

IN THE HIGH COURT OF SINDH AT KARACHI

Before: Mr. Naimatullah Phulpoto, J
Mr. Zulfiqar Ahmad Khan, J

Spl. Cr. Anti-Terrorism Jail Appeal No.128 of 2016

Appellant : Sikander @ Sani through Shamim Iqbal Soomro Advocate.
State : Through Mr. Muhammad Iqbal Awan DPG.
Date of Hearing : 19.01.2018
Date of Judgment : 22.01.2018

JUDGMENT

Zulfiqar Ahmad Khan, J:- Appellant Sikander @ Sani was tried by learned Judge, Anti-Terrorism Court No.IX, Karachi in Spl. Case No.140(III)/2013 in FIR No.217, 218 and 219 of 2013. After full dressed trial, the Appellant was found guilty vide Judgment dated 22.01.2016 which convicted him (a) u/s 324 PPC by sentencing to suffer RI for 10 years with fine of Rs.40,000/-, in default whereof to suffer further RI for 03 months (b) u/s 353 PPC to suffer RI for 02 years with fine of Rs.10,000/-, in default whereof, to suffer further RI for one month (c) u/s 23(1)-A of Sindh Arms Act to suffer R.I. for 07 years with fine of Rs.25,000, in default whereof to suffer RI for three months and (d) u/s 7(ff) of ATA, 1997 r/w section 4/5 of Explosive Substances Act to suffer R.I. for 14 years with fine of Rs.50,000/-, in default whereof, to suffer further RI for four months. All these sentences were ordered to run concurrently and benefit of section 382(b) Cr.P.C was also extended to the Appellant.

2. Brief facts of the prosecution case as averred in the FIRs are that Complainant SI Tanveer Ahmed lodged FIRs on 20.11.2013 stating that on the same day while he alongwith his subordinate staff namely PC Muhammad Nasir, PC Muhammad Tarique and PC/Driver Sujawal Khan were busy in usual patrolling on Govt. Mobile No.1, when they reached Rehmania Chowk, they received a tip-of about the presence of certain members of Lyari Gang War at Syed Mehmood Shah Road Bawa Butt Chowk with intention to commit crime. On such information they proceeded towards that place and reached there at about 0040 hours. Upon reaching there, they saw the Appellant/accused alongwith 4/5 other individuals, who upon seeing the police party started making direct firing upon them with intention to commit murder. Police party returned fire in self-defense wherein 55 rounds were used by the police party, whereafter the accused being armed with weapons was apprehended after having been encircled, while other persons made their escape good. On account of non-availability of private persons, PC Muhammad Nasir and PC Muhammad Tarique acted as mashirs, who found one repeater of 12 bore bearing No.11139SA of black colour loaded with one cartridge in its chamber and two in magazine. Upon his personal search, one Rifle Grenade from the side pocket of his shirt was also recovered. It is alleged that police mobile also received four bullets which passed through and through however no one was hurt. Upon making call by the police party, BDU team comprising of SIP Ayub Baloch and others reached at the spot and inspected the Rifle Grenade, which was in alive condition. The grenade was sealed and handed over to the Complainant. 08 empties of TT pistol, one of 12 bore repeater and 10 of SMG were also secured from the scene. Weapons and other recoveries made at the site were sealed on the spot and an

appropriate memo was prepared, after which the accused was brought to Police Station alongwith the property, where above referred three FIRs were registered against him.

3. After usual investigation, the case was challaned and the Appellant/accused was charged as per Ex.4, to which he pleaded not guilty and claimed to be tried.

4. During trial, prosecution examined P.W.1 Muhammad Ayub Baloch of BDS at Ex.1, who produced entry No.58 to 60 at Ex.P/1-A, clearance certificate at Ex.P-1/B, inspection report of Grenade at Ex.P-1/C, P.W.2 SI Tanveer Ahmed at Ex.2, who produced entry No.29 at Ex.P-2/A, memo of arrest and recovery at Ex.P-2/B, FIRs alongwith their respective entries at Ex.P-2/C to P-2/H, mem of inspection of the place of incident at Ex.P-2/F, entry No.38 at Ex.P-2/J, P.W.3 PC Muhammad Nasir at Ex.3, P.W.4 Inspector Zahid Shah at Ex.4, who produced letter dated 31.05.2014 at Ex.P-4/A, letter dated 04.12.2013 at Ex.P-4/B, letter addressed to Home Secretary at Ex.P-4/C, letter addressed to AIGP FSL at Ex.P-4/D, FSL report at Ex.P-4/E, letter dated 31.01.2014 at Ex.P-4/F, P.W.5 SI Liaqat Ali at Ex.P-5 and then closed its side.

