

IN THE FEDERAL SHARIAT COURT
(Appellate/Revisional Jurisdiction)

PRESENT:

MR. JUSTICE RIZWAN ALI DODANI
MR. JUSTICE ZHAHZADO SHAIKH

CRIMINAL APPEAL NO.7/I OF 2013

Wali Muhammad s/o Ali Muhammad, Caste Mengal,
resident of Goth Jameel Ahmed Mengal.

---Appellant

Versus

The State

---Respondent

Counsel for appellant : Mr. Zahoor-ul-Haq Chishti,
Advocate

Counsel for the State : Mr. Muhammad Sharif Janjua,
Advocate,

FIR No. and date : 33/2012 Dated 31.07.2012
Police Station : Manjhoo Shori,
District Nasirabad

Date of impugned judgment : 03.02.2013

Date of Institution of Appeal : 26.02.2013

Date of hearing : 02.07.2013

Date of decision : 02.07.2013 ✓

Justice Shahzado Shaikh, J:- Appellant Wali Muhammad has through Cr. Appeal No.7/I/2013 challenged the judgment dated 03.02.2013 passed by the learned Sessions Judge, Nasirabad at Dera Murad Jamali in Hadood Case No.18/2012, whereby the appellant was convicted under section 396 PPC and sentenced to life imprisonment with fine of Rs.3,00,000/- or in default thereof to further undergo three years S.I. Benefit of section 382-B Cr.P.C. was extended to the appellant.

2. Brief facts of the prosecution case are that complainant Abdul Khaliq (PW-1) submitted complaint before the SHO, Police Station Manjhoo Shori on 31.07.2012 wherein on 31.07.2012 he alongwith his son Abdul Hameed and Faiz Muhammad were going towards his land for looking after his paddy crop, on motorcycle of Faiz Muhammad bearing registration No.SLB-0935, chassis No. DSC0974507, engine No.DSE-332064 Model-2012. At about 11.35 a.m. when they reached near Shahi Sim Nala, they saw three accused persons, armed with fire arms, coming on 125-motorcycle. When the accused came near them, they signaled them to stop upon which his son Abdul Hameed stopped the motorcycle. The accused demanded motorcycle and on refusal of his son, all the three accused started to beat him with *Butts* of weapons. Abdul Hameed, son of the complainant, became unconscious and fell on the ground. The accused forcibly snatched the motorcycle and went towards South. The accused also took out mobile phones Nokia valuing Rs.5,000/- from

the pocket of the complainant as well as of his son. The complainant further stated that he could identify the accused, if they were brought before him. He left Abdul Hameed and Faiz Muhammad Jatoi at the spot and went to police station for registration of the report.

3. Investigation ensued as a consequence of the registration of crime report. PW.6 Syed Mukhtar Hussain Shah SI had undertaken the investigation. On registration of the FIR, he alongwith the police party and the complainant reached the place of occurrence, inspected it on the pointation of the complainant, prepared memo of inspection of place of occurrence Ex.P/5A and site plan Ex.P/6B, sent injured Abdul Hameed alongwith injury statement to Civil Hospital, Dera Murad Jamali for medical check-up and recorded statements of the witnesses. He conducted investigation at the spot when he received information on telephone that Abdul Hameed succumbed to his injuries in Civil Hospital, Murad Jamali. He, reached the hospital, inspected the dead body, prepared inquest report Ex.P/6C and after completing proceeding handed over the dead body to the legal heirs. On 14.08.2012 he received secret information that one accused of the instant case was arrested in FIR No.157/2012 and was detained in Police Station City Dera Murad Jamali. He summoned the complainant and witnesses namely Abdullah and Abdul Rasheed for identification parade in Police Station Manjhoo Shori. He took the complainant and the witnesses Abdullah and Abdul Rasheed to Police Station City Murad Jamali. Identification parade was conducted under

the supervision of DSP/SDPO wherein complainant Abdul Khaliq and the witnesses identified Wali Muhammad as accused. He prepared memos of identification parade Ex.P/1B, Ex.P/3A & Ex.P/4A. During investigation, the accused confessed his guilt on 22.08.2012 and made disclosure. He prepared memo of disclosure Ex.P/5B. The accused disclosed that the pistol which was used in the offence was taken into possession by the police in case FIR No.157/2012 upon which he took into possession photocopy of recovery memo of pistol Ex.P/6D in this case. After completion of the investigation he sent the accused to judicial lock up and handed over the file to the SHO. The SHO prepared challan Ex.P/6E on 23.08.2012 and submitted before the Court requiring the accused to face trial.

