

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, LARKANA
(1) CrI. Appeal No.S-57 of 2020

Appellant : Nabi Bakhsh s/o Khuda Bux Jakhrani,

Respondent : The State.

(2) CrI. Appeal No.S-58 of 2020

Appellant : Mohammad Hassan s/o Fazal Ali Jakhrani.

Respondent : The State.

Mr. Faiz Mohammad Larik, advocate for the appellants in both appeals.
Mr. Ali Anwar Kandhro, Additional Prosecutor General.

Date of hearing : 22-10-2020.

Date of Judgment : 22-10-2020.

J U D G M E N T.

NAIMATULLAH PHULPOTO, J.-

Appellants Nabi Bakhsh and

Mohammad Hassan, both by caste Jakhrani, were tried by learned Additional Sessions Judge-II, Jacobabad, separately in Sessions Cases No.244 and 245 of 2019 based on Crime Nos.68 and 69 of 2019, registered at Police Station Saddar, Jacobabad. On the conclusion of the trial, vide separate judgments dated 24.09.2020 both appellants were convicted for offence under Section 23(1)(a) of Sindh Arms Act, 2013 and sentenced to suffer R.I. for five years and to pay fine of Rs.20,000/-. In case of default in the payment of fine, both accused were directed to undergo S.I. for three months more. Appellants were extended benefit of Section 382-B, Cr.P.C.

2. Brief facts of the prosecution case are that on 10.06.2019 SIP Shabir Ahmed Sahito along with his subordinate staff left police station under roznamcha entry No.33 at 1735 hours for patrolling duty. While patrolling when the police party reached at Garkhi Khairo road near Nao Wah, where it is alleged that SIP Shabir Ahmed received spy information that accused Nabi Bakhsh and Mohammad Hassan Jakhrani wanted in Crime No.64/2019 registered at Police

Station Saddar, Jacobabad, under Sections 302, 337-H(2), 148, 149, PPC, were coming from Jageer to their village on motorcycle. On such information SIP along with his subordinate staff proceeded in the police mobile to the pointed place. At 1930 hours, police noticed that two persons appeared on the road on a motorcycle. Accused while seeing the police party tried to reverse back, but they were surrounded and caught hold by the police. SIP Shabir Ahmed conducted personal search of both the accused in presence of the mashirs/PCs Karam Hussain and Qalati. From the personal search of each accused, who disclosed his name as Nabi Bakhsh, one TT Pistol of 30-bore was recovered containing 04 live bullets. Another accused disclosed his name as Mohammad Hassan. He was also found in possession of one 30-bore pistol. Both accused disclosed that they had no licenses for the weapons carried by them, which were used in the commission of the murder in Crime No.64/2019 registered under Sections 302, 337-H(2), 148, 149, PPC at P.S Saddar, Jacobabad and u/s 23(1)(a) of Sindh Arms Act, 2013. The motorcycle in the use of the accused was found without number; however, it's engine number was 779380. It was seized by the police. Mashirnama of arrest and recovery was prepared. Pistols were sealed at the spot in presence of mashirs/PCs Karam Hussain and Qalati Khan. Thereafter both accused were brought at the police station, where separate FIRs were lodged against them. FIR No.68/2019 was lodged against accused Nabi Bakhsh for offence under Sections 23(1)(a) of Sindh Arms Act, 2013 and FIR No.69/2019 was lodged against accused Mohammad Hassan for offence under Sections 23(1)(a) of Sindh Arms Act, 2013, on behalf of the State.

3. After usual investigation, challan was submitted against both the accused in the main case bearing Crime No.64/2019 as well as in the aforesaid crimes No.68 and 69 of 2019, under Sections 23(1)(a) of Sindh Arms Act, 2013. Cases were sent up to the Court of Sessions. Trial was held by learned Additional Sessions Judge-II, Jacobabad.

4. Trial Court framed the charge against both the accused separately. Both the accused pleaded 'not guilty' and claimed to be tried. At the trial,

prosecution examined SIP Shabir Ahmed and PC Qalati Khan. They produced the relevant record. Thereafter, prosecution side was closed.

