IN THE FEDERAL SHARIAT COURT

(Appellate Jurisdiction)

PRESENT

MR. JUSTICE SYED AFZAL HAIDER

Criminal Appeal No.211/I of 2007

1. Ejaz alias Gagen son of Hazoor Bakhsh
   R/o Ghari Taiga Shikarpur(Sindh)
2. Khamisa son of Akhwani,
   R/o Ghari Taiga Shikarpur (Sindh)
3. Muhammad Hanif son of Haji Bakhsh,
   R/o Muhammad Khan Goth, Jaccobabad
   (Sindh)
4. Sojhla alias Liaqat son of Abdul Majeed,
   R/o Kot Atai Khan Jaccobabad(Sindh) .... Appellants

Versus

The State .... Respondent

Counsel for appellants	....	Ch. Muhammad Shafique Ahmed Khan Advocate
Counsel for State	....	Mr.Asjad Javaid Ghural, Deputy Prosecutor General
FIR. No. Date & Police Station	....	11/06, 12.1.2006 Channi Goth,
Date of judgment of trial court	....	23.10.2007
Dates of Institution	....	16.11.2007
Date of hearing	....	09.5.2008
Date of decision	....	14.05.2008

JUDGMENT

SYED AFZAL HAIDER, JUDGE.- This appeal is directed against judgment dated 23.10.2007 delivered by learned Additional Sessions Judge, Ahmadpur East in Haraba Trial No.1 of 2006 and Haraba case No.14/06 whereby appellants Ejaz alias Jagan, Muhammad Hanif, Khamisa and Sojhla alias Liaqat were convicted under section 392 and 411 of Pakistan Penal Code and sentenced as under:-

i. Under section 20 of Ordinance VI of 1979 for a period of six years rigorous imprisonment each with fine of Rs.100,000/- each and in default whereof to further undergo one year simple imprisonment each.

ii. Under section 411of Pakistan Penal Code, two years rigorous imprisonment each with fine of Rs. 10,000/- each and in default to further suffer three months simple imprisonment each.

iii. Both the sentence were ordered to run concurrently.

iv. The ¾ the share of fine, if recovered, shall be paid to victims proportionately.

v. Benefit of section 382-B of Code of Criminal Procedure was extended to all the appellants on each count.

2. This case has arisen out of an FIR bearing No. 11, Ex.PA/1 dated 12.01.2006 registered with Police Station Channi Goth, District Bahawalpur on the statement of informant PW 3, Haq Nawaz son of Moosa, made before P.W.14, Iqbal Ahmad, SI. The complainant alleged

therein that he along with 10 other persons, all associated with live stock and goat business proceeded to Sadiq Abad from Lahore on public transport, Ravi Coach No. LXP-5611 after sale of goats. The coach left Ahmadpur East for Sadiqabad. It had covered distance of about 6/7 kilometers when four persons, the appellants, whose features are mentioned in the FIR, stood up in the coach and commanded the driver to leave his seat. One of the dacoits started driving the bus while the other accused started snatching hard cash from the complainant and other passengers. The dacoits in all looted an amount worth Rs. 190,000/- from the complainant, Rs. 90,000/-, from Ghulam Mustafa, a sum of Rs.175,000/- from Sher Muhammad; Rs. 80,000/- from Dildar Ahmad, an amount of Rs.75,000/- from Muhammad Akram and a sum of Rs. 85,000/- from Khalil Ahmad and Rs. 100,000/- from Muhammad Hassan as well as one Nokia Mobile phone bearing number 0300-6723190. An amount of Rs.150,000/- was taken from Khair Muhammad and Rs.65,000/- from Maqsood Ahmad and an amount of Rs.65,00/- from Nawab Zada alongwith a Samsung mobile phone 0301-7679516 from Arz Muhammad and also Rs.97,000/-, Rs.270,000/-, from Ghulam Yasin and Piara son of Saeen Dad Maula Dad

respectively. Various other amounts were snatched from the other passengers. The snatchers then stopped the bus in a deserted place. On resistance one of the accused fired in the air and threatened the complainant and the passengers not to make noise and directed them to drive on the bus slowly. Then they left the bus and ran away from the spot. The complainant further stated that they had boarded the bus from Bahawalpur and the conductor Muhammad Aslam, resident of Kot Abdul Malik Lahore, did not check the accused for security purpose when they boarded the bus from Bahawalpur which indicates that the offenders had committed the dacoity in connivance with the conductor and driver Abdur Rauf. It was urged that action be taken against the accused alongwith the bus staff.