4. The learned trial Court framed charge against the accused 20.11.2012 under section 17(4) of the Offences against Property (Enforcement of Hudood) Ordinance, 1979. The accused did not plead guilty and claimed trial.

5. The prosecution produced six witnesses to prove its case. The gist of the statements of the prosecution witnesses is as under:-

i) Complainant Abdul Khaliq appeared as PW.1 and endorsed the contents of his complaint Ex.P/1-A.

ii) PW.2 Dr. Abid Hussain had medically examined Abdul Hameed on 31.07.2012 and observed as under:- ✓

“INJURIES:

- swelling and bruise on right paritel region of skull.
- X-ray shows of skull on right orbitel region of skull.
- Emergency treatment given but patient not improved and expired at 5:30 p.m. so death is confirmed.

CAUSE OF DEATH: Skull and brain damage

WEAPON USED: Blunt.”

iii) PW.3 Abdullah stated that on 31.07.2012 he and Abdul Rasheed were irrigating their land. At about 11.00 again stated 11.30 a.m. Abdul Khaliq, Abdul Hameed and Faiz Muhammad were coming on motorcycle. Three armed persons came on 125-motorcycle from the other side, stopped Abdul Hameed, Abdul Khaliq etc and demanded motorcycle. Abdul Hameed refused to give motorcycle upon which all the three persons started beating Abdul Hameed, who sustained injuries and fell down. The accused took away motorcycle and Nokia mobile from Abdul Hameed. He alongwith Abdul Rasheed reached at the spot and they alongwith Abdul Khaliq complainant went to police station for registration of the report leaving Faiz Muhammad and Abdul Hameed at the spot. Then they returned at the spot and took injured Abdul Hameed to the hospital at 3.00 p.m. who succumbed to injuries at 5.00 p.m. He further stated that they had seen the faces of the accused. On 14th one accused was arrested and they went to Police Station City Dera Murad where he identified the accused in identification parade, whose name later on was known as Wali Muhammad. The identification parade was repeated three times. ✓

He produced before the trial Court memo of identification parade as Ex.P/3A.

iv) PW.4 Abdul Rasheed stated that on 31.07.2012 he alongwith Abdullah came to their lands situated at Shahi Sim and were irrigating their lands. Abdul Hameed, Faiz Muhammad and Abdul Khaliq came there on motorcycle. Thieves, armed with fire-arms came there on 125-motorcycle, signaled Abdul Hameed to stop and then the thieves started beating them with *Butts*. Abdul Hameed became injured and fell down. In the meanwhile he alongwith Abdullah reached at the spot. The accused fled away snatching motorcycle. He and Abdullah went to Police Station Manjhoo Shori for registration of the report leaving Faiz Muhammad at the spot. After registration of the report, Abdul Khaliq alongwith police came at the spot. He and Abdullah also came at the spot on motorcycle. Police took injured Abdul Hammed to Civil Hospital, Dera Murad Jamali where he succumbed to his injuries at about 5.00 p.m. The accused were arrested and on receiving information that they were detained in Police Station City, he alongwith Abdul Khaliq and Abdullah went to police station for identification parade. They identified accused Wali Muhammad during identification parade from the line of eight persons. The I.O prepared memo of identification parade Ex.P/4A.

v) PW.5 Sahib Dad Constable-339 stated that on 31.07.2012 he alongwith the complainant, police party and the I.O. Syed Mukhtar ✓

Hussain Shah went to the place of occurrence Shahi Sim Nala, where the I.O inspected the place of occurrence on the pointation of the complainant and prepared memo of inspection of place of occurrence Ex.P/5A. He attested the memo of inspection Ex.P/5A. On 22.08.2012 accused Wali Muhammad made disclosure and confessed his guilt before the I.O in his presence as well as in the presence of the SHO and Taj Muhammad. The I.O prepared memo of disclosure Ex.P/5B and he attested his signature on it.

vi) PW.6 Syed Mukhtar Hussain Shah, SI had undertaken the investigation, the details of which have been mentioned in paragraph 3 of this judgment.

6. After closure of the prosecution evidence, the learned trial Court recorded statement of the accused under section 342 Cr.P.C. The accused denied the allegations leveled against him and pleaded innocence. The accused neither opted to record his statement under section 340(2) Cr.P.C. nor selected to produce defence evidence.

7. The learned trial Court, after completing the legal formalities of the trial, assessing the evidence available on the record and hearing the arguments advanced by the learned Counsel for the contending parties, returned the verdict of guilt and recorded conviction and sentence against the appellant as mentioned in opening paragraph of this judgment. ✓

8. Being dissatisfied with the impugned judgment, appellant Wali Muhammad has challenged his conviction and sentence through the instant appeal.

