

IN THE HIGH COURT OF SINDH AT KARACHI

Present:

Mr. Justice Nazar Akber

Mr. Justice Zulfiqar Ahmad Khan

Special Cr. Anti-Terrorism Appeal No. 185 of 2019
Special Cr. Anti-Terrorism Appeal No.186 of 2019
Special Cr. Anti-Terrorism Jail Appeals Nos. 217, 219,
247 and 259 of 2019

Appellant in Spl. Cr. ATA
Nos.185 & 186/2019

: Naveed @ Nek through
Mr. Kher Muhammad, Advocate.

Appellants in Spl. Cr.
A.T.Jail A. Nos. 217 &
2019/2019

: Malik Kashif Awan @ Tinda &
Ashiq Khan @ Ashi through
Mr. Nadeem Azar, advocate.

Appellants in Spl. Cr.
ATA Nos. 247 & 259/2019

: Nabeel @ Cheer & Irfan through
Mr. Salahuddin Chandio, Advocate.

State

: Through Mr. Muhammad Iqbal Awan,
Additional Prosecutor General, Sindh.

Date of Hearing

: 24.11.2020

Date of Judgment

: 24.11.2020

J U D G M E N T

Zulfiqar Ahmad Khan, J:- Appellants Naveed @ Nek son of

Ameer Khan, Malik Kashif Awan @ Tinda son of Muhammad Anwar, Ashiq

Khan @ Ashi son of Dil Muhammad, Nabeel @ Cheer son of Akhtar Zaman

and Irfan @ Elfi son of Abrar were tried by learned Judge, Anti-Terrorism

Court-IV, Karachi in Special Case No.1113 of 2018 [Crime No.598/2018,

under sections 353/324/186/34 PPC read with Section 7 ATA 1997],

Special Case No.1113-A of 2018 [Crime No. 599/2018, under section 23(1)A, Sindh Arms Act, 2013], Special Case No.1113-B of 2018 [Crime No.600/2018, under section 23(l)-A of the Sindh Arms Act, 2013], Special Case No.1113-C of 2018 [Crime No.601/2018, under section 23(l)A of the Sindh Arms Act, 2013], Special Case No.1113-D of 2018 [Crime No.602/2018, under section 23(l)A of the Sindh Arms Act, 2013] and Special Case No.1113-E of 2018 [Crime No.603/2018, under section 23(l)A of the Sindh Arms Act, 2013], registered at P.S. Shah Latif Town, Karachi. On conclusion of the trial, vide common judgment dated 18.06.2019 the appellants were convicted and sentenced under section 265-H Cr. P.C. as under:-

- a. Accused (1) Aashiq Khan @ Ashi s/o Dil Muhammad, (2) Irfan @ Elfi s/o Ibrar, (3) Nabeel @ Cheer s/o Akhter Zaman, (4) Naveed @ Nek s/o Ameer Khan and (5) Malik Kashif s/o Abuzar, found guilty of the charges of offences under Sections 324/353/34, PPC read with Section 7 (h) of ATA, 1997 and sentenced them to undergo R.I. for five years each with fine of Rs.20,000/- each. In default in payment of such fine, they shall further suffer R.I. for six months each.
- b. Accused (1) Aashiq Khan @ Ashi s/o Dil Muhammad, (2) Irfan @ Elfi s/o Ibrar, (3) Nabeel @ Cheer s/o Akhter Zaman, (4) Naveed @ Nek s/o Ameer Khan and (5) Malik Kashif s/o Abuzar, found guilty of the charges of offences under Section 23(1)(a) of Sindh Arms Act, 2013 and sentenced them to undergo R.I. for three years each with fine of Rs.10,000/- each. In default in payment of such fine, they shall suffer R.I. for six months each.

