

THE HIGH COURT OF SINDH AT KARACHI

Special Criminal Anti-Terrorism Jail Appeal No.94 of 2020

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

Appellant: Ali Dino alias Muhammad Ali, through
Mr. Saifullah Shaikh, Advocate.

Respondent: The State, through Mr. Muhammad Iqbal
Anwar, Deputy Prosecutor General Sindh.

Date of Hearing: **01.12.2020**

J U D G M E N T

NAZAR AKBAR, J.- Appellant Allah Dino alias Muhammad Ali son of Muhammad Kabil was tried by learned Judge, Anti-Terrorism Court-XX, Karachi, in Special Cases Nos.36 and 36-A of 2019, arising out of FIRs Nos.451 and 452 of 2018, both registered at P.S. Orangi Town, Karachi for offences under Sections 353/324/34, PPC read with Section 7 of the Anti-Terrorism Act, 1997 and Section 23(1)(a) of Sindh Arms Act, 2013. On conclusion of trial, by judgment dated **18.12.2019**, appellant was convicted and sentenced as under:-

Section

01. Section 324 PPC r/w section 7 of ATA 1997

02. Section 353 PPC

03. Section 23(I)-A SAA

Conviction

Accused to suffer R.I for five years and fine of Rs.20,000/- and in case of default of payment of the fine, accused to undergo R.I for six months, more.

Accused to suffer R.I for one year.

Accused to suffer R.I for five years and fine of Rs.20,000/- and in case of default of payment of fine, accused will have to undergo R.I for six months more.

All the sentences were ordered to run concurrently and the benefit of Section 382-B Cr.P.C was also extended to the appellant/accused.

2. Precisely the facts of the prosecution case as per the FIR are that on 08.12.2018 complainant HC Mohammad Arshad was on patrolling duty along with his subordinate staff and during such patrolling when at about 1115 hours they reached at street of Dairy Farm, Sector-9-E, near Bridge Sewerage Karachi, they found four accused persons available there on two motorcycles, who on seeing police party made fire shots at police party with intention to commit their murder, in result of which PC Attaullah received firearm injuries and in response to such fire shots made by accused, PC Khan Mohammad also allegedly made fire shots in defence of police. During such cross firing, two accused persons received firearm injuries and fell down on the ground. One of the injured accused succeeded to escape from the spot along with his other accomplices and the other one was apprehended at the spot, who on inquiry disclosed his name as Ali Dino (the present appellant). Personal search of accused was conducted and one 30 bore pistol bearing No.31045159 along with magazine loaded with two live bullets and one live bullet in the chamber was recovered from his possession. The accused failed to produce any license of the weapon. The arrested accused disclosed the name of co-accused as Ahsan, who had received firearm injury and succeeded to flee away from the spot. The police also secured four empties of 30 bore and two empties of SMG from the place of incident. The police also secured motorcycle bearing registration No.KMF-8261 which was also seized under Section 550 of Cr.P.C. Thereafter injured accused as well as PC Attaullah were shifted to Qatar Hospital for medical treatment and subsequently police shifted the injured accused to Civil Hospital for further treatment and after returning back to P.S, FIR was registered against the accused. After completion of investigation, challan was submitted against the accused under the above referred sections.

3. On **04.02.2019** trial court framed charge against the accused at Ex.4. Accused pleaded not guilty and claimed to be tried.

4. In order to substantiate its case prosecution examined 06 witnesses viz, **PW-01** complainant HC Muhammad Arshad was examined at Ex: 05; **PW-02** PC Khan Muhammad at Ex: 06; **PW-03** Dr. Muhammad Pervaiz at Ex:07; **PW-04** HC Muhammad Fahim Khan at Ex:08; **PW-05** PC Attaullah at Ex:09 and **PW-06** I/O, Inspector Jameel Ahmed Anwar at Ex:10, thereafter, learned APG closed the side of prosecution vide statement at Ex.11.

