

**Judgment sheet.**  
**IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD.**  
Cr. Appeal No.S-116 of 2017  
Cr. Appeal No.S-123 of 2017

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<b>DATE</b>	<b>ORDER WITH SIGNATURE OF JUDGE</b>
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Date of hearing: 21 .08.2017.

Date of decision: 21.08.2017

Appellants: Through M/s Amjad Ali Sahioto, Ayaz Husain Tunio & Imran Ali Tunio Advocates.

The State Through Mr. Shahid Ahmed Shaikh, D.P.G.

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**J U D G M E N T:-**

**ABDUL MAALIK GADDI, J-** Through this common Judgment, I intend to dispose of the captioned criminal appeals filed by the appellants as these appeals relates to same subject matter arising out of the same judgment dated 24.04.2017 passed by learned Sessions Judge, Tando Allahyar in Sessions Case No.93 of 2016, (Re: State vs. Asif and others) for offence punishable under Sections 324, 353, 427, 147, 148, 149 P.P.C registered at police station A-Section, Tando Allahyar vide crime No.101 of 2016, whereby the learned trial court after full-dressed trial convicted and sentenced the appellants in point No.2 of the impugned judgment.

2. For the sake of convenience, it would be appropriate to reproduce the findings in Point No.2 of the impugned judgment, which reads as under:-

<b>Sections</b>	<b>Sentence</b>
324 PPC	Rigorous Imprisonment for the period of seven (07) years and to pay fine of Rs.50,000/-each. In case of default in payment of the Rs.50,000/- each the accused shall further suffer simple imprisonment for

	the period of two (02) months
352 PPC	Rigorous Imprisonment for the period of two (02) years and to pay fine of Rs.25,000/-each. In case of default in payment of fine Rs.20,000/-each the accused shall further suffer simple imprisonment for the period of one (01) month.
427 PPC	Rigorous Imprisonment for the period of two (02) years and to pay fine of Rs.25,000/-each. In case of default in payment of fine Rs.20,000/-each the accused shall further suffer simple imprisonment for the period of one (01) month.

3. Facts in brief as per police report under Section 173 of the Cr.P.C is that ASI Nek Mohammad Khoso, I/C ADRC, Tando Allahyar was on patrolling duty alongwith ASI Gulzar Ai Leghari, ASI Ghulam Abbas Chandio, PC Khamiso Khan, PC Abdul Jabbar, PC Fazal Hussain, PC Mumtaz Ali, PC Mohammad Bux, PC Ghulam Mustafa, PC Manzoor Ali and DPC Mohammad Ibrahim under DD entry No.13 at 0600 hours and during the course of patrolling, he had received secret information from an informer that accused Asif, who is wanted in number of cases of PS A-Section, Tando Allahyar is selling charas in a cabin lying in front of his house. On receipt of such information, police party reached at the pointed place and identified that accused Asif s/o Murad Makrani, Iqbal alias Gama s/o Murad Makrani, Arif alias Current s/o Deen Mohammad Makrani, Zahid s/o Deen Mohammad Makrani and Tarique alias Kaloo s/o Ghafoor Makrani were standing there, who on seeing the police party, took out pistols from respective folds of their shalwars and made straight fires upon police party with intention to commit their murder, police also retaliated upon the accused persons through an encounter, which continued for about half an hour, then all culprits made their escape good towards

houses, then police party approached at the cabin and found that a huge quantity of charas was lying there, 54 rods of charas duly wrapped with plastic were lying in blue color box, which were weighed and found 18 kilograms, one black shopper having rod type charas measuring 2 kilograms was lying and one plastic KATA in which total 112 pieces of charas in small and big size were lying, which were weighed and found 35 kilograms. It is the further case of prosecution that police party left one ASI Ghulam Abbas Chandio at the recovered charas and in order to arrest the escape accused, encircled the Makrani Houses, during which accused Asif was arrested in injured condition from Alimirah, lying in his house, he was having one TT pistol in his hand, thereafter, they brought the arrested accused Asif at cabin, where police party checked the pistol and found loaded with five live bullets in its magazine. Police party also secured eight denominations of Rs.100/-total Rs.800/- from the side pocket of his shirt. On enquiry regarding valid license and charas, he disclosed that pistol is without license and he alongwith his companions has kept the charas for selling, as such he was arrested in the instant offence as well as under Arms Act and Narcotics Substance Act 1997. He was also arrested in case Cr.No.02/2016 u/s 9-C, Cr.No.10/2016 u/s 324, 353, 147, 148, 149 PPC of PS A-Section, Tando Allahyar. Thereafter, recovered pistol and charas was separately sealed under a mashirnama prepared in presence of officials mashirs namely ASI Gulzar Ali Leghari and ASI Ghulam Abbas Chandio, subsequently police party approached at PS A-Section, Tando Allahyar, where ASI Nek Mohammad Khoso got registered FIR against the accused persons in the manner stated above.

