HIGH COURT OF SINDH AT KARACHI

Special Criminal Anti-TerrorismAppeal No.76 2020

Present: **Mr. Justice Abdul Maalik Gaddi**
Justice Mrs. RashidaAsad

Appellant	:	Fazal Wahab @ Kaki son of Bunier Gul, Through Mr. Tahir Rahim, Advocate.
Respondent	:	The State through Mr. Abdullah Rajput, Deputy Prosecutor General, Sindh along With Complainant ASI Asadullah Gopang.
Date of hearing	:	20.04.2020
Date of Judgment	:	20.04.2020

J U D G M E N T

Abdul MaalikGaddi, J.– Appellant namely, Fazal Wahab @ Kaki was tried by the learned Judge, Anti-Terrorism Court No.X, Karachi, under Section 353/324, PPC read with Section 6(2)(m)(n), 7(1)(h) of Anti-Terrorism Act, 1997, in Special Case No.251 of 2019 (re. The State v. Fazal Wahab @ Kaki), arising out of Crime No.83 of 2019 registered at police station Steel Town, Karachi. By judgment dated 10.03.2020, the appellant was convicted under Section 7(h) of Anti-Terrorism Act, 1997 read with Section 353/324, PPC, and sentenced him to suffer R.I. for five (5) years with fine of Rs.50,000/- and in case of default in payment of such fine, it was further ordered that appellant shall suffer further R.I for six (6) months more. However, benefit of Section 382-B Cr.P.C. was also extended to the appellant.

2. Brief facts of the prosecution case as per FIR are that on 11.03.2019 in between 0330 to 0410 hours, complainant ASI Asadullah Gopang registered FIR No.83 of 2019 under Section 353/324/34, PPC read with Section 7, ATA, 1997 and FIRs bearing No.84, 85 and 86 of 2019 under Section 23(i)(a) of Sindh Arms Act,

2013 at police station Steel Town, Karachi, wherein he stated that on 10.03.2019, he was on patrolling duty of the area, along with his subordinate staff in police mobile-III.During patrolling at about 0040 hours, when police party reached near Bank Al-Habib, Phase-I, Gulshan-e-Hadeed, Service Road, Karachi, they saw “four” suspicious persons on “two” motorcycles, as such, they signaled them to stop, for checking purpose, but instead of stopping, the motorcyclists started direct firing upon them with intention to commit their intentional murder and deterred them from discharging their lawful duties and official functions and started running away from the crime scene. As such, police officials chased them and while chasing they reached at Ayesha Hospital, katcha way at about 0145 hours and finally police party succeeded to apprehended “three” culprits on spot, while their “fourth” accomplice managed to flee away from the crime scene on his motorcycle. Upon inquiry, arrested accused disclosed their names as (i) Liaquat son of Muhammad Younus, (ii) Abrar Ahmed son of Riaz Ahmed and (iii) Adeel Haider son of Syed Razi Haider and from their respective possession, police recovered 30 bore pistol along with magazine having two rounds, one 32 bore revolver containing one round loaded in magazine and one 30 bore pistol without magazine having one round loaded in the chamber along with their CNICs, mobile phones and cash amount, descriptions of which are mentioned in the FIR.The apprehended persons also disclosed the name of present appellant.

3. It reveals from the record that accused (i)Liaquat son of Muhammad Younus, (ii) Abrar Ahmed son of Riaz Ahmed and (iii) Adeel Haider son of Syed Razi Haider, who were allegedly arrested from the spot along with their respective weapons, have been

acquitted by the trial Court in the said case vide judgment dated 25.05.2019 and the said judgment has not been assailed by the prosecution before appellate forum, as such, the said judgment has attained finality.

4. It also reveals from the record that present appellant was arrested in this case on 29.09.2019 when he was already under arrest in Crime No.85 of 2019 of police station Bin Qasim.

5. On perusal of record, it appears that charge against present appellant was framed on 06.02.2020 at Ex.3, to which he pleaded not guilty and claimed to be tried vide his plea available on record at Ex.3/A.

6. At trial prosecution had examined (i)PW-1 ASI Asadullah Gopang at Ex.4, who produced roznamcha entry No.22 at Ex.5/A, memo of arrest and recovery at Ex.5/B, FIRs including all the relevant roznamcha entries at Ex.5/C to Ex.5/J respectively, memo of inspection of place of wardaat at Ex.5/K; (ii) PW-2 HC Nisar Ahmed at Ex.5; (iii) PW-3 PC Muhammad Afzal at Ex.6; (iv) PW-4/IO PI Agha Salahuddin at Ex.7, who produced CRO showing involvement of appellant in some other criminal cases at Ex.7/A; and finally, (v) PI Abdul Qadir at Ex.8. These witnesses were cross examined by the Counsel for appellant and thereafter, learned APG for the State closed the prosecution side vide statement at Ex.9.

