

IN THE HIGH COURT OF SINDH AT KARACHI
(Criminal Appellate Jurisdiction)

Spl. Cr. Anti Terrorism Appeal No. **75** / 2016

Ajab Khan
S/o. Abdul Jabbar,
Muslim, adult, resident of
House No.D-392, Frontier Colony
No.3, Orangi, SITE Town, Karachi,
presently confined in
Central Jail, Karachi.

PRESENTED
02.03.2016
[Signature]
By **Magister (Jud)**

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Appellant

V e r s u s

The State

Respondent

FIR NO.29/2015
U/S 23(i)A S.A.A.
P.S. Super Market

CRIMINAL APPEAL U/S 410 Cr. P.C.

R/W SECTION 25-D(i) OF ANTI TERRORISM ACT 1997

Being aggrieved and dissatisfied with the impugned Judgment dated 25.02.2016, passed by the learned Special Judge, Anti-Terrorism Court No.VI, Karachi in Spl. Case No.B-210/2015 vide FIR No.29/2013, U/S 23(i)A S.A.A. registered at P.S. Super Market, Karachi, convicting the appellant U/S 23(i)A S.A.A. sentenced to undergo R.I. for 7 years and fine of Rs.10,000/= and in case of default in payment of fine

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IN THE HIGH COURT OF SINDH AT KARACHI

Special Cr. A.T. Appeal No.75 and Special Cr. A.T. Jail Appeal
No.127 of 2016

BEFORE: Mr. Justice Naimatullah Phulpoto
Mr. Justice Rasheed Ahmed Soomro

Ajab Khan & another ----- Appellants

Versus

The State ----- Respondent

Appellant Ajab Khan: Through Mr. Saleem Nawaz Waziri
Advocate.

Appellant Muhammad Saddiq: Through Superintendent Central
Prison Karachi.

State: Through Mr. Ali Hyder Saleem,
DPG.

Date of Hearing: 22.08.2017

Date of Judgment: 30.08.2017

J U D G M E N T

Rasheed Ahmed Soomro, J.

The appellants have assailed the judgment dated 25.2.2016, passed by the learned Special Judge, Anti-Terrorism Court No.VI, Karachi in Special Case No.B-209/2015 arising out of FIR No.28/2015 under section 353/324/34 PPC, Special Case No.B-210/2015 arising out of FIR No.29/2015 under section 23(I)A S.A.A., 2013 and Special Case No.B-211/2015 arising out of FIR No.30/2015, under section 4/5 Explosive Act, 1908 read with Section 7 ATA, 1997, all cases registered at Police

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Station Super Market, Karachi whereby the appellant Ajab Khan son of Abdul Jabbar was convicted for an offence under section 23(l)A Sindh Arms Act, 2013 and sentenced to seven years R.I. with fine of Rs.10,000/- and in case of default in payment of fine, he was ordered to suffer SI for four months more. Whereas accused Muhammad Saddiq son of Muhammad Rahman was convicted for an offence under section 4/5 Explosive Act, 1908 read with Section 7(l)(ff) of Anti-Terrorism Act, 1997 and sentenced to fourteen years R.I. so also forfeiture of his property. Benefit of section 382(b) Cr. P.C was extended to both the appellants. However, the appellants were acquitted in main case Crime No.28/2015.

2. The facts giving rise to these appeals are that on 18.2.2015 at about 0300 hours complainant SIP Muhammad Younus lodged the above referred FIRs at Police Station Super Market Karachi narrating that he along with his subordinates ASI Muhammad Yaqoon and PC Babar left in official police mobile whereas ASI Rana Khaidm Hussain, PC Maqsood and PC Rana Alif left in Mehran car for patrolling duty in the area, they received spy information that a few suspects were present at *Lyari Nadie Kinara* opposite Ilyas Goth, Liaquatabad, Karachi. On such information, they reached at the pointed place where they saw three suspects coming towards Teen Hatti to whom they intercepted for checking. The suspects on seeing the police party started firing at them with intention to kill them. In retaliation Police party also fired shots, encircled the accused and got them arrested. Upon enquiry, the accused persons disclosed their names as (1) Ajab Khan son of Abdul Jabbar, (2) Muhammad Saddiq son of Abdul Rehman and (3) Fazal-e-Rabbi son of Adnan. On their personal search, one

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Kalshinkov No.1962-AP-1198 loaded with magazine, containing four live rounds with one round loaded in its chamber as well as two mobile phone sets one made of China the other of Q-Mobile and one CINC were recovered. From the personal search of accused Saddiq, one bomb was recovered, whereas nothing incriminating was found in possession of accused Fazal-e-Rabbi. The case property was sealed and *mashirnama* of arrest and recovery was prepared at the spot in presence of mashirs, whereafter, police brought the accused persons and case property at police station and lodged the above referred FIRs against them.

