

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

Mr. Justice Jamal Khan Mandokhail
Mr. Justice Syed Hasan Azhar Rizvi
Mr. Justice Naeem Akhtar Afghan

**Criminal Petitions No.351-352, 438, 50-K, 76-77-K,
92-K and 94-K of 2022**

(Against the judgment dated 25.03.2022 of the High Court of Sindh, Karachi
passed in ATAs No. 297, 296, 291, 282, 294, 288, 304/2019)

Faheem Anwar Memon	(in CrI.P.No.351)	
Salik Ayaz	(in CrI.P.No.352)	
Ghulam Murtaza Shaikh	(in CrI.P.No.438)	
Abdul Rehman Sheikh	(in CrI.P.No.50-K)	
Naveed Khan	(in CrI.P.No.76-K)	
Saeed Ahmed	(in CrI.P.No.77-K)	
Faroosh Muhammad	(in CrI.P.No.92-K)	
Abdul Ghafoor	(in CrI.P.No.94-K)	...Petitioner(s)

Versus

The State through Prosecutor General, Sindh and others (in CrI.Ps.No.351-352, 438, 50-K, 76-K, 77-K, 92-K, 94-K)	...Respondent(s)
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For the Petitioner(s) (in CrI. Ps. No.351-352)	: Mr. Muhammad Farooq, ASC along with petitioners in person (via video link from Karachi)
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For the Petitioner(s) (in CrI. P No.438)	: Mr. Zulfiqar Khalid Maluka, ASC along with petitioner in person
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For the Petitioner(s) (in CrI. P No.50-K)	: Mr. Amir Mansoob Qureshi, ASC along with petitioner in person
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For the Petitioner(s) (in CrI. Ps No.76-77-K)	: Mr. Muhammad Naeem Memon, ASC along with petitioners in person (via video link from Karachi)
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Petitioner (in CrI. P No.92-K)	: Mr. Ghulam Rasool Mangi, AOR/ASC a/w Petitioner in person (via video link from Karachi)
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For the Petitioner(s) (in CrI.P.No.94-K)	: Mr. Mazhar Ali B. Chohan, AOR Mr. M. Ashraf Samoo, ASC a/w petitioner in person (via video link from Karachi)
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For the State:	: Mr. Saleem Akhtar Buriro, Addl.P.G., Sindh
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Date of Hearing	: 21.05.2024
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J U D G M E N T

NAEEM AKHTAR AFGHAN, J. On the basis of letter dated 14.06.2017 written by Ashraf Ali Nizamani, Deputy Inspector General of Prisons, Karachi Region, FIR No.149 of 2017 was registered on 14.06.2017 with Police Station (**PS**) New Town, Karachi u/s 223/224/225/225-A/114/216/34 PPC r/w section 7 of the Anti-Terrorism Act, 1997 (**ATA 1997**) against the petitioners Ghulam Murtaza Sheikh (Superintendent Prisons), Faheem Anwar Memon (Deputy Superintendent Prisons), Abdul Rehman Sheikh (Assistant Superintendent Prisons), Nawab Ali Senior Prisons Constable (**SPC**), Atta Muhammad Prisons Constable (**PC**), Faroosh Muhammad ASI Prisons, Muhammad Amir PC, Abdul Ghafoor PC, Saeed Ahmed PC, Muhammad Sajjad PC, Muhammad Taghyal Mehar PC, Nadir Hussain PC, Sheikh Muhammad Mumtaz alias Firoon alias Sher Khana alias Shehzad alias Bhai son of Sheikh Muhammad Muslim alias Sheikh Muhammad Aslam alias Muhammad Saleem under trial prisoner (**UTP**) and Muhammad Ahmed alias Munna UTP (belonging to defunct Lashkar e Jhangwi and facing trial before Anti-Terrorism Court in different FIRs/charges for target killings of Police Personnel, Ulema and Doctors belonging to shia community) who had escaped from judicial complex adjacent to Central Prison Karachi.

