

IN THE FEDERAL SHARIAT COURT

(Appellate Jurisdiction)

PRESENT

**MR. JUSTICE AGHA RAFIQ AHMED KHAN, CHIEF JUSTICE
MR. JUSTICE SYED AFZAL HAIDER
MR. JUSTICE SHAHZADO SHAIKH**

JAIL CRIMINAL APPEAL NO. 186/I OF 2005

Khiyal-ur-Rehman alias Khair ur Rehman
son of Maman Khan, resident of Aza Khel,
Peer Bhai Noshera Kalan, District Noshera

.... Appellant

Versus

The State Respondent

CRIMINAL MURDER REFERENCE NO.8/I OF 2005

The State

Versus

Khiyal-ur-Rehman alias Khair ur Rehman

... Respondent

For the appellant ... Malik Abdul Haq,
Advocate

For the State ... Mrs. Rukhsana Malik
Additional Prosecutor General

FIR No. Date & ... 220,28-07-1992
Police Station ... City, Rawalpindi

Date of Judgment of ... 25-09-2000
trial Court

Date of Institution ... 20.06.2005

Date of hearing ... 03-05-2010

Date of decision ... 17.05.2010

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JUDGMENT

AGHA RAFIQ AHMED KHAN, Chief Justice.- Appellant

Khiyal-ur-Rehman has filed this appeal through Jail against the judgment dated 25.09.2000 delivered by learned Additional Sessions Judge, Rawalpindi whereby he was convicted under section 302(b) of Pakistan Penal Code and sentenced to death and also to pay a sum of Rs.100,000/- as compensation under section 544-A of the Code of Criminal Procedure payable to the legal heirs of deceased and in default of non payment of the same the appellant was directed to suffer another term of six months simple imprisonment.

2. The case has arisen out of FIR. No. 220 (Ex.PB/1) registered at Police Station City Rawalpindi on 28.07.1992 on the statement (Ex.PB) of Muhammad Maqsood, complainant/P.W.7 regarding an occurrence dated 09.06.1992 alleged to have taken place in the area of City Saddar Road, Rawalpindi.

3. Brief facts of the case as narrated by complainant in his statement before the police are that on 09.06.1992 he was sitting in his Estate Agency shop while his brother Haji Muhammad Yaqoob

(deceased) was running a sanitaryware shop at City Saddar Road Rawalpindi.

On 09.06.1992 at about 2.00.p.m. he was present in his shop when his servant Muhammad Asad informed him that his brother Muhammad Yaqoob was lying on the floor of his shop with blood was oozing from his head and that he was senseless. On this information he alongwith said servant Muhammad Asad reached the shop of Haji Muhammad Yaqoob and found his brother lying on the floor in an unconscious state. He thought that his brother might have sustained injury due to fall of some iron pipe etc. The injured was immediately shifted to Civil Hospital Rawalpindi. As the injury was serious the patient was taken to Complex Hospital Islamabad. The patient remained senseless and expired on 14.06.1992 due to the head injury. On 28.07.1992 the complainant, his brother Muhammad Iqbal and one Muhammad Jamil were sitting in their shop when a person, under police custody, appeared. He was introduced as Khiyal-ur-Rehman. He disclosed that one and half month ago he with the help of his co-accused Mumtaz Khan attacked a person aged about 40-45 years with a 'Gainti'. The said person became senseless whereafter they took out about Rs. 40,000/- to Rs.50,000/-. It was on this

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information that the complainant came to know that his brother Muhammad Yaqoob was attacked as robbery had to be committed. The weapon of offence was lying in the shop whose ownership was not known. In this background that criminal proceedings were initiated against Khiyal-ur-Rehman and his co-accused Mumtaz Khan (since P.O.).

3. The investigation of the case conducted firstly by Muhammad Ilyas Sub Inspector who interrogated accused Khiyal-ur-Rehman who was already in custody in Case FIR. No.378 dated 07.07.1992 under section 397/324/392 of Pakistan Penal Code read with section 17 Haraba. He had disclosed that he had also committed the crime of theft at City Saddar Road in an iron shop. He further disclosed that he could point out that shop. The accused made confession in the presence of Muhammad Iqbal, Muhammad Jamil and Muhammad Maqsood complainant at the shop of deceased Haji Muhammad Yaqoob and got recovered the Gainti P1 which was taken into possession by the Investigating Officer vide memo Ex.PC. The Investigating Officer inspected the place of occurrence, took notes, prepared site plan Ex.PF. He recorded statements of witnesses under section 161 of the Code of

Criminal Procedure. The formal arrest of accused Khiyal-ur-Rehman in the present case was kept pending as he was already under arrest in another case.

On 08.08.1992 the accused, while on physical remand in this case, opted to get his confessional statement recorded under section 164 of the Code of Criminal Procedure. The Illaqa Magistrate Mr. Abdul Rehman Khalid recorded his confessional statement on the same day and the accused was then sent to judicial lock up. He moved an application Ex.PL to Deputy Commissioner Rawalpindi for the disinterment of deceased Muhammad Yaqoob. Post mortem of the dead body was conducted at Sialkot as a consequence thereof. On 09.01.1993 the Investigating Officer was transferred and the investigation was handed over to SHO Police Station Ganjmandi, Rawalpindi. The investigation of the case was further conducted by Mushtaq Ahmad, Sub Inspector.

