

IN THE FEDERAL SHARIAT COURT
(APPELLATE JURISDICTION)

PRESENT

MR. JUSTICE SYED MUHAMMAD FAROOQ SHAH
MR. JUSTICE SHAUKAT ALI RAKHSHANI

CRIMINAL APPEAL NO.27-P OF 2004

MANZAR ULLAH SON OF MUSAFAR, RESIDENT OF
MATKANI QALANGI ILLAQA SWAT

APPELLANT

VERSUS

1. ASGHAR SON OF WARIS KHAN RESIDENT OF MATTA SHANKAR, MARDAN.
2. MST. BAKHT PARI WIFE OF WARIS KHAN RESIDENT OF MATTA.
3. KHAN ZAMIR SON OF SHAHZAMIR RESIDENT OF FAQUIR ABAD MAJOKAI TEHSIL AND DISTRICT CHARSADEA.
4. THE STATE.

RESPONDENTS

CRIMINAL APPEAL NO.32-P-2004

THE STATE

APPELLANT

VERSUS

1. ASGHAR SON OF WARIS KHAN RESIDENT OF MATTA SHANKAR, MARDAN.
2. MST. BAKHT PARI WIFE OF WARIS KHAN RESIDENT OF MATTA.
3. KHAN ZAMIR SON OF SHAHZAMIR RESIDENT OF FAQUIR ABAD MAJOKAI TEHSIL AND DISTRICT CHARSADEA.

RESPONDENTS

CRIMINAL APPEAL NO.40-P OF 2007

MANZAR ULLAH

APPELLANT

VERSUS

1. SARTAJ SON OF ZARNOSH, RESIDENT OF
MISKEENABAD, TEHSIL TAKHT BHAI, DISTRICT
MARDAN AND
2. THE STATE.

RESPONDENTS.

COUNSEL FOR THE APPELLANT

NEMO.

COUNSEL FOR THE RESPONDENTS

NEMO

COUNSEL FOR THE STATE

MALIK AKHTAR HUSSAIN
AWAN, ASSISTANT A.G,
KPK.

FIR NO. AND
POLICE STATION

NO.308 OF 2001 DT.29.08.2001,
P.S. LUND KHWAR, DISTRICT
MARDAN

DATE OF JUDGMENTS
OF TRIAL COURT

30.04.2004 AND 24.09.2007,
RESPECTIVELY

DATES OF PREFERENCE OF
APPEALS IN FSC

1. CR.A.NO.27-P-2004

02.06.2004

2. CR.A.NO.32-P-2004

28.06.2004

3. CR.A.NO.40-P-2007

14.12.2007

DATE OF HEARING

02.04.2018

DATE OF DECISION

02.04.2018

JUDGMENT:

SHAUKAT ALI RAKHSHANI, J:- By means of this common judgment, we intend to decide three appeals, bearing Criminal Appeal No.27/P of 2004 filed by Manzar Ullah, Criminal Appeal No.32/P of 2004 filed by the State against the respondents Asghar, Mst. Bakht Pari and Khan Zamir as well as Criminal Appeal No.40/P of 2007 filed by Manzar Ullah against Sartaj and another whereby the respondents after full dress trial have been acquitted of the charge framed under section 17(4) of Offences Against Property (Enforcement of Hudood) Ordinance, 1979 (hereinafter referred to as the Hudood Ordinance, 1979) by Additional Sessions Judge cum Judge Special Court Mardan at Takht Bhai, (hereinafter referred as trial court) in case, FIR No.308/2001, registered with Police Station Lund Khwar.

