IN THE HIGH COURT OF SINDH, AT KARACHI

PRESENT:-
Mr. Justice Muhammad Iqbal Kalhoro
Mr. Justice Shamsuddin Abbasi.

Spl. Crl. Anti-Terrorism Jail Appeal No.338 of 2018

Appellant	Muhammad Kamran @ Baba son of Muhammad Siddique through Mr. Raj Ali Wahid Kanwar, Advocate.
Respondent	The State through Mr. Hussain Bux Baloch, Additional Prosecutor General.

Spl. Crl. Anti-Terrorism Jail Appeal No.346 of 2018

Appellant	Noman @ Naan son of Muhammad Qayoom through Mr. Nadeem Ahmed Azar, Advocate.
Respondent	The State through Mr. Hussain Bux Baloch, Additional Prosecutor General.
Date of hearing/short order	**23.09.2020**
Date of detailed reasons	**30.09.2020**

<><><><><><>

JUDGMENT

Shamsuddin Abbasi, J:- Through captioned appeals, appellants Muhammad Kamran @ Baba son of Muhammad Siddique and Noman @ Naan son of Muhammad Qayoom have challenged the vires of the judgment dated 27.10.2018, penned down by learned Anti-Terrorism Court No.XVII, Karachi, in Special Case No.316 of 2015{VII} {Old Special Case No.46 of 2014 and New Special Case No.105 of 2017}, arising out of FIR No.88 of 2013 registered at P.S. Kharadar, Karachi, for the offences punishable under Sections 302, 324 & 34, PPC read with Section 7 of Anti-Terrorism Act, 1997, through which they were convicted and sentenced as follows:-

{a} "Under Section 302{b}/34 P>P>C each & sentenced to suffer life imprisonment as {Tazir} & to pay Rs.1,00,000/- {One Lac} each to the legal heirs of the deceased by way of compensation u/s 544-A Cr.P.C. and in default of payment thereof, further undergo S.I. for six months each.

{b} Under Section 7{1}{a} of Anti-Terrorism Act, 1997 each and sentenced them to suffer life imprisonment.

{c} Under Section 7{c} r/w Section 324 PPC each & sentenced to undergo R.I. for ten {10} years with fine of Rs.50,000/-

each and in case of default of payment to further undergo S.I. for one month each.

The learned trial Court, while awarding convictions as aforesaid, ordered all sentences to run concurrently and extended benefit in terms of Section 382-B, Cr.P.C. in favour of the appellants and acquitted co-accused Ameer @ Mirchi son of Tariq Qazi by observing that charge against him has not been proved as well as kept the case against absconding accused namely, Wasiullah Lakho son of Muhammad Arif, Ayaz Zehri son of Iqbal Zehri, Awais Dadi son of Muhammad Ameen, Rizwan @ PMT son of not known, Muzammil son of not known and Waseem @ Bawa son of not known on dormant file till their arrest.

2. FIR in this case has been lodged on 16.03.2013 at 2230 hours whereas the incident is shown to have taken place on 17.03.2013 at 0245 hours. On the fateful day i.e. 16.03.2013 ASI Riaz Ahmed was present at P.S. Kharadar, Karachi, as duty officer, when he received information that an incident of firing has taken place on back side of Memon Masjid and he was directed to reach Civil Hospital. He went to Civil Hospital, Karachi, vide entry No.49 at 2235 hours, where he conducted legal formalities under Section 174, Cr.P.C. and then recorded the statement of complainant Muhammad Shahbaz son of Inspector Haji Muhammad Nawaz {late} under Section 154, Cr.P.C. The complainant has stated that he is police constable and posted at P.S. Napier whereas his younger brother namely, Muhammad Faraz is posted in Crime Branch as police constable. On the day of incident he was present in his house when he received information that his brother Faraz has sustained fire-arm injuries due to firing and he has been removed to Civil Hospital. He alongwith his family members and other relatives rushed to Civil Hospital where they saw the dead body of Faraz riddled with bullet injuries. On inquiry they came to know that some unknown terrorists had made indiscriminate firing at Gangoo Street near Siddique Halwai shop at about 2230 hours and owing to such firing his brother Faraz become seriously injured and expired at Civil Hospital whereas another person namely, Muhammad Mudassir son of Maqsood Alam, aged about 22/23 years also died due to fire-arm injuries while other persons namely,

Taimoor son of Laeeq, aged about 18 years, Muhammad Manzoor son of Mir Zaman, aged about 30/32 years, and Abdul Khalid son of Bundoo Qureshi, aged about 50/60 years, become injured due to such firing.

