

(9)

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

MR. JUSTICE SYED AFZAL HAIDER

CRIMINAL APPEAL NO. 11/Q OF 2010

CRIMINAL APPEAL NO. 12/Q OF 2010

CRIMINAL APPEAL NO. 13/Q OF 2010

1. Naseebullah son of Hayat Khan,
Resident of Killa Saifullah.
2. Shamsullah son of Mama Gul,
Resident of Killa Saifullah.
3. Abdul Qayyum son of Haji Muhammad Khan,
Resident of Khani Baba, Pishin.

Appellants

Versus.

The State

Respondent

Counsel for appellants	....	Mr. Mujeeb Ahmed Hashmi, Advocate	(Signature)
Counsel for State	.....	Mrs. Shabana Azim, Advocate	
FIR, Date & Police Station	.....	03/2009, 23.3.2009 Kach	
Date of Judgment of trial court	.....	15.4.2010	
Date of Institutions	.....	04.05.2010, 12.5.2010 and 14.5.2010 respectively	
Date of hearing	.....	01.07.2010	
Date of decision	.....	14 .07.2010	

Cr. Appeal No.11/Q/2010
Cr. Appeal No.12/Q/2010
Cr. Appeal No.13/Q/2010

2

JUDGMENT:

Justice Syed Afzal Haider, J:- Appellant Naseebullah through Criminal Appeal No.11/Q/2010, appellant Shamsullah through Criminal Appeal No.12/Q/2010 and appellant Abdul Qayum through Criminal Appeal No.13/Q/2010 have challenged the judgment dated 15.04.2010 delivered by learned Additional Sessions Judge-IV, Quetta whereby they were convicted under section 392/34 of the Pakistan Penal Code and sentenced to seven years rigorous imprisonment each with fine of Rs.30,000/- each or in default thereof to further undergo three months simple imprisonment each. Benefit of Section 382-B of the Code of Criminal Procedure was extended to the appellants. I will dispose of all the above-mentioned three connected matters as they have arisen out of the common judgment delivered in one and the same crime report lodged by the same complainant.

2. Brief facts of the case are that complainant Muhammad Umer PW.1 submitted complaint Ex.P/1-A addressed to the Station House Officer, Police Station Kach, that he was permanent resident of Killi Mina, Ziarat and due to winter season he alongwith his family was temporarily residing at Shahrag, District Harnai. He was driver by profession and had his own vehicle, a double door Datsun bearing registration No.WAA-432 valuing Rs.7,00,000/-. On 23.03.2009 he alongwith his uncle Abdul Khaliq had dropped passengers at Khonazai. On his way back home at Shahrag, they reached Harnai Road near old Levies Chowki Mudguard, at about 4.00 p.m. when they saw three persons standing alongwith a motorcycle who signaled him to stop. As he stopped the vehicle, one of them pointed his fire-arm towards him and forced him out of the vehicle. All the three culprits took them away from the road in a depression and dropped them there after tying their hands and feet with a handkerchief and a

6:1

Cr. Appeal No.11/Q/2010
Cr. Appeal No.12/Q/2010
Cr. Appeal No.13/Q/2010

4

'Chadar'. They snatched a 'L.G' mobile phone and cash amounting to Rs.32,00 from the complainant. Then two persons kept a watch over them while the third took away his vehicle towards Ziarat road. The other two persons then left the place and went away on their motorcycle after about half hour. The complainant as well as his companion managed to release themselves and after boarding a truck reached the police station. The complainant had also given descriptions of the accused in his crime report. FIR No.3/09 was, consequently registered at police station Kach on 23.03.2009.

3. Investigation ensued as a consequence of registration of crime report. Ghulam Shabbir Sub Inspector PW.6 undertook the investigation. He inspected the place of occurrence, prepared site plan Ex.P/6-B and recorded statements of the witnesses under section 161 of the Code of Criminal Procedure. He had given information about the

occurrence at all the 'Nakas' of the surrounding area. He received information from 'Border Naka' Kach about the stolen vehicle upon which he alongwith police party, complainant and eye witnesses reached there. The complainant identified his vehicle. He also identified Abdul Qayum accused as the person who had committed the offence alongwith his two other companions. The Investigating Officer took the stolen vehicle into possession vide recovery memo Ex.P/1-B. In the meanwhile Naseebullah and Shamsullah also reached at the 'Naka' on motorcycle 125-cc. The complainant also identified them as accused persons. The said motorcycle was taken into possession through recovery memo Ex.P/3-C. The Investigating Officer recovered a L.G mobile and cash of Rs.3,200/- from Naseebullah accused which were taken into possession through recovery memo Ex.P/3-A. The complainant identified his mobile phone and cash of Rs.3,200/- at the spot. All the three accused were arrested. The complainant produced one black

