

IN THE HIGH COURT OF SINDH AT KARACHI

Special Criminal AT Appeal No.200 of 2018
Special Criminal AT Appeal No.201 of 2018

Present:

Mr. Justice Naimatullah Phulpoto
Mr. Justice Mohammad Karim Khan Agha

Appellants: Muhammad Nadeem Khan son of Faheem Khan through Mr. Hasnain Ali Chandio, Advocate
Sohailuddin son of Raeesuddin through Mr. Muhammad Ali Waris Lari, Advocate
Respondent: The State through Mr. Muhammad Iqbal Awan, Deputy Prosecutor General Sindh
Date of hearing: 15.10.2018

J U D G M E N T

NAIM ATULLAH PHULPOTO, J.- Muhammad Nadeem Khan and Sohailuddin, appellants, were tried by learned Judge, Anti-Terrorism Court-X, Karachi for offences under Sections 4/5 of the Explosive Substances Act, 1908 in Special Cases Nos.AJ-254/2016 and AJ-253/2016. After full-dressed trial, vide judgment dated 31.07.2018, appellants were convicted under sections 4/5 of the Explosive Substances Act, 1908 and sentenced to undergo 14 years R.I. each. Appellants were extended benefit of Section 382-B, Cr.PC.

2. Brief facts of the prosecution case are that on 17th/18th January 2016, SIP Syed Muhammad Farooq Azam left police station Mobina Town along with subordinate staff for patrolling duty at 2210 hours, vide *Roznamcha* Entry No.31. During patrolling, SIP received spy information on his cellular phone in respect of the presence of some terrorists, carrying explosive substance material, with intention to commit some terrorist activity within the area of Matroville-III. After receipt of such information, police party proceeded to the pointed place. At about 2355 hours police party reached at *Mosmiyat* chowk where saw two persons standing there. It is alleged that accused persons while noticing the police mobile tried to conceal themselves behind the bushes at the backside of University Road. They were surrounded and caught hold by the police. On inquiry, they disclosed their names as Nadeem Khan son of Faheem Khan and Sohailuddin son of Raeesuddin. SIP Farooq Azam conducted personal search of accused in presence of police mashirs and recovered from possession of

accused Nadeem Khan one hand grenade, his original CNIC, cash Rs.850 and one Motorola mobile set. SIP conducted personal search of another accused, namely, Sohailuddin and recovered a shopping bag from his right hand, it was opened, there were 69 ball bearings, one detonator and two feet electric wire of red colour in the bag. Mashirnama of arrest and recovery was prepared in presence of mashirs ASI Bakhat Ali and HC Faisal. Both accused and explosive substance were brought to the police station where separate FIRs were registered against both the accused vide Crimes Nos.15 and 16 of 2016 under sections 4/5 of the Explosive Substances Act, 1908 read with section 7 of the Anti-Terrorism Act, 1997. BDU team was called for defusing the explosive material at police station.

3. Investigation of the cases was conducted by ASI Nadeem Ghouri. IO inspected the place of wardat in presence of mashirs, prepared such mashirnama. IO recorded 161, Cr.PC statements of the PWs. Explosive substance was defused by BDU at police station. Thereafter, explosive material was dispatched to the Forensic Laboratory for report. On conclusion of the investigation, challan was submitted against the accused under the above referred sections.

4. Trial court ordered for joint trial of the aforesaid cases under the provisions of Sections 17 and 21-M of the Anti-Terrorism Act, 1997 vide order dated 18.04.2016.

5. Trial court framed charge against the accused at Ex.3. Both accused pleaded not guilty and claimed to be tried.

6. At trial, prosecution examined PW-1 SIP Syed Muhammad Farooq Azam at Ex-5, PW-2 Bakht Abro at Ex.8, PW-3 Muhammad Amir at Ex.9, PW-4 and Javed Ahmed Jalbani at Ex.10. Thereafter, prosecution side was closed vide statement dated 10.05.2018 at Ex.11.

7. Statements of accused were recorded under section 342, Cr.PC at Ex. 13 and 14. Both accused claimed false implication in these cases and denied the prosecution allegations. Accused Sohailuddin raised plea that he was arrested by Rangers personnel. Both accused declined to give statement on oath in disproof of prosecution allegations. No evidence was led in defence by the accused.

