

IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Appeal No. 423 of 2023

Appellant : Muhammad Ali,
through M/s. Shabana Sadiq &
Shaista Gul, Advocates.

State : through Ms. Seema Zaidi, Addl.
Prosecutor General, Sindh

Complainant : Nemo

Date of hearing : 01.10.2024

Date of Judgment : 01.10.2024

JUDGMENT

MUHAMMAD SALEEM JESSAR. J- By means of instant Cr Appeal the appellant has assailed the Judgment dated 22.08.2023 passed by learned IInd Additional Sessions Judge, Karachi South vide Sessions Case No. 519 of 2023, being outcome of FIR No. 1289 of 2022 U/s 392 and 397 PPC registered at P.S. Preedy Karachi, whereby accused Muhammad Ali son of Khadim Hussain was convicted for committing offence punishable U/S 392 read with section 397 P.P.C; and was sentenced to undergo rigorous imprisonment for seven (07) years and to pay fine of Rs.10,000/-; and in case of default to pay fine, to further undergo simple imprisonment for three (03) months. However, benefit under Section 382-B Cr.PC was extended to him.

2. Brief facts of the prosecution case, as disclosed in the FIR lodged by Complainant Muhammad Abdal son of Muhammad Sardar, are that he along with his mother had gone for shopping to Bohri Bazar on 27.12.2022 but during shopping they needed some more cash, therefore, he alone went to Bank Al Habib ATM Bohri Bazar Branch, Karachi while leaving his mother in

the market. He reached outside the ATM room where one person was already available inside ATM room. He stayed outside where one other person was also standing. The person using ATM inside the ATM room came outside, then complainant asked the person standing outside ATM room before him to go and use the ATM machine but he offered complainant to use ATM first, therefore, he entered ATM room and the other person standing outside also came inside the ATM room and directed the complainant on the point of pistol to keep quiet and withdraw cash through ATM and he snatched his mobile phone Samsung A12. All of sudden main shutter of the ATM room was locked from outside by pulling down it. Thereafter, police came there after few minutes and opened the door of ATM room and captured accused and secured pistol from his hand. Police also secured his mobile phone and ATM Card from the accused. Accused disclosed his name as Muhammad Ali s/o Khadim. Police prepared memo off arrest and recovery at the spot. Thereafter, police brought accused as well as the property to P.S. Preedy where they lodged FIR of instant case as well as connected case.

3. After usual investigation, I.O. submitted challan against accused for committing aforesaid offence. A formal charge was framed at Exh-2 to which accused did not plead guilty and claimed to face trial vide plea Exh-2/A.

4. In order to prove its case, prosecution examined P.W-1 complainant Muhammad Abdal at Ex.03, who produced memo of arrest and recovery, FIR and memo of site inspection as Ex.3/A to Ex.3/C. Prosecution further examined PW-2, arresting officer SIP Mehmood Ahmed, at Ex.04 who produced entry No.52, entry No.25, photocopy of FIR No.1290/2022, attested copy of FIR No.1290/2022 and memo of seizure of USB as Ex.4/A to Ex.4/E. Prosecution further examined PW-3 Investigating Officer SIP Riaz Alam at Ex.05, who produced entry No.35 & 38, entry No.11 & 35, entry No.95 & 63, letter to FSL, FSL report and photograph of pistol as Ex.5/A to Ex.5/F. All witnesses were cross examined by learned counsel for accused and then learned DDPP for State closed prosecution side vide statement Exh:06.

5. Thereafter, statement of accused under section 342 Cr. P.C. was recorded vide Exh-07 in which accused denied allegations of prosecution and stated that some altercation had taken place between accused and the complainant. He stated that the pistol which was allegedly secured from him,

was his licensed pistol and it can be seen in CCTV footage that SIP Mehmood Ahmed took ATM card and mobile phone from complainant Muhammad Abdal. He further stated that he has been falsely involved in this case by SIP Mehmood Ahmed and all P.Ws have deposed falsely. Accused pleaded his innocence in the case and produced photo copy of license of secured pistol as Exh-7/A.

6. However, he neither examined himself on oath as provided U/s 340(2) Cr.P.C., nor produced any witnesses in his defence.

7. After formulating the points for determination, recording evidence of the prosecution witnesses and hearing counsel for the parties, trial Court vide impugned judgment convicted the accused and awarded him sentence, as stated above. Against said impugned Judgment the appellant has preferred instant criminal appeal.

