

FEDERATION OF PAKISTAN Appellant versus MUHAMMAD SHAM MUHAMMADI, ADVOCATE and 3 others Respondents

• **Citation:** 1994 SCMR 932

• **Result:** Order Accordingly

• **Court:** Supreme Court of Pakistan

• **Date of Decision:** 22.6.1993

• **Judge(s):** Nasim Hasan Shah, Ajmal Mian, Sajjad Ali Shah, Pir Muhammad Karam Shah and Maulana Muhammad Taqi Usmani, JJ

• **Case Number:** Shariat Appeals Nos. 14 to 16 of 1991

• **JUDGMENT**

Accomplice

JUDGMENT

AJMAL MIAN, J.---The above appeals are directed against a common judgment dated 23-5-1991 passed by the Federal Shariat Court in Shariat Petitions Nos. 17/I of 1989, 3/I of 1990 and 2/K of 1991, whereby inter alia the following declarations have been granted in respect of Article 16 of the Qanun-e-Shahadat, 1984 (No. 10 of 1984), hereinafter referred to as the Order:--

"76. Section 16 of the Qanun-e-Shahadat, 1984 is, therefore, declared as repugnant to the Injunctions of Islam. An accomplice is not a competent witness in offences punishable with Qisas as well, besides Hadd. A conviction based on his uncorroborated testimony even in matters of Ta'zir will be illegal

92. To sum up, the provision of Article 16 of the Qanun-e-Shahadat, 1984, is declared as repugnant to the Injunctions of Islam to the extent that an accomplice is not a competent witness in offences punishable with Qisas, and a conviction based on uncorroborated testimony of an accomplice even in the matter of Ta'zir will be illegal."

2. In above Shariat Petition No. 17/1 of 1990, it was averred that an accomplice without granting pardon under section 337 or section 338 of the Code of Criminal Procedure, 1898, hereinafter referred to as the Code, could not be a competent witness keeping in view the principles laid down

in Qur'an and Sunnah. It was, therefore, prayed that Article 16 of the Order be struck down and be amended to bring it in conformity with the Injunctions of Islam. Whereas in above Shariat Petition No. 3/I of 1990, it was prayed that Articles 3 and 16 of the Order and sections 337, 338, 339, 494 and other similar sections of the Code empowering the State and the Courts to pardon the criminals, be struck down as being repugnant against the Injunctions of Holy Qur'an, Ahadees, Ijma' and Fiqh. In Shariat Petition No. 2/K of 1991, Article 16 read with illustration (b) to Article 129 of the Order (except in the case of an offence punishable with Hadd) and sections 337 to 339, Cr. P.C. were challenged.

3. It may be observed that while disposing of the above petitions it was held that Article 3 of the Order was not repugnant to the Injunctions of Islam as laid down in the Holy Qur'an and Sunnah of the Holy Prophet (SA.W.). It was also noticed that sections 337 and 338 of the Code were already amended by Criminal Law (Amendment) Act, 1991, in order to bring them in conformity with the Injunctions of Holy Qur'an and Sunnah. However, the Federation of Pakistan filed the above appeals under Article 203-F(1) of the Constitution of the Islamic Republic of Pakistan, 1973, hereinafter referred to as the Constitution.

4. Hafiz SA. Rehman, learned Advocate Supreme Court appearing for the Federation, has candidly conceded that in case of Hadd or Qisas, the evidence of an accomplice is not admissible in view of the Injunctions of Islam but his submission was that in case of Tazir, the evidence of an accomplice was admissible and was sufficient to record a conviction even without the corroboration on material particulars by an independent corroborative piece of evidence. In support of his above submission, he has relied upon paras. 439 and 441 from the book under the caption "Islami Qanun-e-Faujdari, translation of "kitab Ikhtiar " published by Law Publishing Company, Lahore, and certain observations' from pages 175 and 176 from "Nazaratul Hiqmah" which read as follows:-

5. In order to appreciate the above controversy, it may be pertinent to quote hereinbelow above Article 16 and Article 129 with illustration (b) of the Order, which read as follows:-

"16. Accomplice.---An accomplice shall be a competent witness against an accused person, except in the case of an offence punishable with Hadd; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice."

"129. Court may presume existence of certain facts.--- The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events human conduct and public and private business, in their relation to the facts of the particular case.

