

**IN THE HIGH COURT OF SINDH CIRCUIT COURT, HYDERABAD.**

**Cr. Appeal No.S-178 of 2017**

**Appellant:** Ghulamuddin and Jaffar alias Ghulam Hussain.  
Through Mr. Ghulam Asghar Mirbahar, Advocate.

**Respondent :** The State through Syed Meeral Shah A.P.G alongwith SIP Imamuddin, S.H.O P.S Khadhar

**Complainant:** None present for complainant though served as per statement of process server of P.S Khadhar, district Shaheed Benazirabad.

**Date of Hearing :** 02.03.2018

**Date of Judgment :** 02.03.2018

**J U D G M E N T**

**ABDUL MAALIK GADDI, J** – Through this appeal the appellant has assailed the legality and propriety of the judgment dated 19.07.2017, passed by the learned IInd Additional Sessions Judge, Shaheed Benazirabad in Sessions Case No.712 of 2013 (re-The State Versus Ghulamuddin and others) arising out of crime No.09/2012 registered under sections 394, 337-A(i) PPC at P.S Khadhar, whereby the learned trial court after full dressed trial convicted and sentenced the appellant as stated in Point No.2 of the impugned judgment. For the sake of convenience, it would be proper to reproduce Point No.2 of the impugned judgment, which reads as under:-

**POINT NO.2.**

*“In the light of evidence discussed above accused Ghulam-uddin son of Muhammad Malook Rind and Jaffar @ Ghulam Hussain son of Gul-Baig are convicted U/S: 394 PPC for four (4) years with Rigor imprisonment and fine Rs.10,000/- each, if they fail to pay the same, then they will suffer R.I more for three months. The accused Ghulam-uddin caused injury to injured Jumma Khan with his pistol but it was simple injury, therefore he is also convicted U/S: 337-A(i) Shujjah-e-Khafifah whereas he is convicted for 6 months and Daman to be paid as Rs:10000/- to injured Jumma Khan within three months and if he may fail to comply with this order, he will suffer more R.I for about three months. However, both convictions will run concurrently, whereas both accused are also entitled for benefit of section 382-B Cr.P.C. Accused Ghulam-uddin and Jaffar are present on bail their bail bond cancelled and discharged, whereas both accused remanded*

*in Central Prison, Hyderabad to serve conviction awarded to them. Accused Qalandar Bux and Ali Khan are acquitted from the charge. Accused Qalandar Bux and accused Ali Khan are on bail, their bail bonds stands cancelled and surety discharged.”*

2. The brief facts of the prosecution case are that Complainant Meeran Khan lodged F.I.R., alleging therein that he including his cousin namely Jummon Khan and Haji Amir Bux temporary use to live in Village Khair Shah Taluka Sakrand and doing business of cloth in village by way of motorcycles. He further alleged that as usual on the morning time the cousin of complainant Jummon boarded on his motorcycle and complainant and his cousin Amir Bux boarded on the motorcycle of complainant and left the village Khair Shah for selling the cloth and after doing business from various villages, received their outstanding amount from village Palio Magsi and proceeded towards their residential village Khair Shah, the cousin Jummo Khan on his motorcycle led front and complainant and his cousin Amir Bux on the motorcycle of complainant were went behind him, when at about 01.00 p.m, Jummon the cousin of complainant reached at Sim Nala bridge, where complainant party saw that two motorcycles came behind them and four persons were boarded upon it, from which on a red colour motorcycle of Habib Company, one which (1) Ghulam Hussain Rind armed with pistol, (2) Qalandar Bux armed with pistol, on other motorcycle namely Jaffar and one unidentified person, both armed with pistol, they all crossed the complainant party so also cousin of complainant Jumoon on his head and then all accused robbed cash amount of Rs.45,000/- from the pocket of Jumoon the cousin of complainant, one Nokia mobile and one Seiko Five watch from him and then after robbery they all boarded on their motorcycle and went away, thereafter complainant and his companion Amir Bux went and saw that his cousin Jumoon had injury on his head and blood was oozing and fallen down on the earth, thereafter complainant and his Amir Bux brought the injured Jumoon at P.S and after obtaining letter from P.S went to Hospital and after getting first aid from Hospital, came at P.S and lodged the F.I.R.

3. It appears that the trial court framed charge against the accused at Ex.8, to which they pleaded not guilty and claimed to be tried vide their pleas at Ex.10 to 13.

4. In order to establish its case prosecution examined following witnesses:-

1. P.W.1. Complainant Meeran Khan as Ex.14. He produced F.I.R. at Ex.14/A and his further statement as Ex:14/B.
2. P.W.2. Haji Ameer Bux as Ex.15.
3. P.W.3. Haji Jan Muhammad as Ex.16. He produced mashirnama of place of wardat as Ex:6/A, mashirnama of injuries as Ex:16/B, mashirnama of arrest of accused as Ex:16/C, mashirnama of recovery as Ex:16/D.
4. P.W.4 Jumma Khan as Ex.17.
5. P.W.5 Lal Khan as Ex.18.
6. P.W.6 Doctor Muhammad Hashim as Ex:19. He produced police letter as Ex.19/A, medical certificate as Ex:19/B.