8. Learned counsel for appellant/convict submitted that no robbery, as alleged, was committed. According to him, in fact, the complainant, who was already inside the ATM booth, had consumed a lot of time, therefore, the persons standing in the queue outside the booth had lost their temperament and a quarrel took place, therefore the security guard deployed over there, got shutter down and called police. Learned counsel further submitted that the persons who were standing outside the ATM booth in queue, were not cited as witness by the IO and even the security guard as well as members/officials of the bank concerned were also not made mashir or witness in the case. The appellant was made victim by the police at the instance of complainant who seemingly was a tout of the police, therefore, the police did not conduct investigation properly. In support of their contention, learned counsel drew attention of the Court towards evidence of PW-03 at Exh. 05 namely SIP Riaz Alam (available at Page No. 65 of the paper book) where in his cross-examination, he had admitted that nothing incriminating was recovered from the appellant except his own belongings as well as alleged pistol. Both learned counsel submitted that the pistol, as shown, was foisted upon him at the instance of complainant only to strengthen the rope of their false case; hence, appellant has wrongly been made victim. They further submitted that the appellant is in custody and being young one, if the stigma of conviction is not removed, his entire future career will be put on stake/spoiled. Learned

counsel further submitted that there was a joint memo of arrest and recovery of both cases which too is illegal. They further submitted that the prosecution has failed to prove its charge against the accused, therefore, by allowing appeal in hand, appellant may be acquitted of the charges by extending benefit of doubt. In support of their contentions, learned counsel placed reliance upon the cases of (i) *ASFANDYAR and another Versus KAMRAN and another* (2016 SCMR 2084), (ii) *MUHAMMAD RAFIQUE, etc. Versus STATE and others* (PLJ 2011 SC 191), (iii) *MUHAMMAD ARSHAD alias ACHHA Versus STATE and another* (2023 P.Cr.L.J Note 8) and *NOOR MUHAMMAD Versus THE STATE and another* (2010 SCM R 97).

9. On the other hand, learned Additional P.G, Sindh appearing for the State, opposed the appeal and submitted that the appellant was caught red handed at the spot, therefore, is not entitled to the relief, sought for. She further submitted that appellant was the person who committed robbery. She; however, could not controvert the fact that nothing incriminating viz-a-viz. Cash was recovered from the possession of accused, as the complainant himself had deposed that he could not draw the amount from his account. Even, none from the bank officials including security guard were made witnesses or examined by the IO. during investigation.

10. I have heard learned counsel for the appellant as well as learned Additional P.G. appearing for the State and perused the material made available before me on the record with their assistance.

11. It seems that in order to prove its case, the material witnesses examined by the prosecution are; complainant / PW Mohammad Abdal, PW SIP Riaz Alam Awan who conducted investigation of the case and P.W. SIP Mehmood Ahmed who was arresting officer in the main case and was complainant in the offshoot case.

12. Complainant of main case namely, P.W. Muhammad Abdal had specifically deposed in his evidence that he did not withdraw the cash through ATM, therefore, nothing was robbed away from him; however, had deposed that accused allegedly pointed his pistol on him to keep quiet and snatched his mobile phone, meanwhile, main shutter of the ATM booth was locked down by the security guard. Later, police came there and captured the accused along with his pistol. Evidence of complainant reflects that nothing

was robbed away from him except mobile phone which being easily available can be foisted upon appellant. He had further admitted in his cross that neither the persons standing outside of the booth in queue nor security guard or any bank official were cited by the police as witness and mere word by the complainant has been shown against appellant, which cannot be relied upon while maintaining conviction against the appellant without corroboration or support.

13. P.W/SIP Riaz Alam Awan, who conducted investigation of both the cases, had simply deposed that he received accused as well as case property from the complainant and then he visited place of incident; besides, recorded statements of the PWs under Section 161 Cr.P.C. He did not succeed to collect any criminal case registered against the appellant; hence, there was no CRO except instant case. In his cross-examination, he had admitted that CCTV footages of the place of incident, as gathered from USB of concerned bank, which shown that SIP Mehmood Ahmed was disclosing about receiving information of fight between complainant and accused in ATM booth. Per his evidence, though the appellant allegedly had disclosed names of his companions namely Naeem @ Nomi and Ghulam Hussain; however, none of them was charge sheeted by the I.O or any effort was made to get them arrested, even no CDR was collected to believe that appellant allegedly had any nexus with those culprits and had planned for committing instant offence. He further admitted that he did not record statements of any bank official; however, admitted voluntarily that security guard of said bank namely Hazoor Bux was examined but he did not nominate to aforesaid two persons in his statement. Per evidence, the appellant was stated to be addict of Ice, Crystal and Heroin; however, I.O did not take him for checkup from any Government Hospital or to enquire from SIP Mehmood Ahmed to whether accused was in senses at the time of his arrest or was intoxicated/drunken.

