

HIGH COURT OF SINDH AT KARACHI

Special Criminal Anti-Terrorism Jail Appeal No. 165 of 2016

Present: Mr. Justice Naimatullah Phulpoto
Mr. Justice Abdul Malik Gaddi

Date of Hearing : 01.11.2017
Date of Judgment : 01.11.2017
Appellants : Ali Raza & Phool Mian through Ms. Tasneem Shah Advocate.
Respondent : The State through Mr. Mohammad Iqbal Awan Additional Prosecutor General.

JUDGMENT

NAIMATULLAH PHULPOTO, J.- Ali Raza and Phool Mian appellants were tried by learned Judge, Anti-Terrorism Court No.II, Karachi in Special Cases Nos.B-534/2014 (FIR No. 195/2014 under Sections 384/385/386/34 PPC read with Section 7 Anti-Terrorism Act, 1997) and Special Case No. B-535/2014 (FIR No. 196/2014 under Section 23(1)(a) of Sindh Arms Act, 2013). After full-dressed trial, appellants were found guilty. By judgment dated 27.04.2016, appellants were convicted under Section 7(H) of Anti-Terrorism Act, 1997 and sentenced to 5 years R.I each. Appellant Ali Raza was also convicted under Section 23(1)(a) of Sindh Arms Act, 2013 and sentenced to 5 years R.I. All the sentences were ordered to be run concurrently. Appellants were extended benefit of section 382-B Cr.P.C.

2. Brief facts leading to the filing of these appeals are that 05.08.2014 at about 1750 hours complainant lodged FIR stating therein that he is a contractor in Adil Textile Towel Factory. In the month of Ramzan of 2014, he had received calls on his Cell No. 0321-3962534 from Cell No. 0332-7376800. Caller claimed to be Lal Aslam Pathan and demanded Rs.5 Lacs as bhatta from the complainant, in case of non-payment, threats of dire consequences and damage to his property were issued. Complainant told accused that he was unable to pay such huge amount. Thereafter, it is alleged that accused agreed for receiving bhatta of Rs.50,000/-. It is stated that accused sent his CNIC No.42101-4784173-7 for sending bhatta through Easy Paisa. It is alleged

that in the meanwhile, complainant contacted police and informed that he has been asked to reach at Bus Stop of G-23 near Khamiso Goth, for payment of bhatta amount of Rs.50,000/- to the accused. Police headed by ASI Shahid Sher Khan along with his subordinate staff reached at spot civil dresses and concealed their presence. It is alleged that at 1630 hours, one person wearing shalwar and shirt appeared and asked complainant to pay him bhatta, to which complainant handed over him the envelope containing Rs.50,000/-. Suddenly, accused was surrendered and caught hold by police. On enquiry, accused disclosed his name as Ali Raza. Police recovered from his possession envelope, which he had received from complainant, which contained bhatta amount Rs.50,000/-. Personal search of accused was conducted, during search one 30 bore pistol with loaded magazine containing five rounds were recovered from his possession. Further it is stated that one mobile phone Nokia was also recovered from accused. Accused disclosed the name of his accomplice as Abdul Wadood Bengali (known as Phool Mian). Thereafter, accused and case property were brought to the Police Station, where FIRs bearing Crime No. 195/2014 under Sections 384/385/386/34 PPC read with Section 7 Anti-Terrorism Act, 1997 and Crime No.196/2014 under Section 23(1)(a) of Sindh Arms Act, 2013 were registered against accused on behalf of state.

3. After usual investigation, Challan was submitted against accused for offences under Sections 384/385/386/34 PPC read with section 7 Anti-Terrorism Act, 1997 & under Section 23(1)(a) & 24 of Sindh Arms Act, 2013 separately against accused. Learned Trial Court amalgamated the aforesaid cases for joint trial in terms of Section 21-M of Anti-Terrorism Act, 1997.

4. Trial Court framed charge against accused under the above referred sections on 10.11.2014. Accused pleaded not guilty and claimed their trial.

5. At trial, prosecution examined four witnesses, who produced relevant documents to substantiate the charge. Thereafter, prosecution side was closed vide statement at Ex.P/18.

6. Statements of accused were recorded under Section 342 Cr.P.C at Ex.19 and 20 respectively. Accused claimed false implication in these cases and denied the prosecution allegations. Accused Ali Raza and Phool Mian examined themselves on oath in disproof of the prosecution allegations.

