IN THE FEDERAL SHARIAT COURT OF PAKISTAN

(Appellate/Revisional Jurisdiction)

PRESENT

MR. JUSTICE SYED MUHAMMAD FAROOQ SHAH
MR.JUSTICE SHAUKAT ALI RAKHSHANI

Crl. Appeal No.01/P of 2019

Younas son of Sardar
Resident of Uthmanzai, presently Corporation Colony, Peshawar.

…..Appellant

Versus

The State

...Respondent

Counsel for Appellant	---	Mian Qamar Gul Kakakhel, Advocate
Counsel for the State	---	Malik Akhtar Hussain Awan, Assistant Advocate General, Khyber Pakhtunkhwa.
Case FIR No, date & Police Station	---	No. 186 dated 28.01.2016 P.S Paharipura, District Peshawar.
Date of impugned Judgment.	---	15.01.2019.
Date of institution	---	01.02.2019.
Date of hearing	---	10.04.2019.
Date of decision	---	10.04.2019.
Date of Judgment	---	17.04.2019.

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JUDGMENT.

SYED MUHAMMAD FAROOQ SHAH, J:- Younas son of Sardar appellant being convict involved in crime report No.186, under section 17 (3) of The Offences Against Property, (Enforcement of Hudood) Ordinance, 1979, lodged at police station *Paharipura*, Peshawar on 29.01.2016, made a prayer that on acceptance of captioned appeal, he may be acquitted of the charges leveled against him.

2. Vide impugned judgment dated 15.01.2019, handed down by the learned Additional Sessions Judge-V, Peshawar, the appellant was convicted under section 395 PPC and sentenced to suffer 10 years R.I with fine of Rs.50,000/-, or in default of payment of fine to suffer 3 months S.I, more; he was also convicted under

section 412 PPC and sentenced to undergo R.I for 10 years with fine of Rs.50,000/-, in default whereof to undergo simple imprisonment for three months more. However, Benefit as provided under section 382-B Cr.P.C was extended to the appellant/accused.

3. Prosecution story in nutshell is that by charging unknown dacoits in the application dated 29.01.2016, addressed to SHO, *Paharipura*, Peshawar, Fayyaz-al-Mola a homeopathic doctor alleged that on 28.01.2016 at 22:20 hours, he was busy in his clinic, situated in Muslim Colony, Street No.3, Peshawar, when a person/patient entered in clinic and told him that he had abdominal pain and asked him to infuse a drip as he could not got relief from medicines prescribed to him earlier. He (complainant) refused to infuse him drip; in the meanwhile, four other dacoits duly armed with pistols entered the clinic, made him hostage by all five persons, three of them made his family hostage, collected an amount of Rs.300,000/- (Rupees three lac) lying on different places and had also taken out Rs.275,000/- (Rupees two lac and seventy five thousands) from medical store, two and a half *tola* (2½) gold ornaments, two cell phones and one DVR screen. Written complaint was incorporated in FIR. On arrest of four accused and on completion of usual investigation, conducted by the concerned police, challan was submitted before the competent Court of law, by showing two culprits to be absconders. Later on, on their arrest, supplementary challan was also submitted by the concerned police.

4. Formal charge against six (6) accused was framed on 05.12.2017, for an offence punishable under section 17 (3) of The Offences Against Property (Enforcement of Hudood) Ordinance, 1979, read with section 412 PPC, to which they pleaded not guilty and claimed to be tried. On commencement of trial, prosecution examined eight (8) prosecution witnesses. On conclusion of prosecution evidence, statement of Younas appellant/accused was recorded under section 342 Cr.P.C. Once again, by professing

innocence, the accused Younas has denied the prosecution evidence with vehemence.

5. Arguments heard. Record perused.

6. Mian Qamar Gul Kakakhel, learned counsel representing the appellant argued that on the same set of evidence, five co-accused had been acquitted by the learned trial Court and on the strength of identical evidence the appellant has been convicted and sentenced, without independent and strong corroboratory evidence brought against him. Learned counsel next contended that the set of evidence which had been disbelieved to the extent of acquitted co-accused could not be believed to the extent of the appellant. To support his contention, learned counsel placed his reliance on ***Muhammad Afzal vs. The State*** **(2017 SCMR 1645)** and ***Munir Ahmad and another vs. The State and another*** **(2019 SCMR 79)**.

