

IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

Criminal Jail Appeal No. D-200 OF 2004
Criminal Jail Appeal No. D-137 of 2004

Present:

Mr. Justice Khadim Hussain Tunio
Mr. Justice Shamsuddin Abbasi, J.J.

Appellant: Peeral alias Peero,
Through Mr. Shakir Ali Talpur,
Advocate in Cr. Jail Appeal No.D-137/2004.

The State: Through Mr. Nazar Muhammad Memon, A.P.G.

Complainant: Shoukat Ali,
Through Mr. Ahmed Hussain Khoso, Advocate.

Dates of hearing: 12.03.2019

Date of decision: 10.06.2019

J U D G M E N T

Shamsuddin Abbasi, J: Through this common judgment we would like to dispose of captioned appeals bearing Cr. Jail Appeal No.D-137/2004 and Cr. Jail Appeal No.D-200/2004 filed by appellant namely Peeral alias Peero, whereby the appellant has impugned judgment dated 31.05.2004, culminating from Crime No.37/2002 for the offence under Section 302,324,353,440,225,149,109 P.P.C and 7 of Anti-Terrorism Act, 1997 and Section 13-D of Arms Ordinance registered at P.S Jhol, passed by learned Anti-Terrorism Court, Hyderabad & Mirpurkhas Division @ Hyderabad, in Special Session Case No.45/2002, re: State v. Peeral alias Peero and another and Special Case No.44/2002, re: State Vs. Peeral alias Peero and others, whereby trial court has convicted and

sentenced to suffer R.I for life imprisonment for offence under Section 365-A P.P.C each and they shall also liable to pay fine of Rs.125,000/- each; and in default whereof, he was ordered to undergo imprisonment for one year more in Crime No.36/2002. He was also convicted and sentenced to suffer R.I for life imprisonment for offence under Section 302,324,353,109 P.P.C and to pay fine of Rs.1,25,000/- to the legal heirs of the deceased and also to injured in equal ratio; and in default whereof, he was ordered to undergo imprisonment for one year more in Crime No.37 of 2002, while the other co-accused Mir Hassan and Wali Muhammad @ Pehlwan were acquitted of the charge by the learned trial Court. Both the sentences of imprisonment were ordered to run concurrently. However, the appellant was extended benefit of Section 382-B Cr.P.C.

2. Briefly, the facts of Crime No.36/2002 are that the accused persons on 31.07.2002, at about 11-15 a.m. in a street near the house of the complainant Abban along with absconding accused persons armed with K.Ks, G-3 Rifle, Rocket Launcher, allegedly formed an unlawfully assembly and abducted complainant Abban for the purpose of getting ransom amount.

3. Facts of Crime No.37/2002 are that the accused persons along with absconding accused persons on 01.08.2002, at about 11:00 a.m. had formed an unlawful assembly in the sugar cane crop in the land of Altaf Hussain And Mir Hassan near village Anwar Qureshi and allegedly, they had fired upon the police party of P.S Jhol and also police party of other police stations of District Sanghar. It is the prosecution case that the accused persons allegedly caused the death of A.S.I. Muhammad Ali Khoso, P.C Amir Khan, P.C Nisar Ahmed and P.C Amir Kousar. It is also the case of prosecution that accused persons allegedly had fired upon Inspector Punhoo Fakir, P.C Muhammad Ishaq, P.C Bijar and P.C Pir Bux and thereby, these police officials were injured. Above mentioned accused persons along with absconding accused had fired upon the

police party and had deterred the police party from discharging the official duty and the accused persons by their above acts had caused insecurity, terrorism in the locality.

4. After usual investigation, police had challaned the present appellant/accused u/s 365-A, 324, P.P.C r/w S.6/7 of the Anti-Terrorism Act, 1997, vide crime No.36/2002 and under sections 302,324,353,109 P.P.C r/w S.6/7 of the Anti-Terrorism Act, 1997, vide Crime No.37/2002.

5. A formal charge was framed against the appellant and co-accused, to which they pleaded not guilty and claimed to be tried.

6. The prosecution, in order to prove its case, examined both the complainants of the cases, P.Ws Muhammad Malook, S.I.P Muhammad Sharif, A.S.I. Abdul Ghani, S.I.P Ghulam Hussain, Dr. Lashkar Ali (*who conducted postmortem of the deceased*), Abdul Khalique Tapedar, Punhoo Fakir, Sujjan Singh, Muhammad Ishaq, Bijar Khan, Pir Bux, S.I.P Mushtaque Jat and Dr. Hatoomal.