7. Statement of appellant was also examined under Section 342, Cr.P.C. at Ex.10 in which he denied all the allegations as leveled by the prosecution against him by claiming himself to be falsely implicated in this case and prayed for justice. However, neither

appellant examined himself on oath nor produced any evidence in his defence.

8. Mr. Tahir Rahim, learned Counsel for appellant contended that appellant is innocent and has been falsely implicated in this case; that the judgment passed by the trial Court is against the law and on facts; that no incriminating material/weapon was recovered from the possession of appellant and police managed to involve him in the instant case on the basis of statement of co-accused, which is not admissible under the law even otherwise, said co-accused were also acquitted by the trial Court vide judgment dated 25.05.2019 on same set of evidence/witnesses and said judgment has not been challenged by the prosecution before any appellate forum, as such, according to him, the said judgment has attained finality. During the course of arguments, he has taken to us towards the evidence already produced by the prosecution in trial Court and has made an attempt to show that the evidence so produced by the prosecution is contradictory to each other on material particulars of the case. Therefore, no reliance can be placed on contradictory evidence for maintaining the conviction; that present appellant has been convicted by the trial Court merely on the basis of his absconsion and his involvement in other criminal cases, which according to him, no ground for conviction; therefore, he prayed for acquittal of the appellant from the above charge by allowing this appeal.

9. Conversely, Mr. Abdullah Rajput, learned Deputy Prosecutor General, Sindhwhile opposing the aforesaid contentions submitted that the prosecution has fully established its case against the appellant beyond reasonable doubt by producing consistent/convincing and reliable evidence and the impugned

conviction and sentenced awarded to the appellant is the result of proper appreciation of evidence brought on record, which needs no interference. Lastly, he prayed that appeal may be dismissed.

10. We have heard the learned counsel for the parties at a considerable length and have perused the evidence and documents available on record with their able assistance.

11. After hearing the parties, we have come to the conclusion that the prosecution has failed to prove its case against the appellant for the reasons that all the pieces of evidence produced by prosecution in this case before trial Court are weak in nature. It is noted that alleged incident took place when police party was on patrolling duty in the area and during patrolling when they reached at Bank Al-Habib, Phase-I, Gulshan-e-Hadeed, Service Road, Karachi, the present appellant along with his companion (named in FIR) after seeing the police party started firing upon them and in retaliation, police also fired upon them with sophisticated weapons, which was continued for some time, but it is surprising to note that no one has sustained any bullet injury during this encounter from either side, even not a single bullet hit to the police mobile; however, during this encounter co-accused namely, (i)Liaquat, (ii) Abrar Ahmed and (iii) Adeel Haider have been arrested by the police and during their personal search, recovery was also effected from them as stated in FIR and memo of arrest and recovery, but during trial these accused have been acquitted by the trial Court vide judgment dated 25.05.2019, whereas, the case of the present appellant was kept on dormant file. It is also noted that the said judgment has not been assailed by the prosecution before appellate Court; thus, the said judgment has attained finality.

12. The allegation against the appellant is that he was also present along with above named acquitted accused and fired upon police party and thereafter, fled away from the spot. We have noticed that when the police party was equipped with sophisticated weapons, how the present appellant ran away from the spot. Nothing on record that police party has made any efforts to arrest the present appellant from the place of incident. Moreover, the present appellant has been named in this case by the acquitted accused, therefore, under the law, the statement of co-accused cannot be used as evidence against other accused in view of Article 38 of the Qanun-e-Shahadat Order, 1984. On these grounds, false implication of the appellant in this case with due deliberation cannot be ruled out.

13. We have also noticed that whole prosecution case revolves around the evidence of police officials. No doubt, the evidence of police officials is as good as any other citizen, however, in absence of private witnesses though the incident took place in a populated area, their evidence must be scrutinized with a greater degree of circumspection for the reason that in a society with the level of moral values that we unfortunately have, a subordinate is seldom expected to tell the truth in deviation of express or implied instructions of his superior. Here in this case, the present appellant has not been arrested on spot, however, he has been arrested on 29.09.2019, when he was already under arrest in some other crime. Admittedly, nothing was recovered from the appellant in this case, therefore, only memo of arrest in this case is on record, which was allegedly prepared in presence of PC Nazar Ahmed and PC Muhammad Afzal. No independent person has been cited in this case for memo of arrest of the appellant, therefore, the evidence of PC Nazar Ahmed and PC Muhammad Afzal could not be safely relied upon for maintaining the

conviction of the appellant. We have also perused and considered the evidence of remaining witnesses on record, but did not find to be trustworthy and confidence inspiring which too contradictory with each other on material particulars of the case.

14. As already observed above that co-accused named in the FIR have been acquitted by the trial Court on the basis of almost on same set of evidence/witnesses, but convicted the appellant without assigning any valid reason, therefore, under the circumstances, we are of the considered opinion that when prosecution witnesses if disbelieved for co-accused persons, could not be relied upon with regard to the accused/present appellant, unless they were corroborated by evidence which came from unimpeachable independent source which is lacking in this case. In this regard, we are supported with the case of ***Muhammad Asif v. The State*** reported in ***2017 SCMR 486***.

