

**IN THE FEDERAL SHARIAT COURT**

(Appellate/Revisional Jurisdiction)

**PRESENT:**

**MR. JUSTICE SYED MUHAMMAD FAROOQ SHAH**

**CRIMINAL APPEAL NO. 25-I of 2017**

**(Dildar alias Gidari Vs. The State)**

**LINKED WITH**

**CRIMINAL APPEAL NO. 26-I of 2017**

**(Bewas alias Muhammad Ali Vs. The State)**

1. Dildar alias Gidari s/o Muhammad Saddique Shaikh, r/o Village Muhammad Hassan Khuhawar, Taluka Rohri, District Sukkur.
2. Bewas alias Muhammad Ali s/o Mohib Ali Maganhar, r/o Pir Bux Post Office Karam hoth, Taulka Khanpur, District Shikarpur.

.....

Appellants

Versus

The State

Respondent

For the appellants.	...	Mr. Muhammad Sharif Janjua, Advocate.
For the Respondent.	...	Mr. Zafar Ahmed Khan, Additional Prosecutor General, Sindh.
No.& Date of FIR dt.09.09.2009 Police Station	...	No.122/2009, P.S Kandhra, Sukkur.
Date of judgment of trial court	...	23.02.2016
Date of Institution in this Court	...	10.10.2017
Date of hearing	...	08.03.2018
Date of decision	...	08.03.2018

## **JUDGMENT**

**SYED MUHAMMAD FAROOQ SHAH J:-** Caption appeals arising from common judgment are taken together. Both appellants by invoking the appellate jurisdiction of the High Court of Sindh preferred appeals against the judgment dated 23.02.2016, passed by learned Additional Sessions Judge (Hudood), Sukkur, in case FIR No. 122/2009 dated 09.09.2009, registered at Police Station *Kandhra*, District Sukkur u/s 17 (3) (EOH), 1979 and u/s 342, 337-F(i), 149-PPC. On conclusion of trial, appellants were convicted and sentenced u/s 392,324,337-F(i),337-F(iii),337-L-2 of PPC. The appellants under misconception filed appeals against their conviction in High Court of Sindh, bench at Sukkur through Criminal Appeal No. S-61 of 2016 and Cr. Appeal No. S-88 of 2017. the appeals were transferred to this Court vide order dated 25.09.2017 with the observation that during trial the charge was framed under section 17(3) Offences Against Property (Enforcement of Hudood) Ordinance, 1979, so the appeals against final judgment of the learned trial Court lies before this Court. As the original appeals were filed in the High Court of Sindh, so the delay in filing of present appeals in this Court was also condoned vide order dated 23.11.2017 passed by the Hon'ble Chief Justice of this Court. Consequently, the main appeals were admitted for regular hearing.

2. I have heard the submissions advanced by Mr. Muhammad Sharif Janjua, learned counsel representing the appellants and Mr. Zafar Ahmed Khan, Learned Additional Prosecutor General on behalf of State. Learned defence counsel argued that examined PW/*Mushir* Ghulam Nabi

(PW:5) did not support the prosecution. So much so that PW-6/*Mushir* Noor Muhammad stated that his signatures were obtained on blank white papers therefore, he cannot affirm the contents of so called memo Ex; 6-A & 6-C but surprisingly both these witnesses were not declared hostile, which shows that prosecution admitted their evidence to be correct. Next argued that there are discrepancies of grave nature and contradictions among the prosecution witnesses. While placing reliance on **1995 SCMR 1345 (Tariq Pervez Vs. The State)**, **1997 SCMR 25 (Muhammad Ilyas Vs. The State)** & **2008 SCMR 1221 (Ghulam Qadir Vs. State)**, Mr. Januja learned counsel for the appellants argued that it is well settled principle of law that if a single circumstance creates reasonable doubt in a prudent mind about the guilt of the accused, then he shall be entitled to such benefit not as a matter of grace but as a matter of right.

3. Impugned judgment appear to be dictated in a slipshod manner as an offence u/s 324 PPC (attempt to cause murder) has neither been mentioned in the Charge, nor such point for determination was formulated in impugned judgment and no specific question touching the ingredients of section 324 PPC was put to the appellants by the trial Court.

4. It is the case of prosecution that accused persons fired upon the police party while plying the robbed Tractor/Trolley. *Insofar* as applicability of section 324 PPC is concerned, evidence available on record reflects that the prosecution in support of its contention examined main star witness Head Constable Bukhtullah (Ex-P18) who stated that on seeing the police party, the accused fired upon them and such firing was exchanged in between the accused and police party for ten minutes and the police succeeded to

apprehend the accused namely Bewas, and from his possession an illicit weapon was also secured however, his companion accused namely Dildar succeeded to escape. PW Bakhtullah in his cross examination admitted that there is no mention in the FIR or Mashirnama of arrest that pistol was secured by him personally; further stated in cross that 45 bullets were fired by him and accused persons made direct firing and they fired about 30/35 bullets upon the police party. He further stated that during exchange of firing none has received injury from both sides.

