

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

MR. JUSTICE SALAHUDDIN MIRZA
MR. JUSTICE SYED AFZAL HAIDER

CRIMINAL APPEAL NO.37-Q-2005

1. Muhammad Anwar son of Bilal alias Lala
Caste Baloch, resident of Lalabar, Karachi.
2. Sher Ghani son of Syed Muhammad alias Shero,
Caste Yousafzai Pathan, resident of Landhi, Karachi

---- Appellants

Versus

The State

--- Respondent

For the appellants

Mr. Riaz Mansoor Shah,
Advocate

For the State

Mr. Naseer Ahmed Bangalzai,
Assistant Advocate General

No.& date of FIRs
Police Station

No.6/02 , dt.18.08.2002,
Levies Thana Aranji, Khuzdar
& No.7/02, dt. 19.08.2002
Levies Thana Wadh, Khuzdar

Date of judgment of
Trial court

23.06.2005

Date of Institution

05.07.2005

Date of hearing

16.10.2009

Date of decision

23.10.2009

JUDGMENT:

Justice Syed Afzal Haider, J:- Appellants Muhammad

Anwar and Sher Ghani through this criminal appeal have challenged the judgment dated 23.06.2005 delivered by Additional Sessions Judge, Khuzdar whereby they were convicted and sentenced as under:-

<u>Conviction under Section:</u>	<u>Sentence:</u>
(a) Under Section 365 of Pakistan Penal Code	: Three years rigorous imprisonment each with fine of Rs.7,000/- each or in default to further suffer two months simple imprisonment each
(b) Under Section 337-J of Pakistan Penal Code	: Five years rigorous imprisonment each with fine of Rs.10,000/- each or in default thereof to further undergo four months simple imprisonment each.
(c) Under Section 396 of Pakistan Penal Code	: Rigorous imprisonment for life each with fine of Rs.1,00,000/- each or in default thereof to further undergo two years simple imprisonment each.

Benefit of section 382-B of the Code of Criminal Procedure

was also extended to both the appellants.

2. Briefly the prosecution story is that complainant Gulan Khan PW.2 was a driver of Hino Truck bearing registration number LS-7553 which vehicle belonged to one Haji Umer Khan. On 17.08.2002 he was present at Sher Shah

Chorangi Karachi with his Hino Truck. At about 4.00 p.m. Zar Khan son of Umer Khan alongwith three other persons came there and told him that they had to transport onions belonging to these persons from Khuzdar to Karachi market. Zar Khan, who is also a driver, took the truck and proceeded towards Khuzdar alongwith the complainant and the said three persons. On the way they halted for dinner at a hotel at about 9.00 p.m. After taking the meal one of the three persons offered sweets to the complainant and Zar Khan whereafter the complainant slept on the floor of the rear side of the truck while Zar Khan continued driving the truck. At about 4.00 a.m. two persons, one of them armed with pistol, awakened the complainant. He was dismounted from the truck and made to eat some sweet whereafter his hands and feet were tied and he was dumped under a nearby bridge. After some effort he managed to release his feet and came on the road in semi-unconscious condition and reached at a nearby labour camp where his hands were un-fastened. He

covered the distance up to Levies Thana Aranjee and laid information which was recorded as crime report No.6/2002 dated 18.08.2002 under sections 365, 394/34 of the Pakistan Penal Code. He had stated in the FIR that he was not aware whether the accused had taken away Zar Khan with them in the truck or had thrown him somewhere like him.

3. The next day i.e. on 19.08.2002 Muhammad Umer, Levies official PW.3 laid information at Levies Thana Wadh that at about 3.00 a.m. when he was present on his duty, one Mehmood informed him that a dead body was lying in a room of a hotel near Suthli road upon which crime report No.7 dated 19.08.2002 was registered at Levies Thana Wadh against unknown accused persons under section 302/34 of the Pakistan Penal Code.

