

IN THE FEDERAL SHARIAT COURT

(Appellate Jurisdiction)

PRESENT

MR.JUSTICE FAZAL ILAHI KHAN

CRIMINAL APPEAL NO.21/P OF 2000

Muhammad Nawaz s/o Haji Abdul Manan, r/o Salman Khel Badbeer Distt: Peshawar.	...	Appellant
Versus		
The State	...	Respondent
For the appellant	...	Mr.Abdul Latif Afirdi, Advocate.
For the State	...	Mr.Azizur Rehman, Advocate.
F.I.R.No, date and Police Station	...	No.419, 4.8.1996, Nowshera Cantt:
Date of the Order of The Trial Court	...	08.12.1999
Date of Institution	...	17.5.2000
Date of Hearing	...	18.10.2000
Date of Decision	...	18.10.2000

JUDGMENT:-

FAZAL ILAHI KHAN, CHIEF JUSTICE:- This appeal by Muhammad Nawaz son of Haji Abdul Manan resident of Salman Khel, District Peshawar, is directed against the Judgment and Order of the learned Senior Civil Judge/Judicial Magistrate Nowshera, dated 8/12/1999, whereby he was found guilty of an offence Under Section 408 Pakistan Penal Code, convicted and sentenced to five years rigorous imprisonment and a fine of Rs.one lac, in default of payment of fine to suffer one year Simple imprisonment. He was also convicted under Section 380 Pakistan Penal Code and sentenced to five years rigorous imprisonment and a fine of Rs.one lac or in default of payment of fine to suffer one year simple imprisonment. Both the sentences were however, ordered to run concurrently.

2. It may be briefly stated that on 4.8.1996 at 22.30 hours, Mst, Sajida Parveen Sub-Divisional Education Officer (F), Nowshera, lodged a written report Ex.PW3/1 before the SHO Police Station Nowshera Cantt that the pay for the month of July, 1996 amounting to Rs.24,36,000/-, was

brought by Muhammad Nawaz Accountant from National Bank Nowshera and kept it in the locker. Muhammd Nawaz Accountant and Mir Bashir Junior Clerk made payment throughout the day. At about 4.45 p.m she left the office while Muhammad Nawaz Accountant, Munif Naib xxxxxxxx Qasid, Habib Rasool, Inayatullah Chowkidrs and Saeedullah Senior Clerk Brother of PND were still present in the office. /Robin sweeper was also busy in his work. Shakir Chowkidar informed her by phone at about 8.30 p.m that they have been doomed as some unknown person had broken the locks and taken away the entire amount lying in the office locker. On receipt of the information she immediately contacted the Accountant on phone who was residing at Peshawar and herself proceeded to the office. In the meantime Muhammad Nawaz also arrived at the office. On proper checking they found that all the rooms were properly locked. The window of the room of the Accountant was open and its glass broken while the room itself was duly locked. He found the lock of the Almirah broken and the Safe lying in the Almirah opened. It appeared that somebody had entered the room through

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the window and committed the theft. She suspected that someone connected with the office was involved in committing of theft as the doors of all the rooms were locked. That the accused entered the only room where the cash was lying in the Safe in the Almirah. According to Muhammad Nawaz Accountant, a sum of Rs.1808835/- was lying in the Safe at the time of occurrence.

3. Muhammad Sher Khan Inspector (Retd), who was then SHO of Police Station Nowshera Cantt, on receipt of the written report Ex.PW3/1 of Mst, Sajida Parveen SDEO (F) Nowshera, incorporated the same into FIR Ex.PW3/2. After registration of the case its investigation was entrusted to Wali Ayaz Khan ASI who visited the spot, prepared the site plan Ex.PW6/1, took into possession broken China made lock and a broken Kunda of the cupboard, in which the cash amount was kept, vide memo Ex.PW1/1. He took into possession the prepared list of the cash amount, which was stolen, vide memo Ex.PW4/6 in the presence of its marginal witnesses. Proceedings Under Section 204 Criminal Procedure Code was taken against Hazrat

Hussain absconding accused an employee of Ayub Khattak, Mashal Colony Nowshera Cantt. He also got issued proclamation notices against him. Muhammad Nawaz Accountant and Shakir Akhtar Chowkidar both were arrested in the case and seven days police custody of both the accused were obtained and their statements were recorded under section 161 Criminal Procedure Code. On completion of the investigation complete challan was put in court against the accused.

