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ORDER SHEET
IN THE HIGH COURT OF SINDH, CIRCUIT COURT, LARKANA
Cr. Appeal No.D-21 of 2018
Cr. Jail Appeal No.D-18 of 2018

Date of
Hearing
22.07.2020.

ORDER WITH SIGNATURE OF JUDGE

Mr. Altaf Hussain Surahio, advocate for the appellant in both appeals.
Mr. Mohammad Noonari, DPG.
Mr. Abdul Rehman A. Bhutto, advocate for the complainant.

Per prosecution case, the complainant nominated four accused persons, namely, 1) Haseen, 2) Baggan, 3) Allah Bux, and 4) Riaz (the appellant), all by caste Bhayo, along with two unidentified accused. Per FIR, co-accused Haseen (since absconding) had allegedly fired with his K.K. upon deceased Mohammad Alam, whereas accused Baggan had caused KK butt blows to PW Hazar Khan on his chest and role attributed to co-accused Allah Bux and appellant Riaz is of ineffective firing. The main prosecution witness, namely, Faqir Mohammad, who too was an eyewitness of the alleged incident, was not examined at trial. The incident as shown had occurred on 03.02.2017, whereas appellant was arrested on 03.03.2017; however, recovery of alleged offensive weapon was shown to have been made from him on 07.03.2017. The empties were also recovered by the I.O. on 03.02.2017 and the same were sent to laboratory for examination on 27.02.2017 and the weapon alleged produced by the appellant was sent on 17.03.2017 i.e. with the delay of about 10 days and 24 days respectively, available at pages 133 and 135 of the paper book.

Heard learned Counsel for the parties and perused the evidence and other material made available before us on record. For the reasons to be recorded later-on, both the appeals are allowed. The

conviction and sentences recorded against the appellant vide impugned judgment dated 05.04.2018, passed by the learned Judge, Anti-Terrorism Court, Kashmore at Kandhkot in Special Case No.13/2017 re-The State v. Riaz Bhayo & others, being outcome of Crime No.03/2017 of P.S Karampur-Jamal, registered under Sections 302, 324, 337-H(2), 148, 149, PPC and 6/7 of Anti-Terrorism Act, 1997 as well as Special Case No.14/2017 re-The State v. Riaz Bhayo, being outcome of Crime No.11/2017 of P.S Karampur-Jamal, registered under Section 23(i)(a) of Sindh Arms Act, 2013, are set aside and the appellant is acquitted of the charges. The appellant, who is confined in jail, shall be released forthwith if his custody is not required in any other case.


JUDGE
JUDGE

IN THE HIGH COURT OF SINDH, CIRCUIT COURT LARKANA

Cr. Jail Appeal No. D-18 of 2018

Cr. Appeal No. D-21 of 2018

Present

Mr. Justice Muhammad Saleem Jessar,
Mr. Justice Khadim Hussain Tunio,

1. Mr. Altaf Hussain Surahio, advocate for the appellant .
2. Mr. Muhammad Noonari, D.P.G. for the State.
3. Mr. Abdul Rehman Bhutto, advocate for the complainant.

Date of hearing : 22-07-2020

Date of order : 22-07-2020

JUDGMENT

KHADIM HUSSAIN TUNIO, J. By means of this common judgment, we intend to dispose of the above captioned criminal appeals filed by appellant Riaz Bhayo, impugning the Judgment dated 05.04.2018, passed by Special Judge Anti-Terrorism Kashmore @ Kandhkot in Special Case No.13/2017, for offences punishable U/S 302,324,337-H(2), 506-II, 148,149 P.P.C R/w Section 6/7 ATA, Act, 1997, culminated from Crime No.03/2017 of P.S Karampur-Jamal, and Special Case No.14/2017, for offence punishable U/s 23(i)(A), Sindh Arms Act, 2013, P.S. Karampur Jamal, whereby appellant/accused has been convicted and sentenced as under:-

(a) Accused Riaz Ali is convicted u/s 265-H(ii) Cr.P.C for an offence punishable under section 302 (a) read with section 149 PPC and sentenced to suffer R.I for life imprisonment. He is also ordered to pay compensation of fine of Rupees (ONE LAC) to the heirs of deceased



Muhammad Alam as compensation as under section 544-A Cr.P.C and in of default of payment or the recovery of the said aforesaid amount he shall suffer imprisonment for period of S.I for six months more.

