

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)



PRESENT

MR.JUSTICE S. A. RABBANI

CRIMINAL APPEAL NO. 19-K OF 2003

Jawed son of Muhammad Essa, r/o Citizen Colony,
House No.3, Hyderabad,
Presently confined in Central Jail, Hyderabad.

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| | Versus | Appellant |
| The State | | Respondent |
| For the appellant | | Mr.M.M.Aqil Awan, Advocate |
| For the State | | Mr.Arshad Lodhi, Asstt:Advocate General Sindh |
| No.& date of F.I.R Police Station | | No.93 /98,dt.3.12.98 P.S Jamshoro |
| Date of judgment Of trial court | | 21.7.1990 |
| Date of Institution | | 31.3.2003 |
| Date of hearing | | 18.11.2003 |
| Date of decision | | 24.11. 2003 |

JUDGMENT

S. A. RABBANI, J. - On 31.3.2003, the appellant was convicted by Additional Sessions Judge Kotri, for offences under sections 392,397 and 34 PPC. He has been sentenced to seven years R.I with a fine of Rs.25, 000/-. In case of default in payment, he has to undergo six months S.I. He has been given benefit under section 382-B Cr.P.C. This conviction and sentence has been called in question by way of present appeal.

2. According to the F.I.R, lodged in this case at Police Station Jamshoro by one Mukhtiar Ahmad, the complainant, a Divisional Draftsman in Irrigation Department, was coming from Habib Bank Jail Road, Hyderabad on 3.12.1998, the day when the F.I.R was lodged, after collecting salary of the staff, when two persons riding a motorcycle robbed him of the cash on gun point. Police escort was also with the complainant on the occasion. Two other officials Sikandar Azam Narejo and Zahoor Ahmad Lashari were also with him, with the cash of salary of their staff and they were also robbed by the same persons. The F.I.R mentions that on the way police arrested the



present appellant and one Fareed and secured cash, motorcycle and pistols from them.

3. After investigation, the police sent up the present appellant and co-accused Fareed for trial before Additional Sessions Judge Kotri. The trial court framed a charge against present appellant Javed and co-accused Fareed for offences under section 17(3) of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979 read with sections 392, 397 and 34 PPC. They were further charged for an offence under section 411 PPC.

4. To prove the charge against the accused persons, the prosecution examined only three witnesses. They were complainant Mukhtiar Ahmad, Mumtaz Ahmad, a witness to the place of occurrence and one police constable Jamaluddin. Evidence of other prosecution witnesses was given up by the prosecutor and prosecution side was closed.

5. After the prosecution evidence was over, the present appellant, who was on bail, absconded. The trial court, therefore, recorded statement of co-accused Fareed and, on the basis of the evidence on record, convicted

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Fareed on 19.4.2000. Under sections 392,397 and 34 PPC Fareed was sentenced to suffer seven years R.I with a fine of Rs.25000/-.

6. Co-accused Fareed filed an appeal before this Court, which was dismissed and his conviction and sentence was maintained. He filed a jail petition on appeal from the judgment of this Court before the Supreme Court, which was also dismissed. He again moved for suo moto review before the Supreme Court, but it was found that it was not a fit case for suo moto review.

7. Later on it was found that the present appellant was in Central Prison Hyderabad in connection with some other case and then trial against him in this case was resumed.

8. The prosecution had already closed their side. The trial court recorded statement of the present appellant/accused and, on the basis of the same evidence, same conviction and sentence was awarded, as was in the case of co-accused Fareed.

9. Mr.M.M.Aqil Awan, learned counsel for the appellant, submitted that in the case of co-accused Fareed, proper assistance was not offered to the

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courts and that the evidence on record does not prove the guilt of the accused. He submitted that the two other witnesses Zahoor Lashari and Sikandar who were also, according to the prosecution, robbed of cash on the same occasion along with the complainant in this case, were not examined by the prosecution as they refused to support the prosecution story. He submitted that neither memo of recovery was produced on record for evidence, nor the investigation officer, who allegedly recovered the amount from the accused and arrested them, was examined as a witness. Mr. Awan submitted that the accused in this case were not arrested on the spot, but they were arrested at a place far from the place where alleged robbery was committed.

10. Mr. Arshad Lodhi learned A.A.G, submitted that the evidence on record does not appear to be adequate for proof of the guilt of the accused persons but the conviction and sentence of co-accused Fareed on the basis of the same evidence has been maintained up to the level of the Supreme Court of Pakistan, and therefore, the present appellant is also liable to the same conviction and sentence.

