

IN THE FEDERAL SHARIAT COURT
(APPELLATE JURISDICTION)

PRESENT

HON.MR.JUSTICE MUHAMMAD KHIYAR

JAIL CRIMINAL APPEAL NO.189/I OF 1998

Shamsur Rehman alias Zahid Fazal Appellant
s/o Ghulmast Ali Shah r/o
village Gharibabad District
Swabi.

Versus

The State

Respondent

Counsel for the appellant

..... Dr.Muhammad Aslam Khaki,
and Mr.Mohammad Jalal-ud-
Din, Advocates

Counsel for the State

..... Mr.Aziz-ur-Rehman,
Advocate

FIR No. Date and
Police Station

..... 409 dated 3-6-1996
P.S.Kalu Khan District
Swabi.

Date of decision of
the trial court

..... 14-11-1998

Date of Institution

..... 10-12-1998

Date of hearing

..... 24-3-1999

Date of decision

..... 5-5-1999

JUDGMENT

MUHAMMAD KHIYAR, J:-This appeal from jail by convict Shamsur Rehman alias Zahid Fazal is directed against the judgment dated 14-11-1998 of the learned Additional Sessions Judge, Swabi whereby he was convicted and sentenced as under :-

- | | |
|--------------------------|---|
| 1. Under section 392 PPC | 8 years R.I. fine of Rs.10,000/-or in default of payment of fine to suffer one year R.I |
| 2. Under section 472 PPC | five years R.I. fine of Rs.3000/-or in default of payment of fine to suffer six months R.I. |
| 3. Under section 411 PPC | one year R.I. |
| 4. Under section 171 PPC | three months R.I. |

2. All the sentences were ordered to run-concurrently. Benefit of section 382-BCr.P.C. was given to the convict. Co-accused Fazal Rehman was declared proclaimed offender and perpetual non-bailable warrants of arrest were issued against him. The case property was ordered to be kept intact till arrest and trial of Fazal Rahim. Motor car was found to have been returned to the lawful owner.

3. FIR Ex.PA was registered on 3-6-1996 at 11.45 at P.S. Kalu Khan District Swabi on the statement Ex.PA/1 of Muhammad Ashraf complainant (PW-8) made to Said Hakeem Shah, ASI(PW-1) charging two unknown persons for snatching motor-car No.1288/GAJ on pistol point near Nazar Banda District Mardan. The statement made

was that complainant was driver of motor car No.1288/GAJ model 1988 owned by one Sarfraz Ahmad. On 2-6-1996 at 14.30 hours he was present at taxi stand Gujranwala that a taxi driver Anwar by name called him and told him that two passengers going to Peshawar wanted to hire a car to which he agreed.They hired the car for Peshawar via Mardan and back. They travelled in that car upto Mardan. The complainant stayed for the night in Zaman Hotel, Mardan. In the morning, at nine 0 clock he took, the two passengers one of young age of about 24/25 years and the other with white beared aged about 45/50 years towards Nazar Banda. Reaching Naza Banda car was stopped. The old man went inside the village and after 10/15 minutes came back and boarded the car. At 11 a.m. when they reached the place of occurrence, the two passengers took out a pistol and asked the driver to hand over the steering to them. Out of fear, he handed over the car to them and himself got down from the car. The two persons took away the car towards Ismaila. The complainant stated that he could identify the persons if shown to him. Said Hakeem Shah, ASI((PW-1) took up the investigation after registration of the case. He visited the spot and prepared the site plan Ex.PB at the instance of the complainant. On arrival of Amir Khan, SHO police station Kalu Khan (PW-7), Said Hakeem Shah, handed over the case file to him. Amir Khan while on gusht had received information on wireless about the occurrence on the same day at 1400 hours. He proceeded to the spot where complainant

