

IN THE HIGH COURT OF SINDH AT KARACHI

Before: Mr. Salahuddin Panhwar, J
Mr. Zulfiqar Ahmad Khan, J

Spl. Cr. Anti-Terrorism Appeal No. 168 of 2017

[Manzoor Ahmed @ Mavia @ Usama @ Habibullah S/o Ghous Bux
V/s. The State]

Date of Hearing : 21.11.2017
Appellant : Manzoor Ahmed @ Mavia @ Usama
@ Habibullah through Mr. Hashmat
Khalid, Advocate
State : Through Mr. Abrar Ali Khichi, APG

JUDGMENT

Zulfiqar Ahmad Khan, J:- Impugned here is the judgment dated 12.07.2017 passed by Anti-Terrorism Court No. VI, Karachi, in Crime No. 447 of 2015 registered under Section 4/5 of the Explosive Substances Act, 1908 r/w Section 6(2)(ee) and Section 7 of the Anti-Terrorism Act, 1997 at P.S. CTD/OPS, Garden, Karachi, wherein the Appellant/accused was convicted under Section 265-H(ii) for offence under Section 4/5 of the Explosive Substances Act, 1908 r/w Section 6(2)(ee) and Section 7(i)(ff) of the Anti-Terrorism Act, 1997 and sentenced to undergo R.I. for a term of 14 years with forfeiture of his property.

2. Prosecution story in nutshell is that on 21.12.2015 the Complainant ASI Aftab Ahmed of P.S. CTD when interrogated the accused, as well as Abdul Hameed S/o Abdul Aziz and Abdul Latif s/o Muhammad Karim arrested respectively in Crime bearing FIR No. 432 of 2015, FIR No. 433 of 2015 and FIR No.434 of 2015 under Section 23-1-A, Sindh Arms Act, 2013, the accused disclosed that he had concealed/buried two hand grenades at West

Wharf Road Old Railway Track beside Wall and offered that he can have the same recovered. On such disclosure, the Complainant alongwith with his subordinate staff took the accused in police mobile. On the pointation of the accused, when police arrived at West Wharf from the side of Netti Jetti Bridge, police mobile was stopped. As per prosecution, due to non-availability of private witnesses, HC Fatah Lal and HC Muhammad Haroon acted as Mushir and the accused "*while being hand cuffed*" walked ahead towards the backside of railway track wall of Lipton Tea Company where at a place he removed a stone from a dig and took out a shopper and on opening of the said shopper, two hand grenades being ARGES HDGR-69 surfaced which were wrapped in the envelope in a blue color shopper, which were taken into safe custody by police under the memo of arrest and recovery. On return at the P.S, the present FIR was lodged against the accused.

3. After registration of the case, the investigation was assigned to Inspector Sohail Ahmed Khan, who interrogated the accused. He also recorded statements under Section 161 Cr.P.C of the PWs and also visited the place on the pointation of the Complainant and prepared such memo. He also called the Bomb Disposal Unit (BDU) team for the inspection of both the hand grenades and received clearance certificate and final BDU inspection report. After completing the investigation, he submitted challan.

4. To establish its case, the prosecution examined in all four witnesses namely Complainant ASI Aftab Ahmed as PW-1 at Ex-04, who produced Roznamcha entries at Ex-04/A to Ex-04/C. He also produced memo of pointation, recovery and arrest of the accused at Ex-04/D as well as the FIR No. 447/2015, under Section 4/5 of Explosive Substance Act, 1908, alongwith

roznamcha entry at Ex-04/G. PW-02 HC Muhammad Haroon Satti at Ex-05. PW-03 SIP/BDU Expert Ghulam Mustafa Arain at Ex-07, who inspected both the hand grenades and issued clearance certificate. He also issued final inspection report and produced roznamcha entries, clearance certificate and final inspection report at Ex-07/A to Ex-07/D respectively. PW-04 Inspector Muhammad Irfan on behalf of I.O. Sohail Ahmed Khan also appeared, who produced a letter regarding his appointment as well letter regarding CRO of the accused, letter to FSL and BDU for report, a letter to home department for getting sanction etc. at Ex-08/A to Ex-08/H. Thereafter, the prosecution side was closed through Ex-09.

5. Mr. Hashmat Khalid, Advocate representing the appellant/accused submitted that the accused was already in the custody of police as of 15.12.2015 but he was booked in the present crime through FIR on 21.12.2015, which shows malafide of police to falsely implicate the accused in this additional case since no incriminating evidence was found against the accused in the first case. He raised following grounds in support of the case:-

- a) That the impugned judgment dated 12.07.2017 is illegal, irregular, inconsistent, out of jurisdiction and in contradictions with the facts of the case.
- b) That trial Court has failed to consider that the entire case of the accused is hanging on the sole statement of police officials, which are very weak in nature.
- c) That trial Court has failed to consider that recovery of explosive has only taken place in the presence of police party and private witnesses who were available at the place of recovery have not been associated.

6. Learned Assistant Prosecutor General, to the contrary submitted that the prosecution has successfully proved its case

beyond reasonable doubt and the learned trial Court has rightly awarded conviction and sentence and prays for the dismissal of the present appeal. He placed reliance on the case reported as SBLR 2016 Sindh 1334.

7. Heard the parties and reviewed the record.

8. It is admitted prosecution story that the accused during investigation pointed that he had concealed two hand grenades at a secret location and offered to get them recovered, whereupon he was taken to the pointed place alongwith HC Fatah Lal and HC Muhammad Haroon and when they reached at the pointed place as per PW-01 (Ex-04) *“the accused removed stone near the Lipton Tea Company Wall, which surfaced one blue color polythene bag, which contained Khaki envelope, in which, two hand grenades were lying.”* To the contrary, HC Muhammad Haroon Satti (PW-2), in his examination in chief, stated that on 21.12.2015, he alongwith accused/appellant when reached at the place of the incident, they saw one stone near the wall of Lipton Tea Company. He deposes that:-

“We removed the said stone and found one blue color polythene bag, which contained Khaki envelope, in which two hand grenades were lying”.

