# IN THE HIGH COURT OF SINDH, AT KARACHI

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

**Spl. Crl. Anti-Terrorism Jail Appeal No.211 of 2017**

1. Zubair @ Wasi son of Asghar Hussain.

2. Lal Muhammad @ Lalu son of Roshan Ali. ... ... Appellants

Versus

The State. ... ... Respondent

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| Appellants | Through Mr. Mumtaz Ali Khan Deshmukh, Advocate. |
| Respondent | Through Mr. Muhammad Iqbal Awan, DPG. |
| Date of hearing | 09.03.2018 |

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**JUDGMENT**

***Shamsuddin Abbasi, J:*** Appellants Zubair @ Wasi and Lal Muhammad @ Lalu have assailed the convictions and sentences recorded by the learned Judge of Anti-Terrorism Court No.X Karachi, vide judgment dated 30.08.2017, passed in Special Cases No.2493 of 2016 and 2494 of 2016, arising out of FIRs No.391 of 2016 and 392 of 2016 under Sections 4/5 of Explosive Substances Act read with Section 7 of Anti-Terrorism Act, 1997 registered at Police Station Landhi, Karachi.

2. The facts giving rise to this appeal, briefly stated, are that on 21.11.2016 police party of P.S. Landhi, Karachi, headed by ASI Niaz Muhammad Memon, was busy in patrolling of the area in official

mobile. It was about 1430 hours when police party reached at 17-J Bus Stop 89, Landhi, Karachi, they saw two suspects on a motorbike, coming from the side of Daud Chowrangi. The police signaled them to stop whereupon they stopped their motorbike. On inquiry, they disclosed their names as Zubair @ Wasi son of Asghar Hussain and Lal Muhammad @ Lalu son of Roshan Ali. ASI Niaz Muhammad Memon conducted their personal search in presence of mashirs PC Muhammad Sajid and PC Abdul Sattar and recovered one Neepam bomb from the right side pocket of trouser of accused Zubair on which "33" in circle and "VMGK4-05" were written while one Neepam bomb was also recovered from the left side pocket of trouser of accused Lal Muhammad on which same words i.e. "33" in circle and "VMGK4-05" were written. Nothing else was recovered from their possession during further search. ASI Niaz Muhammad Memon arrested both the accused and sealed the recovered property under a mashirnama prepared at spot and also seized motorcycle bearing Registration No.KHR-4809 under Section 550, Cr.P.C. and at the same time also informed BDU squad for defusing the recovered bombs. Thereafter, police brought accused persons and the case property at P.S. Landhi, Karachi, where ASI Niaz Muhammad Memon registered separate FIRs bearing Crime No.391 of 2016 and 392 of 2016 under Sections 4/5 of Explosive Substances Act read with Section 7 of Anti-Terrorism Act, 1997 against each accused on behalf of the State.

3. Pursuant to the registration of FIRs, the investigation was entrusted to Inspector Nadeem Ghouri. I.O. visited the place of incident on the pointation of complainant and prepared memo of site inspection and Naqsha-e-Nazri in presence of mashirs ASI Niaz Muhammad Memon, PC Muhammad Sajid Khan and PC Abdul

Sattar. After completing inspection of place of incident, I.O. returned back to P.S. where he recorded the statements of witnesses under Section 161, Cr.P.C. He also got the case property inspected through SIP Muhammad Mansoor Ahmed of BDU team, who defused both bombs and declared them as rifle grenade and also issued clearance certificate. After completing the usual investigation submitted separate challan before the Court of competent jurisdiction under above referred Sections.

4. Trial Court held joint trial 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 Section 4/5 of Explosive Substances Act read with Section 7 of Anti-Terrorism Act, 1997 at Ex.4, to which both accused pleaded not guilty and claimed trial.

