

IN THE HIGH COURT OF SINDH, BENCH AT SUKKUR.

Present:

Mr. Justice Abdul Rasool Memon
Mr. Justice Irshad Ali Shah

1. CrI. Appeal No.D-36 of 2011.
2. CrI. Appeal No.D-132 of 2017.
3. Cr. Appeal No.D-133 of 2017.

For orders on MA 2214/13
For orders on MA 5505/15
For hearing of main case

Date of hearing: 02.05.2018
Date of Judgment 06.2018

M/s Qurban Ali Malano & Ghulam Shabbir Dayo Advocates for appellants.

Mr. Habib Rehman Shaikh Advocate for complainant.

Mr. Sardar Ali Shah Rizvi DPG.

JUDGMENT

IRSHAD ALI SHAH, J.-The appellants, on having been found guilty, were convicted and sentenced by learned Judge ATA Court Khairpur as under;

"U/s 302 R/W Section 34 PPC they are convicted and sentenced to suffer rigorous imprisonment for life for two times. Both the present accused and proclaimed offender are also liable to pay compensation of Rs.200,000/-each to be paid to the legal heirs of deceased Chiraguddin and Bashir Ahmed u/s 544-A Cr.PC and in case of default they all shall suffer further R.I for a period of six months more.

u/s 324 R/W Section 34 PPC they are convicted and sentenced to suffer R.I for a period of seven years and also to pay fine of Rs.10,000/-each and in default thereof they shall undergo SI for two months more.

u/s 7 of ATA, 1997 they are convicted and sentenced to suffer rigorous imprisonment for life for two times and to pay fine of Rs.200,000/-each and in default thereof they shall undergo RI for one year.

u/s 13(e) Arms Ordinance accused Munir Ahmed convicted and sentenced to suffer RI for a period of seven years and also to pay fine of Rs.5000/-and in case of default thereof he shall undergo SI for one month.

u/s 13(e) Arms Ordinance accused Nadeem Ahmed convicted and sentenced to suffer RI for a period of seven years and also to pay fine of Rs.5000/-and in case of default thereof he shall undergo SI for one month.

2. The case against the appellants is outcome of FIR Crime No.35/2007, u/s 302, 324, 34 PPC of PS Mehrabpur, which was lodged by complainant Shabbir Ahmed, which reads as under;

"Complaint is that I am driver of Tractor. Yesterday at night time there arose exchange of some harsh words between us and Muhammad Amin Malik and others over the issue of children, on that Muhammad Amin Malik and others said that they will see us. Today at morning time I and my deceased father Bashir Ahmed, brother Munir Ahmed and cousin Khalil Rehman, after completing the work at land, were going back, when we reached at bus stop Behlani, there at about 2.15 hours of noon, my deceased cousin Chiraghuddin son of Ghulam Muhammad also joined us. There we found accused. They were Muhammad Amin son of Muhammad Ashraf Malik, who was having MP-5 rifle in his hand, (2) Munir Ahmed son of Muhammad Ashraf Malik who was having kalashnikov in his hand, (3) Nadeem son of Muhammad Ashraf Malik who was having T.T pistol in his hand, (4) Bashir Ahmed son of Muhammad Ashraf who was having T.T pistol in his hand. Soon after their arrival accused Muhammad Amin Malik said that today we will not be spared. After saying so, accused Muhammad Amin Malik made direct fires with his rifle upon Chiraghuddin with intention to commit his murder, those fires hit him at his chest, on that he raised cries and fell down on the ground. Accused Munir Ahmed Malik fired burst of kalashnikov upon my father Bashir Ahmed who also raised cries and fell down on the ground. Accused Nadeem, Muhammad Amin, Munir Ahmed and Bashir Ahmed fired with their respective weapons upon my brother Munir Ahmed and cousin Khalil Rehman with intention to commit their murder. They by raising cries fell down on the ground. Then I and above said injured raised cries, on our cries and fire shot reports Umerddin Shaikh, Abdul Sattar Shaikh, Nawab Shaikh, Ashiq Ali Shaikh and other co-villagers came from hotel and shops. They also saw the accused persons making fires. Then all the four accused making fires went away to their houses by raising slogans. We and all the witnesses found that my father Bashir Ahmed and cousin Chiraghuddin had died after sustaining fire shot injuries. My brother Munir Ahmed and cousin Khalil Rehman were found lying in injured condition. We brought the injured at Behlani Hospital for immediate treatment. I left the witnesses over the dead bodies of both the deceased for security purpose and then myself proceeded there from. Now I have appeared and state that above named

