THE HIGH COURT OF SINDH AT KARACHI

Special Criminal Anti-Terrorism Jail Appeal No.160 of 2019

Present: ***Mr. Justice Nazar Akbar***
Mr. Justice Zulfiqar Ahmad Khan

Appellant: Abdul Kareem son of Moula Bux through Mr. Muhammad Farooq, Advocate.

Respondent: The State through Mr. Muhammad Iqbal Awan, DPG

Date of Hearing: **09.12.2020**

J U D G M E N T

NAZAR AKBAR, J.- Appellant Abdul Kareem son of Moula Bux was tried by learned Judge, Anti-Terrorism Court-X, Karachi, in Special Cases Nos.172 and 172-A of 2018, arising out of FIRs Nos.340 and 341 of 2018, registered at P.S. Shahrah-e-Faisal, Karachi, for offences under Sections 392, 353, 34, PPC read with Section 7 of the Anti-Terrorism Act, 1997 and Section 23(1)(a) of the Sindh Arms Act, 2013. On conclusion of trial, vide judgment dated **29.03.2019**, appellant was convicted and sentenced as under:

1. For offence u/s 392, PPC sentenced to undergo 10 years R.I., with fine of Rs.500,000/-, in default whereof to suffer R.I. for one year more.

2. For offence u/s 7(h) of Anti-Terrorism Act, 1997 read with section 353, 324, PPC 392, PPC sentenced to undergo 10 years R.I., with fine of Rs.100,000/-, in default whereof to suffer R.I. for one year more.

3. For offence u/s 25 of Sindh Arms Act, 2013 sentenced to undergo 7 years R.I., with fine of Rs.50,000/-, in default whereof to suffer R.I. for six months more.

All the sentences were ordered to run concurrently. Benefit of Section 382-B, Cr.PC was extended to appellant. Appellant has challenged the impugned judgment through instant appeal.

2. Facts of the prosecution case as narrated by the complainant Rashid Iqbal son of Muhammad Aslam in his statement under Section 154 Cr.P.C, are that on 08.07.2018, at about 1530 hours, while going to Saima Shopping Mall when he took a U-turn from Dalmian Road, near Shell Petrol Pump, a young person with pistol forced him to stop his Car No.BCM-385, maker Suzuki Mehran. The armed man pointing gun at him, directed him to handover everything he was having at that moment, out of fear, the complainant handed over his Wallet containing cash Rs.1540/-, Office Card and few visiting Cards to him. In the meantime, the Complainant saw a Police official in a uniform on motorbike. He immediately signaled the said police official to stop and informed him about the entire situation. The said police official immediately followed the said young man who made fire shot upon the Police official with intent to commit his murder, as well as deter him from discharging his lawful duties and official functions. In retaliation, Police official also made fire shot in his self-defence, resultantly; the armed robber sustained bullet injury on his right leg above knee cap and fell down on the ground. By the time, Police Mobile of P.S. Shahra-e-Faisal, Karachi also reached at the scene. Complainant learnt the name of Mobile Officer as ASI Illahi Bux, to whom he also disclosed entire incident and the Mobile Officer arrested the injured accused and with the help of his subordinate staff recovered one 30 bore pistol having magazine loaded with one live round. The police in further personal search of apprehended injured robber also secured cash Rs.1540/, office card bearing No. 29735 (Photocopy) and visiting cards belonging to the complainant. The injured/apprehended robber was then shifted to JPMC, Karachi through Chhipa Ambulance under the supervision of Police officials for his medical treatment. Later on,

complainant's statement under Section 154 Cr.P.C was recorded and incorporated in FIR Book bearing Crime No. 340 of 018 under Sections 392, 353, 324 PPC R/W 7 Anti-Terrorism Act, 1997, at PS Shahra-e-Faisal Karachi. ASI Illahi Bux had also registered another FIR No.341 of 2018 under Section 23(1)(a) of the Sindh Arms Act, 2013 at P.S. Shahra-e-Faisal Karachi against the injured arrested robber on behalf of the Slate. After completion of formalities challan was submitted against the accused under the above referred Sections.

3. Trial Court ordered joint trial of both the cases as provided under Section 21-M of the Anti-Terrorism Act, 1997 and framed charge against the accused at Ex.5. Accused pleaded not guilty and claimed to be tried.

