaz and hit on the fingers of right hand of Nasir Ali; next fire from the weapon of Muhammad Nawaz alias Nazi caused an injury in between the chest of Nasir Ali; subsequent thereto, two bullets from the firearm of Raees alias Billa (PO) resulted into injuries on the right side of chest and testicles of Nasir Ali; final action was by Muhammad Yasin alias Cheehma (*appellant*) who fired a shot on the head of Nasir Ali which went through and through; Nasir Ali died at the spot; unknown persons while standing had been extending threats to kill any one if came forward; all the assailants were succeeded to escape from crime scene; occurrence was also witnessed by Sabira Bibi (*not produced*) and residents of locality; motive was that

⁵ Proclaimed Offender

assailants were drug peddlers and Muhammad Yasin alias Cheehma got registered a case for the murder of his brother Haq Nawaz against Nasir Ali (*deceased*), Sultan and Irfan.

4. On the basis of above application FIR (*PA/1*) was recorded by Muhammad Ajmal HC (*Pw-1*).

5. During investigation all accused including appellants were declared as Proclaimed Offenders. However, on 27.12.2016, Muhammad Yasin alias Cheehma and on 18.12.2018 Muhammad Nawaz alias Nazi was arrested in this case.

6. Primarily a report under Section 173 Cr.P.C (*Challan*) was submitted to the extent of Muhammad Yasin alias Cheehma and remaining accused were declared as Proclaimed Offenders. A charge was framed against him on 20.02.2017 for which he pleaded not guilty and demanded his trial. After certain witnesses were examined, Muhammad Nawaz alias Nazi (*appellant*) was also arrested therefore, a supplementary report under Section 173 Cr.P.C was also submitted against him. He too was charged on 30.01.2019 under Sections 302/148/149 PPC and pleaded not guilty.

7. It appears that earlier proceedings with regard to recording of statements of certain witnesses were impliedly declared as *de novo*⁶ and fresh evidence was started.

8. In order to prove its' case prosecution had produced Muhammad Ajmal Head Constable/author of FIR (*Pw-1*), Abdul Majeed Constable (*Pw-2*), Sajid Ali Constable/witness to arrest of Muhammad Yasin (*Pw-3*), Dr. Ghulam Abbas (*Pw-4*), Raja Muhammad Iqbal Janjua/draftsman (*Pw-5*), Abid Mehmood HC/Moharrar (*Pw-6*), Musharraf Ali/eyewitness (*Pw-7*), Ghulam Farid/

⁶ In general usage, *de novo* (literally of new) is Latin expression used in English to mean 'from the beginning', 'anew'.

eyewitness (Pw-8), Muhammad Azhar Sub Inspector/Investigating Officer (Pw-9), Malik Husnain SI/IO (Pw-10), Sajid Ali SI/IO (Pw-11) and Muhammad Sajid (Pw-12).

9. Sabira Bibi, Azhar Abbas and Muhammad Asif were given up being unnecessary. After producing the expert reports (PV and PW), prosecution's evidence was closed by the learned DDPP⁷.

10. In their examinations made under Section 342 Cr.P.C versions of both the appellants were as under: -

Muhammad Yasin alias Cheema

"This case is false and fabricated, PWs are interse related and interested witnesses and are inimical towards me and my co-accused, they have deposed falsely. The PWs are not natural witnesses, they are not residents of near the place of occurrence nor they witnessed the occurrence. The deceased and his family had inimical towards many other persons who were criminal persons and many other criminal cases registered against the deceased and his brothers and their father complainant namely Furqan. Some unknown persons murdered the deceased Nasir and the complainant party after consultation and due deliberation after spot inspection lodged this false FIR against me and my co-accused because on 06.07.2015 the deceased Nasir Ali and his brothers Sultan alias Tani, Irfan alias Fana since P.O and father complainant namely Furqan since died and other accused committed the murder of my real brother Haq Nawaz and I lodged the case FIR No.211/15 u/s 302/449/148/149 PPC Police Station Kohna Khanewal against them and due to that grudge the complainant party lodged this false case against me and my co-accused Nawaz as he was also witness of the abovesaid case. The police did not investigate the matter fairly and due to influence of complainant party they falsely challan me and my co-accused. Nothing was recovered from me and if something is shown fake and planted one"

