

IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Jail Appeal No.632 of 2019

Appellant: Rashid Ali Baloch, through Mr. Zulfiqar Ali Qureshi, Advocate.

Appellant: Muhammad Riaz (None present)

Complainant: Muhammad Anwer, through Mr. Sartaj Ahmed Santio, Advocate

The State: Through Mr. Zahoor Shah, Deputy Prosecutor General, Sindh.

Date of hearing: 25.01.2021.
Date of judgment: 25.01.2021.

JUDGMENT

MUHAMMAD SALEEM JESSAR, J.- Through instant criminal jail appeal, appellants Muhammad Riaz and Rashid Ali Baloch have assailed judgment dated 29.08.2019 passed by learned IVth Additional Sessions Judge, Karachi (East) in Sessions Case No.886/2018, (re: State v. Muhammad Riaz and another), arising out of F.I.R No.191/2018 registered at P.S Ferozabad, Karachi, under Section 395 PPC, whereby the appellants were convicted under Section 395 PPC and sentenced to suffer R.I. for five years each and to pay fine of Rs.50,000/ each. In case of default in payment of fine, they were directed to further suffer S.I for 06 months each. However, accused / appellants were extended benefit of Section 382-B Cr.P.C.

2. The crux of the prosecution case is that complainant Muhammad Anwer lodged the FIR at P.S Ferozabad on 27.04.2018 at about 1630 hours, alleging therein that he resides at the above address and works as scraper. It is further alleged that he had to take payment of house from Malik Rafiq and Altaf, who called him on 25.04.2018 at UBL Branch Mehmoodabad for delivery of cash and gave him cash of Rs.36,50,000/-, therefore, he and his

brother Yasin requested bank official to transfer the said amount to his UBL account in Hafiz Wala Piplan Branch, Mianwali, but bank official refused to transfer such huge amount. It is further alleged that he and his brother Yasin were going to Gulshan-e-Iqbal through his motorcycle alongwith cash and when they reached at 12:30 p.m. at Naheed Store Signal Main Shaheed-e-Milat Road, Karachi, suddenly two young boys, aged about 30/35 years, came on 125 motorcycle. It is further alleged that they stopped at the signal then said culprits on the point of pistol directed them to handover bag of cash to them and thereby they snatched cash of Rs.36,50,000/- and fled away. It is further alleged that both the culprits were wearing pant shirt, out of them one was having light beard thin body, while other was wearing helmet and they can identify the culprits as and when brought before them. Thereafter, complainant lodged the FIR against accused persons to the above effect.

3. After registration of the case, investigation was assigned to I.O/SIP Ghulam Sarwar, who after completion of legal formalities, submitted challan before the Court of law having jurisdiction. In order to establish its case, the prosecution examined PW-1/complainant M. Anwer at Ex.3, who produced copy of FIR, memo of site inspection, memo of arrest and recovery at Ex.3/A to 3/C respectively. PW-2 Muhammad Yasin at Ex.4, who produced copy of memo of identification parade at Ex.4/A. PW-3 the then J.M S. Mehdi Raza at Ex.5, who produced application addressed to JM, original memo of identification parade and list of dummies at Ex.5/A to 5/C respectively. PW-4 SIP M. Asif at Ex.7. PW-5 PC Shaikh Fawad at Ex.8, who produced memo of arrest of accused at Ex.8/A. PW-6 I.O SIP Ghulam Sarwar at Ex.9, who produced roznamcha entries No.30, 26, 27, memo of pointation of place of incident at Ex.9/A to 9/D respectively. Thereafter, prosecution closed its side vide Ex.10.

4. Thereafter, statements of the accused under Section 342 Cr.P.C, were recorded at Ex.11 & 12 respectively, wherein they denied the allegations, claimed to be innocent and prayed for justice. The accused neither examined themselves on oath in terms of Section 340(2) Cr.P.C nor did they lead any evidence in defense in disproof of the charge.

5. I have heard learned counsel for the appellant, learned counsel for the complainant as well learned Deputy Prosecutor General, Sindh, appearing for the State and perused the material available on record.

6. Learned counsel for appellant Rashid Ali Baloch submits that name of appellant Rashid Ali Baloch was not incorporated in the FIR; however, co-accused Muhammad Riaz at the time of his arrest (dated 05.05.2018 page-51 of the paper book) disclosed his name and nothing incriminating is shown to have been recovered from him while in police custody. He next submits that though he was arrested on 24.05.2018; however, was produced before the Magistrate concerned on 28.05.2018 i.e. after the delay of about 03 days, therefore, identification parade allegedly conducted by the Judicial Magistrate has lost its evidentiary value. Learned counsel further points out that complainant had not disclosed the facts of his house which he sold out to Altaf and Rafiq, from whom he received amount in the bank, were examined by the I.O to substantiate the claim of the complainant. He further submits that prosecution has failed to prove its charge against him; hence, prays that appellant Rashid Ali Baloch may be acquitted of the charge.

7. Learned Deputy P.G, Sindh appearing for the State, assisted by learned counsel for the complainant, submits that huge robbed amount is shown to have been recovered from the possession of appellant Muhammad Riaz and that has not been denied by him; besides he had already implicated appellant Rashid Ali Baloch at the time of his arrest; hence, opposes the

appeal. He; however, could not controvert the fact that appellant Muhammad Riaz was not subjected to identification parade, even amount allegedly shown to have been recovered from his possession at the time of his arrest or the other belongings have not been confronted to him at the time of his examination under Section 342 Cr.P.C. Learned Deputy P.G, Sindh is also not in a position to controvert the fact that persons namely Altaf and Rafiq, to whom complainant had sold out his house, were not examined by the I.O nor were nominated by the complainant in his FIR as witnesses.

