

## IN THE HIGH COURT OF SINDH AT KARACHI

Present:

Mr. Justice Nazar Akbar  
Mr. Justice Zulfiqar Ahmad Khan

Special Cr. Anti-Terrorism Appeal No.17 of 2019  
Special Cr. Anti-Terrorism Appeal No.18 of 2019

Appellant : Chuttal Khan Magsi through  
Mr. Muhammad Farooq, Advocate.

State : Through Mr. Hussain Bux Baloch,  
Additional Prosecutor General, Sindh.

Date of Hearing : 14.12.2020

Date of Judgment : 14.12.2020

### J U D G M E N T

**Zulfiqar Ahmad Khan, J:-** Appellant Chuttal Khan Magsi son of Muhammad Hussain Magsi was tried by learned Judge, Anti-Terrorism Court-X, Karachi in Special Cases Nos.500 and 501 of 2016 [Crime Nos.33 and 34 of 2016, under sections 353/324/34 PPC read with Section 7 of ATA 1997 and under section 4/5 of Explosive Substance Act, 1908 read with Section 7 of ATA, 1997], registered at P.S. Khokhrapar, Karachi. On conclusion of the trial, vide judgment dated 29.11.2018, the appellant was convicted and sentenced under section 265-H Cr. P.C. as under:-

- a. For the offence punishable under Section 7(h) of Anti-Terrorism Act, 1997 read with Sections 353/324 PPC and sentenced to undergo R.I. for 10 years with fine of Rs.100,000/-. In case of default in payment of fine he shall suffer further R.I. for six months.
- b. For the offence punishable under Section 7(1)(ff) of Anti-Terrorism Act, 1997 read with Section 4/5 of Explosive

Substance Act, 1908 and sentenced to undergo R.I. for fourteen years.

All sentences were ordered to run concurrently. Benefit of Section 382-B, Cr. P.C. was also extended to accused.

2. The prosecution story unfolded in the crime reports (Exh.10/A and 10/E) are that on 09.02.2016 in between 1300 to 1315 hours SIP Chan Muhammad (complainant) got registered FIR No.33/2016, under sections 353/324/34 PPC r/w Section 7 ATA, 1997 and FIR No.34/2016, under section 4/5 of Explosive Substance Act read with Section 7 ATA, 1997 at P.S. Khokrapar, Karachi stating therein that on that day, he was on patrolling duty alongwith his subordinate staff in Police Mobile. During patrolling duty, SIP Chan Muhammad received a spy information that some suspicious persons were present at Ramzan Laasi Goth Lal Shah Graveyard Khokrapar, Karachi with intention to commit act of terrorism and to attack oil refinery. Upon receiving such spy information, police party immediately rushed towards the pointed place. At about 1200 hours police party reached at the pointed place. The spy pointed out the suspicious persons, who were present inside the boundary wall of Graveyard. As soon as, the police party went inside the boundary wall, they found 03 persons who were sitting there, who on seeing the police party started making fire shots upon the police party with intention to commit their intentional murder, as well as deterred them from discharging their lawful duties and official functions. The police officials also made firing in retaliation. During exchange of firing, the said assailants got frightened and started running away from the crime scene. By the time, police party caught hold one of the accused persons, on the spot, whereas, his other 02 accomplices managed to flee away from the crime scene. Upon inquiry, the apprehended accused disclosed his name as to be Chuttal Khan Magsi son of Muhammad Hussan, whose personal search was conducted by SIP Chan Muhammad, which led to the recovery

of one Hand Grenade from the left pocket of his own shirt. The apprehended accused also disclosed the names of his absconding accomplices as to be Hazar Khan @ Hazar Bugti and Bilal Malik. The police party also checked their official mobile and they found that it had received bullet injuries on its body. Thereafter, SIP Chan Muhammad arrested the apprehended accused on the spot, under the memo of arrest, recovery and seizure and brought him to P.S. alongwith the case property. Hence these FIRs.

3. After usual investigation, challan was submitted against the accused under the above referred sections. All the cases were amalgamated by the trial court under section 21-M of the Anti-Terrorism Act, 1997, vide order dated 02.06.2016 at Exh.03.

4. Trial court framed charge against the accused at Exh.06 in all the cases, to which accused pleaded not guilty and claimed to be tried.

5. At trial, prosecution examined five witnesses. Thereafter, prosecution side was closed.

6. Statement of accused under Section 342 Cr. P.C was recorded at Exh.15, wherein the accused denied all the incriminating pieces of prosecution evidence brought against him on record and claimed false implication in these cases. In a question what else you have to say, he replied that he is innocent and he has been falsely implicated in these cases at the instance of complainant of FIR No.663/2015 of P.S. Karachi Industrial Area.

