THE HIGH COURT OF SINDH AT KARACHI

Special Criminal Anti-Terrorism Appeal No.222 of 2019
Special Criminal Anti-Terrorism Appeal No.223 of 2019
Special Criminal Anti-Terrorism Jail Appeal No.337 of 2019

Date | Order with Signature(s) of Judge(s)

Present: **Mr. Justice Abdul Maalik Gaddi**
Justice Mrs. Rashida Asad

Appellant (in Spl. Cr. A.T.As. No.222 & 223 of 2019)	:	Shahzad Ahmed son of Siraj Ahmed Qureshi through M/s. Arshad H. Lodhi & Tajammul H. Lodhi, Advocates.
Appellant (in Spl. Cr. A.T.J.A. No.337 of 2019)	:	Adnan son of Ashfaq (None present on his behalf).
Respondent	:	The State through Mr. Abdullah Rajput, Deputy Prosecutor General, Sindh.
Date of hearing	:	27.04.2020
Date of Judgment	:	27.04.2020

1. For hearing of M.A. No.8539/2019 (Spl. Cr. A.T.A. No.222/2019).
2. For hearing of M.A. No.8541/2019 (Spl. Cr. A.T.A. No.223/2019).
3. For hearing of M.A. No.14386/2019 (Spl. Cr. A.T.A. No.337/2019).
4. For hearing of main case.

J U D G M E N T

Abdul Maalik Gaddi, J.– Through this common Judgment, we intend to decide the captioned appeals filed by the appellants as these appeals relate to same incident as well as common Judgment delivered by the learned trial Court dated 31.07.2019.

2. By means of these appeals, the appellants have assailed the common Judgment dated 31.07.2019 passed by the Anti-Terrorism Court No.XX, Karachi in Special Cases No.85, 85-A and 85-B of 2019, under Crime No.24/2019 for offence under Section 353/324/34, PPC read with Section 7 of ATA, 1997; Crime No.25/2019 for offence under Section 23(1)(a) of Sindh Arms Act,

2013 and Crime No.26/2019 for offence under Section 23(1)(a) of Sindh Arms Act, 2013 registered at police station Azizabad, Karachi, whereby the learned trial Court after full dressed trial, convicted and sentenced the appellants as stated in concluding paragraph of the impugned judgment. For the sake of convenience, it would be appropriate to reproduce the relevant portion of the impugned common judgment, which read as follows:-

> *"In view of the above facts and circumstances I have come to the conclusion that the prosecution has been able to prove its cases against the accused persons beyond any reasonable doubt and therefore, I have decided to convict them accordingly and they are convicted as under:-*
>
> | *Section* | | *Conviction* |
> |---|---|---|
> | *01.* | *Section 324 PPC r/w 7 of ATA, 1997* | *to suffer R.I. for five years and fine of Rs.20,000/- and in case of default of payment of fine, each of the accused to undergo R.I. for six months, more.* |
> | *02.* | *Section 353 PPC* | *to suffer R.I. for one year.* |
> | *03.* | *Section 23(I)(A) of SAA* | *to suffer R.I. for five years and fine of Rs.20,000/- and in case of default of payment of fine, each of the accused will have to undergo R.I. for six months more.* |
>
> *All the sentences shall run concurrently and the benefits of section 382-B Cr.P.C. are however allowed to be extended in favour of the accused."*

3. Brief facts of the prosecution case as disclosed in the FIR are that on 13.01.2019, complainant ASI Ghulam Ali was busy in patrolling duty in the area along with his subordinate staff in official police mobile –II Azizabad and during patrolling when they reached at Azizabad road, where a person informed to them that some dacoits, committing robbery near to Dehli School. After receiving such

