IN THE FEDERAL SHARIAT COURT

(APPELLATE JURISDICTION)

PRESENT:

Mr. Justice (Rtd) Salahuddin Ahmed	Chairman
Mr. Justice Agha ali Hyder	Member
Mr. Justice Aftab Hussain	Member
Mr. Justice Zakaullah Lodi	Member
Mr. Justice Karimullah Durrani	Member

CRIMINAL APPEAL NO.K-19 OF 1980

Lal Bux ..... Appellant

Versus

The State ..... Respondent

For the Appellant: Mr. Abdul Latif Qureshi
Advocate

For the Respondent Mr. S. Murtuza Hussain
Advocate

Date of hearing: 23rd December, 1980

(12)

AFTAB HUSSAIN, MEMBER

This is a convict's appeal against the order of the Sessions Judge, Dadu, dated 1-11-1980. The learned Sessions Judge convicted the appellant under section 9(I) of the Offences against Property (Enforcement of Hudood) Ordinance, 1979 and sentenced him to amputation of the right hand.

The Sentence also requires confirmation by virtue of S.9(4) of the Ordinance.

The prosecution case briefly is that Dadan, complainant PW-I, had tethered his camel in front of his house on the night between 29th and 30th of May, 1979. After taking his meals he along with other inmates of the house slept near the camel in order to keep watch over it. At about 3.00 A.M. he was awakened by the barking of dogs and saw that his camel was being taken away by some thief. He raised an alarm and chased the thief who was later identified as the appellant. He had hardly gone 10 or 15 paces when the appellant whipped out a pistol, but before he could fire a shot the complainant grappled with him and threw him down. In the meanwhile Sadore PW-2, Mooso PW-4 and other villagers who had heard the alarm reached there and assisted the complainant PW-I in catching hold of the appellant who was armed with a pistol and a hatchet. The appellant was identified by torch light and was taken along with the camel, pistol and hatchet to the Police Post where the first information report exhibit 7 was recorded. Ubaidullah, ASI, PW-5 took into possession the hatchet, pistol with a missed cartridge and the camel, vide the Mashirnama exhibit 10, in the presence of Ghulam Asghar, PW-3 and Buxial. He prepared another Mashirnama, exhibit 13, regarding his inspection of the spot where he found indistinct marks of the struggle and marks of pad of the Camel. This spot was according to PW-5, at a distance of 15 or 16 paces from the house of the complainant. The appellant was sent up for trial under section 382

382 PPC read with section 9(I) of the Offences against Property (Enforcement of Hudood) Ordinance, 1979.

The prosecution version is proved by the evidence of Dadan PW-I, Sadoro PW-2 and Mooso PW-4. The recovery is further proved by Ghulam Asghar mashir PW-3 and Ubaidullah, ASI, PW-5. For Tazkiya-al Shahood the learned Sessions Judge visited the village of the witnesses on the 23rd of February, 1980 and enquired in the presence of the accused and in the gathering of the residents of the village whether any of the witnesses had ever committed a major sin (gunahi kabeera). None of the persons present had any knowledge of the commission of such a sin by any of the PWS 1, 2, and 4.

The appellant denied the charge, In his statement under section 342 Cr.PC, he stated that P.Ws had deposed against him because they were inter related. He explained that his lands are situated adjacent to the lands of the complainant party who had ousted him from it by force. He further stated that he and the complainant party had a dispute over their common pasture and prior to the incident the latter had ousted him from the said pasture by force. He also said that the Police had arrested him from his village.

The evidence of PWS 1, 2, and 4 is flawless and consistent. There is no reason why either of the witnesses should be disbelieved. The learned Sessions Judge has also found on Tazkiya-al-Sahood that the witnesses had never, to the knowledge of any one in the village, committed any major sin. Though the case of the appellant in his statement is that he has been ousted by the complainant party from his land as well as his pasture but no suggestion was made in the cross examination of either of the witnesses about the plea of ouster from the land. The plea of the ouster from the pasture was also not put to the witnesses. A suggestion was made to Dadan, PW-I, whether the pasture in which the appellant and his cattle grazed was common but he denied it and said that his pasture was different from the pasture used by the appellant for grazing his cattle. He also denied the suggestion

that on account of enmity over grazing in the pasture they had quarrelled with each other and this was the reason for his being falsely involved in this case. A mere suggestion of quarrel between the complainant and the appellant was put to Sadoro PW-2 who denied it. The suggestion to Mooso PW-4 was absolutely different. It was to the effect that the appellant had been implicated on account of cattle tresspass. The witness denied it. No evidence was led in support of the plea of the enmity made to the witnesses and the difference between these suggestions and the statement made by the appellant under section 342 Cr.P.C. are sufficient indication of the fact that the plea of enmity was incorrect and was an after thought. The case of theft of camel is, therefore, fully established.

