

IN THE FEDERAL SHARIAT COURT  
(APPELLATE JURISDICTION)

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PRESENT

MR.JUSTICE DR.FIDA MUHAMMAD KHAN.

CRIMINAL APPEAL NO: 1/P OF 1994

Dilbar son of Asmatullah Khan,  
resident of village Sangi Marmar  
Karoona, Tehsil and District  
MARDAN.

...

APPELLANT

VERSUS

The State

...

RESPONDENT

LINKED WITH

JAIL CRIMINAL APPEAL NO; 10/I OF 1994

Diyar Gul alias Diarai son of  
Hasamuddin, resident of Zakaria,  
Tehsil and District SWABI.

...

APPELLANT

VERSUS

The State

...

RESPONDENT

Counsel for both the  
appellants

...

Mr. Tasleem Hussain,  
Advocate

Counsel for the State

...

Mr.Sohail Akhtar,  
Law Officer, NWFP

No.Date of FIR and police  
station.

...

420, dated 20.7.1989  
P.S.Swabi.

Date of decision of the  
trial Court.

...

7.12.1993

Date of Institution of Cr.  
Appeal No.1/P of 1994

...

2.1.1994

Date of Institution of Jail  
Cr.A.No.10/I of 1994

...

4.1.1994

Date of Hearing

...

27.1.1994

Date of decision

...

20.2.1994

JUDGMENT

DR. FIDA MUHAMMAD KHAN, J.- These are two criminal appeals,

Cr. Appeal No.1/P of 1994 is filed by Dilbar son of Asmatullah, resident of Village Sang-e-Marmar Koroona, Tehsil and District Mardan and Jail Criminal Appeal No.10/I of 1994 is filed by Diyar Gul son of Hassamuddin, resident of Zakria, Tehsil and District Swabi. Both these appeals are directed against the judgment dated 7.12.1993 passed by the learned Sessions Judge, Swabi whereby both have been convicted under section 395 PPC read with section 149 PPC and section 20 of Offences Against Property (Enforcement of Hudood) Ordinance, 1979 and each has been sentenced as under:-

Sections 148/149 PPC	:	Three years R.I. and a fine of Rs.5000/- or in default six months R.I.
Section 395/149 PPC	:	Five years R.I. and a fine of Rs.10,000/- or in default further one year R.I.

The benefit of section 382-B Cr.P.C has also been extended. Both the sentences have been ordered to run concurrently.

2. It may be mentioned that, as stated by the learned counsel for the appellant at bar, Jail Criminal Appeal No.10/I of 1994 is infructuous for the reason that the appellant Diyar Gul has undergone the sentences and is out of jail. However, I am disposing of both the appeals on merits by this single judgment.

3. Briefly stated it is the case of prosecution that on 20.7.1989 an amount of Rs.5,00,000/-, which was being taken from Habib Bank

Limited, Swabi to Habib Bank Limited, Faujoon in a Pajero Jeep by a cash sward of Habib Bank, Swabi, was snatched, on a gun point, from the cash sward who were unboarded from the jeep, by the appellants and their absconding co-accused. The report Ex.PA/1 lodged by PW Anwar Ali at police station Noshara Kalan on 20.7.1989 sent to police station, Swabi, which forms the basis of case FIR Ex.PA, reads as under:-