Thereafter learned ADPP for the State closed the side of prosecution vide his statement as Ex.20.

5. Statements of accused were recorded u/s 342, Cr.P.C as Ex.21 to 24, wherein accused denied the allegation and stated that they are innocent. Accused neither examined themselves on oath nor led any evidence in their defense.

6. Trial Court after hearing the learned counsel for the parties, by impugned judgment, convicted and sentenced the appellant, as stated in Point No.2, supra.

7. It is contended by the learned Counsel for the appellants that the case against the appellants has been registered due to enmity; that the evidence so brought on record is contradictory on material particulars of the case, therefore, the same cannot be safely relied upon for maintaining conviction. During course of arguments he has also relied upon the grounds of memo of appeal, which are as under:-

- i. That the impugned judgment of the learned trial court is opposed to law, facts of the case, principles of criminal justice and material available on record and is, therefore, not maintainable and liable to be set aside to the extent of conviction awarded to the appellants.
- ii. That, the judgment which is based on surmises and conjectures is the result of misreading and non-reading of the evidence available on record and the judgment of

the learned trial court is against the law, facts and justice, hence not maintainable at all.

- iii. That, the learned trial court has made a subjective approach to the case and has not assessed the prosecution evidence in accordance with well established principles set up by the superior courts on the subject and has also failed to appreciate the statement of appellants in its true perspective, as such, arrived at a wrong conclusion while convicting the appellants, which has resulted a grave miscarriage of justice.
- iv. That, except the police officials evidence, whatever on record, there is no other independent and admissible evidence on record available to support the prosecution case, as such the conviction of the appellants are bad in law.
- v. That no recovery has been effected from the immediate possession of the appellants but the same was foisted upon them to make out a good case and to show the badly needed efficiency of the police.
- vi. That the appellants were convicted on very highly interested and doubtful evidence of prosecution, hence the conviction is bad in law in the eyes of law.
- vii. That on the basis of the evidence on record the judgment is not sustainable and the learned trial court has not applied his mind while passing the impugned judgment, where poor and innocent persons have been convicted for no offence.
- viii. That the prosecution story as set up in the F.I.R. and deposed in the court does not inspire confidence.
- ix. That a great number of discrepancies have been brought on record to shatter the prosecution testimony.
- x. The case against the appellants/accused is false, fabricated and fictitious and does not appeal to the senses of a prudent mind.
- xi. That on the whole the judgment of the learned trial court is not speaking one and no cogent ground and reason has been given by the learned trial court while convicting the appellants.

- xii. That it is highly in the interest of justice to allow this appeal, otherwise, the appellants will be serious prejudiced.

8. Conversely, Syed Meeral Shah learned Additional Prosecutor General Sindh while opposing the aforesaid contentions submitted that the prosecution has fully established its case against the appellants beyond reasonable doubt by producing consistent / convincing and reliable evidence and the impugned conviction and sentence awarded to the appellants is the result of proper appreciation of evidence brought on record, which needs no interference. Lastly, he prayed that the appeal may be dismissed.

9. I have heard the learned Counsel for the parties at considerable length and have gone through the evidence and documents so made available before me. After going through the record I have come to the conclusion that the prosecution has failed to prove its case against the appellants for the reasons that on perusal of evidence of prosecution witnesses it reveals that the evidence is contradictory on material particulars of the case and on the basis of such contradictory evidence conviction could not be sustained. The contradictions in between the prosecution witnesses as noted with the able assistance of the parties' Counsel are as under:-

- “i. P.W Juma Khan says that at the time of incident they were going to village Palio Magsi for selling the cloth, whereas PW Mir Khan says they were returning back from the village Palio Magsi after selling cloth.
- ii. It is admitted position that at the time of recording evidence of complainant the case property was not available in the Court.
- iii. Complainant in his cross examination has deposed that recovery was made from the house of accused but mashirnama of recovery was prepared at P.S Khaddar.
- iv. The complainant has admitted that at the time of his evidence Medical Certificate was not available on the prosecution record.
- v. Medical officer has deposed in his evidence that injury was of “Entry & Exit” It means the bullet has been passed from the body of injured but in next question he replied that “I did not apply any stitch as injury was simple”.
- vi. PW Haji Ameer Bux deposed in his evidence that injured was remained admitted in hospital for one night and one day, but Dr. deposed in his evidence that

injured was not admitted in hospital and remained in hospital only for two hours.

