

**IN THE HIGH COURT OF SINDH,  
CIRCUIT COURT HYDERABAD**

Before:

Mr. Justice Naimatullah Phulpoto  
Mr. Justice Mohammad Karim Khan Agha

Cr. Jail Appeal No.D-201 of 2010.

Imran Malik

Versus.

The State.

Appellant : Imran Malik	Through Mian Taj Muhammad Keerio, Advocate
Respondent : The State	Through Mr. Shahzad Saleem Nahyoon, Assistant Prosecutor General
Date of hearing	04.05.2017.
Date of judgment	04.05.2017.

**J U D G M E N T**

**MOHAMMAD KARIM KHAN AGHA, J.-** Appellant Imran S/o Abdul Sattar was tried by learned Judge, Anti-Terrorism Court, Mirpurkhas, in Special Case No.13 of 2009, arising out of crime No.433 of 2009, registered at Police Station Town Mirpurkhas for offence under sections 507 PPC r/w section 6/7 ATA. Appellant was found guilty by judgment dated 26.05.2010 (the impugned judgment) and was convicted and sentenced (1) under section 507 PPC to suffer R.I. for 02 years, (2) under section 7(h) Anti-Terrorism Act, 1997 (ATA) to suffer R.I for 05 years and to pay fine of Rs.50,000/-. In case of default in payment of fine the appellant shall further suffer R.I. for 06 months. Both sentences were ordered to run concurrently. Benefit of Section 382-B Cr.P.C. was also extended to the accused. The appellant has challenged the impugned judgment through this instant appeal.

2. The brief facts of the prosecution case as disclosed in the F.I.R are that complainant Inspector Gul Abbas, lodged F.I.R. at Police Station Town Mirpurkhas stating therein that he is Incharge of "15" Madadgar Centre Mirpurkhas. On 21.10.2009, he alongwith telephone operator PC/945 Imran and wireless operator HC/Imamuddin as



usual were available at their office; at about 1022 hours telephone operator PC Imran attended the call, thereafter he told him that from Cell No.0332-2231908 one anonymous person issued threats that he will commit suicide bomb attack within 1-2 days in Mirpurkhas City and that before the blast he will make aerial firing to create terror and will firstly kill prominent doctors by way of target killing then the phone was disconnected, as such they checked the number on CLI and found it to be same. Thereafter, they conveyed message on wireless control and put the Mirpurkhas police on high alert and held nakabandi, so also kept such entry No.3 at about 1022 hours in roznamcha register. Then on the same day duty of telephone operator PC Imran ended at about 1600 hours and telephone operator HC/1114 Muhammad Saleem resumed his duty during which he received calls at about 2017 hours, 2050 hours and 2339 hours from same cell number by the same unknown person, in which caller threatened that he will commit bomb blast, suicide attacks in Mirpurkhas City to kill the general public. On receiving such calls wireless message was again conveyed from control room immediately and police was again put on high alert, such entries were kept in daily diary register at 2017 hours entry No.7, 2050 hours entry No.9 and 2339 hours entry No.11. On next day i.e. 22.10.2009 operator PC Imran was performing his duty when at about 2025 hours he received call from the same cell number by same person in which the caller threatened that he will commit bomb blast, then such message was conveyed on wireless to police control and mobiles were put on high alert and held nakabandi; such entry was maintained in roznamcha register vide entry No.9. Thereafter complainant came at Police Station Town Mirpurkhas and lodged such F.I.R.

3. After completing the usual investigation, police submitted the challan against above named accused.

4. Formal charge against the accused was framed by the trial court at Ex.4. The accused vide plea (Ex.5) pleaded not guilty and claimed to be tried.

5. In order to prove its case the prosecution examined 09 witnesses (PW's) and thereafter learned SPP closed the side of the prosecution vide his statement Ex.17.