The moot question however, is whether the appellant has rightly been sentenced under section 9(1) of the Offences against Property (Enforcement of Hudood), Ordinance, 1979. The only argument of the learned Counsel was that since the only person who had seen the commission of the theft was the complainant and no one else was a witness of commission of the offence, hadd could not be enforced on the appellant, he could at most be subjected to a sentence as tazir. During the arguments, however, another point was raised whether the offence of theft was at all committed within a hirz and could attract hadd punishment.

> "Theft liable to hadd" is defined in section 5 which reads-
>
> Whoever, being an adult, surreptitiously commits, from any 'hirz', theft of property of the value of the 'nisab' or more not being stolen property, knowing that it is or is likely to be of the value of the 'nisab' or more is, subject to the provisions of this Ordinance, said to commit theft liable to 'hadd'".

The necessary conditions for such a theft are:-

i) the accused should be an adult.
ii) he should have surreptitiously committed theft of property.

iii) the property stolen should be of the value of 'nisab'; and

iv) the theft should have been committed from the hirz.

Section 6 describes the nisab for theft liable to hadd as 4,457 grams of gold or other property of equivalent value at the time of theft. Hirz is defined in section 2(d) of the Ordinance as follows:-

> "Hirz' means an arrangement made for the custody of property".

Section 7 deals with the manner of proof of such theft. It provides that theft liable to hadd can be enforced against the accused person if he either pleads guilty of the commission of such theft or when the accused is a muslim at least two muslim adult male witnesses, other than the victim of the theft about whom the Court is satisfied having regard to the requirement of tazkiyah-al-Shuhood that they are truthful persons and abstain from major sins, give evidence as eye witnesses of the occurence.

It is proved by the undisputed statement of Mooso PW-4 that the value of the camel was Rs. 3,000/- or 4,000/-. The question is whether this value is equal or in excess of the nisab as on the date of theft. It is regretted that no evidence has been produced to prove this point although the prosecution should have led same evidence, documentary or oral, to prove the rate of 4,457 grams of gold as prevailing on the 30th of May, 1979. This may not be material in the present case since judicial notice can be taken of the generally known fact that the price of gold per tola has not reached Rs. 3,000/- and a tola being equal to 11.664 grams only, 4,457 grams make only a fraction of a tola. However, it is the duty of the prosecution to prove in each case the value of Nisab.

The next question is whether the theft was committed from a hirz. There could be no difficulty in arriving at a positive and affirmative conclusion if the theft had been committed from some enclosed area, locked or unlocked with no doors or with closed or un-closed doors. In the present case however the evidence

(21)

is that the camel was tethered in the open outside the door of the house but apparently for keeping watch over it, the complainant and the members of his family were sleeping near it. It was for this reason that he woke up immediately on hearing the barking of the dogs and seized the appellant while he was carrying the camel with him. The question is whether the camel was in the complainants' hirz.

Hirz as seen above is defined as an arrangement for the custody of the property. What custody can turn into Hirz is explained in explanation to this definition. It is to the effect that property placed in a house, whether its door is closed or not or in an almirah or other container or in the custody of a person, whether he is paid for such a custody or not is said to be in 'hirz'. Thus hirz does not mean only an enclosed area. It may include even an unenclosed open place provided the movable property placed there remains in the custody of either the owner or some other person.

It is well known that the object of the enforcement of the above Ordinance was to enforce the Shariah law of theft which is punishable with amputation of the right hand. Hirz is a word derived from Fiqh and the condition of property having been stolen from a hirz was imposed in view of the interpretation of relevant traditions by renowned muslim jurists. In the circumstances it would not only be apt and fair but necessarily expedient to interpret the fiqh terminology with reference to precedents in fiqh. This principle of interpretation would also be justified on the principle of justice, equity and good conscience.

The dictionary meaning of Hirz is 'caution' cautionsness, 'protection' 'guard' means of protection, stronghold', castle, fortification, garrisoned town. It is defined in Tafsir-e-Shabe by Abul fateh Al-Jarjani P. 673.

و آنکه (دزدی) گرفتن مال از جائی باشد که مالک قصد حفظ و ضبط او کرده باشد در او بحسب عرف

"The taking of property should be from a place where the owner might have intended to protect or guard it according to usage"

22

In Ba Dasturate-i-Islam Ashna Shawem by Ali Ghafoori P. 404 it is said,

"(In commission of theft) a person is said to exceed Hirz if with intention to commit theft he goes beyound the set limits".

