

IN THE FEDERAL SHARIAT COURT  
( Appellate Jurisdiction )

PRESENT

MR. JUSTICE HAZIQUL KHAIRI, CHIEF JUSTICE  
MR. JUSTICE SALAHUDDIN MIRZA

CRIMINAL APPEAL NO. 5/K of 2006

Mehar Ali Shah son of Muhammad --- Appellant  
Ali Shah, resident of Taluka Kipro,  
District Sanghar

Versus

The State --- Respondent

For the Appellant --- Mr. Rasool Bux Palijo,  
Advocate

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

F.I.R No, date and --- 45/1995, 22.5.1995, PS.  
Police Station --- Mirpur Bathoro

Date of the Order of the --- 3.12.2005  
Trial Court

Date of Institution --- 27.1.2006

Date of Hearing --- 26.3.2007

Date of Decision --- 30.4.2007

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## JUDGMENT:

HAZIQUK KHAIRI, CHIEF JUSTICE.- Appellant Mehar Ali

Shah is aggrieved with judgment dated 3.12.2005 whereby he was convicted by the Court of First Additional Sessions Judge, Thatta under section 302(b) PPC and sentenced to imprisonment for life along with compensation in the sum of Rs.50,000/- payable to the heirs of the deceased as required under section 544(A) Cr.P.C and in case of non-payment thereof to undergo R.I. for six months. The appellant was, however, entitled to the benefit of section 382-B Cr.P.C.

2. Briefly the prosecution case is that on 22.5.2005 at 2100 hours complainant Khuda Bux, a Goldsmith, lodged an FIR at Police Station, Mirpur Bathoro stating that at about 8.30 p.m. he along with his relative Muhammad Moosa and other family members was watching T.V. when the outer door of the house was opened and unknown persons with pistols in their hands, entered into his house. One of them while pointing out his pistol ordered them to keep silence and hand over all the gold and money to them. He told them that there

was neither gold nor money in the house and asked them as to who they were. Thereupon the person holding the pistol struck the butt of his pistol on his head and another person directly fired at Muhammad Moosa with the pistol, which hit his buttock and he fell down. The third person standing at the door directly fired at Nisar who also fell down and later died. On hearing the firing and cries of the family members of the complainant, their neighbours Nisar Ahmad, Dr. Ishaque, Ali Nawaz Jalalani and others came running to the house while all the dacoits except one appellant Mehar Ali Shah, climbed the stairs of the house, jumped from the back side and ran away. Dr. Ishaque and Ali Nawaz Jalalani and other neighbours caught hold of appellant Mehar Ali Shah. In the meantime police reached there and arrested him on the spot.

3. During the course of investigation appellant Mehar Ali Shah confessed his guilt and made confessional statement before the Mukhtiarkar and F.C.M., Mirpur Bathoro. He disclosed the names of co-accused Achar, Mir Muhammad, Nadir and Mehar Lashari and said that they were in his company when they committed the crime.

Accused Muhammad Achar was arrested and after usual investigation the police filed the challan of the case before the Court. Another accused Mehar Lashari was stated to have been tortured to death by the police when he was in police custody. Subsequently, accused Mir Muhammad was also murdered in a separate crime and accused Nadir Ali, who was shown as absconder, was arrested and sent up to stand trial along with appellant Meahr Ali Shah and Muhammad Achar.

4. At the commencement of trial the charge against accused Mehar Ali Shah, Muhammad Achar and Nadir Ali was framed to which they pleaded not guilty and claimed to be tried. The prosecution examined as many as 15 witnesses.

5. PW.1 Khuda Bux who is also the complainant reiterated his version as contained in FIR. He also repeated that on appellant's firing from outer door Nisar Ahmad fell down and later died on his way to Hyderabad. Injured Muhammad Moosa was admitted in Mirpur Bathoro Hospital for examination and treatment. PWs. Dr. Ishaque and Ali Nawaz Jalalani apprehended the appellant along with

Mohallah people. These persons reached there within 5 minutes at the place of Wardat prior to the arrival of police.

6. PW.2 Muhammad Moosa corroborated in full the statement of complainant Khuda Bux in whose house he was watching T.V. He also testified that all of a sudden six persons entered into the house as the door of the house was wide open. One of the persons was standing at the outer door, armed with pistol. The culprits fired at him and also at Nisar Ahmad. Both of them were taken to the local Taluka Hospital Mirpur Bathoro from where Nisar Ahmad was taken to Hyderabad. Appellant Mehar Ali Shah was apprehended by Dr. Ishaque and Ali Nawaz Jalalani and other neighbours and he disclosed his name as Mehar Ali Shah, herein. About 20/25 people from Mohallah were attracted on hearing the firing. His statement was recorded under section 164 Cr.P.C. before the Magistrate at Bathoro. At the time of incident he did not have any television in his house and he used to watch television in the house of the complainant.

