

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

MR. JUSTICE SALAHUDDIN MIRZA
MR. JUSTICE SYED AFZAL HAIDER

CRIMINAL APPEAL NO.23-Q-2005

3. Abdul Ghafoor son of Ghulam Haider
4. Babu Khairan son of Raza Muhammad
Both Langove Sumakzai by Caste, residents
of Dalo Tehsil Kalat. ---- Appellants

Versus

The State --- Respondent

JAIL CRIMINAL APPEAL NO.44-Q-2005

Muhammad Ishaque son of Eid Muhammad
Caste Langove Sumakzai, resident of
Dalo Tehsil Kalat. ---- Appellant

Versus

The State --- Respondent

For the appellants	Mr. Mohsin Javed & Mr. Irshad Ali Rashid, Advocates
For the State	Mr. Naseer Ahmed Bangalzai, Assistant Advocate General
No.& date of FIR Police Station	No.21/2004 , dt.15.04.2004, Levies Thana Kalat,
Date of judgment of Trial court	18.03.2005
Date of Institution	10.05.2005 &30.07.2005 respectively
Date of hearing	13.10.2009
Date of decision	23.10.2009

JUDGMENT:

Justice Syed Afzal Haider, J:- Appellants Abdul

Ghafoor and Babu Khaira through Criminal Appeal

No.23/Q/2005 and Muhammad Ishaque through Jail Criminal

Appeal No.44/Q/2005 have challenged the judgment dated

18.03.2005 delivered by Additional Sessions Judge, Kalat

whereby the appellants were convicted under section 302(b)/34

of the Pakistan Penal Code and sentenced to life imprisonment

each with fine of Rs.20,000/- each or in default to further suffer

two years rigorous imprisonment each. They have also been

held liable to pay an amount of Rs.75,000/- each to the legal

heirs of deceased as compensation under section 544-A of the

Code of Criminal Procedure or in default thereof to further

suffer six months imprisonment each. They were further

convicted under section 392/34 of the Pakistan Penal Code and

sentenced to ten years rigorous imprisonment each with fine of

Rs.10,000/- each or in default thereof to further undergo one

year rigorous imprisonment. Both the sentences of imprisonment were ordered to run concurrently with benefit of section 382-B of the Code of Criminal Procedure.

Since both the above mentioned criminal appeals have arisen out of the same judgment, therefore, we will dispose of both the connected matters by this single judgment.

2. Briefly the prosecution story is that complainant Abdul Aziz PW.1 laid information at Levies Thana Kalat, stating that on 15.04.2004 at about 8.00 p.m. he was present at Levies Line Kalat in connection with his official duty when Muhammad Ashraf PW.3 informed him on wireless that one Muhammad Rafique had given information at Levies Post Nimergh that an unidentified dead body was lying near Kand Nimergh who appears to have been murdered by some unknown persons. This information received by PW.1 was registered as FIR No.21/04 against unknown persons under

section 17(4) of the Offences against Property (Enforcement of Hudood) Ordinance, 1979.

3. Investigation ensued as a consequence of registration of crime report. Munir Ahmed Naib Tehsildar PW.17 investigated the case. He visited the place of occurrence, prepared site plan Ex.P/17-B, took into possession blood stained earth, cap, pair of shoes and a pillow of deceased from the place of occurrence, recorded the statements of witnesses and took the dead body to hospital. He informed all the Levies Check Posts about the vehicle/pickup with direction to arrange Naka. After medical examination, the dead body was handed over to Muhammad Sharif brother of Muhammad Yahya deceased. At about 11.30 p.m. the District Coordination Officer informed him through wireless that pick-up No.WA-714 Quetta was recovered from the possession of accused Muhammad Ishaq at Lack-pass check post. The Levies personnel reached at the spot in Government pick-up and took into possession

the recovered pick-up alongwith seven sacks of fertilizer (Urea) loaded on the vehicle. Accused Muhammad Ishaq was also taken into custody. The Mustung Levies produced knife, toy pistol which were recovered by them from accused Muhammad Ishaq. Thereafter two other accused namely Abdul Ghafoor and Babo Khaira were also arrested. During investigation the accused disclosed that one Abdul Baki was also alongwith them in this occurrence and they were taking the pick-up to Abdul Baki who had given them Rs.25,000/- each for this purpose. Warrants of arrest of accused Abdul Baki were obtained and different raids were conducted on his house but he could not be arrested. On 24.04.2004 the accused persons pointed out the place of occurrence. Thereafter identification parade was arranged under supervision of the Judicial Magistrate Kalat who certified the same. On 29.04.2004 identification parade of accused Abdul Ghafoor was conducted in the presence of Judicial Magistrate Kalat and Muhammad Din witness

identified the accused stating that he had supplied fuel from the pump located at Johan cross. After completion of investigation, a report under Section 173 of the Code of Criminal Procedure was submitted on 30.04.2004 in the Court requiring the accused to face trial.

