

PESHAWAR HIGH COURT ABBOTTABAD
BENCH

JUDICIAL DEPARTMENT

JUDGMENT SHEET

Cr. A No. 71-A/2008

Date of hearing 10.01.2023.

Appellant/s (Sheraz Khan) by Miss. Ayesha Bibi, Advocate.

Respondent/s (The State and complainant) by Sardar Ali Raza, AAG.

Respondents/accused by Mr. Shad Muhammad Khan.

FAZAL SUBHNAN, J. Through this criminal appeal filed under section 417(2) Cr. P.C in case FIR No. 52 dated: 13.02.2005 under section 302/324/337-F(ii)/34 PPC, Police Station, Saddar Haripur, the appellant/complainant has impugned the judgment of learned Sessions Judge-III, Haripur dated: 31.10.2008 vide which respondents/accused were acquitted from the charges levelled against them.

2. Fact of the case in brief, as narrated in the first information report, are that on 13.02.2005 at about 1815 hours, complainant/Sheraz Khan Son of Babu Khan, in injured condition, reported the matter to the police in Emergency Ward DHQ Hospital

Haripur to the effect that he alongwith his sister-in-law, Mst. Nazima Shaheen and Javed son of Phul Pervaiz, his relative, were going together to Haripur and it was about 04:30 PM, when they reached near the house of Babu Nazir, there Babu Nazir, he being empty handed, his son Muhammad Usman alias Jabran, with 30 bore pistol, Rashid Mehmood alias Raju also having 30 bore pistol and accused Babar Ali alias Papa, sons of Nazakat, having an axe, were present and when they reached near the accused, Babu Nazir started abusing them, who were refrained whereupon, he commanded his companions to kill them. In the meanwhile, Babar Ali alias Papa gave axe blow to Javed, resultantly he was injured on the right side of his head. Accused Muhammad Usman alias Jabran fired at Mst. Nazima Shaheen with 30 bore pistol and as a result she got injured on right side of her ribs whereas Rashid Mehmood alias Raju fired at the complainant Sheraz Khan with his 30 bore pistol which landed on left side of his hips and all of them got injured. Motive for the occurrence was

described by the complainant to be an altercation between Javed and Babar Ali, which took place some 4/5 months back but was settled by the elders. That on the sound of firing and their hue and cry, Muhammad Aslam son of Ghulam Haider and Muhammad Pervaiz son of Muhammad Akbar were attracted to the spot and had witnessed the occurrence and shifted the injured to the hospital. The report lodged by the complainant was incorporated into murasila ExPA/1, and thereafter, into FIR Ex.PA. It is pertinent to mention that Mst. Nazima Shaheen died after some 38 days of the occurrence and Section 302 PPC was also added to the charge.

3. Arguments heard and record perused.

4. It is well settled law that prosecution, who bring an allegation against accused person/s on a capital charge has to prove the same through cogent, convincing and conscious inspiring evidence, leaving no room for doubt.

5. In the instant case, it is story of the prosecution that complainant alongwith

injured Javed and Mst. Nazima Shaheen were proceeding to Haripur and when at about 04.:30 PM, they reached near the house of respondents No.1 to 4, respondent No.4 Babu Nazir started abusing them who was asked to desist from this act, who immediately asked the other respondents to kill them and acting upon his Lalkara, accused Babar alias Papa, armed with Axe, hit Javed on his left side of his head, Usman alias Jabran fired with his 30 bore pistol on Mst. Nazima Shaheen which landed on right side of her ribs while Rashid alias Raju fired with 30 bore pistol on the complainant and as a result he was hit on his buttock and due to firing and hue and cry Muhammad Aslam son of Ghulam Haider and Muhammad Pervaiz son of Muhammad Akbar their co-villagers arrived to the scene of occurrence and saw the entire episode and later on shifted them to DHQ Hospital Haripur.

7. From the contents of FIR, it is clear that besides the complainant, the occurrence was witnessed by Javed Akhtar son of Phul Pervaiz, Muhammad Aslam son of Ghulam

Haider and Muhammad Pervaiz son of Muhammad Akbar and being the eye witnesses of the occurrence, they were expected to be consistent and coherent in their statements.

