

IN THE HIGH COURT OF SINDH AT KARACHI

Present:

Mr. Justice Mohammad Karim Khan Agha
Mr. Justice Khadim Hussain Tunio,

SPL. CR. A.T. JAIL APPEAL NO. 190 OF 2020

SPL. CR. A.T. JAIL APPEAL NO. 191 OF 2020

SPL. CR. A.T. JAIL APPEAL NO. 192 OF 2020

Appellant:	Sher Muhammad son Muhammad Yaqoob through Mr. Habib-ur-Rehman Jiskani, Advocate.
Respondent:	The State through Mr. Muhammad Iqbal Awan, Additional Prosecutor General, Sindh.
Date of Hearing:	13.04.2022
Date of Announcement:	19.04.2022

J U D G M E N T

Mohammad Karim Khan Agha, J. Appellant Sher Mohammad son of Muhammad Yaqoob was charge sheeted to face his trial in three Special Cases No.443 of 2019 arising out of FIR No.121 of 2019 under section 384/385/386/34 PPC r/w section 7 of ATA 1997 registered at PS Super Market, Karachi, Special Case No. 444 of 2019 arising out of FIR No.122 of 2019 under section 353/324/34 PPC r/w section 7 of ATA 1997 registered at PS Super Market, Karachi and Special Case No.444-A of 2019 arising out of FIR No.123 of 2019 under section 23(1)(a) of SAA 2013 registered at PS Super Market, Karachi. The appellant, vide impugned judgment dated 27.07.2020 passed by the learned Judge, Anti-Terrorism Court No.IV, Karachi was convicted and sentenced u/s.265-H Cr.P.C. as under:-

- (a) Accused Sher Muhammad s/o Muhammad Yaqoob is found guilty of offences u/s.384/385/386/34 PPC r/w Section 6(2) (k) punishable under section 7(1)(h) of ATA 1997, and is convicted and sentenced to suffer imprisonment for five years and fine of Rs.10,000/- (Rupees Ten Thousand), in case of default in payment of fine, he shall further suffer two months more.
- (b) Accused Sher Muhammad s/o Muhammad Yaqoob is found guilty of the offences u/s. 353/324/34 PPC r/w Section 7(h) of ATA 1997, and is convicted and sentenced to suffer five years imprisonment and fine of Rs.10,000/- (Rupees Ten Thousand), in case of default in payment of fine, he shall further suffer two months more.

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(c) Accused Sher Muhammad s/o Muhammad Yaqoob is found guilty of the offence u/s.23(1) (a) of Sindh Arms Act 2013, and is convicted and sentenced to suffer imprisonment for three years and fine of Rs.5,000/- (Rupees Five Thousand), in case of default in payment of fine, he shall further suffer one month more.

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

2. The brief facts of the prosecution case as per FIR 121/2019 are that the complainant is running general store, with the name and style of "Mujahid General Store" near Iram Backers Liaqutabad-04, Karachi when on 21.06.2019 at about 05:10 hours, complainant received a phone call on his mobile No. 0345-2293488 and his younger brother also received a phone call on his number 0333-2493286, from mobile numbers 0307-2955670 and 0335-2191251. The caller introduced himself that he belongs to Lyari Gangwar, and demanded cash of Rs.20,00,000/- (Rupees two million) as extortion money (Bhatta) and issued threats of dire consequences to them. He threatened them that in case of nonpayment of extortion money they would face dire consequences. Hence, complainant registered said FIR.

3. The facts as narrated in the FIR Nos.122 of 2019 and 124 of 2019 both registered at PS Super Market are that on 25.06.2019 complainant PI Haseebullah Qureshi, SHO of Super Market PS, along with his subordinate staff, was busy in patrolling duty within the jurisdiction of the PS. Whilst patrolling complainant Muhammad Shahid s/o Muhammad Mujahid informed the SHO that he has lodged FIR bearing No.121 of 2019, u/s.384/385/386/34 PPC at Super Market against the culprits who are demanding extortion money from him. He further disclosed that extortionists asked him on phone to reach Teen Hatti Bridge, Nadi Kanara, Lyari Expressway, Liaqutabad for payment of extortion money to the tune of Rs.1,00,000/- (rupees one hundred thousand), he informed the SHO regarding his deal with culprits and that he is present near Teen Hatti Bridge to pay the extortionists. The SHO directed Muhammad Shahid to wait there and wait for him. SHO reached Teen Hatti Bridge along with police officials and met with complainant and directed the complainant to remain present at the pointed place, where the accused directed him to come. The complainant went to the pointed place i.e. Lyari Expressway, Nadi Kinara, accused persons came there, when he handed over an envelope of extortion money to two persons, who were present along with motorcycle. Just after the extortion money was paid

