

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, LARKANA

Crl. Appeal No. 61 of 2016.

01. Mir Hassan son of Noor Hassan
02. Akbar son of Mehmood alias Baboo,
03. Mohammad Hashim son of Kamaluddin,
04. Mohammad Ayoub son of Abdul Rasool,
05. Sadaruddin son of Noor Hassan,
06. Chakar Ali son of Noor Hassan,
07. Mohammad Bux son of Noor Hassan,
08. Mohammad Murad son of Noor Hassan,
09. Wali Mohammad son of Abdul Rasool,
10. Shad Mohammad son of Abdul Rasool,
11. Mohammad Siddique son of Mohammad Ayoub,
12. Mohammad Shahban son of Allah Bux @ Mir Hassan,
13. Zulfiqar son of Allah Bux alias Mir Hassan,
14. Niaz Hussain son of Allah Bux alias Mir Hassan,
15. Ali Mohammad son of Mohammad Hassan,
16. Abdul ghaffar son of Mohammad Hassan,
17. Abbas Ali son of Mohammad Hassan,
18. Riaz Ali son of Noor Hassan,
19. Mohammad Nawaz son of Hazar Khan,
20. Dil Murad son of Gul Mohammad,
21. Shah Murad son of Gul Mohammad,
22. Sahab Khan son of Shafi Mohammad,
23. Liaquat son of Gul Hassan,
24. Kauro son of Ali Hyder,
25. Mour (More) Khan son of Ali Hyder,
26. Khadim Ali son of Abdul Rehman,

All by caste Bangwar, R/o Deh Suhriyani Pur,
Taluka Kandhkot, District Kashmir at Kandhkot.

Presently confined at Central Prison, Sukkur).

.....Appellants.

Versus

2

The State.

.....Respondent.

Crime No.47 of 2009, of P.S A/Section,
Kandhkot, District Kashmir, at Kandhkot.

Offence U/S: 302, 353, 324, 440, 148, 149,
PPC, 3/4 of Explosive Substances Act &
6/7 Anti-Terrorism Act.

**APPEAL UNDER SECTION 25 OF THE
ANTI-TERRORISM ACT, 1997.**

Al

R/Rasool
17.02.17



ORDER SHEET
IN THE HIGH COURT OF SINDH CHIEF JUSTICE COURT, LARKANA
Criminal Appeal No: D-61 of 2016

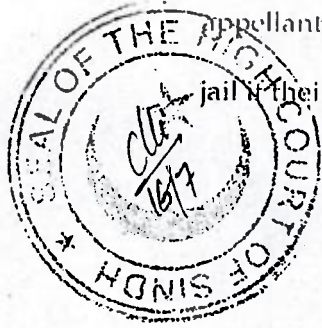
DATE: _____ ORDER WITH SIGNATURE OF JUDGE:

1. For hearing of M.A No. 3457/2016 (126 Cr.PC)
2. For Regular Hearing

15.6.2017

Mr. Safdar Ali G. Bhutto & Mr. Deedar Ali Bangwar, Advocates for the appellants
Mr. Sardar Ali Shah, APG for the State.

For the reasons to be recorded later on, instant appeal is allowed. The appellants are acquitted of the charge. They shall be released forthwith from the jail & their custody is not required in any other crime.



Sd/-Zafar Ahmed Rajput, Judge
Sd/-Adnan-ul-Karim Memon, Judge

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, LARKANA
Criminal Appeal No. D- 61 of 2016.

Before:

Mr. Justice Zafar Ahmed Rajput
Mr. Justice Adnan-ul-Karim Memon

Appellants : Mir Hassan and others, through
M/s. Safdar Ali G. Bhutto and Deedar
Ali Bangwar Advocates.

Respondent : The State, through Mr. Sardar Ali Shah,
Assistant Prosecutor General.

