

THE HIGH COURT OF SINDH AT KARACHI

Special Criminal Anti-Terrorism Jail Appeal No.05 of 2020

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

Appellant: Muhammad Jumma S/o Fayyaz Hussain
(Appellant produced in custody).

Respondent: The State, through Ms. Sema Zaidi, Deputy
Prosecutor General Sindh.

Date of Hearing: **08.12.2020**

J U D G M E N T

NAZAR AKBAR, J.- Appellant Muhammad Jumma son of Fayyaz Hussain was tried by learned Judge, Anti-Terrorism Court-XVI, Karachi, in Special Cases Nos.241 and 241-A of 2019, arising out of FIRs Nos.85 and 86 of 2019, both registered at P.S. Sir Syed, Karachi for offences under Sections 353/324/34, PPC read with Section 7 of the Anti-Terrorism Act, 1997 and Section 23(1)(a) of Sindh Arms Act, 2013. On conclusion of trial, by judgment dated **05.10.2019**, appellant was convicted and sentenced as under:-

- i. The accused Muhammad Jumma S/o Fayyaz Hussain is hereby convicted for the offence u/s 324 PPC and is sentenced to undergo the simple imprisonment for 10 years with fine of Rs.50,000/- and in case of failure to pay the fine, he shall serve SI for six months more.
- ii. The accused is hereby also convicted for the offence u/s 353 PPC and is sentenced to undergo simple imprisonment for 02 years with fine of Rs.10,000/- and in case of failure to pay the fine, he shall serve SI for three months more.
- iii. The accused is hereby also convicted for the offence u/s 7(b) of ATA 1997 and is sentenced to undergo the simple imprisonment for 10 years with fine of Rs.50,000/- and in case of failure to pay the fine, he shall serve SI for six months more.
- iv. The accused is hereby also convicted for the offence u/s 7(1)(h) ATA 1997 and is sentenced to undergo simple imprisonment

for 05 years with fine of Rs.30,000/- and in case of failure to pay the fine, he shall serve SI for three months more.

- v. The accused is hereby also convicted for the offence u/s 23(I)(A) SAA 2013 and sentence him to undergo simple imprisonment for seven years with fine of Rs.50,000/- and in case of failure to pay the fine, he shall suffer SI for three (03) months ore.
- vi. The property of accused Muhammad Jumma as defined in section 02(p)(a) of ATA 1997 are also liable to be forfeited as provided under section 7 (2) of ATA 1997.

Benefit of Section 382-B Cr.P.C. was also extended to accused.

2. Precisely the facts of the prosecution case as per the FIR are that on **22.02.2019** at about 2115 hours PC Adnan of PS Shahra-e-Noor Jehan while on patrolling duty at service road Masjid Farooq Azam, Block-K, North Nazimabad signaled two motorcyclists to stop, but they run away towards Sakhi Hassan Chowrangi. The police chased them, one motorcyclist on Honda 125 motorcycle disappeared at Sakhi Hassan Chowrangi, however, the police reached close to the other motorcycle No.KLC-1719, near Govt. Degree College, 7-D/3, North Karachi at 2130 hours, the motorcyclist on seeing the police party started firing. The police also fired in retaliation, resultantly both the accused received firearm injuries and fell down. The police arrested the injured accused who disclosed their names as Muhammad Jumma (the present appellant) and the other accused succumbed to injuries on the spot was identified as Mohammad Riaz through CNIC recovered from his pocket. The police recovered one 30 bore without number pistol loaded with one round in chamber from each of the accused. In further search, one Q-Mobile red and black colour and cash Rs.1130/- were recovered from deceased Muhammad Riaz and two mobiles, one INFINIX blue colour and one OPPO black colour and cash Rs.1460/- were recovered from the appellant. The injured accused Muhammad

Jumma was shifted to hospital and therefore separate FIRs were registered against the accused Muhammad Jumma.

3. After registration of the case, the investigation was assigned to Inspector Muhammad Jaseem Khan who visited the place of incident and recorded statements of witnesses u/s 161 Cr.P.C and after completion of investigation, submitted challan against the accused under the above referred sections.

4. Trial Court ordered joint trial in both the cases as provided under **Section 21-M** of the Anti-Terrorism Act, 1997, vide order dated **22.04.2019**, Ex.4, and on the same day i.e **22.04.2019** framed joint charge against the accused at Ex.5. Accused pleaded not guilty and claimed to be tried.

