

Judgment sheet.
IN THE HIGH COURT OF SINDH,
CIRCUIT COURT, HYDERABAD.
Cr. Appeal No.S-122 of 2015.

DATE **ORDER WITH SIGNATURE OF JUDGE**

Appellant: Through Imtiaz Ali, Advocate.

The State Through Syed Meeral Shah, DPG

Date of hearing: 19 .09.2017.

Date of decision: 19 .09.2017

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J U D G M E N T :-

ABDUL MAALIK GADDI, J- Through instant appeal, the appellant has challenged the judgment dated 26.08.2016, passed by learned Ist. Additional Sessions Judge, Mirpurkhas in Sessions Case No.198 of 2012, Re: State vs. Muhammad Uris, U/s 13-(d) Arms Ordinance in Crime No.40 of 2012, P.S Mangli, whereby the learned trial court after full-dressed trial convicted and sentenced the appellant under section 265-H(2) Cr.P.C for the offence u/s 13-(d) Arms Ordinance, 1965 and awarded sentence to suffer R.I. for Three (03) years and pay Rs.20000/- as fine and in case of non-payment of fine amount, further suffer S.I for three (03) months. Benefit of Section 382-B Cr.P.C was also extended to the appellant.

2. Concise facts of the case are that the complainant namely ASI Atta Mohiuddin lodged report at police station Mangli on 06.6.2012 at 1600 hours, alleging therein that he was posted as ASI at P.S Mangli. On the said date at about 0900 hours he left the police station alongwith PC Nasir Khan, PC Nasir Mehmood and driver / PC Atique-ur-Rehman in a Government vehicle No.SP-6822

vide Roznamcha entry No.03 for patrolling in the area. During patrolling at different places when he reached at Chak No.07 turn, where he started to check vehicles on the road. At about 1230 hours one silver colour car bearing registration No.ASY-301 came there from Sanghar's side. He gave signal to stop it and found that four persons were boarded in the said car. He apprehended them u/s 54 Cr.P.C and thereafter took their personal search and during interrogation one person disclosed his name as Uris son of Allah Bachayo Mari, from whose possession he also secured one Kalashnikov with magazine bearing No.16203115 and 100 live bullets of SMG. Second person disclosed his NAME as Mitha Khan son of Haji Moula Bux Mari, from whose possession he secured one TT pistol of 30-bore with magazine and 20 live bullets. Third person disclosed his name as Niaz Muhammad son of Bijar Khan Mari, from whose possession he secured one TT pistol of 30-bore with two magazine and 20 live bullets, whereas 04th person disclosed his name as Ibrahim son of Majnoo Khan Nohri, from whose possession nothing was secured as he was driver of the said car. He enquired about license of recovered weapons from the apprehended persons, but they have disclosed that they have no license. He sealed the same recovered weapons at the spot separately and also prepared memo of arrest of accused and recovery at the spot in presence of mashirs PC Nasir Khan and PC Nasir Mehmood as no public person was available there at that time. Thereafter, he brought the arrested accused persons alongwith recovered weapons at P.S where he lodged FIR against the accused persons separately u/s 13-(d) Arms Ordinance.

3. A formal charge against present accused u/s 13-(d) Arms Ordinance, 1965 was framed at Exh.2, to which he pleaded not guilty and claimed to be tried, vide his plea at Exh.2/A.

4. At trial, prosecution examined PW-1 Complainant ASI Atta Mohiuddin examined vide at Exh.04, who produced copy of memo of arrest and recovery at Exh.4/A, copy of FIR as Exh.04/B and roznamcha entry No.03 as Exh.04/C respectively. PW-2 Mashir and eye-witness PC Nasir Khan examined vide Exh.05. PW No.3 I.O of this case ASI Behram Khan examined vide Exh.07, who has produced blastic Expert report as Exh.07/A. Thereafter, the learned ADPP for the State has given-up PW/PC Nasir Mehmood vide his statement Exh.06 and closed the evidence side of the prosecution vide his statement Exh.8.

5. Statement of accused was recorded under section 342, Cr.P.C at Ex.09, wherein he denied the allegation leveled by the prosecution and claimed himself to be innocent. He has neither opted to examine himself on oath nor lead any compurgator. He has only prayed for justice and his acquittal.

6. After hearing the parties' counsel, learned trial court came to the conclusion that the case has been proved against the appellant/accused; he convicted and sentenced him as stated above.

7. It is stated by the learned counsel for appellant that appellant is innocent and has been falsely implicated by the police with malafide intention and ulterior motives; that the appellant was arrested from thickly populated area, but complainant did not

bother to associate any independent person of the locality to witness the event; that the learned trial court did not consider the point that the alleged weapon was recovered on 06.06.2012, but same was received for FSL report on 08.06.2012 though the same was examined at Hyderabad by Incharge Forensic Science Laboratory Forensic Division Hyderabad and there is no explanation of such delay of two days in receiving parcel of alleged weapon by FSL Hyderabad, this aspect of the case creates heavy doubt in the case of prosecution regarding tempering with the alleged weapon, but same was not considered and passed impugned judgment in hasty manner and without applying judicial mind; that learned trial court has only believed upon the examination in chief of the PWs and did not bother to keep the cross examination of witnesses and their examination in chief in juxta position and wrongly held that there is no contradiction in the evidence of complainant and mashir, therefore, he prays for allowing this appeal.

8. On the other hand learned D.P.G for the state contended that the prosecution examined three witnesses who have fully supported the prosecution case. He submitted that the police witnesses are good as private person and their evidence cannot be discarded on the point that they are police officials. There is no contradiction in the evidence of examined witnesses and all witnesses have fully supported the versions of prosecution and the learned trial judge has rightly convicted the appellant; he therefore supported the impugned judgment.

