

THE HIGH COURT OF SINDH AT KARACHI

Special Criminal Anti-Terrorism Appeal No.348 of 2019

**Mr. Justice Abdul Maalik Gaddi
Justice Mrs. Rashida Asad**

Appellant : Nasarullah Khan son of Nazir Ahmed through Mr. Muhammad Farooq, Advocate.

Respondent : The State through Mr. Abdullah Rajput, Deputy Prosecutor General Sindh.

Date of hearing : 08.04.2020

Date of Order : 08.04.2020

JUDGMENT

Abdul Maalik Gaddi, J.– Through this appeal, the appellant has assailed the legality and propriety of the judgment dated 26.12.2019 passed by the learned Judge, Anti-Terrorism Court No.VI, Karachi, in Special Case No.83/2018 (Re: The State v. Nasarullah Khan), arising out of Crime No.145/2018 registered under Section 11-W(i) & 11-F(i) of ATA, 1997 at police station CTD/INV Karachi, whereby the learned trial Court after full dressed trial, convicted and sentenced the appellant as stated in point No.3 of the impugned judgment. For the sake of convenience, it would be proper and relevant to reproduce the findings on the said point, which reads as under:-

“Point No.3

Upshot of the discussion is that prosecution has proved its case beyond the reasonable shadow of doubt as such the present accused has been proved to be guilty of the offence being facilitator of Khalid Makashi a terrorist of proscribed organization Al-Quaida and he had also incited hatred, gave projection to person, proscribed organization for committing terrorist activities, hence, I hereby convict and sentences accused Nasarullah Khan s/o Nazir Ahmed u/s 265(H)(ii) for the offence under section 11-F(i) and 11-W(i) of Anti-Terrorism Act 1997, as under:-

- 1) *Accused Nasarullah Khan is convicted u/s 11-F(i) of ATA, 1997 and he is sentenced to*

undergo for R.I. 06 months and with fine of Rs.5,000/- and in case of default in payment of the fine then he shall suffer a Simple Imprisonment of another 15 days.

- 2) *Accused Nasarullah Khan is also convicted u/s 11-W(i) of ATA, 1997, r/w section 7(i) of ATA, 1997, and he is sentenced to undergo for R.I 05 years and with fine of Rs.10,000/- and in case of default in payment of the fine then he shall suffer a Simple Imprisonment of another 01 month.*

The benefit of Section 382-B Cr.P.C. shall be extended to the above named accused and all the sentences awarded shall run concurrently.”

2. Concisely facts of the case are that on 11.11.2018, complainant SI Muhammad Asim, who was on patrolling duty received spy information about the presence of the appellant/ accused near Holy Family Hospital, Afridi Shaheed Road, Soldier Bazaar No.1, Karachi. He was also suspected of possessing inciting material against Pakistan and was spreading religious hatred. On receipt of such information, police party reached at the pointed place and apprehended a person having black colored bag from his hand, who on inquiry disclosed his name as Nasarullah Khan. The bag found in his possession contained four magazines of Nawa-e-Afghan Jihad, one book titled Rahe Jihad and some other literature, the said SI prepared such memo of arrest and recovery at the spot and brought the accused along with recovered property at police station, where he lodged FIR against the appellant/ accused.

3. After completing the investigation, challan against appellant was submitted in the trial Court and the Presiding Officer of the learned trial Court after completing all legal formalities framed the charge against the appellant at Ex.3 to which he pleaded not guilty and claimed to be tried vide his plea available on record at Ex.4.

4. At the trial, prosecution examined three (03) witnesses. PW-01 SI Muhammad Asim at Ex.05, he has produced departure entry at Ex.06, the memo of arrest and recovery at Ex.07, statement u/s 154 CrPC at Ex.08, entry No.14 at Ex.09 and memo of inspection of the place of incident at Ex.10. PW-02, HC Mehboob Hussain at Ex.11. Finally, PW-03 Inspector Ali Haider at Ex.12, he has produced entry No.17, entry No.20, FIR bearing No.145/2018 and road certificate at Ex.13, 14, 15 and 16, respectively. Thereafter, vide statement at Ex.18 the APG for the State closed the evidence side of the prosecution.

5. Statement of appellant/ accused as required under Section 342 CrPC was recorded at Ex.19, in which he has totally denied the allegations leveled by the prosecution on him. The appellant has further stated in his statement that all PWs have deposed falsely in favour of the prosecution. He has further stated that nothing was recovered from him and he is innocent and was arrested in between the night of 9th and 10th November 2018 by officials of law enforcement agencies in civil dress from his house. They took away the bag of his daughter which had her assignment paper and subsequently showed it to had been recovered from him. Finally, he has prayed for justice. Appellant, however, in support of his case has produced DW-01 Ghulam Fatima, her wife, at Ex.21, she deposed that her husband was picked up by some unknown persons from his house in between the night of 09/10.11.2018 as well as DW-02 Hamid-ur-Rehman Awan (one of Journalist) at Ex.22, also deposed in his evidence that on 10.11.2018, he being Secretary of Karachi Union of Journalists called an urgent meeting at Karachi Press Club for recovery of appellant one day prior to

alleged incident. Appellant, however, did not record his statement on oath.