3. After registration of case investigation was conducted by P.W. 14, Iqbal Ahmad, SI. He visited the place of occurrence, prepared rough site plan, recovered one used empty P21 lying inside the bus, took into possession the bus in question and parked it in the vicinity of Police Station, Channi Goth .The recovered empty was handed over to the Moharrar. He recorded statements of 19 passengers under section 161 of

Code of Criminal Procedure. He also followed the foot-prints of the accused persons which disappeared at a distance of about 100 meters. Rest of the investigation was conducted by Mukhtar Ali, Inspector/SHO PW 15. He arrested Abdur Rauf and Muhammad Aslam, driver and conductor of the bus on 12.2.2006 and during investigation both of them were declared innocent and allegation of abetment under 109 of Pakistan Penal Code was dropped and they were set free. On 15.3.2006 he obtained physical remand of the accused and commenced interrogation. The accused persons disclosed that the looted amount was spent by them and on 19.3.2006 all of them confessed the guilt of the dacoity. In due course, on the pointation of accused Ejaz, investigating office got recovered an unlicensed pistol alongwith four live bullets and a Nokia 1100 mobile phone from a deserted place. The accused Khamisa got recovered one unlicensed pistol and five live bullets and one mobile. Similarly appellant Muhammad Hanif is reported to have got recovered one unlicensed weapon and three live bullets. The accused Sojla alias Liaqat allegedly got recovered one mobile Nokia. Recovery memos were prepared by S.H.O. who took stolen articles into possession. He also recorded statements of two formal PWs on

22.5.2006 and the accused were sent to judicial lock up on 28.4.2006. The charge sheet prepared by S.H.O. on 27.3.2006 against the accused was submitted in the Court on 05.06.2006 for trial.

4. The trial court on 16.10.2006 read over the charges to the accused under section 17 of Offences Against Property (Enforcement of Hudood) Ordinance, 1979 as well as section 411 of Pakistan Penal Code. All the accused pleaded not guilty and claimed trial.

5. The prosecution produced as many as sixteen witnesses to prove its case. After close of the prosecution evidence on 10.10.2007, learned trial court on 11.10.2007 recorded statements of accused under section 342 of the Code of Criminal Procedure wherein all of them made similar statement stating therein that " the police has involved them falsely to show efficiency to please the higher authorities. The private PWs are relatives of the complainant, so they deposed falsely against us. The complainant wanted to grab money from them and they were innocent". The appellants produced Khalid Gujjar as D.W.1 and Mansha Gujjar as D.W.2. The learned trial court, on the basis of the evidence placed on record, came to the conclusion that the accused were guilty under section

392 of Pakistan Penal Code and further that section 17 of Offence Against Property (Enforcement of Hudood) Ordinance, 1979 was not attracted and consequently they were convicted and sentenced as mentioned above. Hence this appeal against conviction and sentence.

6. The crux of the prosecution story as narrated by prosecution witnesses has been stated in para 6 of the impugned judgment of the learned trial court which is being reproduced as under:-