4. A formal charge against present appellants/accused u/s 324, 353, 427, 147, 148, 149 PPC was framed at Exh.6, to which they pleaded not guilty and claimed to be tried, vide their pleas at Exh.6/A to 6/C.

5. At trial, prosecution examined ASI Nek Mohammad Khoso as P.W-1 at Exh.07, who produced DD entry No.13 at Exh.8, mashirnama of arrest and recovery at Exh.9 arrival entry at Exh.10 and FIR at Exh.11. PW-2 ASI Gulzar Ali Leghari was examined at Exh.12, who is mashir of arrest of accused Asif and mashir of recovery, he produced the mashirnama of place of wardat at exh.13. The last witness was SIP Naeem Ashraf, who is the author of FIR as well as had conducted the investigation of instant case. He was examined as PW-3 at Exh.14, he has produced ballistic expert report at Exh.15.

6. Counsel for appellants cross examined the prosecution witnesses. Thereafter, the side of prosecution was closed vide statement at Exh.16.

7. In 342 Cr.P.C statements recorded at Exh.17 to 19 respectively, the appellants have denied the prosecution allegation leveled against them and stated that they are innocent and have falsely been implicated in the present case. All of accused have also showed their willingness to examine themselves on oath but excepting accused Asif, both present accused did not lead defense in their favour. However accused Asif desired to lead defence evidence in the shape of Hafiz Mohammad Sufyan. Thereafter, statements of all three accused persons were recorded on oath u/s

340(2) Cr.P.C at Exh.20 to 22 respectively and DW Mohammad Sufyan, produced by accused Asif, at Exh.23 and subsequently, learned defence counsel through statement dated 11.04.2017 at Exh.24, closed the defence side.

8. Learned advocates for appellants inter-alia contended that the judgment passed by trial court is against the criminal administration of justice; that the impugned judgment is perverse and shocking; that the trial Judge while awarding the conviction has not considered the material contradictions made in the evidence of the PWs; that no independent witness has been cited by the prosecution and the PWs are police officials and subordinate to the complainant, who is author of FIR and I.O of the case, which creates doubt in the prosecution case; that the complainant has failed to collect any private person of locality to act as mashir; that police encounter was a fake encounter, in fact no such incident had occurred; that called encounter was allegedly continued for about half an hour and in such a situation gathering of private persons could not be ignored but prosecution has not examined any independent witness to prove the incident in question; that several contradictions in the testimonies of all the PWs which are of serious nature. He lastly prayed for justice.

9. Learned D.P.G has supported the impugned judgment on the ground that appellants are nominated in the FIR; that the appellants have deterred the public servants / police officials while performing their lawful duty and made a criminal assault with firing in order to kill them; that although there are some minor

contradictions in the evidence of PWs, but the same may be ignored while deciding these appeals.

10. I have carefully considered the arguments as advanced by the learned counsel for the parties and carefully scanned the material so available before me.

11. Blushing upon the unadorned reading of contents of FIR reveals that on the relevant date and time the complainant party during patrolling in the jurisdiction, received spy information from an informer that accused Asif is selling charas in a cabin lying in front of his house. On receipt of such information, police party reached at the pointed place and identified that accused Asif, Iqbal alias Gama, Arif alias Current, Zahid and Tarique alias Kaloo were standing there, who on seeing the police party, took out pistols from respective folds of their shalwars and made straight fires upon them with intention to commit their murder, police also retaliated upon the accused persons through an encounter which was continued for half an hour, then all culprits made their escape good towards their houses and police party approached at the cabin and recovered a huge quantity of charas, however, in order to arrest the escape accused, encircled the Makrani houses, during which accused Asif was arrested in injured condition from Alimirah, lying in his house, he was having one TT pistol in his hand. Surprising to note here that, at the time of incident there was cross firing for about half an hour with the sophisticated weapons, although five accused had allegedly fired at the police party, yet neither any member of the police party had been injured, nor any bullet had hit the police vehicle and the consistent plea of the accused to have

been injured during exchange of firing between two parties was never investigated, so also non-production of medical evidence with regard to the injury of the accused Asif was a serious infirmity in the prosecution case. In this aspect, I am fortified with the case of Mumtaz Ali vs. the State reported in 2011 SCMR 70, which for the sake of convenience is reproduced hereunder:-

