

# THE HIGH COURT OF SINDH, AT KARACHI

Criminal Appeal No. 465 of 2021

Criminal Appeal No. 479 of 2021

Criminal Jail Appeal No. 760 of 2022

Appellants: Shiraz @ Sherry, Waqar Ali @ Bantoo, Asad @ Chota and Adnan @ Addi through M/s. Maroof Hussain Hashmi, Musharraf Azhar and Muhammad Hanif Noonari, advocates

The State: Mr. Khadim Hussain Khuharo, Addl. PG for the State

Complainant: Farheen Fatima through Malik Waseem Hussain Awan, advocate

Date of hearing: 25.09.2023

Date of judgment: 02.10.2023

## J U D G M E N T

**IRSHAD ALI SHAH, J-** It is alleged that the appellants during course of robbery committed murder of Inam Nabi by causing him fire shot injury, for that they were booked and reported upon by the police. At trial, they denied the charge and the prosecution to prove the same, examined in all 19 witnesses and then closed its side. The appellants during course of their examination u/s 342 Cr.PC denied the prosecution's allegation by pleading innocence, they did not examine anyone in their defence or themselves on oath. On conclusion of trial, they were convicted under Section 397 r/w Section 34 PPC and sentenced to undergo rigorous imprisonment for 07 years with fine of Rs.100,000/- each to be paid to the legal heirs of the deceased as compensation; they were further convicted under section 302(b) r/w Section 34 PPC and sentenced to undergo imprisonment for life and to pay compensation of Rs.10,00,000/- each to the legal heirs of the deceased and in default in payment whereof to undergo rigorous imprisonment for 06 months; both the

sentences were directed to run consecutively with benefit of section 382(b) Cr.P.C, by learned I- Additional Sessions Judge, Karachi East vide judgment dated 07.08.2021, which they have impugned before this Court by preferring three separate Appeals.

2. It is contended by learned counsel for the appellants that the appellants being innocent have been involved in this case falsely by the police in a blind FIR, on the basis of defective identification parade and the evidence of the PWs being doubtful in its character has been believed by the learned trial Court without lawful justification, therefore, they are entitled to be acquitted by extending them benefit of doubt. In support of their contentions, they relied upon cases of *Riaz Mas alias Mithoo v. the State* (1995 SCMR 1730), *Tariq Pervez v. the State* (1995 SCMR 1345) and *Shafqat Mehmood and others v. the State* (2011 SCMR 537).

3. Learned Addl. PG for the State and learned counsel for the complainant by supporting the impugned judgment have sought for dismissal of the instant appeals by contending that they have committed murder of young man during course of robbery and prosecution has been able to prove its case against them beyond shadow of reasonable doubt. In support of their contentions, they relied upon case of *Muhammad Ali and others vs. The State and others* (2022 SCMR 2024).

4. Heard arguments and perused the record.

5. It was stated by complainant Mst. Farheen Fatima that on 31.01.2020, she and her brother Inam Nabi after exchanging money from Pakistan Money Exchange Centre at Grumandir were going to Meezan Bank near Garden Karachi for depositing the same to purchase ticket for Inam Nabi as he was intending to go to Vietnam, they were confronted by one person with fair complexion on motorcycle having a headphone, who then turned to Manikji street, in the meanwhile, she heard a fire shot report, then found three persons on two motorcycles, they intercepted her and her brother

