

IN THE FEDERAL SHARIAT COURT

(Appellate Jurisdiction)

PRESENT

MR. JUSTISCE SYED AFZAL HAIDER

CRIMINAL APPEAL NO. 30/P OF 2007

1. Saeed alias Guldang son of Gul Khan, resident of Guli Bagh, Mardan.
2. Abid Ali son of Muhammad Khan, resident of Misri Abad Tehsil & District Mardan.
3. Latif son of Pervaiz, resident of Bacha Gahri, Shamsi Road, Tehsil and District Mardan.

	...	Appellants
	Versus	
The State etc.	..	Respondents
Counsel for appellants		Mr. Anis Muhammad Shehzad, Advocate
Counsel for State	...	Mr. Muhammad Sharif Janjua, Advocate
FIR No. Date & Police Station	...	241, Dated 03.03.2004 Hoti, Mardan
Date of judgment of trial court	...	21.8.2007
Dates of Institution	...	11.9.2007
Date of hearing of Appeal	...	07.11.2008
Date of decision by Federal Shariat Court	...	07.11.2008

JUDGMENT

SYED AFZAL HAIDER, Judge.- This appeal is directed against the judgment dated 21-08-2007 passed by Mr. Shafique Ahmad Tanoli, Additional Sessions Judge-IV, Mardan through which all the three appellants namely Saeed alias Guldang, Abid Ali and Latif have been convicted under section 392 of Pakistan Penal Code and sentenced to four years rigorous imprisonment each in addition to a fine of Rs. 10,000/- each. In default of payment of fine, the appellants have to undergo two months further simple imprisonment. Benefit of section 382-B of the Code of Criminal Procedure was also granted to the appellants.

2. Brief facts of the case as give out in the FIR. No.241 dated 03-03-2004 registered with Police Station Hoti District Mardan, are that on the same day at 10.30.hours the local police, while on mobile duty at Misri Abad, met complainant Shah Hussain son of Hussain Gul P.W.5 alongwith Altaf son of Khitab P.W.6 and Waqar, Councilor of Misri Abad. The complainant disclosed that on 02-03-2004, at evening time, they were returning home on bicycle from their job, when, as they reached near

Bachgan house, Saeed alias Guldang, Abid and Latif, already present there, stopped them and snatched his China made bicycle , one gas cylinder and Rs. 12,00/- while they snatched Rs. 120/- from Mujahid Ali P.W.10 and decamped from there towards Guli Bagh. It may be mentioned here that the actual amount alleged by the complainant was Rs.1200/- but by mistake P.W.3 added one zero to boost up the amount to Rupees 12,000/-.

3. Investigation ensued after registration of the FIR. Asmatullah, ASI, P.W. 12 visited the spot, inspected the same and prepared site plan Ex.PB. He arrested accused Saeed alias Guldang and recovered four hundred rupees from him, being his share of the booty. As the other two accused, Latif and Abdil Ali, were absconding the police officer got warrants of arrest issued against them. After their arrest they were sent up to stand trial.

4. The trial court framed charge against all three accused on 04-06-2005 under section 17(3) of Offences Against Property (Enforcement of Hudood) Ordinance, 1979. The accused did not plead guilty and claimed trial.

5. The prosecution, in order to prove its case, produced as many as 12 P.Ws. After close of the prosecution evidence the learned trial court recorded statements of the accused under section 342 of the Code of Criminal Procedure wherein all of them took the same plea that no independent witness had deposed against them. The witnesses, the appellants stated, were interested only in their conviction. Learned trial court came to the conclusion that case under section 17(3) of Offences Against Property (Enforcement of Hudood) Ordinance, 1979 was not proved but case under section 392 of the Pakistan Penal Code was established and consequently all the appellants were convicted and sentenced thereunder as mentioned above. Hence the present appeal against conviction.

PROSECUTION EVIDENCE

6. Summary of the statement of the witnesses for prosecution is being detailed below:-

a. P.W.1 Salim Dad, S.H.O., Police Station Takhat Bhai, gave an extremely short statement. He stated that on completion of the investigation he "submitted complete challan against the accused on 18-05-2004".

b. P.W.2 Itbar Shah, Head Constable witnessed recovery of gas cylinder on the pointation of accused Abid. In cross examination the witness conceded that no recovery was affected from Saeed alias Guldang appellant and that he had not noted the number of the recovered cylinder either which according to the witnesses was of militia colour. The witness conceded that there were people present at the time of spot inspection but the recovery memo has not been attested by any resident of that area.

c. P.W.3 Muhammad Azam Khan S.I. Police Station Takht Bhai, Mardan was the officer on patrol duty, who recorded the statement of complainant, Ex.PA/1 which was registered at the police station as F.I.R. Ex.PA.

