

IN THE HIGH COURT OF SINDH AT KARACHI

Present:

Mr. Justice Nazar Akbar

Mr. Justice Zulfiqar Ahmad Khan

Special Cr. Anti-Terrorism Appeal No.11 of 2020

Special Cr. Anti-Terrorism Appeal No.12 of 2020

Special Cr. Anti-Terrorism Appeal No.19 of 2020

Special Cr. Anti-Terrorism Appeal No.20 of 2020

Appellant in Spl. Cr.

ATA Nos.11 & 12 of 2020 : *Nemo* for Appellant Muhammad Obedullah Siddiqui @ Habib Kala

Appellant in Spl. Cr.

ATA Nos.19 & 20 of 2020 : *Nemo* for Appellant Syed Ahmed Sulleman @ SP

State : Through Mr. Abrar Ahmed Khitchi,
Additional Prosecutor General

Date of Hearing : 14.12.2020

Date of Judgment : 14.12.2020

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.-XI, Karachi, by judgment dated 14.01.2020, passed in Special Case Nos.57(xi), 58, 59(xi) and 60 of 2018, arising out of FIR Nos.291 and 292 of 2016 for offences under section 4/5 of Explosive Substance Act, 1908 read with section 7 ATA, 1997 and section 23(1)(a) of Sindh Arms Act, 2013; both registered with P.S Zaman Town, Karachi. On conclusion of the trial, accused were found guilty and consequently convicted and sentenced under section 265-H(2) Cr.P.C as under:

- i) For the offence under section 4 and 5 of Explosive Substances Act, 1908, appellant Muhammad Obedullah Siddiqui @ Habib Kala was convicted and sentenced to suffer imprisonment for seven (07) years (each).
- ii) For the offence under section 7(1)(ff) of ATA, 1997, appellant Muhammad Obedullah Siddiqui @ Habib Kala was convicted and sentenced to suffer imprisonment for fourteen (14) years.

- iii) For the offence under section 23(1)(a) of Sindh Arms Act, 2013, appellant Muhammad Obedullah Siddiqui @ Habib Kala was convicted and sentenced to suffer imprisonment for seven (07) years with fine of Rs.15,000/- (rupees fifteen thousand). In case of failure to pay the fine, he shall serve S.I for six months more.
- iv) Whole property of appellant Muhammad Obedullah Siddiqui @ Habib Kala as defined in section 2(pa) of Anti-Terrorism Act, 1997 was ordered to be forfeited to the Government as provided under section 5-A of Explosive Substances Act, 1908.
- v) For the offence under section 4 and 5 of Explosive Substances Act, 1908, appellant Syed Ahmed Sulleman & SP was convicted and sentenced to suffer imprisonment for seven (07) years (each).
- vi) For the offence under section 7(1)(ff) of ATA, 1997, appellant Syed Ahmed Sulleman & SP was convicted and sentenced to suffer imprisonment for fourteen (14) years.
- vii) For the offence under section 23(1)(a) of Sindh Arms Act, 2013, appellant Syed Ahmed Sulleman & SP was convicted and sentenced to suffer imprisonment for seven (07) years with fine of Rs.15,000/- (rupees fifteen thousand). In case of failure to pay the fine, he shall serve S.I for six months more.
- viii) Whole property of appellant Muhammad Obedullah Siddiqui @ Habib Kala as defined in section 2(pa) of Anti-Terrorism Act, 1997 was ordered to be forfeited to the Government as provided under section 5-A of Explosive Substances Act, 1908.

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 both the accused Syed Ahmed Suleman @ SP and Muhammad Obedullah Siddiqui @ Habib Kala, who were already arrested in other crimes bearing No.127 and 141 of 2016 of P.S Zaman Town, during interrogation disclosed that they had hidden one pistol and one hand cracker (each) in Itwar Bazar ground, Sector 43/A Korangi No. 3 ½ Karachi, and led the police party headed by Inspector Muhammad Hayat Khan towards the said place on 27-05-2016. On pointation of accused Syed Ahmed Suleman @ SP at 2100 hours, the earth was dug at distance of 60 yards of western wall inside main gate, where they recovered one black shopper containing one 30 bore pistol bearing No.HAC-946 with 5 live rounds and one hand cracker wrapped in yellow tape and red colour wire. On pointation of

accused Muhammad Obedullah Siddiqui @ Habib Kala @ Pagal at 2130 hours, recovered one black shopper containing one rusted 30 bore unnumbered black butt (word illegible) with 5 live rounds and one hand cracker yellow affixed with red wire (word ambiguous).

