IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

**MR. JUSTISCE SYED AFZAL HAIDER**
**MR. JUSTICE MUHAMMAD AFZAL SOOMRO.**

**CRIMINAL APPEAL NO. 31/I OF 2006**

Ch. Shaukat Ali son of Muhammad Din,
r/o Chungi No.26 Pind Paracha,
District Islamabad

... Appellant

Versus

1. Fazal Elahi son of Noor Muhammad
   r/o Jilala Balgan Thana Rahwali
   District Gujranwala
   (Presently at Mughalabad Rawalpindi)
2. The State ... Respondents

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|---|---|---|
| Counsel for appellant | ... | Ch. Manzoor Ahmed Kamboh, Advocate |
| Counsel for respondent | ... | Raja Muhammad Afsar, Advocate |
| Counsel for State | ... | **Miss. Shabnam Rasheed Abbasi** Deputy Prosecutor General |
| FIR No. Date & Police Station | ... | 279, Dated 8.11.2004 Tarnol, Islamabad |
| Date of judgment of trial court | ... | 23.12.2005 |
| Dates of Institution | ... | 14.02.2006 |
| Date of hearing of Appeal | ... | 01.04.2009 |
| Date of decision by Federal Shariat Court | ... | 09.04.2009 |

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**JUDGMENT**

**SYED AFZAL HAIDER, Judge.-** This appeal moved by Ch. Shaukat Ali seeks to challenge the judgment dated 23.12.2005 passed by learned Judicial Magistrate, Islamabad whereby respondent Fazal Elahi son of Noor Muhammad was acquitted from charges under section 392 of Pakistan Penal Code and section 20 of Offences Against Property (Enforcement of Hudood) Ordinance, 1979 as well as section 411of the Pakistan Penal Code with the specific prayer that respondent be convicted and awarded maximum punishment provided for the offences under which he was charged.

2. This appeal has arisen out of the crime report registered as FIR. No. 279 with Police Station, Tarnol District Islamabad on the written complaint Ex.PA dated 08.11.2004 of Shaukat Ali, complainant P.W.1 against five persons out of which two, including the respondent, were mentioned by name.

3. Brief facts of the case are that the complainant is a poultry dealer near Chungi No. 26 for the last five years. On 8.11.2004 at about

9.15.p.m. he was present in his office with Tahir Nadeem, Rashid Mehmood and Raqeeb when four persons suddenly appeared out of whom two were armed with pistols and two were empty handed. Complainant and others were commanded to raise hands. With their "hands up" the two empty handed intruders took out cash from the drawer of the table and demanded key of safe. Thereafter cash was removed from the safe. A companion of the dacoits was keeping watch outside the shop. As the dacoit went out, one of them fell on the stones and got injured. He was consequently captured by chowkidar Noor Muhammad who identified himself as Fazal Elahi son of Noor Muhammad Caste Gujjar resident of Jalal Balgan, Police Station Rahwali, at present resident of Mughal Abad Rawalpindi. The name of his other companion was Muhammad Shafique. The other reportedly belonged to Azad Kashmir but their names were not known. All of them had forcibly entered the office of the complainant and relieved them of cash, identity card, a calculator and a wrist watch. These offenders made good their escape in a black coloured corolla of 1976 model.

4. The police investigation ensued as a consequence of the registration of crime report. The investigation was taken up by Muhammad Nawaz, SI P.W.5 who on receiving a written complaint sent by Muhammad Nazir, S.I. first of all formally registered an FIR under section 458, 411 of Pakistan Penal Code read with section 20 Haraba and then proceeded to the place of occurrence, inspected the spot, prepared site plan and recorded statements of witnesses under section 161 of the Code of Criminal Procedure. He arrested injured accused Fazal Elahi and started search of the remaining accused from Pir Wadhai and Faiz Abad Adda but they could not be traced. The accused Fazal Elahi ( the appellant ) had been medically examined and thereafter arrested. After completion of investigation the local police submitted in the court a report under section 173 of the Code of Criminal Procedure requiring the accused to face trial.

5. The trial court framed charges against the accused under section 392 of Pakistan Penal Code/section 20 of Offences Against Property (Enforcement of Hudood) Ordinance, 1979 as well as under

section 411 of Pakistan Penal Code. The accused did not plead guilty and claimed trial.

