

IN THE FEDERAL SHARIAT COURT  
( Appellate/Revisional Jurisdiction )

PRESENT

MR. JUSTICE HAZIQUUL KHAIRI, CHIEF JUSTICE  
MR. JUSTICE DR. FIDA MUHAMMAD KHAN  
MR. JUSTICE MUHAMMAD ZAFAR YASIN

CRIMINAL APPEAL NO.14/k of 2005 (Linked with)

Ashiq Ali son of Ghulam Rasool, --- Appellant  
resident of Jhugi No. 368, Sector 11-C,  
Godhra Camp, New Karachi

Versus

The State --- Respondent

CRIMINAL REVISION NO.9/K OF 2005

Abdul Aziz Khan son of --- Petitioner  
Najeebullah Khan r/o House  
No.122-L, Block-2, PECHS  
Karachi

Versus

1. Ashiq Ali son of Ghulam Rasool --- Respondents  
2. The State

For the Appellant --- Mr. Syed Saeed Hassan Zaidi,  
Advocate

For the Complainant/petitioner --- M/s Mahmood A. Qureshi and  
Muhammad Nazeer Tanoli,  
Advocates

For the State --- Mr. Arshad Lodhi, Assistant  
Advocate-General, Sindh

FIR No, date and --- 04/97, 3.1.1997, PS. Ferozabad  
Police Station District East Karachi

Date of the Order of the --- 31.1.2005  
Trial Court

Date of Institution --- 1.4.2005

Date of Hearing --- 31.1.2007 & 6.2.2007

Date of Decision --- 16-3-2007

JUDGMENT:

HAZIQUL KHAIRI, CHIEF JUSTICE.- By this judgment we propose to dispose of the appeal bearing criminal appeal No.14/K of 2005 filed by Ashiq Ali against his conviction and sentence and revision No.19/K of 2005 filed by Abdul Aziz Khan for enhancement of sentence of the appellant both against the judgment, dated 31.1.2005, passed by the learned IInd Additional Sessions Judge (East) at Karachi whereby the appellant was convicted and sentenced as under:-

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- (a) For committing Qatl-e-Amd of deceased Najeebullah and Mst. Sharifunnisa, an offence punishable u/s 302(b) PPC, the appellant is awarded imprisonment for life on each count, as tazir;
  - (b) For committing robbery, an offence punishable u/s 392 PPC, the appellant is sentenced to suffer R.I. for 7 (seven) years, and to pay fine of Rs.50,000/- (fifty thousand) or in default to pay fine he shall undergo R.I. for 6 (six) months more.

Both the sentences were directed to run concurrently and benefit of section 382-B Cr.P.C. was also extended to the appellant.

- (c) The appellant was directed to pay Rs.1,00,000/- (one lac) each to the legal heirs of both the deceased persons respectively as compensation u/s 511-A Cr.P.C.

The amount of fine, if paid, be deposited in the Government Treasury and the amount of compensation, if given, be given to the legal heirs of both the deceased persons respectively.

2. The facts of the case as borne out from the impugned judgment are that on 3.1.1997 at 4.00 a.m. appellant Ashiq Ali entered into the house of Najeebullah, grand-father of the complainant Dr. Aaliya Hameed, in PECHS, Karachi, for committing robbery and upon resistance made by Najeebullah, the appellant killed him and his wife Mst. Sharifunnisa by stabbing injuries to them by means of dagger and also stabbed the complainant twice causing injuries to her. In order to save her life, she gave away cash, prize bonds, gold ornaments and other valuable articles belonging to her and assured him that she would not tell anyone his name. He was a Sindhi having a height of about 5.7" with large black eyes. After the appellant had left the house she went on foot to the house of her aunt PW Mst. Nasima Ashraf and cousin PW.2 Mst. Saima Ashfaq and PW.6 Muhammad Tahir and family friend Kashif Naeem. Thereafter dead

bodies were recovered, inquest prepared, recoveries made at the instance of the appellant, post mortem and autopsy of dead bodies was carried out and chemical report was brought on record. The appellant was arrested on 7.1.1997. The sample of blood secured from the place of incident, blood stained clothes, dagger and other articles of deceased Najeebullah Khan were sent to the Chemical Examiner. On 14.1.1997, statements of Dr. Aaliya and PW.1 Naseem Ashfaq under section 164 Cr.P.C. were recorded on oath by the IXth Judicial Magistrate, Karachi East, in presence of the accused duly cross-examined by the appellant's advocate. After completion of the investigation charge sheet was submitted before the Court on 20.1.1997 to which the appellant pleaded not guilty and claimed to be tried.

