

## IN THE HIGH COURT OF SINDH, AT KARACHI

**PRESENT:-**

**Mr. Justice Naimatullah Phulpoto;**

**Mr. Justice Shamsuddin Abbasi.**

### **Spl. Crl. Anti-Terrorism Jail Appeal No.189 of 2017**

Shahzad Ahmed son of  
Dost Muhammad. ... .. Appellant

Versus

The State. ... .. Respondent

Appellant Through Mr. Muhammad Iqbal Aqeel,  
Advocate.

Respondent Through Mr. Muhammad Iqbal Awan,  
DPG.

Date of hearing 07.03.2018  
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### **JUDGMENT**

**Shamsuddin Abbasi, J:** Appellant Shahzad Ahmed has assailed the conviction and sentence recorded by the learned Judge of Anti-Terrorism Court No.X, Karachi, vide judgment dated 26.02.2016, passed in Special Case No.354(III) of 2014, arising out of FIR No.194 of 2014 under Sections 384, 386, 506-B & 34, PPC read with Section 7 of Anti-Terrorism Act, 1997 and Special Case No.355(III) of 2014, arising out of FIR No.195 of 2014 under Section 23(1)(a) of Sindh Arms Act, 2013 registered at Police Station Shershah, Karachi.

2. FIR in this case has been lodged on 06.10.2014 at 0015 hours whereas the incident had taken place on 05.10.2014 at 2315 hours. Complainant Ashique Hussain son of Nazeer Hussain, resident of House No.257/B, Street No.14, Muhammadi Road, Block-

B, Shershah, Karachi, has stated that he runs business in the name and style "Masha Allah Loom Traders" at Shershah, Karachi. On the fateful day an unknown person made phone calls and SMS from cell number 0315-3395493 to the complainant on his cell number 0333-2322704, wherein the caller demanded Rs.50,000/- as Bhatta and extended threats to kill the complainant and causing damage to his business in case of non-payment of Bhatta amount. The complainant informed the police through an application, but the said person continued his demand and made calls from different cell numbers viz 0313-0297266, 0315-0823065 and cell number 0321-2695650 and finally the Bhatta amount was settled at Rs.5,000/- and the said caller asked the complainant to come at street near Shershah Chowk with Bhatta amount at about 11.00 pm. Meanwhile, complainant first informed the police and then reached at the agreed place alongwith his friend Shahzad Majeed. Police party headed by SIP Hayat Solangi also reached there. It was about 11.15 pm when two persons came at motorcycle bearing Registration No.KGG-9495 and asked the complainant to handover the amount. Complainant handed over them Rs.5,000/-. It is stated that the police party appeared there and encircled them, one person made his escape good while another one was apprehended at spot alongwith extortion money, who disclosed his name as Shahzad son of Dost Muhammad and the name of his accomplice, who managed to escape from the scene as Shahzad son of not known. During search of the accused police recovered a 30 bore pistol with load magazine containing six live bullets from the fold of his shalwar and two mobile phones HTC and Nokia. On demand, the accused failed to produce the documents of the motorcycle. SIP Hayat Solangi arrested the accused and seized the recovered property under a mashirnama prepared at spot in presence

of mashirs. Thereafter, police brought the accused and the case property at P.S. Shershah, Karachi, where complainant Ashique Hussain lodged FIR bearing Crime No.194 of 2014 under Sections 484, 386, 506-B, PPC read with Section 7 of Anti-Terrorism Act, 1997 while separate case being Crime No.195 of 2014 under Section 23(1(a) of Sindh Arms Act, 2013 was also registered against the accused on behalf of the State.

3. Pursuant to the registration of FIRs, the investigation was entrusted to SIP Ghazanfar Ali. I.O. visited the place of incident on the pointation of complainant and prepared memo of site inspection in presence of mashirs Ashique Hussain (complainant) and Ameer Hussain. I.O. sent the recovered pistol to the office of FSL for examination and report and CDR records of cell numbers of complainant as well as of accused to his high-ups. On 10.10.2014 by the orders of high-ups, the investigation was transferred and entrusted to Inspector Jehan Khan Niazi. He interrogated the accused and made efforts to arrest the absconding accused, but could not succeed. I.O. obtained the CDR records of mobile cell numbers and also collected FSL report. After completing the usual investigation, the I.O. submitted separate challan before the Court of competent jurisdiction under above referred Sections.

