

**IN THE LAHORE HIGH COURT MULTAN BENCH, MULTAN
(JUDICIAL DEPARTMENT)**

Criminal Appeal No.663 of 2016

Kashif Nawaz etc. versus The State & another

Writ Petition No.12872 of 2016

Dr. Shahid Irshad Rao versus The State & another

Date of hearing **03.10.2017**

The appellants by Mr. James Joseph, Advocate for the appellants.

The complainant/Writ petitioner by M/s Khalid Ashraf Khan and Rana Muhammad Nadeem Kanju, Advocates.

The State by Malik Muhammad Riaz Saghla, Deputy Prosecutor General, Saleem SI & Tanveer Awan, ASI

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Asjad Javaid Ghural, J. Through Criminal Appeal No.663 of 2016, under Section 25 of the Anti-Terrorism Act, 1997 appellants Kashif Nawaz and Farrukh Shahzad have challenged the vires of judgement dated 25.06.2016 passed by the learned Judge, Anti-Terrorism Court-II, Multan in case FIR No.863 dated 29.12.2014, in respect of offences under Sections 324, 427 & 386 PPC and Section 7 of The Anti-Terrorism Act, 1997 registered at Police Station, Chehlyak, Multan whereby they were convicted and sentenced as under:-

Appellant Kashif Nawaz,

“Under Section 324 PPC

Rigorous imprisonment for five years.

Under Section 386 PPC

Rigorous imprisonment for seven years alongwith the fine of Rs.10,000/- and in case of non-payment of fine, to further undergo simple imprisonment for three months.

Under Section 427 read with 34 PPC

Rigorous imprisonment for two years alongwith the fine of Rs.5000/- and in case of non-payment of fine, to further undergo simple imprisonment for three months.

Under Section 7(h) of the Anti-Terrorism Act, 1997

Rigorous imprisonment for seven years alongwith the fine of Rs.10,000/- and in case of non-payment of fine, to further undergo simple imprisonment for three months.

Appellant Farrukh Shehzad,

“Under Section 324 PPC

Rigorous imprisonment for three years.

Under Section 386 PPC

Rigorous imprisonment for five years alongwith the fine of Rs.10,000/- and in case of non-payment of fine, to further undergo simple imprisonment for three months.

Under Section 427 read with 34 PPC

Rigorous imprisonment for two years alongwith the fine of Rs.5000/- and in case of non-payment of fine, to further undergo simple imprisonment for three months.

Under Section 7(h) of the Anti-Terrorism Act, 1997

Rigorous imprisonment for five years alongwith the fine of Rs.10,000/- and in case of non-payment of fine, to further undergo simple imprisonment for three months.

Benefit of Section 382-B Cr.P.C. was extended to the appellants. All the aforesaid sentences were directed to run concurrently.

2. Dr. Shahid Irshad/complainant has filed Writ Petition No.12872 of 2016 under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 seeking enhancement of sentence of respondents No.2 & 3. We propose to decide both the aforementioned connected matters through this single judgment.

3. The prosecution story unfolded in the crime report (Ex.PA/1) is that complainant Dr. Shahid Irshad Rai (PW-1) being a Professor Doctor (Gynecologist) by profession, was running a private clinic in the name and style of Siyal Clinic, Kachehary Road, Multan. On 29.12.2014 at about 10:00 p.m., he left for his house situated at Nishtar Hospital, Nishtar Colony on his self-driving black Rebon Honda Car bearing No.4189/LEA and was about take turn to Katchehri Road from Siyal Clinic street, one boy standing in front of the Mehmood & Company Godown, made three straight fire shots with his pistol out of which one fire shot hit on the ground near car whereas two fire shots hit the car on left front side. The unknown accused fled away from the

place of occurrence while seating on a motorcycle, which was parked in the nearby car-stand under over-head bridge by his unknown co-accused. On hearing the voice of firing, Muhammad Safdar Khan (PW-9) and Muhammad Tanveer attracted at the place of occurrence and witnessed the occurrence. The accused persons were 18/19 years of age with fit physique wearing pent shirt.

