IN THE HIGH COURT OF SINDH, AT KARACHI

PRESENT:-
MR. JUSTICE NAIMATULLAH PHULPOTO
MR. JUSTICE SHAMSUDDIN ABBASI.

<><><><><><>

Special Criminal Anti-Terrorism Appeal No.87 of 2022
Special Criminal Anti-Terrorism Appeal No.88 of 2022
Special Criminal Anti-Terrorism Jail Appeal No.100 of 2022

1. Muhammad Muneer son of Muhammad Farooq.
2. Muhammad Afzal son of Khadim Hussain. … Appellants

Versus

The State. … Respondent

<><><><><><>

Appellants	Through Mr. Shaista Gul, Advocate.
Respondent	Mr. Muhammad Iqbal Awan, Addl. P.G.
Date of hearing	25.01.2023
Date of recording detailed reasons	**20.02.2023**

<><><><><><>

JUDGMENT

SHAMSUDDIN ABBASI, J. Through captioned appeals, Muhammad Muneer and Muhammad Afzal, appellants, have challenged the vires of the judgment dated 02.04.2022, penned down by the learned Anti-Terrorism Court No.X, Karachi, in Special Cases Nos.280 of 2020 (FIR No.478 of 2020) registered at Police Station Sir Syed, Karachi, for offences under Sections 384, 385, 386 and 34, PPC read with Section 7 of Anti-Terrorism Act, 1997, 280-A of 2020 (FIR No.480 of 2020) registered at Police Station Sir Syed, Karachi, for offence under Section 23(1)(a) of Sindh Arms Act, 2013 and 280-B of 2020 (FIR No.481 of 2020) registered at Police Station Sir Syed, Karachi, for offence under Section 23(1)(a) of Sindh Arms Act, 2013, through which they were convicted and sentenced as follows:-

> *"The accused persons namely, Muhammad Afzal son of Khadim Hussain and Muhammad Muneer son of Muhammad Farooq are "convicted" U/s 7(1)(h) of ATA, 1997 R/w S. 384/385/386/34 PPC and they are sentenced to undergo R.I. for a period of*

> *"05" years (each) with fine of Rs.50,000/- (each) and in default in payment of such fine, they shall undergo further S.I. for a period of "06" months (each).*
>
> *The accused persons namely Muhammad Afzal son of Khadim Hussain and Muhammad Muneer son of Muhammad Farooq are also "convicted" u/s 23(1) A of Sindh Arms Act, 2013 and they are sentenced to undergo R.I. for a period of "05" years (each) with fine of Rs.50,000/- (each) and in default in payment of such fine, they shall undergo further S.I. for a period of "06" months.*
>
> *The accused persons are present in Court under custody through Jail Authority and they are remanded back to Jail to serve out the above sentences. All the sentences shall run concurrently and benefit of Section 382-B Cr.P.C. is also extended to the accused persons from the date of their arrest in these cases".*

2. FIR in this case has been lodged on 19.09.2020 at 4:30 pm whereas the incident is shown to have taken place on the same day (19.09.2020) at 12:15 pm. Complainant Jehanzeb son of Aurangzeb has stated that on the fateful day he reached at his mart "Afroze Drug Mart", situated at House No.B-96, Sector 11-A, North Karachi, where his workers informed him about an envelope that was given to them by an unknown persons with direction to call on the given number. The envelope was opened which contained two live cartridges and a slip /chit wherein it was written "zinda rehna chahte ho toh is number 0301-0029180 per call karo". The complainant immediately informed 15 (Madadgar) and on their advice reported the matter to P.S. Sir Syed, District Central, Karachi, and with the consent of police made a call to extortionist, who demanded Rs.10,00,000/- as extortion money. The complainant showing his inability to arrange such a huge amount and requested the extortionist to reduce the amount, who while disconnecting the phone told him to arrange money. The complainant also claimed to have video recording of the person who came at his Mart and delivered the envelope to his workers.

3. The duty officer ASI Ghulam Akbar registered a case vide FIR No.478 of 2020 under Sections 384, 385, 386 and 34, PPC and reached at the pointed place alongwith police party, accompanied by complainant, where they saw two persons came on motorcycle bearing Registration No.KBB-1132 to collect "bhatta" and meanwhile ASI Ghulam Akbar with the help his party encircled and apprehended them, who disclosed their names as Muhammad

Afzal son of Khadim Hussain and Muhammad Muneer son of Muhammad Farooq. During their search, police recovered one 30 bore pistol loaded with magazine containing three live rounds, one mobile phone VGO tel with SIM No.0301-8817179 and cash of Rs.500/- from Muhammad Afzal while 30 bore pistol loaded with magazine and two live rounds, one mobile phone Nokia and cash of Rs.200/- recovered from Muhammad Muneer. On query both accused failed to produce license of the recovered arms as such they were arrested at spot and brought at P.S. Sir Syed where separate case for recovery of unlicensed arms were also registered under Section 23(1)(a) of Sindh Arms Act, 2013.

