IN THE HIGH COURT OF SINDH, AT KARACHI

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

Spl. Crl. Anti-Terrorism Jail Appeal No.145 of 2016

Sherullah son of
Feroze Khan. ... ... Appellant

Versus

The State. ... ... Respondent

Appellant	Through Ms. Syeda Zubaida Shah, Advocate.
Respondent	Through Mr. Abrar Ali Khichi, DPG.
Date of hearing	14.03.2018

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JUDGMENT

Shamsuddin Abbasi, J:- Through captioned appeal, appellant Sherullah has assailed the conviction and sentence recorded by the learned Judge of Anti-Terrorism Court No.I Karachi, vide judgment dated 30.04.2016, passed in Special Cases No.A-20 of 2014, arising out of FIR No.257 of 2013 under Sections 4/5 of Explosive Substances Act, 1908 read with Section 7 of Anti-Terrorism Act, 1997, registered at Police Station Landhi, Karachi.

2. The facts giving rise to this appeal, briefly stated, are that on 10.12.2013 police party of P.S. Landhi, Karachi, headed by SIP Mohammad Hanif Abbasi, was busy in patrolling of the area in official mobile. During the course of patrolling, SIP Mohammad Hanif Abbasi received spy information that a person was selling charas in a ground near 17-J Bus Stop 89, Landhi, Karachi. On receipt of such

information, police party proceeded to the pointed place and reached there at about 0015 hours, where they saw a person standing in suspicious condition. SIP Mohammad Hanif Abbasi on the pointation of spy informer apprehended the said person with the help of his staff, who disclosed his name as Sherullah son of Feroze Khan. During personal search of accused, SIP Mohammad Hanif Abbasi recovered a hand grenade bearing No.VMG-K 1-05(33) from the right side pocket of his wearing shirt while 20 grams of charas was also recovered, wrapped in a green coloured shopper. Upon such recovery, SIP Mohammad Hanif Abbasi arrested the accused and sealed the recovered property at spot under a mashirnama prepared in presence of mashirs HC Asim and PC Gul Badshah. Thereafter, police brought accused and the case property at P.S. Landhi, Karachi, where SIP Mohammad Hanif Abbasi registered a case bearing FIR No.257 of 2013 under Sections 4/5 of Explosive Substances Act, 1908 read with Section 7 of Anti-Terrorism Act, 1997 against accused on behalf of the State while separate case was also registered against him for recovery of charas.

3. Pursuant to the registration of FIR, the investigation was entrusted to Inspector Ali Mohammad Bugti. On receipt of investigation, I.O. visited the place of incident on the pointation of complainant and prepared memo of site inspection in presence of mashirs SIP Mohammad Hanif Abbasi, HC Asim and PC Gul Badshah. He also recorded the statements of witnesses under Section 161, Cr.P.C. and got the recovered hand grenade (rifle grenade) inspected through officer of Bomb Disposal Unit, Special Branch, Karachi, who defused the same and issued clearance certificate. After completing the usual investigation, Inspector Ali Mohammad Bugti

submitted challan before the Court of competent jurisdiction under above referred Sections.

4. Trial Court framed a charge against accused in respect of offences punishable under Section 4/5 of Explosive Substances Act, 1908 read with Section 7 of Anti-Terrorism Act, 1997 at Ex.3, to which accused pleaded not guilty and claimed to be tried.

5. At the trial, the prosecution examined as many as three witnesses. PW.1 complainant SIP Mohammad Hanif was examined at Ex.4, he produced Roznamcha entry No.39 at Ex.4/A, memo of arrest and recovery at Ex.4/B, FIR at Ex.4/C, Roznamcha entry No.48 at Ex.4/D and memo of site inspection at Ex.4/E, PW.2 PC Gul Badshah was examined at Ex.5 and PW.3 Inspector Ali Mohammad, I.O. of the case, was examined at Ex.6, he produced clearance certificate at Ex.6/A and inspection report of rifle grenade at Ex.6/D. Vide statement Ex.7, the prosecution closed it's side of evidence.

6. Statement of accused was recorded under Section 342, Cr.P.C. at Ex.8, wherein he denied the prosecution case and pleaded his innocence. The accused opted not to examine himself on oath under Section 340(2), Cr.P.C. and did not lead any evidence in his defence.

7. Trial Court, on conclusion of trial and after hearing the learned counsel for the parties and assessment of evidence, convicted the accused under Sections 7(ff) of Anti-Terrorism Act, 1997 and sentenced to undergo rigorous imprisonment for 14 years by extending him the benefit in terms of Section 382-B, Cr.P.C.