- vii. All PWs deposed in their evidence that accused Ghulamuddin and Jaffer were already in jail custody in another crime but no any crime/case number and name of P.S was given where such F.I.R. was lodged.
- viii. PW-2 Haji Amir Bux has deposed in his cross examination that they arrived at Sakrand Hospital at about 04:30 p.m while Doctor has deposed in examination-in-chief that the injured came at Hospital at 06:00 p.m., who in his cross examination has deposed that injured arrived at Hospital at 02:30 p.m.
- ix. Injured Juma Khan has deposed in examination in chief that bullet touched to the front side of his head, while PW Ameer Bux deposed in examination in chief that the bullet was hit to the injured and he fell down on the ground.”

10. It appears from the record that the alleged incident took place on 26.04.2012 at 1300 hours, at Simnala Mori Deh Chanbiar Taluka Sakrand, accused nominated in the F.I.R. caused butt blows of pistol on the head of PW Jumon Khan Pathan and also robbed cash amount of Rs.4500/-, a Mobile Phone of Nokia Company of 1112 number and one wrist watch of Seiko Five from him in presence of complainant Mir Khan Pathan and PW Amir Bux. The evidence of the said witnesses have already been noted as contradictory, therefore, no reliance could be placed on their evidence to maintain the conviction and sentence.

11. As per prosecution evidence at the time of incident present appellants alongwith co-accused Qalander Bux and Ali Khan, who were armed with pistols, caused pistol blows on the head of P.W Jumon Khan Pathan, and on the basis of same set of evidence co-accused Qalander Bux and Ali Khan have been acquitted by the trial court, but the prosecution has not challenged the acquittal order of the said accused before any higher forum.

12. It has been brought in evidence of complainant Meeran Khan that the place of incident was surrounded by hotels and shops but no independent person has been cited as witness to corroborate the version of the prosecution. I have gone through the cross-examination of the complainant. For the sake of convenience, it would be proper to reproduce the cross-examination of the complainant, which is as under:-

*“I was driving my motorcycle and on same motorcycle P.W Amir Bux. It is incorrect to suggest that at place of incident there are some hotels and bus stop. It is correct to suggest*

*that no identification parade was held of any accused before Magistrate. It is correct to suggest that accused persons were arrested in other case and thereafter shown arrested in my case also. It is correct to suggest that Seiko watch and mobile phone are not available in court when my examination in chief is recorded today. It is correct to suggest that P.Ws are my paternal cousins. It is correct to suggest that on pointation of accused persons articles were recovered from their house as per my evidence but mashirnama of recovery of articles were prepared at P.S Khadhar. It is correct to suggest that no medical certificate is available in police file (Note: ADPP confirmed from police file as not available, but she informed that there is one MLO as witness).*

13. From the perusal of above cross-examination it appears that the appellants were already arrested in other case and the alleged recovery was though made from the house of appellants but the mashirnama of recovery of articles were prepared at P.S Khadhar. It also appears from the evidence that the recovered property has not been produced in evidence to confront the same to the appellants. On this aspect of the case, false implication of the appellants in this case could not be ruled out.

14. During course of arguments I have specifically asked the question from learned A.P.G that on the basis of contradiction as stated above whether any conviction could be sustained, he could not reply satisfactorily.

15. As observed above, recovery mashirnama was prepared at Police Station, whereas the alleged recovery was effected from the house of appellants and this fact has not been denied by the learned A.P.G. No convincing evidence is on record to affirm the conviction awarded to the appellants by the trial court

16. In view of the above contradictions in the evidence of prosecution witnesses false implication of the appellants in this case could not be ruled out but the learned trial court has utterly failed to appreciate this aspect of the case.

17. For the above stated reasons, there are several circumstances / infirmities in the prosecution case, which have created reasonable doubts about the guilt of the appellants.

18. In case of Tariq Pervaiz v. The State reported as 1995 SCMR 1345, the Honourable Supreme Court has observed as follows:-

“It is settled law that it is not necessary that there should many circumstances creating doubts. If there is single circumstance, which creates reasonable doubt in the prudent mind about the guilt of the accused, then accused will be

entitled to the benefit not as a matter of grace and concession but as a matter of right”.

Similar view has also been taken in the case of Muhammad Akram v. The State reported as 2009 SCMR 230.

19. While respectfully relying upon the case laws referred to above, I have no hesitation to hold that prosecution has failed to establish its case against the appellants beyond reasonable doubt. Therefore, by extending the benefit of doubt, this appeal is allowed. The conviction and sentence recorded by the learned 2<sup>nd</sup> Additional Sessions Judge, Shaheed Benazirabad vide judgment dated 19.07.2017 is set-aside. Appellants are in custody. They shall be released forthwith if not required in any other case.

This appeal stands disposed of alongwith pending application in above terms.

JUDGE