

IN THE HIGH COURT OF SINDH AT KARACHI

Special Criminal ATA No.125/2015

Appellants : Abid Ali & Another, through Mr. Shoukat Hayat, Advocate.
Respondent : The State through Mr. Abrar Ali Khichi, APG

Special Criminal ATA No.126/2014

Appellants : Abid Ali, through Mr. Shoukat Hayat, Advocate.
Respondent : The State through Mr. Abrar Ali Khichi, APG

Special Criminal ATA No.127/2014

Appellants : Abid Ali, through Mr. Shoukat Hayat, Advocate.
Respondent : The State through Mr. Abrar Ali Khichi, APG

Date of hearing : 16.05.2017

Date of Judgment :

Present: Ahmed Ali M. Shaikh, CJ
Yousuf Ali Sayeed, J

JUDGMENT

YOUSUF ALI SAYEED, J. The Appellants have assailed the Judgment dated 30.04.2014 passed by the Anti-Terrorism Court No. II, Karachi, whereby they were both convicted in Special Case No. B-308/2013 under S.384/385/506/34 PPC, and sentenced to undergo five (5) years rigorous imprisonment, and whereby further convictions were recorded against Abid Ali in Special Case Nos. B-309/2013, under S. 353/324/34 PPC, and B-310/2013 under S. 23(1)A of the Sindh Arms Act 2013, in respect of which he was sentenced to undergo five (5) years rigorous imprison. All the sentences were to run concurrently.

2. As per the joint Charge in the aforementioned cases, the Appellants stood accused of having made extortion calls to one Muhammad Hashim (the “**Complainant**”) on his mobile number from two mobile numbers, 0307-2990890 and 0336-3402571, and of firing on the police personnel when confronted by them during the course of receiving the extortion amount behind Alam Pride, Sector-5, North Karachi (the “**Crime Scene**”). Abid Ali was further charged with possession of an unnumbered unlicensed 30 bore pistol. No mention is made in the Charge of the date or time of the extortion calls or the date, time and location of the encounter culminating in the arrest of the Appellants.

3. Briefly stated, the substance of the FIRs underpinning the cases and giving rise to the Charge is that on 02.09.2013 FIR No.221 was registered by the Complainant at P.S. Bilal Colony, District Central, Karachi at 1830 hours, wherein it was mentioned that extortion calls had been received by him on 29.08.2013 from an unknown person using the two mobile phone numbers as came to be mentioned in the Charge. The related FIR Nos. 223 and 224 of 2013 were registered at the same P.S on the same day by the State through ASI Sakhauddin. FIR No.223/13 relates to the encounter said to have taken place between the police personnel and the Appellants at the time of handover of the extortion amount, resulting in the arrest of the Applicants, whereas FIR No.224/13 pertains to the recovery of the 30 bore pistol from Abid Ali. However, the sequence of these FIRs appears skewed.

4. In this regard, it merits consideration that the time of registration of FIR No.221 (1830 hours) is shown as after the time of related FIR Nos. 223 and 224 (1600 hours and 1620 hours respectively). Yet, FIR No.221 contains no statement as to the encounter and arrest, which is dealt with only under the subsequent FIRs, albeit shown to have been registered earlier. In his deposition (Ex. No. P/1), ASI Abdul Majeed, the duty officer of P.S. Bilal Colony, confirms the aforementioned times. Furthermore, ASI Sakhauddin states in his deposition (Ex. No. P/3) that prior to encountering the Appellants he was informed by the Complainant that the FIR had already been registered by him, and went on to state under cross-examination that he had confirmed this from the P.S. It is said that on being told by the Complainant that the extortionists had called him to the Crime Scene, he proceeded there, where he was met by one Qasim, who apparently disclosed to him the facts of FIR No.221.

5. As per FIR No. 223, read in juxtaposition with the Memo of Arrest (Ex. No. P/4), the encounter with the Appellants is said to have taken place at about 1500 hours in the presence of Qasim, and he and Asif Hashim, the son of the Complainant, are shown as witnesses to the Memo of Arrest, albeit that the latter's presence on the scene is not otherwise mentioned or explained in the FIR, the Memo or in the subsequent depositions of the ASI at trial. It also merits consideration that while Qasim is described in FIR No. 223 as the cousin of the Complainant and the son of one Muhammad Juma, in the Memo of Arrest (Ex. No. P/4) and in the Memo of Examination of the Scene of Offence (Ex. No. P/9), he is referred to as the son of Juma Khan. However, in his deposition (Ex. No. P/17) and that of Asif Hashim (Ex. No. P/16), he emerges as the Complainant's employee and his father's name is shown as Umar. The address ascribed to him in the police papers also differs from what is subsequently mentioned in his deposition.
6. The Prosecution examined nine (9) witnesses namely PW-1 ASI Abdul Majeed, PW-2 ASI Sakhauddin, PW-3 the Complainant, PW-4 Asif Hashim, PW-5 Qasim, PW-6 SI Muhammad Akram, PW-7 PC Naveed Malik, PW-8 Inspector Mehmood Khan Rajpoot and PW-9 PC Wahid Parveez. On a reading of the evidence of these witnesses, the trial Court returned a finding a guilt against the Appellants. Hence, they were convicted and sentenced as aforementioned.
7. Learned counsel for the Appellants submitted that the Appellants are innocent have been falsely implicated. He submitted that the Appellants were wrongly convicted on a misreading of the evidence, in as much as PW-3, PW-4 and PW-5 have all belied the case of the prosecution and specifically stated that the Appellants were actually their relatives and were not the persons responsible. In this regard, learned counsel has taken us through the depositions of the prosecution witnesses and pointed out the following relevant excerpts:

PW-3 Muhammad Hashim, the complainant and intended victim of the extortion attempt, whose deposition is Ex. No.10, has stated with reference to the Appellants that "after 4 to 6 days I was called at PS and told me that they have arrested 2 accused. I stored the police that the arrested accused persons are my relatives and they are not my accused who are calling me." Under cross-examination to the DDPP with permission of the trial Court after being declared a hostile witness, he went on to state that "it is

incorrect that I had given the number from where the calls were coming in the FIR as 0336-3402571” and also stood by his deposition regarding the Appellants in stating that “it is incorrect to suggest that accused present in the Court is the same person who had demanded Bhatta from me and whom I had given the Bhatta.”

PW-4 Asif Hashim, the son of Muhammad Hashim, whose deposition is Ex. No.16, whilst shown as a witness to the encounter and arrest, has stated with reference to the Appellants that “The police had showed us the two accused present in the Court at the PS we told the police that they are our relatives”. Furthermore, he denied being present at the Crime Scene at the relevant time and denied all allegations as to the arrest of the appellants. Consequently, under cross-examination to the DDPP he went on to state that “It is incorrect to suggest that the two accused present in the Court are the same persons who were arrested before me after taking Bhatta from Qasim.”

PW-5 Qasim, son of Umar, whose deposition is Ex. No. P/17, in examination-in-Chief has similarly denied being at the Crime Scene and denied that anything was recovered from the Appellants in his presence. Under cross-examination to the DDPP he categorically stated that “it is incorrect to suggest that the two accused person present in the Court were arrested when they had come to take Bhatta from the complainant. It is incorrect to that I was along with the complainant when the tool used outcome on motorbike to take Bhatta.”

8. Learned counsel for the Applicants also pointed out that whilst it was mentioned by PW-2 in the FIR that at about 1500 hours Qasim was approached by two persons riding on a motorcycle, who received the extortion amount and then fired upon the police personnel while attempting to flee when confronted by them, in his deposition (Ex. No. P/3), PW-2 then disparately stated that three (3) accused persons had come on one motorbike, of whom one escaped on foot. Contrarily, PW-9, PC Wahid Parveez, narrates that the Appellants were not accompanied by anyone.
9. Furthermore, as per the deposition of PW-2 (Ex. No. P/3), there was an exchange of fire between the Appellants and police party at close range (said to be 10 feet). The Appellants are said to have fired 2 to 3 shots at the police party and PW-1 claims that he also returned fire with 3 to 4 shots. However, admittedly, no one was injured and neither the police mobile nor the motorbike of the Appellants was struck. The Memo of Examination of the Scene of Offence

(Ex. No. P/9) also fails to shed any light on what may have been hit by the bullets said to have been fired at the Crime Scene.

10. It also merits consideration that the FIRs, the Memo of Arrest and Seizure as well as the FSL Report are bereft of any description of the 30 bore pistol said to have been recovered from the Appellant and merely describe the weapon as being without number. However, from the cross-examination of PW-1 to the counsel of the Appellant it is evident that the description "Made in China Cal-30 Mouser" was engraved on the pistol produced in Court during the trial. Additionally, as per the FSL Report (Ex. No. P/29), of the two 30 bore crime empties sent for examination, one of the empties had not been fired from pistol said to have been recovered from Abid Ali. Moreover, it is evident from the deposition of PW-1 (Ex. No. P/3) that the empties said to have been recovered from the scene were not produced before the trial Court.
11. Additionally, whilst the Memo of Arrest mentions that SIM Nos. 0336-342571, 0311-1093686 and 0313-22731990 were recovered from the possession of the Appellants, and the FIRs mention one of these numbers (i.e. 0336-342571) as being a number from which extortion calls had been made, the letters previously addressed by Muhammad Hashim to the Chief of the Citizens Police Liaison Committee (Ex No. P/15) and to the SHO P.S. Bilal Colony (Ex. No. P/11), as received on 30.08.2013 and 31.08.2013 respectively, only mention extortion calls having been received from mobile number 0307-2990890. The SIM for that number was not recovered from the Appellants at the time of their arrest.
12. When faced with the testimony of the PW-3, PW-4 and PW-5 and the other discrepancies in the prosecution evidence, the learned APG was unable to put forward any argument to controvert the same or support the finding of guilt recorded in the Impugned Judgment.
13. It is well settled in criminal jurisprudence that even a single circumstance that serves to create reasonable doubt in a prudent mind as to the guilt of an accused entitles him to the benefit of such doubt, not as a matter of grace and concession but as a matter of right. However, in the instant case, convictions were recorded despite the aforementioned discrepancies on record. As such, the Impugned Judgment cannot be allowed to stand, and this Appeal succeeds.

14. These are the reasons for of our short Order dated 16.05.2017 whereby the Appeal was allowed with the result that the Appellants were acquitted of the charges and the conviction and sentence awarded to them was set aside.

JUDGE

CHIEF JUSTICE

Karachi
Dated _____