

CERTIFICATE OF THE COURT IN REGARD TO REPORTING

Criminal Appeal No. 5-47 of 2024

426) Khadim Bhayo

VERSUS

The State

SINDH HIGH COURT

Composition of Bench Before Mr. Justice Muhammad Saleem Jessar

Single/D.B.

Dates of Hearing: 08.04.2025

Decided on: 08.04.2025

(a) Judgment approved for
Reporting

YES
NO 19/4-25

CERTIFICATE

Certified that the judgment / Order is based upon or enunciates a principle of law / decides a question of law which is of first impression / distinguishes/ over-rules/ reverses/ explains a previous decision.

Strike out whichever is not applicable.

NOTE: - (i) This slip is only to be used when some action is to be taken.

(ii) If the slip is used. The Reader must attach it to be the top of the first page
Of the judgment.

(iii) Reader must ask the Judge writing the Judgment whether the Judgment is
Approved for reporting.

(iv) Those directions which are not to be used should be deleted.

**IN THE HIGH COURT OF SINDH, CIRCUIT COURT,
LARKANA**

Crl. Appeal No. S- 47 of 2024.

Appellant : Khadim Bhayo present in person (on bail)
Respondent : *The State*, through Mr. Nazir Ahmed Bangwar,
D.P.G.

Dates of hearing: 08.4.2025.
Date of the judgment: 08.4.2025.

JUDGMENT

MUHAMMAD SALEEM JESSAR-J:- This criminal appeal has been directed against the judgment dated 22.6.2024, passed by learned IInd Additional Sessions Judge, Kandhkot, in Sessions Case No.05/2023, whereby the appellant was convicted for offence punishable under Section 23 (i)(a) & 25 of the Sindh Arms Act, 2013, and sentenced to undergo R.I for ten years and pay fine of Rs.200,000/= and in case of default in payment thereof to undergo S.I for two years. The appellant was extended benefit of Section 382-B Cr.P.C.

2. the crux of prosecution case as unfolded in the FIR is that on 14.11.2023 headed by ASI Rukan Din of P.S Karampur whilst on patrol duty received spy information regarding presence of accused Khadim Bhayo (the appellant) and Altaf Hussain near Ihsan Curve who were allegedly wanted in connection with Crime No.93 of 2023 registered with P.S Karampur under Section 393 PPC, upon such information, police party rushed towards pointed place and at about 5.00 p.m. they arrested the appellant. Due to non-availability of the private persons, complainant by citing PC Altaf Hussain and PC Ali Gohar as attesting witnesses conducted their personal search. However, nothing was recovered from co-accused Altaf Hussain while an unlicensed 9mm Pistol alongwith magazine was recovered from the appellant Khadim Bhayo. After completion of formalities, police came to P.S alongwith the accused as well as property and lodged instant FIR against them on behalf of the State.

3. The police after completion of usual investigation submitted challan of the case. The learned trial Court framed the charge against appellant, to which he pleaded not guilty and claimed trial.

4. The prosecution examined Complainant/author cum I.O ASI Rukan Din (now SIP), PW-2/Mashir/I/C Malkhana PC Altaf Hussain and then ADPP for State closed its side vide statement dated 14.5.2024.

5. The prosecution the statement of appellant was recorded in terms of Section 342 Cr.P.C., in which he denied the allegations of the prosecution leveled against him and claimed his innocence and false implication in this case. However, neither he examined himself on oath nor led any sort of evidence in his defence.

6. After hearing the parties, the trial Court passed the impugned judgment dated 22.6.2024, thereby convicting and sentencing the appellant as stated above. Hence the appellant has preferred instant criminal appeal against said judgment.

7. I have heard appellant in person, learned D.P.G. for the State, and perused the record with assistance of learned D.P.G.

