IN THE HIGH COURT OF SINDH, AT KARACHI

PRESENT:-
Mr. Justice Muhammad Iqbal Kalhoro
Mr. Justice Shamsuddin Abbasi.

Spl. Crl. Anti-Terrorism Appeal No.21 of 2020

Appellant	Muhammad Younis @ Bona son of Wali Muhammad through Mr. Muhammad Daud Narejo, Advocate.
Respondent	The State through Mr. Ali Haider Saleem, DPG.

Spl. Crl. Anti-Terrorism Appeal No.22 of 2020

Appellant	Muhammad Younis @ Bona son of Wali Muhammad through Mr. Muhammad Daud Narejo, Advocate.
Respondent	The State through Mr. Ali Haider Saleem, DPG.

Spl. Crl. Anti-Terrorism Appeal No.23 of 2020

Appellant	Pervaiz son of Muhammad Anwar through Mr. Mehmood A. Qureshi, Advocate.
Respondent	The State through Mr. Ali Haider Saleem, DPG.

Spl. Crl. Anti-Terrorism Appeal No.24 of 2020

Appellant	Pervaiz son of Muhammad Anwar through Mr. Mehmood A. Qureshi, Advocate.
Respondent	The State through Mr. Ali Haider Saleem, DPG.
Dates of hearing	15.09.2020 and 01.10.2020
Date of Judgment	**01.10.2020**

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JUDGMENT

Shamsuddin Abbasi, J:- Through captioned appeals, appellants Muhammad Younis @ Bona son of Wali Muhammad and Pervaiz son of Muhammad Anwar have challenged the vires of the judgment dated 29.01.2020, penned down by learned Anti-Terrorism Court No.VI, Karachi, in Special Case No.582 of 2017, arising out of FIR

No.24 of 2017 registered at P.S. Sher Shah, Karachi, for the offences punishable under Sections 353, 324, 186 and 34, PPC read with Section 7 of Anti-Terrorism Act, 1997, Special Case No.583 of 2017, arising out of FIR No.25 of 2017 registered at P.S. Sher Shah, Karachi, for the offence punishable under Section 23-{1}{a} of Sindh Arms Act, 2013 and Special Case No.584 of 2017, arising out of FIR No.26 of 2017 registered at P.S. Sher Shah, Karachi, for the offence punishable under Section 23-{1}{a} of Sindh Arms Act, 2013, through which they were convicted and sentenced as follows:-

> *{a} "{Accused Muhammad Younis @ Bona and Pervaiz are guilty of an offence u/s 353 PPC, R/w section 6{2}{m}, punishable U/s 7{1}{h} of Anti-Terrorism Act, 1997, bearing Crime No.24/2017 and they are convicted and sentenced to suffer R.I for five years and fine of Rs.20,000/- each and in default, they shall serve SI for four months more.*
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> *{b} Accused Muhammad Younis @ Bona and Pervaiz are also guilty of an offence u/s 324 PPC, R/w section u/s 7{1}{b} of Anti-Terrorism Act 1997, bearing Crime No.24/2017 and they are convicted and sentenced to suffer R.I for 10 years and fine of Rs.20,000/- each and in default, they shall serve S.I four months more.*
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> *{c} Accused Muhammad Younis @ Bona is also guilty of an offence u/s 23{1}{a} of Sindh Arms Act, 2013, bearing Crime No.25/2017 and he is convicted and sentenced R.I for seven years and fine of Rs.20,000/- in default, he shall serve SI four months more.*
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> *{d} Accused Pervaiz is also guilty of an offence u/s 23{1}{a} of Sindh Arms Act, 2013, bearing Crime No.26/2017 and he is convicted and sentenced R.I for seven years and fine of Rs.20,000/- in default, he shall serve SI four months more".*

The learned trial Court while passing convictions as aforesaid ordered all sentences to run concurrently except the sentences awarded in lieu of fine and extended benefit in terms of Section 382-B, Cr.P.C. in favour of the appellants and acquitted co-accused Murad son of Sabir-ul-Haq by observing that case against him suffers badly at the hands of non-convincing evidence.

