

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, LARKANA

**(1) Cri. Appeal No.S-148 of 2019**

Appellant : Safeer *alias* Ali Dino son of Moula Bux Aheer.

Respondent : The State.

**(2) Cri. Appeal No.S-149 of 2019**

Appellant : Irfan Ali son of Moula Bux Aheer.

Respondent : The State.

Mr. Ahmed Bux Abro, advocate for the appellants in both appeals.

Mr. Aitbar Ali Bullo, Deputy Prosecutor General.

Date of hearing : 04-12-2020.

Date of Judgment : 04-12-2020.

J U D G M E N T.

**NAIMATULLAH PHULPOTO, J.-** Appellants Safeer *alias* Ali Dino and Irfan Ali, both sons of Moula Bux, by caste Aheer, were tried by Mr. Ghulam Qadir Tunio, learned Additional Sessions Judge 1st/MCTC, Kamber, separately in Crime Nos.26 and 27 of 2016, u/s 23(1)(a) of Sindh Arms Act, 2013 registered at Police Station Mahi Makol. On the conclusion of the trials, vide separate judgments dated 30.11.2019, both appellants were convicted under Section 23(1)(a) of Sindh Arms Act, 2013 and sentenced to four years R.I. and to pay fine of Rs.20,000/-. In case of default in the payment of fine, both accused were directed to undergo S.I. for three months more. Appellants were extended benefit of Section 382-B, Cr.P.C. Both appellants have filed separate appeals before this Court.

2. Brief facts leading to the filing of the appeals, as mentioned by complainant ASI Mashooque Ali Chandio in his evidence recorded by trial Court in Sessions Case No.169/2016 at Ex.3, are as under:-

“I am complainant in this case. On 16.05.2016, I was posted as ASI at PS Mahi Makol. On the same date, I along with my subordinate staff namely PC Akhtiar, PC Nazar Mohammad and DPC Abdul Karim left the PS in Police Mobile No.SP-6736 with DD entry No.10 at 1630 hours for investigation of main case bearing Crime No.23/2016 U/Ss 302, 452, 34 PPC of PS Mahi Makol. I produce PS attested copy of such DD Entry at Ex.3/A, which is same, correct and attested by me. When we reached near Bakho Khuhawar Bridge, it was 1715 hours, where we received spy information that in the above main crime, the required accused namely Safeer Aheer and Irfan Aheer being armed with pistols used in the above main crime were standing near Baago Wah situated on link road proceeding from Bakho Khuhawar to Jeean Abro for the purpose of transport. On receipt of such information, we proceeded to the informed place and from Bakho Khuhawar Bridge, I took both the mashirs namely Mohammad Naseer Seelro and Rafique Ahmed Seelro and further proceeded to the pointed place. We reached at pointed place at 1730 hours, where we saw that two persons were standing in the northern side. We stopped the police mobile, alighted from it. Both the culprits on seeing us, tried to flee, but we tactfully apprehended them on the spot in presence of mashirs namely Mohammad Naseer and Rafique Ahmed and in their presence, I enquired from both the apprehended culprits about their names and whereabouts. On which, they disclosed their names to be Safeer @ Ali Dino son of Moula Bux Aheer and Irfan son of Moula Bux Aheer. I made body search of both the above-named accused persons in presence of above-named mashirs and I secured one pistol of 30-bore, number erased, Pakistani made in working condition with magazine containing five live bullets of 30-bore from right side fold of shalwar of accused Safeer alias Ali Dino Aheer. I also secured one currency note of Rs.100/- from front pocket of his shirt. I also secured one pistol of 30-bore, number erased, Pakistani made, in working condition with magazine containing four live bullets of 30-bore from right side fold of shalwar of accused Irfan Aheer. I also secured one currency note of

