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IN THE HIGH COURT OF SINDH CIRCUIT COURT LARKANA

Crl. Appeal No.D-93 of 2001

Naimatullah Phulpoto, J.
Salahuddin Panhwar, J.

Date of Hearing: 02.4.2014.

Appellant: Mashooque Ali Mallah, through Mr. Faiz Mohammad Larik,
advocate.

Respondent: The State through Mr.Imtiaz Ali Jalbani, A.P.G.

J U D G M E N T

NAIMATULLAH PHULPOTO, J – Appellant Mashooque Ali was tried by the learned Ist Additional Sessions Judge & Special Judge (S.T.A), Larkana in Special Case No.63/2000 under section 13(d) of Arms Ordinance, 1965. After full dressed trial, the appellant was found guilty through impugned judgment dated 25.9.2001, he was convicted under section 13 (d) of Arms Ordinance, 1965 and sentenced to three years R.I and to pay fine of Rs.5,000/- (Rupee. Five thousand only) in case of non payment of fine, the appellant was ordered to suffer three months R.I more. He was extended benefit of section 382(B), Cr.P.C.

2. Brief facts of the prosecution case as disclosed in the FIR are that on 02.12.1998 at 06:30 p.m, Inspector Nisar Ahmed Shaikh, SHO of Police Station Badeh lodged report stating therein that on the aforesaid date, SHO left Police Station along with sub-ordinate staff namely ASI Asad Nabi, HC Mohammad Ishaque, PCs Reham Hussain and Abdul Ghaffar at 04:00 p.m by roaznamcha entry No.4 in the police mobile for the purpose of investigation of Crime No.82/1998 under section 302, 34, PPC. It is alleged in the FIR that when the police party was returning back, while at 05:00 p.m they reached at Sawani street/Sarak, they noticed a person in suspicion manner, who tried to run away while seeing the police party, he was surrounded and caught hold and his search was conducted in presence of mashirs. K.K was wrapped in

piece of cloth was recovered from his possession which was loaded with 30 live bullets. A bag containing one magazine loaded with 15 live bullets of 7.62 bore were recovered from him. SHO enquired the name of the accused to which he disclosed his name as Mashooque Ali son of Ghulam Qadir. He was enquired about license/permit for the K.K and ammunition carried by him. Accused replied that he had no license of K.K. He was arrested by the SHO in presence of mashirs ASI Asad Nabi and HC Mohammad Ishaque. Such mashirnama was prepared in presence of the mashirs. They signed on it. Thereafter accused and case property were brought to the Police Station, where FIR bearing Crime No.83/1998 under section 13(d) of Arms Ordinance was lodged by the SHO on behalf of State.

3. After usual investigation, challan was submitted against the accused under section 13(d) of Arms Ordinance.

4. A formal charge against the appellant was framed on 22.9.2000 at Ex-2, whereby appellant pleaded not guilty and claimed for trial. At the trial prosecution examined PW-1, complainant SHO Nisar Ahmed Shaikh at Ex-4 who produced attested copy of entry of roaznamacha at Ex-4-A, mashirnama of arrest and recovery of K.K and ammunition from the accused at Ex-4-B and copy of FIR at Ex-4C, PW-2 ASI Asad Nabi mashir of the case at Ex-6. Thereafter SPP conducting the prosecution case closed prosecution side vide his statement at Ex-7.

5. The statement of the accused was recorded under section 342, Cr.P.C at Ex-8. Accused denied the recovery of the K.K and ammunition from his possession and pleaded innocence. Further stated that he was arrested by Dokri Police from his house and such news published in Daily Kawish dated 14.11.1998. The community persons of the accused approached the SSP Larkana against high handedness of the police, whereafter K.K was foisted upon him by the Badeh Police. The accused produced a copy of news clipping of Daily Kawish at Ex-8-A. Accused examined himself on oath under section 340(2), Cr.P.C in disproof of prosecution allegations. He also examined one Imam Bux in his defense at Ex-10. Thereafter side of the accused was closed at Ex-11.

6. Mr. Faiz Mohammad Larik, learned advocate for the appellant has mainly contended that prosecution case is false. The K.K and ammunitions have been

foisted upon the accused. In fact the appellant was apprehended by Dokri police, such news had also appeared in Daily Kawish. Thereafter accused was handed over to Badeh police, where the present case was falsely registered against him. Mr. Larik further contended that case property was neither sealed at spot nor it was sent to Chemical Examiner for report. As such according to him such recovery of the weapon loses its evidentiary value; there are major contradictions in evidence of the ASI and mashir. ASI has stated in his evidence that accused was found having a cloth on his shoulders and beneath the said cloth a Klashnikov containing 30 live bullets were found hanging on his shoulders. He has submitted that evidence of police officials in the back ground of news published in media was not reliable without independent evidence which is lacking in this case. Lastly it is argued that SHO, who is the head of the police party has not been examined by the prosecution at trial and non examination of such material witnesses would be fatal to the prosecution case. In support of his contention he relied upon the case reported as Loung through Superintendent, Central Prison, Hyderabad versus The State 1999 P.Cr.L.J 595.

