

IN THE FEDERAL SHARIAT COURT
(APPELLATE JURISDICTION)

PRESENT

MR.JUSTICE DR.FIDA MUHAMMAD KHAN
MR.JUSTICE ABDUL WAHEED SIDDIQUI
MR.JUSTICE MUHAMMAD KHIYAR

J. CRIMINAL APPEAL NO.158/L OF 1997
CRIMINAL MURDER REFERENCE NO.5/1 OF 1998

Zia Ullah alias Jajj, son of Habib Ullah,
Caste Jat, aged 36 years, Labourer,
resident of Chak No.438/JB, Tehsil
Gojra District Toba Tek Singh. --- Appellant

Versus

The State --- Respondent

Counsel for the appellant: --- Mr.Muhammad Shoaib Abbasi
Advocate

Counsel for the State: --- Ch.Muhammad Ibrahim,
Advocate

No.& Date of FIR
and police station: --- No.2/94 dt.6-1-1994
p.s. T.T.Singh(City)

Date of decision of
trial court: --- 8-9-1997

Date of Institution: --- 4-10-1997

Date of hearing: --- 3-5-1999

Date of decision: --- 3-5-1999

JUDGMENT

MUHAMMAD KHIYAR, J., - Zia Ullah alias Jajj, aged 36 years, son of Habib Ullah, resident of Chak No.438/JB, Tehsil Gojra, District Toba Tek Singh and two others namely, Muhammad Ahsan and Imtiaz Ali were tried in the court of learned Additional Sessions Judge, Toba Tek Singh, in case FIR No.2/94 dated 6-1-1994 police station City, Toba Tek Singh for the offences punishable under section 17(4) of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979 (hereinafter referred as the Ordinance) and section 302/34 PPC. Learned Additional Sessions Judge, vide judgment dated 8-9-1997 acquitted Muhammad Ahsan and Imtiaz Ali and convicted Zia Ullah under section 17(4) of the Ordinance read with section 302(a) PPC and sentenced him to death and to pay a fine of Rs.20000/- in default whereof to undergo six months R.I. The convict was also ordered to pay an amount of Rs.20000/- to the legal heirs of the deceased Zafar Abbas, in default whereof to undergo six months R.I. Death sentence was awarded subject to the confirmation by the Federal Shariat Court. Zia Ullah convict has challenged his conviction and sentence by filing this appeal from jail. Learned Additional Sessions Judge, Toba Tek Singh has sent murder reference for confirmation of death sentence. These two matters are being disposed of by this single judgment.

2. FIR Ex-PD/1 was registered at police station City

Toba Tek Singh on 6-1-1994 at 8.25 p.m. about the occurrence which had taken place on the same day at 7.30 p.m. on the complaint Ex-PD of Iqbal Hussain, complainant, (PW-10) submitted to Muhammad Aslam SHO (PW-13). The complaint made was that on 6-1-1994 at about 7.30 p.m. Iqbal Hussain alongwith Muhammad Zulifqar, Zawar Hussain and deceased Zafar Abbas were sitting in the shop situated in mohallah Gulberg Imam Bargha Road, Toba Tek Singh. Electric light was on. Meanwhile two motor cycles arrived and stopped in front of the shop. Six persons in all, got down from the motor cycles. Three persons were of middle height and three of big height. All were armed. Three of them climbed over the thara of the shop. One of those three ordered the complainant and his companions to stand up and hand over whatever they possessed. Zafar Abbas inquired as to who they were. On this one person whitish colour of middle height fired at Zafar Abbas hitting him on left side of his chest. The injured rushed outside the shop and was fired at by a person with long height which missed. After that accused persons riding motor cycles decamped from the spot towards the western side. The complainant added that he and his companions Muhammad Zulifqar and Zawar Hussain could identify the culprits if shown to them. Zafar Abbas was taken to the hospital where he succumbed to the injury. The complainant leaving Muhammad Zulifqar and Zawar Hussain with the dead body of Zafar Abbas deceased came back and submitted complaint to Muhammad Aslam SHO. The

