IN THE HIGH COURT OF ASINDH, KARACHI

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Before Mr. Justice Ahmed Ali M. Shaikh
Mr. Justice Muhammad Karim Khan Agha

Spl. Cr. A.T.A. Appeal No.50/2013

Sarfraz Ahmed

V.

The State

Date of hearing	29-02-2016
Date of Judgment	15-03-2016
Appellant:	Through Mr. Muhammad Farooq, Advocate.
Respondent:	Through Mr. Zafar Ahmed APG.

JUDGMENT

Muhammad Karim Khan Agha, J. The Appellant has filed an appeal under section 25-A of the Anti Terrorist Act, 1997 (ATA) against his conviction dated 21.10.2013 by the Anti Terrorism Court No.V, Karachi in Special Case No.B-143/2012 under S.6(2) (k) ATA and was awarded sentence for the offence under section 7 (h) of ATA, of RI for seven years along with fine of Rs. 50,000/- or in default in payment of fine to further undergo one year S.I. in FIR No.150/2012 under sections 384/385/386/34 P.P.C. and was also convicted under section 13-D of the Arms Ordinance whereby he was sentence to undergo R.I. for seven years in FIR No. 151/2012 under section 13-D of the Arms Ordinance (the impugned judgment). Both sentences were to run currently.

2. The FIR 150/2012 under section 384/385/386/34 P.P.C. read with section 7 ATA 1997 was lodged on 8-10-2012 at P.S. Yousuf Plaza Karachi. FIR No.151/2012 under section 13-D of Arms Ordinance was lodged on the same date i.e. 8-10-2012 at the same P.S. Both offences mentioned in both the FIRs were subject to joint trial. On 14.2.2013 the charge was framed in respect of both FIRs to which the Appellant claimed trial.

3. The case of the prosecution is that the complainant Akbar Ali was running his Garment shop in Latif Market Block-16, F.B. Area, Karachi and reported on 08.10.2012 that about 10/12 days prior one person made telephone call to his mobile phone and demanded bhatta/extortion of Rs.10,00,000/- and in case of non-payment threatened to kill him. After negotiations an amount of Rs. 50,000/- was settled which the said person had received from him at his shop.

4. After about one week one unknown person gave a chit of bhatta/extortion demanding Rs. 50,000/- more. In the chit he gave a telephone number which the

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complainant was instructed to call. The complainant called the unknown person and an amount of Rs.50,000/- was settled for payment at 12.30 am at his shop. The complainant then telephoned duty officer ASIP Zulqarnain of police station (PS) Yousuf Plaza who directed police mobile of P.S. Yousuf Plaza in which police headed by ASI Muhammad Waseem was present to reach the complainant's shop. ASI Waseem and the police reached the shop of the complainant and hide themselves. At 12.30 in the night the Appellant came to the shop and the complainant paid him Rs. 25,000/- (twenty currency notes of Rs.1000/-each and ten notes of Rs.500/- denomination).

5. ASI Waseem with the help of the police party caught hold of the Appellant and recovered the said amount of bhatta/extortion. The Appellant informed the police party that he was sent by Shaukat Matho, Irfan Mota and Aba Baloch to receive the amount.

6. When ASI Waseem searched the Appellant one pistol 30 bore with magazine and two rounds was recovered which was without license. ASI Waseem arrested the appellant at the shop, prepared the mashirnama of arrest and recovery at the shop, recorded the statement of Akbar Ali u/s 154 Cr.P.C. and brought the Appellant to the police station and got registered the FIR being crime No.150/2012 on the statement of complainant Akbar Ali u/s 384/385/386/34 PPC read with section 7 of ATA 1997 and also FIR No.151/2012 u/s 13-D of Arms Ordinance.

7. The other accused (Shaukat Matho, Irfan Mota and Aba Baloch) who allegedly sent the Appellant to collect the bhatta money could not be arrested by the police and were declared proclaimed offenders by the trial Court on 2-2-2013 and the trial proceeded in their absence.

8. In order to prove its case the prosecution had examined under oath the complainant and 3 other Prosecution Witnesses (P.Ws).

9. The Appellants statement was recorded under section 342 Cr.P.C. and he also gave a statement on oath which was subject to cross examination and called one Defense Witness (DW) in support of his defense.

