

IN THE HIGH COURT OF SINDH, AT KARACHI

PRESENT:-

Mr. Justice Naimatullah Phulpoto;
Mr. Justice Shamsuddin Abbasi.

Spl. CrI. Anti-Terrorism Appeal No.241 of 2017

Muhammad Hashim son of
Fazal Karim. Appellant
Versus
The State. Respondent
Appellant Through Mr. Hashmat Khalid,
Advocate.
Respondent Through Mr. Muhammad Iqbal Awan,
DPG.
Date of hearing 28.02.2018
Date of Judgment 16.03.2018

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JUDGMENT

Shamsuddin Abbasi, J: This appeal is directed against the judgment dated 31.10.2017, rendered by learned Judge of Anti-Terrorism Court No.XVII, Karachi, whereby appellant has been convicted under Section 11-N of Anti-Terrorism Act, 1997 and sentenced to undergo rigorous imprisonment for 05 years and to pay a fine of Rs.25,000/-, in default whereof he was ordered to suffer simple imprisonment for one month more by extending him the benefit of Section 382-B, Cr.P.C.

2. The facts giving rise to this appeal, briefly stated, are that on 12.08.2017 police party of P.S. CTD/OPS (Sindh), District West, Karachi, headed by SIP Aftab Ahmed Abbasi, left police station vide entry No.3 in official mobile bearing Registration No.SPB-823 for searching of absconders, proclaimed offenders and terrorists within the limits of District West, Karachi. During search SIP Aftab Ahmed Abbasi received information that one Shakirulah, a member of a banned organization Lashkar-e-Jhangvi and involved in target killing

and other terrorist activities and Mohtamim (Administrator) of Madrasah Al-Karim Islamic Academy, Banaras, Karachi, now sealed, has a connection with his brother Hashim, who used to collect funds for him, was present at Lakhani stop, Manghopir Road, Karachi. On receipt of such information, the police party proceeded to the pointed place and reached there at about 2130 hours, where they found one person standing in suspicious condition. The police apprehended the said person, who disclosed his name as Muhammad Hashim son of Fazal Karim. Police conducted his personal search and recovered a handbag of black colour from his right hand, containing receipt book from serial No.601 to 700, out of which receipts of serial No.601 to 647 were used and counterfoils were lying in the receipt book, in respect of Chanda Bara-e-Falah-o-Behboob Mujahideen-o-Lahwahiqeen, in the name of Al-Karim Islamic Academy, Haider Chaly, Banaras, Karachi, cash amount of Rs.7,800/-, collected in the name of Chanda and one ball pen. From personal search of the accused, it is alleged that the police also recovered cash of Rs.300/- and copy of his CNIC from the right side pocket of his shirt. SIP Aftab Ahmed Abbasi arrested the accused and seized the recovered property on the spot under a mashirnama prepared in presence of mashirs HC Muhammad Tahir and PC Sajid Khan. Thereafter, brought the accused and the recovered property at Police Station where FIR being Crime No.123 of 2017 under Section 11-H of Anti-Terrorism Act, 1997 was registered against accused on behalf of the State.

3. Pursuant to the registration of FIR, the investigation was entrusted to Inspector Tasaduq Munir. During interrogation, the accused disclosed that he was collecting funds in the name of Chanda for Al-Karim Islamic Academy and prepared to produce

receipt book from his house. Accused led the police party to his house, situated on the upper story of Madrasah Al-Karim Islamic Academy, Pathan Colony, SITE, Karachi, and produced a receipt book from serial No.501 to 600, from the Almirah, all receipts were issued/used and a letter of thanks by Shakirullah on collecting funds for the Madrasah. I.O. prepared memo of pointation and seizure in presence of mashirs SIP Aftab Ahmed Abbasi and HC Muhammad Tahir. He also visited the place of incident on the pointation of complainant SIP Aftab Ahmed Abbasi and prepared memo of site inspection in presence of mashirs HC Muhammad Tahir, PC Sajid Khan and complainant SIP Aftab Ahmed Abbasi. I.O. had also recorded the statements of witnesses under Section 161, Cr.P.C. After completing the usual investigation submitted challan before the Court of competent jurisdiction under Section 11-H and 11-N of Anti-Terrorism Act, 1997.

4. The learned trial Court framed a charge against the accused at Ex.3, to which he pleaded not guilty and claimed to be tried.

