

IN THE HIGH COURT OF SINDH KARACHI

Present:

Mr. Ahmed Ali M. Shaikh, C.J.

Mr. Adnan Iqbal Chaudhry, J.

Spl. Cr. A.T. Appeal No. 66 of 2018

Appellant : Shakeel son of Dodo Khan, through
Mr. Muhammad Rahib Lakho, Advocate.

Respondent : The State through Mr. Zafar Ahmed,
Deputy Prosecutor General Sindh.

Spl. Cr. A.T. Jail Appeal No. 103 of 2018

Appellant : Imran son of Ameer Bux, through
Mr. Ahmed Ali Dewan, Advocate.

Respondent : The State through Mr. Zafar Ahmed,
Deputy Prosecutor General Sindh.

Date of hearing : 16-07-2018

Date of Decision : 10-08-2018

JUDGMENT

ADNAN IQBAL CHAUDHRY J. -

1. Both these appeals under Section 25 of the Anti-Terrorism Act, 1997 are against the judgment dated 28-02-2018 passed by the Anti-Terrorism Court No.XIV, Karachi, in Special Case No. 1621/2016 and Special Case No.1622/2016, the said cases being connected and tried jointly pursuant to Section 21-M of the Anti-Terrorism Act, 1997.

In Special Case No.1621/2016 arising from FIR No.146/2016, both appellants/accused were convicted for the offence of extortion of money/*bhatta* under Section 6(2)(k) Anti-Terrorism Act, 1997 and were sentenced under Section 7(1)(h) of the said Act to R.I. for five (5) years each, a fine of Rs.10,000/- each, and in default of the fine to suffer a further S.I. of six months. In Special Case No.1622/2016 arising from FIR No.147/2016, which was against the

appellant/accused Imran only, he was also convicted for the offence of Section 23(1)(a) of the Sindh Arms Act, 2013 and sentenced to R.I. for six (6) years, a fine of Rs.3000/-, and in default of the fine to suffer a further S.I. of three months, the sentences against him to run concurrently. Both appellants/accused are presently confined at Central Prison Karachi serving their sentence.

2. Along with his appeal, the appellant of Spl. Cr. A.T. Jail Appeal No.103/2018 (Imran s/o Ameer Bux) has moved M.A. No.2969/2018 praying for condoning the delay in filing the appeal as the same is time barred by 19 days. His appeal had been admitted subject to limitation. In his condonation application the appellant Imran has stated that being in jail, his relatives had promised to engage a counsel for him, but failed to do so within time; hence his jail appeal with delay. Though Section 5 Limitation Act, 1908 has not been made applicable to an appeal under the Anti-Terrorism Act, 1997, we observe that in cases where more persons than one are convicted in one trial and even if one of them files an appeal, then the administration of criminal justice dictates that if the appellate court deems just, any benefit of the judgment of the appellate court can also be extended to the non-appealing accused. Such rule in the administration of criminal justice was deployed in the cases of *Muhabbat Ali v. The State* (1985 SCMR 662), *Amin Ali v. The State* (2011 SCMR 323), *Hashim Qasim v. The State* (2017 SCMR 986), and *Rizwan Ahmed Qureshi v. The State* (PLD 2017 Sindh 653).

In the case at hand, the judgment appealed by the co-accused (Imran) in the time-barred Spl. Cr. A.T. Jail Appeal No.103/2018 is also appealed by the other accused (Shakeel) in the connected Spl. Cr. A.T. Appeal No.66/2018 which is within limitation. Both the accused were convicted at one trial for one and the same incident as both are said to have accompanied each other in the commission of the alleged crime. Therefore, even if the time-barred Spl. Cr. A.T. Jail Appeal No.103/2018 is ignored, if this Court finds for the appellant Shakeel in the connected Spl. Cr. A.T. Appeal No.66/2018, this Court can also consider the case against Imran alongside the case of Shakeel.

