

IN THE HIGH COURT OF SINDH, CIRCUIT COURT,  
HYDERABAD

Cr. Appeal No. S- 165 of 2013.

**PRESENT:**

Mr. Justice Abdul Maalik Gaddi.

Appellant Akbar Khan s/o Azad Khan confined in Central Prison Sukkur vide Report dated 07.02.2018 submitted by Superintendent Central Prison Sukkur.

Appellant Akbar Khan through Mr. Sajjad Ahmed Chandio, Advocate.

Respondent. The State through Syed Meeral Shah Bukhari, A.P.G.

Date of hearing : 16.02.2018.

Date of judgment : 16.02.2018.

**J U D G M E N T**

**ABDUL MAALIK GADDI, J:-** Through this appeal the appellant has assailed the legality and propriety of the Judgment dated 11.12.2013, passed by the learned Sessions Judge, Shaheed Benazirabad in Sessions Case No.274 of 2011, registered under section 13(d) Arms Ordinance under crime No.102/2011 of Police Station 'B' Section Nawabshah, whereby the learned trial court after full dressed trial convicted and sentenced the appellant as stated in point No.2 of the impugned judgment. For the sake of convenience it would be appropriate to reproduce the point No.2 of the impugned judgment which reads as under:-

**"POINT NO.2.**

"In view of my findings on point No.1, it is held that the prosecution has successfully established its case against the accused Akbar Khan Talani, therefore, i find him guilty of offence U/S 13(d) A.O. the accused is of 60 years old this fact is taken as mitigating circumstance for awarding him lesser sentence. Accordingly, the accused is convicted and

sentence him to undergo R.I. for three years and pay fine of Rs.50,000/- and in default of payment of fine to undergo S.I. for three months more. He is extended benefit U/S 382-B Cr.P.C. Inasmuch as his period of detention as under trial prisoner w.e.f. 11.7.2011 to 29.8.2011 may be counted towards the period of his conviction. The accused is present on bail he is taken into custody and remanded to District Jail, Shaheed Benazirabad to serve out the sentence awarded to him here and above in accordance with law. The bail bond is cancelled and surety discharged.”

2. As per record it appears that accused Akbar Khan Talani is booked by B-Section, Police to face trial for committing offence punishable U/S 13 (d) A.O. The allegations against him is that on 11.07.2011 at 1530 hours, from his otaq situated in village Muhammad Khan Jamali, Taluka Nawabshah was found carrying/possessing one unlicensed Kalashnikov along with magazine containing 9 live bullets of 7.62 bore, without number in working condition, by Police party headed by SIP Muhammad Iqbal Wassan in presence of ASI Jan Muhammad Mashoori and HC Shahzad Ali Memon. The Kalashnikov and ammunition were sealed at the spot. The Police party then returned at P.S. B-Section, Nawabshah where SIP Muhammad Iqbal Wasan on same date at 0750 hours, thereafter, F.I.R. property, mashirnama and accused were handed over to S.I.O. for further investigation, who after completing usual investigation submitted charge sheet against the accused.

3. The charge against the accused was framed under Section 13(d) Pakistan Arms Ordinance at Ex.2, to which he pleaded not guilty and claimed to be tried vide plea at Ex.3.

4. In support of the case prosecution has examined SIP Muhammad Iqbal Wassan at Ex.6, who produced memo of arrest/recovery as Ex.6-A, FIR at Ex.6-B, attested copy of extract from roznamcha showing departure and arrival of Police party at Ex.6-C and Ex.6-D, mashir Jan Muhammad at Ex.7 and then ASI Manzoor Ali Bhangwar at Ex.8. Whereafter side of the prosecution was closed by Incharge D.R.P. vide Ex.9.

5. Statement of accused U/S 342 Cr.P.C. was recorded at Ex.10, the accused claimed false implication and foistation of property at the instance of one Jamali and denied prosecution allegations. The accused, however, did not examine any witness in his defence nor examined himself on oath.

6. Learned trial court after assessment of evidence on record convicted and sentenced the appellant as stated above.

7. Mr. Sajjad Ahmed Chandio, counsel for the accused contends that the scene of offence was located at village Mehmood Jamali, yet, none from public was joined to attest the recovery, the accused has got enmity with one Wadera of village and the case is registered against him malafidely at the instance of said Wadera, that evidence of police officials is contradictory as such it cannot be relied upon. He further submits that weapon allegedly recovered from the accused has not been sent to Ballistic Expert for its examination and report, therefore, false implication of the appellant in this case cannot be ruled out. He further submits that as per Mashirnama dated 11.07.2011, it reveals that at the time of incident police encounter was made in between the appellant as well as police party which was continued for 10 minutes but surprisingly nobody has received any injury from either side. Even no bullet was hit to the police mobile. It is stated by the counsel for appellant that appellant has been acquitted in the main case of police encounter. He further submits that appellant is aged about more than 60 years and at present he is confined at Central Prison Sukkur in other criminal cases. He further submits that this appeal is pending since 2013 and the appellant is pursuing the matter since 2011. During the course of arguments he has also pointed out/highlighted number of contradictions in between the evidence of the prosecution witnesses and was of the view that in view of contradictory evidence no conviction could be passed against the appellant.

8. Learned A.P.G. after arguments advanced by learned counsel for the appellant and in view of grounds of appeal has recorded his no objection if the impugned judgment is set-aside and the appeal is allowed.

9. I have carefully heard the appellant in person and learned A.P.G. appearing for the State and scanned the entire evidence.

10. After hearing learned counsel for the parties and perusal of the record it transpires that no doubt the accused is nominated in the FIR and it is alleged that after the alleged encounter with the police one unlicensed Kalashnikov, one magazine containing 09 live bullets were allegedly recovered from the possession of the appellant / accused. It is an admitted fact that the alleged recovery of Kalashnikov was made from the Otaq of appellant / accused situated in village Mehmood Jamali, despite of this fact the complainant has not bother to associate any independent person from the locality to witness the arrest and recovery proceedings. Further no explanation was offered by the Investigating Officer or by any other police witness as to why Mashirs/witnesses of the locality were not joined while the search was made.

11. During the course of arguments I have specifically asked a question from learned A.P.G. that when the recovery of alleged weapon was made from the public area why the complainant did not bother to associate any independent person of the locality to act as mashir in this case. He replied that the evidence of the police officials are as good as of private person.

12. No doubt the evidence of the police officials is as good as of private witness and it is settled position of law that when the availability of private witness has not been denied as happened in this case the evidence of private witness are necessary as required under section 103 Cr.P.C.

13. It also appears from the record that the present appellant / accused has been acquitted in the main case crime No.101 of 2011 under section 324, 353 PPC of encounter with police, therefore, the very veracity of recovery of Kalashnikov from the possession of the appellant is a question

whether the same was recovered from the possession of the appellant or otherwise. All these facts lead to the irresistible conclusion that the prosecution has failed to bring home guilt of the appellant and that he is entitled to benefit of doubt.

14. Pursuant to the above discussion, I am of the view that the prosecution had failed to establish its case against the appellant, as such, the appellant is given benefit of doubt and is acquitted of the charge. The impugned judgment of trial court is set-aside.

As per record of this Court the accused was on bail in this case. His bail bond stands cancelled and surety discharged.

JUDGE

A.