

IN THE FEDERAL SHARIAT COURT
(Appellate / Jurisdiction)

PRESENT

MR. JUSTICE SHEIKH AHMAD FAROOQ

CRIMINAL APPEAL NO.37-I-2010

Sohrab Khan son of Gulzar
R/o Kohlu.

Appellant

Versus

The State

Respondent

Counsel for the Appellant

Mr. Jahanzaib Khan Jadoon,
Advocate

Counsel for the State

Syed Pervaiz Akhtar, D.P.G
Baluchistan

No. & date of F.I.R.
Police Station

No.51/2009, dt.18.11.2009
P.S City Kohlu

Date of judgment of
the trial court

15.04.2010

Date of institution of
the appeal

22.04.2010

Date of hearing of
the appeal

31.05.2012

Date of decision

31.5.2012

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JUDGMENT:

SHAHMAD FAROOQ,J:- Through the instant Criminal Appeal, the appellant/ Sohrab Khan son of Gulzar has challenged the judgment dated 15.4.2010, whereby the learned District and Sessions Judge, Kohlu has convicted him under section 392 P.P.C and sentenced him to undergo R.I for five years with fine of Rs.10000/- or in default thereof to further undergo S.I for three months. However, benefit of section 382-B, Cr.P.C, was extended to the convict/accused.

2. Succinctly, the prosecution story as narrated in the FIR (P/5-A) is that on 12.11.2009 at about 10.00 a.m, the complainant alongwith his son namely Raz Muhammad had gone to Tambu for hunting, where accused namely Sohrab Khan son of Gulzar and Khan Gul son of Jamal inquired from them that who had given the permission for hunting in this area, to which, the complainant replied that they were hunting in this area for the last 25/30 years and nobody had ever created any hindrance. The complainant alleged that accused Khan Gul was armed with Kalashnikov whereas accused/Sohrab Khan was empty handed. Thereafter, both the accused snatched his motorcycle (Unique) Model 2009 and one binocular on gun point and also gave beating to the complainant. The complainant and his son Raz Muhammad came from Tambu on foot.

3. After completion of investigation, a report under section 173, Cr.P.C was submitted in the learned trial court for taking cognizance of the offences. Thereafter the accused/present appellant was charged by the learned trial court, to which he did not plead guilty and claimed to be tried.

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4. During the trial, the prosecution in order to substantiate its allegations and to prove the charge produced five witnesses.

5. Statements of P.Ws have been discussed in detail in the judgment of the learned trial court. However, the gist of the material evidence of the prosecution relevant for the decision of the present appeal is being reproduced below:

P.W.1/ Yar Muhammad is the complainant. He reiterated the version given in the FIR. He is an eye-witness of the occurrence. In his deposition, the complainant has stated that accused Sohrab Khan aimed Gun upon him and his other companion namely Muhammad Din snatched binocular from him and accused Sohrab Khan snatched his motorcycle. P.W.1 produced the complaint lodged by him in police station Kohlu as Ex.P/1-A, and identified the accused Sohrab Khan who was present in the court.

P.W.2/ Raz Muhammad, deposed that on 12.11.2009 at about 6.00 a.m he alongwith his father went to Tambu for hunting in a motorcycle. During the hunting the distance between him and his father was 01 kilometer. At about 10.00 a.m, he saw two persons fighting with his father. Thereafter, both persons sat on motorcycle and on his effort to stop them, the accused threatened to shoot him.P.W.2 identified accused Sohrab Khan on the spot, while he could not identify the second accused.

P.W.3/ Bijar Khan Constable No.1119 P.S. Kohlu deposed that he accompanied S.H.O Fareed to Muhammad Din's house situated in Tambu where one red colour Unique motorcycle was standing in a hut (Jhugi), which was taken into police

custody and carried in police vehicle. He is also witness of recovery memo Ex.P/3-A.

P.W.4/ Dunya Khan Constable is a witness of disclosure memo Ex.P/4-A, whereby the accused volunteered to get the snatched motorcycle of the complainant recovered from the house of Muhammad Din and Khan Gul.

