

IN THE HIGH COURT OF SINDH AT KARACHI

Present:

Mr. Justice Muhammad Iqbal Kalhoro
Mr. Justice Zulfiqar Ahmad Khan

Special Cr. Anti-Terrorism Jail Appeal No. 62 of 2018

[Nadeem @ Chitta v. The State]

Appellant : Nadeem @ Chitta through
Mr. Mumtaz Ali Khan Deshmukh,
Advocate.

State : Through Syed Meeral Shah, Addl. P.G.

Date of Hearing : 15.10.2019

Date of Judgment : 15.10.2019

J U D G M E N T

Zulfiqar Ahmad Khan, J:- Appellant Nadeem @ Chitta son of Sirajuddin was tried by learned Judge, Anti-Terrorism Court-IX, Karachi in Special Cases Nos.2470 and 2471 of 2016 [Crime No. 179/2016 under section 4/5 Explosive Substance Act read with Section 7 ATA 1997 and Crime No. 180/2016 under section 23(I)-A of the Sindh Arms Act, 2013], registered at P.S. Super Market. On conclusion of the trial, vide judgment dated 16.01.2018 the appellant was convicted under section 6(2)(ee) of ATA 1997 and sentenced him to suffer 5 years R.I. with forfeiture of his property if any as required under section 5(a) of Explosive Substance Act, 1908. The appellant was also convicted under section 23(1)(a) of the Sindh Arms Act, 2013 and sentenced to 5 years R.I., with fine of Rs.25,000/-, in case of non-payment of fine, he was ordered to suffer R.I. for 6 months more. All sentences were ordered to

run concurrently. Benefit of Section 382-B, Cr. P.C. was also extended to accused.

2. Brief facts of the prosecution case as disclosed in the FIRs are that on 17.11.2016 ASI Nasir Shah was on patrolling duty in the company of his subordinate staff and during patrolling they received a spy information about the availability of a suspect at Graveyard C-1 Area near Eidgah Ground Liaquatabad. On receipt of such information they reached at the pointed place where they found the suspect present there, who upon arrest disclosed his name as Nadeem alias Chitta. Personal search of the accused led to the recovery of a white colour bag containing two aiwan bombs, one was having serial No. (33)19-07 YMG-K and other one having No.2-07AR788M1, one TT pistol of 30 bore bearing No.31050428 along with magazine loaded with five live bullets, two empty magazines, 35 live bullets and one automatic stand gun of 30 bore along with rounded shape magazine and so also two straight magazine from his possession. The accused and the case property were brought at PS where such FIR were registered against him, for allegedly having been found in possession of a explosive substance as well as illicit arms.

3. After usual investigation, challan was submitted against the accused under the above referred sections. Both the cases were amalgamated by the trial court under section 21-M of the Anti-Terrorism Act, 1997.

4. Trial court framed charge against the accused at Exh.03 in both the cases, to which accused pleaded not guilty and claimed to be tried.

5. At trial, prosecution examined four witnesses. Thereafter, prosecution side was closed.

6. Statement of accused under Section 342 Cr.P.C was recorded at Exh.11, wherein the accused denied all the incriminating pieces of prosecution evidence brought against him on record. Accused claimed false implication in the cases. Accused raised plea that on 12.11.2016 he was available at his house where at about 10:30 p.m. Rangers Officials came there and took him away forcibly from his house in the presence of Mst. Salma Siraj (sister of the appellant) and his custody was handed over to police by the Rangers officials, thereafter, these false cases have been registered against him.

7. Trial Court after hearing the learned counsel for the parties and assessment of evidence, by judgment dated 16.01.2018 convicted and sentenced the appellant as stated above. Hence this appeal.

8. The facts of the case as well as evidence produced before the trial produced before the trial Court find an elaborate mention in the judgment dated 16.01.2018 passed by the trial Court and, therefore, the same are not be reproduced here so as to avoid duplication and unnecessary repetition.

9. Learned counsel for the appellants contended that the impugned judgment is illegal, unlawful, arbitrary and is unwarranted by law. It is further contended that learned trial Court did not consider the improvements, discrepancies, and contradictions in the statements of PWs while deciding the case, that appellant/accused was picked up by law enforcement agencies from his house and after some time he was handed over to police whereafter police booked the appellant in above cases by foisting arms and ammunition upon him. He further contended that the arms and ammunitions were sent to the ballistic expert but the numbers of aiwan Bombs and other arms are quite different, which were mentioned in the FIR. Learned counsel further contended that though the occurrence took place in a thickly populated area

surrounding the graveyard but no private person was associated to act as mashir in this case and according to mashirnama of recovery as Exh. 05/B, two aiwan bombs, one was having No. (33)19-07 YMG-K and other one was having No.2-07AR788M1, one TT pistol of 30 bore bearing No.31050428 along with magazine loaded with five live bullets, two empty magazines, 35 live bullets and one automatic stand gun of 30 bore along with rounded shape magazine and so also two straight magazine from his possession were recovered from the white colour bag of appellant but it is admitted that despite having been so armed the appellant did not fire a single bullet. He also contended that the learned trial Court has erred in holding that the prosecution has proved the case against the appellant while there is contradictory evidence which is not trustworthy due to material contradictions and convicted the appellant illegally and the same is result of mis-reading of facts and evidence on record.

