



**JUDGMENT:**

**SHAHZADO SHAIKH, J :-** This Criminal Appeal filed by the appellants namely 1. Inayat 2. Fawad both sons of Nausher 3. Zarshad s/o Sher Afzal 4. Nazir s/o Uzair and Shahid s/o Iqbal, who were convicted and sentenced by Additional Sessions Judge-III, Mardan vide judgment dated 15.04.2010 under section 20 of Harraba Offence Against Property (Enforcement of Hudood) Ordinance read with section 395 PPC and sentenced to the imprisonment for life each with a fine of Rs:50,000/- each and in default of payment of fine to further undergo 02 years S.I. each and under section 458/149 PPC 05 years R.I. each with fine of Rs:10,000/- each in default of payment of fine to further undergo 06 months S.I. each. They were further convicted under section 411 PPC and sentenced to one year R.I each with a fine of Rs.5000/- in default of payment of fine to further undergo 03 months S.I. each with benefit of Section 382-B Cr.P.C. All the sentences were order to run concurrently.

2. Brief facts of the prosecution case are that on 1.12.2009 at 1200 hours complainant Fazal Maula s/o Muhammad Karim lodged the report at police station Par Hoti, Mardan, stating therein that on the night of 23.11.2009, he alongwith his relatives namely Yousaf Shah s/o Halim Shah r/o Dobain, Iftikhar s/o Ahmad Wali r/o Tor Khan Bhatey were sleeping in a room of the house of complainant, while his mother alongwith his sister, brothers and wife of Iftikhar were sleeping in another room. Suddenly all of them woke up on the knocking at the door of the house and opened the door and saw that 8/9 persons with muffled faces, who were duly armed with pistol and daggers entered into the house, tied the hands of the males behind and closed them in the room and started searching the house as a result of which they took away cash amount of Rs.70000/- alongwith gold ornaments weighing 3 and half tolas in the shape of a locket, ear rings and finger rings three in number, 3 mobile phones Nokia with one China mobile set, one CPU, one pistol 30 bore, one woolen *chadder* and one 12 bore rifle single barrel. After that the

complainant narrated the incident to his uncle namely Muhammad Zareen and charged the unknown accused for commission of the offence, hence this case.

3. The case was duly investigated; some of accused were arrested and statements of the PWs were recorded under section 161 Cr.P.C. After investigation, challan was submitted in the court under section 173 Cr.P.C. against the arrested accused to face the trial. The learned trial court framed charge against the arrested accused on 26.3.2010 and 10.4.2010 respectively.

4. The prosecution in order to prove its case produced eleven witnesses as well as one S.W. (Process Server) at the trial. The gist of the evidence of prosecution witnesses is as follows:-

PW-1 Fazal Maula, complainant of this case narrated the same facts as mentioned in the crime report. He further narrated that he had not charged anyone in his report. Later on, he was in search of the accused and came to know from different persons and through his secret inquires that the offence was committed by the accused Shahid, Inayat, Fawad, Zarshad, Nazir and

Murad Ali with the connivance of Mst.Amina alongwith the absconding accused Shah Faisal, Zafar Iqbal, Umar Sajjad and Umar Gul. He charged the accused for the offence committed by them. He had also pointed out the place of occurrence to the Investigating Officer, who prepared the site plan.

PW-2 Yousaf Shah is an eye witness of this case, who narrated the facts of the case on the same lines as narrated by the complainant in his deposition. He further stated that later on, the complainant charged all the accused in his supplementary statement which he came to know through different sources. In his cross examination he admitted that as the faces of accused were muffled and their identification was not possible.

PW-3 Haji Muhammad Zareen is uncle of the complainant to whom the complainant informed about the occurrence in the first instance. He stated that complainant was residing separately from him but in the same Mohalla. He came to know regarding the occurrence at Fajr Azan Vela and went to the house of complainant and found that certain articles were stolen away. In this situation he alongwith Fazli Moula went to the police station and lodged the

report regarding the incident. He narrated that they thought that the case had been registered but after 2/3 days of occurrence they came to know that their case was not registered in the police station. After that, they approached the higher authority, then the present case was registered and Shahenshah SHO was transferred.

