

IN THE FEDERAL SHARIAT COURT OF PAKISTAN

(Appellate/Revisional Jurisdiction)

Crl. Appeal No.05/I of 2019

1. Muhammad Saleem son of Muhammad Siddique, Caste Tanoli Bagal, resident of Kangar Payeen, Tehsil & District Mansehra,
2. Asif Shahzad son of Taj Muhammad, Caste Tanoli Resident of Ganda, Tehsil & District Mansehra.

.....Appellants

Versus

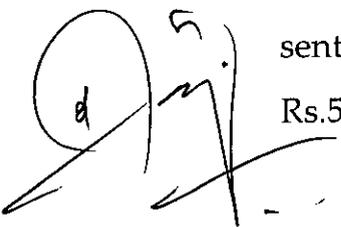
1. The State
2. Shujah ul Mulk Gujar son of Abdul Rehman Gujar (Manager UBL Lorry Adda Mansehra.)

...Respondents

Counsel for Appellants	---	Mr. Wajih-ur-Rehman Khan, Advocate
Counsel for Complainant	---	Mr. Ali Asghar Pasha Khan, Advocate
Counsel for the State	---	Malik Akhtar Hussain Awan, Assistant Advocate General, Khyber Pakhtunkhwa.
Case FIR No, date & Police Station.	---	163 dated 17.02.2011 P.S City, Mansehra.
Date of impugned Judgment.	---	24.01.2019.
Date of institution	---	19.02.2019.
Date of hearing	---	16.05.2019.
Date of decision	---	16.05.2019.

JUDGMENT.

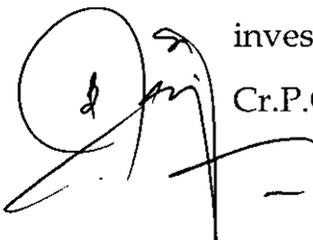
SYED MUHAMMAD FAROOQ SHAH, J:- Through captioned appeal, the appellants abovenamed have prayed to set-aside the conviction and sentences recorded by the learned Additional Sessions Judge-II, Mansehra, vide impugned judgment dated 24.01.2019, whereby they have been convicted under sections 395/397 PPC and sentenced to undergo R.I for 07 (seven) years each, in addition to pay fine, amounting to Rs. 100,000/- (Rupees one hundred thousand) each; in default of payment of fine to undergo S.I for 6 (six) months more. The appellants were also convicted under section 412 PPC and sentenced to undergo R.I for five (05) years each and to pay fine of Rs.50,000/- (Rupees five thousand) each; in default of payment of



fine they shall further undergo S.I for six (06) months. Benefit as provided under section 382-B Cr.P.C was extended to them.

2. Succinct story of the prosecution case as gleaned from record is that on 17.02.2011 at 11:01 A.M suddenly five culprits duly armed with firearm weapons entered one over the other in the UBL Sabzi Mandi Branch, KKH, Mansehra; detained them in washroom of the bank alongwith two account holders namely Shakeel Ahmed Khan and Jamil Akhtar. Naveed, a bank employee made call through cell phone to one Abid Shah of Green Autos, who opened the door of washroom. On checking, cash amounting to Rs.35,25,000/- (Rupees thirty five lac twenty five thousand) from bank counter and Rs. 97,000/- (Rupees ninety seven thousand) from account holder Jamil Akhtar was found looted. The culprits had also taken away mobile phone from Jamil, Israr and Tariq and a repeater (Gun) from bank guard namely Gulzar. Written report (Exh.PA) made by the complainant/bank manager Sardar Shujah-ul-Mulk on the same date at 13:00 hours was incorporated in FIR No.163 (Exh.-PA/1), registered at police station City, Mansehra.

