

ORDER SHEET  
IN THE HIGH COURT OF SINDH AT KARACHI

*Criminal Appeal No. 425 of 2017*

Date	Order with Signature of the Judge
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For hearing of cases.

Heard on : 09<sup>th</sup> July, 2018  
 Date of order : 11<sup>th</sup> October, 2018  
 For Appellant : Mr. Jamal Ahmed S. Mufti, Advocate.  
 For State : Ms. Seema Zaidi, D.P.G.

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**J U D G M E N T**

Kausar Sultana Hussain, J. :- Through the instant appeal under Section 410 Cr.P.C, appellant/convict Syed Rizwan Ali son of Syed Ejaz Ali challenged his conviction and sentence awarded to him by the learned IV<sup>th</sup> Additional Sessions Judge, Karachi South vide Judgment dated 06.09.2017, whereby, accused Syed Rizwan Ali was found guilty of possessing 9M.M Pistol loaded with magazine containing three live bullets, punishable under Section 23(i)(a) of Sindh Arms Act, (S.A.A), 2013 and upon conviction sentenced to four years rigorous imprisonment and also to pay fine of Rs.20,000/- (Twenty thousand rupees) and in case of non-payment of fine further undergo simple imprisonment for three months in case Crime No.107/2015, registered under Section 23(i)(a) S.A.A 2013 at Police Station Azizabad, Karachi (Central).

2. Brief facts of the case as revealed by the prosecution before the trial Court are that on 08.04.2015, the complainant Inspector Hameedullah Khan Niazi lodged F.I.R, wherein it was stated that accused Syed Rizwan Ali son of Syed Ejaz Ali was already arrested in Crime No.243/2014 for offences under Sections 302, 324/34 P.P.C R/W Section 07 of Anti Terrorism Act (A.T.A). During interrogation he disclosed that Pistol used by him in above

crime of murder is in his possession. It was alleged that thereafter accused voluntarily led police party towards Yaseenabad graveyard and got recovered one 9 M.M Pistol alongwith three live bullets under mashirnama. The above report of the complainant Inspector Hameedullah Khan Niazi duly signed by him was presented to Duty Officer/ASI Muhammad Arshad, Police Station, Azizabad in the shape of statement under Section 154 Cr.P.C which was copied in F.I.R by the above named duty officer. Appellant/accused Syed Rizwan Ali, who was already in the custody of police in another case formally arrested in present crime under mashirnama. After usual investigation Challan of the case bearing No. 53 of 2015 was submitted before the learned trial Court, where on 01.06.2016, accused was formally charged to which he pleaded not guilty and claimed trial. In order to prove the case, prosecution examined three witnesses. Statement of appellant/accused was recorded under Section 342 Cr.P.C., wherein he denied the prosecution allegation and professed his innocence. He however neither opted to be examined on Oath as his own witness under Section 340 (2) Cr.P.C. nor desired to produce evidence in his defence. Upon culmination of trial, learned trial Court after hearing both the sides, convicted and sentenced the appellant as mentioned above, hence the instant Criminal Appeal.

3. I have gone through the record carefully and considered the arguments advanced by the learned counsel appearing on behalf of appellant and so also learned DPG for the state

4. As stated above, prosecution in support of its case produced three witnesses as PW-1 ASI Younus Aziz at Exh-4 being well conversant with complainant Hameedullah Khan Niazi, who produced FIR as Exh-4/A, memo of formal arrest and recovery as Exh-4/B and statement of the complainant recorded under Section 154 Cr.P.C. as Exh-4/C; PW-2/ I.O.

ASI Younus Aziz at Exh-5, he produced memo of place of incident as Exh-5/A, Naqsha Nazir ( memo of preparation of map of the site) at Exh-5/B, letter to Incharge CRO as Exh-5/C, letter to FSL at Exh-5/D and Examination Report of Forensic Division Sindh as Exh-5/E; PW-3 mashir P.C Arshad was examined at Exh-6. Thereafter, learned ADPP for the State closed its side vide statement at Exh-7.

5. Per record, statement of the accused/appellant had been recorded under Section 342 Cr.P.C by the learned trial Court to which he termed allegation as false and professed his innocence.

