

IN THE HIGH COURT OF SINDH CIRCUIT COURT HYDERABAD

Cr. Appeal No.D-437 of 2010

PRESENT:

Mr. Justice Naimatullah Phulpoto

Mr. Justice Shamsuddin Abbasi

Date of Hearing: 29.03.2018

*Date of announcement
of the Judgment:* 16.04.2018

Appellants/accused:

- 1.Malook S/o Salib @ Sale Muhammad*
- 2.Sirajuddin S/o Wali Muhammad*
- 3.Ayoub S/o Saalim*
- 4.Khan Muhammad @ Khano S/o Saalim*
- 5.Haneef S/o Romaliyo*
- 6.Sher Khan S/o Bachoo*

All by caste Samejo, through Mr. Abdul Razzaque Leghari, Advocate

The State: *Through Shahzado Saleem Nahiyoon,
Deputy Prosecutor General, Sindh.*

J U D G M E N T

SHAMSUDDIN ABBASI, J:- Through the captioned appeal, the appellants have assailed the judgment dated 29.11.2010 recorded by the learned Special Judge, Anti-Terrorism Court, Mirpurkhas, in Special Case No.07 of 2008 arising out of Crime No.03 of 2008 of P.S Khensar District Tharparkar, whereby appellants Malook, Ayoub, Khan Muhammad alias Khano, Haneef and Sher Khan were convicted and sentenced to undergo the imprisonment with direction to run the sentences concurrently, the detail whereof has been given as under:-

<i>Under Sections</i>	<i>Conviction</i>	<i>To Pay Fine of</i>	<i>In Default of Fine to suffer</i>
7(c) of ATA, 1997	R.I 10 years each	Rs.50,000/- each	R.I 06 months
7(h) of ATA, 1997	R.I 05 years each	Rs.30,000/- each	R.I 03 months
337-A(i) PPC	R.I 02 years each	Rs.20,000/- each	R.I 02 months
337-F(i) PPC	R.I 03 years each	Rs.30,000/- each	R.I 03 months
504 PPC	R.I 02 years each	Rs.20,000/- each	R.I 02 months
147 PPC	R.I 02 years each	Rs.20,000/- each	R.I 02 months
148 PPC	R.I 03 years each	Rs.30,000/- each	R.I 03 months

Benefit of Section 382-B Cr.P.C was also extended to the accused

2. The brief facts of the case are that the FIR of this incident was lodged by Naib Sobedar Muhammad Arshad of Military Intelligence on 11.03.2008 at 2045 hours, wherein he has stated that he was posted at Chore Section 945 Intelligence Battalion (M.I Chore Cantt). On 10.03.2008, he alongwith LNK Naveed, Hawaldar Inayat, driver Fahad were on patrolling duty in supervision of Major Muhammad Ali Bhatti, Incharge Chore Section 945, Intelligence Battalion, in official vehicle of white colour Double Cabin. In the meanwhile, they received spy information that Indian agent would cross the border and would come to village Soomarhar. On receiving such spy information, they proceeded towards the pointed place and reached near village Soomarhar on its northern side at about 1:00 a.m., they arranged nakabandi at the border. At about 0218 hours, one person was coming from the border side and they tactfully apprehended the said person, who was handcuffed with official handcuffs and he raised cries by calling Khan Muhammad alias Khano S/o Saalim, who remained helper of the said Indian agent. At about 0230 hours about 9 / 12 persons armed with Kalashnikov, Hatchets, Lathis and Guns came there. The armed persons stood at some distance and started fires on them in order to kill them. Thereafter, the Major told them that they were military intelligence

