IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Spl. Anti-Terrorism Jail Appeal No. D – 100 of **2022**

(*Fayaz alias Fayaz Hussain and others versus The State*)

Present:
Mr. Muhammad Iqbal Kalhoro, J.
Mr. Arbab Ali Hakro, J.

Dates of hearing : **06.09.2023**, **04.10.2023**, **02.11.2023** & **25.04.2024**

Date of announcement : **29.05.2024**

Ms. Rizwana Jabeen Siddiqui, Advocate for appellants.
Mr. Mehboob Ali Wassan, Advocate for complainant.
Syed Sardar Ali Shah Rizvi, Additional Prosecutor General.

J U D G M E N T

Muhammad Iqbal Kalhoro, J. – Appellants, having been convicted through impugned judgment dated 02.08.2022, passed by learned Judge, Anti-Terrorism Court, Khairpur in Special Case No.41 of 2016 (*Re: State versus Faiyaz alias Faiyaz Hussain & others*), emanating from Crime No.88 of 2016, registered at Police Station Kotdiji, District Khairpur u/s 302, 324, 353, 337-F(iii), 337-F(v), 337-H(2), 506/2, 148, 149 PPC read with Section 7 of Anti-Terrorism Act, 1997, and sentenced to suffer in the terms as below, have filed this Appeal challenging the same:

- U/S 148 PPC, to suffer RI for three years each with payment of fine of Rs.10,000/- (Rupees ten thousand) each, or in default thereof, to suffer further RI for two months each.
- U/S 302(b) PPC read with Section 149 PPC, to suffer rigorous imprisonment for life each with payment of fine of Rs.1,00,000/- (Rupees one lac) each, or in default thereof, to suffer further RI for six months each.
- The movable or immovable property of all the accused be forfeited to the State and compensation as contemplated u/s 544-A CrPC of Rs.2,50,000/- (Rupees two lac fifty thousand) each be paid to legal heirs of deceased Ranwal alias Goro Bheel in lieu of murder of the deceased, or in default thereof, to suffer further RI for six months each.
- U/S 324 PPC read with Section 149 PPC, to suffer RI for ten years each with payment of fine of Rs.50,000/- (Rupees fifty thousand) each, or in default thereof, to suffer further RI for six months each.
- U/S 353 PPC read with Section 149 PPC, to suffer RI for two years each.
- U/S 506/2 PPC read with Section 149 PPC, to suffer RI for seven years each with payment of fine of Rs.35,000/- (Rupees thirty five thousand) each, or in default thereof, to suffer further RI for two months each.
- U/S 337-F(iii) PPC read with Section 149 PPC, to suffer RI for three years.

- U/S 337-H(2) PPC read with Section 149 PPC, to suffer RI for three months each.
- U/S 7 of Anti-Terrorism Act, 1997, to suffer rigorous imprisonment for life each with payment of fine of Rs.50,000/- (Rupees fifty thousand) each, or in default thereof, to suffer further RI for six months.
- All the aforesaid sentences shall run concurrently, with benefit of Section 382-B CrPC extended to the accused.

2. The facts, as mentioned in FIR, briefly are that complainant PC Hadi Bakhsh Bhanbhro posted in Special Branch, Khairpur would regularly transmit special reports to his superiors of Mithri Beat. In the year 2014, an encounter had occurred between some criminals and Kotdiji police resulting in death of two criminals, namely Habibullah alias Haboo Kandhro and Rustam Kandhro, and injuries to Fayaz Kandhro. Accused Fayaz and Kouro Kandhro, suspecting the complainant of spying against their accomplices culminating in fatal encounter, had threatened him of dire consequences. On the fateful day: 13.05.2016, complainant after performing duty of looking after congregations at Friday prayer, and conveying such reports to his superiors, proceeded to have tea at Gada Hussain Hajano's hotel at Mithri Machine Stop. At the said hotel, he saw Sajjad Hussain Bhanbhro, Amanat Ali Bhanbhro and others available. At about 1445 hours, accused Fayaz, Nooro, Dargahi, Gullu, Zakir, Soomar, Kouro and Latif Dino, all armed with deadly weapons, arrived there on three motorcycles. They cautioned complainant that they would teach him a lesson for his spying activities. Then, accused Fayaz and Kouro, with intent to murder, fired at him from their respective weapons causing injuries to his jaw and left arm. When the people attempted to intervene, they fired indiscriminately hitting Ranwal alias Goro on chest and Nawaz Ahmed on his left calf. They both fell down on the ground. Thereafter, accused, firing blindly, fled the scene towards northern side on the motorcycles. Ranwal alias Goro in the meantime succumbed to injuries and died within their sight. The people promptly transported the injured to hospital after getting police letter(s) for medical treatment, and brought Ranwal's body to his family. Finally, FIR was registered by the complainant.

