IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

MR. JUSTICE CH. EJAZ YOUSAF, CHIEF JUSTICE
MR.JUSTICE DR.FIDA MUHAMMAD KHAN

JAIL CRIMINAL APPEAL NO.46/Q OF 2003

Muhammad Amin son of Faiz Muhammad, resident of Nokabad, Tasp, Tehsil and District Panjgoor	---	Appellant
	Versus	
The State	---	Respondent
Counsel for Appellant	---	Mr. Tahir Muhammad Khan, Advocate
Counsel for State	---	Mr. M. Shoaib Abbasi, Advocate
F.I.R. No., date and Police Station	---	117/99, 4.10.1999, P.S. Panjgoor
Date of the Order of the Trial Court	---	20.8.2003
Date of Institution	---	3.9.2003
Date of Hearing	---	29.9.2004
Date of Decision	---	29.9.2004

JUDGMENT

CH. EJAZ YOUSAF, CHIEF JUSTICE.—This appeal is directed against the judgment dated 20.8.2003 passed by the learned Additional Sessions Judge, Panjgur whereby appellant Muhammad Amin son of Faiz Muhammad was convicted under section 20 of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979 read with section 392 PPC and sentenced to five years R.I. alongwith a fine of Rs.5,000/- or in default thereof to further undergo S.I. for six months. He was also convicted under section 302(b) PPC and sentenced to suffer imprisonment for life. Both the substantive sentences of imprisonment were ordered to run concurrently. Benefit of section 382-B Cr.P.C. was, however, extended to the appellant.

2. Facts of the case, in brief, are that on 4.10.1999 report was lodged by one Akbar Shah son of Muhammad Yousaf Shah with Police Station Panjgur wherein, it was alleged that the complainant, in the previous night, was sleeping in his house alongwith his family members including brother Aslam Shah. At about 2.30 a.m, suddenly

some body awoke him. On opening his eyes the complainant saw that two persons were standing nearby. One of them was carrying a pistol in his hand whereas, the other was armed with a kalashankov. The person who was armed with kalashankov asked the complainant to hand him over his arms as well as the Rado wrist watch. In the meanwhile, inmates of the house raised alarm from outside whereupon, both the culprits tried to flee. The complainant chased them. In the meantime, complainant's brother, namely Muhammad Aslam, came running from behind and tried to catch hold of the culprit who was carrying a pistol. As the complainant and his brother tried to over power the culprits, one of them, who was armed with kalashankov opened fire. Resultantly, complainant's brother namely Aslam Shah received bullet injury on his neck and fell down on the ground. The culprit who was over powered by the complainant too, sustained injuries. He too, fell down and later on expired. On the stated allegation formal F.I.R. bearing No.117/99 was registered at Police Station Panjgur under section 17(2) of the Offences Against

Property (Enforcement of Hudood) Ordinance, 1979 and investigation was carried out in pursuance thereof. On the completion of investigation the accused persons were challaned to the Court for trial.

3. Charge was accordingly framed against the accused persons to which they pleaded not guilty and claimed trial.

4. At the trial, the prosecution in order to prove the charge and substantiate the allegation leveled against the accused persons produced ten witnesses i.e. P.W.1 Akbar Shah, P.W.2 Said Muhammad Jan, P.W.3 Murad, P.W.4 Naeem Shah, P.W.5 Muhammad Rafique, P.W.6 Maula Bakhsh, P.W.7 Dr.Sayad Ali, P.W.8 Haji Abdul Aziz, P.W.9 Aslam Shah and P.W.10 Muhammad Ishaque, Inspector/SHO; where-after the accused persons were examined under section 342 Cr.P.C. In their above statements the accused persons denied the charge and pleaded innocence. The appellant, however, got examined three witnesses namely, D.W.1 Muhammad Rahim, D.W.2 Haibat Ali and D.W.3 Khuda Bakhsh, in

his defence. The accused persons did not opt to appear as their own witnesses in terms of section 340(2) Cr.P.C.