5. Learned trial Court recorded statement of accused under Section 342, Cr.P.C of both the accused separately, in which they claimed false implication and raised plea that pistols have been foisted upon them by the police. On the conclusion of the trial, both appellants were acquitted in the main case Crime No.64/2019 of PS Saddar, Jacobabad, for offence under Sections 302, 337-H(2), 148, 149, PPC vide judgment dated 24.09.2020 while holding that prosecution evidence was contradictory and there were infirmities in the case and trial Court extended benefit of doubt to the accused and acquitted them. However, in the above-mentioned offshoot cases both accused were convicted for offence under Section 23(1)(a) of Sindh Arms Act, 2013 and sentenced to R.I. for five years with fine of Rs.20,000/-, as stated above. Hence, these two appeals have been filed separately.

6. As the evidence in both the cases is same and requires same appreciation of evidence, I intend to decide aforesaid appeals by this single judgment.

7. Learned advocate for the appellants mainly contended that it was the case of spy information. SIP Shabir Ahmed had sufficient time to call the independent persons passing on the road, but SIP/investigation officer avoided without assigning sound reasons. It is further submitted that description of the pistols was not mentioned in the mashirnama of the recovery and merely it was mentioned that numbers were rubbed. It is submitted that it is easy for the police to foist such weapons upon the innocent persons. Learned advocate for the appellants further argued that there are material contradictions in the evidence of the prosecution witnesses, particularly on the point of catching hold of the accused persons at the time of recovery; that according to the prosecution case pistols were used in the commission of the murder. It is submitted that prosecution failed to produce any evidence with regard to safe custody and safe transmission of the pistols to the Ballistic Expert. Lastly, it is submitted that pistols have been foisted upon the appellants and they have been acquitted in

the main case by the trial Court while disbelieving the evidence of the investigation officer SIP Shabir Ahmed Sahito and mashir PC Qalati Khan on the point of recovery. He prayed for acquittal of the appellants.

8. Mr. Ali Anwar Kandhro, learned Additional Prosecutor General, conceded to the contentions raised by learned advocate for the appellants and did not support the impugned judgment of the trial Court.

9. 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 24.09.2020, hence the same need not to be repeated here so as to avoid duplication and unnecessary repetition.

10. I have carefully heard the learned Counsel for the parties and perused the relevant record. I have come to the conclusion that prosecution has failed to prove its case against the appellants, for the reasons that it was a case of spy information; SIP Shabir Ahmed failed to associate private persons as mashirs. SIP/investigation officer has admitted in the cross-examination that private persons crossed the road at the relevant time on motorcycles. SIP has failed to explain as to why he did not associate private persons as mashirs of recoveries in these cases. Material contradictions regarding arrest of the accused persons have been highlighted by the defense Counsel. PW No.1 mashir PC Qalati in the cross-examination has replied that SIP Shabir Ahmed Sahito first caught hold the accused persons. He has also admitted that SIP Shabir Ahmed is handicapped from his leg. SIP Shabir Ahmed, the investigation officer in this case, in the cross-examination has replied that he did not catch hold any of the accused. Admittedly, description of the pistols is not mentioned in the mashirnama of recovery. Mere mention that pistols were without numbers is not sufficient. It is the matter of the record that pistols recovered from the possession of the accused were allegedly used in the murder case. It was the duty of prosecution to prove the safe custody of the weapons at the "Malkhana" of the police station and safe transmission to the Ballistic Expert, but prosecution has failed to prove the safe custody and safe transmission of the pistols to the

Ballistic Expert. Rightly reliance has been upon 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.”

11. In this case, accused have raised plea that pistols have been foisted upon them by the police; they had surrendered before the police through one *Sardar* of the community. In these circumstances, evidence of the police officials required independent corroboration, which is lacking in these cases. Complainant/investigation officer had failed to examine the private persons who passed on the road at the time of arrest of accused. No doubt, evidence of the 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 the time. It would be unsafe to rely upon the evidence of the police officials without independent corroboration. 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.”

12. In my considered view, prosecution has failed to prove its case against the appellants. Circumstances mentioned above have created reasonable doubt in the prosecution case. Moreover, trial Court in the murder case, has already disbelieved the testimony of same police officials with regard to recovery of weapons. 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).”

13. 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 appellants. Resultantly, both these appeals were allowed by me vide separate short orders dated 22.10.2020, whereby the conviction and sentence recorded by the trial Court vide judgments dated 24.09.2020 passed by the learned Additional Sessions Judge-II, Jacobabad in Sessions Cases No.244 and 245 of 2019 were set aside and appellants Nabi Bakhsh s/o Khuda Bakhsh and Mohammad

Hassan son of Fazal Ali, both by caste Jakhrani, were acquitted of the charge.
Above are the detailed reasons of such short orders.

JUDGE

Qazi Tahir PA^{rk}