

HIGH COURT OF SINDH AT KARACHI

Special Criminal Anti-Terrorism Jail Appeals Nos. 212 and 213 of 2017

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

Date of Hearing : 18.03.2019
Date of judgment : 21.03.2019
Appellant : None present for appellant
Respondent : The State through Mr. Mohammad Iqbal Awan DPG.

JUDGMENT

NAIMATULLAH PHULPOTO, J.- Muhammad Sohail appellant was tried by learned Additional Sessions Judge-II/Anti-Terrorism Court, Karachi East in Special Case No. 950 and 951 of 2016. After full dressed trial, vide judgment dated 27.02.2017, appellant was convicted and sentenced as under:

- i. *Accused is sentenced R.I for 07 years with fine of Rs.10,000/- (Ten Thousands). In default thereof he shall further undergo S.I for Three months for committing offence u/s 324 PPC.*
- ii. *Accused is sentenced R.I for 01 years for committing offence u/s 353 PPC.*
- iii. *Accused is sentenced R.I for 01 years for committing offence u/s 427 PPC with fine of Rs.2000/-. In default thereof he shall further undergo S.I for one month for committing offence u/s 427 PPC.*
- iv. *Accused is sentenced R.I for 07 years with fine of Rs.10,000/- (Ten Thousands). In default thereof he shall further undergo S.I for Three months for committing offence u/s 7(1)(h) ATA 1997.*
- v. *I found the accused guilty for committing offence u/s 25 of Sindh Arms Act, 2013 and convict him u/s 265-H(ii) Cr.PC and sentence R.I for 05 (Five Years) with fine of Rs.5,000/- (Five Thousands). In default thereof he shall further undergo S.I for Three Months.*

All the sentences were ordered to run concurrently. Appellant was extended benefit of Section 382-B Cr.P.C.

2. Brief facts of the prosecution case as reflected in the evidence of ASI Mukhtiar-ul-Hassan are that on 24.05.2016, he was posted as ASI at P.S

Khokrapar. On the same day, he along with his subordinate staff HC Raiq Hussain, PCs Asghar Ali and Tariq Ali and H.C Driver Rao Luqman left P.S at 8:00 PM vide Rozmancha Entry No. 34 for patrolling duty. While patrolling, when the police party reached at Mehran Chowk, it was 2115 hours, where police found four persons on two motorcycles coming in suspicious manner. Police gave them signal to stop, but culprits instead of stopping their motorcycles, started firing upon the police party with intention to kill. Police also fired in self defence. Resultantly, one accused sustained fire arm injury at his right leg and he fell down. While other accused made their escape good and drove away. On the enquiry, accused who sustained fire arm injury, disclosed his name as Muhammad Sohail son of Muhammad Aleem. ASI secured one T.T Pistol of 30 bore loaded with four live bullets from the possession of accused. It was without license. ASI also secured from the place of incident four empties of 30 bore pistol and six empties of SMG. ASI prepared such mashirnama in presence of PCs Asghar and HC Raziq. Accused was arrested. Accused disclosed the names of co-accused as Asad, Akbar and Kashif. Case property was sealed at spot. Injured accused was referred to the Hospital for treatment and certificate. ASI returned to the P.S where he lodged two FIRs against accused on behalf of state vide Crime No. 153/2016 under Sections 353/324/34 PPC read with Section 7 Anti-Terrorism Act, 1997 and Crime No. 154/2016 under Section 23(i)(A) of Sindh Arms Act 2013.

3. After registration of the FIRs, investigation was entrusted to SIO namely Ali Khan for further investigation, who inspected place of wardat on his pointation and prepared such Mashirnama.

4. On the conclusion of the usual investigation, challan was submitted against accused under the above referred sections showing co-accused Asad, Akbar and Kashif as absconders. Proceedings against absconding accused under Section 87 & 88 Cr.P.C were concluded.

5. Learned Trial Court amalgamated the aforesaid cases for joint trial, in terms of Section 21-M of Anti-Terrorism Act, 1997.

6. Trial Court framed Charge against accused Muhammad Sohail under the above referred Sections at Ex.9. Accused pleaded not guilty and claimed to be tried.

