IN THE HIGH COURT OF SINDH, KARACHI

Spl. Criminal Anti-Terrorism Jail Appeal No. 161 of 2019

Before:

Mr. Justice Mohammad Karim Khan Agha
Mr. Justice Khadim Hussain Tunio

Appellants**:**	(1) Sher Zaman son of Roshan Khan though Mr. Chaudhry Mehmood Anwar, advocate, (2) Khalid son of Mansha and (3) Naik Muhammad son of Ata Muhammad through Ms. Abida Parveen Channer, advocate.
Respondent**:**	The State through Mr. Muhammad Iqbal Awan, Additional Prosecutor General, Sindh.
Date of hearing**:**	26.01.2022
Date of announcement**:**	02.02.2022

J U D G M E N T

KHADIM HUSSAIN TUNIO, J- Through instant appeal, Appellants Sher Zaman, Khalid Mansha and Haji Naik Muhammad have challenged the judgment dated 30.04.2019 *(impugned judgment)*, passed by the learned Judge Anti-Terrorism Court-X, Karachi in Special Cases No. 200/2016 *(Re-State v. Khalid and others)* culminated from Crime No. 682/2011 under sections 353/324/302/186/395/34 PPC r/w section 7 ATA, 1997 and Special Case No. 2363/2016 *(Re-State V. Haji Naik Muhammad)* culminated from Crime No. 648/2011 under section 13-D Arms Ordinance, 1965 at P.S. KIA, Karachi. Through the impugned judgment, appellants were convicted and sentenced as follows:-

> i. Accused Khalid son of Mansha is convicted u/s. 7(a) of ATA, 1997 r/w section 302 PPC and is sentenced to undergo "Life Imprisonment" with fine of Rs.10,00,000/= (Rupees Ten lacs only). In default in payment of such fine, he shall suffer further R.I. of one year.
> ii. The accused Khalid son of Mansha is further convicted for the offence u/s. 7(h) of ATA, 1997 r/w section 353/186/324 PPC and sentenced to undergo R.I. for ten years with fine of

Rs.100,000/=. In default in payment of such fine, he shall suffer further R.I. for six months.

iii. Accused Sher Zaman son of Roshan Khan is convicted under section 7(a) of ATA, 1997 r/w section 302 PPC and is sentenced to undergo 'Life Imprisonment' with fine of Rs.10,00,000/= (Rs. Ten Lacs only). In default in payment of such fine, he shall suffer further R.I. of one year.

iv. The accused Sher Zaman son of Roshan Khan is further convicted for the offence u/s. 7(h) of ATA, 1997 r/w. section 353/186/324 PPC and sentenced to undergo R.I. for ten years with fine of Rs.100,000/=. In default in payment of such fine, he shall suffer further R.I. for six months.

v. Accused Haji Naik Muhammad son of Ata Muhammad is convicted under section 7(a) of ATA, 1997 r/w section 302 PPC and is sentenced to undergo 'Life Imprisonment' with fine of Rs.10,00,000/= (Rs. Ten Lacs only). In default in payment of such fine, he shall suffer further R.I. of one year.

vi. The accused Haji Naik Muhammad son of Ata Muhammad is further convicted for the offence under section 7(h) of ATA, 1997 r/w Section 353/186/324 PPC and sentenced to undergo R.I. for "10" years with fine of Rs.100,000/= in default in payment of such fine, he shall suffer further R.I. for "06" months.

vii. Accused Haji Naik Muhammad son of Ata Muhammad is also convicted u/s. 25 of Sindh Arms Act, 2013 and sentenced to undergo R.I. for seven years with fine of Rs.50,000/=. In default in payment of such fine, he shall suffer further R.I. for six months.

All the sentences were ordered to run concurrently, however, benefit of Section 382-B was also extended to them.

2. Precisely, facts of the prosecution case as disclosed in the FIR are that on 04.07.2011 the complainant SIP Abid Tanoli received spy information that members of a land mafia were available at Sector 6/C Jogi Goth Mehran Town, K.I.A. Karachi and acting on such information, he preceded towards the pointed place alongwith his subordinate staff. At about 2000 hours, police party reached the pointed place and found about 30 to 35 persons, who on seeing the police party started firing upon them. Due to the exchange of fire, HC Naveed Tanoli received firearm injuries, subsequently succumbed to them and expired on the spot. Police opened fire in retaliation and managed to apprehend Khalid Ali, Zohaib Ahmed, Javed Akhtar, Ayaz, Haji Naik Muhammad, Muhammad Siddique, Khalid, Abdul Karim, Haider Gul, Sher Zaman, Raza Muhammad and Ghulam Ali on the sport. Police seized a semi-automatic 8mm Pak-made Rifle along with 4 magazines from accused Javed Akhtar, a Kalashnikov along

