

IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Crl. Appeal No.S-117 of 2024

Appellant

Fazul son of Eiddan Bharo : Through M/s Mehfooz Ahmed Awan
Ateeq-ur-Rehman Shaikh and Farhan Ali
Shaikh, Advocate.

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

Dates of hearing: : 06.03.2025

Date of Judgment : 20.03.2025

JUDGMENT

Ali Haider 'Ada',J - This Appeal is directed against Judgment dated 15.10.2024, passed by learned Additional Sessions Judge-IV/Special Judge for GBV Court, Khairpur in Sessions Case No.06 of 2024, being outcome of FIR No.139 of 2023 U/s 23(1)(a) of Sindh Arms Act, 2013 registered at P.S. Babarloi district Khairpur whereby appellant was convicted and sentenced to undergo imprisonment for Five(05) years and to pay fine of Rs.50,000/-(Rupees Fifty thousand) in case of non-payment of fine, accused/appellant shall suffer simple imprisonment for three months more. However, he was extended benefit under Section 382-B Cr.P.C.

2. Brief facts of the prosecution case are that on 28.10.2023 complainant/ASI Hussain Bhugti alongwith his staff namely PCs Muhammad Ashraf, Jan Muhammad and DPC Abid Hussain left police station for patrolling in the area vide entry No.16 at 1300 hours. During patrolling he received spy information that two persons with white colour GLi car are carrying bullets and magazine at Satio Wah bridge. Complainant party proceeded there at pointed place and aw one GLi Car was parked, one person sitting inside the Car, and another person was

available outside of the car and was having asach (Bachka). On seeing police party, the driver of car drove away the car and escaped from the site while another culprit was arrested at spot with bachka. Due to non-availability of private persons, the complainant associates PCs Jan Muhammad Jagirani and Ashraf Ali Solangi as mashirs.. On query, arrested culprit disclosed his name as Fazul son of Eidan Bharo and also disclosed the name of escape as Ali Gohar Bharo. The recovered sack was opened which contained 18 magazines of K.Kov and 3400 bullets, memo of arrest and recovery was prepared at the spot in presence of mashir brought at police Station where complainant lodged FIR.

3. The investigation was completed and after completing investigation the appellant was sent-up for trial. The trial Court on 09.01.2024 framed the charge in which he pleaded not guilty and claimed for trial.

4. At the trial, prosecution examined PW-1 SIP Hussain Bux who is complainant as he produced roznamcha entries Nos.06, 18 and 19, memo of arrest, recovery and FIR at Ex.4-A to 4-C, secondly mashir PC Jan Muhammad Jagirani was examined who produced memo of site inspection at Ex.5-A, then WASI Ghulam Hyder Thebo who produced copy of relevant entry of Register No.19 of malkhana at Ex.06. Further the prosecution also examined I.O as PW-04 SIP Nazeer Ahmed Bhayo at Ex.07 as he produced roznamcha entries No.4, 15, 21 and 26 at Ex.7-A to 7-D, copy of R.C at Ex.7-E and original report of FSL at Ex.7-F and finally dispatcher of case property was examined as he sent case property to FSL at Ex.8. After closure of prosecution side the trial Court recorded the statement of accused and after hearing passed the judgment and the same assails through this appeal.

5. I have carefully heard learned counsel for the parties and perused the entire evidence available on record.

6. The complainant in his examination-in-chief did not disclose that he received any spy information while in FIR stated that he received information, further even in arrival entry the complainant disclosed all events but did not narrate that he received any spy information. The complainant in his examination-in-chief deposed that he handed over property to Investigation Officer after registration of FIR vide entry No.19 when such entry was perused, it transpired that only FIR was handed over to I.O. There is no mention of the fact that the Investigation Officer received the case property from the complainant.

7. The complainant described the place of incident with one police picket of northern side, village of Shar community on southern side and admitted the presence of villagers. He pointed out in his deposition that during patrolling of area he visited Babarloi bypass, old custom naka and then Pir-Jo-Goth link road.

