

IN THE HIGH COURT OF SINDH AT KARACHI

Present:

Mr. Justice Nazar Akbar

Mr. Justice Zulfiqar Ahmad Khan

Special Cr. Anti-Terrorism Appeal No.286 of 2019
Special Cr. Anti-Terrorism Appeal No.287 of 2019
Special Cr. Anti-Terrorism Jail Appeal No.302 of 2019

In Spl. Cr. ATA : Appellant Hassan
Nos.286 and 287/2019 Through Syed Israr Ali Shah, Advocate

In Spl. Cr. Jail ATA : Appellants Tanveer and Haris
No.302/2019 Through Syed Farhan Shah and Mr. Habib-ur-Rehman Jiskani, Advocates

The State : Through Ms. Seema Zaidi, D.P.G

Date of Hearing : 11.12.2020

J U D G M E N T

Zulfiqar Ahmad Khan, J:- Through instant appeals, Appellants have assailed their conviction and sentences recorded by the learned Anti-Terrorism Court No.-X, Karachi, by judgment dated 30.09.2019, passed in Special Case Nos.213, 213-A, 213-B and 213-C of 2019, arising out of FIR No.77 of 2019 for offences under section 392/353/324/34 PPC read with section 7 ATA, 1997 and FIR Nos.78, 79 and 80 of 2019; all registered with P.S Ferozabad, Karachi. On conclusion of the trial, accused were found guilty and convicted and sentenced as under:-

- i) For the offence under section 392 PPC appellant Hassan S/o Haroon was convicted and sentenced to undergo R.I for ten (10) years with fine of Rs.500,000/-. In default of payment of fine, he shall suffer further R.I for one (01) year.
- ii) For the offence under section 7(1)(h) of ATA, 1997, appellant Hassan S/o Haroon was convicted and sentenced to undergo R.I for ten (10) years with fine of Rs.100,000/-. In default of payment of fine, he shall suffer further R.I for one (01) year.

- iii) For the offence under section 25 of Sindh Arms Act, 2013, appellant Hassan S/o Haroon was convicted and sentenced to undergo R.I for seven (07) years with fine of Rs.50,000/-. In default of payment of fine, he shall suffer further R.I for six (06) months.
- iv) For the offence under section 392 PPC appellant Haris S/o Muhammad Hanif was convicted and sentenced to undergo R.I for ten (10) years with fine of Rs.500,000/-. In default of payment of fine, he shall suffer further R.I for one (01) year.
- v) For the offence under section 7(1)(h) of ATA, 1997, appellant Haris S/o Muhammad Hanif was convicted and sentenced to undergo R.I for ten (10) years with fine of Rs.100,000/-. In default of payment of fine, he shall suffer further R.I for one (01) year.
- vi) For the offence under section 25 of Sindh Arms Act, 2013, appellant Haris S/o Muhammad Hanif was convicted and sentenced to undergo R.I for seven (07) years with fine of Rs.50,000/-. In default of payment of fine, he shall suffer further R.I for six (06) months.
- vii) For the offence under section 392 PPC appellant Tanveer Ahmed S/o Muhammad Ibrahim was convicted and sentenced to undergo R.I for ten (10) years with fine of Rs.500,000/-. In default of payment of fine, he shall suffer further R.I for one (01) year.
- viii) For the offence under section 7(1)(h) of ATA, 1997, appellant Tanveer Ahmed S/o Muhammad Ibrahim was convicted and sentenced to undergo R.I for ten (10) years with fine of Rs.100,000/-. In default of payment of fine, he shall suffer further R.I for one (01) year.
- ix) For the offence under section 25 of Sindh Arms Act, 2013, appellant Tanveer Ahmed S/o Muhammad Ibrahim was convicted and sentenced to undergo R.I for seven (07) years with fine of Rs.50,000/-. In default of payment of fine, he shall suffer further R.I for six (06) months.

All the 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 on 28.01.2019 at about 1910 hours complainant Bakhtiar @ Mukhtiar recorded his statement under section 154 Cr.P.C stating therein that he is running an optical shop, situated at Tariq Road, PECHS, Block-2, Karachi. He further stated that on such day, at about 1800 hours he was available at his shop alongwith his employee namely Muhammad Iqbal, where 3 boys equipped with deadly weapons came at his shop on black colour 125 motorcycle