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

2. Brief facts of the prosecution case as disclosed in the FIRs are that on 27.09.2018, police party headed by ASI Zulfiqar Ali of Police

Station Shah Latif Town, Karachi was on patrolling duty within the jurisdiction of the P.S. and received the tip off about the coming of six armed persons boarded on three motorcycles, from Muhammad Saleh Goth, Beli Bagh Road, with intent to commit an offence on such information at about 18:35 hours police party reached pointed place and saw the persons on three motorcycles, police party signaled them to stop but on they opened fire upon police party. Therefore, encounter took place between the accused persons and police party. In the result of encounter police party apprehended five accused persons who were trying to manage good their escape from the scene but one accused succeeded to flee away from the scene. The apprehended accused persons disclosed their names (1) Aashiq Ali, (2) Irfan @ Elfi, (3) Nabeel @ Cheer, (4) Naveed @ Nek and (5) Malik Kashif Awan @ Tinda. Police party conducted their personal search and recovered on TT Pistol of 30 bore along with loaded magazine and one bullet stuck in chamber, from the possession of accused Aashiq Ali. From the possession of accused Irfan @ Elfi they recovered on TT Pistol of 30 bore along with loaded magazine of 03 live bullets and one bullet stuck in chamber. From the possession of accused Nabeel @ Cheer they recovered one TT Pistol of 30 bore, along with loaded magazine of 03 live bullets and one bullet stuck in chamber. From the possession of accused Naveed @ Nek they recovered one TT Pistol of 30 bore, alongwith loaded magazine of 04 live bullets and one bullet stuck in chamber. From the possession of accused Malik Kashif Awan @ Tinda they recovered one TT Pistol of 30 bore, alongwith loaded magazine of 02 live bullets and one bullet stuck in chamber. Police party demanded valid permission/license of recovered arms and ammunitions from the accused persons but they failed to produce the same. Police party also asked about the registration documents of Motorcycle bearing registration No.KGR-9037, which was in use of accused Nabeel and the Motorcycle bearing registration No.KGN-

5045 was in use of accused Malik Kashif but they also failed to produce registration documents of the said motorcycle. They disclosed the name of absconding accused as Syed Nasir Shah. Thereafter police party arrested them and sealed the recovered arms/ammunitions and motorcycles taken in possession u/s 550 Cr. P.C. After completion of all formalities police returned back at Police Station and separate FIRs were lodged against the accused persons.

3. After usual investigation, challan was submitted against the accused under the above referred sections. All the cases were amalgamated by the trial court under section 21-M of the Anti-Terrorism Act, 1997, vide order dated 04.01.2019 at Exh. 08.

4. Trial court framed charge against the accused at Exh.09 in all the cases, to which accused pleaded not guilty and claimed to be tried.

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

6. Statements of accused under Section 342 (1) Cr.P.C were recorded at Exh.16 to 21, wherein the accused Aashiq Khan @ Ashi, Irfan @ Elfi and Naveed @ Nek denied all the incriminating pieces of prosecution evidence brought against them on record and claimed false implication in these cases. Whereas accused Nabeel @ Cheetar raised plea in his statement under section 342 (1) Cr. P.C. that he was acquitted by the Court in FIR No.219/2016, under section 392/34 PPC, registered at P.S. Sharafi Goth, FIR No.45/2017 and FIR No. 48/2017, under section 23(1)(a) of the Sindh Arms Act, 2013 and accused Malik Kashi Awan @ Tinda raised plea that criminal case arising out of FIR No.804/2014, under section 392/34 PPC, registered at P.S. Shahrah-e-Faisal is pending before District & Sessions Judge, Malir. Accused

however did not lead any defence and declined to give statement on oath in disproof of prosecution allegation.

7. Trial Court after hearing the learned counsel for the parties and assessment of evidence, by judgment dated 18.06.2019 convicted and sentenced the appellants as stated above. Hence these appeals.

8. Learned counsel for the appellants 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 the record and is liable to be set aside and the appellants/accused are entitled for acquittal. Learned counsel further contended that the appellants are innocent and have falsely been implicated in these fact and managed cases of encounter and pistol by the police and learned trial Court did not consider the improvements, discrepancies, and contradictions in the statements of PWs while deciding the case, that appellants/accused were booked by the police in these cases falsely by foisting arms upon them. Learned counsel further contended that the learned trial Court has miserably failed to appreciate the evidentiary value of evidence and also failed to prove the case beyond the shadow of doubt and it is an alleged case of ineffective firing and none from either party sustained bullet injury and no police mobile or motorcycles hit by any bullet and as per story the police faced strong resistance by well-equipped and heavily armed accused persons which sole ground is sufficient to create the doubt in the prosecution story and appellants are entitled for acquittal and the motorcycles were seized under section 550 Cr. P.C. but same were not produced before the trial Court during the trial He also contended that the learned trial Court has erred in holding that the prosecution has proved the case against the appellants while there was contradictory evidence which is not trustworthy due to material contradictions and conviction handed

