

THE HIGH COURT OF SINDH, CIRCUIT COURT LARKANO

Cr. Appeal No 5-71 of 2018

Date

Order with signature of Judge

Appellants

Usman and others (On bail)
Through Mr. Akram Kamboh, advocate.

Complainant

Abdul Rehman (In person)

Respondent

The State through Mr. Muhammad Noonan
D.P.G

Date of hearing 31-01-2019

Date of judgment 31-1-2019

JUDGMENT

MUHAMMAD SALEEM JESSAR, J:- Through captioned Criminal Appeal, the appellants have challenged the judgment dated 16.08.2018, passed by the learned II-Additional Sessions Judge, Mehar, in Sessions Case No.04/2016, re: State Vs. Usman Lakhair and others, emanating from Crime No.12/2015, of P.S. Nau Goth, District Dadu, offence U/S: 397, 337-A(i), 337-A(ii), 337-F(iii), 337-F(v), 337-L(ii), 337-H(2), 147, 148, 149 P.P.C, whereby the appellants have been convicted as under:-

Under Section 397 P.P.C to undergo R.I for seven years and to pay fine of Rs. 10,000/- each, in default whereof to suffer S.I for 3 months more;

Under Section 337-A(i), P.P.C to suffer R.I for one year as Ta'azir;

Under Section 337-A(ii) P.P.C to suffer R.I for 03 years as Ta'azir and each of them to pay Arsh at the rate of 5% of Diyat amount to each injured;

Under Section 337-F(iii), P.P.C to undergo R.I for 02 years as Ta'azir and each of them will pay Daman of Rs. 5,000/- to each injured;

Under Section 337-F(v) P.P.C to undergo R.I for 03 years as Ta'azir and each of them to pay Rs.5,000/- as Daman to each injured;

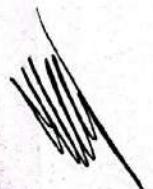
Under Section 337-L(ii) P.P.C each of the appellants to pay Rs.3000/- as daman to each injured;

Under section 337-H(2), P.P.C of the appellants to pay fine of Rs.3,000/- in default whereof to suffer S.I for one month more.

All these sentences were ordered to run concurrently.

2. The process were issued against the complainant returned served. The complainant/injured Abdul Rehman is present in person and submits that he has no means to engage the counsel, however, has shown full trust upon the learned Deputy Prosecutor General.
3. The incident as alleged is said to have taken place on 07.11.2014, whereas the F.I.R was lodged on 11.09.2015 after delay of about more than 10 months. The complainant as well as P.Ws Sulleman and Waseem had allegedly sustained injuries at the hands of appellants. The medicolegal certificates issued by the Medicolegal Officer, namely, Dr. Ghulam Rasool Shaikh were declared invalid by the special medical board constituted by D.G Health under the chairmanship of professor Dr. Asadullah Mahar, Principal Chandka Medical College Larkana, held on 04.03.2015. The medicolegal officer/P.W Dr. Ghulam Rasool Shaikh while depositing in his cross-examination has deposed as under:-

"It is correct that Medical Board had decided its decision against my opinion in final medical certificates issued for all injured, at first instance, thereafter, again final medical certificates were issued. I had seen injuries on all injured very carefully. The Medical Board in its decision had changed my opinion in some of the injuries, in all three medical certificates issued to the injured. It may be position that after issue of final medical certificate, at the first time for the injured, the injuries to the injured may have been self suffered."



4. Besides, P.Ws have contradicted on material points and have admitted that there is existing dispute over landed property between the complainant as well as accused right from 20 years and some of P.Ws have deposed that they were not available at the relevant time and subsequently upon hearing of the cries they rushed to the place of occurrence and rescued the P.Ws from the accused. Nothing incriminating have been shown to have been recovered from the appellants that they had committed the robbery.

