IN THE HIGH COURT OF SINDH AT KARACHI

Spl. Cr. A.T. Appeal No. 82 of 2024

Present Before:
Justice Zafar Ahmed Rajput
Justice Ms. Tasneem Sultana

Appellants	:	I. Khalil Khan s/o Habibullah 2. Sheeraz s/o Niaz Mohammad, through Ms. Farzana Mateen, advocate.
Respondent	:	The State, through Mr. Muhammad Noonari, D.P.G.
Date of hearing	:	**31.01.2025**
Date of order	:	**31.01.2025**

J U D G M E N T

Ms. TASNEEM SULTANA, J. Through this appeal, appellants, namely, Khalil Ahmed s/o Habibullah and Sheeraz s/o Niaz Muhammad have assailed the common judgment, dated 30.05.2024, passed by the learned Anti-Terrorism Court No. XX, Karachi in Special Cases No. 391, 391-A and 391-B of 2023, arisen out of F.I.R. No. 206 of 2023 {*under sections 353, 324/34, P.P.C. r/w Section 7 of Anti-Terrorism Act, 1997* ***("Act of 1997")***} and F.I.Rs. No. 207 & 208 of 2023 {*under section 23(1)(a) of Sindh Arms Act, 2013* ***("Act of 2013")***}, registered at P.S Eidgah, Karachi, respectively, whereby they were convicted and sentenced, as under:-

(i) *for offence under section 324/34, P.P.C. r/w section 7(h) A.T.A., 1997, the appellants shall undergo R.I for five years and pay a fine of Rs. 20,000/-each, in default thereof, each appellant to undergo S.I. for six months;*

(ii) *for offence under section 353, P.P.C., each appellant shall undergo R.I. for one year;*

(iii) *for the offence under section 23(1)(a) of the Act of 2013, each appellant shall undergo R.I for five years and to pay fine of Rs.20,000/-, in default thereof, each appellant shall suffer S.I. for three months.*

All the sentences were ordered to run concurrently and the benefit of section 382/B, Cr. P.C. was extended to appellants.

2. Brief facts of the prosecution case as unfolded by the complainant in FIRs are that, on 10.03.2023, at 10:25 p.m., at Orangzaib Market Eidgah, Karachi, Complainant ASI Syed Nasir Ali Shah during patrolling along with staff, signaled the appellants to stop, who were coming from Patel Road on a motor-cycle. On that, the appellants opened fire on police officials to deter them from discharging their duty and to cause their *qatl-e-amd*; the complainant in retaliation also fired on them, resultantly, appellant Khalil Khan sitting on pillion seat sustained injury on his left leg-calf and he fell down. Both the appellants were apprehended by the police. On personal search from appellant Khalil Khan, a 30-bore pistol along with magazine loaded with two live bullets-one in its chamber- were recovered while from search of appellant Sheraz a 30-bore pistol along with magazine loaded with one live bullet and one bullet in its chamber, were recovered besides some personal belongings. The appellants failed to produce the licenses of the recovered pistols for which separate FIRs under section 23(1)(a) of the Act of 2013 were registered against them.

3. After usual investigation, police submitted the charge-sheet against the appellants. The necessary documents as required under section 265-C, Cr. P.C. were provided to them. The Trial Court framed formal charge against the appellants, to which they pleaded not guilty and claimed to be tried. To prove its case, prosecution examined in all eight witnesses; **PW-1** ASI Syed Nasir Ali Shah, complainant, examined at Ex.-5, who produced D.D Entry No. 56 at Ex. 5-A, memo of arrest and recovery at Ex. 5-B, letter addressed to MLO at Ex. 5-C, copies of FIRs along with their entries at Ex. 5-D to Ex. 5-I, copy of entry in