5. Statement of accused was recorded under Section 342 Cr.P.C. at Ex:12 in which he denied the prosecution allegations, claimed his innocence and false implication in this case. He neither examined himself on oath nor led any evidence in his defence.

6. The learned trial court after hearing the learned counsel for the parties and on assessment of entire evidence convicted and sentenced the appellant by judgment dated **18.12.2019** as stated above. Hence this appeal

7. Mr. Saifullah Shaikh, learned counsel for the appellant has argued that the appellant is innocent and has falsely been implicated in the instant case by the police due to personal grudge arose on non-payment of bribe amount to the police. He further argued that the alleged pistol has been foisted upon the appellant by the police and all the prosecution witnesses have given contradictory statements which do not support the prosecution case. He contended that there is fatal delay in sending the weapons and empties for FSL report which creates doubts and the motorcycle allegedly used in the crime has also not been produced before the trial Court nor was any investigation in connection

of said motorcycle made. He further contended that the appellant is shown as first offender and he has no criminal record. He lastly prayed for acquittal of the appellant.

8. Mr. Muhammad Iqbal Anwar, learned Deputy Prosecutor General Sindh argued that the appellant being armed with deadly weapon tried to commit Qatl-e-Amd of police officials and endangered their lives and also deterred them from discharging their lawful duties and official functions and during such encounter one of the police officials namely, PC Attaullah received firearm injuries. He sought for dismissal of instant appeal by contending that appellant has been fully implicated in the instant case by all the PWs, he was arrested by the police in injured condition after police encounter, therefore, prosecution has proved its case against the appellant beyond any shadow of doubt. He fully supported the impugned judgment.

9. We have carefully heard the learned counsel for the parties and perused the evidence available on record. The scrutiny of record and evidence shows that it is a typical concocted story by two Head Constables and two Police Constables claiming to be on patrolling duty in the jurisdiction of Orangi Town police station. These four police man in a broad day light at 11.15 hours spotted four persons on two motorcycles in suspicious condition near Kettle Farm [Bhanswara] Sector 9-E Orangi Town. The suspicious persons on seeing them started firing and in retaliation the police fired and two of the four suspicious persons got injured but only one was arrested and the other injured managed to run away on the motor bike with two others suspects meaning thereby three persons ran away on one motor bike and Orangi Town Police neither chased them nor subsequently arrested them after interrogation of arrested injured accused. The one injured arrested is

appellant Allah Dino and as usual 30 bore pistol was recovered from him with other articles including a motorbike no. KMF-8261, one mobile phone VigoTel, cash Rs.140 and coloured CNIC. Police recovered 4 empties of 30 bore pistol and 2 empties of official SMG from the spot. It is also alleged that one police official was also injured and after completing formalities the appellant was challaned under Section 353, 324, 34 PPC r/w Section 7 ATA 1997 and also under Section 23(1)(a) Sindh Arms Act, 2013.

10. To prove the charge against the appellant these four police official themselves are the only witnesses as if no other person was available to witness the incident in broad day light at 1115 hours on the busy road in Orangi Town nor anybody was available even on the next day when Inspector / I.O Jamil Ahmed Khan inspected the place of incident. The prosecution has not even tried to collect any confidence inspiring evidence which could have been easily arranged/gathered. The Complainant who had arrested the appellant and claimed to have recovered a pistol form him neither obtained samples of the finger prints of the appellant on the pistol nor he found a private mashir while preparing mashirnama of arrest. In his cross-examination P.W-1/ Complainant HC Muhammad Arshad stated that *"I did not obtain the samples finger prints on pistol recovered from present accused. It is correct to suggest that the incident had taken place at the residential area. It is correct to suggest that I did not take any private mushir while preparing memo of arrest.* The I.O Inspector Jamil Ahmed also did not even draw the sketch of place of incident to identify the place nor was he able to inspect the scene of incident in presence of private mushir. In his cross examination he stated that *"it is correct to suggest that I did not draw the sketch of place of incident while its inspection. Place of incident is situated at Sector 9-E is a road and on both sides of road*