Inam Nabi and then asked them to stop by hitting their motorcycle with the motorcycle of the deceased, she got up and started to run, one culprit followed her and tried to snatch her purse, her brother Inam Nabi came and grappled that person, who by taking pistol from his fold fired at him, which hit on his head. The rest of the culprits came and snatched purse from her and then made their escape good on their motorcycles. The person who shot at her brother was wearing a mask, it was removed during scuffle. The person who snatched purse from her was wearing helmet, which he took off at the time when he was snatching purse from her. The third person was wearing brown color jacket, he was taking rounds on his motorcycle, his face was open. All the accused then fled away, she shifted his brother to Civil Hospital Karachi. Her parents, uncle Saeed, PW Inam and others came at the hospital, his brother was declared dead by Dr. Abdul Jabbar and then her statement under Section 154 Cr.P.C was recorded, it was against unknown culprits with their faces muffled, it was recorded by ASI Nasir Hussain who later on incorporated the same into FIR. There is no disclosure by the complainant in her FIR with regard to the features of either of the appellant. Initial investigation of the case was conducted by I.O/ASI Raja Nasir Mehmood. It was stated by P.W/ PC Naveed that on the date of incident, when he was watching television a news clipping was flashed by ARY News channel, whereby one person was shown to have been killed during course of robbery at Solider Bazar, he shared such information with I.O/SIP Zafar Iqbal, who asked him to record video of such clipping, which he did. On asking he was fair enough to admit that in such video clip, the accused and deceased were not found scuffling with each other; no accused was seen firing at the deceased; nor any of the accused was found snatching purse from the complainant. It was stated by P.W/ASI Abdul Khaliq that on 27.02.2020, he was posted at PS Brigade, on such date the appellants during course of investigation in some other case, admitted before him to have committed the present incident. He

therefore, furnished such information to I.O/SIP Zafar Iqbal of PS Soldier Bazar, who came at PS Brigade; arrested the appellants formally in present case on 01.03.2020 and then took them to PS Soldier Bazar. It was stated by I.O/SIP Zafar Iqbal that on investigation the appellants also admitted before him to have committed the present incident. If for the sake of arguments, it is believed that the appellants have admitted their guilt before the above named police officers, even then such admission being extra-judicial in terms of Article 39 of Qanun-e-Shahadat Order 1984 could not be used against them as evidence. It is further stated by I.O/SIP Zafar Iqbal appellant Waqar @ Bantoo led to recovery of Rs.15000/- from his house being share of his money under robbery. He also secured the motorcycle allegedly used in commission of incident from the showroom of Mirza Taimur Baig with Rs.10,000/- which he allegedly deposited with him being installment of said motorcycle. It was stated by P.W Mirza Taimur Baig that such motorcycle was purchased from him by one Saqib on the guarantee of one Arsalan and its installment worth Rs.10,000/- was paid to him by appellant Adnan @ Addi. It was further stated by him that he had seen appellant Adnan @ Addi in a news clipping flashed by ARY News channel and CCTV footage of the incident. It is contrary to the evidence of P.W/PC Naveed, as per him none of the accused was found scuffling with the deceased in such news clipping. Saqib and Arsalan, who actually purchased the motorcycle on installments from PW Mirza Taimur Baig, which allegedly was used in commission of incident as per I.O/SIP Zafar Iqbal were let off by him. If they were innocent then they ought to have been made witness of the case at least to the recovery of such motorcycle; it was not done by him, for no obvious reason. It was further stated by I.O/SIP Zafar Iqbal that on 09.3.2020, he produced the appellants before the Magistrate having jurisdiction for their remand and identification parade through the complainant, they were remanded to judicial custody. Such application was entertained by the Magistrate concerned and

