

IN THE FEDERAL SHARIAT COURT
(APPELLATE JURISDICTION)

Present

MR. JUSTICE HAZIQUK KHAIRI, CHIEF JUSTICE.

CRIMINAL APPEAL NO.70/K OF 2006

Javaid Ali son of Sahito Khan Zardari,
Resident of 29 Dad, Taluka and
District Nawabshah.

.....Appellant.

Versus

The State.

.....Respondent.

Counsel for the appellant:

Mr. Ali Muhammad Baloch,
Advocate.

Counsel for the State:

Agha Zafir, AAG, Sindh.

No. & Date of FIR/PS

No.25/2004, 29-4-2004
P.S. Dour, District Nawabshah.

Date of judgment
of trial court

8-11-2006

Date of institution
of appeal

20-11-2006

Date of hearing

11-1-2007

Date of decision

8-2-2007

.....

12/1

JUDGMENT:

HAZIQUL KHAIRI, CHIEF JUSTICE.- Appellant Javaid Ali

is aggrieved by the judgment dated 8-11-2006 passed by the learned IIInd Additional Sessions Judge, Nawabshah whereby the appellant was convicted under section 398 PPC and sentenced to undergo seven years R.I. with fine of Rs.10000/- or in default thereof to further undergo three months R.I. The appellant was also convicted under section 353 PPC and sentenced to undergo two years R.I. with fine of Rs.5000/- or in default to further undergo one month R.I. However, both the sentences were ordered to run concurrently and the appellant was extended benefit under section 382-B Cr.P.C.

2. Brief facts of the case are that on 29-4-2004 at about 9.16 P.M. complainant ASI Wazir Hussain Shahani alongwith PC Qurban Ali left police station for patrolling on private motorcycle. After patrolling in Razaabad Muhallah Dour they proceeded to link road village Karim Bux Wagan and on the way when they reached near village Lodho Khan at about 8.10 P.M., they saw three persons armed with pistols on the headlight of motorcycle who signalled them to stop believing them to be from public with intention to rob them. On seeing them that they were in police uniform, they started firing at them to which they returned fire in their self defence, as a result of which one of them fell down whereas another taking advantage of darkness made good his escape. The third one was apprehended by police party comprising ASI Noor Muhammad Zardari, PC Amjad Hussain and Sain Bux who

were taking round in police mobile. On inquiry, the apprehended person disclosed his name as Javaid Ali Zardari (appellant). One unlicensed pistol of 30 bore containing two live bullets in its magazine was secured from him. The injured person disclosed his name as Bashir alias Asghar Mulo Brohi from whom one 30 bore pistol alongwith three live bullets was recovered. On inquiry, apprehended appellant Javaid Ali Zardari disclosed the name of absconding culprit as Abdul Razzaque Chandio. A motorcycle of red colour was also recovered by police from the spot without number plate stated to belong to Bashir who expired subsequently in a hospital at Dour.

After completing usual investigation, the accused were challaned and charged under section 17(i) of the Offences Against Property(Enforcement of Hudood) Ordinance, 1979 and under sections 353, 324 PPC to which they denied.

3. The prosecution examined complainant ASI Wazir Hussain who produced the mashirnama of arrest of appellant Javaid Ali and appellant Bashir alias Asghar Mullo of recovery and F.I.R. PW ASI Noor Muhammad produced mashirnama of the deadbody of Bashir, inquest report and mashirnama of place of occurrence. PW.3 Qurban Ali and PW.4 Inspector Fida Hussain, I.O. produced mashirnama of arrest of accused Abdul Razzaque Chandio and personal search, recovery of pistol and three live bullets. Dr. Gul Hassan Chandio, PW.5 produced post mortem examination report of accused Bashir.

4. Accused were examined under section 342 Cr.P.C. who

denied the allegation against them. None of them examined him or herself on oath to disprove the charges nor any of them examined any defence witness.

5. PW.1 ASI Wazir Hussain, the complainant in his deposition reiterated his version as contained in the F.I.R. including arrival of police party headed by ASI Noor Muhammad at the spot after hearing the said exchange of fire. The person who was lying on the ground after sustaining the injuries and was having 30 bore big mouser, which was off-loaded and found it to contain 8 live bullets in its magazine. Appellant Javaid Ali disclosed the name of injured as Bashir alias Asghar Mullo son of Pir Bux and also disclosed that motorcycle available on spot belonged to injured accused Bashir. It was not having the registration number and bearing model 1998 CD 70. On further inquiry about the licence of weapon, appellant Javaid Ali disclosed that the same is without licence. The secured motorcycle was seized under section 550 Cr.P.C. and then making ASI Noor Muhammad and PC Qurban Ali to be the mashirs, the complainant prepared the mashirnama of arrest of Javaid Ali and Bashir, recovery of weapons and motorcycle and completed other formalities and he lodged the report bearing No.25 of 2004 under sections 324 and 353 PPC and 17(I) of the said Ordinance. A case under section 13-D of Arms Ordinance was also registered separately vide crime No.26 of 2006 against the appellant vide F.I.R. in that case.

6. PW.2 ASI Noor Muhammad and PW.3 Qurban Ali, PC

in their statements corroborated the deposition of PW.1 Wazir Hussain and in fact repeated all the relevant facts narrated by PW.1.

