

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

Criminal Appeal No. S- 166 of 2016

Date of hearing: 12.01.2018

Appellant: Anwar Ali
through Syed Madad Ali Shah, Advocate.

Respondent: The State through Syed Meeral Shah, APG

ABDUL MAALIK GADDI, J:- By means of this appeal, the appellant has assailed the legality and propriety of the judgment dated 24.08.2016 passed by the learned 1st Additional Sessions Judge, Umerkot in Sessions Case No. 47 of 2016 (re-The State v. Anwar Ali) under Crime No. 43 of 2016 registered under Section 23(i) Sindh Arms Act, 2013 at PS Samaro, whereby the learned trial court after full dressed trial convicted and sentenced the appellant in point No.2 of the judgment. For the sake of convenience, it would be advantageous to reproduce the relevant portion of findings in point No.2 which reads as follows:-

Point No.2

In the light of above discussion, I am of the humble opinion that prosecution has been able to establish its case against the accused beyond reasonable doubt, that accused Anwar Khoso by possessing un-licensed pistol and five live rounds has committed an offence punishable under Section 23(i) Sindh Arms Act, 2013, therefore, he is convicted under Section 265-H(ii) Cr.P.C. and sentenced to suffer R.I for (5) years and fine of Rs. 30,000/- in case of default in payment of fine he has to suffer six months more S.I. Benefit of Section 382-B Cr.P.C. is extended to the accused. Accused is present in custody, he is remanded to Central Prison Hyderabad to serve out sentence awarded to him.

2. Facts of the prosecution case are that on 28.04.2016 complainant ASI Muhammad Aslam Jatt of P.S. Samaro lodged FIR at police station Samaro alleging therein that on the day of incident he along with his subordinate staff, carrying official weapons left police station in government vehicle, vide roznamcha entry No. 34 at 2230 hours for patrolling in the jurisdiction. During patrolling reached at Ramjago Mori of Mithrao Canal at 0030 hours where they saw accused Anwar Khoso, proclaimed offender in Crime No. 30 of 2012 under Section 324, 353, 224 and 225 PPC. The police party apprehended the accused Anwar Khoso

and conducted his personal search in presence of mashir and secured a 30 bore pistol from his possession along with 5 live rounds containing in magazine. On inquiry accused disclosed that the pistol is unlicensed one. Thereafter, accused was arrested under the mashirnama of arrest and recovery prepared by associating PC Mohammad Hanif and PC Harlal. The police sealed the case property and brought the accused and recovery property at police station where FIR was lodged against the accused.

3. It appears from the record that after registration of FIR, the investigation was carried by complainant ASI Khadim Hussain Behrani, who after recording the statement of P.Ws under Section 161 Cr.P.C., submitted challan against the appellant in the court of law.

4. At trial copies of documents under Section 265-C Cr.P.C. were supplied to the accused vide receipt at Ex.1. Charge under Section 23(i) of Sindh Arms Act, 2013 was framed against accused above named at Ex.2, to which he pleaded not guilty and claimed to be tried.

5. It also reveals from the record that in order to establish accusation against the appellant / accused, prosecution had examined PW-1 I.O ASI Khadim Hussain Jatt at Ex.03, who produced mashirnama of sarzameen, roznamcha entry No.22 & 27 dated 28.05.2016, permission letter addressed to SDPO Umerkot, criminal record of accused Anwar Khoso, letter addressed to Incharge Forensic Laboratory, Forensic Expert's report and dispatching entry at Malkhana at Ex.03/A to 3/G, P.W complainant ASI Arshad Ali was examined at Ex.04, who produced mashirnama of arrest and recovery and roznamcha entry No. 34 & 35 of PS Samaro dated 27.04.2016, FIR at Ex.4/A & 04/C, P.W-3 mashir HC Mohammad Hanif examined at Ex.05. Thereafter learned ADPP for the State closed the side of the prosecution through statement at Ex.06.

6. Statement of appellant / accused under Section 342 Cr.P.C. was recorded in which the appellant / accused has denied the allegations and stated that evidence against him is false. However, the appellant neither examined himself on oath nor led any evidence in defence.

7. The trial court after hearing the learned counsel for the parties and assessment of evidence, by judgment dated 24.08.2016, convicted and

sentenced the appellant as stated above, hence this appeal has been filed by the appellant.

8. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the judgment dated 24.08.2016 passed by the trial court and therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

9. Syed Madad Ali Shah, learned counsel for appellant while arguing has submitted that the appellant has been involved falsely in this case due to enmity and case property has been foisted upon him by the complainant. He further submitted that the recovered pistol was sent to the ballistic expert with a delay of 08 days without any plausible explanation; hence the property has been managed and tampered. He further submitted that there are material contradictions in the evidence of complainant and prosecution witnesses which makes the prosecution case doubtful. He lastly submitted that the complainant and prosecution witnesses are police officials and all these aspects of the case have not been appreciated by the trial court and convicted and sentenced the appellant in a hasty manner therefore, the impugned judgment is liable to be set-aside and appellant be acquitted from the charge.

