IN THE HIGH COURT OF SINDH CIRCUIT COURT LARKANA

Criminal Appeal No.D- 39 of 2014

Present:
Mr. Justice Naimatullah Phulpoto
Mr. Justice Shahnawaz Tariq

Date of Hearing : 14.01.2015

Mr. Safdar Ali G. Bhutto, advocate for the appellant
Mr. Khadim Hussain Khooharo, DPG for the State

JUDGMENT

SHAHNAWAZ TARIQ,J:- Through the captioned appeal, appellant Muhammad Nadeem Brohi has agitated the judgment dated 29.08.2014, passed by the learned Judge, Anti Terrorism Court, Shikarpur, whereby he was convicted under section 13-d, Arms Ordinance, 1965, and sentenced to suffer R.I for seven years and benefit as envisaged in section 382-B, Cr.P.C. was extended.

2. The relevant facts depicted from instant appeal are that on 08.06.2009, complainant SIP Sikandar Ali Soomro was informed by the DPO through telephone that he had received spy information that one dangerous criminal after purchasing arms from Balochistan, was transporting the same to Karachi via Jacobabad. Whereupon the complainant along with the sub-ordinate staff left the police station vide entry No.10 at 1200 hours and held nakabandi at Mouladad Phattak, Ghareebabad, Jacobabad. It was further averred that at 1300 hours, complainant noticed the indicated car coming on Shamby canal road and appellant was driving the same. Allegedly, on seeing the police, the appellant applied the brake and police party proceeded towards the car but the appellant made straight firing with his TT pistol on police with intention to kill and police took shelter of the wall and also fired shots in retaliation and said firing continued for 05 minutes. Police apprehended the appellant and secured TT pistol from him. During further search, from the dickey of the said car, police recovered

unlicensed 04 shells of rocket launcher, one TT Pistol and 04 klashnikovs along with 04 magazines. Consequently, complainant lodged Crime No.64/2009 for offences punishable under sections 324, 353, 427, PPC, 3/4 Explosive Substance Act, 1908, and 6/7 of Anti Terrorism Act, 1997, and also registered separate F.I.R No. 65/2009, under Section 13 (d), Arms Ordinance, 1965.

3. On the commencement of the trial, charge against the appellant was framed as Ex.2, to which he pleaded not guilty. The prosecution in order to prove its case, examined complainant SIP Sikandar Ali Soomro as PW-1 vide Ex.3 who produced F.I.R and copy of mashirnama of arrest and recovery vide Ex.3/A and 3/B respectively. ASI Sikandar Ali Bhutto as PW-2 vide Ex.4 and Investigating Officer Amanullah Sadhayo as PW-3 vide Ex.6, who produced copy of memo of place of wardat and certificate issued by District Armour regarding the weapons as Ex.6/A and 6/B respectively.

4. The statement of appellant was recorded under section 342, Cr.P.C vide Ex.8, wherein he denied the allegations levelled by the prosecution and pleaded his innocence. Appellant further stated that he was involved falsely in the instant case at the instance of Illahi Bux Soomro who is close relative of the complainant as he has contested election against Illahi Bux Soomro. However, the appellant neither examined himself on oath as required under section 342(2), Cr.P.C nor examined any witness in his defence. After hearing the arguments of counsel for the parties, the appellant was convicted vide impugned judgment. However, on same day the appellant was acquitted in main crime No.64/2009, registered under sections 324, 353, 427, PPC, 3/4 Explosive Substance Act, 1908, and 6/7 of Anti Terrorism Act, 1997.