the police party tried to apprehend the extortionists however on seeing the police party, they started firing upon the police party with intent to kill them, which lead to the police party firing on them in self defence. Resultantly, both suspects sustained bullet injuries and fell down. The police party apprehended them, along with their motorcycle bearing Registration No.KHJ-8041, Maker Union Star 70. On enquiry they disclosed their names as Sher Muhammad and Akbar Ali. In presence of witnesses their personal search was conducted. The police party recovered from the possession of accused Sher Muhammad, one pistol of 30 bore, number rubbed, having black colour with brown colour butt, loaded magazine with four live bullets and one live bullet in chamber loaded, one envelope of extortion money of Rs.1,00,000/-, one Q-Mobile containing two SIMs and cash of Rs.200. From the possession of accused Akber, police party recovered one T.T. Pistol of 30 bore, having black colour, rubbed number, loaded magazine with three live rounds and one bullet in chamber loaded, one mobile phone of G-five, containing two SIMs and cash of Rs.150. Both suspects failed to produce valid license/permission of arms and ammunitions. After completion of legal formalities the police party returned to the police station and the aforesaid FIRs were lodged against the above named accused persons.

4. After usual investigation I.O. submitted charge sheet before the Hon'ble Administrative Judge, ATC where in accused Akber Ali, Sher Muhammad and Siddique were shown arrested thereafter case was transferred to the trial Court for disposal. All three cases were amalgamated u/s.21-M of ATA, 1997 being connected matters and Special Case No.443 of 2019 declared as leading case.

5. The charge was framed against the accused Sher Muhammad s/o Muhammad Yaqoob in which he pleaded not guilty and claimed trial as did co-accused Akbar who died during the course of the trial with the case abating against him and co-accused Siddique who absconded during the trial.

6. The prosecution in order to prove its case examined 07 PWs and exhibited various documents and other items. The statement of accused was recorded under Section 342 Cr.P.C in which he denied all the allegations leveled against him and claimed false implication. The accused neither examined himself on oath nor produced any DW in his defence.

7. After hearing the parties and appreciating the evidence on record the trial court convicted the appellant and sentenced him as set out earlier in this judgment. Hence, the appellant has filed this appeal against his conviction.

8. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the impugned judgment dated 27.07.2020 passed by the trial court and, therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

9. Learned counsel for the appellant has contended that the appellant is completely innocent and has been falsely implicated in this case by the complainant in collusion with the police and this was why the FIR was lodged after an unexplained delay of 4 days; that the appellant was already in police custody at the time of the incident; that his firearm injury was inflicted upon him by the police when he refused to pay a bribe to them; that the pistol, phone and alleged extortion amount recovered from him was foisted on him by the police; that there are major contradictions in the prosecution evidence which renders it unreliable; that there is nothing to connect him to the demand for any extortion money; that no police officer was injured during the so called encounter; that the oral evidence is contradicted by the medical evidence and as such for any or all of the above reasons the appellant should be acquitted of the charge by extending him the benefit of the doubt. In support of his contentions, he placed reliance on the case of **Dr. Muhammad Arar v The State** (SBLR 2010 Sindh 816).

10. On the other hand learned Additional Prosecutor General Sindh has contended that the complainant's evidence, CDR data, and recovery of the extortion money on the spot from the appellant prove the offence of extortion; that the appellant was arrested on the spot in injured condition after an encounter with the police; that an unlicensed pistol was recovered from the appellant when he was arrested on the spot following a police encounter in which he was injured and thus the other offences for which the appellant has been charged have been proved beyond a reasonable doubt and as such the appeal should be dismissed. When confronted by the court the learned APG conceded that based on the particular facts and circumstances of this case no offence under the ATA had been made out. In support of his contentions, he placed reliance on the cases of **Ali Nawaz v The State** (2021 P. Cr. L J 909), **Shah Nawaz v The State** (2020 MLD 466) and **The State/ANF V Muhammed Arshad** (2017 SCMR 283).

