

IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

Cr. Jail Appeal No.D-144 of 2019

Present:

Mr. Justice Muhammad Iqbal Kalhoro

Mr. Justice Muhammad Saleem Jessar

Date of hearing : 08.11.2022

Date of Judgment : 08.11.2022.

Appellants Basheer @ Bashoo : Through Mr. Waqar Ahmed Memon,
and Wazir, both sons of Advocate
Ghulam Rasool @ Jogi @
Ghulam Mustafa Chandio

Complainant Mehboob Ali : Through Mr. Noor Nabi Samo,
Advocate

The State : Through Mr. Shahzad Saleem
Nahiyoan, Additional P.G Sindh.

J U D G M E N T

Muhammad Saleem Jessar. J- By means of this judgment, we propose to dispose of afore-referred appeal through which the appellants named above have assailed the Judgment dated 31.07.2019 passed by learned Special Judge, Anti-Terrorism Court No.II, Central Prison, Hyderabad, in Special Case No.01 of 2018 (Old Special Case No.63 of 2016), being outcome of FIR No.73 of 2016 under Sections 302, 504, 337-H(2), 34 PPC R/W Section 7(1)(a) of Anti-Terrorism Act, 1997 registered at P.S. Rukkan, District Dadu, whereby they have been convicted under Section 302(b) PPC read with Section 7(1)(a) of ATA, 1997 and sentenced to suffer rigorous imprisonment for life and to pay compensation of Rs.100,000/- (Rupees One Lac) each to the legal heirs of deceased Qurban Ali in terms of Section 544-A Cr.P.C, in default thereof, to suffer further rigorous imprisonment for one year. However, both the appellants have been extended benefit of Section 382-B Cr.P.C.

2. The brief facts of prosecution case are that complainant's father namely Qurban Ali had a Kiryana Shop in village Patt Shareef. They had also agricultural land in Deh Pakko Panbhi, Taluka @ District Dadu. Two months prior to the incident the complainant alongwith his father went to their agricultural land in the morning, where they saw a co-villager namely Basheer alias Bashoo (one of the present appellants) standing there, who on seeing them asked as to why they have come at their agricultural land and after that the complainant alongwith his father went to their shop. On 01.07.2016 at about 06:00 p.m., four accused went to said shop, out of them, the present accused Basheer alias Bashoo and Wazir were armed with G-3 rifles while co-accused Ali Hassan and Ali Khan were armed with Kalashnikovs, who while entering in the shop threatened them that they will not be spared. Both appellants / convicts fired shots from their respective weapons upon complainant's father Qurban Ali, who fell down on the ground. Thereafter, all four accused went away by abusing them. Resultantly, his father received fire shots on his right thigh and left side of chest. Then complainant alongwith PW Muneer Ahmed and his cousins Liaqut Ali and Razak Ali took his father in a vehicle to P.S Rukkan wherefrom they obtained letter for treatment and went to Civil Hospital, Dadu, where the Doctor informed the complainant that his father has already died. Thereafter, the complainant informed the police post Patt Shareef on cell phone about death of his father. The Police then came at the hospital and complainant delivered the dead body. After postmortem, the dead body was handed over to complainant, who brought it at his home and after funeral ceremony went to P.S on 03.07.2016 at 02:30 p.m. and lodged instant FIR against the accused.

3. After usual investigation, the I.O submitted challan against the accused before the concerned Court. Necessary papers were supplied to the accused. A formal charge against accused Basheer @ Bashoo, Wazir and Ali Khan was framed at Ex-10, to which the pleaded not guilty and claimed trial vide their pleas at Ex-11 to 13.

4. In order to prove the charge against accused, the prosecution got examined PW-1 Dr. Mukhtiar Ahmed Panhwar at Ex-14, who produced police letter No.210 at Ex-14/A, lash chakas form

at Ex14/B and postmortem report of deceased at Ex14/C. PW-2 Khaliq-u-Zaman (Tapedar) was examined at Ex-15, who produced sketch of vardat at Ex15/A. PW-3 ASI Nisar Ahmed at Ex-16, who produced inquest report and Danishnama at Ex-16/A and 16/B, receipt of handing over dead body to complainant at Ex-16/C, memo of last wearing of deceased at Ex16/D, memo of place of incident at Ex-16/E, copy of FIR at Ex-16/F, entry No.13 at Ex-16/G, memo of arrest at Ex-16/H.

