IN THE SUPREME COURT OF AZAD JAMMU AND KASHMIR
(Shariat Appellate Jurisdiction)

PRESENT:

MR. JUSTICE KHAWAJA M. NASIM
MR. JUSTICE RAZA ALI KHAN

CRIMINAL APPEAL NO. 22 OF 2024
(On appeal from the judgment of Shariat Appellate Bench of the High Court dated 17.11.2023, passed in Criminal Appeal No. 03 of 2018).

Muhammad Ishtiaq s/o Abdul Razzaq, caste Rajput r/o Pakhral Tehsil & District Mirpur, presently confined in Central Jail Mirpur.

…Convict-Appellant

VERSUS

The State through its Advocate General & 2 others.

…Respondents

Appearances:

For the Convict-Appellant:	Mr. Kamran Riaz Butt, Advocate.
For the State:	Sheikh Masood Iqbal, Advocate-General.
Date of hearing:	31.10.2024

JUDGEMENT:

***Raza Ali Khan, J*:-** The captioned appeal has been directed against the judgment of Shariat Appellate Bench of the High Court (*hereinafter referred to as High*

Court) dated 17.11.2023, whereby, the appeal filed by the convict-appellant, herein, has been dismissed.

2. The present case arises from an appeal by the convict-appellant, who was tried and convicted under Sections 458, APC, 17(3)-EHA the offence against Property (Enforcement of Hadd Act), 1995 read with section 13 of Arms Act, 1905 and convicted and sentenced under sections 458/392 APC, in the case registered at Police Station Alibaig on 10.03.2012. According to the contents FIR, the incident occurred at approximately 6:20 p.m. when the complainant was at home alongwith his family. Khawar, a resident of Panjairi and the nephew of the complainant's wife, arrived at the complainant’s house alongwith his wife, Mst. Sawera. When the complainant get them entered in his house, four masked individuals, aged around 25-30 years and of medium height, forcibly entered the residence. One of the intruders was armed with a pistol, while the others wielded weapons resembling Kalashnikovs. On of the robbers halted the complainant and his family, along with Khawar and Mst. Sawera, in a room while the others started searched in the house. The assailants stole approximately Rs. 60,000 in cash, including Rs. 30,000 from Mst. Sawera’s handbag, and various gold ornaments weighting around 15-16 tola\. Additionally, they forcibly snatched a Nokia 2700 mobile phone from the complainant’s daughter, Fareeha, removing the SIM card and battery from the device.

3. Following the investigation, the convict-appellant, Muhammad Ishtiaq, and co-accused, Amir Hussain and Mohsin Shamim, were apprehended and a report under Section 173 of the Criminal Procedure Code (Cr.P.C) was presented. During the course of trial, Amir

Hussain absconded, and Mohsin was acquitted of the charges under Section 265-K Cr.P.C by the trial Court. The prosecution produced 15 witnesses out of the 18 witnesses listed in the calendar of challan and thereafter the convict-appellant, Muhammad Ishtiaq, was examined under Section 365-D, Cr.P.C., wherein he denied the allegations and presented a defense witness under oath. Upon the conclusion of the trial, the District Court of Criminal Jurisdiction, Bhimber, found the convict-appellant guilty of the offences and sentenced him to 7 years' rigorous imprisonment and a fine of Rs. 100,000 under Section 392-APC, with an additional 6 months' simple imprisonment in case of default of payment of fine. He was further sentenced to 7 years' rigorous imprisonment and fined Rs. 50,000 under Section 458-APC, with an additional 4 months' simple imprisonment in default of payment of fine and 2 years' rigorous imprisonment and a fine of Rs. 10,000 under Section 13 of the Arms Act 1965, with a further 2 months' simple imprisonment in case of non-payment of fine. The convict-appellant was also granted the benefit of Section 382-B, Cr.P.C. as per the judgment dated 30.11.2017. The aforesaid judgment was challenged by the convict-appellant before the High Court by filing an appeal which has also been dismissed via the impugned judgment dated 17.11.2023.

