

IN THE FEDERAL SHARIAT COURT

(Appellate /Revisional Jurisdiction)

PRESENT

MR.JUSTICE DR.FIDA MUHAMMAD KHAN

MR.JUTICE RIZWAN ALI DODANI

CRIMINAL APPEAL NO. 9/I OF 2012 LW.

1. Noor Ullah s/o Ghulam Nabi r/o Gharib Abad ... Appellants
Badaber Peshawar
2. Shamaz Gul s/o Baharuddin r/o Haider Colony,
Peshawar
3. Amirzada s/o Ghulam Nabi r/o Gharib Abad
Peshawar

Versus

1. The State ... Respondents
2. Rahim Gul s/o Toor Gul r/o Javid Town
House No.55, Gulbahar No.4 Peshawar

CRIMINAL REVISION NO.1/I OF 2012

Rahim Gul s/o Toor Gul r/o Javid Town ... Petitioner
House No.55, Gulbahar No.4 Peshawar

Versus

1. Noor Ullah s/o Ghulam Nabi r/o Gharib Abad ... Respondents
Badaber Peshawar
2. Shamaz Gul s/o Baharuddin r/o Haider Colony,
Peshawar
3. Amirzada s/o Ghulam Nabi r/o Gharib Abad
Peshawar
4. The State

Counsel for the appellant s ... Mr.Hussain Ali, Advocate

Counsel for the complainant ... Mr.Munir Hussain, Advocate

Counsel for the State ... Mr.Aziz -ur-Rehman, Advocate
on behalf of KPK

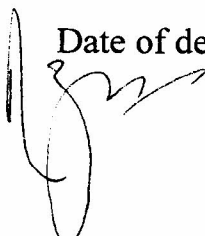
FIR No. Date and ... No.875 dated 14.11.2010,
Police Station P.S. Gulbahar Peshawar,

Date of Judgment of ... 27.02.2012
trial Court

Date of Institution of Appeal ... 10.03.2012 and
& Revision in FSC 26.4.2012 respectively

Date of hearing ... 11.07.2012

Date of decision ... 11.07.2012



JUDGMENT

RIZWAN ALI DODANI, J:- This Criminal Appeal preferred by Noorullah s/o Ghulam Nabi, Shamaz Gul son of Baharuddin and Amirzada son of Ghulam Nabi against the judgment dated 27.02.2012 passed by the learned Additional Sessions Judge-I/Judge Special Court, Peshawar, whereby they were convicted under section 395-PPC and sentenced to 10 years R.I. each with fine of Rs.50,000/- each or in default thereof to further undergo 6 months S.I. Benefit of section 382-B Cr.P.C. has been extended to the appellants.

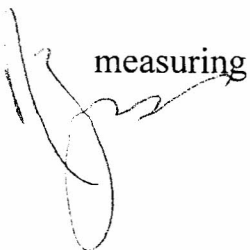
Rahim Gul, complainant also filed Cr.Rev.No.1/I of 2012 for enhancement of conviction and sentences of the above said appellants. Farooq accused convicted Under section 411 PPC and sentenced to 2 years R.I. with fine of Rs.20,000/- or further undergo to 2 months S.I. but he has not filed any appeal.

2. Brief facts of the case as per FIR Ex.PA registered on the basis of Murasila Ex.PA/1 are that, on 14.11.2010 at 1.40 hours, complainant

Rahim Gul son of Toor Gul reported to the local police that, he alongwith

his family members were sleeping in his home, when five persons, whose faces were muffled, and duly armed with firearms weapons entered into his home. This woke him up and on seeking them, one of the accused hit him with iron rod causing injuries on his head, nose and other parts of his person. Later-on, they tied him up with telephone wire, and searched his house, where after, the culprits took away 22 Tolas of golden ornaments, cash amount of Rs.200,000/- two lac, 30 bore pistols and two mobile sets (one Nokia and the second China made), and thereafter, they decamped from the spot.