Dates of hearing : 13.6.2017, 14.6.2017 and 15.06.2017
Date of the order : 15.06.2017

JUDGMENT

ADNAN-UL-KARIM MEMON, J:- This criminal appeal is directed against the judgment, dated **07.09.2016**, passed by the Court of Special Judge, Anti-Terrorism Kashmore @ Kandhkot in Special Case No.28/2013, arisen out of F.I.R No.47/2009, registered at P.S A-Section Kandhkot under sections 302, 353, 324, 440, 148, 149, P.P.C., 3/4 Explosive Substance Act & 6/7 A.T.A, 1997, whereby the appellants were convicted and sentenced as under:

- (i) *Under Sections 302 (b), 149 P.P.C read with Section 7 (a) of Anti-Terrorism Act, 1997, to suffer R.I for life and pay fine of Rs.100,000/- each to the legal heirs of deceased PC Nazakat Ali, PC Meer Ali and PC Shamsuddin as compensation and in case of default to suffer S.I for two years more.*
- (ii) *Under Sections 324, 149 P.P.C read with Section 7 (b) of Anti-Terrorism Act, 1997, to suffer R.I for ten years and pay fine of Rs.50,000/- each to be distributed amongst injured Police officers and in case of default to suffer S.I for one year more.*

Under Sections 440, 149 P.P.C read with Section 7 Anti-Terrorism Act, 1997 to suffer R.I for three years and to pay a fine of Rs.20,000/- each and in case of default to suffer S.I for three months more.



- (iv) Under Sections 353, 149 P.P.C read with Section 7 of Anti-Terrorism Act, 1997, to suffer R.I for two years each.
- (v) Under Section 148 P.P.C to undergo R.I for one year each.

The appellants were, however, extended benefit of Section 382-B Cr. P.C.

2. Brief facts giving rise to this appeal are that, on 12.02.2009, at 2100 hrs., complainant/SHO Gul Hassan Jatoi lodged the aforesaid F.I.R., alleging that during the encounter which took place on said day at 1630 hrs. between the police party and appellants, police constables *Nazakat Ali, Meer Ali, and Shamsuddin* were gunned down by the appellants and caused certain injuries to police constables *Mir Hassan, Mashooq Ali, Mujeeb Rehman, Nazir Hussain, Abdul Qadir, and Sahib Khan*. During the investigation, the appellants were stated to be arrested and sent up for trial before the Court of Special Judge, Anti-Terrorism Kashmir @ Kandhkot in Special Case No.28/2013. Learned Special Judge after completing requisite formalities, framed the charge against appellants at Ex.18, to which they pleaded not guilty and claimed to be tried. Later, amended charge was framed at Ex.23.

3. At the trial, in order to substantiate the charge against the appellants, prosecution examined **PW-1** SIO Gul Hassan Jatoi (*complainant*) at Ex.24, he produced certain documents at Ex.24-A to Ex.24-L; **PW-2** Dr. Muzafar Ali Dahani (*MLO*) examined at Ex.25, he produced Lash Chakas Forms and postmortem reports of deceased constables at Ex.25-A to Ex.25-R; **PW-3** Amanullah Chacher (*Tapedar*) examined at Ex.26, he produced sketch of wardat in triplicate at Ex.26-A to Ex.26-C; **PW-4** SHO Sahib Khan Jagirani examined at Ex.27; **PW-5** P.C Nazir Hussain examined at Ex.29; **PW-6** PC Abdul



Majeed (*mashir of arrest*) examined at Ex.30, he produced imaginary memo of arrest of accused Arsallah at Ex.30-A; **PW-7** PC Abdul Qadir (*injured*) examined at Ex.32; **PW-8** PC Mashooq Ali (*injured*) examined at Ex.33; **PW-9** PC Mujeeb-ur-Rehman (*injured*) examined at Ex.34; **PW-10** ASI Ali Baig examined at Ex.35; **PW-11** SIP Ali Muhammad Mahar examined at Ex.36; **PW-12** PC Mir Hassan (*injured*) examined at Ex.37; **PW-13** Inspector Muhammad Panah Bhutto examined at Ex.39, he produced memos at Ex.39-A to Ex. 39-D; **PW-14** SIO Muhammad Ali (I.O.) examined at Ex.42, he produced documents at Ex.42-A to Ex.42-D; **PW-15** Inspector Abdul Haq Qureshi examined at Ex.44; **PW-16** Abdul Subhan Dayo (*MLO*) examined at Ex.45, he produced post-mortem report of accused Mehmood Khan alias Baboo at Ex.45-A; **PW-17** H.C Noor Muhammad examined at Ex.46; **PW-18** H.C Hairuddin examined at Ex.47, he produced memo of arrest and recovery at Ex.47-A.