⁷ Deputy District Public Prosecutor

Muhammad Nawaz alias Nazxi

“This case is false and fabricated, PWs are interse related and interested and inimical towards me and my co-accused, they have deposed falsely. The PWs are not natural witnesses, they are not residents of near the place of occurrence nor they witnessed the occurrence. The deceased and his family had inimical towards many other persons who were criminal persons and many other criminal cases registered against the deceased and his brothers and their father complainant namely Furqan. Some unknown persons murdered the deceased Nasir and the complainant party after consultation and due deliberation after spot inspection lodged this false FIR against me and my co-accused because on 06.07.2015 the deceased Nasir Ali and his brothers Sultan alias Tani, Irfan alias Fana since P.O and father complainant namely Furqan since died and other accused committed the murder of my real brother Haq Nawaz and my brother/co-accused Yaseen lodged the case FIR No. 211/15 u/s 302/449/148/149 PPC P.S Kohna Khanewal against them and due to that grudge the complainant party lodged this false case against me and my co-accused Yaseen as I was witness of the above said case. The police did not investigate the matter fairly and due to influence of complainant party they falsely challan me and my co-accused. I joined the investigation of this case and got recorded my first version to Muhammad Azhar S.I/O that I was working in Sadiq Poultry Private Ltd. in Rawalpindi as a welder with Muhammad Mukhtiar contractor and on the day of occurrence I was present in the Rawalpindi in above said factory. Muhammad Mukhtiar also submitted his affidavit during investigation to I.O in which he fully supported my version. Muhammad Mukhtiar also produced my attendance certificate in factory on the day of occurrence but the I.O with malafide intention did not make the same part of file and falsely challaned me in this case on the asking of complainant party. Nothing was recovered from me and if something is shown fake and planted one”

11. Appellants in their defence evidence produced copies of FIR and other proceedings (*DA to DD*) however they did not opt to appear in terms of Section 340(2) Cr.P.C.

12. Learned counsel for appellants contended that the charge against Muhammad Yasin alias Cheehma framed by the learned trial court was defective where Section 302 PPC was not recorded; after the arrest of Muhammad Nawaz alias Nazi and submission of supplementary report under Section 173 Cr.P.C, it was the duty of learned trial court to charge both the appellants jointly which was an illegality; under all circumstances, it is the duty of prosecution to prove its' case beyond reasonable doubt and if said assignment is not discharged, the consequences shall be in favour of accused and none else; complainant Furqan did not appear in witness box which is fatal to prosecution; Sabira Bibi daughter of complainant was also stated to be present at crime scene, but she was given up being unnecessary and as she could be the best witness therefore not to bring her in witness box has invited many challenges for prosecution which remained unanswered; statements of two eye witnesses are suffering from contradictions and infirmities hence they cannot be relied upon; information to police even if it was without delay, cannot be considered a good reason to record the conviction and to sustain thereof; the medical evidence does not support ocular account; Muhammad Nawaz (*appellant*) had taken the plea of alibi which was not investigated deliberately by the Investigating Officers hence it is a case of defective investigation; on behalf of Muhammad Nawaz (*appellant*) a certificate was produced showing that on the relevant day he was present on his duty at Rawalpindi, therefore, he could not be convicted; enmity between the parties is not under dispute so without any corroboration statements of eyewitnesses cannot be given stamp of truth; absconding of both the appellants cannot stand in their way if it is found that

prosecution could not establish its' case against them. Learned counsel finally argued that no good reason has been assigned by the learned trial court while convicting the appellants.

13. Appeal has been opposed by learned DDPP.

14. **HEARD.**

15. It is a matter of record that primarily he was Muhammad Yasin alias Cheehma (*appellant*) against whom on 20.02.2017 a charge under two heads was framed by the learned trial court and that was as under: -

“That on 15.3.2016 at 5:15 pm in the area of Lakkar Mandi Basti Chan Shah P.S, Kohna you while armed with firearm weapon along with your co-accused (since P.O) formed an unlawful assembly in furtherance of your common object with the intention to commit Qatl-i-Amd of Nasir Ali s/o complainant Furqan, thus you committed an offence punishable u/s 149 PPC which is within the cognizance of this court.

