

**IN THE FEDERAL SHARIAT COURT**  
**( Appellate / Revisional Jurisdiction )**

**PRESENT**

**MR. JUSTICE HAZIQUL KHAIRI, CHIEF JUSTICE**  
**MR. JUSTICE DR. FIDA MUHAMMAD KHAN**  
**MR. JUSTICE SALAHUDDIN MIRZA**  
**MR. JUSTICE MUHAMMAD ZAFAR YASIN**

**CRIMINAL APPEAL No. 93/L of 2006** L.W.  
**CR.REF.NO.4/L OF 2006**

1. Ghulam Nabi son of Shah Zor Ali, Caste Maiman r/o House No.24/G Near Hussaini Imam Brgha, Kachi Abadi, Korangi, Karachi.
2. Kalandar Bakhsh son of Haji Ghouse Bakhsh, Caste Abhro, r/o House No.1402 Zia Colony, Kachi Abadi, Korangi, Karachi.
3. Mumtaz son of Haji Miraj, Caste Abhro, r/o House No.21, Madina Colony, Ghulshan-e-Iqbal, Karachi.

.....Appellants

**VERSUS**

The State

--- Respondent

Counsel for appellants

--- Kh. A. H. Khalid Butt and  
Mian Junaid Razaq,  
Advocates

Counsel for State

--- Syed Ali Imran, D.P.G.  
Mr. Asjad Javaid Ghural, D.P.G.

F.I.R. No. Date & Police  
Station

--- 115/2002, 22.07.2002. P.S.  
Kameer, Sahiwal.

Date of the Judgment of  
Trial Court

--- 10.03.2006

Date of Institution

--- 20.04.2006

Date of hearing

--- 16.01.2008 & 24.01.2008

Date of decision

--- 14-3-2008

**JUDGMENT:**

**HAZIQUL KHAIRI, CHIEF JUSTICE:-**

**Appellant Ghulam Nabi, Kalandar Bukhsh and**

**Mumtaz have impugned the judgment, dated**

**10.3.2006 of the learned Additional Sessions**

**Judge, Sahiwal, whereby the right hand of each**

**appellant from the wrist and left foot of each**

**appellant from the ankle are to be amputated**

**under section 17(3) of the Offence Against**

**Property (Enforcement of Hudood) Ordinance, 1979**

**(hereinafter referred to as "the said Ordinance").**

**2. Briefly, on 22.7.2002 at about 11.15 a.m.,**

**complainant Khalid Iqbal, Manager (PW.1),**

**Muhammad Ashraf, Assistant Clerk (PW.2) and**

**Muhammad Naeem, Cashier (PW.3) and two**

**Gunmen armed with fire arms were present at their**

**Bank namely National Bank, Adda Shabeel when**

**the appellants armed with pistols entered into the**

**bank while their fourth companion Imran alias Mani**

**remained outside the bank in a Suzuki car. They**

**over-powered the gunman at the entrance of the**

**bank and snatched his gun. One of the appellants**

**fired at other gunman who was standing in cabin**

**which hit him on his arm. They looted Rs.3,87,905/-**

**from Muhammad Nadeem, Cashier, and then ran**

**toward the car. In the meanwhile, one gunman**

**pressed the emergency alarm button while the**

**other gunman climbed over the roof of**

**the bank and raised alarm. The complainant also informed the police on telephone immediately.**

**The public present at Adda**

**stopped the appellants from entering into the car**

**whereupon they fired at them. In the meanwhile,**

**police reached there and arrested the appellants**

**with looted money and fire-arms. However,**

**accused Imran fled away in the car. Due to firing,**

**made by appellants, two gunmen alongwith a**

**number of persons (whose names were mentioned**

**in the FIR) were injured.**

**3. The appellants denied the charge and**

**claimed their trial. The prosecution produced ten**

**witnesses whereafter the statements of the**

**appellants were recorded under section 342 Cr.P.C.**

**In reply to a question as to why the PWs. had**

**deposed against them, each one of them said:-**

**“I belong to Sindh Province and living in Karachi. I deal in sale and purchase of cattle and after purchasing cattle from the Punjab Province sell the same in Karachi. On the alleged day of occurrence I had come to purchase cattle and had just got down from the bus at Adda Shabeel, all of a sudden firing started and numerous persons started throwing brick bats. I also received few injuries and so many other persons present at the Adda also received injuries.”**

