IN THE HIGH COURT OF SINDH, KARACHI

Special Criminal Anti-Terrorism Jail Appeal No. 94 of 2019

Before:
Mr. Justice Mohammad Karim Khan Agha
Mr. Justice Khadim Hussain Tunio JJ-

Appellant: Muhammad Ayoub through Mr. Mumtaz Ali Khan Deshmukh, advocate.

Respondent: The State through Mr. Abdullah Rajput, D.P.G.

Date of hearing: 03.09.2019

Date of decision: 03.09.2019

J U D G M E N T

KHADIM HUSSAIN TUNIO, J- Through captioned Special Criminal Anti-Terrorism Jail Appeal, the appellant has impugned the judgment dated 26.02.2019, passed by the learned Special Judge ATC No. IV Karachi in Special Case No. 1150 of 2018, culminated from F.I.R No. 424 of 2018 registered with P.S Korangi, for the offences punishable u/s 392/34 PPC r/w S. 7 ATA, 1997, whereby he was convicted and sentenced to suffer R.I for three years with a fine of Rs. 10,000/-. The benefit of S. 382-B Cr.P.C was extended to him.

2. Precisely, the allegations against the appellant are that on the day of incident *i.e.11.10.2018 at about 0030 hours*, the appellant accompanied by his companion robbed the complainant on gun-point and took numerous articles from his possession and thereafter fled the scene. After the arrival of police party, the complainant narrated the facts who then accompanied the police and chased the culprits. Upon seeing the police party, the appellant started firing upon the police and in retaliation, police opened fire as well. The present appellant received a gun-shot to his right leg and fell down whereas the other culprit escaped. The appellant was apprehended along with a pistol and robbed articles. Thereafter, the F.I.R was lodged.

3. After conducting usual investigation in the case, a challan was submitted before the trial Court. Thereafter, a formal charge was framed

against the appellant by the trial Court to which he pleaded not guilty and claimed to be tried.

4. The prosecution, in order to substantiate its case against the appellant examined in all 5 witnesses and produced numerous documents in evidence. Thereafter, vide statement, prosecution side was closed.

5. The statement of accused was recorded u/s 342 Cr.P.C wherein he pleaded his innocence and denied the allegations levelled against him while claiming false implication. He stated that he is innocent and was picked up by Ranger personnel and later handed over to the police where he was falsely implicated in the case. He examined himself on oath and also examined his brother namely Asad Ali in his defence.

6. Learned trial Court, after hearing the counsel for parties and assessment of evidence, convicted and sentenced the appellant as stated supra.

7. The facts of the case as well as evidence produced before the trial Court find an elaborate mention in the impugned judgment therefore the same may not be reproduced hereunder for the sake of brevity and to avoid repetition.

8. Learned counsel for the appellant argued that the appellant is innocent and has been falsely implicated in the present case; that there are material contradictions in the evidence of prosecution witnesses; that although there was an encounter, none from the police party received any injury which appears to be doubtful; that the learned trial Judge failed to properly consider the prosecution story which was totally false and absurd; that no confidence inspiring evidence is available on record to hold the appellant guilty of the offence with which he was charged; that the impugned judgment was passed on the basis of conjectures and surmises and in a hasty manner; that the appellant was acquitted for the charge u/s 324 and 353 P.P.C on the same set of evidence. He therefore prayed that the impugned judgment be set aside and the appellant be acquitted of his charge.

9. Conversely, Mr. Abdullah Rajput, learned D.P.G argued that after the encounter, the appellant was arrested effective immediately; that the

alleged pistol with which he fired at the police was recovered from his possession on the spot; that the contradictions if any are minor in nature; that no enmity has been proven by the appellant for him to be falsely implicated in the present case. He prayed for the dismissal of the appeal.

10. We have carefully heard the arguments of learned counsel for the appellants, the contentions of learned D.P.G and have perused the record available before us.

11. After the perusal of record, we have come to the conclusion that the prosecution has failed to prove its case against the appellant for the reason being that the evidence of the police officials is not confidence inspiring. The incident had occurred at night time and the encounter between the police and appellant was with sophisticated weapons. During the encounter, only the appellant received one injury on his right leg and none from the police party received any injury nor was the police mobile damaged. The whole episode appears to be unbelievable. With regard to the safe custody of the recoveries *i.e.* weapon and empties, the prosecution has failed to establish the same. P.W-1 ASI Shabir Ahmed, while being cross-examined, deposed that *he had kept the case property in the malkhana*, however subsequently, he also admitted that he did not produce the entry regarding handing over the case property to the incharge of *malkhana*. Neither was the incharge of *malkhana* examined so as to establish the safe custody of the alleged recoveries. While deposing with regard to the exchange of fire between the police and appellant is concerned, all the P.Ws had their own versions for the same. P.W-1 ASI Shabir Ahmed deposed that *there was a distance of 100 paces* between the police and the culprits when the firing started. While contradicting the same, P.W-2 ASI Nadeem Ali deposed that *the distance was 7 paces*. P.W-4 Muhammad Rafiq, while contradicting P.W-2's statement deposed that the distance was 100 yards. However, neither of these depositions found any corroboration by the medical evidence. From the observations found in the medical evidence, blackening was seen around the entry-wound on the right leg of appellant. Furthermore, P.W-3 Dr. Shehzad Ali deposed that such an observation suggested that the injury was inflicted from a distance of less than four feet. Moreover, while deposing with regard to the time consumed during encounter, all the prosecution witnesses again

deposed differently while contradicting each other. P.W-1 ASI Shabir Ahmed, in his cross-examination, deposed that the alleged encounter *lasted for 3 minutes*. However, his statement was contradicted by P.W-2 ASI Nadeem Ali who deposed that the encounter had lasted for *5 to 7 minutes.*Not only this, police failed to note down the denominations of the alleged robbed currency amount nor did they mention the model and SIM number of allegedly robbed *Q-mobile*. None from public had been cited as a witness of the alleged incident. The serial number for the recovered pistol and that on the license of the appellant is one and same, however the presence of license has not been discussed by any of the prosecution witnesses. Moreover, the appellant was acquitted of the charges u/s 324 and 353 PPC on the same set of evidence by the trial Court.

12. As noted above, there are a number of infirmities/circumstances in the prosecution case which cast doubt over the prosecution case. The Hon'ble Apex Court, in the case of ***Muhammad Mansha v. The State (2018 SCMR 772)***, has been pleased to observe 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).***"

13. For what has been discussed above, this Court, while extending benefit of doubt to the appellant, acquitted him of the charge and consequently set-aside the impugned judgment passed by the learned trial Court vide short order even date.

These are the reasons for the same.

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