down to the appellants 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 these cases despite the fact that the place of occurrence was thickly populated area. In support of their contentions, reliance is placed upon the cases of (1) *ABDUL HAQ @ MULLA and others v. THE STATE* (2018 P. Cr. L.J.), *TANVEER @ CHAND V. THE STATE* (2018 YLR 2264), *SAMEER V. THE STATE* (2018 P. Cr. L.J Note 128), *ZULQARNAIN @ SULEMAN V. THE STATE* (2019 P. Cr. L.J. Note 64) and *MOMIN ALI and others v. THE STATE* (2020 YLR 1160). Lastly, learned counsel for the appellants prayed for acquittal of the present appellants.

9. Learned Additional Prosecutor General has argued that the prosecution has examined three PWs and they have fully implicated the accused in the commission of offence. He further argued that police officials had no enmity to falsely implicate accused in these cases and trial court has rightly convicted the accused. Learned Addl. PG. prayed for dismissal of the present appeals.

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

11. At the trial, prosecution examined PW-01, ASI Zulfiqar Ali, posted at P.S. Shah Latif Town, Karachi deposed that on 27.09.2018 he was on patrolling duty alongwith his subordinates and at about 05:00 p.m. received spy information that on three motorcycles six persons in suspicious condition are boarded, present at Belly Bagh Kacha Road and also informed ASI Ali Murad who was also on patrolling duty on second mobile and on seeing the police party they turned their motorcycles and tried to escape from the scene, they reached the suspects, they fell down from their motorcycles and started firing upon police party with

intent to kill them, in retaliation police party also started aerial firing and encircled the suspects and apprehended five persons while one suspect made his escape good from the scene and due to non-availability of private persons he conducted personal search of the accused persons in presence of police officials and recovered pistols etc. During his cross-examination, he stated that in result encounter none from either party received any bullet injury and police mobile was also not hit by any bullet and encounter remained continue for about 10 minutes and due to encounter none from the vicinity people attracted to the place of incident and further admitted that due to encounter no fear and insecurity created in public and consumed 10 minutes in apprehension of accused persons and one hour in sealing of recovered property, preparation of memo of arrest and recovery he informed SHO of PS regarding encounter and he had not produced any record in this regard and further admitted that departure entry number was not mentioned in memo of arrest and recovery and motorcycles were seized under section 550 Cr. P.C. not produced before the Court and the weapon which were used by the police party were not sent to FSL for examination.

12. PW-02 HC Abdul Nadeem deposed that during patrolling ASI Zulfiqar received spy information that six persons equipped with sophisticated weapons, boarded on three motorcycles were coming from Belly Road and on such information ASI called another police mobile headed by ASI Ali Murad and they saw that six persons who were boarded on three motorcycles, ASI Zulfiqar signaled them to stop the culprits tried to escape from the scene but they were fell down and started firing upon police party in retaliation and self defence they also fired, encircled the culprits and apprehended them, recovered the arms etc. During his cross-examination he stated that during encounter he fired 03 rounds and encounter was continued for about 10 minutes and admitted that none from the police party received injury and nor the police

mobile hit/damaged by bullet and further stated that the place of incident was deserted area and none from the locality was present there and populated area was 500 meter away from the place of incident and admitted that he had not produced arrival entry before the Court and none from the police party sustained bullet injury during encounter and police mobile was not hit/damaged during encounter.

13. PW-03 IO/Inspector Irshad Ali Baloch, posted at PS Shah Latif Town, who was entrusted investigation of crimes, took custody of accused and case property in sealed condition, called complainant for site inspection and place of incident and prepared memo of site inspection etc. During his cross-examination he admitted that official weapons used in encounter were neither taken into possession nor sent to FSL for examination and further admitted that he had not obtained any permission from his high-ups to unseal the weapons which were received by him in sealed condition and none from either sides received any bullet injury and motorcycles or police mobile not hit/damaged by bullet during encounter and further admitted that he had not made entry in Roznamcha regarding sending weapons to FSL and he sent recovered weapons to FSL on 29.09.2018 after delay of one day and it was not in his knowledge that a news alongwith pictures of accused published in Janbaz newspaper on 28.09.2018 that accused persons were picked up by Pakistan Rangers and further admitted that a site plan of incident was not produced by him before the Court.

