

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, LARKANA
Criminal Appeal No. D-18 of 2021

Before:

Mr. Justice Zafar Ahmed Rajput
Mr. Justice Adnan-ul-Karim Memon

Appellant : Arsallah s/o Ghulam Hyder, through
M/s. Abdul Rehman A. Bhutto & Saeed
Ahmed Bajarani, advocates.

Respondent : The State, through Mr. Aitbar Ali Bhullo
Deputy Prosecutor General, Sindh.

Date of hearing : 03.08.2021
Date of the order : 03.08.2021

JUDGMENT

ADNAN-UL-KARIM MEMON, J:- This criminal appeal is directed against the judgment, dated **07.09.2016**, passed by the Court of Special Judge, Anti-Terrorism Kashmore @ Kandhkot in Special Case No.**28/2013**, arisen out of F.I.R No.**47/2009**, registered at P.S A-Section Kandhkot under sections 302, 353, 324, 440, 148, 149, P.P.C., 3/4 Explosive Act & 6/7 A.T.A, 1997, whereby the present appellant, namely, Arsallah s/o Ghulam Hyder (*absconding accused*) was convicted and sentenced along with 27 others co-accused persons, as under:

- (i) *Under Sections 302 (b), 149 P.P.C read with Section 7 (a) of Anti-Terrorism Act, 1997, to suffer R.I for life and pay fine of Rs.100,000/- each to the legal heirs of deceased PC Nazakat Ali, PC Meer Ali and PC Shamsuddin as compensation and in case of default to suffer S.I for two years more.*
- (ii) *Under Sections 324, 149 P.P.C read with Section 7 (b) of Anti-Terrorism Act, 1997, to suffer R.I for ten years and pay fine of Rs.50,000/- each to be distributed amongst injured Police officers and in case of default to suffer S.I for one year more.*
- (iii) *Under Sections 440, 149 P.P.C read with Section 7 Anti-Terrorism Act, 1997 to suffer R.I for three years and to*

pay a fine of Rs.20,000/- each and in case of default to suffer S.I for three months more.

- (iv) Under Sections 353, 149 P.P.C read with Section 7 of Anti-Terrorism Act, 1997, to suffer R.I for two years each.*
- (v) Under Section 148 P.P.C to undergo R.I for one year each.*

2. Brief facts giving rise to this appeal are that, on 12.02.2009, at 2100 hrs., complainant/SHO Gul Hassan Jatoi lodged the aforesaid F.I.R., alleging that during the encounter which took place on said day at 1630 hrs. between the police party and accused persons, police constables *Nazakat Ali, Meer Ali, and Shamsuddin* were gunned down by the accused persons and they caused certain injuries to police constables *Mir Hassan, Mashooq Ali, Mujeeb Rehman, Nazir Hussain, Abdul Qadir, and Sahib Khan*. During the investigation, the present appellant was stated to be arrested along with 27 others co-accused and sent up for trial before the Court of Special Judge, Anti-Terrorism Kashmore @ Kandhkot in Special Case No.28/2013. Learned Special Judge after completing requisite formalities, framed the charge against appellant and co-accused at Ex.18, to which they pleaded not guilty and claimed to be tried. Later, amended charge was framed at Ex.23.

3. At the trial, in order to substantiate the charge against the appellants, prosecution examined **PW-1** SIO Gul Hassan Jatoi (*complainant*) at Ex.24, he produced certain documents at Ex.24-A to Ex.24-L; **PW-2** Dr. Muzafar Ali Dahani (*MLO*) examined at Ex.25, he produced Lash Chakas Forms and postmortem reports of deceased constables at Ex.25-A to Ex.25-R; **PW-3** Amanullah Chacher (*Tapedar*) examined at Ex.26, he produced sketch of wardat in triplicate at Ex.26-A to Ex.26-C; **PW-4** SHO Sahib Khan Jagirani examined at Ex.27; **PW-5** P.C Nazir Hussain examined at Ex.29; **PW-6** PC Abdul

