THE HIGH COURT OF SINDH AT KARACHI

Spl. Cr. Jail ATA No.20 of 2019

Present: **<u>Mr. Justice Zulfiqar Ahmed Khan &</u>**
<u>Mr. Justice Mohammad Saleem Jessar</u>

Date of hearing	:	11.10.2021
Date of Judgment		11.10.2021
Appellant Mohammad Ali son of Ashiq Ali	:	through Mr. Zakir Hussain Bughio, Advocate a/w Mr.Ghulam Mustafa Katpar and Agha Mustafa Durrani, Advocates.
State	:	through Mr. Khadim Hussain Khoohar, Addl. Prosecutor General, Sindh, alongwith ASI Mubarak Ali, P.S. Gulistan-e-Jauhar, Karachi.

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JUDGMENT

Muhammad Saleem Jessar, J.- Through instant Jail Appeal appellant Mohammad Ali son of Ashiq Ali has challenged the common Judgment dated 19.11.2018 handed down by Judge, Anti-Terrorism Court No.XIV, Karachi in Special Case No. 385 of 2017, Special Case No.386 of 2017 (New case No.385-A/2017) and Special Case No.387 of 2017 (New case No.385-B/2017), (re-State Vs. Muhammad Ali S/o Ashiq Ali and another), arising out of FIR No.20/2017 under Sections 392/353/324/34 PPC read with Sections 7 ATA, 1997, FIR No.22/2017 under Section 23 (i) A, Sindh Arms Act, 2013 and FIR No.23/2017 under Section 23 (i) A, Sindh Arms Act, 2013, all registered at P.S.Gulistan-e-Jauhar, Karachi, whereby he convicted present appellant Mohammad Ali, so also co-accused namely, Pervaiz alias Shoukat son of Mohammad Azeem, for offence punishable under Section 392/34 PPC and sentenced them to undergo R.I. for 7 (Seven years) and to pay fine of Rs.5,000/- (Rupees Five thousand only) each and in default to pay fine, both the convicts to undergo S.I. for three months. Both the accused were also convicted for

offence punishable under Section 7 (h) of AT Act read with Section 353 PPC and sentenced to suffer R.I. for 5 (five) years and to pay fine of Rs.5,000/- (Rupees Five thousand only) each and in default to pay fine, both the convicts to undergo S.I. for three months. They were also convicted for offence punishable under Section 7 (I) (b) of AT Act read with Section 324 PPC and sentenced to suffer R.I. for 10 (ten years) and to pay fine of Rs.5,000/- (Rupees Five thousand only) each and in default to pay fine, both the convicts to undergo S.I. for six (6) months. Both the accused were also convicted for offence punishable under Section 23 (i) A, SAA, 2013 and sentenced to suffer R.I. for 5 (five years) and to pay fine of Rs.3,000/- (Rupees Three thousand only) each and in default to pay fine, both the convicts to undergo S.I. for three months.

It was also ordered that all the sentences shall run concurrently, with extension of benefit of Section 382-B Cr. P.C.

Concisely, the facts of prosecution case, as gleaned in the aforesaid FIRs, are that complainant Ahmed Niazi is advocate by profession and resides at House No.A-294, Block-7, Gulistan-e-Jauhar alongwith his family. On 18.01.2017 complainant and his family members were present in the house when at 3.00 p.m. three persons duly armed entered his house and on the show of force committed robbery. It is further alleged that in the meantime, Ahsan Ahmed, younger brother of complainant, sneaked from the house and informed the police officials of nearby police post, and the police officials headed by SIP Naveed Iqbal arrived at the spot when the three culprits were leaving the house with robbed articles. It is further alleged that three culprits on seeing the police party, opened fire with intention to kill police officials and in retaliation police party also opened fire upon the dacoits in their self-defence, with the result two dacoits got injured and fell down out of whom accused Basher Ahmed subsequently succumbed to his injuries, while the third made his escape good. Meanwhile, further police assistance also arrived. Police apprehended both the injured culprits. On the personal search of accused Bashir Ahmed police recovered one 30 bore pistol with two bullets alongwith one shopping bag containing the robbed property i.e. Laptop, Digital Camera of Sony company which was damaged due to firing, Lenovo Tablet, Mobile phones, six bangles, two chains, two artificial bracelets, one original CNIC, one black wallet, cash of Rs.200/-, visiting cards and Nokia phone. From the personal search of other accused namely, Mohammad Ali, police recovered one 30 bore pistol with live rounds. However, the third culprit, whose name was later on transpired as

