

IN THE HIGH COURT OF SINDH, AT KARACHI

PRESENT:-

Mr. Justice Naimatullah Phulpoto;

Mr. Justice Shamsuddin Abbasi

Spl. CrI. A.T.A. No.308 of 2016

Shahbaz Ahmed son of
Khalil Ahmed. Appellant

Versus

The State. Respondent

Appellant In person

Respondent Through Mr. Muhammad Iqbal Awan,
DPG

Date of hearing 06.03.2018

Date of Judgment 16.03.2018

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JUDGMENT

Shamsuddin Abbasi, J: Through captioned appeal, the appellant has assailed the conviction and sentence recorded by learned Anti-Terrorism Court No.II, Karachi, by a judgment dated 13.12.2016, passed in Special Case No.896 of 2015, arising out of FIR No.341 of 2015 under Sections 385 & 386, PPC read with Section 7 of Anti-Terrorism Act, 1997, registered at Police Station Mominabad, Karachi.

2. FIR in this case has been lodged on 02.09.2015 at 2130 hours whereas the incident is shown to have taken place on 27.08.2015 at 2200 hours. Complainant Muhammad Tahir son of Muhammad Zahoor has stated that on the fateful day he was present at his house. It was about 10.00 pm he received a call on his cell phone from cell number 0320-3542346, wherein the caller disclosed his name as “Ustad Khoon Kajal Gang War Ka Right Hand” and

demanded Rs.50,000/- as Bhatta, otherwise alleged that one grenade was enough for him. The caller also extended threats that in case the complainant informed the police or failed to pay extortion amount, he would kill the complainant and his family. Thereafter, the complainant had been receiving similar calls from time to time from the said person till 02.09.2015 when he visited P.S. Mominabad and registered a case vide FIR No.341 of 2015 under Section 385, PPC against unknown person.

3. Pursuant to the registration of FIR, the investigation was entrusted to Inspector Raja Jehangir. I.O. with the help of complainant continued efforts to search out the accused. On 03.09.2015 the I.O. received a phone call from complainant, who informed the I.O. that just now he has received the call from same number and they have decided a place "Taj Lassi House" where caller has come to receive the extortion money. On receipt of such information, I.O. alongwith ASI Muhammad Akram, ASI Darya Khan and other staff proceeded to the pointed place in official mobile and posted his staff at different points. I.O. also remained in contact with the complainant. Meanwhile, a person came to the complainant. The complainant handed over a brown coloured envelope, containing cash, to the said person and as soon as the person returned back, I.O. with the help of his staff apprehended the said person, who disclosed his name as Shahbaz Ahmed @ She son of Khalil Ahmed. From his personal search, I.O. recovered the envelope, containing cash of Rs.10,000/- (09 notes of 1000 denominations each while 02 notes of 500 denominations each). On further search, I.O. recovered one mobile phone containing SIM number 0320-3542346. Thereafter, I.O. arrested the accused and taken into custody the case property

under a mashirnama prepared at spot. During interrogation, accused disclosed the name of one Rizwan as his companion in the commission of crime, but could not be arrested. I.O. also obtained CDR data of both mobiles of complainant and accused as well, which confirmed the calls made by the accused to the complainant. He also recorded the statements of witnesses under Section 161, Cr.P.C. and after completing investigation submitted challan before the Court of competent jurisdiction under Sections 385 & 386, PPC read with Section 7 of Anti-Terrorism Act, 1997.

4. Trial Court framed a charge against the accused in respect of offences punishable under Sections 385 & 386, PPC read with Section 7 of Anti-Terrorism Act, 1997 at Ex.3, to which accused pleaded not guilty and claimed trial.

5. At trial, the prosecution examined as many as four witnesses. PW.1 complainant Muhammad Tahir was examined at Ex.P/1, he produced FIR at Ex.P/2, memo of arrest and recovery at Ex.P/3 and memo of site inspection at Ex.P/4. PW.2 Asif Ali was examined at Ex.P/5. PW.3 SIP Gul Faraz Khan was examined at Ex.P/7, he produced Roznamcha entry No.41 at Ex.P/8, Roznamcha entry No.58 at Ex.P/9, Roznamcha entry No.60 at Ex.P/10, CDR record of cell numbers of complainant as well as of accused at Exs.P/12 & P/13. PW.4 Inspector Raja Jehangir Ahmed was examined at Ex.P/15, he produced Roznamcha entry No.4 at Ex.P/16, Roznamcha entry No.10 at Ex.P/17, Roznamcha entry No.14 at Ex.P/18. Vide statement Ex.P/19, the prosecution closed its side of evidence.