8. Appellant is present on bail; however, his counsel is not in attendance. Appellant claims innocence and false implication in this case by foisting false recovery being offshoot of main case vide Cr. Case No.20 of 2024 arisen out of Crime No.93 of 2023 of P.S Karampur under Section 393 PPC in which he alongwith co-accused Altaf Hussain have been acquitted of the charge vide judgment dated 23.02.2024. He further pointed out that in the main case it was surfaced that prior his false implication in this case as well as main case, father of co-accused Altaf Hussain, who happens to be his cousin, had lodged FIR in the murder case against complainant party of this case, therefore, they have been falsely implicated by complainant of main case, hence while extending benefit of doubt, they were acquitted by the trial court. On all these submissions, he urged that he is innocent and he has been falsely implicated in this case by the police. Hence he may be acquitted in this case.

9. Learned D.P.G after going through the Para No 20 of the impugned judgment at page No.83 of the paper book affirms that appellant has already been acquitted in main case and besides there are certain

discrepancies, irregularities as well as contradictions in the prosecution case, therefore, he has no objection if the appellant is acquitted of the charge.

10. Perusal of record reveals that allegedly police party while on patrolling arrested appellant alongwith co-accused who were wanted in main case and recovery of crime weapon used in the commission of crime in main case was effected from the appellant in presence of police mashirs PC Altaf Hussain and PC Ali Gohar, therefore, instant case was registered by complainant ASI Rukun Din. However, in the main case appellant alongwith co-accused have been acquitted of the charge by the trial Court.

11. As regards the recovery of crime weapon from the appellant is concerned, perusal of ballistic expert's report reflects that the crime weapon was received to their office on 20.11.2023 while it was allegedly recovered on 14.11.2023, thus there is delay of 7 days in transmitting crime weapon from *malkhana* to ballistic expert, creating serious doubt into its safe custody at *malkhana* more particularly when the Mashir of recovery and arrest himself was Incharge Malkhana.

12. Perusal of record reflects; during trial in main case, it was admitted by complainant and P.W in cross examination that father of co-accused Altaf Hussain namely Ghulam Ali had already lodged FIR bearing Crime No.35/2023 under Section 302 PPC at P.S Ghouspur against the father of complainant namely Ghulam Mustafa regarding the murder of his son, therefore, appellant and co-accused were falsely implicated in main case which created serious doubt into the veracity of prosecution case. Hence, prosecution failed to bring home guilt of the accused and they were acquitted of the charge by trial Court vide judgment dated 23.02.2024, true copy whereof has also been brought on record. In view of such background of standing enmity, false implication of present appellant in this case by police at the behest of complainant party of main case can not be ruled out. There is no denial that the prosecution had advance information of the availability of appellant, who was also absconder in main case registered with same police station,; however, the raiding party did not associate a public mashir to witness the arrest and recovery proceedings nor taken any effort to arrange private person to act as mashir and attest that all proceedings being undertaken by the police impartially, thus there is clear violation of Section 103 Cr.P.C.

13. Close scrutiny of the record reflects that prosecution case suffers from discrepancies, irregularities and infirmities as well as contradictions between statements of P.Ws. It is astonishing to see that complainant himself has acted on three counts being complainant, Author of FIR as well as Investigating Officer while mashir PC Altaf Hussain has also acted as Incharge *Malkhana*, testimony of such highly interested witnesses lacks credibility. It is needless to emphasize that an officer, who is himself complainant in the case, cannot be expected to collect and preserve evidence, which goes against his case. He can not properly perform duties of an independent and fair investigating officer. It is, therefore, that the superior Courts have never approved the practice of complainant police officers acting as Investigating Officers. Besides, according to para 3 of rule 25.2 of Police Rules, 1934, it is the duty of an Investigating Officer to find out the truth and his object shall be to discover the actual facts and for the achievement of such object he shall not commit himself prematurely to any view of the facts for or against any person. Reliance is placed in the case reported as **The State v. Bashir and others (PLD 1997 SC 408)** in which Hon'ble Supreme Court while referring to above Police Rules, observed as under:

"It could hardly be expected that a police officer, who is heading a raiding party and is a witness, also becomes the complainant and lodges an F.I.R. against the accused, and then becoming an Investigating Officer of the same case, will comply with the aforesaid Police Rule. In the circumstances, the practice of seizing officer or the head of a police party who is also a witness to the crime becoming or being nominated as an Investigating Officer of the same case should be avoided and if any other competent officer is available in the police station, he may be nominated as the Investigating Officer rather than the head of the police party. As observed Investigating Officer is as important witness for the defence also and in case the head of the police party also becomes the Investigating Officer he may not be able to discharge his duties as required of him under the Police Rules."

