

**HIGH COURT OF AZAD JAMMU AND KASHMIR**  
(SHARIAT APPELLATE BENCH)

Criminal Appeal No. 70/2017.  
Date of Institution 01.11.2017.  
Date of Decision 27.12.2022.

1. Ghaffar Hussain son of Qurban Hussain R/o Potha Shair Dadyal,
2. Imran Hussain son of Noor Ahmed R/o Sector 6 Dadyal,
3. Abrar Hussain son of Qurban Hussain R/o Potha Shair Dadhyal District Mirpur, Azad Jammu and Kashmir,

**(Appellants)**

**VERSUS**

1. The State through Advocate / Additional Advocate General Mirpur, Azad Jammu and Kashmir,
2. Zaheer Ahmed son of Chaudhary Muhammad Taj Jatt by caste R/o Bihari Tehsil Dadyal, District Mirpur, Azad Jammu and Kashmir,

**(Respondents)**

Criminal Appeal No. 72/2017.  
Date of Institution.01.11.2017.

1. Ch. Muhammad Taaj son of Ch. Muhammad Khan (father of deceased),
2. Mst. Sakeena Bibi wife of Muhammad Taj (mother of deceased),
3. Zahida Bibi, widow,
4. Muhammad Zaheer son of Ch. Muhammad Taaj, all Jatt by caste, residents of Bihari Tehsil Dadyal District Mirpur, Azad Jammu and Kashmir,

**(Appellants)**

**VERSUS**

1. Imran alias Moon son of Noor Ahmed, Malik by caste R/o Sector 6 Dadyal, Tehsil Dadyal District Mirpur,
2. Abrar Hussain son of Qurban Hussain, Mouchi by caste R/o Potha Sher, Tehsil Dadyal District Mirpur,
3. Jabbar Hussain,

4. Sarfaraz Hussain,
5. Khalq Nisar sons of Qurban Hussain, all Mouchi by caste, residents of Potha Sher, Tehsil Dadyal District Mirpur,
6. Jamil Ahmed son of Arshad, Sheikh by caste R/o Sector B/3 presently Bathroi Dadyal, District Mirpur,
7. Zahoor Malik son of Noor Ahmed, Malik by caste R/o Sector 6 Dadyal District Mirpur,
8. Tahir son of Zaffar Iqbal Jatt by caste R/o Mohra Gujrran, Dadyal District Mirpur,

**(Respondents)**

9. The State through Additional Advocate General,
10. Sohrab Khan,
11. Zaryab Khan, sons,
12. Saba Zahoor D/o Zahoor Ahmed (deceased) residents of Bihari, Tehsil Dadyal District Mirpur, (Minors thorough real mother named Zahida Bibi).

**( Proforma-Respondents)**

Reference No. 71/2017.

Date of Institution 01.11.2017.

The State through Zaheer Ahmed son of Ch. Muhammad Taaj Jatt by caste R/o Bihari Tehsil Dadyal District Mirpur,

**VERSUS**

Ghaffar Hussain and others

**APPEALS AGAINST THE JUDGMENT AND ORDER OF  
LEARNED ADDITIONAL DISTRICT COURT OF CRIMINAL  
JURISDICTION MIRPUR, DATED 24.05.2016. AND  
REFERNECE SENT BY TRIAL COURT FOR CONFIRMATION  
OF DEATH SENTENCE**

**Before:— 1) Justice Mian Arif Hussain, J.  
2) Justice Sardar Muhammad Ejaz Khan, J.**

***DIVISION BENCH***

**PRESENT:**

- 1) Muhammad Riaz Alam, Advocate for Convict-appellants.
- 2) Raja Inamullah Khan, Advocate for Complainant and legal heirs of deceased,
- 3) Mr. Sajid Nawaz, AAG, for the State.

**JUDGMENT:**

**Justice Mian Arif Hussain, J.** The captioned appeals and reference originate from single judgment and order dated 24.05.2016 recorded and passed by Additional District Court of Criminal Jurisdiction Mirpur, whereby, in a criminal case registered in the offences under sections 147,148,149,427APC, 337H2, 302/341 and 13/20/65 AA, after conducting the trial, the learned trial Court convicted Ghaffar Hussain , one of the accused under section 302(A) APC and awarded him death sentence as Qisas. He was further awarded two years imprisonment along with a fine of Rs.5000/- under section 13/20/65 Arms Act, failing which, he will have to undergo further six months. He is further awarded one year imprisonment under section 427 APC and one month imprisonment under section 341 APC. Moreover, he is ordered to pay compensation to the legal heirs of deceased under section 544-A Cr.P.C to the tune of Rs.5,00,000/-(5 lac). Accused-Imran was convicted under section 13/20/65 Arms Act, and was awarded one year imprisonment along with payment of fine of Rs.5000/- failing which, he will have to undergo further three months imprisonment. Accused-Abrar was convicted under section

13/20/65 Arms Act and was awarded six months imprisonment along with payment of fine of Rs.5000/- failing which, he will have to undergo one month imprisonment, whereas, the other co-accused-persons named "Khalaq Nisar" "Tahir, Jabbar" "Sarfaraz" "Jamil and Zahoor" were ordered to be acquitted of the charge by extending benefit of doubt in their favour, hence, are proposed to be disposed of through this single judgment.