Majeed (*mashir of arrest*) examined at Ex.30, he produced imaginary memo of arrest of accused Arsallah at Ex.30-A; **PW-7** PC Abdul Qadir (*injured*) examined at Ex.32; **PW-8** PC Mashooq Ali (*injured*) examined at Ex.33; **PW-9** PC Mujeeb-ur-Rehman (*injured*) examined at Ex.34; **PW-10** ASI Ali Baig examined at Ex.35; **PW-11** SIP Ali Muhammad Mahar examined at Ex.36; **PW-12** PC Mir Hassan (*injured*) examined at Ex.37; **PW-13** Inspector Muhammad Panah Bhutto examined at Ex.39, he produced memos at Ex.39-A to Ex. 39-D; **PW-14** SIO Muhammad Ali (I.O.) examined at Ex.42, he produced documents at Ex.42-A to Ex.42-D; **PW-15** Inspector Abdul Haq Qureshi examined at Ex.44; **PW-16** Abdul Subhan Dayo (*MLO*) examined at Ex.45, he produced post-mortem report of accused Mehmood Khan alias Baboo at Ex.45-A; **PW-17** H.C Noor Muhammad examined at Ex.46; **PW-18** H.C Hairuddin examined at Ex.47, he produced memo of arrest and recovery at Ex.47-A.

4. The statements of accused persons, including present appellant, were recorded under Section 342 Cr. P.C at Ex.49 to Ex.75 respectively, wherein they denied the allegations against them and claimed to be innocent and false implication in the case. They however neither opted for examination themselves on oath nor led any evidence in their defence. The case was thereafter fixed for final arguments, when present appellant jumped the bail and after completing requisite formalities, he was declared as proclaimed offender vide order, dated 05.03.2016.

5. After hearing the counsel for the parties, the learned trial Court convicted and sentenced the 28 accused persons, including present appellant vide impugned judgment. The case of the appellant and

other 13 absconding accused/ proclaimed offenders was directed to be kept on dormant file till their arrest and production before the Court and to issue perpetual warrants against them, while 26 other accused persons present in Court on bail at the time of pronouncement of judgment were taken into custody and remanded to jail to serve out their sentences. Subsequently, 26 accused persons preferred Crl. Appeal No. 61 of 2016 (*Re: Mir Hasan and others v. The State*) against the impugned judgment, which was allowed by this Court vide order, dated 15.06.2017, thereby they were acquitted of the charge. Later, present appellant/absconding accused preferred instant criminal appeal on being arrested by the police in another case and produced before the trial Court, where the copy of the judgment was supplied to him and he was remanded to jail to serve out the sentence.

6. Learned counsel for the appellant has mainly argued that the judgment passed by the trial Court is much against the law, facts, and equity and liable to be set aside, which has in fact been set aside by this Court while allowing Crl. Appeal No. 61 of 2016. That the appellant due to terrible tribal dispute which claimed many lives had to concealed himself in a hidden place, other wise during the trial he never remained absent in the trial Court; that the learned trial Court has failed to appreciate the factual as well as legal aspects of the case while convicting the appellant; that the evidence adduced by the prosecution at the trial, which consists of only police officials, is not properly assessed and evaluated by the learned trial Court and the evidence is insufficient to warrant conviction of the appellant; that since 26 co-accused have already been acquitted of the charge on the same set of evidence, the present appellant is also entitled for the same treatment.

7. Conversely, learned A.P.G has not opposed this appeal on the ground that on the same set of evidence other 26 co-accused have already been acquitted by this Court by allowing Crl. Appeal No. 61 of 2016 preferred by the co-accused against their conviction and sentenced.

8. We have heard the learned counsel for the appellant as well as D.P.G. and have scanned the material available on record with their assistance.

