

IN THE HIGH COURT OF SINDH, BENCH AT SUKKUR

Spl. Anti-Terrorism Jail Appeal No. D-02 of 2022

Present:-

**Mr. Justice Muhammad Iqbal Kalhoro &
Mr. Justice Arbab Ali Hakro**

Appellant : **Ali Mardan Gopang**, through Mr.
Irshad Hussain Dharejo, Advocate

The State : Through Syed Sardar Ali Shah Rizvi,
Additional Prosecutor General

Date of hearing(s): **05.09.2023, 03.10.2023, 24.10.2023
& 01.11.2023.**

Date of decision: **01.11.2023**

J U D G M E N T

MUHAMMAD IQBAL KALHORO, J:- Appellant stood a trial in Special Case No. 74 of 2009, arising out of crime No.60 of 2009, registered at P.S, Kotdiji-Khairpur for offences under Sections 302, 324, 353, 147, 148, 149 PPC read with Section 7 ATA, 1997 against the charge of murdering PC-Muhammad Moosa on 21.05.2009 at 2230 hours along with absconding accused, 09 in number, at the bridge of Mohabat Wah, Taluka Kotdiji district Khairpur, situated on a link road leading from Kotdiji to Tando Masti, when a police party headed by complainant SIP-Allah Bux Solangi of P.S, Kotdiji, called them out after realizing that they were present there to commit some offence. But the accused instead fired at the police party, retaliated by the latter, and murdered PC-Muhammad Moosa.

2. FIR was registered on 22.05.2009 at 0300 hours, but before registration of which, preparation of inquest report and postmortem of deceased PC-Muhammad Moosa were carried out. He was found to have received three firearm injuries, two on his back and one on his left wrist. The doctor has further defined the time between the injuries and death as instantaneous. After FIR, investigation was entrusted to PW/Inspector Ali Nawaz Lashari, who visited place of incident as well as hospital to verify the facts. From place of incident, he recovered blood stained earth, nine empties of KK fired by the police, two spent

cartridges of .12 bore allegedly fired from the side of accused. Appellant was arrested on 20.07.2009 on the basis of his identification, duly incorporated in the FIR, at the time of incident by PW-Ghulam Abbas. However, no incriminating article was recovered from him during investigation and finally Challan was submitted in the Court showing remaining co-accused as absconders.

3 After framing of a formal charge, the trial against the appellant was commenced and the prosecution examined seven witnesses including complainant and PC-Ghulam Abbas. Thereafter, co-accused Ali Khan was arrested, hence an amended charge was framed and the witnesses were called for re-examination. When four witnesses were re-examined, the appellant jumped off bail, on or after 16.05.2013, but subsequently surrendered through his surety on 25.06.2016 and was granted bail by this Court on 28.12.2016.

4. Thereafter, the prosecution re-examined eight witnesses, who produced all necessary documents including FIR, relevant memos, postmortem report, lab reports regarding blood stained earth and clothes of deceased. On conclusion of their evidence, statement of appellant was recorded only, as meanwhile due to absconion of co-accused Ali Khan, his case had been bifurcated accordingly. In 342 CrPC statement, appellant has denied the charge and has pled innocence. The trial Court in consideration of evidence of PWs found the appellant guilty and has convicted and sentenced him as under, which the appellant has challenged by means of this appeal.

i. U/s 148 PPC, to suffer R.I for three years with fine of Rs. 10,000/- or in default thereof, to suffer R.I for two months more.

ii. U/s 302(b) r/w section 149 PPC, to suffer imprisonment for life and his moveable and immovable property were forfeited to the State with compensation of Rs. 2,50,000/- or in default, to suffer R.I for six months more.

iii. U/s 324 r/w section 149 PPC, to suffer R.I for ten years with fine of Rs. 50,000/- or in default thereof, to suffer R.I for six months more.

iv. U/s 353 r/w section 149 PPC, to suffer R.I for two years.

v. U/s 7(a) ATA, to suffer imprisonment for life with fine of Rs. 50,000/- or in default thereof, to suffer R.I for six months more.

All the sentences were ordered to run concurrently with benefit of section 382-B CrPC, duly extended to the appellant.

