

IN THE HIGH COURT OF SINDH, KARACHI

Special Criminal Anti-Terrorism Appeal No.151 of 2019

Present: Mr. Justice Nazar Akbar
Mr. Justice Zulfiqar Ahmad Khan

Appellants: Shah Nawaz son of Dost Muhammad and Muhammad Rafiq son of Abdullah through Ms. Zainab Bibi, Advocate

Respondent: The State through Ms. Seema Zaidi, Deputy Prosecutor General Sindh.

Date of Hearing : 17.11.2020

J U D G M E N T

NAZAR AKBAR, J.- Appellants Shahnawaz and Muhammad Rafique along with Sameer Ahmed were tried by learned Judge, Anti-Terrorism Court-II, Karachi in Special Case No.17/2011. By judgment dated **21.05.2019**, accused Sameer was acquitted of the charge by extending benefit of doubt, whereas, present appellants were found guilty and were convicted and sentenced as under:

- (i) Under section 302(b)/34, PPC they were sentenced to suffer life imprisonment as Tazir with direction to pay fine of Rs.100,000/- each, in default thereof, to undergo S.I. for 6 months more.
- (ii) Under section 7(1)(a) of ATA, 1997 they were sentenced to suffer life imprisonment, with direction to pay fine of Rs.50,000/- each, in default thereof, to undergo S.I. for 6 months more.
- (iii) Under section 7(1)(c) of the Anti-Terrorism Act, 1997 read with section 324, PPC they were sentenced to under 10 years R.I. each.
- (iv) Under section 7(1)(ff) of the Anti-Terrorism Act, 1997 read with sections 3/4 of the Explosive Substances Act, 1908, they were sentenced to suffer life imprisonment.

All the sentences were ordered to run concurrently. Accused were extended benefit of section 382-B, Cr.PC.

2. Brief facts of the prosecution case are that one Soomar son of Attoo stated in his 154, Cr.PC statement, which was incorporated in the FIR, that on 06.05.2011 at about 08.04 p.m. he went to Jhatpat Market, near Al-Fatah Hotel and was taking beverage from pushcart, when at about 09:10 p.m. four unknown persons came on two motorcycles and threw something which

exploded and he as well as other peoples available at the spot sustained injuries and were brought to Civil Hospital, which include Hamad, Asif, Iqbal, Fazalur Rehman, while another person named Iqbal son of Ibrahim was also brought in injured condition who later on succumbed to the injuries; Mama Usman and Arshad were brought in dead condition to Civil Hospital whereas several other people, who sustained injuries in the incident, were shifted to JPMC for treatment. FIR of the incident was lodged against four unknown persons as Crime No.56/2011, under sections 302, 324, 34, PPC read with section 7 of the Anti-Terrorism Act, 1997 and sections 3/4 of the Explosive Substances Act, 1908 at P.S. Kalakot, Lyari, Karachi.

3. During investigation, investigating officer visited the place of incident, collected bloodstained soil, recorded 161, Cr.PC statements of PWs, called Bomb Disposal Team, who collected clip of hand grenade and sealed the same. As no any clue of culprits was found, therefore, the matter was disposed of in "A" class.

4. Accused Shahnawaz, Muhammad Rafiq, Naeem and Mustafa who were arrested in FIR No.272/2011 at P.S. Nazimabad, during interrogation disclosed their involvement in the present FIR too, as such, they were arrested in the said case. Identification parade of the accused was held before Judicial Magistrate-I, South Karachi where witnesses identified accused Shahnawaz and Muhammad Rafiq, however, they did not identify accused Muhammad Naeem and Mustafa, who were released under section 169, Cr.PC. Accused Shahnawaz and Rafiq disclosed the names of Sameer son of Abdul Razzak and Abid alias Bangali son of Din Muhammad being their accomplices in the commission of present offence. Later on, on 18.10.2011 accused Sameer was arrested in Crime No.163/2011 under section 13(d) of the Arms Ordinance, 1965 at P.S. Napier, who was arrested in this case as well, his identification parade was held before Judicial Magistrate-I South Karachi but witnesses did not identify him. On the conclusion of usual investigation, challan was submitted against accused before the competent court of law.