3. A perusal of record transpires that police inspector Abdul Maroof Khan took up the investigation, proceeded to the place of occurrence and prepared site plan. On 27.02.2011, the appellants were arrested and on their pointation some portions of looted and snatched property was secured. On 07.03.2011, joint identification parade of three (03) apprehended accused was held inside Mansehra jail premises under the supervision of PW-10 Mazhar Hussain, learned civil judge and JM Mansehra. Subsequently, on 15.03.2011 i.e. after one week, in supplementary statement recorded under section 161 Cr.P.C, the complainant PW Sardar Shujah-ul-Mulk nominated all five (05) accused by disclosing their names, parentage and addresses. On completion of usual investigation, final report submitted by the police under section 173 Cr.P.C had been accepted and charge against all five (05) accused

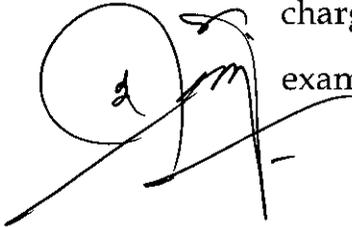


was initially framed on 21.11.2011 for an offence punishable under section 17 (3) of The Offences Against Property (Enforcement of Hudood) Ordinance, 1979, read with section 411/34 PPC. Subsequently, on 31.03.2012 second/altered charge was framed by the learned trial Court for an offence punishable under section 17 (3) of The Offences Against Property (Enforcement of Hudood) Ordinance, 1979, read with section 411/34 PPC. PW customer Jamil Akhtar from whom an amount of Rs. 97,000/- was allegedly snatched had been given up by the learned prosecutor being unnecessary witness. However, prosecution to substantiate its case examined as many as fifteen (15) witnesses and on conclusion of persecution evidence, statement under section 342 Cr.P.C of accused persons were recorded, wherein they professed their innocence.

4. Arguments heard. Record perused.

5. It will be appropriate to take up each piece of evidence produced by the prosecution and to analyze the same. The prosecution has relied upon inter-alia ocular account consisting on testimonies of four (04) witness, PW-7 Sardar Shujah-ul-Mulk Gujjar, manager of the bank, PW-6 Naveed Ahmed, PW-8 Muhammad Adil and PW-11 Syed Asad Ali Shah. Circumstantial evidence of the prosecution is consisting on joint identification parade of three accused including both appellants and joint recoveries on their pointation.

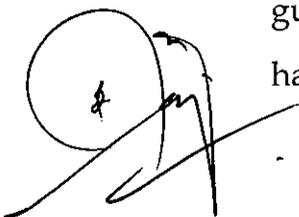
6. Insofar as, ocular testimony of all four bank employees including bank manager/complainant Sardar Shujah-ul-Mulk Gujjar is concerned, he had categorically stated that on 07.03.2011 joint identification of accused Aftab Shah, Asif Shah and Muhammad Saleem was held and thereafter, on 15.03.2011 his supplementary statement under section 161 Cr.P.C was recorded in which he charged the accused for the commission of offence. In cross-examination, he had stated as under:-



"I did not produce the attendance register to the police to verify our presence in the bank at the relevant time. It is correct that I have not mentioned the description/features of the accused in my application (Exh.PA). It is correctly recorded by the police in my supplementary statement that all the persons were having muffled faces. I charged the accused by name in my supplementary statement under section 161 Cr.P.C, which were told to me by the police. I did not push the emergency alarm when the accused entered in the bank. I did not call any body from my cell phone when we were locked in the washroom. I did not show the chowkidar in the site plan. I did not mention the whole amount present in the bank on that very day in my application (Exh.PA). The amount was available in a carton placed on the counter for routine business. It is correct that only cash contained in the carton were taken away. The identification parade was conducted after 22 days of the occurrence. I do not know when the accused were arrested. It is correct that I could not identify the accused Muhammad Saleem. I do not show the role of accused at the time of identification parade when I picked up accused Aftab shah."

7. Eye witness PW-6 Gulzar son of Noor Zaman, security guard in the bank, stated that culprits took away his rifle and cash amount; further stated in cross-examination that his statement was not recorded by the police under section 161 Cr.P.C and that he was present inside the bank when five (05) muffled faces persons entered in the bank but he had not given the descriptions and features of any person to the police nor the same was written in his signed statement; stated that he had left the repeater gun on the table inside the bank and admitted that *"it is correct that I have done negligence in performing my duty"*

8. Another eye witness PW-6 Naveed Ahmed, messenger in the said bank stated that on 17.02.2011 five (05) persons muffled faces came in the bank, hands up all the employees of the bank on gunpoint and confined them in bathroom. In cross-examination, he had admitted that at the time of occurrence the gunner was



