IN THE HIGH COURT OF SINDH AT KARACHI

Special Criminal Anti-Terrorism Jail Appeal No.46 of 2018

Present:

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

Appellant:	Akram alias Akoo son of Bout through Mr. Habib-ur-Rehman Jiskani, Advocate
Respondent:	The State through Mr. Muhammad Iqbal Awan, Deputy Prosecutor General Sindh
Date of hearing:	**16.10.2018**
Date of announcement:	**22.10.2018**

JUDGMENT

NAIM ATULLAH PHULPOTO, J.- Akram alias Akoo son of Bout, appellant, was tried by learned Judge, Anti-Terrorism Court-XVIII, Karachi, for offences under Sections 4/5 of the Explosive Substances Act, 1908, read with section 7 of the Anti-Terrorism Act, 1997 and Section 23(1)(a) of the Sindh Arms Act, 2013 in Special Cases Nos.1491/2017 and 1492/2017. On the conclusion of the trial, vide judgment dated 19.12.2017, appellant was convicted under sections 4/5 of the Explosive Substances Act, 1908 and sentenced to 14 years R.I.; for offence under section 7(ff) of the Anti-Terrorism Act, 1997, appellant was sentenced to 14 years R.I; he was also convicted under 23(1)(a) of the Sindh Arms Act, 2013 and sentenced to 7 years R.I. and to pay fine of Rs.500/- and in default of payment of fine he shall further undergo S.I. for 3 months. All the sentences were ordered to run concurrently. Appellant was extended benefit of Section 382-B, Cr.PC.

2. Brief facts of the prosecution case are that on 13.07.2017, SIP Syed Fida Hussain of P.S. Mauripur left police station along with subordinate staff, vide *Roznamcha* Entry No.5 at about 0805 hours for patrolling duty. During patrolling, SIP received spy information that a suspect belonging to Lyari Gang War was available at Abdullah Shah Ashabi Mazar. Police party proceeded to the pointed place and found suspected person while sitting near a grave. Police surrounded him and caught hold of him. On inquiry, he disclosed his name as Akram alias Akoo son of Bout. Due to non-availability of private persons SIP made PCs Muhammad Hanif and Liaquat as mashirs and conducted personal search of the accused and recovered one hand grenade from the pocket of his

pant and also recovered one 30 bore pistol from the fold of his pant. Pistol was containing 5 live bullets. On further personal search, a Q-mobile set was also recovered. Accused failed to produce license for the arms and ammunitions. He was arrested, mashirnama of arrest and recovery was prepared, pistol was seized at the spot. Explosive material and pistol were brought to the police station. Two FIRs were registered against the accused on behalf of the State vide Crime Nos.132/2017 under sections 4/5 of the Explosive Substances Act, 1908 read with section 7 of the Anti-Terrorism Act, 1997 and 133/2017 under section 23(1)(a) of the Sindh Arms Act, 2013.

3. On 13.07.2017, at 2300 hours, bomb disposal team arrived at police station and defused the recovered hand grenade.

4. Investigation officer inspected place of wardat, recorded 161, Cr.PC statements of the PWs, dispatched 30 bore pistol and hand grenade to the experts for report. After receipt of reports, on the conclusion of investigation, challan was submitted against the accused under the above referred sections.

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

6. Learned Judge, Anti-Terrorism Court-XI, Karachi framed charge against the accused at Ex.4. Accused pleaded not guilty and claimed to be tried.

7. At trial, prosecution examined PW-1 SIP Syed Fida Hussain at Ex-6, PW-2 Muhammad Hanif at Ex.7, PW-3 Shaukat Ali at Ex.8, PW-4 Muhammad Ayub at Ex.9. Thereafter, prosecution side was closed vide statement dated 06.12.2017 at Ex.10.

