

THE HIGH COURT OF SINDH, CIRCUIT COURT LARKANA

Crl. Appeal No. **S-91** of **2016**

Appellants : Manik alias Muhammad Ali & Bakhsh Ali
through Mr. Safdar Ali G. Bhutto,
advocate

Respondent : The State, through Mr. Ali Anwar Kandhro
Additional Prosecutor General

Complainant : Mr. Saleem Raza Jakhar, advocate

Date of Hearing : 06.02.2020
Date of Decision : 06.03.2020

JUDGMENT

ZAFAR AHMED RAJPUT, J: This Criminal Appeal is directed against the judgment, dated 10.09.2016, passed by the learned Sessions Judge, Kashmore at Kandhkot in Sessions Case No.55 of 2015, arising out of F.I.R. No.85/2014, registered under sections 302, 324, 337-H(ii), 148, 149, P.P.C. at Police Station Karampur, whereby the appellants/accused were convicted for the offence punishable under section 302(b), P.P.C. as *Ta'zir* and sentenced to imprisonment for life and to pay fine of Rs.50,000/- which on recovery shall be payable to the legal heirs of deceased Muneer Ahmed and in default whereof to undergo further R.I for six months. The appellants were also convicted for the offence under section 324, P.P.C. and sentenced to undergo R.I for five years and to pay fine of Rs.30,000/- and in default thereof to undergo R.I for three months. They were also convicted for the offence under section 337-A (i), P.P.C. and sentenced to pay amount of Rs.100,000/- as Daman. Both the sentences were ordered to run concurrently and the benefit of Section 382-B, Cr. P.C. was also extended to appellants. The case against the proclaimed offenders, namely, Muhammad Bakhsh @ Muhammado and Shafique was ordered to remain on dormant file, till they are arrested.

2. Brief facts giving rise to this appeal are that, on 29.09.2014, complainant Irfan Ali lodged the aforesaid F.I.R., alleging therein that about 4/5 days prior to the incident accused Bakhsh Ali and others had damaged the paddy crop of complainant party on which the parties exchanged hot words. It was further alleged that on 28.09.2014, the complainant and his cousins Bashir Ahmed, Sadam Hussain, Shafi Muhammad and Muneer Ahmed were going to Karampur on foot and at about 05:00 p.m. they reached northern side of Beghari Irrigation Minor, near Beghari Bridge, where Bakhsh Ali, Manik @ Muhammad Ali, Muhammad Bakhsh @ Muhammad and Shafique, armed with Kalashnikovs, and two unknown persons armed with guns intercepted them and then accused Bakhsh Ali, Manik @ Muhammad Ali and Shafique fired Kalashnikovs shots at Muneer Ahmed, while accused Muhammad Bakhsh @ Muhammad also fired at Shafi Muhammad, who fell down on receiving injuries; thereafter, all the accused fled away making aerial firing. Muneer Ahmed succumbed to injuries.

3. After usual investigation, police submitted the report under section 173, Cr. P.C., showing accused Muhammad Bakhsh @ Muhammad and Shafique as absconders. Having been conducted necessary proceedings, 2nd Judicial Magistrate, Kandhkot declared the said absconding accused as proclaimed offenders and sent up the arrested accused Bakhsh Ali and Manik @ Muhammad Ali to stand their trial before the Court of Sessions Judge, Kashmore at Kandhkot. The trial Court framed formal charge against them, to which they pleaded not guilty and claimed trial.

4. At the trial, in order to substantiate the charge against the accused, prosecution examined seven witnesses. P.W-1 Dr. Noor Muhammad Gujrani examined at Exh.8, who produced medico-legal report of injured Shafi Muhammad, letter of police for examination of injured Shafi Muhammad, post mortem report of deceased Muneer Ahmed and dead body examination form at Exh.8-A to D, respectively.

P.W-2 ASI Abdul Malik examined at Exh.9, who produced memo of examination of dead body, inquest report, memo of injuries of injured Shafi Muhammad, memo of recovery of clothes of deceased and Entry No.16 at Exh.9-A to E, respectively. P.W-3 Irfan Ali Bijarani, the complainant, examined at Exh.10, who produced receipt of delivery of dead body and F.I.R. at Exh.10-A and B, respectively. P.W-4 Sadam Hussain Bijarani, eye-witness, examined at Ex-11. P.W-5 Muhammad Sharif Bangulani, the Tapedar, examined at Exh.13, he produced sketch at Exh.13-A. P.W-6 Arbab Ali Bijarani, the mashir, examined at Exh.14, who produced memo of place of incident, memo of arrest of accused Manik alias Muhammad Ali and recovery, memo of arrest of accused Bakhsh Ali at Exh.14-A to C, respectively. P.W-7 ASI Bagh Ali Buriro, investigating officer, examined at Exh.15, who produced F.I.R. No.88/2014, registered under section 23(i) (a) of Sindh Arms Act against the accused Manik alias Muhammad Ali, entry No.13, entry No.2, entry No.28 & 6, report of Chemical Examiner, report of Ballistic Expert at Exh.15-A to G, respectively. The statements of the appellants/accused Manik alias Muhammad Ali and Bakhsh Ali under section 342, Cr. P.C were recorded at Exh.17 and 18 respectively, wherein they claimed innocence. They, however, declined to examine themselves on oath under section 340(2), Cr. P.C or to produce any witness in their defense.