4. Joint trial was ordered in terms of Section 21-M of Anti-Terrorism Act, 1997.

5. Trial Court framed a charge against the accused in respect of offences punishable under Sections 384, 386, 506-B & 34, PPC read with Section 7 of Anti-Terrorism Act, 1997 and Section 23(1)(a) of Sindh Arms Act, 2013 at Ex.21, to which accused pleaded not guilty and claimed trial.

6. At the trial, the prosecution has examined as many as four witnesses. PW.1 complainant Ashique Hussain was examined at Ex.22, he produced memo of arrest and recovery at Ex.22/A, FIR No.194 of 2014 at Ex.22/B and memo of site inspection at Ex.22/C. PW.2 SIP Hayat Solangi was examined at Ex.23, he produced Roznamcha entry No.13 at Ex.23/A, FIR No.195 of 2014 at Ex.23/B, Roznamcha entry No.16 at Ex.23/C and Roznamcha entry No.17 at Ex.23/D. PW.3 SIP Raja Ghazanfar Ali was examined at Ex.24, he produced Roznamcha entry No.03 at Ex.24/A, Roznamcha entry No.8 at Ex.24/B, memo of seizure of mobile phone CDRs at Ex.24/F and call data records at Ex.24/G. PW.4 Inspector Jehan Khan Niazi was examined at Ex.27, he produced Roznamcha entry No.25 at Ex.27/C, Roznamcha entry No.27/D, Roznamcha entry No.29 at Ex.27/E, firearm examination report at Ex.27/F. Vide statement Ex.28, prosecution closed it's side of evidence.

7. Statement of accused was recorded under Section 342, Cr.P.C. at Ex.29, wherein he denied the prosecution case and pleaded his innocence. Accused 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, convicted accused under Sections 384, 386, 506-B & 34, PPC read with Section 7(h) of Anti-Terrorism Act, 1997 and sentenced to undergo rigorous imprisonment for 05 years. Accused was also convicted under Section 23(1)(a) of Sindh Arms Act, 2013 and sentenced to rigorous imprisonment for 05 years. Both the sentences were ordered to run concurrently and benefit in terms of Section 382-B, Cr.P.C. was also extended in favour of the accused.

9. Feeling aggrieved by the convictions and sentences, referred herein above, the appellant has preferred the present appeal.

10. Learned counsel for the appellant submits that the appellant has been falsely implicated in this case by the complainant with malafide intention and ulterior motives. He added that the accused was working in the shop of the complainant, who did not pay the accused his due salary, which resulted exchange of hot words between the accused and the complainant and based on such reason the complainant with the collusion of police got the accused involved in false case. He further submits that witnesses have contradicted each other on material points, but the learned trial Court recorded conviction without applying it's judicial mind and taking into consideration contradictions and discrepancies in the evidence of the prosecution witnesses. He further submits that there was delay of four days in sending the pistol to the ballistic expert for examination and report without furnishing any plausible explanation. It is also submitted that no evidence had been brought on record to show the ownership of the recovered SIM and the prosecution had also failed to examine the Incharge of the concerned network. Lastly, submitted that the convictions and sentences recorded by the learned trial Judge are bad in law and facts and liable to be set-aside and prayed accordingly.

11. On the other hand, the learned DPG has supported the convictions and sentences recorded by the trial Court against the appellant. He submitted that the appellant was arrested on the spot alongwith extortion money and an unlicensed pistol. The witnesses in their respective evidence have deposed full account of the incident and fully involved the accused with the commission of crime. He, however, conceded that investigating officer did not bother to collect

information from the concerned network about ownership of SIM number and its use during crucial period.

12. We have given anxious consideration to the arguments of learned counsel for the appellant and the learned DPG for the State and perused the entire material available before us.

13. To prove the guilt of the appellant, the prosecution had examined four witnesses, namely, (i) complainant Ashique Hussain, (ii) SIP Hayat Solangi, (iii) SIP Raja Ghazanfar Ali and Inspector Jehan Khan Niazi. All of them in their examination-in-chiefs though supported the case of the prosecution and implicated the accused with the commission of the crime, but could not keep consistency and could not face test of cross-examination.

14. Close scrutiny of the evidence of prosecution witnesses reveals that they have damaged the whole case of the prosecution by way of contradictions and discrepancies, defective investigation and lacunas etc. Here it will be advantageous to discuss and highlight herein below such infirmities and omissions in the depositions of prosecution witnesses.

