IN THE HIGH COURT OF SINDH, CIRCUIT COURT SUKKUR

Criminal Jail Appeal No. S-44 of 2024

Appellants i. Younis son of Abdul Aziz Katohar ii. Dur Muhammad son of Sardar Bux Katohar iii. Inayatullah son of Hamid Katohar & iv. Zulfiqar son of Hamid @ Zaheer Katohar	:	through Mr. Noor Hassan Malik, Advocate
The State	:	through Mr. Khalil Ahmed Maitlo, Deputy Prosecutor General, Sindh along with I.O/Inspector Mehar Ali Shah (Retd)
Complainant Muhammad Iqbal son of Allah Bux	:	In person
Date of hearing	:	11.11.2024
Date of judgment	:	11.11.2024

JUDGMENT

MUHAMMAD SALEEM JESSAR. J- By means of instant Cr. Jail Appeal the appellants have assailed Judgment dated 22.04.2024 passed by IV-Additional Sessions Judge Special / GBV Court, Khairpur in Sessions Case No. 646 of 2017 (re: The State Versus Younis and others) being outcome of F.I.R. No.164/2017, registered at PS Shah Abdul Latif, Khairpur under Section 397 PPC, whereby accused / appellants namely, Younis Katohar, Dur Muhammad Katohar, Inayatullah, and Zulfiqar Katohar were convicted for offence punishable under Section 397 PPC read with Section 149 PPC and were sentenced to suffer rigorous imprisonment for seven (07) years and to pay fine of Rs.50,000/-(Rupees fifty thousand only) each, and in case of

default to suffer S.I. for three months more. All above said accused were also convicted for an offence punishable u/s 337-A (i) PPC read with Section 149 PPC for causing injuries to P.W. Amir Bux and were sentenced to suffer R.I. for two (02) years and to pay *Daman* of Rs.10,000/- (ten thousand only) each to be paid to the injured. They were also convicted for the offence punishable U/s 337-L(2) PPC and were sentenced to pay Daman of Rs.10,000/- (ten thousand only) each to be paid to injured Amir Bux. All sentences were ordered to run concurrently. However, the accused were extended benefit of Section 382-B Cr. P.C.

2. Brief facts of the prosecution case are; that complainant Muhammad Iqbal was running a Suzuki vehicle on rent basis and his brother Ameer Bux used to sell fruits in his village. On 04.07.2017, complainant Muhammad Iqbal, his brother Ameer Bux and nephew Nazir Ahmed son of Ameer Bux were going to Khairpur on a motorcycle for purchasing fruits. At about 05:00 a.m. when they reached the banana orchard of one Mir Jani, they saw six persons with weapon and lathies standing over there, who were identified as accused Inayat armed with TT pistol, Zulfiqar with lathi, Younis alias Younoo with lathi, Dur Muhammad with lathi and two unidentified persons with pistols. The accused signaled complainant party to stop, whereupon complainant tried to run away on his motorcycle but accused Zulfiqar caused lathi blow to PW Ameer Bux. Accused Younis threw some wood on the road and complainant party fell down from the motorcycle. Accused Inayat tried to snatch keys of motorcycles from the complainant but the complainant threw the same, whereupon accused persons caused lathi blows to PWs Ameer Bux and Nazir Ahmed. Accused Inayat snatched Rs.200/- from the complainant. Accused Younis snatched Rs.5000/- from PW Ameer Bux, while accused Dur Muhammad snatched Rs.200/- from PW Nazir Ahmed. Accused Inayat and Zulfiqar also committed dacoity and took away motorcycle of complainant party. Rest of the accused also fled away. Thereafter, PW Ameer Bux was brought at PS, wherefrom he was referred to hospital alongwith letter. Thereafter, injured Ameer Bux was shifted to Civil Hospital, Khairpur for medical examination, treatment and certificate. Thereafter, complainant lodged FIR.

3. After completing usual investigation, the Investigation Officer submitted challan showing accused Younis and Dur Muhammad in custody

while remaining accused as absconders, however, thereafter they were admitted to bail. Thereafter, learned Judicial Magistrate sent up the case to the Court of Sessions Judge, Khairpur, which was marked to the trial court for disposal according to law.

4. A formal charge against accused was framed as Ex.2, to which they pleaded not guilty and claimed trial vide their pleas Ex.3 to 6.