accused on account of their annoyance over issue of children in furtherance of their common intention have committed murder of my father Bashir Ahmed and cousin Chiraguddin and have caused injuries to my brother Munir Ahmed and cousin Khalil Rehman. I am complainant investigation be made."

3. On investigation, both the appellants were arrested; from them were secured by police unlicensed klashnikov and pistol and they, after usual investigation, were challaned before learned trial court to face trial for above said offence, while names of accused Muhammad Amin and Bashir Ahmed were placed in charge sheet as absconders.

4. At one moment, on application of the appellants, learned trial court forwarded the case to court of ordinary jurisdiction for its trial, such order was impugned by the complainant before this court. It was set aside. The order passed by this court, on challenge, was set aside by Hon'ble Supreme Court of Pakistan with direction to this court to pass a fresh order. At the time of hearing of fresh arguments on point of jurisdiction both the parties consented for trial of their case by learned Judge, ATA Court Khairpur, which was ordered accordingly by this Court.

5. At trial, appellants denied the charge and prosecution to prove it, examined PW-1 complainant Shabbir Ahmed, produced through him FIR of the present case. PW-2 Munir Ahmed. PW-3 Khalil Rehman, PW-4 Umerddin Shaikh, PW-5 Nawab Ali Shaikh, PW-6 mashir Liaqat Ali, produced through him mashirnama of place of incident, mashirnama of injuries, inquest reports of dead bodies of deceased and recovery of crime weapons, PW-7 ASI Ali Hassan, PW-8 Dr. Ashiq Ali, produced through him provisional and final medical certificates in respect of injuries sustained by injured, post mortem reports of dead bodies of said deceased, letter of police and receipt, PW-9 Tapedar Allah Jurio, PW-10 SIO/SIP Nazar Hussain Shah, PW-

11 mashir SIP Lal Dino Shar, produced through him mashirnama of arrest of the appellants and then closed the side.

6. The appellants in their statements recorded u/s 342 Cr.P.C. denied the prosecution allegation by pleading innocence by stating that they have been involved in this case falsely by the complainant party due to enmity. They did not examine anyone in defense or themselves on oath in disproof of the prosecution allegation against them.

7. Appellant Munir Ahmed during course of his examination under section 342 Cr.P.C., produced certified copy of an application u/s 156(3) Cr.P.C. which allegedly was made before learned 2nd Civil Judge/Judicial Magistrate Kandiaro by one Muhammad Saleem.

8. On the basis of evidence, so produced before it and on hearing learned counsel for the parties, learned trial court convicted and sentenced the appellants by way of impugned judgment, as stated above.

9. It would be pertinent to mention here that no separate appeals were filed by the appellants to challenge conviction and sentence recorded against them for offence punishable u/s 13(e) A.O. timely. The appellants in order to cover up such deficiency filed their separate appeals subsequently.

10. At the time of recording conviction and sentence against the appellants, learned trial court acquitted absconding accused Muhammad Amin Malik by believing his plea of alibi. His acquittal was challenged by the complainant by way of filing an Acquittal appeal. By doing so, he also filed a Revision application for enhancement of the conviction and sentence which were awarded to the appellants.

11. The acquittal appeal and revision applications were withdrawn by the complainant perhaps on account of amicable settlement with the accused party.

12. All these three appeals have borne out of single judgment of learned trial Court; therefore, same are being disposed of through the single judgment.