Rs.50/- from front pocket of his shirt in presence of above-named mashirs. On enquiry, both the accused failed to produce licenses of the pistols and bullets. Thereafter, I sealed both the properties separately on the spot and prepared such memo in presence of above-named mashirs. I produce PS attested copy of such memo at Ex.3/B, which is same, correct and bears my signature as well as LTIs of both the above-named mashirs. Thereafter, we brought both the above-named accused along with the secured property under memo at P.S Mahi Makol, where I registered the separate FIRs under Section 23(1) SAA 2013 against both the accused persons on behalf of the State. I produce FIR of this case at Ex.3/C, which is same, correct and bears my signature. I also produce PS attested copy of arrival DD Entry No.16 and DD Entries No.17 & 18 regarding starting the FIR and completing the FIR at Ex.3/D to 3/F respectively, which are same, correct and attested by me. On the same date, I handed over the case papers, along with case property and custody of the accused to the I.O. SIP Zakir Hussain Abro for investigation purpose. On 17.5.2016, at 1400 hours, I showed the place of incident to the I.O. SIP Zakir Hussain Abro, who on my pointation, inspected the same and prepared such memo in presence of same mashirs. Accused present in the Court and case property shown to me in the open Court are same.”

3. ASI Mashooque Ali narrated more or less same facts in his evidence in Sessions Case No.167/2016. Hence, the same may not be repeated here.

4. It may be mentioned here that both cases are connected/offshoots of the main case bearing Crime No.23/2016, registered against the appellants at P.S Mahi Makol, under Sections 302, 452, 34 PPC.

5. After usual investigation, challan was submitted against both appellants in the main case under Sections 302, 452, 34, PPC as well as in these connected cases. Trial Court proceeded with main case separately. These cases were also proceeded separately.

6. Charge was framed against the accused/appellants under Section 23(1)(a), Sindh Arms Act, 2013. Both the accused pleaded 'not guilty' and claimed to be tried.

7. At the trial, prosecution examined complainant ASI Mashooque Ali (PW-1), mashir Mohammad Naseer (PW-2) and IO SIP Zakir Hussain Abro (PW-3). They produced the relevant documents. Thereafter, prosecution side was closed.

8. Learned trial Court recorded statements of accused under Section 342, Cr.P.C separately, in which they claimed false implication and denied the prosecution allegations. Accused did not lead any evidence in their defence and declined to give statement on oath in disproof of prosecution allegations. Trial Court after hearing the learned Counsel for the parties and assessment of the evidence available on record, by separate judgments dated 30.11.2019 convicted both the appellants under Section 23(1)(a), Sindh Arms Act, 2013 and sentenced them to undergo four years R.I. and to pay the fine of Rs.20,000/-. In case of default in payment of the fine, they were ordered to suffer S.I. for three months more. Appellants were extended benefit of Section 382-B, Cr.P.C. Both appellants have filed appeals separately.

9. During pendency of the appeals, learned advocate for the appellants by way of his statement filed attested copy of the judgment dated 16.12.2019 passed by learned 1<sup>st</sup> Additional Sessions Judge/MCTC, Kamber in Sessions Case No.321/2016, which reflects that both appellants Safeer alias Ali Dino and Irfan have been acquitted by the trial Court for offence u/s 302, PPC, mainly on the ground that PWs did not support the prosecution case. Learned advocate for the appellants

has also filed attested copy of the deposition of mashir Mohammad Naseer recorded in the main case in order to show that mashir in cross-examination has admitted that present appellants were neither arrested in his presence nor any weapons were recovered from their possession. I.O. just obtained his signature on plain papers.

10. The facts of these cases as well as evidence produced before the trial Court find an elaborate mention in the impugned judgments passed by the trial Court, hence same need not to be repeated here so as to avoid duplication and unnecessary repetition.

11. Learned advocate for the appellants mainly contended that mashir Mohammad Naseer in his evidence recorded in the main case had clearly replied in the cross-examination that neither accused were arrested in his presence nor crime weapons were recovered from them. It is further submitted that it was the case of spy information but police official failed to associate independent respectable persons of the locality, though place of recovery was a road, on which traffic was there. It is further submitted that prosecution has failed to bring on record evidence with regard to the safe custody and safe transmission of the weapons to the Ballistic Expert. It is also submitted that though trial Court recorded evidence in both the cases separately, but evidence in one case was copied in another case. It is submitted that it was against the spirit/requirement of the law. In support of his submissions, learned Counsel has relied upon the cases reported as ***Hamza Ali Hamza v. The State (2010 SCMR 1219)*** and ***Faheem Ali v. The State (2019 MLD 468)*** and prayed for acquittal of the appellants.

12. Mr. Aitbar Ali Bullo, learned Deputy Prosecutor General, conceded that the evidence in both the cases was not recorded

separately. Learned DPG has also admitted that prosecution failed to bring on record the evidence with regard to the safe custody and safe transmission of the weapons to the Ballistic Expert. Learned DPG did not support the impugned judgments passed by trial Court.

