IN THE FEDERAL SHARIAT COURT
(APPELLATE JURISDICTION)

PRESENT

Mr. Justice Aftab Hussain — Chief Justice
Mr. Justice Zahoorul Haq — Judge
Mr. Justice Ch. Muhammad Siddiq
Mr. Justice Malik Ghulam Ali
Mr. Justice Pir Muhammad Karam Shah

CRIMINAL REFERENCE NO.153/I OF 1981

State ... Appellant

Vs

Ghulam Ali ... Respondent

For the appellant — Hafiz S.A. Rehman, Advocate

For the respondent — Mohammad Bashir Kiani, Advocate

JAIL CRIMINAL APPEAL NO.30/I OF 1982

Ghulam Ali ... Appellant

Vs

The State ... Respondent

For the appellant — Mohammad Bashir Kiani, Advocate.

For the respondent — Hafiz S.A. Rehman, Advocate.

Dates of hearing ... 17.3.1982 & 25.4.1982

(21). 36

JUDGMENT

AFTAB HUSSAIN, CHIEF JUSTICE: This is an appeal by Ghulam Ali against the order of Additional Sessions Judge, Sahiwal dated 13.10.1981 by which he convicted him under Section 9 of Offences against Property (Enforcement of Hudood) Ordinance VI of 1979 and sentenced him to amputation of his right hand from the joint of his wrist. The sentence passed is subject to confirmation by this Court; hence criminal reference No.153/I of 1981 is also for consideration.

2. The occurrence took place on the 25th of August, 1979 at about 12.00 noon in Mumbarak Mosque, Lalazar Colony, Okara. The appellant was first tried by a Magistrate exercising powers under Section 30 of the Code of Criminal Procedure and was convicted and sentenced for the same offence on the 25th of November, 1979.

3. The order of the learned Magistrate was set aside in appeal by Ch.Inayatullah Cheema, Additional Sessions Judge, Sahiwal on the 30th of January, 1980 on the ground that the appellant had not been afforded opportunity to cross examine the prosecution witnesses or the court witnesses. The case was thereafter tried by Ch.Mohammad Aslam, Additional Sessions Judge, Sahiwal, since by that time exclusive jurisdiction of trial of Hudood cases had been conferred on Sessions Court vide Section 24 of the Ordinance.

4. The prosecution case is that on the 25th of August, 1979 at about 12.00 noon Mohammad Ibrahim, P.W.1 while in his house, was attracted by an alarm of "Chor Chor'. He rushed towards the mosque and found the appellant alongwith the wall clock of the mosque to have been caught hold of by Mohammad Hussain, P.W. 4 and Mohammad Siddiq, P.W.3. It was said then that the appellant had removed the clock from the wall of the mosque and thus committed its theft.

5. Mohammad Ibrahim brought the appellant alongwith two witnesses to Police Station City, Okara where he submitted an application Ex. P.A. to the police and on this basis the formal First Information Report was recorded by Shah Nawaz, ASI, P.W.2.

6. Shah Nawaz ASI took into possession the stolen clock by Memo Ex.P.B. and arrested the appellant.

7. Four witnesses were examined in support of the prosecution case namely P.W.1, Mohammad Ibrahim,P.W.2, Shah Nawaz, ASI, P.W.3 Mohammad Siddiq and P.W.4 Mohammad Hussain. The Court later examined C.W.1 Mohammad Sharif and C.W.2 Abdul Majeed as expert witnesses. Mohammad Sharif proved the value of 'nisab' and stated that the value of 4.457 grams of gold on the 25th of August, 1979 was Rs 511.46 as the rate of 1 gram of gold on that date was Rs 144.10. This is a mis-calculation since 4.457 grams of gold at the rate of Rs 144.10 would come to about 660 rupees and this would be the value of 'nisab' on the 25th of Aug., 1979.

8. C.W.2 who deals in watches and clocks for the last 30/35 years was of the view that the value of the clock Ex.P/1 on 25.8.1979 was about Rs 750 and the same was its value even on the date of statement.

9. The learned Additional Sessions Judge thereafter examined P.W.1, P.W.3 and P.W.4 again with regard to Tazkiyah-al-Shahood in order to find out whether they had ever committed any major sin. P.W.3 and P.W.4 who are eye witnesses stated that they had never committed any major sin. Both of them said that they had never been involved in any theft, gambling or drinking case. In fact they had never been involved in any criminal case whatso-ever. None of them had appeared in any case even as a witness.

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10. Mohammad Ibrahim also stated that he had never been involved in any criminal case. He stated that he was a rice mill owner and a rice dealer and no case had ever been registered or any complaint made against him by the Food Department.