That on the above said date, time and place you while armed with pistol 30 bore alongwith your co accused caused injuries on the person of Nasir Ali, as a result of which he succumbed to the injuries, thus you committed his Qatl-i-Amd which is within the cognizance of this court”

16. Undoubtedly there is no mention of Section 302 PPC in the above charge so the question before this Court is that whether such mistake on the part of learned trial court can be a reason to vitiate the trial?

17. A charge has been defined under Section 4 (C) Cr.PC which says as under: -

“Charge includes any head of the charge, when the charge contains more than one”

18. A charge under the settled principles of law is precise information of specific accusation and its purpose is to tell an accused as precisely and concisely what the prosecution intends to prove against him during trial. Purpose of framing of charge is also to offer an opportunity to accused to focus and concentrate his attention on the allegations he has to face.

19. Chapter XIX (Ss 221 to 240) deals with '**Form of Charge**' '**Alteration of Charge**' '**Joinder of Offences**' and '**Joinder of Accused**'. Under Sections 221 to 223 Cr. PC, the components of a charge are as under: -

- i. Name, parentage, caste, age and address of accused.*
- ii. The offence.*
- iii. If offence is named specifically by law, which creates offence, the offence may be described in the charge by that name only.*
- iv. The Law and Section of Law.*
- v. In case of previous conviction of the accused for affecting the sentence, the fact and date, place of the previous conviction are to be stated.*
- vi. Particulars to the time, place and the offence and the person against whom or thing in respect of which it is committed.*
- vii. In case of criminal breach of trust or dishonest misappropriation of money, it is sufficient to specify the gross sum in respect of which the offence is committed and the dates between which it is committed provided the time between first and last date does not exceed one year.*
- viii. When the particulars mentioned in Sections 221 and 222 of Cr.PC are insufficient to notify the accused with the matter, which he is charged, the charge should also contain such particulars and the manners in which alleged offence was committed"*

20. In the above said charge the date (15.03.2016), time (05:15 pm), place of occurrence (Lakkar Mandi Basti Chan Shah), offences (forming of an unlawful assembly and firing), name of offence (Qatl-e-Amd) and law (PPC) were notified to Muhammad Yasin. Only one component that is Section of Law (302 PPC) could not be recorded therein. To come out from the effect of this wrong, the provision of Section 225 Cr. PC is quite relevant and reproduced as under: -

*“No **error** in stating either the offence or the particulars required to be stated in the charge, and no **omission** to state the offence or those particulars, shall be regarded at any stage of the case as material, unless the accused was in fact misled by such error or omission, and it has occasioned a failure of justice”*
(Emphasized applied)

21. The significant words used in the above provision are ‘**error**’ or ‘**omission**’. These two words have not been defined under relevant Chapter (*ibid*) or under any of the provisions of Cr.PC. The ordinary dictionary meanings of ‘**error**’ and ‘**omission**’ are as under: -

ERROR “An act involving an unintentional deviation from accuracy; an act that through ignorance, deficiency or accident departs from or fails to achieve or should be done⁸”

OMISSION “Something neglected or left undone; a failure to do something⁹”

22. In the referred charge against Muhammad Yasin alias Cheehma it was an **omission** on the part of learned trial court which can be fatal to prosecution only if the appellants are succeeded to show that because of such omission in fact they were misled and it had occasioned a failure of justice. Under Section 232 Cr. PC, this Court, in the given

⁸ <https://www.dictionary.com/browse/error>

⁹ <https://www.merriam-webster.com/dictionary/omission>

circumstances, as a Court of appeal or revision can interfere only if it is found that by such error or omission appellants were misled in their defence. The said provision for better understanding is as under: -

“232. Effect of material error: (1) *If any Appellate Court, or the High Court [or the Court of Session] in the exercise of its powers of revision or of its powers under Chapter XXVII is of opinion that any person convicted of an offence was misled in his defence by the absence of a charge or by an error in the charge, it shall direct a new trial to be had upon a charge framed in whatever manner it thinks fit.*

(2) *If the Court is of opinion that the facts of the case are such that no valid charge could be preferred against the accused in respect of the facts proved, it shall quash the, conviction”*

23. Learned counsel for appellants is unable to convince this Court that because of omission made by the learned trial court, what prejudice has been caused to appellants or how his clients were misled in their defence or how there was a failure of justice? Therefore, no benefit can be extended to appellants because of said omission in the charge.

