

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

Hon: Mr. Justice Allama Dr. Fida Muhammad Khan
Hon: Mr. Justice Rizwan Ali Dodani
Hon: Mrs. Justice Ashraf Jahan.

CRIMINAL APPEAL NO.4/I of 2014

Abdul Waheed son of Muhammad Ishaque,
Caste Magsi, Resident of Saifabad, Jhal Magsi,
Usta Muhammad.

....

Appellant

Versus.

The State

....

Respondent.

MURDER REFERENCE NO.1/Q OF 2014

The State

Versus.

Abdul Waheed

.....

Counsel for the appellant	...	Mr. Zahoor-ul-Haque Chishti, Advocate
Counsel for the State	...	Mr. Muhammad Tahir Iqbal Khattak, Additional Prosecutor General, Balochistan
FIR. Date & P.S.	...	No.40/2011 dated. 10.05.2011 P.S City Usta Muhammad.
Date of judgment of Trial court	...	07.01.2014
Date of Institution of Appeal in this Court	...	20.01.2014
Date of hearing	...	04.04.2014
Date of Judgment	...	21.04.2014

...

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JUDGMENT

ASHRAF JAHAN, J:- The present appeal alongwith murder reference was disposed off vide common short order dated 04.04.2014, which reads as under:-

“Arguments heard. For reasons to be recorded later in the detailed judgment, this appeal is allowed. Conviction and sentence of appellant Abdul Waheed son of Muhammad Ishaque, awarded under section 17(4) of Offences Against Property (Enforcement of Hudood) Ordinance, 1979 by learned Additional Sessions Judge, Usta Muhammad vide impugned judgment dated 07.01.2014 is set aside and he is acquitted of the charge. He is confined in jail. He shall be released forthwith, if not, required in any other case.

Criminal Murder Reference No. 1/Q of 2014 preferred by the learned trial court is not confirmed and is answered in the negative.

This appeal is disposed of in the above terms.”

Following are the reasons for the above order:-

2. Through this judgment we intend to decide the Criminal Appeal bearing No.4/I of 2014 and Murder Reference No.1/Q of 2014, arising out of common judgment, dated 07.01.2014 in Sessions Case No.5 of 2011 emanating out of FIR No.40 dated 10.05.2011, registered at Police Station City Usta Muhammad, under Sections 302, 324, 392 and 34 PPC passed by the learned Additional Sessions Judge, Usta Muhammad.

3. The present appellant Abdul Waheed was tried in the aforesaid case by the learned Additional Sessions Judge, Usta Muhammad. At the conclusion of the trial, vide judgment dated 07.01.2014, he was convicted under Section 17(4) of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979 (hereinafter referred to as the “Ordinance”) and


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sentenced to death, subject to confirmation by this Court. Whereas the case against the absconding accused Noorullah son of Muhammad Ishaque and Hadi Bakhsh alias Hado son of Faqir Muhammad was kept on dormant file and their perpetual warrants of arrest were ordered to be issued.

Simultaneously Murder Reference No.1/Q of 2014 was also received from the trial Court as required under Section 374 Cr.P.C. read with Section 338-D PPC.

4. The prosecution case as set out in the FIR lodged by complainant Sunil Kumar is that, on 10th May 2011 accused Abdul Waheed came to the complainant's Rice Mill in his Land Cruiser bearing Registration No.WAA-256. The complainant asked him to go to the shop of Rajesh Kumar to bring Ajeet Kumar, who had Rs.3,000,000/- (Rupees Thirty Lacs) cash with him. Accused Abdul Waheed did not return for more than half an hour's time, his mobile phone and that of Ajeet Kumar were also found switched off during this period. Thereafter, at about 10:45 a.m, Abdul Fatah Umrani came to the Rice Mill while driving the vehicle of the accused whereupon the complainant found that Abdul Waheed was in injured condition and Ajeet Kumar was lying dead on the front seat. On enquiry injured accused disclosed that he and Ajeet Kumar after taking Rs.3,000,000/- (Rupees Thirty Lacs) from Rajesh Kumar were coming through WAPDA Grid Station bypass, when they reached near Rafique Rice Mill, three armed persons on motorcycle with muffled faces stopped them and tried to snatch the cash. The accused fired at them with his licensed pistol. But in the meanwhile, all the three persons who can be identified on seeing, also fired back, as a result of which Ajeet Kumar died at the spot, whereas, the


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present accused received bullet injuries on his chest and right leg. The culprits thereafter fled away on motorcycle after snatching all the money. On such report of the complainant, instant case was registered against the unknown accused persons.

