IN THE FEDERAL SHARIAT COURT OF PAKISTAN
(Appellate/Revisional Jurisdiction)

Present:

MR. JUSTICE MUHAMMAD NOOR MESKANZAI, CHIEF JUSTICE

JAIL CRIMINAL APPEAL NO.4/K OF 2021 **Alongwith**
JAIL CRIMINAL APPEAL NO.6/K OF 2017 **Alongwith**
CRIMINAL APPEAL NO. 23/K OF 2018

Kewal son of Amaro Thakur,
Resident of Village Bagh Wah Taluka Hyderabad.
Now confined in Central Prison & Correctional Facility, Hyderabad.

….. Appellant

VERSUS

The State

…. Respondent

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Counsel for the Appellant	….	Qazi Nisar Ahmed, Advocate
Counsel for the State	….	Mr. Zafar Ali Khan, Additional Prosecutor General Sindh
FIR No. date & Police Station	…. ….	47/2013 Dated 20.05.2013 Husri, District Hyderabad
Date of judgment of Trial Court	….	12.07.2017
Date of receipt of Appeal (J. Cr. Appeal No.6/K/2017)	….	28.07.2017
Date of receipt of Appeal (Cr. Appeal No.23/K/2018)	….	03.03.2018
Date of receipt of Appeal (J.Cr. Appeal No.4/K/2021)	….	31.03.2021
Date of hearing	….	04.06.2021
Date of Judgment	….	04.06.2021

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JUDGMENT:

MUHAMMAD NOOR MESKANZAI, CJ--- Appellant Kewal son of Amaro Thakur has been booked as preparator for commission of an offence under Section 17(3) of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979 by the complainant in FIR No.47/2013 dated 20.05.2013 lodged at Police Station Husri, District Hyderabad.

2. Facts of the case in brief are that complainant Shagan son of Wagho lodged FIR No.47/2013 dated 20.05.2013 with the SHO Police Station Husri. As per allegations contained in the FIR, on 30.12.2012 at 8:00 p.m. the complainant alongwith his wife Shrimati Lali, brother-in-law Shamu son of Virson and one Krishan son of Dharam Singh were present in their house when the door was knocked at. The complainant opened the door, five persons armed with weapons entered in the house and one person standing outside the car, can clearly be identified, if brought before him. All the accused persons were nominated in the FIR. After commission of dacoity, the inmates of the house were locked in a room. When the accused left the house, the inmates of the house made hue and cry and the neighbours came and rescued them. The details of robbed articles alongwith money finds mention in the contents of the FIR. Further alleged that the offence was committed at the instance of one Mst. Shrimati Lasoo who used to visit the house of the complainant and was aware of these articles.

3. Investigation culminated in submission of challan before the trial Court. Initially accused Dhamoro and Mst. Shrimati Lasoo were arrested and thereafter appellant Kewal was also arrested. Charge framed by the trial Court was denied, and the prosecution in support of allegations, produced as many as six witnesses. The learned trial Court recorded statements of the accused under Section 342 Cr.P.C. The accused professed innocence, however, did not propose to produce defence witnesses nor opted to record their own statements as contemplated by Section 340(2) Cr.P.C.

4. The learned trial Court found appellant Kewal and Dhamoro guilty of the offence and awarded the following sentence whereas Mst. Shrimati Lasoo was acquitted of the charge:-

> *"For the forgoing reasons, as the case of robbery stands established beyond reasonable doubt against present accused Dhamoro and Kewal, therefore, under section 265-H(ii) Cr.P.C accused* ***Dhamoro son of Walji Thakur*** *and accused* ***Kewal son of Amaro Thakur*** *are convicted and sentenced for* ***an offense punishable U/S 395 PPC to suffer Rigorous Imprisonment for Three (03) YEARS. In addition thereto, each accused shall pay fine of Rs: 20,000/- (Rupees twenty thousand only) each, in default of payment of fine, accused persons shall suffer simple imprisonment for One (01) month more.*** *They shall be entitled to benefit U/S 382-B Cr.P.C."*

