IN THE HIGH COURT OF SINDH AT KARACHI

Cr. Spl. Jail A .T. Appeal No. 39 of 2022
[Muhammad Maqsood and another v. The State]

PRESENT:
Mr. Justice Mohammad Karim Khan Agha
Mr. Justice Arshad Hussain Khan

Appellants	(i) Muhammad Maqsood son of Muhammad Yaseen, (ii) Muhammad Saleem son of Allah Rakha, Through Barrister Muhammad Awais Shaikh, Advocate.
Respondents	The State Through Mr. Ali Haider Saleem, Additional Prosecutor General, Sindh.
Date of Hearing	06.12.2022
Date of Announcement	15.12.2022

J U D G M E N T

ARSHAD HUSSAIN KHAN, J. Appellants namely **(i)** Muhammad Maqsood son of Muhammad Yaseen and **(ii)** Muhammad Saleem son of Allah Rakha, through the captioned appeal have assailed the consolidated judgment dated 28.01.2022 passed by learned Judge, Anti-Terrorism Court No.II, Karachi, in Special Cases No.107, 107-A and 107-B of 2021, emanating from FIRs No.39, 40 and 41 of 2021 under sections 353/324/34, PPC, read with Section 7 A.T.A., 1997, and 23(i)(a) of Sindh Arms Act, 2013, all registered at police station Federal B. Industrial Area, Karachi whereby they were convicted and sentenced u/s.265-H(2) Cr.P.C, as under:-

i) The accused Muhammad Maqood son of Muhammad Yaseen is sentenced and convicted for five years and fine of Rs.10,000/- for being in possession of unlicensed pistol of 30 bore and in default of payment of fine to suffer simple imprisonment for 10 days more under Section 23(i)(a) of Sindh Arms Act, 2013;

ii) The accused Muhammad Saleem son of Allah Rakha is sentenced and convicted for five years and fine of Rs.10,000/- for being possession of unlicensed pistol of 30 bore and in default of payment of fine to suffer simple imprisonment for 10 days more under Section 23(i)A of Sindh Arms Act, 2013;

iii) The accused Muhammad Maqsood son of Muhammad Yaseen and Muhammad Saleem son of Allah Rakha are sentenced and convicted under Section 7(1)(ff) of ATA 1997 as they committed act of terrorism as defined in U/s 6(2)(ee) ATA to 14 years rigorous imprisonment;

It was further ordered by the trial court that all the above sentences shall run concurrently and benefit of Section 382-B, Cr.P.C. was also extended to the appellants.

2. Concisely, facts of the prosecution case as per the FIRs are that on 05.02.2021 ASI Akhtar Abbas of police station Federal B. Industrial Area, along with other police officials namely HC Adnan Majeed (No.22026) on motorcycle No.KNO-0437 and HC Kamran (No.2226), PC Muhammad Amin on other motorcycle No.KNO-0441, were on patrolling in their area to curb crimes. Meanwhile, at around 2200 hours when they reached at main Shah Waliullah Road near Sheezan Street, Block No.22, Federal B. Area, Karachi, they saw two persons coming on motorcycle from the side of Shafiq More Road, considering them to be suspicious, police signaled them to stop but they speeded up their motorcycle, police chased the culprits, seeing police following them, the culprit who was sitting on the back seat of motorcycle took out the pistol from the fold of his pant and started firing upon police with intention to kill them. In self defence, police also returned fire, as a result, one culprit who was sitting on the back seat of motorcycle received firearm injury on his left leg and both culprits had fallen down from the motorcycle, thereafter, complainant ASI Akhtar Abbas apprehended both the accused. On injury, they disclosed their names to be (i) Muhammad Maqsood son of Muhammad Yaseen and (ii) Muhammad Saleem son of Allah Rakha and in absence of private persons, police officials were made mashirs of arrest and recovery and from body search of injured accused Muhammad Maqsood, police secured one firearm pistol of 30 bore, without number, black color, scratched, with empty magazine and chamber along with cash of Rs.210/-. From the body search of accused Muhammad Saleem, police secured one 30 bore pistol from his right side fold, loaded magazine along with 03 live rounds along with cash of Rs.190/-. On demand, accused could not produce the license of pistols and the documents of motorcycle, as such, accused were arrested at the spot and after

completing all the codal formalities they were brought at police station where aforesaid three FIRs were lodged.