4. The prosecution in support of its case examined Fazli Rabi ASI as (PW.1), who had stated that during the days of occurrence he was posted as ASI at Police Station Nowshera Cantt, Wali Ayaz ASI in his presence took into possession a China made lock of Almirah, in which the money was kept, and the chain/bolt of the said Almirah which was broken vide memo Ex.PW1/1, which bears his signature. Rahmat Shah S.I CIA Nowshera (PW.2) stated that on 4.8.1996 the present case was registered while on 16.10.1997 the file was received in the Police Post CIA Nowshera for investigation, whereafter Madad Khan Inspector CIA Nowshera entrusted it

to him for investigation. During investigation he recorded the statements of PWs Nazirullah, Habib Rasool, Abdul Munif, Mir Bashir and Sadiqullah. That during the investigation he came to know that the theft was committed by one Hazrat Hussain the absconding accused and his companions, therefore, he applied to the Court for issuance of warrant under Section 204 Criminal Procedure Code vide his application Ex.PW2/1. He got executed the warrant through DFC Hidayat Shah. He recorded the statement of Hidayat Shah and then sent the case file to SHO Police Station Nowshera Cantt for further necessary action. Muhammad Sher Khan retired Inspector (PW.3) stated that during the days of occurrence he was posted as SHO at Police Station Nowshera Cantt. That on 4.8.1996 he was present in the Police Station where he received written report of the complainant Mst, Sajida Parveen SDEO (F) Nowshera, for registration of the case. He correctly incorporated the written report Ex.PW3/1 into the FIR Ex.PW3/2, which correctly bears his signature. Mst, Sajida Parveen Ex-SDEO (F) Nowshera, (PW.4) reiterated the contents of the FIR, however, elaborating

her report she stated that the salaries of the Staff of the schools of the Sub-Division were being distributed by Muhammad Nawaz accused, who is the Senior Clerk/Accountant. That on the day of occurrence she called Muhammad Nawaz several times to attend her office but he came to her office at 16.30 hours, she asked about the cash book and the cash at which the accused told her that the same would be produced the next day. She after the duty hour and finishing ^{her} work left for her house at Nowshera. While leaving her office Shakir Akhtar accused (Chowkidar) was not on duty, therefore, she wrote a note, asked her peon to give it to Muhammad Nawaz directing him that Shakir Akhtar shall not be paid his salary because of his absence during the duty hours. On the day of occurrence she received a telephonic call from Shakir Akhtar Chowkidar that they have been ruined/looted and stated that theft has been committed in the office at the time when he had gone to offer his prayer. She then contacted Muhammad Nawaz, who was residing at Peshawar, on telephone and herself proceeded to the office. She inspected the locks and cupboard and found the door of one

of the window open towards the office room used by Muhammad Nawaz accused and cupboard of one of the door of the office. In the meantime Muhammad Nawaz alongwith one Khalid arrived in a car and accompanied her to Police Station where she submitted the written complaint (Ex.PW3/1) to SHO Police Station Nowshera Cantt. The same was duly signed by her. After lodging the report she alongwith Muhammad Nawaz and Khalid came back to the office and started checking the record. The DSP alongwith some police officials also came to the office and started investigation. She charged her Accountant Muhammad Nawaz for the theft. The stolen amount included amount of Rs.10 lacs, 50 thousands payable as salary which Muhammad Nawaz accused had intentionally kept with him. Rs.8 lacs and some thousands were the unpaid salaries. The entire amount amounted to Rs.18,90,000/-. The Incharge of may centres xx had reported to her in writing that accountant Muhammad Nawaz accused had taken the responsibility for making payment through office and in this manner he used to collect amount from the employees. She had asked the incharges of centres as

to why they failed to collect the amount for onward payment but they informed her that Muhammad Nawaz on the pretext that entries have not been made in cash book, intentionally delayed the payment. She further stated that Mir Bashir Junior Clerk had brought an application dated 2.7.1996 to her, which was typed on 1.7.1996 for payment of the salaries in cash rather than through cheques. This application according to him was typed on the direction of Muhammad Nawaz Accountant. Nazirullah Senior Clerk at Nowshera had also informed her that Muhammad Nawaz accused/appellant was behind the application. She had also asked Shakirullah about the keys of the office who had informed her that Muhammad Nawaz accused has asked him that in case he was late the keys was to be given to Rahmatullah chowkidar of Secondary Education Office. She stated to have signed Ex.PW4/1, Ex.PW4/2, Ex.PW4/3, Ex.PW4/4, Ex.PW4/5 and Ex.PW4/6. Syed Ahmad Shah S.I Police Line Nowshera (PW.5) stated that during the days of occurrence he was posted as ASI at Police Station Nowshera Cantt, and that he is a marginal witness to the

