

IN THE FEDERAL SHARIAT COURT

(Appellate Jurisdiction)

PRESENT

**MR. JUSTICE AGHA RAFIQ AHMED KHAN, CHIEF JUSTICE
MR. JUSTICE DR. FIDA MUHAMMAD KHAN**

CRIMINAL APPEAL NO.34/P OF 2007 L/W

Safiullah son of Abdul Ghani
R/o. Kunar Afghanistan at present Jabba Sohail Abad
Peshawar

..... Appellant
Versus

1. The State
2. Kiftan son of Abdul Baqi resident of Sardar Ahmed Jan Colony, Peshawar

..... Respondents

CRIMINAL REVISION NO.1/P OF 2008

Kiftan son of Abdul Baqi
resident of Sardar Ahmed Jan Colony, Peshawar

..... Petitioner

Versus

1. Safiullah son of Abdul Ghani
R/o. Kunar Afghanistan at present Jabba Sohail Abad
Peshawar
2. The State

Counsel for appellant Mr. Zulfiqar Ali Chamkani,
Advocate

Counsel for State Mr. Alimgir Khan Durani,
Deputy Advocate General

FIR, Date and 903, 18.12.2005
Police Station Hashtnagri, Peshawar

Date of Judgment of 20.08.2007
trial court

Date of Institutions 21.09.2007 &
29.04.2008 respectively

Date of hearing 07.05.2012

Date of decision 07.05.2012

JUDGMENT

AGHA RAFIQ AHMED KHAN, CHIEF JUSTICE:- This appeal filed by Safiullah son of Abdul Ghani is directed against the judgment dated 20.08.2007 passed by the learned Additional Sessions Judge-X Peshawar whereby the appellant/accused has been convicted under section 17(4) of the Offence Against Property (Enforcement of Hudood) Ordinance, 1979 (hereinafter referred to as the said Ordinance) read with section 412 PPC and sentenced to imprisonment for life. However, the benefit of section 382-B Cr. P.C. has been extended to him.

2. Criminal Revision for enhancement of the sentence awarded to the said appellant has also been filed by the complainant Kiftan,

3. Since both the matters arise out of one and the same judgment, therefore, we are disposing them by this single judgment.

4. Before appraisal of the evidence for deciding the appeal, we would first of all look into the Criminal Revision preferred by Kiftan petitioner/complainant, father of deceased Razi Khan, for enhancement of the sentence awarded to the appellant/accused. It transpires from the record that the Revision Petition is not admitted and is still at preliminary stage. It was fixed several times for hearing but for one reason or other it could not proceed. On 4.3.2011 it was adjourned because clerk of the learned counsel for the petitioner had informed that cousin of the latter had expired. Today also, clerk of the learned counsel informed that uncle of the learned counsel had expired and the learned counsel could not attend

the Court. In this connection, it is worth mentioning that the impugned judgment was passed on 20.08.2007 but the instant Revision Petition was received in this Court on 29.04.2008. This shows that, according to rules, there is delay of six months and nine days. No reason has been given for this delay. The note put up by the office further shows that, as informed by the learned counsel, his client Kiftan petitioner is an Afghan Refugee and has gone to his native country Afghanistan permanently. To day also the learned counsel for the petitioner is absent. In view of the overall facts and circumstances referred to above, it appears that the petitioner is not interested in prosecution. Therefore, the Revision Petition is dismissed for non-prosecution.

5. Now we turn to the case of prosecution which according to FIR, lodged on 18.12.2005 at police station Hashtnagri is to the effect that complainant Kiftan used to sell vegetable in Khushal Bazar. On the day of occurrence, his son was also present in Khushal Bazar. He was present in the shop of Haji Musa Khan who deals in mobile phones. In the meanwhile Safiullah, Mansoor, Nazifullah and Pervaiz alias Tooray, armed with pistols, came over there. They forcibly snatched mobile phones from Musa Khan and ran away. His son Razi Khan chased the accused and tried to apprehend them but the accused fled away. The appellant/accused fired at his son Razi Khan and Haji Musa Khan. Resultantly his son Razi Khan got injured and fell on the ground. He was taken to LRH, Peshawar but he expired. The complainant alleged that the occurrence was seen by him alongwith Haji Musa Khan as well.

6. One of the accused namely Safiullah who is the appellant before us was overpowered by the people. He was physically searched and one pistol 30 bore, with loaded charger carrying 4 live rounds in its chamber, and mobile phone set LG were recovered from him. He was duly arrested by the police. After completion of the necessary investigation he was challaned to face trial. Necessary legal proceedings against the other absconding co-accused have also been initiated and, according to the impugned judgment, perpetual warrants of arrest have been issued against them and they have been declared proclaimed offenders.

