

IN THE FEDERAL SHARIAT COURT

(Appellate Jurisdiction)

PRESENT:

MR.JUSTICE ABDUL WAHEED SIDDIQUI

Criminal Appeal No.57/K of 1998

1. Mohammad Ali @ Mamoon Appellants
s/o Anwar Ali Shah
2. Munawar Ali s/o Haji
Mozan Ali Syed
Both Muslim, r/o
Sri Ghat, Hyderabad
3. Mohammad Naeem s/o
Mohammad Saleem
Caste Marvari,
Muslim r/o Sonari
Gali Hyderabad

Versus

The State	.....	Respondent
Counsel for the appellants	.....	Malik Rab Nawaz Noon Advocate
Counsel for the State	.....	Mrs.Qamur Nisa Advocate
FIR No. Date and Police Station	.....	98 dated 1-9-1992 P.S City Hyderabad
Date of Judgment of the trial Court	.....	14-10-1998
Date of Institution.	.....	17-11-1998
Date of hearing	.....	15-11-1999
Date of decision	.....	23-11-1999

JUDGMENT:

ABDUL WAHEED SIDDIQUI, J:- Appellants have assailed a judgment delivered by the Court of IInd Additional Sessions Judge, Hyderabad on 14-10-1998 whereby they have been convicted under section 392 P.P.C and sentenced to suffer R.I for 7 years each. They are further penalized to pay fine of Rs:5000/- each. In case of non payment of fine, they undergo shall further/S.I for 3 months each. They have also been extended the benefit of Section 382-B Cr.P.C.

2. One Hakim Ali (PW-3) appeared at P.S City, Hyderabad on 1-9-1992 at 1700 hours and lodged an FIR wherein he reported that he is a servant of Mst.Kalsoom (PW-2) Assistant Professor of Sindh University. In the house of Mst.Kalsoom her mother Mst.Amnat and her sister Mst.Ghulam Zohran (PW-1) are residing. On the date of report at about 15-30 hours the complainant was going outside the house that on the door he found three persons in whose hands there were T.T pistols. They made him to come inside the house on the point of the said T.T pistols and asked them to give them every thing which was there on their bodies. Apprehending, Mst.Kalsoom gave them 6 golden bangles, one golden chain which was in her neck, two golden rings which all were worn

by her and Mst.Zohran gave them four golden bangles and one golden chain which were worn by her. Then they took out Rs:30,000/- cash which was there in the almirahs. Afterwards these three culprits ran away and after their running away all the persons in the house remained silent as they were threatened on the points of the T.T pistols. When they ran away the complainant came out of the house and he was intimated by the people that those persons had ran away towards Khata chowk. The faces of the culprits were open and in case they are brought before them they can identify them. Mst.Kalsoom informed her relatives who also came and saw the wardat.

On the basis of this FIR, all the three appellants/accused were arrested, challaned and they were charged under Article 17(3) of the Offences Against Property (Enforcement of Hudood) Ordinance 1979, hereafter to be referred as the said Ordinance, and to this charge the appellants did not plead guilty.

3. To prove its case prosecution examined 11 witnesses. Ghulam Zuhran (PW-1), has deposed that complainant Hakim Ali (PW-3) is a cook in the house of her mother. She has deposed in accordance with the contention in the FIR. Mst.Koolsum Pathan (PW-2) has deposed that complainant Hakim Ali is a

government servant and is working in their house since 6 or 7 years. She has also deposed almost in accordance with the statements in FIR. Hakim Ali (PW-3), the complainant has deposed that the incident had taken place. He has further deposed that the contentions of the FIR were not read over to him by the police and that no identification parade was held in his presence before any Magistrate and that the present accused/appellants are not the same persons who had committed the offence. Abdul Hussain (PW-4) has deposed that he acted as mashir in this case. Police did not secure any jewellery from the accused/appellants in his presence. Police obtained his signature on blank paper. Neither identification parade was held in his presence nor any identification of Jewellery was held before any Magistrate in his presence. Police obtained his signature on some blank papers. He was declared hostile and cross examined by DDĀ. It appears that for the sake of Tazkiyat-ul-Shahood this witness, declared hostile, was once again summoned by the trial Court on 14-3-1998 and examined as PW-10. He was asked certian questions in connection with Tazkiyat-ul-Shahood and then was made to depose. He has deposed that he was mashir made/by police in this case. No identification parade was held in his presence. His signature was obtained on Ex.27/A