6. Statement of accused under Section 342, Cr.P.C. was recorded at Ex.20, wherein he denied the commission of offence and

pleaded his innocence. The accused opted not to make a statement on oath under section 340(2), Cr.P.C., but examined his wife, Mst. Anum, at Ex.21 as his defence witness.

7. Trial Court, on conclusion of trial and after hearing the learned counsel for the parties, convicted the accused under Section 7(h) of Anti-Terrorism Act, 1997 and sentenced to undergo rigorous imprisonment for five years. Benefit in terms of Section 382-B, Cr.P.C. was extended in favour of the accused.

8. Feeling aggrieved by the conviction and sentence, referred herein above, the appellant has preferred the present appeal.

9. Appellant appearing in person submits that police arrested him on the way while he alongwith his wife was going to his sister's house. He further submits that the witnesses have contradicted each other on material points, but trial Court did not take notice of that and recorded convictions without assigning strong reasons. He also submits that the incident had taken place on 27.08.2015 whereas the FIR was lodged on 02.09.2015, after delay of six days, without furnishing any plausible explanation. Lastly, submitted that the conviction and sentence recorded by the learned trial Court was unjust and improper, hence liable to be set-aside and prayed accordingly.

10. Learned DPG refuted the arguments advanced by the learned counsel for the appellant. He submits that the witnesses in their respective statements have supported the case of the prosecution without major contradictions or discrepancies and the minor contradictions in such a crime are of no significance. He has supported the conviction and sentence awarded to the appellant and prayed that the appeal may be dismissed.

11. We have given anxious considerations to the arguments advanced by the learned counsel for the appellant and the learned DPG for the State and perused the entire record available before us.

12. The onus to prove its' case lies on the prosecution. To discharge such onus, the prosecution has examined as many as four witnesses. Here it would be advantageous to discuss and highlight the evidence of the prosecution witnesses and defence as well.

13. PW.1 complainant Muhammad Tahir (Ex.P/1) has deposed that on 27.08.2015 he was present in his house when he received call on his cell number 0310-2075682 from cell number 0320-3542346, wherein the caller demanded Rs.50,000/- as Bhatta. The complainant told the caller that he is servant of Zamzama Sheermaal House and someone has given wrong number to him, but the caller replied that not tried to become clever. He introduced himself as right hand of Ustad Kajal and threatened that if Rs.50,000/- is not paid, one grenade is enough for complainant. The caller also threatened the complainant in Balochi language that if any loss is caused to him, he will pick each one of his family and kill them. Complainant further deposed that he and his brothers worked together in the name of Zamzama Sheermaal House and Zamzama Ice Cream and the caller had been calling him from 27.08.2015 till 02.09.2015 when he went to P.S. and lodged FIR. Complainant further deposed that caller had called him on 03.11.2014 at Taj Lassi Wala, Sector 10/5, Orangi Town. He kept Rs.10,000/- in brown coloured envelope and also informed I.O. Gul Faraz, who advised him to go to the said place and he is going to make settings. The complainant alongwith his friend Asif Malik went to Taj Lassi Wala, Sector 10/5, Orangi Town on motorbike and reached there at about

11.30 pm and made a call to the caller, who replied that he is at Taj Lassi Wala. Complainant went to the accused and gave him the envelope and meanwhile gave signal to I.O. Police came and apprehended the accused, recovered the SIM with which the calls were made. Police also recovered the envelope containing Bhatta amount from the accused, who disclosed his name as Shahbaz. I.O. prepared memo of arrest and recovery at spot. Complainant further deposed that the father and wife of accused had come to him and asked to forgive the accused. On 04.09.2015 complainant received a phone call from Raja Jehangir to reach at the place of incident. He went to the place of incident and pointed out the same to Raja Jehangir, who prepared memo of site inspection.

14. Complainant has been supported by PWs Asif Ali (Ex.P/5) and SIP Gul Faraz Khan (Ex.P/7). They have given almost same evidence as deposed by the complainant.

