

IN THE FEDERAL SHARIAT COURT.
(Appellate Jurisdiction)

PRESENT:

MR.JUSTICE HAZIQUL KHAIRI, CHIEF JUSTICE.

MR. JUSTICE SALAHUDDIN MIRZA.

CRIMINAL APPEAL NO. 107/Q of 1998

Allahnoor son of Darya Khan Umerzai,
R/o Zar Karez, Loralai, Appellant.

Versus

The State Respondent

Counsel for the Appellant ... Mr. Basharatullah, Advocate.

Counsel for the State ... Sheikh Ghulam Ahmed,
Advocate.

FIR No. date and Police Station. ... 23/1997 dated 14.03.1997
Levies Tore Thana, District Loralai.

Date of Judgment of Trial Court. ... 12-08-1998

Date of Institution ... 07-09-1998

Date of hearing ... 12-05-2008

Date of decision:

JUDGMENT

HAZIQL KHAIRI, CHIEF JUSTICE:- Appellant Allah Noor was challaned by Loralai Levies authorities alongwith Lal Khan, Baloch Khan, Darya Khan and Nawab Khan vide FIR dated 14.3.1997 registered at Toor Thana, District Loralai for commission of offence under section 17(4) of the Offence Against property (Enforcement of Hudood) Ordinance, 1979 read with section 34 PPC. All except appellant Allah Noor were acquitted who was convicted under the said section 17(4) for murder of truck driver Imam Din by the learned Sessions Judge Loralai and sentenced to imprisonment for life and fine of Rs.40,000/= with benefit of Section 382-B Cr.P.C..

2. Briefly, the facts of the case are that on 14.3.1997 Abdul Khaliq (PW.6), the then Naib Tehsildar, Mekhter during patrolling received information that some one had killed a truck driver named Imam Din. He rushed to the place of occurrence and, on the pointation of Cleaner of the truck Abdul Ghaffar a dumb person, he arrested four accused

namely Baloch Khan, Lal Khan, Nawab Khan and Darya Khan and brought them to Toor Levies Thana. Accused Lal Khan was in possession of one China rifle with two live cartridges while Baloch Khan was found in possession of rifle of 303 bore (American made) with 23 live cartridges. The same were taken and sealed into parcel. The Investigation Officer prepared site plan, recovered six empty bullets and two live cartridges of China rifle which were allegedly found lying at the spot vide memo Ex.P/I-C. He also took into possession the truck of deceased Imam Din and removed his dead body to Civil Hospital where medical examination of the dead body of deceased was conducted at District Headquarters Hospital, Loralai. PW.4 Dr. Muhammad Anwar took out one bullet from the person of deceased and it was handed over to him. He also took possession of blood stained shirt of the deceased and arrested Allah Noor on the pointation of other accused on 15.3.1997. He recovered on the pointation of appellant Allahnoor a Kalashnikov in the house of a person situated near Toor Levies Thana. The confessional statement

of accused Baloch Khan was recorded on 17.3.1997 by Syed Navid Hassan Naqvi, the then Assistant commissioner/Magistrate First Class, Loralai, while the confessional statements of accused Lal Khan and appellant Allah Noor were recorded on 18.3.1997. PW.6 Mr. Abdul Khaliq, the then Naib Tehsildar, Mekhter sent two live and nine empty bullets and also a bullet taken out from the dead body of deceased to Fire Arm Expert and Chemical Expert, FSL, Quetta, wherefrom report vide Ex.P/7-A and Ex.P/8-A were received. PW.4 Dr. Muhammad Anwar took out one bullet from the person of deceased and handed over it to Naib Tehsildar (PW-6). In cross-examination he stated that when the recovery was being made the Levies officials were standing outside the house while he entered the house with the appellant. It was correct that he did not enquire whose house was it but it was incorrect that the area people were gathered around the house.

3. The testimony of two other witnesses is crucial for purposes of deciding this appeal. The only eye witness to the murder of Imamdin

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was Abdul Ghaffar (PW.3) who is dumb and had made a statement through his translator Mr. Muhammad Raza, Special Education Teacher in complex for Special Education at Barori, Quetta. According to Abdul Ghaffar nine months back it was dark while he and the truck driver were going towards Punjab and the truck was full of coal. Three persons stopped them and fired. Three shots were fired, two of which struck the truck while the third one hit the deceased. He pointed out those persons as Lal Khan, Baloch Khan and the appellant Allah Noor.