5. Appellant Kewal filed Cr. Appeal No.170/2017 and co-convict Dhamoro filed Cr. Appeal No.177/2017 before the Hon'ble High Court of Sindh, Circuit Court, Hyderabad and simultaneously both

the convicts jointly preferred Jail Cr. Appeal No.6/K/2017 through Jail Superintendent before this Court. The appellant Kewal and co-convict Dhamoro were released on bail by the Hon'ble High Court of Sindh, Circuit Court, Hyderabad. However, subsequently the appeals were transmitted to this Court on the ground of lack of jurisdiction by the Hon'ble High Court. These appeals were registered in this Court as Cr. Appeal No.22/K/2018 (Dhamoro Vs. The State) and Cr. Appeal No.23/K/2018 (Kewal Vs. The State). Vide Court's Order dated 10.05.2018 both the appeals were clubbed with Jail Cr. Appeal No.6/K/2017. The co-convict Dhamoro attended the Court, whereas the appellant Kewal, failed to appear before the Court with the result the appeal to the extent of convict Dhamoro was accepted and the impugned judgment was set aside. However, the appeal of the appellant Kewal was dismissed for want of his appearance. The appellant was subsequently arrested. He filed Jail Cr. Appeal No.4/K/2021 under Section 410 read with Section 561-A Cr.P.C. before this Court.

6. Upon our query how second appeal is competent before this Court and secondly, what about limitation and how that can be over looked, the learned Counsel for the appellant submitted that the appeal (Jail Cr. Appeal No.4/K/2021) may be treated as an application under Section 561-A Cr.P.C. with the restricted prayer that the order dated 31.01.2019 may be recalled as it is not a judgment and the appeal (Jail

Cr. Appeal No.6/K/2017) may be revived. The Learned Additional Prosecutor General Sindh did not controvert this position.

7. On merits, the learned Counsel for the appellant contended that the learned trial Court did not appreciate the facts properly, similarly the evidence was misread. It was further contended that on the basis of same evidence one of the accused was acquitted of the charge by the trial Court, whereas, the co-convict was acquitted by this Hon'ble Court. So, in such state of affairs, the judgment passed by the learned trial Court is not sustainable, therefore, may be set aside and the appellant be acquitted of the charge.

8. The learned Additional Prosecutor General Sindh faced difficulty in defending the impugned judgment and he suggested for remand of the case on the ground that the trial Court has awarded the sentence that is not provided even under the law. He further contended that Section 395 provides minimum sentence up to four years, whereas the learned trial Court has awarded three years sentence, therefore, this judgment is defective.

9. I have heard the learned Counsel for the parties and gone through the available record with their valuable assistance.

10. Before embarking upon factual aspect of the case and judging the validity and viability of the impugned judgment, the controversy regarding maintainability of the present appeal requires to be set at rest. Admittedly, the appeal filed by the appellant was

dismissed for non-prosecution by this Court. Now the question that has cropped up for determination is whether Cr. Appeal No.4/K/2021 is competent. The answer to this question, in my humble view, must be a big no for reasons; firstly, because the order dated 31.01.2019 passed by this Court though not a judgment on merits but still occupies the field. Secondly, we are not here to hear appeal against our own order/judgment. Thirdly, without prejudice to preposition, pressed into service in preceding para, the appeal is hopelessly barred by time. The appellant, after obtaining bail remained fugitive of law, did not surrender rather got arrested and produced before the Court, so the delay which is willful, intentional and inordinate cannot be ignored nor is condonable.

11. I am confident to hold that in such a situation or given circumstance of this case, remedy lies in invoking the inherent jurisdiction of the Court for recalling the order of dismissal of appeal in absentia provided either the convict surrenders or is arrested. Since appellant Kewal has been arrested and he has filed the appeal from Jail, hence, the request of the learned Counsel for the appellant appears plausible and viable for treating the appeal as an application under Section 561-A Cr.P.C. Needless to mention that the appeal also finds mention Section 561-A Cr.P.C. Resultantly, the application under Section 561-A Cr.P.C is accepted and Order dated 31.01.2019 passed by this Court whereby the appeal of the appellant Kewal was dismissed for non-appearance of convict is recalled, and the Cr. Appeal No.6/K of 2017 alongwith Cr. Appeal No.23/K of 2018 in their original numbers

stand resurrected. For holding the view, I am fortified by the dictum laid down by the Hon'ble apex Court in its judgment reported in 2015 SCMR 1002 IKRAMULLAH AND OTHERS vs. THE STATE, relevant at page 1006 para 9 is reproduced:-

> *"A report dated 11.12.2014 has been received from the Superintendent, Central Prison, Bannu informing that Adil Nawab appellant had escaped from the said jail during the night between14/15.4.2012 and he has become a fugitive from law eversince. The law is settled by now that a fugitive from law loses his right of audience before a court. This appeal is, therefore, dismissed on account of the above mentioned conduct of the appellant with a clarification that if the appellant is recaptured by the authorities or he surrenders to custody then he may apply before this Court seeking resurrection of this appeal."*

