IN THE HIGH COURT OF SINDH, AT KARACHI

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

Spl. Crl. Anti-Terrorism Appeal No.259 of 2017

Muhammad Asif son of
Noor Islam. ... ... Appellant

Versus

The State. ... ... Respondent

Appellant	Through Mr. Ajab Khan Khattak, Advocate.
Respondent	Through Mr. Muhammad Iqbal Awan, DPG.
Date of hearing	06.03.2018

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JUDGMENT

Shamsuddin Abbasi, J:- Appellant Muhammad Asif has assailed conviction and sentence recorded by the learned Anti-Terrorism Court No.V, Karachi, by a judgment dated 20.11.2017, passed in Special Case No.52 of 2016, arising out of FIR No.353 of 2015 under Section 4/5 Explosive Substances Act, 1908 read with Section 7 of Anti-Terrorism Act, 1997, registered at Police Station Sharafi Goth, Karachi.

2. Precisely, the case of the prosecution is that on 23.12.2015 police party of P.S. Sharafi Goth, headed by ASI Muhammad Saeed, was on patrolling duty in official mobile. During the course of patrolling, ASI Muhammad Saeed received spy information that a suspicious person was standing at Service Road, near Babar Kanta, Landhi, KIA, Karachi, having a shopper in his hand. On receipt of such information, the police party proceeded to

the pointed place and reached there at about 0115 hours. On reaching the place, the police found a person standing in suspicious manner. On the pointation of spy informer apprehended him, who disclosed his name as Muhammad Asif son of Noor Islam. The accused was carrying a shopper in his right hand. On checking the said shopper, ASI Muhammad Saeed recovered one local made bomb, lying in a tin box. During personal search of the accused, police also recovered one mobile phone Samsung and a duplicate copy of his CNIC from the front pocket of his wearing shirt. ASI Muhammad Saeed arrested the accused and took bomb in possession at spot under a mashirnama prepared in presence of mashirs namely, HC Khalid Butt and PC Akhtar Ali and also informed Bomb Disposal Unit, East Division. Thereafter, police brought accused and the case property at P.S. Sharafi Goth, where ASI Muhammad Saeed registered a case against accused vide FIR No.353 of 2015 under Section 4/5 of Explosive Substances Act, 1908 on behalf of the State.

3. Pursuant to the registration of FIR, the investigation was entrusted to Inspector Nusrat Hussain Shaikh. I.O. interrogated the accused, recorded the statements of witnesses under Section 161, Cr.P.C. and inspected the site in presence of mashirs, ASI Muhammad Saeed and HC Khalid Butt. He also accompanied the team of BDU, headed by SIP Ayub Baloch, who got the bomb defused, sealed the same and also obtained a sealed sample of power separately as well as issued a clearance certificate. After obtaining permission from SSP (Technical), Special Branch, I.O. sent the sealed parcel to Deputy Controller, Terrorism Wing, FIA (CTW) for examination and report. After completing usual investigation, I.O. submitted challan before the Court of competent jurisdiction under

Section 4/5 of Explosive Substances Act, 1908 read with Section 7 of Anti-Terrorism Act, 1997.

4. Trial Court framed a charge against the accused, to which the accused pleaded not guilty and claimed trial.

5. At trial, prosecution examined as many as four witnesses. PW.1 complainant ASI Muhammad Saeed was examined at Ex.5, he produced Roznamcha entry No.31 at Ex.5/A, memo of arrest and recovery at Ex.5/B, FIR at Ex.5/C, Roznamcha entry No.45 at Ex.5/D, memo of site inspection at Ex.5/E and clearance certificate at Ex.5/F. PW.2 SIP Muhammad Ayub Baloch was examined at Ex.6, he produced Roznamcha entries No.11 and 12 at Ex.6/A and inspection report at Ex.6/B. PW.3 HC Muhammad Khalid Butt was examined at Ex.7. PW.4 Inspector Nusrat Hussain at Ex.9, he produced Roznamcha entry at Ex.9/A, Naqsha-e-Nazri at Ex.9/B, Roznamcha entry No.5 at Ex.9/C, exploitation reports of Counter Terrorism Wing, FIA, Islamabad at Ex.9/M. Vide statement Ex.23, the prosecution closed it's side of evidence.