7. On the other hand Mr. Imtiaz Ali Jalbani learned A.P.G appearing on behalf of State argued that Klashnikov was recovered from the possession of the accused and he had no license/permit for the weapons and ammunitions carried by him; evidence of police officials is as good as that of any other persons; trial Court has rightly appreciated the evidence of the prosecution witnesses. There is no illegality or infirmity in the prosecution evidence.

8. Heard counsel and perused the record.

9. We have carefully scanned the entire evidence which has been brought on record. SHO Nisar Ahmed Shaikh has stated that on 2.12.1998 he left PS in connection with investigation of crime No.82/1998 of PS Badeh, u/s 302, PPC, during which at Sehwani Sarak they apprehended one person and secured a Kalashnikov alongwith magazine containing 30 live bullets patrolling, so also another magazine lying in a bag containing 15 live bullets. Said person disclosed his name as Mashooque Ali son of Ghulam Qadir. He had no license for Kalashnikov. Such mashirnama was prepared, which was signed by mashirs ASI Asad Nabi and HC Muhammad Ishaque.

In the cross examination he has denied to have sealed the weapon either at the spot or at the police station. He admitted that he had not sent the weapon to the Ballistics Expert. He denied the suggestions that he had not arrested the accused from Sawani Path and had not recovered the Kalashnikov from him. Lastly he denied the suggestion that after keeping the accused at police station he falsely challaned him in this case.

10. Mashir namely ASI Asad Nabi Khichi has stated that on 02.12.1998, he accompanied SHO Nisar Ahmed Shaikh and others from Police Station for investigation of Crime No.82/1998 of PS Bاده. At Sehwan Sarak/Street at about 05:00 p.m they apprehended a person who on seeing them tried to slip away, and recovered one K.K with folding Butt along with 2 magazines, one containing 30 live bullets and other 15. The accused identified himself to be Mashooque Ali Mallah and he failed to produce the license for the K.K recovered from his possession. He further stated that the mashirnama was prepared by SHO which was signed by him and co-mashir HC Mohammad Ishaque. In the cross examination he admitted that K.K and bullets recovered from the accused were not sealed by the SHO at spot. He also denied suggestion that nothing was recovered from the accused and the K.K was foisted upon him by the SHO. He denied that he was deposing against the accused falsely.

11. While appreciating above evidence, it is manifest that the mashirnama of arrest and recovery dated 02.12.1998 reflects that K.K allegedly recovered from the possession of the appellant was neither sealed at spot nor it was sent to the foreign-sic and ballistic expert in order to know if the K.K allegedly recovered from the possession of the appellant was in working condition. PW 2, Asad Nabi in his evidence has categorically stated that "*it is correct that K.K and bullets recovered from the accused were not sealed by the SHO in my presence*". Besides police party had left Police station through Roaznamcha entry No.4 but it is patent that original departure and arrival entries have not been produced at trial in order to show that police party had actually left Police Station for investigation of Crime No.82/1998 registered at Police Station Bاده under section 302, 34, PPC. Further, police officials have stated that the appellant was arrested on 02.12.1998 from the Sawani Sarak which is common street where availability of the private persons in the street at the relevant time cannot be ruled

out. Police officials were unable to give satisfactory explanation as to why they had failed to associate witnesses of the public in a case where recovery of K.K was made in the common street. Examination of non official witnesses in such a case would be essential mainly for the reasons when the appellant has raised specific plea that he was arrested by Badeh Police and such news was published in newspapers and police foisted K.K upon appellant to save their skin. In these circumstances, it would be unsafe to rely upon this piece of evidence without independent corroboration, which is apparently lacking in this case. Material contradictions and inherent defects in the evidence of the prosecution witnesses have also been highlighted by the defense. It has come on record that complainant SHO Nisar Ahmed Shaikh had deposed that the appellant was apprehended, he was having a loin cloth on his shoulder and beneath that loin cloth he was having K.K. Whereas, on the same point ASI Asad Nabi, mashir has deposed that present accused was arrested and he found K.K and a bag of the ammunition hanging in his shoulder. Learned A.P.G could not explain such glaring contradiction, which is material discrepancy to falsify the prosecution case, which cannot be ignored by this Court.

12. Above stated circumstances / defects in the prosecution case are sufficient to hold that the prosecution has failed to prove its case against the appellant and prosecution case is highly doubtful, therefore, we are of the candid view that it is not the duty of the defense to disprove the case of the prosecution but burden of proof is always upon the prosecution to prove the case beyond the reasonable shadow of doubt. The circumstances as evident in this case, have created serious doubt as to the truthfulness of the prosecution case. It is settled principle of law that *benefit of doubt always goes to an accused and for that purpose it is not necessary that there must be multiple circumstances to create doubt. Even, a single circumstance creating a reasonable doubt as to the guilt of the accused entitles him to such benefit not as a matter of grace and concession but as a matter of right.* Rightly reliance has been placed upon the case of Tariq Pervez versus The State 1995 SCMR 1345. Hence, while keeping above touch stone, we have come to conclusion that prosecution evidence is not confidence inspiring and trustworthy, to sustain conviction awarded by the trial Court.

Consequently, appeal is accepted, conviction and sentence recorded by the judgment dated 25.9.2001 against the appellant is set aside. The appellant is acquitted of the charge. He is present on bail, his bail bond stands cancelled and surety is hereby discharged.

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15.4.2014
Judge

Judge 4/2-014

M.Y.Panhwar/**