

IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Criminal Jail appeal No.D-03 of 2015.

Present. *Mr. Justice Naimatullah Phulpoto.*
Mr. Justice Shamsuddin Abbasi.

For hearing of application U/s 426 Cr.PC.

1. For orders on M.A No.4644/2011 (B.A)
2. For hearing of main case.

Date of hearing 03.07.2018.

Date of Judgment 03.07.2018.

Appellants: Mohammad Farooq and Zeeshan Ahmed
through Mr. Abdul Sattar N.Soomro
Advocate.

Respondent. The State, Through Syed Sardar Ali Shah
D.P.G.

JUDGMENT

Shamsuddin Abbasi, J:

Appellant Mohammad Farooq and Zeeshan Ahmed have assailed the judgment dated 07.01.2015 passed by Special Judge Anti-Terrorism Court Khairpur Mir's. Appellants were tried in Special Case No.04/2013 Re- State v. Mohammad Farooq and another arising out of Crime No.232/2012 offence under Sections 3/4 Explosive Substance Act, 13(e) Arms Ordinance and 6/7 of ATA, 1997 registered at Police Station, Gambat. The learned trial Court has convicted the appellants for offence under Section 4(b) Explosive Substance Act, 1908 and awarded sentence them to suffer R.I for life each and to pay fine of Rs.50,000/- each and in case of default in payment of fine it was ordered that they shall suffer further R.I for 06 months each. They were also convicted under Section 13(e) Arms Ordinance and awarded sentence them to R.I for Seven years each and in case of default in payment of fine they shall suffer further R.I for two months each. They were also convicted under Section 7(b) of ATA, 1997 and sentence them to suffer R.I for Life each and to pay fine of Rs.50,000/- each and in case of default in payment of fine they shall suffer further R.I for 06 months.

However, benefit of Section 382-B Cr.P.C was extended to both the accused and it was ordered that sentence awarded to the appellant shall run concurrently.

2. The brief facts of the prosecution case are that the complainant Inspector Asad Nabi Khichi was on patrolling duty on 19.12.2012 at 2100 hours, along with his subordinate staff and reached near Makhdoom Gate of protection bund of National Highway it was about 1915 hours, he saw a car coming from Sukkur side and when the Police party came in front of car, the driver of car suddenly turned his car towards Eastern side and tried to escape but Police party followed them being suspicious car and they succeeded to stop the car near Makhdoom Gate. Police party searched the person who were sitting in the car and so also taken the search of entire car and recovered explosive substance and ammunition. The SHO prepared the memo of above said recovered property in presence of mashirs namely ASI Mazharuddin and PC Hadi Bux. The accused persons disclosed their names as Mohammad Farooque and Zeeshan Ahmed and from their personal search Rs.3000/- and CNIC from accused Mohammad Farooque and Rs.500/- and CNIC from accused Zeeshan Ahmed were recovered. The Police brought both the above said accused and recovered property at P.S Gambat where the SHO registered the FIR and investigation was handed over to Inspector Mohammad Azeem Pathan who after completing investigation submitted challan in the Court.

After usual investigation Police submitted challan against the appellants in learned trial Court.

3. The learned trial Court framed charge against the accused at Ex.03 but they did not plead guilty and claimed for trial.

Asad Nabi

4. The prosecution in order to prove it's case has examined PW-1 Inspector Asad Nabi Khichi who is complainant of the case and was examined at Ex.05, who produced memo of arrest and recovery and copy of FIR bearing Crime No.232/2012. Prosecution has also examined PW-2/SIP Mazharuddin Khuhro who was mashir of the case and was examined at Ex.07. He produced memo of sealing the recovered case property viz. K.Ks, Flyers Rocket cartridges etc. and memo of inspection of recovered Car and memo of inspection of place of incident at Ex.6/A, 6/B and 6/C respectively. Finally the prosecution has examined PW-3/Inspector Mohammad Ameen Pathan who was I.O of the case at Ex.8. He has also produced technical report of Bomb Disposal Unit Sukkur and ballistic expert report at Ex.8-D and 8-E respectively.