personnel but the said armed persons did not stop. The intelligence personnel identified the armed persons as Sawan S/o Saalakh armed with Kalashnikov, Sirajuddin S/o Wali Muhammad armed with gun, Ayoub S/o Saalim armed with hatchet. Accused Ayoub caused hatchet blow to Hawaldar Inayat, which hit on his head, who raised cries and fallen down. Accused Khan Muhammad alias Khano S/o Saalim caused hatchet blow to complainant, which hit him on his right hand. In the meanwhile, accused Haneef S/o Romaliyo, Sher Khan S/o Bachoo caused hatchet blows to LNK Naveed, which hit him on his left arm. All the above accused were by caste Samejo, resident of village Soomarhar, Hote Khan S/o Dost Muhammad by caste Nohri resident of village Soomarhar Taluka Chachro, Saleem S/o Bachoo and Ali S/o Yousif, both by caste Samejo resident of village Soomarhar, Sirajuddin S/o Ali Khan Nohri resident of village Charnoor Taluka Chachro, rescued the Indian agent from their captivity, though the complainant party resisted but as the accused persons were more in number and the complainant party received injuries, therefore, the accused persons forcibly took away the Indian agent from their captivity alongwith handcuffs. Thereafter, the accused ran away after abusing and by creating the sense of insecurity by way of making rashly firing in the air. Thereafter, the complainant party took the injured in their government vehicle to P.S and then shifted him to Taluka Hospital Chachro. The informed the high-ups about the incident, who directed them to lodge the FIR of the incident. The FIR has been lodged by the complainant under Sections 324, 353, 332, 337-H(ii), 337-A(i), 337-F(i), 504, 147, 148, 149 PPC read with Section 6/7 of ATA, 1997.

3. After registration of FIR, the investigation was conducted and during the investigation the I.O prepared the mashirnama of place of incident and

recorded the statement of P.Ws under Section 161 Cr.P.C and arrested the accused Malook and Saleh alongwith hatchets and prepared such mashirnama of arrest and recovery and then finally the challan was submitted in the Court of learned Special Judge, Anti-Terrorism Court, Hyderabad and Mirpurkhas Division at Hyderabad.

4. The learned trial Court framed the charge against all the accused at Ex-5 but the accused did not plead guilty and claimed to be tried.

5. The prosecution in order to establish it's case, had examined 09 P.Ws. P.W-1 ASI Muhammad Khan was examined at Ex-7, who produced FIR at Ex-7/A. P.W-2 ASI Allahdad Chandio was examined at Ex-8, who produced Photostat copy of roznamcha entry No.5 at Ex.8/A, attested photocopy of letter dated 10.03.2008 at Ex-8/B and mashirnama of injuries at Ex-8/C. P.W-3 Muhammad Arshad was examined at Ex-9, whose cross examination was reserved on the request of defence counsel. The prosecution failed to produce rest of the witnesses, however, the learned trial Court issuedailable warrants against the prosecution witnesses. Thereafter, the statement of ASI Ahmed Ali was recorded at Ex-10, who produced un-executedailable warrant at Ex-10/A and Photostat copy ofailable warrant alongwith entry made at Chore Cantonment at Ex-10/B. Thereafter, the proclamation in order to procuring attendance of the witnesses was issued under Section 87 Cr.P.C and it was returned served and then statement of SIP Ilmuddin SHO P.S Khensar was recorded at Ex-11, who produced original proclamation at Ex-11/A, mashirnama at Ex-11/B and his report at Ex-11/C. After completing all codal formalities, the publication of Proclamation for the procuring attendance of P.Ws was published in three newspapers at Ex-12, 12/A and 12/B respectively. During

trial, accused Sirajuddin absconded away and he was declared as proclaimed offender. Prosecution examined P.W-4 LNK Naveed Ahmed at Ex-15. P.W-05 Major Muhammad Ali Bhatti was examined at Ex-16. P.W-06 LNK Fahad was examined at Ex-17, who produced masirhama of vardat at Ex-17/A, mashirnama of arrest of accused Malook and recovery of crime weapon from him at Ex-17/B and mashirnama of house search of accused persons at Ex-17/C to 17/L. Thereafter, the prosecution examined P.W-7 ASI Dittal Rind at Ex-21, who produced final Medico Legal Certificate of LNK Muhammad Arshad at Ex-21/A. P.W-8 Inspector Iqbal Ahmed was examined at Ex-22, who produced letter showing leave granted to Inspector Muhammad Fazil at Ex-22/A and letter of DPO Tharparkar for investigation the case at Ex-22/B. The prosecution lastly examined P.W-9 Dr. Sajjan at Ex-23, who produced letter dated 10.03.2008 at Ex-23/A and provisional and final Medico Legal Certificates at Ex-23/B to 23/H. Thereafter, the prosecution gave up P.W Hawaldar Inayat vide statement at Ex.24 and closed its side by statement at Ex-25.