PW-4 Manazir DFC is a formal witness regarding warrant of arrest under section 204 Cr.P.C. against the absconding accused and likewise he was entrusted with proclamation notice u/s 87 of Cr.P.C. against the accused persons.

PW-5 Muzummil Shah ASI, is also a formal witness who lodged the FIR which is Ex.PA.

PW-6 is Janzada Khan SHO who arrested Mst.Amina accused on 14.12.2009. He also arrested Zarshad accused on 15.12.2009. After their arrest both the accused were handed over to I.O. namely Azam Khan SI for investigation. After completion of investigation, this PW submitted complete

challan against the accused on 4.2.2010. He also arrested Murad Ali accused on 20.3.2010 and handed him over to I.O. for investigation and on 24.3.2010 this PW submitted the supplementary challan of said accused.

P.W-7 Muhammad Arif Constable is the marginal witness of recovery memos Ex.PW-7/1 to Ex.PW-7/7 vide which the I.O. recovered stolen articles as well as crime weapons from the accused persons and took the same into possession.

✓ P.W-8 Mian Mazhar Khan SHO who arrested the accused Inayat on 9.12.2009 and handed over the said accused to police station Par Hoti for investigation.

P.W-9 Muhammad Azam Khan Sub Inspector is the first Investigating Officer of this case, who narrated the facts regarding investigation of this case. He also narrated the facts regarding recovery of stolen articles from possession of the accused. After his transfer the case was entrusted to another Investigating Officer for conducting further investigation.

PW-10 Sardaraz Khan S.I. is another Investigating Officer of this case who completed the investigation of this case and handed over the case file to SHO for submission of challan.

PW-11 Fazal Mahboob, goldsmith is a hostile witness , who stated that Sajjad came to his shop, Rozi Market, situated at Sakhakot and gold ornaments weighing 3 and a half tola were in his possession. This PW had purchased it at the rate of Rs:27000/- per tola, for which he paid him Rs:94500/-. He further narrated that when the police came to his shop and asked him regarding the gold ornaments he handed over the said gold in melted position to the police.

Zubair DFC appeared as SW-1, who narrated the details regarding the warrants of arrest against the absconding accused.

5. The appellants in their statements under section 342 Cr.P.C, denied the allegations of the prosecution and pleaded innocence.



6. After hearing both the parties learned trial Court convicted and sentenced the appellants as mentioned in opening para of the judgment.

7. We have heard learned counsel for the parties at length who let us through entire record of the case. Evidence of the prosecution witnesses as well as statements of accused have been perused. The relevant portions of the impugned judgment have been scanned.

8. During the course of arguments Mr. Talat Mehmood Zaidi, Advocate learned counsel for the appellants Shahid and Fawad contended that FIR was lodged after 08 days from the occurrence. The delay in lodging FIR was not properly explained. The accused stated to be muffled but no structural description of accused has been given in the FIR. In such situation it is not possible to identify the accused; inspite of the fact that FIR was lodged with delay of 08 days. Later on the appellants were involved in this case after due deliberation through supplementary statement of the complainant only to fulfill the lacuna in the case; despite the fact that appellant was living in the neighbourhood to the complainant and complainant had known them prior to

this occurrence; no source of information in respect of accused has been explained by the complainant as faces of the accused were muffled, therefore, identification parade of accused was necessary, as such this case is of no evidence. He further argued that the identification of the stolen articles has not been held which was necessary under the law and the stolen articles have not been identified by any of the prosecution witness, all the recovered articles are planted as the same are easily available in market, description of currency notes recovered from the accused has not been given by the prosecution. He further contended that requirement of illustration (a) of article 129 of Qanoon-e-Shahadat has not properly been taken into consideration by the trial Court because alleged recovery has been effected after about 20/22 days. Statement of Fazl Mehboob under section 164 Cr.P.C. has no legal value because it has not been recorded in accordance with law after fulfilling all the legal formalities which was necessary for this purpose, the Magistrate who recorded the statement was not produced as a witness by the prosecution before the trial Court. The pointation of place of occurrence has no legal

value because the Investigating Officer had already prepared the site plan of place of occurrence prior to arrest of accused.