7. Conversely, Malik Akhtar Hussain Awan, learned Assistant Advocate General, Khyber Pakhtunkhwa for the State submitted that the complainant had patched-up the matter with five co-accused except the appellant/Younas, which was a major dent in the prosecution case. However, the learned State counsel admitted that no appeal against acquittal of remaining five (5) accused had been preferred by the State.

8. Ocular testimony of the prosecution case hinges on sole evidence of PW-4/complainant Fayyaz-al-Mola, who supported the contents of FIR in his deposition recorded on 19.11.2018, with clarification that since he had patched-up the matter with five accused namely ***Imran, Fayyaz, Sajid, Ibrar and Wali Rehman,*** therefore, he was not willing to prosecute/charge them but intended to charge accused/appellant Younas for commission of offence without mentioning any sufficient reason or cause of making compromise with five co-accused excluding the appellant/Younas. A perusal of record transpires that the learned trial Court on

19.11.2018, recorded the evidence of complainant and on the same day in view of no objection of the complainant, had acquitted five accused namely ***Imran, Fayyaz, Sajid, Ibrar and Wali Rehman,*** by invoking the provision of section 265-K Cr.P.C. However, the case was proceeded and prosecution examined six more formal witnesses. Astonishingly, after acquittal of five accused charge was not amended by the learned trial court and remaining five unexamined prosecution witnesses deposed against all six accused. Admittedly, no specific role in commission of offence had been assigned to the appellant by the complainant; more particularly, the appellant/accused was supposedly known to the complainant, who was patient of the complainant possessing medicine prescription issued by the complainant earlier which certainly bore the name of appellant/Younas. At this juncture, a query has been made by this Court to the adversaries that as to whether parties can be allowed to compound the offences which are not compoundable, by virtue of provisions as contemplated in sub section 7 of section 345 Cr.P.C. Undeniably, both charged offences under section 17 (3) of The Offences Against Property (Enforcement of Hudood) Ordinance, 1979 and section 412 PPC are not compoundable. A non-compoundable offence cannot be made compoundable and it could only be done by the legislature, therefore, knowing willfully that provision of section 345 Cr.P.C could not be stretched by including non-compoundable offence; more particularly, the alleged offences were of grave and alarming nature, against the society as a whole and cannot be permitted to compound, the learned trial Court on the very day of recording deposition of complainant, by consent of the parties had invoked provision of 265-K Cr.P.C and acquitted five accused.

9. Suffice it to say that initially six accused were charged having common role in commission of dacoity; the question arises as to whether the evidence which has been disbelieved to the extent of

five co-accused of the appellant who have been acquitted by the learned Courts below can be believed to the extent of appellant. By now it is well settled principle that "***Falsus in uno, falsus in omnibus***" applicable in our system designed for dispensation of justice in criminal cases, therefore, the evidence disbelieved to the extent of acquitted co-accused of the appellant cannot be believed to the extent of the appellant. Recently, the dictum as laid down by the Hon'ble Apex Court on the subject, in authoritative pronouncement in **Criminal Miscellaneous Application No. 200 of 2019 in Criminal Appeal No. 238-L of 2013,** circulated to the Registrars of all the High Courts in the country with a direction to send a copy of the same to every Judge and Magistrate within the jurisdiction of each High Court handling criminal cases at all levels for their information and guidance.

10. As already discussed, the complainant implicated the appellant as well as acquitted five (5) co-accused and recovery of robbed articles was allegedly made from acquitted accused as well as the appellant. The evidence of complainant who is star witness of the prosecution cannot be considered trustworthy or inspiring confidence beyond shadow of reasonable doubt. In view of the background of the facts and circumstances of the case and the evidence analyzed, we 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. No independent corroboration is available on record for maintaining the conviction and sentence of the appellant, therefore, by short Order, the appeal was allowed; conviction and sentences recorded against the appellant by the learned trial Court were set aside. Resultantly,

the appellant languishing in jail since last more than four years was acquitted from the charge, extending him benefit of doubt.

Above are the reasons of our short Order, announced on 10.04.2019.

JUSTICE SHAUKAT ALI RAKHSHANI
JUDGE

JUSTICE SYED MUHAMMAD FAROOQ SHAH
JUDGE

Islamabad the
17th April of 2019
M.Ajmal/.**

Approved for reporting

Justice Syed Muhammad Farooq Shah