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IN THE HIGH COURT OF SINDH CIRCUIT COURT LARKANA

Criminal Appeal No. D-84 of 2015

Criminal Appeal No. D-91 of 2015

Before:

Justice Zafar Ahmed Rajput

Justice Khadim Hussain Tunio

Appellants: Imdad and Nadir, through
Mr. Ali Nawaz Ghanghro, Advocate.
Bashir Lashari, through
Mr. Habibullah G. Ghouri, Advocate

Respondent: The State through Mr. Khadim Hussain
Khooharo, Additional Prosecutor General.

Date of hearing: 07.11.2017.

Date of order: 07.11.2017

J U D G M E N T

KHADIM HUSSAIN TUNIO-J:- By this common judgment, we intend to dispose of above-mentioned both criminal appeals, as the same have arisen out of same crime/offence.

2. Through these two appeals, appellants Imdad Junejo, Nadir Junejo and Bashir Lashari have assailed the single Judgment dated 12.11.2015, passed by learned Judge, Anti-Terrorism Court Larkana, in Special Case No.52 of 2012 (Re: State vs. Imdad and others) culminated from FIR No.59/2012, registered at Police Station Gaji Khuhawar, District Kambar-Shahdadkot under sections 302, 324, 353, 148 149, P.P.C. / SECTION 7 ATA, whereby the appellants were convicted and sentenced as follows:-

a) Accused Imdad Junejo, Nadir Junejo, Bashir lashari as well as proclaimed offenders Yousif, Manzoor, Sikander Ali @ Sikoo and Saddam are convicted for the offence punishable u/s-7(a) of Anti Terrorism Act 1997 r/w section 302(b),149 PPC and award them life imprisonment They are also

ordered to pay a fine of Rs.50,000/- each (Fifty thousand each) and in case of default of payment of fine they shall suffer imprisonment for a period of SI for six months more.

- b) The Accused Imdad Junejo, Naidr Junejo, Bashir Lashari as well as proclaimed offenders Yousif, Manzoor, Sikander Ali @ Sikoo and Saddam are convicted for the offence punishable under section 7 (b) of Anti Terrorism Act 1997 r/w section 324,149,PPC and sentence them to suffer RI for ten years. They are also ordered to pay fine of Rs.20,000/- each (Twentythousand each) and in case of default of payment of fine they shall sufferimprisonment for a period of SI for six months more.**
- c) The accused Imdad Junejo, Nadir Junejo, Bashir Lashari as well as proclaimed offenders Yousif, Manzoor, Sikander Ali @ Sikoo and Saddam are convicted for the offence punishable under section 7-(i) of Anti-Terrorism Act 1997 r/w section S-53,148,149 PPC and sentenced them to suffer RI for five years. They are also ordered to pay fine of Rs.20,000/- each (Twenty thousand each) and in case of default of payment of fine they shall suffer imprisonment for a period of SI for six months more.**

The appellants were extended benefit of section 382-B Cr.PC and all the sentenced ordered to run concurrently.

3. Brief facts of the prosecution case, as narrated in aforementioned F.I.R. lodged on 16.12.2012, at 2000 hours, by S.I.P/ S.H.O. Mir Muhammad of P.S. Gaji Khuhawar, are that on 16.12.2012 upon receiving spy information that notorious dacoit Ayaz Hussain Junejo was sitting, along with his gang, near his village, he along with his subordinate staff, duly armed with official weapons proceeded to pointed place in official vehicle, vide Roznamcha Entry No.20, dated 16.12.2012, at about 1600 hours, and through mobile phone he informed his superior officers about the information and reached the pointed spot, where A.S.I. Ali Hassan of P.S. Naseerabad, along with his sub-ordinate staff also reached there. They identified accused Ayaz Hussain Junejo armed with Kalashnikov, Manzoor Lashari armed with Kalashnikov, Yousif Patoojo armed with repeater, Manzoor Gogani armed with rifle, Imdad Junejo armed with D.D.I. Gun Khadim Junejo armed with Gun, Bashir Lashari armed with