3. During investigation, appellants Fayaz alias Fayaz Hussain, Noor Ahmed alias Nooro and Gullan were arrested on 17.05.2016. In interrogation on 20.05.2016, they led the police to Fayaz's house, and at about 1600 hours, from a trunk lying there produced three .30 bore pistols along with magazines used in the offence, for which they were booked in Crime Nos.96, 97 and 98 of 2016, respectively, at the same police station. After facing a joint trial in such cases, they have been convicted for an offence u/s 23(1)(a) of Sindh Arms Act, 2013 and sentenced to suffer RI for seven years each with payment of fine of Rs.20,000/- (Rupees twenty thousand) each, or in default thereof, to suffer further RI for two months each, in addition to their punishments in the main case.

4. After the Challans in all the cases submitted, accused Soomar and Latif Dino surrendered in the Court and obtained interim pre-arrest bail, which, when was dismissed, they were taken into custody. Subsequently, accused Kouro was also arrested by the police on 05.01.2017, and from his possession, a .30 bore pistol along with a magazine and 06 live bullets were recovered, for which a separate FIR (Crime No.03/2017) was registered against him at the same police station. He also faced a joint trial in Special Case No.03 of 2017 with the main case, and has been convicted for an offence u/s 23(1)(a) of Sindh Arms Act, 2013 and sentenced to suffer RI for seven years with payment of fine of Rs.20,000/- (Rupees twenty thousand), or in default thereof, to suffer further RI for two months, in addition to his punishments in the main case.

5. The case against absconding accused Dargahi and Zakir was bifurcated and ordered to be kept on dormant file till their arrest or surrender in the Court. In terms of Section 21M of Anti-Terrorism Act, 1997, all five cases were amalgamated for a joint trial. A formal charge then was framed against the appellants, to which they pleaded not guilty and claimed for trial. The prosecution, invited to lead evidence, examined as many as twelve (12) witnesses, who have produced all the necessary documents including FIR, entries, memos of inspection of place of incident and recovery, clothes of deceased, recovery of crime weapons, the injuries, production of last worn clothes by injured witnesses, arrest of accused and recovery, inspection of dead body of deceased Ranwal, inquest report, letters for medico legal examination, treatment of injured, sketch of place of incident, postmortem report of deceased, chemical examination report, ballistic expert report, provisional and final medico legal certificate, x-ray reports, receipt of handing over dead body of deceased to his heirs, etc.

6. In the end, appellants' statements u/s 342 CrPC were recorded. They denied the allegations, but did not prefer to examine themselves on oath. However, they led evidence of witnesses Mohan Bheel, Bilawal Bheel and Muneer Bheel in defense. After a full-dressed trial and hearing the parties, learned trial Court has convicted and sentenced the appellants vide the impugned judgment in the terms as above, which they have challenged by means of this Appeal.

7. Learned Counsel in defense has argued that appellants have been falsely implicated in this case. There is no confidence inspiring evidence brought by the prosecution against them. The witnesses have contradicted each other on main facts of the case. There are so many variations and discrepancies in their evidence, which have made entire case of prosecution weak and doubtful. The place of incident has not been established and is disputed. The FIR shows that incident took place inside a room of a hotel, but

the site plan prepared by Tapedar indicates availability of dead body outside of the hotel. Investigation in this case has not been conducted properly. The motive has not been proved either. The jurisdiction of Anti-Terrorism Court was not attracted because there was enmity between the parties, which is reflected from registration of an FIR by the accused party against the complainant. Recovery of three pistols from three different accused was effected from a single trunk available in one and the same house. More so, the pistols allegedly recovered from there did not match with the pistols produced in the evidence as borne out of such admission by the witnesses in evidence.

