

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

MR.JUSTICE CHEJAZ YOUSAF, CHIEF JUSTICE
MR.JUSTICE DR.FIDA MUHAMMAD KHAN
MR.JUSTICE S. A. RABBANI

CRIMINAL APPEAL No.41-Q OF 2001
CRIMINAL MURDER REF.NO.3-Q-2001

Abdul Ghafoor son of Muhammad Jumma
(Now confined in Central Jail Mach, Baluchistan)

Appellant

Versus

The State

Respondent

Counsel for the appellant

Sh.Ghulam Ahmad,
Advocate

Counsel for the State

Mr.M.Shoaib Abbasi,
Advocate.

No. & Date of FIR
Police Station

No.22/98,dt.17.10.98
P.S.Gadani, Lasbela

Date of order of
Trial court

7.6.2001

Date of institution

13.6.2001

Date of hearing

~~17.10.2005~~

Date of decision

17.10.2005

JUDGMENT

DR.FIDA MUHAMMAD KHAN,J Abdul Ghafoor, Wali

Muhammad and Baz Muhammad were convicted by Sessions Judge Khuzdar under section 17(4) Offences Against Property (Enforcement of Hudood) Ordinance, 1979. The trial court awarded death sentence to each of them. To challenge this conviction and sentence, they filed present appeal jointly. During pendency of this appeal, Superintendent Central Jail, Mach, reported that the two appellants viz. Wali Muhammad and Baz Muhammad escaped from jail on 9.10.2002. Warrants were issued for arrest of these two appellants but, since they could not be executed, on the direction of this court, the Sessions Judge conducted proceedings under section 87 and 88 of Cr.P.C. In view of the abscondence of the two appellants, the appeal was pursued, at this stage, on behalf of appellant Abdul Ghafoor only.

2. The charge, on the three appellants, was that they hired a taxi car of one Babu Fazal-e-Haq, driver, and, on the way, they snatched the taxi and killed the driver Babu Fazal-e-Haq. The prosecution case was that the taxi



car No.L-9507, driven by Abdul Ghafoor appellant, was checked at a Naka by police and he could not produce registration papers of the vehicle and, therefore, the taxi car was taken in possession by the police. The appellant was taken to the police station and the police recovered certain articles belonging to Babu Fazal-e-Haq from Abdul Ghafoor. The dead body of Babu Fazal-e-Haq driver was also found by the complainant Liaqat Ali, brother of the deceased, in a 'Nullah'. There was no witness to the incident of killing the deceased and the facts about killing of the deceased driver were revealed by the confessional statements of Baz Muhammad and Wali Muhammad recorded by a Magistrate.

3. To prove the charge, the prosecution examined 18 witnesses before the trial court and the confessions of Wali Muhammad and Baz Muhammad were proved through the evidence of Mr. Munawar Ahmad Shahwani, Judicial Magistrate, who had recorded these confessions. From the evidence placed on record, the learned Sessions Judge Khuzdar concluded that Baz Muhammad, Wali Muhammad and Abdul Ghafoor had snatched the taxi car and killed the driver Babu Fazal-e-Haq and thereby they had



committed 'Harabah', punishable under section 17(4) Offences Against Property (Enforcement of Hudood) Ordinance, 1979

4. On behalf of the appellant Abdul Ghafoor, Shaikh Ghulam Ahmad, learned counsel, contended that there was no eye witness to the incident of killing of the deceased and there was no corroboration to the confession of the co-accused. He submitted that the Judicial Magistrate was not legally competent to record the confession in a case under Hudood Laws and it should have been recorded by the trial court. He submitted that since no 'tazkia-tul-shahood' was conducted in this case, a proof required by section 7 of Offences Against Property (Enforcement of Hudood) Ordinance, 1979, was not available and, therefore, conviction under section 17(4) of the Ordinance was not legal. The learned counsel contended that the recovery of the articles was not fully supported by the witness Khalil Ahmad, who admitted that he was not present at the place where the investigation officer took the taxi in his possession. The learned counsel further contended that the F.I.R was lodged after about 13 hours. About confessions also, he submitted that they were recorded after 13 days of arrest of Baz



Muhammad and Wali Muhammad. He contended that Abdul Ghaffoor made no confession and the confession of co-accused shall not be binding on him.

5. Mr. Muhammad Shoaib Abbasi, learned State counsel, contended that although there is no eye witness of murder of the driver in this case, but the recovery of the articles, supported by the witnesses, corroborates the confession made by the co-accused persons, which can be considered as circumstantial evidence against the appellant, under Article 43 of Qanoon-e-Shahadat Order, and the case of the prosecution stood proved by the unbroken chain of the circumstantial evidence.