2. The facts giving rise to these appeals, briefly stated, are that on 07.02.2017 police party of P.S. Sher Shah, headed by ASI Shabbir Ahmed, was on patrol duty in the area. It was about 0045 hours when they reached infront of Al-Naveed Kanta, Street No.6, Akbar

Road, Sher Shah, Karachi, they noticed five persons on three motorcycles and signaled them to stop, but instead of stopping their motorcycles they started firing on police with intention to kill and also deterred them from discharging their lawful duties. In retaliation, the police returned the fires in self defence whereupon one of the culprits sustained bullet injury on his right leg and fell down. The ASI with the help of his subordinate staff apprehended the injured person and his two accomplices at spot whereas rest of two culprits made their escape good from the scene of offence. On query, the injured disclosed his name as Muhammad Younis @ Bona son of Wali Muhammad while the others two were Pervaiz son of Muhammad Anwar and Murad son of Sabir-ul-Haq. The also disclosed the names of the escaped persons as Lali and Shafqat. The ASI conducted their body search in presence of PC Wazeer Sultan and PC Nasir Iqbal and recovered an unlicensed 30 bore pistol unnumbered loaded with three live bullets in magazine and one chamber load from right hand of Younis while cash of Rs.1800/-, six mobile phones of different companies and one matchbox containing 14 SIMs of different companies were also recovered from his further search. He also recovered an unlicensed 30 bore pistol unnumbered loaded with two live bullets in magazine and one chamber load from Pervaiz while cash of Rs.1200/- and some documents were also recovered from his further search and recovered Rs.2000/- and three wrist watches from Murad. He also secured four empties of 30 bore and five empties of SMG from the place of incident as well as seized motorcycles bearing Registration No.KEO-6249 {Unique 70CC} and KTS-2977 {Unique 70CC} under Section 550, Cr.P.C. and shifted injured accused to hospital for treatment. After completing usual formalities at spot he returned back to police station and registered a case with regard to police encounter vide FIR No.24 of 2017 as well as two other separate cases vide FIR No.25 of 2017 and FIR No.26 of 2017 against appellant Muhammad Younis @ Bona and Pervaiz for recovery of unlicensed arms on behalf of the State.

3. Pursuant to the registration of FIR, the investigation was entrusted to Inspector Muhammad Zubair Ghuman, who inspected the place of occurrence and prepared memo of site inspection on the same day, sent the recovered arms and empties to ballistic expert for

examination, received report of FSL, recorded statements under Section 161, Cr.P.C. of witnesses and after completing usual investigation submitted challan before the Court of competent jurisdiction, whereby the appellants and co-accused Murad were sent-up to face the trial.

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

5. A charge in respect of offences punishable under Sections 353, 324, 186 & 34, PPC read with Section 7 of Anti-Terrorism Act, 1997, and Section 23{1}{a} was framed against appellants and co-accused Murad at Ex.4, to which they pleaded not guilty and claimed to be tried.

6. The learned trial Court took Oath as prescribed under Section 16 of Anti-Terrorism Act, 1997, at Ex.5.

7. At trial, the prosecution has examined as many as four witnesses namely, complainant ASI Shabbir Ahmed as PW.1 Ex.8, PC Wazeer Sultan {one of the mashirs of arrest and recovery memo} as PW.2 Ex.9, Inspector Najmudeen Ahmed Siddiqui {well conversant of investigating officer Inspector Zubair Ghuman now deceased} as pw.3 Ex.10 and MLO Dr. Hafiz-ur-Rehman as PW.4 Ex.11. All of them have exhibited number of documents in evidence. Vide statement Ex.12 the prosecution closed its side of evidence.