" بوقت صدر ایک تحریری مراسلہ منجانب ایس ایچ او صاحب تھانہ صوابی بدست محمد عظیم خان اے ایس آئی صاحب موصول ہو کر درج ذیل ہے -  
تھانہ نوشہرہ کلاں ، ۲۰ روزنامہ ۲۰ جولائی ۱۹۸۹ ضلع پشاور  
انور علی ولد منفعہ خان قوم افغان عمر ۳۶/۲۵ سال ساکن شیخ جانہ ،  
تحصیل و ضلع صوابی بوقت ساڑھے ۱۱ بجے ۲۰ جولائی ۱۹۸۹ بشمول پڈیر  
محمد ڈرائیور حبیب بنک مقبول حسین گارڈ حبیب بنک صوابی بحاضری  
تھانہ اگر مدعی رپورٹ کرتا ہے کہ میں حبیب بنک صوابی میں آفیسر  
ہوں ، حبیب بنک صوابی کے مبلغ پانچ لاکھ روپے بسواری بجیرو جیپ نمبر  
ایم آر بی ۳۶۱۰ بہ تحویل پڈیر محمد ڈرائیور ، گارڈ مقبول حسین برانچ  
حبیب بنک صوابی سے برائے حبیب بنک فوجون روانہ ہوئے - جب میلہ شاہ  
منصور پہنچے تو ایک موٹر کار برنگ سرخ نمبری پی آر جی ۹۲ ہم سے آگے  
ہوئی ، اور ایک گاڑی جس کا نمبر نوٹ نہ کر سکے جو وہ بھی سرخ رنگ  
کی تھی ہمارے پیچھے ہوئی ، ہمیں شک ہوا کہ یہ گاڑیاں ہمارے پیچھا  
کر رہی ہیں لہذا کھنڈا موڑ میں واقع پٹرول پمپ میں ہم نے اپنی گاڑی  
کھڑی کی - اس دوران قریب ۹:۳۰ بجے موٹر کار نمبر پی آر جی ۹۲ پمپ  
میں داخل ہوئی جس میں چار کسان مسلح بہ کلاشن کوف سوار تھے اور  
دوسری گاڑی نمبر نہ معلوم سرخ رنگ جس میں بھی چار مسلح کسان  
سوار تھے پٹرول پمپ کے سامنے روٹ پر کھڑے ہوئے ، چار مسلح کسان  
نے موٹر کار نمبر پی آر جی ۹۲ اتر کر ہم سب پر کلاشنکوف تانے  
اور ڈرائیور پڈیر محمد کو سیٹ سے نیچے اتار کر ان سے چابیاں  
چھین لیں ، مقبول حسین سے بنک کی دونالی بندوق چھین کر رقم  
مبلغ پانچ لاکھ روپے کا تھیلا قبضہ میں کیا - ملزمان نے ہم تینوں  
کو اپنی ہی سرکاری گاڑی میں بٹھا کر خاموش رہنے کا کہا اور جان  
سے مار ڈالنے کی دھمکی دی ، چاروں ملزمان میں سے ایک ملزم جو



ملیشیا کا شلوار قمیض پہنے ہوئے تھا اور شولڈر پر دو سٹار لگے ہوئے تھے ہمارے گاڑی کے فرنٹ پر بیٹھا اور بیٹھتے ہی سر پر پولیس بریٹ کیپ پہن لی اور سیاہ عینک ڈال دیئے۔ جبکہ ایک ملزم سٹیئرنگ پر بیٹھا۔ بقایا دو ملزمان ہماری ساتھ گاڑی میں سوار ہو کر بطرف جہانگیرہ چل پڑے۔ ملزمان کی دو گاڑیاں ہمارے عقب روانہ ہوئیں، جن میں ۲/۲ ملزمان سوار تھے اور کلاشنکوفوں سے مسلح تھے۔ فوجی فاؤنڈیشن کے کارخانے تک مین روڈ پر چلتے رہے، اور بعد ازاں جانب لمرب گچا سڑک پر مڑ گئے، کافی دیر سفر کے بعد رسال پور کے پاس مردان روڈ پر نکل کر جانب نوشہرہ چلتے ہوئے خوشگئی روڈ پر مڑے اور افغان مہاجر کیمپ پر مجھے اور میرے دونوں ساتھیوں پڈیر ڈرائیور اور مقبول حسین گن میں کو گاڑی سے نیچے اتار دیئے، ملزمان بطرف چار سده چلے گئے۔ میں اور میرے ساتھی صرف ان چار ملزمان کو نزدیک سے دیکھ سکے جنہوں نے ہمیں گاڑی کے اندر محبوس رکھا تھا، ان ملزمان کو پٹرول پمپ کھنڈا موڑ پر موجودہ عملے نے بھی دیکھا ہے، یہ چاروں ملزمان جوان العمر ۲۵/۲۳ سال کے تھے، وردی پہنے ہوئے، ملزم کا رنگ گندمی، مونچھیں رکھی ہوئی مضبوط بدن اور درمیانہ قد کا جوان تھا، دوسرے ملزمان میں سے ایک ملزم نے چھوٹی داڑھی رکھی ہوئی تھی۔ ان چاروں ملزمان کو سامنے آنے پر شناخت کر سکتا ہوں۔ مسروقتہ کیش جو چینی کی خالی بوری میں بند تھا اس میں سے تین لاکھ پانچ سو روپے کے نوٹ ڈیڑھ لاکھ سو روپے کے نوٹ اور پچاس ہزار پچاس روپے کے نوٹ تھے۔ یہ تمام کرنسی پرانے نوٹوں پر مشتمل تھی۔ مسروقتہ بندوق دو نالہ سپین ساخت کی ہے۔ جس کا نمبر بینک کے ریکارڈ پر موجود ہے۔ اسی طرح بینک کی بجیرو گاڑی ایم آر بی ۲۶۱۰ ماڈل ۸۷-۱۹۸۶ کے کائڈات گاڑی میں پڑے تھے، برائے رپورٹ آیا ہوں قانونی کارروائی کی جاوے۔ دستخط انگریزی انور علی - مورخہ ۲۰ جولائی ۱۹۸۹ ع -

