

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

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PRESENT:

HON:MR.JUSTICE ABDUL WAHEED SIDDIQUI

Criminal Appeal No.13/P of 1997.

1. Sabir Khan s/o Appellants
Fateh Gul
2. Yar Akbar s/o
Saber
3. Israr Ali s/o
Mandool
4. Gul Muhammad s/o
Tooti

all resident of Qazafi
Bajour Agency

Versus

The State	.....	Respondent
Counsel for the appellant	.....	Mr.Asad Ullah Khan Chamkani, Advocate
Counsel for the State	.....	Mr.Tasleem Hussain Advocate
FIR No. Date and police station	.....	20 dated 5-2-1996 P.S. Munda
Date of the judgment of the trial Court	.....	20-2-1997
Date of Institution	15-3-1997
Date of hearing	27-6-1997
Date of Desision	10-10-1997

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JUDGMENT:

ABDUL WAHEED SIDDIQUI, J:- Appellants have assailed a judgment dated 20-2-1997 delivered by the Court of Additional Sessions Judge/Izafi Zila Qazi, Samar Bagh District Dir whereby each one of the appellants has been convicted under section 392 PPC read with article 20 of the Offences against Property (Enforcement of ~~Hudud~~) Ordinance, 1979 and sentenced to five years R.I each and fine of Rs:10,000/- each in default of payment to undergo further one year R.I each. Also each one of them has been convicted by the same judgment under section 411/34 P.P.C and sentenced to one year R.I each and have been acquitted from the charge under section 342 P.P.C. Benefit of section 382-B Cr.P.C has been extended to each one of them.

2. Story of prosecution, in brief, is that while Karamatullah Khan (PW-6), S.H.O., police station Munda District Dir was on patrol duty at the Bazar of Munda, it was reported to him through a written complaint (Ex.PA/1) on 5-2-1996 @ 12.15 A.M by complainant Muhammad Zahir Shah (PW-1) who had come from a village in Malakand Agency for fateha khawni of Haji Gul Mohammad Malik. He was accompanied by Haji Mir Dad

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(PW-2) Hakim Saeed (PW-3) and Gul Rahman. While returning some persons, having blocked the Shahi road by a motor car near Raheemabad made them to step down from their Datsun No.6594-PRP. They were four, one of whom later on came to be known as Sabir r/o Qazzafi. They snatched this Datsun from them and proceeded towards Qazzafi. The complainant, then, contacted a nearby police chowki @ Ghobana and through wireless intimated the police station. Consequently S.H.O. followed the robbed Datsun and intercepted it on its way and arrested other three accused/appellants as well. An FIR was lodged on the same day @ 12.15 A.M and all the four appellants were challaned. They were charged under sections 347/34, 411/34 P.P.P and article 17 (2) read with 20 of the Offence against Property (Enforcement of Hadd) Ordinance, 1979 to which they did not plead guilty. Prosecution examined 7 PWs and appellant Sabir Khan examined himself on oath.

3. At the outset the question which needs resolution in this case is that appellant sabir Khan , aged 55/56 years, has claimed ownership of the robbed property in his statement u/s 342 Cr.p.C in the following words;

” میں نے گواہی دی ہے کہ اور مجھ سے یہ سب چیزیں جو میری ہیں وہ میری ہیں۔ گورنمنٹ ڈاٹمنٹ
کا یہ دفتر ہے۔ اور اسی ڈاٹمنٹ میں میرا جو لاکھ روپیہ

واہب اللہ داد ہے۔ لہذا تمام ترمیم شدہ دفعات سیرے صدف
پولیس نے غلط طور پر عائد کی ہیں۔

To specific questions about the way the incident has been related by the prosecution, all the appellants including Sabir Khan have denied the existence of such an incident at all in their statements under section 342 Cr.P.C. But in his statement on oath under section 340 (2) Cr.P.C Sabir Khan has admitted the existence of such an incident, but he has given his own version of the story. During examination-in-chief he is deposing:

بیان کیا کہ ڈالشن 6594/PRP میری ملکیت تھی۔ جب کارٹا لنفر میرے پاس ہے جبکی فولڈ کاپی ق دنگ 1/5 ایڈ جس کو میں نے بیروزی کے رہائشی ایک شخص سے ہی حضرت حبیب باعوض مبلغ 6,40,000 روپے فروخت کی اسے مجھے 10,000 روپے نقد دی۔ اور بقایا آدائیگی کا وعدہ کیا 8 ماہ میں بقایا رقم ادا کریگا۔ حضرت حبیب مقررہ مدت میں بقایا رقم کے آدائیگی نہیں کی اور کیا کر گاڑی مذکورہ اس نے شمشیر (شمشور) پر فروخت کی ہے اور جا کر اپنی گاڑی قندے میں کر کے اپنے ٹھوپیل میں لے لے۔ بعد میں نے گاڑی کی تلاش شروع کی۔ اور بروز وقوعہ بمحہ اپنے بیٹے یا راکر اپنے گاڑی کی تلاش میں اپنے