5. In order to prove its case, prosecution examined PW 1, PC Qurban Ali Jamali at Ex.7, who is mashir of arrest of accused Muhammad Younis and Dur Muhammad and produced mashirnama of arrest as Ex.7/A. PW 2 complainant Muhammad Iqbal was examined at Ex.8, who produced FIR as Ex. 8/A. PW 3 Nazir Ahmed Buriro was examined at Ex.9, whereas PW 4 Ameer Bux Buriro was examined at Ex.10. PW 5 Inspector Mehar Ali Shah was examined at Ex.11, who produced mashirnama of site inspection and relevant roznamcha entries as Ex.11/A to 11/C. PW 6 Dr. Khoub Chand was examined at Ex.12, who produced police letter, provisional MLC of injured Ameer Bux, X-Ray plates and Radiologist's report as Ex.12/C and final MLC of injured as Ex.12/D. PW 7 Ghulam Qasim Buriro was examined at Ex.13, who produced mashirnama of noting injuries of injured as Ex.13/A. PW 8 SIP Ashraf Ahmed Phulpoto was examined at Ex.14. Although his cross examination was treated as nil due to absence of learned defense counsel, however, consequent upon grant of application (Exh.16) for recalling him, this witness was also cross examined. PW 9 ASI Akhtar Hussain Khaskheli was examined at Ex.15, who produced relevant roznamcha entries regarding lodging FIR as Ex.15/A. Learned ADPP, appearing for the State, then closed prosecution side vide his Statement Ex.17.

6. Thereafter, statements of accused as provided U/S 342 Cr. PC were recorded at Ex.18 to 21, wherein they denied the allegations of prosecution and prayed for justice. However, they did not examine themselves on Oath U/S 340 (2) Cr. P.C nor produced any witness in their defence. Accused in their respective statements, submitted that they are innocent and have been falsely implicated in the case by complainant because one Bilawal (brother of accused Younis) had filed a case against the police; therefore, police had involved the accused in this false case.

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 and sentenced the appellants vide impugned judgment, as stated above, against which the appellants have preferred instant appeal.

8. I have heard the arguments advanced by learned counsel for the appellants and learned DPG appearing for the State. Complainant Mohammad Iqbal, who was present in person, was also heard and the material available on the record was perused.

9. Learned counsel for the appellants submitted that though the appellants were nominated in FIR with specific role of committing robbery of motorcycle, cash as well causing injuries to PW Nazeer Ahmed and Ameer Bux, however, nothing incriminating connecting the appellants with the commission of alleged offence was recovered by the police from them. He, therefore, submitted the prosecution has failed to establish its charge against them hence, doubt has arisen which goes in favour of the accused. In support of his contentions he placed reliance upon the cases of Hubdar alias Huboo Jagirani and others v. The State (2024 YLR 599), Niaz Ahmed Mirani v. State (2024 YLR 726), Muhammad Asif alias Ashoo v. State (2024 YLR 1217) and unreported judgment dated 15.12.2022 passed by this Bench at Hyderabad in Cr. Appeal No.S-185 of 2021 and S-196 of 2021 and another unreported judgment dated 27.03.2023 Cr. Appeal No.S-55 of 2021 passed by this Court at Circuit Court Larkana. He lastly prayed for grant of appeal.

10. Learned Deputy Prosecutor General appearing for the State, opposed the appeal on the ground that appellants are nominated in the FIR besides, the PWs including injured have fully supported the case of prosecution which has also been corroborated by medical evidence. He, therefore, prayed for dismissal of the appeal. The IO present in Court, however, admitted that no robbed article or offensive weapon was secured from the appellants; however, they were challaned on the basis of statements of PWs as well Medico-Legal Officer.

11. Complainant Muhammad Iqbal Buriro, present in person, submitted that due to misunderstanding the appellants were arrayed as accused; however, they are not real culprits hence, he has no objection if impugned

judgment is set-aside, appeal is allowed and they are acquitted of the charge. In support of his submissions he as well as injured PW Ameer Bux have sworn in their respective affidavits before this Court on 07.11.2024 which were placed on record by the Counsel through his statement dated 07.11.2024.

12. From perusal of the evidence of prosecution witnesses, it seems that there are some material contradictions in their evidence. Besides, they have also made certain admissions which are injurious to the prosecution case.

