

learned 3rd Additional Sessions Judge, Hyderabad, thereby both appellants were convicted under section 392 PPC and sentenced to suffer RI for five years; they were also required to pay fine of Rs. 20,000/- (Rupees Twenty Thousand only) each or in default of payment of fine to suffer SI for three months more. Benefit as provided under section 382-B Cr.P.C was extended to both the accused/appellants.

2. Prosecution story as narrated by the complainant namely Aijaz Nagar in the FIR No. 146/2013, lodged on dated 26.06.2013 at police station A-Section, Latifabad, district Hyderabad, for an offence punishable under section 20 (*Haraabah*) of The Offences Against Property (Enforcement of Hudood) Ordinance, 1979, in nutshell is that on 10.05.2013, at 09:00 hours, the appellants duly armed with pistols intercepted the complainant at Paragon School, Unit No.8, Latifabad, Hyderabad and snatched cash amounting to rupees forty thousand only, one prize bond of Rs.750/- and one mobile phone of Nokia company, model-3110, from his pocket and fled away towards degree college road.

3. Justification of delay of about 46 days in lodging the FIR, as disclosed by the complainant in the FIR is that he was in search of accused and when he came to know that accused Baber s/o Sher Muhammad and his companion Asif alias China, who are criminal in nature had committed the mentioned offence, he reported the crime to

the police. On the same date i.e. 29.06.2013 accused/appellant Babar was arrested by Investigation Officer SIP Muhammad Saleem and from his personal search one robbed prize bond bearing No.G-444426 of Rs.750/- and one China mobile were recovered on 29.06.2013 the complainant Aijaz Nagar was called at PS for identification of the recovered properties, who identified the same before *Mushirs*. After completion of usual investigation, final report under section 173 Cr.P.C was submitted before the concerned Magistrate.

4. Charge (Ex.4) framed by the trial court, against both appellants/accused for an offence punishable under section 20 (*Haraabah*) of The Offences Against Property (Enforcement of Hudood) Ordinance, 1979, to which they pleaded not guilty and claimed to be tried. On commencement of trial, prosecution examined the complainant Aijaz Nagar (Ex.8), PW Muhammad Saleem SIP (Ex.5), PW Head Constable Muhammad Aslam (Ex.6) and PW ASI Fahad Ahmed (Ex.7). On conclusion of prosecution evidence, statement under section 342 Cr.P.C (Ex.10 & 11) of appellants/accused were recorded by the trial Court. Both appellants denied their involvement in the mentioned crime and professed their innocence.

5. Arguments advanced by the learned counsel representing the appellants and learned state counsel are considered. The evidence and material available on record has carefully been perused and

scanned. In support of their contention, learned counsel for the appellants/accused have formulated the following points:-

- I. *That the prosecution has miserably failed to explain any plausible reason or sufficient cause for 46 days delay in lodging the FIR, though the complainant who is sole witness of the alleged incident admitted in evidence that one of the appellant namely Babar was known to him on the day of incident but there is no explanation that as to why he did not disclose his name to the police.. Per learned counsel, deliberation and consultation of lodging the FIR after inordinate delay cannot be ruled out.*
- II. *Learned counsel contended that on the day of arrest of the accused and recovery of alleged snatched mobile phone and prize bond, no independent person or inhabitant of the locality was examined by the investigation officer, to act as a witness or mashir. According to the learned counsel, it is not attracting to a reasonable mind that the accused Babar was keeping snatched prize bond and Nokia mobile in pocket of his paint, for about 46 days after the alleged robbery.*
- III. *That the case of prosecution is that the accused were un- identified at the time of incident but on arrest, their identification test has not been held.*
- IV. *The material contradictions and inconsistencies in the prosecution evidence are fatal which shatter the entire prosecution case.*
- V. *That the appellant Babar was not confronted to the recovery of robbed case property while recording his statement under section 342 Cr.P.C, which is fatal to the prosecution.*

