

IN THE HIGH COURT OF SINDH, KARACHI

Criminal Appeal No.291 of 2016

Mangat Hussain Butt

v/s.

The State

Before: Justice Mrs. Ashraf Jahan.

Appellant : Mangat Hussain Butt
Through Mr. Allah Bakhsh Narejo,
Advocate

The State : Through Ms. Rahat Ehsan, Additional P.G
a/w Mr. Abbas Ali Leghari, Probation
Officer Reclamation and Probation, Karachi
(West)

Date of Hearing : 04.12.2017

Date of Judgment : 06.02.2018

JUDGMENT

MRS. ASHRAF JAHAN, J.: This appeal is directed against the Judgment dated 20.07.2016, in Sessions Case No.2947/2014, passed by the IIIrd Additional District and Sessions Judge, Karachi (West), which arose out of F.I.R. No.427/2014, under section 23(1)(a) of the Sindh Arms Act, 2013 (hereinafter referred to as “**the Act of 2013**”) of Police Station Ittehad Town, Karachi, whereby the Appellant was convicted for two years and to pay fine of Rs.5000/-; in case of default in payment of fine to undergo R.I for one month.

However, before implementing the sentence his custody was handed over to the Probation officer to be kept under his supervision for a period of two years.

2. The facts in a nutshell, as per the case of prosecution are that Complainant ASI Manzoor Hussain lodged F.I.R. No.427/2014, under section 23(1)(a) of the Act, 2013 on 25.11.2014 in continuation of earlier F.I.R. bearing No.426/2014 under section 6/9-C of CNS Act, 1997, stating therein that the apprehended accused in that crime, disclosed his name as Mangat Hussain Butt, from whom one 30 bore pistol without number alongwith two live bullets was recovered, but he failed to produce any license for the pistol, therefore, present F.I.R. was lodged.

3. The investigation of this case was entrusted to SIP Muhammad Ijaz Memon of the same Police Station, who after completing the investigation challaned the accused before the Court of law. Charge against the accused was framed on 29.01.2015 under section 23(1)(a) of the Act, 2013, to which he pleaded not guilty and claimed trial. Thereafter prosecution in order to substantiate its case examined the following witnesses:

- P.C. Muhammad Munir, mashir of arrest and recovery was examined as Ex.3, who produced mashirnama of arrest and recovery as Ex.3/A and identified the accused present in Court to be the culprit of the instant case.

- Complainant ASI Manzoor Hussain was examined by the prosecution as Ex.5, who supported the case of prosecution and produced the F.I.R. of the instant crime as Ex.4/B, Roznamcha Entry as Ex.4/C and mashirnama of place of incident as Ex.4/D.
- S.I. Muhammd Ijaz Memon, Investigating Officer has been examined as Ex.6, who produced the letter addressed to the incharge FSL as Ex.6/A and FSL report as Ex.6/B.
- P.W. Sudhir, the other mashir of recovery and arrest, was given up by the prosecution vide Ex.4 on record.

Thereafter prosecution closed its side vide Ex.7 on record.

- The statement of accused was recorded under section 342 Cr.P.C as Ex.8, wherein he denied the case of prosecution and pleaded that he had been involved in this case falsely at the instance of one Noman Bashir due to enmity over the plot and prayed for justice.

4. I have heard the learned counsel for the Appellant as well as learned State Counsel. It is contended by the counsel for the Appellant that the Appellant was arrested from his house, which is situated within the jurisdiction of other police station. Further there are material contradictions in the evidence of prosecution witnesses in respect of time and manner of the arrest of the Appellant; therefore, the Judgment of the trial Court is liable to be set aside. He

drawn attention of this Court to the operative part of the Judgment and submitted that the impugned Judgment in itself having contradictions, as against Point No.2 it is mentioned that the Appellant has been convicted for two years with fine of Rs.5,000/- and in case of default R.I for one month; whereas in the last paragraph such findings are missing and custody of the Appellant has been given to the probation officer for a period of two years, therefore, the present appeal may be allowed in the interest of justice.

5. On the other hand, it is contended by learned State counsel that all the P.Ws have fully implicated the present Appellant; he has only alleged enmity with one Noman Bashir at the time of his statement recorded under section 342 Cr.P.C., but neither he had opted to record his statement on oath nor took any witness in his defence; therefore, present appeal is liable to be dismissed being devoid of merits.

6. The Probation Officer present in Court furnished his compliance report, which is available on record and verbally informed about the conduct of the Appellant being satisfactory. However, upon directions of the Court he furnished detailed record of criminal cases against the Appellant.

7. I have considered the arguments and have perused the case record. The present appeal is to be examined from two angles:

(i). As to whether the conviction awarded under section 23(1)(a) of the Act, 2013 by the trial Court is maintainable?

(ii). As to whether the Probation Order of the Appellant has been passed in accordance with law?