13. I have carefully heard the learned Counsel for the parties and perused the evidence minutely.

14. Record reflects that the appellants/accused have been acquitted in the main case under Sections 302, 452, 34, PPC by learned 1<sup>st</sup> Additional Sessions Judge/MCTC, Kamber vide his judgment dated 16.12.2019, mainly on the ground that eye-witnesses did not support the prosecution case. It is the matter of the record that evidence of mashir, namely, Mohammad Naseer was recorded before the trial Court in the main case, in which he has categorically stated that neither appellants were arrested in his presence nor pistols were recovered from their possession. It is noticed that trial Court failed to record evidence in both the cases separately. Evidence of the prosecution witnesses was recorded in one case and same was copied/ditto typed in another case. Requirement of the law is that evidence in every case is to be recorded separately. Procedure adopted by the trial Court was absolutely illegal and unwarranted by law. According to the case of prosecution, both pistols were used by the appellants in the commission of the murder. Despite that, it is very strange that prosecution failed to produce the evidence with regard to the safe custody of the weapons at the police station and safe transmission to the Ballistic Expert. In the case of *KAMAL DIN alias KAMALA v. THE STATE (2018 SCMR 577)* the Honourable Supreme Court has held as under:-

“4. As regards the alleged recovery of a Kalashnikov from the appellant’s custody during the investigation and its subsequent matching with some crime-empties secured from the place of occurrence suffice it to observe that Muhammad Athar Farooq DSP/SDPO (PW18), the Investigating Officer, had divulged before the trial Court that the recoveries relied upon in this case had been affected by Ayub, Inspector in an earlier case and, thus, the said recoveries had no relevance to the criminal case in hand. Apart from that safe custody of the recovered weapon and its safe transmission to the Forensic Science Laboratory had never been proved by the prosecution before the trial Court through production of any witness concerned with such custody and transmission.”

15. Needless to mention that while giving the benefit of doubt to an accused it is not necessary that there should be many circumstances creating doubt. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of such doubt, not as a matter of grace and concession, but as a matter of right. It is based on the maxim, “it is better that ten guilty persons be acquitted rather than one innocent person be convicted”. Reliance in this behalf can be made upon the cases of *Tariq Pervez v. The State* (1995 SCMR 1345), *Ghulam Qadir and 2 others v. The State* (2008 SCMR 1221), *Muhammad Akram v. The State* (2009 SCMR 230) *Muhammad Zaman v. The State* (2014 SCMR 749) and *MUHAMMAD MANSHA v. THE STATE* (2018 SCMR 772).

16. For the above stated reasons, there are several circumstances, which have created doubt in the case of prosecution. Therefore, while extending benefit of doubt, both these appeals are allowed, conviction and sentence recorded by trial Court are set aside and appellants are acquitted of the charges. Appellants have already been released after undergoing the sentence awarded to them.

17. Before parting with the judgment it is observed that trial of aforesaid cases were conducted by learned 1<sup>st</sup> Additional Sessions

Judge, Kamber. Appellants were convicted under Section 23(1)(a) of Sindh Arms Act, 2013 and sentenced to four years R.I and pay fine of Rs.20,000/= and in case of default in payment of fine they shall suffer S.I for three months more. Record reflects that above-named appellants were also tried by the same Additional Sessions Judge separately for the main offence under Section 302 PPC registered at same police station. On the conclusion of trial, appellants were acquitted in the main case by trial Court vide judgment dated 16.12.2019. However, appellants have been convicted for offence u/s 23(1)(a) of The Sindh Arms Act, 2013 by learned same Judge/Court, as mentioned above.

18. I have heard learned counsel for the parties as to why joint trial was not conducted of connected/offshoot cases registered under the provisions of the Sindh Arms Act, 2013 with main case under Section 302 of Pakistan Penal Code, 1860 by same Court to avoid possibility of conflicting judgments.

19. I have perused The Sindh Arms Act 2013 Section 13 *ibid* which shows that all the offences under this Act shall be cognizable within the meaning of Criminal Procedure Code 1998 **and are triable by Court of Sessions**. All the offences under this Act shall be non-bailable under Section 41(1) of Sindh Arms Act, 2013. **The provisions of the Pakistan Arms Ordinance, 1965**, in its application in Province of Sindh, except the provisions relating to manufacturing including conversion, export or import of arms and ammunitions **are hereby repealed**.