6. The learned counsel for the appellant has argued that alleged recovery was not made from the exclusive possession of the accused; that learned trial Court did not record the statement of Inspector Hameedullah Khan Niazi who allegedly recovered the weapon. He further argued that the accused is innocent and falsely been implicated in this case with ulterior motives. He also placed reliance on following case laws :-

1. 2016 MLD 230.
2. 2002 P.Cr.L.J 51.

7. Conversely, learned DPG appearing for the State has opposed the contention of the learned defence counsel and supported the impugned judgment on the ground that the trial Court passed the judgment after considering all material placed before it as such it do not invite interference by this Court.

8. I have minutely examined the record, placed before this Court and so also given my anxious consideration to the arguments led by both the counsels. It transpired from record that the accused/appellant was under arrest in another Crime when he allegedly confessed before the police officials that he had hidden a pistol in graveyard which was allegedly used

as weapon of offence in Crime No.243/2014 and as per prosecution version, upon such revelation by the accused/appellant, police party led by Inspector Hameedullah Khan Niazi alongwith PC Arshad and PC Aamir effected alleged recovery of pistol from a graveyard known as Yasinabad Graveyard. It is also on record that prosecution failed to produce said complainant Inspector Hameedullah Khan Niazi before the trial Court for testimony although learned trial Court given ample opportunities to prosecution for the appearance of such an important witness before the Court. However, prosecution produced Investigation Officer of the case namely ASI Younus Aziz, who produced FIR No.107/15; memo of arrest, recovery and statement of the complainant recorded under Section 154 Cr. P.C. on behalf of the complainants. It is incomprehensible as to how a police official could be made substitute of another police official who had an active role as complainant of the case and so also principal witness of recovery of alleged weapon. Producing substitute police official had denied the opportunity of cross-examination to accused which is a valuable right provided to an accused. It is a trial which an accused person or his counsel can exert the purpose of testimony and the reliability of the statement made by the witness. In the present case, accused was denied his legal right to cross examine the complainant who is also the principal/material witness of allegedly recovery. Mashir of the recovery PC Arshad in his statement before trial Court deposed that accused voluntarily led the police party to Yaseenabad Graveyard and went at one grave of Mst. Nanhi Begum and the accused voluntarily produced 9 M.M pistol export quality alongwith three live bullets; however in his statement under Section 154 Cr .P.C. Inspector Hameedullllah Khan Niazi stated that accused got effected the alleged recovery of weapon in between the head side of the grave of Nanhi Begum and the tree from beneath the two blocks, which was packed in blue colour plastic bag. Co-mashir P.C Amir also did not appear before the trial

Court despite issuance of repeated processes. Investigation Officer of the case ASI Younus Aziz during his statement formally produced FIR, statement under Section 154 Cr. P.C. of Inspector Hameedullah Khan Niazi, memo of recovery and arrest, statement of Inspector Hameedullah Khan Niazi recorded under Section 161 Cr. P.C. He deposed that he received the custody of appellant/convict from complainant/Inspector. He during cross-examination stated that he on the pointation of Inspector Hameedullah Niazi Khan visited the place of incident on 21.04.2015 and prepared such memo in the presence of Inspector Hameedullah Khan Niazi and PC Aamir. However PC Aamir too did not testify such memo as already discussed above that he was not produced by the prosecution before the trial Court. More so, a mandatory provisions of Section 103 Cr.P.C had not been complied with as is evident from the record of the case. The prime object of compliance of provisions provided in Section 103 Cr.P.C is to ensure that the recovery is effected justly and fairly to eliminate possibility of false implication as such it is binding on Investigating Agency as a general rule. Furthermore Roznamcha Entry was also not produced by the prosecution to establish that police virtually proceeded towards the place of recovery to retrieve the alleged weapon. Such safeguard in law and rules, as the case may be, have been provided to ensure fair and impartial investigation and to minimize the chances of misuse and abuse of massive authority vested in Investigation Agencies.

9. Per the foregoing reasons, it is quite evident that impugned judgment is result of misreading and non-reading of evidence and also implication of judicial mind by the trial Court, as such not sustainable in the eyes of law. I accordingly, allow appeal of appellant/convict Syed Rizwan Ali and set aside the sentence recorded by the learned trial Court.

The appellant is hereby acquitted of the charge. He is on bail, his bail bonds are cancelled and surety stands discharged.

**J U D G E**

Faheem/P.A