and Said Hakeem Shah,ASI were present. On 12-6-1996 PW Anwar (given up as unnecessary) produced a chit Ex.PC showing the name of Syed Zahid Fazal Mullah Gharib Abad Gohati Tehsil Swabi and telephone No.24132643 & Code No.05324. This chit was taken into possession vide recovery memo Ex.PC. On 13-6-1996 statement of Mohammad Anwar under section 164 Cr.P.C. was got recorded. For the arrest of the accused, the I.O. searched his house where he was not available. Said Muhammad Shah brother of accused produced photograph of accused which was taken into possession vide recovery memo Ex.PC/1. His statements was recorded. On 16-6-1996 Amir Khan I.O. saw the accused on Sher Shah road while he was coming in the stolen motor car with original No.1288/GAJ and was arrested.The car and a brief-case from the digi containing grinding machine,different number plates, seals with stamps, a letter pad, forged identity cards in the name of Shamsher Ali having photo of Shamsher Rehman, original identity card in the name of Shamsher Rehman, registration copy of No.1521/DMR transfer, letter, NOC, photostate copy of identity card of Taj Mohammad,two other registration copies of 2476/MRC and No.8505 LOV in the names of Zubair and Faridullah Shah, and full army uniform of the rank of Lt. Colonel ~~were~~ were recovered and memo Ex.PC/1 was prepared. Amir Khan,SHO interrogated the accused, and on his pointation of the place of occurrence, meo Ex.PC/3 was prepared.

Accused named one Fazel Rahim as co-accused with him. The I.O. could not arrest him ^{therefore} /proceedings under section 512 were conducting against him. However ~~xxxx xxxxxx~~ motor car bearing No.K-2/0815 model 1994 with keys and registration copy, open transfer letter, photostat copy of NIC in the name of Ghano Khan was recovered from the open place in front of house of Fazal Rahim vide memo Ex.PD .

~~xxxxxxx~~ Accused Shams-ur-Rehman was produced before Mohammad Shuhaib Magistrate (PW-5) for recording his confession on 20-6-1996.

The Magistrate recorded confession Ex.PW.5/1. The I.O. then requested the court to supervise the identification parade of the accused. Under the direction of the EAC, Raj Bahadur District Qanungo (PW-6) conducted the identification parade, and proved his report Ex.PW.6/1. After completion of investigation Amir Khan, ASI submitted complete challan against the accused.

4. Accused did not plead guilty to the charge.

5. To prove the charge against the accused prosecution produced 10 PWs.

6. Muhammad Ashraf, complainant, appeared as PW.8 and stated that during the days of occurrence he was taxi driver of motor car bearing registration No,1288-GAJ, Toyota corrola, white colour model 1988 owned by his co-villager Sarfraz Ahmad. On 2-6-1996 at about 1430 hours he was present in the taxi stand of Gujranwala that

Muhammad Anwar PW (not produced) came to him and told him that two passengers wanted to hire taxi for Peshawar. Those two persons also came to the taxi stand, one of them was young aged about 23/24 years and other was old xxxxxx with white beard. After discussion, Rs.4000/- was fixed as hire to take those persons to Peshawar via Mardan and back to Gujranwala. At that time no payment was made. He boarded those persons in motor car and proceeded to Mardan. Reaching Mardan he stayed for the night in Zaman hotel and those persons went to their houses. Next morning the two persons asked him to take them to a village in Swabi for collecting their outstanding amount. He proceeded towards village Ismaila and when they reached the village not known to him, those persons stopped his motor car. The old person alighted from the car and went inside the village. After ten minutes he came back and directed him to return. When they travelled some distance they reached the place of occurrence where both the persons took out their pistols and asked him to hand over the steering of the car to them. He was deboarded from the car and those persons took the car towards xx village Ismaila. Muhammad Ashraf complainant further stated that he travelled on foot and after covering a distance of about 2/3 furlongs met a police party to whom he lodged the report Ex-PA/1 which was read over to him and he signed the same. He had pointed out the place of occurrence to the I.O. and charged the unknown persons. The police carried out the search of the accused in 2/3 villages in his presence. The car in