Register No. 19 at Ex. 5-J, memo of inspection of the place of incident at Ex. 5-K; **PW-2** ASI Habib-ur-Rehman examined at Ex. 6, who produced DD Entry No. 57 at Ex. 6-A; **PW-3**, MLO, Dr. Gulzar Ali examined at Ex. 7, who produced Provisional and Final MLCs of injured appellant Khalil Khan at Ex. 7-A and Ex. 7-B; **PW-4** ASI Abid Ali examined at Ex. 8, who produced DD Entry No. 71 at Ex. 8-A, road certificate to case property at Ex. 8-B; **PW-5**, mashir, HC Sajid Pervaiz examined at Ex. 9; **PW-6** Anzal, the owner of the recovered motorbike examined at Ex. 10; **PW-7** SIP Mohammad Iqbal examined at Ex. 11, who produced SIO-II form of recovered empties and blood sample at Ex. 11-A, entries No. 8,9, and 12 at Ex.11-B; **PW-8**, I.O., Inspector Mohammad Ismail examined at Ex. 12, who produced DD Entry No. 08 at Ex. 12-A, DD Entry No. 30 at Ex. 12-B, deployment list of police official at Ex. 12-B/1 to Ex.12-B/12, DD Entry No. 33 at Ex.12-C. The statements of appellants under section 342, Cr. P.C. were recorded at Ex. 14 and 15 respectively, wherein they denied the allegations against them and claimed to be innocent. Appellant Khalil Khan in his 342, Cr. P.C. statement has stated that in fact police picked him prior to incident and then injured him at police station by making fire shot and then shifted him to hospital for treatment. Appellant Sheeraz has stated that police arrested him from in front of his house situated at Cheel Chowk and then booked him in these false cases. They, however, neither examined themselves on oath to disprove prosecution's allegations nor even led any evidence in their defence. The Trial Court after hearing the learning counsel for the appellants as well as A.P.G. for the State convicted the appellants and sentenced them as mentioned above, vide impugned judgment.

4. We have heard the learned counsel for the appellants as well as D.P.G. for the State and perused the material available on record with their assistance.

5. Learned counsel for the appellants *inter-alia* has contended that the Trial Court has failed to appreciate law and facts involved in the cases and the material contradictions in the statements of the prosecution witnesses, which have created serious doubt in the prosecution case. She has further contended that in alleged encounter neither any of the police officials sustained injury nor even any damage was caused to police mobile. She has also contended that police failed to associate any private witnesses from the locality to prove alleged encounter and recovery of arms. She added that the appellants have no criminal history and they were arrested prior to incident and then police fixed them in a fake encounter and recovery of illegal arms cases after half frying appellant Khalil Khan.

6. Conversely, learned D.P.G for the State while supporting the impugned judgment has maintained that the prosecution has proved its case through ocular and circumstantial evidence. He has further maintained that the appellants had opened fire with their unlicensed pistols on police officials on duty with intention to kill them. He while referring to FSL report and MLC of injured appellant Khalil Khan has also maintained that the crime empties seized from crime scene have been matched with the weapon recovered from the possession of the appellants and the said injured appellant sustained injuries at the spot during encounter.

7. It may be observed that it is the governing principle of criminal law that the onus lies upon the prosecution in a criminal trial to prove all the elements of the offence with which the accused persons are charged with. Article 117 of Qanoon-e-Shahadat Order, 1984 provides that whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that these facts exist. It may further be

observed that since in a criminal case liberty of an accused is at stake, a strict standard of proof is required to establish his guilt, which cannot be based on preponderance of probabilities but it must be proved beyond reasonable doubt. The words "beyond reasonable doubt" means that the prosecution must convince the Court that there is no other reasonable outcome of the evidence produced in trial except the conviction.

8. In the case in hand, it appears from the perusal of the record that only PW-1, complainant, ASI Nasir Ali Shah and PW-5, *mashir*; HC Sajid Pervaiz are the eye-witnesses of the incident. The prosecution through P.Ws have produced memos of arrest & recovery and place of incident, FSL report, Medico Legal Certificate and Serological Analysis Report **(SAR)**. However, prosecution has to prove that the appellants on the alleged day and time were present at the alleged place and they opened fire on police officials to deter them from performing their duty with intention to commit their qatl-e-amd and police succeeded to apprehend them along with illegal arms. *Prima facie*, while convicting the appellants, the Trial Court did not appreciate the fact that despite exchange of fires between appellants and police party, neither any police official or person from the public sustained any firearm injury nor the police mobile was damaged. In their depositions, P.W-1, complainant, ASI Syed Nasir Ali Shah (*Ex-5)* and P.W-8, I.O, PI Muhammad Ismail *(Ex-12)* have admitted these facts. Moreover, the incident had allegedly occurred at 10:25 p.m. on a busy commercial road but no person from the locality and public was associated as witness. P.W-5, eye-witness, HC Sajid Pervaiz *(Ex-9)* has admitted in-cross-examination that the complainant did not make any effort to associate private persons from the locality as witness. He has also admitted that at the time of incident shop of Iqbal Sheermal was opened. PW-2 ASI Habib-ur-Rehman *(Ex.6)* has deposed that on receiving information about the

police encounter, he reached the place of incident, where complainant ASI Nasir Ali Shah handed over him ML Letter *(Ex.7-C)* along with injured, he then shifted injured Khalil Khan to Civil Hospital. It is an admitted position that Ex.5-C bears the seal of the Police Station. It does not appeal to a prudent mind that the said complainant was carrying with him the seal of P.S. at the time of incident. No plausible explanation in this regard is available on record, which leads to inference that the alleged injured appellant was not taken to hospital from alleged place of incident but from the police station.

