

IN THE HIGH COURT OF SINDH, KARACHI

Special Criminal Anti-Terrorism Appeal No.191 of 2018

Present:

Mr. Justice Nazar Akbar

Mr. Justice Zulfiqar Ahmad Khan

Appellant : Rizwan @ Goga Punjabi through
Mr. Nadeem Ahmed Azar, Advocate.

Versus

Respondent : The State, through
Mr. Muhammad Iqbal Awan, Deputy
Prosecutor General, Sindh.

Date of hearing : **08.12.2020**

JUDGMENT

NAZAR AKBAR, J:- Appellant Rizwan @ Goga Punjabi son of Ghulam Ilyas has preferred the instant Criminal Anti-Terrorism Jail Appeal against Judgment dated **24.07.2018**, whereby Anti-Terrorism Court No.XIX, Karachi in Special Case No.94/2017, arising out of FIR No.119/2016, registered at P.S Chakiwara, Karachi, under Sections 302, 353, 324, 186 and 34 PPC r/w Section 7 of Anti-Terrorism, Act, 1997 has convicted the appellant under Section 265-H(ii) for offence under Section 7(a) of Anti-Terrorism Act, 1997 r/w Section 302-B/34 PPC and sentenced him R.I for imprisonment for life and to pay fine of Rs.200,000/- (two lacs) to be paid to the legal heirs of the deceased and in default thereof to suffer S.I for six months. Benefit of Section 382-B Cr.P.C, was also extended to the accused.

2. Precisely, the facts of prosecution case are that on **29.06.2016** SIO/SHO Khan Muhammad of P.S Chakiwara alongwith police party comprising PC Darya Khan, PC Sibgatullah and PC Bachal in Government vehicle No.SP-3855 and HC Pervaiz on government motorcycle No.SPL-428 were on patrolling duty for detection of crime.

They received spy information that criminals of Uzair Group Liyari Gang war, namely (1) Shahab, (2) Goga Punjabi, (3) Rehan Pathan and two unknown persons, who are required to police in different cases, are present at Wachani Mohalla with intention to commit any major crime. On this information, the police party reached at Wachani Mohalla PMT wall gali at about 1830 hours and saw that from left street three young boys to whom HC Muhammad Parvaiz said to stop for investigation as per their susceptible condition but they tried to escape from the spot and started firing on police party with intention to kill them, HC Muhammad Parvaiz received bullet shot on his left armpit. On retaliation, the police party also started firing on the accused in self defence but due to the populated area and congested streets the criminals succeeded to run away from the scene. The injured police constable was sent to the civil hospital for treatment where he succumbed to injuries and subsequently died. Therefore, FIR was registered against the above accused persons.

3. After registration of the case, on **30.06.2016** firstly the investigation was entrusted to SIO/SIP Deedar Abbasi, who visited the place of incident on the pointation of complainant. He received 07 empties of SMG, 05 empties of 30 bore pistol and 04 empties of 9MM pistol and prepared such memo. He recorded statements of witnesses and sent the empties for FSL vide letter dated **30.06.2016**. Thereafter the police papers were handed over to second I.O, PI/SIO Saeed Alam of P.S Baghdadi for further investigation. On **03.02.2017** he received message from SIO of P.S Kala Kot that accused Rizwan @ Goga is confined at lockup of P.S Kala Kot in crime No.250/2016 under Section 353/324 PPC and connected Crime No.251 of 2016 under Section 23(1)(A) of the Sindh Arms Act, 2013. Therefore, the I.O proceeded to P.S Kala Kot and found accused Rizwan confined in lockup, who during interrogation confessed that on **29.6.2016** in evening at 0630 hours, he

alongwith his accomplices (1) Shah Zaman alias Shahu, (2) Shoaib, (3) Rehan Pathan and Shah Zaman's one unknown friend at Wachani Mohalla, PMT street, Chakiwara started firing on police with firearms in which a policeman whose name he later came to know as Muhammad Pervez, died on the spot. On such information, I.O Saeed Alam, after identification of the accused by eyewitnesses SIP Khan Muhammad and PC Darya Khan, re-arrested the accused/ appellant in the present crime. After completion of investigation, I.O submitted challan before the trial Court against the appellants under the above referred sections. The trial Court framed charge against the accused at Ex:4. Accused pleaded not guilty and claimed to be tried.