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complaint was sent to police station city for registration of the case and Shaukat Hayat H.C. (PW-3) recorded formal FIR Ex-PD/1. Muhammad Aslam SHO (PW-13) visited the hospital where he prepared injury statement Ex-PB and inquest report Ex-PC of the deceased and entrusted the dead body to Maqsood Ahmad (PW-4) so as to get post mortem examination conducted. He himself proceeded to the spot where he secured blood stained earth from inside the shop and sealed it into parcel vide memo Ex-PM. Two empties cartridges 30 bore P6,P7 were taken into possession vide recovery memo Ex-PN. Site plan Ex-PO was prepared. He recorded the statements of PWs under section 161 Cr.P.C. On 7-1-1994 Maqsood Ahmad, constable, produced last worn clothes of deceased i.e. shalwar P1, shirt P2 and jacket P3 which the I.O. took into possession vide memo Ex-PE. Post mortem report, sealed phial were also produced to him. He recorded the statement of Maqsood Ahmad on 8-1-1994. Statement of Dr.Khalid Mehmood was also recorded and site plan, Ex-PP of the shop of Dr.Khalid Mehmood was prepared. Another site plan Ex-PF was got prepared from draftsman, Muhammad Ashraf (PW-5) on 9-1-1994 . Thereafter investigation was conducted by other senior officers and Muhammad Aslam remained associated with them.

3. On 23-2-1994 Yousaf Ali ASI police station Saddar (PW-9) and Muhammad Hanif Inspector/SHO (PW-15) were present near Bridge Solairion that at about 5.30 p.m. Zia Ullah, Imtiaz alias Teddi and

Zahid were seen coming from the direction of Janiwala railway station riding a motor cycle. They were apprehended and motor cycle with fictitious number plate was taken into possession vide recovery memo Ex-PK as they failed to show the document of ownership of the motor cycle. Pistol 30 bore P6 and Magazine having six bullets P6/1-6 were recovered from Zia Ullah. Besides that a purse black colour, an identity card and cash amount of Rs.350/- were also recovered from his possession. Recovery memo Ex-PL was prepared to that effect. Articles recovered from Zahid and Imtiaz pertained to another case registered against them. Muhammad Siddiqui (PW-14) formally arrested the accused and sent them to judicial lock up toba Tek Singh. He submitted application on 27-2-1994 for conducting identification parade, which was held on 1-3-1994 under the supervision of Ch.Abdul Sattar, Judicial Magistrate (PW-8). Muhammad Iqbal complainant, Zulifqar, Zawar Hussain and Dr.Khalid Mehmood, PWs identified the accused. Ch. Abdul Sattar, Judicial Magistrate, prepared report Ex-PJ. Muhammad Siddique ASI (PW-14) recorded the statements of recovery witnesses and after completing the investigation challaned the accused to court.

4. At the trial, the accused did not plead guilty to the charge. To prove the charge against the accused, prosecution produced 15 PWs. Zamir Hussain Khan (PW-1) identified the dead body of Zafar Abbas deceased at the time of post mortem examination. Dr.Muhammad Mansha District Headquarters Hospital (PW-2) conducted the post mortem

examination on the dead body of Zafar Abbas on 7-1-1994 at 10.00 a.m.

and observed as under:-

" It was a dead body of a healthy man of about 35 years age eye and mouth closed, clad in shalwar, qameez, jacket, bunion with one wound on the chest and one wound on the right back chest. I have found following injuries on the dead body.

1. A wound 0.5 cm diameter with inverted edges on the front of left chest 6 cm from left nipple that was wound of entrance.
2. A wound of exit 0.6 cm in diameter with inverted edges on the back of right chest. 16 cm from the vertible column and 24 cm from the top of right shoulder.

Scalp, skull and vertabral were intact and healthy membrances, brains and spinal card were also intact and healthy.