3. After recording 154, Cr.P.C. statement of complainant Muhammad Shahbaz at Civil Hospital, Karachi, ASI Riaz Ahmed returned back at P.S. Kharadar and incorporated the said statement in FIR Book and registered a case vide Crime No.88 of 2013 under the above referred Sections on behalf of the State.

4. Pursuant to the registration of FIR, the investigation was followed by Inspector Aijaz Mughal, who found no clue during investigation, which led to filing a report under "A" class. On 01.11.2013 the CID police arrested one accused namely, Kamran @ Baba son of Muhammad Siddique in Crimes No.778 and 780 of 2013. He was interrogated by SIP Sultan Ahmed of P.S. Kharadar in Crimes No.312 and 284 of 2013 and during interrogation accused Kamran @ Baba confessed the commission of present crime and disclosed the names of his companions. He also led the police and shown the place of incident on his pointation whereupon he was arrested in the present case and after completing usual formalities SIP Sultan Ahmed submitted a challan before the Court of competent jurisdiction whereby accused Kamran @ Baba was sent-up to face the trial while other accused were shown as absconders. On 15.03.2014 police arrested one of the absconders namely, Ameer @ Mirchi while he was confined in Central Prison, Karachi, in some other case, which led to filing a supplementary challan. Accused Noman @ Naan was arrested on 17.09.2014 and sent-up to face trial vide Charge Sheet No.88-A dated 07.01.2015.

5. The learned trial Court took Oath as prescribed under Section 16 of Anti-Terrorism Act, 1997.

6. An amended charge in respect of offences punishable under Sections 302, 324 and 34, PPC read with Section 7 of Anti-Terrorism Act, 1997, was framed against appellants and co-accused Noman @ Naan, to which they pleaded not guilty and claimed to be tried.

7. At trial, the prosecution has examined as many as twelve {12} witnesses namely, complainant Muhammad Shahbaz at Ex.34, he was earlier examined before arrest of accused Noman @ Naan on 01.11.2016 at Ex.30, ASI Syed Laeeq as PW.2 at Ex.36, HC Zulfiqar Ali Shah as PW.3 at Ex.37, Muhammad Manzoor as PW.4 at Ex.38, PC Muhammad Zuhaib as PW.5 at Ex.39, Kashif Hussain as PW.6 at Ex.40, Zain ul Abiddin as PW.7 at Ex.41, SIP Muhammad Imtiaz as PW.8 at Ex.42, he was earlier examined at Ex.27 on 09.09.2015 and adopted the same evidence, SIP Riaz Ahmed as PW.9 at Ex.43, Inspector Muneer Ahmed as PW.10 at Ex.44, he was earlier examined at Ex.26 on 09.09.2015 and adopted the same evidence, Dr. Rajender Kumar asPW.11 at Ex.45 and I.O. DSP Aijaz Hussain Mughal as PW.12 at Ex.48. All of them have exhibited number of documents in evidence. Vide statement Ex.49 the prosecution closed its side of evidence.

8. Statements under Section 342, Cr.P.C. of accused Muhammad Kamran @ Baba {appellant herein}, Muhammad Ameer @ Mirchi and Noman @ Naan {appellant herein} were recorded at Exs.50, 51 and 52 respectively, wherein they have denied the prosecution case and professed their innocence. They opted not to examine themselves on oath under Section 340{2), Cr.P.C. and did not adduce any evidence in their defence.

9. The learned trial Court, on conclusion of trial and after hearing the learned counsel for the parties as well as assessing evidence on record, convicted the appellants as detailed in para-1 {supra} vide judgment dated 27.10.2018, impugned herein, and acquitted co-accused Muhammad Ameer @ Mirchi. Feeling aggrieved by the convictions and sentences, referred herein above, the appellants have preferred their respective appeals through Superintendent, Central Prison, Karachi.