9. Crl. Appeal No. 61 of 2016 preferred by the 26 accused persons/convictees against the impugned judgment was allowed by this Court vide Judgment, dated 15.06.2015 observing, as under:

9. Prosecution's case as narrated by the PW-1 complainant/SIO Gul Hassan Jatoi of P.S. A-Section, Kandhkot, is that on 12-02-2009 he received spy information that the accused wanted in crime No. 23/2009, registered under sections 302,148,149, P.P.C. at P.S. A-Section Kandhkot, namely, Jamaluddin, Meer Hasan, Saeed Khan, Akber, Muhammad Hashim, Muhammad Ayoob, all by caste Bhangwar, along with their companions, having Rocket Launcher, Kalashnikovs and other automatic weapons were present in their Otaq of accused Jamaluddin Bhangwar. He communicated said information to SP Investigation and on arrival of other police force i.e. SHO B-Section Kandhkot, SHO Ghouspur, SHO Rasaldar, In-charge Mujahid-1, In-charge Mujahid-2, In-charge Shahbaz-1, In-charge Shahbaz-2, ASI Nisar Ahmed Jakhrani of P.S. Buxapur, along with their staffs, he along with his SHO and staff left P.S. under supervision of SPO, Kandhkot. PW-1 complainant/SIO Gul Hassan Jatoi and SHO Ali Muhammad Mahar (PW-11), along with their staff, boarded in APC (Armoured Personnel Carrier). They all reached the pointed place where they saw 35 persons duly armed whom they identified as Jamaluddin,

having Rocket Launcher, Liaquat and Shaban armed with guns and Mir Hasan, Saeed Khan, Akber, Muhammad Hashim, Muhammad Siddique, Muhammad Ayoob, Zulfiqar Ali, Mehmood, Akram, Abdul Ghaffar, Abbas Ali, Sadruddin, Dilmurad, Shad Muhammad, Hakim Ali, Chakar Ali, and others were armed with Kalashnikovs. On seeing the police mobiles, accused Jamaluddin fired rocket on their APC chain, due to which the chain of the APC was broken and fell in the watercourse. The piece of shell hit to SHO Ali Muhammad Mahar. PCs Nazakat Ali, Mir Ali and Shamsuddin received firearm injuries and died on the spot and PCs Mir Hassan, Mashooq Ali, Nazir Hussain, Abdul Qadir, Mujib-ur-Rehman received injuries. The encounter lasted for 2 to 2 ½ hours. Meanwhile, Tiger Kashmore and mobile of Tangwani came in their assistance and on seeing them, all the accused leaving their motor-cycles but taking their injured companions fled away; thereafter, they brought the dead bodies and injured at Taluka Hospital, Kandhkot.

10. *It transpires from the perusal of record that the prosecution case rests upon ocular testimony and recoveries. Ocular testimony consists of 09 witnesses, namely, PW-1 complainant/SIO Gul Hassan Jatoi; PW-4 In-charge Mujahid-1, Sahib Khan Jagirani (injured); PW-5 P.C Nazir Hussain (injured); PW-7 PC Abdul Qadir (injured); PW-8 PC Mashooq Ali (injured); PW-9 PC Mujeeb-u-Rehman (injured); PW-11 SIP Ali Muhammad Mahar (injured); PW-12 PC Meer Hassan (injured) and PW-13 Inspector Muhammad Panah. Although they have taken in their depositions the names of some of the accused by asserting that they were present at the spot and took part in the encounter, but none of them has deposed that he knew the accused previously. Even they could not recognize the accused by their names during their evidence. PW-7 PC Abdul Qadir has deposed that he could not say whether the accused present in the court fired on them because as soon they reached near Otaq of accused, they (accused) started firing. He as well as PW-1 complainant/SIO Gul Hassan Jatoi and PW-9 PC Mujeeb-ur-Rehman have deposed that the names of accused were disclosed to them by A.S.I Sahib Khan, while*

PW-4 Sahib Khan Jagirani himself could not recognize the accused by their names during his evidence. None of the said eye-witnesses was able to furnish account as to which accused fired on which injured/deceased. The ocular account is also inconsistent on the disclosure of distance between police party and accused during encounter. PW-1 complainant/SIO Gul Hassan Jatoi has deposed that during the encounter the accused were at a call distance from the police party. PW-4 In-charge Mujahid-1, Sahib Khan Jagirani has described the distance of accused about 200 yards from police party. PW-5 P.C Nazir Hussain has deposed that during the encounter, the accused persons were at a distance of about 60/70 paces away from them. PW-7 PC Abdul Qadir and PW-12 PC Meer Hassan have deposed that the accused fired on police party from the distance of about half kilometer. Such state of affairs leads to a conclusion that the said PWs/eye-witnesses were only aware of the names of accused persons and none of them had ever seen them and hence they were not able to identify them. It is humanly not possible to identify a person from the distance of 200 yards to half kilometer. Therefore, the ocular account being untrustworthy does not inspire confidence.

