

IN THE FEDERAL SHARIAT COURT
(Appellate/Revisional Jurisdiction)

PRESENT

MR.JUSTICE SHAHZADO SHAIKH
MR.JUSTICE MUHAMMAD JEHANGIR ARSHAD

CRIMINAL APPEAL NO.16/Q OF 2006

Mst. Ghulam Fatima w/o late Muhammad Ramzan, Appellant/complainant
Caste Wazir, resident of Luni Road, Sibi.

Versus

1. The State Respondents
2. Kamal Khan son of Khaliq Dad,
Caste Sharkoon, resident of Luni Road, Sibi.

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Counsel for the Appellant/complainant	Syed Ayaz Zahoor, Advocate
Counsel for the respondent	Mr. Nazir Ahmed Khajjak, Advocate
Counsel for the State	.....	Syed Pervaiz Akhtar Bukhari D.P.G.
FIR No. Dated Police Station	.....	125/2005 Dated 29.12.2005 City, District Sibi.
Date of impugned Order	.....	31.05.2006
Date of Institution of Appeal	.....	05.07.2006
Date of hearing	.....	16.11.2012
Date of decision	.....	16.11.2012

JUDGMENT:

JUSTICE SHAHZADO SHAIKH, J:- Mst. Ghulam Fatima, appellant/complainant has filed Cr. Appeal No.16/Q of 2006 against the Order dated 31.05.2006 passed by the learned Additional Sessions Judge-II, Sibi in Sessions Case No.04/2006 whereby the learned trial Court by accepting application under section 265-K Cr.P.C., acquitted respondent/accused Kamal Khan from the charge under section 17(3) of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979.

2. The brief facts of the case are that complainant Mst. Ghulam Fatima (PW.1) submitted complaint Ex.P/1-A before the SHO Police Station City, District Sibi on 29.12.2005 wherein she stated that on 28th December, 2005 at about 2.00 a.m. she was sleeping in her room by closing the door. Three accused, armed with fire-arms entered her room after breaking the lock and cutting the chain of the door. They attempted to murder her by pressing her throat; removed her gold ear-rings (*Baliyan/Balochi*) from her ears and gold *kangans* from her hands by extending threats to her life. Thereafter, they demanded cash from her. She further stated that she identified one accused as Kamal who was cultivating her agricultural land but could not identify the remaining two accused. Hence FIR No.125/2005 was registered at Police Station City, District Sibi on 29.12.2005 under section 17(3) of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979.

3. Police investigation ensued as a consequence of registration of crime report. Sultan Khan SI undertook the investigation. He inspected the place of occurrence, prepared site plan, recorded statements of the witnesses and sent the complainant for medical treatment. He arrested accused Kamal Khan and

took his physical remand for fourteen days. After completion of the investigation, Challan was submitted before the Court on 13.01.2006.

4. The learned trial Court framed charge against the accused on 03.03.2006 under section 17(3) of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979. The accused did not plead guilty and claimed trial. Therefore, the prosecution was directed to produce its evidence.

5. During the trial, the prosecution got recorded statements of two witnesses i.e. PW.1 Mst. Ghulam Fatima, complainant and PW.2 Muhammad Ramzan. The gist of the deposition of the PWs is as under:-

i) Mst. Ghulam Fatima, complainant appeared as PW.1 and reiterated the same story as she stated in her complaint Ex.P/1-A. She identified the accused, who was present before the learned trial Court.

ii) PW.2 Muhammad Ramzan stated that on 28.12.2005 at 2.30 a.m. her grandmother (Mst. Ghulam Fatima) while crying came to his house and informed that thieves had looted her and stated that the thieves entered the room by breaking the chain of the door. He went to the house of his grandmother and found that the chain of the door was broken. On query, his grandmother informed him that the thieves had forcibly snatched her gold ear-rings and gold *Kangans* and they took away the gold ornaments by cutting with scissors. She further informed him that out of the three accused she identified one person as Kamal Khan accused. He further stated that they reported the matter to the police. Sultan Khan SI reached at the spot, prepared site plan Ex.P/2-A, took into possession scissors through recovery memo Ex.P/2-B, four receipts of stolen jewelery through recovery memo

Ex.P/2-C. He produced recovery memos upon which he identified his signatures as well as the signatures of Shah Jahan.

