THE HIGH COURT OF SINDH AT KARACHI

Special Criminal Anti-Terrorism Jail Appeal No.10 of 2018

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

Appellant: Faizan @ Lagu S/o Ghulam Haider, through Mr. Habib-ur-Rehman Jiskani, Advocate.

Respondent: The State through Mr. Muhammad Iqbal Awan, Deputy Prosecutor General, Sindh.

Date of Hearing: **24.12.2020**

J U D G M E N T

NAZAR AKBAR, J.- Appellant Faizan @ Lagu son of Ghulam Haider was tried by learned Judge, Anti-Terrorism Court-XIV, Karachi, in Special Cases Nos.1154 and 1153 of 2017, arising out of FIRs Nos.84 and 83 of 2017, registered at P.S. Baghdadi, Karachi for offences under Sections 4/5 of the Explosive Substances Act, 1908 read with Section 7 of the Anti-Terrorism Act, 1997 and Section 23(1)(a) of the Sindh Arms Act, 2013. On conclusion of trial, vide judgment dated **25.11.2017**, appellant was convicted for offence punishable under **Section 23(1)(a)** of SAA, 2013 and sentenced to suffer R.I for **three years** and fine of Rs.3000/-, in default thereof to suffer S.I for three months more. He was also convicted under **Section 5** of Explosive Substances Act and sentenced to suffer R.I for **five years**. The sentences were ordered to run concurrently. Benefit of **Section 382-B** Cr.P.C was also extended to accused/ appellant.

2. Precisely the facts of the prosecution case as per the FIRs are that on **01.05.2017** the police party of P.S Baghdadi headed by SHO Inspector Zafar Iqbal alongwith ASI Pervaiz Khan, PC Imtiaz Ali, Driver/ PC Ghulam Mustafa in police mobile No.SPD-782; and ASI Ghulam Muhammad alongwith PC Hubdar Ali, PC Mohammad

Chandio, Driver/PC Ali Jan in police mobile No.SPC-769 were on patrolling duty, during patrolling duty SHO received information regarding presence of a notorious criminal namely Faizan, member of Baba Ladla group of Lyari Gang War at a certain place with intention to commit crime. On such information, SHO along with police party reached at street No.01, Haji Jumma Khan Road, Gulab Eleven, Baghdadi, Karachi at about 0230 hours, where the spy had pointed towards one suspicious person, however, the said person had tried to flee but the police party had apprehended him, who disclosed his name as Faizan alias Lagu s/o Ghulam Haider (the present appellant) and on personal search, one hand grenade colored Metila bearing No.386-132-84 was recovered from right side pocket of his shirt. On further search one unlicensed 30 bore pistol loaded magazine 05 live rounds were also recovered from the fold of Shalwar, but accused could not produce the license for weapon or given lawful justification for hand grenade. Therefore, they arrested the accused and Police called the Bomb Disposal Squad through phone for defusing the hand grenade and thereafter sealed the recovered arms and ammunition on the spot and prepared memo in presence of mashirs and after completion of legal formalities separate FIRs bearing Nos.84/2017 under Section 4/5 of the Explosive Substance Act, read with Section 7 ATA 1997 and 83/2017 under Section 23(1)(a) of the Sindh Arms Act, 2013, were registered against above named accused for taking further legal action.

3. The investigation was entrusted to Inspector Ubaidullah Khan of P.S Chakiwara, who after completion of investigation on **24.05.2017** 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 by order dated **11.09.2017** and on **27.09.2017** framed 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 05 witnesses i.e **PW-01** complainant SHO/PI Zafar Iqbal was examined at Ex:06. **PW-02** ASI Ghulam Muhammad, was examined at Ex:07; **PW-03** HC Shah Hussain was examined at Ex:08. On **05.10.2017** learned ADPP filed statement to give up two prosecution witnesses, namely, PW-04 ASI Parvez and PW-05 PC Imtiaz Ali at Ex:09 and 10. On **24.10.2017** learned ADPP again filed statement to give up one prosecution witnesses, namely, PC Hubdar Ali at Ex:11. **PW-06** ASI Syed Laique, BDS South Zone was examined at Ex:12; and lastly **PW-07**, Inspector Ubaidullah Khan/I.O was examined at Ex:13, thereafter, learned ADPP closed the side of prosecution vide statement dated **06.11.2017** at Ex.14.

