

IN THE FEDERAL SHARIAT COURT

(Appellate Jurisdiction)

PRESENT

**MR. JUSTICE MUHAMMAD ZAFAR YASIN
MR. JUSTICE SYED AFZAL HAIDER**

JAIL CRIMINAL APPEAL NO. 295/I OF 2006 L/W

Nawab Din son of Gul Din,
r/o Yaqoob Gheeder, District Swabi

.... Appellant

Versus

The State

.... Respondent

JAIL CRIMINAL APPEAL NO.73/I OF 2008

Muqarab Khan son of Akbar Khan,
r/o Tarkhel Bala Tehsil & District
Nowshera.

.... Appellant

Versus

The State

... Respondent

Counsel for appellants

.... Mr. Muhammad Razaqat Ali,
Advocate

Counsel for the State

.... Mr. Muhammad Sharif Janjua,
Advocate

FIR. No. Date &
Police Station

.... 461, 10.06.2001
Akora Khattak

Date of judgment of
trial court

.... 09.03.2005

Dates of Institution

.... 13.11.2006 & 16.07.2008
respectively

Date of hearing

.... 10.02.2009

Date of decision

.... 17.02.2009

JUDGMENT

SYED AFZAL HAIDER, Judge:- Nawab Din through Jail

Criminal Appeal No. 295/I of 2006 and Muqarrab Khan also through another Jail Criminal Appeal No. 73/I of 2008 have challenged the judgment dated 09.03.2005 delivered by learned Additional Sessions Judge-III, Nowshera in Hudood Case No. 34 of 2000, through which both the appellants have been convicted under section 302/34 of Pakistan Penal Code and sentenced to life imprisonment each with a fine of Rs. 100,000/- each and in default of non payment of fine to further undergo two years simple imprisonment each. Accused Muqarrab Khan has also been convicted under section 13 of Arms Ordinance and sentenced to two years imprisonment and to pay a fine of Rs.1000/- and in default whereof to further suffer six months simple imprisonment. Benefit of section 382-B of the Code of Criminal Procedure was extended to both the appellants. Muhammad Afzal co-accused of the appellants was tried alongwith them. He was acquitted by the order of Peshawar High Court Peshawar. Both the appeals of the appellants will be covered by this consolidated Judgment as the judgment of the trial court impugned in these appeals is the same.

2. Brief facts of the case as given out in the impugned judgment are that Jehanzeb Khan, SHO of Police Station Akora Khattak PW10, the complainant, on 10.06.2001 alongwith police officials was on patrolling duty near Akora Railway Crossing when an information was received that a motor car No.GAJ-1313, white colour, model 1987 with four suspected persons was proceeding towards village Umaray. The complainant alongwith police party pursued the said car which was spotted at Khawar Tarkhel Bala. Three persons reportedly came out of the car. One of them was armed with a pistol. They tried to escape but were apprehended. The person having pistol disclosed his name as Muqarrab Khan while the other two identified themselves as Nawab Din and Muhammad Afzal. As the complainant SHO approached the abandoned vehicle he found that the driver had been murdered with firearm. The driving license and Identity Card of the driver indicated that the deceased was Nadim Akram son of Muhammad Akram residents of Chakiyan Tehsil & District Jhelum. A pistol 30 bore No.15170 loaded with three live bullets of the same bore was allegedly recovered from accused Muqarrab. Blood was also found

on the driving seat and after preparation of injury sheet as well as the inquest report Ex.PW.10/2 of the deceased, a murasala Ex.PA, was sent to police station. Consequently FIR. No. 461 (Ex.PW.5/1) was registered on 10.06.2001 by PW5 Sher Afsar ASI on the basis of that Murasla.

3. The essential part of the investigation was carried out by Jehanzeb Khan Inspector, P.W.10, who after apprehending the accused drafted Murasala Ex.PA, prepared Injury sheet Ex.PW.10/1, and the rough site plan Ex. PB of the place of occurrence. He recorded statements of the witnesses under section 161 of the Code of Criminal Procedure. Inquest report Ex.PW.10/2 of the deceased as well as recovery memo Ex.PW.9/2 of one freshly fired empty was prepared by this witness. An indigenous 30 bore pistol No. 15170 was also taken into possession vide recovery memo Ex.PW.9/3. The Investigating Officer also took into possession the last worn blood stained garments of the deceased vide memo Ex.PW2/1 brought by Muhammad Zahir constable from the hospital. He also prepared pointation memo Ex.PW.3/1 of the place of occurrence allegedly on the pointation of accused Muhammad Afzal. After completion of the

investigation P.W.4 Shaukat Ali SI in his capacity as SHO submitted in the court a report under section 173 of the Code of Criminal Procedure requiring the accused to face trial.