5. Heard arguments of both sides and perused the material available on record.

6. For the detailed reasons to be recorded later-on, instant criminal appeal is allowed. Impugned judgment dated 16.08.2018, passed by II-Additional Sessions Judge, Mehar in Sessions Case No.04/2016, re: State Versus Usman Lakhair and others, arising out of crime No.12/2015 of P.S. Nau Goth, District Dadu, is hereby set-aside. Consequently, the appellants Usman, Altaf, Nadir, Shahid, Riaz and Akhtiar; they are present on bail, their bail bonds are hereby cancelled and surety furnished by them are also hereby discharged.


Judge

Abdul Salam/P.A

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88

IN THE HIGH COURT OF SINDH CIRCUIT COURT LARKANO

CRIMINAL APPEAL NO. S-71 OF 2018

Appellants	Usman and others through Mr. Akram Kamboh, advocate,
Complainant	Abdul Rehman (In person)
Respondent	The State through Mr. Muhammad Noonari, D.P.G
Date of hearing	31-01-2019
Date of judgment	31-01-2019

JUDGMENT

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MUHAMMAD SALEEM JESSAR, J:- Through captioned Criminal Appeal, the appellants have challenged the judgment dated 16.08.2018, passed by the learned II-Additional Sessions Judge, Mehar, in Sessions Case No.04/2016, (State Vs. Usman Lakhair and others), emanating from Crime No.12/2015, lodged at P.S. Nau Goth, District Dadu, for offences under sections 397, 337-A(i), 337-A(ii), 337-F(iii), 337-F(v), 337-L(ii), 337-H(2), 147, 148 and 149 P.P.C, whereby the appellants have been convicted as under:-

Under Section 397 P.P.C to undergo R.I for seven years and to pay fine of Rs.10,000/- each, in default whereof to suffer S.I for 3 months more;

Under Section 337-A(i), P.P.C to suffer R.I for one year as Ta'azir;

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Under Section 337-F(iii), P.P.C to undergo R.I for 02 years as Ta'azir and each of them will pay Daman of Rs.5,000/- to each injured;

Under Section 337-F(v) P.P.C to undergo R.I for 03 years as Ta'azir and each of them to pay Rs.5,000/- as Daman to each injured;

Under Section 337-L(ii) P.P.C each of the appellants to pay Rs.3000/- as daman to each injured;

Under section 337-H(2), P.P.C of the appellants to pay fine of Rs.3,000/- in default whereof to suffer S.I for one month more.

All these sentences were ordered to run concurrently.

2. Facts of the case are that on 11.9.2015 at 1430 hours, complainant Abdul Rehman Lakhair, lodged the above FIR, stating therein that on 17.11.2014, he alongwith his son Suleman and nephew Waseem son of Ahsan, were grazing their cattle on their land bearing Survey No. 14 of Deh Nau Goth, where, at about 5.00 p.m., they saw accused persons, namely, Usman, Altaf, Nadir, Shahid, Riaz and Akhtiar, who came there duly armed with KK rifles. They overpowered the complainant and his companions and robbed 15 buffaloes of black colour worth Rs. 200,000/- each, totaling Rs.3,000,000/- for the 15 buffaloes. When complainant party offered resistance, the accused persons inflicted butt blows of KK rifles on them. Therefore, the complainant party raised cries on which PWs Mohammad Saddiq Lakhair and Ghulam Ali Lakhair came running and rescued the complainant party by beseeching the accused persons. The accused persons thereafter left the scene of occurrence and took away the 15 robbed buffaloes and also fired in the air. Due to fear of weapons, the complainant party did not chase the accused persons and then approached the police, obtained letter for medical treatment and approached CMC Hospital, Larkana for treatment. Subsequently, the complainant approached the police station and lodged the above FIR.

3. After usual investigation, challan was submitted by the trial Court wherein the accused were shown as absconders as they could not be arrested and were declared proclaimed offenders, hence proceedings under sections 87 and 88, Cr.P.C., were initiated against them. However, subsequently, all the accused, after obtaining bail before arrest from this Court, surrendered before Sessions Judge, Dadu, on 19.01.2016 who transferred the case to the Court of II Additional Sessions Judge, Mehar for disposal according to law.

4. Necessary documents were provided to the accused persons in terms of section 265-C, Cr.P.C. at Exh.1 and, thereafter, charge was framed against them



for the offences under the above sections to which they pleaded not guilty and claimed trial vide Exh. 3 to 8 respectively.