3. During investigation Inspector Muhammad Muqem Khan who visited the place of incident in presence of mashirs namely SI Muhammad Younus and ASI Yaqoob and prepared such memo of place of incident as well as sketch. He also recorded statements of the witnesses under section 161 Cr.P.C and wrote a letter to FSL. He also received a clearance certificate issued by the Inspector Maasab Hussain of BDU. After completing the usual investigation challan was submitted before the Court of law under the above referred sections.

4. All the above cases were amalgamated as joint trial was ordered by the learned Judge Anti-Terrorism Court in terms of Section 21M of the Anti-Terrorism Act, 1997.

5. Learned Judge Anti-Terrorism Court No.VI, Karachi framed charge against accused Ajab Khan, Muhammad Saddiq and Fazale Rabbi. In the main Special Case No. B-209/2015 as well as in the connected cases bearing Special Cases No. B-210 and B-211 of

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2015, the accused persons did not plead guilty and claimed to be tried .

6. At the trial, prosecution has examined the following witnesses.

1. PW-1 complainant SIP Muhammad Younus, who lodged the FIR No.28/15 under section 353/324/34 PPC read with Section 7 of the ATA, FIR No.29/2015 under section 23(I)A of Sindh Arms Act, 2013 and FIR No.30/2015 under section 4/5 of the Explosive Substances Act, 1908 read with Section 7 ATA, 1997 at Police Station Super Market, Karachi.

2. PW-2 ASI Muhammad Yaqoob, mashir of arrest and recover at Ex-9.

3. PW-3 Inspector Maasab Hussain (BDU) at Ex-11.

4. PW-4 Inspector Muhammad Muqeem Khan.

7. Thereafter, learned Special Public Prosecutor for the State closed the side of the prosecution at Ex-28.

8. Statements of accused were recorded under section 342 Cr.P.C. at Exs-14 to 16. They denied the allegations leveled by the prosecution against them. The accused further stated in their statements that all the PWs including the complainant were interested witnesses and they have falsely deposed against them at the instance of high officials of police. They further raised plea in their statements that nothing was recovered from their possession and police has foisted the case property upon them.

9. Learned trial Court after hearing learned Counsel for the parties and assessment of the evidence available on record convicted and sentenced the appellants vide impugned judgment hence these appeals are preferred by the appellants.

10. The facts of these cases as well as evidence produced before the trial Court find and elaborately mentioned in the judgment dated 25.2.2016 passed by the trial Court and, therefore, the same may not be reproduced here to avoid duplication and unnecessary repetition.

11. We have heard the learned Counsel for the appellant as well as learned DPG.

12. Learned Counsel for the appellants argued that appellants have been acquitted in the main case bearing Crime No.28 of 2015 under sections 353/324/34 PPC read with Section 7 ATA of 1997 registered with Police Station Super Market Karachi by the trial Court and accused Ajab Khan have been convicted under section 23(I)(a) of Sindh Arms Act, 2013 for carrying Kalshinkov for seven years and accused Muhammad Saddiq has been convicted under Section 4/5 of the Explosive Substances Act, 1908 for 14 years under section 7(I)(ff) of Anti-Terrorism Act, 1997. He further argued that explosive substance/bomb was without pin. Learned Counsel has also argued that the bomb disposal unit received the letter from Investigation Officer after one month of registration of the FIR for inspection and it was not in sealed condition. It is urged by the learned Counsel that SIP Muhammad Younus the complainant in his cross examination has replied that nothing was

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recovered from possession of accused Fazal-e-Rabi and Muhammad Saddiq and these accused had not fired upon the police. Learned Counsel has further contended that Kalashinkov recovered from the possession of appellant Ajab Khan was sent to the FSL after five days of its recovery and the FSL report also did not support the case of the prosecution. At the end learned Counsel contended that the appellants were arrested from their respective houses and in the fake encounter their arrest was shown and weapons were foisted upon them.

13. Mr. Ali Hyder Saleem, the learned DPG vehemently opposed the appeal. The learned DPG submitted that the sealing of weapons becomes essential only in a case where the weapon was used in the commission of crime and empties were secured from the wardat and in such a situation, the empties are also required to be sealed instantly and then both the properties are to be sent to the ballistic expert for examination so as to connect the empties with the weapon in order to prove that such weapon was used in the commission of the crime. Learned DPG lastly argued that contentions raised by learned advocate for appellant are without legal force.