4. Muhammad Farooq, SI (PW-8) had visited the place of occurrence, recorded the statements of witnesses under Section 161 Cr.P.C. and supplementary statement of the complainant, secured three crime empties (P-28/1-3) of pistol 30-bore vide memo Ex.PP, took the car into possession vide memo Ex.PQ, prepared unscaled site place Ex.PR and handed over the case properties to the Moharrir.

Haider Ali, Station House Officer (PW-10) had arrested the appellants on a tip-off from near Nishtar Hospital, Multan and upon their personal search mobile phones, mobile sims and cash amount was recovered from their possession, which were taken into possession vide recovery memo Ex.PH & Ex.PJ respectively. He sent the appellants to judicial lockup for identification parade, which was conducted on 12.01.2015. He took into possession a piece of writing with regard to the demand of Bhatta produced by the complainant vide recovery memo Ex.PD. He got specimen writings of both the appellant through the learned Area Magistrate. During his investigation, appellant Kashif Nawaz and Farrukh Shehzad led to the recovery of weapons of offence i.e. pistol (P-22 & P-26 respectively) as well as motorcycle (P-21). After completion of investigation, he got challaned the appellants.

5. At the commencement of trial, the learned trial Court had framed a charge against the appellants to which they had pleaded not guilty and claimed to be tried.

6. The prosecution had produced 11-witnesses besides the reports of Punjab Forensic Science Agency regarding handwriting comparison (Ex.PO/1-3) and that of weapon of offence (Ex. PP). The appellants, in their statements recorded under Section 342 Cr.P.C. had denied and controverted all the allegations leveled against them, they neither opted

to make their statements under Section 340(2) Cr.P.C. nor had they produced any witness in their defence.

7. Learned trial Court, upon conclusion of the trial, had convicted and sentenced the appellant supra, hence the aforementioned criminal appeal as well as the connected constitutional petition.

8. Learned counsel for the appellants has contended that the appellants are quite innocent and have been falsely implicated in this case due to malice and some ulterior motives on part of the complainant as the appellants had nothing to do with the alleged occurrence; that admittedly it was a dark night occurrence and the case was registered against unknown accused persons; that the mode, manner and material with regard to the arrest and implication of the appellants in this case could not be proved by the prosecution beyond reasonable doubt; that the test identification parade was joint one, which is inadmissible in the evidence; that no role had been assigned to the appellants during test identification parade; that as per prosecution, one of the appellants remained student of the complainant and were known to him prior to the occurrence; that the report of Punjab Forensic Science Agency with regard to the handwriting on threat-note was not conclusive; that the report of Ballistic Expert is negative one; that the recovery of weapon of offence is inconsequential as it was not submitted in the office of Ballistic Expert though representative of the police station.

9. Conversely, learned Deputy Prosecution General appearing for the State assisted by learned counsel for the complainant has vehemently opposed the contentions raised by learned counsel for the appellants while submitting that the complainant had no animosity, ill-will or grudge against the appellants to falsely implicate the appellants in this case; that the features of accused persons have been mentioned in the crime report and the appellants were duly identified during test identification parade; that threat-note was sent to the office of Punjab Forensic Expert, which was found with positive report to the extent of appellant Kashif Nawaz; that the recovery of weapon of offence, mobile phones as well as the motorcycle used during the occurrence provides full corroboration to the ocular account; that the prosecution had successfully prove the charge against the appellants beyond reasonable shadow of doubt

and, thus, they are not entitled to any leniency; that no mitigating circumstance could be brought during trial to award lesser punishment to the appellants and, thus, they deserve maximum sentence of their sin provided under the statute.

10. We have heard learned counsels for the appellants, learned Deputy Prosecutor General appearing for the State assisted by learned counsel for the complainant and have perused the record with their able assistance.