and forcibly entered into his shop. The said culprits snatched cash of Rs.15,000/- as well as Samsung mobile phone from him and Rs.5,000/- from his employee, on gunpoint. Thereafter, the culprits started searching drawers and cabinets of the shop. During their search, complainant ran to upstairs and immediately informed to the Police on 15 Madadgaar and at about 1815 hours, Police Mobile of P.S Ferozabad, Karachi reached there. The dacoits on seeing the police personnel started direct firing upon them with intent to commit their intentional murder, so also deterred them from discharging their lawful duties and official functions, which created terror in the mind of public. In retaliation, police party headed by ASI Peer Bux also made fire shots upon the robbers/culprits in their self-defence from their official SMG and 9MM pistol. Resultantly, one robber sustained bullet injury on his left leg and police officials managed to apprehend three dacoits on the spot. On inquiry, the injured dacoit disclosed his name as Hassan, whereas, others, to be Tanveer Ahmed and Muhammad Ibrahim @ Haris. From accused Hassan one 30 bore pistol without number alongwith loaded magazine containing 02 live rounds and 01 bullet loaded in the chamber was recovered from his right hand, whereas, from his personal search, robbed amount of Rs.15,000/- as well as Rs.150/- were recovered from the pocket of his pant. From accused Tanveer Ahmed, one 30 bore pistol without number alongwith loaded magazine having 01 live round, and 01 bullet loaded in the chamber was recovered from his right hand, whereas, from his personal search, one snatched mobile phone from the pocket of his shirt, a brown wallet containing Rs.200/- and black Q Mobile were recovered. From accused Haris, one 30 bore pistol without number having magazine containing 03 live rounds and 01 bullet loaded in the chamber was recovered from his right hand, whereas, from his personal search, snatched cash of Rs.5,000/- from the pocket of his pant as well as Rs.140/- and black Nokia mobile were recovered. The robbed articles were taken into possession by the head of police party, whereas, the remaining articles were sealed by him separately. The head

of police party also inquired from the accused persons regarding valid licenses of the recovered pistols, but they failed to produce the same. The police officials also secured 08 empty shells of 30 bore pistol, 05 empty shells of official SMG and 03 empty shells of 9 MM Pistol from the place of Wardaat in his presence and the same were sealed. The police party also seized a motorbike bearing Registration No.KJC-9284, Black colour Honda Make used by the culprits on the spot, as they failed to produce its registration papers. ASI Peer Bux then prepared memo of arrest, recovery and seizure and obtained his signature, so also signature of his employee. The complainant further stated that as the accused Hassan was injured, so he was shifted to JPMC, Karachi under supervision of ASI Asghar Ali through another called police mobile for his medical treatment. Later on, at about 1955 hours statement of the complainant under section 154 Cr.P.C was incorporated into FIR book.

3. After usual investigation, challan was submitted against the accused/appellants before the competent court of law. Then, trial court framed charge against all the appellants under sections 392/353/324/34 PPC read with section 7(2)(m),(n)/7(1)(h) ATA, 1997 and under section 25 of Sindh Arms Act, 2013 at Exh.07, to which they pleaded not guilty and claimed to be tried.

4. At trial, prosecution examined four (04) witnesses namely, PW-1 Bakhtiar at Exh.9, PW-2 Pir Bux at Exh.11, PW-03 Dr. Afzal Ahmed at Exh.12 and PW-4 Muhammad Shahid Ali at Exh.14, who produced certain documents during their evidence. Thereafter, prosecution side was closed vide statement at Exh.15. Statements of accused under Section 342 Cr.P.C were recorded at Exh.16, 17 and 18, in which they denied all the allegations leveled against them and claimed that they are innocent and have been falsely implicated in these cases by the police. Appellants however did not examine themselves on oath.

5. Trial Court after hearing learned counsel for the parties and assessment of evidence as well as perusal of record by judgment dated 30.09.2019 convicted and sentenced the appellants, as stated above. Hence these present appeals.

6. Learned counsel for the appellants in Spl.Cr.A.T.A Nos.286 and 287 of 2019 contended that that the impugned judgment is illegal, unlawful, arbitrary and is unwarranted by law, and is not in consonance with the evidence brought on record and is liable to be *set aside*, thus the appellant/accused are entitled for acquittal. He further contended that the learned trial Court failed to consider material discrepancies in the evidence of PWs rendering the prosecution case doubtful. For instance, among other star witnesses, star witness namely Muhammad Iqbal was not produced before the trial Court, rather he was given up by the prosecution; that admittedly the distance between the appellants and the police party might be 05 to 07 feet at the time of encounter, however, neither any police official, sustained any injury nor the police mobile was hit by any bullet during exchange of firing; that admittedly the complainant did not mention description of the Samsung mobile as well as denomination of the currency, allegedly snatched from him; that as per prosecution, all three pistols allegedly recovered from the appellants were without numbers, while as per FSL report numbers of two pistols were rubbed; that as per admission of the I.O the case property was received by him in unsealed condition; that during evidence Koth register entry was not produced by the prosecution; that the prosecution failed to produce independent witness(es) except complainant, who is highly interested witness. In support of his arguments, learned counsel for the appellants relied upon the cases reported as 2010 SCMR 846 (Riaz Ahmed v. the State), 2017 P.Cr.L.J 605 [Sindh] (Pirzada alias Peer v. the State), 2011 SCMR 70 (Mumtaz Ali v. the State), 2016 P.Cr.L.J 187 [Sindh] (Hazaro v. the State) 2012 SCMR 428 (Zeeshan @ Shani v. the State) 2019 MLD

