

THE HIGH COURT OF SINDH AT KARACHI

Criminal Appeal No.715 of 2019 Confirmation Case No.37 of 2019

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

Appellants: (1) Syed Talib Ali son of Syed Riaz Ali
(2) Muhammad Azhar Chohan son of
Muhammad Afzal Chohan,
through Syed Ahmed Ali Shah, Advocate.

Respondent: The State through Mr. Abrar Ali Khichi,
Additional Prosecutor General Sindh,

Date of Hearing: **24.12.2020**

J U D G M E N T

NAZAR AKBAR, J.- Appellants Syed Talib Ali and Muhammad Azhar Chohan were tried by learned Additional District and Sessions Judge-VIII (Model Criminal Trial Court), Karachi West, in Sessions Case No.1160/2013, arising out of FIR No.352/2013, registered at P.S. Surjani Town for offence under sections 302/34, PPC. On conclusion of trial, vide judgment dated **29.10.2019**, appellant Syed Talib Ali was convicted under section 302 read with section 34, PPC and sentenced to death as Tazir for committing murder of Asif Jameel, with compensation of Rs.200,000/- under section 544-A, Cr.PC to be paid to the LRs. of deceased and in default whereof to further undergo SI for six months, whereas, Appellant Muhammad Azhar Chohan was convicted under section 302(b), PPC read with section 34, PPC and sentenced to rigorous imprisonment for life with compensation of Rs.200,000/- to be paid to the LRs. of deceased and in default whereof to further undergo SI for six months. Benefit of Section 382-B, Cr.PC was extended to the appellants. Trial Court made Reference No.37/2019 for confirmation of death sentence or otherwise awarded to appellant Syed Talib Ali son of

Syed Riaz Ali. Appellants have challenged the impugned judgment through instant appeal.

2. Brief facts of the prosecution case are that complainant Aamir Jamil resident of House No.C/163, Block-D, North Nazimabad Karachi at about **0015 hours** on **04.7.2013** along with one Shoukat Ali Khan and two persons apprehended by them appeared at police station Surjani Town and reported that he is doing personal business whereas his brother namely Javed Usman has a HOSCOL pump and his younger brother Asif Jamil runs the said pump. On **03.07.2013** he was at home, at about **7.45 pm**, he received a phone call that due to a quarrel fire hit to his younger brother Asif Jamil, who has been brought to Abbasi Shaheed Hospital. On receipt of such information, he rushed to hospital and saw dead body of his brother lying in the mortuary, after postmortem dead body was handed over to him, which he kept in cold storage of KKF, then he went to petrol pump where employee, namely, Tahir and others disclosed that two persons on motorcycle No.HDG-8296, Maker Hero and CNG Rickshaw came at petrol pump for taking petrol, during that some hot words were exchanged between them and Asif Jamil, the dispute was resolved at that time. Subsequently, at 7.30 pm at evening time again those persons came along with their other 10/12 companions who will be identified if they came before him, some of them were armed with canes. They tried to save themselves but the matter was being extended, out of them one of the accused snatched Repeater from security guard and fired upon Asif Jamil, which bullet hit on his ribs and on their shouting 10/12 accused fled away, whereas, two accused were apprehended on the spot with the help of customers. Now they came to know their names as Syed Talib Ali son of Syed Riaz Ali and Azhar Chohan. They tight their hands with ropes. Meanwhile, police mobile came and accused were handed over to police. Hence,

complainant claimed that accused have committed murder of his brother Asif Jamil by causing firearm injuries. His statement was registered as FIR No.352 of 2013 and in column No.5 delay was attributed to the complainant (**Ex:5/E**). At the same date and time, both the appellants were arrested in room of duty officer by SIP Aziz Ahmed and memo of arrest was also witnessed by the complainant and Shoukat Ali (**Ex:5/D**). Thereafter the Investigation Officer at 0100 hours inspected the place of occurrence on the pointation of complainant and witnesses of memo of inspection are Muhammad Tahir and Muhammad Mursaleen (**Ex:3/A**). After completion of investigation, IO submitted final challan against the accused persons on 19.07.2013 under the above referred sections.

3. Trial Court framed charge against the accused at Ex.2. Both the accused pleaded not guilty and claimed to be tried. In order to substantiate its case prosecution examined 7 witnesses, viz **PW-01** Muhammad Tahir was examined at Ex:03; **PW-02** Muhammad Mursaleen at Ex:04; **PW-03** Amir Jameel (complainant) at Ex:05; **PW-04** Shoukat Ali Khan at Ex:9; **PW-05** SIP Aziz Ahmed at Ex:10; **PW-06** SIP Rasheed Ahmed at Ex: 12 and **PW-07** Dr. Siri Chand at Ex:13, thereafter, learned ADPP closed the side of prosecution vide statement at Ex.14.