12. Now adverting to merits of the case, it appears that the prosecution has miserably failed to prove its case against the appellant Kewal beyond reasonable doubt. Admittedly, the FIR is delayed for which there is no explanation, whatsoever. Even according to the contents of the FIR, initially the complainant did not propose to visit police station rather he approached *Nek Mards* of the area and subsequently, he filed application before Justice of Peace. However, there is not an iota of evidence to prove the fact that the complainant ever approached Nek Mards and he was advised not to lodge FIR. In absence of such evidence the inference cannot be ruled out that the delayed FIR has been lodged after consultation and deliberation just to concoct and fabricate a story and rope males and females in the case. Secondly, the PWs have contradicted each other on material particulars.

For instance, PW.1 complainant Shagan states that "*accused Hari robbed mobile from my pocket",* whereas PW.2 Shrimati Lali, wife of the complainant (PW.1) states that *"Accused Kewal snatched mobile from the pocket of complainant".* PW.2 in her cross-examination states that *"The faces of accused were muffled".* In this situation, how the accused were identified, is a question that goes to the roots of the case of prosecution. Similarly, the statement of PW.3 Shamu is also at variance with the statement of PW.1. According to PW.1, Shamu is residing with him since 2010 whereas Shamu PW.3 in his statement categorically states that *"on 30.12.2012, I came at the house of my sister Sht. Lali".* PW.3 contradicts PW.2 on the point of snatching mobile phone from the complainant by accused Kewal. Furthermore, how this witness came to know that accused removed Rs.1,50,000/- from the trunk. The statement about exact amount is something that shakes the veracity of the statement of PW.3. Similarly, there is another contradiction that the PW.1 states that he went to *Nek Mards* for solution of matter whereas PW.3 states that complainant went to police station for lodging FIR but police did not register the same. PW.4 Krishan introduced the story in a different manner. He states that the accused, duly armed, entered the house and made them quiet on the force of weapons and confined them in a room. Thereafter, they went to other room where they committed robbery and removed the articles and amount, details whereof, is mentioned in his statement. It is quite astonishing that when the inmates

alongwith PW.4 were locked in a room prior to committing robbery how they were seen to have taken anything.

13. In the wake of above discussion, it can safely be concluded that the evidence on record was misread, misconstrued, mis-constructed and the facts were mis-appreciated which has resulted in grave miscarriage of justice. On same set of evidence, the trial Court acquitted one co-accused and the other was acquitted by this Court. In such view of the matter, the conclusions drawn by the trial Curt are not sustainable as the law of the land is *falsus in uno falsus in omnibus.*

14. Finally, not only the judgment suffers from inherent defects as far as the appreciation of facts and evidence is concerned, the judgment is legally lacunic in as much as, Section 395 PPC provides minimum sentence of four years for a convict but the trial Court, perhaps, without bothering to go to Section, awarded sentence less than the minimum prescribed sentence provided under the law. Realizing this situation, the learned Additional Prosecutor General Sindh requested for remand of the case. However, the remand of the case is not a viable option as the prosecution has not been able to prove its case beyond reasonable doubt. For sake of convenience, Section 395 PPC is reproduced:-

> *"**395. Punishment for dacoity.** Whoever commits dacoity shall be punished with imprisonment for life or with rigorous imprisonment for a term which shall not be less than four years nor more than ten years, and shall also be liable to fine."*

15. In the light of above discussion, Jail Cr. Appeal No.6/K/2017 alongwith Cr. Appeal No.23/K/2018 filed by appellant Kewal are accepted and conviction recorded by the IIIrd Additional Sessions Judge, Hyderabad vide impugned judgment dated 12.07.2017 is set aside. The appellant namely Kewal son of Amaro Thakur resident of Village Bagh Wah Taluka Hyderabad, now confined in Central Prison & Correctional Facility, Hyderabad in case FIR No.47/2013 dated 20.05.2013 Police Station Husri, District Hyderabad is acquitted of the charge and directed to be released forthwith, if not required in any other case or offence.

16. These are the reasons for my short order of even date.

MR. JUSTICE MUHAMMAD NOOR MESKANZAI
CHIEF JUSTICE

Dated, Islamabad, the
4th June, 2021
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