

# IN THE HIGH COURT OF SINDH AT KARACHI

## Criminal Appeal No.396 of 2020

Date of hearing : 02.03.2021  
Date of Judgment : 02.03.2021  
Appellants Wakeel, Muhammad : through M/s. Rasheed Ashraf,  
Dawood and Muhammad Khan  
Advocates.  
The State : through Ms. Rubina Qadir,  
Deputy Prosecutor General, Sindh.

### **JUDGMENT**

**MUHAMMAD SALEEM JESSAR, J.-** Through instant criminal appeal, appellants (i) Wakeel, (ii) Muhammad Dawood and (iii) Muhammad Khan have assailed judgment dated **24.08.2020** passed by learned Xth Additional Sessions Judge, Karachi (West) in Sessions Case No.1421/2017, (re: State v. Wakeel and others), arising out of F.I.R No.34/2017 registered at P.S Ittehad Town, Karachi, under Section 395 PPC, whereby the appellants were convicted and sentenced for rigorous imprisonment of 10 years each with fine of Rs.500,000/- each. In case of non-payment of fine, they were further directed to undergo imprisonment for six months more; however, benefit of Section 382-B Cr. P.C was extended to them.

2. The facts of the case as narrated in the FIR are that the complainant Ahsan Shah son of Hanif Shah had lodged instant FIR on 28.01.2017 at 0930 hours, alleging therein that he along with his family was sleeping in his home, at about 0330 hours, he listened voice of climbing as such he woke up from sleep and saw that two persons had entered into his room having pistols in their hands. It is further narrated that the same persons asked to him that police raid had been made as such get up and the accused persons had taken mobile phone from him. It is further narrated that his brother Adnan was also sleeping in another room, the accused persons also went in his room and aroused him. It is further narrated that the accused persons also brought his maternal nephew along with them and said him that if someone tried to resist, they would open fire. It is further narrated that persons tied his and his brother Adnan's hands

and also made hostage his family into a room and thereafter, they were searching the rooms of the house. It is further narrated that out of them, one accused brought his brother Adnan at the roof of the house and enquired from him that who were residing in his neighbor as such he told him that he did not know. Thereafter, the accused brought him back and the two accused persons climbed the wall of his neighbour and at about 0530 hours they went away. It is further narrated that thereafter he checked his house and he found that 3 tola Golden ornaments, cash of Rs.150,000/-, 15 hand wrist watches, 25 unstitched suits of clothes, three mobile phones which contained SIMs No.0332-332484, 0340-03019326, 0310-2644373 and two other mobile phones without SIMs were robbed by the accused persons. It is further narrated that he made hue and cries as such his neighbourer namely Muhammad Shafaqat S/o Abdul Rasheed also came into his house and they tied his and his brother Sharafat's hands and they made hostage his family in a room and took away 15 Tola Gold, Cash of Rs.12,00,000/-, two 30 bore licensed pistols and one MP-5 licensed pistol along with 14 rounds and 05 mobile phones which contained SIMs No.0343-8059269, 0348-0992548, 0343-2500409, 0346-1277154 and 0344-9445293 and purse of his brother namely Sharafat which contained his original CNIC, cards and some cash rupees and thereafter they went away. Hence, present FIR was lodged.

3. A formal charge was framed against the accused persons as Ex.4 and pleas were recorded as Ex.5 to 7 in which they pleaded not guilty and claimed for trial.

