

ORDERSHEET
IN THE HIGH COURT OF SINDH BENCH AT SUKKUR.

Crl. Appeal No.S-37 of 2023

DATE ORDER WITH SIGNATURE OF JUDGE

Appellant : Ghulam Abbas son of Muhammad Moosa,
bycaste Lund (Now confined at Central Prison
Khairpur)
Through Mr. Rukhsar Ahmed Junejo, advocate.

The State : Through Mr. Khalil Ahmed Maitlo,
Deputy Prosecutor General, Sindh.

Date of hearing. : 21-07-2023.

J U D G M E N T

Amjad Ali Bohio, J:- Instant criminal appeal is directed against the judgment dated 16.03.2023 passed by learned Additional Sessions Judge, Mirwah in Sessions Case No.933 of 2021, arising out of Crime No. 102/2019, registered at Police Station, Setharja, for an offence under Section 23 (1) (a) of the Sindh Arms Act, 2013.

2. The prosecution case is that complainant/SIP Mumtaz Hussain Marri, accompanied by a police party left Police Station Setharja on 9.12.2019 at 1600 hours vide entry No. 21 for patrolling. While on patrol, they reached Tooba Bridge at the Railway crossing and saw an individual holding SBBL gun. Upon seeing the police party, the person got confused and attempted to escape towards the west. The police personnel came out from their vehicle, encircled and apprehended him at a distance of approximately 10/15 paces at 1700 hours. They seized the aforementioned gun but were unable to find private mashirs despite their efforts. Consequently, PC Shahnawaz Shar and PC Sain Bux Kubar witnessed as mashirs. On enquiry, the person identified himself as Ghulam Abbas Jajoonson of Muhammad Moosa Lund, residing in Nangar Khan Lund, Taluka Thari Mirwah. Physical search of the accused led to the recovery of two live cartridges of 12 bore from the side pocket of his shirt. Upon further inquiry, the

accused disclosed that the weapon was unlicensed. As a result, the weapon was sealed on the spot, and the accused was arrested for commission of offence under Section 23 (1) (a) of the Sindh Arms Act, 2013. It also came to light that he was also wanted in Crime No. 101/2019 under Sections 324, 353, 398, and 401 PPC of PS Setharjar. Complainant prepared such memo on the spot in the presence of the aforementioned mashirs and subsequently brought the accused to the police station, where the above case was registered.

3. During investigation, the parcel was sent to the Incharge Forensic Science Laboratory, Forensic Division Larkana vide Road Certificate No.3467 dated 10.12.2019. Upon completion of the investigation, the Investigating Officer submitted the report under Section 173 of the Cr.P.C.

4. At the trial, the accused was provided with the documents as required under Section 265-C of the Cr.P.C. A formal charge was framed against the accused on 23.5.2022, to which the accused pleaded not guilty.

5. To prove the charge, the prosecution examined complainant SIP Mumtaz Hussain (PW-1). Mashir PC Shahnawaz (PW-2) and I.O/SIP Manzoor Hussain (PW-3). Subsequently, the prosecutor closed its side of evidence on 7th March 2023.

6. In his statement recorded under Section 342 of the Cr.P.C, the appellant claimed his innocence and asserted that the report of the Forensic Lab was manipulated. However, the appellant did not record his statement on oath under the provision of Section 340 (2) of the Cr.P.C and also did not produce evidence in his defense.

7. After hearing the counsel for both parties, the trial Court convicted the appellant/accused. The appellant has challenged the conviction and sentenced by filing the appeal in hand.

8. I have carefully considered the arguments urged by the counsel for the appellant and the learned Deputy Prosecutor General, Sindh. Additionally, I have evaluated the evidence brought on record.

9. The counsel for the appellant has contended that the trial Court failed to consider the contradictions between the evidence of the complainant and the mashir. Additionally, it was claimed that their evidence lacked corroboration on material facts regarding the preparation of the mashirnama. It is agitated that the mashir failed to testify the contents of mashirnama during his evidence, and the evidence of the sole witness being complainant is insufficient to convict the accused. Furthermore, it was pointed out that the parcel containing the SBBL gun and two live cartridges, which allegedly was sealed on the spot, remained out of the police station from 10-12-2019 to 16-12-2019. The Investigating Officer (I.O) failed to provide an explanation for this delay. The parcel was dispatched on 10-12-2019 and delivered to the Incharge Forensic Science Laboratory, Forensic Division Larkana, on 16-12-2019, resulting in a six-day delay caused by dispatcher PC Abid Ali Shahani. The prosecution failed to examine PC Abid Ali Shahani to clarify this delay, and this failure put a dent on the safe custody and safe transmission of the parcel. As a result, the appellant's counsel contends that the appeal merits to be allowed.

10. According to the contention raised by the learned DPG for the State, SIP Mumtaz Hussain and his subordinate staff apprehended the appellant at Tooba Railway Crossing bridge, located at Katchi Sarka leading from Sofai Sahita to Mehrabpur. During the apprehension, they recovered an unlicensed SBBL gun of 12 bore, along with two live cartridges of 12 bore from the appellant's person in the presence of mashirs. The prosecution presented evidence before the trial Court, which corroborated the recovery of the said gun and cartridges. As a result, the trial Court rightly found the appellant guilty of committing an offence under Section 23 (i) (a) of the Sindh Arms Act, 2013, and the impugned judgment was rightly passed.

