

HIGH COURT OF SINDH AT KARACHI

Special Criminal Anti-Terrorism Jail Appeals Nos.253, 254 & 255 of 2016

Present: Mr. Justice Naimatullah Phulpoto
Mr. Justice Rasheed Ahmed Soomro

Sameer Appellant

versus

The State Respondent

Date of Hearing : 18.08.2017

Date of Announcement of judgment : 22.08.2017

Mr. Ajab Khan Khatta, Advocate for the Appellant.
Mr. Muhammad Iqbal Awan, D.P.G.

JUDGMENT

NAIMATULLAH PHULPOTO, J. Appellant Sameer was tried by the learned Judge, Anti-Terrorism Court No.IX, Karachi in Special Cases Nos.228(III), 229(III) and 230(III) of 2014 by the Judgment dated 05.04.2016. Appellant Sameer was convicted and sentenced as under:-

- "A. Upon found guilty of the charge of offence u/s 324 PPC he is convicted and sentenced to suffer R.I. for Ten years and fine of Rs.50,000/- in case of default he shall further suffer R.I. for four months more.
- B. Upon found guilty of the charge of offence u/s 353 PPC he is convicted and sentenced to suffer R.I. for two years and fine of Rs.10,000/- in case of default he shall further suffer R.I. for one month more.
- C. Upon found guilty of the charge of offence u/s 6(2)(ee) of ATA 1997 punishable u/s 7(ff) of ATA 1997 R/W section 4/5 Explosive Substance Act he is convicted and sentenced to suffer R.I. for fourteen years and fine of Rs.50,000/- in case of default he shall further suffer R.I. for four months more.
- D. Upon found guilty of the charge of offence u/s 23(1)-A Sindh Arms Act he is convicted and sentenced to suffer R.I. for seven years and fine of Rs.25,000/- in case of default he shall further suffer R.I. for two months more."

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

2. The brief facts of the prosecution case as disclosed in the FIR are that SI Naseer Muhammad Magsi lodged the report on 19.06.2014 alleging therein that on the same day, he alongwith his subordinate staff PCs Manzoor Ali, Sawan, Ahsan-ul-Haq, Tariq Aziz and Driver Siraj left police station in Government vehicle for patrolling duty. It is alleged that during patrolling, when police party reached at Miran Naka Chowk, Mirza Adam Khan road, it was about 2200 hours, where it is alleged that three persons appeared on road on motorcycle. Police signaled them to stop on which accused left their motorcycle and started firing upon the police party with the weapons carried out by them, with intention to commit their murders. It is alleged that police officials also fired upon accused in their defence. After firing one accused was apprehended and remaining two succeeded in running away. Accused, who was caught hold, on inquiry, disclosed his name as Sameer son of Abdul Sattar. Due to non-availability of private persons, SI Naseer Muhammad Magsi made PC Ahsan-ul-Haq and PC Tariq Aziz as mashirs conducted personal search of the accused and recovered from his possession one 30 bore pistol without number having three live rounds in its magazine and one in its chamber. Accused admitted that it was without license. It is further alleged that one shopping bag was also recovered from motorcycle, it contained three pieces of charas, same were weighted at spot weight was 1100 grams. Accused Sameer had no ownership documents of motorcycle bearing No.KAR-1001 Unique Star. On personal search of the accused, one hand grenade was also recovered from his possession. On inquiry, he also disclosed the names of co-accused, who ran away, as Sarwar son of Ghulam Qadir and Muavia son of Akbar Habib. Mashirnama of arrest and recovery was prepared at the spot in presence of above mashirs. Hand grenade and T.T. pistol were sealed at spot. Motorcycle was also

seized. After preparation of mashirnama, accused and case property were brought to the police station, where SIP lodged FIRs against the accused on behalf of State as Crimes Nos.164, 165 and 167 of 2014 for the offences under Sections 353/324/186/34f PPC read with Section 7 of ATA, 1997, 23(1)-A of Sindh Arms Act, 2013 and 4/5 Explosive Substance Act, read with Section 7 of ATA, 1997.