Illustrations

The Court may presume-----

(a)..... .

(b) that an accomplice is unworthy of credit, unless he is corroborated in material particulars;"

6. It may also be advantageous to reproduce the corresponding provisions contained in the Evidence Act, 1872, hereinafter referred to as the late Act, namely, section 133 and section 114 with illustration (b), which read as follows:--

"133.An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.

114. The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

Illustrations

The Court may presume--

(a)

(b) that an accomplice is unworthy of credit, unless he is corroborated in material particulars;"

7. A comparison of the above-quoted provisions indicates that the above provisions of the Order have been lifted from the late Act with the modification that while enacting Article 16, the words "except in the case of an offence punishable with Hadd" have been added in section 133 of the late Act. Whereas Article 129 and its illustration (b) are the ditto copies of section 114 and its illustration (b).

8. It may be noticed that Article 16 of the Order lays down that an accomplice shall be a competent witness against an accused person except in the case of an offence punishable with Hadd and a conviction recorded on the basis of the testimony of an accomplice is not illegal merely because it proceeds upon his uncorroborated testimony. Whereas Article 129 provides that the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case. The above Article also gives nine illustrations, namely, mentioned in paras. (a) to (i). The above-quoted illustration (b) to Article 129 provides that an accomplice is

unworthy of credit unless he is corroborated in material particulars.

9. The effect of the above two provisions of the Order seems to be that though by virtue of illustration (b) of Article 129 of the Order, the Court may presume that the testimony of an accomplice is unworthy of credit unless it is corroborated in material particulars but the Court may convict an accused person on the basis of the sole testimony of an accomplice in view of the language employed in above Article 16 of the Order except in case of an offence punishable with Hadd. We may observe that in practice the Courts, as a rule of prudence, while construing section 133 of the late Act had been insisting upon to have the testimony of an accomplice or approver corroborated in material particulars keeping in view illustration (b) of section 114 thereof. In this regard, it may be pertinent to refer to the following cases:--

(i) Abdul Qadir v. The State (PLD 1956 SC (Pak.) 407);

(ii) Muhammad Ayub Khuhro v. Pakistan through the Ministry of Interior, Government of Pakistan and 2 others (PLD 1960 SC 237);

(iii) Dr. Muhammad Bashir v. The State (PLD 1971 SC 447).

The above first case relates to the question of evidentiary value of the testimony of an approver whose position is akin to that of an accomplice. While dealing with the above question, it has been held by this Court that merely the fact that the approver was -an educated and was apparently respectable person, would not vary the standard of the nature and quantity of the confirmative evidence which prudence generally requires in such cases keeping in view that though the approver was an Honorary Colonel in the Army but looking at the story of the crime narrated by him, he was no better than a hired assassin.

In the above second case, Muhammad Munir, CJ. made the following observations as to the requirement of corroboration in case of the testimony of an accomplice:--

"An officer of the Special Judge's experience could not be unaware that law requires corroboration of an accomplice by 'independent evidence', and that an accomplice's own previous statements or the confession of a co-accused is not corroboration by independent evidence. There was, however, not one word in the judgment on this vital point for the consideration of the confirming authority."

Whereas in the above third case, Sajjad Ahmed, J., while dilating upon the question of corroboration in case of the evidence of an approver, made inter alia following observation:--

"As a rule of prudence, which has almost hardened into a rule of law, it is dangerous to act on the uncorroborated testimony of an approver, who is a self-confessed criminal, having betrayed his former associates under the temptation of saving his own skin. Suffering from this evidence cannot be viewed without natural reaction of distrust and incredulity. His evidence must first be tested on its basic probabilities like the evidence of any other witness, and more strictly so in his case, because it is the statement of a person of suspicious credentials. His evidence needs corroboration for the simple reason that it cannot be accepted without mental reservation and distrust, and it must, therefore, gather support from other sources to induce faith in its veracity. The corroboration, which is, thus, needed, must confirm in material particulars not only that the crime has been committed, as alleged by the approver, but also that the accused concerned has, or have, committed it. The type of corroboration, although not required to be adequate and sufficient by itself to prove the charge, must tend to show a strong link between the crime and its perpetrators, as alleged by the approver:"

10. The above judgments are in line with the stream of judgments of the Superior Courts of Indo-Pak. The rule of prudence that the testimony of an

approver or accomplice is to be corroborated in material particulars by independent evidence has almost hardened into a rule of law with the passage of time and because of the invariable insistence of the Superior Courts to have corroboration. Though in theory section 133 of the late Act provided that the conviction of an accused person on the basis of uncorroborated evidence of an accomplice was not illegal, but in practice this was not acted upon. There may be a few cases in which the above provision of the late Act might have been pressed into service but overwhelming judicial consensus has been that conviction on the basis of the sole testimony of an approver or accomplice is not safe.

