

IN THE HIGH COURT OF SINDH AT KARACHI

Special Criminal Anti Terrorism Appeal No.162/2016

Appellant : Zahid Hussain @ Bundle & Another,
through Mr. Mumtaz Ali Khan, Advocate.
Respondent : The State, through Mr. Abrar Ali Khichi,
APG.

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Date of hearing : 30.05.2017
Date of Judgment:

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

JUDGMENT

YOUSUF ALI SAYEED, J. The Appellants, Zahid Hussain, son of Akhtar Hussain, and Muhammad Sajjid, son of Shahab Uddin, have assailed the Judgment passed on 02.05.2016 by the Anti-Terrorism Court No. II at Karachi in Special Case Nos. B-58, B-59 and B-60 of 2015 , ensuing from FIR No.339/14 under S. 384/385/34 PPC, FIR No. 340/14 under S. 353/324/34 PPC registered as P.S. Mominabad, Karachi and S.23(1)(A) of the Sindh Arms Act 2013 respectively. In relation to Special Case Nos. B-58 and B-59 of 2015 both the Appellants were convicted 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, as well as sentenced to suffer R.I. for three (3) years. Furthermore, in relation to Special Case No. B-60 of 2015 ensuing from FIR No. 341/14, the Appellant No.1, Zahid, was convicted and further sentenced to undergo five (5) years R.I. and fine of Rs.25,000/- and in case of non-payment to further suffer further imprisonment for six (6) more months. All the sentences were to run concurrently, and the benefit of S.382-B Cr. P.C. was also extended.

2. Briefly stated, in terms of FIR No. 339 of 2014, registered on 11.11.2014 by one Syed Abdul Shahid (the “**Complainant**”), it was stated that on 09.11.2014 an extortionate phone call had been received by him on his cellphone number 0342-2325691 from cellphone number 0347-3553159, and an unknown caller had demanded payment of a sum of Rs.10,000/- via EasyPaisa transfer against CNIC Number 42401-5532017 (one digit missing), which had been sent by the Complainant due to fear. It was further stated that a call was again received that day (i.e. 11.11.2014) at 0200 hours from cellphone number 0347-3553156, and the same voice had demanded a sum of Rs.300,000/- and mentioned that the sum should be arranged for purpose of delivery at a time and location to be specified.

3. FIR No. 340 of 2014 was subsequently registered on 12.11.2014 in relation to an encounter said to have taken place between the police and two assailants near the graveyard at Rahim Shah Colony, Sector 11, Orangi Town, Karachi (the “**Crime Scene**”), during the course of which one of them, namely Zahid, was shot and apprehended, whereas the second assailant fled the Crime Scene but was named/identified by Zahid as being the Appellant No.2, Sajid. FIR No.341 of 2014 pertains to the unnumbered and unlicensed 30 bore pistol shown to have been recovered from the possession of Zahid.

4. On 22.03.2013, the learned trial Court charged the Appellants with extortion of Bhatta from the Complainant as well as the encounter said to have ensued between them and the police at the Crime Scene. The Appellant No.1 was also further charged with possession of the aforementioned firearm. The Appellants pleaded not guilty and claimed trial.

5. The Prosecution examined the Complainant (PW-1), SIP Gul Haider (PW-2), PC Abdul Sattar (PW-3), ASI Muhammad Akram (PW-4), Sub-Inspector Gul Faraz Khan, the initial Investigating Officer of the case (PW-5), and Inspector Orangaib Jadoon, who subsequently superseded SI Gul Faraz as the IO (PW-6). Based on their depositions and the evidence produced, the learned trial Court found the Appellants guilty in terms of the Impugned Judgment, hence this Appeal.

6. Learned counsel for the Appellants contended that the evidence was insufficient for the trial Court to have recorded a conviction, and that the case of the prosecution was riddled with gaps that were overlooked at trial to the detriment of the Appellants. He submitted that the entire version of events narrated in the case for the prosecution was a fabrication and albeit the prosecution failing to discharge the burden of proof, the learned trial Court misread the evidence and failed to resolve the benefit of doubt in favour of the Appellants. Accordingly, he prayed that the Impugned Judgment be set aside.

7. Having heard the arguments advanced at the bar and examined the Impugned Judgment in light thereof and on the basis of the evidence on record, there are certain points that have come to our attention, to which we now turn in our appraisal and determination of the matter.

