

**SHARIAT APPELLATE BENCH OF HIGH COURT OF AZAD
JAMMU & KASHMIR**

Appeal No. 02/2022;
Date of institution. 03.01.2022;
Date of hearing. 28.04.2022.
Date of decision. 29.04.2022.

Muhammad Illyas S/o Muhammad Hussain, caste Bhatti R/o
Boher Colony Tehsil & District Mirpur, present at Central Jail
Mirpur.

.... Appellant

VERSUS

1. State through Advocate General/Additional Advocate
General, Azad Jammu and Kashmir, Mirpur;
2. Zaffar Iqbal S/o Ghulam Nabi R/o Mian Muhammad
Town Mirpur.

..... Respondents

CRIMINAL APPEAL

Before:- Justice Chaudhary Khalid Rasheed, J.

PRESENT:

Raja Muhammad Mehfooz, Advocate for the appellant.
Mr. Muhammad Khalil Ghazi, AAG for the respondents.

JUDGMENT:

The captioned appeal has been filed against the
judgment passed by the learned District Criminal Court
Mirpur, dated 24.12.2021, whereby the appellant has been
convicted under section 458-APC, and was awarded 5 years
rigorous imprisonment and fine of Rs. 10,000/-. In case of
non-payment of fine he has to undergo for further 6 months

simple imprisonment. The appellant was also sentenced to 5 years rigorous imprisonment and fine of Rs.20,000/- under section 20 EHA. The benefit of section 382-B Cr.PC was also extended in his favour.

Precise facts of the case are, Zaffar Iqbal, respondent No.2 herein reported at Police Station City Mirpur on 20.06.2010 that on the midnight of 19/20 June 2010, he along with his wife were sleeping in their home, his brother Qammar Iqbal made telephonic call from lower storey of house that he heard some noises from our storey, whereupon the complainant opened the door of bathroom towards Courtyard, suddenly four unknown persons, out of them two were armed with revolver and one was armed with the handle of pickaxe, caught hold of complainant and forced him inside the room where his wife was sleeping. The dacoits forcibly took off locket, bracelet and ring from the complainant, also violently took bracelet, gold ring and locket from the brother of the complainant Qammar Iqbal and also took 12/15 thousand rupee. It was further proceeded that accused also coercively took off 4 bangles, two bracelets and three gold rings from the wife of complainant and seized Samsung Mobile of the complainant

and Nokia Mobile of his wife. On this report, FIR No. 200/2010 was registered at Police Station City Mirpur on 20.06.2010 in offences under sections 458-APC and 17(3) EHA. During investigation it was found that accused/appellant Muhammad Illyas and co-accused Hameeda Bibi managed and planned dacoity in the house of complainant, thus arrested, after completion of investigation challan was presented before District Criminal Court Mirpur on 28.09.2010. On 09.02.2011, statements of the accused persons under section 242 Cr.PC were recorded, they pleaded innocence, whereupon the prosecution was ordered to lead evidence in support of the allegation. On completion of prosecution evidence, statement of accused under section 342 Cr.PC. was recorded on 07.10.2021. Accused persons again pleaded not guilty, however refused to produce evidence in defence. At the conclusion of trial after hearing arguments pro and contra, the learned trial Court convicted the appellant under section 458-APC and 20 EHA and awarded sentence in the manner indicated above vide its impugned judgment dated 24.12.2021, hence, the captioned appeal to set-at-naught the sentence awarded by the Court below.

The learned counsel for the convict/appellant vehemently contended that appellant was not nominated in the FIR but was subsequently arrested during investigation and was sent to face the trial on the basis of alleged recoveries. The learned Advocate while referring to the statements of recovery witnesses submitted that as per the statements of witnesses, the parcels of recovered articles were prepared at Police Station and witnesses were not brought to the house of the convict/appellant as is alleged in recovery memo, thus, the recoveries are doubtful, hence on the basis of such doubtful recoveries the appellant could not be convicted. The learned Advocate further argued that the same allegation was leveled against Hameeda Bibi who has been acquitted of the charges while disbelieving the prosecution evidence whereas on the basis of said evidence appellant has been convicted. It is further stated that prosecution evidence is piled with enormous contradictions, thus conviction recorded by the Court below ipso facto entails to be extinguished. The learned Advocate held that in case of slightest doubt in the prosecution story the benefit of the same has to be extended in favour of the accused not as grace but as a matter of right, however, in the instant case,

the Court below skipped to ponder the flagrant and blatant discrepancies in the prosecution evidence and convicted the appellant on whimsical and flimsy grounds, hence legitimate construction of concerned law has not been made. The learned counsel further proceeded that no identification parade of the appellant has been conducted which is sine qua non for conviction like case in hand. It is also claimed that prosecution failed to produce important witnesses namely Qammar Iqbal, Zainab Batool and Nadeem Arif, which turned the prosecution version into a chaos. The learned Advocate lastly solicited the acquittal of the appellant.

