IN THE HIGH COURT OF SINDH, KARACHI

Spl. Criminal Anti-Terrorism Jail Appeal No. 187 of 2019

Before:

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

Appellant**:**	Basharat Hussain son of Fazal Hussain bthough Mr. Moula Bux Bhutto, advocate.
Complainant:	Muhammad Ubaidullah through Mr. Abdul Hafeez, advocate.
Respondent**:**	The State through Mr. Muhammad Iqbal Awan, APG Sindh.
Date of hearing**:**	15.02.2022
Date of announcement**:**	23.02.2022

J U D G M E N T

KHADIM HUSSAIN TUNIO, J- Through instant appeal, appellant Basharat Hussain has challenged the judgment dated 16.04.2019 *(impugned judgment)*, passed by the learned Judge Anti-Terrorism Court-III, Karachi in Special Case No. A-08/2014 *(Re-State v. Basharat Hussain)* culminated from Crime No. 273/2013 of PS. Al-Falah Karachi under sections 302/324 PPC r/w section 7 ATA, 1997. Through the impugned judgment, appellant was convicted u/s 302(c) PPC and sentenced to suffer imprisonment for life, convicted u/s 7(a) of the ATA 1997 and sentenced to imprisonment for life with a fine of Rs.100,000/-, in default whereof to undergo further imprisonment for 03 months, convicted u/s 324 PPC and sentenced to rigorous imprisonment for five years with fine of Rs.20,000/-, in default whereof to undergo further imprisonment for 02 months, convicted u/s 7(b) ATA 1997 and sentenced to rigorous imprisonment for ten years with fine of Rs.20,000/-, in default

whereof to undergo further imprisonment for 02 months and to pay compensation of Rs.250,000/- u/s 544/A Cr.P.C to the legal heirs of the deceased Musaib son of Umar Abdul Aziz. Benefit of S. 382(b) Cr.P.C was extended to him.

2. Precisely, facts of the prosecution case as disclosed in the FIR are that the appellant and the complainant party were at loggerheads with each other over landed property bearing No. P-239 Punjab Town, Al-Falah. On 14.11.2013, the complainant was praying Ish'a when he heard gun shots and came out of the Shamsi mosque. He saw a group of people heading towards Punjab Town where he came to know that the appellant had shot at his nephew Musaib and brother Umar Abdul Aziz and during the firing by appellant, two neighbours namely Mst. Razia Bibi and Zaid Affan also received injuries. Musaib and Mst. Razia Bibi succumbed to their injuries on the way to the hospital whereas Umar Abdul Aziz and Zaid Affan were admitted to the hospital for treatment. Thereafter, the complainant appeared at the police station and lodged the FIR.

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, a formal charge was framed against the appellant to which he pleaded not guilty and claimed to be tried.

4. At the trial, prosecution, in order to prove its case, examined as many as thirteen PWs, namely PW-1 **Muhammad Ubaidullah** *(complainant)*, PW-2 **Umar Abdul Aziz**, PW-3 **SIP Saeedullah**, PW-4 **Zaid Afan**, PW-5 **Naseem Umar Farooqi**, PW-6 **Attaullah**, PW-7 **Doctor Nasreen Qamar**, PW-8 **Doctor Afzal**, PW-9 **Mohammad Ibrahim**, PW-10 **I.O Sub-Inspector Ghazanfar**, PW-11 **I.O Inspector Tariq Ali**, PW-12 **Doctor Dileep Khatri** and PW-13 **In-charge FU Farhaj Bukhari**. They produced numerous documents

in their evidence along with other items which were duly exhibited. Thereafter prosecution side was closed. Statement under section 342 Cr.P.C. of appellant was recorded in which he denied the allegations made against him in *toto* and pleaded his false implication in the case while stating that the people of his neighbourhood wanted to oust him. However, he did not examine himself on oath, although he examined CMO Central Prison Ghulam Mohammad as DW-1.

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

6. Learned counsel for the appellant contended that the impugned judgment is not sustainable in law; that the appellant has been falsely implicated as there was a dispute between him and the complainant party over transfer of property; that the complainant wanted to oust the appellant from his neighbourhood due to sectarian differences and when he failed, he involved him in the instant case; that S. 7 of the Anti-Terrorism Act was not applied in the FIR, but was subsequently added later on; that the appellant had lodged FIR No. 82 of 2013 against the complainant party at Police Station Al-Falah when they had gathered in front of his house armed with weapons with intention to oust him and his family; that there are material contradictions in the evidence of the prosecution witnesses; that the alleged act committed by the appellant does not fall within the purview of S. 7 of the Anti-Terrorism Act, as such he prays for the acquittal of the appellant.