3. During the pendency of the case, the complainant left the country and the prosecution could not produce her. PW.1 Mst. Nasima Ashfaq, the daughter of deceased Najeebullah Khan and Sharifunnisa and the aunt (Phuphi) of the complainant, narrated that at about 8.00 a.m. she got up on ringing of the bell of her house and

when she opened the door she found Dr. Aaliya who told her that 2/3 dacoits had entered the house of her grand-father, killed him and her grand-mother and also took away valuable articles. She asked her to telephone Kashif Butt who was the class fellow of her daughter. Thereafter along with them she went to her father's house and found both her parents lying dead and house hold articles scattered all over. Her statement was recorded by the police and her further statement was also recorded by police. PW.2 Mst. Saima Ashfaq and PW.6 Muhammad Tahir corroborated the statement of PW.1 who is their mother. They stated that Kashif Butt was called who was the class-fellow of PW.2. It was stated by them that Dr. Aaliya did not tell the name of the appellant the first day, however, they came to know his name the next day from Dr. Aaliya in the hospital where she made a formal statement before police.

4. PW.7 Kashif Naeem is a family friend and close friend of PW.2. He was called by PW.2 on telephone and he along with other PWs. went to the place of occurrence and then informed about the incident to emergency No.134 in response to which police reached the

place of incident and inspected the dead bodies. Memo was prepared in his presence which was also signed by him. Police prepared inquest report which also bears his signatures. He also got recorded his statement under Section 161 Cr.P.C. before the police.

5. PW.3 Muhammad Yasin and PW.4 Muhammad Asif were told of the murder by PW.1 and were witnesses of mushir-nama and inquest reports of both the deceased and found Dr. Aaliya admitted in Jinnah Hospital where she remained for 10 days. The name of the appellant was disclosed by her the second day of the occurrence.

6. PW.5 Saeedullah, Police Inspector posted as PC at P.S. Ferozabad stated that he was led by the father of the appellant to his house where he arrested the appellant and at his pointation recovered robbed articles namely Rs.55,277/-, 26-American Dollars, Prize Bond of Rs.250/-, Pass Port, Photostat copy of N.I.C. of the deceased, N.I.C. of Dr. Aaliya, wrist watch etc. as well as blood stained clothes of appellant. He prepared memo thereof and produced it. His statement was recorded under section 161 Cr.P.C.

7. PW.11 Muhammad Ahsn Malik was SHO, Ferozabad, received a message from P.S. about the incident. He went to the Surgical Ward 2 of J.P.M.C. where he recorded the statement of Dr. Aaliya under section 154 Cr.P.C. who was in injured condition. Further investigation of the case was conducted by PW.10 Sharafuddin the then Inspector. He inspected the place of incident and the dead bodies, prepared inquest report, sketch of the place of incident and recorded the statements of the complainant under section 161 Cr.P.C. in which complainant Dr. Aaliya had nominated the appellant. He arrested the appellant from Abbasi Nagar outside his house who led him to the place from where robbed articles were recovered in the presence of mashirs. He also got recorded the statement of Dr. Aaliya before PW.13 Abdul Latif, Magistrate. PW.9 Javaid Anwar, ASI was posted at P.S. Ferozabad on 3.1.1997. He had accompanied the SHO to the place of occurrence and in his presence the statement of the complainant was recorded. PW.13 Abdul Latif, Magistrate recorded the statement of Dr. Aaliya Hameed under section 164 Cr.P.C.



8. PW.8 Dr. Muhammad Tariq was on duty on 3.1.1997 when the dead body of Najibullah Khan was brought by SIP Asghar Baig. He carried out the post-mortem and his findings in brief are that the cause of death of the deceased is hemorrhage shock due to profuse bleeding to cardio respiratory failure, resulting from cut throat with sharp object. He was not cross-examined by the appellant. Similarly, PW.12 Dr. Rohina Hassan was on duty on 3.1.1997 as Woman Medico Legal Officer at Abbasi Shaheed Hospital when the dead body of Mst. Sharifa wife of Najibullah Khan was brought. She carried out the post mortem and her findings are that muscles of her interior neck were clean cut, thyroid cartilage bone was intact. Trochea is cut through and through, blood mixed with fine froth coming out. Blood vessels of the right side of the neck clearly cut. She was of the opinion that the death occurred due to cardio respiratory failure secondary to irreversible hemorrhage shock.