8. Careful scrutiny of the statements of prosecution witnesses, however, reveals that all the PWs are closely related to each other and therefore, in that case their testimony was to be considered with due care and caution as no other independent witness is cited to have seen the occurrence. Statement of complainant Sheraz Khan reveals that he has attributed respective role to the respondents No.1 to 4, as narrated in the FIR. In his cross examination he replied that respondent Babar inflicted axe blow to PW Javed while standing in front side. He further replied at the time of occurrence and inflicting injury to PW Javed he was standing on eastern side of the house of Babu Nazir, whereas, Babar was standing on the western side from the house of Babu Nazir respondent. Similarly, in response to a question, he replied that at the time of firing on him accused Rashid was standing towards

eastern side of the respondent Babu Nazir while he was standing toward western side. He further replied that he and Rashid were very close to each other and the distance may be about 01 feet and that he and Rashid were facing each other at the time of fire at him and he (Rashid) was in front of him when he fired at him and received fire there in the same position. He further replied that respondent Rashid did not fire at any other PWs or other person inspite of their intervention. He answered that they grappled with respondent Rashid and Usman and tried to snatch the pistol but could not do so. He also replied that the distance between Mst. Nazima Shaheen and Muhammad Usman at the time of firing was about 2/3 paces. He also answered that Mst. Nazima Shaheen did not lost conscious and remained in her senses after receiving of fire shot till her arrival in the hospital, and that when he reached the hospital in injured condition Mst. Nazima Shaheen was already taken to Abbottabad Hospital after being provided medical treatment and on his arrival to the hospital

Mst. Nazima Shaheen was not present in the hospital. He in later part of his cross examination admitted it correct that as per his report, Usman alias Jabran fired only one shot at Mst. Nazima Shaheen which hit her on right rib.

9. PW-Muhammad Javed Akhtar in his statement described the incident in almost the same manner and in cross examination he answered that about 4/5- months prior, a quarrel took place between him and Babar respondent and that after the above incident no quarrel has taken place between them. He answered that after the occurrence he and Mst. Nazima Shaheen reached to the hospital together and first she was examined by the doctor in his presence and was shifted to Abbottabad Hospital and Sheraz was also there at the time who came alongwith them to the hospital. He also replied that Mst. Nazima Shaheen was in senses till her examination by the medical officer. In response to another question he replied that at the relevant time the distance between Rashid & Sheraz were 1 to 2 paces, whereas, distance between Mst.

Nazima Shaheen and Usman was 2 to 3 paces.

He also replied that Rashid respondent fired only one fire shot on Sheraz and that accused Usman also fired only one shot which hit her at her right rib and that no other fire was made by Rashid or Usman or any other person on Mst. Nazima Shaheen.

10. PW-4 Muhammad Aslam also revealed the event with all minor details and stated to have seen the entire occurrence. He also added that he is also marginal witness to the recovery memo Ex.PW4/1 through which the IO sealed the empties and blood stained sail into parcel. During cross examination he was confronted with his statement recorded under Section 161 Cr.P.C and it was found that he has not stated the details of the act done by each of the accused at the time of occurrence. He described the entire events that took place at the relevant time and active role played by each of the accused but when confronted with his statement, it was found that in his statement under Section 161 Cr.P.C he has not given such detailed account of the occurrence. In his cross-examination, it was confirmed

that two empties were recovered from the spot and that the shirt of Mst. Nazima Shaheen was having one bullet mark and on the dupatta towards lower side.

11. The medical officer PW-05 Tariq Naseem Ejaz had examined all the injured on 13.02.20105, first examined Mst. Injured (now dead) Nazma Shaheen and has reported three bullet injures on her person as following.

1. Fire arm injury grazing wound sized 1 ½ cm in diameter, situated on right side just below rib. The skin and subcutaneous fat damaged. No blackening or touting present.

2. Fire arm entry wound just above to wound No.1. the size is about 5 ml in diameter, marginal are inverted and show blackening. There is hole of fire arm on shirt at the site of the injury. Bleeding is present from the wound.

3. Fire arm entry wound in right hypochondrum sized about 5 ml in diameter. Margins inverted and blackening present on inner margins. The corresponding holes present at the site of fire arms injury on shirt.

