# IN THE HIGH COURT OF SINDH AT KARACHI

Present:

Mr. Justice Nazar Akber
Mr. Justice Zulfiqar Ahmad Khan

**Special Cr. Anti-Terrorism Jail Appeal No. 232 of 2019**

[ Muhammad Junaid @ Laloo v. The State]

| | | |
|---|---|---|
| Appellant | : | Muhammad Junaid @ Laloo through Mr. Altaf Hussain Khoso, Advocate. |
| State | : | Through Ms. Rahat Ahsan, Additional Prosecutor General, Sindh. |
| Date of Hearing | : | 04.11.2020 |
| Date of Judgment | : | 04.11.2020 |

## J U D G M E N T

**Zulfiqar Ahmad Khan, J**:- Appellant Muhammad Junaid @ Laloo son of Noor-ul-Haque was tried by learned Judge, Anti-Terrorism Court-IV, Karachi in Special Cases Nos.1081 and 1081-A of 2018 [Crime No.458/2018, under sections 353/324/186/34 PPC read with Section 7 ATA 1997 and Crime No. 459/2018, under section 23(I)-A of the Sindh Arms Act, 2013], registered at P.S. Zaman Town, Karachi. On conclusion of the trial, vide judgment dated 23.07.2019 the appellant was convicted and sentenced under section 265-H Cr. P.C. as under:-

a. For the offences under Sections 353/324/186, PPC read with Section 7 (h) of ATA, 1997 and sentenced to undergo R.I. for five years with fine of Rs.20,000/-. In default in payment of such fine, he shall suffer R.I. for six months.

b. For the offence under Section 23(1)(a) of Sindh Arms Act, 2013 and sentenced to undergo R.I. for three years with fine of

Rs.10,000/-. In default in payment of such fine, he shall suffer R.I. for two months.

c. For the offence under Section 186, PPC and sentenced to undergo R.I. for six months.

All sentences were ordered to run concurrently. Benefit of Section 382-B, Cr. P.C. was also extended to accused. Co-accused Usman @ Puri was acquitted by the learned trial Court by extending him benefit of doubt.

**2.** Brief facts of the prosecution case as disclosed in the FIRs are that complainant Zulfiqar Ali Gill, posted at Tasveer Mehal Chowki Incharge of Zaman Town PS alongwith HC Ibrahim, HC Zulfiqar, PC Shahid, PC Sikandar, proceeded for patrolling duty in the area and when they reached Noorani Qabristan, Korangi, they noticed that two persons were coming from front side on a motorcycle. Complainant signaled them to stop but accused persons fired upon police party with intent to kill them. Police party retaliated and fired in their defence, on sustaining bullet injury one person fell down from motorcycle and other fled away from the scene. The injured accused was apprehended, who disclosed his name Muhammad Junaid @ Laloo son of Noor-ul-Haque. He also disclosed the name of his companion as Usman and Junaid, one 30 bore pistol load magazine with three rounds were recovered. After completion of legal formalities, FIRs were lodged.

**3.** After usual investigation, challan was submitted against the accused under the above referred sections. Both the cases were amalgamated by the trial court under section 21-M of the Anti-Terrorism Act, 1997.

**4.** Trial court framed charge against the accused at Exh.04 in both the cases, to which accused pleaded not guilty and claimed to be tried.

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

**6.** Statement of accused under Section 342 (1) Cr.P.C was recorded at Exh.14, wherein the accused denied all the incriminating pieces of prosecution evidence brought against him on record and claimed false implication in the cases. Accused raised plea that he was acquitted by the Court in FIR No.156/2015, registered at P.S. Artillery Maidan for offence under section 379 PPC. Accused however did not lead any defence and declined to give statement on oath in disproof of prosecution allegation. In a question what else he has to say, he replied that he is innocent and police has implicated him in this case falsely because of his refusal to pay illegal gratification.

**7.** Trial Court after hearing the learned counsel for the parties and assessment of evidence, by judgment dated 23.07.2019 convicted and sentenced the appellant as stated above. Hence this appeal. While co-accused Usman @ Puri was acquitted by the learned trial Court by extending him benefit of doubt.

**8**. Learned counsel for the appellants contended that the impugned judgment is illegal, unlawful, arbitrary and is unwarranted by law. He further contended that learned trial Court did not consider the improvements, discrepancies, and contradictions in the statements of PWs while deciding the case, that appellant/accused was booked by the police in these cases falsely by foisting arms upon him. He further contended that the time of registration of FIRs and preparation of Mashirnama is the same. He further contended that incident took place on 06.09.2018 and 30 bore pistol rubbed number with magazine, four live cartridges and empties were sent on 07.09.2018 to the ballistic expert's

report, whereas, police mobile was received by the Forensic Division, Sindh, Karachi on 10.09.2018 for examination. 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.

