

**JUDGMENT SHEET**

**IN THE PESHAWAR HIGH COURT,**  
**BANNU BENCH**

*(Judicial Department)*

**Cr.A No.89-B of 2014**

*Alam Zar Vs The state etc*

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

Date of hearing \_\_\_\_ 19/12/2016 \_\_\_\_\_

**Appellant (s) by: Alamzar Khan by Jalal-ud-Din Akbar**

**Azam Garha, Advocate and Quaid Ullah Khattak, Advocate.**

**Respondent: State by Shahid Hameed**

**Qureshi, Addl: AG and Others by Shaukat Ali**

**Khan advocate and Ahmad Farooq Khattak,**

**Advocate.**

**ISHTIAQ IBRAHIM , J.-** Through this single

judgment we intend to dispose of this Criminal appeal

as well as connected ***Criminal Revision petition No.21-***

***B of 2015, titled Haq Nawaz ..VS....The State etc,***

being arisen out of one and same judgment dated

26/06/2014.

2. Alamzar Khan, the appellant through present criminal appeal preferred under section 410 Cr.P.C has impugned the judgment dated 26/06/2014, passed by the learned Additional Sessions Judge, Banda Daud Shah, district Karak whereby he was convicted and sentenced in case FIR No.108 dated 15/03/2013 under sections 302/324/427/34 PPC, registered at Police station Banda Daud Shah, district Karak, the detail whereof is as under:-

- i. U/S 302/34 PPC, he was convicted and sentenced to Life imprisonment and also to pay Rs.50,000/- (rupees fifty thousand) as compensation to the legal heirs of the deceased as provided U/S 544-A Cr.P.C for causing death to the deceased and in default thereof to further suffer imprisonment for six months;*
- ii. U/S 324 PPC to suffer seven years imprisonment with fine of Rs.30,000/-, or in default of payment of fine, to undergo further three month imprisonment.*

*iii. U/S 337 F (v) PPC to suffer three years R.I and Rs.10,000/- as Daman and has also been fined Rs.5000/- under section 427 PPC. In default of payment of fine, he shall further undergo one month imprisonment.*

*iv. All the sentences were ordered to run concurrently with benefit of Section 382-B Cr.P.C which is also extended to the convict/ appellant.*

3. The prosecution version as disclosed in the F.I.R Ex:PA/1 lodged by the injured/ complainant Haq Nawaz is that on 15.03.2013, he alongwith deceased Gul Nawaz was coming back to their village Seri Khwa from village Ahmadi Banda on motorcycle, bearing registration NO.F-8300/Bannu, which was driven by deceased Gul Nawaz; that at 0310 hours, when they reached at place of occurrence known as "Taraqi Ghusha" absconding co-accused Saeed Rahman and appellant/accused Alam Zar, who were already ambushed, on seeing them, they started firing at complainant party with their respective weapons; that

from the firing of absconding co-accused Saeed ur Rehman, Gul Nawaz was hit and had died on the spot, while from the firing of appellant/accused Alam Zar, complainant was hit on his right hand and got injured; that the occurrence has also been witnessed by PWs Hameed Khan and Shahid Nawaz who were behind them on motor cycle. Motive as disclosed by the complainant is blood feud between deceased Gul Nawaz and accused party. Consequently on the report of complainant, murasila was drafted and sent to the Police station, on the basis of which FIR (ibid) was registered against absconding accused including the appellant.

4. After completion of investigation, complete challan was submitted before the trial court against appellant/ accused Alamzar as well as for proceedings under section 512 Cr.P.C against absconding co-accused Saeed ur Rahman. Formal charge against appellant/accused was framed to which

he pleaded not guilty and claimed trial. Trial was commenced.

5. The prosecution in order to prove its case, examined as many as twelve (12) PWs including complainant Haq Nawaz, eye witness Hameed Khan .

