IN THE HIGH COURT OF SINDH AT KARACHI

Crl. Appeal No.516 of 2020

Dates of hearing:	:	23.9.2021
Date of Judgment	:	23.09.2021
Appellant Farooque son of Siddique	:	through Mr. Siraj Ahmed Khoso, Advocate
State	:	through Ms. Seema Zaidi, Deputy Prosecutor General, Sindh a/w ASI Umer Hayat of P.S. Docks, Karachi.

JUDGMENT

Muhammad Saleem Jessar, J.- By means of instant Criminal Appeal appellant Farooque son of Siddique has assailed the Judgment dated 17.11.2020 passed by learned Xth Additional Sessions Judge, Karachi West in Sessions Case No. 918/2018 (*State Vs. Farooque S/o Siddique*), arising out of Crime kNo.123/2018 registered at P.S. Docks, Karachi under Sections 392/397/34 PPC, whereby the appellant has been convicted for an offence punishable under section 392 PPC and sentenced to undergo R.I. for five (5) years and to pay fine of Rs.50,000/- (Rupees Fifty Thousand only) and in case of non-payment of fine, he was ordered to undergo S.I. for three months more.

The crux of prosecution case, as unfolded by complainant Hamza Khan S/o Ali Bahadurin in the aforesaid FIR, are that on 16.03.2018 at about 2045 hours, he alongwith his friend Mairaj Khan S/o Shams Khan were going to Phoenix Security Office situated at West Wharf Road on motorcycle bearing registration No.KIR-8626 and when they reached at ICI company Near Islami Kanta, Muhammadi Colony, Karachi, at about 08:45 P.M accused Farooq S/o Siddique and his other two accomplices got stopped them. All the three culprits were holding pistols in their hands and asked him and his friend to hand over to accused whatever they

possessed, else they would commit their murder, as such due to fear he handed over them his Intex mobile phone, IMEI No.911528150036190, 911528150036182 which contained two SIMs, one purse having cash of Rs.2300/, his original CNIC, company card, ATM card of Bank Al-Habib, his father's original CNIC and photocopy of his mother's CNIC. It was further stated that the accused also snatched one purse which contained cash of Rs.1200/-, original CNIC, company card, ATM card of Bank Al-Habib and one driving license from his friend Miraj. Then they made hue and cry, in the meantime, one police mobile coming from Islamia Kanta reached there and on seeing police party, they showed braveness and succeeded to apprehend one accused who was holding pistol in his hand, while other two accused made their escape good. It was further stated that ASI Muhammad Azeem Khan alongwith his subordinate staff arrested the apprehended accused who, on inquiry, disclosed his name as Farooq S/o Siddique and that of absconding accused as Younus S/o Muhammad Hussain @ double Roti and Muhammad Alam @ Mad Alam S/o Unknown. It was further stated that the accused Farooq further disclosed the police that the looted articles were taken away by absconding accused, thereafter police took the recovered pistol and accused in their custody and accordingly complainant lodged FIR at Police Station.

After completing usual investigation police submitted challan in the Court, showing present appellant in custody while other two accused as absconders. A formal charge was framed against accused vide Ex.2 to which he pleaded not guilty vide his Plea Ex.2/A and claimed to be tried.

In order to prove its case, prosecution examined P.W-1, complainant Hamza Khan, who produced memo of arrest and recovery as Ex.3/A, FIR as Ex.3/B and memo of site inspection as Ex.3/C. P.W-02, ASI Muhammad Azeem, was examined at Ex.04, who produced Roznamcha entry No.44 as Ex.4/A, entry of registration of FIR as Ex.4/B, while P.W-03, ASI Umer Hayat, I.O. of the case, was examined at Ex. 08, who produced two Roznamcha entries No.15 and 42 as Ex.8/A and Ex.8/B respectively. Thereafter, learned DDPP, appearing for the State, closed prosecution side vide his Statement Ex.09.

Statement of accused was recorded under Section 342 Cr. P.C. at Ex.10, in which he denied the allegations leveled against him and claimed to be innocent,

having been falsely implicated in the case. However, accused did not examine himself on oath nor produced any witness in his defence to disprove the allegations levelled against him by the prosecution.

