

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

Criminal Appeal No.S- 99 of 2018.

Appellant: Haji s/o Jamal by caste Wassan (present on bail).
Through Mr. Manzoor Ahmed Panhwar, Advocate.

The State: Through Mr. Shahzado Saleem Nahiyoan, Additional P.G.

Date of Hearing: 17.01.2022.

Date of Judgment: 17.01.2022.

J U D G M E N T

Naimatullah Phulpoto J. Appellant Haji son of Jamal was tried by learned Sessions Judge, Tando Muhammad Khan in Sessions Case No.10 of 2018 arising out of crime No.14 of 2018 of Police Station Shaikh Bhirkio under section 23(1)(a) Sindh Arms Act, 2013. After regular trial vide Judgment dated 24th April 2018, appellant Haji was convicted under section 23(1)(a) Sindh Arms Act, 2013 and sentenced to 02 years R.I. He was also directed to pay fine of Rs.10,000/- In case of default in payment of fine, he was ordered to suffer S.I. for two months more. Appellant was extended benefit of Section 382 (b) Cr.P.C.

2. Brief facts of the prosecution case as disclosed in the F.I.R. are that on 25.02.2018, ASI Gul Muhammad alongwith his subordinate staff left P.S for patrolling. During patrolling when they reached at link road Saindad Waggan near patrol pump at about 1830 hours, police party saw one person who while seeing the police party tried to run away but he was apprehended by the police. On inquiry, he disclosed his name and address. Police found him in suspicious manner and conducted personal search, one TT Pistol was recovered from the left side fold of his shalwar with magazine containing 5 live bullets of 30 bore. From his further personal search two mobile Sims of Zong and Jazz were also recovered from his possession of accused. Such mashirnama was prepared in presence of mashirs HC Abdul Hakeem Kaka and PC Mehboob Ali. Thereafter, accused and the case property were brought at police station where the FIR was lodged on behalf of the State for offence u/s 23(1)(a) Sindh Arms Act, 2013.

3. Trial Court framed the charge against appellant / accused Haji at Ex.02 to which accused pleaded not guilty and claimed to be tried.

4. At the trial, prosecution examined complainant / IO ASI Gul Muhammad at Ex.5, who produced arrival and departure entries bearing No.13 and 16, mashirnama of arrest and recovery, FIR and ballistic report. PW.2 Mashir HC Abdul Hakeem Kaka was examined at Ex.06. Thereafter prosecution closed its' side.

5. Learned trial court recorded statement of accused under section 342 Cr.P.C. in which accused claimed false implication in this case and denied the prosecution allegations. Appellant raised plea that he has been falsely involved in this case at the instance of one Mir Muhammad Nizamani, landlord of the village. Nothing was recovered from his possession and alleged recovery has been foisted upon him.

6. Trial court after hearing the learned counsel for the parties and assessment of evidence vide its' judgment dated 24.04.2018 convicted the appellant Haji and sentenced him in the terms as stated above. Hence, this appeal.

7. Mr. Manzoor Ahmed Panhwar, learned advocate for appellant argued that as per evidence of the prosecution witnesses, from the possession of the appellant one TT Pistol of 30-bore alongwith 05 live bullets was recovered from the fold of shalwar of the appellant but according to report of the ballistic expert 7.63 mm bullets were recovered; that in the mashirnama of arrest and recovery bullets of 30-bore were recovered; that there is no evidence regarding the safe custody and safe transmission of the weapon to the ballistic expert; that mashir has deposed that the seal affixed by him in mashirnama is not same; that complainant / ASI Gul Ahmed has admitted in evidence that he has not produced the entry of Malkhana by which the case property was sent to the ballistic expert for analysis; that PC Parvez had taken pistol to the ballistic expert but he has not been examined by the prosecution at trial; that description of the pistol is not mentioned in mashirnama; that complainant has admitted in cross examination that there is patrol pump near the place of incident and the police officials did not ask any private person to act as mashir; that complainant / ASI has admitted that mashirnama was prepared by DPC Nazar Ali but he has not been examined. He lastly contended that appellant has raised plea that he has been falsely involved in this case at the instance of one Mir Muhammad Nizamani. He has prayed for acquittal of the appellant. In support of his submissions, he has relied upon the cases reported as KAMAL DIN alias

KAMALA v. THE STATE (2018 SCMR 577) and MUHAMMAD MANSHA v. THE STATE (2018 SCMR 772).