ڈبل ٹینڈ گارڈی میں لطاف ٹیمرگرہ جارہے تھے۔ جب بوقت 11.00 بجے ڈرائیو گوسکر سے حقوڑے آئے چلے گئے تو میرے بیٹے یارا کرنے کھبے کیا۔ کہ ڈائٹن 6594 R.R.P. جس کے ایم تلاش ہیں۔ طرف ٹیمرگرہ جارہے ہیں۔ لہذا میں نے اپنے بیٹے سے کہا کہ اپنی گارڈی کو اپنی ڈائٹن سے آ کر کے روڈ بلاں کر کے تاکر اپنے بیٹے کو روک دیا جاسکیں۔ میرا حکم پر میرے بیٹے نے اپنی گارڈی اُس ڈائٹن سے آ کر کے روڈ بلاں کی۔ اور ایم اپنے گارڈی نیچے اتر گئے میں نے ہمہ اپنے بیٹے کے اسی ڈائٹن میں سوار ڈرائیو اور ڈیگر سوار یول سے کیا۔ آ رہی ڈائٹن پر میرا رقم بقایا ہے۔ اور جب تک یہ رقم مجھے ادا کی جائے۔ میں یہ گارڈی اپنے تحویل میں رکھوں گا اسی گارڈی میں سوار ڈرائیو اور سوار یول نے یہ جواب کیا۔ سلام بھی اسی وطن نے دینے والے ہیں۔ اور اگر اس گارڈی پر کسی کا رقم بقایا ہے تو ہم بات چیت کرنے کیلئے تیار ہیں۔ میں نے اُن کو اپنی ڈائٹن سے اُترنے کیلئے کہا کہ وہ بائی ہوئے ہمیں گارڈی سے نہ اتارا جائے اور ہم ضمانت دینے کو تیار ہیں۔ میں نے اُن کو کیا کہ آپ میرا گارڈی میں اپنے گھروں کو چلا جائے۔ اور یہ گارڈی کھبے حوالہ کر کے انھوں نے انکار کیا لہذا میں نے اُنکو گارڈی سے اتار کر اپنی گارڈی کو بطرف منڈو روانہ کیا اسے اپنے گارڈی بھی اپنے ساتھ روانہ کیا۔ وہ لوگ میرے ساتھ جانے پر مندا مندا ہوئے لہذا میں اُنکو موقع پر مجبور کیا پھر میں نے یہ گارڈی منڈو کے اڈہ میں جاؤں ایک بار میں میں کھڑا کیا اتنے میں انہی لوگوں نے اس گارڈی کے احوال پتلی اور سرقہ بھجری کی رپورٹ فنانس کی رقم لیکر لوہیں والے آکر میرا قبضہ سے ڈائٹن برآمد کی۔ میں نے سرقہ یا بھجری یا حدیہ کا کوئی ثبوت نہیں دیا ہے۔ بلکہ اپنے رقم کو حاصل کرنے کیلئے اس گارڈی کو اپنا تحویل بنا لیا ہے۔

The documents on the basis of which he is claiming are exhibited as Ex1/D-1, 1/D-2. Now the position of Ex 1/D-2 is that it is a receipt cum-agreement passed on by Al-Khalij Motors, New Ada Munda District Dir indicating that vehicle RIP-6524 was sold for Rs:6,15,000/- to appellant Sabir Khan. Out of this consideration, Rs.62000/- was paid by him on 6-5-1995 and the remaining amount was payable by 6-2-1996 and every month Rs:5000/- as well. This receipt-cum-agreement is not a registered document. Condition No. 5 in the said agreement is that this vehicle purchased on the basis of deferred payment, if sold to some one else or in case of accident, sinking or snatching, the second party i.e Sabir Khan himself shall be responsible. The cloumn in condition No.8 has been left unfilled. Ex.1/D-1 is the form of application for transfer of vehicle to the Registration Authority moved by one Sher Wali Khan s/o Ghaffar Khan. It carries neither the name of appellant Sabir Khan nor the date of application. This position has been admitted by appellant Sabir Khan during cross. He is deposing:

یہ درست ہے سٹریٹ رجسٹریشن ایکٹ کے تحت کسی گاڑی کو خریدنے کے پندرہ دن کے اندر اندر اپنے نام جسٹر کرنا ضروری ہوتا ہے یہ گاڑی میں نے وقوع سے 7/8 ماہ قبل خرید لی تھی۔ یہ درست ہے کہ یہ ٹرانسفر لیٹر کا غلط نام با رہین سٹریٹ رجسٹریشن کے تحت ہے۔ یہ درست ہے کہ اس ٹرانسفر لیٹر میں یہ نام تحریر ہے۔

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Appellant Sabir Khan has claimed that he sold the incriminating vehicle to Hazarat Habib and that Hazrat Habib sold it to Shamshool. None of them have been produced in defence. In view of this position and in the presence of statutory provisions of the Sale of Goods Act, 1930, and the Provincial Motor Vehicles Ordinance, 1965, and the/I hold that the claim of appellant Sabir Khan about the ownership of vehicle No.PRP 6584 is not maintainable in law.

4. I have heard the learned counsel for appellant and state. Appellant's counsel has contended that the case is that of two versions. One that of prosecution, second that of ownership of the incriminating robbed article in the hands of appellant Sabir Khan. As discussed above, the second version is not maintainable and therefore, this contention is repelled. The contention that no mens rea was there as the act was done bona fide is repelled for the simple reason that appellants have first of all denied the occurrence in their statements u/s 342 Cr.P.C and later on in his statement u/s 340(2) Cr.P.C appellant Sabir Khan has taken a sommersault, has admitted the existence of the occurrence but has twisted the story. Depositions of the victims namely Muhammad Zahir Shah(PW-1), Haji Mir Dad (PW-2) and Hakim Saeed(PW-3) in the

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circumstances of the case, are inspiring confidence, although the learned counsel for appellant is correct that there appear to be discrepancies among the ocular witnesses. But these are discrepancies/neither material nor substantial to dislodge the entire story of the prosecution.

5. It has been contended by the counsel for appellant that the Offence under section 411 P.P.C is not constituted.

The said section reads:

"Dishonestly receiving stolen property---
Whoever dishonestly receives or retains, any stolen property, knowing or having reason to believe the same to be stolen property, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both."

I agree with this contention in view of the fact that once the commission of robbery has taken place and the incriminating robbed valuables have not yet been transferred to some one who has received the said valuables dishonestly or has retained the said stolen property, knowing or having reason to know to believe the same to be stolen property the offence under section 411 P.P.C is not constituted. In the present case, the robbed vehicle was recovered soon after the commission of robbery and in between it was not yet received or retained

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dishonestly by any body to constitute offence under section 411 P.P.C. Consequently conviction and sentence of the appellants under section 411 P.P.C is set aside.

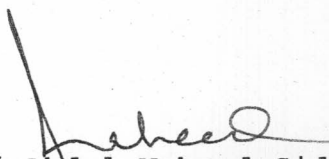
6. I find certain mitigating circumstances in the present case. Muhammad Zahir Shah (PW-1) has admitted that in the vicinity of the place of occurrence, ~~xxx~~ some relations of the appellants also reside ^{at} and/the time the robbed vehicle was snatched from them, the residents of those houses had also taken lathis against the complainant party. He has also admitted that no other vehicle was robbed. The circumstances in which the vehicle was robbed do prove that the appellants are not habitual robbers or thieves. It appears that due to illegal practices of sale and purchase of vehicles and other valuables in our society, the appellants have developed an erroneous concept of law and under the spell of the said concept have indulged into the offence clearly punishable under section 392 P.P.C. I am persuaded in the circumstances of the case that it shall be in the interest of justice to maintain the conviction under section 392 P.P.C but sentence of each one of the appellants ^{be kept at} ~~at~~ the minimum of R.I. for three years and fine of Rs:2000/- each, in default of payment/the

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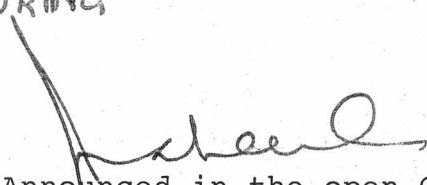
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said fine to undergo S.I. for three months more. Benefit of section 382-B Cr.P.C is also extended to each one of the appellants,

The impugned judgment is upheld with modifications as discussed above.


(Abdul Waheed Siddiqui)
Judge

APPROVED FOR REPORTING


Announced in the open Court
today the 10th October, 1997.
Islamabad/ Zain/*