

IN THE HIGH COURT OF SINDH, AT KARACHI

Spl. CrI. A.T.J.A. No.19 of 2017

PRESENT:-

Mr. Justice Naimatullah Phulpoto

Mr. Justice Shamsuddin Abbasi

Date of hearing: 13.02.2018

Date of Decision: 13.02.2018.

Appellants: 1. Aqil Abbas son of Ali Abbas
2. Muhammad Kamran son of Muhammad Aslam
3. Muhammad Tanveer son of Muhammad Siddique.
Through Mr. Nazakat Ali Mirani, Advocate

The State Through Mr. Muhammad Iqbal Awan, DPG

J U D G M E N T

SHAMSUDDIN ABBASI, J: Through captioned appeal, the appellants have assailed the conviction and sentence recorded by the learned Anti-Terrorism Court No.X, Karachi, by a judgment dated 28.12.2016, passed in Special Case No.196 of 2016, arising out of FIR No.09 of 2016 under Section 385, 386,435 & 34, PPC read with Section 7 of Anti-Terrorism Act, 1997 registered at Police Station Mauripur, Karachi.

2. FIR in this case has been lodged on 21.01.2016 at 1430 hours whereas the incident had taken place on 15.12.2015 at 2200 hours. Complainant Muhammad Jawaid has stated that he was Supervisor in Faisal Transport Service (Pvt) Limited. On the fateful day at about 9.00 pm an unknown person delivered an envelope to

the Chowkidar namely, Ameer Abdullah, who was performing duty at the warehouse of Faisal Transport Services (Pvt) Limited, which contained a small piece of cloth 'Kafan' and a chit in the name of Faisal, owner of the company, wherein a demand was made for payment of Rs.20,00,000/- as extortion money / Bhatta with a threat that in case of non-payment of amount, the complainant, his owner, Faisal, and the Chowkidar would be killed. The Chowkidar handed over the said envelope to the complainant. He made a call to his owner namely, Faisal, and informed him about the envelope, but he told him that he was going to perform Umrah and would see the matter after return from Umrah. It is alleged that on 09.01.2016 some unknown persons came and set on fire wheels of truck, which was parked on complainant's plot. It is further alleged that accused put a chit on another vehicle parked nearby, wherein it was written **"Abhi to Gari ke tyre jale hain, agar hum se rabta nahin kara to hum sari garion ko aag lagadenge tumhare bande bhi mare jaenge"**. A cell number 0304-2286346 of 'Gang war' was also written thereon. He contacted his owner, Faisal, and on his instructions lodged a case, it was recorded vide Crime No.09 of 2016 under Sections 385, 386, 435 & 34, PPC read with Section 7 of Anti-Terrorism Act, 1997 at Police Station Mauripur, Karachi.

3. Pursuant to the registration of FIR, the investigation was entrusted to SIO Inspector Jahan Khan Niazi. He visited the place of incident on the pointation of complainant and prepared memo of site inspection. On 22.01.2016, the investigation was transferred to Inspector Muhammad Sohail for further investigation. On receipt of investigation, he recorded further statement of complainant and also

taken into custody the envelope alongwith Bhatta chit and piece of cloth having blood stains. On 23.01.2016 I.O. had received information from ASI Iftikhar Qureshi of SIU that accused Muhammad Kamran, Muhammad Tanveer and Aqil Abbas, arrested in other crimes. On receipt of such information, I.O. proceeded to SIU and interrogated the accused persons. I.O. arrested all the three accused in the present crime. During interrogation, accused Aqil Abbas disclosed that they had used SIM number 0304-2286346 in making calls of Bhatta, which was picked by him from the house of one Amjad, resident of Malir, where he had done painting work. On such disclosure, I.O. recorded the statement of said Amjad, who confirmed that about three months back accused Aqil Abbas had done painting work in his house and during such work accused picked the said SIM from his house, but such fact came to his knowledge later on. I.O. collected CDR of the SIM number used in the present crime, recorded the statements of witnesses under Section 161, Cr.P.C. and after completing usual investigation submitted challan before the Court of competent jurisdiction under Sections 385, 386, 435 & 34, PPC read with Section 7 of Anti-Terrorism Act, 1997.

4. Trial Court framed a charge against the accused persons in respect of offences punishable under Section 385, 386, 435 & 34, PPC read with Section 7 of Anti-Terrorism Act, 1997 at Ex.3, to which they pleaded not guilty and claimed to be tried.