11. The Federal Shariat Court in the judgment under appeal has referred to a number of verses from the Holy Qur'an and Traditions of the Holy Prophet (SA.W.) and some books of the eminent Islamic jurists to conclude that in case of offences entailing punishment of Hadd or Qisas, the evidence of an accomplice is not admissible at all but in case of offence punishable with Ta'zir, his testimony can be relied upon provided it is corroborated by independent piece of evidence. Reliance has also been placed on the case of Federation of Pakistan through Secretary, Ministry of Law and another v. Gul Hasan Khan (PLD 1989 SC 633) and the case of Muhammad Alam v. The State (1983 SCMR 1127). It will suffice to refer the following verse from the Holy Qur'an:----

(O' ye who believe! if a wicked person comes to you with any news ascertain the truth).

12. An accomplice who takes part in the commission of the offence for which his co-accused is charged with falls within the category of a wicked person in terms of the above verse of the Holy Qur'an and, therefore, before acting upon his testimony, the truthfulness of it is to be verified by corroborative pieces of evidence on material particulars.

13. We may observe that one of us (Maulana Muhammad Taqi Usmani, J.) while rendering the judgment in the case of Gul Hasan Khan (supra), has touched upon Article 16 of the Order as under:-----

14. It may also be instructive to refer to the following portion from the note of Shafiur Rahman, J. appended to the above judgment of Maulana Muhammad Taqi Usmani, J. in the case of Gul Hasan Khan (supra):-----

"(1) Section 133 of the Evidence Act and sections 337 to 339 of the Code of Criminal Procedure prescribe the conditions and the offences for which an offender can be made an approver and the extent and the manner in which his testimony may be utilized at the trial. The situations, the conditions, the offences and the requirements justifying reception of approver's testimony are all exceptional, bordering on necessity and demands of public policy. The various provisions of the Evidence Act with which its section 133 is to be read establish that whilst it is not illegal to act upon the uncorroborated evidence of an accomplice, it is a rule of prudence so universally followed as to amount almost to a rule of law that it is unsafe to act upon an evidence of an accomplice unless it,, is corroborated in material respects so as to implicate the accused. The evidence of approver where alongwith other evidence is found to be satisfactory, it should be sufficient to convict and sentence an offender under Ta'zir, for which according to my learned brother, ample scope exists even where Injunctions of Islam provide for the punishment."

. 15. Reference may also be made to the following observations of one of us (Maulana Muhammad Taqi Usmani, J.) in the case of Muhammad Aslam v. The State (supra):--

16. We may observe that a distinction is to be drawn between an offence punishable with Hadd or Qisas and an offence which entails Ta'zir. In the former case, the State cannot deviate as to the type or nature of evidence which is required for recording a conviction in terms of the Holy Qur'an and Sunnah but in the latter case, a State provides the punishment and, therefore; the State can, also lay down the type and nature of evidence for warranting conviction. So in the case of offences entailing punishment of Hadd and Qisas, even the State cannot provide that the testimony of an accomplice or an approver will be admissible. However, in case of an

offence punishable with Ta'zir, the State may provide that the testimony of an accomplice or an approver is admissible in evidence and can furnish basis for conviction subject to corroboration or otherwise as the facts of the case warrant.

The above-quoted extracts from the books relied upon by Hafiz SA. Rehman do not seem to be in conflict with the above view, which we are inclined to take. There may be a case, in which keeping in view the facts and circumstances, it may not be possible to have corroborative piece of evidence., In such a case, if the offence is punishable with Ta'zir, the State may provide that the testimony of an accomplice will be sufficient provided the Court after appraisal of evidence is satisfied that under the circumstances of the case there could not have been any corroborative piece of evidence and it is also satisfied that the case stands proved.

