

IN THE HIGH COURT OF SINDH, KARACHI

Criminal A.T.J.Appeal No.176 of 2019

Present:

Mr. Justice Nazar Akbar

Mr. Justice Zulfiqar Ahmad Khan

Appellant No.1 : Jaysham Masih son of Yaqoob Masih
Appellant No.2 : Rashid Masih son of Javed Masih
Through Mr. Habib-ur-Rehman Jiskani,
Advocate.

Versus

Respondent : The State
Through Mr. Muhammad Iqbal Awan, DPG.

Date of hearing : **06.11.2020**

JUDGMENT

NAZAR AKBAR, J:- Appellants Jaysham Masih and Rashid Masih have preferred the instant Criminal Anti-Terrorism Jail Appeal against Judgment dated **30.05.2019** passed by the learned Judge, Anti-Terrorism Court No.XV, Karachi in Special Case Nos.70/2018 (Old No.805/2018) and 70-A/2018 (Old No.806/2018), arising out of FIRs Nos.411/2018 and 412/2018 registered at P.S K.I.A, Karachi, under Section 392, 397, 353, 324, 186 and 34 PPC r/w section 7 of Anti-Terrorism, Act, 1997 and Section 23(i)(a) of Sindh Arms Act, 2013, whereby the appellants were convicted and sentenced as under:-

Since, the accused Jaysham Masih S/o Yaqoob Masih and Rashid Masih S/o Javed Masih have been found guilty of offence punishable u/s 7(i)(b) of ATA 1997 r/w Section 397 PPC, they are convicted and sentenced u/s 265-H(ii) Cr.P.C. They are sentenced to undergo rigorous imprisonment for 10 years, each, for the offences punishable u/s 7(i)(b) of ATA, 1997, r/w Section 397 PPC. They are also liable to pay fine of Rs.30,000/-, each, and in case of failure to pay the fine

they would further undergo 06 months more simple imprisonment, each.

Both the accused are also found guilty for the offences punishable u/s 324/353 PPC. Hence, they are convicted and sentenced to undergo rigorous imprisonment for 10 years each, for the offence punishable u/s 324 PPC and rigorous imprisonment for 02 years, each, for the offence punishable u/s 353 PPC. The accused Rashid Masih was also found guilty for the offence punishable u/s 25 of S.A.A, 2013. Hence, he is convicted and sentenced to undergo rigorous imprisonment of 10 years, with fine of Rs.30,000/-, for the offence punishable u/s 25 of S.A.A, 2013. In case of failure to pay the fine he will further undergo simple imprisonment for 06 months, more.

All the above sentences are to run concurrently. Both accused are also extended benefit of Section 283 Cr.P.C.

2. Precisely, the facts of prosecution case are that on 19.06.2018 the complainant Saleem Ahmed Shaikh alongwith his cousin Sana D/o Basheer was proceeding towards Awami Colony, Karachi on his motorcycle No.KIJ-8873, maker Crown having black color; at about 20:30 hours when they reached at Sector-32, near 1-D bus stop, K.I.A, Karachi, 02 persons wearing pants shirts came from the back on a motorcycle bearing registration No.KJE-1928, maker Unique star having black color and one of them who was wearing black shirt took them on gunpoint and ordered to handover whatever they had. Hence, he snatched cash of Rs.300/- form complainant, they also snatched brown colored purse from his cousin Mst. Sana having cash of Rs.600/- and one golden colored mobile phone whereupon, the complainant resisted. At the same time, the patrolling police party of P.S K.I.A arrived at the spot. The culprits on seeing the police party, tried to escape from there and also opened fire upon them with intention to kill them. In retaliation, police party also made firing due to which both the culprits sustained firearm injuries and fell down. Subsequently, the police party arrested both the culprits. The arrested accused persons disclosed their names as Jaysham Masih

s/o Yaqoob Masih and Rashid Masih s/o Javed Masih, accused Jaysham Masih was driving the motorcycle, whereas accused Rashid Masih took them on gunpoint. Their personal search was conducted in presence of the complainant and the police recovered unlicensed pistol loaded with magazine having live bullets from possession of accused Rashid Masih, as well as robbed articles of the complainant and his cousin from possession of the accused persons also seized their motorbike bearing registration No.KJE-1928. Hence, the present FIRs were registered against the appellants.

3. On conclusion of investigation, I.O, SIP Younus Niamat submitted challan against the accused under the above referred sections. Learned Judge, Anti-Terrorism Court on **07.09.2018** decided to hold joint trial in both the cases as provided under **Section 21-M** of the Anti-Terrorism Act, 1997. Then on **10.11.2018** the trial Court framed charge against the accused at Ex:6. Accused pleaded not guilty and claimed to be tried.

4. In order to prove its case, prosecution examined PW-1, complainant, Saleem Ahmed at Ex:07, PW-2 Sana Bashir at Ex:09, PW-03, MLO, Dr. Aijaz Ahmed at Ex:10, PW-04 ASI, Bashir Ahmed Abro at Ex:11, PW-05 Yousus Niamat at Ex:12 and PW-06 I.O/Inspector Gul Hassan Siyal at Ex:13.

