

IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Spl. Anti-Terrorism Appeal No. D – 105 of 2022

(Wazir and others versus The State)

Present:

Mr. Muhammad Iqbal Kalhoro, J.

Mr. Arbab Ali Hakro, J.

Dates of hearing : **20.12.2023, 22.02.2024 & 20.03.2024**

Date of decision : **20.03.2024**

Mr. Sohail Ahmed Khoso, Advocate for appellants.

Mr. Aftab Ahmed Shar, Additional Prosecutor General.

J U D G M E N T

Muhammad Iqbal Kalhoro, J.– Appellants were tried in Special Case No.67 of 2016 by the Anti-Terrorism Court, Khairpur arising out of Crime No.23 of 2016, registered at Police Station FM Narejo, Khairpur Mir's U/S 302, 324, 353, 404, 427, 109, 148, 149 PPC read with Section 7 of Anti-Terrorism Act, 1997, and have been handed down conviction and sentence, in terms of impugned judgment dated 13.09.2022, as detailed below, which they have challenged in this appeal:

- For the offence U/S 302(b) PPC read with Section 149 PPC, to suffer rigorous imprisonment for life each on two counts with payment of fine of Rs.1,00,000/- (Rupees one lac) each, or in default thereof, to suffer further RI for six months each.
- The movable or immovable property of all the accused be also forfeited to the State and they have been ordered to pay compensation as contemplated U/S 544-A CrPC to the legal heirs of deceased PC Mubarak Ali and PC Muhammad Younis of Rs.2,50,000/- (Rupees two lac fifty thousand) each, or in default thereof, to suffer further RI for six months each.
- For the offence U/S 324 read with Section 149 PPC, to suffer RI for ten years each with payment of fine of Rs.50,000/- (Rupees fifty thousand) each, or in default thereof, to suffer further RI for six months each.
- For the offence U/S 353 read with Section 149 PPC, to suffer RI for two years each.
- For the offence U/S 404 read with Section 149 PPC, to suffer RI for three years each with payment of fine of Rs.20,000/- (Rupees twenty thousand) each, or in default thereof, to suffer further RI for two months each.
- For the offence U/S 402 read with Section 149 PPC, to suffer RI for seven years with payment of fine of Rs.35,000/- (Rupees thirty

five thousand) each, or in default thereof, to suffer further RI for two months.

- For the offence U/S 212 read with Section 149 PPC, to suffer RI for five years each with payment of fine of Rs.25,000/- (Rupees twenty five thousand) each, or in default thereof, to suffer further RI for three months.
- For the offence U/S 7(a) of Anti-Terrorism Act, 1997, to suffer rigorous imprisonment for life each on two counts with payment of fine of Rs.1,00,000/- (Rupees one lac) each, or in default thereof, to suffer further RI for six months each.
- All the above sentences have been ordered to run concurrently with benefit of Section 382-B CrPC extended to the accused.

2. As per brief facts set out in FIR (Crime No.23 of 2016), complainant SIP/SHO, Police Station Piryaloi along with his team was on duty, investigating Crime No.49 of 2016 registered at same police station u/s, among others, 395 PPC on 07.10.2016. During which he received spy information about presence of 25/26 dacoits in nearby cotton as well as banana crops in Deh Lakha Landhi. He conveyed such information to his high-ups and sooner than later SHOs of different police stations with their teams arrived at the spot. He along with them challenged the dacoits, armed with deadly weapons. At least eight (08) of them were identified by him, whose names he has mentioned in FIR. In response, they fired at police and the police retaliated the same. In cross-firing, PC Mubarak Ali, PC Mukhtiar Ali, PC Muhammad Younis, PC Atta Muhammad, PC Altaf Soomro and PC Allah Dino Bullo were injured, whereas, from other side, two dacoits also got injured. In the ongoing firing, a dacoit namely Bilawal, after having received a firearm injury, expired. Meanwhile, the police saw six (06) persons on their motorcycles emerging from the jungle and taking away dead body of Bilawal under the cover of firing made by their colleagues. Out of whom, three (03) were identified as Raja alias Raju, Abdul Waheed and Farooq Shah.

3. In the meantime, police of other police stations also came at the spot and participated in the encounter, which continued at least for one and half hour. But then suddenly stopped as the accused / dacoits taking advantage of bushes had made their escape good. Necessary documents recoding event of the encounter were prepared by the complainant, after he had found PC Mubarak Ali dead from firearm injuries. He then referred the injured Police Constables to hospital for treatment, secured 40 empties of SMG, 35 empties of G-3 rifle, 50 empties of Kalashnikov and 60 empties of G-3 rifle, fired by both the parties. On their way back to Police Station, the police party came to know that PC Muhammad Younis had succumbed to his injuries and expired. At Police Station, he registered the FIR as above.