Record reveals that during trial an application under section 265-K Cr.P.C. was filed by the accused persons namely Dad Muhammad and Qadeer on 27.7.2000, which was allowed and they were acquitted.

5. After hearing the arguments of the learned counsel for the parties the learned trial Judge convicted and sentenced the appellant vide judgment dated 31.8.2000, which was assailed before this Court through Criminal Appeal No.113/Q of 2000. Since it was found that the learned trial Judge while passing the above judgment had failed to specify or mention any penal provision or section under which the appellant was convicted and sentenced, therefore, the judgment, with consent of the parties, was set aside and the case was remanded to the trial Court for re-writing of the judgment on 13.9.2002.

6. The learned trial Judge after doing the needful again convicted the appellant and sentenced him to the punishments as mentioned in the opening para hereof.

7. We have heard Mr.Tahir Muhammad Khan, Advocate, learned counsel for the appellant, Mr.Muhammad Shoaib Abbasi, Advocate, learned counsel for the State and have also perused the entire record with their assistance, carefully.

8. Mr.Tahir Muhammad Khan, Advocate, learned counsel for the appellant has contended that; no evidence was available to believe that the appellant ever intended to commit robbery as nothing was taken away nor recovered from his possession; that crime weapon i.e. Kalashankov was also not recovered; that if the appellant was not known to the complainant then as to why he after arrest was not put to identification test; that statements of both the eye-witnesses i.e. complainant as well as P.W.9 Aslam Shah are not only inconsistent inter se on material points but, are unbelievable as well qua identity of the accused persons; that as per complainant, the appellant was his

neighbour, hence, if he i.e. the appellant was identified by the witnesses during the occurrence, then as to why his name was not disclosed at the time of recording the FIR. He maintained that the omission, so made indicates that appellant's claim towards identification of the appellant was an after thought; that 161 Cr.P.C. statement of P.W.9 Aslam Shah was recorded with considerable delay i.e. two months and ten days after the occurrence whereas, as per his statement, he remained in Hospital for about a month hence, the delay in recording his statement, renders the same as unbelievable. Reliance has been placed on the following reported judgments:-

(1) Muhammad Khan vs. Maula B akhsh and another (1998 SCMR 570) in which case it was held that credibility of a witness is looked with serious suspicion if his statement under section 161 Cr.P.C. is recorded with delay without offering any plausible explanation.

(2) Abdul Khaliq vs. The State (1996 SCMR 1553) wherein, it was held by the Hon'ble Supreme Court of Pakistan that late recording of 161 Cr.P.C. statement of a prosecution witness reduces its value to nil unless there is plausible explanation.

In the end, he pleaded that since an iota of evidence was not available to connect the appellant with the crime, therefore, he may be acquitted of the charge.

9. Mr.Muhammad Shoaib Abbasi, Advocate, learned counsel for the State has urged that from perusal of the evidence it appears that both the parties were not coming out with the truth. In the FIR, it has been mentioned that the culprits were unknown to the complainant. In his statement, at the trial, the complainant has admitted that appellant was his neighbour and that he had, during the occurrence, also identified him hence, if it was so then the question arise as to why name of the appellant was not disclosed at the very outset. The very fact that one of the robbers was killed but no body came forward to lodge report for his murder also casts serious doubt regarding genuineness of the prosecution version. He candidly conceded that, in the circumstances, the defence plea that occurrence was an offshoot of a quarrel, could not have been ruled out.

