

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

Cr. Appeal No.S-120 of 2017
Cr. Appeal No.S-121 of 2017

DATE	ORDER WITH SIGNATURE OF JUDGE
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Date of hearing: 02 .10.2017.

Date of decision: 02.10.2017

Appellant Attaullah: Through Mr. Muzzamil Khan Bughio,
Advocate.

Appellant
Muhammad Iqbal: Through Mr. Javed Chaudhry, Advocate.

The State Through Mr. Erum Ahmed, DDPP.

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J U D G M E N T :-

ABDUL MAALIK GADDI, J- By this common judgment I intend to dispose of above captioned both appeals which arising out of the same incident, whereby two separate FIRs bearing crime No.81 of 2015 and 82 of 2017 under sections 23-I(A) Sindh Arms Control Act, 2013 lodged by complainant ASI Sadaqat Ali of CIA Centre Mirpurkhas under the same mashirnama of place of incident and recovery.

2. Through instant appeals, the appellants have challenged the judgment dated 10.05.2017 passed by learned Ist. Additional

Sessions Judge, Mirpurkhas in Sessions Case Nos.331 & 332 of 2015 in aforementioned crime, whereby the learned trial court after full-dressed trial convicted and sentenced the appellant Attaullah u/s 23(i)A Sindh Arms Control Act, 2013 to suffer R.I for Seven (07) years and pay Rs.1,00,000/-as fine and in case of non-payment of fine amount, further suffer S.I for Five (05) months more, whereas, appellant Muhammad Iqbal was convicted u/s 23(i)A Sindh Arms Control Act, 2013 to suffer R.I for Three (03) years and to pay Rs.50,000/-as fine and in case of non-payment of fine amount, further suffer S.I for Three (03) months more. Both appellants were extended benefit of section 382(B) Cr.P.C.

3. Related facts of crime No.81 of 2015 and Crime No.82 of 2015 respectively are as under:-

Facts of Crime No.81 of 2015 of PS Satellite Town Mirpurkhas.

As per the case of prosecution on 15.9.2015 at 2200 hours the complainant ASI Sadaqat Ali of CIA Centre, Mirpurkhas lodged FIR at P.S Satellite Town Mirpurkhas, alleging therein that he alongwith PC Saeed Baig, PC Muhammad Ameen, PC Shakir Ali, PC Rustam and driver PC Ghulam Abbas during patrolling duty on spy information at ring road near Kak Bungalow curve found the accused Attaullah standing armed with un-licensed pistol of 30-bore with magazine, 05 live bullets of 30-bore, cash Rs.70/-and one bag containing one un-licensed repeater gun of 12-bore with magazine, two un-licensed arms and ammunition viz.rifle of 44-bore with magazines, pistol of 9 mm bore with magazine, a revolver of 32-bore, one magazine of 44-bore, two magazines of 9 mm bore, 90

live bullets of 9 mm bore, 82 live bullets of 44-bore, 06 live cartridges of 12-bore, 12 live bullets of 32-bore and 05 Arms licenses. He then sealed parcel the recovered weapons at the spot and prepared mashirnama of arrest of accused and recovery at the spot in presence of mashirs PC Rustam Ali and PC Muhammad Shakir. Thereafter, he brought the arrested accused alongwith recovered case property at P.S Satellite Town, Mirpurkhas, where he lodged the FIR u/s 23(1)A Arms Act against the accused on behalf of the State.

Facts of Crime No.82 of 2015 of PS Satellite Town Mirpurkhas.

As per the case of prosecution on 15.9.2015 at 2200 hours the complainant ASI Sadaqat Ali of CIA Centre, Mirpurkhas lodged FIR at P.S Satellite Town Mirpurkhas, alleging therein that he alongwith PC Saeed Baig, PC Muhammad Ameen, PC Shakir Ali, PC Rustam and driver PC Ghulam Abbas during patrolling duty on spy information at ring road near Kak Bungalow curve found the accused Muhammad Iqbal standing armed with un-licensed pistol of 9 mm bore with magazine containing 06 live bullets, another magazine containing 10 live bullets and cash Rs.50/-. He then sealed parcel the recovered weapons at the spot and prepared mashirnama of arrest of accused and recovery at the spot in presence of mashirs PC Rustam Ali and PC Muhammad Shakir. Thereafter, he brought the arrested accused alongwith recovered case property at P.S Satellite Town, Mirpurkhas, where he lodged the FIR u/s 23(1)A Arms Act against the accused on behalf of the State.

4. At trial, prosecution examined in above stated cases the same set of witnesses viz. complainant ASI Sadaquat Ali, who produced the copy of mashirnama of arrest of accused and recovery, copy of FIR, copy of departure entry of CIA Centre. PW-2 / mashir PC Rustam Ali, who produced the case property, PW-3 First I.O of the

case SIP Nadeem Akhtar Baig, who produced report of Ballistic Expert and last PW-4 IInd I.O of the case Inspector Riaz Ahmed was examined by the prosecution, thereafter the side of prosecution was closed vide statements as Exh.09 and 10 respectively in both cases.