685 [Sindh] (Muhammad Imran v. the State), 2017 P.Cr.L.J 992 [Peshawar] (Attaullah v. the State and another and 2009 SCMR 230 (Muhammad Akram v. the State).

7. Learned counsel for the appellant Tanveer and Haris contended that no bullet hit police mobile; that no person of the locality was called in order to prove version of the complainant; that the evidence produced by the prosecution is not only inconsistent, conflicting and contradictory, but also untrustworthy, as there was no independent/corroborative evidence on record with regard to happening of the encounter; that the complainant is not an eye witness, as he ran to first floor before the alleged encounter, as per his own deposition, and the only independent private witness namely Muhammad Iqbal had already been given up by the prosecution; that during the site inspection, the I.O did not find any bullet mark or any other hole on the walls or other properties of the vicinity.

8. On the other hand learned Deputy Prosecutor General has fully supported the impugned judgment and contended that the trial Court has rightly convicted the accused on the basis of evidence brought on record by the prosecution. Lastly, she prayed for dismissal of these present appeals.

9. We have heard learned counsel for the appellants as well as learned Deputy Prosecutor General for the State and have minutely scanned the entire evidence available on record.

10. PW-01 (complainant Bakhtiar) in his examination in chief deposed that when he was available at his shop, 3 boys equipped with deadly weapons entered in his shop at about 1800 hours and snatched cash of Rs.15,000/- from the counter as well as white colour Samsung mobile phone from him and Rs.5,000/- from his employee Muhammad Iqbal, on gunpoint. Thereafter, the culprits started searching drawers and cabinets of the shop; hence he rushed to the first floor by chance where he

informed the police on 15 Control and after few minutes police mobile of P.S Ferozabad reached there. The robbers, on seeing the police officials, started direct firing upon them with intent to commit their intentional murder. In retaliation, police officials also made fire shots upon the robbers and in result thereof one accused sustained bullet injury on his right leg. Later on, police officials managed to apprehend 03 robbers on the spot. On inquiry, the robbers disclosed their names as to be Hassan, Tanveer and Haris. As the accused Hassan was injured, so he was shifted to JPMC, Karachi through another police mobile for his medical treatment, while the entire case property was sealed by the head of Police party separately, in cloth parcels in his presence.

11. Conversely, PW-1 in his cross examination admitted that he descended from the first floor when police party had already apprehended the robbers. He further admitted that his shop had 2 front glass doors and one glass affixed on a wall of the shop however none of these glasses sustained any scratch during exchange of firing. Also, there is no mention of any smashing of the glasses in his 154 Cr.P.C statement, FIR, or in memo of inspection of the place of Wardaat. However, PW-2 (who was I.O of the case), in his cross examination, admitted that the glasses of the shop were smashed and that too he failed to produce the smashed glasses in the trial Court.

12. There also appears a contradiction as to which leg of the injured Hassan sustained bullet injury. According to 154 Cr.P.C statement of the complainant, FIR and deposition of PW-2, appellant Hassan sustained bullet injury on his left leg, but the complainant (PW-01), by contradicting his earlier stance, deposed that the said accused Hassan sustained bullet injury on his right leg. Shifting injured Hassan to JPMC, Karachi is also a mystery, as PW-1 in his 154 Cr.P.C statement and PW-2 (ASI Pir Bux) in the FIR as well as in his examination in chief, stated that after the encounter he called police mobile from the area and the injured accused

Hassan was shifted to JMPC, Karachi through ASI Asghar in another police mobile. However, this chain of evidence was broken by the MLO, who by producing Exh.12/A in the trial Court, deposed that the injured Hassan was brought by ASI Pir Bux.

