

**IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)**

PRESENT

MR. JUSTICE ZAHOR AHMED SHAHWANI
JUSTICE MRS. ASHRAF JAHAN

JAIL CRIMINAL APPEAL NO.02/I OF 2016

Arshad son of Khushdil ... Appellant
resident of Angar Killi
Teh & District Charsadda

Versus

The State ... Respondent

LINKED WITH

JAIL CRIMINAL APPEAL NO.10/I OF 2016

Javed son of Khushdil ... Appellant
resident of Angar Killi
Teh & District Charsadda

Versus

The State ... Respondent

Counsel for the appellants ... Malik Abdul Haq, Advocate

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

FIR No. date and ... No.1437, dated 08.11.2009
Police Station P.S. Charsadda

Date of Judgment of the ... 11.10.2011
trial Court

Date of Institution of ... 22.02.2016
J.Cr. Appeal No.02/I/2016

Date of Institution of ... 27.04.2016
J.Cr. Appeal No.10/I/2016

Date of hearing in FSC ... 15.03.2017

Date of Announcement ...

JUDGMENT.

ZAHOOR AHMED SHAHWANI, J. Through this single Judgment we shall dispose of Jail Criminal Appeal No.02/I of 2016 filed by Arshad and Jail Criminal Appeal No.10/I of 2016 filed by Javed both sons of Khushdil as both the matters are outcome of the same judgment dated 11.10.2011 passed by the learned District & Sessions Judge/ Judge Juvenile Court, Charsadda in case FIR No.1437 dated 08.11.2009 registered Under Section 17(4) of Offences Against Property (Enforcement of Hudood) Ordinance, 1979 at police station Charsadda, whereby both the accused/appellants were convicted under section 396-PPC and sentenced to life imprisonment each with a fine of Rs:70,000/- each or in default to further undergo for six months S.I. Benefit of Section 382-B Cr.P.C. was extended to the appellants.

2. It is prosecution case that on 08.11.2009, complainant Muhammad Iqbal reported the case to the police that Irfanullah (deceased) was his maternal nephew and he had purchased Generator Tractor for him to earn his livelihood. On 08.10.2009 he had gone for the purpose of earning his livelihood and on that very day at 05 p.m. he informed the complainant through his mobile phone No.0313-9894157 that he was hired for taking maize from Sardheri to Dargai in his generator tractor trolley. After some while, he tried to contact him but in vain as his mobile was off and from that very day neither had he returned back to home nor his whereabouts were known to him. The said report was incorporated into Naqal Mad No.22 dated 12.10.2009 and inquiry under section 156(2) Cr.P.C was conducted and during inquiry it came into notice that the offence

was committed by accused/appellants. The accused were arrested and during interrogation the accused disclosed that they have committed the offence. The accused also made pointation of the place of offence, wherefrom skeleton of human body and pieces of clothes of deceased Irfanullah were recovered in the presence of complainant, who identified the same to be the clothes of deceased Irfanullah. On such report of the complainant and murasila Ex.PA/1, FIR No.1437 (Ex.PA) dated 08.11.2009 under Section 17(4) of Offences Against Property (Enforcement of Hudood) Ordinance, 1979, police station Charsadda was registered against the accused.

3. The case was duly investigated. The accused were arrested on 09.11.2009 and statements of PWs were recorded under Section 161 Cr.P.C. against the appellants to face trial, the learned trial Court framed charge against the accused on 29.04.2010 under Section 17(4) of Offences Against Property (Enforcement of Hudood) Ordinance, 1979. Both the accused did not plead guilty and claimed trial.

4. At the trial, prosecution examined six (06) witnesses. **P.W-1** is Rohan Zeb Khan SHO, who submitted complete challan against the accused Sher Dil, Khushdil, Javed and Arshad; **P.W-2** Amir Rahman, ASHO is the Investigating Officer of the case, who deposed that while conducting inquiry under section 156(2) Cr.P.C. he was informed by the informer that the offence had been committed by accused Khushdil alongwith his sons namely Sher Dil and Javed etc, he arrested Sher Dil and interrogated him and during interrogation the accused disclosed that two days back their father Khushdil with brother Javed, Arshad and Said Amin Shah booked generator tractor of

