

IN THE HIGH COURT OF SINDH AT KARACHI

Present:

Mr. Justice Nazar Akbar

Mr. Justice Zulfiqar Ahmad Khan

Special Cr. Anti-Terrorism Appeal Nos. 249 and 250 of 2019

[Baqar Hussain Shah v. The Special Judge ATC-X and another]

Appellant : Baqar Hussain Shah through
Mr. Qaim Ali Memon, Advocate

State : Through Ms. Seema Zaidi,
Deputy Prosecutor General

Date of Hearing : 17.11.2020

Date of Judgment : 17.11.2020

J U D G M E N T

Zulfiqar Ahmad Khan, J:- Through instant appeal, Appellant has assailed his conviction and sentence recorded by learned Anti-Terrorism Court No.-X, Karachi, by judgment dated 31.08.2019, passed in Special Case Nos.1068 and 1068-A of 2018, arising out of FIR No.194 of 2018 for offences under sections 392/353/324/34 PPC read with section 7 ATA, 1997 and FIR No.195 of 2018 under section 23(1)(a) of Sindh Arms Act, 2013; both registered at P.S Mehmoodabad, Karachi. On conclusion of trial accused was found guilty and consequently convicted and sentenced as under:

- i) For the offence under section 392 PPC, appellant was convicted and sentenced to undergo R.I for ten (10) years with fine of Rs.500,000/- (rupees five lac). In case of failure to pay the fine, he shall further suffer R.I for one year.
- ii) For the offence under section 7(1)(h) of ATA, 1997, appellant was convicted and sentenced to undergo R.I for ten (10) years with fine of Rs.100,000/- (rupees one lac). In case of failure to pay the fine, he shall further suffer R.I for one year.
- iii) For the offence under section 25 of the Sindh Arms Act, 2013, appellant was convicted and sentenced to suffer R.I for seven

(07) years with fine of Rs.50,000/- (rupees fifty thousand). In case of failure to pay the fine, he shall further suffer R.I for six 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 complainant namely Muhammad Hasnain was coming back from Kalapul on his motorcycle after meeting with his friend, when he reached at Dow Laboratory's lane, Chanesar Goth, Karachi at about 01:30 a.m., two persons on a motorcycle bearing No.KHV-9181 reached there, who intercepted him. Thereafter, both persons took out their pistols and put them on complainant's head and directed him to take out all of his belongings, and forcibly robbed one Nokia mobile phone, a wallet containing cash of Rs.450/-, CNIC including other documents and tried to escape. Suddenly a police mobile of P.S Mehmoodabad headed by ASI Amjad Siddiqui reached there and complainant started making hue and cry and narrated entire facts to the head of the police party. The culprits on seeing police mobile started running away from the crime scene on the motorcycle. ASI Amjad directed them to stop, but accused started firing upon police party. In retaliation, police party also made fire shots upon the culprits/robbers. In result of such firing, the culprit who was sitting on the rear seat of the motorcycle sustained bullet injury on his right leg, due to which, he fell down, whereas, other culprit who was driving the motorcycle managed to flee away leaving behind motorcycle at the spot. The apprehended/injured accused on inquiry, disclosed his name as to be Baqar Hussain Shah, whereas, he also disclosed his companion's name to be Noor Hussain. Thereafter, ASI Amjad conducted his personal search of the apprehended/injured accused, which led to the recovery of one (01) unlicensed 30 bore pistol alongwith loaded magazine and one (01) round loaded in the chamber from his right hand and a wallet containing cash of Rs.450/-, CNIC, other cards and one Nokia Mobile phone in presence of mashirs. ASI Amjad also inquired from the apprehended accused

regarding valid license of the recovered pistol, but he failed to produce the same. Thereafter, he sealed the recovered articles separately, whereas, he also took into his possession the motorcycle used by the culprits, as the same was found to be stolen from the jurisdiction of P.S. Mehmoodabad, Karachi. Thereafter, injured accused was shifted to the hospital for his medical treatment. Later on, another case under section 23(1)(a) of Sindh Arms Act, 2013 was also registered against the accused.

3. After usual investigation, challan was submitted against the accused before the competent court of law. Then, trial court framed charge against the accused at Exh.07, to which he pleaded not guilty and claimed to be tried.

4. At trial, prosecution examined five (05) witnesses, who produced certain documents during their evidence. Thereafter, prosecution side was closed vide statement (Exh.15). Statement of accused under Section 342 Cr.P.C was recorded (Exh.16), in which he denied all the allegations leveled against him and claimed that he is innocent and has been falsely implicated in this case by the police. He however did not examine himself 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 31.08.2019 convicted and sentenced the appellant as stated above. Hence the present appeal.