8. Firstly, in FIR No. 339 (Ex No. P/3), the Complainant had specified that he had received extortionate calls on his cellphone number 0342-2325691. These calls were said to have been received on 09.11.2014, from cellphone number 0347-3553159, and on 11.11.2014 (i.e. the date of the FIR), from cellphone number 0347-3553156. Apparently both these calls were made by the same person as it was categorically mentioned by the Complainant that the voice of the caller was the same on both occasions. More importantly, whilst the aforementioned FIR was registered at 0730 hours, later that very day (i.e. 11.11.2014), at 2230 hours, the Complainant reappeared at P.S. Mominabad and handed over a USB said to contain a recording of the telephonic conversation. Strangely, there is no mention in the FIR itself of any such recording having been made, and whether such recording was of one or of both conversations remains unknown, as even more strangely, there is no mention of the same being heard in Court during the course of the trial and the USB itself was never produced as an Exhibit, albeit that the Memo regarding Seizure of the USB was produced by the Complainant during the course of his examination-in-chief as Ex No. P/5.

9. As far as the further conversation inter se the Complainant and extortionists where the details of the drop-off to be made at the Crime Scene were disclosed, as per Report No.26 entered in the Daily Diary at PS Mominabad at 1605 hours on 12.11.2014 (Ex. No. P/11), the Complainant is shown to have appeared at the PS and stated that a call had been received at about 3:30 during which he had been told that the caller along with an accomplice was standing near the Crime Scene. This conflicts with the Complainant's subsequent deposition, where he stated that he had been called to the graveyard at 4:30 PM. Furthermore, this last call is not reflected in FIR No. 340. Nor was the recording said to have been made of this call entered in evidence.

10. Secondly, there was no link established between the Appellants and the sum of Rs.10,000/- said to have been transferred by the Complainant via EasyPaisa. The Money Transfer Receipt produced by the Complainant as Ex No. P/5 reflects the 'Receivers CNIC' as 42401-5532017-9, but this is not the CNIC of either of the Appellants. Nor was this CNIC or even a copy thereof recovered from their possession. In fact, it appears that the aspect of the Receivers CNIC was never probed.

11. Crucially, it also merits consideration that there was no link established between the Appellants and the cellphone numbers from which the extortionate calls are said to have been made to the Complainant. As per the Prosecution, such calls were made to the Complainant's cellphone number 0342-2325691 from cellphone numbers 0347-3553159 and 0347-3553156. However, neither of these numbers were shown to be registered in the name of either of the Appellants, nor were any SIMS corresponding to these numbers shown to be recovered from their possession. In fact, the CDR Data shown to have been obtained by Sub-Inspector Gul Faraz Khan (PW-5) and produced by him as Ex. No. P/19 shows cell number 0347-3553156 to be registered in the name of one Zubaida under CNIC Number 42000-0474839-6 and does not even otherwise reveal any call nexus between such number and that of the Complainant. In fact, the CDR data produced does not appear to relate to the cellphone number of the Complainant at all. Furthermore, the same CDR Data also disparately and quite inexplicably refers to cell number 0345-3553159 (shown to be registered in the name of one Ghulam Muhammad under CNIC Number 41203-2233440-

1), when this is not even the number from which the extortionate call was said to have been made – the same having a 0347 code.

12. Thus, there appear to be visible gaps in the prosecution evidence relating to the charge of extortion that were never properly investigated. In fact, as conceded by SI Gul Faraz Khan (PW-5), he was not competent in rank to conduct the investigation, which is presumably why the same was then entrusted to Inspector Orangzaib Jadoon (PW-6). However, as per the deposition of the latter (Ex. No. P/26), the only part he played was to collect the FSL Report (Ex. No. P/27) and submit the challan. As such, the only evidence that apparently links the Appellants to the charge of extortion is their alleged presence at the Crime Scene, receiving the drop-off amount from the Complainant and, in the case of the Appellant No.1, his arrest on culmination of the encounter.
13. It is well settled that the standard of proof beyond a reasonable doubt is a fundamental principle 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.
14. In light of this basic principle, as far as the Appellant No.2 is concerned, it has to be considered that he was not apprehended at the Crime Scene, and was implicated in FIR No. 340 on the basis of ostensibly having been named/identified by the Appellant No.1 as the second assailant. In his Statement under S.342 Cr. P.C., the Appellant No.1 dispelled any suggestion as to having implicated the Appellant No.2 in as much as he denied any association with him. Nonetheless, the Appellant No.2 was shown to have been rearrested in relation to FIR Nos. 339 and 340 as per the Memo Regarding Re-Arrest of the Accused prepared by Sub-Inspector Gul Faraz Khan (PW-5), which was produced in evidence as Ex. No. P/15. As per this document, the Appellant No.2 is said to have been 'tactfully interrogated' and during interrogation 'made disclosure about both cases'. Sub-Inspector Gul Faraz Khan stated in his deposition (Ex. No. P/14) that "the accused present in the Court wearing white cap is the accused Sajid who had confessed before me and who was arrested before me". However, under cross-examination he conceded that "It is correct that in my statement u/s 161 I had not stated that accused had disclosed to me that he had gone

alongwith Zahid to take bhatta and had done firing. I see Ex. P/15 and say even in this it is not mentioned that accused Sajid had confessed...”.