5. Statements of accused were recorded under section 342, Cr.P.C, wherein appellant/accused Attaullah denied the allegations leveled against him and stated that he is innocent and involved in this case falsely, however he examined himself on oath vide Exh.11 and produced one original cheque of Rs.30,000/=alongwith bank memo as Exh.11/A & Exh.11/B and also examined DW-1 namely Muhammad Niaz son of Muhammad Riaz in his defence vide Exh.12 and thereafter his counsel closed the defence side vide statement at Exh.13. While, in statement u/s 342 Cr.P.C appellant/accused Muhammad Iqbal has also denied the allegations leveled against him and stated that he is innocent, however he declined to examine any witness in his defence and also declined to examine himself on oath, though asked by the Court.

6. After hearing the parties' counsel, learned trial court came to the conclusion that the cases have been proved against the appellants/accused; he convicted and sentenced them as stated above.

7. The main contention of the learned counsel for the appellants is that the impugned judgments of conviction and sentence is perfunctory, opposed to law and facts on record; that the trial Judge while awarding the conviction has not considered the material contradictions made in the evidence of the PWs; that no independent witness has been cited by the prosecution and the PWs are police officials and subordinate to the complainant; that the complainant has failed to collect any private person of locality to act as mashir; that the case of the prosecution is full of doubts and based upon enmity. During the course of arguments learned counsels pointed out number of contradictions in between the evidence of PWs and according to them no conviction can be based on the basis of contradictory evidence.

8. On the other hand learned DDPP for the state contended that the prosecution examined above said witnesses who have fully supported the prosecution case. He submitted that the police witnesses are good as private person and their evidence cannot be discarded on the point that they are police officials. There is no contradiction in the evidence of examined witnesses and these witnesses have fully supported the versions of prosecution and the learned trial judge has rightly convicted the appellants; he therefore supported the impugned judgments.

9. I have carefully considered the arguments as advanced by the learned counsel for the parties and carefully scanned the material so available before me.

10. Read-through the contents of FIR as well anticipation the whole situation of the case from cranium to tail it aromas that the learned trial court while passing the impugned judgment did not consider the same. It is alleged against the appellants that on the relevant date, time and place unlicensed weapons with bullets as stated above were recovered from them by the police. It has been brought in evidence that incident took place in a thickly populated area i.e. Ring Road near Kaka Bungalow curve and the police party had already advanced information regarding the presence of appellants at there, but despite of this fact, the complainant did not bother to take with him any independent person either from the place of information or from the place of incident which is clearly violation of section 103 Cr.P.C, such lapse on the part of prosecution has cut at the roots of its case rendering the entire episode doubtful and it, by itself, was enough to make the prosecution version unbelievable. Also, it is an admitted position that this incident took place on 15.9.2015 and recovered weapons were received by Forensic Science Laboratory Forensic Division Hyderabad for opinion on 30.09.2015, after lapse of period about fifteen days, for which no explanation has been furnished,

therefore the tempering with the same weapons and false implication of the appellants in this case cannot be ruled out and non-sending the recovered property to the ballistic expert for forensic report in time, is fatal to the prosecution case. In this respect, I am fortified with the case of Muhammad Umair and another vs the State, reported in 2017 MLD (Sindh) 1097, hence the relevant placitum / portion of the same is reproduced hereunder:-

(d) Penal Code (XLV of 1860)---

**---S.7---Sindh Arms Act (V of 2013), S.23(1)-A---
Explosive Substances Act (VI of 1908),**

---“Record showed that weapons as well as hand grenades were sent for firearm examination after six days of their recovery---Prosecution had no explanation for keeping the ammunition in their custody for about six days although the Forensic Office was situated in same city--.”

11. Further, perusal of record shows that the weapons alongwith bullets and cartridges were recovered by the police from the possession of accused, however the plain reading of above Forensic report it appears that only cartridges were sent for analysis purposes which also creates doubt in the case of prosecution. Record further shows that the prosecution has miserably failed to produce any criminal history / record against the appellants to show that they are habitual offender.

12. I have also gone through the evidence of complainant ASI Sadaqua Ali and Pw/mashir PC Rustam, who are said to be witness of arrest and recovery, but their evidence has been found contradictory on material particulars. Besides this as I have observed above that the place of arrest and recovery of appellants is highly doubtful, therefore, the evidence of these witnesses cannot be safely relied upon.

13. Besides this, I have perused the evidence so brought on record and found that the evidence of the prosecution witnesses is contradictory on material particulars to which the learned counsel for appellant Attaullah has drawn attention towards such lacunas while submitting written synopsis, surprisingly disregarded / left by the trial court while passing the impugned judgment, which for the sake of accessibility are produced hereunder.

1. There is admitted enmity with ASI Riaz, who is serving at P.S. Sattellite Mirpurkhas as the appellant done work furniture of same ASI Riaz and he gave Cheque in favour of appellant which was dishonored and that the appellant in this regard filed criminal petition u/s 22-A & B Cr.P.C before the court of law against such ASI before this incident, but the learned trial court failed to consider the same while passing impugned judgment.