5. Trial court framed charge against accused at Ex.4, to which the accused pleaded not guilty and claimed to be tried.

6. At trial, prosecution examined PW-1 Malik Muhammad Riaz at Ex.P/1, PW-2 SIP Safdar Ali at Ex.P/14, PW-3 Yar Muhammad at Ex.P/16, PW-4 Yar Muhammad at Ex.19, PW-5 Soomar at Ex.20, PW-6 Muhammad Slaeem Khan at Ex.23, PW-7 Muhammad Aijaz at Ex.24, PW-8 Asif Ali at Ex.25, PW-9 Dr. Abdul Haleem Memon at Ex.26, PW-10 Dr. Syed Farhat Abbas at Ex.27, PW-11 Zulfiqar Ali at Ex.28, PW-12 Dr. Muhammad Tayyab at Ex.29, PW-13 Imtiaz Ahmed Khan at Ex.30, PW-14 Chand Khan at Ex.31. Thereafter, prosecution side was closed at Ex-35.

7. Statements of accused were recorded under section 342, Cr.PC. All the accused claimed false implication at the behest of rival party in the instant case and denied the prosecution allegations. They neither examined themselves on oath nor produced any defence witness in disproof of the prosecution allegation.

8. Trial Court after hearing the learned counsel for the parties and assessment of evidence, by judgment dated 21.05.2019 convicted and sentenced the appellants as stated above. Hence the instant appeal.

9. The facts of the case as well as evidence produced before the trial Court find an elaborate mention in the judgment dated 21.05.2019 passed by the trial Court and, therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

10. Ms. Zainab Bibi, learned counsel for the appellants, mainly argued that appellants have been falsely implicated in the instant case by the police in order to take reward from the high ups; the extrajudicial confession by the appellants before the police had no legal sanctity in the eyes of law; eyewitnesses Ghulam Nabi and Muhammad Yousuf, who allegedly have identified the present appellants before the Judicial Magistrate concerned in identification parade, have neither been named in the final report submitted by the investigating officer nor were produced by the prosecution before the trial court for examination; no explanation has been furnished by the prosecution for non-examination of such material witnesses at trial; there is an unexplained delay of seven days in holding the identification parade; there is no direct evidence with the prosecution to connect the appellants in the instant case; the appellants were already under arrest in some other

cases, in which they have already been acquitted by the courts concerned. She lastly argued that keeping in view the above submissions the appellants are entitled to be acquitted by extending benefit of doubt. In support of her contentions, she relied upon the cases of AZEEM KHAN and another vs. MUJAHID KHAN and others (2016 SCMR 274), SAJID MUMTAZ vs. BASHARAT (2006 SCMR 231) and unreported judgment of the Division Bench of this Court in Special Cr. ATA No.291 of 2018.

11. Ms. Seema Zaidi, learned Deputy Prosecutor General Sindh, argued that prosecution had examined fourteen prosecution witnesses, who have fully supported the case of the prosecution. She further argued that the appellants have been identified by the witnesses before the Judicial Magistrate concerned in identification parade. Learned D.P.G. argued that no mala fide has been brought on record to falsely implicate the accused persons in such a heinous offence in which several persons have lost their lives and several sustained serious injuries. Ms. Zaidi supported the impugned judgment and prayed for dismissal of the appeal.

12. We have carefully heard the arguments advanced by the learned counsel for the parties and scanned the entire evidence of the prosecution witnesses.

13. With regard to the extrajudicial confession made by the accused persons before the police while they were in custody in some other case, there was absolutely no reasons for the accused to make such a confession, especially, to an offence which carries the death penalty, which confession does not appeal to reason at all based on the particular facts and circumstances of the case. Admittedly, the accused persons were not taken to have their confession recorded under section 164, Cr.PC before the Magistrate concerned. It is settled law that extra care and caution must be taken before recording conviction on the basis of such confession without strong corroboration as there is a serious risk that such extrajudicial confession has been concocted by the police.

