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

Cr. Appeal No.S-185 of 2021
Cr. Appeal No.S-196 of 2021

Date of hearing	:	15.12.2022.
Date of Judgment	:	15.12.2022.
Appellants Maqsood & Muhammad Hanif	:	Through Mr. Muhammad Ayoub Laghari, Advocate.
Appellant Maqsood	:	Through Mr. Manzoor Hussain Subhopoto, Advocate
The State	:	Mr. Shahid Ahmed Shaikh, Additional P.G Sindh.
Complainant Hakim Ali	:	Present in person.

J U D G M E N T

Muhammad Saleem Jessar. J.- By this single judgment, I propose to dispose of above said two Criminal Appeals as both appeals have arisen from one and the common judgment dated 29.09.2021 passed by the trial Court.

2. Through these Criminal Appeals, appellants have assailed judgment dated 29.09.2021 passed by learned IInd Assistant Sessions Judge, Hyderabad, in Sessions Case No.877 of 2019, (Re: The State v. Maqsood and another), arising out of F.I.R No.141 of 2019 registered at P.S Hatri, Hyderabad, under Sections 397, 337-D PPC, whereby they have been convicted and sentenced to suffer rigorous imprisonment for 07 years. Besides, appellant Maqsood has been convicted for offence under Section 337-D PPC and is burdened to pay Arsh to injured to the extent of 1/3rd of Diyat amount of current fiscal year; in default thereof, to suffer S.I for one year more.

3. Precisely, the facts of the case are that on 20.10.2019 at about 1900 hours appellants stopped the bother of complainant

namely Muhammad Zubair infront of the office of Sadiq Livena near Chang Moar bye-pass when he was driving Motorcycle and deprived of wallet, CNIC, Student Card, photocopies of CNIC of his father, cash amount of Rs.3000/- and other documents. On restrictions, one accused mad straight fire upon Muhammad Zubair which hit at his abdomen and he fell down and thereafter accused persons fled away. Hence, instant F.I.R was lodged.

4. After usual investigation, the accused were arrested and challaned before the Court of Law by concerned Investigating Officer. The learned trial Court after completing the legal formalities framed a formal charge against appellants at Ex-02, to which they pleaded not guilty and claimed their trial.

5. In order to establish the charge, the prosecution examined 07(seven) PWs namely, Dr. Wasim Khan, injured Muhammad Zubair, complainant Hakim Ali, Munir Ahmed, Zaheer Hussain, ASIP Ali Ahmad, ASIP Muhammad Younus, who produced various documents in their evidence, and then prosecution side was closed vide statement at Ex.12

6. Thereafter, statements of the accused under Section 342 Cr.P.C were recorded at Ex.13 to 14, in which the accused denied the allegations leveled against them by the prosecution and prayed for justice. The accused neither examined themselves on oath in terms of Section 340(2) Cr.P.C, nor led any evidence in their defense in disproof of the charge against them.

7. After formulating the points for determination, recording evidence of the prosecution witnesses and hearing learned Counsel for the parties, trial Court vide impugned judgment convicted and sentenced the appellants in the terms as stated in preceding paragraph; hence, both the appellants have filed the appeals in hand.

8. M/s. Manzoor Hussain Subhopto and Muhammad Ayoub Laghari, Advocates for appellants submitted that appellants are innocent and they have falsely been involved in this crime. They further submitted that appellants were not nominated in F.I.R