8. Further, it was urged by her in arguments that a pistol was recovered from appellant Kouro, which he had allegedly used in the crime, but it was not sent to ballistic expert for a report. There are contradictions and inconsistencies over seat and number of injuries received by the victims in evidence, and some of the witnesses, who claimed to be eyewitnesses, were not examined by the prosecution inducing a probability that had they been examined, they would not have supported the prosecution case. Bloodstained earth and pistols were sent for a lab report after a long delay, therefore, such reports, may be in positive, are not worthy of reliance. The medical evidence is contradictory to the oral account furnished by the eyewitnesses making the case highly doubtful. Appellants are entitled to benefit of doubt as the prosecution's case suffers from irreparable lacunas. She has relied upon the cases of **1968 SCMR 161**, **1976 P Cr. L J 254**, **1981 SCMR 795**, **PLD 1988 Karachi 521**, **1990 P Cr. L J 1018**, **1996 SCMR 167**, **PLJ 2000 SC 1041**, **NLR 2000 CrLJ 345**, **2001 SCMR 424**, **NLR 2001 Criminal 510**, **2002 P Cr. L J 51**, **PLJ 2003 SC 733**, **2003 SD 875**, **2004 SCMR 1185**, **2004 SD 258**, **2017 SCMR 596**, **2018 SCMR 772**, **PLD 2020 Supreme Court 61**, **2020 YLR 1071** and **2021 P Cr. L J 1654**.

9. On the other hand, learned Counsel for the complainant and learned Additional Prosecutor General have supported the impugned judgment stating that witnesses have given unassailable evidence against the accused. No material contradiction has come on record. They have lastly prayed for dismissal of appeal.

10. We have considered submissions of the parties and perused material available on record. In this case, prosecution has examined 12 witnesses, who have produced all the relevant documents to prove the charge against the appellants. Out of these witnesses, two are eyewitnesses, who have given firsthand account of the incident. The contradictions pointed out in defense are minor in nature having no debilitating effect on merits of pristine eye-account of the scene furnished by the witnesses, who have not wavered on any of salient features of the case constituting core of the event. The witnesses are consistent in revealing main features of the scene, arrival of the accused on three

motorcycles armed with deadly weapons, indulging in firing murdering deceased and injuring complainant and another, and their escape from the scene. This evidence runs parallelly and in alignment with the story disclosed in the FIR. Their lengthy cross-examination has not yielded a reply undermining intrinsic value of their evidence suggesting innocence of the accused. We have, in fact, minutely gone through written arguments submitted by the defense counsel to find out any major contradiction pointed out by her, but are afraid none, suggested by her, could be construed as having an adverse effect on overall merits of the case.

11. The factum of firing and injures by firearms on persons of deceased and injured is established from recovery of fired bullet-castings from the spot and medical evidence recording such injuries. Medico-legal officer, without admitting to any aberration casting cloud over genuineness of the story in cross-examination, has revealed all the necessary details that he noted while examining the injured and conducting postmortem of deceased. In his evidence, nothing incongruous and conflicting to the story as set up by the prosecution, has come on record to instill a sense of suspicion in the mind. All the links constituting the chain of events right from incident itself to completion of investigation are complete. There is confidence-inspiring eye-account, supported by medical evidence, relevant lab reports of articles collected in the investigation, recovery of crime weapons at the source of appellants, positive reports identifying them to have been used in crime, evidence of Mashirs verifying various steps of investigation taken by the IO including recoveries of incriminating articles from appellants effected in their presence. Nothing is left out to enforce an element of doubt in the prosecution case. In our humble estimation, the story holds, rings true, is all encompassing, and stands proved from unimpeachable evidence given by the witnesses. All the accused have committed the offence conjointly with their common object is conspicuous from collection of material in investigation, place of incident and the manner of executing the offence evidenced by the witnesses. The accused all came together duly armed on three motorcycles at the hotel where the complainant was present, resorted to indiscriminate firing after cautioning him of his activities and murdered one person and critically injured two persons including him. Nothing is there to hold that some of the accused had not come with such object, and nothing cogent and inspiring has been suggested by them in defense either to think otherwise than their guilty mindset.