It is explained at P. 405 that it is not necessary that there should be a walled enclosure or locked area of these limits. The limits may be the limits of grazing of goats in the fields.

In fiqh there are two kinds of Hirz(I) Hirz bil makan and (2) Hirz bil Hafiz. The first is the enclosed area where none may enter without permission of the owner. The other Hirz may be unenclosed or may be a place in which permission for entry may not be required, just as mosques, common roads and open places outside the city. Where property is stolen from such unprotected places the hand of the thief cannot be cut except in cases in which the watch man is near the property whether sleeping or awake or whether the property be under him or near him, Tilka Hudood ullah by Ibrahim Ahmad Alwaqfi P. 237, 238 and 239. This is borne out by the tradition of Sufwan son of Omayya. The facts of that case are that Safwan was sleeping in a Mosque with his mantle under his head. The thief removed the mantle from under his head. He was immediately captured by Safwan who took him to the Holy Prophet. The Holy Prophet directed the hands of the thief to be cut. Safwan who appeared to have been struck with compassion said that he rather gifted the mantle to the thief. The Holy Prophet said this could have been done before he was brought to him. The sentence was therefore executed.

This is an instance of a case in which there was no Hirz except the immediate custody of the property in the owner, it was stolen from a building which could be visited by all Muslims including the thief. From this tradition has been deduced. Thus if theft is committed from Hirz Nigehban

(23)

(watch man's custdy) in open space, for example ground or field, it would be punishable with amputation of hands. Theft of cattle from the grazing ground which can be used by all is not so punishable but if the theft of the cattle be from the immediate custody of the Watchman even though in the grazing ground it would amount to theft punishable with Hadd. If several camels travel in a row and the person who drives them is in the front row and some camel who is behind him, is removed alongwith the goods tied on its back it would not amount to removal from Hirz, since the object of such a person is to transport goods from one place to another. But if there be a person in the back row who travels as a watchman the hands of the thief will be cut. All these precedents can be found in Ein-ul-Hedaya Vol.II Kitab Sirka (کتاب السرقہ) from pages 498 onwards. There can be no doubt in the present case that the Camel was stolen from the Hirz Negahban of the complainant, who was sleeping near the Camel.

Now the evidence in the case is that the removal of the Camel from the place where it was tethered was not seen by any of the witnesses. The complainant also woke up to find the camel missing though he saw it being driven by the thief at some distance from the Hirz. He raised alarm and chased the thief. He caught him and grappled with him. It was at that stage that the two witnesses arrived and captured him. The appellant did not claim the ownership of the camel nor did he explain either at the time of his capture or before the court.his presence alongwith the complainant's camel only a few paces from the place where the camel was tied. His explanation given during trial that he was taken in custody from his village has been disbelieved. The question is whether this evidence is sufficient under S.7 of the Ordinance to bring home to the appellant an offence liable to Hadd.

Section 7 requires that at least two witnesses other than the victim of the theft should give evidence as eye witnesses of the occurence. The question would be whether the eye witnesses should be witnesses of the entry of the thief in the Hirz and removal of the stolen property therefrom.

(24)

The learned Counsel for the appellant argued in affirmation of the above proposition and placed reliance upon Section 8 which provides that where theft liable to hadd is committed by more than one person and the aggregate value of the stolen property is such that, if the property is divided equally amongst such of them as have entered the hirz, each one of them gets a share which amounts to, or exceeds the nisab, the hadd shall be imposed on all of them who have entered the hirz, whether or not each one of them has moved the stolen property or any part thereof.

This Section deals with an altogether different question and not about the evidence necessary to prove hadd.Reliance upon it is of no avail.

According to Shariah also the evidence of two witnesses is necessary to prove the offence, The evidence must be of a person who has seen what is visible and heard what is audible (Einul Hadaya Vol.3 page 339). At page 348 of the book it is said that the witness if of sale must have seen the sale or heard the admission (of the parties about the transaction of sale), and if of murder should have witnessed the murder. On this basis it can be said that the witnesses of theft must be the witnesses of actual occurrence of theft which would no doubt mean the entry or the presence of the thief in a Hirz and removal by him of the stolen property thereof.

