

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

Cr. Jail Appeal No.S-123 of 2018

Date of Hearing: 10.08.2020

Date of Judgment: 10.08.2020

*Appellant/accused: Ali Nawaz S/o Haji Mallah,
through Mr. Noor Muhammad Soomro
Advocate*

*The State: Through Mr. Shahzad Saleem
Nahiyoon, Deputy Prosecutor
General, Sindh.*

J U D G M E N T

NAIMATULLAH PHULPOTO, J:- Appellant Ali Nawaz was tried by learned IInd Additional Sessions Judge, Badin in Sessions Case No.75 of 2017 for offence under Section 23(1)(a) of Sind Arms Act, 2013. On conclusion of the trial, vide judgment dated 05.04.2018, appellant was convicted under Section 23(1)(a) of Sindh Arms Act, 2013 and sentenced to 05 years R.I. Appellant was extended benefit of Section 382-B Cr.P.C.

2. Brief facts of the case as disclosed in the F.I.R are that on 26.09.2017, ASI Ghulam Shabbir Khoso alongwith his subordinate staff, namely PCs Ali Sher and Mazhar Hussain left Police Station vide Roznamcha Entry No.21 at 1630 hours for investigation of Crime No.273 of 2017, registered at P.S Badin, under Sections 376 & 34 PPC. It is alleged that when the police party reached at Tando Bago Road near Tando Gamoon, where it

is alleged that ASI received spy information that the accused wanted in the aforesaid crime was present there. The police party proceeded to the pointed place while calling the mashirs on the telephone and reached at Tando Gamoon at 1800 hours. The present appellant was found standing there and he tried to run away while seeing the police mobile; however, he was surrounded and was caught hold. On inquiry, the accused disclosed his name as Ali Nawaz son of Haji, by caste Mallah, resident of Village Ibrahim Mallah. ASI conducted personal search of the accused in presence of mashirs, namely PCs Abdul Qayyum and Ali Sher Chandio and recovered from the right fold of his shalwar one 30-bore pistol alongwith magazine containing thee live bullets. Pistol was checked by ASI and on its barrel it was written "made as Italy Cal 30 Bore/Pak". ASI secured the same in his possession alongwith three bullets in presence of mashirs. Accused was inquired about license of the weapon which he was carrying, he disclosed that it was without license. Accused was arrested, mashirnama of arrest and recovery was prepared. Thereafter, the accused and case property were brought to the Police Station where the aforesaid F.I.R was lodged against the accused on behalf of the State.

3. After usual investigation, challan was submitted against the accused in the aforesaid crime, so also in the main case bearing Crime No.273 of 2017, registered at P.S Badin for offence under Sections 376 & 34 PPC.

4. Trial Court framed the charge against the accused under Section 23(1)(a) of Sindh Arms Act, 2013 at Ex-2. Accused pleaded not guilty and claimed to be tried.

5. Prosecution in order to prove its case, examined P.W-1 Mashir Abdul Qayyum at Ex-4, who produced memo of arrest and recovery at Ex-4/A. PW-2 complainant ASI Ghulam Shabir was examined at Ex-5, who produced FIR, entries of departure and arrival, entries of sending the property through PC Imran Ali, report of ballistic examiner and memo of arrest and recovery from Ex-5/A to 5-E respectively. Thereafter, prosecution side was closed.

6. Statement of the accused was recorded under Section 342 Cr.P.C at Ex-7, to which the accused claimed false implication in this case and denied the prosecution allegation. Accused declined to give statement on oath in disproof of the prosecution allegations and also no evidence in defence was led. Accused claimed his innocence and prayed for justice.

7. Learned Trial Court after hearing the learned Counsel for the parties and assessment of the evidence, convicted the appellant under Section 23(1)(a) of Sindh Arms Act, 2013 and sentenced him as stated above, hence, the appellant has preferred this appeal.

8. Learned Advocate for the appellant has mainly argued that appellant has been acquitted in the main case and this is an offshoot case and the evidence of the PWs has been disbelieved

by the trial Court in the main case. It is submitted that there was delay of 07 days in sending the weapon to the ballistic expert. Learned Advocate for the appellant further argued that prosecution has failed to bring on record the evidence with regard to the safe custody and safe transmission of the weapon to expert. It is submitted that in the FIR, the number of the weapon has been mentioned as 30-bore pistol but in the cross-examination, complainant / Investigating Officer has clearly stated that weapon was without number. Lastly, it is argued that prosecution has utterly failed to prove its case against the appellant and prayed for acquittal of the appellant.

9. Learned D.P.G argued that prosecution has proved its case against the appellant by cogent and confidence inspiring evidence, corroborated by positive report of ballistic expert and prayed for dismissal of the appeal.

10. I have carefully heard learned Counsel for the appellant, learned D.P.G for the State and perused the evidence minutely.

11. Evidence of the case in detail need not to be repeated here as the same have been mentioned in extenso in the judgment impugned.

12. It is matter of the record that appellant has been acquitted in the main case bearing Crime No.273 of 2017 registered at P.S Badin for offence under Sections 376 & 34 PPC

by the learned trial Court. It appears that evidence of the prosecution witnesses has been disbelieved by the trial Court in the main case and on the same evidence of ASI namely Ghulam Shabbir Khoso and mashir namely Abdul Qayyum, the appellant has been convicted in this case, without independent corroboration. It was the case of spy information. The Investigating Officer of the case had failed to associate any respectable person of the locality and telephoned mashir Abdul Qayyum, who had acted as mashir in the main case, whose evidence has been disbelieved by the learned trial Court in the aforesaid main case. According to the prosecution case, the pistol was kept at Malkhana of Police Station for 07 days. There was inordinate delay of 07 days in sending weapon to the expert for report. 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 as held by the Honourable Supreme Court in the case of KAMAL DIN alias KAMALA v. The STATE (2018 SCMR 577), in which it was observed 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.”

13. It also appears that weapon was taken to the expert by PC Imran, he has also not been examined by the prosecution. ASI Ghulam Shabbir Khoso, who is the complainant in this case, has clearly replied in cross-examination that weapon was without number. The said ASI / complainant has mentioned number of the weapon in the FIR as 30-bore pistol. With regard to the omission on the part of the prosecution, learned D.P.G could not satisfy the Court. There are several circumstances in this case, which have created doubt in the prosecution case. It is well 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 the accused, then the accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right as held by Honourable Supreme Court in the case of MUHAMMAD MANSHA v. THE STATE (2018 SCMR 772) which reads 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).”

14. In the light of what has been discussed above, I have come to conclusion that the prosecution has miserably failed to prove the charge against the appellant. Trial Court has failed to appreciate the evidence against the appellant properly and erred in convicting the appellant, therefore, the appeal in hand is allowed. Conviction and sentence recorded by trial Court vide judgment dated 05.04.2018 are set aside. Appellant is acquitted of the charge. Appellant shall be released forthwith, if not required in any other custody case.

JUDGE

Shahid