7. Trial Court after hearing the learned counsel for the parties and assessment of evidence, by judgment dated 29.11.2018 convicted and sentenced the appellant as stated above. Hence these appeals.

8. Learned counsel for the appellant contended that the impugned judgment is illegal, unlawful, arbitrary and is unwarranted by law. He further contended that learned trial Court did not consider the improvements, discrepancies, and contradictions in the statements of PWs while deciding the case, that appellant/accused was booked by the police in these cases falsely by foisting explosive substance upon him. He further contended that no specific role has been assigned to the appellant. He further contended that official weapons of police were not sent for FSL which makes the whole story doubtful. He also contended that the learned trial Court has erred in holding that the prosecution has proved the case against the appellant while there was contradictory evidence which is not trustworthy due to material contradictions and conviction handed down to the appellant is illegal and the same is result of mis-reading of facts and evidence on record. Learned counsel further contended that the appellant is innocent and has falsely been implicated in these fake and managed cases of encounter and hand grenade by the police. Learned counsel further contended that the learned trial Court has miserably failed to appreciate the evidentiary value of evidence and also failed to prove the case beyond the shadow of doubt and allegedly official police mobile was hit by a bullet which sole ground is sufficient to create the doubt in the prosecution story and as per FIR no pistol was recovered from the exclusive possession of appellant/accused and in absence of pistol the offence under section 353/324 PPC cannot be established. Learned counsel further contended that no independent witness has been cited by the prosecution in these cases despite the fact that the place of occurrence was thickly populated area. Lastly, learned counsel prayed for acquittal of the appellant

9. Conversely, learned Additional Prosecutor General has argued that the prosecution has examined five PWs and they have fully implicated the accused in the commission of offence. He further argued

that police officials had no enmity to falsely implicate accused in these cases and trial court has rightly convicted the accused. Learned Additional Prosecutor General prayed for dismissal of the present appeals.

10. We have carefully heard the learned Counsel for both the parties and scanned the entire evidence available on record.

11. At the trial, prosecution examined P.W.1 SIP (BDU) Muhammad Faris has deposed that on 09.02.2016, he was posted at BDU East Zone, Karachi as a SIP and had received a call from Akbar Base, who had informed that officials of PS Khokrapar, had arrested an accused and from his possession Explosive Material was recovered and its inspection was required. During his cross-examination he admitted that the recovered Hand Grenade was without Detonator.

12. PW-2 PC Muhammad Rizwan has deposed that on 09.02.2016, he was posted at posted at PS Khokrapar as P.C. On that day, he and PC Shoukat Ali were on a Motorcycle, while SIP Chan Muhammad, PC Khuda Bux, PC Shoaib Iqbal and DHC Fayyaz, who in Police Mobile were on patrolling duty. The spy/informant pointed out three suspected persons. As soon as they all got down from their Vehicles, the culprits started firing upon them, with intention to deter them from discharging their official duties and attempted to commit their murder with their Pistols. In retaliation, on direction of SIP Chan Muhammad, they all started fire shots, in their defense. Two suspects escaped away making fire shots, while the other was cordoned-off by them and he was apprehended. Upon inquiry, the apprehended person disclosed his name to be Chuttal Magsi son of Muhammad Hassan. Thereafter, SIP Chan Muhammad conducted his personal search **recovered one Hand Grenade from the pocket of his Kameez**. SIP Chan Muhammad also inquired the names of his absconding accomplices. On checking, SIP Chan Muhammad found

Bullet injury on right side above the tyre of police Mobile. SIP Chan Muhammad also secured 04 empties of 30 bore and 04 empties of SMG from the spot. During his cross-examination he stated that they reached at the place of Wardaat, after 10 minutes of receiving spy information and they were at the distance of 10 feet from the Culprits, at the time of encounter and the encounter had taken place after 12:15 P.M and admitted that they started fire shots upon the accused person **and the present accused did not make any fire shots** and the absconding accused persons had made fire shots upon the Police party and only a Hand Grenade was recovered from the possession of present accused.

