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IN THE HIGH COURT OF SINDH, CIRCUIT COURT LARKANA

Criminal Jail Appeal No.D-57 of 2016

Present:

**Mr. Justice Zafar Ahmed Rajput,
Mr. Justice Irshad Ali Shah,**

Appellant : Janoo s/o Bingao @ Mangalo Kosh,
Through Mr .Safdar Ali Bhutto, Advocate

State : Through Mr.Khadim Hussain Khooharo, A.P.G.

Date of hearing : 11.09.2018

Date of decision : 11.09.2018

JUDGMENT

IRSHAD ALI SHAH, J.-, The appellant by way of instant appeal has impugned the judgment dated 27.08.2016 passed by learned Judge, Anti-Terrorism Court, Kashmore @ Kandhkot, whereby he has been convicted and sentenced in Special Case No.51 of 2013, arisen out of Crime/F.I.R No.241/2009, registered at P.S Kashmore under sections 302, 324, 353, 148, 149 and 7 of Anti Terrorism Act, alongwith absconding accused 01.Siddique @Tagyo s/o Gul Hassan @ Gullo Shar, 02. Bhoru s/o Manthar Shar, 03.Mehar s/o Bachal Kosh, 04. Gada Ali @ Gadi s/o Saindad, 05. Sobo s/o Todo, 06. Shareef @ Mego s/o Dado, all by caste Kosh, 07. Tajo s/o Kenso Shar in their absentia for an offence u/s.302-B, 149 PPC r/w Section 7-A of Anti-Terrorism Act, 1997, to undergo imprisonment for life and to pay fine of Rs.50,000/- (fifty thousands) each or in case of default

in payment the defaulter shall have to undergo S.I for 01 year more. He as well as absconding accused above named also convicted for an offence u/s.324 r/w Section 149 PPC to undergo Imprisonment for 10 years and to pay fine of Rs.20,000/- each and in case of default to undergo S.I for three months more. He as well as above named absconding accused also convicted for an offence u/s.353 PPC and sentenced to undergo R.I for 03 years and to pay fine of Rs.10,000/- each in default S.I for 01 month more. He as well as above named absconding accused also convicted for an offence u/s.148 PPC and sentenced to undergo R.I for 01 year and to pay fine of Rs.5000/- each and in default to undergo S.I for 15 days more. It was further ordered that if fine amount is realized, the same shall be paid to the legal heirs of deceased PC Abdul Hameed to the extent of 70 % and 30 % of the amount be paid to injured PC Muhammad Din. Besides, the absconding accused named above also convicted u/s.21-L of the Anti-Terrorism Act, 1997 and sentenced each of them to suffer R.I for 05 years and all the sentences were ordered to run concurrently".

2. The facts in brief necessary for disposal of instant appeal are that the appellant and others allegedly deterred the police party of P.S Kashmore, led by complainant SIP Karim Bux Lakho, from discharging their lawful duty as public servant, which resulted in an encounter between the said police party and appellant and others, whereby Ali Kosh one of the culprit and PC Abdul Hameed lost their lives and PC Muhammad Din sustained fire shot injuries and then they made their escape good, for that the present case was registered.

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3. On investigation, the appellant was arrested at District Jail, Shikarpur and after usual investigation was challaned before the learned trial Court to face the trial for the above said offence.

4. At trial, the appellant did not plead guilty, and the prosecution to the charge examined PW-01 HC Bebarak Jakhrani, who produced receipts of dead body of deceased PC Abdul Hameed and receipt of handing over the dead body to the wife of deceased PC Abdul Hameed Jakhrani; PW-02 SIP Karim Bux Lakho, who produced memo of recovery of weapons and empties and FIR bearing Crime No.241/2009, PW-03 PC Muhammad Din Mangi, PW-04 ASI Ghulam Sarwar Kakro, who produced memo of seeing the dead body of deceased PC Abdul Hameed Brohi, inquest report on dead body of deceased Abdul Hameed, memo of seeing the dead body of deceased accused Ali Kosh, inquest report on dead body of deceased accused Ali Kosh, memo of place of vardat, blood stained earth and recovery of empties; PW-05 PC Liaquat Ali, who produced memo of imaginary arrest of accused Bhoro and Siddique, PW-06 Judicial Magistrate Agha Niaz Ahmed Pathan, who produced letter of SHO and mashirnama; PW-07 SHO Ziad Ali Noonari; PW-08 ASI Muhammad Hassan Malik, who produced memo of arrest of accused Mehar Kosh; PW-09 ASI Khan Muhammad Brohi, who produced memo of imaginary arrest of accused Janoo Kosh; PW-10 Senior Medical Officer Manzoor Ahmed Kalwar, who produced Lash Chakas form of deceased PC Abdul Hameed, Lash Chakas form of deceased accused Ali Kosh, postmortem report of deceased PC Abdul Hameed, postmortem report of

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deceased accused Ali Kosh, letter of SHO, Provisional medical certificate of injured PC Muhammad Din and his final opinion; PW-11 SIO Ihsan Ahmed Channa, who produced report of chemical examiner.

