IN THE HIGH COURT OF SINDH AT KARACHI

SPL. CR. ANTI-TERRORISM JAIL APPEAL NO.101/2015

PRESENT: MR. JUSTICE SALAHUDDIN PANHWAR & MR. JUSTICE NAZAR AKBAR

Appellant : Syed Maroof Shah,
through Mr. Mumtaz Ali Khan Deshmukh, advocate.

Respondent : The State,
through Ms. Rahat Ehsan, D.P.G.

Date of hearing : 10.01.2018.

Date of announcement : 31.01.2018.

J U D G M E N T

SALAHUDDIN PANHWAR, J. Through the instant appeal, appellant has challenged judgment dated 10.04.2015 passed by Anti-terrorism Court No.IX, Karachi, in Special Case No.34(III)/2014 arising out of FIR No.20/2014, P.S. Mehmoodabad, u/s 4/5 of Explosive Substances Act 1908, whereby he was convicted under section 7(ff) r/w section 5 of the Explosive Substance Act, 1908 and sentenced him to suffer R.I. for life imprisonment and fine of Rs.100,000/- and in case of non-payment thereof, to suffer R.I. for one year more.

2. Precisely relevant facts are that complainant ASI Khalid Yaqoob lodged FIR that on 11.01.2014 in continuation of crime No.19/2014 for offence u/s 353/324/34 PPC he alongwith HC Yaqoob Shahid, driver HC Najamuddin and PC Nizamuddin were busy on government mobile for patrolling when on spy information at around 0300 hours they reached at corner of street No.7 near *Kundi*

Chowk, Kashmir Colony, Karachi, where accused Maroof Shah @ Mehtab Baba @ T.T. s/o Sami Ahmed and his accomplices made direct firing upon police party with intention to commit their murder; police party also made firing in their defence and consequently, one of accused was apprehended on spot who disclosed his name as mentioned above; one 9 mm pistol without number was recovered from him and during personal search one hand grenade was also recovered from the fold of his *shalwar*; recovered articles were taken in custody by police and team of B.D.S. was informed through phone; thereafter police came back to police station where above FIR was lodged.

3. Heard learned counsel for appellant and learned D.P.G. and perused the available record *carefully.*

4. Learned counsel for appellant has argued that the appellant was actually taken from his house by the law enforcement agencies on 01.01.2014 and thereafter booked in present crime; that place of alleged incident is a thickly populated area but no independent person has been cited as witness; further, descriptions of hand grenade has not been given properly and material contradictions and discrepancies have come on record which made the prosecution case doubtful therefore impugned judgment is liable to be set aside.

5. Learned D.P.G. contended that prosecution has proved the charge against appellant beyond any reasonable doubt; B.D.U. reported that recovered hand grenade contained explosive material/substance; no material contradictions have been pointed

out to this Court; that due to fear and threat of terrorism citizen avoid becoming witness in such type of case; appellant has not proved any malice or enmity of police with him in order to establish his alleged false implication in present case; hence the impugned judgment is legal and proper.

6. It is *prima facie* matter of record that manner of claimed arrest of appellant and recovery from him resulted into lodgment of three (03) F.I.Rs i.e FIR Nos.19/2014 u/s. 353/324/34 PPC; 20/2014 (*instant one)* and 21/2014 under section 23-A(1) Sindh Arms Act, 2013 with same police station. It is a matter of record that appellant has been acquitted by the trial Court in connected case of alleged encounter vide judgment dated 01.08.2017 (Special Case No.2874/2014 arising out of FIR No.19/2014 u/s 353/324/34 PPC). Moreover, appellant has also been acquitted by this Court vide judgment dated 28.12.2017 passed in Cr. Jail Appeal No.389/2016 arising out of FIR No.21/2014 under section 23-A(1) Sindh Arms Act, 2013 on the conclusion, *inter alia*, that neither incident as alleged had taken place nor the subject recovery in that appeal, was effected from the possession of appellant. All three cases against the appellant, including those two that ended in *acquittal,* are based on one and same set of evidence.