After formulating the points for determination, recording evidence of the prosecution witnesses and hearing counsel for the parties, learned trial Court vide impugned judgment convicted and sentenced the appellant as stated above, while the case of absconding accused namely, Younus son of Mohammad Hussain alias Double Roti and Mohammad Alam alias Alam son of unknown was ordered to be kept on dormant with direction to issue their life time arrest warrants through S.S.P. Investigation West and it was further ordered that their case shall be re-opened as and when they are arrested and produced before the Court. Against the judgment of conviction, the appellant has preferred instant criminal appeal.

I have heard learned counsel for the appellant as well as learned D.P.G. appearing for the State and perused the material available on the record.

Learned counsel for the appellant has contended that the appellant is innocent and has been falsely involved in the present case, as he could not fulfill the demand of police to pay illegal gratification. He further contended that the trial Court has passed impugned judgment on the basis of surmises and conjectures. According to him, although prosecution case is that the accused robbed two persons i.e. the complainant and one Mairaj / Siraj, but surprisingly enough only complainant has been examined, while other star witness / alleged eye-witness cum victim of the incident has been given up by the prosecution which is fatal to the prosecution case. He further submitted that even there is material contradiction in the statements of complainant himself as well as other prosecution witnesses with regard to the name of person who was accompanying the complainant at the time of alleged incident as sometime his name has been shown as ***Mairaj*** and sometime as ***Siraj*** which also creates serious doubts in the prosecution case. He further submitted that even there is contradiction so far as time of alleged incident is concerned, as in the FIR it has been shown as 08.45 **PM**, whereas in the deposition of complainant the time has been shown as 08.30 **AM**. He further submitted that a joint memo of recovery and arrest has been prepared in both the cases i.e. the present case and the other under the Arms Act. He further submitted that no allegedly looted amount or any other article has been recovered from the

possession of present appellant. He further submitted that there are material contradictions in the statements of prosecution witnesses. He next submitted that there is overwriting in the memo of arrest, which creates serious doubts. According to him, admittedly independent persons were available at the spot, despite that none of them has been made as witness or mashir of recovery and arrest, which is clear violation of Section 103 Cr. P.C. He also submitted that 161 Cr. P.C. statements of the witnesses were recorded after considerable delay. He prayed for setting aside the impugned judgment and acquittal of the accused/appellant.

Conversely, learned D.P.G. appearing for the State supported the impugned judgment. She submitted that the accused was apprehended at the spot and offensive weapon was also recovered from his possession, in presence of witnesses. She further contended that the prosecution witnesses have implicated the accused persons in the commission of the alleged offence and their evidence could not be shaken in the cross-examination. However, she could not controvert the submission of the appellant's counsel that the alleged robbed cash and articles were not recovered from the possession of present appellant. Despite that, she prayed for dismissal of the appeal and maintaining the impugned judgment.

In the instant case, so far as ocular testimony is concerned, prosecution has examined only one witness namely, complainant Hamza Khan. Although complainant claimed that one Mairaj / Siraj was also accompanying him at the time of incident and he was also robbed by the accused persons but he could not be examined by the prosecution.

The complainant deposed that on 16.03.2018, in evening time, he was going to his job from Baldia Town. The bridge of I.C was jammed; therefore, he was passing under the said bridge. At about 08:30 A.M, he reached near to I.C Bridge. Siraj Khan, his brother-in-law was also accompanying him on motorcycle. He further deposed that there is a such passage wherefrom only one person on motorcycle could pass; therefore, he had stepped down from his bike and was crossing the passage and when again he boarded on the bike, three culprits reached there and removed the key of motorcycle of complainant and threw the same in river and thereafter they dragged him towards a corner by holding his hair and also gave him beatings. He further deposed that the culprits took out his purse

containing Rs.2300/-, one Intex mobile phone, his original CNIC, ATM Card, CNIC of his parents. From Siraj one Nokia Mobile Phone and Rs.1200/- were snatched by the accused. He further deposed that **one of the accused was armed with pistol**, who aimed the same at him. Meanwhile, he heard the siren of police mobile, on which two culprits escaped away along with looted items; however, they succeeded in apprehending present appellant namely, Farooque. He further deposed that accused Farooq disclosed the name of his absconding companions as Muhammad Hussain alias Double Roti; however, he did not remember the name of other accused. He further deposed that police recovered pistol along with four live bullets from the accused / appellant in his presence for which police got prepared memo of arrest and recovery vide Ex. 3/A. He further deposed that thereafter, they went at P.S, where FIR was lodged by him. He further deposed that I.O had inspected the place of incident on his pointation and prepared such memo Ex. Ex.3/C.

