

JUDGMENT SHEET
IN THE HIGH COURT OF SINDH, KARACHI.

Present:

Mr. Justice Muhammad Iqbal Kalhoro, J.
Mr. Justice Khadim Hussain Shaikh, J.

Cr. Anti Terrorism Appeal No.157 of 2016

Syed Ali Haider Shah @ Ali Kala	.....	Appellant.
Versus		
The State	.....	Respondents.
Cr. No.322/2013 P.S. Mehmoodabad U/s 353, 324, PPC r/w S.7 ATA, 1997		

Cr. Anti Terrorism Appeal No.158 of 2016

Syed Ali Haider Shah @ Ali Kala	.....	Appellant.
Versus		
The State	.....	Respondents.
Cr. No.323/2013 P.S. Mehmoodabad U/s 4/5 Explosive Substance Act r/w S. 7 ATA, 1997		

Cr. Anti Terrorism Appeal No.159 of 2016

Syed Ali Haider Shah @ Ali Kala	.....	Appellant.
Versus		
The State	.....	Respondents.
Cr. No.324/2013 P.S. Mehmoodabad U/s 23(1)(a) of Sindh Arms Act		

Mr. Zafar Ali Agha Advocate for the appellant.

Mr. Abrar Ali Khichi D.P.G for the State.

Date of hearing: 14.09.2017

Date of decision: 14.09.2017.

J U D G M E N T

MUHAMMAD IQBAL KALHORO J: By this common judgment all the above captioned appeals are disposed of which arise out of same judgment dated 25.04.2016 passed by Anti-Terrorism Court No.IX, Karachi in above crimes and offences, whereby the appellant has been convicted and sentenced to suffer RI for 10 years with fine of Rs.50,000/- in default whereof to suffer SI for four months more for offence punishable u/s 324 PPC, to suffer R.I. for 02 years and fine of Rs.10,000/-, in default whereof to suffer RI for one month more u/s 353 PPC; to suffer R.I for 14 years with fine of Rs.50,000/-, in default

whereof to suffer R.I. for four months u/s 7(ff) Anti-Terrorism Act, 1997 r/w section 4/5 Explosive Substance Act; and to suffer R.I. for 07 years and fine of Rs.25000/-, in default whereof to suffer RI for two months more U/s 23(1)(a) of Sindh Arms Act, 2013. All the sentences have been ordered to run concurrently. Benefit of section 382-B Cr.P.C has also been extended to the appellant.

2. Brief facts of the prosecution case are that on 03.11.2013 at 2225 hours, the complainant ASI Khalid Yakoob lodged FIR No.322/2016 U/s 353, 324 PPC r/w section 7 ATA, 1997 stating therein that he alongwith his subordinate staff was on patrolling duty when he on a tip-off regarding presence of a suspect at Foot Ball Ground, Chanesar Goth, Karachi, reached there at 2100 hours and found a person available there, who seeing them started firing upon them with intention to commit murder. His fire was retaliated by the police and consequently the said person was apprehended. On inquiry, he disclosed his name as Ali alias Kala. From his personal search, the complainant recovered an unlicensed 30 bore pistol bearing No.A-5721 alongwith a magazine loaded with one live bullet and one bullet in its chamber, and a hand grenade No.Y3PRM-2-56-88 written on its clip and 386-34-89 written inside it. The recovered pistol with its rounds and the grenade were sealed at the spot. Thereafter the accused and property were brought at P.S. where three separate FIRs were registered against him.

3. After usual investigation, the challan against the appellant was submitted in the court. A formal charge against him was framed at Ex.4 to which he pleaded not guilty and claimed his trial.

4. In the trial, the prosecution has examined P.W.1 complainant ASI Khalid Yakoob at Ex.6, P.W.2 PC Liaqat Ali at Ex.8, P.W.3 SI Muhammad Amir of Bomb Disposal Unit at Ex.10 and P.W.4 Inspector Saeed Akhtar at Ex.11. They produced all the necessary documents including memo of arrest and recovery, FIRs, report of Bomb Disposal

Unit and report of FSL, etc. Statement of appellant u/s 342 Cr.P.C was recorded at Ex.13, in which he has denied the allegations. He examined himself on oath at Ex.14 and examined defence witnesses namely Muhammad Muslim and his wife Mst. Hameeda alias Saima at Ex.15 and 16 respectively. At the conclusion of trial, learned trial court convicted and sentenced the appellant vide impugned judgment in the terms as stated above and through the instant appeals, the appellant has challenged the same.