**9**. Learned Additional Prosecutor General has argued that the prosecution has examined four 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 appeal.

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

**11**. At the trial, prosecution examined P.W.1, Aijaz Ahmed, MLO posted at JPMC deposed that he has examined the accused and found the following injuries:-

1. Firearm projectile injury measuring 0.5 cm x 0.5 cm at posterior aspect of right leg. Inverted margin no blackening and chairing seen at middle of third.

2. Firearm exit wound measuring 0.5 cm x 0.5 cm at anterior medical aspect of right leg at its middle third. Everted margin blood was oozing. The injured was referred to X-ray and there was no bony injury in X-ray. I kept the injury reserved but not declared *Juraiy Gayair Jafia Mutalamia*.

In his cross-examination, he deposed that this type of injury can be if the injured was sitting on motorcycle and firing was made from

back side. This injury was caused if fired from more than 3/4 feets distance.

**12.** P.W. 2, Complainant ASI Zulfiqar Gil of P.S. Zaman Town deposed that he was posted as Tasveer Mehal Chowki Incharge of Zaman Town P.S. and proceeded for patrolling in the area alongwith HC Ibrahim, HC Zulfiqar, PC Shahid, PC Sikandar in police mobile. He deposed that he saw that two persons coming from front side on motorcycle and signaled them to stop but the said person made fire upon them with intent to kill and in reply they also made fires one person fell down on receiving injury and the other fled away taking advantage of dark, then he checked the person who fell down who was holding in his right hand one 30 bore pistol load magazine 03 rounds, the bleeding was oozing from his right calf of leg and disclosed his name Muhammad Junaid & Laloo son of Noor-ul-Haque and the name of absconding companion Usman @ Puri; further deposed that one bullet was hit on police mobile on the body of back side above tyre then he prepared mashirnama at the spot and also sealed the property and secured 04 empties of 30 bore and 05 empties of SMG and came back at P.S. Zaman Town with the police letter and injured accused was sent to hospital with HC Zulfiqar and he registered two FIRs and produced the said two FIRs at Ex.08/E and 08/F, respectively and further deposed that on the next morning SIO inspected the place of incident on his pointation and prepared mashirnama and recorded 161 Cr. P.C. statement and saw two cloth parcels which are de-sealed in the court. One containing one pistol, magazine and 04 live bullets and 01 test empty. The second cloth parcel de-sealed and containing 04 empties of 30 bore and 05 empties of SMG, which were same. In his cross-examination, he deposed that the exchange of firing continued about 3/4 minutes. The distance at that time between them and accused was about 15 feets and denied that the accused were ahead and the police mobile behind them and further denied that the accused

had passed away from them and they remained sanding at their position and admitted that the accused who was caught at the spot was driving the motorcycle and the person sitting on back set fled away and did not disclose the "Holiya" of absconding accused to SIO and prepared the mashirnama in the light of police mobile standing position, 15/20 minutes consumed in preparation of mashirnama etc. and the distance between P.S. and place of incident was about 01 kilometer, further admitted that no public was gathered at the place of incident and the SIO at the time of site inspection did not make private person as mashir and admitted that on the barrel of the pistol Star is written and he did not say in his 161 Cr. P.C. statement about the said written of Star.

**13.** PW-03 HC Zulfiqar Ali in his cross-examination has deposed that the distance between them and accused when the signal was made by ASI about was 07/08 yards and the signal was made at about 01:45 or 02:00 am and the exchange of firing continued about five minutes. He further deposed that he did not give the police mobile number in his 161 Cr. P.C. statement, and about half an hour consumed in all the proceedings at the place of incident and the distance between place of incident and P.S. Zaman Town was 2/½ kilometers and admitted that he did not give the "Hulliya" and description of the absconding accused in his 161 Cr. P.C. statement and no private person was taken by I.O. at the time of site inspection.

**14.** PW-04 Inspector/I.O. Muhammad Aslam in his cross-examination deposed that in 161 Cr. P.C. statement ASI Zulfiqar stated the recovery of four bullets and he did not say that three were in magazine and one in chamber and admitted that in 161 Cr. P.C. statement recorded on 06.09.2018 the witnesses did not say that they can recognize the running away culprit nor they told the "Holiya" and the pistol was without number as per witnesses and in 161 Cr. P.C. statement the police mobile

registration number was not given and denied that first the vehicle Inspector checks the police mobile in case of receiving bullet on it and then it send to FSL.

