

IN THE SUPREME APPELLATE COURT GILGIT-BALTISTAN
GILGIT
Cr.Appeal No. 02/2010

Before: - Mr. Justice Muhammad Nawaz Abbasi, Chief Judge.
Mr. Justice Muhammad Yaqoob, Judge.

Ehsan Ullah s/o Azur Khan r/o Bargo Gilgit. Petitioner/Appellant.

VERSUS

The State

Respondent.

CHARGES UNDER SECTION 302/324/34 P.P.C. READ WITH SECTION 6/7 ANTI TERRORISM ACT, 1997 VIDE F.I.R. NO. 408/05 OF POLICE STATION CITY GILGIT AND F.I.R. NO. 420/05 UNDER SECTION 13 A.O.

PETITION FOR LEAVE TO APPEAL UNDER ARTICLE 61(B) AGAINST THE ORDER/JUDGMENT OF CHIEF COURT DATED 21-04-2010, WHEREBY APPEAL FILED BY THE APPELLANT ALONGWITH OTHER TWO ACCUSED HAVE BEEN DISMISSED UPTO THE EXTENT OF APPELLANT ONLY AND ALLOWED UPTO TO THE EXTENT OF TWO CO-ACCUSED NAMEDLY SHER NAWAZ AND REHMAT AMIN.

Present: - Malik Haq Nawaz, Senior Advocate for petitioner.
Advocate General, Gilgit-Baltistan for the State.

Date of Hearing: - 03-11-2010.

JUDGMENT:-

Muhammad Yaqoob, J..... By this single judgment we intend to dispose of Cr.Appeal.No.02/2010, filed by the convict namely (Ehsanullah) and Cr.P.L.A.No. 03/2010, preferred by the State, as common question of facts and law is involved in both the matters.

Precisely stating the facts of the case are that the S.H.O. police station city Gilgit, has registered a case on 13-08-2005, vide F.I.R. No. 408/2005, under section 302, 324, 34 P.P.C. and 6/7 of Anti Terrorist Act, 1997, on the written application submitted by Hajat Ali (PW-3) wherein the said PW has stated that he is resident of Bargo and is

member of the Union Council of the Area, to day on 13-08-2005, M/S. Shahzada Khan, Jaffar Ali, Haji Ali Madad and other people residents of Bargo were come to Gilgit in the Dotson of Ijlal Hussain for their own business.

At about 7:00 a.m. when the Dotson reached in the "Pari" between the village Harpoon and Hainzel, the terrorists who were sitting already there opened random firing on the passengers of the said vehicle with their automatic weapons. In the result of firing, "Shahzada_Khan s/o Muhammad Ayub" received bullet injuries and died on the spot, where as M/S Jaffar Ali, Abdar Hussain, Wajahat Hussain and Tareef Hussain injured critically. The deceased and injured persons have no enmity with any body. Apparently, the occurrence is result of present unfortunate tension of Shia and Sunni. However, the legal heirs of the deceased and the injured persons will themselves complain their grievances.

After completion of the investigation incomplete challan was submitted in the court on 03-01-2006, against accused Ehsanullah and Rehmat Amin, whereas accused Sher Nawaz was shown as absconder, and place in column No.2 of the challan.

Accused namely Sher Nawaz was arrested by the police on 25-01-2007 and complete challan against the said accused was submitted in the trial court for trial. The prosecution to prove their case against the above named three accused produced and examined, 17 P.W's and also re- examined the (4) P.W's who were examined prior to arrest of the absconded accused "**Sher Nawaz**". The prosecution also produced fire arms expert report, Exh.P/A, autopsy and medico legal reports, Exh. PM, Exh.PM/1,Exh. PM/2 and photographs of Dotson Exh.PW-14/1. That on conclusion of trial, the learned trial court convicted all the three accused and awarded following punishments:-

- (i) Ehsan Ullah (petitioner/accused)
 - (a) death sentence under section 302/34 read with section 6/7 Anti Terrorist Act 1997, and a fine of Rs.300,000/-.

