

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, LARKANO

Crl. Appeal No.S-94 of 2018

Appellant : Zaheer alias Sajjad Bhurgri, through Mr. Azizullah M. Buriro, Advocate.

Respondent : The State, through Mr. Sharafuddin Kanhar, Assistant Prosecutor General.

Date of hearing : 04-03-2019.
Date of Judgment : 04-03-2019.

JUDGMENT.

MUHAMMAD SALEEM JESSAR, J. - Through this appeal, the appellant/accused Zaheer alias Sajjad Bhurgri has assailed the judgment dated 18.10.2018 handed down by the learned II-Additional Sessions Judge, Mehar in Sessions Case No.133 of 2018, being outcome of Crime No.203 of 2017, registered at Police Station K.N. Shah, District Dadu, under Sections 392, 397, PPC, whereby after full-dressed trial he has been convicted under Section 265-H(2), Cr.P.C, for offence under Section 397, PPC and has been sentenced to suffer R.I for seven (07) years and to pay fine of Rs.10,000/-; in case of default in payment of the fine appellant/accused was ordered to suffer S.I for 03 months more. Besides, benefit of Section 382-B, Cr.P.C was extended to him.

2. According to the case of prosecution, on 31.10.2017, complainant Sikander Ali Leghari lodged FIR at P.S K.N. Shah, stating therein that on 26.10.2017 he along with his brother Ghulam Rasool and relative Sadam Hussain left on a motorcycle and proceeded from Mian Naseer Muhammad to K.N. Shah via link road and it was about 11.00 a.m. time when they crossed controlling line (band) on eastern side, where they noticed and identified accused Zaheer alias Sajjad s/o Hameed alias Liaque by caste Bhurgri r/o Mazar Bhurgri, Taluka Johi, Naveed s/o Zahid Khooharo r/o Chhor Qamber, Taluka KN Shah and one unknown person who was seen properly and can be identified if seen again, armed with pistols, present there, who pointed pistols and



signaled to stop the motorcycle. Accused Zaheer alias Sajjad on point of pistol snatched motorcycle from complainant and cash Rs.10,000/- as well. The particulars of the motorcycle snatched from complainant are CD-70, model 2017, red colour, bearing Chassis No.CB-451316, Engine No.9720132, whereas accused Naveed Ali Khooharo on point of pistol snatched Q-mobile from complainant's brother Ghulam Rasool and they went away to northern side. Because of fear of weapons, complainant party remained silent and returned to their village. On the next day complainant and his witnesses met with accused Zaheer alias Sajjad Bhurgri, who met with them, he was asked for return of motorcycle and he replied them to return, within one or two days snatched motorcycle would be returned, but they kept the complainant on false hopes and refused to return, thereafter FIR was lodged. It is mentioned in the FIR that one mobile with two sim cards was also snatched from the complainant by accused Zaheer alias Sajjad, particulars of robbed properties is mentioned in the FIR in detail including sim card numbers. The investigation of the case resulted in challan of accused wherein accused Zaheer alias Sajjad was shown in custody, co-accused Naveed and unknown person as absconding accused. During investigation, accused Zaheer alias Sajjad was arrested by SHO Police Station Faridabad on 27.10.2017 and robbed motorcycle as well as another motorcycle High Speed bearing No.DUE-1758 bearing engine No.RMI 549290, chassis No.SR 70881578 being robbed property of FIR No.71/2017 u/s 392, PPC of Police Station Faridabad were recovered from him, while he was arrested in a police encounter.

3. After supply of documents vide receipt Ex.4, a formal charge was framed against the appellant, to which he pleaded 'not guilty' and claimed to be tried.