5. Thereafter, learned DDPP for the State has closed prosecution side vide statement at Ex.09.

6. Thereafter, the learned trial Court has recorded the statement of accused U/s 342 Cr.P.c, at Ex.10 & 11, in which they have denied the allegations leveled by the prosecution against them but neither they have examined themselves on oath nor lead any defence witness in their defence. However, they have replied to the question that what you have to say. They replied that they are innocent and on 19.12.2012 about 7:00 p.m. they were going to Karachi for purchase a new car when they reached near Gambat one Head Constable stopped their vehicle, who took their personal search and snatched Rs.1200000/- cash from accused Mohammad Farooque. They resisted on that they brought to Police Station where they were presented before SHO Asad Nabi Khichi to whom they narrated the facts of incident but he has also not paid any heed on complaint and who booked them in false cases. They further

Asad Nabi Khichi

stated that no any incriminating article has been recovered from their possession and they prayed for justice but neither they examined themselves on oath nor led any evidence in their defence.

7. The learned trial Court after hearing both the sides have passed impugned judgment whereby the appellants were convicted and sentenced as mentioned above.

8. Learned Counsel for appellants have contended that prosecution evidence rests upon official witnesses. The mashirs of the recovery are sub-ordinate staff ^{to} complainant and they were highly interested. He has further contended that prosecution witnesses have not produced departure and arrival entries. He further contended that the prosecution miserably failed to establish it's case on the point of safe custody of case property as neither they have produced any Roznamcha entry of Malkhana nor examined Head Muharer of Malkhana. He further contended that place of recovery is situated in a thickly populated area on main road near bus stand but complainant has failed to associate any independent witnesses for alleged recovery. He further contended that incident was taken place on 19.12.2012 at 7:15 p.m. which are dark hours of the night in the month of December and police has disclosed the source of identification is head light of the vehicle which is always treated as weak source of identification. He further contended that according to the prosecution witnesses weapons recovered from the possession of appellants were without description and their numbers were rubbed. He further contended that appellants were belongs to Province of K.P.K and how is it possible that they travelled from K.P.K to the place of incident without number plate on the car by keeping huge quantity of arms and ammunition in a car openly. He further contended that there is a

R. S. Sharma

material contradictions in the evidence of prosecution witnesses as well as PWs have contradict the documents produced by them. He pointed out that on one hand PWs have stated that recovered weapons were without any description and on the other hand they admitted this fact in cross examination that word A, B-OA were written over the Kalashnikov. He further contended that learned trial Court has proceeded with this matter without having jurisdiction on the point that offence does not nexus with the Section-7 of Anti-Terrorism Act, 1997.

9. On the other hand learned Deputy Prosecutor General has argued that prosecution witnesses have supported their case and they have established their case beyond reasonable shadow of doubt He further contended that appellants were arrested from the place of incident along with huge quantity of weapons and they were shifting the weapons to Karachi for terrorist activities and he has supported the judgment passed by the learned trial Court.

10. Heard learned Counsel for the appellants as well as learned Deputy Prosecutor General and perused the material available on record.

11. We have carefully scanned the evidence of prosecution witnesses which were rest upon Inspector Asad Nabi Khichi, PW-2 SIP Mazharuddin and PW-3 Inspector Mohammad Ameen Pathan.

12. PW-1 Asad Nabi Khich was examined by the prosecution, he has supported the case of prosecution but he has admitted the fact that they did not stop any other vehicle except the vehicle of accused. He also admitted the fact that place of incident is busy area for the purpose of transport and situated near the bus stop at National Highway. He has also disclosed that they chased the accused party for about 250 meters

Handwritten signature

upto three minutes. He also admitted that they took 1½ hour for completing legal formalities at the place of recovery. He further admitted that they alighted first accused who was sitting on driving seat at 1915 hours whereas mashirnama of arrest and recovery was also prepared at 1915 hours. He admitted that they did not seal the property at the place of recovery. He also deposed that during entire proceedings no private person came there. He also admitted that case property was sealed on 12.12.2012 at 03:00 p.m. at Police Station. He further admitted that he has not mentioned the serial numbers of currency notes as well as descriptions of currency notes. However, he has denied the defence plea of accused that police have false implicated them in this case after snatching Rs.1200000/- in order to usurp their amount.