2. That 15 days delay in sending weapon to expert which fatal the prosecution case, such delay break the case of prosecution and that not a single private witness is associates in whole case inspite of spy information.
3. That prosecution and learned trial court has not even examine the star witnesses of case namely Qalandar Bux and Zahoor, which licenses of weapons were shows to be recovered from appellant even the judgment is silent about such view and that cash so recovered from the accused were not produced by police as property; that appellant have not previous any criminal history as like this case; that no any case pending against him; that judgment of learned trial court is even silent about statement on oath and defense witnesses produced by appellant Attaullah and also has not discussed the documents viz. Cheque, memo and petition copy produced by appellant; that all the witnesses are police officials.
4. That complainant ASI Sadaquat Ali during evidence taken names of places where he visited , SLD Factory, P.O office Chowk, Kipro Chowkm Muhajir Colony, Iqbal Pump in cross, but mashir PC Rustam Ali says they stop o Shahi Bazar, Tando Adam Naka and Choona Factory in cross. Complainant further says in cross PC Rustam hold accused while PC Rustam Ali says ASI caught hold accused. Complainant also says that 6

weapons were recovered while PC Rustam has taken only 4 names of weapons in his chief. Likewise ASI says that Allah Abbasi was working as incharge of CIA Centre while PC Rustam says Allah Abbasi was working as un-officials incharge of CIA Centre; ASI Sadakat says accused not tried to escape away in cross however PC Rustam says accused tried to run away. Furthermore the complainant ASI Sadakat says in his chief examination that he secured only five magazine, whereas PC Rustam says only one magazine was secured from the possession of accused.

5. While further lacunas describing in this written synopsis the counsel for appellant light-on the same that complainant disclosed that he secured 5 magazine from the possession of accused, but as per Forensic report only 8 magazine has been sent to them.
6. That complainant mashir mashir admitted in their evidence that the place of incident is busy road, that they both admitted that they did not try to collect any private mashir inspite of spy information; that IO of case neither visited the place of incident; that entry of Malkhana were not produced by any one, that entry of arrival and site visit has not been produced; that complainant and mashir admitted that description of weapons has not mentioned in memo and so also the colour of

baig. That test empties sent by forensic laboratory were not produced by any one in whole case.

14. Looking to the above noted contradictions and points, I have no hesitation to hold that the prosecution has failed to prove its case against the appellants and the learned trial court did not appreciate the evidence properly. It is settled position of law that if there is slight apprehension regarding prosecution case being untrue, its benefit must extended to the accused. Reliance is placed in the case of **Tariq Perves v. The State** reported as **1995 SCMR 1345**, wherein it has been held that if a single circumstance creates reasonable doubt in the prudent mind about the guilt of the accused then he will be entitled to such benefit not as a matter of grace, 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**.

15. In addition to the above position, I have also quest the defective Charge so framed by the learned trial court as well as the statement of accused under section 342 Cr.P.C which shows that this charge is missing in respect of disclosure of the whole episode as at the time of incident under the same mashirnama the above both appellants were arrested but trial court failed to ask **query from the accused regarding arrest of co-accused** which was required bylaw that whole event of incident has to be put into the

mouth of appellant while framing of charge, hence the manner of conducting trial is also fatal in it. In this respect I relied upon the case law reported in SBLR 2017 Sindh 1379 which for the sake of convenience is reproduced hereunder:-

C) Criminal Procedure Code (V of 1898)---Section 221 to 240---Chapter XIX---Charge---Charge being foundation of trial is precise-formulation of specific accusation made against a person who is entitled to know its nature at the earlier stage, which he is required to defend---Chapter XIX of the Cr.P.C, contains provisions with regard to the charge in criminal cases---Section 221 to 240 specify different provisions regarding charge. The subject of charge in criminal cases is of utmost importance as the entire edifice of a criminal case is built upon the framing of a correct charge.

16. Similarly, it is settled principal of law that at the time of recording statement under section 342 Cr.P.C of accused the specific question be put forth him regarding the whole episode of the commission of offence, but the same was not exercised by the trial court and the position is same like above discussed charge, hence the major lacuna has also been left in it which cuts the root of whole proceedings before the trial court and creates dent into it.

17. For my above stated reasons, I have no hesitation to hold that the prosecution has failed to prove its case against the appellants and the learned trial court did not appreciate the evidence and record properly, resultantly above both appeals are allowed. The impugned judgments are set-aside and the appellants

are acquitted from the charge. Appellant Attaullah is in jail, he shall be released forthwith, if no more required in any other custody case or crime. However, appellant Muhammad Iqbal is present on bail, his bail bond stands cancelled and surety discharged. Since, these appeals are disposed of, therefore, MA No.6149/2017 pending in appeal No.120/2017 has become infructuous.

JUDGE.

Ahmed/Pa