

ORDER SHEET
IN THE HIGH COURT OF SINDH, CIRCUIT COURT, LARKANA
Cr. Appeal No.D-24 of 2024

Date of Hearing 01.01.2025.	ORDER WITH SIGNATURE OF JUDGE
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1. For orders on office objection.
2. For hearing of Main Case.
3. For hearing of M.A. No.1603/2024.

Mr. Ashique Ali Jatol and Naseer Ahmed Wagan, advocates for the appellant.
Mr. Ali Anwar Kandhro, Addl. P.G.

Learned Counsel for the appellant submit that the appellant was charged with Sections 324, 353, 34, PPC read with Sections 5 & 6 Explosive Act, 1908 and 6/7, Anti-Terrorism Act, 1997; however, during the trial the prosecution failed to establish the charge in terms of Sections 324, 353, 34, PPC read with Sections 6/7, Anti-Terrorism Act, 1997 and the appellant was held guilty only for the charge u/s 5 & 6 of Explosive Act, 1908. He next submits that the evidence of same set of PWs was disbelieved to the extent of remaining sections, while it was believed on second episode and the technical point he raises is the trial Court did not bifurcate the case of appellant at the time of framing of charge. Hence, the prosecution failed to establish its charge against the appellant, therefore, the impugned judgment being perverse cannot be maintained. Therefore, they pray that by allowing instant appeal, the appellant may be acquitted of the charge. In support of their contentions, they have placed reliance on the case reported as *Ramesh Kumar v. The State* (2024 MLD 608).

Learned Addl. P.G. opposes the appeal and supports the impugned judgment, containing that the appellant was found guilty of keeping in his possession the hand grenade shells and no malafide has

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been proved against the prosecution, therefore, appeal merits no consideration.

Arguments heard. For the reasons to be recorded later on, instant criminal appeal is allowed. The conviction and sentence awarded to the appellant vide impugned judgment dated 18.4.2024 passed by the learned Special Judge, Anti-Terrorism Court, Shikarpur, in Special Case No.44/2023, re-The State v. Khawand Bux & others, based on Crime No.60/2023 of PS Mouladad, District Jacobabad, are set aside to the extent of appellant Khawand Bux Shaikh only. Consequently, the appellant is acquitted of the charge. The appellant is in custody, therefore, he shall be released forthwith, if not required to be detained in any other case. The case of absconding accused Imam din @ Imoo son of Bahar Jagirani and Ali Khan son of Bangul Golo shall remain on dormant file, as is ordered under the impugned judgment.


JUDGE


JUDGE

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CERTIFICATE OF THE COURT IN REGARD TO REPORTING

Criminal Appeal No. D- 24 of 2024

Khawand Bux Boohar

VERSUS

The State

SINDH HIGH COURT

Composition of Bench Before

Mr. Justice Muhammad Saleem Jessar
Mr. Justice Amjad Ali Bohio

Single/D.B.

Dates of Hearing: 01.01.2025

Decided on: 01.01.2025

(a) Judgment approved for
Reporting

01.01.2025
YES
NO

C E R T I F I C A T E

Certified that the judgment / Order is based upon or enunciates a principle of law / decides a question of law which is of first impression / distinguishes/ over-rules/ reverses/ explains a previous decision.

Strike out whichever is not applicable.

- NOTE: - (i) This slip is only to be used when some action is to be taken.
- (ii) If the slip is used. The Reader must attach it to be the top of the first page Of the judgment.
- (iii) Reader must ask the Judge writing the Judgment whether the Judgment is Approved for reporting.
- (iv) Those directions which are not to be used should be deleted.

IN THE HIGH COURT OF SINDH, CIRCUIT COURT LARKANA

Criminal Appeal No. D-24 of 2024

Present:

Mr. Justice Muhammad Saleem Jessar

Mr. Justice Amjad Ali Bohio

Appellant Khawand Bux : through M/s. Ashique Ali Jatoi &
Naseer Ahmed Wagan, Advocates

The State : through Ali Anwar Kandhro, Addl.
Prosecutor General, Sindh.

Date of Hearing : 01.01.2025

Date of Judgment : 01.01.2025

JUDGMENT

MUHAMMAD SALEEM JESSAR. I- By means of instant Cr. Appeal, appellant Khawand Bux S/o Shahban has assailed the Judgment dated 18.04.2024 passed by learned Special Judge, Anti-Terrorism Court, Shikarpur vide Special Case No. 44 of 2023, being outcome of FIR No. 60/2023, whereby he was convicted for offence punishable under section 5 of Explosive Substance Act, 1908 r/w section 7 of Anti-Terrorism Act 1997 for keeping the grenade shells and was sentenced to suffer R.I for 07 years. The property of accused was also directed to be forfeited to the State as required under section 5 of Explosive Substance Act, 1908. However, benefit under Section 382-B Cr.PC was extended to him.

