

Judgment sheet.

**IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD.**

Cr. Appeal No.S-115 of 2017

Cr. Appeal No.S-117 of 2017

Cr. Appeal No.S-125 of 2017

Cr. Appeal No.S-133 of 2017

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<b>DATE</b>	<b>ORDER WITH SIGNATURE OF JUDGE</b>
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Date of hearing:	17 .08.2017.
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Date of decision:	17.08.2017
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Appellants:	Through M/s Amjad Ali Sahioto & Waqar Ahmed Memon, Isharat Ali Lohar and Fakir Rehmatullah Hisbani, Advocates.
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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 27.04.2017 passed by learned Sessions Judge, Tando Allahyar in Sessions Case No.97 of 2016, (Re: State vs. Lala Anwar and others) for offence punishable under Sections 324, 353, 147, 148, 149 P.P.C registered at police station A-Section, Tando Allahyar vide crime No.88 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:-

Sections	Sentence
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.

3. Facts in brief as divulged in the FIR are that on 18.08.2016 ASI Nek Mohammad Khoso, I/C ADRC, Tando Allahyar was on patrolling duty alongwith ASI Ghulam Abbas Chandio, ASI Gulzar Ahmed Laghari, PC Mohammad Bux, PC Mohammad Hussain, PC Raza Hussain, PC Waqar Ahmed and DPC Ghulam Rasool under DD entry No.11 at 1615 hours and during the course of patrolling, he had received secret information from an informer that accused Anwar is selling charas in street infront of his house, situated in Makrani Mohallah, Tando Allahyar. On receipt of such information, police party reached at the pointed place and identified that accused Lala Anwar s/o Pir Bux Makrani was standing there, he was having white colour shopper in his right hand. Police party parked police mobile, in the meantime Zubair s/o Rasool

Bux Makrani, Shoaib s/o Ishaque Makrani, Asif s/o Murad Bux Makrani, Tariqu alias Kaloo s/o Ghafoor Makrani and Arif alias Current s/o Deen Mohammad, who all were armed with pistols, thereafter accused Lala Anwar took out pistol from the fold of his shalwar and he alongwith co-accused has fired upon police party with intention to commit their murder, police also retaliated upon the accused persons through an encounter and also conveyed such message to their high-ups for calling extra force and then incharge of 15 namely ASI Zulfiqar Ali Mangrio also reached at the spot alongwith staff, thereafter police party encircled the culprits through an encounter, which continued for about half an hour, then firing from accused side stopped, subsequently police arrested two accused persons namely Lala Anwar from whom pistol and charas was secured and accused Zubair alongwith pistol. Rest of accused persons namely Shoaib, Asif, Tariqu alias Kaloo and Arif alias Current made their escape good towards narrow streets of Makrani Mohallah, then police party secured pistol from accused Lala Anwar which was checked and found that the same is of 38 bore and containing five live bullets in its magazine. It is also stated that thereafter police party also secured the charas and on checking found consisting on four pieces of charas having written 'SHER-E-SINDH' on them, then pistol of accused Zubair was checked and found loaded with three live bullets in its magazine, same was got unloaded and weight of charas was also made and found 2010 grams.

On enquiry regarding recovered pistols and charas, arrested accused persons could not reply satisfactorily as they were arrested u/s 324, 353, 147, 148, 149 PPC, 23(1)(a) of Sindh Arms Act as well as 9(c) of Control of Narcotics Substance Act 1997. It is also stated that both arrested accused persons were also required in case Cr.No.63/2016 u/s 324, 386, 504 PPC, 6/7 of ATA of PS B-Section, Tando Allahyar, as such they were also arrested in said crimes. On personal search of accused, four denominations of Rs.100/-each were secured from the front pocket of shirt of accused Lala Anwar. Recovered property was separately sealed on the spot in presence of official 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, 147, 148, 149 PPC was framed at Exh.9, to which they pleaded not guilty and claimed to be tried, vide their pleas at Exh.9/A to 9/E.

5. At trial, prosecution examined ASI Gulzar Ali Leghari at Exh.10, who is mashir of arrest of accused Lala Anwar and Zubair and mashir of recovery. He has produced mashirnama of arrest and recovery at Exh.11. Next 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-2 at Exh.12, he has produced ballistic expert report at Exh.13 and mashirnama of place of occurrence at Exh.14. The last witness was ASI Nek Mohammad, he was examined being PW-3 at Exh.15, who produced DD entry No.11 at Exh.16, attested carbon copy of arrival entry at exh.17 and FIR at Exh.18. No other witness was examined by prosecution.

6. Counsel for appellants cross examined the prosecution witnesses. Thereafter, the side of prosecution was closed vide statement at Exh.19.

7. In 342 Cr.P.C statements recorded at Exh.20 and 22 to 25 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. However, accused Lala Anwar has produced photocopy of medical letter at Exh.21. All of accused have also showed their willingness to examine themselves on oath but they did not desire to lead defence evidence. Thereafter, statements of all accused persons were recorded on oath u/s 340(2) Cr.P.C at Exh.26 to 30 respectively.

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. Mr. Shahid Ahmed Shaikh, 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.           Glowing inception upon the case of prosecution reveals that on 18.08.2016 the complainant party during patrolling in the jurisdiction, received spy information from an informer that accused Anwar is selling charas in street in front of his house, situated in Makrani Mohallah, Tando Allahyar. On receipt of such information, police party reached at the pointed place and identified that accused Lala Anwar was standing there and police party parked police mobile, in the meantime accused Zubair, Shoaib, Asif, Tariqu alias Kaloo and Arif alias Current, who all were armed with pistols made straight firing upon police party with intention to commit their murder, police also retaliated upon the accused persons through an encounter which was continued for half an hour, thereafter police party encircled the culprits and arrested two accused persons namely Lala Anwar and Zubair alongwith incriminating articles. Perusal of unadorned reading of the contents of FIR, it amazed that at the time of incident the straight firing was made by either party who were armed with lethal weapons and such encounter was continued for half an hour, but surprisingly nobody from police side had sustained a single injury /scratch or the same hit to police mobile, which creates doubt to the case of prosecution. 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 this incident took place on 18.8.2016 and recovered pistols were sent to the Ballistic Expert for opinion which were received on 01.9.2016, after the delay of thirteen days, for which no explanation has been furnished, therefore, false implication of the appellants in this case cannot be ruled out and non-sending the recovery property to the ballistic expert for forensic report in time, is fatal to the prosecution case. Record further shows that the prosecution has miserably failed to produce any criminal history / record against the appellants to show that they are habitual offenders.

13. I have gone through the evidence of complainant SIP Naeem Ashraf who has conducted the investigation and PWs ASI Gulzar Ali Leghari, who is mashir of arrest of accused and recovery and ASI Nek Mohammad, 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 highly doubtful, therefore, the evidence of these witnesses cannot be safely relied upon.

14. 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**.

15. 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.

16. 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.

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

**JUDGE**

Ahmed/Pa