8. Statements of accused were recorded under section 342, Cr.PC at Ex.11. Accused claimed false implication in this case and denied the prosecution allegations. Accused raised plea that on the night of incident he had gone to the house of his maternal uncle, situated at Mauripur as his maternal uncle was unwell. He further stated that Rangers reached at the house of his maternal uncle and he was taken away by the Rangers who registered false case against him. Accused did not give statement on oath in disproof of prosecution allegations. No evidence was led in defence by the accused.

9. Learned Judge, Anti-Terrorism Court-XVIII, Karachi, after hearing the learned counsel for the parties and assessment of evidence available on record,

vide judgment dated 19.12.2017, convicted and sentenced the appellant as stated above, hence this appeal.

10. The facts of the case as well as evidence produced before the trial Court find an elaborate mention in the judgment dated 19.12.2017 passed by the trial court and, therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

11. Mr. Habib-ur-Rehman Jiskani, learned advocate for appellant contended that it was the case of spy information but no private person of the locality was associated by SIP for making him as mashir in this case. It is further contended that description and the number of the hand grenade has not been mentioned in the mashirnama of arrest and recovery; that in the report of FSL number of pistol has been mentioned but investigation officer failed to describe it in his evidence; that BDU expert has mentioned the number of hand grenade but the description has not been disclosed by the police officials in their evidence. It is also argued that it was unbelievable that police arrested the accused without resistance when he was armed with pistol and hand grenade. Lastly, it is argued that accused was picked up by the Rangers, hand grenade and pistol have been foisted upon him. In support of his contentions, reliance is placed on 2018 SCMR 772 (Muhammad Mansha Vs. The State).

12. Mr. Muhammad Iqbal Awan, Deputy Prosecutor General, argued that accused had raised specific defence plea and he could not substantiate the same at trial. He further argued that hand grenade was with detonator, it was difficult for the police to foist it upon the accused. However, learned D.P.G. conceded to the contention of the learned defence counsel that in the mashirnama of arrest and recovery, numbers of the hand grenade and pistol have not been mentioned. However, learned D.P.G. prayed for dismissal of the appeal.

13. We have carefully heard the learned counsel for the parties and examined the entire evidence, minutely.

14. Prosecution story appears to be unbelievable and unnatural for the reasons that accused was arrested from the graveyard on spy information by the police at on 13.07.2017 at 06:00 p.m. It was the case of spy information, it is admitted fact that efforts were not made by the head of the patrolling party to associate independent person of the locality for making him as mashir of the recovery. It is admitted fact that in the mashirnama of arrest and recovery, the

description of hand grenade and pistol have not been mentioned but in the reports of the experts complete description/numbers of the hand grenade and pistol have been mentioned. Omission on the part of the prosecution would be fatal to the case of the prosecution. There was a serious infirmity in the prosecution case. According to the prosecution itself, accused was armed with hand grenade and pistol but he was arrested by the police without any resistance. Safe custody of the pistol at police station and safe transit to the chemical examiner/experts have also not been established as held by the Honourable Supreme Court in the case of KAMALUDDIN alias KAMLA versus The STATE (2018 SCMR 577). Relevant portion is reproduced as under:-

> "4. As regards the alleged recovery of a Kalashnikov from the appellant's custody during the investigation and its subsequent matching with some crime-empties secured from the place of occurrence suffice it to observe that Muhammad Athar Farooq DSP/SDPO (PW18), the Investigating Officer, had divulged before the trial court that the recoveries relied upon in this case had been affected by Ayub, Inspector in an earlier case and, thus, the said recoveries had no relevance to the criminal case in hand. Apart from that safe custody of the recovered weapon and its safe transmission to the Forensic Science Laboratory had never been proved by the prosecution before the trial court through production of any witness concerned with such custody and transmission.