4. To prove the case, prosecution examined PW-1 complainant Sikander Ali Leghari at Ex.9, he produced FIR at Ex.9/A, PW-2 Ghulam Rasool at Ex.10, whereas PWSadam Hussain s/o Ali Hassan was given up by prosecution through statement Ex.11. Another Sadam Hussain s/o Meeral Khan was examined at Ex.12, who was mashir and produced mashirnama of place of wardat at Ex.12/A, mashirnama of arrest of accused at Ex.12/B; I.O/ASI Sikandar Ali was examined at Ex.13, who produced FIR No.72/2017 Police Station

Faridabad lodged by SIP/SHO Karim Bux Chandio against accused Zaheer alias Sajjad at Ex.13/A, another FIR No.73/2017 of Police Station Faridabad u/s 24 of Sindh Arms Act, 2013 at Ex.13/B, mashirnama of arrest and recovery of two robbed motorcycles including one robbed from complainant of this case at Ex.13/C and thereafter the prosecution closed its side vide statement Ex.14.

5. Statement of appellant/accused Zaheer alias Sajjad was recorded under Section 342, Cr.P.C at Ex.15, wherein he pleaded his innocence. However, he did not lead defence evidence nor examined himself on oath in terms of Section 340(2), Cr.P.C. The appellant produced certified copies of judgment in his favour, one passed in S.C. No.83/2018 passed by learned 3rd Additional Sessions Judge, Dadu in police encounter case crime No.72/2017 of Police Station Faridabad at Ex.15/A and another in S.C. No.661/2017 passed by same Court of learned 3rd Additional Sessions Judge, Dadu in case FIR No.73/2017 of Police Station Faridabad u/s 24 of Sindh Arms Act, 2013 at Ex.15/B.

6. Trial Court vide impugned judgment dated 18.10.2018 convicted and sentenced the appellant as discussed in paragraph-1 supra.

7. Mr. Azizullah Burio, learned Counsel for the appellant, submits that incident of this case as mentioned in the FIR is said to have taken place on 26.10.2017, at 1100 hours of the day, whereas FIR was registered on 31.10.2017, at 1600 hours, though the distance between the place of occurrence and police station was 18/19 kilometers and thus no plausible explanation has been furnished by the prosecution for such delay. He further argued that nothing incriminating is shown to have been recovered from the possession of the appellant nor was produced by him during investigation. Besides, he submits that the alleged recovery of robbed motorcycle is shown to have been made by SHO PS Faridabad on 27.10.2017, at 0100 hours of the night. He has focused upon the memo of recovery available at Ex.13-C at page 27 of the paper book and stated that even the memo of recovery prepared by SHO PS Faridabad does not show the alleged robbed motorcycle was recovered from exclusive possession of the appellant; however, as is mentioned in the memo is that it was left by accused Naveed and some

unknown culprits. He has also criticized the delay on the ground that recovery was allegedly effected by the police on 27.10.2017, even then FIR of this case against him and others was lodged by complainant on 31.10.2017 i.e. with the delay of more than 06 days from the incident and 04 days from the recovery. Mr. Buriro further referred to the evidence of prosecution witnesses and submits that there are major contradictions as well as discrepancies in the prosecution evidence, as complainant in his chief has deposed that at the time of snatching the motorcycle from him it was driven away by co-accused Naveed, while his brother PW Ghulam Rasool, who is shown to be eyewitness of the alleged incident, deposed that it was driven away by appellant Zaheer. He has further focused that after alleged occurrence the complainant party, as alleged, had gone to the village of accused, where they met with the father of accused/appellant but neither he was made as an accused nor was examined by the I.O. as witness in the case to ascertain that the complainant party had gone to their house and who kept them on false hopes, therefore, delay could not have been explained. He lastly submits that even the appellant has been acquitted from the alleged recovery of motorcycle as well as offensive weapon arisen out of Crime No.72/2017 of Police Station Faridabad u/s 324, 353, 412, 427, PPC and FIR No.73/2017 of Police Station Faridabad u/s 24 of Sindh Arms Act, 2013, which were tried by 3rd Additional Sessions Judge, Dadu and copies of such judgments both dated 17.7.2018 have been filed by the appellant through his statement u/s 342, Cr.P.C, available at Ex.15/A and 15/B of paper book vide Page-63. Record supports his contention.

