

**IN THE HIGH COURT OF SINDH  
BENCH AT SUKKUR**

**Criminal Appeal No. D-189 of 2019**

**Present:-**

Adnan-ul-Karim Memon &  
Yousuf Ali Sayeed, JJ

Appellant : Azhar Ali and another, through Mr. Manzoor Ahmed Soomro, Advocate.

Respondent : The State through Mr. Syed Sardar Ali Shah, DPG

Complainant : Danesh Kumar, in person.

Date of hearing : 29.07.2020

**JUDGMENT**

**YOUSUF ALI SAYEED, J.** The Appellants, Azhar Ali and Zaheer Ahmed, were apparently partaking of an evening meal on 23.12.2018 at 'Hotel Dileep' (the "**Establishment**") situated in Asmatullah Market, Ghotki, when they were arrested by a team of police personnel from P.S. A-Section Ghotki (the "**Station**"), who are said to have been responding to a call made to the Station by the proprietor of the Establishment, namely one Danesh Kumar (the "**Complainant**"), alleging that he had been the victim of extortion at their hands.

2. The Complainant's version, as discernible from the First Information Report No. 340/2018 (the "**FIR**") that was then registered at the Station under S.384 PPC and S.7 of the Anti-Terrorism Act, 1997 (the "**ATA**") at 8:10 pm on the same day, as well as his deposition at trial, is that the Appellants used to frequent the Establishment on a daily basis over the past 6 to 7 years to threaten him in order to avail free meals and extort a sum of Rs.1000/-, which, as per routine, also came to pass on 23.12.2018, when they arrived at about 07:30 pm to make their usual demand by instilling fear and causing harassment, due to which the Complainant pliantly paid each of them the demanded amount of Rs.500/- and thereafter informed the police via telephone.

3. As per the prosecution, SIP Muhammad Iqbal Rajput then arrived at the Establishment along with his subordinates within minutes of the Complainant's call and arrested the Appellants on their being pointed out, resulting in the recovery of a single Rs.500/- denomination currency note from Azhar Ali, along with three mobile telephones and an original CNIC, whereas only a cash amount of precisely the same sum and denomination was recovered from Zaheer Ahmed.
  
4. Following the usual investigation, the matter was sent up before the Anti-Terrorism Court, Ghotki at Mirpur Mathelo (the "**ATC**"), where the Appellants came to be charged under S.384 read with S. 34 PPC and S.7(h) of the ATA in Special Case No.01/2019 (Re: The State v. Azhar Ali and another) with having received a sum of Rs.500/- from the Complainant on 23.12.2018 by way of extortion perpetrated at the Establishment through the use of threats. They pleaded not guilty and claimed trial, during the course of which the prosecution examined the Complainant (PW-1), who produced the FIR (Ex.03/A), Notan Das (PW-2), an employee of the Complainant at the Establishment, SIP Muhammad Iqbal Rajput (PW-3), who produced an attested copy of Entry No.17, 18 and 19 (Ex.06/A), the Memo of Arrest, Personal Search and Recovery (Ex.06/B), copies of Entry No. 21, 22, 23 (Ex.06/C) and the Memo Regarding Inspection of the Scene (Ex.06/D), PC Khalid Hussain (PW-4), HC Rafique Ahmed Mahar (PW-5), and Inspector Zulfiqar Ali Mahar (PW-6), the investigating officer of the case, who produced the attested copy of Entry No.20 at (Ex. 10/A) and a list of the Appellants criminal record (Ex. 10/B), whereas Bashir Ahmed, one of the staff members at the Establishment, and PC Noor Muhammad, one of the police personnel involved in the arrest, were given up as witnesses. The Appellants were examined under S. 342 Cr. P.C. (Ex.12 and 13), and denied the allegations, further stating that they had been falsely booked in the case at the behest of one Muhammad Bux Mirani, due to a matrimonial

dispute. Azhar Ali had also produced a true copy of FIR No.201/2016 of P.S. A-Section Ghotki, a true copy of Criminal Miscellaneous Application No.1888 of 2016 (Re: Mst. Zeenat vs. SHO of P.S. A-Section Ghotki and others), a true copy of Order dated 13.08.2016, a copy of the Order dated 16.08.2016 in Cr. Misc. Application No. 1861/2016, and a true copy of Complaint No.73/2019. Neither of the Appellants examined themselves on oath, nor examined any witness in their defence.

