

ORDER SHEET  
IN THE HIGH COURT OF SINDH CIRCUIT COURT LARKANA  
Criminal Appeal No. D- 126 of 2011  
Crl. Acquittal Appeal No. D- 43 of 2011

DATE	ORDER WITH SIGNATURE OF JUDGE
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Dates of Hearing: 6.2.2018 and 7.2.2018

Mr. Habibullah G. Ghouri, Advocate for the appellant in Crl. Appeal No.D-126/2011.

Mr. Javed Ali Gopang, Advocate for appellant in Crl. Acq: Appeal No.D-43 of 2011

Mr. Sardar Ali Shah, Deputy Prosecutor General for the State.

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For the reasons to be recorded later on, Crl. Appeal No.D- 126/2011 filed by convict Abdul Ghaffar Jatoi is hereby allowed. The appellant is acquitted of the charge. He shall be released forthwith if not required in any other custody case. The Criminal Acquittal Appeal No.D-43 of 2011 filed by Mst. Zulekhan (the legal heir of deceased ASI Qamaruddin) is hereby dismissed.

Abid H. Qazi/\*\*

IN THE HIGH COURT OF SINDH, CIRCUIT COURT LARKANA**Present:**

Mr. Justice Muhammad Iqbal Kalhoro.

Mr. Justice Fahim Ahmed Siddiqui.

Criminal Appeal No. D- 126 of 2011.

Abdul Ghaffar Jatoi. ....Appellant

Versus

The State. ....Respondent

Criminal Acquittal Appeal No. D- 43 of 2011.

Mst. Zulekhan Gopang. ....Appellant.

Versus

Abdul Wahab and others. ....Respondents.

Dates of Hearing: 06.02.2018 and 07.02.2018.

Date of Judgment: 07.02.2018.

Mr. Habibullah G. Ghouri, Advocate for the appellant in CrI.  
Appeal No. D- 126/2011.Mr. Javed Ali Gopang, Advocate for the appellant in CrI.  
Acquittal Appeal No. D- 43/2011.

Syed Sardar Ali Shah, DPG for the State.

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

**Fahim Ahmed Siddiqui, J:** This single judgment will dispose of the captioned two appeals, which have been directed against the judgment dated 11.11.2011, passed by learned Judge, Anti Terrorism Court, in Special Case No.70/2008 (State Vs. Abdul Ghaffar & others), whereby appellant Abdul Ghaffar Jatoi was convicted and sentenced under Sections 302, 324, 353, 148, 149 PPC & 6/7 Anti-Terrorism Act, 1997, while some of the accused were acquitted. The operative part of the impugned judgment is as under:

*"For what has been discussed above, in points No. 2 and 3,  
I am of the firm opinion that the prosecution has*

successfully proved its case against the present accused Abdul Ghaffar, absconders accused Dur Muhammad and Saalim, they are found guilty under section 265-H (ii) Cr.P.C for the offence punishable under Section 302 (b) read with section 149 PPC and 7 Anti-Terrorism Act, 1997, hence they are convicted and sentenced to suffer R. I. for imprisonment of life and to pay a fine of Rs.200,000/- each (two lacs each) compensation under section 544-A Cr.P.C to the LRs of deceased ASI Qamaruddin, PC Zulfiqar and PC Muhammad Mithal.

I further come with the present accused Abdul Ghaffar, absconders accused Dur Muhammad and Saalim for offence punishable under section 353 PPC and sentenced them to suffer R.I. for two years.

Both the convictions will run concurrently. However, the benefit of Section 382 (b) Cr.P.C is extended to accused Abdul Ghaffar, he is produced by jail authorities and remanded back with a conviction warrant/slip with directions to serve out the above sentence. The conviction and sentence recorded against absconding accused Dur Muhammad and Saalim shall operate concurrently on their arrest.

Regarding the present accused Abdul Wahab, absconders accused Hashim and deceased accused Ghulam Ali, I have found them not guilty for the above offences; therefore, I acquit them from the charge under section 265-H (i) Cr.P.C. Accused Abdul Wahab produced in custody, sent back with directions to Superintendent District Prison Larkana to release him forthwith if he is not required in any other custody case."