11. None of the Court Witnesses was at all cross examined. Similarly no question was put to either of the three prosecution witnesses during the proceedings of Tazkiyah-al-Shahood suggesting that they had ever committed any major sin or had ever been involved in a criminal case or again that they had appeared even as witnesses before the courts. No suggestion was made that they were not truthful witnesses.

12. The learned Additional Sessions Judge also inspected the spot on the 9th of September, 1981 and found that the clock P.1 was hanging in the Mehrab of the mosque at a height of about 6/7 feet. The wooden pulpit (منبر) was also lying in the Mehrab and the stolen clock could be removed while standing on the said pulpit. He also found that according to the persons who had gathered there Mohammad Siddiq, P.W.3 stayed in the mosque as Khadim. The police record was also checked with respect to these P.Ws. and it was reported that there was no record in respect of them. The learned Sessions Judge in his judgment also referred to inquiry made by him openly as well as secretly from reliable persons acquainted with these witnesses, a fact which was critisized by the learned counsel on account of its absence from the report on record. There is no reason to disbelieve this assertion. But even if this part of his judgment be ignored there is sufficient material on record for the Court's satisfaction including the proceedings of Tazkiyah-al-Shahood that all the three witnesses i.e. P.W.1, 3 and 4 are truthful witnesses. Full opportunity of cross examination was given to the appellant twice but

he failed to bring on record any thing which may be in the least derogatory to the conduct or character or truthfulness of these witnesses.

13. Referring now to the evidence of P.W.1 Mohammad Ibrahim who was attracted on the noise of 'Chor Chor', he saw Mohammad Hussain P.W.4 and Mohammad Siddiq P.W.3 grappling with Ghulam Ali appellant who had a clock Ex.P/1 in his hand. He denied that the occurrence had taken place at 1.00 P.M. or 1.30 P.M. He did not know if Mohammad Siddiq was the father of Ghulam Ali, appellant and that he had any enmity with Siddiq, P.W.3. He also denied that he had been called from the mosque to the police station by a head constable of police station city, Okara. Shah Nawaz, ASI, P.W.2, Investigating Officer also denied that he had falsely involved the appellant at the instance of Siddiq, P.W.3.

14. Mohammad Siddiq, P.W.3 stated that Ghulam Ali appellant removed the wall clock from the mosque and he and Mohammad Hussain, P.W.4 over powered him with the stolen clock at the spot when he was still inside the compound of the mosque. According to him the value of the clock was Rs 2000/-. In cross examination he stated that it was Eid day and after Eid prayer he had been sleeping in the mosque. Mohammad Hussain according to him had first caught the appellant when he had removed the clock. He denied that he was sleeping at that time. He stated that he caught hold of the appellant just after Mohammad Hussain, P.W.4 and Ibrahim, P.W.1 arrived there.

15. Mohammad Hussain stated that Ghulam Ali had removed the clock after standing over the pulpit and when he removed it he had caught hold of him and on his alarm Mohammad Siddiq who was lying in the mosque also came there. Mohammad Ibrahim was also attracted on hearing the alarm. In cross examination

he stated that the appellant had removed the clock at the instance of Mohammad Ibrahim. He stated that the clock was affixed at the height of about 6/7 feet.

16. The removal of the clock by the appellant from the wall of the mosque and his being caught red handed at the spot is proved beyond any shadow of doubt by the evidence of independent witnesses. The appellant did not attribute any motive for falsely involving him, to Ibrahim,P.W.1 and Mohammad Hussain, P.W.4. His case in cross examination of P.W.1 and P.W.2 was that his father had some enmity with Mohammad Siddiq, P.W.3 but the details of the alleged enmity were not put to these witnesses. A question was put to Mohammad Siddiq, P.W.3 that 15 days prior to the registration of the case the father of the appellant quarrelled with him but he denied this suggestion. But when the statement of the appellant was recorded under section 342 Criminal Procedure Code he did not make any such allegation. He merely stated that he had been falsely inolved in this case by the P.Ws. No evidence of any enmity with Mohammad Siddiq was led by him. It therefore, appears that the suggestion about such enmity made to some of the witnesses was not correct. In these circumstances there is no reason why the evidence of these three witnesses should not be believed.

17. The only question which remains to be considered is whether the evidence is sufficient for confirming the Hadd sentence or the appellant may be convicted and sentenced in Ta'zir.

