IN THE HIGH COURT OF SINDH AT KARACHI

Present:
Mr. Justice Nazar Akber
Mr. Justice Zulfiqar Ahmad Khan

Special Cr. Anti-Terrorism Appeal No. 13 of 2020

[Imran Hussain @ Mama v. The State]

Appellant	:	Imran Hussain through Mr. Muhammad Imran Meo, Advocate
State	:	Through Mr. Syed Meeral Shah Bukhari, Addl. Prosecutor General, Sindh
Date of Hearing	:	27.11.2020

J U D G M E N T

Zulfiqar Ahmad Khan, J:- Appellant Imran Hussain @ Mama son of Nazeer Hussain was tried by learned Judge, Anti-Terrorism Court-XVII, Karachi in Special Case No.1104 of 2018 [Crime No.433 of 2012, under section 302/34 PPC read with Section 7 ATA 1997], registered at P.S. Peerabad, Karachi. On conclusion of the trial, vide judgment dated 11.01.2020 the appellant was convicted under section 265-H(2) Cr. P.C. and sentenced under section as under:-

a. For the offence under section 302(b) PPC to suffer life imprisonment as (Tazir) and to pay Rs.200,000/- (Two lac.) to the legal heirs of the deceased by way of compensation under section 544-A Cr. P.C. and in default of payment thereof, further undergo S.I. for six months.

b. For the offence under Section 7(1)(a) of ATA, 1997 sentenced to suffer life imprisonment.

All sentences were ordered to run concurrently and benefit of Section 382-B Cr. P.C. was also extended to the accused.

2. The prosecution story unfolded in the FIR is that the complainant is residing with his parents in a rented house at Sector 'A', Qasba Colony near Zahid Kiryana store and engaged in the business of Marble. On 07.10.2012 he was present in the House when at about 2100 hours one Raheem informed him on phone that his father Bashir Ahmed @ Baber has received fire shot injury at Qasba Mour near Madina Hotel. On receiving such information, he immediately rushed to the pointed place where he came to know from general public that his father was injured by bullet injury at about 1945 hours and was taken to Abbasi Shaheed Hospital for treatment through Chippa Ambulance, then he immediately went to Abbasi Shaheed Hospital where he saw and identified dead body of his father Bashir Ahmed @ Baber was lying on cemented Thella of mortuary. In the statement, he has mentioned that on that day his father had gone on his motorcycle to Madina hotel, Qasba road for bringing food, who had been killed in the firing made by the unknown culprits. Complainant claimed against unknown culprits for committing murder of his father with firearm weapons for unknown reasons.

3. After usual investigation, challan was submitted against the accused under the above referred sections. Then, trial court framed charge against the accused at Exh.03 in this case, to which accused pleaded not guilty and claimed to be tried.

4. At trial, prosecution examined seven (07) witnesses. Thereafter, prosecution side was closed. Statement of accused under Section 342 Cr.P.C was recorded at Exh.14, where accused denied all the incriminating pieces of prosecution evidence brought against him on record and claimed false implication in the case. In a question what else he has to say, he replied that he is innocent and did not commit any offence as alleged and he was arrested on 17.08.2017 from his house and

then his mother filed petition (C.P. No. D-5669 of 2017), before this Court on 23.08.2017 for his illegal arrest/detention and nothing was recovered from him on his pointation and prayed for acquittal.

5. Trial Court after hearing learned counsel for the parties and assessment of evidence by judgment dated 11.01.2020 convicted and sentenced the appellant as stated above. Hence the present appeal.

6. Learned counsel for the appellants contended that the impugned judgment is illegal, unlawful, arbitrary and is unwarranted by law. He further contended that learned trial Court did not consider the improvements, discrepancies, and contradictions in the statements of PWs while deciding the case, that the appellant/accused was booked by the police in this case falsely by foisting arms upon him. He further contended that the instant FIR was lodged against the unknown persons by the complainant and the alleged incident is unseen and un-witnessed, meaning thereby the alleged murder was a blind, but the trial Court has failed to consider such situation and circumstances while deciding the case through impugned judgment and only two empties of 30 bore pistol have been recovered as per prosecution story. Learned counsel for the appellant contended that the appellant was picked up by the CTD Police from his house on 17.08.2017 and subsequently he was booked in this case, upon which, him mother Mst. Nasreen Begum wife of Nazeer Hussain has filed C.P. No.D-5669 of 2017 before this Court about the missing of accused in which DIG, CTD, Incharge Special Investigation Unit (SIU), Director General, Rangers and SHO of PS Peerabad were respondents. He also contended that the learned trial Court has erred in holding that the prosecution has proved the instant case against the appellant while there was contradictory evidence, which is not trustworthy due to material contradictions and conviction handed down