5. Prosecution, in order to establish its case beyond any reasonable doubt against the accused persons, examined:

- a) PW-1 complainant Abdul Rehman at Exh.9, who produced his statement recorded prior to registration of FIR and copy of FIR at Exh.9/A and 9/B respectively;
- b) PW-2 Waseem at Exh.10;
- c) PW-3 Muhammad Saddiq Lakhair at Exh.11;
- d) PW-4 Ghulam Nabi Lakhair at Exh.12, who was mashir and produced mashirnama of inspection of place of vardat at Exh.12/A,
- e) PW-5 Dr. Ghulam Rasool Shaikh at Exh.13, he is medical officer and produced Police letter, photo copies of provisional medical certificates of injured Waseem, Sulleman and the complainant, final medical certificates of the abovesaid three injured persons, opinion of Medical Board regarding injuries to the said injured persons alongwith progress sheet and x-ray reports of the injured at Exh.13/A to 13/R respectively;
- and
- f) PW- ASI/IO Muhammad Khan Solangi at Exh.14.

Thereafter, learned State counsel closed his side vide Exh. 15.

6. Statements of accused under section 342, Cr.P.C. were recorded at Exh.16 to 21, wherein they denied prosecution allegations and claimed innocence. However, neither they examined themselves on oath nor produced any evidence in defence.

7. Learned trial Court, after hearing the learned counsel for the parties, and formulating points for determination, convicted and sentenced the accused / appellants as stated above.

8. I have heard learned counsel for the parties and have perused the record and the case law cited before me. The complainant appeared in person and showed his confidence in the learned State counsel as he did not have the means to engage a counsel of his own.

9. Learned counsel for the appellants submitted that the impugned judgment is contrary to law, facts and the evidence on record and is, therefore, liable to be set aside. Per learned counsel, there are material contradictions and discrepancies in the evidence of the prosecution witnesses, benefit whereof should have been gone in favour of the appellants; however, such lacunas were ignored by the learned trial Court. It was also submitted that FIR in the case was lodged with inordinate and unexplained delay of more than one year. Learned counsel submitted that appellant Usman is a very old person and has very weak eyesight and is also suffering from hepatitis B and C while appellant Shahid is a disabled person being a victim of polio virus which has affected one of his arms. The learned counsel further submitted that no specific injury allegedly sustained by the complainant party was attributed to any of the appellants. He also stated that though the incident is alleged to have occurred in open field but no independent witness has been associated with the trial as all the witnesses are related inter se. That no crime weapon or any other incriminating material was recovered from any of the accused / appellant. He also attacked the veracity of the medical certificates produced at the trial.

10. Conversely, learned State counsel supported the impugned judgment and stated that there is reason to disbelieve the injured witnesses of the incident. He contended that the accused have been named in the FIR and that delay in lodging the FIR has been reasonably explained as the delay occurred because the police did not lodge the FIR promptly and the complainant party had to resort to filing application under section 22-A, Cr.P.C. Learned State counsel submitted that the medical evidence fully supports the ocular evidence and, therefore, the impugned

judgment is fully justified. Finally, learned State counsel submitted that 15 buffaloes were robbed by the accused on gun-point from the complainant party, therefore, they do not deserve any leniency. He prayed for dismissal of the appeal and maintaining of the conviction and sentence.