6. The learned trial Court recorded the statements of accused under Section 342 Cr.P.C at Exs-26 to 36, wherein the accused denied the allegations leveled by the prosecution against them. Accused did not examine themselves on oath nor led any evidence in their defence.

7. The learned trial Court after hearing the learned Counsel for the parties and having assessed the evidence, passed the judgment dated 29.11.2010 and acquitted accused Sawan, Sirajuddin, Hote Khan, Saleem, Ali Samjeo and absconding accused Sirajuddin S/o Ali Khan Nohri, while convicted and sentenced accused Malook, Ayoub, Khan Muhammad alias Kano, Haneef and Sher Khan, the detail whereof is given supra, hence the present appeal.

8. The learned Counsel for the appellants contended that the incident had taken place in the odd hours of the night and the source of identification has not been disclosed by the prosecution witnesses. The identity of the accused with parentage and their addresses in the dark night hours was highly doubtful. He further contended that there was delay in lodging of FIR, which created doubt to the extent that FIR of the incident has been registered after consultation. He further contended that judgment passed by the learned trial court is a result of misreading and non-reading of evidence and the learned trial Court has not considered the discrepancies, material contradictions and lacunas created in the case. He further contended that identification parade was not held in this case and that the main role of causing injury to P.W Major Muhammad Ali Bhatti was attributed to accused Khan Muhammad alias Khano, who has expired and the conviction cannot be based on sharing of common object particularly when trial Court has extended benefit of doubt to six accused including absconding accused Sirajuddin. He further contended that the learned trial Court has disbelieved prosecution case that accused had made firing on the complainant party but none had received any firearm injury, therefore, the learned trial Court has also disbelieved the charge of firing upon the complainant party with intention to kill Army personnel. He further contended that before registration of FIR, the complainant had made entry in roznamcha, wherein he did not implicate any of the accused named in the FIR, even roznamcha entry did not show specific role to any of the accused. He further contended that the credibility of evidence of P.Ws is doubtful and he finally contended that the evidence of the prosecution witnesses is suffering from material contradictions, discrepancies and lacunas, therefore, he prayed for acquittal of the accused.

9. On the other hand, the learned Additional Prosecutor General has supported the judgment passed by the learned trial Court and further contended that the prosecution witnesses have fully established the case and their evidence is reliable, trustworthy and confidence inspiring, therefore, he prayed for maintaining the judgment passed by the learned trial Court.

10. Heard the learned Counsel for the parties and perused the material available before us.

11. In this case, the Police had challaned accused Malook, Sawan, Sirajuddin S/o Ali Khan Nohri, Ayoub, Khan Muhammad alias Khano, Haneef, Sher Khan, Hote Khan, Saleem, Ali Samejo and Sirajuddin S/o Wali Muhammad. We have noticed that accused Sawan, Hote Khan, Sirajuddin S/o Wali Muhammad, Saleem, Ali Samejo and absconding accused Sirajuddin S/o Ali Khan Nohri were acquitted of the charge, while accused Malook, Ayoub, Khan Muhammad alias Khano, Haneef and Sher Khan were convicted, who have filed the present appeal. During pendency of this appeal, accused Khan Muhammad alias Khano died away and proceedings were abated against him, whereas accused Malook, Ayoub, Haneef and Sher Khan faced trial.

12. We have carefully examined the prosecution evidence. P.W-1 ASI Muhammad Khan has stated in his evidence at Ex-7 that on 11.03.2008 he was posted as Deputy Incharge at P.S Khensar. When on that day, Naib Subedar Muhammad Arshad of Military Intelligence Chore Cantonment came at P.S and lodged FIR of the incident. He recorded the FIR and produced the same at Ex.7/A. Thereafter, he handed over the FIR to SIO / ASI Muhammad Dittal for investigation. In his cross-examination,

he has stated that the distance in between the P.S and the place of incident is about 60 kilometers. He further stated that there is Indus Rangers Post at about half kilometer away from village Soomarhar where this incident had taken place.