to the appellant is illegal and the same is result of mis-reading of facts and evidence on record and no independent eye witness has been cited. In support of his contentions, learned counsel for the appellant placed reliance on the cases of (1) ***TOOH V. THE*** **STATE (1975 P. Cr. L.J. 440),** (2) ***NAQIBULLAH and another V. THE STATE*** **(PLD 1978 SC 21),** (3) **MUHAMMD ISRAR and another v.** ***THE STATE*** **(2002 P. Cr. L.J 1072),** (4) ***MUHAMAD PERVEZ and others v. THE STATE and others*** **(2007 SCMR 670),** (5) ***Malak JEHANGIR KHAN and others v. SARDAR ALI and 2 others (2007 SCMR 1404),*** *(6)* ***MAH GUL V. THE STATE*** **(2009 SCMR 4),** (7) ***AZEEM KHAN and another v. MUJAHID KHAN and others (2016 SCMR 274),*** (8) ***MUHAMMAD ISMAIL and others v. THE STATE*** **(2017 SCMR 898)** and (9) ***MUHAMMAD AZHAR HUSSAIN and another v. THE STATE and*** **another (PLD 2019 SC 595).** Lastly, he prayed for acquittal of the appellant.

7. Conversely, learned Additional Prosecutor General has argued that the prosecution has examined (07) PWs and they have fully implicated the accused in the commission of the offence. He further argued that police officials had no enmity to falsely implicate accused in this case and trial Court has rightly convicted the accused. Learned Additional Prosecutor General, Sindh prayed for dismissal of the present appeal.

8. We have heard learned counsel for both the parties and scanned the entire evidence available on record.

9. At trial, prosecution examined P.W.1, ASI Alam Zaib, who was duty officer on that day, who deposed that MLO Dr. Zahoor Ahmed of Abbasi Shaheed Hospital has informed on police control that one dead body of person namely Bashir Ahmed @ Babar son of Gohar Ali has been received from Qasba Morr, then he took his subordinate staff and met

with the said MLO and moved application for permission from MLO for conducting inquest proceeding under section 174 Cr. P.C. and prepared memo inspection of dead body and recorded 154 Cr. P.C. statement of Zeshan son of Bashir Ahmed against some unknown culprits and obtained his signatures. During his cross-examination, he has admitted that he had not obtained CNIC copies of complainant and witness Shamsur Rehman and had not obtained any document to ascertain as to whether the complainant Zeshan was son of deceased.

10. PW-02 HC Shahzad has deposed that on 28.08.2017 SIP Shakeel Mehmood took him to P.S CTD Civil Line, where he took out the already arrested accused namely Imran @ Mama in case Crime No.140/2017 under section 23(1)(a) of Sindh Arms Act, 2013 and the accused during interrogation disclosed about his involvement in the present case (Crime No.433 of 2017 of PS Peerabad) and on 01.09.2017 again they took the accused for pointation of place of incident. During his cross-examination he admitted that the registration number of police mobile of P.S was not mentioned in his 161 Cr. P.C. statement and Roznamcha entry was not mentioned through which they left Peerabad police station and there was no mention about specific place/room where the accused was sitting and I.O. Shakeel Mehmood had not taken any of police personnel of P.S CTD as Mushir and he did not know whether I.O. called the private witnesses of this case while going to P.S CTD for interrogation and it was fact that they maintain entry in the Roznamcha of arrival on duty and admitted that he had not produced any such entry during his evidence and it is not mentioned in his 161 Cr. P.C. statement about the registration number of police mobile, departure entry number of police station and further admitted that there was no any private person taken as Mushir while prepared entries by the I.O. and in his 161 Cr. P.C.

statement there was no mention about the directions around the place of incident.

11. PW-03 SIP Shakeel has deposed that he received information that one accused was arrested by the CTD Civil Lines in some case who has disclosed during investigation about his involvement in the present case, then he interrogated the present accused in presence of his companions and completed all formalities. During his cross-examination he admitted that initially this FIR was disposed of under 'A' Class and he had not mentioned police mobile registration number in the entries and so also in the Mushirnama. He further admitted that it was not necessary to produce such entry before the Court through which he brought the accused before the Court for remand and then when he brought the accused back at CTD Lockup and it was also not necessary to produce the entries of PS Peerabad for taking accused for remand and further admitted that at the time of pointation of place of incident he had not called any person from public nor he had called any private witnesses of this case and he had not prepared any Naqsha-e-Nazri at the time of preparing memo of pointation and he could not say whether the statement of accused under section 164 Cr. P.C. was recorded in the chamber or in the Court and denied false implication of the accused.

