

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI

Criminal Appeal No.288 of 2019

Date	Order with signature of Judge
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For hearing of case.

04.07.2020

None present for the appellant.
Ms. Seema Zaidi, Additional P.G, Sindh.
Rao Aslam, SSP Investigation, District West a/w
SHO Nadeem Ahmed & SIP Imam Bux, A/SIO P.S Baldia Karachi.

NAZAR AKBAR, J.- This Criminal Appeal is directed against the judgment dated **17.04.2019** passed in Sessions Case No.1227/2016 arising out of FIR No.62/2016 under **Sections 320/427 PPC** registered at P.S Baldia Town, Karachi, whereby the Xth Additional Sessions Judge, West Karachi, has convicted the appellant under **Section 323** of Qisas and Diyat Ordinance and did not find the ingredients of **Section 320/427 PPC** in the prosecution case. The operative part of the impugned judgment is reproduced below:-

The outcome of the discussion made hereinabove, I have reached to the conclusion that the present accused Muhammad Saleem Shehzad has committed offence of causing accident and committing the death of deceased Mujeeb ur Rehman. Initially the accused was charged under Section 320/427 PPC but after appreciation of evidence and available record, the ingredients of same section are not attracted in the present case but section 322 PPC is very much attracted. Hence, offence under section 322 PPC is proved against the accused. Therefore, I convict the accused U/S 265-H(ii) Cr.P.C sentence him to make payment of Diyat U/s.323 of Qisas and Diyat Ordinance amount equivalent to 30630 grams of silver as per the notification published in the official gazette in the year 2018/2019.

2. Learned Additional P.G has contended that the trial Court has taken an uncalled for lenient view against the appellant while

exonerating the appellant from the charges under **Section 320 PPC** despite clear evidence on record for inflicting the punishment of TAAZIR. With the help of learned Additional Prosecutor General, Sindh I have gone through the record. While contesting the findings of trial Court to drop charges under **Section 320 PPC**, she has drawn attention of Court towards following observations of learned trial Court on point No.2:-

It is matter of record that firstly the complainant, who is son of deceased and P.W-02 Habib ur Rehman, who is Pesh Imam of Mosque had arrived at hospital but the accused did not meet them. This shows that the accused was trying to save his skin by hatching a fake story that he brought the deceased at hospital. The accused has taken the plea that he tried to put the brakes and deceased was in speed and could not control over the motorcycle can also not be believed to be true. **On the one hand, accused is saying that it was another trailer, which hit the deceased and on the other hand he is saying that he put the brakes but deceased was in speed, it clearly shows that trailer of accused hit with the bike of deceased and caused him serious injuries, resultantly, deceased died. It has come on record that on the date, time and place of accident took place, the accused was driving the trailer in question and due to his rash and negligent driving, he caused the accident and caused the death of deceased.** Instead of helping the injured and providing him immediate medical treatment and taken him to nearby hospital, accused acted mercilessly and escaped from the place of incident and leaving the injured dying at the road. **This act of accused warrants action as per law. It has been proved beyond any shadow of doubt that the deceased died unnaturally death due to negligent and reckless driving of accused. The accused requires no mercy and concession; hence point No.2 is answered in affirmative.**

3. It is strange that despite the above discussion of evidence and answering point No.2 in affirmative the learned Judge in discussion on point No.3 has failed to convict the appellant under **Section 320 PPC** and contrary to his own findings on point No.2, he declared:-

“-----Initially the accused was charged under section 320/427 PPC but after appreciation of evidence and available record, the ingredients of same section are not attracted in the present case-----.”

And the learned Judge has convicted him only under **Section 322 PPC**. In fact the finding on issue No.2 once recorded in affirmative, the learned Judge had no reason to conclude that the offence under **Section 320** was not made out.

4. The appellant after filing of the instant appeal and obtaining bail on **30.5.2019** has absconded from this Court and, therefore, after taking action against the surety for production of the appellant, the surety was forfeited and the I.O was directed to produce the appellant. On his failure, the SSP Investigation was called to explain the circumstances in which the appellant could not be arrested by the police. However, pursuant to the order dated **18.06.2020** owner of the vehicle involved in the accident was present in Court on **23.06.2020**. The owner of vehicle Malik Dad Khan was directed to produce the vehicle in Court on **25.06.2020**. He did not produce the vehicle unless police took its custody. Then this case has been fixed for hearing on **26.6.2020, 27.6.2020, 01.7.2020** and **02.07.2020**. The last order dated **02.07.2020** contains many facts showing the conduct of Mohammad Saleem Shahzad, the absconding appellant, and Malik Dad Khan, owner of the vehicle involved in the accident, therefore, it is reproduced below:-

02.07.2020

None present for the appellant.
Mr. Muhammad Nizar Tanoli Advocate for owner of the vehicle.
Owner of the vehicle Malik Dad Khan is also present in person.
Ms. Seema Zaidi, Additional P.G, Sindh.
Rao Aslam, SSP Investigation, District West a/w
SIP Abdul Ghaffar, I.O of the case.

