

IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Appeal No.S-44 of 2021

Appellant: Ali Jaffar (on bail) through M/s. Salahuddin Khan Gandapur and Peer Darvesh, advocates.

The State: Through Mr. Riasat Ali, D.P.P., Sindh.

Dates of hearing: 17.03.2021.

Date of judgment: 17.03.2021.

JUDGMENT

MUHAMMAD SALEEM JESSAR, J.- Through instant Criminal Appeal, appellant Ali Jaffar has assailed judgment dated 21.01.2021 passed by learned Additional Sessions Judge, Karachi (South) in Sessions Case No.152/2017, (re: State v. Ali Jaffar), arising out of F.I.R No.29/2017 registered at P.S Kharadar, Karachi, under Section 23 (1) (a) Sindh Arms Act, 2013, whereby the appellant was convicted for the offence punishable under section under Section 23 (1) (a) Sindh Arms Act, 2013 and sentenced to undergo R.I. for one year with fine of Rs.20,000/-. In case of default in payment of fine, he was directed to further suffer S.I for 10 days. However, accused / appellant was extended benefit of Section 382-B Cr.P.C.

2. Brief facts of prosecution case are that on 11.01.2017 complainant SIP Nasir Khan posted in investigation department of PS Kharadar along with officers and officials of investigation during patrolling and search of absconders, on spy information reached at bartan Gali Jodia Bazar and apprehended appellant Ali Jaffar, who was absconder in various crimes of PS Kharadar. On his search, police recovered an un-licensed pistol 30 bore rubbed number along with loaded magazine with three bullets from the fold of his trouser in presence of HC Muhammad Toufeeq and PC Muneer Ahmed due to non-availability of public witnesses being night time i.e. 2115 hours. The recovered arm was taken into possession by the police and returned to PS where instant case was registered against appellant. The accused is stated to be absconder in FIR No.211/2012 under section 302, 34 PPC.

3. After completing the required formalities, learned trial Court framed the Charge against accused at Ex.2, to which he pleaded not guilty and claimed to be tried.

4. In order to substantiate the charge, prosecution has examined P.W-01 Inspector Nasir Khan at Ex.4, P.W-02 Inspector (I.O) Muhammad Anwar at Ex.5 and P.W-3 HC Muhammad Taufeeq at Ex.6. Thereafter, prosecution closed its side vide statement at Ex.7.

5. Statement of accused was recorded under Section 342, Cr.P.C. at Ex.8, in which he denied the prosecution allegations and professed his innocence by stating that he was arrested by Rangers from his house and falsely implicated in present case and prayed for justice. Accused examined himself on oath at Ex.D in disproof of the prosecution allegations and also led evidence of one Syed Iqbal Hussain as defence witness at Ex.D/1.

6. Learned trial Court, after hearing learned ADPP on behalf of State, appellant in person and assessment of the evidence, convicted and sentenced the appellant as stated above, hence, this appeal has been preferred.

7. Learned counsel for appellant contended that the appellant is innocent and has been falsely implicated in instant case. He further contended that in fact the appellant was arrested from his house on 01.01.2017 by Rangers; however, after keeping 08/10 days in custody, the appellant was handed over to the police, who implicated him in instant case. According to learned counsel, the appellant, through his evidence on oath as well evidence of defense witness Syed Iqbal Hussain, has proved the factum of his arrest from his house and his version has not been shattered by the prosecution despite conducting lengthy cross by them at length. He pointed out that as per prosecution they had spy information regarding alleged presence of appellant at Kharti Masjid, Bartan Gali, even though, no independent witness was acted to witness the arrest of accused and recovery, if any. Learned counsel added that case property on which basis charge against appellant was framed, was not produced in evidence, even then he has been convicted on the basis of assumptions and presumptions. He, therefore, prays for acquittal of the appellant from all charges.

8. Learned D.P.P. Sindh for the State submits that recovery of one 30 bore pistol with loaded magazine along with 03 live bullets was effected; that the appellant is criminal and was also absconder in a murder case in FIR No.211/2012; hence, he does not deserve any leniency. He, therefore, prayed that impugned judgment being based on cogent and well reasons does not require any interference by this Court and prayed for dismissal of instant appeal.

