

IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

Cr. Spl. Jail ATA Appeal No.D-256 of 2009

Cr. Spl. Jail ATA Appeal No.D-260 of 2009

PRESENT

Mr. Justice Naimatullah Phulpoto

Mr. Justice Muhammad Karim Khan Agha

Date of Hearing: 18.05.2017

Date of Judgment: 26.05.2017

Appellants/accused: *Through Mr. Nazeer Ahmed Bhatti, Advocate.*

The State: *Through Syed Meeral Shah Bukhari, Additional Prosecutor General, Sindh.*

JUDGMENT

NAIMATULLAH PHULPOTO, J:- Appellants Nawab alias Akbar, Punhoon alias Punhal and Qurban Ali were tried by learned Special Judge, Anti-Terrorism Court, Hyderabad in Special Case No.33 of 2009 arising out of Crimes No.27 & 28 of 2008 registered at P.S Peerumal. By judgment dated 13.11.2009, the appellants Nawab alias Akbar S/o Mubarak Ghanghro, Punhoon alias Punhal S/o Wahid Bux Machhi and Qurban Ali S/o Khamiso Mallah were convicted under Section 324/34 PPC and sentenced to 05 years R.I each. They were also convicted under Section 353/34 PPC and sentenced to 01 year R.I each. They were directed to pay a fine of Rs.2000/- each, in case of default in payment of fine, they were ordered to suffer S.I for 06 months more. Appellants were further

convicted under Section 7(b) of Anti-Terrorism Act, 1997 and sentenced to 10 years R.I. Movable and immovable properties of accused persons to the extent of Rs.200,000/- (Rupees Two Lacs) were also ordered to be forfeited to the State. Appellant/accused Nawab alias Akbar was further convicted under Section 13(e) of Arms Ordinance, 1965 in Crime No.28 of 2008 and sentenced to 05 years R.I and to pay a fine of Rs.30,000/- and in default whereof, to suffer R.I for 01 year more. All the sentences were ordered to run concurrently. Appellants were extended benefit of Section 382(B) Cr.P.C. It may be mentioned here that accused Mukhtiar Ali was convicted in his absentia.

2. Brief facts of the prosecution case as disclosed in the FIR are that SHO P.S Peerumal left Police Station on 30.09.2008 at 2145 hours vide roznamcha entry No.18 alongwith his subordinate staff for arrest of the accused wanted in Crime No.26 of 2008 registered at P.S Peerumal under Section 342 and 17(3) of H.O, 1979. SHO Sahib Dino and his staff, when reached at sugarcane crop, saw the footprints of the culprits. It is alleged that the complainant/SHO arranged the Government Footprint Tracker from Tando Adam. SHO with the help of foot tracker, tracked footprints of culprits, which disappeared at sugarcane crop of one Sain Bux Junejo. It is alleged that all of sudden, five dacoits/accused emerged from the sugarcane crop and started firing upon the police. Police in self defence also fired upon the culprits. SHO conveyed message to DPO Sanghar regarding the

encounter and for further Police force DSP Sanghar alongwith his subordinate immediately reached at the place of incident and participated in the cross firing. It is alleged that firing lasted for 1.1/2 hours. Thereafter, the police officials entered into sugarcane crop. It is alleged in the FIR that one dacoit armed with pistol raised his hands up and surrendered before the Police; he was caught-hold and pistol was secured from his possession, containing a magazine loaded with bullets. On inquiry, the accused disclosed his name as Nawab alias Akbar. On the search light of the vehicle, the Police party found a dead body of one dacoit lying in a sugarcane crop and a Kalashnikov was lying beside him. His name was disclosed by co-accused Nawab alias Ali Akbar as Saleem Shaikh. Police took his dead body and sent to the Civil Hospital, Sanghar for conducting his post-mortem examination and report. SHO lodged two cases bearing Crimes No.27 & 28 of 2008 against the accused on behalf of the State at Police Station.

3. After usual investigation, challan was submitted against accused Nawab alias Akbar, Punhoo alias Punhal and Qurban Ali under the above referred Sections, before the learned Judge, Anti-Terrorism Court, Hyderabad. The Investigating Officer submitted supplementary challan, in which accused Mukhtiar Ali was shown as absconder.

4. Trial Court issued Non-Bailable Warrant against absconding accused Mukhtiar Ali, which returned un-executed. He was declared as proclaimed offender, services of the Advocate on

state expenses were provided to him under the provisions of Anti-Terrorism Act, 1997. Learned Trial Court ordered joint trial in main case as well as under Arms Ordinance, 1965 as provided in 21-M of Anti-Terrorism Act, 1997.

5. Learned Trial Court framed the charge against the accused at Ex-14. Accused pleaded not guilty and claimed to be tried.

6. In order to substantiate the charge, prosecution examined P.W-1 Ghulam Ali, P.W-2 Muhammad Javed, P.W-3 Sahib Dino, P.W-4 Maqbool Ahmed, P.W-5 Muhammad Umar, P.W-6 Muhammad Hayat, P.W-7 Muhammad Sharif, P.W-8 Mubarak Ali and P.W-9 Dr. Shabir Ahmed. Thereafter, prosecution side was closed.

7. Statements of the accused were recorded under Section 342 Cr.P.C at Ex-28, 29 and 30. Accused claimed false implication in the case and denied the prosecution allegations. Accused did not lead evidence in defence and also declined to examine himself on oath in disproof of the prosecution allegations.