2. During investigation Naveed Ahmed Khan (Assistant Superintendent Prisons), Salik Ayaz (Assistant Superintendent Prisons), Rafique Ahmed Channa (Head Clerk/Tower Incharge), Yasir Ali (Production Clerk ATC), Muhammad Shafique (private person), Bilawal Hussain Abbasi (private person), Azhar-ud-Din (private person), Zubair Ayub Khan (private person) and Mst. Sher Bano (private person) were also arrayed as co-accused; two saw blades, two pliers, four shaving razors, two small scissors, two handkerchiefs, hair of head and beard were also recovered from washroom of an ATC Court.

3. On completion of investigation, interim as well as supplementary reports under section 173 Cr.P.C. were submitted whereafter the trial proceedings commenced before the Anti-Terrorism Court No.XIX, Karachi (**the Trial Court**).

4. During the trial proceedings, accused Nawab Ali SPC passed away on 09.10.2017. On conclusion of the trial proceedings, while acquitting accused Muhammad Shafique, all the remaining accused (facing trial)

were awarded conviction and sentence as follows by the Trial Court vide judgment dated 12.10.2019:

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|---|--|---|
| 1 | <i>Accused persons are convicted u/s 265-H(ii) Cr.P.C. for committing offence u/s 223, PPC</i> | <i>to suffer S.I. for two (02) years and fine of Rs.2000/- each and in case of default of payment of fine, they shall suffer S.I. for one month more.</i> |
| 2 | <i>Accused persons are convicted u/s 265-H(ii) Cr.P.C. for committing offence u/s 225-A, PPC</i> | <i>to suffer S.I. for two (02) years and fine of Rs.2000/- each and in case of default of payment of fine, they shall suffer S.I. for one month more.</i> |
| 3 | <i>Accused persons are convicted for committing offence 7(g) of ATA, 1997.</i> | <i>to suffer S.I. for two (02) years and fine of Rs.2000/- each and in case of default of payment of fine, they shall suffer S.I. for one month more.</i> |

All the above sentences were ordered to run concurrently with benefit of section 382-B Cr.P.C. The case file was kept in dormant by the Trial Court till arrest of the two escapee UTPs and the absconding accused.

5. The convicts challenged their conviction and sentence by filing appeals before High Court of Sindh, Karachi (**the Appellate Court**).

The appeals filed by the convicts Rafiq Ahmed Channa Tower Incharge, Yasir Ali Production Clerk ATC, Nadir Hussain PC, Muhammad Sajjad PC, Muhammad Taghyal Mehar PC and Atta Muhammad PC were accepted and they were acquitted of the charge by the Appellate Court vide common judgment dated 25.03.2022 which has not been challenged by the State.

6. While maintaining the conviction and sentence of the convicts Ghulam Murtaza Sheikh (Superintendent Prisons), Faheem Anwar Memon (Deputy Superintendent Prisons), Abdul Rehman Sheikh (Assistant Superintendent Prisons), Naveed Ahmed Khan (Assistant Superintendent Prisons), Salik Ayaz (Assistant Superintendent Prisons), Faroosh Muhammad ASI Prisons, Saeed Ahmed PC and Abdul Ghafoor PC u/s 223 and 225-A PPC, their conviction and sentence u/s 7(g) of ATA 1997 was set aside and their appeals were disposed of accordingly by the Appellate Court vide common judgment dated 25.03.2022.

7. Feeling aggrieved of their conviction and sentence, the convicts have filed the instant Criminal Petitions for Leave to Appeal.

8. After hearing learned counsel for the petitioners and learned Additional Prosecutor General, Sindh, we have perused the available

record which reveals that the two escapee UTPs were confined in Ward No. 26 of Central Prison Karachi.

On 13.06.2017 both the escapee UTPs were not required to be produced before any ATC Court situated in the Judicial Complex adjacent to Central Prison Karachi for hearing/trial proceedings. In absence of any order u/s 41 of the Prisoners Act, 1900 for production of the two escapee UTPs before ATC Court on 13.06.2017, their names were included in the list of prisoners to be produced before ATC Courts on 13.06.2017 due to which their custody was shifted through the tunnel from Central Prison Karachi to the Judicial Lockup of ATC Courts situated in the adjacent Judicial Complex. On the said date Nawab Khan SPC was Incharge of Ward Nos.25 and 26 and he was assisted by Abdul Ghafoor PC and Atta Muhammad PC.