4. On 27.10.2016, he recorded his further statement disclosing names of other accused as Roshan, Waseem alias Wasu, Ali Nawaz alias Nazo, Bhai Khan, Muhammad Usman, Sahil, Wazir and Habibullah alias Hablo, who had taken part in the encounter. During different times, staggering over the year 2016, all the eleven appellants turn by turn were arrested. From appellant Habibullah alias Hablo, arrested on 27.10.2016, an unlicensed .30 bore TT pistol was recovered, which was then sent along with the empties to the forensic expert for a report, and the lab report (Ex.39/B, Page No.599) shows that one empty marked as "C1" was found fired from it which in view of the fact that no empty of .30 bore pistol was recovered from the place of incident is strange. He, however, was booked in Crime No.51 of 2016 for offence U/S 23(1)(a) of Sindh Arms Act, 2013, and has been convicted and sentenced to suffer RI for seven years with payment of fine of Rs.20,000/- (Rupees twenty thousand), or in default thereof, to undergo RI for two months more, in addition to his punishment in the main case.

5. Learned Counsel in defense has argued that appellants are innocent, have been falsely implicated in this case. There is absolutely no case against them. Names of appellants except appellant Abdul Majeed do not transpire in FIR. No specific role has been assigned to him, nonetheless. There are six (06) eyewitnesses examined by the prosecution, out of which four (04) witnesses have not identified the accused to be the culprits. PW-17 Nadir Ali (Ex-37) has denied his presence at the spot and participation in the encounter contrary to the prosecution's version depicting his presence at the spot and taking part in the encounter. He has confined his evidence to the fact of registering FIR as per verbatim of the complainant.

6. On the other hand, learned Additional Prosecutor General has supported the impugned judgment, while conceding above factual position i.e. four (04) witnesses not identifying the appellants to be the accused.

7. We have heard the parties and perused material available on record. In this case, prosecution has examined eighteen (18) witnesses, who have produced all the necessary documents to prove the charge against the appellants. Evidence of complainant shows that he had identified, among others, appellant Abdul Majeed alias Mujoo and Shahan alias Shahoo, who had fired at police party along with other unknown dacoits, injuring at least five (05) Police Constables. Out of whom, two (02) Police Constables namely Mubarak Ali Narejo and Muhammad Younis succumbed to their injuries and died. Out of these two appellants, appellant Shahan expired in jail on 30.03.2023. The report filed by the jail authorities had verified this fact; and in view thereof, the

appeal against him was abated on 20.03.2024 U/S 431 CrPC before start of arguments in this case on that day.

8. The case against appellants Abdul Waheed and Raja alias Rajoo, as setup by the complainant in his evidence, is that they were among six (06) accused, who had emerged on three (03) motorcycles from behind the jungle and had taken away dead body of Bilawal. Neither in the FIR nor in evidence, except the above role, anything has been alleged to make out a case of encounter against them. We in the course of arguments asked the learned Additional Prosecutor General, keeping in view their role, what offence they could be alleged to have committed. His view was that at the most they would be assigned to have committed an offence U/S 201 PPC: causing disappearance of evidence of offence, or giving false information to screen the offender. A perusal of this provision of law shows that the offence is constituted only when an accused causes disappearance of evidence with intention to screen the accused, who has committed the main offence. In the entire case, the prosecution has not alleged that these accused in order to screen the main accused or for the purpose of destroying the evidence had taken away dead body of accused Bilawal, nor such charge was framed against them or in 342 CrPC statements, such question was put up to them for their explanation. It has been candidly accepted by the learned Additional Prosecutor General that insofar as allegations of encounter, and in the course of which murdering and injuring police constables are concerned, they cannot be held responsible for it, as neither FIR nor the evidence of witnesses suggest that they were armed with any weapon and had fired at the police party at the time of incident.

9. Names of remaining appellants neither transpire in FIR nor in 161 CrPC statements of witnesses recorded during investigation. They were introduced in the case through a further statement of complainant recorded on 27.10.2016 after twenty (20) days of the incident. A copy of the statement is available at Page No.267 of the paper book (Ex.14/D). A perusal thereof shows complainant's claim that he had come to know of names of unknown / unidentified accused as Roshan, Waseem alias Wasu, Ali Nawaz alias Nazoo, Bhai Khan, Muhammad Usman and Sahab who had fired at police party, whereas, Wazir and Habibullah were the ones who were riding on three (03) motorcycles and had taken away dead body of Bilawal. He, however, has not revealed the source of getting such information from, or the date and time when he had obtained such information on plus where exactly he had obtained such information and that out of unknown accused named by him as to who actually was Roshan, Waseem etc. for instance. In the entire case, except complainant, none has taken names of the said appellants as accused in the case or the fact