The learned State counsel on the other hand confronted and asserted that prosecution has established the guilt of appellant to the hilt beyond shadow of any reasonable doubt by producing cogent, tangible and convincing evidence. The learned counsel further stated that prosecution case is strengthened from the recoveries effected from the convict/appellant and recovery witnesses fully supported the prosecution version to elevate solid corroboration, so the Court below has rightly and accurately

convicted the appellant vide impugned judgment which is justified to be upheld.

I have heard the learned counsel for the parties and gone through the record of the case with utmost care and caution.

The case established and brought forwarded by the prosecution against convict/appellant was that he along with Hameeda Bibi designed and plot dacoity in the house of complainant in connivance and conspiracy with Mst. Sakeena Bibi, on the day of occurrence executed their contrive and after dacoity divided the stolen property which was recovered during investigation. The whole prosecution case spins around a central axis of recoveries of the stolen articles. As per the contents of annexure Exh.PD alleged to be recovered at the instance of convict appellant one bracelet, one locket, two rings and one Nokia Mobile were recovered from an iron box existed in the residential room of his house. Abid Rasheed S/o Abdul Rasheed and Abdul Shakoor S/o Muhammad Suleman were mentioned as witnesses of the recoveries. Abid Rasheed appeared in the Court and got recorded his statement on 11.01.2012. During cross examination, he has stated that recovered mobile

[illegible]

The other recovery witness namely Abdul Shakoore got his statement recorded on 13.05.2015 who during cross examination deposed that recovered articles have not shown to him today. He further deposed that recovery memo was prepared at Police Station. The relevant portion of his statement is reproduced as under:

"پولیس نے برآمدگی مظہر کی موجودگی میں نہ کی تھی۔ جو چیزیں عدالت میں موجود ہیں یہی برآمد ہوئی تھیں۔ مظہر نے پولیس کو لکھوایا تھا کہ مظہر کے دو موبائل فون چوری ہوئے ہیں۔ مظہر نے نوکیا فون کا ذکر کیا تھا۔ برآمد شدہ فون نوکیا نہ ہے۔۔۔۔۔ سوال جرح بیان کیا کہ یہ درست ہے کہ مظہر نے پولیس بیان درخواست Ex.PA میں موبائل فون سام سنگ اور ایک نوکیا لکھوایا تھا۔ جبکہ موجودہ عدالت موبائل فون Sony Ericson ہے۔ یہ درست ہے کہ یہ فون مظہر کا نہ ہے۔"

The above reproduced statements of the prosecution witnesses put a considerable question marks on the whole prosecution story because both recovery witnesses admitted that the recoveries were prepared at Police Station and were signed by them at Police Station, thus, the stand taken by the prosecution that stolen articles were recovered at the pointation of Muhammad Illyas from his house is blatantly refuted and denied. After excluding the recoveries of stolen articles on the pointation of accused it remains nothing with the prosecution case to justify the

conviction of the appellant. After going through the impugned judgment, I am of the view that the Court below fell in error while convicting the appellant because prosecution has miserably failed to guilt the accused to the hilt or to prove its case beyond shadow of rational or plausible doubt. In this case, appellant was neither nominated in the FIR nor identification parade was conducted thus the sole evidence relied upon by the prosecution is recoveries of stolen articles which were not proved in accordance with the required standard that can justify or vindicate conviction, therefore, the only option left to this Court is to pass a command of acquittal of the appellant for the reason that benefit of a slightest doubt has to be resolved in favour of an accused person not Ex-gratia but as a matter of right as held by the learned apex Court of Azad Jammu and Kashmir in 2014 SCR 351 and 2017 SCR 428. The alleged designing and planning to commit the dacoity amongst the accused persons is also not proved through any tangible, cogent and concrete evidence, which is sine qua non for conviction. Moreover, co-accused, Hameeda Bibi was acquitted by the Court below while discrediting the evidence harvested by the prosecution however, on the

basis of same and identical evidence the appellant was convicted which is unjustified and not capable of being sustained. Reliance may be placed on PLJ 2019 S.C. 265.

The crux and epitome of the above discussion is, the instant appeal is hereby accepted and appellant is acquitted of all charges leveled in this case.

Circuit Mirpur;
29.04.2022

Approved for reporting.

-Sd-
JUSTICE

-Sd-
JUSTICE