5. After registration of the FIR, the investigation started. During which on 14th May 2011, the complainant got recorded his supplementary statement and nominated accused Abdul Waheed as well as his brother Noorullah and his friend Hadi Bakhsh alias Hado in this crime. On 15th May, 2011 present accused was arrested and his statement was recorded before police. At his pointation one 32-bore revolver with six live rounds, six empty rounds, mobile phone and Rs.1,000,000/- (Rupees Ten Lacs) were also recovered from his house, which were taken into possession through recovery memo dated 15.05.2011. After completing the investigation, challan was submitted against three accused showing accused Abdul Waheed in custody, whereas accused Noorullah and Hadi Bakhsh were shown absconding, who were later declared proclaimed offenders by the learned trial Court vide Order dated 13.08.2011.

6. The charge under Section 17(4) of the Ordinance read with Sections 302, 392, 34 PPC was framed against the accused on 04.08.2011 to which he pleaded not guilty and claimed trial.

7. The prosecution, in order to prove its case, in all examined eleven witnesses. For proper appreciation the gist of their evidence is reproduced as under:-

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- (i) First of all prosecution examined complainant Sunil Kumar, who produced the written complaint as Ex.P/1-A and FIR as Ex.P/1-B. He endorsed the contents of FIR but did not nominate the present accused with the commission of crime, therefore, he was declared hostile and was cross-examined by the learned District Attorney.
- (ii) PW.2 Abdul Fatah, in his evidence, supported the case of prosecution on the point that he had taken the deceased Ajeet Kumar and injured Abdul Waheed (present accused) to Sapna Rice Mill in the vehicle of accused Abdul Waheed.
- (iii) PW.3 Darya Bakhsh was examined on 29.12.2011. He supported the case of prosecution only to the extent that he was informed about the incident by his son. The above witness was also declared hostile by the prosecution and he was cross-examined by the learned District Attorney.
- (iv) PW.4 Harpal Das was also declared hostile by the prosecution. He supported the case of prosecution only to the extent of murder of Ajeet Kumar. However, he did not nominate the present accused with the commission of crime.
- (v) PW.5 Dr. Mukhtiar Ahmed had conducted the postmortem of the deceased Ajeet Kumar, and also examined injured accused Abdul Waheed and issued medical certificate about his injuries.

As per postmortem report, he found following injuries on the person of deceased:-

- “1. Three firearm wounds of entrance on right side of face. Blackening is present (1/2”)
- 2. One firearm wound of entrance on left side face.
- 3. One firearm wound of entrance on right side of chest. Blackening is present.

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4. One firearm wound of entrance on right forearm. Blackening is present. (1/2")
5. One firearm wound of exit on right forearm (3/4").
6. Lacerated wound on right upper arm on deltoid region.

ABDOMEN

All the organs of abdomen were healthy.

Cranium and Spinal Cord.

THORAX

Walls, ribs, and cartilages	Damaged 3 rd rib from right side
Pleurae	Damaged from right side
Trachea	Healthy
Right lung	Damaged
Left lung	Healthy
Pericardium and heart	Healthy
Blood vessels	Damaged from right side of chest

REMARKS

By examination of the body, my opinion is that the cause of death is excessive blood loss and injury to vital organ like right lung and blood vessels."

The doctor as stated earlier, had examined the accused also and as per medical certificate, found following injuries on the body of accused Abdul Waheed:-

- "1. Firearm wound of entrance on left side of chest. Blackening is present.
2. Firearm wound of exit from left side of chest below axilla.
3. Firearm wound of entrance on right thigh (upper side) Blackening is present.
4. Firearm wound of exit on right thigh (lower side).

Name of injuries: Grievous
The kind of weapon used: Firearm.
Duration of injuries: Fresh"

- (vi) PW.6 Rajesh Kumar, supported the case of the prosecution on the point that Ajeet Kumar had come to his shop and had taken away Rs.3,000,000/- (Rupees Thirty Lacs) alongwith the

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accused Abdul Waheed in his vehicle and thereafter at 11.00 a.m., he was informed about the incident.

(vii) PW.7 Rakesh Kumar supported the case of prosecution by deposing that on 9th May, 2011, he alongwith the complainant and deceased Ajeet Kumar were coming on motorcycle when witness Rajesh Kumar called the complainant and offered him Rs.5,000,000/- (Rupees Fifty Lacs), whereupon Sunil Kumar told him that he will take Rs.3,000,000/- (Rupees Thirty Lacs) and accordingly the next day Abdul Waheed and Ajeet Kumar went to the shop of Rajesh Kumar for obtaining the amount and thereafter the incident took place.

