

Judgment sheet.
IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD.
Cr. Appeal No.S-213 of 2007
Cr. Appeal No.S-214 of 2007

DATE	ORDER WITH SIGNATURE OF JUDGE
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Date of hearing: 25 .09.2017.

Date of decision: 25.09.2017

Appellant: Abdul Ghafoor in person in Cr.Appeal No.213/07.

The State Through Syed Meeral Shah, D.P.G.

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J U D G M E N T :-

ABDUL MAALIK GADDI, J- At the very outset, learned D.P.G has filed Death Registration Certificate regarding the death of appellant/accused Abdul Rauf issued by Secretary Union Council Mirza Bagh Taluka Qazi Ahmed District Shaheed Benazirabad, showing therein that appellant/accused Abdul Rauf has been expired due to his natural death on 05.02.2008, taken on record, therefore, in view of such situation, the proceedings against deceased Abdul Rauf (appellant) stands abetted in above captioned both appeals, hence the Criminal Appeal No.S-214 of 2007 is hereby disposed of having become infructuous.

2. Through this judgment, I intend to dispose of the captioned criminal appeal viz. bearing No.S-213 of 2007 filed by the appellant Abdul Ghafoor, whereby he has assailed the legality and propriety of

judgment dated 12.10.2007 passed by the learned Sessions Judge, Nawabshah in Sessions case No.91 of 2006, P.S Kazi Ahmed, for offence under section 324, 353, 148, 149, 344 PPC, whereby the learned trial court after full-dressed trial convicted and sentenced the appellant for offence u/s 324 PPC to suffer RI for 5 (five) years and fine of Rs.10000/-(ten Thousands), in case of default in payment of fine, he will suffer more RI for two months. He was also sentenced to suffer RI for 2 (two) years for offence U/S 353 PPC and for offence u/s 344 PPC he was also convicted and sentenced to suffer RI for 2 (two) years and fine of Rs.2000/- (two thousands), in case of default of payment of fine to suffer RI for one month more. Benefit of section 382(B) Cr.P.C was also extended to him.

3. The brief facts of the prosecution case as per FIR lodged by complainant SIP/SHO Lutaf Ali Rahu at PS Kazi Ahmed on 03.04.2006 at 1115 hours are that he alongwith his subordinates was present on his duty at the PS, where he received spy information that some criminals had come in the village of Kashmir Marri and are stayed there. On such information the complainant SIP Lutaf Ali Rahu alongwith his subordinate staff namely ASI Dawood, ASI Mohammad Hanif, HC Azeem, PC Mehmood, PC Ghulam Shabir, PC Khuda Dino, PC Pehlwan, PC Arbab Shah and PC Ghulam Raza left P.S vide entry No.29 at 0745 hours in police mobile and went to the pointed place and reached there at about 8-30 a.m and saw that some armed persons were present there, who on seeing the police party in uniform tried to run

away, but the complainant challenged them, on which they fired at the police party with intention to commit their murder, police party also fired in their self defence and such firing continued for about 15-20 minutes. During the encounter three unidentified persons ran-away towards west in the banana crop. A person having Kalashnikov was identified by ASI Muhammad Dawood Rind as accused Kashmir Marri. In the meanwhile, there were cries from inside the house requesting for protection. The police party encircled them and asked the culprits to raise their hands up and out of them one person having Kalashnikov was apprehended, his name etc were enquired who disclosed his name as Abdul Rauf Marri and other man having country made pistol who was apprehended disclosed his name as Abdul Ghafoor. SHO Lutaf Ali Rahu secured Kalashnikov and pistol respectively from them which were unlicensed. There were cries from inside the thatched chappar on which the complainant party rushed there and saw that one person was tied with ropes who was untied and his name etc. were enquired who disclosed that he is abductee and was abducted on 22.2.2006 at about 12-00 night from Monghia Mori. He further disclosed that he was kidnapped by 7 dacoits and two of the dacoits brought him in the truck and detained him in this chappar. Thereafter SIP Lutaf Ali Rahu prepared such mashirnama of arrest and recovery in presence of ASI Mohammad Dawood Rind and ASI Muhammad Hanif Mahar. Inquiry was made about the abductee from the arrested accused who disclosed that their brother Kashmir Marri

and his friend have abducted the abductee for ransom and they used to stand guard over the abductee, then they brought the accused, weapon and abducted at P.S and lodged FIR.

