

IN THE HIGH COURT OF SINDH, AT KARACHI

PRESENT:-
Mr. Justice Naimatullah Phulpoto;
Mr. Justice Shamsuddin Abbasi.

Spl. Crl. Anti-Terrorism Appeal No.191 of 2017
Spl. Crl. Anti-Terrorism Appeal No.192 of 2017

Abdul Ahad son of
Abdul Samad. Appellant

Versus

The State. Respondent

Appellant Through Mr. Muhammad Farooque,
Advocate.

Respondent Through Mr. Muhammad Iqbal Awan,
DPG.

Date of hearing 01.03.2018
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JUDGMENT

Shamsuddin Abbasi, J: Appellant Abdul Ahad son of Abdul Samad has assailed the convictions and sentences recorded by the learned Anti-Terrorism Court No.I Karachi, by a common judgment dated 29.08.2017, passed in Special Cases No.1213 of 2016 and 1214 of 2016, arising out of FIR No.201 of 2016 under Section 4/5 of Explosive Substances Act, 1997 read with Section 7 of Anti-Terrorism Act, 1997 and FIR No.202 of 2016 under Section 23(1)(a) of Sindh Arms Act, 2013 registered at Police Station Quaidabad, Karachi.

2. Since aforesaid appeals arose from the common judgment, therefore, we deem it appropriate to decide the same together.

3. The facts giving rise to these appeals, briefly stated, are that on 30.07.2016 police party of P.S. Quaidabad, Karachi, headed by SIP Khaitoo Mal, was busy in patrolling of the area in official mobile. During patrolling he received spy information about a suspect, seated in a car bearing Registration No.AVC-972 Suzuki VXR of blue colour, coming from the side of Lalaabad to Sher Pao Chowrangi. On receipt of such information, the police party proceeded to the pointed place, surrounded the area and started snap checking. It was about 0745 hours the police party noticed the said car appeared from the side of Lalaabad. Police stopped the car and found one person sitting on the driving seat, who disclosed his name as Abdul Ahad son of Abdul Samad. A white coloured plastic shopper was lying in his lap, it contained explosive substance. It's weight was 1100 grams. During personal search of the accused, the police had also recovered one 30 bore pistol with five live bullets in its' magazine, from left fold of shalwar, on which words "CAL-30-MADE AS CHINA Norinco" were written. On further search one mobile phone Samsung black colour, a wallet containing cash of Rs.310/-, one NIC in the name of Abdul Ahad son of Abdul Samad and some visiting cards were also recovered. On demand the accused failed to produce the license of the recovered arms and ammunition. SIP Khaitoo Mal arrested the accused on the spot under a mashirnama prepared in presence of mashirs ASI Muhammad Nasir Khan, ASI Muhammad Shafique and HC Sadaqat Shah and sealed property at spot. Thereafter, police party brought accused and the case property at P.S. Quaidabad, Karachi, where two FIRs being Crime No.201 of 2016 under Section 4/5 of Explosive Substances Act, 1997 read with Section 7 of Anti-Terrorism Act, 1997 and FIR

No.202 of 2016 under Section 23(1)(a) of Sindh Arms Act, 2013, were registered on behalf of the State.

4. Pursuant to the registration of FIRs, the investigation was entrusted to Inspector Muhammad Ali Marwat. He visited the place of incident on the pointation of complainant SIP Khaitoo Mal and prepared memo of site inspection in presence of complainant and ASI Muhammad Shafique, recorded the statements of witnesses under Section 161, Cr.P.C., interrogated the accused, obtained the sample of recovered explosive substance from SIP Sajjad Hussain of BDU and sent the sample to FIA/CTW, Islamabad for examination and report. He also obtained permission from Home Department for submission of challan and after completing the usual investigation submitted separate challan before the Court of competent jurisdiction under above referred Sections.