9. Mr. Zahoor-ul-Haq Chishti, Advocate/learned Counsel for appellant Wali Muhammad has raised the following points for consideration of this Court:-

- i) The appellant was not nominated in the FIR.
- ii) The names of PW.3 Abdullah and PW.4 Abdul Rasheed were not mentioned in the FIR as witnesses.
- iii) The DSP, who supervised the identification parade was not produced.
- iv) The star witness Faiz Muhammad, whose motorcycle was snatched by the accused, was not produced as witnesses.
- v) The snatched articles i.e. motorcycle and mobile were not recovered from the appellant during investigation.
- vi) No role was attributed to the appellant.
- vii) The descriptions of the accused were not mentioned in the FIR.
- viii) The disclosure of the appellant before the police is inadmissible under Qanoon-e-Shahadat.
- ix) There are many contradictions between the witnesses of the prosecution itself.

- x) No description of fire-arms were mentioned in the FIR, pistol recovered from the appellant in another case, was attributed to the appellant in the instant case.
- xi) There is conflict between medical and oral evidence. According to oral evidence three persons gave beating to Abdul Hameed with *Butt* blows whereas the medical report shows only one injury on the head of Abdul Hameed.
- xii) The other two accused are absconders and the learned trial Court has shifted all the burden on the present appellant.
- xiii) The impugned judgment is not sustainable because section 396 PPC is not attracted.
- xiv) The prosecution failed to prove its case beyond shadow of reasonable doubt and the appellant deserves acquittal.

The learned Counsel for the appellant relied upon on the following judgments:

2011 SCMR 563
Sabir Ali alias Fauji Vs. The State

*Complainant had neither named the accused nor given his descriptive features in the F.I.R.---Evidence of identification parade was of no value due to the inherent defect that the witnesses had not described the role of accused in the occurrence while identifying him--- Witnesses according to F.I.R. did not know the accused prior to the occurrence and the identification parade was not held according to law, therefore, identification of accused in court by the witnesses was also of no value----
-----Confessional statement allegedly made by accused before the Investigating Officer was not believable in the absence of any corroborating evidence and no inference in this regard could be drawn against the accused when this circumstance was not put to him in his statement recorded under S.342, Cr.P.C.*

Failure on the part of witnesses to describe the role of accused at the time of identification parade is an inherent defect, which renders the identification parade valueless and unreliable.

PLD 2009 Peshawar 44

Abdul Ghani alias Fazal Ghani Vs. Muhammad Sharif and another.

Accused was not charged in the FIR, but he was for the first time named after one month by the father of deceased who did not appear for evidence before the court at the trial---Identification parade in the case was held after seven days of arrest of accused and said delay in the identification parade had not been explained---Complainant though had stated in the F.I.R that he could identify accused, who fired at the deceased, but he had given no description of features etc., which could be made a base for future recognition---In the test identification parade, the complainant had only pointed out accused to be an accused, but had not specified the role played by him---Complainant did not state that it was the accused who had fired at the deceased---Said statement of the complainant belied the medical evidence and the site plan---It was belatedly stated that accused was the one who had fired at the deceased, presuming that he was available to the prosecution for the time being qua identification---Conviction and sentence recorded by the Trial Court against accused were set aside extending him the benefit of doubt and he was acquitted of the charge and was set at liberty.

Mere fact that a witness was disinterested, by itself, was not a certification that what he would speak, would be true, unless his statement intrinsically rang true---Where a very responsible and respectable person would make a statement which was not acceptable to common sense, would be believed by the court, because the court of law would evaluate the evidence on the basis of prudence.

2010 SCMR 846

Riaz Ahmed Vs. The State

Prosecution case rested only on the solitary statement of the complainant---One eye-witness of the occurrence had expired and the other eye-witness had been given up by the prosecution being unnecessary---Presumption under

illustration (g) of Art. 129 of Qanun-e-Shahadat, 1984, could fairly be drawn that had the given up witness been examined in the Court, his evidence would have been unfavorable to the prosecution---Oral evidence was in conflict with medical evidence---Statement of the complainant was neither supported nor corroborated by any piece of evidence.

10. On the other hand, Mr. Muhammad Sharif Janjua, learned Counsel for the State has made the following submissions:-

i) FIR is prompt.

ii) Statement of PW.1 Abdul Khaliq complainant is corroborated by PW.3 Abdullah and PW.4 Abdul Rasheed.

iii) The medical report also supported the ocular account as the doctor PW.2 observed swelling and bruise on the skull of Abdul Hameed deceased.

iv) There is no enmity between the complainant and the appellant.

v) The prosecution has fully proved its case beyond reasonable doubt and the appellant deserves no leniency.