question was returned to the lawful owner after recovery. After the arrest of the accused he was summoned by the I.O. and got the accused identified xxxxx in regular identification parade conducted at Swabi jail. The complainant stated that name of the accused was Shamsur Rehman son of Gulmast Ali Shah, resident of Gharib Abad Gohati. During cross-examination he admitted that he was doing the job of taxi driver and had been going to Mardan even before the occurrence taking passengers in his taxi and had also visited District Swabi many times. He admitted that Sarfraz Ahmad had come to Swabi during investigation of the case. He denied the suggestion that one Muhammad Bashir Gujar son of Muhammad Wazir had come with him to Mardan and the car belonged to him and that he was his driver. He admitted that he identified the accused out of 20/25 persons. He denied the suggestion that he was deposing falsely.

7. Said Hakeem Shah ASI (PW-1) recorded the murasila Ex-PA/1 and sent the same to the police station for registration of the case. He had x: prepared the site plan ex-PB at the instance of the complainant and on the arrival of xxx SHO, he handed over the case file to him. During cross-examination he denied the suggestion that after due consultation with his officers, including the SHO police station Kalu Khan, murasila was drafted under their pressure to entangle false persons in the case and that no occurrence of snatching of the car had taken place.

8. Afsar Said MHC (PW-2) incorporated the murasila in the FIR Ex-PA. Sardar Ali DFC (PW-3) executed warrant under section 204 Cr.P.C. and proclamation under section 87 Cr.P.C. against absconding accused Fazal Rahim and deposed to that effect.

9. Muhammad Saeed ASI (PW-4) is the marginal witness of the recovery memo Ex-PC vide which the I.O. took into possession one chit Ex-P1 produced by Muhammad Anwar son of Fazal Hussain resident of Gujranwala on which address "Said Zahid Fazal, Mohallah Gharib Abad Gohati, Tehsil and District Swabi near Govt. College, Phone No.24132643 alongwith code No.05324" was written. He also proved the recovery memo Ex-PC/1 vide which I.O. had taken into possession xxx photo Ex-P2 of accused Shams-ur-Rehman produced by Said Muhammad Shah PW in the presence of marginal witness. He is also marginal witness of Ex-PC/2 vide which the I.O. recovered one brief-case from the motor car and from the brief-case different articles mentioned above by the I.O. from the accused at the time of arrest. He witnessed the pointation memo Ex-PC/3 of the place of occurrence shown by the accused where he had snatched the motor car. He admitted that at the time of house search of the accused the highups of the police department including DSP Swabi was present. He was unaware of strained relations of accused with his brother. He stated that accused was arrested alongwith motor car on Sher Shah road near Fazal Camp, leading to village Dagai. He admitted that

dickey of the car was locked which was opened by the I.O. after obtaining key from the accused and the key was also taken into possession at the spot which was not produced in court. He explained that the recovery memo Ex-PC/2 "Kalid" was mentioned. He denied the suggestion that the accused was roped with the ulterior motive.

10. Muhammad Shoaib Khan, Judicial Magistrate Swabi (PW-5) deposed about recording of confession of the accused on 20-6-1996 at about 1430 hours. He proved the confessional statement Ex-PW-5/1 which was read over to the accused who thumb impressed xx the same. The memorandum of inquiry Ex-PW-5/2 and certificate Ex-PW-5/3 were bearing his signatures. During cross-examination he admitted that he remanded the accused to police custody on 17-6-1996 for three days. He stated that he had inquired from the accused that whether he was tortured by the police or not but no specific question regarding torture was written in the memorandum of inquiry. He stated that he recorded the confession after observing the legal formalities and was satisfied that accused was giving a voluntary confessional statement.