6. During the trial, when the statements of two witnesses PW.1 Mst. Ghulam Fatima and PW.2 Muhammad Ramzan were recorded, the accused/respondent submitted application under section 265-K Cr.P.C. for his acquittal on 02.05.2006. The learned trial Court, on receipt of application under section 265-K Cr.P.C., gave its notice to the State and the complainant party for arguments and after hearing the arguments of the contending parties accepted the application filed by accused/respondent Kamal Khan under section 265-K Cr.P.C. and acquitted him from the charge, leveled against him vide Order dated 31.05.2006. Being aggrieved by this Order, the complainant Mst. Ghulam Fatima has filed the instant appeal against acquittal of Kamal Khan respondent/accused.

7. Syed Ayaz Zahoor, learned Counsel for appellant/complainant Mst. Ghulam Fatima has formulated the following points:-

i) The learned trial Court has erred in law by accepting the application filed by respondent/accused Kamal Khan under section 265-K Cr.P.C. because only two witnesses were examined at that time and it was not the proper stage to acquit the accused/respondent and the statements of material witnesses had yet to be recorded.

ii) PW.1 Mst. Ghulam Fatima, appellant/complainant had categorically leveled allegations against Kamal Khan, respondent/accused. ✓

- iii) PW.2 Muhammad Ramzan had corroborated the statement of the complainant.
- iv) The complainant had identified accused Kamal Khan, accused/respondent at the spot.
- v) The statements of material witnesses i.e. Shah Jahan regarding recovery memos and the Investigating Officer were not recorded by the learned trial Court.
- vi) Sufficient material is available on the record to connect the accused/respondent with the commission of offence.

The learned Counsel for the appellant/complainant relied on the following case law:-

- i) 2005 SCMR 1544
The State through Advocate General, Sindh Vs. Raja Abdul Rehman
- ii) 2009 P.Cr.L.J 36 [Federal Shariat Court]
Hashim Vs. Gul Muhammad & 2 others

He has prayed that the appeal may be accepted and the case may be remanded back for trial afresh.

8. On the other hand, Mr. Nazir Ahmed Khajjak, learned Counsel for respondent Kamal Khan has raised the following contentions:-

- i) The impugned Order of the learned trial Court is well based on reasons and there is no deficiency in the reasons given by the learned trial Court.

- ii) There are many improvements and contradictions in the statements of the prosecution witnesses.
- iii) The FIR was lodged with an unexplained delay of 15 hours as the occurrence took place at 2.00 a.m. whereas the FIR was got registered at 5.10 p.m.
- iv) Two material witnesses i.e. the complainant Mst. Ghulam Fatima PW.1 and Muhammad Ramzan PW.2 were examined but from their statements no incriminating material came on the record to make basis for probable conviction of the respondent accused.
- v) The remaining witnesses were not of important nature.
- vi) The accused/respondent remained in police custody under physical remand for fourteen days but nothing was recovered from him.
- vii) The occurrence took place in the dark night and it was not possible for the complainant to identify the accused in the darkness.
- viii) Enmity was established between the parties.
- ix) There was no probability of conviction of the accused/respondent, therefore, the learned trial Court has rightly acquitted the accused/respondent by accepting his application under section 265-K Cr.P.C.

The learned Counsel for respondent has referred to the following case law:- ✓

- i) 2012 P Cr.L.J 999
Abdul Razak Gabole & 2 others Vs. The State
- ii) 2006 MLD 1489
Mrs. Naheed Rana Vs. Naheeda Shamim & 3 others

10. Syed Pervaiz Akhtar Bukhari, learned DPG appearing for the State has made the following submissions:-

- i) The judgment of learned trial Court is based on mis-reading and non-reading of evidence.
- ii) The statement of PW.1 Mst. Ghulam Fatima complainant fully implicated the accused.
- iii) The statements of PW.1 and PW.2 are not contradictory.
- iv) The statements of important witnesses were not recorded.
- v) The I/O was not examined at the trial.
- vi) The learned trial Court had decided the application under section 265-K Cr.P.C. at an early stage without giving sufficient opportunity to the prosecution to produce its case.
- vii) According to the learned DPG appearing for State, the order of the learned trial Court is liable to be set aside.