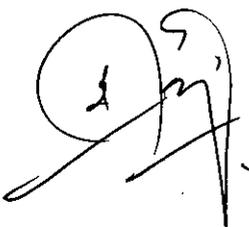
alongwith gun/repeater present in the bank and customers of the bank were also present at the time of occurrence; the bank is situated adjacent to vegetable market which is thicket area. He admitted that *"it is correct that accused were muffled faces and I didn't identify any accused."*

9. PW-8 Muhammad Adil, cashier in the bank is also an eye witness, stated that on the eventful day, five (05) muffled faces persons came in the bank at 11:00 A.M, hands up all the employees and confined them in the bathroom; the peon of the bank called the shopkeeper near to the bank and while counting cash he found Rs. 35,25,000/- missing from the counter. In cross-examination, he had admitted that his statement was not recorded by the I.O. However, he himself recorded his statement regarding the occurrence. He had also admitted that muffled faces persons came inside the bank for dacoity and looted the bank; further stated that he had not seen the dacoits while looting the bank.

10. PW-11 Syed Asad Ali Shah an employee of the bank acted marginal witness of recovery memos, disclosure memo and pointation memo, stated in cross-examination that neither accused snatched mobile from him nor his statement was recorded by I.O and that the accused were having muffled faces.

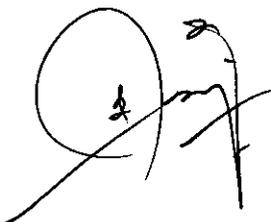
11. By no stretch of imagination the aforesaid ocular testimonies can be considered of worth reliance. All four (04) eye witnesses did not implicate the appellants in commission of the alleged offence; therefore, I have no hesitation to observe that it is not the case of sufficient and convincing ocular evidence inspiring confidence, on the basis of which the appellants could be held responsible in commission of the charged offences.

12. Joint identification parade of three (03) accused was held in the jail premises and the magistrate supervising the identification proceedings had not verified the period, if any for



which the accused person have remained in police custody after their arrest and before the identification test and did not incorporate such fact in his report; separate identification parade is required to be held in respect of each accused person as per rule of prudence laid down by the superior Courts. In the present case; firstly the identification parade was held through the complainant on 07.03.2011 and subsequently, the complainant vide his statement recorded on 15.03.2011 implicated the accused persons with their name, parentage and addresses; moreso, he did not identify the appellant Muhammad Saleem during identification test. The learned magistrate was obliged to prepare list of all the persons (dummies) who form part of the liner at the parade alongwith their parentage, occupation and addresses but the same has not been prepared.

13. Elevating the testimony of complainant Sardar Shujah-ul-Mulk (PW-7), I have observed that neither he disclosed description/features of the accused in initial report nor in supplementary statement and that the identification test does not reveals that dummies were of the same complexion in features. The appellants were arrested on 27.02.2011 and the identification parade was conducted on 07.03.2011 i.e. after inordinate delay of more than one week which reduces the evidentiary value of test of identification, more particularly, the complainant stated in his deposition that the name, parentage and addresses of the accused persons were disclosed to him by the police. Apparently several infirmities in the identification parade dimensioning its evidentiary value as the identification parade had been conducted in utter violation of touchstone enunciated by the superior Courts. Gross irregularities in identification of accused persons reveals that eye witnesses did not identify the culprits having muffled faces at the scene of occurrence; more particularly, their descriptions/features, height, clothes and the body structures has not been described by the eye witnesses in their statement recorded by the police as well in



their depositions. Suffice it to say that no legal sanctity can be attached to such a test identification parade; particularly, the prosecution witnesses did not identify the accused before the learned trial Court during the trial.