11. In the impugned judgment, learned Judge of the trial court observed that the following were the points for determination before the court in this case:

“ Point No.1: Whether accused Jawaid alongwith co-accused Fareed (who was convicted vide judgment 19.4.2000) in furtherance of their common intention armed with deadly weapon robbed forcibly cash of Rs.89,000/- and also robbed P.W Zahoor Ahmad and Sikandar and committed Harabah in persuance of their common intention?.

Point No.2: Whether robbed property was recovered from possession of present accused Jawaid being knowingly retained as stolen/robbed property by him.

Point No.3: What offence, if any, accused Jawaid has committed.”

12. On point No.2, about recovery of robbed property from possession of the accused, the trial court held that it was not proved on record. In the earlier judgment also, in the case of co-accused Fareed, a point for determination was whether accused Fareed was found in possession of the stolen property and, in that case also, the trial court gave a negative finding on it. Thus, about the recovery of the alleged robbed property from the appellant and the co-accused, the trial court is consistently of the view that it was not proved.



13. The first prosecution witness in this case is the complainant, Mukhtiar Ahmad himself. The trial court observed in the judgment that the complainant chased the culprits and came ahead on a bridge and informed Jamshoro police at Al-manzil situated at Jamshoro bridge, who made arial firing and meanwhile patrolling police party of Jamshoro with SHO Jamil Qureshi and P.W Jamaluddin were present there and due to arial firing accused fell down from motorcycle and they were arrested in presence of P.W Jamaluddin, complainant and other eye witnesses Zahoor and Sikandar, and robbed amount of complainant was recovered from possession of the both accused and they were arrested by the S.H.O. Relying on it, the trial court observed that all these facts of incident show that both the accused were arrested at spot read-handed with some robbed amount of complainant.

14. The trial court erred in observing that the complainant was present when the accused persons were arrested, because the complainant Mukhtiar Ahmad himself stated before the trial court that accused, after snatching the cash from them, ran away on the motorcycle and, on the way, two bags with cash fell down. He stated that meanwhile their police escort reached there

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and they and other people followed the accused and caught them. The complainant does not say that he also chased the accused when they were running on the motorcycle. During cross-examination, he stated that after half an hour of the incident, he went to the police station.

15. According to F.I.R, the incident took place at 13.45 hours and F.I.R was registered at 1500 hours, whereas P.W Jamaluddin stated before the court that on that day, at about 6.00 p.m, he went on patrol alongwith SHO Jamil Qureshi whereafter they found the culprits arrested on the bridge, and they were searched by the SHO in his presence. According to this witness, therefore, the accused were arrested after 6.00 p.m whereas the F.I.R, giving the whole story, was registered at 3.00 p.m on the same day. P.W Jamaluddin is, therefore, not telling the truth and his statement cannot be relied upon.

16. The complainant stated that the persons who snatched cash from him were with muffled faces. They were not apprehended on the spot where the cash was snatched and, according to the complainant himself, they ran away on motorcycle after snatching the cash. The conviction has been mainly

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based on the assumption that the accused were apprehended on the spot, which is not in accordance with the evidence on record.

17. The third witness examined is of no consequence because he is simply a witness of the memo of inspection of place of occurrence. He produced mashirnama which shows that the police saw, in his presence, the place where allegedly cash was snatched. The trial court itself held that recovery of the cash from the accused was not proved. Since recovery was not proved and at the time when the cash was snatched, the faces of the culprits were muffled, as stated by the complainant himself, there is nothing to show that the appellant was amongst the persons who snatched cash from the complainant. The charge against him, thus, does not stand proved.

18. As regard the previous judgment, in the case of co-accused Fareed, Mr.Awan referred to the case of Allah Waraya Vs. The State (PLJ 1996 Cr.C.(Quetta)986 (D.B). In that case, it was observed that previous judgment in which appellant was not a party has no pre-judicial effect, as for as, petitioner's case is concerned. It was held that the trial court misdirected

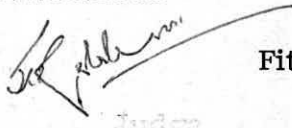
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itself by recording conviction/sentence against the petitioner on the basis of previous judgment.


19. In any case, a conviction is to be based on the evidence on record and, in the present case, the evidence, as discussed above, does not prove, beyond a reasonable doubt, that the appellant was amongst the culprits who robbed the complainant. He is, therefore, entitled to acquittal. Accordingly, the appeal is allowed and conviction and sentence of the appellant is set aside. He shall be released in this case forthwith.


S. A. RABBANI
JUDGE

Announced on 24.11.2003
At Karachi/
M.Akram


Judge

Fit for reporting.


Judge