6. Ocular account of the occurrence in this case has come out from the statements of complainant Haq Nawaz (PW-10), eye witness namely Hameed Khan (PW-11); Dr. Atif ur Rehman Medical officer THQ hospital, Banda Daud Shah as PW-3, who has conducted Medico-legal examination of injured/complainant Haq Nawaz as well as autopsy on dead-body of deceased Gul Nawaz. He found following injuries on person of complainant:-

***Two (02) wounds seen on right upper limb. One at shoulder which was bleeding profusely alongwith a fire arm wound on right arm. Patient was given emergency treatment, bandage applied and referred to DHQ KDA Kohat for proper management.***

7. On the same day, he also conducted autopsy upon deadbody of deceased Gul Nawaz and following injuries were found on his body:

- 1. Entry wound of 3x3 cm on right side of the head 02 inches away from right ear.*
- 2. Entry wound of 3x3 cm on the same side of head 1 inch above the first wound.*
- 3. Exit wound of 5-6 inches blowing the skull bone with brain matter lying outside.*
- 4. Entry wound of about 2 x 2 cm in right hypochondrium 3 inches away from epigastrium.*
- 5. Exit wound of about 6 x 6 cm above right posterior superior iliac spine on right side of back.*

**Abdomen:-**

*Walls, peritoneum injured. Stomach, Simi solid food was found in the stomach, Large intestine. Transverse colon injured with fecal matter in abdominal cavity. Liver was also injured.*

**Cranium & spinal Cord:**

*Scalp, Skull and vertebrae shattered vault of skull.*

**Membrane, brains and spinal cord:-**

*Brain matter lying outside (brought in plastic bag by police).*

**Muscle, bones and cartilages:- Muscles injured.**

**Remarks:- In his opinion the deceased had died due to fire arm injuries.**

**Probable time elapsed between injury & death:**

*20 to 30 minutes between death and post mortem one to two hours.*

After conducting autopsy on the deadbody, the doctor handed over post mortem documents alongwith blood stained garments, injury sheet to constable Muhammad Irfan No.737.

The statements of remaining witnesses are formal in nature.

8. After conclusion of trial statement of appellant/accused U/S 342 Cr.P.C was recorded wherein he did not opt to examine himself under section 340 (2) Cr.P.C however, wished to produce some documents in defence.

9. After hearing learned counsel for the parties, appellant/ accused was convicted and sentenced as above by the learned trial court, vide impugned judgment dated 26/06/2014, hence the instant Appeal for his acquittal, whereas complainant has also preferred connected *Criminal Revision No.21-B of 2015, titled Haq Nawaz VS Alam Zar etc* for enhancement of conviction and sentence of appellant.

10. The learned counsel for appellant made his submissions that the impugned judgment is against law and facts on record because as per contents of FIR, only role of causing injuries to the complainant/respondent has been given by him to the appellant/accused; that prosecution witnesses have improved their initial version considerably and introduced new facts and also referred to the contradiction between statements of complainant Rab Nawaz (PW-10) and eye witness Hameed Khan (PW-11), medical evidence and also



recovery witnesses but that the learned trial Court has not properly appreciated the evidence on record and has fallen in error of law whereby has brought under consideration inadmissible evidence; that prosecution has not proved its case, while the whole statements of material PWs are inconsistent; He further contended that the witnesses had not proved their presence at the spot but the learned trial court has not appreciated the available evidence in its true perspective and thereby committed patent illegality which has occasioned in gross mis-carriage of justice.

**11.** On the other hand, the learned Additional Advocate General and the learned counsel for respondent/complainant argued that prosecution has produced direct and circumstantial unimpeachable, trustworthy evidence against appellants and has proved its case beyond any shadow of doubt; that medical as well as circumstantial evidence in shape of recovery of

blood stained earth and blood stained garments of deceased as well as injured and recovery of ten empty shells of 12 bore from the spot supports the prosecution case and in this respect the FSL reports are also in positive; that appellant was rightly found guilty, however, the sentence is not proper in the given circumstances, may be enhanced.

12. We have heard arguments of learned counsel for the parties, learned Addl.A.G for the State and gone through the record of the case.

13. The prosecution case, as per first information report is that the complainant has charged the accused/ appellant for making effective firing at him, which resulted into the injury on his right hand, while absconding accused Saeed-ur Rehman for committing qatl-e-amd of Gul Nawaz with shotguns, when complainant sitting on rear seat and deceased driving the motorcycle reached at the spot. As

per report, Hameed Khan and Shahid Nawaz had witnessed the occurrence, being present behind the accused on motorcycle.

14. As the co-accused Saeedur Rehman is absconding, we would refrain ourselves to comment on such aspects of the case, which may affect the case of absconding accused, like improvements, interested witnesses, recoveries and general discrepancies or contradictions in evidence. The complainant PW-10 in his statement as well as first information report charged the accused/ appellant for attempting his life by firing at him with his shotgun, he has not charged the accused/ appellant for making firing at the deceased. The case of present accused/ appellant falls only to the extent of attempt to commit qatl-e-Amd of complainant or to that effect for the injury which received the complainant or at least sharing of intention.