Through the appeal no.70/2017 Ghaffar Hussain and others, convict-appellants have called in question the validity of conviction order with the prayer of their acquittal, whereas, through second appeal no.72/2017, complainant named Zaheer Ahmed S/o Ch. Muhammad Taaj and other legal heirs of deceased have challenged the validity of judgment regarding award of lesser punishment and acquittal of the accused persons.

Through the Criminal reference, death penalty awarded as "Qisas" has been sought to be confirmed.

Facts of the case, in brief, are that Zaheer Ahmed S/o Ch. Muhammad Taaj resident of Bihari, Tehsil Dadyal District Mirpur, submitted a written report to the Police Station Dadyal, alleging therein, that he is a resident of Behari, today, on 30.05.2011, complainant along with brother named Zahoor Son of Muhammad Riaz residents of Basaar Bihari were going to their house situated at Bihari from their "Hotel Dream Land" on their own car and

as soon as at 07:40pm, they reached front of Descent Hair Dresser near Post Office at Main Bazar Dadyal where accused persons named Abrar, Ghaffar, Jabbar, Nisar, Sarfaraz sons of Qurban Hussain residents of Potha Banghish, Jamil Ahmed son Sheikh Arshad resident of Mirpur presently Bathroi, Tahir son of Zaffar resident of Mohra Gujran, Zahoor, Imran alias Moon, sons of Noor Ahmed residents of Sector no.6 Dadyal and three unknown persons were standing there who stopped the car and while abusing the Zahoor Ahmed asked him to come out from car and said that today you will not be left alive. It is alleged that accused-Ghaffar was armed with 30-bore pistol, accused-Jamil was armed with Iron fist, Accused-Abrar was armed with dagger, accused-Tahir was armed with 30-bore pistol and Imran alias Moon was armed with 12-bore Repeater. It is alleged that accused-"Ghaffar" by stopping the car made six fires on Zahoor Ahmed, one of which hit his back and one hit his left arm. It is alleged that due to said firing, window glasses of vehicle also broke and body of the car was got damaged. It is claimed that in the meantime, accused Jamil armed with Iron fist inflicted a blow on the head of "Zahoor Ahmed" and caused severe injuries, due to which, blood was oozed out, whereas, Imran alias Moon armed with 12-bore was making indiscriminate firing. Zahoor, due to serious injuries fell at the seat of the car and the complainant rescued him to

Tehsil Headquarter Hospital where he succumbed to injuries and breathed his last. The motive behind the occurrence is that in the day time, a dispute between Zahoor and accused-Ibrar due to making a shave emerged and by hatching said grudge, Zahoor has been murdered, hence, accused persons be proceeded accordingly.

Upon receiving the application, a case in the offences under section 147,148,149,427,302,/341, 337-H2 APC was got registered vide F.I.R no.69/2011 at Police station Dadyal, subsequently, during the investigation, section 13/20/65 Arms Act was also incorporated.

After conducting investigation, Challan report was presented before the Court of competent jurisdiction.

After taking cognizance of the matter and handing over the relevant record to the accused persons, statements of the accused-persons were got recorded under section 265-D Cr.P.C but accused persons denied the veracity of allegations, pleaded not guilty and claimed trial, whereupon, prosecution was ordered to lead evidence in support of its version.

After recording evidence of prosecution, accused-persons were got examined under section 342 Cr.P.C, who again denied the veracity of allegations, levelled against them and opted not to record their statements under sections 340(2) Cr.P.C and evidence in defense.

After hearing the learned counsel for parties and evaluating the evidence, the learned Additional District Court of Criminal Jurisdiction, Mirpur recorded the judgment impugned herein, through which conviction and acquittal has been recorded in the terms as narrated herein above.

Feeling dissatisfied, both the parties have challenged the validity of judgment impugned herein through the captioned appeals.

Arguments heard.

