

CERTIFICATE OF THE HIGH COURT OF SINDH, KARACHI

Spl Criminal Anti-Terrorism Jail Appeal NO. 15 of 2021

Muhammad Arif

Vs

The State

HIGH COURT OF SINDH

Composition of Bench.

D.B.

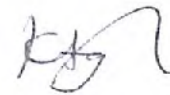
Mr. Justice Muhammad Karim Khan Agha
Mr. Justice Zulfiqar Ali Sangi

Date(s) of hearing: 15-08-2022

Decided on : 17-08-2022

Judgment approved for Reporting

Yes



CERTIFICATE.

Certified that the judgment */Order is based upon or enunciates a principle of law
*/decides a question of law which is of first impression/distinguishes/. Over-rules/
reverses/explains a previous decision.

* Strike out whichever is not applicable.

NOTE: - (i) This slip is only to be used when some action is to be taken.

(ii) If the slip is used, the Reader must attach it to the top of the first
page of the judgment.

(iii) Reader must ask the Judge writing the Judgment whether the
Judgment is approved for reporting.

(iv) Those directions which are not to be used should be deleted.

IN THE HIGH COURT OF SINDH

Crl. Jail Appeal No. 15 of 2021

Muhammad Arif s/o Anees Ahmed,
adults, presently
confined in Central Prison,
Correction Facility Karachi.....Appellant in person

Versus

The state.....Respondent

Special Case NO.662/2019
New Spl. No.194/2019
FIR No.378/2019
Sections.353/324 PPC.
R/w Sec. 7 ATA, 1997.
PS. Jamshed Quarters, Wazirchi.
Special Case NO.662 A 2019
FIR No.379/2019
Sections.23(i) (A) S.A.A.2013
PS. Jamshed Quarters, Karachi.

APPEAL UNDER SECTION 25 OF THE
ANTI-TERRORISM ACT, 1997 READ
WITH SECTION 410 CR.P.C.

Honourable Sir,

Being aggrieved and dis-satisfied with impugned judgement dated 07.12.2020. issued by Mr. Rashid Mustafa Solangi, Learned Judge Anti-Terrorism Court-XVI, Karachi. in Special Cases numbers mentioned above re: State Vs. Muhammad Arif son of Muhammad Arif. being outcome of FIR numbers mentioned above, Police Stations Jamshed Quarters, Wazirchi. under sections as mentioned above.

Whereby convicting and sentencing the Appellant/ accused and awarding him:

01. Under section 324 PPC, he has been convicted and sentenced to suffer simple imprisonment for (10) years, and fine of Rs.50,000/-, in case of default of payment of fine, he shall further suffer imprisonment for (06) months.
 02. Under section 353 PPC, they has been convicted and sentenced to suffer for (02) years, and fine of Rs.10,000/-, in case of default of payment of fine, he shall further suffer imprisonment for (03) months.
 03. Under section 7(b) of ATA, 1997, he has been convicted and sentenced to suffer imprisonment for (10) years, and fine of Rs.10,000/-, in case of default of payment of fine, he shall further suffer imprisonment for (06) months.
 04. Under section 7(1)(h) of ATA, 1997, he has been convicted and sentenced to suffer imprisonment for (05) years, and fine of Rs.10,000/-, in case of default of payment of fine, he shall further suffer imprisonment for (06) months.
 05. Under section 23 (i) A, Sindh Arms Act 2013, he have been convicted and sentenced to suffer imprisonment for (07) years, and fine of Rs.50,000/-, in case of default of payment of fine, he shall further suffer imprisonment for (03) months.
- The property of accused as defined in section 02(p)(a) of ATA, 1997 are also liable to be forfeited as provided under section 7(2) of ATA, 1997.
- Benefit of section 382(b) Cr.P.C was extended and it was ordered that all the sentences shall run concurrently.

IN THE HIGH COURT OF SINDH, KARACHI

Spl. Criminal A.T. Jail Appeal No.15 of 2021.

Present:

Mr. Justice Mohammad Karim Khan Agha
Mr. Justice Zulfiqar Ali Sangi,

Appellant:	Muhammad Arif S/o. Anees Ahmed through Mr. Muhammad Asad Ashfaq, Advocate.
Respondent:	The State through Mr. Ali Haider Saleem, Additional Prosecutor General Sindh.
Date of hearing:	15.08.2022.
Date of Announcement:	17.08.2022.