4. The statements of appellants/accused were recorded under Section 342 Cr. P.C at Ex.49 to Ex.75 respectively, wherein they denied the allegations against them and claimed to be innocent and false implication in the case. They, however, neither opted for their examination on oath nor led any evidence in their defence.

5. After hearing the counsel for the parties, the learned trial Court convicted and sentenced the appellants vide impugned judgment.

6. Learned counsel for the appellants have mainly argued that the judgment passed by the trial Court is against the law, facts, and equity and thus liable to be set aside; that the trial Court has failed to appreciate the factual as well as legal aspects of the case while convicting the appellants; that the evidence adduced by the



prosecution at the trial was not properly assessed and evaluated by the trial Court, which is insufficient to warrant conviction of the appellants; that some of the prosecution witnesses admitted in the cross-examination that during the encounter, the appellants were at a call distance from the police party, then how it could be possible to have a police encounter at call distances, whereas the other PWs narrated different distance; as such, the prosecution evidence being incredible is liable to be discarded; that the PWs have admitted in their depositions that they had not seen as to which accused fired on which deceased/injured and also admitted that they could not identify the appellants by name present in the Court; that the ocular testimony is not worthy of reliance and it cannot form the basis of conviction of the appellants; that the medical evidence is in conflict with ocular account and the same does not furnish corroboration qua appellants; that the learned trial Court disregarded the material aspect of the case while recording conviction of appellants; that the impugned judgment has been passed by the trial Court in violation of guiding principles laid down by the Apex Court for appreciating of evidence.

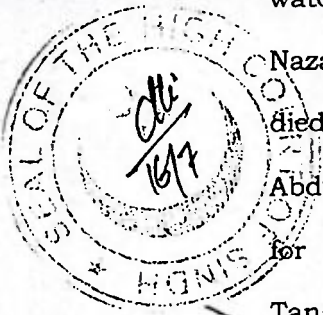
7. Conversely, learned A.P.G opposed the grant of appeal, on the ground that the prosecution has fully established its case by producing trustworthy ocular as well as circumstantial, medical and ocular evidence.

8. We have heard the learned counsel for the appellants as well as A.P.G. and have scanned the material available on record with their assistance.

9. Prosecution's case as narrated by the PW-1 complainant/SIO Gul Hassan Jatoy of P.S. A-Section, Kandhkot, is that on 12-02-2009

