

THE HIGH COURT OF SINDH AT KARACHI

Special Criminal Anti-Terrorism Jail Appeal No.58 of 2020

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

Appellant: Babar @ Billa S/o Muhammad Rafique, (Nemo).

Respondent: The State, through Ms. Rahat Ahsan,
Additional Prosecutor General Sindh.

Date of Hearing: **24.12.2020**

J U D G M E N T

NAZAR AKBAR, J.- Appellant Babar @ Billa was tried by learned Judge, Anti-Terrorism Court-VI, Karachi, in Special Cases Nos.03 and 03-A of 2019, arising out of FIRs Nos.623 and 624 of 2018, both registered at P.S. Zaman Town, Karachi for offences under Sections 353, 324, 186, 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 **07.11.2019**, co-accused Salman Ali was acquitted of the charges, however, appellant/accused Babar @ Billa was convicted and sentenced as under:-

- i. I hereby convict the accused person namely **Babar @ Bila** s/o Muhammad Rafiq for the offence u/s **353 PPC**, hence he shall suffer R.I **two (2) years** with fine of Rs.5,000/- and in case of failure to pay the fine accused person shall suffer SI two months more.
- ii. I also hereby convict the accused **Babar @ Bila** s/o Muhammad Rafiq for the offence u/s **324 PPC**, hence he shall suffer R.I for **five (5) years**.
- iii. I also hereby convict the accused **Babar @ Bila** s/o Muhammad Rafiq for the offence u/s **23-1-A** SAA of 2013, hence he shall suffer R.I **seven (7) years**.

The benefit of section 382(b) Cr.P.C is extended to the above named accused all the sentences awarded shall run concurrently.

2. Brief facts of the prosecution case as per the FIRs are that on **15.11.2018** ASI Tariq Ali Khan along with subordinates HC Muhammad Ibrahim, PC Sikandar Ali, PC Izhar, PC Asif in official mobile were on patrolling duty in the area, during which at about 0315 hours they reached at Coast Guard Chowrangi Road, Korangi 2^{1/2} Karachi, they saw two persons coming on a motorcycle. They were signaled to stop for checking, but both the accused took out their pistols and resisted the police by firing on them with intention to kill. The police also retaliated in which the pillion rider accused received bullet injury in his right leg's calf and fell off the motorcycle, whereas, the other one escaped from the crime scene on motorcycle. ASI Tariq Ali Khan apprehended the fallen accused with the help of his subordinates. On inquiry, the accused disclosed his name as Baber @ Bila S/o Muhammad Rafiq (the present appellant). The accused was found holding a 30 bore unnumbered pistol in his right hand and loaded magazine with 2 live rounds which were seized by police. On further enquiry the accused disclosed name of his absconding accomplice as Salman @ Langra S/o Saleem Shah. ASI Tariq Ali Khan asked for license of such pistol which he could not produce then the weapon was sealed on the spot. The accused was brought to P.S and letter was prepared and thereafter police took him to JPMC for medical treatment. After medical treatment accused was discharged and then he was again brought to P.S and separate FIRs were registered against him.

3. On **26.11.2018** co-accused Salman S/o Saleem Shah filed an application for pre-arrest bail and he was admitted to pre-arrest bail and he has also joined the trial.

4. After completion of investigation, challan was submitted against the accused under the above referred sections.

5. Trial Court ordered joint trial in both the cases as provided under **Section 21-M** of the Anti-Terrorism Act, 1997, vide order dated **15.02.2019**, Ex.4, and on the same day i.e **15.02.2019** framed joint charge against the accused at Ex.5. Accused pleaded not guilty and claimed to be tried.

6. In order to substantiate its case prosecution examined 04 witnesses viz, **PW-01** complainant ASI Tariq Ali Khan was examined at Ex:09; **PW-02** HC Muhammad Ibrahim at Ex:18; **PW-03** MLO Dr. Aijaz Ahmed at Ex:19 and **PW-04** SIO/Inspector/I.O Waheed Ahmed at Ex:23, learned APG filed statement at Ex:08 and given up one prosecution witness, namely, PC-Izhar Ahmed and closed the side of prosecution for evidence vide statement at Ex.34.

7. Statements of accused were recorded under **Section 342** Cr.PC at Ex.16, in which they denied the prosecution allegations, claimed their innocence and false implication in this case. They stated that all the PWs including complainant are interested and they have falsely deposed against them at the instance of police. Accused Babar has stated that nothing has been recovered from his possession. He claimed that the police had demanded an amount of Rs.3 lac, which he refused to pay, therefore, they made instant cases against him. Accused Babar has produced DW-1 Mst. Haneefa Bibi in his defence, while accused Salman Ali neither examined himself on oath nor led any evidence in his defence.

8. The learned trial court after hearing the learned counsel for the parties and on assessment of entire evidence acquitted co-accused Salman Ali and convicted and sentenced the appellant Babar @ Billa by judgment dated **07.11.2019** as stated above.

9. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the impugned judgment dated **07.11.2019** passed by the trial Court, therefore, the same are not reproduced here so as to avoid duplication and unnecessary repetition.

