IN THE HIGH COURT OF SINDH, KARACHI

Spl. Criminal Anti-Terrorism Appeal No. 346 of 2019

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

Appellants:	Javed Kalia, Irfan Kana, Saifullah and Khalid through Mr. Raj Ali Wahid and Mr. Nadeem Ahmed Azar, advocates.
Respondent:	The State through Mr. Muhammad Shahzad Anjum, Special Prosecutor Rangers assisted by Mr. Abrar Ahmed Kichchi, Additional Prosecutor General, Sindh.
Date of hearing:	19.01.2022
Date of Judgment:	27.01.2022

JUDGMENT

KHADIM HUSSAIN TUNIO, J- The appellants Javed Kalia, Irfan Kana, Saifullah and Khalid have filed the present appeal, challenging the judgment dated 17.12.2019 *(impugned judgment)* passed by the leaned Anti-Terrorism Court-II, Karachi *(trial Court)* in Special Case No. 501/2018, emanating from Crime No. 142/2012 under section 302 and 34 PPC r/w section 7 of the Anti-Terrorism Act *(*ATA, 1997*)* registered at Pakistan Bazar Police Station, whereby appellants were convicted and sentenced for causing the death of deceased Nazish under section 302 PPC as well as under section 6-A of ATA punishable under section 7-A of ATA to imprisonment for life and to pay an amount of Rs.100,000/- *(Rupees one lac only)* each as compensation to the legal heirs of the deceased, failure whereof, they were ordered to undergo SI for six months more. Benefit of Section 382-B, Cr.P.C. was however extended to the accused.

2. The brief facts of the prosecution case are that on 23.08.2012, complainant Haseebullah's son Nazish Iraqi was on his way back home after praying *Asr* at his local mosque and was accompanied by his brother Najeebullah when they were attacked by six assailants boarded on three motorbikes who opened fire at the two indiscriminately. Najeebullah took cover to save himself, whereas Nazish was shot five times. The assailants

escaped in the meantime and Najeebullah shifted his brother to the Qatar Hospital and was referred to Agha Khan Hospital where Nazish expired during treatment. After the deceased's burial ceremony, investigation officer recorded the complainant's 154 Cr.P.C statement who implicated the present appellants and two others and on that basis, the FIR was registered.

3. After completion of investigation, Investigating Officer (IO) submitted a challan against the accused persons. Necessary documents were provided to the accused u/S 265-C Cr.P.C. and then formal charge was framed to which they did not plead their guilt and claimed to be tried. In order to substantiate its case, prosecution examined eleven witnesses namely PW-1 **Muhammad Haseebullah**, PW-2 **Muhammad Nasir** who was declared hostile, PW-3 **SIP Mohammad Ibrahim**, PW-4 **Najeebullah**, PW-5 **ASI Ishaq**, PW-6 **Mohammad Nasir**, PW-7 **Inspector Nisar Ahmed Qureshi**, PW-8 **MLO/Dr. Jagdesh Kumar**, PW-9 **Inspector Mohammad Rasheed**, PW-10 **ASIP Qaiser Alam**, PW-11 **Sub-Inspector Javed Akhtar** and produced a number of documents and other items. Statement of accused were recorded under section 342 Cr.P.C. wherein they denied all the allegations levelled against them and stated that they had been falsely implicated on the pretext of political rivalry.

4. After evaluating the evidence on record, learned trial Court convicted the appellants and sentenced them as stated in supra para.

5. Learned counsel for the appellants have contended that the evidence of the complainant is hear-say since he did not see the incident for himself, nor could identify the accused he nominated in his statement before the police; that previous enmity, which is an undisputed fact of this case, cannot be construed as terrorism; that PW-2 Muhammad Nasir has been declared hostile by the trial Court; that there are many discrepancies in the evidence of the prosecution witnesses and they have given contradictory statements; that PW-1 Muhammad Haseebullah had collected five empties and handed them over to the IO, the safe custody of which during the intervening period could not be ascertained; that the PW-9 Rasheed in his cross-examination admitted that Section 7 of ATA is not