13. P.W-2 ASI Allahdad, who was posted as Incharge of Police Post Tar Ahmed of P.S Khensar, deposed that on 10.03.2008 at about 1705 hours, Naib Subedar Muhammad Arshad came at Police Post alongwith Major Muhammad Ali Bhatti, Hawaldar Inayat, LNK Naveed and driver Fahad on double cabin and stated that they were deployed at Military Intelligence, Chore where they received information about availability of Indian agent at village Soomarhar. Naib Subedar Muhammad Arshad further informed to the ASI Allahdad that they got arrested the Indian agent from village Soomarhar and on his cries the villagers attacked on them with intention to kill them and got released the Indian agent and caused injuries to Major Muhammad Ali Bhatti, Hawaldar Inayat, Hawaldar Naveed, Naib Subedar Muhammad Arshad and LNK Naveed and on the request of Muhammad Arshad the entry was kept at Police Post and ASI Allahdad issued a letter to them for medical treatment. ASI Allahdad prepared mashirnama of injuries in presence of driver Fahad and Zahoor Ahmed vide entry No.5, which he has produced at Ex-8/A and mashirnama of injuries at Ex-8/C. ASI Allahdad has stated in his cross-examination that police post Tar Ahmed is situated within the jurisdiction of P.S Khensar and village Tar Ahmed consists on about 25 houses. He further stated that both the mashirs of injuries were employees of Military Intelligence. He further stated that the distance between the Police Post Tar Ahmed and village Soomarhar is about 25 kilometers. He admitted the fact in his cross-examination that entry No.5 did not reveal any name of the accused. He

further stated that the complainant remained at police post for lodging his report, getting letter and preparation of mashirnama of injuries only for 10 minutes.

14. We have also perused the mashirnama of injuries of the injured, which reveals that Major Muhammad Ali Bhatti had sustained injury on head above ear and on hand. Injury of LNK Naveed reveals that he had received injury on fore-arm. Injury of Hawaldar Inayat reveals that he had received injury on head, whereas the injury of Subedar Muhammad Arshad reveals that he had received injury on hand.

15. P.W-3 complainant Naib Subedar Muhammad Arshad has deposed that he was working in Section 945 Intelligence Battalion of Military Intelligence at Chore Cantonment. On the day of incident, he alongwith Major Muhammad Ali, Hawaldar Inayat, LNK Naveed and driver Fahad on receiving spy information that an Indian agent would cross the border at night time and on receiving such information they left their office at 1:00 a.m. and reached at village Soomarhar at 1:00 a.m., where they saw that one person was entering in our country from India. They surrounded and apprehended him, on which the apprehended person made cries by calling one Khan Muhammad and Sirajuddin in order to get him released from their captivity. In the meanwhile, the accused persons came there armed with Kalashnikov, guns, lathis and attacked on them with intention to kill them and got the Indian agent released from their captivity. He further stated that prior to their attack, Major Muhammad Ali informed them that they belonged to Intelligence Battalion and they had arrested Indian agent, even then accused assaulted on them with their weapons and accused Khan Muhammad caused injury to Major Muhammad Ali, which hit on his head and he fell down. Accused Ayoub caused hatchet blow to