5. Thereafter, an application under Section 23/A of ATA, 1997 was filed on behalf of accused Ali Khan for transferring the case from Anti-Terrorism Court to ordinary Court, which was dismissed vide order dated 08.12.2017.

6. Thereafter, the case was tried by another ATC Judge and the required oath u/s. 16 of ATA, 1997 was taken by the trial judge on 09.11.2018 vide Ex.19. Thereafter, an Amended Charge was framed against accused Basheer alias Bashoo, Wazir, Ali Hassan and Ali Khan at Ex.20, to which they pleaded not guilty and claimed to be tried vide their pleas at Ex.21 to 24 respectively.

7. In order to prove the charge against accused, the prosecution examined PW-1 Mahboob Ali (the complainant) at Ex-26. PW-2 Muneer Ahmed was examined at Ex-27. PW-3 Abbas Ali was examined at Ex-28. PW-4 Liaquat Ali was examined at Ex-30, who produced memo of injuries at Ex-31. PW-5 Muhammad Rafique was examined at Ex-32. PW-6 Nisar Ahmed was examined at Ex-33. PW-07 Bashir Ahmed Ujjan was examined at Ex-34, who produced letter of SSP Dadu dated 28.07.2016 at Ex-35 and report at Ex-36. PW-8 Haji Khan was examined at Ex-37, who produced memo of arrest at Ex-38. PW-9 Mian Bux was examined at Ex-39. PW-10 Shabir Ahmed was examined at Ex-40, who produced memo of injuries at Ex-41, letter for treatment of injured at Ex-42, memo of arrest at Ex-43. Thereafter, learned APG gave up PW Nazir Ahmed vide Ex-44. PW-11 Mitho Khan was examined at Ex-45 and then learned A.P.G closed side of prosecution vide statement at Ex-46.

8. Statements of accused under section 342 Cr.P.C were recorded at Ex-47 & Ex.50 respectively. All the accused denied the prosecution allegations and claimed their innocence; however, neither

they opted to be examined on oath as provided under Section 340(2) Cr.P.C nor they produced any witness in their defense.

9. After formulating the points for determination, recording evidence of the prosecution witnesses and hearing learned Counsel for the appellants as well learned APG for the State, trial Court vide impugned judgment convicted and sentenced appellants Basheer @ Bashoo and Wazir as stated above and acquitted co-accused Ali Hassan and Ali Khan from the charges; hence, this appeal has been filed by accused / convicts.

10. Learned counsel for appellants submitted that appellants have been implicated falsely on account of dispute over landed property and that the offensive weapons viz. rifles were not shown to have been recovered from their possession nor they had produced the same before the police during investigation. He further submitted that since the appellants as well complainant party have grudge with each other; therefore, it was not a case of terrorism as no terrorism was spread nor anybody was shown to have been feared with alleged act of the appellants; hence, the police have wrongly applied Sections 6 & 7 of the Anti-Terrorism Act, 1997. He; therefore, submitted that no case warranting application of ATA was made out; hence, the appellants may be acquitted from the charges of the ATA. As far as the main offence is concerned, learned Counsel for appellant submitted that there are many contradictions as well discrepancies in the prosecution evidence which are sufficient to hold the appellants to be innocent and as such they are entitled for acquittal by way of benefit of doubt.