13. PW-03 SIP Chan Muhammad deposed that on 09.02.2016, he was posted at PS khokrapar as SIP. On that day, he alongwith PC Shoaib Iqbal, PC Khuda Bux, DHC Muhammad Fayyaz were on patrolling duty in police Mobile while PC Shaukat and PC Rizwan were on motorbike. They stopped their Mobile as well as Motorcycle and got down from them. The 03 culprits started fire shots upon them, in order to cause their death and deter them from their official duties. Two culprits escaped away, whereas, he with the help of his subordinate staff apprehend one suspect on the spot, who upon inquiry disclosed his name to be Chuttal Khan Magsi S/o Muhammad Hassan and conducted personal search and recovered one hand grenade POF 197 (black colour) from the right side pocket of his Kameez and also recovered 04 empty shells of 30 bore, 04 empty shells of SMG from the place of Wardaat, sealed the empty shells and prepared memo of arrest, recovery and seizures and obtained the signatures of Mashirs. During his cross-examination, he stated that the spy had taken only 02 minutes furnishing information to him and **admitted that he had not mentioned in his statement before the Court, so also in his statement under section 161 Cr.P.C. that the spy had accompanied him towards Lal Shah Graveyard (place of Wardaat)**

and the height of the boundary Wall might be 03/04 feet and the accused persons were at the distance of 20/25 feet from them and he could not say that how many fire shots were made by the each accused, because he did not know their names and **admitted that he had not written date on Article P/2**, so also Article P/3 and he did not remember the name of Duty Officer who was present at that time, when they had come back after the encounter, that he had sought permission from him, and he had handed over the investigation of these cases along with Police papers, custody of accused so also case property to I.O. at 02.00 Pm, as he had come late.

14. PW-4 Inspector Muslim Tunio has deposed that on 09.02.2016, he was posted as SDI Saudabad and received investigation of Crime No. 33/2016 and 34/2016 of P.S Khokrapar through Letter of SSP Korangi. During his cross-examination, he stated that **he did not remember the time of registration of the FIRs and the FIRs were registered on 09.02.2016** and they had proceeded to the place of Wardaat in official police Mobile but **he did not remember its registration number** and further admitted that the place of Wardaat was thickly populated area and he did not secure any incriminating article from the place of Wardaat. He had prepared memo of inspection of place of Wardaat on the spot on the bonnet of the Police Mobile and **he did not remember the location/address of place of Wardaat** and the encounter between police and the culprits had happened and the police party was of P.S Khokrapar but **he did not remember the names of those police officials** and no one from either side had received bullet injury but police vehicle had received bullet injury on upper side of right rear tyre and he had interrogated the accused Chuttal in the afternoon and he had not produced the entry of P.S. KIA.

15. PW-05 HC Muhammad Aijaz has admitted that the memo of re-arrest of the accused was prepared by SHO Muhammad Muslim Tunio at about 2330 hours and he did not know that from where, Inspector Muhammad Muslim Tunio had obtained information regarding the involvement of the accused in present case crime.

16. Record reflects that recovered hand grenade No. HE-36 (POF Made), EOD Device was inspected by PW-01 SIP Muhammad Faris, who in his report (Exh.7/E) dated 02.03.2016 has found **the said hand grenade without detonator**, whereas, four 30 bore crime empties and four 7.62x39 mm bore crime empties were also examined by the Ballistics Expert on 28.03.2016. It may be noted that **FIRs were registered on 09.02.2016, whereas, crime empties were received on 28.03.2016 for chemical examination.** Furthermore, **Hand Grenade has not been sent for FSL report**, which creates serious doubt in the prosecution case. According to Exh.12/D, the Investigating Officer has written a letter to Incharge FSL Branch for inspection of Police Mobile No.SP-6495 as the said vehicle has received one bullet injury on its body but **no FSL report of damage to police mobile has been produced by the prosecution.**

17. Record further reveals that the encounter took place between 1300 to 1315 hours but surprisingly no injury was caused to any party not even the general public except police mobile has allegedly received one bullet injury on upper side of right rear tyre but the same has not been produced for FSL examination. Furthermore, PW-03 SI Chan Muhammad has admitted that he himself had handed over the investigation of these cases along with police papers, custody of accused so also case property to I.O. without any authorization from competent authority. It was a case of spy information but prosecution has also failed to show that despite being a well-populated area when police had sufficient time to



associate any independent/private persons of the locality for making them as *Mushirs* of recovery and PW-03 SIP Chan Muhammad has failed to do so without justification and failed to explain that why such was not done, which cuts the roots of prosecution case. The above prosecution evidence shows glaring contradictions/ambiguity. This fact has totally been ignored by the learned trial Court while passing the impugned judgment.