8. Learned Judge, Anti-Terrorism Court-X, Karachi, after hearing the learned counsel for the parties and assessment of evidence available on record, vide judgment dated 31.07.2018, convicted and sentenced the appellants as stated above, hence these appeals have been separately filed. By this common judgment we intend to decide the same.

9. The facts of the case as well as evidence produced before the trial Court find an elaborate mention in the judgment dated 31.07.2018 passed by the trial court and, therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

10. Learned advocate for appellants contended that it was the case of spy information but no independent and respectable person of the locality was associated as mashir in these cases; that it was the night time incident, source of light has not been disclosed by the prosecution; that there was delay of about six months in sending the hand grenade/explosive substance to the expert for report, no explanation for such delay has been furnished by the prosecution; that there was no evidence of safe custody of the explosive substance at the *Malkhana* of the police station and safe transmission to the expert. It is further argued that brother of appellant Nadeem Khan, namely, Amir had filed Constitution Petition No.D-7469/2015 on 26.11.2015 against police but the defence plea was ignored by the trial court without any legal justification. Lastly, it is argued that appellants were concealing themselves behind the bushes at night time, the element of the terrorism was missing in these cases. In support of their contentions, learned counsel for the appellants placed reliance upon the cases of ASIF KHAN versus The STATE (2018 YLR 661) and INTEKHAB AHMAD ABBASI and others versus The STATE and others (2018 SCMR 495).

11. Mr. Muhammad Iqbal Awan, Deputy Prosecutor General, argued that hand grenades were recovered from the possession of the accused and accused possessed explosive substance to carry out terrorist activities. Learned D.P.G. further argued that police officials had no motive to foist explosive substance upon the accused, however, learned D.P.G. conceded that there was no evidence with regard to the safe custody of the explosive substance at the police station and transmission to the chemical examiner. Learned D.P.G. further admitted that source of light was torch but the same was not produced before the trial court at trial. However, he prayed for dismissal of the appeals.

12. We have carefully heard the learned counsel for the parties and scanned the entire evidence, minutely.

13. We have come to the conclusion that prosecution has failed to prove its case against the appellants beyond any reasonable doubt for the reasons that prosecution case appears to be highly unnatural and unbelievable. It was case of spy information, SIP Farooq Azam had sufficient time to call the independent persons of the locality for making them as mashirs of recovery but he failed to do so without justification. SIP had admitted that he had received spy information on his cellular phone. Nowadays, modern technology is available, SIP failed to produce call data of his cellular phone to satisfy the Court that actually he had received a call at relevant point of time. Prosecution case is silent with regard to the source of light on which accused were identified in bushes. However, in the cross-examination, it has come on record that accused were identified on torch light but said torch was not produced before the trial court at trial. Non-production of torch before the trial court would be fatal to the case of prosecution. We have several reasons to disbelieve the prosecution case. It is the case of prosecution that accused were armed with hand grenade/explosive substance and pistol. It is unbelievable that no attempt was made by the accused to either use the pistol or the explosive substance at the time of their arrest in order to escape. It was against the conduct of the criminal minded persons to surrender without resistance when armed with deadly weapon. According to the case of prosecution, accused were concealing themselves behind the bushes but in the mashirnama of arrest and place of wardat, there was no mention of bushes at the place of occurrence. SIP failed to contact bomb disposal unit for defusing the explosive substance at the place of recovery. Under what circumstances, he brought explosive substance safely at police station, has not come on record. Prosecution evidence is silent with regard to the safe custody of the hand grenade/explosive substance at the police station and safe transit to the expert. Reports of experts at Ex.10/J and 10/K reflect that explosive substances were sent after six months of the recovery. Delay in dispatch of substance to experts has not been explained by the prosecution. Accused Nadeem Khan has raised plea in cross-examination that he was arrested from his house by Rangers personnel in presence of his family and after two months his custody was handed over to the police of police station Mobina Town and false cases were registered against him. SIP has shown ignorance about the applications moved by the mother of accused