14. Prosecution has failed to prove its case against the appellants beyond any shadow of doubt for the reasons that as per prosecution story there were four accused persons who came on motorbikes at the place of incident and

threw some substance at the place of incident. In order to prove its case, the prosecution produced witnesses Ghulam Nabi and Muhammad Yousuf, who were allegedly eyewitnesses of the incident, before the Judicial Magistrate for identification parade of the accused, in which they identified accused Shahnawaz, by assigning him the role of driving the motorcycle, and Muhammad Rafiq, who allegedly threw the explosive substances at the place of incident. Admittedly, both witnesses Ghulam Nabi and Muhammad Yousuf were never appeared at trial, therefore, the accused persons did not have any opportunity to cross-examine the said witnesses. The prosecution also failed to produce the said witnesses at trial before the trial court for recording their evidence. No explanation for nonproduction of the said two witnesses has been placed on record during trial. Non-examination of such material witnesses at trial is fatal to the prosecution case and creates serious dent in its case. It has rightly been argued by the learned counsel for the appellants that there is a delay of 7 days in holding the identification parade through the eyewitnesses, who had not previously described the *huliya* of the accused, did not know them, at best only had a fleeting glance of them in the dark, since there was no evidence as to the source of light at 09:10 p.m., as such, such identification parade evidence, which generally is regarded as only supportive/corroborative evidence and not primary evidence, cannot be relied upon. Reliance is placed on JAVED KHAN vs. The STATE (2017 SCMR 524).

15. The perusal of prosecution evidence available on record reveals that accused persons came on motorbikes and threw the explosive substances at the place of incident, whereas, admittedly, no motorbike was presented during the trial, which seems to be an important blow to the prosecution case.

16. Perusal of prosecution evidence reveals that its case is entirely based on circumstantial evidence, all pieces of prosecution evidence have to make one chain, an unbroken one where one end of it touches the explosion at the place of incident, resulting into loss of lives and injuries to the persons available at the spot, whereas the other to the neck of the accused. In case of any missing link in the chain, the whole chain is broken and no conviction can be recorded in crimes entailing capital punishment. This principle is

fully attracted to the facts and circumstances of the present case. It is also a well settled principle of law and justice that no one should be construed into a crime on the basis of presumption in the absence of strong evidence of unimpeachable character and legally admissible one. Similarly, mere heinous or gruesome nature of crime shall not detract the Court of law in any manner from the due course to judge and make the appraisal of evidence in a laid down manner and to extend the benefit of reasonable doubt to an accused person being indefeasible and inalienable right of an accused. In getting influence from the nature of the crime and other extraneous consideration might lead the Judges to a patently wrong conclusion. In that event the justice would be casualty. Reliance is placed on the case of AZEEM KHAN and another vs. MUJAHID KHAN and others (2016 SCMR 274).

17. We have noted that there are number of infirmities / circumstances in the prosecution case which create doubt. It is a known principle of appreciation of evidence that benefit of all favourable circumstances in the prosecution evidence must go to the accused regardless of whether he has taken any such plea or not. Reliance is placed on the case of *Muhammad Nawaz and another v. The State and others* (2005 PLD SC 40).

18. In the view of above discussion, we have come to the conclusion that the prosecution has failed to prove its case against the accused beyond any shadow of doubt, therefore, we extend benefit of doubt to the accused and allow the aforesaid appeal. Resultantly, conviction and sentences awarded to the appellants by the trial Court vide judgment dated 21.05.2019 are set aside and appellants Shah Nawaz and Muhammad Rafiq are acquitted of the charge. They shall be released forthwith if they are not required in any other case.

19. These are the reasons for our short order dated 17.11.2020.

J U D G E

J U D G E

Karachi, dated
Dec. ____ 2020

Gulsher/PS