So far as the first point is concerned, it requires in-depth study and evaluation of the evidence brought on record by the prosecution, as mentioned earlier the prosecution in order to prove its case has examined three witnesses, the Complainant, Mashir of arrest and recovery and the Investigating Officer. The perusal of evidence of above witnesses reveals that all of them have supported the case of prosecution on material points as their evidence could not shattered during the cross examination. It will be also relevant to mention here that the recovered pistol was sent for forensic examination and report is available on record as Ex.6/B, with the result that at the time of examination it was in working condition.

8. No doubt there are some minor contradictions in the evidence brought on record as in the F.I.R. time of incident is mentioned as 1:30 p.m., whereas in mashirnama it is mentioned as 2:30 p.m., but so far as the date and manner of incident are concerned, there is no contradiction in the evidence of prosecution witnesses, therefore, such minor contradictions are ignorable. It is also to be kept in mind that at the same time two F.I.Rs were lodged, one under section 6/9-C of the CNS Act and the other under section 23(1)(a) of the Act of

2013, the present F.I.R., so such type of confusion could be caused due to preparation of mashirnamas in two different cases. As there are no other material discrepancies or infirmities in the evidence of prosecution case, therefore, solely on the ground of some minor contradiction, the entire evidence of prosecution cannot be brushed aside.

9. Moreover, in the instant case though the Appellant has taken the defence that he was got involved in this case at the behest of one Noman Bashir, with whom he had some dispute over plot, but neither he opted to record his statement on oath on this point nor examined any defence witness to support his stance. The trial Court in its Judgment dated 20.07.2016 has also discussed such aspects of the case and thereafter answered the point No.(1) in the affirmative and while deciding the point No.(2) convicted the Appellant for two years with a fine of Rs.5000/- and in case of default in payment of fine to suffer R.I for one month as mentioned in the column of findings on point No.2 on the third page of impugned judgment. The learned counsel for the Appellant during the course of his arguments failed to point out any lacuna in the case of prosecution, therefore, I am of the view that the prosecution has succeeded to prove its charge against the present Appellant beyond the shadow of reasonable doubt.

10. So far as the next point, as to whether the order regarding probation of present Appellant for two years is concerned, the perusal of record reveals that the learned trial Court in this regard has given two reasons;

- That the Appellant is first offender and not a previous convict.
- That the Appellant is young man and the only earning member of his family.

In this regard when record is perused, it transpires that it has already come during the evidence that prior to the instant case he was involved in many other criminal cases as well. During the pendency of this appeal history of his criminal record was called, which has been submitted by the probation officer. For ready reference same is reproduced as under:

"S.No.	Particulars of the Criminal Case	Trial Court	Present Status of the Criminal Case
1.	Cr. Case No.4656/2011 F.I.R. No.446/2011 u/s 447, 448, 420, 471, 506 PPC, P.S. Saeedabad, The State v/s Mangat Hussain Butt S/O Basheer Ahmed	XIV Civil Judge & Judicial Magistrate (West) Karachi	Accused Mangat Hussain Butt s/o Bashir Ahmed Acquitted U/S 245(I)Cr.P.C on 07.01.2017
2.	Cr. Case No.1576/2012 F.I.R. No.165/2012 U/S 392/354/34 PPC P.S. Saeedabad The State v/s. Noman and others	1 st Civil Judge & Judicial Magistrate (West) Karachi	The proceeding of the case has been stopped till production of witnesses by the prosecution against the accused Mangat Hussain Butt S/O Bashir Ahmed Butt and Noman @ Nomi S/O Naeem Akhtar on 01.04.2016.

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| 3. | Case No. 2871/2012
F.I.R. No.308/2012
U/S 489-F P.P.C
P.S. Saeedabad
The State v/s Mangat Hussain Butt s/o Basheer Ahmed | XVIth Civil Judge & Judicial Magistrate (West) Karachi | Accused Mangat Hussain Butt s/o Bashir Ahmed acquitted u/s. 245(I) Cr.P.C on 31.03.2017 |
| 4. | Special Case No.B-292/2013
F.I.R. No.253/2013
U/S 385/386/324/337-H PPC r/w Section 7 of ATA, 1997
P.S. Ittehad Town Karachi
The State v/s. Mangat Hussain s/o Bashir Ahmed | Anti-Terrorism Court No.V, Karachi | Accused Mangat Hussain s/o Bashir Ahmed Acquitted u/s 265-H(i)Cr.P.C on 05.11.2015 |
| 5. | Special Case No. 313 / 2013
F.I.R. No.137/2013 u/s. 9/B CNS Act, 1997
P.S. Ittihad town, Karachi.
The State v/s. Mangat Hussain | Special Court-II (CNS) Karachi | Accused Mangat Hussain s/o Bashir Ahmed Acquitted u/s. 265-K Cr.P.C on 27.04.2016 |
| 6. | Special Case No.1354 / 2014
F.I.R. No.426/2015
u/s 6/9-C CNS Act, 1997
P.S. Ittehad Town
The State v/s. Mangat Hussain Butt s/o Bashir Ahmed.” | Special Court-I (CNS) Karachi | Case is pending before the Special Court-I (CNS) Karachi. |

The perusal of above details reflects that apart from the present case, in last 6/7 years, the Appellant had remained involved in six other criminal cases, out of which the last one is still pending before Special Court-I (CNS), Karachi, whereas in other cases either he had been acquitted or proceedings had been stopped. This being the history of criminal record of present Appellant, which has not been denied or challenged by him during the proceedings of this appeal, I

am unable to understand as to how the trial Court in its judgment has held that he is first offender. Thus, the above findings, being contrary to the record, have been wrongly made basis for passing an order of probation. Likewise the trial Court in the last paragraph of its judgment has further held that:

“I saw accused, he is a young man and he stated that he is only earning member of his family and if he has been sent to judicial custody his family will be spoiled.”