7. Statement of appellant under Section 342 Cr.P.C. was recorded, wherein he denied all the allegations and claimed to be innocent.

8. The trial court finding the appellant guilty for offence, with which he was charged, convicted and sentenced him as mentioned hereinabove, whereas acquitted the accused Wali Muhammad and Mir Hassan.

9. Learned counsel for the appellant has contended that the appellant is innocent and has been involved falsely in the case; that there are contradictions in the deposition recorded before the trial Court; that the prosecution witnesses have not supported the case, that learned trial court has not properly evaluated

the evidence and passed illegal judgment and did not consider material contradictions, therefore, impugned judgment requires interference by this Court and is liable to be set-aside and accused may be acquitted of the charge.

10. On the other hand, learned Additional Prosecutor General has supported the impugned judgments. He added that the impugned judgments in the circumstances do not require any interference by this Court.

11. We have given anxious considerations to the arguments of both the sides and perused the entire material available before us with their able assistance.

12. We have scanned the evidence of P.W No.1 complainant Abban, who is complainant in F.I.R, who deposed that he was Kamdar of one Abdul Ghani Zamindar and he lived in the village of Abdul Ghani. On 31.07.2012, he was in his house, at about 11:15 p.m., he was called from the outside of his house, he went there and saw five armed persons standing outside of his house, their faces were opened and he saw them in the light of the electric bulb. Out of them, one person armed with K.K. disclosed his name as Mumtaz Mari, second person armed with G-3 rifle disclosed his name as Gul Nawaz, third one disclosed his name as Piral Mari, fourth one disclosed his name as Devo Kolhi and fifth one was Dad Khaskheli, who was armed with Rocket Launcher. He further deposed that all these persons had forcibly kidnapped him; when they reached near street of his house, Sobho and Malook had met with them, to whom accused persons gave message for his Zamindar for payment of ransom amount for his release. He further stated that after covering a distance of 1 and ½ acres area there was a garden of Haji Abdul Ghani and accused persons along with abductee entered in the garden, Sobho and Malook had raised cries about his abduction and on their cries villagers gathered and encounter took place between dacoits and villagers; during encounter police had also reached there and they also participated in the

encounter. He further stated that firing continued for half an hour and by taking the advantage of the situation complainant Abban succeeded to make escape well from the clutches of dacoits and crossed the road in between place of incident. He further stated that thereafter armed persons had run away from the scene of offence, but police had tracked their footprints and chased them. He further stated that he reported the matter to zamindar, who resided in Quetta on telephone and on his advice he lodged the F.I.R. of incident. During cross examination he replied that there are 400/500 houses in his village and the said garden is surrounded by the houses of the villagers. He further deposed that about 8/10 villagers had their licensed guns and the firing between the villagers and dacoits were continued for 15 minutes. He also deposed that the villagers and police had tracked the footprints of the dacoits, however, he admitted the fact that accused were not known to him and he came to know their names by disclosing themselves before him. He further replied that dacoits had not disclosed the names of their father.

13. We have also examined the deposition of P.W-2 Muhammad Malook, who stated that on the day of incident he along with P.W Sobho were talking to each other outside their house when five dacoits came there along with abductee Abban, however he disclosed names of accused along with descriptions of their weapons. The dacoits gave them message for their zamindar Abdul Ghani for the payment of ransom amount for the release of Abban. He further stated that he raised cries and thereafter encounter had taken place in between the villagers and dacoits, in the meanwhile, police party also arrived there and they also participated in encounter. He further stated that abductee Abban got him released from the clutches of dacoits, dacoits also ran away from the scene of incident, but police chased the culprits. He further stated that during investigation his statement under section 164 Cr.P.C. was also recorded in this

case before learned Judicial Magistrate, Tando Adam. During cross examination, he also admitted the fact that accused persons were not known to them previously; the accused had not disclosed the names of their fathers.

14. We have also examined the statement of P.W-3 Abdullah, who was mashir of the case, who stated that the police visited the place of occurrence and prepared mashirnama in his presence and in presence of co-mashir Fateh Muhammad, however he has stated that during encounter between villagers and dacoits he himself participated in encounter having shotgun with him; he further stated that encounter in between dacoits and villagers was continued over 10/15 minutes, thereafter police arrived there and participated in encounter and encounter had continued about half an hour.