4. Statements of accused were recorded under section 342 Cr.PC at Ex.19 and 20, they denied the prosecution allegations, claimed their innocence and false implication in the instant case. They did not examine themselves on oath but examined witnesses in their defence.

5. The learned trial court after hearing the learned counsel for the parties and on assessment of entire evidence convicted and sentenced the appellant vide judgment dated 29.10.2019, as stated above.

6. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the impugned judgment dated 29.10.2019 passed by the trial Court therefore the same are not reproduced here so as to avoid duplication and unnecessary repetition.

7. Learned counsel for appellants, at the very outset argued that there are contradictions in evidence of the prosecution witnesses, which create serious doubt in the prosecution case and the complainant has falsely implicated the appellants in the instant case for mala fide reasons; while passing the impugned judgment learned trial court did not consider the actual facts and circumstances of the case; learned trial court did not evaluate the prosecution evidence in its true perspective; there has been an unexplained delay of 5 hours in lodging of FIR and everything has been done by the complainant party even before lodging the FIR. No efforts were made to obtain fingerprints on the alleged Repeater said to have been snatched by the appellant Talib Ali and no role has been assigned to the appellant Muhammad Azhar; The Investigation Officer has delayed sending of weapon for FSL by 12 days; the conviction is based on presumption. He further argued that the Ambulance driver who was examined as defence witness has fully negated the prosecution story. None of the customers who allegedly helped in apprehending the appellants were associated as independent witnesses. Lastly, it has been argued that prosecution has failed to prove its case against the appellants beyond any shadow of doubt, as such, prayed for acquittal of the appellants.

8. Learned Deputy Prosecutor General Sindh contended that the appellants were apprehended at the spot, who after snatching the Repeater from the security guard fired on Asif Jamil, who later on succumbed to the firearm injuries caused by the appellants and their

custody was handed over to the police, all PWs/eyewitnesses have fully implicated the appellants in the instant case. He further argued that due to criminal act on the part of the accused persons, one innocent person has lost his life; the prosecution has proved its case against the appellant beyond any shadow of doubt. He fully supported the impugned judgment and prayed for dismissal of the instant appeal and that the instant confirmation reference may be answered in affirmative.

9. We have carefully heard learned counsel for the parties and examined the prosecution evidence minutely.

10. The prosecution story is that appellant Talib Ali has snatched Repeater from security guard of deceased and fired at him when he was caught hold by the other appellant, namely, Muhammad Azhar. It is also alleged that the appellants had come on a motorbike around 5:00 P.M and there has been exchange of hot words between the appellants and deceased, however, around 5:00 PM they had gone on the intervention of people available at the petrol pump. Then around 7:30 PM the appellants came again with their 10/12 friends and in the second round of quarrel, appellant Talib Ali snatched Repeater from Chowkidar and fired only one shot at the deceased. All other accused/accomplices ran away and the two appellants were arrested by the staff of petrol pump and confined in the CNG Room from 7:30 PM to 12:00 midnight till the complainant reached at petrol pump and took them to police station where in the room of duty officer both the appellants were arrested. It was also alleged in the story that while snatching the Repeater from Chowkidar/security guard a blow of danda was hit at the hand of the security guard. The story appears to be unnatural as no prudent mind can accept the events narrated to the police by the complainant after 5 hours of the incident in which one man has lost his life. The complainant was not eye witness of murder.

The incident was not reported to police at helpline 15 by any staff member of petrol pump. Nor it was immediately reported to Surjani Town Police Station which is at a distance of hardly 1¹/₂ kilometer from the place of incident. None from the petrol pump made any telephone call, even to the complainant or deceased's family. It is also not clear that who has called Chhipa Ambulance for shifting the dead body from the alleged place of incident i.e allegedly a petrol pump in Surjani Town to Abbasi Shaheed Hospital. The only witnesses of the scene of incident are a chowkidar/security guard, namely PW-1 Muhammad Tahir and another employee PW-2 Muhammad Mursaleen. None of the other employees were examined.