4. The learned trial court framed charge against the accused Khiyal-ur-Rehman on 11.04. 1994 under sections 302 read with 34 of Pakistan Penal Code and under section 17(4) of Offences Against Property (Enforcement of

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Hudood) Ordinance, 1979 read with section 34 of the Pakistan Penal Code.

The accused did not plead guilty and claimed trial.

5. The prosecution in order to prove its case at the trial produced 13 witnesses. The gist of deposition of prosecution witnesses is as under:-

- i. Qamar-ud-Din Draftsman took rough notes of the place of occurrence. He appeared as P.W.1 and stated about the steps taken by him in the case;
- ii. Sajid Hussain Shah, ASI appeared as P.W.2 and deposed that on receipt of complaint Ex.PB sent by Muhammad Ilyas S.I, he recorded formal FIR. Ex.PB/1.
- iii. Muhammad Jamil P.W.3 deposed that on 14.06.1992 Muhammad Yaqoob deceased of this case died of injuries sustained by him. He further stated that accused Khiyal-ur-Rehman led the police to the place of occurrence in handcuffs and got recovered the weapon of offence i.e. Gainti;
- iv. Haji Muhammad Younas appeared as P.W.4 and stated that in his presence the dead body of deceased Muhammad Yaqoob was disinterred from graveyard at Sialkot. He identified the dead body of Haji Muhammad Yaqoob in the presence of Rana Farooq Ahmad, Magistrate and Dr. Zahid Ghani Dar. After the post-mortem the dead body was again buried in the same graveyard.

- v. Syed Muzamil Ali as P.W.5 deposed that on 28.07.1992 he and Arshad P.W.were sitting in Police Station Ganjmandi Rawalpindi when during investigation accused Khiyal-ur-Rehman disclosed that about one and half month back he alongwith Mumtaz Khan injured a person aged about 40-45 years in a shop with a "Gainti" and took out Rs. 40,000/- to Rs. 45,000/- from the draws.
- vi. Haji Arshad Iqbal appeared as P.W.6. He stated that on 28.07.1992 he was present in his shop situated at Bara Market Rawalpindi at about 8.00.a.m. when Muzamil Hussain Shah P.W. came to him and he requested Muzamil Shah to accompany him to Police Station Ganjmandi as a case of such like nature had happened with his maternal uncle about one and half month before. When they reached there accused Khiyal-ur-Rehman was called by Raja Ilyas S.I. and in their presence the accused disclosed that about one and half month ago he alongwith his co-accused Mumtaz Khan committed an offence at City Saddar Road Rawalpindi in PVC Market and attacked a person with "Gainti" who became senseless as a result of injury whereafter took Rs. 40,000/- to Rs. 45,000/- from drawer of the counter and ran away.
- vii. Muhammad Maqsood, complainant appeared as P.W.7 and reiterated the facts recorded in crime report Ex.PB.
- viii. Dr. Zahid Ghani Dar had conducted post-mortem on the dead body of deceased Haji Muhammad Yaqoob after disinterment.

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He appeared as P.W.8 and deposed about the postmortem in detail and also verified the issuance of postmortem report:

- ix. Rana Farooq Ahmad Khan, Assistant Commissioner Tandlianwala District Faisalabad appeared as P.W.9 to state that on the direction of Deputy Commissioner Sialkot the dead body of deceased of Haji Muhammad Yaqoob was taken out of grave on 17.02.1993 whereafter postmortem of the corpse was undertaken by the doctor and then the dead body was buried again.
- x. Mushtaq Ahmad, Sub Inspector appeared as P.W.10. He had investigated the case partially.
- xi. Muhammad Ilyas, Sub Inspector appeared as P.W.11. The detail of his investigation has already been mentioned in an earlier paragraph of this Judgment.
- xii. Malik Aftab Hussain, Reader to Assistant Commissioner Cantt. Rawalpindi appeared as P.W.12 and identified the hand writing and signatures of late Abdul Rehman Khalid, Magistrate.
- xiii. Dr. Professor Muhammad Shafi as P.W.13 stated that on 09.06.1992 he, as head of Department of Neurosurgery at Pakistan Institute of Medical Sciences, Islamabad, treated Haji Muhammad Yaqoob aged about 42 years who was admitted in ICU with the history of head injury and loss of consciousness. The injured died due to the head injury. He also verified the ICU record at the trial court.

6. The learned trial court after close of the prosecution evidence recorded statement of accused Khiyal-ur-Rehman under section 342 of the Code of Criminal Procedure wherein he, in reply to Question No.8 retracted the confessional statement made by him and stated that the same was made due to police pressure. Neither he opted to make statement on oath under section 340(2) of the Code of Criminal Procedure nor produced any evidence in his defence. The learned trial court after completing all legal formalities returned the verdict of guilt. The appellant was convicted and sentenced as noted in the opening paragraph of this Judgment. Hence the present Appeal through Jail.