> "PW 1 Karam Hussain ASI chalked out an FIR Ex.PA/1 on the basis of a complaint Ex.PA. PW 2 Muhammad Akram 943-C is a recovery witness of empty P-1 vide recovery memo Ex.PB which was also attested by Fraz Hussain 845 HC. PW 3 Haqnawaz is the complainant of the case who in his examination-in-chief substantially supported the prosecution's version as disclosed in the FIR Ex.PA/1 on the basis of his statement Ex.PA who was subjected to cross-examination but material dent was made while he denied that he falsely implicated the accused to grab money from the accused persons PW 4 Maqsood Ahmed, Muhammad Hassan, PW 5, Muhammad Akram PW 6, Nawabzada PW 7, Dildar PW 8, Shair Muhammad PW 9, Ghulam Mustafa PW 10 and Khair Muhammad PW 11. All these PWs are victim of the occurrence and substantially supported and corroborated each other proved the charge against the accused. They were subjected to thorough cross examination but no material discrepancy was spelt out to brush aside their veracity or their statement could be taken as tainted and blurred one. Rather they are natural witnesses. Abdul Rauf PW-12 Driver and PW-13 conductor of the Bus in their examination-in-chief

have supported the prosecution's stance by giving full and accurate accounts of occurrence with meticulous detail. They were subjected desperate cross examination but no material discrepancy and contradiction were pointed out to make their statements in credulous while they too are natural witnesses of the occurrence. PW 14 Iqbal Ahmed SI who conducted partial investigation also supported the prosecution's story and deposed that he himself saw the place inside the coach where the fire arm shot was struck. He also disclosed that he recorded the statement of PW 3, drew complaint and forwarded that to the Police Station for registration of the case. He also prepared rough site plan and took into possession the coach and empty. Then he followed the foot prints which disappeared at a distance of 100 Meters. He further deposed that on information he collected the accused from Police Station Khanpur. Rest of the investigation was conducted by Mukhtar Ali Inspector/SHO. Mukhtar Ali Inspector/SHO in his statement as PW 15 deposed that both Driver PW 12 and Conductor PW 13 during investigation were found not involved in the commission of offence as a bettors facilitators and offence under section 109 PPC was deleted. He got received accused persons after having been identified by the complainant and other PWs, after recording supplementary statements from District Jail Rahimyar Khan through Iqbal Ahmed SI PW 14 and commenced investigation from that stage it was handed down to him by PW 14. Ejaz accused lead to the place of recovery, a deserted place, got recovered a pistol (unlicensed) P-3 along with four live rounds P-4 to P-7 and a Nokia Mobile 1100 P-2 while Khamisa accused also got recovery an unlicensed pistol P-8 with five live bullets P-9 to P-13 and Mobile set P-14, Muhammad Haneef accused got recovery one unlicensed weapon P-15 with three live bullets P-16 to P-18 and Sojla (Liaqat) accused got recovered one Mobile set P-19 vide site recovery Memos Ex.PJ, Ex.PK, Ex.PL and Ex.PM which were attested by the attesting

witnesses. He was exhaustively cross examined but no malice or ill-will was suggested to him while his statement was recorded. It does not suffer from material contradictions, therefore, it does not make it as unbelievable. The prosecution also tendered identification sheet/Memo of Nokia Mobile Set Ex.PC, site plan without scale Ex. PD, recovery memo of Pistol from Ejaz alias Jagan Ex.PE from Muhammad Haneef Ex.PG from Khamisa Ex.PF and Sojla (Liaqat) Ex.PH and concluded the evidence."

7. I have read the evidence and perused the record with the assistance of learned counsel for the parties. The learned counsel for the appellant was asked to formulate the points that he wished to rely upon in support of his challenge to the impugned judgment. The learned counsel stated that; a) the recoveries of mobiles and pistol are violative of the provisions of section 103 of the Code of Criminal Procedure; b) that no identification parade was held as stipulated by article 22 of Qanun-e-Shahadat Order 1984; c) that the driver and the conductor were suspected of connivance with the accused and hence could not be cited as witnesses for the prosecution; d) that there is no independent evidence to corroborate the version of the complainant and e) that the positive report about empties is not helpful as the weapons were recovered from open places and the empties were sent to the ballistic expert after a delay of three months; f) the

charge was defective because of the omission to mention section 34 of the Panel Code. The accused cannot be held vicariously liable without being confronted with a charge under section 34; g) it was then urged that the appellants could not be convicted for dacoity, as contemplated by section 20 of Ordinance VI of 1979, because they are less than five in number and further that in the absence of section 34 of the Penal Code from the charge, there could be no conviction under section 392 of the Panel Code and it is therefore a fit case for retrial by amending the charge to incorporate section 34 of the Penal Code; and further more that punishment could have been awarded only for extortion as visualized by section 384 of the Penal Code which section stipulates awarding sentence upto three years. In the end learned counsel in the alternative prayed that sentence of already undergone be awarded as the appellants have suffered imprisonment, including span of detention during trial, for a period of one year one month and twenty five days as on 09 May 2008.

