IN THE HIGH COURT OF SINDH AT KARACHI

Spl. Criminal A .T. Jail Appeal No. 81 of 2023

PRESENT:
Justice Zafar Ahmed Rajput,
Justice Amjad Ali Bohio.

Appellants	:	1. Faiyaz Khan s/o Zahid Khan, through Mr. Abdul Nabi Advocate 2. Imran s/o Jamal, through Mr. Iftikhar Ahmed Shah Advocate
Respondent	:	The State, through Mr. Saleem Akhter Buriro, Addl. Prosecutor General, Sindh.

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Date of Hearing : 14.11.2023

Date of Judgment : 24.11.2023

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J U D G M E N T

Amjad Ali Bohio, J.- This Spl. Crl. Anti-Terrorism Jail Appeal is directed against the consolidated judgment dated 15.04.2023, passed in Special Case No.101 of 2023 (*arising out of FIR No.691/2022 registered at Police Station Bilal Colony, Karachi under Section 324, 353, 34 P.P.C. read with Section 7 of the Anti-Terrorism Act, 1997*) and Special cases No.101-A & 101-B/2023 (*arising out of FIRs No.692 & 693/ 2022, registered at the said Police Station under Section 23(1)(a) of the Sindh Arms Act, 2013*), whereby the Anti-Terrorism Court No.XIII, Karachi ("the trial Court") has convicted the appellants/accused and sentenced them, as under:

(i). Appellant/accused Faiyaz Khan and Imran convicted for the offence punishable u/s 324-PPC in Crime No.691/2022 in respect of encounter with police and sentenced to under R.I for ten years each and to pay fine of Rs.50,000/- each and in default whereof they shall suffer further R.I for four months each; their whole property was forfeited; they were also convicted under Section 353-PPC in Crime No.691/2022 and sentenced to undergo R.I for two years each.

(ii). Appellant/accused Faiyaz Khan in Crime No.692/2022 was convicted for the offence punishable under Section 23(1)(a)

of the Sindh Arms Act, 2013, and sentenced to undergo R.I for seven years with fine of Rs.20,000/-. In case of default whereof, he shall suffer further R.I for two months.

(iii). Appellant/accused Imran Khan in Crime No.693/2022 was convicted for the offence punishable under Section 23.(1)(a) of the Sindh Arms Act, 2013, and sentenced to undergo R.I for seven years with fine of Rs.20,000/-. In case of default whereof, he shall suffer further R.I for two months.

(iv). Both the appellants/accused were convicted for the offences punishable under Section 7 (h) of ATA, 1997 and sentenced to undergo R.I for ten years with fine of Rs.50,000/- each. In case of default whereof, he shall suffer further R.I for two months.

(v) All the said sentences were directed to run concurrently by extending them benefit of Section 382-B Cr.P.C.

2. It is alleged that, on 05.12.2022 at about 0245 hours, complainant SIP Javed Ibrahim and his subordinate staff, found the appellants riding on a motorcycle without registration number at Internal Road near Apna Lawn, Sector 5-E, New Karachi. They signaled them to stop, on that the appellants alighted from the motorcycle and opened fire on the police party to commit their *qatl-e-amd*. Police party retaliated in self defence causing firearm injury to appellant Imran and apprehended the appellants. From personal search, police party recovered from appellant Imran an unlicensed 30-bore pistol, rubbed number, with magazine loaded with three live bullets, Rs.300/-, Infinix and Samsung phones while, from appellant Faiyaz police recovered an unlicensed 30-bore pistol with magazine loaded with four live bullets, Rs.800/-, Huawei and Nokia keypad phones. On failure of the appellants to produce valid documents, the complainant/SIP seized the motorcycle. He also seized three empties of 9 MM and four of 30 bore pistols from the spot under Memo of Arrest, Recovery and Seizure prepared in the presence of the mashirs and booked the appellants in the aforesaid crimes/FIRs.

3. After usual investigation, I.O submitted reports under Section 173, Cr.P.C. The trial court amalgamated the aforesaid connected cases in terms of section 21-M of Anti-Terrorism Act and then framed charge against both accused on 04.03.2023, to which they pleaded not guilty and claimed for trial. At the trial, the prosecution examined PW-1 SIP Javed Ibrahim (*complainant)* at Ex-6; PW-2 PC Adil Bashir at Ex-7; PW-3 PC Kashif at Ex-8, PW-4 PC Sabir Shah (*Mashir*) at Ex-10; PW-5 ASI Noman at Ex-12; PW-6 Dr. Muhammad Yaseen (*MLO*) at Ex.13 and PW-7 Inspector Ashraf Ali (*I.O*) at Ex-14, who produced relevant documents, recovered articles and exhibited the same during their evidence before the trial Court. After conclusion of prosecution evidence, statements of appellants were recorded under Section 342, Cr.P.C, at Ex-16 & 17 respectively; however, they neither examined themselves on oath under Section 340(2), Cr.P.C. nor led any evidence in their defence. After hearing learned counsel for the parties and evaluating the evidence on record, the trial Court convicted the appellants and sentenced them vide impugned judgment.

4. We have heard the learned counsel for the appellants as well as learned Addl. P.G. and scanned the material available on record with their assistance.