5. The appellant during course of his examination u/s.342 Cr.PC denied the prosecution's allegation by pleading innocence by stating that he has been involved in this case falsely at the instance of Wadero Manzoor Kosh on account of dispute of his maternal uncle with him over the landed property. He did not examine anyone in his defense or himself on oath in disproof of the prosecution allegation.

6. On evaluation of evidence, so produced by the prosecution, the learned trial Court convicted and sentenced the appellant as detailed above by way of judgment, which the appellant has impugned before this Court by way of instant criminal appeal.

7. It is contended by learned counsel of the appellant that the appellant being innocent has been involved in this case falsely by the police, the evidence so produced by the prosecution was not inspiring confidence, yet was believed by learned trial Court without any lawful justification to record conviction against the appellant. By contending so, he sought for acquittal of the appellant.

8. Learned A.P.G has sought for dismissal of the instant appeal by contending that the appellant has actively participated in commission of the incident.

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

10. There is no dispute with regard to death of deceased PC Abdul Hameed and injuries to PW/PC Muhammad Din, which is well proved by the evidence of medical officer Dr. Manzoor Ahmed. Only the point which requires determination is liability of the appellant to the alleged incident. In this regard it appears that the police party led by complainant SIP Karim Bux, as per FIR on information went at the place of incident, situated in Kalwar Muhalla, Kashmore, which is inhabited by the people of different caste, yet no independent witness to the incident was associated in the proceedings by the police. Such omission on the part of the police could not be lost sight of, which smells of something wrong. Complainant SIP Karim Bux despite supporting the case of prosecution on factual premises to some extent, in end of his examination in chief was fair enough to admit that the appellant present in the Court was not the same, who fired at the police party. There appears no reason to disbelieve the complainant in that respect. If the evidence of the complainant is believed to be true then the involvement of the appellant in the present case appears to be doubtful. PWs PC Muhammad Din and ASI Ghulam Sarwar have implicated the appellant to be one of the culprits claiming to have seen the culprits at the distance of one and half furlong and 100 paces respectively, which is unbelievable. As such the involvement of the appellant in this case on the basis of his identity under the light of bulb and search light from the above distance appears to be doubtful. The appellant on arrest was not subjected to identification parade, for no obvious reason, such omission on the part of police could not be lost sight

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of. No injury either to the deceased or to the injured is attributed to the appellant specifically, which has made his participation in commission of the incident to be doubtful. It was denied by SIO/SIP Ahsan Ahmed during course of his examination that the place of incident is situated in thickly populated area. He in that respect was belied by PW/ASI Ghulam Sarwar by stating that different caste people are residing at Kalwar Muhalla Kashmore, such fact also takes support from FIR of the incident, which appears to be significant.

11. In case of **Zeeshan alias Shani (2012 SCMR-428)**, it was held by the Honourable Supreme Court of Pakistan that;

"Delay of more than one hour in lodging report had also given rise to the inference that occurrence did not take place in the manner projected by prosecution and time was consumed in making effort to give a coherent attire to prosecution case, which hardly proved successful---Such delay was all the more fatal when police station, besides being connected with the scene of occurrence through a metalled road, was at a distance of 11 kilometers from the latter---Supreme Court observed that standard of proof should have been for higher as compared to any other criminal case, when according to prosecution, it was a case of police encounter and it was desirable and even imperative that such case should have been investigated by some other agency, as police in such case, could not have been investigators of their own cause---

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Such investigation which was woefully lacking independent character could not be made basis for conviction in a charge involving capital sentence”.

12. Above are the reasons of our short order dated **11.09.2018**, whereby the instant appeal was allowed in following terms;

“For the reasons to be recorded later-on, this Criminal Jail Appeal is allowed, conviction and sentence awarded to appellant Janoo son of Bingao @ Manglo Kosh, vide judgment dated 27.08.2016, passed in Special Case No.51 of 2013 (The State vs. Siddique and others) emanating from Crime No.241 of 2009, registered at P.S Kashmore for offence punishable u/s.302,324,353,148,149 PPC and 7-A of Anti Terrorism Act, 1997, are set-aside and the appellant is acquitted of the charge. The concerned jail authorities are directed to release the present appellant forthwith in the instant case if his custody is not required in any other criminal case”.