

IN THE FEDERAL SHARIAT COURT OF PAKISTAN
(Appellate/RevisionalJurisdiction)

JUSTICE SYED MUHAMMAD FAROOQ SHAH

Crl. Appeal No. 15/K of 2018

Ahmed Ali S/o Muhammad Khan by caste Khatyan,
Resident of Warhaw, District Shahdadt at Qambar.

.....Appellant

Versus

The State

...Respondent

LINKEDWITH

Crl. Appeal No. 16/K of 2018

Khalil Ahmed S/o MuhammadAslamby caste Soomro,
Resident of SaindinoMallah.

.....Appellant

Versus

The State

...Respondent

Counsel for the State	---	Mr. Khadim Hussain Koorah, Additional Prosecutor General, Sindh.
Case FIR No, date & Police Station	---	FIR No. 82/2005 dated 20.10.2005 P.S and District Jamshoro.
Date of impugned Judgment.	---	21.02.2007.
Date of institution	---	03.03.2018.
Date of hearing	---	04.02.2019.
Date of decision	---	04.02.2019.

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JUDGMENT.

SYED MUHAMMAD FAROOQ SHAH, J.— The captioned appeals are directed by the appellants named above, against the impugned judgment, pronounced on 21.02.2007 by the learned Sessions Judge, Jamshoro @ Kotri, in crime report No. 82/2005, lodged at Police stationJamshoro, under section 17 (3) of The Offences Against Property (Enforcement of Hudood) Ordinance, 1979, read withsection

392/34 PPC, thereby the Appellants were convicted for an offence punishable under section 392 PPC and sentenced to suffer R.I for 07 (seven) years each and to pay a fine of Rs. 50,000/- (Rupees fifty thousand) each, in default thereof to suffer R.I for 18 (eighteen) months more, with benefit of section 382-B Cr.P.C. Initially, the appellants have filed Criminal Appeals Nos. S-67 of 2007 and S-68 of 2007, respectively, before the learned High Court of Sindh Circuit, Hyderabad. The learned High Court of Sindh Circuit, Hyderabad, transferred both appeals to this court for want of jurisdiction as the charge was framed by the trial court under *Hadood* Laws.

2. Story of the prosecution case in nutshell is that on 06.10.2005 at 22:30 hours, motorcycle No. HDQ-2518, Honda CD-70, was forcibly snatched from the Complainant Muhammad Nawaz on gun point by the appellants when he was plying the said motorcycle and PW Aftab Hussain was sitting on rear seat. As per prosecution version, the said motorcycle was owned by father of the Complainant. It is an admitted position that neither alleged robbed motorcycle was recovered nor its ownership documents have been brought on the record. Moreover, statement of the owner of the said motorcycle i.e. father of the Complainant has not been recorded by the investigation officer under section 161 Cr.P.C. After 14 days of the said incident i.e. on 20.10.2005, crime report was lodged by the complainant though he visited the police station concerned on three occasions prior to registration of FIR and on completion of usual

investigation, final report under section 173 Cr.P.C, submitted by the investigation officer was accepted by the concerned magistrate.

3. Formal charge under section 17 (3) of The Offences Against Property (Enforcement of Hudood) Ordinance, 1979, read with section 392/34 PPC was framed by the trial court against the appellants/accused, to which they pleaded not guilty and claimed to be tried. Ocular account of prosecution case hinges on testimonies of Complainant Muhammad Nawaz (Ex.15) and PW Aftab Hussain (Ex.19). Evidence of mashir Ghulam Sarwar was recorded (Ex.17) and lastly the investigation officer SIP Manzoor Ali (Ex.20) was examined. Thereafter, statements of the accused/appellants under section 342 Cr.P.C were recorded vide Ex. 23 and 24, in which they denied all the allegations leveled against them and categorically professed their innocence.

4. Submissions made by the appellants and worthy arguments advanced by Mr. Khadim Hussain Khooraho, Additional Prosecutor General, Sindh, representing the State are considered and evidence has carefully been scanned.

5. As per averments of the appeals and grounds agitated by the appellants, there are material contradictions, inconsistencies and gross irregularities in the prosecution evidence. Complainant stated in his testimony recorded by the trial Court that he informed his father just after 15 minutes of the incident and intimated to the police

on telephone number 15 and on the same night one ASI and some police constables contacted the Complainant at 12:00 or 12:30 midnight but neither the Complainant lodged the report at the police station nor such report was reduced in writing in diary/*Roznamchaby* the police. The Complainant has stated in cross-examination that Jamshoro police station informed him that some dacoits were arrested by the Bhatai Nagar police station, as such the Complainant along with his father and other relatives went to the police station Bhatai Nagar on 10.10.2005 i.e. four days after the incident, where he found the appellant Ahmed Ali confined in police lock-up, whereas eye witness of the incident namely Aftab Hussain has stated in examination-in-chief that two days after the incident, they received information that some culprits have been arrested by the police of *Pinjyar* police station, where they saw the appellant Ahmed Ali. According to the version of the Complainant he has identified the accused by names at the time of commission of robbery but the Complainant did not disclose the names of accused persons during investigation, conducted about 14 days prior to registration of crime report. On the contrary, the Complainant has admitted in cross-examination that the accused were not known to him prior to the incident, as such the identification of the accused after their arrest by the Complainant and prosecution witness Aftab Hussain in the presence of magistrate was necessary, as no legal sanctity is attached to the identification of the accused before the trial Court. The incident has

taken place on 06.10.2005; FIR was registered on 20.10.2005, whereas statement of PW AftabHussain under section 161 Cr.P.C was recorded on 25.10.2005, after about 19 days of the incident. According to the Complainant version, the incident has been taken place near *Khyber weighbridge*, whereas according to PW AftabHussain, the place of incident was situated near WAPDA Colony, though there is three miles distance in between *WAPDA Colony* and *Khyber weighbridge*. The Complainant has stated in cross-examination that he informed the police on telephone number 15, whereas PW AftabHussain has contradicted the version of the Complainant and stated that the father of the Complainant informed police on telephone number 15. PW AftabHussain has stated in cross-examination that the name of the Accused Ahmed Ali was disclosed to them by the concerned police, therefore, it is crystal clear that the complainant party was not knowing the accused/appellants prior to the incident and the concerned police informed the names of accused to the complainant party. Moreover, the investigation did not reflect any sufficient cause or plausible reason of not making the recovery of incriminating article (robbed motorcycle) including crime weapon from the appellants.