10. Since the appeals are outcome of a common judgment and pertain to same crime, therefore, we deem it appropriate to decide the same together through a single judgment.

11. The relevant facts as well as evidence produced before the learned trial Court find an elaborate mention in the impugned judgment, therefore, the same are not reproduced here so as to avoid duplication and unnecessary repetition.

12. It is jointly contended on behalf of the appellants that they are innocent and have been false implicated in this case by the police with malafide intention and ulterior motives. It is next submitted that the prosecution has failed to prove its case against the appellants beyond any shadow of doubt. The eye-witnesses as well as injured persons have not supported the case of the prosecution and did not identify the appellants while recording their evidence during trial as well as in identification parade held before a Magistrate against appellant Muhammad Kamran @ Baba. Nothing incriminating has been recovered from the possession of appellants and the alleged recoveries are foisted upon them. The prosecution has failed to produce any iota of evidence against the appellants and in absence thereof the report of FSL is unsafe to rely upon. The occurrence has taken place at 10:30 pm and the FIR has been lodged at 2:45 am after the delay of about four hours and fifteen minutes without any explanation. It is also submitted that witnesses have contradicted each other and made dishonest improvements in order to bring the case in line with medical evidence. The prosecution has not been able to produce any direct evidence against the appellants as such no conviction can be based on the evidence of other witnesses. The convictions and sentences recorded by the learned trial Court are bad in law and facts and without application of a judicial mind to the facts and surrounding circumstances of the case. The matter needs sympathetic consideration with regard to innocence of the appellants more particularly when they are facing the charges of capital punishment. The learned trial Court has not properly evaluated the evidence brought on record as well the contradictions and discrepancies on material aspects of the matter which has demolished the whole case of the prosecution. The learned counsel while summing up their submissions have prayed that the prosecution has miserably failed to prove the guilt of the appellants and, thus, according to them, under the abovementioned facts and circumstances of the case the

impugned judgment may be set-aside and the appellants may be acquitted of the charge by extending them the benefit of doubt. In support of their submissions, they have relied upon {2008 SCMR 707} *Ali Sher & others v The State,* {2020 P.Cr.L.J. 328} *Farooq v Musavir Ahmed,* {2020 YLRN 15} *Nazeer Ahmed v Zaheer Ahmed,* {2020 P.Cr.L.J. 170} *Haroon ur Rashid v The State,* {2020 YLR 195} *Gohar Khan v The State,* {2017 SCMR 1601} *Basharat Ali v Muhammad Safdar & another},* {2010 SCMR 846} *Riaz Ahmed v The State,* {2011 SCMR 474} *M. Saleem v M. Azan & another,* {2012 SCMR 327} *Khalid @ Khaldi & others v The State,* {1996 SCMR 188} *Sarfaraz Khan v The State,* {2019 SCMR 872} *Sajjan Solangi v The State,* {2009 SCMR 230} *Muhammad Akram v The State,* {2001 P.Cr.L.J. 1401} *Khawaja Muhammad v The State,* {2019 YLR 1264} *Ayaz v The State and* {2018 P.Cr.L.J. N 12} *Aqeel Ahmed alias Tiloo v The State}.*

13. In contra, the learned Additional Prosecutor General has argued that prosecution has successfully proved its case against the appellants. The story set-forth in the FIR is natural and believable. The ocular account furnished by the prosecution has been corroborated by medical evidence. There is positive report of Forensic Division showing that the empties secured from the place of incident were matched and fired from the same weapons recovered from the possession of appellants. The witnesses in their respective statements have supported the case of the prosecution and implicated the appellants with the commission of offence and the minor discrepancies and contradictions are of no significance. Lastly submitted that the impugned judgment is based on fair evaluation of evidence and no interference is called-for. He, therefore, prayed for dismissal of appeals.

14. We have given anxious consideration to the submissions of learned counsel for the appellants and the learned DPG for the State and scanned the entire material available before us and the cited case law with their able assistance.

15. As regard unnatural death of deceased Faraz and Mudassir is concerned, PW Dr. Rajender Kummar {Ex.45} has deposed that on 16.03.2013 he was Medical Legal Officer at Civil Hospital, Karachi.

