

IN THE FEDERAL SHARIAT COURT

(Appellate Jurisdiction)

Present

MR. JUSTICE HAZIQUL KHAIRI, CHIEF JUSTICE.
MR. JUSTICE DR. FIDA MUHAMMAD KHAN.
MR. JUSTICE SALAHUDDIN MIRZA

JAIL CRIMINAL APPEAL NO.8/I OF 2006
CRIMINAL REF. NO.5/I OF 2007

Faisal Khan son Muhammad Arif Khan,
Caste Gujjar, resident of Bidian,
District Attock. Appellant.

Versus

The State. Respondent.

For the appellant Mr. Abdul Majeed,
Advocate.

For the State Mr. Asjad Javed Ghural,
DPG, Punjab.

No. & Date of FIR/PS No.554, dated 21-9-2003,
P.S. Wah Cantt.
District Rawalpindi.

Date of judgment
of trial court 29-11-2005

Date of filing of appeal 19-1-2006

Date of hearing 14-1-2009

Date of decision 27.2.09

JUDGMENT

HAZIQL KHAIRI, CHIEF JUSTICE.- This Jail Criminal Appeal No.8/I of 2006 is directed against the judgment dated 29-11-2005 passed by the learned Additional Sessions Judge, Taxila, whereby appellant Faisal Khan was convicted under section 17(4) of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979 (hereinafter referred to as "the said Ordinance"), read with section 7(a) of the said Ordinance and sentenced to death alongwith fine of Rs.50,000/- to be paid to the legal heirs as compensation or in default thereof to further suffer six months' imprisonment.

2. On 21-9-2003 at about 2.30 p.m. the appellant Faisal Khan and Zeeshan accused duly armed entered the shop of complainant Gul Zaman known as Naveed Jewelers, for the purpose of robbery. There was grappling between the appellant Faisal Khan and the complainant's brother Muhammad Younis, who was sitting in the shop. During the grappling the appellant fired burst through 8 MM Rifle hitting Muhammad Younis on the face whereas second shot was fired by accused Zeeshan by his .30 bore pistol, as a result of which he fell down and died on the spot.

3. The appellant was charged under sections 302/34, 392 and 412 PPC which was denied by him and claimed trial. The prosecution produced two witnesses, whereafter the appellant desired to record his confessional statement.

4. PW.1 Muhammad Masood, 1055/HC was posted as Moharrir, Chowki PP No.2, Police Station, Wah Cantt. On 21-9-2003 when in the evening Muhammad Shabbir, SI handed over to him "one sealed

parcel containing blood stained earth relating to deceased Muhammad Younis stamp with MA, another parcel containing empties of 30 bore pistol and 8 MM with stamp of MA” to him to put in the Malkhana which on 29-9-2003 he handed over to Muhammad Niaz 908/C. One parcel was deposited in FSL and the other with Chemical Examiner, Lahore.

5. PW.2 Muhammad Yousaf, a labourer deposed that on 3-11-2003, he had accompanied Muhammad Irshad and they went to Police Post No.2, P.S. Wah Cantt. together where I.O. brought appellant Faisal Khan for investigation. They were led by the appellant to Quarter No.10-H/999 Wah Cantt. where in the western room of the house he produced rifle out of iron box lying under the cot. He also produced live cartridges/magazine (Gattah). The I.O. took into possession the rifle and magazine vide recovery memo.

6. After the testimony of the said two witnesses, appellant Faisal Khan made a request to the trial judge to record his confession which was recorded in the following words:-

“I want to confess my guilt in the light of some Quranic verses of Sura Al-Nisa, Al-Baqra, Al-Touba, Al-Maida. On 21-9-2003 at about 2.00 p.m. I armed with rifle 8 MM entered with the intention of dacoity into the shop of Naveed Jeweler where Younis was sitting on cash and gold. The matter was resisted by Younis deceased. Due to the resistance, many people gathered there. There were so many people that one had to face very much difficulty to go on motorcycle or vehicle etc. from that place. In few minutes, there was much rush at that point of shop of Younis situated in Nawababad Bazar. Seeing that rush of people and resistance of Younis, I tried to slip away from place but Younis tried to apprehend me and tried to catch me hold, in

that situation due to fear, 8/10 fires were made by me in the air. I made this aerial firing due to fear of rush of people and secondly that Younis had caught hold barrel of my 8 MM rifle. In the meantime, police in civil uniform and other police officials in the uniform with their weapons also came there. Due to my aerial firing, police officials tried to remove the rush of people so that they apprehend me.

My co-accused Zeeshan Amin armed with 30 bore pistol was also standing on one side, while on the other side police officials were present. I and deceased Younis were standing side by side. While Younis was trying to snatch rifle from me while holding the barrel of rifle, whereas the trigger side of rifle was under my control. At the same time, co-accused Zeeshan Amin made firing with his pistol in response to the firing of police officials who made aerial firing to remove the rush of people, meanwhile police officials made firing towards my legs, while my co-accused Zeeshan Amin made firing with his 30 bore pistol on deceased Muhammad Younis which hit him, while fire of police officials also hit the deceased Muhammad Younis, received fires of my co-accused from my back side and fire of police officials on his left side and when he was just to fall down the barrel of the rifle was in his hand and it came in such a position that my firing which I was already making hit Muhammad Younis on his face and he fell down.

My co-accused made his good escape on that occasion. Due to all the injuries, he received at my hand, of my co-accused and police officials, Muhammad Younis succumbed to the injuries. I also tried to run away and at some distance, i and my co-accused gathered and we fled away. I had not murdered Muhammad Younis with intention.”