6. Statement of accused under Section 342, Cr.P.C. was recorded at Ex.24, wherein he denied the prosecution case and pleaded his innocence. Accused examined himself on oath under Section 340(2), Cr.P.C. as DW.1. He also examined his brother, Majid, in his defence as DW.2, who supported the version of accused that on 07.01.2015 his brother (accused) was arrested by Rangers and after 46 days his custody was handed over to Sharafi Goth police, SHO P.S. Sharafi Goth obtained phone number of our family and called wife of accused at P.S. she went there and met with accused, police had beaten accused at P.S. and also recorded movie.

7. Trial Court on conclusion of the trial and after hearing the learned counsel for the parties, convicted the accused under

Section 7(I)(II) of Anti-Terrorism Act, 1997 and sentenced to 14 years rigorous imprisonment vide judgment dated 11.01.2017.

8. Feeling aggrieved by the said conviction and sentence, the accused preferred Spl. Criminal Anti-Terrorism Appeal No.36 of 2017 before this Court. Vide judgment dated 23.08.2017, learned Division Bench of this Court set-aside the impugned judgment dated 11.01.2017 and remanded the case back to the trial Court with a direction to make suitable amendment in the charge, on the basis of material produced before the trial Court at the time of submission of final report, and decide the matter preferably within a period of two months. The operative part of the judgment dated 23.08.2017 is reproduced below:-

> *"We have heard learned counsel for the parties. Mr. Mohammad Jawaid Alam, Judge, Anti-Terrorism Court No.V, Karachi framed charge against accused, which is reproduced as under:*
>
> ***C H A R G E***
>
> *I, Mohammad Jawaid Alam, Judge Anti-Terrorism Court No.V, Karachi do hereby charge you accused namely:*
> *Mohammad Asif son of Noor Islam*
> *As follows:-*
>
> *That on 23.12.2015 you were standing at Service Road Babar Kanta KIA Landhi Karachi holding one shopper in suspicious condition. The police party headed by ASI Mohammad Saeed checked your shopper which was containing one local made bomb in Tin Box and thereby you have committed the offence fall U/s 7(1)(ff) of ATA 1997 within the cognizance of this Court.*
>
> *And I hereby direct that you be tried by this Court on the said charge.*
>
> *12. Thereafter, case proceeded and appellant was convicted under Section 7(1)(ff) of ATA and sentenced as stated above. According to the prosecution case on 23.12.2015, police recovered from the possession of accused a shopper which was containing one local made bomb and FIR was lodged under Sections 4/5 of the Explosive Substance Act, 1908 read with Section 7 of ATA1997. After usual investigation, challan was submitted against accused under the above referred sections. Trial Court failed to frame charge against accused under Section 4/5 of the Explosive Substance Act, 1908 and sentenced the*

accused under Section 7(1)(ff) of ATA, 1997. Learned counsel for the appellant has rightly argued that serious prejudice was caused to the appellant in his defence and proceedings are vitiated. Learned DPG conceded to the contention raised by learned counsel for the appellant and recorded no objection in case the case is remanded to the trial Court for suitable amendment in the charge.

13. In the view of above, we have come to the conclusion that serious prejudice was caused to the appellant in his defence as trial Court framed defective charge against accused and omitted the framing of charge under Section 4/5 of the Explosive Substance Act, 1908. It is settled principle of law that charge against accused would be specific, fair and clear in all respects to provide an opportunity to accused to defend himself in due course of trial. Charge should be clear and by no means, confused to prejudice accused. Prime object and principle of framing charge would be to make aware the accused of the substantive accusations, which were to be proved by the prosecution with clear intention and with unambiguous description of the offence so as to enable accused to defend himself. We respectfully rely upon the judgment of the Honourable Supreme Court of Pakistan in the case reported as ***S.A.K. Rehmani vs. The State*** *(2005 SCMR 364), wherein it was observed as under:*

"We are conscious of the fact that "whether a person is convicted of an offence and the Appellate Court is of the view that he has been misled in his defence by the absence of a charge or by an error in the charge, appropriate action can be taken including remand of the case with direction for making suitable amendment in the charge". AIR 1949 All 509, 50 Cri. L. Jour 923, AIR 1958 Ker. 94, ILR 1959 Ker. 283, 1958 Cri.L. Jom 516, AIR 1942 Pat. 143, 43 Cri.L. Jour 134, AIR 1922 Lah. 135, 23 Cri.L. Jour 5".