14. P.W. SIP Mahmood was the arresting officer in the main case and was complainant in the connected case under Section 23(1)(a) S.A.A. According to him, on the day of alleged incident, he left P.S. under entry No.52 at 0750 hours for patrolling purpose on police mobile along with PC Nazar and DPC Nisar. During patrolling he received spy information that robbery was being committed in the ATM booth of Bank Al Habib, Bohri Bazar, Karachi. He reached at the pointed place at 1530 hours and found that shutter of ATM was

closed. Guard of the bank informed him that robber and one victim were inside the ATM booth and same had been closed. He opened the shutter and went inside. One of the persons standing in ATM booth disclosed his name as Abdar and while pinpointing to the other person standing inside the booth, told that said person was the dacoit and had robbed mobile phone and ATM card from Abdal on force of pistol. He further deposed that he searched accused and secured one pistol of 9mm bore from belt of his pant along with seven bullets duly loaded in the magazine. On further personal search of accused, he secured robbed mobile of Abdar from possession of accused. Four other mobile sets viz. Vivo, Infinix, Samsung & I-phone were too recovered from right side pockets of pant of accused. One purse containing Rs.3000/- was also secured from backside pocket of his pant. Three ATM cards of different banks were too recovered from the purse of accused. One CNIC of accused with his name as "Muhammad Ali s/o Khadim Hussain" was also recovered from the purse of accused. On enquiry accused too disclosed his name Muhammad Ali s/o Khadim Hussain. Accused failed to produce license of secured pistol on demand. He sealed pistol along with magazine and live bullets at the spot. He also seized and secured rest of the case property recovered from accused. He prepared such memo at the spot in presence of mashirs Abdar and PC Nazar Hussain. He then arrested accused for the offence u/s 392/397 PPC. The accused was brought to P.S. where private complainant got registered FIR No.1289/2022 The said witness also registered separate FIR bearing No.1290/2022 u/s 23(1)(a) S.A.A. against accused. Thereafter, he deposited case properties with Head Mohrar of P.S. and confined the accused in police lockup. I.O. recorded his statement u/s 161 Cr.P.C. He further deposed that on 28-12-2022 he along with I.O. and PC Nazar Hussain went to Bank Al Habib and I.O. collected CCTV footage of alleged incident in USB in his presence and in presence of PC Nazar Hussain. The trial Court appended a Note to the effect that all cards are in the name of accused.

15. In his cross-examination he admitted that in the video of CCTV footage, he is shown to have been disclosing that he had received information regarding quarrel between two persons in ATM booth of Bank Al Habib, therefore, he had directed to down the shutter of the ATM. He further admitted that in the video it can be seen that he had collected ATM of complainant from his own hands while entering in the ATM booth after

opening its shutter. According to him, there was rush of general public at the door of ATM booth when he reached there. He further admitted that there is no witness of alleged incident or fight between the complainant and accused inside the ATM booth except complainant himself. He categorically admitted that no cash was debited from the ATM card of the complainant at the time of alleged incident. According to him, he is the author of both FIRs, so also is the mashir and witness in the case. He further admitted that ASI Tufail was duty officer of the P.S. when he brought the accused at P.S. along with case properties with private complainant. According to him, his name and signature are visible in the FIRs being author of those FIRs and that the same do not contain signature of duty officer. He specifically admitted that he had failed to produce any authority or permission to lodge FIRs in presence of duty officer. He also admitted that he is mashir, witness, so also author of both FIRs.

16. It is worthwhile to point out at this juncture that prosecution has miserably failed to examine the material witnesses in this case. Admittedly, the I.O. had recorded statement of the Guard under Section 161 Cr.P.C, of the bank namely, Huzoor Bux and, in fact, he was the person who had closed down the shutter of the ATM Booth at the time of alleged incident. However, very strangely, said material witness was not examined before the trial Court.

