

## IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

Cr. Appeal No. S- 312 of 2019

Appellant Ghulam Qadir: Through Mr. Nasrullah A. Khaskheli,  
Advocate

State: Through Mr. Shahid Ahmed Shaikh,  
D.P.G.

Date of hearing and judgment: 07.02.2020

### **JUDGMENT**

**ABDUL MAALIK GADDI, J.**-Through this appeal, the appellant has assailed the legality and propriety of the judgment dated 09.10.2019 passed by learned IInd Additional Sessions Judge, Shaheed Benazirabad in Sessions Case No.651 of 2018 (Re: The State V/s Ghulam Qadir) arisen out of Crime No.82 of 2018, registered U/S 23-A(i) Sindh Arms Act, 2013 at PS Bandi, whereby the learned trial court after full dressed trial convicted and sentenced the appellant as stated in Point No.2 of the impugned judgment. For the sake of convenience, it would be proper to reproduce Point No.2 of the impugned judgment which reads as under:-

“In view of above discussions as well as my findings on point No.1, I convict the present accused U/S 265H(ii) Cr.P.C. for the offence punishable under section 23 I A Sindh arms Act and sentence him to suffer R.I for two years with fine of Rs.20,000 (Twenty thousands) while taking lenient view considering him to be a first offender in the light of non-bringing any material by the prosecution on record to prove him previous convict person. He shall suffer S.I for one month in case of non-payment of fine. However, he will avail benefit of section 382-B Cr.P.C. The accused being on bail, is taken into custody and remanded to serve out the sentence with conviction warrant.”

2. Facts of the case are that complainant HC Qaiser Khan Dahri lodged the F.I.R. alleging therein that on 24.11.2018 at 1530 hours at Sada Wah Mouri, Taluka Daur he being head of police party, while patrolling in their jurisdiction, apprehended the accused (appellant) and recovered one un-licensed SBBL gun of 12-Bore alongwith three live cartridges from his possession in presence of mashirs PCs Khalid Hussain and Muhammad Ramzan. Thereafter the accused and recovered property were brought at

police station, where he lodged F.I.R against the said accused on behalf of the State.

3. After usual investigation, police submitted final report before the concerned Judicial Magistrate, who took cognizance of the offence and subsequently, the case was entrusted to the learned trial Court, where formal charge vide Ex.2 has been framed against the accused, who vide his plea Ex.3 pleaded not guilty and claimed to be tried.

4. At trial, the prosecution to prove its case has examined P.W / PC Khalid Hussain at Ex.4, who produced mashirnama of arrest and recovery at Ex.4/A; complainant / HC Qaiser Khan at Ex.5, who produced F.I.R. at Ex.5/A and roznamcha entry at Ex.5/B; P.W / I.O ASI Bahadur Khan at Ex.6, who produced Ballistic Expert report at Ex.6/A; thereafter, learned ADPP closed the prosecution side at Ex.7. The aforementioned witnesses have sufficiently been cross examined by the counsel for appellant.

5. Later on statement of accused was recorded U/S 342 Cr.P.C in which he denied the prosecution allegation and claimed his innocence. However, he did not examine himself on oath nor led any evidence in his defence.

6. Learned counsel for the appellant contended that the case is managed one and appellant is innocent and has been falsely implicated in this case; that the alleged SBBL gun as well as cartridges have been foisted upon him due to non-payment of illegal gratification; that although the place of incident was a busy place, however, no independent witness has been cited by complaint and all the PWs / mashirs being police officials are interested witnesses; that the learned trial Court has only believed upon the examination in Chief of the PWs and did not bother to consider their respective cross examination while delivering the judgment and has miserably failed to properly evaluate such evidence; that learned trial Court while not discussing the cross examination of the prosecution witnesses has passed the impugned judgment in a hasty manner and the appellant ought to have been acquitted, hence, the findings recorded by the trial Court requires interference by this Court. He lastly prayed for acquittal of the appellant from the charge.

7. Learned D.P.G. opposed this criminal appeal on the ground that appellant has been apprehend at the spot with SBBL gun alongwith cartridges which as per Chemical Examiner's report was in working condition; that the trial Court has passed the impugned judgment after appreciating the entire evidence on record and the same is proper and perfect hence does not require any interference.

8. I have heard the learned counsel for appellant, learned D.P.G for the State and perused the material available on record.

