IN THE HIGH COURT OF SINDH AT KARACHI

Special Criminal ATA No.5/2013

Appellants	:	Naveed & Another, through Mr. M.A. Kazi & Mr. Irshad Jatoi, Advocates.
Respondent	:	The State through Mr. Abrar Ali Khichi, APG
Date of hearing	:	05.05.2017
Date of Judgment	:	

Present: Ahmed Ali M. Shaikh, CJ
Yousuf Ali Sayeed, J

JUDGMENT

YOUSUF ALI SAYEED, J. The Appellants, namely Naveed, son of Muhammad Hassan, and Qamaruddin, son of Bhaji, have assailed the Judgment dated 30.03.2013 passed by the Anti-Terrorism Court No.1, Malir, Karachi, whereby they were both convicted in Special Case No. A-159/2012 under S.386/34 PPC read with S.7 of the Anti-Terrorism Act, 1997, and sentenced to undergo five (5) years R.I. and fine of Rs.20,000/- and in case of non-payment to further suffer simple imprisonment for six (6) months, and whereby the Appellant No.1, Naveed, was also convicted in respect an offence under S.13-D of the Arms Ordinance and further sentenced in relation thereto to undergo three (3) years R.I. and fine of Rs.5,000/- and in case of non-payment to further suffer further imprisonment for three (3) more months . All the sentences were to run concurrently.

2. Briefly stated, as per FIRs Nos. 519 of 2012 registered at P.S. Shah Latif Town, Malir, Karachi on 24.08.2012 by one Dr. Muhammad Rafiq (the "**Complainant**"), it was said that for the past 10 to 12 days extortionate threats had been received by him on his mobile phone number 0346-2434286 from mobile phone number 0313-3376143, demanding payment of Rs.300,000/-. It is said that on 19.08.2012 he received an SMS directing him to immediately pay Rs.20,000/- though Easy Paisa against CNIC No.42000-0420446-7, and the pay the remaining Rs.300,000/- after Eid. It is said that he did not comply and a call was again received on 23.08.2012, when he agreed to pay the extortion amount the next day (i.e. 24.08.2012) at 3 PM after encashing the same from the Qadafi Town branch of Meezan Bank (the "**Bank**").

3. The aforementioned FIR goes on to narrate that the Complainant gave information of these facts to SI Tan-e-Raj at P.S. Shah Latif Town who informed him that he would investigate. It is said that the next day, having informed the police that he would pay the extortion amount through Cheque No.0082082 drawn on Account No.0100070210 (the "**Cheque**"), the Complainant proceeded to the Bank. It is said that as he alighted from his car in front of the Bank, he was approached by three persons on a motorcyle, who asked him whether he had encashed the cheque, and on being told that he was about to do so, directed him to hand over the cheque to them, which they would encash themselves. It is said that he handed over the cheque, when, at about 3 PM, SI Tan-e-Raj arrived at the scene with other police personnel and encircled them. However, as per what is stated, one of the accused persons who was seated at the rear of the motorcycle got off and escaped, whilst the two persons who were apprehended disclosed their names as Naveed and Qamar. It is said that the personal search of Naveed yielded inter alia the Cheque from his right qameez pocket, a coloured copy of CNIC No.42000-0420446-7 in the name of Muhammad Hassan, son of Ali Akber, from his front pocket, and a unnumbered 30 bore pistol with 4 live rounds in the magazine from the left side fold of his shalwar, whereas the personal search of Qamar yielded a Nokia 5030 mobile phone containing SIM No. 0313-3376143. FIR 520/12 was registered separately against Naveed in respect of the recovery of the unlicensed firearm from his possession.

4. On 22.03.2013, the learned trial Court charged the Appellants of inter alia having "demanded Bhatta for Rs.300,000/- from the complainant by giving life threats to the complainant and his family members and also demanded Rs.20,000/- by way of easy paisa and on 24.08.2012 at 1500 hour at main National Highway Road opposite Meezan Bank Qazafi Town Bin Qasim Branch, Shah Latif Town, Karachi, alongwith absconding co-accused in furtherance of your common intention, committed extortion by putting complainant Dr. Muhammad Rafique in fear of death". Naveed was further charged with possession of an unnumbered unlicensed 30 bore pistol. No mention whatsoever was made in the Charge of the date or time of the extortion threats, the Cheque, or the CNIC against which the payment of Rs.20,000/- was demanded. The Appellants pleaded not guilty and claimed trial.

5. The Prosecution examined the Complainant (PW-1), SI Tan-e-Raj (PW-2), HC Abdul Shakoor (PW-3) and Inspector Saleem Shah, the IO of the case (PW-4). And based on such depositions and the evidence produced the learned trial Court found the Appellants guilty in terms of the impugned Judgment.

6. Learned counsel for the Appellants contended that the evidence was insufficient for the trial Court to have recorded a conviction, and that that the entire case of the prosecution was marred by gaps and defects that were gravely prejudicial to the Appellants and undermined the very concept of a fair trial. He pointed out that the FIRs had been registered after the supposed incident culminating in the arrest of the Appellants notwithstanding that it was said the Complainant had given information of a cognizable offence to the police prior thereto. He submitted that the so-called facts narrated in the FIR were a fabrication that had been subsequently designed to falsely implicate the Appellants.