4. The learned trial Court framed charges against the accused persons on 26.06.2004 under section 17(4) of the Offences against Property (Enforcement of Hudood) Ordinance, 1979 as well as section 109/34 of the Pakistan Penal Code. The accused did not plead guilty and claimed trial.

5. The prosecution produced seventeen witnesses to prove its case. The gist of the prosecution witnesses is as under:-

- (i) Complainant Abdul Aziz, Levies Defidar appeared as PW.1 and verified the contents of crime report.
- (ii) PW.2 Feroz Khan, Naib Risaldar Levies, stated that on 15.04.2004 at about 10.14 p.m. he received message on wireless set that accused persons after killing the driver had succeeded to take away a red

coloured Datson pick-up from the area of Kalat. At about 11.00 p.m. he alongwith other officials stopped a red colour pick-up at the Check Post which was the same pick-up about which wireless message was received. They took the pick-up P/1 into possession through recovery Fard Ex.P/2-A alongwith seven sacks of fertilizer (Urea) P/2 through recovery Fard Ex.P-2-B and arrested accused Muhammad Ishaq who was driving the pick-up. One toy pistol was recovered from his possession. Accused was asked about his co-accused, who said that when they reached near the Chek Post, they ran away. The Levies persons started the search of accused, who were arrested from nearby and were identified by Muhammad Ishaq accused.

- (iii) Muhammad Ashraf, Levies Sepahi, PW.3 had received information about snatching of a red coloured pick-up No.WAA-714 and that its driver had been murdered. He alongwith levies officials arranged a Nakah. At about 10.15 p.m. the said vehicle coming from Mastung side was stopped. On personal search, one knife and one toy pistol was recovered from the driver Muhammad Ishaq accused. The accused informed them that he was

accompanied by two other companions, who after seeing the Nakah ran away. The levies chased them and arrested them after few minutes.

- (iv) PW.4 Abdul Rahim was declared hostile.
- (v) PW.5 Muhammad Ashraf, Levies Piada, deposed that on 15.04.2004 at about 7.50 p.m. he was on duty at Nimergh Levies Check Post when one Muhammad Rafiq informed that one person was lying dead near Nimergh Raod. He immediately informed Abdul Ghafoor Dafidar at Kalat Levies Line. Thereafter he received order from Kalat Levies Line that the matter be reported to all the Levies Check Posts, whereafter Tehsildar Munir Ahmed came on the spot and on wireless informed that the dead body was of one Yahya driver. He instructed to inform the family members of Yahya deceased that his dead body was lying at Civil Hospital. The PW further stated that he heard a wireless message at midnight that accused persons alongwith weapon of crime/murder were arrested at Lack Pass.
- (vi) PW.6 Noor Ahmed, Levies Man, deposed that on 15.04.2004 at about 10.00 p.m. he alongwith Naib Tehsildar, reader Jameel Ahmed and Driver Saleem reached at the place of occurrence, took

the dead body into possession, recovered a pair of Balochi Chappal, one cap and one pillow, blood stained earth and stones vide recovery memo Ex.P/6-A.

- (vii) PW.7 Badal Khan deposed that he alongwith his partner went to the shop of Hindu and bought 30 sacks of urea. He then hired a Datson at Bus stand from one Yahya for Rs.300/-. The said Datson pick-up was taken to the shop for loading fertilizer (urea). He then went to Bazaar to buy house hold effects while the driver Yahya went to the Bus stand and waited for his return. When he came back, the accused were standing with driver Yahya. The latter told that he had agreed to take the accused to Nimergh and Rs.350/- as fare was agreed upon between the accused and the driver Yahya. However, the driver told them that he would take them only up to Nikergh Kand. The driver asked Babo Khaira accused to sit on the front seat while others to sit in the rear cabin. The PW alighted near Chapper at his tubewell and unloaded fifteen sacks of fertilizer and asked the driver to drop the accused and on return the other fifteen sacks would be unloaded on the other tubewell. Thereafter the driver asked the other two

accused to sit on the front seat, whereafter they proceeded towards Nimergh Kand. The PW further stated that he waited till 9/10 p.m. for the driver as the remaining fifteen sacks of fertilizer were still in the alleged vehicle. At about 2.00 a.m. one Attaullah, brother of driver Yahya, accompanied by his dead body came to him and enquired about the other person travelling in the pick-up. The witness then gave details to the said Attaullah.