5. The trial culminated in the conviction of the Appellants by the ATC vide Judgment dated 12.09.2019 and each of them being sentenced to rigorous imprisonment for three years under Sections 384/34 PPC and for five years under Section 7(h) of the ATA as well as to pay a sum of Rs.2000/- as fine, or undergo further imprisonment of 15 days in case of default. Both the sentences were ordered to run concurrently, with the benefit of Section 382-B Cr. P.C also being extended. Being aggrieved, the Appellants have impugned the ATC's Judgment through the instant Appeal under S.25 of the ATA.
  
6. Learned counsel for the Appellants contended that the evidence was insufficient for the ATC to have recorded a conviction, and 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 FIR had been registered after the supposed incident culminating in the arrest of the Appellants despite it being averred by the Complainant that he had verbally given information of a cognizable offence to the police prior thereto. He submitted that the narrative in the FIR was a fabrication that had been designed to falsely implicate the Appellants.

7. He argued further that the testimony of the prosecution witnesses was inconsistent, and that whilst it was evident that many other persons, including those who happened to be patronizing the Establishment at the time of the arrest, were shown as being present, none of them had been called upon as witnesses. Moreover, he emphasised upon the fact that Bashir Ahmed and PC Noor Muhammad had been given up as witnesses by the prosecution.
8. Conversely, the learned APG, along with the Complainant who was present in person, defended the impugned Order, but on query posed, they were both unable to articulate the precise threat(s) alleged to have been made by the Appellants on the day of their arrest or on the umpteen occasions that they are said to have previously visited the Establishment over the preceding 6 to 7 years. Furthermore, they conceded that there had been no show of arms or use of force by the Appellants.
9. Having considered the arguments advanced in light of the material available on record, we have observed as follows:
  - The Complainant alleged that the Appellants had been extorting a sum of Rs.500/- each from him on a daily basis over the past 6 to 7 years, but had never formally reported the matter to the police. When questioned in this regard during the course of his cross-examination, he sought to explain away such unusual behaviour by stating that “Prior registration of this case, I had verbally informed the police about the extortion of Bhatta amount by the accused”. Needless to say, such a statement does not suffice to explain the aberrant behaviour of the Complainant, for if even if is accepted that the Appellants had so intimidated the Complainant as to render him mute over all those years, it then beggars belief that a person who did not come forward to press for registration of a case over that protracted period would suddenly report the matter telephonically whilst the alleged extortionists were still at the scene, and that the police would then remarkably arrive within a matter of minutes of such intimation to make their arrest.

- No details of the threats said to have been made by the Appellants to the Complainant on 23.12.2018 or any previous occasion over the past 6 to 7 years were disclosed in the FIR, and even the Charge, which is confined to the events of 23.12.2018, also fails to set out the specifics of the threat said to have been made by the Appellants on the date. The evidence of the relevant prosecution witnesses, namely the Complainant (PW-1) and Notan Das (PW-2) is also completely bereft of such details, and even at the time of hearing of the Appeal, the Complainant was unable to readily articulate the scope/nature of the threat allegedly made on that date or at any earlier point in time. As such, the very elements of the alleged offence were not properly disclosed, let alone proved.
- No weapons of any sort were recovered from the Appellants. Indeed, during his cross-examination, Notan Das (PW-2), conceded that “At the time of the incident, the accused were unarmed”. Furthermore, each of the Appellants was conveniently shown to have precisely one currency note of Rs.500/- in his possession, and whilst possession of a note of that denomination is scarcely incriminating, the prosecutions version that the alleged extortionists had no other money in their possession strikes us as unusual.
- The currency notes said to have been recovered from the Appellants at the time of their arrest were not identified in the FIR (Ex.03/A) or Memo of Arrest, Personal Search and Recovery (Ex.06/B) by reference to any marking or to their serial number, and during his cross-examination, the Complainant (PW-1), conceded that “It is correct that I have not mentioned the serial numbers of currency notes of Bhatta amount in the FIR”. Even otherwise, none of the case property was exhibited in evidence, nor were the Appellants confronted with the same at the time of their Statements under S.342 Cr. P.C. being recorded. 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, and precludes the same from being used as evidence against him at trial, as held by the Honourable Supreme Court in the Judgment reported as Qaddan v. The State 2017 SCMR 148. In this case, as previously observed, the prosecution had failed to even properly introduce the case property into evidence.