7. What is pertinent to note is that the appellant was charged under sections 302/34, 392 and 412 PPC but he was convicted under section

17(4) of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979, which is a graver charge as under the Ordinance, the prescribed punishment is death only whereas under section 302 PPC, the punishment is death as qisas or death or imprisonment as tazir or imprisonment of either description for a term which may extend to twenty five years when punishment for qisas is not applicable.

8. In the case of Pir Imtiaz and another-Vs-The State 2005 P.Cr.L.J. 721 decided by a Full Bench of the Federal Shariat Court, the accused was charged under section 10(3) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979, but were convicted under section 10(4) thereof without alteration of charge which was considered fatal and hence the conviction was set aside and the case was remanded to the trial court for its fresh trial and fresh decision. But no useful purpose will be served in the present case as doors for fresh trial have closed after the judicial confession of the appellant.

9. In the present case at no stage the charge was amended nor the altered charge was read over to the appellant nor was he given the opportunity to defend himself, which is a grave illegality as admittedly the altered charge entails graver punishment.

10. What further may not be lost sight of is that since the appellant was charged under PPC, he made confession under section 164 Cr.P.C., read with section 304(a) PPC. He did not "plead guilty of the commission of theft liable to Hadd" as contemplated under Section 7(1) read with Section 16 of the Ordinance, yet he was convicted under Section 17(4). An admission of guilt under Section 7(1) of the Ordinance is somewhat similar to Section 243 Cr.P.C. and is an

admission simplicitor whereas the requirements of judicial confession are mandatory in nature failure whereof will render the confession invalid. The confession whether retracted or not has to be strictly scrutinized on the touchstone of established judicial principles. In short the conviction of the appellant under Section 17(4) of Offences Against Property (Enforcement of Hudood) Ordinance, 1979, on the basis of confession under Section 164 Cr.P.C., is patently erroneous, without jurisdiction and of no legal effect.

11. Now reverting to the testimony of PWs. 1 & 2 and the confession itself, there is nothing to show that the theft of any property had taken place. As per F.I.R. there had been grappling between the appellant and the complainant's brother Muhammad Younis during the course of which both the accused fired at him resulting into his death. However in the sequence of events during grappling the appellant had fired burst through 8 M/M Rifle, hitting Muhammad Younis on the face whereas second shot was fired by accused Zeeshan, by his 30 bore pistol as a result of which he fell down and died on the spot. The confession of the appellant was somewhat different in the sense that he had stated that "deceased Muhammad Younis received fire of co-accused from my side and fire of police official on his left side and when he was just to fall down the barrel of the rifle was in his hand came in such a position that my firing which I was already making, hit Muhammad Younis on his face and he fell down". In short as per F.I.R. although the appellant also fired but the last shot on Muhammad Younis came from co-accused as a result whereof he fell down and died but according to confessional

statement of appellant on account of firing from co-accused and police official the deceased was just to fall down when the appellant fired on his face and he fell down. There is inconsistency in the two versions as it cannot be established beyond any shadow of doubt as to who ultimately caused death of Muhammad Younis, the appellant or co-accused Zeeshan. There is also no post-mortem examination or medical report to establish which of the two accused had caused the death of the deceased.

12. Learned Counsel for the appellant, Mr. Abdul Majeed Advocate, pleaded that the appellant is a young student and deserves mercy on account of his conduct during the trial. He did not retract the confession. It was conceded that he intended to commit robbery during the course of which death of the deceased had taken place while firing was going on. The fire shot by the appellant was incidental. Learned counsel for the appellant placed reliance on 1995 SCMR 351, 1992 SCMR 2047 and PLJ 1988 Cr.C (Quetta) 986 (DB).

13. It is paradoxical that "Dacoity with murder under section 396 PPC contains among other punishments, rigorous imprisonment for a term which shall not be less than four years nor more than ten years" but there is no similar provision relating to "Robbery with murder".

14. It has been repeatedly held by the Superior Courts that where the admission of guilt is the only basis of conviction, the statement of the accused should be accepted in its entirety and believing it to be true, court would examine that what offence has been made out against accused.

15. It was further contended by the learned counsel that if the confession of the appellant be accepted in its entirety as truthful on the facts and circumstances of the case and further if there were mitigating circumstances, benefit thereof should be given to the appellant. Reliance was placed on *Arbab-Vs-The State*, 1972 P.Cr.L.J.76 and PLD 1982 Federal Shariat Court 126,

16. In view of the foregoing, we hold that the confession of the appellant was truthful and honest and without ambiguity and was free from coercion or inducement and as such accepted by us in its entirety. We, therefore, while accepting the confession in full and also because of mitigating circumstances, set aside the impugned judgment dated 29-11-2005 but convict the appellant under section 319 PPC and sentence him to five years' R.I. and impose sum of Rs.75000/- as Diyat to be paid to the legal heirs of the deceased or in default to further suffer six months' S.I. The appellant shall not be entitled to benefit under section 382-B Cr.P.C. as there was gross negligence on his part. His sentence shall run with effect from the date of this judgment.

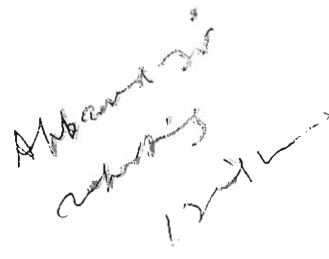
Criminal ~~Murder~~ Reference No.5/I of 2007 is replied in negative.


JUSTICE HAZIQUL KHAIRI
Chief Justice


JUSTICE DR. FIDA MUHAMMAD KHAN


JUSTICE SALAHUDDIN MIRZA

Announced on 27.2.09
at Islamabad
M.Khalil


Announced
27/2/09