9. Heard arguments and perused record.

10. Close scrutiny of the evidence reflects that with no denial the prosecution had advance information of the availability of appellant, who was also absconder in cases registered at same police station Kharadar, however, the raiding police party did not associate a public mashir to witness the arrest and recovery proceedings, if any. It is worthwhile to describe that the police officers / officials know the consequences of non-association of the private person(s) to be acted as mashir(s) confirming the prosecution version to see all proceedings being undertaken by the police; despite the fact that such omission on the part of prosecution points to some imprecision especially in presence of stance taken by the appellant duly supported by his defence witness that he was arrested from his house by Rangers. It is also a fact that in criminal administration of justice each and every case is to be decided on its own facts and peculiar circumstances and in the instant case the prosecution has not corroboratively handled the process during arrest and recovery proceedings, which, dents the prosecution case.

11. Unfortunately, the alleged recovered case property was not produced before the learned trial Court and it was deposed by PW complainant Inspector Nasir Khan that due to fire in the malkhana of city Court, the case property was burnt; as such, no confirmation regarding recovery of alleged un-licensed weapon was made before learned trial Court as to whether it was same having similar description. In this respect reliance may be placed upon the case of **Imtiaz Khan & another v. the State (2020 P.Cr.LJ 202 Peshawar)**, wherein the learned Divisional Bench of the Peshawar High Court has held as under:-

“6. In the instant case, we find a peculiar situation, where instead of confronting the accused-appellants with the relevant incriminating evidence/case property, they were confronted with the procedure adopted on the spot, **while no case property was produced and exhibited before the trial court during the course of examination of accused-appellants**, so therefore, the evidence used against the accused-appellant on that account was incomplete.”

(emphasis supplied)

12. Apart from above, no departure entry number or vehicle was mentioned in FIR, even names of other police officials are mentioned in the FIR as admitted by PW complainant Inspector Nasir Khan during course of cross-examination. Complainant also failed to mention the place where he received spy information. In such circumstances, where the prosecution fails to bring on record corroborative evidence, as such, conviction cannot be made on the basis of such illusive evidence, which too is riddled with many lacunas and loopholes as described above. As such, it would not be in accord of safe administration of justice to maintain the conviction and sentence of the appellant in the circumstances of the case.

13. Needless to emphasize that it is a well-settled principle of law that the prosecution is bound under the law to prove its case against the accused beyond any shadow of reasonable doubt, but no such duty is casted upon the accused to prove his innocence. It has also been held by the Superior Courts that conviction must be based and founded on unimpeachable evidence and certainty of guilt, and any doubt arising in the prosecution case must be resolved in favour of the accused. In the case reported as **Wazir Mohammad v. The State (1992 SCMR 1134)**, it was held by the Hon'ble Supreme Court as under:-

"In the criminal trial whereas it is the duty of the prosecution to prove its case against the accused to the hilt, but no such duty is cast upon the accused, he has only to create doubt in the case of the prosecution."

14. In another case reported as **Shamoon alias Shamma v. The State (1995 SCMR 1377)** it was held by Hon'ble Supreme Court as under:-

"The prosecution must prove its case against the accused beyond reasonable doubts irrespective of any plea raised by the accused in his defence. Failure of prosecution to prove the case against the accused, entitles the accused to

an acquittal. The prosecution cannot fall back on the plea of an accused to prove its case.....Before, the case is established against the accused by prosecution, the question of burden of proof on the accused to establish his plea in defence does not arise."

15. In view of above legal position, instant appeal was allowed by short order dated 17.03.2021. Consequently the impugned judgment dated 21.01.2021 penned down by learned IX-Additional Sessions Judge, Karachi (South) in Sessions Case No. 152 of 2017 "Re- The State v. Ali Jaffer" being outcome of Crime No.29 of 2017 of P.S Kharadar, Karachi under Section 23(i)(a) of Sindh Arms Act, 2013 was hereby set aside. Resultantly appellant Ali Jaffer son of Ghulam Ali was acquitted of the charge. Appellant was present on bail; therefore, his bail bonds were ordered to be cancelled and surety furnished by him stood discharged. Above are the reasons for the said short order.

JUDGE