7. He pointed out that the Complainant had subsequently deposed contrarily to what had been disclosed in the FIRs, and that the testimony of the other prosecution witnesses was also inconsistent. He submitted that whilst it was evident from the testimony of the prosecution witnesses that many other persons, including the security guard of the Bank, were shown as being present at the time of arrest and seizure, none of these persons had been called upon as witnesses.

8. Learned counsel for the Appellants referred to the depositions of Complainant (Exhibit No.11), and pointed out that that Complainant had stated in his examination-in-chief that “I am not sure the present accused in the Court are the same culprit are not”. Furthermore, whilst the date shown as the alleged date of incident in the body of FIR is 24.09.2012, in his examination-in-chief as well as under cross examination the Complainant disclosed the date as 28.08.2012. He further pointed out that the Complainant had also even otherwise conceded that at the time of handing over the cheque neither threats were given nor a weapon was shown, and that the Complainant had admitted that the requisite funds were not available in his account at that point. Learned counsel submitted that this created serious doubt as to the whole prosecution story.

9. Whilst the aforementioned testimony has to be viewed in the context of the further statement of the Complainant that he had been approached by the Appellant's family members beseeching forgiveness, such testimony nonetheless compromises the foundation and integrity of the prosecution's case.

10. Moreover, learned counsel pointed out that two persons associated with the Complainant, namely Rashid Ali and Sain Dad, who were said to have been present at the spot and who, along with the Complainant (PW-1) are shown as mashirs to the Memo of Arrest and Seizure (Ex. 11-A), were given up as witnesses by the prosecution vide statement (Ex. 15). It is a settled principle of law that if a party fails to produce before the Court the best piece of evidence that is available with it, then a presumption or adverse inference may be drawn in terms of Illustration (g) of Article 129 of the Qanun-e-Shahadat Order, 1984, that had the said piece of evidence been produced before the Court it would have been unfavourable to such party. Such a presumption can be drawn in the instant case that had Rashid Ali and Sain Dad been produced in Court they would not have supported the prosecution. Thus, non-examination of both these witnesses has materially undermined the prosecution's case.

11. Learned counsel also invited attention to the testimony of SIP Tan-e-Raj (PW-2), whose deposition is Ex. 12, who admitted under cross examination that it was correct to suggest that it is not mentioned in the Memo of Arrest and Seizure (Ex. 11-A) that the Cheque was handed over in his presence or that he had asked person from amongst the public present at the scene to serve as witnesses to the memo. Furthermore, he had to concede that whilst the Memo of Arrest and Seizure (Ex. 11-A) showed the recovery of four live cartridges, the case property present in the Court consisted of four live cartridges as well as one empty. Learned counsel also pointed out that whilst SIP Tan-e-Raj (PW-2) had deposed in his Examination-in-Chief that the alleged Cheque was recovered from the shirt pocket of accused Naveed, PW-3 HC Abdul Shakoor Khan had contrarily deposed in his Examination-in-Chief (Ex.13) that the Cheque was recovered from the possession of Qamar.

12. Lastly, turning to the testimony of the Inspector Saleem Shah, the IO of the case (PW-4), whose deposition is Ex.14, learned counsel pointed out that the IO had admitted that he had not produced the record of communication data between the cell phones of the Complainant and the Appellant, and that he had not even verified the ownership of the SIM of the Complainant or the concerned Appellant from the cellular companies. He also conceded that he had not obtained any report as to the availability of finger and thumb impression of the Appellants on the case property. He further conceded that the Appellants did not have any previous criminal record.

13. Additionally, it merits consideration that at the time of recording of their statements under S.342 Cr. P.C the Appellants do not appear to have been confronted with the recovered items forming part of the prosecution evidence or the FSL Report pertaining to the pistol said to have been recovered, and whilst a cheque for Rs.300,000/- was mentioned in one of the questions put to them, the question was couched in general terms and did not specify any further details. In fact, it is apparent from a plain reading of the S. 342 Statements that the entire line of questioning was lacking in material particulars. All of this runs contrary to the settled principle that a piece of evidence not put to an accused person at the time of recording of his statement under S. 342, cannot then be considered against him.

14. It is also well settled that the standard of proof beyond a reasonable doubt is a fundamental principal of all criminal trials, and even a single circumstance that serves to create reasonable doubt in a prudent mind as to the guilt of an accused entitles him to the benefit thereof, not as a matter of grace or a concession, but as a matter of right. However, in the instant case, convictions were recorded despite the aforementioned discrepancies on record, which in our view, serve to create appreciable doubt as to the veracity of the prosecution's case.

15. When faced with the aforementioned discrepancies in the prosecution evidence, the learned APG was unable to put forward any argument to controvert the same or support the finding of guilt recorded in the impugned Judgment.

16. As such, the impugned Judgment cannot sustain, and this Appeal succeeds. These are the reasons for our short Order dated 05.05.2017 whereby the Appeal was allowed with the result that the Appellants were acquitted of the charges and the conviction and sentence awarded to them was set aside.

JUDGE

CHIEF JUSTICE

Karachi
Dated _____