3. Investigation of this case was assigned to Arab Nawaz, CIO PW-7; Police Station Gulbahar, District Peshawar after registration of the FIR. He went to the spot where he prepared the site plan Ex.PW.7/1 at the instance of the complainant. During such visit, he took into possession blood from the spot through tissue paper vide recovery memo Ex.PW.1/1. Similarly, he also took into possession vide recovery memo Ex.PW.1/2 blood stained shalwar half white, Banyan white colour, one telephone wire white colour measuring 5 foot 7 inches, one empty mobile box regarding mobile phone



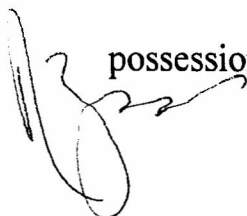
set China made double SIM bearing IMEL numbers 354446030219262 and 354446030229469, one photocopy of license already Ex.P6 regarding the snatched pistol 30 bore number 31038950, and license copy No.7400DCPR dated 6.6.1995 produced by the complainant. He also recorded statement of the only eye-witness Mst. Musarat Bibi wife of the complainant. He had received medico-legal report of the injured complainant. During the course of investigation, the informer informed him that, accused Amir Zada etc had committed the offence. It also came to his knowledge that, at the time of arrest of the accused Noorullah, the SHO had recovered from his possession mobile set China made dual SIM. On dialing the IMEI number as existing on the mobile box; the same appeared on the screen of the set. After detection of IMEI number on the recovered mobile set, the accused was confirmed to had been involved in the present case. During further interrogation, accused Noorullah, Ameer Zada and Shamaz Gul led him in police custody to the shop of accused Farooq, where accused Noorullah pointed to the said Farooq Jeweler present there. The accused Farooq

produced, from a drawer two gold earrings (Jhumkay), one gold necklace,

one gold Chain locket in the name of Rahim Khan inscribed thereon, one gold locket without chain, two gold earrings (Kantay), two gold finger rings and after weighment the gold ornaments were found to be 7 Tolas 1-1/2 Masha, which were taken into possession vide recovery memo Ex.PW.1/4. He arrested accused Farooq Under section 412 PPC, and prepared his card of arrest which is Ex.PW.7/3. He prepared the sketch of shop of the accused Farooq which is Ex.PW.7/4.

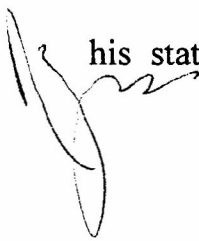
Accused Noorullah led the police to his residential room in house and wherefrom a box, lying under his bed, produced two gold bangles (Kangan) which were taken into possession vide recovery memo Ex.PW.3/2. He also prepared house sketch of accused Noorullah Ex.PW.7/5.

Accused Amir Zada also led the police to his house and as a result, the accused from room in his house delivered two gold bangles (Kangan), one mobile set Nokia and 30 bore pistol bearing No.31038950, which were taken into possession vide recovery memo Ex.PW.5/1. Since he was in possession of the photocopy of the license of 30 bore pistol produced by



the complainant, he tallied the pistol's number with the number mentioned in the license, and found them same.

Accused Shamaz Gul also took the police to his house for the recovery of snatched articles. There from he produced two gold bangles (Kangan), a small gold finger ring, one 30 bore pistol with a number erased/cut, and cash amount of Rs.40,000/- of different denominations. He took into possession above articles and amount vide recovery memo Ex.PW.7/7. The witness further told that he had sent to the FSL through application Ex.PW.7/9 the blood stained Banyan and shalwar of the complainant for opinion which was received with positive result, and the same is Ex.PW.7/10. The complainant on 06.12.2010 identified all the recovered articles as his and snatched property and which for the identification memo was prepared as Ex.PW.7/13. He then recorded supplementary statement of the complainant, wherein, he nominated the accused facing trial as culprits. He also produced the complainant on 07.12.2010 before the learned Judicial Magistrate Ist Class for recording his statement under section 164 Cr.P.C. Ex.PW.6/1 vide his application



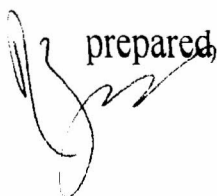
Ex.PW.7/14. After completion of the investigation, he handed over the file to the SHO for submission of challan.

4. The accused were formally charge under section 17(2) and 3 Harraba, 412 and 411 PPC on 11.3.2011 to which they pleaded not guilty and claimed trial.