P.W.5 / SI/SHO Ghulam Fareed is the investigating officer of this case. He deposed that complainant/Yar Muhammad had given a written application at the police station Kohlu in which he nominated the accused, whereupon FIR was lodged as Ex.P/5-A. He recorded the statements of the witnesses and arrested the accused Sohrab Khan.

6. After closure of the evidence of the prosecution, statement of the accused/present appellant was recorded under section 342 Cr.P.C. The present appellant denied the prosecution version and claimed innocence. In response to the crucial questions regarding his involvement in this case, he replied as follows:

Question: Why the prosecution witnesses deposed against you?

Answer: P.Ws being father and son have deposed falsely.

Question: What else do you want to say?

Answer: "I am innocent. Have committed no offence"

However, accused/present appellant Sohrab Khan neither opted to make a statement under section 340(2) Cr.P.C on oath nor produce any defence witness in disproof of the charge/ allegation made against him.

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7. Upon conclusion of the trial, the learned trial court found the present appellant guilty of committing the offence punishable under section 392 PPC and sentenced him as mentioned in paragraph No.1 of this judgment.

8. Being aggrieved by the impugned judgment, dated 15.4.2010, the appellant has challenged the legality and validity of his conviction and sentence through the instant appeal before this Court.

9. Learned Counsel for the appellant submitted that there are material contradictions in the statements of the witnesses of the prosecution. He further submitted that the alleged recovery of the motorcycle was not effected from the physical possession of the present appellant. He maintained that there is an unexplained delay of six days in the registration of the case as the occurrence took place on 12.11.2009 whereas the FIR was lodged on 18.11.2009. He contended that according to FIR, the present appellant namely Sohrab Khan was empty handed whereas the complainant while appearing as P.W.1 has deposed that Sohrab Khan/present appellant snatched the motorcycle from him on gun point. He pointed out that in the FIR, two accused namely Sohrab Khan/present appellant and one Khan Gul are alleged to have committed the offence, whereas during the trial P.W.1 mentioned the name of the second accused as Muhammad Din. He argued that the impugned judgment is result of mis-reading and non-reading of evidence available on record. He argued that the extra-judicial confession or any disclosure made by accused while he is in custody of the police, is not admissible in evidence. In support of his arguments, he relied upon the judgments, reported in 2010 SCMR-164, 2011 SCMR-563 and 2012 SCMR-440.

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10. Conversely, the learned Deputy Prosecutor General supported the judgment on the ground that the date of the registration of the case seems to have been wrongly mentioned by the police as the complainant submitted a written application regarding the occurrence on 12.11.2009 (Ex.P/1-A). He further submitted that the motorcycle was recovered from the house of the co-accused namely Muhammad Din as a result of a disclosure made by Sohrab Khan/present appellant. He asserted that the appellant/Sohrab Khan was identified by the eye witnesses i.e P.W.1 and P.W.2. He claimed that the appellant is fully connected with the commission of the offence and has been rightly convicted and sentenced by the learned trial court vide the impugned judgment dated 15.4.2010.

11. I have heard the learned Counsel for the appellant as well as Deputy Prosecutor General in addition to examining the evidence/documents available on record carefully.

12. No doubt the occurrence took place on 12.11.2009 and the F.I.R was lodged on 18.11.2009 but it is established not only from the application of the complainant for registration of case i.e Ex.P/1-A but also from the contents of the F.I.R that the matter was reported to the police on 12.11.2009. The delay in the registration of the FIR occurred due to police who started investigation prior to the lodging of the FIR, therefore, the delay stands explained and the complainant cannot be made to suffer for any illegal act of the police officers as they could have not started investigation prior to registration of the case as envisage under section 154 Cr.P.C.

13. Secondly, from the bare perusal of the FIR/Ex.P/5-A, it is revealed that the complainant/Yar Muhammad (P.W.1) had mentioned the names of the two accused as Sohrab Khan and Khan Gul. The complainant has also stated in the

FIR/Ex.P/5-A the accused/ Sohrab Khan,/the present appellant was empty handed at the time of occurrence. On the contrary, complainant while appearing as P.W.1 during the trial deposed that two accused namely Sohrab Khan and Muhammad Din stopped them from hunting and on his refusal to accede to their command, the accused/Sohrab Khan snatched his motorcycle on gun point. There is no plausible explanation for the substitution of the accused namely Khan Gul with accused Muhammad Din by the complainant/prosecution.