15. Admittedly an amount of Rs.5,000/- was agreed to be paid by the complainant to the accused as Bhatta and the place of receiving the extortion money was also fixed and the police had a prior information about the incident, inspite of that no proper arrangements were made, even the police did not accompany any independent person from the way and even none from the locality, situated in a thickly populated area. 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 was asked to act as mashir.

16. It is important to note that the complainant has stated that he informed to SIP Hayat Solangi about the demand of Bhatta from accused persons and on his advice, he agreed to handover the Bhatta amount to the accused on the pointed place. Further, mashirnama of arrest and recovery, FIR and Roznamcha entry for departure from police station show that SIP Hayat Solangi was leading the police party and he arrested the accused on the spot, but complainant Ashique Hussain in his cross-examination stated that SHO Shershah was supervising the police team during whole incident. This aspect of the matter made the whole case of the prosecution doubtful because things are not same as mentioned in the case, there are many things which have been concealed by the police particularly when PW.2 SIP Hayat Solangi denied a suggestion in his cross-examination that SHO was accompanied with him at the time of incident. The another aspect which has damaged the case of the prosecution is that crime numbers were mentioned on the sealed parcels, which were sealed at spot, but PW.2 SIP Hayat Solangi admitted in his deposition that he put crime numbers on sealed parcel at police station, which too created doubt in respect of safe custody of case property.

17. We have gone through the evidence of the investigating officer Inspector Jehan Khan Niazi (Ex.27). During his cross-examination, he admitted that *"It is correct that complainant and present accused were residing in the same Mohallah"*. This aspect of the matter find supports the plea taken by the accused for his false implication by the complainant with malafide intention and ulterior motives on the matter of dispute over salary, to be paid by the complainant to the accused for his job. We may add here that the recovered currency notes were not sealed on the spot and this fact

has been admitted by the complainant (Ex.22) and recovery officer SIP Hayat Solangi (Ex.23) in their respective evidence. In his cross-examination, the complainant replied that, *"It is correct to suggest that police officials did not seal mobile phone and cash on the spot in my presence"*. On the other hand, the recovery officer in his examination-in-chief deposed that *"As far as the recovered amount is concerned, I kept it in an envelope (khakhi colour). I also kept the mobile phones in a plastic shopper"*. The complainant has deposed that he had put specific mark on the currency notes whereas the recovery officer has admitted in his cross-examination that he did not put any specific mark on the currency notes that were to be handed over to the culprits by the complainant, even did not state that complainant had put specific mark on notes. He also admitted that *"the recovered pistol is without number as per mashirnama of arrest and recovery. The word "Star" is existing on the top of recovered pistol but I did not mention it in the memo of arrest and recovery"*. The recovery officer also deposed that *"I also seized the motorbike under Section 550, Cr.P.C. and said motorcycle was not shown as case property"* In his cross-examination, he admitted that *"It is correct to suggest that in entry No.17 (Ex.23/D) it is not mentioned regarding the recovered mobile phone and Bhatta amount"*. We have gone through the contents of memo of arrest and recovery (Ex.22/A) and FIR (Ex.22/B). Both these documents did not disclose that the recovery officer had seized the motorcycle under Section 550, Cr.P.C. It is also a matter of record that memo of arrest and recovery was prepared on 05.10.2014 at 2330. These infirmities and omissions have caused a fatal blow to the case of the prosecution and made the recovery doubtful.



18. PW.3 SIP Raja Ghazanfar Ali was the investigating officer, who had conducted initial investigation. He visited the place of incident and prepared memo of site inspection (Ex.22/C). He admitted in his cross-examination that *“When I reached at the place of incident there were 02/04 persons present over there. It is correct to suggest that I did not take private witnesses in this case”*.

19. PW.4 Inspector Jehan Khan Niazi had conducted final investigation and submitted challan in Court. He admitted in his cross-examination that during investigation no previous criminal record of the accused was found. He further admitted that recovered Bhatta amount was in an open and torn envelope. He also admitted that there were no identification marks on the recovered currency notes. In reply to a question, he admitted that *“It is correct that complainant of these cases did not submit before me any National Tax Number through which it could be assumed that he was a trader”*. He also admitted that *“It is correct to suggest that I did not produce 02 private witnesses of these cases before this Court”*.