6. The points for determination in this case were:

- i) Whether Babu Fazal-e-Haq taxi driver was murdered;
- ii) Whether the present appellant Abdul Ghaffoor was involved in murder of Babu Fazal-e-Haq;
- iii) Whether the taxi was snatched by Abdul Ghaffoor; and
- iv) What offence has been committed by Abdul Ghaffoor ,
appellant .



7. The point No.1 stands proved by the evidence of Dr.Farrukh, who, on 17.10.1998, conducted examination post mortem on the dead body, supported by the evidence of complainant-Liaqat Ali who found the dead body tied with a rope. The medical officer noted the following injuries on the dead body:

1. Rope mark on neck left side more prominent
2. Bleeding from nostrils
3. Abrasion 1 inch $\frac{1}{2}$ inch top of left shoulder with achymosis around it
4. Scratch, two in number, 6 inch in to 4 inch each on right fore arm
5. Rope marks on right and left fore arm near wrist joint on left fore arm more prominent
6. Scratch deep 8 inch other 6 inch on left side of chest
7. Multiple scratches 8 in number right lumber region of back 4 inch each
8. Rope marks on right and left arm near elbow joint
9. Multiple scratches whole back
10. Rope mark on right and left leg near ankle joint

According to him, the cause of death was strangulation and the weapon used was a rope.

8. Complainant Liaqat Ali is brother of the deceased. He stated that on 16.10.1998 he went in search of his brother Fazal-e-Haq as he had not returned till his usual time of return. Abdul Hafeez, complainant's brother, has also corroborated his evidence. He, along with his brother Shaukat Ali and Abdul Hafeez and cousin Ali Akbar, went in search of his brother Babu

Fazal-e-Haq and found dead body of Fazal-e-Haq in a 'nullah', and the dead body was tied with a white rope and handkerchief. This evidence is sufficient to prove the first point beyond a reasonable doubt.

9. Appellant Abdul Ghafoor made no confession, but co-accused Wali Muhammad and Baz Muhammad made a confession before P.W Munawar Ahmad Shahwani, Judicial Magistrate Quetta. Mr.Munawar Ahmad Shahwani stated that, after all legal formalities, he recorded confession of Baz Muhammad and Wali Muhammad. He produced these confessional statements. He stated that the accused gave these statements voluntarily.

10. In the case of Abdul Ghafoor, these confessional statements of the co-accused, produced by Judicial Magistrate, can be used as circumstantial evidence under Article 43 of Qanun-e-Shahadat Order, 1984.

11. Co-accused Baz Muhammad gave details of their actions before the commission of the offence and stated that they purchased a white rope and Abdul Ghafoor asked him to hire a taxi of new model and they hired one such taxi for Rs.150/- and went to Moosa Goth, where, at the instance of Abdul Ghafoor, he asked the driver to stop and the vehicle was stopped.

According to this confessional statement, Abdul Ghafoor and Wali Muhammad over powered the taxi driver and Baz Muhammad took the control of the taxi. He said that they took the driver towards a jungle. He said that Abdul Ghafoor asked him to bring knife from the vehicle and when he came back, they started back, leaving the driver there. Baz Muhammad stated that he asked Abdul Ghafoor about the driver, on which Wali Muhammad told him that they had fasten the hands and foot of the driver with the rope and rope was also tied around his neck.. Baz Muhammad further stated that, on the way, police gave a signal to stop but Abdul Ghafoor asked him not to stop . When they reached Bella, the police made them stop by closing the road and asked for papers relating to the taxi. He said that Abdul Ghafoor gave some papers to police with identity card of the driver. Then SHO took them to police station.

12. Co-accused Wali Muhammad gave similar details and said that they had fasten the driver and Abdul Ghafoor tied him with the rope. He said Abdul Ghafoor had taken the driver towards jungle. He said that Abdul Ghafoor gave a watch of the driver to Baz Muhammad and, on his refusal,

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he gave it to him. He said that Abdul Ghafoor told them that he had killed the driver by fastening a rope around his neck. This accused further stated that police stopped them at Bella and demanded papers of the vehicle and Abdul Ghafoor took out a wallet of the driver from his pocket which contained the identity card of the driver and some other papers and then the SHO Gul Muhammad took them to police station.

13. These statements, made before the Magistrate, suggest that Abdul Ghafoor killed the driver Babu Fazal Haq by strangulation with a rope and P.W. Liaqat Ali found the dead body fastened with a rope. He stated that he untied the dead body and left the rope on the spot. Said rope was recovered by the police witnesses from that place.