**15.** Record reflects that recovered weapon viz.30 bore pistol etc. were recovered from the possession of the appellant on 06.09.2018, which were received by the Ballistic Expert on 07.09.2018, who has furnished his opinion as follows:-

> 05. OPINION: The examination of the case as led that.
>
> i) The above mentioned pistol is in working condition at the time of examination.
>
> ii) One 30 bore crime empty marked as "C1" was 'fired' from the above mentioned 30 bore pistol rubbed number, in question in view of the fact that major points i.e. striker pin marks, breech face marks are 'similar'.
>
> iii) Three 30 bore empties marked as "C2, C3 and C4" were 'not fired' from the above mentioned 30 bore pistol rubbed number in question, in view of the fact that major points i.e. striker pin marks, breech face marks and 'dissimilar'.
>
> iv) Five 7.62x39 mm bore crime empties marked as "C5 to C9" are 'fired' empties of 7.62x39 bore fire arm/weapon.
>
> Note: One 30 bore test empty is being sent in the sealed parcel of the above mentioned fire arm/weapon."

The above report of Ballistics Expert shows that the three 30 bore crime empties marked as "C2, C3 and C4 were not fired from the said pistol, which creates serious doubt in the prosecution case. No evidence of modern devices to that extent has been produced by the prosecution before the trial court.

**16.** Record further shows that one police mobile bearing Registration No.SPE-241 was also inspected by the Ballistics Expert and furnished his opinion that the hole marked as ENT (left side on the body near left tyre mudguard crossed) are caused due to the passage of fired projectile of

fire arm. PW-02 in his testimony stated that one bullet was hit on police mobile on the body of back side above tyre but the police mobile number has not been given in his deposition. PW-03 in his deposition has also stated that one fire was hit on police mobile above tyre at body and admitted that he did not give the police mobile number in his 161 Cr. P.C. statement and stated that only one bullet mark was available on the damaged police mobile. How old that mark is also not answered, and whether that mark is outcome of bullet hitting the mobile or not is also not answered. The age of the bullet hole damage has not been provided by the prosecution. All the PWs have not given the exact registration number of the police mobile, which was allegedly hit by the accused. It is the case of the prosecution that the two accused were on motorcycle but the said motorcycle has not been made case property. Trial Court has already acquitted co-accused namely Usman @ Puri by extending benefit of doubt. Prosecution has also failed to show that despite being a well-populated area when police had sufficient time to associate private Mushirs, why so was not done. From the perusal of above evidence, it transpires that the encounter took place for 3 to 5 minutes but not a single injury was caused to police party and PWs-02 and 03 have admitted that the encounter continued for about 3/4 and 5 minutes and no one from police party sustained any firearm injury, which cuts the roots of prosecution case. The above prosecution evidence shows glaring contradictions/ ambiguity. This fact has totally been ignored by the learned trial Court while passing the impugned judgment. Mashirnama of recovery does not disclose the number of recovered pistol but the report of Laboratory (FSL) discloses as rubbed number of pistol, and such contradiction/infirmity has also created serious doubt in the prosecution case.

**17.** According to the defence plea, the appellant was in custody of the police before registration of the case but such plea has been

disbelieved by the trial Court without assigning and reason. No doubt, police officials as citizen are as good witnesses in Court proceedings as any other person yet, some amount of care is needed when they are the only eye witnesses in the case. It is not on account of an inherent defect in their testimony, but due to the possibility that an individual police official in mistaken zeal to see that the person he believes to be a culprit is convicted, might blur line between duty and propriety. It is settled law that in the exercise of appreciation of evidence it is necessary as prerequisite, to see whether witness in question is not such an overzealous witness.

**18.** Prosecution failed to prove that appellant assaulted or used criminal force to police officials to deter from discharge of their duty. Appellant 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.

**19.** It appears that the Investigation officer to conduct fair investigation in this case has failed as no independent person of locality was examined in order to ascertain the truth beyond any reasonable doubts. The above stated circumstances in our view created serious doubts about the very happening of the encounter. The standard of the proof in such a 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 was a day time incident. 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."

**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.** In view of the above stated reasons, we have had no hesitation to hold that there are several infirmities in the prosecution case as highlighted above, which have created doubt. In the case of **Tariq Pervez V/s. The State (1995 SCMR 1345)**, the Honourable Supreme Court has observed as follows:-

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

**22.** From the above discussion, it is evident that the investigation and inquiry carried out is neither satisfactory nor free from *malice* and the accused's implication in the instant case is not free from doubts. He thus could not be left at the mercy of Police. The review of the impugned judgment shows that essential aspects of the case have slipped from the sight of the learned trial Court which are sufficient to create shadow of doubt in the prosecution story. 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)**.

**23.** For the above stated reasons, we reach to an irresistible conclusion that prosecution has utterly failed to prove its case against the appellant and trial court failed to appreciate the evidence according to settled principles of law. False implication of the appellant could not be ruled out. Resultantly, the appeal is allowed and conviction and sentence recorded by the trial Court vide judgment dated 23.07.2019 are set aside and appellant is acquitted of the charges. Appellant shall be released forthwith if not required in some other custody case.

**24.** These are the reasons for our short order dated 04.11.2020.

JUDGE

JUDGE

*hanif*