8. Heard learned Counsel for the respective parties as well as learned D.P.G representing the State and perused the material available on record.

9. The unfolding story of the case is that the appellants are alleged to have snatched cash of Rs.36,50,000/- from the complainant and then fled away. Admittedly, the incident is shown to have taken place on 25.04.2018 whereas FIR of the incident was lodged on 27.04.2018 even then none of the accused was nominated by the complainant in his FIR. The delay in lodging of FIR has always been held fatal by the Superior Courts in various cases and on account of such delay the prosecution case would be nothing but full of doubt, which creates reasonable doubt and the benefit whereof has ever been extended to the accused. In this respect, I am fortified by the dictum laid down by the Honourable Supreme Court in case of *AYOUB MASIH v. The STATE* (PLD 2002 SC 1048) in which it has been observed as under:-

“12.....Unexplained inordinate delay in lodging the F.I.R. is an intriguing circumstance which tarnishes the authenticity of D the F.I.R.; 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 F.I.R. 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 F.I.R. has assumed great significance inasmuch as the prosecution story is doubtful from outset and the prosecution evidence is remarkable, in weakness only.”

10. Appellant Muhammad Riaz, as shown, was arrested by the police on 05.05.2018; whereas, he was not subjected to identification parade. It was duty of the I.O that after arrest of appellant Muhammad Riaz he was to be examined into identification parade. In the case of ABDUL SATTAR & another v. The STATE (1994 P.Cr.LJ 409) the identification parade of the accused though held without observing the necessary formalities was considered as illegal and the accused in that case was acquitted. But in the case in hand, no identification parade of accused Muhammad Riaz appears to have been made, which puts dents in the prosecution story. Even, the amount shown to have been recovered from appellant Muhammad Riaz was not produced before the Magistrate at the time of identification parade of appellant Rashid Ali Baloch though the PWs, who allegedly had participated in identification test, have not specified allegations against both appellants regarding the role they have played in commission of the offence. Nothing incriminating has been shown to have been recovered from the possession of appellant Rashid Ali Baloch and his name was taken by co-accused / appellant Muhammad Riaz. Further, the I.O did not extend the scope of his investigation towards bank concerned wherefrom complainant allegedly received the amount from Altaf and Rafiq, even the complainant has failed to pinpoint concerned official of the bank to whom he had requested for transfer of the funds to his UBL Bank Account at Mianwali Branch. Appellant Rashid Ali Baloch was booked under FIR No.120/2018 at P.S Mochko, under Section 23(i) (a) of Sindh Arms Act, 2013; whereas, I.O has shown him to have been arrested in this crime; however, I.O did not produce a single document/entry, showing his departure from P.S. Ferozabad towards P.S Mochko for the purpose; hence, investigation seems to have not been conducted properly.

Mere picking a person during identification parade by the PWs without assigning specific role is not sufficient to hold a person to be accused of such a crime; besides the complainant had also not given description of the currency notes in his FIR. All the narrated features show that prosecution has not come with its clean hands, hence, the entire evidence of the witnesses adduced by the prosecution could be of no help to the prosecution.

11. Moreover, conviction of an accused cannot be based solely on identification parade, unless the prosecution is able to substantiate its charge against the accused through trustworthy and confidence inspiring testimony of the witnesses, which standard of evidence could not be seen here in this case. As the best piece of ocular evidence available with the prosecution has been abandoned for variety of reasons, therefore, in a sense, it appears that it is an unseen and un-witnessed crime. Admittedly, in this case, there are number of irregularities, infirmities and lacunas, which even have created serious doubts in the prosecution case. It is settled principle of law that for extending benefit of doubt, it is not necessary that there should be multiple circumstances creating doubt, but if there appears single circumstance in the case of an accused, which may create reasonable doubt in a prudent mind about the guilt of accused, then the accused will be entitled to such benefit as a matter of right but not as a matter of grace or concession. The factum of benefit of doubt is very much lucid in its entirety that if there exist a reasonable ground to believe that the accused has not participated in the commission of alleged crime in the mode and manner as alleged by the prosecution, then there is no need to have discussed a number of circumstances to prove the innocence of accused even a single circumstance creating reasonable doubt is sufficient for acquittal of accused. In this respect, guidance is derived from the case of TARIQ

PERVEZ v. The STATE (1993 SCMR 1345), wherein the Hon'ble Apex Court has 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”

12. The upshot of above discussion is that the prosecution has miserably failed to prove its charge against appellants. Consequently, instant appeal is hereby allowed. Resultantly, impugned judgment dated 29.08.2019 handed down by learned IVth Additional Sessions Judge, Karachi (East) in Sessions Case No.886/2018 (re: The State Vs. Muhammad Riaz and another) being outcome of FIR No.191/2018 registered at P.S. Ferozabad, Karachi, under Section 395 PPC, is hereby set aside to the extent of conviction and sentences of the appellants only; whereas, the order to the extent of property involved in the case shall remain intact. Appellants **(i) Muhammad Riaz son of Niaz Ahmed and (ii) Rashid Ali Baloch son of Muhammad Miskeen** are acquitted of the charge(s). They are in custody, therefore, they shall be released forthwith if their custody is no more required by jail authorities in any other custody case.

JUDGE