11. Two eyewitnesses, PW-1 Muhammad Tahir and PW-2 Muhammad Mursaleen have contradicted each other on several facts. Both PWs were unaware of the fact that who called Chhipa Ambulance and both stated that *"some person had made telephone call to Chhipa Welfare and the ambulance of Chhipa came at spot and took the dead body of deceased Asif to hospital."* PW-1 Muhammad Tahir did not disclose that whether anybody has accompanied the dead body or not. PW-2 Muhammad Mursaleen stated that **Shahid cashier** had also gone along with dead body but cashier Shahid has not been examined at all. The complainant has received a call from hospital as neither PW-1 Muhammad Tahir nor PW-2 Muhammad Mursaleen has stated in their examination-in-chief that anyone of them have informed the family of the deceased about the incident of murder at the petrol pump. The two witnesses have also contradicted each other about the manner and place of murder allegedly committed by the appellant Talib Ali. PW-1 Muhammad Tahir stated that *"The accused Talib snatched repeated from me and fired upon the deceased and the other accused Azhar Chohan had captured the deceased Asif. We then apprehended the*

accused persons with the help of persons available at petrol pump and kept them in CNG room.” In his cross-examination he tried to improve his statement when he stated that “The accused who had fired upon the deceased had then thrown the Repeater on the ground. After that I tried to capture the accused persons.....The accused Azhar has captured the deceased and thrown him on the earth and accused Talib had fired upon him.” But in the same breath he, to another question replied that “It is correct that there was no hole in the earth.” PW-2 Muhammad Mursaleen in his examination-in-chief has stated that “Out of them one motorcyclist went behind Asif Bhai and they started fighting with Asif and might be they were snatching cash from Asif”. The accused had then snatched the Repeater from security guard by inflicting dandas to him and took Asif Bhai in CNG room and the other accused had told Talib to kill Asif Bhai. The accused Talib had fired upon Asif on which we all rushed towards the place of incident and apprehended both the accused and kept them locked in CNG room.” In cross-examination, PW-2 Muhammad Mursaleen stated that “They took the dandas lying near generator and inflicted to the security guard on his head and he was bleeding.” It is unnatural and unbelievable that after firing one shot to the deceased, the appellant instead of making his way to run away by firing in the air, he himself threw the weapon on the spot and he was happily arrested by the same person whose head was bleeding since he was hit in his head while Repeater was snatched from him. Neither any **Danda** was produced by complainant to police nor security guard, PW Tahir received any medical treatment for his head injury. PW Tahir failed to explain that how and why he could not even protect his weapon from the appellant and how it came again in his hand to hand over to the complainant who handed over it to the police not at the place of occurrence but at the police station. It is pertinent to note that in the entire episode before and even in the process of arrest of

appellants, no other person was even slightly injured, nor even appellants were injured or beaten by anyone in the CNG room. Beside this, the prosecution neither made any effort to obtain finger prints on the Repeater nor sent the Repeater to any finger print expert to verify that it was in the hands of the appellant at the time of firing or even after or before.

12. The status of PW-01 Muhammad Tahir that he was working as security guard/chowkidar at the petrol pump and the weapon Repeater was provided to him by the deceased is also highly doubtful as no evidence to this effect has come on the record. In his cross-examination, PW-1 Mohammad Tahir about his position at petrol pump stated that *“.....It is incorrect to suggest that I had given my status in the statement u/s 161 as Chowkidar. Vol. says that I am security guard at petrol pump. I am not educated. I started to work at petrol pump as security guard about 12 to 13 days before this incident. It is correct that I had not disclosed the name of security agency who had appointed me as security guard at petrol pump. Vol. says I was appointed as security guard by deceased Asif. I do not know who was license holder of that Repeater. Vol. says that deceased Asif had disclosed that the same is in the name of company. It is correct that Asif had not given any authority or any other relevant document alongwith Repeater to me..... At the time of incident I myself, Mursaleen and Shahid were present at petrol pump. Mursaleen used to fill the petrol in the vehicles..... I do not know who had called to Chipa ambulance. I also do not know who had informed the police about the incident. I had informed about the incident to the brother of deceased. It is correct that I had not given the phone number on which I had informed to the brother of deceased and from which number.”* The complainant about Thair/ guard in his cross-examination to advocate for accused

Talib stated that *“The guard Tahir was employed by deceased himself about 15/30 days prior to this incident. It is correct that no formal appointment letter was issued to guard Tahir. Vol. says no such appointment letter is being issued by us for employee of any person.”* And about Repeater, the complainant in his cross to counsel for accused Azhar Chohan stated that *“The repeater present in Court is of petrol pump and not of security personnel or accused. This repeater was in hand of guard/chowkidar Tahir at the time of incident. The license of this repeater was issued in name of petrol pump and not in name of guard Tahir. Such permission is obtained by us that any guard may keep the arm at time of duty hours at petrol pump.”* But he did not produce licence of the said Repeater during investigation nor in Court.