11. We have heard the learned Counsel for the parties at length and perused the record with their assistance. The relevant portions of the impugned judgment have been scanned.

12. The most important witness in this case was Mst. Ghulam Fatima. She got registered the crime report wherein she stated that on 28th December, 2005 at about 2.00 a.m. she was sleeping in her room by closing the door. Three accused, armed with fire-arms entered her room after breaking the

lock and cutting the chain of the door. They attempted to murder her by pressing her throat; removed her gold ear-rings (*Baliyan/Balochi*) from her ears and gold *kangans* from her hands by extending threats to her life. Thereafter, they demanded cash from her. She further stated that she identified one accused as Kamal who was cultivating her agricultural land but could not identify the remaining two accused. However when she appeared at the trial as PW.1 she made many improvements in her statement. She stated that on 28.12.2005 she was sleeping alone in her room while her son had gone to Dera Murad Jamali in connection with his service. Accused/respondent Kamal Khan inquired from her that when her son Shah Zaman would come back from Dera Murad Jamali and she replied that he would come after two days. She further stated that in the night at about 2.30 a.m. three accused persons, armed with fire-arms entered her room, pressed her throat, removed her gold ear-rings and gold *Kangans* by extending threats. She further stated that the accused demanded cash from her upon which she identified accused Kamal Khan but she could not identify the other two accused. The complainant stated in her cross-examination that there were six rooms in her home. She had three sons and they were living in separate house however the courtyard of all the houses was common and it had a common main gate. She admitted in her cross-examination that her house was surrounded with other houses of the neighbours and on her raising alarm her grand-sons, grand-daughters and daughter-in-law were attracted to the spot but it does not appeal to prudent mind that in the presence of so many persons, living within the same compound the accused

could successfully accomplish the offence of this nature and succeed in fleeing away.

13. The complainant stated that she identified accused Kamal Khan at the time of occurrence but she did not disclose as to how she was able to identify him whereas his grand-son Muhammad Ramzan stated that she informed him that she identified accused Kamal Khan from his voice. It is also important to note that entire evidence of Muhammad Ramzan, the grand-son of Mst. Ghulam Fatima, being main witness from her side, was based on hearsay, as he was not the witness of the occurrence/commission of offence. Furthermore, Mst. Ghulam Fatima did not attribute/assign any role to Kamal Khan. She also admitted in her cross-examination that some time before the incident she had a dispute with Kamal Khan on *Buzgari* of land, which was later compromised. It had also come on record that she had got Kamal Khan, her *Bazgar*, arrested earlier also, and she herself had got him released. Hence, enmity was established between the parties. The complainant herself stated that the police reached at the spot within half an hour whereas the crime report was registered at 5.10 p.m. with a delay of 15 hours and no explanation was given by the complainant in this regard.

14. PW.2 Muhammad Ramzan stated that her grand-mother Mst. Ghulam Fatima, complainant informed him that the accused forcibly snatched her gold jewelry by cutting with scissors but the complainant did not state about the scissors anywhere in her statement. This witness also admitted that her grand-mother had a dispute with Kamal Khan respondent/accused on *Buzgari* of land and earlier the accused/respondent was also arrested by the

police on her report. From this also, *enmity is established between the complainant and the accused/respondent. The accused/respondent remained in police custody on physical remand for fourteen days but neither the snatched/robbed articles, nor the alleged crime weapon were recovered from him. The scissors was also not recovered from the possession of the accused Kamal Khan, but was stated to be lying at the place of occurrence and was blood-stained, but the same was not sent for forensic test. The complainant PW.1 and her grand-son Muhammad Ramzan are the main witnesses in this case but there are many improvements and contradictions in their statements regarding the occurrence.*

15. Section 265-K Cr.P.C. does not in express terms lay down any condition for recording statements of all or any of the specific PWs as witnesses. It only refers to the hearing of the accused and the prosecutor. Section 265-K, Cr.P.C. is reproduced below:

265-K. Power of Court to acquit accused at any stage. Nothing in this Chapter shall be deemed to prevent a Court from acquitting an accused *at any stage* of the case; if, *after hearing the prosecutor and the accused* and for *reasons* to be recorded, it *considers* that there is no *probability* of the accused being convicted of any offence.