(b) Ten years rigorous imprisonment under section 324/34 read with section 6/7 Anti Terrorist Act 1997 and a fine of Rs. 100,000/- .

(c) Seven years rigorous imprisonment under section 13-A.O with benefit of 382(b) Cr.P.C.

(d) In default of payment to undergo one year rigorous imprisonment.

(ii) Rehmat Amin, Respondent/accused.

(a) Dead sentence under section 302, read with section 6/7 Anti Terrorist Act 1997 and fine of rupees three lac Rs. (300,000/-).

(b) Ten years rigorous imprisonment under section 324/34 read with Antiterrorist Act and fine of Rs. One lac (100,000/-).

(c) Seven years rigorous imprisonment under section 13- A.O with benefit of section 382-b, Cr.P.C.

(d) In default of payment to undergo one year rigorous imprisonment.

(iii) Sher Nawaz, Respondent/accused.

(a) Awarded life imprisonment under section 302/34, read with section 6/7 Antiterrorist Act and a fine of Rs. three lac (300,000/).

(b) Ten years rigorous under section 324/34 read with section 6/7 Antiterrorist Act and a fine of Rs. One lac, (100,000/-).

(c) In default of payment to undergo one year rigorous imprisonment.

The petitioner and respondents No.1 and 2, preferred an appeal under section 410 Cr.P.C. before the Hon'ble Chief Court Gilgit-Baltistan against the impugned judgment passed by the trial court dated 27-04-2009. The learned Division Bench of Chief Court Gilgit-Baltistan, vide its judgment dated 21-04-2010, acquitted respondent No.1 and 2 from all the charges leveled by the prosecution, while appeal to the extent of present petitioner "Ehsanullah" has been dismissed and maintained the conviction /sentence awarded by the Trial Court.

Being dissatisfied and aggrieved from the judgment, present petitioner has directed this petition for leave to appeal which has been admitted for regular hearing on the point of re-appraisal of evidence. We therefore deem it proper to reproduce the contents of short order dated 04-05-2010 for elaboration:-

“Having heard the learned counsel we find it is a fit case for reappraisal of evidence. Leave is accordingly granted with direction that the appeal will be heard on present record with permission to the parties to add additional documents in the original record. “

We have heard the learned counsel for the parties at length. The learned counsel for the petitioner mainly contended that the evidence against the petitioner/convict has been procured with malafide intention, that the occurrence is un-seen, as evident from the statement of F.I.R. lodger, who should have been informed about the names of the assailants, as he was a responsible person and he had met the occupants of the vehicle. The same were not disclosed to him rather no body had any information regarding the name of assailants.

The present petitioner and the respondents No.1 and 2 have been nominated after a period of three days of occurrence, as such the statements of PW-1 to 4 is highly doubt full and can not be relied upon their deposition. The learned Division Bench of Chief Court Gilgit-Baltistan has rightly extended the benefit of doubt in favor of respondents No.1 and 2, namely Rehmat Amin and Sher Nawaz Khan.

He further submits, that the impugned judgment of Hon'ble Chief Court Gilgit-Baltistan is not sustainable in the eye of law and is liable to be set aside, as the basic principle of reappraisal of evidence in this criminal case have been completely ignored and all benefit of inherent doubts have been extended to prosecution instead of defence, as such the learned Division Bench has violated this golden principle also.

The learned counsel for petitioner further emphasized that the prosecution has miserably failed to bring the guilt Home against the petitioner as well as respondents No.1 and 2. By producing trust

worthy and convincing evidence against the petitioners without any delay, this aspect of the case has not been taken into consideration by the learned division Bench of Chief Court Gilgit-Baltistan, which resulted in great miscarriage of justice.