18. For the aforementioned inconsistencies and flaws, we are compelled to consider the case at hand as one where prosecution has failed to prove its case against the appellant beyond any reasonable doubt and prosecution's case appears to be highly unnatural and unbelievable. It is the case of prosecution that accused were armed with hand grenade/explosive substance and 30 bore pistols. It is unbelievable that no attempt was made by the accused to use the hand grenade/explosive substance at the time of his arrest in order to escape. It appears to be against the mindset of a criminal minded person to surrender without resistance when armed with deadly weapon. According to the case of prosecution, accused alongwith two accomplices was present inside the boundary wall of Graveyard who on seeing police party started firing on them but surprisingly no injury/scratch has been caused to any party. PW-03 SIP Chan Muhammad failed to explain that under what circumstances, he brought explosive substance safely at the police station. Prosecution evidence is silent with regard to the safe custody of the hand grenade/explosive substance at the police station and its safe transit to the expert. Hand grenade has not been sent for forensic test. Delay in dispatch of recovered crime empties to experts has not been explained by the prosecution. Accused has raised plea that he has been falsely implicated in these cases at the instance of complainant of FIR No.66/2015, registered at P.S. Karachi Industrial Area. Unfortunately, trial court failed to consider

the defence story. According to defence version, the present accused was acquitted by the learned Judge, Anti-Terrorism Court & I-Additional Sessions Judge, Karachi-East, vide judgment dated 18.08.2018 in Special Case No.923/2016. Trial court ought to have looked into it for just decision of the case. It is always prudent that a Court takes judicial notice of documents, which were not produced in evidence but were part of the judicial record to do substantial justice between the parties. In a criminal case, it is the duty of the Court to consider the entire evidence produced by the prosecution and the defence both. If, after an examination of the whole evidence, the Court is of the opinion that there is a reasonable possibility that the defence put forward by the accused might be true, such a view be judicially considered. In such circumstances, the accused is always entitled to the benefit of doubt, not as a matter of grace, but as of right. Reliance is placed on the case of **NADEEM-UL-HAQ and others vs. The STATE (1985 SCMR 510)**.

19. As highlighted above, official weapons, which were used in the alleged encounter, have also not been sent for FSL report. Admittedly, Head *Mohrrar* of Police Station has not been examined. Sending the weapons to the forensic division with the considerable delay has also not been explained properly, as such no sobriety can be attached to the positive report, with regard to the safe custody of the weapon at police station and its safe transit, the Honorable apex court in the case of ***Kamaluddin alias Kamala V. The State (2018 SCMR 577)*** has held as under:

“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 to 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”

20. Prosecution has also failed to prove that appellant assaulted or used criminal force to police officials to deter from discharge of their duty hence in our view, appellants had been convicted under section 324, PPC without any evidence. From the prosecution evidence available on record, offence had no nexus with the object of Anti-Terrorism Act, 1997 as contemplated under sections 6 and 7 of the Anti-Terrorism Act, 1997 as evidence available on record makes it clear that encounter had not taken place. Above stated circumstances create doubt about the very commencement of the encounter.

21. It appears that the Investigation Officer who is required to conduct fair investigation has failed as no independent person of locality was examined in order to ascertain the truth beyond any reasonable doubts. The standard of the proof in such a 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 desirable that it should have been investigated by some other agency. Such dictum has been laid down by the Honourable 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.”

22. For the above reasons, we are unable to rely upon the sole evidence of the police officials with regard to the encounter particularly when admittedly there was cross-firing but no injury/scratch was caused to the accused and/or police party. The distance between police officials and accused was 20/25 feet at the time of encounter and none from the either party sustained any bullet injury. Non-production of the arrival and departure entries of police station also cut the roots of the prosecution case.

23. Admittedly it is now well established that while giving the benefit of doubt to an accused, it is not necessary that there should be countless 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)*.

24. From the above discussion, it is evident that the investigation and inquiry carried out is neither satisfactory nor free from *malice* and the

appellant's implication in these cases is not free from doubts. He thus could not be left at the mercy of Police. The review of the impugned judgment shows that essential aspects of the case have slipped from the sight of the learned trial Court which are sufficient to create shadow of doubt in the prosecution story.

**25.** For the above stated reasons, we reach to an irresistible conclusion that prosecution has utterly failed to prove its case against the appellant and trial court failed to appreciate the evidence according to settled principles of law. False implication of the appellant could not be ruled out. Resultantly, these appeals are allowed and conviction and sentence recorded by the trial Court vide judgment dated 28.11.2018 are set aside and appellant is acquitted of the charges. Appellant shall be released forthwith if not required in any other custody case.

**26.** These are the reasons for our short order dated 14.12.2020.

JUDGE

JUDGE

Hanif/Barkat Ali