IN THE HIGH COURT OF SINDH AT KARACHI

Crl. Appeal No. 131 of 2021
&
Crl. Appeal No. 145of 2021

Appellant:		Sohail Ahmed through Mr.Jan Muhammad Naich, Advocate (in Cr. Appeal No. 131 of 2021)
Appellant	:	Pervez Ali through Mr.Ameet Kumar, Advocate(in Cr.Appeal No.145 of 2021)
The State	:	The State through Syed Meeral Shah, Addl. P.G
Date of hearing	:	07th May 2021
Date of decision	:	07th May 2021

JUDGMENT

SALAHUDDIN PANHWAR J.-Appellants/accused above named through their respective appeals have assailed the impugned judgment dated 27.02.2021 passed by learned 1X- Additional Sessions Judge, South Karachi in Sessions Case No.218 of 2019 arising out of FIR No.406/2018, registered under sections 392/397/34, PPC at PS Chakiwara Karachi, whereby, after full-dressed trial, the appellants were convicted under Section 392 PPC and sentenced to suffer RI for 03 years and to pay fine of Rs.10,000/- each. In default of payment of fine, each accused was ordered to undergo SI for 03 months more. Benefit of section 382-B, Cr. P. C. was also extended to them.

2. Precisely, the facts of the prosecution case, as alleged in the FIR, are that on 27.12.2018 complainant Noman lodged FIR stating therein that he was present at his shop when at about 2030 hours two persons came in one white colour Cultus VXR Car without number; entered into the shop and on the force of weapons robbed Rs.40,000/- and ran away in a car

towards Bihar Chowk. The complainant identified the said accused, who earlier took away Rs. 78,000/- from him. Meanwhile, police came there to whom complainant disclosed about the incident. The police chased the culprits and apprehended them from the *tanga stand*. From their possession, police recovered robbed amount of Rs.40,000/- ornaments, mobile phones and unlicensed weapons. Accused were brought at PS where such FIR was lodged against them.

3. Charge was framed against accused at Ex.2, to which they not plead guilty and claimed to be tried.

4. In order to prove its case, the prosecution examined PW-1 ASI Abdul Majeed at Ex. 3, PW-2 P.C. Baluch Jatoi at Ex.4, PW P.C. Ghulam Abbas gave up by prosecution through statement at Ex.5, PW-3 Muhammad Noman (complainant) at Ex.06, PW-4 SIP Sohail at Ex.07.Thereafter, prosecution side was closed vide statement at Ex.08.

5. Statements of accused were recorded under section 342, Cr.P.C, wherein they denied all the allegations leveled against them by the prosecution and pleaded their innocence. They neither examined themselves on Oath as required under Section 340(2) Cr.P.C nor adduced any evidence in their defence.

6. Thereafter, learned trial Court after hearing the learned counsel for respective parties, convicted and sentenced the appellants as mentioned above. Appellants being aggrieved and dissatisfied with the impugned judgment have filed the aforesaid appeals which are being disposed of through this single Judgment.

7. Learned counsel for the appellants, *inter alia*, has contended that the appellants are innocents and have been falsely implicated in this case by the police with malafide intention and ulterior motive; that the complainant did not implicate the appellants as culprits of the offence and hence was declared hostile; that the complainant has also not identified the case property allegedly recovered from the possession of the appellants; that the appellants have also been acquitted in the case of recovery of unlicensed weapons; that the witnesses examined by the

prosecution have contradicted each other on material points; that the findings of the learned trial Court are based on surmises and conjecture; that the impugned judgment is the result of misreading and non-reading of evidence and contrary to applicable law, hence liable to be set-aside. Lastly he prayed for acquittal of the appellants from the charge.

8. Conversely, learned Additional Prosecutor General Sindh has opposed the contentions raised by the learned counsel for the appellants and submitted that recovery was effected on spot; that all the prosecution witnesses have fully supported the prosecution case except complainant who was declared hostile and was issued notice under Section 193 Cr.P.C, but the complainant did not appear and submitted his reply; that the prosecution has discharged its onus of proving the guilt of the appellants who failed to disprove the same while adducing their defence. He, therefore, prayed for dismissal of the appeal.