9. Learned counsel placed reliance on following case law in favour of his contentions.

- i. SCMR 1995 pg 1350 (Falik Sher Vs. The State.)
- ii. YLR 2008 pg 2669 (Muhammad Tahir Vs. The State)
- iii. YLR 2008 pg 1755 (Nasir Mehmood Vs. The State)

10. Mr. Qausain Faisal Mufti, Advocate learned counsel for the appellants namely Inyat, Zarshad and Nazir contended that there is no distinction mark of recovered stolen properties, and illustration (a) of Article 129 of Qanoon-e-Shahadat has not been taken into consideration properly. He further argued that record shows that signatures of PW-7 namely Muhammad Arif differ on recovery memos; this fact goes against the prosecution.

11. Learned counsel placed reliance on the following case law in favour of his contentions.

- i. SCMR 1997 pg. 971 (Farhan Ali Vs. The State)
- ii. SCMR 1984 pg. 930 (Muhammad Iqbal Vs. The State)

iii. SCMR 1995 pg. 1350 (Falak Sher Vs. The State)

iv. NLR 1989 pg 341 (Muhammad Luqman Vs. The State)

v. SCMR 1971 pg 955 (Bahadar Khan Vs. The State)

12. Mr. Muhammad Saleem Mardan, Advocate, learned counsel for the complainant, contended that the complainant was minor at the time of occurrence and he is a labourer (generator mechanic). While he was sleeping in his house alongwith his family members when gang of the desperate and hardened criminals armed with deadly weapons entered into his house at mid-night and committed the offence in a barbaric manner and robbed the house. In such situation the complainant straightway informed about the incident to his uncle and lodged the report properly before the police, but the police did not lodge his report regarding the occurrence and delayed the matter deliberately but after interference of the higher authority, this case was registered, resultantly the SHO who was giving favour to the accused was transferred due to procession of locality; this occurrence has been duly supported by the recoveries of the robbed cash amount, gold ornaments which were sold by Shahid and Sajjad (absconder) to goldsmith who had melted the

same and narrated this fact before the Magistrate in the shape of his statement under section 164 Cr.P.C. The delay in lodging the FIR has been properly explained by the complainant, in fact the complainant proceeded to the police station to lodge the FIR but unfortunately his report was not lodged by the concerned SHO. Although there is slight difference between the signatures of PW-7 who was witness of the recovery memos but the defence should have verified the signature from signature expert, if they had any objection. Lastly, he prayed that prosecution has successfully proved its case beyond reasonable doubt. He also contended that there was no enmity between the parties to fabricate the false case against the appellants. Hence, the conviction and sentences passed by the learned Addl: Sessions Judge-III, Mardan may be maintained.

13. Learned counsel for the State on the other hand opposed the appeal and supported the judgment under challenge and arguments advanced by the Counsel for the complainant.

14. We have carefully analyzed the arguments of the learned counsel for the appellants as well as learned counsel for the complainant and learned counsel for the State in the light of evidence on record.

15. It transpires from the record that occurrence took place on 23.11.2009 and FIR No. 138 was registered at police station Par Hoti, Mardan on 1.12.2009. Delay in lodging the matter has not been explained fully and description of culprits has not been mentioned in the FIR. In such situation identification test of the accused persons became necessary in the case.

✓ Holding of such test is a check against false implication and it could be a good piece of evidence against the genuine culprits. Holding of identification parade cannot be dispensed with, simply because the persons accused of committing the robbery, had subsequently been found in possession of the robbed articles. So far as the recovery of crime pistol is concerned from the possession of the appellants, it was doubtful as it was not made in the presence of any independent witness nor the specification as to the weapons allegedly used in the commission of offence was given in the FIR and