20. As to the recovery of mobile phone SIM from the possession of accused is concerned, the learned DPG has conceded that the investigating officer of the case did not bother to collect information from the concerned network about ownership of such number and its use during crucial period. Even the prosecution had not examined Incharge of the concerned network company to dig out the truth. It is a matter of record that SIM was not sealed at spot. It has caused damage to the prosecution case. Prosecution had also failed to satisfy on the point of safe custody of recovered pistol. It is an admitted fact that pistol alongwith magazine and live bullets was recovered from the possession of accused on 05.10.2014, but it was sent to the office of Forensic Division, Sindh, Karachi, on 09.10.2014,

after the delay of four days without furnishing valid excuse or explanation. No evidence had been brought on record to ascertain that during intervening period i.e. from 05.10.2014 to 09.10.2014, the case property was kept in safe custody. The Hon'ble Supreme Court of Pakistan in a case of *Ikramullah & others v The State* reported in 2015 SCMR 1002, took serious note for keeping the case property in safe custody and proving its safe transit to the examiner and emphasized as follows:-

*“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”.*

21. Another important aspect of the matter is that prosecution had failed to produce private witnesses namely, Shahzad Majeed and Ameer Hussain at trial. According to the prosecution case, PW Shahzad Majeed had accompanied the complainant and the relevant point of time was present at the scene when complainant handed over the extortion money to the accused and in his presence SIP Hayat Solangi had arrested the accused and recovered the extortion money and other property, hence he was the star witness of the prosecution, unfortunately the prosecution had failed to examine him at trial though hectic efforts were made to procure his attendance. Trial Court issued NBW against said witness and in

response thereto, the investigating officer Inspector Jehan Khan Niazi, appeared and recorded his statement as Court witness (Ex.26), wherein he had stated that this witness has left his ordinary place of residence and shifted to an unknown place just to evade his arrest. PW Ameer Hussain was the mashir of memo of site inspection, but he too had not been examined by the prosecution without furnishing any plausible explanation. This fact too rendered the case of the prosecution extremely doubtful.

22. At this juncture, it is very difficult for us to give due weight to the testimony of prosecution witnesses in view of the admissions, contradictions, discrepancies, infirmities and omissions, explained herein above, which clearly show the credibility of PWs highly doubtful and untrustworthy and demolished the whole case of the prosecution and also shattered the entire fabric of the testimony of witnesses. It is a well-settled law that no one should be construed into a crime unless his guilt is proved beyond reasonable doubt by the prosecution through reliable and legally admissible evidence. On the point of benefit of doubt, rule of Islamic Jurisprudence has been laid down in the judgment rendered by the Hon'ble Supreme Court of Pakistan in *Ayub Masih's case* (PLD 2002 SC 1048), wherein the apex Court has ruled as under:-

*"It is also firmly settled that if there is an element of doubt as to the guilt of the accused, the benefit of the doubt must be extended to him. The doubt, of course, must be reasonable and not imaginary or artificial. The rule of benefit of doubt, which is described as the golden rule, is essentially a rule of prudence, which cannot be ignored while dispensing justice in accordance with law. It is based on the maxim, "It is better that ten guilty person be acquitted rather than one innocent person be convicted". In simple words it means that utmost care should be taken by the Court in convicting an accused. **It was held in "The State v Mushtaq Ahmed (PLD 1973 SC 418)** that this rule is antithesis of haphazard approach or reaching a fitful decision in a case. It will not be out of place to mention here that this rule occupies a pivotal place in the Islamic Laws and is enforced rigorously in view of the saying of Holy Prophet*

*(P.B.U.H) that the mistake of Qazi (Judge) in releasing a criminal, is better than his mistake in punishing an innocent”.*

23. Needless to mention that in criminal cases the burden to prove it's 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. Under the law, emphasis is on the quality of evidence rather than quantity. In the case of *Tariq Pervez v The State* reported in 1995 SCMR 1345, the Hon'ble Supreme Court of Pakistan has settled the principle on the point of benefit of doubt in the following terms:-

*“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”.*

24. For the reasons, discussed herein above, we have come to the conclusion that the prosecution has failed to prove it's case against appellant beyond shadow of doubt. Therefore, while extending the benefit of doubt in favour of the appellant, we hereby

allow this appeal, set-aside the convictions and sentences recorded by the learned trial Court by impugned judgment dated 26.02.2016 and acquit the appellant of the charge. The appellant shall be released forthwith if not required to be detained in any other case.

25. Vide short dated 07.03.2018 this appeal was allowed and these are the reasons thereof.

JUDGE

JUDGE

Naeem