

Judgment Sheet

PESHAWAR HIGH COURT, PESHAWAR

JUDICIAL DEPARTMENT

**CONSOLIDATED
J U D G M E N T**

**Cr.A. No. 196-P/2014
&
Cr. A. No. 197-P/2014**

Date of hearing 09.11.2017.

*Appellant: (Imran) by Mr. Ishfaq Ahmad
Afridi, Advocate.*

*Respondents: (The State & another) by Syed
Sikandar Hayat Shah, A.A.G assisted by Mr.
Shahzad Gul Khattak, Advocate, counsel for
the complaint.*

QALANDAR ALI KHAN, J.- This single judgment in the instant appeal is also directed to dispose of the connected criminal appeal No. 197-P/2014 titled "Aziz-ur-Rehman vs the State", as both the instant appeal as well as afore-mentioned connected appeal arise out of the same case vide FIR No. 30 dated 25.01.2011 under sections 302/324/34 PPC police station Nizampur; and both the criminal

appeals are also directed against the same judgment/order of learned Sessions Judge, Nowshera, dated 17.03.2014.

2. The case/FIR was registered on the report of Shakir Khan son of Qadir Khan resident of Jabi, Nizampur, in DHQ hospital Nowshera Kalan, who was brought alongwith deceased, Muhammad Mujahid son of Muhammad Sadiq, by his relatives and reported to the police at 11:00 hours on 25.01.2011 to the effect that earlier at 9:50 hours he alongwith his cousin Muhammad Mujahid and other relatives was proceeding towards the river for working there as laborers and when reached Jabba Khwar, Nizampur, at 9:50 hours, they noticed Naeem Khan and Imran sons of Asif Khan, Shafiq-ur-Rehman and Aziz-ur-Rehman sons of Niamat Khan, present there armed with daggers (*Churri*) and attacked them causing him dagger (*Churri*) wound on the chest and also inflicted serious dagger (*Churri*) wounds on the abdomen and chest of his cousin, Muhammad Mujahid, who succumbed to the

injuries while on his way to the hospital. The occurrence was reportedly witnessed by relatives of the complainant namely Faisal son of Aslam Khan and Akhtar Amin; while motive for the occurrence was cited altercation between the accused and victims one day prior to the occurrence. In his report, the complainant charged all the four (4) accused mentioned in the FIR. The report/FIR was also verified by relative of the deceased and complainant, namely, Akhtar Amin, who thumb impressed the *Murasila*, like the complainant, drafted by Ihsan-ur-Rehman SI (PW-11). On the basis of *Murasila* (Ex. PW-8/1), case/FIR (Ex. PA) was registered; and both the deceased and the injured were referred for postmortem and medical examinations, respectively, to the Medical Officer.

3. The postmortem examination of deceased, Muhammad Mujahid, revealed the following wounds:-

- 1) *Stab wound right sternal border at the level of 5th intercastle space 1 1/2 inch long.*

- 2) *Stab wound left sternal border about 01 inch above the wound# 1 and 01 inch long.*
- 3) *Stab wound right hypocondrum 1 1/2 inch long liver seen damage to the correspondence wound.*
- 4) *Stab wound 02 inches to the left nipple 1 1/2 inch long, left lung can be seen damaged.*
- 5) *Stab wound 11/2 inch long about 05 inches below left axilla. Lung can be seen damaged.*
- 6) *Stab wound left upper arm about 2 inches below left shoulder joint. Skin, muscle, blood vessels and brachial nerve damaged.*
- 7) *Stab wound just above right iliac wrist about 2 inches long, skull and muscle deeply cut-down."*

The time between injury and death was shown instantaneous; and duration between death and postmortem as 04 to 05 hours.

4. The same Medical Officer (PW-10) also examined the injured/complainant, Shakir Khan, and found two stab wounds, one at left nipple about 3 inches long, skin and muscle cut down and the other at left sternal border about 01 inch long, skin and muscles cut down.