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11. We have heard the arguments of the learned counsel for the appellant and learned Additional Prosecutor General Sindh and have gone through the entire evidence which has been read out by the learned counsel for the appellant, and the impugned judgment with their able assistance and have considered the relevant law including the case law cited at the bar.

12. After our reassessment of the evidence we find that the prosecution has proved beyond a reasonable doubt the charge against the appellant for which he was convicted, **except** in respect of the offences under the ATA of which he is acquitted, keeping in view the fact that each criminal case must be judged on its own particular facts and circumstances for the following reasons;

(a) It is true that the FIR was lodged after a 4 day delay and that such delay can be fatal to the prosecution case. Based on the particular facts and circumstances of this case we do not find it fatal to the prosecution case that the FIR was not lodged until 4 days after the original demand for extortion as often in such type cases the complainant hopes that the extortion demand will not be carried through and as in this case often out of fear of reprisals the complainant is reluctant to immediately lodge the FIR a fact which we must be alive to keeping in view the prevailing law and order situation in Karachi and the number of violent acts which are carried out daily by organized gangs/groups with the collection of bhatta being prevalent in the city. In this case person's allegedly belonging to the Lyari gang war demanded the extortion money. In any event the FIR was against unknown persons as such there was no attempt by the complainant or the police to cook up a false case against the appellant otherwise he would have been named in the FIR. The complainant also had no proven enmity with the appellant and thus had no reason to implicate him in a false case. In addition neither the prosecution has received any undue benefit from the delayed FIR nor has the delay in lodging the FIR caused any prejudice to the appellant and as such based on the particular facts and circumstances of this case we do not find the delay in lodging the FIR to be fatal to the prosecutions case. In this respect reliance is placed on the case of **Muhammad Nadeem alias Deemi v The State** (2011 SCMR 872).

(b) According to the evidence of PW 1 Muhammed Shahid who was running a general store in Liaquatabad Karachi and who is the complainant in this case on 21.06.2019 he received a call from a member of Lyari gang war demanding extortion money failing which he would face dire consequences including firing on his shop and home which were near to each other. On 25.06.2019 he lodged his FIR against unknown persons for extortion and on 26.06.19 after negotiations he agreed to pay RS one lac as exhortation money to the caller at an agreed location. He informed PW 4 Haseebullah Quershi SHO PS Supermarket who informed him to wait at an agreed location where they met up and decided that the complainant would go to the location agreed with the extortionists and pay the extortion amount. At the agreed location PW 4 Haseebullah Quershi and his police party lay in wait for the extortionists who arrived on a motor bike and took the extortion money from PW 1 Shahid Muhammed whereupon the police revealed themselves in order

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to arrest the accused who fired on the police who as per the evidence of PW 4 Haseebullah Quershi returned fire which lead to the appellant being shot by the police and being apprehended on the spot along with ransom amount, phone and unlicensed fire arm. Neither of these two eye witnesses had any enmity with the appellant and had no reason to implicate him in a false case, they were not dented despite lengthy cross examinations and as such we believe their evidence.

(c) There evidence is corroborated/supported by the following evidence on record;

- (i) The recovered extortion money of RS 100,000 which was found in the possession of the appellant on his arrest on the spot in an envelope in denominations of Rs5,000.
- (ii) The memo of arrest and recovery which fully supports the prosecution case which was made at the spot and contains all material details including recovery of empties at the spot at P.85 of the paper book which is set out below for ease of reference;