with loaded magazine containing 15 rounds and 1 round in the chamber from appellant Haji Naik Muhammad, one repeater from accused Raza Muhammad and a 30 bore pistol with a loaded magazine containing 4 rounds and 1 in the chamber along with a strip containing 7 rounds from accused Ghulam Ali. The complainant inquired about licenses of recovered arms and ammunition from the apprehended accused, but none of them could provide the same. During the exchange, the assailants had snatched away official SMG NO. 33648 along with a loaded magazine containing 30 rounds from deceased HC Naveed Tanoli, which was not recovered. Thereafter the complainant brought the arrested accused and the recovered case property at police station, then lodged FIR against them.

3. After registration of FIR, investigation was conducted by the Investigating Officer *(IO)*, who then submitted challan before the trial Court. After observing all the legal formalities, co-accused were declared as absconders and proceedings under sections 87 and 88 Cr.P.C were initiated against them. Thereafter a formal charge was framed against the appellants and accused, to which they pleaded not guilty and claimed to be tried.

4. At the trial, prosecution, in order to prove its case, examined as many as eleven PWs, namely PW-1 **SIP Abid Ali Tanoli** *(complainant)*, PW-2 **ASI Sarfaraz Ahmed**, PW-3 **SIP Muhammad Javed**, PW-4 **PC Muhammad Ishaque**, PW-5 **Muhammad Yousuf Tanoli**, PW-6 **Dr. Farhat Abbas**, PW-7 **Dr. Dilip Kumar Khatri**, PW-8 **ASI Muhammad Shakil**, PW-9 **Dr. Afzal Ahmed Memon**, PW-10 **DSP Fateh Muhammad Shaikh** and PW-11 **DSP Ghulam Nabi Wagho**. They produced numerous documents in their evidence along with other items which were duly exhibited. Thereafter prosecution side was closed. Statements under section 342 Cr.P.C. of accused were recorded in which they denied the allegations made against them in *toto* and they pleaded their false implication in the cases by complainant SHO Abid Tanoli and other police officials. Neither they

examined themselves on oath or adduced any evidence in their defence.

5. After hearing learned counsel for the respective parties, learned trial Court convicted and sentenced the appellants as stated supra.

6. Learned counsel for the appellants jointly contended that the appellants Sher Zaman and Khalid Mansha allegedly arrested on the spot were found empty handed and nothing has been recovered from their possession; that there is no direct evidence against them; that the IO deposed that no evidence has been collected by him against Sher Zaman and Khalid Mansha; that there is no specific role against any of the three appellants; that there are general allegations against them; that not a single bullet hit the police mobile; that as per post-mortem report, deceased had received five injuries which contradicts the version of the prosecution witnesses, therefore there are contradictions in medical evidence and ocular evidence; that safe custody of the case property was not established; that deceased HC Naveed Ahmed Tanoli was not on official duty; that the deceased was wearing Shalwar and Qameez at the time of commission of alleged incident, per report under section 174, Cr.P.C; that three private persons have expired during the alleged encounter of the culprits with the police party; that only Kalashnikov was recovered from the possession of appellant Haji Naik Muhammad at the time of his arrest; that there is a 10 day delay in sending the recovered Kalashnikov and empties to the Forensic Laboratory; that safe custody of the Kalashnikov and empties have not been proved; that empties have not been produced in Court though PW-1 produced Kalashnikov with bullets; that Kalashnikov numbered as mentioned in the FIR but PW-1 deposed that he secured Kalashnikov with rubbed number; that no person from public has been made mashirs of arrest and recovery; that specific place of commission of alleged incident has not been mentioned in the memo of place of incident; that names of mashirs are

not disclosed in the roznamcha entry; that people were protesting against the police party; that complainant has been dismissed from the service on the charge of alleged false FIR against the innocent people. In support of their contentions, learned counsel referred the case law reported as ***Usman alias Kaloo v. The State*** **(2017 SCMR 622)**, ***Zahir Yousaf and another v. The State and another*** **(2017 SCMR 2002)**, ***Tahir Mehmood alias Achoo v. The State and another*** **(2018 SCMR 169)** and ***Muhammad Abrar v. The State and another*** **(2014 YLR 537)**.

7. Conversely, learned Additional Prosecutor-General Sindh has fully supported the impugned judgment especially as the accused were arrested on the spot after a deadly encounter and appellant Haji Naik Muhammad on his arrest had on him a Kalashnikov which lead to a positive FSL report. In support of his contentions, he has cited case law reported as ***Hakim Khan v. The State*** **(2013 SCMR 777)**; ***Asif v. The State*** **(2020 SCMR 610)** and ***Muhammad Ashraf v. The State*** **(2011 SCMR 1046)**.

