

[Quetta]

Before Mrs. Syeda Tahira Safdar, J

MANZOOR AHMED and another---Appellants

Versus

THE STATE---Respondent

Criminal Jail Appeals Nos. 8 and 9 of 2009, decided on 19th January, 2010.

Penal Code (XLV of 1860)---

---S. 392/34---Robbery---Appreciation of evidence---Benefit of doubt---No allegation that accused persons attempted to cause death, hurt or wrongful restraint of any person or even caused fear for the same---Offence, in circumstances, could not at least be covered under offence of theft, maximum punishment for which was three years with fine--Counsel for accused did not press the appeals on merits, but had prayed for moderate reduction in quantum of sentence---Contradictions in the statements of the complainant with regard to incident and recovery of allegedly robbed articles, had made evidence produced by the prosecution highly doubtful---Complainant had improved his statements with variation of time due to which credibility of the report lessened---Eye-witness of the occasion was wife of the complainant and other family members, but their statements were not recorded by the Investigating Officer nor they were mentioned as witnesses in challan---Identification of accused persons were not made from them, but on basis of some search made with the help of dogs by the complainant, several persons were nominated---Nowhere it was mentioned that said dogs led towards the residence of accused persons, being the real culprits---Complainant had not disclosed that on basis of what material he nominated accused persons being the real culprits---Trial Court, while discussing the evidence, did not consider contradiction present in the statements of witnesses and also in memos prepared during course of investigation---Trial Court had failed to appreciate the material present on record in its true context---Presence of

material contradictions, reasonable doubt appeared the benefit of which surely would go to accused persons---Prayer of reduction in circumstances, was not acceded, rather benefit of doubt was exercised in favour of accused persons---Impugned judgment of the Trial Court was set aside and accused were acquitted.

Abdullah Kurd for Appellant (in Criminal Jail Appeals Nos. 8 and 9 of 2009).

Zahoor Ahmed Shahwani, P.-G. for Respondent (in Criminal Jail Appeals Nos. 8 and 9 of 2009).

Date of hearing: 20th October, 2009.

JUDGMENT

MRS. SYEDA TAHIRA SAFDAR, J.---The above mentioned two Jail appeals preferred by appellant Manzoor Ahmed and Taj Muhammad, being aggrieved of judgment made on 24-10-2007, by Sessions Judge, Lasbela at Hub, whereby both the appellants/accused were convicted of the charge and punished for the offence under sections 392/34, P.P.C. to suffer rigorous imprisonment for a period of 3 years with fine of Rs.10,000. In case of default further suffer simple imprisonment for a period of 4 months. As both the appeals are made against same judgment, therefore, it will be better to decide the same with this common judgment in order to avoid any contrary findings.

2. It is contention of appellant Manzoor in Criminal Appeal No.08 of 2009 that he belongs to a very poor family while he is falsely involved in present case. There is no eye-witness against him; due to his poverty he is unable to pay the amount of fine. Further due to his conviction his family is facing trouble, as he is the only earning hand. He has prayed for accepting of his appeal and order of trial Court be set aside: While appellant Taj Muhammad in his Appeal bearing No.9 of 2009 has asserted that he being sole bread-winner of his family involved in present case, due to which his family is suffering seriously and starving. He has never committed any offence nor even involved in any case. He has prayed for remitting the sentence to the extent of payment of fine further prayed for his acquittal.

3. As per record an F.I.R. No. 3 of 2007 on 26-1-2007 was registered on report of one Gul Hassan, whereby it was reported that at the time of prayer of Juma (Friday) from back gate of his residence three persons entered in his residential room and took forcibly ornaments weighing 30/40 tolas, cash amount nearly Rs.200,000 (Rupees two lacs) and mobile set lying in a cupboard and fled away. After registration of case, investigation was made, while appellants were arrested on 29-1-2007. After completion of investigation case was challaned to the extent of appellants, while two accused persons namely Bashir Ahmed and Barkat Ali were nominated therein as absconding accused. Trial was held; on completion of the same the trial Court convicted both the accused persons/appellants under sections 392/34, P.P.C. to suffer rigorous imprisonment for a period of 3 years with fine of Rs.100,00 (Rupees ten thousand only). In default further suffer simple imprisonment of 4 months each. The appellants preferred appeals from Jail, which were sent to Federal Shariat Court, but the same were not entertained for want of jurisdiction, while the appeals were sent to this Court which are pending for adjudication.

4. During course of arguments the learned counsel appointed on behalf of appellants made statement that he does not want to press the appeals on merits rather prayed for moderate reduction in quantum of sentence. The learned P.-G. opposed the request, according to him, as the sentence awarded to the appellants is the minimum period provided for the offence, therefore, no further reduction can be made.

5. In present case the offence alleged against the accused persons is, punishable under, section 392/34, P.P.C. Section 392 speaks as under:-

"392, P.P.C. Punishment for robbery.