During his cross-examination, he admitted, ***"This incident is of 7.30 pm."***. …….. ***"On my shouting 7/8 security guard were gathered there. It is correct to suggest that there is Islami Kanta. It is correct to suggest that place of incident is <u>thickly populated are</u> and people passes from there as well as traffic also plying……..It is correct to suggest that police did not associate any of the person as witness from where gathered there……It is correct to suggest that I.O. did not associate any person…"***

P.W ASI Muhammad Azeem deposed that on 16.03.2018 he was posted as ASI at P.S Docks. On that day, as per entry No. 44, he along with other police officials left for patrolling and when at about 2045 hours they reached near Islamia Kanta, they heard the noise and saw that two persons who were in security guard uniform had caught hold of one person. He further deposed that they disclosed him that the apprehended person was looting them along with his other companions, who made their escape good. He further deposed that on enquiry the apprehended person disclosed his name as Farooq and also disclosed the name of his accomplices as Younus and Muhammad Alam. He further deposed that from accused Farooq, they recovered one pistol along with live bullets and accordingly he prepared memo of arrest and recovery and thereafter, sealed the case property on spot. He further deposed that he brought the accused at P.S and registered the FIR. He also deposed that he had also accompanied the I.O. of the case to the

place of incident along with complainant, where I.O prepared memo of site inspection and also recorded his statement under Section 161 Cr. P.C.

In his cross-examine he admitted, ***"It is correct to suggest that I have not associated any person to act as independent mashir……..The pistol was handed over to me by the complainant. It is correct to suggest that pistol produced in court do not bear number of its made company or country. It is correct to suggest that sketch of pistol do not bears signature of mushirs."***

The third witness examined by the prosecution is P.W Umer Hayat, who had carried out the investigation of the case. He alongiwth ASI Mohammad Azeem also inspected the site on pointation of complainant and recorded 161 Cr. P.C. statements of the witnesses. Then on pointation of accused Farooque he conducted raid for arresting absconding accused persons but could not arrest them and then he submitted challan before the Court. In his cross-examination he admitted that he *had not given notice to any person from public to become Mashir.*

In the instant case prosecution evidence is consisting of only three witnesses namely, complainant Hamza Khan, ASI Mohammad Azeem and ASI Umer Hayat, I.O. of the case. In his deposition the complainant has categorically admitted that *on his shouting 7/8 security guard had gathered at the spot.* He also admitted that *Islami Kanta is situated near the spot and that place of incident is situated in a thickly populated area and people passes from there and traffic also used to ply there.* He also admitted that *police did not associate any one of the persons gathered at the place of incident as* witness and that *I.O. also did not associate any such person.* Likewise, ASI Mohammad Azeem, who allegedly effected arrest of the accused and also recovered offensive weapon from him, also admitted in his evidence that *he did not associate any independent person to act as mashir*. No plausible explanation has come forward from prosecution side that despite the fact that private and independent persons were available at the spot at the time of alleged incident, as to why the police did not associate any of such persons to act as witness and/or mashir. Such conduct of the police is violative of the provisions of Article 129(g) of the Qanoon-e-Shahadat Order as well as Section 103 Cr. P.C.

Now it is well settled that despite availability of disinterested witnesses, non-examination of such witnesses in the case gives inference that in case such

witnesses had been examined, they would have deposed against the prosecution as envisaged under Article 129(g) of Qanoon-e-Shahadat Order. In the case of ***Bashir Ahmed alias Manu*** Vs. ***The State*** **(1996 SCMR 308)** it was held by Honourable Supreme Court that despite presence of natural witnesses on the spot they were not produced in support of the occurrence an adverse inference under Article 129(g) of Qanun-e-Shahadat Order could easily be drawn that had they been examined, they would not have supported the prosecution version. In another case reported as ***Mohammad Shafi*** Vs. ***Tahirur Rehman*** **(1972 SCMR 144)** it was held that large number of persons had gathered at the place of occurrence but prosecution failing to produce single disinterested witness in support of its case, therefore no implicit reliance could be placed on evidence of interested eye-witnesses. In the case reported in ***Ghulam Shabbir*** Vs. ***Bachal*** reported in **1980 SCMR 708**, it was observed that no witness of locality nor owner of hotel was produced in support of prosecution case nor any independent evidence to corroborate testimony of the three eye-witnesses was produced, as such, the acquittal was upheld by the Honourable Supreme Court.