2. Briefly stated, the facts of the prosecution case, as disclosed in the FIR lodged by complainant ASI Inayat Ali Channa at Police Station Mola Dad, District Jacobabad on 02.08.2023 at 1810 hours, are; that on said date, he alongwith his subordinate staff namely; PC Mohammad Khan and PC Abdul Nabi, having investigation bag left P.S. in government vehicle bearing Registration No.SPF 909 driven by driver PC Noor Mohammad vide roznamcha departure entry No. 15 recorded at 1600 hours for patrolling in the area. After patrolling different places, when at about 1700 hours, they reached at Chand Shakh Bridge, they saw three persons standing there, out of whom one was having cloth bag and remaining two were armed with KKs. On seeing police mobile, they started straight firing upon police personnel with intention to kill them. The complainant / police party stopped their vehicle, alighted therefrom and opened fire in retaliation in their defense while taking shelter of Chand Shakh bank. Such encounter lasted for about five minutes and thereafter two accused having KKs succeeded to escape away towards western side while one accused stood there. The police party apprehended him at the spot. Due to non-availability of private persons, complainant/ASI by citing nominated PC Mohammad Khan and PC Abdul Nabi as mashirs, conducted his personal search. On query, accused disclosed his name to be present appellant and further disclosed names of escaping accused persons as Imam Din @ Imoo s/o Bahar Jagerani r/o Haq Baho Mohalla, Osta Mohammad, Balochistan and Ali Khan s/o Bangul Khan Golo r/o Taluka Garhi Khairo. The complainant opened the secured cloth bag and found 20 grenade shells used in Awan weapon. The accused disclosed that he alongwith escaping accused, used to purchase the same from Balochistan and sell the same in Sindh province. Thereafter, on conducting his personal search, two currency notes of Rs.500/- each were secured from his right side pocket which were sealed on the spot separately. Thereafter, complainant/ASI prepared such mashirnama of recovery and arrest of accused on the spot in presence of both mashirs and then returned back alongwith arrested accused and property to P.S. Mola Dad where he lodged FIR on behalf of State against the accused regarding aforesaid incident.

3. After registration of FIR, CIO/Inspector Ghazanfar Ali Bhuto started investigation. On the same day at 1930 hours, he inspected the place of vardat on the pointation of complainant, ASI Inayat Ali Channa, collected 25 empties of 7.62 bore from position of police party and 20 empties of 7.62 bore from

position of accused party which he sealed on the spot separately and prepared such mashirnama in presence of mashirs PC Mohammad Khan and PC Abdul Nabi and then recorded 161 Cr. P.C. statements of PWs/police officials. After getting permission from SSP Jacobabad, he sent the recovered empties to FSL Larkana and received such report. CIO also got defused recovered grenade shells through incharge BDU Mohammad Ismail Gilal of Special Branch, Larkana and thereafter obtained consent / permission through SSP Jacobabad from Home Department Government of Sindh, Karachi for trial of accused under Section 7 of Explosive Act. After completing all legal formalities, CIO submitted final report/challan on 09.10.2023, before trial Court for adjudication. After completion of investigation, the police have added sections 324, 353 & 34 PPC read with Section 4/5 Explosive Substance Act, 1908 read with Section 6/7 of ATA, 1997 by showing accused Khawand Bux son of Shaban Bohar in custody whereas accused Imam Din alias Imoo s/o Bahar Jagerani and Ali Khan s/o Bangul Golo as absconders.

4. After taking cognizance of the offence, learned trial Court issued NBWs against absconding accused but could not be executed and were returned unserved by the process server/ASI Abdullah Mohammadani of P.S. Mola Dad with endorsement that accused have shifted away to some unknown place. Such statement of process server / ASI was recorded on oath vide Ex.01. He produced his endorsement, statement of four local persons, copies of entries of roznamcha and unexecuted NBW as Ex.1/A to Ex. 1/J. The proceeding under Section 87 Cr. P.C. was also initiated against absconding accused and statement of same process server/ASI Abdullah of P.S Mola Dad was recorded as Ex.2. He produced his endorsement, mashirnama of publications regarding affixing process at different places, copies of roznamcha entries and proceeding u/s 87 Cr. P.C. as Ex.2/A to Ex.2/F. The publications in national newspapers were made against absconding accused as required under Section 19 Subsection (10) of Anti-Terrorism Act, 1997 and kept on record as Ex.3 & Ex.4; however, accused failed to appear before the trial court. The reports u/s 88 Cr. P.C. against absconding accused were also received from Mukhtiarkar, Taluka Garhi Khairo and Tehsildar Osta Mohammad Balochistan in which they stated that there is no moveable / immoveable property in the name of absconding accused. Such reports were kept on record as Ex.5 & Ex.6. To avoid the proceedings to be lingered on in the case of appellant, case of absconding accused was kept on dormant file till