It was about 11:10 pm two injured namely, Faraz, aged about 30 years, and Mudassir aged about 22 years, brought at Civil Hospital by one Umair with history of firearm injuries. He examined injured Faraz and noted three injuries on his person, who was referred to emergency operation theater for further management where he expired. He issued M.L. No.1302 of 2013 {45/A}. He also examined injured Mudassir and noted five injuries on his person, who was referred to emergency operation theater for further management where he expired. He issued M.L. No.1301 of 2013 {Ex.45/C}. Thus, the factum of death of deceased Faraz and Mudassir has been independently established through strong and convincing evidence adduced by the Medical Officers as a result of cardio pulmonary arrest on account of hemorrhage. Insofar as injuries caused to PWs Taimoor and Muhammad Manzoor are concerned, he deposed that on the same day injured Taimoor, aged about 25 years, and Muhammad Manzoor, aged about 30 years, brought at hospital by same person namely, Umar with history of fire-arm injuries. He examined injured Taimoor and noted one injury on his person and referred the patient to emergency operation theater. He issued M.L. No.1300 of 2013 {Ex.45/E}. He also examined injured Muhammad Manzoor and noted two injuries on his body and then referred him to emergency operation theater for further management. He issued M.L. No.1304 of 2013 {Ex.45/F}. The kind of weapon used in the commission of offence declared as fire-arm projectile. The factum of injuries, thus, stand proved through strong and convincing evidence adduced by the Medical Officer. As to PW Zain-ul-Abiddin is concerned, the prosecution has not been able to bring on record any medical evidence with regard to injuries allegedly sustained by him in the incident of firing.

16. It is an undisputed fact that the appellants are not named in the FIR, which has been lodged against unknown persons claiming therein that due to indiscriminate firing of unknown terrorists two persons died and three become injured. Occurrence alleged to have taken place at 2230 hours and according to PW SIP Riaz Ahmed he received information about the incident at 2235 and immediately rushed to Civil Hospital vide entry No.49 where he completed 174, Cr.P.C. proceedings, secured blood-stained clothes of both

deceased as well as recorded 154, Cr.P.C. statement of complainant at 0200 hours and then returned back to P.S. vide entry No.53 dated 17.03.2013 made in the Roznamcha of P.S. for his arrival. Surprising to note that the times of placing entry No.53 and registration of FIR are same i.e. 0245 hours. This fact, thus, caused a big dent to the prosecution case. Furthermore, the FIR has been lodged after four hours and fifteen minutes of the incident and forty five minutes after recording 154, Cr.P.C. statement of complainant. Delay in recording the FIR has not been properly explained. Hence, presumption would be drawn that FIR has been lodged after due deliberations and consultations. Furthermore, it is a well settled principle of law that FIR is always treated as a cornerstone of the prosecution case to establish guilt against those involved in a crime, thus it has a significant role to play, hence if there is any delay in lodging of FIR and commencement of investigation, it gives rise to a doubt and benefit thereof is to be extended to the accused. Reliance may well be made to the case of *Zeeshan @ Shani v/s The State* {2012 SCMR 428}, wherein it has been held by Hon'ble apex Court that delay of more than an hour in lodging of FIR give rise to an inference that occurrence did not take place in the manner projected by the prosecution and time was considered in making efforts to give a coherent attire to prosecution case, which hardly proved successful.

17. Admittedly, complainant Muhammad Shahbaz is not the eye-witness of the incident and his evidence is hearsay in nature. According to him while he was present in his house, he received information that his younger brother Faraz has become injured in an incident of firing by unknown persons and removed to Civil Hospital as such he went there and saw dead body of his brother riddled with bullet injuries. PWs Zain-ul-Abiddin, Muhammad Manzoor and Kashif Hussain, alleged to be the eye-witnesses of the incident, but they have not supported the case of the prosecution to the extent of identification of appellants during trial. PW Zain-ul-Abiddin though supported the case of the prosecution with regard to incident of firing allegedly taken place causing death of PC Faraz and Mudassir and injuring three persons including him, but categorically deposed that the persons who made firing at the crime scene are not present in

Court. It is noteworthy that PW Taimoor son of Laeeq also sustained injuries due to firing of unknown persons, but prosecution has not been able to produce him at trial for recording his evidence. It has also come on record that appellant Muhammad Kamran @ Baba was put to a test of identification before a Magistrate and during such parade the said eye-witness Taimoor has not identified the appellant and this fact has also been admitted by investigating officer DSP Aijaz Hussain Mughal {PW.12 Ex.48} in his cross-examination.