Hawaladar Inayat on his head, who also fell down on the ground. Accused Sher Khan and Haneef caused hatchet blows to LNK Naveed on his arm and accused Malook caused hatchet blow to the complainant on right hand and got released the Indian agent from their captivity. He further stated that accused made firing in the air by taking away the Indian agent. The complainant and driver Fahad got the injured in their vehicle and shifted to police post Tar Ahmed where they met P.P Incharge at about 5:00 p.m., who gave them letter for treatment from Taluka Hospital Chore. Thereafter, the complainant shifted the injured to Taluka Hospital where first aid was provided to the injured, wherefrom Major Muhammad Ali was shifted to CMH Chore Cantt. and thereafter Major was shifted to PMC Al-Shifa Hospital at Karachi on helicopter. He further stated that he had lodged FIR after getting directions from the high-ups. He in his cross-examination has stated that there is rangers post at village Mubarak, which is at the distance of one kilometer from village Soomarhar. He further stated that the distance between the Indo-Pak border and the village Soomarhar would be about 2 / 3 kilometers. He further stated that "it is correct that it is the duty of Indus Ranger Personnel posted at the post to apprehend the anti-state culprits who crossed the Indo-Pak border." He further admitted that they used to maintain roznamcha register for their movement. He also stated that Indus Rangers Post also maintained roznamcha register. He further admitted that "it is fact that there exists many villages near the Indo-Pak border pertaining to border length of 100 miles and there so many inhabitants and we did not know each and every one by their name and parentage." He further admitted that he had not produced departure entry of roznamcha register, to which they departed from their sub-office on the day of occurrence. He had denied the suggestion that "I do not know Jumoo, Ali Asghar, and

Madad Ali but I only know Haroon by face. They are not our informer. It is incorrect to suggest that I had reached at this Court on vehicle and one Haroon is accompanied me. I do not know whether absconding accused Sirajuddin S/o Ali Khan Nohri was taken up by Military Intelligence personnel. About 80 houses are situated in village Soomarhar and about 300 peoples are residing in village Soomarhar. It is fact that we had not mentioned name of Indian agent in FIR to whom we apprehended because as soon as we apprehended and handcuffed him when we coming towards our vehicle this incident took place.” This P.W denied the suggestion that accused Khan Muhammad was not present at the place of incident as he was suffering from paralysis, even he could not stand for walk due to his illness. This witness also admitted this fact “It is fact that accused persons were not involved by us in any other case being Indian agent, anti-state before any police station” He further stated that “there was exchange of firing in between us and accused persons and accused persons fires Kalashnikovs, Guns and we also fired in our defense upon accused persons through SMG (M.P-5). We fired about ¾ fires while accused persons fired about 40/50 fires. I had shown the place of incident to police of I.T P.S Khesar. It is fact that police had not secured even single empty from the place of incident in my presence. Here we have noticed that the complainant has stated in his examination-in-chief that they had received information about crossing of border by Indian agent at night time and after receiving such information they left their office and proceeded towards pointed place but the complainant took summersault in his cross-examination and stated that while patrolling in the area they received spy information near village Turdos about crossing of border of Indian agent, even this witness did not remember whether the night of incident was dark

or moonlight. The complainant deviated from his version in respect of empties secured from the place of incident and replied on the question of Advocate Haji Qalandar Bux Leghari as under:-

“I have already stated that 40 / 50 empties were secured by the police from the place of incident, which were not counted by him.”

16. We have also examined the evidence of P.W-04 LNK Naveed Ahmed, who has stated that on 10.03.2008 he was on patrolling duty alongwith team of Major Muhammad Ali. When they reached near Turdos at about 1:00 (midnight), Major Muhammad Ali received secret information through satellite phone that an Indian agent would enter into Pakistan from Indo-Pak border from village Soomarhar. Thereafter, they immediately rushed towards the pointed place and made Nakabandi. At about 02:18 a.m. (midnight) where they apprehended Indian agent while crossing Indo-Pak border. They handcuffed him and brought towards their vehicle. When they covered 250 / 300 paces the said Indian agent raised cries by calling Khan Muhammad alias Khano, on which 9 to 12 persons armed with K.K, rifles and hatches rushed towards them by firing upon them and that Major informed them they belong to Military Intelligence but they continued firing upon them so also caused hatchet injuries. This P.W has contradicted the complainant on the point that they are maintaining roznamcha register at their office at Chore Cantt. He further contradicted the complainant and stated that they were in the field since last two days prior to this incident. He also contradicted the complainant and stated that they received spy information at their office at Chore and proceeded to the pointed place but this P.W stated that we departed from Khipro two days prior to the incident, visited village Siloo Tar then village Turdos where they stayed for a night. They received information near Turdos on 10.03.2008 wherefrom they went

to pointed place and started Naka at about 1:00 a.m (night). Again tis P.W contradicted the version of the complainant given in the FIR as well as in deposition that they also fired on accused party in their defense and he specifically stated that "We did not made fire upon the accused persons in defense. It is fact that we do not sustain any fire arm injury fired by the accused persons upon us so also no bullet hit on our vehicle"