8. On the other hands mashir/eye witness deposed in deposition that they patrolled at Babarloi curve and then patrolling towards pointed place/place of incident. He further described the place of incident that on western side there is link road, date palms while northern side orchard there, as on southern side Satio Wah. Apparently, both witnesses contradicted each other on this point, which creates doubt upon prosecution case.

9. The main point is that the complainant stated that due to non-availability of private mashirs the police officials were deputed as mashir and thereafter search of accused was conducted and weapon was recovered while PW/mashir deposed that on receiving such information *“We proceeded towards pointed place where we saw one white colour GLi Car was standing there and near it, one person was standing there and a white Colour sack (Bachka) was lying infront of Car and another person sat in the car. The person sat in the Car seeing us as police*

escaped towards Pir-Jo-Goth alongwith car. We apprehended present accused who was standing there and it was about 1330 hours. On inquiry about identity, he introduced himself as Fazul Muhammad son of Eiddan Bharo r/o Kotri, Taluka Rohi district Sukkur. About rest of the accused, he disclosed his name as Ali Gohar Bharo. The recovered Bachka was opened and found 18 magazine of Kalashnikov and 3400 live bullets were lying in it. No proper person was present, however, I and PC Ashraf Ali were acted as mashirs and obtained out signatures.” {Underlining to add emphasis}. It means that, all exercise was completed prior to their appointment as mashir.

10. The said mashir further disclosed that it is correct that different numbers were printed on bullets but memo of recovery is silent about such aspect as no number of bullets were mentioned in memo. It is observed that in such like cases recovery of weapons is main substance and identification mark of property must be written/handed while such aspect is lacking in instant case.

11. The WHC who kept entry No.60 of Malkhana in Register-19, the said entry consisted upon only three columns, though register No.19 is defined in Rs.22.70 in prescribed form. For further reasoning such rule is read as under:-

22.70. Register No.XIX. This register shall be maintained in Form 22.70.

With the exception of articles already included in registered No.XVI every article placed in the store-room shall be entered in this register and the removal of any such article shall be noted in the appropriate column.

FORM No.22.70

Police Station. _____ District

1- Serial No.

- 2- No. Of first information report (if any), from whom taken (if taken from a person), and from what place.
- 3- Date of deposit and name of depositor.
- 4- Description of property.
- 5- Reference to report asked for order regarding disposal of property.
- 6- How disposal of and date.
- 7- Signature of recipient (including person by whom dispatched).
- 8- Remarks.

12. As such an entry did not make it clear that WHC had kept the entry, since in the column of the depositor the name of the complainant was mentioned instead of that of WHC. It is pertinent to mention that one impulse performed two actions as through entry No.6 the case property was kept in malkhana and through the same entry the case property took out for forensic analysis. In this regard the rule 22.48 of Police Rule, 1934 is very much clear that to record all events which took place at Police station.

13. The Investigation Officer deposed that he received the case property in sealed condition while the complainant and mashir as well memo of recovery and arrest did not show that property was sealed or in sealed condition.

14. Further complainant and mashir pointed that there is one police picket is available but I.O, in his deposition denied the availability of police picket and made contra view with complainant and eye witness, even description of property contradicted between prosecution evidence.

15. The Investigating Officer disclosed that the case property was sent for analysis after the delay of 26 days as FIR was registered on 28.10.2023 and the

case property was sent to analysis on 22.11.2023 through one PC Murad Ali. First of all such delay is without any plausible explanation and property was sent to FSL Larkana through one PC but entry of Station diary did not show presence of said PC and the road certificate was also silent about the name of dispatcher.

16. The arrival entry for visit of place of incident did not make any corroborative piece about movement of police as simply it was mentioned that after visit of place of incident kept the entry, which did not show that any kind of memo was prepared at place of incident .

