

THE HIGH COURT OF SINDH AT KARACHI

Special Criminal Anti-Terrorism Jail Appeal No.08 of 2019
Confirmation Case No.14 of 2019

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

Appellant: Abul Hashim son of Ghulam Mian through
Mr. Khalid Ahmed Khan, advocate.

Respondent: The State through Mr. Hussain Bux Baloch,
Additional Prosecutor General Sindh.

Date of Hearing: **17.12.2020**

J U D G M E N T

NAZAR AKBAR, J.- Appellant Abul Hashim was tried by learned Judge, Anti-Terrorism Court-XV, Karachi, in Special Cases Nos.110 and 111 of 2017, arising out of FIRs Nos.145 and 146 of 2013, registered at P.S. Korangi Industrial Area, Karachi for offences under sections 392, 397, 302, 353, 324, 336, 337(f)(vi), 34, PPC read with section 7 of the Anti-Terrorism Act, 1997 and Section 23(1)(a) of the Sindh Arms Act, 2013. On conclusion of trial, vide judgment dated **29.11.2018**, appellant was convicted and sentenced as under:

- (i) For offence under section 7(i)(a) of the Anti-Terrorism Act, 1997, read with section 302, 397 PPC, sentenced to death to be hanged by his neck till he is dead. He is also liable to pay fine of Rs.500,000/-, in default thereof, to undergo imprisonment for 3 years more. His properties were ordered to be forfeited as provided under Section 7(2) of the Anti-Terrorism Act, 1997.
- (ii) For offences punishable under Section 7(i)(c) of the Anti-Terrorism Act, 1997 read with Section 324, 353, 337-F(vi), PPC sentenced to undergo 10 years R.I. He is also liable to pay Daman of Rs.200,000/- as compensation for anguish suffered by SIP Naqi Lodhi, in terms of Section 337-Y, PPC over a period of 2 years in lump sum from the date of decision. In case of failure to pay Daman or any part thereof within the above specified period, he would be dealt with in terms of Section 337-Y(ii), PPC.
- (iii) For offence under section 7(i)(h) of Anti-Terrorism Act, 1997 read with Section 324, PPC sentenced to 10 years R.I. and to pay fine of Rs.100,000/-, in default whereof, to undergo further imprisonment for 2 years.

- (iv) For offence under Section 343, PPC sentenced to undergo 2 years R.I.
- (v) For offence under section 23(1)(a) of the Sindh Arms Act, 2013 sentenced to 10 years R.I. and to pay fine of Rs.200,000/-, in default whereof, to undergo further imprisonment for one year.

All the sentences were ordered to run concurrently. Benefit of Section 382-B, Cr.PC was extended to appellant. Trial Court made Reference No.14 of 2019 for confirmation of death sentences or otherwise, awarded to the appellant through the impugned judgment. Appellant has challenged the impugned judgment through instant appeal.

2. Brief facts of the prosecution case as per the FIRs are that complainant Muhammad Adil Raheem son of Abdul Raheem in his statement u/s 154 Cr.PC disclosed that he is a resident of Landhi No.05, Karachi and working at Artistic Factory. On **11.03.2013** at about 10:00 pm, while he was returning to home from his work, accompanied by his friends Muhammad Asim and Dawood Khan, and reached in front of the Office of UC No.01. Korangi No.2 ½ between Bilal Chowrangi and GPO, two persons on a motorcycle having pistols intercepted them and on gunpoint robbed the complainant of mobile phone Samsung and cash Rs.2,200/-. While, the culprits were committing robbery, one patrolling police mobile of P.S. Korangi headed by SIP Naqi Lodhi and his other subordinates passed from there. As soon as the culprits saw the police party, they opened straight fire upon them as well as upon the complainant party. In retaliation, police also made aerial firing. Due to the firing made by culprits, one bullet hit to SIP Naqi Lodhi on the knee of his left leg due to which he became injured and fell down. The police officials managed to arrest one culprit, with pistol 30 bore, loaded with magazine having one live round and one live bullet in its chamber, which was taken into custody. The police