made out against the accused; that nothing has been recovered during the course of investigation besides the empties and the clothes of the deceased; that the accused were already arrested and confined at Central Prison, Karachi at the time of their arrest; that as per PW-2, all the accused were wearing helmets at the time of the incident, therefore their identification by the witnesses is doubtful. In support of their submissions, they have cited the caselaw titled *Farooq Ahmed v. The State* (2020 SCMR 78), *Sajan Solangi v. The State* (2019 SCMR 872), *Tahir Sarwar alias Shohab and others v. The State* (2007 PCrLJ 1682), *Fazal Hussain alias Faqira and others vs. The State* (2020 PCrLJ 311), *Jalal Hassan v. Ameer Hamza Awan* (2019 MLD 1170) and *Atta Ullah alias Qasim v. The State* (PLD 2006 Kar. 206).

6. Conversely, learned Special Prosecutor Rangers assisted by the learned Additional Prosecutor General has supported the impugned judgment while contending that there is sufficient evidence on the record to uphold the conviction awarded to the appellants; that ocular account has been supported by the medical evidence; that the complainant has secured empties and handed them over to the Investigating Officer; that the parties known to each other and there is no case of mistaken identity. He has referred to the case law titled *Islam v. The State* (PLD 1962 (W.P) Lah. 1053), *Allah Dad and others v. The State* (PLD 1978 SC 01), *Muhammad Mansha v. The State* (2001 SCMR 199), *The State v. Abdul Ghaffar* (1996 SCMR 678), *Khursheed Ahmed v. The State* (1983 SCMR 513), *Riaz Hussain v. The State* (2010 MLD 1127), *Muhammad Saleem v. The State* (2018 SCMR 1001), *Muhammad Lateef v. the State* (PLD 2008 SC 503), *Naeem Ullah Niazi v. The State* (2017 PCrLJ(N) 147), *Khalid Javed Gillan and another v. The State* (1984 PCrLJ 100), *Gana Gul v. The State* (2002 PCrLJ 1490), *Khizr Hayat v. The State* (2011 SCMR 429), *The State through A.G. NWFP v. Sarfaraz and 3 others* (2011 SCMR 641) and *Shaikh Riazuddin v. The State* (2019 PCrLJ 622).

7. We have heard the arguments advanced by the learned counsel for the appellants as well as Special Prosecutor Rangers assisted by Additional Prosecutor General Sindh and have gone through the entire evidence available on the record.

8. The essence of the prosecution's allegations is that the present appellants accompanied by two others, boarded on three motorbikes, armed with weapons, description of which finds no mention anywhere, shot at the deceased while he was returning from *Asr* prayers while his brother took cover and saved himself. The FIR was lodged after a delay of two days and to explain the same, the complainant at the time of his deposition stated that he had informed the police that he would indulge into legal proceedings after the burial of his son. The incident took place on the 23rd of August, the burial took place on the 24th after Friday's congregational prayers and the FIR was lodged on the 25th when the IO recorded the complainant's 154 Cr.P.C statement. Even if the complainant's "explanation" for the delay is considered, he was expected like any other reasonable victim to a crime to approach the police at his earliest which would have been the 24th, however he chose to continue the delay in the proceedings for another day. Needless to say that such delay cannot simply be brushed aside as it assumes great significance and could be positively attributed to consultation *(especially when there was admitted enmity between the parties as in this case)* and calculated preparations, keeping the possibility to implicate anyone whom ultimately the prosecution might wish to nominate. Reliance in this respect is placed on the case law titled ***Muhammad Rafique v. The State*** **(2014 SCMR 1698)**. Though in the present case, the possibility of consultation need not be assumed as the same has been admitted by the complainant in his 154 Cr.P.C statement. Numerous witnesses were examined before the trial Court, many of whom provided no aid to the prosecution case. Prosecution examined, firstly, the complainant Haseebullah who is the father of deceased Nazish. His deposition (Ex. P-1) is of no help to the prosecution as he squarely admits that he had not seen the incident for himself and had only heard gunshots which made him inquire about his son's whereabouts. He also admits to political rivalry amongst the two parties, one being supporters of the People's Party and the other belonging to the MQM. Prosecution examined Muhammad Nasir, brother of the deceased who in his examination-in-chief (Ex. P-5) completely shattered the case of the prosecution while deposing that the accused were nominated on the

