

IN THE FEDERAL SHARIAT COURT

(Appellate Jurisdiction)

Present:

Mr. Justice Dr. Fida Muhammad Khan,
Mr. Justice Abdul Waheed Siddiqui,
Mr. Justice Muhammad Khiyar

JAIL CRIMINAL APPEAL NO.3/Q/1998 L.W.Cr.Ref.No.4/Q/1997.

Abdul Jalil S/o Jumma Khan,
Khaskhaili by caste, R/o Mawach Goth,
Karachi

Appellant

Versus

The State

Respondents

Counsel for the appellant

...

Syed Alamdar Raza, Advocate

Counsel for the State

...

Qari Abdul Rashid Advocate

Date, P.S.No.FIR

...

34/97 dated 4-4-1997 P.S. Hub.

Date of decision of Trial Court....

24-9-1997

Date of institution

.....

26-12-1997

Date of hearing

.....

07-10-1998

Date of decision

.....

6-5-1999

.....

JUDGMENT:

ABDUL WAHEED SIDDIQUI, J:- Appellant has assailed a judgment delivered on 24-9-1997 by the court of Sessions Judge, Lasbella whereby he has been convicted under article 9(1) of Offences Against Property (Enforcement of Hudood Ordinance 1979, hereafter to be referred to as the said ordinance, and has been punished with amputation of his right hand from the joint of the wrist. A criminal reference No. 4/Q/1997 has also been made by the trial court for confirmation and execution of the sentence.

2. Story of prosecution, succinctly, is that a complaint Ex.P/1-A was lodged on 4-4-1997 at 1.15 P.M by one Muhammad Hanif (PW-1) at Police Station Hab District Lasbella Balochistan alleging therein of that he is owner one barber's shop in the main bazar of R.C.D Road. One person, by name Haji, usually comes for taking bath at his hamam came to take bath in the month of Ramzan on the day of incident and went inside the bath room. Another person also went after him who on seeing, could be indentified. Soon afterwards that person went out. In the meanwhile Haji started crying from inside the bath room that some one had taken out Rs. 23,500/- from the pocket of his shalwar. The complainant, his brother Ashraf and some other persons present started running

after the culprit, but he ~~was not~~ ^{escaped.} The victim Haji made the complainant responsible for the theft as it was committed in his shop. Since the theft was committed in his shop, therefore, his profession and good name were affected ~~and his name was~~ as his brother remained in search of the offender. On the date of complaint his brother Ashraf informed him that the culprit was available at Sakran stand. He went to that place and found him ^{to be} the same person. The culprit was apprehended who disclosed his name to be Abdul Jalil. He was brought at police station and the complaint lodged. FIR was immediately recorded. After completion of investigation appellant was challaned. He was charged on 2-9-1997 under articles 9/14 of the said ordinance to which he pleaded guilty and made a request for a lenient view. Earlier, during investigation, also the appellant/accused had made a confessional statement under Section 164 Cr.P.C on 12-4-1997 before the court of Judicial Magistrate Hab.

Muhammad Hanif (PW-1), the complainant and Haji (PW-2), the victim, were examined. PW-1 was crossed ^{and the reply was} in the following words;

" میں نے حلیہ ملزم بتلایا تھا، اسی لئے میرے بھائی نے اس کو دیکھ کر مجھے اطلاع کی تھی اور پھر میں نے اس کو پہچانا تھا "

In spite of chance provided, no cross was made upon PW-2. However, the appellant uttered the following words at the time the chance of cross

was provided;

"موقع فراہم کیا گیا، حرج ندارد، البتہ پھر ملزم نے کہا کہ
میں ٹرائیور آدمی ہوں مجھے اگر مدعی اجازت دے تو میں تھوڑے
تھوڑے کر کے اسکو رقم دے دوںگا، جس پر مدعی نے کہا کہ نہیں "

During statement under section 342/ Cr.P.C, to question No.2,

appellant replied as under;

" یہ سب کچھ اچانک ہوا - میری ماں بہت بیمار تھی - اسی لئے میں
نے یہ جوڑی کی ، محمد پر رحم کھاٹی جائے "

To all other questions, the appellant has replied in affirmative.

4. We have heard the counsel for appellant and State . Mr. Syed Alamdar Raza, counsel for appellant, has contended that in awarding the sentence the conduct of the accused should be kept in view. In the present case, immediately after arrest the appellant/accused confessed and next day he made his confessional statement under section 164 Cr.P.C which is clearly a statement of repentence indicating the offence having been committed under "Ikrah" as defined in clause (i) to article 10 of the said ordinance. According to him repentence purges the sinner. He has also contended that without the closure of the evidence of prosecution. statement under section 342 cr.P.C. was recorded which is in violation of the procedure as laid down in Cr.P.C. Another contention is about undue unexplained delay in lodging FIR. Mr. Qari Abdul Rashid, the

learned counsel for State has contended that the stolen property exceeded the value of 'Nisab ; was under Hirz, was taken away surreptitiously by an adult and sane person and the accused pleaded guilty of the commission of theft liable to Hadd. Consequently the offence committed stands proved beyond reasonable doubts for awarding Hadd punishment. He has supported the impugned judgment.

5. At the outset, we have pondered about the constituent parts of the article 5 of the said ordinance which reads as under .

