

IN THE HIGH COURT OF SINDH, AT KARACHI

PRESENT:-

Mr. Justice Naimatullah Phulpoto;
Mr. Justice Shamsuddin Abbasi.

Spl. Crl. Anti-Terrorism Jail Appeal No.126 of 2016

Muhammad Zafar son of
Tariq Javed. Appellant

Versus

The State. Respondent

Appellant Through Mr. Muhammad Ilyas Awan,
Advocate.

Respondent Through Mr. Muhammad Iqbal Awan,
DPG.

Date of hearing 23.02.2018

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JUDGMENT

Shamsuddin Abbasi, J: Through captioned appeal, the appellant has assailed the convictions and sentences recorded by the learned Anti-Terrorism Court No.IV, Karachi, by a common judgment dated 31.03.2016, passed in Special Cases No.A-28 of 2015 and A-29 of 2015, arising out of FIR No.283 of 2014 under Section 4/5 Explosive Act, 1908 read with Section 6(2)(ee) & 27-A read with Section 7 of Anti-Terrorism Act, 1997 and FIR No.284 of 2014 under Section 23(i)(a) of Sindh Arms Act, 2013 registered at Police Station Shah Faisal Colony, Karachi.

2. Precisely, the case of the prosecution is that on 17.10.2014 police party of P.S. Shah Faisal Colony, headed by SIP

Muhammad Ashraf, was on patrolling duty. During patrolling he received spy information that one person was standing at Total Petrol Pump, near Natha Khan Bridge, with intention to commit some act of terrorism. On receipt of such information, the police party proceeded to the pointed place at about 0915 hours. On the pointation of spy informer apprehended a person with a motorcycle, who on inquiry disclosed his name as Muhammad Zafar @ Zafar Supari. SIP Muhammad Ashraf took his personal search in presence of mashirs and recovered one 30 bore pistol loaded with magazine containing five live bullets from the fold of his shalwar while one mobile phone Nokia, CNIC and cash amount of Rs.970/- were also recovered from the front pocket of his shirt. A shopper was hanging on his motorcycle, it was checked and two rifle grenades were recovered. On demand the accused failed to produce the license of the recovered arm and ammunition. SIP Muhammad Ashraf arrested him and sealed the recovered properties at spot under a mashirnama prepared in presence of mashirs ASI Ismail and HC Rana Babar. Thereafter, police party brought accused and the case property at P.S. Shah Faisal Colony, Karachi, where two FIRs vide Crime No.283 of 2014 under Section 4/5 of Explosive Substances Act, 27-A and Section 7 of Anti-Terrorism Act, 1997 and FIR No.284 of 2014 under Section 23(1)(a) of Sindh Arms Act, 2013, were registered for recovery of two rifle grenades and unlicensed pistol were lodged on behalf of the State.

3. After registration of FIRs, the investigation was entrusted to Inspector Ghulam Fareed. I.O. visited the place of incident on the pointation of complainant SIP Muhammad Ashraf and prepared memo of site inspection in presence of complainant and ASI Ismail. He also recorded the statements of witnesses under Section 161,

Cr.P.C. and sent the case properties to ballistic expert for examination and report. On 24.10.2014 the investigation was transferred from him and entrusted to Inspector Naseem Farooqui. He verified the investigation earlier conducted by SIP Muhammad Ashraf and also collected report from the office of ballistic expert. After completing usual investigation, police submitted challan before the Court of competent jurisdiction under above referred Sections.

4. The learned trial Court framed a charge against the accused at Ex.4, to which he pleaded not guilty and claimed to be tried.

5. At the trial, the prosecution has examined as many as five witnesses namely, PW.1 SIP Muhammad Ashraf, who is complainant of the case was examined at Ex.7, he produced mashirnama of arrest and recovery at Ex.7/A, copy of FIR No.283 of 2014 at Ex.7/B, copy of Roznamcha entry at Ex.7/C, copy of FIR No.284 of 2014 at Ex.7/D, copy of Roznamcha entry at Ex.7/E, clearance certificate issued by SIP Muhammad Akram Tanoli of BDU at Ex.7/F, mashirnama of inspection of place of incident at Ex.7/G, copy of Roznamcha entry No.3 at Ex.7/H, PW.2 HC Rana Babar was examined at Ex.8, PW.3 SIP Muhammad Akram was examined at Ex.9, who inspected the rifle grenades, defused the same., issued clearance certificate and final inspection report and produced Roznamcha entry No.9 at Ex.9/A and Roznamcha entry at Ex.9/B, final inspection report at Ex.9/C, final detailed report at Ex.9/D, PW.4 Inspector Muhammad Naseem Farooqui was examined at Ex.10, who produced examination report at Ex.10/A. approval for challan at Ex.10/B and permission of challan under Section 7 of Explosive Substances Act at Ex.10/C, PW. 5 Inspector Ghulam Fareed was examined at Ex.11, he inspected the place of incident and

prepared memo of site inspection in presence of mashirs. The prosecution closed its side vide statement Ex.12.

