

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, LARKANA

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Crl. Appeal No.D-35 of 2013
Crl. Revision Appln. No.D-03 of 2014
Crl. Jail Appeal No.D-51 of 2015.

PRESENT:

Mr. Justice Zafar Ahmed Rajput,
Mr. Justice Muhammad Iqbal Kalhoro,

Appellants in Crl. : Gul Hassan Magsi and Aijaz Ahmed Kalhoro, through
Appeal D-35/2013 Mr. Asif Ali Abdul Razak Soomro, advocate.
& Crl. Jail Appeal
No.D-51/2015.

Applicant in Crl. : Aijaz Ahmed Kalhoro, through Mr. Saleem Raza Jakhar,
R.A. No.03/2014. Advocate.

Respondent : The State, through Mr. Khadim Hussain Khooharo,
Deputy Prosecutor General.

Date of hearing: 22-11-2016.

Date of Judgment: 22.11.2016.

J U D G M E N T .

ZAFAR AHMED RAJPUT, J.- By this common judgment, we intend to dispose of above-mentioned three matters, as the same have arisen out of a common judgment .

2. The appellant Gul Hassan Magsi and appellant/applicant Aijaz Ahmed Khoso have impugned the judgment dated 30.5.2013 passed by the learned Judge, Anti-Terrorism Court, Larkana in Special Case No.32/2011, arisen out F.I.R bearing Crime No.299/2011 registered at Police Station Kamber, District Kamber-Shahdadkot under Sections 302, 324, 353, 148, 149, PPC read with Section 7(a) of Anti-Terrorism Act, 1997, whereby appellants Gul Hassan and Aijaz Ahmed (proclaimed offender) have been convicted and sentenced under Section 302(b), 149, PPC read with Section 7(a) of Anti-Terrorism Act, 1997 for imprisonment for life; under Section 353, 149, PPC to suffer R.I for two years and fine of Rs.2000/- each and/or in default thereof, they

should undergo R.I for three months more; under Section 148, PPC to suffer R.I for three years and to pay fine of Rs.5000/- each and in default thereof, they should undergo R.I for three months more. The benefit of Section 382(b), Cr.P.C has, however, been extended to appellant Gul Hassan for the period which he has already undergone as under-trial prisoner in the case.

3. Brief facts of the prosecution case, as narrated in the F.I.R lodged on 08.10.2011 at 0045 hours by SIP Ghulam Muhammad Bozdar, SHO P.S Kamber on behalf of State, are that on the eventful day he alongwith his subordinate staff including HC Ali Murad Junejo, duly armed with official weapons in government vehicle were on patrolling, when at about 2345 hours they reached near the land of Nizam Magsi at Kamber-Gaibi Dero road, they saw on headlight of their mobile six armed persons coming from northern side paddy crop on the road having arms in their hands with open faces, who got the police mobile stopped, on that the police party at once stopped their mobile, alighted and disclosed their identity and asked them to throw their weapons but out of them three accused persons, armed with Kalashnikovs, opened fire, which hit HC Ali Murad Junejo. The police party by taking shelter also fired in their defence. The encounter continued for about 15 minutes and thereafter all the accused persons made their escape good by taking advantage of darkness of night and paddy crop; they however followed the accused persons and tried to trace them out but could not succeed; then the police party on the light of their police mobile saw HC Ali Murad Junejo who had already been martyred having multiple injuries; they brought his dead body at Taluka Hospital, Kamber and thereafter, the case was registered.

4. During course of investigation appellant/accused Gul Hassan was arrested and he was sent up for trial before the Court of learned Special Judge, Anti-Terrorism, Larkana by showing appellant Hazoor Bux alias Hazoor Chandio and Aijaz Ahmed Kalhoro and three unknown accused persons as absconders in challan.

5. The learned trial Court vide order dated 06.1.2012 declared the aforementioned absconders accused as proclaimed offenders. Thereafter charge was framed against accused Gul Hassan (Ex.11), to which he pleaded 'not guilty' and claimed to be tried, while his plea was kept on record at Ex.11-A.