9. Heard and perused record. .

10. *Prima facie,* the appellants / convicts were charged which reflects from point of determination i.e:-

> 1. Whether on 27.12.2018 at about 2030 hours at Noman Communication & Easy Load at Mirza Adam Khan Road, Gulistan Colony Corner Gali No.2 Karachi they were came in white color Cultus VXR without number and entered in the shop of complainant and looted amount of Rs.40,000/- and escaped from the place of incident by sitting in the said vehicle towards Bihar Chowk. In the meantime police chased and arrested them recovered looted amount of complainant i.e. 40,000/- and recovered weapon and mobile phones from the possession of accused Pervaiz?

11. The perusal of the charge (point of determination), *prima facie,* makes it obvious that it consists on two parts. The first one relates to commission of *'dacoity'* while the later relates to arrest and recovery. It is not a matter of dispute that the appellants / convicts stood acquitted from charge of recovery of *alleged* crime weapon(s) but have been convicted for committing *'dacoity'*. Here, it is also worth mentioning that the *sole* witness

of the incident i.e **complainant Muhammad Noman** *categorically* stated in his cross-examination by learned DDPP (after being declared hostile) as:-

> *"It is incorrect to suggest that case property was recovered in my presence.* ***The case property does not belong to me.*** *"*

12. Needless to add that complainant Muhammad Noman was, *otherwise,* the owner of robbed property hence it was the complainant *alone* who could have determined the status of ***case property*** to be ***robbed property*** or *otherwise.* Therefore, allegation to extent of second part of ***charge*** can't be said to be ever established by the prosecution.

13. Now, I would revert to *first* part of the charge which, per learned trial Court, stood established to satisfaction of conscious of learned trial court hence resulted in the *challenged* conviction. Here, it would be relevant to refer relevant portion of the *impugned* judgment of conviction which reads as:-

> *"… The record shows that all prosecution had examined and they fully supported the prosecution version except complainant although he had supported the incident that accused persons entered in his shop and committed dacoity / robbery and further stated that police informed him that dacoits have been arrested. Further stated he had also signed FIR so also memo of arrest and recovery but according to him contents were not read over to him. Complainant failed to disclose that why he has signed FIR so also memo of arrest and recovery when accused persons have not been arrested in his presence. He has also admitted that memo of arrest and recovery and FIR bears his signature. It is also pertinent to mention here that the complainant had declared hostile by the prosecution and this court issued show cause notice U/s 193 PPC to complainant after recording his evidence but complainant did not appeared (appear) and not filed any reply of show cause.*
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> *It is also on record that at the time of hearing of bail application of accused persons as stated by the learned counsel for accused persons that complainant had raised no objection meaning thereby that he had mixed up with accused persons and supported them while incident is against the society and in the Karachi City those incident eld on daily basis and such persons looted the public. Furthermore such incident are not compoundable therefore no objection of complainant has no value in such circumstances. The attitude of complainant shows that he had given false evidence and after recording his evidence show cause notice against him on 13.02.2020 but he remained absent till yet and not submitted his reply, therefore, proceedings U/s 193 PPC be initiated separately against*

> *complainant. The learned counsel for accused failed to disclose any enmity with police so the police managed FIR, memo of arrest and recovery and falsely challaned them in collusion with complainant. The complainant also failed to move any application before any forum that he has been forced to singe (sign(FIR and memo of arrest and recovery by police therefore plea taken by accused persons that on 27-12-2018, they were coming from Nawabshah in Cultus VXR for registration and when they reached at Garden, police stopped them and at that time, Rs.80,000/- are in possession of accused Sohail and police demanded money and on their refusal police booked them in the present case, which does not appeal the mind."*
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> *In the light of above discussion, I am of the view that* **only on the statement of complainant who had declared hostile, accused persons cannot be acquitted while arrested on spot and looted amount recovered from them on spot**, *hence I answered point No.1 as affirmative."*

14. I am in no doubt while insisting that it is never the prosecution papers which hold one guilty or innocent but it is always the material, brought on record in shape of *evidences* (during trial), which was / is to be appreciated for holding one guilty or otherwise. Thus, such settled principle is not open to any deviation else the purpose of ***trial*** shall fail. This, however, was completely ignored by the learned trial court while giving much weight to material, collected during *investigation.*