16. In this regard, following needs consideration:

By enacting Ss. 249-A and 265-K, Cr.P.C the Legislature in its wisdom has not left the question of recording evidence as a condition before taking action under either of the provisions. [PLD 1999 S.C. 1063]

Court has ample powers to acquit accused even if the witnesses are not examined, provisions of S. 265-K, Cr.P.C, are meant to prevent the rigours of a prolonged trial when it is apparent from the record whether there is no probability of the accused being

convicted of the offence. Burden of proof is on the prosecution and where evidence available with it, if at all accepted the same would not be able to establish the charge against accused in the light of required standard of law, recording of further evidence would waste public time and serve no public interest rather on the contrary such futile exercise would prove to be further scandalous to the accused person, who equally deserve justice and fair treatment in all respect. [PLD 2008 Kar. 310]

There is no embargo placed on the power of the Court to acquit the accused at any stage. [2004 P.Cr.L.J. 1071]

Accused can demand his discharge or acquittal during the course of judicial proceedings, under S. 249-A, Cr.P.C. or 265-K, Cr.P.C. [2005 P.Cr.L.J. 2022]

17. However, the case law on the subject is very clear that the trial Court has to satisfy itself on the *probability* or otherwise of the conviction for which it has to give clear reasons in its order.

18. The impugned order dated 31.05.2006 indicates that the learned trial Court has given sufficient reasons that there was no probability of conviction of the accused, as follows:-

“i) Alleged incident took place on 28.12.2005 at 2.30 AM, however, case was registered on 29.12.2005 at 5.10 PM after unexplained and inordinate delay of about 14 hours inspite of the fact the police station situates at a distance of 1½ K.M from place of incident which factum safely shows that registration of case is result of consultation and deliberation to falsely involved accused Kamal Khan in case especially when previous grudge and dispute is an admitted feature of case. PW-1 and PW-2, both candidly admitted suggestion that accused Kamal Khan was Ex-Buzgar of complainant Mst. Ghulam Fatima and dispute arose between them prior to incident which was settled and police also arrested accused Kamal Khan who was later on released on the request of Mst. Ghulam Fatima and although names of accused Kamal Khan is does figure in FIR but

without attribution of specific role which he allegedly played during course of incident and PW.2 admitted a suggestion that he stated in his police statement that his grand-mother Ghulam Fatima identified accused Kamal Khan on the strength of his voice and it is settled principle of law that voice is a weakest piece of evidence and conviction of accused could not be based without corroboration of other supportive piece of evidence and it is inconceivable and a prudent mind even does not accept that accused alongwith his accomplices might have entered into house of complainant while being equipped with weapon and deprived her to her gold ornaments for the reasons that it was brought on record that complainant Mst. Ghulam Fatima reside alongwith her three married sons in same and one courtyard having one and same main gate of compound and it is quite strange that none of inmates of house have witnessed incident with their own eyes or to have witnessed while culprits made good their escape after incident while boundary wall of house are 15 feet in length which was brought on record by PW-1 during cross-examination.

