

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

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PRESENT

MR.JUSTICE NAZIR AHMAD BHATTI

CRIMINAL APPEAL NO.16/P OF 1994.

1. Jamil son of Yaqoot, resident of village Gandaf, Swabi and ... Appellants
2. Muzahim Shah son of Shah Usman village Gandaf, Swabi.

Versus

The State ... Respondent

For the appellants ... M/s Zahurul Haq, Bar-At-Law and Tariq Pervez, Advocate

For the State ... Mr.Khalid Khan, Advocate

No.& date of F.I.R Police Station ... No.59, dt.27.2.1993 P.S Topi

Date of order of the trial court ... 8.2.1994.

Date of Institution ... 19.2.1994.

Date of hearing ... 16.4.1994.

Date of decision ... 14.6.1994

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JUDGMENT

NAZIR AHMAD BHATTI, J. On 27.2.1993 at about

11 A.M three persons entered commissary shop of the complainant situate in Right Bank Colony, Turbela Dam, about 1½ kilometers away from Police Station Topi. At that time the owner complainant Muhammad Ismail and his servant Haider Zaman were present in the shop. One of the accused, who was armed with a pistol, took position at the door while the other two accused entered the shop. One of the accused, who had entered the shop, was also armed with a pistol and he snatched away an amount of Rs.9000/- from the complainant at pistol point while the other accused caught hold of Haider Zaman and shut him inside the Store and then took out Rs.595/- from the Safe made of a paper box. Then the accused, who was standing outside, cut away the telephone line and all the three started running towards Indus river. The complainant raised alarm and also informed the police on telephone from a nearby office. The police party and the complainant party chased the three accused and apprehended two of them who turned out to be appellant Muzahim Shah and accused Abdul Rehman, while the third succeeded in escaping. From the personal search of appellant Muzahim Shah the police recovered one pistol 30 Bore No.1236 with a loaded chamber with five cartridges and also Rs.9000/-. From the personal search of the accused Abdul Rehman an amount of Rs.595/- was



also recovered. The complainant then submitted a written complaint in

Police Station Topi at 11.30 A.M which was incorporated in

F.I.R No.59 the same day.

2. The third accused Muhammad Jamil was also arrested on 6.3.1993 by P.W.9 Noor Muhammad SHO of the Police Station and on 7.3.1993 the brother of this accused produced one pistol Ex.PW.6/1 to the S.H.O.

3. Appellant Muzahim Shah and accused Abdul Rehman made separate confessional statements on 3.3.1993, Ex.PW.8/2 and P.W.8/4 respectively, before P.W.8 Alhaj Mazhar Sajjad, Magistrate Ist Class, while appellant Muhammad Jamil made a confessional statement on 8.3.1993, Ex.P.W.8/7, before the same Magistrate. Identification parades of the accused were also held on 8.3.1993 by the aforesaid Magistrate and P.W.1 Complainant Muhammad Ismail and P.W.2 Haider Zaman identified all the accused correctly.

4. After investigation all the three accused were sent up for trial before the Additional Sessions Judge Swabi who charged all the three ~~as accused~~ under sections 342/34 and 411 PPC, section 17(3) of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979 and section 13 of the Arms Ordinance, 1965. All the three accused pleaded not guilty to the charges and claimed trial. During the trial 9 prosecution witnesses were produced by the State, out of whom P.W.1 complainant Muhammad Ismail and P.W.2 Haider Zaman are eye witnesses of the occurrence. The accused made



statement under section 342 Cr.P.C wherein they denied the commission of the offence as also having made any confession. They also denied the recovery of any incriminating material from them and also denied that they were arrested at the spot. But none of them ~~neither~~ produced any defence nor made any desposition on oath.

5. After the conclusion of the trial the learned Additional

Sessions Judge convicted and sentenced all the three accused as under:-

Accused Abdur Rehman was convicted under section 392/34 PPC and sentenced to the period of imprisonment already undergone in the Judicial Lockup. For the offence under section 392 PPC accused Jamil was sentenced to undergo rigorous imprisonment for 6 years and to pay a fine of Rs.5000/- or in default to further undergo rigorous imprisonment for one year. For the offence under section 342 PPC he was sentenced to undergo rigorous imprisonment for 9 months and to pay a fine of Rs.500/- or in default to further undergo rigorous imprisonment for 2 months. For the offence under section 392 PPC accused Muzahim Shah was sentenced to undergo rigorous imprisonment for 5 years and to pay a fine of Rs.4000/- or in default to further undergo rigorous imprisonment for 6 months. For the offence under section 342 PPC he was sentenced to undergo rigorous imprisonment for 2 months. For the offence under section 411 PPC he was sentenced to undergo rigorous imprisonment for 2 years and to pay a fine of Rs.2000/- or in default to further undergo rigorous imprisonment for 4 months. For the offence under section 13 of the Arms Ordinance, 1965 he was sentenced to undergo rigorous imprisonment for 2 years and to pay a fine of Rs.500/- or in default to further undergo rigorous imprisonment for 2 months. The learned Additional Sessions Judge has also ordered that all the substantive sentences of imprisonment of both the accused shall run concurrently.