3. After registration of the FIRs investigation was assigned to Inspector Gulab Khan Chandio, who after usual investigation submitted Challan before the Administrative Judge, Anti-Terrorism Courts, Karachi. The Charge was framed on 14.04.2021 at Exh.3, against the appellants by learned trial court, to which accused pleaded not guilty and claimed to be tried, vide their pleas recorded at Exhs.4 and 5 respectively. At the trial in order to prove the charge against the appellants the prosecution examined the following witnesses:-

(i) PW-1 HC Muhammad Kamran son of Haji Hashim (No.022261) at Exh.7, who produced memo of arrest and seizure at Exh.7/A and sketch of the pistol on its back;

(ii) PW-2/complainant ASI Akhtar Abbas son of Muhammad Pehelwan at Exh.8, who produced entry of leaving the police station for the purpose of patrolling at Exh.8/A, Entry No.42 at 11:15 p.m. regarding coming back to police station and of lodging of FIR at Exh.8/B, FIR No.39/2021 under Section 353/324/34, PPC read with Section 7 ATA 1997 at Exh.8/C, FIR No.40/2021 under Section 23(i)A of SAA, 2013 at Exh.8/D, FIR No.41/2021 under Section 23(i)A of SAA, 2013 at Ex.8/E, memo of place of occurrence prepared by the IO at Ex.8/F, Entry by which weapon had been issued to him as Ex.8/G;

(iii) PW-3/Medico Legal Officer, namely, Dr. Ali Ikram son of Muhammad Javed Ikram at Ex.9, who produced ML Certificate No.919/2021 at Ex.9/A, letter dated 05.02.2021 given by HC Nadeem for treatment of injured accused at Ex.9/B;

(iv) PW-4/IO Inspector Gulab Khan son of Faiz Muhammad at Ex.P/10, who produced Entry No.3 at 08:10 hours at Ex.P/10-A, Entry No.21 at Ex.P/10-B of reaching back to PS at Ex.10-C, letter to FSL at Ex.P/10-D, FSL report dated 18.02.2021 at Ex.10-E, CROs of accused at Ex.P/10-F and Ex.10-G, Charge Sheet No.39/2021 at Ex.10-H, Charge Sheet No.40/2021 at Ex.P/10-I, Charge Sheet No.41/2021 at Ex.10-J.

These above witnesses were cross-examined by learned counsel for the appellants. Thereafter, learned Assistant Prosecutor General, Sindh, for the State closed the prosecution side, vide Statement at Exh.11.

4. It appears from the record that statements of accused were recorded under Section 342, Cr.P.C. at Exhs.12 and 13 in which appellants denied all the allegations and stated that they are innocent as no incident has been taken place and nothing were recovered from their possession and alleged recoveries of pistols were foisted against them. Accused Muhammad Maqsood did not examine himself on oath, nor produced any witness in his defence. However, accused Muhammad Saleem examined himself on oath under Section 340(ii), Cr.P.C. at Exh.14 and denied all the allegations as levelled against him by the prosecution but did not produce any witness in his defence.

5. It appears from the record that since all three Special Cases No.107, 107-A and 107-B of 2021 arose from aforesaid three FIRs and the same incident therefore, vide order dated 14.04.2021, learned trial court amalgamated all three cases and Special Case No.107 of 2021 was treated as leading case. After appreciating the evidence on record the trial court convicted and sentenced the appellants as mentioned in the impugned judgment. Hence, the present appellants have filed instant appeal against their convictions.