11. The incident of making fire shots at the car being driven by the complainant had taken place at Siyal Clinic Street near Kachehary Road at 10:00 p.m. on 29.12.2014 and the case was registered on the same night against two unknown accused persons. It was admittedly a dark night occurrence and no source of light has been given in the un-scaled site plan (Ex.PR). Both the appellants were arrested on a tip-off and were implicated in this case subsequently. The prosecution case hinges upon the circumstantial evidence of test identification parade, recovery of weapons of offence i.e. pistol as well as motorcycle at the instance of the appellants, a piece of paper produced by the complainant to the police showing demand of Bhatta and threat to himself and his family, report of Punjab Forensic Science Agency with regard to the comparison of handwriting thereon and the report of Punjab Forensic Science Agency relating to a pistol alleged to be the weapon of offence. The appellants were arrested by Haider Ali, Station House Officer (PW-10) on a tip-off from near Nishtar Hospital, Multan being suspected persons but no detail of nature of being suspect or material could be brought on record. During cross-examination, complainant/Dr. Shahid Irshad (PW-1) had admitted that one of the appellants namely Kashif Nawaz was student of final year and he had passed in the examination of his subject. He further admitted that Kashif Nawaz was student of MBBS at the time of occurrence and he was qualified to be MBBS at the time of making statement before the learned trial court. In this state of affairs, we have inquired from the learned Law Officer as well as the learned counsel for the complainant that on what basis the appellants were apprehended by the police on 02.01.2015 and what was the nature of suspicion but they remained fail to satisfy the Court. Appellant Kashif Nawaz was admittedly a practicing MBBS doctor by profession and his presence inside or outside the Nishtar Hospital

at any time was quite natural. Co-appellant Farrukh Shehzad was admittedly his friend. The presence of both the appellants inside or outside the hospital was quite natural and cannot be termed suspicion in any capacity whatsoever. The mode and manner of the appellants' implication in this case clearly indicates something else behind the scene, which was suppressed by the prosecution for the reasons best known to them.

12. After showing the arrest, the appellants were sent to judicial lockup for test identification parade, which was conducted on 12.01.2015 under the supervision of Mr. Muhammad Arif Zia, learned Special Judicial Magistrate (PW-2). During test identification parade, the appellants were identified by the complainant and Muhammad Safdar Khan (PW-9) after putting hands on their heads but without assigning any role played by them during occurrence. It is noticeable that identification parade so held was a joint one conducted in one go in one row of multiple dummies. The law is well settled by now that the practice of joint test identification parade in one go has no worth reliance. We seek guidance from esteemed judgment of august Supreme Court of Pakistan rendered in case titled "GULFAM and another versus The STATE (2017 SCMR 1189)" wherein it has been held as under:-

“The prosecution had maintained that the present appellants had correctly been identified by the above mentioned eye-witnesses during a test identification parade conducted and supervised by a Magistrate but we note that the parade so conducted and held was a joint parade in which both the present appellants had been made to stand along with many other dummies. Holding of joint identification parade of multiple accused persons in one go has been disapproved by this Court in many a judgment -----”

13. Besides the aforementioned occurrence of firing at the car of the complainant, it was claimed by the prosecution that the appellants had sent a threat-note (Ex.PC) through TCS to the complainant claiming that they had demanded Bhatta of Rs.20,00,000/- from the complainant as price of his life, which was directed to be paid on 1st of January in front of Tayyab Ardgan Hospital, Muzaffargarh. The said piece of writing was taken into possession by Haider Ali, Station House Officer (PW10) vide recovery memo (Ex.PD) on 15.01.2015. Haider Ali, Station House Officer obtained sealed specimen hand-writings of both the appellants through the learned Area Magistrate and

handed over the same to Muhammad Aslam, ASI/Moharrir (PW-6) for its onward transmission to the office of handwriting expert for comparison with the threat-note. Muhammad Aslam, ASI/Moharrir transmitted the same to the office of Punjab Forensic Science Agency after removal of objections of the said office through Mazhar Abbas 2408/C on 20.03.2015. The report of Punjab Forensic Science Agency was received with the result of probability of matching with the hand-writing of Kashif Nawaz. We have noticed that the prosecution has withheld Mazhar Abbas 2408/C, who had deposited the aforesaid sealed specimen writing in the office of Punjab Forensic Science Agency. He had not been even cited as witness in the relevant column of report under Section 173 Cr.P.C. The report of Punjab Forensic Science Agency (Ex.PC) is also silent with regard to the name of the police official, who had deposited the sample specimen in the side office. Anyhow, the report of Punjab Forensic Science Agency containing the probability of matching with the specimen of appellant Kashif Nawaz and, thus, the same cannot be connected with the appellants with certainty.