- (viii) PW.8 Zahoor Ahmed, Levies Personnel, stated that he alongwith Ghulam Sarwar was the recovery witness of memos Ex.P/8-A, Ex.P/8-B & Ex.P/8-C through which toy pistol P/10, knife P/12 and picture P/13 were taken into possession by the Tehsildar.
- (ix) PW.9 Sunil Kumar, Photographer, deposed that on 15.04.2004 accused got themselves photographed in the shop of Japail Dass and on 20.04.2004 the said pictures were taken into possession. The parcel P/14 was prepared which was attested by him and Ghulam Farooq. Identification marks were on the said parcel, whereafter recovery Fard/Memo Ex.P/9-A was prepared.

- (x) PW.10 Rajesh Kumar, Shopkeeper, deposed that on 15.08.2004 two persons purchased 30 pack of Urea which were loaded on red colour pickup.
- (xi) PW.11 Muhammad Din deposed that on 15.04.2004, he was working at Johan cross Zahrazai Petrol Pump when after ISHA time a red colour pickup came from Kalat side carrying three persons. One of them asked him to pour fuel worth Rs.500/- in the pick-up tank. The accused who made the payment of Rs.500/- was identified in the Court as Abdul Ghafoor.
- (xii) PW.12 Muhammad Rafiq, Driver, deposed that on 15.04.2004, when he alongwith Manzoor Ahmed, Ghulam Rasool and Mir Gull was taking potatoes in his pickup to Nimergh, they saw a cap, pair of shoes and a pillow lying beside the road near Nimergh Kand at Maghrab time. They stopped the vehicle. There was a dead body lying beside the road. Ghulam Rasool and Mir Gull stayed near the dead body and one Manzoor informed the levies at levies post. Thereafter they came to know that the dead body was of Yaha who is brother of Attaullah.
- (xiii) PW.13 Abdul Qayyum, Judicial Magistrate, had supervised the identification parade of accused

persons conducted at Levies Thana, Kalat. Memos Ex.P/13-A, Ex.P/13-B, Ex.P/13-C and Ex.P/13-D were prepared. He recorded statements of accused Abdul Ghafoor, Babo Khaira and Muhammad Ishaq under section 164 of the Code of Criminal Procedure and sent all the three statement to Sessions Judge Mastung in one sealed envelope Ex.P/13-F.

- (xiv) PW.14 Badal Khan had identified the accused who were brought to the place of occurrence by Tehsildar and had pointed out the place where they had killed the driver and took away his pickup.
- (xv) PW.15 Abdul Rahim, Levies Personnel, stated that on 19.04.2004 he alongwith Muhammad Noor was present at the office of Naib Tehsildar/Investigating Officer. Attaullah came at the office of Investigating Officer and produced clothes comprising gray colour Shalwar Kameez and white colour Banyan, packed in a parcel P/16, belonging to deceased. The Investigating Officer took the same into possession.
- (xvi) Dr. Syed Fazal Rehman, PW.16, had medically examined the dead body and found the following injuries:-

- “1. Stab wound on the left side of chest “4 c length “2 x width x 3 x depth. Perforated chest. 2 -½ inches above left nipple injuries.
2. Perforated incised wound on the right side of chest.
“2 -½ x length x “2-1/2 depth width “2 injuries right lung.
3. Stab wound on the left grouin 2x1x1/2.
4. Duration 4 to 5 hours.
5. Weapon. Sharp edge weapon.
6. Cause of death. Syncope.
7. Excessive Hemorrhage.

Death due to blood flow, in this regard I issued MLC which is Ex.P/16-A, to which I identify my signature.”

(xvii) Munir Ahmed, Naib Tehsildar/Investigating Officer appeared as PW.17. He had investigated the case whose details have already been mentioned in paragraph 3 of this judgment.

6. After close of the prosecution evidence, the statements of accused were recorded under section 342 of the Code of Criminal Procedure. They denied the allegations leveled against them and claimed innocence. They did not opt

to record their statements on oath under section 340(2) of the Code of Criminal Procedure or to produce evidence in their defence.