Irfanullah and brought him to *Sheikh Abad* and they after snatching the said tractor killed him and threw the dead body in sugarcane crops. They sold out the said generator tractor to one Wisal. After the said disclosure the complainant alongwith accused Sher Dil and on the pointation of accused few pieces of clothes of deceased Irfanullah were taken into possession and thereafter complainant reported about the murder of deceased Irfanullah committed by accused/appellants and for snatching of tractor trolley from deceased. He also reduced the report of complainant into murasila Ex.PA/1 into writing, produced recovery memo Ex.PW-2/1, arrested accused Sherdil vide card of arrest Ex.PW-2/2; **P.W-3** is Amir Muhammad HC, who reduced into writing the report of Muhammad Iqbal complainant into Naqal Mad No.22 dated 12.10.2009; **P.W-4** is Muhammad Iqbal complainant, who narrated the same facts as mentioned in the FIR; **P.W-5** is Bakht Zaman Inspector, who deposed that after receipt of copy of FIR Ex.PA and murasila Ex.PA/1 proceeded to the place of occurrence alongwith Amir Rehman SI, who produced the site plan Ex.PW-5/1, on his instruction Badan Khan S.I. applied for 07 days police custody vide application Ex.PW-5/2 of accused Sherdil. He deposed that accused Sherdil during police custody led the police party to his house wherefrom one 30 bore pistol bearing No.4146 loaded with three live rounds as case property, one mobile set Nokia 1110 with a sim belonging to deceased Irfanullah and 11 CNICs belonging to different persons alongwith of deceased Irfanullah were recovered vide recovery memo Ex.PW-4/1, arrested accused Sher Dil , Javed , Arshad and Said Amin Shah vide card of arrest Ex.PW-5/3 and from the possession of accused Khush Dil recovered mobile Motorola model I-C.117 alongwith sim, from the possession of accused Javed one mobile LG vide recovery memo Ex.PW-4/1,

produced accused Khushdil, Javed, Arshad and Said Amin Shah before the Ilaqa/Judicial Magistrate for obtaining police custody vide his application Ex.P.W-5/4, he also recovered the tractor trolley of deceased Irfanullah from accused Wisal and separate case was registered in this regard and **P.W-6** Rizwanullah Khan, ASI who incorporated the contents of murasila into FIR Ex.PA.

5. After close of prosecution evidence, statement of the appellants were recorded under section 342 Cr.P.C. wherein they denied the allegation levelled against them by prosecution. They did not opt to record their statement on oath as envisaged under section 340(2) Cr.P.C. nor to produce any witness in their defence. The learned trial Court concluded the proceedings by means of judgment dated 11.10.2011 whereby the appellants were convicted and sentenced in the aforementioned terms. The appellants being aggrieved by the impugned judgment preferred these appeals.

6. Malik Abdul Haq, learned counsel for the appellants contended that the appellants have not been directly nominated in the report of complainant party, which was taken into writing as per Mad No.22 dated 12.10.2009 of missing of the deceased after delay of four days; that complainant PW-4 is close relative (uncle of the deceased), being interested witness; that the recovery of skeleton and clothes on the pointation of the accused/appellants is doubtful; that the record and evidence are silent about the safe custody of the crime articles hold such deficiency on the part of prosecution reacts its case as no crime weapon has been recovered; that there is no medical report; that the accused have not make confession before Judicial Magistrate, as neither they were

produced nor signed the confession, and Judicial Magistrate has not adopted the proper procedure required for recording the confessional statement; that the statement of complainant and PWs suffer from discrepancies, inconsistencies and improvement; that there exists material contradiction in the contents of case FIR and statements of the PWs recorded under Section 164Cr.P.C. and in the Court during the trial; that prosecution miserably failed to prove its case against the appellants; that the case of prosecution is full of doubt, therefore, the benefit of doubt may be extended to the appellants as matter of right; he lastly submits that the learned trial Court without appreciation of evidence convicted and sentenced the appellants which is not sustainable in the eye of law and the appellants are entitled to clean acquittal. In support of his contentions reliance are placed as under:-

1957 PLD SC (Pak)257,	2012 SLR (FSC) 508 ca,	2012 SLR (FSC) 625 cb,
1987 SCMR 1177,	1991 PLJ (LHR) 396,	1973 PLD SC 49,
1985 PLD SS (AJK) 125,	1981 SCMR 435,	2005 YLR 2032,
2005 PLD SC 63 at pg 75,	2004 SCMR 1178,	2007 PLD SC 539.

7. Conversely, Mr. Arshad Ahmad Khan, Assistant Advocate General, Khyber Pakhtunkhwa defended the judgment of the learned trial Court and contended that the FIR has been lodged without any consultation or fabrication; that the recovery of human skeleton from the spot confirmed the venue of occurrence, are matching and positive; that one country made pistol, eleven identity cards including the card of the deceased and a chain eight feet long were recovered from the box of the house of co-accused Sherdil; that on the pointation of co-accused Sherdil the police party recovered the tractor and trolley from the shop of Kamran mechanic; that there is no chance of false

charge, he lastly submits that the prosecution has proved its case against the appellants beyond any shadow of doubt; the involvement of accused/appellants in this case is fully established; he sought dismissal of the appeals.

8. We have heard the learned counsel for the appellants, as well as learned Assistant Advocate General, Khyber Pakhtunkhwa and have gone through the record.

9. It is an admitted fact that there is no eye witness of the incident and the case of prosecution hinges upon circumstantial evidence, which has been collected by prosecution in the shape of recovery of skeleton of deceased as well as NIC, mobile phone of deceased and robbed generator tractor trolley on pointation of co-accused Sherdil. According to prosecution that crime weapon i.e. pistol was also recovered on pointation of co-accused Sherdil from his residential room. Now we deal with the recoveries one by one.

