THE HIGH COURT OF SINDH AT KARACHI

Special Criminal Anti-Terrorism Appeal No.139 of 2020
Special Criminal Anti-Terrorism Appeal No.140 of 2020

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

Appellant: Waseem-ur-Raza son of Ahsan-ur-Raza.

Respondent: The State through Mr. Zafar Ahmed Khan, Additional Prosecutor General Sindh.

Date of Hearing: **18.12.2020**

J U D G M E N T

NAZAR AKBAR, J.- Appellant Waseem-ur-Raza was tried by learned Judge, Anti-Terrorism Court-X, Karachi, in Special Cases Nos.671/2019 and 671-A, arising out of FIRs Nos.720/2019 and 721/2019, registered at Police Station Ferozabad, Karachi, for offences under Sections 385, 386, 468, 471, 170, 171, PPC 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, appellant was found guilty and by impugned Judgment dated **25.09.2020**, he was convicted and sentenced as under:-

1. For offences under section 7(1)(h) of Anti-Terrorism Act, 1997, appellant was sentenced to undergo **7 years R.I**. and to pay fine of Rs.300,000/-, in default whereof to undergo S.I. for 1 year.

2. For offences under section 468, PPC, appellant was sentenced to undergo **3 years R.I**. and to pay fine of Rs.100,000/-, in default whereof to undergo S.I. for 6 months.

3. For offences under section 471, PPC, appellant was sentenced to undergo **1 year R.I**. and to pay fine of Rs.50,000/-, in default whereof to undergo S.I. for 4 months.

4. For offences under section 170, PPC, appellant was sentenced to undergo **1 year R.I**. and to pay fine of Rs.40,000/-, in default whereof to undergo S.I. for 3 months.

5. For offences under section 171, PPC, appellant was sentenced to undergo 2 months R.I.

6. For offences under section 23(1)(a) of the Sindh Arms Act, 2013, appellant was sentenced to undergo 5 years R.I. and to pay fine of Rs.50,000/-, in default whereof to undergo S.I. for 6 months.

All the sentences were ordered to run concurrently. Benefit of Section 382-B, Cr.PC was extended to appellant. Appellant has challenged the impugned judgment through instant appeals.

2. Brief facts of case as per FIR are that on 17.11.2019 at 1345 hours ASI Muhammad Asghar Niazi along with his subordinates was on patrolling duty in official mobile, during patrolling, on information that a person wearing police uniform, duly armed was wrongfully and fraudulently obtaining extortion money from the civilians by harassing them near Bagh-e-Bahar Marriage Hall, Shaheed-e-Millat Service Road, Karachi, they reached at the pointed place and apprehended the said person. ASI Asghar Niazi conducted personal search of the said person and recovered unlicensed 30 bore pistol along with loaded magazine, having 3 live rounds from his possession in presence of mashirs. Upon his further search ASI also recovered copies of his CNIC, fake police card bearing Buckle No.4572, Cash Rs.710 and other visiting cards from his possession. Accused was arrested, memo of arrest and recovery was prepared. Articles recovered from accused were sealed at spot. Hence, instant FIRs were lodged. After conclusion of investigation, challan was submitted against the accused under the above referred sections.

3. Trial Court ordered joint trial in both the cases as provided under Section 21-M of the Anti-Terrorism Act, 1997. Trial Court framed charge against the accused at Ex.4. Accused pleaded not guilty and claimed to be tried.

4. In order to prove its case prosecution examined 4 witnesses, thereafter, learned APG closed the side of prosecution at Ex.9.

5. Statement of accused was recorded under section 342 Cr.PC. at Ex.12, 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.

6. The learned trial court after hearing the learned counsel for the parties and on assessment of entire evidence convicted and sentenced the appellant vide judgment dated 25.09.2020 as stated above.

7. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the impugned judgment dated 25.09.2020 passed by the trial Court therefore the same are not reproduced here so as to avoid duplication and unnecessary repetition.

8. On **18.12.2020** when these appeals were listed before this Court, learned counsel for the appellant was not present, therefore, with the assistance of learned Additional P.G we have perused the record as well as evidence available in the file. Mr. Zafar Ahmed Khan, learned Additional Prosecutor General Sindh, fully supported the impugned judgment and contended that the appellant was arrested at the spot, wearing police uniform, armed with unlicensed 30 bore pistol, loaded with live rounds and during his personal search one fake police card was also recovered from his possession, all such pieces of evidence are sufficient to award conviction and the trial court based on evidence available on record and the instant appeals are liable to be dismissed as such.