13. According to complainant Mohammad Iqbal and injured P.W. Ameer Bux, at the time of alleged incident, accused lnayatullah was armed with pistol whereas rest of the accused were holding lathis. This assertion has been contradicted by P.W. Nazir Ahmed, who also claims to have witnessed the incident. According to him, accused Inayatullah as well as **one unidentified accused were armed with pistols** whereas rest of the accused were holding lathis. Likewise, according to complainant and P.W. Nazir Ahmed, after alleged incident accused Inayat and Zulfiqar ran away on the snatched motorcycle, whereas P.W. Amir Bux deposed, ***"All accused went on same motorcycle which was snatched from us."***

14. Besides, the complainant has made self-contradictory statement in the F.I.R. and his evidence. According to him, they reached the police station, after the alleged incident, at 5.30 a.m., however, in his cross-examination he categorically admitted, ***"We reached in the hospital at about 5.30 am."*** It seems to be unbelievable that after reaching the police station and obtaining medical letter from the P.S., which also would have consumed some time, they reached the hospital at the same time i.e. 5.30 a.m. This puts dent in the prosecution case.

15. PW. Nazir Ahmed in his cross-examination stated, ***"I remained one week in hospital."*** However, neither he himself in his examination in chief, nor any other witness deposed about such fact.

16. Injured P.W. Amir Bux in his examination in chief deposed, ***"My brother tried to run but accused Zulfiqar caused lathi to me and I became unconscious."*** Complainant has also made such statement in his evidence to the effect that when he tried to run away on motorcycle, accused Zulfiqar tried to inflict lathi blow to him but he rescued himself and the lathi blow hit to

P.W. Amir Bux. Now, it is not understandable that when at the very initial stage of alleged incident P.W. Amir Bux went unconscious, then as to how he has deposed, ***"Accused Younis robbed Rs.5000/- from me."*** How could in a state of unconsciousness, he could witness that accused Younis had robbed Rs.5000/- from him. Besides, in his cross-examination he, in the first instance, deposed that his statement under Section 161 Cr. P.C. was recorded in the hospital; however, in the same breath he took somersault and said that the same was recorded at police station. Above contradictions and lacunas create serious doubts about the veracity and credibility of the prosecution witnesses.

17. Apart from above, from the contents of the F.I.R. it appears that delay has occurred in the lodging of F.I.R. In the F.I.R. the date and time of the alleged incident has been shown as '4.7.2017 at 0500 hour (05.00 AM)' whereas the F.I.R. was lodged on the same day but at '1400 hours (2.00 P.M.)' i.e. after a delay of nine hours. No explanation has been offered for such delay and it is simply mentioned that on the arrival of complainant at P.S. the F.I.R. was registered.

18. Now, from the evidence of complainant and other P.Ws it seems that soon after the alleged incident, they reached the police station. It is not understandable that when they had reached the police station immediately after the alleged incident, then what compelled them from not lodging the F.I.R. at that time. Even, presuming for the sake of argument, that when they reached the police station, they were referred to hospital for examination and medical treatment of the injured as well as report in respect of the injuries sustained by him, even then as per medical certificate they had reached the hospital at 5.30 a.m. when the injured was examined by the doctor. Assuming, the time consumed in the medical examination was one or even two hours, even then the complainant party would have left the hospital at about 7.30 a.m. and then complainant could have proceeded to police station for lodging of F.I.R. It is not understandable as to why he waited till 2.00 P.M. and lodged the FIR after about 9 hours. It seems that the Provisional Medical Certificate was issued on 06.7.2017 and the final certificate was issued on 10.7.2017, therefore, the complainant also cannot take a ground for such delay that he was waiting for issuance of medical certificates.

19. In the circumstances, it appears that there is inordinate unexplained delay in lodging of F.I.R. Needless to emphasize that due to inordinate and unexplained delay in lodging the FIR, the possibility of consultation and deliberation for implication of the accused cannot be ruled out.