6. Learned counsel for the appellant contended that the impugned judgment is illegal, unlawful, arbitrary and is unwarranted by law so also bad in law as well as on facts, and is not in consonance with the evidence which is present on record and is liable to be *set aside* and the appellant/accused is entitled for acquittal. Learned counsel further contended that the appellant is an innocent and has no any criminal record, he however, has been falsely implicated by the police in the

present case, which did not took place. He further contended that the learned trial Court did not consider the discrepancies and contradictions in the statements of PWs while deciding the case beyond any shadow of doubt. It failed to appreciate that it is alleged case of straight firing upon police party, but neither anyone nor even police mobile was hit by any 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 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. Learned counsel further contended that no independent witness has been cited by the prosecution in this case despite of admissions of PW-01 and PW-04 in their cross examinations that the area in which alleged crime took place is thickly populated area. Lastly, learned counsel for the appellant prayed for acquittal of the present appellant.

7. On the other hand, learned DPG 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 the present appeal.

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

9. Summarized deposition of PW-01 complainant Muhammad Hasnain (Exh.08) is that on 04.09.2018 he was coming back after meeting with his friend namely Faheem, when he reached at the lane of Dow Laboratory at about 01:30 hours (midnight), two persons on one motorcycle appeared there, who intercepted him, the person sitting on the rear seat took out his pistol and loaded the same and the culprit sitting on front seat conducted his personal search and forcibly robbed one Nokia

mobile phone, a wallet (**brown colored**) containing Rs.450/- including other documents. In the meantime, Police mobile of P.S Mehmoodabad, Karachi reached there. The culprit, who was holding pistol in his hand, made firing upon the police mobile, with intent to commit their intentional murder and deterred them from discharging their lawful duties and official functions. In retaliation, police party also made fire shots upon the culprits/robbers, in their self-defence. In result of firing, the culprit holding pistol in his hand, sustained bullet injury on his right leg's calf and fell down. The police officials encircled the injured culprit/robber, while his accomplice succeeded to run away from the crime scene, after leaving his motorcycle there. On inquiry, the injured robber disclosed his name as to be Baqar Hussain Shah. Thereafter, injured accused was shifted to Hospital for his medical treatment, while he was taken to Police station. On the next day, he was called at Police Station. Thereafter, he alongwith I.O and other Police officials proceeded to the place of Wardaat, where, on his pointation, I.O inspected the place of Wardaat and prepared such memo and obtained his signature, so also signature of co-mashir. At that stage of the trial, learned APG for the State requested the Court to declare him as Hostile Witness, which request was allowed by the trial Court. In his cross-examination, he admitted as under:-

- *"It is correct to suggest that the place of Wardat is a thickly populated area.*
- *It is correct to suggest that neither, Police Party nor, Police Mobile sustained any bullet injury, during exchange of firing. The Firing continued around 05 to 10 minutes. On seeing the Police party, the absconding accomplice of the present accused fled away from the crime scene.*
- *It is correct to suggest that description of Mobile phone set is not mentioned in memo of arrest, recovery and seizure, FIR, so also in my statement U/s 161 Cr.PC.*
- *It is correct to suggest that description and denomination of the currency notes robbed from me are not mentioned in the memo of*

arrest, recovery and seizure, so also in my statement U/s 161 Cr.PC.

- *It is correct to suggest that color of wallet robbed from me, is not mentioned in memo of arrest, recovery and seizure, including my statement U/s 161 Cr.PC.*
- *It is correct to suggest that Police Officer did not associate any private person from the locality as mashir in this case, in my presence. I alongwith Police officials remained at the place of Wardat around 01 hour and 30 minutes. The contents of memo of arrest, recovery and seizure were not read over to me.*
- *It is correct to suggest that I.O did not inquire from area people, regarding veracity of this incident, in my presence, at the time of inspection of place of Wardat.”*

10. PW-02 Iftikhar Ahmed (earlier I.O) had deposed that on 04.09.2018 he received investigation of present crime alongwith police papers, sealed case property and custody of accused. Thereafter on the same day, he contacted the complainant and directed him to reach at the place of Wardaat. Thereafter, he proceeded to the place of Wardaat alongwith his subordinate staff. On pointation of the complainant, he inspected the place of Wardaat and prepared such memo and obtained the signatures of complainant and ASI Amjad Siddiqui. He also prepared sketch of place of Wardaat and obtained signatures of mashirs. In his cross examination, he admitted as under:-

- *“I received investigation of these cases at 13:45 hours & at the same time, I contacted the Complainant of this case. I proceeded to the place of Wardaat in official Mobile, whose registration number I do not remember, at the moment. I along with ASI Amjad Siddiqui reached at the place of Wardaat, where, Complainant was already available.*
- *As soon as we reached at the place of Wardaat, Complainant also reached over there.*
- *I prepared memo and sketch on bonnet of Police Mobile, myself.”*

11. PW-03 Dr. Aijaz Ahmed had deposed that on 4th September 2018, ASI Amjad Siddiqui of P.S Mehmoodabad, Karachi brought an injured of Police encounter namely Baqar Hussain S/o Shabbir Hussain for medical examination under custody. He found injury No.01 as Fire Arm projective entry wound, measuring 05. X 0.5 CM at right leg, at is lateral aspect, in middle thigh. He then referred the injured for X-Ray and reserved the case and issued provisional MLC. On receiving Radiologist's report, no fracture was found on right leg, hence injury No.01 was declared as Jurrah Ghayr Jaiffah Muttalhimah.