14. For the above stated reasons, the conviction and sentence recorded against the appellant by the Trial Court vide judgment dated 11.01.2017 are set-aside. The case is remanded to the trial Court for making suitable amendment in the charge, on the basis of material produced before the trial Court at the time of submission of the final report. Trial Court shall proceed further by recording evidence of the prosecution witnesses and defence. Thereafter case shall be decided strictly in accordance with law, preferably within a period of 02 months.

15. In the view of above, appeal is allowed to the above extent".

9. After remand of the case, the trial Court framed an amended charge against the accused on 14.09.2017 in respect of offence punishable under Section 4/5 of Explosive Substances Act

read with Section 7 of Anti-Terrorism Act, 1997 at Ex.19, to which the accused again pleaded not guilty and claimed trial.

10. In view of the directions of this Court as contained in the judgment dated 23.08.2017, trial Court summoned the witnesses, but the DDPP filed a statement for adopting the examination-in-chiefs of the prosecution witnesses recorder earlier, which is reproduced as under:-

> *"It is submitted on behalf of prosecution, I adopt the same examined in chief of ASIP Muhammad Saeed dated 12.04.16. It is further submitted that the undersigned is also adopt same examination in chief of PW.2 SIP Ayub Baloch, HC Khalid Butt dated 23.05.16 and Inspector Nusrat Sheikh (I.O) of the case dated 30.08.2016. Prayed in the interest of justice".*

On the other hand, the counsel for the accused also filed an application with a following prayer:-

> *"It is prayed that the undersigned counsel may be allowed to adopt the earlier recorded DWs statement in the matter in hand in the interest of justice. The undersigned counsel may be allowed to further cross-examined complainant ASI Saeed".*

11. On the above statement and application, the learned trial Court had passed following order:-

> *"The learned DDPP has adopted the examination in chief of all prosecution witnesses whereas the learned defence counsel also has no objection and further made application that he will adopt the same cross-examination of the witnesses except that he wants to put some more questions to the complainant. By consent the both applications are allowed.*

12. Based on the above position, trial Court had examined only complainant Muhammad Saeed as PW.1 at Ex.22. For the sake of convenience, his examination-in-chief is reproduced below:-

> ***To Mr. Shamim Akhtar, DDPP for the State.***
>
> *The learned DDPP adopted the same examination in chief of this witness. The learned Defence Counsel has no objection so the evidence recorded by this witness on 12.04.2016 is taken on*

record. The present accused and case property present in the Court is the same.

Cross by Mr. Ajab Khan Khatak adv. For accused.

The learned defence counsel adopted the cross-examination conducted on 12.04.2016 of this witness with the prayer that he will put some more questions in addition to that cross-examination.

I am educated upto Metric. The shopper which was in the hands of the accused is available today in the court. Today the shopper is of green colour. I did not mention the color of the shopper in mashirnama. After proceeding from PS we went to take fuel and thereafter stood at Alfalah Nadi and thereafter we came at Murtaza Chowrangi where the information was received. On receipt of information within 07/08 minutes we reached at the place of incident. The information was given to me by phone and informer was also with me at the time of arrest. I did not mention the color of the tin nor its size. On that day after off of my duty I remained at PS. I gave the paper and property to I.O. at 9 am. I do not remember if the site inspection was conducted at 87.30 am. It is correct that after handing over the case property to I.O. I have no concerned with the same. Voluntarily says that I had handed over the case property after inspection by BDU. The bottle which was given to us by BDU was glass bottle. I have no sufficient knowledge about explosive. It is not correct to say that I malafidely wrote words explosive in the mashirnama. The mashirnama is in my hand writing.