5. Statement of accused u/s 342 Cr.P.C was recorded at Ex.12, wherein he denied prosecution's allegations and stated that about 16/17 days prior to the registration of the FIRs, he was taken away from Jooria Bazar where he was selling dry fruits on his hand-cart by a police officer namely Malik Nazeer on account of not paying illegal gratification to the said police officer. Whereafter he was booked in these false cases and all the recoveries are foisted upon him.

6. Mr. Shamim Iqbal Soomro, learned counsel for the Appellant mainly contended that as per FIRs, the incident took place on 12.11.2013 at 0040 hours which inter alia resulted in recovery of one Rifle Grenade at the place of incident, however, per P.W.1 Muhammad Ayub, BDU expert, he received a call at 0005 hours regarding the recovery of said Grenade. These two versions materially contradict each other as no such call could have been made 35 minutes before the start of the alleged encounter. He further pointed out that P.W.1 Muhammad Ayub vide Ex.P-1 has deposed that he inspected the Grenade at the Police Station, whereas according to statement of P.W.2 SI Tanveer Ahmed, the BDU team reached the spot and inspected the Rifle Grenade there, therefore, pointed out towards these two alarming contradicting statements which do not corroborate with each other. It was further stated that despite a claim of police encounter, where 55 rounds were fired no one received injuries, and while it has been stated in the FIR that police mobile was hit by bullets, however, no such memo was made nor any forensic report was presented before the trial Court. The BDU expert has deposed that he had inspected the Grenade at P.S. where it was sealed, whereas according to the Complainant Tanveer Ahmed (PW.2) the same was sealed at the spot. I.O. also did not produce any evidence showing bullet signs on the neighbouring walls to prove the version that an encounter did take place. He further stated that the I.O. did not examine any private person though alleged incident took place in a thickly populated area. By making reference to the FIRs and mashirnama of recovery of arms, the learned counsel distinguished that while in the FIRs the 12 bore repeater is mentioned to carry Sr. No.11139SA whereas in the entry No.35 Ex.P-2/F, number of the repeater is shown to be as 11139512 which fact has been admitted

by SI Tanveer Ahmed in his cross-examination. He further pointed out that mashir Muhammad Nasir has given number of the repeater in his cross-examination to be SA 11139 and in the FSL report Ex.P-4/E, number of the said repeater is mentioned as 11129SA, which are eye popping contradictions. He further argued that learned trial Court disbelieved the version of the accused without giving any cogent reasons. He finally submitted that for the aforesaid reasons, prosecution's case is highly doubtful, whose benefit shall travel to the Appellant as a right as per the dictum laid down in the case of Tarique Bashir Vs. The State (1995 SCMR 1345) and not as a grace.

7. Learned DPG on the other hand supported the case of the prosecution and stated that the police officials had no enmity with the Appellant to involve him in this case falsely. Learned DPG, however, candidly admitted that there is discrepancy in the number of repeater appearing in the various pieces of evidence. Further he admitted that none was injured in the alleged encounter, and whilst as per prosecution's own version, the incident took place on 12.11.2013, the repeater was sent to Expert only on 04.12.2013 and evidence with regard to safe custody of the same at the Police Station was not brought before the trial Court.

8. After hearing learned counsel for the parties, we have scanned the entire prosecution case. While we believe that the evidence of the police officials cannot be discarded simply because they belong to police force, nonetheless no Court should start considering a case with a prejudice to either side. The instant case, for the reasons detailed above, is marred with discrepancies and contradictions, nonetheless tried by an Anti-Terrorism Court for recovery of a repeater and Rifle Grenade, where fate of the accused