5. The investigation in the case was entrusted to Bashir Ahmed, SI/OII (PW-2), who proceeded to the spot, inspected the spot, and

prepared site plan (Ex. PW-2/1). During spot inspection, the Investigating Officer secured bloodstained sand from the place assigned in the site plan to deceased, Muhammad Mujahid, and the same alongwith bloodstained garments sent by the Medical Officer after postmortem examination was dispatched to the Forensic Science Laboratory, Peshawar, wherefrom, positive result was received. Likewise, bloodstained sand collected from the place assigned to the injured/complainant in the site plan was sent alongwith his shirt, and result in this respect was also received from the FSL in the affirmative. All the four (4) accused named in the FIR remained at large, and were proceeded under sections 204 and 87 Cr.P.C and *challan* was submitted against them under section 512 Cr.P.C, leading to recording of statements of 3 PWs; and order of the learned Judicial Magistrate, Nowshera, dated 25.06.2011, whereby, all the four (4) accused were declared proclaimed offenders and perpetual warrants of arrest were issued against them. The appellants, Imran and Aziz-ur-

Rehman, were arrested from Karachi on 08.06.2011. They were shifted from Karachi, and a joint complete/supplementary *challan* were submitted against them; but, later on, separate *challan* was submitted against appellant, Aziz-ur-Rehman, under the Juvenile Justice System Ordinance, 2000. They were separately tried, after separate formal charges were framed against them; firstly, under sections 302/34 PPC, secondly, under sections 324/34 PPC, thirdly, under sections 337-F (ii)/34 PPC, and, fourthly, also under sections 337-F (ii)/34 PPC, to which, the accused/appellants pleaded not guilty and claimed trial.

6. During separate trials, the prosecution produced the following 11 PWs, namely:-

- Jehanzeb Khan, HC # 440 (PW-1) was entrusted with warrants of arrest against absconding accused under section 204 and also proclamation under section 87 Cr.P.C against them;

- Bashir Ahmad SI/OII (PW-2) was entrusted with investigation of the case, and he accordingly conducted investigation;
- Kamran Khan SHO (PW-3) submitted supplementary *challan* against accused/appellants, Imran and Aziz-ur-Rehman;
- Alamzeb Khan SI (PW-4) arrested both the accused/Appellants, Imran and Aziz-ur-Rehman, from Karachi and conducted proceedings of their shifting from Karachi;
- Razifat Shah FC # 1239 (PW-5) a marginal witness to recovery memos pertaining to recoveries of bloodstained sand from the spot and bloodstained garments taken into possession by the Investigating Officer;
- Subhanullah, ASI, (PW-6), registered case/FIR (Ex. PA) on the receipt of *Murasila*;

- Naseem Khan SI, (PW-7), submitted *challan* under section 512 Cr.P.C against the absconding accused;
- Shakir (PW-8), complainant in the case, and his report was incorporated in the *Murasila* (Ex. PW-8/1);
- Akhtar Amin (PW-9), the eyewitness mentioned in the FIR, and he also verified report of the complainant;
- Dr. Muhammad Younas Khan Khattak (PW-10), the Medical Officer, who conducted postmortem examination of deceased, Muhammad Mujahid, and also medically examined the injured/complainant, Shakirullah; and
- Ihsan-ur-Rehman SI (PW-11) drafted *Murasila* (Ex. PW-8/1) on the report of the complainant.

7. After prosecution closed its evidence, statements of both the accused/appellants were recorded. They refuted allegations of the prosecution, but declined to be examined on oath or produce defence evidence. On

conclusion of trial, the accused/Appellants were found guilty of the charges levelled against them, and convicted under section 302 (b) PPC, and sentenced to life imprisonment and also held liable to compensation of Rs. 50,000/- to all the legal heirs of the deceased or in default thereof to further 6 months SI. The accused/appellants were also convicted under section 324 PPC and sentenced to 5 years RI. The accused/appellants were further convicted under section 337 F (ii) PPC and sentenced to one year RI and payment of *Daman* of Rs. 30,000/- to complainant and in case of non-payment of *Daman*, the accused/appellants were to be kept in jail in simple imprisonment till payment of *Daman*. In separate judgments dated 17.03.2017, the learned Sessions Judge/Judge Special Court directed that all the sentences shall run concurrently, while extending benefit of section 382 (B) Cr.P.C to the accused/appellant. Through separate criminal appeals, the appellants assailed the judgment dated 17.03.2014, and also their conviction and sentences awarded to them.

8. Arguments of learned counsel for the convicts/appellants and learned A.A.G appearing on behalf of the State assisted by learned counsel for the complainant heard; and record perused.