9. It is also matter of record that the clothes of the injured appellant were not secured by the complainant and the I.O, which raises serious doubt regarding the claim of prosecution that after receiving injury, the appellant fell on the ground. Though the prosecution has relied upon SLR of the blood swab, stated to be secured from crime scene, yet the SAR is of no assistance to the case of prosecution, as the same simply shows that the said blood was of human; however, it does not reflect that if the sample was in fact collected from the place of occurrence, as the same has not been shown collected from the alleged crime scene in presence of private mashirs. Another aspect of the case is that the said complainant and mashir have deposed in their respective evidence that the members of Crime Scene Unit **(CSU)** arrived at place of incident to secure crime empties and bloodstained earth and secured the same without associating any witness. Since the alleged securing of said articles is unattested, it carries no authenticity. In this modern age, every one carries cell phones with camera and even small shop keepers have CCTV Camera at their business places, yet in the instant case, the I.O. made no effort to secure such recording of the incident or it's after math. In the same sequence, it can be noted that the I.O also did not make any inquiry from people of the locality about the alleged police encounter.

10. It may be observed that neither complainant nor I.O. has brought any material on the record to suggest that the appellants have ever involved earlier in any criminal case. C.R.O. reports are silent on the previous criminal record of the appellants. In cases like present one, the role of I.O. is of pivotal nature as the officials of police party, who become PWs, are always subordinates of the complainants. Hence, the responsibility becomes two-fold in the matters where the cases also rest on proving or otherwise of recovery of incriminating articles. Nothing is brought on record to show that the complainant and concerned I.O. had taken any effort to associate private person as witnesses. There is no denial to the fact that our society has serious law and order breakdown, but at the same time accused persons cannot be convicted merely on the basis of allegations. It is alarming to note that cases of police encounter, in which only accused receives injury on specific part of body i.e. leg-calf, known as half-fry, or cases in which neither a police official receives injury nor the vehicle is damaged are rising in our Province. In case of *Muhammad Umair & others v. The State* **(2017 YLR 1097)**, this Court while setting aside the conviction and sentence awarded by the Trial Court in case of police encounter and sustaining injuries by the accused only, has observed that *complainant and prosecution witnesses supported the version of FIR, but such narrative prima facie did not appear to be natural or confidence inspiring for the reasons that despite alleged claim of encounter, neither any of the police official nor vehicle received any scratch.* This Court has also held in cited case that *the prosecution is duty bound to prove the accusation and could not be benefited from the failure or inability of the defence*, and that *mere saying of word from the mouth of complainant did not constitute any offence, unless corroborated and a slightly doubt in the prosecution case, benefits the accused*.

11. In case of *Mehboob-ur-Rehman vs. the State* **(2013 SCMR 106)** the Apex Court has set-aside the conviction and sentence of accused/convict by holding that the *accused while raising a defense plea was only required to show that there was a reasonable possibility of his innocence and the standard of proof was not similar to that as expected of the prosecution, which had to prove its case beyond any reasonable doubt.* In the cases of *Muhammad Mansha v. The State* **(2018 SCMR 772)**, Muhammad *Akram v. The State* **(2009 SCMR 230)** and *Tariq Pervaiz v. The State* **(1995 SCMR 134)**, it has been held that *for giving benefit of doubt, it is not necessary that there shall be many circumstances created doubt, and or single circumstances creating reasonable doubt in a prudent mind about guilt of accused makes him entitle not as a grace or concession, but as a matter of right*.

12. For the foregoing facts and reasons, we are of the view that that the prosecution has failed to prove its case against the appellants/accused beyond any reasonable doubt to sustain conviction.

13. These are the reasons of our short Order, dated ***31.01.2025,*** whereby instant appeal was allowed by setting aside the impugned judgment dated 30.05.2024.

J U D G E

J U D G E

Dated: _____

Faheem/PA