

Judgment Sheet
PESHAWAR HIGH COURT, BANNU BENCH
(Judicial Department)

Cr.A No.243-B/2017

Hazrat Ghulam and another
v.
The State etc.

JUDGMENT

For appellant: **Syed Fakhr-ud-Din Shah, Advocate.**

For respondents: **Mr. Sultan Mehmood Khan, Advocate.**

For State: **Mr. Umer Qayyum, Asstt. A.G.**

Date of hearing: **03.10.2023**

Dr. Khurshid Iqbal, J.-

1. By this single opinion, we intend to dispose of the instant Criminal Appeal No.243-B/2017, along with Criminal Revision No.53-B/2017 and the connected Criminal Appeal No.178-B/2022, as all of them have arisen out of one and the same FIR # 206, dated 13.08.2011, under sections 302 / 324 / 337-F(iii) / 148 / 149 PPC of Police Station Domel, District Bannu, on the strength of which, the learned Additional Sessions Judge-IV, Bannu, vide judgment, dated 21.10.2017, convicted and sentenced the appellants Hazrat Ghulam and Noor Nawaz as under:

- i. Under section 302(b) PPC, to life imprisonment on three counts, along with payment of compensation of Rs.200,000/- (rupees two hundred thousand) to the legal heirs of each deceased under section 544-A Cr.P.C, recoverable as arrears of land revenue.

- ii. Under section 324 PPC for effective firing at the complainant Noor Muhammad, to 03 years imprisonment, along with fine of Rs.10,000/- each and in default of its payment, to undergo 01 month S.I.
- iii. Under section 337-F(iii) PPC for causing injuries to the complainant Noor Muhammad, to 02 years imprisonment, along with payment of Rs.50,000/- each as Daman to the complainant.
- iv. Under section 148 PPC, to 01 year imprisonment, along with fine of Rs.10,000/- each and in default of its payment, to undergo 01 month S.I.



All the sentences were ordered to run concurrently. The benefit under section 382-B Cr.P.C was extended.

2. Similarly, the learned Additional Sessions Judge-V, Bannu, vide judgment, dated 15.09.2022, convicted and sentenced the appellant Muhammad Saeed Khan as under:

- i. Under section 302(b) PPC, to life imprisonment on three counts, along with payment of compensation of Rs.200,000/- to the legal heirs of each deceased under section 544-A Cr.P.C and in default, to suffer imprisonment for 01 year.
- ii. Under section 324 PPC for effective firing at the complainant Noor Muhammad, to 03 years imprisonment, along with fine of Rs.10,000/- and in

default of its payment, to undergo 01 month S.I.

iii. Under section 337-F(iii) PPC for causing injuries to the complainant Noor Muhammad, to 02 years imprisonment, along with payment of Rs.50,000/- as Daman to the complainant.

iv. Under section 148 PPC, to 01 year imprisonment, along with fine of Rs.10,000/- and in default of its payment, to suffer 01 month S.I.

All the sentences were ordered to run concurrently. The benefit under section 382-B Cr.P.C was extended.

3. On 13.08.2011 at 19:30 hours, the complainant Noor Muhammad brought the dead bodies of Sher Nawaz and Asghar Khan to RHC Domel and reported in injured condition that on the eventful day, he, along with Shah Alam Khan were proceeding on one motorcycle, while Sher Nawaz Khan and Asghar Khan, on another. When reached near the house of one Muhammad Sharif, they saw in a thoroughfare accused Hazrat Ghulam, Noor Nawaz, Umer Saeed Khan, Ikram Ullah and Sadiq Ali, duly armed with Kalashnikovs. The accused stopped the motorcycles of the complainant party, asking them not to use this thoroughfare, and the same moment, also started firing at them with their respective Kalashnikovs in order to commit their qatl-i-amd. As a result, complainant and Shah Alam were hit and injured; whereas, Sher Nawaz Khan and Asghar Khan were hit and died on the spot. Motive for the occurrence is stated to be a dispute over the thoroughfare. The occurrence is stated to have been witnessed by the people present at the spot.