**4. As far as the evidence adduced by the prosecution is concerned, it is an open and shut case of conviction of the appellants. PW.1**

**Muhammad Khalid Iqbal, Manager of the bank,**

repeated in his testimony all material details as found in his F.I.R. duly supported by the testimony of PW.2 Muhammad Ashraf, Assistant Clerk in the bank and PW.3 Muhammad Naeem, Cashier of the bank. PW.9 Talib Hussain, a Cultivator from public, also corroborated the testimony of PW.1 and others. In short there is no cavity in the depositions of prosecution witnesses and the case is fully established against the appellants beyond any shadow of doubt. Accused Imran was declared P.O.

5. Although it is a simple case of bank robbery but a high profile matter in terms of sentence awarded to the appellants namely amputation of right hand from wrist and

**amputation of left foot from ankle under section 17(3) of "the said Ordinance".**

**6. The main thrust of arguments advanced by Mr. Khalid Butt, learned Counsel for the appellants is two-fold, firstly the case does not fall within the ambit of Tazkiya-al-Shuhood as there was no inquiry to the truthfulness of the witnesses and their abstinence from major sins, which is mandatory for the punishment as Hadd under section 7 of "the said Ordinance" and, secondly, the testimony of bank employees namely PWs. 1,2 and 3 is inadmissible in Sharia as they are the employees of the bank and their relationship is of master and servant.**

**7. As regards the first point raised by the learned counsel for the appellants it would be advantageous to reproduce section 7 of "the said Ordinance" which reads as under:-**

**"Section 7: The proof of theft liable to Hadd shall be in one of the following forms, namely:-**

- (a) The accused pleads guilty of the commission of theft liable to Hadd; and**
- (b) At least two Muslim adult male witnesses, other than the victim of the theft, about whom the Court is satisfied, having regard to the requirements of Tazkiya-al-Shuhood, that they are truthful persons and abstain from major sins (Kabir), give evidence as eye-witnesses of the occurrence:**

**Provided that, if the accused is a non-Muslim, the eye-witnesses may be non-Muslim:**



**Provided further that the statement of the victim of the theft or the person authorized by him shall be recorded before the statements of the eye-witnesses are recorded."**

**8. What brings into fore is that section 7 of "the said Ordinance" envisages that three conditions have to be fulfilled for proof of theft liable to Hadd, namely (i) there shall be an inquiry by the trial Court as to the credibility of at least two male eye witnesses (ii) the credibility of eye witnesses shall be determined on the basis of their truthfulness and abstinence from major sins (iii) the statement of the victim of the theft or the person authorized by him shall be recorded before the statements of eye witnesses are recorded.**

9. In the present case, the victim of the theft is a bank which is a fictitious person/entity and is not a natural person. Being a fictitious person it cannot adduce evidence of the theft personally but only through its agent or representative and in the circumstances of the case its representative to record statement on its behalf is the bank Manager viz PW.1 Muhammad Khalid Iqbal. His statement on behalf of the victim was recorded before the statement of other eye-witnesses were recorded namely Officer Grade-III, PW.2 Muhammad Ashraf and Cash Officer PW.3 Muhammad Naeem Watoo and others.