Similarly, he examined Muhammad Javaid s/o Phul Pervaiz and noted the following injures;-

1. *Fire arm entry wound on left glottal region sized about 5 ml in diameter. The margins were inverted showed ring of blackening. The hole was present on the trouser at the site of fire arm injuries which was also blood stained.*
2. *The exit wound size 1 cm in diameter, with margins everted and profuse bleeding occurred. The hole of fire arm injury was present on corresponding site of injury. The shirt which was light black in colour was signed and handed over to police. The parent was admitted in male surgical ward.*

12. From the due consideration of statements of prosecution witnesses, as discussed above, it is clear that prosecution has failed to prove their case through conscious inspiring evidence. The occurrence allegedly took place at 04:30 PM and report was lodged at 18:15 hours. It is the prosecution version that PW-4, Muhammad Aslam and Muhammad Pervaiz reached the spot of occurrence as soon the quarrel started and allegedly they tried to intercept the accused party, which means that if the

prosecution story is accepted to be true, then both these persons were present at the time of quarrel and injuries sustained by the injured, but they took about two hours to shift the injured to the hospital, when admittedly the spot of occurrence was near to the Pakka road where vehicles ply regularly. Thus, time was consumed in lodging the report and inference can be drawn that report was lodged after due deliberation and consultation to rope all their opponents in the case.

13. Record further reveals that the prosecution story is not supported by the medical evidence. PWs, Sheraz Khan, in his report attributed the role of axe blow to respondent, Babar Ali, and one fire each to respondents Muhammad Usman and Rashid Mehmood, resulting injuries one each to Mst. Nazma Shaheen and complainant Sheraz Khan. In their statements they consistently replied that respondent Muhammad Usman and Rashid Mehmood had fired one fire each, which hit Mst. Nazma Shaheen and Sheraz Khan. In contrast to the above, it is in the evidence of PW-5 Dr. Naseem Ejaz that Mst.

Nazma Shaheen received three (3) fire shots, one grazing injury on arm, another fire arm injury just above the wound No. 1 and third on right Hypochondrium with corresponding holes present on the shirt. Thus, the medical evidence is in startling contrast to the ocular account forwarded by the complainant and PW Muhammad Javed regarding the number of fire received by the deceased Mst. Nazima Shaheen.

14. From the evidence, it is clear that at the time of alleged firing, PW Sheraz Khan and respondent Rashid Mehmood were right in front of each other but the injury sustained by him is on left glottal region which is posterior to the pelvis (between the hip bones) which is again not possible when complainant was facing the respondent Rashid Mehmood. It is also to be mentioned that injury on the head of injured Muhammad Javed Akhtar is incised wound on the left side of the head with 2cm to 5 ml, which is very small wound as compared to the allegation of axe blow. It has also been noticed that, he too was allegedly present in front of respondent Babar Ali but his injury is

described by the medical officer on left side of the head and not on the front side. More so, the said injury is so small that it is not believable that after full blown axe blow, he only received a very small wound. Thus, in our view, the medical evidence does not corroborate the prosecution story. In this respect reliance is placed on the case of Tajamal Hussain Shah-Versus- The State and another reported in 2022 SCMR 1567, wherein, it has been held that: -

“The ocular account in this case is furnished by Zulfiqar Ahmed (PW-18) and Muhammad Daraz (PW-19). According to these PWs of the ocular account, the petitioner while armed with .30 bore pistol made a straight fire shot on Muhammad Sajjad, deceased, which landed on his chest, due to which he fell down and ultimately succumbed to the injury. However, this stance is contradicted by the medical evidence. According to Dr. Raheem Khan (PW-15), who conducted postmortem examination of the deceased Muhammad Sajjad, the injury on the chest, just above the nipple of the deceased, was an exit wound and the margins of the wound were black whereas the entry wound was on the back of the deceased i.e. at thoracic spine. The blackening around the wound shows that the fire shot would have been made from a close range but according to the

site plan, the petitioner was shown standing at a distance of 18 steps away from the deceased. This major discrepancy raises serious doubts on the credibility of the prosecution witnesses of the ocular account.”

15. The prosecution story described two fire shots resulting injury to complainant Sheraz Khan and Mst. Nazima Shaheen and as per recovery memo Ex.PW-4/1 two alleged crime empties were recovered from the spots of respondents Muhammad Usman and Rashid Mehmood. The deceased Mst. Nazima Shaheen had 3 bullet wounds on her person and therefore recovery of only two empties does not commensurate the number of injuries of the two injured. Allegedly, a 30 bore pistol P-2 was recovered on the pointation of respondent Usman, which was sent to the FSL for analysis along with two alleged crime empties and the report thereof Ex.PW-9/5 reveals that the pistol was without firing pin, hence, no comparison could be made. The other 30 bore pistol and axe, allegedly used in the offence, were not recovered to have conclusively proved that these were used in the commission of offence. Though shirt and

shalwar of the two injured were sent to the FSL and it is opined that these contained human blood and were positive report, without any other supporting material on the record, would not connect the respondents with the alleged crime.