2. Precisely, the facts gleaned from the FIR, reveals that on 29.8.2001 at about 3.10 p.m, the local police of Lund Khwar reached the crime scene after receipt of the information that a dead body was lying in a Datsun (Pick-up) near Islam Bacha Korona, Sakha Kot, whereafter, the appellant/complainant Manzar Ullah lodged the FIR bearing No.308/2001 (Ex.PA) with the averments, that he is conductor of Datsun bearing No.4210/DIR, while Rashid Khan(deceased) was driver and that they used to ply taxi

on the route between Bat Khela and Hissar Baba. He added, that while they were present at Hissar Baba Adda, at about 12.00 p.m, two young men along with two women came and hired their taxi for Jalala, whereof Rs.550/- was fixed as fare. According to him, when they reached near Jalala Bridge, 6/7 persons, who had muffled their faces appeared being armed with pistols and Kalashnikovs and attempted to snatch the Datsun, but during the resistance shown by the driver, one of the culprits made firing with his Kalashnikov, whereby the driver Rashid Khan was hit and he succumbed to the injuries on the spot, whereafter, he was taken blindfolded at a distance and left them alongwith Datsun and made their escape good.

3. After registration of the FIR, P.W.16, Aurangzeb,ASI prepared site plan Ex.PW.15/1, on the pointation of appellant and took into possession the Datsun bearing registration No..4210/DIR, through recovery memo Ex.PW-16/1 as well as crime empty of 7.62 Bore from the crime scene through recovery memo as Ex.PW/12-1, blood stained earth Ex.PW.12/2 and blood stained clothes of deceased Rashid through recovery memo Ex.PW.16/2, which were sent for F.S.L report.

P.W.13 Shakir Ullah, brother of deceased got recorded his statement whereby, he nominated nine accused namely Asghar,

Ms.Bakht Pari, Mst. Baswara, Khan Zamir, Shamsur Rehman, Ziarat Gul, Sartaj, Saifor and Wazir including respondents, thus, Ziarat Gul was arrested on 3.9.2001 , Shamsur Rehman alias Shams on 12.9.2001 and Asghar on 16.9.2001, whom were identified by the appellant in the identification parade carried out by P.W.10 Naib Tehsildar Rekhan Gul Khan . Allegedly, Kalashnikov was recovered from the possession of accused Ziarat Gul, which was taken into possession through recovery memo Ex.PW.15/3 and was sent for examination of F.S.L, whereof matched report Ex.PW.16/9 was received. The confession of respondents Ziarat Gul, Asghar and Mst. Bakhat Bhari were stated to be recorded by P.W.14, Judicial Magistrate Liaqat Khan.

4. After conclusion of the investigation, the accused persons namely Ziarat Gul, Shamsur Rahman alias Shams, Asghar and Mst.Bakht Pari were booked and sent to face trial, whereas co-accused persons namely Sartaj, Saifor, Wazir, Mst.Baswara and Khan Zamir were placed in column No.2 of the challan dated 4.10.2001 as absconders .

In the meanwhile, co-accused/respondent Khan Zamir was arrested, who was sent to face the charge, before the trial court but was tried as juvenile separately, after denial of the charge.

5. The trial court on receipt of the challan, after compliance of the codal formalities, declared the said absconders as Proclaimed Offenders and respondents namely Ziarat Gul, Asghar, Shamasur Rehman alias Shams and Mst.Bakhat Bhari were charged, to which they pleaded not guilty and claimed trial.

6. The prosecution in order to substantiate the charge and culpability of the aforesaid respondents, produced as many as sixteen witnesses, whereafter, on closure of the prosecution side, the aforesaid respondents were examined under section 342 Cr.P.C, which allegations were categorically denied by them.

7. On conclusion of the trial and hearing the respective counsel appearing on behalf of the State and Defence, the trial court on 30.4.2004 acquitted all the four respondents having been found not guilty of the charge.

The appellant as well as the State being aggrieved by the judgment dated 30.4.2004 rendered by the trial court, impugned the judgment by preferring Cr.Appeal No.27-P-2004 and Cr.Appeal No.32-P-2004.

8. Respondent Sartaj, was arrested on 1.4.2007, and after necessary investigation was sent for trial, who also succeeded to secure his acquittal on 24.9.2007. The appellant Manzar Ullah,

assailed the said judgment through Cr.Appeal No.40-P of 2007, which was taken up alongwith aforesaid criminal appeals.