5. At the trial, the prosecution has examined as many as eight (08) witnesses. PW.1 Amjad Niaz was examined at Ex.4. PW.2

complainant Muhammad Javed was examined at Ex.5, he produced FIR at Ex.5/A, memo of site inspection at Ex.5/B, memo of seizure at Ex.5/C, letter of demand of Bhatta at Ex.5/D and paper chit of threat at Ex.5/E. PW.3 Chowkidar Ameer Abdullah was examined at Ex.6. PW.4 Usman was examined at Ex.7. PW.5 ASI Iftikhar Qureshi was examined at Ex.8. PW.6 PC Ali Jan was examined at Ex.10, he produced memo of arrest of accused at Ex10/A, memo of seizure of CDR and call data at Exs.10/B and 10/C respectively. PW.7 DSP Jahan Khan was examined at Ex.11, he produced Roznamcha entry No.33 at Ex.11/A, Roznamcha entry No.38 at Ex.11/B, Roznamcha entry No.4 at Ex.11/C and Roznamcha entry No.12 at Ex.11/D. PW.8 Inspector Muhammad Sohail, I.O. of the case, was examined at Ex.12, he produced Roznamcha entry No.12 at Ex.12/B, entry No.47 at Ex.12/C and entry No.48 at Ex.12/D. Vide statement Ex.13, the prosecution closed it's side of evidence.

6. Statements of accused Aqil Abbas, Muhammad Kamran and Muhammad Tanveer under Section 342, Cr.P.C. were recorded at Exs.14, 15 and 16 respectively, wherein they have denied the commission of offence and pleaded their innocence. The accused opted not to make a statement on oath under section 340(2), Cr.P.C. and did not examine any witness in their defence.

7. Trial Court, on conclusion of trial and after hearing the learned counsels for the parties, convicted the accused under Sections 385, 386 & 34, PPC read with Section 7(1)(h) of Anti-Terrorism Act, 1997 and sentenced them to undergo rigorous imprisonment for five years each and to pay a fine of Rs.20,000/- each, in default whereof

they were ordered to suffer rigorous imprisonment for six months more, however, benefit of Section 382-B, Cr.P.C. was extended in their favour.

8. Feeling aggrieved by the aforesaid conviction and sentence recorded by the learned trial Judge, the appellants have preferred the present appeal.

9. Learned counsel appearing on behalf of the appellants at the very outset argued that it was a case of acquittal. It is further submitted that prosecution witnesses have contradicted each other on material points, but such contradictions have not been considered by the learned trial Court. No iota of evidence or any other material was available on record to establish the involvement of the appellants in this case, hence no criminal liability could be pinned down on the appellants. The entire story fabricated in the F.I.R. is based on malafide and dishonest intention and further the complainant has not given the names of any of the appellants in the FIR. Further, the incident is shown to have taken place on 15.12.2015 whereas the FIR has been lodged on 21.01.2016, after about 37 days of the incident without furnishing any plausible explanation with regard to such delay, which has caused a fatal blow to the prosecution case and benefit of doubt ought to have been extended in favour of the appellants instead of recording conviction. It is also submitted that no substantial evidence has been brought on record against the appellants to establish that they have committed the present crime. He has also pointed out that appellant Muhammad Kamran has been acquitted in a case of recovery of unlicensed revolver vide judgment

dated 18.08.2016 passed by the learned Additional Sessions Judge-VIII, Karachi (West) and also placed a copy of the said judgment. The learned counsel lastly submits that the prosecution has failed to discharge its liability of proving its case against the appellants beyond shadow of reasonable doubt, there were so many circumstances creating doubt, despite the learned trial Judge recorded conviction and sentence without applying his judicial mind and considering the material contradictions in the statements of the witnesses, hence the conviction and sentence awarded to the appellants is illegal and unlawful and liable to be set-aside and prayed accordingly.

10. Counsel for the State, on the other hand, refuted the arguments advanced by the counsel for the appellants. The witnesses in their respective statements have supported the case of the prosecution without major contradictions or discrepancies and the minor contradictions in such a heinous crime are of no significance. He has, therefore, prayed that the appeal may be dismissed.