Ch. Muhammad Riaz Alam, Advocate, the learned counsel representing the convict-appellants, after narration of the facts of the case at some length argued that report of occurrence was preferred in Tehsil Headquarter Hospital, upon which, F.I.R was got registered and in the back side of "report Marg", (Exh PQ) names of Safdar Hussain and Abdul Waheed have been recited as, witnesses, meaning thereby, that the complaint neither was present at the place of occurrence nor was in the hospital at the time of preparation of report of death. The learned counsel argued with vehemence that one of witness "Safdar Hussain" was not associated in the challan report, whereas, other witnesses Abdul Waheed Sani recited in the said report though was associated in the challan report but he was not produced before the Court for recording his statement, which facts perse signifies that

the mode of occurrence is quite different from the mode as narrated in the prosecution story. The learned counsel argued that prosecution failed to produce natural and independent witnesses of occurrence, which facts reveal that real story has been concealed, hence, on this sole ground, the case of the convict appellant stands a case of acquittal. The learned counsel further argued that F.I.R was got registered after a considerable delay and no plausible reason is assigned. It is argued that Zaheer, Muhammad Riaz and Abdul Waheed have been recited as eye witnesses, one Riaz is brother in law of the deceased and Zaheer is real brother of the deceased, hence, both the said witnesses being close relative of the deceased could not be relied upon. The learned counsel added that occurrence is unseen and witnesses recited in the challan report being unanticipated witnesses are not worthy to be relied upon. The learned counsel argued that in the light of prosecution story, six fires have been alleged to be made by single person but it is astonishing that only one person was injured whereas no sign of said firing in the inner part of vehicle appears there. He further added that occurrence took place in the dark hours of night, hence, no identification was possible, moreover, no witness amongst all the shopkeepers to the vicinity has been associated. Further claimed that keeping in view the factum of blackening of injury, it establishes that fire has been made



inside the vehicle. The learned counsel further added that in the light of evidence, mode of occurrence as narrated by the prosecution does not establish and other incriminating material brought on record hardly supports the manner of occurrence and numerous contradictions of serious nature in the prosecution's witnesses exist there but the learned trial Court without evaluating the evidence in its true perspective has recorded the impugned judgment merely on the basis of surmises and conjectures, hence, the same being perverse, arbitrary and against the law and facts, is liable to be set aside.

Conversely, Raja Inamullah Khan, Advocate, the learned counsel representing the complainant submitted that prosecution's case is of ocular count and admittedly the motive behind the occurrence supports the version of the prosecution in clear terms. The learned counsel pressed into service that accused persons nominated in the F.I.R while forming an unlawful assembly restrained the vehicle of the complainant party and attacked with deadly weapon, result of which, one Zahoor sustained injuries and soon after he breathed his last. The learned counsel argued that witnesses recited as eye witnesses were already present in the vehicle, hence, they could not be treated as chance witnesses and so far as the question of non-production of "Waheed" witness is concerned, the same was not a witness of F.I.R, moreover,

the witness recited in the side "death report" may not be the eye witness of the occurrence. The learned counsel argued with vehemence that in view of nature of occurrence, the provisions of common intention and common object attract in the matter in hand, hence, all the persons nominated in the F.I.R severally and jointly held liable for the commission of alleged offence but the learned trial Court failed to comprehend this proposition. The learned counsel pressed into service that role of Jamil, one of the accused who inflicted injury at the head of deceased is also established and role of Imran of indiscriminate aerial firing is also proved. The learned counsel added that if there was no such aerial firing, then the injured could be rescued. The learned counsel maintained that role of the other accused persons as narrated in F.I.R is also proved and in terms of section 149 Cr.P.C all the accused persons are requested to be convicted and sentenced accordingly.

The learned AAG while opting the arguments advanced on behalf of the learned counsel for complainant simply stated that accused persons acquitted by the learned trial Court, may be convicted and sentenced accordingly.

After having heard the arguments of the learned counsel for parties, We have also gone through the record made available at the file with due care and caution.

From the perusal of record, it depicts that Zaheer Ahmed, complainant, while reporting the matter of murder of his brother "Zahoor Ahmed" nominated a number of accused persons in the F.I.R, alleging therein, that all these accused persons while forming an unlawful assembly restrained and stopped the complainant party and one of the accused Ghaffar made six fires at the person of Zahoor Ahmed, Jamil inflicted blow at the head of Zahoor, Imran made aerial firing indiscriminately, whereas other accused persons Tahir, Ibrar also armed with weapons, contributed by making Lalkara and harassment etc., hence, all the nominated persons having common object are liable to be proceeded.

The allegation of the direct firing on the person of Zahoor is attributed to Ghaffar Hussain. Admittedly, Zahoor Ahmed succumbed to the injuries sustained and postmortem report speaks that death is result of fire arm injury and the case of the prosecution is of ocular count.

From the perusal of record it depicts that complainant himself and other witnesses recited as eye witnesses corroborate the story of the prosecution. The motive behind the occurrence is also established. Report of forensic laboratory coupled with autopsy report, recovery of crime weapon etc. also strengthens and corroborates the prosecution's version.

So far as the objection of relative witnesses is concerned, the question arises here that if an occurrence is taken place in presence of more than one person having relationship with each other then how the said relative persons, being a natural witnesses could not be associated as witness. Unless and until previous enmity is not pointed out against the related witnesses, the statement of related witnesses could not be thrown away, therefore, this argument beyond any reasonable justification could hardly be accepted.