that they were a part of the gang of dacoits, who had fired at the police party, or were a part of team of six (06) accused, who during the course of ongoing encounter between the parties had dared to come at the spot and taken away dead body of accused Bilawal. In absence of necessary details given by the complainant, identifying the said appellants as above, the case against them does not seem to be confidence inspiring. Except the sketchy evidence of complainant, noted above, nothing is available on record to suggest or to identify their role in the case. The failure of complainant to disclose the source of getting information about the appellants to be accused in the case has dealt a fatal blow to the prosecution's case qua identification and role of these appellants. No effort was made even in the trial by the prosecution to introduce such source who had revealed names of these appellant and their part in the incident to the complainant either. We, therefore, are of the view that the case against these appellants as set out by the prosecution is not free from a doubt.

10. Insofar as identification of Abdul Majeed and his firing at police party with the result as revealed above is concerned, all the three (03) injured namely PC Mukhtiar Ali, PC Altaf Ali and PC Allah Dino have not identified him or any accused present in the Court for this matter. PW-3 PC Mukhtiar Ali (Ex.16) while deposing on the point of identification has said that the accused present in the Court are not the same, and further that he does not identify them, who caused injuries to him at the time of incident. PW-4 PC Altaf Ali (Ex.17) in his evidence has stated that "I did not identify the accused, who made fires upon me. Whenever the accused are brought before me, I would identify them. I after receiving the bullets, become (sic) unconscious. The accused present in Court, are not same, who were amongst the culprits at the time of incident." PW-5 PC Allah Dino (Ex.19) has stated that "All the accused present in the Court cannot be identified by me at this time as I had seen the accused at the place of incident for only one time." Further, all the aforesaid three (03) witnesses were declared hostile by the Court at the request of the Prosecutor concerned, and in their cross-examination conducted by him nothing beneficiary to the prosecution's case over the point of identification of the accused / appellant Abdul Majeed alias Mujoo or others has come on record.

11. Next, the complainant in his evidence as well as in FIR has claimed that after receiving spy information about presence of dacoits, he had informed the high-ups and sought their help. In response, among others, SHO, Police Station FM Narejo along with his staff had come at the spot and had participated in the encounter. But when SHO, Police Station FM Narejo namely Nadir Ali was called upon to give evidence at Ex.37, he on the contrary said that he had not seen the incident and only as per verbatim of the complainant had lodged the

FIR, which nonetheless sounds strange as the FIR contains a mention of his presence with his team at the spot. The above discussion indicates that in fact, there is no evidence against the appellants except appellant Abdul Majeed alias Mujoo whose presence and participation in the encounter in view of evidence of three injured and PW SHO Nadir Ali is not free from a doubt either. It is clear that prosecution has not succeeded in establishing the case against the appellants beyond a reasonable doubt. It is settled that when there is a single circumstance creating a reasonable doubt, the benefit of which is to be extended to the accused not as a matter of grace but as a matter of right.

12. Notwithstanding, the record shows that from appellant Habibullah, an unlicensed .30 bore pistol was recovered on 27.10.2016, against which a separate case bearing Crime No.51 of 2016 was registered against him. In the case, he has been convicted and sentenced to suffer RI for seven years with payment of fine of Rs.20,000/- (Rupees twenty thousand), or in default thereof, to undergo RI for two months more. He was arrested on 27.10.2016, and since then, a simple calculation would show, he has already completed the entire sentence. It was in this backdrop that learned defense Counsel realizing his imminent release from jail on account of serving the entire sentence in the aforesaid crime and offence did not press the appeal on merits and we while announcing a short order on 20.03.2024 acquitting the accused in the main case had observed such fact.

13. Consequently, in view of above discussion, the appeal is **allowed** to the extent that conviction and sentence awarded to appellants Wazir, Habibullah alias Hablo, Abdul Majeed alias Mujoo, Abdul Waheed, Raja alias Rajoo, Sahib, Bhai Khan, Waseem and Roshan Ali in the main case i.e. Special Case No.67 of 2016 (Re: State versus Wazir and others), arising out of Crime No.23 of 2016, registered at Police Station FM Narejo, Khairpur, are set aside, and the above named appellants are **acquitted** of the charge and they shall be released forthwith by jail authorities, if they are not required in any other case. However, the appeal to the extent of appellant Habibullah's conviction and sentence awarded U/S 23(1)(a) of Sindh Arms Act, 2013 is **dismissed as not pressed**, as the said appellant has already served out his entire sentence in the said crime and offence.

These are the reasons of our short order dated 20.03.2024.

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