5. At the trial, the prosecution has examined as many as three witnesses. PW.1 complainant SIP Aftab Ahmed Abbasi was examined at Ex.4, he produced entry No.34 at Ex.4/A, memo of arrest of accused, personal search and seizure at Ex.4/B, FIR at Ex.4/C, entry No.17 at Ex.4/D, entry No.41 at Ex.4/E, memo of pointation and seizure at Ex.4/F, letter of Mufti Shakir at Ex.4/G, memo of site inspection at Ex.4/H and sketch of site inspection at Ex.4/I. PW.2 PC Sajid Khan was examined at Ex.5. PW.3 Inspector Tasaduq Munir, investigating officer, was examined at Ex.6, he produced carbon copy of entry No.43 at Ex.6/A, carbon copy of entry No.45 at Ex.6/B, letters regarding sealing of Madrasah (four leaves)

at Ex.6/C, letter of SSP Intelligence CTD, Sindh for constitution of JIT at Ex.6/D, attested photocopy of Notification at Ex.6/E. Vide Ex.7 the prosecution closed its side of evidence.

6. Statement of accused under Section 342, Cr.P.C. was recorded at Ex.8, wherein he denied the prosecution case and pleaded his innocence. The appellant opted not to examine himself on oath under Section 340(2), Cr.P.C. He, however, examined his brother, Muhammad Akber, at Ex.9 in his defence, who produced photocopy of registration of Madrasah alongwith bank receipt and registration form at Ex.9/A, photocopy of bail releasing order of his brother Muhammad Shakirullah at Ex.9/B and photocopy of receipt of graveyard showing death of his father at Ex.9/C.

7. The learned trial Court, on conclusion of trial and after hearing the learned counsel for the parties, convicted the accused under Section 11-N of Anti-Terrorism Act, 1997 and sentenced him to undergo rigorous imprisonment for 05 years and fine of Rs.25,000/-, in default whereof he was ordered to suffer simple imprisonment for one month more by extending him the benefit of Section 382-B, Cr.P.C.

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

9. The learned counsel for the appellant has argued that the accused was arrested from a thickly populated area and it was a case of prior information, but police did not associate any independent witness of the locality to witness the arrest and recovery and both the mashirs of arrest and recovery were police officials and subordinate to complainant. The learned counsel further argued that accused was running a registered Madrasah and based on such reason he alongwith his family was under watch of law enforcement

agencies. He also argued that accused was arrested from his house on 09.08.2017 and false case was registered. Finally, he argued that the accused belongs to a religious family and has nothing to do with the alleged offence and prayed for his acquittal.

10. On the other hand, the learned DPG has submitted that the appellant was arrested and receipts of funds for Al-Karim Islamic Academy were recovered. Learned DPG argued that appellant was affiliated with Tehreek-e-Taliban Pakistan (TTP). All the witnesses in their respective testimonies have supported the case of the prosecution and implicated the appellant with the commission of crime. Finally, he submitted that the prosecution has successfully proved the guilt of the appellant and prayed for dismissal of appeal.

11. We have given anxious consideration to the arguments of both the sides and perused the entire material available before us.

12. To reach a just and fair decision, we deem it appropriate to first discuss the evidence led by the prosecution and the accused as well in his defence in brief.

13. PW.1 complainant Aftab Ahmed Abbasi (Ex.4) has deposed that on 12.08.2017 he alongwith HC Tahir Khan, HC Orangzaib, HC Salman Noor, HC Naveed and PC Sajid was busy in search of absconders and terrorists in Government Mobile No.SPB-823. During patrolling when he reached in the area of SITE, spy informer came to him and disclosed that Muhammad Hashim, brother of Shakirullah, a terrorist of banned organization Lashkar-e-Jhangvi, was present at Lakhani stop, Manghopir Road. He proceeded to the pointed place, apprehended Muhammad Hashim and recovered one black coloured plastic handbag from his hand, containing one receipt book of funds/chanda from serial No.601 to 700 on which it was written "Chanda Barai Falah-o-Behbood

Mujahideen and Lahwahiqaen, Al-Karim Islamic Academy, Haider Chaly, Banaras, Karachi. He further deposed that receipts from serial No.601 to 647 were utilized but counterfoils were lying in the book. He also recovered Rs.7800/- of different denominations as funds/chanda amount and one blue colour ball pen from the bag. The complainant has further deposed that on his direction HC Tahir conducted personal search of the accused and recovered Rs.300/- and copy of his CNIC from side pocket of his shirt. He arrested the accused in presence of HC Tahir and PC Sajid and prepared memo of site inspection, brought the accused at P.S. and lodged FIR. This witness has further deposed that on 13.08.2017 I.O. called him for site inspection and told him that during interrogation the accused has disclosed about another receipt book of chanda/funds lying in his house. He alongwith I.O. went to the house of accused in police mobile and accused on his pointation got recovered one receipt book. Wrapped in a blue coloured plastic shopper, from the Almirah lying in a room and handed over it to I.O. which contained serial No.501 to 600, all receipts were utilized and only counterfoils were lying. He has also seen a letter written by Shakirullah to accused regarding funding. I.O. prepared memo of recovery and he and HC Tahir acted as mashirs and thereafter they went to the place of incident, where I.O. prepared mashirnama in his presence and in presence of HC Muhammad Tahir and PC Sajid.