8. It is prosecution's case that an encounter took place on 04.07.2011 between the police and over 30 to 35 assailants who were initially disclosed to the complainant by a spy informer being part of land mafia. During the encounter, HC Naveed Tanoli received five firearm injuries; a gunshot wound on his head, another gunshot wound on his left arm, a gunshot wound on his chest, a gunshot wound on his left abdomen and the last one on his right knee joint. Per medical records, his death was instantaneous. His service weapon, admittedly, an SMG bearing No.33648 alongside a magazine with 30 loaded bullets was taken away by the assailants and the same could not be recovered. However, during all this, police managed to apprehend numerous culprits and amongst them were the present appellants; Sher Zaman and Khalid who were both empty-handed and Haji Naik Muhammad from whom a Kalashnikov was recovered. Since the nature of allegations against appellants Sher Zaman and Khalid against

appellant Haji Naik Muhammad are different, we will be discussing their cases separately.

9. A perusal of record shows that the allegations levelled against the appellants Sher Zaman and Khalid are collective; that being that 30 to 35 assailants attacked upon the police party that had come to raid them. Only general allegations surfaced after a perusal of the testimonies of the witnesses as well and nothing was brought on record to establish a solid role played by the two appellants, Sher Zaman and Khalid, in the commission of the offence. It is also a matter of record that both these appellants were empty handed when they were apprehended and prosecution has miserably failed to prove that they had any connection whatsoever with the assailants who had attacked upon the police party. It is rather surprising, therefore, to see that despite there being no evidence against them, they were convicted by the learned trial Court and sentenced to imprisonment for life. After perusing the impugned judgment, we observed that the reasoning adopted by the learned trial Court mainly revolved around the appellant Haji Naik and not the other two; Sher Zaman and Khalid. At this juncture, it would be pertinent to note that it is an axiomatic principle of law that mere presence of an accused person at the place of incident can never be sufficient to establish that said accused shared common intention in the commission of an offence unless evidence is brought on record to prove so. In this respect, reliance is respectfully placed on the case of ***HASSAN versus The STATE*** **(1969 SCMR 454)**, wherein the Hon'ble Apex Court has been pleased to observe that:-

> *"**It appears from the observations of the High Court that the High Court was still thinking of the charge of rioting and that mere presence or being a member of the unlawful assembly was sufficient to warrant a conviction.** The Sessions Judge had applied section 34 to the case and **in order to support a conviction under that section mere presence would not be sufficient, but there must be proof of some overt act on the part of each accused done in furtherance of the common intention.** Here the evidence is clear that the appellant was empty handed and he did not assault Suleman, as was stated by P. W. 3. Neither of the Courts has considered the case of this appellant separately or the evidence against him. He*

> *went to the place empty handed and there is no evidence that he assaulted anybody or that in the circum-stances he could have intended to cause a grievous hurt to, anybody. Judged by the standard applied by both the High Court and the Sessions Judge to the case of the three acquitted persons, the case of the appellant stands on a much more favourable ground and we see no justification for upholding his conviction. The appeal is, therefore, allowed and the conviction and sentence on the appellant are set aside and he is acquitted."*
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> ***(emphasis supplied)***

10. For these reasons and in the wake of serious doubts in the prosecution case regarding appellant Sher Zaman and Khalid, we see no legal justification in upholding their conviction and sentence. The rule of benefit of doubt, which is described as golden rule which cannot be ignored while dispensing justice in accordance with law as held by the Honourable Supreme Court of Pakistan in the case reported as ***AYUB MASIH v. THE STATE*** **(PLD 2002 SC 1048)**:-

> *"……It is hardly necessary to reiterate that the prosecution is obliged to prove its case against the accused beyond any reasonable doubt and if it fails to do so the accused is entitled to the benefit of doubt as of right. It is also firmly settled that if there is an element of doubt as to the guilt of the accused the benefit of that doubt must be extended to him."*