Whoever, commits robbery shall be punished with rigorous imprisonment for a term, which (shall not be less than three years nor more than tin years) and shall also be liable to fine; and, if the robbery be committed on the Highway the imprisonment may be extended to fourteen years."

Thus in view of the same the offence alleged against the appellant is of robbery which is defined in section 390, P.P.C. which speaks as under:--

"Section 390, P.P.C. Robbery. In all robbery there is either theft or extortion.

When theft is robbery.---Theft is "robbery" if, in order to the committing of the theft, or in committing the theft, or in carrying away or attempting to carrying away property obtained by the theft the offender for that end, voluntarily causes or attempts to cause to any person death or hurt or wrongful restraint, or 'fear of instant death or of instant hurt, or of instant wrongful restraint.

When extortion is robbery.---Extortion is "robbery" if the offender, at the time of committing the extortion, is in the presence of the person put in fear, and commits the extortion by putting that person in fear of instant death, or instant hurt; or of instant wrongful restraint to that person. Or to some other person, and, by so putting in fear, induces the person to put in fear then and there to deliver up the thing extorted."

Keeping in view the above mentioned section in present case offence of robbery is not made out as per contents of F.I.R. and written complaint made by complainant Gul Hassan. There is no allegation that the offenders/appellants attempted to cause death, hurt or wrongful restraint of any person or even causes fear for the same. The offence in the circumstances can at least cover under offence of theft as defined under section 378, P.P.C. while the maximum punishment for theft is three years with fine or with both as per section 379, P.P.C. Before accepting or rejecting the prayer of reduction in quantum of sentence the merits are required to be seen.

6. The perusal of record reveals that the complainant Gul Hassan reported the matter in writing on 26-1-2007, which is present on record as Exh.P/1-A, wherein it is his contention that on getting information about the incident he reached at home, while checked the articles and other things in the house thereby found that some ornaments are taken by the dacoits while certain ornaments, ladies Rado watch and licensed T.T. Pistol are left behind, while cash amounting to Rs.200,000 (Rupees two lacs only) and ornaments weighing 30/40 Tolas and a mobile phone has been taken away, while remaining articles are lying on their places. No one is nominated in the same. Thereafter, on 28-1-2007 he presented an application, wherein he nominated Taj Muhammad, Gul Muhammad, Jan Muhammad, Ghulam Hussain son of Ghulam Haider, Manzoor Ahmed son of Abdul Ghani. It is contended therein that he called for whereby search was carried out through search Dogs, who led them to the room of their servants, thus he believes that his servants named above are involved in the commission of offence. This application is present on record as Exh.P/1-B. Thereafter on 29-1-2007 another application was submitted by the complainant with contents that while reporting the matter he and his family members in tension failed to mention the correct facts about amount and ornaments, after confirmation it reveals that an amount of Rs.85000 (Rupees eighty five thousand) delicate gold bangles 12 Nos., thick gold bangles 8 Nos., ear-rings 2 Nos. and a Mobile phone Samsung were snatched by the offenders on force of a fake toy pistol. The remaining amount is present in his cupboard. It is further mentioned therein that he (complainant) was called on telephone by S.H.O. Thana Site while 17 gold Bangles, wherein 12 delicate, 5 thick, Cash amount of Rs.23600 and mobile Phone, which was hidden in earth by digging a pit by accused Manzoor, Taj and Bashir were recovered in his presence which he identified. This application is present on record as Exh.P/1-C. On 4-2-2007 he again

