

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE AGHA RAFIQ AHMED KHAN, CHIEF JUSTICE

CRIMINAL APPEAL NO.26/Q of 2010.

1. Atta Muhammad S/o Ameer Jan,
R/o Mangocher, District Kalat.
 2. Naimatullah S/o Haji Amanullah,
R/o Basham Kanak,
 3. Mir Hazar son of Allah Bakhsh
R/o Degari Quetta
- Appellants.

Versus

The State. Respondent.

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| Counsel for appellants, | | Sardar Ahmed Haleemi, Advocate. |
| Counsel for State | | Mr.Liaqat Ali, Advocate. |
| FIR No. date and Police Station. | | No.02, dated 20.01.2010. P.S,Kardgaab District Mastung. |
| Date of impugned Judgment. | | 28.06.2010. |
| Date of Institution | | 07.08.2010. |
| Date of hearing | | 08.12.2010. |
| Date of decision | | <u>14-12-2010</u> |

JUDGMENT

JUSTICE AGHA RAFIQ AHMED KHAN, Chief Justice.— This Criminal appeal is directed against the judgment dated 28.06.2010 delivered by learned Sessions Judge Kalat Division at Mastung whereby appellants Mir Hazar, Naimatullah, Atta Muhammad and co-accused Baig Muhammad have been convicted under section 392 PPC and sentenced each of them to five years' rigorous imprisonment and fine of Rs.10,000/-, or two months simple imprisonment in default of payment thereof. Benefit of section 382-B, Cr.P.C was extended to the appellants.

2. Prosecution story as narrated by complainant Muhammad Bakhsh son of Noor Muhammad in FIR No.02 dated 20.01.2010 lodged at Police Station Kardgaap is that he was resident of near Killi Khurasani Kardgaap and earn his livelihood by keeping cattle. In between the night of 15/16 January 2010 he was present in his house when someone knocked at the door of his house saying that they were government employees and wanted to search his house. As he opened the door he saw 5/6 armed persons standing there who pushed the complainant aside and forcibly entered into the house. They first searched the room of the complainant and ~~the~~ locked him in the room and started to search the

other rooms of the house. After departure of the said persons, the complainant with great difficulty opened the lock of the door and came out of the room and saw the locks of other rooms as well as the locks of the boxes lying therein broken. On checking he found Rs.300,000/- missing from the boxes which were allegedly taken away by the said persons. The complainant then appeared at police station and lodged his FIR as stated above.

3. After completion of usual investigation the appellants as well as co-accused Baig Muhammad were sent up for trial before the learned Sessions Judge Kalat who on 02.04.2010 framed charge against them under section 17 (3) Offences Against Property (Enforcement of Hudood) Ordinance, 1979, to which they pleaded not guilty.

4. In support of the case, the prosecution examined PW.1 Muhammad Bakhsh (complainant); PW.2 Imam Bakhsh; PW.3 Attaullah; PW.4 DSP Abdul Haq; PW.5 Muhammad Hassan; PW.6 SI Shah Muhammad and PW.7 SI/O. Abdul Rahim.

5. On conclusion of the prosecution evidence, statements of the appellants and the accused under section 342 Cr.P.C. were recorded by the learned trial Court in which they denied the charges and claimed that

they had been falsely implicated at the instance of DSP Abdul Haq who was nursing grudge against them. Neither they opted to be examined on oath nor produced any witness in their defence in terms of Section 340(2) Cr.P.C.

6. The learned Sessions Judge Kalat Division after hearing arguments of both parties and on appraisal of evidence convicted and sentenced the appellants and co-accused as stated above.