4. PW.4 Dr. Muhammad Anwar in his report had stated that on 14.10.1997 he was posted as Medical Officer, Civil Hospital, Loralai, when the Levies officials brought for examination the dead body of Imam Din. He stated as under:

“Deceased had received a bullet shot at his head. The entrance of the bullet was present on the right side of the skull just above the hair. There was no sign of exit present at skull. The bullet had crossed the whole brain and head also damaged the same. However the bullet was during examination taken out from the

brain and handed over to levies official. While on my examination the whole body of deceased did not find any other injury at the body of deceased. I issued Medical Certificate in this respect as Ex.PW/4-A which bears my signature. The cause of death was damage of brain due to bullet shot caused severe hemorrhage circulatory collapse.”

5. PW.7 Akhtar Hussain, Firearm Expert, FSL, Quetta, deposed that on 24.3.1997 he received sealed parcels containing 303 and 7.62 MM bore rifles and Kalashnikov. According to him after receiving the crime weapon and empty bullets he carried out test of the same and during test it appeared that the bullets 9 in numbers of 7.62 MM rifle marked as C1 to C9 sealed in parcel No.1 had been fired by the Kalshnikov bearing No.6916 found in parcel No.5. The crime bullets lead were in parcel No.4 and were not tested. The live bullets seven numbers could be fired from any fire arms weapon of 7.62 bore rifle including the rifle sent to him for examination. The rifle of 303 bore was in working condition. He issued certificate bearing No.35 dated 26.4.1997 and produced the same as Ex.P/7-A which is same and

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bears his signature. In cross-examination he stated that any bullet of 7.62 can be fired by China rifle.

6. It is also significant to reproduce the testimony of PW.5 Dad Karim, Government Servant, as under:

“On 14.3.1997 Tehsildar Loralai took me and Abdul Wahab to Levies Thana Loralai, where in our presence identification test of accused Lal Khan, Baloch Khan, Darya Khan, Nawab Khan carried out. I have been also included as dummies. Besides me there were three other dummies. In my presence one dumb recognized the present accused named above. The identification test carried out twice and the said dumb recognized accused Lal Khan, Darya, Nawab Khan and Baloch Khan. I produce Fard-i-Shnakht as Ex-P/5.A which is same and bears my signature. I identify accused Lal Khan, Baloch Khan, Darya Khan, Nawab Khan present in Court.”

7. PW.8 Syed Abdul Jabbar, Chemical Expert produced his certificate regarding the suspected blood stained cloth.

8. According to the confessions of Baloch Khan and Lal Khan a sheep belonging to appellant was hit and killed by the deceased truck driver. In his confession Baloch Khan stated that appellant came

to his house and told him to go alongwith him to extract money from the truck driver because he had received less money for his sheep.

Since the truck driver did not stop the appellant Allah Noor fired at him. The other co-accused Lal Khan in his self-exculpatory confession had stated that the mother of the appellant came to their house and told them that the appellant took a Kalashnikov and went to wrongfully gain money from the truck driver. His brother afterwards went towards the road and saw the appellant firing at the truck driver.

The confessional statement of appellant Allah Noor is inculpatory wherein he had stated that he, Baloch Khan and Lal Khan went towards road because they heard some hue and cry. He next stated that Baloch Khan and Lal Khan asked the truck driver to stop but he did not stop, hence they all three opened fire at truck but he stated nowhere that he had killed Imam Din. He also mentioned presence of a dumb person inside the truck.

9. Learned counsel for the State Sheikh Ghulam Ahmed vehemently urged that the prosecution witnesses have fully established the case against the appellant, particularly, in view of his

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confessional statement and the confessional statement of co-accused Lal Khan and Baloch Khan. Here reference may also be made to the deposition of PW.6 Abdul Khaliq, Naib Tehsildar who on the pointation of PW.3 Abdul Ghaffar, the dumb person went to the eastern side and he recovered a China rifle with two live bullets and cartridges from Lal Khan, an American rifle-303 with 23 live cartridges from Baloch Khan, and also arrested them. Upon their arrest they involved the appellant Allahnoor for committing murder on 15.3.1997.