On opening the thorax there was wound on the left side of chest and right back chest the ribs and cartrilages were healthy and intact. Pleuras were ruptured by the bullet from the entrance to exit wound. Right lung was congested and was torn at the root of the bullet. Left lung was also congested and torn at the root of the bullet. Ascending aorta ruptured mainly and blood vessel were also ruptured. Rest of the organs were healthy and intact. There was a hole in the trachea.

On opening the abdomen stomach contained semi digested material. Rest of the organs were healthy and intact. Bladder contained about 150 CC of urine. Organs of generation fully developed and healthy and intact."

In the opinion of the doctor death was caused due to haemorrhage and shock which was caused by rupture of ascending aorta mainly and other blood bessels. The injuries were caused by fire arm and were ante mortem. The injury was sufficient to cause death in the ordinary course of nature.

The witness proved carbon copy of his post mortem report Ex-PA . He handed over the last worn clothes of the deceased and police papers to Maqsood Ahmad Head Constable. He also signed the injury statement Ex-PB and inquest report Ex-PC.

Shaukat Hayat (PW-3) recorded the formal FIR Ex-PD/1. On 7-1-1994 he was entrusted with two sealed parcels containing blood stained earth /clothes and empty cartridges which he kept in the malkhana. He handed over the sealed parcel containing blood stained earth/clothes to Maqsood Ahmad constable (PW-4) on 15-1-1994 for onward transmission to the office of chemical examiner and sealed parcel containing empty cartridges to the office of Forensic Science Laboratory Lahore. On 7-3-1994 he was also handed over two sealed parcels one containing pistol 30 bore and other containing 32 bore which he kept in the malkhana intact. On 19-3-1994 he handed over these parcels to Muhammad Sarwar constable (PW-7) for onward transmission to the office of Forensic Science Laboratory Lahore. Maqsood Ahmad (PW-4) got the post mortem examination of the deceased and after the post mortem examination was conducted brought relevant papers and last worn clothes of the deceased and handed over the same to the I.O. He had taken the sealed parcel containing blood stained earth to the office of chemical examiner and sealed parcel containing empties to the office of Forensic Science Laboratory Lahore. He brought the reports of chemical examiner and produced the same before the moharrir. Muhammad Ashraf, Draftsman (PW-5) prepared the site plan Ex-PF and its duplicate Ex-PF/1. Taj Muhammad (PW-6) proved the recovery of revolver 38 bore, wrist watch at the instance of Muhammad Ahsan accused. Muhammad Sarwar (PW-7) was handed over two sealed parcels

onward transmission to the office of Forensic Science Laboratory Lahore which he deposited intact. Ch.Abdul Sattar, Magistrate Ist Class (PW-8) proved the identification report Ex-PJ. Yousaf Ali ASI (PW-9), Muhammad Aslam SHO (PW-13), Muhammad Siddique S.I. (PW-14) and Muhammad Hanif Inspector (PW-15) deposed about the investigation conducted by them. Iqbal Hussain complainant (PW-10) stated that on 6-1-1994 he alongwith Muhammad Zulifqar, Zawar Hussain, PWs were sitting in the shop of Zafar Abbas deceased that persons driving two motor cycles came there. Three persons entered the shop of the deceased, one of them armed with pistol challenged Zafar Abbas deceased that he should hand over what he had. Zafar Abbas resisted and challenged who he was. Zia Ullah accused fired at Zafar Abbas deceased with the pistol hitting him on the left side of chest. They raised alarm. The deceased in injured condition stepped outside the shop. Imtiaz accused armed with pistol fired which missed the target. Zia Ullah, Imtiaz and Ahsan accused ran away from the spot. The deceased fell down in the shop. He was brought out in injured condition and was taken to civil hospital Toba Tek Singh where he succumbed to the injuries before receiving any medical aid. Zulifqar and Zawar Hussain PWs were left with the dead body of the deceased and he proceeded to lodge the report but on the way thanedar met him to whom he submitted application Ex-PD which was read over to him and it was signed by him. The complainant stated that he mentioned the
and stature

