IN THE HIGH COURT OF SINDH AT KARACHI

Special Criminal Anti-Terrorism Appeal No. 293 of 2015

PRESENT: MR. JUSTICE SALAHUDDIN PANHWAR &
MR. JUSTICE ZULFIQAR AHMAD KHAN.

Appellant : Rafaqat alias Saleem in person.

The State, : through: Mr. Abrar Ali Khichi, DPG.

Date of hearing: 21st November 2017

Date of Judgment: 21st November 2017.

JUDGMENT

The appellant Rafaqat @ Saleem son of Ashraf was booked in Crime No.109 of 2013 under Section 324, 386, 387, PPC read with Section 7 of Anti-Terrorism Act, 1997 registered with Police Station Bilal Colony, Karachi.

2. Vide judgment dated 25.11.2015, passed by Anti-Terrorism Court No.V, Karachi, he was convicted to undergo rigorous imprisonment of five (05) years with imposition of fine of Rs.50,000/-, and in case of failure thereof, he was ordered to undergo simple imprisonment of six months, however, he was extended with the benefit of Section 382-B, Cr.P.C.

3. Precisely, relevant facts of the prosecution case are that on 17.05.2013 ASIP Faiz Muhammad of Police Station Bilal Colony alongwith his staff was busy in patrolling of the area. It was about 4.30 pm when they reached at Sector 5-E, North Karachi, they heard firing. Meanwhile, one Muhammad Tahir came and told about a person, who fled away after taking Rs.50,000/- as Bhatta from him. He further told that due to his firing, the culprit sustained injury. ASIP Faiz Muhammad with the help of his staff seized six empties of 9 mm pistol and four empties of 30 bore from the place of incident under a mashirnama and then took said Tahir to Police Station Bilal Colony, made entry in Roznamcha and then accompanied by Tahir went to Abbasi Shaheed Hospital in search of the culprit, where they found one person, lying on the stretcher, who was identified by Tahir as the same culprit, who disclosed his name as Rafaqat, from whom cash amount

of Rs.50,000/- and one mobile phone was recovered, hence he was arrested under a mashirnama and then shifted to operation theater. ASIP Faiz Muhammad also recorded the statement under Section 154, Cr.P.C. of said Tahir as complainant and then returned to Police Station, where contents of such statement were incorporated in FIR Book.

4. After completion of the investigation a challan was submitted before Anti-Terrorism Court No.V, Karachi, which framed a charge against the appellant in respect of offences punishable under Section 324, 386 and 387, PPC red with Section 7 of the Anti-Terrorism Act, 1997 to which the appellant pleaded not guilty and claimed to be tried.

5. To substantiate the charge, prosecution examined as many as seven witnesses while the appellant examined himself under Section 342, Cr.P.C. and also on oath under Section 340(2), Cr.P.C. The learned trial Judge found the evidence of the prosecution witnesses consistent and unshaken during the course of cross-examination as such he awarded conviction and sentence, explained herein above. The appellant, feeling aggrieved by such conviction and sentence, has preferred instant appeal.

6. We have heard the appellant, who is appearing in person and the learned DPG as well as perused the entire material available before us.

7. The appellant has contended that on account of enmity, the complainant has falsely involved him in this case as he has contracted marriage with the daughter of servant of the complainant otherwise he has nothing to do with the alleged offence. He further contented that no incriminating article was recovered from him and the alleged recovery was foisted one. He also denied to have sustained bullet injury due to the firing of the complainant and stated that he become injured due to the firing of the dacoits, who robbed cash from him and while he tried to run away, they fired on him and due to their firing, he become injured and taken to Abbasi Shaheed Hospital, where police met with him and demanded illegal gratification of Rs.200,000/- and failing to pay the amount

booked him in this false case with collusion of the complainant. The appellant lastly submits that he is a welder by profession and sole supporter of his family and also not a previous convict; therefore, keeping in view his submissions and the period of detention in jail, a lenient view may be taken against him.

8. In contra, learned DPG contends that the prosecution has successfully proved its case beyond any reasonable doubt and the learned trial Court has rightly awarded conviction and sentences and prays that the appeal may be dismissed.

9. We have considered the submissions raised by appellant in view of the reply given by the learned DPG. Needless to mention here that concept of punishment can be reformative and learned trial Courts are bound to award sentence after considering all aspects, nature of crime, conduct as well as previous criminal history of an accused. Discretionary powers are given to the trial Court entitling it to provide punishment up to 5 years. The Court can award punishment to any quantum and that is the only reason that such language is inserted on that statute. In the case in hand, we had not seen that such an exercise has been undertaken by the trial Court, therefore, trial Courts shall always in the cases wherein minimum and maximum sentences are awarded to justify the quantum of their punishment in the judgments.