5. The prosecution has produced 09 witnesses at the trial to prove its case. The gist of these witnesses is as under:-

PW-1 Muhammad Riaz Khan, SI stated that on 14.11.2010 he visited the spot alongwith CIO/Investigation Officer and in his present, the I.O had recovered blood through tissue paper Ex.P1 from the place of occurrence and sealed the same into a parcel affixing 3/3 seals in the name of NZ monogram vide recovery memo Ex.PW.1/1. Similarly, on the same day, the complainant of the present case handed over to the I.O. on the spot one Shalwar Ex.P2, one Banyan Ex.P3 blood stained, one telephone wire white colour Ex.P4, one empty packing box of China mobile set having IMEI number Ex.P5, one photocopy of license of 30 bore pistol Ex.P6. In this respect the I.O. prepared recovery memo which is Ex.PW.1/2 and sealed the Shalwar and Bunyan in parcel No.2 by affixing 3/3 monograms of NZ on it.

The witness further stated that appellants Noor ullah, Amir Zada and Shamaz Gul and led the police party to the spot, and pointed out the place of occurrence. In this respect pointation memo was prepared, which is Ex.PW.1/3. The I.O. had also taken

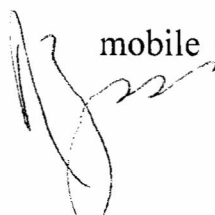


into possession golden ornaments presented by Farooq gold smith which consisted of 02 earrings Exp7, one necklace Ex.p8, one locket bearing the name of Rahim Khan in English letter and one locket without chain Ex.P.10 two earrings (Kantay) E.P11, two finger rings Ex.p12 which were weighed and found 7 tolas and 1-1/2 Mashas vide recovery memo Ex.PW.1/4. The I.O. also recorded his statement u/s.161 Cr.P.C.

PW-2 Atiq Shah, SHO deposed that on 3.12.2010 he arrested accused Amir Zada, Noorullah and Shamaz Khan and recovered from personal possession of Amir Zada one pistol alongwith 8 rounds, from accused Shamaz one 30 bore pistol having magazine containing 8 rounds and similarly, from accused Noorullah he had recovered one mobile phone China double SIM. He prepared recovery memo Ex.PW.2/1 and prepared card of arrest which is Ex.PW.2/2 .He prepared a Roznamcha report in the shape of Mad No.17 which is Ex.PW.2/3. After completion investigation, he submitted complete challan against the accused.

PW-3 Sartaj, SI appeared as PW-3 and stated that on 14.11.2010 the complainant reported the matter to him which is reduced into the shape of Murasila Ex.PA. He also prepared the injury sheet of complainant Rahim Gul which is Ex.PW.3/1 and sent the injured to Lady Reading Hospital, Peshawar for treatment.

PW-4 Shabir Hussain Muharrir appeared as PW-4 and stated that he is a marginal witness to the identification memo Ex.PW.4/1;vide which, in his presence, the complainant identified the snatched but recovered property which consists of gold ornaments of different shapes, two mobile set and two .30 bore pistols as his ownership.



The witness verified the document as well as his signature over it as correct.

- PW-5 Sahar Gul, constable appeared as PW-5 and stated that he is a marginal witness to the recovery memo Ex.PW.5/1 vide which, the I.O. had taken into possession two gold bangles Ex.P4, one mobile Nokia set and one .30 bore pistol Ex.P15, which were handed over by accused Amir Zada, when had led the police party to his house.
- PW-6 Rahim Gul, complainant appeared as PW-6 who stated that in his statement as such reiterated the said story involving the occurrence as reflects in the FIR Ex.PA. His statement u/s.164 Cr.P.C. has also been recorded by Judicial Magistrate.
- PW-7 Arab Nawab, Chief Investigation Officer (CIO) appeared as PW-7 and his role as investigation officer has also been mentioned in para No.3 of this judgment.
- PW-8 Dr. Ghulam Qadar, appeared as PW-8 and stated that on 14.11.2010 at 2.40 am he examined Rahim Gul s/o Toor Gul aged about 38 years r/o Gulbahar No.4 and found the following:-

“On examination the patient was conscious. One small lacerated wound on nasal bridge 1cm, one lacerated wound on scalp 1.5 cm and bruises on back posteriorly on chest.