Shoukat, succeeded to flee with part case property. After completing all necessary formalities at the spot, accused persons were sent to hospital, while terror had spread in the area because of the said incident.

Thereafter, the statement of complainant Ahmed Niazi under Section 154 Cr. P.C. was duly incorporated as FIR No.20/2017 under Sections 392/353/324/34 PPC read with Sections 7 ATA, 1997 at P.S. Gulistan-e-Jauhar, while FIR No.21/2017 for recovery of illegal arms from accused Bashir Ahmed and FIR No. 22/2017 under Section 23 (i) A, Sindh Arms Act, 2013 against accused Mohammad Ali were also registered. On 19.01.2017 the third accused Shoukat alias Pervaiz was also apprehended from nearby bushes and one 30 bore pistol alongwith two live rounds were recovered from him for which ASI Abdul Aziz got registered FIR No.23/2017 under Section 23 (i) A, Sindh Arms Act, 2013.

On completion of usual investigation, challan was submitted before the Court against the accused persons. A formal Charge was framed against the accused vide Ex.5, to which they pleaded not guilty and claimed trial vide their Pleas Ex. 5/A and 5/B.

In order to prove its case, prosecution examined complainant Ahmed Niazi at Ex.06, who produced memo of arrest and recovery alongwith visual sketch, statement under Section 154 Cr. P.C., memo of place of incident as Ex.6/A to 6/C respectively. SIP Naveed Iqbal was examined at Ex.7, who had produced copies of entries and three separate FIRs as Ex.7/A to 7/E. ASI Faqeer Mohammad was examined at Ex.8, who produced proceedings under Section 174 Cr. P.C., memo of inspection of dead body as Ex.8/A and 8/B. HC Samar Abbas was examined at Ex.9, who produced memo of place of incident, memo of arrest and recovery alongwith visual sketch as Ex/.9/A and Ex/9/B. Thereafter, P.Ws namely PC Tariq Mehmood and PC Sadiq were given up vide Statement Ex. 10. P.W. Doctor Shiraz Ali was examined at Ex.11, who produced MLC and letter addressed to MLO as Ex.11/A to Ex.11/D. ASI Ashiq Alil was examined at Ex.12, who produced letter sent to Incharge Mortuary and copy of entry as Ex.12/A and Ex.12/B, whereas ASI Abdul Aziz was examined at Ex.12, who produced copy of entry and one FIR as Ex.13/A and Ex.13/B. P.W. Ahsan Ahmed was examined at Ex.15 and finally I.O. Abdul Sattar was examined at Ex.15, who produced copies of entries, 13 photographs of culprits and place of incident, copy of entry, letters sent to Incharge FSL, FSL reports, letter sent to SSP, CRO record and Incharge, CRO/CIA, Superdiginama, letter

sent to Incharge Chhipa and certificate, copy of entry, letter sent to MLO and MLC, letter sent to Chemical Examiner, letters sent to Director, Laboratories and Civil Surgeon, Cause of Death Certificate, letter sent to Malkhana City Court, Superdiginama and certificate of returned case property as Ex.15/A to 15/Z-1.

Thereafter, Statements of accused were recorded under Section 342 Cr. P.C. vide Ex.15 and Ex.16 wherein they denied prosecution allegations and claimed to be innocent. However, neither they got examined themselves on oath, nor produced any witness in their defence.

After formulating the points for determination, recording evidence of the prosecution witnesses and hearing counsel for the parties, learned trial Court vide impugned judgment convicted and sentenced both the accused, as stated above.

