

IN THE HIGH COURT OF SINDH AT KARACHI**Criminal Appeal No. 296 of 2009**

Appellant : **Noor Hussain (in person)**

Respondent : **The State**
through Mr. Zahoor Shah, DPG

JUDGMENT

Omar Sial, J.: On 29-8-2004, S.I. Saeed Iqbal who was then performing his duty in the Bangladesh Section of the Special Branch of police in Karachi, stopped three persons named Fazal Haq, Zia and Noor Hussain on the suspicion that they were nationals of Bangladesh and as the three persons could not answer his questions in a satisfactory manner, he arrested them on the charge that they had come illegally to Pakistan from Bangladesh in the year 1980. An F.I.R. bearing number 222 of 2004 was registered under Article 3(2)(a) of the Foreigners Order, 1951 and section 14(2) of the Foreigners Act, 1946 at the Mithadar police station in Karachi.

2. The charge against the three accused persons was framed on 10-11-2004 to which they pleaded not guilty and claimed trial. The trial commenced with P.C. Mohammad Saleem Qureshi (**PW-1**) and H.C. Syed Mehdi Ali (**PW-2**) being examined as the first and second prosecution witnesses. They were both members of the police party which had arrested the accused. After the testimony of the first two witnesses were recorded, accused Fazal Haq and Zia were declared absconders and the trial subsequently proceeded against only Noor Hussain. S.I. Saeed Raza was examined as the third prosecution witness (**PW-3**). He was the complainant of the case and also the head of the police party which had apprehended and arrested the accused. The prosecution then closed its side.

3. Noor Hussain, recorded his statement under sections 342 Cr.P.C. and then under section 340(2) Cr.P.C and professed his innocence. He recorded that he was in the business of selling Compact Discs and Digital Video Discs and for that purpose he would visit Dacca amongst other countries. On 29-8-2004, while he was about to enter the airport for one such visit, a man named Shaukat approached him and asked him to produce his travel documents. Noor produced the documents upon which Shaukat told him that the travel documents were forged and then handed over the documents to S.I. Saeed Raza. He was taken to a police station where he was asked for Rs. 10,000 to let

him go. He declined to pay the bribe and instead showed all his Pakistan nationality documents to the police officer but the police still registered the case. He produced a number of documents including his national identity card in support of his assertion.

4. The learned 7th Additional Sessions Judge, Karachi South on 13-11-2006 announced the judgment in the case and convicted Noor Hussain for an offence punishable under section 3(2)(a) of the Foreigners Order, 1951 and section 14(2) of the Foreigners Act, 1946 and sentenced him to rigorous imprisonment for three years and a fine of Rs. 50,000 (or a further period of three months simple imprisonment in default). It was also ordered that Noor Hussain be deported after serving the sentence. Noor Hussain filed an appeal against the said judgment before this Court (Criminal Appeal No.390 of 2006) and this Court on 13-11-2006 set aside the judgment of the trial court and remanded the case back to the trial court on the ground that the trial court had not taken into consideration the citizenship documents produced by Noor Hussain at trial. The learned trial court on 12-11-2009 wrote a letter to the NADRA office and on the basis of NADRA's reply passed a judgment on 12-11-2009 maintaining the conviction and sentence passed in the earlier judgment. It is this judgment of the learned trial court which has been impugned in these proceedings by Noor Hussain.

5. I have heard the appellant in person as well as the learned D.P.G and examined the record. My observations are as follows.

- (i) P.C. Mohammad Saleem Qureshi testified that on 29-8-2004 he was on duty along with S.I. Saeed Raza and H.C. Mehdi Ali when S.I. Saeed Raza brought the accused with him and told Qureshi that the three were trying to leave Pakistan on forged documents. Qureshi testified that the arrest was not made before him nor was the memo of arrest prepared at the time of arrest. Instead, the same was prepared at the police station. He admitted that he had merely put his signature on the memo at the police station. He also admitted that his section 161 Cr.P.C. statement bore a date which was one month after the date of the incident. Syed Mehdi Ali, the second prosecution witness also testified on the same lines as Qureshi. Mehdi Ali further admitted that the extent of his knowledge was that he had heard that there was something wrong with the passports of the accused. His section 161 Cr.P.C. statement also reflected that the same was prepared one month after the incident.

