

IN THE HIGH COURT OF SINDH, KARACHI.

Cr. Appeal No.69 of 2016

Date	Order with signature of Judge
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Appellant: Fatah-ullah s/o Lal Muhammad through
Mr. Muhammad Waseem Samo Advocate.

Respondent: The State through Mr. Muzafar Ali Solangi
DDPP

Cr. Appeal No.168 of 2016

Appellant: Karimullah s/o Muhammad Nabi through Mr.
Muhammad Waseem Samo Advocate

Respondent: The State through Mr. Muzafar Ali Solangi
DDPP

Date of hearing: 14.10.2016.

Date of Judgment 14.10.2016.

J U D G M E N T

MUHAMMAD IQBAL KALHORO J: By this common Judgment, these two appeals preferred by the appellants against the Judgment rendered in S.C. No.19/2014 for the offence U/s 395, 397, 34 PPC bearing crime No.119/2013 registered at P.S. Ghizri on 27.03.2013 has been challenged, whereby the appellants have been convicted for committing offence as stated above to undergo imprisonment for 10 years and fine of Rs.25000/- each has also been imposed upon them. It is further provided that in case of default in payment of fine, appellants shall suffer imprisonment for six months more Benefit of section 382-B Cr.P.C has also been extended to the appellants.

2. As per facts of the prosecution case, on 27.03.2013, complainant Mirza Abdul Mateen Baig lodged FIR in above crime and offences reporting robbery in Habib Bank Ltd Islamia Branch Saher Commercial Area, DHA, Phase VIII, Karachi, where he was working as Branch

Manager. According to his version, on the day of incident he was present alongwith other staff members. At about 1052 hours, two persons entered the Bank, soon thereafter they grappled with security guard and snatch his rifle, after snatching rifle from him they caused him head injuries. It is further alleged that one person, who was standing outside the Bank, captured another security guard and thereafter three of them robbed cash of Rs.12,52,684/- and after making fires, they fled from the spot. It is alleged that in their firing one security guard was also injured. The complainant in his FIR has also stated that the accused had come in a Suzuki Mehran Car No.AUX-393 and after robbery/ dacoity, they fled away in the same car.

3. Appellant Fatahullah was arrested on 05.04.2013 from one compound situated at Ghizri alongwith said car, which was used in the commission of offence. After his arrest, he was interrogated in which he disclosed the names of his accomplices and on 08.04.2013, he led the police party to his Flour Mill (Atta Chaki), where from he produced allegedly robbed amount of Rs.100,000/-. Appellant Karimullah was arrested on 06.08.2013 in FIR No.129/2013 for committing offence u/s 23 of Sindh Arms Act, 2013 by the police of Police Station Aziz Bhatti. During investigation, he admitted committing present offence and on the basis of his such admission, he was also arrested in the present crime.

4. Record reflects that subsequently co-accused Noorullah was also arrested and he was put to the identification parade in which the prosecution witnesses picked him as one of the culprit of the crime. On the basis of evidence collected during investigation, the appellants were referred for the trial U/s 173 Cr.P.C. In the trial as the accused pleaded not guilty to the formal charge framed by the trial court, the prosecution examined P.W.1 Syed Ali Asim, P.W.2 Khalil Ahmed, P.W.3 Zulfiar Hussain P.W.4 Dr. Jagdesh Kumar, P.W.5 Waqar Ahmed

Soomro, P.W.6 complainant Mirza Abdul Mateen Baig, P.W.7 Mushtaque Ali, P.W.8 Asghar Khan, P.W.9 SIP Rana Muhammad Ilyas, P.W.10 Inspector Ali Ahmed, P.W.11 SIP Rana Asghar and P.W.12 Inspector Sohail Ahmed Khan. The above witnesses have produced all the necessary documents which include FIR and memo of identification parade, memo of arrest and recovery etc.

5. After closure of prosecution evidence, the statements of accused u/s 342 Cr.P.C were recorded by the trial court. They have pleaded innocence and have denied allegations leveled against them by the prosecution. However, neither any of them examined himself on oath nor led any defence evidence.

6. On conclusion of trial, learned trial court found the appellants guilty of the offence they were charged with and accordingly convicted them in the terms as stated above.

7. Mr. Muhammad Waseem Samo, Advocate for the appellants emphasized in his arguments that the prosecution has failed to establish its case against the appellants beyond reasonable doubt. He states that although it is alleged that the cash of Rs.100,000/- was recovered from appellant Fatahullah but there is no evidence to the effect that this amount was the same, which was robbed from the Bank as no identification of the said amount was carried out during investigation. He has further pointed out that the complainant who is Bank Manager has admitted that the cash which remain available in the Bank carries stamp of "Cash Out" but the cash recovered from the appellant Fatahullah admittedly does not contain any such stamp. He further states that although the recovery of car allegedly used in commission of offence has been shown by the prosecution but the said car was never produced in the trial so much so the prosecution has failed to bring any evidence linking appellant Fatahullah with the said

car. According to him, the claim of the prosecution regarding the car is that it belongs to uncle of appellant Fatahullah but even said uncle of appellant Fatahullah has not been examined by the prosecution to support this fact. Learned counsel has drawn my attention to the evidence of prosecution witnesses, who in their depositions have not identified the appellant Fatahullah. Learned counsel states that in view of such evidence against the appellant, a reasonable doubt regarding his involvement in commission of offence has been created and when reasonable doubt is created, benefit of which has to be extended to the accused not as a matter of grace but as a matter of right. As to the role of appellant Karimullah, his argument is that the only evidence against him is CCTV footage and impugned Judgment shows that on the basis of this evidence, appellant Karimullah has been convicted but according to him, this piece of evidence was not put to the appellant Karimullah in his statement recorded u/s 342 Cr.P.C which has materially prejudiced case of appellant Karimullah in defending himself. He further states that the conviction of appellant Karimullah on the basis of CCTV footage, when admittedly this piece of evidence was not confronted to him, is not in accordance with law and is illegal.