9. No doubt, complainant in the case, Shakir Khan, carried stamp of injuries on his person, but mere presence of injuries on his person would neither make him a truthful witness nor his testimony sufficient to result in conviction of accused, unless his deposition was consistent with and corroborated by other ocular and circumstantial evidence, which was lacking in the case. The complainant had thumb impressed the *murasila*, drafted on his report, and PW Akhtar Amin also thumb impressed the *murasila*; but when the complainant appeared as PW.8, he stated in his statement before the Court that he had signed his report/*murasila* in English. Likewise, Akhtar Amin (PW9) stated that he did not remember as to whether his “thumb impression was obtained upon the report or not”. The

complainant, Shakir, stated that PWs Akhtar Amin and Faisal had also signed the *murasila*; but the *murasila* bears the thumb impression of only one so-called eye witness, Akhtar Amin, besides thumb impression of the complainant. The lodging of report and drafting of *murasila* on the report of the complainant in the DHQ hospital, Nowshera Kalan, after delay of one hour and 10 minutes inspite of police post, Sabir Abad, situated on main road from village Jabai to Nowshera would certainly raise question about possibility of prior consultation and deliberation before lodging the report/FIR.

10. All the four accused named in the FIR, being members of the same family, accused Imran and Naeem real brothers inter-se and sons of Asif Khan and Shafiq-ur-Rhman and Aziz-ur-Rehman also real brothers inter-se and sons of Naimat Khan, were charged for causing dagger “(Churri)” blows to the deceased and the complainant; but complainant Shakir (PW8) improved his statement in this regard by

saying that he was attacked and assaulted by Imran and Naeem whereas deceased was hit by Shafi-ur-Rehman and Aziz-ur-Rhman.

11. Apart from the fact that Akhtar Amin (PW9) claiming to be an eye witness, did not receive a single injury despite alleged sudden attack by four accused having daggers (*Churri*) in their possession, their assemblage at the place of occurrence from different locations where they were residing, while proceeding towards the river, which has not been shown in the site plan, is not finding any explanation from the record. In the site plan, the place of occurrence has been shown as Jabai 'Khawar', and deceased, complainant and the so-called eye witnesses were shown proceeding from western side towards river situated on the eastern side; but neither houses of the complainant party have been shown on the western side nor their destination i.e. river shown on the eastern side. It may be added here that the I.O showed the site plan prepared on the pointation of the eye witnesses; but the eye witness, Akhtar Amin (PW9), categorically

stated in his statement before the Court that ‘the site plan was not prepared at his instance, rather the same was prepared on the instance of PW Faisal’, who was not produced as a witness by the prosecution. The site plan was admittedly not prepared on the pointation of the complainant, Shakir; thus, in other words, the site plan was not corroborated through the testimony of the eye witnesses, on whose alleged pointation the same was prepared by the I.O. Intriguingly, both the deceased and injured complainant had been shown side by side with each other in the site plan; but witness to the recovery memo (EXPW2/2 and EXPW2/3) i.e. Razifat Shah FC No.1239 (PW5) stated in his statement before the Court that “the blood stained sand was recovered from the six paces from each other”.

12. Needless to say that both the eye witnesses mentioned in the FIR, namely, Faisal and Akhtar Amin were, admittedly, closely related to the deceased and the injured complainant, who were also related inter-se,

therefore, not only the injured complainant but also both the eye witnesses mentioned in the FIR were interested witnesses, being closely related to each other. Although, scribe of the *murasila*, Ihsan-ur-Rehman SI (PW11), stated in his statement before the Court that in the report of the complainant other relatives of the complainant were also shown present along with the complainant while they were proceeding towards river side, however, their names had not been mentioned as eye witnesses of the occurrence; and that the deceased and the injured complainant were also accompanied by many persons of the locality when they were brought to the hospital; but none of them were cited as PWs to lend credence to the version of the prosecution.

13. The motive for the occurrence was mentioned as altercation with the accused one day prior to the occurrence, but apart from absence of anything on record regarding altercation between the accused and unspecified member (s) of the complainant party one day

prior to the occurrence, the reason for previous altercation also remained a matter of speculation. As such, the alleged motive was not proved, rather negated by the complainant (PW8) by saying that “there was no quarrel at all with the accused party prior to the instant occurrence”. Undoubtedly, motive is not an essential pre-requisite for proof of a criminal case, but once alleged in a case, it becomes incumbent upon the prosecution to prove the same, otherwise, the lack of proof can cause considerable damage to the prosecution case.