JUDGMENT

MOHAMMAD KARIM KHAN AGHA, J:- The appellant Muhammad Arif S/o. Anees Ahmed has preferred the instant appeal against the judgment dated 07.12.2020 passed by Learned Judge, Anti-Terrorism Court No.XVI, Karachi in Special Case No.662 of 2019 (New Special Case No.194 of 2019) arising out of Crime No.378 of 2019 u/s. 353/324 PPC R/w section 7 ATA 1997 and Special Case No.662-A of 2019 (New Special Case No.195 of 2019) arising out of Crime No.379 of 2019 u/s. 23(1)(A) of Sindh Arms Act, 2013 registered at P.S. Jamshed Quarters, Karachi whereby the appellant was convicted and sentenced as under:-

- (i) The accused Muhammad S/o. Anees Ahmed was convicted for the offence u/s. 324 PPC and sentenced to undergo simple imprisonment for 10 years with fine of Rs.50,000/- and in case of failure to pay the fine he was ordered to serve SI for six months more.
- (ii) The accused was also convicted for the offence u/s. 353 PPC and sentenced to undergo simple imprisonment for 02 years with fine of Rs.10,000/- and in case of failure to pay the fine, he was ordered to serve SI for three months more.

- (iii) The accused was also convicted for the offence u/s.7(b) of ATA 1997 and sentenced to undergo simple imprisonment for 10 years with fine of Rs.50,000/- and in case of failure to pay the fine, he was ordered to serve SI for six months more.
- (iv) The accused was also convicted for the offence u/s.7(1)(h) of ATA 1997 and sentenced to undergo simple imprisonment for 10 years with fine of Rs.30,000/- and in case of failure to pay the fine, he was ordered to serve SI for three months more.
- (v) The accused was also convicted for the offence u/s 23(I)(A) SAA 2013 and sentenced him to undergo simple imprisonment for seven years with fine of Rs.50,000/- and in case of failure to pay the fine, he was ordered to serve SI for three (03) months more.
- (vi) The property of accused as defined in section 02(p)(a) of ATA 1997 was also ordered to be forfeited as provided under section 7(2) of ATA 1997.

The benefit of Section 382-B was also extended to the accused.

2. The brief facts of the prosecution case as per F.I.R. lodged by complainant ASI Hakim Ali are that on 28.10.2019 at about 2240 hours while he was on patrolling along with staff reached at Summit Bank near Parda Park, MA Jinnah Road, Karachi and saw a person coming out of ATM booth in suspicious condition and when he called him to stop, the person on seeing the police party started firing, the police also fired in retaliation, resultantly the suspect received bullet injury on his stomach and was arrested by the police who disclosed his name as Muhammad Arif s/o Anees Ahmed. Meanwhile one person also came out from ATM booth disclosed his name as Asfand Ali and stated that the accused on the force of pistol snatched Rs.7000/-, from him and accordingly the FIRs were registered against the accused for the above crime.

3. After usual investigation the case was challaned and the accused was sent up to face trial. He plead not guilty and claimed trial

4. The prosecution in order to prove its case examined 07 witnesses and exhibited various documents and other items. The statement of accused was recorded under Section 342 Cr.P.C in which he denied the allegations leveled against him and claimed false implication. He did not examine himself on oath and did not call any DW in support of his defence case.

5. After hearing the parties and appreciating the evidence on record and hearing both sides the trial court convicted the appellant and sentenced him as stated above, hence, the appellant has filed this appeal against conviction.

6. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the impugned judgment dated 07.12.2020 passed by the trial court and, therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

