IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

MR.JUSTICE CH. EJAZ YOUSAF CHIEF JUSTICE

CRIMINAL APPEAL NO.32/Q OF 2003

1. Babo Eidal Khan son of Abdul Khalique alias Kaloo, Caste L:angove, resident of Yousufzai, Mangocher.	--	Appellants
2. Wali Muhammad son of Mir Muhammad,Caste Langove, resident of Killi Fatehyanzai, Mangocher.		
	Versus	
The State	--	Respondent
Counsel for the appellants	--	Syed Muhammad Tahir, Advocate.
Counsel for the State	--	Sheikh Ghulam Ahmed, Advocate.
No.date of FIR and Police Station	--	No.2 dated 20.2.2003 Sub-Tehsil,Mangocher.
Date of the order of Trial Court	--	28.4.2003
Date of institution	--	27.5.2003
Date of hearing	--	25.5.2004
Date of decision	--	25.5.2004

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JUDGMENT

CH. EJAZ YOUSAF, CHIEF JUSTICE.- This appeal is directed against the judgment dated 28.4.2003 passed by the learned Additional Sessions Judge, Kalat whereby appellants Babo Eidal Khan son of Abdul Khalique alias Kaloo and Wali Muhammad son of Mir Muhammad were convicted under section 392 PPC and sentenced to undergo five years R.I. each or in default thereof to further suffer S.I. for nine months each. Benefit of section 382-B Cr.P.C. was, however, extended to the appellants.

2. Facts of the case, in brief, are that on 20.2.2003 report was lodged by one Abdul Salam son of Pir Muhammad with P.S. Sub Tehsil Mangocher wherein, it was alleged that the complainant used to ply Coaster bearing Registration No.LSB-92 from Kalat to Gazag. On the said date, when he alongwith passengers was enrout to Kalat, at about 8.30 p.m. he found that some unknown persons had blocked the road by putting huge stones thereon. No sooner the complainant stopped the vehicle then the culprits, who were six in number, boarded the bus, snatched cash as well as other valuables from passengers and fled. It was further alleged that the culprits

were speaking Brahvi language. On the stated allegation formal FIR bearing 2/2003 dated 20.2.2003 was registered under section 17(3) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979, at the said police station and investigation was carried out in pursuance thereof. On the completion of investigation the appellants were challaned to the Court for trial, whereas the rest of the culprits could not be apprehended.

3. Charge was accordingly framed against the appellants to which they pleaded not guilty and claimed trial.

4. At the trial, the prosecution in order to prove the charge and substantiate the allegation leveled against the accused persons produced eight witnesses, in all. P.W. 1 Abdul Salam is the complainant. He, at the trial, reiterated the version contained in the FIR. P.W.2 Muhammad Yousaf deposed that six unknown persons duly armed with deadly weapons, who had muffled their faces had blocked the road. They entered in the vehicle and on gun point snatched away cash as well as other valuables from the passengers. He added that later on as they reached at Kohak cross, they found that the present appellants were sitting in a hotel in suspicious

condition hence, they were apprehended. P.W.3 Shah Ali too, while corroborating the statement of P.W.1 in all material particulars added that six persons were responsible for committing the robbery and that he had identified the present appellants to be the culprits at the test identification parade held at the Tehsil. P.W.4 Haji Khan and P.W.5 Muhammad Nooh, two other eye-witnesses of the occurrence, also corroborated the statements of other PWs qua commission of the offence. P.W.6 Khalil Ahmad was the cleaner of the bus. He stated that the culprits had snatched a sum of Rs.1300/- alongwith a wrist watch from him. P.W.7 Hafiz Muhammad Ibrahim deposed that he was present at the Tehsil where test identification parade of some of the accused persons was carried out. P.W.8 Munir Ahmed, Naib Tehsildar, is the Investigating Officer of the case.

5. On the completion of prosecution evidence the accused persons were examined under section 342 Cr.P.C. In their above statements all the accused persons denied the charge and pleaded innocence. They, however, failed to lead any evidence in their defence or to appear themselves as their own witnesses in terms of section 340(2) Cr.P.C.

6. After hearing arguments of the learned counsel for the parties, the learned trial Court convicted the appellants and sentenced them to the punishments as mentioned in the opening para hereof.

7. I have heard Syed Muhammad Tahir, Advocate, learned counsel for the appellants, Sheikh Ghulam Ahmed, Advocate, learned counsel for the State and have also perused the entire record with assistance carefully.

8. Syed Muhammad Tahir, Advocate, learned counsel for the appellants has contended that conviction has been recorded against the appellants merely on the basis of test identification parade which was of no avail because all the accused persons had, at the time of occurrence, muffled their faces and none of the eye-witnesses were able to see face of any of the culprits. He added that since neither any incriminating material was recovered from the possession of the appellants nor any other piece of evidence was available to connect them with the crime, therefore, they could not have been convicted for the offence.

9. Sheikh Ghulam Ahmed, Advocate, learned counsel for the State has candidly conceded that the only piece of evidence available on record

against the appellants was their identification at the test identification parade as well as in Court and that all the witnesses except one i.e. the complainant have stated that the culprits, at the time of occurrence, had muffled their faces. He has also admitted that neither the looted property or any part thereof was recovered from the possession of the appellants nor any other incriminating material was, on record, available to believe that the appellants were involved in the offence.