9. Statement of appellant Ashiq Ali was recorded under section 342 Cr.P.C., in which he denied the prosecution allegations levelled against him and pleaded to be innocent. His defence plea was that Dr.

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Aaliya knew him previously and when he went to hospital to see her she told him that this incident was committed by Police Constables and she recognized them but police pressurized her to give his name instead of actual culprits and she did not give his name in the FIR. He has falsely been implicated in this case.

10. The appellant also examined himself on oath under section 340(2) Cr.P.C. in which he deposed that he knew the complainant Dr. Aaliya prior to the incident for about two and half years. All the family members of Dr. Aaliya knew him previously. He used to visit the house of the complainant before this incident for the purpose of repairing of their vehicles. On the next day of the incident he came to know about the incident when he went to the house of Dr. Aaliya where so many people present were crying and weeping and they disclosed to him that 3/4 unknown persons had entered into the house of Dr. Aaliya and they killed her grand parents and robbed away valuable articles. Thereafter he immediately went to the Jinnah Hospital to see Dr. Aaliya who had also sustained injuries during this incident. She also disclosed that 3/4 unknown dacoits had entered into

their house and had killed her grand parents and robbed away valuable articles and also caused injuries to her. She further disclosed that when she was sleeping some persons attacked her but she did not give the name of any person as they were unknown persons. She also disclosed that she had lodged the FIR to the above effect. His version was that PWs. had deposed against him at the instigation of police. However, he admitted that after four days he was arrested in front of his house and taken to the Police Station where he found robbed property on the table.

11. The appellant was convicted and awarded death sentence by the learned Additional Sessions Judge, vide Judgment, dated 12.06.2003.

12. The accused preferred Criminal Appeal No.36/K of 2003 before this Court which vide judgment dated 27.6.2004 set aside the Judgment, dated 12.6.2003 of the learned Additional Sessions Judge and with consent of the parties, the case was remanded back to him for fresh decision in accordance with law, with direction that the appellant be re-examined under section 342 Cr.P.C. and confronted with all the incriminating circumstances/evidence available on record

with liberty to lead evidence under section 340(2) Cr.P.C. The criminal reference made by the Court of Additional District Judge for confirmation of the death sentence awarded to the appellant was answered in negative.

13. In the second round of trial, statement of appellant under section 342 Cr.P.C. was recorded in which he again denied the allegations levelled against him and pleaded to be innocent when confronted with the fact that robbed articles and blood stained dagger were recovered at the instance and pointation of the appellant he denied it. He also took a plea that before recording the statements under section 164 Cr.P.C. of Dr.Alia and Naseem Ashfaq, the copies of FIR and their 161 Cr.P.C. statements were not supplied to him either by the I.O. or by the learned Judicial Magistrate nor he was given the opportunity and time to defend his side. P.Ws. had deposed against him with ulterior motive and the police had involved him falsely. The appellant adopted his earlier statement on oath, which he had recorded during the course of first round of the trial. Thus the

appellant was provided with full opportunity in terms of remand Order dated 27.6.2004 of this Court.

14. Reverting back to the prosecution case, the complainant made a statement under section 164 Cr.P.C. on oath on 14.1.1997 reiterating what she had stated in FIR and under section 161 Cr.P.C. adding further that she had also handed over to the appellant 5,500 dollars, bond worth Rs.3,000/-, three lockets and three rings. She also named the appellant as the culprit. She was cross-examined by appellant's counsel and stated that she had come from Lahore three days earlier to the incident and denied that she had any affair with the appellant or that she had a date with him. She also denied that she had hit her grand-father and grand-mother when they stopped her from running away with the appellant.

15. Firstly it was urged by the learned counsel for the appellant Syed Saeed Hassan Zaidi that the appellant even though was fully known to the complainant she did not name him in FIR which by itself creates doubts as to the prosecution case. It is true that she did not name him in FIR but she had given his name the next day under

her statement under section 161 Cr.P.C. as well as in her statement under section 164 Cr.P.C. on oath before a Magistrate. The contents of FIR gives his full description and contains his threat that if she disclosed his name she will face dire consequences. It is also pertinent to note that the learned counsel for the appellant had failed to cross-examine her when she appeared under section 164 Cr.P.C. as to why his name was not disclosed in FIR and why she remained silent when he visited her in hospital.