7. The learned trial Court after completing the codal formalities of the trial returned a verdict of guilt against the accused. Conviction and sentence ensued as mentioned in the opening paragraph of this judgment.

6/1

8. We have gone through the file of this case. The evidence produced by prosecution as well as the statements of accused recorded under section 342 of the Code of Criminal Procedure have been perused. Relevant portions of the impugned judgment have been scanned. We have also heard both the learned Counsel appearing on behalf of appellants. Learned Assistant Advocate General representing the State has also been heard.

9. The arguments that found favour with the learned trial Court in returning the verdict of guilt and consequent sentences may be summarized as follows:-

- (i) That the accused persons were apprehended one after the other at the Luck Pass by Levies staff;
- (ii) That the witnesses for the prosecution have no personal animosity with the accused to falsely implicate them, and
- (iii) That nothing has been brought on record on behalf of accused against prosecution;
- (iv) That all the witnesses are natural witnesses;
- (v) Pw.2 Feroz Khan and PW.3 Muhammad Ashraf apprehended the accused at the spot and recoveries of toy pistol, knife and the pick up were effected from the accused;
- (vi) Medical evidence corroborated the prosecution version;
- (vii) Medical evidence was never challenged in cross-examination;
- (viii) The voluntary confessional statement revealed the motive behind murder and snatching of the pick-up;
- (ix) The accused were duly identified by witnesses, and

- (x) The defence was not able to demolish the prosecution case though the witnesses were put to the test of lengthy cross-examination.

10. Learned Counsel for the appellants, in the light of the findings of the learned trial Court urged as follows:-

- (i) That knife was recovered only from Ishaque appellant and it would not be prudent to attribute murder to the other two appellants;
- (ii) There was no witness of the occurrence of murder as admittedly it was an un-witnessed incident;
- (iii) That nothing incriminating was attributed by witnesses and consequently the accused were not obliged to challenge the statement of witnesses for the prosecution;
- (iv) That PW.4 Abdur Rehman, the witness who had been declared hostile, stated that he had not seen Babo Khaira and Abdul Ghafoor accused boarding the pick-up;
- (v) That the confession of the accused was not voluntary;
- (vi) That the accused were not produced before the learned Magistrate at the time of recording the confession;

- (vii) That the identification parade took place fourteen days after the arrest of accused persons;
- (viii) That the prosecution failed to prove the case beyond reasonable doubt and consequently the appellants are entitled to benefit of doubt;
- (ix) That the description of the recovered knife was not given;
- (x) That it was not possible for PW.2 to have received information at 10.15 p.m. that a red coloured pick-up had been snatched involving a murder and then the pick-up was seized at 11.00 p.m. at the Check Post;
- (xi) That there was no mention in the statement of Feroz Khan PW.2 of a knife having been recovered from Ishaque accused at the time of his arrest, and
- (xii) It was also urged that Babo Khaira and Abdul Ghafoor accused were arrested on the disclosure of Ishaque accused and consequently the arrest of two accused was not legal.

11. In support of the above contentions learned

Counsel relied upon the following precedents:-

- (i) Nazim Khan and 2 others Versus The State
1984 SCMR 1092

Learned Counsel relied upon this case to assert that benefit of reasonable doubt cannot be denied to the accused. Indeed this is an accepted principle of criminal law.

- (ii) Imran Ashraf and 7 others Versus The State
2001 SCMR 424

Learned Counsel, on the authority of this precedent, maintained that delay in registration of crime report adversely affects the prosecution case. In the case of Imran Ashraf the Supreme Court at pages 448/449 held that "police enjoys no jurisdiction to cause delay in registration of the case and under the law is bound to act accordingly enabling the machinery of law to come into play as soon as it is possible-----Any slackness or lukewarm attitude by the registering registering authority of FIR in fact intends to help the accused involved in the commission of the offence."

- (iii) Ziaul Rehman Versus The State
2001 SCMR 1405

This precedent was relied upon to assert that one weak piece of evidence does not corroborate another similar evidence.

- (iv) Basharat and another Versus State
PLJ 1996 SC 139

This precedent was cited to show that it is not possible that accused will keep blood stained knife in the house for ten days when he had sufficient time to wash the knife.

- (v) Muhammad Ali Versus Muhammad Farooq and 5 others
1989 SCMR 1099

It was stated that recovery of crime empties from the spot was not material if the matching report from the Forensic Science Laboratory was in the negative.

- (vi) Riaz Masih alias Mithoo Versus State
PLJ 1996 SC 168

Learned Counsel relied upon this authority to contend that recovery of blood stained knife by itself is not sufficient for conviction on the charge of murder.