17. It is pertinent to mention here that the complainant had stated that their vehicle went out of order when they were going to police post Tar Ahmed from village Soomarhar after the incident and they called another vehicle from Chore. This aspect is also admitted by the present P.W in his evidence that their vehicle came out of order when they were returning from the place of incident and they waited for other vehicle for about 13 to 14 hours. We have also noticed that the learned Counsel for the accused had suggested to both these P.Ws that they sustained injuries due to accident of their vehicle and they managed this case on the request of their informer Haroon and all the accused have been implicated at the instance of their informer Haroon.

18. We have also examined the evidence of P.W-5 namely Major Muhammad Ali, who has stated that on 10.03.2010 he was posted as Incharge Sub-Office 945 Military Intelligence Chore Cantonment. On that day he was on patrolling alongwith his subordinate staff in double door government vehicle. During patrolling, he received spy information through satellite phone at 11:15 p.m. (night time) that an Indian agent expected to cross Indo-Pak boarder near village Soomarhar. They immediately rushed towards pointed place and at 1:20 a.m. they formed a Naka and at about 02:18 a.m. they apprehended a person who was crossing the border, they handcuffed in his hands, who raised cries by calling Khan Muhammad alias

Khano, on that about 11 persons rushed towards them who were armed with Kalashnikov, Shot Gun, Hatchets and Lathis and they made straight firing upon them with intention to kill them. This witness disclosed his identity and directed them not to make fires on them but they continued the fires. Thereafter, they assaulted on the complainant party and accused Khan Muhammad alias Khano caused hatchet injury to Major Muhammad Ali on head, on which he became unconscious. He further stated that he regained his conscious in CMH Chore. We have noticed that this P.W has contradicted himself and he has stated in examination-in-chief that he was available at his office at Chore, when he received spy information about crossing border of an Indian agent near village Soomarhar but he deviated from this version in cross-examination where he has stated that he had received spy information through satellite phone when they were travelling in between village Mubarak-Tar and Turdos. He further stated that they left their sub-office for patrolling one day prior to this incident towards chachro where they stayed for a night. Here again we have noticed that P.W LNK Naveed has stated in his deposition that they stayed a night at village Turdos, whereas this P.W has stated that they stayed for a night at chachro. It is pertinent to mention here that Major Muhammad Ali replied about the age of accused Khan Muhammad alias Khano (now dead) as under:-

“It is incorrect to suggest that accused Khan Muhammad alias Khano who has caused injury to me, was at the time of incident was paralyze and unable to cause injury upon me. I cannot say whether age of accused Khan Muhammad alias Khano was at the time of incident about 70 years.

19. At this juncture, we have perused the bail application filed by accused Khan Muhammad alias Khano before the learned trial court, where his CNIC is available, which shows his date of birth as 1948. This shows

that at the time of incident accused Khan Muhammad was more than 60 years old. If we consider this aspect of the case with the plea taken by the accused that they were falsely implicated in this case at the instance of one Haroon, who was informer of the complainant party, which creates serious doubts in the prosecution case.

20. P.W Major Muhammad Ali further stated that he was referred to PNS Shifa at Karachi as out-door patient for audiogram test. We feel that the complainant has exaggerated that Major Muhammad Ali was shifted from CMH Chore to PNS Shifa Karachi on helicopter but Major Muhammad Ali has neither stated that he was shifted to Karachi in helicopter nor he stated that he was admitted at PNS Shifa as injured as indoor patient but he was treated as out-door patient. This aspect of the case also created doubt in our mind as the complainant and other P.Ws have exaggerated in order to create heinous offence.