10. Syed Meeral Shah, learned Additional Prosecutor General stated that the prosecution has examined four PWs who have fully implicated the accused in the commission of offence. He further argued that police officials had no enmity towards falsely implicating the accused in these cases and trial court has rightly convicted the accused. Learned Additional Prosecutor General prayed for dismissal of instant appeal.

11. We have carefully heard the learned Counsel for both the parties and scanned the entire evidence available on record.

12. Record reflects that two aiwan bombs, one was having No. (33)19-07YMG-K and other one was having No.2-07AR88M1, one TT pistol of 30 bore bearing No.31050428 along with magazine loaded with five live bullets, two empty magazines, 35 live bullets and one automatic stand gun of 30 bore along with rounded shape magazine and so also two straight magazine from appellant's possession were recovered in a white

colour bag at the time of his arrest i.e. 17.11.2016, while the same were received by the Ballistic Expert on same day for inspection, in which, the numbers of the two Grenades are mentioned as 1st Rifle Grenade VMG-K-19-07 (33) and 2nd Rifle Grenade A-R-22-07-M-1 (33), for which, no proper explanation is given by the prosecution, which creates serious doubts in the case of prosecution but the learned trial Court did not consider this fact at the time of deciding the case. In fact it is alleged that the same grenades were shown recovered in another case.

13. PW-01 ASIP Nasir Shah in cross-examination has deposed that they had received the information from informer at “Daak Khana” however he did not disclose this location in his statement as recorded under section 161 Cr. P.C. where he has stated that he was patrolling on the relevant day and it was 12-15 am on 17.11.2016 when the informer shared the information about presence of the accused person at the relevant place. He further deposed that the graveyard had a boundary wall with entry gates to it. There were three entry gates to enter the graveyard, but he did not remember the colour of the gate from which he entered the graveyard. He has admitted that there was a residential area on all the four sides of the graveyard and public use to pass through the graveyard as a matter of routine, and the accused was standing outside the graveyard but the raiding team did not associate any inhabitant of the locality to witness the recovery of incriminating articles from the possession of the accused. He states that he prepared the memo of arrest and recovery while sitting on the front of seat of police mobile and the accused was made to sit into the police mobile when he was preparing the memo of arrest and recovery, however, to the contrary PW-02, who claims to be an eye witness of the arrest states that the said memo was prepared by PW-01 in standing position on the backside of the police mobile. He admitted that the colour of the pistol is not mentioned in the memo of arrest and recovery prepared by him and

further admitted that he did not prepare the sketch of the stand gun and that some of the parts of stand gun as available before the court are in broken condition and he did not remember the marking /serial number of the aiwan bombs written over the same. He further admitted that the sketch of the place of arrest and recovery did not disclose the timing as to at what time it was prepared by the I.O. and further admitted that he did not seal the mobile phone and also did not disclose the denomination of the currency notes in the memo of arrest and recovery. Whereas, PW-2 Adil Khan has deposed in his cross-examination that the boundary wall of the graveyard was mostly damaged as some of the portions of the wall were in damaged condition and there was only one entry gate to the grave yard and the memo of arrest and recovery was prepared by ASI Nasir Shah in standing position on the backside of police mobile as stated earlier. PW-3 Abid Farooq deposed in his cross that both the rifle grenades were in un-sealed condition when the same were handed over to him for inspection thereof and he did not remember as to whether he had already given any evidence in ATC-V in respect of the same grenade having the same marking No. VMGK1907(33), which was also shown before the Court as case property in the present case and also did not remember as to whether he had produced the clearance certificate in respect of the same rifle grenade having the same marking number before ATC-V. So also, PW-4 Rao Zaheer Ahmed also deposed he received the weapons as well as bullets in sealed condition whereas the explosive substance was in un-sealed condition when the same were received by him for the purpose of investigation. The above prosecution evidence shows glaring irregularities, contradictions and alarming mismatch of various version of the same occasion, which fact has totally been ignored by the learned trial Court while passing the impugned judgment.

14. It is also an admitted fact that the Appellant was not found connected with any militant group or had been found financier or having provided any facility to the militants. Prosecution has failed to show that despite being a well-populated area when Police had sufficient time to associate private Mushirs, why so was not done. The prosecution's case further fails to satisfy the test of reasonableness on the ground that when the accused was loaded with two grenades, one TT Pistol along with magazine loaded and 35 live bullets and one automatic stand gun (in "First Blood Rambo" style), why he did not make a single fire or resisted his arrest. In similar circumstances the Apex Court has held that the evidence of the Police officials was tainted with doubts as well as failing to inspire confidence. The case of **Muhammad Pervaiz v/s. The State (2005 SCMR 1038)** is in sight where expounding on Section 5 and 5-A of the Explosive Substances Act, 1908 recovery of the incriminating articles in similar circumstances was held to be un-satisfactorily and the accused was acquitted.