6. At the trial, the prosecution has examined as many as four witnesses. PW.1 Inspector Muhammad Masood was examined at Ex.5, he produced Roznamcha entries No.15 and 19 at Exs.5/A and 5/B, clearance certificate at Ex.5/C, Roznamcha entry No.21 at Ex.5/D and final inspection reports at Ex.5/F and 5/G. PW.2 PC Muhammad Sajid was examined at Ex.6, he produced memo of arrest and recovery at Ex.6/A and memo of site inspection at Ex.6/B. PW.3 complainant ASI Niaz Muhammad was examined at Ex.7, he produced Roznamcha entry No.4 at Ex.7/A, FIRs No.391 of 2016 and 392 of 2016 at Exs.17/B and 17/C respectively and Roznamcha entries No.21 and 22 at Exs.17/D and 17/E respectively. PW.4 Inspector Nadeem Ghouri, I.O. of the case, was examined at Ex.9, he produced Roznamcha entry No.25 at Ex.9/A, sketch of site and some snaps at Exs.9/B and 9/C respectively and Roznamcha entry No.31

at Ex.9/D. Thereafter prosecution closed it's side of evidence vide statement at Ex.10.

7. Statements of accused Zubair and Lal Muhammad were recorded under Section 342, Cr.P.C. at Exs.11 and Ex.12 respectively, wherein they had denied the prosecution case and pleaded their innocence. Both accused examined themselves on oath under Section 340(2), Cr.P.C. at Exs.13 and 14 and also produced Saeeda Jabeen, mother of accused Zubair, at Ex.15, she produced photocopy of application addressed to D.G. Rangers at Ex.15/A, TCS receipt at Ex.15/B, Shahina Lal Muhammad, wife of accused Lal Muhammad, at Ex.16 and Saeed Ahmed at Ex.17 in their defence. Vide statement Ex.18, the defence counsel closed his side of evidence.

8. Trial Court, on conclusion of trial and after hearing the learned counsel for the parties and assessment of evidence, convicted both accused under Sections 7(1)(ff) of Anti-Terrorism Act, 1997 and sentenced to undergo rigorous imprisonment for 14 years each by extending them benefit in terms of Section 382-B, Cr.P.C.

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

10. Learned counsel for the appellants submits that the appellants have been falsely implicated in this case. He further submits that the accused were picked up from their house on 04.11.2016 by the Rangers and thereafter accused were handed over to the SHO of P.S. Landhi, who had booked both the appellants in false cases and foisted the alleged recovery upon them. He added that the mother of accused Zubair, Mst. Saeeda Jabeen, had made application to D.G. Rangers, wherein she has specifically stated that

on 04.11.2016 Rangers raided their house and forcibly took her son Zubair and nephew Lal Muhammad with them and since then they were in their custody. He further added such application was sent through TCS on 19.11.2016, which is prior to the date of incident i.e. 21.11.2016. He further submits that all the witnesses were police officials and the prosecution had failed to produce a single independent witness to corroborate and support the version of police. Lastly, submitted that the learned trial Judge has recorded the conviction without applying his judicial mind and noticing the material contradictions in the evidence of the prosecution witnesses and prayed for acquittal of the appellants.

11. On the other hand, the learned DPG has supported the convictions and sentences recorded by the trial Court against the appellants. He submitted that the appellants were arrested alongwith rifle grenades, which constituted an act of terrorism and directed against the society. He further submits that the prosecution has examined four witnesses, all of them have implicated the appellants with the commission of offence. Finally, submitted that the prosecution had successfully proved the guilt of the appellants and prayed for dismissal of appeal.

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

13. To prove the guilt of the appellants, the prosecution had examined four witnesses, namely, (i) Inspector Muhammad Masood, he had examined the case property, defused it and issued clearance certificate, (ii) PC Muhammad Sajid, mashir of arrest and recovery and site inspection, (iii) complainant ASI Niaz Muhammad and (iv) Inspector Nadeem Ghouri, investigating officer of the case. On the

other hand, the appellants had examined themselves on oath under Section 340(2), Cr.P.C. and also produced three witnesses in their defence, namely, Mst. Saeeda Jabeen, mother of accused Zubair, Shahina Lal Muhammad, wife of accused Lal Muhammad and Saeed Ahmed, one of their neighbors. All of them in their respective statements on oath and evidence have stated that on 04.11.2016 the Rangers picked up both accused from their house and thereafter the police falsely implicated them in the present crime. In support of the plea taken by the accused in their defence, DW.1 Mst. Saeeda Jabeen (Ex.15) has produced photocopy of application addressed to D.G. Rangers and a TCS receipt showing the date of acknowledgment as 19.11.2016, which is prior to the incident of this case i.e. 21.11.2016. This fact, thus, rendered the case of the prosecution doubtful. It seems that the police just to show illegal detention of the appellants as legal and lawful involved them in false cases. 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 Learned 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:--*
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> > *"(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".*

14. We have carefully examined the evidence of prosecution witnesses All of them have shattered 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 the relevant portions of their depositions.