11. Now coming to the case of appellant Haji Naik Muhammad, the allegation against him on the face of the record is that he had participated in the attack on the police party of Police Station KIA. He was arrested on the spot and police recovered a Kalashnikov bearing No.AC-1143 from his possession. The complainant had also recovered a total of 16 7.62 bore empties, the same bore as the Kalashnikov recovered from the appellant Haji Naik Muhammad. In the absence of a solid ocular account, the only pieces of evidence available are circumstantial evidence. When considering circumstantial evidence, it is important to ensure that the circumstances of the case make an unbroken chain of events which on one end leads to the body of the crime and the other to the neck of the one culpable. In this respect, reliance is placed on the case reported as ***Hashim Qasim and another v. The State*** **(2017 SCMR 986)**. The first incriminating piece of evidence available against the appellant Haji Naik is the recovery of the weapon

itself. When FIR of the incident is put in juxtaposition with the FSL report available at Ex. 25/H, it is noted that the relevant weapon recovered from the appellant bore the number AC-1143. This number finds mention in the FIR and in the FSL report, which suggests that the weapon originally recovered from the appellant was the same later on received by the Forensics Lab. In the description of the articles received, the gun found mention at Serial No. 2 *"One 7.62mm bore SMG rifle No. AC-1143 with magazine now butt/body signed and sixteen 7.62mm bore live cartridges as exhibits."* The recovered case property was sealed on the spot and this fact too was reaffirmed by the FSL Examiner who notes under General Remarks in his report that the parcels received were in sealed condition. In this respect, reliance is placed on the case of ***ZAHID and ANOTHER v. THE STATE*** **(2020 SCMR 590)**. The FSL examiner noted with regard to the recovered empties as follows:-

> "iii. Five 7.62mm bore crime empties now marked as 'C5 to C9' were **'fired'** from the above mentioned 7.62mm bore SMG rifle No. AC-1143 in question, in view of the fact that major points *i.e.* striker pin marks, breech face marks, chamber marks are **'similar'**.
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> iv. Eleven 7.62mm bore crime empties now marked as 'C10 to C20' were **'not fired'** from the above mentioned 7.62mm bore SMG rifle No. AC-1143 in question, in view of the fact that major points *i.e.* striker pin marks, breech face marks, chamber marks are **'dissimilar'**."

This fact proves that the appellant Haji Naik had in fact shot his Kalashnikov at the place of incident. As such, the elements of S. 324 and 353 Cr.P.C are satisfied along with S. 25 of the Sindh Arms Act 2013. Learned counsel for the appellants brought forth various contradictions in the evidence of the prosecution witnesses which we rightly considered. However, it is noted that such contradictions either relate to minor procedural aspects of the case or some other minor details that would otherwise be inconsequential. PW-1 Abid Tanoli, in his examination-in-chief deposed that *"We also secured one Kalashnikov from accused Haji Naik Muhammad, USSR AC1143 was mentioned on its body along with loaded magazine containing 3 bullets in the magazine, whereas 1 round in the chamber."* In this respect, PW-2 Sarfaraz Ahmed

deposed in his examination-in-chief that "*9th one disclosed his name to be Haji Nek Muhammad and we secured one SMG from his possession and number 1143 was written on it.*" He was also shown the Kalashnikov at which point he deposed that "*I see one Kalashnikov along with bullets and say it is same which was recovered from accused Haji Naik Muhammad marked as Article P/1.*" Evidence of all the P.Ws is consistent on all material particulars of the case, although there are minor contradictions in the evidence of the PWs, but the same are not material and certainly not of such materiality so as to affect the prosecution case. These variations may well be due to mere lapse of memory or confusion caused in his mind by a relentless cross-examiner. It needs no special emphasis to state that every contradiction cannot take place of a material contradiction and, therefore, minor contradictions, inconsistencies or insignificant embellishments do not affect the core of the prosecution case and should not be taken to be a ground to reject the prosecution evidence. Reliance, in this respect, is placed upon ***ZAKIR KHAN vs. THE STATE*** **(1995 SCMR 1793)**. The defence Counsel could not point out any material discrepancy in the evidence of the eye-witnesses besides the few minor ones.

12. However, as far as the conviction of the appellant u/s 302 PPC and u/s 7 of the Anti-Terrorism Act is concerned, suffice it to say that the same cannot sustain. Before diving into discussion regarding the applicability of the Anti-Terrorism Act, it would be advantageous to discuss why an offence u/s 302 PPC is not made out. It is a matter of record that the allegations in the FIR were general in nature and were against a collective amount of 30 to 35 people. None of the prosecution witnesses deposed as to who out of those 30 to 35 people had shot at the martyred HC Naveed Tanoli. Nothing was brought on the record to suggest that the bullets fired by the appellant Haji Naik Muhammad had hit the deceased and caused his death. No other iota of evidence is available to suggest that the appellant was involved in the murder. As such, in the absence of any viable evidence, conviction u/s 302 PPC cannot sustain. Now, the applicability of section 6 of the Anti-