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was on where the occurrence had taken place. He identified the accused in the identification parade as well as in the court. During cross-examination Iqbal Hussain admitted that PWs Zulifqar and Zawar Hussain were closely related to him. He also admitted that deceased was his real brother. He admitted that his munshi who had left the service wrote the application Ex-PD. He denied the suggestion that application was managed by the police. He admitted that identification parade was held in judicial lock up after about two months of the occurrence. He denied that the accused were shown to him prior to identification parade. He denied the suggestion that the assailants had fired from outside the shop. Muhammad Zulifqar (PW-11) corroborated the statement of Muhammad Iqbal. He identified the accused in court. He had joined the investigation and had witnessed the recovery of empties from the spot. He had also identified the accused in the identification parade. The witness admitted that deceased was his cousin and that he resided 100 yards away from the place of occurrence. He denied the suggestion that he was not present at the time of occurrence. He stated that he had seen three accused riding motor cycle. During cross-examination he stated that empty cartridges were lying outside the shop and not inside the shop. He denied the suggestion that accused were shown to him before the identification parade was held and that he was not present at the time of occurrence. He denied the suggestion that due to relationship he was deposing against the accused. Dr.Khalid Mehmood

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M.S. Medical Store of his cousin Mehmood Shafi. Mehmood Shafi had gone to his house and in his absence three accused present in court came there on a motor cycle. Zia Ullah on pistol point asked him to stand up and ----- to part with whatever he had with him. The other two accused kept standing near the motor cycle. He told Zia Ullah accused that he did not know what was there inside the shop. One of the two persons standing near motor cycle fired. Zia Ullah opened the counter and told him that he had removed the cash amount. He got back and the other two accused stepped forward and searched his person. They took some change from his pocket and snatched his wrist Seiko watch. Thereafter all the three accused ran away towards Talab Bazar. After half an hour, his cousin came back and informed him that a shop keeper was murdered. He identified all the accused in the identification parade held in judicial lock up. During the cross-examination the witness was confronted with his statement under section 161 Cr.P.C. to show that he made improvements. He denied the suggestion that he dishonestly improved his statement in order to involve all the accused in this case. Muhammad Ilyas Akhtar, DDA tendered in evidence chemical examiner's report Ex-PQ, Serologist report, Ex_PR and report of Forensic Science Laboratory Ex-PS and closed the prosecution case.

5. Zia Ullah accused when examined under section 342 Cr.P.C. denied all the incriminating circumstances appearing in evidence against him. He denied that any pistol was recovered from his possession. About the identification parade he stated that he was shown to the PWs prior to the identification parade. When asked as to why the PWs deposed against him he stated that he was falsely roped in by the police just to make their "karguzai" and that the PWs deposed falsely at the instance of the police. He professed innocence and produced no defence. He also declined to appear as witness on Oath.

6. The trial court did not believe the oral testimony of Iqbal Hussain (PW-10) and Zulifqar (PW-11) as against Imtiaz Ali and Muhammad Ahsan being contradictory and not corroborated by independent evidence. The identification evidence was also disbelieved, and they were acquitted. Oral testimony of Iqbal Hussain and Zulifqar PWs was however, believed as against accused Zia Ullah because Forensic Science Laboratory report Ex-PS provided independent corroboration to their testimony. He was, therefore, convicted and sentenced as stated above.

7. Muhammad Shoaib Abbasi, Advocate, for the appellant, contended that trial court committed illegality in awarding the sentence under section 17(4) read with section 302(a) of the PPC for, neither any tazkiya-tush-Shahood was done nor evidence required for awarding hadd sentence was available on record.

He contended that evidence not believed against the co-accused Imtiaz Ali and Muhammad Ahsan could not be relied upon for conviction of accused Zia Ullah. PWs Iqbal Hussain and Zulfiqar are chance witnesses, they have failed to give specific role to the accused, and have made improvements, as in the FIR six persons were charged whereas in the court PWs deposed that they were three in number. Contradictions in the statement of Iqbal Hussain (PW-10) and Zulfiqar (PW-11) , one saying that accused came inside the shop and fired from a distance of 2/3 feet and other saying that they appeared in front of counter of the shop, and fired from a distance of 9/10 feet make them untrustworthy. Learned counsel for the appellant argued that recoveries are fake as nobody from the public was associated in the proceedings and challenged the report of Forensic Science Laboratory as not reliable.