4. Investigation ensued as a consequence of registration of crime reports. Abdul Rehman Naib Tehsildar PW.13 had partly investigated the case FIR No.6/2002. He

visited the place of occurrence where the accused had thrown the complainant, prepared site plan and took into possession through recovery memo Ex.P/10-A two pieces of cloths produced by the complainant by which the accused had tied his hands and feet. On 25.08.2002 he took into possession stolen truck through recovery memo Ex.P/8-A. The investigation of case FIR No.7/2002 was conducted by Shafee Muhammad Naib Tehsildar PW.12. He prepared site plan of the place of occurrence of murder, sent the dead body of Zar Khan to Civil Hospital, handed over the dead body to the legal heirs of the deceased, and recorded statements of the witnesses under section 161 of the Code of Criminal Procedure. On 14.09.2002 Gulan Khan informed him that he had identified two accused persons as Muhammad Anwar and Sher Ghani who were confined at Police Station Sharifabad Karachi. The Investigating Officer obtained warrants of accused from Judicial Magistrate, Khuzdar. He approached Home Secretary

Karachi for custody of accused persons who had given him a letter to the effect that accused Muhammad Anwar and Sher Ghani were confined in Central Jail, Karachi in case FIR No.310/2002 Police Station Sharifabad Karachi and were facing trial before the Judicial Magistrate, Karachi, therefore, the accused will be handed over to him on completion of their trial. He prepared incomplete challan on 11.12.2002 whereafter he was transferred on 27.09.2003. Muhammad Younus Tehsildar PW.14 had also investigated the case. He also used to contact Home Secretary and ADAO for taking custody of accused persons but to no avail. He was Incharge of both Thanas i.e. Arangee and Wadh, therefore, he prepared incomplete challan in both the cases. Hameed Ullah Naib Tehsildar, Incharge of Levies Thana Arangee PW.15, was also acting Tehsildar of Levies Thana Wadh. He also investigated both the cases. On 09.01.2005 he took the custody of Muhammad Anwar and Sher Ghani accused from Central Jail

Karachi on the basis of a letter of ADAO whereafter he formally arrested both the accused and took their remand from Judicial Magistrate, Wadh. He recorded supplementary statement of complainant Gullan Khan on 13.01.2005 and also recorded statements of witnesses under section 161 of the Code of Criminal Procedure. He sent the accused to judicial lock upon 19.01.2005. After completion of investigation, separate reports relating to FIR 6/2002 and FIR 7/2002 were prepared on 29.01.2005 and submitted on 07.02.2005 in the court requiring the accused to face trial.

5. The learned trial Court framed charges against the accused persons on 05.04.2005 under section 17(4) of the Offences against Property (Enforcement of Hudood) Ordinance as well as under sections 365/337-J of the Pakistan Penal Code. The accused did not plead guilty and claimed trial.

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

- (i) PW.1 Dr. Abdul Wahid had conducted medical examination of injuries on the dead body of Zar Khan deceased on 19.08.2002 and observed as under:-

“DETAIL OF INJURIES.

- 1) One day old dead body.
- 2) Process of putrefaction was started.
- 3) Exit bullet injury on the temporal region of the head.
- 4) Pressure marks of throttling at the neck.

CAUSE OF DEATH:-

1. Massive bleeding.
 2. Suffocation.”
- (ii) Complainant Gullan Khan appeared as PW.1 and endorsed the contents of crime report Ex.P/2-A.
- (iii) PW.3 Muhammad Umer, Levies Official, had laid information to the Naib Tehsildar of Levies Thana Wadh that one Mehmood apprised him that a dead body was lying in a room of a hotel near Suthli road upon which crime report No.7 dated 19.08.2002 was registered regarding murder of Zar Khan deceased.

(iv) PW.4 Sultan Mehmood Khan deposed that on 17.08.2002 at about 3/4.00 p.m. when he alongwith Gullan Khan, Asgher and Zar Khan were present at Truck Adda, Marrisur road, Shershah Karachi, three persons came there, hired the truck of Zar Khan deceased for transporting onions from Khuzdar to Karachi and fare of Rs.18,000/- was agreed between them. Whereafter Zar Khan and Gullan Khan complainant alongwith the accused persons proceeded in truck No.LS/7553 for Khuzdar. The witness identified Muhammad Anwar and Sher Ghani, accused present in Court, as two persons out of the three persons who had hired the truck. It was further stated that on 18.08.2002 Gullan Khan complainant informed him that the said persons had abducted Zar Khan alongwith the truck. On 19.08.2002 Aslam, Nazar Khan and Gullan had gone to Wadh in search of Zar Khan and the lost vehicle where Muhammad Aslam from Wadh informed them that the three persons had murdered Zar Khan and taken away the truck. After some days, he alongwith Gullan and Asgher went to Police station Sharifabad on receiving information about arrest of some dacoits where they identified the accused as Muhammad Anwar and Sher Ghani.