17. We may also observe that Article 16 and illustration (b) of Article 129 of the Order are apparently in conflict. In such a case the Court is required to place such construction, which may harmonize the above two provisions. Though by virtue of the above Article 16 it is permissible that the Court may, convict an accused person on the basis of . uncorroborated evidence of an accomplice, but the Court as a rule of prudence and because of above illustration (b) to Article 129 of the Order insists upon for having the testimony of an accomplice corroborated in material particulars, and, thereby harmonize the above two provisions.

18. The upshot of the above discussion is that we are inclined to hold that the evidence of an accomplice is not admissible at all in case of an offence punishable with Hadd and Qisas. However, in case of an offence, which entails punishment of Ta'zir, his testimony is admissible and furnish the basis for conviction provided it is corroborated in material particulars. However, in exceptional cases for the reasons to be recorded by the Court, his testimony may be acted upon as sufficient for warranting recording of conviction.

We would, therefore, dispose of the above appeals in the above terms.

Article 16 of the Order may be amended accordingly by 31-8-1993, failing which the said provision will become void and shall be of no effect to the extent stated above.

(Sd.) Dr. Nasim Hasim Hasan Shah, J.

(Sd.) Ajmal Mian, J.

(Sd.) Sajjad Ali Shah, J.

(Sd.) Pir Muhammad Karam Shah, J.

MAUIJ.NA MUHAMMAD TAQI USMANI, J: --I have had the privilege to go through the elaborate judgment prepared by my learned brother Mr. Justice Ajmal Mian in this case. I agree with him in the following two points:--

(1) That the evidence of an accomplice is not admissible at all in case of an offence punishable with Hadd or with Qisas.

(2) That in the case of an offence punishable with Ta'zir his testimony is admissible and may furnish the basis for conviction, provided it is corroborated in material particulars.

However, I have reservations with regard to the concession given by K him in some exceptional cases in the following words:--

"However, in exceptional cases for the reasons to be recorded by the Court, his testimony may be acted upon as sufficient for warranting recording of conviction:'

I am of the view that even in the cases of Ta'zir the conviction cannot be

based on the solitary testimony of an accomplice until it is corroborated by some other piece of evidence which may include the circumstantial evidence also.

The most relevant Verse of the Holy Qur'an in this issue is the following Verse of Surah Al-Hujurat (Surah No.106, Verse No.6) which says:----

“O those who believe if a sinful person comes to you with a news, verify its truth, lest you should harm people unknowingly and then become repenting on what you have done.

This Verse of the Holy Qur'an is almost clear in that the news of a sinful person is not sufficient for establishing the truth, unless it is verified and ascertained by some external source which, of course, should be from outside the news itself. The word " (verify its truth) used in the Holy Qur'an is sufficient to establish that the solitary evidence of a sinful person is not enough to take an action against any one. A person who has received such a news has been directed by the Holy Qur'an to verify its truth from other source. If the news finds some corroboration, it can be acted upon, but if it does not, it will not be safe, according to the Qur'anic direction, to take a harmful action against any one on its basis.

In view of this Qur'anic direction the Muslim jurists have also held that although the standard of evidence required for the proof of an offence punishable with Ta'zir is not as strict as is required in the cases of Hadd or Qisas, yet, in cases of Ta'zir, a solitary evidence of an admittedly sinful person is not enough for conviction. They have held that in order to prove an offence liable to Ta'zir, either of the two requirements must be fulfilled.

(a) the number of witnesses is two;

(b) the solitary witness is `Adl' (a person against whom no sin or offence is

established).

See: Ibn `Abidin: Radd-al-Muhtar p. (sic).

It is obvious that an accomplice who has admitted to commit an offence cannot be termed as `Adl'. Therefore, his solitary statement against his co-accused cannot furnish a reliable basis for conviction in any case, both according to the Holy Qur'an and to the view of the Muslim jurists based upon it.

I am, therefore, of the considered view that the judgment of the Federal Shariat Court in this case is well-founded and needs no interference by this Court. I would, therefore, dismiss this appeal.

ORDER OF THE COURT

The above appeals stand disposed of in terms of the majority judgment.

(Sd.) Nasim Hasan Shah, J.

(Sd.) Ajmal Mian, J.

(Sd.) Sajjad Ali Shah, J.

(Sd.) Pir Muhammad Karam Shah, J.

(Sd.) Maulana Muhammad Taqi Usmani, J.