

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

Cr. Appeal No.S-144 of 2018

Date of Hearing: 18.09.2020
Date of Judgment: 25.09.2020

Appellant: Akbar alias Akboli S/o Lal Muhammad Shaikh, through Mr. Roshan Ali Azeem Mallah, Advocate.

The STATE: Through Mr. Shewak Rathore,
Deputy Prosecutor Genera, Sindh.

J U D G M E N T

NAIMATULLAH PHULPOTO, J.- Appellant was tried by learned 2nd Additional Sessions Judge, Badin in Sessions Case No.61 of 2018, arising out of Crime No.97 of 2018, registered at P.S. Badin for offence under Section 23(1)(a) Sindh Arms Act, 2013. After regular trial, the appellant was convicted under Section 23(1)(a) Sindh Arms Act, 2013 and sentenced to seven (7) years. However, appellant was extended benefit of Section 382-B Cr.P.C.

2. Brief facts of the prosecution case as reflected in the impugned judgment are that on 15.04.2018 complainant ASI Muhammad Salam Khoso Incharge PP Town of P.S Badin left PP alongwith his subordinate staff HC Ghulam Rasool, HC Sultan Ahmed in police mobile driven by DPC for patrolling vide Roznamcha entry No.13 at 2200 hours. During patrolling, when they

reached at a plot towards Northern side of Railway station Badin, they saw a person was standing there, who on seeing the police, tried to run resultantly he fell down on the earth. They stopped the mobile, encircled him and apprehended at the spot. On inquiry, the said person disclosed his name as Akbar alias Akboli son of Lal Muhammad Shaikh. ASI Muhammad Salam Khoso conducted the personal search of accused and recovered one 30 bore pistol from the right side fold of his Shalwar. The pistol was opened and checked and found containing three live bullets in its magazine. The pistol was in working condition. CL03 Mauser made in China BG norinco were written on the body of pistol. The accused failed to produce its license. Due to fall on the ground, accused also sustained injuries on left leg and left hand. The property was sealed at spot. Complainant prepared such memo of arrest and recovery in presence of mashirs HC Ghulam Rasool and HC Sultan Ahmed. Thereafter, ASI brought the accused and case property at P.S Badin where he lodged FIR against the accused on behalf of State.

3. On the conclusion of usual investigation, challan was submitted against accused under Section 23(1)(a) Sindh Arms Act, 2013.

4. Learned Trial Court framed the charge against appellant at Ex.2. Accused pleaded not guilty and claimed to be tried.

5. At the trial, prosecution, in order to establish its` case, examined complainant ASI Muhammad Salam at Ex.3, he produced

departure entry No.13, memo of arrest and recovery, FIR, entry No.3 of registration of FIR, departure and arrival entry of PC Imran Ali who deposited the property with the office of Expert, Forensic Science Laboratory report and the list of criminal cases registered against accused (Criminal record) from Ex.3-A to 3-G respectively and PW-2 mashir HC Ghulam Rasool at Ex.4. Thereafter, prosecution side was closed.

6. Statement of accused was recorded under Section 342 Cr.P.C at Ex-6, in which accused claimed false implication in this case and denied the prosecution's allegation. He stated that police has foisted the weapon at the instance of complainant party of main case. Accused however, neither examined himself on Oath nor led any evidence in his defence.

7. Learned trial Court after hearing learned counsel for the parties and assessment of evidence vide judgment dated 22.06.2018 convicted and sentenced the appellant as stated hereinabove.

8. Learned advocate for the appellant mainly contended that it was the case of spy information; police had sufficient time to call independent and respectable persons of the locality to act as mashirs in this case but police avoided without assigning the sound reasons; that this is a case of misreading and non-reading of evidence; that there are material contradictions in the evidence of prosecution witnesses; evidence has not been appreciated properly

by the trial court while passing the judgment; that it was night time incident; source of light has not been mentioned. He further contended that prosecution failed to produce any evidence with regard to safe custody and safe transmission of the pistol to Ballistic Expert. Lastly, it is submitted that the pistol has been foisted upon the appellant. Learned counsel for the appellant in support of his contentions has placed reliance upon the cases reported as Ameenullah v. The State (2019 P.Cr.L.J Note 96) and Syed Maroof Shah v. The State (2019 P.Cr.L.J Note 108).

9. Mr. Shewak Rathore, learned Deputy Prosecutor General argued that prosecution has proved its' case that the appellant was found going armed with unlicensed pistol and report of the Ballistic Expert was positive. Learned D.P.G. supported the impugned judgment of the trial Court. He prayed for dismissal of the appeal.