also secured 8 empties of 30 bore pistol and 4 empties of SMG from the place of incident. The other culprit managed to escape from there by making firing. In the meanwhile, another police mobile of P.S. Korangi headed by SIP Ghulam Sarwar along with his subordinates came over there, who enquired the name of the arrested accused. He disclosed his name as Abul Hashim son of Ghulam Mian. He also disclosed the name of his escaped companion as Abdul Rafique son of Muhammad Siraj. SIP Ghulam Sarwar seized motorcycle registration No.KBX-3065 maker Superstar of black colour, having Engine No.185336, Chassis No.257669. Injured SIP Naqi Lodhi was shifted to Jinnah Hospital. SIP Ghulam Sarwar prepared memo for arrest of accused and recovery, which was signed by the complainant and his friend Muhammad Asim, as witnesses. During commotion, they could not find their third companion Dawood Khan. However, they proceeded to the police station along with police party, where they informed SIP Ghulam Sarwar that their third companion was missing. Hence, SIP Ghulam Sarwar returned to the place of incident. They searched for Dawood Khan with the help of head lights of police mobile. They recovered dead body from bushes at about **0200 hours**, which was identified by complainant to be his friend Dawood Khan, aged about 22 years, who sustained firearm injury on his head, due to the firing made by the culprits. In the meanwhile, SIP Rao Muhammad Javaid also returned from Jinnah Hospital and came at the spot. He carried out all the legal formalities and thereafter the dead body of the deceased Dawood Khan was shifted to Jinnah Hospital. When SIP Rao Muhammad Javaid returned to the police station from Jinnah Hospital, he recorded the statement of the complainant under section 154 Cr.PC. On the basis of the said statement of complainant, present **FIR No.145/2013** under sections 392/302/ 353/324/34 PPC was registered at PS Korangi Industrial Area, Karachi. A separate FIR No.146/2013 under section 13(1)(a) of

the Sindh Arms Act, 2013 was also registered against the caused by SIP Ghulam Sarwar. After completion of investigation, challan was submitted against both the accused under the above referred sections. When the proceedings against absconding accused under section 87 and 88, Cr.PC, were completed they were declared as proclaimed offender and the case against them was kept on dormant file.

3. Trial Court ordered joint trial in both the cases as provided under Section 21-M of the Anti-Terrorism Act, 1997 and framed charge against the accused at Ex.6. Accused pleaded not guilty and claimed to be tried.

4. In order to substantiate its case prosecution examined 10 witnesses, namely, PW-01 SIP Rao Muhammad Jawaid was examined at Ex:09; PW-02 Dr. Afzal Ahmed at Ex:10; Pw-03 SI Ghulam Sarwar at Ex:11; Pw-04 PC Farhan Khan at Ex:12; PW-05 Inspector Saghir Ahmed at Ex:13; PW-06 Muhammad Adil Raheem at Ex:15; PW-07 Dr. Dileep at Ex:16; PW-08 SIP Naqi Lodhi at Ex: 17; PW-09 Muhammad Awais Khan at Ex:19; and PW-10 (Retd.) Inspector Shabeer Mustafa at Ex:21. Thereafter, learned APG closed the side of prosecution for evidence vide statement at Ex.22.

5. Statement of accused was recorded under section 342 Cr.PC at Ex.23, in which he denied the prosecution allegations, claimed his innocence and false implication in these 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 vide judgment dated 29.11.2018 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

29.11.2018 passed by the trial Court therefore the same are not reproduced here so as to avoid duplication and unnecessary repetition.

8. Learned counsel for appellants, at the very outset argued that the police has falsely implicated the appellants in the instant case for mala fide reasons; the conviction is based on presumption as, while passing the impugned judgment, learned trial court did not consider the actual facts and circumstances of the case and did not consider the reports with regard to bullet injury sustained by the deceased; learned trial court did not evaluate the prosecution evidence in its true perspective and has chosen only the parts of evidence favourable to the prosecution; learned trial court failed to take into consideration the plea raised by the appellant in his 342, Cr.PC statements. Lastly, it has been argued that prosecution has failed to prove its case against the appellant beyond any shadow of doubt, as such, prayed for acquittal of the appellant.