16. Next it was contended on behalf of the appellant that the prosecution had failed to produce complainant Dr. Aaliya the only eye witness of the incident and in her absence no credibility could be attached to the deposition of prosecution witnesses. There is nothing on record to justify her non-appearance nor to justify the conviction of the appellant.

17. It is true that the complainant was the only an eye witness and was not available as prosecution witness but her statements in FIR, under section 154 Cr.P.C. in hospital, under Section 161 Cr.P.C. and more particularly under Section 164 Cr.P.C. on oath are on record.

She was cross-examined by the appellant's Counsel Mr. Mumtaz

Abbas when she made statement under section 164 Cr.P.C. on oath in the presence of the appellant but her deposition remained firm and steady. To say that her statements contained in her complaint and under section 164 Cr.P.C. be brushed aside having no evidentiary value is not correct. A statement on oath under section 164 Cr.P.C. stands at a higher pedestal than a statement simplicitor which gives right to an accused person to cross-examine a witness. The introduction of section 1-A to section 164 Cr.P.C by the Law Reform Ordinance 1972 is perhaps aimed at to meet a situation like this or where a witness due to old age or inordinate delay in Court proceedings may not be available to offer his evidence at a late stage.

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18. It was next contended by the learned counsel for the appellant that Dr. Aaliya Hameed should have been recalled and re-examined by the Court under section 540 Cr.P.C. as was held in the case "*Muhammad Azam Vs. Muhamamd Iqbal PLD 1984 SC 95*" where the evidence relating to Nikah was essential to the just decision of the case. It is not so presently as recalling or re-examining the



complainant is neither tenable nor essential for just decision of the case. The deposition of other witnesses if seen along with medical reports, chemical report, memos of recovery, sketch of place of Wardat fully and independently establish the prosecution case against the appellant beyond any shadow of doubt.

19. The further objection raised by the learned counsel for the appellant that he was not supplied copies of FIR and statements under section 161 and 164 Cr.P.C. of the complainant and of PW.1 Mst. Nasima Ashfaq under section 164 Cr.P.C. is not correct. This objection is an after thought which was taken by the appellant when he was re-examined under section 342 Cr.P.C. after remand of the case. However, no such objection was taken by him when he deposed earlier under section 340(2) Cr.P.C. in his defence nor he cared to cross-examine PW.11 SHO and PW.10 Investigating Officer on this point.


20. In his revision petition Abdul Aziz Khan son of deceased persons has prayed for enhancement of sentence of the appellant, which according to him is death sentence. Learned counsel for the

petitioner Mr. Muhammad Nazeer Tanoli argued that the prosecution having fully proved its case against the appellant, it was mandatory for learned Sessions Judge to have awarded death sentence to the appellant placing reliance on the case of "*Ijaz alias Billa and three others Vs. The State 2002 SCMR 294*" and *Muhammad Yasin Vs. The State 2002 SCMR 391*". However, it was also observed by the Hon'ble Supreme Court of Pakistan that where strong mitigating circumstance exists, lesser sentence may be awarded. The statement under oath of Dr. Aaliya Hameed was recorded on 14.1.1997 and the prosecution adduced its evidence with effect from 20.8.1998. There was thus a gap of above 19 months. Technically and strictly speaking she cannot be substituted as a prosecution witness even though her statement under section 164 Cr.P.C. on oath was made before a Magistrate and she was cross-examined in the presence of the appellant by the appellant's counsel. At the same it cannot be denied that the statement of a witness on oath under section 164 Cr.P.C. before a Magistrate in the presence of the appellant with right to cross-examination has many attributes and features of evidence during

trial as envisaged under the Qanune Shahaat Order, 1984. Learned trial Court had awarded lesser punishment to the appellant as the complainant/victim was not examined at the trial. We therefore, agree with the trial Court.

21. For the aforesaid reasons we dismiss the appeal as well as the revision.

*sd/*  
  
JUSTICE DR. FIDA MUHAMMAD KHAN


*sd/*  
 16/3/07  
JUSTICE HAZIQL KHAIRI  
Chief Justice

*sd/*  
  
JUSTICE MUHAMMAD ZAFAR YASIN

Karachi, the

16th March 2007  
Bashir/\*

Approved for reporting. *sd/*

  
CHIEF JUSTICE

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