

IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Appeal No.57 of 2024

Appellant: Through Muhammad Imran Advocate
State: Through Ms. Seema Zaidi, Additional PG
Respondent No.1: Abdul Aziz-ur-Rehman in person
Date of hearing: 01.7.2024
Date of Judgement 12.7.2024

J U D G M E N T

ADNAN-UL-KARIM MEMON, J. – Appellant Abdul Rehman and another accused were tried by learned XII Additional Sessions Judge, Karachi East in Sessions Case No. 1377/2021 under Section 392/397/34 PPC. After a regular trial, appellant Abdul Rehman was convicted and sentenced for an offense punishable under Section 397 PPC for seven years with a fine of Rs. 50,000/- in case of default, the appellant would further undergo SI two months.

2. Brief facts leading to the filing of the instant appeal as mentioned by the trial Court in the impugned judgment is that complainant Aman ul Haq lodged an FIR stating therein that on 08 02 2021, at about 2015 hours, he accompanied his daughter namely Dua from her Tuition Center and brought her at his House No. N-90, Shamshad Housing Society, Jama-e-Milia, Karachi. His daughter went inside the house and he was standing outside the house on his motorcycle. Suddenly two boys on one motorcycle, wearing Kameez and Shalwar, arrived and a boy, who was sitting on the backside on the point of weapon, snatched his mobile phone LG-Touch, One Brown color wallet containing a cash amount of Rs. 2000/-, an ATM Card of MCB and Copy of CNIC. The society is covered with boundary walls having only one gate for entry and exist. After committing this incident accused escaped, however complainant immediately started his motorcycle and reached at main gate of the society where he informed about the incident to Chowkidar Muhammad Haneef. In the meanwhile, he saw the two accused coming on the motorcycle. The complainant shouted and pointed them to Chowkidar as same accused. The accused tried to run away through the main gate but Chowkidar pushed them and they fell along with their motorcycle. The Chowkidar apprehended one accused while the other stood and fired at Chowkidar but he remained safe due to a miss of fire. One of the accused after firing took

his motorcycle and succeeded in escaping. Someone from Muhallah made a phone call to the police 15 helpline and informed them about the incident. Later on, Chippa Ambulance also arrived because the apprehended accused had sustained injuries due to falling from the motorcycle ASI Mushtaq Incharge police mobile arrived and enquired about details of the incident from the complainant. He took into his custody apprehended the accused who disclosed his name as Abdul Rehman son of Muhammad Sultan and disclosed the name of the escapee accused as Amir ASI Mushtaq conducted a personal search of the accused and recovered the snatched mobile phone LG-Touch and light brown skin color wallet containing cash amount of Rs. 2000/-, ATM Card of MCB and copy of CNIC. Another Keypad mobile phone of the accused and a cash amount of Rs. 500/- was also recovered from the accused. Such a memo was prepared, recovered pistol and case properties were sealed separately on the spot. Thereafter, the injured accused was shifted to JPMC sealed properties brought at P.S., and an FIR was lodged.

3. On 04.05.2021, a formal charge was framed against accused Abdul Rehman and Aamir Zaib as Ex. 02, to which, they pleaded not guilty and claimed trial.

4. To prove its case prosecution examined as many as four witnesses. Details thereof are as under:-

PW-1 ASI Muhammad Nazir (Author of FIR) as Ex 3. he produced a statement under s. 154 Cr. P.C of the complainant and FIR as Ex.3/A and Ex. 3/B

PW-2 Aman ul Haq (Complainant) as Ex 4, he produced a memo of arrest and recovery, a memo of seizure of empty, memo of site inspection as Ex. 4/A to Ex.4/C

PW-3 SIP Rana Wakeel (investigation officer) as Ex.5, he produced entry No. 20, entry No. 22, Letter to the FSL examiner. FSL report, CRO record of accused as Ex. 5/A to Ex 5/F

PW/-4 ASI Mushtaque Ali was examined as Ex 12, he produced entry No. 16, letter, entry No. 19, photocopy of memo of arrest and recovery of accused Aamir, and entry No.23 as Ex. 12/A to Ex. 12/E.

5. Statements of accused Abdul Rehman and Aamir Zaib under section 342 Cr.P.C. were recorded at Ex. 14 and Ex. 15, wherein they denied the accusation leveled against them by pleading their innocence. They neither examined themselves on Oath nor produced any defense witness and prayed for justice.

6. Trial Court after hearing the learned counsel for the appellant, and prosecutor, and while examining the evidence minutely by judgment dated 13.12.2023, convicted and sentenced the appellant as stated above. Hence, the appellant has filed an instant appeal against his conviction and sentence.