6. The statement of accused was recorded under section 342 Cr.P.C. at Ex. 18, in which he has denied the allegations of



prosecution while claiming his innocence. In his said statement, the accused has further stated that the police has falsely implicated him in this case at the instance of their high-ups as many other persons were arrested after his arrest and were let off malafidely; that the SIM did not pertain to him and had been foisted on him and he was arrested from his house. He did not examine himself on oath, however, he led defense evidence in disproof of the prosecution case by examining DWs Bundoo and Muhammad Aslam (Exs. 19 and 20, respectively) and produced newspapers clippings i.e. (1) daily Kawish dated 04.11.2009, (2) daily Jang dated 03.11.2009 and (3) Jurrat dated 03.11.2009.

7. The learned trial court after hearing the learned counsel for the parties and on the assessment of the entire evidence convicted and sentenced the accused / appellant as stated above through the impugned judgment.

8. By order dated 06-06-2012 the appellant was released on bail by this court pending the hearing of this instant appeal.

9. The facts of this case as well as evidence produced before the trial court find an elaborate mention in the impugned judgment passed by the trial court therefore the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

10. Learned counsel for the appellant has contended that the appellant did not make any threatening phone calls to police 15; that there was no eye witness to the phone calls which he allegedly made to the police; that the appellant was not the owner of either the phone or the SIM; that the threats continued after his arrest which showed that the police had got the wrong man and that the phone and SIM had been malafidely foisted on him by the police in order to show their efficiency and as such the prosecution had failed to prove its case against him beyond a reasonable doubt and as such he was entitled to be acquitted.

11. Learned A.P.G. appearing for the State while supporting the impugned judgment stressed the close corroborative evidence given by the police and the fact that the impugned judgment had fully covered all aspects of the case.

12. We have considered the arguments of learned counsel, perused the record and the relevant law and case law.



13. S.507 PPC concerns criminal intimidation by an anonymous communication and in general for the ATA to be attracted there must be a design and intent to put the public in fear of their safety i.e mens rea.

14. In our view there appear to be three main issues in this case

(a) Whether the telephone calls to police 15 were made at all and if so what was the content of those calls.

(b) Whether the caller was the appellant.

(c) Whether the content of the calls fell within the ambit of the ATA.

15. Turning to the first issue whether the telephone calls to police 15 were made at all and if so what was the content of those calls.

16. Based on the evidence of the PW's who dealt with the calls PW Mohammed Gul Abbas (who was the complainant who was in charge of police 15 who lodged the FIR and was intricately involved in the calls), PW Imran (who was the first shift telephone operator who received some of the calls), PW Saleem (who was second shift telephone operator who received some of the calls) and PW Inadullah (who was the wireless operator who put out the high alert warnings to the Mirpurkhas police following the calls) we find their evidence to be convincing and fully corroborated not only through their oral evidence but also through their actions as is supported by the various roznamcha entries which came on record during the trial. If no such calls were received then it would not make sense to make roznamcha entries and thereafter put the police on high alert. This is more so since it was done on two occasions covering 2 days and two separate shifts. None of these witnesses were in our view particularly damaged on cross examination especially as it seems that at this stage the defense was not particularly controverting the fact that threatening calls may have been made prior to the arrest of the appellant. Despite such PW's being police officers in our view in this instance, based on the facts and circumstances of this case and their evidence, especially as the accused at this stage was not identifiable they can be believed on this aspect of the case. especially as it seems that their S.161 Cr.PC statements were recorded promptly and there was no major contradictions between those statements and their evidence at trial. It is settled law that in some instances police officials can be as good a



witness as other witnesses. The only fault on the part of the complainant appears to be that he delayed the registering of the FIR by a day which should not have been the case especially as this was a serious terrorist threat and may have proved fatal to the prosecution case. It was not at that time possible to name the appellant in the FIR as the identity of the caller at that stage was unknown. However not with standing this short coming and the fact that the full language was not used in the roznamcha entries, for example, a demand of one crore was made during one of the calls which was not mentioned in the roznamcha, we find that the calls were made and received and there content was of a threat to the public based largely on the actions of the aforementioned PW's after receiving the calls.

