

HIGH COURT OF SINDH AT KARACHI

Special Criminal Anti-Terrorism Appeals Nos. 298, 299 & 300 of 2016

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

Date of Hearing : 23.10.2017
Date of Judgment : 26.10.2017
Appellants : Mohammad Adnan and Mohammad Salman Khan through Mr. Mumtaz Ali Khan Deshmukh Advocate.
Respondent : The State through Mr. Mohammad Iqbal Awan DPG.

JUDGMENT

NAIMATULLAH PHULPOTO, J.- Mohammad Adnan and Mohammad Salman Khan appellants were tried by learned Judge, Anti-Terrorism Court No.X, Karachi in Special Cases Nos.712, 713 and 714 of 2016. After full-dressed trial, appellants were found guilty and by judgment dated 29.11.2016, appellants were convicted under Section 386/34 PPC 7(1)(h) of Anti-Terrorism Act, 1997 and sentenced to 5 years R.I each. Appellants were 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 also extended benefit of section 382-B Cr.P.C.

2. Brief facts of the prosecution case in nutshell are that on 22.04.2016, complainant Mohammad Imran Abdul Majeed moved an application to SHO Bahadurabad Police Station alleging therein that on 18.04.2016, he was present at his house situated at S.V Complex Meeran Mohammad Shah Road, KDA Scheme No.1, Karachi, at about 8:00 pm, he received a call on his Cell No. 0300-9219220 from Cell No. 0348-4638477. The said caller introduced himself as Shahnawaz @ Shani and used filthy language. Caller demanded from the complainant bhatta of Rs.5 lacs. In case of non-payment of bhatta amount, threats of dire consequences were issued. Threat was also issued that shop of the complainant would be set on fire. Complainant lodged FIR on 23.04.2016 bearing Crime No.58/2016 under Sections 386/34 PPC read with

Section 7 Anti-Terrorism Act, 1997. On 25.04.2016 at 12:45 am, complainant received a call on his Cell from Cell No.0311-4607101, caller asked him to reach at Lal Qila with bhatta amount. Thereafter, complainant went to police station Bahadurabad and informed the police about the said call. Complainant along with police officials went to Lal Qila and at about 1:45 pm, when he reached at the pointed place, he found two persons around him. Police surrounded and caught them hold. Said persons disclosed their names as Adnan and Salman. From personal search of accused Adnan police recovered one 30 bore pistol along with loaded magazine containing 6 bullets, wallet and 3 SIMs, Q-Mobile and Rs.560/-. From personal search of accused Salman, police recovered one 30 bore pistol along with loaded magazine containing 5 bullets, 4 SIMs, Wallet, Q-Mobile and cash of Rs.900/-. Accused failed to produce licenses of the said weapons. Accused were arrested and mashirnama of arrest and recovery was prepared at spot. Police sealed pistols and bullets at the spot. Thereafter, accused and case property were brought at Police Station Bahadurabad, where FIRs bearing Crime No. 60/2016 & Crime No. 61/2016, under Section 23(1)(a) of Sindh Arms Act, 2013 were registered against the accused on behalf of state.

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

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

5. At trial, prosecution examined six witnesses, who produced relevant documents to substantiate the prosecution case. Thereafter, prosecution side was closed vide statement at Ex.11.

6. Statements of accused were recorded under Section 342 Cr.P.C at Ex.12 & 13 respectively. Both the accused claimed false implication in these cases and denied the prosecution allegations. Accused declined to examine on oath in disproof of the prosecution allegations and did not lead evidence in defence.

7. Trial Court after hearing learned counsel for the parties and examination of the evidence available on record, by judgment dated 29.11.2016, convicted and sentenced the appellants as stated above. Hence these appeals are filed. We intend to dispose of these appeals by this single judgment.

8. The facts of the case as well as evidence produced before the trial Court find an elaborate mention in the Judgment dated 29.11.2016 passed by the learned trial Court, therefore, the same may not be reproduced here so as to avoid unnecessary repetition.

9. Mr. Mumtaz Ali Khan Deshmukh learned Advocate for the appellants has mainly contended that according to the evidence of complainant he received first call for bhatta on 18.04.2016, but FIR was lodged on 23.04.2016. Delay in lodging of the FIR has not been explained. It is argued that accused were arrested on 25.04.2016 during day time near Lal Qila but no private person of the locality has been associated as mashir of the recovery. It is also submitted that bhatta amount was not passed on to the accused persons, but it was managed by the police due to enmity. Counsel for the appellants further argued that prosecution story was unbelievable that accused were arrested with T.T. Pistols, if it was so, there were no circumstances to prevent the accused from firing upon the police party for making their escape good from the place of incident. Lastly, it is argued that ingredients of Sections 386 PPC read with Section 7 Anti-Terrorism Act, 1997 are not satisfied from the evidence, which is available on record. In support of his contentions, he has relied upon the case of *Irshad Ali and another vs. Mohammad Shahid and another (2015 P.Cr.L.J 158)*.