11. The incident as alleged is said to have taken place on 07.11.2014, whereas the F.I.R was lodged on 11.09.2015 after delay of about more than 10 months. No doubt that the learned State counsel tried to explain the delay which occurred due to refusal of the police to lodge the FIR and, resultantly, the complainant had to file an application under section 22-A(6)(i) Cr.P.C. However, the evidence on record discloses entirely different story. PW-1 Abdul Rehman, the complainant of the F.I.R., states in his deposition that the incident occurred on 7.11.2014 in which he sustained injuries also and he remained under treatment at CMC Larkana for about 6 / 7 days, thereafter, after discharge from the hospital, he went to the police station to lodge F.I.R. Since the incident is said to have occurred on 7.11.2014 and the complainant remained under treatment at CMC Larkana for 6 / 7 days, therefore, if the complainant approached the police station on the seventh day of the incident, the date would be 14.11.2014. Thus, according to the complainant, after the incident he approached the police station on or about 14.11.2014 for lodging F.I.R. but the SHO allegedly refused to register the same. This PW, in his deposition, at page 43 of the paper-book, states that he filed the application under section 22-A, Cr.P.C. before the Sessions Judge, Dadu on 11.09.2015. On the same date the application seems to have been allowed and the F.I.R. appears to have been lodged on the same date also and the place of vardat was also inspected on the same date. However, there is no explanation for the inaction on the part of the complainant in the intervening period from about 14.11.2014 to 11.9.2015. This silence of the complainant for the above period gives rise to a lot of doubts and creates a dent in the case of the prosecution. He has not given any reason as to why he did not approach the Court of Sessions Judge, Dadu earlier i.e.

immediately after 14.11.2014 when the SHO of PS Nau Goth allegedly refused to register his FIR. Thus, there is unexplained delay in filing of the F.I.R. which goes against the prosecution and the benefit of doubt is to be extended to the accused / appellants. The learned trial Court has tried to attribute the delay in filing of the FIR to the lack of education of the complainant; however, this important aspect of the case should not have been brushed aside lightly as the fate of the accused depends on this very important piece of evidence. In case there was any doubt as to the dates on which the application was filed, then the learned trial Court should have called upon the complainant to produce the same in evidence. It is a settled law that conviction and sentence should be based on solid and concrete evidence which is unimpeachable and should not be based on surmises and conjecture, as was done in the present case.

12. Next, I will take up the allegation of robbery. The case of the prosecution as set up in the F.I.R. lodged by the complainant Abdul Rehman is that the accused robbed them of 15 buffaloes on 7.11.2014. However, perusal of the deposition of the complainant (page 43 of the paper book) reveals that the complainant himself states that on arrival the accused / appellant asked the complainant, who was grazing his cattle on the disputed land, not to bring the cattle there for grazing to which the complainant "replied that I am grazing cattle in my own land." This exchange of words clearly indicates that the accused / appellant did not come with intention to rob the complainant party of the cattle, rather they came there to lodge protest with the complainant party about the grazing of their cattle on the disputed land. It has also been argued by learned counsel for the appellants that appellant Usman is an aged person having a very weak eyesight while he is also suffering from Hepatitis B and C whereas appellant Shahid is a disabled person being victim of polio virus. These assertions were not denied by any one. In case the accused / appellants had come to the place of vardat with intention of robbing the complainant party, they would not have indulged in

101⁷

such exchange of words. In this regard this is also noteworthy that the complainant stated in his deposition that the accused / appellant came with muffled faces but removed the muffles on arrival at the spot. However

13. , PW-2 Waseem in his deposition (page 51 of paper book) states that "Accused persons were not with muffled faces when they arrived on the spot." It is unbelievable that people living in the same area would rob others in such a manner while there is no assertion that the appellants / accused have any previous history of robbery or any other criminal record.

14. It has also come on record that there is dispute between the parties with regard to the land in question. In this regard a question was put to PW-2 Waseem during his cross-examination and he replied as under:

"It is fact that there is landed dispute going on between complainant and Majeed and Mohammad Lakhair since last 20 years."

Similar statement was made by PW-3 Mohammad Saddique in his deposition available at page 55 of the paper-book.