18. According to Section 5 of the Offence against Property (Enforcement of Hudood) Ordinance, 1979 whoever, being an adult, surreptitioulsy commits, from any 'hirz' theft of property of the value of the 'nisab' or more not being stolen property, knowing that it is or is likely to be of the value of the

'nisab' or more is, said to commit theft liable to 'hadd'.

19. The appellant is 25 years of age and had committed theft by removing the clock from the wall where it was fixed at a height of about 6/7 feet and in order to remove it the appellant used the wooden pulpit (منبر). Surreptition is proved by the fact that theft was committed at a time when those who came to offer their prayer were not expected to be in the mosque and Mohammad Siddiq was visibly sleeping and this surreptition continued as required by explanation till the clock had already been removed from the wall and the offence had been completed. The 'nisab' for theft liable to Hadd is 4.457 grams of gold value of which on the date of offence was proved by the evidence of C.W.1 to be about 660/- rupees while the value of the clock on the said date was proved by th evidence of C.W.2 to be about Rs 750/- which exceeded the value of 'nisab'. None of these witnesses were cross examined and there is no reason why they should make false statements.

20. According to section 7 the theft can be proved by the evidence of atleast two muslim adult male witnesses, other than the victim of the theft, about whom the Court is satisfied, having regard to the requirements of 'tazkiyah-al-Shahood' that they are truthful persons and abstain from major sins, and who give evidence as eye-witnesses of the occurrence. In order to satisfy himself about the requirement of 'tazkiyah-al-shahood' the learned Sessions Judge examined P.W.1, P.W.3 and P.W.4 again in the presence of the appellant who was given an opportunity to cross examine each of them. There is no reason to disbelive them. They have been proved to be truthful witnesses. The truthfulness of these witnesses was inquired into by the learned Sessions Judge by calling for report of the police record also. The condition that there should be two independent eye witnesses

for the offence of theft other than the victim of the theft has been satisfied in this case by the evidence of atleast Mohammad Siddiq P.W.3 and Mohammad Hussain P.W.4. The evidence of Mohammad Ibrahim is also equally relevant since he found the appellant with the clock grappling with the other two witnesses.

21. The only question now to be determined is whether the condition of theft being committed from 'hirz' was satisfied or in other words whether the evidence is sufficient to prove the removal of the clock from 'hirz'.

22. 'Hirz' is defined in section 2(d) as an arrangement made for the custody of property. It is explained that property placed in a house whether the door is closed or not is said to be in 'hirz'.

23. It is clear from the record that the clock was hung on the wall at a height of about 6/7 feet and it was not possible to remove it without ascending over some thing which happened in the present case to be the pulpit. The mosque was a built up area like a house and it was not material whether its door was closed or not. There is no exclusion of any building like the mosque from its definition. There can be no doubt that theft had been committed from 'hirz'.

24. The learned counsel for the appellant submitted that firstly the ownership of the clock was not proved and members of the committee of management of the mosque or some persons on behalf of the committee should have been produced. He also submitted that the evidence of one witness was not sufficient to prove the value of the stolen property and there should be more than one expert witnesses in that behalf. He relied upon some juristic opinion mainly of Fiqh Hanafie and urged that a mosque by itself is not a 'hirz' and in any case theft from a mosque or baitulmal is not liable to be punished with Hadd on account of the property in them being common

property of the muslims. The learned counsel also submitted that it appears that Mohammad Siddiq, P.W.3 had not seen the occurrence and had reached the spot later.

25. The first point is without merit. The appellant did not claim the clock which is proved to be the property of the mosque by the evidence of three witnesses. It was unnecessary to produce any member of the managing committee if there be any, of the mosque for this purpose.

26. The last point may be taken at this stage. It was argued that Mohammad Siddiq, P.W.3 had reached the spot later but the evidence of all the three witnesses bears testimony to the presence of Mohammad Siddiq and his having caught the appellant after Mohammad Hussain, P.W.4 had surprised him. The portion of the evidence relied upon by the learned counsel in cross examination is not sufficient to hold that Mohammad Siddiq was not present in the mosque or he came alongwith or after Mohammad Ibrahim P.W.1. That point is also without force.

27. It was urged that the evidence of one witness was not sufficient to prove the value of the stolen property and in support of this reliance was placed upon Fatawa-i-Alamgiri, Vol.3, P.303, Durrul Mukhtar, Vol.2, P.466, Islami Qawanin, Hudood, Qisas, Diyat aour Taziraat by Dr.Tanzilur Rehman, P.67. It is stated in these books that hands will not be amputated on the assessment of valuation of 'nisab' by one person but this appears to be the strict Hanafi view which has not been adopted in the offences against property (Enforcement of Hudood) Ordinance VI of 1979. Two witnesses are necessary in this Law only for seeing the commission of theft and not assessment of valuation of 'nisab'. This argument is, therefore, without force.