instigation of People's Party higher-ups at which point he was declared as hostile by the prosecution. In his cross-examination, he deposed that all the accused who had opened fire on the deceased were wearing helmets. The sole eye-witness to the incident, Najeebullah, brother of the deceased, (Ex. P-7) admitted the enmity between the two parties on the pretext of political rivalry and also admitted that his father (the complainant) and the deceased even had cases pending against them for crimes committed due to the animosity brewing between the parties. It is a matter of record that both the parties have lodged a plethora of FIRs against each other and co-accused Noshad who was nominated in the present case was also killed after the incident. PW Haseebullah, in his cross-examination, also admitted that the day of the incident was the fourth day of Eid and they were returning from the mosque after praying Asr and various pull-carts were also present in the vicinity. He also admitted that the place of incident itself was a thickly populated area. The complainant Haseebullah also deposed in his examination-in-chief that his son, the deceased, was shifted to the hospital by his other son PW-4 Najeebullah and people of the neighbourhood. When viewed together, both these witnesses admitted the presence of other independent witnesses at the place of incident *i.e.* the neighbours that took the deceased to the hospital, people returning from the Asr prayer, bystanders and pull-cart owners. Yet, no one besides the relatives of the deceased came forward to testify as to what had happened on the day of the incident, those who did all seem to be interested witnesses; therefore little, if any, reliance can be placed upon them. It will not be out of place to mention here that the statement of an interested witness, ordinarily, needs corroboration which is always used to support the statements of witnesses, when the Court reaches the conclusion that the version of P.Ws. is prima facie, correct, but in the instant case no corroboratory or confirmatory evidence is available against the accused persons. Reliance in this regard is placed on the case of ***Zahoor Ilahi v. State*** **(1997 SCMR 385)**. The recording of statement of an independent person is not absolute rule, but in the present case, ocular witnesses being interested, the rule of caution required independent corroboration of testimony of related witnesses. It needs no reiteration that conviction must

be founded on unimpeachable evidence and certainty of guilt. The Honourable Supreme Court in the case of ***Safdar Baloch alias Ali v. The State*** **(2019 SCMR 1412)** has observed that:-

> "Criminal liability is to be essentially settled on evidentiary certainty and not on moral satisfaction or factualities incompatible with evidence based upon truth. Prosecution's case against the appellants cannot be viewed as beyond reasonable doubt and thus conviction cannot be maintained without potential risk of error."

9. It is also a matter of record that PW-4 Najeebullah had taken his brother to the hospital and in doing so, it is reasonable to assume that he himself would have received blood stains on his clothing akin to those found on the deceased's clothing that was recovered, yet the same were not recovered by the investigation officer nor produced by the said witness before the police voluntarily so as to support his own version of events and also establish his presence beyond reasonable doubt. The Hon'ble Apex Court, in the case of ***Mst. Sughran Begum v. Qaiser Pervez*** **(2015 SCMR 1142)** observed that:-

> "20. Both the eye-witnesses admitted that their clothes were stained with the blood of the deceased while lifting and handling him but the investigating officer, otherwise showing extraordinary interest in the case, ***did not take the same into possession because if these were sent to the Chemical Examiner for examination and grouping with that of the blood stained clothes of the deceased, the same would have provided strongest corroboration to the, testimony of the two eye-witnesses***. This omission strikes at the roots of the case of the prosecution and bespeaks volumes about the dishonest and false claim of the said witnesses."
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> ***(emphasis supplied)***

