

For uploading

IN THE FEDERAL SHARIAT COURT OF PAKISTAN  
(APPELLATE JURISDICTION)

PRESENT

MR. JUSTICE MEHMOOD MAQBOOL BAJWA

1. MUHAMMAD IBRAHIM S/O GHULAM HYDER BANGULZAI,  
RESIDENT OF DERA MURAD JAMALI.
2. ALI AHMED SON OF ABDULLAH KALHORO, RESIDENT OF  
DHADHAR.
3. JUMMA KHAN SON OF SULLEMAN RAHEJA RESIDENT OF  
NOUSHEHRA NOW CONFINED IN DISTRICT JAIL SIBI

APPELLANTS

VERSUS

THE STATE.

RESPONDENT

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FOR THE APPELLANTS	::	M/S MUHAMMAD ALI KANRANI AND GHULAM ALI J. RIND, ADVOCATES
FOR THE STATE	::	MR. YAHYA KHAN, ADDITIONAL PROSECUTOR GENERAL, BALOCHISTAN.
NO. & DATE OF FIR	::	41 of 2013. 28.12.2013
POLICE STATION	::	LEVIES, HAJI SHAHER.
DATE OF JUDGMENT OF TRIAL COURT	::	27.09.2014
DATE OF PREFERENCE	::	22.10.2014
DATE OF HEARING	::	13.12.2017
DATE OF DECISION	::	13.12.2017

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**JUDGMENT:**

**MEHMOOD MAQBOOL BAJWA, J:** Crime Report bearing No. 41 of 2013 was registered against the present appellants, three in number, under Section 17 (3) of The Offences Against Property (Enforcement of Hudood) Ordinance VI of 1979 (Hereinafter called Ordinance VI of 1979) at Police Station Levies Haji Shaher by Muhammad Barat (P.W-1) with the accusation that on 28<sup>th</sup> of December, 2013 at about 10:30 a.m. he was going to Mithri Dam on his motorcycle No. QAY-106 and at about 10:30 a.m. near Mithri he was intercepted by the present appellants armed with pistol riding on motorcycle who on pistol point snatched the motorcycle and managed to escape.

The appellants were arrested and motorcycle No. QAY-106 was recovered from Muhammad Ibrahim (appellant No.1). Ali Ahmed (appellant No. 2) got recovered motorcycle No.SLT-1681 while Jumma Khan (appellant No.3) produced one Pistol alongwith two magazines and 10 live bullets.

After observing codal and legal formalities, Report under Section 173 of The Code of Criminal Procedure 1898 (Act V of 1898) (Hereinafter called The Code) was submitted.

Since the appellants denied the allegations contained in the charge under Section 17(3) of Ordinance VI of 1979, therefore, in order to prove its case, prosecution produced Muhammad Barat, complainant (P.W-1), Hakim Ali, Levies Constable (P.W-2), Khadim Hussain, Levies Constable (P.W-3) and Bahder Khan, Naib Tehsildar (P.W.4).

The appellants in their respective statements recorded under Section 342 of The Code denied the incriminating evidence put to them and maintained that they were falsely implicated. The appellants, however, neither appeared as their own witness nor adduced evidence in defence.

The learned Sessions Judge, Sibi through judgment dated 27 of September, 2014 recorded conviction against the appellants under Section 392 read with Section 34 of The Pakistan Penal Code 1860 (XLV of 1860), awarded sentence of five years rigorous imprisonment to each appellant besides payment of Rs.25,000/- as fine and in default to further undergo two year simple imprisonment. Benefit of Section 382 of The Code was extended.

2. Being aggrieved of the conclusion recording conviction and awarding sentences, all the three appellants have assailed the legality and validity of judgment by way of present appeal.

3. Learned Counsel for the appellants No. 1 and 2 and representing the appellant No.3 submitted separate arguments contending that the prosecution miserably failed to prove its case against the appellants beyond shadow of doubt. Referring to the statement of complainant, Muhammad Barat (P.W-1) as well as contents of the F.I.R. (Ex.P4-A), it was submitted that the complainant made improvement while appearing as witness. Elaborating argument, it was contended that the complainant as a witness (P.W-1) deposed that he was going on motorcycle with a child but the factum of the company of child was not mentioned in the crime report. Referring to reply given in cross examination by the complainant, it was submitted that there is admission on the part of complainant that he did not see the appellants prior to the occurrence.

Continuing the argument, the learned Counsel representing the appellants No. 1 and 2 further contended that the Investigating Officer who apprehended the appellants was not produced and as such adverse presumption has to be drawn against the prosecution. Referring to the evidence of complainant (P.W.1) and other witnesses (P.Ws.2 to 4), it was submitted that there are material contradictions in the statements of witnesses exhibiting serious doubt about the veracity of the prosecution version.

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Learned Counsel for the appellant No.3 further contended that recovery of pistol, magazines and live bullets was planted though nothing was recovered from the appellant.

4. Time and again process was issued in the name of complainant but he could not be traced out and as per report made on the process issued for today, the complainant who was serving on Mithri Dam after completion of the assignment has left the place.

