

ATC Aquitted - Handgrenade - Safe Custody. 327
NFR

IN THE HIGH COURT OF SINDH AT KARACHI

Special Criminal AT Jail Appeal No.67 of 2017

Present:

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

Appellants: Muhammad Fayaz son of Jamal Ahmed through Mr. Muhammad Farooq Khan, Advocate

Respondent: The State through Mr. Muhammad Iqbal Awan, Deputy Prosecutor General Sindh

Date of hearing: 19.10.2018

Date of Judgment 25.10.2018

JUDGMENT

MOHAMMAD KARIM KHAN AGHA, J. - Mohammad Fayaz son of Jamal Ahmed appellant, was tried by learned Judge, Anti-Terrorism Court No.IX, Karachi in Special Case Nos.118/2015 and 119/2015 for offences u/s. 6(2) (ee) of ATA 1997 punishable u/s.7 (ff) of ATA 1997 read with Section 4/5 of the Explosive Substances Act, 1908 and u/s. 23(1)-(a) Sindh Arms Act, 2013. On conclusion of the trial, vide judgment dated 30.01.2017, the appellant was convicted under Section 6(2)(ee) of Anti-Terrorism Act, 1997 punishable u/s.7(ff) of ATA 1997 read with Section 4/5 Explosive Substances Act and sentenced to 14 years R.I. with forfeiture of his property, if any, as required u/s. 7(2) of ATA 1997 and was convicted u/s. 23(1)(a) Sindh Arms Act, 2013 and sentenced to undergo R.I for seven years and to pay a fine of Rs.25,000/-, in case of default in payment of fine, the accused will have to undergo R.I. for six months more. Both the sentences were ordered to run concurrently law. Benefit of Section 382-B, Cr.P.C. was extended to the accused (the impugned judgment).

2. Brief facts of the prosecution case as disclosed in the FIRs are that ASI Akhter Abbas posted at AVCC/CIA, Karachi accompanied with police party ASI Muhammad Moosa, PC/13462 Masood Ahmed, PC/26526 Babar Wasaan & PC/16764 Muhammad Rafique equipped with weapons by means of official mobile was patrolling in District West Karachi. During patrolling, ASI Akhter Abbas received spy information that a young man armed with a pistol and hand grenade was present at Shahra-e-Orangi, Sector-5, Chowrangi near Kamal Petrol Pump Orangi Town in order to commit acts of terrorism. Therefore, the ASI briefed his police party and reached at the above place where on the pointation of the spy apprehended the accused at 0015 hours who disclosed his name as

Muhammad Fayyaz son of Jamal Ahmed Askari. Due to unavailability of private witnesses, ASI Muhammad Moosa and PC Muhammad Rafiq were appointed witnesses and in their presence, physical search of the accused was conducted and recovered one hand grenade, one without number 30 bore pistol loaded with 05 rounds in magazine and cash of Rs.300. License of recovered arms was demanded from accused but he could not produce the same. The above act of accused is an offence punishable U/s. 23(1)-(a) Sindh Arms Act 2013 and U/s. 4/5 Explosive Substances Act 1908, hence the accused was arrested and recovered pistol and ammunition was sealed on the spot whereas recovered hand grenade was taken into police possession separately by informing B.D.U. team. Thereafter, at arrival at the Police Station a case under Section 4/5 Explosive Substances Act 1908 was registered against the accused while a separate case of recovered arms and ammunition was also registered under Section 23(1)-A Sindh Arms Act, 2013 against the accused on behalf of the State.

3. Investigation of cases was entrusted to Inspector Amjad Kliyar. I.O. visited place of occurrence, prepared memo of site inspection and sketch of place of occurrence in presence of mashirs and recorded 161, Cr.PC statements of PWs, dispatched the weapon and grenade recovered from accused to the experts for reports, such reports were received by the I.O. who also collected CRO of accused. On conclusion of investigation, challan was submitted against the accused under the above referred sections.

4. Charge was framed against the accused under the above referred sections. Accused pleaded not guilty and claimed to be tried.

5. At trial, prosecution in support of its case examined ASI Akhtar Abbas at Ex.P/1, who produced the memo of arrest and recovery at Ex.P-1/A, copies of FIRs of both cases at Ex.P-1/B & 1/D and clearance certificate of hand grenade at Ex.P-1/E. Prosecution also examined ASI Mohammad Moosa at Ex.P-2, ASI Saleem Akhtar of BDU special branch at Ex.P-3, who produced DD entry No.21, 33 and 40 (one leaf) at Ex.P-3/A, letter in respect of hand grenade at Ex:P-3/C and examined Inspector Amjad Javed at P-4, who is said to be the Investigating Officer, he produced the DD entry No.21 dated 04.07.2014 at Ex.P-4/A, copy of application written by I.O. to Incharge FSL for the examination of weapon at Ex.P-4/B, the examination report of Weapon at Ex:P-4/C, DD entry No.32 dated 03.07.2014 at Ex:P-4/D, DD entry No.46 dated 04.07.2014 at Ex:P-4/E, DD entry No.43 dated 04.07.2014 at Ex:P-4/F, the copy of letters written to the DIGP and Home Department for permission of trial as required under Section 7 of

Explosive Substances Act 1908 at Ex:P-4/G and Ex:P-4/H. Thereafter, prosecution closed its side.