14. Complainant has been supported by mashir PC Sajid Khan (Ex.5). He has given almost same evidence as deposed by the complainant.

15. PW Inspector Tasaduq Hussain (Ex.6) has deposed that on 12.08.2017 he received investigation of the case. During interrogation the accused disclosed about recovery of another receipt

book of chanda/fund on his pointation from his house. He called the complainant and raiding party staff. Accused led police party to his house, situated at first floor/roof of the Madrasah Al-Karim Islamic Academy, Banaras, Karachi. The accused knocked the door, someone opened the door and they went inside. I.O. has further deposed that the accused produced one blue coloured shopper and handed over it to him, it contained one receipt book of chanda/funding from serial No.500 to 600, all leaves were utilized, on which "Chanda bare Fallah-o-behboob Lawahekin wo Mujahideen" and one letter of thanks of Shakirullah for collecting chanda were written. At about 0215 he prepared memo of recovery in presence of SIP Aftab Ahmed and HC Tahir. He also visited the place of incident on the pointation of complainant and prepared memo of site inspection in presence of complainant SIP Aftab Ahmed and PC Sajid and Naqsha-e-Nazri in presence of complainant SIP Aftab Ahmed, PC Sajid and HC Tahir and then came back at about 0445 hours. He further deposed that during investigation, the accused was produced before a JIT. After completing the investigation, the I.O. has submitted challan against him in Court.

16. The appellant in his statement under Section 342, Cr.P.C. (Ex.8) has denied the prosecution case and pleaded his innocence, raised defence plea that he was arrested from his house on 09.08.2017 and was falsely implicated in this case. In his defence, the appellant has examined his brother Muhammad Akbar (Ex.9), who has supported the plea of appellant with regard to his arrest on 09.08.2017. He further deposed that they belong to a religious family and run a registered Madrasah, they were under watch of law enforcement agencies. He finally deposed that accused has been falsely implicated in this case.

17. We have also carefully examined the entire evidence and cross-examination of prosecution witnesses. Material discrepancies and contradictions in their evidence have been noticed. Complainant Aftab Ahmed Abbasi, in his cross-examination has stated that vide entry No.34 (Ex.4/A) he left police station for arresting absconders and terrorists. In reply to a specific question, he admitted that neither number of absconders and terrorists nor their names were mentioned in the entry. Complainant has further admitted that he left police station CTD to arrest absconders and terrorists within the limits of District (West), but did not keep any entry in the Roznamcha of police station SITE where he received information about presence of terrorist Shakirullah. Complainant Aftab Ahmed Abbasi (Ex.4) and mashir PC Sajid Khan (Ex.5) have contradicted each other on the point of patrolling places in the area. Complainant has stated that first they reached within the jurisdiction of police station Pak Colony, but did not stop there, then they went Habib Bank Chowrangi and stayed there for about 02 hours whereas mashir has stated that after leaving police station CTD, they first went to Garden area, then Pak Colony and thereafter they reached at Barra Board near Habib Bank, where they remained present for about 2½ hours. They have also contradicted each other with regard to recovery of receipt book of chanda on the pointation of accused. Complainant has stated that on reaching the house of accused, they first asked the women to observe Pardah and thereafter they went to one room and then accused took them to another room wherefrom they recovered fund receipt book, but mashir has stated that he has not seen any woman in the said house. These contradictions and discrepancies have caused a fatal blow to the prosecution case.

18. It is the case of the prosecution that appellant used to collect chanda/funds for Madrasah Al-Karim Islamic Academy, Karachi, but no iota of evidence has been brought on record to show link or connection of the said Madrasah with any banned organization and that the receipt books allegedly recovered from the appellant were of banned organization. This fact has been admitted by the complainant that he has no proof as to whether Madrasah Al-Karim Islamic Academy belonged to banned organization “Lashkar-e-Jhangvi” and no where in the receipt books the name of “Lashkar-e-Jhangvi” is written. As per prosecution case itself, out of the alleged recovered receipt books, more than 150 receipts were issued after receiving chanda, but not a single person has been examined as witness at trial to prove that appellant was collecting chanda/funds for any banned organization.