4. Mr. Muhammad Kamran Riaz Butt, the learned counsel for the convict-appellant, contended that the High Court's decision is erroneous, failing to properly interpret both; the law and the facts of the case. He argued that both the lower courts neglected a comprehensive examination of the evidence brought on record, pointing out that the prosecution's witnesses

were not independent. One witness is the son of the complainant's sister-in-law, and another, Mst. Fareeha Rani, is the complainant's daughter, undermining their impartiality. Moreover, two crucial witnesses listed in the challan as eyewitnesses failed to appear in court and did not testify the incident. The complainant's failure to produce independent witnesses throughout the trial casts serious doubt on the appellant's guilt, an oversight that was critically ignored by the lower Courts, thereby undermining their judgments. Furthermore, Mr. Butt highlighted that co-accused Mohsin Shamim was acquitted of the charge under Section 265-K Cr.P.C., and argued that, by the rule of consistency, the appellant should be extended a similar relief. He additionally pointed out that, during the appeal's pendency, the convict-appellant was granted bail under Section 426 Cr.P.C. but was later detained in an unrelated case since 3 March 2023, in Central Jail Mirpur. Despite informing the learned High Court of this development, the High Court upheld the District Criminal Court Bhimber's conviction, ignoring verified reports from Central Jail Mirpur (26 September 2023) and District Jail Bhimber that the convict-appellant had been imprisoned since 3 March 2023 and had completed his sentence awarded by the trial Court. He further asserted that the High Court issued its judgment on 17 November 2023, but, in accordance with the provisions of Cr.P.C., the appellant was entitled to receive the judgment in custody, as he was confined in Central Jail Mirpur; however, the judgment was only dispatched to the jail superintendent on 4 March 2024. Accordingly, the appellant's appeal is well within time, based on the judgment's service date. Mr. Butt further cited this Court's judgment reported as *2022 SCR 26*, where delay due to conviction was

condoned, urging the Court to extend similar leniency to the appellant under this precedent.

5. Sheikh Masood Iqbal, the learned Advocate-General representing the State, argued that the impugned judgments of the High Court and the District Criminal Court Bhimber, are fully in accordance with law and no merit exists to justify intervention by this Court. He argued that the convict-appellant has failed to provide any compelling grounds to challenge the rulings issued by the High Court and District Criminal Court Bhimber. According to the learned Advocate General, the prosecution has convincingly established the guilt of the accused through reliable eyewitness testimony, which withstood cross-examination and provided substantial and convincing ocular evidence. He therefore urged the Court to dismiss the appellant’s appeal. Furthermore, he highlighted that the appellant’s appeal is excessively delayed and claimed that, by his own calculation, the appellant has served only approximately two and a half years of the sentence, contrary to the appellant’s calculation. The learned Advocate General maintained that the prosecution’s case was proved beyond any reasonable doubt, free from material contradictions or embellishments, and that recoveries were conducted based on the convict-appellant's pointation, which further reinforced the prosecution’s case. He concluded by asserting that any modification of the judgments or reduction in punishment would require strong, cogent evidence and reason, neither of which is present in this case nor pointed out by the convict-appellant. Thus, the judgments of the courts below should remain undisturbed.

6. We have heard the learned counsel for both parties and thoroughly reviewed the case record. Since,

both the courts below convicted the appellant, the concurrent findings of both Courts would typically not warrant any interference by this Court. Nonetheless, in the interest of justice, we have revisited the matter and re-evaluated the evidence. The case was reported on 10.03.2012, shortly after the alleged incident, leading to the apprehension and trial of the convict-appellant for the charges outlined in the FIR. The prosecution listed 18 witnesses in the calendar of witnesses, out of whom 15 got recorded the statements before the Court. During the course of trial, Amir Hussain the co-accused absconded after being granted bail, while another accused, Mohsin Shamim, was acquitted of the charges under Section 265-K, Cr.PC. Upon conclusion of the trial, the learned trial Court convicted the convict-appellant and sentenced him in the manner indicated hereinabove.

