

IN THE FEDERAL SHARIAT COURT  
(Appellate Jurisdiction)

PRESENT:

**MR. JUSTICE MUHAMMAD JEHANGIR ARSHAD**

CRIMINAL APPEAL NO.23/Q/2010

Hafeezullah  
son of Haji Saeedullah,  
caste Safi, resident of  
Labour Colony Nawan, Killi,  
Quetta

Appellant

Versus

The State

Respondent

Counsel for the appellant : Mr. Muhammad Qahir Shah,  
Advocate

Counsel for the State : Mr. Muhammad Rafique Longove,  
Advocate on behalf of Additional  
Prosecutor General Balochistan  
for State.

FIR No. and date : 241/2008, dated 26.09.2008,  
P.S. Satellite Town,  
District Quetta.

Date of impugned  
judgment : 28.08.2009

Date of Institution : 22.07.2010

Date of hearing : 31.05.2012

Date of Judgment : 31.05.2012

**JUDGMENT:**

**Muhammad Jehangir Arshad, J:** This appeal has been filed to challenge the judgment dated 24.08.2009 passed by learned Additional Sessions Judge,III, Quetta whereby the learned Additional Sessions Judge-III, Quetta after convicting the appellant under section 392 PPC sentenced him to suffer 10 (ten) years' R.I and fine of Rs.10,000/- (Rupees ten thousand only) or in default of payment of fine to further undergo 3 (three) month S.I. with benefit of section 382-B Cr.P.C.

2. On 26.09.2008 at 05:05 p.m. Mst. Aziz Fatima, complainant (PW.1) lodged FIR No.241/2008 with Police Station, Satellite Town, Quetta stating as follows:-

*"It is submitted that on 26.09.2008 I alongwith y daughter went for shopping of household articles in white colored alto car bearing registration NO.AAH-117 and when we reached Quetta road, I un-boarded from the car so as to purchase articles from a cart standing over there, while my daughter was sitting on the rear seat. I was busy in purchasing household articles, I heard hue and cry of my daughter, therefore, I turned back and saw that an unknown person is sitting on driver seat and reversing the same, duly armed with pistol saying to my*



*daughter to stop screaming. I reached to the vehicle and got the steering. The accused while reversing the vehicle hit it with electricity tower, due to which the same was badly damaged. I made hue and cry which made due to which people of the area gathered over there and with the help of them accused was overpowered with his pistol, who told his name as Hafeezullah son of Haji Saeedullah. Since accused attempted to snatch my car on the basis of arm, therefore, I report and request of registration of a case against him."*

3. In the light of the above noted contents of FIR the police after completion of investigation submitted the challan against the appellant under section 17 (2) of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979, the learned trial Court on receipt of the challan framed the following charge against the appellant on 13.12.2008:-

*"I, Murad Ali Baloch, Additional Sessions Judge-III, Quetta, do hereby charge you:-*

*Hafeezullah son of Haji Saeedullah, caste Safi, resident of Labour Colony Nawan, Killi, Quetta as follows:-*

*That on 26.09.2008 at 4.45 p.m. at Quetta road Thana Galli, you duly armed tried to snatch alto car white colour bearing No.AAN-117 from complainant, but apprehended at the spot with pistol and thereby you have*



*committed an offence punishable under section 17 (2) of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979 within cognizance of this Court.*

*And I hereby direct that you be tried by this Court on the said charge."*

4. In support of its case prosecution produced Mst. Aziz Fatima, PW.1 and complainant, Zafar Iqbal, ASI as PW.2, Ahmed Nawaz, ASI as PW.3, Amir Jan, S.I. as PW.4, Rehmatullah Umrani, Judicial Magistrate as PW.5 and Raja Abdul Qayyum, S.I. as PW.6 who recorded the statement of appellant Exh.P-5/C under section 164 Cr.P.C. The above noted PWs in their evidence also proved documents Ex.P/1-A to P/6-B.

After the completion of evidence appellant got recorded his statement under section 342 Cr.P.C. in which he denied the charge and pleaded innocence.

5. On the conclusion of trial, the learned trial Court finally through the impugned judgment found the appellant guilty of the charge and imposed the sentence as noted above, hence this appeal.



