

IN THE FEDERAL SHARIAT COURT  
(APPELLATE JURISDICTION)

**CRIMINAL APPEAL NO. 11/K/2011**

Zahid *alias* Sajjan & another ..... Appellants.  
Vs.  
The State ..... Respondent.

**CRIMINAL APPEAL NO. 14/K/2011**

Baburlu *alias* Karim Bux and another ... Appellants.  
Vs.  
The State ..... Respondent.

For the appellants : Mr. Dur Muhammad Shah, Advocate  
For the State : Mr. Javed Akhtar Qureshi, D.D.P.P.  
Date of hearing : 27.01.2014  
Date of decision : 07.02.2014

**J U D G M E N T**

**ASHRAF JAHAN, J.-** By way of present appeals bearing Nos. 11/K and 14/K of 2011, the appellants have assailed judgment dated 30.07.2011, passed by the learned First Additional Sessions Judge Hyderabad, in Sessions Case No.90/2004, under Section 20 Harabah (Enforcement of Hudood) Ordinance, 1979 (hereinafter referred to as the "Ordinance"), whereby they have been convicted under Section 20 of the said ordinance and sentence to suffer R.I. for ten years and also to pay fine of Rs.10,000 (ten thousand) each and in case of default to further undergo S.I. for six months.

As both appeals arise out of one judgment, therefore, the same are being disposed of by this single judgment.

The facts as per F.I.R. lodged by the complainant Syed Shehzad Ali Saeed that he used to reside at the given address and was a student of Sindh University Jamshoro. On 29.01.2004 at about 9:00 p.m. he

had gone to Anwar Villaz for condolence of his deceased relative Syed Muhammad Shah. On return to his house at about 10:30 p.m., his cook namely Shehzado Rajper informed him that at about 22 00 hours there was bell at the door and on opening the door his cook was pushed by the persons standing at the door, who were six in number and forcibly entered in the house showing pistol. One, out of above six culprits aimed pistol at the cook and the remaining five persons conducted search of the house and took away one repeater of 12 bore bearing No. P-19048, one gold chain weighing 07 tolas, gold bangles weighing 06 tolas, one male gold ring and one mobile phone of Nokia Sr. No. 8260 with SIM No. 0320-4171205. They gave fist and kick blows to the servant and issued him threats. Five persons were with open faces who could be identified on seeing while one was with muffled face. The Complainant alongwith his cook searched the accused persons but they had made their escape good taking advantage of the darkness.

On the basis of aforesaid facts F.I.R. No. 17 was registered at police station Qasimabad, District Hyderabad under Section 20 of the said Ordinance on 30.1.2004 at 00:30 hours

After investigation, Police submitted challan on 18.3.2004 showing three accused namely Zahid alias Sajjan s/o Muhammad Bux Jatoi, Majnoon alias Muhammad Bachal s/o Ali Nawaz and Baburbloo alias Karim Bux s/o Dur Muhammad, whereas one Vakeel s/o Abdul Majeed and two unknown person were shown as absconders. Subsequently accused Vakeel was produced and supplementary challan was submitted. Charge against the accused persons was framed on 1.2.2005 u/s 20 Harabah of the said ordinance to which they pleaded not guilty and claimed for trial.

In order to prove its case the prosecution has examined six witnesses, a gist of their evidence is as under:-

- (i) Complainant Syed Shehzad Ali Shah is examined as Ex.08 and he has endorsed the contents of FIR and has produced it as Ex.8/A,

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(ii) P.W. Syed Izhar Ali, mashir of place of incident is examined at Ex.09, and has produced memo of place of incident as Ex.9/A.

(iii) P.W. Shahzado Rajper who is the eye witness of the incident has been examined as Ex.10. In his examination in chief he has supported the version of prosecution case.

(iv) P.W. Subhan who is mashir of arrest of three accused is examined as Ex.11. He has produced the mashirnama of arrest of accused persons as Ex. 11A.

(v) P.W. SIP Ghulam Raza Investigation Officer of this case is examined as Ex.12.

(vi) Lastly prosecution has examined P.W. SIP Shahabuddin who had recorded the F.I.R.

As the witnesses of identification parade were not traceable therefore the memo of identification of suspects was produced by the prosecutor alongwith statement as Ex. 17/A and side of prosecution was closed vide Ex.17 on record.