کارروائی پولیس حسب گفتمہ - سائل رپورٹ درج ہو کر پڑھ کر سنائی و سمجھائی گئی - درست تسلیم کر کے زیر بیان خود دستخط ثبت کیا - جس کی میں تصدیق کرتا ہوں - وقوع پٹرول پمپ نزد کھنڈا موڑ علاقہ تھانہ صوابی ضلع صوابی میں سرزد ہوا ہے - رپورٹ کنندہ کے پہنچتے ہی بذریعہ وائریس حملہ متعلقین کو اطلاع دی گئی - ضلع پشاور مردان، چار سده، اور صوابی پولیس کو مطلع کیا گیا - بلحاظ علاقہ نقل رپورٹ تھانہ صوابی بھجوائی جا رہی ہے - ایس ایچ او صاحب دوران تحریر رپورٹ تھانہ پہنچ چکے ہیں -

جناب عالی نقل بمطابق اصل ہے -

دستخط انگریزی پرویز خان

نوشہرہ کلاں مورخہ ۲۰ جولائی ۱۹۸۹ -

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4. After usual investigation the appellants/accused alongwith their co-accused were sent to the learned trial court where the prosecution in all examined nineteen witnesses. P.W.1 is Anwar Ali. He is the complainant who reiterated his statement as mentioned above. P.W.2 is Pazir Mohammad who was driver in Habib Bank Limited, Swabi and was driving the Pajero Jeep wherefrom Rs.5,00,000/- were snatched. He is eye witness of the occurrence who supported the case of prosecution. P.W.3 is Mohammad Azeem Khan, Additional SHO. He is a marginal witness to the recovery memos Ex.PW-3/1, Ex.PW-3/2 and Ex.PW-3/3. P.W.4 is Gul Mohammad Khan, Tehsildar who conducted identification parade of appellant Dilbar on 9.8.1989 wherein he was identified by PWs Anwar Ali, Pazir Mohammad and Maqbool Hussain. On 3.9.1989 he got identified two packets of currency notes of Rs.10,000/- each by PWs Anwar Ali and Zaristan, cashier. P.W.5 is Noshad Khan, S.I. He arrested the appellant Dilbar on 1.8.1989 and recovered cash amount Rs.11,100/- and other articles and handed over the same to Inspector, CIA on 2.8.1989. P.W.6 is Sher Hassan Khan, Line Officer. He prepared recovery memos Ex.PW.6/1 which concerns the recovery of currency notes from absconding co-accused Dilshad. P.W.7 is Fazal Mabood Khan, Manager, Habib Bank, Swabi. He is a formal witness who produced the licence copy of D.B. shot gun P.1 to Investigating Officer. P.W.8 is Faujoon in whose presence on 24.7.1989 Rehmanuddin produced amount of Rs.45,000/- from his



house and handed over the same to Diyar Gul, appellant who had gone there in hand cuffs alongwith police party. The amount was taken into possession by the Investigating Officer vide recovery memo Ex.PW.8/1 which bears his signature as a marginal witness. P.W.9 is Bazeed Khan, Inspector who investigated the case. He arrested Diyar Gul, appellant on 27.7.1989 and got recorded his confessional statement before the Magistrate on 3.8.1989. He also recovered an amount of Rs.45,000/- on his pointation from Rehmanuddin, acquitted co-accused, whose confessional statement was also recorded on 3.8.1989. He arrested the appellant Dilbar on 2.8.1989 from whom cash amount of Rs.11,100/- and some other articles were already recovered by ASI Noshad P.W.5 and got recorded his confessional statement on 8.8.1989. He also recovered Rs.32,000/- on his pointation from his baithak. On 9.8.1989 he got him identified in an identification parade by P.W.4 Gul Mohammad Khan, Tehsildar. He also arrested other accused in this case and submitted challan on 18.1.1990 and also submitted supplementary challans on 3.6.1991 and 11.7.1991. P.W.10 is Zafar Iqbal Khan, Magistrate who recorded confessional statement of appellants Diyar Gul and Rehmanuddin on 3.8.1989 and of appellant Dilbar on 8.8.1989. P.W.11 is Muambar Khan, Inspector who helped P.W.9 in the investigation of this case. He is also a marginal witness to the recovery memos Ex.PW.8/1 and Ex.PW.9/4. P.W.12 is Abdul Qayum Khan, SHO who arrested acquitted co-accused Bashar in this case. P.w.13 is Pervaiz Khan, SHO

