

HIGH COURT OF SINDH AT KARACHI

Special Criminal Anti-Terrorism Jail Appeal No.178 of 2017

Present: Mr. Justice Naimatullah Phulpoto
Mr. Justice Mohammad Karim Khan Agha

Appellant : Javed through Mr. Abbas Gaad Advocate
Respondent : The State through Mr. Mohammad Iqbal Awan
Deputy Prosecutor General
Date of Hearing : 29.05.2019
Date of Judgment : 31.05.2019

JUDGMENT

NAIMATULLAH PHULPOTO, J.- Javed appellant was tried by learned Judge, Anti-Terrorism Court No. V Karachi in Special Case No.386/2016. On conclusion of the trial, vide judgment dated 21.07.2017, appellant was convicted under section 7(i)(ff) of Anti-Terrorism Act, 1997 and sentenced to R.I for 14 years with forfeiture of his property.

2. Brief facts of the prosecution case are that on 05.02.2016, ASI Ali Abbas of P.S Rizvia Society was on patrolling duty along with his subordinate staff. When the police party reached at Ali Basti near Zamindar Hotel, Gulbahar No.1, Karachi, it was 1000 hours, police party saw the present accused standing in the suspicious manner. Accused tried to run away while seeing the police party, but he was surrounded and caught hold of. On enquiry he disclosed his name as Javed son of Imam Bux. ASI Ali Abbas conducted personal search of the accused in presence of police mashirs and recovered from his possession one hand grenade and cash of Rs.3000/-. Accused was arrested and mashinrma was prepared. Thereafter, accused and case property were brought to the police station Rizvia Society where ASI Ali Abbas lodged case/ FIR No.45/2016 against accused on behalf of state for offence under sections 4/5 Explosive Substance Act read with section 7 Anti-Terrorism Act, 1997. Thereafter copy of the FIR and explosive material were handed over to Inspector Raja

Jahanghir for investigation, who inspected place of wardat in presence of mashirs, called BDU at police station for examination of the hand grenade. Expert examined hand grenade and issued clearance certificate. I.O on the conclusion of the usual investigation, submitted challan against accused for offence under section 4/5 Explosive Substance Act read with section 7 Anti-Terrorism Act, 1997.

3. Trial Court framed Charge against accused at Ex. 3 under the above referred sections. Accused pleaded not guilty and claimed his trial.

4. At trial, prosecution examined four witnesses. Thereafter, learned DDPP closed the prosecution side.

5. Statement of accused under Section 342 Cr.P.C was recorded at Ex.12. Accused denied the prosecution allegations and claimed false implication in the case. Accused neither examined himself on oath in disproof of the prosecution allegations nor produced any witness in his defence.

6. Trial Court, after hearing the learned counsel for the parties and assessment of evidence, by judgment dated 21.07.2017, convicted and sentenced the appellant as stated above, hence this appeal.

7. The facts of the case as well as evidence produced before the Trial Court find an elaborate mention in the judgment dated 21.07.2017 passed by the Trial Court and therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

8. Mr. Abbas Gaad Advocate for appellant after arguing the appeal at some length does not press the same on merits but prayed for reduction of sentence on the following grounds:

(a) That from the evidence offence u/s 7(i)(ff) of Anti-Terrorism Act, 1997 is not made out.

(b) That the appellant is first offender and he is not previous convict.

(c) That appellant is a young person and supporter of his family having two children aged about 5 to 7 years.



(d) That from the evidence at the most offence u/s 5 of Explosive Substance Act is made out.

(e) That in the case of **Mohammad Yasin vs. The State (1984 SCMR 866)**, the Honourable Supreme Court has reduced sentence for possessing explosive substance to three years. He has also relied upon the case reported as **Suneil vs. The State (2018 P.Cr.L.J 959)**.

9. Mr. Mohammad Iqbal Awan, Deputy Prosecutor General conceded to the contentions raised by the learned Advocate for appellant that prosecution has failed to prove the offence u/s 7(i)(ff) of Anti-Terrorism Act, 1997. However, he argued that prosecution has succeeded to establish the case against appellant for possessing hand grenade. Learned DPG recorded no objection for reduction of the sentence to some reasonable extent on the ground that appellant is not previous convict.