15. The complainant in his statement recorded as PW-10, stated that:

***“When we reached the place of occurrence (Taraqi Ghusha) absconding accused Saeed Rehman and accused facing trial Alam Zar duly armed were already present and on seeing us they started firing upon us, with the fire shot of absconding accused Saeed-ur-Rehman, deceased Gul Nawaz was hit and died on spot, while with the fire shot of accused Alam Zar I was hit on my right hand and got injured”***

It is further stated in cross examination that:

***“They did not fire from the front side rather they fired upon us while we were being crossing them.”***

One fire of shot gun executes many pellets, which expands with increase of distance, then how in simultaneous firing that too with shotgun complainant who is on motorcycle with deceased sitting almost attached to each other, could distinguish the role of each

accused that whose fire-shot hit deceased and whose fire-shot hit him. When we go through the site plan the accused/ appellant is shown at point No.6, while the complainant at Point No.2, distance between the two is mentioned as 100 feet, then in such a situation, any fire of accused is sufficient to hit both, the complainant as well as deceased. Even further, the eye witness, Hameed Khan examined as PW-11, who is real uncle of deceased has stated in cross-examination that both the accused fired simultaneously. It is by now settled that mere presence of stamp of injuries on the person of a witness is not a yardstick for determining the truthfulness or falsehood of a witness. It cannot be believed that every injured witness would speak the truth and every unhurt eyewitness would tell a lie. It is the circumstances of the case and intrinsic worth of his statement, that determine the veracity and credibility of a witness, which can be assessed in the light of

attending circumstances of each and every case.

Reliance is placed on case titled “Nazir Ahmad Vs Muhammad Iqbal and another” (2011 SCMR 527).

While in the instant case, it is held that the complainant has exaggerated the charge to the extent of appellant. In similar situation the apex Court in case titled “Tawab Khan and another Vs the Stae” (PLD 1970 Supreme Court 13), it is held that:

*“As compared to this, the case against Tawaib Khan is very doubtful. He is alleged to have fired from a distance of 20 yards and had allegedly succeeded in causing only one pellet injury on the right forearm of the deceased. There were no indications of any firing from the spot from which he had allegedly fired such as we find in the case of Khawaja Muhammad. If Tawaib Khan had fired from that close distance-20 paces as is alleged-he must have certainly caused a greater damage to the deceased than is attributed to him. He could not be such a bad marksman as to cause only one stray pellet injury with his gun from a distance of 20 paces. The injuries to the deceased,*

*according to my view, were all caused by two shots, one from behind and the other from front, both of which were initially attributed to Khawaja Muhammad by the deceased as well as by Mst. Meraj Dana, although, subsequently, the deceased magnified the number of these shots to three and Mst. Meraj Dana did so into many more. This exaggeration was introduced merely to ascribe the firing of a shot by Tawaib Khan, but this, as I have said above, is very doubtful.*

*In these circumstances, I am constrained to reject the evidence of Mst. Meraj Dana as well as of the dying declarations of the deceased as far as Tawaib Khan is concerned, giving him C the benefit of doubt which, I consider, was wrongly withheld from him by the Courts below. I would, therefore, acquit him. As already stated above, the guilt of Khawaja Muhammad is established beyond doubt and his conviction and sentence as awarded by the trial Judge and confirmed by the High Court, are well-merited in which no interference is justified. I decide the appeal accordingly. Tawaib Khan shall be released forthwith if not wanted in any other case.”*

16. Medical evidence also belies the case of prosecution to the extent of participation of appellant for the reason that from the distance of 100 feet, whether a pellet could penetrate into the body is question for which no plausible explanation has been mentioned nor the complainant would be in position to specify the injury that it was caused by the appellant, though at the trial prosecution witnesses tried to improve their case but in our view it was an abortive effort.

17. As per record it is evident that both the complainant and deceased were empty handed, even the eye witness Hameed Khan PW-11, who is real uncle of deceased watching the tragedy but neither trying to save deceased from accused nor prohibiting the accused from the commission of offence. How it is possible that four persons riding on two motorcycle having blood feud



would not carry any weapon, particularly in this area of the country, which is beyond our comprehension.

18. Sattar Khan incharge investigation recorded his statement as PW-12, in cross examination he stated that:

***“It is correct that I have shown two hillocks on either side of the road, where the occurrence took place. The height of these hillocks might be 10 to 15 feet.”***

Further prepared site plan Ex:PB, wherein he has shown hillocks on either side of the road, which are further clarified from photographs ExPW12/1, available on file, wherein there are so many embankments and places where a person could easily hid himself.