10. Mr. Mohammad Iqbal Awan, learned DPG argued that both the accused who are brothers were arrested at Lal Qila and pistols were recovered from their possession. He has submitted that two SIMs were recovered from accused Mohammad Salman Khan. SIM No.0348-4638477 was in the name of one Sajjad Ali and another SIM No.0311-4607101 was in the name of appellant Mohammad Salman Khan and calls were made by him to the complainant on his Cell, which is matter of record. Learned DPG supported the impugned judgment and prayed for dismissal of the appeals.

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

12. Complainant Mohammad Imran Abdul Majeed has deposed that on 18.04.2016, he was present at his house at 8:00 pm, he received a call from Cell No.0300-9219220 and from Cell No. 0348-4638477 for bhatta of Rs.5 lacs. He informed the incident to his uncle on 19.04.2016 and on 22.04.2016, he went to police station where he submitted written application and lodged the FIR on 23.04.2016. Complainant has further deposed that on 25.04.2016, he received a call on his mobile from Cell No.0311-4607101, caller asked complainant to reach at Lal Qila for payment of bhatta. Complainant went to the pointed place with some officials of P.S Bahadurabad. At 1:45 pm, two persons appeared there. Police caught hold of them and enquired their names. They disclosed their names as Adnan and Salman. Police conducted personal search of accused. From possession accused Adnan, police recovered 30 bore pistol and 3 SIMs and from the possession of accused Salman, one 30 bore pistol and 4 SIMs were recovered. Police arrested accused, sealed pistols, brought accused and case property at police station where two separate FIRs were registered. In the cross-examination, complainant has admitted that no resistance/fire was made by the accused at the time of their arrest. However, complainant has denied the suggestion that there was dispute in between the accused and complainant over the money transaction.

13. We are unable to rely upon the evidence of complainant and other witnesses for the reasons that complainant has categorically deposed that after arrest of the accused, pistols and bullets were sealed, but there is no mention in his evidence that SIMs were also sealed. There was inordinate delay in lodging the FIR without plausible explanation. Prosecution story appears to be unbelievable for the reasons that both accused are brothers inter-se and if they were armed with pistols why resistance was not shown by them at the time of their arrest. Even bhatta was not passed on to them. I.O had failed to interrogate Sajjad Ali regarding SIM from which calls were received by the complainant. So far SIM in the name of appellant Mohammad Salman is concerned, it was not sealed at spot. Therefore, no reliance can be placed upon the recovery of the SIM in the name of appellant Mohammad Salman. According to prosecution case, both accused were arrested near Lal Qila, it was day time no reason has been assigned why private persons were not made as mashirs of arrest and recovery.

14. From the close scrutiny of the evidence, we have come to the conclusion that not a single word has been deposed by the P.Ws that complainant was put in fear of injury, death or grievous hurt. Element of terrorism was also missing in this case. Antecedents/ business of the complainant from whom bhatta was demanded has also not brought on record. Appellants have been convicted under Section 386 PPC, but prosecution has failed to establish ingredients of Section 386 PPC. 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."

15. At the cost of repetition, it is mentioned that complainant in his evidence nowhere has deposed that accused persons intentionally put him in fear of death or of grievous hurt and he has failed to substantiate the charge of extortion through concrete or confidence inspiring evidence, as such element of terrorism is missing in this case. Therefore, conviction under Section 7(h) of Anti-Terrorism Act, 1997 is not sustainable under the law. Evidence of complainant is also silent regarding his financial status and source of income against which accused had been demanding bhatta. Defence plea 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."

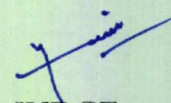
4. We note that observation made by the High Court is based upon the record of the case and no misreading in this respect was pointed out before us. The submission of learned counsel for the petitioner that in evidence petitioner has brought on record sufficient material to substantiate the fact of demand 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."

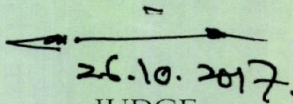
16. In this case, there are number of infirmities/lacunas, which have created serious doubt in the prosecution case. It is settled principle of law for extending benefit of doubt, it is not necessary that there should be multiple circumstances creating doubt. If a single circumstance, which creates reasonable 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."

17. 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-X, Karachi had no jurisdiction to try these cases. Accused have faced agony of long trial since 25.04.2016, as such re-trial in the peculiar circumstances of the case is not ordered. Consequently, Appeals are allowed, conviction and sentence awarded by the learned Judge, Anti-Terrorism Court-X, Karachi vide judgment dated 29.11.2016 are set aside. Appellants Mohammad Adnan and Mohammad Salman are acquitted of the charges. Appellants Mohammad Adnan and Mohammad Salman shall be released from custody forthwith, if they are not wanted in some other custody case.


JUDGE


26.10.2017

JUDGE