7. PW.3 Ali Nawaz Jalalani is a neighbour of the complainant and appellant's relative. On hearing the noise of fire arm and cries of

complainant's family members he rushed towards the house of the complainant where one person armed with pistol was standing at the door of the complainant who fired pistol shot at Nisar which hit his abdomen as a result thereof he fell down. Subsequently, the appellant was apprehended with pistol by the Mohallah people. Other accused ran away from the back side of the house. Both Muhammad Moosa and Nisar Ahmad were taken by police to Taluka Hospital Bathoro.

8. PW.4 Dr. Muhammad Ishaque was sitting on the day of incident at 8.30 p.m. at the Otaq of one Ali Muhammad where Ali Nawaz Jalalani (PW.3) was also present. On hearing cries of fire arm they rushed towards the house of the complainant and saw Nisar Ahmad also coming running there and while he was trying to apprehend the appellant along with others the appellant fired at him and he fell down. Mushirnamas of arrest and recovery were made which bear his signatures. The other Mohallah people attracted to were Habibullah, Haji, Abdul Rehman, Muhammad Yameen, Muhammad Ismail, Abdullah, Dr. Dilawar and many more who

witnessed the incident. Soon police arrived there and took appellant Mehar Ali Shah in its custody along with pistol.

9. PW.5 Dr. Rahtullah deposed that in his presence Mushirnamas of place of Wardat, of dead body, of injuries and of clothes of deceased were prepared and bear his signatures.

10. The other witnesses are PW.6 Dr. Abdul Shakoor, who was posted as Medical Officer, Taluka Hospital, Mirpur Bathoro, who examined injured Khuda Bux, Haji Moosa and Nisar Ahmad and, since the injuries of Haji Moosa and Nisar were serious, he referred them to LMCH Hyderabad but within one hour Nisar Ahmad died and was again brought to him and he performed his post mortem examination and submitted the post mortem report of deceased Nisar Ahmad, PW.7 Noor Nabi, Mukhtiarkar and F.C.M., Mirpur Bathoro, who recorded the confession of the appellant, PW.8 Muhammad Juman, a peon at Taluka Hospital Sujawal and PW.9 Allahdino, ASI, Police Station, Mirpur Bathoro who recorded FIR, memo of arrest and memo of recovery of 12 bore pistol all of which bear his signatures.

PW.10 Saeed Khan prepared sketch of Wardat.

11. It is pertinent to note that Muhammad Moosa who was injured in the firing got recorded his statement under section 164 Cr.P.C. on 6.6.1995 before the Magistrate. He specifically stated that the appellant fired at Nisar Ahmad as a result of which he fell down and later died. PWs. Dr. Ishaque and Ali Nawaz Jilalani also got recorded their statements under section 164 Cr.P.C. on 6.6.1995 before the Magistrate which is substantially the same as deposed by Muhammad Moosa.

12. The appellant also made judicial confession under section 164 Cr.P.C. before Mukhtiarkar and FCM, Mirpur Bathoro on 6.6.1995 as under:-

12/1  
"I know Nadir Lashari since 1989, he was guard in a Chinese Company and I was a driver at Jamshoro Thermal Power in 1989, and I am still a driver there but my posting order is as a fireman. On 22.5.1995, I, Constable Achar, Constable Mir Muhammad Khoso and Nadir Lashari came together to Mirpur Bathoro where Achar, friend Mehar Lashari met us he took us to a hotel and served us with a tea. Mehar Lashari consulted us and told us that a crime has to be committed in Mirpur Bathoro then he said that I am a local resident and would be identified therefore, I am giving you two persons instead of myself those



two people were already sitting in the hotel, Constable Achar knows them. Then Mehar Lashari walked a little further and stopped then, I, Achar, Constable Mir Muhammad Khoso, Nadir Lashari and two other persons, whom I do not know went together and entered in to the house of Khatti goldsmith, with intention of committing a crime. I stood at the door of the house, Achar and other went inside the house and fought with the owner of the house, who raised cries, on their cries and on fire neighbours came running from outside one of them tried to catch me, I fired at him with my pistol, injured and brought him to down to earth, other people surrounded me and caught me along with a pistol, I, Constable Achar, Mir Muhammad Khoso, Nadir Lashari and two others had entered into the house of goldsmith Khatti with the intention of committing crime.”

