

THE HIGH COURT OF SINDH AT KARACHI

Special Criminal Anti-Terrorism Jail Appeal No.02 of 2020

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

Appellant: Shabbir Shah @ Waqas. (Nemo).

Respondent: The State, through Mr. Zafar Ahmed Khan,
Additional Prosecutor General Sindh.

Date of Hearing: **18.12.2020**

J U D G M E N T

NAZAR AKBAR, J.- Appellant Shabbir Shah @ Waqas was tried by learned Judge, Anti-Terrorism Court-XII, Karachi, in Special Case No.1879 of 2017, arising out of FIR No.279 of 2017, registered at P.S. Landhi, Karachi for offences under Sections 392, 394, 353, 324, 186, 34, PPC read with section 7 of the Anti-Terrorism Act, 1997. On conclusion of trial, by judgment dated **06.12.2019**, appellant was convicted under Section 265-H(ii) of Cr.P.C and sentenced under **Section 394** PPC to suffer R.I for **07 years**. The appellant was also sentenced under **Section 353** PPC to suffer R.I for **01 year**. The appellant was also sentenced under **Section 324** PPC to suffer R.I for **05 years**. The appellant was also sentenced under **Section 7** of ATA, 1997 to suffer R.I for **05 years**. All the sentences were ordered to run concurrently. Benefit of **Section 382-B**, Cr.PC was extended to appellant. Appellant has challenged the impugned judgment through instant appeal.

2. Brief facts of the prosecution case as per the FIR are that complainant Muhammad Abid Raheem son of Dolatzar of FIR No.279/2017 recorded his statement u/s 154 Cr.PC on 27.09.2017 at about 2230 hours and stated that he is running his business. On

27.09.2017 at about 1710 hours he was going to his house on motorcycle and when he reached at Sharif Colony, 36-B, double road near Siddiquiyah Masjid, Landhi Karachi, three persons came on motorcycle, who showed their weapons and pointed out to stop and stopped their motorcycle in front of motorcycle of complainant and by showing of weapons, snatched Rs.18,000/- from him and on his resistance, one accused fired upon him with intention to commit his murder, which hit his right side rib and he became injured. In the meantime, two police officials of P.S Landhi came there, who were already known to complainant, accused persons also made firing upon police party with intention to commit their murder, in retaliation, police also made firing due to which one accused became injured, who was taken on motorcycle of its middle seat by his companions, motorcycle slipped and fell down but the accused again successively fled away from the spot. Area people took complainant to hospital at Korangi No.5 for medical treatment, from where he was again taken to JPMC through Chhipa Ambulance. In the said ward of JPMC one injured accused was also brought, who was having bullet injury on left leg and also identified by complainant to be the same who fired upon him. ASI Abdul Rahman also came there and after interrogation, arrested the injured accused, who disclosed his name as Shabbir Shah (the present appellant) and also disclosed the names of his escaped companions as Yousuf @ Takkar S/o Dilawar Khan and Sohail Ahmed S/o Alam Zaib.. On the basis of 154 Cr.PC statement of complainant, present FIR No.279/2017 under Sections 392/394/353/324/186/34 PPC was registered at PS Landhi, Karachi. After completion of investigation, challan was submitted against the accused under the above referred sections. Proceedings against absconding accused Yousuf @ Takkar were

completed under Section 87 and 88, Cr.PC, who was declared as proclaimed offender.

3. On **06.03.2019** Trial Court framed charge against the accused at Ex.7. Accused pleaded not guilty and claimed to be tried.

4. In order to substantiate its case prosecution examined 06 witnesses viz, **PW-01** complainant Muhammad Abid was examined at Ex:09; **PW-02** Muhammad Ashiq (brother of complainant) at Ex:10; **PW-03** ASI Abdul Rahman at Ex:11; **PW-04** Dr. Abdul Ghaffar at Ex:12; **PW-05** ASI Syed Shiraz Ali at Ex:13 and **PW-06** Inspector/I/O Nadeem Ghouri at Ex:14, thereafter, learned APG closed the side of prosecution vide statement at Ex.15.

5. Statement of accused was recorded under Section 342 Cr.PC at Ex.16, 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 **06.12.2019** as stated above.

7. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the impugned judgment dated 06.12.2019 passed by the trial Court, therefore, the same are not reproduced here so as to avoid duplication and unnecessary repetition.

8. The record shows that Vakalatnama of Syed Farooq Ahmed Sheerazi is available on record but he has never appeared in this case to represent the appellant. Even on the first date of hearing i.e **30.01.2020** he was not present and the instant appeal was admitted

for regular hearing in his absence and, therefore, Production Order of the appellant was issued. On **18.12.2020** when this appeal was fixed before this bench, we have perused the record available in file with the help of learned Additional Prosecutor General and also minutely scanned the evidence available on record.

9. Learned Additional Prosecutor General Sindh 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. However, the evidence of prosecution appears to be full of doubtful statements.