19. Element of terrorism is missing in this case. Here, we deem it appropriate to reproduce Sections 11(H) and 11(N), which read as under:-

“11-H. Fund raising. (1) A person commits an offence if he—

(a) Invites another to provide money or other property, and

(b) Intends that it should be used or has reasonable cause to suspect that it may be used for the purpose of terrorism {or by a terrorist or organization concerned in terrorism}.

(2) A person commits an offence if—

(a) he receives money or other property, and

(b) intends that it should be used or has reasonable cause to suspect that it may be used for the purposes of terrorism {or by a terrorist or organization concerned in terrorism

(3) A person commits an offence if he—

(a) provides money or the property, and

(b) knows or has reasonable cause to suspect that it will or may be used for the purposes of terrorism {or by a terrorist or organization concerned in terrorism

(4) In this section a reference to the provision of money or other property is a reference to its being given, lent or otherwise made available whether or not for consideration”.

“11-N. Punishment under Sections 11-H to 11-K. *Any person who commits an offence under Sections 11-H to 11-K, shall be punishable on conviction with imprisonment for a term not less than {five years} and not exceeding {ten years} and with fine”.*

20. The legislatures have defined these provisions in order to suppress/support of terrorists, who create unrest and feeling of un-secureness in the mind of people, but we feel that mere recovery of receipts books of any Madrasah, against which no evidence has been brought on record to have a link or connection with any banned organization, was not sufficient to convict a person.

21. 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”.

22. The another important aspect of the matter is that the complainant had failed to associate any independent person to witness the recovery of receipt book allegedly affected from the house of appellant where he voluntarily led the police and produced receipt book. Besides, it was a case of prior information and the place of recovery was a busy place, despite complainant had not taken any independent person either from the place of receiving information or from the place of occurrence to act as mashir, without assigning valid reasons. Even otherwise, record did not reveal as to whether any effort was made to persuade any person from the locality or for that matter the public was asked to act as witness of incident. Thus, there is clear violation of mandatory requirement of Section 103, Cr.P.C. Reliance is placed on the case of *Muhammad Mansha versus The State* (1997 SCMR 617), relevant portion is reproduced hereunder:-

“We find that the raid was conducted on the house of the appellant consequent upon secret information. So, the police had ample time to associate two respectable persons from the locality to witness the house search, as required by the provisions of section 103, Cr.P.C. which may be reproduced advantageously:-

"103.--(1) Before making a search under this Chapter, the officer or other person about to make it shall call upon two or more respectable inhabitants of the locality in which the place to be searched is situate to attend and witness the search and may issue an order in writing to them or any of them so to do.

(2) The search shall be made to their presence, and a list of all things seized in the course of search and of the places in which they are respectively found shall be prepared by such officer or other person and signed by such witness: but no person witnessing a search under this section shall be required to attend the Court as a witness of the search unless specially summoned by it.

(3) The occupant of the place searched, or some person in his behalf, shall, in every instance, be permitted to attend during the search, and a copy of the list prepared under this section, signed by the said witnesses, shall be delivered to such occupant or person at his request.

(4) When any person is searched under section 102, subsection (3), a list of all things taken possession of shall be prepared, and a copy thereof shall be delivered to such person at his request.

(5) Any person who, without reasonable cause, refuses or neglects to attend and witness a search under this section, when called upon to do so by any order in writing delivered or tendered to him, shall be deemed. to have committed an offence under section 187 of the Pakistan Penal Code. "

5. The plain reading of this section would show that before making a search of any place, the police officer is obliged to call upon at least two respectable inhabitants of the locality to attend and witness the search, but unfortunately, in the instant case the two respectable inhabitants were not associated during the search of the house. The Investigating Officer could issue an order in writing calling upon the two respectable inhabitants of the locality to attend and witness the search but he has not done so. No doubt, he had joined Amanullah Shah P.W.2 from the public to witness the recovery but that will not fulfill the mandatory requirement of sections 103, Cr.P.C. and this legal infirmity per se may vitiate the search proceedings.

23. No doubt, the police witness is as good witness as other member of public, but in such type of cases the evidence must be of highest quality, which is lacking in this case in view of the reasons explained herein above. There are also material discrepancies, explained herein above, which have demolished the case as set up by the prosecution and also shattered the entire fabric of the testimony of witnesses. It is obligatory upon the prosecution to prove its' case beyond any reasonable doubt and in failure to do so would be fatal for the prosecution. 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”.

24. 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 appellant, we hereby set-aside the convictions and sentences recorded by trial Court vide judgment dated 31.10.2017, 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