at the P.S Hyderabad where it obtained his signature on some blank papers. He did not act as mashir of identification of accused persons, as the mashir of production of the golden ornaments and that the PW Mst.Kalsoom did not identify the golden ornaments before Mukhtiarkar in his presence. Accused present in the Court are not known to him. The witness was once again summoned by the Trial Court on 14-3-1998 for the Tazkiyat-ul-shahood and he has once again deposed as PW-11. After the questions about Tazkiyat-ul-Shahood, he has deposed that 10/15 days after the incident he was called at the P.S where his ^{signatures} / on the plain papers were obtained. He has not acted as mashir of the identification parade. He however was made to sign on Ex.27/A but he does not know what were the contents of this exhibit. He was declared hostile and cross examined by PP. Abdul Qayoom (PW-7) has deposed that on 27-9-1992 he was working as SIP at P.S City Hyderabad and that he received case papers of this case from the SHO on that date. He interrogated accused Muhammad Ali who was arrested at P.S Cantt in crime No.46. During interrogation this accused confessed having committed to offence of this case and showed his willingness/produce the case property which was lying in his house. He thereafter arranged for the mashires and then alongwith the accused

he proceeded for his house which was situated at Alam Chand Line. The accused Muhammad Ali led to the upper story of the house and produced one bundle from under the Gadda of Palung. The bundle, when opened was having 10 golden bangles. He prepared such mashirnama in presence of mashirs Abdul Hussain and Jawed. Thereafter leaving accused Mohammad Ali at P.S Cantt^{he} returned to P.S City alongwith the recovered property which was handed over by him to the WHC. He called the PWS for identification of the golden ornaments and then he took accused Muhammad Ali to the office of ADM Hyderabad who issued orders that the identification parade be hold by the IIRD Class Magistrate Latifabad. The identification parade was held and the ornaments were mixed with other ornaments During which Mst.Zohran identified the ornaments to be the same. Thereafter accused Mohammad Ali got identified through the PWS in the identification parade. Such mashirnama was prepared. He produced the mashirnama as Ex.23/A and stated that it bears his signatures. The mashirs were Anwar and Muhammad Morial. On 15-10-1992 he handed over the case papers to the SHO as remand period had come to an end. Remaining two accused were not apprehended by him. Abdul Hameed (PW-8) was has deposed that on 1-9-1992 he working as ASI at P.S City Hyderabad, At 5-00 P.M complainant came at P.S and he registered

the FIR verbatim under his signature under article 17(3) of the said ordinance. He has proved FIR as Ex.17/A. After lodging the FIR he went to the place of wardat alongwith the complainant where he prepared the mashirnama of the place of wardat in presence of mashirs Nazar Mohammad and Qadeer. He has proved the mashirnama of wardat as Ex.19/A. Then he recorded statement of PWs Mst.Kalsoom, Mst.Amanat and Mst. Zohran. Thereafter the plain papers taken from him by the S.H.O. Nazeer Ahmed (PW-9) has deposed that on 10-10-1992 he was working as Assistant Mukhtiarkar and TCM Latifabad. On that day SIP P.S City Hyderabad came to him for holding identification parade of accused Muhammad Ali alongwith four witnesses. He completed the necessary procedure for holding the identification parade and got the handcuffs of the accused removed. Thereafter he called the witnesses one by one for the identification who identified the accused in his presence. He prepared such mashirnama in presence of mashirs which is Ex.18/C and say that it is the same mashirnama which bears his signature. Due to lapse of time he can not say in the Court whether the accused present in the Court was the same who was identified. He had also arranged for identification of the ornaments recovered from the accused. For that too on

the very same date already mentioned by him the SHO had come along with the witnesses. He completed procedure and got the golden ornament identification which were 10 golden bangles, one golden ring and one golden chain. The witness identified the ornaments and a mashirnama was prepared which is Ex.18/B and it is the same which bears his signature. Due to the lapse of time he can not say whether the case property shown to him in the Court is the same.

