

HIGH COURT OF SINDH, CIRCUIT COURT
HYDERABAD

Cr. Jail Appeal No.S-210 of 2017

Cr. Appeal No.S-226 of 2017

[Dhani Bux @ Kando versus The State]

Appellant : Through Mr. Irfan Ali Khaskheli advocate

Complainant : None present

The State : Through Mr. Shahid Ahmed Shaikh Addl: P.G

Date of hearing : 21.05.2024

Date of decision : 29.05.2024

JUDGMENT

MUHAMMAD KARIM KHAN AGHA, I.- Appellant has challenged the Judgment dated 15.09.2017 passed by the learned Additional Sessions Judge Sehwan in Sessions Case No.358 of 2014 (Re: *The State versus Dhani Bux @ Kando*), outcome of Crime No.83 of 2014 registered at P.S Sehwan District Jamshoro under Sections 302, 324, 504, 114, 337-F(ii) and 34 PPC, whereby he has been convicted and sentenced to suffer imprisonment for life and R.I for 07 years for offences under Section 302(b) and 324 PPC respectively, however, benefit of Section 382-B Cr.P.C has been extended to him.

2. The brief facts of the case are that on 18.06.2014 at about 1800 hours complainant Ghulam Rasool appeared at P.S Sehwan and lodged the subject FIR by stating as follows:

"Complain is that I am farmer by profession; we are in matrimonial relationship with Bahadur Mallah and Wasaro Mallah party, whom we had given hands of two sisters while sister of Bahadur namely Farzana married with my son Wali Muhammad; about 15/20 days back my daughter-in-law Farzana angered with her husband and went to the house of her brother Bahadur on which Bahadur Mallah party became annoyed with us and sent threats that they will see us; that on 14.06.2014 I, my son Ghulam Hussain aged about 20/22 years, cousin Ali Bux S/o Wali

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Muhammad and Lal Dino S/o Adam Mallah after finishing work were returning together from Bobak city towards our home, when at about 06:00 pm we reached in common street near Bobak Girls Primary School we saw that each one namely Bahadur S/o Dhani Bux, (2) Sanwal S/o Piyaro @ Babur Mallah having cartridges pistols in their hands, (3) Wasaro S/o Abdul Rehman Mallah having pistol in his hand and (4) Dhani Bux @ Kando S/o Imam Bux Mallah having danda in his hand all residents of Bobak were standing in street; **that accused Dhani Bux abused us and told that you maltreated our girl Mst. Farzana and threw her from house, we restrained him not to abuse, on which he became annoyed and instigated the other accused that not to leave them and kill them,** on which accused Bahadur caused straight fire from his pistol on my son Ghulam Hussain which hit him at right side of chest, who fell down while raising cries; accused Sanwal made straight fire from his pistol at my cousin Ali Bux which hit him on back side, who also fell down while raising cries; accused Wasaro Mallah made straight fires from his pistol at us with intention to commit murder which missed since we fell down on earth; we raised hue and cry, on our cries and firing voice people of city came running there, on seeing them accused went towards western side while abusing; then we arranged vehicle and were shifting the injured to Dadu Hospital but my son succumbed to injuries and died in the way near Khudaabad; that we reached Dadu Hospital and Doctors gave first aid to injured Ali Bux and then we shifted him to Sehwan Hospital and gave such information to Police; that police reached to Sehwan Hospital and issued letter of injured for treatment, from where Ali Bux was referred to Hyderabad for further treatment whereas after conducting postmortem dead body of my son was handed over to me for funeral ceremonies; that after completion of burial now **after three days I came at P.S and complain that above accused persons with their common intention on the issue of Mst. Farzana on the instigation of accused Dhani Bux @ Kando,** accused Bahadur Mallah made straight fire from his pistol at my son Ghulam Hussain and committed his murder and accused Sanwal made straight fire from his pistol at my cousin Ali Bux with intention to commit his murder and injured him and accused Wasaro Mallah made straight fires with his pistol at us with intention to commit murder which missed, I am complainant and investigation may be made."