6. As per evidence of complainant, his father reached at the place of incident on his mobile phone call, within 15 minutes and they all chased culprits in a car and contacted the concerned police. Police conducted investigation for about 14 days prior to registration of the

FIR, without showing any plausible explanation and sufficient cause of inordinate delay in lodging the FIR, therefore, consultation and deliberation in lodging the FIR cannot be brushed aside.

7. The learned trial Court has erred to endorse the clarification of the complainant, who stated in cross-examination that they were not prepared to lodge the FIR till recovery of the motorcycle. By stating two fold version, the complainant deposed that accused persons were previously known to him, and on other side clarified in his deposition that he saw the accused Ahmed Ali at police station Bhitai Nagar on 10.10.2005, to be one of the culprit, who disclosed names of remaining culprits, to be accused Khalil Ahmed and Aslam Moula, therefore, the observation of the learned trial Court that at the time of lodging FIR names of accused persons were known to the Complainant is self-contradictory.

8. By not supporting the impugned judgment, learned Additional Prosecutor General has correctly argued that findings and reasons of conviction and sentence recorded by the learned trial Court are self-contradictory, particularly there is no plausible explanation of inordinate delay in lodging the FIR. Moreover, the complainant clarified in his deposition that he saw the accused Ahmed Ali at the police station Bhitai Nagar on 10.10.2005 and he identified him to be one of the culprit but FIR has been lodged after 10 days of such identification. The learned trial Court has also erred to make observation that preparation and signing of memo of place of

occurrence at police station is having no legal defect. On the contrary, the learned State counsel present in Court, submits that preparation of memo of place of occurrence is not a formality but requirement of a fair and transparent investigation. The learned trial Court by accepting the explanation of delay in lodging the FIR has also incorrectly observed that the Complainant Muhammad Nawaz in his cross-examination has clarified that they were not prepared to lodge the FIR in case motorcycle would have been given to them by accused persons, as such explanation of the complainant cannot be considered plausible by any stretch of imagination. Another view taken by the learned trial Court with regard to non-examination of father of complainant not fatal to the prosecution case is also incorrect, as being owner of alleged robbed motorcycle and his participation in investigation just after 15 minutes of the incident was very material to be a prosecution witness. Learned trial Court has also erred to observe that identification of accused persons/appellants by the witnesses before the trial Court was enough, as it is settled principle of law as laid down by the Hon'ble Apex Court that identification during proceedings of trial is not substitute of identification test before the magistrate. Reliance in this regard may conveniently be placed on the cases reported as 2011 SCMR 527(Nazir Ahmad Vs. Muhammad Iqbal and another); and 2017 SCMR 1189(Gulfam and another vs. The State).

9. It is not out of context to mention that the investigation by police in a cognizable offence without registering a case is against the canon of law as well as settled principle on the subject as laid down in 2004 SCMR 1185 (Iftikhar Hussain and others Vs. The State) by the Hon'ble Apex Court that any doubt in lodging the FIR and commencement of investigation gives rise to a doubt in favour of accused. Provision of section 154 Criminal Procedure Code is mandatory in nature to set the law in to motion therefore, information of cognizable offence should be incorporated in FIR as held in (i) PLD 2007 SC 539 (Muhammad Bashir Vs. Station House Officer, Okara Cantt. and others) (ii) 2010 PCr.LJ 231 (Mst. Shehnaz alias Asma alias Rani and another Vs. The State) (iii) 2002 PCr.LJ 2007 (Ghulam Qadir Vs. The State and another).

10. From perusal of prosecution evidence and impugned judgment recorded by the learned trial Court, material discrepancies, gross irregularities and legal infirmities can be noted in the prosecution case; more particularly, it is an admitted position that to ascertain legal authenticity of prosecution version, certain material irregularities and infirmities pointed above have been surfaced. Putting the present case to the test as laid down by series of judgments of Hon'ble Supreme court, it is clear that there are material discrepancies and contradictions in the prosecution evidence, mentioned as above; beside the investigation prior to lodging the FIR without any sufficient cause and plausible reason is having no legal sanctity.

In view of whatever mentioned above, I have no hesitation to observe that the impugned judgment is result of complete misreading of evidence and/or it is due to incompetency resulting distorted conclusion as to produce the positive miscarriage of justice. It needs no reiteration that sufficient circumstances as discussed above are creating doubt in a reasonable and prudent mind about guilt of the appellants, therefore, they are entitled to such benefit not as a matter of grace but as a matter of right. Story as a whole,as setup by the prosecution appears to be concocted and cannot be considered trust worthy due to materialcontradictions; beside legal infirmities andinconsistencies mentioned above.Resultantly, the appeal is allowed; impugned judgment is set aside. The appellants are acquitted of the charge. They are present on bail; their bail bonds stand cancelled and sureties discharged.

JUSTICE SYED MUHAMMAD FAROOQ SHAH

Karachi the
February 4th,2019
M.Ajmal/**.