which too was delayed for about three days. They next submitted that alleged offensive weapon viz. pistol is shown by the police to have been recovered from the possession of appellant Maqsood, infact it was not recovered but was foisted upon him only in order to strengthen the rope of their false case. They have further submitted that appellants were arrested by the police on 28.10.2019; whereas they were subjected to identification parade on 08.11.2019 with delay of about 11 days; hence, the identification parade has lost its evidentiary value and cannot be relied upon to maintain conviction against the appellants. Learned Counsel next submitted that the Motorcycle allegedly driven by the appellants was recovered by the police, even the Motorcycle driven by complainant party was also recovered by the I.O after two days of the incident from National Highway but were not recovered from exclusive possession of appellants; even both Motorcycles were not produced in evidence to connect the appellants with the commission of alleged offence. They further went on to say that per challan, certain articles were shown to be the case property; however, nothing was produced in evidence nor was exhibited; even same were not confronted with the appellants at the time of their statement recorded under Section 342 Cr.P.C. They further submitted that only piece of evidence against appellants is the identification parade, which, in view of admitted facts cannot be relied upon; hence, submitted that prosecution has miserably failed to prove its charge against them; and the trial Court without appreciation of the above facts has wrongly convicted the appellants; therefore, the judgment impugned is liable to be set aside. They have further submitted that appellant Maqsood has also been acquitted from the charge of Sindh Arms Act, 2013 which is also fatal for the prosecution case; hence, pray that these appeals may be allowed. In support of their contentions, they relied upon the case of KASHIF ALI and another v. The STATE (2019 YLR 1573). Learned Counsel further submitted that mere identification parade is not sufficient to maintain conviction against the appellants as the prosecution otherwise has not proved its charge against them; hence, they are entitled for their acquittal. In

support of this contention, they have cited case of GHULAM AKBAR v. MUHAMMAD AKBAR, DIRECTOR, P.I.D.C., KARACHI and 3 others (1969 P.Cr.LJ 755). As far as identification parade is concerned, learned Counsel submitted that learned Magistrate has not mentioned under Certificate of identification proceedings regarding dummies, complexion, ages, features and height like accused. In support of this contention, they have cited case law reported as BABAR KHAN v. The STATE (2016 SD 691(i) Lahore). As far as proper picking of the PWs / Mashir to the appellants at the time of identification parade is concerned, learned Counsel submitted that injured at the time of his examination under Section 161 Cr.P.C did not disclose features as well height, colour and character of the appellants and further admitted in his cross before the trial Court that I.O had shown him certain photographs of the appellants through which he identified the appellants. Learned Counsel further submitted that infact the appellants had enmity with Arain community over money transaction and they being influential persons of the area hired the services of I.O of this case who played at their hands and thereby implicated the appellants in this case with which the appellants had no nexus. They; therefore, submitted that by granting these appeals, appellants may be acquitted of the charges by extending benefit of doubt to them.

9. Mr. Shahid Ahmed Shaikh, learned Additional P.G Sindh appearing for the State has very candidly submitted that prosecution has miserably failed to establish its charge under Section 397 PPC against appellants as nothing was robbed away, nor was recovered from the possession of appellants during investigation; therefore, they are entitled for acquittal from the charge under Section 397 PPC. He; however, opposed the appeals and supported the impugned judgment on the ground that appellant Maqsood had caused firearm injury to injured PW Muhammad Zubair; therefore, trial Court has convicted him under Section 337-D PPC; hence, he is liable to pay 1/3rd of Diyat to inured. He; however, could not controvert the fact that injured PW had not specifically implicated the appellants in his 161 Cr.P.C

statement; however, later he picked them up in the identification parade on the basis of photographs shown to him. He also could not controvert the fact that appellants were arrested by the police on 28.10.2019 and were subjected to identification parade on 08.11.2019 with certain delay.

10. Complainant Hakim Ali present in person submitted that nothing was robbed from his brother and whatever mentioned in the case papers was told to him by his injured brother Muhammad Zubair. Nothing was recovered in his presence and the Motorcycle belonging to his brother though was produced before the police; yet it was not brought before the Court at the time of trial; even was not confronted with the accused at the time of their statement under Section 342 Cr.P.C.

11. Heard the parties and perused the record.

12. Admittedly, the names of appellants does not find place under the F.I.R, nor even colour, character, height as well features of their bodies were given by the complainant. The complainant as admitted by him before the trial Court, even before this Court today, was not accompanied with injured at the time of alleged offence and whatever he had deposed before the trial Court was told to him by his injured brother Muhammad Zubair. Though the F.I.R was delayed for about three days; yet no one was nominated in the F.I.R. Per available evidence, the appellants were arrested by the police on 28.10.2019 and at the time of their arrest nothing incriminated was secured from their possession, nor was produced by them during investigation except an offensive weapon from appellant Maqsood. Later, they were subjected to identification parade on 08.11.2019 with delay of about 11 days of their arrest. The said identification parade, in view of settled law as laid down by the Hon'ble Supreme Court in case of MUHAMMAD PERVEZ and others v. The STATE and others (2007 SCMR 670) has lost its evidentiary value and cannot be believed to maintain conviction solely on that basis against the appellants. Not only the identification parade was conducted by not adopting the guidelines of Apex Court but even any witness picks out an accused from dummies line or crowd, which even cannot prove that the accused,