Sohailuddin and brother of accused Nadeem Khan before D.G. Rangers Sindh, Inspector General of Police Sindh and Honourable Chief Justice of Pakistan. We have noticed that regarding disappearance of accused Nadeem Khan, Constitution Petition No.D-7469/2015 was filed by Muhammad Amir Khan, brother of appellant Muhammad Nadeem Khan, in which it was stated that Muhammad Nadeem Khan was picked up by the Rangers on 07.11.2015. Learned counsel for the appellant has also drawn attention of the Court to FIR No.653/2015, lodged by Mst. Mahik Jabeen wife of accused Muhammad Nadeem Khan at P.S. Gulshan-e-Iqbal, Karachi on the directions of this Court under sections 365, 34, PPC regarding disappearance of her husband on 07.11.2015. Unfortunately, trial court failed to consider the defence theory. No doubt, applications moved by the relatives of the accused persons to the high officials including Honourable Chief Justice and Constitution Petition No.D-7469/2015 filed by brother of appellant Muhammad Nadeem Khan were not produced by accused in his statement under section 342, Cr.PC but the same were available on record. Constitution Petition No.D-7469/2015 was the part of judicial record before the trial court, copy was available in R and Ps. Trial court ought to have looked into it for just decision of the case. It is observed that Court may take judicial notice of such documents, which were not produced in evidence but were the part of the judicial record to do substantial justice between the parties. In a criminal case, it is the duty of the Court to review the entire evidence that has been produced by the prosecution and the defence. If, after an examination of the whole evidence, the Court is of the opinion that there is a reasonable possibility that the defence put forward by the accused might be true, it is clear that such a view reacts on the whole prosecution case. In these circumstances, the accused is entitled to the benefit of doubt, not as a matter of grace, but as of right, because the prosecution has not proved its case beyond reasonable doubt. Reliance is placed on the case of NADEEM-UL-HAQ and others vs. The STATE (1985 SCMR 510).

14. As highlighted above, prosecution has utterly failed to establish safe custody of the explosive substance at police station and its safe transmission to the expert. Head *Muharrar* of the *Malkhana* has also not been examined. Honourable Supreme Court in the case of KAMALUDDIN alias KAMLA versus The STATE (2018 SCMR 577) has laid down the following principle:

“4. As regards the alleged recovery of a Kalashnikov from the appellant's custody during the investigation and its subsequent matching with some crime-empties secured from the place of occurrence

suffice it to observe that Muhammad Athar Farooq DSP/SDPO (PW18), the Investigating Officer, had divulged before the trial court that the recoveries relied upon in this case had been affected by Ayub, Inspector in an earlier case and, thus, the said recoveries had no relevance to the criminal case in hand. Apart from that safe custody of the recovered weapon and its safe transmission to the Forensic Science Laboratory had never been proved by the prosecution before the trial court through production of any witness concerned with such custody and transmission.

15. After careful reappraisal of the evidence discussed above, we are entertaining no amount of doubt that the prosecution has failed to bring home guilt to the accused as the evidence furnished at the trial is full of factual, legal defects and is bereft of legal worth/judicial efficacy. Therefore, no reliance can be placed on the same.

16. Needless to mention that while giving the benefit of doubt to an accused it is not necessary that there should be many circumstances creating doubt. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of such doubt, not as a matter of grace and concession, but as a matter of right. It is based on the maxim, "it is better that ten guilty persons be acquitted rather than one innocent person be convicted". Reliance in this behalf can be made upon the cases of Tariq Pervez v. The State (1995 SCMR 1345), Ghulam Qadir and 2 others v. The State (2008 SCMR 1221), Muhammad Akram v. The State (2009 SCMR 230) and Muhammad Zaman v. The State (2014 SCMR 749).

17. For the reasons discussed above, appeals are allowed by extending benefit of doubt. Conviction and sentence recorded by the trial court against the appellant are set aside. Appellant shall be released forthwith if not required in some other custody case.

18. Let the copy of this judgment be sent to Mr. Muhammad Khan Burririo, Judge, Anti-Terrorism Court-X, Karachi, through learned Registrar of this Court with direction to be careful in future.

19. These are the reasons of our short order dated 15.10.2018.

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