At this stage, it would be worthwhile to point out that against the aforesaid judgment co-accused Pervaiz alias Shoukat had preferred Special Cr. AT Appeals No.344 of 2018 and Special Cr. AT Appeals No.345 of 2018 which were allowed by another Division Bench, comprising Mr.Justice Nazar Akbar (as he then was) and one of us namely, Zulfiqar Ahmed Khan, J. vide common judgment dated 26.11.2020 and consequently, accused Pervaiz alias Shoukat was acquitted of the charges. As a consequence of retirement of Mr.Justice Nazar Akbar (as he then was), vide order dated 30.08.2021 Honourable Chief Justice constituted present Special Division Bench for disposal of instant appeal.

We have heard learned counsel for the appellant, so also learned Additional P.G. appearing for the State. We have also gone through the evidence adduced before the trial Court and perused the material available on record.

Learned counsel for the appellant submitted that the appellant is innocent and has falsely been involved in instant case. He submitted that there are various contradictions in the evidence of prosecution witnesses, so also there are discrepancies and infirmities in the prosecution case which have created doubts benefit whereof should have been extended to the accused / appellant. According to him, co-accused Pervaiz alias Shoukat has already been acquitted, therefore, present appellant also deserves to be acquitted on account of *rule of consistency*. He submitted that, in fact, the accused was a passerby and had

sustained injury due to firing in the area but police had falsely implicated him in these cases. He further submitted that there is gross violation of Section 103 Cr. P.C. as no private person of the locality has been associated to act as mashir or witness in the case and all the witnesses are either police officials or from complainant party, although admittedly several mohallah people had gathered at the spot at the time of incident. He also submitted that no arrival and departure entries have been produced by the police officials which also damages prosecution case. According to him, although accused is alleged to have opened fire upon the police party but neither any police official nor any person from complainant party has been shown to have sustained any injury. He argued that due to contradictions in the evidence and discrepancies in the investigation, serious doubts have been created and the accused is entitled to be extended benefit of such doubts. According to him, even if there is only one circumstance which creates reasonable doubt, the accused must be given benefit thereof not as a matter of grace or concession but as a matter of right. In support of his contention, he relied upon the case of ***Tariq Pervez*** Vs. ***The State (1995 SCMR 1345)***. He prayed for setting aside the impugned judgment and acquittal of the accused.

Learned Additional Prosecutor General Sindh, appearing for the State, opposed the appeal, stating that the impugned judgment has been passed by the trial Court after discussing each and every point involved in the case and cogent reasons have been assigned for its findings, therefore, impugned judgment does not call for any interference by this Court. According to him, the case of acquitted accused namely, Pervaiz alias Shoukat, is distinguishable from the case of present appellant as he was not arrested at the spot like the present appellant and was got apprehended on the next day from the bushes and there was no nexus between the cases of two accused. According to him, minor discrepancies are ignorable as the same usual take place after the passage of time. He prayed for dismissal of instant appeal and maintaining the conviction and sentences awarded to the accused.

It seems that prosecution witnesses have made certain admissions which support the case of the accused / appellant. P.W. 1 / complainant, Ahmed Niazi, in his cross-examination made following admissions:

> *"The absconding accused* ***Asim Hussain*** *was only known to me up to the extend that he was rickshaw driver who used to pick and drop my mother some time having my mother contact number………The resident of accused Asim Ali is not known to me……It is correct that mohallah people were gathered at the spot. The mohallah people were* ***10/12***

> ***persons****……It is correct that none from police and complainant party sustained any fire arm during encounter………It is correct that police did not call any person from mohallah to act as mashir..”*

Two important factors emerge from above admissions. Firstly, it is not understandable that when neither in the F.I.R., nor in his examination-in-chief the complainant has said a single word about said absconding accused **Asim Hussain**, then as to how in his cross-examination the name of absconding accused Asim Hussain has emerged. Assuming, for the sake of arguments, that said absconding accused **Asim Hussain** was also accompanying the three accused namely, present appellant Mohammad Ali, expired accused Basheer Ahmed and absconding / acquitted accused Pervaiz alias Shoukat, who allegedly entered the house of the complainant and committed robbery, then as to why the name of said accused **Asim Hussain** was not mentioned in the FIR and the evidence of complainant and other prosecution witnesses and in case he was not accompanying the said three accused, then what was the fun in mentioning his name by the complainant in his cross-examination. This creates serious doubts in the prosecution story.

