

IN THE HIGH COURT OF SINDH AT KARACHI

Present:

Mr. Justice Nazar Akbar

Mr. Justice Zulfiqar Ahmad Khan

Special Cr. Anti-Terrorism Appeal No.350 of 2019
Special Cr. Anti-Terrorism Appeal No.351 of 2019
Special Cr. Anti-Terrorism Jail Appeal No.16 of 2020

In Spl. Cr. ATA : Appellant Muhammad Ali @ Lomri
Nos.350 & 351/2019 Through Mr. Haad Abid, Advocate

In Spl. Cr. Jail ATA : Appellant Muhammad Waqas Qureshi
No.16/2020 Through Mr. Muhammad Hanif Noonari,
Advocate

The State : Through Mr. Abrar Ali Khichi, D.P.G.

Date of Hearing : 22.12.2020

JUDGMENT

Zulfiqar Ahmad Khan, J:- Through instant appeals, Appellants have assailed their conviction and sentences recorded by the learned Anti-Terrorism Court No.-XVI, Karachi, by judgment dated 18.12.2019, passed in Special Case Nos.344 & 344-A of 2019, arising out of FIR No.107 of 2019 for offences under section 392/353/324/34 PPC read with section 7 ATA, 1997 and FIR Nos.108 and 109 of 2019 under section 23(1)(a) of Sindh Arms Act, 2013; all registered at P.S Paposh Nagar, Karachi. On conclusion of the trial, accused were found guilty and convicted and sentenced under section 265-H(2) Cr.P.C. as under:-

- i) For the offence under section 392 PPC appellant Muhammad Ali @ Lomri was convicted and sentenced to undergo rigorous imprisonment for seven (07) years with fine of Rs.30,000/- and in case of failure to pay the fine, he shall serve S.I for four (04) months.
- ii) For the offence under section 23(1)(a) of Sindh Arms Act, 2013, appellant Muhammad Ali @ Lomri was convicted and sentenced to undergo simple imprisonment for seven (07) years with fine of Rs.10,000/- and in case of failure to pay the fine, he shall suffer S.I for three (03) months more.

- iii) For the offence under section 392 PPC appellant Muhammad Waqas Qureshi was convicted and sentenced to undergo rigorous imprisonment for four (04) years with fine of Rs.30,000/- and in case of failure to pay the fine, he shall serve S.I for four (04) months.

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

2. Prosecution story unfolded in the FIR is that on 12.05.2019 complainant Muhammad Amir was going to his house on his motorcycle at 0400 hours and when he reached at Khair-ul-Bashar Masjid, Block-W, Alama Iqbal Town, Karachi, two young boys robbed his pursue containing Rs.3,110/- and his coloured copy of CNIC and while they were fleeing, police mobile came there, whereupon he made hue and cry and informed police officials about the fact, who challenged the accused, but they started firing upon the police. Police officials also fired in retaliation and arrested the accused near Hakim Bawarchi. The accused disclosed their names to be Muhammad Ali @ Lomri and Muhammad Waqas. The police recovered from accused Muhammad Ali one 30 bore pistol rubbed number, wrapped handle with solution tape and broken plastic handle from both side, having magazine loaded with two rounds in magazine and one bullet in chamber, cash of Rs.600/- and one Q A-6 white colour mobile, snatched black wallet containing Rs.3,110/- and one colour copy of CNIC in the name of Muhammad Amir. From accused Muhammad Waqas Qureshi, one 30 bore pistol rubbed number having magazine loaded with three rounds thrust in right side fold of wearing shalwar and Rs.250/- were recovered. Thus, both the accused were arrested and lodged separate FIRs against them for the above crime.

Appellant Muhammad Waqas Qureshi however acquitted for the offence under section 23(1)(a) of Sindh Arms Act, 2013.

3. After usual investigation, challan was submitted against the accused/appellants before the competent court of law. Then, trial court framed charge against all the appellants under sections 392/353/324/34 PPC read with section 6(2)(m) & (n) punishable under section 7(1)(h) and under section 23(1)(a) of Sindh Arms Act, 2013 at Exh.05, to which they pleaded not guilty and claimed to be tried.

4. At trial, prosecution examined three (03) witnesses namely, PW-1 Muhammad Amir at Exh.8, PW-2 SI Mushtaque Ahmed at Exh.09 and PW-03 I.O Muhammad Anees at Exh.10, who produced certain documents during their evidence. Thereafter, prosecution side was closed vide statement at Exh.11. Statements of accused under Section 342 Cr.P.C were recorded at Exh.12 and 13, in which they denied all the allegations leveled against them and claimed that they are innocent and have been falsely implicated in these cases by the police. Appellants however did not examine themselves on oath.