11. We have heard the arguments advanced by the learned Counsel for the appellant as well as the State Counsel, perused the record, and examined relevant portions of the impugned judgment with their assistance.

12. Complainant Abdul Khaliq put the law in motion by submitting complaint against three unknown accused persons ✓

regarding occurrence of snatching motorcycle and mobile phone as well as giving beating by the accused to his son Abdul Hameed, while the complainant alongwith Faiz Muhammad were present at the spot. No resistance was offered by the complainant and his other companion Faiz Muhammad and they remained silent spectators. It is very strange that a son was getting beating by three accused persons but his father did not make any effort to rescue his son from the accused. Faiz Muhammad was an important witness of this case because he was present at the spot and had seen the occurrence. His motorcycle was snatched by the accused persons but he had not made any effort even to save his own motorcycle. No alarm was raised by the complainant and Faiz Muhammad even after fleeing away of the accused.


13. PW.3 Abdullah and PW.4 Abdul Rasheed were produced as chance witnesses. They were claimed to have seen the occurrence and reached at the spot, but their names were not mentioned in the FIR as witnesses whereas the complainant stated in his statement at the trial that he, Abdullah and Abdul Rasheed had gone to police station for registration of the report, leaving his son Abdul Hameed in injured unconscious condition and Faiz Muhammad at the spot. PW.3 Abdullah and PW.4 Abdul Rasheed also stated in their statements that they accompanied the complainant to police station for registration of the case. According to the prosecution story, five persons i.e. complainant Abdul Khaliq, Abdul Hameed, Faiz Muhammad,

Abdullah and Abdul Rasheed were present at the spot but none of them made any effort to chase the accused persons. All the witnesses including complainant, father of Abdul Hameed deceased stated that they had seen the accused beating Abdul Hameed but none of them dared to intervene or interfere with the accused for the rescue of Abdul Hameed. The natural reaction of human being is that in such eventuality when the son was lying unconscious in injured condition, the father would first take him to hospital for medical treatment to save his life and then to make efforts for other legal proceedings because the human life is more precious than other things i.e. motorcycle, mobile phone etc. It seems highly improbable that the complainant left his son Abdul Hameed in unconscious injured condition at a deserted place and he himself went to police station for registration of the report.

14. The accused were not named in the FIR even the complainant had not given any details about the features of the accused persons. Appellant Wali Muhammad was stated to have been arrested in another case by the police of Police Station City Dera Murad Jamali and according to I.O Syed Mukhtar Hussain Shah PW.6 he received spy information that one accused of this occurrence was arrested by the police of Police Station City Dera Murad Jamali. It is not disclosed that when no description/features of the accused were mentioned in the FIR then how the I.O. was able to know that the accused of this occurrence was arrested.

15. Identification parade of the accused was conducted in Police Station City Dera Murad Jamali where complainant Abdul Khaliq, Abdullah and Abdul Rasheed had identified accused Wali Muhammad. No role was attributed to the accused persons in the FIR and the complainant and witnesses had identified Wali Muhammad, present appellant during identification parade without assigning any specific role which he performed at the time of occurrence. The identification parade was supervised by the DSP/SDPO but the said DSP/SDPO was not produced as witness to verify the details of the identification parade. PW.1 Complainant Abdul Khaliq, PW.3 Abdullah and PW.4 Abdul Rasheed deposed that they, on their own, went to police station for identification parade on receiving information about the arrest of the accused whereas the I.O. PW.6 Syed Mukhtar Hussain Shah stated that he summoned the complainant and the witnesses to police station Manjhoo Shoori and took them to police station City Dera Murad Jamali for identification parade. These circumstances create many doubts about the authenticity of the identification parade.

16. No recovery of snatched articles was effected from the appellant. According to the I.O, the accused made disclosure before him that the two mobile phones were taken by his co-accused Asad to his home, while the motorcycle was taken by Jehangir alias Baqar Shah, co-accused. He further stated that he could have got recovered the stolen motorcycle. Appellant Wali Muhammad remained under investigation for many days but the I.O has not explained about any



efforts if he made to trace out co-accused Asad and Jehangir alias Baqar Shah nor has he given any details of his efforts, if any, to recover the snatched articles. The I.O admitted in his cross-examination that he had not got recorded statement of the accused under section 164 Cr.P.C. before the Magistrate. It is settled principle of law that the disclosure before the police has no legal value under the provisions of Qanun-e-Shahadat Order, 1984, and in fact nothing has been established or discovered on the disclosure of accused. PW.5 Sahib Khan admitted in his cross-examination that the distance between Police Station City Dera Murad Jamali and the Court of Judicial Magistrate was 1-k.m. but the I.O did not bother to approach the Court of law for conducting identification parade and to record statement under section 164 Cr.P.C.