15. Moreover, whilst convicting the Appellant No.2, the learned trial Court observed that SIP Gul Haider (PW-2) and PC Abdul Sattar (PW-3) had identified Sajid to be the same person who had fled the Crime Scene and based its determination on such an identification. However, the deposition and cross of PC Abdul Sattar shows that he made no such identification of the Appellant No.2 at trial. In fact, he stated under cross-examination that “the other accused I can not identify who had escaped from the scene of Crime”. Furthermore, whilst, SIP Gul Haider did identify the Appellant No.2 in his deposition (Ex. No. P/7), he subsequently admitted under cross-examination that he had not previously provided a description of the fleeing suspect in his S.161 statement, nor even mentioned that he could make a positive identification. As such, we are of the opinion that there was insufficient evidence to bring home a conviction of guilt against the Appellant No.2 on either the charge of extortion or that of involvement in the encounter said to have ensued at the Crime Scene.

16. Turning now to the case of the Appellant No.1, it is noteworthy that there also appears to be some contradiction surrounding the events said to have ensued immediately preceding the encounter at the Crime Scene, in as much as the Complainant (PW-1) stated in his deposition (Ex. No. P/1) that and he had been asked to keep the money at the side of the graveyard wall. He went on to further state that “I had kept the money near the wall of the Graveyard” and that Zahid was apprehended by the police “as he took the money and tried to go”, whereas in the Memo of Arrest and Seizure (Ex. No. P/6) prepared by SIP Gul Haider, it is stated that “then by finding two suspected persons standing at the corner of the graveyard sent the complainant towards culprits for handing over them Bhatta money.” The deposition of SIP Gul Haider (Ex. No. P/7) is consistent with this version, in as much as he stated that “I saw two persons were standing near the corner of the graveyard and I could see them. I had sent the complainant towards them. When I suspected that that they are the same as they proceeded to go I surrounded them”. This version is supported by PC Abdul Sattar (PW-3), and under cross-examination, when questioned in this regard, the Complainant himself conceded that he had not mentioned in his statement under S. 161 Cr. P.C. that he had kept the money in the graveyard near the wall.

17. Thus, it merits consideration that the circumstances surrounding the arrest do not conform to a scenario where the Appellants were caught *in flagrante delicto* collecting the bhatta amount from a specified drop-off point as per instructions earlier conveyed to the Complainant or of the Complainant being approached whilst awaiting contact, and is instead a case of the Complainant seeking out persons who were found to be present at the Crime Scene and were pointed out by SIP Gul Haider. It also has to be borne in mind that there is no mention by the Complainant that the caller had disclosed any means whereby he and his accomplice were to be identified as the persons to be approached for the purpose of the bhatta payment. Thus, under such circumstances, whilst the charges against the Appellant No.1 as to his firing during the encounter at the Crime Scene and being caught in possession of an unlicensed firearm remain to be examined in their own right, in our view his mere presence at the Crime Scene would not of itself serve to conclusively establish his guilt in relation to the charge of extortion in the absence of other evidence establishing the bhatta calls and linking the Appellant No.1 thereto, as well as to the payment said to have been made by the Complainant via EasyPaisa. In the absence of such corroborative evidence, this aspect of the case becomes doubtful in our view, and the benefit in that regard has to be extended to and resolved in favour of the Appellant No.1.
18. As regards the charges levelled in relation to the encounter and recovery of the unlicensed firearm shown against the Appellant No.1, there are some discrepancies, in as much as Report No. 36 dated 12.11.2014 (Ex. No. P12), said to document the return of the police party from the Crime Scene following the encounter, refers to a departure report without specifying the number of such report, which remains blank. Such departure report was itself not produced in evidence. Additionally, no specific description or sketch of the pistol was provided, which was simply referred to in the Memo of Arrest and Seizure (Ex. No. P/6) as “a 30 bore pistol, without number & license, Pak made, loaded with magazine containing two rounds while one bullet found in chamber”. However, as per PC Abdul Sattar (PW-3), on the Appellant No.1 being searched, the recovered pistol contained one bullet in the chamber and one in the magazine.

19. Furthermore, the Deposition of the Complainant (PW-1) shows that upon the cloth parcels containing the case property being desealed in Court, one was found to contain a pistol, with three bullets in the magazine and one empty, and the other was found to contain four empties of firearms of the police and three empties of firearms of the accused. This leaves one empty unaccounted for as in terms of the Memo of Arrest and Seizure (Ex. No. P/6) it was recorded that "From the spot, 04 fired shells of official SMG and three of 30 bore Pistol were also seized by the police".