5. Trial Court after hearing learned counsel for the parties and assessment of evidence as well as perusal of record by judgment dated 18.12.2019 convicted and sentenced the appellants, as stated above. Hence these present appeals.

6. Learned counsel for the appellants contended that the impugned judgment is illegal, unlawful, arbitrary, unwarranted by law and is not in consonance with the evidence brought on record, hence liable to be set *aside*, and the appellant/accused are entitled for acquittal. Whereas, the learned trial Court has failed to consider material discrepancies in the evidence of prosecution witnesses rendering the prosecution case doubtful. They further contended that there is no description of the amount allegedly snatched from the complainant; that 161 Cr.P.C statements of witnesses do not mention about the snatched purse and money; that allegedly the police made aerial firing, but none has sustained any bullet

injury; that as per examination-in-chief of complainant (PW-01) accused were 15/20 paces away from him whereas as per examination-in-chief of PW-2 accused were 5/10 paces away from the complainant; that the I.O did not produce original Roznamcha entry before the trial Court; that the police mobile was not produced before the trial Court; and that the case property was sent to FSL with two days' delay. They lastly contended that the charges under section 324, 353 and 7 ATA were not proved before the trial Court resulting in acquittal of both the appellants, whereas the only punishment awarded to the appellants was under section 392 PPC as well as section 23(1)(a) of Sindh Arms Act, 2013, for which too appellant Muhammad Waqas has been acquitted by the trial Court. Thus, these circumstances make the prosecution case highly doubtful. In support of their arguments, learned counsel for the appellants had relied upon the cases of Danish Ali v. the State (SBLR 2018 Sindh 1904), Deedar Ahmed v. the State (2016 P Cr.LJ 1911), Azmat Ali v. the State (2012 YLR 1152 [Lahore]), Gul Muhammad alias Guloo v. the State (2003 SD 875) and Abdul Sattar and others v. the State (2002 P Cr.LJ 51).

7. On the other hand learned Deputy Prosecutor General has fully supported the impugned judgment and contended that the trial Court has rightly convicted the accused on the basis of evidence brought on record by the prosecution. Lastly, he prayed for dismissal of these present appeals.

8. We have heard learned counsel for the appellants as well as learned Deputy Prosecutor General for the State and have minutely scanned the entire evidence available on record.

9. PW-01 (complainant) in his examination in chief deposed that he work in Embroidery in New Karachi Godra and on 12.05.2019 when he was returning his home after having visited his friend he reached near Khair-ul-Bashar Masjid Paposh Nagar where two accused appeared on a

motorcycle. One of them came to him and snatched his purse and fled away. Meanwhile, police came there, whom he informed about the incident. The police signaled the accused to stop, who were ahead at the distance of around 15/20 paces and the police made aerial firing over the accused in retaliation of the fires made by them. The police caught both the accused. One of the accused disclosed his name to be Muhammad Ali, from whose body search police recovered one pistol with rounds, Rs.600/-, one mobile and his purse. The second accused disclosed his name Waqas, from whose body search police recovered one pistol and some rounds and cash of around Rs.250/-. They were arrested under the memo after putting the recovered articles into cloth by associating him and H.C Muhammad Imran as witness. Thereafter, he came at P.S where he got lodged the FIR, thereafter, Sub Inspector called him to come at the place of incident where he prepared the memo of the place of incident by associating him as one of witnesses. Thereafter his statement under section 161 Cr.P.C was recorded. In his cross examination conducted by Mr. Haider Farooq Jatui, Advocate for appellant Waqas, he stated that *“at the time of formalities no one from public was available”* however in the cross conducted by another counsel, he admitted that *“it is correct to suggest that since it was Ramzan month the shops were open at the time of incident.”*

10. PW-2 in his examination in chief deposed that on 12.05.2019 he was posted as Sub Inspector at P.S Paposh Nagar. He alongwith H.C Muhammad Imran, P.C Muhammad Kashif, P.C Rizwan Taj and DPC Arif Hussain left for patrolling in police mobile bearing No.SPC-432 vide entry No.41 at 0015 hours. While patrolling when they reached at Masjid Khair-ul-Bashar at about 0400 hours, one person on a motorcycle informed them by crying “Dakoo Dakoo” who were also going on a motorcycle just ahead. They chased and signaled the accused to stop, who started firing on them with intention to commit their murder. He directed the staff to fire