13. We have also examined the evidence of PW-2 ASI Mazharuddin who was cited as mashir of recovery of arms and ammunition as well as mashir of sealing case property, inspection of recovered car and place of incident. This PW has deposed on the same line as deposed by Inspector Asad Nabi Khichi. However, he has contradicted PW-1 Inspector Asad Nabi Khichi on the point of visiting areas during patrolling after departure from Police Station and before reaching at place of recovery. He has further contradicted and denied the presence of any bus stand (Adda) at Makhdoom gate near the place of recovery. He also contradict the complainant as complainant deposed that firstly they got down a person who was sitting on the driving seat whereas he deposed that they got down both the accused from the car. He has also contradict the complainant on the point of time consumption at the place of incident as complainant deposed that they had completed all the formalities at the place of incident within one and half hour

Asad Nabi Khichi

whereas this PW has deposed that they took one hours and 15 minutes in inquiring the names of accused persons and recovery of case property and thereafter they completed all other formalities. He also admitted the fact that the mashirnama available at Ex.6-A in which 100 live bullets were not mentioned. He has admitted that word Katchra has been mentioned over the explosive substance and same fact has not been mentioned in the mashirnama of recovery of arms and ammunition. However, he has also admitted this fact that on the Kalashnikov neither any word ABCD or any alphabetic word was written nor any figure was written over the Kalashnikov but he on the same time has admitted that word AB-OA was written over the Kalashnikov. He has also admitted the fact that range number was also written over the Kalashnikov which fact has not been mentioned in mashirnama of recovery as well as in my statement recorded by I.O. under Section 161 Cr.P.C He has also admitted that word 'S' is written over one of the Kalashnikov. However, he has admitted the very important aspect of the case that empty of G-3 rifle and empty of 7.62 bore present in Court were not recovered at the spot. He has also admitted the fact that there is one Katcha room constructed near the place of incident and this fact has been mentioned in mashirnama but not in a FIR.

14. We have also examined the deposition of PW of Inspector Mohammad Ameen Pathan who has investigated the case who deposed that on 19.12.2012 he was posted as SIO at Police Station A-Section, Khairpur and on the same day he received message on mobile that some terrorist had been arrested by the Gambat Police and was directed to reach at Police Station, Gambat thereafter he reached at Police Station and received the copy of FIR along with mashirnama of arrest of accused

and recovery from SHO Police Station, Gambat. He further deposed that in the meanwhile officials of bomb disposal Unit also reached at Police Station headed by Inspector Tahir who defused explosive material and issued letter to them. Thereafter he received case property and prepared mashirnama of inspection of Car in presence of said mashirs and recorded the statements of witnesses. He also visited the place of incident on the pointation of complainant and prepared mashirnama of place of incident. He has sent the case property to ballistic expert after getting permission from SSP and after completing other formalities he has submitted the challan on 03.01.2013 in learned trial Court. He was put on lengthy cross however, he has admitted this fact that he had not deposited the case property in the Malkhana of Police station. He has further admitted that case property was available in the office of SHO when he received it. He also admitted that he had not mentioned the fact about the presence of 100 live bullets in his mashirnama for sealing the case property prepared by him on 20.12.2012. However, he has also admitted that word made USSR was written over the flyer cartridges as well as of 12 live detonators in the technical report. He has also admitted fact that word made USSR was also written over the empties of detonators. He has also admitted this fact that he has received Kalashnikov without number, without any mark and nothing was written over the Kalashnikov but he admitted that Kalashnikovs present in Court word AB & OA were written over one Kalashnikov. He has also admitted the departure entry was not produced in trial Court.

15. After scanning the evidence of PWs we have come to the conclusion that it is admitted fact that place of arrest and recovery was situated in very thickly populated area near the bus stand but PWs have

Di. Anwar

deposed that during whole process of recovery and arrest which was completed in more than one and half hour neither any passenger came there nor any private vehicle crossed them which is very hard to believe for any prudent mind to accept this version of the complainant when the time of recovery was 7:15 p.m. which are not odd hours of the night and particularly when it was near the bus stand on National Highway. There is also contradictory view in respect of deposition of complainant, mashir, and I.O. in respect of presence of one constructed katcha room near the place of incident as per FIR and mashirnama and deposition of complainant and mashirs. The place of recovery was shown on road and no presence of any building has been shown near the place of recovery but mashirnama of seeing place of incident shows that there was one katcha room situated near the place of incident and this fact has been put up by the learned Counsel for accused during cross examination to the complainant in which he has admitted that he has not mentioned the presence of katcha room at the place of incident in the mashirnama of arrest and recovery.