8. Ch.Muhammad Ibrahim, Advocate, learned counsel for the State conceded that conviction of the appellant under section 17(4) read with section 302(a) PPC was illegal. He submitted that this court has the power to alter the sentence of had to that under tazir.

9. We have heard the learned counsel for the parties at some length and with their assistance have carefully gone through the evidence on record. The occurrence which took place at 7.30 p.m. on 6-1-1994 was promptly reported to the police at 8.25 p.m. Iqbal Hussain complainant (PW-10) gave the detail of the occurrence that

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on 6-1-1994 when he alongwith Zulfiqar Ali and Zawar Hussain
PWs were sitting with Zafar Abbas in shop of the deceased, two
motor cycles with six persons, three on each motor cycle came to
the shop. He identified three accused facing trial in the court as the
persons who entered the shop. He stated that Zia Ullah accused
was armed with pistol and challenged Zafar Abbas deceased that
he should part with anything he had. Zafar Abbas resisted and
was fired at by Zia Ullah hitting the deceased on the left chest.
They raised alarm. The deceased in injured condition stepped outside
the shop. Imtiaz accused then fired at the deceased which missed
the target. Three accused present in court and other three ran away
from the spot. The injured was removed to the hospital where he
succumbed to the injures. Leaving Zulfiqar and Zawar Hussain
with the deceased he proceeded to lodge the report and on the way
met the SHO to whom complaint, Ex-PD was made. Iqbal Hussain
complainant. (PW-10) stated that he identified the accused in the
identification parade. The witness was cross-examined at length but
nothing useful could be obtained from him. Merely because that
he is related to the deceased does not mean that he is not deposing
the truth. His presence at the time of occurrence cannot be doubted.
His shop is at a distance of 30/40 yards from the shop of the
deceased. He must be sitting at the shop of the deceased at

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the time of occurrence, and had witnessed the occurrence. Zulfiqar (PW-11) gave similar account of the occurrence as given by PW-10. He had also witnessed the recoveries of blood stained earth, empty cartridges of 30 bore pistol from the spot and correctly identified the accused in identification parade and also in the court. He is, no doubt, related to the deceased but that alone does not make him a false witness. He was residing at a distance of 100 yards from the place of occurrence and it was not unusual for him to have come to the shop of the deceased and being present at the time of occurrence. Contradictions in the statements of PW-10 and PW-11 about the distance and place of firing as pointed out by the learned counsel for the appellant are not so material as to have adversely effected the prosecution case. Their testimony finds corroboration from the medical evidence. Both the PWs stated that deceased was hit on left side of his chest. According to P.M. report Ex-PA proved by doctor Muhammad Munsha (PW-2) there was a wound 0.5 cm diameter with inverted edges on the front of left chest 6 cm from left nipple. Recovery of two empties from the spot also prove that two fire shots were made, first--- by Zia Ullah which hit the deceased and second by Imtiaz (acquitted accused) which missed the target. About the number of accused as mentioned in the FIR and that stated by the PWs in court suffice it to say that the PWs gave effective role to accused Zia Ullah and identified him in the identification

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parade albeit held belatedly but no genuine reason to ignore it as no irregularities were committed still the PWs had identified the accused during trial in court and gave effective role to Zia Ullah. How Zia Ullah who was not named in the FIR came into picture is a different story narrated by Muhammad Hanif Inspector (PW-15). On 23-2-1994 Muhammad Hanif Inspector was on duty patrolling the area of chak No.387/JB Mouza Allar that the accused came riding on motor cycle and when asked to produce any proof of ownership of motor cycle, they failed to do so. They were apprehended and motor cycles were taken into possession under section 550 Cr.P.C. On personal search of Zia Ullah pistol P6, 30 bore loaded with six bullets, a magazine P6/7 were taken into possession vide memo Ex-PL. Recovery memo was signed by Munir Ahmad ASI (given up) and Yousaf Ali ASI (PW-9) Earlier Muhammad Aslam SHO (PW-13) to whom application, Ex-PD was submitted by Iqbal Hussain after sending him to the police station for registration of the case proceeded to the hospital where he prepared injury statement Ex-PB and inquest report Ex-PC of the deceased and after entrusting the dead body to Maqsood Ahmad constable for getting post mortem examination he proceeded to the spot ~~spot~~ where he secured blood stained earth from inside the shop and took into possession two empty cartridges of 30 bore pistol from near the place of occurrence vide recovery memo Ex-PM. The blood stained earth and the empties were sealed into parcels. These sealed