**10. We fear the contention that the evidence of Bank employees is inadmissible under Sharia has no force and is without any substance. Firstly, the owner is a Banking company and is a fictitious person. Its real owners are its share holders who may change from time to time and probably run into thousands. Its employees owe no loyalty to them directly or legally and there is no privity of contract between them and the employees of the Bank.**

**11. Secondly fictitious legal entities or statutory/corporate bodies were not in existence in the days of Holy Prophet (Peace be upon Him) and the relationship of master and servant existed only**

**between natural persons. Apart from this if such argument is accepted then all the dacoits and robbers shall have free hand to commit dacoity and robbery of Banks without any fear and in due course there shall not be any Bank at all. Last but not the least our Qanun-e-Shahadat does not recognize any such exception. In chapter-II of Qanun-e-Shahadat Ordinance 1984 all persons are competent to testify unless otherwise specifically debarred. There is nothing therein imposing any legal disability on the employee or servant of any one including a fictitious person to testify under Sharia Law in a matter concerning his employer.**

**12. What boils down now is the credibility of eyewitness on the touchstone of Tazkiya-al-Shuhood i.e. their being truthful person and their abstinence from sins (Kabir) within the meaning of Section 7 of the Ordinance. Mr. Hammad Khalid Butt learned counsel for the appellants brought to our notice the manner in which the learned trial Court dealt with the truthfulness and abstinence from major sins of PWs.1, 2 and 3 and how he failed to identify the person authorized to represent the victim namely the National Bank and also other witnesses as required under Section 7 supra. He treated all the employees of the Bank alike. However, the manner in which their credibility i.e.**

**Tazkiya-al-Shuhood was examined by him was as**

**under:-**

**“PW.1 Muhammad Khalid Iqbal son of Iqbal Ahmad, Caste Mughal, age 53 years, Regional Inspector, National Bank of Pakistan, Regional Headquarter, Sahiwal, on oath.**

**Q.1 Have you ever told a lie?**

**Ans: Yes. I might have told lie on certain occasions.**

**Q.2 Have you ever committed any of the major sins like zina etc.?**

**Ans: No.**

**Q.3 Do you offer prayer regularly?**

**Ans: Yes.**

**(On the basis of the questions put to the witness the Court is satisfied that the witness is a truthful witness and abstains from major sins. Let his statement be recorded.)**

**PW.2 Muhammad Ashraf son of Taj Muhammad, Caste Joiya, aged 33, Officer Grade-III, National Bank of Pakistan, Arifwala, resident of Chak No.153/9-L, Tehsil and District Sahiwal, on oath.**

**Q.1 Had any criminal case been registered against you?**

**Ans: No.**

**Q.2 Have you told lie ever in life?**

**Ans: No.**

**Q.3 Have you ever committed any major sin like zina etc.?**

**Ans: No.**

**(On the basis of the questions put to the witness I am satisfied that the witness is truthful.**

**Let his statement be recorded).**

**PW.3 Muhammad Naeem Wattoo son of Mian Muhammad Yar, Caste Wattoo, aged 40 years, Cash Officer, NBP Thana Bazar Branch, Arifwala, r/o Chak No.161/EB, Tehsil Arifwala, District Pakpattan Sharif, on oath.**

**Q.1 Have you ever told a lie?**

**Ans: No.**

**Q.2 Have you ever committed any of the major sin?**

**Ans: No.**

**Q.3 Do you offer prayer regularly?**

**Ans: I do not offer prayer regularly.**

**(On the basis of the questions put to the witness the Court is satisfied that the witness is a truthful witness and abstains from major sin. Let his statement be recorded.)"**

**13. It was submitted by the appellants'**

**counsel that inquiry such as made by the learned**

**trial Judge is no inquiry in the eyes of law and is**

**perverse and arbitrary. In support he placed**

**reliance on Amjad Pervez Vs. The State, 2004 YLR**

**1592 FSC in which it was held by the Federal**

**Shariat Court that "Tazkiya-al-Shuhood" is a**

**mandatory requirement and that:**

**"According to Islamic Fiqh it would be desirable if the witnesses are scrutinized through credible persons (Muzakkis) preferably of the same walk of life to which the witness belongs if they happen to know or could gather correct information about their dealings, conduct and behavior."**