10. After recording of the evidence and hearing oral submissions on behalf of the parties the Appellant was convicted for the offenses and sentenced as mentioned earlier.

11. In essence the Appellant's defense was that he had not extracted any extortion money from the complainant and that the complainant in league with the police had falsely made up the case against him. This was because the complainant owed the Appellant approx Rs.35, 720/- which he wanted to avoid

paying and thus by registering this false case he could rid of the debt as well as the Appellant. According to Appellant he did not go to the shop of the complainant to collect the extortion money as he had not demanded any and was at the relevant time in his flat when he was forcibly taken away and removed by the police in order to implicate him in this false case.

12. The Appellant submitted that the impugned judgment should be set-aside on account of the following main grounds; that the learned Special Judge has failed to appreciate facts and law involved in the case, that the learned Special Judge misread and non-read the evidence and thus caused miscarriage of justice, that the Appellant was running a garment business and had outstanding invoices payable by the complainant and that the learned Judge erred in holding otherwise, that the settlement of the amount of Rs.50,000/- in the FIR and the statement of the complainant that Rs. 25,000/- was subsequently stated was a major contradiction, that as the complainant had informed the police before the raid and seizure it was necessary to have the currency notes marked or number noted vide memo which was not done and that was a major contradiction which cuts the very root of the case, that the mashirnama of seizure and the FIR were lodged at the police station after returning to the police station, thus the entire seizure and action by the police before lodging of the FIR are illegal and with no consequences and that the provisions of section 103 Cr.P.C. have been flagrantly discarded.

13. The learned counsel for the Appellant carefully took us through the evidence in support of his above main grounds

14. On the other hand learned counsel for the State submitted that the impugned judgment had been decided correctly based on the evidence and learned counsel for the Appellant had not been able to show otherwise and thus the impugned judgment should be upheld.

15. Neither party cited any authority in support of their respective contentions and relied upon the record to substantiate their submissions.

16. We have gone through the impugned judgment, considered the arguments of the learned counsel and carefully gone though all the evidence and other material related to the case which forms a part of the record.

17. The statement of the complainant under oath is very similar to his FIR (on extortion and the recovery of an unlicensed weapon i.e. the prosecution story narrated above) with no major contradictions. He produced the mashirnama which the police prepared on the spot, he produced the case property in sealed condition (seized pistol, 2 bullets and seized currency notes 20,000 made up of 1,000

denomination and 5,000 made up of 500 denomination), his S.154 Cr.PC statement, the police's mashirnama of inspection of the crime scene and the envelope containing the demand chit. He stated that he had given the chit to the police. He also identified the accused in Court in respect of two extortions as the person who personally collected the money from him. During cross examination he admitted that the evidence which he produced was in relation to the 8-10-2012 extortion episode alone.

18. It is correct that the mashirnama's are not signed by two independent witnesses however to an extent this is understandable since the incident took place late at night i.e. 12.30 am when few witnesses even if around would want to involve themselves. It is not uncommon in such circumstances for independent witnesses to be unavailable or unwilling and we do not regard this aspect as fatal to the prosecution's case.

19. With regard to the Appellants defense case we find that in cross examination of the complainant he did not put forward either strongly or convincingly the defense that he was to later rely upon. i.e. being a business associate/rival of the complainant who owed him approx RS 35,720 which he was refusing to repay. Importantly the complainant was not confronted in cross examination with the invoices which purportedly bore his signature showing that he owed money to the Appellant on account of supply of garments or the precise amount of money owed which the Appellant later relied on in his defense. In our view there was no plausible reason for this confrontation not being done if the Appellant's version of events were to be believed. In fact it may deliberately not have been done as the complainant may have denied his signature which later the Judge did not find to be in conformity with the complainants signature on his S.154 Cr.PC statement and mashirnama's which would have then damaged the defense's case. There appears to be every likelihood that these invoices may have been fabricated. It was the Appellants case that the complainant had falsely implicated him in league with the police however during the cross examination of the complainant he did not put to him that the complainant had told him that he would rather pay the police than return any money to him prior to the incident which was an assertion which he later relied upon in his own evidence in support of his defense. This seems to us an important omission. In short the complainant was not badly damaged let alone shattered during cross examination.

