

IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Spl. Anti-Terrorism Jail Appeal No. D – 08 of 2021
(*Muhammad Toufique Ansari & 03 others versus The State*)

Present:

Mr. Muhammad Iqbal Kalhoro, J.
Mr. Arbab Ali Hakro, J.

Dates of hearing : **16.08.2023 & 05.09.2023**

Date of decision : **05.09.2023**

M/s Hashmat Khalid and Asif Ali Jatoi, Advocates of appellants.
Mr. Khalil Ahmed Maitlo, Deputy Prosecutor General.

J U D G M E N T

Muhammad Iqbal Kalhoro, J. – Appellants, having been convicted through impugned judgment dated 30.01.2021, passed by learned Judge, Anti-Terrorism Court-II, Sukkur in Special Case No.86 of 2018 (*Re: State v. Muhammad Toufique & others*), arising out of Crime No.27 of 2012 under Sections 302, 324, 427, 148, 149, PPC read with Section 7 of the Anti-Terrorism Act, 1997 registered at Police Station Aram Bagh, Karachi, and sentenced to suffer in the terms as below, have filed this Appeal challenging the same.

- (a) *U/S: 148-PPC they are convicted & sentenced to suffer R.I. for a period of three years.*
- (b) *U/S: 302(b) R/W Section 149-PPC they are convicted and sentenced to suffer R.I. for a period of imprisonment for life for three times on each count. They are also liable to pay compensation of Rs.100,000/- each to be paid to the legal heirs of deceased. In case of default they all shall suffer further S.I. for a period of three months more.*
- (c) *U/S: 324 R/W Section 149-PPC all the above named four accused are convicted and sentenced to suffer R.I. for a period of seven years and fine of Rs.10,000/- each to be paid to injured complainant as compensation and in default thereof they shall undergo S.I. for a period of six months more.*
- (d) *U/S: 427 R/W Section 149-PPC they are convicted and sentenced to suffer R.I. for a period of two years and also to pay the fine of Rs.1,000/- each and in default thereof they shall undergo S.I. for a period of one month more.*
- (e) *U/S: 7 of ATA, 1997 they are convicted and sentenced to suffer R.I. for a period of imprisonment for life for three times on each count and also to pay the fine of Rs.100,000/- each and in default thereof they shall undergo R.I. for a period of one year more.*

The above sentences awarded to the appellants have been ordered to run concurrently with benefit of Section 382-B, CrPC.

2. As per brief facts, complainant, by profession an Advocate, in an FIR dated 25.01.2012, has disclosed that he and three other Advocates, namely, Babar Muneer, Kafeel Ahmed Jafferi and Gohar Shakeel were heading towards their homes in a Suzuki Khyber Car No. R-7162 on the same day. When they reached Deen Muhammad Wafai Road, opposite office of Daily Aman Newspaper at about 1510 hours, suddenly firing started from the side of driving seat. He in order to save himself ducked down. When firing stopped, he craned his head up and saw two boys escaping on a motorcycle. He found himself and fellow advocates injured. He drove the car to the Civil Hospital, where all the three lawyers succumbed to injuries and died. He had received a bullet injury on elbow of his right hand and one through and through bullet injury on his stomach. Per him, at the place of incident, one police mobile was present and in charge thereof, an ASI, was busy talking on phone. He did not take any action against the accused, who however were not known to him.

3. In investigation, after FIR, appellant Mehmood Babar was arrested on 07.10.2012 and on 10.10.2012 was put to identification parade before the Magistrate concerned, where PWs Muhammad Akram and Muhammad Iqbal, stated to be resident of District Jehlum, Province of Punjab, identified him to be one of the culprits. On 08.02.2012, appellants Salahuddin, Muhammad Toufique and Moulana Rashid were arrested formally in this case, as on 02.02.2012, they had already been arrested in an encounter (with police) case bearing Crime No.80 of 2012 of Police Station CID, Karachi. Allegedly, from appellant Muhammad Toufique, one 9mm pistol had also been recovered. On 13.02.2012, appellant Muhammad Toufique was put to identification parade before the same Judicial Officer and identified by the same witnesses to be one of the accused in this case. Confessional statement of appellant Salahuddin was recorded on 22.02.2012 by the same Judicial Officer. Further, in the investigation, from the place of incident, 03 empties of 9mm bore pistol, 04 empties of 30 bore pistol and a separate one empty of 9mm bore were recovered and sent for a lab report, which is available at Page 421 of the paper book as Ex.50/J, and shows that the same empties were fired from the weapons of respective bores. But such report has nothing to do with the pistol recovered from appellant Muhammad Toufique. On the basis of such

evidence, the Challan was submitted against the appellants and the prosecution was invited to lead evidence after the appellants pled not guilty to the charge framed against them.

