IN THE HIGH COURT OF SINDH, AT KARACHI

PRESENT:-
Mr. Justice Naimatullah Phulpoto; and
Mr. Justice Shamsuddin Abbasi.

Spl. Crl. Anti-Terrorism Appeal No.176 of 2017
Spl. Crl. Anti-Terrorism Appeal No.177 of 2017

Muhammad Sami son of
Muhammad Saeed. ... ... Appellant

Versus

The State. ... ... Respondent

Appellant	Through Syed Hafeezuddin, Advocate.
Respondent	Through Mr. Muhammad Iqbal Awan, DPG.
Date of hearing	20.02.2018

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JUDGMENT

Shamsuddin Abbasi, J: Through captioned appeals, the appellant has assailed the convictions and sentences recorded by the learned Anti-Terrorism Court No.I/Additional Sessions Judge-I, (East), at Karachi, by a common judgment dated 22.07.2017, passed in Special Cases No.1955 of 2016 and 1956 of 2016, arising out of FIR No.274 of 2016 under Section 353, 324 & 34, PPC read with Section 7 of Anti-Terrorism Act, 1997 and FIR No.275 of 2016 under Section 23(i)(a) of Sindh Arms Act, 2013 registered at Police Station, Saudabad, Karachi.

2. Since both the aforesaid appeals arose out of common judgment, therefore, we deem it appropriate to decide the same together.

3. Precisely, the case of the prosecution is that on 05.10.2016 police party of P.S. Saudabad, headed by ASI Muhammad Khan, was busy in patrolling of the area. It was about 2245 hours, when the police party reached at Railway line, near Darakhshan Society, Malir, Karachi. It is also alleged that police party saw a person standing at the corner of the road alongwith a motorcycle in suspicious condition. Police tried to check him, but the said person in order to evade his arrest, deterred the police party from discharging their officials duties and resorted to firing on them with intention to kill. The police in retaliation returned the fire shots in self defence, whereupon the culprit sustained bullet injury on his left hand, and in that succeeded in causing his arrest. During his personal search, police recovered one 30 bore pistol bearing No.2964, black and white, containing the words "FY", with load magazine containing four live bullets from his right hand, to which he failed to produce a license as such he was arrested on the spot and the recovered property was sealed under a mashirnama prepared in presence of mashirs HC Riaz Hussain and PC Abid Chishti. On verification, the motorcycle that was recovered from the scene of offence was found to be the stole property, it was seized under Section 550, Cr.P.C. The accused was then shifted to hospital for his medical treatment and certificate. Thereafter, he was brought at Police Station Saudabad, where two separate FIRs for police encounter and recovery of unlicensed arm were registered on behalf of the State.

4. After registration of FIR, the complainant handed over the case papers and recovered property to ASI Bakht Ali for further investigation. I.O. inspected the place of incident, prepared memo of site inspection and seizure of empties. By the orders of SSP, the

further investigation was transferred and entrusted to Inspector Ali Khan, who sent the recovered pistol to FSL for examination and report, recorded the statements of witnesses under Section 161, Cr.P.C. After completing the usual investigation, the I.O. submitted two challan before the Court of competent jurisdiction under Section 353, 324 & 34, PPC read with Section 7 of Anti-Terrorism Act, 1997 and Section 23(1)(a) of Sindh Arms Act, 2013.

5. The joint trial was ordered in terms of Section 21-M of Anti-Terrorism Act, 1997.

6. Trial Court framed charge against the accused in respect of offences punishable under Section 353, 324 & 34, PPC read with Section 7 of Anti-Terrorism Act, 1997 and under Section 23(1)(a) of Sindh Arms Act, 2013 at Ex.3, to which he pleaded not guilty and claimed to be tried.

7. At the trial, the prosecution has examined as many as five witnesses namely, complainant ASI Muhammad Khan was examined at Ex.4, who produced Roznamcha entry No.61 at Ex.4/A, memo of arrest, personal search and recovery at Ex.4/B, FIRs No.274 of 2016 and 275 of 2016 at Exs.4/C & 4/D respectively, Roznamcha entry No.77 at Ex.4/E, memo of site inspection at Ex.4/F, PW.2 Dr. Ejaz Ahmed was examined at Ex.5, who produced Medico Legal Certificate at Ex.5/B, M.L. Certificate of Accident & Emergency Department, JPMC, Karachi at Ex.5/C, PW.3 HC Riaz Hussain was examined at Ex.6, PW.4 SIP Bakht Ali was examined at Ex.7, who produced Roznamcha entry No.2 at Ex.7/A and PW.5 Inspector Ali Khan was examined at Ex.8, who produced Roznamcha report No.32 at Ex.8/A, letter to FSL at Ex.8/C and ballistic expert report at Ex.8/D. The prosecution then closed its side vide statement at Ex.9.

8. Statement of accused under Section 342, Cr.P.C. was recorded at Ex.10, wherein he denied the prosecution case and pleaded his innocence. The accused opted not to examine himself on oath under Section 340(2), Cr.P.C. and did not lead any evidence in his defence.

9. The learned trial Court, on conclusion of the trial and after hearing the learned counsel for the parties, convicted the accused under Section 324, PPC and sentenced him to undergo rigorous imprisonment for seven years under and to pay a fine of Rs.10,000/-, in default whereof he was ordered to undergo simple imprisonment of three months more. He was further convicted under Section 353, PPC and sentenced to one year rigorous imprisonment. Appellant was also convicted and sentenced under Section 25 of Sindh Arms Act, 2013 to undergo rigorous imprisonment for five years and to pay a fine of Rs.5,000/-, in default whereof he was ordered to undergo simple imprisonment of three months more.