- VI. *Investigation Officer did not bother to record the statement of the owner of Lazzat Dairy, who allegedly delivered cash amounting to Rs. 40,000/- to the complainant.*
- VII. *That the complainant stated in his examination-in-chief that on the very same day of incident, he reported the matter to the police by filing a written application/complaint but all three police officials examined by the prosecution did not support his such stance.*
- VIII. *To sum up their contentions, learned counsel for the appellants argued that appellants/accused have been falsely implicated in this case by the complainant by lodging the FIR, after inordinate delay of 46 days without any sufficient reason or plausible cause; beside, sufficient discrepancies and contradictions in prosecution evidence are creating reasonable doubt in a prudent mind about the guilt of the accused, therefore, the appellants/accused are entitled for such benefit as a matter of right and not as a matter of grace, as held by the Hon'ble Apex Court in the cases, reported as (i) **1995 SCMR 1345** (*Tariq Parvez v. The State*) (ii) **1997 SCMR 25** (*Muhammad Ilyas v. The State*), (iii) **2008 SCMR 1221** (*Ghulam Qadir and 2 others v. The State*). Lastly, learned counsel contended that from very first glance of prosecution evidence, the story as setup by the prosecution appears to be fabricated and cannot be considered trustworthy, particularly, due to contradictions in between the ocular account and circumstantial evidence.*

6. Conversely, learned Additional Prosecutor General, Sindh contended that irregularities in investigation and delay of 46

days in lodging the FIR with reason is not fatal to the prosecution case. Learned Additional Prosecutor General has further argued that the evidence of three police officials examined in this case is as good as any other public person of the locality; moreover, the contradictions and inconsistencies in depositions of prosecution witnesses, as pointed out by the learned counsel representing the accused are not having much significance. According to learned prosecutor, sufficient evidence has brought by the prosecution on record to connect the accused in commission of alleged offence.

7. *Insofar* as, the allegations of snatching cash, amounting to Rs. 40,000/-, one prize bond of Rs.750/- and one mobile phone of Nokia company, model-3310 on 10.05.2013, from possession of complainant is concerned, prosecution case hinges on sole ocular testimony of complainant Aijaz (Ex.8), who stated in examination-in-chief that on 10.05.2013, the alleged incident had taken place and he immediately went to police station, where he was asked to disclose the names of accused and that as to whether he was knowing them? Thereafter, he was tracing the accused and on 26.06.2013, he found accused Babar sitting at the same place; he communicated the information to the police and lodged FIR against accused Babar and Asif alias China. The complainant in deposition has improved his statement as narrated in the FIR ; relevant portions from his evidence are reproduced hereinbelow:-

“I went immediately to PS who asked me to disclose the names of accused and further asked me that as to whether I was knowing them, then I think and reviewed that before whom I have taken the amount from Lazzat Dairy, then I remind that accused Babar was sitting on the stall of his father which is located just in front of Lazzat Dairy and at the time of taking money from Lazzat Dairy accused Babar was staring me. Thereafter, I kept on tracing out the accused but could not find them. But on 26.06.2013, I found accused Babar sitting at the same place, hence, I immediately went to the police station and communicated the information and lodged my FIR against accused Babar and Asif alias China. I see the FIR at Ex.7/A which is same, correct and bears my signature. Police immediately arrested the accused Babar on the same day before me. After three days of lodging FIR, police called me and showed me the robbed Nokia phone and so also photograph of accused Asif alias China, whom I identified accordingly.”

8. In cross-examination conducted by learned counsel for accused Babar, the complainant stated as under:

“It is correct that the place of incident is a populated area. It is correct that I have not mentioned in the FIR regarding keeping money in both pockets of my shirt. It is correct that I have not mentioned in the FIR that which of the accused has robbed money from me. I did not know the accused prior to the incident. It is correct that no

ID parade of accused was conducted before any Court. I don't know the exact distance between my residence and place of incident but there is little distance. I did not note down the time of visit of place of incident by police. Police went to place of incident on motor cycles.”

9. In cross-examination conducted by learned counsel for appellant/accused Asif alias China, the complainant has stated:

“It is correct that property is not sealed. It is correct that there was SIM card in my robbed mobile. It is correct that I have not mentioned my SIM number in the FIR or evidence. It is correct that I have not mentioned the description of mobile number in the FIR and in evidence. It is correct that I have not mentioned in the FIR the source through which I came to know about the names of accused. My application/complaint was kept by police on the same day of incident when I went there. It is correct that I have not produced the copy of said application/complaint in evidence. It is correct that I have not mentioned in the FIR that which of the accused put pistol and which of the accused has robbed money from me. It is correct that I have not named Ahmed from whom I collected milk dues as a witness nor the person who disclosed the names of accused to me. It is correct to suggest that in the FIR I have stated that the accused are criminals. It is correct that I have obtained all information and then registered the FIR.”

