

ORDER SHEET

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THE HIGH COURT OF SINDH, CIRCUIT COURT LARKANO

Cr. Appeal No. S-17 of 2017

Date Order with signature of Judge

For hearing of main case.

04-02-2019

Mr. Aitbar Ali Bullo, D.P.G for the State.

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Appellant is present in person (on bail), however, his counsel, as intimated by Mr. Athar Abbas Solangi, advocate is out of station. Appellant present files certified copy of judgment dated 05.01.2019 passed by III-Additional Sessions Judge, Shikarpur in Sessions Case No.108/2005, re: State V/S Raja @ Sajid Ali Bhutto and others, being outcome of Crime No.10/2005 of P.S. Garhi Yasin, Shikarpur, under Section 302,148,149,114 P.P.C, same is taken on record.

Heard appellant in person and learned D.P.G. for State.

The appellant submits that instant case is outcome of main case, in which he has been acquitted by means of captioned judgment, therefore, the instant case was lodged against him at the behest of complainant of main case and police in order to strengthen rope of their false case, has foisted weapon upon him; however, nothing was recovered from him.

For the reasons to be recorded later-on, instant criminal appeal is allowed. Impugned Judgment dated 01.02.2017, passed by III-Additional Sessions Judge, Shikarpur in Sessions Case No.611/2016, re: State V/S Raja @ Sajid Ali Bhutto, being outcome of Crime No.58/2016 of P.S. Garhi Yasin Shikarpur, U/S 23(1)(a) of Sindh Arms Act, 2013 is hereby set-aside. Consequently the appellant is hereby acquitted of the charge. He is present on bail, his bail bond is cancelled and surety furnished by him is also hereby discharged.

Judge

Aitbar Ali Bullo D.P.A

Above order completed
on Date 23-02-2019
Signature
Main Court 23.2.19 10

IN THE HIGH COURT OF SINDH, CIRCUIT COURT LARKANO

Cr. Appeal No.S-17 of 2017.

Appellant : Raja alias Sajid Ali Bhutto, present in person (on bail).

Respondent : The State, through Mr. Aitbar Ali Bullo, DPG.

Date of hearing : 04.02.2019.Date of Decision : 04.02.2019.JUDGMENT

Muhammad Saleem Jessar, J.- Through this Criminal Appeal, appellant Raja alias Sajid Ali Bhutto son of Nizamuddin Bhutto has challenged the Judgment dated 01.02.2017 passed by the learned IIIrd Additional Sessions Judge, Shikarpur, in Sessions Case No.611 of 2016 (Re: The State v. Raja @ Sajid Ali Bhutto), outcome of Crime No.58 of 2016 of P.S Garhi Yasin, District Shikarpur, whereby he convicted the appellant for offence under Section 23(1)(a) of Sindh Arms Act, 2013 and sentenced him to suffer R.I. for 05 (five) years and to pay fine of Rs.50,000/- (Rupees fifty thousand only) and in case of non-payment of fine to undergo S.I. for six months more.

2. Succinctly, the facts of the prosecution case, as unfolded by complainant HC Mohammad Bachal Dayo in FIR No.58 of 2016, registered at P.S. Garhi Yasin, are that on 18.9.2016 he along with staff PC Abdul Majeed and PC Mohammad Mithal proceeded for patrolling in the official vehicle driven by PC Mohammad Tagial vide Roznameha Entry No.15, during which he received spy information that Raja alias Sajid Ali Bhutto, being proclaimed offender of Crime No.10/2005 of PS Garhi Yasin, was present near graveyard of Pir Moosan Shah, on which complainant and his staff proceeded towards the pointed place and at about 1600 hours they apprehended the said person, who on enquiry disclosed his identity to be Raja alias Sajid Ahmed. During his personal search one TT Pistol of 30-bore, Pakistan made, was recovered along with one magazine containing 04 live bullets, which he disclosed to be unlicensed. Such mashirnama of arrest and recovery was prepared. Thereafter, they returned back along with accused and secured property at P.S., where

complainant registered the FIR of this case against the accused on behalf of the State.

3. The charge against the accused/appellant was framed under Section 265(d), Cr.P.C. at Ex.2, to which he pleaded 'not guilty' and claimed to be tried vide his plea as Ex.3.