5. Learned counsel for the appellant contended that impugned judgment passed by the trial Court is erroneous, improper and faulty as such liable to be set aside. He further submitted that the trial Court has not appreciated the evidence adduced by the prosecution adequately and also ignored the material

contradictions made by the PWs during their evidence. He further contended that complainant has failed to produce copy of roznamacha entry under which police party left police station and its non production at trial has made the entire proceedings highly doubtful. He further contended that learned trial Court has also failed to scrutinize properly the evidence of same police witnesses as by discarding their evidence in main special case No.2/2009 arising out of Crime No. 64/2009, under sections 324, 353, 429, PPC read with Section 3 & 4 of Explosive Substance Act and 6/7 of Anti Terrorism Act, 1997, but believed it in present case whereby the appellant was convicted on the strength of evidence of same witnesses who deposed in similar manner in both the cases. Learned counsel for the appellant also submitted that despite the prior information received by the complainant from DPO, he did not associate any private mashir while appellant was allegedly apprehended by the police from Mouladad Railway Crossing, Ghareebabad, Jacobabad, at 1300 hours in bright day. He further contended that recovered weapons were neither sealed at the spot nor sent to Ballistic Expert for ballistic report as such the conviction based upon the alleged recovery was unjustified and unfounded. He further contended that learned trial Court has also committed gross illegality and joint trial of both the cases was not conducted on the basis of same set of evidence as required by the provisions of Anti Terrorism Act, 1997, which resulted into conflicting judgments by the same Court. He further contended that complainant had not deposed that he handed over the recovered property to the Investigating Officer nor the Investigating officer had stated that he received the recovered arms from the complainant at the time of lodging of F.I.R. He further contended that there is material contradiction in charge and evidence led by the prosecution witnesses as in charge one KK is mentioned while in evidence PWs have deposed that four KKs were recovered from possession of accused and said contradiction is fatal to the recovery of the arms. He relied on 1995 SCMR 1345, 1998 P.Cr.L.J 1287, 1998 P.Cr.L.J 1399, 1999 P.Cr.L.J 595, 2002 P.Cr.L.J 51, 2004 P.Cr.L.J 290, PLD 1986 SC 146 and PLD 1966 SC 708.

6. While controverting the arguments advanced by the appellant, learned DPG vehemently contended that appellant has failed to show the iota of evidence not considered by the trial Court as such baseless plea has been raised in this regard. He further contended that appellant was arrested on the spot after an encounter held with police party, whereby a huge quantity of illegal arms and ammunitions were recovered from the possession of the appellant as such the trial Court has rightly convicted the appellant. He further contended that PWs have fully supported the contents of F.I.R and also corroborated each other as such their statements are trustworthy. He further submitted that all the required documents have already been produced during the course of trial and the learned trial Court after considering the evidence supported with the documents has rightly convicted the appellant and the impugned judgment does not call for any interference and appeal is liable to be dismissed. He conceded that appellant was acquitted by the trial Court in main special case.

7. Perusal of the available record and consideration of the arguments advanced by the counsel for the parties supported with case law emanated that appellant was booked in two special cases, first case lodged vide FIR No.64/2009, under section 324, 353, 427, PPC read with section 3 & 4 of Explosive Substances Act, 6 & 7 of Anti Terrorism Act, against the present appellant along with 4 companions who were shown as absconders in Challan and second case lodged vide FIR No.65/2009, under section 13(d), Arms Ordinance, 1965. It is also essential to mention that photo copies of the evidence of same PWs recorded in main special case, were placed in present case after correcting the serial numbers of exhibits with ball point, and signatures of the learned presiding officer. After recording the evidence in both special cases, appellant was acquitted in main case vide crime NO.64/2009, by the Court of Anti Terrorism, Shikarpur, vide judgment dated 29.08.2014, and on same date the appellant was convicted in present case which was off shoot of the main case.

8. It is worthwhile to mention that original mashirnama of arrest and recovery and mashirnama of inspection of place of wardat were produced by the prosecution in main case, while copies whereof were produced in present case. Admittedly, both cases were based on same incident and joint mashirnama of arrest and recovery as well as joint mashirnama of inspection of place of wardat were prepared and produced by the prosecution. Likewise, the same of set of PWs and their similar evidence were adduced by the prosecution regarding the alleged events, happening and recoveries, therefore, it was essential for the learned trial Court to try both the cases with joint trial as envisaged under section 21-M of Anti Terrorism Act, 1997, but the trial Court has ignored this important aspect of the cases and conducted separate trials of both special cases which caused serious pre-judice to the appellant as the learned trial Court had passed conflicting judgments.