According to one view even circumstantial evidence can prove theft. The biggest exponent of this view was Hafiz Ibn Qayyam. The authority for this view is the tradition by Hazrat Umar about the punishment of adultery in which it is said that stoning to death is obligatory in case of adultery by a married person whether male or female, if the same is proved by evidence, confession or by pregnancy. The Malikees and Imam Ahmed held pregnancy to be sufficient evidence of adultery. They said that pregnancy is as good evidence (to make one liable (to punishment for adultery) as is evidence of recovery of stolen property from a person accused of theft to make him liable to amputation of hands. (Elam-ul-Mawaqqeen by Ibn Qayyam (Arabic Text) Vol.3 page 20, Tilka Hudood-ullah by Ibrahim Ahmed alwaqfi page 45)

The Hanafees do not deny the weight of circumstantial evidence but they consider it good for tazir. This is evident from the opinion of Abu Bakr Aamash who opined that where the thief denies the theft but the stolen property has been recovered from him he can be punished with Tazir Sentence. Durre Mukhtar (urdu translation) Vol. 2, P. 449, Raddul Mukhtar (Arabic) Vol.3, P. 214. But Imam Abu Hanifa insisted upon the time element also that delay in the complaint or in production of witnesses by the complainant may be fatal to his case.From the opinion of Abu Baker Amash and the dictum of Imam Abu Hanifa about delay being fatal to the cause, can be evolved the principle that a thief can be punished in Tazir on mere evidence of recovery of stolen goods from him, if the recovery is not delayed. This justifies in sharia the principle laid down in the Evidence Act in S. 114 Illustration (a) that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen unless he can account for his possession.

Section 7 of the Ordinance appears, to have been drafted according to the Hanafee view. It provides for the evidence of atleast two Muslim male adult eye witnesses of the occurance other than the victim of the theft. The witnesses are required to be eye witnesses of theft which would include all steps taken by the thief to perfect the offence i.e. the surreptitious entry of the thief in the hirz and removal of the stolen property therefrom. Evidence falling short of this cannot make the thief liable to Hadd. He can only be punished by way of Tazir.

In the present case such evidence is not forthcoming. Consequently Hadd cannot be imposed on the appellant. The sentence of amputation of hand is not confirmed. He can however be convicted of a tazir offence under SS 13 & 14 of the Ordinance.

From the evidence it appears that the appellant was armed with a hatchet as well as a pistol. From this it appears that he had made preparation for causing death or hurt, or restraint or

(26)

fear of death, or of hurt, or of restraint, in order to the committing of theft or in order to the effecting of his escape after the committing of theft or in order to retaining of property taken by such theft. He is liable to be punished in tazir under section 382 PPC.

His conviction under section 7 of the Hudood Ordinance is set aside. He is convicted under section 382 PPC and sentenced to 7 years rigorous imprisonment and Rs.1,000/- as fine. In case of default in payment of fine he shall undergo rigorous imprisonment for a further period of 6 months.

Member-II

Member-III

Member-IV

Order of the Court.

The order of the learned Sessions Judge imposing hadd of amputation of the right hand, on the appellant is not confirmed. His conviction under section 7 of the Hudood Ordinance is set aside. He is convicted under section 382 PPC and sentenced to 7 years rigorous imprisonment and Rs.1,000/- as fine. In case of default in payment of fine he shall undergo rigorous imprisonment for a further period of 6 months. With the above modification the appeal stands dismissed.

Chairman

Member-I

Member-II

Member-III

Member-IV

Announced. The Counsel for the parties may be informed.

Chairman

Islamabad
February 14,1981.

Approved for reporting.

(22)

SALAHUDDIN AHMED, CHAIRMAN: I agree with the order passed by my learned brother, Aftab Hussain, J. I should, however, like to observe that one of the essential ingredients of Section 5 of the Offences against property (Enforcement of Hudood), Ordinance, 1979 is "surreptitiously commits, from any 'hirz', theft of property....." In other words the commission of theft must be from a 'hirz'. In the present case although there is the evidence of the complainant that before he went to sleep he had tethered his Camel near him in front of his house, there is no evidence to show that any body had actually seen the appellant entering the 'hirz' or in the 'hirz'. The possibility cannot be excluded that somehow the Camel might have got loose, and strayed outside the house and outside the 'hirz', and it was then caught hold of and was being removed when the appellant was apprehended. If that he so commission of theft from the complainant's 'hirz' or custody has not been proved. The complainant alone saw the Camel having been driven by the appellant at some distance from the 'hirz' of the complainant, and the complainant caught hold of and grappled with the appellant. At this stage the other two witnesses arrived and helped in capturing the appellant. These two witnesses are not, therefore, the witnesses of occurrence, namely, the entry of the appellant in the 'hirz', and removal of the Camel from there. Thus there is no evidence of theft liable to Hadd in the present case.

Section 8 supports the view that entering the 'hirz' is one of the essentials of the Offence of theft liable to Tazir. The Section has already

Contd.....2

(22)

been quoted by Aftab Hussain J., and I need not reproduce it again.

Islamabad.
February 14,1981.

Chairman