7. I have heard learned counsel for the parties and perused the material available on record with their able assistance.

8. The points, that require consideration, are that as to whether the evidence in the case is sufficient to sustain the conviction of the appellant under section 397 Cr.P.C. It shall be advantageous to reproduce section 397 PPC herein below:-

“397. Robbery or dacoity, with attempt to cause death or grievous hurt. If, at the time of committing robbery or dacoity, the offender uses any deadly weapon, or causes grievous hurt to any person or attempts to cause death or grievous hurt to any person, the imprisonment with which such offender shall be punished shall not be less than seven years.”

9. The appellant has admitted in his evidence that the incident took place just in front of the main gate of his house and he did not raise hue and cry. He also admitted that one person was sitting on the backside of the motorcycle and had a pistol in his hand after committing robbery, they fled from the place of occurrence and he told the incident to the Chowkidar present at the main gate of the society and Chowkidar closed the main gate, however he apprehended one accused, who was sitting on backside on motorcycle and other accused, who was driving the motorcycle fired from pistol and he succeeded to escape. He also admitted that no pistol was recovered from the present appellant. The trial Court acquitted the accused Aamir Zaib from the charge by giving him the benefit of the doubt on the premise that shockingly neither arresting officer ASI Muhammad Nazir nor Mushir of arrest (complainant) deposed the single word regarding arrest of accused Aamir Zaib in their entire evidence and this fact is big blow to prosecution case, if this is the position of the case, the entire case of the prosecution becomes doubtful as no recovery was effected from the present applicant then the question of firing at the time of alleged incident does not arise on the part of appellant. The Chowkidar was not examined by the prosecution. Once the doubt has been created in the prosecution case and coupled with no recovery of the

alleged weapon from the applicant conviction cannot be made safely against the appellant.

10. Admittedly, no weapon was used by the appellant in the commission of the incident as admitted by the complainant in his deposition, therefore, the punishment to the appellant under section 397 PPC is misplaced.

11. It is a settled principle of law that no one should be convicted of a crime based on presumption in the absence of strong evidence of unimpeachable character and legally admissible. Similarly, the mere heinous or gruesome nature of the crime shall not detract the Court of law in any manner from the due course to judge and make the appraisal of evidence in a laid down manner and to extend the benefit of reasonable doubt to an accused person being indefeasible and inalienable right of an accused. It is also an established principle of law that an accused person is presumed to be innocent until and unless he is proven guilty beyond a reasonable doubt and this presumption of his innocence continues until the prosecution succeeds in proving the charge against him beyond a reasonable doubt based on legally admissible, confidence-inspiring, trustworthy and reliable evidence. It has also been held by the Superior Courts that conviction must be based upon unimpeachable evidence and certainty of guilt and any doubt arising in the prosecution case must be resolved in favor of the accused. The rule of giving the benefit of the doubt to an accused person is essentially a rule of caution and prudence and is deep-rooted in our jurisprudence for the 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". While in Islamic criminal law, it is based on the high authority of sayings of the Holy Prophet of Islam (Peace Be Upon Him): "Avert punishments (Hudood) when there are doubts" and "Drive off the ordained crimes from the Muslims as far as you can. If there is any place of refuge for him [accused], let him have his way because the leader's mistake in pardon is better than his mistake in punishment." The Honourable Supreme Court has quoted probably the latter part of the last-mentioned saying of the Holy Prophet (PBUH) in 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.***" The same principle has also been followed by the Honourable Supreme Court of Pakistan in a recent Judgment in the case of *Naveed Asghar and 2 others v. The State (PLD 2021 SC-600)*. It is also a settled principle of law that if a single circumstance creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused will be entitled to such benefit not as a matter of grace and concession, but as a matter of right, as has been held in case of *Tariq Pervez v. The State reported as (1995 SCMR-1345)*, wherein the Honourable Supreme Court of Pakistan has held as under:-

"The concept of benefit of the doubt to an accused person is deep-rooted in our country for giving him the benefit of the doubt, it is not necessary that there should be many circumstances creating doubt. If there is any 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".

12. The sequel of the above discussion is that the prosecution has miserably failed to establish the guilt against the present appellant beyond the shadow of reasonable doubt. Consequently, the conviction and sentence awarded to the appellant by the learned trial Court vide impugned judgment is set aside and the instant criminal appeal is **allowed** resulting in the acquittal of the appellant, he be released forthwith if not required in another case.

JUDGE

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