

# THE HIGH COURT OF SINDH AT KARACHI

Special Criminal Anti-Terrorism Appeal No.101 of 2018  
Special Criminal Anti-Terrorism Appeal No.102 of 2018

Present: *Mr. Justice Nazar Akbar*  
*Mr. Justice Zulfiqar Ahmad Khan*  
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Appellants: (1) Aziz alias Kamal son of Nadeem and  
(2) Waqar Khan son of Zulfiqar Khan through  
Mr. Moula Bux Bhutto, Advocate.

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

Complainant: In person.

Date of Hearing: **17.12.2020**

## **J U D G M E N T**

**NAZAR AKBAR, J.-** Both the appellants were tried by learned Judge, Anti-Terrorism Court-VIII, Karachi, in Special Case No.871/2016 for offence under Sections 302, 397, 34, PPC read with section 7 of the Anti-Terrorism Act, 1997 arising from FIR No.113/2016 of P.S **Landhi, Karachi**. Appellant Aziz alias Kamal was also tried in Special Case **No.761/2016** (Re-numbered as Special Case No.26/2017) for offence under section 23(1)(a) of the Sindh Arms Act, 2013 arising from crime No.195/2016 of P.S **Awami Colony**, Karachi. On conclusion of trial, vide judgment dated **19.03.2018**, appellants were convicted and sentenced to imprisonment for life for offence under section 7(i)(a) of the Anti-Terrorism Act, 1997 read with section 302, 397, 34, PPC and to pay fine of Rs.500,000/- each, in default whereof to undergo imprisonment for further 3 years. Their properties were also ordered to be forfeited as provided under section 7(2) of the Anti-Terrorism Act, 1997. Appellant Aziz alias Kamal was also convicted under section 25 of the Sindh Arms Act, 2013 and sentenced to 10 years R.I. and to fine

of Rs.200,000/-, in default thereof to further undergo imprisonment for one year.

All the sentences were ordered to run concurrently. Benefit of Section 382-B, Cr.PC was extended to appellants. Appellants have challenged the impugned judgment through instant appeals.

2. Brief facts of case are that on 13.03.2016, complainant Abdul Majeed along with his brother Abdul Rehman, nephew Adnan and friend Idress, who had come to meet them and were chatting outside their house. At about 2130 hours, their friend Idrees when seated on his car for going to his house, in the meanwhile, one person along with his another companion came to him and while putting pistol upon him, asked for handing him over whatever he had, on which Idrees gave him Rs.1600/- and key of the car. The other accused who was sitting on motorcycle was captured by the brother of complainant, namely, Abdul Rehman (deceased), on seeing the situation, his companion, the robber, fired upon Abdul Rehman, who received fire shot injuries, felt down on the ground. Nephew of complainant, namely, Adnan came running and on seeing him both the accused along with their third companion who was said to be standing in the corner of street went away on their motorcycle. The injured was taken to hospital but he could not survive the injuries and died. After burial and funeral, on the next day, the complainant got his statement under section 154, Cr.PC recorded, which was incorporated in FIR at **P.S. Landhi, Karachi**.

3. The appellants were arrested in another FIRs Nos.194, 195 and 196 of 2016, registered at **P.S. Awami Colony**, during investigation both accused disclosed to have committed present offence, IO of the present case interrogated them, who rearrested them in the instant case as well. They were produced before Civil Judge & Judicial Magistrate

East Karachi where PWs Idrees and Adnan identified them. IO sent recovered 9MM pistol to FSL for its matching with five empties recovered from the place of incident. After completion of investigation, challan was submitted against both the accused under the above referred sections.

4. 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.5. Accused pleaded not guilty and claimed to be tried.

5. In order to prove its case prosecution examined 12 witnesses, thereafter, learned APGs closed the side of prosecution at Ex.82.