Second admission made by the complainant in his cross-examination is that 10/12 persons of the mohallah had gathered at the spot at the time of alleged incident and further that police did not call any person from mohallah to act as mashir. Admittedly, the mashirs shown in the memo of arrest of the accused persons and the alleged recovery of crime weapon as well as robbed articles from them, are complainant Ahmed Niazi and his brother Ahsan Ahmed. No plausible explanation has been furnished by the prosecution as to why, despite availability of private independent persons of the locality at the spot at the time of alleged arrest and recovery, none of them was associated as mashir or witness of the incident. This is in clear contravention of the provisions of Section 103 Cr. P.C. Even S.I. Naveed Iqbal, who was posted at nearby police post and allegedly reached the spot on receiving intimation from complainant's brother Ahsan Ahmed and got arrested the accused persons, in his cross-examination also admitted, ***“Mohallah people about 50/60 were gathered at the spot. The private mashir was already available, therefore, I had not called any other private mashir. It is correct that private mashir is brother of complainant.”*** There is no logic in his explanation that as private mashir was already available, therefore he did not call any private person of the mohallah to act as mashir. Admittedly, the two mashirs got associated by the police were the complainant himself and his real brother Ahsan Ahmed. In such an eventuality, it was incumbent upon him to call private independent persons

of the mohallah, who were available at the spot at that time, to act as mashir which he miserably failed to do, thus acted in gross violation of the provisions of Section 103 Cr. P.C.

Needless to emphasize that in view of provisions of section 103 Cr. P.C. the officials making searches, recoveries and arrests, are reasonably required to associate private persons, more particularly in those cases in which presence of private persons is admitted, so as to lend credence to such actions, and to restore public confidence. This aspect of the matter must not be lost sight of indiscriminately and without exception.

In the case reported as State Vs. Bashir and others (PLD 1997 S.C. 408) Honourable Supreme Court held as under:

> *"As regards above second submission of Mr.M.M. Aqil, it may be observed that it has been repeatedly held that the requirements of section 103 Cr.P.C. namely, that two Members of the public of the locality should be Mashirs of the recovery, is mandatory unless it is shown by the prosecution that in the circumstances of a particular case it was not possible to have two Mashirs from the public."*

Yet in another case reported as Yameen Kumhar Vs. The State (PLD 1990 Karachi 275) this Court after discussing various case-laws on this point held as under:

> *" A perusal of the aforestated authorities and a catena of judgments of various High Courts which we have not quoted here clearly lay down that Section 103 Cr. P.C. is to be applied to recovery, search and arrest made during investigation of a crime. It has been termed as mandatory but not absolute and its non-compliance in certain circumstances will not render search and recovery illegal. However, where during investigation of a crime recovery is made from any inhabited locality compliance with section 103 must be made. It cannot be ignored or brushed aside on the whims and caprices of the Investigating Officer except on well-founded grounds and in exceptional cases. If recovery has been made in contravention of section 103, it is the duty of the prosecution to explain it and give valid and reasonable explanation for such digression.* ***Recovery is an important piece of evidence which is to be proved by disinterested, independent and respectable witnesses. Such witnesses should be of the locality if the circumstances of the case permit****. Section 103 embodies rule of prudence and justice. It is intended to eliminate and guard against 'chicanery' and 'concoction', to minimise manipulation and false implication. It is for these reasons that there is a consensus in the Superior Courts that compliance with section 103 should not be bypassed nor that its applicability be restricted to proceedings under Chapter VII only. The principles of section 103 have been applied and practised during investigation in crimes for so long and with such*

regularity and force that any attempt to restrict it to proceedings under Chapter VII only will unsettle the settled law.