5. A perusal of memo of arrest, search and recovery, Ex.18-A reveals that robbed tractor bearing No. SKC-7551 and .30 bore pistol without number alongwith magazine were secured from appellant Bewas alias Muhammad Ali Manganhar. However, there is no mention about recovery of live bullets in magazine of said pistol nor empties were secured from the placed of occurrence, though as per statement of recovery witness about eighty (80) bullets were fired during the aforesaid encounter but none has received injury which shows that there was no straight firing made by the appellants with intention/attempt to cause murder of police persons as alleged in the memo of arrest, recovery and in the FIR.

6. It is an admitted position that neither Charge nor statement of accused reflects that the appellants were Charged for an offence punishable u/s 324 PPC. Surprisingly, no such point of determination was formulated by the trial Court. For the sake of convenience amended Charge framed by the trial Court is reproduced hereinbelow.

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AMENDED CHARGE

I, Abdul Shakoor Shaikh, Addl. Sessions Judge(Hudood),  
Sukkur, do hereby charge you accused

1. Dildar alias Gidari son of Muhammad Saddique Shaikh
2. Bewas alias Muhammad Ali son of Mohib Ali Maganhar

as follows:

That you on or about 09.9.2009 at about 3.00 a.m at the link road leading from Aror to Daodanko with jurisdiction of P.S Kahndhra alongwith absconding accused being armed with deadly weapons in furtherance of your common intention committed harrabah on the show of force robbed one tractor trolley bearing registration SKC-7551 1Messy Ferguson 240 Model 1985, cash amount and mobile phone sets and also wrongfully confined the complainant party, and thereby you committed an offence punishable under section 17(3) EHO, 1979, r/w section 395,342,148,149 PPC within the cognizance of this court.

And I hereby direct that you be tried by this court on the aforesaid charge.

This the 11<sup>th</sup> day of September, 2014

Addl: Sessions Judge (H),  
Sukkur 11/9/14

"

7. From perusal of record, it appears that only contents of aforesaid Charge were repeated while recording the statement of accused u/s 342 Cr.P.C; No specific question with regard to applicability of section 324 PPC was put to the appellants which shows that they have not been afforded opportunity to explain all incriminating circumstances bearing in evidence against them, though trial Court is bound to ask such question to the accused with detail of those piece of evidence, which have to be made the basis of conviction.

8. Suffice it to say that in case of omission to put such questions to the accused u/s 342 Cr.P.C, their conviction cannot be sustainable; more

particularly the aforementioned illegality or gross irregularity cannot be cured in light of case law reported in **2006 P.Cr..L.J 149** (*Mehmood Raza Vs. The State & 3 others*), **2010 SCMR 1009** (*Muhammad Shah Vs. The State*), **1999 SCMR 697** (*Sheral alias Sher Muhammad Vs Th State*), **2017 SCMR 148** (*Qaddan and others Vs. The State*). It need not to be emphasized that section 342 Cr.P.C mandate that all incriminating evidence is to be put to accused in his statement under that section and the evidence which has not been confronted to accused, conviction cannot be based on such evidence. Consequently, the conviction and sentence recorded by the trial Court u/s 324 PPC is set aside.

9. At this juncture, after arguing the appeal at some length, Mr. Muhammad Sharif Janjua, learned counsel for the appellant without pressing the appeal on merits, contended that the appellants are sole bread winner of their families and they are behind the bars since more than 3 years, being convict and they shall be satisfied if this Court remit the fine/daman amount by considering the aforementioned peculiar facts and circumstances of the case. On the other side, counsel representing the state recorded no objection to such proposition made by the learned counsel for the appellants. A perusal of fresh jail role dated 01.03.2018 transmitted by the Superintendent Central Prison Sukkur to this Court, transpires that the appellants have served the substantive sentence of two (2) years, fifteen (15) days, they earned remission of one (1) year, four (4) months & Twenty Seven (27) days. The benefit of section 382-B Cr.P.C was extended to them and as per jail role, their under trial period calculated by the Jail Authority is one (1) year, nine (9) months & Twenty One (21) days. Therefore, the total period of their

confinement is five (5) years, seven (7) months & three (3) days till 01.03.2018.

10. It is not out of context to mention here that plea of reduction of sentence does not constitute a bar for the appellate Court from interfering, where findings are based on erroneous and speculative presumptions or non reading or mis-reading of evidence. Reliance in this regard is placed on *Abdul Razzaq Vs. The State* reported in **2002 SCMR 1239**, therefore, conviction and sentence recorded by the trial Court u/s 324 PPC has been set aside with reasons mentioned as supra. The appellants have already served the conviction and sentence recorded in remaining offences except fine and 'daman' which amount is remitted in view of reasons recorded above. Consequently, the appellants are set free in this case; Superintendent Central Prison Sukkur is directed to release them forthwith if they are not required in any other case. Appeal is accordingly disposed of in the above said terms.

**JUSTICE SYED MUHAMMAD FAROOQ SHAH**

*Note:- As directed, Copy of this judgment be transmitted to the author trial Judge through Registrar Sindh High Court for his self evaluation as he departed from settled judicial principles concerning administration of justice while convicting the appellants to undergo sentence of seven year under section 324 PPC, as observed in preceding paragraphs of this judgment.*

Announced on 08.03.2018  
at Islamabad

*Muhammad*  
*Salman Habibi/*