IN THE HIGH COURT OF SINDH AT KARACHI

Crl. Appeal No.153 of 2017

Appellant : Rauf son of Hameed
through Mr. Saadat Hassan, Advocate.

Respondent : The State,
through Ms. Seema Zaidi, DPG.

Crl. Appeal No.159 of 2017

Appellant : Akhtar Zaman son of Malik Din

Respondent : The State,
through Ms. Seema Zaidi, DPG.

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Date of hearing : 23.04.2018.

Date of detailed reasons: 03.05.2018.

J U D G M E N T

SALAHUDDIN PANHWAR, J : Through captioned appeals, appellants Rauf and Akhtar Zaman have impugned judgment dated 21.03.2017 passed by the learned Additional Sessions Judge-III, Karachi (Central) in Sessions Case No.566 of 2013, arising out of FIR No.100 of 2013 under Sections 392, 397, 394 & 34, PPC registered at Police Station Shahrah-e-Noor Jehan, Karachi, whereby the appellants were convicted under Section 392, PPC and sentenced to undergo rigorous imprisonment for seven years each and to pay a fine of Rs.50,000/- each, in default whereof they were ordered to undergo simple imprisonment for six months more by extending them the benefit in terms of Section 382-B, Cr.P.C.

2. Succinctly, but relevant, facts as set out in the prosecution case are that Complainant Tariq Mehmood lodged F.I.R; contending therein that on

01.11.2012 at 12:15 night he and his family members were sleeping, at 4:00 night, four persons who look like Pathan/Baloch, out of them two were with muffled faces while two were in open faces, entered in his house by cutting lock/Kunda of main gate and by cutting grill of window. They all were having weapons in their hands. They awoke his mother and sisters and took them inside his room and got them seated in corner of room, thereafter made search of Almirah and they took jewelry, One gold set weighing 10 tolas, One gold ring, One Gold Jhumka, 12 gold bangles weighing 18 tolas, One gold necklace 5 tola, one gold bali set and cash amount Rs.20,000/-. They also snatched his sister's mobile phones Nokia C-3, IMEI No.357004047196010 and other two mobile phones and on resistance of his sister they hit butt of pistol on her head and other parts of her body, which caused injuries to her. On his hue & cries they fled away from there by taking all the aforementioned articles. He moved an application to the hi-ups of police, whereupon instant FIR was lodged.

3. Both the appellants/accused persons were inducted by the trial Court; wherein they pleaded not guilty and claimed for trial.

4. To substantiate the charge, prosecution examined as many as six witnesses which consists the number of ***eye-witnesses*** as two (02).

5. The statements of appellants were recorded under section 342 Cr.PC wherein they pleaded innocence. .

6. Heard the respective sides and perused the available material.

7. Every case, involving *direct* evidence, would always require proving the *direct* evidence *first* hence to examine the *legality* of judgment, impugned, it would be advantageous to discuss the evidence of complainant

Tariq Mehmood and eye witness Mst. Tosheba Mehmood *first*. At this point, it is necessary to add that place of incident in the instant case is place of residence of complainant and Mst. Tosheba Mehmood (*sister of complainant)* hence their status was never *short* to that of **natural witnesses.** Such status, *however,* would never be sufficient to believe the words of such ***witnesses*** as gospel truth but *criterion* to appreciate shall always remain the same that such *evidence* must be '*natural* and *confidence inspiring*' because in law, the weight is always given to *credibility* of evidence and not to *personality* and even *reputation.* Reference may be made to the case of *Abid Ali & 2 others v. State* 2011 SCMR 208 wherein it is held as:-

> "21. To believe or disbelieve a witness all depends upon **intrinsic value of the statement** made by him. Even otherwise, there cannot be a universal principle that in every case interested witness shall be disbelieved or disinterested witness shall be believed. It all depends upon the **rule of prudence and reasonableness** to hold that a particular witness was present on the scene of crime and that he is making true statement. A person who is reported otherwise to be very honest, above board and very respectable in society if gives a statement which is illogical and unbelievable, **no prudent man despite his nobility would accept such statement**."

