

IN THE HIGH COURT OF SINDH AT KARACHI**Criminal Appeal No. 413 of 2016**

Akbar Bacha v. The State

Criminal Appeal No. 431 of 2016

Muhammad Azam v. The State

*Khawaja Muhammad Azeem, Advocate for Appellant in Crl. Appeal No.413/2016.**Mr. Muhammad Muneer, Advocate for appellant in Crl. Appeal No.431/2016.**Mr. Sagheer Ahmed Abbasi, APG.***JUDGMENT**

Omar Sial, J.: Akbar Bacha and Muhammad Azam, the two appellants in these appeals, have impugned a judgment dated 27-10-2016 passed by the learned Sessions Judge, Karachi Central. In terms of the said judgment the appellants were convicted and sentenced as follows:

- (i) For an offence under section 393 P.P.C. read with section 34 P.P.C.: Rigorous imprisonment for 3 years and a fine of Rs. 50,000 or a further imprisonment of 3 months in lieu thereof.
- (ii) For an offence under section 302(b) P.P.C. read with section 34 P.P.C.: Imprisonment for life and a fine of Rs. 300,000 or a further imprisonment of 6 months in lieu thereof.

Background

2. Asif Ali Sheikh owned a Telenor franchise shop. On 11-6-2011 at about 8:00 p.m., he along with Ishaq Ali and Abdul Samad were socializing in the CCTV room of the shop when they saw 3 boys of Pathan origin, armed with pistols, arrive outside the shop and try to enter it. Sultan, a guard of the shop, armed with a repeater, offered resistance but was shot at by one of the intruders, Sultan too opened fire. Simultaneously, Asif Ali Sheikh, who had a pistol, also opened fire as did the intruders. The aftermath of the shooting which continued for a good 10 minutes saw Asif Ali Sheikh and Sultan seriously injured, 1 of the intruders was shot on his leg whereas the remaining 2 sustained minor pellet injuries, however, all 3 managed to escape. Ishaq Ali and Abdul Samad Bhatti shifted the injured to the Agha Khan Hospital but unfortunately both succumbed to the injuries inflicted on them and died. They were told by the Agha Khan

hospital to take the dead to Jinnah hospital for further medico-legal procedures. While they were at Jinnah hospital they saw the police of the Awami Colony police station bring in 2 injured persons (the appellants) which both Ishaq and Bhatti recognized as 2 of the 3 injured persons with whom they had had an encounter earlier. Ishaq Ali recorded a statement under section 154 Cr.P.C. and F.I.R. No. 428 of 2011 was registered under sections 393, 302 and 34 P.P.C. at the Shah Latif Town police station against the appellants.

Trial

3. The two appellants pleaded not guilty and claimed trial. At trial the prosecution examined 7 witnesses. **Ishaq Ali (PW-1)** was the complainant and an eye witness. **Abdul Samad Bhatti (PW-2)** was an eye witness. **Niaz Ahmed Shaikh (PW-3)** (a witness to the handing over to the dead bodies of the complainant parties as well as the identification of the 2 accused at the Jinnah hospital. **Ghulam Mustafa Niazi (PW-4)** was the police officer who first responded to the information that there had been a shoot out at the Telenor franchise in which people have been injured. **Dr. Syed Farhat Abbas (PW-5)** was the doctor who conducted the post mortem of the deceased. **Mohammad Ashfaq Mughal (PW-6)** was the learned magistrate who recorded the section 164 Cr.P.C. statement of Abdul Samad Bhatti. **Dilawar Khattak (PW-7)** was the investigating officer of the case.

4. In their section 342 Cr.P.C. statements both the appellants pleaded their innocence. Both, also stated that the present case had been filed against them purely due to a grudge that S.I.P. Pathan Khan of the Awami Town police station had against them arising out of earlier cases which had been filed against them but in which they had been acquitted. They also took the plea of alibi. Appellant Akbar Bacha produced his two brothers **Muhammad Shakir (DW-1)** and **Salman Bacha (DW-2)** as his witnesses whereas appellant Azam produced his brother **Zakir Khan (DW-3)** as well as DW-1 Muhammad Shakir as his witnesses.

Parties heard

5. I have heard the learned counsels for the appellants as well as the learned APG. The complainant did not effect an appearance despite notice. My observations and findings are as follows.

Timeline of events

6. It might be of help to understand the factual aspects of the incident, as revealed through the evidence recorded, if the same are put into a chronological order:

Date	Time	Event
11-6-2011	8:25 p.m.	3 armed men enter the shop.
11-6-2011	8:25 to 8:35 p.m.	The shoot out occurs.
11-6-2011	9:00 p.m.	Police receives information of the incident.
11-6-2011	10:30 p.m.	The dead bodies are examined by the police at the Agha Khan hospital. Section 174 Cr.P.C. proceedings.
12-6-2011	12:00 a.m.	The dead bodies are released by the Aga Khan hospital to be taken to JPMC.
12-6-2011	1:30 a.m.	The dead bodies are handed over to the doctors at J.P.M.C. for post mortem.
12-6-2011	2:00 a.m. to 3:00 a.m.	Post mortem conducted.
12-6-2011	2:30 a.m.	Ishaq Ali records his section 154 Cr.P.C. statement at the JPMC.
12-6-2011	3:00 a.m.	The 2 appellants are arrested upon the identification of Ishaq Ali.
12-6-2011	4:00 a.m.	F.I.R. No. 428 of 2011 is registered.
12-6-2011	8:00 a.m.	Inspection of place of incident.
22-6-2011	Time not recorded	Clothes of the deceased as well as blood samples collected from the spot sent for chemical analysis
23-6-2011	Time not recorded	Case property comprising of: 1 cartridge of 12 bore; 6 empties of a .30 bore pistol; 1 empty of 9 mm 2 .30 bore pistols sent for FSL analysis
27-6-2011	12:00 p.m.	The repeater used by deceased Sultan in the incident seized by police from the place of incident.
27-6-2011	Time not recorded	Chemical Analysis report received.
29-6-2011	Time not recorded	FSL report issued
29-6-2011	Time not recorded	The repeater used by the deceased Sultan in the incident sent for FSL analysis.
7-7-2011	Time not recorded	FSL report received.