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

9. Learned counsel for the appellant submits that the appellant has been falsely implicated in this case. He further submit

that the accused was picked up from his house by the Rangers during an operation, kept him in wrongful confinement for about seven days, and thereafter handed over custody of accused to police, who also kept him in wrongful confinement for about 15 days and thereafter booked the accused in this case by foisting the alleged recovery upon him. He further submits that all the witnesses were police officials and the prosecution had failed to produce a single independent witness to corroborate and support the version of police. Learned counsel further submits that the witnesses have contradicted each other on material points, but the learned trial Court did not consider such contradictions and recorded conviction without applying it's judicial mind. He also submits that FIR and mashirnama of arrest and recovery show recovery of one hand grenade from the possession of accused while the report of BDU reflects that the recovered grenade was a rifle grenade. Lastly, submitted that the prosecution had failed to prove the guilt of the accused beyond shadow of reasonable doubt and prayed for acquittal of the appellant.

10. On the other hand, the learned DPG has supported the conviction and sentence recorded by the trial Court against the accused. He submitted that the appellant was arrested alongwith rifle grenade, which constituted an act of terrorism and directed against the society. He further submits that the prosecution has examined three witnesses, all of them have fully implicated the appellant with the commission of offence without major contradictions and discrepancies. Finally, submitted that the prosecution had successfully proved the guilt of the appellant and prayed for dismissal of appeal.

11. 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 material available before us.

12. To prove the guilt of the appellant, the prosecution had examined three witnesses, namely, (i) complainant SIP Mohammad Hanif, (ii) PC Gul Badshah and (iii) Inspector Jehan Khan Niazi, investigating officer of the case. All of them in their respective examination-in-chiefs though supported the case of the prosecution and implicated the accused with the commission of the crime, but could not keep consistency and failed to face test of cross-examination.

13. Close scrutiny of the evidence of prosecution witnesses reveals that they 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 herein below the relevant portions of their depositions.

14. Complainant SIP Mohammad Hanif in his examination-in-chief has deposed that on 10.12.2013 he alongwith his staff left police station for patrolling under Roznamcha entry No.09 at 2000 and also produced departure entry at Ex.4/A, which shows number of entry as 39 at 2010 hours dated 09.12.2013. The difference of entry number, date and time not only demolished the whole case of the prosecution, but also shattered the entire fabric of the testimony of complainant. It is also important to note that complainant and mashir PC Gul Badshah in their respective examination-in-chiefs have deposed that on seeing the police, the accused tried to run away from the scene, but the FIR and the mashirnama of arrest and recovery did not show that at the time of his arrest, the accused made resistance and tried to run away from the scene. The

complainant has deposed that at the time of arrest of accused, a hand grenade was recovered from his possession whereas according to mashir PC Gul Badshah it was a rifle grenade recovered from the possession of accused. The report of SIP Muhammad Masood Awan, Bomb Disposal Unit, Special Branch, Karachi (Ex.6/D) also reflects that it was a rifle grenade and not a hand grenade. Such a report also reflects that the grenade was in working condition, which was defused later on, despite of the fact that the grenade was in working condition, the complainant had not informed the office of BDU at the time of it's recovery for defusing the same and this fact has also been admitted by the complainant in his cross-examination that *"I had not called officials of Bomb Disposal Unit".* In his examination-in-chief PW PC Gul Badshah deposed that during search one rifle grenade was recovered from the possession of the accused whereas in his cross-examination he admitted that one hand grenade was recovered from the possession of accused as mentioned in the memo of arrest and recovery. This witness also admitted that he has not disclosed the number of recovered grenade as well as time of arrest and recovery in his deposition. The admissions and contradictions, referred herein above, have caused a fatal blow to the prosecution case.

15. As to the deposition of investigating officer Inspector Ali Mohammad (Ex.6) is concerned, it is an admitted fact that in each case, the investigating officer is an important character, who is under obligation and duty bound to dig out the truth. In the case in hand, it appears that just formalities have been completed and no sincere efforts have been made by the investigating officers to dig out the truth. In his examination-in-chief, I.O. Inspector Ali Mohammad deposed that on 10.12.2013 he received case papers, property viz rifle grenade and custody of accused for investigation purposes. He also

sent the grenade to the office of BDU for examination and report under his letter Ex.6/C. A bare perusal of Ex.6/C reflects that the grenade that was sent for examination and report was a hand grenade and not a rifle grenade and this fact has also been admitted by the investigating officer in his cross-examination that *"It is correct to suggest that letter Ex.6/C discloses the name of property as hand grenade".* This witness had also conducted site inspection and prepared memo of place of incident, but did not produce any entry with regard to his departure from police station for site inspection as well as arrival entry after inspection of place of incident and this fact has also been admitted by him in his cross-examination that *"It is correct to suggest that I have not produced any entry under which I had left P.S. for inspection place of incident. It is correct to suggest that I have also not produced any entry about my arrival at P.S.".* He also admitted that confessional statement of accused was not recorded before Magistrate. These infirmities and omissions, on the part of investigating officer, thus, rendered the whole case of the prosecution extremely doubtful.

