

IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Appeal Nos. 257 & 258 of 2023.

Appellant in both : Kamal Khan son of Israr Ahmed,
Appeals Through Mr. Habib ur Rehman Jiskani, Advocate

Respondent : The State
Through Mr. Muhammad Mohsin Mangi, APG

Date of short order : 09.05.2025

Date of Judgment/Reason : 14.05.2025

JUDGMENT / REASONS

KHALID HUSSAIN SHAHANI, J. – By this common judgment, I intend to decide both captioned appeals preferred by the appellant Kamal Khan, which arise out of the judgment dated 28.03.2023 passed by the learned Xth Additional Sessions Judge, Karachi South in Sessions Case Nos. 1001/2022 & 1002/2022 arising out of FIR Nos. 75 & 76 of 2022 registered at Police Station Baloch Colony, offence under Sections 393, 397, 337-F(iii), and 34 PPC & 23-1(a) Sindh Arms Act, 2013 respectively. The learned trial Court convicted the appellant and sentenced him as under: -

- i. *For offence under section 397 PPC to suffer R. I. for 07 years with benefit of section 382-B Cr.P.C.*
- ii. *For offence under Section 337-F(iii) PPC to suffer R.I. for 03 years as Tazir and liable to pay Daman of Rs.50,000/- to injured Muneeb ur Rehman.*
- iii. *For offence under section 23-1(a) Sindh Arms Act to suffer R.I for 07 years and to pay fine of Rs.20,000/-. In default, he shall suffer S.I. for 02 months with benefits of section 382-B Cr.P.C.*

2. The facts giving rise to the instant appeals, as stated in the FIR, are that on 25.02.2022 at about 10:00 p.m., the complainant Saeed Ahmed along with his sons Muneeb-ur-Rehman and Aneeb-ur-Rehman was present at his shop “Muhammadi Wood Works” located in Manzoor Colony, when three unknown armed persons arrived on a motorcycle and at gunpoint robbed mobile phones from his sons. During the course of robbery, one of the culprits allegedly fired at Muneeb-ur-Rehman, causing him firearm injury. The complainant and his sons allegedly apprehended one of the accused at the scene, who later disclosed his name as Kamal Khan, while the others managed to flee. A case was registered against the apprehended

accused for offence under Sections 393, 397, 337-F(iii), and 34 PPC. Simultaneously, a separate FIR No. 76/2022 was also registered for offence under Section 23(i)(a) of the Sindh Arms Act for alleged recovery of a pistol.

3. During trial, the prosecution examined seven witnesses in support of its case, including the complainant, the injured, his brother, the arresting and investigating officers, and the medical officer. The appellant denied the allegations, claimed innocence, and opted not to lead any evidence in defence. After full-dress trial, the learned Court convicted and sentenced the appellant as above.

4. Learned counsel for the appellant contended with vehemence that the impugned judgment is legally flawed, factually unsustainable, and the result of gross misappreciation of evidence on record. He began by assailing the foundational premise of the prosecution case namely, the identification of the accused, as wholly absent and fatally defective. Learned counsel submitted that despite the claim in the FIR that the accused was apprehended on the spot, none of the three eyewitnesses, including the complainant and the injured, identified the appellant before the trial court during their examination-in-chief or otherwise. This failure, he argued, strikes at the root of the case, particularly where the identity of the assailants was originally unknown, and there was no prior familiarity between the witnesses and the appellant. He contended that in such circumstances, where the case entirely hinges upon direct evidence, non-identification of the accused in court is fatal, and the learned trial court erred in assuming that such identification was implied. He emphasized that presumptions have no place in criminal law, especially where the liberty of a citizen is at stake. Learned counsel next highlighted serious contradictions between ocular and medical evidence. According to the complainant and his sons, only one shot was fired during the alleged incident, which struck Muneeb-ur-Rehman. However, the medical officer (PW-6) unequivocally deposed that there were two entry wounds and two exit wounds, indicating multiple shots or ricochets. This discrepancy, counsel submitted, not only undermines the veracity of the prosecution narrative but also indicates either exaggeration or fabrication, especially when the investigating officer did not recover any bullet shells from the scene nor establish the trajectory of fire. On the point of recovery, learned counsel forcefully argued that the