5. The learned counsel for the appellants has contended that the impugned judgment is not sustainable in law as well as on facts and it is fit case to be reversed; that the major part of the investigation was conducted before recording of the F.I.R. and the F.I.R. was lodged with delay of 23 hrs; hence consultation and deliberation before its lodging for false implication of the accused cannot be ruled out; 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 ocular account is not consisting upon the unimpeachable character, as the P.Ws No. 3, 4 & 6 are near relatives to each other and also to the deceased; that the learned trial Court has failed to take notice of the fact that the empties and Kalashnikov were handed over by the complainant at the spot to the investigating officer, such recovery being dubious could not be relied upon; that the inconsistent evidence of alleged eye-witnesses and non examination of star witness i.e. injured Shafi Muhammad at the trial has rendered the entire prosecution case against the appellants highly doubtful, but the learned trial Court has disregarded such 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.

6. Conversely, learned counsel for the complainant and A.P.G. have fully supported the impugned judgment. They have maintained that the specific role has been assigned to appellants in the F.I.R. and the prosecution witnesses have fully connected them in their evidence with the commission of alleged offence; that medical evidence also confirms ocular testimony regarding injuries sustained by the deceased and injured Shafi Muhammad; that Forensic Science Laboratory (FSL) report in respect of Kalashnikov recovered from appellant Manik proves that the same was used in the commission of alleged offence by him; that the contradictions in the depositions of prosecution witnesses being minor in nature do not discard the same at all.

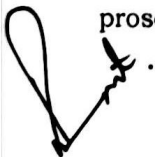
7. Heard the learned counsel for the appellants, complainant and Addl. P.G as well as scanned the material available on record with their assistance.

8. It appears that the alleged incident took place on 28.09.2014 at 05:00 p.m. thereafter; injured Shafi Muhammad and the dead body of



the deceased were brought at police station by the P.W-3 complainant Irfan Ali under D.D. Entry No. 16 at 5:40 p.m. (Exh. 9-E), where memo of exhibit of injuries of said injured (Exh.9-C), memo of exhibit of corpse (Exh.9-A), inquest report (Exh.9-B) and memo of recovery of clothes of the deceased (Exh.9-D) were prepared by the duty officer P.W-2 ASI Abdul Malik from 05:55 to 08:30 p.m. It also appears that injured Shafi Muhammad and dead body of the deceased were brought at Rural Health Centre, Karampur at 06:15 p.m. where injured was examined/treated and the post mortem of the deceased was conducted from 6:45 to 07:45 p.m. The dead body of the deceased was received by said complainant vide D.D. Entry No. 18 at 08:30 p.m. and it was after said preliminary investigation, the F.I.R (Ex.10-B) was recorded by the complainant on 29.09 2014 at 4:30 p.m., with delay of 23 hrs.

9. It may be seen that the P.W-3 complainant Irfan Ali was available at police station after occurrence on the same day from 5:40 to 8:30 p.m. but he did not lodge the F.I.R. at the first available opportunity. It may be observed here that an F.I.R. in a criminal case is an extremely imperative piece of evidence for the purpose of corroborating the oral evidence adduced at the trial. The object of insisting upon prompt lodging of the F.I.R. to the police in respect of commission of an offence is to obtain early information regarding the circumstances in which the crime was committed, the names of actual culprits and the part played by them as well as the names of eye-witnesses present at the crime scene. Delay in lodging the F.I.R. quite often results in adornment with mala fide intension. On account of delay, the F.I.R not only deprives of the advantage of spontaneity, danger creeps in of the introduction of coloured version, exaggerated account or concocted story as a result of deliberation and consultation, adversely affecting the case of the prosecution.



10. It transpires from the perusal of record that the prosecution case rests upon ocular testimony and recoveries. Ocular testimony consists of two witnesses, namely, P.W-3 complainant Irfan Ali and P.W-4 Sadam Hussain. Both these witnesses are cousins of the deceased. They have reiterated the contents of the F.I.R.; however, deposed in cross-examination that the deceased Muneer Ahmed received firearm injuries at the distance of 9/10 paces and Shafi Muhammad received fire from 5 to 6 paces and they (*witnesses*) were at the distance of 10/15 paces from the accused. They have further deposed that the incident continued for 5 to 10 minutes. P.W-1 Dr. Noor Muhammad Gujrani has contradicted the said P.Ws by stating that the deceased received firearm injuries at the distance of 35 feet. It is surprising to note that the accused allegedly fired continuously for 5 to 10 minutes, but none of the said eye-witnesses received even a single injury despite the fact that they were also available at the scene of incident with the deceased and injured at the short distance. Furthermore, P.W-3, the complainant, has deposed that Shabeer, Sadam, Muhammad Anwer, and Arbab were accompanied by him when he went to police station with dead body and injured and from there to hospital, while P.W-4 Sadam Hussain has stated that the complainant and he was accompanied by injured and dead body while taking them to police station and he could not remember if anybody else was accompanied by them. It is noticeable that as per post mortem report (Exh.8-C), the dead body was identified by Amir Jan and Rab Nawaz, who are also stated to be the cousin of the deceased, but none of the said eye-witnesses has disclosed their names as accompanying persons on the way to hospital from police station and even they have not been cited as witnesses in the calendar of witnesses. Had the said eye-witnesses were accompanied by the injured and dead body from the occurrence, they should have identified the dead body to P.W-1, Dr. Noor Muhammad. Such state of affairs makes the presence of said eye-witnesses at the occurrence doubtful.