10. Conversely, Syed Meeral Shah learned APG while considering the ground of appeal as well as arguments and contradictory evidence of the prosecution witnesses on material particular of the case has not supported the impugned judgment, and raised his no objection for acquittal of the appellant.

11. I have heard the learned counsel for the parties and scanned the entire evidence available on record.

12. After careful consideration and meticulous examination of the available record, suffice to say that mere heinous nature of the offence is not sufficient to convict the accused because the accused continues with presumption of innocence until found otherwise at the end of the trial. It is the settled principle of law that burden is always upon the prosecution to prove the case beyond shadow of doubt. Keeping in view of the basic touch stone of criminal administration of justice, I have examined the ocular evidence as well as circumstantial and documentary evidence along with impugned judgment.

13. I have come to the conclusion that the prosecution has failed to prove its case against the appellant for the reason that in this case all the pieces of evidence produced by the prosecution are weak in nature. It appears from the record that the alleged incident took place on 28.4.2016 and the present appellant was arrested when police party during patrolling reached at Ramjago Mori of Mithrao Canal from where the present appellant was arrested and recovered 30 bore pistol along with 05 live rounds containing in magazine. It has been also come in evidence that the place from where the present appellant was arrested is a road side and surrounded by houses and shops and despite of this fact the complainant did not bother to associate any independent person of the locality to witness the arrest and recovery proceedings. Non-association of private witnesses in the recovery proceedings appears to fatal in the prosecution. No reason has been given that why the complainant did not associate any private person of the locality, therefore, in absence of private person in the recovery proceedings false implication of the appellant could not be ruled out. I have noted that recovery was made on 28.4.2016 but the case property received by the office of Forensic Science Laboratory on 6.5.2016 after a delay of about 08 days for which absolutely no explanation has been furnished to the effect that during this intervening period where the property was lying and in whose custody, therefore, under these circumstances tampering in the case property could not be ruled out. I have also noted that HC Muhammad Hanif in his examination in chief stated that on 27.4.2016 he was posted at PS Samaro and on the said date he along with complainant went for patrolling but FIR and mashirnama shows that the complainant left police station for patrolling with his subordinate staff on 28.4.2016. I have noted number of contradictions in the prosecution evidence on material particular of the case; for example, per evidence of ASI Arshad Ali & PC Muhammad Hanif they left police station for patrolling on 27.4.2016 at 2230 hours whereas per FIR they left the police station on 28.4.2016 at 2230 hours; per ASI Arshad Ali they patrolled at Brohiabad, Hanifabad, Saleh Bhambhro and then arrived at Ramjago Moi whereas per HC Muhammad Hanif they patrolled at Bacha Band Road then Nabisar wah mori and Rahoabad and reached at Saleh Bhambhro; per ASI Arshad Ali they saw accused from the distance of about 25 to 30 feet whereas per HC Muhammad Hanif they saw the accused from the distance of about 50 feet; per ASI Arshad Ali accused on seeing police party ran for about

10 to 15 feet whereas per Muhammad Hanif accused on seeing the police party did not try to runaway; per ASI Arshad Ali they did not handcuffed the accused whereas per HC Muhammad Hanif after arrest they handcuffed the accused; per ASI Arshad Ali when he was preparing mashirnama the torch was holding HC Hanif whereas per Muhammad Hanif the torch was holding by HC Harlal; per ASI Arshad Ali HC Hanif fetched white papers, hardboard and torch from the vehicle whereas per Muhammad Hanif HC Harlal fetched white papers, hardboard and torch from the vehicle; per ASI Arshad Ali when he was preparing mashirnama accused was in custody of HC Harlal while the case property was in the custody of HC Hanif whereas per Muhammad Hanif the mashirnama was prepared by ASI Arshad Sahib and at that time accused was in his custody while the case property was in the custody of complainant Muhammad Aslam Jatt.

14. In view of the above contradictions in the evidence of prosecution witnesses false implication of the appellant in this case could not be ruled out but the learned trial court has utterly failed to appreciate this aspect of the case.

15. For the above stated reasons, there are several circumstances / infirmities in the prosecution case, which have created reasonable doubts about the guilt of the appellant.

16. In case of Tariq Pervaiz v. The State reported as 1995 SCMR 1345, the Honourable Supreme Court has observed as follows:-

“ It is settled law that it is not necessary that there should many circumstances creating doubts. If there is single circumstance, which creates reasonable doubt in the prudent mind about the guilt of the accused, then accused will be entitled to the benefit not as a matter of grace and concession 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.

17. While respectfully relying upon the case laws referred to above, I have no hesitation to hold that prosecution has failed to establish its case against the appellant beyond reasonable doubt. Therefore, by extending the benefit of doubt, this appeal is allowed. The conviction and sentence recorded by the learned 1st Additional Sessions Judge, Umerkot vide judgment dated 24.8.2016 is set-aside. Appellant is acquitted of the

charge. The appellant is on bail; his bail bonds are cancelled and surety is discharged.

JUDGE

Karar_hussain/PS*