3. Per FIR No.146/2016, Adil Manzoor (hereinafter 'the Complainant') resides at a house in New Karachi, and at the back-side of such house he also runs a cardboard manufacturing factory; that on 04-08-2015 around 13:45 hours both the accused made their way into said factory, held the Complainant at gun-point and demanded Rs.5000/- (Rupees Five Thousand only) from him as *bhatta*; that on the Complainant's plea that he would need to go out of the premises to get such money, the accused allowed him to do so and followed him outside; that on coming out of the premises onto the street the Complainant saw a Police mobile passing nearby and shouted/called to them for help; that on seeing the Police both the accused ran, but were caught; that on a search of the accused by ASI Mehmood Ali, a .30 bore pistol with a magazine of four (4) live rounds was found on the person of Imran for which he did not have a license; that the Complainant informed the Police that both accused had demanded *bhatta* from him; that the pistol recovered from Imran was sealed by ASI Mehmood Ali, who did the relevant paper work, arrested both the accused, took them to the Police Station where FIR No.146/2016 was registered against both accused at 14:45 hours.

Per FIR No.147/2016, ASI Mehmood Ali along with other police officers were on patrol in a police mobile around 13:45 hours when they saw the accused, who on seeing the Police seemed to be disturbed; that the Complainant (Adil Manzoor) informed the Police party that the accused had demanded *bhatta* from him; both accused ran, but were caught; that on a search of the accused by ASI Mehmood Ali, a .30 bore pistol with a magazine of four (4) live rounds was found on the person of Imran for which he did not have a license; that the pistol recovered from Imran was sealed by ASI Mehmood Ali, who arrested both accused, took them to the Police Station where FIR No.147/2016 was registered against one of them i.e. Imran under Section 23(1)(a) of the Sindh Arms Act, 2013 on the information of ASI Mehmood Ali.

4. Charge was framed on 08-09-2017 under Sections 384/385/34 PPC read with Section 7(h) Anti-Terrorism Act, 1997 against both the accused (Shakeel and Imran), and also under Section 23(1)(a) Sindh Arms Act, 2013 against Imran. Both the accused pleaded not-guilty. The prosecution examined the following witnesses:

- (i) the Complainant/victim (Adil Manzoor) as PW 01;
- (ii) the uncle of the victim, Ayaz as PW 02;
- (iii) the scribe of the FIRs, ASI Javed Ibrahim as PW 03;
- (iv) the officer making the arrest and recovery, ASI Mehmood Ali as PW 04;
- (v) the I.O., Inspector Zulqurnain Akhtar as PW 05.

5. In his examination-in-chief, the Complainant (PW 01) stated that at the time of the incident, i.e., after one of the accused entered the factory, *"The said person had then demanded Rs. 5000/-, on which I said that I do not have such amount. In the meanwhile my father had also arrived, and the culprits had again demanded Rs.5000/-"*. He also stated that the accused who had demanded *bhatta* from him had agreed to let him (the Complainant) go outside to get the money but that *"the culprit had hold my son aged 11 years who was available in the factory, and allow me to go outside"*. He further stated that *"When I went outside, my sister who was watching the incident from the first floor had raised cries....."*. But in FIR No.146/2016 the Complainant did not make any mention of his father arriving at the scene to witness the incident, he did not make any mention of his son being present at the time or being detained by any of the accused, nor did he make any mention of his sister witnessing the incident.

6. It was on cross-examination that the Complainant had for the first time also introduced his brother as a witness of the incident in stating that *"At the time of incident I alongwith my brother were present inside the factory, and in the meanwhile my father had also arrived with my son aged 8 years as my father had brought my son from the school."* Neither FIR No.146/2016 nor the Complainant's examination-in-chief made any mention of his brother being present along side him at the time of the incident.