8. Conversely, Mr. Sharafuddin Kanhar, learned APG, assisted by Mr. Mohammad Afzal Jagirani, learned Counsel for the complainant, oppose the appeal and support the impugned judgment, on the grounds that appellant is nominated in the FIR, besides, recovery of alleged robbed motorcycle is shown to have been made from him by SHO PS Faridabad, therefore, the trial Court has rightly convicted the appellant for the offence, he stood charged with. Learned APG has placed reliance upon the case of Imdad Hussain alias Imtiaz & 2 others v. The State (2018 Y L R 2184) and submits that in the captioned case delay was not considered and the impugned judgment passed by the trial Court was maintained. He; however, could not controvert or justify

that the recovery of alleged motorcycle was effected from him by SHO PS Faridabad on 27.10.2017, even then the FIR of this case was lodged by complainant against him and others on 31.10.2017. Both the Counsel have no justification for such discrepancy caused by the complainant himself.

9. Heard learned Counsel for the appellant, learned APG as well as learned Counsel for the complainant and gone through the material available on record.

10. Before dilating upon the merits of the case, I would prefer to discuss the delay in lodgment of FIR. Per prosecution case, the incident is said to have occurred on 26.10.2017, at 1100 hours of the day, whereas FIR was lodged on 31.10.2017, though as per available record the alleged robbed motorcycle is shown to have recovered from the appellant and co-accused Naveed by SHO PS Faridabad on 27.10.2017, even then the complainant remained mum for 04 days. I could not gather the wisdom behind such delay, which seems to be willful and deliberate. Though the delay in criminal cases is fatal and has been deprecated by the Apex Court in its numerous judgments; however, in the instant case the nature of evidence as well as chain is not connecting the pieces of the crime and it is quite different from the reported case of *Imdad Hussain alias Imtiaz* (supra). The Hon'ble Supreme Court of Pakistan while allowing appeal in case of *Ayub Masih v. The State* (PLD 2002 SC 1048), has held as under:-

"The unexplained delay in lodging the FIR coupled with the presence of the elders of the area at the time of recording of FIR leads to the inescapable conclusion that the FIR was recorded after consultation and deliberation. The possibility of fabrication of a story and false implication thus cannot be excluded altogether. Unexplained inordinate delay in lodging the FIR is an intriguing circumstance which tarnishes the authenticity of the FIR, casts a cloud of doubt on the entire prosecution case and is to be taken into consideration while evaluating the prosecution evidence. It is true that unexplained delay in lodging the FIR is not fatal by itself and is immaterial when the prosecution evidence is strong enough to sustain conviction but it becomes significant where the prosecution evidence and other circumstances of the case tend to tilt the balance in favour of the accused. In the present case the delay in lodging the FIR has assumed great significance inasmuch as the prosecution story is doubtful from outset and the prosecution evidence is remarkable in weakness only."

11. The complainant of this case, who happens to be eye-witness of the alleged occurrence, stated that appellant and co-accused being casual visitors of their village with certain people of Leghari community were well-known to them and thus were known to them and, therefore, were identified by him at the time of occurrence. Such his statement is totally belied by his brother Ghulam Rasool, who is also shown to be eye-witness of the alleged incident. It will be conducive to reproduce the relevant portion of their evidence hereunder:-

"Complainant Sikandar Ali

Accused Zaheer previously had been playing cricket and he had played cricket even in our village prior to occurrence, hence he was well known to me. Accused Naveed resides about 40 to 50 km away from my village but previously I had no relation with him of any kind. Accused Naveed used to come and meet with one Khalil Leghari, Rasheed Leghari, my co-villagers, hence Naveed was also previously known to me. I had seen co-accused Naveed many times in my village and I had met with accused Naveed even at the Otaq of Khalil Leghari. It is correct that the motorcycle belonging to me was told by the sobedar at Faridabad Police Station that he has recovered from culprits. Voluntarily says sobedar told such fact to our nekmard namely, Mohammad Sharif Leghari."