So far as the role of accused Jamil is concerned, it depicts that he is attributed with a role of inflicting injury through iron fist on the head of deceased but the distance of said occurrence from the deceased is claimed to be 8 to 9 feet, which stands not rational as a blow with fist from the such distance could not be inflicted, hence, his involvement regarding the said allegation stands not proved.

So far as the allegation against Imran regarding aerial and indiscriminate firing is concerned, it depicts that empties recovered do not tally with the gun alleged to be used for the purpose. Moreover, no specific words of "Lalkara" alleged to be made by Imran have been pointed out, however, recovery of "unlicensed gun" from the possession of Imran establishes the guilt under section 13/20/65 of Arms Act.

So far as the allegation against one of the accused Tahir is concerned, pistol has been claimed to be recovered from his possession but according to prosecution story, no role is attributed to the said accused and pistol claimed to be recovered from possession of Tahir is found "licensed pistol", hence, neither his attribution to the occurrence establishes nor he may be convicted under section 13/20/65 Arms Act.

So far as the question of application of section 149 APC is concerned, undisputedly, in view of said provision, every member of unlawful assembly stands guilty of offence committed in prosecution of common object but the said doctrine of vicarious liability requires quo existence of ingredients that; one should be member of unlawful assembly; that in prosecution of common object of that assembly, offence should have been committed by the member of unlawful assembly; and that the offence be of such a nature that member of that assembly, knew the offence to be likely to be committed in prosecution of common object. No doubt where five or more persons are nominated in the F.I.R, unlawful assembly appears to be established but the main question needs consideration as to whether the said persons knew the offence to be likely to be committed or not ? where some persons do nothing and appear merely, passive witnesses and have joined the assembly as a

matter of idle curiosity without intending to entertain the common object of the assembly, in such a situation, mere presence with other members of the unlawful assembly alone is not per se sufficient to hold everyone of them criminally liable for the offences committed by the others unless there is sufficient evidence on record to show that they were intended to or knew the likelihood of the commission of such offending act.

In the light of above touchstone regarding application of section 149 APC, now, we advert to the matter in hand and try to find out as to whether section 149 APC stands applicable in the matter in hand or not ? The motive behind the occurrence admittedly appears to be of trifling nature and in view of said enmity of trifling nature, it stands irrational that each member of unlawful assembly must be actuated with grudge and was inclined to commit the offence of murder. Moreover, in the occurrence in hand, four persons nominated in the F.I.R have been shown as passive witnesses, whereas, no attribution to accused "Tahir" despite of having pistol is alleged and similarly "Lalkara" is not established, hence, it cannot be determined that all the accused persons formed the unlawful assembly for the purpose of commission of offence of murder, hence, the question of application of vicarious liability as envisaged in section 149 APC hardly attracts in the matter in hand.

In view of afore-narrated circumstances, it may be observed that learned trial Court after evaluating the evidence of the prosecution quite in a legal fashion has rightly fixed the main liability on principle accused "Ghaffar" against whom allegation of direct firing at the person of deceased is levelled and ultimately has been proved through cogent, convincing and confidence inspiring evidence.

The other two convict appellants "Imran and Abrar" in view of their specific roles have also rightly been held responsible for the commission of offence levelled against them. Against Jamil and other co-accused, prosecution failed to prove its stance, hence, learned trial Court has justifiably acquitted them of the charge.

The learned counsel representing the convict-appellants, has claimed that occurrence being unseen, irrational as narrated by the prosecution and tainted with improvement coupled with association of partial witnesses makes the matter of acquittal but all the said questions have categorically be addressed by the learned trial Court, hence, it deems not appropriate to reiterate the same in detail.

The crux of above discussion is that matter in hand is of ocular count coupled with solid, cogent corroborative evidence, hence, the findings of trial Court , being recorded quite in consonance with evidence are

ordered to be maintained, resultantly, both the appeals no.70/2017 titled " Ghaffar Hussain and 2 others Vs. The State and another and appeal no.72/2017 titled "Ch. Muhammad Taaj and 3 others Vs. Imran alias Moon and 7 others" being devoid of substance are hereby dismissed whereas, reference no.71/2017 sent by the learned trial Court is answered affirmatively. A copy of the judgment shall be annexed with the connected appeal and reference.

Muzaffarabad.  
27.12.2022.

**JUDGE**

**JUDGE**

Judgment has been written and duly signed. The Dy. Registrar Headquarters is directed to transmit the file forthwith to Circuit Mirpur. The Dy. Registrar Circuit Mirpur, shall announce the judgment in presence of parties as well as their counsels after issuing notices to them.

**JUDGE**

**JUGDE**