4. A formal charge U/S 324, 353, 148, 149, 344 PPC and section 13-D Arms Ordinance, against the accused was framed to which he pleaded not guilty and claimed his trial.

5. At trial, prosecution examined 4 witnesses namely PW-1 complainant SIP/SHO Lutaf Ali Rahu at Exh.9, he produced mashirnama of arrest and recovery of weapon and recovery of abductee Aziz at Exh.9/A, FIR at Exh.9/B, PW-2 Mashir ASI Mohammad Haneef Mahar at Exh.11, he produced mashirnama of wardat at Exh.11/A. PW-3 Aziz Awan at Exh.12. PW-4 I.O ASI Mohammad Hussain at Exh.15. Thereafter, DDA closed the prosecution side vide statement at Exh.15.

6. In 342 Cr.P.C statement recorded at Exh.17, the appellant has denied the prosecution allegation leveled against him and stated that he is innocent and has falsely been implicated in the present case. However, neither he has examined himself on oath, nor he has examined any witness in his defence.

7. It is stated by the appellant 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, 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 15-20 minutes 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.

8. Learned D.P.G has supported the impugned judgment on the ground that appellant is nominated in the FIR; that the appellant has 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.

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

10. Blushing upon the unadorned reading of contents of FIR reveals that on the relevant date, time and place the complainant party received spy information from an informer that some criminals had come in the village of Kashmir Marri and are stayed there. On such

information the complainant SIP Lutaf Ali Rahu alongwith his subordinate staff named above left P.S and reached there at about 8-30 a.m and saw that some armed persons were present there, who on seeing the police party in uniform tried to run away but the complainant challenged them, on which they fired at the police party with intention to commit their murder, police party also fired in their self defence and such firing continued for about 15-20 minutes. 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. 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 the relevant portion of the same 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---
---Accused was acquitted in circumstances.”**

11. 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 appellant 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. Further, perusal of record it also contemplates that one accused Kashmir Khan who per FIR at the time of incident identified by ASI Muhammad Dawood Rind having armed with Kalashanikov fled away from the place of wardat, has already been acquitted by the trial court, therefore this fact creates doubt that upon the same incident and on the same allegation this accused has been acquitted on the description in impugned judgment that complainant and PWs did not implicate him. In addition to the PW namely Aziz Awan who as per FIR in the entire scenario of the case has come forth as star-witness of the whole event such as he was abducted by the accused persons and recovered by the police from their illegal confinement at the time of incident, but it is surprise that this witness, at the time of recording his evidence did not support the case of prosecution and stated in his evidence that police did not record his statement under section 161 CrPC. He also did not identify the accused persons present before the trial court at the time of

recording his evidence, which creates apparent doubt in the happening so narrated by the prosecution. Furthermore, 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 incriminating articles 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.

12. I have gone through the evidence of above all witnesses, 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 area, but no independent person of the locality cited as a witness the event, therefore, the evidence of above witnesses cannot be safely relied upon.

13. 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.**

14. 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 appellant seems more plausible and convincing, while the version of the prosecution is totally doubtful.

15. For my above stated reasons, I have no hesitation to hold that the prosecution has failed to prove its case against the appellant and learned trial court did not appreciate the evidence and documents on record properly. Consequently, this appeal is allowed. The impugned judgment passed by the trial Court is set-aside. Resultantly, the appellant is acquitted from the charge. He is present on bail, his bail bond stands cancelled and surety discharged.

JUDGE