(viii) PW.8 Aneel Kumar deposed that on the day of incident he was at his home and after receiving information, he went to the hospital where he was informed about the incident. The above witness was declared hostile at the request of learned District Attorney and he was cross-examined.

(ix) PW.9 Constable Deedar Hussain is mushir of the following recovery memos:-

Ex.P/9-A	Recovery Memo of vehicle Land Cruiser.
Ex.P/9-B	Parcel No.1 piece of seat cover stained with blood of Ajeet Kumar deceased.
Ex.P/9-C	Parcel No.2 piece of seat cover stained with blood of Abdul Waheed.
Ex.P/9-D	Parcel No.3 Recovery Memo of one empty alongwith one bullet led.
Ex.P/9-E	Parcel No.4 Recovery Memo of T.T.Pistol alongwith Magazine.
Ex.P/9-F	Parcel No.5 Recovery memo of Arms Licence and Photostat copy of documents of vehicle.
Ex.P/9-G	Recovery memo of last worn clothes of Abdul Waheed, injured accused.
Ex.P/9-H	Recovery memo of last worn clothes of Deceased Ajeet Kumar.
Ex.P/9-I	Memo of inspection of place of occurrence.

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- (x) PW.10 ASI Muhammad Asif Qadri has produced disclosure memo Ex.P/10-A, memo of site inspection Ex.P/10-B, recovery memo of 32-bore revolver, six live rounds, six empty rounds and *charmae* Ex.P/10-C, recovery memo of mobile phone alongwith SIM Ex.P/10-D and lastly recovery memo of robbed amount Rs.1,000,000/- (Rupees Ten Lacs) Ex.P/10-E.
- (xi) The last witness PW.11 SI Abdul Majeed, Investigating Officer of the case deposed that first the investigation of this case was conducted by the then SI Muhammad Ramzan and after his retirement the investigation of this case was entrusted to him. He produced the site plan, inquest report, challan, FSL report and firearm report as Ex.P/11-A to Ex.P/11-H.

8. After the completion of prosecution evidence, their side was closed on 05.12.2012. The statement of the accused under Section 342 Cr.P.C. was recorded on 12.12.2013, wherein he denied the case of the prosecution and took the plea that he has been falsely implicated in this case and has no link with the occurrence. He also stated that no private witness has deposed against him, therefore, he may be acquitted in the present case. However, he did not make any statement on Oath as provided under Section 340(2) Cr.P.C. nor did he produce any evidence in his defence.

9. After the conclusion of trial, learned Additional Sessions Judge, Usta Muhammad convicted and sentenced the appellant vide judgment dated 07.01.2014, which is impugned before this Court.

10. We have heard the learned Counsel for the appellant as well as the learned State Counsel and have perused the case record.

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11. The learned Counsel for the appellant has submitted that:-

- (i) The present accused has not been nominated in the FIR.
- (ii) The accused himself has received injuries during the incident, which have been declared by the doctor as grievous in nature. Besides, the injury sustained by him on the left side of his chest cannot be self inflicted.
- (iii) Mainly the case of the prosecution is based upon the confession of accused before the police, which is not admissible under the law, thus cannot be relied upon.
- (iv) The accused was not produced before the Magistrate to record his confession under Section 164 Cr.P.C.
- (v) The recoveries allegedly made on the pointation of accused are doubtful as the prosecution has failed to produce any independent witness in this regard and there is clear violation of provisions of Section 103 Cr.P.C. as both the *mashirs* of recoveries belong to police.
- (vi) The report of Forensic Expert is of no help for matching six empties with the 32-bore revolver as no empties were secured from the spot or from the vehicle and they were sent together to the FSL.
- (vii) All the material independent witnesses have not deposed against the present accused, therefore, were declared hostile by the prosecution.
- (viii) There is contradiction regarding the place and date of arrest of accused and otherwise also the case of the prosecution is full of contradictions. Therefore, the prosecution has bitterly failed to prove its case against the present accused.


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12. Conversely, the learned State Counsel has supported the impugned judgment and submitted that the trial Court has rightly convicted the

present accused as there is sufficient evidence to connect him with the commission of crime. In this regard, he has pointed out that the accused himself had disclosed about the commission of crime before police; there is recovery of Rs.1,000,000/- (Rupees Ten Lacs) as per share of the accused and of crime weapon alongwith empties on his pointation. Besides, the Forensic Laboratory report shows matching of empties with the crime weapon, therefore, the prosecution has succeeded to prove its case against the present accused.