4. In order to prove its case, prosecution examined **PW-1**, ASI Khan Muhammad at Ex:06; **PW-2**, ASI Sabir Sultan at Ex:07; **PW-3**, H.C Muhammad Hussain at Ex:08; **PW-04** PC Darya Khan at Ex:09; **PW-05** MLO Dr. Abdul Ghaffar at Ex:10; **PW-06** first I.O Inspector Deedar Ali Abbasi at Ex:11 and **PW-07** second I.O Inspector Saeed Alam at x:12. Thereafter, on 27.06.2018 learned APG filed statement to give up three prosecution witnesses, namely, PC Sibgatullah, PC Bachal and PC Shahid Mehmood at Ex:13. Thereafter learned APG closed the prosecution side vide statement at Ex:14.

5. On **29.6.2018** Statement of accused/appellant was recorded under **Section 342**, Cr.P.C vide Ex:15. He denied the allegations leveled against him. He further stated that *he is innocent and nothing was recovered from him. He further stated that he was arrested by the police from his house by ASI Anwar Kala and such petition was filed before Hon'ble High Court of Sindh by his mother Mst. Zarina.* However, neither he examined himself on oath u/s 340(2), Cr.P.C nor produced any witness in his defense.

6. Learned trial Court after hearing the learned counsel for the parties and examination of evidence, by judgment dated **24.07.2018** convicted and sentenced the accused/appellant as stated above. Hence the instant appeal.

7. Mr. Nadeem Ahmed Azar, learned counsel for the appellant has contended that the appellant is innocent and did not commit the alleged offence and has falsely been implicated in this case by the police. He further contended that in fact on **02.07.2016** the accused/ appellant was picked up by the police and it has also come in newspaper on the very next day. He further contended that mother of appellant made certain application to SHO, P.S Chakiwara as well as SSP, South but no heed was paid, therefore, she filed C.P No.D-4161/2016 for recovery of her son before this Court, which was subsequently disposed of. He argued that there is no direct or indirect evidence against the accused/appellant and even no confessional statement as well as identification parade has been made. He further argued that the accused/appellant was not examined under Section 164 Cr.P.C by the police before competent Court of law. He lastly prayed for acquittal of the appellant.

8. Mr. Muhammad Iqbal Awan, learned Deputy Prosecutor General Sindh argued that all the prosecution witnesses have supported the prosecution case and in case some contradictions appear in the evidence are minor in nature. Learned D.P.G. prayed for dismissal of the appeal.

9. We have heard the learned counsel for the parties and carefully scanned the evidence available on record.

10. The case of prosecution against the appellant begins with the arrest of the appellant in Crime No. 250 of 2016 and Crime No. 251 of

2016 both registered at Kala Kot Police Station Karachi South for offences under Section 353, 324 PPC r/w Section 788, 97 offences under Section 23(1)(a) of Sindh Arms Act 2013. The prosecution claimed that the appellant was arrested in injured condition in police encounter. Even the said story of police encounter in Crime No. 250 of 2016 has a reference to the instant offence allegedly committed by appellant and others in the jurisdiction of Chakiwara police station. The I.O has stated in his evidence that Kala Kot police has informed him that accused / appellant during the investigation of Crime No. 250 of 2016 has confessed that he and his other companions have been involved in police encounter in Chakiwara in which one H.C. Muhammad Nafees was killed and therefore the I.O from Chakiwara police station went to Kala Kot P.S. and after interrogation he arrested the appellant in the instant case. The prosecution to connect the accused / appellant with the offence in the instant case has relied on the pistol allegedly recovered from him on **3.9.2016** for which Crime No.251 of 2016 was registered at Kala Kot police station against the appellant/ accused. The appellant in both Crime No.250 and 251 of 2016 of police station Kala Kot has been acquitted by the Trial Court in Special Case No.575 of 2017 by Judgment dated **03.04.2018**. The prosecution has not preferred any appeal against the acquittal in Crime No. 250 & 251 of 2016. The very fact that the appellant has been acquitted in the case of recovery of weapon allegedly used or supposed to have been used by appellant in killing Head Constable Muhammad Pervaiz on **29.6.2016** in police encounter in Chakiwara automatically stand disproved. Besides this the FSL report of 30 bore pistol allegedly recovered from the appellant on **3.9.2016** was sent for FSL on **7.2.2017** that is almost after five months of the recovery of the weapon and the superior courts have time and again held that the delay in sending the weapon for forensic testing always creates doubt in the