The above *principle* of appreciation of evidence must continue and the Court should never *deviate* from it. To see whether this has been followed properly or otherwise, it would be advantageous to make direct referral to *evidences* of both witnesses which are:-

(1) Examination in Chief of PW-1 Complainant Tariq Mehmood:-

> "On 01.11.2012 at about 4.10 a.m. I was sleeping I was woked (woke) up by accused Rauf present in court by saying "Utho" and putting TT pistol on my leg. When I woked (woke) up I wanted to hold the

accused but when I saw accused Akhtar Zaman and Naseer Gul the absconding accused from the window of my room who entered in my room and all the three accused took me in another room on pistol point and all the four had TT pistols in their hands in that room my four sisters and my mother were sitting on gunpoint of **one accused who was muffled face** I cannot recognize him but his name was disclosed by accused Akhtar Zaman afterwards. All the three accused namely Naseer, Rauf and Akhtar Zaman one by one went into the room of my sister where the gold was kept and after 15 to 20 minutes all the three went into that room together and Akhtar Zaman remained upon me and my family guarding us. During this time we continued reciting Dua-e-Younus accused Akhtar Zaman also asked us to recite the same we asked for the water from him but he refused meanwhile my mind was working and while reciting Dua-e-Younus a point came that accused Akhtar Zaman took 2-3 steps backward towards the door **I at once pushed him outside and locked the door my sister broke the window panes and we all started shouting for help upon which the accused persons fled away after taking all the gold and cash Rs.25,000/-** after coming out the room we checked that room where we found **artificial gold was lying on the bed** and **the gold worth of Rs.42,00,000/-, cash of Rs.25,000/- and one mobile phone Nokia C-3** was taken away by the accused persons. A neighbours also came in the house and told us that the accused persons were seen flying in while (white) corolla. On the same day I went to P.S. Shahrah-e-Noor Jehan early in the morning and gave our application there. I produce the application as Exh. 4/A against unknown persons but FIR was not lodged. Then we gave application to IG office I produce the same as Exh. 5/B upon which action was taken on 5th March 2013 I was called by DSP Shahid Khan Abbasi and on the same day my FIR was lodged. I produce FIR No.100/2013 as Exh. 5/C. I.O. Arif Hussain visited the place of incident on my pointation and prepared such mashirnama and obtained my signature. I produce memo of inspection as Exh.5/D. On 12th March 2013 I delivered two letters one to CPLC Gulburg for making the sketch and second letter for CRO which were given to me by police. When I gave IME number of my stolen mobile directly to Mr. Aftab Ahmed Khan a CPLC officer along with an application because IO of the case was not cooperating with me and when I asked CPLC

Officer that whether IO gave IME number to him or not for investigation he denied so I gave application directly which I produce herewith as Exh. 5/E. on the same day Mr. Aftab Ahmed Khan SMS informing me that my case has been registered and asked me to come at his office and I went there I was told that IME number of my stolen phone has been kept surveillance. On 16.05.2013 CPLC officer called me and asked me about the Sim number of my stolen phone. **On 17.05.2013 CPLC officer informed me that he got arrested accused Akhtar Zaman through IME number with the help of P.S. Taimoria**. He further informed me that now his task at CPLC has concluded and on 20.05.2013 accused Akhtar Zaman was handed over to P.S. Shahra-e-Noor Jehan from where police spoiled my case. On the same day on 20.05.2013 I was called at P.S. Shahra-e-Noor Jehan where I was shown accused Akhtar Zaman and I identified the accused who disclosed his name as Akhtar Zaman and also disclosed the names of his companions as Hanif, Naseer Gul and Rauf Nawaz. Memo of arrest of accused Akhtar Zaman was prepared upon which police obtained my signature. I produce memo of arrest Akhtar Zaman as Exh. 5/F. I also produce memo of seizer of my stolen mobile phone Nokia C-3 from accused as Exh.5/G. Accused persons namely Akhtar Zaman and Rauf Nawaz present in court are same who committed dacoity in my house but Rauf Nawaz could not be investigated as he has taken bail before arrest from the Court and Inspector Mehmood told me that he cannot arrest. I see case property in sealed cloth bag my stolen mobile phone was of red color, sealed cloth bag desealed from which a red colored Nokia C-3 has been taken out it is same having IME No. 357004/04/719601/0."

8. The complainant claimed happening of incident in a *particular* manner and himself produced the documents (*Exh.5/A to 5/G).* The manner in which he (*complainant)* claimed happening of incident does not appear to be *logical* particularly when he (*complainant)* claimed that out of four *culprits* two were muffled faces while two were with open faces. When one chooses a *night* time for committing an offence, the ultimate object behind such *choosing* is nothing but to conceal *identity* therefore, claim of the complainant that two out of four

were *muffled* faces while *two* were with open faces appears to be against human behaviour rather seems to be *improvement*. Such conclusion finds support from the admissions, made by complainant in his cross-examination which are:-

> **"It is correct to suggest that it is written in my application Ex.5/A that 4 muffled faces accused entered in my house after cutting grill of house**."