7. Conversely, learned APG Sindh has fully supported the impugned judgment while arguing that the prosecution has proved, beyond reasonable doubt, by examining injured witnesses and independent eye-witnesses including PW-5, 6 and 9 that the appellant committed the offence; that ocular accounts also find

support by medical evidence; that contradictions, if any, in the evidence of the prosecution witnesses are minor and may be ignored; that the appellant has failed to bring on record any evidence to substantiate his defence plea and DW-1 has given general observations with regard to the presence of a foreign body in the appellant's leg. In support of his contentions, learned APG relied on the case law reported as ***Muhammad Mansha v. The State*** **(2001 SCMR 199)**, ***Abdul Majeed v. The State*** **(2008 SCMR 1228)**, ***Ijaz Ahmad v. The State*** **(2009 SCMR 99)**, ***Amjad Ali and others v. The State*** **(PLD 2017 SC 661)**, ***Waris Ali and 5 others v. The State*** **(2017 SCMR 1572)**, ***Tahir Mehmood alias Achoo v. The State*** **(2018 SCMR 169)**, ***Muhammad Bilal v. The State and others*** **(2019 SCMR 1362)**, ***Akhmat Sher and others v. The State*** **(2019 SCMR 1365)**, ***Farooq Ahmed v. The State and another*** **(2020 SCMR 78)**, ***Nawab Siraj Ali and others v. The State*** **(2020 SCMR 119)** and ***Muhammad Farhan alias Irfan v. The State*** **(2021 SCMR 488)**.

8. Learned counsel for the complainant, while adopting the arguments advanced by the learned APG, further contended that the offence committed by the appellant fell within the ambit of S.7 of the Anti-Terrorism Act and was rightfully tried by the Anti-Terrorism Court. In support of his contentions, he has cited the case law reported as ***Mirza Shaukat Baid v. Shahid Jamil*** **(PLD 2005 SC 530)**, ***Zulfiqar Ali v. The State*** **(2008 SCMR 796)**, ***Faisal Mehmood v. The State*** **(2010 SCMR 1025)**, ***Khuda e Noor v. The State*** **(PLD 2016 SC 195)**, ***Muhammad Sikandar v. The State*** **(PLD 2019 Islamabad 527)** and ***Ghulam Hussain v. The State*** **(PLD 2020 SC 61)**.

9. We have heard the learned counsel for the respective parties and perused the record with their assistance.

10. It is the prosecution case that the incident took place on 14.11.2013 while the complainant was offering Ish'a prayer in the

Shamsi mosque of their neighbourhood. That is when he heard gun shots and exited the mosque, only to see a group of people heading towards Punjab Town where the appellant resided. When he reached at the place, he was informed by the bystanders that the appellant had allegedly entered the shop of his brother Umar Abdul Aziz, House No. P-240, and had opened fire on his nephew Musaib and his brother Umar. He was also informed about two neighbours namely Mst. Razia Bibi and Zaid Affan receiving injuries. All four injured were taken to the hospital, however Musaib and Mst. Razia Bibi succumbed to their injuries during the transport, whereas the other two underwent treatment for their wounds. The motive set up by the prosecution was that they had a dispute with the appellant over the purchase of House No. P-239 belonging to him. Such a fact has been admitted by the appellant in his statement u/s 342 Cr.P.C as well. A prudent perusal of the evidence available on the record brings the Court to the conclusion that prosecution has undeniably proven its case against the appellant for the offence alleged against him by examining numerous witnesses whose evidence remained un-shattered on material aspects of the case even after lengthy cross-examinations. The complainant deposed in his examination-in-chief that "*Since it was 9th Muharamul Haram due to which all communication systems were closed except the PTCL, due to which we could not call police on the spot. Thereafter, on 15-November 2013 at about 02:00 am I lodged an FIR at P.S Alfalah against the accused Basharat Hussain s/o Fazal Hussain alleging therein the fact about two murders and two injured persons.*" The incident took place at the time of Ish'a prayer and is noted to be 8 pm on the 14th of November, whereas the FIR was lodged on 15th of November 2013 at 2 am, roughly 6 hours after the incident. A presumption of promptitude is attached to the lodging of FIR since the complainant has also explained why he had failed to call the police on the spot immediately and then went back to his