10. We have carefully heard learned counsel for the parties and scanned the entire evidence.

11. Record reflects that charge was framed against accused under section 7(i)(ff) of Anti-Terrorism Act, 1997. To substantiate the charge, prosecution examined 04 witnesses. Not a single witness has deposed that accused created terror or insecurity in the area. Therefore, conviction of appellant/accused under section 7(i)(ff) of Anti-Terrorism Act, 1997 is not sustainable under the law and it is set aside, appellant is acquitted from the charge of 7 Anti-Terrorism Act, 1997. As regards to recovery of hand grenade from the possession of accused is concerned, ASI Ali Abbas has deposed that he along with his subordinate staff was busy on patrolling duty on 05.02.2016, when they reached near Zamindar hotel, saw present accused there. He was standing in suspicious manner. It was 1000 hours in the morning. Appellant was caught hold and his personal search was conducted in presence of mashirs. Hand grenade was recovered from his possession. Such mashirnama was prepared. Mashir has also supported the case of prosecution at trial. Evidence of police officials is trust worthy and confidence inspiring. BDU expert has also provided corroboration to the evidence of P.Ws. In our view, prosecution has succeeded to prove its' case to the extent of recovery of hand grenade from the possession of accused

on 05.02.2016. As such from evidence available on record offence u/s 5 of Explosive Substance Act 1908 is made out.

12. Section 423 Cr.P.C, subsection (b)(2) gives the appellate Court sufficient power to alter the conviction with or without reducing the sentence. Rightly reliance has been placed upon the case of **Mohammad Yasin vs. The State (1984 SCMR 866)**, the relevant portion of the judgment is reproduced as under:

"9. Learned counsel for the appellant, however, argued that since the appellant was impliedly acquitted of the charge under section 5, he cannot now be convicted and sentenced for the same, in the absence of any revision or appeal against his acquittal. We are not persuaded to agree with this submission. The accused was duly charged under the said section and had consequently been put on notice. The fact of possession as well as the circumstances raising reasonable suspicion required by the provision of section 5 were duly proved but since the learned trial Judge felt that graver and more serious offences, under sections 3 and 4 (b) of the Act, stood proved from the evidence on the record, which are punishable with much higher sentence than the one under section 5, he chose to convict him under the said sections, but he did not acquit the appellant of the charge under section 5. He merely omitted to award a sentence there under probably in view of the provisions of paragraph I of section 71, P. P. C. As such it was not necessary that a revision or an appeal against the appellant's acquittal should have been filed.

Section 423, Cr. P. C. subsection (b) (2) gives the appellate Court sufficient power to alter the conviction with or without reducing the sentence. We, therefore, alter the appellant's conviction from sections 3 and 4 (b) to one under section 5 of the Explosive Substances Act, 1908. However, view of the fact that sentence for this offence is lesser than the appellant for which the appellant was convicted by the trial Court, we reduce the sentence from 7 years' R. I. to 3 years' R. I. The sentence of fine is, however, maintained.

The appeal is dismissed with the above modification."

13. We, therefore, while relying upon the above cited judgment of the Honourable Supreme Court, alter the appellant's conviction from 7(i)(ff) of Anti-Terrorism Act, 1997 to one under section 5 of Explosive Substance Act 1908. As per Jail Roll dated 28.05.2019, appellant has served including remission 03 years, 7 months and 24 days and it is argued before us that appellant is first offender and he is not previous convict and appellant is father of two children aged about 5 to 7 years. We therefore, reduce the sentence from 14 years R.I to one already undergone by the appellant. As regards to the forfeiture of property of the appellant is concerned, the same

was ordered by the Trial Court without hearing the appellant and it was against the principle of natural justice. Therefore, order of the forfeiture of the property of the appellant is hereby set aside. Conviction recorded by the trial Court vide judgment dated 21.07.2017 is maintained as discussed above, however, sentence is reduced to one already undergone. Resultantly, the appellant shall be released forthwith if not required in any other custody case.

14. In the view of above, the appeal is disposed of in the above terms.


JUDGE


31.5.2019
JUDGE