The Ex.5/A is the *first* application which the complainant claimed to have made to the police station on very day in ***morning*** for lodgment of the FIR wherein *categorically* mentioned that **'four muffled persons'** entered into his house. None could deny that *spontaneity* (*early response / action)* normally guarantees the *truth* to a greater extent because there is no time to devise or contrive anything to his advantage or disadvantage of others, so was held in the case of *Mushtaq Hussin & another v. State* 2011 SCMR 45 at its Rel.P-57 as:-

> ".. The purpose of the F.I.R. is to set the criminal law in motion and to obtain the first hand, spontaneous information of occurrence in order to exclude the possibility of fabrication of story or consultation or deliberation or the complaint has had time to devise or contrive anything to his advantage and the disadvantage of others and to safeguard the accused of such like happenings/occurrence in the F.I.R., as the spontaneity is the guarantee of truth to a greater extent.

9. Further, the attempted explanations, given by complainant also bring such *claim* of the complainant under serious clouds which are:-

> "..Out of them two boys were not in muffled faces. **Again says three boys were not muffled faces**. It is correct to suggest that **it is not written in my application that out of them three persons were not muffled faces**. It is correct to suggest that in Ex.5/B it is also not mentioned which was **moved on 27-02-2013** that out of them three persons were without muffled faces. It is correct to suggest that it is

> mentioned in FIR that out of them two persons were muffled faces, while two persons were open faces. It is correct to suggest that FIR was lodged with the **delay of 4 months 4 days & 7 hours**.

The *admissions* are also sufficient to indicate that complainant never remained *stuck* with his *first* claim i.e trespass by four muffled faced persons rather with *passage* of time the complainant deliberated to open a room for himself while adding that out of four, only two were muffled faces.

10. Be that as it may, it is also a matter of record that the *culprits* otherwise were **'unknown'** hence in such eventuality it was always necessary for prosecution to have put the *suspected* to identification parade but instant matter no identification parade was held rather the complainant detailed the arrest of accused as:-

> "On 16.05.2013 CPLC officer called me and asked me about the Sim number of my stolen phone. On 17.05.2013 CPLC officer informed me that he got arrested accused Akhtar Zaman through IME number with the help of P.S. Taimoria"

11. It can safely be concluded that foundation of the *identity* of the accused persons had *two* parts i.e *recovery of robbed mobile through IME* and *identification* by complainant.

12. First be taken *first.* The manner of arrest through *specific* IME (claimed to be robbed one) was a material *circumstance* but neither said official of CPLC was examined nor the record through which arrest of accused became possible was brought on record. This would mean that the prosecution never *safely* proved that the *mobile* phone, recovered from accused, was owned; used by complainant; robbed from complainant and was found in *use* of the accused. Again failure of prosecution would result same effect that it would be

prosecution which has to share consequences of its own negligence. The view is guided by principle, so enunciated in case of *Azeem Khan* 2016 SCMR 274 whereby *similar* situation and its *effects* were discussed with reference to ***accused*** here situation is similar but reference is relating to **complainant** which would not prejudice the *analogy.*

13. However, above shows that on **'16.5.2013'** complainant gave *sim number* of his stolen phone while on following day i.e **'17.5.2013'** the accused was arrested through "**IME".** The *sim* number has nothing to do with the **IME** *however,* in short, the arrest of accused Akhter Zaman was result of **'IME'** number but no such record was produced by complainant that stolen / robbed mobile phone had *particular* **IME** number rather when questioned he (complainant) admitted in his cross as:-

> "It is correct to suggest that **I have not produced the box of mobile phone before this court**. Vol; says I had handed over the **box to the IO but he has not produced that box before this court**."

The IME number though was mentioned in the FIR but this FIR is *admittedly* lodged after more than four (04) months of the alleged date of incident hence mere mentioning of the IME without *proof* of such *mobile* to be the **'stolen/robbed'** one was of no help because status thereof was never more than that of a *corroborative* piece. The I.O to *whom* the mobile phone *box* was claimed to be handed over by complainant also did not produce the same nor had received the same under any ***mashirnama*** which *omission*, if is examined keeping claim of complainant, would make the prosecution to suffer consequences of Article 129(g) of Qanun-e-Shahadat Order, 1984 i.e ***'had such***

box been produced it would not have supported the claim of prosecution that it was the same robbed mobile'.