9. Learned Additional Prosecutor General Sindh sought dismissal of instant appeals by contending that appellant has been fully implicated in the instant case by all the PWs, arms and ammunitions were recovered from his possession, therefore, prosecution has proved its case against the appellant beyond any shadow of doubt. He fully supported the impugned judgment.

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

11. PW.1 SIP Rao Muhammad Jawaid in his cross-examination has stated that, *"....It is correct to suggest that place of incident is situated on service lane.It is correct to suggest that I did not know about the incident as I was not present at the time of encounter."*

12. PW-2 Dr. Afzal Ahmed, MLO, JPMC, in his cross-examination has stated that, *“I came to Court on directions of my authorities for recording my statement on oath. It is correct to suggest that I have not produced any authority letter in written to show that I am authorized doctor and can lead any evidence in Court.”*

13. PW.3 SIP Ghulam Sarwar in his cross-examination has stated that, *“Memo of arrest and recovery was written by Munshi and in his own writing. Again says that the memo of arrest and recovery was prepared by me in my own handwriting.It is correct to suggest that I did not mention in Ex.11/B that on which part of his leg ASI Naqi Lodhi has received bullet injury. It is correct to suggest that I have not mentioned in memo the names of those officials who caught hold the accused when I reached at the spot. It is **correct to suggest that I have provided the number of 30 bore pistol, make and colour in my memo of arrest and recovery.** It is correct to suggest that I have not mentioned in my memo of arrest and recovery that who had taken injured ASI Naqi Lodhi to JPMC and how he was taken to hospital.”*

14. PW.4 PC Farhan Khan in his cross-examination had stated that, *“It is correct to suggest that in my deposition I did not disclose before the Court that we patrolling in Government mobile and I did not disclose the number of police mobile before this Court. ... Distance between accused persons and police party at the time of encounter was about 10/12 meters. When ASI Naqi Lodhi got injured, firstly I and HC Amjad attempted to arrest the accused then we took the ASI Naqi Lodhi, who after sustaining bullet injury fell down.”*

15. PW.6 Muhammad Adil Raheem in his cross-examination has stated that, *“.....It is correct to suggest that except myself the accused persons/culprits did not commit any robbery with my friends. Vol. adds, they tried to commit robbery with my friends, when the police party*

opened fire upon the culprits, we were standing beside them. **Due to firing, I sat down on the road, while my friends kept standing. Later on, they fell down. My friend Dawood Khan sustained firearm injuries. At that time, the culprits were conducting search of Dawood Khan.** Accused persons were at a distance of 15 to 20 feet from the police party, where encounter started. Two culprits were travelling on one motorcycle. One of the culprits escaped from the spot on foot, after making firing. I informed the police at police station that my friend Dawood Khan was missing. I was accompanied by SIP Ghulam Sarwar and 4 to 5 other police officials at the time when we went in search of Dawood Khan on police mobile. We found dead body of Dawood Khan within 10 minutes. It is incorrect to suggest that due to darkness I am unable to state anything that my friend sustained firearm injury due to the firing made by police or by culprits. **Vol. adds: since the culprits were conducting search of my friend Dawood Khan and suddenly firing started, he sustained injury due to firing made by culprits. It is incorrect to suggest that deceased Dawood Khan did not expire due to firing made by accused Abul Hashim. It is correct to suggest that accused Abul Hashim did not commit robbery with me, Vol. adds: his accomplice committed robbery with me”**

16. PW-8 SIP Naqi Lodhi in his cross-examination has stated that, “...Culprits were at a distance of 15/16 paces from us when they opened fire upon us. The encounter lasted for about 4/5 minutes.”

17. PW.10 PI/IO Shabeer Mustafa in his cross-examination had stated that, “...**It is correct to suggest that I had sent the recovered weapon for FSL after a delay of 4 days.** It is correct to suggest that I had submitted challan after about one month of registration of FIR.”