**MEMO REGARDING ARREST OF ACCUSED PERSONS,
SEIZURE OF ARMS AMMUNITION AND RECOVERED
EXTORTION MONEY**

In presence of the following witnesses, tonight I the PI/SHO Haseebullah Qureshi posted at P.S Super Market accompanied with officials HC/517 Muhammad Naseem, HC/22819 Syed Munir Shah, PC/1109 Niaz Afridi, Driver PC/23755 Rehan Pasha by means of official mobile Toyota SPN-126 were busy in area patrolling regarding suppression of crime that during patrolling one person who disclosed his name as Muhammad Shahid s/o Muhammad Mujahid phoned me and informed that I have registered the Case Crime No.121/2019, U/s 384/385/386/34 PPC R/s 7 ATA at Police Station Super Market against extortionists, now these extortionists are demanding extortion, I told them that I can pay them Rs.1 lac, than they said me on phone that you bring Rs.1 lac at under teen hati bridge, Lyari express way, Nadi Kinaray, Liaquatabad but do not be over smart else you will be murdered, he further said that now he is near teen hatti, I the SHO told him do not go further, I am coming to you, I the SHO accompanied with officials by means of official mobile reached near teen hatti bridge and met with informer and told him that they have to arrest the accused persons, you go with money at the aforesaid place told by them, I am coming behind you with my officials, I the SHO very tactfully alighted the officials and went towards Nadi and saw secretly there were two persons on one motorcycle, Muhammad Shahid gave them envelop of Rs.1 lac to them, I the SHO with the help of accompanied officials by encircling tried to apprehend them, both accused persons in fear of their arrest started firing with their pistols on police party with intention to commit murder, I the SHO for the safety of myself and officials by using the right of self-defense made two fires with 9MM pistol, PC Niaz Afridi made two fires with official SMG and PC Rehan Pasha made two fires with official 9MM, then both accused persons received bullet injuries in right legs became injured and fell down, they were apprehended by encircling with help of accompanied officials.

Upon enquiry, they disclosed their names as Sher Muhammad s/o Muhammad Yaqoob, 2) Akbar s/o Mohiuddin, due to non-availability of private witnesses, from accompanied persons Muhammad Shahid s/o Muhammad Jamal, officials, PC Rehan Pasha and PC Niaz Afridi were made witnesses of the Memo. Upon conducting their personal search from 1) Sher Muhammad s/o Muhammad Yaqoob from his right hand holding one TT pistol 30-bore, number scratched, black colour, handle brown, on right side of its barrel in English engraved as "Made in Pakistan cal 30-bore Automatic" one bullet loaded in chamber and four rounds loaded in magazine was recovered, upon conducting further search from the right pocket of his wearing Qameez the extortion money of Rs.1 lac in envelop inside two notes with denomination of Rs.5000/- each, the numbers written on notes as 1) BQ-6968649, 2) N-8773317, 3) AU-0574499, 4) AL-5097091, 5) BQ-6968665, 6) AL-4519948, 7) BC-1826573, 8) BB-8326373, 9) BB-6749352, 10) AQ-6251600, 11) W-1272593, 12) Q-8925827, 13) AY-3635268, 14) BC-2965573, 15) S-3207072, 16) AW-6002273, 17) AQ-2760397, 18) BA-2533866, 19) AV-8751750, 20) AT-1090509 were recovered, further from his front pocket one Q-mobile model D-6 with two Telenor sims, black colour and cash Rs.200/- were recovered from 2) Akbar s/o Mohiuddin conducting his search in his right hand holding one TT pistol 30-bore black colour number scratched one bullet loaded in chamber, three loaded in magazine was recovered, upon conducting further search from the left pocket of his wearing pant one mobile Phone G-5 model G-3310 black colour with sims of Jazz and ufone in use and Cash Rs.150/- was recovered. Both accused persons were demanded licenses of recovered arms which they failed to produce, such act of accused persons is offence U/s 353/324/34 PPC R/w 7 ATA U/s 23(1)A SAA, hence after apprising them about their case crime both accused persons were duly arrested. From the spot bullets fired by accused persons 04 empties of 30-bore and empties of official SMG, four empties of official 9MM pistol were recovered, whereas, one bullet due to firing of accused persons one bullet hit at left side body of official mobile and its mark is available. The motorcycle in use of accused persons No.KHT-8041 maker Union Star 70-CC, black colour, engine No.SAE134117, Chasis No.SAC141450 demanded documents of its ownership but both accused persons failed to produce the same, hence, assuming it snatched property was seized by police U/s 550 Cr.P.C, prepared the memo on the spot. From the accused persons recovered arms ammunition, the empties recovered from spot and the extortion money were sealed and seized separately, obtained the signatures of witnesses on memo and parcels, the personal search and motorcycle was seized by police, informed police control regarding police encounter and area police mobile was called also ambulances were called which reached on spot. Letter of injured accused persons were given to ASI Shaukat Ali, the accused persons were sent through ambulances for treatment at Abbasi Shaheed Hospital.

