

THE HIGH COURT OF SINDH AT KARACHI

Special Criminal Anti-Terrorism Jail Appeal No.83 of 2020

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

Appellant No.1: Imam Bux S/o Kaloo.

Appellant No.2: Imran Ali S/o Sultan Ahmed.
Through Ms. Azra Iqbal, Advocate.

Respondent: The State, through Ms. Seema Zaidi, Deputy
Prosecutor General Sindh.

Date of Hearing: **09.12.2020**

J U D G M E N T

NAZAR AKBAR, J.- Appellants Imam Bux and Imran Ali were tried by learned Judge, Anti-Terrorism Court-IV, Karachi, in Special Cases Nos.431, 431-A and 431-B of 2019, arising out of FIRs Nos.127 and 128, both registered at P.S Pak Colony for offences under Sections 353/324/34, PPC read with Section 7 of the Anti-Terrorism Act, 1997 and Section 23(1)(a) of Sindh Arms Act, 2013 and FIR No.144 of 2019, registered at P.S. Garden, Karachi for offence under Sections 392/397/34 PPC. On conclusion of trial, by judgment dated **28.02.2020**, the appellants/accused were convicted and sentenced as under:-

- (a) Accused (1) Imam Bux S/o Kaloo and (2) Imran Ali s/o Sultan Ahmed found guilty of the charged offence u/s **353/324/34-PPC** R/W Section 6(2)(n) punishable under section 7(1)(h) ATA 1997, they are convicted and sentenced to suffer imprisonment for **five years**, each, and fine of Rs.10,000/- (Rupees Ten thousand) each, in case of default in payment of fine, they shall further suffer imprisonment for three months, each.
- (b) Accused (1) Imam Bux S/o Kaloo and (2) Imran Ali s/o Sultan Ahmed also found guilty of the charged offence punishable u/s **397/34 PPC**, are convicted and sentence to suffer imprisonment for **seven years**, each.

- (c) Accused **Imam Bux** S/o Kaloo found guilty of the charged offence punishable u/s **23(1)(a)** of Sindh Arms Act 2013, is convicted and sentence to suffer imprisonment for **three years** and fine of Rs.05,000/- (Rupees Five thousand), in case of default in payment of fine, he shall further suffer imprisonment for two months.

All the sentences shall run concurrently. The benefit of Section 382(b) Cr.P.C shall be extended to both the accused persons.

2. Brief facts of the prosecution case as per the FIRs are that on **27.06.2019** two police constables of P.S Garden Karachi, namely PC Wajid Ali Shah and PC Sajid Ali, were busy in patrolling duty on official motorcycle. While patrolling at about 10:20 hours when they reached at Muhammadi Masjid, Garden West Karachi, they saw that two persons were riding on a black color motorcycle snatched cash from an old man aged about 70/72 years (Muhammad Ibrahim, complainant of FIR No.144/2019 of P.S Garden) by causing pistol butt on his head and tried to flee. The victim raised hue and cry, the said police officials arrived there, the culprits tried to escape from the scene but both the PCs chased them and near Chattri Chowk, Goal Tanki, when police officials tried to stop them, accused persons opened fire on the police party with intention to kill and deterred them from performing their lawful duties. In retaliation and self defence, police party also started firing, in result of which one accused sustained bullet injuries and fell down from the motorcycle, police party apprehended both the suspects. The injured accused disclosed his name as Imam Bux and other suspect disclosed his name as Imran (the present appellants). Police party conducted search of injured accused Imam Bux and recovered one pistol of 30 bore punched number alongwith magazine loaded with five live bullets, cash of Rs.5050/-, color copy of CNIC and one black color Nokia mobile phone. From possession of accused Imran one black color Nokia mobile phone was recovered. One 70cc motorcycle, Registration No.KMU-6450, Engine No.SSA-1476124, Chassis

No.SSA1449521, maker Super Power was also seized u/s 550 Cr.P.C. Accused persons failed to produce valid licence/permission of arms and ammunition as well as registration documents of motorcycle. Thereafter, injured accused Imam Bux was shifted to Hospital in Chippa Ambulance for medical treatment, while accused Imran along with recovered case property shifted to P.S Pak Colony. After completion of legal formalities, two separate FIRs were lodged at P.S Pak Colony by complainant, P.C Sajad Ali and the third one was registered at P.S Garden by complainant, Muhammad Ibrahim Abdul Latif for taking further legal action against accused/appellants.

3. After completion of investigation, on **12.07.2019** SIO Zulfiqar Ali/ of P.S Jackson submitted two separate charge sheets against the accused/ appellants, while PI/SIO Rafique Ahmed of P.S Garden on **23.07.2019** submitted one separate charge sheet in crime No.144/2019 against the accused/ appellants under the above referred sections.

4. Trial Court ordered joint trial in all three cases as provided under **Section 21-M** of the Anti-Terrorism Act, 1997, vide order dated **13.09.2019**, Ex.4, and on the same day i.e **13.09.2019** framed joint charge against the accused at Ex.5. Accused pleaded not guilty and claimed to be tried.