S.B.B.L Gun and saw two unidentified persons armed with guns, sitting there. They stopped their vehicles and asked them to surrender, but they started firing on police party with intention to commit their Qatl-i-amd. The police party took the position and fired in their defence. During the encounter, accused Ayaz Hussain Junejo, along with his gang, started moving towards his house. Meanwhile S.R.P/P.C-Sada Hussain received firearms injuries, who fell down on the ground, while accused Ayaz Hussain Junejo also sustained firearms injuries and he also fell down entering into his house; co-accused while firing shots started moving towards southern side ditch. During encounter Inspector Muhammad Ibrahim Soomro, S.H.O P.S. Naseerabad, A.S.I. Rabban Ali Detho, I/C C.I.A Qambr, H.C Himath Ali, of Special Team No.1, A.S.I. Mujahid Hussain of Special Tam No.2, H.C Wazir Ali, I/C Special Team No.4, S.I.P Badal Khan, S.H.O P.S. Warah, S.I.P Imdad Ali, S.H.O P.S. Waggan, along with their staff, reached there, who while taking positions from different sides, started firing upon the offenders. Subsequently, accused Manzoor Lashari, while raising cry fell down and other accused, namely, Imdad Junejo, Nadir Ali Junejo and Bashir Lashari surrendered themselves. Accused Yousif Patojo, Manzoor Gogani and two unidentified accused taking shelter of diversion of minors, made their escape good. Accused Manzoor Lashari had sustained firearms injuries and died, one Kalashnikov with one magazine containing seven live bullets of 7.62 bore was lying near him, which was secured. Police party then entered into the house of Ayaz Hussain Junejo and saw him expired one Kalashnikov with magazine containing 9 live bullets of 7.62 bore was secured. P.C Sada Hussain had sustained firearms injuries and expired on the spot. The complainant then cited A.S.I. Iqbal Ahmed and A.S.I. Ali Hassan as mashirs and prepared mashirnama of arrest of accused and recovery. He also sent the dead bodies of deceased P.C and accused for legal formalities, and then he brought the arrested accused along with weapons at Police Station, where he lodged the F.I.R.

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4. After completion of investigation challan was submitted in the Court on 31.12.2012, showing accused Imdad Junejo, Nadir Junejo and Bahsir Lashari as in custody, while the names of accused Yousif Patojo, Manzoor Gogani, Sikanar Ali @ Sikoo Chandio and Sadam Lashari were mentioned in column No.2 with red ink, showing them as absconders. Subsequently, they were declared as Proclaimed Offenders by the trial Court. Mr. Abdul Karim Surahio, Advocate was appointed as an advocate for Proclaimed Offenders.

5. The trial Court supplied the case papers to accused Imdad Junejo, Nadir Junejo and Bashir Lashari free of cost on proper receipt at Ex.-1. Presiding Officer took the oath, under section 16 of Anti Terrorism Act, 1997 at Ex.9. Thereafter, charge was framed against said accused at Ex.10, to which they did not plead their guilt and claimed to be tried, vide pleas recorded at Ex-10-A to 10-C. At the trial, prosecution examined nine witnesses. Statements of accused were recorded under section 342 Cr. P.C at Ex.9 and 10, respectively in which they denied the prosecution allegations and stated that they were falsely implicated by the police. They; however, neither examined themselves on oath as their own witnesses nor produced any evidence in their defence. On the conclusion of the trial, the Judge, Anti-Terrorism Court, Larkana after hearing the learned counsel for the parties, convicted the accused and awarded them sentence vide impugned judgment.

6. Learned counsel for the appellants/accused have contended that the appellants have been falsely implicated by the complainant; that the evidence adduced by the prosecution at the trial was not properly assessed and evaluated by the trial judge; that the evidence produced at the trial by the prosecution was insufficient to warrant conviction of the appellant; that the trial Judge has not observed the established rules of the appreciation of the evidence while convicting the appellants; that it was the duty of prosecution to establish the