7. Learned counsel for the appellants contended that the entire prosecution case depend upon the identification parade of PWs Muhammad Bakhsh and Imam Bakhsh and the recovery. According to him, neither the identification parade was conducted in accordance with the law and instruction as laid down by the superior Courts nor the alleged recoveries. He has also pointed out certain major contradictions in the FIR and in the statements of the PWs and unexplained delay of four days in lodging the FIR. He has relied on case law reported as;

(i) PLD 1996 Supreme Court 574 (Mushtaq Ahmed..Vs..The State),

- (ii) PLD 2005 Quetta 86 (Abdul Salam and others..Vs..The State and others) and
- (iii) 1992 S.C.M.R page 2088 (Asghar Ali alias Sabah and anothers.Vs..The State and others.

8. Learned counsel for the State has supported the impugned judgment and has contended that all the witnesses have involved the present appellants in this case, thus prosecution has fully proved the same.

9. I have given full consideration to the arguments of learned counsel for the parties and gone through the entire material available with me.

10. The incident is said to have been committed at night between 15th & 16th January 2001 and FIR has been lodged on 20.1.2010 at 12.30 p.m. There is clearly unexplained delay of four days in lodging the FIR. Admittedly it was night time. Complainant has not mentioned any description of the accused persons in the FIR. The complainant and the witnesses have also not given any description of the culprits in their police statements, therefore, in absence of any description safe reliance cannot be placed on such identification

parade. The identification parade was held in supervision of a DSP in the jail premises inspite of the fact that near jail court of Magistrate was available and they were present as admitted by the DSP before the trial Court. There is no explanation as to why identification parade was not ^{not} conducted from the Judicial Magistrate. There are major contradictions in the FIR as well as in the statements of witnesses. The complainant has stated in the FIR that the culprits had taken away rupees three lacs cash from his house but in his statement before the court he has stated that the culprits took rupees one lac. There are also improvements in the statements that accused had taken away golden and silver bangles (کڑے) and Balochi silver neck-less but these facts have not been stated in the FIR. There are other major contradictions also in the statement of witnesses namely Attaullah, Imam Bakhsh and complainant Muhammad Bakhsh. DSP Abdul Haq in cross-examination has admitted that on 10.2.2010 the identification parade was held under his supervision in the jail premises; the courts were opened and that he did not approach Judicial Magistrate for the

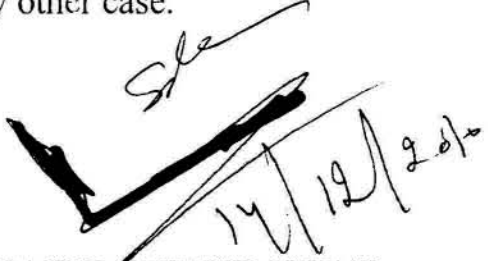
purpose of supervision of the identification parade. As far as recoveries in the case are concerned, the same have been procured from the houses of the appellants. They were allegedly in custody of the police but at the time of alleged recoveries no private respectable person of the locality ^{was called} to act as Mashir and in that respect no explanation has been given. Section 103 Cr.P.C reads as under:

“Before making a search under this chapter, the officer or other person about to make it shall call upon two or more respectable inhabitants of the locality in which the place to be searched is situated to attend and witness the search and may issue an order in writing to them or any of them so to do”.

“The search shall be made in their presence, and a list of all things seized in the course of such search and of the places in which they are respectively found shall be prepared by such officer or other person and signed by such witnesses; but no person witnessing a search under this section shall be required to attend the court as a witness of the search unless specially summoned by it”.

The police Officers have clearly violated the above provision of law by not associating two or more respectable inhabitants of the locality at the time of search of their houses.

11. For the above discussed reasons and in view of the legal position, I have come to this conclusion that the prosecution had failed to prove the charge against the appellants beyond any reasonable doubt, therefore, this appeal is allowed. The conviction and sentences passed by the learned Sessions Judge Kalat Division at Mastung are set-aside. The appellants be released forthwith if not required in any other case.


JUSTICE AGHA RAFIQ AHMED KHAN
Chief Justice

Announced on 14-12-2010
at Islamabad.

F.Taj/*

Approved by
reporting

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