3. After usual investigation, challan was submitted against the accused before the competent court of law. Then, trial court framed charge against the accused Syed Ahmed Suleman @ SP at Exh.04 and later on framed amended charge against both the accused Muhammad Obedullah Siddiqui @ Habib Kala and Syed Ahmed Suleman @ SP at Exh.08, to which they pleaded not guilty and claimed to be tried.

4. In order to substantiate its case, prosecution examined four (04) witnesses namely PW-01 PI Muhammad Hayat Khan (Exh.13), PW-02 HC Muhammad Ayoub Exh.14), PW-03 SIP BDU East Zone Syed Sajjad Hussain (Exh.15) and PW-04 SIO Ali Khan (Exh.16), who produced certain documents during their evidence. Thereafter, prosecution side was closed vide statement (Exh.17). Statements of accused under Section 342 Cr.P.C were recorded (Exh.18 and Exh.19), 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. They however did not examine themselves on oath.

5. The learned trial Court after hearing learned counsel for the parties and assessment of evidence as well as perusal of record by judgment dated 14.01.2020 convicted and sentenced the appellant as stated above. Hence these present appeals.

6. None appeared for the appellants, whereas, learned Additional 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, he prayed for dismissal of these present appeals.

7. We have heard learned Additional Prosecutor General for the State and have minutely scanned the entire evidence available on record.

8. Summarized deposition of PW-01 complainant Muhammad Hayat Khan is that investigation of crime Nos.127 and 141 of 2016 was pending before him and both the accused Syed Ahmed Hussain Sulleman @ SP and Ubaidullah Siddiqui @ Habib Kala @ Pagal were arrested in the above cases. On 27.05.2016, during interrogation accused disclosed that on 21.03.2016 they committed attack upon the Rangers Choki at Korangi 2½ with hand crackers and made their escape good from the place of incident. They concealed two pistols and two hand crackers at Sunday Bazar situated at Korangi 3½ Sector 34-A and they were ready to produce the above explosive substance and pistol. Then he brought both the accused in custody at Sunday Bazar ground and firstly accused Syed Ahmed Hussain Sulleman voluntarily led to the police party to the place where he had concealed the pistol and hand cracker. Then the accused voluntarily produced black shopper after digging the earth containing one 30 bore pistol, five live bullets in magazine and one hand cracker. He recovered pistol and hand cracker/grenade and took the same in his possession in presence of HC Muhammad Ayoub Jamali and PC Muhammad Iqbal. He prepared such memo of recovery at the spot on the pointation in presence of above named mashirs at 2100 hours. He also prepared sketch of the pistol and live bullets and magazine. Then the other accused Ubaidullah Siddiqui voluntarily led the police party to the same place where he had concealed the pistol and hand cracker. When they reached at the place, accused after digging the earth took out the shopper containing one 30 bore pistol, five live bullets in magazine and one hand cracker. He prepared such memo of recovery at the spot on the pointation of accused in presence of above named mashirs at 2130 hours so also prepared sketch of the pistol and live bullets and magazine. Then he brought accused and case property at P.S Zaman Town. Then he informed the BDU through Akbar Base to defuse the explosive substance.

On 27.05.2016 at about 2310 hours SIP Sajjad Hussain of BDU came at P.S Zaman Town and made the cracker/hand grenades in safe and sealed them in the plastic shopper and issued clearance certificates so also obtained his signatures over both the clearance certificates of crime Nos.191 and 192 of 2016. On 28.05.2016 he handed over the investigation of both the cases to Inspector Ali Khan Sanjrani so also handed over the custody of accused, case property and police files on the directions of higher authorities. On 28.05.2016 Inspector Ali Khan Sanjrani inspected the place of recovery on his pointation at about 1830 hours in presence of HC Ayoub Jamali and PC Muhammad Iqbal and prepared memos of site inspection in their presence. On the same day Inspector Ali Khan Sanjrani also recorded his statement under section 161 Cr.P.C at P.S Zaman Town. In his cross examination he stated as under:-