- (ii) Apart from the fact that S.I. Saeed Raza prepared the memo of arrest at the police station well after the arrest had been made and recorded witness statements after one month, he did not even bother to seize the documents that the accused carried at the time of their arrest, of course there was no memo of recovery prepared. The travel documents of the accused were not even sent to the concerned departments and foreign missions for verification as to whether the same were genuine or not. Not an iota of investigation was conducted by S.I. Saeed Raza and it appears from the record that all rules which he was obligated to follow were blatantly flouted by him.
- (iii) At the trial absolutely no cogent evidence was led to establish the prosecution case. To the contrary the inefficiency, incompetency and dishonesty of the witnesses, in particular S.I. Saeed Raza, was adequately demonstrated. The learned trial court in the first judgment that was passed simply went along with the prosecution version and it appears, after quoting out of a few laws, passed a judgment on the ground that *“from his appearance, personality and mother tongue, the present accused appears to be from East Pakistan and therefore burden lies upon him to prove himself a Pakistan national.”* This Court takes a strong exception to the foregoing observation of the learned trial court and records its disapproval of the same. The learned trial court was expected to decide on the basis of evidence before it and not on the appearance and accent of the accused.
- (iv) When the case was remanded back to the learned trial court for taking into consideration the plea raised by the appellant in his defence and the string of documents which he had produced at trial, the learned trial court, in a very non-serious and arbitrary manner, appears to have sent only the national identity card to NADRA and on the basis of a letter written by NADRA proceeded to convict and sentence the appellant without having given him the opportunity of cross examining the NADRA official or ever was confronting the appellant with the said letter.
- (v) The appellant produced his old national identity card as well as his new computerized national identity card subsequently, his Certificate of Domicile issued on 9-6-1992 showing that he had been living in Pakistan since birth i.e. 5-8-1967, his Permanent Residence Certificate issued on

6.7.1992 showing him to be a resident of Karachi, his admit card issued by the Board of Secondary Education for the Annual Exam 1987, his Mark Sheet for the said exam, his School Certificates issued in 1986, his marriage certificate issued in 1991, his passport issued as far back as 1988, Form 'B' issued to his father Bashir Ahmed which shows the appellant as a minor. None of these documents were taken into consideration by the learned trial court. On the strength of these documents, prima facie, the appellant was a Pakistan citizen. It appears that all this evidence was brushed aside and the appellant condemned as he appeared to be from the then East Pakistan.

- (vi) One of the sections with which the appellant was charged, convicted and sentenced for was Article 3(2)(a) of the Foreigners Order, 1951. This provision entitles the civil authority to decline leave to enter Pakistan if a foreigner is not in possession of a valid passport or visa for Pakistan. The circumstances of the present case were different. The appellant had been living in Pakistan for several decades and was apprehended while he was on his way out of the country for a business trip.
- (vii) Another aspect of the impugned judgment is that while convicting the appellant under section 14(2) of the Foreigners Act, 1946 included in its sentence that the appellant also be deported after serving his sentence. Section 14(2) of the said Act empowers a trial court to sentence a person up to ten years imprisonment and a fine of Rs. 10,000. It gives no power to a trial court to also order deportation. Deportation of an under trial prisoner or a prisoner who is serving a sentence appears to only be possible under section 14B of the Act with the consent or upon the order of the Federal Government. The record reveals the absence of both.

6. In view of the above, I am of the view that on the basis of the evidence produced at trial the prosecution failed to establish its case against the appellant. The appellant has faced the agony of a protracted trial and appeal proceedings. He is entitled to the benefit of doubt.

7. Above are the reasons for the short order dated 11.09.2018 which was as follows:

“For reasons to be recorded the appeal is allowed and the appellant is acquitted of the charges. He is present on bail, his bail bond stands cancelled and surety discharged.”

JUDGE