

IN THE FEDERAL SHARIAT COURT  
(Appellate Jurisdiction)

PRESENT

HON. MR. JUSTICE DR. FIDA MUHAMMAD KHAN  
HON. MR. JUSTICE RIZWAN ALI DODANI

CRIMINAL APPEAL NO.2/I OF 2012

1. Sher Zaman son of Said Hakim resident of Toor Dhair Tehsil Takht Bhai District Mardan
2. Saida Gul son of Noor Gul resident of Qazi Abad Tehsil Takht Bhai and District Mardan.
3. Bunair Gul alias Munir Gul son of Feroz Khan resident of Gujarano Killay, Dakho Baba Sheikh Abad Tehsil Takht Bhai District Mardan.
4. Ismail alias Saleem son of Zarif Khan resident of Qutab Garh Tehsil Takht Bhai District Mardan.
5. Shakir son of Shah Jee resident of Yakh Kohai Toor Dhair Takht Bhai District Mardan.

.....

Appellants

Versus

1. The State
2. Arshad Mehmood son of Munsif Khan, resident of P.O. Nawan Shehar Rwal Kot Tehsil and District Abbottabad

.....

Respondents

Counsel for the appellants ..... Mr.Gohar Rehman Khattak,  
Advocate

Counsel for State ..... Mr. Aziz-ur-Rehman,  
Advocate

FIR, Date and Police Station ..... 576, dt: 16.12.2009  
Takht Bhai, Mardan

Date of Judgment of trial court ..... 22.11.2011

Date of Institution ..... 18.01.2012

Date of hearing ..... 10.07.2012

Date of decision ..... 10.07.2012

Handwritten mark/signature

**JUDGMENT**

**DR. FIDA MUHAMMAD KHAN, Judge.-** The appellants

Sher Zaman, Saida Gul, Bunair Gul, Shakir and Ismail alias Saleem faced trial alongwith their acquitted co-accused Imtiaz and Saleem and absconding co-accused, before Additional Sessions Judge-II, Takht Bhai for an offence under the mischief of section 17(3) of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979/342 PPC in a case registered against them vide FIR No. 576 dated 16.12.2009 at Police Station, Takht Bhai. On conclusion of the trial, vide judgment dated 22.11.2011, the said appellants/accused have been convicted under section 395 PPC and sentenced to 10 years R.I. each with a fine of Rs. 50,000/- each or in default of payment of fine to suffer six months further S.I. They have also been convicted under section 342 PPC and sentenced to undergo one year R.I. each, with a fine of Rs.3000/- or in default of payment of fine to further suffer one month S.I. each. The benefit of section 382-B, Cr.P.C. has been granted to them.

A

2. Briefly stated the case of prosecution as recorded on the statement of Arshad Mahmood, complainant is to the effect that as per daily diary dated 18.11.2009, while he was taking 6-1/3 ton sarya (steel) in Truck bearing No.Peshawar K-6844, it was forcibly snatched from him and he was kept under illegal custody by some unknown accused. After conducting search of the accused on his own he then got satisfied that the said truck had been snatched from him by Sher Zaman, Wajid Shah, Shakir, Riaz, Munir Gul, Saida Gul, Gul Muhammad and Saleem. He has however, not disclosed the source of his satisfaction.

3. After registration of the case necessary investigation was conducted and after completion of the same, complete challan was put to the court against the said accused for their trial. They were summoned through court process. They were formally charged but they did not plead guilty and claimed trial.

4. At the trial the prosecution examined 09 witnesses including two S.W. The detail of their depositions is as under:-

\* PW.1 is Niaz Muhammad Khan, ASI. He is marginal witness of recovery memo (Ex.PW.1/1) vide which the Investigating

Officer took into possession one Kalashincov No.4177 loaded with 25 live rounds of 7.62 bore;