(b) Accused Riaz Ali is convicted for an offence punishable under section 324 read with section 149 PPC and sentenced to suffer R.I for ten years. He is also ordered to pay compensation u/s 544-A Cr.P.C of Rupees (twenty thousand) only to the victim/injured Hazar Khan and in case of default of payment of compensation he shall suffer imprisonment for period of S.I for three months more.

(c) Accused Riaz Ali is convicted for an offence punishable under section 337/H2 read with section 149 PPC and sentenced to suffer R.I for two years.

(d) Accused Riaz Ali is convicted for an offence punishable under section 506/2 read with section 149 PPC and sentenced to suffer R.I for one year.

(e) Accused Riaz Ali is convicted for an offence punishable under section 148 PPC and sentenced to suffer R.I for one year.

(f) Accused Riaz Ali is convicted for an offence punishable under section 23(1)(a) Sindh Arms Act 2013, and sentenced to suffer R.I for seven years.

(g) Accused Riaz Ali is convicted for an offence punishable under section 7 (a) of Anti Terrorism Act 1997 read with section 149 PPC and sentenced to suffer R.I for life imprisonment. He is also ordered to pay fine of Rupees (thirty thousands) and in case of default of payment of fine he shall suffer imprisonment for period of S.I for two months more.

(h) Accused Riaz Ali is convicted for an offence punishable under section 7 (c) of Anti Terrorism Act 1997 read with section 149 PPC and sentenced to suffer R.I for ten years. He is also ordered to pay fine of Rupees (ten thousand) and in case of default of payment of fine he shall suffer imprisonment for period of S.I for one month more.

2. Precisely, facts of the case as emanated from F.I.R No.03/2017 are that about four months prior to the present incident, accused Haseen alias Mola Bux and others armed with deadly weapons, while creating a terror-stricken environment, committed dacoity of a buffalo from



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the house of complainant during which complainant's brother Kamalduin and cousin Haji Karim Bux Tanwri showed resistance, on which accused killed both of them. That case was registered as crime No.83/2016, U/S 395,396, 337/H2 P.P.C and 6/7 ATA at P.S. Karampur-Jamal. On the day of incident complainant along with his cousin Hazar Khan and Faqeer Muhammad Alam were sitting on the cots in front of their otaq situated in village Wahid Bux Bijarani. At about 11:30 a.m, six accused, boarded on two motorcycles, came there and were identified by the complainant party as Haseen alias Mola Bux, Allah Bux, Baggan and Riaz, all by caste Bhaya along with two un-identified accused who were present with uncovered faces. Accused Haseen alias Mola Bux fired from his Kalashnikov upon Muhammad Alam, accused Baggan Bhayo caused butt blows of Kalashnikov to Hazar Khan, which hit him below his neck. Thereafter, accused ran away while making aerial firing. Afterwards, the complainant saw injured Muhammad Alam who had sustained fire on his back side, which was through and through and blood was oozing and he succumbed to his injuries. The complainant party brought the dead body to Police Station and lodged the F.I.R. On 07.03.2017, appellant Riaz Bhayo, who was under arrest prior to this in case/crime No. 03 of 2017, exclaimed during interrogation that he was ready to produce the weapon that was



allegedly used by him in the commission of the offence. Therefore, he led the police party headed by SHO Syed Noor Ali Shah to his house and from a patch of *palal* grass on the southern side of his house; he produced a Kalashnikov, having a folding rubber butt, along with a magazine which contained fifteen live bullets. Having failed to produce a valid license for the same, the weapon was confiscated by the police in the presence of mashirs P.C Doulat Khan and P.C Abdul Ghaffar and the accused and case property were brought back to police station where another F.I.R bearing crime No. 11 of 2017 was lodged u/s 23(i)A, Sindh Arms Act, 2013.

3. After providing necessary documents, a formal charge was framed against the appellant/accused in which he denied the prosecution allegations and claimed to be tried.

