

Judgment Sheet
IN THE HIGH COURT OF SINDH,
CIRCUIT COURT, HYDERABAD

Cr. Jail Appeal No. D- 65 of 2019

BEFORE :

Mr. Justice Muhammad Shafi Siddiqui
Mr. Justice Irshad Ali Shah

Date of hearing
& decision:

11.11.2020

Appellant

:

Badar @ Badro
through Mr. Zahid Mallah, Advocate.

Respondent

:

The State through
Ms. Sana Memon, A.P.G.

J U D G M E N T

MUHAMMAD SHAFI SIDDIQUI, J:- This Criminal Jail Appeal is preferred by the appellant through Senior Superintendent, Central Prison, Hyderabad in respect of his conviction, awarded to him vide judgment dated 13.4.2019. The appeal was admitted for regular hearing on 25.9.2019 and the record and proceedings were called and paper book was ordered to be prepared. Notices were issued, paper book was prepared and the appeal was heard and allowed on 11.11.2020 by a short order.

2. Brief facts of the case are that appellant Badar @ Badro was an absconder in the trial court of Crime No. 23 of 2005 registered at police station Tharriri Mohabat under Section 302, 324, 353, 34 PPC 6/7 ATA. Initially the trial of said offence was initiated in his absentia and he was awarded life imprisonment through 1st judgment dated 29.7.2006. He was then arrested in some other crime and consequently on acquiring knowledge about his current conviction, he preferred Criminal Special ATA Jail Appeal No. D-45 of 2008 and sought suspension of the subject judgment and his acquittal. The appeal was then converted into an application under Section 19(12) of the ATA 1997 consequently case was remitted to the trial court for disposal in accordance with law.

3. The enquiry was held by the then Presiding Officer of the trial court who could not concur with the reasons of absconion as raised by the appellant, dismissed the subject application vide order dated 18.12.2008 and maintained the 1st judgment of 29.7.2006.

4. The said order was then assailed by the appellant in Criminal Jail Appeal No. D-05 of 2009 which was decided by this Court vide order dated 12.2.2009 whereby again the matter was remanded to the trial court with direction that the accused shall be provided assistance of the counsel. Complying with the order of this Court and completing all formalities the judgment was again maintained vide order dated 1.7.2009 and the appellant was required to serve out the sentence in terms of initial judgment of 29.7.2006. The order was then challenged in Criminal ATA Jail Appeal No. D-27 of 2010 before this court. The impugned judgment dated 29.7.2006 and the aforementioned two orders of the trial court were set-aside and the case was remanded to the trial court for denovo trial vide order dated 21.8.2017. In consequence of such remand for denovo trial, the same conviction, for the reasons mentioned in the impugned judgment was maintained under Section 7(a) of ATA 1997 read with Sections 302(b), 34 PPC which reads as under:-

- i. Accused Badar alias Badro is hereby convicted and sentenced to imprisonment for life under Section 7(a) of ATA 1997 r/w Sections 302(b) / 34 PPC, for committing offence of terrorism whereby death of deceased ASI Khadim Ali Jat was caused. He is directed to pay fine of Rs.2,00,000 (Two hundred thousand) or in default to undergo imprisonment for one year more. Half of the fine, if recovered shall be paid to the legal heirs of deceased Khadim Ali.
- ii. Accused Badar alias Badro is further convicted and sentenced to undergo R.I for Ten (10) years and fine of Rs.50,000/- or in default to undergo imprisonment for six (06) months for committing of offence of terrorism, whereby caused grievous hurt to PC Bahawal Khan Khoso, thereby endeavored to commit Qatl-e-Amd of the later, under Section 7(c) of ATA 1997 r/w Sections 324 / 34 PPC. Half of the fine, if recovered, shall be paid to the injured P.C. Bahawal Khan Khoso.
- iii. Accused Badar alias Badro is further convicted and sentenced to imprisonment for five (05) years and fine of Rs.10,000/- or in default to undergo for three months more under Section 7(h) of ATA 1997 r/w Section 353/34 PPC. The sentence awarded to accused Badar alias Badro is three counts indicated above, concurrently to run. Benefit of Section 382-B Cr.P.C. is extended in favour of present accused.

5. The prosecution case as narrated in the FIR was that HC Altaf Hussain Gorar along with his companions were on routine patrolling and when at about 1745 hours they reached hotel of Rajab Khaskheli near village Malkani, they saw three persons coming out from village side on motorcycle. They soon realized that they were the wanted persons as identified by them and having Kalashnikovs in their hands and the motorcycle was driven by notorious dacoit Mashooq Ali Chandio who was wanted in some crimes at police station Tharriri Mohabat. They informed through wireless to TPO Mehar and SHO PS Tharriri Mohabat and further directed the accused to surrender themselves and throw their weapons. However, the fires were exchanged and in consequence whereof fire arm injuries were caused to ASI Khadim Ali and dacoit Mashooq Ali who died while PC 2083 Bahawal Khan Khoso sustained firearm injuries. The other two accused however ran away.