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who brought report of the complainant to police station, Swabi. P.W.14 is Jan Mohammad, ASI who arrested acquitted co-accused Johar in this case, P.W.15 is Jamshed Khan, SHO who submitted supplementary challan against acquitted co-accused Malak Ghawar. P.W.16 is Mohammad Riaz, FC who was entrusted with the warrant of arrest against Malak Ghawar and others. He executed warrant and proclamation notices according to law. P.W.17 is Mohammad Anwar Khan, ASI who registered the case vide FIR Ex.PA and also brought a jeep of the Bank from Mohmand Agency. P.W.18 is Mohammad Iqbal Khan, ASI who arrested absconder co-accused Dilshad on 16.8.1989. P.W.19 is Mohammad Nazir Khan, ASI who partly investigated the case and then handed over the investigation to P.W.9 Bazeed Khan.

5. The appellant/accused Dilbar made a statement under section 342 Cr.P.C wherein he pleaded innocent. Regarding cash amount of Rs.11,100/- recovered from his possession he stated as here under:-

"I was arrested without any fault on my part and the I.O. snatched the above mentioned amount from me which was of my own and in no way was the stolen amount".

Replying to another question about Rs.32,000/- recovered on his pointation as stolen property he stated that the said amount in fact belonged to his cousin Munir Khan. He had given the said amount to the I.O. under the threat that the police will torture him. Regarding

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the identification parade he stated that he was shown to the PWs at police station before the identification parade. He stated that he was innocent and was maliciously involved by the police in this case. He declined to make any statement on oath.

5. The appellant Diyar Gul also denied the allegation and pleaded innocent. He denied to have made any voluntary confessional statement and stated that the same was the result of police torture. Regarding the amount of Rs.45,000/- recovered on his pointation as stolen property he made a statement in the following words:-

"I have not pointed out the place where the alleged occurrence had taken place. No stolen money had been recovered from me or at my instance. The tractor was sold by the father of accused Rehmanuddin and the police raided the house of accused Rehmanuddin and recovered Rs.45,000/- which was not the stolen property but was in fact the price of the tractor".

He stated that the PWs were police officials and were interested in his conviction. He also declined to make a statement on oath in disproof of the charges levelled against him.

6. Munir Khan appeared as D.W.1 and made a statement in the following words:-

"Accused Dilbar is my cousin. Inspector Bazeed Khan had come to Mardan, in connection with investigation of this case. The said Inspector met me, he arrested accused Dilbar and brought him to PS Swabi, where he hanged him through his hands and tortured him due to which Dilbar asked me, that the police is torturing him and is demanding money from him. The accused Dilbar requested me to arrange an amount of Rs.32,000/- I arranged the amount of Rs.32,000/- from my shop and handed over the same to Bazeed Khan, Inspector".





7. I have heard the learned counsel for the parties and have perused the record with their assistance.

8. It transpires that the learned trial court has disbelieved the identification parade due to some incurable infirmities and has correctly held the same as invalid and inadmissible. However on the basis of their confessional statements and recovery of stolen amount on their pointation, the learned Judge has convicted and sentenced the appellants/accused as mentioned above. Thorough scrutiny of the evidence brought on record in respect of confessional statements of the appellants and recovery of stolen amount on their pointation is, therefore, necessary to determine their guilt or innocence in this connection.

9. It appears from the record that the confessional statements of the appellants Diyar Gul and Dilbar were recorded respectively on 8th and 7th day of arrest. Thus considerable delay has occurred in recording the same. Although, as held in so many cases, mere delay in recording confession, in principle, is not fatal to the prosecution when the court is satisfied that the confession is true and voluntary. However, in case the accused raises the plea of having recorded the confession due to inducement, promise, threat or torture by the prosecuting agencies there should be some satisfactory explanation for the delay in recording the same so that the court is



enabled to arrive at a correct conclusion. The confession is in fact acknowledgement of one's guilt in terms of offence and is a sort of information which carries with it the probability of truth provided there is nothing on the contrary to falsify or disprove it. However, when it is retracted or is alleged to have been recorded under pressure, threat or torture etc., a reasonable doubt is created about its veracity and the courts are bound to receive the same with great caution. In all such cases the doubt needs to be dispelled either by some other reliable evidence or strong corroborative circumstance, in the absence of which intrinsic worth of the confessional statement remains suspicious and for that reason it alone cannot form basis for conviction.