Advised X-Ray, referred to CTW+Neuro Surgical Ward +ENT Ward+ Radiology Department.

Time between injury and examination is 1 to 2 hours. Kind of weapon was blunt.

Note: According to Radiologist/SR (Senior Registrar) opinion of LRH Radiology Unit, the nasal bone shows fracture in the X-Ray.

Radiology opinion that the nature of injury is



grievous. The injury sheet and medico-legal report is Ex.PW.8/1.”

PW-9 Amir Siyaf Khan, SI appeared as PW-9 and stated that on receipt of Murasila Ex.PA/1, he correctly incorporated its contents in the shape of FIR Ex.PA.

6. After close of prosecution evidence, the statements of the accused were recorded. The accused neither opted to make their statements under section 340(2) Cr.P.C. nor produced any evidence in their defence. In reply to question “why this case against you and why PWs had deposed against you all the accused stated the same as follows:-

“All the PWs are police officials and they are interested in the success of prosecution case. They are innocent and falsely been charged in the instance case”.

7. Learned SPP for the State and learned counsel for complainant jointly close the prosecution evidence in the instant case on 10.5.2011.

8. APP for the state abandons PW Zalo Khan Constable and PW Amjad Ali Khan, ASI being un-necessary.

9. The learned counsel for all the appellants argued that the complainant Rahim Gul lodged the FIR wherein he stated that the

offenders were muffled faces, however, he stated that he could identify

them, but no descriptions were given by him nor the identification parade was conducted, so the accused/appellants were not identified by the complainant at any stage. He further argued that no one has seen the occurrence and the appellants were arrested by the police on alleged tip of their informer and that only after their arrest they called the complainant for alleged identification of the stolen articles and not for the identification of the culprits. The significant aspect of this case he argued, that the prosecution case solely hinges on the witnesses/Mushirs of recovery of stolen articles but strangely no pain or effort was bore by the prosecution to produce any independent witnesses and that all the Mushirs in this regard are police officials. He relied upon PLD 2008 Lahore 470 (Wallayat Vs. The State) with regard to his ground as to identification of stolen property and he also referred to volum No.3 of Chapter 11, part-C of Lahore High Court rules.

10. On the other hand the learned counsel for the complainant submitted that the stolen property was recovered from the appellants/accused on their

pointation such as Rs.40000/- out of stolen amount of Rs.200,000/- was

recovered and 15.5 tolas out of 22 tolas of stolen gold have also been recovered besides mobile phone and pistols from the accused persons.

11. It has also submitted by the counsel that all the recovered articles were returned to the complainant on superdari vide trial Court order dated 22-12-2010. He lastly argued that conviction was rightly awarded to the appellants by the trial Court, moreso, he emphasised that their sentences may be enhanced as under the facts and evidence the appellants deserve for maximum imprisonment as prescribed under the law.

12. The learned counsel for the State adopted the arguments of the counsel for the complainant and supported the impugned judgment.

13. We have gone through the relevant record and the portions of the impugned judgment with the assistance of the counsel of the parties and heard their arguments as well. As regards the arguments of the counsel for the appellants/ accused that there is no eye witness of the occurrence in any manner whatsoever except the complainant who too while lodging the report stated that the accused were with muffled faces and as such the

prosecution case solely hinges upon the alleged recovery of stolen property

from the appellants on their pointation, we are convinced with it that per

prosecution case this is the sole connection between the guilt and culprits.

So the witnesses of the recovery of the stolen property are the key

witnesses of the prosecution. Therefore, the credibility and worth of

credence of these witnesses have to be seen and scrutinized from every

reasonable aspect with great care. In this regard prosecution has produced

Muhammad Riaz (PW-1), Sartaj (PW-3) Sahar Gul (PW-5) and the I.O.