14. Investigation officer, police inspector Abdul Maroof Khan (PW-15), had admitted in cross-examination, that in his application the complainant did not charge anybody by name and that no description or features were given by him in his application. With regard to arrest of accused, he admitted that there was no written proof on the record that accused were identified through CD or USB data and that the accused had muffled faces. He has also admitted that statement of the *chowkidar* was not recorded under section 161 Cr.P.C and that he had not taken the record of the bank through which it could be determined that how much cash was present in the bank on the day of occurrence and that how much cash carried by the customers in the bank; that the pointation of the spot made by the accused was joint pointation and nothing was recovered in consequence of that pointation in the bank; further admitted that the recovery was made on the joint pointation of the accused and that he had not associated any independent witness with the recovery memos though recovery places were situated in thickly populated area. He had also admitted that neither the currency note nor repeater (gun) was produced in the Court and that during whole proceedings of preparation of all memos not a single independent witness had associated; further admitted that during the identification parade Muhammad Saleem accused (appellant) could not be identified after twenty two (22) days of occurrence. It may be observed that it is by now a well settled principle of law that a joint recovery at the pointation of accused persons cannot be used against them, moreso; putting three (03) accused in joint identification had also lost evidentiary value of identification test. Keeping in view unreliable and untrustworthy

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ocular testimony reproduced hereinabove beside illegalities in conducting the identification parade, mentioned as supra, the persecution has miserably failed to prove the charge against the appellants.

15. The legal proposition of the case much emphasized by the learned counsel for the appellant was that the rules of justice enunciated by section 103 of the Code are so embedded in criminal jurisprudence of Pakistan and to universally accepted that in all criminal cases two mashirs are always cited for recovery and reliance is placed on these witnesses in the ordinary course provided they are independent, respectable and inhabitants of the locality. The residence of the mashirs becomes relevant depending on the facts of the case. In order to ensure proper investigation and clear proof preference should be given to the witnesses of the locality, particularly witness who are respectable.. Where witnesses are not of the locality the Court should cautiously examine their statement. Reference in this regard is made to the cases of Abdul Rashid v. State (PLD 1975 Kar. 92); Ballia and others v. State (1985 SCMR 854); Nasrullah and another v. State (1977 PCr.LJ 132); Rahmat v. State (PLD 1976 Lah. 1444); Muhammad Shafi and others v. State (PLD 1967 SC 167); Muhammad Khan v. Dost Muhammad (PLD 1975 SC 607); Afzal v. State (1983 SCMR 1); Niaz Muhammad alias Jaja and another v. State (PLD 1983 SC (AJ&K) 211); Malik Aman v. State (1986 SCMR 17); Sultan and others v. State (1987 SCMR 1177); Khair Gul v. State (1989 SCMR 491) and The State v. Abba Ali Shah (PLD 1988 Kar. 409).

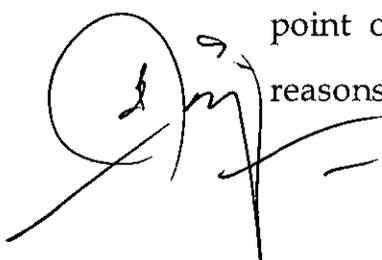
16. Putting the present case to the test laid down by the series of judgments of superior Courts, it is clear that in view of discrepancies in the evidence mentioned as above, besides non-association of the independent witnesses, I am of considered view that the prosecution has failed to bring home guilt of the appellants. In view of the facts and circumstances of the case and the evidence

analyzed, I have to observe that the impugned judgment is result of complete misreading of evidence and/or it is due to incompetency resulting distorted conclusion as to produce a positive miscarriage of justice. It is well settled principle of law that if a single circumstance creates reasonable doubt in a prudent mind about the guilt of the accused, then he shall be entitled to such benefit not as a matter of grace but as a matter of right as held in (i) 1995 SCMR 1345 (Tariq Parvez v. The State), (ii) 1997 SCMR 25 (Muhammad Ilyas v. The State), (iii) 2008 SCMR page 1221 (Ghulam Qadir v. The State). It needs to be clarified that from very first glance on prosecution evidence, the story as set up by the prosecution is not inspiring confidence and cannot be considered trustworthy due to contradictions and inconsistencies in between the ocular account and circumstantial evidence.