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11. It may be seen with astonishment that the injured Shafi Muhammad has not been examined by the prosecution. He was natural witness and being injured his presence at the occurrence cannot be doubted. Hence, on the incident his evidence was the best piece of evidence but the prosecution withheld the same by not putting him in witness box. He was given up by the D.P.P. on the statement of complainant, dated 22.02.2016 (Exh.12) that the said injured witness has lost his mental balance due to sustaining severe bullet injury. No supporting medical certificate was annexed by the complainant with the said statement. It may also be seen that the injury allegedly sustained by the said P.W was declared by the P.W-1, MLO in medico-legal certificate (Exh.8-A) as *Shajjah-i-Khafifah*, which has been defined under sections 337(1) and 337(3) (i), P.P.C. as simple hurt on head or face of the victim without exposing bone. As per deposition of P.W-4 Sadam Hussain, the said injured witness was discharged from the hospital on the same day of occurrence after treatment. Hence, it is beyond comprehension that a person who sustained simple head injury lost his mental balance unfitting him after one year and five months of the incident to appear as witness. The justification *per se* furnished by the complainant for giving up the said injured witness appears to be bereft of reasons.

12. It is well-settled principle of law that if a best piece of evidence is available with the party and the same is not produced in Court then it can be presumed that the party has some ulterior and sinister motive behind it, therefore, presumption under illustration (g) of Article 129 of Qanun-e-Shahadat, Order 1984 can fairly be drawn that had the said evidence been produced, it would have been unfavorable to the said party. In the present case the prosecution, without assigning any convincing reasons, withheld the best piece of evidence of P.W Shafi Muhammad; as such, a presumption can fairly be raised that had P.W.

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Shafi Muhammad been produced in Court he would have not supported the prosecution case.

13. So far recovery is concerned, it has been brought on record through the evidence of P.W-7 ASI Bagh Ali, investigating officer that on 29.09.2014, he accompanied by the complainant visited place of incident in presence of mashirs Muhammad Anwar and Arbab Ali and secured blood stained earth in sealed parcel and 10 empties of 7.62 bore, 5 of 12 bore and 3 of TT pistol from the place of occurrence. P.W-6 Mashir Arbab Ali has given different version in cross-examination by stating that the complainant handed over the empties to police at place of occurrence. P.W-3 complainant Irfan Ali has also admitted in cross-examination that he handed over the blood stained earth and empties to ASI Bagh Ali which he sealed at the place of occurrence. In view of such facts, no credibility can be attached with the recovery memo as recovery of empties was not affected from the occurrence but handed over by the complainant.

14. Another recovery is the recovery of Kalashnikov from accused Manik alias Muhammad Ali. In this regard P.W-7 ASI Bagh Ali has deposed that on 03.10.2014, upon spy information, he took mashirs Muhammad Anwar and Arbab Ali from Karampur Laro and reached near Khariro Minor Bridge where he arrested accused Manik and recovered Kalashnikov from his possession under memo of arrest and recovery (Exh.14-B). P.W-6 Mashir Arbab Ali in his cross-examination first admitted that the Kalashnikov was given by the complainant to police, but then again said that in fact complainant was present at the time of arrest of accused Manik and recovery of Kalashnikov from him. It is noticeable that P.W-7 ASI Bagh Ali has not stated that at the time of arrest of said accused, the complainant was also accompanied by him as deposed by the said mashir. Even it does not reflect from Exh.14-B if the complainant was also accompanied by the police party at the time of

arrest of accused Manik. Such contradictory statement of said mashir makes the recovery of Kalashnikov from the possession of accused Manik doubtful.

15. As regards positive Ballistic Expert report (Exh.15-G), it may be observed that when the recoveries of crime weapon and empties have been found doubtful, no reliance can be placed on it. Even otherwise, it can be seen that the alleged recovered Kalashnikov and empties were sent to the office of Forensic Science Laboratory after 10 days of the so-called recovery of Kalashnikov, which has rendered the report to be legally unacceptable and thus, the same is inconsequential as the possibility cannot be ruled out of consideration that the same has been managed and maneuvered in order to get favorable report of Ballistic Expert.

16. In view of the above stated facts and discussion, I am of the considered view that in the instant case there is no convincing and trustworthy evidence against the appellants to connect them with the commission of alleged offences and thus, prosecution has miserably failed to prove its case against them beyond reasonable doubt. I therefore, allow this criminal appeal, set aside the conviction and sentences of appellants and acquit them of the charges. They be set at liberty forthwith, if not required to be detained in any other case.