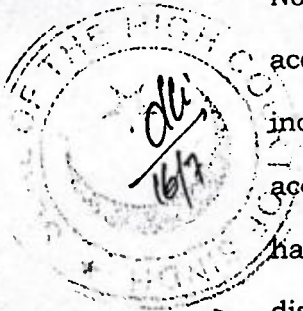


he received spy information that the accused wanted in crime No. 23/2009, registered under sections 302,148,149, P.P.C. at P.S. A-Section Kandhkot, namely, Jamaluddin, Meer Hasan, Saeed Khan, Akber, Muhammad Hashim, Muhammad Ayoob, all by caste Bhangwar, along with their companions, having Rocket Launcher, Kalashnikovs and other automatic weapons were present in their *Otaq* of accused Jamaluddin Bhangwar. He communicated said information to SP Investigation and on arrival of other police force i.e. SHO B-Section Kandhkot, SHO Ghouspur, SHO Rasaldar, In-charge Mujahid-1, In-charge Mujahid-2, In-charge Shahbaz-1, In-charge Shahbaz-2, ASI Nisar Ahmed Jakhrani of P.S. Buxapur, along with their staffs, he along with his SHO and staff left P.S. under supervision of SPO, Kandhkot. PW-1 complainant/SIO Gul Hassan Jatoi and SHO Ali Muhammad Mahar (PW-11), along with their staff, boarded in APC (*Armoured Personnel Carrier*). They all reached the pointed place where they saw 35 persons duly armed whom they identified as Jamaluddin, having Rocket Launcher, Liaquat and Shaban armed with guns and Mir Hasan, Saeed Khan, Akber, Muhammad Hashim, Muhammad Siddique, Muhammad Ayoob, Zulfiqar Ali, Mehmood, Akram, Abdul Ghaffar, Abbas Ali, Sadruddin, Dilmurad, Shad Muhammad, Hakim Ali, Chakar Ali, and others were armed with Kalashnikovs. On seeing the police mobiles, accused Jamaluddin fired rocket on their APC chain, due to which the chain of the APC was broken and fell in the watercourse. The piece of shell hit to SHO Ali Muhammad Mahar. PCs Nazakat Ali, Mir Ali and Shamsuddin received firearm injuries and died on the spot and PCs Mir Hassan, Mashooq Ali, Nazir Hussain, Abdul Qadir, Mujib-ur-Rehman received injuries. The encounter lasted for 2 to 2 ½ hours. Meanwhile, Tiger Kashmore and mobile of Tangwani came in their assistance and on seeing them, all the



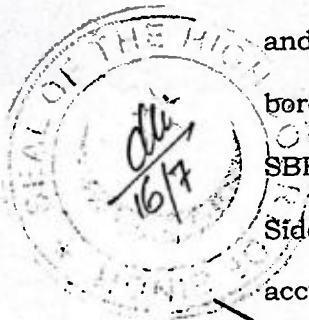
accused leaving their motor-cycles but taking their injured companions fled away; thereafter, they brought the dead bodies and injured at Taluka Hospital, Kandhkot.

10. It transpires from the perusal of record that the prosecution case rests upon ocular testimony and recoveries. Ocular testimony consists of 09 witnesses, namely, PW-1 complainant/SIO Gul Hassan Jatoi; PW-4 In-charge Mujahid-1, Sahib Khan Jagirani (*injured*); PW-5 P.C Nazir Hussain (*injured*); PW-7 PC Abdul Qadir (*injured*); PW-8 PC Mashooq Ali (*injured*); PW-9 PC Mujeeb-u-Rehman (*injured*); PW-11 SIP Ali Muhammad Mahar (*injured*); PW-12 PC Meer Hassan (*injured*) and PW-13 Inspector Muhammad Panah. Although they have taken in their depositions the names of some of the accused by asserting that they were present at the spot and took part in the encounter, but none of them has deposed that he knew the accused previously. Even they could not recognize the accused by their names during their evidence. PW-7 PC Abdul Qadir has deposed that he could not say whether the accused present in the court fired on them because as soon they reached near *Otaq* of accused, they (accused) started firing. He as well as PW-1 complainant/SIO Gul Hassan Jatoi and PW-9 PC Mujeeb-ur-Rehman have deposed that the names of accused were disclosed to them by A.S.I Sahib Khan, while PW-4 Sahib Khan Jagirani himself could not recognize the accused by their names during his evidence. None of the said eye-witnesses was able to furnish account as to which accused fired on which injured/deceased. The ocular account is also inconsistent on the disclosure of distance between police party and accused during encounter. PW-1 complainant/SIO Gul Hassan Jatoi has deposed that during the encounter the accused were at a call distance from the police party. PW-4 In-charge Mujahid-1, Sahib Khan



Jagirani has described the distance of accused about 200 yards from police party. PW-5 P.C Nazir Hussain has deposed that during the encounter, the accused persons were at a distance of about 60/70 paces away from them. PW-7 PC Abdul Qadir and PW-12 PC Meer Hassan have deposed that the accused fired on police party from the distance of about half kilometer. Such state of affairs leads to a conclusion that the said PWs/eye-witnesses were only aware of the names of accused persons and none of them had ever seen them and hence they were not able to identify them. It is humanly not possible to identify a person from the distance of 200 yards to half kilometer. Therefore, the ocular account being untrustworthy does not inspire confidence.