Learned SSP states that he has obtained the vehicle involved in the accident which is lying at main gate of this Court. The vehicle should be in the custody of the Nazir of this Court pending this appeal because the appellant/accused who has been convicted for an offence under Section 320 PPC has been driving this vehicle and the record shows that the convicted accused is being protected by the owner of the vehicle.

The record shows the absconding appellant was released on bail on **30.5.2019** and after his release on bail he never appeared in Court. He was released on surety of only **Rs.50,000/-** and therefore, the surety also did not bother to produce him and allowed the surety to be forfeited by order dated **13.5.2020** when I.O was directed to trace and produce the appellant. Then on **18.6.2020** I.O informed that he has been informed by brother of appellant that appellant has died. However, on verification it has come on record that the appellant/accused is not dead and absconding.

The record further shows that the appellant has been produced by the owner of the vehicle before the police with the help of brother of the appellant. The owner of the vehicle namely Malik Dad Khan is smart man he refused to appear in trial Court to record his evidence despite the fact that he was also mushir of arrest of the appellant. He dodged police or managed with process server to report to the trial Court that he is not in Karachi and his whereabouts are not traceable. The impugned order shows that he remained absent from the Court and he did not come in the witness box to record his evidence.

On **23.06.2020** he was present in this Court and after hearing orders to produce the vehicle in Court since it was given to him on superdiginama he practically refused to obey Court order. The report of the learned SSP submitted on the last date of hearing shows that his son has informed the police that owner of vehicle is not in Karachi. Today again he is saying that he has gone out of Karachi though the CDR which is available on record reflects his location in Karachi during this period. His son is also smarter enough, he has committed to the police to produce his father within two days. On the appointed time, when he came to the Police Station he tried to stage a drama that he was being illegally detained by the police. This kind of persons cannot claim any indulgence from the Court. The absconding appellant/accused can still be produced by the owner of the vehicle with the help of brother of the appellant/accused but he is not ready to do. Therefore, the vehicle will remain in the custody of the Nazir of this Court until the absconding appellant is produced in Court. The I.O and the learned SSP should make sure that the original driving licence of the appellant/accused should also be produced in Court with fresh verification on the next date of hearing.

Adjourned for **04.07.2020** at **11:30 am** as suggested by the SSP for production of absconding accused.

5. Pursuant to the above order, SSP Investigation Rao Aslam has filed a report regarding verification of driving licence of the absconding appellant. It is taken on record. According to the report the licence produced by the appellant at the time of his arrest was fake and bogus. It is necessary to mention here that the appellant was produced before the Investigation Officer for his arrest in crime No.62/2016 by the owner of the trailer namely **Malik Dad Khan** and real brother of the appellant namely **Bashir Ahmed**. It may be mentioned here that during the trial prosecution has relied on a report dated **30.08.2016** from the Incharge Driving Licence Branch, Khairpur wherein driving licence of the appellant was verified as genuine. Such report was produced as **Ex.7/G** available in the R&Ps. However, today the learned SSP has submitted a verification report dated **03.07.2020** which shows that the driving licence of the appellant was fake and bogus. It means the appellant has managed a bogus verification report regarding his driving licence, therefore, SSP Investigation present in Court is directed to ensure a comprehensive inquiry through the competent authority into the circumstances in which a fake licence was initially issued from Driving Licence Branch, Khairpur and then it was protected by sending verification report about the fake licence as genuine and whoever is responsible in issuing fake licence and verification report dated **30.08.2016** from the Driving License Branch Khairpur, action be taken against all those persons according to law. The driving licence which was provided by the appellant to the investigating officer is produced

today in compliance of the above order and same is returned to the concerned police officer for again depositing it in the malkhana.