6. The appellant recorded his statement under Section 342 Cr.P.C. and has denied the allegations leveled against him and claimed that he has been falsely implicated by the police in the above offense when he refused to pay a bribe to them. However, neither the appellant examined himself on oath nor produced any witness in his defense.

7. Trial Court after hearing the learned counsel for the parties and assessment of evidence, by the impugned judgment convicted and sentenced the appellant as stated above. Instant appeal was filed by the appellant against the convictions and sentences recorded against him.

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

9. The learned counsel for the appellant has mainly contended that he is innocent and has been falsely implicated by the police because he refused to pay a bribe to them; that there were no independent witnesses as required under S.103 Cr.P.C.; that no description of the hand grenade had been given in the mashirnama of arrest and recovery; that no sketch of the pistol was a part of the mashirnama of arrest and recovery; that the grenade was inspected 12 to 13 hours after recovery which was a long delay which remained unexplained; that there was no detonator attached to the grenade and as such the Explosive Substances Act 1908 was not attracted and that for all the above reasons he was entitled to be acquitted or at the very least have his sentence reduced especially as he had already spent over 4 years in jail and was a poor man who was the sole bread winner of the family. In support of his contentions regarding reduction in sentence he relied on **Naeemullah Niazi v. The State** (2017 P.Cr.L.J Note 145). This case however as reported in 2017 P.Cr.L.J. Note 145 is of no assistance to him as it has been wrongly reported regarding any reduction in sentence

10. Conversely, the learned DPG has vehemently opposed the appeal and has contended that there is no legal infirmity in the impugned judgment. That the accused was arrested on the spot and the pistol and grenade were recovered from him on the spot and that the BDU expert found ball bearings in the grenade and as such the appeal should be dismissed. In support of his contentions in

respect of a grenade without a detonator being an explosive substance he placed reliance on **Naeemullah Niazi v. The State** (SBLR 2016 Sindh 1334).

11. We have heard the arguments of the learned counsel for the parties, carefully gone through the evidence on record which was read out by the appellant and considered the same along with the relevant law.

12. We find that there are flaws in the prosecution case. For example, it would appear that no terror was caused in this case so as to bring it within the ambit of the ATA; that based on the facts and circumstances of the case **only** S.5 of the Explosive substances Act 1908 is applicable which gives a maximum sentence of **up to 14 years** it being irrelevant that the hand grenade had no detonator on which reliance is placed on **Naeemullah Niazi case** (Supra); that no departure entry has been exhibited by the prosecution which is crucial to the prosecution case as was held in the case of **Shaukat Ali V The State** (2004 YLR 356); that no independent mushir has been associated with the case despite the arrest and recovery being made from a thickly populated area; that the description of the grenade as recorded in the mashirnama of arrest and recovery is wholly inadequate as it does not even mention the number on the grenade which was later mentioned in the BDU report; that not even a sketch of the pistol has been made; that as per the prosecution evidence that BDU was handed the grenade for inspection from an *almari* (not the malkana) at the PS where it was being kept and as such there is little, if any, evidence that this was the same grenade that was recovered from the accused especially as there may have been other grenades in the *almari* and in the mashirnama the number of the grenade which had been recovered had not been noted; furthermore there is no evidence that the grenade was kept in safe custody for the 12-13 hours when it was kept in the *almari*. Likewise there is little, if any, evidence to prove the safe custody of the pistol from the time of its recovery until its receipt at the FSL which as per the case of **Kamal Dinba alias Kamala V State** (2018 SCMR 577) will seriously damage the prosecution case; that there is no report from an expert chemical examiner that the grenade contained live explosives only a DBU report; that it does not particularly appeal to reason that a person with a pistol and a hand grenade would not try to escape or put up any resistance when approached by a police party; that it is a cardinal principle of criminal jurisprudence that the benefit of the doubt must go to the accused even if there is only one circumstance which creates doubt in the mind of a reasonable and prudent man as was held in the case of **Tariq Pervez V State** (1995 SCMR 1345); that when all the flaws in the prosecution case, although individually they may not make a case of

acquittal, **are read together** in our view a reasonable doubt is created as to the guilt of the accused and thus since the accused is entitled to the benefit of the doubt the impugned judgment is set aside and the appeal is upheld and we direct that the appellant be released from custody unless he is required in any other custody case.

13. Thus, for the reasons mentioned above the appeal is allowed and stands disposed of in the above terms.