9. Since, inception of the appeals in question, several efforts for procurement of the attendance of respondents were made but in vain as such on 01.11.2017, statement of process server SI/SHO Noor Daraz was recorded on oath regarding non-availability of respondents in the days to come.

On 12.5.2010, death of Ziarat Gul and Shamsur Rehman alias Shams was reported by learned Additional Sessions Judge-I Takht Bhai, which report was placed on file, thus on 22.2.2018 Criminal Appeals to the extent of Ziarat Gul and Shamsur Rehman alias shams (respondents No.1 and 3), stood abated.

10. As the matter was lingering on since last 13 years, which cannot be kept pending indefinitely, as such this Court decided to hear the criminal appeals in hand on merits, in absence of appellant Manzar Ullah and respondents. The reasons for proceeding with the instant appeals shall be discussed, while imparting with the judgment in the proceeding paras.

11. Malik Akhtar Hussain Awan, Assistant Advocate General K.P.K heard on behalf of the State as well as appellant

Manzar Ullah. Perused the record, including the judgments impugned herein as well evidence produced by the prosecution.

12. Learned Assistant Advocate General K.P.K inter-alia contended that the impugned judgments dated 30.4.2004 and 24.9.2007 are contrary to the facts and law, as well as result of sheer misreading and non-reading of evidence. He also urged that despite judicial confessional statement of the accused persons namely Asghar, Mst.Bakht Pari and Ziarat Gul, pointation of crime scene, identification of Ziarat Gul and Shamsur Rehman alias Shams and Asghar by appellant Manzur Ullah, respondents have wrongly been acquitted, ignoring even the recovery of Kalashnikov made on the pointation of Ziarat Gul as well as positive result of F.S.L of the crime weapon matched with the empty.

13. The paramount question, which cropped up in our mind was as to whether in absence of the respondents, the appeals could be heard or not. Admittedly, the instant appeals have been filed far back in the year, 2004 and 2007 and after issuance of notices,ailable warrants and non-ailable warrants against the respondents, their presence could not be procured, as such it was felt with concern, and sorrow that delay in non-disposal of the instant appeals amounts to denial of justice, therefore, we

concluded to decide the instant appeals forthwith without any further delay as the matter cannot be kept pending for indefinite time, in view of the dictum laid down by Apex Court, referred herein after. It may not be irrelevant to add, that regarding non-execution of non-bailable warrants, it was reported that the respondents had shifted to some un-known place and there was no prospect of execution of non-bailable warrants, therefore, SI/SHO Noor Daraz was examined on oath by this Court on 22.2.2018. Furthermore, during the pendency it was also known that respondents No.1 and 3 had died, whose death certificates were made part of the record and the appeal to their extent was abated, henceforth, it was decided to proceed with the case against the respondents in their absence, in view of the dictum expounded in case reported in **PLD 1981 SC 265** titled as **Hayat Bakhsh and others Vs. The State**, which principle was further followed in the judgment reported in **1985 SCMR 614** titled as **Nazar Hussain Vs. The State** as well as **2015 SCMR-1002** titled as **Ikramullah and others Vs. The State**, wherein it was held categorically, that either appellant or respondents, in case of conviction or acquittal, if reluctant, to surrender or appear, loses right of audience and the appeal can be determined in absence. The relevant portion of the

judgment reported in **PLD 1981 SC 265** titled as **Hayat Bakhsh and others Vs. The State** is captioned herein below for ready reference:

"It would not be possible at all to adjourn an appeal against acquittal even against a single acquitted accused/absconding respondent for an indefinite period, although the office of the Court would make efforts to ensure his surrender/arrest in obedience to the process of the Court, for a reasonable period before fixing the appeal for hearing; and if he remains fugitive, the Court would proceed to determine the appeal in his absence. If after the examination of the case the acquittal merits to be reversed, there would be no impediment to decide the appeal accordingly, but in case the judgment of acquittal merits to be maintained, the same would not be reversed on account of the abscondence of the accused/respondent. This would apply to both the situations whether the appeal is against one acquitted or more."