5. In order to substantiate its case prosecution examined 07 witnesses viz, **PW-01** senior MLO Dr. Muhammad Naeemuddin was examined at Ex:07; **PW-02** PC Muhammad Adnan at Ex:08. **PW-03** ASI Muhammad Arif was examined at Ex:10; **PW-04** ASI Umer Hayat at Ex:11; **PW-05** Inspector Muhammad Jaseem Khan at Ex:12; **PW-06**. Learned APG gave up one prosecution witness, namely, PC Waqas at Ex:09 and on **03.08.2019** he closed the side of prosecution vide statement at Ex:13. On **21.08.2019** learned APG filed application at Ex:14 requesting the court to call Dr. Muhammad Khalid, MLO Abbasi Shaheed Hospital as prosecution witness on the ground that he has examined the accused and issued MLC, the said application was allowed on the same day and Dr. Muhammad Khalid was examined at Ex:15. Thereafter on **02.9.2019** learned APG again filed another application at Ex:16 for calling prosecution witness, namely Arish, as allegedly on the day of incident he was robbed and he had lodged an FIR No.31/2019 against unknown persons at Jauharabad Police

Station, the said application was also allowed and **PW-07 Arish** (student) was examined at Ex:17. It is pertinent to note that name of Arish was not mentioned in the list of witnesses in the challan. Thereafter, learned APG again closed the side of prosecution vide statement at Ex.18.

6. Statement of accused was recorded under **Section 342** Cr.PC at Ex.19, in which he denied the prosecution allegations, claimed his innocence and false implication in this case and stated that he has no concern with dead accused Muhammad Riaz and received firearm injury by the police on the road being an innocent passerby and prayed for justice. He neither examined himself on oath nor led any evidence in his defence.

7. The learned trial court after hearing the learned counsel for the parties and on assessment of entire evidence convicted and sentenced the appellant by judgment dated **05.10.2019** as stated above. Hence this appeal.

8. The record shows that the instant Jail Appeal against the order dated **05.10.2019** was filed through Superintendent, Central Prison, Karachi along with application under **Section 5** of Limitation Act for condonation of delay by letter dated **14.01.2020**. The appeal was admitted for regular hearing by order dated **30.01.2020** with the observation that the appeal appears to be time barred, however, the point of limitation will be decided along with appeal. The appellant has pleaded for condonation of delay in filing appeal on the ground that he is a helpless poor man and his family was unable to arrange and engage a defence counsel to prepare and file the appeal against the impugned judgment. The impugned order also shows that the appellant has filed an application in his own handwriting (Ex:6) before the trial court

stating therein that he is a poor person and is unable to engage a counsel, therefore, the trial Court by order dated **03.5.2019** has provided him a counsel on state expenses. The grounds taken by the appellant in application under **Section 5** of Limitation Act appears to be reasonable, therefore, application (MA No.478/2020) is allowed and the delay in filing of instant appeal is condoned.

9. Now coming to the merits of the instant appeal, on **08.12.2020** when this appeal was fixed before this bench, the appellant was produced in custody and we have perused the record available in file with the help of learned Deputy Prosecutor General and also minutely scanned the evidence available on record.

10. Learned Additional Prosecutor General Sindh sought for dismissal of instant appeal by contending that appellant has been fully implicated in the instant case by all the PWs, he was arrested by the police in injured condition after police encounter, therefore, prosecution has proved its case against the appellant beyond any shadow of doubt. He fully supported the impugned judgment.

11. Close scrutiny of evidence reflects that prosecution story appears to be unnatural and unbelievable for the reason that the prosecution has failed to bring on record evidence of police encounter since not a single bullet or shell of any official weapon was recovered from the alleged place of incident. It is the case of the prosecution that encounter took place between the police and the accused persons and there was straight firing from both sides whereas no one from police party riding on two motorcycles have sustained any bullet injury allegedly fired by the accused party nor any bullet hit their motorcycles. IO/PW-5 deposed that ***“It is correct to suggest that FSL at Ex.12/G mentions the date of receiving of the property on 28.02.2019”***, meaning

thereby the same were sent after **six days** of the incident. There is also no explanation from the prosecution as to why private motorcycles used by the police officials were not made case property, therefore, the same were neither produced before the Court nor shown in the seizure memo and also in the final challan. It means even the lawful presence of police at the place of encounter is not proved and there was no encounter as well.

12. The appellant has stated in his statement under Section 342 Cr.P.C that he was a passerby and he has been injured in the cross firing and the police has falsely implicated him, appears to have more plausible position than the stand taken by the police against the appellant. The prosecution while claiming that the appellant and deceased Muhammad Riaz have started firing on seeing the police approaching them besides having failed to prove encounter as discussed in para-12 above. The prosecution has also failed to connect the two accused with each other. The only connection which could have been established between them was the mobile phone recovered from them. It is alleged that at the time of arrest and taking into custody of the dead body, amongst others, included one Q-Mobile set, Rs.1130 from one accused and Rs.1460/- and two mobile sets from the other accused but in the challan not a single mobile phone has been shown as a case property nor the mobile data was obtained to establish that the mobiles recovered from the two accused were used by them to communicate with each other on the same phones any time prior to the incident. Besides this, the appellant has received injury on his back as is evident from the medical report and examination of Dr. Khalid of Abbasi Shaheed Hospital (Ex:15). Injury No.1 and 2 were shown on the buttock of the appellant and as compare to the appellant, the deceased Muhammad Riaz, as reported by Dr. Nasimuddin, who conducted

postmortem of deceased, has received four injuries. Two injuries were shown to have been hit in the abdomen of the deceased and one in the chest and another injury in his shoulder. The location of injuries on the deceased suggests that the police has fired him from the front and if the deceased and appellant were together on one motorcycle, then obviously the bullets which have been through and through to one accused, should have caused injuries to the other accused/appellant sitting on the same motorbike. It means even the presence of both the accused together is very doubtful.

