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FOR REPORTING

IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

Before:
Mr. Justice Mohammad Karim Khan Agha

Cr. Appeal No.S-25 of 2015.

Haji Khan

Versus

The State

Appellant : Haji Khan	Through Mr. Mir Shakir Ali Talpur Advocate.
Respondent : The State	Through Mr. Shahid Ahmed Shaikh, A.P.G.
Date of hearing	27.04.2017.
Date of judgment	28.04.2017

JUDGMENT

MOHAMMAD KARIM KHAN AGHA, J.- Appellant Haji Khan was tried by learned III-Additional Sessions Judge, Shaheed Benazirabad, in Sessions Case No.97 / 2014, arising out of crime No.86 of 2013, registered at Police Station Daulatpur, for offence under sections 324, 353, 401, 398 PPC. Accused / appellant was found guilty by judgment dated 28.01.2015 (the impugned judgment) and was convicted and sentenced; (1) under Section 324 PPC to undergo five years imprisonment and further he was directed to pay fine of Rupees ten thousand, in case of default of payment of fine, the accused / appellant was ordered to undergo S.I for one month more, (2) under Section 398 PPC to undergo R.I for four years and to pay fine of Rs.10,000/-, in default thereof to suffer S.I for fifteen days more, (3) under section 353 PPC to undergo R.I for two years and to pay fine of Rs.2000/-, in case of failure to pay fine, he was ordered to suffer S.I for 10 days more. All the sentences were ordered to run concurrently. Whereas, the accused / appellant was acquitted from the charge under section 401 PPC. However, benefit of Section 382-B Cr.P.C. was also extended to him. The appellant has challenged the impugned judgment through this instant appeal.

2. Briefly the facts of the prosecution case are that complainant HC Muhabat Ali Solangi of P.S Daulatpur lodged F.I.R. stating therein that on 19.07.2013 at 2000 hours near 34 Hazar Mori at Bus Stop Qasim Shah Khuhi Deh Malwah Taluka Kazi Ahmed present accused alongwith absconding accused with their common intention duly armed with deadly weapons made preparation to commit offence and gave signal to complainant party to stop with intention to commit the offence of robbery and also made firing upon them with intention to commit their murder where upon the police officials returned fire and after an encounter lasting around 15 minutes the appellant was captured/arrested in injured condition and through such acts the appellant and the absconding accused also deterred police party from discharging their lawful duty. After the encounter the police party returned back alongwith arrested appellant and weapon at police station where complainant lodged instant F.I.R.

3. After completing necessary formalities charge was framed against accused / appellant at Ex.8, to which he pled not guilty and claimed for trial vide Ex.9.

4. In order to substantiate its case the prosecution examined 03 prosecution witnesses (PW's) and thereafter learned DDPP closed the side of the prosecution under his statement at Ex.13.

5. Thereafter, statement of accused / appellant under Section 342 Cr.P.C was recorded at Ex.14 wherein he denied the prosecution case claiming his innocence and that he had been falsely implicated. He neither examined himself on oath nor led any evidence in his defence.

6. The learned trial court after hearing the learned counsel for the parties and on the assessment of the entire evidence convicted and sentenced the accused / appellant as stated above in the impugned judgment.

7. By order dated 31-03-2015 the appellant was released on bail by this court pending the hearing of this instant appeal.

8. The facts of this case as well as evidence produced before the trial court find an elaborate mention in the impugned judgment passed by the trial Court therefore the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

9. Learned counsel for the appellant contended that the impugned judgment is opposed to facts, law and equity; that the trial court has failed to appreciate the material placed before it and convicted the appellant; that the trial court has miserably misconceived the evidence recorded and the witnesses in their respective cross-examinations left room of doubt which is favoring the appellant; the factual aspects of the case have not been properly examined judiciously nor given due care and weight as such conviction is not sustainable under the law; that the prosecution case suffers from legal and factual infirmities; that the trial court has also failed to appreciate the facts on record which leading towards fabrications, improvements, exaggerations in the prosecution case for creating justification; that the motive as set forth is very weak and not to be considered as basis of the alleged incident; that the trial court has also misconceived the legal infirmities gravely involved in the case while convicting the appellant and as such for all the above reasons the prosecution had failed to prove its case against the appellant beyond a reasonable doubt and thus for all the above reasons the impugned judgment should be set aside and the appellant acquitted.

10. In support of his contentions, learned counsel for the appellant has placed reliance on the cases of **Samander alias Qurban and others v. The State** (2017 MLD 539), **Sadaruddin alias Sadoro and others v. The State** (2015 MLD1259), **Abdul Aziz and 4 others v. The State** (2014 YLR 584), **Muhammad Hanif alias Pocho v. The State** (2014 PCr.LJ 928), **Rahim Bakhsh v. The State** (2010 PCr.LJ 642), **Mour and 4 others v The State** (2016 PCr.LJ 1706) and **Mumtaz Ali v. The State** (2011 SCMR 70).

11. The learned A.P.G. fully supported the impugned judgment and contended that based on the evidence on record the prosecution had proved its case against the appellant beyond a reasonable doubt.

12. I have considered the arguments of learned counsel, perused the record and the case law cited by them at the bar.

13. I am of the view that there are grave doubts as to the reliability of the prosecution story which has come on record through the PW's for the following reasons:

(a) That there is no entry stating the time when the police party left the police station for patrol. Entry No.11 is an arrival entry

and **not** a departure entry which arrival entry may have been falsified in order to cover up the lack of a departure entry as it refers to a so called time of departure which otherwise has not been noted down any where by the police. The significance of the absence of such departure entry was highlighted in the case of **Mour and 4 others v The State** (2016 PCr.LJ 1706) by reference to the case of **Long through Central Prison Hyderabad V State** (1999 P.CR.LJ 595) which was a Division Bench judgment of this Court.