information, they proceeded towards the pointed place, where it was about 0330 hours they saw two suspicious persons, who after seeing police party, coming towards them, started firing upon them with an intention to commit their murder. In retaliation, police party also made some fire shots upon accused persons. They both received fire arm injuries on their legs and fell down from their motorcycle on the ground at Karachi Academy School, Block-2, Federal B Area, Karachi. The police mobile also received a fire shot on its wind screen. During encounter, they got succeeded to apprehend the accused persons on the spot in injured condition. One of apprehended person disclosed his name as Adnan who was having one 30 bore pistol along with magazine containing three live rounds in his right hand which was secured from his possession. During his personal search, police also got secured one shopper containing three mobile phones from the fold of his shalwar and cash amount of Rs.180/- from the pocket of his front shirt. The other accused disclosed his name as Shahzad who was also having 30 bore pistol along with magazine containing two live rounds in his right hand which was secured from his possession. From his personal search, the police also secured two mobile phones and cash amount of Rs.3507/- from his possession. Accused Adnan received fire arm injury on his left leg under the knee and whereas accused Shahzad received fire arm injury on his right leg. Police also secured three empties of 9mm, two empties of SMG and two empties of 30 bore from the spot. The police seized motorcycle bearing Registration No.KLX-8432 under Section 550, Cr.P.C. which was found to be the stolen property in case Crime No.22 of 2019 of same police station. The accused persons failed to produce the license of the recovered weapons, therefore, they were challaned in these cases.

4. On perusal of record, it reveals that these cases were amalgamated by the trial Court under Section 21-M of ATA 1997 on 04.02.2019 at Ex.3 as such a joint charge was framed against the accused persons at Ex.4, to which they pleaded not guilty and claimed their trial vide their pleas at Ex.4/A and 4/B.

5. At trial, the prosecution has examined the following witnesses:-

(i) PW-1 ASI Ghulam Ali at Ex.5, who produced roznamcha entry No.23 at Ex.5/A, memo of arrest and recovery at Ex.5/B, FIRs along with qaimi reports at Ex.5/C to Ex.5/H respectively;

(ii) PW-2 PC Mubashar Ali at Ex.6;

(iii) PW-3 SIP Mukhtiar Abbasi at Ex.7, who produced DD entry No.29 dated 13.9.2019 at Ex.7/A, letter addressed to MLO Abbasi Shaheed Hospital Karachi at Ex.7/B;

(iv) PW-4 Dr. Siri Chand at Ex.8, who produced final reports of medical treatment of accused persons dated 13.01.2019 at Ex.8/a and Ex.8/B respectively, medical report of accused persons at Ex.8/C and Ex.8/D respectively, supplementary medico legal reports of accused persons at Ex.8/E and 8/F respectively;

(v) PW-5 I.O/Inspector Muhammad Hasan Lashari at Ex.9, who produced roznamcha entry No.35 at Ex.9/A, photographs of place of incident at Ex.9/B, DD entry No.37 dated 13.01.2019 at Ex.9/C, letter dated 14.01.2019 addressed to incharge CRO west zone Karachi at Ex.9/D, CRO of accused persons at Ex.9/E to Ex.9/G respectively, letter dated 14.01.2019 addressed to incharge FSL at Ex.9/H, letter addressed to incharge FSL for police mobile at Ex.9/I, entry showing the using of police mobile by the police party on the day of incident at Ex.9/J, FSL report of weapons and empties at Ex.9/K, FSL report of police mobile at Ex.9/L.

These witnesses have been cross examined by the Counsel for accused. Thereafter, leaned APG for the State closed the prosecution side vide Statement at Ex.10.

6. Statements of accused under Section 342, Cr.P.C. were recorded at Ex.11 and Ex.12, wherein they denied the prosecution allegations and prayed for justice. However, they neither examined themselves on oath nor led any evidence in their defense.

7. Trial Court after hearing the learned counsel for the parties and assessment of evidence, by judgment dated 31.07.2019, convicted and sentenced the appellants as stated s*upra*. Hence, these appeals have been filed by the appellants.