13. It is contended by learned counsel for the appellants that they, being innocents are involved in this case falsely by the complainant party to satisfy their grudge with them over kids' fight, otherwise they have nothing to do with the incident. By contending so an impression was given that the appellants have been substituted with real culprits of the incident. It is further contended by them that there were material inconsistencies and contradictions in between the evidence of complainant and his witnesses, those were not considered by learned trial court in its true perspective. It was further contended that the weapons have been foisted upon the appellants by the police at the instance of the complainant party; as such the appellants could not be connected with the recovery of the weapons. It was further contended by them that 161 Cr.P.C. statement of P.W. Munir Ahmed was not read over to him by the police and he was not able to distinguish between appellants Munir Ahmed and accused Bashir Ahmed at the time of his examination. It is further contended by them that the case was not to have been tried by ATA Court, even with the consent of the parties, as the Courts could not accord jurisdiction with the consent of the parties. By contending so, they sought for acquittal of the appellants as, according to them; they have also compounded the offence with the complainant party outside of the Court at the intervention of their Nek

Mards. In support of their contention, they relied upon cases of Muhammad Tufail and others vs. Settlement and Rehabilitation Commissioner Hyderabad and others (PLD 1967 Karachi 258), (2) Molvi Noor Muhammad and others vs. The State (2000 PCr.LJ 1583), (3) Shaikh Muhammad Amjad vs. The State (2002 PCr.LJ 1317), (4) Amanullah and others vs. The State (PLD 2003 Quetta 11), (5) Rashid Ahmed vs. The State (PLD 1972 SC 271), (6) Pir Sabir Shah vs. Shah Muhammad Khan and others (PLD 1995 SC 66), (7) Karachi Dock Labour Board vs. M/s Quality Builders and others (PLD 2016 SC 121), (8) Pervaiz Iqbal vs. Special Judge Anti Terrorism Court No.3 and others (2013 YLR 92), (9) Dr. Zahoor Mehdi vs. Election Commissioner of Pakistan (PLD 2009 SC-1), (10) Muhabat Ali and others vs. The State (2007 SCMR 142), (11) Syed Saeed Muhammad Shah vs. The State (1993 SCMR 550), (12) Muhammad Hussain @ Hussaini vs. The State (PLD 1995 Lahore 229), (13) Rahat Ali vs. The State (2010 SCMR 584), (14) Tariq Pervaiz vs. The State (1995 SCMR 1345) and (15) Shafiq Shah and others vs. The State (2010 PCr.LJ 1156).

14. Learned DPG has supported the impugned judgment by contending that offence punishable u/s 7 ATA of 1997 is not compoundable one.

15. Learned counsel for the complainant did not raise any objection to acquittal of the appellants by stating that both the parties have compounded the offence outside the court at the intervention of the Nek Mards of their communities.

16. We have considered the above arguments and perused the record.

17. Unnatural death of deceased Bashir Ahmed and Chiraguddin and injuries sustained by injured / P.Ws. Munir Ahmed and Khalil Rehman are proved by the evidence of Dr. Ashiq Ali, such fact even otherwise, is not

disputed by the appellants, hence what remains to be examined is the liability of the appellants towards the present incident.

18. It is stated by complainant Shabbir Ahmed during course of his examination before learned trial court that they were having dispute with the accused party over kids' fight. On 17.5.2007 he, his father Bashir Ahmed (deceased), his brother Munir Ahmed and cousin Khalil Rehman were going back after visiting their land, when reached at Behlani bus stop there at about 2.15 pm they were joined by cousin Chiraguddin (deceased). In the meanwhile there came accused Muhammad Amin armed with MP-5 rifle, Munir Ahmed armed with kalashnikov, Nadeem Ahmed with TT pistol and Bashir Ahmed with TT pistol. It was further stated by the complainant that on their arrival it was stated by accused Muhammad Amin that the complainant party may not be spared and then he made straight fires with his rifle upon Chiraguddin with intention to commit his murder, those fires hit to Chiraguddin at chest and he fell down on the ground by raising cries. Accused Munir Ahmed fired burst of kalashnikov at Bashir Ahmed, he fell down on the ground. Accused Nadeem, Muhammad Amin, Munir Ahmed and Bashir Ahmed then fired with their respective weapons upon PWs Munir Ahmed and Khalil Rehman with intention to commit their murder and they fell down on the ground by raising cries. It was further stated by the complainant that he and injured persons raised cries and on their cries and fire shot reports PWs Umerddin Shaikh, Nawab Ali Shaikh, Abdul Sattar Shaikh and Ashiq Ali Shaikh came running from shops and hotels. They also saw the accused persons, they went away by making aerial firing. It was further stated by the complainant that Bashir Ahmed and Chiraguddin were found dead while Munir Ahmed and Khalil Rehman were found sustaining