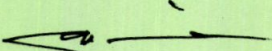
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7. In order to substantiate the charge, prosecution has examined P.W-1 ASI Mukhtiar-ul-Hassa at Ex.10, who produced Roznamcha entry No.34 at Ex.10/A, memo of arrest and recovery at Ex.10/B, FIRs No. 153 and 154 of 2016 at Ex.10/C and 10/D. He further produced Roznamcha entry No.43 at Ex.10/E and memo of site inspection at Ex.10/F. P.W-02 Dr. Ejaz Ahmed examined at Ex.11. He produced medical certificate bearing No. J-4928 at Ex.11/A and final medico legal report at Ex.11/B. PW-03 HC / Mashir Razik Hussain examined at Ex.12. PW-04 Ali Khan /I.O examined at Ex.13. He produced departure entry No. 48 at Ex.13/A, letter dated 25.05.2016 sending fire arm to FSL at Ex.13/B, FSL Report at Ex.13/C, letter addressed to Incharge FSL for examination of damaged Govt. Mobile at Ex.13/D, Examination report of police mobile at Ex.13/E, letter of obtaining CRO record of accused at Ex.13/F and CRO record at Ex.13/G. Thereafter, learned DDPP closed the prosecution side vide statement at Ex.14.

8. Statement of accused was recorded under Section 342 Cr.P.C at Ex.15, in which he denied the prosecution allegations and claimed false implication in this case. Accused raised plea that P.Ws have deposed against him falsely as they are police officials. Plea was raised by the accused that he was arrested from his house by the police and he was brought at P.S where fire arm injuries were caused to him at his leg. Nothing was recovered from his possession. Accused did not lead any defence and declined to give statement on oath in disproof of prosecution allegations.

9. Trial Court, after hearing learned counsel for the parties and assessment of the evidence vide judgment 27.02.2017 convicted and sentenced the appellant as stated above. Thereafter, appellant Muhammad Sohail on 05.10.2017, filed Jail Appeals through Senior Superintendent Central Prison, Karachi along with an application for condonation of delay. Appellant prayed that he may be provided defence counsel on state expenses due to his financial constraints. Consequently, services of Mr. Haider Bux Shahwani Advocate were provided to him for defending the appellant on state expenses vide order dated 02.08.2018. It appears that Mr. Shahwani remained absent on several dates of hearings. He appeared on two dates but requested for time. Mr. Haider Bux Shahwani Advocate is called absent today. There is no legal justification to adjourn the appeals without any cogent reasons.

10. We have gone through the evidence with the assistance of Mr. Muhammad Iqbal Awan learned DPG and perused the relevant record.



11. The facts of the case as well as evidence produced before the Trial Court find an elaborate mention in the judgment dated 27.02.2017 passed by the Trial Court and therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

12. Record reflects that according to the case of the prosecution, there was cross firing at Mehran Chowk at 9:15 Pm on 24.05.2016, but no source of light has been disclosed in the prosecution evidence. It is quite unbelievable that four accused persons fired upon the police party with sophisticated weapons but not a single injury was caused to any police official, but fire of police hit to the appellant while selecting his leg. From perusal of the evidence of the medical officer, we have noted that Doctor in his cross-examination has replied that appellant/accused had sustained fire arm injury from the distance of 03 feet, but no blackening around the injury has been found by the Doctor. Accused has raised plea in his statement under Section 342 Cr.P.C that he was fired by the police at police station and the fact that no blackening around the injury was found that supports the plea of the accused. As already we have mentioned that incident had taken place at Mehran Chowk at 9:15 PM and these are not odd hours of night, particularly at Karachi. No private person has been cited as witness/ mashir in this case.

13. P.W-Inspector Ali Khan had carried out the investigation of the case, who deposed that he dispatched empties collected from wardat and pistol for FSL examination but cleverly he has not mentioned the date on which case property was sent to the Ballistic Expert. Report of FSL at Ex.13/C indicates that number of 30 bore pistol was rubbed but in the Mashirnama of arrest and recovery this fact has not been mentioned by ASI/complainant. I.O in his cross-examination has replied that at the time of inspection of place of wardat, private persons were present but they were not prepared to give their statements. I.O had authority to take action against them but no action whatsoever was taken by him which reflects that his evidence was also not trustworthy. I.O no where has deposed about safe custody of the empties and pistol at Police Station and their safe transmission to the Ballistic Expert, as such positive report of FSL would not improve the case of prosecution. Law is well-settled by now that prosecution is under legal obligation to prove the safe custody of the recovered weapon and its safe transmission to the Forensic Science laboratory as held by the Honourable Supreme Court in the case of **KAMAL DIN alias KAMALA versus The STATE**