13. The appellant was examined under section 342 Cr.P.C. wherein he denied the prosecution story and elected to produce his evidence in rebuttal. According to Haji son of Noor, DW.1, about 10 years back DW Refique asked him to accompany him at Mirpur Bathoro as he had to purchase buffaloes from there. In the morning they went to the cattle market but could not find the buffaloes of their choice so they went to a hotel where appellant Mehar Ali Shah met them and told them that he had also come there to purchase the buffaloes from the cattle market. While they were there police party reached there and

took personal search of appellant Mehar Ali Shah and arrested him. It was stated by him that he came to Mirpur Bathoro at about 8.00 or 8.30 p.m. The deposition of DW.2 Muhammad Rafique is also to the effect that in the company of DW.1 he went to cattle Market of Mirpur Bathoro where he met the appellant who had also come there to purchase buffaloes. DW.3 is Basharat Ali Khan an Assistant Director, Security, at Thermal Power Station, Jamshoro, deposed that appellant Mehar Ali Shah had filed an application to the Chief Executive for a certificate showing that he was on his duty in the evening shift on 22.5.1995. This application was endorsed by him to the Deputy Manager who again marked the said application for onward transmission to section Incharge for verification and report. In reply he sent his letter, dated 31.8.2004, to the Deputy Manager informing that the appellant performed his duty in the evening shift at Thermal Power Station, Jamshoro, on 22.5.1995 and that the evening shift starts from 1400 hours (2.00 p.m.) and finishes at 2200 hours (10.00 p.m.). DW.3 produced an extract of attendance for the month of May, 1995.

14. It was firstly urged by Mr. Rasool Bux Palijo, learned counsel for the appellant that the so-called judicial confession has no evidentiary value as it was recorded after 10 days of occurrence and the learned trial Court should have overlooked it while pronouncing verdict against the appellant. In support of his contention he placed reliance on State Vs. Ishaq P.Cr.L.J. 597 in which it was held that "there can be no doubt that the confession was recorded after a considerable delay, and certainly long after 24 hours. The law as it stands, will not countenance the same and it has to be totally ruled out of consideration." Other case law cited by him is Tooh Vs. The State 1975 P.Cr.L.J. 440 and Muhammad Israr and another Vs. The State 2002 P.Cr.L.J. 1072. Learned counsel for the appellant further submitted that the appellant retracted the confession in his statement under section 342 Cr.P.C., therefore, it would be travesty of justice if a delayed retracted confession of an accused is taken into consideration and made basis of his conviction. In support he placed reliance on Naqibullah and another Vs. The State PLD 1978 SC 21,

Khalid javed and another Vs. The State 2003 SCMR 1419 and  
Muhammad Yaqoob Vs. The State 1992 SCMR 1983.

15. We agree with Mr. Paliyo, counsel for the appellant, that there was a delayed confession of 10 days made by the appellant which too was retracted by him and we also agree with him that it would be unsafe and injudicious to convict him solely on that basis.

16. It was next contended by the learned counsel that the trial Court had failed to consider and/or misread the evidence adduced by the appellant pursuant to his statement under section 342 Cr.P.C. for setting up his defence. It was submitted that there is not a word in the entire judgment about the plea of alibi. While going through the impugned judgment we find that the learned trial Judge did consider defence evidence and stated:-

“DW Haji has deposed that DW Muhammad Rafique had come to him at his home where he made his stay and on the next morning they went at cattle market Mirpur Bathoro where accused Mehar Ali met them. But Muhammad Rafique has deposed that DW Haji came to him and made his stay with him in his house and on the next morning they went to cattle market Mirpur Bathoro for purchasing she-buffalo where accused

Mehar Ali Shah met them. Therefore looking to such contradictory statements of these defence witnesses I do not hesitate to say that it is an after thought theory which has been cooked up by the DWs in order to extend undue favour to the accused. Accused Mehar Ali Shah in his statement as recorded u/s 342 Cr.P.C. has shown himself to be residing at Jamshoro where he is employed in WAPDA but for the purpose of seeking a buffalo he chose cattle market Mirpur Bathoro which is located at a distance of about more than 100 K.M. from Jamshoro. There are other cities also such as Thatta, Sujawal, Hyderabad, which are located nearer to Jamshoro but accused Mehar Ali Shah inspite of going there he had come to Mirpur Bathoro after bye-passing these cities only for the purpose of purchasing a buffalo. Thus this theory as put forth by the accused in order to justify his availability at Mirpur Bathoro appears to be managed one. Thus the presence of the accused itself in Mirpur Bathoro Town corroborates the version of the complainant party about having apprehended him at the spot when he came there in the company of his companions for committing robbery from the house of complainant.”

