

IN THE HIGH COURT OF SINDH, BENCH AT SUKKUR

Criminal Appeal No. S-59 of 2021
a/w
Cr. Revision Application No.S-93 of 2021

Appellants: Jam Tanveer and others through Mr. Qurban Ali Malano, Advocate.

Complainant: Muhammad Jameel Malik through Mr. Ubedullah K, Ghoto, advocate

The State: Through Syed Sardar Ali Shah, DPG

Date of hearing: 31.01.2022.
Date of decision: 31.01.2022.

J U D G M E N T

ZULFIQAR ALI SANGI, J:- Through captioned appeal, appellants Jam Tanveer and others have assailed the Judgment dated 17.08.2021, passed by learned Additional Sessions Judge/MCTC, Ubauro, in Sessions Case No.276/2017 re-*“Muhammad Jameel Malik v. Jam Tanveer and others”*, arising out of Direct Complaint No.56/2017, under Section 3 (2) of Illegal Dispossession Act, 2005, whereby the appellants were convicted under Section 3 (2) of Illegal Dispossession Act, 2005 and sentenced to suffer R.I for one year and to pay fine of Rs.100,000/- (one lac rupees) each which will be paid to the Complainant, in case of default in payment of fine, they shall undergo SI for three months more. Besides, Complainant has also preferred a Criminal Revision Application against impugned judgment prayed therein for enhancement of sentence awarded to the Appellants from one year to ten years.

2. The brief facts as alleged in the complaint are that his late father Muhammad Ibrahim was owner of an agricultural land bearing survey number 108 (4-10) acres, 113 (5-07 acres to the extent share 25 paisa area as per share is 2-14 acres, situated in Deh Ubauro, Taluka Ubauro, District Ghotki. It is further alleged that on 11.09.2017 at about 1.20 pm the complainant along with his brother Abdul Karim and his son Naveed went to look-after their above mentioned land, when they reached there, they saw and identified accused (1) Jam Tanveer, (2) Muhammad Madan both empty handed, (3) Maqbool Ahmed armed with pistol, (4) Mouj Ali, (5) Janib, (6) Habib Ali, (7) Ghulam Hyder, (8) Shakeel Ahmed, (9) Rajib Ali, (10)

Abdul Hameed and (11) Ageel Ahmed all armed with lathies came over there. On coming they caused kicks and fists blows to the complainant and his witnesses. They also dismantled hut and removed one hand pump of the complainant from the said land. The cotton crop was standing in the agricultural land area of 2-14 acres. The accused persons illegally trespassed and occupied the above said land of the complainant and dispossessed him without any lawful authority. The proposed accused persons have no right or title over the said land. Although the complainant tried to resolve the matter through respectable persons, but he could not get the relief, therefore, he filed direct complaint prayed therein for taking cognizance of the incident; besides complainant be put in possession of disputed land, being owner of the disputed land.

3. The complaint was received to the trial Court from the Court of learned Sessions Judge Ghotki for its disposal according to law. Pursuant to that, reports were called from concerned SHO as well as Mukhtiarkar Revenue. The Mukhtiarkar and SHO after completing inquiry submitted their respective reports, whereupon the trial Court took cognizance on 07.11.2017. Consequently warrants in the sum of Rs.50,000/- were issued for each accused. The accused appeared before the Court and joined the trial.

4. The requisite case papers were supplied to the accused vide receipt at Exh.1/A 05 and 1/8. The charge against them was framed at Exh.2 to which they pleaded not guilty and claimed trial vide their pleas recorded at EXh.3 to 13 respectively.

5. During trial, prosecution examined Pw.1 complainant Muhammad Jameel Malik at Exh.14. He produced true copy of Form VII at Exh.14/A, certified true copy of judgment dated 10.12.2015 passed by learned Civil Judge, Daharki at Exh.14/B, decree at Exh.14/C, judgment dated 31.08.216 passed by the appellate Court at Exh.14/D and decree at Exh.14/E. He produced execution order dated 13.05.2017 at Exh.14/F and certified copy of diary dated 18.09.2017 at Exh.14/G. He also produced report of Mukhtiarkar dated 05.09.2017 which is placed on record with marked "X". PW.2 Abdul Kareem Malik was examined at Exh.15. PW.3 Naveed Ahmed Malik was examined at Exh.16. Thereafter the learned counsel for the complainant closed his side of evidence at Exh.17.