recovery memo Ex.PW1/1, vide which a lock China Made and a broken chain of Almirah Ex.P.1 and Ex.P.2, respectively, were taken into possession by the Investigation Officer in his presence. Wali Ayaz Khan ASI (PW.6) is the Investigation Officer. The statement of Mir Bashir was recorded as CW.1, who stated that during the days of occurrence he was posted as Junior Clerk in the Office of SDEO (F) Nowshera. On the day of occurrence Muhammad Nawaz Accountant sent him to the Office of District Accounts Officer to collect the pay bills which were returned for correction. When he was leaving the office Muhammad Nawaz accused instructed him that salaries and other amounts were lying in the cupboard of the office, therefore, he shall inform the chowkidar to be careful. Therefore, he (the witness) while leaving the office, had instructed Shakir Akhtar accused to be present and vigilant.

5. After close of the prosecution evidence the accused were examined under section 342 Criminal Procedure Code, who denied the allegations. They also recorded their statements under section 340 (2)

Criminal Procedure Code. Muhammad Nawaz accused/appellant produced two witnesses in his defence.

6. The learned trial Judge after reproducing the relevant portions of the statements of the prosecution witnesses, held as under:-

“From the narration of the above facts and appreciation of the evidence of EX.PW4/1, Ex.PW4/2, Ex.PW4/3, Ex.PW4/4, Ex.PW4/5 and Ex.PW4/6, it become obvious and easily comprehensive that the accused Muhammad Nawaz had ruthlessly looted the amount of Rs18,90,153/- through his willful manipulation by breaking the lock and hook/kunda of the cash Almirah and leaving the window open in order to create some doubt against someone else and also leaving the office cautioning the chowkidar. I am, therefore, led to the irresistible conclusion that the accused Muhammad Nawaz is guilty of the offence under Section 380/408 Pakistan Penal Code (Instead of section 457 Pakistan Penal Code) under the Circumstances of the case and under the provisions of Section 236/237 Criminal Procedure Code”

The learned counsel for the appellant contended that the present case against the accused is that of no evidence, there is no ocular or circumstantial evidence connecting the accused with the commission of the offence. That the finding of guilty is based on the solitary statement of Mst,Sajida Parveen PW. Even she did not charge the accused/appellant nor suspected him for the offence till the time proceedings were taken against her and she was removed from service. Her statement is nothing more than suspicion and vengeance as Muhammd Nawaz rightly put the

responsibility on her not to make proper arrangement for the cash as it was she who had ordered payment of the salaries in cash rather than through cheques. As she had been found careless and lacking in performance of her duty and removed from service, therefore, her statement should not have been relied upon. It was further contended that strangely enough Hazrat Hussain who was found by the Investigation Officer to have committed the offence, and declared absconder by the trial Court, was acquitted while the accused/appellant who was found innocent in the investigation was convicted. It was further contended that the statement of Mst, Sajida Parveen is full of improvements and contradictions. That the documents referred to by the learned trial Judge are the statements of accounts prepared by Muhammad Nawaz accused at the instance of Mst, Sajida Parveen and signed by her so that the correct picture of the amount in respect whereof theft was committed shall be known to the Investigation Officer. These exhibits have wrongly been

relied upon as incriminating corroborative evidence to the statement of Mst, Sajida Parveen.

7. After hearing the learned counsel for the parties and going through the entire evidence with their help, in the instant case as already pointed out nobody is charged or suspected for the commission of the offence in the report lodged by Mst, Sajida Parveen, SDEO (F) Nowshera, who was the incharge of the Office. Muhammad Nawaz accused/appellant, who was working as Accountant in the Office during the days of occurrence, was to collect the salaries and other amounts from the National Bank of Pakistan under the direction and supervision of Mst, Sajida Parveen. During the investigation as usual Muhammad Nawaz accused/appellant and Shakir Akhtar were arrested and their five days police custody was obtained to recover the stolen amount in case they have committed the offence. Admittedly during those five days police custody the accused did not confess that they had committed the offence and as such the police failed to make any recovery from them, therefore,