5. Thereafter, the learned APG closed the prosecution side vide statement at Ex:14 and subsequently on **09.05.2019** the charge was ordered to be amended vide Ex:16. The prosecution side adopted the evidence previously recorded by submitting an application under **Section 47** of Qanoon-e-Shahadat Order vide Ex:17, which was allowed and prosecution side was closed vide Ex:18. Statements of accused were recorded under Section 342, Cr.P.C vide Ex:19 and

Ex:20. They denied the prosecution allegations leveled against them. Accused Rashid Masih stated that the alleged recovery has been foisted upon him. Both the accused claimed to be innocent. They neither examined themselves on oath u/s 340(2), Cr.P.C nor produced any witness in their defense.

6. Learned trial Court after hearing the learned counsel for the parties and examination of evidence, by judgment dated **30.05.2019**, convicted and sentenced the accused/ appellants as stated above.

7. We have heard learned counsel for the appellants as well learned Deputy Prosecutor General and perused the record.

8. Mr. Habib-ur-Rehman Jiskani, learned counsel for the appellants has made submissions that the appellants are innocent and have been falsely implicated with malafide intention by the police which forced the complainant party to implicate the appellants. He further contended that no single person from the area was called in order to prove the version of the complainant but fake story has been believed which is illegal and against the law. He further argued that the appellants/accused were arrested illegally and later on the police caused injuries to both the appellants to falsely make out a case of encounter. The police has prepared all false mushirnamas at police station and even not properly sealed, as in the court unsealed case property was produced. Some of the items shown in mushirnama were not even produced. He argued that the evidence produced by the prosecution is not only inconsistent, conflicting and contradictory but also untrustworthy, dishonest and false as such the prosecution has miserably failed to establish case against the appellants, therefore, the conviction awarded under Section 7 Anti-Terrorism, Act, 1997 is bad, illegal and not warranted as there are serious

contradictions in the evidence of prosecution witnesses. He lastly prayed for acquittal of the appellants.

9. Mr. Muhammad Iqbal Awan learned Deputy Prosecutor General argued that prosecution had examined six PWs and they had fully supported the prosecution case. He further argued that after police encounter the appellants were arrested by the police and weapon was recovered from the possession of the accused/ appellants and the trial Court for the sound and valid reasons convicted and sentenced the accused/appellants. He supported the impugned judgment and prayed for dismissal of the instant appeal.

10. We have scanned the entire evidence and on perusal of the evidence and observed material contradictions in the prosecution story. It was strangely a one sided encounter, neither the police party nor the complainant and his cousin Mst. Sana sustained any firearm injury. Even no bullet mark was found on police mobile or motorcycle of the complainant. The complainant in his evidence has stated that a crowd of people gathered over there, however, as per statement of the arresting officer ASI Bashir Ahmed, no crowd of people gathered at the place of incident and therefore, private witness of the alleged encounter could not be associated by the police. In the FIR the cash amount snatched from the complainant was mentioned as Rs.300/-, whereas the complainant in his evidence has stated that the accused also snatched his mobile phone Nokia and wallet having cash about Rs.900/- which is also a contradiction in the prosecution case. The complainant also did not state in his examination-in-chief that the accused were injured on the spot. It was alleged that the accused were on motorcycle but strangely enough the said motorcycle, which was the seized as case property was not produced. Even documents of motorbike were neither produced nor it is stated anywhere that it

was owned by the accused or that it was even a stolen bike. The case property was not sealed at the spot as stated by the complainant in his examination in chief that *“One ladies purse of brown color having some articles of makeup, one mobile phone Nokia and cash Rs.900/- are produced in **unsealed condition**”*. While it is alleged that the complainant and the lady were on a motorcycle, however, in his examination-in-chief Sana Bashir stated that we went to the Police Station in Police Mobile. All such omissions cut the roots of the prosecution case as held in the case of Abdul Sattar and others vs. the State (2002 PCr.LJ 51), wherein it has been observed as under:

“3. Admittedly, in neither of the cases in hand Roznamcha entry was produced by the prosecution in order to prove that the police, in fact, proceeded to the place of scene to recover the alleged weapons. This lapse on the part of prosecution has cut the root of the case of prosecution, thus, rendering the entire episode shrouded by doubt. This fact by itself was enough to disbelieve the prosecution version. Reference can be made to the case of Fareed Ahmed Langra v. The State reported in 1998 PCr. LJ 1368 and another Division Bench judgment in Qalandaro's case reported in 1997 MLD 1632.”

11. The concept of benefit of doubt to an accused person is deep-rooted in our Country. For giving him benefit of doubt, 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, as held by the Honourable Supreme Court in the case of Tariq Pervez versus the State (**1995 SCMR 1345**). In the present case, there are several circumstances as discussed above, which create reasonable doubt in the prosecution case.

12. As a result of unsatisfactory state of evidence in this case, we found several circumstances, which create doubt in the prosecution case and we were unable to uphold the conviction and sentence of

appellants Jaysham Masih son of Yaqoob Masih and Rashid Masih son of Javed Masih recorded by the trial Court vide judgment dated **30.05.2019** and by giving benefit of doubt, we allowed this appeal, set aside the impugned judgment and acquitted the appellants of the charge through short order dated **06.11.2020**. These are the reasons for the said short order.

JUDGE

JUDGE

Karachi, Dated:12.11.2020

Ayaz Gul