61

Cr. Appeal No.11/Q/2010
Cr. Appeal No.12/Q/2010
Cr. Appeal No.13/Q/2010

6

colour 'Lungi' and handkerchief by which the accused tied the complainant and his uncle. These articles were taken into possession by the Investigating Officer through recovery memo Ex.P/3-D. On 24.03.2009 identification parade of all the three accused persons was conducted in the presence of the DSP/HQ wherein the complainant and the eye witnesses correctly identified the accused persons and Identification forms Ex.P/1-B, Ex.P/1-C and Ex.P/1-D were prepared which were verified by the DSP, Head Quarter. On 05.04.09 accused Shamsullah made disclosure regarding the occurrence and disclosure memo Ex.P/2-A was prepared. On 04.04.2009 the Investigating Officer took into possession Photostat copies of documents of the stolen vehicle through recovery memo Ex.P/5-A. Abdul Qayum accused made disclosure regarding the occurrence on 05.04.2009 and disclosure memo Ex.P/2-B was prepared. On the pointation of Abdul Qayum accused a Kalashnikov bearing No.19051102, Bolt No.51102 alongwith one magazine and 15

51

live cartridges were recovered which were taken into possession through recovery memo Ex.P/2-B. After completion of investigation, the Station House Officer submitted report Ex.P/6-D under section 173 of the Code of Criminal Procedure before the Court on 06.04.2009 requiring the accused to face trial.

5.1

4. The learned trial Court framed charge against all the three accused persons on 03.06.2009 under section 17(3) of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979 read with section 392/34 of the Pakistan Penal Code. The accused did not plead guilty and claimed trial.

5. The prosecution produced six witnesses to prove its case. The gist of the statement of the prosecution witnesses is as under:-

- (i) Complainant Muhammad Umer appeared as PW.1 and endorsed the contents of his complaint Ex.P/1-A.

- (ii) PW.2 Abdul Fateh Constable had attested memo of pointation of place of occurrence Ex.P/2-A and recovery memo Ex.P/2-B by which the police took into possession one Kalashnikov alongwith one magazine and 15 live cartridges recovered from Abdul Qayum accused.
- (iii) PW.3 Abdul Khaliq, uncle of complainant Muhammad Umer, was the eye witness and stated about the occurrence. He attested recovery memo Ex.P/3-A of stolen cash and mobile phone, recovery memo Ex.P/1-B of stolen vehicle, recovery memo Ex.P/3-C of motorcycle, recovery memo Ex.P/3-D of handkerchief and 'chadar' was taken into possession.
- (iv) PW.4 Haji Muhammad Yousaf Constable had attested recovery memo ExP/1-B of stolen vehicle, recovery memo Ex.P/3-A of motorcycle used by the accused persons during the commission of offence and recovery memo Ex.P/3-C regarding stolen cash and mobile phone.
- (v) PW.5 Ain-ud-Din Sub Inspector stated that on 04.04.2009 the complainant produced registration documents of stolen vehicle which were taken into possession by the Station House Officer through

6-1

recovery memo Ex.P/5-A and he attested the said recovery memo.

(vi) PW.6 Ghulam Shabir Sub Inspector had undertaken the investigation whose detail has already been mentioned in paragraph 3 of this judgment.

6. On close of prosecution evidence, the learned trial Court recorded statements of accused under section 342 of the Code of Criminal Procedure. The accused denied the allegations leveled against them and claimed their innocence.

7. Shamsullah and Abdul Qayum accused also got recorded statements under section 340(2) of the Code of Criminal Procedure. Shamsullah accused stated that on 23.03.2009 he alongwith Abdul Qayyum went to Ziarat as Abdul Qayyum accused had to take some money from some one. The said person promised for return of money on the next day. Then accused Abdul Qayum returned to Kuchlak while he stayed for night at Cheena with one Abdul Hameed. On the

5.1.

Cr. Appeal No.11/Q/2010
Cr. Appeal No.12/Q/2010
Cr. Appeal No.13/Q/2010

10

next day the police arrested him. Accused Abdul Qayum stated that he was running the business of dry fruits. He had given material valuing Rs.2,30,000/- to the complainant but he did not make payment. He alongwith Shamsullah and Naseebullah went to the house of the complainant. When they reached at Zarang the complainant also reached there. He demanded money from the complainant who refused upon which a quarrel took place between him and the complainant. However the complainant promised for return of money on the next day. Then he went to Kuchlak while his co-accused Shamsullah and Naseebullah stayed in the house of their relative. On reaching Kuchlak he was sitting in a hotel with his friends Asadullah Nasir and Akhtar Muhammad when he received telephonic call of the complainant who inquired him about his location and he told that he was present in Zamindar Hotel. After some time police came there, arrested him and took to police station Kuchlak. Then they shifted him to Ziarat police station.