24. After the submission of supplementary report under Section of 173 Cr.P.C (*Challan*), no doubt that a joint charge was required to be framed against both the appellants in terms of Section 239 Cr.PC but as it was a procedural irregularity causing no injustice to appellants so cannot be a reason to reverse the proceedings conducted by the learned trial court.

25. Coming to the merits of the case, I have gone through the record of learned trial court with the valuable assistance of both the sides. Occurrence had taken place at 05:15 pm. Police Station was at a short distance where Furqan immediately appeared and submitted an application and

within next 15 minutes that was at 05:30 pm, the FIR was chalked out. In this document (PA) complete details and manners of occurrence are recorded which includes names of appellants and their co-accused, weapons they were carrying, names of complainant and witnesses and the role assigned to every accused. The defence during cross-examination to the witnesses was completely failed to shatter the genuineness of this document. Even by imaginations there is nothing to hold that FIR was not recorded at the given date and time or in the manners as prosecution claimed. In these circumstances, the most promptly lodged FIR has ruled out the question of false involvement of the appellants in this case.

26. Furqan, the complainant of the case, before could attend the witness box had taken his last breath therefore appellants cannot take any benefit of the act of GOD in particular when two eyewitnesses Musharraf Ali (Pw-7) and Ghulam Farid (Pw-8) are still in the credit of prosecution.

27. These are the recognized principles of law that prosecution is not bound to produce each and every witness of the case¹⁰ and that it is the quality and not the quantity that has to prevail for the purpose of arriving at a just decision of the case¹¹. If Sabira Bibi, the daughter of complainant, was not produced, that by no means can be stated as a damaging factor for the prosecution.

28. No doubt that prior to the occurrence there was an enmity in existence between the parties but the eyewitnesses Musharraf Ali and Ghulam Farid produced by the prosecution in this case were proved to be independent having no relations with complainant or enmity with

¹⁰ Muhammad Shafqat vs. The State 1970 SCMR 713

¹¹ Farman Ali and another vs. The State & another 2020 SCMR 597 and Niaz-ud-Din & another vs. the State and another PLJ 2011 SC 381

appellants. Musharraf Ali was although residing at a distance of about half kilometer but in the same vicinity where both the parties were living. He categorically stated that he came there to see one Kamran who was the owner of the shop where he/Musharraf Ali used to work. Similarly Ghulam Farid (*Pw-8*) was residing quite close to the house of complainant which fact too could not be disputed by defence. Keeping in view the time of occurrence 05:15 pm in the month of March, presence of both the witness has also been proved to be natural.

29. The cross-examination conducted on both the eyewitnesses makes it clear that defence was unable to smash or destroy their reliability. Even by presumptions or imaginations there is nothing to suggest that they had any reason or grudge or motive to depose falsely against appellants while appearing in court.

30. As mentioned earlier FIR was recorded at 05:30 pm. It was thereafter when Sajid Ali S.I (*Pw-11*) arrived at crime scene where he prepared injuries statement (*PE*) and inquest report (*PF*) and send the dead body for postmortem examination under the escort of Abdul Majeed/Constable (*Pw-2*). The dead body was ultimately in hospital at 06:30 pm as admitted by Doctor Ghulam Abbas (*Pw-4*) who, then, conducted the postmortem examination at midnight that was 12:05 am. In these circumstances it is not only a case of prompt information to police but prompt postmortem examination of the body of Nasir Ali.

31. Learned counsel for appellants although claimed contradictions and infirmities in the statements of witnesses but during course of arguments he could not refer any portion of cross-examination to substantiate such contention. It is needless to observe that eyewitnesses came

in witness box after about three years and four months of the occurrence because appellants were absconders so the minor lapses, if any, in the statements of witnesses were quite natural and cannot be a reason for acquittal on the strength of golden principle that doubt arising out from the statements of witnesses must be genuine and not artificial.

32. Reverting to medical evidence, he was Doctor Ghulam Abbas who, on 16.03.2016 at about 12:05 am (midnight) conducted the postmortem examination of Nasir Ali and observed as under: -

Injury No.1. Firearm entry wound 1x1 cm left side of skull 4cm above left ear. No blackening and burning present. Fire arm exit wound 3X3 cm right side of skull 7 cm above right ear. Brain matter out.