6. The order dated **02.07.2020** was passed in presence of the owner of the vehicle involved in the accident and his lawyer but today both are absent. Be that as it may, since it has come on record that the vehicle involved in the accident was driven by the appellant on a fake and bogus licence, the SSP Investigation present in Court has informed that action will be taken against **Malik Dad Khan**, owner of the vehicle involved in the accident in accordance with law for allowing his vehicle to be driven by a person who was having a fake licence or in other words who was driving the vehicle without licence. In this context the prosecution may take guidance from a judgment of this Court in the case of **Atta Muhammad vs. The State** reported in **2005 P.Cr.L.J 1648** Karachi wherein the **Hon'ble Mr. Justice Rahmat Hussain Jafferi** (as he then was) has observed that in the case of vehicle being driven by a person without driving licence and an offence under **Section 320 PPC** is committed by such person, the owner of the vehicle is to be treated as co-accused being abettor in terms of **Section 107 PPC** and his case would fall under **Section 114 PPC**. The relevant observations from para-7, 11 and 14 to 17 from the said judgment are reproduced below:-

7. Under section 3 of the Motor Vehicles Ordinance, 1965 (hereinafter referred to as the "Ordinance, 1965"), a person is entitled to drive any motor vehicle or public service vehicle if he holds an effective licence authorizing him to drive such vehicle. The said section reads as under:-

"3. Prohibition on driving without licence.---
 (1) No person shall drive a Motor Vehicle in any public place unless he holds an effective licence authorizing him to drive the vehicle; and no person shall so drive a Motor Vehicle as paid employees or shall so

drive a public service vehicle unless his licence specially entitles him so to do:

Provided that a person receiving instruction in driving a Motor Vehicle may, subject to such conditions as may be prescribed by Government in this behalf, drive a Motor Vehicle in any public place.

(2) No person shall drive a motor vehicle in any public place unless he had in his possession his own copy of the most recent version of the Pakistan Highway Code published by the Federal Government."

Thus, for driving any vehicle, the driver should have an effective licence authorizing him to drive such vehicle.

11. From the above provisions of law it is clear that under section 3 of the Ordinance, 1965, the applicant was authorized to drive on effective licence only. After it has ceased to be effective then his driving of public service transport vehicle became unlawful, therefore, his case would fall within the definition of unlawful as mentioned in section 321, P.P.C. Thus, the applicant appears to have committed an offence punishable under section 322, P.P.C.

14. It will be noticed that the offences of accidents are increasing day by day and particularly from the hands of drivers, who ply transport vehicles: If the person is holding a valid licence and due to accident the offence is committed then he is required to be released on bail **but if a person who is driving a vehicle without a licence or an effective licence then he will be driving the vehicle unlawfully**. As such the cases of such person should be examined differently from the cases of persons whose actions are lawful and accidentally without any intention the offence is committed.

15. In order to curb the driving of a person who does not hold the licence or an effective licence the **Ordinance, 1965, has made the owner or person incharge of a motor vehicle responsible by directing such persons that they should not permit such drivers to drive the vehicle in public place**. The said provision is available in section 5 of the Ordinance, 1965, which reads as under:-

"5. Owners of Motor Vehicles not to permit contravention of section 3 or section 4.---
No owner or person incharge of a Motor Vehicle shall cause or permit any person who does not satisfy the provisions of section 3 or section 4 to drive the vehicle."

16. From the facts of the case it appears that owner of the Bus bearing No.JA-7070 had allowed and permitted the applicant to drive the vehicle in contravention of section 3 of

the Ordinance, 1965, as the applicant was not holding effective driving licence to drive the bus at public place, therefore, it appears that the owner has abetted the crime as defined in section 107, P.P.C. which reads as under:--

"107 Abetment of a thing. A person abets the doing of a thing, who---First. Instigates any person to do that thing; or

Secondly. Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or

Thirdly. Intentionally aids, by any act or illegal omission, the doing of that thing."

17. The case of the owner or person in charge of the vehicle of such type of cases would fall under third category of section 107, P.P.C. therefore, the owner or person in charge of vehicle is also equally responsible for the offence committed by the applicant and his case would fall under section 114, P.P.C.

7. In view of the above facts and evidence on record and observations of trial Court reproduced in para-2 above, the findings of trial Court that ingredients of **Section 320 PPC** are not attracted appears to be against the evidence. In addition to it, as per report submitted by the SSP Investigation today the absconding appellant at the time of accident was driving the vehicle without any licence, therefore, once the appellant is arrested and produced before this Court, he should be put on notice under **Section 439(2)** of the **Cr.P.C** that why his punishment should not be enhanced to include conviction under **Section 320 PPC**.

8. Adjourned; to come up on **14.07.2020** by which date the learned SSP Investigation, West, Karachi shall arrest the absconding appellant and produce before the Court.

JUDGE

Ayaz Gul