7. We have gone through the file. The evidence of the witness for prosecution as well as the statement of appellant has been scrutinized. Arguments of the contending parties have also been heard.

8. It might as well be noted at the outset that though the report under section 173 of the Code of Criminal Procedure was sent against Mumtaz Khan and Khial-ur-Rehman, Mumtaz Khan accused was shown as an absconder and placed in column No.2 of the report. The conviction and

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sentence in this case was recorded only against Khial-ur-Rehman. A perpetual warrant of arrest of accused Mumtaz Khan (since proclaimed offender) was also issued by the learned trial court and sent to the District Magistrate Rawalpindi for compliance. In this view of the mater this appeal will dispose of the conviction and sentence of Khial-ur-Rehman appellant alone.

9. Our observations after hearing the arguments of the contending parties are as follows:-

- i. The instant case depends upon firstly on a confession recorded by later Mr. Abdul Rehman Khalid, Magistrate Rawalpindi on 08.08.1992. This confession has been retracted by the appellant who in response to Question No.8 of his statement under section 342 of the Code of Criminal Procedure stated that it was due to police pressure on him that he, while in police custody, was constrained to make confessional statement. Secondly the case rests upon extra judicial confession made during police custody and thirdly upon recovery of 'Ganti'.
- ii. P.W.3 Muhammad Jamil, P.W.5 Syed Muzammil Shah and P.W.6 Haji Arshad Iqbal have categorically stated that during investigation accused Khial-ur-Rehman, while in custody, had disclosed that he had killed Haji Muhammad Yaqoob. Needless to say that the confessional statement made to a police officer is

inadmissible as such a confession is hit by Article 38 of Qanoon-e-Shahadat, 1984.

iii. The confessional statement made by the appellant and recorded by learned Magistrate under section 164 of the Code of Criminal Procedure has been retracted. Moreover only the copy of the confessional statement has been placed on record without showing the reason why the original was not produced at the trial. The learned Magistrate had died and his Reader appeared in court to identify the signatures and the hand writing of the late Magistrate who had reportedly recorded the confessional statement of appellant.

iv. It is also worth mentioning that the statement of Dr. Zahid Ghani Dar who appeared at the trial as P.W.8, got his statement recorded at the trial but at the end of his statement only nil cross-examination is written. The date of deposition has neither been written nor has the learned trial court verified that the statement was read over and acknowledged correct. The signatures of the learned trial court are also missing. It was because of this omission that the doctor was summoned by the Federal Shariat Court. He put his appearance in this Court on 05.01.2006 in compliance with the Order of this Court dated 24.10.2005. In the cross-examination he stated that he was unable to mention the exact cause of death but in his opinion injury No.1 could be the cause of death. He also stated that he had not mentioned the cause of death in the statement recorded before the trial court.

- v. The incident is alleged to have taken place on 09.06.1992 when Haji Muhammad Yaqoob deceased was found in an injured and un-conscious condition in his shop. He died in the hospital in this state on 16.06.1992. Till then there was neither any suspicion about the assailant nor was any theft from the shop of deceased reported to police. It was on 17.02.1993 that the dead body was disinterred from the grave and the dead body was subjected to post-mortem.
- vi. P.W.11 Muhammad Ilyas, Sub Inspector stated that on 28.07.1992 i.e. almost six weeks after the occurrence Muhammad Maqsood complainant produced 'Ganti' P1 allegedly lying in the shop of the deceased. This 'Ganti' was allegedly left by the appellant in the shop. This 'Ganti' was neither blood stained nor was suspected by the complainant to be the crime weapon.

10. There is no eye witness in this case. The confession has been retracted. It has been held in the case of Arif Nawaz Khan and three others Versus State reported as PLD 1991 FSC 53 at page 64 paragraph 14-A that a retraction has to be accepted in which case the Hadd punishment cannot be imposed unless Hadd punishment is proved by evidence. The confession before the police officer by the appellant was made while in custody and hence not worthy of credence. The recovery of "Ganti" does not take the case

of the prosecution any further. The original record of the confessional statement of appellant recorded by learned Magistrate has not been placed on record. We also find that the appellant is in jail for the last almost 18 years.

11. In view of what has been stated above the prosecution has not been able to establish its case against the appellant beyond reasonable doubt. In this view of the matter it is not safe to maintain conviction and sentence recorded by the learned trial court. As a consequence thereof the appeal is accepted. The conviction and sentence recorded by learned trial Court is set aside. The Murder Reference is answered in the negative. Appellant Khiyal-ur-Rehman alias Khair-ur-Rehman son of Maman Khan is directed to be released forthwith if not required in any other case.

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JUSTICE AGHA RAFIQ AHMED KHAN
CHIEF JUSTICE


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JUSTICE SYED AFZAL HAIDER

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JUSTICE SHAHZADO SHAIKH

Announced in open Court
at Islamabad on 17-05-2010.
UMAR DRAZI

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Fit for reporting

JUSTICE AGHA RAFIQ AHMED KHAN
Chief Justice