15. We have also scanned the deposition of P.W-4 SIP Muhammad Shareef, who stated that on the day of incident he was S.H.O at P.S. Jhol and he had received telephonic message from Otaq of Abdul Ghani that dacoits group of Mumtaz Mari had abducted kamdar Abban. He went there, where encounter between villagers and dacoits was going on and he has also participated in encounter along with his subordinate staff. However, he has admitted that he could not identify the dacoits at the time of encounter. He further stated that dacoits had escaped from the scene of offence towards southern side. He prepared mashirnama of recovery of abductee in presence of mashir, as well as place of incident and secured empties from the place of incident. He further stated that before leaving the police station he informed about the incident to his high ups and requested them for providing foot trackers namely Darya Khan and Muhammad Ismail, who also reached at the place of incident; they started foot tracking and came to know that dacoits had entered in the land of Meer Hassan Kerio and Altaf Kerio, where sugarcane crop was cultivated, police encircled the land and dacoits opened firing on them and again encounter had taken place

between police and dacoits and as a result of firing, SIP Punhoon Faqir and P.C. Bijar Khan had sustained firearm injuries in retaliation of their firing, one of the dacoit also got injured. The firing continued for half an hour, thereafter A.P.C. arrived there along with S.P Mr. Ghulam Qadir Thebo and his team. He further stated that all the S.H.Os of District Sanghar had also arrived along with their staff, thereafter A.P.C. entered in the sugarcane crop, but APC could not find out dacoits due to availability of water in sugarcane crop. He had also prepared mashirnama of injuries of SIP Punhoon Faqir and P.C.Bijar Khan in presence of ASI Abdul Ghani and P.C. Ghulam Hussain. He referred the injured to civil hospital for their treatment. He further stated that firing continued and during night time they again tried to search out the dacoits, during that course one Amir Khan, gunman of DSP Sanghar had sustained firearm injuries and died at the spot. He prepared mashirnama of dead body in presence of mashirs and sent the dead body to hospital for postmortem. He further stated that the operation continued in the sugarcane cultivation and on 02.08.2002, DSP Khipro Raja Badi-uz-zaman also arrived along with his staff and S.H.O P.S.Khipro also arrived there at 11:00 a.m. They tried to enter in sugarcane crop and started search operation, thereafter again cross firing started between dacoits and police on that one dacoit Dad Khan raised cries, who sustained injuries and died at the spot. He further stated that two P.Cs Pir Bux and Muhammad Ishaque had also sustained firearm injuries, who were also referred to the hospital for treatment. He further stated that from time to time the firing was continued between dacoits and police. It is pertinent to mention here one of the most aspect of the case which he disclosed is that he had seen the dacoits on their search light and they would identify if they see them again. He further stated that on 03.08.2002 in the morning time, dacoits tried to run away from the sugarcane cultivation and started firing; resultantly, ASI Muhammad Ali Khoso and P.C Nisar Khan had

also sustained firearm injuries and due to those injuries they died at the spot. He completed the formalities and referred the dead bodies to the hospital. He further stated that he and DSP Khipro conducted the search operation for the dacoits in the same cultivation and during that course of search they secured one rocket launcher along with its ammunition and dead body of dacoit Gul Nawaz Mari, which was lying there. They also secured used articles of dacoits and prepared such mashirnama; police shifted the dead body of dacoit to hospital for postmortem; they started tracking of dacoits and finally reached at the land of Mir Hassan, where they found foot prints outside the Otaq of accused Mir Hassan which disappeared while wheel marks of jeep and motorcycle were available there; they presumed that dacoits were shifted by accused Mir Hassan towards other place, thereafter he returned to police station Jhol, where he lodged F.I.R. of abductee Abban, as well as F.I.R. of the encounter between police and dacoits. However, the P.Ws have categorically stated that accused Mir Hassan, Pehlwan and Wali Muhammad were not known to them previously. (During his cross examination he however contradicted the complainant and stated that abductee Abban met with him in the garden, whereas complainant Abban stated that during encounter he made escape good from the clutches of dacoits and crossed the road between the place of incident.) He did not disclose that police recovered him. He further stated that the distance between first sugarcane cultivation and second sugarcane cultivation would be about 1 and ½ kilometers. (He also contradicted the time of incident as per F.I.R. the encounter in between the dacoits and police was started at about 11:00 a.m. in F.I.R. No.37/2002, whereas he has stated that the encounter had started with dacoits at about 8:30 a.m.) He also stated that DSP Headquarter, SHO. P.S.Piromal and S.H.O. P.S.Khipro had continued siege on the eastern side from Lakha side, wherefrom dacoits had run away.

16. We have also examined the deposition of P.W-6 Dr. Lashkar Ali, who conducted post mortem of deceased and examined the injuries and produced postmortem report of the deceased.