prosecution story. The Investigating Officer (P.W-7) in his evidence has not been able to explain that under what circumstances he could not send the pistol recovered from the appellant for forensic testing for almost 5 months. The question of safe custody of the weapon and its transmission to the forensic laboratory was more than enough to doubt the prosecution story for connecting the appellant with Crime No. 119 of 2016. The unexplained delay of months in sending the alleged weapon for FSL has rendered the report of FSL inconsequential. It cannot be relied upon as corroborative evidence. In these circumstances it was a case of no evidence of involvement of the appellant in the murder of Head Constable Muhammad Pervaiz. The investigating officer in his cross examination has conceded that the confessional statement of accused / appellant has not been recorded before any Magistrate and therefore, mere statement of a police officer that the accused during investigation of another crime had confessed his involvement in an offence cannot be relied upon for his conviction. Extra judicial confessions have always been disapproved by the superior courts for convicting an offender / accused unless it is otherwise corroborated by confidence inspiring independent evidence. The Hon'ble Supreme Court in the case of Sajid Mumtaz and others v. Basharat and others (**2006 SCMR 231**). In this case the Honourable Supreme Court has observed that *“such confessions, by now have become the signs of incompetent investigation, a judicial mind before relying upon such weak type of evidence, capable of being effortlessly procured, must ask a few questions, like why the accused should at all confess, what is the time lag between the occurrence and the confession, whether the accused had been fully trapped during investigation, before making the confession, what is the nature and gravity of the offence involved, what is the relationship or friendship of the witnesses with the maker of confession and what above all in the position or authority held by the witnesses”*. In

view of the observation of Hon'ble Supreme Court about admission of guilt, merely a confession of appellant during interrogation and confinement in another offence registered in Crime No.250 & 251 of 2016 was of no consequences. On top of it when the prosecution failed to even challenge the acquittal of appellant in Crime No.250 & 251 of 2016 then whatever could be the evidence of the witnesses who have already been disbelieved by a competent court of criminal jurisdiction the testimony of same witnesses against the same appellant cannot be considered as trustworthy.

11. In the case in hand the prosecution has failed to bring on record any independent witness of the incident of **29.06.2016**. The so called spy information and an encounter resulting in alleged death of Head Constable Muhammad Pervaiz is shrouded in mystery. The doctor who conducted post mortem in his post mortem report as well as in the examination in chief has stated that he found body of male muslim aged 44 years wearing **black pent and red shirt**. A police officer on duty is not supposed to wear a black pent and red shirt. It means even the place of death of head constable Muhammad Pervaiz was not Chakiwara and even if it was Chakiwara he was not on official duty of patrolling in the area with other police officers.

12. In view of the above facts and evidence, we have no hesitation to hold that there are several circumstances/infirmities in the prosecution case as highlighted above, which have created reasonable doubt about the guilt of accused. By now it is settled law that 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 the accused, then the accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right. In the case of

Muhammad Mansha vs. The State (**2018 SCMR 772**), the Hon'ble Supreme Court has observed as follows:-

“4. Needless to mention that while giving the benefit of doubt to an accused it is not necessary that there should be many circumstances creating doubt. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of such doubt, not as a matter of grace and concession, but as a matter of right. It is based on the maxim, "it is better that ten guilty persons be acquitted rather than one innocent person be convicted". Reliance in this behalf can be made upon the cases of Tariq Pervez v. The State (1995 SCMR 1345), Ghulam Qadir and 2 others v. The State (2008 SCMR 1221), Muhammad Akram v. The State (2009 SCMR 230) and Muhammad Zaman v. The State (2014 SCMR 749).”

13. In view of the above discussion when the prosecution has already failed to prove its case against the appellant beyond any reasonable doubt, the conviction of appellant cannot be maintained. Consequently, by short order dated **08.12.2020** this appeal was allowed and conviction and sentence recorded by the trial Court by judgment dated **24.07.2018** was set aside and appellant was acquitted of the charge. These are the reasons for our short order.

J U D G E

J U D G E

Karachi, dated
January 23, 2021

Ayaz Gul