

IN THE HIGH COURT OF SINDH AT KARACHI

PRESENT:

***Mr. Justice Aftab Ahmed Gorar***  
***Mr. Justice Anjad Ali Sahito***

Spl. Crl. Anti-Terrorism Jail Appeal No. 196 of 2018

Appellant : Ghulam Kabir @ Sunny S/o Doraiz Khan  
in person

Respondent : The State  
Through Mr. Sagheer Ahmed Abbasi,  
Assistant Prosecutor General, Sindh

Date of hearing : 25.03.2019

Date of Judgment: 25.03.2019

**J U D G M E N T**

**AMJAD ALI SAHITO, J.-** Being aggrieved and dissatisfied with the judgment dated 13.03.2017 passed by learned Judge, Anti-Terrorism Court No.2 & II<sup>nd</sup> Additional Sessions Judge, Karachi East in Special Case No.569/2016 arising out of the FIR No.107/2016 for the offence under Section 324/353/34 PPC read with Section 7 ATA, 1997 registered at PS PIB Colony Karachi East, whereby the appellant in his absentia was convicted and sentenced to suffer Rigorous Imprisonment for five years and to pay fine of Rs.5,000/- and in case of default of payment, he shall further suffer S.I. for one month.

2. Brief facts of the prosecution case are that on 15.03.2016, SHO/SIP Mirza Safdar lodged an FIR at PS PIB Colony alleging therein that on the same day he along with SIP Syed Niaz Ali Shah, PC Mumtaz, PC Qaiser Iqbal, PC Shahid, and PC/DR Shehroz were on patrolling duty in Govt. Mobile-I under entry No.29 in the area to prevent the crime. During the course of patrolling, he received spy information that at Jhanday Shah Qabristan (Graveyard) Bukhari Colony Old Sabzi Mandi, Saeed-ur-Rehman @ Kaki with

his companions was selling narcotics. As such on receiving said information police party reached at the pointed place at 04:30 P.M. and raided upon culprits, who upon seeing police party started firing from their weapons with the intention to commit their Qatl-e-AMD. Police party also return fired in self-defense. Due to the exchange of firing one accused was died on the spot while three accused were received firearm injuries and rest of the accused fled away under the cover of firing. Complainant arrested the injured accused. On query injured accused disclosed their names as (1) Talib Ali s/o Mansab Ali, (2) Zeeshan s/o Muhammad Saeed and (3) Ghulam Hussain s/o Faizullah. Complainant conducted the person search of died accused and recovered one pistol 30 bore without number load magazine along with 05 live rounds. He also conducted a personal search of accused Talib and recovered one pistol of 30 bores without number along with 03 live bullets while from the possession of accused Zeeshan recovered one 30 bore pistol without number load magazine along with 04 live bullets. Complainant also conducted the personal search of accused Ghulam Hussain and recovered one plastic shopper containing 200 token heroin weighing 90 grams and sale proceed of Rs.350/-. Injured accused disclosed the names of absconding accused as (1) Saeed-ur-Rehman @ Kaki s/o Moosa Khan (2) Saeed Pathan s/o not known, (3) Sheri s/o not known, (4) Zain @ Grenade s/o not known, (5) Ghulam Kabir @ Sunny s/o Dervaiz Khan, (6) Kareem s/o not known, and (7) Zia Pathan s/o not known, (8) Rahat Khatak s/o not known, and (9) Hidayatullah @ Mustafa s/o Koray Khan. On demand accused failed to produce license of recovered pistols. At the spot, complainant secured 08 empties of 30 bore pistol and 05 empties of SMG. He seized the case property

separately at the spot and prepared a memo of arrest and recovery. Thereafter he dispatched the injured accused along with died accused through Edhi ambulance to the hospital. Hence, instant FIR was registered along with offshoots cases u/s 23-(i)A of Sindh Arms Act, 2013 as well as FIR was registered under the Narcotics Act.

3. After the registration of FIR, the usual investigation was carried out as such on the conclusion of the investigation, I.O. submitted charge sheet before Administrative Judge, Anti-Terrorism Court, Karachi Division, Hon'ble High Court of Sindh Karachi showing the applicant/accused as an absconder. On 09.01.2018 SIP Syed Aslam Shah appeared before the Court and filed an application for issuance of production order of accused Ghulam Kabir @ Sunny.

4. In order to prove its case, the prosecution examined the following witnesses:-

1. PW-1 Complainant SIP Mirza Safdar at Ex.28, who produced memo of arrest and recovery at Ex.28/A, FIR No.110/2016 at Ex.28/B, FIR No.107/2016 at Ex.28/C and site inspection memo at Ex.28/D.
2. PW-2 SIP Syed Niaz Shah Bukhari at Ex.29, who is mashir of both memos.
3. PW-3 SIP Syed Aslam Shah at Ex.30, who is the first I.O. of the case.
4. PW-4 MLO Dr. Afzal Ahmed at Ex.32, who produced post mortem report bearing No.164-16 of unknown deceased accused at Ex.32/A, medical certificate of cause of death at Ex.32/B, post mortem report of cause of death of accused Talib at Ex.32/C, medical certificate of cause of

death of accused Talib at Ex.32/D, medico-legal certificate of accused Zeeshan at Ex.32/E and medico-legal certificate of accused Ghulam Hussain at Ex.32/F.