home, arranged transport for the injured and then appeared at the police station. The prompt lodging of FIR controverts any assumptions of substitution of the appellant. Moreover, PW-3 SIP Saeedullah visited the place of incident within the next hour of lodging of FIR; *i.e.* 3 am and collected blood stained earth, 1 empty of 12 bore, 2 empties of .30 bore and 2 used coins of .30 bore which he had sealed on the spot. The appellant was also arrested on the same day *i.e.* at 8 pm, he was pointed out by the complainant to SIP Saeedullah whereafter he was arrested and brought to the police station where during interrogation, he agreed to present the weapons he had used in the commission of the offence. The weapons, a .30 bore pistol with 8 bullets in the magazine and a 12 bore gun along with 2 live rounds *"Kartoos"* and one empty cartridge, were secured from a room within the house of the appellant. The complainant, who had accompanied SIP Saeedullah during this seizure, signed over the memo of recovery of such items as well. PW-2 Umer Abdul Aziz, victim and eye-witness of the incident deposed that he was present at his cousin's shop along with his son Musaib when the appellant came out of his house and opened fire at the shop, hitting Musaib first which prompted PW-2 to rescue his son and in doing so, the appellant fired at PW-2, injuring him as well. Learned counsel for the appellant contended that no independent witnesses were examined by the prosecution, however the same is incorrect as multiple private witnesses came forward to depose against the appellant. PW-5 Naseem Farooq who was a bystander deposed in his examination-in-chief that *"Thereafter he (appellant) went in his house and from the front door of his house he went towards the shop situated on the front side of his house when he again made fire which hit to Umar Abdul Aziz and he became injured and second fire made by him hit to one Musaib Abdul Aziz and he succumbed to his injuries."* PW-6 Attaullah, a shopkeeper from the area, was also

examined by the prosecution who deposed that *"meanwhile accused Basharat did direct fires upon Musaib Bin Umar who just entered my shop from back door. Musaib Bin Umar sustained bullet injuries and fell down. When Umar Abdul Aziz who was hiding alongwith me behind the cabinet saw this happening he got panic and came out from the cabinets shouting for help for his son Musaib Bin Umar and reached to Musaib for help, seeing this accused Basharat, who was standing outside the front door of my shop started direct fires upon him. Consequently, he received bullet injuries on his back and calf and he also fell down."* Such facts were corroborated by the PW-8 MLO Dr. Afzal who found the cause of death to be *"Cardio respiratory failure due to homographic shock, due to chest injury resulting from firearm projectile."* He also admitted in his cross-examination that *"It is correct to suggest that projectile was not secured from the body of deceased during its post-mortem"* which proves and corroborates the recovery of "sikas" by the SIP Saeedullah. As such, medical evidence is also in full conformity with the ocular account.

11. The contention of the learned counsel for the appellant regarding the prosecution witnesses being related to the complainant and deceased inter-se and interested is of little, if any, assistance to the appellant. Despite the close relationship of the complainant and P.Ws with the deceased, their evidence after careful consideration is found trustworthy. It is a settled principle of law that mere relationship with the deceased is not a ground to discard otherwise trustworthy evidence provided that there is no ill will or enmity between the witnesses and the appellant which was not present in this case. Reliance in this respect is placed on the case of ***Nasir Iqbal alias Nasra and another v. The State*** **(2016 SCMR 2152)**. Moreover, the deceased was murdered in the presence of his own father. It is unusual for him to set free the real culprit and nominate an innocent person instead and that too without any

justifiable reason or rhyme. It appears extremely unreasonable to even consider such a fact. Reference is made to the case of ***Islam Sharif v. The State*** **(2020 SCMR 690).** Even if the evidence of other related and "interested" witnesses is taken out of consideration, the evidence of PW-5 a bystander and PW-6 a shopkeeper, both independent witnesses, is straight forward, confidence inspiring and trustworthy and their presence at the time of incident has been explained, therefore their evidence alone is sufficient to hold the appellant guilty of the charge when perused alongside the medical evidence. 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. 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 counsel for the appellant could not point out any material discrepancy in the evidence of the eye-witnesses besides a few minor ones. The defence plea agitated by the appellant is of little help to him as well. DW-1 Ghulam Muhammad who is the CMO at Central Prison Karachi examined the appellant and found a foreign body in his leg, however he deposed in his examination-in-chief that whether the same is a bullet or not is left undetermined and that the same was in no way, shape or form harmful to the appellant and did not require extraction. The case of the prosecution is firmly structured on ocular account, furnished by the witnesses, viewed from any angle, natural and trust-worthy. Duration of the injury coincides with the fatality that befell the