9. Now adverting to the merits of the appeal, indeed the complainant was informed by the DPO on 08.06.2009, at 1200 hours that a dangerous criminal was transporting a huge quantity of arms and ammunitions by a car from Balochistan to Karachi via Jacobabad, whereupon he along with his sub-ordinate staff rushed towards Mouladad Railway Crossing, Ghareebabad, Jacobabad, and held nakabandi, but neither the complainant associated any private mashir nor made any serious efforts to associate any public person in order to ensure the transparency of the alleged recovery. Allegedly, there was an encounter between the appellant and the police party with the distance of some paces which continued for 05 minutes but none from either side sustained any bullet injury or any passerby as it was happened in a populated area particularly in a bright day, therefore, availability of the general public at the venue cannot be ignored. In the case of State v. Bashir and others, PLD 1997 SC 408, the Hon'ble Supreme Court while dealing with the issue of applicability of the provisions of section 103, Cr.P.C, has observed as under:-

> *"As regards the above second submission of Mr. M.M. Aqil, it may be observed that it has been repeatedly held that the*

requirement of section 103, Cr.P.C. namely, that two members of the public of the locality should be Mashirs to the recovery, is mandatory unless it is shown by the prosecution that in the circumstances of a particular case it was not possible to have two Mashirs from the public. In this regard, it will suffice to refer to a recent Judgment of this Court in the case of Mushtaq Ahmed v. The State, PLD 1996 SC 574. In the case in hand SIP Muhammad Rafique has not been able to give any cogent explanation as to why he was unable to secure two Mashirs from the public."

10. Admittedly, the complainant had failed to produce the copies of entries made in roznamcha register at the time of departure for the snap checking as directed by the DPO and also on his arrival at police station after the incident which were essential to establish that in fact police had left for place of the incident and such failure on the part of prosecution has created serious doubt and had shaken the entire premise of the case. Undeniably, the complainant had not deposed that on his arrival at police station the recovered arms and ammunitions were handed over to the Investigation Officer nor the Investigation Officer stated in his evidence that such recovered arms and ammunition were received by him from the complainant for conducting the investigation. The non availability of such iota of evidence is another fatal lacuna on the part of the prosecution which established that prosecution evidence is not inspiring confidence.

11. Moreover, the Investigation Officer had failed to send the alleged recovered arms and ammunitions to the Forensic and Ballistic Expert to find out that same were in functioning condition nor any such report was produced before the trial Court. The contents of FIR are also silent that the alleged recovered arms and ammunitions were sealed at the spot or afterwards which was a mandatory requirement under the prescribed procedure for the recovery and law settled by the superior Courts.

12. The appellant in his statement under section 342 Cr.P.C had categorically stated that he is innocent and had been falsely involved in instant case by the complainant SIP Sikandar Ali Soomro who is close relative of Illahi Bux Soomro as he had contested election against said Illahi Bux Soomro.

13. We have meticulously considered the submissions made by the parties and have minutely examined the evidence adduced by the prosecution which has failed to bring the guilt of accused at home. It is well settled that for giving benefit of doubt to an accused it is not necessary that there should be many circumstances creating doubts. If a single circumstance creates reasonable doubt in a prudent mind about the guilt of the accused, then he will be entitled to such benefit not as a matter of grace and concession but as a matter of right. Consequently, the instant appeal stands allowed and appellant is acquitted of the charge. The impugned judgment dated 29.08.2014, passed by the learned ATC, Shikarpur, is hereby set-aside. The appellant shall be released forthwith if he is no more required in any other case.

Larkana.

Dated:23.01.2015.

JUDGE

JUDGE