4. The trial court on receipt of the report took cognizance of the case and charged the accused on 08.07.2002 under section 302/34 of Pakistan Penal Code and section 17(4) of Offences Against Property (Enforcement of Hudood) Ordinance, 1979. All the accused were also charged under section 411 of Pakistan Penal Code but Muqarrab Khan alone was charged under section 13 of Arms Ordinance. All the accused did not plead guilty and claimed trial.

5. The prosecution in order to prove its case produced 11 witnesses. Gist of the deposition of witnesses is as follows:

i. P.W.1 Muhammad Zahir, Constable No. 881 stated that he escorted the dead body of the deceased from the place of occurrence to the District Headquarter Hospital, Nowshera while in the cross examination he stated that he had escorted the dead body from Police

Station to the District Head Quarters Hospital as he had not accompanied the police party to the spot.

ii. P.W.2 Walayat Khan, Constable No.406 stated that he signed the recovery memo Ex.PW.2/1 through which the Investigating Officer took into possession the blood stained garments of the deceased brought from the hospital by Muhammad Zahir P.W.1.

iii. Mumtaz Khan, ASI appeared as P.W.3 to depose that accused Muhammad Afzal, and Muqarrab Khan in his presence led the police party to the place of occurrence where pointation memos were prepared. He also signed the pointation memos.

iv. P.W.4, Shaukat Ali, SI/SHO of the police submitted complete challan in the court while Sher Afsar, ASI appeared as P.W.5 to state that he registered the FIR after receipt of the Murasala

v. Retd. Subedar Muhammad Akram, father of the deceased appeared as P.W.6 and verified the fact that deceased was driver of car No. 1313/GAJ and was driving the same as taxi. Two days prior to the occurrence the deceased had informed him that he would proceed to

Rawalpindi alongwith Muhammad Afzal accused. On 09.06.2001 at about 10.00.a.m. after routine work the P.W. went to taxi stand Dina and found that his son Nadeem Akram was present there. Muhammad Afzal, who was standing in a chowk, hailed the taxi whereupon his son Nadeem Akram deceased left for Rawalpindi alongwith the accused. On the next day when the deceased had not returned home the witness went to Haji Sultan, owner of the taxi and inquired about his son but he was informed that Nadeem Akram had not returned. He was informed by a nearby barbar that he had received a telephonic query from Police Station Akora Khattak inquest about his son and the taxi.

vi. P.W.7 Muhammad Farooq stated that he identified the dead body of the deceased in DHQ Hospital Nowshera on 10.06.2001 while Haji Sultan owner of the car appeared as P.W.8 and verified the fact that the car which was caught by the police of Akora Khattak belonged to him though he did not acknowledge deceased as the driver of his taxi.

vii. P.W.9 Fazal Rabbi, SI is the marginal witness of recovery memo

Ex.PW.9/1 of the vehicle seized by the I.O. The P.W. also signed some other recovery memos.

viii. Jehanzeb Khan, Inspector appeared as P.W.10 and deposed about the steps taken by him whose detail has already been given in an earlier paragraph.

ix. Lastly Dr. Waseem Yar Khan appeared as P.W.11 and stated that on 10.06.2001 he conducted postmortem examination of the dead body of Nadeem Akram and found the following:-

“EXTERNAL APPEARANCE

1. “Stout, Rigormortris developed and the clothes of deceased were contaminated with dust and sand. A fire arm entry wound of $\frac{1}{4} \times \frac{1}{4}$ in size and 03 cm above the right ibro without charring marks.
2. A fire arm exit wound of $\frac{1}{2} \times \frac{1}{2}$ cm in size on back of skull (Occipital region) brain mater, protudy from the wound. The Skull bones were fractured, scalp was injured, membrain and brain wee injured. Thorix was intact. Mouth was injured whereas, the remaining parts are intact.

OPINION.

The death occurred due to injury due to vital organs
i.e. brain by fire arm weapon.”

6. The trial court after close of the prosecution evidence examined the accused under section 342 of the Code of Criminal Procedure wherein both the appellants as well as Muhammad Afzal, the acquitted accused, took up the plea of innocence and stated that they have been falsely implicated in this case. Nawab Din accused opted not to make statement on oath under section 340(2) of the Code, whereas accused Muqarrab Khan not only gave details of the incident as he had seen it, but also appeared as DW1. In support of his contention Ghulam Hussain appeared as DW2. Both of them were duly cross-examined.