18. In view of above evidence, it is apparent that prosecution has failed to prove its case against the appellants beyond any reasonable doubt for the reasons that the evidence against the appellant is highly unnatural and unbelievable; that the prosecution has sent the recovered weapon to FSL with a delay of four days, as admitted by PW-10 PI/IO Shabeer Mustafa in his cross-examination, which obviously creates serious doubts in the efforts of police to connect the appellant with the offence. The delay in sending the weapon to FSL has always been considered fatal to prosecution case by the superior courts. We may refer to the case of JAVED KHAN alias BACHA and another Vs. The STATE and another (**2017 SCMR 524**) wherein 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).

19. We have noted that the alleged incident had occurred on 11.03.2013 at 2200 hours, whereas, the FIR was registered on 12.03.2013 at 0600 hours with a delay of about 08 hours. This delay has adverse effect on the case of prosecution. The death has occurred in presence of two persons on the spot during encounter and yet none was eyewitness of injury caused to the deceased and his disappearance from the place where he was reportedly injured. It is unbelievable that a

friend of complainant got firearm injury in his forehead in his presence and with injury he silently slipped away towards bushes instead of falling down and crying for medical treatment. Once he was declared a missing person from the place of incident then why after six hours police instead of contacting his family first went to the place of incident. No blood stained earth or bushes were taken into possession to confirm that his body was recovered from the place as alleged in the FIR. In the FIR the story is in two parts. In first part there is no mention of injury to the deceased Dawood. Even the complainant has failed to recall that the deceased was with them. The incident took place at 10:00 pm. The appellant was arrested at 10:30 pm and FIR was registered after 8 hours at 6:30 am. The second part of the story is about recalling by the complainant that Dawood was missing and then police before lodging FIR went back to place of incident to recover his dead body from the bushes is unnatural. Such story is result of deliberation and consultation, why immediately FIR was not lodged. It is settled law that unexplained delay in lodging FIR would create a doubt and its benefit has to go to the accused. Reliance is placed on the case of *Mst. ASIA BIBI ..Vs..The STATE and others (P L D 2019 Supreme Court 64)*, the relevant observation of the Hon'ble Supreme Court in the said judgment is reproduced below:-

29.....There is no cavil to the proposition, however, it is to be noted that in absence of any plausible explanation, this Court has always considered the delay in lodging of FIR to be fatal and casts a suspicion on the prosecution story, extending the benefit of doubt to the accused. It has been held by this Court that a FIR is always treated as a cornerstone of the prosecution case to establish guilt against those involved in a crime; thus, it has a significant role to play. If there is any delay in lodging of a FIR and commencement of investigation, it gives rise to a doubt, which, of course, cannot be extended to anyone else except to the accused. Furthermore, FIR lodged after conducting an inquiry loses its evidentiary value. [see: *Iftikhar Hussain and others v. The State (2004 SCMR 1185)*]. Reliance in this behalf may also be made to the case titled as *Zeeshan @ Shani v. The State (2012*

SCMR 428) wherein it was held that delay of more than one hour in lodging the FIR give rise to the inference that occurrence did not take place in the manner projected by prosecution and time was consumed in making effort to give a coherent attire to prosecution case, which hardly proved successful. Such a delay is even more fatal when the police station, besides being connected with the scene of occurrence through a metaled road, was at a distance of 11 kilometers from the latter. In the case titled as Noor Muhammad v. The State (**2010 SCMR 97**) it was held that when the prosecution could not furnish any plausible explanation for the delay of twelve hours in lodging the FIR, which time appeared to have been spent in consultation and preparation of the case, the same was fatal to the prosecution case. In the case titled as Muhammad Fiaz Khan v. Ajmer Khan (**2010 SCMR 105**) it was held that when complaint is filed after a considerable delay, which was not explained by complainant then in such situation it raises suspicion as to its truthfulness. Thus, we are of the view that in the facts and circumstances of the case, the explanation given by the prosecution is not plausible.

20. 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).”

21. 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 under Section 7 of ATA, 1997 cannot be maintained. Consequently, by short order dated **17.12.2020** this appeal was allowed and conviction and sentence recorded by the trial Court by judgment dated **29.11.2018** was set aside and appellant was acquitted of the charge. The confirmation reference sent by the trial court is answered in the “Negative”. These are the reasons for our short order.

JUDGE

JUDGE

Karachi, Dated:12.04.2021

Ayaz Gul