4. In order to prove the charge against the accused, the prosecution examined PW-1 complainant/HC Mohammad Bachal at Ex.4, who produced memo of arrest, FIR and entry at Ex.4-A to 4-C respectively. PW-2 PC Abdul Majeed, who acted as mashir, was examined at Ex.5; he produced memo of wardhat at Ex.5-A; then PW-3 IO/SIP Ghulam Rasool was examined at Ex.6, who produced FSL report at Ex.6-A. Thereafter, prosecution side was closed vide statement at Ex.7.

5. Statement of the accused under Section 342, Cr.P.C was recorded at Ex.8, wherein he denied the prosecution allegations and professed his innocence. However, neither did he examine himself on oath under Section 340(2), Cr.P.C. nor produced any witness in his defence.

6. After formulating the points for determination, recording evidence of the prosecution witnesses and hearing the learned counsel for the parties, the learned trial Court, vide impugned judgment, convicted and sentenced the appellant, as stated above. Against the said judgment, appellant has preferred instant appeal.

7. Appellant present in person submits that he was falsely involved in the present case. He further submits that there are material contradictions in the evidence of the prosecution witnesses, which make the prosecution case highly doubtful. He also submits that nothing was recovered by the police from him, but the same was arranged by the police in collusion with complainant of main case viz. Crime Nos.10/2015 of same police station and foisted against him.

8. Conversely, learned DPG supports the impugned judgment and contends that the prosecution has succeeded in proving its case against the appellant/ accused and the prosecution witnesses have supported the prosecution case and have fully implicated the appellant in the commission of the alleged offence. He further submits that the accused was apprehended by the police party and the crime weapon was recovered from his possession. According to him, minor

contradictions in the evidence of the prosecution witnesses are ignorable. He; however, could not controvert the fact that any independent person from the place of receiving spy information and the place of recovery, which is situated at the distance of only one kilometer from police station on Garhi Yasin-Larkana main road, was made/associated as witness nor justification has been given by the complainant for non-joining of the independent person(s). He prayed for dismissal of the appeal and maintaining the conviction and sentence awarded to the appellant vide impugned judgment.

9. I have heard the appellant in person as well as learned DPG appearing for the State and have perused the material available on the record.

10. It seems that that no independent person was associated as witness from the place of receiving spy information i.e. 15-Center Eid Gah Naka road, Garhi Yasin Bypass and/or the place of recovery situated at the distance of only one kilometer from police station on Garhi Yasin-Larkana main road and no justification has been given by the complainant for non-joining of the independent person(s). Admittedly both above places are public places, hence availability of private persons at the said places could not be ruled out. Apart from that, there are contradictions in the depositions of the complainant HC Mohammad Bachal and mashir PC Abdul Majeed. Complainant in cross-examination stated that after leaving police station they first went to 15 police, Eid-Gah, Dakhan Naka and then to bypass through Khirthar Canal, while mashir in his cross-examination has stated that after leaving police station first they went to Eid Gad and then to Dakhan Naka, where HC Mohammad Bachal stated that he has received spy information. Complainant stated that he received spy information through Mobile phone. He; however, admitted that he has not mentioned in the mashirnama or the FIR that he received information through mobile phone. On the other hand, mashir stated that the spy informer gave information to complainant at some distance from them at Dakhan Naka. Complainant in cross-examination admitted that he had not asked any private person to accompany with them to the place of incident. Complainant has stated that he alone followed the accused and apprehended him from a distance of about 15/20 paces away from police mobile, while mashir PC Abdul Majeed stated that they parked the mobile adjacent to accused and immediately apprehended him and they did not allow accused to run; mashir has further stated that he and PC Mohammad Mithal captured the accused. According to complainant, the hands of accused were not tied with any thing after arrest and

simply he was handed over to police constables, while mashir stated that after arrest accused was handcuffed. Complainant admitted in cross-examination that he had not asked any private person who were crossing from said road to act as mashir or arrest and recovery, while mashir has stated that complainant asked 2/3 persons to act as mashirs, but they refused.