5. PW-5 DSP Hussain Ahmed Nasir at Ex.33, who is also an eye witness of the incident.
6. PW-6 Inspector Bashir Ahmed Korai at Ex.34, who is second I.O. of the case and produced departure entry at 34/A, letter dated 06.04.2016 for sending last wearing cloth of deceased accused for chemical examiner at Ex.34/B, chemical examiner report at Ex.34/C, letter for sending firearms to FSL at Ex.34/D, FSL report at Ex.34/E, letter for obtaining CRO record of accused at Ex.34/F and CRO record of accused at Ex.34/G.

Learned DDPP filed a statement to give up PW SIP Farman Aasi at Ex.35. Thereafter, learned DDPP closed the prosecution side for evidence at Ex.36.

5. The statements of accused under Section 342 Cr.P.C. were recorded at Ex.37 & 38, wherein they denied the prosecution allegations and claimed to be tried.
6. The learned trial Court, after concluding trial vide judgment dated 13.03.2017 acquitted co-accused namely Zeeshan and Ghulam Hussain and convicted the appellant in absentia which is impugned by the appellant Ghulam Kabir @ Sunny before this Court by way of filing the instant appeal. Later on absconding co-accused Rahat Zaman Khattak was also acquitted by the learned trial Court vide judgment dated 13.11.2017 by extending him the benefit of the doubt.
7. Appellant is present in person and mainly contended that co-accused Zeeshan, Ghulam Hussain and Rahat Zaman Khattak

were already acquitted by the learned trial Court on the ground that prosecution failed to establish charge against the co-accused beyond any reasonable shadow of doubt; that he has been convicted for offence under Section 21-L Anti-Terrorism Act, 1997 for five years; that the conviction awarded to him by the learned trial Court may be set aside and lastly prayed for his acquittal.

8. Learned DPG supported the impugned judgment passed by the learned trial Court, however, he conceded that co-accused Zeeshan, Ghulam Hussain, and Rahat Zaman Khattak have been acquitted by the learned trial Court vide judgment dated 13.03.2017 and 13.11.2017 respectively.

9. We have heard the parties. On the assessment of the material brought on record, it appears that SHO/SIP Mirza Safdar lodged the FIR at PS PIB Colony that on 15.03.2016 they were on patrolling. During the course of patrolling, they received information that at Jhanday Shah Qabristan, Saeed-ur-Rehman @ Kaki with his companion was selling narcotics. On such information, they reached the pointed place and raided upon the culprits, who upon seeing police party started firing with their weapons. Police party also made fires on their defence. During the exchange of fires, police arrested injured accused namely Talib Ali, Zeeshan, and Ghulam Hussain, who have disclosed the name of the present appellant, and submitted the charge sheet wherein no residential address has been shown. The conviction to the appellant is a sole consequence of his abscondence, therefore it would be proper and justified to examine whether NBWs issued to the appellant were served upon him or not. A perusal of record reflects that process server namely Bashir Ahmed and others were examined who have given proclamation under Sections 87 & 88 for

service upon the appellant as well as absconding accused. Their statements were recorded in the Court wherein they have disclosed that they have gone to serve proclamation warrants/notice to the given address of the accused persons but could not execute the same as the accused persons were not residing in the said locality and therefore publication was made which shows that simply the formalities were completed by the learned trial Court and no such proof was produced by the prosecution to believe that warrants were served upon the appellants, who willfully remained absconder. The reference in this context is made to the case of **Haji Muhammad Vs. The State (PLD 2003 Supreme Court 262)**, wherein the Hon'ble Supreme Court of Pakistan has held that:

*“3. Therefore, keeping the sentence to remain intact was unwarranted and after having set aside the conviction trial Court may have not kept intact the sentence because conviction in a crime is followed by sentence and if the conviction is not sustainable then the sentence also cannot be allowed to remain intact, otherwise presumption would be that the plea put forward by the petitioner for not attending the Court was not found to be acceptable. It may be noted that in such-like cases where an accused has been convicted/sentenced in absentia the Court is bound to follow the relevant provision of law strictly because conviction/sentence has been recorded without providing him opportunity of hearing and believing the statement of prosecution. It is also important to note that as far as main case failing within the mischief of sections 302/365-A/120-B/109/34 P.P.C. read with sections 7-L and 21-L of the Act, it concerned, the prosecution failed to established accusation against the petitioner, therefore, interference can conveniently be drawn that he was not involved in the commission of offence, as such recording conviction in his absence in terms of section 21-L of the Act, 1997 was so illegal.”*

10. Furthermore, the learned trial Court while acquitting the co-accused observed that the prosecution failed to establish the charge against the accused beyond any reasonable shadow of doubt and by extending the benefit of the doubt, acquitted accused

Zeeshan, Ghulam Hussain, and Rahat Zaman Khattak. In this case, co-accused Zeeshan, Ghulam Hussain and Rahat Zaman Khattak have been acquitted by the learned trial Court with almost same role, and the appellant was involved in this case on the basis of statement of co-accused which is a weak type of evidence otherwise prosecution has not collected any evidence to connect the present appellant with the commission of offence, therefore the present appellant is also entitled to the same relief.

11. For the reasons discussed above, the instant appeal is allowed. The conviction and sentence awarded to the appellant under Section 21-L of Anti-Terrorism Act, 1997 by the learned trial Court (Judge, Anti-Terrorism Court & IInd Additional Sessions Judge, Karachi East) vide judgment dated 13.03.2017 are set aside. Appellant Ghulam Kabir @ Sunny is acquitted of the charge leveled against him in this case by extending the benefit of the doubt. The appellant is in jail, he is directed to be released forthwith, if not required in any other custody case.

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