6. The prosecution in order to prove its case produced 6 witnesses at the trial. The gist of the deposition of the witnesses for the prosecution is as under:-

i. Complainant Ch. Shaukat Ali appeared as P.W.1 at the trial. He endorsed the facts recorded in the FIR Ex.PC

ii. Abdul Raqeeb P.W.2 and Tahir Nadeem P.W.3, the alleged eye witnesses of the occurrence sought to corroborated the statement of complainant, P.W.1.

iii. Muhammad Ameer, Head Constable appeared as P.W.4. He was marginal witness of recovery memo through which the Investigating Officer received a photo copy of the statement and receipts amounting to Rs. 3,75,350/- vide memo Ex.PB.

iv. Muhammad Nawaz, S.I. appeared as P.W.5 and deposed about the investigation conducted by him. The detail of his investigation has already been mentioned in paragraph No.4 of this Judgment.

v. Lastly Muhammad Nazir, ASI appeared as P.W.6. He stated that he alongwith other police officials visited the place of occurrence after receiving information about the dacoity in the shop of Shaukat Poultry dealer. He found Fazal Elahi accused in an injured condition. An identity card and a

calculator was recovered from him. This witness received a written complaint from P.W.1 which was sent to the police station from where Muhammad Nazar, ASI came for investigation purposes. P.W.5 sent the accused to the hospital and prepared the identification memo Ex.PE as well as recovery memo Ex.PF which were signed by him.

7. After close of the prosecution evidence the learned trial court examined the accused under section 342 of the Code of Criminal Procedure wherein he took up the plea that he was innocent and the case against him was registered with the connivance of police. The learned trial court heard the arguments of learned counsel for the accused as well as the prosecutor and after assessing the evidence available on record returned a verdict of not guilty. The respondent Fazal Elahi was acquitted from all the charges. Aggrieved by this judgment the complainant has moved the present appeal against acquittal.

8. We have gone through the file. The evidence of witnesses for the prosecution and the statement of the accused as well as the documentary evidence available on record has been perused. The relevant portions of the judgment have also been scanned. The arguments advanced

by the learned counsel for the appellant as well as learned Deputy Prosecutor General have been noted for consideration.

9. The learned counsel for the appellant raised the following points for the consideration of Court:-

i. That the trial stands vitiated as the trial in this case was conducted by Judicial Magistrate whereas under section 20 the Court of Session has the exclusive jurisdiction;

ii. That the learned trial court illegally closed the right of producing evidence to the extent of Constable Muhammad Qasim, a witness of recovery of stolen articles;

iii. That the conclusions arrived at in the impugned judgment are the result of misreading as well as non-reading of evidence;

iv. That the evidence available on record conclusively connects the accused/respondent No.1 with the offence; and

v. No conclusion other than guilt of the accused can be drawn from the evidence available on record.

10. Learned Deputy Prosecutor General has however supported the impugned judgment and submitted that the appellant did not raise the question of jurisdiction before the trial court and at the appellate stage such

an objection should not be entertained. On the merits of the case it was submitted that the evidence was deficient on crucial points and the acquittal was justified.

11. In so far the question of Jurisdiction is concerned I agree that this question should have been raised before the learned trial court so that not only his views would have been available on the file but the respondent would have had an opportunity of addressing the learned trial court on this very question. May be if the question of jurisdiction was decided at the initial stage the accused would have been saved from the travail of appearing as a respondent in this appeal against acquittal. This view that the objection should be raised at the initial stage finds support from the case of Abdul Ghani Versus State reported as PLJ 1998 Cr. Cases 879 at page 882, a Division Bench case from Baluchistan High Court, wherein it was held as under:-

> "It may be pointed out that the jurisdiction of the learned Additional Sessions Judge was not challenged, the appellant submitted to the jurisdiction of the ordinary court and throughout the proceedings

did not raise the question of jurisdiction. Moreover the learned counsel for the appellant failed to show as to what prejudice has been caused to the appellant. Thus the argument of Mr. K.N. Kohli, learned counsel objecting to the jurisdiction of ASJ Khuzdar is devoid of force, hence repelled".