E:1

The third companion was not present in the police station.

- (v) PW.5 Haji Mehmood deposed that he went to Mosque situated at R.C.D. road Miandar Wadh to fetch water. He felt that foul smell was emitting from the adjacent Kacha room where there used to be a hotel. He glanced in the room and saw a dead body lying there. He immediately informed Muhammad Ummer, Levies official in this regard who laid information at Head Quarter Levies Wadh.
- (vi) PW.6 Allah Bakhsh stated that at about 4.45 a.m. some body called him and he saw a person whose hands were tied on his back. He un-fastened his hands who informed him that some persons threw him there after tying his feet and hands and took away truck and its owner.
- (vii) PW.7 Muhammad Asgher supported the statement made by Sultan Mehmood Khan PW.4.
- (viii) PW.8 Peer Muhammad, Levies Dafedar had attested recovery memo Ex.P/8-A through which the Investigating Officer took into possession truck bearing registration No.LS-7553 from Industrial Police Station Quetta.

- (ix) PW.9 Muhammad Aslam had identified the dead body of Zar Khan and received the same from Levies officials.
- (x) PW.10 Muhammad Rafique was the witness of recovery memo Ex.P/10-A through which the Investigating Officer took into possession one white colour Romal and one piece of black colour cloth having white stripes which were produced by Gullan complainant.
- (xi) PW.11 Muhammad was the witness of recovery memo Ex.P/11-A through which the Investigating Officer took into possession dead body of Zar Khan deceased. He was also witness of memo of search of dead body Ex.P/11-B.
- (xii) PW.12 Shafee Muhammad, PW.13 Abdul Rehman, PW.14 Muhammad Younus and PW.15 Hameedullah had investigated the case one after the other the details of which have already been given in paragraph No.4 of this judgment.

7. After close of the prosecution evidence, the statements of accused were recorded under section 342 of the Code of Criminal Procedure. The accused denied the allegations leveled against them and claimed innocence. No explanation was given by accused as to why witnesses had

deposed against them. 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.

8. 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.

9. 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 the learned Counsel appearing on behalf of appellants. Learned Assistant Advocate General representing the State has also been heard.

10. Learned Counsel for the appellant raised the following points for our consideration.

- (i) That there was no eye witness. On a Court query the learned Counsel stated that there was no eye witness of the factum of murder;
- (ii) That the version of the accused has not been appreciated by the learned trial Court. On another Court question the learned Counsel stated that the appellants pleaded innocence and false involvement which aspect was not discussed by the learned trial Court. However attention of learned Counsel was invited to the paragraph preceding conclusion in the impugned judgment where the plea of innocence adopted by accused in his statement recorded under section 342 of the Code of Criminal Procedure was duly mentioned and considered;
- (iii) That it was an unseen occurrence and consequently the case depended upon circumstantial evidence;
- (iv) That the weapon of offence was not recovered from the appellant;
- (v) That the stolen truck was recovered from Quetta as abandoned property;
- (vi) That the statement of complainant PW.2 under Section 161 of the Code of Criminal Procedure was recorded on 03.01.2005 after a lapse of three years. The record was checked in the presence of learned Counsel and it was found that the

statement under section 161 ibid was recorded on 19.08.2002 i.e. a day after the registration of FIR on 18.08.2002 and not after three years as asserted by learned Counsel. However the supplementary statement of PW.2 was recorded after three years as per record;

(vii) It was next contended that there was inordinate delay in lodging the FIR. Attention of learned Counsel was drawn to the statement of Gulan Khan PW.2 who, after traversing some distance on foot, reported the matter to police on 18.08.2002 at 1.25 p.m. about an incident that occurred during the early hours of the same day. The complainant had been doped and his hand feet also tied by dacoits. The delay of a few hours under the circumstances, was thus fully explained.

(viii) Learned Counsel during the course of arguments adopted three stances one after the other as regards the allegation of hiring the truck. It was initially stated (a) that no such hiring transaction took place as stated by the appellant in his statement recorded under section 342 of the Code of Criminal Procedure; the learned Counsel then contended (b) that the accused had gone to hire the truck but due to non-settlement of the amount of fare, the deal was not struck and the accused returned.