6. At the very outset the learned counsel for the appellant pointed out that the appellant due to lack of services of counsel/advocate could not cross-examine the above noted PWs and thus was deprived of his basic fundamental right of fair trial, the learned counsel further argued that it was the basic right of the appellant to be defended by pleader/advocate as provided under section 340 Cr.P.C. which has been violated in this case, therefore, neither the evidence produced by the prosecution against the appellant could be read against him nor the impugned judgment could be considered as a valid and lawful judgment having based on such evidence, learned counsel further argued that it is established from the record that on 23.12.2008 when the statement of complainant was being recorded Mr. Ghani Jan, Advocate who was engaged counsel by the appellant, at the first instance avoided to appear in the Court and finally withdrew his power of attorney and the learned trial Court instead of providing opportunity to the appellant for engaging another



counsel closed the right of the appellant to cross-examine the complainant. According to learned counsel even on the subsequent dates when evidence of remaining PWs specially Mr. Rehmatullah Umrani, Judicial Magistrate (PW.5) was recorded, the appellant right of cross-examining him was also closed, without allowing him opportunity of engaging new counsel knowingly that the appellant was behind the bar. It is further argued by the learned counsel that the Court should have appointed some counsel to defend appellant on State expenses but without appointing any counsel the prosecution evidence was recorded exparte and thus the appellant was deprived of his right of fair trail as well as to be defended by a pleader in terms of section 340 Cr.P.C. Learned counsel therefore argued that the prosecution evidence recorded by the learned trial Court without allowing the appellant of cross-examine could not be declared as a legal evidence nor the appellant could be convicted on the basis of such evidence. Learned counsel, therefore, submitted that the case be



remanded to the learned trial Court for decision after appointing some counsel on his behalf at State expenses so that the appellant may exercise his right to defence through pleader/advocate .

7. In the alternate, learned counsel for the appellant argued that the learned trial Court despite the contents of the FIR as well as evidence wrongly held the appellant guilty of commission of offence under section 392 PPC whereas it was in fact case of attempt to commit robbery punishable under section 393 PPC which provides a maximum punishment of 7 (seven) years' R.I., therefore, according to the learned counsel for the appellant instead of sending the case back to the learned trial Court for recording the evidence after allowing appellant to cross-examine the PWs which would entail a considerable time and the appellant has already suffered agony of facing the trial in jail since his arrest from the date of registration of the case, it would be appropriate if the sentence of 10 (ten) years as awarded by the learned trial Court is reduced to 4 (four) years' R.I. and in such case



the appellant would neither ask for retrial nor would press or agitate this appeal by asking for its decision on merits.

8. On the other hand this appeal has been opposed by Mr. Muhammad Rafique Longove, Advocate on behalf of Additional Prosecutor General Balochistan for State by arguing that appellant having been arrested on the spot and further never asked the learned trial Court for affording him opportunity to appoint new counsel or to appoint a counsel on State expenses, Therefore, today he cannot raise voice on the plea that he was not allowed full opportunity of defence by pleader/advocate as required under section 340 Cr.P.C. According to learned counsel for the State the appellant voluntarily made confessional statement before the Judicial Magistrate which has been proved through the statement of learned Judicial Magistrate who appeared before the learned trial Court and got recorded statements, therefore, the appellant was rightly dealt with by the learned trial Court and the technical plea being raised by the learned counsel for



the appellant today has no legal force which may be turned down and the appeal be rejected.

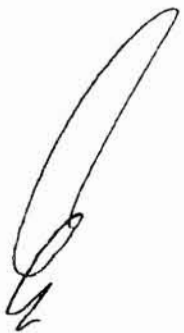
9. Arguments considered, record perused.

10. There is no denying the fact that on 23.12.2008 when the statement of PW/complainant was recorded Mr. Ghani Jan, Advocate who was appearing on behalf of the appellant as a defence counsel, in the learned trial Court, firstly tried to avoid the cross-examine her and later on abruptly withdrew his power of attorney at that stage. The learned trial Court should have adjourned the case even for a short date allowing the appellant either to engage a fresh counsel or to appoint some counsel at State expenses, but instead the learned trial Court straight away closed the right of the appellant to cross-examine the witness, similarly while recording the remaining evidence though on different dates the right of the appellant to cross-examine the PWs was closed due to non availability of his counsel knowingly that the appellant was behind bar and it was not possible for him to engage



new counsel and only option available to the learned trial Court was to appoint some counsel to defend the appellant on State expenses.