6. The prosecution then in order to prove its case examined P.W No.1 Dr. Barkat Ali, Medical Officer, at Ex.12, who produced form of seeing dead body at Ex.12-A, postmortem report at Ex.12-B, P.W No.2 Saleemullah, Tapedar at Ex.13, who produced three copies of sketch of place of incident at Ex.13-A, P.W No.3 SIP/SHO Ghulam Muhammad complainant, at Ex.14, who produced F.I.R, at Ex.14-A, mashirnama of seeing dead body at Ex.14-B, mashirnama of place of incident at Ex.14-C, receipt of delivery of dead body at Ex.14-D, mashirnama of arrest of accused Gul Hassan at Ex.14-E, Chemical report at Ex.14-F, attested photocopy of roznamcha entry No.31, at Ex.14-G, attested photocopy of roznamcha entry No.34, at Ex.14-H, P.W No.4 HC Kareem Bux at Ex.15, P.W No.5 PC Mir Hazar mashir at Ex.19, who produced inquest report of dead body of deceased HC Ali Murad at Ex.19-A. The DDPP for the State submitted application u/s 540, Cr.P.C for calling PC Mir Hassan, which was allowed by consent, which is kept on record at Ex.16. The DDPP for the State gave up P.W HC Muhammad Ayoub and PC Rajib Ali vide statement kept on record at Ex.17 and 18. The ADPP for the State then closed the prosecution side vide statement kept on record at Ex.20.

7. Statement of appellant/accused Gul Hassan u/s 342, Cr.P.C was recorded at Ex.21, in which he has stated that the case of prosecution is false and the P.Ws have deposed against him as they are police officials. He further stated that he is innocent and falsely implicated in this case and prayed for justice. He, however, neither examined himself on oath u/s 340(2), Cr.P.C nor produced any witness in his defence.

8. The learned trial Court after hearing the parties and assessing the evidence on record found the appellants guilty of the charge, hence they were

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convicted and awarded sentences as per terms mentioned above, vide judgment dated 30.5.2013. Against that, appellant Gul Hassan Magsi preferred Criminal Appeal No.D-35/2013 on 04.6.2013. Subsequently, appellant/accused Aijaz Ahmed Kalhoro was arrested on 07.11.2013 and sent up with supplementary challan, but the learned trial Court without accepting supplementary challan remanded him to jail custody pursuant to the impugned judgment, hence he filed an application under Section 19(12) of Anti-Terrorism Act, 1997, which was dismissed by the learned trial Court vide order dated 03.2.2014; the said order has been assailed by the appellant Aijaz Ahmed in Criminal Revision Application No.D-03/2014. Besides, on 03.6.2015 he also preferred Criminal Jail Appeal No.D-51/2015 against the impugned judgment.

9. Mr. Asif Ali Abdul Razak Soomro, learned Counsel for the appellants, has mainly contended that the learned trial judge has erred on law and facts of the case; that the ocular testimony in the case is unworthy of credit being full of contradictions and improvements; that as per prosecution, out of six accused, three accused who were duly armed with K.Ks fired directly at complainant party which hit deceased HC Ali Murad Junejo, but surprisingly neither other police official sustained any injury nor even any bullet hit the official vehicle of police; that neither names of accused/appellants transpire in the F.I.R nor even description of accused persons is mentioned therein; that as per deposition of complainant SHO Ghulam Muhammad Bozdar they saw accused at the distance of 50/60 paces while the alleged incident had taken place in odd hours of pitch dark night and the only source of identification of accused was headlight of police mobile, which is very weak type of evidence; that the names of accused were disclosed by the P.Ws, namely, HC Kareem Bux and PC Meer Hazar subsequently in their statements under Section 161, Cr.P.C; that deceased HC Ali Murad as per prosecution case was also duly armed with official weapon but neither availability of his service weapon has been shown at the place of incident nor the same has been shown to have been secured and the same has also not been produced at any time during trial

and the entire prosecution case is silent as to availability or non-availability of service weapon carried deceased HC Ali Murad. Mr. Soomro while relying upon the case of Zeeshan alias Shani v. The State, reported as 2012 SCMR 428 has submitted that the prosecution failed to prove its case against the appellants beyond reasonable doubt, therefore, they are entitled for the benefit.

10. Mr. Khadim Hussain Khooharo, learned DPG, while conceding the arguments of learned Counsel for the appellants has recorded his no objection for allowing the aforementioned appeals and criminal revision application by setting aside the conviction awarded to appellants.

11. We have read out the evidence from the record with the assistance of learned Counsel for the parties and have also considered the arguments addressed at the bar.