7. The learned trial court thereafter heard arguments of the parties and after appraisal of the evidence on record convicted and sentenced Nawab Din and Muqarrab Khan accused as noted in the opening paragraph of this consolidated judgment.

8. We have perused the record and also scanned the evidence adduced by both the parties including the statements of

the accused recorded under section 342 of the Code of Criminal Procedure. We have also read the relevant portions of the judgment.

9. The following facts, as they emerge from a reading of the record, have to be kept in view before arriving at some conclusion in this case.

a). It is a case of two versions. The prosecution party builds the entire story as consequence of a chase by police mobile patrol whereas the defence has just the opposite tale to tell. Incidentally both the parties claim participation in the events ensuing the murder.

b). The complainant P.W.10 Jehanzeb Khan, SHO also alleges that he saw the accused emerging out of the car at the place of occurrence. Additionally the Investigating Officer of the same complaint which was registered on the basis of the Murasala sent by him. Does the principle of fair play in the administration of criminal justice permit three roles simultaneously particularly when serious charges are leveled against accused persons who expects transparent and unbiased investigation? Justice must appear to have been done in the facts and circumstances of the case. It is possible for a police officer to be a witness and a complainant. He may even arrest the accused at the spot if he is a witness of a cognizable offence but we do not approve that he also assumes the role of an Investigating officer as well. The officer must seek assistance of

other competent officers to undertake the exercise of investigation. Law would certainly permit a police officer, who witnesses the commission of a cognizable offence, to do what the situation at that critical moment demands but the principle of safe administration of justice and fair play require that the role of investigation is assumed by an independent source. It is the right of an accused to demand fair investigation, uninfluenced by the opinion of the complainant. A witness views things from one angle whereas the canvass before an Investigating Officer is wider than the setting of a witness.

c). Admittedly, the actual occurrence under consideration was not seen by any witness of the prosecution. Even P.W.10, the complainant-cum-witness-cum-Investigating Officer does not claim having seen any one particular or more than one accused having fired at the deceased. In other words direct evidence as to who killed the deceased and the manner in which the deceased was killed at a given point of time is not available. The learned trial court has rightly found that "it is clear that the prosecution story is based on circumstantial evidence.....". It is therefore meet to see whether the circumstantial evidence adduced by the prosecution lends sufficient corroboration to bring home the guilt to the accused. The situation like this calls for a cautious assessment of the evidence and watchful analysis of the attending circumstances.

d) The four next important points for determination in this case are: i). the location of dead body after the murder. It was the front seat of the car as claimed by the prosecution and; or ii) the dead body was discovered outside the car on the road side as stated

by the defence; iii). the mode and manner of the dispatch of dead body from the place of occurrence and iv). its destination. Whether it was the police station where the dead body was taken to initially before being conveyed to the Hospital for post-mortem or it was sent directly to the hospital from the place of occurrence. The determination of these questions will go a long way to lend support to the one or the other theory.

e). The accused claimed that the deceased was with them from 8th till 10th March and it was during the night between 9/10 March, 2001 that his dead body was found lying on the road side, when he had gone to Jahangira to meet his friend.

10. After perusal of record the learned counsel for the parties were asked to formulate their points for the consideration of this Court. Learned Counsel for the appellants raised the following contentions:-

i. The dead body was taken from the place of occurrence to the police station by accused Muqarrab as stated by him and D.W.2 Ghulam Hussain.

ii. The dead body, according to the deposition of P.W.11, Dr. Waseem Yar Khan who had observed its external appearance, was " stout, Rigor Mortis developed *and the clothes of the deceased were contaminated with dust and sand*".(Emphasis Added). The presence of dust and sand on the dead body supports the contention that it was lying 70/80 yards away from the vehicle on the road side

as stated by accused Muqarrab Khan appearing as D.W.1 which fact to some extent is also supported by D.W.2 as well.

iii. The accused Muqarrab Khan is attributed the role of having shot the deceased. The allegation is that the deceased was driving the car while accused Muqarrab at the time of firing the fatal shot, was sitting behind him in the rear seat. The medical evidence does not support this allegation because the entry wound is the forehead and the exit wound is back of the skull. The injury is a clear indication that shot was fired from the right frontal side. There is neither blackening nor charring which shows that it was not a point blank shot from inside the car.