There also seems to be violation the provision of Section 103 Cr.P.C. as despite availability of independent persons, none of them was associated as mashir to witness arrest of the accused and the recovery of offensive weapon from him. Needless to emphasize that in view of provisions of section 103 Cr. P.C. the officials making searches, recoveries and arrests, are reasonably required to associate private persons, more particularly in those cases in which presence of private persons is admitted so as to lend credence to such actions, and to restore public confidence. This aspect of the matter must not be lost sight of indiscriminately and without exception.

In the case reported as State Vs. Bashir and others (PLD 1997 S.C. 408) Honourable Supreme Court held as under:

> *"As regards above second submission of Mr.M.M. Aqil, it may be observed that it has been repeatedly held that the requirements of section 103 Cr.P.C. namely, that two Members of the public of the locality should be Mashirs of the recovery, is mandatory unless it is shown by the prosecution that in the circumstances of a particular case it was not possible to have two Mashirs from the public."*

In another case reported as ***Yameen Kumhar*** Vs. ***The State*** **(PLD 1990 Karachi 275)** this Court after discussing various case-law on this point held as under:

> "However, where during investigation of a crime recovery is made from any inhabited locality compliance with section 103 must be made. It cannot be ignored or brushed aside on the whims and caprices of the Investigating Officer except on well-founded grounds and in exceptional cases. If recovery has been made in contravention of section 103, it is the duty of the prosecution to explain it and give valid and reasonable explanation for such digression. **Recovery is an important piece of evidence which is to be proved by disinterested, independent and respectable witnesses. Such witnesses should be of the locality if the circumstances of the case permit**. Section 103 embodies rule of prudence and justice. It is intended to eliminate and guard against 'chicanery' and 'concoction', to minimise manipulation and false implication. It is for these reasons that there is a consensus in the Superior Courts that compliance with section 103 should not be bypassed nor that its applicability be restricted to proceedings under Chapter VII only. The principles of section 103 have been applied and practised during investigation in crimes for so long and with such regularity and force that any attempt to restrict it to proceedings under Chapter VII only will unsettle the settled law.
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> The provisions of Chapter VII make it clear that they relate to the search of any place but it cannot be restricted only to house or a closed place, it can be an open place, open area, a. playground, field or garden from where recovery can be nude for which search is conducted. Although in strict sense the provisions of section 103 are restricted to searches under Chapter VII of Cr. P.C. it has become a practice to apply it to all recoveries made by the Police Officers while investigating any crime. **The rules of justice enunciated by section 103 are so embedded in our criminal, jurisprudence and so universally accepted that in all criminal cases two mashirs are always cited for recovery and reliance is placed on these witnesses in the ordinary course provided they are independent, respectable and inhabitants of the locality.** The residence of the mashirs becomes relevant depending on the facts of the case. The emphasis should be on respectability."

Another salient feature of the case is that; although, as per prosecution case, the accused robbed two persons i.e. the complainant and one Mairaj / Siraj, but surprisingly enough only complainant has been examined, while other star witness / alleged eye-witness of the incident has been given up by the prosecution which is also fatal to the prosecution case and is also hit by the aforesaid provisions of Article 129(g) of Qanoon-e-Shahadat Order. Although, the plea taken by the prosecution in this behalf is that the said witness had left his place of residence

and shifted to his native place in KPK and in order to establish this fact I.O. of the case namely ASI Umer Hayat was also examined, however, the complainant has categorically admitted that the said Mairaj / Siraj was his **brother-in-law**. In this view of the matter, there is strong presumption that he must have known whereabouts of the said witness which could have been easily provided to the Court for issuance of process to him in KPK, particularly in view of the fact that he was allegedly an eye-witness of the incident and even cash and other articles were looted from him too, thus his evidence was very much material in order to decide the fate of the trial in accordance with law.