4. In order to substantiate its case prosecution examined 4 witnesses, thereafter, learned APG closed the side of prosecution vide statement at Ex.13. Statement of accused was recorded under Section 342 Cr.P.C at Ex.14, in which he denied the allegations and claimed his innocence and false implication in these cases. He neither examined himself on oath nor led any evidence in his defence.

5. The learned trial court after hearing the counsel for the parties and on assessment of entire evidence convicted and sentenced the appellant vide judgment dated **29.03.2019**, as stated above.

6. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the impugned judgment dated 29.03.2019 passed by the trial Court therefore the same are not reproduced here so as to avoid duplication and unnecessary repetition.

7. Learned counsel for appellant, at the very outset argued that the police has falsely implicated the appellant in the instant case for mala fide reasons; while passing the impugned judgment learned trial court did not consider the actual facts and circumstances of the case; learned trial court did not evaluate the prosecution evidence in its true perspective; there was neither any injury nor any damage to the police party in the alleged encounter. The weapon was foisted upon the appellant and even not a single empty was found on the spot to match the so-called recovered 30 bore pistol from the appellant, the conviction is based on presumption. Lastly, it has been argued that prosecution has failed to prove its case against the appellant beyond any showed of doubt, as such, prayed for acquittal of the appellant.

8. Learned Deputy Prosecutor General Sindh contended that the appellant was caught red handed at the spot, who fired at the police official with intention to commit his murder and to deter him from performing his official duties, arms and ammunition have been recovered from his possession, all PWs have fully implicated the appellant in the instant case; therefore, the prosecution has proved its case against the appellant beyond any shadow of doubt. He fully supported the impugned judgment and prayed for dismissal of the instant appeal.

9. We have carefully heard learned counsel for the parties and examined the prosecution evidence minutely.

10. The prosecution has alleged that the appellant is guilty of offence under Section 353, 392 & 324 PPC on the complaint of one Rashid Iqbal who

claimed to have been robbed by the appellant on gun point when he was travelling in his Mehran Car No. BCM-385 at 3:30 p.m. near Saima Shopping Mall. The method of arrest of the appellant is very novel. An injury was caused to him by a passerby police official namely PC Sohail who was there by chance while he was on the way to his house on a motorbike. He was signaled by the victim and said policeman tried to challenge the robber who instantly fired at the said PC. In retaliation the said PC also fired which hit the appellant and he got injured that facilitated his arrest. However, the said star witness was not examined by the prosecution nor his pistol was obtained by the police to send it for forensic testing. The prosecution failure to examine PC Sohail who is said to be at the scene of incident by chance and has played major role in arrest of the appellant creates a serious dent in the prosecution story. The other important aspect of this fact is that the case of assault on police (Section 353 PPC) was not be made out when the police officer who has been assaulted by the appellant has neither appeared in witness box nor the said police official even otherwise was performing his duty at the relevant time. The Investigating Officer P.W-4 has admitted in his cross-examination that "**it is correct to suggest that P.W Sohail Shah was not posted at police station Shahra-e-Faisal Karachi**". Even the claim of the prosecution that the appellant has fired at the said PC is not proved in view of the fact that neither any empty of 30 bore pistol was recovered from the scene of incident nor any empty was sent to FSL. Only pistol allegedly said to have been recovered from the appellant was sent for forensic. Therefore, FSL reports is inconsequential to prove the charge against the appellant that he assaulted to deter the police officer from discharging his duty. The Trial Court has misconstrued the evidence while holding that the

appellant was guilty of offence under Section 353 PPC and convicted him under **Section 353 and 324 PPC**. The question of commission of offence under Section 324 PPC also does not arise in absence of proof of use of firearm by the appellant. Neither anybody was hurt nor murdered by the appellant. When the prosecution has failed to establish the case under Section 353 CPC the natural consequence is that the offence under **Section 392 PPC** could not be established without any independent or corroborative evidence for the offence of robbery on gun point to attract the provisions of **Section 7** of ATA 1997.