10. Feeling aggrieved by the aforesaid convictions and sentences recorded by the learned trial Judge, the appellant has preferred the present appeals.

11. The learned counsel for the appellant submits that the incident had taken place at odd hours of the night and police did not disclose the source of identification. The learned counsel for the appellant further submits that prosecution has examined five witnesses, who all are police officials and prosecution has failed to produce any independent witness. He further submits that the mashirnama of arrest and recovery showed that the pistol recovered from the possession of appellant was having black coloured handle and “M” was written on it’s handle/butt whereas the case property i.e. pistol, when de-sealed in trial Court, alphabet “FY” was written on

its handle/butt. He further submits that the investigating officer did not send the empties, recovered from the place of scene, to ballistic expert for matching purposes. Finally, he submits that the appellant has been fired in police custody and prayed for his acquittal.

12. On the other hand, the learned DPG, submits that the appellant was arrested from the scene of offence alongwith pistol in injured condition. He fired upon the police with intention to kill them. He further submits that all the prosecution witnesses have supported the case of the prosecution. Finally, he prayed that the appeal may be dismissed.

13. Heard learned counsel for the appellant and the learned DPG for the State and perused the material available on record carefully. According to the FIR, the appellant has received firm arm injury on his right hand. Ocular evidence is corroborated by medical evidence, but learned trial Judge framed defective charge and mentioned that the appellant had received fire arm injury on his leg. The important aspect of the matter is that according to medical evidence, appellant has received injury at palm and an exit wound was from back side of the hand. It means that appellant either had received injury when he raised his hands, it could be a sign of surrender or it could be possible that on the directions of police he raised his hands up before police in order to cause him injury and thereafter police fired on his hand. PW HC Riaz Hussain admitted that appellant has received firearm injury at palm. There is material contradiction in the evidence of complainant ASI Muhammad Khan and mashir of recovery namely, HC Riaz Hussain with regard to description of recovered TT Pistol. According to mashirnama of recovery the handle of recovered pistol was of black coloured and alphabet “M” was written on it and the complainant has deposed in

his evidence that *"It is correct that in the FIR it is mentioned that word "FY" in English is mentioned on black plastic cover of the pistol"* whereas mashir of arrest and recovery of pistol namely, HC Riaz Hussain deposed that "FY" was written on the handle of the recovered pistol. This discrepancy, thus, rendered the entire recovery extremely doubtful. PW SIP Bakht Ali, investigating officer of the case, in his cross-examination has admitted that, *"It is correct to suggest that I have not produced the Naqsha Nazri today before this Court".* He further admitted that, *"It is correct to suggest that I have not produced the entry of koth register".* He further admitted that, *"It is correct to suggest that the recovered weapon was sent for FSL by Inspector Ali Khan Sanjrani.* We have serious concern over the safe custody of case property, as prosecution has failed to produce entries of Malkhana to satisfy this Court that property was kept in safe custody or even examined any witness who kept the property in Malkhana and /or deposited it to the FSL.

14. The appellant in his statement under Section 342, Cr.P.C. has denied the prosecution evidence and pleaded his innocence. The learned trial Judge while framing the charge has mentioned that the appellant has received fire arm injury on his leg, on the other hand, in paragraph 2 of impugned judgment, it is stated that the appellant has sustained bullet injury on his left hand. Whereas the actual position as per record is that the appellant has received firearm injury on his right hand. It seems that the learned trial Judge has passed the impugned judgment in haste without applying his judicial mind and has mis-read the evidence. It is also important to note that there was exchange of fires from both the sides, but none from the police has sustained any single injury, hence in view of this background of the matter, the case appears to

be a managed one. Even the empties recovered from the scene of crime had not been sent to the ballistic expert to ascertain as to whether the same were fired from the same pistol that was recovered from the possession of appellant. This fact has also caused a fatal blow to the prosecution case. It is also an admitted fact that all the PWs are police officials and no private person was associated to witness the incident, despite the place of incident is a busy place, without assigning valid reasons. Even otherwise the record did not reveal that as to whether any effort was made to persuade any person from the locality or for that matter the public to act as witness of incident. This fact, thus, rendered the case of the prosecution extremely doubtful. No doubt the police witness is as good witness as other member of public, but in such type of cases the evidence must of highest quality, which is lacking in this case, in view of the reasons explained herein above. Apart there are material discrepancies, explained herein above, which has demolished the case as set up in the FIR and also shattered the entire fabric of the testimony of witnesses. It is obligatory upon the prosecution to prove it's case beyond any reasonable doubt and in failure to do so would be fatal for the prosecution. Needless to mention that in criminal cases the burden to prove its case rests entirely on the prosecution. The prosecution is duty bound to prove the case against accused beyond reasonable doubt and this duty does not change or vary in the case in which no defence plea is taken by the accused. The defence plea is always to be considered in juxta position with the prosecution case and in the final analysis if the defence plea is proved or accepted, then the prosecution case would stand discredited and if the defence is substantiated to the extent of creating doubt in the credibility of the prosecution case then in that case it would be enough but it may

be mentioned here that in case the defence is not established at all, no benefit would occur to the prosecution on that account and its duty to prove its case beyond reasonable doubt would not diminish even if the defence plea is not proved or is found to be false. 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".*

15. For the above stated reasons, we hold 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 convictions and sentences recorded by the learned trial Judge by impugned judgment dated 22.07.2017, acquit the appellant of the charge and allow this appeal. The appellant shall be released forthwith if not required to be detained in any other case.

16. Foregoing are the reasons of our short order dated 20.02.2018, whereby these appeals were allowed.

JUDGE

JUDGE

Naeem