d. Marjan Ali, P.W.4 is a witness of recovery of China made cycle from machenic Muhammad Shoaib. The stolen cycle was sold to him by Abid Ali on 04.03.2004 for a sum of Rs.2200/-. The witness during cross-examination stated that the mechanic Shoaib did neither produce "any I.D. Card or number of I.D.Card of the above stated Abid. Similarly no written proof in this respect was produced to the I.O. by said Shoaib. No witness nor name of any witness was disclosed to the I.O. by the said Shoaib that in whose presence the bicycle was given to him by Abid." The witness also stated that he had not brought the cycle in the Court. The said Shoaib appeared as P.W.7 in support of the prosecution version.

e. P.W.5 is the complainant himself. He supported the contents of his complaint. In the cross-examination he stated that the amount of Rupees 1200/- was returned to him by the Investigating Officer. He however stated that the names of the appellants were disclosed to him by a passer-by whose

name he did not know. The accused, according to him, "were muffled faces". The occurrence according to him took place at night.

f. Altaf P.W.6 stated that on the day following the occurrence, the complainant told him that accused Saeed and two others snatched certain "amount as well as cycle and cylinder" from him. The witness states that he then accompanied the complainant to lodge report at the Police Station. The witness, during cross-examination, stated that only the name of Saeed accused was disclosed to him by the complainant.

g. Muhammad Shoaib, P.W.7 runs a bicycle shop. He produced China made cycle Ex.P1 which he had purchased from his relative Abid Ali appellant on 04.03.2004 for a sum of Rupees 2200/-. Out of this amount a ^{1000/-} sum of Rupees 1000/- was adjusted against outstanding amount and Rupees 1200/- was paid in cash to accused Abid Ali.

h. Tahir Rehman, P.W.8, at the time of occurrence was posted as Moharrar in the Police Station. He registered formal F.I.R. Ex.PA, the crime report of this case.

i. P.W.9 Mir Aman was present at the time the police brought accused Saeed at the site. The accused reportedly pointed the spot where occurrence took place. The witness thumb marked the pointation memo Ex.PW 9/1.

j. Mujahid P.W.10, a cart driver, deposed that on 02.03.2004 at 20.45 hours, he while going to his house reached village Misri Abad. Three persons Saeed, Abid and Latif armed with pistols, stopped him and snatched Rs.120/- in cash on gun point. During cross-examination the witness stated that when he went to the Police Station the person from whom the bicycle was snatched was already present there.

k. P.W.11 Salim Zada, retired IHC, while posted at Police Station Hoti Mardan at the time of occurrence complained of, partly investigated the case. The two accused, Latif and Abid reportedly showed him the place of occurrence whereafter he prepared Ex.P.W.11/1, the pointation memo. During cross-examination the witness conceded that he did not prepare "the site plan of the place of pointation." The cylinder recovered by him had no trade mark and weighed about 5/6 K.G. which fact was not mentioned in recovery memo.

l. P.W.12 Asmat Ullah A.S.I. was posted at Police Station Hoti Mardan during the time the crime report under consideration was lodged. Investigation of the case was entrusted to him. He inspected the spot, prepared site plan and interrogated Saeed appellant who produced four currency note of the denomination of Rs.100/- each which, according to the accused, was his share of the snatched money given him by two appellants. Recovery Memo was prepared. The other two accused were absconding and necessary steps were taken for the issuance of warrants and proclamation notices. He conceded that he had "written in the site plan of Point No.1 that all the accused had aimed their weapons on the complaint but this fact is not written in the F.I.R." He also conceded that the currency notes recovered from the accused were not before the trial court at the time the witness was making his deposition.

7. Misal Khan witness was abandoned as he had died and P.Ws Jamshed and Muhammad Khan S.I. were given up as un-necessary.

Witnesses other than those who deposed were also given up by learned

S.P.P.

8. The substance of the statement of appellants made under section 342 of the Code of Criminal Procedure has already been given in para 5 of this judgment. The appellants neither produced defence nor opted to be examined under section 340(2) of the Code of Criminal Procedure.

The appellants claimed innocence of the charge.

THE IMPUGNED JUDGMENT

9. Learned trial Court, after considering evidence on record and assessing the contentions of the parties came to the conclusion that case of the prosecution was proved against the three appellants. He therefore convicted the appellants under section 392 of the Penal Code and acquitted Asad accused from whom nothing incriminating had been recovered. The reason for convicting the appellants under section 392 of the Penal Code instead of section 17(3)-H of the Offence Against Property, Ordinance, 1979, under which the accused were charged, according to the learned trial

Court was that the nature of proof required under the latter Ordinance was not available.

10. The reasons that prevailed upon the learned trial Court to record conviction against the appellants included inter alia the element of recoveries on the pointation of the accused, deposition of P.W.7 Shoaib, who purchased the cycle from his relative appellant Abid, the factum of direct nomination of appellants in the crime report and the evidence of eye witnesses i.e. both the victims of robbery.

11. Learned Counsel for the parties were asked to formulate points in support of their contentions. Learned counsel for the appellants stated that the witnesses of prosecution were not independent, the recoveries did not inspire confidence, there were contradictions in the statements of star witnesses and there have been improvements in the story of the prosecution.

