

THE HIGH COURT OF SINDH AT KARACHI

Special Criminal Anti-Terrorism Jail Appeal No.229 of 2019

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

Appellant: Shahid @ Darinda S/o Abdullah. (Nemo).
Respondent: The State, through Mr. Abrar Ali Khichi,
Deputy Prosecutor General Sindh.
Date of Hearing: **24.12.2020**

J U D G M E N T

NAZAR AKBAR, J.- Appellant Shahid @ Darinda was tried by learned Judge, Anti-Terrorism Court-XX, Karachi, in Special Cases Nos.63 and 63-A of 2019, arising out of FIRs Nos.04 and 05 of 2019, both registered at P.S. Kalri, Karachi for offences under Sections 353/324 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 **29.04.2019** appellant/accused 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

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

to suffer R.I for **one year**.

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

2. Brief facts of the prosecution case as per the FIRs are that on **08.01.2019** SI Rashid-ur-Rehman was on patrolling duty along with his subordinate staff, namely, PC Muhammad Aamir, PC Zahoor Ali and

HC Tahir Hameed in official police mobile No.SP-079-A; during patrolling he received an information through an informer that one member of Lyari Gang War is available at Brocker Chowk (intersection) Truck Ada, Opposite Allied Bank Limited, Karachi with intention to commit crime. The police party proceeded towards the pointed place, where on pointation of spy, they saw one suspicious person who after seeing the police party, started firing upon them with intention to commit their Qatl-e-Amd. In retaliation police party also made some fire shots upon the accused, who received firearm injuries on his legs. During encounter, at about 1955 hours, they got succeeded to apprehend the accused on the spot in injured condition. The apprehended accused disclosed his name as Shahid alias Darinda S/o Abdullah (the present appellant). Thereafter personal search of accused was conducted by SI Rashid-ur-Rehman and recovered one 30 bore pistol of black color alongwith magazine containing one live round and one in its chamber from the right hand of accused. The police enquired about the license of recovered pistol from the accused but he failed to produce the same. Therefore, the police arrested him and sent him in Chhipa Ambulance to Civil Hospital, Karachi for medical treatment, wherefrom he was brought at the police station and separate FIRs were registered against him. After completion of investigation, challan was submitted against the accused under the above referred sections.

3. Trial Court ordered joint trial in both the cases as provided under **Section 21-M** of the Anti-Terrorism Act, 1997, vide order dated **30.01.2019**, Ex.3, and on **15.02.2019** 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 05 witnesses viz, **PW-01** complainant SIP Rashid-ur-Rehman was

examined at Ex:05; **PW-02** PC Muhammad Aamir at Ex:06; **PW-03** SIP Ghulam Hussain at Ex:07, **PW-04** Dr. Muhammad Javed Memon, MLO Civil Hospital at Ex:08 and **PW-05** I.O/Inspector Nisar Ahmed Lodhi at Ex:23, thereafter, learned APG closed the side of prosecution vide statement dated **03.4.2019** at Ex.10.

5. Statement of accused was recorded under **Section 342(1)** Cr.PC at Ex.11, in which he denied the prosecution allegations, claimed his innocence and false implication in this case. He stated that he was arrested from his house on **27.12.2018** by some police officials and after ten days keeping him in their illegal custody, they fixed him in these false cases. 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/accused by judgment dated **29.04.2019** 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 **07.11.2019** 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 the instant Jail Appeal against the Judgment dated **29.04.2019** was filed through Superintendent, Central Prison, Karachi along with application under **Section 5** of Limitation Act for condonation of delay by letter dated **27.08.2019**. The appeal was admitted for regular hearing by order dated **16.09.2019** with the observation that the appeal appears to be time barred, however, the point of limitation will be decided along with appeal. The appellant has pleaded for condonation of delay in filing appeal on the ground that he is a helpless poor man and his family was unable to arrange and

engage a defence counsel to prepare and file the appeal against the impugned judgment. The impugned judgment also shows that the appellant has filed an application in his own handwriting (page-135 of R&Ps) before the trial court stating therein that he is a poor person and is unable to engage a counsel, therefore, counsel on state expenses may be provided to him and therefore, the trial Court by order dated **15.2.2019** provided him a counsel on state expenses. The grounds taken by the appellant in application under **Section 5** of Limitation Act appears to be reasonable, therefore, application (MA No.8809/2019) is allowed and the delay in filing of instant appeal is condoned.