19. In addition to that the complainant in his first information report did not stated regarding weapon of offence, nor he stated that who was sitting on rear seat and who was driving the motorcycle, while in his statement recorded as PW-10, he disclosed that he was

sitting on rear seat, while the deceased was driving the motorcycle, whereas this statement is negated by the investigation officer Sattar Khan PW-12, who in his cross examination categorically stated that the deceased was sitting at the rear seat while the complainant was driving the motorcycle, meaning thereby that the prosecution has failed to specify through cogent evidence, that who was driving the motorcycle at the time of occurrence, which creates serious doubt regarding receiving of injury by fire shot of the accused/appellant. No doubt complainant PW-10 is an injured witness and his presence on the spot could not be denied, but his evidence to the effect that he received injury with the fire shot of accused/ appellant, is not proved rather medical evidence belied the same, as he has received other injuries also but for that injury, the prosecution is silent that through which means the same was caused. The complainant has not stated in

F.I.R that he fell down from motorcycle during the occurrence.

20. So for as recoveries of empties are concerned the investigation officer recovered 10 empties in scattered position, vide recovery memo: Ex:PF, while report of the firearms expert is Ex:PK/1, according to which it is opined that these were fired from different 12 bore weapons, but this report cannot implicate the accused/ appellant, as firstly the crime weapon has not been mentioned in the first information report and secondly, during the trial it was disclosed that the accused were carrying with 12 bore shot guns, but further it has not been mentioned either it was single barrel or double barrel, as in case of double barrel weapon, two different striker pins are affixed for each barrel which cause different kind of striker marks and may result the same situation.

21. So for as site plan is concerned, it was prepared on the pointation of PW-11, Hameed Khan on

15.03.2013, whereas the same was verified from complainant on 26.03.2016. The site plan is not substantive piece of evidence which may be used to contradict or discredit the evidence of an eyewitness, but, being the first reflection of the spot, indicated/pointed by the eye-witness, furnishes a panoramic view of the occurrence to scrutinize the evidence of the prosecution witnesses tendered at the trial. Reliance is placed on case titled **“Iqbal shah Vs The State” (1998 P Cr. L J 1177).**

22. So for as motive is concerned, it is always considered as a double edge weapon which cuts both ways and it can be used by the accused to take revenge and at the same time can be a tool used by the complainant, for false charge, as well, being close relative of deceased.

23. Though in the instant case appellant-convict has remained absconder for a considerable period, but abscondence alone can only be used as a

circumstance against the accused and cannot be a substitute of direct evidence. When ocular account is disbelieved, then any circumstantial evidence in the shape of recoveries or abscondence of accused loses their efficacy for recording conviction of the accused. As ocular account furnished by the complainant PW-10, and eye witness Hameed Khan PW-11, is not worthy of credence to the extent of accused/ appellant, on the basis of which conviction of the appellant may be maintained in a capital charge. Thus, abscondence, how long so ever may be, cannot be accounted against the appellant.

24. It is settled principle of law that when two inferences can be drawn from the prosecution evidence, then one favouring the accused is to be followed. When this principle is applied to the instant case, even if one considers that the accused/ appellant has participated in the crime, at the same time, another circumstance

boggles the mind that he has not participated at all. In such a situation, the best and safest course open for the Court is to follow the latter by discarding the former.

25. It is cardinal principle of criminal justice that prosecution is bound to prove its case beyond any shadow of doubt and if any reasonable doubt arises in the prosecution case, benefit of the same is to be extended to the accused, not as a matter of grace or concession, but as a matter of right. On reappraisal of evidence as discussed earlier, we are of the firm view that appellant-convict is entitled to the benefit of doubt. Therefore, while extending the same benefit, this appeal was allowed and appellant was acquitted while connected criminal revision, of complainant was dismissed vide our short order of even date. These are the reasons for our short order, which is re-produced herein below:-

“For the reasons to be recoded later,  
the instant criminal appeal is

accepted, the impugned judgment of conviction dated 26.06.2014, rendered by learned Additional Sessions Judge, Banda Daud Shah, Karak, is set-aside and consequently appellant Alam Zar Khan is acquitted of the charges leveled against him. He be set at liberty forthwith if not required in any other case. While connected *Cr.R No.21-B/2014* titled "*Haq Nawaz Vs Alam Zar Khan*, stands dismissed."

**Announced.**

**19.12.2016**

\*Azam/P.S\*

**J U D G E.**

**J U D G E.**