8. Mr. Arshad H. Lodhi assisted by Mr. Tajammul H. Lodhi, learned Counsel for appellants contended that appellants are innocent and have been falsely implicated in these cases; that whole case of prosecution based upon evidence of police officials and no independent witness has been cited to witness the arrest and recovery proceedings though place of incident was populated area, as such, the police has violated the requirement of Section 103, Cr.P.C.; that nothing was recovered from the possession of appellants as well as the alleged recoveries have been foisted upon them by the police to show their efficiency; that during the alleged encounter, no police official received any injury, however, according to him, the injury received by the accused persons was not the result of encounter, but it was caused by the police before the alleged incident just to show police encounter. During the course of arguments, he has taken to us towards the evidence of prosecution witnesses on record and has pointed out various contradictions in their evidence; therefore,

according to him, no reliance could be placed on contradictory evidence for maintaining the conviction, as such, he has prayed for allowing these appeals.

9. Conversely, Mr. Abdullah Rajput, learned Deputy Prosecutor General, Sindh while supporting the impugned judgment submits that the prosecution has fully established its case against the appellants beyond reasonable doubt by producing consistent/convincing and reliable evidence and the impugned conviction and sentenced awarded to the appellants is the result of proper appreciation of evidence brought on record, which needs no interference. Lastly, he prayed that appeal may be dismissed.

10. We have heard the learned counsel for the parties at a considerable length and have perused the evidence and documents available on record.

11. After careful consideration and meticulous examination of the available record, suffice to say that mere heinous nature of offence is not sufficient to convict the accused because the accused continues with presumption of innocence until found otherwise at the end of the decision of appeal. It is the settled principle of law that burden is always upon the prosecution to prove the case beyond shadow of doubt. Keeping in view of this basic touchstone of criminal administration of justice, we have examined the ocular evidence and documentary evidence, alongwith impugned common judgment.

12. After hearing the parties, we have come to the conclusion that prosecution has failed to establish its' case against the accused/appellants for the reasons that all the pieces of evidence so brought by the prosecution in these cases against the appellants are

weak in nature. It is noted that it was a case of spy information with regard to availability of the present appellants that they were allegedly available at Dehli School for the purpose of committing robbery and dacoitee. On such information, police party reached at pointed place and present appellants after seeing police party, started firing upon them and in retaliation, police also fired upon them and during this encounter, the appellants received fire arm injuries at knees of their legs. It has been brought on record that the encounter was continued for about seven minutes with sophisticated weapons at the distance of 20-25 yards, but surprisingly, no police person had received any fire arm injury, but accused/appellants received injuries at their knees. It is the case of appellants that in fact no police encounter had taken place as they were involved in these cases falsely by the police after causing fire arm injuries at their knees before the date of alleged incident just to show fake police encounter. It is also noted that when the alleged encounter was taken place at the distance of 20 to 25 yards, then question arises that how at long distance, the appellants received injuries at the leg of their knees (lower part of the leg). When confronted this aspect of the case to learned Deputy Prosecutor General, Sindh for his reply, he has no satisfactory answer with him.

13. On perusal of record, it appears that though the prosecution had produced joint entry of departure and arrival bearing No.22 and 23 of roznamcha register available at Ex.5/A of R&Ps in order to prove the movement of police, however, the police mobile registration number, wherein police party went for patrolling on the day of alleged incident and same was allegedly hit with fire shot on its front wind during encounter, is neither mentioned in the entry of the roznamcha register nor in the FIR or memo of arrest and recovery and even in

evidence, but surprisingly, FSL report issued by the office of Assistant Inspector General of Police Forensic Division, Sindh Karachi, showing the police mobile registration number as SPB-863, which was used in alleged incident was hit with fire shot at its front wind. In our view, non-mentioning of police mobile registration number in the FIR, memo of arrest and recovery and in evidence, puts the movement of police on the day of alleged incident shrouded in doubts.

14. On perusal of record, we have also noted number of infirmities/lacunas in the case of the prosecution. For example, admittedly, investigating officer did not obtain the blood stained earth from the place of incident. No blood stained trousers/shalwars of the appellants recovered and sent to chemical examiner to show that actually they received injuries and blood on it was of human. Allegedly police recovered Rs.180/- from the possession of appellant Shahzad and Rs.3507/- from the possession of appellant Adnan, but complainant of the case did not mention denomination/type of currency in the memo of arrest and recovery as well as 161, Cr.P.C. statements. Though admittedly the alleged incident took place in the populated area, despite of this fact, complainant did not obtain the services of the private mashirs to witness the event. No explanation in this regard from prosecution side is available to strengthen the case of prosecution.

