

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI

Before:
Mr. Justice Muhammad Iqbal Kalhoro
Mr. Justice Irshad Ali Shah

Special Cr.A.T.Appeal No.112 of 2018

Kamran and Irfan Hussain Appellants

Versus

The State Respondent

Special Cr.A.T.Appeal No.113 of 2018

Irfan Hussain..... Appellant

Versus

The State Respondent

M/s Qadir Hussain Khan and Umer Farooq, advocates for the appellants.

Mr. Ali Haider Saleem, DPG for the State along with PW Muhammad Younus Khan, Deputy Director, Land and Anti Encroachment, KMC

Dates of hearing : 04.02.2020, 18.02.2020, 27.02.2020 & 10.03.2020

Date of decision : 20.03.2020

J U D G M E N T

IRSHAD ALI SHAH, J:- The appellants by way of instant appeals have impugned judgment dated 17.02.2018, rendered by learned Judge Anti-Terrorism Court No.II, Karachi, whereby they have been convicted and sentenced as under;

- “a) *Accused Irfan Hussain s/o Ghulam Hussain is convicted and sentenced to suffer Rigorous Imprisonment for life u/s 7 (a) of Anti-Terrorism Act, 1997 with fine of Rs.5 Lacs as compensation to be given to the legal heirs of deceased. In case of failure to pay the fine he will further undergo for six months.*
- b) *The recovery of unlicensed pistol 9mm from accused Irfan Hussain is also proved. He is also convicted and sentenced to suffer R.I for 14 years u/s 23-I-A of S.A.A.*

c) *The accused Kamran though was in league with his brother Irfan Hussain, but had not fired at Anti-Encroachment party therefore he is convicted and sentenced to suffer Rigorous Imprisonment for 15 years u/s 7 (b) of ATA, 1997 with fine of Rs.2 Lacs as compensation to be given to the legal heirs of deceased. In case of failure to pay the fine he will further undergo for six months."*

2. The facts in brief necessary for disposal of the instant appeals are that the appellants have established a Hotel on public property by making encroachment over it. Deceased Muhammad Ishaq being Deputy Director of Task Force Anti-Encroachment, KMC with his team went at the said Hotel to remove such encroachment. He and his team were deterred from discharging their lawful duty as a public servant by making fires at them with intention to commit their murder, resultantly Muhammad Ishaq, Deputy Director of Task Force Anti-Encroachment, KMC sustained fire shot injuries, he was taken to Hospital, there he died of such injuries, for that the present case was registered. On arrest, from appellant Irfan Hussain was secured a pistol of 09 mm bore. After usual investigation the appellants were reported upon by the Police to face trial for the above said offence.

3. At trial, the appellants did not plead guilty to the joint charge and prosecution to prove it, examined P.W-1 Complainant Mazhar Khan (Exh.P/1). He produced his statement, FIR of the present case service card and his CNIC. P.W-2 Mr.Muhammad Aslam the then Civil Judge and Judicial Magistrate at (Exh.P/5), he produced letter of the police and 164 Cr.P.C. statements of P.Ws Irfan Hussain Khan and

Muhammad Kamran. P.W-3 Mr. Asif Ahmed the then Civil Judge and Judicial Magistrate at (Exh.P/10), he produced letter of the police and 164 Cr.P.C. statements of P.Ws Syed Abdul Majeed and Muhammad Younus Khan. P.W-4 Muhammad Younus Khan, Deputy Director Land KMC at (Ex.P/24). He produced memo of site inspection, letter issued by Director Land Anti-Encroachment KMC and 14 photographs. P.W-5 Syed Abdul Majeed s/o Abdul Aziz, Deputy Director Lands KMC (at Exh.P/41). P.W-6 Muhammad Kamran Abbas, Deputy Director Anti-Encroachment and Cell KMC (at Exh.P/42), he produced memo of examination of dead body of the deceased. P.W-7, ASI Syed Abdul Majeed s/o Wali Dad, (at Exh.P/45), he produced roznamcha entries, memo of recovery of empties, letter to Medical Officer, receipt whereby the dead body of the deceased was delivered to the complainant party. P.W-8 PC Riasat Ali (at Exh.P/52), he produced memo of arrest of appellant Irfan Hussain and recovery of pistol from him. P.W-9 HC Haider Ali (at Ex.P/55). P.W.10 SIP Muhammad Afzal (at Exh.P/56), he produced roznamcha entries, photographs, sketch of place of incident, notice under section 160 Cr.P.C. issued against the witnesses, letters whereby he sent empties and cloth of the deceased to FSL and Chemical Examiner. P.W-11 Dr.Sheraz Ali (at Exh.P/63), he produced medical certificate and death certificate of the deceased. P.W-12 Investigating Officer Inspector Ali Haider (at Exh.P/66), he produced roznamcha entries, Statements, FIR of Crime

No.117/2014, reports of FSL and laboratory and his letter for CRO of appellants.