6. Statements of accused were recorded under section 342 Cr.PC at Ex.83 and 83, in which they denied the prosecution allegations, claimed their innocence and false implication in these cases. Accused Aziz alias Kamal stated that on **16.04.2016** he was arrested from his house and before identification parade he was shown to witnesses at police station. Police demanded illegal gratification for his release which he could not arrange, therefore, he was falsely implicated in this case. Appellant Waqar Khan stated that on **14.04.2016**, his motorcycle was stolen, he lodged such FIR at P.S. Landhi. His motorcycle was recovered and he was called at P.S. Landhi, he went there on **16.04.2016**, wherefrom he was sent to P.S. Awami Colony, where he was informed that his motorcycle has been used in commission of offence and he was arrested. Witnesses were frequently visiting police station before identification parade. Both accused claimed to be innocent and requested for justice. Both the accused examined themselves on oath; they did not examine any witness in their defence.

7. 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 **19.03.2018** 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 **19.03.2018** passed by the trial Court therefore the same are not reproduced here so as to avoid duplication and unnecessary repetition.

9. 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; 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 pleas raised by the appellants in their 342, Cr.PC statements. Lastly, it has been argued that prosecution has failed to prove its case against the appellants beyond any showed of doubt, as such, prayed for acquittal of the appellants.

10. Learned Additional Prosecutor General Sindh sought dismissal of instant appeals by contending that appellants have been fully implicated in the instant case and specific role has been assigned to each one of the accused persons; arms and ammunitions were recovered from possession of accused, therefore, prosecution has proved its case against the appellants beyond any shadow of doubt. He fully supported the impugned judgment.

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

12. PW.1 in his cross-examination stated that, *“The entire incident had taken place within one or two minutes. I was at the distance of about 10/12 feet from PW Idrees when he sat in his car, whereas, Abdul Rehman (deceased) was at the distance of about 7/8 feet. I saw accused from the distance of 8/10 paces, who came on foot. The distance between motorcycle of accused and car of Idrees was about 8/10 feet. We took our brother to hospital in Edhi Ambulance. I had disclosed before police that about 5/6 fires were shot by accused. .... It is a fact that police had collected evidence from the place of incident. It a fact that I had **given two empties to the police after six days of the incident. ...After I got myself free from burial, funeral and receiving condolences, our children cleaned the place where the incident had taken place from where two more empties were found that I handed over to police. Mostly the employees are residing in my street in my street and none of them were present in the street at the time of incident.....** Somebody from Mohalla called the Ambulance which reached within 4/5 minutes and deceased was taken to Jinnah Hospital.”*

13. PW-2 Maqbool Rehman in his cross-examination has stated that, *“I heard 5/7 firearm shots. Perhaps we took our father in Chhipa Ambulance. **It is a fact that I am not the eyewitness of the incident.**”*

14. PW.3 Vinode Kuman Civil Judge & Judicial Magistrate Karachi East, in his cross-examination has stated that, *“It is a fact that I have not mentioned in the memo that accused had raised no objection regarding identification parade etc. It is a fact that counsel of accused moved application in late hours in which he had complained that accused had already been shown to the witnesses. Since the identification parade*

*had already been held, during which no such objection was raised, I ordered to file the application.”*

15. PW.5 Adnan in his cross-examination has stated that, *“The entire incident of snatching and firing had taken place within a minute.....**Police had thoroughly inspected place of incident.**”*

16. PW.7 ASI Jasim Ali in his cross-examination had stated that, *“...It is incorrect to suggest that several persons **were not available** at the place of incident when I visited the same. It is a fact that both the attesting witnesses of memo are relatives of deceased and complainant.”*