4. The prosecution has examined as many as 14 witnesses, who have submitted all the necessary documents including FIR, relevant memos of recovery, arrest, identification parade, confessional statement, postmortem reports etc. Further, prosecution examined the Judicial Magistrate, before whom identification parades and confessional statement of the appellants were recorded. He has produced the same in his evidence and are part of the trial. In the end, statements of appellants under Section 342, CrPC were recorded. They denied the allegations against them, but did not prefer to examine themselves on oath or lead evidence in defence in terms of Section 340(2), CrPC. After such full-dressed trial and hearing the parties, learned trial Court convicted and sentenced the appellants in the terms as stated above, which they have challenged by means of this Appeal, as stated above.

5. Learned Defence Counsel have argued that appellants are innocent, have been falsely implicated in this case. There is absolutely no evidence against them except the identification parade, but the witnesses, who allegedly identified the appellants, have not been examined by the prosecution. They were the chance witnesses being originally resident of District Jehlum, Province of Punjab. The prosecution has not explained their presence at the spot at the relevant time. The complainant and Investigating Officer of the case have not identified the appellants in their respective depositions to be the culprits; as such, the case against them is doubtful. The learned trial Court has based its findings of conviction on deposition of learned Magistrate without realizing that the said Judicial Officer is not the eyewitness. And he had merely acted to a formal request of holding identification parade in the line of his duty, which will not make him a material witness, not least when they very witnesses who allegedly identified the appellants were not examined; that confession of appellant Salahuddin is not inculpatory and is based on hearsay information he had acquired, the same cannot be made a basis of conviction or sentence to the appellants.

6. On the contrary, learned Deputy Prosecutor General has supported the impugned judgment and submits that the appellants

have failed show any ill will on the part of complainant to implicate them in this case. Nothing has been brought on record to show that complainant and police officials had any motive or feelings of animosity against the appellants to involve them in this case. He submits that any deficiency in the investigation, it is settled, shall not spoil the case of prosecution. Non-examination of the witnesses, therefore, is not a circumstance leading to inference of acquittal in favour of the appellants. He has relied upon the cases reported as **2011 SCMR 725**, **2014 P Cr. L J 885** and **2023 SCMR 117**.

7. We have considered submissions of parties and perused material available on record and taken guidance from the case law. The incident, as narrated in FIR, has been reiterated by the complainant in his deposition at Ex.391. But he has clearly stated that he cannot say whether the appellants are the real culprits or not, as, per him, he had not seen any of the accused at the time of incident. This statement is ostensibly against his disclosure in FIR, in which he has stated that after stoppage of firing, when he upraised his head, he had seen two boys escaping on a motorcycle from the scene of occurrence. But, be that as it may, such shabby evidence has not helped the prosecution case a bit. Apart from him, prosecution has examined one Advocate Khalid Mumtaz, who was the General Secretary of Karachi Bar Association on the relevant date. He is not the eyewitness or in any manner related to the incident, but being office bearer of the Bar Association had been exposed to investigation proceedings and made as a witness on the basis of his efforts to pursue the case and look after the injured and the deceased. In his deposition, he has stated that his statement was recorded by the Investigating Officer under Section 161 CrPC; complainant had not disclosed name of any accused on his query or that he had identified anyone at the time of incident, and when he enquired from Investigating Officer about presence of any eyewitness, he had denied it.

8. The other witnesses, mostly Police Officials, related to investigation proceedings etc. and Medico Legal Officer, who had conducted postmortem report of the deceased and had attended to the injured, are of no substance insofar identity of the appellants and their involvement as accused is concerned. The evidence of Police Officials mainly covers aspects of the investigation, arrest of the appellants, effecting recovery from the place of incident and from appellants subsequently after their arrest and winding up the investigation by

submitting the Challan. Hence, it is apparent that entire prosecution case, upon which conviction and sentence of the appellants have been recorded by the trial Court, is largely based on identification parade of the appellants and confessional statement of appellant Salahuddin.