some houses are situated. I tried to take private mushirs while preparing memo of inspection but nobody cooperated with us". The prosecution has relied only on the testimony of interested P.Ws who were police officers and have caused a very grievous injury to the innocent appellant. It is also an admitted fact borne from the record that the appellant was never involved in any criminal activity. Not a single FIR has ever been registered against him at any of the police station in Karachi. In the absence of any criminal record of the appellant, the first allegation that the police party have spotted four persons including the appellant in suspicious condition on two motor bikes could not be believed at all. Even the initial statement of the police officials in the FIR that the accused were suspicious persons also turned out to be false statements. Consequently the prosecution has failed to attribute even motive of appellant to attack police. Neither the suspicion was proved nor could the recovery of pistol be proved in absence of any independent witness of recovery of pistol particularly when no finger prints were taken to identify that the pistol was recovered from the appellant. The I.O has also failed to even inspect the place of incident since he did not draw any sketch of place of incident.

11. The prosecution had the opportunity to collect some independent evidence such as the evidence of finger prints of appellant on the pistol, finding out the owner of the motor bike, if at all it was recovered from the appellant/accused. The I.O did not inquire and investigate who was owner of motor bike nor tried to arrest the second injured and two others who were said to have run away on the other motor bike. The other injured could have been arrested by the police by trying to include possible places of medical treatment in the vicinity of place of incident where the absconding injured accused could have gone for his treatment. No efforts were made to find out the clinic of the doctor or

the hospital in the vicinity to find out the injured. In fact it was concocted story therefore neither any efforts were made to find out the so called injured and the other two accomplices of the appellant who have run away.

12. The medical evidence and report of forensic experts are also not in favour of the prosecution. It is the case of the prosecution that encounter took place between the police and four accused persons and there was a straight firing from both sides whereas according to MLO the injury sustained by the accused / appellant was on his left buttock from the back side. P.W-3 Medico legal Officer Dr. Muhammad Pervaiz Anwar of Qatar Hospital has deposed that when he examined the injured Allah Dino he found entry wound size of 0.5 cm x 0.5 cm inverted margin on left buttock with exit wound size 02 cm x 02 cm at averted irregular margin active bleeding on left inguinal area. Neither the wound size of injury caused to the appellant matched with the size of bullet of official weapon nor the police has sent the official SMG for forensic testing to find out that the official weapon was at all used by the police in the encounter or not. Merely by sending two empties of 7.62 x 39 mm bore, the claim of police firing from official weapon cannot be proved. Rather by not sending the official SMG with its empties for forensic testing amounts to withholding of an important evidence which was necessary to be brought on record to prove that police used official weapon. By withholding an available evidence the prosecution has failed to prove charge of encounter (**Section 353 PPC**).

13. In view of the above facts and evidence, we have no hesitation to hold that there are several circumstances/infirmities in the prosecution case as highlighted above, which have created reasonable doubt about the guilt of accused. By now it is settled law that for giving benefit of

doubt to an accused, it is not necessary that there should be many circumstances creating doubts. If there is a circumstance, which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right. In the case of Muhammad Mansha vs. The State (**2018 SCMR 772**), the Hon'ble Supreme Court has observed as follows:-

“4. 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).”

14. In view of the above discussion when the prosecution has already failed to prove its case against the appellant beyond any reasonable doubt, the conviction of appellant cannot be maintained. Consequently, by short order dated **01.12.2020** this appeal was allowed and conviction and sentence recorded by the trial Court by judgment dated **18.12.2019** was set aside and appellant was acquitted of the charge. These are the reasons for our short order.

J U D G E

J U D G E

Karachi, dated
January 25, 2021

Ayaz Gul