21. We have examined the evidence of P.W-6 of LNK Fahad. He was driver of Major Muhammad Ali and Police cited him as mashir of place of incident as well as mashir of arrest and recovery of accused Malook and recovery of hatched from accused Malook. He has also contradicted Major Muhammad Ali. As per statement of Major Muhammad Ali that after getting hatchet injury he became unconscious and he regained his senses at CMH Chore but this P.W Fahad has stated that while return from the place of incident their vehicle became out of order, thereafter, Major Muhammad Ali conveyed a message for providing other vehicle and after about 10 / 12 hours other vehicle came there. Major Muhammad Ali has stated that he was unconscious during the period from the time of incident and reaching at the hospital where he regained his senses. P.W Fahad has also disclosed the fact that there was check-post of Pakistan Rangers at the distance of

one kilometer from the place of incident where he had parked his vehicle at the time of incident but surprisingly he stated that he heard the fire shots and stated that no any rangers personnel deployed at check-post came at the place of incident, while returning from the place of incident, they informed rangers personnel about the incident. We are afraid that if actually this incident had taken place as stated by the prosecution witnesses then why Rangers did not help the military personnel by taking immediate action against anti-state elements. He had contradicted the complainant who stated that police had secured 50 / 60 empties from the place of incident, whereas P.W Fahad has stated that police did not secure any empty from the place of incident in his presence. He further stated that the hatchet recovered from the possession of accused Malook was not blood-stained. He further admitted the fact that like hatchets are mostly available in the market and can be easily purchased. Surprisingly and frankly he admitted the fact that he put his signatures on all the mashirnamas at police station. We have noticed here that there is statement dated 18.10.2010 filed by Advocate for accused with a request that accused Sirajuddin S/o Ali Khan Nohri has been abducted and is not traceable, therefore, he withdraw his power in respect of accused Sirajuddin and the learned trial Court had passed the order on the same day, which reveals that the trial Court had declared him as proclaimed offender and his case was ordered to be proceeded in his absentia.

22. We have also examined P.W No.7 ASI Muhammad Dittal, who was first I.O of the case. He has stated that on 11.03.2008 the investigation was handed over to him and on 12.03.2008 he alongwith his subordinate staff visited the place of incident on the pointation of the complainant and secured blood-stained mud and prepared mashirnama in presence of

mashirs namely Fahad and Zahoor Ali. Here we have noticed that both the P.Ws Fahad and Zahoor were working in Military Intelligence as stated by the prosecution witnesses and we have also noticed the unawareness of the Investigating Officer, who came before the learned trial Court after about 02 years and disclosed that both the mashirs Fahad and Zahoor are private persons. This aspect of the case shows seriousness of investigation in this case, which is also fortified from the statement of P.W Fahad, in which he has frankly disclosed that he has signed all the papers and mashirnamas at police station. This P.W has stated that he has not recorded the statement of Incharge Police Post Tar Ahmed of P.S Khensar. It is a matter of record that Incharge Police Post Tar Ahmed had not only made entry in the roznamcha book of P.P Tar Ahmed after arrival of the complainant party but he has prepared mashirnama of injuries as well as he given letter to injured for treatment. The other important aspect of the case is that the I.O has stated that he did not inquire about the Indian agent nor he tried to apprehend the Indian agent or had nominated as co-accused in this case. Both the complainant and mashir have stated that they went at the place of incident alongwith the Investigating Officer but the Investigating Officer denied this fact, who stated that both the mashirs met with him at village Soomarhar. He further stated that it is fact that he did not seal the blood-stained mud and he did not secure mud in cloth but the mud produced in Court was in cloth, which fact has been admitted by the I.O of the case during cross-examination. He further stated that it is a fact that he did not inquire about the incident from the officials deployed at Indus Rangers Post situated at the distance of one kilometer from the place of incident. He further admitted that he did not recover any weapon from which the accused had made firing.

23. We have also examined P.W-9 Dr. Sajjan, who was Medico Officer Taluka Hospital Chachro. He has stated that letter dated 10.03.2008 pertains to details of injured, in which four injured were mentioned namely Major Muhammad Ali Bhatti, LNK Naveed, Hawaldar Inayat and Naib Subedar Arshad of Military Intelligence Chore Cantonment and issued medical certificate to the injured. Thereafter, the prosecution closed its side vide statement at Ex-26.

24. We have also perused the statements of accused recorded by the trial Court under Section 342 Cr.P.C, wherein they have denied all the allegations leveled against them by the prosecution but neither they examined themselves on oath nor they led evidence in their defense.

