

JUDGMENT SHEET.

HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD.

Criminal Appeal No.D-48 of 2009  
Criminal Appeal No.D-57 of 2009

Date	Order with signature of Judge
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PRESENT: 1. Justice Ahmed Ali M. Shaikh  
2. Justice Salman Hamid

Appellants: Ashraf, Muhammad Iqbal, Asif and Sardar through M/s. Ch: Aftab Ahmed Warraich and Khwaja Ayatullah, Advocates.

Respondent: The State through Mr. Shahid Ahmed Shaikh, Assistant Prosecutor General, Sindh at Hyderabad.

Date of hearing: 20.08.2010.

Date of judgment: 20.08.2010.

**Ahmed Ali M. Shaikh J:** By this consolidated judgment, we intend to decide Criminal Appeal No.D-48 of 2009 and Criminal ATA No.D-57 of 2009 as both have arisen out of common judgment dated 29.4.2009, passed by learned Judge, Anti Terrorism Court, Mirpurkhas in Special Case No.02 of 2008, Crime No.61 of 2005 for offence U/s 402, 324, 353, 34 P.P.C. & 7(H) of ATA, 1997, by which the appellants have been convicted and sentenced U/s 402 & 34 P.P.C. to undergo R.I for 07 years and fine of Rs.30,000/- each. In default of payment of fine, they have to further undergo R.I for 06 months. They were further convicted and sentenced U/s 324 P.P.C. to undergo R.I for 10 years and fine of Rs.50,000/- each. In default of payment, they have to further undergo R.I for 06 months. The Appellants were further convicted and sentenced U/s 353 P.P.C. to undergo R.I for 02 years and fine of Rs.5000/- each and in case of default, they have to further suffer R.I for 06 months. The appellants have also been convicted for offence U/s 7 (h) of Anti Terrorism Act, 1997 to suffer R.I for 10 years and fine of Rs.50,000/- each and in case of default in payment of fine, they have to further undergo R.I for 06 months. All the convictions were ordered to run concurrently. However, the benefit of Section 382-B Cr.P.C was extended to them.

The facts given rise to these appeals are that on 18.9.2005 SIP Syed Altaf Hussain Shah, SHO PS Jhudo alongwith his subordinate staff was on patrolling and during patrolling at about 2325 hours, they received wireless message to the effect that Abid Hussain Qaimkhani, T.P.O Dighri is available at abandoned brick kiln

Nabisar link road where encounter is going on between the dacoits and police party and one of the dacoit has been arrested, following which he alongwith police party proceeded towards the pointed place and reached there at about 2345 hours where T.P.O Abid Hussain Qaimkhani alongwith his subordinate staff namely PCs Abbas Ali, Muhammad Shareef and Safdar Ali was present. The T.P.O handed over him one dacoit namely Muhammad Iqbal son of Khushi Muhammad by caste Kamboh r/o Navy Chak, near Pangrio Taluka Tado Bago, District Badin. He also handed over one Kalashankov alongwith one magazine and five live bullets. T.P.O further informed him that while they were on patrolling and reached at the place of occurrence, suddenly five persons emerged out on road, from bushes, out of them three were identified in the beam of head lights of the vehicle as Iqbal Kamboh, Sardar Kamboh and Asif Kamboh, while remaining two could not be identified and they would be able to identify them if seen. All the culprits were armed with deadly weapons. The culprits pointed and aimed their weapons at the police party. The police personnel got out from the vehicle and took their positions. Meanwhile culprits opened straight fires upon the police party with intention to commit their murder. Police also fired in their defence. However, during the exchange of firing dacoit Iqbal Kamboh fell down on the ground whereas rest of the accused made their escape good by taking advantage of bushes. They arrested Iqbal Kamboh alongwith K.K. Complainant was further directed to send further police force as they had to chase the absconding accused. Complainant prepared mashirnama of arrest and recovery, sealed Kalashankov and bullets. On inquiry accused could not produce the license of the weapon. Later on the accused and case property were brought at Police Station where complainant/SHO Syed Altaf Hussain Shah lodged the F.I.R. on behalf of the State.