As regards the age of Appellant, the perusal of his statement recorded under section 342 Cr.P.C. reveals that he himself had disclosed his age 45 years and profession as businessman. It is not understandable how the Court observed him of young age and only bread earner of his family. Such findings without basis are incorrect, unrealistic and contrary to record, therefore, not acceptable.

11. So far as the powers of Court to release the offenders on probation are concerned, the same are governed by Section 562 Cr.P.C. For ready reference the same is reproduced as under:

“562. Powers of Court to release certain convicted offenders on probation of good conduct instead of sentencing to punishment. When any person not under twenty one years of age is convicted of an offence punishable with imprisonment for not more than seven years, or when any person under twenty one years of age or any woman is convicted of an offence not punishable with death or [imprisonment] for life, and no previous conviction is proved against the offender, if it appears to the Court before which he is convicted, regard being had to the age, character or antecedents of the offender and to the circumstances in which the offence was committed, that it is expedient that the offender should be released on probation of good conduct, the Court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period (not exceeding three years) as the Court may direct, and

in the meantime to keep the peace and be good behaviour:

Provided that, where any first offender is convicted by a Magistrate of the third class, or a Magistrate of the second class not specially empowered by the Provincial Government in this behalf and the Magistrate is of opinion that the powers conferred by this section should be exercised he shall record his opinion to that effect, and submit the proceedings to a Magistrate of the first class [x x x] forwarding the accused to, or taking bail for his appearance before, such Magistrate, who shall dispose of the case in manner provided by section 380.

- (1A) Conviction and release with admonition.** In any case in which a person is convicted of theft, theft in a building, dishonest misappropriation, cheating or any offence under the Pakistan Penal Code punishable with not more than two years imprisonment and no previous conviction is proved against him, the Court before whom he is so convicted may, if it thinks fit, having regard to the age, character, antecedents or physical or mental condition of the offender and to the trivial nature of the offence or any extenuating circumstances under which offence was committed, instead of sentencing him to any punishment, release him after due admonition.
- (2) An order under this section may be made by any Appellate Court or by the High Court where exercising its power of revision.
- (3) When an order has been made under this section in respect of any offender, the Court may, on appeal when there is a right of appeal to such Court, or when exercising its power of revision, set aside such order and in lieu thereof pass sentence on such offender according to law:

Provided that the High Court shall not under this subsection inflict a greater punishment than might have been inflicted by the Court which the offender was convicted.

- (4) The provisions of sections 122, 126-A and 406-A shall, so far as may be, apply in the case of sureties offered in pursuance of the provisions of this section.”

A bare reading of above provision of law clearly denotes that it can be applied in an offence which is punishable with imprisonment for

not more than seven years, while in the instant case the offence is under section 23(1)(a) of the Act of 2013 which is punishable upto fourteen years with fine. Thus it is not covered by section 562 Cr.P.C.

12. No doubt in order to reduce crime from the society, Courts should be extra careful and considerate while deciding the cases of young and first offenders, so that they get a chance to reform themselves, instead of becoming a habitual criminal after mixing up or interacting with the hardened criminals in jails. In this regard 'Probation of Offenders Ordinance, 1960', provides the category of convicts in whose cases the Court can exercise such jurisdiction, but ofcourse certain criteria and guideline is provided to exercise such jurisdiction and the Courts have to give reasons in writing in this respect. They have to take into consideration age, character, antecedents, physical or mental condition of the offender alongwith the nature of offence etc. Keeping in mind such guiding principles, when the Judgment of the trial Court is perused it reveals that, the reasons assigned in the Judgment, on the face of it, are contrary to the facts on record. Thus, it is established that the reasons assigned by the trial Court for handing over the custody of the Appellant to the Probation Officer are perverse, erroneous and illegal; therefore, cannot be sustained.

13. In the light of above discussion, I am of the view that the Judgment of the trial Court to the extent of convicting the Appellant under section 23(1)(a) of the Act of 2013, awarding him sentence for

a period of two years and fine of Rs.5000/-, in case of default in payment of fine S.I for one month more is maintained but set aside to the extent of handing over his custody to the Probation Officer. He may be taken into custody and sent to the Central Prison, Karachi for carrying out his conviction, however the benefit of section 382-B Cr.P.C. is extended in his favour.

Judge

Manzoor