

# IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

**Cr. Appeal No.D-106 of 2018**

**Cr. Appeal No.D-107 of 2018**

**Present:-**

**Mr. Justice Muhammad Iqbal Kalhoro**

**Mr. Justice Adnan-ul-Karim Memon**

Date of hearing: 14.02.2019 & \_\_\_\_\_  
Date of decision: \_\_\_\_\_  
Appellants: Through Mr. Aziz Ahmed Leghari advocate  
The State Through Ms. Rameshan Oad, APG

## **J U D G M E N T**

**MUHAMMAD IQBAL KALHORO J:-** Through this single judgment, we dispose of both the listed appeals impugning judgment dated 28.11.2018 by learned I<sup>st</sup> Additional Sessions Judge/Judge Anti-Terrorism Court, Mirpurkhas convicting and sentencing the appellants in Special Cases No.04 & 05 of 2016 arising out of Crime No.102/2016 u/s 234, 353, 337-F(iii), 147, 148, 149 PPC r/w section 7 of ATA, 1997 in following terms; and judgment dated 28.11.2018 convicting and sentencing appellant Zulifqar Ali in Crime No.103/2016 u/s 23(i)A of Sindh Arms Act, 2013 in following terms.

1. **U/s 324 r/w section 149 PPC:** To suffer R.I for seven (07) years each and to pay Rs.50,000/- each as fine and in case default in payment thereof shall suffer further S.I for four (04) months more.
2. **U/s 353 r/w section 149 PPC:** To suffer R.I for two (02) years each and to pay Rs.20,000/- each as fine and in case default in payment thereof shall suffer further S.I for four (04) months more.
3. **U/s 337-F(iiii) r/w section 149 PPC:** To suffer R.I for three(03) years each as Tazir and to pay Rs.50,000/- each as Daman to injured PW PC Abid Hussain.
4. **U/s 148 PPC:** To suffer R.I for two (02) years each and to pay Rs.10,000/- each as fine and in case of default in payment thereof shall further suffer S.I for one (01) year more.
5. **U/s 7 of ATA, 1997:** To suffer R.I for seven (07) years each and to pay Rs.50,000/- each as fine and in case of default in payment thereof shall further suffer S.I for four (04) months more.
6. **Accused/Appellant Zulfiqar Ali** has also been sentenced **u/s 23(i)-A of Sindh Arms Act, 2013** to suffer R.I for seven (07) years and to pay Rs.50,000/- as fine and in case default in payment thereof shall further suffer S.I for four (04) months more.

2. Allegedly on 26.08.2016 complainant SIP Haji Allahdino was present at PS when he received spy information about presence of appellants duly armed at their village Bhogi Khan Noohani along with absconders in crime No.99/2012. He along with his subordinate staff left PS vide daily diary entry No.14 and reached pointed place where appellants with intention to kill them made straight fires towards them. They also retaliated and in the ensuing encounter PC Abid Hussain received a bullet injury on back side of his shoulder and some bullets also hit police mobile. Ultimately, police party succeeded to arrest one of the accused namely Zulfiqar son of Fateh who was armed with a Repeater with three live cartridges and from him further ten cartridges concealed in a bag were recovered. Whereas, remaining accused were able to make their escape good. The arrested accused along with recovered weapon was brought at PS, where aforesaid FIRs were lodged.

3. After usual investigation the cases were challaned before the trial Court, where appellants Gohram, Saleem, Alam, Fateh, Moula Bux, Rasheed, Hyder, Muzaffar Khan and Waseem surrendered and joined trial. A formal charge was framed against them; they pleaded not guilty and claimed trial. In order to prove the case, prosecution has examined 08 witnesses in both cases. They have produced all necessary documents including FIR, memos, medical certificate, etc. After prosecution evidence, appellants' statements u/s 342 Cr.P.C were recorded, wherein they have denied the allegations and have claimed innocence. However, the appellants neither examined themselves on Oath, nor they produced any witness in their defense. Finally, the appellants were convicted vide impugned judgments in the terms as stated supra.

4. Mr. Aziz Ahmed Laghari learned counsel for appellants while praying for acquittal of the appellants has argued that appellants are innocent and falsely implicated in this case as no encounter took place between them and police party; that there are material contradictions in the evidence of witnesses which has rendered the entire case doubtful; that there is no memo showing that police mobile was damaged in the alleged encounter although the witnesses have said that it was hit by cross firing; that the police had spy information in advance, yet they did not join any private person as a witness in this case; that though the prosecution witnesses have claimed in their evidence that each of them had fired a number of rounds but nothing was found at the place of incident; that SIP Haji Allahdino has admitted that the accused persons had filed a Constitutional Petition against him and other police officials prior to registration of this case

and hence their false implication cannot be ruled out; that the prosecution has also failed to establish ingredients of section 7 Anti-Terrorism Act, 1997, yet the learned trial court has convicted the appellants for such offence; that appellant Zulfiqar Ali is juvenile but this fact was ignored by the learned trial court; and that the Repeater allegedly recovered from the possession of appellant Zulfiqar Ali was foisted upon.