In his statement under section 342 Cr.P.C, appellant/accused Syed Muhammad Ali has denied all the specific questions. To question No.5 as to why the PWs have deposed against him, he has replied that no PW has deposed against him except police officials. He has declined to be examined on oath and has not produced any witness in his defence. Appellant Munawar Ali has also taken the same line in his statement under section 342 Cr.P.C and so is the case of appellant Muhamamd Naeem.

4. I have heard the learned counsel for appellants Malik Rab Nawaz Noon and learned counsel for the State Mrs.Qamur Nisa. The learned counsel for appellants has rightly contended that this is a case of no evidence in view of the facts that firstly complainant has not supported the FIR and that he was not declared hostile, secondly that PW-5 namely

Fareed Hussain who acted as mashir of the place of incident has deposed that his signature was obtained on blank paper and that the police had not visited the place of incident in his presence and that his signatures were obtained at the P.S at the time of recording the FIR but he has not been declared hostile and thirdly that PW-6 who has been shown as mashir of identification of the accused persons and the mashir of production of the golden ornaments has not supported the prosecution and has not been declared hostile. In view of this position when the complainant and two important material mashirs have not been declared hostile then in that case a clear doubt is created in the story of prosecution. Another contention of the learned counsel for appellants is that the deposition of PW-7 has not been believed by the trial Court and that the trial Court itself in its impugned judgment, para No.20 has admitted that the case stands doubtful.

This para reads as under:-

"According to prosecution's case the I.O. recovered the stolen property from accused Mohammad Ali in presence of mashirs Abdul Hussain and Jawed Hussain. During trial both the mashirs Abdul Hussain and Jawed Hussain have not supported the recovery of stolen property from accused Mohammad Ali hence both the mashirs were declared hostile. On the point of recovery there is only evidence of SIP Abdul Qayoom but his evidence is not corroborated by any piece of evidence, hence

mere evidence of I.O without corroboration will be highly unsafe for awarding the conviction, hence the prosecution has failed to establish the point No.3 without any shadow of doubt. The point No.3 therefore, stands doubtful"

Another contention of the learned counsel for appellants is that in FIR neither the features nor the description of the culprits is given although it has also been said that the faces of the culprits were opened at the time of the incident. In their statements under section 161 Cr.P.C, which were recorded four days after the incident, The PWs have not made an iota of reference to the features and description of the culprits. In this context the learned trial court has relied upon PLD 1988 Karachi 539, but it has not made a reference to another case of the supreme Court of Pakistan reported as 1993 SCMR 585 in which the apex Court has not agreed with the rulings of the above mentioned cited case of Karachi jurisdiction in the following words:-

"S.302-- Special Courts for speedy trials Act (IX of 1992), S.13(5)--- Appeal against acquittal --- Appreciation of evidence--- Identification test had no value for want of description of accused in FIR --- Ocular evidence was unreliable and doubtful-- Motive against accused was of weakest kind -- Appraisal of evidence by Trial Court was satisfactory--- Appeal against acquittal of accused was dismissed in circumstances."

On the one hand there is a delay of four days in recording the statement under section 161 Cr.P.C and for this delay no explanation has been given. On the other hand witnesses of the recovery are declared and hostile the complainant as not supported the prosecution. The members of the identification parade have resiled and the trial court has not believed the recoveries as shown by SIP Abdul Qayoom and in view of this situation the rulings appearing in 1985 SCMR 721, 1988 SCMR 557 and PLJ 1997 SC 1992 do come into the picture and this court is bound by the rulings of Shariat Appellate Bench. When confronted with this situation, the learned counsel for State has conceded that even the trial Court in its impugned judgment has admitted that in this case there is clear doubt, yet she has supported the impugned judgment. It is an established rule

that the benefit of doubt is always given to the appellant/ accused. In the present case this benefit is extended to the appellants, and the impugned judgment is set aside. The appeal is accepted. The appellants namely Mohammad Ali @ Mamoon s/o Anwar Ali Shah, Munawar Ali S/o Haji Mozan Ali and Muhammad Naeem s/o Muhammad Saleem shall be released from the custody in case they are not wanted in any other case. In the end I feel it essential to appreciate the adequate assistance given by the learned counsel for appellant namely Malik Rab Nawaz Noon, Advocate.

Approved for Reporting

(Abdul Waheed Siddiqui)
Judge

Announced in the open Court.

Islamabad, the
23rd November, 1999.
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