back and resultantly caught both of them. The accused who was driving motorcycle disclosed his name to be Muhammad Waqas Qureshi S/o Fazalddin and his companion disclosed his name to be Muhammad Ali @ Lomri S/o Muhammad Hussain. In the meantime the person who shouted "Dakoo Dakoo" also appeared and disclosed his name to be Muhammad Amir S/o Muhammad Jahangir. During body search of accused Muhammad Ali one 30 bore pistol rubbed number, the grip of the pistol with broken strips, loaded magazine with 02 rounds and 01 round in chamber was recovered. His further body search led to the recovery of Q-Mobile, cash of Rs.600/-, one black pursue with zip containing in it Rs.3,110/- one colour copy of CNIC in the name of Muhammad Amir. Muhammad Amir disclosed that this is his pursue which was snatched by the accused. While body search of another accused namely Muhammad Waqas led to the recovery of one 30 bore pistol rubbed number loaded magazine there rounds, cash of Rs.250/- and one black colour Nokia keypad mobile. The accused could not produce the license. The motorcycle with registration No.KIL-3689 was also secured which was enquired from ACLC computer section via wireless, who informed that the motorcycle was stolen property of P.S Nabi Bux in crime No.156/2019. They also secured two empties of 09 MM Pistol and two empties of 30 bore pistol and the weapon and ammunition were sealed so also empties under the memo by drawing the sketch of the weapon and ammunition and empties by associating Muhammad Amir, H.C Muhammad Imran. Two fires during the incident had hit the police mobile. On arrival back at the police station, FIR No.107 of 2019 was got lodged by the complainant. The investigation was entrusted to P.I SIO Muhammad Anees, who took them to the place of incident and prepared memo of the place of incident at 1400 hours by associating him and Muhammad Amir as witness. On arrival back at the P.S his statement under section 161 Cr.P.C was recorded. In his cross examination, he admitted that *"it is correct to suggest that departure entry I have produced as Ex.09/A is photocopy."*

Voluntarily says that, same is stamped”.... “It is correct to suggest that entry is not mentioned in the memo, FIR nor in my statement u/s 161 Cr.P.C.”...“It is correct to suggest that IO did not associate any public witness during site inspection.”

11. PW-3 in his examination in chief deposed that on 12.05.2019 he was posted as SIO at P.S Paposh Nagar where he received FIRs bearing Crime Nos. 107 to 109 of 2019 alongwith police papers and case property and accused in lockup. He left P.S in a police mobile alongwith SIP Mushtaque for place of incident vide entry No.13, whereas complainant Muhammad Amir was directed on the phone to reach at the place of incident. Complainant reached accordingly and on his pointation place of incident was visited under memo by associating SIP Mushtaque and complainant. He also prepared sketch and made photography. He returned back at P.S vide arrival entry No.18, where statements of witnesses under section 161 Cr.P.C were recorded. The accused were interrogated and he received previous criminal record of the accused. Weapons and the police mobile were dispatched to FSL for examination through letters and he received their reports vide Ex.10/k and Ex.10/N. In his cross examination, he admitted that *“it is correct to suggest that public witnesses are not associated”... “It is correct to suggest that the police mobile is not available in the court. Voluntarily says that, official mobile is out of order.”*

12. It was case of the prosecution that accused robbed a purse from the complainant and were escaping from the crime scene, meanwhile police mobile reached there and challenged the accused, who opened fire upon the police personnel with intention to kill them and deterred them from discharging their lawful duties so also created sense of fear and insecurity in the vicinity. After encounter both the accused were arrested by the police with recovery of the robbed articles and unlicensed pistols.

However, for the charges under sections 324, 353 PPC and 7 ATA, learned trial Court has already acquitted both the appellants and there is no challenge to that acquittal, hence there remains only a case of robbery and recovery of alleged unlicensed pistols, for which appellant Muhammad Waqas has also been acquitted by the learned trial Court on the ground that the alleged recovered pistol from him was not in working condition as per FSL report.