After usual investigation conducted by Inspector Zulfiqar Hussain Qaimkhani, he submitted challan showing the appellant Muhammad Iqbal in custody while accused Muhammad Sardar, Muhammad Asif, Muhammad Ashraf and Yaseen Rind were shown as absconders. Formal charge was framed against the appellants to which they pleaded not guilty and claimed their trial. Later on a supplementary challan was submitted in respect of co-accused Sardar, as such amended charge was framed, to which all the accused persons pleaded not guilty.

To substantiate its case, the prosecution examined the following witnesses:-

PW-1 SIP/SHO Syed Altaf Hussain Shah, PW-2 S.P Abid Hussain Qaimkhani, PW-3 ASI Imdad Ali, PW-4 ASI Rasool Bux., PW-5 PC Abbas Ali, PW-6 SIP Zulfiqar Ali Qaimkhani, PW-7 PC Abdul Hadi, PW-8 ASI Abdul Majeed, PW-9 Inspector Ghulam Farid Jatt and PW-10 Mr. Nadeem Badar Qazi, Civil Judge



& Judicial Magistrate. Then the prosecution closed its side. The statements of appellants were recorded U/s 342 Cr.P.C, whereby they claimed their innocence.

After hearing the learned counsel for the parties, the trial Court passed the impugned judgment as stated above.

Heard Mr. Ch: Aftab Ahmed Warraich, Advocate for appellant Ashraf and Mr. Khwaja Ayatullah, Advocate for appellants Muhammad Iqbal, Asif and Sardar.

Mr. Ch: Aftab Ahmed Warraich, learned counsel for the appellant Ashraf contended that appellant is innocent and he has been falsely implicated by the police. Per learned counsel, the name of appellant Ashraf did not appear in the F.I.R. though PW T.P.O Abid Hussain Qaimkhani has admitted in his cross examination that he and accused Ashraf Khaskheli are residing in the same vicinity. While replying to a suggestion, he further admitted that it is correct to suggest that I know accused Ashraf very well as he is residing in same vicinity. Per learned counsel, though the appellant Ashraf was previously known to PW/T.P.O Abid Hussain Qaimkhani as the PW Abid Hussain and Ashraf Khaskheli are resident of same locality, therefore, the identification of the appellant through PW Abid Hussain Qaimkhani has lost its value and cannot be treated as a valid piece of evidence against the appellant Ashraf. Per learned counsel, except the so called identification parade, there is no piece of evidence against the appellant Ashraf to show any nexus with the alleged occurrence.

Mr. Khwaja Ayatullah, learned counsel for the appellants Muhammad Iqbal and others contended that appellants are innocent and they have been implicated in this case by PW Abid Hussain who was T.P.O at the time of occurrence. Per learned counsel, PW-1 (Complainant) is not eye witness of the occurrence but his evidence is of hearsay therefore, same cannot be equated with eye witness account. Per learned counsel, though it is the case of the prosecution that there was exchange of firing between the police party and the appellants which continued for 10/15 minutes but none from the either side received any injury. Even not a single bullet hit the police vehicle therefore prosecution case from the very face of it seems to be a cock and bull story and it is nothing but brainchild of PW Abid Hussain. Learned counsel further contended that per F.I.R. the SHO received wireless message to the effect that an encounter is going on between the police party and dacoits but in his deposition complainant Altaf Hussain Shah stated that when they reached at the place of occurrence, PW Abid Qaimkhani handed over him the custody of appellant Iqbal but PW Abid Hussain in his deposition stated that after apprehending the appellant Iqbal, other accused ran away and then he informed PW Altaf Hussain Shah. It is contended that place of so called incident is an abandoned place and far from the residential area of the people and none amongst the PWs have stated that accused were available there for committing any offence therefore, ingredients of Section 402 and Section 7 (II) of ATA, 1997 are badly missing. He lastly contended



that none amongst the PWs have even received scratch therefore, Section 324 P.P.C. is also not applicable to the facts of the case.

Mr. Shahid Ahmed Shaikh, A.P.G for the State supported the impugned judgment.

Heard learned counsel for the parties and perused the record.