14. **The Supreme Court of Pakistan in the case Ghulam Ali Vs. The State PLD 1986 SC 741 dealt at length with credibility of witnesses and the mode and manner of inquiry and held as follows:**

**"No one who has deposed or who has come to depose for the prosecution in a case of Hadd**



would be willingly disclosing that he has some defects of character or that he is not a truthful person. No doubt it is necessary to put searching questions to him and cross-examine him so as to discover what he wants to conceal from the Court. The statement of the witnesses by itself is not enough to give the verdict in his favour. There is need for Muzakkis whose number is not fixed. But even if one Muzakki (a referee and the person who gives evidence about truthfulness of the witness) is examined for each witness, he should be present when the witness is being subjected to questioning for Tazkiya-al-Shuhood. The Muzakki should also be questioned about his antecedents and character and dealings. These elements amongst other very important ones are essential. They can easily be found from any book of Fiqah. As to how and what questions are to be asked can also be found. All the

books which have already been referred made reference to these matters. In the present case the only referee which, trial Judge nominated to test the veracity and quality of the eye-witnesses was the Muharrir of the Police Station who sent a report that there was nothing against them in the record of the Police Station. This hardly falls within any modes of the Tazkiya-al-Shuhood. Even if a question had to be asked from the Moharrir in the secret inquiry it should have been addressed to him in a closed envelope asking various questions to which the Muharrir would have answered after making due inquiry in this behalf and then the Muharrir should also have been examined regarding his report. The trial Court thought it enough that the report of the Muharrir was endorsed by an A.S.I. This mode to say the least was the mockery after Tazkiya-al-Shuhood."

**15. Earlier in the case of State Vs. Amir Zaman Nawaz and 4 others, PLD 1979 SC (AJ&K) 78, it was held that it is the obligation of Qazi to ascertain sagaciousness of witness and Tazkiya is neither a part of cross-examination nor a substitute for cross-examination which should be done by holding inquiry by Qazi, openly or secretly, himself or through an official purgatory to ascertain whether witness making statement is a person of unimpeachable character or just and sagacious. Other cases on which we were able to lay our hands were Abdus Salam Vs. The State 2000 SCMR 338 and Allah Ditta Vs. The State PLD 1992 Lahore 45.**

16. **What then follows is that the learned Additional Sessions Judge was extremely callous and unmindful in awarding the grave punishment to the appellants completely closing his eyes to the requirements of Tazkiya-al-Shuhood. He cared not to appoint Muzakkis to inquire about the truthfulness of witnesses and their abstinence from major sins. He rather took upon himself this onerous job. However, the manner in which he conducted the inquiry was nothing but a mockery of high order based upon ignorance, personal whims and pervert outlook. To him PW.1, who on certain occasions tells lies is as credible as PW.2 who never tells lies. Again PW.3 who never offers**

**prayers at all is as good as PW.1 who offers prayers regularly. This superfluous and summary inquiry and the casual manner in which it was held was in clear violation of the requirements of Tazkiya-al-Shuhood under section 7 of “the said Ordinance”.**

17. **While parting with this aspect of the case, we may add here that nowhere under “the said Ordinance” or elsewhere in our laws major sins have been defined. Different religious communities and societies have their own concepts of major sins and their own cannons of**

