

***Judgment Sheet***

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

Criminal Appeal No. S- 315 of 2017

Date of hearing: 12.01.2018

Appellant: Muhammad Mithal  
through Mr. Pirbhulal U Goklani, 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 06.12.2017 passed by learned 4<sup>th</sup> Additional Sessions Judge, Shaheed Benazirabad in Sessions Case No. 03 of 2017 (re-The State v. Muhammad Mithal) under Crime No. 114 of 2016 registered under Section 23(i)(a) Sindh Arms Act, 2013 at PS Daulatpur, whereby the learned trial court after full dressed trial convicted and sentenced the appellant in point No.2 of the impugned 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**

Since it is proved that at the time of arrest one pistol and 02 bullets were recovered from the possession of accused Muhammad Mithal, for which he had no license. Hence he has committed an offence punishable under Section 23-A Sindh Arms Act, 2013. Therefore, accused Muhammad Mithal s/o Allah Warrayo is convicted under Section 265-H(ii) Cr.P.C. and sentenced to undergo Rigorous Imprisonment for (5) years and to pay fine of Rs. 50,000/- in case of failure to pay fine he shall further undergo S.I for six months more. Benefit of Section 382-B Cr.P.C. extended to the accused.

2. Facts of the prosecution case are that on 9.12.2016 at 08:30 hours complainant ASI Nazeer Ahmed Solangi lodged FIR at P.S. Daulatpur stating therein that complainant along with his staff left P.S vide roznamcha entry No. 20 at 07:00 hours for patrolling. After patrolling from different places at about 07:30 hours they reached at Khar link road near Railway level crossing where they saw one person was coming with road who on seeing the police vehicle tried to slip away, looking him as suspected police party encircled and apprehended him. Due to non-

availability of private witnesses, PC Anwar Ali and PC Abdul Khaliq Solangi were engaged as mashirs. On enquiry accused disclosed his name Muhammad Mithal s/o Allah Warrayo Hotipoto. ASI conducted his personal search and recovered one pistol with magazine from his left side of shalwar. Police party checked pistol and found two live bullets were lying in its magazine. On enquiry said person disclosed that pistol is without license. ASI sealed pistol and prepared mashirnama of arrest and recovery and brought accused and property at police station where FIR was lodged against the accused for offence under Section 23-A(i) of Sindh Arms Act, 2013.

3. It appears from the record that after registration of FIR, the investigation was carried by complainant ASI Nazeer Ahmed Solangi, who after recording the statement of P.Ws under Section 161 Cr.P.C., submitted challan against the appellant in the court of learned Civil Judge & Judicial Magistrate, Daulatpur, who sent the same to learned 4<sup>th</sup> Additional Sessions Judge, Shaheed Benazirabad being a case of Sessions Trial.

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(1)(a) 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 vide his plea at Ex.02/A respectively.

5. It also reveals from the record that in order to establish accusation against the appellant / accused, prosecution had examined complainant ASI Nazeer Ahmed at Ex.3, who produced entry, FIR, mashirnama of arrest and recovery at Ex.3/A to 3/D and P.W PC Anwar Ali at Ex.4. Prosecution witnesses have been cross examined by the counsel for the applicant. Thereafter learned ADPP for the State closed the side of the prosecution through statement at Ex.05.

6. Statement of appellant / accused under Section 342 Cr.P.C. was recorded at Ex.6 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 06.12.2017, 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 06.12.2017 passed by the trial court and therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

9. Mr. Pirbhulal U Goklani, 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 11 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 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 at a considerable length and perused the evidence and documents 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 and have come to the conclusion that the prosecution has failed to prove its case against the appellant for the reason that on 9.12.2016 police party headed by ASI Nazeer Ahmed left police station under Entry No. 20 at 7:00 hours for patrolling along with his subordinate staff and during patrolling when they reached at Khar link road near railway level crossing the present appellant / accused was arrested. It has come on record that it was a morning time and the traffic was available over there but despite of this fact the complainant who is I.O of the case did not bother to associate any independent person of the locality to witness the recovery proceedings. It is settled principle that judicial approach has to be conscious in dealing with the cases in which testimony hinges upon the evidence of police official alone. I am conscious of the fact that provisions of Section 103 Cr.P.C. are not attracted to the cases of personal search of accused. However, where alleged recovery was made on road side which is meant for traffic as happened in this case, omission to secure independent mashirs, particularly, in case of a snap checking cannot be brushed aside lightly by the court. Prime object of Section 103 Cr.P.C. is to ensure transparency and fairness on the part of the police during course of recovery, curb false implication and minimize scope of foisting of fake recoveries upon accused. As observed above at the time of recovery from appellant, complainant did not associate private person as recovery witnesses and only relied upon his subordinates and further more he himself registered the complaint and investigated the case. In my view investigating officer of police or such other force, under Section 34 of the Arms Act, was not authorized to exclude independent witnesses. It does not do away with principle of producing the best available evidence. No doubt that no specific bar exists under the law against complainant who is also investigating officer of the case, but being the complainant it cannot be expected that as an investigating officer he will collect any material which goes against the prosecution or gives any benefit to the accused. Evidence of such officer therefore, is a weak piece of evidence and for sustaining a conviction it would require independent corroboration which is lacking in this case. As observed above non-association of independent witness as mashir in this case false implication of the appellants could not be ruled out.

13. I have examined the case file with the assistance of learned counsel for the parties and it is noted that the copies of entries of arrival and departure appears to be managed as according to the FIR ASI left PS at 7:00 a.m. vide Entry No. 20 dated 9.12.2017 and he has produced the entry of arrival as Entry No. 4 and according to the prosecution he arrived at PS at 8:30 a.m. on the same date within one hour then entry should have been after the `20` but prosecution has produced entry No. 04 which falsify the departure as well as arrival of the ASI and so also the arrest and recovery.

14. It appears from the record that incident took place on 9.12.2016 but the case property was received by the office of Forensic Science Laboratory for examination on 22.12.2016 after the delay of 12 days for which no explanation has been furnished that during this intervening period where the case property was lying and in whose custody. This aspect of the case creates doubt in the prosecution case and the question of tampering in property could not be ruled out. It is noted that as per mashirnama one 30 bore pistol without number and magazine with two live bullets were recovered from the appellant but the report of FSL showing also cartridges which has not been recovered from the possession of the appellant but this fact has not been appreciated by the trial court. I have also gone the contradiction in the evidence of the prosecution witnesses on material particulars of the case for example that according to I.O when he left PS WHC became the Incharge if it was so then FIR could have been recorded by WHC who was the Incharge but I.O himself being Incharge lodged the FIR.

15. In the instant case there are also 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 guilty 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 reported as **1993 SCMR 1345** wherein the Hon'ble Supreme Court has held as under:-

“ The concept of benefit of doubt to an accused persons is deep-rooted in our country for giving him benefit of doubt, it is not necessary that there should be many circumstances creating

doubt. It there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right”.

16. For the above stated reasons, while respectfully relying upon the above cited case law, I have no hesitation to hold that prosecution has failed to prove its case against the appellant beyond any shadow of reasonable doubt. Consequently, appeal is allowed, conviction and sentence awarded by the trial court vide judgment dated 06.12.2017 are set-aside and the accused is acquitted from the charge. Appellant is in jail, he shall be released forthwith, if he is not required in any custody case. Since the appeal is allowed, therefore, miscellaneous application listed at serial No.2 has become infructuous, as such, the same is disposed of accordingly.

JUDGE