(At this stage the learned Defence counsel put a question to witness as to what he has written at 05th line from the bottom of mashirnama. The witness states explosive but he could not give pronunciation of substance properly).

(At this stage the learned defence counsel put a question as what he has written in mashirnama this question is not relevant as it is not possible to write entire mashirnama in cross-examination. The writing he already has given in Ex.5/B therefore the question is disallowed).

I do not know the meaning of explosive substance. It is not correct to say that the mashirnama is not in my hand writing. I know the meaning of 4/5 substance Act. It is not correct to say that neither I caught the accused nor any thing was recovered from his possession and I prepared false mashirnama and case has been instituted at the instance of high-ups.

13. The prosecution had closed it's side of evidence on 30.10.2017.

14. The trial Court examined the accused under Section 342, Cr.P.C. wherein he denied the prosecution case and pleaded his

innocence. He had taken the same plea that on 07.11.2015 some persons attacked at his house, out of them one was Mohammad Asif. He informed the police on 15 and also the Rangers helpline. Rangers arrived there and took him and his friend, Aamir, and kept them detained for six days. Thereafter, Rangers released Aamir and handed over custody of accused to police on 22.12.2015 and then police booked him in this false case by foisting the recovery.

15. An application was filed by the counsel for the accused seeking permission to adopt the evidence of defence witnesses recorded earlier while the learned DDPP also prayed for adoption of his cross-examination. Thereafter, the counsel for the accused closed his side of evidence vide Ex.26.

16. The learned trial Court, on conclusion of trial and after hearing the learned counsel for the parties, convicted the accused under Section 7(i)(ff) of Anti-Terrorism Act, 1997 read with Section 4/5 Explosive Substances Act, 1908 and sentenced to undergo rigorous imprisonment for 14 years. Benefit in terms of Section 382-B, Cr.P.C. was also extended to the accused.

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

18. The learned counsel for the appellant submits that the accused was arrested from a populated thickly area and it was a case of prior information, but police did not associate any independent witness of the locality to witness recovery proceedings and both the mashirs of arrest and recovery were police officials and subordinate to complainant. The learned counsel further submits that on 07.11.2015 the Rangers picked up accused from his house and handed over his custody to Inspector Nusrat Shaikh, SHO of P.S. Sharafi Goth. He further submits that the brother of accused, Majid,

and mother of accused, Qamar-un-Nisa, filed various applications to different forums against illegal detention of accused at the hands of law enforcement agency on 12.12.2015, which is prior to incident of this case i.e. 23.12.2015. It is next submitted that the law enforcement agencies, just to show the illegal detention of the accused as legal, have managed a false case against the accused. It is also submitted that the witnesses have contradicted each other on material points, but the same were not considered by the learned trial Court. Lastly, submitted that the conviction and sentence recorded by the learned trial Court was unjust, improper and misreading of evidence, hence liable to be set-aside and prayed accordingly.

19. On the other hand, the learned DPG has submitted that the appellant was arrested from the place of scene alongwith a bomb, which constituted an act of terrorism and directed against the society. He further submits that the prosecution has examined four witnesses, all of them have supported each other and implicated the accused with the commission of offence. It is next submitted that the defence has failed to point out any illegality, irregularity or infirmity in the impugned judgment. Finally, he submitted that the prosecution has successfully proved the guilt of the accused and prayed for dismissal of appeal.

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

21. While disposing of Spl. Criminal ATA No.36 of 2017 by judgment dated 23.08.2017, learned Division Bench of this Court observed the charge defective and based on such observation remanded the case back to the trial Court with a direction to make suitable amendment in the charge, on the basis of material produced

before the trial Court at the time of submission of the final report and proceed with the case by recording evidence of the prosecution witnesses and defence. The trial Court framed amended charge against accused, adopted the same evidence recorded earlier in the first phase, with the consent of both the sides, and based conviction of the accused on such adopted evidence.