Convicts Jamil and Muzahim Shah have challenged their conviction and sentence by the appeal in hand.

6. I have heard learned counsel for the parties at length who also put through the entire record of the case.

7. The uncontroverted essential circumstances of the case are that appellant Muzahim Shah and convict Abdul Rehman were chased by the complainant and the police party had apprehended both of them within half an hour of the occurrence alongwith the stolen money. An amount of Rs.9000/- was recovered from the personal search of appellant Muzahim Shah and an amount of Rs.595/- was recovered from the personal search of convict Abdul Rehman. A pistol of 30 bore home made, with loaded chamber and No.1236 was also recovered from the possession of appellant Muzahim Shah at the very time of his arrest. Although both the aforesaid convicts were caught red handed within half an hour of the occurrence and there was no need of their further identification yet that formality was also carried out and both of them were correctly identified by both the eye witnesses. Although appellant Jamil was apprehended after a few days of the occurrence yet he was also correctly identified during the identification parade. As such there was no mistake of any kind about the identity of the three accused and it was established beyond any doubt whatsoever that all the three had taken part in the armed robbery committed in the shop of the complainant.

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8, The learned counsel for the appellants had contended that the confessional statements made by all the three accused were not inculpatory and had not proved the guilt of any of them and could not be taken into consideration. It was also contended by the learned counsel that the confessional statements were incompatible inter se on facts and had been recorded after 5 days and could not be taken as a proof of their guilt. I have very seriously considered this contention of the learned counsel but I am unable to agree with him. The minute perusal of each confessional statement would disclose that all the appellants had not only planned to commit robbery in the shop of the complainant but each of them had taken some part in the advancement of their objective. They were all present inside or outside the shop of the complainant and each was playing his own role in the commission of the offence. Even appellant Jamil, who was not arrested at the spot, confessed that they had planned to commit robbery in the shop of the complainant and that he and his co-accused Muzahim Shah had entered the shop while convict Abdul Rehman stood at the outer door and appellant Muzahim Shah deprived the complainant of the money at pistol point. Appellant Muzahim Shah had stated in his confessional statement that he and appellant Jamil had entered the shop of the complainant and had deprived him of the amount at pistol point while Abdul Rehman had stood at the outer door. Similar is the confessional

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statement of convict Abdul Rehman. It shall thus be seen that all the three confessional statements had ascribed some sort of active role in the commission of the offence to each of them including the maker of each confessional statement. It could not, therefore, be said that the confessional statements were exculpatory or had been obtained by any coercive or oppressive method.

9. It was also contended by the learned counsel for the appellants that there was contradiction in the testimony of the two eye witnesses and they had made a departure from the original prosecution story in as much as the complainant had pointed out at the time of trial a different accused who had entered the shop than the one mentioned in the F.I.R.

I have considered this aspect of the matter very carefully and although there is some contradiction in the evidence with regard to this point yet it loses its significance for the simple reasons that two of the culprits were immediately apprehended red handed. In view of the latter circumstance any contradiction in the prosecution evidence would be immaterial. Even otherwise the court has to sift grain from the chaff. There were very powerful circumstances going against the appellants and in that view the learned trial court was justified in discarding any contradiction in the ocular testimony.



10. It was also contended by the learned counsel for the appellants that the F.I.R was recorded after investigation.

No doubt the formal F.I.R was recorded after the apprehension of the two culprits but it had come in the evidence that the complainant had narrated the occurrence to the police party when he and the latter were chasing the culprits. It could not, therefore, be said that no formal F.I.R was made before any investigation was carried out.

11. The impugned judgment of the learned Additional Sessions Judge discloses very sound reasons for describing each and every aspect of the matter and he had arrived at the correct conclusion in holding the appellants guilty for offences under sections 392, 342 and 411 PPC and has sentenced each of them appropriately and in this respect there is not a single point to disagree with the impugned judgment. However, the learned Additional Sessions Judge could not legally try and convict the appellants under section 13 of the Arms Ordinance, 1965 which had to be taken cognizance of by the Magistrate under the provisions of Arms Ordinance.

12. The net result of the above discussion is that the conviction and sentence of both the appellants as recorded by the learned Additional Sessions Judge is maintained except under section 13 of the Arms Ordinance about which the impugned



judgment and conviction and sentence of Muzahim Shahid's
are set aside with the direction that for the aforesaid offence
they shall be tried by a Magistrate competent to try him
otherwise the appeal is dismissed. The conviction and sentence
of both the appellants are maintained. The substantive sentences
of imprisonment shall run concurrently. They shall also be
entitled to the benefit under section 382-B Cr.P.C.

Fit for reporting.

J U D G E

Announced on 14.6.1994.
at Islamabad.
M.Akram/