6. Learned counsel for the appellants in his arguments has contended that the appellants are innocent and have falsely been implicated in these cases; that neither any encounter took place nor any recovery was effected from them; that firearm injury has been given to appellant Maqsood at police station; that no private person has been cited to witness the arrest and recovery proceedings; that all the witnesses are police officials, therefore, their evidence cannot be relied upon for maintaining the conviction; that there are major contradictions in the evidence of prosecution witnesses, which creates doubts in the prosecution case, hence, the benefit of same may be given to the appellants; that ingredients of section 6 (2) (ff) of ATA 1997 are completely missing from the charge and the proceedings conducted before the trial court, as such, the conviction recorded under section of the ATA 1997 is unwarranted. He has further argued that the learned trial court has failed to consider the fact that there was no reliable, trustworthy and confidence inspiring pieces of evidence available on the record on the basis of which such convictions could be maintained; therefore, the appellants may be acquitted from the charge. In support

of his contentions, learned counsel has relied upon the cases of *Abdul Ghafoor v. The State* [2022 SCMR 1527], *Tajamal Hussain Shah v. The State* [2022 SCMR 1567]; *Zeeshan @ Shani v. The State* [2012 SCMR 428], *Liaquat Ali Abbasi and 2 others v. The State* [2022 P.Cr.L.J Note 78], *Hashim Raza alias Taaro v. The State* [2020 P.Cr.L.J Note 22], *Owais and another v. The State* [2022 P.Cr.L.J 920], *Muhammad Younus alias Bona and another v. The State* [2022 YLR 924], *Tariq Pervez v. The State* [1995 SCMR 1345], *Muhammad Amir and others v. The State* [2020 MLD 1777], *Nakeef Nindwani v. The State* [2021 MLD 1466], *Sohail alias Kashif v. The State* [2021 YLR Note 134], *Mukhtiar Ahmed alias Atatoo v. The State* [2018 YLR Note 203] and *Muhammad Aslam and another v. The State* [1989 MLD 323 (2)]

7. On the other hand, learned Additional Prosecutor General, Sindh, while supporting the impugned judgment contended that the appellants were arrested from the spot and recovery of pistols have been effected from them; that accused were coming on motorbike and seeing the police party started firing upon them and encounter took place between them and as a result of which appellant Muhammad Maqsood received bullet injury; that no enmity has been pointed out by the appellants with the police; that all the prosecution witnesses have fully supported the prosecution case which proved the guilt of the accused; that CRO of both accused shows that they are hardened and desperate criminals, hence, they are not entitled for any relief. In support of his contentions, learned Additional Prosecutor General, Sindh, has relied upon cases of *Fazal Akbar and another v. The State and another* [2013 P.Cr.L.J 369], *Muhammad Saleem and another v. The State* [2005 P.Cr.L.J 644] and *Muhammad Iqbal v. The State reported* [2007 YLR 317].

8. We have given our anxious consideration to the arguments of learned counsel for the appellants as well as learned Addl. P.G for the State and have gone through evidence as well as the impugned judgment with their able assistance and have considered the relevant law including those case laws cited at the bar. The evidence produced before the trial court finds an elaborate mention in the impugned

judgment as such the same is not being reproduced here to avoid unnecessary repetition.

9. First we would take up the point regarding applicability of section 6 of the Anti-Terrorism Act, 1997 (The Act) to the present case, which is punishable under section 7 of the Act, and likewise we would also consider the legal position of trial of the present appellants by the said forum, which culminated in the conviction of appellants under the said penal provision of the Act and under sections 353/324/34 PPC as well as under section 23(i) SAA, 2013 keeping in view the unlicensed weapons.