28. It was urged that mosque is not a 'hirz' since it is open to visitors at all times and nothing placed

in the mosque, however valuable it may be the property stolen, can attract the divine injunction of amputation of hand. In any case even if it is assumed that the mosque is a 'hirz', the appellant cannot be punished with Hadd in so far as he could not get out of the 'hirz' and is said to have been caught in the mosque.

29. For the first proposition reliance was placed upon Ainul Hidaya, Vol.2, P.494 and 501, Jamiaul Jaafri, P.524, Bahar-e-Shariat, Vol.9, P.106, Tabyinul Haqaiq, P.221, Raddul Mukhtar, Vol.3, P.206, Kanzul Daqaiq, P.192, Bahrur Raiq, Vol.5, P.54, Bidayatul Mujtahid, Vol.2, P.412. For the second proposition that unless the thief goes out of the 'hirz' he cannot be visited with the penalty of amputation of hand, reliance was placed upon Wasail-ul-Shia, Vol.18, P.509, Almabsoot, Vol.9, P.147.

30. The whole point, therefore, is whether Masjid is a 'hirz' for the protection of its property. This point has been discussed in some detail in Kitabul Fiqah by Abdul Rehman Aljaziri (urdu translation), Vol.5, P.343. It is stated there that it is the Hanafi view since a mosque is not constructed as a place for protection of property but remains open from morning to evening without any guard, the theft of the property of the mosque for example mats, chandelier etc. is not visited with the penalty of cutting of hand. In fact if the property is not protected or guarded, its theft is not liable to Hadd punishment. But the Malikis say that the door of the mosque as well as what is inside it including carpets, mats, chandelier are all under the protection of the mosque wherever they might be placed and if the value of the property exceeds 'nisab' the sentence of cutting of hands must be imposed on the thief. And it is not one of the conditions for awarding this punishment that the stolen property may be taken

out of the mosque. He is liable to hadd when he removes any thing from where it was placed even if for this removal he breaks the roof or flooring etc. According to Shafie if a muslim commits theft of the door, the trees, the fencing, four walls, the roof or the chandelier, kept there for decoration, his hands will be amputated but not in the theft of carpets, mats or lanterns, since these properties which are for the good of the community, are like the property of Baitulmal. However if the theft be of valuable carpets and carpets for decoration or of the covering of the pulpit, his hand will be cut.

31. In Al-mughni by Ibn-e-Qudama, Vol.8, P.253 the opinions of different schools of thought are given. It is stated if someone commits theft of doors of the mosque or of the Ca'aba or any thing from its roof, there are two opinions about him. Firstly he is liable to cutting of hand and this is the opinion of Shafie, Abu-Alqasim, Sahib-e-Malik, Abu Saur and Ibn-ul-Munzir that he has committed from 'hirz' for such things are kept in hirz and there is no doubt about it. The second opinion is that there is no cutting of hand and this is the opinion of those who act on Rai (opinion). The ground is that no one is the owner of the property from among the creatures of Allah and it is like committing theft from Baitulmal.

32. In Badaiul Sanai, Vol.7, P.74, it is stated that mosque by itself is not a 'hirz' in view of the permission to enter it but it becomes 'hirz' by virtue of there being a guard. And if there be a chandelier it become 'hirz' on account of guard and not the whole of the mosque and if it is removed its removal is from the 'hirz' and is liable for amputation.

33. In view of these different opinions it will not be correct to say that a mosque is not a hirz even for its valuable property. In the present case Mohammad Siddiq was in the mosque. He is stated to be a Khadim.

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Mohammad Hussain was also there. The presence of others means that the place was guarded, since no person who comes to offer prayer will allow anyone to take away any thing from the mosque.

34. The view of Imam Malik is more acceptable and it appears that Imam Malik had considered the mosque to be a corporate body with a right to own property, as also a 'hirz'.

35. The definition of 'hirz' in the Ordinance does not make any exception in favour of properties which are open to entry by all persons. It is therefore, clear that the place where the wall clock was hung was its 'hirz' and its removal from that place by the appellant made him liable to punishment as Hadd. The appeal is, therefore, dismissed and the sentence of amputation of hand is confirmed.

CHIEF JUSTICE

JUDGE - II

JUDGE - III

JUDGE - IV

JUDGE - V

Announced

Islamabad, the 29th June, 1982
AZN

fit for reporting

29/6/82

29/6/82