9. I have heard the parties at length and have perused the documents and evidence on record. Perusal of contents of FIR reveals that on the relevant date, time and place police party during snap checking the vehicles at about 1230 hours found that one silver colour car bearing registration No.ASY-301 came there from Sanghar's side. On signal the said car was stopped there and police party apprehended the appellant and other accused boarded in the Car and then police took their personal search, during interrogation one person disclosed his name as Uris son of Allah Bachayo Mari, from whose possession he secured one Kalashnikov with magazine bearing No.16203115 and 100 live bullets of SMG. Second person disclosed his as Mitha Khan son of Haji Moula Bux Mari, from whose possession he secured one TT pistol of 30-bore with magazine and 20 live bullets. Third person disclosed his name as Niaz Muhammad son of Bijar Khan Mari, from whose possession he secured one TT pistol of 30-bore with two magazine and 20 live bullets, whereas 04th person disclosed his name as Ibrahim son of Majnoo Khan Nohri, from whose possession nothing was secured as he was driver of the said car. Joint mashirnama was prepared showing the PC PW Nasir Khan & PC Nasir Mehmood as mashir of the case.

10. Read-through the whole of above, it is very dreadful to note here that the accused persons being armed with unlicensed lethal weapons such as Kalashnikov / TT pistols etc. with bulk of bullets, were apprehended by the police without any resistance or trying to run away from the occurrence, but surprisingly remained mum and left themselves at the mercy of police. Lone in this

aspect, I am fortified with the case of Moinuddin alias Wseem vs the State reported in 2016 YLR 523 (Sindh) which for the sake of convenience is reproduced hereunder:-

**---S. 23-A (ii)---Recovery of weapon---
Appreciation of evidence---Benefit of doubt---
Accused was convicted by Trial Court and
sentenced to imprisonment for six years---
Validity---Neither memo of arrest nor
statement of complainant reflected that on
seeing police, accused tried to escape from
Wardat (occurrence)---Either prosecution
witnesses were not present together at the
time of alleged recovery or accused was not
arrested as alleged by prosecution---Trial Court
escaped such points while writing judgment---
Not necessary that there should be many
circumstances for extending benefit of doubt
but if a simple circumstance had created
reasonable doubt in prudent mind about guilt
of accused that he was entitled to its benefit
not as a matter of grace and concession but as
a matter of right---Prosecution failed to
establish charge against accused beyond
shadow of doubt---High Court, extended benefit
of doubt to accused, set aside conviction and
sentence awarded by Trial Court---Appeal was
allowed in circumstances.**

11. Besides this, the incident took place at the busy road viz. Chak No.07 but the police party did not associate any private person to act as mashir or witness the event, such lapse on the part of prosecution has also cut at the roots of its case rendering the entire episode doubtful and it, by itself, was enough to make the prosecution version unbelievable, thus recovery of weapon is clear violation of section 103 Cr.P.C. Moreover, as per record the weapon allegedly recovered from the accused was sent to the ballistic expert on 08.6.2012, however, the incident took place on 08.6..2012, after the delay of 02 days, though the same was examined at Hyderabad by Incharge Forensic Science Laboratory

Forensic Division Hyderabad and there is no explanation of such delay of two days in receiving parcel of alleged weapon by FSL Hyderabad, therefore tempering with such weapon cannot be ruled out. It further contemplates that there were three FIRs bearing crime No.40/2012, 41/2012 and 42/2013 separately lodged by the complainant on same day and in these FIRs the mashirnama of arrest and recovery is same, even though in Crime No.41 of 2012 under section 13-(d) Arms Act, the accused Mitha Khan has been acquitted under Section 249-A Cr.P.C and also in another FIR bearing crime No.42/2012 under section 13-(d) Arms Act the proceedings against accused Niaz Mohammad was stopped by the trial Court under Section 249 Cr.P.C because of the reasons that PWs were remained absent from adducing their evidence and it is pertinent to note here that in cases bearing crimes No.41/2012 and 42/2012 yet no appeal has been filed by the prosecution, therefore, beholding the said situation which cuts apparently the roots of prosecution case and makes the whole episode doubtful and under these circumstances it reveals that perhaps the incident has not been taken place in a fashion as alleged in the FIR.

12. It is also appears that the whole case of the prosecution depends upon the evidence of the complainant ASI Atta Mohiuddin, mashir and eye-witness PC Nasir Khan and I.O of the case ASI Behram Khan. I have perused the evidence of these three witnesses with the assistance of learned DPG, but finds contradictory on material particulars of the case. Besides this as I have observed above that the place of arrest and recovery is highly doubtful,

therefore, the evidence of these witnesses cannot be safely relied upon for conviction of appellant.

13. I have gone through the case of **Tariq Pervaiz v. The State** reported as **1995 SCMR 1345**, wherein it has been held that if a single circumstance creates reasonable doubt in the prudent mind about the guilt of the accused then he will be entitled to such benefit not as a matter of grace, but as a matter of right. Similar view has also been taken in the case of **Muhammad Akram v. The State** reported as **2009 SCMR 230**.

14. I have also perused the evidence and documents on record and has also considered the version of both the parties put forward by them through evidence and found that the version of the appellant seems more plausible and convincing, while the version of the prosecution is totally doubtful.

15. For my above stated reasons, I have no hesitation to hold that the prosecution has failed to prove its case against the appellant and learned trial court did not appreciate the evidence and documents on record properly. Consequently, the instant appeal is allowed. The impugned judgment passed by the trial Court is set-aside. Resultantly, the appellant is acquitted from the charge. He is present on bail, his bail bond stands cancelled and surety discharged.

JUDGE.