3. During investigation, Investigating Officer visited place of vardaat in presence of mashirs, collected empties and recorded 161 Cr.P.C. statements of PWs. Weapons were sent to the expert for the report, positive report was received, on the conclusion of usual investigation. Challan was submitted against the accused under Section 4/5 Explosive Substance Act u/s 324, 353 PPC read with 7 ATA and u/s 23(1)A of Sindh Arms Act 2013.

4. Case proceeded before the learned Judge, Anti-Terrorism Court No.III, Karachi. The cases under Section 23(1)(a) of Sindh Arms Act, 2013, under Section 4/5 Explosive Substance Act, and under Section 7 ATA were amalgamated with main case, ~~therefore~~, joint trial was ordered by the trial Court in terms of Section 21-M of the ATA 1997.

5. Charge was framed against the accused at Ex.4 for offences under Sections 353/324/186/34 PPC r/w 7 ATA, 4/5 Explosive Substance Act, 23(1)-A of Sindh Arms Act, 2013. Accused pleaded not guilty and claimed to be tried.

6. At trial, prosecution examined following witnesses:-

- (i) PW-1 SI Naseer Mohammad at Ex.6, who produced entry No.37 at Ex.6-A, memo of arrest and recovery at Ex.6-B,

copies of the FIRs at Ex.6-C to Ex.6-E, entry No.43 at Ex.6-F, clearance certificate of hand grenade at Ex.6-G.

- (ii) PW-2 PC Tariq Aziz at Ex.7, who produced memo of inspection of place of incident at Ex.7-A.
- (iii) PW-3 SI Mohammad Ayub Baloch at Ex.8, who produced entries No.44, 45 and 48 at Ex.8-A, detailed inspection report of the hand grenade at Ex.8-B.
- (iv) PW-4 Inspector Abid Hussain at Ex.9, who produced entry No.48 at Ex.9-A, entry No.55 at Ex.9-B, Medical Receipt at Ex.6-C, Medico Legal Certificate of accused at Ex.9-D, letter addressed to incharge FSL at Ex.9-E, FSL report at Ex.9-F, FIR No.178/2014 of police station Kharadar at Ex.9-G, letter dated 20.08.2015 at Ex.9-H, letter addressed to Home Department at Ex.9-I.

Thereafter, prosecution was closed its side vide statement at Ex.10.

7. Statement of the accused was recorded under Section 342 Cr.P.C. in which he claimed for false implication of this case and denied the allegations leveled against him. Accused stated that report of FSL has been managed by the police. In a question, what else accused has to say, he replied that he is innocent and he has been falsely implicated in this case. He runs mobile shop. On 17.06.2014, robbery was committed from his shop. He went to police station for lodging report, but police involved him in this case. Accused did not lead evidence of witness in his defence and declined to give statement on oath in order to disprove the prosecution allegations.

8. Learned trial Court after hearing the learned counsel for the parties and assessment of the evidence by the Judgment dated 05.04.2016

convicted and sentenced the appellant as stated above. Hence, these appeals are filed.

9. The facts of these cases as well as evidence produced before the trial Court find an elaborate mention in the Judgment dated 05.04.2016 passed by the learned trial Court, therefore, the same may not be reproduced here so as to avoid unnecessary repetition.

10. Mr. Ajab Khan Khattak, learned advocate for the appellant Sameer has made following submissions:-

- (i) That in the mashirnama of arrest and recovery, description of the hand grenade and pistol is not mentioned.
- (ii) That in the report of the BDS so also in his evidence, number of hand grenade is mentioned, but no such number has been mentioned in the mashirnama of recovery of such weapons.
- (iii) That complainant has admitted that mashirnama of arrest and recovery was prepared by the Munshi Muhammad Hussain but his name did not transpire in departure entry as well as in the list of challan, which reflects that mashirnama was not prepared at the spot.
- (iv) That weapons were sent to FSL after delay of 15 days.
- (v) Learned counsel for appellant in support of his contentions relied upon the case law reported as 2017 YLR 1097 (*Re: Muhammad Umair and another v. The State and another*).

