IN THE FEDERAL SHARIAT COURT OF PAKISTAN

(Appellate/Revisional Jurisdiction)

Cr. Appeal No.27/I of 2011

Khan Mir son of Halla, Caste Hamzazai
R/o Maikhtar,
(Presently confined in Central Jail, Loralai)

Appellant…

Versus

The State

Respondent..

Counsel for the Appellant.	**---**	**Mr. Muhammad Wasay Tareen, Advocate.**
Counsel for the State.	**---**	**Mr. Muhammad Naeem Khan Kakar, Additional Prosecutor General, Baluchistan.**
Case FIR No, Date & Police Station	**---**	**FIR No.02/2011, dated 14.01.2011 P.S Levies Mekhtar, Dist: Loralai**
Date of impugned Judgment.	**---**	**12.04.2011**
Date of institution	**---**	**21.05.2011.**
Date of hearing	**---**	**26.03.2019**
Date of decision	**---**	**26.03.2019**

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JUDGMENT.

Syed Muhammad Farooq Shah, J :--- The Captioned appeal is directed under section 24 of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979, against the judgment recorded and pronounced on 12.04.2011, by the learned Sessions Judge, Loralai, whereby the appellant has been convicted and sentenced under section 395/511 PPC and awarded sentence for three years R.I and to pay fine of Rs.10,000/-, in default whereof, he shall suffer S.I for three months more. Benefit of section 382-B Cr.P.C was

extended to him. The appellant/convict has made a prayer to set-aside the impugned judgment and to acquit him of the charge on facts and grounds averred in the appeal.

2. Story of the prosecution case in nutshell is that on 14.01.2011, at about 6:00 P.M, the complainant Khuda-i-Rahim alongwith two drivers namely PW's Dawood and Ali Ahmed, while plying truck bearing registration No.TKG-933, on a highway leading from Punjab to Quetta, at 06.00 PM, intercepted at *Sepero Ooza*, on gunpoint by six persons with muffled faces. It is alleged that the complainant and his both companions were de-boarded; they were beaten by the culprits and snatched a cash amounting to Rs. 11,000/-, two blankets worth of Rs.6,000/-, three mobile phones amounting to Rs.7,000/- and one torch worth of Rs.170/-; five culprits went towards their vehicle behind the truck, while one of them boarded in their truck, tried to drove it to the roadside, abruptly he was apprehended by the Complainant and his two companions and brought him to levies check post, *Mekhtar*, where he was handed over to levies alongwith a loaded pistol recovered from his possession. Memo of recovery (Exh.P/2-A) reflects that the incriminating crime weapon as well as other case property viz Rs.1300/-, two mobile phones of Nokia and two cards of *Chamlang Zamindar Coal Company* were recovered by PW Najeeb-ud-din *Hawaldar levies* and he was produced before *Naib Tehsildar*, who prepared the aforesaid memo of recovery. Thereafter, the written complaint moved by the Complainant Khuda-i-

Rahim (Exh.P/1-A) on 14.01.2011, was converted into FIR (Exh.P/7A).

3. Investigation was conducted by the *levies* authorities at *Mekhtar,* under the supervision of *Naib Tehsildar Mekhtar*. On completion of investigation, challan was submitted before the Court, for trial.

4. On commencement of the trial, charge was framed by the trial Court, for an offence punishable under section 17(3) of The Offences Against Property (Enforcement of Hudood) Ord: 1979, to which the appellant did not plead guilty and claimed trial. After examining the seven witnesses, the prosecution closed it's side. Statement of the appellant, under section 342 Cr.P.C was recorded by the trial court, in which he had vehemently denied the allegations leveled against him and professed his innocence by recording his statement under section 340(2) Cr.P.C. In defence, he produced DW-1 Akhtar Mehmood S/o Haji Pai.

5. Worthy arguments advanced by Mr. Muhammad Wasay Tareen, learned counsel representing the appellant and Mr. Muhammad Naeem Khan Kakar, learned Additional prosecutor General, Baluchistan for the State are considered, record has also carefully been perused with the able assistance rendered by them.