11. *So far recovery is concerned, it has been brought on record through the evidence of P.W-1 complainant/SIO Gul Hassan Jatoi that he recovered five motor cycles of the accused from the occurrence on 12.02.2009 under mashirnama of recovery (Ex.24-A); however, nothing has been brought on record to establish as to in whose names the said motor-cycles are, as no registration record has been collected in investigation and produced in evidence to establish that the same were belong to any of accused persons. Other recoveries are the recoveries of number of empties on 13.03.2009 under memo of recovery (Ex.39-A) and un-license DBBL gun of 12 bore and live cartridges from accused Niaz Hussain; un-license SBBL gun of 12 bore and live cartridges from accused Hakim Ali; un-license SBBL gun of 12 bore and live cartridges from accused Ali Muhammad; un-license SBBL gun of 12 bore*

and live cartridges from accused Muhammad Siddique and un-license SBBL gun of 12 bore and cartridges from accused Abdul Ghaffar on 23.06.2009 under memo of arrest and recovery (Ex.47-A). It is an admitted position that the empties recovered from the occurrence on 13.02.2009 and the alleged guns recovered from above-named accused on 23.06.2009 were not sent to ballistics expert to ascertain if any of the empties were fired from the guns allegedly recovered from the said accused. So far recovery of alleged guns are concerned, it is an admitted position that the accused Niaz Hussain, Ali Muhammad, Muhammad Siddique and Abdul Ghaffar have already been acquitted vide separate judgments dated 10.02.2010 passed by learned Judicial Magistrate Kandhkot in their respective cases registered under section 13 (d) Arms Ordinance. In view of such facts, no credibility can be attached with the alleged recoveries.

12. *It may be noted that besides police force of P.S A-Section Kandhkot, SHO B-Section Kandhkot along with his staff, SHO Ghouspur along with his staff, SHO Rasaldar along with his staff, in-charge Mujahid-1 along with his staff, In-charge Mujahid-2 along with his staff, In-charge Shahbaz-1 along with his staff, In-charge Shahbaz-2 along with his staff, ASI Nisar Ahmed Jakhrani of P.S. Buxapur along with his staff, SPO, Kandhkot were present at the occurrence and took part in alleged encounter, but despite such a heavy force available at the spot, police party failed to arrest even a single accused from the spot.*

13. *In view of the above stated facts and discussion, we are of the considered view that in the instant case there is no convincing and trustworthy evidence against the appellants/accused to connect them with the commission of alleged offences and thus, prosecution has miserably failed to prove its case against them beyond reasonable doubt. In this regard, we are supported with the case of Tariq Pervez v. The State (1995 SCMR 1345) wherein the Hon'able Supreme Court has held that "the concept of benefit of doubt to an accused*

persons is deep-rooted in our country for giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts. If there is a 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.”

14. *For the foregoing facts and reasons, we allow this criminal appeal, set aside the conviction and sentences of appellants recorded vide impugned judgment and acquit them of the charges. They be set at liberty forthwith, if not required to be detained in any other case*

10. The present appellant has been convicted by the trial Court on the same set of facts and evidence, above mentioned, which this Court has not considered sufficient to warrant conviction of the appellants of Crl. Appeal No. 61 of 2016 and award them afore-mentioned sentences. So far the case of present appellant is concerned; we do not find any special features that distinguish his case/role from those of said appellants, justifying recoding conviction and sentence to present appellant. Hence, the present appellant is also entitled to the same benefit of doubt earlier extended in favour of appellants of Crl. Appeal No. 61 of 2016. Consequently, we allow this criminal appeal, set aside the conviction and sentences of appellant recorded by the trial Court vide impugned judgment and acquit him of the charges. He shall be set at liberty forthwith, if not required to be detained in any other case

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