

**IN THE FEDERAL SHARIAT COURT**  
**(APPELLATE JURISDICTION)**

**PRESENT**

**MR. JUSTICE DR. FIDA MUHAMMAD KHAN**  
**MR. JUSTICE MEHMOOD MAQBOOL BAJWA**  
**MR. JUSTICE SYED MUHAMMAD FAROOQ SHAH**  
**MR. JUSTICE SHAUKAT ALI RAKHSHANI**

**REFERENCE NO.14-I OF 2004.**

THE STATE  
RESPONDENT

**VERSUS**

MUHAMMAD ARIF S/O MUHAMMAD SHARIF, CASTE JAT SAHI, R/O  
PATIALA SAHIAN, P.S. DINGA, DISTRICT GUJRAT.

APPELLANT

COUNSEL FOR THE STATE SIDHU,	...	CH. MUHAMMAD SARWAR  ADDITIONAL PROSECUTOR GENERAL, PUNJAB.
COUNSEL FOR THE APPELLANT	...	NO REPRESENTATION
FIR NO. AND POLICE STATION	...	NO. 109 OF 2002 P.S. RAILWAY POLICE, RAWALPINDI.
DATE OF JUDGMENT OF TRIAL COURT	...	28.03.2003
DATE OF RECEIPT OF REFERENCE	...	08.07.2004
DATE OF HEARING	...	09.04.2018
DATE OF DECISION	...	09.04.2018

**MEHMOOD MAQBOOL BAJWA, J:** Reference under Section 17(5) of The Offences Against Property (Enforcement of Hudood) Ordinance VI of 1979 (Hereinafter called The Ordinance) has been sent by learned Judge Anti-Terrorism Court No.1, Rawalpindi and Islamabad Capital Territory for confirmation of sentence of amputation of right hand from the wrist and left foot from the ankle of Muhammad Arif Son of Muhammad Sharif, Caste Jat Sahi, Resident of Patiala Sahian, District Gujrat, in view of conclusion of proof of offence under Section 17(3) of The Ordinance through judgment dated 28<sup>th</sup> March, 2003.

2. Crime Report bearing No. 109 of 2002 (Ex.PF-1) was registered against Muhammad Arif (convict-respondent) and his three associates namely Ifzal, Ifran and Asif (whose names and particulars were revealed later on) at the instance of Amanat Ali, ASI (P.W.7) with the accusation that on 13<sup>th</sup> of December, 2002, he along with Shahid Ikram and Jamil Ahmed constables (P.W.10-P.W.11) came to Gujrat, got custody of Mohammad Malik (accused in case F.I.R No.138 of 1999 registered under Section 13 of The Pakistan Arms Ordinance XX of 1965 at Police Station Railways, Rawalpindi) from District Jail, Gujrat, in order to produce him in the court of learned Senior Civil Judge, Rawalpindi on the following day, boarded in Bogie No.15 of Tezgam. When the train halted at Railway Station Tarki due to cross of another train, the

convict alongwith his three associates, named above came in their bogie. The convict as per allegations threw chilli powder in the eyes of police contingent. Rest of the accused (later on were murdered in police encounter), who were armed with pistols, while causing injuries to Shahid Ikram and Jamil Ahmed, constables (P.W.10-P.W.11) got free Muhammad Malik, accused being taken to Rawalpindi. The said accused also snatched official SMG rifle having double magazine from Shahid Ikram, constable (P.W.10) and fled away.

As per accusation, when the train stopped at Sohawa Railway Station, occurrence was intimated not only to Railway employees but also at Police Station, Sohawa.

Different Raiding parties as per stance consisting of contingents of Police Stations Sohawa, Domeli and complainant etc started search of assailants. The convict having official rifle was apprehended from the bushes near Sohan Chowk.

