THE HIGH COURT OF SINDH AT KARACHI

Special Criminal Anti-Terrorism Jail Appeal No.21 of 2019

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

Appellant: Azam son of Muhammad Ubaid through Mr. Habib-ur-Rehman Jiskani, advocate.

Respondent: The State through Mr. Muhammad Iqbal Awan, DPG.

Date of Hearing: **11.12.2020**

J U D G M E N T

NAZAR AKBAR, J.- Appellant Azam son of Muhammad Ubaid was tried by learned Judge, Anti-Terrorism Court-IV, Karachi, in Special Cases Nos.610 and 611 of 2018, arising out of FIRs Nos.57 and 58 of 2018, registered at P.S. Mehmoodabad, 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 **21.12.2018**, appellant was convicted under section 5 of the Explosive Substances Act, 1908 and sentenced to R.I. for **5 years** and for offence under section 23(1)(a) of the Sindh Arms Act, 2013 sentenced to 5 years R.I. with fine of Rs.20,000/-, in default whereof to undergo SI for 6 months more. 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 appeal.

2. Brief facts of the prosecution case as per the FIRs are that on 11.04.2018, Complainant SIP Jalal Shaikh of P.S Mehmoodabad, Karachi, along with his subordinate staff was on patrolling duty in the area. He received spy information about presence of suspicion person on motorcycle No.KLH-6890, at Raza Elahi Road, near Mehran Hotel,

Chanesar Goth, when they reached at the pointed place, on pointation of spy informant police party apprehended the suspected, who disclosed his name as Azam son of Muhammad Ubaid (the appellant herein). Due to non-availability of private witnesses, presence of official witnesses the complainant conducted personal search of accused and from the left side pocket of his pant one hand grenade was recovered. On his further personal search police party also recovered from the right side fold of his pant one unlicensed pistol of 30 bore, with loaded magazine containing five live bullets, without number. On demand of permission/valid license of arms ammunitions and explosive, he failed to produce the same. Therefore, they arrested the accused and after completion of legal formalities separate FIRs bearing Nos.57/2018 under section 4/5 of the Explosive Substance Act, read with Section 7 ATA 1997 and 58/2018 under section 23(1)(a) of the Sindh Arms Act, 2013, were registered against above named accused for taking further legal action. After completion of formalities 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 and framed charge against the accused at Ex.5. Accused pleaded not guilty and claimed to be tried.

4. In order to substantiate its case prosecution examined 04 witnesses i.e **PW-01** SIP Abbas Shah was examined at Ex:06. **PW-02** HC Sundar Khan was examined at Ex:07; **PW-03** SI Muhammad Jalal Shaikh was examined at Ex:08 and **PW-04** Inspector Yousuf Jamal was examined at Ex:09, thereafter, learned ADPP closed the side of prosecution vide statement dated **03.12.2018** at Ex.10.

5. Statement of accused was recorded under section 342 Cr.PC at Ex.11, 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 **21.12.2018** 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 **21.12.2018** passed by the trial Court therefore the same are not reproduced here so as to avoid duplication and unnecessary repetition.

8. Learned counsel for appellant, at the very outset argued that the police has falsely implicated the appellant in the instant case for mala fide reasons; the conviction is based on presumption as, while passing the impugned judgment, learned trial court did not consider the actual facts and circumstances of the case; learned trial court did not evaluate the prosecution evidence in its true perspective. Lastly, it has been argued that prosecution has failed to prove its case against the appellant beyond any showed of doubt, as such, prayed for acquittal of the appellant.

9. Learned Additional Prosecutor General Sindh sought for 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.

10. We have heard learned counsel for the parties and carefully examined the prosecution evidence minutely.

11. PW.1 SIP Abbas Shah in his cross-examination has stated that, ***"It is correct to suggest that in Ex.6/C (letter addressed to SSP Special Branch, BDU) not contains the number and description of hand grenade. It is correct to suggest that recovered explosive was not sent to Islamabad for FSL."***

12. PW-2 HC Sundar Khan in his cross-examination has stated that, "***It is correct to suggest that I have not produced Roznamcha Entry before Court today***……. *When we were busy in patrolling in Azam Basti at 03:30 hours SIP Jalal Shah received spy information…….****The spy informer was not with us****. After receiving spy information SIP Jalal Shaikh directed us to go towards Chanesar Goth. On the direction of SIP Jalal Shaikh we stopped the motorcyclist. ….At 03:15 we reached at the pointed place. Within 2/3 minutes motorcyclist came there. We consumed one hour in recovery, arrest and in preparation of memo of arrest, recovery and seizure, the number and description of hand grenade and pistol is not mentioned……It is not in my knowledge that on 08.04.2018 accused Azam was picked up by police from his house."*

13. PW.3 SIP Jalal Shaikh in his cross-examination has stated that, *"…..* ***When I reached place of incident the informant was present there*** *and after pointation of accused he left the place of incident.* ***At the time of apprehension accused did not show any resistance****. It is correct to suggest that* ***words "Diamond M11" which are engraved on the body of pistol and its description are not mentioned in the memo of arrest and recovery****. …..It is* ***correct to suggest that***

motorcycle is not produced by me before the Court. Voluntarily says that motorcycle recovered in another case of P.S. Mehmoodabad and it was handed over to ACLC*. I consumed one hour in whole process and returned back to PS at about 04:30 hours……****When we left PS for site inspection we all were on motorcycles."***

14. PW.4 PI/IO Yousuf Jamal in his cross-examination had stated that, *"….I left P.S. for site inspection on police mobile while complainant was on motorcycle…..****It is correct to suggest the hotel and shops are situated at the place of incident, which were open at the time of site inspection and people were present there****. It is correct to suggest that no one was taken as mashir of site inspection from the locality. I have gone through the memo of arrest and recovery.* ***It is correct to suggest that colour of grenade is not mentioned in the memo of arrest and recovery and it is also mention therein there the pistol is without number.***

15. From perusal of above evidence, 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 man was going on stolen motorcycle after midnight at 3:30 a.m on a road with explosive and a 30 bore pistol loaded and on signal by police to stop he neither tried to run away nor resisted his arrest. It was neither the place where he wanted to use the explosive nor police was able to find out who gave 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.

16. It was case of spy information. Complainant/SIP had admitted that he had received spy information but he did not disclose that how and when he received said information. And interestingly spy was present with the police in the mobile and on his pointation the appellant was arrested. Neither the so-called spy who was present is nominated as witness nor even his name is disclosed. And the witness

PW.02, HC Sundar Khan in his crossed contradicted the complaint when he stated that spy was not present on the spot. 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. SIP/ complainant failed to contact bomb disposal unit for defusing the explosive substance at the place of recovery. SIP Abbas Shah from Bomb Disposal Squad confirmed in his cross-examination that I inspected the hand grenade in the room of duty officer. 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. The complainant SIP Muhammad Jalal Shaikh even before lodging the FIR himself become the Investigation Officer and at the odd hour of night (around 3:30 a.m.) he contacted CPLC and on phone get the information about the alleged motorcycle recovered from the appellant and he himself handed over it to CPLC without producing in Court and without permission of Court. But neither he has produced any entry of his phone cell to CPLC at 3:30 a.m. nor even produced any document of handing over motorcycle to the CPLC.

16. 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)."

17. 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:-

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18. 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 **11.12.2020** this appeal was allowed and conviction and sentence recorded by the trial Court by judgment dated **21.12.2018** 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