14. There is, indeed, another intriguing aspect of the case of showing no resistance either by deceased, Mujahid, or by the injured-complainant, Shakir Khan, and other two eye witnesses, who escaped unhurt, although not only the deceased received seven stab wounds and the injured complainant also received two stab wounds, but the accused were shown in possession of daggers (*Churri*), without being armed with any firearm; and the deceased, complainant and the eye witnesses not making

even an attempt to run away from the scene of occurrence despite having seen the accused from a distance of 5/6 paces sitting there having in their possession daggers (*churri*). At least, the deceased and the injured-complainant have been shown standing like statues and receiving daggers (*churri*) blows on their bodies, without showing any re-action and resistance; and the eye witnesses also showing no reaction/resistance, according to the FIR; but improved their statements in this regard by deposing that they had tried to rescue the deceased and injured-complainant and stopped the accused from fatal dagger (*churri*) attacks, but they failed as the situation was out of their control. Their testimony in this respect all along remained inconsistent because despite complainant (PW8) showing Muhammad Akhtar Amin and Faisal PW trying to rescue them in his examination-in-chief, contradicted himself by saying “that PW Faisal and Akhtar Amin did not come near to them as the accused were also attempting at their lives as well”; and Akhtar Amin (PW9) stated that no attempt was

made by the accused at them at the time of scuffle and further that “neither PW Faisal nor PW Akhtar Amin had separated any one of the accused from us”. Even this improvement in their statements did not receive any support from the record, as neither any injury had been shown to have been received by them during their alleged struggle to rescue the deceased and injured-complainant and stop the accused from the daggers (*churri*) attack, nor their clothes were found stained with blood either during their said alleged attempt or when they were removing the deceased, then seriously injured, and the injured-complainant to the hospital.

15. The postmortem report also appeared in conflict with the FIR, by showing time between injury and death as ‘instantaneous’; whereas the FIR lodged by the complainant showed deceased, Mujahid, succumbing to the injuries on his way to the hospital. The statement of Medical Officer (PW10), showing the possibility of injuries on both the deceased

and the injured caused by Axe would make the FIR showing all the injuries caused by dagger (*Churri*) more doubtful.

16. The above stated discrepancies, contradictions and improvement, in the case of the prosecution created serious doubts in the case, benefit of which must have been extended to the accused. Although, there was much focus on abscondence of the appellants for considerable time, but their arrest from Karachi, statement of Bashir Ahmad S.I (PW2) showing the accused facing trial/appellant, residing at Karachi and not at village Jabai, and also statement of Jehanzeb Khan HC (PW1) admitting the factum of non-preparation of sketch of houses of the accused and no private person accompanying him at the spot at the time of pointation inspite of his admission of the fact that many people were attracted to the spot from the surrounding houses at the time of pointation but they were not made witnesses to the pointation proceedings, and further that no pointation whatsoever had been made by the accused in his presence and that he had signed

the pointation memo inside the Police Station, would not only make abscondence of the appellants bereft of any evidentiary value for the case of the prosecution; but would also render the pointation memo (EXPW1/9), to which Jehanzeb Khan, HC No.440 (PW1) is also marginal witness besides being enterested with warrants of arrest against the accused, not worthy of any evidentiary value, which was even otherwise not admissible in evidence in the absence of any recovery/discovery as a result of alleged pointation by the accused/appellants. Likewise, abscondence of the accused/appellants, per-se, without being supported by corroborative ocular and circumstantial evidence, could not bring home charge against the accused/appellants.

17. There was, as such, no incriminating evidence on the record to make the accused/appellants liable to conviction and sentences awarded to them. Therefore, both the appeals of Imran (Cr.A No.196-P/2014) and that of Juvenile Aziz-ur-Rehman (Cr.A No.197-P/2014) are accepted; and impugned judgments

dated 17.03.2014, together with conviction of the appellants and sentences awarded to them, are set aside; and the accused/appellants are acquitted of the charges. They be set free, forthwith, if not required in any other case.

Announced.
Dt. 09.11.2017

J U D G E

J U D G E

(Ayub)