8. On the contrary, Mr. Muzafar Ali Solangi, learned DDPP has supported the impugned Judgment and states that the prosecution has been able to bring home guilt of the appellants. Learned prosecutor has however, admitted that the appellant Karimullah has been convicted on the basis of CCTV footage but that piece of evidence has not been put to him in his statement u/s 342 Cr.P.C.

9. I have considered the submissions of the parties and have perused the material available on record. The entire case of the prosecution is based on the evidence of Bank officials viz. complainant and P.Ws Syed Ali Asim, Khalil Ahmed and Mushtaque Ali and evidence of I.O., mashir, MLO, who has examined the injured. All the

prosecution witnesses who belong to the Bank, from where robbery was committed have not identified the appellant Fatahullah in their depositions. In his evidence, I.O. of the case has also admitted that appellant Fatahullah is not visible in CCTV footage. So virtually except alleged recovery of Rs.100,000/- and the vehicle viz. Suzuki Mehran Car that was allegedly used in commission of offence, no other piece of evidence is available against appellant Fatahullah. In regard to the alleged cash of Rs.100,000/- recovered from the appellant Fatahullah, it may be mentioned that prosecution has not brought any evidence to show that this is the same property which was in fact robbed from the Bank. Admittedly after recovery of the said car, same was not put to the identification, the numbers available on the currency notes were neither given by the complainant in the FIR nor the I.O. has made any attempt to find out the serial numbers or series of currency notes which were robbed from the Bank so that they could be matched with money allegedly recovered from appellant Fatahullah. The Bank Officer namely P.W.1 Ali Asim has admitted in his evidence that the cash which remain available in the Bank always carry stamp of "Cash Out" and when the alleged recovered cash was de-sealed in the court and was shown to the I.O, who stated that no such stamp was available on the cash allegedly recovered from appellant Fatahullah. In my view, therefore, the prosecution has not brought any confidence inspiring evidence to link the alleged recovered cash from appellant Fatahullah with the money allegedly robbed from the Bank. Insofar as recovery of alleged Suzuki Mehran Car from appellant Fatahullah is concerned, it is obvious from perusal of record that prosecution has failed to show any connection of the appellant to the said car. It is alleged that the appellant alongwith said car was arrested from one compound situated in Ghizri but the prosecution has not made any efforts to find out owner of the said compound and as to whether on the day of incident,

the said car was under the use of the appellant Fatahullah. Merely on the basis of recovery of vehicle that has been shown by the prosecution, the appellant, in absence of any other corroborative piece of evidence, cannot be said to have committed offence of robbery. No witness from the Bank found the appellant at the place of incident and even CCTV cameras installed inside and outside the Bank have not shown presence of the appellant at the spot. The fact that the said car was never produced in the trial also cannot be ignored. The record reflects that in the case, prosecution has claimed that the owner of the said car is uncle of appellant Fatahullah but surprisingly he was not examined as P.W. to atleast confirm the said fact as well as assertion of the prosecution that on the same date, this car was used by appellant Fatahullah in commission of offence. It is evident that the whole prosecution case is based on circumstantial evidence, the principle that governs such cases is that the prosecution has to establish the case against the accused by connecting every link of the chain against the accused which starts from the commission of offence till arrest of the accused. But in the present case as discussed above, the prosecution has failed to bring on record any confidence inspiring evidence. Learned DDPP although has supported the impugned Judgment but was not able to controvert the above facts.

10. In view of foregoing discussion, I am of the view that the prosecution has failed to establish case against the appellant Fatahullah beyond reasonable doubt and in these circumstances, benefit of doubt to him cannot be denied.

11. Insofar as case of the appellant Karimullah is concerned, learned defence counsel in his arguments has admitted that he is visible in CCTV footage and this piece of evidence is available against him but since this was not put to him in his statement u/s 342 Cr.P.C, his conviction is not sustainable and is illegal. This fact has not been

disputed by the learned DDPP. I have considered this fact, case of prosecution against him is based on his alleged admission of the guilt before the police officials and the CCTV footage in which allegedly he is shown committing the offence. It was incumbent upon the trial court, therefore, to put this piece of evidence to the appellant Karimullah for the purpose of seeking his explanation thereon. Without putting this piece of evidence to the appellant Karimullah, I am of the view that his conviction is illegal and against the dictum laid down by the Honourable Supreme Court. In the circumstances I am of the view that his case shall be remanded back to the trial court with directions to record his statement U/s 342 Cr.P.C afresh after confronting him with this piece of evidence which allegedly show him visible and committing offence. This proposal has even not been opposed by learned DDPP.

12. In view of above discussion by giving benefit of doubt, appellant Fatahullah is acquitted of the charge and is directed to be released forthwith if not required in any other custody case. However, Cr. Appeal No.168/2016 filed by appellant karimullah is disposed of, whereby his case is remanded back to the trial court with directions to record statement of appellant Karimullah U/s 342 Cr.P.C afresh by confronting him the evidence of CCTV footage allegedly collected by the prosecution and produced in the case against him and shall decide the case within a period of two months.

Both the appeals in the above terms stand disposed of alongwith pending applications.

JUDGE

A.K.