ii) The accused was confined in police custody who was investigating for fourteen days and no recovery was effected to him with regard to removed articles from his possession inspite of the fact that accused was arrest soon after incident while although investigating agency of case took into possession four receipts of gold ornaments which do not transpire ownership of PW-1 Mst. Ghulam Fatima which also do not bear exact particulars of gold ornaments while although complainant Mst. Ghulam Fatima deposed that accused persons forcibly removed two gold ear-rings from her ear and bangles from her wrist, however, receipts so taken into possession do not tally with exact number of gold ornaments and receipt of gold ear-rings and bangles also bear name of Shah Zaman and Muhammad Ramzan. ✓

iii) It is suffice to mention at this juncture that investigating agency of case also not recorded statement of proprietor of gold-smith from where alleged gold ornaments were purchased to prove ownership of complainant Mst. Ghulam Fatima and all above cumulative factors and circumstances shows false involvement and implication of accused facing trial Kamal Khan in instant case for some ulterior motive and there is not eye witness of incident and circumstantial evidence in shape of Muhammad Ramzan could not be based for recording conviction of accused which also smacks and smell from enmity and previous grudge and requirements of law postulated by provision of Article 7 of Qanoon-e-Shahadat Order are also lacking in instant case and I fully concur principle enunciated by Apex forums in above referred reported citations for acquittal of accused Kamal Khan of the charge which are rightly attracted with regard to facts and circumstances which are applied and relied upon with utmost respect and statements of PW-1 and PW-2 also suffers from dishonest improvements, fatal discrepancies and major contradictions which also erased entire prosecution case to the foundation which evidence of such shaky nature could not be based for recording conviction of accused Kamal Khan which also smacks and smells and rest of the witnesses shown in calendar of challan are purely formal in nature whose examination will not improve charge, as a consequences whereof, continuation of further trial amounts to abuse of process law, futile exercise of jurisdiction and mere wastage of time especially when there is no possibility accused facing trial being convicted of offence charged with."

The statement of PW.1 Mst. Ghulam Fatima, complainant in this case, and her grand-son Muhammad Ramzan PW.2 are contradictory on the material points of entry of the accused into the house by breaking or cutting the lock/chain and their leaving the house, lack of descriptions of the stolen/robbed items and convincing evidence regarding ownership and

possession of gold ornaments/case property in the name of Mst. Ghulam Fatima. The record, shows that there is continuing inimical inter-se disputes and relationship between the parties and there is apparent effort of *abuse of process of Court* .

19. For convenience, section 561-A, CrPC., is reproduced below:

561-A. Saving of inherent power of High Court.

Nothing in this Code shall be deemed to limit or affect the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this Code; *or to prevent abuse of the process of any Court* or otherwise to secure the ends of justice.

20. In this regard the reference can be made to the following judgments/case law:-

Proceedings in a criminal trial against an accused can be quashed by High Court under section 561-A, Cr.P.C. where it is established that due to some legal defect in the proceedings accused cannot be convicted at the trial, or the case is of no evidence at all and keeping the matter pending will nor serve any useful purpose which will amount to abuse of process of court. [2005 YLR Kar. 3258 (c)].

To quash a judicial proceeding in order to secure the ends of justice would involve a finding that if permitted to continue, that proceedings would defeat the ends of justice, or in other words, would either operate or perpetuate an injustice. To find an abuse, it would be necessary to see in the proceeding, a perversion of the purpose of the law such as to cause harassment of an innocent party, to bring about delay, or where the machinery of justice is engaged in an operation from which no result in furtherance of justice can accrue, and similar perverse results. [PLD 1965 SC 287 M.S. Khawaja Vs. The State]

It was observed by the Hon'ble Apex Court that the main consideration to be kept in view would be whether the continuance of the proceedings before the trial forum would be futile exercise, wastage of time and abuse of process of Court or not. If on the basis of facts admitted and

patent on record no offence can be made out against the present respondent then it would amount to abuse of process of law to allow the prosecution to continue with the trial against him.

21. In view of what has been discussed above, Criminal Appeal No.16/Q/2006 filed by appellant/complainant Mst. Ghulam Fatima against acquittal of respondent Kamal Khan from the charge under section 17(3) of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979 is dismissed and the impugned Order dated 31.05.2006 passed by the learned trial Court in Sessions Case No.04/2006 is upheld.

22. These are the reasons of our short order dated 16.11.2012.



JUSTICE SHAHZADO SHAIKH


JUSTICE MUHAMMAD JEHANGIR ARSHAD

Dated, Quetta the
16th October, 2012
Imran/*

FIT FOR REPORTING.



JUSTICE SHAHZADO SHAIKH