6. Statement of accused under Section 342, Cr.P.C. was recorded at Ex.13, wherein 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.

7. The learned trial Court, on conclusion of trial and after hearing the learned counsel for the parties, convicted the accused under Section 4/5 Explosive Act read with Section 6(2)(ee), Section 27-A punishable under Section 7(I)(ff) of 7 ATA, 1997, to undergo rigorous imprisonment for 14 years and forfeiture of his property. The appellant was further convicted under Section 23(1)(a) of Sindh Arms Act, 2013 to undergo rigorous imprisonment for seven years and fine of Rs.10,000/-, in default whereof, the appellant was ordered to undergo simple imprisonment of four months more. Feeling aggrieved by the aforesaid convictions and sentences, the appellant has preferred the present appeal.

8. The learned counsel for the appellant submits that the accused was arrested in a thickly populated area and it was a case of prior information, but police did not associate any independent witness of the locality to witness recovery proceedings and both the mashirs of arrest and recovery were police officials and subordinate to complainant. The learned counsel further submits that on 15.10.2014, the mother of the appellant namely, Mst. Naseem wife of Tariq Javed, had filed CP No.D-5319 of 2014 before this Court against illegal detention of her son (appellant) at the hands of law enforcement agency on 13.10.2014, which is prior to incident of this case i.e. 17.10.2014. In support of this contention, the learned

counsel for the appellant has placed a copy of petition alongwith order dated 30.10.2014 passed in this petition. The learned counsel for the appellant further submits that besides the cases in hand, the appellant was implicated in three other cases, wherein he has been acquitted by the Court of competent jurisdiction. In support of this contention, the learned counsel has placed copies of three judgments dated 06.09.2017, passed by learned Additional Sessions Judge-IV, Karachi (South) in Sessions Case No.630 of 2016, arising out of FIR No.355 of 2009 under Section 147, 148, 149, 395, 435, 324, 337-H, 427 & 34, PPC of P.S. Shah Faisal Colony, Sessions Case No.273 of 2016, arising out of FIR No.305 of 2011 under Section 302 & 34, PPC of P.S. Korangi Industrial Area and in Sessions Case No.440 of 2016, arising out of FIR No.489 of 2012 under Section 302 & 34, PPC of P.S. Korangi Industrial Area, Karachi. He finally submits that the appellant is in continuous custody since last three years and prayed for his acquittal.

9. On the other hand, the learned DPG has submitted that the appellant was arrested from the place of scene alongwith two rifle grenades and one 30 bore pistol, hence he deserves no leniency. He further submits that the prosecution has examined five 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 for dismissal of appeal.

10. We have given anxious consideration to the arguments of both the sides and perused the entire material available before us.

11. To substantiate the defence taken by the appellant, the learned counsel for the appellant has produced certified copy of CP No.D-5319 of 2014, which was filed by the mother of the appellant against Province of Sindh, Director General Rangers, Inspector

General of Police and SHO Bin Qasim, which was filed prior to incident of this case. In the said petition, she has stated that her son (appellant) was serving in Port Qasim, Karachi. On 13.10.2014 at about 4.00 pm he was picked up by law enforcement agency while he was returning from his duty. The said petition was disposed of vide order dated 30.10.2014 as under:-

“Per learned counsel since the detenu has been produced before the concerned Court, he has been instructed to withdraw the instant petition as the petitioner intends to approach the trial Court for redressal of her grievance. Order accordingly”.

12. It seems that the police just to show illegal detention of the appellant as legal and lawful involved him in a series of cases, out of which, in three cases, he has been acquitted by the Court of competent jurisdiction, copies whereof have been placed on record. All the three cases were of heinous nature, prosecution had failed to discharge its burden, resultantly he was acquitted. Failure of the prosecution in establishing the guilt of the appellant in the said cases finds support the plea taken by the appellant with regard to his innocence. Reliance is placed on the case of *Muhammad Mansha versus The State* (1997 SCMR 617), wherein the benefit of doubt has been extended in favour of appellant on the ground that cousin of appellant filed an application under Section 491, Cr.P.C. against S.I/Officer Incharge Narcotic Staff, Muhammad Akram (Ex.6), before Hon'ble Lahore High Court, Lahore, for his illegal detention prior to the registration of criminal case for the recovery of 20 kilograms of heroin. Relevant paragraph is reproduced hereunder:-