11. The place of receiving spy information as well as that of recovery were admittedly populated area, no justification has been furnished by the complainant for non-associating of independent witnesses. No doubt, the police persons are the good witnesses as like anyone good from the public but in presence of independent persons of the area, it was essential rather incumbent upon the police officer to have associated such uncontroversial persons as mashirs of recovery proceedings only to abstain himself from any adverse or animosity ought to be occurred on his part but that has not been done by police officer. Needless to emphasize that in view of the provisions of Section 103, Cr.P.C. the officials making searches, recoveries and arrests, are reasonably required to associate private persons, more particularly in those cases in which the presence of private persons is admitted so as to lend credence to such actions, and to restore public confidence. This aspect of the matter must not be lost sight of indiscriminately and without exception. In the case reported as *The State v. Bashir and others (PLD 1997 S.C 408)*, the Honourable Supreme Court has held as under:-

"As regards above second submission of Mr. M.M. Aqil, it may be observed that it has been repeatedly held that the requirements of section 103 Cr.P.C. namely, that two Members of the public of the locality should be Mashirs of the recovery, is mandatory unless it is shown by the prosecution that in the circumstances of a particular case it was not possible to have two Mashirs from the public."

12. It is also settled principle of law that a criminal case is to be decided on the basis of totality of impressions gathered from the circumstances of the case and not on the basis of single element. Reference in this regard can be made from the case of *Nadeem Ramzan v. The State (2018 SCMR 149)*.

13. Independent persons were available and were not joined in the recovery proceedings, therefore, no implicit reliance could be placed on the evidence of police witness. In this regard, reference can be made from the cases of *Mohammad Shafi v. Tahirur Rehman (1972 SCMR 144)* and *Ghulam Shabbir v. Bachal and another (1980 SCMR 708)*.



14. In view of the aforesaid contradictions in the evidence of the prosecution witnesses, so also admissions made by them coupled with the legal flaws and lacunas in the prosecution case, as pointed out above, it can safely be held that the prosecution has not succeeded in proving its case against the accused / appellant beyond reasonable shadow of doubt. It is settled principle of law that a single circumstance, which creates doubt in the prosecution case, is sufficient to extend benefit of doubt to the accused but in this case there are several circumstances, which have created doubt in the prosecution story but unfortunately the prosecution evidence has not been appreciated by the trial Court according to the settled principle of law. Even an accused cannot be deprived of benefit of doubt merely because there is only single circumstance, which creates doubt in the prosecution case as has been observed by the Honourable Supreme Court of Pakistan in the case reported as *Tariq Pervaiz v. The State (1995 SCMR 1345)*, wherein it has been held as under:-

"The concept of benefit of doubt to an accused person is deep-rooted in our country. For giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts. If 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."

15. Furthermore, the appellant has placed on record certified copy of judgment dated 05.01.2019 passed by III-Additional Sessions Judge, Shikarpur, in Sessions Case No.108/2005, which is outcome of Crime No.10/2005 of PS Garhi Yasin, registered under Sections 302, 148, 149, 114, PPC, which is the main case, wherein the appellant has been acquitted of the charges.

16. For what has been discussed above, it can safely be held that the prosecution has miserably failed to prove its case beyond reasonable shadow of doubt and this Court in absence of the prosecution version cannot take step forward in upholding the impugned judgment, hence, the same needs to be interfered in presence of the reasonable doubts in the prosecution story as well as keeping in view the observance of the Apex Court as referred to above. The appellant has also been acquitted from the charge of main case and instant case being offshoot of that main case has no independent legs to stand upon. Reference can be made to the cases reported as *Iltaf Hussain v. The State (1996 SCMR 167)*, *Riaz Hussain Kalhoro v. The State (2004 P.Cr.L.J 290)*, *Mashooque Ali Mallah v. The State (2016 P.Cr.L.J Note 8)* and *Deedar Ahmed v. The State (2016 P.Cr.L.J 1911)*.

17. For the foregoing reasons, instant Criminal Appeal was allowed by short order dated 04.02.2019, the impugned judgment dated 01.02.2017, handed down by the learned 3rd Additional Sessions Judge, Shikarpur in Sessions Case No.611/2016 re-State v. Raja alias Sajid Ali Bhutto, being outcome of Crime No.58/2016 of PS Garhi Yasin, Shikarpur, u/s 23(1)(a) of Sindh Arms Act, 2013, was set aside and the appellant / accused was acquitted of the charges. These are the reasons for my short order.


JUDGE

Disposed of case / For Direction

- 1- For Orders on MA No. 1400/2019 ('U/A')
- 2- For Orders on MA No. 1401/2019 ('E/A')
- 3- For Orders on MA No. 1402/2019 (561 A.C.P.)

Statement Report filed as Slg 'B'