12. It has been deposed by the prosecution witnesses that on 08.10.2011, at about 2345 hours, at Kamber-Gaibi Dero road near the land of Nizam Magsi, six armed persons, whose faces were open, attacked on police party in which HC Ali Murad Junejo was murdered. Hence, the case of the prosecution is contingent on the evidence of identification of the accused persons as neither the names nor description of the accused persons are mentioned in the F.I.R and their names have subsequently been taken by the PWs HC Karim Bux and PC Mir Hazar in their statements under Section 161, Cr.P.C. It appears that said PWs were all along with complainant during patrolling and after the alleged incident complainant brought dead body of deceased HC Ali Murad at Taluka Hospital, where he left HC Muhammad Ayoub and HC Kareem Bux to look after the dead body and then he went to police station and lodged the F.I.R, but surprisingly the names of accused persons do not appear in the F.I.R. Even P.Ws PC Rajib Ali and Hazar Khan were all along available with the complainant at the time of registration of the F.I.R, yet none of them disclosed the names of accused to complainant, if they had identified the appellants/accused during encounter. In this regard PW

Ghulam Muhammad, SIP/SHO PS Mian Jo Goth (Ex-14) has admitted in cross-examination that the witnesses did not disclose the names of accused to him from incident upto registration of F.I.R. He has also admitted that the accused were not known to him previously and no criminal record of the accused was collected by him during investigation of the case. So also PW HC Karim Bux (Ex.15), who later-on gave the name of accused persons in his statement u/s 161, Cr.P.C, had admitted in his cross-examination that he did not give information about the identification of accused to any officer prior to recording of his 161, Cr.P.C statement. Similarly, PW PC Mir Hazar (Ex.19) has admitted in cross-examination that he was sitting on backside of mobile and identified the accused from the distance of about 50/60 paces while alighting from their mobile on headlight of mobile. He has further admitted that he was serving at P.S Kamber about one year prior to the incident and he had no visiting terms with accused Gul Hassan; neither he had acted as mashir, complainant or witnesses in any case against accused Gul Hassan nor even the said accused was ever arrested in any case of Police Station Kamber during his posting period. Since it is an admitted position that there is no evidence on record to show that the appellants had any criminal background and that they were ever involved in any criminal case; then question arises as to how could the prosecution witnesses, namely, HC Karim Bux and PC Mir Hazar identified them and on the said question the prosecution failed to bring on record any piece of evidence. It may be observed here that it is not a case of the prosecution that an illiterate person has reported the incident and thus lost sight of such an important aspect of the case. It is a case of police encounter witnessed and reported by an experienced police officer/official. The complainant is Sub-Inspector in Police Department and posted as SHO. It appears that after lodging the F.I.R against unknown accused persons, during course of investigation an effort was made subsequently to improve the original version in recording statement of HC Kareem Bux and PC Mir Hazar under Section 161, Cr.P.C by introducing the names of appellants/accused claiming

that the said PWs had seen and identified them in the light of the headlights of the police mobile from the distance of 50 – 60 paces.

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13. It is also the case of the prosecution that the police party proceeded from police station for patrolling; however, it has come on record that the deceased HC Ali Murad was not in uniform when he died and his official weapon was neither recovered under any mashirnama nor even produced in trial Court during evidence of prosecution witness. This fact casts doubt on the veracity of entire evidence.

14. The Honourable Supreme Court of Pakistan in the case of *Zeeshan alias Shani* (supra), the standard of proof in the case should have been far higher as compared to any other criminal case when according to prosecution it was a case of police encounter. It was, thus, desirable and even imperative that it should have been investigated by some other agency. Police, in this case, could not have been investigators of their own cause. Such investigation which is woefully lacking independent character cannot be made basis for conviction in a charge involving capital sentence, that too when it is riddled with many lacunas and loopholes listed above, quite apart from the afterthoughts and improvements. It would not be in accord of safe administration of justice to maintain the conviction and sentence of the appellant in the circumstances of the case.

15. Under the aforementioned facts and circumstances of the case, the learned DPG has rightly recorded his no objection for allowing the Criminal Appeals as the prosecution has miserably failed to prove its case against the appellants/accused. We, therefore, by extending the benefit of doubt allow this appeal, set aside the conviction and sentence awarded and acquit the appellants of the charges. They be set free forthwith if not required in any other

case.

16. In view of acquittal of the appellants, the Crl. Revision Appln. No.D-03 of 2014 has become infructuous, which is dismissed accordingly. 81

17. Above are the reasons of our short order dated 22.11.2016, whereby the listed appeals were allowed.

Qazi Tahir PA**