12. PW-04 Amjad Siddiqui had deposed that on 04.09.2018 he was on patrolling duty along with PC Muhammad Adil and DPC Aqib Niazi in Police Mobile. They were patrolling in the area and in the meantime, at about 01:30 a.m., when they reached near Dow Lab Lane, Chanesar Goth, Karachi, one person approached them, who disclosed that two robbers/dacoits had committed robbery with him and were running away on their motorcycle, on such disclosure, they started chasing them in their Police mobile, meanwhile, culprits opened straight firing upon them, with intent to commit their intentional murder, so also deterred them from discharging their lawful duties and official functions. In retaliation, they also made fire shots upon the culprits in their self-defence, resultantly, one culprit, who was sitting on the rear seat of the motorcycle sustained bullet injury on his right leg and fell down, whereas, his accomplice managed to escape away from the crime scene, getting benefit of narrow lanes, leaving behind his motorcycle. Thereafter, they managed to apprehend one dacoit on the spot, in an injured condition. On inquiry, the injured robber disclosed his name as to be Baqar Hussain S/o Shabbir Hussain, who was holding a pistol of 30 bore in his right hand along with loaded Magazine and 01 round loaded in the chamber. Upon his further search, he also secured wallet (**brown colored**) containing cash Rs.450/- one colored copy of CNIC of the complainant one Nokia mobile and including some other documents, which were robbed by the accused along with his

absconding accomplice from the complainant on gunpoint. Thereafter, he sealed the recovered pistol, live round and magazine in white colored cloth parcel. He also secured one motorcycle from the place of Wardaat, which was used by the present accused and his absconding accomplice in this incident. He then inquired from the apprehended accused regarding registration papers of the recovered motorcycle, including valid license of the recovered pistol, but he could not produce the same. He also got verified the recovered motorcycle from ACLC and he came to know that same was snatched from the jurisdiction of P.S Mehmoodabad, Karachi. He also secured 03 empty shells of SMG and 04 empty shells of 30 bore pistol from the place of Wardaat and sealed them in white colored cloth parcel. He then prepared memo of arrest, recovery and seizure, including sketch of recovered pistol, live round and magazine on back of such memo and obtained signatures of the complainant and co-mashir PC Adil. Thereafter, injured accused was shifted to JPMC, Karachi for his medical treatment, through his letter. Thereafter, he along with complainant came back to Police station, where he also registered another FIR baring No.195/2018 under section 23(1)(a) of the Sindh Arms Act, 2013 against the arrested accused. Later on, investigation of these FIRs was entrusted to SIP Iftikhar. He along with I.O, complainant and other police officials proceeded to the place of Wardaat, where, on pointation of the complainant, I.O inspected the place of Wardaat, prepared such memo, as well as visual sketch of place of Wardaat and obtained his signatures, so also signatures of complainant. In his cross-examination, PW-04 admitted as under:-

- *“It is correct to suggest that I have not produced my departure entry in Court.*
- *It is correct to suggest that I myself did not see anybody being looted or robbed. The Complainant met us at the corner of Dow Lab lane. The Complainant disclosed to me that he was robbed 02 minutes ago. The robbers were running towards Farooq Hotel.*

- *The robbers were available at the distance of 30 to 35 paces from us, when the Complainant made disclosure before me.*
- *Due to exchange of firing, neither, any Police official nor, Police Mobile sustained any bullet injury except wall of vicinity. I myself made 02 fire shots, whereas, PC Adil also made 02 fire shots during exchange of firing. During exchange of firing no any fire hit to the motorcycle of the culprits, except walls of the vicinity.*
- *We remained at the place of Wardaat for about 45 minutes.*
- *I do not remember the exact duration of encounter.*
- *It is correct to suggest that description and denomination of recovered currency notes are not mentioned in the memo of arrest, recovery and seizure.*
- *It is correct to suggest that wallet produced in Court is of **black color**.*
- *It is correct to suggest that color and description of recovered Pistol are not mentioned in the memo of arrest, recovery and seizure. The Pistol produced in Court, today is rubbed number.*
- *The empty shells were lying on the ground **at different places**. We secured empty shells from the place of Wardaat with the help of search light.*
- *I do not remember that from whom I got verified regarding motorcycle of the accused persons.*
- *It is correct to suggest that my arrival entry neither, bears my signature, nor, name of any other Police official.”*