Upon perusal of the depositions and material available on record, it appears that none amongst the PWs have stated in their depositions that appellants were gathered for the purpose of committing dacoity. However, it is the case of prosecution that when the police party headed by T.P.O Dighri arrived at the place of occurrence, five persons duly armed with weapons emerged on the road and made straight fires upon the police party therefore, it is clear that ingredients of Section 402 P.P.C. are missing. So far recovery of KK from appellant Iqbal Jatt is concerned, in this respect a separate case was registered under arms ordinance but he has been acquitted by the trial Court. It is pertinent to mention here that no acquittal appeal has been preferred against that acquittal order. There are also glaring contradictions in the depositions of PWs in respect of various aspects of the case, particularly the deposition of PW-2 Abid Hussain Qaimkhani creates dent in the entire prosecution case though the entire prosecution case is based on the testimony of Abid Hussain Qaimkhani. So far the evidence of PW-1 Aitaf Hussain Shah is concerned, same is not helpful for the prosecution as he was neither eye witness of the incident nor claimed so. The prosecution case rests on three pieces of evidence i.e. Ocular version furnished by PW Abid Hussain Qaimkhani, recovery of KK from appellant Iqbal and identification parade of appellant Ashraf. As far as the ocular account of the alleged incident is concerned which is furnished by PW Abid Hussain and others, same did not inspire confidence and also did not appeal to reason because on the one hand it is claimed that exchange of firing with deadly weapons continued for 10/15 minutes but on the other hand it is admitted by P.Ws that none from the either side received even a scratch what to say about the fire arm injury. Not only this but it is very strange that not a single bullet hit police mobile though the same was parked at the road which was an open place. So far evidence of other PWs is concerned, admittedly they were the subordinate of PW Abid Hussain, therefore; their evidence requires corroboration which is badly lacking. As far as the evidence of I.O Zulfiqar Hussain Qaimkhani is concerned it appears during investigation, he could not collect any evidence against the appellants. From his deposition it appears that he prepared the mashimama of wardat which was shown to him by T.P.O Abid Hussain and secured some empties and recorded 161 Cr.P.C statements of the PWs. In his deposition he stated that he alongwith his subordinate staff reached at the place of occurrence at 3-30 a.m. In his cross examination, he stated that he consumed one hour time in searching the empties and preparing mashimama of place of incident.

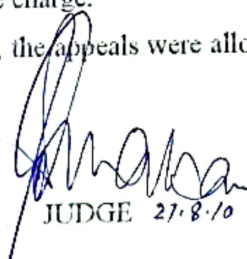
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However, the mashimama of wardat and recovery of empties reveals that mashimama was prepared at 3-30 hours when he himself stated that he reached at the place of occurrence at 3-30 a.m and consumed one hour in searching the empties and preparing mashimama at the place of incident. Naturally, mashimama would have been prepared at about 4-30 a.m instead of 3-30 a.m. Therefore, it appears that he has prepared the mashimama of wardat and the recovery of empties at Police Station and merely fulfilled the formalities in order to strengthen the case. As far as the recovery of KK from appellant is concerned, he is already acquitted from that charge by the concerned Sessions Judge, as stated above. So far the identification parade of appellant Ashraf is concerned, it is already mentioned above that there is admission on the part of PW Abid Hussain that he and appellant Ashraf are residing in the same vicinity and appellant Ashraf was known to him previously. Now the question arises that why he did not disclose the name of appellant Ashraf to the PW-1 who on his information registered the case. From the deposition of PWs 1 and 2 it appears that none amongst them tried to follow the culprits who made their escape good though both P.Ws on the day of incident were heading their respective police parties. Such conduct on the part of senior police officials reflects that in fact no police encounter had taken place but a false case was registered which was a cock and bull story.

In view of what has been discussed above, the prosecution has failed to prove charge against the appellants, therefore, the conviction and sentence recorded by Trial Court vide judgment dated 29.4.2009 in Special Case No. 61 of 2005 is set aside and they are acquitted of the charge.

For the foregoing reasons, the appeals were allowed by our short order dated 20.8.2010.

  
JUDGE 27.8.10

  
JUDGE 26.8.2010