5. In order to substantiate its case prosecution examined 10 witnesses viz, **PW-01** complainant of FIR No.144/2019 was examined at Ex:06; **PW-02** PC Wajid Ali Shah at Ex:07; **PW-03** ASI Khalid Javed at Ex:08 and **PW-04** PI Ghulam Muhammad at Ex:09, **PW-05** Dr. Arift, MLO Civil Hospital at Ex:10; **PW-06** PC Sajid Ali at Ex:11 **PW- 07** Aurangzeb Khan, Duty Officer, P.S Pak Colony at Ex:12; **PW-08** Inspector Zulfiqar Ali at Ex:13; **PW-09** Dr. Abdul Aleem Memon,

Additional Police Surgeon at Ex:14 and **PW-10** Inspector Rafiq at Ex:15 thereafter, learned APG on 03.02.2020 closed the side of prosecution vide statement at Ex.16.

6. Statements of accused were recorded under **Section 342(1)** Cr.PC at Ex.17 and 18, in which they denied the prosecution allegations, claimed their innocence and false implication in this case.

7. The learned trial court after hearing the learned counsel for the parties and on assessment of entire evidence convicted and sentenced the appellants/accused by judgment dated **28.02.2020** as stated above.

8. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the impugned judgment dated **28.02.2020** passed by the trial Court, therefore, the same are not reproduced here so as to avoid duplication and unnecessary repetition.

9. Ms. Azra Iqbal, learned counsel for the appellants argued that the appellants are innocent and have been falsely implicated in this case by the police; no recovery of alleged robbed cash has been affected from the accused/appellants and the alleged recovered pistol and other articles have been foisted upon them. She further argued that the alleged recovered pistol, cash and other articles were not sealed at the spot but later on the same were sealed at police station. She contended that the alleged incident had taken place in a thickly populated area in daylight time but no private person has been cited as witness in these cases. She further contended that the evidence 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 their case against the appellants/accused.

She further argued that there was no independent/corroborative evidence on record regarding the encounter and the alleged encounter is highly doubtful; no statement of area people has been recorded although police encounter as per prosecution story had taken place for more than 8 minutes. She has pointed out that in the alleged encounter neither any police official nor police motorcycle or passerby was hit by the fire shots of appellants which clearly proves fake story of the prosecution. She further argued that there is no criminal record of the appellants. She lastly prayed for acquittal of the appellants.

10. On the other hand, Ms. Seema Zaidi, learned Deputy Prosecutor General Sindh sought for dismissal of instant appeal by contending that appellants have been fully implicated in the instant case by all the PWs, they were arrested by the police in injured condition after police encounter, therefore, prosecution has proved its case against the appellants beyond any shadow of doubt. She fully supported the impugned judgment.

11. We have carefully examined the evidence of the prosecution witnesses and noticed that the case of the prosecution was full of lacunas, contradictions and discrepancies. We deem it appropriate to emphasize such infirmities as under:-

- (i) It is case of the prosecution that encounter has taken place between the police and the accused persons in which one accused sustained bullet injury on his face. However, strangely enough neither any police official nor the police motorcycle or even a passerby was hit by alleged firing of the accused party.
- (ii) PW-01, Muhammad Ibrahim, complainant of FIR No.144/2019 in his cross examination has deposed that ***“I left my home for bank at about 10:15 am. I consumed 10/12 minutes in journey from my home to bank. I***

maintain my own account in HBL Garden Branch. I was remained in Bank for about 15 minutes. In journey from HBL Garden to place of incident I spent 10/15 minutes.”, whereas in the FIR the time of incident is mentioned as **1020 hours**. In his examination in chief, PW-01 has stated that **“When I was on the way boarded on my Scooter Vespa and reached at Fowara Chowk, in all of sudden, motorcycle hit my Scooter”**. However, in his cross-examination he admitted that **“It is correct to suggest that it is not mentioned in my statement u/s 154 Cr.P.C that my Scooter was hit by motorcycle of accused persons.”** PW-01 in his examination in chief stated that **“I tried to rescue myself but he hit butt of pistol on my head and snatched case of Rs.5000/- which was lying in front pocket of my shirt and ran away.”** However, in his cross-examination he admitted that **“It is correct to suggest that it is not mentioned in my statement u/s 154 that accused persons hit pistol on my head.”** In his cross-examination PW-01 further deposed that **“It is correct to suggest that accused persons snatched cash of Rs.5000/- which was lying in front pocket of my shirt but they did not snatch cash of Rs.30,000/-. Vol says that they did not know about the case of Rs.30,000/- as it was lying in side pocket of my shirt..... It is correct to suggest that I did not disclose the description of accused persons in my statement u/s 154 Cr.P.C..... It is correct to suggest that police officials at PS disclosed me that accused who inured me and snatched cash from me are arrested by them after encounter.”**