5. Facts in brief are that complainant/SHO Allah Bux Solangi of P.S, Kotdiji was on patrol duty along with his team including deceased PC-Muhammad Moosa in his private car. When they reached bridge of Mohabat Wah at about 2230 hours, they saw on the head light of the car, ten armed persons standing. Police party and PC-Ghulam Abbas identified five persons as Ali Mardan (appellant) and Ali Khan having a double barrel shot gun each, Goro Gopang and Sajjan alias Saju with a single barrel shot gun each, and Akbar Gopang with a KK, whereas, five unknown persons had shot guns and lathies. They parked their car on the bridge and called out the accused to surrender by introducing them as police, but the accused immediately took position and started firing upon them with intention to commit their murder. The police retaliated in defence. The encounter continued for 10 minutes and thereafter all the accused made their escape good. In the meantime, as the complainant had conveyed information of the encounter to other police stations, Inspector Ghulam Mohiuddin Kalwar, SPO, Kotdiji and SIP Muhammad Iqbal Domki, SHO, P.S, Kumb arrived there. Then, they found PC-Muhammad Moosa lying on the ground profusely bleeding from the injuries and unconscious. He was found to have sustained firearm injuries on left side of his back. He was sent to Civil Hospital, Khairpur for treatment through SHO Muhammad Iqbal Domki. Complainant party then along with SPO, Kotdiji, chased the accused by tracking their footprints which led them to village Angh near houses of accused persons. Later on, complainant appeared at P.S and registered FIR, as stated above.

6. As per record, the prosecution has examined complainant/SIP Allah Bux Solangi and PC-Ghulam Abbas as eyewitnesses, whereas, in the case, four eyewitnesses have been cited. Out of PCs Khadim Hussain and Karim Bux, who were not examined, PC-Khadim Hussain was given up although he was present in the Court for evidence. Complainant in his evidence has disclosed that PC-Ghulam Abbas had identified the accused on the headlight of the car, although in FIR, he has claimed that accused were identified by them all i.e. the police party and PC-Ghulam Abbas, particularly. But in his evidence, he has stated that it was only PC-Ghulam Abbas, who had identified the accused and on whose statement, names of five accused were

incorporated in the FIR. He has further revealed that they had seen and identified the accused on the basis of headlight of the car.

7. We have heard parties and perused material available on record. Learned defence counsel in his arguments, rebutted strongly by learned Additional P.G, has pointed out that neither the car, the only source of identification of the accused, has been produced in the trial, nor the same was even made as a case property during investigation. The I.O, in his entire evidence, has not referred to the car, nor the fact of its inspection having been carried out either by him, and noting essential details about it like registration number etc. No inspection memo of the car is shown to have either been prepared or produced in the Court. Therefore, according to him, the fact of patrolling on the said car by complainant/SHO and his team on the fateful day and identification of the accused on its headlight is not without a doubt. He has further pointed out that witnesses have described distance between the accused and the police available in the car as 115 paces. Per him, at night time i.e. 2230 hours, when otherwise no source of light is available, it would be well-nigh impossible to identify each accused with his name and his father's name. But, strangely here PC-Ghulam Abbas has identified at least five accused with their fathers' names, as if they were already known to him, and that who was armed with what weapon. But, when his evidence was recorded (Exh.14), he has admitted that prior to the incident, the accused were not known to him. Therefore his statement that he had identified the accused at the relevant time, the only source of FIR, is doubtful.

8. These ambiguities, when are put to learned Additional P.G, have gone unchallenged. Besides, the site plan shows that distance between the accused and the police party was at least 680 feet, contrary to evidence suggesting distance of 115 paces between accused and police, which at the night time is too much for a car to cover in the headlights enabling the police party to identify the accused, not already known to them. If that distance mentioned in the site plan by Tapedar and described by him in evidence is taken into account, identification of the accused on the headlight of the car, which is not even the case property and no detail about it has been brought up, will become suspicious. Not least when there was no other source of light available at the bridge to add to the light of headlights from other

angles to enhance its range. It does not appeal to the common sense that a person who does not know any accused prior to the incident would identify each accused with his father's name and the nature of weapon he was holding.