6. The statements of the accused have been recorded at Exh.18 to Exh.28 respectively. The accused persons have denied that

the allegations leveled against them. They denied to have encroached upon the land of complainant. They further stated that they are innocent and prayed for justice. The accused neither examined themselves on oath, nor led any evidence in their defence.

7. After allowing application U/S 540 Cr.P.C vide order dated 13.05.2019 moved by the learned counsel for the complainant, PW Mukhtiarkar Revenue Ubauro Amanullah Dahar was examined at Exh.29. He produced report and attested copy of entry No.33 dated 26.07.2004 at Exh.29/A 29/C respectively. PW SIP Yar Muhammad was examined at Exh.30. He produced original report along with the statements of witnesses of complainant namely Yasir and Abdul Majeed, report prepared by him at Exh. 30/A to 30/D respectively. Then the learned counsel for the complainant closed his side of evidence at Exh.32. Mr. Mashooque Ali Shaikh learned counsel for all the accused, except accused Jam Tanveer has adopted the same cross examination as conducted by learned counsel for the accused Jam Tanveer from PW Mukhtiarkar Ubauro vide his statement at Exh. 32. Again the statements of the accused have been recorded at Exh.33 to Exh.43 respectively. Again after allowing application U/S 540 Cr.P.C vide order dated 19.10.2020 moved by the learned counsel for the complainant, PW Mukhtiarkar Revenue Ubauro Shahid Hussain Dayo was examined at Exh.44. He produced attested Photostat copy of mashirnama dated 05.09.2017 at Exh.44/A. Then the learned counsel for the complainant closed his side of evidence at Exh.45. Again the statements of the accused persons have been recorded at Exh.46 to Exh.56 respectively.

8. Learned counsel for the appellants has contended that the prosecution has failed to prove its case beyond reasonable doubt; that learned trial Court did not appreciate the important aspect regarding the major contradictions of the prosecution witnesses; that Complainant has suppressed the facts of Direct Complaints in respect of Civil Suit No.272 of 2017 before learned Senior Civil Judge, Ubauro, which was disposed of through compromise decree with the brother Abdul Kareem and possession still lying with the complainant; that there is no specific allegation and the story managed against the appellants without legal justification; that the complainant has 25% share and no partition took place; however complainant with malafide intentions filed direct complainant; that there is material contradictions in the version of complainant and the

PWs and are inconsistent with the story narrated in complaint; that inspite of easy availability of independent persons at the place of incident not a single witness was associated as witness to corroborate the version of Complainant, therefore in presence of enmity between the parties, the testimony of complainant and PWs, is fatal to the prosecution case; that complainant and PWs are relatives and interested, therefore their evidence cannot be believed; besides there are many lacunas and contradictions in the evidence of PWs; that the impugned Judgment is against the law, facts, principles of natural justice and equity; that learned trial court has erred in convicting the appellants by not taking into consideration the entire material and thus the impugned Judgment is liable to be set-aside. He finally prayed that by extending benefit of doubt, the appellants may be acquitted.

9. On the other hand, learned Counsel representing the Complainant/Applicant in connected revision application, at the very outset, submitted that complainant is real owner of the land and has prima facie proved his case; that PWs alongwith official Respondents have fully supported the version of Complainant; that there is specific role of appellants/accused dispossessing the complainant from his land, which was fully supported; however learned trial Court awarded lesser punishment, hence this revision application has been preferred for enhancement of sentence.

10. Learned DPG appearing for the state has supported the impugned judgment and further contended that the prosecution has proved its case against the appellants beyond any reasonable shadow of doubt by producing oral as well as documentary evidence; that the learned trial court has rightly convicted the appellants and they do not deserve any leniency; that there appears no illegality or irregularity in the impugned judgment which is well reasoned and does not require any interference of this court.

11. I have heard learned counsel for the parties and have gone through the material available on record with their able assistance.

12. On reassessment of the entire evidence and perusal of the record I am of the view that the prosecution has failed to prove its case beyond a reasonable doubt by producing trustworthy and confidence inspiring evidence.

13. Complainant Muhammad Jameel was examined who deposed that he has 25 paisa share in land Survey No. 108 (4-10) and Survey No. 113 (5-7) acres situated in Deh and Taluka Ubauro. In the year 2005 accused Jam Tanveer and others took possession for which he filed suit for possession and the same was decreed in his favour and the judgment was executed vide report dated: 05-09-2017. PW-2 Abdul Kareem and PW-3 Naveed Ahmed have not deposed a single word in respect of civil litigation in between the parties. PW-2 during cross-examination stated that complainant filed suit for mutation of khata.