17. Findings of learned trial Court are based on erroneous and speculative presumptions including non-reading/misreading of evidence. It is not out of context to mention that the learned trial judge in non-compliance of section 367 of the Criminal Procedure Code did not draw the point or points for determination or the findings with reason for the decisions in the impugned judgment. It shall be advantageous to reproduce hereinbelow Section 367 Cr.P.C.:-

*S 367. Language of judgment: contents of judgment.
(1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by the presiding officer of the Court, or in English; and shall contain the point or points for determination, the decisions thereon and the reasons for the decisions; and shall be dated and signed by the presiding officer in open court at the time of pronouncing it and where it is not written by the presiding officer with his own hand, every page of such judgment shall be signed by him.*

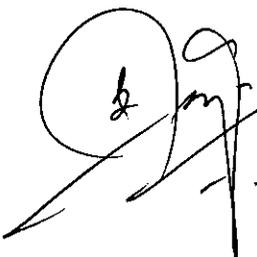
Section 367 Cr.P.C provided that a judgment should contain the point or points for determination, the decisions thereon and the reasons for the decisions. It is therefore, the duty of a judge to ensure



not only that he dispenses justice but the justice also seems to have been done. Provision of this section is mandatory and intended to constitute a substance as distinguished from mere form of judgment. Judgment not showing the points for determination or decisions thereon is not a judgment in the eyes of law.

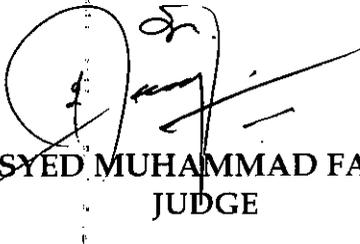
18. Perhaps, the learned trial Judge did not bother to peruse and to consider cross-examination of eye witnesses, resultantly, the impugned judgment has been passed against the appellants. Suffice it to say that cross-examination is the great legal engine invented for the discovery of truth. Cross-examination of eye witnesses reproduced above was not an empty formality, but a valuable right and best method for ascertaining the truth. The right of cross-examination has from times immemorial been held to be particularly in criminal cases a valuable right to the accused. It is a weapon which an accused person or an advocate on his behalf can wield for the purpose of testing the veracity of the statement made by a witness. Moreso, the concept of benefit of doubt to an accused person is deep routed in our country. The prosecution is duty bound to prove its case beyond the shadow of reasonable doubt and if any single or slightest doubt is created, benefit of same must go to the accused and it would be sufficient to disbelieve the prosecution story. It is settled law that benefit of doubt would go to the accused, regardless of fact whether he had taken any defence plea or not.

19. In concluding paragraph 30 of impugned judgment, the learned trial Court did not bother to pass any appropriate Order as required under section 517 Cr.P.C, rather kept intact case property till expiry of appeal period and arrest of absconding accused. Since the impugned judgment is set aside and the appellants have been acquitted from the charged offences, therefore, the learned trial Court is directed to pass an appropriate order for disposal of the case property under section 517 Cr.P.C, in accordance with law, after affording opportunity of hearing to all concern.

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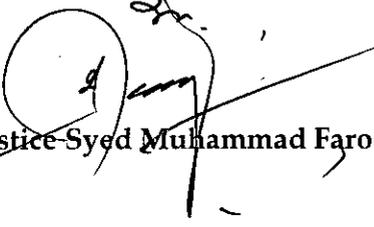
Above are the reasons of short order of even date, whereby the appeal was accepted, conviction and sentences recorded by the learned trial Court were set aside and the appellants were acquitted from the charges by extending them the benefit of doubt.

Note: Copy of this judgment be transmitted to the learned trial Court for information and compliance, instantly.


JUSTICE SYED MUHAMMAD FAROOQ SHAH
JUDGE

Islamabad the
16th May of 2019
M.Ajmal/**.

Approved for reporting


Justice-Syed Muhammad Farooq Shah

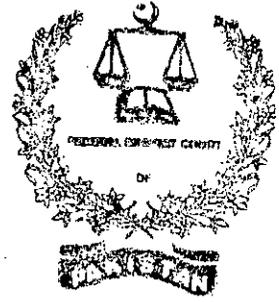
Cr.A.No.05/I/2019-FSC:
FEDERAL SHARIAT COURT

Islamabad the 16th May, 2019.