11. We have given anxious considerations to the arguments of learned counsel for the appellants and the learned DPG for the State and perused the entire record available before us.

12. The onus to prove its case lies on the prosecution. To discharge such onus, the prosecution has examined as many as eight witnesses. Here it would be advantageous to discuss and highlight the evidence of the prosecution as well as of defence as under:-

13. PW.1 Amjad Niaz (Ex.4) has deposed that he used to supply designing cloths to shopkeepers. On 29.01.2016 he received a phone call from SI Muhammad Sohail of SIU, Karachi, whereby he was informed that his SIM number 0304-2286346 has been recovered from the possession of accused Aqil Abbas, who had been arrested in a crime and he was directed to appear at police station. Thereafter he went to his house and tried to find out his SIM but could not find it and on 31.01.2016 he went to police station and met with SI Muhammad Sohail, who had recorded his statement. He informed to police that arrested accused Aqil Abbas used to work at his house as painter and during work he might have stolen his SIM. Police recorded his statement under Section 161, Cr.P.C. In his cross-examination, PW Amjad Niaz has admitted that he did not make any report regarding missing of his SIM even he was unaware that his SIM was stolen and used in a crime. He has denied that he was using the said SIM till 31.01.2016.

14. PW.2 complainant Muhammad Javed was examined at Ex.5. He has supported the contents of FIR lodged by him and admitted that police informed him that accused involved in the present crime had already been arrested in another crime and shown him arrested accused Tanveer and Kamran, who had worked in their workshop for a period of one year. During his cross-examination, this witness has admitted that he has not lodged FIR on 09.01.2016. He also admitted that it is not mentioned in the FIR that accused persons demanded Bhatta from him. He also admitted that Bhatta chit was received on 15.12.2015 whereas the FIR was lodged on 21.01.2016 and no explanation has been furnished by him for

causing inordinate delay in lodging of FIR. This witness also admitted that he has not provided Bhatta chit, envelope and blood stained cloth to Inspector Jan Khan Niazi at the time of inspecting the place of incident and registration of FIR. He also admitted that accused Tanveer and Kamran worked in their workshop for one year, but he did not receive any complaint against them. He also admitted that mobile SIM number 0304-2286346 was written with different pen. He also admitted that mobile number was not mentioned in Bhatta chit.

15. PW.3 Ameer Abdullah (Ex.6) was a Chowkidar in Faisal Transport Service, Mauripur. He deposed that on 15.12.2015 he was present on his duty, it was about 10.30 pm when one person entered into the garage and handed over him an envelope with direction that the same should be handed over to the owner of the company and on next day he handed over the envelope to Munshi of the company namely, Javed, who opened the same in his presence, wherein one chit containing the writing with red ink and a piece of cloth having some blood spots were found in it. He further deposed that after about 15 to 20 days, some persons again came at the garage and set truck's wheels on fire and also fixed some chit on another truck. On next day he handed over the said chit to Munshi Javed. On call he went to police station Saddar, where his statement was recorded. During his cross-examination, this witness has admitted that in his statement under Section 161, Cr.P.C. the date of incident is mentioned as 12.12.2015. He has also admitted that accused Kamran and Tanveer used to work in their garage/workshop for last four years.

16. PW.4 Usman (Ex.7) is watchman in Faisal Transport Service. He deposed that on 15.12.2015 when he reached at the workshop he came to know that someone handed over letter of Bhatta to Ameer Abdullah (night watchman), which was handed over to foreman Javed who spoke to Boss Faisal and informed him about the situation. On 09.01.2016 he came to know that somebody set the truck on fire and thereafter Javed had lodged FIR. On 21.01.2016 Inspector Jahan Khan Niazi came at the workshop at about 9.30 am and inspected the place of incident, prepared memo of site inspection and obtained his signature as well as of Javed.