8. The accused produced three witnesses in their defence. The gist of the deposition of defence witnesses is as under:-

- (i) DW.1 Abdul Hameed stated that on 23.03.2009 Naseebullah and Shamsullah had stayed for night in his house. On the next day, the police arrested them.
- (ii) DW.2 Muhammadan stated that he was resident of Killi Khanai Regi. Accused Abdul Qayum was also residing in their Haveli. On 23.03.2009 the police came to his house and inquired about the address of Abdul Qayum accused. Then the police took him alongwith his cousin Asadullah to the house of Abdul Qayum accused from where they were taken to police station Ziarat and confined them in lock up. The police brought accused Abdul Qayum from Kuchlak police station to Ziarat. The witness further stated that he was released but accused Abdul Qayum was detained at Ziarat Police Station.
- (iii) DW.3 Asad Khan stated that on 23.03.2009 he was going to Queata on his vehicle. He halted at a hotel

Cr. Appeal No.11/Q/2010
Cr. Appeal No.12/Q/2010
Cr. Appeal No.13/Q/2010

12

at Kachlak for taking meal where Abdul Qayum accused was also taking meal. In the meanwhile police came there and took Abdul Qayum to police station Kachlak

9. The learned trial Court after completing the requisite formalities of the trial returned a verdict of guilt against the appellants who were convicted and sentenced as mentioned above.

10. I have seen the file. The evidence of the witnesses for the prosecution, the statements of accused both under section 342 and section 340(2) of the Code of Criminal Procedure as well as the evidence of defence witnesses has been perused. The relevant portions of the impugned judgment have been examined. I have heard the learned Counsel for all the three appellants. Mr. Rehmatullah Bareech Advocate appearing for Abdul Qayum appellant has raised the following contentions:-

(i) That the identification parade, as held in this case, is violative of the rules covering the identification parade because it was conducted in a police station in the presence of the police officers and in this respect he relies upon the case of Muhammad Pervez and others Vs. The State and others reported as 2007 S.C.M.R 670. I have gone through the cited precedent relied upon by learned Counsel. In fact this is a case in which it has been held that if role of the accused has not been described by the witness at the identification parade, such type of identification loses its value and cannot be relied upon and also if the prosecution witnesses had seen the accused before identification parade, such piece of evidence of identification parade can also not be relied upon. I am afraid the contention that the identification

6/1

Cr. Appeal No.11/Q/2010
Cr. Appeal No.12/Q/2010
Cr. Appeal No.13/Q/2010

14

parade was held in the police station is not covered by this authority. However the learned Counsel further contended that according to the statement of the Investigating Officer PW.6 the complainant had been shown the appellant a day before the identification parade was held. I have gone through the evidence of PW.6 with the assistance of learned Counsel for the appellant in which it is stated that there was a 'Border Naka' where he received information on wireless that a vehicle has been stopped at the 'Naka' on account of suspicion whereupon the witness alongwith police party and the complainant reached there. The complainant identified not only the vehicle concerned but also identified appellant Abdul Qayum who had taken his vehicle. This clearly shows that the appellant was not shown by the police, but the appellant had

been caught handed alongwith the vehicle at the 'Naka'. Identification parade held next day would, therefore, not become doubtful. Identification parade was not essential. The factum of identity had been established when the appellants were apprehended at the Nakka.

- (ii) That this identification parade is of no value for the simple reason that it was not conducted under the supervision of the Magistrate. On a Court question as to the legal provision which makes it incumbent that the identification parade should invariably be held under the supervision of the Magistrate, learned Counsel replied in the negative and he was not able to refer to any case law.
- (iii) That Abdul Khaliq PW.3 who was accompanying the complainant did not identify the appellant in

Cr. Appeal No.11/Q/2010
Cr. Appeal No.12/Q/2010
Cr. Appeal No.13/Q/2010

16

the identification parade though Ex.P/1-B chart of identification proceedings shows that the witness had identified the appellant thrice. This objection is not established on record. I have gone through the evidence of PW.3. He has not stated that he did not identify the accused during the identification proceedings.

- (iv) That the dummies in the identification parade were not identical because according to the complainant the appellant had a cut mark on the right side of his face and was supporting a beard and had a long nose. The learned Counsel also submitted that the dummies should have sharp resemblances with the actual accused in identification parade. On court question whether this aspect was assailed in the

cross-examination of the complainant, the answer was in the negative.

(v) That all the dummies did not have beard. This argument is also not valid because the identification parade was not essential in the facts and circumstances of this case.

(vi) That the recovery of the vehicle is doubtful for the reason that the complainant in his cross-examination stated that he was not aware that his vehicle was recovered by Kachlak police. However he stated that according to his information it was the Ziarat police which had recovered the vehicle. This argument is also not valid because the complainant was not supposed to know whether a particular police party was attached with one or the other police station.