5. Trial Court held joint trial in terms of Section 21-M of Anti-Terrorism Act, 1997.

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

7. At the trial, the prosecution has examined as many as four witnesses. PW.1 complainant SIP Khaitoo Mal was examined at Ex.5, he produced Roznamcha entry No.43 for departure from police station at Ex.5/A, mashirnama of arrest and recovery at Ex.5/B, FIRs No.201 and 202 of 2016 at Exs.5/C and 5/D respectively, Roznamcha entry No.10 for arrival at police station at Ex.5/E, memo of site inspection at Ex.5/F and clearance certificate at Ex.5/G. PW.2 ASI Muhammad Shafique was examined at Ex.6, PW.3. PW.3 SIP Syed Sajjad Hussain Shah of BDU was examined at Ex.7, he produced Roznamcha entry for visiting police station at Ex.7/A,

Roznamcha entry No.19 at Ex.7/B, Roznamcha entries No.3, 5, and 9 at Ex.7/C and inspection report at Ex.7/E. PW.4 Inspector Muhammad Ali Khan, I.O. of the case, was at Ex.8, he produced Roznamcha entry No.13 at Ex.8/A, examination report at Ex.8/D and report of CTW/FIA at Ex.8/G. Thereafter the prosecution closed its side vide statement at Ex.9.

8. Statement of accused under Section 342, Cr.P.C. was recorded at Ex.10, wherein he denied the prosecution case and pleaded his innocence. The appellant examined himself on oath under Section 340(2), Cr.P.C. at Ex.11 and also produced his father, Abdul Samad, as DW.1 at Ex.12 in his defence.

9. The learned trial Court, on conclusion of trial and after hearing the learned counsel for the parties, convicted the accused under Section 7(ff) of Anti-Terrorism Act, 1997 and sentenced him to undergo rigorous imprisonment for 07 years. The accused was further convicted under Section 23(1)(a) of Sindh Arms Act, 2013 and sentenced to undergo rigorous imprisonment for 05 years and fine of Rs.20,000/-, in default whereof he was ordered to suffer simple imprisonment for 06 months more. However, it was ordered that both the sentences shall run concurrently. Accused was extended benefit of Section 382-B, Cr.P.C.

10. Feeling aggrieved by the aforesaid convictions and sentences, the appellant has preferred the present appeals.

11. The learned counsel for the appellant submits that the appellant has been falsely implicated in this case inasmuch as there was exchange of hot words between the appellant and the SHO of P.S. Site Superhighway, where his brother was illegally detained, on the demand of bribe and after exchange of such words the SHO handed over his custody to Inspector Muhammad Ali Marwat, I.O. of

this case, who has booked the appellant in false cases and foisted the alleged recovery upon him. He further submits that appellant was arrested from a thickly populated area in day time and it was a case of prior information, but police did not associate any independent witness of the locality to witness recovery proceedings and all the mashirs of arrest and recovery were police officials and subordinate to complainant. The learned counsel further submits that the appellant has examined himself on oath under Section 340(2), Cr.P.C. and produced sufficient documentary proof with regard to missing of his brother and the efforts taken by him for the recovery of his brother. He finally submits that learned trial Judge has based the conviction without applying his judicial mind and noticing the material contradictions in the evidence of the prosecution witnesses and prayed for acquittal of the appellant.

12. On the other hand, the learned DPG has submitted that the appellant was arrested and explosive substance and a 30 bore pistol were recovered from his possession. He further submits that the prosecution has examined four witnesses, all of them have fully implicated the appellant with the commission of offence. Finally, he submits that the prosecution has successfully proved the guilt of the appellant and prayed for dismissal of appeal.

13. We have given anxious consideration to the arguments of learned counsel for the appellant and the learned DPG for the State and perused the entire record available before us.

14. On the other hand, the prosecution has examined four witnesses namely, PW.1 complainant SIP Khaitoo Mal, PW.2 ASI Muhammad Shafique, mashir of memo of arrest and recovery and memo of site inspection, PW.3 SIP Syed Sajjad Hussain Shah and PW.4 Inspector Muhammad Ali Khan, investigating officer of the case.