(PW-7) as well at the trial. That as per record all these three prosecution

witnesses happened to be police officials, though there is no cavil to say

that police officials are good witnesses, as also held by the August

Supreme Court in its most of the judgments, however, looking at the nature

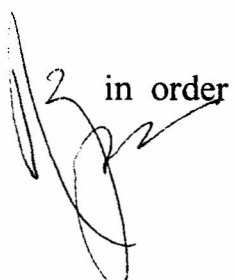
and circumstances of each case where no other set of evidence is available,

in the interest of safe administration of justice reliable corroboration is

required to reach the just conclusion of the decisions. In the instant case

also prosecution was required to meet the given circumstances and facts of

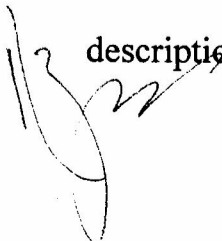
the case by adhering to the demanding legal and evidentiary requirements

 in order to make out the prosecution case reasonable and presentable.

That under article 40 of Qanun-e- Shahadat Order, 1984 such facts or information as disclosed by accused during investigation in custody of the police which relates to incriminating material not known to the police earlier is admissible, therefore to have maximum benefit of this statutory exception prosecution is expected to put every efforts in order to make it transparent, reliable and fool proof. That as deposed by the I.O. (PW-7) that he has informed the local police before hand to be present at the time of pointation but strangely no police official was also cited as musher from that police station. So when the case according to its facts and circumstances depends only upon the witnesses of recovery then heavy duty was cast on the prosecution to make such evidence transparent and reliable, seemingly there appears no effort on part of the prosecution with regard to this aspect. In the given situation we are of the view that how so credible the testimony of these three police officials as well as the I.O. are but without having found any independent or reliable corroborative nature of evidence it would not be safe to make such

evidence a basis for the conviction especially when no reason in this regard was assigned by the prosecution. That in order to connect the appellants/accused with the crime or to connect them with the recovered stolen property we find so much difficulty inasmuch as the available record is unable to help us satisfactorily in connecting the appellants with the recovered stolen articles. No doubt the stolen articles of huge amount have been recovered and were identified by the complainant irrespective of the fact that due process was not adopted in this regard even then in the absence of any substantive piece of evidence it may be doubted that it could be foisted on any person without any difficulty by the police to save the actual culprits. So the hunger of this doubt could only be extinguished by a convincing independent or corroborative piece of evidence which is absent on the record.

14. Besides, after going through the record we are also convinced with the submissions of counsel for the appellants with regard to the material discrepancies in the case such as the complainant has even not given the description of the stolen articles and amount at any stage nor he has



produced the receipts of the golden ornaments before the trial Court. That the alleged identification of recovered stolen property, which were allegedly recovered from the appellants on their pointation, were not properly conducted such as it should have been undertaken before the competent Magistrate and that they were required to mix with other similar gold articles but in the instant case it was identified by the complainant before the police. That recovered property was not produced before the Court at the trial except the articles which were allegedly recovered from appellants/accused Amir Zada.

15. As discussed above we are not convinced with what has been brought on record by the prosecution for convicting the appellants in the offence they have been charged with. So we extend benefit of doubt to all the appellants and set aside the impugned judgment of the trial Court. Resultantly, the Criminal Appeal No.9/I of 2012 filed by Noorullah etc Vs. The State is allowed, conviction and sentences as awarded to the appellants namely Noorullah son of Ghulam Nabi, Shamaz Gul son of Baharuddin and Amir Zada son of Ghulam Nabi by the learned Additional



Sessions Judge-I/Judge Special Court, Peshawar vide judgment dated 27.02.2012 are set aside and they are acquitted of the charge. They are confined in jail, they shall be released forthwith if not required in any other case.

16. Consequently Criminal Revision No.1/I of 2012 filed by Rahim Gul Vs. Noorullah etc is dismissed. However, the order dated 22.12.2010 of Judicial Magistrate-I, Peshawar in respect of grant on superdari of various articles shall remain intact.


These are reasons of our short order dated 11.07.2012.


JUSTICE RIZWAN ALI DODANI


JUSTICE DR.FIDA MUHAMMAD KHAN

Islamabad, the
11th July, 2012
Abdul Majeed/-

Approved for reporting


JUSTICE RIZWAN ALI DODANI