**“---Ss.324 & 353---West Pakistan Arms Ordinance (XX of 1965), S.13(d)---Attempt to commit qatl-e-amd, assault or criminal force to deter public servant from discharge of his duty, going armed without license---Appraisal of evidence---Despite the occurrence having taken place at a public place and 48 shots having been fired by the police functionary in the alleged police encounter, nobody from public reached the spot---Neither the said police functionary nor the other prosecution witness had stated that the accused had fired at the police party---Although three accused had allegedly fired at the police party, yet neither any member of the police party had been injured, nor any bullet had hit the police vehicle---Consistent plea of the accused to have been injured during exchange of firing between two parties was never investigated, instead the complainant police officer had himself investigated the case---Non-production of medical evidence with regard to the injury of the accused was a serious infirmity in the prosecution case---Possibility could not be ruled out that either the deceased accused or the absconding accused might have fired at the raiding party---Accused was acquitted in circumstances.”**

12. Besides this, it is an admitted fact that incident took place in a thickly populated area in the daylight time and the complainant having advanced information about the availability of the present appellants at the pointed place, but despite of this fact the complainant did not bother to associate any independent person of the locality with him to witness the incident and no plausible explanation has been offered by the complainant that why

he did not accompany any independent person with him from the place of information to witness the event, thus the same is clearly violation of section 103 Cr.P.C. However, the prosecution witnesses and regarding mashir of arrest and recovery are police officials and subordinate to the complainant, therefore, their evidence cannot be safely relied upon. Notwithstanding, there is no record to show that the complainant has made any efforts to associate any independent person of the locality to witness the incident, such lapse on the part of prosecution had cut at the roots of its case rendering the entire episode doubtful and it, by itself, was enough to make the prosecution version unbelievable. Also, it is an admitted position that there is delay in sending the recovered pistol to the Ballistic Expert for opinion, for which no explanation has been furnished, therefore, false implication of the appellants in this case cannot be ruled out and non-sending the recovered property to the ballistic expert for forensic report in time, is fatal to the prosecution case.

13. I have gone through the evidence of complainant ASI Nek Muhammad Khoso, PW ASI Gulzar Ali, who is mashir of arrest of accused Asif and mashir of recovery and SIP Naeem Ashraf, who is the author of FIR as well as had conducted the investigation of instant case, but their evidence has been found contradictory on material particulars. Besides this as I have observed above that the place of arrest and recovery is a populated are but no independent person of the locality cited as a witness the event, therefore, the evidence of above witnesses cannot be safely relied upon.

14. During course of arguments I have specifically asked the question from learned D.P.G for State that whether any weapon

was recovered from appellants Tarique Ali Kaloo and Iqbal alias Gama, he replied in negative and he submits that only appellant Asif was arrested on the spot and recovery was effected from him, as such separate case under section 23(1)(a) Sindh Arms Act was registered against him. It is also stated by learned D.P.G for State that appellants having a criminal record and they are involved in many criminal cases, but in this regard he has failed to produce any criminal record / history against the appellants in these appeals. Even otherwise, merely pendency of the criminal cases against appellants do not advance the case of the prosecution unless the same have been ended into conviction up to the level of the superior courts.

15. I have gone through the case of **Tariq Perves v. The State** reported as 1995 SCMR 1345, wherein it has been held that if a single circumstance creates reasonable doubt in the prudent mind about the guilt of the accused then he will be entitled to such benefit not as a matter of grace, but as a matter of right. Similar view has also been taken in the case of **Muhammad Akram v. The State** reported as 2009 SCMR 230.

16. I have also perused the evidence and documents on record and has also considered the version of both the parties put forward by them through evidence and found that the version of the appellants seems more plausible and convincing, while the version of the prosecution is totally doubtful.

17. For my above stated reasons, I have no hesitation to hold that the prosecution has failed to prove its case against the

appellants and learned trial court did not appreciate the evidence and documents on record properly. Consequently, these appeals are allowed. The impugned judgment passed by the trial Court is set-aside. Resultantly, the appellants are acquitted from the charge. They are in jail, therefore, jail authorities are directed to release them forthwith, if they are not required in any other case.

18. Since, the appeals are allowed, therefore, the listed applications under section 426 Cr.P.C are also disposed of having become infructuous.

JUDGE