The learned counsel for petitioner pointed out that the four injured PW's whose statements were recorded on 15/16-08-2005 have not charged any of accused including present petitioner, although PW-5, Shabbir Hussain, P.W-6, Abdul Karim, P.W-8, Riazat Hussain, remained with the injured in the hospital and police has not visited them. He further strongly pressed that the two PW,s namely Abdul Karim PW(6) and Riazat Hussain PW(8) were not identified all the three accused whereas PW-5 Shabbir Hussain identified all the three accused but his evidence is also shaky and not trustworthy. Moreover, the police planted fake recoveries from the present petitioner and respondent No.1 and 2, which were shown to have been recovered on 27-08-2005, but due to unknown reasons F.I.R. No. 420/2005 was lodged on 29-08-2005 (after two days) without any explanation, hence the recovery has no value at all, therefore it can not be used against the present petitioner as well as respondents No.1 and 2 as an evidence. He further submits that as per prosecution case 7 cartridges of 7.62 mm rifle were recovered from the place of occurrence on 13-08-2005, while the weapons i.e. Kalashnikov, 7-mm rifle and repeater was affected on different dates, but these articles were dispatched to Forensic Science laboratory together on 28-03-2006 after laps of 7 months 3 days without any explanation and the safe custody of incriminating articles were not known during the above mentioned period, as such the expert report and other incriminating articles have no value at all in the eye of law.

He concluded his arguments with the last submission that the petitioner is innocent, the occurrence is unseen, all the three accused are not directly charged in the FIR and the complainant has falsely implicated all the three accused in this case. Therefore, the impugned judgment is not maintainable and liable to be set aside.

He further prayed that the present petitioner may kindly be acquitted to meet the ends of justice.

On the other hand the learned Advocate General Gilgit-Baltistan vehemently opposed the arguments advanced by the learned counsel for the petitioner and submits that the prosecution case rests on solid foundation as the witnesses and the F.I.R. lodger have stated true facts without any ambiguity or concoction. The F.I.R. has been lodged promptly, which discloses the name of the deceased as well as the injured persons, who were boarding on the vehicle. The injured persons are natural witnesses and they fully nominated the names of assailants/present petitioner along with respondents No.1 and 2, their veracity could not be shattered by the defence counsel after putting a lot of questions. He further pointed out that the recovery of empty shells have been affected without any delay, report of forensic Science laboratory is in positive and connect all the accused with the commission of murder of Shahzada Khan. The ocular evidence, prompt recovery of weapon of offence, medical evidence and positive report of forensic Science laboratory makes out a strong case against petitioner as well as against respondent No.1 and 2, namely Rehmat Amin and Sher Nawaz Khan, hence the case against all the 3 accused is proved without any shadow of doubt, therefore the learned Division Bench of Chief Court Gilgit-Baltistan has rightly upheld the conviction awarded by the trial court to the present petitioner. He further submits respondents No.1 and 2 are also fully involved in this case. The prosecution has established acquisition beyond shadow of doubt by producing sufficient evidence against all the three accused. He further submits that the impugned judgment of learned Chief Court Gilgit-Baltistan may kindly be upheld to meet the ends of justice.

We have carefully examined the respective contentions as agitated on behalf of the parties in the light of relevant provisions of law and record of the case. We have also minutely perused the impugned judgment dated 21-4-2010, as well as the judgment passed by the Anti-Terrorism Court No. I, Gilgit, with care and caution.

The entire record has been scanned with the eminent assistance of both the learned counsel for the parties. After having careful scrutiny of the entire record, we are of the considered opinion that the case in hand is fit for remand on the following grounds:-