12. However it does not mean that the question of jurisdiction cannot be taken for the first time at the appellate stage. It might as be noted that section 418 of the Code of Criminal Procedure states very clearly that "An appeal may lie on a matter of fact as well as matter of law". Explanation of this section is to the effect that severity of a sentence shall be deemed to be a matter of law. The objection as regards jurisdiction of a tribunal is certainly a question of law.

13. In the case of Rashid Ahmad Versus State reported as PLD 1972 Supreme Court 271 at page 275 it was held as follows:-

"It is an elementary principle that if a mandatory condition for the exercise of jurisdiction by a Court, tribunal or authority is not fulfilled, then the entire proceedings which follow become illegal and suffer from want of jurisdiction. Any order passed in

continuation of these proceedings in appeal or revision equally suffer from illegality and are without jurisdiction. The learned Advocate General fully supported this view and asked for dismissal of the appeal"

14. The appellate court is well within its right to determine the question of jurisdiction even though it is raised for the first time at the appellate stage. The reason is very clear. If it is found that another court was competent under the law to preside over the trial, than such a trial would be void in the eyes of law. This principle was very clearly enunciated in the case of Mansab Ali Versus Amir, reported as PLD 1971 Supreme Court 124 at page 127 ( which has since been followed) as follows:-

"So far as the first point is concerned that the objection should have been taken in the trial court and any subsequent objection raised before the High Court or this Court could not be taken into consideration. Reliance was placed in the cases of Abdul Rashid v. The Crown (1), S.M.K. Alvi v. The Crown (2), Gokulchan Dwarkadas Moraka v. The King (3), Nirode Chandra Biswas and others v. The

State (4), F.D. Costa v. The State (5), Abdul Khaliq v. The State (6), Qazi Mushtaq Ahmad v. Muhammad Ramzan and another (7), and Abdul Khaliq v. The State (8). The trend of these decisions is that objection of this nature should be taken in the trial court and an objection raised at the appellate stage is not fatal to the case. It will be noticed that in the present case no objection about the sanction was taken before the trial court. An objection to this effect was taken before the High Court and before this Court. In my view, the latest view of this Court in the case of Mansab Ali v. Amir and others is a complete answer to these questions. It has been held by this Court in the above mentioned case that if a mandatory condition for the exercise of a jurisdiction before a Court, tribunal or authority is not fulfilled, then the entire proceedings which follow become illegal and suffer from want of jurisdiction. Any order passed in continuation of these proceedings in appeal or revision equally suffer from illegality and are without jurisdiction. It was further held in the case of Chittaranjum Cotton Mills Ltd. v. Staff Union that "question relating purely to the jurisdiction of the Court should be raised at any stage of the proceedings". In this connection, the following

observation is relevant:-

> "Where the Court is not property constituted at all the proceedings must be held to be coram nor judice and, therefore, non-existent in the eye of law. There can also be no doubt that in such circumstances 'it could never be too late to admit and give effect to the plea that the order was a nullity' as was observed by the Privy Council in the case of Chief Kwame AsanteTedhone v. Chief Kwame 9 DLR (P C)."

In view of this clear observation of this Court, I am of the view that the appellant was entitled to raise objection in the High Court and the High Court should have decided this point raised before it. In the circumstances of the present case, this Court also is competent to go into this question".

15. Let us now revert to the precise objection raised by the learned counsel for the appellant on the question of jurisdiction in this case. The specific objection is that the trial of the case emanating from FIR. No.279/2004, in which a report was sent to the court requiring the accused to face trial, should have been conducted by the court of Session and not by the Judicial Magistrate as visualized by section 20. The text of section 20.

read and referred to by the learned counsel is certainly correct but this provision is contained in Ordinance VII of 1979 i.e, the offence of Zina (Enforcement of Hudood) Ordinance, 1979 whereas the instant case is covered by section 24 of Ordinance VI of 1979 i.e, the Offences Against Property (Enforcement of Hudood) Ordinance, 1979. The text of section 24 is reproduced as under:-