14. Complainant further deposed that on 11-09-2017 he along with Abdul Karim and Naveed Ahmed were available at the land where accused persons namely Jam Tanveer and Madan empty handed, Maqbool, Mouj Ali, Janib, Habib, Ghulam Hyder, Akeel Ahmed, Shakeel Ahmed, and Abdul Hameed with pistols and lathies came and gave kicks and fist blows to them and dismantled hand pump and chupra (hut) and then brought them to Benazir Chowk and illegally dispossessed them. PW-2 and 3 have not deposed a single word that they were taken by the accused persons towards Benazir Chowk.

15. Complainant during the cross-examination admitted that accused Jam Tanveer did not cause him kicks and fist bellows. PW-3 stated in his cross-examination that the accused persons assaulted all three of them.

16. The complainant during cross-examination stated that accused Jam Tanveer was standing at the distance of about one acre. Complainant also stated in cross-examination that he does not know that accused Jam Tanveer is shareholder in the same land. Again he admitted that accused Jam Tanveer was not standing on Sr. Nos. 108 and 113. However the PW-2 Abdul Kareem stated during cross-examination that accused Tanveer was standing along with other accused on the land at the time when they were dispossessed. PW-3 during cross-examination stated that accused Jam Tanveer on the date of incident was away from them at a distance of about 1-00 acre. PW-3 also during cross-examination stated that "It is correct that

accused Jam Tanveer at the time of incident was standing at some distance away from the disputed land.”

17. PW-2 admitted that accused Jam Tanveer is landlord. He also admitted that accused Jam Tanveer is respectable person of Ubauro. PW-3 also stated that accused Jam Tanveer is the landlord of Taluka Ubauro.

18. Complainant also admitted during cross-examination that he has not disclosed the boundaries of his land in petition and in his examination-in-chief. He admitted that he had not cultivated any crop on the land. He admitted during cross-examination that he in para No.7 of the petition mentioned that just after two days of the handing over possession accused persons dispossessed him from the land and again stated that it is due to some mistake as accused persons dispossessed him after five days of handing over the possession.

19. The complainant during cross-examination stated that he does not remember that whether in civil suit No. 277/2017 filed by him he stated in para No. 18 that on 15-08-2017 he was in possession of the disputed land and the said suit was decreed by consent and survey No. 108 and 113 were mentioned in the plaint. However at the same time he admitted during the cross-examination that in the plaint of said suit survey numbers 108 and 113 are mentioned. He also stated that he does not remember that accused Jam Tanveer sold out 5-15 acres land from survey number 108 and 113 to accused Muhammad Madan, Raham Ali, Mouj Ali, and Janib Ali.

20. PW-2 during cross-examination admitted that he does not distinctly recognize each accused by their names. PW-3 also during cross-examination stated that “I distinctly am not able to identify each accused by his name”.

21. Beside the above contradictions in the evidence of witnesses it is surprising to see that after the statement under section 342 Cr.P.C of accused Aqeel Ahmed some documents are

available in the paper book and the same were also exhibited as Ex.28 at page numbers 141 to 166 in respect of civil litigation in between the parties. At page 145 the copy of memo of plaint of F.C. Suit No. 272 of 2017 is available which was filed by the complainant himself against his brothers and others persons in which PW Abdul Kareem is also defendant No. 1-e. the suit was filed on 05-10-2017 and in its prayer clause "b" the complainant admitted that the possession of the disputed land was with him. Prayer clause b is reproduced as under:-

(b) To grant permanent injunction in favour of the plaintiff there by restraining the defendant No.1 to 6 permanently **from interfering with the plaintiffs peaceful physical possession** and restraining the defendant No.1(a) to 1(i) from the transferring and selling, gifting, exchanging or alienating the suit property mentioned in the prayer clause (a) above or mortgage leasing or encumbering the same in any manner whatsoever at the hand of anybody and else and also restrained to the defendant No.2 to 4 issue sale certificate of suit property and restrained the defendant No.5 to 6 not to interfere with the peaceful possession of the suit property of the plaintiff of the plaintiff without the due course of law.