Muhammad

4. Initially, all the accused went into hiding. After completion of investigation, complete challan under section 173 Cr.P.C was submitted against them for proceedings under section 512 Cr.P.C. Later, accused Hazrat Ghulam and Noor Nawaz were arrested. They faced a full-fledged trial before the learned Additional Sessions Judge-IV, Bannu. On conclusion of their trial, they were convicted and sentenced vide judgment, dated 21.10.2017, as stated above. They filed the instant criminal appeal against it. The complainant being aggrieved with the quantum of the sentence, preferred the connected Criminal Revision No.53-B/2017. During its pendency, accused Muhammad Saeed Khan was also arrested. Supplementary challan was submitted against him. Hence, the judicial record was sent to the learned trial court for the purpose of trial and this appeal and the revision were adjourned *sine die* till the fate of the arrested accused vide order, dated 25.02.2020. On conclusion of his trial, the appellant Muhammad Saeed Khan was also convicted and sentenced vide judgment, dated 15.09.2022, as mentioned above. Hence, he assailed it through the connected Criminal Appeal No.178-B/2022. All the three matters are being take up for disposal through this common judgment.

5. We have anxiously considered the submissions advanced at the bar and perused the record.

6. The injured complainant Noor Muhammad was examined twice: firstly, as PW-09, on 15.04.2017, at the trial of Hazrat Ghulam and Noor Nawaz, appellants in the instant appeal and secondly, as PW-05, on 21.02.2022 at the trial against Muhammad Saeed Khan, the appellant in the connected appeal. He was accompanying all the three deceased on the day of the occurrence at the relevant time. He is the victim and the sole survivor of the incident. He got injured with fire shots. His

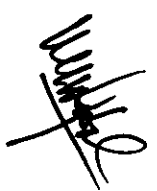
testimony as an injured complainant is of vital importance in the case.

7. In his examination-in-chief, he narrated the initial story of the incident recorded in the murasila. While under cross examination, he was challenged on several key aspects, such as, the place and time of the occurrence; the direction of his and his companions' journey; the mode and manner of the occurrence; the shifting of the two deceased Sher Nawaz and Asghar and Sher Alam (then injured) from the scene of the occurrence; and the presence of passersby, including notably of Shadiullah (PW-10), brother of Shah Alam; and the motive. He categorically deposed in his cross examination that he didn't fell unconscious after having been hit with fire shot and was in his full senses. He verified the scene of the occurrence to the I.O. after having been discharged from the hospital. He told that he and his companions had left their house at 04.00 / 04.30 hours on motorbikes and they all were going to Bodin Khel Adda, a place some 1-1/2 km away from the scene of the occurrence. He correctly stated that there are date trees on both sides of the scene of the occurrence; that the accused party was on their left side (shown towards south in the site plan). He stated that when both the parties confronted each other, they didn't exchange hot words with each other before the firing by the accused party. Though, he had stated in the murasila that the accused party asked them that they wouldn't allow them going on the thoroughfare (use of the thoroughfare stated as motive). However, that was the accused party's unilateral stance. The complainant party didn't answer or maybe they either didn't find an opportunity or the accused party didn't allow them to say something harsh in response. He reiterated that near the scene of the occurrence, the house of Sharifullah (father of Ikramullah, one of the absconding accused) is situated. He

unintelligible

confirmed that none of their motorbikes was hit with fire shot. He told that the villagers arrived at the spot and after about 20-25 minutes, they were able to shift the two deceased and Sher Alam then in injured condition to the Rural Health Centre (RHC) of Domel town. He lodged the report there at 07.30 hours, thereby confirming the time of the report he had mentioned in the murasila.

8. During his examination for the second time, he recorded the same statement-in-chief. But he was cross examined more bitingly. He was asked what may be called certain new questions; for example, the time the complainant had spent in Bodin Khel Adda, which he stated was about 1-1/2 hour; when they reached the scene of the incident, the deceased Asghar and Sher Nawaz was ahead him and Shah Alam, an information he had mentioned in the murasila; the accused party raised lalkara to stop them from using the thoroughfare; and the duration of the firing as 7-8 seconds. The remaining cross examination was almost on the same aspect as discussed above.



9. As regards, the presence of the passersby, particularly, Shadiullah, in the earlier statement, he was not candidly cross examined. Shadiullah was named only twice in the cross examination: firstly, and indeed not straightforwardly that Shadiullah contacted the villagers via a cell phone; and secondly, while lodging the report, he had told to the police official that Shadiullah was the eye witness. He was confronted with the murasila and the trial court observed that the information was missing in the murasila. We shall discuss the legal status of this discrepancy later in this opinion. Regarding other passersby, he replied negatively, stating that he named no such person. In the latter statement, he directly challenged. When asked, he replied that he had not seen Shadiullah at the time of the incident. He reiterated from his earlier deposition