**morality and dictates of religious beliefs. In many**

**Societies sins are distinguishable from crime but in**

**some they are inseparable from crimes. However,**

**for our purpose let us examine which are major**

**sins under Sharia.**

**Narrated Anas bin Malik Allah's Apostle**

**Muhammad (Peace be upon Him) mentioned the**

**greatest sins. He said, "To join partners in worship**

**with Allah, to kill a soul which Allah has forbidden**

**to kill, and to be undutiful or unkind to one's**

**parents." The Prophet added, "shall I inform you of**

**the biggest of the great sins? That is the forged**

**statement or the false witness." (The Book of Al-**

**Adab, chapter on "undutiful to one's parents"**

**Al-Jamil' al Sahib lil-Bukhari, Kazi Publications,  
Lahore, Vol.8, page.7).**

**Narrated Abu Huraira: Prophet said, "Avoid the  
seven great destructive sins." The people enquired,  
"O Allah's Apostle What are they? "He said, "To join  
in worship along with Allah, to practice sorcery, to  
kill the life which Allah has forbidden except for a  
just cause, (according to Islamic law), to eat up  
Riba (usury) to eat up an orphan's wealth, to back  
the enemy and fleeing from the battlefield at the  
time of fighting and to accuse chaste women, who  
are good believers. (The book of al-Wasaya; Al-  
Jami al Sahih Lil-Bukhari, Kazi Publications,  
Lahore, Vol.4, Page.23).**

**18. The opinion of the companions of the Holy Prophet regarding the number of Major Sins is different. The number is either four, seven or eleven. Abd Allah Ibn Masud says: Major sins are four. According to Abd Allah ibn Umr these are seven. Abd Allah ibn Amr ibn al'As counted it as nine. According to Abd Allah ibn Abbass Major sins are seventy. Minimum number is seven, he also said that the number of Major Sins is seven hundred. (Dr. Wahabah al Zuhailly: Al- Tafseer al Munir fi al Aqeedah wa al Shari'ah wa al Manhaj. Dar al Fikr Beirut 1998/1418, Vol. 5, page 40.)**

**According to Mufti Muhammad Shafi sin for which a punishment has been prescribed by the Holy Quran**



**or the words of la'nat have been revealed or the punishment of hell has been announced, all these are Major Sins. (Ma'arif al Quran published by Services book Club, G.H.Q. Rawalpindi 2002, Vol.2, page 385.)**

**Mindful of our constitutional duties, we may**

**state that Quran and Sunnah shall always serve as**

**our guide in determining what are major sins and**

**would state further that in order to ascertain**

**whether a witness successfully stands to the test**

**of Tazkiya-al-Shudood, the appointed Muzaki or any**

**one in his place, should have social, cultural**

**and religious interaction with him. Any casual inquiry or formal relationship with him shall not fulfill the requirements of Tazkiya-al-Shuhood and would defeat the very purpose of credibility of a witness as embedded in the concept of Tazkiya-al-Shuhood.**

19. **In view of the foregoing discussion, the prosecution has been fully able to establish its case of robbery against the appellants against whom there is irrebutable evidence falling under Tazir Laws whereby the Bank was robbed to a tune of Rs.3,87,905/-, during the course of which the appellants caused injuries to a number of persons.**

**Learned Counsel for the appellants pointed out to a few minor discrepancies here and there in the depositions of PWs but in view of over-whelming and confidence inspiring evidence adduced by the prosecution such discrepancies would fade away into oblivion. Resultantly the appellants' conviction & sentence under Section 17(3) of the Offences against Property (Enforcement of Hudood) Ordinance, 1979 are set aside, however, they shall stand convicted under Section 394 PPC (Tazir) and sentenced to ten years R.I. each alongwith fine of Rs.10,000/- payable by each of the appellants, in default whereof they shall undergo 3 months S.I.**

**each. The appellants shall be entitled to benefit  
under Section 382-B Cr.P.C.**

Criminal Reference is not confirmed and answered  
in negative.

~~Justice Haziqul Khairi~~  
**Justice Haziqul Khairi**  
**Chief Justice**

~~Justice Dr. Fida Muhammad Khan~~  
sd/

**Justice Dr. Fida Muhammad Khan**

sd/

**Justice Salahuddin Mirza**

sd/

**Justice Muhammad Zafar Yasin**

**Announced** at Islamabad

14.3.2008

Approved for re-issuing

~~Justice Muhammad Zafar Yasin~~

14/3/08