17. We fully agree with reasons given and conclusions arrived at by the learned trial Court in disbelieving the alibi plea set up by the appellant. What further transpires from the record is that the plea of alibi was not put up by the appellant to any of the prosecution witnesses. Neither Ali Nawaz Jalalani, Dr. Ishaque and Muhammad Moosa

were cross-examined by the appellant when they recorded their statements under section 164 Cr.P.C. nor any suggestion to the plea of alibi was put to them in his lengthy cross-examination. Besides the deposition of DWs. Haji and Muhammad Rafique and other evidence on record demolishes the plea of alibi put up by the appellant. In case of Muzaffar Baig etc. Vs. The State reported in NLR 1982 Cr.L.J. 428, it was held by a Division Bench of Lahore High Court:

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“In these circumstances, if the plea of alibi is accepted, then it will adversely react on the whole prosecution version. Muzaffar Baig appellant as per statements of Hayat Ali (DW.1) and Asif Shabbir (DW.2) was marked present on duty on the date of occurrence. Even if the entry in the Register regarding presence on duty is accepted as true and factual, the same would not satisfactory establish that he could not be present at the place of occurrence at the time the incident was alleged to have occurred. In similar circumstances, in case reported as Haji Ghulam Shabbir V. the State (1978 SCMR 216), the hospital records produced to show that the accused in that case was admitted in the hospital on the day of occurrence, was not relied upon as the hospital was located within less than 100 miles from the place of occurrence. Muzaffar Baig appellant could have easily reached the village, even if, he marked himself present on duty in the morning in the said register. We

have, therefore, no hesitation in discarding the plea of alibi taken up by Muzaffar Baig, appellant.”

18. It is thus evident that the plea of alibi set up by the appellant was an after thought and the evidence adduced by him is made up, concocted, inconsistent and not convincing at all. The contention of the learned counsel that when there are two possibilities, the one more favourable to the accused should be given preference is untenable in this case for reasons given above.

19. Next, learned counsel for the appellant asserted that there were a number of loopholes and discrepancies in the evidence of prosecution witnesses. He first referred to the deposition of Medical Officer PW Dr. Abdul Shakoor who stated in his report that three wounds were found on the body of the deceased which could not have been caused by a single shot. Moreover, PW Muhammad Moosa in his deposition had stated that appellant had made fire at deceased Nisar from a distance of about 15/20 feet whereas PW Dr. Abdul Shakoor deposed that this distance was 7/8 inches. PW Muhammad Moosa and PW Dr. Ishaque did not disclose the names of the people of the locality who had gathered at the place of occurrence and the



prosecution witnesses were related to each other. Lastly it was argued that PW Dr. Ishaque and Ali Nawaz Jalalani were in the house of Wali Muhammad, a neighbour of the complainant when they heard cries and noise of fire and came running, therefore, how could they be eye witnesses to firing by the appellant which must have taken place earlier, whereupon learned Assistant Advocate-General for the State Mr. Arshad H. Lodhi submitted that there were cries of the family members when six armed persons entered into house and that the first shot was received by Muhammad Moosa deceased and not by the appellant.

20. All the eye witnesses produced by the prosecution were natural witnesses. PW Muhammad Moosa, a neighbour, was on a visit to the complainant's house. PW Ali Nawaz Jalalani and Dr. Ishaque were sitting in the house of another neighbour and rushed to the house of the complainant on hearing cries and gun fire. It is not the case of the appellant that he had any enmity either with the complainant or any of the prosecution witnesses so as to falsely implicate him. It is a clear cut case of murder in which the appellant was caught red handed and



recovery of pistol was made on the spot as evidenced by Mushirmamas  
of recovery and arrest.

21. We accordingly find no substance in this appeal which is  
hereby dismissed. We uphold the judgment passed by the learned  
First Additional Sessions Judge, Thatta. The appellant shall be  
entitled to the benefit of section 382-B Cr.P.C.

  
  
30/4/07  
JUSTICE HAZIQUL KHAIRI  
Chief Justice

  
JUSTICE SALAHUDDIN MIRZA

Announced at Karachi  
the 30th April 2007

Approved for reporting  
Hud in  
2/5/07