that Shadiullah came to the spot and informed the family members about the incident. Then, he said Shadiullah had accompanied the dead body of Shah Alam to the RHC Domel. Next, he spelt out a very important fact that Shadiullah didn't inform the police officials in the RHC, right at the time of making of the first information report that he was the eye witness of the incident. Another important fact he stated was that Shadiullah accompanied the I.O. to the scene of the incident, on whose behest the latter prepared the site plan, which he, later on, verified after having been discharged from the hospital. Yet another, rather most important fact he revealed was that Shadiullah was on the way back from village Amel Khel and he witnessed the incident. Before we proceed to discuss this aspect of the case in greater details later while evaluating the testimony of Shadiullah, it seems pertinent to examine the complainant's testimony from the perspective of motive. The complainant did refer to previous blood feud of his family. However, nothing was brought from his mouth that the instant incident was committed by their other adversaries in the village. He specifically testified that the dispute between them and the accused party was over the use of the thoroughfare on which they were going at the eventful day at the relevant time.

10. Shadiullah was examined as PW-10 at the trial against Hazrat Ghulam and Noor Nawaz and as PW-06 at the trial of Muhammad Saeed Khan. On both occasions, he recorded one and the same examination-in-chief. He deposed that on the eventful day, he had gone to village Amal Khel in connection with some urgent work. On the way back to his village by foot, when he reached around 06:30 pm to the place of the incident, he saw both the parties; amongst the accused party, he heard appellant Hazrat Ghulam questioning the complainant party why it was using the thoroughfare, which is stated to be

prohibited for them, then, they opened fire with which all the four persons of the complainant party were hit; two amongst them died on spot and the other two seriously injured. He rushed to the spot, saw the two injured, one of whom Shah Alam was his brother. He informed the family members on a cell phone; in response, people reached the place of the incident in two Datsun pickups and took the injured and the deceased to RHC Domel, where the complainant lodged the report at 07:30 pm. He pointed to the I.O. the place of the incident which led the latter to prepare the site plan of incident.

11. While under cross examination, he deposed that he and the complainant party were unaware about each other having reached to the place of the incident. The critical aspects of his cross examination are: firstly, at the time of incident, appellant Hazrat Ghulam questioned why the complainant party had used the disputed thoroughfare. This is deviation from his examination-in-chief where he stated that all the accused persons said so. Secondly, in his earlier statement, he said that he had gone to village Amal Khel for an urgent work; in the latter, he said he had gone there in connection with construction of a mosque. Thirdly, one Irfadullah, a resident of village Amal Khel, had taken him there on motorbike; he was coming back on foot and intended to board a vehicle for his village from the near around the place of incident. Fourthly, he stated that the accused persons started firing at the complainant party when they reached near them. This deviation from his examination-in-chief where he said that the appellant Hazrat Ghulam had questioned the complainant party about the use of the disputed thoroughfare. Fifthly, he didn't inform the police officials in RHC Domel that he was the eye witness. He added that he told to one Aqleem Khan who disclosed this fact to the police officials.

M. H. Khan

12. It would be pertinent to evaluate these critical aspects in juxtaposition with his remaining cross examination. His remaining cross examination reveals that he was able to correctly say that he had left his house at 03:30 pm in the company of Irfadullah, who took him to his village Amel Khel; on the way back, he wanted to catch a passenger vehicle for village from the disputed thoroughfare on which such vehicles ply. He pointed out the place of the incident to the I.O. correctly, showing positions of the parties at the time of the occurrence, the existence of thick dates trees near around the crime scene; the house of Muhammad Sharif near there; distance at which he had seen the accused party and his own point of presence. Above all, he told that he had no prior information of the complainant party's visit to the area. He confirmed having seen both the parties at the place of the incident at the relevant time and more so, all the accused persons having fired at each one of the complainant party; amongst whom his brother Shah Alam died later on.

Muhammad

13. His sudden appearance on the place of incident—particularly when it is admitted position that he is the brother of deceased Shah Alam and close relative of others—prompts a question that he might have been planted there. But the fact that the complainant Noor Muhammad had not seen him before the happening of the incident appears to be true. The reason is that had the complainant seen him before the incident, he would have surely nominated him as the eye witness. His close relationship is undeniably a factor that matters regardless of the fact whether he was introduced as a chance witness or a natural eye witness. One may think that the I.O. should have examined Irfadullah as a witness of the fact that he had taken Shadiullah on his motorbike to his village Amal Khel. But that might not have been wholly helpful, because he didn't accompany him on

the way back to his village. No doubt, he rushed to complainant Noor Muhammad soon after the happening of the incident and managed to send information of the incident to the village. However, he correctly pointed out the crime scene to the I.O. There is nothing on the record that the complainant Noor Muhammad might have tutored him about the mode and manner of the incident. Last, but not the least, the deposition of Shadiullah in examination-in-chief that appellant Hazrat Ghulam questioned the complainant about the use of the disputed thoroughfare or raised lalkara and his deviation in the cross examination that all the accused opened fire soon after the complainant party alighted from motor bikes is a minor discrepancy, as his statement categorically shows that he was present on the crime scene. As the testimony of PW Shadiullah is found natural and confidence inspiring, therefore, the mere fact that his name does not figure in the FIR is no ground to discard his statement. In somewhat similar circumstances, this Court in Rahat Ali v. The State and another (2018 PCr.LJ 206) observed:



The significant piece of evidence before us is the statement of Abdar Ali Shah (PW-7). As stated earlier, he has not been named in the FIR to be the eye-witness of the occurrence. Learned counsel for the appellant during the course of his arguments vehemently urged that since the name of Abdar Ali Shah is not mentioned in the FIR, therefore, his testimony is not worth consideration. He was of the view that the safer course is to keep his statement out of

consideration. We know that as a rule of prudent, Courts should keep out of consideration the testimony of a witness whose name is not figured in the FIR but it is not a rule of law. The Court in a fit case may go for consideration of the testimony of such a witness if it is corroborated with other reliable evidence on record and in this view of the matter, we would see as to whether Abdar Ali Shah has witnessed the occurrence and, if so, up to what degree it has been corroborated.

14. Even otherwise, if the statement of above said PW Shadiullah is kept out of consideration, still we have before us the direct testimony of injured complainant Noor Muhammad. We found it natural, trustworthy, and confidence inspiring. It finds complete support from the medical evidence as well as the circumstantial evidence. It was not convincingly shattered by the defence. The well entrenched principle of criminal jurisprudence is that it is not the quantity, but the quality of evidence which matters. Even a single testimony of an eye witness is sufficient to sustain conviction if it has the ring of truth. Reliance is placed on Muhammad Sadiq v. The State (2022 SCMR 690), wherein the Supreme Court held:

Even otherwise, if we keep aside the testimony of Mst. Zubaida Bibi (PW-6) even then the petitioner can be convicted on the solitary statement of Ahmed Nawaz

(PW-7) as it is an established principle of law that testimony of a solitary eye-witness is sufficient to sustain conviction of an accused if the same rings true and inspires confidence and it is the quality of the testimony of a witness that has to be weighed and not the quantity of witnesses.

15. Adverting to corroborative evidence, we would examine recoveries now. As many as 17 empties of 7.62 bore were recovered from the place of the incident. The presence of all the appellants and firing by each one of them coupled with the FSL report that the empties were fired from different weapons substantiates the prosecution case. This aspect not only excludes the possibility of the offence being committed by a single assailant, but also points towards the involvement of more than one assailant in the commission of the offence. The bloodstained earth from the respective places and their bloodstained garments with their positive FSL reports further strengthen the prosecution case. The site plan, as discussed above in detail, also fully buttress the prosecution case. Moreover, the medical evidence has established that all the three deceased and the injured complainant received injuries on the fronts of their bodies. It lends full support to the ocular account as far as the nature, locale, time and impact of the injuries on the persons of the deceased and the injured are concerned.

16. As far as motive is concerned, though the thoroughfare is stated to be *bandobasti*, not privately owned by the accused party, both the complainant and the eye witness candidly testified that the accused party was not happy that the

complainant party should use it. It is not necessary that the accused party was preventing the complainant party from its use because they claimed their ownership over the disputed thoroughfare. The aforesaid PWs admitted having enmity with other persons in the village, but they remained firm in their depositions that they had no other dispute with the accused party other than the use of the thoroughfare. Even otherwise, the mere fact that the prosecution has failed to prove motive is not by itself a reasonable ground for acquittal, especially when the ocular account is natural, trustworthy and finds complete support from the medical and circumstantial evidence. The failure to prove motive may, however, react against the quantum of sentence on a charge of murder as held by the Supreme Court in Nadeem Ramzan v. The State (2018 SCMR 148). The relevant part of the judgment reads:

It has been held by this Court in many cases that if the prosecution asserts a motive but fails to prove the same then such failure on the part of the prosecution may react against a sentence of death passed against a convict on a capital charge and a reference in this respect may be made to the cases of Ahmad Nawaz v. The State (2011 SCMR 593), Iftikhar Mehmood and another v. Qaiser Iftikhar and others (2011 SCMR 1165), Muhammad Mumtaz v. The State and another (2012 SCMR 267), Muhammad Imran alias Asif v. The State (2013 SCMR 782), Sabir Hussain alias Sabri v. The State (2013 SCMR 1554), Zeeshan Afzal alias Shani and