- *“On 26.05.2016 custody of accused Syed Ahmed Sulleman and Muhammad Ubaidullah was handed over by Rangers to me for investigation of crime No.127/2016 and 141/2016 of PS Zaman Town. I do not know whether accused Syed Ahmed Sulleman was remained in custody of the Rangers since last about 45 days.*
- *It is correct to say that in my statement recorded under section 161 Cr.P.C I have not mentioned that during interrogation accused disclosed that on 21-3-2016 they committed attack upon the check post of the Rangers.*
- *It is correct to say that place of recovery is not under the exclusive control of the accused and it is used by the general public so also ground used for Sunday Bazar.*
- *It is correct to say that I have not prepared the sketch of the place of recovery. Accused dug the earth at about 6 inches and then produced the shopper.*
- *It is correct to say that after dug the earth the extra sand was placed alongwith the hole.*
- *It is correct to say that during inspection of the place of recovery conducted by Investigation Officer Inspector Ali Khan Sanjrani on my pointation at that time he did not mention in the memo of inspection produced at Ex.13/J that he found a hole of six inch on two places from where accused produced case property after dug it.*

- *Memo of recovery on the pointation of accused was preped by Munchi on my dictation by ASI Haneef. I called Munchi ASI Haneef from PS after recovery. It is correct to say that such fact in respect of preparing memo by ASI Muhammad Haneef has not been mentioned in my statement recorded under section 161 Cr.P.C.*
- *I do not know whether on 28-3-2016 accused was arrested by the Rangers from his house illegally and on 2-4-2016 elder sister of accused sent application to Hon'ble Chief Justice regarding illegal detention of accused so also filed Constitutional Petition D-2418/2016 before Hon'ble High Court of Sindh Karachi on 27-4-2016 for the same purpose."*

9. PW-02 Muhammad Ayoub had deposed that on 27.05.2016 the accused Muhammad Ubaidullah Siddique alias Pagal and accused Syed Ahmed Sulleman alias SP were already under arrest in the case of attack upon the Rangers. During interrogation by Inspector Hayat Khan both the accused disclosed that after attack upon the Rangers they had concealed their weapons in the ground of Sunday Bazar Korangi No.3½ near petrol pump. Then Inspector Hayat Khan left PS Zaman Town with him and other staff PC Muhammad Iqbal alongwith accused in police mobile for recovery of the weapons on the pointation of both accused at about 8:35 p.m. Then they directly reached at Sunday Bazar ground Korangi at about 9:00 p.m. Both accused stopped the police mobile at Sunday Bazar and firstly accused Syed Ahmed Sulleman voluntarily led the police party towards eastern side and while digging the earth he produced one black colour shopper containing one cracker and one 30 bore pistol loaded with five live bullets in magazine. Inspector Muhammad Hayat Khan prepared the memo of recovery at the spot in my presence and in presence of co-mashir PC Iqbal. Then accused Ubaidullah alias Pagal voluntary led the police party at a distance of about 40 yards towards southern of the Sunday Bazar ground and by digging the earth he produced one black shopper. Inspector Muhammad Hayat opened that black shopper and found one cracker and one 30 bore pistol loaded with five live bullets in magazine. Then inspector Hayat Khan prepared such memo of recovery while seated in the police mobile in my presence and in presence of co-

mashir PC Iqbal at about 9:30 p.m. Then they brought accused and case property at PS Zaman Town where Inspector Hayat Khan lodged FIRs vide crime Nos.291/2016 and 292/2016 against the accused and handed over custody of the accused to lockup Incharge and handed over the case property to WHC. Inspector Muhammad Hayat also informed BD Unit about recovery of crackers. On the next day i.e. 28-5-2016 at about 6:00 p.m. Inspector Ali Khan Sanjrani came at PS Zaman Town and on their pointation Inspector Ali Khan Sanjrani inspected the place of recovery of accused Ubaidullah at about 6:30 p.m. in his presence and in presence of Inspector Muhammad Hayat and PC Iqbal and prepared such memo at the spot. Then he inspected and prepared second memo of inspection on our pointation of accused Syed Ahmed Sulleman alias SP at about 6:50 p.m. Then they returned back at PS Zaman Town in separate police mobile and his statement under section 161 Cr.P.C was recorded by Inspector Ali Khan Sanjrani. In his cross examination, he admitted as under:-