supplementary statement. The complainant had not explained the specific role played by the accused during the incident as it was not reported as to what role was played by each one of the accused. Names of the appellants do not appear in the FIR. Complainant Fazal Moula stated that he had not named the appellants in the FIR but later on when he was in search of the accused, he came to know from different sources and through secret inquiries, that the offence was committed by the present appellants and he had charged the accused through his supplementary statement. It is clear that many improvements have been made by the complainant at the time of his supplementary statement for involving the appellants in the case and no reliance can be placed on such type of statements. Evidence in respect of the appellants, Inyat, Fawad, Zarshad and Nazir is also not established. This aspect of the case was not examined properly by the trial court. Admittedly, no specific role is attributed to any appellant and only presence of the appellants at the place of occurrence has been stated by the complainant. The allegation against the appellants that they were present at the place of

occurrence seems to be incorrect. PW-2 stated that he, Fazal Moula and Iftikhar were sleeping in one room but after occurrence when the culprits left from their house, they did not make any hue and cry, which is very strange and creates reasonable doubt as three male members were present on the spot, besides ladies and children. Despite the fact that the alleged culprits had been living in their neighbourhood, but they had not been identified during the occurrence. During the occurrence they had not made any struggle to save their house from robbery as it is stated that one 30 bore pistol and one 12 bore single barrel gun was available in the house. It has been stated that hands of male members were tied and they were closed in one room. But it is strange that other members of the family did not untie their hands. There is complete silence as to how they got the door opened, if they did not raise any hue and cry, or if the door was not closed from outside, it seems strange that all of them remained quite all along. Under the circumstances, the statement of this PW is not natural. The occurrence took place at about mid night on 23.11.2009 and the FIR was lodged on 1.12.2009 after about 08 days,



although the police station was not far from their house and the complainant Fazli Moula has not given any reasonable explanation of this inordinate delay in his statement. He stated that after the occurrence he was in search of the accused, which is not satisfactory at all.

16. In this view of the matter , we are of the considered view that offence under section 20 of Harraba Offence Against Property (Enforcement of Hudood) Ordinance read with section 395-PPC and section 458/149 PPC is not proved from the evidence available on record, as there are many contradictions and doubts to extent of appellants namely 1. Inayat 2. Fawad both sons of Nausher 3. Zarshad s/o Sher Afzal 4. Nazir s/o Uzair, who were convicted and sentenced by Addl: Sessions Judge-III, Mardan vide his judgment dated 15.04.2010 under section 20 of Harraba Offence Against Property (Enforcement of Hudood) Ordinance read with section 395 PPC and sentenced to the imprisonment for life each with a fine of Rs:50,000/- each in default of payment of fine further undergo 02 years S.I. each and under section 458/149 PPC 05 years R.I. each with fine of Rs:10,000/- each in

default of payment of fine to further undergo 06 months S.I. each. They were further convicted under section 411 PPC and sentenced to one year R.I each with a fine of Rs.5000/- in default of payment of fine to further undergo 03 months S.I. each with benefit of Section 382-B Cr.P.C. They are, therefore, acquitted by giving the benefit of doubt to the charge to the extent levelled against them. They shall be released forthwith if not required in any other case.

17. While appeal to the extent of appellant Shahid s/o Iqbal, it is dismissed, as sufficient evidence linking the appellant/accused with the offence is available on the record. Fazal Mehboob PW-11 appeared before the Judicial Magistrate, Mardan on 23.12.2009 and got recorded his statement under section 164 Cr.P.C. after fulfilling all the legal formalities. He categorically stated in his statement that he was running the business of jewelry where 15-16 days before recording of his statement Shahid and Sajjad came to his shop, Rozi Market, Sakhakot. They gave him gold ornaments i.e. one necklace, one pair of ear rings, three finger rings weighing 3 and half tola

for sale, which he purchased from them at the rate of Rs.27000/- per tola and paid them the total amount of Rs: 94500/- in cash. The said gold ornaments had been melted and converted into metal, which he had handed over to the Investigating Officer, who took it into the possession. He further stated that he had no knowledge that the said gold ornaments were the stolen property. However, during his deposition before the learned trial Court, he named only Sajjad, whereas he did not name Shahid, whom he had fully involved in association with Sajjad in his statement before the Judicial Magistrate under Section 164 Cr.P.C., which was recorded after fulfilling all legal requirements, out of his free will, and duly signed by him before the Magistrate. He maintained his statement about Sajjad, who is absconder, as at least for the time being, he was not facing him. Therefore, Fazal Mehboob PW-11 was declared hostile. It is, therefore, important to analyze conduct of Fazal Mehboob PW-11, in this respect. The first and foremost source of information for the complainant was Fazal Mehboob PW.11 from whom the complainant came to know regarding sale and purchase of his robbed gold and after having information the complainant straight away informed the