4. Pursuant to the registration of FIRs, the investigation was followed and in due course challans for each case were submitted before the Court of competent jurisdiction under the above referred Sections, whereby the appellants were sent up to face the trial.

5. A charge in respect of offences under Sections 384, 385, 386 and 34, PPC read with Section 7 of Anti-Terrorism Act, 1997, and 23(1)(a) of Sindh Arms Act, 2013 was framed against appellants. They pleaded not guilty to the charged offences and opted to a trial.

6. At trial, the prosecution has examined as many five (05) witnesses. The gist of evidence, adduced by the prosecution in support of its case, is as under:-

7. Complainant Muhammad Jehanzeb appeared as witness No.1 Ex.6, ASI Ghulam Akbar as witness No.2 Ex.7, HC Shahid Ali as witness No.3 Ex.8, Hammas as witness No.4 Ex.9 and Inspector Shaikh Abdul Rehman as witness No.5 Ex.10. All of them were subjected to cross-examination by the defence. Thereafter, the prosecution closed its side vide statement Ex.11.

8. Appellants Muhammad Afzal and Muhammad Muneer were examined under Section 342, Cr.P.C. at Ex.12 and Ex.13 respectively. They have denied the allegations imputed upon them by the prosecution, professed their innocence and stated their false implication in these case by ASI Ghulam Akbar at the instance of complainant on account of enmity.

9. Upon completion of the trial, the learned trial Court found the appellants guilty of the offences charged with and, thus, convicted and sentenced them as detailed in para-1 (supra), which necessitated the filing of the listed appeals, which are being decided together through this single judgment.

10. It is contented on behalf of the appellants that they are innocent and have been falsely implicated in these cases by the complainant after joining hands with police as otherwise they have nothing to do with the alleged offences and have been made victim of the circumstances. It is next submitted that the prosecution has failed to prove ingredients of Section 7 of Anti-terrorism Act, 1997, hence conviction and sentence awarded to appellants under Anti-Terrorism Act is illegal and in violation of the precedents of Hon'ble apex Court. Per learned counsel, insofar as other offences are concerned, the prosecution has failed to discharge its legal obligation of proving the guilt of the appellants as per settled law and the appellants were not liable to prove their innocence. The impugned judgment is bad in law and facts and based on assumptions and presumptions without assigning any valid and cogent reasons. The witnesses being interested and inimical to the appellants have falsely deposed against appellants. They were inconsistent with each other rather contradicted on crucial points benefit whereof must go to the appellants. The learned trial Court while passing the impugned judgment has deviated from the settled principle of law that a slightest doubt is sufficient to grant acquittal to an accused. The investigating officer has conducted dishonest investigation and involved the appellants in false cases at the instance of complainant. The learned trial Court also did not appreciate the evidence, adduced by the prosecution, in line with the applicable law and surrounding circumstances and based its findings on misreading and non-reading of evidence and arrived at a wrong conclusion in convicting the appellants merely on assumptions and presumptions. The impugned judgment is devoid of reasoning without specifying the incriminating evidence against each appellant. The learned trial Court totally ignored the pleas taken by the appellants in their Section 342, Cr.P.C. statements and recorded conviction ignoring the neutral appreciation of whole evidence. The material available on record does not justify the conviction and sentences awarded to the appellants and the same are not sustainable in the eyes of the law. The learned counsel while summing up his submissions has emphasized that the

impugned judgment is the result of misreading and non-reading of evidence and without application of a judicial mind, hence the same is bad in law and facts and the conviction and sentences awarded to the appellants, based on such findings, are not sustainable in law and liable to be set-aside and the appellants deserve to be acquitted from the charge and prayed accordingly.

11. The learned Additional Prosecutor General while controverting the submissions of learned counsel for the appellants has submitted that appellants have been arrested red handed alongwith unlicensed arms. The witnessed while appearing before the learned trial Court remained consistent on each and every material point. They were subjected to lengthy cross-examination but nothing adverse to the prosecution story has been extracted which can provide any help to the appellants. The ocular account furnished by the prosecution has been supported by Call Data Record (CDR). The role of the appellants is borne out from the evidence adduced by the prosecution. The prosecution in support of its case has produced ocular as well as circumstantial evidence, which was rightly relied upon by learned trial Court. The findings recorded by the learned trial Court in the impugned judgment are based on fair evaluation of evidence and documents brought on record, to which no exception could be taken. The plea taken by the appellants with regard to their false implication does not carry weight vis-à-vis providing help to the defence. The appellants neither appeared on Oath nor produce any witness to substantiate their innocence. The prosecution has successfully proved its case against the appellants beyond shadow of any reasonable doubt, thus, the appeals filed by the appellants warrant dismissal and their conviction and sentences recorded by the learned trial Court are liable to be maintained.