8. I told the learned counsel for the appellant that my task would have been made easy had section 386 not been part of the Penal Code. Section 386 stipulates imprisonment upto ten years in case of extortion by

putting any person in fear of death or of grievous hurt. And certainly when a person brandishes a fire arm and also empties a shot from the lethal weapon in a public carrier, held hostage by dacoits, and commits extortion he certainly puts the victim in fear of death or a grievous injury. Therefore if the prosecution story is believed wherein a number of passengers were relieved of their belonging on the point of gun then the argument for leniency in awarding punishment to already undergone may not be valid.

9. Learned counsel for the State on the other hand vehemently supported the verdict of guilty and submitted that; a) the prosecution has produced best possible evidence to connect the appellants with the crime; b) that though no cash was recovered from the appellants as they had spent all the money, yet the recovery of mobiles and pistols corroborate the prosecution version; c) that the faces of appellants at the time of committing the offence were not muffled and hence the question of their identification posed no problem; and lastly; d) that reliable evidence including the evidence of the eye witnesses as well as PW 12 and PW 13, the driver and the conductor of the Bus was also produced who had no animus against the appellants; e) learned counsel also stated that no

prejudice was caused to the appellants by the omission of section 34 of the Penal Code from the charge and particularly when every one from among the appellants actively participated in the crime there was no need to add section 34 of the Penal Code in the charge. The learned counsel further stated that f) PW 5 identified his Nokia mobile, recovered from Ijaz accused with the help of the Sim; and g) learned counsel also urged that the driver and conductor were natural witnesses and a person does not loose his expacity to appear as a witness only because at one stage the complainant thought that he could be associated with the offence.

10. I have considered the arguments of the parties in the light of evidence placed on the record and have also gone through the evidence of two defence witnesses. The defence witnesses were however not mentioned in the statements of appellants nor did the learned counsel for the appellant rely upon that statements before me. The defence witnesses have indeed introduced a different story altogether and it is strange that being public representatives of the locality they failed to report what in their view was an obvious injustice, to the higher authorities. In this view of the matter defence evidence is not worthy of credence and is only an after thought. It

does not inspire confidence. Even the learned counsel for the appellant has not considered it appropriate to refer to its existence on the file.

11. In so far as the objection about recoveries of empties, mobiles and pistols not having been effected in the presence of independent witnesses is concerned the record shows that Ex.PE and PG, the recovery memos of a 30 bore pistol from Ijaz and Hanif appellants respectively and Ex.PH recovery memo of a mobile phone from Sajhla appellant were attested by two police officers on the same date to 19th March, 2006. It is true that the purpose behind incorporating section 103 of the Code of Criminal Procedure, whereby witnesses from public sector are required to be associated, is to obviate possibility of false implication and to seek independent corroboration of the statement of police officer who allegedly recovers articles associated with the crime. In case respectable independent witnesses are, in a given situation, not available or the persons asked to come forward refuse to witness the recovery then there should be evidence to that effect. However it has also been held that police witnesses are as good witnesses as any other witness and when none from public section is available or forthcoming then the evidence of police officers would be

acceptable. PW 16 Maqbool Hussain SI is an attesting witness of the recoveries. He nowhere says that an effort was made to collect respectable persons from the adjoining areas nor does he claim that a certain set of persons was asked but it refused to oblige. It is however worth noticing that though he pointedly referred in his examination in chief, to each accused from whom different articles were recovered but he could not pick up who was who among the appellants at the trial. In this view of the matter the evidence regarding recoveries is being excluded from consideration. The next objection that positive report of the forensic expert is of no value to the prosecution is also sustained because when the evidence regarding recovery of pistols, empties, mobiles is being excluded the testimony of ballistic expert automatically becomes redundant. The question of identification however arises only where the witness had not the opportunity to have a good look at the accused. Identification parade as such is not a requirement of law. It is a method whereby the veracity of the witness is tested. It is a relevant fact under article 22 of Qanun-e-Shahadat Order, 1984. The fact that a witness identifies accused at the trial is sufficient unless it is shown that the witness had no opportunity of having