then identification parade of the appellant was directed to be conducted on 10.03.2020. By such act, the said Magistrate exposed the identity of the appellants. On 10.03.2020, the appellants were produced before Mr. Niaz Hussain the Magistrate having jurisdiction by I.O/SIP Zafar Iqbal for their identification parade, whereby they were identified with specific roles by complainant Mst. Farheen Fatima. The identity of the appellants by the complainant with specific role, in absence of disclosure of their descriptions by her in FIR of the incident is somewhat strange. Be that as it may, how the appellants were produced by the I.O/SIP Zafar Iqbal before the said Magistrate, on the date when their identification parade was to be conducted when they as per him were already remanded to judicial custody on 09.03.2020. No explanation to such mystery is offered by the prosecution. The identification parade was conducted on 9<sup>th</sup> day of the arrest of the appellants in the present case. No explanation to such delay is offered, therefore, such identification parade could reasonably be judged with doubt. The police official who actually arrested the appellants within jurisdiction of PS Brigade has not been examined by the prosecution; his examination was essential to prove the actual date of arrest of the appellants and recovery, if any, made from them. Evidence of P.W Ismail is only to the extent that he obtained the dead body of the deceased being his father, it is of little help to the case of prosecution. Evidence of PW Imran is only to the extent that he attested the memo of inspection of dead body; it hardly needs to be discussed. It was stated by PW Zeeshan Mustafa that soon after the incident police and rangers personnel came at the beauty parlor of his wife and obtained CCTV recording. There is nothing in his evidence, which may suggest the presence of the appellants in such CCTV recording. It was stated by P.W/SIP Amanullah Leghari that on asking of I.O/SIP Zafar Iqbal, he obtained CCTV recording relating to the incident from Command and Control Centre. By stating so, he was fair enough to say that faces of the culprits on two motorcycles were not identifiable. Evidence of P.W

Kamran Jeelani is to the extent that the complainant came with her brother Inam Nabi and exchanged money from Pakistan Currency, Grumandir Branch, Karachi. Evidence of P.W Irshad Ahmed is only to the extent of recovery of Rs.15000/- from the house of the appellant Waqar alias Manto; such recovery even otherwise was made from Mst. Arbeena wife of the said appellant. There is no forensic report of any of the CCTV recording produced in evidence. CDR report as per I.O/SIP Zafar Iqbal is not containing seal or signature of the authorized person. Nothing has been produced on record, which may suggest that any of the weapon allegedly secured from the appellants was found matched with the empty and live bullet secured from the place of incident of the present case. It is pleaded by appellants Waqar @ Banto and Asad @ Chota that their arrest was shown by the police on filing of petition by Mst. Roshan before this Court; copy of such petition is part of record. The plea of innocence raised by the appellants during course of their examination under Section 342 Cr.P.C as such could not be ignored in the circumstances of the case.

6. The discussion involved a conclusion that the prosecution has not been able to prove its case against the appellants beyond shadow of reasonable doubt and to such benefit they are found entitled.

7. In the case of *Sabir Ali alias Fauji vs. The State* (2011 SCMR 563), it has been held by the Apex Court that;

*"It is also settled principle of law that when witnesses giving no description of the accused previous to identification, such type of identification cannot be reliable. See Maula Dad's case (AIR 1925 Lah. 426). It is an admitted fact that in terms of contents of witnesses did not know the appellant and his co-accused before the occurrence. Identification parade was not held in accordance with law therefore, identification in court by the witnesses is also of no value in terms of law laid down in Sultan's case (PLD 1976 B.J. 10). It is also settled principle that identification test is of no value when description/feature of accused is not given in the contents of the F.I.R."*

It was further held that;

*“Witnesses of identification had various opportunities to see the accused prior to the holding of identification parade? which even otherwise having been held six months after the occurrence and nine days after the arrest of accused, had created many doubts about his identity.”*

8. In the case of *Muhammad Mansha vs. The State* (2018 SCMR 772), it has been held by the Apex court that;

*“4....Needless to mention that while giving the benefit of doubt to an accused it is not necessary that there should be many circumstances creating doubt. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of such doubt, not as a matter of grace and concession, but as a matter of right. It is based on the maxim, "it is better that ten guilty persons be acquitted rather than one innocent person be convicted".*

9. The case law which is relied upon by learned Addl. P.G and learned counsel for the complainant is on distinguishable facts and circumstances, therefore, same hardly supports the case of prosecution.

10. In view of the facts and reasons discussed above, the conviction and sentence awarded to the appellants by learned trial Court are set aside, consequently, they are acquitted of the offence for which they were charged, tried, convicted and sentenced by learned trial Court and shall be released forthwith, if not required to be detained in any other custody case.

11. The instant Criminal Appeals are disposed of accordingly.

JUDGE