25. We have gone through the judgment passed by the learned trial court in which the trial Court has set points for determination in the case. Point No.1 was "whether on 10.03.2008 at about 0230 hours (night time) near village Soomarhar Taluka Chachro all the accused persons alongwith absconding accused Sirajuddin Nohri duly armed with Kalashnikovs and Guns in furtherance of their common intention fired upon Military Intelligence personnel by making rash firing?" the findings of this point declared by the learned trial Court "as not proved" and acquitted the accused of their charge of assault by way of straight firing from their lethal weapons such as Kalashnikov, Guns, Rifles and Hatches on military personnel while they were performing their official duty and convicted the appellants / accused only on the ground that they inflicted the injuries to the complainant party.

26. We have carefully examined the evidence of the prosecution case and have observed that the time of incident was about 02:30 a.m.

(night time) but the source of identification has not been disclosed by the prosecution witnesses. The Military Personnel were also highly trained and duly armed with sophisticated weapons when they arrested a person who was crossing the border from India to Pakistan and on the cries of arrested person, 9 / 12 persons came there armed with Kalashnikov, Guns, Hatchets and Lathis in order to rescue the apprehended person and both the sides exchanged fires from their weapons. It is very surprising to note here for us that despite odd hours and in absence of any source of identification, the complainant party had identified all the accused with parentage under very tense position, particularly when indiscriminate firing had taken place. It is also observed here that delay of 21 hours in lodging of FIR suggests that FIR has been lodged after due consultation and deliberation. It is further observed herein that entry No.5 dated 10.03.2008 at Ex-8/A transpires that this entry was kept by the complainant at police post Tar Ahmed at about 1705 hours (05:05 p.m.), which did not show the name of any accused nor features were given. Besides that, both the parties were armed with sophisticated weapons and they made straight fires upon each other but none from either side has received any single injury which is very unbelievable. This fact has also been denied from the circumstantial evidence when the police reached at the place of incident, but they did not secure a single empty from the place of incident, even the learned trial Court had acquitted the accused from the charge of firing upon the complainant party, even mashir of the place of incident, who was military personnel, admitted this fact that police did not secure any empty from the place of incident and even mashir has stated that he has signed all the papers at the police station.

27. We have found a number of contradictions in the evidence of the prosecution witnesses as discussed herein above and the same need not be mentioned here again. The evidence of the prosecution witnesses appears to be un-reliable, un-trustworthy and unbelievable. The Honourable Supreme Court of Pakistan has settled a principle that there is no need of so many doubts in the case but if any single circumstance which creates reasonable doubt in a prudent mind then the benefit of which should go in favour of the accused as a matter of right but not as a matter of concession as reported in the case. Learned trial Court extended the benefit of doubt and acquitted some of the accused and on the other hand convicted some of the accused from the charge on same set of evidence without legal justification. The other aspect of the case was that the fatal injury caused to Major Muhammad Ali Bhatti was attributed to accused Khan Muhammad alias Khano, who has died during pendency of the case.

28. For the above stated reasons, prosecution has failed to prove it's case against the appellants / accused beyond any shadow of doubt. It is well settled principle of law that it is not necessary that there should be many circumstances which may create doubt for acquittal of an accused, if there is single circumstance which may create reasonable doubt in a prudent mind, the benefit thereof is to be given in favour of the accused as a matter of right but not as a matter of grace or concession as has been observed by the Honourable Supreme Court of Pakistan in the case of TARIQ PERVEZ V/S. THE STATE, reported as 1995 SCMR 1345.

29. In view of what has been discussed herein above, we have come to conclusion that the prosecution case is full of doubts, and while extending benefit of doubt to the appellants / accused, set-aside the judgment dated 29.11.2010 and allow this appeal. The accused Malook S/o

Salib alias Saleh Muhammad, Ayoub S/o Saalim, Haneef S/o Romaliyo and Sher Khan S/o Bachoo, all by caste Samejo, who are present on bail, are acquitted of the charge and their bail bonds stand cancelled and sureties are hereby discharged.

JUDGE

JUDGE

Shahid