charge against the accused beyond any shadow of doubt and the burden of proof always lies on the shoulders of the prosecution and the benefit of even a slightest doubt is to be extended in favour of the accused and for that there is no need of availability of uncounted, multiple and many circumstances, rather a single circumstance creating doubt in the case of prosecution is held to be sufficient for acquittal of accused as held in **1995 SCMR 1345**. They added that it is not the quantity but the quality of evidence to prove the charge, and it is settled principle of law that evidence of a police officer is to be scrutinized cautiously while relying upon the same; that the material aspects of the present case, which were to be taken into consideration for just adjudication of the matter, were completely discredited in the testimony of the P.Ws who had been examined in the case and their testimony being full of doubts, defects and dents cannot be relied upon at all; that although the incident is alleged to have taken place in a populated area, yet not a single independent witness from the vicinity was taken into account or associated as mashir or at least as a witness and that too only on the point that the incident took place at the relevant date, time and place and the firing was exchanged between the police party and the culprits, irrespective of the fact of implication of any accused by any of the independent person; that the prosecution story is vague and unacceptable; that it is an admitted fact that the appellants were not known to the complainant and P.W, hence, the question arises as to how did they implicate the present appellants if they had not known them previously; that there is no criminal record of the deceased accused Ayaz Hussain, who admittedly died in a room from where 17 bullets were recovered.

7. On the other hand learned APG has supported the impugned judgment. According to him, the conviction and sentence of appellants is justified.

8. We have given due consideration to the submission made by learned counsel for the appellants as well as APG and gone through the R&Ps minutely.

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9. Perusal of record shows that the prosecution case is full of contradictions which create serious doubts. Admittedly, none of the accused persons, including deceased accused Ayaz Hussain Junejo, has any previous record of being involved in any crime/ offence. Hence, the very base of prosecution story fins not legs. Even the circumstantial evidence is not supportive to prosecution case being contradictory. In this regards, we may refer the deposition of P.W 2 SHO Mir Muhammad has testified that "*in the mashirnama of arrest and recovery, there is no mentioned of empties.*" Further, he has admitted that he had not collected the blood stained earth from the places of Vardat. Such like aspects raise serious doubts in the prosecution case. P.W 3 ASI Ali Hassan has contradicted the statements made by P.W 1 ASI Iqbal Ahmed who had deposed that only two accused namely *Manzoor Gogani and Yousuf Patojo* had successfully fled the scene of offence, however, P.W 3 ASI Ali Hassan has stated that "*Accused Manzoor, Sikoo, Yousif, and Sadam Lashari made their escape good towards the southern side.*" Numerous depositions have also made it clear that 17 bullet empties were recovered from the empty room to which accused Ayaz crawled to and died, here question arises as to how the empties were available in the room where the accused died. The above aspects of the case not only create serious doubt in the case of the prosecution, but also weaken the prosecution's case against the appellants.

10. Needless to add that the prosecution is duty bound to prove its case against the accused beyond any shadow of doubt and if any circumstance created doubt in the prosecution case, benefit thereof must go to the accused as a matter of right, for, any reasonable doubt arising out of the prosecution evidence, picking the judicial mind, is sufficient for acquittal of the accused. In case of *FARYAD Ali V. THE STATE* (2008 SCMR 1086), the Honorable Supreme Court of Pakistan has held that:-

"12. *The common intention of an accused person for murder is a question of fact which can be*

ascertained on the basis of the acts and the conduct of the accused, the ferocity of the attack, the weapon used, the number of blows coupled with the element of pre-concerned of mind. While the appellant in the instant case has caused injuries to Taj Ali (P.W.6) and Mst. Muniran Bibi (P.W.7) with Wahola a blunt weapon and as per medical evidence (discussed above), no such injury has been sustained by the deceased at the hands of the appellant which is proof of the fact that despite participating in the occurrence, the appellant had no intention to kill any member of the complainant party. Reference in this context can be placed in the case of Zahid Imran and others v. The State and others PLD 2006 SC 109."

In case of Muhammad Akram v. The State (2009 SCMR 230), the Honourable Supreme Court of Pakistan has held that:-

"It is an axiomatic principle of law that in case of doubt, the benefit thereof must accrue in favour of the accused as matter of right and not of grace. It was observed by this Court in the case of Tariq Pervez v. The State 1995 SCMR 1345 that for giving the benefit of doubt, it was not necessary that there should be many circumstances creating doubts. If there is circumstance which created reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of doubt not as a matter of grace and concession but as a matter of right."

11. In the light of what has been discussed above, we are of the considered view that the prosecution has miserably failed to prove its case against the appellants and; therefore, these appeals are allowed and conviction and sentence recorded by the trial court against the appellants are set aside.

These are the reasons for the short order dated 07.11.2017.

S.Ashfaq.PS.