

IN THE HIGH COURT OF SINDH, AT KARACHI

PRESENT:-

Mr. Justice Naimatullah Phulpoto;

Mr. Justice Shamsuddin Abbasi.

Spl. Crl. Anti-Terrorism Appeal No.72 of 2016

Muhammad Farhan @ Indian
son of Muhammad Munaf. Appellant

Versus

The State. Respondent

Appellant Through Mr. Muhammad Farooq,
Advocate.

Respondent Through Mr. Saleem Haider,
DPG.

Date of hearing 16.02.2018
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JUDGMENT

Shamsuddin Abbasi, J: Appellant Muhammad Farhan @ Indian son of Muhammad Munaf was booked in Crime No.470 of 2013 under Section 4/5 of Explosive Substances Act, 1908 read with Section 23(A)(i) of Sindh Arms Act and Section 7 of Anti-Terrorism Act, 1997 registered at Police Station Kharadar, Karachi. By a judgment dated 16.02.2016, passed by learned Judge of Anti-Terrorism Court No.IV, Karachi, in Special Case No.20(III) of 2014, appellant was convicted under Section 4/5 of Explosive Substances Act, 1997 and sentenced to undergo rigorous imprisonment for 14 years and to pay a fine of Rs.50,000/-, in default whereof he was ordered to suffer rigorous imprisonment for six months more. The appellant was also convicted under Section 23(A)(i) of Sindh Arms Act, 2013 and sentenced him to undergo rigorous imprisonment for

05 years and to pay a fine of Rs.50,000/-, in default whereof he was ordered to suffer rigorous imprisonment for six months more. The sentences awarded to the appellant were ordered to run concurrently and he was also extended with the benefit of Section 382-B, Cr.P.C.

2. Feeling aggrieved by the convictions and sentences recorded herein above, the appellant has preferred the instant appeal.

3. Precisely, the case of the prosecution is that on 22.12.2013 police party of P.S. Kharadar, Karachi, headed by SIP Bashir Ahmed, was busy in patrolling of the area in official mobile. During patrolling he received spy information that 5/6 suspicious persons, who belonged to Lyari Gangwar, were present at Khajoor Market, near Water Pump Tank, armed with deadly weapons. On receipt of such information, police party proceeded to the pointed place and reached there at about 1435 hours and found 5/6 persons standing there. The police party encircled and tried to apprehend them, but they on seeing the police party, in order to evade their arrest, resorted to firing on them with intention to kill them. The police in retaliation returned the fire shots in self defence and succeeded in causing the arrest of three culprits, who disclosed their names as Muhammad Farhan @ Indian son of Muhammad Munaf (present appellant), Farhan son of Illahi Bux and Nadeem Akhtar son of Muhammad Nazeer while two others managed to escape from the scene of occurrence, whose names were disclosed by co-accused as Sultan Ahmed son of Muhammad Sadiq and Jan Muhammad @ Janoo Pumpwala. During search one 30 bore pistol loaded with three live bullets in magazine and one in chamber and two hand grenades, wrapped in a blue coloured shopper bag, were recovered from the possession of accused Farhan @ Indian while other arms and

ammunitions were also recovered from other arrested accused. On demand the accused failed to produce the license of the recovered arm and ammunition. SIP Bashir Ahmed arrested him and sealed the recovered pistol on the spot under a mashirnama prepared in presence of mashirs PCs Shafiullah and Muhammad Ejaz. He brought the accused and the recovered property at P.S. Kharadar, Karachi, where FIR No.470 of 2013 under Section 4/5 Explosive Substances Act, 1997 read with Section 23(1)(a) of Sindh Arms Act, 2013 and Section 7 of Anti-Terrorism Act, 1997 was lodged against the present appellant on behalf of the State.

4. After registration of FIR, the investigation was entrusted to Inspector Aijaz Hussain Mughal. I.O. visited the place of occurrence on the pointation of complainant SIP Bashir Ahmed, secured 05 empties of SMG, 03 empties of 9 MM pistol, 04 empties of 30 bore pistol, sealed the same on the spot and prepared memo of site inspection in presence of mashirs SIP Bashir Ahmed and PC Muhammad Ejaz. He also recorded the statements of witnesses under Section 161, Cr.P.C., sent the recovered arms and ammunitions to the office of FSL for examination and report and also got the inspection of hand grenades through BDU. After completing the usual investigation, he submitted challan before the Court of competent jurisdiction.

5. The learned trial Court framed a charge against the accused at Ex.3, to which he pleaded not guilty and claimed to be tried.

6. At the trial, the prosecution has examined as many as four witnesses namely, PW.1 SIP Bashir Ahmed at Ex.7, who is complainant of this case, he produced departure entry at Ex.7/A, memo of arrest and recovery at Ex.7/B, arrival entry at Ex.7/C, FIR

at Ex.7/D, attested copy of memo of site inspection at Ex.7/E, PW.2 PC Shafiullah was examined at Ex.8, who is one of the mashir of memo of site inspection, PW.3 SIP Muhammad Aamir from BDU was examined at Ex.11, who examined the hand grenades, he produced letter of I.O. at Ex.11/A, clearance certified at Ex.11/B, final report at Ex.11/C, Roznamcha No.27 and 37 at Ex.11/D, PW.4 Inspector Aijaz Ahmed Mughal was examined at Ex.12, who is investigating officer, he produced Roznamcha entry No.35 at Ex.12/A, attested copy of Naqsha-e-Nazri at Ex.12/B, Roznamcha entry No.38 at Ex.12/C, attested copy of permission letter at Ex.12/D and examination report of FSL at Ex.12/E. The prosecution closed its' side vide statement Ex.13.