their arrest or surrender vide order dated 30.11.2023 EX.7. The required police papers were supplied to appellant Khawand Bux u/s 265-C Cr. P.C vide receipt Ex.8. Oath was taken by the Presiding Officer as required u/s 16 of Anti-Terrorism Act 1997 vide Ex.9.

5. A formal charge was framed against accused / appellant Khawand Bux vide Ex.10 to which he pleaded not guilty and claimed to be tried. Such plea of accused was recorded at Ex.10/A.

6. The prosecution in order to prove its case, examined PW-1 complainant, ASI Inayat Ali Channa at Ex 10, who produced attested copy of departure roznamcha entry as Ex.10/A, mashirnama of recovery and arrest of accused as Ex. 10/B, copy of FIR as Ex.10/C, carbon copies of entries regarding registration of FIR as Ex.10/D & Ex.10/E. PW-2, PC Mohammad Khan Jakhro, eye witness of the alleged incident and mashir of recovery, arrest of accused, place of vardat and defusing of grenade shells, was examined at Ex.11, who produced mashirnama of place of vardat as Ex.11/A and mashirnama of defusing of grenade shells as Ex.11/B. PW-3 PC Saddam Hussain Khonharo, who deposited empties with FSL Larkana was examined at Ex.12, who produced R.C. alongwith covering letter of SSP, Jacobabad as Ex.12/A. PW-4 WHC Manzoor Ahmed Soomro, who kept the recovered property in mall khana of P.S., was examined at Ex.13, who produced attested photocopy of entry of Register No.19 as Ex.13/A. PW-5 ASI Mohammad Ismail Gilal, I/C BDU Larkana, who defused recovered grenade shells, was examined at Ex. 14, who produced technical report as Ex.14/A. PW-6 I/O/Inspector Ghazanfar Ali Bhutto was examined at Ex.15, who produced attested carbon copy of entry regarding receiving of case papers for investigation as Ex.15/A, carbon copy of letter written to SSP Jacobabad for sending BD team to check and defuse property as Ex.15/B, FSL report of Larkana as Ex.15/C, attested photocopy entry of arrival of BD team at P.S. as Ex.15/D, carbon copy of letter written to SSP, Jacobabad for obtaining permission from Home Department, Government of Sindh, for trial of accused under Explosive Act as Ex.15/E, copy of letter of SSP Jacobabad written to Home Department, Government of Sindh, as Ex.15/F, copy of order of sanction / permission of Home Department, Government of Sindh, for trial of accused under Explosive Act at Ex.15/G, interrogation form and criminal record of accused Khawand Bux as Ex.15/H and Ex.15/I, carbon copy of

letter written to Mukhtiar, Taluka Osta Mohammad Balochistan for providing details of moveable/immoveable properties of absconding accused as Ex.15/J, carbon copy of letter sent to NADRA, Jacobabad for blocking CNICs of absconding accused as Ex.15/K. Thereafter, learned APG, appearing for the State, closed side of prosecution vide Statement Ex.16.

7. In his statement under Section 342 Cr P.C vide Ex.17, the appellant denied the allegations of prosecution, claimed innocence and prayed for justice. Accused further stated that he has falsely been implicated in the case by the police. Per his plea, in fact, he was arrested by SHO Abdul Qadir Chandio two days prior to registration of this case, who demanded illegal gratification for his release and on his refusal, he managed his false encounter with his subordinate staff namely, ASI Inayat Ali Channa and others and foisted property upon him, which property was also shown in unsealed condition during press conference held by SHO Abdul Qadir Chandio. Accused neither examined himself on oath u/s 340 (2) Cr. P.C., nor produced any witness in his defense.

8. After formulating the points for determination, recording evidence of the prosecution witnesses and hearing counsel for the parties, trial Court vide impugned judgment convicted and sentenced the appellant, as stated above, while the case of two absconding accused was kept on dormant file till their arrest or appearing before the trial Court. Against the said judgment the appellant has preferred instant criminal appeal.