“the record of the case will show that on 17-6-1990 i.e., a day before the alleged recovery of heroin from the Baithak of the appellant, Muhammad Sanaullah had filed a Habeas Petition against Muhammad Akram, S.I. P.W.6 for the recovery of Muhammad Mansha appellant from his custody. In

paragraphs 3 to 5 of the Habeas Petition (Cr. Misc. No. 392//H of 1990), it has been stated:--

"(3) That Muhammad Mansha has moved an application before the S.P., Kasur, Photostat copy of the same is annexed for the kind perusal of this Honourable Court. The police authorities C.I.A. instead of registration of the case the police personnel have become inimical towards the detenue as the accused persons are paying monthly to the police, therefore, the police authorities were deriving a vedge against the detenue and their family members. They have considered the said application as if some complaint was lodged against them. Respondent/Akram Major Incharge of C.I.A., Kasur who is known for commission of atrocities and that is why he is being called as Akram Major although he is nothing to do with the Pak Army. Akram Major/respondent alongwith a big Squad of Police personnel on 13-6-1990 at about 4-00 a.m. early morning raided the house of the detenue Muhammad Bashir son of Jamal Din is the real paternal uncle of the petitioner and. therefore, the petitioner has gone to meet him and has stayed at night in his house.

(4) That the respondent has arrested Bashir and the three detenue and Nawaz. He said that I am taking them in custody to teach you the lesson for filing application before the high forum/officers. This occurrence has been witnessed by hundreds of the villagers as they have collected in front of the house. However, Muhammad Ashraf son of Khushi Muhammad, Abdul Ghafoor son of Muhammad Din both residents of Thing More were also present and interfered that innocent persons may not be arrested but respondent has threatened them of dire consequences.

(5) That since then respondent/Akram Major detaining them in his illegal custody and neither he has produced them in any Court nor there is any case against them.

It is also pertinent to mention here that respondent has demanded Rs.one lac for the release of the detenue on the pretext that in case the money aforesaid is not paid to him he will involve the detenue in false and frivolous cases of heroin etc."

This petition came up before the High Court for hearing on 18-6-1990 and the High Court had directed Muhammad Akram, S.I., P.W.6 to appear in person before the Court to answer whether the alleged detenue were being detained by him, and if so, under what authority of law. In this view of the matter, reasonable possibility of the plea of false involvement of the appellant on account of filing of the habeas petition against Muhammad Akram P.W.6 on 17-6-1990 in the Lahore High Court, Lahore is very much there entitling the a appellant to the benefit of doubt".

13. Admittedly all the witnesses examined by the prosecution were 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 but 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 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”.

14. We have also carefully examined the depositions of witnesses and noticed that the witnesses have contradicted each other on material points. Complainant SIP Muhammad Ashraf, in his examination in chief, has deposed that appellant was arrested from near Total Petrol Pump, he called the persons available at the petrol pump to act as mashir, but they declined. On the other hand, mashir HC Rana Babar, has deposed that appellant did not make any attempt to escape at the time of his arrest, nobody was present at the time of arrest and recovery. Further, the complainant has deposed that he himself had caught hold the appellant whereas the mashir has deposed that they all have caught hold the appellant. These are the vital contradictions and caused a fatal blow to the prosecution case. It is also an admitted fact on record that the complainant had a prior information about the presence of the appellant, despite he has not associated any independent witness either from the place of receiving information or from the place of incident. Even on this point

both complainant and mashirs have contradicted each other. It is the case of the prosecution that police arrested the appellant very easily. Neither there was exchange of fire between the police party and the appellant nor appellant tried to make his escape good from the scene of offence and police arrested the accused alongwith 30 bore pistol with load magazine containing five live bullets and two rifle grenades, but it is surprising to note that during deposition of P'W.1 Muhammad Ashraf when the case property was de-sealed in open Court from sealed Article marked "A", it contained one 30 bore pistol, magazine, five live bullets and one empty shell. However, the mashirnama of arrest and recovery and FIR too did not show recovery of one empty shell from the place of occurrence, but PWs in their statements have disclosed the availability of an empty shell in sealed article marked "A". This discrepancy in the evidence of PWs has demolished the case of the prosecution as set up in the FIR and also shattered the entire fabric of the testimony of witnesses. 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 an 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 juxtaposition 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, thus, we are of the opinion that the prosecution has failed to discharge its liability of proving the guilt of the appellant beyond shadow of doubt. The Hon'ble Supreme Court of Pakistan in the case (supra) has held that for extending the benefit of doubt in favour of an accused, it is not necessary that there may be many circumstances creating doubt, if there is a circumstance which create reasonable doubt in a prudent mind about the guilt of the accused, then the accused will be entitled to such benefit not as a matter of grace and concession, but as a matter of right. Accordingly, 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 06.09.2017, 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.

15. Vide short dated 23.02.2018 we had allowed this appeal and these are the reason thereof.

JUDGE

JUDGE

Naeem