

IN THE FEDERAL SHARIAT COURT OF PAKISTAN
(Appellate Jurisdiction)

Present.

MR. JUSTICE SARDAR MUHAMMAD RAZA, CHIEF JUSTICE

CRIMINAL APPEAL NO.05/P of 2013.

Iqbal alias Malang son of Zameer Gul,
R/o Nowshera, presently Jagra,
Peshawar. Appellant.

Versus

The State Respondent.
JAIL CRIMINAL APPEAL NO.31/I of 2013.

Saadat Khan son of Daulat Khan,
R/o Khan Sahib Qila, Dheri Zardad,
Charsadda. Appellant.

Versus.

The State. Respondent.

JAIL CRIMINAL APPEAL NO.32/I of 2013

Sajjad son of Bashir resident of
Tehsil Bazar, District Charsadda. Appellant.

Versus

The State Respondent.

Counsel for the M/s Khizar Hayat (Khanaza),
Appellants. M. Sharif Janjua & Qazi Nisar
Ahmed, Advocates.

Counsel for the Arshad Ahmed Khan,,
State. Assistant Advocate General,
Khyber Pukhtunkhwa.

Case FIR No. date FIR # 634 dated 03.05.2011,
& Police Station. Police Station Charsadda.

Date of judgment 25.09.2013.
of trial Court.

Date of receipt of 02.11.2013; 09.12.2013 &
Appeals 12.12.2013 Respectively.

Date of hearing 03.07.2014.

Date of decision. 03.07.2014.

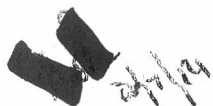


JUDGMENT

SARDAR MUHAMMAD RAZA, C.J. — Iqbal alias Malang,

Saadat Khan and Sajjad have filed these appeals against the judgment dated 25.9.2013 of the learned Additional Sessions Judge-V, Charsadda whereby, on conviction under section 392 PPC, they were sentenced to rigorous imprisonment for five years and a fine of Rs.20,000/- in default whereof they were to undergo imprisonment for three months. In addition thereto Saadat and Iqbal alias Malang were also convicted under section 411 PPC as receivers of the stolen property and sentenced to imprisonment for two years and a fine of Rs.5000/- each in default whereof they were to suffer simple imprisonment for two months.

2. Brief background of the case as furnished by Altaf Hussain complainant of Muslim Abad Station Korona, Charsadda is, that he and his family lives in the same house alongwith his brother Shah Hussain and two daughters of his sister namely Mst. Nazli and Noreen. Shah Hussain is living in the Punjab for one year prior to the occurrence whereas the nieces aforesaid are serving as nurses in the hospital at Peshawar.

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3. On 3.5.2011 at 2.30 a.m., he was present in his house when four persons scaled over the outer wall of the house and knocked at the door of his residential room. They pushed open the door and all the four entered the room and started searching the house. They took gold ornaments weighing thirteen tolas and two wrist watches from the room and godown of Shah Hussain. A sum of Rs.1,50,000/- and ornaments weighing nine tolas were taken from the room of Mst. Nazli. Upon search from the complainant's room, the culprits took away ornaments weighing twelve tolas, a pistol of .32 bore, a cellular phone Nokia 1112 along with sim # 0334-8389139 and a Citizen wrist watch. The general description of the four persons was given in the FIR which was recorded the same day at 06.30 a.m. it was however not stated that he identified any of the culprits by face.

4. During trial Mst. Nazli appeared as PW.4, only to confirm the theft of Rs.1,50,000/- and gold ornaments weighing nine tolas from her room. Beyond that her statement is not relevant because at the time of occurrence she was not present.

5. Altaf Hussain appeared as PW.5. It may be stated at this juncture that some days after the occurrence, the local police had informed the

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complainant that an accused by the name of Saadat was arrested by the police. Complainant went to the police station where he saw accused Saadat in the lock-up. As stated earlier, the complainant had never given the facial description of the accused in the FIR and had never mentioned that he would be able to identify the culprits as and when brought face to face. When in court, the complainant, in order to justify the identification, coined an excuse that all the accused at the time of occurrence had muffled their faces but during occurrence the mask of one of them fell down and he happened to see his face. It is a glaring improvement for which an occasion arose or rather created to get the complainant examined under section 164 Cr.P.C. In the latter statement he also made an improvement that he had heard about the dispute between Sajjad and Saadat over the distribution of stolen items.

6. Theft from the room of Shah Hussain, the complainant's brother is also unreasonable. It is admitted that he is living in the Punjab for more than one year prior to the occurrence. It does not appeal to common sense that residing away for such a long time, he would keep gold ornaments in his room which became so easily accessible to the robbers. The allegation of theft in this behalf seems to be fake and exaggerated.

7. Gold ornaments like necklace (P.1), *Tikka* (P.2), one ring (P.3) and one *Jhumer* (P.4) weighing four tolas are stated to have been produced before the police by one Ali Haider alleging that the said articles were entrusted to him by Sajjad accused for safe custody. That, lateron, when he came to know that it was a stolen property, he voluntarily produced the same before the police. In this behalf the most important witness constituting primary evidence, was Ali Haider who was never produced before the court. I believe that by withholding the primary and the best evidence, the prosecution has not done any favour to its own case. The recovery hence, is not proved.

8. A sum of Rs.23000/- is alleged to have been recovered from accused Iqbal. The detail of such recovery is that while in police custody the accused Iqbal called Izzat Khan through a cell phone call who brought the amount to the police station on call of the accused. The defence version is that such call was made by the police officer who requisitioned the amount under threat. This defence version is proved by Haroon Shah (DW.1) in whose presence the amount was so brought to the police station. He is a marginal witness to the recovery memo

(Ex.PW.11/3).

9. Coming to the recovery of Rs.68,000/- allegedly recovered by the police from his house. While in police custody, the amount was allegedly brought by the accused from his house stating that it was his share of the extorted amount/articles. If one takes it for granted that the number of accused was four, then, keeping in view the stolen property, the share of one accused does not amount to what is alleged above. Some gold ornaments were also recovered wherefrom it transpires that it was not the share of Saadat but a lion's share. Regarding this recovery as well it is pleaded by the accused that the amount was procured by the police from the father of the accused under strong threat of third degree methods to be used against the accused. In these circumstances, I believe that the recovery was made at the alleged pointation of the accused from a place in Khan Saib Qilla. In the given circumstances, it was necessary for the Investigating Officer to have strictly and fairly complied with the provisions of section 103 Cr.P.C; which proceedings are avoided for no plausible reason. The case against the accused is not at all free from doubts.

10. Because of the recoveries aforesaid, the appellants have also been convicted under section 411 PPC; which reads as under:


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him. It should always be somebody else, other than the one who stole or extorted the articles. The conviction under section 411 PPC of the appellants is illegal.

13. Consequently the appeals are accepted and the appellants (i) Iqbal alias Malang son of Zameer Gul (ii) Saadat Khan son of Daulat Khan and (iii) Sajjad son of Bashir are hereby acquitted of the charges under sections 392/411 PPC. The impugned judgment dated 25.9.2013 of the learned Additional Sessions Judge-V, Charsadda is set-aside. If not required in any other cause, they are directed to be released forthwith.


Mr. Justice
Sardar Muhammad Raza,
Chief Justice.

Announced.
at
Islamabad
3rd July 2014
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Approved for Reporting. 