- (iii) PW-4 Inspector Ghulam Muhammad/I.O of crime No.144/2019 in his cross-examination has stated that **the place of incident is populated area and people were passing through place of incident at the time of site inspection**. However, he has not associated any person from the locality to be the mashir of site inspection. At the time of arrest of injured accused at hospital also he has not associated any person as mashir of arrest as he has also

admitted in his cross-examination that ***it is correct to suggest that at the time of arrest of accused Imam Bux at hospital I have not associated any person as mashir of arrest.***

- (iv) It is an admitted fact that that the investigating officer had not sealed the recovered articles i.e. mobile phones allegedly recovered from the possession of accused.
- (v) PW-2 SIP Wajid Ali Shah in his cross-examination has stated that ***“It is correct to suggest that at the place of incident we have not seized anything and not prepared memo of arrest and recovery at the spot”***. He also admitted that none from the locality was associated to act mashir of arrest and recovery.
- (vi) It is an admitted position that the police has not sealed the SIMs allegedly recovered from the possession of accused;
- (vii) PW-2 in his cross-examination has also stated that it is correct to suggest that in the memo of arrest and recovery details of SIMs are not mentioned. The reason for not producing the mobile SIMs is one that by producing the mobile the court could have taken the cognizance and called the mobile data to confirm that at what point of time these accused were at what place.
- (viii) PW-03 also stated that ***“at the time of my arrival at PS complainant was not present at PS and he came PS for about 01:15 PM. I recorded 154 Cr.P.C statement of complainant at about 01:45 PM..... It is correct to suggest that there is overwriting in time mentioned in 154 Cr.P.C statement. There is overwriting on digit 01. It shows that time was mentioned 1145 but by overwriting it looks 1345.”***
- (ix) The alleged recovered pistol was received by the PW-08, SIO Zulfiqar Ali/I.O of crime No.127/2019 on **27.06.2019**, however, it was sent for FSL on **28.06.2019** as admitted by SIO Zulfiqar Ali in his cross examination, no plausible

explanation with regard to delay in sending the weapon at Forensic Division has been furnished by the prosecution.

- (x) No official weapon allegedly used in the encounter has been sent for forensic testing, however, only three 9mm bore empties were sent for FSL.

12. Further, the record shows that an effort was made to amalgamate two different crimes having taken place in the jurisdiction of two different police stations, one in the jurisdiction of P.S Pak Colony and the other in the jurisdiction of P.S Garden. The complainant of alleged robbery of Rs.5000/- first identified the appellants in police station, where before lodging the FIR, police had already disclosed him that culprits were arrested in an encounter and they were already available in the police station. The prosecution has given no justification for not sending the official weapons for FSL alongwith empties of the official weapons, though empties of official weapons and the alleged 30 bore pistol allegedly recovered from the accused were recovered from the same spot on the same day. The place of incident was a thickly populated area and it was a daylight time but neither the bullets hit any person nor any police officials or any passerby and their motorcycle and even no damage has been caused to private property.

13. The above lacunas not only made the recovery doubtful, but has demolished the whole case of the prosecution and also shattered the entire fabric of the testimony of the prosecution witnesses. It is very difficult for us to give any weight to the testimony of prosecution witnesses. The credibility of PWs was highly doubtful and untrustworthy. It is a well settled law that no one should be convicted for a crime unless his guilt is proved beyond reasonable doubt by the prosecution through reliable and legally admissible evidence. On the point of benefit of doubt, rule of Islamic Jurisprudence has been laid

down in the judgment rendered by the Hon'ble Supreme Court of Pakistan in AYUB MASIH's case (**PLD 2002 SC 1048**), wherein the apex Court has observed as under:--

"It is also firmly settled that if there is an element of doubt as to the guilt of the accused, the benefit of the doubt must be extended to him. The doubt, of course, must be reasonable and not imaginary or artificial. The rule of benefit of doubt, which is described as the golden rule, is essentially a rule of prudence, which cannot be ignored while dispensing justice in accordance with law. It is based on the maxim, "It is better that ten guilty person be acquitted rather than one innocent person be convicted". In simple words it means that utmost care should be taken by the Court in convicting an accused. It was held in "The State v. Mushtaq Ahmed (PLD 1973 SC 418) that this rule is antithesis of haphazard approach or reaching a fitful decision in a case. It will not be out of place to mention here that this rule occupies a pivotal place in the Islamic Laws and is enforced rigorously in view of the saying of Holy Prophet (P.B.U.H) that the mistake of Qazi (Judge) in releasing a criminal, is better than his mistake in punishing an innocent".

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 appellants beyond any reasonable doubt, the conviction of appellants cannot be maintained. Consequently, by short order dated **09.12.2020** this appeal was allowed and conviction and sentence recorded by the trial Court by judgment dated **28.02.2020** was set aside and appellants were acquitted of the charge. These are the reasons for our short order.

J U D G E

J U D G E

Karachi, dated
April _____, 2021

Ayaz Gul