IN THE HIGH COURT OF SINDH CIRCUIT COURT MIRPURKHAS

Criminal Acquittal Appeal No.S- 17 of 2023

Appellant:	Qeemat son of Bhan Through Mr. Hitesh Kumar Maheshwari, Advocate.
Respondents:	1. Moosa son of Arho @ Karo Dal. 2. Babu son of Muhammad Dal. 3. Nawaz @ Ali Nawaz son of Bakho Narejo. 4. Kalo @ Moula Bux son of Jumoon Narejo. 5. Wassayo @ Allah Wassayo son of Latif Narejo.
Date of hearing:	27.10.2023
Date of detailed reasons:	30.10.2023

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J U D G M E N T

Shamsuddin Abbasi, J-: Qeemat son of Bhan, appellant, has challenged the validity of the judgment dated 11.10.2023, penned down by the learned Civil & Family Judge Tharparkar @ Mithi, in Criminal Case No.106 of 2023 (FIR No.12 of 2023) registered at Police Station Jhun, District Tharparkar, for offences under Sections 379 and 34, PPC, through which respondents were acquitted of the charge after holding full dressed trial.

2. F.I.R in this case has been lodged on 28.07.2023 at 8:30 pm whereas the incident is shown to have taken place on 03.04.2022. Complainant Qeemat son of Bhan has stated that on 02.04.2022 he left his sheep in jungle for grazing and on 03.04.2022 when he arrived at Habib Narejo Well he found 25 sheep were missing. He also noticed footsteps of five persons at the scene of offence. He then made queries from villagers and also went to village Godangarhi and met with Khamiso and Pancho, who informed him that while they were returning from village Jorio Bheel and reached near Habib Narejo Well, they saw Moosa son of Arho, Babu son of Muhammad, Nawaz son of Bakhar, Kalo son of Jumo and Wassayo son of Latif

loading 25 sheep in white colour Suzuki and on their query disclosed that they have purchased the sheep from Qeemat. Qeemat then went to P.S. and lodged FIR for offences under Section 379 and 34, PPC.

3. Pursuant to the registration of FIR, the investigation was followed and in due course the challan was submitted before the Court of competent jurisdiction under the above referred Sections, whereby the respondents were sent up to face the trial.

4. A charge in respect of offences under Sections 379 and 34, PPC was framed against respondents, to which they pleaded not guilty to the charged offence and opted to be tried.

5. At trial, the prosecution has examined as many as five witnesses. The gist of evidence, adduced by the prosecution in support of its case, is as under:-

6. Qeemat (complainant) appeared as witness No.1 Ex.4, Khamiso as witness No.2 Ex.5, Pancho as witness No.3 Ex.6, Jean as witness No.4 Ex.7 and investigating officer ASI Kalo Mal as witness No.5 Ex.8. Thereafter, the prosecution closed its side vide statement Ex.9.

7. Respondents were examined under Section 342, Cr.P.C. at Ex.10 to Ex.14, wherein they have denied the allegations imputed upon them by the prosecution, professed their innocence and stated their false implication. They opted not to make a statement on Oath under Section 340(2), Cr.P.C. nor adduce any evidence in their defence.

8. Upon completion of the trial, the learned trial Court concluded that the prosecution failed to prove its case against the respondents beyond shadow of reasonable doubt, and, thus, acquitted them as detailed in para-1 (supra), which necessitated filing of the instant Criminal Acquittal Appeal.

9. The learned counsel for the appellant (complainant) contends that the prosecution has proved its case through valid and reliable evidence connecting the respondents (accused) with the commission of offences charged with; that the witnesses produced by prosecution were consistent on each and every aspect of the matter and defence did not shatter their evidence during cross-examination; that the learned trial Court did not appreciate the evidence in line with the applicable law and surrounding circumstances as well as the recovery and based its findings on misreading and non-reading of evidence and arrived at a wrong conclusion in acquitting the respondents (accused); that the impugned judgment is bad in law and facts and liable to be set-aside and the respondents (accused) deserve to be convicted in accordance with law and, therefore, this Acquittal Appeal merits consideration.

10. I have heard the learned counsel for the appellant (complainant) and perused the record minutely. He has made a resolute effort to convince me with his submissions, but failed to point out any illegality or infirmity in the impugned judgment or any other material favouring to issue notice to the respondents (accused). No doubt, it is an acquittal appeal and the entire burden lies on the prosecution to prove glaring error of law and fact resulting into grave miscarriage of justice in the judgment of acquittal.