After that formal F.I.R (Ex PF-1) was recorded. Official rifle alongwith two magazines, 36 live cartridges, key of handcuff secured from convict was taken into custody vide memo (Ex.PD). Muhammad Zamurd, ASI (P.W.4) concluded investigation.

3. The convict was formally charged under Sections 7(c) (h) of The Anti Terrorism Act 1997 (Act XXVII of 1997) (Hereinafter

called Act XXVII of 1997) and Section 225 of The Pakistan Penal Code, 1860 (Act XLV of 1860) (Hereinafter called The Code) and Section 17(3) of The Ordinance.

4. The prosecution in order to prove its case produced thirteen witnesses.

The convict in his statement recorded under Section 342 of The Code of Criminal Procedure, 1898 (Act V of 1898) (Hereinafter called Act V of 1898) denied the incriminating evidence with which he was confronted.

5. The learned Trial Court through judgment dated 28<sup>th</sup> March, 2003 while appraising evidence recorded conviction under Section 7(h) of Act XXVII of 1997 and Section 225 of The Code and awarded different sentences. Charge under Sections 7(c) of Act XXVII of 1997 and 324 of The Code was dropped.

Recording conviction under Section 17 (3) of The Ordinance, sentence of "Hadd" referred to in Para (1) of the judgment was imposed, confirmation of which has been sought.

6. The convict by preferring Criminal Appeal No.215-I of 2003 assailed the legality and validity of judgment recording conviction and awarding sentences.

The convict, whose sentences were suspended by this Court through order dated 12<sup>th</sup> August, 2011 after his release left Pakistan

for abroad and now-a-days is settled in France as is evident from different orders on the file. Being fugitive of law, he lost right of audience and his appeal was dismissed due to his above-mentioned conduct through judgment of even date recorded in the appeal.

7. Reference under Section 17(5) of The Ordinance has to be decided by us.

We have heard learned Law Officer on legal as well as factual premises particularly with reference to our domain to decide the fate of Reference in the absence of convict.

8. The Apex Court examined the issue of disposal of Reference under Section 374 of Act V of 1898 in the absence of convict in “GUL HASSAN AND ANOTHER v. THE STATE (PLD 1969 Supreme Court 89) and “HAYAT BAKHSH AND OTHERS v. THE STATE” (PLD 1981 Supreme Court 265) and it was held that such type of Reference can be decided even in the absence of convict but on merits.

9. We are not un-mindful that present Reference has been sent under Section 17(5) of The Ordinance and not under Section 374 of Act V of 1898.

10. In order to settle the moot point, we may make reference to the provisions of Section 24(2) of The Ordinance, which is reproduced for ready-reference.

“The provisions of the Code of Criminal Procedure, 1898 (Act V of 1898), relating to the confirmation of the sentence of death, shall apply, ‘*mutatis mutandis*’ to confirmation of sentences under this Ordinance”

Section 24(1) of The Ordinance is another enabling provision regarding applicability of the provisions of Act V of 1898 in respect of cases under the said Ordinance though ‘*mutatis mutandis*’.

Section 24(1) is of general in nature while the provision reproduced above (Section 24(2) is specifically applicable to cases for confirmation of sentences awarded under the Ordinance.

Honourable Shariat Appellate Bench of Supreme Court examined question of applicability of provisions of Act V of 1898 to the cases under The Ordinance in the case of “INAYAT ULLAH v. THE STATE” (PLD 2007 SC 237) and it was held at page-242 as follow:

“The provisions of Cr.P.C. are applicable *mutatis mutandis* in respect of cases arising under the provisions of Offences Against Property Ordinance, 1979 in view of Section 24 of The Ordinance. Therefore, Federal Shariat Court can examine question of fact and law and can quash, confirm, modify or enhance sentence”

(underlining is our)

11. Pursuant to above, Reference sent to this Court can be decided in the absence of convict, who after suspension of sentences left Pakistan and has been settled in France.