10. So far as the recovery of skeleton of deceased Irfanullah on pointation of co-accused Sherdil from a field of sugarcane is concerned, the same is not helpful to the case of prosecution, because admittedly no post mortem/medical report is available on record to show that the alleged recovered skeleton was of deceased Irfanullah. Though the complainant Muhammad Iqbal (PW-4) had claimed that he had identified the skeleton and clothes recovered on pointation of co-accused Sherdil were of deceased Irfanullah, as deceased used to sew his clothes from the tailor shop of one Amjad, but surprisingly neither the concerned doctor who conducted postmortem was produced in the Court at the time of trial, nor said tailor Amjad was examined by prosecution in support of its case.

11. Apart from that PW-2 Amir Rehman ASHO, who had carried out proceeding under section 156(2) Cr.PC, while replying a question stated that from skeleton it could not be deciphered that the skeleton belonged to male or female human being, or an animal. Meaning thereby, that in absence any postmortem/medical report is not safe to conclude/rely that alleged skeleton was of deceased Irfanullah.

12. Secondly, the recovery of crime weapon pistol and live rounds on pointation of co-accused Sherdil from his residential room is also not helpful to the case of prosecution because neither any empties had been recovered from the place of occurrence, nor any matching report had been obtained. Even no medical report is available to ascertain that deceased had received any bullet injuries.

13. Moreover, the recovery of mobile phone and sim belonging to deceased on pointation of co-accused Sherdil is also doubtful as no document is available on record to conclude that the alleged recovered mobile Nokia alongwith sim belonged to deceased or it was in his use. Even no data has been collected to confirm that the said phone sim was in use of deceased.

14. According to prosecution that eleven NICs including one of deceased were also recovered on pointation of co-accused Sherdil from his residential room. So far the recovery of NIC of deceased is concerned, the same too is not helpful to the case of prosecution, because the alleged room from where the NICs were recovered was not in exclusive use and occupation of co-accused Sherdil, on whose pointation alleged recovery was made, nor the independent recovery mashir namely Sartaj Naib Nazim was produced by

prosecution in support of its case before the trial Court at the time of trial. The alleged recovery of pistol, NICs and mobile phone further stands highly doubtful as the recovery mashir, who is also the complainant of the case, has remained present at each and every place of recovery which shows his interestedness, as he is relative of the deceased. The sole independent witness/recovery mashir namely Sartaj who was the Naib Nazim of the area (Assara Yasinzai) not examined by prosecution in corroboration of the recoveries.

15. Moreover, the case of the prosecution further stands highly doubtful in view of the FIR lodged by complainant with delay of about one month which has remained un-explained. According to record that alleged incident took place on 08.10.2009, while the FIR was chalked on the request of complainant on 08.11.2009, whereas the complainant states that on 12.10.2009, he reported the matter to police which was reduced into writing vide Mad No.22 of the *Roznamacha*, but it is astonishing to note that what prevented the complainant from registering/chalking formal FIR on 12.10.2009, if the accused/culprits otherwise were unknown.

16. According to prosecution story that police came to know through informer that appellants had committed the offence and co-accused Sherdil was arrested and on his pointation alleged recoveries including the skeleton of deceased was made on 08.11.2009. It was also the case of prosecution that co-accused Sherdil during interrogation made disclosure and implicated the appellants but neither any disclosure memo has been prepared nor got exhibited before the trial Court. It is also an admitted fact that accused were produced before concerned Judicial Magistrate for getting recorded their confessional

statements under section 164 Cr.P.C. but they refused to do so, which further makes the case of prosecution highly doubtful.

17. It may not be out of place to mention here, that prosecution also failed to produce the alleged recovered robbed generator tractor trolley, which was recovered on pointation of accused, nor made it article in the Court, which further casts doubt to the case of the prosecution.

18. The appellants in their statements recorded under section 342-Cr.P.C. have fully denied the case of prosecution and adopted plea of innocence. Careful perusal of the record shows that no incriminating evidence has been collected against the appellants to connect them with the commission of offence.

19. The record reveals that prosecution has been unable to collect concrete evidence against appellants which could have been made a base for their conviction but the learned trial Court without proper appreciation of evidence convicted and sentenced the appellants which calls for interference on the part of this Court. As such the Jail Criminal Appeal No.02/I of 2016 and Jail Criminal Appeal No.10/I of 2016) filed by the appellants are hereby accepted and the judgment dated 11.10.2011 passed by the learned trial Court whereby the convict/appellants were convicted and sentenced is set aside. Consequently the appellants namely Arshad and Javed sons of Khushdil are

acquitted of the charge. The appellants be set at liberty forthwith if not required
in any other case.

(MR. JUSTICE ZAHOOR AHMED SHAHWANI)

(JUSTICE MRS. ASHRAF JAHAN)

Announced on _____
at Islamabad.
Zain/*

Approved for reporting

Judge