15. Also to keep in mind is the open secret that frivolous litigations account for a huge proportion of cases tried by Anti-Terrorism Courts in Pakistan, thereby taking a large proportion of the time and resources of these Courts detracting them from the devoting time, energy and resources to real hardcore terrorist cases, many of which get neglected due to backlog of cases in these Courts. A research paper in this regard by M. Zaidi (2012) is of relevance, where sociological analysis of the subject matter has been undertaken. The paper points out to an apparent fact that Police uses Anti-Terrorism Courts for the purposes of incriminating accused with the sole objective of getting long prison sentences, denial of bail, and to misuse the stricter sentencing regime of ATA. While the paper concludes with an eye-popping observation that 90% of cases pending before the AT Courts do not really relate to hardcore terrorist activities, by making reference to Section 6 of the

Anti-Terrorism Act, the paper points out that the broad definition of “terrorism” given under the Section 6 forces a number of ordinary criminal actions to fall under the ambit of terrorism. This wide definition has created a host of problems in particular when these cases are prosecuted through poorly trained police force susceptible to all sort of pressures. Therefore, convictions coming from Anti-Terrorism Courts, meant to portray accused as an evil for offences which clearly do not show any connect with the heavily loaded term of terrorism, give rise to suspicion and their outcome is to be taken with a pinch of salt. This view finds support from the judgment of *Waris Ali & 5 others vs. The State* reported as **2017 SCMR 1572** where courts are cautioned to not to hurriedly jump to the conclusion that offences tried by Anti-Terrorism courts were in fact terrorist acts. This landmark judgment in fact points out to a new direction by holding that *forcibly trying a citizen under harsh regime of ATA laws instead of ordinary penal law of the land is violation of Article 4(1) of the Constitution of the Islamic Republic of Pakistan.*

16. Omissions are always fatal to the case of the prosecution; tempering with case property could not be ruled out where the same was not sealed. Scrutiny of the prosecution evidence reveals that aiwan grenades found on the accused have shown to have different serial numbers at various places. Safe custody of the grenades and to stand gun at police station and safe transit to experts have also not been established. In the circumstances at hand evidence of police officials does not appear to be trustworthy thus required independent corroboration, which is lacking in this case. Reliance is placed on the case reported as **PLD 2004 Supreme Court 39** (*The State vs. Muhammad Shafique alias Pappo*), in which the Honourable Supreme Court has observed as under:-

“13. It has been established by the evidence of Muhammad Saeed Abid C.W. that the respondents were neither the owners of said house nor tenants. It being so, it is very hard to believe that they were occupying it B and were living therein. Learned High Court specifically noted that despite the fact that it was known to the prosecution that the house belonged to aforesaid witness, yet, no evidence was collected to show that the respondents were in its possession. Neither Chowkidar nor labourers nor neighbours were joined by the investigating agency to demonstrate that ever any of them was seen entering or coming out from it. The alleged recoveries of explosive substances, weighing about 30 k.gs. a kalashnikov with 25 live rounds loaded in the magazine from under the mattress of respondent Abdul Jabbar and a wooden box from under said bed of respondent Muhammad Shafique, containing 10 detonators 10 igniters, a T.T pistol loaded with six live rounds, do not inspire confidence, as so much could not be concealed under said mattresses. Besides, Mashir of recovery namely, Muhammad Usman, as rightly held by High Court, was stock witness of the prosecution, as in the cases related to F.I.Rs. Nos. 58, 59, 61, 62, 68 of 1998 and 16 of 1999 he was cited as prosecution witness of recovery. It is a strong circumstance, which creates doubt about credibility of this witness, particularly when other witness Mushir Abdur Rehman was not examined.”

17. In view of the above stated reasons, we have had no hesitation to hold that there are several infirmities in the prosecution case as highlighted above, which have created doubt. In the case of **Tariq Pervez V/s. The State** (1995 SCMR 1345), the Honourable Supreme Court has observed as follows:-

“It is settled law that it is not necessary that there should many circumstances creating doubts. If there is a single 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.”

18. From the above discussion, it is evident that the investigation and inquiry carried out is neither satisfactory nor free from *malice* and the accused’s implication in the instant case is not free from doubts. He thus could not be left at the mercy of Police. The review of the impugned judgment shows that essential aspects of the case have slipped from the sight of the learned trial Court which are sufficient to create shadow of doubt in the prosecution story. It is a settled law that for creating

doubt, many circumstances are not required and if a single circumstance creates a reasonable doubt in a prudent mind, then its benefit be given to the accused not as matter of grace or concession but as a matter of right (1995 SCMR 1345 & 2009 SCMR 230). For these numerous reasons, we were not convinced that prosecution had brought guilt to the accused's doorsteps beyond any taint or shadow of doubt, therefore while extending the benefit of doubt to the Appellant, he was acquitted from the charge through our short order dated 15.10.2019 by allowing this appeal and by *setting aside* the impugned judgment dated 16.01.2018, passed by learned Judge, Anti-Terrorism Court-IX, Karachi.

These are the reasons of our said short order.

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