20. Be that as it may, barring these few inconsistencies, the evidence of all of the prosecution witnesses who were shown to be present at the Crime Scene, including the Complainant, appears to otherwise be more or less uniform in the context of the encounter and recovery shown from the Appellant No.1, and positively placed the Appellant No.1 as the assailant who was injured and arrested thereat in possession of a 30 bore pistol. Whilst, in his statement under S.32 Cr. P.C., the Appellant No.1 generally denied the allegation of extortion and his involvement in the encounter, it merits consideration that he failed to advance any reason why the Complainant would have falsely implicated him, and the cross-examination of the Complainant also does not hint at any suggestion of enmity or false implication. As such, this testimony of the Complainant, as corroborated by that of the police personnel, remained unchallenged and unshaken and in the face thereof the aforementioned inconsistencies are not so glaring as to unsettle the finding against the Appellant No.1 as to his involvement in the encounter and possession of the firearm.

21. However, a point of some note is that there were no injuries caused to the law enforcement personnel during the alleged encounter despite their apparently having encircled the Appellants and it being said that they fired straight at the police personnel with deadly intent, and as it transpires, the only gunshot injuries sustained were by the Appellant No.1, who is said to have been taken directly from the Crime Scene to Abbasi Shaheed Hospital for treatment. The only medical evidence in this regard is a faintly legible Medical Report of that date bearing M.L. No. 8291/14 (Ex. No. P/25) issued by the Medico Legal Officer, indicating that he was brought there by one ASI Jan Muhammad. However, neither this ASI nor the MLO were produced as witnesses, nor indeed is there any further reference to the ASI in any other document.

22. As per the aforementioned Medical Report, the Appellant No.1 received gunshot wounds just above both knees. Indeed, in the Memo of Arrest and Seizure (Ex. No. P/6) whilst it is recorded that “the accused sustained bullet shots on calf of both legs” it is also categorically mentioned that he “fell down being injured”. Report No. 36 dated 12.11.2014 (Ex. No. P12) also similarly reflects that the Appellant No.1 fell down upon being injured. This begs the question as to how he remained standing after having received the first injury so as to again be shot in the other leg, and makes the second gunshot wound questionable, as it is improbable that the Appellant No.1 was simultaneously shot in both legs or, even more remarkably, that a single ‘magic bullet’ went on to cause the injuries to both his legs.
23. The further point that is of considerable concern to us is the treatment admittedly meted out to the Appellant No.1 in the aftermath of the encounter. In this regard, it falls to be considered that as per the Medical Report the Appellant No.1 arrived there at 5 PM and despite his gunshot wounds being recorded as fresh, in a matter of hours he had inexplicably been removed from the hospital to PS Mominabad and placed in the lockup. SIP Gul Haider (PW-2) stated in his deposition (Ex. No. P/7) that after the accused being taken to the hospital for treatment he was brought back to the PS and placed in the lockup. This also stands confirmed from deposition of PW-3 and from the Memo of Arrest and Seizure (Ex. No. P/6) wherein there is a reference to the aforementioned Medico Legal Report and a confirmation that the Appellant No.1 had been brought back to the PS. As per PW-3, they left the hospital at about 7 or 7:15 PM. At the very latest, the Appellant No.1 was back in the lockup in his injured state by 2045 hours, which is the time shown in Report No. 36 dated 12.11.2014 (Ex. No. P12), wherein this is noted. This state of affairs is disturbing to say the least, as it amounts to a denial of proper medical treatment and constitutes a clear violation of the right to life. In the wake of such inhumane treatment, it is scarcely surprising that one the legs of the Appellant No.1 had to be amputated, as reflected in his statement under S.342 Cr. P.C. and also noted in Para 49 of the Impugned Judgment.

24. In view of the foregoing, the finding of guilt recorded against the Appellant in terms of the Impugned Judgment is set aside in its entirety and he is acquitted of all charges against him. As regards the Appellant No.1, whilst the finding of guilt in relation to the charge of extortion is reversed and conviction against him is set aside to that extent, this Appeal is dismissed to the extent of the finding of guilt recorded against him in relation to the further charges under S. 353/324/34 PPC and under S.23(1)(A) of the Sindh Arms Act. However, the record shows that he remained in jail as an under-trial prisoner and then as a convict after decision of the case and has thus remained incarcerated for a major portion of the sentence. In our view, in mind of the facts and circumstances of the case, the sentence already undergone by him would be sufficient to meet the ends of justice. Resultantly, while maintaining his conviction under S. 353/324/34 PPC and under S.23(1)(A) of the Sindh Arms Act, the quantum of sentence awarded in that regard is reduced to the period already served out. As such, both the Appellants are ordered to be released forthwith unless required in any other case.

25. The captioned Appeals are disposed of in the aforesaid terms.

JUDGE

CHIEF JUSTICE

Karachi
Dated _____