Terrorism Act, punishable u/s 7 of the Act has been a long standing controversy before the Courts. The recognized principle now is that all acts mentioned under subsection (2) of S. 6 of the ATA, if committed with design/motive to intimidate the government, public or a segment of the society, or alternatively evidence has been collected by the prosecution to suggest that the aforesaid aim is either achieved or otherwise appears as a by-product of the said terrorist activities are to be dealt with under the Anti-Terrorism Act. The Hon'ble Apex Court, in the case of ***GHULAM HUSSAIN and others v. THE STATE and others*** **(PLD 2020 SC 61)** has been pleased to observe that:-

> *For what has been discussed above it is concluded and declared that for an action or threat of action to be accepted as terrorism within the meanings of section 6 of the Anti-Terrorism Act, 1997 the action must fall in subsection (2) of section 6 of the said Act and the use or threat of such action must be designed to achieve any of the objectives specified in clause (b) of subsection (1) of section 6 of that Act or the use or threat of such action must be to achieve any of the purposes mentioned in clause (c) of subsection (1) of section 6 of that Act. It is clarified that any action constituting an offence, howsoever grave, shocking, brutal, gruesome or horrifying, does not qualify to be termed as terrorism if it is not committed with the design or purpose specified or mentioned in clauses (b) or (c) of subsection (1) of section 6 of the said Act. It is further clarified that the actions specified in subsection (2) of section 6 of that Act do not qualify to be labeled or characterized as terrorism if such actions are taken in furtherance of personal enmity or private vendetta.*

13. Nothing was brought on record to suggest that the appellant Haji Naik Muhammad possessed the intention, design or purpose to cause harassment to any part of the society, which otherwise fails anyway since the prosecution witnesses failed to dispose regarding the exact place of incident and the population in the vicinity to suggest that the people in the area were harassed or frightened in any manner. For an act to be considered terrorism, it must either be an offence punishable u/s 302 PPC where the victim is a police officer, member of the armed forces or a public servant. Even otherwise, if S. 302 PPC was considered, the presence of deceased-martyr HC Naveed Tanoli in his official capacity is at dispute. Prosecution witnesse No. 2 deposed that the deceased was not posted at the given place of incident, as such was

not considered a police official at the given time. Prosecution also alleged that he was available in his civil clothing at the time of the incident, which further strengthens said point. However, since the conviction u/s 302 PPC cannot sustain, this applicability does not stand. The other acts considered terrorism are those consisting of two parts; the *actus reus* being where as a result harassment and fear is created and the *mens rea*, that being the intention to cause such harassment or fear. The Hon'ble Apex Court further observed in the case of ***Ghulam Hussain*** *(supra)* that:-

> *"Now creating fear or insecurity in the society is not by itself terrorism unless the motive itself is to create fear or insecurity in the society and not when fear or insecurity is just a byproduct, a fallout or an unintended consequence of a private crime. In the last definition the focus was on the action and its result whereas in the present definition the emphasis appears to be on the motivation and objective and not on the result. Through this amendment the legislature seems to have finally appreciated that mere shock, horror, dread or disgust created or likely to be created in the society does not transform a private crime into terrorism but terrorism as an 'ism' is a totally different concept which denotes commission of a crime with the design or purpose of destabilizing the government, disturbing the society or hurting a section of the society with a view to achieve objectives which are essentially political, ideological or religious."*

The above principles were again reiterated in the case of ***ALI GOHAR and others v. Pervez Ahmed and others*** **(PLD 2020 SC 427)**. As already noted, the elements of terrorism are missing in the present case, therefore conviction in that respect cannot sustain either. Having been guided amply by the above judgment to understand the characteristics of an action to be labelled as terrorism, this Court is left with no doubt that alleged offence cannot be equated with terrorism.

14. In view of the above discussion and circumstances, we are of the considered view that the prosecution has failed to discharge its burden against the appellants Sher Zaman and Khalid beyond reasonable shadow of doubt, but has proven its case against the appellant Haji Naik Muhammad u/s 324, 353 PPC and S. 25 of the Sindh Arms Act. Resultantly, conviction and sentence awarded to the appellants Sher Zaman and Khalid through impugned judgment are

hereby set aside and they are acquitted of the charges. They are ordered to be released forthwith if not required in any other custody case. The conviction and sentence awarded to appellant Haji Naik Muhammad u/s 302(b) PPC and u/s 7 of the Anti-Terrorism Act are also set aside, however his conviction and sentence u/s 324, 353 PPC and u/s 25 of the Sindh Arms Act are maintained. Benefit of S. 382(b) Cr.P.C is also maintained.

15. Captioned Special Criminal Anti-Terrorism Appeal No. 161 of 2019 stands disposed of in the above terms.

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