17. We have also examined the deposition of P.W-7, Abdul Ghani, who has deposed on the same line as deposed by S.H.O. Jhol, (P.W-4 SIP Muhammad Sharif). He however, stated that the dacoits had disclosed their identity loudly as Mir Mumtaz Mari, Piral Mari, Imdad Khaskheli and Gul Nawaz and others. He further stated that dacoits disclosed that they had having G-3, K.K and Rocket Launcher and threatened the police party not to come near to them otherwise police would be killed, thereafter encounter had taken place in the sugarcane crop. He further stated that on search light he identified accused Wali Muhammad, Mir Hassan and one unidentified person and they had fired at the police party and had run away, however, he further stated that they were previously known to him and further stated that the statement under section 161 Cr.P.C. was recorded on 04.08.2002 and he admitted the fact that in his statement under section 161 Cr.P.C he did not disclose that accused Mir Hassan and Pehlwan had made firing on police party, however, he also admitted the fact regarding over writing in his statement under section 161 Cr.P.C in respect of date mentioned over it.

18. We have also examined the Statement of P.W-8 Abdul Khaliq, who was Tepedar of the Beat and on the pointation of police officials prepared the sketch of place on incident.

19. We have also examined the Statement of P.W-9 SIP Ghulam Hussain, who almost deposed on same line as deposed by the complainant of the case. However, he had specifically disclosed the names of the dacoits as Mumtaz, Gul Nawaz, Piral Mari, Devo Kolhi and Dad Khaskheli, but did not disclose the date,

time, place and manner, in which he saw the dacoits. It is a matter of importance that encounter was going on for three days on different places. Particularly when the APC could not find out its path at the place of incident and the place of incident is Sugarcane crop of 6 feet in the water. It is pertinent to mention here that this P.W again stated that in the night hours' time, there was firing from eastern side and they saw on search light three persons came and in retaliation they also made firing on them and they identified them on search light as Mir Hassan and Wali Muhammad, whereas he couldn't identify the third one. (It is the matter of record that this P.W has specifically implicated accused Mir Hassan and Wali Muhammad duly armed with weapons and fired on police party, but the trial court found them innocent and acquitted them of the charge and the State did not file any acquittal appeal against Mir Hassan and Wali Muhammad before this Court, which proves that the State has admitted the findings made by learned trial Court against accused Wali Muhammad and Mir Hassan). This P.W had also stated that the culprits reached in Otaq of Mir Hassan, where the footprints disappeared there and wheel marks of jeep and motorcycle were found and they presumed that Mir Hassan and Wali Muhammad had helped the dacoits to run away from the scene. During his cross examination, he stated that accused Mir Hassan and Wali Muhammad were seen by him at the distance of 1½ acres. He has also given height of sugarcane, which were 6 feet in height. He further admitted the fact that in the morning of 04.08.2002 they came to know about escape of dacoits from the scene of offence.

20. We have also examined the Statement of P.W-10 Inspector Punhoon Faqir, who has also deposed in same line as deposed by the earlier P.Ws, who were injured in the case and after receiving injuries, he was shifted to hospital, where he remained under treatment.

21. We have also examined P.W-11 Sajjan Singh, who has also deposed the same as already deposed by the earlier P.Ws, but did not disclose the name of appellants and specifically implicated accused Mir Hassan Kerio and stated that the footprints led towards the Otaq of Mir Hassan Kerio. He has also deposed that on 02.12.2003, the police of police Station Naunabad had informed them that accused Piral was under the arrest of P.S.Naunabad; thereafter they went there and arrested accused Piral and prepared such mashirnama in the present crime.

22. We have also examined P.W-12 Muhammad Ishaque, who was also injured of the case and did not disclose the name of any of the culprits and stated that he participated in the encounter and got injured in the incident.

23. We have also examined P.W-13, H.C Bijar Khan, who stated that he was posted in Special Team and participated in the said encounter and disclosed the names of dacoits as Mumtaz Mari, Imdad Khaskheli, Gul Nawaz and Devo Kolhi. (This P.W did not disclose the name of present appellant and he had specifically stated that accused persons present in the court were not seen by him at the spot).

24. We have examined the deposition of P.W-14, P.C. Pir Bux who stated in the same line by deposing that during encounter accused disclosed their names as Mumtaz, Piral, Devo Kolhi and Imdad Khaskheli. He was also injured of the incident and after sustaining injuries he was referred to hospital for treatment.

25. We have also examined P.W-15, SIO Mushtaque, who investigated the case and after usual investigation submitted the final challan of the case and stated that he had recorded the Statement of P.Ws and arrested accused Mir Hassan and Wali Muhammad on 21.08.2002, but did not secure any crime weapon from them.