person solely hinged to the testimony of police officials, a prudent mind would always search for the possibility of corroborating police version with some independent persons, which in this case could have been easily arranged. It is alleged that the case at hand is the case of spy information, and the alleged encounter took place at 0040 hours where it is stated that 5/6 persons were present at the place of incident and the police party being heavily armed, a fundamental question arises that how a large number of those persons could have made their escape good and only the Appellant would have been arrested? Nowhere in the evidence is shown as to how the accused was identified in the middle of the night since no source of light has been pointed out. It is further alleged that in the encounter more than 55 rounds were shot but surprisingly none received injuries and the I.O. was unable to even show any signs on nearby buildings or other permanent structures evidencing outcome of such massive exchange of fire. While it is alleged that 4/5 bullets hit police mobile, however, neither evidence was brought before the trial court nor the same was presented through an Expert report. It is also not confidence inspiring to note from the deposition of P.W.4, that no sketch of the place of incident was drawn during inspection nor the Complainant pointed out any single bullet marks at the place of incident. The said witness in his examination-in-chief admitted that no previous criminal record was found against the Appellant. As rightly pointed out by learned counsel for the Appellant that there is a great divide between what has been stated by the Complainant and deposed by the BDU expert with regard to the recovery of the Rifle Grenade where the Complainant has stated to have handed over the Grenade to the BDU expert at the place of incident, whereas the BDU expert Muhammad Ayub has deposed

that he for the first time saw the Grenade in the Police Station. Most worrying aspect of the entire story is that the incident took place at 0040 hours and after having shot 55 rounds and going through the lengthy encounter when the Appellant was taken into custody and a Grenade was found from the side pocket of his shirt which acts would have consumed a considerable time, however, BDU expert through Ex.P-1 has deposed that he got to know of the incident at about 0005 hours. Shockingly more than 35 minutes before the encounter even started. To us, this is a fatal blow to the case of the prosecution. Be that as it may, it again took more than 22 days between the incident and when the repeater being sent to the Expert which delay has neither been justified nor any cogent reason in support thereof has been given, which gives serious jolts to the prosecution's case as to the safe custody of the same during this longish period. One can also not ignore that for the repeater found, the prosecution through various documents has assigned four different serial numbers to the same. Also shocking is that while FIR, memo of recovery and seizure and Roznamcha entry do not mention any serial number of the Rifle Grenade, however, the same finds mention in BDU report. Thus as such no sanctity can be attached to the such type of recovery. No doubt, Sindh Arms Act, 2013 is enacted to curb the proliferation of arms and ammunitions and punishment for possession of any firearm is extended to 14 years and with fine. The rule for safe administration of criminal justice is "*the harsher is the sentence, the stricter is the standard of proof*". Therefore, for the purposes of safe administration of criminal justice, some minimum standards of safety are to be observed so as to strike a balance between the prosecution and the defence and to obviate any chances of miscarriage of justice on account of exaggeration of the

investigating agency. Such minimum standards of safety are even otherwise necessary for safeguarding the Fundamental Rights of the citizen regarding life and liberty, which cannot be left at the mercy of police officers without prosecution of independent evidence. It is a known principle of appreciation of evidence that benefit of all favourable circumstances in the prosecution evidence must go to the accused regardless of whether he has taken any such plea or not. Reliance is placed on the case of Muhammad Nawaz and another v. The State and others (2005 PLD Supreme Court 40).

9. Now coming to the statement of accused u/s 342 Cr.P.C where he has utterly denied the prosecution story, he has stated that he is a street vendor selling dry fruit and was picked up 16/17 days prior to the alleged incident since he refused to pay bribe to one police officer namely Malik Nayar. The trial court despite presence of glaring infirmities in the prosecution case, gave no findings as to why the said version of the Appellant should not have been believed in particular when despite utterly faulty and laughable evidence having been presented against the Appellant, no motive has been brought to surface nor it has been alleged that he belonged to any terrorist or underground organization or gang. To the contrary, there is evidence on the file that despite having a search made, no case surfaced against the Appellant.

10. In this case, there are numbers of infirmities and lacunas, as highlighted above, which have created serious doubts in the prosecution case. It is a settled principle of law that for extending benefit of doubt, it is not necessary that there should be multiple circumstances creating doubt, if a single circumstance, which creates reasonable doubt in a prudent mind about the guilt of

accused, then he will be entitled to such benefit not as a matter of grace and concession, but as a matter of right, which has been held in the case of Tarique Pervez Vs. The State (1995 SCMR 1345).

11. For the above stated reasons, while relying upon the above referred dictum of the apex Court, we have come to the conclusion that prosecution has failed to prove its case against the Appellant beyond any shadow of doubt. Benefit of doubt is extended to the Appellant. Consequently, appeal is allowed and conviction and sentence awarded to the Appellant by the trial court is set-aside. Appellant namely Sikander @ Sani S/o Yar Muhammad is acquitted of the charges. Appellant shall be released forthwith if he is no more required in any other custody case.

Judge

Judge