iv. The seat of injury disproves the allegation of P.W.10 Jehanzeb Khan SHO who alleged that three persons, including an accused armed with pistol, "came out of the motor car" and decamped from the spot. If this allegation that accused armed with pistol was seen emerging from the car after having shot the deceased were to be believed then the very basis of medical evidence is falsified.

v. PW 11 states that *three live bullets* of 30 bore were recovered from Muqarrab accused which were then sealed and stamps of MN were embossed. The report of the Fire Arm Expert Ex.PW 9/5 however shows that *there were five* 30 bore live cartridges sent for test. How could three bullets become five bullets while sealed in a parcel?

vi. Ex.PW 10/4 is an application dated 14.06.2001 initiated by PW10, the Investigating Officer, addressed to the trial

court for recording confessional statements of the accused under section 164 of the Code of Criminal Procedure. Along with that there are three separate orders of learned Additional Sessions Judge-II Nowshera wherein it is certified that the statements could not be recorded because the accused claimed having been tortured by the police. The accused were consequently sent to judicial lock up. This fact indicates that as a last resort the police went to the extent of extorting confessional statements from accused only because the SHO was himself the complainant, a witness and also an Investigating Officer in the same case and he wanted to secure conviction of the accused persons at any cost.

11. Learned counsel for the State however supported the judgment and stated that the accused were arrested at the spot as a result of hot pursuit and a pistol had also been recovered from Muqarrab Khan accused and the report of the Forensic Expert shows that the empty recovered from the spot had been fired from the recovered crime pistol. Lastly it was stated that the accused themselves accepted that they had hired the taxi. The motive was to grab the vehicle which design was frustrated due to the timely arrival of Police petrol. In this view of the matter the learned

counsel contended that the conviction and sentence should be maintained.

12. However, we have found the following points from a reading of the evidence:-

i. The pistol 30 bore loaded with three live bullets as well as the crime empty were recovered vide Ex.PW.9/3 and Ex.P.W.9/2 respectively. The recovered items were placed in a parcel and sealed with three stamps each with MN embossing. This was stated by P.W.10 the complainant-cum-Investigating Officer. These items were sent to the Fire Arms Expert for test on 14.06.2001. The witness during cross-examination dated 17.07.2004 admitted that even though the items contained in the sealed parcel were reportedly examined yet the initial seals of the Investigating officer bearing the stamp MN on the parcels were intact till the date he was deposing i.e. during a period of three years no one opened the parcels. In this view of the matter the report of the Expert "that the one 30 bore crime empty marked "C" was fired from the 30 bore pistol No. 15170" loses significance and the entire recovery connecting the accused with the crime stands demolished.

ii. The prosecution story is that the Police Mobile Gasht on 10.06.2001 pursued an unseen vehicle, when an intelligence about a car in which four persons were present in suspicious

condition was conveyed to them. A very basic question was put to Mumtaz Khan, ASI whether any record of movement of police is maintained? to which he responded by saying that “ usually we maintained daily diary and record of arrival and departure but no such record is available on the file of the present case”. This shows that no reliance can be placed on the alleged investigation steps undertaken by the police.

iii. P.W.10, the complainant-Investigating Officer claimed having pursued the car, allegedly carrying the accused before the occurrence. This witness stated that from Railway crossing Akora to the place of occurrence many roads emanate from the main road but surprisingly he, in response to a pointed question, stated that “we had followed the vehicle of the deceased only by tracing the signs of its Tyres.” This sort of a compass whose needle lies flat in the invisible impression of tyres on metalled road has never been heard of in practical life. This sort of explanation is simply absurd. How come that the police party followed one road when many other off shoots were there on the way.

iv. PW 6, father of the deceased, admitted that the taxi stand from where his son moved about “maintained the record of booking” but the Munshi who maintains the record of movement of taxis was not produced during investigation to confirm that it was hired.

v. PW 10, the Investigating Officer stated that constable Muhammad Zahir No.881 escorted the dead body to the hospital

after preparing "the injury sheet of the deceased Nadeem Akram". Apparently this was done at the place of occurrence but PW1. Muhammad Zahir in cross-examination stated that he "took the dead body from the police station to the Hospital. I had not accompanied the police party which visited the spot on the day of occurrence."

