

IN THE HIGH COURT OF SINDH, BENCH AT SUKKUR

Criminal Appeal No.S-**105** of 2021
(**Qamaruddin Jajooho v. The State**)

Criminal Appeal No.S-**106** of 2021
(**Muhammad Moosa & others v. The State**)

Date of hearing: **12-02-2024**
Date of decision: **12-02-2024**

Appellants: Through Mr. Rukhsar Ahmed Junejo,
Advocate along with appellants.

Complainant: Through Mr. Ghulamullah Memon,
(*Crl. Appeal No.S-106/2021*) Advocate along with complainant.

The State: Through Mr. Shafi Muhammad Mahar,
Deputy Prosecutor General.

J U D G M E N T

MUHAMMAD IQBAL KALHORO, J.- In Crl. Appeal No.S-106 of 2021), complainant Deedar Ali lodged FIR No.21 of 2020 at P.S, Mohbat Dero under sections 17/3 Offences Against Property (Enforcement of Hudood) Ordinance, 1979, 506/2 & 504 PPC on 17.02.2020 at 1230 hours, alleging therein that on 16.02.2020 at 0100 hours, accused Muhammad Moosa, Qurban Ali, Qamaruddin armed with pistols, Saindad armed with gun and one unidentified accused armed with repeater came at the mango garden of Syed Mohsin Shah. Accused Muhammad Moosa then robbed Rs.2000/- from complainant, accused Saindad robbed Rs.1500/- from Syed Moosan Shah, accused Qamaruddin robbed Rs.5000/- from Syed Najeebullah Shah. They also robbed an inverter, one solar plate, one fan and a wire measuring 50 meter. Then, while leaving, the accused extended threats of murder and abused the complainant party.

2. Whereas, in Crl. Appeal No.S-105 of 2021, accused Qamaruddin, arrested in crime No.21 of 2021, admitted his guilt and voluntarily led the police to 'Lemon Garden' situated on eastern side of grave yard on 19.02.2020 and produced, in presence of complainant ASI-Bashir Ahmed and witnesses a bag containing inverter and an unlicensed pistol of .30 bore along with magazine in working condition, hence a separate FIR No.22 of

2020 under section 24 Sindh Arms Act, 2013 was registered against him.

3. In the trial of main case, the prosecution has examined six witnesses: the complainant, named above as PW-1, PWs-2&3 are eyewitness Syed Najeebullah Shah and Syed Moosan Shah, PW-4 HC Hizbullah is author of FIR, PW-5 is SIP Bashir Ahmed Gopang, who is the first I.O and second I.O is PW-6 Inspector Raham Hussain, who produced all the relevant documents including FIR, memos of arrest, recovery etc. Whereas, in 24 Sindh Arms Act case bearing sessions case No.122 of 2020, prosecution led evidence of PWs-1&2 Syed Najeebullah Shah and Syed Moosan Shah, who acted as mashirs of recovery, PW-3 is complainant SIP Bashir Ahmed Gopang, who had also conducted investigation. He produced relevant documents including FIR, mashirnamas, FLS report, roznamcha entries etc. After which, statements of appellants in terms of section 342 CrPC were recorded. They have denied the case against them and pleaded their innocence. The appellants neither examined themselves on oath nor examined any witness in their defense. However, by impugned judgments dated 24.11.2021, passed by learned Additional Sessions Judge-II, Khairpur, appellants have been convicted and sentenced as under:

i. For offence u/s 395 PPC, to suffer R.I for five years each and fine of Rs.10,000/- each and in case of default, to suffer S.I for one month.

ii. For offence u/s 506/2 PPC, to suffer S.I for six months each and fine of Rs.4000/- each and in case of default, to suffer S.I for 15 days.

iii. For offence u/s 504 PPC, to suffer S.I for three months each and fine of Rs.2000/- each and in case of default, to suffer S.I for one week.

iv. For offence u/s 24 Sindh Arms Act, appellant Qamaruddin has been sentenced to suffer R.I for five years and fine of Rs.20,000/- and in case of default, to suffer S.I for one month.