10. The record shows that the instant Jail Appeal against the order dated **07.11.2019** was filed through Superintendent, Central Prison, Karachi along with application under **Section 5** of Limitation Act for condonation of delay by letter dated **04.03.2020**. The appeal was admitted for regular hearing by order dated **18.03.2020** 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:3/A) before the trial court stating therein that he is a poor person and is unable to engage a counsel, therefore, counsel on state expenses may be provided to him and therefore, the trial Court by order dated **15.2.2019** 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.2329/2020) is allowed and the delay in filing of instant appeal is condoned.

11. Now coming to the merits of the instant appeal, on **24.12.2020** when this appeal was fixed before this bench even paper book has not been prepared, however, we have perused the record available in Court file with the help of learned Additional Prosecutor General and also minutely scanned the evidence available in the R&Ps.

12. 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. She fully supported the impugned judgment.

13. We have heard the learned Additional Prosecutor General and carefully perused the evidence available on record.

14. Close scrutiny of evidence reflects that prosecution story appears to be unnatural and unbelievable for the reason that PW-01, complainant ASI Tariq Ali himself has contradicted on many occasions. At one point of time in his cross-examination he stated that **“PC Izhar ran after the accused who was escaping while firing upon him.”**, whereas, he next stated in his cross-examination that **“The accused who was riding the motorcycle had not fired upon us”**. The said PC Izhar, who was said to have run after the co-accused while escaping and firing upon him was given up by the prosecution. Even two other police officials, namely, PC Sikandar and PC Asif, who were also present at the time of alleged encounter, were not examined by the prosecution. PW-01 complainant ASI Tariq Ali in his cross-examination has further deposed that **“When I signaled the accused persons to stop, our vehicle and motorcycle of accused was in running condition and accused also fires from running motorcycle. The distance between police party and accused at the time of encounter would be about 40/50 meters. The accused also crossed us while firing”**. However, strangely enough neither any police official nor the police mobile was hit by alleged firing of the accused party.

15. PW-02, HC Muhammad Ibrahim in his cross-examination has deposed that ***“At the time of encounter, the distance between the accused and police party would be 100 or 150 meters. Upon the directions of ASI Tariq, we all four police officials issued fires upon accused persons. Since the accused were in front of us, and firing, we also issued fires upon them when they were in front of us. The encounter remained continue for seconds only. I do not remember, how many fires were issued by us. However, complainant collected four empties of SMG.”*** It is also unbelievable that all four police officials have fired upon the accused persons in an encounter which lasting for seconds, as alleged by PW-02, but only four fires were shot by the police party. The case of prosecution is that the official weapons were used by the police in the so-called encounter but no official weapon of police was sent for FSL, however, only four empties of 7.62x39mm bore were sent for FSL. The above stated circumstances in our view created serious doubts about the very happening of the encounter.

16. Further, the perusal of impugned judgment reflects that on the same set of evidence learned trial Court has acquitted co-accused namely salman Ali. The Hon'ble Supreme Court in several cases has held that when the case of accused for acquittal was not distinguished from the case of co-accused on the same set of evidence, the conviction of co-accused on the basis of insufficient evidence cannot be sustained. In the case of Rehmat alias Rehma Masih vs. the State reported in **1995 SCMR 733** the Hon'ble Supreme Court has acquitted the accused in Section 302-B PPC on the same principle relying on the several Supreme Court judgments. In the case of Imtiaz @ Taj vs. The State reported in **2018 SCMR 344** the Hon'ble Supreme Court has held that:-

“3. It is not disputed that four co-accused of the appellant attributed effective firing at and specific injuries to Rustam Ali deceased had been acquitted by the trial court. **The law is settled that if the eye-witnesses have been disbelieved against some accused persons attributed effective roles then the same eye-witnesses cannot be believed against another accused person attributed a similar role unless such eye-witnesses receive independent corroboration qua the other accused person** and a reference in this respect may be made to the cases of Ghulam Sikandar v. Mamaraz Khan (PLD 1985 SC 11), Sarfraz alias Sappi v. The State (2000 SCMR 1758), Iftikhar Hussain and others v. The State (2004 SCMR 1185) and Akhtar Ali v. The State (2008 SCMR 6).”

In another case of Shabbir Ahmed vs. the State reported in **2011 SCMR 1142** the Hon'ble Supreme Court has acquitted the co-accused whose appeal was not even filed before the Hon'ble Supreme Court. The relevant observations of the said judgment are reproduced below:-

“The conviction and sentence of the petitioner is set aside and he is acquitted of the charge and, shall be released forthwith, if not required in any other crime. **As far as role of co-accused Bismillah, who has not filed the petition before this Court, but has challenged his conviction and sentence before the Federal Shariat Court is similar to the case of the present petitioner, therefore, benefit of doubt is also given to him. He shall also be released forthwith, if in jail and not required in any other crime.**”

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:-

“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).”

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 cannot be maintained. Consequently, by short order dated **24.12.2020** this appeal was allowed and conviction and sentence recorded by the trial Court by judgment dated **07.11.2019** was set aside and appellant was acquitted of the charge. These are the reasons for our short order.

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Dated: _____ .04.2021

Ayaz Gul