(Underline is ours)

14. After threshing out the evidence available on record, it can be inferred with no doubt in mind, that the case of the prosecution rests upon the ocular testimony of P.W.11 Manzar Ullah. He stated to be the eye witness of the occurrence and lodged FIR. P.W.13, Shakir Ullah, is brother of the deceased Rashid Khan, who nominated the accused persons to have participated in the attempted decoity and murder of his brother. The prosecution also relied upon the pointation of the place of occurrence made by respondents as well as on the identification parade conducted by Naib Tehsildar P.W.10 Rekhan Gul Khan, through P.W.11 Manzur Ullah, Judicial confessional statement got recorded by Ziarat Gul,

Asghar and Mst.Bakht Pari as well as recovery of Kalashnikov being crime weapon on the pointation of accused Ziarat Gul with positive F.S.L report of the said weapon, used in the crime.

15. Adverting to the ocular testimony furnished by P.W.11 Manzar Ullah, his deposition is of prime importance, on whose report the Law Enforcement Contingent was set at motion. He reiterated the report on the basis, whereof the FIR was lodged by testifying that two men and two women hired the taxi driven by the deceased Rashid Khan, with whom he was accompanying him as conductor and that 6/7 persons emerged from nearby crop fields and attempted to snatch the said Datsun (Pick-up), but during resistance Rashid Khan was done to death, whereafter after taking them alongwith the deceased in the same Datsun (Pick up) at a distance, abandoned them by making their escape good. In his report, he categorically stated that he could identify two culprits, who had hired the Datsun(Pick-up).

16. It is surprising to observe, that when the accused persons named herein before were nominated by P.W.13 Shakir Ullah and after their arrest were gone through the test of identification, P.W.11 Manzur Ullah during the course of identification parade identified Ziarat Gul, Shamsur Rehman and Asghar, which

were not only excessive in number, as reported in the FIR but were alleged culprits, who had not hired the taxi but were given the role, who emerged subsequently from the crop fields and tried to snatch their Datsun (Pick up), which is contrary to the judicial confessional statement recorded by Ziarat Gul and Asghar. In such view of the matter, not only the testimony of P.W.11 Manzar Ullah becomes doubtful but the very identification parade on the basis whereof, the case of the prosecution case rest, falls down, as such in attending circumstances neither the testimony of P.W.11 Manzar Ullah could be made basis for conviction nor the identification carried out by P.W.10 Naib Tehsildar Rekhan Gul Khan can be relied upon.

Above all, while lodging FIR P.W.11 Manzar Ullah not only failed to furnish description of the culprits, but even did not attribute any role to them, thus identifying the aforesaid accused persons at subsequent stage in an identification parade with no specific role would be worthless, having no sanctity in the eyes of law. In this regard reliance can be placed on the judgments reported in **2017 SCMR 135** titled as **Azhar Mehmood and others Vs. The State**, **2010 SCMR 1189** titled as **Bacha Zeb Vs. The State** and **PLD 1981 SC 142** titled as **Lal Pasand Vs. The State**.

17. In so far, the judicial confessional statement got recorded by Ziarat Gul, Asghar and Mst.Bakhat Pari are concerned, not only there is sufficient unexplained delay in recording the alleged judicial confessional statement but P.W.14 Judicial Magistrate Liaquat Khan, while recording the so called judicial confessional statement has escaped from the compliance of requisite formalities. The certificates issued by him do not mention that if the accused does not make judicial confession, he would not be handed over to the police and it also does not mention that as in which language, the judicial confessional statements were recorded and that their handcuffs were removed prior to recording their statements.

On perusal of the judicial confessional statement, it also appears that the judicial confessional statement of Ziarat Gul and Mst.Bakhat Pari, are exculpatory having not played any incriminating role in the occurrence.