11. I have re-examined the evidence adduced by the prosecution minutely. According to the prosecution's version, the appellant, Ghulam Abbas Lund, was allegedly found in possession of an unlicensed SBBL gun and 2 live cartridges of 12 bore on 09-12-2019 at 1700 hours. Due to the non-availability of private

persons, two police officials acted as mashirs and the complainant prepared a memo of arrest and recovery in their presence. The complainant produced the mashirnama (Ex. 4-C) and testified that it was correct. However, the mashir, PC Muhammad Tagial, did not corroborate the complainant's evidence regarding the preparation of the mashirnama in their presence. He also failed to testify the mashirnama produced by the complainant at Exh.4-C. Even the mashirnama at Exh.4-C was not shown to mashir PC Muhammad Tagial during his evidence by the prosecution to verify his signature on it. As a result, the prosecution could not prove it's case beyond reasonable doubt, particularly the alleged recovery since the memo of recovery prepared by the complainant on the spot lacked corroboration by the mashir.

12. Shifting focus to the evidence of the Investigating Officer, it is evident that the I.O received the case property on 09-12-2019, as stated during his examination in chief. However, he failed to explain the place where he kept the property after receiving it, whether in the Malkhana or elsewhere. Upon close scrutiny of the I.O's evidence, there is no indication of place where the sealed parcel was kept at the Police Station before it's dispatch through PC Abid Ali Shahani, as mentioned in the R.C No. 3467 dated 10-12-2019 (Ex. 6-E). The I.O was responsible for keeping the parcel in the Malkhana until its dispatch, and such information should have been recorded in Register No. 19, but such evidence is not brought on record. Consequently, the prosecution admittedly failed in proving the safe custody of the property from 09-12-2019 to 10-12-2019.

13. Furthermore, the I.O also failed to testify that the parcel was delivered to the Head Moharrar for proper safekeeping in the malkhana. Non disclosure of such crucial information adds weight to the contention raised by the counsel for the appellant as it is argued that nothing was recovered from the accused, and the alleged recovery was managed, manipulated, and falsely attributed to the accused at a later stage. Considering the absence of solid evidence about the proper custody and handling of the parcel during the mentioned period, the possibility of tampering with the evidence cannot be ruled out. The reliance in this regard is

placed upon the case of “Kamal Din alias Kamala v. The State” (2018 S C M R 577), which reveals as under:-

“4. As regards the alleged recovery of a Kalashnikov from the appellant’s custody during the investigation and it’s subsequent matching with some crime-empties secured from the place of occurrence suffice it to observe that Muhammad Athar Farooq DSP/SDPO (PW 18), the Investigating Officer, had divulged before the trial court that the recoveries relied upon in this case had been effected 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 it’s 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.”

14. It is observed that the prosecution caused delay of six days to deliver the SBBL gun and cartridges from Police Station to FSL Larkana and Dispatcher P.C Abid Ali Shahani has not been examined to explain such inordinate delay with regard safe transmission of the SBBL gun to the Ballistic Expert, as such positive report of FSL would not prove the case of prosecution. Law is well settled now that prosecution is under legal obligation to prove the safe custody of the recovered weapon and it’s safe transmission to the Forensic Science Laboratory as held in above referred case of Kamal Din alias Kamala v The State.

15. Notwithstanding the above, the prosecution is responsible to prove the safe transmission of the weapon after it was dispatched from PS on 10-12-2019 under RC No. 3467. The I.O stated that PC Abid Ali Shahani took the property to the Incharge Forensic Laboratory, Forensic Division Larkana. However, the six days’ delay between the dispatch of the property and its delivery to the laboratory required the production of PC Abid Ali Shahani by the prosecution to explain such a delay but prosecution failed to examine him. Since there are material discrepancies with regard to investigation in above case, lacking support of independent witnesses as such prosecution evidence cannot be made basis for conviction. The above principle has been laid down by the Honourable Supreme Court in case of Zeeshan alias Shani v. The State (2012 S C M R 428) as under:-

“11. The standard of proof in this case should have been far higher as compared to any other criminal case when according to the prosecution it was a case of police encounter. It was, thus, desirable and even imperative that it should have been investigated by some other agency. Police, in this case, could not have been investigators of their own cause. Such investigation which is woefully lacking independent character cannot be made basis for conviction in a charge involving capital sentence, that too when it is riddled with many lacunas and loopholes listed above, quite apart from the after thoughts and improvements. 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. We, therefore, by extending the benefit of doubt allow this appeal, set aside the conviction and sentence awarded and acquit the appellant of the charges. He be set free forthwith if not required in any other case.”

16. Moreover, the prosecution also failed to corroborate the fact regarding preparation of the memo of arrest and recovery in the presence of the mashirs. The sole mashir examined in this case did not testify the mashirnama of arrest and recovery, thereby raising doubts about its authenticity. The failure of the mashir to testify to it's preparation implies that it was not actually prepared in his presence. The entire prosecution's case rests on the memo of recovery, which is admittedly not proved, the subsequent proceedings as mentioned above are not proved.

17. It is well settled by now that the prosecution is bound to prove it's case against the accused beyond any shadow of reasonable doubt, but no such duty is casts 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 any doubt arising in the prosecution case must be resolved in favour of the accused. Honourably Supreme Court in a case of “Shamoon alias Shamma v. The State” (1995 S C M R 1377) held as under:-

“The prosecution must prove it's 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 it's 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.”

18. In these circumstances and after an independent evaluation of evidence available on record, I have nodoubt to judge that the prosecution has not been able to prove it's case against the appellant beyond reasonable doubt.

19. Considering the above stated reasons it can be safely inferred that the appellant's conviction is not warranted by the evidence produced against him in this case. Accordingly, I allow the appeal acquitting the appellant by setting aside his conviction and sentence. These are the reasons of my short order announced on 21.7.2023.

J U D G E.

Nasim/PA