(b) That despite the police patrol receiving prior spy information about the whereabouts of the appellant and the absconding accused no attempt was made by them to include any independent mushirs in violation of S.103 Cr.PC. In this respect reference may be made to the case of **Samander alias Qurban and others v. The State** (2017 MLD 539)

(c) That the 2 eye witness PW's both of whom were police officials (complainant PW 1 HC Muhabat Ali and PW 3 Ali Dost) state that it was about 8pm when they were signaled to stop, thereafter the encounter started and lasted for around 15 minutes by which time according to PW 1 it was then too dark to collect empties and according to both PW 1 and PW 3 the encounter took place from about 40/45 paces and PW 3 was in the rear of the mobile. Then how was it possible in such dark at such distance with only the police mobile light for both PW's to identify all assailants by name. In my view this narration of events seems to lack credibility. In this respect reference may be made to the case of **Mour** (Supra)

(d) According to PW 1 he and 4 other police officials were in the police mobile at the time of the encounter making 5 in total. According to his evidence all the police officials were armed with SMG's and started firing and he alone fired approx 35 shots. PW 3 fired 32 rounds. According to PW 2 (the IO) according to the S.161 statements of 2 of the other police officials at the scene (Anwar and Abdul Latif) they also fired around 25/30 rounds. Thus it was likely that the police party fired well over one hundred rounds but **not a single recovery was made**. The motor cycle near by was also not hit by a single bullet. This does not seem to be understandable. In this respect reference may be

made to the case of **Abdul Aziz and 4 others v. The State** (2014 YLR 584)

(e) During the alleged encounter which lasted round 15 minutes and bearing in mind that the 5 police officials were fired upon first by the 3 accused and that the accused fired bursts from their Kalashnikov's as per the evidence of PW 3 it seems not to appeal to reason that not a single police officer out of 5 received a scratch let alone an injury and that not even a single bullet hit the police mobile and not a single round out of the many fired by the accused was recovered. In this respect reference is made to the case of **Sadaruddin alias Sadoro and others v. The State** (2015 MLD1259)

(f) It seems strange that the wounded and bleeding appellant who was injured in the leg during the encounter was not taken straight to the hospital for treatment when he was arrested. Instead he was taken to the PS where according to PW 2 ASI Ghulam Qadir he was sent to the hospital for treatment. However there is no mashirnama of arrival of the injured accused, no letter referring him to hospital and no MLC. In this respect reference may be made to the case of **Mumtaz Ali v. The State** (2011 SCMR 70). So how did the appellant get to the Hospital? Was he taken from the scene of the incident or was there no scene of incident and in fact he was injured in police custody and a false encounter was cooked up against him as apparently he was a known criminal? Interestingly, despite it being dark and the encounter taking place around 40/45 paces away the police managed to expertly hit the appellant in the knee cap only.

(g) PW 2 who was the IO of the case was declared to be a hostile witness by the prosecution and was cross examined by the prosecution so to a certain extent in my view his evidence is doubtful/unreliable as he was not voluntarily prepared to support the prosecution case. He visited the wardat a day after the incident rather than the same night and did not prepare a proper sketch of the wardat setting out the positions of the various parties and police mobile, motorcycle etc at the time of the incident.

(h) with regard to the recovery of the illegal weapon which was near the unconscious injured appellant at the time of recovery it is observed that as per the ballistic report its serial No. was found having been "rubbed". This was quite an obvious distinguishing feature however it is not mentioned in the memo of arrest and recovery and ought to have been so mentioned. It was found to be in working order but there was no ballistic match as no recoveries were made and no evidence that it had even been fired during the alleged encounter. In my view the above caste doubt on the weapon's recovery from the possession of the appellant especially keeping in view the other circumstances surrounding the alleged encounter as mentioned above. It thus cannot be ruled out that the recovered weapon was foisted upon him by the police.

14. It is true that the 2 police eye witnesses largely corroborate each other, that it is settled law that minor contradictions can be ignored and police witnesses are as good as any other witnesses however each case must be considered keeping in view the particular facts and circumstances of that case which is unlikely to be exactly identical to other cases on its own particular facts and circumstances and evidence led at trial.

15. It is also a cardinal principle of criminal law that it is the obligation of the prosecution to prove its case beyond a reasonable doubt against the accused and any benefit of the doubt must go to the accused as of right and not as of concession. In this respect reference is made to the case of **Tariq Pervez v. The State** (1995 SCMR 1345).Furthermore, it was recently held by the Hon'ble Supreme Court in the case of **Hashim Qasim V State** (Criminal Appeals No.115 and 116 of 2013) dated 12th April 2017 in respect of the benefit of doubt at para 20 by reference to the case of **Riaz Masih @ Mithoo v. The State** (NLR 1995 Crl. 694) that even a single doubt, if found reasonable, would entitle the accused person to acquittal and not a combination of several doubts is bedrock principle of justice.

16. I am of the view that when the evidence is viewed in its totality especially bearing in mind the factors high lighted in para 13 (a) to (h) above I have grave doubts that an encounter took place at all between the police and the appellant and the two absconding accused and even

if such an encounter did take place there are in my view grave doubts in the prosecution case the benefit of which must go to the appellant.

17. Thus, I find that the prosecution has failed to prove its case beyond a reasonable doubt against the appellant and that the appellant is entitled to the benefit of the doubt and as such set aside the impugned judgment and up hold this appeal.

18. As such the appellant is hereby acquitted and he is ordered to be immediately released by the concerned jail authorities, if he is in custody, unless he is in custody in respect of some other case.

Hyderabad:
Dated: 28-04-2017