15. It was the case of the prosecution that after recovery of case property the complainant immediately informed BDU squad and

brought the accused and the case property at police station, but PW.1 Inspector Muhammad Masood (Ex.5) in his cross-examination had showed his ignorance about receiving of information at their office from police. On the other hand, PW PC Muhammad Sajid (Ex.6) has admitted in his cross-examination that complainant did not inform Bomb Disposal Team about the recovery of bombs on the spot. PW Inspector Muhammad Masood had admitted that recovered rifle grenades cannot be fired without rifle launcher. In the FIR, the complainant had stated that two Neepam bombs were recovered from the possession of accused, but PW Inspector Muhammad Masood had stated that same were rifle grenades and not Neepam bombs. PW.2 PC Muhammad Sajid in his cross-examination also admitted that word Neepam Bomb was written in the memo of arrest and recovery and he has stated so in his 161, Cr.P.C., but such words were not written on Articles P/1 and P/2 (case property). It was also the case of the prosecution and written in the FIR that one bomb was recovered from right side pocked of trouser of accused Zubair while one bomb was recovered from the left side pocket of trouser of accused Lal Muhammad, but complainant Niaz Muhammad (Ex.7) in his examination-in-chief has deposed that he conducted search of accused Lal Muhammad and recovered a bomb from his right side pocket of trouser. Mashir PC Muhammad Sajjid in his cross-examination had stated that complainant ASI Niaz Ahmed prepared memo of arrest and recovered on the bonnet of police mobile while complainant has stated that he prepared memo of arrest and recovery while sitting on the rear seat of police mobile. He also admitted that the FIRs were lodged against the accused on the directions of SHO, but this fact is not mentioned in the Roznamcha entry. Complainant has stated in his cross-examination that he tried

to pick up private mashirs from the place of incident, but nobody cooperated with police. Complainant further admitted that he did not issue any notice under Section 160, Cr.P.C. to any private person. He also admitted that it is not mentioned in the mashirnama of arrest and recovery or in the FIR that he asked the private persons to act as mashir, but they refused. On the other hand, mashir PC Muhammad Sajid no where in his deposition has stated that complainant asked anyone from the public to act as mashir. He simply admitted that complainant did not take private mashirs from the place of incident. PW Inspector Nadeem Ghouri, investigating officer of this case, in his cross-examination admitted that the place of incident was a thickly populated area, but he did not associate any independent person to act mashir of site inspection as nobody made cooperation with police. These contradictions, discrepancies, infirmities and omissions not only demolished the case of the prosecution, but also shattered the entire fabric of the testimony of witnesses.

16. Admittedly the place of incident is situated in a thickly populated area, but no independent person was associated to witness the arrest of accused and recovery of case property. All 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".*

17. Prosecution had also failed to satisfy this Court on the point of safe custody of case property. It is an admitted fact that rifle grenades were recovered from the possession of appellants, which were inspected by the bomb disposal expert on 22.11.2016 and on 29.11.2016 the I.O. had written letter for issuance of final inspection reports, which were issued on 05.12.2016. No evidence had been brought on record to ascertain that during intervening period i.e. from 21.11.2016 to 05.12.2016, the case property was kept in safe custody at P.S. 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".*

18. 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, discussed herein above, which clearly showed the credibility of PWs highly doubtful and untrustworthy. 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".*

19. In the circumstances, explained herein above, the plea taken by the appellants that the police implicated them in false cases seems to be correct. 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. Thus, we are of the opinion that the prosecution has failed to discharge its liability of proving the guilt of the appellants 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 Court by impugned judgment dated 30.08.2017, acquit the appellants of the charge and allow this appeal. The appellants shall be released forthwith if not required to be detained in any other case.

20. Above are the reasons for our short order dated 09.03.2018.

JUDGE

JUDGE

Naeem