15. PW.4 Inspector Raja Jehangir Ahmed (Ex.P/15) has deposed that on 04.09.2015 he was entrusted with the investigation of Crime No.341 of 2015. He received FIR, case property and the custody of accused. He first went to P.S. Orangi Town and then to P.S. Mominabad and made entries of his arrival in the Roznamcha of both police stations. He also visited the place of occurrence and prepared memo of site inspection. He has recorded the statements of witnesses under Section 161, Cr.P.C. and also obtained CDR records of the mobile phones and after completing the investigation submitted challan in Court.

16. Accused in his statement under Section 342, Cr.P.C. has denied the prosecution case and pleaded his innocence. He has taken the plea that while he alongwith his wife was going to his sister's

house on motorbike, in the way Raja Jehangir and Gul Faraz stopped him and asked to park motorcycle at side whereupon his wife started crying, Gul Faraz asked a mechanic to call housemates of the accused and thereafter took accused to police station where police demanded Rs.100,000/- for his release.

17. Accused has been supported by his wife, Mst. Anum (Ex.21). She has supported the plea taken by the accused in his defence and deposed almost same evidence as averred by the accused in his statement under Section 342, Cr.P.C.

18. We have carefully examined the evidence of the prosecution witnesses and noticed that the case of the prosecution was full of lacunas, contradictions and discrepancies. We deem it appropriate to emphasize such infirmities as under:-

(i) It is an admitted fact that neither in the mashirnama of arrest and recovery, the serial numbers of currency notes are mentioned nor any of the prosecution witness deposed so;

(ii) It is an admitted fact that that the investigating officer had not sealed the recovered property i.e. envelope containing extortion money/Bhatta allegedly recovered from the possession of accused;

(iii) It is an admitted that that the police has not sealed the SIM allegedly recovered from the possession of accused;

(iv) Overwriting at two places in the mashirnama of arrest of accused and recovery of extortion money and SIM. In 8th line of mashirnama, there is overwriting in respect of timings (2330) and at another place, there is overwriting on the date of preparation of mashirnama, which clearly shows date 2.9.15, but '2' was overwritten as '3';

(v) Complainant Muhammad Tahir has suppressed the relationship with PW.2 Malik Asif. In his deposition,

complainant has deposed that Malik Asif is his friend, whereas Malik Asif has disclosed his relation with complainant as his cousin;

(vi) PW.2 Malik Asif in his deposition has contradicted the contents of mashirnama of arrest of accused and recovery of extortion money and SIM. In the mashirnama, the time of recovery was shown as 2330 hours (11.30 pm) whereas PW Malik Asif, who is mashir No.1, has stated that *“police had prepared documents and I have also signed it was 1.30 pm. I see Ex.P/3 and say it bears my signature. He further deposed that “I had not read contents of Ex.P/3. Vol. says it was written before me and I had signed it”. He further deposed that “it was written two (2) which was made three (3)”. He further deposed that “I see Ex.P/3 and say it the 8th line there is overwriting and it was written 2330 hours”;*

(vii) It is the case of the prosecution that police had recovered extortion money on 03.09.2015, but there is contradictory date mentioned on the envelope containing extortion money as 04.09.2015;

(viii) PW Malik Asif (mashir) has admitted that *“writing on the envelope was written by police after 04.09.2015. Even the paper which is in the plastic bag was kept in it on 04.09.2015”*. He also admitted that word “notes” was written on the plastic bag containing the currency notes;

(ix) Complainant Muhammad Tahir has deposed that when he reached at the place for payment of Bhatta, police was already present there, whereas PW.3 SIP Gul Faraz Khan has deposed that complainant Muhammad Tahir told him on phone that he has reached there;

(x) Cutting over sentence in the examination-in-chief of PW.3 SIP Gul Faraz Khan, which reads as *“I entered this information in entry no.58 at about 2230 and proceeded to the pointed place which entry I produced as Ex.P/9”*. We may also point out that the learned trial Judge had also written in her own handwriting word “I produced” before sentence “in entry no.58 at about 2230 and proceeded to the pointed place. We have also noticed

pen tick marks () over the cutted lines, which shows that the learned trial Judge after cutting the lines restored the original sentence.