10. Since the appellant, being in person, while pleading his poverty, has prayed for leniency therefore, we feel it quite necessary to say that awarding punishment is only meant to have a balance in the society because all the divine laws speak about hereafter where the true ***'Adl'*** shall be made and every *sin* shall receive its ***'due'***. Thus, conceptually, punishment to an accused is awarded on the concept of retribution, deterrence or reformation so as to bring peace which could only be achieved either by keeping evils away (criminals inside jail) or strengthening the society by reforming the guilty. There are certain offences, the punishment whereof is with phrase "**not less than**" while there are other which are with phrase "**may extend upto**" Thus, it is quite obvious and clear that the

law itself has categorized the offences in two categories regarding quantum of punishment. For one category the Courts are empowered to award *any* sentence while *other* category the discretion has been limited by use of the phrase **'not less than'** Such difference itself is indicative that the Courts have to appreciate certain circumstances before setting quantum of punishment in in *fist* category which appear to be dealing with those offences, the guilty whereof may be given an opportunity of **"reformation"** by awarding less punishment which how low-so-ever, may be, will be legal. The concept of reformation should be given much weight because conviction normally does not punish the guilty only but whole of his family/dependents too. A reformed person will not only be a better brick for society but may also be helpful for future by properly raising his dependents. The plea of reduction in sentence however shall not be available to hardened criminals, guilty of serious offences because the term *hardened criminals* itself is sufficient to fade away the chances of *reformation.* In short, learned trial Courts are bound to *determine* the quantum of sentences after considering all aspects, nature of crime, conduct as well as previous criminal history of an accused because wherever the law gives discretion, it *impliedly* demands that out of two available *legal* things the better will be chosen. The *option* of choosing one by leaving the other therefore, the Courts must deliberate this aspect while determining the quantum of sentence in respect of cases, falling within such *category.*

11. Having detailed the *criterion,* now we would take up the merits of the case, but before that we would add that for constituting an act of terrorism, the object, design or purpose behind the said act (offence) is also to be establisehed so as to justify a conviction under Section 7 of the Anti-Terrorism Act, 1997. In this context, reliance can be placed on the case of *Kashif Ali v Judge, ATA Court No.II* (PLD 2016 SC 951, wherein it is held as under:-

> *"12…… In order to determine whether an offence falls within the ambit of Section 6 of the Act, it would be essential to have a glance over the allegations leveled in the FIR, the material collected by the investigating agency and the surrounding circumstances, depicting the*

> *commission of offence. Whether a particular act is an act of terrorism or not, the motivation, object, design or purpose behind the said act has to be seen. The term "design" which has given a wider scope to the jurisdiction of the Anti-Terrorism Courts excludes the intent or motive of the accused. In other words, the motive and intent have lost their relevance in a case under Section 6(2) of the Act. What is essential to attract the mischief of this Section is the object, for which the act is designed"*

12. The manner in which the complainant paid *extortion* money to appellant despite, being armed with weapon; ran despite injuring the appellant without receiving any harm though allegedly six (06) empties of 9 mm were recovered by police; met with police and within short span of time found appellant in *hospital* alongwith alleged *extortion* money bring clouds of *doubts* which, if not sufficient for acquittal, may well be taken as *mitigating* circumstances towards *quantum* of punishment. Reference may well be made to case of *Muhammad Mushtaque v. State [*2017 SCMR 1995. The appellant has been awarded sentence of five years under Section 7(1)(h) of Terrorism Act, 1997, out of which he has passed two years seven months and twenty five days in prison. The appellant has pleaded himself to be a sole bread earner of his family and not a previous convict, which is not disputed by the prosecution. The detention of only bread earner shall compel the families to step-out for survival least bread which if result in bringing a slightest spot towards such helpless family shall ruin their lives.

13. Keeping in view, the phrase **"may extend upto"** and the circumstances explained herein above coupled with the period of detention in prison; we find it appropriate to reduce the sentence from five (05) years to already undergone. So far as penalty by imposition of fine is concerned, keeping in view the facts and circumstances of the case, the same is set-aside. The appellant is present on bail, his bail bond stands cancelled and surety discharged.

14. With the above observations, the appeal stands disposed of.

JUDGE

JUDGE

Sajid