14. Record reflects that five weapons viz.30 bore pistols etc. were recovered from the possession of the appellants on 27.09.2018, which were received by the Ballistic Expert on 29.09.2018 from the I.O., who stated in his report that pistols are in working condition at the time of examination and seven 7.62x39 mm bore crime empties marked as "C9 to C15" are 'fired' empties of 7.62x39 mm bore fire arm/weapon.

15. Prosecution has utterly failed to prove safe custody of crime weapons at the maal-khana of police station and its safe transit to expert. It is crucial to note that PW-03 Inspector Irshad Ali Baloch, during his cross-examination has admitted that the official weapons used in encounter were neither taken into possession nor sent to FSL for examination and he had not obtained any permission from his high-ups to unseal the weapons which were recovered by him in sealed condition, further admitted that he sent recovered weapons to FSL on 29.09.2018 after delay of one day. From the above testimony, it is quite clear that PW-03 Inspector Irshad Ali Baloch has tampered the case property. Incharge maal-khana on the point of safe custody of weapons has also not been examined by the prosecution. Delay in sending the weapons to the forensic division with the delay of one day has also not been explained properly, as such no sanctity can be attached to the positive report, 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:

“As regards the alleged recovery of Kalashnikov from the appellant’s custody during the investigation and its subsequent matching with some crime-empties secured from the place of occurrence suffice to 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”

16. From the perusal of the evidence and as per statements of PWs 01 and 02, it appears that another police mobile headed by ASI Ali Murad was called by ASI Zulfiqar at the time of incident but the said ASI has not been cited as prosecution witness nor the registration numbers of both the police mobiles have been given during trial. Neither two

motorcycles, recovered during the encounter, which were seized under section 550 Cr. P.C., have been produced before the Court nor even registration numbers of the said motorcycles have been furnished by the prosecution during trial.

17. We are unable to rely upon the evidence of the police officials with regard to police encounter for the reason that there was cross-firing for about 10 minutes but no injury/scratch was caused to the accused and police party, even to the passersby; police mobile and motorcycles of the accused were also not damaged. Non-production of the arrival and departure entries of police station also cut the roots of the prosecution case.

18. Admittedly, the place of occurrence is a thickly populated area and the persons from the public despite being present and available were not called upon to become the mashirs of recovery of pistols and other ammunition except police officials who are interested witnesses. As such, prosecution case suffers from independent evidence regarding recovery, which creates serious doubt in the case of prosecution case, particularly in the circumstances when enmity has been alleged against police officials. The conviction or acquittal of an accused person depends upon the creditability of the witnesses. In the case at hand which was a case of spy information, accused were arrested at about 05:00 p.m., it is clear that no efforts at all were made by ASI Zulfiqar Ali to associate any independent person to witness the arrest and recovery. It is settled principle of law that judicial approach has to be cautious in dealing with such type of cases. We are conscious of the fact that provisions of section 103 Cr. P.C. are not attracted to the case of personal search of a person, but in this case accused were arrested on a road, omission to secure independent mashirs from the locality is significant and cannot be brushed aside lightly by this Court.

19. The mashirnama of recovery does not disclose the number of recovered pistols but the report of Laboratory (FSL) discloses as rubbed number of pistols, and such contradiction has also created serious doubt in the prosecution case.

20. Omissions are always fatal to the case of the prosecution; tempering with case property could not be ruled out where the same was not sealed. Lapse on the part of the police is clear and admitted. Wisdom behind sealing the weapons at the place of incident is to eliminate the possibility of manipulation of evidence after the recovery of the crime weapons. Sealing of weapons is essential, particularly in cases when it is alleged that weapon was used in the commission of crime and empties were secured from the *vardat*. In the circumstances at hand evidence of police officials does not appear to be trustworthy thus required independent corroboration, which is lacking in this case. Reliance is placed on the case reported as **PLD 2004 Supreme Court 39** (*The State vs. Muhammad Shafique alias Pappo*), in which the Honourable Supreme Court has observed as under:-

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

which creates doubt about credibility of this witness, particularly when other witness Mushir Abdur Rehman was not examined.”