15. Although it has been denied by the complainant that there was any dispute over land between the parties; however, the evidence on record points to other direction. Complainant Abdul Rehman has stated in his deposition that "Accused Usman, Altaf, Shahid, Riaz, Nadir and Akhtiar came at land, they were all armed with KK rifles, but they asked me not to bring cattle there to whom I replied that I am grazing cattle in my own land." This last sentence clearly indicates that there was dispute with regard to the subject land. In case the accused were robbers and had come to the spot for the purpose of robbery, then they would have straight away robbed the complainant party of their belongings, and would have disappeared without indulging in such talk. These statements clearly establish that there was actually dispute between the parties with regard to the said land. PWs

Waseem and Saddique have admitted in their evidence that there was landed dispute between the complainant and Majeed and Muhammad Lakhair; however, the above statement of the complainant Abdul Rehman also indicates that there was dispute / enmity between the accused / appellants and the complainant with regard to the said land. It may be observed that the Superior Courts have time and again held that enmity is a double-edged weapon which would cut both ways and where, on the one hand, it may be a motive for implicating the accused falsely, on the other hand it could also be termed as strong motive for committing offence by the accused. In the present case there is strong motive for implicating the accused falsely as discussed above.

16. The objection regarding non-recovery of empties at the scene of incident and non-availability of foot prints of the accused also has no relevance as the F.I.R. could not be lodged promptly. After passage of considerable time neither empties, if any, would be available on the spot nor foot prints could be found. Since the delay in recording FIR is also attributable to the complainant, therefore, this lapse would also be on the part of the complainant, therefore, the complainant / prosecution cannot get any benefit from the same.

17. Apart from the above, a perusal of the evidence on record shows that there are glaring omissions and discrepancies / contradiction therein which are enumerated hereunder:

a) PW-1 Abdul Rehman stated in his deposition that "We injured were shifted on a donkey-cart to police station." PW-3 Muhammad Ishaque also stated that "...injured were shifted to police station Nau Doth on one donkey-cart." However, PW-Waseem stated that "PW Saddique and Ghulam Ali had brought, we were injured at police station Nau Goth two donkey carts..." This is a clear contradiction in the deposition of two witnesses as the earlier two witnesses (PW-1 and PW-

3) stated that they were brought to police station on one donkey cart; however, the other PW (PW-2) states that they were brought in two donkey carts. If all these persons were present on the spot they would remember the exact number of donkey cart(s) which was / were used to shift them to police station.

b) PW-Waseem stated that "*We remained about half an hour in Taluka Hospital Mehar.*" However, the complainant, PW-1 Abdul Rehman stated that "*We remained about 5 minutes at Taluka Hospital Mehar...*" In half an hour and five minutes there is huge difference and the same cannot be attributed to bona fide difference which can be ignored being minor contradiction.

c) PW-1 Abdul Rehman, the complainant, stated that the accused came with muffled faces on the spot and removed the mufflers later on while PW-2 Waseem states that they were not with muffled faces when they arrived on the spot. PW-3 Mohammad Saddique also states that accused were with naked faces at spot. Since PW-1 stated that the accused removed their mufflers on arrival at the spot, therefore, the contradiction between his statement and that of PW-3 Muhammad Saddique can be ignored as it is alleged that PW-3 came at the spot later on. However, as per the deposition of PW-1, he was grazing cattle at the said spot with his son Suleman and nephew Waseem. Waseem is PW-2. Therefore, there is clear contradiction in the statement of PW-1 and PW-2 regarding whether the accused came with muffled faces or were not with muffled faces.

d) PW-2 Waseem stated that "The PW Saddique and Ghulam Ali were available in their houses and they came on spot and rescued us." However, PW-3 Muhammad Saddique stated that "I was present on my

tube well, installed on my own land." Thus, there is a contradiction whether he was available at his home or was at his tube well.

e) As noted by the learned trial Court, the complainant also made contradictory statements with regard to the nature of land as at one time he stated that the land is uncultivated and earlier he stated that there was wheat crop, paddy crop, Till crop available at the land.

f) During his cross examination, PW-3, Mohammad Saddique, stated that injured Abdul Rehman and Sulleman were completely unconscious on spot. After the occurrence they remained unconscious even at Taluka Hospital Mehar and regained their conscious at CMCH Larkana, since I was with them. Thus, according to this witness, who was present with the injured all along as per his own statement, injured Abdul Rehman was unconscious at the spot and regained conscious at CMCH Larkana. It can be safely presumed that Abdul Rehman fell unconscious due to the alleged KK butt blows at the place of wardat. However, in his deposition he states that "We raised cries, on our cries Basheer and Saddique came on spot, who rescued us. Thereafter all accused had forcibly snatched 15 buffaloes from me and had robbed such property and went towards northern side while making firing in air." Later on, in his deposition he also states that he was taken to the police station on a donkey cart. He also states that "we remained about 5 minutes at Taluka Hospital Mehar, no treatment was provided at Mehar and at once we were referred to CMCH Larkana." When the complainant was unconscious at the spot and regained conscious at CMCH Larkana then how he was deposing about the acts which took place during the period of his unconsciousness. In such view of the matter, his deposition was not based on ocular evidence as he was