10. The scope and applicability of section 6 of the Act has been dilated upon by the Honourable Supreme Court as well as High Courts and the view, which was persistently taken in this regard is that all the acts mentioned in subsection (2) of section 6 of the Act, if committed with design/motive/intent to intimidate the government, public or a segment of the society, or the evidence collected by prosecution suggest that the aforesaid aim is either achieved or otherwise appears as a by-product of the said terrorist activities, are to be dealt with by the special courts established under the Act. Thus, the test to determine whether a particular act is terrorism or not is the motivation, object, design or purpose behind the act and not the consequential effect created by such act. In the present case, the allegations against the appellants are that on the fateful day ASI Akhtar Abbas along with the police party while patrolling in the area considering the appellants to be suspicious signaled them to stop but instead of stopping they accelerated their motorbike and the appellant sitting on the rear seat of the motorbike started firing upon the police and in retaliation the police also fired upon the appellants. Resultantly, the appellant sitting on the rear seat of the motorbike received a fire arm injury on his left leg and both the appellants fell down and were apprehended along with unlicensed arms, that is 30 bore pistols and a stolen motorbike maker Unique was also seized. The said act of the appellants created sense of fear, insecurity in the minds of the people of the locality and as such they were, inter alia, convicted under section 7(1) (ff) of ATA 1997. No doubt, the

offence is heinous one, however, it does not appear in sub-section (2) of section 6 of the Act, hence, the said offence does not fall within the cognizance of the Anti-Terrorism Courts. Further the mode and manner of the occurrence does not suggest their design for creating fear and terror in the public rather their only aim was to flee from the scene. It is persistent view of the Honourable Supreme Court that mere gravity or brutal nature of an offence would not provide a valid yardstick for bringing the same within the definition of terrorism. This view was reaffirmed by the larger Bench of the august Supreme Court of Pakistan in the case of *Ghulam Hussain and others v. The State and others reported* [PLD 2020 SC 61], wherein it has been held has under:

> "For what has been discussed above it is concluded and declared that for an action or threat of action to be accepted as terrorism within the meanings of section 6 of the Anti-Terrorism Act, 1997 the action must fall in subsection (2) of section 6 of the said Act and the use or threat of such action must be designed to achieve any of the objectives specified in clause (b) of subsection (1) of section 6 of that Act or the use or threat of such action must be to achieve any of the purposes mentioned in clause (c) of subsection (1) of section 6 of that Act. It is clarified that any action constituting an offence, howsoever grave, shocking, brutal, gruesome or horrifying, does not qualify to be termed as terrorism if it is not committed with the design or purpose specified or mentioned in clause (b) or (c) of subsection (1) of section 6 of the said Act. It is further clarified that the actions specified in subsection (2) of section 6 of that Act do not qualify to be labeled or characterized as terrorism if such actions are taken in furtherance of personal enmity or private vendetta".

Keeping in view the above, the offences in the present case do not qualify the meanings of section 6, which is punishable under section 7 of the Act. This Court, after scanning the entire evidence and material available on the record has come to the conclusion that section 7 of the Act is not applicable to the present case in light of the judgment of the larger bench in Ghulam Hussain's case (supra) and as such the appellants are acquitted of any offence under the ATA.

11. Now we would look into conviction and sentence of the appellants under sections 353/324/34 PPC and under section 23(i) SAA, 2013 recorded by learned trial court in the impugned judgment.

Perusal of the record shows that the prosecution in order to prove the charge against the appellants examined 04 PWs and all of them supported the stance of the prosecution. Whereas learned defence counsel failed to point out any material discrepancy in the evidence available on the record. The prosecution on its part had established the recovery of the arms and stolen bike from the appellant. The FIRs were lodged promptly. From both the appellants firearms were recovered, as deposed by the police officers, and were properly sealed as such there cannot be remotely apprehension of it being foisted as alleged. Further from the testimony of the investigation officer PW-4 namely Gulab Khan it reveals that he sent the seized weapon for FSL and collected the report which supports the prosecution case. He also collected the CRO of the appellants which established that the appellants were involved in other cases of similar nature and this witness exhibited such reports along with several other documents in support of the case of prosecution. There was no motive with the police witness to falsely involve the appellants in the crime. We have noted that no ill-will or any enmity was suggested during the cross examination of all the witnesses. Conversely, appellant Muhammad Saleem during his cross-examination on his statement on oath, has very candidly admitted that "*There is no enmity of police with me. There is no enmity of police witnesses with me who have given the evidence in this case"*.