16. It has also been admitted by the complainant in his cross examination that 100 bullets of K.Kovs were sealed at the spot and not handed over to I.O. PW has also admitted this fact that they have not given the denomination of currency notes in mashirnama of arrest and recovery. There is also contradiction in respect of arrest of accused persons as complainant stated that firstly they got down the person who was sitting at driving seat thereafter they got down a person who was sitting on front seat of car whereas mashir stated that they got down both the accused at once from car and then inquired their names and addresses.

17. The prosecution witnesses have failed to establish their case on the point of safe custody as they have failed to produce any entry of Malkhana register and they have also failed to examine incharge of Malkhana even prosecution has not been examined the witness who brought the case property to forensic Laboratory.

18. The appellants have taken plea that they were going to purchase car from Karachi and they possessed Rs.1200,000/- cash in their vehicle and police in order to usurp their money and falsely implicated them in this case. It is matter of record that neither they have examined themselves on oath nor produced any defence witnesses. It is primary duty of prosecution to prove it's case but in this case prosecution failed to prove it's case by cogent evidence.

19. It is well settled law that the police witnesses are as good as other public witnesses and their statements could not be discarded merely for the reason they were the Police employees. The police employees are the competent witnesses like any other independent witnesses and their testimony cannot be discarded merely on the ground that they are the police employees as laid down in the case of Mohammad Azam v. The State PLD (1996 SC 67), Mohammad Hanif v. The State (2003 SCMR 1237), Riuaz Ahmed v. The State (2004 SCMR 988) and Naseer Ahmed v. The State (2004 SCMR 1361). The relevant portion of case law reported in 2004 SCMR 1361 (Naseer Ahmed v. State) is reproduced as under:-

"It has been held by this Court, time and again that the police officials are as good witnesses as others, and their evidence on this score alone should not be discarded. Now-a-days, drug trafficking has created dangerous problems for the society and the country at large. This menace should be curbed so that people in society would get relief".

A. J. Khan

20. In the present case the evidence of PWs is not reliable, trustworthy and inspiring confidence. The evidence of prosecution witnesses who all are the mashir of recovery is sub-ordinate to complainant and prosecution has failed to prove their case from any independent source and it would not be safe to rely upon the evidence of police officials without independent corroboration which is lacking in this case. It is well settled principle of law that for extending benefit of doubt to accused it is not necessary that there should be many circumstances creating doubt. If a single circumstance creates doubt in a prudent mind about the guilt of the accused they he will be entitled to such a benefit not as a matter of grace but as a matter of right. In case of Tariq Pervez v. The State 1995 SCMR 1345, in which the Honourable Supreme Court has held as under;

“For giving benefit of doubt to an accused it is not necessary that there should be many circumstances creating doubts. If a simple circumstance creates reasonable doubt in a prudent mind about the guilt of accused, then he will be entitled to such benefit not as a matter of grace and concession but as a matter of right”.

In the case of Ikramullah v. The State (2015 SCMR 1002), the Honourable Supreme Court of Pakistan has held as under;



“5. In case in hand not only the report submitted by the Chemical Examiner was legally laconic but safe custody of the recovered substance as well as safe transmission of the separated samples to the office of the Chemical Examiner had also not been established by the prosecution. It is not disputed that the investigating officer appearing before the learned trial court had failed to even to mention the name of the police official who had taken the samples to the office of the Chemical Examiner and admittedly no such police official had been produced before the learned trial court to depose about safe custody of the samples entrusted to him for being deposited in the office of the Chemical Examiner. In this view of the matter the

Ali Khan

prosecution had not been able to establish that after the alleged recovery the substance so recovered was either kept in safe custody or that the samples taken from the recovered substance had safely been transmitted to the office of the Chemical Examiner without the same being tampered with or replaced while in transit."

21. Having explained herein above, we have come to the conclusion that prosecution has miserably failed to prove its case against the appellants beyond reasonable shadow of doubt, allow the appeal and conviction and sentence recorded by the trial Court against appellants vide judgment dated 07.01.2015 are set-aside.

These are the reasons of our short order dated 03.07.2018.


31/07/2018
JUDGE

JUDGE