4. I have heard learned counsel for the parties. Appellants' counsel has pointed out to certain discrepancies in evidence of witnesses and the fact that there is inordinate delay of one day in lodgment of FIR, not least when the accused had been identified by the complainant at the spot, for which no plausible explanation

has been furnished by the complainant; that in FIR of main case, although complainant has nominated the accused by name, parentage and address, but has failed to disclose as to how he knew them: whether they were previously known to him; that the recovery of inverter and pistol were effected from an abandoned place on 19.02.2020 after three days of the incident, the I.O had sent the pistol to lab for FSL report on 24.02.2020 after about five days, of which period there is no evidence of its safe custody. His arguments have been rebutted by learned counsel for the complainant. Learned Deputy P.G for the State has however conceded to the arguments of defense counsel.

5. A perusal of record reflects that there is delay of one day in registration of FIR and it has not been explained. The appellants had been identified by the complainant party at the spot, yet he chose to remain idle for one day and registered the FIR thereafter. Therefore, false implication of the appellants after due deliberation and consultation cannot be ruled out. FIR and the eye account of the incident in the main case furnished by three witnesses demonstrates that they had identified the appellants except appellant Ajeeb, who was later identified to be the person mentioned in FIR as unidentified at the time of incident. However, his name was added in the Challan as accused without conducting his identification before the concerned Magistrate. Furthermore, eyewitness PW-3 Syed Moosan Shah, who also acted as mashir of recovery of crime weapon and inverter, while replying to a question in cross-examination, has revealed that he cannot identify the accused present in the Court by name. His evidence recognizing the appellants precisely with their names is not therefore without a doubt.

6. More so, in FIR, all the accused are nominated by name, parentage and address, but complainant has failed to disclose as to how he or the others had recognized them. What was the source: were they previously known to them, or were they resident of the same vicinity. Nothing of the sort has come on record to explain this point. Next, the incident took place at odd hours of night and appellants were identified on the light of bulbs. It is

settled that the identification of the accused on the light of bulbs is always treated as the weakest type of evidence. The recovery of inverter of Lawrence Company, allegedly valuing Rs.1,40,000/-and crime weapon i.e. pistol, allegedly used in the commission of offence, was effected from an abandoned place viz. the bushes in graveyard on 19.02.2020 after three days of the incident. The pistol so recovered was sent to the Lab for FLS report on 24.02.2020, of which period there is no explanation of its safe custody. A perusal of FLS report (Ex.5/C) in 24 Arms Act case, shows that the weapon was received by lab on 24.02.2020 through PC Ameer Ali Mari, but admittedly, the said constable has not been examined by the prosecution to establish safe transmission of pistol from P.S to lab.

7. It is also not known where the property viz. pistol was lying, implying that safe custody of the pistol at P.S till it was sent to lab is questionable and the prosecution has failed to discharge its burden of proving this point. Even otherwise, mashir Syed Moosan Shah in the main case in clear terms has deposed that he cannot identify the accused present in Court by name. Furthermore, the inverter to be the same stolen inverter has not been established satisfactorily. There is no record of holding identification of this article before the Magistrate to establish its identity. More so, the appellant Qamaruddin in the main case was not confronted with the recovery of inverter and pistol, effected allegedly on his pointation, in his statement recorded under section 342 CrPC. It is settled that a piece of incriminating evidence which is not asked about from the accused in his 342 CrPC statement cannot be used for recording conviction against him. Apart from the word of complainant and witnesses that appellants had committed theft, no satisfactory evidence implicating them in the case has been found.

8. It is apparent that the prosecution has not been able to establish either safe custody of the pistol at P.S from 19.02.2020 to 24.02.2020 nor its safe transmission through P.C Ameer Ali Mari to lab for forensic examination. This coupled with discrepancies in the evidence of eyewitnesses, highlighted above, have rendered

both the cases doubtful. The prosecution under the law is bound to establish the case beyond a reasonable doubt through confidence inspiring evidence to persuade Court to reach a conclusion leading to guilt of the accused and his sentence. In absence thereof, accused cannot be convicted and sentenced. It is settled that once a doubt seeps in the prosecution case, its benefit has to go to the accused not as a matter of grace but as a matter of right.

9. For foregoing discussion, I am of the view that the prosecution has not been able to prove both cases against the appellants beyond a reasonable doubt, and they are entitled to its benefit. Accordingly, these Crl. Appeals are **allowed** and the appellants are acquitted of the charge. They are present on bail. Their bail bonds are cancelled and sureties discharged. Office is directed to release surety documents to the sureties after proper verification, identification and as per rules. ***Office to place a signed copy of this order in captioned connected matter.***

JUDGE

Ahmad