12. We have also noted that one of the appellants namely Muhammad Saleem examined himself on oath under Section 340(2), Cr.P.C. at Exh.14 and denied all the allegations as leveled against him by the prosecution, but, did not produce any witness in his defence, he, however, was subjected to cross-examination by the state counsel. Whereas very strangely, the other appellant namely Muhammad Maqsood did not opt for statement on oath despite the fact that both the appellants in their statements under section 342 Cr.P.C. pleaded their innocence and claimed false implication. Since both the appellants before the trial court were being represented by one and the same counsel as such, it does not appeal to a prudent mind that only one appellant/accused for his innocence was advised to make such statement on oath. Insofar as the statement of appellant-Muhammad

Saleem under section 340 (2) is concerned, from perusal of the statement it appears that the defence counsel did not put questions to the PWs in respect of the stance taken in the said statement. Furthermore, in the cross-examination the appellant has very candidly admitted certain facts. Relevant excerpts from the cross examination of the Appellant, for the sake of ready reference are reproduced as under:

> "It is correct to suggest that 03 FIRs are lodged against me …… It is correct to suggest that co-accused Maqsood was with me……. There is no enmity of police with me. There is no enmity of police witnesses with me who have given the evidence in this case. It is correct to suggest that 03 FIRs are lodged against co-accused Maqsood. It is correct to suggest that I take narcotics since many years. It is correct to suggest that after I take narcotics I do not remain in my senses, voluntarily states I go to sleep…… I know co-accused Maqsood for the last 2-3 years, voluntarily states we together take narcotics. It is correct to suggest that I had been arrested in case for taking narcotics"

Keeping in view of the above, the statement of the appellant Muhammad Saleem appears to be an afterthought besides by not giving the statement on oath by another co-accused discredited the above said statement of appellant Muhammad Saleem. In the circumstances, the statement of appellant Muhammad Saleem on oath is of no help to the appellants in the present case.

13. Insofar as the contention of learned counsel regarding minor discrepancies in the evidence led by the prosecution is concerned, it may be observed that minor discrepancies in the evidence generally occur in each and every case, which are to be over-looked and only material contradictions are to be taken into consideration as has been held by the Honourable Supreme Court of Pakistan in case of *Zakir Khan v. The State* [1995 SCMR 1793]. We are therefore of the view that the prosecution witnesses are reliable, trustworthy and their evidence is confidence inspiring and we believe the same especially as they had no ill will or enmity with the appellants.

14. Insofar as the contention of learned counsel that no private person has been cited to witness the arrest and recovery proceedings is concerned, it is well settled principle of law that the Police officials are as good as private witnesses and their testimony could not be discarded merely for the reason that they were police officials, unless the defense would succeed in giving dent to the

statements of prosecution witnesses and prove their mala fide or ill-will against accused which the defense counsel has neither been able to do or show during cross-examination. Reliance can be placed on the case of *Zafar v. The State* [2008 SCMR 125].

15. From the evidence available on the record all the prosecution witnesses have fully corroborated the version of the prosecution. All the witnesses were cross-examined at length but their testimonies could not be shattered. Learned counsel for the appellants during his arguments though has made efforts to bring out material contradiction, however, his efforts yielded no fruit as he has failed to bring out any material contradiction from the record. The case law relied upon by learned counsel for the appellants has been gone through and found distinguishable from the facts of the present case as such the same are of no assistance to him.

16.The upshot of the above discussion is that the prosecution has proved the charge against the appellants beyond shadow of reasonable doubt; the evidence on the record has properly been appreciated by learned trial court while recording conviction and sentence of the appellants. Thus, the impugned judgment, being well-reasoned, does not call for any interference. Resultantly, this appeal, being bereft of any merit, is accordingly dismissed. The conviction and sentence recorded by trial court, vide impugned judgment dated 28.01.2022, under sections *353/324/34 PPC and U/s 23 (i) a SAA* is maintained, however, their conviction and sentence under section 7 ATA is set aside, hence, they are acquitted of the charge under the ATA. The appellants shall have the benefit of S.382 (B) Cr.PC and any remissions applicable to them under the law now that they have been acquitted of the offence under the ATA.

Judge

Judge

Jamil*