103

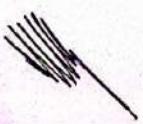
unconscious during all this period. As a matter of fact PW-3 states that "they" were unconscious on the spot and regained conscious at CMCH Larkana, therefore, the entire evidence of PW-1 and PW-2 becomes doubtful.

18. There are some other contradictions also; however, the same are of minor in nature and can be attributed to the fact that the complainant is an illiterate person. Therefore, the same are being ignored. However, the contradictions pointed out above are not of such nature which could be ignored or attributed to ignorance due to the fact that the complainant was not a literate person.

19. I have already noted in my short order that the complainant as well as P.Ws Suleman and Waseem had allegedly sustained injuries at the hands of appellants. However, the medico-legal certificates issued by the Medico-legal Officer, namely, Dr. Ghulam Rasool Shaikh were declared invalid by the special medical board constituted by D.G Health under the chairmanship of Professor Dr. Asadullah Mahar, Principal Chandka Medical College, Larkana, held on 04.03.2015. The medico-legal officer/P.W Dr. Ghulam Rasool Shaikh while deposing in his cross-examination has deposed as under:-

"It is correct that Medical Board had decided its decision against my opinion in final medical certificates issued for all injured, at first instance, thereafter, again final medical certificates were issued. I had seen injuries on all injured very carefully. The Medical Board in its decision had changed my opinion in some of the injuries, in all three medical certificates issued to the injured. It may be position that after issue of final medical certificate, at the first time for the injured, the injuries to the injured may have been self suffered."

20. As discussed above, P.Ws have contradicted each other on material points and have admitted that there is existing dispute over landed property between the complainant as well as accused right and some of P.Ws have deposed that they were not available at the relevant time and subsequently upon hearing of the cries they rushed to the place of occurrence and rescued the P.Ws from the accused. This makes the case of the prosecution doubtful. The accumulative effect of the abovesaid contradictions, discrepancies, infirmities, legal flaws and lacunas in the



prosecution case is that serious dents have been put and doubts have been created in the prosecution case. In view of aforesaid defects, lacunas and discrepancies and contradictions in the evidence of the prosecution witnesses, it can safely be held that the prosecution has not succeeded in discharging the obligation on its part. Needless to emphasize the well settled principle of law that the accused is entitled to be extended benefit of doubt as a matter of right. In the present case, there are many circumstances which create doubts in the prosecution case. In the case reported as Tariq Pervaiz vs. The State 1995 SCMR 1345 the Honourable Supreme Court held as under :-

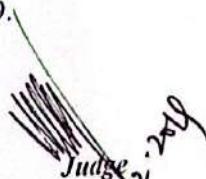
"The concept of benefit of doubt to an accused is deep-rooted in our country. For giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right."

21. It is also worth consideration that neither the robbed buffaloes nor any other incriminating material has been recovered from the appellants to corroborate the other evidence to establish that they had committed the robbery.

22. Instant criminal appeal was allowed vide short order dated 31.1.2019, and the Impugned judgment dated 16.08.2018, passed by II-Additional Sessions Judge, Mehar in Sessions Case No.04/2016, (State Versus Usman Lakhair and others), arising out of crime No.12/2015 of P.S. Nau Goth, District Dadu, was set aside. Consequently, the appellants Usman, Altaf, Nadir, Shahid, Riaz and Akhtiar; were acquitted and their bail bonds were cancelled and surely furnished by them were also discharged.

23. Above are the reasons for my short order dated 31.1.2019.

Larkana, the 13th February, 2019.


Judge
AM/2/2019