17. It is also admitted position that at the time of alleged incident several private persons had gathered at the place of incident i.e. outside the ATM Booth, so also there were several employees of the bank available inside the bank, but neither any private person, nor even any of the bank employees was associated as mashir or witness of the case. In this view of the matter, in the light of Article 129(g) of the Qanoon-e- Shahadat Order, 1984, strong inference / presumption could be gathered that had said witnesses been examined, they would not have supported the case of prosecution.

18. In this connection, reference may be made to a decision of Honourable Supreme Court given in the case of *Abdul Ghani Vs. The State* reported in 2022 SCMR 2121, wherein a Full Bench of Honourable Supreme Court held as under:

"Thereafter, according to Noor Ullah Khan, S.I. (PW-4) on 08.06.2011 he sent the sample parcels to the office of Chemical Examiner but according to the report of Chemical Examiner the

sample parcels were delivered there by one Head Constable No. 25 on 10.06.2011 but the said Head Constable was not produced by the prosecution during the trial. The learned State Counsel could not explain as to why the said Head Constable was not produced to confirm the safe transmission of the sample parcels to the office of Chemical Examiner so an adverse presumption under Article 129(g) of the Qanun-e-Shahadat Order, 1984 can be drawn against that person that he is not supporting the prosecution case."

19. In the case of *Bashir Ahmed alias Manu vs. The State* reported in 1996 SCMR 308 it was held by Honorable Supreme Court that *despite presence of natural witnesses on the spot they were not produced in support of the occurrence an adverse inference under Article 129(g) of Qanun-e-Shahadat Order, could easily be drawn that had they been examined, they would not have supported the prosecution version.* In another case reported as *Mohammad Shafi vs. Tahirur Rehman (1972 SCMR 144)* it was held that *large number of persons had gathered at the place of occurrence but prosecution failing to produce single disinterested Witness in support of its case, therefore no implicit reliance could be placed on the evidence of interested eye-witnesses.*

20. So far as alleged recovery of pistol from possession of the accused / appellant is concerned, it may be observed that despite fact that accused was allegedly holding the pistol and the accused as well as the complainant remained in the ATM for about 15 minutes but the accused did not use the crime weapon. Not only this, even after the police had opened the shutter of the ATM room, even then the accused did not use the said crime weapon in order to make his escape good. Even otherwise, now it is well settled that *recovery of weapon by itself is only a corroboratory piece of evidence which did not have any decisive role.* In this connection, reference can be made to the case of *Ajmal and others Vs. The State and others* reported in 2016 Y L R 623 [Lahore] wherein it was held as under:

"Even otherwise law is quite settled on the point that an accused cannot be sentenced only on the ground that some recovery has been effected from him because at the most it can be considered only one incriminating material against the accused which is corroboratory in nature and to prove the guilt of an accused the prosecution has to produce a compact and concrete composition of evidence which is missing in this case qua the culpability of Aamir alias Hamid appellant."

21. In another case reported as *Khush Bar Vs. The State*, reported in 2018 P.Cr.L.J.N. 63 Gilgil-Biltistan Chief Court it was held that *recovery of weapon*

by itself is only a corroboratory piece of evidence which did not have any decisive role.

22. As stated above, in the charge sheet filed by the I.O. in this case, it was written that accused had disclosed names of his friends / accomplices as Naeem @ Nomi and Ghulam Hussain, despite that he did not place names of Naeem @ Nomi and Ghulam Hussain in column of challan / charge sheet, Even there is no material available on the record that the I.O. had submitted any report whereby the case against the above said two accomplices was recommended for disposal in 'C' Class etc. Similarly, he did not collect CDR or any other evidence against those two accomplices regarding their availability at the place of incident at the time of alleged incident, nor he had collected any information from NADRA about the names of said two accomplices. This also create serious doubts in the prosecution story.

23. Besides, there are also other lacunas in the prosecution case, such as nothing incriminating was recovered from the appellant except his own belongings and even the alleged pistol recovered from him was his licenced pistol which was returned to him vide impugned judgment; that there was a joint memo of arrest and recovery in both cases which too is illegal; that in the offshoot case under Arms Act, the accused / appellant has already been acquitted; that SIP Mahmood was the complainant in the offshoot case under the Arms Act; however, at the same time he acted as mashir and witness in the case which is also not permissible; that there seems to be violation of Section 103 Cr.P.C. as despite there being several independent persons available, no person from the locality was associated as mashir etc.