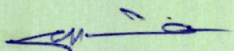
Accused Ali Raza also examined DWs (1) Mohammad Ayub and (2) Ali Asghar.

7. Trial Court after hearing learned counsel for the parties and examination of the evidence available on record, by judgment dated 27.04.2016, convicted and sentenced the appellants as stated above. Hence this appeal has been filed.

8. The facts of the case as well as evidence produced before the trial Court find an elaborate mention in the Judgment dated 27.04.2016 passed by the learned trial Court, therefore, the same may not be reproduced here so as to avoid unnecessary repetition.

9. Ms. Tasneem Shah Advocate appeared on behalf of the appellants and argued that prosecution has failed to establish the charge of bhatta against accused. She has argued that complainant has not disclosed the source of his income and his antecedents in his evidence. She has argued that according to the case of prosecution, accused Ali Raza was arrested at spot, but not a single person from the bus stop has been examined by the prosecution at trial. It is also argued that description of the pistol/its' number is mentioned in the mashirnama of arrest and recovery as well as in the evidence of ASI but surprisingly in the FSL report rubbed number 30 bore pistol is mentioned. It is also argued that mobile SIM number is not mentioned in the mashirnama of arrest and recovery. No record of call data has been produced. Learned Advocate for appellants further argued that not a single piece of evidence has been collected by the prosecution against co-accused Phool Mian. Lastly, it is argued that prosecution case was highly doubtful. Learned counsel for the appellants in support of her contentions has relied upon the cases reported as *Irshad Ali and another vs. Mohammad Shahid and another (2015 P.Cr.L.J 158) & Sagheer Ahmed vs. The State and others (2016 SCMR 1754)*.

10. Mr. Mohammad Iqbal Awan learned Additional Prosecutor General Sindh half heartedly opposed the appeal and admitted that no call data has been produced by the prosecution. He has admitted that number of SIM which was recovered from the possession of accused Ali Raza has not been mentioned in the mashirnama of arrest and recovery. He has also admitted that source of income of the complainant has not been mentioned in his



evidence. It is also admitted that no private person from bus stop has been examined by the prosecution.

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

12. Close scrutiny of evidence reflects that accused Ali Raza was arrested at bus stop but no private person was associated by ASI for making him as mashir of arrest and recovery. It is the case of prosecution that from the possession of accused Ali Raza one mobile along with SIM was recovered, but SIM number has not been mentioned in the mashirnama of arrest and recovery. Prosecution has also failed to produce call data in order to establish that accused had contacted complainant for bhatta. Complainant has also failed to disclose the source of his income. SIM was not sealed at spot. Investigation officer failed to collect information from concerned Mobile Network about use of said SIM during that period and ownership of SIM. Description of weapon has also not been mentioned in mashirnama. In this case, there are several infirmities in the prosecution case as highlighted above. We have also no hesitation to hold that learned Judge, Anti-Terrorism Court had no jurisdiction to try this case under provisions of Section 7 Anti-Terrorism Act, 1997 for the reason that allegation of terrorism was missing in this case; antecedents/ business of the complainant from whom bhatta was demanded has also not brought on record. Complainant went himself to pay bhatta to accused. Complainant was not put in fear or death or grievous hurt by accused, except threat calls. At this juncture, it would be appropriate to refer section 386 of the Pakistan Penal Code, which is as under:--

"386. Extortion by putting a person in fear of death or grievous hurt. Whoever commits extortion by putting any person in fear of death or of grievous hurt to that person to any other, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

13. From the evidence available on record provisions of section 6(2)(k) of Anti-Terrorism Act, 1997 are not attracted in this case. Therefore, conviction under Section 7(h) of Anti-Terrorism Act, 1997 is not sustainable under the law. Even at the cost of repetition, it is mentioned that evidence of complainant is also silent regarding his financial status and source of income against which accused had been demanding bhatta. Defence evidence was also not considered by the Trial Court and it was rejected without assigning

reasons. The crucial issue of jurisdiction of Anti-Terrorism Court is involved in this case. In the case of *Sagheer Ahmed vs. The State and others* (2016 SCMR 1754), it has been held by the Honourable Supreme Court that in the cases in which element of terrorism is missing, Anti-Terrorism Court has no jurisdiction to try such cases under the provisions of Anti-Terrorism Act, 1997. Relevant portion is reproduced as under:

"2. We have heard the learned counsel for the parties and have gone through the record.