2. The factual matrix of the case is that on 19.10.2006, the complainant SIP Khadim Hussein Umrani SHO of Police Station Aqil @ Pir Sher, Larkana, lodged FIR alleging therein that on 17.10.2006, one Bashir Ahmed Jatoi recorded N.C report against Ghulam Ali Jatoi and others for damaging of crop by grazing cattle. On the day of report, he received spy information about apprehension of armed conflict between the parties. On such information, he sent ASI Qamaruddin Gopang along with PC Zulfiqar Ali Malgani, PC Muhammad Mithal Rahoojo and PC Anwar Ali Korai towards the reported place. After a while, ASI Qamaruddin informed him on walkie-talkie about aggravation of the situation and apprehension of retaliation and he sought further

reinforcement for assistance. On such information, the complainant SHO along with some other staff duly armed proceeded towards the place of the incident. They reached near village Hamzo Jatoi, where ASI Qamaruddin along with his subordinates was available. Meanwhile, the accused emerged from village who were identified as (1) Dur Muhammad s/o Waris, (2) Abdul Ghaffar s/o Hashim (appellant), (3) Ghulam Ali s/o Ibrahim (4) Salim s/o Ghulam (5) Wahab s/o Khair Muhammad (6) Hashim s/o Azhar and three unidentified persons, who all armed with deadly weapons. After challenging the police party, they started to take sheltered position. The complainant also directed his subordinates to take position at some sheltered place. The accused persons were informed about the police but they started straight firing upon the police party with their respective weapons. Accused Dur Muhammad fired upon ASI Qamaruddin, which hit him at his face and he fell down. Accused Abdul Ghaffar fired upon PC Zulfiqar who sustained injuries on head and abdomen and fell down. Accused Saalim fired upon PC Mithal who received injuries and fell down. The police party retaliated the firing in their defence but all the accused continued to fire upon the police party in order to commit their murder. The encounter continued for half-an-hour and in the meantime the accused persons succeeded in fleeing towards jungle. In the incident ASI Qamaruddin and PC Zulfiqar were martyred on the spot while PC Mithal was seriously injured. The complainant conveyed the information about the incident to the higher-ups and shifted the injured and deceased police officials to hospital. Thereafter, the complainant lodged FIR on behalf of the state. Subsequently, the injured PC Mithal also succumbed to injuries during treatment at hospital.

3. After lodging of FIR, the investigation was conducted and a final report was submitted before the trial Court, wherein accused Abdul Ghaffar and Abdul Wahab were produced in custody while the rest of the accused were shown as absconders. The arrested accused were remanded to jail custody and proceedings under Sections 87/88 Cr.P.C were carried out against absconding accused and after requisite

publication, they were declared absconders and case was directed to be proceeded against them in absentia. Meanwhile accused Ghulam Ali was murdered, the proceedings against him were abetted.

4. The charge was framed against the accused persons, to which the arrested accused pleaded not guilty and claimed trial. The prosecution in order to establish the case against the accused persons produced teeming number of witnesses with following details:

PW-1 SHO Khadim Hussain  
Umrani (Ex.17).

He is complainant and allegedly present at the scene of incident. He produced copy of FIR (Ex-17/A).

PW-2 Abdul Karim Mangi  
(Ex-19).

He is Tapedar, who prepared the sketch of the scene of incident and produced the same (Ex-19/A).

PW-3 Dr. Muneer Ahmed  
Sheikh (Ex-20).

He is MLO, who produced letter of SHO, Medical Certificate of injured PC Muhammad Mithal, Post-mortem Reports of deceased Qamaruddin, Zulfiqar Ali and Muhammad Mithal (Ex-20/A to 20/E).

PW-4 ASI Sikander Khan  
Chandio (Ex-22).

He is eye witness who described the happening of incident and produced different memo i.e. seeing injuries, dead-bodies and place of incident. (Ex-22/A to 22/C).

PW-5 PC Nawab Ali Khoso  
(Ex-23).

He is also eye witness who described the happening of incident.



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PW-6 PC Muhammad Ramzan  
Bhutto (Ex-25).

He is corps bearer who produced the receipts of dead-bodies of PC Qamaruddin and Zulfiqar Ali (Ex-25/A and 25/B).

PW-7 H.C Mir Muhammad  
Korai (Ex-26).

He is corps bearer who produced the receipts of dead-body of PC Muhammad Mithal (Ex-26/A).

PW-8 SIO/SIP Niaz Ahmed  
Mugheri (Ex-30).

He is the incharge officer of investigation, who described the steps of investigation and produced memo of seeing injuries of PC Mithal (Ex-30/A), Ballistic Expert Report (Ex-30/B) and Chemical Analyzer Report (Ex-30/C).

PW-9 SIP Sartaj Ahmed  
Jagirani (Ex-31).

He produced the Memo or Arrest of accused and recoveries from them (Ex-31/A).