3. After usual investigation police submitted the challan wherein present appellant was shown in custody while co-accused were shown as absconders and later declared as Proclaimed Offenders and the learned trial court after completing necessary formalities framed the charge against the appellant to which he pleaded not guilty and claimed trial.

4. In order to prove its case the prosecution examined seven (07) witnesses, who exhibited numerous documents and other items.

Then statement of accused under Section 342 Cr.P.C was recorded whereby he denied the allegations leveled against him and claimed his false implication by the complainant party on account of matrimonial dispute. However, he neither examined himself on Oath nor led any evidence in his defense.

5. After hearing the learned counsel for the parties and assessment of evidence available on record, learned trial Court convicted and sentenced the appellant as stated above, hence this appeal has been filed.

6. The facts of the case as well as evidence produced before the trial Court find an elaborate mention in the impugned judgment, therefore, the same are not reproduced here so as to avoid duplication and unnecessary repetition.

7. Learned counsel for the appellant has contended that the appellant is innocent and has been falsely implicated in this case on account enmity hence the FIR was lodged after an unexplained delay of 3 days; that the eye witnesses are planted witnesses and their evidence be discarded especially as they are all related to the deceased and have enmity with appellant; that S.103 Cr.PC has been violated; that the legal ingredients of "instigation" had not been made out; that there are material contradictions in the evidence of the witnesses which renders their evidence unreliable and that for any or all of the above reasons the appellant should be acquitted of the charge by extending him the benefit of the doubt. In support of his contentions he placed reliance on the cases of **Tarique Pervez vs. The State** [1995 SCMR 1345], **Ahmad Yar and 2 others vs. The State** [2005 MLD 1119 Lahore], **Talib vs. The State** [2006 MLD 1301 Karachi], **Muhammad Akram vs. The State** [2009 SCMR 230], **Mst. Sughra Begum and another vs. Qaiser Pervez and others** [2015 SCMR 1142], **Imtiaz alias Taj vs. The State and others** [2018 SCMR 344], **Raza and another vs. The State and others** [2020 SCMR 1185], **Imran vs. The State through VIIth Anti-Terrorism Court at Karachi** [2021 P Cr.L.J 1384 Sindh], **Adnan Abbasi vs. The State** [2022 P

Cr.L.J 376 Sindh], **Sajjad Hussain vs. The State and others** [2022 SCMR 1540], **Pervaiz Khan and another vs. The State** [2022 SCMR 393], **Amir Muhammad Khan vs. The State** [2023 SCMR 566], **Lakhmir vs. The State** [2023 P Cr.L.J Note 57 Sindh] and **Sona Khan and others vs. The State** [2024 YLR 504 Sindh].

8. Learned APG Sindh who was also representing the complainant, after going through the entire evidence of the prosecution witnesses as well as other record of the case supported the impugned judgment. In particular, he contended that there were two eye witnesses in this case all of whose evidence could be safely relied upon who had proved that the appellant had instigated the absconding co-accused to fire on the complainant party which left one person dead and one PW Ali Bux injured; that the medical evidence supported the ocular evidence and the appellant had lead the police to his danda, which according to the eye witnesses he had on him at the time of the incident, on his pointation at a hidden place which only he could have known about; that all the elements of instigation had been proved and as such the prosecution had proved its case beyond a reasonable doubt and the appeal be dismissed. In support of his contentions, he placed reliance on the cases of **Anwar Shamim and another vs. The State** [2010 SCMR 1791], **Abid Ali vs. The State** [2017 SCMR 662] and **Muhammad Nawaz and others vs. The State through P.G and others** [PLD 2022 SC 523].

9. I have heard the arguments of the learned counsel for the appellant and learned Additional Prosecutor General Sindh and have gone through the entire evidence which has been read out by the learned counsel for the appellant and the impugned judgment with their able assistance and have considered the relevant law including the case law cited at the bar.

10. Based on my reassessment of the evidence of the PW's, especially the medical evidence and recovery of empties at the crime scene I find that the prosecution has proved beyond a reasonable doubt that Ghulam Hussain (the deceased) was murdered by

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firearm and PW Ali Bux was injured by firearm on 14.06.2014 at about 6pm at common Street Bubak town near girls primary school, Bubak Taluka Sehwan.