12. We have heard the learned counsel for the parties, given our anxious consideration to their submissions and also scanned the entire record carefully with their able assistance.

13. To substantiate an act of terrorism falling under Section 6 of Anti-Terrorism Act, 1997 (The Act), the object, design or purpose behind the said act (offence) is also to be established so as to justify a conviction under Section 7 of the Act.

14. If one is convicted for certain offences under the provisions of Pakistan Penal Code, Sindh Arms Act and Anti-Terrorism Act, it shall seriously prejudice the guarantee provided by Article 13 of the Constitution, therefore, it would always be obligatory upon the prosecution to first establish "object" thereby bringing an act of terrorism and in absence thereof punishment awarded under Section 7 would not be legally justified particularly when accused is convicted for other offences falling under the provisions of Pakistan Penal Code and Sindh Arms Act. The scope and applicability of Section 6 of the Act has been dilated upon by the Hon'ble apex Court and the view persistently taken is that all acts mentioned in Sub-section (2) of Section 6 of the Act, if committed with design/motive/intent to intimidate the government, public or a segment of the society, or the evidence collected by the prosecution suggest that such an aim is either achieved or otherwise appears as an offshoot of such terrorist activities, are to be dealt with by Special Courts established under the Act. To determine whether a particular act is terrorism or not is motivation, object, design or purpose behind the act and not the consequential effect created by such act. In the case in hand, the allegation against the appellants is that they demanded "bhatta" from complainant with a threat to kill him if he fails to pay the extortion money. The prosecution has claimed that such an act of the appellants created sense of fear, insecurity in the mind of complainant and his workers. The mode and manner of the occurrence does not suggest any design for creating fear and terror. The complainant on receipt of envelope, whereby a demand for payment of "bhatta" was made, immediately rushed to police and lodged FIR, but did not utter a single word as to fear and terror either in his FIR or while appearing before the learned trial Court. His witnesses also did not depose so. The Hon'ble Supreme Court has taken a persistent view that mere gravity or brutal nature of an offence would not provide a valid yardstick for bringing the said offence within the definition of terrorism and this view has been reaffirmed by the larger Bench of the august Supreme Court of Pakistan in the case of *Ghulam Hussain and others v The State and others reported* [PLD 2020 SC 61], wherein it has been held has under:

> *For what has been discussed above it is concluded and declared that for an action or threat of action to be accepted as terrorism within the meanings of section 6 of the Anti-Terrorism Act, 1997 the action must fall in subsection (2) of section 6 of the said Act and the use or threat of such action*

> *must be designed to achieve any of the objectives specified in clause (b) of subsection (1) of section 6 of that Act or the use or threat of such action must be to achieve any of the purposes mentioned in clause (c) of subsection (1) of section 6 of that Act. It is clarified that any action constituting an offence, howsoever grave, shocking, brutal, gruesome or horrifying, does not qualify to be termed as terrorism if it is not committed with the design or purpose specified or mentioned in clause (b) or (c) of subsection (1) of section 6 of the said Act. It is further clarified that the actions specified in subsection (2) of section 6 of that Act do not qualify to be labeled or characterized as terrorism if such actions are taken in furtherance of personal enmity or private vendetta".*

15. Based on the peculiar facts and circumstances of the case and the view taken by the Hon'ble apex Court in the cases (supra), we are of the view that the prosecution has failed to place on record any evidence to substantiate the intention of the appellants was designed to coerce or intimate the public. In view thereof, the present case does not fall within the meanings of Section 6 punishable under Section 7 of the Act. The conviction and sentences awarded to the appellants under the provision of Section 7 of the Act, are, thus, unjustified and not warranted in law. The same is, therefore, set-aside.

16. Coming to the conviction and sentences awarded to the appellants under the Sections 384, 385, 386 and 34, PPC and Section 23(1)(a) of Sindh Arms Act, 2013, are concerned, suffice to observe that FIR has been lodged with promptitude which left no room for concoction. The complainant did not nominate the appellants in the FIR and as such had no intention to involve them in a false case otherwise he would have named the appellants with a specific role. The complainant and PW.4 Hammas are independent witnesses, who had no reason to falsely implicate them. The record is suggestive of the fact that the appellants were arrested red handed alongwith unlicensed pistols and mobile phones with SIMs, used in the commission of offence whereby they made calls for payment of "bhatta". The prosecution has also placed on record Call Data Record (CDR) of SIMs 0313-2647167, 0301-0029180 and 0301-8817179 as well as USB containing CCTV footage, which provide a chain of events from the demand of extortion money to the registration of FIR and arrest of the appellants red handed with unlicensed pistols, mobile phones and SIMs,