8. Statements under Section 342, Cr.P.C. of appellants Muhammad Younis @ Bona and Pervaiz were recorded at Exs.13 and 14 respectively, wherein they have denied the prosecution case and professed their innocence. They have stated that police picked them on 23.02.2017 and foisted the alleged recovered arms on them. With regard to injury allegedly sustained by appellant Muhammad Younis @ Bona, he stated that the same is inflicted by police at P.S. They have further stated that all the witnesses examined by the prosecution are police officials and they being interested and inimical to them have deposed falsely. The appellants opted not to examine

themselves on oath under Section 340{2), Cr.P.C. and did not adduce any evidence in their defence.

9. The learned trial Court, on conclusion of trial and after hearing the learned counsel for the parties as well as assessing evidence on record, convicted the appellants as detailed in para-1 {supra} vide judgment dated 29.01.2020, impugned herein. Feeling aggrieved by the convictions and sentences, referred herein above, the appellants have preferred their respective appeals.

10. Since all the four appeals are outcome of a common judgment and pertain to same crime, therefore, we deem it appropriate to decide the same together through a single judgment.

11. The relevant facts as well as evidence produced before the learned trial Court find an elaborate mention in the impugned judgment, therefore, the same are not reproduced here so as to avoid duplication and unnecessary repetition.

12. It is jointly contended on behalf of the appellants that they are innocent and have been false implicated in this case by the police with malafide intention and ulterior motives. It is next submitted that the prosecution has failed to prove its case against the appellants beyond any shadow of doubt. The occurrence has taken place at main road in a thickly populated area despite the complainant has failed to associate any private witness in the recovery proceedings, thus the alleged recovery is in violation of Section 103, Cr.P.C. Nothing incriminating has been recovered from the possession of appellants and the alleged recovery of pistols is foisted upon them. There is unexplained delay of about seven days in sending the case property to FSL, thus the report of Forensic Division is unsafe to rely upon. The occurrence has taken place at 12:45 am and the FIR has been lodged at 2:30 am after the delay of about one hour and forty five minutes without any explanation, hence the possibility of false implication of appellants cannot be ruled out. The learned trial Court has based conviction solely on the testimony of police officials without any corroboration from independent witnesses. It is also submitted that witnesses have

contradicted each other and made dishonest improvements in order to bring the case in line with medical evidence. The prosecution has failed to produce any independent witness in the case to corroborate the testimony of police witnesses as such no reliance can be given to their evidence without independent corroboration. The convictions and sentences recorded by the learned trial Court are bad in law and facts and without application of a judicial mind to the facts and surrounding circumstances of the case. The matter needs sympathetic consideration with regard to innocence of the appellants more particularly when ocular account has not been supported by any independent witness. The learned trial Court has not properly evaluated the evidence brought on record as well the contradictions and discrepancies on material aspects of the matter which has demolished the whole case of the prosecution. The learned counsel while summing up their submissions have prayed that the prosecution has miserably failed to prove the guilt of the appellants and, thus, according to them, under the abovementioned facts and circumstances of the case the impugned judgment may be set-aside and the appellants may be acquitted of the charge by extending them the benefit of doubt. In support of their submissions, the learned counsel have relied upon the cases of *Zeeshan @ Shani v The State* {2012 SCMR 428}, *Abdul Ghani & others v The State & others* {2019 SCMR 608}, *Samad Ali v The State* {2019 MLD 670} and *Abrar Hussain v The State & another* {2017 P.Cr.L.J. 14}.

13. In contra, the learned DPG has argued that prosecution has successfully proved its case against the appellants. The story set-forth in the FIR is natural and believable. The ocular account furnished by the prosecution has been corroborated by medical evidence. There is positive report of FSL stating therein that the empties secured from the place of incident were fired from the same pistols recovered from the possession of appellants. The police witnesses in their respective statements have supported the case of the prosecution and implicated the appellants with the commission of offence and their evidence cannot be discarded merely on the ground that they belong to police department. Lastly submitted that the impugned judgment is based on fair evaluation

of evidence and no interference is called-for. He, therefore, prayed for dismissal of appeals.