10. PW.1 complainant Muhammad Abid in his cross-examination has stated that, ***"It is correct to suggest that motorcycle upon which I was travelling is not available in my statement u/s 161 Cr.P.C, voluntarily states that on that day I was not own my motorcycle, but I lend the same from a neighbor to send cash at my house. It is correct to suggest that it is not available in my statement u/s 161 Cr.P.C that I am having a shop of chicken. It is correct to suggest that police officials, with whom encounter took place, not shifted me to Hospital..... It is correct to suggest that place of incident is Katchiabadi and thickly populated area. It is correct to suggest that no bloodstained earth was collected from spot by the I.O of the case at the time of site inspection., voluntarily states that blood which was oozing from my body was absorbed by my clothes as I wore Shirt and Jeans. I cannot say whether I.O took into possession my clothes or not, but my clothes were cut off by Doctors of JPMC and secured the same in a shopper..... I noticed***

*the accused when his wound was cleaned by the nursing staff of hospital.....***It is correct to suggest that accused not tried to escape from the hospital after watching police near to him. It is correct to suggest that date upon statement u/s 154 Cr.P.C is overwritten. It is correct to suggest that Hulia of accused persons are not available in my statement u/s 154 Cr.P.C.**

11. PW-03 ASI Abdul Rahman in his cross-examination has stated that “*It is correct to suggest that my duty hours are not available in my statement u/s 161 Cr.P.C, voluntarily says that it was the fault of I.O, who not mentioned such time. It is correct to suggest that in the initial line of statement u/s 161 Cr.P.C it is mentioned therein that one Abid became injured at double road due to firearm injury, to whom his brothers reached at JPMC, it is not mentioned therein that he became injured due to incident of snatching. It is correct to suggest that even in entry No.41 at Ex:11/A it is not mentioned that Abid became injured during the incident of snatching. It is correct to suggest that my letter addressed to MLO having no reference that Abid became injured during incident of snatching. It is correct to suggest that have not obtained any ML Number of accused Shabbir Shah from MLO neither noted its number. It is correct to suggest that today I have not produced any entry/memo through which it is to be proved that upon which bed number accused Shabbir Shah was admitted for medical treatment.*”

12. PW-4 Dr. Abdul Ghaffar, MLO, JPMC, in his cross-examination has stated that, “*It is correct to suggest that wound of exit of Abid was not noted as there was no exit. It is correct to suggest that at 1752 hours MLC No.J-9441 was issued, whereas at about 1859 hours MLC No.J-9437 was issued, which is out of sequences.....*

It is correct to suggest that in MLC of Waqas the place of occurrence is written as Qayoomabad, whereas in my examination in chief I have disclosed such place as Jam Sadiq Bridge.”

13. PW.5 ASI Shiraz Ali in his cross-examination has stated that, “.....At the time when **I collected the empties from spot, bloodstained of accused as well as victim were available, but I had not tried to collect.** No other police official came at spot except us after this incident. It is correct to suggest that it is not available in my statement u/s 161 Cr.P.C that I have informed to SHO about this incident. It is correct to suggest that it is also not available in my statement u/s 161 Cr.P.C that when I reached at P.S duty officer ASI Abdul Rehman went to JPMC.**It is correct to suggest that Hulia of accused persons is not available in my statement u/s 161 Cr.P.C nor I have disclosed today before this court.”**

14. PW.6 SIO Muhammad Nadeem in his cross-examination has stated that, “I consumed one hour at spot to complete the formalities. It is correct to suggest that according to my examination in chief I took photographs of the place of incident at the time of inspection. **It is correct to suggest that I did not collect any bloodstained earth from the spot. It is correct to suggest that I did not make any private witness to be mashir except the brothers of injured / complainant, as nobody was ready to be mashir. I not sent official SMG for FSL examination whether the recovered empties are matched or not.** Photographs of place of incident does not show any date & time. **It is correct to suggest that place of incident is thickly populated area.”**

15. Close scrutiny of the above evidence reflects that prosecution story appears to be unnatural and unbelievable for the reason that according to prosecution case, it was a thickly populated area, but no effort was made by the police party to associate any private person as PW. The complainant himself has contradicted on many occasions. He made false statement that when the police arrived at the place of incident, the appellant has made straight firing on the police but the record shows that there was no mention of recovery of weapon from the appellant. The complainant has not even mentioned the particulars of his motorcycle on which he was traveling at the time of incident. No *Hulia* of accused was mentioned in the statement of complainant. The injured/ complainant was not sent to the hospital by the police but the public gathered has shifted him to hospital and subsequently the police has come to give him medico-legal treatment by the time the medical examination was completed. Story of the prosecution is that the accused has gone to JPMC on his own where the complainant was also getting treatment. Had he been a criminal, the appellant would not have gone to JPMC, rather would have tried to get treatment from some private hospital. The prosecution has failed to establish that the official weapon was used by the police in the so-called encounter since there is no mention of the official weapon and no official weapon of police was sent for FSL. It appears that the Investigation officer to conduct fair investigation in this case has failed, as no independent person of locality was examined in order to ascertain the truth beyond any reasonable doubt. The above stated circumstances in our view created serious doubts about the very happening of the encounter.

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 appellant beyond any reasonable doubt, the conviction of appellant cannot be maintained. Consequently, by short order dated **18.12.2020** this appeal was allowed and conviction and sentence recorded by the trial Court by judgment dated **06.12.2019** was set aside and appellant was acquitted of the charge. These are the reasons for our short order.

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Karachi, dated
April _____, 2021

Ayaz Gul