17. PW.5 ASI Iftikhar Qureshi (Ex.8) has deposed that on 23.01.2016 he was posted at SIU Saddar. He received FIRs No.05 of 2015 and 06 of 2016 under Section 23(1)(a) of Sindh Arms Act, 2013 for investigation purposes under the orders of high ups so also he received custody of accused, relevant papers and case property. He interrogated the accused and during interrogation accused disclosed that in the month of November, 2015 they wrote extortion slip to one Asif's house alongwith blood stained cloth and they had also informed that they belong to gang war. They further disclosed that they have also written Bhatta chit to Faisal Transport Company at their workshop in the name of Faisal, the owner of the said workshop. They have also confessed that they set the wheels of the truck on fire. He then contacted P.S. Mauripur and P.S. Mochko and get confirmation report. He also met PI Sohail of SIU, who was dealing with these cases and handed over the custody of accused to him, who arrested accused in Crime No.294 of 2015 and 09 of 2016 and later on his statement under Section 161, Cr.P.C. was also

recorded by Inspector Sohail. During his cross-examination, this witness has admitted that he has mentioned the numbers of FIRs No.05 of 2015 and 06 of 2015 in his statement under Section 161, Cr.P.C. and at the same time he resiled from his version by stating that it was written mistakenly. He also admitted that it was not mentioned in his 161, Cr.P.C. statement that during interrogation present accused had disclosed that they had sent blood stained cloth to one Asif. He had specifically admitted that he did not produce the accused before Magistrate for recording their confessional statements under Section 164, Cr.P.C. He shown his ignorance that accused had been acquitted from the charges of FIR No.05 of 2016 and FIR No.06 of 2016 for recovery of crime weapons from the possession of accused Tanveer and Kamran.

18. Prosecution had examined PC Ali Jan at Ex.10 as mashir of arrest, recovery of weapons, mobile phones alongwith SIM. He deposed that on 22.01.2016 he was posted at P.S. SIU/CIA as police constable and was on patrolling duty alongwith ASI Muhammad Amin, PC Mustafa and two other police officials. During patrolling ASI Amin received spy information that three persons were coming from Hescol petrol pump on their motorbike and they had been nominated in many FIRs. On receiving information they started snap checking. Meanwhile, they saw three suspicious persons on motorbike, they tried to intercept them but said accused tried to escape from the scene, but they got succeeded to arrest them at spot under Section 54, Cr.P.C. who disclosed their names as Aqil Abbas, Tanveer and Kamran. ASI Amin conducted their search and recovered one mobile phone alongwith two SIMs, CNIC and some

cards from accused Aqil Abbas, one mobile phone alongwith SIM, one pistol and some cards from accused Tanveer and one mobile phone alongwith SIM, pistol and some cards from accused Kamran. Thereafter, they brought the accused alongwith recovered articles at P.S. where ASI Amin registered FIRs against accused Aqil Abbas, Tanveer and Kamran. He further deposed that during interrogation, accused disclosed that they had sent Bhatta chit to one Muhammad Asif, resident of Mauripur and one Faisal, owner of Faisal Transport Company. Police also recovered SIM bearing number 0304-2286346. After transfer of investigation, the custody of accused and police papers were handed over to Inspector Sohail, who rearrested accused in Crime No.294 of 2015 and Crime No.09 of 2016, prepared memo of arrest at police station and obtained the signatures of mashirs.

19. PW.7 Inspector Jahan Khan Niazi (Ex.11) has supported the case of the prosecution and recorded almost same evidence as deposed by the earlier witnesses. This witness in his cross-examination has admitted that complainant party did not register FIR of setting the wheels of truck on fire. He also admitted that he has not confirmed the contents of said FIR from the neighbourers.

20. PW.8 Inspector Muhammad Sohail (Ex.12) is the investigating officer of the case. This witness has deposed that he was directed to conduct investigation of FIR No.09 of 2016 under Section 385, 386 read with Section 7 ATA, 1997 of P.S. Mauripur and FIR No.294 of 2015 under Section 385, 386 read with Section 7 ATA, 1997 of P.S. Mochko. After receiving FIRs and case papers, he visited the place of incident on 22.01.2016 where complainant has handed

over him envelope containing Bhatta chip of Rs.2,000,000/- and cloth having red stains of blood. He prepared seizure memo and obtained the signature of complainant as well as of PC Muhammad Mustafa. On 23.01.2016 he received call from ASI Iftikhar of SIU who informed him about the arrest of accused Aqil, Kamran and Tanveer under FIRs No.09 and 294 of 2015. He was further informed that police recovered three mobile phones and four SIMs from the possession of accused including SIM number 0304-2286346, which was used in this crime. Thereafter he took custody of accused and interrogated them, who confessed the commission of present crime. He recorded the statement under Section 161, Cr.P.C. of PW Ameer Abdullah and collected CDR of said number. In his cross-examination, he admitted that, *It is correct to suggest that it is mentioned in 161, Cr.P.C. statement of ASI Iftikhar, PC Ali Jan and PC Mustafa that present accused persons were arrested in FIR No.05 of 2015 and 06 of 2015 and the same is mentioned in final challan*” but justified this as a typing mistake. He has also admitted that ASI Iftikhar, PC Mustafa and PC Ali Jan were his subordinates. He also admitted that he has not moved any application to the Magistrate for recording confessional statements of accused. He also admitted that neither he has sealed the case property nor made entry in Register No.19 regarding case property.