6. Statement of accused was recorded under Section 342 Cr.PC at Ex.15, in which he denied the prosecution allegations, claimed his innocence and false implication in these cases. He neither examined himself on oath nor led any evidence in his defence.

7. The learned trial court after hearing learned counsel for the parties and on assessment of entire evidence convicted and sentenced the appellant vide judgment dated **25.11.2017** as stated above.

8. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the impugned judgment dated 25.11.2017 passed by the trial Court therefore the same are not

reproduced here so as to avoid duplication and unnecessary repetition.

9. The record shows that the instant Jail Appeal against the judgment dated **25.11.2017** was filed through Superintendent, Central Prison, Karachi along with application for condonation of delay by letter dated **08.01.2018**. The appeal was admitted for regular hearing by order **22.02.2018** 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 since the appellant was in jail and due to personal problems was unable to file the jail appeal in time. The impugned Judgment also shows that the appellant has made oral request to the trial court for engaging a counsel on state expenses and therefore, the trial Court by order dated **27.9.2017** provided him a counsel on state expenses. The ground taken by appellant in application for condonation of delay appears to be reasonable, therefore, application (MA No.229/2018) is allowed and the delay in filing of instant appeal is condoned.

10. Learned counsel for appellant has argued that the appellant/ accused is innocent and the police has falsely implicated him in the instant case for mala fide reasons; nothing has been recovered from the appellant and the alleged recovery of hand grenade and 30 bore pistol were foisted upon him. He pointed out that no private person was associated as mashir of arrest and recovery. He further contended that the appellant is a physically handicap person. Lastly, it has been argued that prosecution has failed to prove its case against the appellant beyond any shadow of doubt, as such, prayed for acquittal of the appellant. In support of his contentions, learned

counsel for the appellant has relied upon the case reported as State through Prosecutor General Punjab vs. Naseeb Shah and 5 others (**2020 MLD 548**).

11. Learned Deputy Prosecutor General Sindh sought dismissal of instant appeal by contending that explosive substance as well as arms and ammunitions were recovered from the possession of the appellant; all PWs have fully implicated the appellant in the instant case, therefore, the prosecution has proved its case against the appellant beyond any shadow of doubt. He fully supported the impugned judgment.

12. We have carefully heard learned counsel for the parties and examined the evidence of both parties minutely. We have noticed that the case of the prosecution was full of lacunas, contradictions and discrepancies.

13. PW.1 Inspector Zafar Iqbal, complainant in his cross-examination has stated that ***"It is correct to suggest that departure is not mentioned in the memo of arrest and recovery and FIR***. *The spy information was received at night, therefore, no private person was available.....There was street light as well as light of police mobiles.* ***All the formalities were completed in one hour at the place of incident*****.....*****It is correct to suggest that present accused is crippled as one leg was already amputated. It is correct to suggest that accused was on crutches***."

14. PW-2 ASI Ghulam Muhammad in his cross-examination has stated that *"We were available at Juna Masjid when SHO had called back the one police mobile. The SHO had not taken any private person*

and further says that it was night time and no one was prepared to act as mashir. We reached the place of recovery at 0230 hours. At that time no any other person beside the accused was available..... ***All the formalities were completed on spot within 35 minutes****. The I.O had also not associated any private person to act as mashirs, and further says that private person were not willing to act as mashir."*

15. PW.7 Inspector Ubaidullah Khan/I.O in his cross-examination has stated that *".....The names of witnesses are not mentioned in the main body of such memo, and further says that the names and signature of the said witness are available on the same memo.* ***It is correct to suggest that no private person was associated as witness****."*