17. The next issue is whether the caller was the appellant. In our view, based on the reasons mentioned below, we are not convinced from the evidence that the caller was the appellant.

(a) There was no eye witness to him making any such calls

(b) There was no recording of his call whereby his exact words could be captured or whereby modern devices of voice recognition could have been used. Furthermore, none of the telephone operators who actually heard the caller over the phone were ever confronted with the voice of the appellant to see if it had a likeness.

(c) As per memo of arrest and recovery neither the telephone nor SIM were said to be damaged however when the SIM was exhibited in court it was damaged.

(d) PW Hussain regional manger of U-Fone confirmed that the calls to police 15 had been made from the SIM at the relevant times and produced a computerized log to this effect. However he was unable to say whom the SIM belonged to.

(e) Despite the SIM and mobile phone being in working order according to PW Attaullah, who was the IO of the case, and allegedly proved this by making a call to PW Photo Khan who was a police officer Mushir in this case no such call showed up on the computerized record of PW Hussain relating to this now damaged SIM. Likewise PW Photo Khan did not confirm in his evidence whether such a call was made to him. Even if the call was not picked up by the receiver it would have shown up as

either a missed call or not received call. Interestingly PW Photo Khan stated in his evidence that he did not know whether the phone and SIM was working when he saw it in damaged condition at trial. Thus, there are severe doubts as to whether the SIM was even in working order when it was recovered let alone whether the appellant made the calls in question.

(f) As per memo of arrest and recovery neither the mobile phone nor SIM were sealed. This was admitted by PW Attaullah, who was the IO and made the arrest and recovery, in his cross examination. Although he is contradicted by PW Photo Khan who as Mushir says in his evidence that the mobile and SIM were sealed on the spot. Thus, both the phone and SIM could have been switched or planted.

(g) With regard to the identity of the owner of the SIM PW Hussain did not make any such identification and the only evidence available that the call came from the appellant was as per PW Photo Khan and PW IO Attaullah's receipt of "secret information" that the appellant was the caller and according to PW Photo Khan he was available at railway pattaack.

(h) According to his own evidence PW IO Attaullah received "secret information" about the appellant at 2pm at the PS so he had plenty of time to arrange for independent Mushirs. However he completely failed to do so. The appellant was arrested in the day time hours (5pm according to PW Attaullah) and according to PW Photo Khan it was a busy area and 5 or 6 persons gathered at the time of the arrest but none of them was made as independent mushirs in violation of S.103 Cr.PC. According to Photo Khan's evidence the IO asked him to get independent Mushir's but all refused. This contradicts PW IO Attaullah who states that no person gathered at the time of arrest despite it being a busy road and he does not mention asking Photo Khan to seek out an independent Mushir.

(i) The question also arises as to why it took so long for PW IO Attaullah to arrest the appellant i.e. over 3 hours after receiving the "secret information" especially as according to the evidence of PW Photo Khan the PS was only 2KM's away from the place of arrest (railway pattaack) which information had been given to him through the "secret information" and they immediately arrested



there in the mobile and arrested the appellant. Interestingly whilst PW Photo Khan says that the information was received whilst they were out on patrol PW IO Attaullah says that he received this "secret information" whilst they were at the PS. Despite the IO having the close location of the appellant instead of rushing to the spot from the PS he as per his own evidence left the PS and patrolled Kipro Nappa, Civil Hospital before finally coming to soldier rest house where they found the appellant. This long delay of over 3 hours in arresting the appellant from a place which was only 2 KM's away from the PS has gone completely unexplained and does not appeal to reason when it is considered that the appellant had allegedly been giving very serious threats about causing terrorist related activities in Mirpurkas City and the police were on high alert and may well have disappeared from where he was located as it was not his house or place of work and evaded arrest. In this respect reliance is placed on **Muhammad Asif v. The State** (2017 SCMR 486)