4. In order to prove its case, prosecution examined as many as seven witnesses namely, PW-1 Saeed Zadaat as Ex.8, who produced memo of arrest as Ex.9. PW-2 Complainant Ahsan Shah as Ex.10, who produced FIR as Ex.11, memo of site inspection as Ex.12 and identification test parade of accused Wakeel as Ex.13 and identification test parade of accused Muhammad Khan as Ex.14 and identification test parade of accused Dawood at Ex.15, PW-3 Shafaqat as Ex.16, who produced identification test parade at Ex.17 to 19. PW-4 Sharafat Ali as Ex.20, who produced identification test parade as Ex.21 to 23, PW-5 Nazeer Hussain as Ex.24, who produced Roznamcha entry as Ex.25, PW-6 Gulzan Ahmed as Ex.26, PW-7 Hadi Bux as Ex.27, who produced letter for CDR as Ex.27/A, entries at Ex.27/B to Ex.27/D, PW-8 Civil Judge & Judicial Magistrate Mushtaque Ali Jokhio as Ex.28, who produced application moved

by I.O for identification parade as Ex.28/A. Thereafter, prosecution side was closed vide statement Ex.29.

5. Statements of accused were recorded under Section 342 Cr. P.C as Ex.30 to 32 respectively, in which they denied prosecution allegations and claimed to be innocent; however, neither they examined themselves on oath nor produced any defense witness.

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

7. Learned counsel for the appellants submits that appellants are not nominated in the FIR nor Hulia Form or body descriptions are mentioned in the FIR. He next submits that appellants were booked by P.S Mominabad, Karachi, under Crime No.144, 145, 146 of 2017 for offence under Section 23 (i) (a) of Sindh Arms Act, 2013 wherefrom they were shown arrested by the I.O in this case. Next submits that on following day of their arrest, appellants were produced before the Magistrate for holding their identification parade. He next submits that identification parade held before the Magistrate is not in consonance with the provisions of evidence Act; besides, PWs had identified them by pointing their fingers simply to the effect that they are same; however, no role was assigned to any of the appellants at the time of their identification parade. Next submits that even at the time of recording evidence of the prosecution witnesses, none of the PWs had specified role of the appellants that such and such was done/played by them at the relevant time. He further submits that when an identification parade lacks proper role of the appellants duly pointed out by the PWs, it carries no weight in the eyes of law. Further adds that nothing incriminating was recovered from them or was produced by the appellants during investigation which may connect them with the commission of alleged offence. He further submits that on mere identification parade which too is defective, conviction cannot be maintained. In support of his contention, he places reliance upon cases(i) *HAKHEEM and others Versus The STATE* (2017 SCMR 1546), (ii) *MUHAMMAD FAYYAZ Versus THE STATE* (2012 SCMR 522), (iii) *KAMAL DIN alias KAMALA Versus The STATE* (2018 SCMR 577), (iv) *ZIAUL REHMAN Versus THE STATE* (2000 SCMR 528), *AYUB MASIH Versus THE STATE*

(PLD Supreme Court 1048) and (vi) *AZHAR MEHMOOD and others Versus The STATE (2017 SCMR 135)*.

8. Learned Deputy P.G appearing for the State opposes the appeal on the ground that appellants were rightly picked up by the PWs before the Magistrate at the time of their identification test; besides, no enmity or ill-will has been alleged with complainant party. She further submits that impugned judgment does not suffer from any illegality or infirmity, which may require interference by this Court, therefore, she submits that appeal in hand may be dismissed and the judgment impugned may be maintained.

9. The complainant inspite of notice has chosen to remain absent.

10. Heard and record perused. Admittedly, the appellants are not nominated in FIR nor their body descriptions or height is given by the complainant in his FIR. Though the appellants were subjected to identification parade yet they were not picked up by the PWs with reference to their specific role allegedly played by them at the time of offence and mere showing of the accused present before the Court being same, is not sufficient to hold them responsible for the offence alleged by the prosecution. Nothing incriminating has been shown to have been recovered from their possession or was produced by the appellants during investigation which may connect them with commission of the offence. In case of Azhar Mehmood (Supra), while dealing with identical issue, the honourable Supreme Court of Pakistan has held that test of identification parade is of no evidentiary value where no role has been assigned by the PWs at the time of the parade. It is also not disputed that occurrence in this case had taken place during night and culprits had remained unknown even no source of light was given by the prosecution through which they (culprits) could have been recognized. It is also the case of prosecution that at the time of offence, culprits were allegedly having muffled faces, if such piece of evidence is presumed to be true, even then their identification parade without proper recognition cannot be held legal when the PWs had not seen them with open faces. Moreover, the prosecution has emphasized upon extra judicial confession of the appellants allegedly before the police which in view of dicta laid down by the Honourable Supreme Court of Pakistan in Case of *SARFRAZ KHAN Versus THE STATE (1996 SCMR 188)* is not reliable. It is settled law that extra judicial confession is a weak type of evidence which can easily be procured when direct

