IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

Cr. Appeal No.D-22 of 2022

Before;

Mr. Justice Amjad Ali Sahito
Mr. Justice Khadim Hussain Soomro

Appellant:	ASI Majnoo son of Basar Meghwar, Through Mr. Imam Ali Chang, Advocate.
The State:	Through Mr. Nazar Muhammad Memon, Addl.P.G..

Date of hearing: 16-10-2024.

Date of decision: 16-10-2024.

J U D G M E N T

AMJAD ALI SAHITO, J:- Through instant appeal, the appellant has challenged the judgment dated 26.02.2022, passed by learned Judge Anti-Terrorism Court-II, Central Prison Hyderabad, in New Special Case No.31 of 2020 (Old ATC case No.9 of 2020), Re: State vs. Ramzan alias Ramoo & others, U/ss 324, 353, 392, 337-F(1), 223, 224, 225, 427 PPC r/w Sections 6/7 Anti-Terrorism Act, 1997, whereby the learned trial court after full-dressed trial convicted and sentenced the appellant ASI Majnoo S.I. for two years with fine of Rs.10,000/-for the commission of offence punishable under Section 223 PPC, in case of default of making payment of fine he will suffer further simple imprisonment for three months. Benefit of Section 382-B Cr.P.C was also extended to the appellant.

2. Concise facts of the case are that, UTPs namely Ghulam Hussain alias Baboo Shah involved in Crime No. 64/2017

under sections 302, 201 PPC of Police Station Sujawal and Ramzan alias Ramoo Involved in Crime Nos. 47/2019 under sections 324, 353 PPC, Crime No. 01/2020 under section 411 PPC & Crime No. 02/2020 under section 23 (1) (a) of Sindh Arms Act, 2013 of Police Station Ladiyun in Prison Van were produced before Sessions Court Thatta on 16.03.2020 under police Escort comprising HCs Muhammad Usman, Shakeel Akhtar, PC Ahmed Ali and DHC Muhammad Azeem from Badin Jail. After attending the Sessions Court Thatta said two accused were returned back in Prison Van, when HC Shakeel Akhtar absented himself and deliberately went away and did not give company to other police officials named above to Escort/guard the prisoners. At about 1445 hours, on its way back Prison Van reached at Main Saeedpur, Sujawal Thatta Main Road, the UTPS named above started commotion inside the Van. PC Ahmed Ali opened the back-cavity door of Prison Van and was instantly hit at his face, his official SMG rifle was snatched from him, thenceforth, the accused started firing. On fire shot, DHC Muhammad Azeem and HC Muhammad Usman stopped Prison Van and the aforementioned UTP's fired upon two Police Officials with intention to cause their death, who sustained firearm injuries and fell on ground while PC Ahmed Ali became unconscious in the Prison Van and above named accused driving the Prison Van managed to escape moving towards Bela Town. On receipt of the information through PC Iqbal Ahmed, ASi Qamaruddin Magsı along with other Police Officials named in the FIR arrived at New Saeedpur, Sujawal Thatta Road, found HC

Muhammad Usman and DHC Muhammad Azeem in injured condition at the road with blood oozing out from their legs, dispatched them to Makli Hospital, chased the accused. At about 1730 hours when they reached near place Khadan Jo Goth they saw Prison Van parked there, and UTPs fled away towards forest. Complainant ASI Qamaruddin opened back cavity door of Prison Van and found PC Ahmed Ali in semi-conscious condition on having sustained head and face Injuries, with blood from his injuries. The said PC could narrate the above crime story to him, who instantly, through wireless, summoned police contingent and sent them to chase and arrest UTPS. While he alongwith Prison van, arrived at Police Station Sujawal and registered captioned crime against the above named UTPs, HC Shakeel Akhter and PC Ahmed Ali, to suffer for negligence on account of escape of the UTPs named above from lawful confinement/custody.

3. At trial, the appellant did not plead guilty to the charge and prosecution to prove it, examined complainant Qamaruddin and his witnesses and then closed the side.

4. The appellant, in his statement recorded u/s 342 Cr.P.C has denied the prosecution's allegation by pleading innocence; he however, did not examine anyone in his defence or himself on oath to disprove the prosecution allegation against him.

5. It is contended by learned counsel for the appellant that the appellant being innocent has been involved in this case falsely by his high-ups' in order to protect their own skull from the clutches

of law and shifted their burden upon innocent lower staff deliberately; that the learned trial court has misread the evidence recorded by the learned Judge, which has caused great miscarriage of justice, that the appellant was not present at the alleged place of incident and being Incharge of Prison Custody, he only arranged pick up and drop of UTPs from jail to Court and Court to Jail, thus, there no default on part of the appellant, hence, the impugned judgment is against the law, justice and equity and also against the norms of the criminal justice and is liable to be set aside; that the alleged section 223 PPC is not made out from the contents of FIR against the appellant as the name of the appellant does not appear in FIR and has been given later on, it becomes evident that section 223 PPC was wrongly applied in the above case against the appellant and the appellant has been wrongly convicted for the alleged offence, which is not made out against him; that no independent person of the locality has been examined on the point of creating sense of insecurity or terrorism, which was essential to prove the point No. 4 of the points of determination but inspite of that the learned trial court absolved in favour of the prosecution and answered the point No. 4 as proved, which has created great miscarriage of justice and the same is against the norms of criminal justice; that the prosecution has failed to prove the case beyond the doubt and benefit of doubt would have been given to accused but the learned trial court has failed to give benefit of doubt to the accused; that the learned trial court has not applied its judicial mind to the

defence version; that the impugned judgment is bad in law and has been passed by the learned Special Judge while exercising the jurisdiction in an illegal and mechanical way and the entire exercise is without jurisdiction and justification. By contending so, he sought for acquittal of the appellant.