(j) It is also significant that on leaving the police station to follow up the "secret information" PW IO Attaullah by his own admission made no entry of his leaving the police station let alone the reason why. This omission alone could be fatal to the prosecution case. The significance of the absence of such departure entry was highlighted in the case of **Memon and 4 others v The State** (2016 PCr.LJ 1706) by reference to the case of **Long through Central Prison Hyderabad V State** (1999 P.CR.LJ 595) which was a Division Bench judgment of this Court and **Shaukat Ali V The State** (2004 YLR 356)

(k) With regard to the identity of the appellant this in our view has not been satisfactorily explained from the evidence. As mentioned above the only information that it was a person named Imran came from "secret information". This information gave the name of Imran and where to find him but there is no evidence that a description of his appearance was ever given. Thus, if PW Photo Khan and PW IO Attaullah had not seen Imran before how were they able to pick him out from a busy area such as railway pattach? And why did Imran remain in that area for 3 hours apparently loitering around especially as he had no reason to be there?

(l) the mashirnama of arrest and recovery does not contain the writing on the mobile phone of "I love you" which being a distinguishing feature ordinarily should not have been missed. Neither is PW IO Attalluah's alleged call to PW Photo Khan mentioned in the Mashirnama as proof that the phone was tested and found to be in working condition at the time of recovery.

(m) It is surprising that the appellant was arrested near the railway phatak since this is an area which has nothing to do with him bearing in mind that he does not work for the railways and was apparently not visiting any one or with any one at the time of his arrest but just apparently loitering around at 5pm on his own.

(n) The news paper articles were produced by the appellant at trial went unchallenged and indicates that such threatening calls were still being made to the police **after** the arrest of the appellant which is an indication that the police may have got the wrong man. This is also the plea which the appellant has taken throughout the trial and that the real culprit was one Kashif and his sister who PW IO Attaullah admits to interrogating the day earlier in the case. The gist of the news paper articles produced by the appellant before the trial court are set out below for ease of reference:

**"In daily Jang dated 03.11.2009** it is mentioned that police arrested one **Asif Ali** alongwith mobile phone who is accused for issuing threats to 15 police centre that they will cause bomb blast at important areas of the city. He informed the police that one of his friends has used his mobile and issued such threats to police for which he has no knowledge.

**In daily Kawish dated 04.11.2009** it is mentioned that police arrested one **Abdul Latif** S/o Abdul Karim Panhwar from Goth Karo Panhwar on the allegation that through mobile phone of his friend he called police and made threats that they will spread terror in the city.

**In daily Jurrat dated 03.11.2009** it is mentioned that threats of bomb blast at Madadgar Centre Murpurkhas and Peoples' Medical College Nawabshah. Police arrested one person namely **Asif Wijlo** R/o Garhor Shant and student of SAL College, who informed that his mobile phone was with his friend. There were also threats of bomb blast in Peoples' Medical College Nawabshah and Tando Allahyar.



(o) In his S.342 Statement the appellant has stated as under which is the stance which he has taken throughout the trial and cross examined the PW's on.

"I am not involved in this case. The police has falsely implicated me at the instance of police highup as many other persons were arrested after my arrest and let off malafidely. I produce Newspapers in which this fact was disclosed. These are, Daily Kawish dt 4.11.2009, Daily Jang dt 3.11.2009 and Daily Jurrat dt 3.11.2009. **The Sim do not pertains to me and had been foisted against me and I was arrested from my house.** I pray for justice." (bold added)

(p) The appellant brought two DW's who both as eye witnesses corroborated the fact that the appellant was arrested from his house on 27-10-2009 at around 12.30 (midnight) by Inspector Ayoub Dars (who by order dated 28-10-2009 was placed in charge of the Investigation team to find the person responsible for the threatening calls who was not called by the prosecution to give evidence) and nothing was recovered from him and that he was taken for investigation. This is also the line of the defense which the appellant took at trial. Admittedly one of these witnesses was his grandfather and the other a friend and are both interested witnesses. However both the key witnesses about the identity of the caller being the appellant are both interested witnesses both being police officers (PW Photo Khan and PW IO Attaullah) neither of whose evidence in our view is credible, trust worthy or confidence inspiring in respect of this aspect of the case and both of whom in our view were badly damaged during cross examination and should have, based on the facts and circumstances of this particular case, joined an independent Mushir at the time of the arrest of the appellant which would have given greater credibility to their evidence.