11. The Complainant (P.W-2) claimed that he handed over Nokia mobile and cash of Rs.1500/- to the appellant out of fear, and only one man responded to him was a policeman on motorbike as if none else was available on the scene of incident. However, all other P.Ws have conceded that on the spot several persons were gathered when Shahra-e-Faisal police reached by chance to arrest the appellant. The I.O and other police officials claimed that they have dispersed the people gathered around the injured appellant but none of the private person was made mashir of arrest or recovery of robbed articles. P.W.-1 Illahi Bux has stated in his examination in chief stated that he reached at the place of wardat and dispersed the people gathered there but he did not associate any independent mashir while preparing mashirnama of recovery of pistol and bullet. In the case of Mohammad Shafi vs. Tahirur Rehman (**1972 SCMR 144**), the Hon'ble Supreme has observed as under:-

> "It is the prosecution case that a large number of persons had collected at the place of occurrence and they were kept at bay by the accused persons' firing at them indiscriminately. The failure on the part of the prosecution to produce a single disinterested witness is a point that goes against the prosecution. In the

> absence, therefore, of any corroboration of the evidence of the said eye-witnesses, it was not safe to place implicit reliance on their evidence."

In the case reported as Ghulam Shabbir Vs. Bachal and another (**1980 SCMR 708**), the Hon'ble Supreme Court has observed as under:-

> "……In these circumstances, we are inclined to agree with the observations of the High Court that was too much of a coincident that these two witnesses should have come all the way from their village to be present at the spot at the time of occurrence. It is also surprising that no witness of the locality not-even the owner of the 'hotel' in question should have been produced to support the prosecution case. Moreover, there is no independent evidence whatsoever to corroborate the testimony of the three eye-witnesses. We feel that the learned High Court has recorded a very elaborate and well considered judgment and was justified in acquitting the respondent. We do not consider this to be a fit case for re-appraisal of evidence. This petition is, consequently, dismissed as being without any merit."

In the case in hand even the police officer, who challenged the appellant/ accused on the request of the complainant, was not examined.

12. Yet another aspect of the case is that the entire proceeding from registration to the investigation and conviction was illegal and unlawful because the offence was not committed in the limits of Police Station Shahrah Faisal. PW.4 PI/IO Abdul Latif in his cross-examination had stated that, *"….It is correct to suggest that place of wardat comes within the jurisdiction of P.S. Aziz Bhatti. It is correct to suggest that I had not prepared sketch of place of wardat. I remained at place of wardat for inspection purpose from 1800 to 1055 hours, again says that I was present at the place of wardat for inspection purpose till 1950 hours.*……The evidence of I.O. clearly shows legal flaws in the case of prosecution when the I.O. admitted that place of (Wardat) incident falls within jurisdiction of P.S Aziz Bhatti, then it

was his duty to hand over the case to Aziz Bhatti Police in obedience to police Rule 25.4 of the Police Rules, 1934. It reads as follows:-

> **25.4 Where offence appears to have occurred in other police station.—**(1) If a police officer after registering a case and commencing and investigation discovers that the offence was committed in the jurisdiction of another police station he shall at once send information to the officer-in-charge of such police station.
>
> (2) Upon receipt of information such officer shall proceed without delay to the place where the investigation is being held and undertake the investigation.

13. It is also settled law that the prosecution primarily is bound to establish the guilt against the accused without shadow of reasonable doubt by producing trustworthy, convincing evidence enabling the Court to draw conclusion, whether the prosecution has succeeded in establishing accusation against the accused or otherwise, and if it comes to the conclusion that the charges so leveled against the accused has not been proved beyond reasonable doubt, then accused would become entitled for his release on getting benefit of doubt in the prosecution case. The requirement of the criminal case is that if any single and slightest doubt is created, benefit of the same must go to the accused as a matter of right but not as a matter of grace or concession as has been observed in the case of "MOHAMMAD MANSHA v. THE STATE" (2018 SCMR 772), wherein the Honourable Apex Court has observed as under:-

> "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 Tarique Parvez v. The State (1995 SCMR 1345), Ghulam Qadir

> and 2 others v. The State (2008 SCMR 1221), Mohammad Akram v, The State 2009 SCMR 230) and Mohammad Zaman v. The State (2014 SCMR 749)."

14. In view of the above reasons, we have no hesitation to hold that the prosecution has failed to prove its case against the appellant and the learned trial Court did not appreciate the evidence properly. Consequently, by short order dated **09.12.2020** this appeal was allowed and conviction and sentence recorded by the trial Court by judgment dated **29.03.2019** was set aside and appellant was acquitted of the charge. These are the reasons for our short order.

JUDGE

JUDGE

Ayaz Gul

Karachi,
Dated: 23.01.2021.