11. The crime in this case is shown to have taken place on 03.04.2022 whereas the FIR has been lodged on 28.07.2023, resulting a delay of about one year and four months, without furnishing any plausible explanation, hence in absence of any plausible explanation, the delay in lodgment of FIR castes a suspicion on the prosecution story. There is no denial of the fact that the complainant is not eye-witness of the incident, he came to know about taking away his sheep by respondents (accused) through Khamiso (PW.2 Ex.5) and Pancho (PW.3 Ex.6) on the same day of incident. The question arises why the complainant party kept mum and did not report the matter to police till 28.07.2023, which give rise to a presumption that F.I.R has been lodged after due deliberations and consultations. The Hon'ble apex Court, in absence of any plausible explanation, has always considered the delay in lodgment of F.I.R to be fatal and castes a suspicion on the prosecution story, extending the benefit of doubt to the accused. The Hon'ble apex Court has always treated the delay in lodgment of F.I.R as a cornerstone of the prosecution case to establish guilt against those involved in a crime and held that if there is any delay in lodging of a F.I.R and commencement of investigation, it gives rise to a doubt, which, of course, cannot be extended to anyone else except to the accused. Reliance in this behalf may well be made to the case of Zeeshan @ Shani v The State **(2012 SCMR 428)** wherein it has been held delay of more than one hour in lodgment of FIR give rise to an inference that occurrence did not take place in the manner projected by prosecution and time was consumed in making effort to give a coherent attire to prosecution case, which hardly proved successful. In another case reported as 2010 SCMR 97 ***(Noor Muhammad v The State)*** it has been held that *"when the prosecution could not furnish any plausible explanation for the delay of twelve hours in lodging the FIR, which*

time appeared to have been spent in consultation and preparation of the case, the same was fatal to the prosecution case. In the light of such precedents the explanation furnished by the prosecution, referred to above, is not plausible, benefit whereof must go to the appellants".

12. The ocular account has been furnished by PW.2 Khamiso (Ex.5) and PW.3 Pancho (Ex.6). Before analyzing their evidence, it would be appropriate to first go through the FIR because the entire prosecution machinery came into motion when complainant lodged FIR regarding an incident of theft of his 25 sheep. The complainant has claimed that besides noticing footsteps of five persons he was also informed by PWs Khamiso and Pancho that they saw respondents loading sheep in a vehicle. According to F.I.R, the incident was occurred 03.04.2022 and on the same day the complainant came to know the names of accused persons, despite he did not bother to inform their names to police and did not take any effort to get them arrested through police. Omission, thus, caused a big dent to the prosecution case.

13. Reverting to the testimony of eye-witnesses Khamiso and Pancho is concerned; suffice to observe that they are co-villagers and "Meghwar" by caste. The complainant also belongs to same caste and village, therefore, possibility of false implication of respondents (accused) and favouring the complainant cannot be ruled out in absence of any corroborative piece of evidence. The entire record is silent as to any effort was made to persuade any independent person from the locality or for that matter any other person or a villager was asked to act as witness or mashir of recovery. This position itself is sufficient to discard the evidence of the two prosecution witnesses, who seems to be interested witnesses. It is well settled that testimony

of an interested witness is of second degree and unsafe to rely upon without having independent corroboration. Moreso it is an undisputed fact that the statements under Sections 161, Cr.P.C. of said witnesses were recorded on 29.07.2023 after about one year and four months of the incident and after one day of lodgment of FIR. No plausible explanation and valid reason has been furnished to that extent. The delay of even one or two days without explanation in recording the statements of witnesses has been held fatal for the prosecution and not worthy of reliance by the august Supreme Court of Pakistan in the case of *Muhammad Asif v. The State* reported as **2017 SCMR 486** as under:-

> *"There is a long line of authorities/ precedents of this court and the High Courts that even one or two days unexplained delay in recording the statement of eye-witness would be fatal and testimony of such witnesses cannot be safely relied upon."*

14. From review of record, it emerged that narrators of ocular account, besides being interested witnesses, also failed to establish source of identification. The argument that the complainant has identified the accused through footsteps is irrelevant because in absence of source of identification in night time incident such type of identification is always considered fatal for prosecution case as it gives room to the possibility of false implication. Reference may well be placed to the case of *Gulfam and another v The State* **(2017 SCMR 1189)**.

15. As to the recovery of five sheep allegedly made from the cattle pen of Babu is concerned, suffice to observe that the complainant has claimed that his 25 sheep were stolen, but only five have been shown recovered in presence of Khamiso, one of the eye-witnesses, and Devao, who admittedly has not been examined by the prosecution. Furthermore, the incident alleged to have taken place

on 03.04.2022 and the alleged recovery has been made on 03.08.2023 after one year and four months. Surprising to note that despite prior information about presence of accused, the investigating officer ASI Kalo Mal (PW.5 Ex.8) has not associated any independent person either from the way leading to the pointed place or from the place of recovery to act as mashir, without assigning valid reasons. Even he has failed to disclose the name of the informer, who conveyed information about presence of accused, nor produced him at trial. The record is also suggestive of the fact that no accused was arrested from the place of recovery. The only explanation that has been furnished is that accused Babu ran away on seeing police. This explanation, on the face of it, seems to be self-made because besides ASI Kalo Mal there were other police officials in the raiding party, which reached at the pointed place in a private vehicle, accompanied by complainant and two mashirs, and when they encircled the accused how could he made his escape good. This fact, thus, rendered the entire recovery extremely doubtful.