who is pointed out by witnesses, has committed the guilt or taken part in the commission of offence unless it is corroborated by ocular account or strong circumstantial evidence; however, in instant case it is lacking. Moreover, the delay of 11 days in identification parade of the accused cannot be ignored because such delay has ever been considered to be illegal by the Hob'ble Supreme Court in so many cases, one of which is the case of NAZIR AHMED v. MUHAMMAD IQBAL and another (2011 SCMR 527).

13. Further, the injured PW Muhammad Zubair had picked up appellant Maqsood at the time of identification parade to be the person who allegedly fired upon him with pistol; yet this fact was not stated by him in his 161 Cr.P.C statement. In such circumstances, the plea taken by accused to the effect that I.O had played at the hands of influential persons of Arain community over money transaction, carries weight and this aspect of the defence theory was not kept in juxtaposition by the trial Court. To this respect, I am fortified by the dictum laid down by the Hon'ble Supreme Court in case of RAZA and another v. The STATE and 2 others (PLD 2020 Supreme Court 523) wherein it has been held as under:

> "15. In a criminal trial, it is now jurisprudentially settled that the proper course for the court is to first discuss and assess the prosecution evidence in order to arrive at the conclusion as to whether or not the prosecution has succeeded in proving the charge against the accused on the basis of the evidence. In case where the accused has taken a specific plea the court is to appreciate the prosecution evidence and the defence version in juxtaposition in order to arrive at a just conclusion."

14. Moreover, learned Additional P.G Sindh has very candidly conceded that nothing incriminated was secured from the appellants, nor was robbed away; besides, the identification parade, in view of the discrepancies noted above, is defective; therefore, he would not support the impugned judgment to the extent of charge under Section 397 PPC; however, has opposed the appeal to the extent of charge under Section 337-D PPC. Learned

Additional P.G has forgot that main source of implication of appellants in the crime was the identification test, which in view of settled law as referred to above, is highly doubtful and defective; therefore, could not be believed against appellants or relied upon to maintain the conviction against the appellants as if the one set of evidence has not been relied upon by learned Additional P.G then other set of the evidence, which is outcome of later, cannot be relied upon to maintain conviction against the appellants. No doubt, the injured had sustained injury on his person and all sympathies goes to favour the injured; yet it does not mean that other innocent person in absence of any unimpeachable evidence can be burdened for such a charge which otherwise has not been proved by the prosecution beyond any reasonable shadow of doubt. It is well settled principle of law that if there creates a single doubt about the guilt of accused, the benefit whereof should go to accused as of his right but not grace or concession. In this respect, reliance can be placed upon the case titled as MUHAMMAD AKRAM v. The STATE (2009 SCMR 230), wherein at page-236, it has been held as under:-

> " It is an axiomatic principle of law that in case of doubt, the benefit thereof must accrue in favour of the accused as matter of right and not of grace. It was observed by this Court in the case of Tariq Pervez v. The State 1995 SCMR 1345 that for giving the benefit of doubt, it was not necessary that there should be many circumstances creating doubts. If there is circumstance which created reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of doubt not as a matter of grace and concession but as a matter of right."

15. In the circumstances and in view of the discrepancies and lacunas as stated above, the prosecution story cannot be believed to maintain conviction against the appellants. Consequently, these appeals are allowed. The conviction and sentence recorded against the appellants, vide impugned judgment dated 29.09.2021, passed by learned IInd Assistant Sessions Judge, Hyderabad, in Sessions Case No.877/2019, arising out of Crime No.141 of 2019 of P.S Hatri, under Sections 397 & 337-D PPC, are set aside. Consequently, appellants Maqsood and

Muhammad Hanif are hereby acquitted of the charges. They are confined in Central Prison, Hyderabad; therefore, the jail authorities are directed to release them forthwith if they are no more required in any other custody case.

JUDGE

Shahid