seen the accused before. It has also been held that the evidence offered by prosecution through identification parade is not substantive piece of evidence but has only corroborative value. The allegation of robbery in a coach has been made in this case and it is established that the four accused remained in the Coach in the open view of many passengers for some time before they left the transport at a deserted place which fact certainly makes it possible for the complainant and the victim eye witnesses to preserve in their memory the faces they encountered and then identify them later on in a court of law or some other place as the occasion arises. The short but alarming incident in a limited space certainly leaves deep impressions on the victim particularly when under threat of life his attention is fully focused on the players of the tragic episode.

12. The version of complainant, PW 3 finds ample support from the evidence of eight other eye witnesses who were not only present at the time the robbery took place in the coach but they were also relieved of their cash and mobiles. This kind of direct evidence of a number of independent witnesses who were sailing in the same boat is not usually available in theft cases. All these witnesses have no common interest interse nor any joint

enmity with the appellants. The testimony of these witnesses is not contradictory on the salient features of the case. The story narrated by Haq Nawaz, PW 3, the complainant is fully corroborated by the testimonies of Maqsood Ahmed PW 4, Muhammad Hussain PW 5, Muhammad Akram PW 6, Nawabzada PW 7, Dildar PW 8, Sher Muhammad PW 9, Ghulam Mustafa PW 10, Khair Muhammad PW 11, Abdur Rauf PW 12 the driver of the coach and Muhammad Aslam conductor of the coach appearing as PW 13. They are all natural witnesses and inspire confidence. Defence counsel did not at all suggest that the appellants were not the persons responsible for the offence of dacoity. It is not at all reasonable to discard the testimony of the witnesses because one of them was not fasting on the day he appeared as a witness at the trial during the month of Holy Ramzan or that another witness was not able to recite certain Kalima. It is also not fair to demand independent corroboration from passengers of other coaches. Independent witnesses are already available in the form of so many eye witnesses who had been robbed. The fact that money was not recovered from the dacoits does not mean that the crucial ingredient of the offence complained of is missing. Recovery is only a corroborative fact.

Direct and reliable and mutually corroborative ocular evidence can sustain conviction.

13. Reverting to the objection that omission to mention section 34 of Penal Code in the charge makes the case fit for remand and consequent retrial, the law is very clear that omission to mention section 34 of the Pakistan Penal Code does not affect the case if no prejudice is caused to the accused. It was so held in the case of Haji Khudai Dost and another Vs. The State reported as 2005 P.Cr.L.J 520. It is even otherwise clear from evidence that each accused participated actively and played a distinctive and an independent role in the commission of an offence against specific individuals. It is also not possible to agree with the argument of the learned counsel that since the conductor and the driver of the coach were suspected by the complainant therefore they could not be produced as witnesses in the case. The facts and circumstances of the case in which a number of persons were relieved of their valuables by armed person in a public transport are suggestive of that category of anti-social offences which do not permit exercise of further leniency towards the appellants.

14. In view of the overwhelming direct ocular evidence available on the file and not uncertain identification proved through independent witnesses, sufficient material has been brought on record to connect the appellants with the crime complained of. Consequently the conviction and sentence recorded by learned trial Court on 23.10.2007 in the Haraba trial 1/2006 as mentioned in para 1 of this judgment is upheld and maintained. The appeal, registered as criminal appeal No.211/I of 2007, is dismissed.

JUSTICE SYED AFZAL HAIDER

Announced in Open Court
on 14th May, 2008 at Islamabad
Mujeeb-ur-Rehman/*

Approved for reporting

JUSTICE SYED AFZAL HAIDER