6. After conclusion of trial, the appellant was convicted and sentenced as mentioned above by the learned trial Court, hence the instant appeal.

7. Mr. Muhammad Farooq, learned counsel for appellant has argued that the impugned judgment passed by the learned trial Court is against the law and on facts and that the prosecution story is false and concocted one and no such incident of recovery of proscribed books or literatures ever took place as alleged, but the learned trial Court did not consider these aspects of the case in this true perspective; that in fact appellant, who is a senior Journalist, had been taken away by the law enforcement agency from his house in between the night of 09/10.11.2018 and subsequently handed over to CTD, who falsely involved him in this case; that news of arrest of appellant was published in the Washington Post and Daily Mail, UK, so also, the Karachi Press Club also issued a press release regarding illegal arrest of the accused at the hands of law enforcement agency prior to the date of his alleged arrest shown in the FIR. In this regard he draws attention of this Court towards the photocopies of the Press Release issued by Karachi Press Club as well as newspaper clipping appearing in the said newspaper and was of the view that appellant was picked up by unknown persons prior to alleged incident. Therefore, according to him, false implication of the appellant in this case with due deliberation and consultation cannot be ruled out; that there is no specific allegation against the appellant/ accused nor any public witness was associated at the

time of alleged arrest of the appellant from the busiest place of Karachi viz. M.A. Jinnah Road in front of Holy Family Hospital; that investigating Officer has also not collected any evidence against the appellant being member or supporter of any proscribed organization or persons nor had he published or glorified any proscribed organization in his publication, as he is Journalist by profession. Per learned counsel the appellant has no criminal record and there is no direct evidence against him; that there are major flaws and dents in the prosecution case, as according to him neither the appellant is writer, author, publisher or printer of the alleged books/ magazines or he was spreading the hatred material among the public; that appellant is a lover of Pakistan. Therefore, he prayed that this appeal may be allowed and the appellant may be acquitted from the charge.

8. Conversely, Mr. Abdullah Rajput, learned Deputy Prosecutor General Sindh has supported the impugned judgment by arguing that impugned judgment passed by the learned Presiding Officer of the trial Court is perfect in law and on facts and submits that after registration of FIR, JIT was constituted, which thoroughly interrogated the appellant and after gathering entire information from all the sources, the appellant was declared "black"; that the appellant is well connected to the commission of crime being facilitator of Khalid Makashi, a terrorist of proscribed organization Al-Quaida and the four magazines "Nawa-e-Afghan Jihad" one book in the name of "Rah-e-Jihad", one book in the name of "Punjabi Talban" and other literature had been recovered from the appellant and this act of appellant has incited hatred and projected persons and proscribed organization to commit terrorist activities; that all the prosecution witnesses have supported the prosecution

case and that the appellant has not brought on record any enmity with the complainant or prosecution witnesses, therefore, according to him, this appeal merits no consideration and the same may be dismissed.

9. We have heard the learned counsel for the parties at a considerable length and perused the evidence and documents so made available before us.

10. It is noted that the whole prosecution case revolves around the evidence of three witnesses i.e. (i) complainant ASI Muhammad Asim; (ii) HC Mehboob Hussain, mashir of arrest and recovery of appellant and (iii) Inspector Ali Haider who conducted the investigation of the case. Their evidence and documents so brought on record have been perused and considered by us with due care. This case is based upon spy information with regard to availability of the appellant at Holy Family Hospital by containing different types of literatures against Pakistan Armed Forces and Government of Pakistan in his bag. On such information, police party reached at pointed place and apprehended the present appellant and recovered black color bag in his hand and on opening the said bag found literature in shape of eleven books, which containing incite hatred material. Such memo was prepared on spot and accused was arrested in presence of police mashirs, but it is noted that complainant in his cross examination has admitted that the place of arrest and recovery was populated and congested area, but despite this fact the complainant did not bother to associate any independent person from the said area to witness the event. For the sake of convenience, it would be proper

to reproduce the relevant portion of the cross examination of the complainant, which reads as under:-

"It is a fact that place of arrest was situated in the thickly populated and congested area, which also remains busy at relevant time when the accused was arrested. It is a fact that there were security guards of Holy Family Hospital, but they were inside the hospital. We did not see any person while passing through on foot as vehicles were passing and I did not ask any person on those vehicles to act as witness of such recovery."