However, after reading the evidence the learned Counsel urged finally that (c) hiring of truck as well as the departure of accused alongwith the deceased and PW.2 in the truck is admitted but the appellants had in fact alighted from the truck on the way. There was consequently no evidence that the accused were responsible for the murder of Zar Khan;

- (ix) It was next contended that dead body of Zar Khan was recovered by PW.3 on 19.08.2002 for which a separate FIR No.7/2002 was registered. On a Court question the learned Counsel stated that (a) FIR 7/2002 was registered in Tehsil Wadh on 19.08.2002 whereas FIR 6/2002 was registered in Sub Tehsil Aranji on 18.08.2002; (b) learned Counsel then submitted that this point relating to recovery of dead body was raised only for information purpose.
- (x) That the statements of Sultan Mehmood, PW.4 and Muhammad Asghar, PW.7 under Section 161 of the Code of Criminal Procedure were recorded by the police on 13.01.2005 i.e. 28 months after the incident and their names did not find mention in the two incomplete challans submitted in trial Court. It was only the complete challan in which these persons were introduced as witnesses. It was,

therefore, urged that these witnesses should not be believed. The record was checked in the presence of learned Counsel for the appellants and it transpired that the physical custody of accused was actually handed over to the Balochistan Province police from Sindh province only on 11.01.2005 and hence within two days of the initiation of investigation by local police the statements of PW.4 and PW.7 were recorded on 13.01.2005. The complete challan was consequently submitted on 29.01.2005 where the names of both the witnesses are duly mentioned. Their names could not have been mentioned in the incomplete challans without recording their statements under section 161 of the Code of Criminal Procedure.

- (xi) In the end learned Counsel relied upon the following four precedents:
- (a) Tahir Javed Versus The State 2009 Supreme Court Monthly Review 166 and Umer Versus The State 2009 Pakistan Criminal Law Journal 1119 to urge that benefit of doubt should be resolved in favour of accused;
 - (b) Muhammad Afzal alias Abdullah and others Versus The State and others 2009 Supreme Court Monthly Review 436 to assert that

evidence of recovery is purely corroborative in nature and recovery alone is not sufficient to maintain conviction.

- (c) Lastly the learned Counsel for the appellants relied upon the case of Sultan Muhammad and another Versus The State 2009 Supreme Court Monthly Review 1115 to show that where the witness had not seen the occurrence, post-mortem examination of the dead body was a must *in order to establish the cause of death*. The attention of the learned Counsel for the appellants was invited to the death certificate Ex.P/1-A issued by PW.1 Dr. Abdul Wahid, Medical Officer, who had examined injuries on the dead body of Zar Khan and found a bullet injury on the temporal part of the head and the cause of death was massive bleeding because of this injury and suffocation. The authenticity of this certificate as regards the cause of death of deceased Zar Khan has, therefore, been established by the prosecution which was not challenged in the cross-examination.

11. After going through the evidence and considering the points raised by learned Counsel for the appellant we have observed that:-

- (i) Evidence of PW.2, Gulan Khan, has established beyond doubt that the Hino truck bearing registration Number LS-7553 was hired by accused persons for transporting onion from Khuzdar to Karachi;
- (ii) It is also on record that accused boarded the truck and Zar Khan deceased was on the driver seat;
- (iii) Further that on their way they halted at Las Bela for food. The accused served sweets to them. Gulan Khan, PW.2 occupied the rear portion of the truck while Zar Khan was occupying the driver's seat and the accused were sitting on his left;
- (iv) That at about 4.00 a.m, the two accused woke him up in the area of Wadh. Anwar accused was armed with T.T.Pistol and Sher Ghani accused was holding a cloth and a Romaal. Anwar accused pointed his pistol towards him and Sher Ghani accused made him eat sweets forcibly. He was de-boarded from the truck and deposited under the nearby bridge after his hands and feet had been tied. The accused then took the truck away;

- (v) PW.2 after reaching the police station laid information about the incident and thereafter proceeded to Karachi;
- (vi) Dead body of Zar Khan was recovered from an abandoned way ward restaurant within the area of Wadh. The dead body had a head injury and rope around the neck;
- (vii) That PW.1 Dr. Abdul Wahid, Medical Officer, Quetta examined dead body and issued a certificate on 19.08.2002 indicting massive bleeding and suffocation as the cause of death due to bullet injury on the temporal region of the head;
- (viii) That a month after the occurrence police officials of Sharifabad Police Post informed them about the arrest of two persons who divulged having taken the truck after killing a person. The witness identified both the accused.