10. Besides the testimonies of interested and related witnesses who have a solid animus to falsely implicated the present appellants and also lack independent corroboration which results in their depositions being taken with a grain of salt, five crime empties were recovered from the place of incident by the complainant and then handed over to the police. Place where the same were kept during the intervening period and under who's supervision were they available finds no answer. How did the police not recover the same on the day of the incident *i.e.* 23.08.2012 finds no

explanation. Regardless, the five empties were sent to the ballistics examiner, report for which indicated that the same were fired from a 9mm pistol. This piece of evidence would have supported the prosecution's case had any of the witnesses deposed with regard to the weapons possessed by the assailants who had attacked the deceased. PW Najeebullah, otherwise making bold assertions and clearly remembering whether the assailants had helmets or not, did not say a word regarding the weapons used. It is quite surprising for us to note that when he was able to remember a minor detail such as the helmets, what stopped him from noting what kind of weapons were possessed by the assailants. *"Stabit praesumptio do nec probetur in contrarium"* a legal maxim that translates to *"A presumption will stand good until the contrary is proved."* The presumption regarding the bullet empties could also be that they were in-fact not related to the crime, but to support the case of the prosecution and to settle their score of enmity, the same were managed by the complainant and then handed over to the police. Nothing has been brought on record by the prosecution to suggest otherwise, therefore the presumption stands and the recovery is of no help to the prosecution. In these circumstances, circumstantial evidence linking the appellant to the offence is entirely lacking and certainly does not meet the guidelines. In this respect, reliance is placed on the case law reported as ***Azeem Khan and another v. Mujahid Khan and others*** **(2016 SCMR 274)**. As far as medical evidence is concerned, the MLO found five distinct injuries on the body of the deceased and all these injuries were admittedly caused by a firearm. What the prosecution fails to understand is that medical evidence, at best, can be confirmatory evidence of any fact. It cannot furnish corroboration as to the identity of the offender, it can only furnish corroboration to the extent of the weapon used in the crime, locale of injury and the cause of death. It would have been helpful to the prosecution if the crime weapons were known by the prosecution. In this respect, reliance is placed on the case of ***Machia and 2 others v. The State*** **(PLD 1976 SC 695)**.

11. A critical analysis of the prosecution evidence shows that the same is based on the ballistic examiner's report stating that the empties were fired from a 9mm weapon and the ocular account furnished by PW-4

Najeebullah which too is full of material irregularities. We find that the incident had not taken place in a manner as stated by the prosecution. There are strong circumstances in the prosecution case to prompt a jurisprudent assumption that the appellants were never present at the place of incident and due to the animosity admitted by the parties, they were substituted with the real culprits. While enmity can prove to be a daring motive, it can also be a strong reason for false implication. It is rather surprising to note that in the absence of any circumstances calling for a conviction, trial Court convicted the appellants while ignoring glaring discrepancies in the prosecution case, contrary to proper criminal administration of justice. It is well settled principle of criminal administration of justice that no conviction can be awarded to an accused until and unless reliable, trustworthy and unimpeachable evidence containing no discrepancy casting some cloud over the veracity of prosecution story is adduced by the prosecution. We are of the considered view that prosecution could not bring home the guilt of appellant without reasonable doubt. In case titled ***Tariq Ali Shah and another v. The State and others*** **(2019 SCMR 1391)**, the Hon'ble Supreme Court has held as follows:-

> "Witnesses do not appear to have come forward with the whole truth and given the formidable past hounding both sides, patent discrepancies cannot be viewed as trivial… It would be unsafe to maintain the conviction. Criminal Appeal No.299-L/2017 is allowed; impugned judgment is set aside; the appellant is acquitted from the charge and shall be released forthwith, if not required in any other case. As a natural corollary, Criminal Appeal No.298-L/2017 is dismissed."

12. It is a settled principle of law that in case of doubt, the benefit arising thereon goes to the accused as a matter of right and not as a matter of grace, and there is no requirement to suggest that there must be many circumstances creating doubt as even a single circumstance creating reasonable doubt in a prudent mind about the guilt of the accused makes him entitled to its benefit. Reliance in this respect is placed on the cases of ***Tariq Pervaiz v. The State*** **(1995 SCMR 1345)** and ***Haji Kasim Khan v. Qadeer Khan*** **(2018 YLR 282)**.

13. For what has been discussed above, this Court has reached the undisputed conclusion that prosecution has failed to prove its case against the appellants beyond a reasonable doubt, therefore instant Special Criminal Anti-Terrorism Appeal is allowed, the conviction and sentence of the appellants recorded by the learned trial Court are hereby set aside and they are acquitted of the charge by extending them benefit of doubt. They shall be released forthwith if not required in any other custody case.

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