14. We have given anxious consideration to the submissions of learned counsel for the appellants and the learned DPG for the State and scanned the entire material available before us with their able assistance.

15. The entire case of the prosecution rests on the testimony of PW.1 complainant ASI Shabbir Ahmed and PC Wazeer Sultan, who alleged to be the eye-witnesses of the incident and directly implicated the appellants in the commission of crime. A bare look to their evidence reveals that they have contradicted each other on material aspects of the matter. The complainant has stated that the accused were at a distance of 20 meters from police party when encounter took place and it continued for about 10/15 minutes whereas mashir PC Wazeer Sultan has stated that distance between accused and the police party during encounter was about 17/18 paces and it continued for two minutes. Complainant has stated that he prepared memo of arrest and recovery by placing the paper on the bonnet of police mobile in the torch light of his cell phone and it took about 10 minutes in preparing the same whereas according to mashir the memo of arrest and recovery was prepared while placing the paper on the bonnet of police mobile in the street light and it took about 20 minutes in preparing the same. The complainant has stated that he called ambulance of Chippa from his cell phone and it arrived within 15 minutes and then he shifted the injured accused to Civil Hospital through PC Nasir Iqbal but mashir has not deposed so. The complainant has further admitted in cross-examination that he has not associated driver of ambulance to act as mashir. This position has demolished the case as set up in the FIR and also shattered the entire fabric of the testimony of witnesses as unsafe to rely upon.

16. It is important to note that the incident alleged to have been taken place at 12:45 am and according to complainant and mashir they completed the formalities at spot within half an hour and then came back at P.S. in 10 minutes, meaning thereby the complainant

reached P.S. at 1:25 am, but admittedly the FIR has been lodged at 2:30 am viz after one hour and forty five minutes of the incident and after one hour and five minutes of reaching the complainant at P.S. The prosecution has not been able to furnish any explanation with regard to delay in lodging of FIR. Hence, presumption would be drawn that FIR has been lodged after due deliberations and consultations. Furthermore, it is a well settled principle of law that FIR is always treated as a cornerstone of the prosecution case to establish guilt against those involved in a crime, thus it has a significant role to play, hence if there is any delay in lodging of FIR and commencement of investigation, it gives rise to a doubt and benefit thereof is to be extended to the accused. Reliance may well be made to the case of *Zeeshan @ Shani v/s The State* {2012 SCMR 428}, wherein it has been held by Hon'ble apex Court that delay of more than an hour in lodging of FIR give rise to an inference that occurrence did not take place in the manner projected by the prosecution and time was considered in making efforts to give a coherent attire to prosecution case, which hardly proved successful.

17. It is noteworthy that there was exchange of fires from both the sides, but none from the police personnel, who were four in number, sustained any injury/scratch in the encounter ensuing after alleged indiscriminate firing by five accused persons ridding on three motorcycles. It is, indeed, something beyond comprehension that only one accused, out of five, sustained injury during encounter, but the complainant/ASI and other members of the police party namely, PC Wazeer Sultan, PC Nasir Iqbal and DPC Barkat Ali escaped unhurt and did not receive a single scratch despite the fact that they were in the close proximity of five accused persons i.e. from 20 meters and the encounter remained continued for about 10/15 minutes as deposed by the complainant. Even the Medical Officer {PW.4} did not say as to whether the appellant Muhammad Younis @ Bona sustained injury from front or back side. He, nevertheless, stated that entry wound No.1 was on the medial side of the body of the appellant and exit wound No.2 was on the lateral side of right leg of the appellant. Besides, the FIR shows that five persons riding on three motorcycles and coming from Al-Naveed Kanta opened firing on the police party the

moment they were signaled to stop, without any indication in the FIR that either they first got down from the motorcycles and then started firing at the police party or made fires on the police straight from their motorcycles. A bare perusal of the FIR reveals simultaneous firing by all the five accused named in the FIR and in reply thereof the police personnel, who were four in number, returned the fires in self defence whereupon appellant Muhammad Younis @ Bona become injured, but none of the witnesses have deposed that with which firing he sustained injury. Thus, the story set-forth in the FIR seems to be self-made and unsafe to rely upon. Reliance may well be made to the case of *Abid and another v. The State* {2019 YLR 613}, wherein it has been held as under:-