vi. Column No.24 of the Inquest Report Ex.PW 10/2 is absolutely blank. As required it does not indicate the place from where the dead body was discovered. The location of the dead body is required to be given in this column. However a note is given in column No.23 that the dead body is handed over to police. The name of the police constable and his number (Zahid No.881) is mentioned in a different ink and in English language. It is clearly the doing of PW.11, the Doctor who handed over the dead body to Zahid Constable after the Post Mortem examination on 10.06.2001. The signatures on the Post Mortem Report by the Doctor and nine other signatures as well as the one in column No.23 are identical. This fact also establishes that the dead body was in fact sent to the hospital from the police station where the Inquest Report forms are available. This fact also explains the reason that column No.24 was left blank. The Investigating Officer did neither mention the existence of car on a given point on the road side nor the fact that the dead body was found on the driving seat of the car.

vii. The complainant PW10 wants us to believe that he, alongwith the raiding party while on mobile patrol "received an

information that a Motor car No.1313/GAJ of white in colour Model-1987 wherein *four persons including driver in suspected condition* had gone towards Umaray” (Emphasis added). How were the passengers in the said car determined to be in suspected condition. Are the informers of police endowed with supernatural power and uncanny vision to penetrate into the mental condition of person travelling in fast moving vehicles without any obvious evidence?. If this is the basis of the alleged chase then the prosecution has utterly failed to inspire confidence in its entire story.

viii. It is not understandable as to why the pointation memos Ex.PW.3/1, P.W.3/2 and PW.3/3 were prepared by the Investigating Officer P.W.10 in this case to determine the locale of the incident when the witness had alleged to have captured the car and the accused from this particular place. This was apparently an exercise in futility or, it was an act of over smartness. However, the interesting part of these pointation memos is that nothing is mentioned therein to ascertain the place of occurrence. Even the milestone number is not mentioned nor the fact that it was a road side. The origin and destination of the road is also not mentioned.

ix. Transparent and fair investigation is a valuable right of the accused in the administration of justice. Every possible effort has to be made to prevent violation of this basic right and to make its infringement cognizable so far as possible. Combining three roles in one police officer would certainly raise reasonable apprehension in the mind of the accused

about the conduct and result of the investigation. No one can become an arbiter in the cause he espouses. Investigation or Enquiry envisages determination of the rights and liabilities of parties. This process contemplates three factors: the party, the investigator and the report of the Enquiry Officer. Two factors are already combined in one person and the result of the investigation/enquiry will determine the fate of the party i.e. the third factor. Therefore the inquiry should not only be transparent but it should appear to be fair, even handed, objective and impartial. Justice is not associated with a Judge/Qazi alone. Every person in authority is supposed to act justly. The object of judicial system, particularly in Islam, is the elimination of Zulm and maintenance of equity. The tradition of the Holy Prophet (PBUH).

الا ظلم را ح و ظلم مسئول

Each one of you is a guardian (protector, custodian, keeper, trustee) and each one of you is accountable for his charges (responsibilities, obligations).

This tradition is a pointer to a significant social aspect that each and every Muslim in authority is answerable to every other person who is under his control, jurisdiction, dominion, influence or authority. In fact every human being has been made responsible for every other person in the society.

13. Learned counsel at the end drew our attention to the following precedents though during the arguments we had already expressed similar opinion.

- a). Aksar Khan versus The State
1995 MLD 1237
- b). Tariq Pervez versus The State
1995 SCMR 1345
- c). Abdul Samad versus The State
NLR 1986 SD 144

In the case of Aksar Khan the Inspector Police was a complainant as well as an Investigator. The Hon'ble Single Judge held that "legally he could not assume this dual function and he should have entrusted the investigation of the case to another reliable and dis-interested police officer. This fact, by itself renders the very trial of the case a sheer mockery". The case of Tariq Pervez reaffirms the principle that "if a simple circumstance creates reasonable doubt in the prudent mind about the guilt of accused, then he will be entitled to such benefit not as a matter of grace and concession but as a matter of right". In the case of Abdul Samad, a Division Bench of the Federal Shariat Court held that the accused would be entitled to benefit of doubt if on the acceptance of

deposition of one witness the evidence of the other witness on the same point is falsified.

14. In the light of what has been stated above we are clear in our mind that the prosecution has failed to bring home the guilt to the accused and consequently we find it difficult to maintain convictions under both the counts and the ensuing sentences. The defence put forward by the appellant is certainly convincing. The convictions and sentences of both the appellants under section 302-34 of the Pakistan Penal Code as well as the conviction and sentence of Muqarrab Khan appellant under section 13 of Arms Ordinance are hereby set aside. Both the accused are directed to be released forthwith unless required in some other case.



JUSTICE SYED AFZAL HAIDER


JUSTICE MUHAMMAD ZAFAR YASIN

Announced in open Court
on 17.02.09 at Islamabad
MUJEEB-UR-REHMAN/*


Fit for reporting