evidence of crime is not available. For putting reliance upon extra judicial confession a threefold proof is required which has not been done in this case. The evidence of extra judicial confession alone without corroboration is not sufficient to maintain any conviction against the appellants.

11. It is also pertinent to mention here that proceedings of the test identification parade brought on record of this case clearly show that appellants had not been picked up by the eye-witnesses in that parade with reference to their any role played by them during the occurrence in issue. It is settled law that as has repeatedly been held by the superior Courts that identification of an accused without reference to the role allegedly played by him/them during the occurrence is shorn of any evidentiary value. Reference in this respect may be made to the case of Azhar Mehmood and others v. The State (2017 SCMR 135), Muhammad Fayyaz v. The State (2012 SCMR 522), Shafqat Mehmood and others v. The State (2011SCMR 537) and Sabir Ali alias Fauji v. The State (2011 SCMR 563).

12. Admittedly, the prosecution evidence is full of lacunas, contradictions and discrepancies, explained herein above. It is very difficult for me to give due weight to the testimony of prosecution witnesses as their credibility is highly doubtful and untrustworthy; hence, it warrants no interference. It is a well settled law that no one should be construed into a crime unless his guilt is proved beyond reasonable doubt by the prosecution through reliable, confidence inspiring and legally admissible evidence, thus, I have no hesitation to say that prosecution case is in the corner where reflection of doubt comes into being and if there appears a single doubt in the prosecution case the benefit of which would infact go in favour of the accused as a matter of right and same is the position in the case in hand. On the point of benefit of doubt, Rule of Islamic Jurisprudence has been laid down in the judgment rendered by the Hon'ble Supreme Court of Pakistan in *Ayub Masih's case (PLD 2002 SC 1048)*, wherein it has been ruled as under:-

*“The rule of benefit of doubt, which is described as the golden rule, is essentially a rule of prudence which cannot be ignored while dispensing justice in accordance with law. It is based on the maxim, “it is better that ten guilty persons be acquitted rather than one innocent person be convicted”. In*

*simple words it means that utmost care should be taken by the Court in convicting an accused. It was held in The State v. Mushtaq Ahmed (PLD 1973 SC 418) that this rule is antithesis of haphazard approach or reaching a fitful decision in a case. It will not be out of place to mention here that this rule occupies a pivotal place in the Islamic law and is enforced rigorously in view of the saying of the Holy Prophet (p.b.u.h) that the “mistak of Qazi (Judge) in releasing a criminal is better than his mistak in punishing an innocent.”*

12. The upshot of above discussion is that prosecution has miserably failed to prove its charge against the appellants, therefore, impugned judgment cannot be maintained as it is mandatory for the prosecution to prove its case against accused beyond any reasonable doubt. Accordingly, instant appeal is hereby allowed. Consequently, impugned judgment dated 24.08.2020, handed down by learned Xth Additional Sessions Judge, Karachi (West) in Sessions Case No.1421/2017 (re: The State Vs. Wakeel and others), being outcome of FIR No.34/2017 registered at Police Station Ittehad Town, Karachi, under Section 395 PPC, is set aside. The appellants/accused are confined in jail; they shall be released forthwith if not required in any other custody case. Above are the reasons for the short order dated 02.03.2021.

**JUDGE**