13. The Investigating Officer, SIP Rasheed Ahmed also in his cross-examination conceded that *“In my investigation I did not secure license of the Repeater involved in this case. In my investigation I did not collect any document showing therein belonging of the Repeater with any person of company.”* The failure to identify the Repeater and its owner creates very much doubts in the story that whether such Repeater has at all been used in the incident or not. The record shows that neither the Repeater was recovered by the police from the accused nor its empty was collected by Investigation Officer from the place of incident, rather it has been handed over by the complainant to the police along with apprehended appellants. **Ex:5/D**, memo regarding arrest of produced accused persons, seizure of Repeater, M/C and rickshaw was prepared on **14.7.2013** at **0005 hours** at police station in the room of duty officer and not at the place of incident. Relevant portion of memo or arrest and seizure is reproduced below:-

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“.....in presence of witnesses at 0005 hours they were arrested in room of D/O (Duty Officer), the aforesaid Rickshaw and M/C was seized as evidence and

case property by the police, the aforesaid Repeater was also seized and sealed at office of D/O, the witnesses affixed their signatures and got completed the memo, moreover upon conducting search of accused persons nothing was recovered nor any thing was seized.”

The complainant also confirmed in his cross-examination on **22.10.2014** that *“I also handed over one Repeater, one rickshaw (without number) and one motorcycle (Honda bearing No.8296) so also the accused persons to police at police station which was secured from place of incident. The police had prepared the mashirnama of arrest and recovery at about 11:30/12 night which I produce as Ex:5/D, it is same, correct and bears my signature”.*

14. In addition to the above evidence, irrespective of the fact that the Investigation Officer has failed to find out the license of the said Repeater which was admittedly provided to the security guard at the petrol pump by the deceased, the I.O did not send the Repeater and the empty to the forensic laboratory until **15.07.2013** (Ex:12/H) though it received by the I.O from the complainant on **04.07.2013** at 0005 hours. The I.O himself in his examination-in-chief stated that *“on 15.7.2013 I deposited the secured Repeater to the office incharge FSL.”* It confirms that the Repeater was not immediately sent for forensic testing and the I.O took about **12 days** for sending the same for FSL but neither any explanation that why he failed to immediately send it for forensic testing and where had it been kept, since no *malkhana* entry showing deposit of the same during this period in the *malkhana* was produced. In the case of JAVED KHAN alias BACHA and another Vs. The STATE and another (**2017 SCMR 524**) the Supreme Court of has observed as under:-

10. As regards the matter of matching the bullet casing with the pistol, it is not free from doubt. The Police allegedly recovered the pistol stated to have been used in the crime in another case (FIR No.237 dated 29.6.2001) however **the pistol was sent to the Forensic Science Laboratory on**

7.1.2002, whereas the investigation officer stated that Raees Khan disclosed using the same weapon in this crime on 14.10.2001; the delay in sending the pistol was not explained. Neither the Forensic Science Laboratory nor any of the policemen, who had retrieved the bullet and its casing and had kept them in custody and then delivered them to the Laboratory, mention the marks affixed on the seals affixed on the parcels in which the said items were delivered to and received by the Laboratory. **Under such circumstances it would not be safe to uphold the conviction of the appellants merely on the basis of the firearm expert's report because of the legitimate concerns about when and how the bullet casing and pistol were delivered to the Forensic Science Laboratory.** (Emphasis provided).

15. Another important aspect of this case is that according to **Ex:12/A** at the time of registration of **FIR No.352/2013** under Section 302 PPC, another FIR **No.353/2013** under Section 23(1)(a) of Sindh Arms Act, 2013 was also registered at P.S Surjani Town, since licence of the seized Repeater handed over by the complainant to the police was not produced but there is no progress in the case of **Crime No.352/2013**. Allegedly this FIR was in respect of the Repeater said to have been used in commission of offence under Section 302 PPC in FIR No.352/2013 and on presentation of challan under said FIR whoever was found to be guilty of offence under **Section 23(1)(a)** of Sindh Arms Act, 2013 should have also been tried along with the case of Crime No.353/2013 under Section 302 PPC. The prosecution has totally suppressed the progress, if any, in respect of crime No.353/2013 under Section 23(1)(a) of Sindh Arms Act, 2013. This fact also suggests that the complainant and PW-1, who claimed to have been in possession of the same, have failed to establish lawful authority of the said Repeater and its presence at the place of incident.

16. 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).”

17. In view of the above discussion when the prosecution has already failed to prove its case against the appellants beyond any reasonable doubt, the conviction of appellants under Section 7 of ATA, 1997 cannot be maintained. Consequently, by short order dated **24.12.2020** this appeal was allowed and conviction and sentence recorded by the trial Court by judgment dated **29.10.2019** was set aside and appellants were acquitted of the charge. The confirmation reference sent by the trial court was answered in the “Negative”. These are the reasons for our short order.

JUDGE

JUDGE

Karachi,
Dated: 06.03.2021

Ayaz Gul