15. It is trite that a conjecture has no place in criminal law whereas an inference plays an important role because the same is based upon a logical deduction from circumstances available on the record. The circumstances becoming clear to us upon a proper appreciation of the evidence available on the record go a long way in convincing us that the appellant was not arrested by the police party at graveyard as alleged by the prosecution. It is unbelievable that the appellant had surrendered before police without causing any harm to the police. After his surrender, some engineering had been resorted to by the prosecution so as to cook up a false story. In the case of LAL KHAN and others vs. QADEER AHMED and others, Honourable Supreme Court has observed as under:-

> "3. There are certain facts which are not disputed in this case and they include the facts that the place of occurrence was the house of Qadeer Ahmed respondent and his deceased brother Ijaz, it was the police party which had gone to that house to conduct a raid and the said party surprised the respondent and his deceased co-accused who were otherwise peacefully present in their own house, upon seeing the police party it were the respondent and his deceased co-accused who had started firing at the police party which fires had hit Muhammad Akram,

S.I. leading to his death and in retaliation of such firing at the police party the police had fired back at Ijaz co-accused who after receipt of firearm injuries at the hands of the police died at the spot. There was a serious infirmity in this story of the prosecution and that was that if, according to the prosecution itself, the initial firing at the police had been resorted to by Qadeer Ahmed respondent and his deceased co-accused namely Ijaz and if through such firing one member of the police force had been critically injured at the spot then what was expected was that the police party would fire back at both the present respondent and his deceased co-accused rather than choosing the said co-accused as the only target of the police response. The places of presence of the accused party and the police party at the spot shown in the site-plan of the place of occurrence clearly established that if the police party wanted to target Qadeer Ahmed respondent as well then there was nothing to stop it from causing injuries to him. This shows that the police party had not fired at Qadeer Ahmed respondent which is a clear indication of a real possibility that it was only the respondent's co-accused namely Ijaz who had fired at the police party and in response the police party had fired back at him and that Qadeer Ahmed respondent had not fired at the deceased at all and that is why he was not hurt by the police party. It may be true that four crime-empties secured from the place of occurrence had matched with the pistol statedly recovered from the custody of Qadeer Ahmed respondent at the time of his surrender before the police party at the spot but it cannot be lost sight of that the said pistol had been recovered at the spot and it was not difficult for the police party to manufacture as many crime-empties from the said recovered pistol as it wanted so as to strengthen its case against Qadeer Ahmed respondent. These factors available on the record of this case cannot be treated as conjectures because they are not purely speculative. We find that such circumstances lead to inferences which can be drawn on the basis of the facts available on the record. It is trite that a conjecture has no place in criminal law whereas an inference plays an important role because the same is based upon a logical deduction from circumstances available on the record. The circumstances becoming clear to us upon a proper appreciation of the evidence available on the record go a long way in convincing us that Qadeer Ahmed respondent had not fired at the police party at all and that is why he was not harmed by the police party at the spot and also that he had surrendered before the police without causing any harm to anybody and after his surrender some engineering had been resorted to by the prosecution so as to cook up a story qua the respondent's role and to bolster the same through contrived circumstances."

16. After careful reappraisal of the evidence discussed above, we are entertaining no amount of doubt that the prosecution has failed to bring home guilt to the accused as the evidence furnished at the trial is full of factual, legal defects and is bereft of legal worth/judicial efficacy. Therefore, no reliance can be placed on the same.

17. Needless to mention that while giving the benefit of doubt to an accused it is not necessary that there should be many circumstances creating doubt. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of such doubt, not as a matter of grace and concession, but as a matter of right. It is based on the maxim, "it is better that ten guilty persons be acquitted rather than one innocent person be convicted". Reliance in this behalf can be made upon the cases of Tariq Pervez v. The State (1995 SCMR 1345), Ghulam Qadir and 2 others v. The State (2008 SCMR 1221), Muhammad Akram v. The State (2009 SCMR 230) and Muhammad Zaman v. The State (2014 SCMR 749).

18. For the reasons discussed above, appeal is allowed by extending benefit of doubt. Conviction and sentence recorded by the trial court against the appellant are set aside. Appellant Akram alias Akoo son of Bout shall be released forthwith, if not required in some other custody case.

22.10.2018

JUDGE

JUDGE

Gulsher/PS