> *"No person, apart from the appellants, being injured in the claimed police encounter, when it was claimed that the appellants shot from a short distance of 10 to 12 steps with the intention to kill; no damage to any vehicle or property as a consequence of the firing; case property not being sealed despite record to the contrary; 8 instead of 6 live bullets being produced at trial; 2 empties sealed in the bag by FSL not emerging at trial; evidence of property being tampered with; record showing that the appellants were brought to the hospital at a time when the prosecution claimed they were still lying on the ground in an injured condition at the place of incident; a remarkably hastened process of initial investigation casting doubt on its veracity---are all factors that make us form the view that the prosecution was unable to prove its case beyond reasonable doubt".*

18. The incident alleged to have taken place at main road near Al-Naveed Kanta and firing was exchanged from both sides, therefore, the possibility of private persons at road could not be ruled out. Suffice to add here that it has come on record that recovery was allegedly made from a road in a populated area, but police did not make any effort to persuade any person from the locality or for that matter the public was asked to act as witness of arrest and recovery proceedings. A bare perusal of record reveals that the place of occurrence is located in a populated area on a busy road and it is admitted by complainant in his cross-examination that he did not call any private witness to attest the arrest and recovery proceedings. To that extent the contention of the counsel for the appellant remains firmed. Therefore, the manner of recovery as narrated through evidence recorded by the police officials has lost its sanctity. We are

also conscious of the fact that there should some plausible explanation that actually attempts were made to associate any independent witness from the locality, when otherwise under the circumstances of the present case the appellants have pleaded their false implication and even denied their arrest from the place of occurrence or at the time as shown by the prosecution, hence association of an independent witness was necessary to attest the arrest and recovery proceedings, but admittedly no such efforts were made either by the complainant or by the investigating officer while conducting site inspection, which has caused serious dent to the prosecution case. It is also the case of prosecution that appellants were armed with pistols and it is unbelievable that they without causing any harm to police were arrested at spot.

19. Apart from above, the prosecution has also failed to establish the safe custody of the alleged recovered weapons from appellants and empties secured from the scene of offence. A bare perusal of entry No.22 dated 07.02.2017, which is available at page No.105 of the paper book and do not find single word about keeping the recovered property in safe custody or anywhere either it was kept at malkhana of the police station or was handed over to anybody. We have also noticed that the weapons and empties alleged to have been recovered on 07.02.2017 but the same have been received in the office of Forensic Division on 14.02.2017 i.e. after seven days of its recovery. Delay in dispatch of the case property to the office of Forensic Division has not been explained. Neither the name of police official, who had taken the case property to the office of Forensic Division, has been mentioned nor examined by the prosecution at trial in order to prove safe transit to the expert. We have also examined the report of expert, issued by the office of Assistant Inspector General of Police, Forensic Division, {Sindh}, Karachi, available at page No.153 of the paper book, which describes three empties of 30 bore pistol marked as “C1, C2 and C3” whereas the case of the prosecution is that four empties of 30 bore pistol were secured from the scene of offence. The report also reflects that the weapons and empties were received in the laboratory on 14.02.2017 i.e. after seven days of its recovery. Thus, the prosecution has failed to substantiate the point of safe custody

of case property from 07.02.2017 to 14.02.2017 and its safe transit to the expert through cogent and reliable evidence and the recovery on the face of it seems to be doubtful. Reliance may well be made to the case of *Ikramullah & others v The State* {2015 SCMR 1002}, wherein Hon'ble apex Court has settled principle for keeping recovered narcotic substance in safe custody and proving its safe transit to the chemical examiner was emphasized in the following terms:-