20. Prior to the enactment of the Sindh Arms Act, 2013, West Pakistan Arms Ordinance, 1965 was applicable. This Court in various judgments examined the jurisdiction of Sessions Judges for conducting



trial for the offence under Section 13(d) of Arms Ordinance, 1965. In the case of **Akbar Khan v. The State (1991 MLD 1829 Karachi)** held as under:

7. I need not enter into the merits of the case as the trial of the appellant by Additional Sessions Judge for the offence under section 13-D of the Arms Ordinance, 1965, was coram non iudice and the conviction recorded against him is a nullity in the eye of law.

8. Section 14-A of the Arms Ordinance, 1965, which was added in the year 1976, has ousted the jurisdiction of Sessions Judge, Additional Sessions and Assistant Sessions Judge, to try such cases in the following words:---

"(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1898 (Act V of 1898), an offence punishable under section 13 or section 14 shall, unless it has been committed in respect of any of the arms, ammunition or military stores referred in the proviso to the said section 13 shall be triable by a Magistrate of the first class.

(2) All cases relating to offences triable by a Magistrate of the first class under subsection (1) and pending in a Court of Session immediately before the commencement of the Pakistan Arms (Amendment) Ordinance, 1976, in which the charge had not been framed shall, on such commencement stand transferred to the Court of the Magistrate of the First Class having jurisdiction over such cases."

21. This Court held in the above-mentioned case that as the First Class Magistrate had exclusive jurisdiction to try the case against accused under Section 13(d) Arms Ordinance, 1965, the cognizance taken by Additional Sessions Judge was illegal and conviction awarded to the appellant was without jurisdiction.

22. Now Sindh Arms Act, 2013 is in force and all the offences under this Act are triable by Court of Sessions.

23. Court in case of *Akbar Khan* (supra) realized that there was the possibility of the conflicting judgments by two different Courts on the possession of the arms by the accused i.e. one given by Sessions/ Additional Sessions Judge and another by First Class Magistrate under Arms Ordinance, 1965. **To avoid cropping up of such a situation**

**concerned Government was directed to take steps for suitably amending the relevant provisions of the law.**

24. To avoid cropping up of such a situation, Government of Sindh has taken the steps and The Sindh Arms Act, 2013 has been enacted. In case, Sessions Judge/Additional Sessions Judge try both cases (main case as well as case under the Sindh Arms Act, 2013) separately, a number of legal complications will arise, mainly evidence of one case cannot be read in another case. The prosecution deserves protection of law so as to prosecute the case with least inconvenience and without unnecessary hardship; equality before law without equal protection is a travesty; scales must be held strictly in balance. The provisions of Sections 233 and 239 of the Criminal Procedure Code, 1898 vest a discretion in the Court to try offences of the kinds indicated therein jointly. Even under the provisions of Anti-Terrorism Act, 1997, learned Judge, Anti-Terrorism Court while trying any offence under Anti-Terrorism Act, may also try other offence which an accused may, under the Code of Criminal Procedure, 1898, be charged at the same trial, if the offence is connected/offshoot with such other offence. Under Section 21-M of Anti-Terrorism Act, 1997 main offence and offence under the provisions of Sindh Arms Act, 2013 committed in the course of same transaction are jointly tried. Joint trial by same Court would not cause any prejudice to the accused. The Sindh Arms Act, 2013 has been promulgated, which is triable by Court of Sessions under Section 35 *ibid*.

25. **I am tempted to point out that where an accused is alleged to have used an arm in the commission of an offence triable by Court of Sessions, his trial under the Sindh Arms Act, 2013 must be held jointly by Sessions Judge/Additional Sessions Judge trying**

**the main case, to avoid possibility of conflicting judgments by different trials by same or different Courts on the point of possession of Arms by the accused i.e. one given by Sessions Judge/Additional Sessions Judge trying the main case and the other by same or other Court by recording and appreciating evidence separately.**

26. A copy of Judgment be sent to Mr. Ghulam Qadir Tunio, Additional Sessions Judge, for future guidance.

JUDGE

Qazi Tahir PA/\*