14. Thirdly, the alleged recovery of the motor cycle was not effected from the physical possession of the present appellant. Needless to mention here that confession made by an accused regarding his guilt in the custody of the police and in the absence of a Magistrate and without strong corroborative evidence, is of no legal value. Extra Judicial Confession is a very weak type of evidence and no conviction can be recorded on it without any independent corroboration. Even otherwise there are material discrepancies in the statements of prosecution witnesses regarding the place of recovery of the motorcycle. P.W.3, who is a marginal witness of the recovery memo Ex.P/3-A, in his cross-examination explained that the motorcycle was recovered from a hut "jhuggi" and no person was present therein. On the other hand, P.W.5, who is investigating officer of this case, admitted in his cross-examination that the motorcycle was recovered from the middle room of a house which comprised of three rooms, one bath room and one latrine. P.W.5 also admitted the presence of women in the house wherefrom the motorcycle was allegedly recovered.

15. In these circumstances, not only the recovery of the motorcycle on the disclosure of the present appellant is highly doubtful but also the same is in

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violation of section 103 Cr.P.C. Moreover, the recovery of the motorcycle alone and that too from the house of a co-accused on the alleged disclosure of the present appellant is not sufficient to record his conviction particularly when the ocular account of the occurrence is not confidence inspiring. It has been held in the case of Sabir Ali alias Fauji Vs. the State reported in 2011 SCMR-563 that the accused is to be acquitted where the witnesses had made improvements in their statements before the trial court and the ocular testimony was inconsistent and did not inspire confidence. A similar view was taken in a judgment reported in 2012 SCMR-440 that mere recovery of pistol alone from the accused would not be sufficient to corroborate the ocular account which was not believable.

16. Even otherwise, the alleged recovery of motorcycle on the pointation of the present appellant cannot be described as a discovery under Article 40 of the Qanun-e-Shahadat Order, 1984 as the same was not recovered from any hidden place and could have been easily recovered in the normal course of investigation by the investigating officer without the pointation of the present appellant.(Reliance 2010 SCMR 1604). Furthermore, the said information provided by the accused did not connect him with the commission of the offence beyond reasonable doubt. In the so called '*inkishaf*' (disclosure) placed on record as Ex.P/4-A, the accused stated that the motorcycle of the complainant was snatched by Khan Gul son of Jamal and Muhammad Din on gun point on 18.11.2009 and he could get the same recovered from the house of Muhammad Din and Khan Gul. The said disclosure by no stretch of imagination connect the accused/present appellant with the crime.

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17. Finally, in this case, the prosecution witnesses particularly the complainant/P.W.1 has made improvements and substituted the name of one of the accused Khan Gul with Muhammad Din, without any explanation at all. As a matter of fact there is only one witness of the occurrence i.e P.W.1 as admittedly P.W.2/Raz Muhammad was one kilometer away from his father at the time of occurrence. Moreover, there are material discrepancies and contradictions in the statements of the prosecution witnesses and the ocular account of the occurrence is not believable. Hence, the impugned judgment dated 15.4.2010 is not sustainable in the eyes of the law.

18. The upshot of the above discussion is that the prosecution has failed to prove the charge against the accused/present appellant beyond reasonable shadow of doubt. Resultantly, the instant appeal is accepted and the judgment dated 15.4.2010 passed by the learned trial court whereby the present appellant was convicted under section 392 PPC and sentenced to five years rigorous imprisonment with fine of Rs.10,000/- or in default thereof to further S.I for three months is set aside. Consequently, the accused/present appellant is acquitted of the charge. The appellant/Sohrab Khan is present on bail. His bail bond stands discharged and sureties are ordered to be released.



JUSTICE SHEIKH AHMAD FAROOQ

Quetta, 31.5.2012
M.Akram/

APPROVED FOR REPORTING



JUDGE