21. Prosecution has failed to establish safe custody of weapons at Police Station and safe transit to chemical examiner. Prosecution failed to prove that appellants assaulted or used criminal force to police officials to deter from discharge of their duty. Appellants had been convicted under section 324, PPC was without any evidence. From the prosecution evidence available on record, offence had no nexus with the object of Anti-Terrorism Act, 1997 as contemplated under sections 6 and 7 of the Anti-Terrorism Act, 1997. Therefore, evidence available on record makes it clear that encounter had not taken place. Above stated circumstances created doubt about the happening of the encounter. The standard of the proof in this case should have been far higher as compared to any other criminal case when according to the prosecution it was case of police encounter. It was desirable that it should have been investigated by some other agency. Such dictum has been laid down by the Honourable Supreme Court in the case of **Zeeshan alias Shani versus The State** (2012 SCMR 428). Relevant portion is reproduced as under:-

“11. The standard of proof in this case should have been far higher as compared to any other criminal case when according to the prosecution it was a case of police encounter. It was, thus, desirable and even imperative that it should have been investigated by some other agency. Police, in this case, could not have been investigators of their own cause. Such investigation which is woefully lacking independent character cannot be made basis for conviction in a charge involving capital sentence, that too when it is riddled with many lacunas and loopholes listed above, quite apart from the afterthoughts and improvements. It would not be in accord of safe administration of justice to maintain the conviction and sentence of the appellant in the circumstances of the case. We, therefore, by extending the benefit of doubt allow this appeal, set aside the conviction and sentence awarded and acquit the appellant of the charges. He be set free forthwith if not required in any other case.”

22. In criminal cases the burden of proving its case lies on the prosecution and the prosecution is duty bound to prove the case against the accused through reliable evidence, direct or circumstantial and that too beyond reasonable doubt. Besides this, it is a settled principle of law, that if there is an element of doubt as to guilt of an accused, the benefit of that doubt must be extended to him. The doubt of-course must be reasonable and not imaginary or artificial. The rule of benefit of doubt, which is described as the golden rule, is essentially a rule of prudence which cannot be ignored while dispensing justice in accordance with law.

23. No doubt, the Sindh Arms Act, 2013 is enacted to curb the proliferation of arms and ammunitions and punishment for possession of any fire arm is extended to 14 years and with fine. The rule for safe administration of criminal justice is; the harsher the sentence the stricter the standard of proof. 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 police officers 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.

24. In presence of such lacunas in the prosecution case we are of the considered view that the conclusion drawn and reasons advanced by learned trial Court do not show fair evaluation of evidence, which is not in accordance with the settled principles in criminal cases, therefore,

impugned judgment is a result of erroneous and unreasonable lines of reasoning and merits interference by this Court to erase the effect of miscarriage of justice.

25. In view of the above stated reason we have no hesitation to hold that there are several circumstances/infirmities in the prosecution case as highlighted above, which have created reasonable doubt about guilt of accused. In the case of **Tariq Pervaiz V/S The State 1995 SCMR 1345**, the Honorable Supreme Court has observed as under:

“It is settled law that it is not necessary that there should be many circumstances creation doubt, if there is a single circumstance which creates doubt in the prudent mind about the guilt of accused then the accused will entitled to benefit not as a matter of grace and concession but as matter of right.”

26. From the above discussion, it is evident that the investigation and inquiry carried out is neither satisfactory nor free from *malice* and the appellants' implication in these cases is not free from doubts. They thus could not be left at the mercy of Police. The review of the impugned judgment shows that essential aspects of the case have slipped from the sight of the learned trial Court which are sufficient to create shadow of doubt in the prosecution story. It is a settled law that for creating doubt, many circumstances are not required and if a single circumstance creates a reasonable doubt in a prudent mind, then its benefit be given to the accused not as matter of grace or concession but as a matter of right (**1995 SCMR 1345 & 2009 SCMR 230**).

27. For the above stated reasons, we reach to an irresistible conclusion that prosecution has utterly failed to prove its case against the appellants and trial court failed to appreciate the evidence according to settled principles of law. False implication of the appellants could not be ruled out. Resultantly, these appeals are allowed and

conviction and sentence recorded by the trial Court vide judgment dated 18.06.2019 are set aside and appellants are acquitted of the charges. Appellants shall be released forthwith if not required in some other custody case(s).

28. These are the reasons for our short order dated 24.11.2020.

JUDGE

JUDGE

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