20. PW 2 Zulquarnain who was the ASI posted at PS Azizababd at the time of the incident states in his cross examination that he received the complainants complaint in respect of the extortion demand and request for assistance at 11.50 pm and recorded it word for word and thereafter directed ASI Waseem to proceed to the complainants shop a record of which was recorded in the Roznamcha of the PS (in our view this is strong corroborative evidence to support the police version

as opposed to the defense version of events). This is corroborated by PW 3 (ASI Waseem) who received the call at 11.50 and thereafter proceeded to the shop which on cross examination he said took 10 to 15 minutes to reach. Since the incident was due to take place at around 12.30 am this would indicate that there was insufficient time to mark the notes/currency for identification. ASI Waseem also confirms that the relevant recoveries were made at the site and brought to the PS which is corroborated by PW 2 Zulquarnain. He was not badly damaged let alone shattered during cross examination.

21. PW 3, as noted above, was Mohammed Waseem who was the ASI who made the arrest of the Appellant at the complainants shop. After the arrest he prepared the mashirnama of arrest and recovery. His statement largely corroborates that of the complainant. Importantly it was not put to him during cross examination that he had taken the appellant from his home and falsely implicated him in this case as was later stated by the Appellant in his statement under oath. In our view this is a strong indication that the Appellant's defense in this respect is an after thought as it seems inconceivable that the person who allegedly took him from his house by force was not confronted by this during cross examination if this was the case. He was not badly damaged let alone shattered during cross examination.

22. PW 4 was Syed Irshad Abdi who is an Inspector who was the IO of the case who performed the usual functions of the IO i.e. went to place of wardat, seized the chit, recorded statements of witnesses' etc.before filing the challon. He also was not badly damaged let alone shattered during cross examination.

23. It is notable that for the first time during the recording of his S.342 statement the Appellant mentioned the precise amount of RS 35,720 which the complainant allegedly owed him. This precise figure was not put to the complainant during his cross examination. In his S.342 statement he denied being at the shop but did not say that he was dragged from his flat by ASI Waseem and falsely implicated in the case.

24. For the first time in his statement under oath the Appellant mentions that ASI Waseem forcibly took him from his flat with another police officer. As mentioned earlier he did not cross examine ASI Waseem on this point. In his statement he named Mr and Mrs Inayat as witnesses to his abduction from his flat by ASI Waseem who also confronted Waseem who allegedly told them that the Appellant was wanted on a complaint by Akbar.

25. The Appellant also claimed for the first time that the police involved him in this false case after 2 days because he refused to pay them RS 2 lacs. Significantly none of the PW's (all of whom were from the police bar the

complainant were confronted on this point during cross examination including ASI Waseem who allegedly took him forcibly from his flat.)

26. Although the Appellant during his evidence in chief asserted that he was forcibly removed from his flat on 7-10-12 at 11.30 pm during cross examination he admitted that he had not complained about his abduction to any one nor had any one else including family members or the Inayat's. His cross examination also suggested that he was not running a garment business let alone having any business relationship with the complainant. Only Ms Inayat supported his abduction by the police. Mr.Inayat did not come forward nor did any one else who allegedly witnessed his abduction by the police. Notably according to Ms Inayat the Appellant's wife was also present at the time of the Appellant's abduction yet she made no complaint to the local SHO about the incident.

27. Importantly, it also appears that the mobile no. of the complainant and mobile no. of the Appellant (which is the same as on the chit) are available on the call data which shows that they were in contact.

28. Even, if we exclude the evidence in respect of the bail application which the learned Judge mentioned in the impugned judgment and the minor contradictions pointed out by the learned Judge in the impugned judgment as alluded to by the Appellant in this appeal we observe that the prosecution's evidence is corroborated and shows a chain of events whereby the accused was apprehended for the offense and the Appellant was not able during cross examination of the PW's to put any dent in the prosecution's case.

29. On the other hand, as discussed above, as can be seen from the cross examination of the PW's by the Appellant (none of whom were badly damaged let alone shattered on cross examination) the defense version of events does not appear to be very compelling let alone plausible.

30. In our view the learned Judge has rightly held the prosecution evidence to be trusty worthy and on the evidence we are of the considered opinion that the prosecution has proved its case against the Appellant beyond a reasonable doubt even if the bail evidence is excluded and the minor contradictions are considered which the judge has accounted for in the impugned judgment.

31. Accordingly this Appeal is dismissed.

Dated: 15-3-2016