17. PW.9 SIP Muhammad Ramzan of PS Awami Colony, who arrested that present accused in his cross-examination had stated that, *“As soon as I saw the accused who were coming from opposite direction, **I signaled them to stop and they were at the distance of about 50 paces from us.** ...none of us received any sort of injury.....none of accused could be made injured. Accused Waqar was riding motorcycle. **Encounter remained continue for about 2/3 minutes only.** Perusal of memo of arrest and recovery Ex.48, Page 243 of paper book, reveals that PW.9 SIP Muhammad Ramzan of P.S. Awami Colony accompanied by subordinate staff, namely, PCs Akhter Ali, Naseer Ahmed, Sikandar Ali and Driver PC Imran Ali were on patrolling duty in the area in two Police Mobiles-I and II. While patrolling, at about 2130 hours when they reached at road on the back of Rashid Latif Cricket Stadium, near Papan Park, Korangi No.5½, Karachi, they signaled to stop **6 suspected** persons riding on 2 motorcycles coming from front side, the accused persons started firing on police party with intention to kill and their bullets were hit on left side of each mobiles, police party also fired in self-defence and apprehended **three persons** riding on motorcycle No.LHU-8154 Superpower while their three accomplices riding on*

another motorcycle succeeded to escape away. Arrested accused disclosed their names as **Aziz alias Kamal, Waqar Khan, Ubaidullah**. In presence of police officials/mashirs personal search of arrested accused was conducted, which led to recovery of 9MM pistol loaded with 5 live rounds in magazine and 1 loaded in chamber from accused **Aziz alias Kamal** while one 30 bore pistol without number loaded with 4 live rounds in magazine and one loaded in chamber was recovered from accused **Waqar Khan** whereas one 30 bore pistol loaded with 3 live rounds in magazine and one loaded in chamber was recovered from **Ubaidullah**.

18. PW-11 SIP Mohammad Ibrahim in his cross-examination stated that, *"It is fact that in my examination-in-chief I have mentioned names of only two accused persons. Voluntarily says, **the third accused namely Ubaidullah was not concerned with the present case, therefore, I have not disclosed his name.** It is incorrect to suggest that there was no light in the area when I visited place of incident on the pointation of accused persons. I reached at the place of incident at about 2030 hours. I consumed about 10 minutes in all the proceedings at the place of incident. **The distance between place of incident and PS Landhi was about one furlong.**"*

19. We have noted that three accused were allegedly arrested on **19.4.2016** in FIR No.194/2016 for offence under Section 353/324/34 PPC and each of the accused was also arrested for an offence under Section 23(1)(a) of the Sindh Arms Act, 2013 registered against accused Aziz, Waqar and Ubaidullah in FIR No.195/2016, 196/2016 and 197/2016 respectively. Out of three arrested accused, the present appellants during investigation allegedly confessed to have committed crime No.113/2016 under Section 302/397 PPC in the jurisdiction of

P.S Landhi. It is apparent from the record that the main case against them was crime No.194 under Section 353 PPC of PS Awami Colony (police encounter) and all the three accused have been acquitted in the said case and the appellant No.2 has also been acquitted in crime No.197/2016 under Section 23(1)(a) of Sindh Arms Act, 2013. The prosecution has not disputed this fact nor the prosecution has placed before the Court record of proceedings of any criminal case in respect of crime Nos.194, 196 and 197 of 2016 of P.S Awami Colony. It is also an admitted position that the alleged extrajudicial confession about the offence under crime No.113/2016 of P.S Landhi is the only evidence against the present appellants. In this context, the prosecution has claimed that the recovered pistol from the appellant Aziz alias Kamal in crime No.195/2016 has been used by him in the offence under Section 302 PPC reported as crime No.113/2016 at P.S Landhi. In the first place confession of accused in the police custody cannot be used against him unless a proper confessional statement in terms of **Section 164** of the Cr.P.C is recorded through the relevant Magistrate at the earliest. In the instant case no confessional statement is on the record and the appellants have denied having confessed their guilt in their statement under Section 342 of the Cr.PC as well as at the time of framing of charge. Both the appellants have examined themselves on oath in which they have denied their involvement in either of the offence. In view of this very fact, the confession alleged by the police has not been proved and the appellants were not supposed to be convicted by the trial Court on this ground alone.

