

HIGH COURT OF SINDH AT KARACHI

Cr. Anti-Terrorism Appeals Nos.28 and 32 of 2012

Present: Mr. Justice Naimatullah Phulpoto
Mr. Justice Rasheed Ahmed Soomro

Appellants: Javed son Abdul Rehman in Cr. ATA No.28 of 2012 through Mr. Muhammad Aslam Shar, Advocate.

Muhammad Asif @ Dada in Cr. ATA No.32 of 2012 through Mr. Fazal-ur-Rehman, advocate

Respondent: The State through Mr. Muhammad Iqbal Awan, Deputy Prosecutor General Sindh.

Date of Hearing : 15.08.2017

Date of Judgment : 15.08.2017

JUDGMENT

NAIMATULLAH PHULPOTO, J.- Appellants Javed and Muhammad Asif alias Dada were tried by learned Judge, Anti-Terrorism Court No.III, Karachi. By judgment dated 06.10.2012, both the appellants were convicted under sections 385/386, PPC read with section 7(h) of the Anti-Terrorism Act, 1997 and sentenced to five years R.I. each with fine of Rs.10,000/-. In default of payment of fine, accused were ordered to suffer SI for three months more. Accused were extended benefit of section 382-B, PPC.

2. Brief facts of the prosecution as disclosed in the F.I.R. are that complainant Dr. Abdul Aziz lodged his report on 18.09.2011 at 2245 hours at P.S. Kharadar, alleging therein that he runs Aziz Dental Clinic at Adamjee Dawood road. It is alleged that on 15.09.2011 at 05:30 p.m. when he arrived at his clinic, Shaukat, dispenser of the clinic delivered an envelope to him. Doctor opened it and found a chit in it, Lyari Gang War Kalu Bhai was written on the chit. Doctor was asked through the chit to pay Rs.200,000/- else threats were issued to him. Cell numbers of the sender of the chit were also mentioned as 03228282451 and 03222238380, it was also mentioned that in case of failure, he would be murdered by means of a bullet of Rs.38/-. Doctor inquired from his dispenser Shaukat to which he told him that a few minutes before his arrival, one person not previously known to him gave such

chit to him. Shaukat claimed that he could identify that person if produced before him. Thereafter, time and again complainant received telephone calls from cell numbers 03228282451 and 03422485955. Caller disclosed his name as Maroo/Kaloo and demanded bhatta of Rs.200,000/- from the complainant. Thereafter, complainant lodged F.I.R. No.346/2011 at police station Kharadar under sections 385, 386, 506-B, 34 PPC read with section 6(k) and 7 of the Anti-Terrorism Act, 1997. Investigation was carried out by ASI Muhammad Anwar of P.S. Kharadar.

3. During investigation, on 20.09.2011 at night time SIT South, Karachi informed the complainant about the arrest of culprits Asif alias Dada and Javed. Both the culprits during interrogation admitted the commission of alleged offence. IO further informed that on 19.09.2011 at 2200 hours accused Asif was arrested at Baghdadi crossing, at that time mobile phone with Sim No.03422485955 and photocopy of the slip of bhatta in the name of Doctor Abdul Aziz were recovered from his possession. On the inquiry, accused Asif alias Dada further disclosed the name of co-accused as Javed son of Abdul Rahman. Accused Javed was also arrested. The Sim of mobile phone was in the name of Farooq brother of accused Asif. It is alleged that during investigation bhatta of Rs.20,000/- was recovered on the pointation of both the accused on 23.09.2011 from the secret cavity of counter table of video game shop of accused Javed.

4. After completion of investigation, challan was submitted against both the accused before learned Judge, Anti-Terrorism Court-III, Karachi. Trial court framed charge against both the accused at Ex-4. Both the accused pleaded not guilty and claimed to be tried.