13. It is also an admitted fact from the evidence that not a single bullet allegedly fired by the accused including the appellant has hit the police officials or any of the property, however as per challan sheet a girl was hit by the police firing and she has died and a case has been registered against the police officials, namely, PC Adnan, PC Hasan Ali, PC Waqas and PC Mazhar Ahmed as crime No.108/2019 of P.S Sir Syed is pending against them. The prosecution has failed to prove any previous criminal record of the deceased as well as the appellant. However, an attempt was made to show involvement of the appellant in a FIR registered at Jauharabad Police Station bearing FIR No.31/2019 of same day. The FIR was against the unknown persons and the complainant was called at hospital and forced to declare that the appellant was same person who has robbed his mobile and yet his mobile was not recovered from the appellant.

14. The record shows that there are three FSL reports Ex:12/E and 12/I both dated **28.02.2019** and Ex:12/G dated 21.03.2019, these are in respect of the same case property (weapons and empties allegedly recovered on **22.2.2019** from the alleged place of incident) but some of the recovered empties and the 30 bore pistols were sent after six days

and another set of 7.62x39mm bore weapons were sent on **21.03.2019**. The prosecution has not sent all the recovered weapons and empties from the place of incident on one and the same day, obviously creates serious doubts in the efforts of police to connect the appellant with the offence. The delay in sending the weapon to FSL has always been considered fatal to prosecution case by the superior courts. We may refer to the case of JAVED KHAN alias BACHA and another Vs. The STATE and another (**2017 SCMR 524**) wherein the Supreme Court of has observed as under:-

10. As regards the matter of matching the bullet casing with the pistol, it is not free from doubt. The Police allegedly recovered the pistol stated to have been used in the crime in another case (FIR No.237 dated 29.6.2001) however **the pistol was sent to the Forensic Science Laboratory on 7.1.2002, whereas the investigation officer stated that Raees Khan disclosed using the same weapon in this crime on 14.10.2001**; the delay in sending the pistol was not explained. Neither the Forensic Science Laboratory nor any of the policemen, who had retrieved the bullet and its casing and had kept them in custody and then delivered them to the Laboratory, mention the marks affixed on the seals affixed on the parcels in which the said items were delivered to and received by the Laboratory. **Under such circumstances it would not be safe to uphold the conviction of the appellants merely on the basis of the firearm expert's report because of the legitimate concerns about when and how the bullet casing and pistol were delivered to the Forensic Science Laboratory.** (Emphasis provided).

15. Besides above, the record also reflects that according to prosecution case, it was a thickly populated area, but no private person was associated as mashir. It appears that the Investigation officer to conduct fair investigation in this case has failed, as no independent person of locality was examined in order to ascertain the truth beyond any reasonable doubts. The above stated circumstances in our view created serious doubts about the very happening of the encounter. The standard of the 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 in which a passerby girl has died by the police and mastermind of encounter PC Adnan (PW-2), PC Hasan Ali, PC Waqas and PC Mazhar Ahmed are facing trial in crime No.108/2019 under Section 302 PPC etc. All these police officials have been shown in the list of witnesses but except PC Adnan others have not been examined by prosecution. In these circumstances it was desirable that it should have been investigated by some other agency. Such dictum has been laid down by the Hon'ble Supreme Court in the case of Zeeshan alias Shani versus the State (2012 SCMR 428). Relevant portion is reproduced as under:-

“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.”

16. In view of the above facts and evidence, we have no hesitation to hold that there are several circumstances/infirmities in the prosecution case as highlighted above, which have created reasonable doubt about the guilt of accused. By now it is settled law that for giving benefit of doubt to an accused, it is not necessary that there should be many circumstances creating doubts. If there is a circumstance, which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right. In the case of

Muhammad Mansha vs. The State (**2018 SCMR 772**), the Hon'ble Supreme Court has observed as follows:-

“4. Needless to mention that while giving the benefit of doubt to an accused it is not necessary that there should be many circumstances creating doubt. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of such doubt, not as a matter of grace and concession, but as a matter of right. It is based on the maxim, "it is better that ten guilty persons be acquitted rather than one innocent person be convicted". Reliance in this behalf can be made upon the cases of Tariq Pervez v. The State (1995 SCMR 1345), Ghulam Qadir and 2 others v. The State (2008 SCMR 1221), Muhammad Akram v. The State (2009 SCMR 230) and Muhammad Zaman v. The State (2014 SCMR 749).”

17. In view of the above discussion when the prosecution has already failed to prove its case against the appellant beyond any reasonable doubt, the conviction of appellant cannot be maintained. Consequently, by short order dated **08.12.2020** this appeal was allowed and conviction and sentence recorded by the trial Court by judgment dated **05.10.2019** was set aside and appellant was acquitted of the charge. These are the reasons for our short order.

JUDGE

JUDGE

Karachi,
Dated 20.03.2021

Ayaz Gul