11. Mr. Muhammad Iqbal Awan, learned DPG argued that prosecution has proved its case against the appellant. According to learned DPG, appellant was caught hold at the spot. Hand grenade and T.T. pistol were recovered from his possession. He has further submitted that weapons were sent to the FSL and positive report was received.

Lastly, he has submitted that there is huge evidence against the appellant to connect him in this case and prayed that appeal may be dismissed. In support of his contentions learned DPG has relied upon SBLR 2014 Sindh 1472 (Re: Abdul Baqi @ Talaha & 2 others v. The State).

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

13. We have come to the conclusion that prosecution has failed to prove its case against the appellant/accused Sameer for the reasons that there was encounter on 19.06.2014 at 10:00 p.m. at Mirza Adam Khan road. Source of identification of accused at such odd hours of night is not mentioned in the prosecution case. It is also unbelievable that police was equipped with arms and ammunitions, but two persons easily ran away from the police. It is also questionable that there was encounter with the sophisticated weapons from both sides, but none received injury in the incident. We have perused the mashirnama of arrest and recovery at Ex.6/B. In the mashirnama, description of hand grenade and T.T. pistol have not been mentioned but in the evidence description has been given. As such, rightly it has been contended that case property was tampered at police station. Investigating Officer in his evidence has admitted that hand grenade was not sealed at spot. In the cross examination, PW-3 Muhammad Ayub Baloch has replied that he found no detonator on explosive device/material. His reply in cross examination is as under:-

"It is correct to suggest that on the clearance certificate there are printed words "SEARCH VISUALLY AND WITH ELECTRONIC EQUIPMENTS. NO DETONATING OR EXPLOSIVE DEVICE / MATERIAL FOUND". Voluntarily says that mistakenly I had not given the cut mark to these printed lines."

14. According to prosecution case, mashirnama of arrest and recovery was prepared by Munshi of police station namely ASI Abdul Majeed, but his name did not transpire in the departure entry of police station. This fact has been admitted by the PW-4 Abid Hussain, Inspector in his cross examination. He has further admitted that hand grenade was not handed over to him in sealed condition. Accused has raised plea that his father is serving in police department as ASI and he had moved application against S.H.O., much annoyance was caused to S.H.O. Appellant was detained at P.S as before registration of the case and these cases were falsely registered against him. Record reflects that according to prosecution case, accused was arrested at Miran Naka Chowk, Mirza Adam Khan road, but no private person was associated by S.H.O. Naseer Ahmed to make him mashir in this case. Learned Division Bench of this Court in the case of *Muhammad Umair and another v. The State and another* reported as 2017 YLR 1097 [Sindh] has held as under:-

"14. As regard allegation of encounter, involving attempt to commit Qatl-e-Amd and deterring police party from performing its duties, it appears that to prove this the prosecution has relied upon the statement of complainant and the PWs who have supported the version of FIR in toto. At this point, we would take a pause to first say that mere narrating the prosecution story in toto is never sufficient to hold the burden of a conviction because the requirement of law is always that 'no conviction could sustain unless it stands the test of being direct, natural and confidence inspiring'. Each word must always be given its due meaning and importance. A direct evidence if otherwise does not appear to be 'natural' and 'confidence inspiring or unimpeachable' shall not be sufficient to convict an accused because Criminal Administration of Justice is based on the maxim, "it is better that ten guilty persons be acquitted rather than one innocent person be convicted". This appears to be the reason, which now becomes a well embedded principle of law, that 'a reasonable doubt' is always sufficient to acquit the accused'. The reliance can well be placed on the case of Muhammad Nawaz v. State 2016 SCMR 267 wherein case of Ayub Masih's case (PLD 2002 SC 1048) was referred as:-