7. Learned counsel for the appellant has contended that there is no independent evidence that the appellant fired on the police; that the private witnesses are planted witnesses and cannot be relied upon; that the ocular evidence is contradicted by the medical evidence; that there are material contradictions in the prosecution evidence which makes it unreliable; that there is a delay in lodging the FIR which lead to it being concocted by the police in collusion with the independent PW's; that there was a delay in sending the empties for FSL which made the FSL report unreliable and that the USB footage was inadmissible, that the pistol was foisted on him and that no encounter took place with the police and that for all or any of the above reasons the appellant should be acquitted of the charge by being extended the benefit of the doubt. In support of his contentions he relied upon the following cases *Shahzaib v The State* (2022 MLD 950), *Asaddullah v The State* (2022 P Cr.L J 774), *Muhammad Zakir v The State* (2022 MLD 204), *Asfandiyar and another v Kamran and another* (2016 SCMR 2084), *Tariq v The State* (2018 YLR 2246), *Shahzada Khan v The State* (2020 YLR 1048), *Muhammad Ali v The State* (2021 P Cr. L J 373), *Muhammad Younis alias Bona v The State* (2022 YLR 924), *Mst. Sughra Begum v Qaiser Pervez* (2015 SCMR 1142), *Muhammad Ali v The State* (2017 SCMR 1468), *Naveed Asghar v The State* (PLD 2021 SC 600) and *Sikandar Ali Lashari v The State* (2016 YLR 62).

8. On the other hand learned APG fully supported the impugned judgment and prayed for the dismissal of the appeal especially keeping in view the fact that the appellant was arrested on the spot in injured condition by reliable police eye witnesses; that the independent eye witnesses also supported the prosecution case; that oral evidence overrode medical evidence if there was some discrepancy between the same; that the pistol was recovered from the accused when he was arrested on the spot which lead to a positive FSL report when matched with the empties recovered at the scene; however when confronted by 4

this court he conceded that this case did not fall within the purview of the ATA. In support of his contentions he placed reliance on the cases of **Asif and others v The State** (2020 SCMR 610), **Ghulam Abbas v The State** (2022 SCMR 1102), **Muhammad Ilyas v The State** (2011 SCMR 460) and **Muhammad Ashraf v The State** (2011 SCMR 1046).

9. We have heard the arguments of the learned counsel for the appellant as well as learned APG and have gone through the entire evidence which has been read out by learned counsel for the appellant, and the impugned judgment with the able assistance of learned counsel and have considered the relevant law including the case-laws cited at the bar.

10. After our reassessment of the evidence we find that the prosecution has proved beyond a reasonable doubt the charge against the appellant for which he was convicted **except** in respect of the ATA offences for the following reasons keeping in view that each criminal case must be decided on its own particular facts and circumstances;

(a) That the FIR was lodged with promptitude which gave the police no time to cook up a false case against the appellant.

(b) That according to independent witness PW 3 Asfand Ali on 28.10.2019 he was withdrawing cash at approx 2230 from an ATM of summit bank when a robber came behind him in the ATM booth and by pointing a pistol at his back forced him to withdraw a further RS5000 in addition to the RS2000 which he had already withdrawn and robbed the same from him along with his mobile phone. The robber ordered him to remain in the ATM booth from which he heard firing after the robber left. He came out of the booth where he saw the police mobile and the robber/accused lying in an injured condition with a pistol in his hand who was then taken to hospital for treatment.

(c) Although it is only of corroborative value the CCTV footage which was recovered from the bank showed what happened in the ATM booth at the given time which fully corroborates the evidence of PW 3 Asfand Ali being robbed by the accused. PW 3 Asfand Ali being an independent witness had no enmity or ill will towards the appellant and had no reason to implicate him in this false case. He was not dented on cross examination and the money which was stolen from him by the accused along with his mobile phone containing his SIM was recovered from the accused on his arrest along with his pistol.

(d) That the appellant was caught red handed on the spot with an unlicensed pistol and the items stolen from PW 3 Asfand Ali after an encounter between the police and the accused after he left the ATM booth having robbed the accused.

(e) That the arrest and recovery was made on the spot by the police whose evidence fully corroborates each other in all material respects as well as the prosecution case. It is well settled by now that the evidence of a police witness is as reliable as any other witness provided that no enmity exists between them and the accused and in this case no suggestion of enmity has been made against any PW. They had no reason to falsely implicate the appellant by for example foisting the recovered pistol on him. Thus we believe the police evidence and rely upon the same which is corroborative in all material respects. Reliance in this respect is placed on the case of **Mushtaq Ahmed V The State** (2020 SCMR 474)

(f) That PW 6 Rehan who owned a nearby car show room and was on his way home was also an independent witness who witnessed the encounter between the police and the accused. It was never suggested that he was a chance witness and did not live and work in the area. He had no enmity or ill will towards the accused and had no reason to implicate the accused in a false case. He was not dented during his evidence and his evidence fully corroborates the police evidence of the accused being shot by the police after an encounter with the police and we believe and rely upon his evidence.