5. At trial, prosecution examined PW-1 Abdul Aziz, PW-2 Riaz Ahmed, PW-3, Shaukat Ali Khan, PW-4 Tariq Mehmood, PW-5, HC Naeem Ahmed, PW-6 PC Ghulam Shabbir, PW-7 Orangzaib, PW-8 ASI Hussain Bux, PW-9 SI Muhammad Anwar, PW-10 Inspector Ali Ahmed. Thereafter, prosecution side was closed vide statement of DDPP dated 08.08.2012 at Ex-17.

6. Trial Court after hearing the learned counsel for the parties and assessment of evidence, by judgment dated 06.10.2012 convicted and sentenced the appellants as stated above. Thereafter, appellants Muhammad

Asif alias Dada and Javed filed appeals through Superintendent, Central Prison, Karachi. By this single judgment, we decide aforesaid appeals as the same arise out of common judgment dated 06.10.2012.

7. Mr. Muhammad Aslam Shar, advocate for appellant Javed contended that there was no direct evidence against accused Javed. Only the piece of evidence collected against him was recovery of bhatta on joint pointation of both the accused. Learned advocate for appellant submits that joint pointation of recovery was inadmissible in evidence. In support of his contention, he relied upon the case of SHABBIR AHMED versus THE STATE (2011 SCMR 1142).

8. Mr. Muhammad Iqbal Awan, Deputy Prosecutor General Sindh, submits that appellant Javed was involved by co-accused Muhammad Asif alias Dada during interrogation and bhatta money was recovered from his video game shop. Learned DPG admits that according to mashirnama and evidence brought on record, recovery of bhatta was on joint pointation of both the accused from video game shop. Learned DPG prayed for dismissal of appeal.

9. After perusal of the evidence, we have come to the conclusion that in this case PW-4 Tariq Mehmood is star witness of the case. He has deposed in his examination in chief as under:

“I am doing part time job at the clinic of Dr. Abdul Aziz (the complainant). PW Shaukat Ali is also doing part time job at clinic of Dr. Abdul Aziz. On 15.09.2011 at about 5:00 p.m. one Asif came at clinic delivered an envelope to Shoukat for its delivery to Dr. Abdul Aziz. Shoukat put the said envelope at the table of Dr. Abdul Aziz. After some time Dr. Abdul Aziz came at the clinic, he opened envelope and read the letter. He called me and Shoukat, informed us to have received threatening letter and author demanded Rs.200,000/- as extortion money. Doctor showed us the said letter. I see Ex.7/A and say it is the same letter. On 18.09.2011 19.09.2011, at about 5:00 p.m. Dr. Abdul Aziz gave me an envelope contains four notes of Rs.5,000/- each and directed to deliver the said envelope to a person, who will come in front of Al-Basit Hotel, Lyari gate. He informed me to have received so many threatened calls, therefore, giving the said amount to save his life. Dr. Abdul Aziz directed Shoukat to follow and watch me. I went to the pointed place, for some time waited for a person. Asif came there and received envelope from me. Then I came back to clinic. On 21.09.2011, SIP Anwar came at clinic and informed us to have arrested the person, who received envelope from me. He had recorded

my 161 Cr.PC statement. On 26.09.2011 S.H.O. and IO/SIP Anwar brought the accused at clinic later shown them the place of giving of letter and receipt of extortion money. The IO prepared memo of pointation of place of the incident and receipt of extortion money. I see Ex.9/A and say it is same memo, true and bears my signature. The envelope and four notes of Rs.5000/- each available in the Court are same, given to me by Dr. Abdul Aziz and I delivered the same to accused Asif. Accused Asif present in the Court is same.”

10. PW-10 Ali Ahmed IO has deposed that on 23.09.2011 he submitted application to the Judicial Magistrate for holding identification parade but it was refused by him. He has further deposed that he collected call data in the name of brother of accused Asif. PW-9 Muhammad Anwar SIP has deposed that on the night in between 22.09.2011 to 23.09.2011 he interrogated both the accused regarding bhatta money, both accused jointly produced money kept in safe custody at Daboo shop of accused Javed.