7. The appellant/accused was formally charged on 18.07.2006 for offences under section 17(4) of the said Ordinance as well as under section 411 PPC, to which he pleaded not guilty and claimed trial.

8. At the trial, the prosecution examined nine witnesses in all. PW.1 Dr. Sabahat Amir, KMC on 19.12.2005 conducted postmortem examination on the dead body of Razi Khan deceased which had been brought by Asmatullah and identified by Fazale Wahid and Amir Hamza.

The said PW, inter-alia made the following observations:

“External Appearance.

A well built young man, 20 to 23 years of age, wearing sky blue shalwar qamees and white banyan, rigor mortus and lividity fully developed.

Injuries.

1. Fire arm entry wound left side front of abdomen 1 x .8 cm 12 cm from midline, 15 cm below costal margin.

2. Fire arm exit wound right side back of abdomen 1 x 0.6 cm, 11 cm from midline, 03 cm below costal margin.

Skull, scalp and vertebra were not injured. Thorax; not injured.

Abdomen: small intestines and large intestines were injured, right kidney injured.”

OPINION.

In his opinion the decd: died due to injury to right kidney, small and large intestines because of fire arm.

According to PW.1, the time between injury and death was immediate and between death and P.M. examination was 8 to 15 hours. P.W.2 is Asmatullah, constable. He escorted the dead body of Razi Khan deceased to the mortuary for PM examination. P.W.3 is Sir Biland Khan, Head Constable who is marginal witness to recovery memo (Ex.PW.3/1) vide which the I.O. recovered and took into possession, from the accused, one mobile set LG (Ex.P-1) and one 30 bore pistol (Ex.P-2). He stated that the pistol was without number. PW.4 is Siraj, ASI who deposed that on 18.12.2005 the complainant had brought the dead body of his son Razi Khan in the ambulance and lodged the report wherein he charged the appellant/accused Safiullah and his other co-accused namely Mansoor, Pervaiz and Nazifullah for commission of offence. He added that at that time many people brought the appellant/accused Safiullah to the police station who had been allegedly overpowered on the spot. He conducted


personal search of the appellant/accused and recovered from him one mobile phone set LG and one 30 bore pistol alongwith one loaded charger and four live rounds. In the presence of marginal witnesses, he took the same into possession vide recovery memo (Ex.PW.4/1). He also prepared inquest report as well as the injury sheet and thereafter sent the dead body under the escort of Asmatullah constable to KMC for post mortem examination. P.W.5 is Amir Hamza. He identified the dead body of the deceased Razi Khan son of Kiftan at the time of P.M Examination. P.W.6 Haji Musa Khan is an eye witness who made statement in the following words:-

“I am mobile seller at Khushal Bazar. On the day of occurrence I was present in my shop whereas vegetable seller Razi Khan son of Kiftan R/o Sardar Ahmed Jan colony came to my shop and stay there. We were busy in gossiping, meanwhile four persons duly armed with pistols and their name were known to me as Safiullah, Mansoor, Pervez, Nazifullah, came there. The accused Safiullah handed over the mobile set to them and during the course of snatching more mobile I shouted and with the help of other people apprehended the accused Safiullah whereas other accused run away from the spot. The Razi Khan chased the accused and during such period the accused started firing due to which Razi Khan received injuries. The injured was taken to the hospital by the people of the locality. During transit to hospital the deceased died in the way. I handed over the accused Safiullah to the local police and during searched the accused the local police recovered one mobile set and one 30 bore pistol without number alongwith four live rounds. I am the eye witness of the occurrence and charged the accused for the commission of the offence.”

He was cross-examined at great length. P.W.7 is Kiftan, complainant. He reiterated his statement as mentioned hereinabove. P.W.8 is Waris Khan, Head Constable in whose presence the I.O. took into possession blood stained clothes of the deceased. P.W.9 is Noor Muhammad, SI/SHO. He was entrusted with the investigation of the present case. He made an application before the Magistrate for obtaining warrant of arrest against the absconding accused namely Mansoor, Pervaiz and Nazifullah vide his application Ex.PW-9/5 and handed over the same to the DFC concerned for its execution. Like wise, he applied for and obtained the proclamation notices in triplicate against the above said accused and handed over the same to DFC concerned for execution. He recorded the statements of PWs, received the PM report in respect of the deceased and placed the same on file. After completion of the investigation he submitted complete challan against the appellant/accused.