- (vii) Bahadur Khan Versus The State
PLD 1995 SC 336

This precedent was relied ^{upon} /to assert that corroboration was required where a confession was retracted and further that the confession should be read as a whole and reliance should not be placed on inculpatory part alone.

12. Learned Assistant Advocate General supported the conviction and sentence awarded by the learned trial Court.

13. We have given anxious thought to the facts and circumstances of this case. Our observations, after assessing the evidence in the light of the contentions raised by learned Counsel for the appellants and the findings of the learned trial

13.

Court, are as follows:-

- (i) Accused Ishaque was arrested alongwith the stolen pick-up. A knife and a toy pistol was also recovered. On information imparted by him the other two accused were arrested shortly afterwards from near the Police Post. This aspect has been fully established. The accused were not in a position to explain their presence at that spot at that time in the given circumstances;
- (ii) Accused were duly identified. Learned Counsel for the appellants has not been able to point out any thing objectionable in the statement of Mr. Abdul Qayum, Judicial Magistrate who undertook identification parade on 28.04.2004. After having been identified the appellants made voluntary confessional statement on 30.04.2004. The learned

- Magistrate, recording the confession, very clearly stated that accused were personally present before him while making confessional statement;
- (iii) The recovery of pick-up stands established. It did not belong to the appellants nor have the appellants been able to justify possession of the stolen pick-up immediately after the murder of Yahya driver of the stolen pick-up;
- (iv) Learned Counsel for appellants have not been able to show that any one witness was biased against the accused or favourably disposed towards the deceased to falsely implicate the accused;
- (v) Badal Khan PW.7 has given the last seen account. He had hired Yahya driver to transport fertilizer. The accused also boarded the same pick-up as paid passengers. Their proposed destination was Nimergh, a place farther away where Badal Khan had alighted. The purchase of urea fertilizer by Badal PW.7 has been duly proved by Rajesh Kumar PW.10. His statement was not challenged in cross-examination. Muhammad Din PW.11 also supported the prosecution version. He had dispensed fuel for the pick-up. He identified Abdul Ghafoor accused who made payment of Rs.500/- for the fuel charges.

- (vi) Learned trial Court has, in a detailed judgment spread over 26 pages, duly assessed the entire evidence and also considered the points raised by learned Counsel for the accused.
- (vii) It has not been shown by the appellants that the prosecution produced even a single stock witness;
- (viii) The prosecution has established all the links from the time the appellants hired Yahya's pick-up and boarded the same up to the time of arrest of accused at the police post. This position gets strength from voluntary confessional statement and the medical evidence. The presence of PW.7 Badal at the time the deceased started the journey has not at all been disproved.
- (ix) The date, time and place of death of Yahya driver is not disputed. The injuries found on the person of deceased were duly proved from the evidence of Dr. Syed Afzal Rehman PW.16 which was not subjected to cross-examination despite opportunity.

14. The precedents relied upon have also been seen. It is an established principle of law that the accused is entitled to benefit of doubt. The element of delay in registration of FIR is

not relevant in the case. We are aware of various judicial pronouncements that one weak piece of evidence does not necessarily corroborate a similar piece of evidence. Neither keeping of a blood stained knife by the accused nor the report of Forensic Expert was a fact in issue in this case.

15. Learned Counsel for the appellants were not able to explain the disappearance of Yahya driver from his pick up which was being driven by him and soon after the murder it was in the physical custody of appellants with Ishaq accused occupying the driver's seat. The direct evidence of PW.7, which includes last seen evidence, stands established. Learned Counsel for the appellants has not succeeded in identifying reasonable doubt from the record. The impugned judgment is well reasoned and no fanciful or capricious element has been pointed out by the learned Counsel for the appellants.

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In view of what has been stated above we are not persuaded to interfere in the findings arrived at by the learned trial Court in convicting and sentencing the appellants in the given facts and circumstances of this case. Resultantly Criminal Appeal No.23/Q/2005 as well as Jail Criminal Appeal No.44/Q/2005 arising out of impugned judgment dated 18.03.2005 delivered in Hudood Case No.4/2004 fail. Both the appeals are dismissed.

 Sed
JUSTICE SYED AFZAL HAIDER

 Sed
JUSTICE SALAHUDDIN MIRZA

Announced
Dated Quetta the 23 October 2009
M. Imran Bhatti/*

 Sed
FIT FOR REPORTING