- Both Bashir Ahmed, who is one of the persons associated with the Complainant and is stated by the Complainant in his deposition to have been present at the Establishment when the extortion amounts were received by the Appellant under threat made by them and is also said to have accompanied the Complainant along with another unnamed person to the Station at the time of the registration of the FIR, as well as PC Noor Muhammad, one of the police personnel who was a witness to the Memo of Arrest, Personal Search and Recovery (Ex.06/B), were given up as witnesses by the prosecution. 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 the aforementioned persons been produced in Court they would not have supported the prosecution. Thus, non-examination of both these persons has materially undermined the prosecution's case.
- There are also certain discrepancies in the testimony of the prosecution witnesses as to the presence of Ranger's personnel and their role, in as much as the Complainant deposed that "It is correct that on 23.12.2018, Rangers as well as police had arrested both the accused persons at my hotel", whereas the statement of Notan Das was that "It is incorrect that present accused were arrested by the Rangers. Voluntarily says that both the accused were arrested by the police". Furthermore, SIP Muhammad Iqbal Rajput (PW-3) stated that "The personnel of Rangers had also reached at the hotel. The Rangers personnel were with us at Sarkari Bagh, who were making snap checking and proceeded with us towards the place of wardat. It is correct that it was neither mentioned in the FIR nor in the mashirnama of place of arrest and recovery that Rangers personnel were with us at Sarkari Bagh, who were making snap checking and proceeded with us towards the place of wardat", whereas PC Khalid Hussain (PW-4) contrarily stated that "The Rangers personnel were also available at Dileep hotel at the time of arrest of accused. We came to know that some other persons in civil dress belonging to Law Enforcement Agency were also available at the place of wardat. After our arrival at Dileep hotel, the Rangers personnel reached there. "

- Whilst the depositions of the prosecution witnesses reflect that members of the public were present at the Establishment at the relevant time, and it appears from a reading of their testimony and the Memo Regarding Inspection of the Scene (Ex.06/D) that such persons would have been well placed to witness the goings on, none were produced to bear witness to the alleged occurrence. Although this was simply put down by SIP Muhammad Iqbal Rajput (PW-3) as unwillingness on the part of the members of the public to come forward, it does not explain why neither the police personnel at the scene nor the IO subsequently made the necessary effort in that regard and did not give notice to any such person.
- The so criminal record of the Appellants was only produced by Inspector Zulfiqar Ali Mahar (PW-6) in the form of a printed list (Ex. 10/B), *sans* any certification and bereft of even copies of the FIRs referred to therein. Furthermore, other than the particular FIR underpinning the matter at hand, there was no other case listed wherein Zaheer Ahmed had been implicated.

10. It is well settled that the presumption of innocence and standard of proof beyond a reasonable doubt are fundamental tenets of a criminal trial, and even a single circumstance that serves to create reasonable doubt in a prudent mind as to the guilt of the accused entitles him to that benefit, not as a matter of grace or a concession, but as a matter of right. We are fortified in this regard by the Judgments of the Honourable Supreme Court in the cases reported as Muhammad Akram v. The State 2009 SCMR 230 and Tariq Pervez, v. The State 1995 SCMR 1345. As such, for an accusation underpinning a charge to crystallize into a conviction, the same has to be proven as per the prescribed standard through legally admissible evidence that is sufficiently probative in that regard. Needless to say, in the normal course, that burden rests on the prosecution throughout the trial and never shifts to the accused. However, whilst in our opinion the points observed by us serve to raise appreciable doubt as to the merit and veracity of the prosecution's case, the same were not properly considered at trial, and a conviction was recorded, which in our view is unsound and cannot be allowed to stand.

11. Moreover, as regards the conviction under section 7(h) of A.T.A., it is manifest that the prosecution has not brought any material on record to establish that the Appellants had a nexus with any organization or mafia involved in the collecting of extortion money or that the unspecified threat made by them created a sense of insecurity amongst the public in the immediate vicinity of the Establishment, let alone a mass scale, or that the alleged action was otherwise designed to achieve any of the objectives specified in S.6(1)(b) of the ATA or the use or threat of such action was designed to achieve any of the purposes mentioned in S.6(1)(c) thereof. As such, the ingredients of “terrorism” are lacking, in light of the Judgment of the Apex Court in the case reported as Ghulam Hussain and others v. The State PLD 2020 Supreme Court 61, and the conviction under S. 7(h) is even otherwise not maintainable.

12. These are the reasons for our short Order dated 29.07.2020, whereby the Appeal was allowed, with the Appellants being acquitted and the impugned Judgment along with their conviction and sentence being set aside.

JUDGE

JUDGE