As far as the judicial confessional statement of Asghar is concerned, he stated to have hired the Datsun (Pickup) and that he accompanied them towards the crime scene, and after murder he took the dead body in the said Datsun away, whereas Ziarat Gul in his judicial confessional statement has stated that when respondent Sartaj made firing upon driver with Kalashnikov, who

got injured, said two men and two women ran towards the crops field, whereas respondent Asghar went alongwith Saifor and Sartaj in the Datsun. It means Asghar is other than the two persons who were accompanying two women in the said vehicle.

In respect of arrival and presence, there are numerous contradictions, which suggest us to believe that the judicial confessional statements are untrue, un-trust worthy and not confidence inspiring, thus, the same being not worthy of credence, cannot be believed for holding the respondents to be guilty of the charge. In this regard we would like to refer the judgment reported in **2017 SCMR 898** titled as **Muhammad Ismail and others Vs. The State.**

Be that as it may, the judicial confessional statements have been retracted by all the respondents. The judicial confessions of Asghar can at the best be used against him alone and not against the co-accused persons provided that in certain cases under Article 43 of the Qanun-e-Shahadat Order, 1984 it could only be taken into account as a corroborative circumstance but in the instant case since the judicial confessions are contrary in nature, therefore, it would be unsafe to have reliance upon such judicial

confession. In this regard we are fortified with the dictum laid down in the case reported in **2012 SCMR 109** titled as **Mushtaq Vs. The State.**

18. The prosecution also relied upon the pointation of the place of occurrence made by respondents in the presence of P.W.15 Shahida Khan and P.W.16 Aurangzeb,ASI, which in our view, have no importance, as it cannot be considered as incriminating evidence in terms of **Article 40 of the Qanun-e-Shahadat Order, 1984.** Such pointation would be hit under **Articles 38 and 39 of the Qanun-e-Shahadat Order, 1984** as in consequence of such pointation neither any recovery nor any other new fact has been discovered, so far to corroborate the substantive evidence on record, henceforth, no reliance can be placed upon on such piece of evidence. In this regard, we are fortified to the principle settled in the judgment reported in **2000 SCMR 528** titled as **Ziaul Rehman Vs. The State.**

19. As far as recovery of Kalashnikov and positive result of F.S.L are concerned, it is suffice to mention here, that the testimony of P.W.15 Shahida Khan is important to be scrutinized, who stated to have got recovered Kalashnikov on the pointation of Ziarat Gul, but the judicial confessional statement of Ziarat Gul suggests that

the role of making fire from Kalashnikov upon the deceased Rashid Khan was attributed to Sartaj. Thus, the recovery of Kalashnikov is of no corroborative value, even if, with the positive matching result.

After analyzing and reappraisal of the entire evidence on record we firmly believe, that the trial court has rightly appreciated the evidence in its true perspective and the judgment impugned herein does not suffer from any infirmity, illegality, mis-reading and non-reading of evidence, warranting interference, as the scope of appeal against acquittal is limited, which does not allow interference, unless and until the verdict is based on speculation, capricious, contrary to the evidence on record, flimsy and whimsical. In this regard, we would also like to refer the judgment reported in **2017 SCMR 1710** titled as **Mst.Anwar Begum Vs. Akhtar Hussain alias Kaka and 2 others**, **2017 SCMR 135** titled as **Azhar Mehmood and others Vs. The State**, **PLD 2011 S.C 540** titled as **Hafiz Shaikh Anwar-ul-Haque through L.Rs Vs. Jehan Khan and others** and **PLD 1975 SC 227** titled as **Abdur Rashid Vs.Umid Ali and 2 others**.

20. The nut shell of the above discussion is, that we are unable to find any merit in these appeals to persuade us to

Cr Appeal No.27-P of 2004 L/w
Cr.Appeal No.32-P of 2004 L/w
Cr.Appeal No.40-P of 2007

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interfere with the judgments rendered by the trial court. Therefore,
the appeals having no merit, stand dismissed.

JUSTICE SHAUKAT ALI RAKHSHANI

JUSTICE SYED MUHAMMAD FAROOQ SHAH

Islamabad, 2.4.2018
M.Akram/