alleged recovery of robbed mobile phones is untrustworthy and unsubstantiated. He pointed out that when the case property was produced during trial, neither the complainant nor the alleged victim Aneeb-ur-Rehman could identify the phones as theirs, and the parcel bore no identifying marks or signatures. Furthermore, the complainant admitted that the case property parcel did not bear his signature, thereby disconnecting the alleged recovery from the crime. In such circumstances, he submitted, the chain of evidence was broken, and the recovery could not be legally relied upon. As to the recovery of the pistol, learned counsel submitted that the entire procedure was legally flawed and devoid of evidentiary value. He argued that the Investigating Officer failed to produce Register No. 19 of the malkhana to establish the movement and safe custody of the weapon. He cited the principle laid down in *Sharafat Khan v. The State* (PLD 2022 SC 281), where the Hon'ble Supreme Court stressed that in criminal prosecutions, particularly involving physical evidence like narcotics or arms, the prosecution must establish the sanctity of the chain of custody beyond doubt. In the present case, not only was the pistol produced at an odd stage, during the examination of the complainant, but also no evidence was led to establish when, where, and by whom the weapon was sent for forensic examination. Further contending, learned counsel submitted that no independent witness was associated during arrest or recovery, despite the incident allegedly taking place in a public area at 10:00 p.m. in a busy neighborhood. The exclusive reliance on interested witnesses namely, the complainant and his sons renders the prosecution case inherently doubtful. He stressed that in criminal trials, especially those involving capital or serious punishment, independent corroboration is crucial to ensure the integrity of the judicial process. Learned counsel also drew the Court's attention to the fact that all three private witnesses, including the complainant and his sons, categorically stated in their cross-examination that they had no objection to the acquittal of the accused. While conceding that such statements are not conclusive proof of innocence, he argued that they reflect the witnesses' own lack of confidence in the prosecution case and reinforce the entitlement of the accused to the benefit of doubt. In conclusion, learned counsel submitted that the prosecution case is replete with contradictions, procedural defects, and evidentiary gaps, all of which make it impossible to hold that the prosecution has discharged its burden of

proving guilt beyond reasonable doubt. He urged that the accused be acquitted of all charges and released forthwith.

5. On the other hand, learned Assistant Prosecutor General opposed the appeals and supported the impugned judgment in its entirety. He argued that the prosecution had successfully established its case against the appellant through credible ocular, medical, and documentary evidence. He began by submitting that the appellant was caught red-handed by the complainant party during the occurrence, and that itself constitutes a strong piece of circumstantial evidence, particularly when the accused was arrested at the spot immediately after the incident and handed over to police with the allegedly snatched articles and a weapon. Learned APG submitted that the testimony of the injured witness is always accorded great evidentiary value, as held in numerous precedents of the superior courts. He argued that Muneeb-ur-Rehman, who received firearm injuries during the incident, fully supported the prosecution version and implicated the accused in unequivocal terms. He contended that minor discrepancies in number of gunshots or wounds should not overshadow the core consistency in the narrative, which remains unshaken throughout the trial. As to the recovery of mobile phones, the learned APG submitted that minor lapses in identification or marking of property cannot be a ground for outright rejection of the recovery evidence. He argued that the accused was apprehended at the scene and the phones were immediately recovered, thus making the contemporaneity of seizure a strong circumstantial indicator. He submitted that minor procedural irregularities, such as lack of signature on the parcel or inability to describe the phones in detail, do not erode the substance of the recovery. With respect to the recovery of the pistol, the learned APG admitted that some procedural lapses may have occurred, but contended that the non-production of the malkhana register is not fatal, especially when the recovery was made from the person of the accused in the presence of the complainant and was later confirmed by the ballistic report. He emphasized that the prosecution case does not rest solely on recovery but is corroborated by multiple independent pieces of evidence, including medical reports and prompt registration of FIR.

The learned APG further submitted that non-identification of the accused in court should be viewed in the context of the fact that the appellant was already known to the complainant party due to his apprehension at the

scene. He argued that since the accused was arrested on the spot, formal dock identification was not strictly necessary, and the trial court rightly concluded that the accused was the same person involved in the incident. Regarding the complainant and his sons expressing “no objection” to the acquittal, the learned APG dismissed this as legally irrelevant and motivated by fear or compromise, which should not override the otherwise cogent and coherent prosecution evidence. He reminded the Court that the State is the real complainant in criminal cases, and prosecution must proceed in accordance with law even if private parties lose interest or try to retract. In conclusion, learned APG submitted that the prosecution successfully proved the case beyond a reasonable doubt, and the learned trial court rightly convicted the appellant. He prayed that the appeals be dismissed and the conviction and sentence maintained.