12. We have also taken into account the various variations pointed out by defense counsel in arguments to win acquittal of the appellants, but are not persuaded of their efficacy to undermine entire effort put in by the prosecution to prove its case. Complainant, a police official having no apparent motive to

falsely implicate the appellants in such a heinous offence carrying capital punishment, has given a detailed version of events taking place on the fateful day culminating at murder of one person and injures to himself and another person. Per his evidence, he was present in the hotel on the fateful day when all (07) seven accused duly armed with deadly weapons came on three motorcycles. They after calling him out for his spy sorties, considered by them detrimental to their criminal activates, fired from respective weapons critically injuring him. When people tried to save him, they indiscriminately made firing killing one person by name Ranwal Bheel and injuring Zawaz Ahmed. The minor inconsistencies by him in describing local of injuries on his person like whether it was on his shoulder or biceps, located close to each other and indistinguishable to a layman to highlight precisely in evidence, or who brought him to hospital et al would not make his evidence doubtful or the appellants as innocent. He got injured in the incident thus his presence there is beyond a question.

13. Then, the urge made in defense over difference of time and its odd equation, recorded in papers and described by the complainant, pointing to his presence at the hospital and at place of incident purportedly at the same time does not make any difference over merits of the case either. For, firstly in police papers the exact time of such activities is never recorded, it is always probable time, close to actual time of any given activity. Secondly, it is the job of the IO to record such timings in the papers, a part of the case, an injured witness going through a sever trauma, is not naturally cut out to remember such tiny details and describe them with precision in his evidence later on.

14. The evidence of PW-2 is in compete conformity with version of the complainant. He has supported him on all material facts of the case, and has not faltered in cross-examination to any suggestion when called upon to explain his position qua the incident. He has even confirmed the motive part of the story by stating that as soon as the accused came, they told the complainant that he had got their companions killed, hence they would not spare him, and then made firing. Likewise, none of the other witnesses, including the IO putting up entire account of investigation, in their evidence has made any admission or yielded to any suggestion in cross-examination favorable to the appellants.

15. Next, it was urged in defense that the fact that all three pistols were recovered from a trunk lying in the same house is sufficient to hold such recovery doubtful. It was clarified by the learned DPG that the three appellants namely Fayaz alias Fayaz Hussain, Noor Ahmed alias Nooro and Gullan on whose source such recovery was effected are brothers inter se and living in one and the same house, therefore, such recovery is not unconscionable. We agree with him that recovery of three pistols, used by three brothers living together, from the same house is not shocking. The fact that on examination by the lab

along with empties collected from the spot, these pistols have been found to have been used in the subject crime is a relevant circumstance linking the appellants with the offence. Some discrepancies on description of the pistols produced in the court and accounted in the relevant memo, urged in defense, is not material either as far as the main incident and use of such weapons in it by the appellants is concerned. Any error by the IO in recording description of the pistols accurately in the memo at the time of recovery would not hold down their identity as crime weapons, not the least when such fact has been confirmed by the lab report. More so, in the main case, such recovery has been referred to as supporting evidence. In presence of positive report of lab confirming use of said weapons in the offence, mostly based on matching profile with empties recovered from the spot, we have no reason to disbelieve the status of that weapons as crime weapons and infer something not borne out of record available in the case.

16. It was also urged by defense counsel in her arguments that since some of the material witnesses have not been examined by the prosecution in the trial, it would run against it and make the case as doubtful. It may be said that time-tested proposition qua prerogative of the prosecution to examine as many witnesses as it thinks fit to prove the charge still holds good and relevant. Prosecution's decision not to examine any number or a particular witness on some point already brought on record by the other witness would not adversely reflect on its effort to establish the charge or the fact of proving the charge itself against the accused. The court would not hesitate in accepting evidence of even a single witness on a given point to record conviction against the accused when it finds it confidence inspiring and in alignment with other concomitant circumstances supporting it. Here, in this context, it is helpful to note that from their conduct the appellants appear to be desperate and dangerous. Complainant is a police official and in that sense enjoys more protection and security than an ordinary fellow, yet just because the appellants were wary of his alleged spying activates reporting against them, they launched a deadly attack, in the course of which seriously injured him and another person present at the scene besides murdering a third fellow. In such a milieu, expecting an ordinary person to come forward and give evidence against as dangerous a person as the appellants is simply to expect an urbanite to hold a bull by the horn. It would be equally unlikely to think that appellants would not have exerted any pressure upon the witnesses to desist them for appearing in the court to adduce evidence against them. Some of the witnesses, not examined by the prosecution therefore would not make much difference on merits of the case.