11. Raj Bahadar district QanoonGo (PW-6) deposed that he was directed by EAC revenue Swabi to conduct the proceeding of identification parade of accused Shams-ur-Rehman in the judicial lock up Swabi and that he did so. Firstly accused was made to sit with 15 under trial prisoners in the judicial lock up and Muhammad Ashraf and Muhammad Anwar PWs were called one by one who correctly identified the accused Shams-ur-Rehman. After that he sent Muhammad Ashraf and

Muhammad Anwar outside the judicial lock up and changed the manner of the under trial prisoners and then complainant and Muhammad Anwar was called again for identification of the accused who correctly identified them. The practice was repeated and third time also ^{and} the witnesses identified the accused. He proved his report Ex-PW-6/1 to be in his hand writing and bearing his signature. During cross-examination he admitted that he had got no magisterial power and had never conducted identification parade before and that identification parade was conducted on the direction of the EAC Revenue. He admitted that at the time of identification parade jail Superintendent, SHO Amir Akhan and police party was present.

12. Amir Khan S.I. (PW-7) deposed about the investigation conducted by him. He had gone to the spot when he received a wireless message about the occurrence where the complainant as well as Said Hakeem Shah ASI were present. On 12-6-1996 PW Muhammad Anwar produced a chit showing address of Syed Zahid Fazal xxxxxxxx xxxxxxx xxxxxxx xx. which he took into possession vide recovery memo Ex-PC. On 13-6-1996 he produced Muhammad Anwar before the Magistrate for recording his statement under section 164 Cr.P.C. For the arrest of the accused he conducted house search but he was not available. His brother Said Muhammad Shah produced photo xxxxx of Shams-ur-Rehman which was taken into possession vide recovery memo Ex-PC/1. He recorded the statement of his brother. Since accused

was absconding, therefore, he applied for warrant under section 204 Cr.P.C. and proclamation under section 87/88 Cr.P.C. against the accused. He recorded the statements of the PWs under section 161 Cr.P.C. On 16-6-1996 he arrested the accused on Sher Shah road while driving stolen car. From the car, a brief-case containing articles mentioned above were taken into possession vide recovery memo Ex-PC/2. He interrogated the accused and during interrogation accused pointed out the place of occurrence and on his pointation memo Ex-PC/3 was prepared. Accused named one Fazal Rahim as his co-accused and for search of the said accused the I.O. conducted his house search but he was not available but from a dagga Maidan he recovered one motor-car bearing No.K-2/0815 Model 1994 alongwith key and a registration copy with open transfer letter and photo state copy of NIC in the name of Ghano Khan was recovered which was taken into possession vide recovery memo Ex-PD. He produced accused Shams-ur-Rehman before the Magistrate for recording his confession. The I.O. requested the court to conduct identification parade which was conducted by the District Qanoongo. On the request of Amir Khan (PW-7) Muhammad Shoaib Khan, Judicial Magistrate (PW-5) recorded the confession of the accused. After completion of the investigation Amir Khan ASI(PW-7) submitted complete challan against the accused and against Fazal Rahim challan under section 512 was submitted. During cross-examination he stated that he had not cited the complainant as a witness to the recovery memo Ex-PC/2 and stated that he ~~marked~~^{marked} his presence

in his diaries. He stated that ^{despite} ~~despite~~ his efforts, no private person from Shewa Adda and other localities were prepared to witness the recovery and arrest of the accused. He denied the suggestion that with the effort of the local police and other high ups, the case was cooked up against the accused with some ulterior motive. He denied the suggestion that accused Shams-ur-Rehman was arrested from his house at Batkhela Malakand Agency. He stated that there was nothing to show that the relations between the accused and his brother were strained, and that he was residing in one and the same house with his brothers at Gharib Abad Gohati within the jurisdiction of police station Swabi. He denied the suggestion that intentionally he had not associated any police official from police station Swabi and stated that one ASI of police station Swabi had accompanied him to the house of the accused.