9. We have perused the confessional statement available as Ex.39/D at Page 281 of the paper book. This appellant, Salahuddin, is not in any manner connected with the main offence nor he was even present at the spot. He had not seen the incident is also admitted. The confession made by him is not inculpatory as he does not concede that either he or the remaining appellants had committed the offence. His confession is to the effect that he had heard about appellant Toufique committing the offence (from whom he has not specified), and that appellant Rashid and others used to visit his hotel, where he would work as a waiter. He was arrested formally in this case on 08.02.2012, and before it in another case on 02.02.2012. His confession was recorded on 22.02.2012 after delay of almost 20 days of his arrest. In such facts and circumstances, the confessional statement, which is not even inculpatory, and shows that its maker was not present at the spot, cannot be solely relied upon for recording the conviction of the accused unless the same is corroborated materially by the independent evidence, which the prosecution case is completely lacking.

10. Except the identification parades of the appellants namely Mehmood Babar and Muhammad Toufique, the witness of which prosecution failed to produce in the trial, no direct or indirect evidence has been brought on record showing connection of the appellants with the alleged offence. The trial Court's reliance on Magistrate's evidence to record the conviction and sentence is but shortsighted and, is sans appreciation of failure of the prosecution to produce the witnesses, who had allegedly actually identified the appellants and claimed to have seen them at the scene of occurrence. The Magistrate's evidence is to the effect of recording the identification parades held before him and the confession. He is not an eyewitness or in a position to verify authenticity of the statements of such witnesses identifying the culprits, nor his evidence can be counted (supporting it may be) as a substitute thereof, unless those witnesses were examined by the prosecution in the trial and an opportunity given to the accused to cross-examine them and try to find out the truth.

11. Further, the Investigating Officer, in his evidence, has admitted his utter failure to trace down whereabouts of those witnesses, namely, Muhammad Akram and Muhammad Iqbal, and present them in the Court for trial. The contention in defence that these witnesses were chance witnesses, seen in such context, gets undeniably reinforced and creates suspicion over their presence at the spot. Then the Investigating Officer, in his evidence, has not explained as to why these witnesses were present at the spot and how they happened to spot the appellants while committing the offence. Therefore, there is absolutely no reliable record in the prosecution case to show presence of the said witnesses at the time of occurrence firstly and secondly their spotting the appellants clearly within a blink of a moment within which the occurrence took place and subsequently identifying them at late stage before the Magistrate. Then, when the identification parade is seen in the backdrop of evidence of complainant, who has not identified the appellants to be the accused and that of Investigating Officer (Ex.50), who in his examination-in-chief has specifically stated that he cannot say that whether there is any solid ocular evidence against present accused, as during entire investigation he had not collected any and that he cannot say whether the accused are the same or not, it loses its significance, and cannot be relied upon for recording conviction against the appellants. The complainant, who himself got injured, is the main witness of the prosecution, and he has shown doubt over the identity of the appellants to be the culprits.

12. Insofar as case of appellant Moulana Rashid is concerned, it appears that prosecution has utterly failed to bring any evidence against him except that his name has been disclosed by appellant Salahuddin in his confession to be the person who used to visit him along with appellant Muhammad Toufique. This disclosure does not in any manner connect the said appellant with the alleged crime and offence.

13. In our view, as a result of above discussion, the prosecution has failed to bring any trustworthy evidence against the appellants to maintain the conviction and sentence recorded by the trial Court. There are multiple factors and circumstances as noted above, which create reasonable doubt over the case of prosecution. It is settled that once the doubt creeps in the prosecution case, the benefit of which has to go to the accused not as a matter of grace but as a matter of right. No doubt the alleged offence, in which three young lawyers lost their lives, is

heinous one and shocking to the public and was sufficient to create terror in the society. But to convict a person, reliable and trustworthy evidence was required, which could connect the appellants with the offence. In absence of any direct evidence, prosecution was under bounden duty to lead reliable circumstantial evidence connecting the appellants with the offence, but as we have discussed above, no direct or trustworthy circumstantial evidence is available against the appellants except few bits and pieces, which do not confirm a chain of events having one end touching the appellants and the other the victims.

14. We, therefore, while giving a benefit of doubt to appellants Muhammad Toufique, Moulana Muhammad Rashid, Salahuddin and Mehmood Babar alias Darki Shah, acquit them of the charge, **allow** instant appeal, set aside their conviction and sentence, and order their release forthwith if not required in any other custody case. These are reasons of our short order dated 05.09.2023.

The appeal is **disposed of** in the above terms.

J U D G E

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Abdul Basit