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for the prosecution to produce each of the cited witnesses at the trial."

19. Further, the evidence could not be disbelieved merely on the basis of immaterial and inconsequential contradictions unless the inconsistencies and contradictions are shown to effect material parts of prosecution case.

Reference in that respect may well be made upon the case of **Ravi Kapur v.**

State of Rajasthan (2013 SCMR 480) wherein it is held as under:-

"It is a settled principle that the variations in the statements of witnesses which are neither material nor serious enough to affect the case of the prosecution adversely are to be ignored by the court...

It is also a settled principle that statements of the witnesses have to be read as a whole and the court should not pick up a sentence in isolation from the entire statement and ignoring its proper reference, use the same against or in favour of a party. The contradictions have to be material and substantial so as to adversely affect the case of the prosecution. Reference in this regard can be made to"

20. The injuries on the persons of the injured and death of deceased at a particular spot is also indicative of the fact that presence of such witnesses and deceased was / is natural one. The complainant and his witnesses are appearing to be natural witnesses to the incident. Their evidence is corroborated in shape of recovery of blood stained earth, empty bullets of MP-5 rifle, Klashnikov and TT pistols from the place of incident, which were effected by SIO/SIP Syed Nazar Hussain in presence of PW/mashir Liaqat Ali. On arrest from both the appellants were recovered by SIO/SIP Nazar Hussain Shah, unlicensed Kalashnikov and TT pistols which were used by them in commission of the incident. Such recovery could not be said to be foistation as it was found matched to large extent with the recovery of empties from place of incident as per Expert report. The investigating officer of the present case indeed was having no reason to have foisted the

unlicensed weapons upon the appellants. Legally, the conviction could well be recorded on ocular account alone, if the same appears to be convincing and natural. However, when it comes to the case of capital punishment, the ocular account, if found supported with other corroborative pieces of evidence, would always be safe to conclude that the prosecution has successfully established its case and mere inconsistencies and minor contradictions would be of no avail for defense. Reference in that respect if need be may well be made upon the case of **Ghulam Muhammad & another v. State & another (2017 SCMR 2048)**, wherein it is observed as under;

"3. In the FIR, Wazir Ali (appellant) and Muhammad Aslam (convict-appellant) have been attributed hatchet blows on the person of Mukhtar Hussain (deceased). Ocular account was furnished by Ghulam Muhammad complainant (PW.6) and Mehtab Hussain (PW.7) who while appearing before the learned trial court stood by the contents of the FIR. The injuries caused by the said convicts were observed by Dr. Irshad Hussain (PW.3) who conducted autopsy on the dead body of Mukhtar Hussain (deceased). Prosecution case is further corroborated by the recovery of hatchets (Ex.PF/PG) at the instance of both the convicts and positive reports of Chemical Examiner and Serologist vis-a-vis the said hatchets. **Therefore, we hold that the prosecution successfully brought home guilt against both the convict to the hilt** and CrI. M.A. No.452-L of 2015 is dismissed and his conviction and sentence recorded / maintained by the learned courts below is upheld."