12. According to Section 16 of The Ordinance, provision of Section 7 shall apply, *mutatis mutandis*, for the proof of "Haraabah".

13. Keeping in view the provision of Section 7 referred to, in order to award sentence of "Hadd", the accused must plead guilty of commission of offence and that too before a court of competent jurisdiction.

If there is no "admission of guilt", then the provision under reference requires fulfillment of following three conditions:

- (i) There must be an inquiry by the trial court as to the credibility of at least two male eye-witnesses;
- (ii) Credibility of the witnesses shall be determined on the basis of their truthfulness and abstinence from major sins, (known as Tazkiya Al-Shuhood); and
- (iii) Statement of the victim or the person authorized by him shall be recorded before recording the statements of eye-witnesses.

14. Dealing with moot point, it was held by this Court in "AMJAD PERVEZ v. THE STATE" (2004 YLR 1592) that 'Tazkiya Al-Shuhood' is a mandatory requirement irrespective of the fact whether objection has been raised or not about the probity and credibility of witnesses. Dealing with the mode and manner, it was concluded that witnesses must be scrutinized through credible

persons (*Muzakkis*) preferably of the same walk of life to which the witnesses belong provided they happen to know or could collect correct information about their behaviour and conduct.

In the case of "GHULAM ALI v. THE STATE" (PLD 1986 SC 741), matter was examined at length and it was held that statement of witness by itself would not be sufficient to give the verdict of truthfulness and requirement of "Tazkiya Al-Shuhood" has to be acted upon.

We may also advantageously make reference to the dictum laid down in "ABDUS SALAM v. THE STATE" (2002 SCMR 338) on the proposition.

15. We may add here that cross-examination is not a substitute of "Tazkiya" and it is the duty of the Qazi (Judge) to determine sagaciousness of witness by holding an inquiry while adopting any mode (openly or secretly), either himself or through an official purgatory.

16. Perusal of the statements of witnesses, i.e., Amanat Ali, ASI, complainant and eye-witness (P.W.7), Shahid Ikram, Constable (P.W.10) (victim of offence) and Jamil Ahmed, Constable, another eye-witness (P.W.11) as well as interim order sheet clearly reveals that no attempt, whatsoever, was made by learned Trial Court to make "Tazkiya Al-Shuhood".



Violation of mandatory requirement by itself is sufficient to quash the conclusion recording conviction and awarding sentence under Section 17(3) of The Ordinance.

17. Another infirmity noticed by us is violation of second proviso of Section 7(b) of The Ordinance, according to which statement of the victim or the person authorized by him shall be recorded before recording deposition of eye-witnesses.

As per prosecution case, Shahid Ikram, Constable (P.W.10) is the victim of "Haraabah" who in his direct statement also deposed that convict snatched rifle from him.

Amanat Ali, ASI (P.W.7) who is complainant as well as eye-witness appeared on 19<sup>th</sup> March, 2003, when his direct statement was recorded, adjourning the case for cross-examination which was concluded on 21<sup>st</sup> March, 2003. However, statement of victim was recorded on 20<sup>th</sup> March, 2003, though was cross-examined on the day when P.W.7 was subject to cross-examination.

Even otherwise, numerical order clearly demonstrates that statement of victim (P.W.10) was recorded after the statement of complainant, eye-witness (P.W.7).

18. Matter does not end here.

In order to attract, provisions of Section 17(3) of The Ordinance, value of the property regarding which offence of

“Haraabah” has been committed should be equal or exceeds the “Nisab”.

19. Mode and manner of determination of price of SMG Rifle in order to cover the case within the ambit of “Nisab” as defined in Section 6 of The Ordinance also suffer from legal infirmity.

For better appreciation, the relevant provision is reproduced.

“Nisab” - “The nisab for theft liable to Hadd is four decimal four five seven (4.457) grams of gold, or other property of equivalent value, at the time of theft”.