4. The appellants in their statements recorded u/s 342 Cr.PC, denied the prosecution allegation by pleading innocence, they besides examining themselves on oath, they examined DWs Kamran, Afaq Ahmed, Muhammad Nawaz, Khan Muhammad, Iftikhar and Shah Baig in their defence and also produced certain documents to prove their innocence and then closed the side.

5. Appellants in their statements recorded on oath pleaded their innocence and whatever was stated by them was endorsed by their witnesses in defence.

6. On evaluation of evidence, so produced by the prosecution, learned trial Court convicted and sentenced the appellants by way of impugned Judgment, as is detailed above.

7. It is contended by learned counsel for appellant Kamran that he being innocent has been involved in this case falsely by the complainant party otherwise he has nothing to do with the alleged incident and co-accused Rizwan on the basis of similar allegation has already been let-off by the police during course of investigation. By contending so, he sought for acquittal of appellant Kamran.

8. It is contended by learned counsel for appellant Irfan Hussain that he being innocent has been involved in this case falsely by the complainant party on account of his failure to pay them 'Bhatta'; the

complainant is not an eye witness of the incident; the FIR has been lodged with delay of about seven hours; 164 Cr.P.C. statements of the P.Ws has been recorded with considerable delay; P.W. Irfan has not been examined by the prosecution; the recovery of pistol has been made from the appellant on 14th day of his arrest, such pistol has not been similar with the empties secured from the place of incident; there is no recovery of blood stained earth from the place of incident; the appellant has never been charged for being in possession of unlicensed pistol and learned trial Court has believed the evidence of the P.Ws without assigning cogent reasons. By contending so, he sought for acquittal of appellant Irfan Hussain. In support of his contentions he relied upon the cases of ***Dur Muhammad alias Duri and others Vs. The State (1194 MLD 1493)***, **2. *Khalid Javed and another Vs. The State (2003 SCMR 1419)*** and **3. *Muhammad Asif Vs. The State (2008 SCMR 1001)***.

9. It is contended by learned DPG for the State who is assisted by PW Muhammad Younus Khan, Deputy Director, Land and Anti Encroachment, KMC that the appellants neither are innocent nor are involved in this case falsely; they are encroachers and they to protect their encroachment have fired at the complainant party when they had gone to remove such encroachment being public servant thereby they killed a responsible officer; it is the quality of evidence which is to be considered and not the quantity; the omission on the part of investigating officer to collect the blood stained earth from the place

of incident is not enough to dismiss the entire case; the complainant party was having no reason to involve the appellants in this case falsely and the evidence of the P.Ws has been believed by learned trial Court rightly. By contending so, he sought for dismissal of the appeals. In support of his contentions, he relied upon the cases of ***Habib Sultan Vs. The State (2008 P Cr. L J 405) and Niaz-un-din and another Vs. The State and another (2011 SCMR 725).***

10. We have considered the above arguments and perused the record.

11. P.Ws Syed Abdul Majeed s/o Abdul Aziz and Muhammad Kamran Abbas during course of their examination have not been able to recognize appellant Kamran. Even otherwise the role attributed to him (Kamran) in commission of incident is only to the extent that he brought co-accused appellant Irfan Hussain at the place of incident through his motorcycle, therefore, his involvement in commission of incident, on the basis of vicarious liability is appearing to be doubtful one, he (Kamran), therefore, by extending of benefit of such doubt is acquitted of the offence, for which he (Kamran) has been charged, tried and convicted by learned trial Court. He (Kamran) shall be released forthwith in the present case.

12. So far case of appellant Irfan Hussain is concerned, it is somehow different. There is no denial to the fact that deceased Muhammad Ishaq, Deputy Director of Task Force Anti-Encroachment, KMC has died of unnatural death after sustaining fire