The provisions of Chapter VII make it clear that they relate to the search of any place but it cannot be restricted only to house or a closed place, it can be an open place, open area, a. playground, field or garden from where recovery can be nude for which search is conducted. Although in strict sense the provisions of section 103 are restricted to searches under Chapter VII of Cr. P.C. it has become a practice to apply it to all recoveries made by the Police Officers while investigating any crime. ***The rules of justice enunciated by section 103 are so embedded in our criminal, jurisprudence and so universally accepted that in all criminal cases two mashirs are always cited for recovery and reliance is placed on these witnesses in the ordinary course provided they are independent, respectable and inhabitants of the locality.*** *The residence of the mashirs becomes relevant depending on the facts of the case. The emphasis should be on respectability."*

Another discrepancy committed during the investigation of the case is that police officials have not produced *roznamcha* entries of different events which took place during the course of investigation. P.W.3, ASI Faqeer Mohammad who, while patrolling in the area, received intimation from ASI Ashique Ali about alleged encounter having taken place between the police and the accused and reached at the spot in police van alongwith his subordinate staff, in his cross-examination admitted:

"It is correct to suggest that I have not produced the copy of departure entry before the court neither disclosed the number of entry in my evidence."

Likewise, ASI Ashiq Ali, who prepared and handed over letter for treatment of two accused to MLO and also prepared report under Section 174 Cr. P.C., in his cross-examination admitted as under:

"When I came on duty such arrival entry kept in roznamcha but copy I have not produced neither disclosed in my examination chief. When I left PS and went to Jinnah Hospital Karachi such entry No.24 kept in roznamcha. It is fact that I not deposed in my examination in chief about entry No.24 neither produced the same."

In the same manner, HC Samar Abbas and ASI Abdul Aziz also admitted that they had not produced the relevant *roznamcha* entries before the trial Court.

This is also injurious to the prosecution case. In the absence of any roznamcha entry it becomes suspicious as to whether, in fact, the police party had left the police station to the pointed place. In the case of Mour Vs. The State reported in 2016 P. Cr. L.J. 1706 this Court, while dealing with the point of non-production of roznamcha entry, held as under:

> "*Another point is that the complainant party left police station vide roznamcha entry No.42 but as per prosecution evidence said entry has not been produced at the time of time of recording of their evidence. Non-production of this vital document in evidence has also created serious doubt regarding departure of police from police station.*"

In another case reported as ***Attaullah*** Vs. ***State*** **(2017 P.Cr.L.J. 992 Peshawar)**, it was held that *non-production of entry in Roznamcha by the prosecution in the court to prove the movement of police from the Police station to the place of arrest and recovery of case property made the entire proceedings of police doubtful and the prosecution version became unbelievable.*

Yet, there is another significant point in the case. Admittedly, co-accused Pervaiz alias Shoukat, who had allegedly made his escape good from the place of incident and was subsequently apprehended from the bushes, has been acquitted vide a common judgment dated 26.11.2020 passed by another Division Bench in Special Cr. AT Appeals No.344 and 345 of 2018, therefore, as per *rule of consistency*, present appellant is also entitled to be extended same relief. Although, according to learned A.P.G. appearing for the State, the case of acquitted accused namely, Pervaiz alias Shoukat is distinguishable from the case of present appellant as the former was not arrested at the spot like the present appellant and was got apprehended on the next day from the bushes and there was no nexus between the cases of two accused; however, from the perusal of the judgment dated 26.11.2018 whereby accused Pervaiz was acquitted, it seems that most of the grounds which persuaded learned Division Bench to acquit the said accused, are common in nature and they are also applicable to the case of present appellant. For instance, (i) violation of the provisions of Section 103 Cr. P.C., as discussed in paras 20, 21 and 22 of the judgment; (ii) non-production of arrival and departure entries by police officials, as discussed in para 23 of the judgment; (iii) extension of benefit of doubt to the accused as discussed in paras 24, 25, 26 and 30 of the judgment and (iv) although there being cross-firing during alleged police encounter, no injury/scratch was caused to the police officials or the complainant party. All these grounds are also available in the present case too, therefore, *rule of consistency* does apply to instant case and, thus, the appellant, besides other grounds as discussed in the earlier part of this judgment, is also entitled to be acquitted on this score too.