> "**Application of Code of Criminal Procedure, 1898.**(1) The provisions of the Code of Criminal Procedure, 1898, shall apply, mutatis mutandis, in respect of cases under this Ordinance:
>
> Provided that, if it appears in evidence that the offender has committed a different offence under any other law, he may, if the Court is competent to try that offence and to award punishment therefore, be convicted and punished for that offence.
>
> Provided *further that an offence punishable under section 9 or section 17 shall be triable by a Court of Session and not only by a Magistrate authorized under section 30* of the said Code and an appeal from an order under either of the said sections or from an order under any other provision of this Ordinance which imposes a

sentence of imprisonment for a term exceeding two years shall lie to the Federal Shariat Court. (Emphasis added)

Provided further that trial by a Court of Session under this Ordinance shall ordinarily be held at the headquarters of the Tehsil in which the offence is alleged to have been committed.

(2). The provisions of the Code of Criminal Procedure, 1898 relating to the confirmation of the sentence of death shall apply, mutatis mutandis, to confirmation of sentences under this Ordinance.

(3) The provisions of sub-section (3) of section 391 or section 393 of the Code of Criminal Procedure, 1898 shall not apply in respect of the punishment of whipping awarded under this Ordinance.

(4) The provisions of Chapter XXIX of the Code of Criminal Procedure 1898, shall not apply in respect of punishments awarded under section 9 or section 17 of this Ordinance"

16. It is abundantly clear from the wordings of second proviso to sub-section (1) of section 24, quoted above, in which emphasis has been added, that cases under section 9 or section 17 of Ordinance VI of 1979

shall be exclusively tradable by a Court of Sessions. The jurisdiction of a Magistrate to try offences under section 7 and section 17 of Ordinance VI of 1979 alone has been taken away. All the Hudood Ordinances do not have a uniform provision to deal with the question of jurisdiction. Every Ordinance/Order has specific provisions. The provision relating to trial under one Ordinance cannot be employed to trials under the other Ordinance relating to Hudood.

17. After the conclusion of investigation, the report under section 173 was transmitted by local police on 10.02.2005 and finally presented in the Court of learned Judicial Magistrate on 21.02.2005 and registered as such whereafter the learned trial court assumed jurisdiction and proceeded to frame charge under two heads on 07.03.2005. It is being reproduced as under:-

> "That on 08.11.2004 at about 9.50.p.m. you accused alongwith your co-accused entered into the office of complainant situated near Chungi No.26 Pend Paracha, Islamabad armed with pistol and snatched cash and tried to run away from the place of occurrence alongwith your co-accused, you accused were apprehended by the complainant and other witnesses, thus thereby committed an offence under section 392 PPC, 20 Haraba, which is within the cognizance of this Court.

> Secondly, that on the same day during personal search, Identity Card of the complainant and one calculator Casio was recovered from your possession, which was identified by the complainant as his stolen property, thus you accused thereby committed an offence under section 411 PPC, which is within the cognizance of this court".

The accused did not plead guilty and claimed trial. The prosecution itself sent the case for trial before the learned trial court in which process the accused/respondent was neither consulted nor involved. The accused never raised objection of illegal usurpation of jurisdiction by the learned Judicial Magistrate. However, a bare perusal of the charge shows that the accused/respondent was called upon to defend himself against two charges i.e. "under section 392 PPC 20 Haraba and under section 411 PPC" alleged by the prosecution. The second proviso to sub section (1) of section 24, reproduced above, directs that " an offence punishable under section 9 or section 17 shall be triable by a Court of Session and not by a Magistrate authorized under section 30 of the said Code...". It clearly means that offences punishable other than section 9 and section 17 will not be tried by the Court of Session. In the instant case the charge was under section 20 of Ordinance VI of 1979 which contemplates "Punishment for haraba liable to

Tazir" as well as section 392 and section 411 of the Pakistan Penal Code. At the end of the trial learned Judicial Magistrate Islamabad observed as follows:-

> "There is no evidence available to connect the accused with the theft or with the occurrence to attract section 392 PPC. Also there is no evidence to connect him with offence u/s 20 Haraba. Prosecution have also not presented any MLR of accused in corroboration with Ex.PA. The only recovery effected is of ID card, Casio calculator worth Rs.30/- from the accused, after he was taken into custody by the complainant. There is no evidence to suggest that these were the stolen articles, therefore, section 411 PPC is also not attracted. In view of the above discussion the accused Fazal Elahi s/o Noor Muhammad is hereby acquitted from all the charges u/s 392 PPC and 411 PPC leveled against him. Case property be dealt with in accordance with law".