13. We have considered the arguments advanced before us and have perused the case record.

14. Admittedly, it is a case of no ocular evidence as at the time of occurrence only the present appellant and the deceased were in the vehicle. PW.2 Abdul Fatah is the person who reached at the place of occurrence just after hearing the noise of firing and when he reached there he was informed by the present appellant that they had been robbed and requested him to take him to Sapna Rice Mill. This witness, in his evidence, has disclosed that at that time the appellant was in injured condition and he had taken the deceased and the injured appellant to the Sapna Rice Mill. Regarding injuries the evidence of the doctor is of material value. The perusal of postmortem report of deceased Ajeet Kumar shows that he had received six firearm wounds which proved fatal and consequently he died at the spot. At the same time the present appellant had also received two firearm shots, out of which one was on the left side of his chest which passed through left side of the chest below axilla. It is important to note that this injury, which

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is on the left side of chest, could be fatal, therefore, such injury on the vital part of the body does not appear to be self inflicted.

15. Another important aspect of the case which creates doubt in the prosecution story is that when as per the case of the prosecution the alleged confessional statement was made by the appellant before the police, in which he had disclosed about his involvement and that of his brother and one friend in the crime and had led the police party to his house for the recovery of cash and crime weapon, then why has the police not associated some independent person from the locality to witness these recoveries, as required under Section 103 Cr.P.C. It was incumbent upon the police to have taken independent witnesses from the locality or to have furnished some reasonable explanation for not doing so which is lacking in the case. In the present case alleged recovery of crime weapon, looted money worth Rs.1,000,000/- and mobile phone is said to have been made at the pointation of appellant from his house. It has also come on record that house of appellant was located in Yaqoob Mohallah, Usta Muhammad, and at his request the police party got the street vacated at the relevant time. It is not understandable that instead of asking the respectables of area to witness the recoveries, the police got the street vacated and only police officials acted as mashirs. There is ample law laid down by the Hon'ble apex Court that in case of availability of independent witnesses, if the recovery is not attested through them, the same becomes doubtful. Reference in this regard may be made to the case of Muhammad Afzal Vs. The State 1983 SCMR 1, State through Advocate General Sindh Vs. Bashir and others PLD 1997 Supreme Court 408 and lastly upon the case of

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Muhammad Azam Vs. The State PLD 1996 Supreme Court 67. Further it has been held in plethora of cases by the Hon'ble Supreme Court that Section 103, Cr.P.C. applies with full force when search is to be made of place which is in an inhabited locality. The main object behind Section 103 Cr.P.C. is to guard against possible chicanery and concoction. Its application is mandatory in nature unless it is shown by the prosecution that in the circumstances of a particular case it was not possible to have mashirs from the locality. It will be relevant to mention that as per case of prosecution, PW.6 Rajesh Kumar had given the amount of Rs.3,000,000/- (Rupees Thirty Lacs) to the deceased, but during his evidence he had not disclosed the denomination of notes given to the deceased. Further, no identification test of recovered money and of mobile phone (belonging to deceased Ajeet Kumar) had been conducted through the concerned witnesses i.e. complainant and Rajesh Kumar to ascertain the same as actual robbed property. These lacunas are thus fatal to the case of prosecution and cannot be ignored specially in the circumstances when there is no ocular evidence against the present appellant.

16. It is important to note that the complainant in this case is the brother of deceased and the other PWs are also his close relatives. They, in FIR and during the evidence before the trial Court, have not nominated the present appellant with the commission of crime. Rather they have been declared hostile and cross-examined by the learned prosecutor, but they have categorically denied the suggestions made by the prosecutor regarding involvement of present appellant in the commission of crime or about any compromise between the parties before Nawab Tariq Khan Magsi. It will be relevant to mention here that as per case of prosecution complainant got recorded his further statement on 14.05.2011 implicating the present appellant but the complainant during his cross-examination has clearly denied to this version and replied that neither he had recorded any statement on 14.05.2011 nor implicated present appellant with commission of this crime.

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17. In the present case, it is the case of the prosecution that there had been some compromise between the parties before Nawab Tariq Khan Magsi, but the prosecution has not opted to examine him as it's witness, even none from the private prosecution witnesses have supported such compromise or *faisla* in their evidence. Further neither any *faisla* is produced on record nor any witness of such *faisla* is examined, therefore, this version of prosecution is not supported through any oral or documentary evidences.