14. The recovery of weapon of offence i.e. pistol (P-22) alongwith three live bullets (P-22/1-3) is shown to have been affected at the instance of appellant Kashif Nawaz, which was taken into possession vide recovery memo Ex.PM on 05.02.2015. The aforesaid pistol was sent to the office of Punjab Forensic Science Agency through Mazhar Abbas 2408/C for its comparison with the crime empties already secured by Muhammad Farooq, SI (PW-8) from the crime scene but said Mazhar Abbas constable has neither been produced nor had he been cited as witness in report under Section 173 Cr.P.C. The positive report of Punjab Forensic Science Agency (Ex.PP) does not contain the name of depositing official. The prosecution evidence is totally silent with regard to the name of depositing official and the date of its submission in the aforesaid office. The aforesaid report shows that the parcel containing empties was submitted in the office of Punjab Forensic Science Agency on 17.02.2015 after one month and 20-days of the occurrence whereas the crime weapon was received in the said office on 20.02.2015 just 15-days of its recovery from appellant Kashif Nawaz. It appears that the empties had been maneuvered by the prosecution after arrest and recovery of weapon of

offence from the appellant just to procure favourable report. In the given circumstances, the recovery of weapon of offence at the instance of appellant Kashif Nawaz is inconsequential.

15. The recovery of motorcycle (P-21) is shown to have been effected at the instance of appellant Kashif Nawaz being used in the alleged occurrence but the crime report shows that no colour, model or registration number of the motorcycle being used in the alleged occurrence, has been mentioned and, thus, the recovery of aforesaid motorcycle cannot be safely connected with the incident in issue.

16. Appellant Kashif Nawaz had stated in his statement under Section 342 Cr.P.C. that he has been falsely implicated in this case because the complainant was president of Pakistan Medical Association and he being young-doctor and an active prolific of Young Doctor's Association had some differences with Pakistan Medical Association. Appellant Farrukh Shehzad had stated that he being friend and supporter of Kashif Nawaz, has been falsely implicated in this case. Appellant Kashif Nawaz had neither appeared under Section 340(2) Cr.P.C. nor had he produced any witness to show his designation nor nature of his membership with the Young Doctor's Association nor the nature of his differences with the Pakistan Medical Association. The defence version taken by the appellants is vaguely formulated, which is straightaway brushed aside being bald and afterthought assertion.

17. The mode and manner of the implication of the appellants in this case as ascribed by the prosecution is not free from doubt as the prosecution has suppressed some real facts in this respect. It was admittedly a dark night occurrence of winter and foggy season and no source of light has been given by the prosecution. The description of accused persons at the time of alleged occurrence in a dark night is not possible. Furthermore, the practice of joint test identification parade has always been disapproved by the Apex Court, which is far from being relied upon by this Court. The recovery of weapon of offence remained inconsequential as the crime empties secured from the place of occurrence had been withheld by the investigating officer for a considerable period perhaps in waiting the arrest of the accused persons just to manage the

same by firing with the weapon recovered at the instance of the appellants. What to speak of an iota of evidence, the case in hand is replete with doubts and the prosecution has failed to prove the guilt against the appellants beyond any shadow of doubt rather it is a case of no evidence.

18. The nutshell of above discussion is that Criminal Appeal No.663 of 2016 filed by appellants Kashif Nawaz and Farrukh Shehzad is ***allowed***, their conviction and sentence awarded by the learned trial court vide judgment dated 25.06.2016 are set aside and they are acquitted of the charge by giving the benefit of doubt to them. They will be released forthwith from jail if not required to be detained in connection with any other case.

19. Writ Petition No.12872 of 2016 filed by complainant Dr. Shahid Irshad Rao seeking enhancement of sentence of respondents No.2 & 3 is without any merit the same stands *dismissed in limine*.

(Raja Shahid Mehmood Abbasi)
Judge

(Asjad Javaid Ghural)
Judge

Approved for Reporting.

JUDGE