14. Other articles belonging to deceased recovered from Abdul Ghafoor include driving licence of the deceased, one photograph of the deceased, one certificate issued by District Magistrate Lasbella, one receipt of battery, copies of some other receipts and one wallet. The SHO also recovered one handkerchief, one rope and one shirt pocket detached from the shirt. The memoes of recovery have been produced on record and the witnesses to the



recovery supported the version about recovery. The medical officer had found that cause of death of Babu Fazal Haq was strangulation, with the use of rope. The taxi car was also recovered from possession of the appellant.

15. The medical officer found bleeding from nostrils of the deceased. The S.H.O had secured the shirt of Abdul Ghafoor which was blood stained. It was sent to the laboratory for analysis and the Chemical expert in the Laboratory reported after test that all the articles, including the shirt and the rope, were stained by human blood. This un-broken chain of circumstantial evidence leads to the conclusion that appellant Abdul Ghafoor caused death of the driver Fazal-e-Haq by strangulating with use of a rope.

16. The learned counsel for the appellant has raised a point that in the cases under Hudood Laws, a confession should be recorded before the trial court and it cannot be recorded by a Magistrate, as was done in this case. This impression is created, with regards to confession, due to unwary drafting of the Hudood Laws. The provision about proof liable to Hadd in section 7 of

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Offences Against Property (Enforcement of Huddud) Ordinance, 1979 in clause (a) has been correctly drafted as under:

“(a) The accused pleads guilty of the commission of the offence liable to Hadd;”

but in the other laws viz. the Offence of Zina (Enforcement of Huddud) Ordinance, 1979, The Offence of Qazf (Enforcement of Hadd) Ordinance, 1979, and the Prohibition (Enforcement of Hadd) Order, 1979, corresponding provision has been drafted in different words. The intention of law, in all these cases, was that a plea of guilt before the trial court was sufficient proof of the offence liable to Hadd.

17. The words used in clause (a) of section 3 of Offence of Zina (Enforcement of Huddud) Ordinance, 1979, are not same as used in section 7 of Offences Against Property (Enforcement of Huddud) Ordinance, 1979. In clause (a) of section 3 Offence of Zina (Enforcement of Huddud) Ordinance, 1979, clause (a) of section 6 of Offence of Qazf (Enforcement of Hadd) Ordinance, 1979, and clause (a) of section 9 of Prohibition (Enforcement of Hadd) Order, 1979, instead of a 'plea of guilt', 'making of a confession' has been mentioned. The use of word 'confession' in these

provision creates an impression that it was a 'confession' that is recorded, during investigation, under section 164 Cr.P.C. As a matter of fact, this clause in these three laws, was the same as clause (a) of section 7 Offences Against Property (Enforcement of Hudood) Ordinance, 1979, and it was that if the accused pleads guilty before the trial court, it would be sufficient proof of his guilt for imposing Hadd. Under section 164 Cr.P.C, only a Magistrate is authorized to record confession.

18. Since the proof in the present case was not in accordance with section 7 of the Ordinance, as neither the accused pleaded guilty, as required under clause (a), nor requirement of Tazkiatul Shuhood was fulfilled, as required by clause (b) of this section, the accused/appellant could not be convicted under section 17(4) of the Ordinance. However, since it is proved beyond doubt that qatl-e-amd of driver Babu Fazale Haq was committed, the offence would fall under section 302(b) PPC. As it is proved by the evidence placed on record that the taxi and other articles belonging to the deceased were recovered from appellant Abdul Ghafoor and he was involved in qatl-e-amd of the taxi driver, he is also liable under section 392 PPC. The appeal of Abdul Ghafoor is, therefore, dismissed. However, conviction recorded against appellant Abdul Ghafoor son of Muhammad Junma, by the learned Sessions Judge, Khuzdar vide judgment dated 7.6.2001 is altered from under section 17(4) of the Offences Against

Property (Enforcement of Hudood) Ordinance, 1979, to that under section 302 (b) PPC, read with section 392 PPC, and he is sentenced as under:

- 1) Under section 302 (b) PPC Death sentence. The appellant shall be hanged by neck till he is dead.
- 2) Under section 392 PPC To undergo R.I for ten years and a fine of Rs.ten thousand or, in default thereof, to further suffer S.I for six months.

With the above modification in the conviction and sentences of the appellant, criminal murder reference No.3/Q of 2001 is answered in affirmative to the extent of Abdul Ghafoor.