18. In this view of the matter the objection of the learned counsel for the appellant as regards jurisdiction is not sustained. A judgment delivered after due consideration of the facts and the law applicable in the

case and having jurisdiction to arbitrate upon the controversy, cannot be dubbed as *coram non judice*.

19. Before taking up the other contentions raised by learned counsel for the appellant we will refer to certain observations made in the court for reflection by learned counsel for the appellant.

i. The appellant as a complainant was content with the charges framed by the learned trial court against the respondent on 07.03.2005. This charge was not challenged;

ii. The appellant did not file complaint in the court of competent jurisdiction requiring the respondent/accused to appear and face charge under sections 15/20 of the Ordinance VI of 1979.

iii. That the appellant as a complainant was content with the situation that respondent/accused alone faced the trial and he was not interested in seriously pursuing other accused mentioned in his crime report dated 08.11.2004; and

iv. That the appellant had acquiesced in the assumption of jurisdiction by learned judicial Magistrate, Islamabad.

20. Learned counsel for the appellant was then asked to address this Court on the point that in an appeal against acquittal the appellate Court has to be satisfied that the impugned judgment suffers from i) perversity to an extent that has caused miscarriage of justice or ii) evidence has been received by the trial court without legal authority or iii) the acquittal was based upon consideration foreign to the record of the case or iv) the trial court has utterly failed to consider some material evidence available on record or v) the findings of the trial court were wholly illegal or opposed to reason or vi) there has been an utter disregard of the principles relating to appreciation of evidence or vii) misreading of evidence to the extent that it has occasioned grave miscarriage of justice or viii) the grounds of acquittal recorded by the trial court are not capable of being sustained on the evidence available on record or ix) the conclusion arrived at by the trial court are such that no reasonable person can approve.

21. It was also brought to notice of the learned counsel that appellate courts are proverbially reluctant to interfere in the acquittal unless the complainant can bring his case within the purview of the

established principles referred to above. In an appeal against acquittal the first impression is that presumption of innocence of the accused has received judicial recognition. The findings of the trial court honoured. The accused is entitled to benefit of reasonable doubt. Appellate court is loath to disturb findings of fact. The mere fact that a different conclusion would be possible on the basis of evidence would not persuade a judge to alter verdict of acquittal. The trial court has the exclusive advantage of observing the conduct and the mode and manner of answers given by witness in the process of cross-examination. This advantage weights heavily in favour of the conclusions arrived at by the trial court particularly in an acquittal judgment.

22. We have gone through the evidence brought on record both oral and documentary with the able assistance of learned counsel for the parties. The relevant portions of the impugned judgment have also been scanned. Our observations are as follows:-

i. The conclusion arrived at by the learned trial court resulting in the acquittal of respondent are justified by the evidence available on the record.

ii. The impugned judgment is well reasoned. All the aspects of the case, pointed out by the learned counsel for the parties have been addressed to in the judgment under review.

iii. No part of the material evidence has been ignored from consideration.

iv. Defence plea has been considered in the light of facts of the case.

v. The learned trial court was also conscious of those things which the prosecution had refrained from placing on record. For example the findings in paragraph 10 of impugned judgment:

> "Prosecution have also not presented any MLR of accused in corroboration with 'Ex.PA" ( the written crime report moved by the complainant dated 08.11.2004).

The accused/appellant was admittedly injured. The defence of the accused was that on account of money dispute he was thrashed by the complainant and his companions. The complainant on the contrary alleged that the appellant while making good his escape fell

on stones and was injured. The medico-legal report if produced would have corroborated either defence plea or prosecution version. Non-production of the MLC appears to be a conscious effort on the part of complainant or police to withhold very material evidence from the consideration of trial court. The presumptions is that had it been produced it would have certainly supported defence version and therefore it was not brought of record. The learned trial court was legally justified in presuming this inference.