(q) As mentioned above in this paragraph 17 there appears to be numerous important contradictions between the evidence of the two key police PW's (Photo Khan and IO Attaullah) regarding the arrest and recovery of the appellant and the circumstances leading up to it. It is true that minor contradictions will not be fatal to the prosecution case but the numerous important contradictions in the evidence of the two key prosecution witnesses regarding the arrest and recovery of and from the appellant (PW Photo Khan and PW IO Attaullah) whose evidence



we have already found to be neither credible, trustworthy or confidence inspiring) in our view are to such an extent when read in the context of correctly identifying the caller of the threats that when taken together amount to major contradictions which evidence the appellant cannot in our view be safely convicted on without strong, credible and reliable corroborative evidence which we find to be lacking in this case in terms of the identity of the caller of the threats to police 15. In this respect reliance is placed on **Zakir Khan & others v. The State** (1995 SCMR 1793).

18. It may be that if only one or two of the factors in paragraph 17 were present then this would not have been fatal to the prosecution case however when all such factors are taken as a whole and the evidence is read in its entirety we reach the inescapable conclusion that for the reasons mentioned in paragraph 17 above we are of the considered view that the prosecution has not been able to prove that the appellant was the person who made the threats to police 15 by telephone.

19. Admittedly, an unwitnessed case such as this is difficult to prove, but the cardinal principles of criminal justice cannot be sacrificed at the alter of expediency simply because we are passing through difficult times in terms of acts of terrorism against the State. The prosecution has the obligation to prove its case beyond a reasonable doubt and the benefit of the doubt must go to the accused as of right and not as of concession. In this respect reference is made to the case of **Tariq Pervez v. The State** (1995 SCMR 1345). Furthermore, it was recently held by the Hon'ble Supreme Court in the case of **Hashim Qasim V State** (Criminal Appeals No.115 and 116 of 2013) dated 12<sup>th</sup> April 2017 in respect of the benefit of doubt at para 20 by reference to the case of **Riaz Masih @ Mithoo v. The State** (NLR 1995 CrI. 694) that even a single doubt, if found reasonable, would entitle the accused person to acquittal and not a combination of several doubts is bedrock principle of justice.

20. In this case as per paragraph 17 above we have grave doubts about some elements of the prosecution case and as such the benefit of such doubts must go to the appellant. In essence prima facie it appears to us that such threatening calls were made and received by the police 15 but not by the appellant. Instead, it appears prima facie



from the evidence that the police may have, in order to show their efficiency in light of the above referred order dated 28-10-2009 from SP Mirpurkhas whereby the police were tasked with catching the culprit within a given deadline and were subject to submitting daily progress reports to the said SP, and to allay public fears about a potential terrorist attack in Mirpurkhas City as such rumors had been flying around in the public domain, arrested the appellant and most probably foisted the SIM and phone on him.

21. By way of completeness since the appellant has not been found to be the person who made the threats to police 15 his conviction under the ATA in the impugned judgment will automatically fall along with his conviction under S.507 PPC.

22. Thus, we find that the prosecution has failed to prove its case beyond a reasonable doubt against the appellant and that the appellant is entitled to the benefit of the doubt and as such set aside the impugned judgment, up hold this appeal and acquit the appellant.

23. These are the reasons for our short order of even date.

Hyderabad:

Dated: 04-05-2017