5. On the other hand, Ms. Rameshan Oad learned Assistant P.G has supported the imputed judgment and has stated that there is sufficient evidence against the appellants.

6. Heard and perused the record. We have found a number of contradictions in the evidence of witnesses on the material facts, which have rendered the prosecution case doubtful. Evidence of injured P.C. Abid Hussain P.W.1 indicates that while he was fully engaged in the encounter, he received injury, which is further evident from his disclosure in cross examination that he after alighting from police mobile had fired forty rounds in the encounter, but seat of his injury i.e. over lower border of scapula does not support his version because if he was in middle of exchange of fire which would mean that he was facing the accused then how he received the injury on his back part. Such injury would rather indicate that his backside was towards the appellants, which in a situation of an encounter seems unbelievable. His claim that he after getting down from the police mobile had participated in the encounter has been contradicted by P.W.2 namely Asad Ali who in his cross examination has stated P.C. Abid Ali and P.C. Sonharo while sitting in the police mobile had opened fire to the accused. In his examination in chief he has stated that P.C. Abid Ali received a bullet injury on his buttock which is not even the case of prosecution on this point and is in conflict with medical evidence.

7. PC Abid Hussain and P.W.2 Asad Ali have in their evidence claimed that at the time of encounter he (PC Abid Ali) was in police uniform, whereas P.W.3 Kishore Kumar has stated that PC Abid Ali was in civvy which shows that he was not even part of police party which took part in the alleged encounter, which is further fortified from the fact that he in his evidence does not say that memo of recovery and arrest of appellant Zulfiqar was prepared at the spot before him. In his cross examination he has disclosed that he does not know about any recovery from appellant Zulfiqar. P.C. Abid Ali has stated that after leaving Police Station they had reached place of incident in ten minutes, whereas P.W.4 namely

Hootchand states that they had reached place of incident within thirty minutes. This witness further states that PC Abid Ali had received injury while alighting from police mobile which is contrary to other evidence and even the statement of PC Abid Ali as he in his cross examination has disclosed that after alighting from the police mobile he had fired forty rounds before the injury. All the witnesses have claimed in their evidence that during the cross fire the police mobile was hit but the record does not reflect that any memo to that effect was prepared or the police mobile as case property was produced before the trial Court to establish such version.

8. It is also strange to note that all the PWs in their examination in chief have described the incident exactly in same words without any slight difference which does not appeal to the common sense and appears to suggest that the witnesses have given tutored evidence to implicate the appellants in the incident which otherwise from the attendant circumstances does not appear to have taken place in the manner as proposed by the prosecution in its case because it is alleged that more than ten accused and almost equal number of police officials were firing at each other with deadly automatic weapons but none of them except PC Abid Ali who has received minor injury fallen under section 337-F(ii) punishable for five years only, received any injury or any damage was caused to the surrounding area including police mobile. The arrest of appellant Zulfiqar from the spot does not appear to be confidence inspiring as no details in this regard have been furnished by the prosecution witnesses in their evidence except that he was arrested from the spot. It is not clear in what manner and how only the appellant and not any accused were arrested when this appellant was placed in equal situation along with the remaining accused and was armed like the others but they succeeded to run away whereas he was arrested. Complainant SIP Allahdino PW5 in his cross examination has disclosed that PC Abid Ali was still in police mobile when he was hit by a bullet fired by the accused which is in complete contradiction to what the other witnesses have said on this very crucial fact. Injured himself has stated that he was outside of the police mobile and was engaged in firing with the accused when he was hit, PW 4 Hootchand says that PC Abid Ali received injury while alighting from the police mobile and this witness has disclosed that while he was still in the police mobile and coming out when he was hit by the bullet. Although the complainant has supported the recovery of alleged repeater from appellant Zulfiqar but he has admitted in cross examination that certain words such “Khyber Arm Company Peshawar” written

on the barrel of alleged repeater have not been mentioned in the mashirnama memo of its recovery. This witness has also contradicted on the point of time consumed by the police party in reaching the place of incident from Police Station with other witnesses by disclosing that within 5/6 minutes the police party had reached the place of incident.

7. We have also noted that neither the blood stained earth was retrieved from the place of incident nor the blood stained clothes of the injured were produced in the Court by the prosecution in support of its case. The Investigating Officer of the case in his cross examination has disclosed that he had not obtained record of ammunition from Police Station to show its use by the police party at the time of incident that he had not collected empty shells from inside the police mobile and has even admitted that he is not aware whether some police officials were riding on the motorcycle on the date of incident and further he has not noticed any mark of bullet hit any article available at the place of incident which has made the entire case doubtful as the claim of the witnesses that they had fired several rounds in the encounter is not established or that claim of some of witnesses that while sitting in the police mobile had fired at the appellants or even the place of incident where this incident took place as the Investigating Officer was not able to notice any bullet mark from the article/substance at the place of incident. The Investigating officer further failed to record any independent person during investigation although the witnesses have admitted existence of village nearby place of incident.

JUDGE

Further, P.W. 3 Kishore Kumar was part of police party but he does not say that memo of recovery and arrest of appellant Zulfiqar was prepared at the spot before him. In his cross examination he has disclosed that he does not know about any recovery from appellant Zulfiqar.