21. Needless to state that appellant Munir Ahmed is attributed specific role of causing fire shot injuries to deceased Bashir Ahmed. It is true that the role attributed to appellant Nadeem Ahmed in commission of incident is to the extent that he with rest of the culprits caused unspecified fire shot injuries to PWs Munir Ahmed and Khalil Rehman but for this reason he could not be absolved of the liability by extending him benefit of doubt as it was he, who with rest of the culprits being armed with deadly weapon gone over to the complainant party, participated in commission of the incident,

thereby committed death of two innocent persons and caused fire shot injuries to two more persons with intention to commit their murder too. However, it is also a matter of record that the complainant and his witnesses have categorically named the appellants as well co-accused to have come at particular place, having armed themselves with deadly weapons. Thus, manner in which the accused persons, came at a particular place in such a fashion could lead to no other presumption but that each of them knew the consequences of their such **assembly**. Reference in that respect if need be may well be made to the case of **Ramchandran and others v. State of Kerala (2012 SCMR 1156)**, wherein it is observed as under;

"15. The crucial question for determination in such a case is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects specified by section 141. While determining this question, it becomes relevant to consider whether the assembly consisted of some persons which were merely passive witnesses and had joined the assembly as a matter of idle curiosity without intending to entertain the common object of the assembly. (vide *Masalti v. State of Uttar Pradesh*, AIR 1965 SC 202)

12. Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under second part of section 149 IPC if it can be held that the offence was such as the members knew was likely to be committed. The expression 'knew' does not mean a mere possibility, such as might or might not happen. For instance, it is a matter of common knowledge that if a body of persons go armed to take forcible possession of the land, it would be right to say that someone is likely to be killed and all the members of the unlawful assembly must be aware of that likelihood and would be guilty under the second part of section 149 I.P.C."

22. Such participation on the part of appellant Nadeem Ahmed, prima facie involves him in commission of the incident on point of vicarious liability. Thus, it could well be concluded safely that all the accused persons,

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including the appellants, acted in furtherance of their common intention, hence could seek no exception to the legal position. In these circumstances learned trial court was right to record conviction and sentence against both of the appellants, as stated above.

23. No doubt at present learned counsel for the complainant has raised no objection to acquittal of the appellants but there could be made no denial to the fact that the raising of no objection to the acquittal of the appellants in the Code has got no legal value at all. The law is quite clear that question of **guilt or innocence** shall always be determined on basis of material, brought on record during trial. A wish and will of the defense or prosecution shall never be a ground to make a departure from such settled principle of law. The wish and will of the complainant party could only matter, if the course, as is provided by Section 345 of the Code, is adopted which too is subject to limitation (s), so imposed by the law itself. Thus, the mere no-objection to acquittal by complainant party is of no significance.

24. The legality of the impugned judgment is questioned by learned counsel for the appellants, by contending that the learned trial court acquired the jurisdiction with consent of the parties otherwise it was having no jurisdiction to proceed with the instant case. In that respect, they relied upon the cases of **Muhammad Tufail and others**, (2) **Shaikh Muhammad Amjad**, (3) **Molvi Noor Muhammad and others**, (4) **Amanullah and others**, (5) **Rashid Ahmed**, (6) **Pir Sabir Shah**, (7) **Karachi Dock Labour Board**, (8) **Muhabbat Ali and another** and (9) **Dr. Zahoor Mehdi (Supra)**, but these cases hardly support their contention. There can be no denial to the fact that on remand from honourable Apex Court, the question of jurisdiction of ATA Court was pending determination before this Court when both the

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fire shot injuries. It was further stated by the complainant that the injured were then taken to Ranipur hospital and he then went to PS Mehrabpur to lodge report of the incident, leaving behind the above named witnesses over the dead bodies of the above said deceased. The complainant was supported in his version by PWs Munir Ahmed, Khalil Rehman, Umerddin and Nawab Ali, on all material points with regard to the manner whereby the death of the deceased was committed and injuries to the injured were caused as well as time and place of incident. In the instant matter, the father and cousin of the complainant undeniably lost their lives while the witnesses received fire-arm injuries on their persons with intention of committing their murder too. In such eventuality, the possibility of false involvement by substituting innocent with real culprits is a rare phenomenon. To make out an exception, the accused persons would always be under legal obligation to bring such a material on record which could establish least show possibility of existence of a motive of such a grave nature that same motivated the complainant to substitute real culprits with innocent persons. It is however matter of record that defense has not brought any such serious animosity between the parties. A quarrel between the children, in our view, is not such a serious motive which could have promoted the complainant party to falsely involve the appellants at the cost of the real culprits. Reference in this respect is made upon the case of **Zahoor Ahmed v. The State (2007 SCMR 1519)** wherein it is observed that;