22. The complainant has denied that he has filed a suit however PW-2 admitted such fact and the accused also brought on record its copy in the statement under section 342 Cr.P.C, these facts reflect that the complainant had concealed the real facts and deposed a false story before the trial court. In view of such fact their evidence cannot be relied upon. The accused also brought on record the copy of decree dated: 12-12-2017 passed in the above suit by way of compromise in which parties settled their dispute and also settled terms and conditions which are reproduced as under:-

TERMS AND CONDITIONS

1. That the plaintiff is lawful owner of the agricultural land.
2. That this Honourable Court may be pleased to direct the defendant No.4 [Mukhtiarkar (L.R) Ubauro] to keep the name of the plaintiff namely Muhammad Jameel son of Muhammad Ibrahim in entry of Fotti Khata Badal entry No.33 dated 26.07.2004 of the agricultural land bearing S.No.108 (04-10) acres. S.No.113 (05-07) acres extent share 25 paisa in which total area as per share (02-16 $\frac{1}{4}$), 109 total (02-35) acres as per share 64 paisa total area (18 $\frac{1}{4}$) Ghuntas total land area (02-34 $\frac{1}{2}$) acres satiated in Deh Tappo Ubauro, Taluka Ubauro District Ghotki.
3. That the defendant No.01 will not claim any right or interest in respect of subject property of the agricultural land bearing S.No.108 (04-10) acres, S.No.113 (05-07) acres extent share 25 paisa in which total area as per share (02-16 $\frac{1}{4}$), 109 total (02-35) acres as per share 64 paisa total area (18 $\frac{1}{4}$) Ghuntas total land area (02-34 $\frac{1}{2}$) acres situated in Deh Tappo Ubauro, Taluka Ubauro, District Ghotki in any form.
4. That the defendant No.01 to 01(i) will be bound to get implemented the terms and conditions of the compromise before revenue authorities and in revenue record required.

5. That the compromise between the parties has been arrived with the intervention of "Nekmards" of the tribe who have done the "Faisla" on Holy Quran and it is for the betterment of the family as the parties of this compromise belong to one and same family.

Given under my hand seal of this court
This the 12th day of December 2017

Sd/-12.12.2017
(Abdul Hafeez Naich)
C.O.C
Senior Civil Judge Ubauro

Sd/12.12.2017
(Naved Huder Phulpoto)
Senior Civil Judge Ubauro

23. After going through the above documents, it is very much clear that the story in the complaint that on 11.09.2017 accused persons illegally dispossessed him from the land, was managed by the complainant in view of the fact that he admitted in the F.C. Suit No.272 of 2017 filed on 05-10-2017 that he was in possession of the disputed land. It is well-settled principle of law that the prosecution is under obligation to prove its case against the accused person at the standard of proof required in criminal cases, namely, beyond reasonable doubt standard, and cannot be said to have discharged this obligation by producing evidence that merely meets the preponderance of probability standard applied in civil cases. If the prosecution fails to discharge its said obligation and there remains a reasonable doubt, not an imaginary or artificial doubt, as to the guilt of the accused person, the benefit of that doubt is to be given to the accused person as of right, not as of concession as has been held by Honourable Supreme Court of Pakistan in case of **Tariq Pervez v. State (1995 SCMR 1345)**.

24. The rule of giving benefit of doubt to accused person is essentially a rule of caution and prudence, and is deep rooted in our jurisprudence for safe administration of criminal justice. In common law, it is based on the maxim, "*It is better that ten guilty persons be acquitted rather than one innocent person be convicted*". The Honourable Supreme Court has quoted probably latter part of the last mentioned saying of the Holy Prophet (peace be upon him) in the case of **Ayub Masih v. State (PLD 2002 SC 1048)** "*Mistake of Qazi (Judge) in releasing a criminal is better than his mistake in punishing an innocent.*" Reliance also is place on the case of **Naveed Asghar and 2 others v. The State (PLD 2021 SC 600)**.

25. Keeping in view the said golden rule of giving benefit of doubt to an accused person for safe administration of criminal justice, I am firmly of the opinion that all the evidence discussed above is completely unreliable and utterly deficient to prove the charge against the appellants beyond reasonable doubt. Resultantly, the Criminal Appeal No. S-59 of 2021 is allowed and the Judgment dated: 17.08.2021 passed by the Court of Additional Session Judge/MCTC, Ubauro, in Session case No. 276 of 2017, Direct Complaint No. 56 of 2017, U/S 3(2) Illegal Dispossession Act, 2005 is set aside and the appellants are acquitted of the charges.

26. Since the appeal filed by the appellants is allowed and they were acquitted, therefore, the Revision Application No. S-93 of 2021 filed by the complainant for enhancement of sentence became infructuous and is hereby dismissed.

27. These are the reasons of my short order dated: 31-01-2022.

J U D G E