In this regard, the reference can be made to the following judgments/case law:-

Confessional statement of accused before police which leads to discovery of no new fact or circumstance on pointation of accused would have no evidentiary value and such confessional statement before police cannot be used against accused. [NLR 2007 Criminal Quetta 142].

No formalities of law observed. It could not be admissible in evidence at all. [AIR 1936 P.C. 253 and PLD 1950 BJ 5].

Appreciation of evidence. Extra-judicial confession. Principle. Extrajudicial confession is a very weak type of evidence and no conviction on it can be awarded without its strong corroboration on the record. [200 SCMR 277 (a)].

17. The complainant made many improvements in his statement and at belated stage he introduced two witnesses

Abdullah and Abdul Rasheed in the prosecution story, who were not mentioned at the time of complaint/FIR, whereas the star witness Faiz Muhammad, who was accompanying the complainant on the motorcycle and was present at the spot at the time of occurrence and according to the complainant was the owner of robbed motorcycle, was not produced as witness at the trial.

18. The medical evidence is also not helpful to the prosecution because the oral account does not support the medical evidence. According to the oral evidence, three accused persons gave beating with *Butt* blows of fire-arms to Abdul Hameed but the medical report shows only "swelling and bruise on right paritel region of skull."

19. In nutshell, the appellant was not nominated in the FIR, nor his features were disclosed nor any role was assigned to him in FIR or even at the time of identification parade, which was not held by Magistrate and even the concerned DSP/SDPO was not produced as witness. The owner of robbed motorcycle, who was present at the time of occurrence, was not present at the time of identification parade. The persons who claimed to have identified the accused have made contradictions as the I.O. stated that they were summoned for the purpose, whereas they stated that they had gone to the P.S. on their own accord.

20. The following create serious suspicion in the Prosecution story:

- i) The occurrence took place on 31.7.2012 within the jurisdiction of P.S. Manjhoo Shori, whereas the accused was stated to have been arrested in another

FIR No.157/2012 (date of the FIR not on record), by P.S. City Dera Murad Jamali. The I.O. of this case on spy information came to know about the accused and his involvement in this case on 14.8.2012. On the same day he arranged everything including necessary processing/orders from his P.S. Manjhoo Shori, and processing/orders from P.S. Dera Murad Jamali, summoned the witnesses Abdullah, PW.3 and Abdul Rasheed, PW.4 and the complainant Abdul Khaliq, PW.1 at P.S. Manjhoo Shoori, took them to P.S. Dera Murad Jamali (keeping in view the distance in rural areas of Balochistan between P.Ss), and arranged the Identification Parade, without the Magistrate. The DSP/SDPO, who supervised the identification parade was not produced. The accused was first identified on 14.8.2012, and then he (the accused) after remaining under custody for 8 days, made the confession but he was not produced before the Magistrate for statement under Section 164 Cr.P.C. Neither any effort was made to arrest the co-accused disclosed by the present accused, nor any recovery was effected to fill in the fatal gaps in the prosecution story. Even the eyewitness Faiz Muhammad, the owner of the snatched motorcycle was not produced.

- ii) PW.3 Abdullah and PW.4 Abdul Rasheed, not mentioned in the FIR as witnesses, could not give details of their land on which they were working the time of occurrence.
- iii) Since no personal description and role was attributed to the appellant at any stage, in any manner, by PW, he could not be linked to the fatal injury deceased/victim Abdul Hameed, and the


offences. Description of fire-arms was also not given in the FIR.

21. From the above facts and circumstances of the case, we have come to the conclusion that it is a case of no evidence and the occurrence has not taken place in the manner as disclosed in the FIR, to take the unbroken chain to the neck of the accused. The learned trial Court has failed to apply its judicial mind to the evidence available on the record, which is not sufficient and free from reasonable doubt to record conviction against the appellant.

22. Resultantly, Cr. Appeal No.7/I/2013 filed by Wali Muhammad son of Ali Muhammad is accepted, impugned judgment dated 03.02.2013 passed by learned Sessions Judge, Nasirabad at Dera Murad Jamali in Hudood Case No.18/2012 is set aside. The conviction and sentence of the appellant are also set aside. The appellant be released forthwith if not required in any other case.

23. These are the reasons of our short order dated 02.07.2013.


Justice Shahzado Shaikh


Justice Rizwan Ali Dodani

Dated, Islamabad the
2nd July, 2013
M. Imran Bhatti/*

Fit for reporting.


Justice Shahzado Shaikh