

IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Appeal No. 24 of 2014

Appellants : Yaqoob Bengali & Muhammad Iqbal Khan
through Mr. Hashmat Khalid, Advocate

Respondent : The State
through Ms. Robina Qadir, D.P.G.

Date of hearing : 7th September, 2022

JUDGMENT

Omar Sial, J: A man by the name of Khurram Surya at 3:30 p.m. on 29.11.2012 reported an offence to the Brigade police station which had been committed earlier that day at 14:45 a.m. Surya disclosed that he owned a shop by the name of Surya Motors where he had deployed a watchman by the name of Ameer Nawas. At 7:00 a.m. on 29.11.2012 his watchman Ameer Nawas told him that at 4:45 a.m. a rickshaw had come and parked close to the shop. A little while later a Shehzore vehicle came from which disembarked 3 persons. One person made the watchman forcibly sit in the rickshaw at gun point whereas his 2 companions, also with weapons, blindfolded the watchman and tied up his hands. The men then broke the locks of the shop and proceeded to steal 140 tires and some tubes as well as Rs. 3,000 from the watchman. **F.I.R. No. 308 of 2012** was registered under section 392 and 34 P.P.C. against unknown persons.

2. On 12.12.2012, the C.I.A. police arrested two persons by the name of Liaquat Ali and Yaqoob Bengali in an alleged police encounter in which **F.I.R. No. 608 of 2012** had been registered under sections 353, 324 and 34 P.P.C. According to the C.I.A. police, the 2 men in custody also confessed to have stolen the tires for which **F.I.R. No. 308 of 2012** had been registered. The 2 men also disclosed that they had sold some of the tires to appellant Muhammad Iqbal Khatri. Appellant Muhammad Iqbal Khatri was therefore arrested, however, a separate **F.I.R. being No. 612 of 2012** was registered against him for having committed an offence under section 411 P.P.C.

3. Appellant Muhammad Iqbal Khatri was tried in the case arising out of F.I.R. No. 612 of 2012 and on 16.03.2016 was acquitted by the learned 6th Civil Judge &

Judicial Magistrate, Karachi Central. No appeal was filed by anybody against his acquittal.

4. In the case arising out of F.I.R. No. 308 of 2012, during trial, accused Liaquat Ali absconded. Accused Yaqoob Bengali and Muhammad Iqbal Khartri were however convicted for offences punishable under section 392 and 34 P.P.C. They were sentenced to 6 years imprisonment and directed to pay a fine of Rs. 30,000 each. If they did not pay the fine, they would have to spend another 2 months in prison. The judgment was passed on 17.01.2014 by the learned 8th Assistant Session Judge, Karachi East.

5. Both, Yaqoob Bengali and Muhammad Iqbal Khatri, being dissatisfied with the view formed by the learned 8th Assistant Session Judge, Karachi East vide her judgment dated 17.01.2014 filed the current appeal. On 24.02.2014, both Bengali and Khatri were granted bail by this Court. Bengali absconded after being granted bail whereas Khatri continued to appear in Court for most of the 8 years that this appeal has been pending adjudication.

6. Learned counsel for appellant Khatri argued that the case against Khatri is one of double jeopardy. According to the learned counsel, Khatri was tried and acquitted in the same offence earlier (being the case arising out of F.I.R. No. 612 of 2012) and therefore he could not be vexed twice. Learned DPG on the other hand was of the view that in F.I.R. No. 612 of 2012, the charge against Khatri was that he had purchased the stolen tires from Bengali and Liaquat whereas in F.I.R. No. 308 he was convicted and sentenced for being one of the 3 persons who had committed the robbery at Surya Motors.

7. I have heard the counsels. None effected an appearance on behalf of the complainant of the case despite notice. My observations and findings are as follows.

8. It will be useful to reproduce the contents of the 2 F.I.R.'s as the same will have a bearing on the question of double jeopardy:

F.I.R. No.308 of 2012.

Orally by the complainant: I reside at the above address and we have a Shop on the ground floor of home with the name & style of Surya Motor in which I am running business of vehicles tires. I have deputed a Chowkidar namely Ameer Nawis to look-after my shop in night time. On 28.11.2012 at about 0900 hrs. of

the night time as usual I after closing the shop went to my home. Today on 29.11.2012 at 0700 a.m., the Chowkidar Ameer Nawis disclosed me that at about 04.45hrs of the night time, he was present outside of shop some Rickshaw were also parked there by the drivers. Meanwhile one Shahzore vehicle came thereat in which three persons were sitting one of them aged 30 years wearing Shalwar Qameez alighted from the vehicle and came to the Chowkidar and told that their Rickshaw is missing and wanted to check its number. He came near to him and suddenly took out pistol and forcibly made sit him in a Rickshaw. In the meanwhile two of his companion also alighted and came near to him. One of them also holding pistol. They wrapped his hands & eyes with handkerchief. One of them remained stand near to me while the other one broken the locks of Surya Motor Shop and took him inside the shop from where they took out the tires, loaded into vehicle and snatched his mobile phone with cash Rs.3000/= and escaped away. After receiving the such information from Chowkidar, we went at the shop, checked the shop and found the shutter locks broken and 140 tires of different size were missing including tubes from the shop. Now I have come to lodge the report. My complaint is against three unknown persons for tying the Chowkidar on gunpoint, entering inside the shop by breaking the locks and snatched away the difference tires, tubes and mobile phone of the Chowkidar. I want legal action. Heard the report and admitted it to be correct.