15. We have carefully examined the evidence of prosecution witnesses i.e. complainant SIP Khaitoo Mal (Ex.5), ASI Muhammad Shafique, mashir of recovery (Ex.6), SIP Sajjad Hussain Shah, BDU expert (Ex.7) and Inspector Muhammad Ali Khan, I.O. of the case (Ex.8). All of them have shattered the whole case of the prosecution by way of contradictions and discrepancies, defective investigation and lacunas etc. Here it will be advantageous to discuss and highlight the relevant portions of their depositions as follows:-

16. PW.1 complainant SIP Khaitoo Mal, in his cross-examination has replied that *"It is correct to suggest that I had not produced entry under which I had made my presence at P.S. for performing duties.....I have not produced entry under which I had called ASI Abdul Khaliq and other staff at place of incident.....I myself had prepared memo of arrest and recovery at Ex.05/B. I see memo at Ex.05/B and say that it is not mentioned in the same that I had received spy information when I had reached at Star Ground. It is correct to suggest that place of incident was situated at thickly populated area. I see seal cover of pistol and say that correspondence and hand writing was of PC Ashraf. FIR was registered after sealing of pistol and on our reaching at P.S. It is correct to suggest that Crime No.202/2016 is mentioned on the seal cover. Vol. says that it was mentioned at P.S. After registration of FIR, entry No.10 was registered in the station diary.....I myself had registered the FIRs with my own hand. I myself had prepared memo of arrest and recovery (Ex.5/B). I see memo of arrest and recovery and FIR and say that writing of both the documents is different from each other. It is correct to suggest that P.S. SITE Super Highway is also falls in District Malir. It is incorrect to suggest that one Fazal Khaliq, the brother of accused was taken away from outside the Anti-Terrorism Court on 28.07.2016, by the police of*

SITE Super Highway. I do not know, if accused informed about the apprehension of his brother to 15 and Rangers Personnel and made application to different forums. It is incorrect to suggest that accused was handed over to the Police of P.S. Quaidabad, when he went to P.S. SITE Super Highway to get release his brother.....I see clearance certificate and say that it is mentioned in the same that "On the inspection we found a chemical powder and recommended for laboratory of forensic". It is incorrect to suggest that all the documents were prepared at P.S. not at place of incident".

17. PW.2 ASI Muhammad Shafique, in his cross-examination has replied that *"Complainant himself had prepared memo of arrest and recovery. All the correspondence appears over the seal cover of case property is in the handwriting of complainant. There is difference in writing of memo of arrest and correspondence made over the seal cover. It is incorrect to suggest that seal cover of alleged recovered case property was made at P.S.....It is correct to suggest that this fact is not mentioned in memo of arrest and recovery.....I do not know, if father of accused namely Abdul Samad had made application to Incharge of Police Post Abbas Town about missing of accused. It is correct to suggest that complainant did not call any person to cite him as a witness of recovery. It is incorrect to suggest that all the formalities were made at P.S. not at place of incident".*

18. PW.3 SIP Syed Sajjad Hussain Shah, in his cross-examination has replied that *"I see clearance certificate and say that it is mentioned in the same that "On the inspection we found an Chemical Power and recommended for Laboratory of Forensic.". It is correct to suggest that it is not mentioned in the clearance certificate that I had obtained sample from the explosive substance. It is correct to*

suggest that I issued final report on the basis of letter of I.O. dated 13.07.2017. It is incorrect to suggest that I am deposing falsely”.

19. PW.4 Inspector Muhammad Ali Khan, in his cross-examination has replied that *“It is correct to suggest that I have not produced any order of competent authority to investigate this matter. I do not know who had recorded FIR. I do not know the name of author of the memo of arrest and recovery. It is correct to suggest that entry Ex.08/A is carbon copy of daily station diary. I do not know who had made this entry.....I myself had prepared memo of inspection with my own hand.....It is correct to suggest that I had not recorded statements of PWs ASI Abdul Khaliq, PC Shafiullah, PC Abdul Rehman and PC Driver Muhammad Ashraf. It is correct to suggest that complainant was my subordinate.....I see report of Federal Investigation Agency, Islamabad and say that it is mentioned in the same that “used in photographic chemicals”. I do not know, if father of accused Abdul Samad had made application to the Incharge Police Post Abbas Town of P.S. Sachal about missing of his son, which was received by him on 30.07.2016. It is incorrect to suggest that father of accused had also approached me. It is correct to suggest that accused has no previous criminal record”.*