Keeping in view the yardstick, examination of evidence of complainant (P.W.7), victim (P.W.10) and another eye-witness (P.W.11) clearly reveals that all the three witnesses did not utter even a single word about the value of rifle, 2 magazines and 36 cartridges statedly snatched by the convict and associates. No other evidence was led in this regard.

The learned Trial Court dealt with this aspect in the middle of para (19) of the judgment in the following manner. “Apparently, the value of SMG rifle, cartridges is about Rs.10,000/ .....”

(Emphasis supplied)

Use of words "Apparently" and "About" clearly reveals that opinion is not based on any evidence. Determination is speculative, based on surmises and conjectures.

The learned Trial Court acted in a very casual manner though should be conscious of the fact that since punishment of "Hadd" is deterrent, therefore, harder proof is required.

It also ignored the yardstick provided in First proviso of Section 17(3) of The Ordinance with reference to "Nisab" when offence has been committed conjointly and by more than one person.

20. Pursuant to above, conviction recorded and sentence awarded, confirmation of which has been sought is not sustainable on legal premises.

21. We have also re-appraised the evidence adduced by prosecution particularly statements of Amanat Ali, ASI, complainant-eye-witness (P.W.7), Shahid Ikram, Constable, victim (P.W.10) and Jamil Ahmad, Constable, another eye-witness (P.W.11) on factual premises in order to determine whether case has been made out by prosecution for recording conviction under Section 20 of The Ordinance (punishment for Haraabah liable to tazir).

22. As per contents of Crime-Report (Ex.PF-1), the convict and his three associates entered in the bogie in which Muhammad Malik (accused) was present being escorted by complainant (P.W.7) and witnesses (P.W.10-P.W.11).

As per accusation, they all were clad in "Chaddars". It is further alleged that convict threw "chilli powder" in the eyes of the police party and his three associates gave butt blows to Shahid Ikram and Jamil Ahmad, Constables (P.W.10-P.W.11). Contents of F.I.R. further reveals that these three assailants not only got Muhammad Malik released from the custody of police contingent headed by complainant but also snatched SMG rifle, cartridges etc.

Examination of F.I.R. further reveals that convict having official rifle was found in the bushes near Sohan Chowk.

23. Arrival of the convict and his companions in the bogie, clad in "chaddars", throwing "chilli powder" in the eyes of complainant (P.W.7) and witnesses (P.W.10-P.W.11), attack upon the heads of witnesses by butts of rifles hardly provides occasion and opportunity to note the features and description of the convict.

Only evidence to connect the convict in the commission of crime is that he was apprehended from bushes near Sohan Chowk having official rifle as referred in the contents of F.I.R.

24. Evidence led by prosecution on this aspect has to be examined.

The complainant (P.W.7) in his direct statement maintained that convict was seen near the bushes at Sohan Chowk, who was

apprehended having official rifle in his possession. In cross-examination, he explained that bushes were in jungle area at the distance of 20-25 yards from Sohan Chowk.

However, according to Shahid Ikram, Constable (P.W.10), convict was seen near Sohan Chowk. In cross-examination though he stated that convict was found in bushes but according to him, the bushes were at the distance of about 3-4 yards from the road.

Jamil Ahmed, Constable (P.W.11) turned the table while introducing entirely a different story about the inter-se distance of bushes from Sohan Chowk by deposing that place of arrest of convict would be about one kilometer from Sohan Chowk.

Admittedly, all the three witnesses introduced different story about the place of arrest of the convict which cannot be reconciled.

We are not un-mindful of the fact that element of assessment is involved while describing the distance but this by itself would not be sufficient to grant premium, particularly keeping in view the deposition of complainant (P.W.7) and Jamil Ahmed, Constable (P.W.11).

We have gone through the site plan (Ex.PG), prepared by Muhammad Zamurd, ASI-I.O. (P.W.4), which does not suggest the location of bushes. We are conscious that site plan is not a substantive piece of evidence unless confronted to its maker which

was not done. However, even if site plan is ruled out from consideration, it would not improve the case of prosecution in view of inconsistency among the witnesses which cannot be reconciled.