PW.4 Inspector/I.O. Fida Hussain in his statement deposed that on 29-4-2004 he was posted at Police Station, Dour in Investigation Branch as Incharge. He received the papers of crime forwarded by SHO of Police Station, Dour for investigation. The appellant Javaid Ali who was injured during the commission of crime was referred to RHC Dour for examination, treatment and certificate. During the incident, Bashir alias Asghar Mullo was killed. His deadbody was brought at RHC Dour. He went there and prepared mashirnama of deadbody of deceased Bashir in presence of mashirs ASI Noor Muhammad and PC Qurban Ali and obtained their signatures. The inquest report of the deadbody of Bashir was prepared by him in presence of these mashirs and he obtained their signatures. He saw Exh.6/B and confirmed its correctness. On the same day he examined the prosecution witnesses under section 161 Cr.P.C. On the next day of the incident, he visited the place of wardat and recovered 05 empties of SMG and 04 empty bullets of 30 bore. The mashirnama of wardat and recovery was prepared by him in presence of the said mashirs and obtained their signatures. On 7-5-2004 he arrested accused Abdul Razzaque Chandio from Balochpur bus stand and secured one 30 bore pistol alongwith magazine which was loaded with three bullets. Mashirnama of his arrest and recovery was prepared by him in presence of HC Chakkar Khan and PC Karim Bux and obtained their signatures. He produced it and confirmed its

correctness and identified the appellant Javaid and accused Abdul Razzaque present in court to be the same.

7. PW.5 Dr. Ghulam Hassan Khoso in his statement deposed that on 29-4-2004 he was posted as Medical Officer at RHC Dour. The dead body of Bashir Ahmed was referred to him by police of Police Station, Dour for post mortem examination and report. From the internal and external examination of the dead body, he opined that the cause of death was due to the fire arm injury which was sufficient to cause his death. On the same day the police of Police Station, Dour had also referred appellant Javaid Ali Zardari for examination and treatment.

8. Appellant Javaid Ali in his statement u/s 342 Cr.P.C. alleged that he and deceased accused Asghar were going to his village on his motorcycle. Complainant and PC Qurban stopped them and demanded illegal gratification and on refusal, he was maltreated. Police committed the murder of deceased Bashir alias Asghar Mullo and in order to save their skin from the punishment for murder of Bashir, the police party falsely involved him in this case so that he may be prevented from giving evidence against them. He has further stated that he has been acquitted from the case under section 13-D Arms Ordinance and produced copy of judgment as Exh.11/A. However, he did not examine himself on oath nor adduced any evidence in his defence. Accused Abdul Razzaque in his statement stated that he has been implicated in the case falsely due to enmity of Dour police

with his father and due to non-payment of illegal gratification. He was already in police custody in another case. He has not examined himself on oath nor led any defence.


9. What transpires from the prosecution evidence is that there was encounter between the accused persons and the police as a result whereof accused Bashir died and the second accused escaped but later arrested and the third namely appellant Javaid Ali was injured and arrested. Mashirnama of place of occurrence and mashirnama of arrest etc were prepared. As per Fida Hussain, Inspector/Investigating Officer, on the next date of incident, he recovered five empties of SMG and four empty bullets of 30 bore.

10. There is no doubt that in this incident, accused Bashir died on account of his injuries whereas appellant Javaid Ali also received injuries. The prosecution witnesses namely ASI Wazir Hussain, ASI Noor Muhammad, PC Qurban Ali and Inspector Fida Hussain, I.O. are police officials, according to whom the police party had an encounter with the accused persons who started firing at them on seeing them in police uniform but strange enough none of them was injured in this encounter although firing continued for 10-15 minutes. What is pertinent to note is that there is a mere accusation of the prosecution that the accused intended to rob them but in furtherance thereof there is nothing to suggest either of theft or extortion as required under section 390 PPC read with sections 378 and 383 PPC. No property to be taken was produced or identified, not even named. It was pointed

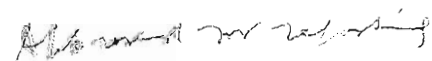
out by Mr. Ali Muhammad Baloch, counsel for the appellant, though although the incident had taken place at a public road and there was a village nearby, no inhabitant thereof was made a witness of the incident or of recovery as required u/s 103 Cr.P.C. The empties were recovered by the police the next day for which no excuse for delay was given, which were not sealed nor produced before the Ballistic Expert. He also referred to the cross examination of PW.1 Wazir Hussain who lodged the F.I.R. and stated that he did not remember if he had taken the appellant Javaid Ali to hospital.


11. The facts as borne out from record are a pointer to high handedness on the part of the police who in any case had used ruthless force against the accused persons resulting into the death of one of them. It cannot be ruled out that for justification thereof the police has concocted a cock and bull story implicating the accused persons in a crime and foisting upon them arms stated to be recovered from them.

12. Resultantly the appeal is accepted and the impugned judgment of the learned IIInd Additional Sessions Judge, Nawabshah is set aside with direction to the jail authorities to release the appellant forthwith if he is not required in any other criminal case.


JUSTICE HAZIQUL KHAIRI
Chief Justice

Announced on 8-2-07
at Karachi.
M. Khalil




8/2/07