16. We have also noticed a big flaw/omission floating on the surface of the record. Admittedly, SIP Mohammad Masood Awan, officer from BDU, who had examined grenade, defused it and issued clearance certificate, though cited as witness in the challan, but the prosecution did not examine him without furnishing any plausible explanation or valid reason. Failure of the prosecution in producing it's important witness SIP Muhammad Masood Awan for recording his statement has caused a fatal blow to the prosecution case inasmuch as ambiguity still exists that the recovered grenade was actually a hand grenade or a rifle grenade. Such a lacuna on the part

of the prosecution made the whole case of the prosecution extremely doubtful.

17. At this juncture, it is very difficult for us to give due weight to the testimony of prosecution witnesses in view of the admissions, contradictions, discrepancies, infirmities, omissions and lacunas, explained herein above, which clearly showed the credibility of PWs highly doubtful, untrustworthy and inspire no confidence. 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".*

18. The place of incident was situated in a thickly populated area and this fact has also been admitted by the PWs in their respective evidence, but no independent person was associated to witness the arrest of accused and recovery of case property. Even otherwise the 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 the incident. All witnesses examined by the prosecution were police officials. No doubt police witnesses are as good and equal as that of other independent witnesses and conviction can be based 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 based on the evidence of police officials and accused would be entitled to the benefit of doubt. Under the law, emphasis is on the quality of evidence rather than quantity. In this respect 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".*

19. Prosecution had also failed to satisfy this Court on the point of safe custody of case property. As per prosecution case rifle grenade was recovered from the possession of appellant on 10.12.2013, which was inspected by the Officer of Bomb Disposal Unit on 21.01.2014. The prosecution neither examined Head Muharrir with whom the case property was kept nor any other evidence had been brought on record to ascertain that during intervening period i.e. from 10.12.2013 to 21.01.2014, the case property was kept in safe custody. The Hon'ble Supreme Court of Pakistan in a case of *Ikramullah & others v The State* reported in 2015 SCMR 1002, took serious note for keeping the case property in

safe custody and proving its safe transit to the examiner and emphasized as follows:-

> *"In the case in hand not only the report submitted by the Chemical Examiner was legally laconic but safe custody of the recovered substance as well as safe transmission of the separated samples to the office of Chemical Examiner had also not been established by the prosecution. It is not disputed that the investigating officer appearing before the learned trial court had failed to even to mention the name of the police official who had taken the samples to the office of the Chemical Examiner and admitted no such police official had been produced before the learned trial Court to depose about safe custody of the samples entrusted to him for being deposited in the office of the Chemical Examiner. In this view of the matter the prosecution had not been able to establish that after the alleged recovery the substance so recovered was either kept in safe custody or that the samples taken from the recovered substances had safely been transmitted to the office of the Chemical Examiner without the same being tampered with or replaced while in transit".*

20. The plea taken by the appellant that he was picked up by the Rangers during an operation and after putting him 20 days in wrongful confinement, he was falsely implicated in this case, though is without any documentary proof, but in view of the facts and circumstances of the case, explained herein above, such a plea seems to have weight. Even otherwise 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. Thus, we are of the opinion that the prosecution has failed to discharge its liability of proving the guilt of the appellant beyond shadow of doubt. The

Hon'ble Supreme Court of Pakistan in the case (supra) has held that for extending the benefit of doubt in favour of an accused, it is not necessary that there may be many circumstances creating doubt, if there is a circumstance which create reasonable doubt in a prudent mind about the guilt of the accused, then the accused will be entitled to such benefit not as a matter of grace and concession, but as a matter of right.

21. For what has been discussed herein above, we are of the considered view that the prosecution has failed to prove the guilt of the appellant beyond shadow of reasonable doubt. Accordingly, while extending the benefit of doubt in favour of the appellant, we hereby allow this appeal, set-aside the conviction and sentence recorded by the learned trial Court by impugned judgment dated 30.04.2016 and acquit the appellant of the charge. The appellant shall be released forthwith if not required to be detained in any other case.

22. Above are the reasons for our short order dated 14.03.2018.

JUDGE

JUDGE

Naeem