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another v. The State and another (2013 SCMR 1602), Naveed alias Needu and others v. The State and others (2014 SCMR 1464), Muhammad Nadeem Waqas and another v. The State (2014 SCMR 1658), Muhammad Asif v. Muhammad Akhtar and others (2016 SCMR 2035) and Qaddan and others v. The State (2017 SCMR 148). In the case in hand we find that in the absence of proof of the asserted motive the real cause of occurrence had remained shrouded in mystery and this factor has put us to caution in the matter of the appellant's sentence of death.

17. Appellant Muhammad Saeed Khan recorded his statement on oath under section 340, Cr.P.C. He set up a defence that during the days of the incident, he was not present in the locality. He stated that two months prior to the incident, he had a money dispute with appellant Hazrat Ghulam, his elder brother. Due to that dispute, he added, he had gone to village Dua Manzai where he was residing with one Gul Faraz. He further added that after 10-15 days of Eid-ul-Fitr, he returned to his village and then left for Karachi for some labour job. While under cross examination, he couldn't satisfactorily establish that he was not available in the locality. He admitted that his sister has been married to the brother of Gul Faraz. It is not appealing to a prudent mind that his sister wouldn't have been informed about the occurrence. He opted to produce Gul Faraz as his witness. But he failed to do so despite as many as five opportunities given to him by the trial court. He thus failed to prove his defence plea.

18. The conclusion of the above discussion is that it has been fully established that the appellants fired at the complainant party with the intention to commit qatl-e-amd of each one of them. They proved successful in their bid as three amongst them—Asghar Khan, Sher Nawaz and Shah Alam—were killed and complainant Noor Muhammad seriously injured. The complainant being injured in the incident furnished direct, clear and cogent evidence of having seen and identified the appellants duly armed on the place of the incident, fired with their respective firearm weapons with their criminal intention to commit murder of all the four persons of the complainant party. Even if the testimony of Shadiullah is ignored, the testimony of the complainant is sufficient for conviction as it is direct, substantial and confidence inspiring. The ocular account has been fully supported by recovery of empties of 7.62 bore from the places of presence of the appellants and bloodstained earth from the places of presence of the three deceased and the complainant as well as their blood stained garments with their respective positive FSL reports. The motive has been proved. However, even if motive is ignored, still direct evidence couldn't be discarded. Moreover, non-proof of motive could be considered as a mitigating circumstance in awarding of punishment as held by the Supreme Court in Ghulam Muhammad and another v. The State and another (2017 SCMR 2048). The same is true of the non-specific role attributed to the appellants. Rather, each one of them is responsible for each murder and attempted murder. It follows that on proof, each one is liable to punishment on three counts coupled with attempted murder of and injuries caused to the complainant. It is thus abundantly clear that the prosecution has been successful in establishing the charge against the appellants beyond any shadow of doubt. However, as regards the quantum



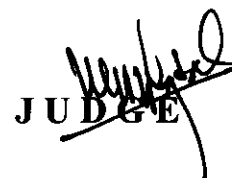
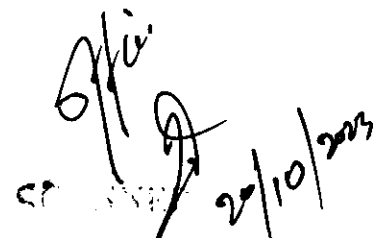

of sentence, we find that as many as five persons have been nominated. It is not clear that whose fire shot proved fatal. The occurrence appears to have happened at the spur of the moment. The element of premeditation or preplanning is not discernable from the facts and circumstances of the case. These factors being apparent on the record, have rightly been taken as mitigating circumstances to award the sentence of life imprisonment. The quantum of sentence is thus found to be in consonance with the principles laid down under the criminal jurisprudence.

19. For the aforesaid reasons, we are firm in our view that the impugned judgments are based on proper appraisal of evidence on the record. The conclusions drawn and reasons given are cogent and convincing which find complete support from the record of the case. Hence, no interference is called for. Consequently, both the appeals, along with the criminal revision petition being without any substance, are hereby dismissed.

Announced
03.10.2023
(Ghafoor Zaman)



JUDGE


JUDGE
20 OCT 2023


(D.B)
Hon'ble Mr. Justice Fazal Subhan
Hon'ble Mr. Justice Dr. Khurshid Iqbal