6. Learned counsel representing the appellant, by pleading the innocence of the appellant argued that the case of the prosecution hinges on contradictory and inconsistent evidence of prosecution witnesses. Learned counsel for the appellant submitted that the trial

court did not consider the defence version by putting it in juxtaposition, as the appellant recorded his statement on oath under section 340(2) Cr.P.C and has also examined DW-1 Akhtar in his defence, but the trial Court neither discarded nor accepted the said defence evidence. As per learned counsel, the evidence put forth by the appellant is convincing, trustworthy and is appealing to a prudent mind, whereas one set up by the prosecution does not seems to be true, rather story of the prosecution appears to be concocted and fabricated one, as five persons after looting the complainant party went towards their vehicle while convict/appellant sit in the truck of the complainant, where two other drivers were also sitting and they all three caught hold the appellant with pistol and his custody was handed over to the levies and after 14 days of his arrest, the *Naib Teshildar* recorded disclosure statement of the appellant. Learned counsel contended that the prosecution has miserably failed to prove the allegations of alleged robbery or attempt to commit robbery by the appellant, as ocular testimony brought on record by the prosecution does not appeal to a reasonable mind; moreso, the appellant was teenager/juvenile at the time of alleged incident. Learned counsel further argued that the FIR had been lodged after 21 hours of the occurrence, without any plausible explanation; such delay makes the prosecution case highly doubtful. Learned counsel submitted that as per defence version, the complainant and his two companion drivers had tried to commit unnatural offence with convict/appellant who was 14/15 years of age, boarded in the truck by taking lift from *Soor*

Dahka Hotel, situated at some distance from *Mekhtar*; nefarious design of the complainant and his companion drivers became foiled due to resistance and shrike made by the appellant and subsequently the appellant was apprehended and he has been involved in this false case. Learned counsel next submitted that the trial Court passed the impugned judgment on ocular accounts viz. depositions of PW-1, 3 and 4, whose statement are full of contradictions. It is argued that no recovery of snatched articles was affected from the convict/appellant and even there were no allegations of attempt to commit alleged robbery by the appellant. Learned Counsel for the appellant placed his reliance on the cases of ***Farid vs. The State*** **(PLD 2002 Supreme Court 553),** ***Abul Salam and others vs. The State and others*** **(PLD 2005 Quetta 86) and** ***Nawaz alias Najee vs. The State and another*** **(2014 PCr.LJ 69).**

7. Conversely, Mr. Muhammad Naeem Khan Kakar, learned Additional Prosecutor General, Baluchistan for the State without controverting the aforementioned submissions made by the learned counsel for the appellant, supported the impugned judgment and submitted that the appellant was caught red-handed by the complainant and his two companion drivers.

8. I have evaluated the evidence produced by the prosecution and defence as well, in addition to minutely scanning the impugned judgment. Ocular testimony of the prosecution rests on PW-1 Khuda-i-Rahim, PW-3 Ali Ahmed and PW-4 Dawood Khan. A perusal of their evidence transpires that the complainant in his

application leveled allegations of snatching robbed property by six culprits. Allegedly, the appellant boarded in the truck of the complainant and tried to drive it towards road side but such fact does not appear in the FIR. Moreso; Khuda-i-Rahim the Complainant (PW1) in deposition stated that from six culprits, five of them after committing alleged robbery went to their vehicle, while sixth one (the appellant) boarded in the truck of complainant had been apprehended and from his possession a pistol with sixteen bullets was recovered. He had admitted in cross-examination that the said culprit (appellant) was having no beard. He has further stated in cross-examination that the appellant had bitten on the hand of the complainant; however, he has denied that the appellant has falsely been involved in recovery of pistol. Another eye witness, PW-3 Ali Ahmed stated that six muffled faces persons duly armed with weapons snatched an amount of Rs.11,000/-, two blankets worth of Rs.6,000/- and one torch worth of Rs.170/- from them. One culprit boarded in their vehicle and remaining five went towards their vehicle, the person who sat in the truck was apprehended and his custody was handed over to the *levies.* The said person disclosed his name Khan Mir (Appellant), having a T.T pistol. He denied false implication of the appellant due to quarrel among them. PW-4 Dawood Khan is also an eye witness, stated similar fact of snatching valuables from them by six persons having muffled faces and one of them boarded in their vehicle, the said person was apprehended and from his possession a T.T pistol was recovered. In cross-examination, he has denied that on his request, he

had been lifted in the truck and subsequently involved in a false case due to quarrel.