13. PW-05 Muhammad Yameen had deposed that on 05.09.2018 he received investigation of Crime No.194 and 195 of 2018 from S.I Iftikhar Ahmed for the purpose of further investigation as SIP was not competent to investigate cases of ATA. On 06.09.2018, he wrote a Letter to I/c FSL Sindh at Karachi alongwith sealed case property for its examination, whose examination report was received by him on 13.09.2018. In his cross examination, he admitted as under:-

- *“It is correct to suggest that I did not re-visit the place of Wardaat for its veracity.*
- *I received entire case property in a sealed condition. SIP Iftikhar Ahmed deposited the sealed case property into the Malkhana & he handed over me the same in sealed condition. I kept sealed case property with me from 05.09.2018 to 06.09.2018, in my al-mirah, fixed in my office.”*

14. From perusal of above evidence, we have noted material contradictions in the evidence of prosecution witnesses that is to say PW-01 in his examination in chief deposed that one **brown colored** wallet was robbed by him, while PW-04 deposed that he secured one **brown colored** wallet from the accused Baqar Hussain from the place of incident, however, the said PW-04 in his cross examination stated that *“It is correct to suggest that wallet produced in Court is of **black color**”*. PW-01 complainant Muhammad Hasnain in his cross examination stated that I alongwith Police officials remained at the place of Wardaat around 01 hour and 30 minutes, while PW-04 ASI Amjad Siddiqui in his cross examination stated that they remained at the place of Wardaat for about 45 minutes. With regard to inspection of the alleged crime scene PW-01 in his cross examination stated that on the very next day he reached at Police Station at about 01:45 p.m. and at about 02:00 p.m. he alongwith SIP Iftikhar, ASI Amjad Siddiqui and PC Adil reached at the place of Wardaat, for its inspection on two motorcycles, whereas, SIP Iftikhar Ahmed in his cross examination stated that he received investigation of these cases at 13:45 hours and at the same time he contacted with complainant and he proceeded to the place of Wardaat in official Mobile, where complainant was already available. However, PW-04 in his cross examination stated that at about 01:45 a.m. they left P.S on their official motorcycles for inspection of place of Wardaat and reached there at about 02:00 a.m. As to preparation of memo of inspection, PW-4 in his cross examination stated that I.O prepared memo of inspection of place of Wardaat while

sitting on stairs of a house, whereas PW-2 stated that he prepared himself memo and sketch on the bonnet of police mobile.

15. We have also noted that PW-01 in his cross examination admitted that the place of Wardaat is a thickly populated area, whereas, Police Officer (ASI Amjad Siddiqui) neither associated any private person from the locality as mashir, in his presence, nor subsequent I.O (Muhammad Yameen) inquired from area people regarding veracity of the incident, in his presence at time of inspection of place of Wardaat. Both PW-01 and PW-04 in their cross examinations admitted that neither police party, nor police mobile or motorcycle of the alleged accused sustained any bullet injury during exchange of firing, which allegedly continued 05 to 10 minutes. Admittedly, there is no description of wallet, currency and recovered pistol in the memo of arrest, recovery and seizure and 161 Cr.P.C statement of complainant.

16. As far as sending of case property to FSL is concerned, *prima facie* there appears some tempering in the date and signature of I.O in Ex.14/A. Even if one ignores it, the delay of one and half day in sending the weapons to the forensic division has also not been explained properly. Admittedly, police weapons were not sent to FSL.

17. With regard to the safe custody of the weapon at police station and its safe transit, the Honorable Apex Court in the case of **Kamaluddin alias Kamala V/S The State (2018 SCMR 577)** has held as under:

“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.”

18. From the above discussion, it is evident that the prosecution has failed to establish safe custody of weapon at Police Station and safe transit to chemical examiner. Prosecution also failed to prove that

appellant assaulted or used criminal force to police officials to deter from discharge of their duty. From the prosecution evidence available on record, we reach to the conclusion that the case has no nexus with the objects of Anti-Terrorism Act, 1997 as contemplated under sections 6 and 7 of the Anti-Terrorism Act, 1997 as evidence available on record makes it clear that no encounter in fact took place. It is also 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 the police. Review of the impugned judgment shows that essential aspects of the case have manifestly 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. 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 then 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).”

19. In view of the above stated reasons, we have no hesitation in holding that there are several infirmities in the prosecution case, as highlighted above, which have created doubt, therefore, 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 the settled principles of law. False implication of the

appellant could not be ruled out. Resultantly, this appeal was allowed by our short order dated 17.11.2020, whereby conviction and sentences recorded by the trial Court were set aside and appellant was acquitted of the charges.

20. Above are the reasons of our short order dated 17.11.2020.

JUDGE

JUDGE

Barkat Ali, PA