kept the parcels in the malkhana and on 15-1-1994 handed over the parcels to Maqsood Ahmad (PW-4) for onward transmission to the office of chemical examiner and Forensic Science Laboratory Lahore. Maqsood Ahmad brought back the articles with their reports on 20-1-1994. The report Ex-PQ of chemical examiner is that articles were stained with blood. Serologist report Ex-PR is that earth were stained with human blood. The report of Forensic Science Laboratory Lahore is that crime empties of 30 bore was fired from pistol of 32 bore. The recovery of 30 bore pistol from Zia Ullah accused and its use by him at the time of occurrence is proved beyond doubt.

Dr. Khalid Mahmood (PW-12) deposed about the incident which occurred on the same day at 7.00 p.m. He was present in the M.S. Medical Store of his cousin Mahmood Shafi, that three accused came there on motor cycle. He identified Zia Ullah accused in court and stated that he came near to him in front of the counter and pointed out the pistol towards him to hand over to him whatever he had with him. He identified acquitted accused in court who were standing near the motor cycle. He stated that he told Zia Ullah that he had no knowledge what was there inside the shop and Zia Ullah opened the counter and told him that he had removed the cash amount. He also took Seiko watch from his possession.

After half an hour his cousin, Mahmood Shafi came back to his shop and informed him that a shop keeper had been murdered.

Dr.Khalid Mehmood identified the accused in the identification parade. The witness was confronted with the statement recorded under section 161 Cr.P.C. to show that he made improvements. He could not give minutest details in his statement recorded under section 161 Cr.P.C. From the evidence on record we are fully convinced that Zia Ullah accused has committed the murder of Zafar Abbas deceased. However,his conviction under section 17(4) read with section 302(a)PPC was uncalled for, because punishment of death as Hadd under section 17(4) of the Ordinance can be awarded to a person only when proof as required by law i.e. section 7 of the Ordinance is available. Section 7 of the Ordinance provides for the proof of theft liable to Hadd in the form 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 Tazkiya-Al-Shuhood, that they are truthful persons and abstain from major sins (kabair), give evidence as eye-witnesses of the occurrence;

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

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

Explanation. In this section, 'Tazkiya Al-Shuhood' means the mode of inquiry adopted by a Court to satisfy itself as to the credibility of a witness."

In the present case accused made no confession. Trial Court nowhere adopted the procedure of Tazkiya Al-Shuhood. It has not been made clear as to which mode of enquiry was adopted by the Court to satisfy itself about the credibility of the

witnesses. Likewise section 302(a) PPC providing punishment of death as qisas for 'Qatl-e-Amd' was not attracted to this case. Section 17 sub section (2) of Qanun-e-Shahadat Order provides that for Hadd punishment proof should be the same as required by section 7 of the Ordinance. This being the position death sentence awarded to Zia Ullah appellant as Hadd under section 17(4) of the Ordinance read with section 302(a) PPC is altered to that under section 302(b) PPC as tazir. Sentence of fine and order for payment of compensation is maintained. Appeal fails and is dismissed. Death sentence is confirmed. Murder Reference is answered in the affirmative.

(Dr. Fida Muhammad Khan)
Judge

(Muhammad Khiyar)
Judge

(Abdul Waheed Siddiqui)
Judge

Islamabad, the 3rd May, 1999
Zia

APPROVED FOR REPORTING

Muhammad Khiyar
Judge