20. The other very serious lapse on the part of prosecution is that the so-called pistol allegedly used by the appellant on **13.3.2016** was said to have been recovered on **19.04.2019** after encounter with police in crime No.194/2016 of P.S Awami Colony jurisdiction. The recovered



pistol and empties were sent to FSL with a delay of **seven** days, as admitted by PW-12 Inspector Imtiaz Hussain in his cross-examination when he stated that ***I had sent pistol and empties to FSL on 25.04.2016*** (with a delay of seven (7) days, as the same were recovered on **19.04.2016**). ***It is a fact that I did not obtain finger prints on the pistol recovered from the possession of the accused.***” The perusal of FSL reports dated 16.3.2016 Ex.35 at page 107 and two more FSL reports as Ex.80 and Ex:81 at page-401 and 403 of paper book shows that three empties of 9mm pistol were received in the office of FSL on **14.3.2016** in **crime No.NIL of 2016** of P.S Landhi much before even arrest of appellant. Then same empties were again sent on **21.4.2016** as Ex.81 (page 403) with two more empties said to be of FIR No.113/2016 of P.S Landhi. The two additional empties of FIR No.113/2016 were **not** recovered by police but said to have been found by the complainant himself after two/three days of the incident and handed over to the police by him at the police station. Thereafter these five empties were once again sent to FSL Laboratory on **25.4.2016** with 9 mm pistol of crime No.195/2016. These FSL reports obviously create 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).

Not only there is a delay in sending the pistol to FSL Laboratory, even the alleged witness/victim of robbery in crime No.113/2016 has also not supported the version of the police. PW.4 Muhammad Idrees in his cross-examination had stated that, *“The entire incident had hardly taken place within a minute. I was surprised regarding the incident. The other accused riding on the motorcycle was at the distance of 10/15 feet from me. ....Police did not collect anything in my presence from the place of incident. I have not stated before police that one accused was standing near to me who had snatched cash from me, and other accused was on the motorcycle whereas third accused had fired upon deceased.....I never visited police station in respect of incident. Since I was not in my proper senses after the incident.”*

21. PW.8 SIP Ali Murad in his cross-examination had stated that, *“....It is a fact that in my memo it is mentioned that **the third partner of accused persons had issued fire** upon the deceased. **Voluntarily says, the complainant party had disclosed to me that the accused who had snatched keys and mobile phone and amount from PW Idrees had issued fire upon the deceased. I had dictated such memo to my munchi, who might have written it wrongly. This fact does not transpire in my report u/s 168, Cr.P.C.***

22. The crux of above facts and evidence is that the prosecution has failed to connect the appellants with the offence allegedly committed in the jurisdiction of P.S Landhi (Crime No.113/2016) and such failure also adversely effect on the claim of the prosecution that the appellants Aziz alias Kamal was also guilty of offence under Section 23(1)(a) of the Sindh Arms Act, 2013 (crime No.195/2016). The evidence of the prosecution regarding encounter and arrest of all the three accused including the present appellants has not been established since all three accused said to have been involved in crime No.194 of 2016 and they have already been acquitted then how they can be found guilty of an offence which is said to have been confessed by two of them during the interrogation of crime No.194/2016 once the case of police encounters is not proved then on same evidence offence of carrying arms at the relevant time is also not made out. The co-accused on identical set of evidence have already been acquitted for offences under Section 23(1)(a) of the Sindh Arms Act, 2013 or at lease no case against them is pending.

23. 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).”

24. In view of the above discussion when the prosecution has already failed to prove its case against the appellants beyond any reasonable doubt, the conviction of appellants under Section 7 of ATA, 1997 cannot be maintained. Consequently, by short order dated **17.12.2020** these appeals were allowed and conviction and sentence recorded by the trial Court by judgment dated **19.03.2018** was set aside and appellants were acquitted of the charge. These are the reasons for our short order.

JUDGE

JUDGE

Karachi, Dated:       .04.2021

Ayaz Gul