18. In this context the perusal of record further reveals that the Investigating Officer of this case S.I. Muhammad Ramzan has not been examined. One DSP namely Khalid Zaman Marri, who is said to have attended proceedings of alleged compromise, has also not come forward to support this contention. With this background, it appears that such story, as set up by the prosecution, finds no support from the evidence brought on record during the trial.

19. Reverting to the evidence produced on record by the prosecution, it is found that there are contradictory versions of the police witnesses regarding arrest of appellant. As per evidence of ASI Muhammad Asif Qadri, appellant was hospitalized w.e.f. 10.05.2011 to 15.05.2011 in police custody, whereas PW.11 SI Abdul Majeed Investigating Officer, during his evidence, has deposed that appellant was produced by Nawab Tariq Khan Magsi for arrest and he was arrested formally in this case on 15.05.2011. Surprisingly, in the present case no hospital record is produced by the prosecution to show as to whether the appellant was admitted in the

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hospital. Likewise, no *mushirnama* of arrest of accused is produced on record to show when or from which place he was arrested in the present case.

20. It will be relevant to note that if the version of prosecution is accepted that the appellant was admitted in hospital under the custody of police with effect from 10.05.2011 to 15.05.2011 till the date of his arrest, then question arises as to how he was in knowledge about exact places where the looted money and crime weapon were concealed. All these facts create serious doubts about the truthfulness of the case of prosecution against the appellant.

21. In addition to the above discussion, in the present case, the appellant is convicted and sentenced to death under Section 17(4) of the Ordinance. Therefore, we have to see as to whether under the relevant law such conviction could be awarded or not, as there are certain legal requirements of law, which are to be fulfilled before awarding the sentence under the above referred provision of law. In this regard we will first revert to Section 16 of the Ordinance i.e. "proof of Haraabah", which clearly specifies that the provisions of Section 7 shall apply '*mutatis mutandis*' for the proof of "haraabah" and when we examine Section 7, it clearly provides certain standards of evidence which are required to be fulfilled to prove the theft liable to hadd. For the sake of convenience, Section 7 is hereby reproduced as under:-

Proof of theft liable to hadd. The proof of theft liable to 'hadd' shall be in one of the following forms namely:

- (a) the accused pleads guilty of the commission of theft liable to 'hadd'; and
- (b) at least two Muslim adult male witnesses, other than the victim of the theft, about whom the Court is satisfied, having regard to the requirements of '*tazkiyah-al-shuhood*', that they are truthful persons and abstain from major sins (*kabir*), give evidence as eye-witnesses of the occurrence:

Provided that, if the accused is non-Muslim, the eye-witnesses may be non-Muslim:

Provided further that the statement of the victim of theft or the person authorized by him shall be recorded before the statements of the eye-witnesses are recorded.

Explanation. In this Section, '*tazkiyah-al-shuhood*' means the mode of inquiry adopted by a Court to satisfy itself as to the credibility of a witness.


22. A bare perusal of above referred provisions of law amplifies that either the accused has to confess about his guilt or at least two Muslim adult male witnesses, other than the victim of the theft, about whom the Court is satisfied, having regard to the requirements of *tazkiyah-al-shuhood*, give evidence as eye-witness of the occurrence, then only punishment under Section 17(4) of the Ordinance can be awarded. Whereas in the present case, though as per case of prosecution, the accused/appellant had made confession before police but during the trial the accused/appellant did not own such statement and on the contrary taken the plea that he was falsely involved in this case. Further not a single person has come forward to depose against the present accused/appellant, let alone *tazkiyah-al-shuhood*. In such circumstances, in our humble view the trial Court has committed an error while awarding sentence of death under

Section 17(4) of the Ordinance, in the situation when *tazkiyah-al-shuhood* is a mandatory requirement for imposition of *hadd* punishment under Section 17(4) and has to be conducted in all cases where sentence of *hadd* is awarded. Reference in this regard may be made to the case of Muhammad Saleem and others Vs. The State 2005 SCMR 849. Thus in the light of above discussion, we are of the considered view that in the circumstances of the present case punishment under Section 17(4) of the Ordinance could not be awarded. Therefore, on this count also the sentence cannot sustain.

23. Foregoing are the reasons for extending benefit of doubt to the appellant and ordering his acquittal in terms of short order dated 04.04.2014.

As a sequel of above, Murder Reference bearing No.1/Q of 2014 was answered in negative.


Justice Ashraf Jahan


Justice Dr. Fida Muhammad Khan


Justice Rizwan Ali Dodani

Islamabad
21st April, 2014
Imran/*

File for reporting.