6. As against the present appellant / accused the primary witness Bahawal Khan who allegedly sustained injuries has recorded his evidence and was subjected to cross-examination. Similarly one Muhammad Yaqoob was also examined and subjected to cross-examination. The P.W / witness Bahawal Khan did not attribute any specific role to the present appellant. He deposed that upon seeing the notorious dacoits, ASI Khadim Ali gave information to his superiors on wireless and asked them to take position. He further deposed that ASI Khadim Ali asked dacoits to surrender whereas accused left their motorcycle took position and started firing with intention to cause murder of police officials, as a result of which he received firearm injury at his left side lower jaw and fell down whereas ASI Khadim Ali also fell down and succumbed to injuries. In retaliation police party also opened fires and thereafter he become unconscious on account of the injuries sustained by him.

7. Similarly one Muhammad Yaqoob I.O of the crime and prime witness No.11 of the prosecution recorded his examination in Chief and narrated the same story. He deposed that on 26.3.2005 case bearing FIR No. 23 of 2005 was handed over to him for investigation. He considered it to be an encounter between police and three dacoits nominated in the FIR which took place on 25.3.2005 at 1745 hours. He reached at the spot and saw the dead body of ASI Khadim Ali Jat lying in police mobile and the memo of dead body was prepared by him in presence of the mashirs namely ASI Hakim Ali Sargani and PC Rajab Ali which was produced. He also produced the inquest report. The MLO was asked to undertake post-mortem of deceased ASI Khadim Ali

Jat. He reached at the place of incident on the pointation of the complainant and consequently prepared the memo and produced. He obtained the samples of the blood lying on the earth and secured empties which were 73 in number and were fired from the accused and complainant side and the same were sealed separately. He then proceeded to Taluka Hospital Mehar where complainant pointed out the dead body of dacoit Mashooq Ali. The memo was prepared in presence of same mashirs which was produced. Again the MLO was asked to undertake the post-mortem of Mashooque Ali.

8. We have heard learned counsels and perused the material available on record.

9. We do not see any specific role either assigned in the FIR registered as Crime No. 23 of 2005 or in the examination in chief of any of the witness including the prime witness i.e. Bahawal Khan, who sustained injuries against present appellant. The deposition of I.O disclosed that there were 73 empties recovered; however, no Ballistic Report or Forensic Lab Report was obtained to show as to from which ammunition or weapon those bullets were fired; of course there were some official weapons of the police companions and perhaps three unofficial weapons as mentioned in the FIR and recovered one from one of the dacoit. Thus it cannot be ruled out that the I.O has not performed his duty diligently, at least to demonstrate that certain empties were fired from the ammunition / weapons of accused. Even the only Kalashnikov which was recovered from one of the accused who succumbed to the injuries on account of cross firing, was not sent to the forensic lab to obtain ballistic report. Therefore on account of this lacking, the court cannot reach to a conclusion that certain bullets were fired from an unknown weapon allegedly carried by the accused who ranaway. There should have been comparative forensic / ballistic report to demonstrate that three unknown weapons were used to fire some of those 73 empties.

10. The incident took place around 1745 to 1800 hours on 25.3.2005 whereas it was reported on 26.3.2005 at around 0100 hours. There is thus a delay of seven hours in lodgment of FIR, whereas the police station was hardly few kilometers away from the place of incident. No justifiable reason is provided for such delay in lodgment of the FIR. The reports were also not exhibited in respect of the blood allegedly secured from the place of incident and so also the clothes being sent for chemical examination. The I.O has also admitted in his cross examination that he has not produced any letter regarding

the empties being sent to ballistic expert. No criminal record of any previous incidents in respect of appellant was disclosed. On the contrary, an FIR has been produced from the defence side which suggest the enmity between the brother of the appellant and HC Anwar Khaskheli on account of which enmity the appellant allegedly was looped in the alleged offence and consequently was challaned. The subject FIR is produced as Exhibit. Though this defence plea is also very weak and not confidence inspiring yet even if it is ignored the burden originally rest upon prosecution which was not discharged properly.

11. We thus reached to the conclusion that the prosecution has failed to prove the involvement of appellant in the present case beyond shadow of doubt; whereas there are enough contradictions available in the evidence and sufficient negligence on the part of I.O which led to the acquittal of the appellant by extending him benefit of doubt.

12. The above are the reasons of our short order passed on 11.11.2020, whereby instant Jail Appeal was allowed and appellant was acquitted.

JUDGE

JUDGE