18. Appellant Muhammad Kamran @ Baba has been shown arrested on 01.11.2013 whereas appellant Noman @ Naan is said to be arrested on 17.09.2014 after they confessed commission of the present crime. During interrogation they also shown their willingness to point out the place of incident and voluntarily led the police party and showed place of occurrence on their pointation. We are conscious of the fact that after making such disclosure before the police no new fact was discovered. The place of occurrence was already in the knowledge of the police and such pointation is worthless, irrelevant and inadmissible as the said place was already in the knowledge of police and a site plan of the same place had already been prepared by police on 17.03.2013 as such showing the place of incident to police by appellants on their pointation is of no significance.

19. As to the positive FSL report about the crime empties secured from the place of occurrence and the crime weapons allegedly recovered from the possession of appellants is concerned, suffice it to say that appellant Muhammad Kamran @ Baba has been shown arrested on 01.11.2013 alongwith crime weapon i.e. after more than seven months of the incident whereas appellant Noman @ Naan is said to be arrested on 17.09.2014 alongwith crime weapon i.e. after more than one year and six months of the incident. It is also noteworthy that the weapon allegedly recovered from the possession of appellant Muhammad Kamran @ Baba has been sent to ballistic expert for its matching with the crime empties allegedly secured from the place of occurrence and the same have been received in the office of Forensic Division on 04.11.2013 i.e. after three days of its recovery whereas the weapon allegedly recovered from the

possession of appellant Noman @ Naan has been sent for matching purposes and received in the office of Forensic Division on 23.09.2014 after the delay of six days of its recovery. Delay in dispatch of the case property to the office of Forensic Division has not been explained. Neither the name of police official, who had taken the case property to the office of Forensic Division, has been mentioned nor examined by the prosecution at trial in order to prove safe transit of the case property to the expert. In view of this background of the matter, two interpretations are possible, one that the alleged empties and pistol have not been tampered and the other that these were not in safe hand and have been tampered. It is settled law that when two interpretations of evidence are possible, the one favouring the accused shall be taken into consideration. Thus, the positive FSL report qua the crime empties and weapons being delayed without furnishing any plausible explanation, would not advance the prosecution case, therefore, has wrongly been relied upon by the learned trial Court. Even otherwise the prosecution has failed to substantiate the point of safe custody of case property and its safe transit to the expert through cogent and reliable evidence and the alleged recovery of crime weapons, on the face of it, seems to be doubtful. Reliance may well be made to the case of *Ikramullah & others v The State* {2015 SCMR 1002}, wherein Hon'ble apex Court has settled principle for keeping recovered narcotic substance in safe custody and proving its safe transit to the chemical examiner was emphasized in the following terms:-

> *"In the case in hand not only the report submitted by the Chemical Examiner was legally laconic but safe custody of the recovered substance as well as safe transmission of the separated samples to the office of Chemical Examiner had also not been established by the prosecution. It is not disputed that the investigating officer appearing before the learned trial court had failed to even to mention the name of the police official who had taken the samples to the office of the Chemical Examiner and admitted no such police official had been produced before the learned trial Court to depose about safe custody of the samples entrusted to him for being deposited in the office of the Chemical Examiner. In this view of the matter the prosecution had not been able to establish that after the alleged recovery the substance so recovered was either kept in safe custody or that the samples taken from the recovered substances had safely been transmitted to the*

> *office of the Chemical Examiner without the same being tampered with or replaced while in transit".*