Apart from above, there are also certain other contradictions in the evidence of prosecution witnesses as well as defects in the investigation. For instance; (i) in the F.I.R. the complainant disclosed the time of alleged incident as 8.45 **p.m.** (night) whereas in his examination-in-chief he stated that incident took place at about 08.30 **a.m.** (morning). Yet in his cross-examination he deposed, ***"This incident is of 7.30 p.m."***; (ii) in the FIR complainant stated that the apprehended accused Farooque disclosed the name of absconding accused as Younus son of Mohammad Hussain alias Double Roti and Mohammad Alam alias Mad Alam son of unknown, whereas in his deposition he stated that the apprehended accused disclosed the name of one of his accomplices as Mohammad Hussain alias Double Roti, whereas complainant stated that the name of other accomplice he did not remember; (iii) ***a joint memo of arrest*** and recovery was prepared in both the cases i.e. the present case as well as in another case under the Arms Act; (iv) No FSL report has been produced in order to ascertain the status and condition of the alleged offensive weapon, (v) ASI Mohammad Azeem admitted in his cross-examination that *the pistol was handed over to him by the complainant.* This means that the offensive weapon was not recovered from the possession of the accused, rather the same was possessed by the complainant when ASI Mohammad Azeem reached at the spot and it was complainant who handed over the same to ASI Mohammad Azeem. He also admitted that *pistol produced in court did not bear number of its made company or country.* All these factors create doubts in the prosecution case. Learned counsel for the appellant also raised plea that there is material contradiction in the two statements of complainant i.e. one made in the FIR and the other in his deposition, so also in the evidence of other prosecution witnesses as well as in certain documents with regard to the name of aforesaid

alleged eye-witness who was accompanying the complainant at the time of alleged incident; as sometime his name has been shown as ***Mairaj*** and sometime as ***Siraj***. However, I am not convinced by such submission as from the perusal of contents of original F.I.R. in Urdu it seems that the name of the said person has been shown therein as Siraj in Urdu. However, in the challan it has been shown as Miraj. I am of the opinion that this might have occurred due to misunderstanding as while writing the two names i.e. ***Siraj*** and ***Mairaj*** in Urdu language speedily, there seems to be visible similarity in the two names.

Needless to emphasize that it is a well settled principle of law that prosecution is bound under the law to prove its case against the accused beyond any shadow of reasonable doubt. It has also been held by the Superior Courts that conviction must be based and founded on unimpeachable evidence and certainty of guilt, and any doubt arising in the prosecution case must be resolved in favour of the accused. In the case reported as Wazir Mohammad Vs. The State (1992 SCMR 1134) it was held by Honourable Supreme Court as under:

> *"In the criminal trial whereas it is the duty of the prosecution to prove its case against the accused to the hilt, but* ***no such duty is cast upon the accused, he has only to create doubt in the case of the prosecution****."*

In another case reported as Shamoon alias Shamma Vs. The State (1995 SCMR 1377) it was held by Honourable Supreme Court as under:

> *"The prosecution must prove its case against the accused beyond reasonable doubts* ***irrespective of any plea raised by the accused in his defence.*** *Failure of prosecution to prove the case against the accused, entitles the accused to an* **acquittal**. *The prosecution cannot fall back on the plea of an accused to prove its case…….****Before, the case is established against the accused by prosecution, the question of burden of proof on the accused to establish his plea in defence does not arise."***

The accumulative effect of the abovesaid infirmities / legal flaws in the prosecution case is that serious dents have been put and doubts created in the prosecution case. In view of aforesaid defects and lacunas, it can safely be held that the prosecution has not succeeded in discharging such obligation on its part. It is also a well settled principle of law that the accused is entitled to be extended benefit of doubt as a matter of right. In the present case, there are many circumstances which create doubts in the prosecution case. Even an accused cannot be deprived of benefit of doubt merely because there is only one

circumstance which creates doubt in the prosecution story. In the case reported as Tariq Pervaiz vs. The State 1995 SCMR 1345 the Honourable Supreme Court held as under :-

> ***"The concept of benefit of doubt to an accused person is deep-rooted in our country. For giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right."***

For the foregoing reasons, by short order dated 23.09.2021 instant appeal was allowed and the impugned Judgment dated 17.11.2020 passed by learned Xth Additional Sessions Judge, Karachi West in Sessions Case No. 918/2018 (*State Vs. Farooque S/o Siddique*), arising out of Crime No.123/2018 registered at P.S. Docks, Karachi under Sections 392/397/34 PPC was set aside. Consequently, the appellant Farooque son of Siddique was acquitted from all charges. He, being in custody, was ordered to be released forthwith, if his custody is not required in any other criminal case.

Above are the reasons for the said short order.

JUDGE