9. The allegation against the appellant is that on the fateful day he was apprehended from Sada Wah Mouri, Taluka Daur and one unlicensed SSBL alongwith three live cartridges was recovered from his possession. On perusal of prosecution evidence it reveals that the place of incident was a busy place and surrounded by houses so also many people were available there but complainant did not bother to pick / associate any independent person from that place to witness the event. So also no explanation is available on record that why police party did not obtain the services of private persons though available. No doubt the evidence of police official is as good as that of any other witness but when the whole prosecution case rests upon the police officials and hinges upon their evidence and when the private witnesses were available at the place of information or at the place of incident then non-association of private witness in the recovery proceedings create serious doubt in the prosecution case. It is settled principle that the judicial approach has to be conscious in dealing with the cases in which testimony hinges upon the evidence of police officials alone. I am conscious of the fact that provisions of Section 103 Cr.P.C. are not attracted to the cases of personal search of accused relating to the arms. However, when the alleged recovery was made on busy road and houses were available there as happened in this case omission to secure the independent mashirs, particularly, in the case of patrolling cannot be brushed aside lightly by the court. Prime object of Section 103 Cr.P.C. is to ensure the transparency and fairness on part of the police during course of recovery, curb false implication and minimize scope of foisting of fake recoveries upon accused. As observed above, at the time of recovery in this case, complainant did not bother to associate any private person to act as recovery mashir / witness and only relied upon his subordinates / colleagues and furthermore he himself registered the FIR. It does not do away with the principle of producing the best available evidence. In this regard I am fortified with the cases of **Nazir Ahmed v. The State** reported in PLD 2009 Karachi 191 and **Muhammad Khalid v. The State** reported in 1998 SD 155. Hence as observed above, due to non-association of independent witness as mashir in this case, false implication of the appellant cannot be ruled out. I have also noted a number of contradictions in the evidence of the prosecution witnesses. For example, in his cross-examination, P.W / PC Khalid Hussain (Ex.4) has stated that *"It is correct to suggest that private witnesses were not engaged in this case."* Whereas complainant / Qaiser Khan in his cross-examination stated that *"I tried for private witnesses but could not succeed. I sent PC Ramzan for private witnesses."* When these contradictions and discrepancies in prosecution

evidence were confronted with the learned D.P.G, he could not reply satisfactorily.

10. It is also noted that alleged incident took place on 24.11.2018 while the case property viz SBBL gun alongwith three cartridges was sent / received in the Forensic Science Laboratory for its examination and report on 10.12.2018 after a delay of 16 days of recovery, for which no satisfactory explanation has been furnished by the prosecution. During the course of arguments, I have specifically asked the question from learned D.P.G to explain such delay and also to explain that during this intervening period before and with whom the case property was lying and in case it was lying in Malkhana whether any such entry of Malkhan has been brought on record to corroborate this fact, he has no satisfactory answer with him.

11. Furthermore, HC Ghulam Akbar, who took / delivered the case property / weapon to Forensic Science Laboratory for its examination and report, has also not been examined by the prosecution. On query, learned D.P.G has once again no plausible answer with him that why this Ghulam Akbar has not been examined. This aspect of the case also creates serious doubt in the prosecution case.

12. In these circumstances, I am of the view that prosecution case is not free from doubts and it is well settled principle of law that even a single circumstance creating a reasonable doubt, the benefit of which, always goes in favour of accused. In the instant case there are material discrepancies and lacunas in the prosecution evidence. In this regard, reliance can be placed upon case of **Tariq Parvez v. The State** (1995 SCMR 1345) wherein it has been held by Honourable Supreme Court of Pakistan that:

"For giving benefit of doubt to appellant 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 matter of right".

13. In the light of what has been discussed above and case law, I am of the considered view that the prosecution has entirely failed to prove its case against the appellant beyond any shadow of reasonable doubt hence he is entitled to be acquitted of the charge.

14. Above are the reasons of short order dated 07.02.2020, whereby instant appeal was allowed and as a result thereof impugned judgment dated 09.10.2019, passed by learned IInd Additional Sessions Judge, Shaheed Benazirabad in Sessions Case No. 651 of 2018 (re: State V Ghulam Qadir), emanating from Crime No.82 of 2018, registered at Police Station Bandi,

under section 23(A)(i) Sindh Arms Act was set aside and the appellant was acquitted of the charge. As the appellant was in custody, he was ordered to be released forthwith if not required in any other custody case. Consequently, the listed application was also disposed of.

JUDGE

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