20. On the point of delay in lodging FIR, the Hon'ble Supreme Court in the case of Ayub Masih v. The State (PLD 2002 SC 1048) held as under:-

> ***"The unexplained delay in lodging the F.I.R. coupled with the presence of the elders of the area at the time of recording of F.I.R. leads to the inescapable conclusion that the F.I.R. was recorded after consultation and deliberation. The possibility of fabrication of a story and false implication thus cannot be excluded altogether. Unexplained inordinate delay in lodging the F.I.R. is an intriguing circumstance which tarnishes the authenticity of the F.I.R., casts a cloud of doubt on the entire prosecution case and is to be taken into consideration while evaluating the prosecution evidence. It is true that unexplained delay in lodging the F.I.R. is not fatal by itself and is immaterial when the prosecution evidence is strong enough to sustain conviction but it becomes significant where the prosecution evidence and other circumstances of the case tend to tilt the balance in favour of the accused."***

21. In the case of Sabir Hussain V. The State (2022 YLR 173), it was held as under:

> ***"9. The complainant has knowledge about missing of the deceased on 13.07.2019, but despite that, the complainant did not lodge the report, and he lodged the report on 16.07.2019 at 10:30 a.m. Nothing came on record about lodgment of the report of missing of the deceased by the complainant in Levies Thana. It has also come on record that the dead body of the deceased was recovered from the water bank of the Madrasa on 16.07.2019 at 6:30 a.m., and the FIR was lodged on the same date at 10:30 a.m., with a delay of four hours from the recovery of dead body of the deceased. The lodgment of the FIR with delay by the complainant create reasonable doubt in the prosecution case. Reliance in this behalf is placed in the case of Mehmood Ahmed and 3 others v. The State and another (1995 SCMR 127)."***

22. There also seems to be violation of Section 103 Cr. P.C. while effecting arrest of the accused Younis and Dur Mohammad Mohammad. Both the mashirs of arrest of the said accused are police officials namely, P.C. Qurban Ali Jamali and PC Ashraf Ali Shah. From the evidence of I.O. Inspector Meher Ali Shah, it seems that he has categorically admitted in his cross-examination that on receiving spy information about the presence of accused persons, they proceeded towards the pointed place in a **private car** which was arranged by the complainant. He further admitted that said mashirs were his subordinates

and that when he alongwith complainant reached the pointed place, the mashirs had reached there even prior to their arrival. Mashir PC Qurban Ali in his evidence admitted, ***"It is correct to suggest that SIP Syed Mehar Ali Shah received prior spy information but no private mashir was associated by him."***.

23. There is no explanation having been offered by the prosecution that when the I.O. had got spy information in advance, then as to why he did not arrange two independent mashirs of the locality for witnessing the process of arrest of the aforesaid two accused, as required under Section 103 Cr. P.C. Needless to emphasize said two mashirs being subordinates to the Investigating Officer, it can hardly be expected from them that they would depose against the investigation carried out by their superior.

24. In this view of the matter, it is clear that the mandatory requirement as envisaged under Section 103 Cr. P.C. was not fulfilled. The purpose of associating independent mashirs of the locality is to ensure the transparency of the recovery process. Needless to emphasize that in view of provisions of section 103 Cr. P.C. the officials making searches, recoveries and arrests, are reasonably required to associate private persons, more particularly in those cases in which presence of private persons is admitted, so as to lend credence to such actions, and to restore public confidence. This aspect of the matter must not be lost sight of indiscriminately and without exception. Only cursory efforts are not enough merely in order to fulfill casual formality, rather serious and genuine attempts should be made to associate private mashirs of the locality.

25. In the case reported as State Vs. Bashir and others (PLD 1997 S.C. 408) Honourable Supreme Court held as under:

> *"As regards above second submission of Mr.M.M. Aqil, it may be observed that it has been repeatedly held that the requirements of section 103 Cr.P.C. namely, that two Members of the public of the locality should be Mashirs of the recovery, is mandatory unless it is shown by the prosecution that in the circumstances of a particular case it was not possible to have two Mashirs from the public."*

26. In the case of *Sarmad Ali* Vs. *The State* reported in 2019 MLD 670, relied upon by learned counsel for the appellant, it was observed *that the place of incident was thickly populated area but no independent person from the said area was*

called to act as mashir of recovery and, therefore, it was held that the prosecution case suffered from lack of independent evidence regarding recovery of the pistol.