9. Now coming to the merits of the instant appeal, on **24.12.2020** when this appeal was fixed before this bench even paper book has not been prepared, however, we have perused the record available in Court file with the help of learned Deputy Prosecutor General and also minutely scanned the evidence available in the R&Ps.

10. Learned Deputy 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.

11. We have heard the learned Deputy Prosecutor General and carefully perused the evidence available on record. The scrutiny of record and evidence shows that it is a typical concocted story by police party claiming to be on patrolling duty received spy information at about 1955 hours and as soon as tried to arrest the accused/appellant, the accused person on seeing them started firing and in retaliation the police also fired and the accused got injured and subsequently arrested

and as usual 30 bore pistol was recovered from him with other articles. Police recovered 4 empties of 30 bore pistol, 3 9mm bore empties and 11 empties of official SMG from the spot. After completing formalities the appellant was challaned under Section 353/324 PPC r/w Section 7 ATA 1997 and also under Section 23(1)(a) Sindh Arms Act, 2013.

12. To prove the charge against the appellant the police officials themselves are the only witnesses as if no other person was available to witness the incident at about 1955 hours on the busy road in Kalri, Karachi nor anybody was available even when Inspector/I.O Nisar Ahmed Lodhi 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 from him neither secured blood stained earth from the place of incident nor he found a private mashir while preparing mashirnama of arrest. In his cross-examination P.W-1/ Complainant SIP Rashid-ur-Rehman stated that *“It is correct to suggest that I did not secure the blood stained earth from the place of incident. It is correct to suggest that the place of incident situated at thickly populated area. **It is correct to suggest that I did not mention the description/hulia of present accused in the FIR.** It is correct to suggest that I had mentioned in memo of arrest and recovery that I secured Q-mobile from possession of accused person, whereas, I produced Voice mobile before this Court.....**It is correct to suggest that neither police mobile got received any fire shot, nor any police officials received any injury. It is correct to suggest that investigation officer did not take private mushir while inspecting the Memo of Site Inspection.**”* The I.O Inspector Nisar Ahmed Lodhi also did not even mention the time in the sketch of place of incident nor was he able to inspect the scene of incident in presence

of private mushirs. In his cross examination he stated that “***It is correct to suggest that the place of incident is situated at populated area. It is correct to suggest that I did not take any private musir, while preparing memo of inspection. It is correct to suggest that time is not mentioned in the sketch of place of incident, but I had mentioned the time in memo of inspection.***”

13. The medical evidence and report of forensic experts are also not in favour of the prosecution. P.W-4 Medico legal Officer Dr. Muhammad Javed Memon of Civil Hospital has deposed that when he examined the injured Shahid Hussain @ Darinda he found entry wound size inverted margin of 0.8cm over interior side of right leg rounded with exit wound 1.5cm and firearm wound of entry 0.7c.m, over interior side of left leg rounded, inverted margin with exit wound 1.5cm over posterior side of left leg. 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. The forensic report shows that out of 4 shots allegedly fired by the accused, 2 empties marked as C3 and C4 from 30 bore were not fired from the said 30 bore pistol allegedly recovered from the accused. Merely by sending 11 empties of 7.62x39 mm bore and 3 empties of 9mm pistol, 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**).

14. 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).”

15. 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 **24.12.2020** this appeal was allowed and conviction and sentence recorded by the trial Court by judgment dated **29.04.2019** 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