DR.FIDA MUHAMMAD KHAN
JUDGE


CH.EJAZ YOUSAF
CHIEF JUSTICE

Islamabad, 17.10.2005
M.Akram/

S. A. RABBANI, J. Agreeing with the reasons and verdict given by my learned brothers I feel that scrutiny of section 302 PPC, as it stands after amendment, is necessary. Following is the present shape of this section:

Sec.302. Punishment of qatl-I-amd. Whoever commits qatl-I-amd shall, subject to the provisions of this Chapter, be:

- (a) punished with death as qisas;
- (b) punished with death or imprisonment for life as ta'zir, having regard to the facts and circumstances of the case, if the proof in either of the forms specified in section 304 is not available; or
- (c) punished with imprisonment of either description for a term which may extend to twenty-five years, where according to the injunctions of Islam, the punishment of qisas is not applicable."

2. Clause (b) of this section provides for a sentence of death, or imprisonment for life as ta'zir, in a case where proof as provided under section 304 PPC is not available. This makes a reference to section 304 PPC for mode of proof viz. the requirement in respect of evidence. Section 304 PPC mentions two forms of evidence in its clauses (a) and (b). Clause (a) mentions a confession and clause (b) again refers to Article-17 of Qanun-e-Shahadat Order, 1984. Thus, if an evidence, other than a confession, is required to prove Qatl-e-amd liable to Qisas, it shall be the evidence as provided in Article 17 of the Qanun-e-Shahadat Order. Article 17 of Qanun-e-Shahadat Order 1984, in its sub-section (2), provides two categories of the evidence. Clause (a), which relates to matters pertaining to financial or

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future obligations, is applicable to civil cases only. The evidence relevant to section 304 PPC would be what is given in clause (b), which says that, in all other cases, the court may accept or act on the testimony of one man or one woman or such other evidence as the circumstances of the case may warrant.

It can be seen that this clause does not provide for any specific evidence and, thus for proof of qatl-e-amd under section 304 PPC, any sort of evidence, warranted in the circumstances, may be accepted for such a proof. There is, therefore, no substantial basis for distinction in clauses (a) and (b) of section 302 PPC.

3. Clause (1) of Article 17 of Qanun-e-Shahadat Order, 1984 provides that competence of a person to testify, and the number of witnesses required in any case, shall be determined in accordance with the injunctions of Islam as laid down in the Holy Quran and Sunnah. The number of witnesses to prove a murder for qisas has neither been prescribed in the Holy Quran nor by Sunnah of the Holy Prophet (SAW). There is no case in the history, during the life time of the Holy Prophet (SAW), in which any specific

number of witnesses was demanded for proof of qatl-e-amd for the purpose of Qisas.

4. Clause (I) of Article 17 of the Qanun-e-Shahadat Order limits the requirement to the Holy Quran and Sunnah and there is nothing in the Holy Quran or Sunnah about any specific number of witnesses required to prove qatl-e-amd for qisas. In these two sources of law, the competence of a person to testify is applicable in the case of all crimes and it would not make a difference for proof of a qatl-e-amd in the cases where qisas is applicable and those where a killer is sentenced to death as ta'zir, and accused may be punished under section 302 (b) PPC only when it is proved that he has committed the offence of qatl-e-amd and it stands proved that he has killed a person for which he is being punished. There is, therefore, no wisdom in depriving the legal heirs of the person killed of their right of qisas or diyat.

5. The condition of Tazkiya-Al-Shuhood, although does not have its origin in the Holy Quran or Sunnah, has been provided in the cases of Hudood laws in the Hudood Ordinances but it has nowhere been provided in law for applicability in the cases of proof of qatl-e-amd for qisas.

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6. Moreover, whole of the section 302 PPC has been made compoundable under section 345 Cr.P.C. and they are heirs of the victim who may compound, although it can be with the permission of the court.

Thus the offence of qatl-e-amd may be compounded by the heirs of the victim in all the three categories in section 302, and, with the permission of the court, the legal heirs can also compound the offence even if the punishment of death has not been awarded on proof required for qisas.

Under section 345 Cr.P.C, the heirs can even compound a case where the punishment has been awarded as ta'zir, or even where, under the Injunctions of Islam, punishment of qisas is not applicable.

6. Section 310 PPC provides for compounding of right of qisas in qatl-e-amd, but even if the right of qisas is not available in a case, it can be compounded under section 345 Cr.P.C. It can, therefore, be seen the categorization of the punishment in section 302 PPC is without any substantial basis and is inconsequential.

7. Section 302 Pakistan Penal Code was made compoundable in view of

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the right of Qisas conferred by Holy Quran. In case, the categorization in this section has a real basis, the cases under clauses (b) or (c) have no justification for making them compoundable, for absence of right of qisas.

The law needs reconsideration for its rectification.



S. A RABBANI
JUDGE

'Akram'

APPROVED FOR REPORTING.



JUDGE