9. It reveals that Arshad Ali Aziz (PW.13), having been convicted in a narcotics case, along with another convict (whose name has not come on record), were deputed by Yasir Ali (Production Clerk ATC) with the permission of Rafique Ahmed Channa (Tower Incharge) to work in the prison and perform duty of maintaining the register of UTPs required to be produced before the ATC Courts.

10. In absence of any production order by the ATC Court, the names of the two escapee UTPs were wrongly inserted in the list of UTPs required to be produced before ATC Courts on 13.06.2017 by the prisoner Arshad Ali Aziz but surprisingly, instead of arraying him as co-accused, he was produced by the prosecution at the trial as PW.13.

11. On 13.06.2017 Ward No. 26 was unlocked by Abdul Ghafoor PC and counting of the prisoners was also made by Abdul Ghafoor PC on the said date. It reveals that on the said date, on the instruction of Abdul Ghafoor PC, Atta Muhammad PC escorted both the escapee UTPs to ATC Court No.7 situated in the Judicial Complex.

12. Evidence reveals that on 13.06.2017 the escapee UTP Muhammad Ahmed had met with PW.9 Zeeshan (Reader of ATC Court No.7) in the court room and inquired from him about presence of his advocate and about filing of his bail application while on the said date escapee UTP Sheikh Muhammad Mumtaz wanted to see his lawyer in the premises of the Judicial Complex.

13. On 13.06.2017 Faroosh Muhammad ASI Prisons was Incharge of ATC Court Escort/production area and he was assisted by Muhammad

Taghyal Mehar PC, Muhammad Sajjad PC, Saeed Ahmed PC and Nadir Hussain PC; Muhammad Taghyal Mehar PC and Muhammad Sajjad PC were deputed at ATC Court No. 11, Nadir Hussain PC was deputed at ATC Court No. 12 while Saeed Ahmed PC was deputed at ATC Court No.7 situated in the Judicial Complex. On the said date, being incharge of the production area it was duty of Faroosh Muhammad ASI Prisons to unlock/lock the production area.

14. The escapee UTP Muhammad Ahmed Khan was produced by Saeed Ahmed PC in ATC Court No. 7 on 13.06.2017 and he along with other UTPs were to be sent back to the prison and after closing the ATC Courts, the production area was to be locked.

15. Evidence reveals that without sending the two escapee UTPs back to prison, Saeed Ahmed PC reported OK to Faroosh Muhammad ASI Prisons about closing the ATC Courts. Being incharge ATC Court Escort/production area, Faroosh Muhammad ASI Prisons did not ensure return of the two escapee UTPs back to the prison.

On return of all the UTPs, except the two escapee UTPs, in Ward Nos.25 and 26 on 13.06.2017 in Central Prison Karachi from the Judicial Complex/ATC Courts, Abdul Ghafoor PC wrongly declared correct numbers of the UTPs in the relevant register No.10/lockup report despite missing of the two escapee UTPs.

16. In the early morning of 14.06.2017, when the UTPs were being counted for production in ATC Courts, it revealed that the two escapee UTPs are missing and the matter was immediately reported to the High ups.

17. The evidence available on record reveals that with the active connivance of Abdul Ghafoor PC, Saeed Ahmed PC and Faroosh Muhammad ASI Prisons, the escapee UTPs managed their escape after cutting the iron bars/grill of lockup of ATC Court No. 18 situated on the first floor of the Judicial Complex and after shaving their beard and cutting their hair in the washroom of ATC Court No.18.

18. The overwhelming incriminating evidence proves sharing of common intention and active connivance of Abdul Ghafoor PC, Saeed Ahmed PC and Faroosh Muhammad ASI Prisons with the escapee UTPs in managing and facilitating their escape from confinement.