12. PW-04 Dr. Zahoor Ahmed, who has conducted the postmortem of the dead body has opined as follows:-

i. Firearm wound of entry circular shape no blackening right occipital region with its corresponding wound of exit over right parital region.

ii. Firearm wound of entry over right side face with his corresponding wound over left side neck.

iii. Firearm wound of entry over left shoulder/clavicular region anteriorly with no wound of exit, however blood palpable over scapular region posteriorly the crime bullet recovered and handed over to I.O.

All injuries were antimortum.

13. PW-05 Shahbaz Ahmed Sheikh, Civil Judge/Judicial Magistrate, who has recorded statement of accused under section 164 Cr. P.C., which was produced before the Court at the time of evidence. During his cross-examination, he has deposed that I.O. had not supplied copy of FIR and he had not seen the contents of the said FIR at the time of application of re-opening of the case file, which was previously disposed of under 'A' Class and admitted that he did not ask the question in confessional statement that accused would not be remanded to police custody even after making confessional statement, but particularly he had mentioned on the first page of confessional statement proforma.

14. PW-06 SI Ghulam Ahmed reiterated all the averments made by the police officials and during his cross-examination he admitted that the entries were not the carbon copies of the original entry and that on 161 Cr. P.C. statement of the witnesses he had not mentioned date and further admitted that he had not recorded statement of Raheem, who has informed the complainant about the incident and there was no any mention about securing blood stained earth from the place of incident and further admitted that he had sent the empties to FSL after about 14 days of seizer and he had not mentioned the numbers embossed on the empty bullets in the memo.

15. PW-07 P.I/I.O Muhammad Rasheed during his cross examination admitted that after receiving investigation he had not gone to the place of incident for investigation, nor inquired about the witnesses and it was not in his knowledge that accused was arrested from his house on 17.08.2017.

16. Record reflects that as per memo of seizure (Exh. 11/B), prepared on 08.10.2012 by SIP Ghulam Ahmed, has recovered two fired shells of

30 bore from the place of occurrence, which were sent for FSL on 21.10.2012 with the delay of fourteen (14) days

17. Surprisingly, Mushirnama of recovery does not disclose recovery of any weapon, but only shows two 30 bore empties, which creates serious doubt in the prosecution's case, whereas, no evidence of modern devices to that extent has been produced by the prosecution before the trial Court.

18. It is interesting to note that the present accused has been arrested in this case after five years and no identification parade has been conducted and the present case was disposed of in 'A' Class. It transpired from the testimony of PW-02 that he had not produced any arrival entry during his evidence and it was not mentioned in his 161 Cr. P.C. statement about the registration number of police mobile, departure entry number of P.S Peerabad and there was no any private person taken as Mushir while preparing memo. Furthermore PW-03 admitted that he had not mentioned police mobile registration number in the entries and so also in the Mushirnama and at the time of pointation of place of incident he had not called any person from public and admitted his ignorance about the statement of the accused that whether the statement of accused under section 164 Cr. P.C. was recorded in the chamber or in the Court, more particularly, he did not disclose the descriptions/physical features of accused in his statement under section 161 Cr. P.C. The above prosecution evidence shows glaring contradictions/ambiguity. This fact has totally been ignored by the learned trial Court while passing the impugned judgment. It is very strange that police officials have no knowledge about the registration number of police mobile. It is also well-settled principle by now that once there appears a single doubt as to the presence of witness on the

crime spot it would be sufficient to discard his testimony as a whole. A reference may be made to the case titled ***Mst. Rukhsana Begum and others v. Sajjad and others*** **(2017 SCMR 596)**, wherein it has been held as under:-

> "A single doubt reasonably showing that a witness/witnesses' presence on the crime spot was doubtful when a tragedy takes place would be sufficient to discard his/their testimony as a whole. This principle may be pressed into service in cases such witness/witnesses are seriously inimical or appears to be a chance witness because judicial mind would remain disturbed about the truthfulness of the testimony of such witnesses provided in a murder case, is a fundamental principle of our criminal justice system."