15. As regards to the investigation conducted by the investigating officer in these cases, record transpires that investigating officer not only failed to dig out source from whom appellants snatched the purse and mobile phones as alleged. Nothing on record to whom these mobile phones belongs. No evidence and proof on record that at

the time of alleged incident, these appellants were indulged in committing dacoittee. Needless to say that investigating officer is duty bound to collect all relevant evidence pertaining to the allegation of crime in issue so as to dig out truth enabling and facilitating the Court to administer the justice, however, in instant case, investigating officer also failed to discharge his duty in the manner as provided under the law. It is also noted that crime weapons viz. 30 bore pistols, which were allegedly recovered from the appellant as per memo of arrest and FIR, were without number, but as per FSL report, it reflects that these weapons were rubbed number. Moreover, number of empties, which were secured from the place of incident is also disputed and same is not matching with FSL report.

16. As observed above that it was a alleged encounter in between police and the appellants and the whole prosecution case revolves around the evidence of police official. No doubt, evidence of police official is as good as another citizen, however, their evidence must be scrutinized with a greater degree of circumspection for the reason that in a society with the level of moral value that we unfortunately have, a subordinate officer is seldom expected to tell the truth in deviation of the express or implied instructions of his superior, therefore, under the circumstances, it was proper and even imperative that it should have been investigated by some other agency to maintain the transparency and to curb the false implication. We have also perused the evidence of prosecution witnesses, but did not find to be trustworthy and confidence inspiring which too contradictory with each other on material particulars of the case, therefore, in the given circumstances, their evidence cannot be safely relied upon for maintaining the conviction. We have also gone

through the case of ***Zeeshan @ Shani v. The State*** reported in ***2012 SCMR 428***; in this authority, it has been observed as under:

> 11. The standard of proof in this case should have been far higher as compared to any other criminal case when according to the prosecution it was a case of police encounter. It was thus, desirable and even imperative that it should have been investigated by some other agency. Police, in this case, could not have been investigators of their own cause. Such investigation which is woefully lacking independent character cannot be made basis for conviction in a charge involving capital sentence. That too when it is riddled with many lacunas and loopholes listed above, quite apart from the after thoughts and improvements. It would not be in accord of safe administration of justice to maintain the conviction and sentence of the appellant in the circumstances of the case. We therefore, by extending the benefit of doubt, allow this appeal, set-aside the conviction and sentence awarded and acquit the appellant of the charges. He be set free forthwith if not required in any other case."

17. As observed above that these cases are riddled with many lacunas and loopholes as listed above, but the learned trial Judge has utterly failed to consider and appreciate these aspects of the case in its true perspective, therefore, in the given circumstances, benefit of doubt must go in favour of the appellants, therefore, the impugned common judgment cannot be maintained. In this regard, we are supported with the case of ***Tariq Pervez v. The State*** reported as ***1995 SCMR 1345***, wherein the Hon'ble Supreme Court has held as under:-

> *"The concept of benefit of doubt to an accused persons 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."*

18. Keeping in view of the above, we are of the firm view that the Presiding Officer of the learned trial Court acted erroneously in the matter with misconception, misinterpretation, misreading and non-reading of evidence on record and convicted the appellants purely on non-appreciation and non-application of the required norms of the

law and that of justice. Consequently, we allow these appeals, set-aside the impugned common judgment and acquit the appellants from the above charges. They are in custody, therefore, jail authorities are directed to release them forthwith from the above cases, if they are not required in any other criminal case. Since these appeals are allowed, therefore, the listed applications are also disposed of.

19. These appeals were allowed by us on 27.04.2020 after hearing the parties through our short order and these are the detailed reasons thereof.

Office is directed to send copy of this judgment along with R&Ps of the cases to the trial Court for information through some swift means, preferably, within three (3) days from today.

JUDGE

JUDGE

*Faizan A. Rathore/PA**