11. On the other hand, learned Additional P.G Sindh appearing for the State opposed the appeal on the ground that the appellants are habitual offenders of committing murders and even appellant Bashir @ Bashoo was wanted under Crime No.01 of 2014 registered at P.S Rukkan District Dadu, under Section 302 PPC and was confined at District Jail, Dadu; and he was arrested in this case while he was confined in jail. He next submitted that no animosity or ill-will has been shown for implicating them falsely at the hands of complainant party. Learned Additional P.G further submitted that the offence allegedly occurred in broad hours of the day viz. 6:00 p.m. on

01.07.2016 when almost the day light shines with its all spirit; besides they being known to each other and having strained relations over landed dispute, the question of false implication or mistaken identity does not arise; hence, submitted that there is no illegality or infirmity in the impugned judgment which may warrant interference by this Court. However, learned A.P.G concedes that it was not a case of terrorism and police had wrongly applied Sections 6 & 7 of the Act; therefore, he has extended his no objection for acquittal of the appellants from the charges of Section 6 & 7 of ATA, 1997.

12. Learned Counsel for the complainant while adopting the arguments advanced by learned Additional P.G Sindh opposed the appeal vehemently and submitted that FIR of the case was lodged promptly; besides the appellants have been nominated under FIR with specific role of causing firearm injuries to deceased which have been corroborated by medical evidence; therefore, there is no difference between ocular version and medical evidence. He further argued that police was informed in time and the I.O had completed all the legal formalities by preparing inquest report, mashirnama of dead body as well lash chakas form; hence, the prosecution has proved its charge against the appellants without any reasonable shadow of doubt and as such they are not entitled for the relief they have sought for. In last, learned Counsel for the complainant argued that appellants are habitual offenders and are involved in many criminal cases of like nature; therefore, by dismissing instant appeal, the impugned judgment may be maintained. In support of his arguments, he has placed reliance upon the cases reported as 2020 PLD SC 61, 2020 SCMR 78, 2020 SCMR 1422, 2017 SCMR 1572, 2018 SCMR 153, 2018 PLD SC 178, 2021 SCMR 612, 2007 SCMR 142, 2018 SCMR 506, 2018 SCMR 326, 2019 SCMR 1165, 2012 SCMR 59 and PLD 2009 SC 11.

13. We have heard learned Counsel for the parties and have gone through the evidence made available before us on record. Admittedly, the appellants are nominated in FIR with specific role of causing firearm injuries to deceased which landed at his chest as well thigh and due to the injuries the deceased could not survive and was deprived of his precious life. The appellants have not shown any

animosity or ill-will, even mala fide on the part of complainant for implicating them falsely. We have also examined the evidence adduced by the prosecution before the trial Court and find that learned Defence Counsel in spite of conducting lengthy cross could not shatter the evidence adduced by the prosecution. The ocular version has been corroborated by the medical evidence and the Medico Legal Officer examined before the trial Court has deposed word against word and his evidence has also not been shattered by the defence in respect of any crucial point.

14. Reverting back to the issue of application of Sections 6 & 7 of Anti-Terrorism Act, 1997, we have gone through the FIR available at Page-101 of the paper book which reveals that complainant had not uttered a single word regarding spread of terrorism in the adjoining area besides the offence had allegedly occurred inside the shop of complainant party, even no one was shown to have been feared due to the act of the appellants and that any insecurity or panic in public or havoc was made by the appellants at the time of incident because of that no concrete evidence in this regard was brought by the prosecution during trial so as to ascertain the element of terrorism. As far as the offensive weapons viz. G-3 rifles allegedly used in the commission of offence are concerned, the same were neither recovered by the police during investigation nor were produced by the appellants before police during investigation at the time of their interrogation. Mere collection of some affidavits of the entities of G-3 rifles does not constitute any offence under the provisions of the Act *ibid*. In this regard, we are fortified by the case **of GHULAM HUSSAIN and others v. The STATE (PLD 2020 Supreme Court 61)** in which the Hon'ble Supreme Court after discussing and taking into consideration a plethora of judgments on the issue involved has held as under:-