On the point of '*rule of consistency',* it would be advantageous to refer to a judgment of Honourable Supreme Court passed in the case of ***Mohammad Asif*** Vs. ***The State*** reported in **2017 SCMR 486**, wherein it was held as under:

> *"It is a trite of law and justice that once prosecution evidence is disbelieved with respect to a co-accused then, they cannot be relied upon with regard to the other co-accused unless they are corroborated by corroboratory evidence coming from independent source and shall be unimpeachable in nature but that is not available in the present case."*

In another case reported as ***Umar Farooque*** v. ***State*** **(2006 SCMR 1605)** Honourable Supreme Court held as under:

> *"On exactly the same evidence and in view of the joint charge, it is not comprehendible, as to how, Talat Mehmood could be acquitted and on the same assertions of the witnesses, Umer Farooque could be convicted."*

In the case of ***Mohammad Asif*** Vs. ***The State*** reported in **2017 SCMR 486** it was held by Honourable Supreme Court that *once prosecution witnesses were disbelieved with respect to a co-accused then, they could not be relied upon with regard to the other accused unless they were corroborated by corroboratory evidence which came from an independent source and was also unimpeachable in nature.*

Yet, in another case reported as ***Mohammad Akram*** vs. ***The State*** **(2012 SCMR 440)** the Apex Court while holding that same set of evidence which was disbelieved qua the involvement of co-accused could not be relied upon to convict the accused on a capital charge, acquitted the accused. In view of this legal position, appellant is also entitled to be extended same benefit as given to the acquitted accused.

Before parting with this judgment, it may be observed that in a case of police encounter, it is not appreciable that case should be investigated by the same investigating agency. Such aspect of the case was taken into consideration in the earlier judgment whereby co-accused Pervaiz alias Shoukat was acquitted. In para 22, while relying upon a judgment of Honourable Supreme Court, it was held as under:

> *"The standard of the proof in such a case should have been far higher as compared to any other criminal case when according to the prosecution it was a case of police encounter in day time. It was desirable that **it should have been investigated by some other agency**. Such dictum has been laid down by the Honourable Supreme Court in the case of **Zeeshan alias Shani versus The state (2012 SCMR 428).** Relevant portion is reproduced as under:-*
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> > *"11. The standard of proof in this case should have been far higher as compared to any other criminal case when according to the prosecution it was a case of police encounter. It was, thus, desirable and even imperative that **it should have been investigated by***

> ***some other agency*. *Police, in this case, could not have been investigators of their own cause.*** *Such investigation which is woefully lacking independent character cannot be made basis for conviction in a charge involving capital sentence, that too when it is riddled with many lacunas and loopholes listed above, quite apart from the afterthoughts and improvements. It would not be in accord of safe administration of justice to maintain the conviction and sentence of the appellant in the circumstances of the case. We, therefore, by extending the benefit of doubt allow this appeal, set aside the conviction and sentence awarded and acquit the appellant of the charges. He be set free forthwith if not required in any other case."*

For the aforesaid reasons, by a short order dated 11.10.2021, instant appeal was allowed and the impugned judgment dated 19.11.2018 handed down by Judge, Anti-Terrorism Court No.XIV, Karachi in Special Case No. 385 of 2017, Special Case No.386 of 2017 (New case No.385-A/2017) and Special Case No.387 of 2017 (New case No.385-B/2017), (re- State Vs. Muhammad Ali S/o Ashiq Ali and another), arising out of FIR No.20/2017 under Sections 392/353/324/34 PPC read with Sections 7 ATA, 1997, FIR No.22/2017 under Section 23 (i) A, Sindh Arms Act, 2013 and FIR No.23/2017 under Section 23 (i) A, Sindh Arms Act, 2013, all registered at P.S.Gulistan-e-Jauhar, Karachi, was set aside. Consequently, appellant Mohammad Ali son of Ashique Ali was acquitted of the charges and ordered to be released forthwith, if not required in any other crime / offence.

Above are the reasons for the said short order.

JUDGE

JUDGE