6. Learned A.P.G for the State however formally opposed the appeal of the appellant.

7. We have considered the above arguments and perused the record.

8. Admittedly, the name of appellant does not transpire in the FIR and so also whole the event from head to tail so brought by the prosecution against present appellant in trial is silent. Whereas, per record it appears that the appellant was convicted only on presumption and assumption basis as no strong evidence could be brought by the prosecution to connect him obviously with the commission of the offence whereby he was convicted u/s 223 PPC and for the sake of convenience and then to discuss hereunder which is reproduced as follows:-

> **223. Escape from confinement or custody negligently suffered by public servant:**
> Whoever, being a public servant legally bound as such public servant to keep in confinement any person charged with or convicted of any offence or lawfully committed to custody, negligently suffers such persons to escape from confinement, shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

9. Negligence of prison official can be taken into consideration on the basis of presumption or surrounding circumstances while taking disciplinary action against a public servant but to bring home charge in criminal proceedings

against a public servant under sections 223 and 225-A, P.P.C., definite and concrete evidence is required to prove the factum of negligence which is apparently missing in this case. The reliance is placed in the case of "**FAHEEM ANWAR MEMON and others vs. The STATE through Prosecutor General, Sindh and others [2024 SCMR at Page-1536].**

10. Under the above referred section the prosecution must prove that whoever being public servant is legally bound to keep in confinement any person charged with or convicted of any offence or lawfully committed to custody, negligently suffers such persons to escape from confinement, meaning thereby that the prosecution must prove the escape made by negligence of public servant. Mere proving that the accused person was/were on duty does not constitute the above referred section in absence of evidence of negligence. The word `negligence" is defined in Black's Law Dictionary as under:

> *"negligence, n. (14c) 1. The failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation; any conduct that falls below the legal standard established to protect others against unreasonable risk of harm, except for conduct that is intentionally, wantonly, or willfully disregardful of others' rights. The term denotes culpable carelessness. The Roman-law equivalents are culpa and neglegentia, as contrasted with dolus (wrongful intention)."*

11. Further, the provision as enumerated in section 223, P.P.C. were discussed in case titled Muhammad Yaqoob v. The State (PLD 2001 SC 378) as follows:

> "The main prerequisite in absence whereof the provisions as contained in section 223, P.P.C. cannot be pressed into service is that the accused 'must negligently suffer such person to escape'. It is the bounden duty of the prosecution to prove the 'negligence' of a public servant, which has resulted in such escape. We may mention here that during departmental proceedings initiated under

> Service Laws, the factum of 'negligence' has its own peculiar characteristic. There is no cavil to the proposition that negligence is a term of art having multiple dimensions in different jurisdictions. It, however, can be defined as 'the omission to do an act, which a reasonable man, guided upon those considerations, which ordinarily regulate the conduct of human affairs, would do, or doing an act which 'reasonable and prudent' man would not do. 'Negligence' is the absence of such care, skill and diligence as it was the duty of the person to bring to the performance of the work which he is said not to have performed. There are three degrees of negligence: (1) ordinary which is the want of ordinary diligence, (2) slight: the want of great diligence, (3) gross: the want of even slight diligence (Kedarnath v. State 1965 All. 233 + Nemichand v. Commissioner, Nagpur Division, Nagpur, ILR 1947 Nag. 256: 228 IC 525: 1947 NU 281). The factum of negligence as discussed hereinabove can be taken into consideration and negligence may be proved on the basis of presumption or surrounding circumstances while taking disciplinary action, but in criminal proceedings definite and concrete evidence would be required to prove the factum of negligence which is lacking in this case."

12. Apart from the above, read-through the contents of FIR which demonstrates that on the relevant date and time when after attending the Sessions Court Thatta accused were returned back in Prison Van, HC Shakeel Akhtar absented himself and deliberately went away and did not give company to other police officials named above to Escort/guard the prisoners. At about 1445 hours, on its way back Prison Van reached at Main Saeedpur. Sujawal Thatta Main Road, the UTPS named above started commotion inside the Van. PC Ahmed Ali opened the back-cavity door of Prison Van and was instantly hit at his face, his official SMG rifle was snatched from him, thenceforth, the accused started firing. On fire shot, DHC Muhammad Azeem and HC Muhammad Usman stopped Prison Van and the aforementioned UTP's fired upon two Police Officials with intention to cause their death, who sustained firearm injuries and fell on ground while PC Ahmed Ali became unconscious in the Prison Van and above named accused

driving the Prison Van managed to escape moving towards Bela Town.