5. Mr. Zafar Ali Agha advocate for the appellant has contended that this is a simple case of recovery but the police has malafidely turned it into a case of encounter, which even from the facts of the case is not borne out; that no one in the alleged encounter was injured although it is alleged to have taken place in a ground where no safety or shelter was available to either party to seek protection thereof; that alleged number of empties recovered from the place of incident does not match with the evidence of the prosecution witnesses; that although it is alleged that besides two empties of 30 bore pistol, five empties of SMG were recovered but in the entire prosecution case it has not been disclosed as to who out of the police party was armed with the SMG to lend credence to the recovery of SMG empties. In respect of the remaining appeals, learned counsel has requested for altering the sentence and reducing it to the minimum period on the ground that the appellant is the first offender and he is in jail since the time of alleged incident. In support of his said prayer, learned counsel has contended that this is a simple case of recovery from an abandoned place without any element of terrorism, therefore, conviction awarded to the appellant u/s 6(2)(ee) r/w section 7(1)(ff) of ATA, 1997 is unjustified. According to him, the case against the appellant at the most falls u/s 4/5 of Explosive Substance Act and minimum punishment whereof as provided under the law is RI for 07 years.

6. Learned DPG has not been able to oppose the contentions of learned defence counsel in respect of the case registered against the appellant u/s 324,353 PPC for alleged encounter. Learned DPG has also not opposed the request of learned counsel for alerting and reducing the sentence awarded to the appellant for the offences of keeping a hand grenade and an unlicensed pistol.

7. We have considered the submissions of the parties and have perused the material available on record. It is the case of the prosecution that the appellant was arrested on 03.11.2013 at 2100 hours after an encounter with the police from a Football Ground Chanesar Goth, Karachi and from him a hand grenade and a 30 bore pistol with two live rounds were recovered. In support of such accusations the prosecution has examined in all four witnesses. The evidence of prosecution witnesses viz-a-viz alleged encounter is not confidence inspiring. The place of incident is alleged to be an open ground where no one except the appellant and the police party at the time of encounter was available. The memo of place of incident does not show that there was any safety or shelter available to both the parties to hide themselves from the alleged straight firing, yet no one received any scratch from the direct firing during encounter. The memo of place of incident shows that besides two 30 bore empties, five empties of SMG were recovered from the place of incident. However, it is not clear as to who out of the police party was armed with SMG to presume that he had fired. More so the recovery of these five empties is not in harmony with the disclosure made by the I.O. in his evidence which shows that he had fired 6/7 rounds and other police officials had also fired rounds. In the given facts and circumstances, we agree with the contention of learned defence counsel that the prosecution has not been able to prove its case of alleged encounter against the appellant beyond a reasonable doubt. We, therefore, extend benefit of doubt to the appellant, allow Cr. Appeal No.157/2016 and acquit him of that charge.

8. However, insofar as recovery of a hand grenade and 30 bore pistol from the appellant is concerned; learned defence counsel has not pressed merits but has requested for alteration and reduction in sentences still we have examined the record and proceedings of the case. The prosecution witnesses have consistently supported the recovery of said articles from the appellant and perhaps this is the reason learned defence counsel has prayed for alteration and reduction in the sentence. His contention that this is a simple case of recovery without any element of terrorism is not without force. Because as per item No.4(ii) of the third schedule to the ATA, 1997, a case becomes triable by the Anti-Terrorism Court if use of firearms and explosive substance etc. in mosque, Imam Bargah, Church, Temple or any other place of worship is involved in the case. For this view reliance can be placed on the case of *Amjad Ali and others Vs. The State (PLD 2017 SC 661)*. In the present case it is alleged that the hand grenade was recovered from the appellant from the fold of his shalwar when he was present in a ground where no one was present. And notably although the hand grenade was allegedly recovered from the appellant on 03.11.2013 but its inspection by the Bomb Disposal Unit was carried out on 27.11.2013 after about 24 days. This delay has not been explained satisfactorily by the prosecution. These facts appear to influence learned DPG to not oppose the request of learned counsel for the appellant to alter and reduce the sentence of the appellant. As we have observed by referring to item No.4(ii) of the third schedule to the ATA, 1997 that this is a simple case of recovery without involving the element of terrorism, therefore, punishment awarded to the appellant U/s 6(2) (ee) r/w section 7(ff) of ATA, 1997 does not appear to be justified. We accordingly in view of above discussion, convict the appellant only U/s 4/5 Explosive Substance Act for keeping the hand grenade and sentence him to a minimum period of 07 years as provided under the said provision of law with fine of Rs.50,000/- in default of

which, to suffer SI for two months more on the ground that he is first offender and is in jail continuously from the date of incident. Conviction and sentence awarded to the appellant for offence u/s 23(1) (a) of Sindh Arms Act, 2013 through impugned judgment i.e. R.I. for 07 years with fine of Rs.25,000/-, in default whereof to suffer SI for two months more shall remain the same. Benefit of section 382-B Cr.P.C stands extended to the appellant and his above sentences shall run concurrently.

All the appeals stand disposed of in the above terms.

JUDGE

JUDGE

A.K.