5. The learned counsel for the appellants while pointing out some discrepancies in the depositions of the PWs, have claimed the false implication of the appellants in the aforesaid cases and dubbed the alleged encounter as fake one for the reason that despite exchange of fires with sophisticated weapons at close range, none from the police party sustained any injury. They have also questioned the apparent lack of damage even to police mobile at the scene, or even the motorcycle

belonging to the appellants and termed the incident as one of police excesses commonly known as "half fry".

6. On the other hand, learned Addl. PG. has fully supported the impugned judgment.

7. It appears from the perusal of the record that the prosecution's case suffers from material infirmity. We have also found contradictions in the testimonies of the PW-1, SIP Javed Ibrahim/complainant and P.W-4 PC Sabir Shah/Mashir regarding the sequence of events. The said PW-1 has deposed that the appellants did not pass by their official vehicle while, PW-4 has deposed that the appellants crossed their path, prompting the police to chase them. PW-1, in his examination–in-chief has testified recovery of four empties of 9 MM pistol and three of 30 bore pistol; however, in his cross-examination, the said PW has admitted that it is mentioned in his 161, Cr.P.C. statement that three empties of 9 MM pistol and one empty of 30 bore pistol were recovered from the place of the incident. Such contradictions in the deposition of said PW, his 161, Cr.P.C., FIR and Memo of Arrest and Recovery cast serious doubt in recovery of empties from the crime scene, which ultimately makes the entire prosecution case regarding alleged police encounter doubtful. The trial Court has overlooked such essential aspects of the prosecution case.

8. There is another aspect of the case. The alleged encounter lasted for few minutes but none from the police party received any injury to his body; even no bullet hit to their official vehicle by the hands of the appellants who were having pistols and dared to open straight fire on the police party and suddenly they stopped firing after two shots, each, though they had more live bullets in their alleged recovered pistols. Besides, it has been admitted by the PW-7 Inspector Ashraf Ali (*I.O*),

that no blood marks were found at the occurrence, which fact alone casts doubt on the authenticity of the alleged encounter.

9. It is also an admitted position that the prosecution has not produced *Malkhana* entry to establish that after alleged recovery, the arms were kept in safe custody in *Malkhana* before dispatching the same to Forensic division for report. If the recovered arms were recovered, it must have been indeed kept in the *Malkhana* of the Police Station and there should have been an entry in Police Register No. 19 which, in the instant case, the prosecution has failed to produce. Besides, it is evident from the Forensic Science Laboratory (FSL) report (*Ex-14/E*) that P.W-7 Inspector Ashraf Ali (*I.O*) personally delivered the five sealed parcels/case property to the FSL. However, in his testimony the said PW has claimed to have sent the case property to the FSL and denied its delivery personally. Notably, no police official is listed among the prosecution witnesses who took the case property to the FSL. This discrepancy raises significant concerns in delivery the parcels intact to the FSL. During his evidence, the said PW did not disclose the name of the police official through whom he sent the case property to FSL. Consequently, the prosecution failed to establish the safe departure and delivery of the parcels to the Forensic Expert. This omission raises doubts about the integrity of the chain of custody. In the case of *Kamal Din alias Kamala v. The State* (2018 SCMR 577) the Apex Court has observed that the prosecution must establish the safe custody of recovered weapons and their secure transmission to the Forensic Science Laboratory through the production of any witness concerned with such custody and transmission before the trial court. Therefore, in the instant case, it was/is imperative for the prosecution to fulfill its legal

obligation in establishing the safe custody and transmission of recovered weapons.

10. It is well-established legal principle that the prosecution bears the burden to proving its case against the accused beyond a shadow of reasonable doubt. It is also settled principle that the accused is not under any duty to prove innocent. Furthermore, the Superior Courts have time and again emphasized that conviction must be based on unimpeachable evidence. The Honourable Supreme court in a case of *"Shamoon alias Shamma v. The State"* (1995 S C M R 1377) held as under:-

> *"The prosecution must prove its case against the accused beyond reasonable doubts irrespective of any plea raised by the accused in his defence. Failure of prosecution to prove the case against the accused, entitles the accused to an acquittal. The prosecution cannot fall back on the plea of an accused to prove its case. Where the prosecution succeeds in establishing its case against the accused beyond reasonable doubts, then the stage arrives for consideration of the plea of accused in defence and the question of burden of proof becomes relevant. Before, the case is established against the accused by prosecution, the question of burden of proof on the accused to establish his plea in defence does not arise."*

11. In these circumstances, and following an independent evaluation of the evidence available on record, we are of the view that the trial Court acted erroneously while passing the impugned judgment, which is based on misinterpretations, misreadings, and non-readings of evidence on record. It is evident that there was a failure to appreciate and apply the required norms of the law and equity.

12. For the foregoing facts, discussion and reason, it can be safely inferred that the appellants' conviction is not warranted by the evidence presented in this case. Accordingly, we allow the appeal and acquit the appellants of the charge by setting aside their conviction and sentence recorded vide impugned judgment. The appellant shall be released forthwith by the Jail Authority if their custody is no more required by any other Court in any other case/offence.

Judge

Judge