4. In order to substantiate the charge against the appellant/accused, the prosecution examined P.W-1, Tapedar Nazar Muhammad at Ex.10, he produced sketch of place of wardat at Ex.10/A, P.W-2, complainant Jamaludin at Ex.11, he produced FIR at Ex.11/A and receipt of receiving the dead body of deceased Muhammad Alam at Ex 11/B. (PW.3) eye witness as well as injured Hazar Khan at Ex 12, he produced original 164 Cr.P.C statement at Ex 12/A. (PW-4) ASI Mehrab at Ex 13, he produced copy of roznamcha entry at Ex 13/A,



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mashirnama of inspection of dead body of deceased Muhammad Alam at Ex 13/B, danistnama as well as lash chakas form of deceased Muhammad Alam at Ex 13/C and 13/D respectively, mashirnama of injuries of injured Hazar Khan at Ex 13/E, letter addressed to Medical officer for treatment of injured at Ex 13/F, copy of arrival entry at Ex 13/G, mashirnama of seal the cloth of deceased Muhammad Alam at Ex 13/H. (PW-5) Manzoor is also eye Witness as well as mashir of place of wardat and recovery at Ex 14, he produced mahsirnama of place of wardat at Ex 14/A and mashirnama of arrest of present accused Riaz at Ex 14/B. (PW-6) Medical Officer Doctor Kartar Lal at Ex 15, he produced provisional Medical Certificate of injured Hazar Khan at Ex 15/A, Post Mortem report of deceased Muhammad Alam at Ex 15/B, letter issued by SHO addressed to M.O for treatment at Ex 15/C, lash chakas form of deceased Muhammad Alam at Ex 15/D. (PW-7) PC Doulat Khan at Ex 16, he produced memo of recovery of KK, bullets and formal arrest of accused at Ex 16/A. Learned S.P.P. has submitted statement, in which he has given up P.Ws Muhammad Hassan and Faqeer Muhammad, such statement is kept on record at Ex 17. (PW-8) Inspector/CIO Noor Ali Shah at Ex 18, he produced roznamcha entry at Ex 18/A, letter addressed to S.S.P Kashmore @ Kandhkot for permission to dispatch the blood stained earth at Ex 18/B, letter



addressed to Mukhtiar Kar for preparation of sketch place of wardat at Ex 18/C, copies of roznamcha entry at Ex 18/D and 8/E respectively. FIR of Crime No 11/2017, under section 23(i)(A), Sindh Arms Act at Ex 18/F, copies of roznamcha entry at Ex 18/G to 18/I respectively, report of Chemical Examiner Karachi at Ex 18/J, two forensic science laboratory reports at Ex 18/K and 18/L. Thereafter, prosecution side was closed vide statement of learned D.D.P.P. for the State at Ex.19.

5. The statement of accused was recorded under Section 342 Cr.P.C, in which he stated that he has been implicated falsely due to enmity, however, he neither examined himself on oath nor adduced any evidence in his defence.

6. After hearing the learned counsel for the parties, the trial Court convicted the appellant/accused as mentioned above.

7. Learned counsel for the appellant submits that the appellant is innocent and has been falsely implicated in both the cases; that he was juvenile at the time of incident; that Section 6/7 ATA, 1997 is not applicable as there is admitted enmity between the parties, therefore, the present case does not come within the ambit of Sections 2,6 and 7 of ATA, 1997; that learned trial court has erred on facts and law; that learned trial court has not considered the material contradiction brought on the record; that learned trial court has also not applied its



judicial mind; that no active role for causing any injury to the deceased has been attributed to the present appellant; that alleged recovery has been foisted upon the appellant; that 22 empty shell of bullets/K.K were recovered and were sent to the forensic science laboratory, but it is not clear that which bullet has hit the deceased. He has lastly prayed for setting-aside the impugned judgment.

8. On the other hand, learned Deputy Prosecutor General has supported the impugned judgment and submitted that all the P.Ws have supported the case of prosecution, that their evidence is un-shattered; that the trial court has rightly convicted the appellant and the impugned judgment in the circumstances does not require any interference by this Court. However, learned counsel for the complainant has adopted the same arguments.