7. Thus, the Complainant (PW 01) had deposed that both his father and his brother had witnessed the demand of *bhatta* from the Complainant, the brother being present before-hand, while the father arriving during the incident. Assuming that the Complainant's sister, who allegedly also saw the incident from the first floor of the house, was not listed as a prosecution witness because she was a lady (that being the observation of the trial court), there is no explanation why the prosecution did not enlist the father and the brother of the Complainant as witnesses. The impugned judgment too does not explain why the trial court did not feel the need to summon the father and brother of the Complainant to corroborate the oral evidence of the Complainant when both such persons were material witnesses to Special Case No. 1621/2016. If both the father and brother of the Complainant were present at the time of the incident, then clearly they were "acquainted with the facts of the case" within the meaning of Section 265-F Cr.P.C. Thus, in circumstances where material witnesses were neither enlisted nor summoned, this Court can only draw an adverse presumption under Article 129 of the Qanoon-e-Shahadat Order, 1984 that had such persons been called as witnesses, their evidence would not have supported the case of the prosecution. To that effect, Illustration (g) of Article 129 of the Qanoon-e-Shahadat Order, 1984 reads:

"The Court may presume:

(g) that evidence which could be and is not produced would, if produced, be unfavorable to the person who withholds it."

8. Admittedly, Ayaz (PW 02) was not witness to the demand of *bhatta* as he had arrived when the accused had already been apprehended. Therefore, the only evidence of the demand of *bhatta* was the oral evidence of the Complainant (PW 01). In addition to the improvements that the Complainant tried to make in his evidence (discussed above in paras 7 to 9), his evidence is also contradictory and contradicted as discussed below and is thus not reliable to sustain the conviction:

- (a) On cross-examination, the Complainant said *“Ayaz is my maternal uncle, and my sister had informed him about the incident”*. But, Ayaz (PW-02), in his examination-in-chief contradicted that in saying that *“At about 02:30 afternoon the Complainant had called me on mobile phone and asked me to come at factory.”*
- (b) Per the Complainant’s examination-in-chief, his son was present in the factory at the time of the incident, but on cross-examination the Complainant stated that his son was brought to the scene of the incident by his father who had brought him home from school.
- (c) In FIR No.146/2016 the Complainant (PW 01) stated that both the accused and entered into his factory to demand *bhatta* and when he was allowed by them to go outside to get the money, both accused followed him outside. But in his examination-in-chief he stated that *“At about 01:45 afternoon, while I was sitting inside the factory one culprit had come inside, while the other had remained outside”,* and that when he (the Complainant) was allowed to go outside to get the money *“One culprit was already in the street while the other had come out from the factory.”* However, at no time did the Complainant identify which one of the two accused had come inside the factory to hold him at gun point and demand *bhatta*. This lacuna in the prosecution’s evidence is in our view fatal to their case as it fortifies the doubt that is already created by the discussion in paras 7 to 11 above and from the statements of the accused under Section 342 Cr.P.C. Per the accused Shakeel, he had in fact been taken into custody by the Police of P.S. Sachal on 03-08-2016 and he had been falsely implicated in this case. Per the accused Imran, the police had involved him in a false case when he refused to give them illegal gratification.

9. The manner in which the accused were apprehended is also not free from doubt. Per the Complainant’s narration in the FIR,

when he was allowed by the accused to go outside the house to get the money, that is when he saw a Police mobile passing by and shouted/called to them for help. In his examination-in-chief the Complainant stated that *"When I went outside, my sister who was watching the incident from the first floor had raised cries. In the meantime a police mobile, which was passing the same street had stopped. One culprit was already in the street while the other had come out from the factory."* The examination-in-chief of PW 04 (ASI Mehmood Ali) does not say that the Complainant shouted/called for help; rather he says *"During patrolling at 13:45 hours, we reached Kagazi medical center, Sector 11/F, there we saw two persons in suspicious condition, while the Complainant had informed me that the said two persons were asking for bhatta of Rs.5000/-"*