9. However, perusal of evidence negates the contention of learned Addl. P.G. PW-1 complainant in his cross-examination deposed that, ***"I***

do not have the departure entry of that day but can produce my departure entry on the next day*.... It is a fact that recovered pistol is of rubbed numbers on both sides..... Mashirnama was prepared at spot by me at 1345 hours. It is a fact that* ***signature of private mashir Wahid Ali is not available*** *at Ex.5/A.* ***Wahid Ali is a witness of Shadi Hall****. It is a fact that* ***except the recovered pistol, no other article was sealed.*** *It is fact that place of occurrence was inspected after three days of incident.* ***Belt is not available with Uniform present in Court****. It is fact that in Ex.5/A the signatures of mashirs have been obtained on marginal side.* ***I have brought the case property in a green coloured shopper, without any seal****.*

10. **PW.2** in his cross-examination has stated that, *"****My statement was recorded after 9 days of the incident****. I stated in my statement recorded by the police that I was coming to my duty at the time of incident. It is wrongly mentioned in my police statement that I was already at work..... **All the above articles were sealed in a white coloured bag. I only signed on a paper whereupon the Fard was prepared.***

11. **PW-3** Mujeeb, the alleged victim in his cross-examination has stated that, *"****I do not know regarding number and colour of pistol recovered from the accused in my presence****.....****The said white clothed Thaili was not closed/sealed before me****. The said person in the police uniform was demanding money from me, but not obtained any amount.* ***The accused only demanded Bhatta from me, but no amount was received by him. The incident took place between 02:00 to 02:30 pm****. I was not pointed out any pistol by the accused at the time of incident. I do not know whether* ***the accused person had demanded any bhatta from other passerby or not.....No private***

person was called by police. *My* ***maternal uncle use to put his signature in English.***

12. **PW.4** IO/PI Arshad Mehmood in his cross-examination stated that, *"It is correct to suggest that* ***incident had occurred with two persons, namely, Wahid Ali and Mujeeb****. ....It is a fact that while recording 161 Cr.PC statement ASI Asghar Niazi of P.S. Ferozabad, Karachi, he had mentioned that recovered pistol of 30 bore is without number.....****It is a fact that I had recorded 161, Cr.PC statements of PWs Mujeeb Ahmed and Wahid Ali on 26.11.2019, after delay of 09 days of occurrence of incident****, though,* ***I have not mentioned any reason in my papers. I had not made any dispatch entry while I was leaving PS for depositing the recovered weapon to the FSL. I had received police papers, along with entire case property in a sealed condition, wherein, a pistol of 30 bore, without number, was sent to FSL along with 3 live rounds.***

13. The perusal of above evidence is more than enough to conclude 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. At the very outset, we noted that the incident took place at 1345 hours in a broad daylight at a thoroughfare but no effort was made by the complainant to associate any independent person to act as mashir of arrest and recovery. **PW.2 Wahid Ali is real maternal uncle of PW.3 Mujeeb, who is the allegedly a victim though he had not paid any Bhatta**. 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.

14. Perusal of FIR, Memo or arrest and recovery and 161 statement of complainant PW-1 shows that the recovered pistol was **un-numbered**, however, perusal of FSL report Ex.8/K reflects that the pistol sent for report, that too, with an unexplained delay of **three days**, is of **rubbed number**. PW-1 complainant has also admitted in his cross-examination that ***"it is a fact that recovered Pistol is of rubbed numbers on both sides"***. 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 Kamaluddin alias Kamala vs. The State (**2018 SCMR 577**). The relevant observations of the Hon'ble Supreme Court in the said case are reproduced below:-

> "4. As regards the alleged recovery of Kalashnikov from the appellant's custody during the investigation and its subsequent matching with some crime-empties secured from the place of occurrence suffice it to observe that Muhammad Athar Farooq DSP/SDPO (PW18), the Investigating Officer, had divulged before the trial court that the recoveries relied upon in this case had been affected by Ayub, Inspector in an earlier case and thus, the said recoveries had no relevance to the criminal case in hand. **Apart from that safe custody of the recovered weapon and its safe transmission to the Forensic Science Laboratory had never been proved by the prosecution before the trial court through production of any witness concerned with such custody and transmission**."

15. Pw-1 complainant has also contradicted his own version as well as version of PW-4 I.O/Inspector Arshad Mehmood regarding case property, as according to PW-4, the case property was handed over to him in a white cloth bag duly sewed but PW-1 brought the case property to the Court in unsealed condition kept in a green color shopper without any seal as he has admitted in his cross-examination that ***"Today, I have brought the case property in a green colored shopper, without any seal."*** PW-2 Wahid Ali in his cross-examination has also contradicted his own statement under Section 161 Cr.P.C as in the said statement he stated that he was on job but in his deposition before the Court he stated that he was on motorcycle and his nephew Mujeeb was sitting ahead and both were present at the time of incident. He also admitted in his further cross-examination recorded on 12.8.2020 that ***"No Bhatta was demanded by the accused Waseem Ul Raa in front of me, from the victim"***. Whereas PW-3 Mujeeb

contradicted the version of his uncle by saying that ***"said police personnel told me that he would book me in Maava (Gutka) case and demanded money from me."***

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 under Section 7 of ATA, 1997 cannot be maintained. Consequently, by short order dated **18.12.2020** these appeals were allowed and conviction and sentence recorded by the trial

Court by judgment dated **25.09.2020** was set aside and appellant was acquitted of the charge. These are the reasons for our short order.

JUDGE

JUDGE

Karachi
Dated:____.04.2021

Ayaz Gul