19. Reappraisal of the evidence reveals that while awarding conviction and sentence u/s 223 PPC and 225-A PPC and dismissing appeals of the

convicts Abdul Ghafoor PC, Saeed Ahmed PC and Faroosh Muhammad ASI Prisons, the Trial Court as well as the Appellate Court have not committed any illegality or irregularity.

20. Record does not reveal of any connivance or sharing of common intention by the convicts Ghulam Murtaza Sheikh (Superintendent Prisons), Faheem Anwar Memon (Deputy Superintendent Prisons), Abdul Rehman Sheikh (Assistant Superintendent Prisons), Naveed Ahmed Khan (Assistant Superintendent Prisons) and Salik Ayaz (Assistant Superintendent Prisons) with the convicts Abdul Ghafoor PC, Saeed Ahmed PC, Faroosh Muhammad ASI Prisons and the two escapee UTPs in managing and facilitating their escape.

21. The counting of UTPs in the evening of 13.06.2017 was wrongly mentioned as correct by Abdul Ghafoor PC in Register No.10/lockup report and in the early morning of 14.06.2017, the two escapee UTPs were found missing at the time of counting the UTPs who were to be taken to the ATC Courts and the matter was immediately brought to the notice of the high ups. Hence in such circumstances, no question arises of negligence or lack of supervision by the Superintendent Prisons, Deputy Superintendent Prisons and Assistant Superintendent Prisons of Central Prison Karachi under Pakistan Prisons Rules, 1978.

22. According to settled principles, the factum of negligence can be taken into consideration on the basis of presumption or surrounding circumstances while taking disciplinary action against a public servant but to bring home charge in criminal proceedings against a public servant u/s 223 PPC and 225-A PPC, definite and concrete evidence is required to prove the factum of negligence. Reference in this regard is made to the case of '**Muhammad Yaqoob v. The State**'¹.

In the instant case the prosecution has failed to produce definite and concrete evidence to prove the negligence of Superintendent Prisons, Deputy Superintendent Prisons and Assistant Superintendent Prisons of Central Prison Karachi.

23. On reappraisal of evidence available on record it is concluded that while awarding conviction and sentence to the convicts Ghulam Murtaza Sheikh (Superintendent Prisons), Faheem Anwar Memon (Deputy Superintendent Prisons), Abdul Rehman Sheikh (Assistant Superintendent Prisons), Naveed Ahmed Khan (Assistant Superintendent Prisons), Salik Ayaz (Assistant Superintendent Prisons) and while

¹ PLD 2001 SC 378

dismissing their appeals, the Trial Court as well as the Appellate Court have erred in properly appreciating the evidence available on record and have failed to appreciate that the prosecution did not prove the charge against the said convicts beyond reasonable doubt.

For the above reasons drawn today, vide our short order dated 21.05.2024 (reproduced herein below), Criminal Petitions for Leave to Appeal Nos: 77-K/2022 (filed by Saeed Ahmed PC), 92-K/2022 (filed by Faroosh Muhammad ASI Prisons) and 94-K/2022 (filed by Abdul Ghafoor PC) were dismissed while Leave to Appeal was granted in Criminal Petitions for Leave to Appeal Nos: 351/2022 (filed by Faheem Anwar Memon Deputy Superintendent Prisons), 352/2022 (filed by Salik Ayaz Assistant Superintendent Prisons), 438/2022 (filed by Ghulam Murtaza Sheikh Superintendent Prisons), 50-K/2022 (filed by Abdul Rehman Sheikh Assistant Superintendent Prisons) and 76-K/2022 (filed by Naveed Ahmed Khan Assistant Superintendent Prisons), the same were converted into appeals and allowed.

"Criminal Petitions No. 351-352, 438, 50-K, 76-K of 2022

For the reasons to be recorded later, these petitions are converted into appeals and allowed. The judgments dated 12.10.2019 and 25.03.2022 of the Anti-Terrorism Court-XIX, Karachi and the High Court respectively are set aside to the extent of the appellants.

Criminal Petitions No. 77-K, 92-K and 94-K of 2022

2. *For the reasons to be recorded later, these petitions are dismissed."*

Judge

Judge

Judge

Islamabad

11.06.2024

Atif/Zohaib

APPROVED FOR REPORTING