8. On the other hand, Mr. Shahzado Saleem Nahiyoan, Additional P.G. argued that prosecution has proved its` case against the appellant as he was found in possession of unlicensed 30-bore TT pistol which was recovered from his possession during patrolling. However, he admitted that there are some omissions and contradictions in the evidence of prosecution witnesses. Lastly, he has prayed for dismissal of the appeal.

9. The facts of this case as well as evidence produced before the Trial Court find an elaborate mention in the judgment passed by the Trial Court dated 24.04.2018, hence, the same need not to be repeated here so as to avoid duplication and un-necessary repetition .

10. 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 appellant was arrested near the patrol pump by police on 25.02.2018 at 1830 hours and from his possession one unlicensed TT Pistol alongwith bullets was recovered. Complainant / ASI Gul Muhammad made no efforts to associate any private person to witness the recovery proceedings though the availability of private persons during day hours around the place of recovery could not be ruled out. Omission to associate independent mashirs cannot be brushed aside lightly. Appellant has raised plea that he has been implicated in this case at the instance of one Mir Muhammad Nizamani, in these circumstances non-examination of the private persons who were available around the place of wardat would be fatal to the case of prosecution. It is also the matter of record that TT Pistol was recovered from the possession of appellant on 25.02.2018 but there is nothing on record that soon after the recovery it was brought to the police station, kept in safe custody in Malkhana and it was safely transmitted to the ballistic expert. Learned Additional P.G admitted that the prosecution failed to produce entry before the trial court with regard to safe custody and safe transmission of the weapon to the ballistic expert. Complainant has deposed that after arrest of the accused, he brought accused and the case property to the police station and FIR was written by one driver constable on his dictation but the said driver constable has not been examined by the prosecution at trial. As regards to the ballistic expert report before the trial court at Ex.5/D, it appears that case property was received by the ballistic expert through PC Parvez of P.S Shaikh Bhirchio, but he has not been examined by the prosecution at trial. Learned

advocate for appellant has questioned the description of unlicensed weapon, it appears that description of the pistol as mentioned in the ballistic expert report is not available in the mashirnama of arrest and recovery. Moreover, from the perusal of mashirnama of arrest and recovery, at Ex.5/B, it transpires that from the possession of accused two Sims of Jazz and Zong mobiles were also recovered. Investigation officer failed to collect the data of the said Sims from the concerned cellular companies in order to collect further evidence against the appellant in this case. Material contradictions in the evidence of prosecution have also been brought on record. Additional Prosecution has no explanation for such contradictions in the evidence of prosecution witnesses.

11. Prosecution has utterly failed to prove the safe custody and safe transmission of pistol to the Ballistic Expert and no reliance can be placed upon such positive report of the Ballistic Expert as held by Honourable Supreme Court of Pakistan in the case of 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. As regards the evidence of the police officials is concerned, no doubt, evidence of the police officials cannot be discarded simply because they belong to police force; however, where 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 the time. In this case availability of the private witnesses could have been easily arranged, but it was avoided by the complainant/ investigation officer. Accused in his statement recorded under Section 342, Cr.P.C. has claimed false implication in this case and raised plea that crime weapon has been foisted upon him by the police. In these circumstances, evidence of the police officials without independent corroboration would be unsafe

for maintaining the conviction. 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. 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 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. 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:-

“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 *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. In view of what has been discussed above, I have no hesitation to hold that the prosecution has failed to prove its case against the appellant. Keeping in view the above facts and circumstances, the appeal is allowed.

Conviction and sentence recorded by the trial Court vide impugned judgment dated 24.04.2018 passed by the learned Sessions Judge, Tando Muhammad Khan in Sessions Case No.10 of 2018 are set aside and appellant Haji son of Jamal by caste Wassan is acquitted of the charge. He is present on bail, his bail bond stands cancelled and surety is hereby discharged.

JUDGE

Tufail