13. Definitely, the FIR is completely silent regarding the incident initially so chronicled against present appellant even it does not contain the name of the appellant, which appears to be significant. Moreover, learned trial court while convicting and passing the impugned judgment pinpointed that ***appellant / accused ASI Majnoo being incharge Prison Police Van did not perform his duty in accordance with law***. Nevertheless, reappraisal of evidence of the prosecution witnesses, PW-2 HC Muhammad Usman in his cross examination so conducted by the defence counsel of present appellant, who admitted that present appellant / accused ASI Majnoo did not accompany with them to Thatta, whereas, he produced UTPs in the court of Sujawal. He also admitted that ***when appellant / accused Majnoon handed over UTPs to them they were properly handcuffed and prison police van door was properly locked***. ***He admitted that they arrived at Thatta Sessions Court from Sujawal safely***. He admitted that this incident took place on their return to Sujawal from Thatta and this fact was also affirmed by the other witnesses in their evidence despite of the fact that PW / injured HC Muhammad Azeem has categorically in his examination-in-chief deposed that ASI Majnoo is innocent, which fact also cannot be ignored; hence, in such circumstances, no question arises of negligence on the part of appellant despite of the fact that as per prosecution witnesses at the time of handing over UTPs to the

police escort by him, they were properly handcuffed and prison police Van door was properly locked and they arrived at Thatta Sessions Court from Sujawal safely and this incident took place on their return to Sujawal from Thatta when before departure from concerned Court suddenly HC Shakeel Akhtar sneaked away from the occurrence on the pretext of his illness, which seems and describes his fault rather on part of present appellant and / or any involvement of him in the commission of offence so committed by the hardened criminals.

14. Under such circumstances, the prosecution was under legal obligation to prove the case on its own strength and cannot take advantages of any lapse of the defence. In criminal cases where there are two probabilities, which favour the accused will be accepted because the accused is favorite child of law. It is settled principle of criminal administration of justice that no one can be convicted on the basis of presumption. The presumption how much strong cannot take place of legal evidence. Reliance is placed in a case of Saifullah v. State 2018 MLD 751 [Balochistan], wherein it was held:

> "12. It is, by now, well established principle of law that it is the prosecution, which has to prove its case against the accused by standing on its own legs and it cannot take any benefit from the weaknesses of the case of defence. In the instant case, the prosecution remained fail to discharge its responsibility of proving the case against the petitioner. There remains no cavil to the proposition that if there is a single circumstance which creates reasonable doubt regarding the prosecution case, the same is sufficient to give benefit of the same to the accused, whereas the instant case is replete with circumstances which have created serious doubt about the prosecution story. Even as per saying of the Holy Prophet (P.B.U.H), the mistake in releasing a criminal is better than punishing an innocent person). Same principle was also followed by the Hon'ble Supreme Court of Pakistan in the case of

> Ayub Masih v. The State (PLD 2002 SC 1048); herein at page 1056, it was observed as under:--
> "It will not be out of place to mention here that this rule occupies a pivotal place in the Islamic Law and is enforced rigorously in view of the saying of the Holy Prophet (P.B.U.H) that the "mistake of Qazi (Judge) in releasing a criminal is better than his mistake in punishing an innocent"
> In supra mentioned case of Ayub Masih, the Hon'ble Supreme Court was also pleased to observe as under:--
> "... The rule of benefit of doubt, which is described as the golden rule, is essentially as rule of prudence which cannot be ignored while dispensing justice in accordance with the law. It is based on the maxim, "it is better that ten guilty persons be acquitted rather than one innocent person be convicted" ..."

15. The conclusion which could be drawn of the above discussion would be that the prosecution has not been able to prove its case against the appellant beyond shadow of doubt and to such benefit the appellant is found entitled.

16. In case of *Muhammad Masha vs The State (2018 SCMR 772),* it was observed by the Hon'ble Supreme Court of Pakistan that;

> *"4....Needless to mention that while giving the benefit of doubt to an accused it is not necessary that there should be many circumstances creating doubt. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of such doubt, not as a matter of grace and concession, but as a matter of right. It is based on the maxim, "it is better that ten guilty persons be acquitted rather than one innocent person be convicted". Reliance in this behalf can be made upon the cases of Tariq Pervez v. The State (1995 SCMR 1345), GhulamQadir and 2 others v.The State (2008 SCMR 1221), Muhammad Akram v.The State (2009 SCMR 230) and Muhammad Zaman v.The State (2014 SCMR 749)."*

17. In view of the facts and reasons discussed above, the conviction and sentence recorded against to the extent of present appellant by way of impugned judgment are set-aside. Consequently, he is acquitted of the offence, for which he has been charged, tried and convicted by learned trial Court, he is present on bail, his bail bond stands cancelled and surety is discharged. It

is further ordered that the surety papers be returned to the surety after proper verification and identification as per rules.

18. The instant appeal is disposed of accordingly.

JUDGE

JUDGE

Ahmed/Pa,