27. Yet in another case reported as Yameen Kumhar Vs. The State (PLD 1990 Karachi 275) this Court after discussing various case-laws on this point held as under:

> ***"A perusal of the aforestated authorities and a catena of judgments of various High Courts which we have not quoted here clearly lay down that Section 103 Cr. P.C. is to be applied to recovery, search and arrest made during investigation of a crime. It has been termed as mandatory but not absolute and its non-compliance in certain circumstances will not render search and recovery illegal. However, where during investigation of a crime recovery is made from any inhabited locality compliance with section 103 must be made. It cannot be ignored or brushed aside on the whims and caprices of the Investigating Officer except on well-founded grounds and in exceptional cases. If recovery has been made in contravention of section 103, it is the duty of the prosecution to explain it and give valid and reasonable explanation for such digression. Recovery is an important piece of evidence which is to be proved by disinterested, independent and respectable witnesses. Such witnesses should be of the locality if the circumstances of the case permit. Section 103 embodies rule of prudence and justice. It is intended to eliminate and guard against 'chicanery' and 'concoction', to minimise manipulation and false implication. It is for these reasons that there is a consensus in the Superior Courts that compliance with section 103 should not be bypassed nor that its applicability be restricted to proceedings under Chapter VII only. The principles of section 103 have been applied and practised during investigation in crimes for so long and with such regularity and force that any attempt to restrict it to proceedings under Chapter VII only will unsettle the settled law.***
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> ***The provisions of Chapter VII make it clear that they relate to the search of any place but it cannot be restricted only to house or a closed place, it can be an open place, open area, a. playground, field or garden from where recovery can be nude for which search is conducted. Although in strict sense the provisions of section 103 are restricted to searches under Chapter VII of Cr. P.C. it has become a practice to apply it to all recoveries made by the Police Officers while investigating any crime. The rules of justice enunciated by section 103 are so embedded in our criminal, jurisprudence and so universally accepted that in all criminal cases two mashirs are always cited for recovery and reliance is placed on these witnesses in the ordinary course provided they are independent, respectable and inhabitants of the locality. The residence of the mashirs becomes relevant depending on the facts of the case. The emphasis should be on respectability."***

28. In view of aforesaid factual and legal position, the arrest of accused/appellants Younis and Dur Mohammad has lost its evidentiary value.

29. It is also noteworthy that during pendency of instant appeal, the complainant and injured P.W. Amir Bux have sworn their personal affidavits stating therein they have no objection if instant appeal is allowed and the appellants are acquitted. Even the complainant at the time of hearing of this appeal, stated that due to misunderstanding the appellants were arrayed as accused; however, they are not real culprits and he raised no objection if this appeal is allowed and the accused / appellants are acquitted of the charges. Since, nothing incriminating has been shown to have been recovered or was produced by the appellants during investigation, hence, main offence in terms of Section 397 PPC could not be termed to have been established more particularly when the I.O as well as complainant have specifically stated that nothing was recovered from them and they were challaned upon the statements of prosecution witnesses, that too is dubious as the complainant stated before the Court that he had implicated the appellants due to misunderstanding and therefore, they are not real culprits of the offence. As far as, application of Section 337-A(i) & 337-L(ii) PPC read with Section 149 PPC are concerned, the offence in terms of the injury(ies) allegedly sustained by the complainant party, are compoundable and the main offence in terms of Section 397 PPC has not been established, therefore, following the dictum laid down by the superior Courts, the subsequent offence should be termed as compounded. Reference can be had from the case of *AASHIQUE ALI Versus The State (PLD 2008 Karachi 420)*.

30. It is a 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 the 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****."*

31. In another case reported as Shamoon 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****."*

32. Needless to emphasize the well settled principle of law that the accused is entitled to be extended benefit of doubt as a matter of right and not as a grace or concession. In present case, there are various admissions in evidence of the prosecution witnesses which created 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. Thus, in my view, the prosecution has miserably failed to prove its charge against the appellants beyond a reasonable shadow of doubt. It is settled law that whenever even a slightest doubt arise out of the prosecution case/evidence, the benefit of the same must be extended in favour of the accused. In the case reported as Tariq Pervaiz vs. The State 1995 SCMR 1345 the Honourable Supreme Court held as under :-

> ***"The concept of benefit of doubt to an accused person is deep-rooted in our country. For giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right.***

33. On 11.11.2024, after hearing learned counsel for the parties, instant Appeal was allowed and impugned judgment dated 22.04.2024 penned down by learned Additional Sessions Judge-1V, Khairpur Mirs vide Sessions Case No.646 of 2017 Re-State Younis and others arising out of Crime No.164 of 2017 registered with Police Station, Shah Abdul Latif Khairpur Mir's under Section 397 PPC was set-aside. Appellants Younis, Dur Muhammad, Inayatullah and Zulfiqar were acquitted of the charges. The appellants, who were in custody, were directed to be released forthwith if their custody is no longer required by the jail authorities in any other criminal custody case. Above are the reasons for the said short order.

JUDGE

Approved for Reporting