14. I have also scanned the prosecution evidence consisting upon only two prosecution witnesses. PW-1 complainant/I.O stated in cross examination that after leaving Police Station, they patrolled through firstly Begari Pull, then Khararo Pull and then arrived at Iqbal Laro, which was contradicted by PW-2 Mashir/I/c Malkhana by stating that they patrolled through Karampur City, then Khararo, then Sher Garh and then arrived at Iqbal laro. P.W-1 stated that they noticed accused at the distance of 50/60 paces which is contradicted by Mashir PC Altaf Hussain by stating they noticed accused at the distance of 30/40 paces. In his cross examination, PW-1 complainant/I.O claimed that they asked private persons to act as mashir but

no one was ready which is contradictory to the version of FIR in which there is no mention about saying any body to act as mashir, while the mashir simply stated that due to non-availability of private mashirs, complainant associated him and another PC as mashirs. Thus the prosecution evidence on such material points contradicts to each other.

15. Moreover, the appellant has been acquitted from the charge of main case and it being offshoot case the appellant deserves to be acquitted from the charge of present case. I am fortified with the dicta laid down by learned Bench of Lahore High Court in the case of **Yasir Chaudhry vs. The State and another (2012 MLD1315)**. It will be appropriate to reproduce relevant Para No.5 of said judgment which reads as under:

"5. In the case reported as Manjhi v. The State (PLD 1996 Kar. 345), it has been held that when the accused has been acquitted in the main case, he would become entitled to acquittal in a case which is offshoot of the said case. Same is the position here, as the present lis is an offshoot of the main murder case. So, respectfully following the dictum laid down in the judgment supra, this petition is allowed and the application of the petitioner under section 249-A, Cr.P.C. is accepted and the petitioner is acquitted of the charge in case F.I.R. No.17 of 2003 dated 12-1-2003 registered under section 7 of the Surrender of Illicit Arms Act No.XXI of 1991 with Police Station Civil Lines, Bahawalpur. Resultantly, the proceedings before the learned trial Court are quashed."

16. In view of above discussion, there appears several circumstances / infirmities in the prosecution case, which have created reasonable doubts about the guilt of the appellant. In the case of **Muhammad Akram v. The State (2009 SCMR 230)**, it is held by hon'ble Supreme Court as under :-

"It is an axiomatic principle of law that in case of doubt, the benefit thereof must accrue in favor of the accused as matter of right and not of grace. It was observed by this Court in the case of Tariq Pervez v. The State 1995 SCMR 1345 that for giving the benefit of doubt, it was not necessary that there should be many circumstances creating doubts. If there is circumstance which created reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of doubt not as a matter of grace and concession but as a matter of right."

17. In the circumstances and in view of above peculiar circumstances of the case as well as citations discussed herein above, prosecution has miserably failed to prove its charge against the appellant beyond shadow of reasonable doubt. Consequently, instant appeal is hereby

(91)

allowed. Resultantly impugned judgment dated 22.6.2024 passed by trial Court/Ind Additional Sessions Judge, Kandhkot vide Sessions Case No.05/2023 Re: State v. Khadim Bhayo, whereby the appellant was convicted and sentenced for offence punishable under Section 23 (i)(a) & 25 of the Sindh Arms Act, 2013, is hereby set aside. Resultantly, the Appellant stand acquitted of the charge. He is present before the court on bail. His bail bond stand cancelled and surety shall be deemed to be discharged; subject to proper verification, identification and as per rules.

JUDGE

Approved for reporting.

Shahir/P.S

The above order has been complied
On 22/04/2025

Accountant