

**IN THE HIGH COURT OF SINDH,
CIRCUIT COURT HYDERABAD**

Cr. Appeal No. S- 13 of 2017

Date of hearing: 16.03.2020

Date of Judgment: 16.03.2020.

Appellant Khadim Hussain is present on bail.

Syed Shafique Ahmed Shah, Advocate for appellant.

Ms. Rameshan Oad, A.P.G. for the State.

JUDGEMENT

ABDUL MAALIK GADDI, J- Through this criminal appeal, the appellant has assailed the legality and propriety of judgment dated 17.01.2017 passed by learned Additional Sessions Judge-I, Tando Adam in Sessions Case No.104/2015 (Re: The State V/s Khadim Hussain) arising out of Crime No.19/2015 registered U/S 23(1) (a) Sindh Arms Act, 2013 at PS B-Section Tando Adam, whereby the learned trial court after full dressed trial convicted and sentenced the appellant as stated in Point No.3 of the impugned judgment. For the sake of convenience, it would be proper to reproduce Point No.3 of the impugned judgment which reads as under:-

“For the reasons discussed in points supra I hold that the prosecution has proved its case beyond any reasonable doubt. I, therefore, convict Khadim Hussain s/o Ali Bux Kori for offence under S. 23-(1) (a) of the Sindh Arms Act 2013. The normal penalty for the offence provided is upto 14 years and fine however there are mitigating circumstances to the effect that no previous record of conviction has been produced in evidence; and that no date and time of recovery was mentioned over the parcel of the property therefore, considering the said mitigating circumstances, he is sentenced for three years R.I and he is fined Rs:10,000/- (Ten thousand). In default of fine he shall suffer six months S.I more. He is present on bail. His BB stands cancelled and surety is discharged. He is remanded to C.P Hyderabad through the Superintendent District Jail Sanghar to serve of the sentence awarded to him today. He is entitled for benefit

of S.382-B CrPC. Copy of the judgment supplied to the convict under S. 371 CrPC.”.

2. Facts of the prosecution case as disclosed in F.I.R are that on 16.02.2015 at about 1900 hours ASI Ali Dinu Shah had left station along with his staff whose names are mentioned in FIR, vide station diary No.25. On spy information received at Tando Branch Minor regarding wanted accused in Crime NO.14 of 2015 who were found seen at Dargah Mehmood Shah, the complainant party reached there at 1900 hrs. Per complainant, they found three armed persons and they were apprehended. Of whom, the present accused disclosed his name as Khadim Hussain. He was armed with a 30 bore Pistol loaded with five live bullets. The accused disclosed that he had no license to keep it. The other accused were also armed with weapons hence after sealing the weapons separately on the spot under joint memo of recovery and arrest in presence of mashirs PC Ghulam Hyder and PC Kamaluddin, the case under S. 23(1)-(a) of the Sindh Arms Act 2013 was registered against the accused on behalf of the State.

3. Charge (Exh.2) was framed against the accused to which he pleaded not guilty and claimed to be tried vide plea (EXh.3).

4. Prosecution in order to prove its case examined Complainant ASIP Ali Dinu Shah as PW-1 (Exh.4); he has produced the attested copy of station diary NO.25, attested Photostat copy of memo of recovery and arrest (The original in Case NO.17 of 2015) and FIR at EXh.4/ A to C, respectively. Mashir PC Ghulam Hyder examined as PW-2 (Exh.5); he has produced memo of place of incident at EXh.5/A. Investigation Officer ASIP Ziauddin examined as PW-3 (Exh.6); he has produced Forensic report of weapon at EXh.6/A and Station diary No.47 at Exh.6/B. Side for the prosecutions closed vide statement at Exh.7.

5. Statement of the accused under S.342 Cr.P.C (Exh.8) recorded wherein he has pleaded innocence and denied the recovery and took plea that he was arrested from his land at 03.00 PM. However, he did not opt to appear in the witness box for statement on oath under S. 340 Cr.P.C. He also did not lead any defence.

6. Learned counsel for the appellant mainly contended that the appellant is innocent, case is managed one and he has been falsely implicated in this case; that the alleged recovery of 30 bore pistol with five live bullets has been foisted upon him due to non-payment of illegal gratification; that no independent witness has been cited by complaint at the place of incident and the PWs being police officials are interested witnesses; that the learned trial Court has only believed upon the examination in Chief of the PWs and did not bother to consider the cross examination of witnesses while delivering the judgment and has miserably failed to properly evaluate the evidence; that learned trial Court while not discussing the cross examination of the witnesses has passed the impugned judgment in a hasty manner and the appellant ought to have been acquitted, hence, the findings recorded by the trial Court requires interference by this Court. He lastly prayed for acquittal of the appellant from the charge.

7. On the other hand, learned A.P.G. opposed the appeal on the ground that positive report of FSL is there and no specific enmity has been attributed to any member of the police party to falsely implicate the appellant. She further contended that Section 103 Cr.P.C. is not applicable in the case in hand. Lastly, she prayed for dismissal of this appeal.

8. I have heard the learned counsel for appellant, learned A.P.G for the State and perused the material available on record.