20. Another intriguing feature which has caused serious dent to the prosecution case is that the prosecution neither produced the case property viz empties, blood-stained earth, wearing clothes of deceased and the weapons allegedly recovered from the possession of appellants at trial nor exhibited the same in evidence as articles. The only explanation that has been furnished by the prosecution is that the case property has been destroyed owing to fire in the Malkhana. Even the case property has not been shown to the appellants at the time of recording their statements under Section 342, Cr.P.C. It is a well-settled principle of law that conviction can only be based upon the evidence which is put to the accused in his statement under Section 342, Cr.P.C. for obtaining his explanation and if such evidence is not put to the accused in such statement then it cannot be used against him. Furthermore, it is by now well settled that the recovery of fire-arms and empties etc. are always considered to be corroborative piece of evidence and such kind of evidence by itself is not sufficient to bring home the charges against the accused more particularly when the other material put-forward by the prosecution in respect of guilt of the appellants has been disbelieved. It has been affirmed by the Hon'ble Supreme Court in case cited as 2001 SCMR 424 *{Imran Ashraf and 7 others v The State}* in the following manner:-

> *"Recovery of incriminating articles is used for the purpose of providing corroboration to the ocular testimony. Ocular evidence and recoveries, therefore, are to be considered simultaneously in order to reach for a just conclusion."*

Likewise, if any other judgment is needed on the same analogy, reference can be made to the case of *Dr. Israr-ul-Haq v. Muhammad Fayyaz and another* reported as 2007 SCMR 1427, wherein the relevant citation (c) enunciates:

> *"Direct evidence having failed, corroborative evidence was of no help. When ocular evidence is disbelieved in a criminal case then the recovery of an incriminating article in the nature of weapon of offence does not by itself prove the prosecution case.*

21. The prosecution has based its case against appellants on the confessions allegedly made by them before police, but they have not confessed their guilt before the competent Court of law, therefore, the alleged admissions before police have no evidentiary value in view of Article 38 of the Qanun-e-Shahadat Order, 1984. A confession before police is inadmissible in evidence in normal cases, but in cases where the accused is facing the charges of terrorism Section 21-H of the Anti-Terrorism Act, 1997, has made such a confession before police conditionally admissible with a condition that there should be some other evidence including circumstantial evidence, which must reasonably connect the accused with the alleged offence before a confession made by the accused before the police is accepted by a Court worthy of any consideration. Such conditional admissibility of a confession before police is contingent upon availability of some other evidence connecting the accused with the offence charged with, but in the present case, as discussed herein above, all the other pieces of evidence relied upon by the prosecution against the appellants have utterly failed to connect them with the alleged offence. In this view of the matter the case in hand is not a fit case wherein the Court could even consider the confession before police attributed to the appellants.

22. It is a well settled principle of law that involvement of an accused in heinous nature of offence is not sufficient to convict him as the accused continues with presumption of innocence until found guilty at the end of the trial, for which the prosecution is bound to establish the case against the accused beyond any shadow of reasonable doubt by producing confidence inspiring and trustworthy evidence. The prosecution has not been able to bring on record any direct evidence. Rather, there are so many circumstances, discussed above creating serious doubts in the prosecution case which cut the roots of the prosecution case and according to golden principle of benefit of doubt one substantial doubt would be enough for acquittal of the accused. The rule of benefit of doubt is essentially a rule of prudence, which cannot be ignored while dispensing justice in accordance with law. Conviction must be based on unimpeachable evidence and certainty of guilt and any doubt arising in the prosecution case, must be resolved in favour of the accused. The said

rule is based on the maxim "it is better that ten guilty persons be acquitted rather than one innocent person be convicted" which occupied a pivotal place in the Islamic Law and is enforced strictly in view of the saying of the Holy Prophet (PBUH) that the "mistake of Qazi (Judge) in releasing a criminal is better than his mistake in punishing an innocent".

23. The epitome of whole discussion gives rise to a situation that the appellants have been convicted without appreciating the evidence in its true perspective, rather the prosecution case is packed with various discrepancies and irregularities, which resulted into a benefit of doubt to be extended in favour of the appellants not as a matter of grace but as a matter of right. Accordingly, vide our short order dated 23.09.2020 we had allowed these appeals, set-aside the convictions and sentences recorded by the learned trial Court by impugned judgment dated 27.10.2018, acquitted the appellants of the charge by extending them the benefit of doubt and ordered their release from the prison forthwith if not required to be detained in connection with any other case and these are the reasons thereof.

JUDGE

JUDGE

Naeem