17. Examining defense witnesses, who are in fact legal heirs of deceased Ranwal Bheel and belong to minority community, absolving the appellants of his

murder appear to be but a part of the same kind of pressure by the latter. None of them otherwise had joined investigation for recording their version of the incident, never tried to approach and apprise the real facts to the relevant police officials seized with the case, or the court where investigation report was being submitted and the appellants' remand was being sought. They never moved any application claiming that they were present at the spot and had seen the actual accused, who are not at least the appellants, so that at the very outset wrong could have been arrested and the police set out for nabbing real culprits as per their version. This did not happen and the course of investigation remained as it was, therefore their introduction as late as statement u/s 340(2) CrPC does not inspire confidence and make their version of the event unworthy of reliance.

18. Next, learned counsel in her arguments also emphasized that before the FIR certain investigation was done like preparation of inquest report, memo of place of incident and postmortem which strangely contains mention of crime number, which is illegal and makes the entire investigation faulty and unreliable. The mention of crime number on the postmortem report is not inconceivable in this age of mobile phones when such things can be easily and conveniently discovered and made a part of the relevant papers before the actual FIR. The letter by the police to the medico legal officer requesting for postmortem usually contains all the necessary details about deceased and the crime number that has either been or is to be registered in due time. Writing of such a letter would itself posit that the police have been informed of the incident and are on board to ensure completion of all the fundamentals required to be done in law either pre or post investigation. Seen in such backdrop mention of crime number on such papers would not appear shocking or a result of some manipulation in the investigation to cause prejudice to the accused.

19. Further, insofar preparing inquest report etc. before the FIR is concerned, it may be mentioned that preparation of inquest report, *lash chakas* form and conducting postmortem of the deceased before registration of the FIR is not against the law. This preliminary investigation is conducted in terms of Section 174 CrPC read with Rule 25.31 of the Police Rules, 1934, which mandate the officer in charge of a police station or some other police office that he, on receiving information regarding unnatural death or sudden death of a person, shall immediately proceed, after sending information to the nearest Magistrate, to the place where such dead body is present and shall act as prescribed by Rule 25.33 of the Police Rules, 1934 and Section 174 CrPC. These provisions of law require him to prevent destruction of evidence, draw up a report of the apparent cause of death describing the wounds, fractures, bruises found on the body and the manner or by what weapons such injury or

mark appear to have been inflicted. Further, in such cases, as is provided by Rule 25.31, if he suspects commission of a cognizable offence, he shall register the case and commence investigation. Legally, therefore, in our humble view, the above initial formalities are to be completed by the police official with a view to preserve and record the elementary position and condition subsisting at the spot with regard to the dead body, its surroundings and cause of death (through postmortem) so as to be investigated later on on registration of the FIR if it turns out be unnatural. This exercise, therefore, will not make the case of prosecution as doubtful and preparation of such reports as illegal.

20. Lastly, on the point of jurisdiction of Anti-Terrorism Court questioned by the defense counsel, we may say that as per prosecution's case motive to commit this crime has a genesis in official activates of surveillance of the area conducted by the complainant. It is stated that due to that the accused were not happy with him and had on previous occasions, particularly after an encounter in which two of their accomplices were killed by the police, had warned him of dire consequences. In the investigation, nothing personal between the complainant and the accused has been highlighted by the IO as a cause leading to commission of this offence. In cross-examination, in reply to a question, the complainant has admitted that he is accused in some FIR registered by accused Latif Dino Kandhro. But thereafter nothing has been suggested to him that whether the instant FIR was registered by him as a counterblast to the same; or what is the context and facts of that FIR or in what capacity the complainant has been arraigned therein or what role has been assigned to him etc. to lead the court to infer this FIR being an outcome of some enmity between the parties. Sans of such material and absence of any effort in cross-examination aimed at challenging the roots and motive part of the story, we cannot infer what is not obvious and hold that Anti-Terrorism Court in the wake of filing of the Challan, had no jurisdiction to exercise in this case.

21. The upshot of above discussion is that appellants have not been able to make out a case of acquittal and the impugned judgment need not be interfered with. Hence, this appeal is **dismissed**. The conviction and sentence awarded to the appellants by the trial court is upheld and maintained.

The appeal is accordingly **disposed of**.

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