7. Soon after the incident, the complainant promptly presented an application for the registration of FIR and subsequently recorded a statement, wherein he consistently reiterated the facts initially described in the FIR. This established the immediate and formal initiation of the case proceedings. The first prosecution witness, Khawar Farooq, a relative and an eyewitness to the incident, testified in court, providing a detailed account of the events. He stated that as soon as the convicts and co-accused entered the home, they forcefully snatched his and the complainant’s mobile phones. He described how convict Amir pointed a Kalashnikov at him, instilling fear and preventing any potential resistance. Meanwhile, the convict Muhammad Ishtiaq, snatched Rs. 30,000 from purse of Khawar's wife's and forcibly removed her earrings, displaying calculated coordination. Khawar further testified that Amir, taking advantage of the situation, forcibly took

a chain from the neck of the complainant's daughter, Fareeha, and also snatched her mobile phone. Subsequently, two other robbers separated from the group, moving to a different room where they continued their search, and seized additional valuables, including gold ornaments and cash stored in a cupboard. Khawar's testimony corroborated the sequence of events described in both the FIR and the complainant's statement were consistent with the accounts provided by the prosecution's eye-witnesses strengthening the case.

8. Similarly, another key prosecution witness, Fareeha Rani, also provided a coherent and corroborative account of the events. She testified that she was seated in the television room, along with other family members, watching a wedding video when four masked individuals, armed with weapons and speaking Punjabi, entered the house with an intimidating presence. She described the robbers as of medium height, detailing how they forcibly seized her father's mobile phone and took earrings from her cousin, Sawera. Furthermore, she recounted that the robbers snatched Rs. 30,000 from Sawera's purse, demonstrating a thorough and forceful search for valuables. According to Fariha, two of the robbers then moved to another room where they located and took several additional items of significant value, including two bracelets, four bangles, two gold sets, a ring, and another Rs. 30,000 in cash from a cupboard. Fareeha's clear and unwavering testimony confirmed her ability to identify the convict-appellant in the courtroom, strengthening the prosecution's case regarding the identification of the culprits. She further identified her Nokia mobile phone model 2700, substantiating her account and adding to the weight of the material evidence. Both eyewitnesses

testimonies are consistent with the original report, establishing a credible narrative of the incident that withstood cross-examination, leaving a little room for doubt regarding the sequence of events and the identity of the accused. The detailed and consistent statements provided by Khawar and Fareeha, corroborating the complainant's account, reinforced the prosecution’s case, creating a solid foundation for the charges levelled against the convict. The other prosecution witnesses namely Muhammad Nadeem s/o Raja Muhammad Anwar and Waqas s/o Raja Khalid Farooq who are recovery witnesses also stated in their Court statements that police recovered from convict Muhammad Ishtiaq a Necklace, one Bangal, one ring, which came to his part after robbery. A 30 bored pistol was also recovered based on convcit’s pointation. These two witnesses are also the recovery witnesses of the other ornaments recovered from accused Amir Hussain.

9. The evaluation of the above statements from eyewitnesses indicates that the incident unfolded precisely as described in the prosecution’s narrative. The testimonies of these witnesses remained credible and consistent throughout their statements, with no major contradictions or embellishments noted. They each corroborated the allegations detailed in the FIR and attributed direct responsibility to the convict-appellant for the commission of the offense. In addition to these primary eyewitnesses, other prosecution witnesses, namely Waqas Farooq, Mehboob Akhtar, Babr Iqbal, Asghar Ali, M. Imran, Muhammad Khalid, Raja Farooq, Zia-ullah, and Inspector Muhammad Riaz, also provided testimony linking the convict-appellant to the offences. Their statements collectively strengthened the prosecution’s case by corroborating key facts and confirming the involvement of

the appellant. Based on this body of consistent and credible evidence, we find that the learned trial Court, following a thorough deliberation and careful consideration of all evidence, reached a well-supported and just conclusion in convicting the appellant for the offenses charged with.