22. No doubt cases are to be decided expeditiously, but the Courts are bound to adopt legal course and dispose of the cases after paying due attention to the record of the cases and application of judicial mind just to avoid violation of any provision of law. The Courts are not supposed to proceed with the cases in a haste and slipshod manner. To ensure fair trial and self-dispensation of justice, Courts are bound to fulfill all formalities and legal requirements. In the case in hand, this Court ordered retrial by framing a fresh charge against the accused and recording of evidence of the prosecution witnesses and defence inasmuch as the charge was found to be a defective one and in compliance thereof, the trial Court though framed a fresh charge, but did not record fresh evidence in the matter and based conviction of the accused by way of adopting earlier evidence recorded in the first phase. It is important to note that when the charge was defective, the entire evidence recorded on the basis of such charge was useless and to be discarded. It was incumbent upon the trial Court to record the whole evidence of the prosecution as well as of defence afresh on the basis of fresh charge and then decide the matter in accordance with law. The procedure adopted by the learned trial Court is reflective of miscarriage of justice and in violation of Article 10-A of the Constitution of Islamic Republic of Pakistan, 1973, which provides right to fair trial. Here it would be advantageous to reproduce Article 10-A of the Constitution, which reads as under:-

> ***10-A. Right to fair trial.***---*For the determination of his civil rights and obligations or in any criminal charge against him a person shall be entitled to a fair trial and due process".*

23. In our view, the conviction and sentence recorded by the trial Court on the basis of earlier evidence, adopted with the consent of the parties, was illegal and not admissible in the eyes law. Reliance is placed on the case of *Zahoor v The State* reported as 1991 MLD Karachi 1951, wherein it has been held as under:-

> *"10. On all the above scores the depositions of complainant Mir Bahadur (P.W.1), Malik Ali Ahmed (P.W.2) and Muhammad Shafa (P.W.3) brought on the record of Sessions Court under Article 47 of the Qanun-e-Shahadat,1984, cannot be treated as evidence. After discarding this evidence there remains no evidence against the appellant and consequently he is entitled to an acquittal.*
>
> *11. In the result the impugned judgment is set aside and the appeal is accepted. The appellant is acquitted from the charge. He is in custody and be released forthwith, if not required in any other case. The re-trial of the appellant is not ordered for the simple reason that he has already remained in custody for such a long time and in fact suffered the punishment which in ordinary course could have been awarded to him".*

In another case of *Ali Akbar v The State* reported as PLD 1997 Karachi 146, it has been observed as under:-

> *"Learned State Counsel submitted that since the statement of complainant was brought on record with the consent of the parties, its relevancy and validity could not be challenged. This proposition, however, is not correct for the simple reason that an inadmissible evidence cannot be made admissible by consent of the parties".*

24. The settled scheme of law is that the prosecution is duty bound to shift the burden of proof on the shoulder of the accused by producing its witnesses in Court and once the prosecution is succeeded in discharging this duty in a manner as described by law, then the onus shifted to accused to disprove the allegation of prosecution. In the case in hand, trial Court allowed the statement filed by learned DDPP and the application of learned defence counsel,

seeking adoption of earlier evidence, without application of Judicial mind, adopted the same evidence, which was recorded earlier in first phase of trial, and based conviction on such adopted evidence. The procedure adopted by the trial court was not warranted by law and absolutely illegal particularly in the circumstances when the accused was facing trial in a case punishable under Section 4/5 of Explosive Substances Act, 1908 and Section 7 of Anti-Terrorism Act, 1997. Thus, the conviction and sentence awarded to the appellant was illegal, unlawful and not in accordance with law because the pre-requisites of fair trial were not provided to the appellant. The appellant is in custody and he cannot be held responsible for any omission or reckless act of the prosecution. In the circumstances, we hereby allow this appeal, set-aside the conviction and sentence recorded by the learned trial Court by impugned judgment dated 20.11.2017 and acquit the appellant of the charge. The appellant shall be released forthwith if not required to be detained in any other case.

25. Above are the reasons for our short order dated 06.03.2018.

JUDGE

JUDGE

Naeem