5. The learned law officer while controverting the arguments submitted that statement of complainant-Muhammad Barat (P.W.1) by itself is sufficient to prove the case of prosecution beyond shadow of doubt. Contended that complainant got no bias or animus against the appellants and such his evidence which even otherwise inspires confidence is sufficient to prove the case of prosecution, finding support from the deposition of Hakim Ali and Khadim Hussain, Levies Constables (P.W.2 to P.W.3) and Bahadur Khan, Naib Tehsildar, Investigating Officer (P.W.4). Submitted that evidence of recovery witnesses (P.W.2 to P.W.3) is sufficient to prove recovery of motorcycle of complainant as is evident from recovery memo ( Ex.P/3-A). Contended that the ocular account finds support from the recovery of motorcycles as well as pistol, bullets, sufficient to establish the guilt of appellants.

6. Except complainant (P.W.1), there is no eye witness of the occurrence. Though direct statement of the complainant (P.W.1) is in line with the case of prosecution set up in F.I.R. (Ex.P/4-A) but some improvement was made by him as is evident from comparison of his said statement with contents of F.I.R. He while appearing as a witness deposed that he was going with child to the Mithri Dam but the factum of company of child does not find mentioned in the crime report.

Though F.I.R. was lodged within an hour after the occurrence nominating three appellants as culprits but reply given in cross examination is sufficient to demolish super structure of the case of prosecution. The complainant admitted in cross-examination that he did not see the appellants prior to the occurrence.

This Court is conscious that the complainant stated that he did not see the appellants (accused) prior to the occurrence and did not maintain that appellants (being accused) were not known to him. However, use of words "did not see prior to the occurrence" gives irresistible conclusion that the appellants were not known to him prior to the occurrence.

Keeping in view the reply, holding of identification test was essential to prove the identity of appellants as culprits but same was not conducted.

Mentioning the name of appellants in the F.I.R. as such is insignificant.

7. Learned law officer was confronted with this reply who was unable to satisfy the court with reference to the identity of the appellants as culprits. It is not understandable how the complainant (P.W.1) got information about the names and other particulars of the appellants as culprits when he saw them first time. This state of affairs cast serious doubt about the time of registration of F.I.R. as well.

8. The circumstances are sufficient to brush aside the evidence of complainant (P.W.1).

9. Recovery of pistol, live bullets as well as magazines from the custody of appellant No.3 through recovery memo (Ex.P.3-C), even if taken as gospel truth, by itself would not be sufficient to prove the case of prosecution for two-fold reasons. First, no firing was ever made during the course of occurrence and second, recovery is a corroborative piece of evidence which by itself is not

sufficient to prove the guilt of the said appellant in the absence of convincing ocular account.

Similarly, recovery of motorcycle No.SLT 1681 from the custody of Ali Ahmed (appellant No.2) through recovery memo (Ex.P.3-B) would not provide corroboration as the same was not snatched in the present occurrence.

Motorcycle No.QAY-106 statedly owned by complainant was allegedly recovered from the custody of Muhammad Ibrahim (appellant No.1) through memo (Ex.P.3-A) but the same cannot be considered as supporting material due to omission on the part of the complainant to highlight the registration number of motorcycle in his statement as PW-1. It is further to be noted that the complainant neither during the course of investigation nor in evidence produced registration book and as such how it can be presumed that the motorcycle recovered from the appellant No.1 was owned by complainant and was snatched.

10. The recovery as such from all the three appellants becomes inconsequential in the circumstances.

11. Argument advanced by learned Counsel for appellants No. 1 and 2 regarding non-appearance of Investigating Officer who arrested the appellants cannot be lost sight. However, even if this aspect is ignored, it would not be sufficient to endorse the conclusion assailed.

12. There is no other incriminating evidence to prove the guilt of appellants.

13. Argument advanced by learned law officer that neither the complainant (P.W.1) nor recovery witnesses (P.W.2-P.W.3) got any malice against the appellants by itself would not be sufficient to give credit to their evidence.

14. Pursuant to discussion made, prosecution failed to prove its case against the appellants beyond shadow of doubt and as such benefit of doubt has to be given to the appellants not as a matter of course and concession but as a matter

of right. Reliance is placed upon the dictum laid down in "TARIQ PERVEZ v. THE STATE" (1995 SCMR 1345), "YASIN alias GHULAM MUSTAFA v. THE STATE" (2008 SCMR 336) and "HASHIM QASIM and another v. THE STATE" (2017 SCMR 986).

15. Epitome of above discussion is that while extending benefit of doubt and accepting the appeal, the judgment rendered by learned Trial Court is hereby set-aside and the appellants are acquitted of the charge.

16. Sentence of all the three appellants was suspended by this Court through order dated 05.06.2015, who are present in the Court.

They and their sureties stand discharged of their respective bonds.

  
MR. JUSTICE MEHMOOD MAQBOOL BAJWA

Dated, the 13<sup>th</sup> December, 2017  
at Quetta.  
*Sharif*