9. From the perusal of record, I have come to the conclusion that the prosecution has failed to prove its' case against the appellant beyond any shadow of doubt for the reasons that on the relevant date and time, the police party left police station for investigation of crime No.14/2015 in a government vehicle vide roznamcha entry No.25 and when they reached near Dargah Mehmood Shah Taluka Tando Adam, they received spy information about the availability of present appellant alongwith co-accused having been armed with 30 bore Pistol loaded with five live bullets.

It has been brought in evidence that the place of incident (Mehmood Shah Dargah) was a thickly populated area but the police party did not bother to associate any independent person of the locality

to witness the recovery proceedings either from the place of information or from the place where the present appellant has been arrested and alleged recovery is said to have been affected. During the course of arguments we have specifically asked the question from learned A.P.G. that when the private persons were available at the place of incident why their services were not obtained to witness the event, she has no satisfactory reply with him and she was of the view that evidence of police officials is as good as that of a private person. No doubt the evidence of police officials is as good as that of a private person however, in a case of recovery of pistol where the fate of an accused person hinges upon the testimony of police officials alone, it is essential to find out if there was any possibility of securing independent persons at the time of recovery. The conviction or acquittal of an accused person depends upon the credibility of the witnesses as assessed by the Court but where it was possible for the police officials to call independent witnesses to act as mashir but they deliberately avoided, the Court has to be very careful in weighing such evidence. It is settled principle of law that judicial approach has to be cautious in dealing such type of evidence.

10. It further appears from the record that alleged pistol was recovered from the appellant on 16.02.2015 but the same was received by Forensic Science Laboratory Hyderabad on 20.02.2015 after the delay of about four (04) days for which no explanation has been furnished by the prosecution. Moreover, the recovered pistol alongwith bullets were retained by whom during this intervening period has also not been explained by the prosecution that after its recovery under whose custody, the same were lying. For the sake of arguments, if it is assumed that the case property was lying in Malkhana then no report/entry of Malkhana has been produced to corroborate the version of prosecution. No official from Forensic Laboratory has been examined in this case. Even the name of official is not mentioned who brought the parcel to FSL, Hyderabad and only SIO Tando Adam District Sanghar is mentioned there. The name of person who brought the case property from FSL has also not been mentioned.

11. I have also gone through the evidence of prosecution witnesses with the able assistance of learned counsel for the parties and found

that the same is contradictory to each other on material particulars of the case. For instance, complainant ASI Ali Dino in his cross examination deposed that **“It is correct to suggest that T. T. Pistol today produced in this court is not in working condition as the same cannot fire by pressing its trigger as well as the magazine is not fit in it as half inch of magazine remained outside from the pistol.”** He further replied in his cross examination that **“It is correct to suggest that no time and date is available in cotton bag in which the case property was produced in this court today in sealed condition.”** PW-2 PC Ghulam Hyder who is mashir of the case in his examination in chief deposed that **“we also recovered repeater from accused Khadim Hussain alongwith four live cartridges.”** He stated that **“PC Kamal firstly apprehended the accused persons.”** He further stated that **“It is correct to suggest that FIR number as well as the sections are also available upon the cotton bag.”** He has also stated that **“It is correct to suggest that the time of preparation of memo of inspection of place of incident as Ex.5/A, is mentioned at 0720 hours to 0730 hours. Whereas, today in my examination in chief, I have stated time as 0615 hours.”** Moreover, the learned counsel for appellant has also placed on record the certified true copy of order dated 22.12.2016 passed by same trial court in Sessions Case No.150/2015 (Re-The State v. Azhar alias Manzoor alias Mann and others) which is the main case, arising out of crime No.14/2015 u/s 395 PPC registered at P.S. B-Section, Tando Adam in which the present appellant alongwith other co-accused has already been acquitted of the charge and no acquittal appeal has been filed against the said acquittal order.

12. Admittedly, in this case, there are number of infirmities/lacunas, which have created serious doubt in the prosecution case. It is settled principle of law that for extending benefit of doubt, it is not necessary that there should be multiple circumstances creating doubt. If a single circumstance, which creates reasonable doubt in a prudent mind about the guilt of accused, then he will be entitled to such benefit not as a matter of grace and concession, but as a matter of right, as has been held in the case of **Tariq Pervez v. The State [1995 SCMR 1345]** wherein it has been held by Honourable Supreme Court of Pakistan that:

"For giving benefit of doubt to an accused it is not necessary that there should be many circumstances creating doubts. If a simple circumstance creates reasonable doubt in a prudent mind about the guilt of accused, then he will be entitled to such benefit not as a matter of grace and concession but as a matter of right".

13. Keeping in view of the above, I am of the firm view that the Presiding Officer of the learned trial Court acted erroneously in the matter, with misconception and misinterpretation and disposed of the matter purely on non-appreciation and non-application of the required norms of law and that of justice. Consequently, I allowed this appeal, set aside the impugned judgment dated 17.01.2017 passed by learned Additional Sessions Judge-I, Tando Adam in Sessions Case No.104/2015 (Re: The State V/s Khadim Hussain) arising out of Crime No.19/2015 registered U/S 23(1) (a) Sindh Arms Act, 2013 at PS B-Section Tando Adam and acquit the appellant from the above charge. Appellant is present on bail, his bail bond stands cancelled and surety discharged.

JUDGE

Tufail