Sd/- (in English) of
complainant.

F.I.R. No.612 of 2012

Complainant stated that arrested accused persons Liaquat Ali and M. Yaqoob in Crime No.608/2012, 609/2012 and 610/2012, during interrogation disclosed that they accompanied with other companions robbed tire, tubes from Surya Motors, Khudad Colony, Brigade and sold out the same to one Iqbal Khatri. On their disclosure Iqbal Khatri arrested under section 54 Cr.P.C. On pointation of accused Iqbal Khatri, complainant alongwith police party proceeded towards New Karachi, District Central, and at about 1600 hours, from plot No.7, Sector 12/A, New Karachi, police party recovered 50 different tires and tubes, allegedly case property of crime No.308/2012. Hence FIR under section 111 PPC lodged against accused.

9. It is an admitted position that F.I.R. No. 612 of 2012 was registered on the complaint of the police for exactly the same incident for which F.I.R. No. 308 of 2012 was registered on the complaint of Khurram Surya. I most respectfully do not agree with the argument of the learned DPG that this is not a case of double jeopardy solely because of the fact that F.I.R. No. 612 of 2012 was under section 411 P.P.C. whereas F.I.R. No. 308 of 2012 was registered under section 392 P.P.C. It was the job of the investigating officer to investigate the case in its entirety and not only to restrict himself to the aspect of Khatri receiving the stolen goods. Obviously, the investigating officer of F.I.R. No. 612 of 2012 came to the conclusion that Khatri's role was restricted to the allegation of receiving stolen goods hence, section 392 was not applied. As mentioned above, he was acquitted of that charge. The non-professional and non-serious attitude of the police is evident from the fact that F.I.R. No. 612 of 2012 itself records that the 50 tires recovered was part of the stolen property in F.I.R. No. 308 of 2012. Instead of a separate F.I.R. being registered, the investigating officer of F.I.R. No. 308 of 2012 should have dealt with the matter. This behavior of the police lends credence to the stance taken by Khatri that he was asked for a bribe but when he did not pay the C.I.D. police he was falsely accused in F.I.R. No. 612 of 2012.

10. It would facilitate reference if Section 403 Cr.P.C. is reproduced:

403. Person once convicted or acquitted not to be tried for same offence.(1) A person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under section 236, or for which he might have been convicted under section 237.

(2) A person acquitted or convicted of any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former trial under section 235, subsection (1).

(3) A person convicted of any offence constituted by any act causing consequences which, together with such act, constituted a different offence from that of which he was convicted, may be afterwards tried for

such last mentioned offence, if the consequences had not happened, or were not known to the Court to have happened, at the time when he was convicted.

(4) A person acquitted or convicted of any offence constituted by any acts may, notwithstanding such acquittal or conviction, be subsequently charged with, and tried for, any other offence constituted by the same acts which he may have committed if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged.

(5) Nothing in this section shall affect the provisions of section 26 of the General Clauses Act, 1897 (X of 1897), or section 188 of this Code.

Explanation. The dismissal of a complaint, the stopping of proceedings under section 249, or the discharge of the accused is not an acquittal for the purposes of this section.

11. The appellant's case falls squarely within the ambit of sub-section 1. When he was tried for an offence under section 411 P.P.C. he could have also been tried for an offence under section 392 P.P.C. The exception contained in sub-section 4 could have applied, however, in the present case the learned magistrate who was empowered to try a case under section 411 P.P.C. was also competent to try a case under section 392 P.P.C. pursuant to Schedule II of the Cr.P.C. In view of the foregoing the trial of the appellant arising out of F.I.R. No. 308 was hit by the principles of double jeopardy.

12. Notwithstanding the above, even on merits the prosecution was unable to prove its case. Khurram Mustafa Suria's testimony at trial was based on hearsay. He said what he had been told by the watchman Ameer Nawas. No identification parade was held in which Ameer Nawas would have identified the appellant as being one of the three persons who robbed the shop. Recovery of even one tire was not effected in the present case. In the case for recovery of the 50 tires, the appellant was acquitted. No record was produced at trial that would establish that the complainant was indeed the owner of the tires he said were robbed. One would imagine that if the complainant was in the business of trading in new tires, he himself would have the exact specifications of the goods which were stolen. The police had all 3 accused in its custody yet apart from the tires, the rickshaw

and the Shehzore vehicle allegedly used by the accused in the robbery were also not recovered. In view of the foregoing observations, apart from the defence of double jeopardy, the prosecution was also not successful in proving its' case against the appellant beyond reasonable doubt.

13. In view of the above, the appeal is allowed and the appellant acquitted of the charge. He is present on bail. His bail bonds stand cancelled and surety discharged.

JUDGE