9. We have heard learned counsel for the appellant, learned counsel for the complainant and learned Deputy Prosecutor General Sindh and perused the record minutely with their assistance.

10. From the perusal of record, it is revealed that the complainant nominated four accused persons, namely, Haseen, Baggan, Allah Bux, and Riaz (the appellant), all by caste Bhayo, alongwith two unidentified accused. Per FIR, co-accused Haseen (since absconding)



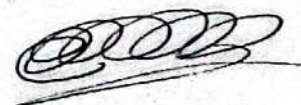
had allegedly fired with his K.K. upon deceased Mohammad Alam, whereas accused Baggan had caused KK butt blows to PW Hazar Khan on his chest and role attributed to co-accused Allah Bux and appellant Riaz is of aerial firing. The main prosecution witness, namely, Faqir Mohammad, who too was an eyewitness of the alleged incident, was not examined at trial. The incident as shown had occurred on 03.02.2017, whereas appellant was arrested on 03.03.2017; however, recovery of alleged crime weapon was shown to have been made from him on 07.03.2017. The empties were also recovered by the I.O. on 03.02.2017 and the same were sent to laboratory for examination on 27.02.2017 and the weapon alleged to have been produced by the appellant was sent on 17.03.2017 i.e. with the delay of about 10 days and 24 days respectively, available at pages 133 and 135 of the paper book.

11. It is pertinent to mention here that the case of the present appellant is completely different from the primary accused persons, who were assigned the role of actively firing upon the deceased. It was mentioned in the F.I.R that the present appellant caused aerial firing in order to cause a terror-stricken environment. At trial, eye-witnesses have deposed that the present appellant made aerial firing. Except for that role, aerial firing, the appellant has not been assigned any overt



act/firing upon the deceased or causing any injury to injured Hazar Khan. If it is believed that the appellant shared a common intention with primary co-accused who have been specifically attributed the role of aerial firing upon the deceased, then we are unable to understand as to what were the circumstances which prevented the appellant from shooting even though he was armed with such a high-caliber rifle and why did he not directly fired upon the deceased or witnesses. Prosecution could not bring on record any evidence that suggested that the appellant shared a common intention with the primary co-accused. There is also no evidence to satisfy the court that the appellant facilitated the primary co-accused in the commission of offence. Here, it would be safe to assume that since the appellant is a caste-fellow and closely related to the other co-accused, he was falsely implicated and that the complainant party threw a wider net to satisfy their enmity and settle their scores with the appellant and co-accused on the pretext of enmity. The Hon'ble Apex Court, in the case titled as *Hassan v. The State* (1969 SCMR 454) has been pleased to observe that:-

"It appears from the observations of the High Court that the High Court was still thinking of the charge of rioting and that mere presence or being a member of the unlawful assembly was sufficient to warrant a conviction. The Sessions Judge had applied section 34 to the case and in order to support a conviction under that section mere presence would not be sufficient, but



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there must be proof of some overt act on the part of each accused done in furtherance of the common intention. Here the evidence is clear that the appellant was empty handed and he did not assault Suleman as was stated by P. W 3. Neither of the Courts has considered the case of this appellant separately or the evidence against him. He went to the place empty handed and there is no evidence that he assaulted anybody or that in the circum-stances he could have intended to cause a grievous hurt to, anybody. Judged by the standard applied by both the High Court and the Sessions Judge to the case of the three acquitted persons, the case of the appellant stands on a much more favourable ground and we see no justification for upholding his conviction. The appeal is, there-fore, allowed and the conviction and sentence on the appellant are set aside and he is acquitted."

12. Moreover, the alleged recovery of the crime weapon as stated above was made and sent to the ballistics examiner after a shocking delay of 27 days. Such a delay was at no point explained by the prosecution, nor did the prosecution provide any evidence to establish the safe custody of the same. Therefore, any report from the ballistic expert in that regard cannot be believed in order to uphold the conviction of the appellant. In this regard, the Hon'ble Apex Court in the case of *Javed Khan alias Bacha and another v. The State* (2017 SCMR 524) has been pleased to observe that:-

"10. As regards the matter of matching the bullet casing with the pistol, it is not free from doubt. The Police allegedly recovered the pistol stated to have been used in the crime in another case (FIR No.237 dated 29.6.2001) however the pistol was sent to the Forensic Science Laboratory on 7.1.2002, whereas the