Recovery

7. The prosecution case was that the appellants were armed with 0.3 bore pistols whereas Asif Ali had a 9 mm pistol and Sultan a repeater. The investigating officer of the case admitted that the 7 empties of the 0.3 bore pistol recovered from the place of incident did not match the pistols seized from the appellants.

The 9 mm pistol which was used by Asif in the shoot out also seems to have miraculously disappeared from the record of the case and was not seized or produced at trial. Similarly, the repeater that Sultan had allegedly used was also not seized in a timely manner – the incident occurred on 11-6-2011, the scene of incident was inspected on 12-6-2011 however the memo of seizure of the repeater shows that the repeater along with 3 live bullets was seized from the place of incident on 27-6-2011. Further, the seizure memo of the repeater shows that the repeater along with 3 live cartridges was seized and sealed on the spot on 27-6-2011 whereas the 2 empties of the repeater were seized and sealed on 12-6-2011. It is most surprising that the parcel sent to the FSL on 29-6-2011 contained the repeater and the 2 empties which were supposed to have been sealed at an earlier date. I do not believe the prosecution version in this regard. In any case the accused were not confronted with the seized arms and ammunition or the respective expert reports issued in this regard when they recorded their section 342 Cr.P.C. statements. A blood stained sandal belonging to one of the appellants was recovered from the spot. The investigating officer admitted that he had not sent the sandal for forensics nor was it included in the list of case property in the challan filed.

Witnesses

8. Ishaq Ali, the complainant, admittedly lived in Shikarpur. No evidence was produced at trial to show what Ishaq Ali was doing in Karachi at the time the incident occurred. Wahid Baksh and Khalid Mehmood were the witnesses to the memo of inspection of place of incident and the recovery of the empties as well as the blood sample and the sandal and the seizure of the repeater and its live cartridges. Neither of the witnesses was examined at trial. No reason was attributed to their absence. In such circumstances the presumption contained in Article 129 illustration g will come into play that had the two witnesses been examined they would not have supported the prosecution case. No official of the security company was examined to show that Sultan was indeed stationed at the shop that night and that he had been killed in a shoot out there.

9. I also find it surprising that no independent eye witness was cited by the prosecution even though the shop where the incident occurred was in a populated area and a Chippa Ambulance Booth was right next to the said shop. It also does not appeal to reason that with an ambulance booth located right next

to the shop, the witnesses preferred to move the injured to the hospital in an unidentified private vehicle. There was no documentary evidence produced at trial that would show that the 2 deceased were indeed brought to the Aga Khan hospital for the initial treatment. There is no death certificate issued by the hospital; no doctor or staff of the hospital recorded a statement to support the prosecution version. It is doubtful that the dead were brought to Aga Khan hospital in the first instance.

CCTV footage

10. The CCTV footage, through which it was alleged that the complainant party saw the 3 boys try to enter the shop and after which the shoot out occurred was not seized or displayed at trial. The reason given for its non-availability according to the complainant Ishaq Ali was that the CCTV equipment did not have enough memory and hence subsequent recording erased the earlier recording. According to SIP Dilawar Khattak, the investigating officer, the CCTV equipment did not have any recording facility. Both versions are not devoid of doubt. If the recording facility was there then it appears odd to me that the memory capacity of the equipment was so low that the subsequent recording erased all recording of the incident. If the CCTV equipment had no memory facility, then the eye witness account remained uncorroborated.

Scene of Incident

11. Even though it is claimed that the shoot out lasted for at least 10 minutes, the memo of the place of incident does not reflect that any bullet marks were found on the walls etc. The photographs of the scene of incident as exhibited at trial also do not show any collateral damage.

Arrest

12. The manner in which the appellants were arrested also remained shrouded in mystery. It was claimed by the prosecution that the appellants were arrested by the police of Awami Colony in another case (F.I.R. No. 254 of 2011) and that the 2 appellants had been injured in that encounter between the police and the appellants. Absolutely no witness was examined who would corroborate this story of the prosecution. No memo was prepared that would indicate where on the body had the appellants been shot at. No doctor was examined in this regard.

13. The 2 accused were acquitted in the case arising out F.I.R. No. 254 of 2011 on 4-8-2015. When they were arrested in F.I.R. No. 254 of 2011, another case under section 13-D of the Pakistan Arms Ordinance 1965 was also registered against them. The Appellant Azam was not only acquitted in that case but the learned trial judge issued a show cause notice against the complainant in that case as to why proceedings under section 211 P.P.C. should not be initiated against him.

Conclusion

14. The prosecution case is replete with contradictions, however, in view of the above observations I have concluded that the case of the prosecution was not proved beyond reasonable doubt. To the contrary, the prosecution evidence appears to be manipulated in places. Accordingly, the appeals are allowed and the appellants acquitted of the charge. The appellants should be released forthwith if not required in any other custody case.

JUDGE