5. After examining of the prosecution witnesses, the learned ADPP closed the prosecution side under his statement (Ex-32). The statement of accused persons under Section 342 Cr.P.C were recorded (Ex-33 & 34) in which they denied all the allegations leveled against them during trial and claimed their innocence. The accused Abdul Ghaffar produced with his statement certified copies of two acquittal judgments dated 03.06.2009 passed in cases initiated on FIR No.25/2006 under Sections 324 & 353 PPC and FIR No.26/2006 under Section 13 (d) Arms Ordinance (Ex-33/A & 33/B). Similarly accused Abdul Wahab also produced the certified copy of acquittal judgment dated 03.06.2009 passed in case initiated on FIR No.27/2006 under Section 13 (d) Arms Ordinance (Ex-34/A). Both the accused in their statements under Section 342 Cr.P.C declined to be examined on oath but they sought to examine

a defence witness namely Bashir Ahmed Jatui, who was examined as a defence witness (Ex-35). After recording of the evidence and hearing of the arguments, the trial Court pronounced the impugned judgment.

6. While arguing, the learned counsel for the appellant has drawn our attention towards different portions of the deposition of prosecution witnesses and highlighted certain contradictions in their testimonies. The learned counsel submits that the prosecution case is full of discrepancies and contradictions; as such the same is not free from doubt. He submits that the ocular account of the complainant and witnesses is completely antagonistic on the vital points of their evidence. He submits that although there were a number of police vehicles available at the time of alleged incident but none of them received any stretch. According to him, no damage was caused to any house of the village where the encounter allegedly took place. According to him, if the complainant had fired 60 rounds and other police officials also used weapons, then there must be hundreds of rounds fired but to no casing of bullets fired by the police or accused persons was collected and produced before the trial Court. He points out that the weapons used by the deceased police officials were also not produced during trial as real or object evidence in support of the prosecution case. He submits that even the medical and ocular evidence are not in conformity to each other. He also makes it a great point that the 'Sketch' prepared by Tapedar and 'Memo of Place of Incident' is also contradictory to each other. He submits that if the sketch of the scene of offence is considered in the backdrop of the evidence of complainant and eyewitnesses, it can be said that the complainant and eyewitnesses were actually not available at the scene of offence at the time of incident and they have fabricated a false story in order to save their skins. He submits that at the end of trial, certain important questions were not asked to the appellant in the statement recorded under Section 342 Cr.P.C. He submits that the appellant has been acquitted from the charge of companion case pertaining to Arms Ordinance. In the end, he submits that at the time of alleged incident, the appellant was hardly 18 years old and he is behind the bars for a period of more than

11 years, as such a lenient view may be taken for him. In support of his contentions, he seeks reliance from 2012 SCMR 2418 & 2013 SCMR 583.

7. As against the above arguments, the learned D.P.G supported the impugned judgment by submitting that there is no fatal defect in the entire prosecution case. According to him, the judgment is proper and there is no misreading or non-reading of the available evidence. Regarding the statement recorded under Section 342 Cr.P.C, his contention is that if any question was not asked in the statement, it will not vitiate the entire trial especially when the conviction is not awarded on any such omitted question. In this respect, he takes reliance from PLJ 2010 Supreme Court 388. He submits that non-availability of bullet marks on the walls of village or causing any damage is also not so important, as the incident was taken place outside the village and even outside the Otaq. Regarding sketch, his contention is that the same is not a substantial piece of evidence. According to him, the contradictions pointed out by the learned counsel for the appellant are minor and they cannot cause any damage to the prosecution case. He submits that the medical evidence is also not having much deviation from the ocular account. According to him, in the incident three policemen lost their lives and the prosecution has established that the appellant had a hand in the said incident, as such the conviction and sentence awarded to him is to be maintained.

8. The learned counsel for the aggrieved person (widow of PC Zulfiqar) has adopted the arguments of the learned D.P.G.

9. We have heard the arguments advanced and have gone through the entire material available in the record and proceedings of the trial Court in the light of the valued assistance provided at Bar.