Memo regarding arrest of accused persons and seizure was prepared on the spot, read over to the witnesses who admitted it to be correct and signed thereon.

- (iii) The pistol recovered from the appellant on his arrest on the spot lead to a positive FSL report when matched with the recovered empties at the spot.
- (iv) During the police encounter the appellant was shot in the leg which is corroborated by the medical evidence. There is no

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blackening around the wound which indicates that it was not inflicted by the police on him at close range and as such ties in with the police evidence of the distance between the accused and the police during the encounter being about 15 feet.

- (v) The police mobile during the encounter was hit by a bullet as confirmed by a positive FSL report and photo's.
- (vi) The mobile phone which was recovered and from which some calls were made to the complainant belonged to PW 3 Muhammed Khalid an independent witness who had reported that his phone had been stolen from him by two persons on motor bike to which he lodged an FIR. He had no enmity with any one and had no reason to make up a false story and did not even know that his phone had been stolen by the accused as he was not in a position to identify the accused as the accused wore a muffler on his face when he robbed him of his phone.
- (vii) The CDR data reveals that on the day of the incident calls were made from the phone which was recovered from the appellant to the complainant at the very location where it had been arranged for the extortion amount to be collected.
- (viii) It has come in evidence that absconding co-accused Siddique was the master mind of the extortion who it was suggested worked with the complainant and therefore knew every aspect of his business and was related to the deceased co-accused Akbar who died during the trial and who according to the evidence played a full part in the attempted extortion of the complainant and later encounter with the police.
- (ix) That all the PW's are consistent in their evidence and even if there are some contradictions in their evidence we consider these contradictions as minor in nature and not material and certainly not of such materiality so as to effect the prosecution case/evidence and the conviction of the appellant. In this respect reliance is placed on the cases of **Zakir Khan V State** (1995 SCMR 1793) and **Khadim Hussain v. The State** (PLD 2010 Supreme Court 669). The evidence of the PW's provides a believable corroborated unbroken chain of events from the time the appellant and the co-accused demanded the extortion money from the complainant to the lodging of the FIR to the negotiation down of the extortion money to the complainant informing the police of the place where the extortion money was to be paid to the payment of the extortion money to the police encounter to the arrest of appellant on the spot in an injured condition after the encounter from where the extortion money and unlicensed pistol was recovered from him and a phone which through CDR data also linked him to the extortion demands.
- (x) That the police PW's had no proven enmity or ill will towards the appellant and had no reason to falsely implicate him in this

case for instance by foisting a pistol and the extortion money on him and in such circumstances it has been held that the evidence of the police PW's can be fully relied upon. In this respect reliance is placed on **Mushtaq Ahmed V The State** (2020 SCMR 474).

(xi) That although there may be some defects/omissions in the prosecution case/investigation these are only of a minor nature and do not dent the prosecution case or lead to any benefit of the doubt being given to the appellant. In this respect reliance is placed on the case of **The State/ANF V Muhammed Arshad** (2017 SCMR 283).

(xii) Undoubtedly it is for the prosecution to prove its case against the accused beyond a reasonable doubt but we have also considered the defence case to see if it at all can cast doubt on or dent the prosecution case. The appellant has not put up any meaningful defence case and has simply claimed that he was falsely implicated by the police as he refused to pay a bribe which has not been proven at all and is a common defence in such type of cases. Interestingly/significantly in his S.342 Cr.PC statement the appellant admits being taken to hospital for medical examination which is in line with the prosecution case. As such in the face of reliable, trust worthy and confidence inspiring prosecution evidence we disbelieve the defence case which has not cast any doubt whatsoever of the prosecution case.

13. We, however, find that these offences do not fall within the purview of the ATA as held in the case of **Ghulam Hussain V State** (PLD 2020 SC 61) as there was no intent, purpose or design to create terror and only an attempt to collect extortion money privately and secretly from the complainant and as such the appellant is acquitted of the offences under the ATA.

14. Resultantly the appeals are dismissed however the convictions and sentences are only upheld with regard to the non ATA offences so charged. The appellant shall have the benefit of S.382 (B) Cr.PC and any remissions available to him under the law.