police about the accused, and in such a manner the complainant had not concealed any thing from the police and this action of the complainant was after his due satisfaction that he named the accused for occurrence. This assertion of the complainant was duly corroborated by the robbed gold ornaments which were traced to have been sold by accused Shahid with his companion Sajjad to the goldsmith at Malakand agency and the goldsmith had melted the same. The goldsmith categorically stated in his statement before Magistrate under section 164 Cr.P.C. that he had purchased the gold ornaments of the descriptions (as given by the complainant also) weighing about 3½ tolas from Shahid and Sajjad at the rate of Rs.27,000/- per tola and also paid total amount of Rs.94,500/- in cash to the accused. The said goldsmith further stated that he melted the gold ornaments and later on when the police came and inquired from him about the above-said robbed ornaments, he handed over the said gold in melted form to the police. This fact was duly corroborated by Muhammad Arif PW.7, witness of recovery memo Ex.PW.7/6 whereby the police took into possession 3½ tolas melted



gold. Furthermore the police also recovered Rs.5,000/- from Shahid accused vide recovery memo Ex.PW.7/5.

18. House trespass, dacoity or Harraba, is admittedly vocation of hardened criminals, as also argued by the learned counsel for the complainant. Historically and in criminology these crimes are treated as heinous by all important religious and secular legal systems. In such offences, offenders are always, as in this case, fully armed and could go to any extent, including murder. It is not easy to stand witness against them. Retraction by witnesses when they come face to face with such criminals during identification or trial before court, as in this case, is not very rare. Fazal Mehboob PW-11 refrained from naming Shahid but maintained his earlier statement against Sajjad only without giving plausible reason about such a partial withdrawal. He did not challenge any lapse in recording his earlier statement, non-compliance of legal procedure, or any pressure or suggestion when name of Shahid was mentioned by him. He did not challenge his signature. Both of these names of accused were mentioned by him in the same statement under one signature duly attested by

the Magistrate, as a full document. Conduct of the Magistrate was also not challenged. No allegation of enmity of Magistrate or anyone else connected with the process of such recording, against Shahid, was made. Furthermore, if the story was false, he would not have returned/given the gold without any contest. Items and weight of gold ornaments were not disputed, if any of these items was different from the items reported in the FIR. Shahid was nominated, charged and linked with the stolen property, and also named by independent witness Fazal Mahboob with whom no enmity was claimed. Therefore, conviction and sentences of appellant Shahid S/O Iqbal, as awarded by Additional Sessions Judge-III, Mardan, under Section 20 Harraba of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979 read with section 395 PPC, for life imprisonment with fine of Rs.50,000/- or in default of payment of fine to further undergo two years S.I, under section 458/149 PPC for five years R.I. with fine of Rs.10,000/- or in default thereof to further undergo six months S.I. and under section 411 PPC for one year R.I. with fine of Rs.5,000/- or in default thereof to further undergo three months S.I. are maintained. Benefit under section 382(B) Cr.P.C. as allowed

by the learned trial Court is also maintained. All the sentences shall run concurrently. The direction of learned trial Court for issuance of perpetual warrants of arrest against proclaimed offenders Shah Faisal, Sajjad alias Sajid, Zafar Iqbal, Umar and Ajab Gul is upheld.

19. These are reasons of our short order dated 09-09-2011.

  
  
**JUSTICE SHAHZADO SHAIKH**

  
  
**JUSTICE RIZWAN ALI DODANI**

Islamabad, the  
09 September, 2011  
Zain/\*

**FIT FOR REPORTING.**

  
  
**JUSTICE SHAHZADO SHAIKH**