> *"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".*

20. The appellants have taken the plea in their defence that they were picked up by the police on 23.02.2017 and the injury on the person of appellant Muhammad Younis @ Bona was inflicted at P.S. Though such a plea has not been substantiated by any documentary evidence nor appellants have examined any witness in their defence despite the prosecution is not absolved from its duty to prove the case against accused beyond reasonable doubt and this duty does not change or vary even in the cases in which the defence plea has not been established. The prosecution has not been able to bring on record anything in negation to the plea taken by the appellants and the investigation officer too did not interrogate/investigate this aspect of the matter. It seems that he has only completed formalities and no sincere efforts were made to dig out the truth. Unfortunately, trial Court has also not considered the defence plea and relied upon the evidence of the prosecution witnesses without applying a judicial mind

21. Another intriguing feature which has caused serious dent to the prosecution case is that the prosecution neither produced the weapons allegedly recovered from the possession of appellants and the empties alleged to have been secured from the place of incident at trial nor exhibited the same in the evidence as articles. Nothing has been brought on record with regard to non-production of case property at trial except that the same has been lost. The entire record is silent with regard to cause of loss of the case property. Even the same has not been shown to the appellants at the time of recording their statements under Section 342, Cr.P.C. It is a well-settled principle of law that conviction can only be based upon the evidence which is put to the accused in his statement under Section 342, Cr.P.C. for obtaining his explanation and if such evidence is not put to the accused in such statement then it cannot be used against him.

22. Insofar as the contention of learned D.P.G. that recovery of weapons from the possession of appellants and positive report of FSL fully established the involvement of the appellants in the commission of crime, suffice it to say that in view of delay of seven days in sending the case property to the office Forensic Division without furnishing any explanation such a report has lost its sanctity and unsafe to rely upon. Furthermore, it is by now settled that the recovery of fire-arms and empties etc. are always considered to be corroborative piece of evidence and such kind of evidence by itself is not sufficient to bring home the charges against the accused especially when the other material put-forward by the prosecution in respect of guilt of the appellant has been disbelieved. It has been affirmed by the Hon'ble Supreme Court in case cited as 2001 SCMR 424 *{Imran Ashraf and 7 others v The State}* in the following manner:-

> *"Recovery of incriminating articles is used for the purpose of providing corroboration to the ocular testimony. Ocular evidence and recoveries, therefore, are to be considered simultaneously in order to reach for a just conclusion."*

Likewise, if any other judgment is needed on the same analogy, reference can be made to the case of *Dr. Israr-ul-Haq v. Muhammad*

Fayyaz and another reported as 2007 SCMR 1427, wherein the relevant citation (c) enunciates:

> *"Direct evidence having failed, corroborative evidence was of no help. When ocular evidence is disbelieved in a criminal case then the recovery of an incriminating article in the nature of weapon of offence does not by itself prove the prosecution case.*

23. It is well settled principle of law that involvement of an accused in heinous nature of offence is not sufficient to convict him as the accused continues with presumption of innocence until found guilty at the end of the trial, for which the prosecution is bound to establish the case against the accused beyond any shadow of reasonable doubt by producing confidence inspiring and trustworthy evidence, It is also well settled principle of law that if a single circumstance creates doubt in the prosecution case its benefit must go to accused not as a matter of grace or concession but as a matter of right. The principle expressed by saying that to be on the safer side, the acquittal of ten guilty persons is to be preferred to the conviction of a single innocent person. A very high standard of proof is, therefore, required to establish the culpability of an accused, which is lacking in the present case.

24. The final and eventual outcome of the entire discussion is that the prosecution has failed to discharge its onus of proving the guilt of the appellants beyond shadow of reasonable doubt. Therefore, while extending the benefit of doubt in favour of the appellants, we hereby set-aside the convictions and sentences recorded by the learned trial Court by impugned judgment dated 29.01.2020 and acquit the appellants of the charge. They shall be released forthwith if not required to be detained in connection with any other case.

25. The captioned appeals stand allowed in the foregoing terms.

JUDGE

JUDGE

Naeem