No doubt the evidence of the police officials is as good as any other citizen, however, their evidence must be scrutinized with a greater degree of circumspection for the reasons that recovery mashirs are subordinate to complainant and subordinate official is seldom expected to tell truth in deviation of express or implied instructions of his superiors. Here in this case, admittedly, the private persons were available at the place of incident, but they were not cited as a witness of recovery. No explanation in this regard has been furnished by the prosecution and so also no efforts were made by the complainant to secure the independent witness. It is by now well established principle of law that despite of availability of independent/neutral witnesses on spot, non examination of such witnesses draws an inference in view of Article 129(g) of Qanun-e-Shahadat Order, 1984, that if they had been examined, they would not have supported the case of prosecution, therefore, non compliance of provision of Section 103, Cr.P.C. creates doubt in the prosecution story. In this regard, we are supported with the cases of ***Mushtaq Ahmed v. The State*** reported in **PLD 1996 SC 574** and ***The State through Advocate General, Sindh v. Bashir and others*** reported in **PLD 1997 SC 408**.

11. The allegations against the appellant are that he being the facilitator of Khalid Makashi a terrorist of proscribed organization

'Al-Qaeda' having possession of a black color bag containing four magazines "Nawa-e-Afghan Jihad", one book in the name of "Rah-e-Jihad", one book in the name of "Punjabi Talban" and other literature at the time of his arrest, but on perusal of record, no convincing evidence is available on record to show that the appellant has any nexus with the terrorist of proscribed organizations. Nothing on record that alleged material so collected by the recovery officer was authored, printed or published by the appellant nor even any material is placed on record to show that accused was member of any proscribed organization. No evidence on record that the appellant was spreading these material among the peoples. There is only oral assertion of the prosecution witnesses which has not been supported by any independent witness. Merely asserting that appellant has connection with proscribed organizations is not enough to connect him in this case. The appellant has denied allegations as leveled against him by the prosecution in his statement recorded under Section 342, Cr.P.C. and submitted that he was picked up by some unknown persons from his house and foisted hatred material against him. In this regard, the appellant has produced two witnesses namely, Ghulam Fatima (wife of appellant) as well as one Hamid-ur-Rehman who is said to be Journalist, supported the case of appellant. These witnesses were though cross examined before the trial Court, but they did not shake and the learned trial Court did not take into consideration this aspect of the case in its true perspective.

12. The evidence so brought on record by the prosecution appears to be stereotyped. Investigating officer of the case in his evidence has deposed that case property was not handed over to him in sealed condition. He also admitted that none of the

book/journal recovered from the accused, the complainant put his signature and the alleged material pertains to year 2011-2012, but this fact has also been ignored by the learned trial Court.

13. It is pertinent to mention here that on perusal of record available before us, the alleged case property viz. four magazines of "Nawa-e-Afghan Jihad", one book in the name of "Rah-e-Jihad", and one book in the name of "Punjabi Talban" along with other literatures allegedly recovered from the possession of the appellant were not produced/tendered or exhibited in the evidence by the prosecution to prove that the alleged material was infact hatred. Not only this, the alleged recovered material is also not available in the R&Ps of the trial Court. When confronted this fact to learned Deputy Prosecutor General, Sindh for reply, he has no satisfactory answer with him.

14. It needs not be said that it is obligatory upon the prosecution to produce/tender the alleged recovered material from the appellant before the Court during trial as initial burden lies upon the prosecution. In absence thereof, it could not be held that the appellant was carrying alleged recovered material with his person and the same was recovered from him. It is settled principle of law that non production of case property in evidence before trial Court is fatal to prosecution case and destroys its very foundation.

15. It has vehemently been argued by the learned Deputy Prosecutor General, Sindh that in this matter Joint Investigation Team (J.I.T) was also constituted to probe the matter wherein appellant was found "black", therefore, conviction awarded to the appellant may be maintained. We have, however, not felt persuaded to agree with the learned Deputy Prosecutor General,

Sindh for the reasons that the said J.I.T report was neither produced in evidence nor brought on record and in absence thereof, no reliance can be placed on it. Even otherwise, J.I.T report has no evidentiary value, unless the material on the basis of which the said report was prepared is produced and proved during trial.

16. As regards to the investigation conducted by the investigation officer in the case in hand, record transpires that investigation officer not only failed to dig out the source of publication of alleged recovered material, but also failed to find out from where the appellant obtained the alleged recovered material. Needless to say that investigating officer was duty bound to collect all relevant evidence pertaining to allegation of crime and to dig out the truth enabling and facilitating the Court to administer justice, however, it appears that investigating officer has failed to discharge his duties in the manner as provided under the law. It is also admitted by investigating officer of the case in his cross examination that the appellant having no previous criminal record of any kind. Nothing also on record that appellant was remained indulge in such type of activities in past.

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 [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.348 of 2019, set-aside the conviction and sentence recorded by the learned trial Court through impugned judgment and acquit the appellant Nasarullah Khan son of Nazir Ahmed from the above charge. He is in custody, therefore, jail authorities are directed to release the appellant forthwith, if he is not required in any other case.

18. This appeal was heard and allowed by us after hearing the arguments of learned Counsel for the parties in open Court on 08.04.2020 and these are the detailed reasons thereof.

JUDGE

JUDGE

*Faizan A. Rathore/PA**