16. I have examined the impugned judgment and found that the learned trial Court has fully appreciated the evidence and documents brought on record by the prosecution and rightly arrived at a conclusion that prosecution has failed to establish the charge against respondents beyond shadow of reasonable doubt. Relevant excerpt of the impugned judgment is reproduced below:-

> *"8. I have given due consideration to the arguments of both sides and have carefully gone through the evidence and the documents brought on record therewith. The allegation against the present accused are that on 03.04.2022 at about 01.00 am night hours they has stolen 25 sheep of complainant from the jungle near well situated at Habib Narejo located in the southern side of village Manjethi, Taluka Islamkot by loading it into Suzuki vehicle. Record shows that incident took place 03.04.2022 at about 01.00 am night hours but complainant lodged the FIR on 28.07.2023 after delay of more than one year without proper explanation. Complainant admitted in cross examination that well of*

Habib Narejo (place of incident) is situated at the village of accused while all private witnesses are his relative and resident at his village. Complainant also admitted that none from village of accused is witnesses in this case. The complainant also admitted that he lodge the FIR with delay of about 16 months. He also admitted that from date of incident till lodging of FIR he did not file any complainant at the police station or court. It is matter of record that complainant is not eye witness of the incident. Complainant produced recovered sheep at Ex.4/D but he do not remember that where the picture of sheep was captured. PW Khamiso in his cross examination stated that "it is correct to suggest that no where I disclosed that to whom I went to meet in village Jorio". Pw Khamiso admitted that Gagan and Bhanoon are son and father. PW Pancho, stated in his cross examination that after recovery police obtained his signature at police station Jhun but the memo of recovery at Ex.4/C shows that PW Pancho is not mashir of recovery. PW WHC Jean was examined by this Court wherein he produced entry No.8 of register No.19 wherein he made entry of recovered sheep but he admitted in cross examination that his signature is not available in entry No.8, even name of police station or district is not mentioned in the said entry. I am supported in this view by the case reported as Kamran alias Ghulam Rasool alias Kaloo v The State (PLD 1997 Karachi 484). It is trite law that many circumstances have not required to create a doubt but if single circumstance creates reasonable doubt in prudent mind then benefit must be awarded to the accused not as a matter of grace but as a matter of right as the accused is innocent child of law. From the above discussion, I am of the humble opinion that prosecution has failed to prove the charge against accused persons beyond any reasonable shadow of doubt, hence point is answered as "doubtful".

9. In view of above discussion, I am of the considered opinion that the prosecution could not successfully establish the charge against the accused beyond any reasonable doubt. Accused Moosa s/o Arho @ Karo Dal, Babu s/o Muhammad Dal, Nawaz @ Ali Nawaz s/o Bakho Narejo, Kalo @ Moula Bux s/o Jumoon Narejo and Wassayo @ Allah Wassayo s/o Latif Narejo are therefore, extended benefit of doubt and acquitted of the charge under section 245(ii) Cr.P.C. Accused present in Court on bail their bail bonds stands cancelled and surety is discharged".

17. It is a well settled that in criminal cases every accused is innocent unless proven guilty and upon acquittal by a Court of competent jurisdiction such presumption doubles. Very strong and cogent reasons are required to dislodge such presumption. It is further settled that acquittal carries with it double presumption of innocence, it is reversed only when found blatantly perverse,

resting upon fringes of impossibility and resulting into miscarriage of justice. It cannot be set aside merely on the possibility of a contra view. A judgment of acquittal should not be interjected until findings are perverse, arbitrary, foolish, artificial, speculative and ridiculous. Interference in a judgment of acquittal is rare and the prosecution must show that there are glaring errors of law and fact committed by the Court in arriving at the decision, which would result into grave miscarriage of justice, the acquittal judgment is perfunctory or wholly artificial or a shocking conclusion has been drawn. Therefore, in my considered view the Appellant keeping in mind the narrow scope of an Acquittal Appeal has not been able to make out a case and I do not find any reason to interfere with the judgment of the Trial Court. In view thereof, the same is upheld and maintained. In consequence, vide my short order dated 27.10.2023, this Criminal Acquittal Appeal was dismissed in *limine* and these are the reasons thereof.

JUDGE

Faisal