"6. ... The petitioner is a maternal-cousin of the deceased, so also the first cousin of the deceased through paternal line of relationship and thus, in the light of the entire evidence it has correctly been concluded by the learned High Court that the blood relation would not spare the real culprit and instead would involve an innocent person in the case. Further it has rightly been observed that it was not essential


parties by extending consent withdrawn their objection to the jurisdiction of learned trial court. Prima facie, it was such consenting arrangement which had resulted in not determination of the question of jurisdiction, on merits though in earlier round, this Court had found the case to be tried by the Court of ATA. Therefore, the appellants at such stage are not legally justified to raise such plea. Even otherwise, the appellants could have raised such objection during trial thereby challenging the applicability of Section 6/7 of the ATA. In addition, the learned Trial Court has also convicted the appellants for offence under section 7 of the ATA which is also indicative of the fact that such aspect was also considered by the trial Court. Such appreciation resulted in convincing the learned trial Court to find the section of ATA applicable to the case. Thus, such plea of the appellants is also of no legal value particularly to seek an acquittal.

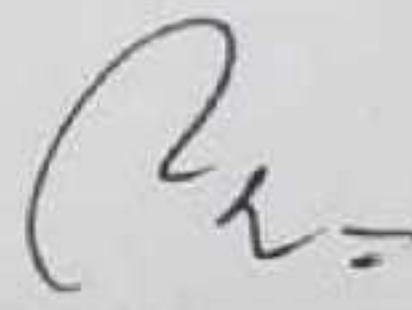
25. On merit, leaned counsel for the appellants referred the cases of **Shafiq Shah, Tariq Pervaiz, Rahat Ali, Muhammad Hussain, and Syed Saeed Muhammad Shah(Supra)**, but these cases too are of no help to the case of the appellants, as the same are on distinguishable facts and circumstances. In case of **Shafiq Shah (Supra)**, no plausible explanation was given by the complainant for not reporting the incident to police timely. In the instant matter there is no such delay in reporting the case to police. In case of **Tariq Pervaiz (Supra)** it was held that single infirmity is sufficient to record acquittal of the accused. It was narcotics case. In the instant matter no infirmity is appearing to justify recording the acquittal of the appellants by extending them benefit of doubt. In case of **Rahat Ali (Supra)** there was inordinate delay of one month in reporting the incident to police. In the instant matter there is no such delay in reporting the incident to police. In

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case of Muhammad Hussain (Supra) the main reason for acquittal of the accused was that there was no identification parade. In the instant matter there was hardly a need for identification parade of the appellants as both the parties were known to each other very well. In case of Syed Saeed Muhammad Shah (Supra) the witnesses made improvement which made their version not worthy of reliance. It was case of Zina. In the instant matter no improvement is made by the witnesses on the merit of the case which could have made their version to be not worthy of reliance.

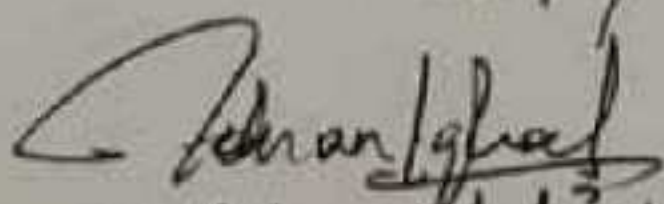
26. In view of the facts and reasons discussed above, it could be concluded safely that no case for making interference with the impugned judgment is made out by this Court. Consequently, all the three appeals stands dismissed.


JUDGE


JUDGE

Announced by Us.


J. Parilwar
20/4/2018


J. Adnan Iqbal Chaudhry