(xi) We may also point out that the date of preparation of mashirnama of site inspection shown on it as 04.09.2015, whereas the entry No.41 (Ex.P/8), which pertains to departure of SIP Gul Faraz Khan for site inspection, showed date as 02.09.2015.

19. The above lacunas not only made the recovery doubtful, but has demolished the whole case of the prosecution and also shattered the entire fabric of the testimony of witnesses. At this juncture, it is very difficult for us to give due weight to the testimony of prosecution witnesses. The credibility of PWs was highly doubtful and untrustworthy. It is a well settled law that no one should be construed into a crime unless his guilt is proved beyond reasonable doubt by the prosecution through reliable and legally admissible evidence. On the point of benefit of doubt, rule of Islamic Jurisprudence has been laid down in the judgment rendered by the Hon'ble Supreme Court of Pakistan in *Ayub Masih's case* (PLD 2002 SC 1048), wherein the apex Court has ruled as under:-

*"It is also firmly settled that if there is an element of doubt as to the guilt of the accused, the benefit of the 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 with law. It is based on the maxim, "It is better that ten guilty person 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 antithesis 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 Laws and is enforced rigorously in view of the saying of 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".*

20. Needless to mention that in the matters of demanding Bhatta, the criminals generally choose a person or party having sound financial status and handsome source of income. In the case in hand, the complainant neither had a sound financial status nor earned handsome income. According to his own statement, the complainant is doing joint business with his brothers in the name of "Zamzama Sheermaal House & Zamzama Ice Cream". In the absence of any tangible evidence with regard to sound financial position of the complainant, the demand of Bhatta by the accused seems to be unjustified. Reliance is placed on the case of *Sagheer Ahmed v The State* (2016 SCMR 1754), wherein it has been observed as under:-

"The averments of FIR are silent regarding the financial status and source of income of the complainant against which accused have been demanding Bhatta. Complainant has also not disclosed the specific dates, times and places of demanding Bhatta by accused persons nor any such evidence was produced before the Investigating Officer to prima facie establish such allegations. In absence of any tangible material, mere allegations of demanding Bhatta do not attract section 6(2)(k) of Anti-Terrorism Act, 1997, in the present case nor said section was mentioned in the FIR and Challan. Perusal of Challan reflects that Investigating Officer had made a request to the Anti-Terrorism Court for return of FIR and other documents so that Challan may be submitted before the ordinary Court of law as no case under the provisions of Anti-Terrorism Act, 1997 was made out, but his request was declined by the Anti-Terrorism Court vide order dated 09.06.2014, and cognizance was taken by the Court".

21. In the circumstances of the case, referred herein above, the plea taken by the appellant with regard to his false implication seems to have sufficient weight. Needless to mention that in criminal cases the burden to prove its' case rests entirely on the prosecution. The prosecution is duty bound to prove the case against accused beyond reasonable doubt and this duty does not change or vary in the case in which no defence plea is taken by the accused. The defence plea is always to be considered in juxta position with the

prosecution case and in the final analysis if the defence plea is proved or accepted, then the prosecution case would stand discredited and if the defence is substantiated to the extent of creating doubt in the credibility of the prosecution case then in that case it would be enough but it may be mentioned here that in case the defence is not established at all, no benefit would occur to the prosecution on that account and its duty to prove its case beyond reasonable doubt would not diminish even if the defence plea is not proved or is found to be false. The Hon'ble apex Court has settled the principle in a case of *Tariq Pervez v The State* reported in 1995 SCMR 1345 on the point of benefit of doubt, which is reproduced as under:-

“The concept of benefit of doubt to an accused person is deep-rooted in our country. For giving benefit of doubt to an accused, it is not necessary that there should be many circumstances creating doubts. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of accused, then the accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right”.

22. For the reasons, discussed herein above, we are of the considered view that the prosecution has failed to discharge its' liability of proving the guilt of the appellant beyond shadow of doubt. Therefore, while extending the benefit of doubt in favour of the appellants, we hereby set-aside the conviction and sentence recorded by the learned trial Court by impugned judgment dated 13.12.2016, acquit the appellant of the charge and allow this appeal. The appellant shall be released forthwith if not required to be detained in any other case.

JUDGE

JUDGE