11. From the above prosecution evidence, it is crystal clear that there was huge evidence against appellant Asif to connect him in the commission of offence. Both dispensers of doctor have fully implicated him. After conviction, appellant Muhammad Asif alias Dada filed appeal. On expiry of sentence and earning remissions he was released from the jail. He did not turn up to contest his appeal as such appeal filed by appellant Muhammad Asif alias Dada is dismissed; conviction and sentence recorded against him by trial Court are maintained.

12. Case of appellant/accused Javed is distinguishable from the case of accused Muhammad Asif alias Dada, for the reasons that there was no direct evidence of dispensers PWs Shoukat Ali Khan and Tariq Mehmood against him. There was no call data with regard to accused Javed. Investigation officer has admitted that bhatta money was recovered by him on the joint pointation of both the accused from video shop of accused Javed. Relevant portion of his evidence is reproduced as under:-

“In between night of 22.09.2011 and 23.09.2011, I had interrogated both the accused in respect of extortion money. Both accused volunteered to produce the said extortion money kept in safe custody at Daboo shop of accused Javed.”

13. Learned DPG has also rightly pointed out that it is the case of joint pointation of bhatta money from video game shop of accused Javed.

Recovery of bhatta money on the joint pointation of both accused it is inadmissible in evidence. Rightly reliance has been placed on the case reported in 2011 SCMR 1142 (Shabbir Ahmed versus the State). Relevant portion is reproduced as under:-

“3. It is argued on behalf of the petitioner that the complainant of this case when appeared before the trial Judge has not charged the petitioner nor his co-accused Bismillah and that mere recovery of snatched motorcycle could not connect the petitioner nor his co-accused with the commission of crime because the house wherefrom the motorcycle was recovery, no evidence was produced that the same belonged to the co-accused Bismillah.

4. After perusal of the impugned judgment and the evidence of the prosecution, we find that in this case no regular test identification parade was held. The alleged recovery of motorcycle was made on the joint pointation of the two accused. The house wherefrom recovery is affected does not belong to the co-accused because no person from the locality was associated during the course of alleged recovery.

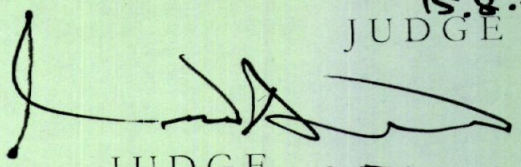
5. As far as the statement of the complainant is concerned, he stated on oath the he has seen the accused facing trial for the first time in the Court and that he had not identified the assailants at the time of occurrence. He further stated that he has named and charged the accused on the behest of the police and that he has not made a voluntary charge against the accused but was forced to do so by the police. He finally stated that the accused, present in the Court (trial Court), were not the accused and were innocent.

6. In view of the evidence which in no manner connect the present petitioner as well as his co-accused Bismillah, we find that this is a case of no evidence, therefore, the conviction and sentences recorded against the present petitioner as well as his co-accused Bismillah are not sustainable. Notice of the petition given to Mr. Tahir Iqbal Khattak, Additional Prosecutor General is accepted by him.

7. For the reasons stated hereinabove, this petition is converted into appeal and allowed. The conviction and sentence of the petitioner is set aside and he is acquitted of the charge and shall be released forthwith, if not required in any other crime. As far as role of co-accused Bismillah, who has not filed the petition before this Court, but has challenged his conviction and sentence before the Federal Shariat Court is similar to the case of the present petitioner, therefore, benefit of doubt is also given to him. He shall also be released forthwith, if in jail and not required in any other crime.”

14. For the above stated reason, we have no hesitation to hold that the prosecution has failed to establish its case against accused Javed. Therefore, for the above stated reasons by extending benefit of doubt, appeal of appellant Javed is allowed; conviction and sentence recorded by the trial Court

vide judgment 06.10.2012 are set-aside. Appellant is present on bail, his bail bond is cancelled and surety is hereby discharged.

15.8.2017
JUDGE

JUDGE
15/8/17

Gulsber/PS

Issue Cheque No. 53950700 Dated 24/8/17
for Rs. 100000/- Rupees one lac only

~~NAZIR~~
24/8/17 in front of Sajjad Ahmad
s/o Umeed Ali Solangi