15. I am also surprised that learned trial court while evaluating the evidences *did* consider the facts, confined to bail plea. The facts and plea(s), taken while seeking bail(s), I shall insist, can't be made part of the evidences (***trial)*** hence the same *legally* can't be considered while evaluating the evidence(s). Such approach on part of the learned trial Court also *legally* can't be stamped being completely in negation to ***Safe Administration of Justice*** for holding one *guilty* or *innocent.*

16. As regard the absence of any *motive* for the police to falsely involve the appellants / convicts in the case, as taken by trial court, for finding the appellants / convicts guilty, it would suffice to refer relevant portion of the judgment of honourable Apex Court, recorded in the case of *Azeem*

Khan & another v. Mujahid Khan & Ors 2016 SCMR 274 wherein such aspect was considered and held as ***misconceived.*** The relevant portion reads as:-

> 29. The plea of the learned ASC for the complainant and the learned Additional prosecutor General, Punjab that because the complainant party was having no enmity to falsely implicate the appellants in such a heinous crime thus, the evidence adduced shall be believed, **is entirely misconceived one**. It is a cardinal principle of justice and law that only the intrinsic worth and probative value of the evidence would play a decisive role in determining the guilt or innocence of an accused person. Even evidence of uninterested witness, not inimical to the accused may be corrupted deliberately while evidence of inimical witness, if found consistent with the other evidence corroborating it, may be relied upon. Reliance in this regard may be placed on the case of *Waqar Zaheer v. The State* (PLD 1991 SC 447)

17. It is matter of record that it was the complainant *alone* who was in a position to identity the *culprits* therefore, when such *only* witness not found the *accused* as his ***culprits*** then it was never safe to hold such *accused* (sent up persons) to hold them guilty else the purpose and objective of golden principle of ***Safe Criminal Administration of Justice*** regarding extending ***benefit of single reasonable doubt*** to accused as matter of right shall collapse. Such settled principle of law, *perhaps,* has completely been ignored by the learned trial Court which, otherwise, stood reaffirmed in recent judgments of honourable Apex Court regarding extending benefit of doubt to accused as:-

> *State v. Ahmed Omar Sheikh* 2021 SCMR 873 (Rel. P-918)
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> > (i) The High Court had rightly extended the benefit of doubt to Fahad Nasim Ahmed, Syed Salman Saqib and Sheikh Muhammad Adil and acquitted them from all the charges and had also rightly extended the benefit of doubt to Ahmed Omar Sheikh qua all other charges. However, the High Court ignored these important points mentioned above and wrongly convicted him under section 362, P.P.C. when as discussed above, the evidence of Nasir Abbas (PW-1) was full of doubts and no reliance can be

> placed on such doubtful statement. So the conviction of Ahmed Omar Sheikh under section 362, P.P.C was not justified. Although, learned counsel for the parents of Daniel Pearl argued that **it is a high-profile case but even in such like cases the benefit of doubt cannot be extended to the prosecution and it is settled since centuries that such benefit can only be extended to the accused who is facing the trial.**

In another case of *Najaf Ali Shah v. State* 2021 SCMR 736, it is held as:-

> 9. **Mere heinousness of the offence if not proved to the hilt is not a ground to avail the majesty of the court to do complete justice**. This is an established principle of law and equity that it is better that 100 guilty person should let off but one innocent person should not suffer. …… **It is a well settled principle of law that for the accused to be afforded this right of the benefit of the doubt it is not necessary that there should be many circumstances creating uncertainty and if there is only one doubt, the benefit of the doubt it is not necessary that there should be many circumstances creating uncertainty and if there is only one doubt, the benefit of the same must go to the petitioner**. This Court in the case of *Mst.Asia Bibi v. The State* (*PLD 2019 SC 64)* while relying on the earlier judgments of this Court has categorically held that *"if a single circumstance creates reasonable doubt in a prudent mind about the apprehension of guilt of an accused, then he /she shall be entitled to such benefit not as a matter of grace and concession, but as of right. Reference in this regard may be made to the cases of ……*

18. The above discussion as well effects of settled principle of law are sufficient to convince me that impugned judgment of conviction is not sustainable in law. The same, accordingly, is hereby set-aside and the appellants / convicts stand acquitted of the charges. These are the reasons of the short order dated 07th May 2021 whereby both the appeals were allowed. Office shall place copy of this order in connected case.

J U D G E

SAJID