10. We have given our anxious consideration to the respective contentions of the learned counsel for the parties besides perusing the record of the case, minutely. In the instant case, the appellant has been convicted on two counts i.e. under section 392 PPC for committing the offence of robbery and under section 302(b) PPC for committing murder. The prosecution case is based on the ocular testimony furnished by the complainant and P.W.9 Aslam Shah, the evidence of recoveries comprising of blood stained chappals and some stones and recovery of a TT pistol, live bullets, empties, cap, chadar and shoes. So far as the recovery of TT pistol, live bullets, cap, chaddar, shoes, belonging to the deceased are concerned, it does not in any way connect the appellant with the crime. The recovery of blood stained shoes and stones from the house of the accused, in the absence of grouping and the proof that recovered shoes actually belonged to the appellant too, do not provide any basis to believe that the appellant was involved in the crime. The prosecution version is that the person who was murdered, was one of the robbers and companion of the

appellant and he was killed as a result of the firing made by the present appellant who tried to rescue him from the complainant party. Strangely, no report by heirs of the deceased has been lodged. The crime weapon i.e. the kalashankov too, has not been recovered. Though it has been admitted by the complainant that the appellant was his neighbour and that he had identified the appellant at the time of occurrence, yet, he failed to disclose his name at the time of recording of the FIR. The question, as to how the culprits, if it was a pitch-dark night, was able to identify the appellant and that too, without any source of light requires answer as well. Omission to name the appellant in the FIR assumes great importance, in view of the statement made by the I.O. at the trial to the effect that since the appellant was previously known to the complainant, therefore, he was not put to identification test. So far as the testimony of P.W.9 Aslam Shah is concerned, though he has claimed that appellant had fired at him as a result whereof he fell down and became unconscious but he has not claimed that he had seen the appellant committing murder of

his own companion i.e. the deceased robber. He has, at the trial, admitted that his 161 Cr.P.C. statement was recorded on 16.12.1999 with a delay of two months and ten days whereas, the occurrence is alleged to have taken place on 4.10.1999. He has though stated that he remained under treatment in the National Hospital at Karachi for about a month but he has not explained as to why his statement was not recorded soon after his discharge from the hospital. No explanation whatsoever has been offered, in this regard, by the I.O. as well. It is well settled that statement recorded by the Police Officer after delay and without explanation has to be ruled out of consideration. Reference in this regard, in addition to the cases relied upon by the learned counsel for the appellant, may also be usefully made to the following reported judgments:-

1) Syed Saeed Muhammad Shah and another Vs. The State 1993 SCMR 550;
2) Ismail and another Vs. The State 1983 P.Cr.L.J.829;
3) Dilshad Vs. The State 1995 P.Cr.L.J.248;
4) Muhammad Khan Vs. Maula Bakhsh and another 1998 SCMR 570;
5) Jani and another Vs. The State 1996 P.Cr.L.J.656;

6) Shabbir Hussain and others Vs. The State PLJ 199 FSC 126;
7) Muhammad Hussain alias Hussaini Vs. The State PLD 1995 Lahore 229; and
8) Muhammad Khan and two others Vs. The State and others PLJ 2001 Cr.C.(Quetta) 978 (DB)

It is also in the statement of the complainant that after the occurrence a tracker was called to trace the culprits out by following their foot prints which, according to the prosecution, led to the house of the appellant but here the question arises that if the complainant had seen the appellant and he was also able to identify him at the time of occurrence, as well, then what was the necessity to search for the culprits by tracking the foot prints. All the above narrated facts gravely militates against bona-fides of the prosecution and renders the story as unbelievable.

For facts and reasons mentioned above, we are satisfied that the occurrence in the instant case has not taken place in the manner as suggested by the prosecution. The prosecution has miserably failed to produce confirmatory evidence in this regard. In this case there is

room for doubt, benefit of which must go to the appellant. Convictions and sentences recorded against appellant Muhammad Amin son of Faiz Muhammad under section 20 of the Offence of Zina (enforcement of Hudood) Ordinance, 1979 read with section 392 PPC as well as under section 302(b) PPC are therefore, set aside. Appeal is allowed and in consequence the appellant is acquitted of the charge. He shall be released forthwith if not required in any other case.

These are the reasons for our short order of the even date.

(CH. EJAZ YOUSAF)
Chief Justice

(DR.FIDA MUHAMMAD KHAN)
Judge

Islamabad, the
29th September, 2004.
ABDUL RAHMAN/**

FIT FOR REPORTING

CHIEF JUSTICE