10. During the course of arguments, the learned counsel for the convict appellant raised a point that the police did not associate any independent witness during the course of recovery proceedings from him which is a violation of the provisions of section 103 Cr.P.C. This argument lacks credence as the non-compliance of this provision does not factually undermine the prosecution case. The Courts have consistently laid down the principle of law regarding the competency of the police officials as witnesses and emphasized that their testimonies should not be discarded solely due to their affiliation with the police force. Furthermore, the defense has failed to point out any enmity or prejudice of police or any witness against the convict-appellant. Generally, the public remains reluctant to get involved due to having no direct grievance against the accused of such offenses which exacerbates the legal procedure and contributes the lack of security and protection for witness. This point came under the consideration before this Court in the case reported as *Khursheed Hussain Shah vs. State*[1], wherein, this Court has observed as under: -

> "It is consistent view of the Courts that police officials are competent witnesses and their statement cannot be discarded merely, for the reason that they belong to the police force."

[1] [2022 SCR 334}

Reference may also be made to a judgment reported as *Salah-ud-Din vs. The State*[2], wherein the supreme Court of Pakistan has held that: -

> *"It is well settled by now that police officials are good witnesses and can be relied upon if their testimony remained unshattered during cross examination."*

The apex Court of Pakistan in a recent judgment reported as *Shabbir Hussain vs. The State*[3], again reiterated the same principle: -

> *"On the contrary, it sounds straightforward and confidence inspiring without a slightest tremor. Absence of a witness from the public, despite possible availability is not a new story; it is reminiscent of a long-drawn apathy depicting public reluctance to come forward in assistance of law, exasperating legal procedures and lack of witness protection being the prime-reasons. Against the above backdrop, evidence of official witnesses is the only available option to combat the menace of drug trafficking with assistance of functionaries of the state tasked with the responsibility; their evidence, if found confidence inspiring, may implicitly be relied upon without a demur unhesitatingly; without a blemish, they are second to none in status."*

11. The learned counsel for the convict-appellant has pointed out minor inconsistencies in the prosecution witnesses' statements, specifically noting that, according to the testimony of prosecution witness Fareeha, the convict-appellant was allegedly carrying a Kalashnikov, however, the recovered weapon on record was a 30-bore pistol, a discrepancy which raises some doubt about the prosecution's version of events. While this inconsistency raises questions regarding the reliability of certain aspects of the prosecution's case, it is not sufficient by itself to undermine the entirety of the case. Nonetheless, such

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[2] [2010 SCMR 1962]
[3] [2021 SCMR 198]

discrepancies may serve as mitigating factors, depending on the broader circumstances of the case. Courts often exercise discretion regarding minor inconsistencies, particularly when the overall evidence sufficiently connects the accused to the offense. In certain instances, leniency may be extended on the basis of mitigating factors; however, this is typically reserved for cases where the inconsistencies do not overshadow the substantive evidence against the accused. Here, the learned District Court of Criminal Jurisdiction sentenced the convict-appellant to seven years' rigorous imprisonment and imposed a fine of Rs.100,000 under section 392, APC, along with a further seven years' rigorous imprisonment and a Rs.50,000 fine under section 458, APC. Additionally, the convict was sentenced to two years' rigorous imprisonment and fined Rs.10,000 under section 13(b) of Arms Act, 1965. According to the report from the Superintendent of Jail Mirpur, the convict has already served five years, nine months, and three days, leaving a remainder of one year, two months, and twenty-seven days of his sentence. Given the mitigating factors, we find it appropriate to modify the impugned judgments of the trial Court and the High Court. Accordingly, the appellant's sentence of seven years' imprisonment is reduced to the period already served, while the remaining terms concerning fines imposed by the High Court shall remain unaltered.

This appeal stands partly accepted in the manner indicated hereinabove.

JUDGE JUDGE

Muzaffarabad,
07.11.2024