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investigation officer stated that Raees Khan disclosed using the same weapon in this crime on 14.10.2001; the delay in sending the pistol was not explained. Neither the Forensic Science Laboratory nor any of the policemen, who had retrieved the bullet and its casing and had kept them in custody and then delivered them to the Laboratory, mention the marks affixed on the seals affixed on the parcels in which the said items were delivered to and received by the Laboratory. Under such circumstances it would not be safe to uphold the conviction of the appellants merely on the basis of the firearm expert's report because of the legitimate concerns about when and how the bullet casing and pistol were delivered to the Forensic Science Laboratory."

13. The above aspects have led us to believe that the prosecution has failed to establish its case beyond reasonable shadow of doubt and has failed to discharge its duty in that regard. We have found that the incident has not taken place in a manner as stated by the prosecution. There are strong circumstances in the prosecution case which expose reasonable doubt and led us to hold that the prosecution has not proved its case against the appellant for the offences charged beyond a reasonable doubt keeping the assertion of the FIR in juxtaposition of the evidence adduced by the prosecution. It is well settled principle of criminal administration of justice that no conviction can be awarded to an accused until and unless reliable, trustworthy and unimpeachable evidence containing no discrepancy casting some cloud over the veracity of prosecution story is adduced by the prosecution. We are of the considered view that prosecution could not establish the guilt of appellant at home without reasonable doubt. In this regard, we find guidance from the case titled as "*Tariq Ali Shah and another v. The State and others*" (2019 SCMR 1391).



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14. The Hon'ble Apex Court, in the case titled as "Faheem Ahmed Farooqui v. The State" (2008 SCMR 1572) has also been pleased to observe as under:-

"It needs no reiteration that for the purpose of giving benefit of doubt to an accused person, more than one infirmity is not required, a single infirmity creating reasonable doubt in the mind of a reasonable and prudent mind regarding the truth of the charge makes the whole case doubtful. Merely because the burden is on the accused to prove his innocence does not absolve the prosecution from its duty to prove its case against the accused beyond any shadow of doubt."

15. In another case titled as "Mohammad Mansha v. The State" (2018 SCMR 772) whereby the Hon'ble Supreme Court of Pakistan has held as under:-

"4. Needless to mention that while giving the benefit of doubt to an accused it is not necessary that there should be many circumstances creating doubt. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of such doubt, not as a matter of grace and concession, but as a matter of right. It is based on the maxim, "it is better that ten guilty persons be acquitted rather than one innocent person be convicted". Reliance in this behalf can be made upon the cases of Tarique Parvez v. The State (1995 SCMR 1345), Ghulam Qadir and 2 others v. The State (2008 SCMR 1221), Mohammad Akram v. The State 2009 SCMR 230 and Mohammad Zaman v. The State (2014 SCMR 749)."


16. In the case titled as "Qasim & another v. The State" (2017 SCMR 986), the Hon'ble Apex Court has held as under:-




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"20. Even a single doubt, if found reasonable, would entitle the accused person to acquittal and not a combination of several doubts is bedrock principle of justice. Reference may be made to the case of Riaz Masih @ Mithoov. The State (1995 SCMR 1730)."

17. In view of above, both the appeals are allowed. The conviction and sentences recorded against the appellant vide impugned Judgment dated 05.04.2018, passed by the learned Judge, Anti-Terrorism Court, being outcome of Crime No.03/2017 of P.S Karampur-Jamal, registered under Sections 302, 324, 337-H(2), 148, 149, PPC and 6/7 of Anti-Terrorism Act, 1997 as well as Special Case No.14/2017 re-The State v. Riaz Bhayo, emanated from Crime No.11/2017 of P.S Karampur-Jamal, registered under Section 23(i)(a) of Sindh Arms Act, 2013, are set aside and the appellant is acquitted of the charges. The appellant, who is confined in jail, shall be released forthwith if his custody is not required in any other case. These are the reasons for the said short order dated 21.07.2020.


27.7.2020,
Judge


27/7/2020.
Judge

Abdul Salam/T.A