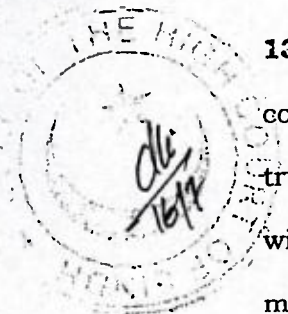
11. So far recovery is concerned, it has been brought on record through the evidence of P.W-1 complainant/SIO Gul Hassan Jatoi that he recovered five motor cycles of the accused from the occurrence on 12.02.2009 under mashirnama of recovery (Ex.24-A); however, nothing has been brought on record to establish as to in whose names the said motor-cycles are, as no registration record has been collected in investigation and produced in evidence to establish that the same were belong to any of accused persons. Other recoveries are the recoveries of number of empties on 13.02.2009 under memo of recovery (Ex.39-A) and un-license DBBL gun of 12 bore and live cartridges from accused Niaz Hussain; un-license SBBL gun of 12 bore and live cartridges from accused Hakim Ali; un-license SBBL gun of 12 bore and live cartridges from accused Ali Muhammad; un-license SBBL gun of 12 bore and live cartridges from accused Muhammad Siddique and un-license SBBL gun of 12 bore and cartridges from accused Abdul Ghaffar on 23.06.2009 under memo of arrest and



recovery (Ex.47-A). It is an admitted position that the empties recovered from the occurrence on 13.02.2009 and the alleged guns recovered from above-named accused on 23.06.2009 were not sent to ballistics expert to ascertain if any of the empties were fired from the guns allegedly recovered from the said accused. So far recovery of alleged guns are concerned, it is an admitted position that the accused Niaz Hussain, Ali Muhammad, Muhammad Siddique and Abdul Ghaffar have already been acquitted vide separate judgments dated 10.03.2010 passed by learned Judicial Magistrate Kandhkot in their respect cases registered under section 13 (d) Arms Ordinance. In view of such facts, no credibility can be attached with the alleged recoveries.

12. It may be noted that besides police force of P.S A-Section Kandhkot, SHO B-Section Kandhkot along with his staff, SHO Ghouspur along with his staff, SHO Rasaldar along with his staff, In-charge Mujahid-1 along with his staff, In-charge Mujahid-2 along with his staff, In-charge Shahbaz-1 along with his staff, In-charge Shahbaz-2 along with his staff, ASI Nisar Ahmed Jakhrani of P.S. Buxapur along with his staff, SPO, Kandhkot were present at the occurrence and took part in alleged encounter, but despite such a heavy force available at the spot, police party failed to arrest even a single accused from the spot.

13. In view of the above stated facts and discussion, we are of the considered view that in the instant case there is no convincing and trustworthy evidence against the appellants/accused to connect them with the commission of alleged offences and thus, prosecution has miserably failed to prove its case against them beyond reasonable doubt. In this regard, we are supported with the case of *Tariq Pervez v.*



The State (1995 SCMR 1345) wherein the Hon'able Supreme Court has held that "the concept of benefit of doubt to an accused persons is deep-rooted in our country for giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right."

14. For the foregoing facts and reasons, we allow this criminal appeal, set aside the conviction and sentences of appellants recorded vide impugned judgment and acquit them of the charges. They be set at liberty forthwith, if not required to be detained in any other case

15. Above are the reasons of our short order dated 15.06.2017, whereby we allowed the instant appeal.

Sd/-Adnan-ul-Karim Memon, Judge
Sd/-Zafar Ahmed Rajput, Judge

Certified to be true Copy

1/C Assistant Registrar (Criminal Branch)

No. 13281 LCC/Cr.Appeal.No.D-61/2016,

Larkana, dated 16th July, 2021

COPY FORWARDED TO:

- The Special Judge. Anti-Terrorism Court, Kashmir @ Kandhkot, for information & necessary compliance a/w R&Ps Five Parts.

Niaz

(Abid Hussain Qazi)
Deputy Registrar
High Court of Sindh,
Circuit Court, Larkana

16/7