shot injuries. Such fact prosecution has able to prove by examining Medical Officer Dr.Sheraz Ali. No doubt, complainant Mazhar Khan is not eye witness of the incident but there could be no denial to the fact that he in capacity of Director Anti-Encroachment Cell, KMC, on intimation had lodged the report of the incident with the police. The narration of the incident made by him takes support from the evidence of P.Ws Muhammad Younus Khan, Muhammad Kamran Abbas and Syed Abdul Majeed son of Abdul Aziz on all material points. It had inter-alia stated by them that on 31.01.2014 they with deceased Muhammad Ishaq, Deputy Director of Task Force Anti-Encroachment, KMC and rest of the employees went at the place of incident to remove encroachment made by appellant Irfan Hussain in shape of hotel. Appellant Irfan Hussain after having exchange of hot words with them went away and then came back with one more person on motorcycle and then started making fires upon the officials engaged in removal of such encroachment. Muhammad Ishaq, Deputy Director of Task Force Anti-Encroachment, KMC sustained fire shot injuries. They intimated the incident to the complainant and took Muhammad Ishaq, Deputy Director of Task Force Anti-Encroachment, KMC in injured condition to the Hospital, where he died of such injuries. Despite lengthy cross-examination they have stood by their version on all material point with regard to the death of deceased Muhammad Ishaq at the hands of appellant Irfan Hussain by means of fire shot injuries. Undeniably they are

public servant, they went at place of incident in discharge of their lawful duty and they as such, were having no reason to have involved appellant Irfan Hussain in this case falsely at the cost of life of their officer. No doubt, the FIR of the incident has been lodged with the delay of about seven hours but such delay has been explained plausibly by the complainant himself by stating that when he went at the police station, the SHO was not found available there who came later and then his FIR was recorded. It is true that from place of incident no blood stained earth has been secured by the police and the pistol which has been secured from the possession of appellant Irfan Hussain has not been found similar with empties secured from the place of incident. The pistol which has been secured from the appellant as has come on record is other than the one, which has been used in commission of the incident and failure of the police to secure the blood stained earth from the place of incident was due to the cooperation to the appellant, on the part of investigating officer, which the appellant has himself admitted in his statement on oath by saying that the Police has cooperated with him.

13. The case of the prosecution also finds support to a large extent from the statement made by appellant Irfan Hussain on oath. It has been admitted by him that *“he has not taken permission from government to start a Restaurant, it is situated over an area of 2500 square yards, it is Government land he has not paid any money to Government but was providing food to the officials, he was also*

involved in the case for committing theft of Sui Gas, he has not paid any income tax, he has reconstructed the Hotel while in custody with help of Police.” No denial is made by him with regard to the presence of the witnesses, who according to him came at the place of incident to destroy his Hotel, despite status quo order in his favour. Whatever is stated by appellant Irfan Hussain is endorsed by his defence witnesses. In such situation, it obviously was not necessary for the prosecution to have examined the witnesses in addition those, who have already been examined.

14. In above circumstances, it would be hard to make a conclusion that involvement of the appellant Irfan Hussain in commission of incident is false. Indeed, he (Irfan Hussain) has been dealt with leniently by learned trial Court by awarding him lesser punishment for committing murder of innocent person, in line of his duty, therefore, his (Irfan Hussain) punishment for offence punishable u/s 7 (a) of Anti-Terrorism Act, 1997 is maintained.

15. So far recovery of crime weapon viz. Pistol of 09 mm bore from appellant Irfan Hussain is concerned, it is doubtful, such recovery has been effected from him on 14th day of his arrest, it has not been witnessed by independent person and the Pistol so recovered is found to be the other than the one, which is used in commission of the incident and for this recovery surprisingly, appellant Irfan Hussain has never been charged by learned trial Court. In these circumstances, the conviction and sentence which are recorded

against appellant Irfan Hussain for offence punishable under section 23-I (A) of the Sindh Arms Act, 2013 could not be sustained. It is set aside.

16. The case law which is relied upon by learned counsel for appellant Irfan Hussain is concerned, it is on distinguishable facts and circumstances. In case of ***Dur Muhammad alias Duri and others Vs. The State*** (supra), main reason for the acquittal of the accused was that they were afforded no opportunity to cross examine the prosecution witnesses. In the instant matter such opportunity is afforded to the accused. In case of ***Khalid Javed and others*** (supra) the acquittal of the accused was recorded by Honourable Supreme Court mainly for the reason that it was the case of two version, one was disclosed in FIR and other was disclosed in supplementary statement. In the instant matter, there is no supplementary statement which may make the case to be of two version. In case of ***Muhammad Asif Vs. The State*** (supra) the main reasons for acquittal of the accused was that there was delay in lodgment of FIR and witnesses failed to explain their presence at the place of incident. In the instant matter, the delay in lodgment of the FIR has been explained by the complainant and presence of the witnesses at the place of incident the prosecution has been able to prove beyond shadow of doubt, which even otherwise is not doubted by the accused.

17. The instant appeals are disposed of in above terms.

JUDGE

JUDGE