- (a) That the impugned judgment of the learned Division Bench of Chief Court did not contained evolution of evidence and discussion and also did not assign reasons for arriving at the conclusion as required under section 376 Cr.P.C.
- (b) That the learned trial Court has convicted all the three accused under section 324/34 P.P.C read with section 6/7 ATA, awarded 10 years rigorous imprisonment with fine of Rs.1,00,000/- each. Whereas the learned Division Bench of Chief Court has hopelessly failed to apply its judicious mind to the extent of conviction under section 324/34 P.P.C read with section 6/7 ATA.
- (c) That the learned Division Bench of Chief Court is totally silent regarding the conviction/punishment awarded by the learned trial court under section 324/34 P.P.C. as such a legal flaw is apparent on the face of impugned judgment.
- (d) That the instant case is a fit case for re-appraisal of evidence therefore, the findings of learned Division Bench of Chief Court is not sustainable.
- (e) That the acquittal of the respondents No.1 and 2 by the Chief Court without assigning the cogent reasons under section 367 Cr.P.C. Although it is prime duty of the court to note down the points for determination and then to record the decision, whereas a careful perusal of the impugned judgment reveals that acquittal of respondent No.1 and 2 from the charges leveled by the prosecution under section 302/324/34 P.P.C. is baseless and without foundation.
- (f) That the acquittal of the respondent No.1 and 2 did not put forward reasonable, convincing and acceptable grounds to understand that as to why their acquittal has been ordered.
- (g) That at the appellate stage, whole original case stands

re-opened for its hearing and decision in accordance with law, such like appeals can not be decided summarily without analytically discussing the evidence on record. The appeals of the parties were required to have been decided in accordance with the evidence but this

has not been done by the learned Division Bench of Chief Court Gilgit-Baltistan.

It is a cardinal principle of law that judgment must be a speaking one, so its reader may understand with clarity the reasons for which acquittal or sentence has been maintained.

Thus for these reasons the impugned judgment relating to the present petitioner as well as to the respondents No.1 and 2 is not maintainable.

This Court while discussing the entire evidence observed "that Courts approach" while apprising the evidence should be dynamic and not static. It should keep in view all the facts and circumstances of the case and if it is satisfied that factually the person charged with the offence has committed the same, it should record the conviction, though there might have been some technical lapses on the part of the prosecution, provided the same have not pre-judged the accused in the fair trial. However, the **Basic principle of re-appraisal of evidence in criminal cases is that if a witness is trustworthy and reliable then conviction can safely be based on his evidence. In case such witness is un-reliable his evidence cannot be utilized for the passing of conviction against the accused. If however the witness has given partially reliable and partially un-reliable evidence, then applying the device of shifting the grain from chaff and seeking independent corroboration from other reliable evidence on material,** but unfortunately, the learned Division Bench of Chief Court Gilgit-Baltistan has violated this principle also in the instant case.

That in criminal jurisprudence General Principle is that the prosecution is to prove the case against the accused beyond any shadow of doubt and such burden does not shift from

prosecution even if accused takes up any particular plea and fails in it and if there is any room for benefit of doubt in the case of prosecution, the same will go to accused and not to prosecution.

As a result of above discussion, we set aside the impugned judgment dated 21-4-2010 passed by the learned Division Bench of Chief Court Gilgit-Baltistan and remanded back the Cr.P.L.A No.02/2010 filed by Ehsanullah accused and Cr.P.L.A No.03/2010 filed by the State against the acquittal of Rehmat Amin and Sher Nawaz, for fresh decision in accordance with law.

Our short Order dated 4-11-2010 in the case in hand is reproduced herein below is treated as part of this judgment :-

“For the reasons to be recorded later, Cr. Appeal No.02/2010 in which leave was granted on 04-05-2010, and connected Cr.P.L.A No.03/2010 which is now converted into an appeal are disposed of together by a consolidated judgment in the following terms.

The judgment of the Chief Courts is set aside and case is remanded back to the Chief Court for decision of the appeal of accused afresh in accordance with law. In the meanwhile the judgment of trial court will hold the field and respondents in Cr. Appeal No.03/2010 namely Rehmat Amin s/o of Mayoon and Sher Nawaz Khan s/o Mayoon and Sher Nawaz Khan s/o Haroon s/o Bargo, Gilgit, shall remain on bail subject to the furnishing of bail bond in the sum of Rs.2 lac each with two sureties each in the like amount to the satisfaction of the Sessions Judge, Gilgit.”

Cr. Appeal No.02/2010 and connected Cr.P.L.A No.03/2010 is converted into appeal and allowed.

Announced.
03-11-2010

CHIEF JUDGE

JUDGE