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10. It was contended by Mr. Basharatullah, Advocate for the appellant, at the very outset that the appellant was not nominated in F.I.R. He was implicated by co-accused Baloch Khan and Lal Khan whose confessional statements are exculpatory but they involved the appellant to save their skin. But it cannot be ignored that arms with live bullets/cartridges were recovered from their possession and although they were exonerated of the commission of crime, their deposition cannot be relied upon on that account.

11. As regards the deposition of PW.3 Abdul Ghaffar the dumb witness through his translator Muhammad Raza, it was vehemently urged by the learned counsel for the appellant that his evidence has to be set aside as section 119 of Evidence Act 1872 dealing with the evidence of a dumb witness is no more on statute book after the repeal of Evidence Act, 1872, on 26.10.1984. Section 119 of repealed Evidence Act 1872 runs as under:

“**119. Dumb witness:** A witness is unable to speak may give his evidence in any other manner in which he can make it intelligible, as by writing or by signs; but such writing must be written and the signs made in open Court. Evidence so given shall be deemed to be oral evidence.”

12. It is true that under the Qanun-e-Shahadat Order 1982 which replaced the Evidence Act 1872, there is no such provision for dumb witness but his evidence may be recorded through an expert under the provision of Article 59 of Qanun-e-Shahdat Order 1984 (Section 45 of repealed Evidence Act 1872) in which among others a Court may form an opinion of specifically skilled persons “when a point of foreign law, or of science or art, or as to identity of handwriting or

finger impression" is brought to its notice. In the present case the testimony of dumb person (PW-3) was verbally translated by Mr. Muhammad Raza, Teacher of Special Education Complex, Barori, Quetta. No doubt the language of a dumb person requires special knowledge or skill which may be acquired through Specialist in the field. The appellant has not questioned the credibility or competence of Mr. Muhammad Raza who is an expert in his field. What may further be added here is that an expert's evidence is a weak piece of evidence and unless corroborated by direct or circumstantial evidence no conviction can be passed upon it.

13. Learned counsel for the appellant conceded that he would not question the reports of PW.4 Dr. Muhammad Anwar and PW.7 Akhtar Hussain as regards the cause of death of Imam Din by a solitary shot at his head. But his contention was that although three weapons were recovered by the prosecution namely a China rifle from Lal Khan, a 3.3 bore American rifle from Baloch Khan and a Kalashnikov at the pointation of the appellant, there is nothing

on record to suggest that the deceased was murdered by a shot coming from the Kalashnikov 6916 (with bullet of 7.62 M.M.). The firearm Expert PW.7 Mukhtar Hussain had admitted in his cross-examination that any bullet of 7.62 MM bore could be fired by a China rifle. It is also evident from the testimony of PW.6 Abdul Khaliq, Naib Tehsildar, that he recovered China rifle with two live cartridges from Lal Khan and one rifle of 303 bore with 23 cartridges from Baloch Khan. He sent two live and nine empty bullets and also a bullet taken out from the dead body of the deceased to chemical expert.

14. We agree with the learned counsel for the appellant that it was not ascertainable which gun/rifle was used for killing the deceased and whether all the nine empty bullets recovered by PW.6 and the one bullet taken out from the dead body of the deceased came out from the Kalashnikov belonging to the appellant. On the basis of this evidence, the involvement of Baloch Khan and Lal Khan in the firing at the truck resulting into the death of Imam Din cannot be ruled out. Their confession was also self-exculpatory. They remained silent

till they were arrested. It may be added here that according to PW.6 Abdul Kahliq, Naib Tehsildar, on the pointation of cleaner of the truck Abdul Ghaffar (PW.3) he arrested only Baloch Khan, Lal Khan, Nawab Khan and Darya Khan and brought them to Toor Levies Thana. There were also only four dummies in identification parade of the appellant as per the testimony of PW.6, which were insufficient for purposes of identification. For these reasons the evidence of dumb person (PW.3) by itself cannot form basis of the conviction of the appellant.

15. In view of the overall appraisal of the evidence adduced by the prosecution it is evident that the prosecution has failed to establish a case of conviction against the appellant and he is entitled to benefit of doubt. Accordingly the appeal is accepted and the impugned judgment of the learned Sessions Judge Lora Lai dated 12.8.1998 is set aside with direction to jail authorities to release the appellant forthwith unless required in some other criminal case.

12/8/08
Justice Haziqul Khairi
Chief Justice.

12/8/08
Justice Salahuddin Mirza.

*Appointed for
rehearing
12/8/08
15/7/08*