which linked the appellants to the demand of extortion. It is also noteworthy that pistols recovered from the possession of appellants and two miss live cartridges, wrapped in envelope, were sent to the office of Assistant Inspector General of Police, Forensic Division, Sindh, Karachi, and testified to be the live cartridges of 30 bore pistol recovered from the possession of appellants. Such report of the Forensic Division is available at Ex.10/G page 233 of the paper book. The appellants did not discredit the report either at the time of its production or while recording their statements under Section 342, Cr.P.C. and failed to create a doubt as to the genuineness of such report.

17. It is a well settled that onus to prove its case always rests on the shoulder of the prosecution and once the prosecution succeeded in discharging such burden with cogent evidence then the accused become heavily burdened to disprove the allegations levelled against him and prove his innocence through cogent and reliable evidence. The appellants while recording their statements under Section 342, Cr.P.C. have failed to shatter the prosecution evidence nor placed on record any convincing evidence to substantiate their plea of false implication on account of enmity. In the circumstances, since no specific plea has been taken by the appellants, the learned trial Court has rightly discarded the same to be of untrustworthy. They have also not appeared on Oath under Section 340(2), Cr.P.C. and failed to place on record any evidence in support of their plea, which may give rise to a presumption that the plea taken by them for their false implication was not a gospel truth, therefore, they avoided to appear and deposed on Oath under Section 340(2), Cr.P.C. If both the versions, one put forward by the appellants and the other put forward by the prosecution, are considered in a juxtaposition, then the version of the prosecution seems to be more plausible and convincing and near to truth while the version of the appellants seems to be doubtful.

18. In view of the analysis and combined study of the entire evidence by way of reappraisal, with such care and caution, we are of the considered view that the prosecution has been able to prove the charges of extortion and recovery of unlicensed arms beyond shadow of reasonable doubt. The appeals, insofar as it impugn conviction under Sections 384, 385, 386 and 34, PPC and Sections 23(1)(a) of Sindh Arms Act, 2013, are bereft of merit stand dismissed. It is, however, pertinent to note that awarding

punishment is only meant to have a balance in the society because all the divine laws speak about hereafter. Thus, conceptually, punishment to an accused is awarded on the concept of retribution, deterrence or reformation so as to bring peace which could only be achieved either by keeping evils away (criminals inside jail) or strengthening the society by reforming the guilty. The law itself has categorized the offences. There are certain offences, the punishment whereof is with phrase "not less than" while there are other sentences which are with phrase "may extend upto". Such difference itself is indicative that the Courts have to appreciate certain circumstances before setting quantum of punishment in later case which appear to be dealing with those offences, the guilty whereof may be given an opportunity of "reformation" by awarding less punishment which how low-so-ever, may be, will be legal. The concept of reformation should be given much weight because conviction normally does not punish the guilty only but whole of his family. The appellants are first offenders and have no previous criminal history in their credit as well as they are young in between the ages of 20 to 23 years, as reflected from their Section 342, Cr.P.C. statements, therefore, they may be given an opportunity to improve themselves as a law abiding citizen. A reformed person will not only be a better brick for society but may also be helpful for future by properly raising his dependents. Taking these mitigating factors into account and by exercising our judicial discretion, we while disposing the appeals, vide our short order dated 25.01.2023, had modified the sentences as follows:-

> *(i) Conviction and sentence of the appellants under Section 7(1)(h) ATA was unwarranted in law, hence set aside in view of the dictum laid down by the Honourable Supreme Court in the case of Ghulam Hussain vs. State (PLD 2020 SC 61). However, conviction recorded against the appellants under Sections 384, 385, 386, 34 PPC is modified to Section 386 PPC and appellants are convicted under section 386 PPC and sentenced to undergo R.I. for 03 years each and to pay fine of Rs.50,000/- each. In case of default in payment of fine, appellant shall suffer S.I. for 06 months more.*
>
> *(ii) Conviction of appellants Muhammad Afzal and Muhammad Muneer separately recorded under Sections 23(1)(a) of Sindh Arms Act, 2013 is maintained. However, sentence of 05 years R.I. awarded to each of the appellant is reduced to 03 years R.I. Fine of Rs.50,000/- each is also maintained. In case of default in payment of fine, appellants suffer S.I. for 06 months.*

(iii) All the sentences shall run concurrently. Appellants shall be entitled to the benefit under Section 382(b), Cr.P.C.

19. Above are the reasons for our short order dated 25.01.2023.

JUDGE

JUDGE

NAK/PA