6. The cornerstone of the prosecution case rests on the assertion that the accused was apprehended on the spot immediately after the incident and was found in possession of a pistol. The injured Muneeb-ur-Rehman, according to the FIR, received firearm injuries at the hands of one of the robbers. However, on careful scrutiny, several significant legal and factual infirmities emerge, which render the prosecution’s case doubtful in nature.

7. Most notably, none of the three eyewitnesses namely the complainant Saeed Ahmed and his sons Muneeb-ur-Rehman (the injured) and Aneeb-ur-Rehman identified the appellant in the court as the person involved in the commission of the alleged robbery. In fact, all three failed to even recognize the appellant as one of the assailants. This failure of dock identification is fatal to the prosecution case. The learned trial court, in its judgment, presumed identification of the accused without any affirmative statement to that effect from the material witnesses. This amounts to a serious misreading and non-reading of evidence.

8. It is a settled principle of criminal law that identification of the accused in the court by eyewitnesses is an essential and mandatory requirement when the case hinges upon the direct evidence of those witnesses. In absence of such identification, especially when the FIR itself states that the accused was unknown to the complainant, the mere fact that a person was apprehended at the scene cannot substitute for legal proof of identity.

9. The Medical Officer (PW-6) deposed that the injured received two entry wounds and two exit wounds caused by firearm. However, both the complainant and the injured consistently stated that only a single shot was fired by the assailants. This is a material contradiction that casts serious doubt on the occurrence and sequence of events. The ocular account of a single gunshot is incompatible with the medical evidence showing multiple firearm wounds. This discrepancy has not been adequately explained by the prosecution and further weakens the reliability of the case.

10. The recovery of mobile phones allegedly snatched from the complainant's sons was not legally substantiated. When shown the case property in court, neither the complainant nor his son Aneeb-ur-Rehman could identify the recovered phones. The complainant candidly admitted that the parcel containing the case property did not bear his signature. The failure to prove ownership and to identify the allegedly robbed items breaks the link between the crime and the accused. As regards the recovery of the pistol, the procedure followed was seriously flawed. The alleged recovery was made by PW-1 (the arresting officer), but the case property was not produced at the time of his examination. It was instead produced later during the examination of PW-2, the complainant. Furthermore, the investigating officer failed to produce Register No. 19 (malkhana register) to establish the safe custody and movement of the pistol from the time of recovery to its dispatch for forensic examination. The absence of proof regarding the chain of custody casts doubt on the genuineness of the recovery.

11. The Supreme Court in PLD 2016 SC 608 (Abdul Ghani Vs. The State) has reiterated that in order to ensure a fair trial under Article 10-A of the Constitution, the prosecution must demonstrate that case property allegedly recovered were safely kept and transmitted without tampering. The same standard applies here: failure to establish the chain of custody renders the alleged recovery unreliable.

12. All the witnesses produced were either related to the complainant or official witnesses. No independent witness was associated at the time of alleged arrest, recovery, or during investigation. In view of the nature of allegations, and the public setting in which the alleged robbery occurred,

the absence of independent corroboration is conspicuous and raises further doubts.

13. During cross-examination, all three private witnesses, including the complainant and the injured, unequivocally stated that they had no objection to the acquittal of the accused. While such a statement does not ipso facto exonerate the accused, it certainly adds to the overall doubtful nature of the prosecution case and reinforces the benefit of doubt available to the appellant.

14. The principles governing the benefit of doubt are deeply entrenched in criminal jurisprudence. The Hon'ble Supreme Court via various judgments have been pleased to hold that if a single circumstance creates reasonable doubt in a prudent mind, then the accused is entitled to its benefit. In the present case, there are not just one but multiple glaring discrepancies, failure to identify the accused, contradictions in medical evidence, unproven recovery, and absence of reliable chain of custody, all of which cumulatively shake the foundation of the prosecution case.

15. The learned trial Court failed to appreciate these material legal and factual aspects and proceeded to convict the appellant on conjectures and presumptions, which is not permissible under the law.

16. In view of the foregoing discussion, I am of the considered opinion that the prosecution has failed to prove the charge against the appellant beyond a reasonable doubt. The benefit of doubt must go to the accused as a matter of right, not of concession. Consequently, both Criminal Appeals are allowed. The conviction and sentence recorded against the appellant Kamal Khan by the learned Xth Additional Sessions Judge, Karachi South, vide judgment dated 28.03.2023 are hereby set aside. The appellant is acquitted of the charge. He shall be released forthwith if not required in any other case. These are the detailed reasons for the short order announced on 09.05.2025.

J U D G E