- *“It is correct to say that in my statement recorded u/s 161 Cr.P.C it has not been mentioned that on the call of Inspector Muhammad Hayat, ASI Muhammad Haneef also reached at Sunday Bazar Ground who written the memo of arrest and recovery on the dictation of Inspector Muhammad Hayat Khan in our presence.”*

10. PW-03 Syed Sajjad Hussain had deposed that on 27-05-2016 at about 22:25 hours he received entry No.18 from control room of DIG West East Karachi that PS Zaman Town has recovered explosive substance from the possession of accused and therefore BD Team was required to visit the PS Zaman Town to examine the explosive substance. On the same day i.e. 27.05.2016 at about 02:50 hours he left his unit vide entry No.19 and proceeded towards PS Zaman Town and reached there at about 11:00 p.m. where he made entry in the Roznamcha bearing No.36 at about 23:00 hours dated 27.05.2017 and met with duty officer ASI Muhammad Hayat who handed over him two hand grenades recovered from the possession of accused in crime Nos.291/2016 and 292/2016 of

PS Zaman Town. He examined the one hand grenade of crime No.291/2016 and found chemical powder measuring 150 grams, non-electric detonator, and det-cord of orange colour in the hand grenade. Then he examined another hand grenade of crime No.292/2016 and found 39 ball bearings, chemical powder 150 grams, det-cord of range colour and non-eclectic detonator. He made the hand grenades safe and sealed and handed over to ASI Muhammad Hayat and issued such clearance certificates. On 16-6-2016 he issued his final inspection report of the case property of crime Nos.291 and 292 of 2016.

11. PW-04 Ali Khan had deposed that on 27.05.2016 he was posted as Inspector as well as SIO at Police station Khokhra Par. On that day received investigation of four cases vide crimes No.291/2016 & 292/2016 of Police Station Zaman Town for conducting investigation through order of SSP District Korangi dated 6-5-2016. He received case papers, case property and custody of accused namely Syed Ahmed Sulleman and Ubaidullah from Inspector Hayat Khan. On 28-5-2016 he sent case property viz: pistols of 30 bore alongwith five live bullets of each case to Forensic Science Laboratory for examination and report. On the same day he made inspection of the place of arrest and recovery in crime No.292/2016 at about 18:30 hours situated at Sunday Bazar ground Korangi 3½ Karachi in presence of mashirs Inspector Hayatullah and PC Iqbal on the pointation of complainant Inspector Hayat Khan and prepared such memo at the spot in presence of above mashir. Then he also inspected the place of incident in crime No.291/2016 on the pointation of complainant Inspector Hayat Khan situated at Sunday Bazar ground Korangi No.3½ in presence of mashir of Inspector Hayat Khan and HC Ayoub Jamali. He prepared memo of inspection at the spot. He left Police station Zaman Town at about 18:05 hours vide entry No.16 for inspection of the place of recovery and also returned back at Police station after inspection and made such entry bearing No.21 at about 19:15 hours. Then he returned back at Police Station Zaman Town, where he recorded

statement of PWs Inspector Hayat Khan, HC Ayoub Jamali and PC Iqbal under section 161 Cr.P.C. He also made interrogation from the accused. During investigation of this case, he also received FSL report of Crime Nos.291 and 292 of 2016. He sent letter to BD Expert through SSP and received final inspection report of hand crackers of both cases. He also sent application to SSP for permission as required under section 7 Explosive Substance Act, 1908. During investigation of these cases explosive powder was also received from BD Expert to send Forensic Science Laboratory Islamabad for examination and analysis report. Then he sent explosive powder to the Forensic Science Laboratory Islamabad through letter dated 06-09-2016. In his cross examination, he stated as under:-