14. Further, it was also admitted by the complainant in his cross that:

> "I had purchased mobile phone from Sarena Market at Sakhi Hassan. It is correct to suggest that I have not produced that shopkeeper as a witness in this case."

The prosecution however never attempted to produce any receipt of shop from where mobile phone was purchased nor examined such shop-keeper which (*evidence)* was otherwise necessary for proving said fact. I would further add that model of allegedly recovered mobile phone was never claimed to be *rarely* available in market hence in such eventuality it was never safe to hold conviction on such foundation which, as discussed above, was never safely proved. Reliance is made on the case of *Muhammad Nawaz & Ors V State & Ors* 2016 SCMR 267 wherein it is observed as:

> "(f) During the occurrence, certain gold ornaments, identity card and bag of the complainant were snatched by the appellants. During the course of investigation some articles allegedly robbed during the occurrence were allegedly recovered at the instance of the appellants. No description of the robbed articles was given by the complainant in the FIR. The complainant whose ornaments were allegedly robbed during the occurrence and who allegedly identified the same, during her cross-examination, affirmatively responded to the suggestion that the gold ornaments referred above could be purchased form the goldsmith's shop. Therefore, it is highly unsafe to rely on the evidence of **recovery, which even otherwise is a corroborative piece of evidence and relevant only when the primary evidence i.e ocular account inspires confidence.**

15. Now, would take the *second* part i.e identification. For this, I would refer to relevant part of complainant's evidence which is:-

> "He further informed me that now his task at CPLC has concluded and on 20.05.2013 accused Akhtar Zaman was handed over to P.S. Shahra-e-Noor Jehan from where police spoiled my case. On the same day on 20.05.2013 I was called at P.S. Shahra-e-Noor Jehan where **I was shown accused Akhtar Zaman and I identified the accused** who disclosed his name as Akhtar Zaman and also disclosed the names of his companions as Hanif, Naseer Gul and Rauf Nawaz".

16. In examination-in-chief the complainant that he (complainant) *first* saw the accused Akhter Zaman at PS Shahra-e-Noor Jehan but during his cross-examination he contradicted himself while saying as:

> "I don't know that the accused Akhtar Zaman was not produced before the court for identification parade. **Vol; says I identified the accused Akhtar Zaman at PS Taimoria.**

17. From above, it is clear that complainant was allowed to see the *suspect* even before its handing over to PS Shahrah-e-Noor Jehan where the complainant was again allowed to see the accused Akhter Zaman without following the required procedure of ***identification parade*** however, even if complainant had fingered yet it was obligatory upon the investigation agency to get such *claim* of complainant verified from other eye-witnesses of incident by arranging proper *identification.* This was also not done which leaves the *foundation* i.e identity of the accused persons under clouds.

18. Be that as it may, now would examine that whether the base (evidence of complainant) stands to test of being *confidence inspiring* and *natural* or otherwise?. I would say that besides manner of *introducing* claim of **two out of four culprits with open faces',** the story of the prosecution was never worth

believing and even the complainant never successfully established the place of incident because admittedly the alleged place of incident is a *three storey* building where complainant was residing at *ground floor* but what complainant (prosecution) admitted in his cross is as:

> " It is incorrect to suggest that after dacoity no mohalla people came at my house. **Vol; says I also stated this statement before IO but the IO did not call any mohalla people or chowkidar for recording their statement."**
>
> "The house bearing No.K-514, is a rented house. I did not provide the copy of rent agreement to the IO. It is correct to suggest that the rented house consists of three stories."
>
> "I am residing on the ground floor of that rented house. The electricity bill of rented house is separate. I did not provide the copy of electricity bill to the IO. I don't remember the number of my electric /sui gas bill."
>
> "The name of owner of house No.516 is Meraj-ul-Haq. I did not produce landlord Meraj before the IO of the case as landlord. I don't know the names of occupants who were residing on the first and 2nd floor of the house."

From above, it becomes quite evident that none from two other families, residing on *first* and *second* floor of the same building where complainant party was residing at *ground* floor, were examined *even* though they were the *most* natural and independent persons whose attraction on *calls / cries* of complainant party was *unavoidable.* The complainant had claimed in evidences as:

> "A neighbours also came in the house and told us that the accused persons were seen flying in while (white) corolla."

This was not supported by sister of complainant (other eye-witness) as she claimed in her cross examination as:

> "I don't know that on which vehicle accused went away but the **chowkidar** told us that the accused went away through white car"

None *however* has been examined which again let the provision of Article 129(g) of Qanun-e-Shahadat Order, 1984 come into play.