19. According to the defence plea, the appellant was arrested in Crime bearing No.140 of 2017, under section 23(1)(a) of Sindh Arms Act, 2013 by P.S CTD and subsequently the appellant was arrested in this case after five years. Furthermore, the mother of the accused, namely, Mst. Nasreen Begum has filed C.P. No. D-5669 of 2017 before this Court on 23.08.2017 and on 18.01.2018 she had submitted before the Court that her son is confined in jail in a criminal case, but such plea has been disbelieved by the trial Court without assigning any reason. No doubt, police officials as citizen are as good witnesses in Court proceedings as any other person, yet some amount of care is needed when they are the only eye witnesses in the case. It is not on account of an inherent defect in their testimony, but due to the possibility that an individual police official in mistaken zeal to see that the person he believes to be a culprit is convicted, might blur line between duty and propriety. It is settled law that in the exercise of appreciation of evidence it is necessary as prerequisite, to see whether witness in question is not such an overzealous witness. It is very unfortunate that the learned trial Court ignored the defence plea without assigning any sound reason. We have perused the R&P and copy of the Constitutional Petition No.5669 of 2017 filed by mother of the accused against the Rangers and Police Officials, in which serious allegations have been leveled against the

Rangers and police officials. In these circumstances in our view it was the duty of the prosecution to have examined an independent and responsible person(s) of the locality. Investigation Officer has admitted that at the time of inspection of place of incident private persons were present, but he has not cited them as witnesses or Mushir. No any recovery of the crime weapon was made. Safe custody of the weapons at Police Station and safe transit have also not been established, which is requirement of the law, as held in the case of ***Kamaluddin alias Kamala vs. The State*** [2018 SCMR 577], wherein, the Honourable Supreme Court of Pakistan has observed as under:-

> *"4. As regards the alleged recovery of Kalashinkov from the appellant's custody during the investigation and its subsequent matching with some crime-empties secured from the place of occurrence suffice it to observe that Muhammad Athar Farooq DSP / SDPO (PW18), the Investigating Officer, had divulged before the trial court that the recoveries relied upon in this case had been affected by Ayub, Inspector in an earlier case and thus, the said recoveries had no relevance to the criminal case in hand. Apart from that safe custody of the recovered weapon and its safe transmission to the Forensic Science Laboratory had never been proved by the prosecution before the trial court through production of any witness concerned with such custody and transmission."*

20. Record further reveals that the confessional statement of the accused under section 164 Cr. P.C has been recorded after getting four times police custody remand from concerned Magistrate with delay of 14 days after his arrest and such delay in recording of confessional statement has lost its credibility, more particularly, no sketch was made of the place of incident and it was admitted by the PWs that bloodstained earth was not collected by the I.O., who even failed to take any independent person with him while taking the accused to the place of incident for pointation of place of incident and no independent Mushir was made at the time of recovery of alleged two empties from the place of occurrence. The present case was investigated earlier by different Investigation officers, but remained fruitless as such the

matter was disposed of in 'A' Class. The above prosecution evidence shows glaring contradictions. This fact has totally been ignored by the learned trial Court while passing the impugned judgment. Defence theory has been substantiated by filing the constitution petition to show that the accused person was picked up by the CTD Police in FIR No.140 of 2017, under section 23(1)(a) of Sindh Arms Act, 2013. Therefore, for the purposes of safe administration of criminal justice, some minimum standards of safety are to be laid down so as to strike a balance between the prosecution and the defence and to obviate chances of miscarriage of justice on account of exaggeration by the investigating agency. Such minimum standards of safety are even otherwise necessary for safeguarding the Fundamental Rights of the citizens regarding life and liberty, which cannot be left at the mercy of the police officers/officials without production of independent evidence. It would be unsafe to rely upon the evidence of police officials without independent corroboration which is lacking in this case. Consequently, in view of our above discussion, we are of the considered view that the appellant was picked up earlier by the CTD personnel and he was later implicated in this blind case. Hence, no sanctity can be attached to the prosecution case as well as the deposition of prosecution witnesses also for the reason that under the prevalent condition family members of the appellant anticipating their implication in false and bogus FIRs promptly resorted to the constitutional jurisdiction of this Court.

21. In view of the above stated reasons, we have 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. 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."

22. 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.

23. For the above stated reasons, we have reached to an irresistible conclusion that the prosecution has utterly failed to prove its case against the appellant and trial Court failed to appreciate the evidence according to settled principles of law. False implication of the appellant could not be ruled out. Resultantly, this appeal was allowed and conviction as well as sentence recorded by the trial Court vide judgment dated 11.01.2020 were set aside and appellant was acquitted of the charges.

24. These are the reasons of our short order dated 27.11.2020.

JUDGE

JUDGE

Karachi,
Dated 08.06.2021
Barkat Ali, PA