10. In the instant case, there are certain aspects which require consideration. The FIR is logged by the complainant on behalf of the state and the place of incident is only 2 km away from the police station



but the FIR is delayed by <sup>of and</sup> two half an hour, which is an inordinate delay considering that the deceased are police officials of the same police station where the FIR was lodged. It is worth noting that it has come on the record that the police station is situated in between the place of incident and hospital. It has also come on the record that the distance between police station and the place of incident can be covered within 10 minutes. No doubt, after the incident it was duty of the complainant, being in charge of police party, to first shift the injured and dead bodies to hospital but even then a delayed FIR is not comprehensible. It is also a perplexing question that if the dispute was between the two groups of a tribe then why they attacked upon the police party. It is alleged in the FIR that one Bashir Ahmed Jatoi had come a few days earlier and reported about some dispute regarding damage of his agriculture farms by some persons through their cattle. It appears from the FIR, that the dispute earlier reported was further heightened, as a spy informer reported to SHO about a would be skirmish between the parties of earlier dispute. The prosecution has not examined the said Bashir Ahmed Jatoi but the defence has examined one Bashir Ahmed Jatoi on this point, who belies any such report furnished by him. However, the person who has appeared as a defence witness have a different parentage, which is sufficient to discredit him on this point. But, it will make no difference as it is the settled law that the prosecution cannot get any advantage from the weakness of the defence case. It is the prime duty of the prosecution to establish its case beyond any reasonable doubt.

11. It is a natural phenomena that contradictions <sup>of</sup> occur in the deposition of witnesses. Minor contradictions in the deposition of two witnesses can be overlooked, as they may appear due to certain factors like difference of IQ-level amongst the witnesses, the position of witness from where he has observed the incident and the duration between the occurrence and recording of deposition. However, major contradictions in respect of time, place, distances or mode and style of occurrence of incident, may be fatal to the prosecution case. It is to be noted that complainant in his deposition has stated that the village, where the

incident took place, comprising 20/25 houses. On the other hand, witness Nawab Ali says that there were 40/50 houses in the said village while Tapedar Abdul Karim says that there were 100/125 houses in the said village. The complainant while deposing says that the distance between accused persons and police party will be 100/125 paces while the witness Nawab Ali says that the distance will be 60/70 paces. The complainant states that Bashir Jatoi was not accompanied with the first police party headed by ASI Qamaruddin while witness Nawab Ali says that Bashir Jatoi and ASI Qamaruddin and other policemen left police station at 11.00 a.m. in a jeep belonging to PC Zulfiqar. It is also notable that the complainant has stated that the first police party left the police station at 12:10 noon in the jeep of PC Zulfiqar. Complainant says that the jeep of PC Zulfiqar was brought back on the day of incident while witness says that it was brought back on the next day. Complainant says the said Bashir Jatoi did not come to police station after the incident while witness Nawab Ali says he came to police station on the next day of the incident. The complainant says that from their position, the village was situated at a distance of 100/125 paces while witness Samandar Khan says that it was at 20 paces. There are contradictions between the position of deceased policemen given by different witnesses. According to witnesses of ocular account, the accused persons fired at the deceased policemen from a distance of 20/30 paces but as per medico-legal officer, the deceased received injuries at a distance of more than 3 feet which may be 10 feet probably. The duration of death and post-mortem described by the medico-legal officer does not match with the time of alleged incident.

12. There are other important factors, which may also create a doubt regarding the prosecution case. It is the case of the prosecution that there was a fight between the two groups of Jatoi tribes belonging to village Hamzo Jatoi. However, during trial the prosecution did not try to establish this important fact. In the alleged incident, a car belonging to complainant and a jeep belonging to deceased PC Zulfiqar was used but the same was not made case property. It is said that Bashir Jatoi has

recorded a NC report but the same was not produced during trial. Similarly, no entry of movement of police was produced during trial. After the arrest of the accused persons, the weapons were recovered after 20 days of the incident but the same were sent to ballistic expert even after considerable delay. The casings of bullets used by police were neither recovered from the place of the incident nor produced during trial, which creates doubt regarding happening of incident as described by the complainant in FIR. The ballistic expert report clearly indicates that the crime empties marked as C-8 to C-21 were not fired from the any of the SMGs allegedly recovered from the arrested accused persons as they were found dis-similar. We are of the view that these aspects of the case are sufficient for causing fatal blow to the entire prosecution case.

13. For the foregoing details, the instant criminal appeal was allowed by our short order dated 07.02.2018 and the judgment of conviction and awarding sentence dated 11.11.2011, passed by learned Judge Anti Terrorism Court in Special Case No.70/2008 (*State Vs. Abdul Ghaffar & others*) against the appellant Abdul Ghaffar was set-aside and he was acquitted and these are the reasons for our aforesaid short order. Whereas, the Criminal Acquittal Appeal No. D- 43 of 2011 (*Mst. Zulekhan Gopang Vs. Abdul Wahab Jatoi and others*) was dismissed by the same short order for same reasons.