25. According to the complainant (P.W.7), associates of convict caused blunt injuries to the witnesses (P.W.10-P.W.11) and also snatched official rifle. Same is the case of prosecution in F.I.R. (Ex.PF-1). However, Shahid Ikram and Jamil Ahmed, Constables (P.W.10-P.W.11) contradicted the stance by deposing that it was convict who snatched the rifle. Role of convict was entirely changed by these two witnesses.

26. Story narrated in the Crime-Report and coming from the mouth of witnesses demonstrating their conduct appears to be unnatural and afterthought.

The witnesses with one voice stated that train halted at Tarki Railway Station, where occurrence took place. According to the witnesses, they were in bogie No.15, where convict and his associates came, caused injuries to two police officials (P.W.10-P.W.11), got released Muhammad Malik and while making firing managed to escape. If the prosecution story rings true, why they did not raise hue and cry in order to attract the passengers and railways employees. It cannot be believed by any stretch of

imagination that there was no other passenger in the bogie in which occurrence took place.

27. It is the case of prosecution which has been explained by the witnesses that just after occurrence, the train moved and when it stopped at Railway Station Sohawa, guard and other staff of the train approached them to whom detail of occurrence was intimated.

We are surprised to note the conduct and behaviour of complainant and other witnesses (P.W.7, 10-11). Even if train started moving, it could have been stopped at least by the complainant by using the "emergency chain" installed in each bogie. We have also noted that it was not a "passenger train" running on branch track. It is a fast train since long which is a public secret having all such type of facilities in order to cater the needs of emergency. Silence as such speaks loudly.

28. Matter can be examined from another angle as well. It is not understandable that convict while separating him from his companion shall select a place for his rescue and that too having official rifle stately snatched, easily accessible to police contingent.

29. Though Shahid Ikram and Jamil Ahmed, Constables (P.W.10-P.W.11) were medically examined by Dr. Muhammad Rashid

Javaid (P.W.1) but his evidence and Medico- Legal Certificates (Ex.PA-PB) cannot advance plea of prosecution in view of glaring infirmities pointed out in the evidence of the witnesses (P.W.7, 10 and 11).

It is further to be noted that both the injured were medically examined on 14<sup>th</sup> December, 2002 as is evident from certificates (Ex.PA-B) but strangely enough time of arrival of both the injured does not find mentioned in the said certificates which keeping in view peculiar circumstances of the case appears to be intentional and deliberate in order to reconcile duration of injuries with the time of occurrence by just adding that probable duration of injuries is 36 hours.

30. We, in the circumstance, are unable to persuade ourselves to believe, rely and act upon the evidence led by prosecution either to endorse conviction under Section 17(3) of The Ordinance or alter conviction under Section 20 of The Ordinance.

31. Viewed from whichever angle, conclusion drawn by learned Trial Court is perverse, arbitrary, speculative and in utter disregard of the mandatory provisions of law dealt with.

32. Consequent upon, conviction recorded and sentence awarded under Section 17(3) of The Ordinance cannot be endorsed on legal as well as factual premises.



33. Reference sent by learned Trial Court is answered in negative, setting aside the conviction and quashing the sentence of amputation of right hand from the wrist and of left foot of convict from the ankle.

34. The convict to the extent stands acquitted under Section 376 of Act V of 1898 read with Section 17 (5) of The Ordinance.

**JUSTICE MEHMOOD MAQBOOL BAJWA**

**JUSTICE DR. FIDA MUHAMMAD KHAN**

**JUSTICE SYED MUHAMMAD FAROOQ SHAH**

**JUSTICE SHAUKAT ALI RAKHSHANI**

Dated, Islamabad the  
09<sup>th</sup> April, 2018  
\*Mubashir\*