IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

Criminal Appeal No.S-171 of 2020

Appellant	:	Ali Sher son of Hebat Khan through Mrs. Samreen Khaskhlei, Advocate.
Respondent	:	The State through Mr. Fayaz Hussain Sabki, Assistant Prosecutor General, Sindh along-with SIP Abdul Khalique Khoso, P.S. Bulri Shah Karim.
Date of hearing	:	20.09.2021
Date of decision	:	20.09.2021

J U D G M E N T

Khadim Hussain Tunio, J- Through instant Criminal Appeal, appellant Ali Sher has called in question the judgment dated 21.10.2020, passed by the learned Additional Sessions Judge-I, Tando Muhammad Khan, in Sessions Case No. 26 of 2020 (Re: the State v. Ali Sher), arising out of Crime No. 28 of 2020, registered at P.S Bulri Shah Kareem, for offence under Section 23(i)(a) of Sindh Arms Act, 2013, whereby he has been convicted and sentenced to suffer imprisonment for 1 year with a fine of Rs.10,000/- and in case of non-payment of fine, he was ordered to suffer further simple imprisonment for 3 months.

2. It is alleged that on 22.03.2020, the appellant was apprehended by the police party headed by ASI Muhammad Aslam of P.S Bulri Shah Kareem and, from the appellant, they secured a country-made pistol of 12 bore without number along with live cartridges from his possession, for which F.I.R was lodged.

3. On completion of all the formalities, a formal charge was framed against the appellant, to which, he pleaded not guilty and claimed to be tried.

4. The prosecution in order to substantiate the charge against the appellant examined 3 (three) witnesses namely PW-1 ASI Muhammad Aslam (complainant) at Ex.3, PW-2 Mashir HC Mushtaque at Ex-4 and PW-3 I.O Ghulam Akbar at Ex-5 and they produced various documents through their evidence. Thereafter, the prosecution side was closed.

5. Statement of the accused under Section 342 Cr.P.C. was recorded, wherein he denied the allegations leveled against him by the prosecution and pleaded his innocence. However, he did not examine himself on oath in terms of Section 340(2) Cr.P.C, nor led any evidence in his defence.

6. Upon conclusion of the trial, learned trial Court after hearing the learned counsel for the respective parties convicted and sentenced the appellant as stated in the preceding paragraph.

7. Learned counsel for the appellant has contended that the appellant has been falsely implicated in the case; that PWs are police officials and interested witnesses; that nothing has been secured from his possession and the case property as alleged against him has been foisted upon the appellant; that the appellant has been acquitted by the trial Court in the main case; that impugned judgment passed by the learned trial Court is opposed to the law, facts and is against the principal of natural justice; that mashirs/witnesses are the police officials and inimical witnesses and

no independent witness has been cited by the police; that the case property has been sent to the Ballistic Expert with a delay of 3 days which too has not been considered by the trial Court while recording conviction against the appellant, even no explanation with regard to the safe custody of the weapon during intervening period has been furnished by the prosecution.

8. Conversely, learned A.P.G has supported the impugned judgment.

9. I have heard the learned counsel for the parties and have perused the material available on the record.

10. The prosecution, in order to substantiate the charge against the appellant of recovering 12-Bore country-made Pistol with live cartridges has examined three witnesses i.e. ASI Muhammad Aslam, HC Mushtaque and I.O Ghulam Akbar. No doubt, the evidence of police witnesses is admissible, but same does not mean that they are reliable witnesses. Every case is to be seen in the light of its own facts. All the three witnesses have given statements in the line of F.I.R but after having examined their evidence, I have found material contradictions in their evidence, which have created reasonable doubt in the prosecution case. Before commenting on the evidence of the prosecution witnesses, some aspects of the prosecution case which too are creating uncertainty on part of the prosecution and are required to be discussed here. The whole case of the prosecution rests upon the evidence of police officials who received spy information regarding the presence of the appellant and co-accused wanted in the main case No. 26 of 2020 u/s 382

and 34 PPC for theft of a buffalo. The alleged recovery was made from the appellant in presence of the police officials. In this case, the alleged recovery of 12-bore country-made Pistol along with live cartridges is alleged to have been recovered from appellant on 22.03.2020 but the said weapon along with three cartridges was received by the office of Forensic Science Laboratory, Forensic Division, Hyderabad for its expert opinion on 25.03.2020 through the SHO of PS Bulri Shah Karim as per the receipt available on the record at Ex.5-F, though the police constable through whom the same was delivered is nowhere mentioned. No evidence has been brought on record regarding safe custody of the case property besides the register 19 entry's copy which in itself is questionable. The in-charge of the malkhana namely ASI Muhammad Hasil Rajar has not been examined so as to establish safe custody either. Moreover, the complainant and PWs deposed that they had affixed two seals on each parcel sent to the FSL, however as per the receipt of the same, there were three seals found on each parcel. The numbers on the pistol recovered and the initials of the appellant are not disclosed in the memo, FIR and evidence of the witnesses. It is also claimed by the complainant that he along with subordinate staff left PS in official vehicle for investigation of case bearing Crime No. 26 of 2020 and they apprehended the appellant along with alleged weapon and in said case, appellant has been acquitted after full-dressed trial by the Court of learned Civil Judge & Judicial Magistrate-III/MTMC, Tando Muhammad Khan while extending him benefit of doubt vide judgment dated 18.08.2020 passed in Criminal Case No.19 of 2020 and copy of the said judgment has been produced. More so, the place of incident as disclosed by

complainant and mashir is situated at a busy road where many cars pass by and people were present, even the place where the complainant received spy information was admitted to be a heavily populated place. Despite of that none of the independent/private persons had been picked by the complainant from the place of occurrence in order to make them mashir to ascertain the veracity of the incident. No cogent reason or plausible explanation has been furnished by the prosecution for non-association of independent witnesses by the police when independent people were available at the place of recovery, which was a thickly populated area; therefore, under such circumstances, no implicit reliance can be placed upon the evidence of interested witnesses. In this regard, reliance is placed upon the cases of ***MUHAMMAD SHAFI v. TAHIRUR REHMAN (1972 SCMR 144)*** and ***GHULAM SHABIR v. BACHAL & another (1980 SCMR 708)***.

11. Admittedly, in the case in hand, there are number of infirmities, lacunas as well as circumstances that create serious doubt in the prosecution story. It is settled principle of law that for extending benefit of doubt, it is not necessary that there should be many circumstances creating doubt. If there is a single circumstance, which creates reasonable doubt in a prudent mind about the guilt of an accused, then the accused deserves to be entitled to such benefit as a matter of right but not as a matter of grace and concession, as has been observed in the case of ***"MOHAMMAD MANSHA v. THE STATE" (2018 SCMR 772)*** wherein the Hon'ble Apex Court has also observed as under:-

> *"4. 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 Tarique Parvez v. The State (1995 SCMR 1345), Ghulam Qadir and 2 others v.The State (2008 SCMR 1221), Mohammad Akram v, The State 2009 SCMR 230) and Mohammad Zaman v.The State (2014 SCMR 749)."*

12. For the foregoing reasons and discussion, this Court has reached the conclusion that prosecution has failed to prove its case against the appellant beyond reasonable shadow of doubt, therefore, vide short order dated 20.09.2021 the impugned judgment was set aside and the appellant was acquitted of the charge. These are the reasons for the said short order.

JUDGE

Muhammad Danish*