deceased. Wounds on the person of deceased are consistent with the weapon used and allegedly recovered. The witnesses are in comfortable unison on all the salient aspects of the incident as well as details collateral therewith. The cross-examination remained inconsequential inasmuch as nothing adverse could be solicited from the witnesses except for a volley of suggestions, vehemently denied. These various pieces of evidence are inexorably pointing to the appellant's guilt with no space to entertain any hypothesis of innocence or substitution.

12. However, as far as the conviction of the appellant u/s 7 of the Anti-Terrorism Act is concerned, suffice it to say that the same cannot sustain. Learned trial Court convicted the appellant for the murder of Musaib and causing injuries to Umer Abdul Aziz, however refused to believe the version of the prosecution with regard to the appellant causing injuries to Zaid Afan and Mst. Razia Bibi. 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 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."*
>
> ***(emphasis supplied)***

13. At no point was the prosecution able to prove through cogent evidence that the appellants possessed the animus to commit acts of terrorism besides vague statements and an admission during interrogation before the police. As reiterated in ***Ghulam Hussain's case*** *(supra)*, S. 6 of the Anti-Terrorism Act is a strict *mens rea* offence; where it is important for the prosecution to establish such *mens rea* alongside the *actus reus*, which alas was not done in the present case. It was also held in the case of ***Ghulam Hussain*** (supra) that creation of fear and insecurity in the society is not by itself terrorism unless the motive for the same is to create fear or insecurity in the society and where fear and insecurity are the by-product of an act done to satisfy a personal vendetta, the same does not constitute terrorism either. The above principles were again reiterated in the case of ***Ali Gohar and others v. Pervez Ahmed and others*** **(PLD 2020 SC 427)**. As far as the injuries caused to PW-2 Umar Abdul Aziz and deceased Musaib are concerned, the same were done in pursuit of personal vendetta and to settle the scores in a long-standing enmity between the parties over the sale of the appellant's house, an aspect of the case admitted by both sides. Although prosecution witnesses tried to bend the story to show that the appellant, in an erratic state of mind opened fire on everyone, the same has already been disbelieved by the trial Court. It could reasonably be presumed that the same was done to shape the incident as an act of terrorism to satisfy their vengeance and get the appellant a much harsher punishment than what he deserves. It is also a matter of record that S. 7 of the Anti-Terrorism Act was initially not applied in the FIR, but was rather later on added. PW-3 SIP Saeedullah also only

recovered two bullet casings, one of which was shot at PW-2 Umar Abdul Aziz and the other at the deceased Musaib. Despite not believing the story of the prosecution in this respect, learned trial Court proceeded to convict the appellant u/s 7 of the Anti-Terrorism Act, which for the above stated reasons cannot sustain. 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. As far as the conviction u/s 302(c) PPC is concerned, it is only made applicable where murder is committed in the spur of the moment due to sudden provocation. Nothing was brought on record to suggest that the appellant committed the murder of deceased Musaib due to any sudden provocation as sudden provocation is rarely applicable where a strong motive to commit the crime is present. In this case, the appellant had been at loggerheads with the complainant party for a while which he admits in his statement u/s 342 Cr.P.C statement and in pursuit of that, he attacked upon PW-2 Umar, injuring him and killing his son Musaib. As such, conviction recorded u/s 302(c) PPC is converted to a conviction u/s 302(b) PPC with no modification to the sentence.

15. In view of the above discussion and circumstances, we are of the considered view that the prosecution has succeeded to bring at home the guilt of the appellant Basharat Hussain beyond reasonable doubt. However, the conviction and sentence awarded to the appellant u/s 7(a) and 7(b) for the reasons above, being not sustainable, are set aside. So also, the conviction awarded to the appellant u/s 302(c) PPC being wrongfully applied is converted to one u/s 302(b) PPC with the sentence being maintained, however his conviction and sentence u/s 324 PPC is maintained. The order

regarding payment of compensation u/s 544/A PPC is maintained as well. Benefit of S. 382(b) Cr.P.C is also maintained.

16. Captioned Special Criminal Anti-Terrorism Jail Appeal No. 187 of 2019 stands disposed of in the above terms.

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