After completing the evidence of prosecution side the appellants were examined under Section 342 Cr.P.C. wherein they denied the allegations leveled against them and took the plea that they had been arrested from their houses and falsely implicated in this case.

The appellants/accused did not make any statement on oath as provided u/s 340(2) Cr.P.C. nor did they produce any evidence in their defence. After concluding the trial the learned 1st Additional Sessions Judge, Hyderabad, convicted and sentenced the appellants vide his judgment dated 30.7.2011, which is impugned before this Court.

I have heard the learned counsel for the appellants as well as the learned counsel for the state and perused the case record with their assistance.

The learned counsel for the appellants Mr. Dur Muhammad Shah has submitted that:-

- The trial Court while awarding punishment to the present appellants has ignored the material facts and lacunas in the case of prosecution.

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- The only eye witness of this case has given contradictory evidence regarding arrest of accused and has disclosed that he had identified the accused persons at police station.
- There is no recovery from the present accused.
- The identification parade was not held in accordance with Law, as there was joint identification parade of three accused, that too, after delay of six days. The three appellants/accused except accused Vakeel were arrested on 3.3.2004 but their identification parade was held on 9.3.2004 for which no plausible explanation has been brought on record. Therefore this inordinate delay in conducting the identification parade is fatal to the case of prosecution. In support of his contentions he has relied upon the case of **Shafqat Mehmood and others vs. the State 2011 SCMR page 537.**
- It is also pointed out that the P.Ws Abdul Hadi and P.W. Mohsin who are shown as the witnesses of identification of accused are not the eye witnesses of this case. Even otherwise prosecution has failed to examine them in support of their case.

Conversely learned counsel for the State while supporting the impugned judgment submitted that the only eye witness has implicated all the accused with commission of crime, therefore the trial Court has rightly convicted the present appellants/accused. In support of his contention he has relied upon the case of **Muhammad Pervez and others vs. the State and others, 2007 SCMR 670.** However at the same time he has conceded to the irregularities committed during the identification parade, and non-appearance of the two witnesses of the identification test.

I have given my anxious consideration to the points raised by the learned counsel for the parties and have minutely gone through the evidence on record.

The perusal of record reveals that F.I.R. had been lodged by the complainant Syed Shahzad Ali Shah as per facts disclosed by his cook namely Shahzado Rajper, in whose presence six persons, five with open faces and one with muffled face entered into the house of complainant. But surprisingly no

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description about their appearance is disclosed in the FIR. It is also silent as to which of the culprit has pointed pistol at the P.W. Shahzado Rajper at the time of offence or caused him fists and kicks blows.

In the present case the star witness of the prosecution is P.W. Shahzado Rajper who is the only eye witness of this alleged crime. As per his evidence six persons have entered in the house and he was confined in the bath room. In his evidence though he has deposed that accused present in Court are same but he has not assigned any specific role to any of the accused. His evidence is also silent to the effect that accused had caused him fists and kicks blow or issued threats of dire consequences as earlier stated in the F.I.R.

In his cross examination also he has given contradictory evidence regarding case of prosecution. The relevant portion of his cross-examination is reproduced hereunder for ready reference:-

"I am working as cook since last five years. On next day I came to know that accused were arrested. I also identified the accused at police station. It is incorrect to suggest that police shown me the accused as culprits of the incident. I went to police station alongwith Syed Izhar Ali Shah. It is correct that nothing was recovered from accused persons in my presence. It is incorrect to suggest that my friends committed dacoity in the house of Syed Irshad Ali and present accused are falsely implicated in this case to save my friends. I and family members of Syed Irshad Ali Shah were available in the house."

The perusal of above cross examination reveals that as per this witness accused were arrested on the next day of incident and he had identified them at police station. These facts are in contradiction to the case of prosecution, as according to mashirnama of arrest three accused were arrested on 3.3.2004, after more than one month of alleged incident. Further the above P.W. has disclosed that family members of Syed Irshad Ali Shah were available in the house but this fact has not been disclosed in the F.I.R. or by the complainant during his evidence before the Court.

In the present case the complainant in support of his case has examined himself and P.W. Shahzado Rajper who is his cook, no independent witness of the vicinity is examined to support the alleged incident.