9. The deposition made by the aforestated witnesses reveals that neither appellant had been involved in robbery of valuables nor he had attempted to commit alleged robbery or dacoity; more particularly from his possession snatched articles had not been recovered. *Insofar* as, the memo of recovery is concerned, it depicts recovery of T.T pistol .30 bore alongwith sixteen bullets and magazine, beside cash amounting to Rs.1300/-, two mobile phone of Nokia and two cards of *Chamlang Zamindar* Coal Company from the possession of the appellant. The *Naib Tehsildar*/ investigation officer *i.e.* PW-7 deposed that after registration of FIR on 14.01.2011, he prepared the disclosure memo on 27.01.2011. Neither had he attested the memo of recovery (Exh.P/2-A), nor memo of disclosure, in his deposition. In cross-examination, he had stated that the case property was lying with PW-5 Najeeb-ud-din, for 15/20 days prior to registration of FIR. He has shown ignorance with regard to the fact that pistol, mobile, cash and two cards were handed over to the PW Najeeb-ud-din by FC. He admitted that the prosecution witness Abdul Rasheed is constable of levies. He has denied that the appellant disclosed him about the fact that he had taken lift from the truck driver Khuda-i-Rahim and PW-3 Ali Ahmed. He has also denied the suggestion that truck drivers shirked and teased the appellant. He has further stated that till 28.01.2011 i.e. for about fourteen days the appellant had repeatedly been produced before magistrate for

recording his statement under section 164 Cr.P.C but he did not agree. This fact shows that after refusal of the appellant to record his admission of alleged crime before the magistrate, his so-called disclosure statement was recorded by the Investigation Officer/ Naib Tehsildar, PW Imam Bakhsh.

10. PW-2 Abdul Rasheed, who was *levies* constable, stated that the truck drivers handed over the accused Khan Mir alongwith two mobile phones, cash amounting to Rs.1300/-, two cards of *Chamlang Zamindar Coal Company* and T.T pistol with sixteen bullets to PW-5 Najeeb-ud-din, *Hawaldar* of the *levies*. In cross-examination he admitted that in his presence nothing was recovered from the possession of the appellant. He has shown unawareness about the age of the appellant, to be of 13 years. PW-5 Haji Najeeb-ud-din, stated in evidence that on 13/14th January,2011 during night hours, he found a truck parked at FC check post. Truck driver handed over cash amounting to Rs.1300/-, a pistol alongwith magazine, 16 cartridges, two mobile phones, two cards of *Chamlang Zamindar Coal Company,* which were handed over to him by the FC. He had secured the same and handed over the convict/appellant Khan Mir alongwith case property to *Naib Tehsildar Loralai*. In cross-examination, this witness admitted that he did not act marginal witness of memo of recovery, further admitted that the said ammunition/weapon, cash and mobile phones were not recovered in his presence. PW-6 Muhammad Aslam, *levies Sepoy* is a witness of alleged disclosure statement made by convict/appellant, who produced

memo of disclosure as Exh.P/6-A, stated that in his presence the appellant admitted the commission of offence alongwith his four companions and that pistol and mobile were owned by him. In cross-examination, he has shown unawareness about the period, that for how long the appellant was in custody prior to lodging the FIR on 28.01.2011, stated that he was confined in *levies* police station, situated in the city.

11. In defence, the appellant examined himself under section 340(2) of the Code and produced DW-1 Akhtar S/o Haji Palay, who stated that the appellant Khan Mir had been boarded in a Ten-wheeler truck for *Mekhtar* and next day he came to know that he had been involved in a *dacoity*. He has further stated that the appellant disclosed him that drivers of the truck tried to commit unnatural offence with him. This witness has categorically stated that the appellant is having sound family history and is not a *Dacoit*. In cross-examination, the defence witness has emphatically denied that the appellant had committed the alleged offence of robbery.