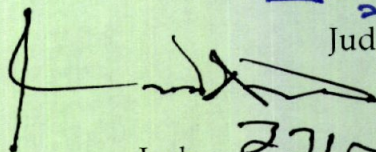
"...It is hardly necessary to reiterate that the prosecution is obliged to prove its case against the accused beyond any reasonable doubt and if it fails to do so the accused is entitled to the benefit of doubt as of right. It is also firmly settled that if there is an element of doubt as to the guilt of the accused the benefit of that doubt must be extended to him. The doubt, of course, must be

reasonable and not imaginary or artificial. The rule of benefit of doubt, which is described as the golden rule, is essentially a rule of prudence which cannot be ignored while dispensing justice in accordance of law. It is based on the maxim, it is better that ten guilty persons be acquitted rather than one innocent person be convicted." In simple words it means that utmost care should be taken by the Court in convicting an accused. It was held in The State v. Mushtaq Ahmed (PLD 1973 SC 418) that this rule is antitheses of haphazard approach or reaching a fitful decision in a case. It will not be out of place to mention here that this rule occupies a pivotal place in the Islamic law and is enforced rigorously in view of the saying of the Holy Prophet (p.b.u.h) that the "mistake of Qazi (Judge) in releasing a criminal is better than his mistake in punishing an innocent."

Resuming, the discussion what is quite evident from perusal of the evidence that though the complainant narrated contents of FIR but such narration (evidence) prima facie does not appear to be 'natural or confidence inspiring' for reasons that despite alleged claim of an encounter neither any of the police officials or vehicle (police mobile) received a single "scratch" although accused persons allegedly made firing with lethal weapons, including Kalashnikov. As per allegations, the police party was attacked upon at the hands of the appellants and in order to prove their allegations they were required to collect some tangible evidence yet they have miserably failed to bring concrete material against the appellants. The version of complainant of FIR as well as their respective memos and the statements of the witnesses, nowhere they have uttered a word that in retaliation they had fired certain number of rounds and suffice to say not a single empty spent by the complainant party has been collected by the I.O. during investigation even they have miserably failed to show that they were laced with certain particular weapons. Further to meet their accusation, the presence of the complainant party at relevant place and time was essential and in absence of any scratch or injury on their part, their allegation is baseless and the factum regarding alleged encounter has also not been proved. Besides, arrest of two of the accused persons out of five by police without being hurt/injured or having any other reason when other three under same situation made their escape good; non-recovery of empties from place of incident. These all are circumstances when do not let the prosecution story worth believing for a prudent mind. Therefore, charge to such an extent fails to stand well with the required test. Though, in law failure of defence has never been sufficient to hold one guilty because it is settled principle of law, it is the duty of the prosecution to prove its accusation and the prosecution could not be benefited from the failure or inability of the defence."

15. We are unable to rely upon the evidence of police officials without independent corroboration, which is lacking in this case for the reasons that prosecution evidence did not inspire confident and it is full of doubts. It is a known principle of appreciation of evidence that benefit of all favourable circumstances in the prosecution evidence must go to the

accused regardless of whether he has taken any such plea or not. Reliance is placed on the case of **Muhammad Nawaz and another v. The State and others (PLD 2005 SC 40)**. In the present case there are several circumstances, which created serious doubt in the prosecution case. We have no hesitation to hold that prosecution has miserably failed to prove charge against the appellant Sameer beyond reasonable shadow of doubt. Consequently, the appellant Sameer is acquitted of the charge by extending benefit of doubt, the aforesaid appeals are allowed. Impugned judgment dated 05.04.2016 is set-aside. Appellant shall be released forthwith, if he is no more required in any other case.


Judge

Judge

22/8/17

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Faizan/PA*