10. Remaining three prosecution witnesses are police officials. PW ASI Fahad Ahmed (Ex.7) registered the FIR in verbatim, admitted in cross-examination that FIR has been lodged by the complainant after 40/45 days of the incident. He has further stated in cross-examination that complainant has mentioned in the FIR that he searched out the accused/appellants and then came to know about the names of the accused/appellants. He has further admitted non-mentioning the details of alleged robbed mobile. PW HC Muhammad Aslam (Ex.6) stated in examination-in-chief that he put his signature on memo of place of incident (Ex.5/A) and on the same day accused Babar was arrested and from his personal search one mobile and one prize bond of Rs. 750/- were recovered. Search memo (Ex.5/B) was prepared and on 29.06.2013 complainant was called at police station where he identified the robbed articles and such memo (Ex.5/C) was also prepared.

11. Investigation Officer SIP Muhammad Saleem (Ex.5) stated in examination-in-chief that on 26.06.2013 investigation of the mentioned crime was handed over to him and on the same day he arrested the nominated accused Babar and from his personal search he recovered one robbed prize bond and one China mobile as well. Thereafter on 29.06.2013ss, the complainant Aijaz Nagar was called at police station for identification of the recovered property, which was identified.

12. Admission made by the Investigation Officer in his deposition is very material for determination of point for determination that as to whether the appellants duly armed with firearm weapons robbed the complainant from valuable i.e. Rs.40,000/-, one mobile phone and prize bond. In examination-in-chief the IO admitted that names of staff are not mentioned in entry number 24, whereby they left the police station. He has admitted that no identification parade of accused/appellants was conducted. He also admitted that property was not sealed and envelope in which the property is lying, neither bore his signature nor signature of *Mushir*. In the last of cross-examination he has stated that *“it is correct that nothing was recovered from the accused but it is incorrect to suggest that he is implicated in false case.”* Sufficient material discrepancies and contradictions in prosecution evidence are found visible. The evidence of complainant has not been corroborated by any eye witness. Moreso; the complainant has tried to improve his statement averred in the FIR, as by explaining the delay of 46 days in lodging the FIR, he has given two fold version. On one side, he has supported the contents of the FIR and on the other side he stated in examination-in-chief that after incident he immediately rushed to the police station and he was asked to disclose the names of accused and then he reviewed that he had taken the amount from Lazzat Dairy and found the

accused/appellant Babar sitting on the stall of his father which was located in front of Lazzat Dairy and at the time of taking money from Lazzat Dairy accused/appellant Babar was staring him and on the date of arrest he found accused/appellant Babar sitting at the same place hence, he immediately informed to the police by lodging the FIR.

13. The appellant Babar has not been questioned on alleged recovery of robbed property from his person, therefore in case of omission to confront the accused on alleged recovery under section 342 Cr.P.C, the conviction cannot be sustained as such irregularity cannot be cured in light of the dicta as laid down in the case reported as **2006 P.Cr.L.J 149** (Mehmood Raza Vs. The State), **(ii) 2010 SCMR 1009** (Muhammad Shah Vs. The State), **(iii) 1999 SCMR 697** (Sheral alias Sher Muhammad Vs. The State) and **(iv) 2017 SCMR 148** Qaddan and others Vs. The State.

14. From the above discussions and on perusal of the evidence recorded by the learned trial Court, material discrepancies can be noted in the prosecution case. Astonishingly, while recording the impugned judgment, perhaps aforementioned material discrepancies, and contradictions in between the prosecution witnesses skipped away from sight of learned trial judge. A perusal of impugned judgment reveals that the trial court acted in oblivion of principles of appreciation of evidence in criminal trial to evaluate

it and discover the probabilities with regard to the conviction of the accused.

15. All the aforesaid circumstances would clearly show that no cogent and convincing evidence had been produced by the prosecution to bring home the guilt of the appellants beyond shadow of any reasonable doubt. Admittedly, the complainant in his evidence has improved contents of FIR. From material on record, the version of prosecution adversely affects the credibility of prosecution witnesses testimony and according to the golden principle of benefit of doubt one substantial doubt would be enough for acquittal of accused.

These are the reasons of pronouncement of short Order dated 08.02.2019, whereby the appeal was accepted; the impugned judgment dated 19.05.2017 was set aside and the appellants were acquitted of the charge.

JUSTICE SYED MUHAMMAD FAROOQ SHAH

Islamabad.
February 11th, 2019
M.Ajmal/**.

Approved for reporting

JUSTICE SYED MUHAMMAD FAROOQ SHAH