12. Well settled principle of criminal justice by now is that prosecution has to stand on its own legs and any doubt arising out of the case, has to be resolved in favour of the accused. It is beyond imagination to believe the prosecution version that six persons with muffled faces looted three persons/drivers of truck; five culprits went towards their vehicle, while teenager convict/appellant boarded in the truck of complainant, and he was over powered and his custody was handed over to levies authorities. On the contrary, the defence plea as

setup by the appellant is appealing to mind; more particularly, the complainant has admitted in cross-examination that the appellant had bitten on his hand which shows that the complainant has tried to commit some sort of nonsense with a youngster/appellant; moreso, five accused persons had left the place of incident in their vehicle by leaving a youngster at the mercy of three drivers of the truck. Admittedly, the statement of the appellant recorded under section 340(2) Cr.P.C and the defence evidence put forth by the appellant had not been considered in juxtaposition by the trial Court, while recording the impugned judgment. It is also an admitted fact that all three eye witnesses had not been stated about the snatched property recovered by them from the appellant, except an incriminating weapon. At this juncture, learned counsel representing the appellant stated at bar that the appellant had been acquitted by the competent court of law, in the case of possessing illicit weapon, wherein the recovery memo had not been considered of worth reliance.

13. The evidence beside other material collected during the trial if taken into consideration reveals that the entire investigation was carried out by the truck driver and his companions and the role of investigation officer and *levies* are secondary. Suffice it to say that prosecution had not gathered tangible evidence against the appellant to establish the allegations charged with, as there is nothing on record that the appellant had committed robbery or dacoity and that some snatched articles were recovered from his possession by the drivers of the truck, as they deposed that except an illicit weapon nothing was

recovered from the appellant, then how surfaced an amount of Rs.1300/-, two mobile and two cards etc. allegedly recovered from the appellant, which as per prosecution evidence handed over by the drivers to the *levies* personnel. The FIR had been lodged after 21 hours delay without any plausible explanation and the memo of disclosure (*Fard-e-Inkishaf*) was drawn on 28th January, 2011. The investigation officer had admitted in cross-examination that the appellant had repeatedly been produced before the concerned magistrate for recording his statement under section 164 Cr.P.C and on his refusal, the so called memo of disclosure *(Fard-e-Inkishaf)* was recorded, after 14 days of arrest of the appellant, which has got no sanctity in the eyes of law. If it all, mere presence of the appellant in a vehicle cannot be treated as support to saddle him with the responsibility of robbery or attempt to commit robbery, unless prosecution established through independent and tangible evidence that either the appellant had committed the alleged robbery or involved in any attempt of robbery as the appellant had been convicted by the trial Court under section 395/511 PPC for a term of three years.

14. Since the appellant in the instant case has pleaded the case to be of two versions, one put forth by him and other by the prosecution, the doctrine of juxtaposition would be applicable and when both versions are examined in juxtaposition, the version put forth by the appellant seems to be convincing, based on tangible evidence, whereas one set by the prosecution does not appeal to be

trustworthy. Whatever mentioned above, I have no hesitation to observe the possibility of fabrication of prosecution story and false implication of the appellant, more particularly, the testimony of all three drivers i.e. PW-1, 3 and 4, reproduced as supra, neither inspires confidence nor can be termed as an evidence having come from an unimpeachable source. False implication of the appellant cannot be ruled out as FIR was lodged after consultation and deliberation and the delay of 21 hours in lodging the same had not been explained. These factors react on the credibility of the prosecution version.

For what has been discussed above, I reached at the irresistible conclusion that the prosecution has miserably failed to prove any case against the appellant beyond reasonable doubt, consequently, the appeal is accepted, conviction and sentence of the appellant recorded by the trial court vide impugned judgment dated 12.04.2011 is set aside; he is on bail, his bail bond stands cancelled and surety discharged.

JUSTICE SYED MUHAMMAD FAROOQ SHAH

Quetta the
March 26, 2019
M.Ajmal/*

Approved for reporting

JUSTICE SYED MUHAMMAD FAROOQ SHAH