10. The facts of this case as well as evidence produced before the Trial Court find the elaborate mention in the judgment passed by the Trial Court dated 22.06.2018, hence, the same need not to be repeated here so as to avoid duplication and un-necessary repetition.

11. After hearing the learned counsel for the parties and having gone through the evidence available on record, I have come to the conclusion that the prosecution has failed to prove its' case against the appellant for the reasons that prosecution story appears

to be un-natural and unbelievable for the reasons that complainant party was on patrolling and appellant was arrested on 15.04.2018 at 10-30 p.m. from an open plot. Source of light has not been mentioned. During investigation nothing came on record as to why appellant was standing armed with pistol at odd hours of night in an open plot. In the FIR number of pistol is not mentioned but in mashirnama of arrest and recovery it has been mentioned that its number was rubbed. Complainant / ASI Muhammad Salam Khoso has deposed that after arrest and recovery he brought the accused to police station. His evidence is silent with regard to the deposit of pistol in Malkhana of police station or handing over weapon to the Investigation Officer. Prosecution has also failed to examine PC Imran Ali who had taken weapon to the Ballistic Expert for report. Learned advocate for appellant has contended that the prosecution has failed to produce the safe custody of pistol at Malkhana of police station and its` safe transmission. I am clear in my mind that prosecution has utterly failed to prove the safe custody and safe transmission of weapon to the Ballistic Expert. It is also unbelievable that police caught hold the accused and accused did not open any fire upon police or in air though the pistol was full of bullets. It is clear that the prosecution failed to establish safe custody and safe transmission of the weapon to the Ballistic expert and positive report of the Ballistic Expert would not improve the case of prosecution. Reliance is placed upon the case reported as **KAMAL DIN alias KAMALA v. The STATE (2018 SCMR 577)**, wherein the Honourable Apex 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.”

12. No doubt the evidence of police officials cannot be discarded simply because they belong to police force. Where, however, the fate of the accused persons hinges upon the testimony of police officials alone, it is necessary to find out if there was any possibility of securing independent persons at that time. Judicial approach has to be cautious in dealing with such evidence as held in the case of **SAIFULLAH v. The STATE (1992 MLD 984 Karachi)**. Relevant portion is reproduced as under:-

“8. The evidence of police officials cannot be discarded simply because they belong to police force. In Qasim and others v. The State, reported in PLD 1967 Kar. 233, it was held:-

"A police officer is as good a witness as any other person. The standard of judging his evidence is the same on which the evidence of any other witness is judged."

However, in a case of this nature where the fate of an accused person hinges upon the testimony of police officials alone, it is necessary to find out if there was any possibility of securing independent persons at that time. Judicial approach has to be cautious in dealing with such evidence."

13. In my considered view, prosecution has failed to prove its' case against the appellant. He was arrested near Railway Station from open plot but Investigation Officer failed to examine any independent person of locality. Appellant was unrepresented during trial, but he raised plea that he has been falsely implicated at the instance of Mir Muhammad Soomro. In my view right to fair trial is the essence of criminal justice whereby each and every party is equal before the Court and should be provided full opportunity to advance its case and such right being enshrined under Article 10-A of Constitution of Islamic Republic of Pakistan, 1973 which postulates fair opportunity of trial. Therefore, Court while proceeding with a matter has to keep in mind that no one should be deprived of precious right of defence or in other words to be condemned unheard, which is lacking in the present case rather the record shows that the trial Court has taken down the prosecution evidence of two witnesses in stereo typed manner in one day without being cross-examined by the adversary. The essence of Qanun-e-Shahadat Order, 1984 as required under Chapter X has not been

adhered to in its letter and spirit under Article 133 of Qanun-e-Shahadat Order, 1984 and thus the trial conducted in haste by ignoring the principles of fair trial and due process as has been guaranteed under the Constitution of 1973. It would be unsafe to rely upon the evidence of police officials without independent corroboration, which is lacking in this case. Circumstances mentioned above have created reasonable doubt in the prosecution case. It is settled law that it is not necessary that there should be many circumstances creating doubts. If there is a single circumstance, which creates reasonable doubt in a prudent mind about the guilt of accused, then the accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right. In this regard reliance can be placed upon the case of **Muhammad Mansha v. The State (2018 SCMR 772)**, wherein the Honourable Supreme Court has observed as follows:-

“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) and Muhammad Zaman v. The State (2014 SCMR 749)."

14. Considering these facts, I have been led to the conclusion that the appellant's conviction is not warranted by the evidence produced against him in this case. Accordingly, I allow the appeal, acquitting him and setting aside his conviction and sentence. The appellant who is in custody be released forthwith, if not required in any other case.

JUDGE

Shahid