15. It has vehemently been argued by the learned Deputy Prosecutor General, Sindh that the appellant has remained fugitive from law for about six (6) months in this case from trial Court, whereas, he was arrested on 29.09.2019, which fact was duly supported by the prosecution witnesses and defence Counsel failed to shatter their testimonies, as such, he was of the view that appellant is not entitled to any relief. We have, however, not felt persuaded to agree with the learned Deputy Prosecutor General, Sindh for the reasons that no doubt the accused remained absconder for six (6) months, however, surprisingly, no question was put to him in this regard during his statement recorded under Section 342, Cr.P.C., but has been convicted on the basis of his absconsion, which appears to be against the law, as the appellant has not been heard on this point.

Apart from this, admittedly, he was under arrest in some other case, therefore, it was not possible for him to appear before the trial Court to face trial as the situation was beyond his control, as such, under the circumstances, his absence before the trial Court was not deliberate or intentional, but the Presiding Officer of the learned trial Court has utterly failed to consider all these facts in its true perspective, yet the appellant was convicted on his absconsion. Be that as it may, there is also plethora of authorities of Superior Courts on this point that mere abscondence of accused is not a conclusive proof of the guilt of the accused. The value of abscondence depend upon the facts of each case and abscondence alone cannot take place of guilt unless and until the case is otherwise proved on the basis of cogent and reliable evidence. No reliable or corroborative evidence on record to convict the appellant in this case. The accused persons generally disappear due to fear of police or because of the feeling of the guilt or they do not know about the pendency of the case against them, therefore, in view of the dictum handed down in ***PLD 2008 SC 298 [Rahimullah Jan v. Kashif and others]***, wherein it has been held that mere abscondence would not be taken as a conclusive proof of guilt of accused. If any other authority in respect of abscondence is needed, reliance can also be placed upon ***1999 AC 564 [Zaley Mir v. The State],*** wherein long abscondence of four (4) years of the accused was not taken as a ground for conviction of accused and accordingly the conviction was set-aside.

16. Learned Deputy Prosecutor General, Sindh also submits that this appellant is involved in other criminal cases, therefore, he is not entitled for any relief and if he would release, certainly he would repeat the offence. We are again not impressed with the argument of

learned Deputy Prosecutor General, Sindh in this regard for the reasons that in our humble opinion prior to conviction, it is presumed that every accused is innocent. Insofar as the case in hand is concerned, despite repeated queries by this Court, learned Deputy Prosecutor General, Sindh has failed to establish that the appellant was ever convicted in any case registered against him, therefore, he cannot be refused relief if otherwise under the law he becomes entitled for such relief. In this respect, we are fortified by the case of ***Jafar @ Jafri v. The State*** reported in ***2012 SCMR 606***, wherein the Hon'ble Supreme Court has held as under;

> "8. We have heard the learned Counsel for the parties and have also gone through the contents of the compromise. As at present no sufficient evidence is available on record to conclude that the accused/appellant is habitual offender, coupled with the fact that although another F.I.R., referred to by the learned Additional P.G., has been registered against him but it, itself is not sufficient to prove the appellant to be so, unless it is proved/established that he has been convicted in the said F.I.R. and the said conviction has been finally maintained by the superior Courts. Therefore, we have decided to dispose of this case in terms of compromise."

17. All discussed above leads us to an irresistible conclusion that the prosecution remained fail to prove the case against the appellant beyond the shadow of reasonable doubt while there is no cavil to the proposition that responsibility to prove its case is squarely rest upon the shoulders of the prosecution that has not been discharged successfully in this case and it is settled law that benefit of each and every doubt is to be extended to the accused and that only a single reasonable doubt qua the guilty of the accused is sufficient to acquit him of the charge. Even as per saying of the Holy Prophet (P.B.U.H.) the mistake in releasing a criminal is better than punishing an innocent person. Same principle was also followed by the Hon'ble Supreme Court of Pakistan in the case of ***Ayub Masih v. The State***

reported in ***PLD 2002 SC 1048***, wherein, at page 1056, it was observed as under:-

> *"It will not be out of place to mention here that this rule occupies a pivotal place in the Islamic Law and is enforced rigorously in view of the saying of the Holy Prophet (P.B.U.H.) that the "mistake of Qazi (Judge) in releasing a criminal is better than his mistake in punishing an innocent."*

In view of the above, we accept/allow this Special Criminal Anti-Terrorism Appeal No.76 of 2020, set-aside the conviction and sentence recorded by the learned trial Court through impugned judgment and acquit the appellant Fazal Wahab @ Kaki son of Bunier Gul from the above charge. He is in custody, therefore, jail authorities are directed to release him forthwith, if he is not required in any other case.

18. This appeal was heard and allowed by us through our short order after hearing the arguments of learned Counsel for the parties on 20.04.2020 and these are the detailed reasons thereof.

JUDGE

JUDGE

*Faizan A. Rathore/PA**