21. The entire case of the prosecution hinges only on admission of accused before police during interrogation. Even otherwise, admission of accused before police during investigation is an inadmissible piece of evidence in view of Article 39 of the Qanun-e-Shahadat. It is also an undisputed fact that no identification

parade has been held before any Magistrate to justify the involvement of the appellants in the present crime and no plausible explanation has been furnished in this regard so much so the investigating officer in his statement has admitted that he did not put the appellants before Magistrate for holding their identification parade. These facts, thus, caused dent in prosecution case and possibility of false implication of appellants could not be ruled out. It is pertinent to mention here that in each case, the investigating officer is an important character, who is under obligation and duty bound to dig out the truth. In the case in hand, it appears that just formalities have been completed and no sincere efforts have been made by the investigating officer towards fair and transparent investigation to dig out the truth.

22. We have carefully examined the evidence of the prosecution witnesses and noticed that they have contradicted each other on material points. Complainant Javed has stated that accused Kamran and Tanveer worked in their garage/workshop for one year whereas PW Ameer Abdullah has stated that accused Kamran and Abdullah worked at the workshop for about four years. However, both PWs in their depositions had admitted that they had not received any kind of complaint against them during their service period. It is an admitted fact that the police had not sealed the said SIM at the time of its recovery. This fact not only has made the recovery doubtful, but has demolished the whole case of the prosecution and also shattered the entire fabric of the testimony of witnesses. There is no tangible evidence that the said SIM was recovered from the present appellants. It is also a matter of record that appellants Muhammad

Kamran and Muhammad Tanveer have been acquitted from a case under Sindh Arms Act, 2013 by the Court of competent jurisdiction, vide judgment dated 18.08.2016 and he has placed on record copy of the said judgment. We have no room to give due weight to the evidence of police witnesses as well as private witnesses on the ground that private PWs had implicated the accused on the disclosure of official witnesses that present accused were the real culprits of this crime from whom the police had recovered SIM which was used in this crime. Even prosecution had not examined Faisal, owner of Faisal Transport Service to whom Bhatta chit was sent.

23. Prosecution evidence is full of lacunas, contradictions and discrepancies, explained herein above. It is very difficult for us to give due weight to the testimony of prosecution witnesses. The credibility of PWs was 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”.

24. In another case of *Sagheer Ahmed v The State* (2016 SCMR 1754), the Hon’ble Supreme Court of Pakistan has observed as under:-

“The averments of FIR are silent regarding the financial status and source of income of the complainant against which accused have been demanding Bhatta. Complainant has also not disclosed the specific dates, times and places of demanding Bhatta by accused persons nor any such evidence was produced before the Investigating Officer to prima facie establish such allegations. In absence of any tangible material, mere allegations of demanding Bhatta do not attract section 6(2)(k) of Anti-Terrorism Act, 1997, in the present case nor said section was mentioned in the FIR and Challan. Perusal of Challan reflects that Investigating Officer had made a request to the Anti-Terrorism Court for return of FIR and other documents so that Challan may be submitted before the ordinary Court of law as no case under the provisions of Anti-Terrorism Act, 1997 was made out, but his request was declined by the Anti-Terrorism Court vide order dated 09.06.2014, and cognizance was taken by the Court”.

25. 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 it's duty to prove it's 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”.

26. For the reasons, discussed herein above, we are of the considered view that the prosecution has failed to discharge it's liability of proving the guilt of the appellants beyond shadow of doubt. Therefore, while extending the benefit of doubt in favour of the appellants, we hereby set-aside the conviction and sentence recorded by the learned trial Judge by impugned judgment dated 28.12.2016, 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.

27. Vide short order dated 13.02.2018, this appeal was allowed and these are the reasons thereof.

JUDGE

JUDGE