19. Further, the complainant had claimed entrance of the accused by break of **'kunda'** but the other eye-witness stated *otherwise* as:-

> "They were entered in our house from back side after cutting grill and their companion called rest of the accused."

This also does not find place in memo of sirzamin.

20. Further, the complainant admitted in his cross-examination as:-

> "IO himself came at place of incident. IO remained about 1 to 2 hours at place of incident. **When the IO visited the place of incident all the house hold articles were in scattered condition. IO visited the place of incident in presence of my mother, Asif & me**.

The date & time of *incident* is claimed as **'01.11.2012 at 12:15**" and visit of I.O is dated **'20.5.2013'** i.e after more than **'five months'** yet surprisingly the *articles* were in *scattered* condition. The complainant further responded in his cross-examination as:-

> "It is correct to suggest that it is not mentioned in the Ex.5/D that Kunda was broken. Vol; says I pointed out the same to the IO. **IO did not prepare the memo of site inspection in my presence**. I don't remember where I had put my signature on Ex.5/D. IO had read over the contents of memo of site inspection.

Although the complainant in his examination-in-chief categorically stated that mashirnama of sirzamin (Ex.5/D) at his pointation by saying that:-

> "Arif Hussain visited the place of incident on my pointation and prepared such mashirnama and obtained my signature."

but so as to justify non-mentioning of the '**broken-kunda'** into site inspection he (complainant) tried to take a *summersault* while saying :

> "IO did not prepare the memo of site inspection in my presence.

but in same breath further stated that:

> "I don't remember where I had put my signature on Ex.5/D. IO had read over the contents of memo of site inspection."

From above, there was never sufficient evidence *even* to establish the happening of the incident at the given place.

21. Further, there was another *important* aspect which is allegation of robbed *gold* ornaments. The claim the prosecution was that the accused had taken only *gold* ornaments while leaving the *artificial* ornaments. This piece seems to be not in accordance with human behaviour because in such like situation the priority would always be to escape rather than to take trouble in making difference between *gold* and *artificial*. This even was *improbable* when the complainant in his examination-in-chief stated as:

> "…my mind was working and while reciting Dua-e-Younus a point came that accused **Akhtar Zaman** took 2-3 steps backward towards the door I at once pushed him outside and locked the door my sister broke the window panes and we all started shouting for help upon which the accused persons fled away after taking all the gold and cash Rs.25,000/- after coming out the room we checked that room where we found artificial gold was lying on the bed and

> the gold worth of Rs.42,00,000/-, cash of Rs.25,000/- and one mobile phone Nokia C-3 was taken away by the accused persons.

Such *piece* of prosecution story *however* was completely contradicted by other eye-witness whose examination-in-chief shows *entirely* different manner by saying that:

> "Thereafter they made sat us on a bad and their companions also came there. Thereafter I made request, but they did not accept my request. Thereafter accused **Abdul Rauf** caught hold my neck and asked to keep silent. Thereafter **they started to beat all the family members**. Thereafter **they took gold ornaments valuing about Rs.38,00,000/= to 40,00,000/= mobile phone Nokia C-3, cash Rs.20,000/=**. They had a decator to which they deducted gold ornaments and kept gold ornaments and left artificial jewelry.

These both witnesses *prima facie* never were on one page in respect of manner of incident and the plea of devoice for differentiating between *gold* and *artificial* was an exaggeration. Not only this, but the complainant admittedly brought nothing on record to substantiate that there was robbery of gold ornaments because he *(complainant)* himself admitted as:-

> "It is correct to suggest that I have not produced receipt of gold ornaments which were taken by the accused at the time of incident."

The above discussion of the evidence of both eye-witnesses makes it quite clear that the manner of happening of incident; identification of *culprit;* place of *incident;* and even robbery of given *articles* were not established safely but the complainant remained making *improvements* which were always sufficient to bring the golden rule of benefit of doubt thereby tilting the scale in favour of the accused persons. Further, there have been deliberate failure *least* negligence on part of prosecution in not bringing the *independent* witnesses and material on

record so as to corroborate the robbery by *unknown* persons; arrest of accused with robbed mobile or through IME of robbed mobile hence discussion of other evidence, being *not* direct is not necessary. This is for simple reason that where the direct evidence fails the corroborative evidence *alone* cannot hold conviction.

22. In consequence to what has been discussed above, appeal was allowed by short order dated 23.04.2018. These are the detailed reasons.

J U D G E