9. The appellant/accused made statement under section 342 Cr. P.C. wherein he denied the allegation and pleaded his innocence. He denied his presence at the place of occurrence at relevant time and stated that he was already in police custody in the police station Hashtnagri, after having been arrested by Siraj ASI with TT Pistol. He explained that actually he had been arrested by Siraj, ASI with TT Pistol in the front of the mosque in Hashtnagri and then involved in the present case because, after the brutal murder of Razi Khan, father of deceased alongwith the president of Pull Cart Association and other shop keepers who had blocked the main

G.T. road in protest of the murder and consequently, as a result of pressure on the police officers, he was involved in the instant case only to satisfy the high ups of the police and the bereaved family. He further stated that he was Hafiz-e-Quran and had completed his religious course from Dar-ul-Uloom and could not even think about such a heinous act. He also produced his certificate (Ex.PK). Regarding the recovery of mobile and pistol from his possession, he stated that the case of prosecution was full of mockery because there was nothing with the police official to involve him in the instant case, therefore, his own mobile set was taken into possession by Siraj ASI at the time of his arrest, alongwith TT Pistol and planted against him in the present case as the snatched mobile. While responding to question No.4 regarding the recovery, he again made statement in the following words:-



“I was neither arrested from the place of occurrence nor any incriminating article were recovered from my possession as I have stated above that the mobile set was my own as in this respect the statement of PW Musa Khan is crystal clear in which he has categorically stated that the mobile which was snatched from him was Nokia 3220. So far as 30 bore pistol is concerned it is totally fabricated.”

Responding to the question “Why the PWs have deposed against you?” he made statement in the following words:-

“So far as PW Musa Khan and complainant are concerned they were forced by the police officials to depose against me for the success of the prosecution case. All other PWs are police officials hence, interested in the success of the instant case.”

He declined to make statement on oath under section 340(2)
Cr.P.C.

10. We have heard learned counsel for the parties and have
perused the record with their assistance.

Learned counsel for the appellant submitted that:-

- the impugned order of the learned trial court is against the law, facts and material on record and, as such, not tenable in the eye of law.
- the prosecution has failed to prove its case and the improvement made by the prosecution in the evidence has been illegally relied by the trial court.
- the alleged recovery is planted and fabricated, has not been proved beyond doubt and the contradictions in the statements of the PWs in this respect have been over looked by the trial court.
- the order of the trial court is manifestly wrong and the evidence produced by the prosecution does not connect the appellant with the alleged offence.
- the appellant has been convicted on highly flimsy, doubtful and interested evidence of prosecution. Hence conviction is bad in the eye of law and needs to be set aside.

11. Learned counsel for the State supported the impugned judgment. However, he was unable to support the case of prosecution qua the recoveries of pistol and mobile phone.

12. We have given our anxious consideration to the point raised by learned counsel for the parties and have minutely gone through the evidence on record.

13. So far as the case of prosecution against the appellant/accused is concerned, it is based on the statements of PW.6 Haji Musa Khan and

PW.7 Kiftan. PW.6 is eye witness of the occurrence and PW.7 is the complainant. The deposition of both these witnesses, however, suffer from major discrepancies. PW.7 Kiftan does not seem to be an eye witness of the occurrence. It appears that he repeated whatever he had heard at the spot from other people who were present over there. His testimony thus amounts to hearsay and, as such does not inspire confidence. His statement contains major contradictions on material points as compared to that of PW.6 who is admittedly an eye witness. The deposition of PW.6 Haji Musa Khan, who is star witness of the case, reveals ocular details of the whole occurrence which hinges on his testimony alone. He has given details of the events from beginning to the end. According to him, he was present in his shop where the deceased Razi Khan had come and while they were busy in gossiping, four persons armed with pistol came over there. PW.6 named them as Safiullah, Mansoor, Pervez and Nazifullah. The appellant/accused Safiullah entered his shop and asked for a mobile phone set and its price and then handed that over to other accused who were standing outside and, thereafter, they ran away. Razi Khan chased them and in the meanwhile the other accused started firing due to which Razi Khan received injuries and, while the people of the locality were taking him to the hospital, he died during the transit on the way. PW.6 shouted and with the help of other people, he apprehended the appellant/accused Safiullah. He handed over the appellant/accused to the local police and during search, the local police recovered one mobile set LG and one 30 bore pistol without number,

alongwith four live rounds. He was cross-examined at great length. The cross-examination of PW.6 Haji Musa Khan is reproduced below. The relevant portion has been underlined to highlight the actual role and position of the present appellant/accused during the entire occurrence:

“I am matriculate and running business for the last two years. At the relevant time beside Razi Khan two employees namely Imtiaz and Asif were present on the shop. It is correct that the place of occurrence is a populated area. The deceased Razi Khan was present half an hour before the occurrence. The accused were four in number. Only accused Safiullah entered in my shop. The accused Safiullah told me to give him some mobile alongwith their rates. The accused Safiullah took one mobile from me and handed over the same to other co-accused who were present outside the shop. At that time the accused had not aimed pistol at me nor forcibly taken the mobile set from me. The accused Safiullah remained in the shop whereas the other accused ran away from the spot. In the meanwhile we followed the accused. I had not noticed any pistol etc. with the accused standing outside the shop. The number of the mobile was NOKIA 3220 which was given to the accused Safiullah for the purpose of purchase. At the relevant time many types of mobile were present in my showcase. The mobile in question was second hand and the value of the said mobile was about Rs.5000/-. The accused Safiullah handed over mobile set to his co-accused and he ran away from the spot. I was not in knowledge that the accused when snatched the mobile set from me. I considered him as customer. The accused Safiullah was standing in my shop when I heard the fire shot I started cry and thereafter with the help of other shopkeepers I overpowered the accused Safiullah. It is incorrect to suggest

that after fire shot I apprehended the accused and also conducted search of the accused. Similarly, I have not recovered any mobile or pistol from accused Safiullah. It is correct that the deceased received injuries from the fire shot fired by the absconding accused. It is correct that the I.O prepared the site plan on my pointation and nothing has been added by the I.O himself. Only one fire shot was hit by the accused. It is correct that I suspected that the accused Safiullah is the companion of the absconding accused, therefore, I arrested him. I did not escort with the deceased. After arresting the accused Safiullah we handed over the accused to the local police of P.S. Hashtnagri. It is incorrect to suggest that the accused Safiullah was not member of the absconding accused. It is also incorrect to suggest that the accused Safiullah had nothing to do with the present occurrence”.

14. Critical analysis of the statement and cross examination of PW. 6 reveals that:-

- * Intiaz and Asif were employees of PW.6 and they had also seen the occurrence but they have neither been produced by the prosecution nor even cited as witnesses.
- * Out of the four accused, only the appellant had entered his shop and he had asked for his mobile set and its price. This does not show any malafide on his part.
- * The appellant/accused after taking mobile set from PW.6 handed over the same to other co-accused who were present outside the shop.
- * The appellant had neither aimed pistol at him nor had forcibly taken the mobile set from him. Even after the other accused had run away, the appellant/accused remained present inside his shop.
- * The mobile taken from PW.6 was Nokia 3220 but the one recovered from possession of the appellant/accused was admittedly a mobile set 'LG'. Thus the recovered mobile was not the one taken from PW.6.

- * The appellant/accused had taken the mobile for the purpose of purchase.
- * PW.6 considered him as customer and this shows that he had neither used any force nor had given any other indication that he was a dacoit.
- * PW.6 heard fire shot from the outside and, at that time, the appellant/accused was standing inside his shop.
- * The appellant/accused was overpowered with the help of other shopkeepers because PW.6 suspected that the appellant/accused was the companion of the absconding accused.
- * The deceased got fire arm injuries from one single fire shot fired by the absconding accused and not by the appellant/accused who, according to the evidence, had not at all fired even a single shot.


15. The depositions of PW.9 Noor Muhammad Khan, Sub-Inspector and PW.3 Sir Biland Khan, H.C. are contradictory to the one made by Musa Khan (PW.6) and it is not clear to confirm who made the alleged recoveries. It is also very pertinent to mention that neither any blood stained earth nor any empty has been recovered from the place of occurrence. This aspect of the case also raises doubt about the actual place of occurrence. The Forensic Science Laboratory report about the recovered pistol is positive, however, in the absence of any crime empty and its matching with the same, it is inconsequential. There is also no positive evidence to prove that the pistol recovered from the appellant/accused was giving smell of fresh discharge at the time of its recovery. The statements of PW.3 and PW.4 are very clear in this respect. Moreover, there is contradiction regarding the number of live bullets allegedly recovered from the appellant and those shown in the FSL report. This contradiction adversely reflects on the integrity of the investigating officer.

16. It is a well settled and universally accepted law that the prosecution is bound to prove its case beyond any reasonable doubt. However, in the instant case, the aforesaid appraisal of the evidence on record shows that the prosecution has not been able to prove its case against the appellant/accused beyond any reasonable doubt. We may also mention that for giving benefit of doubt to an accused, it is not necessary that there should be many circumstances creating doubt. If there is any single circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused shall be entitled to the benefit not as a matter of grace and concession but as a matter of right.

17. The upshot of the above discussion is that, in the absence of any satisfactory basis for upholding the conviction and sentence of the appellant, we extend the benefit of doubt to him, allow his appeal, set aside his conviction and sentences, and acquit him of the charges. He shall be released forthwith if not required in any other case.

18. As a natural sequel the Criminal Revision for enhancement of the sentence is dismissed.

19. These are the reasons for our short order of even date.


JUSTICE AGHA RAFIQ AHMED KHAN
Chief Justice


JUSTICE DR. FIDA MUHAMMAD KHAN

Peshawar the May 07, 2012
F.Taj/*

Approved for reporting