submitted an application wherein it is his contention that in his case there are only three accused persons namely Manzoor Ahmed, Taj Muhammad and Bashir Ahmed while the remaining persons who are taken into custody on suspicions namely Irshad, Miraj Ahmed, Abdul Raheem, Ali Hassan Marri, Shah Nawaz, Jan Muhammad, Muhammad Aslam, Rajoo, Raza Gul, Gul Muhammad, Saeed Ahmed Mst. Nooza wife of Ghulam Haider, Tahira daughter of Ghulam Haider, Ghulam Hussain are innocent. They be released on personal bond, as their relatives and family members visited his house and assured him. The improvement in the statements are apparent. From the material present on record it is evident that the incident was occurred on 26-1-2007 while the appellants were arrested on 29-1-2007, thereafter they made disclosure on same day, and the recovery of cash amount Rs.23600 and 17 Nos. golden Bangles, and a mobile phone was made on their pointation on the same day. The complainant also approached the Police Authorities by submitting application on the very same day. He nominated the present appellants on 28-1-2007 while they were arrested on 29-1-2007 and all proceedings and recovery were effected on the same date. Though it has been asserted that disclosure was made by the appellant while on the same pointation of site was made and recovery was effected these facts are required to be proved specifically. P.W.II is witness of pointation of site and recovery of gold Bangles. He produced map of site from where gold Bangles, mobile phone and cash were recovered. But during course of cross-examination he admitted that mobile phone and cash were not recovered in his presence. P.W.III Moula Bakhsh is also witness of disclosure made by the appellants and recovery effected thereon, according to him disclosure memo. Exh.P/3-A and recovery memo. Exh.P/3-B were prepared in his presence and he signed both of them. He identified the recovered articles. It has been noted by the trial Court That the signatures of the witness are not present on disclosure memo. Though it has been asserted by the prosecution witnesses that recovery of cash amounting to Rs.23600, gold bangles 17 Nos. and mobile phone were effected on pointation of the appellants but P.W.2. only stated about recovery of bangles, but contrary to the same the remaining witness stated about recovery of all the three articles. The recovery memo. is also for all the three articles. But contrary to this evidence the complainant while appearing before the Court in his statement has asserted that the- three persons who entered in his house make hostage his family members, while advanced threat that if keys of the cupboard are not handed over to them, the child sitting there would be killed. His family handed over the ornaments wearing by them and also handed over the keys. They also took money from the money box of the children. He further stated that when he reached back from Karachi, the accused persons took gold ornaments, cash Rs.85000, one licensed pistol, two watches further the remaining ornaments in boxes were also taken away. During course of cross-examination he admitted that several other persons were arrested on suspicions, whose fathers and relatives approached him and assured him that they being not the thieves, while some of them were Marri, who make efforts for compromise and pardoned. He further admitted that in said persons Baba Qalandarani and Abdul Razzaq were included. He further admitted that mentioned two persons returned his Samsung Mobile Phone and cash amount of Rs.26500, further these articles were obtained by them from Marri. They also made recommendation for accused Manzoor that he be released due to his tender age. Though in his application i.e. Exh.P/1-C he asserted that recovery of golden bangles 17 Nos., cash amount of Rs.23600 and Mobile Phone was effected in his presence from the site, which were hidden by the accused/ present appellants in ditch/under earth. But contrary to the same during cross-examination to his statement he has admitted that the accused persons neither made disclosure in his presence nor any recovery was effected in his presence.

7. From above mentioned facts contradictions are clearly apparent, which were required to be considered. The complainant on one hand admitted receiving of money and mobile from two persons, while on other hand asserted that recovery was made from site. It is further apparent that witnesses in respect of recovery of stolen articles appeared but all of them admitted that recovery was not effected in their presence. In case the complainant took help of dogs to search the real culprits, but no such act was done in presence of any law officer or even in presence of Investigating Officer. Due to these contradictions the evidence produced by the prosecution became highly doubtful. The complainant improves his statement with variation of time; due to the same credibility of the report lessen day by day. Keeping in view his own admission that two of the recovered articles are handed over to him by Baba Qalandrani and Abdul Razzaq weaken his case against the appellants. The improvements made therein are seen to be an afterthought. Moreover in present case the eye-witness of the occasion is wife of the complainant and other family members but their statements were not recorded by the Investigating Officer nor they are mentioned as witnesses in challan. Further identification of accused persons were not made from them. Rather only on basis of some search made with help of dogs by the complainant several persons were nominated. But nowhere it is mentioned that said dogs lead towards the residence of the present appellants, being the real culprits. It is not disclosed by the complainant, while appearing before the Court that on basis of what material he nominated the appellants being the real culprits.

8. The learned trial Court while discussing the evidence did not consider these contradictions present in statements of witnesses and also in memos prepared during course of investigation. It is further observed that despite the fact that the complainant soon after registration of F.I.R. changed the value of the amount allegedly taken by the accused persons from Rs.200,000 to 85000 and gold bangles 20 Nos. two earrings and Mobile phone. Despite the same necessary amendments were not made by the Police Authorities rather case was challaned as per contents of F.I.R. The trial Court also framed the charge on basis of the same to said extent, which is not proper.

On basis of above discussion the learned trial Court failed to appreciate the material present on record in its true context. The apparent contradictions are not considered. Though there is request from counsel for the appellants for moderate reduction in the sentence but due to presence of material contradictions reasonable doubt appears the benefit of which surely goes in favour of accused persons.

In the circumstances as the prosecution has failed to discharge the burden and case is not made out against the appellants free of doubt, thus benefit of the same must go in favour of the appellants/accused, which the trial Court failed to do so. Thus in the circumstances prayer of reduction is not acceded rather benefit of doubt is exercised in favour of the appellants. The Criminal Jail Appeals bearing No. 8/2009 and 9/2009 are hereby accepted. The impugned judgment, dated 24-10-2007 made by Sessions Judge Lasbela at Hub is set aside. The appellants/accused namely Manzodr Ahmed son of Abdul Ghani and Taj Muhammad son of Ghulam Haider of F.I.R. No. 3 of 2007 Police Station Site Hub District Lasbela are acquitted of the charge. They be released forthwith, if not required in any other case.

H.B.T./37/Q

Appeals accepted.