12. In this view of the matter we do not find any force in the arguments advanced by learned Counsel for the appellants. Learned Counsel representing the State and learned Counsel for the complainant support the conviction and sentence.

13. We are conscious of the fact that convictions, based upon circumstantial evidence, should be recorded with due care and caution. In this case PW.2 was not only the witness in whose presence the truck was hired by the accused but he also travelled with the deceased and the accused in the same truck. They halted at Lasbella for dinner. This witness was dumped under a bridge after his hands and feet were tied down and later on the dead body of Zar Khan was also recovered from the same area. The last sighting of the deceased with accused had a close proximity with the death of Zar Khan which rules out the possibility of the deceased having come in contact with some one else. The accused have not at all been able to give any explanation as to the disappearance of Zar Khan deceased or their own disappearance from the place of occurrence. The statement of Gullan Khan is consistent and established the important links of the chain. His statement is corroborated by medical evidence which proved that Zar Khan

met a violent death. The truck had also been robbed. There is no plausible reason to disbelieve him. His testimony inspires confidence. He has no hostility towards the accused. Being a driver of the ill fated truck his presence throughout is natural. His status as a driver or his presence throughout has not been doubted at all. In this way the chain of events is complete. We, therefore, feel that the material placed on record is incompatible with the innocence of accused. The conclusion arrived at by the learned trial Court do not merit interference as no perversity has been shown. Unless the findings of the trial Court are artificial or speculative resulting in miscarriage of justice, the appellate Court will not reverse the conclusion.

14. The following two cases may be cited in relation to circumstantial evidence:-

- (i) Conviction in the case of Shahid-U-Zaman Versus The State 1973 SCMR 258 was maintained where inter-alia the deceased was last seen in the company of accused and the accused had also been

identified and the prosecution witnesses had no motive to falsely implicate the accused.

(ii) In the case of Muhammad Amjad Vs. State PLD 2003 SC 704 the Apex Court, at page 718 D, held:

“Now it is a settled proposition of law that death sentence can be awarded on circumstantial evidence, provided all circumstances constitute a chain and its no link is missing and their combined effect is that the guilt of the accused is established beyond any shadow of doubt.”

15. A perusal of a number of cases on the question of circumstantial evidence shows that reliable evidence of having seen the victim alive with accused, can form the basis of conviction if, inter alia, the accused is unable to give a satisfactory explanation of the disappearance of deceased from the point where he was last seen by dependable witness and the various links of the story establish an unbroken chain which leads to the inference of the guilt of accused. However, it goes without saying that facts of each case determine its fate.

16. Conviction and sentence in this case was recorded by learned trial Court under Section 396 of the Penal Code which section covers Dacoity with Murder. According to Section 391 of the Pakistan Penal Code a theft becomes dacoity when five or more persons conjointly commit robbery. The number of accused in this case is less than five. It is, therefore, a case of Robbery with Murder for which, unfortunately, there is no separate provision like Section 396 *ibid.* In this view of the matter the conviction recorded by the learned trial Court under Section 396 of the Pakistan Penal Code cannot be sustained. Conviction is consequently converted into one under Section 392 read with Section 302 of the Pakistan Penal Code. The appellants are sentenced to imprisonment for life while the sentence of fine is maintained. Reasons for awarding lesser punishment, as advanced by learned trial Court, are being maintained. Benefit of Section 382-B of the Code of Criminal Procedure is not being disturbed.

17. As a result of what has been stated above, Criminal Appeal No.37/Q/2005 is dismissed with the above-mentioned modification by way of alteration of conviction recorded under Section 396 of the Pakistan Penal Code.

18. Office is directed to send a copy of this judgment to the Law Secretary, Federal Government of Pakistan for considering the feasibility of proposing addition of Section 394 (A) in Chapter XVII of the Pakistan Penal Code to make Robbery with Murder an independent offence like Dacoity with Murder as contemplated by Section 396 of the Pakistan Penal Code.

Sd/-

JUSTICE SYED AFZAL HAIDER

Sd/-

JUSTICE SALAHUDDIN MIRZA

Announced

Dated Quetta the 23rd October 2009.

M. Imran Bhatti/*

Fit for reporting.

Sd/-

JUSTICE SYED AFZAL HAIDER