Injury No.2. Firearm entry wound 1x1 cm at back of chest. 2 cm lateral to vertebral column 4cm away from medial border of right scapula. No blackening, no burning present. Fire arm exit wound 2x2 cm right side of anterior of chest 2 cm below right clavicle and 8 cm above right nipple.

Injury No.3. A firearm entry wound 1x1 cm lateral to vertebral column 5 cm away from medial border of right scapulae. No burning, no blackening present. Firearm exit wound 2x2 cm right side of anterior of chest 2 cm lateral to sternum, 6 cm away from right nipple.

Injury No.4. Fire arm entry wound 1x1 cm of left nipple areola of left side anterior chest. No blackening, no burning present. One bullet removed from chest.

Injury No.5. Firearm entry 1x1 cm right side anterior lower abdomen, right iliac fossa, 7 cm away from right anterior superior iliac supine. No blackening, no burning present. Fire arm exit wound 2x2 cm at back of trunk 3 cm away from vertebral column of right side.

Injury No.6. A fire arm entry wound 1x1 cm on left forearm posterior medially 2 cm above ulna head. No blackening, no burning present. Exit wound 2x2 anterior of

*forearm 2 cm above lower border of ulna.
Entry exit wound inter distance of 3 cm.*

Injury No.7. *Firearm entry wound 1x1 cm of palm of right hand anteriorly at third metatarsal bone. No burning, no blackening present. Exit wound 2x2 cm at back of right hand at third metatarsal bone.*

Injury No.8. *Firearm entry wound 1x1 cm right hand ring finger anteriorly at second phalangeal bone. No blackening, no burning present. Exit wound 1x1 cm posteriorly ring finger of right hand at second phalangeal bone.”*

33. According to Doctor all the injuries were fatal and ante mortem in nature and caused by firearm weapons.

34. It was contended that the medical evidence does not support the direct evidence, but learned counsel for appellants has been completely failed to refer any such contradiction between two sets of witnesses. Therefore medical evidence of this case is a strong corroboration to the ocular account.

35. The report of PFSA (PV) with regard to matching of empties with the pistols recovered at the instances of appellants is inconsequential, therefore, it requires no discussion. However, the negative report shall have no adverse impact on the testimony of two eyewitnesses for the reason that at the most it is a corroborative and not conclusive piece of evidence.

36. It is the prosecution case that after the occurrence, appellants and their co-accused had disappeared and was declared as Proclaimed Offenders. Muhammad Yasin alias Cheehma was arrested on 27.12.2016 whereas, Muhammad Nawaz alias Nazi was apprehended on 18.12.2018. Raees alias Billa who is their real brother is still wanted. Even if it is presumed that the absconding of appellants has not been proved in accordance with law, even then their long

disappearance and avoidance from process of justice is a hurdle in their way and can be used as corroboration to the ocular account. Both appellants could not explain their long disappearance after the occurrence and they also could not dispute their dates of arrest as stated by the investigating officers.

37. Muhammad Nawaz (*appellant*) had taken the plea of alibi¹² but after two years and nine months of the occurrence when he was arrested. It is settled principle of law that the plea of alibi being special plea must be taken at first available opportunity and being a distinct plea is required to be substantiated by adducing cogent and concrete evidence. Muhammad Nawaz, before he was arrested by the police, never agitated anywhere even by moving any application to any authority that he was not present at crime scene. Although in cross-examination he suggested to the Investigating Officer about such plea and the person with whom he was present but that person was not produced by him in his defence. He submitted a photocopy of letter dated 19.04.2016 (*Mark-A*) issued by a Private Department that was 'Sadiq Poultry (Pvt.) Ltd.' where it was maintained that Muhammad Nawaz had been working at the said poultry farm, from 02.01.2016 to 21.03.2016. This document which could not be marked by the learned trial court is having no evidentiary value. Even if it's original was brought on record that could not be exhibited without appearance of the person who had issued the same. Therefore, plea of alibi raised by Muhammad Nawaz is of no worth at all.

38. Learned trial court while taking into consideration the evidence from all possible angles rightly proceeded to

¹² The plea of having been at the time of the commission of an act elsewhere than at the place of crime

convict the appellants hence this Court finds no justification to interfere in the well-reasoned impugned judgment.

39. Summing up the deliberations made above this appeal has no merit hence it is **dismissed**.

(Sohail Nasir)
Judge

Approved for Reporting

(Judge)

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