The case of the prosecution is that the accused were apprehended just outside the house of the Complainant albeit after a chase of 10/15 paces. On cross-examination, the Complainant said *"The police had apprehended the accused just outside my factory..."* ; but then he also said that *"About 20 minutes were spent in search of the accused persons by the police officials."*

10. As regards the recovery of the pistol from the accused Imran, the case of the prosecution is that the pistol was recovered on a physical search of Imran after both accused were apprehended. In his examination-in-chief PW 04 (ASI Mehmood Ali) stated *"Such memo of arrest and recovery was prepared on spot in presence of Adil Manzoor and HC Sirtaaj.....The case property was sealed on spot. Thereafter, I returned with accused, case property and complainant to PS".* On cross-examination, PW 04 said that *"I had prepared the memo of arrest and recovery by placing the papers on the bonnet of police mobile. At that time police mobile was parked in the same street..... It is correct to suggest that date and time are not mentioned on the sealed parcel."*

In juxtaposition to the above deposition of PW 04 (ASI Mehmood Ali), on cross-examination the Complainant (PW 01) stated that *"The memo of arrest and recovery was prepared on spot after search. The concerned police official had prepared memo of arrest and recovery while sitting in the factory. It is correct to suggest that the sealed*

parcel of bag of the recovered pistol does not bear the date and time. The crime weapon was sealed at PS.

Thus the two witnesses examined by the prosecution to give evidence of the recovery of the pistol, contradicted each other in stating the time and place of preparation of the memo of arrest and recovery, and the time and place of the sealing of the pistol. Such contradiction gives reason to doubt the recovery of the pistol itself.

11. In addition to the above, there is other evidence that strengthens the doubt of the recovery of the pistol. ASI Mehmood Ali (PW 04) stated to have recovered and sealed four (4) live rounds along with the pistol. But Report No.41 (Exhibit No.17/B) which records inter alia the taking-over by the I.O. of the custody of the case property including the pistol, records that along with the pistol there were three (3) live rounds, not four (4). And yet, the letter dated 08-08-2016 (Exhibit No.17/D) whereby the pistol was sent by the I.O. to the Forensic Division states that four (4) live rounds, not three (3), duly sealed with the pistol were being sent for examination. Furthermore, per the examination-in-chief of the I.O. (PW-05), he had sent the recovered pistol to the Forensic Division at Garden Headquarters, Karachi under cover of letter dated 08-08-2016 (Exhibit No.17/D). Per the I.O. (PW 05), the delay in sending the pistol for forensics occurred due to the fact that he was preoccupied with investigation. However, the letter dated 08-08-2016 (Exhibit No.17/D) and the Examination Report of the Forensic Division (dated 15-06-2018, Exhibit No.17/E), both state that the pistol was received by the said Division on 10-08-2016. While the delay in sending the pistol for forensics from the date of recovery to 08-08-2016 is explained by the I.O. in his deposition, there is no explanation of the whereabouts of the pistol in the intervening two days between the letter dated 08-08-2016 and its receipt at the Forensic Division on 10-08-2016. The Examination Report of the Forensic Division dated 15-06-2018 (Exhibit No.17/E) is evidence only of the working condition of the pistol. Apparently, the pistol was not even examined for finger prints of Imran.

Given the above discussed lacuna and contradiction in the prosecution's evidence, the statement of the accused Imran recorded under Section 342 Cr.P.C. that the pistol had been planted/foisted on him, cannot be ruled out beyond reasonable doubt.

12. For what has been discussed above, we hold that the prosecution has not been able to prove the charges against both accused beyond reasonable doubt. Therefore, the judgment dated 28-02-2018 passed by the Anti-Terrorism Court No.XIV, Karachi, in Special Case No. 1621/2016 and Special Case No.1622/2016 arising respectively from FIR No.146/2016 and FIR No.147/2016, is set aside and the accused Shakeel s/o Dodo Khan and Imran s/o Ameer Bux are acquitted. They are directed to be released from jail if their custody is not required in any other case.

JUDGE

CHIEF JUSTICE