13. Apart from above, colour and recovery of the snatched Samsung mobile phone are also contradictory. For instance, PW-1 in his examination in chief deposed that the culprits/robbers snatched Samsung mobile phone of white colour from him, which, as per his 154 Cr.P.C statement, FIR and memo of arrest & seizure, was recovered from accused Tanveer, but as per deposition of PW-2 the said snatched Samsung mobile was recovered from the accused Haris. Recovery of personal search articles of accused/appellants is also highly doubtful. That is to say, as per memo of arrest and seizure, one Q Mobile phone was recovered from accused Tanveer, which was sealed on the spot. However, as per parcel de-sealing note of the learned Judge Anti-Terrorism Court No.X in presence of learned APG and learned counsel for the appellants, another Samsung mobile phone was discovered, instead of Q mobile phone.

14. Besides aforesaid infirmities in the prosecution story, it is also worth to add here that PW-1 in his 154 Cr.P.C statement had narrated that Rs.15,000/- were snatched from him, but in his examination in chief he deposed that the appellants snatched Rs.15,000/- from the counter. During encounter, as per prosecution version, the distance between police party and the appellants were 05 to 07 feet however neither any member of the police party nor employee Muhammad Iqbal sustained any injury and that too neither police mobile nor walls of the vicinity had any bullet injury mark. Admittedly, there is no mention of model and colour of the snatched mobile, as well as description of the currency, in the FIR and memo of arrest, recovery and seizure. In his cross examination, the I.O admitted that when police party goes for patrolling duty, official arms and

ammunitions are allotted to them and entries with regard to the allotment and depositing back the arms and ammunitions are incorporated in the Koth register and that too he did not produce any entry of such register in the trial Court. He further admitted that the official weapons used in the alleged encounter were not sealed by him and he did not send the same to the FSL. The I.O also admitted that he received snatched articles in an open condition. Admittedly, the I.O also did not receive any criminal record of the appellants.

15. Now coming to the positive FLS report. As per FIR, three 30 bore pistols without numbers were sent to the FSL for examination alongwith live rounds and empties, but according to FSL report, two pistols allegedly recovered from appellants Hassan and Tanveer were rubbed number, which *prima facie* appear to be different from the weapons, alleged to have been recovered from the appellants. Besides, colour of all three 30 bore pistols is not mentioned in the memo of arrest and seizure, and so also in the FIR, to attach authenticity therewith. The PWs are not consistent with each other on the number of secured empty shells, as PW-2, (who was Incharge of the police party), deposed that he secured 07 empty shells of SMG and 06 empty shells of 30 bore pistol from the place of Wardaat, which does not match with his own prepared/signed memo of arrest and seizure as well as letter of the I.O (available at Exh.14/C) and FSL report, which speak otherwise. On the other hand, PW-1 in his examination in chief did not disclose recovery of empty shells of 30 bore pistol.

16. It is well settled law that the positive FSL report is corroborative piece of evidence which by itself is insufficient to convict the appellants in absence of substantive piece of evidence. It is meant to test the veracity of ocular evidence. Both corroborative and ocular testimony is to be read together and not in isolation. When there is no eye-witness to be relied

upon then there is nothing which can be corroborated with the recovery.¹
In the instant case, as discussed above, not only the ocular testimony is contradictory but also the description of allegedly recovered pistols and number of secured empties, are free from doubt. Thus, no reliance could be placed on both the counts and conviction could not be maintained.

17. 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 well 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.²

18. It was pointed out that Special Criminal Anti-Terrorism Jail Appeal No.302 of 2019 is barred by 01 day. Since no case has been made out against the appellants and they are acquitted of the charges, therefore, for the safe administration of criminal justice, we feel it appropriate to condone the delay, which is accordingly done.

19. In view of the above stated reasons, we have no hesitation to hold that there are several infirmities in the prosecution case, as discussed above, which have created doubt, therefore, we reached to a conclusion that the prosecution has failed to prove its case against the appellants and the trial Court failed to appreciate the evidence according to the settled principles of law. False implication of the appellants could not be ruled out. Resultantly, these appeals were allowed by our short order dated 11.12.2020, whereby conviction and sentences recorded by the learned trial Court were set aside and appellants were acquitted of the charges.

¹ Ijaz Ahmed v. the State, 1997 SCMR 1279, Asadullah v. Muhammad Ali, PLD 1971 SC 541, Saifullah v. the State, 1985 SCMR 410

² Muhammad Mansha v. the State, 2018 SCMR 772

20. These are the reasons of our short order dated 11.12.2020.

JUDGE

JUDGE

Karachi,
Dated ___06.2021
Barkat Ali, PA