13. Abdul Baqi Khan (PW-9) SHO police station Kalu Khan stated that he submitted challan under section 512 Cr.P.C. against the accused who was then absconding. Bakhtar Ali F.C. (PW-10) had executed the warrant under section 204 Cr.P.C. and proclamation under sections 87/88 Cr.P.C. against the accused.

14. After the prosecution evidence was closed, accused was examined under section 342 Cr.P.C. All the incriminating circumstances appearing in evidence against him was put to him and to all the questions his reply was ~~xxx~~ " it is incorrect". He stated that recoveries were fabricated and that he did not abscond. He retracted from the confession. When asked about the identification his reply was ~~xxx~~ " it is incorrect". When asked

as to why the PWs deposed against him he stated that all were police officials and interested, and that private PWs were inimical towards him. He professed innocence and did not opt to be examined as witness on oath and also produced no evidence in defence.

15. Trial court believed the prosecution evidence and vide impugned judgment, convicted and sentenced him as mentioned herein above.

16. Dr.Muhammad Aslam Khaki, Advocate, assisted by Mr. Muhammad Jalal-ud-Din, Advocate, for the appellant challenged the conviction on more than one grounds. He contended that identification of the accused was not supervised by a proper person. Recoveries were not witnessed by independent persons and confession having been retracted finding no corroboration from other evidence, it could not be made basis for conviction of the accused. Learned counsel further contended that Muhammad Anwar was a material witness who was given up as unnecessary because he was not supporting the prosecution case. Investigation was unfair as the I.O. failed to verify from Mardan Hotel about stay of accused for the night in that hotel. Photograph handed over to the I.O. by the accused's brother must have been shown to the complainant before identification parade was held. It was argued that conviction under sections 392 and 411 PPC both was illegal. Non-production of case property i.e. brief case and motor car at the trial was fatal to the prosecution case. Learned counsel prayed for acquittal of

the accused/appellant as the prosecution failed to prove the charge against the accused beyond doubt as required by law.

17. Mr.Aziz-ur-Rehman, Advocate, for the State, was unable to assist the court properly.

18. Accused in this case was charged for having committed offences punishable under section 17(3) of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979 and for offences punishable under section 411, 471,472 PPC. Since the proof of harabah liable to hadd was not available on record, therefore, accused was convicted and sentenced under section 392 PPC and was also convicted for the offences under section 411, 472 and 171 PPC. Ocular account of the occurrence was furnished by Muhammad Ashraf, complainant (PW-8). He has given the detail of the occurrence as to how the motor car, he was driving was hired by the two persons from Gujranwala, taken to Mardan and then to some village in Swabi District where those two persons snatched the car ~~from him~~ at pistol point. After he was robbed of the car, he went on foot on the road and after covering some distance met Said Hakeen Shah ASI (PW-1) who was on gasht and made report to him which was recorded in the shape of murasila Ex-PA/1. The occurrence having taken place at 11.00 a.m. was promptly reported at 11.45 a.m. by Muhammad Ashraf. Therefore, question of deliberation or consultation with the highups of the police department did not arise.

Even if car was owned by Sarfraz Ahmad/complainant could report the occurrence of snatching of the car to the police. He had identified the accused in the identification parade held by Raj Bahadar Qanoongo (PW-6). Learned counsel for the appellant has not been able to refer to any rule/regulation or the case law that identification held was improper. Raj Bahadar Qanoongo (PW-6) was directed by the Magistrate to conduct identification parade. None of the witnesses were put any question that photo of the accused was shown to the complainant before identification was held or complainant had seen the accused before identification parade. There is nothing on record to discredit the testimony of Mohammad Ashraf complainant. He has given true version of the incident and has to be believed.