13. From perusal of the evidence, we have noted material contradictions and defects in the evidence of prosecution witnesses, which does not inspire confidence in order to maintain conviction rather creates doubts. For instance, as per examination in chief of the complainant accused were **15/20** paces away from him whereas as per examination in chief of PW-2 accused were **5/10** paces away from the complainant; and that PW-1 in his cross examination stated that the firing between the police personnel and accused continued for around **05/10** minutes, while PW-2 in his cross examination stated that the encounter continued for **02/03** minutes. Admittedly, 161 Cr.P.C statements of PWs are silent *inter alia* with regard to description of cash amount of Rs.3,110/-, securing of empties from the place of incident and sealing of the case property at the spot. Undoubtedly, the Roznamcha entries (Exh.9/A and 9/B) are neither original nor attested, but only round seals of P.S are affixed on it. As to the inspection of place of incident, PW-1 in his cross examination stated that he reached at the place of incident before IO, who was accompanied by sub Inspector Mushtaq on **motorcycle**, while IO in his examination in chief stated that they left for place of incident in a **police mobile**. Admittedly police mobile was not produced before the trial Court, so also as per deposition of PW-02 as well as letter of I.O to FSL (Ex.10/L), **two** fires had hit the **left** side of police mobile during the incident, whereas, as per FSL report at Ex.10/N, **three** firearms marks were observed on the **right** side of the police mobile. Moreover, the police mobile was sent to

the FSL with two days' delay without proper explanation. In this view of the matter, evidence of the prosecution witnesses is doubtful.

14. It has been repeatedly held that the requirement of section 103, Cr.P.C, namely, that two members of the public of the locality should be Mashirs to the recovery, is mandatory unless it is shown by the prosecution that in the circumstances of a particular case it was not possible to have two Mashirs from the public.¹ In the case at hand, neither efforts were made to associate another person from locality to act as Mashirs of the memo of arrest and recovery as well as site inspection, nor any explanation was given for this failure, rather it was admitted by both PW-2 and PW-3 that IO did not associate any public witness during site inspection, which is clear violation of section 103 Cr.P.C, rendering the recoveries as doubtful.

15. Now coming to the positive FLS report. It is settled law that the positive FSL report is corroborative piece of evidence which by itself is insufficient to convict the appellants in absence of substantive piece of evidence. It is meant to test the veracity of ocular evidence. Both corroborative and ocular testimony is to be read together and not in isolation. When there is no eye-witness to be relied upon then there is nothing which can be corroborated the recovery.² In the instant case, as discussed above, not only the ocular testimony is contradictory but also the number of bullets which allegedly hit the police mobile are variant to that of deposition of PW-2 and letter of I.O to FSL, so also side of the police mobile to which bullets allegedly hit, is also change, as highlighted in the preceding paragraph. Thus, no reliance could be placed on ocular and corroborative evidence and conviction could not be maintained.

¹ State through Advocate-General Sindh v. Bashir and others, PLD 1997 SC 408

² Ijaz Ahmed v. the State, 1997 SCMR 1279, Asadullah v. Muhammad Ali, PLD 1971 SC 541, Saifullah v. the State, 1985 SCMR 410

16. The case laws relied upon by the learned trial Court for convicting the appellants are quite different from the instant case, as in one case the delay of sending crime weapon and crime empty was held not to overweight the ocular evidence, which was found in line with and supported by the medical evidence³ and in the latter case lapses on the part of the investigating agency in the presence of convincing and direct evidence were not considered to brush aside the case of the prosecution.⁴ However in the case at hand, not only the ocular evidence is contradictory, as discussed above, but also FSL report is in conflict with the ocular testimony. In these circumstances where learned trial Court has already identified contradictions with regard to happening of an encounter and advancing benefit of doubt to one of the alleged accused *inter alia* relying on the FSL report, it would be unsafe to maintain conviction in the case of robbery, as court must consider the cumulative effect of total evidence while assessing its evidentiary value and pieces of evidence would not be read in isolation.⁵

17. 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 version. It is settled law that for creating doubt, many circumstances are not required and if a single circumstance creates a reasonable doubt in a prudent mind, then its benefit be given to the accused not as matter of grace or concession but as a matter of right.⁶

18. In view of the above stated reasons, we have no hesitation to hold that there are several infirmities in the prosecution case, as discussed above, which have created doubt, therefore, we reached to a conclusion that the prosecution has failed to prove its case against the appellants

³ Muhammad Aslam v. the State 2012 SCMR 593

⁴ Habib Sultan v. State, 2008 P.Cr.L.J 405

⁵ Muhammad Ibrahim v. the State, 2017 P Cr.LJ 1130 [Gilgit-Baltistan Chief Court]

⁶ Muhammad Mansha v. the State, 2018 SCMR 772

beyond reasonable doubt and the trial Court failed to appreciate the evidence according to the settled principles of law. False implication of the appellants could not be ruled out. Resultantly, these appeals were allowed by short order dated 22.12.2020, whereby conviction and sentences recorded by the learned trial Court were *set aside* and appellants were acquitted of the charges.

These are the reasons of our short order dated 22.12.2020.

JUDGE

JUDGE

Karachi,
Dated 07.06.2021
Barkat Ali, PA