10. In the present case no explanation is brought on record to show what caused the delay in recording these confessional statements when the appellants were already available in police custody. Obviously it casts doubt on the voluntary nature of the statements and render them suspicious, especially so when we observe that both the appellants have taken a stand in their statements under section 342 Cr.P.C to that effect. The appellant Diyar Gul has specifically alleged that his confessional statement is the result of police torture. Several suggesions in this respect have been made to P.W.9. Trend of the cross-examination of P.W.10 who recorded the statements is also suggestive of the same as well as of the fact that the confessional statements have not been recorded in accordance with the mandatory



provisions of section 164 Cr.P.C. Deposition made by D.W.1 Munir Khan further shows that appellant Dilbar was subjected to torture by the police. Both the appellants have retracted their confessional statements. It may be significant to point out in this connection that, in his confessional statement, one of the acquitted co-accused namely Rehmanuddin has alleged that he had handed over Rs.45,000/- to the police party as demanded by Diyar Gul, appellant on 28.7.1989. However, it is the deposition of one of the prosecution witness, namely Faujoon P.W.8, that Rehmanuddin was not present at the time of handing over the said amount to the police. He admitted that the said amount had been handed over by Mohammad Amin. In the light of this deposition there hardly remains any further need to highlight the involuntary nature of these statements and as such it would be very unsafe to maintain conviction on their basis.

11. So far as the recovery is concerned it is borne out on record that there were no specific marks of identification on the stolen currency notes. Neither any number of any currency note was on the record to tally it with any recovered currency notes nor there was affixed any seal on the bundle of the currency notes that could in any way render help in its precise identification beyond any reasonable doubt. The complainant has clearly admitted that they do not affix their seal on the currency notes. It appears, however, strange to note



that P.W.9 has alleged that the seal of Habib Bank Limited, Swabi was there, though he admits that it was dim and could not be read properly. It is also noteworthy that the "baithak" of appellant Dilbar wherefrom the amount of Rs.32,000/- is shown to have been recovered from an Almirah on his pointation is stated, as admitted by P.W.9, to be having no boundary wall and he also did not remember if the door of the said baithak or almirah was opened or closed. It is also significant to mention that the mandatory provisions of section 103 Cr.P.C have been violated and no respectable inhabitant of the area has been associated with the search proceedings and the only one independent witness cited as marginal witness to the recovery memo Ex.P.W.9/4, namely Mohammad Shah, was abandoned by the prosecution as unnecessary.

12. Moreover it is pertinent to observe that one of the marginal witness, namely Mohammad Azeem, to the recovery memo Ex.PW.3/3 vide which the amount of Rs.11,100/- has been shown as recovered from Dilbar was not recovered from the accused Dilbar in his presence, as admitted by him in the cross-examination. The other marginal witness Khanzeb has been abandoned.

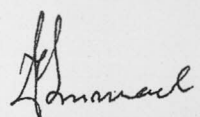
13. It is also very pertinent to note that according to the evidence of P.W.9 Bazeed Khan, Inspector as well as that of P.W.4 Gul Mohammad Khan, Tehsildar, Anwar Ali complainant and Zaristan,





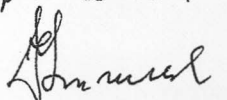
Cashier, Habib Bank Limited recovered stolen amount in the proper identification parade on 3.9.1989 and a report Ex.PW.4/1 was prepared in this behalf. However, it is very strange that P.W.1 Anwar Ali who was actually the best person to come out with the same has not uttered a single word in this respect. The other witness of identification of currency notes in identification parade namely Zaristan has not been produced. This renders the testimony in respect of identification of recovered property as mere hearsay and shatters the evidentiary value of the evidence regarding the recovered currency being the stolen one.

14. Consequently for the reasons stated above, I have no doubt in my mind that the prosecution has not been able to prove its case against the appellants beyond any shadow of reasonable doubt. Hence I allow the appeals filed by Diyar Gul alias Diarai son of Hasamuddin and Dilbar son of Asmatullah Khan, set aside their conviction and sentences and acquit them of the charges. The appellant Diyar Gul is already out of jail. The appellant Dilbar is in Jail, he shall be released forthwith if not wanted in any other case. The case property shall be restored to the appellants according to law.

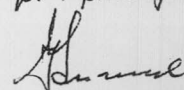
  
(DR.FIDA MUHAMAMD KHAN)  
Judge

Islamabad, 20th day of February, 1994  
/M.Arshad Khan/

*Announced in open court.*

  
20.2.94

*Approved for reporting*

  
20.2.94