19. Amir Khan ASI (PW-7) on receiving information about the occurrence, at once reached the spot and took up the investigation, of the case. He examined the complainant and then on 12-6-1996 one Anwar (not examined) produced a chit Ex-P1 to him on which address of Syed Zahid Fazal was written. He got recorded his statement under section 164 Cr.P.C. House of the accused was searched who was not available. Accused's brother produced photo of accused which was taken into possession vide recovery memo Ex-PC/1. Accused was arrested on 16-6-1996 while driving motor-car No.1288/GAJ on Sher Shah road. Motor-car alongwith brief-case containing registration of different motor cars, number plates, National Identity Cards of different persons and army

uniform was recovered. At the instance of the accused pointation memo Ex.PC/3 was prepared. Amir Khan, I.O. got recorded the confession of the accused from Muhammad Shoaib Khan, Judicial Magistrate (PW-5). He also got the accused identified in the identification parade held by Raj Bahadar District Qanoongo (PW-6) on the direction of EAC Revenue. The recovery of motor-car from the accused at the time of his arrest is proved by Muhammad Saeed, ASI one of the marginal witness of the recovery memo Ex-PC/2. He had also witnessed the recovery of a chit Ex-P1 vide memo Ex-PC and that of photo Ex-P2 vide recovery memo Ex-PC/1. Amir Khan and Muhammad Saeed PWs have given consistent statements. Except that they are police officials there is nothing on record to disbelieve them. Amir Khan, ASI stated that no body from the public was prepared to witness the recoveries. We all know that people generally avoid to become the witnesses to the recoveries, in such like cases. The contention that key with which brief-case was opened was not taken into possession is devoid of force as in the recovery memo Ex-PC/2 Persian word "sub" is written ^{and} ~~which means that~~ it was taken into possession though ^{not} produced at the trial as it was not asked for and no dejection was raised by the defence. The mere suggestions to the PWs that they had cooked up the case for ulterior motive is not sufficient to discredit their testimony unless it was shown as to what was the ulterior motive due to which the case was cooked up. Confession made by the accused

before Muhammad Shoaib Khan, Judicial Magistrate (PW-5) though retracted appears to be voluntary and is corroborated by the evidence of recoveries, identification of accused by the complainant during identification parade. It is true that Muhammad Shoaib Khan had not recorded specific question about police torture in the memorandum of inquiry but he has stated that he had asked the accused whether he was tortured by the police or not and after satisfying himself that he was making voluntary confession, his confession was recorded. Accused claimed to have sold the motor car to one Bashir and stated that since he was not paid ^{the} whole amount, and when he came to know that car was being driven by Muhammad Ashraf, he alongwith his co-accused Fazal Rahim (proclaimed offender) went to Gujranwala hired the car for Peshawar, came to Mardan and next morning went to Nazar Banda and snatched the car from the complainant, and drove it towards Mardan and handed it over to his co-accused, ^{who} ~~he~~ then forged number plate and ~~his co-accused~~ gave the car to him which he was taking for sale that on 16-6-1996 near Nazar Fazal camp police stopped him and car was taken into possession and he was arrested. Even if had any claim over the motor-car he had no ^vright to snatch the car from the complainant. He could resort to legal course for recovery of amount. It is proved beyond reasonable doubt that accused committed robbery and he was rightly convicted and sentenced under section 392 PPC. His conviction

under section 411 PPC was however unlawful. Conviction of accused under section 472 PPC was also not called for as there was no evidence proving that he made or counterfeited any seal or plate or other instrument for making an impression, intending that the same shall be used for the purpose of committing any forgery punishable under section 467 PPC. Section 467 PPC provides punishment for forgery of a document which purports to be a valuable security, will etc.

20. In the result conviction and sentence awarded to the accused under section 472 and 411 PPC are set aside, and he is acquitted, of the charge under section 472 and 411 PPC. His conviction and sentence under section 392/171 PPC is maintained. The sentence under section 392/171 PPC shall run concurrently and benefit of section 382-B Cr.P.C. shall be extended to him.

Appeal is disposed of as above.

Announce today in open court

(Muhammad Khayar)
Judge

(Muhammad Khayar)
Judge

Islamabad, the
5th May, 1999
Abdul Majeed

approved for reporting
Jar.
5/5