24. The accumulative effect of above said admissions made by the complainant and other prosecution witnesses in their respective cross-examinations, as well as other lacunas in the prosecution case is; that doubts have been created in the prosecution case, the benefit whereof must be extended to the accused.

25. It is well settled principle of law that the prosecution is bound under the law to prove its case against the accused beyond any shadow of reasonable doubt. It has also been held by the Superior Courts that conviction must be based and founded on unimpeachable evidence and certainty of guilt, and any doubt arising in the prosecution case must be resolved in favour of the

accused. In instant case prosecution does not seem to have proved the allegations against the accused/appellant by producing unimpeachable evidence, thus doubts have been created in the prosecution version. In the case reported as Wazir Mohammad Vs. The State (1992 SCMR 1134) it was held by Honourable Supreme Court as under:

“In the criminal trial whereas it is the duty of the prosecution to prove its case against the accused to the hilt, but no such duty is cast upon the accused, he has only to create doubt in the case of the prosecution.”

26. In another case reported as Shamoona alias Shamma Vs. The State (1995 SCMR 1377) it was held by Honourable Supreme Court as under:

“The prosecution must prove its case against the accused beyond reasonable doubts irrespective of any plea raised by the accused in his defence. Failure of prosecution to prove the case against the accused, entitles the accused to an acquittal.”

27. It is also now well settled that the accused is entitled to be extended benefit of doubt as a matter of right and not as a grace or concession. In the present case, there are various admissions in the evidence of the prosecution witnesses, so also certain discrepancies and lacunas in the prosecution case which create doubts and put dents in the prosecution case. Even an accused cannot be deprived of benefit of doubt merely because there is only one circumstance which creates doubt in the prosecution story.

28. In this connection, reference may be made to a recent case of *Ahmed Ali and another Vs. The State* reported in 2023 SCMR 781, wherein a Full Bench of Honourable Supreme Court has held as under:

“12. Even otherwise, it is well settled that for the purposes of extending the benefit of doubt to an accused, it is not necessary that there be multiple infirmities in the prosecution case or several circumstances creating doubt. A single or slightest doubt, if found reasonable, in the prosecution case would be sufficient to entitle the accused to its benefit, not as a matter of grace and concession but as a matter of right. Reliance in this regard may be placed on the cases reported as Tajamal Hussain v. The State (2022 SCMR 1567), Sajjad Hussain v. The State (2022 SCMR 1540), Abdul Ghafoor v. The State (2022 SCMR 1527 SC), Kashif Ali v. The State (2022 SCMR 1515), Muhammad Ashraf v. The State (2022 SCMR 1328), Khalid Mehmood v. The State (2022 SCMR 1148), Muhammad Sami Ullah v. The State (2022 SCMR 998), Bashir Muhammad Khan v. The State (2022 SCMR 986), The State v. Ahmed Omer Sheikh (2021 SCMR 873), Najaf Ali Shah v. The State (2021 SCMR 736), Muhammad Imran v. The State (2020 SCMR 857), Abdul Jabbar v. The State (2019 SCMR 129), Mst. Asia Bibi v. The State (PLD 2019 SC 64), Hashim Qasim v. The State (2017 SCMR 986), Muhammad Mansha v. The State (2018 SCMR 772), Muhammad Zaman v. The State (2014 SCMR 749 SC), Khalid Mehmood v. The State (2011 SCMR 664), Muhammad Akram v. The

State (2009 SCMR 230), Faheem Ahmed Farooqui v. The State (2008 SCMR 1572), Ghulam Qadir v. The State (2008 SCMR 1221) and Tariq Pervaiz v. The State (1995 SCMR 1345)."

29. In view of above, it can safely be held that prosecution has not succeeded in proving its case against the accused beyond shadow of reasonable doubt.

30. For the foregoing reasons, by a short order passed on 01.10.2024 instant Criminal Appeal was allowed. Consequently, judgment dated 22.08.2023 passed by learned IInd Additional Sessions Judge, Karachi South vide Sessions Case No. 519 of 2023 (*re-the State Versus Muhammad Ali*), being outcome of FIR No. 1289 of 2022 for the offence punishable to Sections 392 and 397 PPC, registered at P.S. Preedy Karachi, was set-aside. Resultantly, appellant Muhammad Ali son of Khadim Hussain was acquitted of the charges by extending benefit of doubt to him. He was in custody, therefore, was directed to be released forthwith, if his custody was not required in any other case.

JUDGE

Karachi