11. It is further astonishing to note that the learned trial Court allowed Mr. Ghani Jan, Advocate to withdraw his power of attorney without any justification and without notice to the appellant and in such eventuality if the learned trial Court was of the view that the recording of statement of Mr. Aziz Fatima complainant (PW.1) was necessary on the said date, the learned trial should have refused to allow Mr. Ghani Jan, Advocate to withdraw his power of attorney and should have compelled him to perform his duties till the appellant had appointed new counsel or the learned trial Court had provided him the services of counsel at State expenses. It is also to be noted with displeasure that while recording the remaining evidence on subsequent dates, the learned trial Court by way of closing the right of defence/cross-examination of the appellant in the absence of advocate was not only acted in violation of the provision of section 340 Cr.P.C. but also against the known principle that an accused had got right of fair trial which includes right of engaging counsel/pleader.




12. This Court is therefore, satisfied that the learned trial Court acted illegally and with material irregularity by recording the evidence of prosecution in the absence of any counsel on behalf of the appellant or without providing the services of counsel to the appellant either to defend himself or to cross-examine the PWs, and due to non cross-examination of prosecution witness the appellant was not only condemned un-heard but also faced to suffer failure of justice not curable by this Court specially when the evidence of PW.5 namely Mr. Rehmatullah Umrani, Judicial Magistrate who recorded the alleged confession by the appellant and the said witness was not only very material but his evidence was such that without affording of an opportunity of being cross-examined; could not be considered as lawful evidence; before holding the appellant guilty of confession made by him voluntarily and without any force; further when the confessional statement has been given much weight by the learned trial Court at page 7 of the judgment.

13. The upshot of the above discussion is that the evidence recorded by the learned trial Court in the absence of any counsel on

the part of the appellant and also without cross-examination cannot be treated as legal and lawful evidence and no confession on the basis of such evidence could be recorded by the learned trial Court.

14. In the above noted facts and circumstances, the question now arises whether the matter be sent back to the learned trial Court for recording of evidence afresh after affording opportunity of cross-examining the witnesses to the appellant or as suggested by the learned counsel for the appellant this Court should itself imposed the appropriate sentence as suggested by the learned counsel.

15. Keeping in view, the agony of the appellant who is behind the bars since the registration of the case, it is also a fact that in case, if the case is remanded to the learned trial Court for fresh decision it would not only entail another period of at least one year in



recording evidence afresh but it would also add further agony to the appellant through such proceedings which would not be a proper and reasonable course to be adopted by this Court. Moreover possibility of non availability<sup>of</sup> the prosecution evidence after lapse of near about four years of occurrence can also not be rules out. Further due to act of

Court appellant also suffered miscarriage of justice against known principles "*no one to suffer due to act of Court*" as held by the apex


Court in PLD 2007 S.C. 472, 582

16. In this view of the matter, I am inclined to agree with the suggestion of the learned counsel for the appellant that instead of sending back the matter to the learned trial Court for afresh decision and in order to save the appellant from the agony of facing the fresh trial, the sentence of 10 (ten) years' as imposed by the learned trial Court is reduced to 4 (four) years' R.I. by maintaining the sentence of fine as imposed by the learned trial Court.


17. Resultantly, this appeal is disposed of with the modification that the sentence of 10 (ten) years' R.I. as imposed by the learned trial Court shall be considered as sentence for a period of 4 (four) years', however, the sentence of fine as well as the penalty in default as imposed by the learned trial Court shall remain intact, the appellant would also be entitled to benefit of section 382-B Cr.P.C.

18. Before parting with the judgment it would not be out of place to mention here that alongwith trial of this case, appellant was

also tried under Arms Ordinance, 1965 and was found guilty of the charge and was imposed sentence of 3 (three) years' R.I. with penalty of fine also on the same day when the conviction and sentence in the present case was recorded. According to learned counsel for the appellant as the judgment of the learned trial Court in the Arms Ordinance, 1965 was silent, therefore, the appellant would seek the indulgence of this Court, if it is observed that the sentence passed by the learned trial Court in the case tried under Arms Ordinance shall also run concurrently as required by section 397 Cr.P.C. The request so made by the learned counsel is genuine, therefore, it is directed that both the sentences shall run concurrently.

  
**Justice Muhammad Jehangir Arshad**

Dated Quetta the  
31<sup>st</sup> May, 2012  
Hummayun\*-

  
*Approved for reporting.*

**Justice Muhammad Jehangir Arshad**