From: **The Registrar,
Federal Shariat Court,
Islamabad.**

To : **The District & Sessions Judge,
Mansehra.**

Subject:- CRIMINAL APPEAL NO.05/I OF 2019.
(Asif Shahzad etc. Vs. The State etc).



Appeal against the judgment of Ms.Sadia Arshad, Addl.Sessions Judge-II, Mansehra dated 24.01.2019, Case No.04/03 of 2011, The State Vs. Asif Shahzad & another, U/S.395/397-PPC, 07 years R.I. each with fine of Rs.100,000/-each, or 6 months each (ii)U/S.412-PPC,05 years R.I.each, with fine of Rs.50,000/-each or 06 months S.I.each, with benefit of Sec.382-B,Cr.P.C. in case FIR No.163 dated 17.02.2011 P.S. City Mansehra, District Mansehra.

Dear Sir,

I am directed to inform you that the above cited Cr. Appeal came up for regular hearing before the Court on **16.05.2019** and the Court has been pleased to accept the appeal by setting aside against their conviction and sentences recorded by the learned Additional Sessions Judge-II, Mansehra to the appellants through impugned judgment dated 24.01.2019. The Court has directed that the appellants namely-(1)Muhammad Saleem son of Muhammad Siddique caste Tanoli Bagal resident of Kangar Payeen,Tehsil & Distt.Mansehra(2)Asif Shahzad son of Taj Muhammad,caste Tanoli resident of Ganda Tehsil & Distt.Mansehra(both now confined in Central Jail,Haripur and Distt. Jail,Mansehra) are acquitted from the charge by extending the benefit of doubt to them. They are in custody. The concerned Superintendent, Jail is directed to release them forthwith from jail, if they are not required to be retained in connection with any other case. A certified copy of order of this Court dated **16.05.2019** is enclosed herewith for information and immediate compliance. Original record of trial court and detailed judgment will be sent later on.

Yours faithfully,



(MUHAMMAD TARIQ)

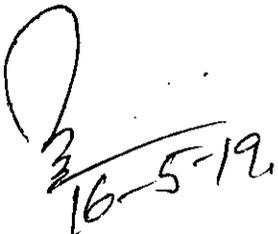
o/l ASSISTANT REGISTRAR (JUDL)

FOR REGISTRAR

051-9203856/9213939

Copy along with certified copy of Order of this Court dated **16.05.2019** for information and necessary action is forwarded to the:-

- i) **The Superintendent, District Jail, Mansehra.**
- ii) **The Superintendent, Central Prison, Haripur**


16-5-19

o/l 
ASSISTANT REGISTRAR (JUDL)
FOR REGISTRAR

Cr.A.No.05/I/2019-FSC:
FEDERAL SHARIAT COURT

Islamabad the 22nd May, 2019.

From: **The Registrar,
Federal Shariat Court,
Islamabad.**

To : **The District & Sessions Judge,
Mansehra.**

Subject:- CRIMINAL APPEAL NO.05/I OF 2019.
(Asif Shahzad etc. Vs. The State etc).

Appeal against the judgment of Ms.Sadia Arshad, Addl.Sessions Judge-II, Mansehra dated 24.01.2019, Case No.04/03 of 2011, The State Vs. Asif Shahzad & another, U/S.395/397-PPC, 07 years R.I. each with fine of Rs.100,000/-each, or 6 months each (ii)U/S.412-PPC,05 years R.I.each, with fine of Rs.50,000/-each or 06 months S.I.each, with benefit of Sec.382-B,Cr.P.C. in case FIR No.163 dated 17.02.2011 P.S. City Mansehra, District Mansehra.

Dear Sir,

I am directed to refer to this Court's letter of even number dated **16.05.2019** and to enclose herewith a certified copy of detailed judgment passed by this Court dated **16.05.2019** for information and necessary action.

2. I am further to return herewith the original record of trial court alongwith police file in the above cited case which was received in this Court vide letter No.1751/D&SJ/(MA) dated 02.03.2019.

Yours faithfully,

o/c
(MUHAMMAD TARIQ)
ASSISTANT REGISTRAR (JUDL)
FOR REGISTRAR
051-9203856/9213939

[Handwritten Signature]
22-5-19