11. The only question left before me therefore is whether the appellant instigated the absconding co-accused or some other person to fire upon the deceased which lead to his death and fire upon PW Ali Bux which caused him injuries by firearm and attempted to murder the him and the complainant by firearm at the said time, date and location?

12. After my reassessment of the evidence on record, I find that the prosecution has **NOT** proved beyond a reasonable doubt the charge against the appellant for which he was convicted for the following reasons;

(a) That the FIR was lodged **after a delay of 3 days**. I find that this delay has not been fully explained. Admittedly, the complainant took the dead body to the hospital where it was subject to post mortem and then released to him the same day for burial purposes. Under such circumstances it would have been expected that the FIR would have been lodged the next day **yet 2 days have gone unexplained** before the FIR was finally lodged. There is no evidence of the police receiving the information that the appellant instigated the co-accused to fire on the deceased or the injured PW Ali Bux before this time or even any supporting evidence to this effect for example a police entry naming the appellant as an instigator of such firing. It is noted that the complainant is related to the appellant and the deceased and that there was enmity between the complainant and the appellant on account of a matrimonial dispute and thus the complainant had every reason to involve the appellant in a false case. This three days unexplained delay in Lodging the FIR coupled with the above, related witnesses and enmity between the parties, means that there was every chance during this 3 day period that the complainant consulted with others and concocted a false case against appellant and as such based on the particular facts and circumstances of this case I find this unexplained 3 day delay in lodging the FIR fatal to the prosecution case. In this respect reliance is placed on the cases of **Pervaiz Khan** (Supra) and **Amir Muhammed Khan** (Supra)

(b) Admittedly both the complainant PW 1 Ghulam Rasool and PW 4 Ali Bux who claim to be eye witnesses to the incident state in their evidence that the appellant instigated the absconding co-accused to fire and kill the complainants party but as already noted the FIR was lodged 3 days after the incident by the complainant which means that PW 4 Ali Bux who was the injured eye witness gave his S.161 Cr.PC statement **at a minimum of 4 days after the incident without any reasonable explanation** as he was conscious

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throughout this period despite being treated in hospital and as such it is settled that his eye witness evidence is of no evidentiary value under these circumstances. In this respect reliance is placed on the case of **Muhammad Asif vs. The State** [2017 SCMR 486].

(c) Furthermore, in the case of **Lakhmir** (Supra) it was held as under whilst acquitting the appellant of instigation;

"16. It is pointed out by learned counsel for the appellant that appellant Lakhmir is about 74 years of age and he is in jail since 28.09.2018 (date of impugned judgment) and almost two years have been passed. The case and claim of appellant Lakhmir as stated in his statement under section 342, Cr.P.C, is that he is innocent and has been falsely implicated in this by the complainant on account of petty dispute over landed property. The enmity in between the complainant and appellant Lakhmir has not been disputed. Appellant is facing trial since 2012 and almost 08 years have been passed. As observed, only the role attributed to present appellant is that of instigation and no unimpeachable evidence is available on record to prove the guilt of present appellant as instigator. Merely saying by complainant party that the appellant was present at the time of incident and he is instigated to co-accused without any documentary or unimpeachable evidence is not enough to connect the appellant with the commission of alleged offence, therefore, under these circumstances, false implication of appellant Lakhmir could not be ruled out." (bold added)

The same considerations apply in this case where the appellant was only allegedly armed with a danda and did not hit any of the complainant's party; he is 72 years of age and has been in jail for more than 10 years (excluding any remission which he may have earned)

(d) That the danda which was produced allegedly on his pointation after his arrest was not used to strike any of the complainant party and the possibility of it being foisted cannot be ruled out.

13. Thus, for the reasons mentioned above, by extending the appellant the benefit of the doubt, he is acquitted of the charge, the impugned judgment is set aside, his appeals are allowed and he shall be released unless wanted in any other custody case.

14. The appeal stands disposed of in the above terms **although it is made clear** that the findings in this appeal will have no bearing on the case of the absconding co-accused when they are arrested or surrender who shall face trial in accordance with law.