In the same paragraph of the impugned judgment it has been found:

> "There is no evidence available to connect the accused with theft or with occurrence to attract section 392 of the Pakistan Penal Code. Also there is no evidence to connect him with offence under section 20 Haraba."

It is also found by the learned trial court after assessing the prosecution evidence that:

> "The statement of the guard/chowkidar Noor Muhammad under section 161 of the Code of Criminal Procedure was never recorded neither

he was presented as witnesses by the prosecution in person".

On the point of recoveries the learned trial court in the same paragraph founds as follows:-

> " The only recovery effected from the present accused is Identity Card and calculator worth Rs. 30/- of the complainant in accordance with Ex.PE ( the Fard Shinakht Ishia Baramda i.e. memo of identification of the recovered items: Identity Card and a calculator) which is recovered when he was taken into custody by the complainant (emphasis added). Even these articles were never exhibited by prosecution as case property".

It is worthy of mention that the findings arrived at by the learned trial court as mentioned in paragraph 10 of the impugned judgment have not at all been assailed either in the grounds of appeal or even before us while submitting arguments on behalf of the complainant/appellant.

vi. We have also observed that the appellant inspite of the fact that he knew very well the respondent as well as his co-accused Muhammad Shafique, yet he feigned ignorance about their identity in his crime report. The complainant thought that his complaint would not remain cognizable if he was to disclose that he knew both of them who had a money dispute

with him. By suppressing the fact that he knew the two accused personally, the complainant has done dis-service to his cause.

vii. We noticed that the complainant did not attribute any active role to the respondent in the crime report moved by him immediately after the occurrence.

viii. The complainant, in his deposition recorded on 06.12.2005 at the trial did not allege that respondent was armed with a pistol.

ix. P.W.2 Abdul Raqeeb, who claimed to be an eye witness of the occurrence is a personal servant of the complainant and *admitted that his statement under section 161 of the Code of Criminal Procedure was never recorded.* He appeared for the first time at the trial stage i.e. one year and one month after the alleged incident.

x. P.W.3 Tahir Nadeem, a close relative of the complainant and an eye witness stated that respondent Fazal Elahi was unarmed. This fact contradicts the role assigned to the respondent.

xi. The objection of the learned counsel for the appellant is that there has been miscarriage of justice because he was illegally deprived of his right to produce recovery witness. This objection is not valid because the learned trial court found that the witness, the police officer, notwithstanding service having effected upon him, did not appear as required on 17.12.2005 at the trial. The learned trial court declined further opportunity to the prosecution as he had received instructions from the Hon'ble High

Court to complete the trial of this case. The complainant accepted this order and did not avail the opportunity to challenge it as provided in law. However I asked the learned counsel to explain the prejudice caused to the prosecution by non-production of this witness. This witness if produced would have stated only this much that a calculator worth Rs. 30.00 and the I.D. Cards was allegedly recovered by the complainant from respondent accused before the arrival of police and he identified these two things as his own. This was in fact the statement of complainant recorded in Ex.PE which memo even otherwise was also signed by the complainant and Tahir Nadeem P.W.3 who did not say anything about such a recovery having taken place. The complainant himself had signed memo Ex.PB and he being a witness of this document could have proved it as well but he did not opt to say anything about it in his examination-in-chief. Notwithstanding these facts we told the learned counsel for the appellant that we are prepared to read Ex.PE as part of record but he must show us as to how this document would advance his case particularly when the respondent from whom the recovery of these items is alleged, was already in the custody of the complainant before the arrival of police and these two items were produced by complainant before the police officer with the remark that he has recovered these items from the accused/respondent. There was no recovery of any cash or a pistol from the respondent though he is alleged to have been caught almost red handed.

23. In view of what has been stated above we are not persuaded to disagree, in an otherwise reasoned judgment, with the conclusions arrived at by the learned trial court culminating in the acquittal of respondent who has also suffered incarceration extending over a period of one year one month and 15 days. As a result thereof Criminal Appeal No.31/I of 2006 is dismissed.

**JUSTICE SYED AFZAL HAIDER**

**JUSTICE MUHAMMAD AFZAL SOOMRO**

Announced in open Court
on 09-04-2009 at Islamabad
***Mujeeb ur Rehman/****

***Fit for reporting***