9. Although, prosecution witnesses in their evidence have given impression that deceased PC-Muhammad Moosa, injured from the firing of accused, was sent to civil hospital through SIP/SHO, P.S, Kumb, namely, Muhammad Iqbal Domki for treatment and then he died somewhere on his way. But, postmortem of the deceased shows that he had died instantaneously after receiving firearm injuries. Said PW, namely, Muhammad Iqbal, who had allegedly taken him to hospital, has not been examined by the prosecution to clarify this point and to reveal as to when or where the deceased had died, if he did not die at the place of incident, as stated by PC-Ghulam Abbas and complainant/SHO Allah Bux. The impression from the evidence of both these eyewitnesses is very clear that the deceased was injured at the spot, he was alive and sent to Civil Hospital, Khairpur with SIP Muhammad Iqbal Domki, for treatment. But this impression is belied by the postmortem report which shows that he died instantaneously after having been hit.

10. This glaring contradiction between ocular account and medical evidence in the peculiar circumstances of the case cannot be brushed aside. We are aware that it is a settled proposition that when there is a difference between medical evidence and oral account, the preference has to be given to the oral account. But here, at least on locale and impact, the two points out of four i.e. time, local, nature and impact of injuries, the prosecution witnesses have given evidence contrary to the postmortem report. About locale of injuries, SHO/complainant Allah Bux Solangi in his evidence has stated that the deceased had received the injuries on his left eye and other parts of body, whereas, postmortem report does not show that the deceased having received any injury on his left eye, but two clear cut firearm injuries on his back and one on his wrist, which this witness has not specified in clear terms or for that matter any other witness including the mashir. And then, there is difference on impact of the injuries. The postmortem report shows that impact of the injuries was instantaneous death of the deceased, but against it, these witnesses have stated that the

deceased was injured but did not die instantaneously and was taken to hospital for treatment.

11. It has been pointed out in arguments that in the FIR, besides appellant, name of co-accused Sajjan, who too was identified by PC-Ghulam Abbas, is also mentioned as accused. And he has been assigned identical role, to that of the appellant, of firing at the police party. But, surprisingly during investigation, this accused was let off by the I.O, apparently without any cogent reason. Neither at the stage of submission of Challan, nor during the trial, the prosecution made any attempt to move an application to join him as accused. Then, the conclusion of the I.O in his favour was accepted by the trial Court, without applying judicial mind perceptibly and recording reasons for letting him off, and at the same time convicting the appellant. During arguments, when we tried to seek explanation from learned Additional P.G about exoneration of this accused with similar role to that of appellant, we met with a deafening silence. The I.O apparently failed to highlight any difference between the case of let off accused Sajjan and the present appellant to justify his discharge and the Court blindly followed his opinion. Both appellant and this accused were identified by PC-Ghulam Abbas at the spot and more so at the time of evidence, both the witnesses: complainant and him have taken name of Sajjan as one of the accused, along with appellant firing at the police. But surprisingly, not merely he was let off at the investigation stage, never challenged, but also the Court failed to take notice of it and proceeded to convict the appellant.

12. Another unexplained point that we have found with an element of surprise is that as per prosecution case, the police party had fired nine fires from KKs, whereas, from the side of accused, based on recovery of two spent cartridges, only two fires were made from shot guns. The injuries found on the person of the deceased, as per medical evidence, are stated to have been caused by missile bullets which are fired from the rifles like KK etc. and not from the shotgun. We, therefore, wonder whether it was fire made by the accused or by the police which had hit the deceased and caused his death.

13. From such facts and circumstances, we are of the view that the case against the appellant is not free from a doubt. It is settled that

once a doubt sets in the prosecution case, its benefit has to go to the accused not as a matter of grace but as a matter of right. The above discussion reflects that there are many circumstances creating doubt over presence of police party at the spot and that of the appellant with co-accused and their identification.

14. From foregoing discussions, it is clear that the prosecution has not been able to prove the case against the appellant beyond a reasonable doubt, and he is entitled to its benefit. By means of a short order dated 01.11.2023, this appeal was **allowed** and the appellant was acquitted of the charge. He was ordered to be released from the jail forthwith, if not required in any other custody case. The above are the reasons of the same.

The appeal is accordingly **disposed of**.

JUDGE

JUDGE