5. Theft liable to hadd. Whoever, being an adult, surreptitiously commits, from any hirz, theft of property of the value of the nisab or more not being stolen property, knowing that it is likely to be of the value of the nisab or more is ,subject to the provisions of this Ordinance, said to commit theft liable to hadd.

A plain reading of this article computes the following ingredients of this article:

- 1- The offender should be adult.
- 2- The offender commits the offence of theft surreptitiully.
- 3- The stolen property was in hirz at the time of the occurrence of offence.
- 4- The stolen property is not a stolen property itself.
- 5- The offender commits the offence knowing that the property which is being stolen is or is likely to be of the value of the nisab or more

From the evidence brought on the record it is clear that the appellant was adult within the meaning of article 2(a) of the said ordinance. It is also clear that he has committed the offence of theft surreptitiously as per Explanation 2 to article 5 of the said Ordinance and that the stolen property was in hirz within the meaning of article 2(d) of the said ordinance which reads:

" hirz" means an arrangement made for the custody of property."

It is also neither alleged nor proved that the stolen property was not in itself a stolen property. Out of the five ingredients of the offence of theft liable to Hadd four are constituted as discussed. The fifth constituent part is in doubt. It is clear from the record that at the time of the commission of offence, appellant was neither in the knowledge that the property which was being stolen is of the value of nisab or more nor he had an idea that it was likely to be of such a value, the value of nisab, being 4.457 grams of gold or the property of equivalent value.

Haji (PW-2), the victim has deposed as under;

"برحلف بیان کہ رمضان کے مہینہ میں ، میں پڑی سے حمام میں نہانے گیا تھا، حمام میں نہانے کے لئے میں نے اپنے کپڑے اتارے تھے - نہاتے نہاتے میرا شلوار گرا، جس کے جیب میں تیسٹیں ہزار پانچ سو روپے تھے، اور شلوار گرنے پر دوسرے کمرہ حمام میں ملزم حاضر عدالت نہا رہا تھا، جس نے میری رقم شلوار کی جیب سے نکال کر بھاگا۔ تو میں نے شور مچایا۔ دوکاندار نے کہا کہ میں ملزم کو شناخت کر سکتا ہوں لہذا بعد میں دوکاندار حمام والے نے ملزم حاضر عدالت کو پکڑوا دیا۔"

This deposition and the circumstances of the case do prove beyond reasonable doubt that the offence was committed in such a haste that the offender was not likely to know that cash he was stealing exceeded the value of Nisab. This being so, then the fifth ingredient of the theft attracting Hadd punishment is missing. We have before us the principles of withholding Hadd punishments for slight doubt as laid in the sunnah of the Holy Prophet. Following are the sunan, inter alia, which make us reach the conclusion that theft which has been committed is not liable to the punishment of Hadd as laid down in article 9 of the said Ordinance.

عن ابى هريرة رضى الله عنه قال قال رسول الله صلى الله عليه وسلم ادرواء الحدود ما استطعتم -
(رواه ابويعلى فى مسنده)

Hazrat Abu Huraiara narrated from the Holy Prophet (PBUH) who directed to withhold hudood as much as possible (Musnad Abu-Yaali)

۲- عن عائشة رضى الله عنها قالت قال رسول الله صلى الله عليه وسلم ادرواء الحدود عن المسلمين من استطعتم فان كان لهم مخرج فخلوا سبيله فان الامام ان يخطئ فى العفو خير من ان يخطئ فى العقوبة (الترمذى)

Hazrat Aisha (R.A) narrated that the Holy Prophet (PBUH) directed to withhold Hudood from the muslims as much as possible and in case he

has a way to be brought out of it , then leave his way and
(this is because) if the authority makes a mistake in acquittal, it is better ^{than}
to make a mistake in conviction (Sahih Tirmizi)

Once proved that the offence of theft committed is not
constituted to be a theft liable to Hadd then it is falling within the
meaning and scope of article 13 punishable under article 14 of the said
ordinance. Both these articles read as under;

13. Theft liable to tazir - Whoever commits theft which is not
liable to hadd or for which proof in either of the forms
mentioned in section 7 is not available, or for which hadd
may not be imposed or enforced under this Ordinance, shall
be liable for tazir.

14. Punishment for theft liable to tazir; - Whoever commits theft
liable, to tazir shall be awarded the punishment provided for the
offence of theft in the Pakistan Penal Code (Act XLV of 1860).

In the circumstances of the present case we find that the
offence committed is falling within the meaning ^{and} scope of section
380 P.P.C. consequently we hereby set aside the impugned judgment
of the punishment of Hadd and convict the appellant under section
380 P.P.C and sentence him to R.I for 3 years and a fine of Rs.20,000/-
in default of payment of which he shall have to undergo S.I for one
year more. In case of recovery, ^{amount} $\frac{1}{2}$ of the recovered shall be paid to
the victim under section 544 Cr.P.C. Benefit of section 382-B Cr.P.C

is also extended to him. The appellant has been in custody as a prisoner of simple imprisonment. This period shall be calculated as if he has been under Rigorous Imprisonment. The appeal is dismissed in terms as above.

(Abdul Waheed Siddiqui)
Judge

(Dr. Fida Muhammad Khan)
Judge

(Muhammad Khayar) 3.5.99
Judge

Announced in open Court on 6-5-1999
at Islamabad

(Dr. Fida Muhammad Khan)
Judge

Approved for Reporting

(Abdul Waheed Siddiqui)
Judge

Latif Baloch/

(Muhammad Khayar)
Judge