- \* PW.2 is Amir Muhammad, IHC No. 898. He is also a marginal witness of recovery memo (Ex.PW.2/1) through which truck No. Peshawar K-6844 was recovered by I.O. and produced before the court by Moharrar of Police Station, Nowshera Cantt;
- \* PW.3 is Arshad Mahmood, complainant and reiterated the same facts as he got recorded in the FIR;
- \* PW.4 is Lal Roz Khan, Sub Inspector. He stated that on receipt of report of the complainant, he drafted formal FIR (Ex.PA);
- \* PW.5 is Wali Muhammad Khan, Judicial Magistrate who recorded confessional statement of accused Saida Gul which is (Ex.PW.5/2). He also recorded confession statement of accused Sher Zaman and the same is (Ex.PW.5/5);
- \* PW.6 is Tila Muhammad, Foot Constable, he is also a marginal witness to pointation memo (Ex.PW.6/1) vide which accused Saida Gul and Sher Zaman pointed out various places of occurrence to the I.O. and also pointed out the place where they confined the truck driver and the cleaner;
- \* PW.7 is Javaid Shah Khan, S.I. He firstly and partially investigated and gave the details of investigation conducted by him in the case;

- \* PW.8 is Liaq Muhammad Khan, S.I. who also partly investigated the case. He also gave the details in respect of his investigation; and
- \* PW.9 is Fazli Malik, ASI. He deposed that while he was on patrolling, complainant Arshad Mehmood met him and on his complaint, he entered the same in a Roznamcha. Nobody had been charged in the said complaint.

After completion of the evidence, statements of Said Bacha and Sher Alam were recorded as S.W.1 and S.W.2 respectively. Both of them stated about the role attributed to them regarding the warrants of arrest of accused.

5. The appellants/accused made statements under section 342 Cr.P.C. but they denied the allegations leveled against them. In answer to the question, "why the PWs have deposed against you?", all of them have stated that the PWs were highly interested and had falsely deposed against them. They added that the witnesses were police officials and no private person had deposed against them".

6. We have heard learned counsel for the parties and have anxiously perused the record with their assistance. It transpires from the record that the instant case of prosecution mainly rests on the confessional

statement made by the appellants/accused Sher Zaman and Saida Gul as well as on the recovery of sarya ( steel) of tenmonds on the pointation of one of the accused Ismail.

7. Before discussing the evidence we deem it pertinent to point out that two identical incidents had taken place, one after the other in the jurisdiction of the same police station. The instant occurrence took place on 17.11.2009 and report in this respect was lodged at police station Takht Bhai on 16.12.2009. The allegation made in this FIR pertained to forcible snatching of a truck that was carrying sarya (steel). The other case which was registered at the same police station on 10.12.2009 was also identical in nature with the only difference that the truck in the later occurrence was carrying cement. Probably due to lack of proper assistance in the matter, both the cases have been mixed up together by the trial court. For example, the confessional statements made by the appellants/accused Sher Zaman and Saida Gul on 19.12.2009 are in respect of the cement which was loaded on the truck. In both the cases no recovery from the appellants/accused was effected either that of sarya or that of cement. So



far as the recovery of steel on the pointation of appellant/accused Ismail is concerned that is not free from doubt. The sarya (steel) was recovered from a graveyard which was a public place and was accessible as well as visible to the passerby public. Moreover that place was not at all owned by the appellant/accused Ismail. In this connection it may also be pertinent to point out that the recovery memo vide which the steel was recovered and secured was witnessed by Tahir and Afsar Khan. However, none of them has been produced by the prosecution. Identification of the said recovered steel was also not carried out through the regular process of identification parade. It is also worth mentioning that the places where both the above occurrences took place are different altogether. There is no other evidence against the appellants. As far as the appellants Munir Gul and Shakir are concerned, there is no evidence worth the name against them.

8. We may also mention that the confessional statements in the other case which took place on 10.12.2009 have no relevance or connection with the case before us. Learned counsel for the State who was supporting

the impugned judgment was not in a position to explain this mixed up evidence which on the face of it visibly appeared to be doubtful.

9. Consequently for the reasons stated above, we extend the benefit of doubt to the appellants/accused namely Sher Zaman son of Said Hakim, Saida Gul son of Noor Gul, Bunair Gul son of Feroz Khan, Ismail alias Saleem son of Zarif Khan and Shakir son of Shah Jee. We allow their appeal and set aside the conviction and sentences awarded to them by the learned Additional Sessions Judge-II, Takht Bhai vide the impugned judgment dated 22.11.2011 and acquitted them of the charges. They are confined in jail. They shall be released forthwith if not required in any other case.

  
JUSTICE DR. FIDA MUHAMMAD KHAN

  
JUSTICE RIZWAN ALI DODANI

Islamabad the 10<sup>th</sup> July, 2012  
UMAR DRAZ/\*

Fit for reporting  