17. Surprisingly, in FSL examination report, it reveals that case property brought and signed by PC Ali Murad as such aspect is neither supported by any other documents in shape of entry or road certificate which forms solid believe that such examination report is based on verbatim of I.O.

18. In statement u/s 342 Cr.P.C the trial Court did not put the material question in shape of FSL examination report. Such piece of evidence was not placed before accused at the time of recording of his statement. Thus the same could not considered against him. In this regard I am fortified with the case of *Imtiaz alias Taj v. The State and others* (2018 SCMR 344), the Honourable Supreme Court held that:-

S-342 Piece of evidence or a circumstances not put to an accused person at the time of recovering his statement under S. 342 Cr.P.C could not be considered against him.

In the case of *Abdul Hayee and Abdullah alias Ghazali and another v. The State and another* reported in 2025 SCMR 281 held in para-14 that;

“Insofar as the recoveries of weapons of offence from the petitioners in another case bearing FIR No.121 dated 26.05.2009 under Section 324, 353, 186,148, 149 PPC., read with Section 13 of the Arms Ordinance, 1965

and Section 7 of the Anti-Terrorism Act, 1997, at Police Station Mochh, District Mianwali, which recoveries were also relied upon by the prosecution in the instant case and positive reports of Forensic Science Laboratory are concerned, we have noted that the said recoveries were not put to the petitioners in their statement recorded under Section 342 Cr.P.C., therefore, the above mentioned pieces of prosecution evidence cannot be considered against the petitioners and the same have rightly been discarded by the learned High Court in paragraph No.15 of the impugned judgment. Reference in this context may also be made to the case of, Fida Hussain Shah. The State (2024 SCMR 1622), Haji Nawaz v. The State (2020 SCMR 687) and Mst. Anwar Begum v. Akhtar Hussain (2017 SCMR 1710).”

In the case of Shahab-u-din v. The State (2019 YLR 1277) held in para-13

that;

13. *“In view of the above stated reasons, we have no hesitation to hold that there are several infirmities in the prosecution case as highlighted above, which have created doubt in prosecution case. In the case of Tariqe Pervez v. The State (1995 SCMR 1345), the Honourable Supreme Court has observed as following:-*

“It is settled law that it not necessary that there should many circumstances creating doubts. Ifg there is a single circumstances, 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 a matter of right”.

In the case of Ramesh Kumar v. The State (2024 MLD 608) the Division

Bench of this Court in para-12 has held as under;

12. *“We have come to the conclusion that prosecution has failed to prove it’s’ case against the appellant for the reasons that SHO had failed to associate with him private persons to witness recovery proceedings. It is case of the prosecution that had grenades were handed over to the incharge Malkhana of the police station but he has failed to produce entry of Malkhana to satisfy the Court that in fact he had kept hand grenades at the Malkhana in safe custody, explosive substance was sent to the expert after 03 days without explaining the delay. Record reflects that hand grenades were handed over to ASI Amanat Ali, he has also not been examined by the prosecution. Clearance Certificate produced by the prosecution at*

Ex.4/D, there is clear overwriting in the date. Learned Addl.P.G could not explain about the overwriting in date. On our minute examination, the prosecution has utterly failed to establish safe custody of the explosive substance at police station and its safe transmission to the expert. Honourable Supreme Court in the case of Kamaluddin alias Kamala v. The State, (2018 SCMR577) has laid down the following principle:

“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 Farooque 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 weapons 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.

19. I have no hesitation to hold that the prosecution has failed to prove it’s case against the accused. Resultantly, instant appeal was allowed. Conviction and sentence recorded by the trial court vide judgment dated 15.10.2024 was set aside and appellant Fazul Bharo was acquitted of the charge. The appellant was present on bail, his bail bond stand cancelled and surety was discharged. These are the reasons of short order dated 06.03.2025.

JUDGE

*Ihsan/**