

IN THE HIGH COURT OF SINDH CIRCUIT COURT, HYDERABAD.

Criminal Appeal No.D-112 of 2018

Appellant: Fida Hussain alias Saboo Janjhi
through Mr. Muhammad Saleem
Laghari, Advocate.

Respondent: The State through Mr. Nazar
Muhammad Memon A.P.G. Sindh.

Date of hearing: 20.09.2022.

Date of Decision: .09.2022.

J U D G M E N T

AMJAD ALI SAHITO, J. Through this Criminal Appeal, the appellant has challenged the judgment dated 03.05.2018, passed by learned Sessions Judge, Tharparkar @ Mithi in Sessions Case No.75 of 2014, Crime No.39 of 2014 registered at PS Chachro for the offence under section 23-A (i) Sindh Arms Act, 2013, whereby the appellant was convicted and sentenced for the offence u/s 23 (1) (a) Sindh Arms Act, 2013 for possessing an unlicensed 30-bore pistol to undergo R.I. for seven years and pay fine to the tune of Rs.100,000/-; in case of default to undergo S.I. for six months more. However, the benefit of section 382-B Cr.P.C. was extended to the appellant.

2. Brief facts of the case are that on 17.07.2014, the appellant being already arrested in crime No.38 / 2014 of PS Chachro registered for the offences under section 302, 114, 34 PPC during interrogation while confessing the said offence volunteered to produce the crime weapon viz. pistol allegedly used in the commission of said offence. He led the police party headed by SIP Dur Muhammad Khoso towards his village Janjhi in western side and produced an unlicensed 30-bore with magazine loaded with three live bullets buried near the stem of 'Khabar' tree, wrapped in a black colour Thelhi. Such memo of arrest and recovery was prepared in presence of mashirs

Mushtaque Ali Janjhi and PC Kelo Mal. The appellant and case property was brought at PS and instant FIR was registered.

2. After observing usual formalities, learned trial Court framed the Charge against accused at Ex.2, to which he pleaded not guilty and claimed to be tried. In order to substantiate the charge, prosecution has examined P.W-01 mashir Mushtaque Ali at 05; PW-02 Complainant SIP Dur Muhammad Khoso at Ex:06 and PW-03 PC Jowaro Mal at Ex"09. The witnesses produced numerous documents in their evidence. Thereafter, prosecution closed its side vide statement at Ex.10.

3. Statement of appellant was recorded under Section 342, Cr.P.C. at Ex.11, in which he denied the prosecution allegations and claimed his innocence and stated that he has been falsely implicated in present case due to enmity. Alleged recovery of pistol has been foisted upon him. He prayed for justice. However, appellant did not examine himself on oath nor led defense evidence in disproof of prosecution allegations.

4. Learned trial Court, after hearing learned DDPP on behalf of State, counsel for appellant and appraisal of the evidence, convicted and sentenced the appellant as stated above, hence, this appeal was preferred.

5. Xxx

6. Xxxx

7. xxxxx

8. 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 basis of assumptions and presumptions. He, therefore, prays for acquittal of the appellant from all charges.

9. 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; 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.

10. Heard arguments and perused record.

11. 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 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 defense 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 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.

12. 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. -----

13. 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 evidence, which too is riddle with many lacunas and loopholes as mentioned 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.

14. 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 cast 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."

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."

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

JUDGE

Abdullah Channa/P.S