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request was made for their further police custody and the learned Judicial Magistrate remanded them to further two days police custody, but even in these two days the police failed to collect any evidence to connect the accused/appellant with the commission of the offence. Rather after thorough investigation in the case and prolong interrogation of the accused, Hazrat Hussain absconding accused was held to have committed the offence against whom warrant under Section 204 Criminal Procedure Code was issued and proceedings under Sections 87/88 Criminal Procedure Code taken. The SHO Police Station concerned, thereafter recommended to the high-ups that the case shall be handed over for further investigation to CIA. Accordingly, the investigation was handed over to Rahmat Shah S.I of C.I.A, Nowshera. He recorded the statements of Nasrullah, Abdul Munif, Mir Bashir and Sadiqullah and affirmed the report of the previous Investigation Officer that one Hazrat Hussain absconding accused who was serving with Ayub Khattak residing adjacent to the place of occurrence and his companions had committed the

offence. The investigation Officer in his cross-examination in Court admitted that as a result of his investigation both the accused were innocent. Muhammad Sher Khan Inspector (PW.3), the then SHO Police Station Nowshera Cantt, stated that when the First Information Report was being lodged by Mst, Sajida Parveen, she did not suspect her office staff for commission of the offence.

8. The only circumstantial evidence against the accused/appellant in this case is that he was the Accountant and it was his duty to disburse salaries under the direction and control of Mst,Sajida Parveen. He in his capacity as such received the amount from National Bank of Pakistan and other amounts and made part payment of the salaries and kept the remaining amount in the office. It was the duty and responsibility of Mst, Sajida Parveen to have taken all measures for safe custody of such huge amount. Had she made such arrangement the occurrence could have been avoided.

9. The learned trial Judge without judicious appraisal of the evidence failed to determine the main issue as to whether prosecution succeeded in proving beyond reasonable ^{ground} ~~ground~~ that Muhammad Nawaz accused/appellant committed the offence. The learned trial Judge after giving the narration of facts and summary of the evidence laid great emphasis on the statement of Mst, Sajida Parveen SDEO (F) Nowshera. The learned trial Judge coined the following phrase

” اب گتلی ہے نہ چھوری کرنے والا شخص، گھر کا چھوری ہے .“

and observed that the Investigation Officer suppressed the phrase. The learned trial Judge however, failed to elaborate the phrase as the complainant being the Head of the Office was in a better position, likewise Muhammad Nawaz, to know that a huge amount was lying in the Office. Even all those working in the Office, and though incharge of the circles in the sub-division were in the know of the fact that the monthly salaries of the employees of the department were to be collected from the main office. Although over-all supervision and control of the office was

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that of Mst, Sajida Parveen she being incharge of the Office, yet the phrase reproduced above about the knowledge was attributed to the appellant and made the basis for his conviction. The learned trial Judge has erred in basing conviction on such baseless assumption in absence of any other corroborative evidence.

10. As far as the statement of Mst, Sajida is concerned, she neither charged the accused in the FIR nor suspected him for the commission of the offence. It was rightly pointed out by the learned counsel for the appellant that Mst, Sajida Parveen charged the appellant after she was proceeded against and removed from service.

10. As already pointed out Mst, Sajida Parveen did not charge the accused nor suspected him for the commission of the offence and according to her own showing she charged him when she was proceeded against and removed from service. More so, Muhammad Sher Khan, Inspector (PW.3) did state that Mst, Sajida Parveen did not suspect the staff of her office for commission of the offence before him. Such being

the case the learned trial Court was not justified to have relied bare statement of Mst, Sajida Parveen in convicting the accused acquitting Hazrat Hussain a declared proclaimed offender in the case. To sum up the above, the prosecution failed to prove its case against the accused/appellant. There is no ocular or circumstantial evidence connecting the accused/appellant with the commission of the offence of theft.

12. Accordingly, this appeal is accepted the Judgment and Order of the learned trial Judge dated 8.12.1999, is set-aside and he is acquitted of the charge. The accused/appellant is on bail, his bail bonds stand discharged and sureties absolved from their liabilities. The case against Hazrat Hussain absconding accused will remain pending and shall be put on trial after his arrest.

Fazal Ilahi
(FAZAL ILAHI KHAN)
Chief Justice.

Peshawar, the
18th October, 2000.
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Fir for reporting.
Fazal Ilahi
Chief justice.