12. Learned counsel for the State however supported the judgment and contended that the learned trial Court has already taken a lenient view and awarded only four years sentence to the appellants, that there was no

inordinate delay in informing the police, the accused were nominated by name and identified by their respective parentage, the witnesses were independent, there was no enmity to prompt the complainant to implicate the accused falsely and the element of recoveries further strengthened the prosecution case. It was therefore contended that the judgment of learned trial Court must be sustained.

CONCLUSION

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13. I have gone through the file and the deposition of the witnesses has also been perused with the help of learned counsel for the parties. I have come to the following conclusions:-

- i. Section 392 of the Pakistan Penal Code punishes robbery. Section 390 of the Penal Code states that in all robbery there is either theft or extortion. This provision of law further enunciates that theft is robbery if, in order to committing the theft, or in carrying away or attempting to carrying away property obtained by the theft the offender for that end, voluntarily causes or attempts to cause to any person death or hurt or wrongful restrain, or fear of instant death or of instant hurt, or of instant restrain.
- ii. The ingredients of robbery have been clearly mentioned in section 390 of the Code. This section clearly suggests that the accused should have, from the start, the intention not only to relieve the person of his property

but also for that purpose put the victim under wrongful restraint or cause hurt or death. There is no finding of the learned trial Court on this basic ingredient of robbery. The complainant, P.W.5, neither in his statement before the police at the time of recording the crime report nor even at the time of deposing before the learned trial either alleged element of restrain, fear of death or even instant hurt against the appellants. The complainant makes us believe that he, as well as Mujahid P.W.10, who was accompanying him, became victim of robbery. Mujahid P.W.10 on the contrary not only introduced the element of the appellants being "duly armed with pistols" but he specifically mentions that he was "all alone" at the time of incident when he was relieved of Rs.120/- by the appellants.

iii. The recovered cycle or the gas cylinder was not identified by P.W.5, the complainant because nothing was produced in the Court by the prosecution. The currency, reportedly recovered from the appellant was not produced in the trial Court either. Without theft there is no robbery and without restrain or fear of death or injury there is no robbery.

iv. Who is the owner of the cycle we do not know? The evidence of Shoaib P.W.7, that he purchased a cycle from Abid appellant, however may not be cooked up story but the question is whether the stolen cycle had been identified even by Shoaib P.W.7. The complainant has not substantiated his claim of ownership of the cycle either by a purchase receipt or through the statement of the shop keeper who sold the said cycle to the complainant. The element of theft itself being doubtful and the element of force or restrain or fear of injury not available on record it is not

safe to support the judgment whereby the appellants were convicted for the offence of robbery.

v. The complainant and his companion Mujahid P.W.10, the second victim contradict each other on the crucial ingredient of the charge in as much as the definition of Haraba, as contemplated in section 15 of the Offences Property (Enforcement of Hudood) Ordinance, 1979, is that one or more persons, whether equipped with arms or not, make show of force for the purpose of taking away the property of another and attack him or cause wrongful restraint or put him in fear of death or hurt. The complainant has not alleged any such restraint etc. about himself or his companion Mujahid PW.10, but the latter subsequently introduced the element of "three persons armed with pistols". Such a contradiction is certainly destructive of the prosecution story because it is motivated improvement by the prosecution witness.

vi. It sounds very strange that the complainant who admittedly did not know the names of the appellants should have been informed by a passer by about the names, parentage and even the place of residence of the appellants immediately at the time the incident took place at night time when the faces of the robbers were also muffled. We do not know who was this chance informer who disappeared from the scene after conveying crucial information to the complainant. The prosecution simply introduced the appearance of a mysterious person who supplied information to the witness at the spot and then faded away in the thin air. It is rather uncanny and should be ignored in serious matters which affect the life and liberty of citizens.

14. In this views of the matter the prosecution story does not appear to be consistent and convincing. In order to bring home the guilt to the accused the prosecution must establish the case beyond all reasonable doubts. The freedoms of a citizen cannot be jeopardized on conjectures and surmises. Pushing people behind the bars also means deprivation of the means of livelihood. The right of movement, the right to earn and the conjugal rights can be suspended only on solid grounds. There are certainly doubts in the instant case and extending benefit of doubt to the appellants, I accept the Criminal Appeal No.30-P of 2007 whereby the judgment dated 21.08.2007 delivered by Additional Sessions Judge-IV, Mardan was assailed. As a consequence of the acceptance of appeal the conviction and sentence recorded by learned trial Court under section 392 of the Pakistan Penal Code is being set aside. The appellants are present on bail. They are hereby acquitted and the sureties of the appellants are relieved of the liability of respective bail bonds.

S. M. Haider

JUSTICE SYED AFZAL HAIDER

Islamabad the 7th Novemver, 2008
Mujeeb/

S. M. Haider
Fit for Reporting.