7. Statement of accused under Section 342, Cr.P.C. was recorded at Ex.14, wherein he denied the prosecution case and pleaded his innocence. The appellant opted not to examine himself on oath under Section 340(2), Cr.P.C. and did not lead any evidence in his defence.

8. Trial Court on conclusion of trial and after hearing the learned counsel for the parties recorded convictions and sentences as stated above.

9. The learned counsel for the appellant submits that the incident had taken place in a thickly populated area and police had prior information, but no independent witness or any respectable person of the locality was associated to witness the alleged recovery proceedings and both the mashirs of arrest and recovery were police officials and subordinate to complainant. He further submits that witnesses have contradicted each other on material points. He also submits that Section 7 of Anti-Terrorism Act, 1997 has been wrongly inserted inasmuch appellant had not committed any act of Terrorism.

The learned counsel further submits that nothing incriminating was recovered from the possession of appellant and the alleged recovery has been foisted upon him. Lastly, submitted that the prosecution has failed to discharge its' burden of proving the guilt of the appellant and prayed for his acquittal.

10. On the other hand, the learned DPG has submitted that the appellant was arrested from the place of scene alongwith two hand grenades and one 30 bore pistol. He further submits that the prosecution has examined four witnesses, who all have fully implicated the appellant with the commission of offence. Finally, he submits that the prosecution has successfully proved the guilt of the appellant and prayed that the appeal may be dismissed.

11. We have anxiously considered the arguments of both the sides and perused the entire evidence available before us.

12. Prosecution case is full of contradictions, discrepancies and lacunas. According to the mashirnama of arrest and recovery as well as FIR, two hand grenades were recovered from blue coloured shopping bag, same was in the right hand of the appellant, but complainant SIP Bashir Ahmed has deposed in his examination-in-chief as under:-

“From the further personal search of accused Muhammad Farhan @ Indian, one hand grenade wrapped in blue coloured shopping bag was recovered”.

It was a major and material contradiction, it made the whole prosecution case doubtful. We cannot ignore this aspect of the matter that FIR and mashirnama show two hand grenades were recovered while complainant has deposed that one hand grenade was recovered. It is also important to note that during trial, the prosecution has failed to produce said blue coloured shopping bag

before trial Court, which was wrapped over the hand grenades. It is an admitted fact that complainant had prior information about the presence of culprits at the pointed place, inspite of the fact that police failed to associate any private person to witness the alleged recovery. Witnesses have admitted that the place of incident is a thickly populated and busy place. Even otherwise the record does not reveal that as to whether any effort was made to persuade any person from the locality to act as witness of incident alleged recoveries. Omission, thus, rendered the case of the prosecution extremely doubtful.

13. The another important aspect of the matter is that according to police there was an encounter in between police party and the accused persons, but surprisingly when both parties were armed with deadly weapons and there was exchange of fires from both sides, none from either side has sustained any firearm injury and mashirnama of place of inspection did not show any bullet mark on any wall or anywhere else or even on police mobile. This aspect too has made the case of the prosecution highly doubtful.

14. PW SIP Muhammad Aamir of BDU in his statement has deposed that he received letter dated 24.12.2013 and he went to P.S. Kharadar on 02.01.2014 for inspection and defused the hand grenades and issued clearance certificate. We have carefully examined the whole record and found that no where it is mentioned that the hand grenades were kept in safe custody at police station. Neither prosecution has produced any entry to show that the property was kept in Malakhana from 22.12.2013 till 02.01.2013 nor examined any witness to prove the safe custody of recovered articles. This aspect of the matter has been discussed by Hon'ble apex Court of Pakistan in the case of *Ikramullah & others v The State* reported in 2015 SCMR 1002, which is reproduced as under:-

“In the case in hand not only the report submitted by the Chemical Examiner was legally laconic but safe custody of the recovered substance as well as safe transmission of the separated samples to the office of Chemical Examiner had also not been established by the prosecution. It is not disputed that the investigating officer appearing before the learned trial court had failed to even to mention the name of the police official who had taken the samples to the office of the Chemical Examiner and admitted no such police official had been produced before the learned trial Court to depose about safe custody of the samples entrusted to him for being deposited in the office of the Chemical Examiner. In this view of the matter the prosecution had not been able to establish that after the alleged recovery the substance so recovered was either kept in safe custody or that the samples taken from the recovered substances had safely been transmitted to the office of the Chemical Examiner without the same being tampered with or replaced while in transit”.

15. All the witnesses examined by the prosecution are police officials. No doubt police witnesses are as good and equal as that of other independent witnesses and conviction can be based on their evidence unless no malafide is brought on record. It is a well settled law that their testimony should be reliable, dependable, trustworthy and confidence worthy. If such qualities are missing in their evidence then no conviction can be based on the evidence of police officials without independent corroboration and accused would be entitled to the benefit of doubt. Under the law, emphasis is on the quality of evidence rather than quantity. In this respect the Hon'ble apex Court has settled the principle in a case of *Tariq Pervez v The State* reported in 1995 SCMR 1345 on the point of benefit of doubt which is reproduced as under:-

“The concept of benefit of doubt to an accused person is deep-rooted in our country. For giving benefit of doubt to an accused, 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 accused, then the accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right”.

16. Taking into consideration the above evidence on record, we are of the considered view that the prosecution has failed to

discharge its' liability of proving the guilt of the appellant beyond shadow of doubt. Therefore, while extending the benefit of doubt in favour of the appellant, we hereby set-aside the conviction and sentence recorded by the learned trial Judge by impugned judgment dated 16.02.2016, acquit the appellant of the charge and allow this appeal. The appellant shall be set free forthwith if not required to be detained in any other case.

17. These are the reasons for our short order dated 16.02.2018.

JUDGE

JUDGE

Naeem