20. Close scrutiny of the evidence of prosecution witnesses, discussed herein above, revealed that the witnesses have contradicted each other on material points. Complainant SIP Khaitoo Mal in his cross-examination has stated that correspondence and handwriting on the seal cover of pistol was of PC Ashraf whereas mashir ASI Muhammad Shafique has stated that all correspondence on the seal cover of case property were in the handwriting of complainant. Complainant has stated that he himself prepared memo of site inspection and registered the FIR in his own, but at the same

time admitted that handwriting of both the documents was different. On the other hand, mashir has also admitted that handwriting of memo of recovery and correspondence over the seal cover of case property was different. PW.3 SIP Syed Sajjad Hussain Shah had examined the explosive substance and had taken sample in a bottle. This witness in his cross-examination has admitted that it is not mentioned in the clearance certificate that he has obtained sample from the explosive substances. He further admitted that final report has been issued by him on the basis of letter of I.O. PW.4 Inspector Muhammad Ali Khan was the investigating officer of the case, but he failed to produce any order of competent authority to investigate the matter and admitted so in his cross-examination. Even he was not aware as to who had recorded the FIR and prepared memo of site inspection. This witness has also admitted in his cross-examination that he has not recorded the statements of witnesses ASI Abdul Khaliq, PC Shafiullah, PC Abdul Rehman and Driver Muhammad Ashraf, who were eye witnesses of the incident. At this juncture, it is very difficult for us to give due weight to the testimony of prosecution witnesses in view of the admissions, discrepancies and contradictions, discussed herein above, which clearly showed the credibility of PWs 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”.*

21. Admittedly the complainant had prior information about arrival of the appellant in a car and the place of arrest was a thickly populated area, inspite of that he had not associated any independent witness either from the place of receiving information or from the place of incident. Even otherwise, the record does not reveal that as to whether any effort was made to persuade any person from the locality to act as witness of incident alleged recoveries. No doubt police witnesses are as good and equal as that of other independent witnesses and conviction can be recorded on their evidence, but it is a well settled law that their testimony should be reliable, dependable, trustworthy and confidence worthy. If such qualities are missing in their evidence then no conviction can be passed on the evidence of police witnesses and accused would be entitled to the benefit of doubt. Under the law, emphasis is on the quality of evidence rather than quantity as held by the apex Courts.

22. To prove his innocence and false implication in the cases in hand, the appellant has examined himself on oath under Section 340(2), Cr.P.C. and also produced his father, Abdul Samad, in his defence. While recording his statement on oath under Section 340(2),

Cr.P.C. the appellant has produced TCS receipts and list of phone numbers to show that he has sent applications regarding missing of his brother to different forums and also made phone calls to various authorities including police and rangers. He deposed that his brother was missing and he informed Madadgar 15 and Rangers as well on their cell numbers and also visited P.S. Boat Basin for registration of a case regarding missing of his brother, but police refused to receive his application. He further deposed that on the instructions of his counsel, he visited P.S. Site Superhighway where he found his brother detained, police demanded bribe for release of his brother and on his refusal, there was exchange of hot words between him and the SHO Asmatulah Marwat, who handed over him to SHO of P.S. Quaidabad, Muhammad Ali Marwat, and thereafter falsely implicated in these case. The appellant has been supported by his father, DW.1 Abdul Samad. He deposed that on 30.07.2016 he went to Police Post Abbas Town and P.S. Sachal and submitted application for missing of his son. In support of his statement, he has produced attested photocopy of the application at Ex.12/A.

23. The plea taken by the appellant that he has been falsely implicated in these cases on account of exchange of hot words between him and the SHO of P.S.SITE Superhighway on the demand of bribe for the release of his brother could not be brushed aside. 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.