8. Trial Court after hearing the learned Counsel for the parties and assessment of the evidence by judgment dated 13.11.2009, convicted and sentenced the appellants/accused as stated above, hence, these appeals. By this single judgment, we intend to decide the aforesaid appeals.

9. The facts and evidence produced before the Trial Court find an elaborate mention in the judgment passed by the Trial Court dated 13.11.2009, therefore, the same may not be reproduced here, so as to avoid duplication and un-necessary repetition.

10. Mr. Nazeer Ahmed Bhatti, learned Advocate for the appellants has mainly contended that the prosecution case was highly doubtful. According to the case of the prosecution, there was cross firing between the Police and the accused for 1.1/2 hours but no one sustained a fire arm injury from the Police, even no scratch was caused to any of them. It is further argued that it was fake encounter, in which deceased Saleem Shaikh was killed by the police officials. Lastly, it is contended that in order to save the skin this false case was lodged against the accused persons but the Trial Court did not appreciate the evidence according to the settled principles of law.

11. Syed Meeral Shah Bukhari, learned Additional P.G argued that the appellants fired upon the police party with sophisticated weapon but luckily police was saved. He further argued that the evidence of the police officials was confidence inspiring and the Trial Court has rightly relied upon the evidence of the police officials. Lastly, he has submitted that appeals may be dismissed.

12. Record reflects that Trial Court by judgment dated 13.11.2009 convicted and sentenced the appellants/accused mainly for the following reasons:-

“The nutshell story of the case is that present case arose from the very foundation of crime No.26/2009 in which one Sahib Dino approached before Police Station Peerumal and who has lodged his fir U/S.17/3 H.O and 342 PPC and the said matter is pending before Civil Judge and Judicial Magistrate Sanghar, subsequently on the very day after lodging the FIR by P.S Peerumal he alongwith his subordinate staff and complainant Sahib Dino went behind the accused persons for arrest in the offence in which they have committed in Crime No.26/2008 and they reached at the place of wardat where encounter took place one accused was arrested and other was lying dead due to encounter with the police, thereafter police arrested the accused namely Nawab who was narrated the name of deceased Saleem Shaikh who was accompanied with him in the above said crime. Thereafter, police lodged separate FIR in Crime No.27 & 28/2008 at P.S Peerumal. This court has examined main material witnesses of place of occurrence, recovery of license weapons, arrest, dead body, place of incident recovery of un-licensed weapon, arrest of accused, dead body of the deceased accused, place of accused, dead body of the deceased accused, place of wardat/danashnama of deceased accused Saleem Shaikh, recovery of clothes, identification as well as arrest of accused Qurban and Punhoon alias Punhal and medical officer who has conducted the post mortem of deceased accused Saleem Shaikh. The entire evidence collected by this court have fully supported the prosecution without any benefit of doubt. On the other hand learned defence counsel have totally failed to establish his theory about the acquittal of the accused or showing innocent of the accused in the above offence and crime nor he has given any dent on the prosecution witnesses in order to prove his theory adopted by him at the time of trial nor he has produced any material/document which also support about the false implication of the accused as well as absconding accused, which create any benefit of doubt which goes in favour of the accused.”

13. From the close scrutiny of the evidence, it transpires that a large number of the police officials participated in cross firing with sophisticated weapons but during the encounter not a single injury or scratch was caused to any of the police officials. On the other hand, it was the case of the prosecution that one accused namely Nawab alias Akbar armed with pistol was arrested and the dead body of another accused namely Saleem Shaikh, having sustained fire arm injuries, was recovered with Kalashnikov. It is a matter of deep concern that accused persons were armed with sophisticated weapons, and fired for 1.1/2 hours, but not a single injury was caused to any of the police officials. The prosecution story appeared to be unnatural and unbelievable. Defence plea appears to be cogent that Police killed one Saleem Shaikh and to save the skin lodged this false case against accused persons. From the evidence brought on record, the ingredients of Sections 324, 353/34 PPC are also not made out. Moreover, Anti-Terrorism Court had also no jurisdiction to proceed with the matter as is clear from the evidence, offence triable by ATC is not made out. Moreover, accused Mukhtiar Ali was convicted in his absentia and such conviction awarded to him in his absentia was violative of the Constitution of 1973.

14. It is evident that no private person was associated in recovery proceedings by the SHO in the entire episode, although so could have been done very easily. Evidence of the above named police officials did not inspire confidence and is tainted with

doubts. Rightly reliance has been placed upon the case of *MUHAMMAD PARVAIZ V/S. THE STATE (2005 SCMR 1038)*.

15. It is also well settled law that it is not necessary that there should be many circumstances creating doubts. If there is a single circumstance, which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right as held by Honourable Supreme Court in the case of *TARIQ PERVEZ V/S. THE STATE (1995 SCMR 1345)*.

16. For the above stated reasons, we have no hesitation to hold that the prosecution has failed to prove its case against the appellants beyond reasonable doubt. Consequently, by extending benefit of doubt, appeals are allowed. Appellants Nawab alias Akbar and Qurban Ali are present on bail, their bail bonds stand cancelled and surety is hereby discharged. Accused Punhoo alias Punhal is in custody. He shall be released forthwith, if not required in some other custody case.

JUDGE

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