26. We have also examined P.W-16, Dr. Hotomal, who examined the injured and issued medical certificate.

27. After examination of the depositions of 16 P.Ws, who were examined by the prosecution to prove their case, which consist upon two sets of witnesses; one comprise of private persons namely P.W/complainant Abban, P.W Muhammad Malook and P.W Abdullah. PW Abban who is abductee of the incident and complainant in F.I.R. No.136/2002 regarding his abduction and P.W Muhammad Malooq had supported the version of complainant regarding his abduction as an eye witness of the incident of abduction, whereas PW Abdullah is mashir of recovery of abductee/complainant Abban from the clutches of dacoits.

28. This Court scrutinized the depositions of private persons, according to whom abduction of complainant Abban took place on 31.07.2002, however, it is admitted fact that the complainant Abban categorically stated that the abductors were not known to him, but at the time of abduction, they disclosed their names and the same fact has also been admitted by other PW Muhammad Malook, who also admitted the fact that the abductors were also not known to him previously. It is also admitted fact that F.I.R. in respect of abduction of Abban was registered after the delay of three days, as the incident had taken place on 31.07.2002 at about 11:15 p.m., whereas F.I.R. has been lodged on 03.08.2002 at 1530 hours. At this stage, the Court cannot ignore the fact that soon after the incident of abduction of Abban, he was released and police encounter took place between police and dacoits which had continued for three days, in which three police officials were martyred and four police officials got injured in the incident including death of two dacoits, the Court at this stage cannot ignore the fact that the complainant would be free from any pressure in which heavy casualties of police personnel had taken place. Apparently, it is proved that none of the private persons had admitted the fact that the culprits were not known to them previously, but on the other hand, they disclosed their names and merely stated

that the accused disclosed their names to them, which is not appealable to a prudent mind that there was no need to criminals to disclose their identity when they were committing a heinous bloody offence in which police officials lost their lives and several got injured. And other set of evidence which comprising of police officials who participated in the encounter with dacoits. It is matter of record that place of incident was sugarcane crop and according to the prosecution witnesses the height of sugarcane crop was about 6 feet, the dacoits were inside the field and police party had encircled them for three days. The only piece of evidence, which disclosed by all the police officials that accused/dacoits by raising voices disclosed their names is also not appealable to a prudent mind to believe this logic when the bloody encounter was ensued, in which heavy casualties took place from both the sides and under these circumstances they disclosed their names. It is a matter of record that none of the eye witnesses from the police department stated that they had seen the culprits in the day time. No doubt this is a heinous offence in which three police officials had lost their lives and four got injured in the incident, but for the safe administration of justice, this Court cannot rely on such weak type of evidence brought by the prosecution to maintain the conviction only on the statement that the dacoits had loudly disclosed their names. It is also matter of record that after same set of witnesses comprising of all police officials who had implicated the accused Mir Hassan and Wali Muhammad, but learned trial court had acquitted them from the charge. It is the matter of record that the State has not filed any acquittal appeal before this court, which presumed that they have admitted the findings of learned trial court in respect of their innocence. At this stage we take advantage on the principle of *falsus in uno falsus in omnibus*, the Honourable Apex Court has given findings on this principle and authored a land mark Judgment on this issue in a Criminal Appeal No.238-L of 2013.

29. This Court is of the considered view that the prosecution has miserably failed to prove its case against the appellant beyond the shadow of reasonable doubt; in fact this is a case of no evidence, therefore, while extending the benefit of doubt to the appellant and relying upon the case of *Muhammad Mansha v/s. The State (2018 SCMR 772)*, wherein Honourable Apex Court has held as under:

“4. Needless to mention that while giving the benefit of doubt to an accused it is not necessary that there should be many circumstances creating doubt. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of he accused, then the accused would be entitled to the benefit of such doubt, not as a matter of grace and concession, but as a matter of right. It is based on the maxim, “it is better that the guilty persons be acquitted rather than one innocent person be convicted”. Reliance in this behalf can be made upon the cases of *Tariq Pervez v. The State (1995 SCMR 1345)*, *Ghulam Qadir and 2 others v. The State (2008 SCMR 1221)*, *Muhammad Akram v. The State (2009 SCMR 230)* and *Muhammad Zaman v. The State (2014 SCMR 749)*.”

30. For the foregoing discussion, while extending the benefit of doubt in favour of appellant namely, Peeral alias Peero son of Meeran Mali, we hereby acquit him of the charge by setting aside the impugned judgment dated 31.05.2004. The appellant is in custody. He shall be released forthwith if not required to be detained in any other case.

31. The appeals in hand stand allowed in the foregoing terms.

JUDGE

JUDGE