(g) It is true that according to the ocular evidence the accused was hit in the stomach and it is suggested that the accused was shot in the back by the medical evidence of PW 2 Dr. Ali Raza who was the MLO. However it is well settled by now that ocular evidence takes precedence over medical evidence. In this respect reliance is placed on the cases of **Muhammed Riaz** (PLD 2005 SC 484) and **Shafqat Ali** (PLD 2005 SC 288). In any event in cases of so called fake police encounters the police usually shoot the accused in the leg and never in the stomach or back. The fact that there was no blackening around the wound also supports the prosecution evidence that the police firing was made from more than 3 feet and that this was a genuine encounter.

(h) Although it is true that no policeman or police mobile was hit during the encounter it came in evidence that bullet marks were seen on a wall and the shutter of one shop close to the occurrence of the encounter.

(i) A mere two day delay in sending the empties/pistol to FSL is of no great significance as was held in the case of **Muhammed Ashraf** (Supra).

(j) The recovered pistol produced a positive FSL report with the empties which were recovered at the scene when they were sent for FSL report.

(k) The bike recovered at the scene which the appellant was riding at the time of his arrest was found to be stolen.

(l) The appellant has a CRO for similar type cases and as such appears to be a habitual offender.

(m) That all the PW's are consistent in their evidence and even if there are some contradictions in their evidence we consider these

contradictions as minor in nature and not material and certainly not of such materiality so as to effect the prosecution case and the conviction of the appellant. In this respect reliance is placed on the cases of **Zakir Khan V State** (1995 SCMR 1793) and **Khadim Hussain v. The State** (PLD 2013 Supreme Court 669). The evidence of the PW's provides a believable corroborated unbroken chain of events from the police leaving on patrol to the robbery of PW 3 Asfand Ali by the accused at the ATM to the accused entering into an encounter with the police after he robbed PW 3 Asfand Ali after he left the ATM booth in order to escape to the accused being shot by the police during the encounter to the accused being arrested on the spot in injured condition with an unlicensed firearm whilst in possession of the robbed articles.

(n) Undoubtedly it is for the prosecution to prove its case against the accused beyond a reasonable doubt but we have also considered the defence case to see if it at all can cast doubt on or dent the prosecution case. The defence case is one of false implication simpliciter. The appellant did not give evidence on oath in order to refute the prosecution case and did not call any DW in support of his case. In his S.342 Cr.PC statement the accused does not even deny his presence at the scene and simply says every allegation against him is false. He also did not claim any enmity with any witness or provide any reason for us to disbelieve their evidence and thus we disbelieve the defence case in the face of reliable, trust worthy and confidence inspiring prosecution evidence.

11. As such the appeal is dismissed and the convictions and sentences are maintained **except** in respect of the offences under the ATA for which the appellant is acquitted as this was not a case of terrorism which fell within the definition of terrorism as set out by the Supreme Court in the case of **Ghulam Hussain V State** (PLD 2020 SC 61) where in essence for there to be an act of terrorism there had to be an object, intent, purpose and design to create terror on account of the act committed. Based on the particular facts and circumstances of this case it appears that the appellant's intent was to commit robbery and that he opened fire on the police only in order to make his escape good.

12. As such the appeal is partly allowed and the appellant stands convicted and sentenced as under:


(a) U/s. 324 PPC and sentenced to undergo simple imprisonment for 10 years with fine of Rs.50,000/- and in case of failure to pay the fine to serve SI for six months more.

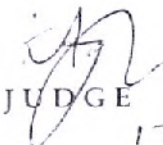
(b) U/s. 353 PPC and sentenced to undergo simple imprisonment for 02 years with fine of Rs.10,000/- and in case of failure to pay the fine, to serve SI for three months more.

- (c) U/s 23(I)(A) SAA 2013 and sentenced to undergo simple imprisonment for seven years with fine of Rs.50,000/- and in case of failure to pay the fine, to serve SI for three (03) months more.

All the sentences shall run concurrently. The benefit of Section 382-B is also extended to the appellant and any applicable remissions under the law now that the appellant has been acquitted of any offence falling under the ATA.

13. The appeal is disposed of in the above terms.


JUDGE Ali,
17/08/2022.


JUDGE
17/08/22