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Admittedly, no recovery has been made from the present accused. Thus there is no corroboratory piece of evidence against the present appellants/accused to connect them with the commission of crime.

Insofar as the identification parade is concerned, available on record as Ex.17/A, its perusal reveals that it had been held on 9.3.2004, jointly in respect of three accused, except accused Vakeel. The witnesses of this identification were Abdul Hadi and Mohsin Ali, who were not eye witnesses of this case and even otherwise not examined by the prosecution. There is no explanation from the prosecution side that when the accused were arrested on 3.3.2004 why this parade was held on 9.3.2004 after delay of six days, through above mentioned witnesses and why the only eye witness Shahzado Rajper has not come forward to identify the accused before Magistrate.

It will be important to mention that the only eye witness has deposed that the accused were arrested on the next day of incident and he had identified them at police station, while on the other hand it is the case of present appellants/accused that they were arrested from their houses. In such circumstances no reliance can be placed upon this identification memo which is not only not in accordance with law but also not supported by any witness. Reliance in this regard is placed upon the case law cited by the learned counsel for the appellants (2011 SCMR 537) Supra, wherein it has been held that identification parade of each accused should be held separately. It is also settled principle of law that if the accused are not named in the F.I.R. identification parade becomes necessary. In the instant case the identification parade was not conducted through the only eye witness, even the P.Ws who had identified the accused before Magistrate have not come forward in support. Therefore in above circumstances, such identification parade loses its value, and can not be relied upon at all.

It is the case of prosecution that three accused were arrested by the police when they were in a park near Becon House School, Qasimabad Hyderabad. As per evidence of S.I.P. Ghulam Raza who is investigating officer

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of this case, case papers of this crime were handed over to him on 3.3.2004. On the very day he received phone call from the complainant that the culprits of incident are available in a park. Therefore police party reached there, complainant alongwith his servant P.W Shehzado were already there and at pointation of P.W. Shehzado the accused persons who on seeing the police party tried to run away, were apprehended. In the present case mashir of arrest is P.W. Subhan who in his cross examination has admitted that he is relative of complainant and was already available there at the time of arrest. He categorically deposed that the accused persons did not try to run away at the time of arrest. It is evident that no independent mashir of the vicinity has been examined by the prosecution and the mashir Subhan Ali Shah has belied the prosecution version that accused tried to run away at the time of arrest. It is also strange to note that on 3.3.2004 investigation was handed over to S.I.P. Ghulam Raza and on the very day three accused were arrested. The manner in which mashir has been arranged and arrest has been made appears to be doubtful in absence of any independent mashir especially in the background that the case of accused persons is that they had been arrested from their houses. Moreover, in contrast to this P.W. Shahzado had deposed that accused were arrested on the next day of incident, such contradictory pieces of evidence make this arrest completely doubtful.

Another important aspect of the instant case is that case of prosecution is totally silent as to when accused Vakeel was arrested in this case and how he was connected with commission of this crime.

In the present case it has been argued by the State Counsel that as the only eye witness has implicated the present accused with the commission of crime therefore the trial court has rightly convicted them. In this regard it would suffice to say that no doubt conviction can be awarded on solitary evidence of one eye witness, but such evidence should have been confidence inspiring, which fact is lacking in the present case as neither the description of accused persons had been disclosed by the eye witness at the time of lodging the F.I.R,

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nor any specific role has been assigned against the accused persons. Further the eye witness has given contradictory evidence regarding arrest of accused. Moreover there is no other incriminating evidence such as recovery of stolen articles or the pistol used in the crime, therefore in such circumstances in absence of any sort of corroboratory piece of evidence no reliance can be placed on mere contradictory verbal assertions of one eye witness. Thus the case law cited by the learned counsel for the State is not applicable in the facts and circumstances of present case.

In view of the foregoing , I do not find any plausible reason for upholding the conviction of the appellants by the trial Court. Therefore, the present appeals are allowed, conviction and sentences of appellants Zahid alias Sajjan, Majnoon alias Muhammad Bachal, Baburloo alias Karim Bux and Vakeel are set aside by extending them the benefit of doubt and they are acquitted of the charge. The appellants are present on bail, their bail bonds stand cancelled and sureties discharged.

Announced in open court on this 7<sup>th</sup> day of February, 2014.

  
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JUSTICE ASHRAF JAHAN

Approved for reporting.  