(2018 SCMR 577). Learned Division Bench of this Court in the case of **HARCHAND and others versus THE STATE (2005 MLD 946) Karachi**, more or less in similar circumstances has held that no police official has sustained injury in an encounter, prosecution has failed to prove its' case. Relevant portion of the judgment is reproduced as under:-

8. Admittedly no police officer or anyone else was injured in the incident. It is also admitted position that neither empties were recovered from the place of Wardat nor the same were produced in Court. P.W. Muhammad Yousif who claimed to be heading the police party involved in the encounter has admitted in the cross-examination that when we reached the place of occurrence there was no firing on the spot. It has further been admitted by P.W. Muhammad Yousif that the police encounter lasted for a short while. He admitted that the accused persons present in Court had started shouting that they may not be killed as they were prepared to surrender. He further admitted that the accused were seen by them as they had raised their hands and their weapons were lying in front of them. This statement of the complainant was sufficient to show that the appellants voluntarily surrendered before the police party and thus there was no question of deterring the police party from discharging their duties or causing obstruction of the sort. Admittedly the place of occurrence viz. banana garden was surrounded by habitations but none of the private persons was associated to witness the arrest of the accused or the recovery of the crime weapons. In the circumstances, neither any encounter has been proved nor is there any evidence to show that an attempt was made on the police party to commit their murder. The prosecution has miserably failed to bring home the guilt of accused persons. The judgment of conviction recorded by learned Special Judge was devoid of material evidence and was bereft of cogent reasons. The same was unsustainable and was liable to be set aside. The conviction cannot be sustained merely on the basis of surmises.

14. Appellant/accused was tried under the provisions of Anti-Terrorism Act, 1997 and has been sentenced to 07 years R.I and to pay fine of Rs.10,000/- (Ten Thousands). In default thereof he was ordered to further undergo S.I for 03 months. The standard of proof in this case should have been far higher as compared to any other criminal case, when according to the prosecution it was a case of police encounter. It was, thus, desirable and even imperative that it should have been investigated by some other agency. Police, in this case, could not have been investigators of their own cause. Such investigation which is woefully lacking independent character cannot be made basis for conviction, that too when it is riddled with many lacunas and loopholes as mentioned above. The same principle has been laid down by the Honourable Supreme Court in case of **ZEESHAN @ SHANI versus THE STATE (2012 SCMR 428)**. Relevant portion is reproduced as under:

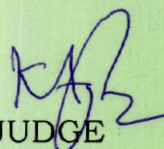
"The standard of proof in this case should have been far higher as compared to any other criminal case when according to the prosecution it was a case of police encounter. It was, thus, desirable and even imperative that it should have been

investigated by some other agency. Police, in this case, could not have been investigators of their own cause. Such investigation which is woefully lacking independent character cannot be made basis for conviction in a charge involving capital sentence, that too when it is riddled with many lacunas and loopholes listed above, quite apart from the afterthoughts and improvements. It would not be in accord of safe administration of justice to maintain the conviction and sentence of the appellant in the circumstances of the case. We, therefore, by extending the benefit of doubt allow this appeal, set aside the conviction and sentence awarded and acquit the appellant of the charges. He be set free forthwith if not required in any other case."

15. Evidence of police officials as discussed above in the above stated circumstances, required independent corroboration, which is lacking in this case. There are several loopholes / lacunas in the prosecution case. The same went in favour of accused. It is settled principle of law that benefit of all the favourable circumstances shall be extended to the accused as held in the case of **ABDUL JABBAR and another versus The STATE (2019 SCMR 129)**. In these circumstances and after an independent evaluation of evidence available on record, we have no manner of doubt in our minds that the prosecution has not been able to prove its case against the appellant beyond reasonable doubt.

16. For the above stated reasons, we have come to the conclusion that prosecution has miserably failed to bring home the guilt of appellant/accused. Resultantly, conviction recorded by the learned Trial Court vide judgment dated 27.02.2017 is without sufficient material, connecting the appellant with the case and it lacks cogent reasons for conviction. The same is not sustainable under the law and is also liable to be set aside. Conviction cannot be sustained merely on the basis of surmises.

17. In the above stated circumstances and reasons, delay in filing of the appeals is condoned and Appeals are **allowed**. Impugned judgment of conviction is set aside. Appellant Muhammad Sohail son of Muhammad Aleem is acquitted of charge. He be released forthwith if not required in any other case.


JUDGE

21.3.2019
JUDGE