PW Ghulam Rasool

Accused Zaheer and Naveed however, had not been visiting to any particular person at our village as per my information. Accused Zaheer resides about 3/4 km away from my village, whereas accused Naveed resides about 4/5 km away from my village on eastern side. We came to know in our village that robbed motorcycle has been recovered by police of Police Station Faridabad, hence we came at Police Station Faridabad and we met with SHO of Police Station Faridabad and informed him engine and chassis numbers of our motorcycle."

12. It is also pertinent to mention that SHO PS Faridabad, who allegedly had recovered the robbed motorcycle from the appellant, was not cited as witness in this case nor was examined before the trial Court and he being star witness of the case, the prosecution lost him and thus by doing so has damaged its own case. In this view of the matter, inference under Article 129(g) of Qanoon-e-Shahadat Order, 1984 could be drawn that in case such person had been examined by the prosecution, he would not have supported the prosecution case. It is a settled principle of law that non-examination of essential and important witnesses in the case gives inference that in case such witnesses had been examined, they would have deposed against the prosecution, as

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envisioned under Article 129(g) of Qanoon-e-Shahdat Order. In case of Bashir Ahmed alias Manu v. The State (1996 SCMR 308) it was held by Honourable Supreme Court that despite presence of natural witnesses on the spot they were not produced in support of the occurrence an adverse inference under Article 129(g) of Qanun-e-Shahadat Order could easily be drawn that had they been examined, they would not have supported the prosecution version.

13. Apart from above, the appellant has been acquitted from the charge of connected cases i.e. in S.C. No.83/2018 bearing Crime No.72/2017 of Police Station Faridabad u/s 324, 353, 412, 427, PPC as well as S.C. No.661/2017 being outcome of FIR No.73/2017 of Police Station Faridabad u/s 24 of Sindh Arms Act, 2013. Reference can be had from the cases reported as *Loung v. The State* (1999 PCr.LJ 595), *Deedar Ahmed v. The State* (2016 PCr.LJ 1911), *Mashooque Ali Mallah v. The State* (2016 PCr.LJ Note 8), *Iltif Hussain v. The State* (1996 SCMR 167) and *Riaz Hussain Kalhoro v. The State* (2004 PCr.LJ 290). In the case reported as *Yasir Chaudhry Vs. The State* (2012 MLD 1315) it was held by the Lahore High Court as under:-

"In the case reported as Manjhi v. The State (PLD 1996 Karachi) it has been held that when the accused has been acquitted in the main case, he would become entitled to acquittal in a case which is offshoot of the said case. Same is the position here, as the present lis is an offshoot of the main murder case. So, respectfully following the dictum laid down in the judgment supra, this petition is allowed and the application of the petitioner under section 249-A, Cr.P.C. is accepted and the petitioner is acquitted from the charge in case FIR No.17 of 2003 dated 12.1.2003 registered under section 7 of the Surrender of Illicit Arms Act No.XXI of 1991 with Police Station Civil Lines, Bahawalpur."

14. In the circumstances and in view of above major discrepancies as well as flaws in the prosecution evidence, I am of the humble opinion that the prosecution has miserably failed to prove its charge against the appellant beyond any reasonable shadow of doubt, which always goes to favour the accused. Reliance can be placed on the case of *Tariq Pervaiz v. The State* (1995 SCMR 1345), wherein it has been held as under:-

"The concept of benefit of doubt to an accused person 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."

14. The upshot of the above discussion is that the impugned judgment, in view of the major discrepancies in the prosecution evidence thus suffers from probabilities and infirmities, hence is liable to be set aside. Accordingly, instant appeal is allowed. The impugned judgment dated 18.10.2018 handed down by the learned II-Additional Sessions Judge, Mehar in Sessions Case No.133 of 2018 re-State v. Zaheer alias Sajjad Bhurgri & others, is hereby set aside to the extent and effect of conviction and sentence awarded to appellant Zaheer alias Sajjad Bhurgri. Consequently, appellant Zaheer alias Sajjad Bhurgri is hereby acquitted of all the charges. He is in custody, therefore, he shall be released forthwith if his custody is not required in any other case.

Oazi Tahir PA'