16. We have come to the conclusion that prosecution has failed to prove its case against the appellants beyond any reasonable doubt for the reasons that prosecution case appears to be highly unnatural and unbelievable. A crippled man was found standing at 0250 hours in a street with explosive and a 30 bore pistol loaded. It was neither the place where he wanted to use the explosive nor police was able to find out who gave to him and/or from whom he got it. In these circumstances, failure of police to produce Entry of patrolling in the area further damaged the credibility of police that the accused was arrested in the manner and with explosive material at all. It is now well settled principle of law that roznamcha entries of departure and arrival of police is mandatory to prove the very presence of the police at the relevant time at the place of incident. If in the above otherwise obvious situation, still some help is required from a case-law, one may refer to the judgment in the case of Abdul Sattar vs. The State (**2002 P.Cr.L.J 51**) and the case of Waris vs. the State (**2019 YLR**

2381). In these cases failure to produce entry of departure and arrival from police station has been declared a case of serious doubts in the prosecution story for which benefit has to go to the accused. In this context reliance is also placed on the case of Mohammad Hayat and 3 others vs. the State (**2018 P.Cr.L.J Note 61**) wherein it was observed that:-

> 15. Admittedly, in the cases in hand arrival and departure entries were not produced before the trial Court in order to prove that police party, in fact proceeded to the place of occurrence and recovered two abductees and arrested accused Muhammad Hayat with Kalashnikov. Roznamcha entries of second episode of arrest of co-accused and recovery of weapons have also not been produced. This lapse on the part of prosecution has cut the roots of the prosecution case, thus, rendered entire episode shrouded by doubt. This omission by itself was enough to disbelieve the evidence of police officials. **It is also admitted fact borne out from the record that Kalashnikovs allegedly recovered from the appellants were neither sealed at spot nor the same were sent to Ballistic Expert for report.** Conviction under section 13(d), Arms Ordinance, 1965 could not be maintained unless weapons allegedly recovered were sealed at spot and opinion of Ballistic Expert was produced in order to prove that weapons so recovered were infact functional.

It was case of spy information, Inspector Zafar Iqbal had sufficient time to call the independent persons of the locality for making them as mashirs of recovery but he failed to do so without justification. Complainant/SHO had admitted that he had received spy information on his cellular phone. Nowadays, modern technology is available, he failed to produce call data of his cellular phone to satisfy the Court that actually he had received a call at relevant point of time. And interestingly FIR (Ex:6-B) shows that spy was present with the police in the mobile and on his signal and pointation the appellant was arrested. Neither the so-called spy who was present is nominated as witness nor even his name is disclosed. It means entire

story is cooked. We have several reasons to disbelieve the prosecution case. It is the case of prosecution that accused was armed with hand grenade/ explosive substance and pistol. It is unbelievable that no attempt was made by the accused to either use the pistol or the explosive substance at the time of his arrest in order to escape. It was against the conduct of the criminal minded persons to surrender without resistance when armed with deadly weapon. SHO/ complainant failed to contact bomb disposal unit for defusing the explosive substance at the place of recovery. Under what circumstances, he brought explosive substance safely at police station, has not come on record. Prosecution evidence is silent with regard to the safe custody of the hand grenade/explosive substance at the police station. Non-production of departure entries of police station also cut the roots of the prosecution case.

17. The record also shows that the prosecution has given up their witnesses by filing statement during trial who were said to have been mashirs of recovery, meaning thereby either the said witnesses were not present at the time of incident at all or they have refused to give evidence, or the prosecution has realized that may be the truth could come out from their mouths during their evidence, therefore, the prosecution decided to give up the said witnesses.

18. After careful reappraisal of the evidence discussed above, 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)."

19. In view of the above discussion when the prosecution has already failed to prove its case against appellant beyond any reasonable doubt, the conviction of appellant cannot be maintained. Consequently, by short order dated **24.12.2020** the instant appeal was allowed and conviction and sentence recorded by the trial Court by judgment dated **25.11.2017** was set aside and the appellant was acquitted of the charges. These are the reasons for our short order.

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Karachi
Dated: . .2021

Ayaz Gul