3. High Court in the impugned judgment has observed as follows:

"10. The averments of FIR are silent regarding the financial status and source of income of the complainant against which accused have been demanding Bhatta. Complainant has also not disclosed the specific dates, times and places of demanding Bhatta by accused persons nor any such evidence was produced before the Investigating Officer to prima facie establish such allegations. In absence of any tangible material, mere allegations of demanding Bhatta do not attract section 6(2)(k) of Anti-Terrorism Act, 1997, in the present case nor said section was mentioned in the FIR and Challan. Perusal of Challan reflects that Investigating Officer had made a request to the Anti-Terrorism Court for return of FIR and other documents so that Challan may be submitted before the ordinary Court of law as no case under the provisions of Anti-Terrorism Act, 1997 was made out, but his request was declined by the Anti-Terrorism Court vide order dated 09.06.2014, and cognizance was taken by the Court.

11. Cumulative effect of the averments of FIR, surrounding circumstances and other material available on record have replicated that offence having been committed on account of previous old enmity with a definite motive. The alleged offence occurred at Faiz Wah bridge, which is not situated in any populated area, consequently, the allegations of aerial firing have not appeared to us to be a case of terrorism as the motive for the alleged offence was nothing but personal enmity and private vendetta. The intention of the accused party did not depict or manifest any act of terrorism as contemplated by the provisions of the Anti-Terrorism Act, 1997. Consequently, we are of the considered view that complainant has failed to produce any material before the Investigating Officer that at the time of occurrence sense of fear, panic, terror and insecurity spread in the area, nevertheless it was a simple case of murder due to previous enmity, thus, alleged offence does not fall within purview of any of the provisions of Anti-Terrorism Act, 1997. While probing the question of applicability of provisions of Anti-Terrorism Act, 1997, in any crime, it is incumbent that there should be a sense of insecurity, fear and panic amongst the public at large to invoke the jurisdiction of the Anti-Terrorism Court. Indeed, in each murder case there is loss of life which is also heinous crime against the society but trial of each murder case cannot be adjudicated by the Anti-Terrorism Court, except existence of peculiar circumstances as contemplated under sections 6, 7, 8 of Anti-Terrorism. Act, 1997."

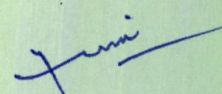
4. We note that observation made by the High Court is based upon the

record of the case and no misreading in this respect was pointed out before us. The submission of learned counsel for the petitioner that in evidence petitioner has brought on record sufficient material to substantiate the fact of demand of Bhatta in FIR that complainant party was doing business of brick kiln. There is no allegation in the FIR that complainant party was engaged in brick kiln business. Be that as it may, we find that High Court has rightly dealt with the matter and prima facie there is nothing on record to deviate from the same. The petition is, therefore dismissed and leave refused."

14. In this case, there are number of infirmities/lacunas, which have created serious doubt in the prosecution case. It is settled principle of law for extending benefit of doubt, it is not necessary that there should be multiple circumstances creating doubt. If a single circumstance, which creates reasonable doubt in a prudent mind about the guilt of accused, then he will be entitled to such benefit not as a matter of grace and concession, but as a matter of right, as has been held in the case of **Tariq Pervez vs. The State (1995 SCMR 1345)**, wherein the Honourable Supreme Court has held as under:-

"The concept of benefit of doubt to an accused persons is deep-rooted in our country for giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused will be entitled to the benefit not as matter of grace and concession but as a matter of right."

15. For the above stated reasons, while respectfully relying upon the above cited authorities, we have no hesitation to hold that prosecution has failed to prove its case against the appellants beyond any shadow of doubt. Moreover, learned Judge, Anti-Terrorism Court-II, Karachi had no jurisdiction to try these cases. Accused have faced agony of long trial since 05.08.2014, as such re-trial in the peculiar circumstances of the case is not ordered. Consequently, Appeal is allowed, conviction and sentences awarded by the learned Judge, Anti-Terrorism Court-II, Karachi vide judgment dated 27.04.2016 are set aside. Appellants Ali Raza and Phool Mian are acquitted of the charges. Appellants are produced in custody. They are returned back to Jail with directions that they shall be released from custody forthwith, if they are not wanted in some other custody case.


JUDGE .

1.11.2017
JUDGE