16. From the statements of PWs Sheraz Khan, Javed Akhtar and Muhammad Aslam, it is clear that their statements were not only contradictory but these also suffers from willful improvements. The site plan Ex.PW9/1 was prepared on the pointation of eye witnesses, but in their statements PW-Sheraz Khan and Javed have misdescribed the presence of each and every respondent as well as their own spot. In his cross-examination PW Sheraz Khan replied that at the time of occurrence and inflicting injury, Javed was standing on eastern side of the house of Babu Nazir whereas Babar was standing on western side whereas in the site plan the spot No.4 given to respondent Baber is towards south of the house of Babu Nazir and PW Javed Akhtar is further towards north of Babar. In his initial report, PW Sheraz has not stated

anything about the grappling of Muhammad Aslam and Muhammad Pervaiz but Sheraz Khan in his cross examination has stated that on arrival to the spot the said PWs grappled with the respondents. It is in the FIR that on hearing fire shot and hue and cry, the PWs Muhammad Aslam and Muhammad Pervaiz were attracted, whereas, PW Muhammad Aslam, who in his statement recorded under section 161 Cr.P.C has not mentioned anything about seeing the entire incident, has recorded full-fledged statement, stating to have seen the entire occurrence. In our view there exist material contradiction in the statements of these witnesses and at the same time they have made willful improvements in their court statements to bring the case in line with prosecution story, hence, their testimony is not free from doubt, and in the absence of independent corroboration, their statements cannot be believed to be true and reliable.

17. It is evident from the record that on 16.02.2015 statement of Mst. Nazima Shaheen was recorded during investigation by the IO, after gaining her consciousness,

wherein she charged respondent Usman for making firing upon her and causing injuries upon her person. Mst. Nazima Shaheen, later-on died in the hospital and her autopsy was conducted on 21.03.2005. on scrutiny of her statement, it is observed that Mst. Nazima Shaheed died after some 38/39 days of the occurrence. She remained alive for sufficient time, hence, having no immediate apprehension of death, hence, her statement cannot be considered as dying declaration. Dying declaration is a statement which a person made, under the belief that as he/she is to depart to the world hereafter, hence, the person would make a true statement without advancing the cause or reason of his/her death. Record reveals that there was no reason for an injured person to give each and every details of the occurrence in such a situation, however to authenticate such statement, the IO was required to have recorded the statement of the concerned medical officer of the hospital to confirm that Mst. Nazima Shaheen was conscious and well oriented in time and space and that it was a voluntary

statement to implicate the respondent for the crime. Thus, in all, the statement of Mst. Nazima Shaheen recorded after 38 days of occurrence does not qualify to be accepted as dying declaration. In the case of Mst. Zahida Bibi-Versus-The State reported in PLD 2006 SC 255 while deliberating on this aspect the August Supreme Court of Pakistan has held that; -

“The rule of criminal administration of justice is that the dying declaration like the statement of an interested witness requires close scrutiny and is not to be believed merely for the reason that dying person is not expected to tell lie. This is a matter of common knowledge that in such circumstances in preference to any other person, a doctor is most trustworthy and reliable person for a patient to depose confidence in him with the expectation of sympathy and better treatment to disclose the true facts. In the present case, in the manner in which the statement of deceased was recorded by the Sub-Inspector, would seriously reflect upon its correctness and consequently, could not be considered worthy of any credit to be relied upon as dying declaration. The perusal of record would show that the two courts in complete departure to the principles of appraisal of evidence and the rule of criminal administration of justice, held the petitioner guilty of the charge on the basis of hearsay and shaky

evidence.

18. From the detailed discussion on different aspects of the case, it is held that the learned Trial court, after considering the material brought on record, has properly appreciated the record and We have found no illegality or irregularity in recording acquittal in the case, hence, the impugned judgment being unexceptionable is maintained and the appeal in hand being meritless, stands dismissed.

Announced.

10.01.2023.

Date of writing judgment

17.01.2023

Muhammad Tariq Stenographer

J U D G E

J U D G E

Hon'ble Justice Wiqar Ahmad & Hon'ble Justice Fazal Subhan.