- *“It is correct to say that in the statements of PWs recorded under section 161 Cr.P.C in which it has not been mentioned that at the time of recovery and preparing memo ASI Haneef was present there.*
- *It is correct to say as per memo of recovery and statements of PWs recorded under section 161 Cr.P.C it has been mentioned that the memo of recovery of both accused were prepared by Inspector Hayat Khan.*
- *It is correct to say that as per report counter terrorism Wing Federal Investigation Agency Islamabad received explosive powder on 10-10-2016 while FIR was lodged on 27-5-2016 with a delay of five months. During this period the case property was kept in safe custody of WHC of Police Station Zaman Town. I have not made WHC as witness to establish the case property was kept in safe custody for five months so also I have not produced any documentary proof during my examination-in-chief.*
- *It is correct to say that during police custody I did not produce accused before any Magistrate for recording his confessional statement under section 164 Cr.P.C.*
- *It is correct to say that I have not mentioned regarding receiving of the samples of the explosive powder from the WHC in the challans.”*

12. From perusal of above evidence, we have noted material contradictions in the evidence of prosecution witnesses with regard to preparation of memos of recovery of both the appellants on the spot on

the pointation and in presence of the mashirs. PW-1 and PW-2 in their examination in chief deposed that PW-1 (Complainant Muhammad Hayat Khan) prepared both memos of the recovery on the spot, but said PWs in their cross examinations by reverting back from their earlier stance, admitted that the memos of recovery were prepared by ASI Haneef. Also, both the aforesaid PWs in their cross examinations, admitted that they did not mention in their 161 Cr.P.C statements before I.O that ASI Haneef prepared memos of the recovery of both the appellants on the spot.

13. We have also noted that PW-01 in his cross examination admitted that the custody of the appellants was handed over to him on 26.05.2016 by the Rangers for investigation of Crime Nos.127 and 141 of 2016 of P.S Zaman Town. Nonetheless, the FIRs (of present Crime bearing Nos.291 and 292 of 2016) were lodged on 27.05.2016 at 22:00 and 22:30 hours (at night) with more than one day's delay, which creates doubt in a prudent mind. The sister of the appellant has already moved an application to the Hon'ble Chief Justice on 02.04.2016 regarding illegal detention of the appellant by the Rangers and so also filed Constitutional Petition bearing C.P No.D-2418/2016 before the High Court of Sindh at Karachi on 27.04.2016, such fact is also worth noting.

14. The basic allegation against both the appellants is that they during interrogation admitted that they had attacked on Rangers' check post on 21.03.2016, but PW-01, on the contrary, in his cross examination, admitted that he has not mentioned in his 161 Cr.P.C statement that during interrogation accused disclosed that on 21.03.2016 they had committed attack upon the Ranger's check post and that admittedly the appellants were not produced before any Magistrate for recording their confessional statements under section 164 Cr.P.C. Hence, admission of PW-01, on one hand, and failure to produce the appellants before concerned Magistrate on the other hand, seriously dents prosecution story.

15. Contrary to Exh.13/I, in the memo of inspection of crime scene at Exh.13/J, the I.O has not mentioned anything about 6 inches hole from the place where accused produced case property after digging the earth and that too in the said Exh.13/J there appears alteration in its preparation time. Admittedly, the place of recovery is thickly populated area, which is not under exclusive control of the appellants, and is being used by the general public.

16. As per deposition of PW-04, he had received explosive powder during investigation from BD expert, however, sent the same to the Forensic Science Laboratory, Islamabad on **06.09.2016** (Exh.16/J), which was admittedly received at Federal Investigation Agency (FIA) HQ Islamabad on **10.10.2016** with five months' delay, as the FIRs were lodged on **27.05.2016**. In his cross examination, he admitted that the said case property was kept in safe custody of WHC of P.S Zaman Town, but neither WHC was produced as witness to establish that the case property was kept in safe custody for five months, nor any documentary proof in this regard was submitted by the said PW before the trial Court. He also admitted that he has not mentioned single word about explosive powder in the charge sheet (challan). The above stated inordinate delay without any plausible justification creates serious dents in the prosecution story. 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.”

17. From the above discussion, it is evident that the prosecution has failed to establish safe custody of the explosive powder and its safe transit to the laboratory. 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. They thus could not

be left at the mercy of the police. 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 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).”

18. 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 an irresistible conclusion that the prosecution has utterly 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 14.12.2020, whereby conviction and sentences recorded by the learned trial Court were set aside and appellants were acquitted of the charges.

19. Above are the reasons of our short order dated 14.12.2020.

JUDGE

JUDGE