“The new definition of 'terrorism' introduced through the amended section 6 of the Anti-Terrorism Act, 1997 as it stands today appears to be closer to the universally understood concept of terrorism besides being easier to understand and apply. The earlier emphasis on the speculative effect of the act has now given way to a clearly defined mens rea and actus reus. The amended clause (b) of subsection (1)

of section 6 now specifies the 'design' and clause (c) of subsection (1) of section 6 earmarks the 'purpose' which should be the motivation for the act and the actusreus has been clearly mentioned in subsection (2) of section 6 and now it is only when the actusreus specified in subsection (2) of section 6 is accompanied by the requisite mens rea provided for in clause (b) or clause (c) of subsection (1) of section 6 that an action can be termed as 'terrorism'. Thus, it is no longer the fear or insecurity actually created or intended to be created or likely to be created which would determine whether the action qualifies to be termed as terrorism or not but it is now the intent and motivation behind the action which would be determinative of the issue irrespective of the fact whether any fear and insecurity was actually created or not. After this amendment in section 6 an action can now be termed as terrorism if the use or threat of that action is designed to coerce and intimidate or overawe the Government or the public or a section of the public or community or sect, etc. or if such action is designed to create a sense of fear or insecurity in the society or the use or threat is made for the purpose of advancing a religious, sectarian or ethnic cause, etc. Now creating fear or insecurity in the society is not by itself terrorism unless the motive itself is to create fear or insecurity in the society and not when fear or insecurity is just a byproduct, a fallout or an unintended consequence of a private crime. In the last definition the focus was on the action and its result whereas in the present definition the emphasis appears to be on the motivation and objective and not on the result. Through this amendment the legislature seems to have finally appreciated that mere shock, horror, dread or disgust created or likely to be created in the society does not transform a private crime into terrorism but terrorism as an 'ism' is a totally different concept which denotes commission of a crime with the design or purpose of destabilizing the government, disturbing the society or hurting a section of the society with a view to achieve objectives which are essentially political, ideological or religious. This approach also appears to be in harmony with the emerging international perspective and perception about terrorism. The international perception is also becoming clearer on the point that a violent activity against civilians that has no political, ideological or religious aims is just an act of criminal delinquency, a felony, or simply an act of insanity unrelated to terrorism. This metamorphosis in the anti-terrorism

law in our country has brought about a sea change in the whole concept as we have understood it in the past and it is, therefore, of paramount importance for all concerned to understand this conceptual modification and transformation in its true perspective.”

15. Accordingly, we are of the view that no case of terrorism was made out and no doubt the police had wrongly applied said sections of ATA, 1997. Besides, the trial Court has also not appreciated the fact whether the basic ingredients for proving the case within the ambit of Sections 6/7 of ATA were attracted / fulfilled or otherwise. In view thereof, the appellants are acquitted from the charges of Section 7(1)(a) of Anti-Terrorism Act, 1997.

16. As far as main appeal is concerned, we are of the view that prosecution has exclusively proved the case against appellants without any shadow of doubt. The eye-witnesses have fully proved the case against appellants and their version is fully corroborated by the medical evidence. According to the case of prosecution, the appellants have made straight fire at deceased, which hit him on his chest and thigh. In instant case, there are three eye-witnesses who all have categorically deposed that in their presence appellants had fired at the deceased from their respective weapons and there is no contradiction in evidence of these witnesses regarding time, place and manner of the incident. Further, PW-1 Dr. Mukhtiar Ahmed after conducting postmortem of deceased has opined that death of deceased was the result of firearm injuries caused at his chest and thigh and his evidence regarding death of the deceased and cause of death was not challenged during lengthy cross-examination by the defence; hence, it stands established that deceased Qurban Ali died on 01.07.2016 due to firearm injuries caused by appellants.

17. For what has been stated above, it has been established that appellants have caused death of deceased and they have rightly been awarded the conviction and sentence to the extent of life imprisonment and said imprisonment of life in absence of any unimpeachable evidence warrants no interference by this Court. Consequently, the appeal in hand, vide a short order dated 08.11.2022, was dismissed and the conviction and sentence recorded

by learned Judge, Anti-Terrorism Court No.II, Central Prison, Hyderabad in Special Case No.01 of 2018 (Old Special Case No.63 of 2016) being outcome of FIR No.73 of 2016, vide judgment dated 31.07.2019, were maintained. Above are the reasons of said short order of even date.

JUDGE

JUDGE

Shahid