10. I have given my anxious consideration to the respective contentions of the learned counsel for the parties. In the instant case, all the accused persons, who were six in number, had, at the time of occurrence, allegedly muffled their faces. None of the eye-witnesses, except P.W.1 have, at the trial, claimed that they, at the time of occurrence, were able to see their faces. It is the prosecution version that since both the appellants were identified by the witnesses, at the test identification parade, therefore, they were responsible for the offence. But the question arise as to how if the culprits were not seen by the witnesses, they were able to identify them at the test identification parade and what was the mode. It could have been

certainly not by seeing their faces or by appearance because the culprits had muffled their faces and their physical description was also not given by any of the witnesses. In the circumstances of the case, at the most, it could have been by voice because it has come in the FIR that the culprits were speaking Brahoi language but, in this behalf too, the record is silent. Though P.W.1 Abdul Salam, the complainant, at the trial, has claimed that since, at the time of occurrence, face of one of the culprits unveiled, therefore, he was able to see his face but this is clearly an improvement at his part as neither in the FIR, nor in his statement recorded by the police under section 161 Cr.P.C, with which he was duly confronted in the course of his cross-examination, it was found so written. Logical inference therefore, would be that none of the eye-witnesses were able to identify the culprits.

There is yet, another discrepancy. P.W.1 has claimed that he was able to see face of one of the culprits but this is the prosecution version that both the appellants were identified by the witnesses in the course of their test identification parade. It is astonishing, because if only the face of one

culprit was seen as to how the witnesses were able to identify both the appellants and that too, in the absence of details qua physical description of the culprits.

11. It would be pertinent to mention here that in cases of dacoity or robbery conviction can be based on the evidence of identification but the legal requirement is that it must be convincing, though its value may vary with the circumstances established in each case.

In the above context it may also be noted here that in a case of dacoity or robbery in which, the victim is not killed and is able to see the culprit identification may be made through facial characteristics, identifying natural marks or tattoos, hair line and colour, race, clothing, speech characteristics and unnatural habits or nervous spasms but in other cases in which, the victim is killed or is unable to see the culprit because of use of mask or other disguise, identification, in addition to any of the above noted factors, may be made by general physical built, finger prints, foot prints, type of disguise, recovery of the loot, means of escape, including description of vehicle if used and type of weapon used or carried by the

culprit. A sufficiently compelling combination of these factors may succeed in convincing a Court that person charged with the offence was responsible for committing the crime but, in absence thereof the presumption of innocence attached to the accused cannot be dislodged merely on suspicion as it appears to have happened in the instant case.

12. In this case, it stands established that faces of the culprits were not seen by any of the eye witnesses and if it was so, then the question arise as to how? police in the absence of any clue or indication reached and found the present appellants. PW.2, at the trial, has stated that after the occurrence, as they reached at Kohak where, in a hotel, both the appellants were sitting therefore, they were caught on suspicion but he himself has not pointed out as to how they became suspicious as neither they were seen by any body nor physical description by appearance of any of the culprits was available nor the robbed property or any part thereof was recovered from the possession of the appellants hence, I see force in the contention raised by the learned counsel for the appellants that in the absence of any proof the appellants could not have been convicted for the offence merely on

suspicion. Here, it may be pointed out here that what to speak of convicting a person on suspicion, it has in a number of cases laid down by the Superior Courts that conviction cannot be based solely on the identification of an accused by a single witness. Reference in this regard may usefully be made to the case of Lal Pasand Vs. The State PLD 1981 Supreme Court 142 wherein conviction was recoded against the appellant by the High Court solely on his identification by a retired Superintendent Police. It was held that though the witness was an honest witness yet, the dangers of errors in identification being great it was not safe to base conviction on the evidence of solitary eye-witness, if the witness had had only a fleeting glimps of the assailant. In the case of Zulfiqar Vs. The State 1991 P.Cr.L.J.1145 a Division Bench of Lahore High Court was pleased to hold that the Courts before acting upon evidence of identification parade must look for some independent evidence direct or circumstantial to eliminate chances of false implication. In the case of Muhammad Nawaz Vs. The State 2000 P.Crl.L.J.2064 it was held that identification of accused was not possible when admittedly they had committed the offence with muffled

faces in the dark hours of the night and their identification parade was held after 9 months of the occurrence. In the case of Emperor Vs. Maqbool Ahmad Khan AIR 1932 Oudh 317 it was held that in dacoity cases evidence adduced as to identification of dacoits ought not to be accepted too readily, but should be looked at with great caution. In the case of Nebi Dusadh v. Emperior – 1956 Cr.L.J. 95, it was laid down by Patna High Court that though no hard and fast rule can be laid down that in every case of dacoity, if there is identification by only one witness, that identification should never be accepted as every instance of identification in circumstances which usually accompany a case of dacoity has to be judged on the facts of that particular case, but if after a careful scrutiny, there is the slightest hesitation in the mind of the court that there was possibility of a mistaken identification or that the statement of the sole witness was influenced by some of the causes, the accused, in view of the matter, is entitled, as a matter of course, to the benefit of a reasonable doubt.

13. Since in the instant case no evidence direct or circumstantial is available to connect the appellants with the crime, therefore, in view of the

principle enunciated in the above quoted rulings I am inclined to hold that in this case the prosecution has miserably failed to bring home charge against the appellants. In this case there is room for doubt benefit whereof must go to the appellants. Convictions and sentences recorded against them by the learned Sessions Judge, Kalat vide the impugned judgment dated 28.4.2003, therefore, are set aside and the appellants are acquitted of the charge. They may be released forthwith if not required in any other case.

These are the reasons of my short order of the even date.

(Ch. Ejaz Yousaf)
Chief Justice

Quetta,dated the
25th May, 2004
ABDUL RAHMAN/**

FIT FOR REPORTING

CHIEF JUSTICE