14. Heard learned counsel and perused the record with their assistance.

15. After hearing the learned counsel for the parties, we have perused the evidence minutely. We have come to the conclusion that prosecution has failed to prove it's case against the appellants for the reasons that it was the case of spy information. Sub-Inspector Police Muhammad Younis had sufficient time to call the

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independent and respectable persons of the locality to witness the recovery proceedings, but it was not done in this case. No entry of spy information was made.

16. Admittedly, the appellants have been acquitted in the main case under sections 353, 324, 34 PPC on same memo of arrest, recovery and evidence. It appears that no legal or factual evidence was available with the prosecution against the appellants therefore they have been acquitted from the main case but inspite of that on the same set of evidence the learned trial Court found the appellants guilty and convicted the appellants Ajab Khan under section 23(1)(a) of Sindh Arms Act, 2013 and Muhammad Sadiq under section 4/5 of Explosive Substance Act, 1908 read with section 6(2)(ee) and Section 27-AA of ATA 1997 punishable under section 7(1)(ff) of ATA 1997. In such circumstances the case against the appellants appears to be highly doubtful. There is a contradiction in the contents of F.I.R. and cross-examination of complainant PW SIP Muhammad Younis. According to F.I.R. the encounter between the police and accused took place but in cross-examination complainant has stated that accused had not fired upon the police, which creates reasonable doubt in the prosecution case for which the prosecution has no explanation. Apart from this the complainant has also alleged regarding commission of encounter but no person sustained any injury in the so-called encounter. Therefore the very credibility of the commission of the offence is doubtful. The incident had taken place in a thickly populated area but the complainant did not take efforts to call private persons to act as mashir of recovery though it was a case of spy information and the complainant had sufficient time.

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Furthermore, the Kalashnikov recovered from the possession of appellant Ajab Khan was sent to the Forensic Science Laboratory for its report after 05 days of recovery and the report submitted by FSL does not support the case of the prosecution, on the contrary, the same also supports the version of the Defence Counsel. Para. 2 (ii) of FSL Report is reproduced as under:-

"ii. Four 7.62 mm bore crime empties now marked as "C6 to C9" were 'not fired' from the above mentioned 7.62mm bore SMR rifle No. (1962 x P1198), in view of the fact that major points i.e. striker pin marks, breech face marks and chamber marks are 'Dissimilar'."

17. Further PW ASI Muhammad Yaqoob deposed in his cross-examination that the case property was sealed on the spot and SIP Muhammad Younis called Bomb Disposal Unit for inspection of the Avan Bomb while PW SIP Masab Hussain deposed in his cross-examination that the rifle grenade was not in sealed form at the time of handing over the same to him by the I.O. PW SIP Muhammad Younis in his cross-examination has deposed that there was no pin in the Avan bomb/ rifle grenade.

18. For the above stated reasons, there are several circumstances/ infirmities in the prosecution case, which have created reasonable doubt about the guilt of the appellants.

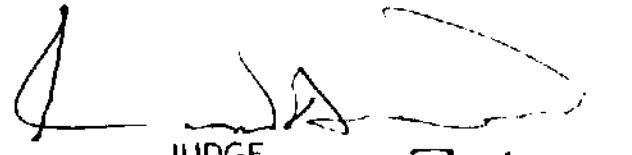
19. In case of **Tariq Pervez v. The State** (1995 SCMR 1345), the Honourable Supreme Court has observed as follows:-

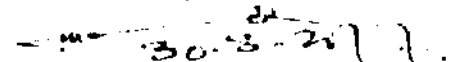
"It is settled law that it is not necessary that there should be many circumstances creating doubts. If there is a single circumstance, which creates reasonable doubt in a prudent

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mind about the guilt of the accused, then the accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right."

20. While respectfully relying upon the case law referred to above, we have no hesitation to hold that prosecution has failed to establish it's case against the appellants beyond reasonable doubt. Therefore, by extending the benefit of doubt, the appeals are allowed. The conviction and sentence recorded by the Judge, Anti-Terrorism Court No.VI, Karachi, vide judgment dated 25.02.2016 are set aside. Appellants are acquitted of the charge. Appellants, namely, Ajab Khan and Muhammad Saddiq shall be released forthwith if no more required in any other custody case.


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