9. Undoubtedly there are obvious contradictions between these two statements creating holes in the prosecution story to start with. When as per PW-1's statement, the accused was handcuffed already. It is also surprising that the second eye witness of the alleged recovery namely HC Fatah Lal has not been examined for which omission, no plausible explanation has been put forward. It however is admitted that at no given point of time the accused had possession of the hand grenades and also to keep in mind is that they were only recovered in suspicious circumstances.

10. It is also a fact that the Appellant was not found connected with any militant group or had been found financier or having provided any facility to the militants. Prosecution has failed to show that despite being a well-populated area when in particular it is alleged that the accused had given prior whereabouts of the grenades allegedly concealed by him, Police had sufficient time to associate private Mushirs, but it was not done. The prosecution's case further fails to satisfy the test of reasonableness on the ground that when Police party knew that two hand grenades had been concealed in earth by the accused, there was a looming danger that during excavation an explosion could take place. Therefore, why the Bomb Disposal Unit was not called in at the time of recovery of the hand grenades remains a mystery. In similar circumstances the Apex Court has held that the evidence of the Police officials was tainted with doubts, failing to inspire confidence. The case of Muhammad Pervaiz v/s. the State (2005 SCMR 1038) is in sight where expounding on Section 5 and 5-A of the Explosive Substances Act, 1908 recovery of the incriminating articles was held to be not satisfactorily proved and the accused was acquitted in those circumstances.

11. Of serious concern is the report of BDU read with the statement of SIP Ghulam Mustafa, Incharge BDU, which alleges that both the hand grenades were made at Pakistan Ordnance Factory Wah. It must be kept in mind that POF is a unit of Ministry of Defence Production. Without giving specific product ID, LOT or Batch number of the hand grenades allegedly having been found and attempting to connect those with one of the most distinguished defence production unit of Pakistan which is known across the globe for manufacturing internationally acclaimed defence equipments, prosecution fails to convince as to how the

accused got hold of these hand grenades which cannot be let out from the extremely secure premises of POF Wah. It seems that prosecution celebrated the mere recovery without getting into trouble of finding how the hand grenades landed in the hands of the accused, which on the face of it is not confidence inspiring. It is also a fact that the hand grenades were not sent for forensic nor were any efforts made by police to dig as to what the accused was planning to do with these grenades. While per police, the grenades were unearthed, however what remained buried under heaps of sand and dust was plot or intent of the accused as to what he was planning to do with these explosives.

12. Also to keep in mind is the open secret that frivolous litigations account for a huge proportion of cases tried by Anti-Terrorism Courts in Pakistan, thereby taking a large proportion of the time and resources of these Courts detracting them from the devoting time, energy and resources to real hardcore terrorist cases, many of which get neglected due to backlog of cases in these Courts. A research paper in this regard by M. Zaidi (2012) is of relevance, where sociological analysis of the subject matter has been undertaken. The paper points out to an apparent fact that Police uses Anti-Terrorism Courts for the purposes of incriminating accused with the sole objective of getting long prison sentences, denial of bail, and to misuse the stricter sentencing regime of ATA. While the paper concludes with an eye-popping observation that 90% of cases pending before the AT Courts do not really relate to hardcore terrorist activities, by making reference to Section 6 of the Anti-Terrorism Act, the paper points out that the broad definition of "terrorism" given under the Section 6 forces a number of ordinary criminal actions to fall under the ambit of terrorism. This wide definition has created a host of problems in particular

when these cases are prosecuted through poorly trained police force susceptible to external pressures. Therefore, convictions coming from Anti-Terrorism courts meant to portray accused as an evil for offences which clearly do not show any connect with the heavily loaded term of terrorism ignite suspicion and such outcomes are to be taken with a pinch of salt. This view finds support from the recent judgment of Waris Ali & 5 others *vs.* the State reported as 2017 SCMR 1572 where courts are cautioned to not to hurriedly jump to the conclusion that offences tried by Anti-Terrorism courts were in fact terrorist acts. This landmark judgment in fact points out to a new direction by holding that *forcibly trying a citizen under harsh regime of ATA laws instead of ordinary penal law of the land is violation of Article 4(1) of the Constitution of the Islamic Republic of Pakistan.*

13. Now coming to the case of Naimatullah Niazi v/s. the State (SBLR 2016 Sindh 1334) cited by learned APG, the said case could be distinguished easily from the case at hand since in that case one hand grenade was recovered from *“the right side pocket of the shirt of the accused”*, whereas, in this case the prosecution alleges that the hand grenades were recovered from earth (hidden at a specific place) on the pointation of the accused. On account of these circumstantial divergent facts, where there are other serious doubts as to the mode of recovery, findings given in the abovementioned case could not be safely superimposed on the case at hand as doing so will defeat the interest of justice.

14. From the above discussion, it is evident that the investigation/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 upon 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 (1995 SCMR 1345 & 2009 SCMR 230). For these numerous reasons given above, we were not convinced that prosecution had brought guilt to the accused's doorsteps beyond any taint or shadow of doubt. Therefore while extending the benefit of doubt to the Appellant, he was inter alia acquitted from the charge through our short order dated 21.11.2017 by allowing this appeal and by *setting aside* the impugned judgment.

These are the reasons of our said short order.

Judge

Judge