7. The case of the prosecution rests on ocular count with regard to encounter as well circumstantial evidence in shape of recovery. By now certain *propositions* have attained status of *established* principles of law which *normally* cannot be ignored while determining guilt or innocence during *Criminal Administration of*

Justice. One of such propositions is that when ocular evidence is disbelieved in criminal case then recovery or corroborative evidences *fail* themselves (Dr. Israr-ul-Haq, 2007 SCMR 1427).

8. In the instant matter, witnesses are same as well *mashirnama* which *undeniably* disbelieved for one *charge* hence *legally* it is never safe to believe it for *other* charge. We would be safe in saying that in such *eventuality* the conviction could not be recorded unless the Court has other independent corroborative evidence to believe other part of the charge while relying on one and same set of evidence that is already *disbelieved* for one part of charge. The *corroboration* must match the test, detailed in the case of *Sughra Begum v. Qaiser Pervez* (2015 SCMR 1142) wherein it is held as:

> "In law, corroborative evidence means evidence of someone else other than the eyewitness whose evidence is needed to be corroborated therefore, this evidence of recovery cannot be held to be a corroboratory one because eyewitnesses cannot corroborate themselves but it must come from an independent source. According to the Black's Law Dictionary, 9th Edition, corroborating evidence has been defined as follows:-
>
> > *'Evidence that differs from but strengthens or confirms what other evidence shows (needing support)'*
>
> It has been repeatedly and emphatically laid down by this Court that **corroboratory evidence must come from independent source of unimpeachable nature to lend support or to supplement the ocular testimony of the eyewitnesses**."

9. In the instant case such *independent* corroboration lacked. The conviction cannot be recorded on mere *allegation* of one to have been found in possession of some explosives but requires establishing thereof, which shall always include *proving* of ocular

account *first.* It may also be insisted that in cases, arising out of one and same *transaction,* two *contrary* views i.e acquittal for one consequence of same series of *allegations (*charge) and conviction for other consequence of same series of allegations (*charge)* must be backed with lawful justifications because *credibility* of ***same set of witnesses***, being disbelieved, is a sufficient *doubt* for acquittal. Reference may also be made to the case of *Imam Bux alias Immo vs. The State* reported in 2013 YLR 30 wherein it was held as under:

> "I have come to the conclusion that the prosecution has failed to prove its case against the appellant/accused for the reason that two cases were registered against the appellant and others, one case bearing No.6 of 2010 under section 324,354, 148 ,149 PPC and other bearing No.7 of 2010 under section 13(d) Arms Ordinance, 1965, joint mashirnama was prepared in presence of the mashirs, both the cases were tried and decided by the same Court. Learned trial Court disbelieved the prosecution evidence in one case and more or less on the same evidence of prosecution witnesses convicted the appellant without assigning sound reasons."

10. It is a matter of record that ocular count and circumstantial evidence with regard to recovery of one unlicensed 9mm pistol alongwith 3 live bullets were disbelieved by this Court in judgment dated 28.12.2017 in Cr. Jail Appeal No.389/2016 and in main case appellant was acquitted by trial Court hence same set of evidence cannot be believed by this Court in present appeal for convicting the appellant for the recovery of hand grenade as alleged.

11. Since, except difference in *recovery* of crime weapon there has been brought no *independent* and further evidence by prosecution to believe the words of already *disbelieved* set of evidence hence on basis of *recovery* alone it would never be safe to hold that

prosecution succeeded in discharging its burden i.e ***to prove the charge beyond shadow of doubt.*** Accordingly, we feel ourselves safe in saying that instant case with regard to recovery of hand grenades is doubtful.

12. In view of what has been discussed above, we are of the view that parameters as settled by the superior Courts for appreciation of evidence for recording conviction, as well acquittal of appellant from main case are *sufficient* to accept present appeal which we hereby do. Resultantly, impugned judgment dated 10.04.2015 passed in Special Case No.34(III)/2014 is set aside. The appellant shall be released forthwith, if not required in any other custody case.

J U D G E

Imran/PA **J U D G E**