18

Cr. Appeal No.11/Q/2010
Cr. Appeal No.12/Q/2010
Cr. Appeal No.13/Q/2010

18

(vii) That the disclosure memo is dated 05.04.2009 and the appellant was reportedly arrested on 23.03.2009. I would not be relying upon the disclosure memo.

(viii) That the Kalashnikov was not sealed at the spot but was sealed in the police station. Learned Counsel relied upon the case of Abdul Sattar and others Vs. The State reported as 2002 P.Cr.L.J 51 to urge that if the recovered property is not sealed at the spot, it loses its value. This contention has no relevance with factum of recovery of the vehicle and cash.

(ix) That disclosure made by the appellant is not admissible under the law because it was made before the police officer. As stated above I am not relying upon the disclosure memo.

(x) That the recovery of vehicle as well as the arrest of the accused is doubtful. This contention is not supported by evidence on record.

(xi) It was also urged that the recovery of the vehicle and other items was violative of Section 103 of the Code of Criminal Procedure. This contention is not valid because no search was being made as contemplated by section 103 *ibid*.

(xii) At the end the learned Counsel urged that this case is full of doubts. On a court question as regards the applicability of section 103 of the Code of Criminal Procedure, the learned Counsel submitted that he would not press this point.

11. Mr. Rauf Hashmi Advocate appearing on behalf of
Naseebullah appellant raised following points:-

Cr. Appeal No.11/Q/2010
Cr. Appeal No.12/Q/2010
Cr. Appeal No.13/Q/2010

20

- (i) That he adopts the arguments advanced by the learned Counsel for appellant Abdul Qayum.
- (ii) That the recovery of cash amount and mobile phone from his client is doubtful.
- (iii) That according to the evidence of PW.6 the recovery took place from front pocket of Naseebullah whereas according to the complainant the cash amount and the mobile were taken away by Abdul Qayum.
- (iv) That Naseebullah appellant was arrested from Ziarat on 23.03.2009 and he has been involved falsely. It was, therefore, urged that benefit of doubt should be given to the appellant.

12. Mr. Sarfraz Ahmed Shaikh Advocate appearing

on behalf of Shamsullah appellant urged as under:-

- (i) That Shamsullah appellant was not identified by Abdul Khaliq PW.3.
- (ii) That no specific role has been mentioned against Shamsullah appellant.
- (iii) That the extra judicial confession of Shamsullah made before the police is not admissible in evidence.
- (iv) Lastly that it is a case of doubt. He relied upon the case of Ghulam Qadir and 2 others Vs. State reported as PLJ 2008 SC 747 wherein it was held that for the purpose of giving benefit of doubt to an accused person more than one infirmity is not required. A single infirmity creating reasonable doubt in the mind of a reasonable and prudent mind regarding truth of the charge, the report proceeds to say, makes the whole case doubtful.

Cr. Appeal No.11/Q/2010
Cr. Appeal No.12/Q/2010
Cr. Appeal No.13/Q/2010

22

(v) That it is a duty of the prosecution to prove its case.

(vi) The learned Counsel at the end adopted the arguments advanced by the learned counsel for appellant Abdul Qayum.

13. The learned Counsel for the State has supported the conviction and sentence recorded by the learned trial Court.

14. I have seen the file. The evidence available on record as well as statement of witnesses and the evidence of defence witnesses has been perused. Relevant portions of the impugned judgment have been examined. The arguments of contending parties have also been considered.

15. After considering the entire material my observations are that the learned trial court had considered the prosecution as well as defence evidence and after careful assessment he recorded conviction of appellants on the basis of

recovery of vehicle, mobile phone as well as cash from the possession of appellants soon after the occurrence. The appellants were arrested at the Naka and duly identified by the complainant at the time they were apprehended soon after the occurrence. The version narrated by complainant has been corroborated by PW.3 another eye witness who supported the factum of recovery of stolen articles from the spot. I do not find any strong reason to disagree with the findings of learned trial court.

16. As a consequence of what has been stated above the three appeals have no merit and are hereby dismissed. However while awarding sentence the learned trial Court directed the appellants "to suffer rigorous imprisonment seven three years each." This does not make sense. I would therefore impose a sentence of three years each with a fine of Rs.30,000/- each and in case of default in payment of fine, the appellants

Cr. Appeal No.11/Q/2010
Cr. Appeal No.12/Q/2010
Cr. Appeal No.13/Q/2010

24

will undergo a further term of three month simple imprisonment each. Benefit of section 382-B of the Code of Criminal Procedure has already been extended to them. With this modification/clarification on the point of period of sentence the appeals are dismissed.

S. M. Haider

JUSTICE SYED AFZAL HAIDER

Announced in open Court
on 14.07.2010 Islamabad
Bhatti/

Fit for reporting

S. M. Haider