24. In an identical case of *Muhammad Mansha versus The State* reported in 1997 SCMR 617, the Hon'ble apex Court has extended the benefit of doubt to an accused on the ground that before registration of FIR with regard to a recovery of 20 kilograms heroin, habeas corpus petition was filed by cousin of accused in Hon'ble Lahore High Court and Hon'ble apex Court observed as under:-

"the record of the case will show that on 17-6-1990 i.e., a day before the alleged recovery of heroin from the Baithak of the appellant, Muhammad Sanaullah had filed a Habeas Petition against Muhammad Akram, S.I. P.W.6 for the recovery of Muhammad Mansha appellant from his custody. In paragraphs 3 to 5 of the Habeas Petition (Cr. Misc. No. 392//H of 1990), it has been stated:--

"(3) That Muhammad Mansha has moved an application before the S.P., Kasur, Photostat copy of the same is annexed for the kind perusal of this Honourable Court. The police authorities C.I.A. instead of registration of the case the police personnel have become inimical towards the detenue as the accused persons are paying monthly to the police, therefore, the police authorities were deriving a vedge against the detenue and their family members. They have considered the said application as if some complaint was lodged against them. Respondent/Akram Major Incharge of C.I.A., Kasur who is known for commission of atrocities and that is why he is being called as Akram Major although he is nothing to do with the Pak Army. Akram Major/respondent alongwith a big Squad of Police personnel on 13-6-1990 at about 4-00 a.m. early morning raided the house of the detenue Muhammad Bashir son of Jamal Din is the real paternal uncle of the petitioner and. therefore, the petitioner has gone to meet him and has stayed at night in his house.

(4) That the respondent has arrested Bashir and the three detenue and Nawaz. He said that I am taking them in custody to teach you the lesson for filing application before the high forum/officers. This occurrence has been witnessed by hundreds of the villagers as they have collected in front of the house. However, Muhammad Ashraf son of Khushi Muhammad, Abdul Ghafoor son of Muhammad Din both residents of Thing More were also present and interfered that innocent persons may not be arrested but respondent has threatened them of dire consequences.

(5) That since then respondent/Akram Major detaining them in his illegal custody and neither he has produced them in any Court nor there is any case against them.

It is also pertinent to mention here that respondent has demanded Rs.one lac for the release of the detenu on the pretext that in case the money aforesaid is not paid to him he will involve the detenu in false and frivolous cases of heroin etc."

This petition came up before the High Court for hearing on 18-6-1990 and the High Court had directed Muhammad Akram, S.I., P.W.6 to appear in person before the Court to answer whether the alleged detenu were being detained by him, and if so, under what authority of law. In this view of the matter, reasonable possibility of the plea of false involvement of the appellant on account of filing of the habeas petition against Muhammad Akram P.W.6 on 17-6-1990 in the Lahore High Court, Lahore is very much there entitling the a appellant to the benefit of doubt".

25. We have noticed overwriting in the time mentioned as 0910 hours in entry No.10 dated 30.07.2016 (Ex.5/E). This variation in time clearly shows that police has tried to manage the case against the appellant. The another important aspect of the matter is that as per prosecution case 1100 grams of explosive substance was recovered from the possession of appellant, but clearance certificate issuing officer Syed Sajjad Hussain Shah (Ex.7) mentioned the weight of recovered explosive substance near about one kilogram and a sample of 15 grams was sent to the Counter Terrorism Wing, FIA, Islamabad for forensic test, then total weight becomes 1015 grams, whereas the recovered explosive substance was 1100 grams. The shortfall of 85 grams of substance creates doubt with regard to safe custody of the property at police station and its' transit to expert. In a case of *Ikramullah & others v The State* reported in 2015 SCMR 1002, the Hon'ble apex Court took serious note of the safe custody of recovered property and hold as under:-

"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”.

26. 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. Reliance is placed on the case of *Tariq Pervez v The State* (1995 SCMR 1345).

27. For what has been 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 conviction and sentence recorded by the learned trial Judge by impugned judgment dated 29.08.2017, 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.

28. Foregoing are the reasons of our short dated 01.03.2018, whereby these appeals were allowed.

JUDGE

JUDGE