9. We have heard the arguments advanced by learned counsel for the appellant as well as learned Additional Prosecutor General appearing for the State and have perused the material available on the record.

10. Learned Counsel for the appellant submitted that the appellant was charged for the offences under Sections 324, 353, 34, PPC read with Sections 5 & 6 of Explosive Act, 1908 and 6/7 of Anti-Terrorism Act, 1997; however, during the trial the prosecution failed to establish its charge in terms of Sections 324, 353, 34, PPC read with Sections 6/7, Anti-Terrorism Act, 1997 and the appellant was held guilty only for the offence under Sections 5 & 6 of Explosive Act, 1908. He next submitted that same set of evidence of prosecution witnesses was disbelieved to the extent of offences under other sections, while it was believed on second episode. While making such

submission, the technical point raised by learned counsel, was; that the trial Court did not bifurcate the case of appellant at the time of framing of charge. According to him, the prosecution failed to establish its charge against the appellant, therefore, the impugned judgment, being perverse, cannot be maintained. Consequently, he prayed that by allowing instant appeal, the appellant may be acquitted of the charge. In support of his contentions, he placed reliance on the case reported as Ramesh Kumar v. The State (2024 MLD 608).

11. Learned Additional P.G. opposed the appeal and supported the impugned judgment, contending that the appellant was found guilty of keeping in his possession the hand grenade shells and no *nulafide* has been brought against the prosecution, therefore, appeal merits no consideration and is liable to be dismissed.

12. From perusal of the evidence of prosecution witnesses it seems that there are certain material admissions made by the prosecution witnesses from which certain legal flaws / lacunas are surfaced in the investigation / prosecution case, which put serious dents in the prosecution case.

13. Complainant ASI Inayat Ali Charua in his cross-examination, *inter alia*, admitted that at the very first instance he saw the accused persons from a distance of 60/70 paces and from same distance the culprits started firing upon police party. He also admitted that when accused persons opened firing upon police officials, they were still sitting in police mobile, however, neither any bullet hit to the vehicle, nor any person from either side received any fire shot injury. He further admitted that Chand Shakh is located on the main road leading towards Jacobabad, Rato Dero, Garhi khairo, thus, traffic used to ply on said road; however, he added that during encounter and till completion of legal formalities which took about 50 minutes, no vehicle passed on said road. According to him, he fired 25 shots from his official SMG during encounter, however, he showed his inability to give numbers of shots fired by other police officials. He also admitted that P.S Mola Dad is situated in thickly populated area. He deposed that he did not remember as to whether I.O. made any effort for associating private person while proceeding towards place of vardat.

14. P.W. PC Mohammad Khan, claims to have seen the alleged incident and to be present alongwith complainant at the time of alleged incident, so also having acted as mashir of arrest and recovery etc. He admitted in his cross-examination that Chand Shakh is situated on the main road leading towards Jacobabad-Rato Dero-Garhi Khairo where traffic used to ply. According to him, firstly they saw accused persons from a distance of about 60/70 paces and the accused started straight firing upon police party from the same distance; however, none from either side received any fire shot injury, nor any bullet hit to police vehicle. He deposed that he spent 25 rounds from his official weapon; however, he could not say as to how many shots were fired by other police staff. According to him, the Investigating Officer did not make any effort for associating any private person while proceeding to place of vardat.

15. The Investigating Officer namely, Inspector P.W. Ghazanfar Ali in his cross-examination admitted that some shops were situated at the distance of about 200/300 paces from PS Mola Dad. According to him, he tried to associate private person to act as mashir on the way while going to place of vardat but no one was ready to act as mashir; however, he did not take any legal action against such persons. He admitted that there was a road leading from Jacobabad to Garhi Khairo and traffic used to ply on said road. He further admitted that incident had taken place on main road at Chand Shakh bridge.

16. P.W. ASI Mohammad Ismail, who was Incharge, Bomb Disposal Unit, Larkana, and had defused the grenade shells, in his examination-in-chief deposed that on 20.8.2023 he was posted as BD incharge Larkana and on said date on receiving message from SSP, Special Branch, Larkana, he got defused explosive material recovered in a crime by police of PS Mola Dad District Jacobabad. In his cross-examination he admitted that he did not keep his arrival entry at PS Mola Dad.

17. From above admissions following discrepancies / lacunas are visible in the investigation / prosecution case:

- i) The complainant as well as alleged eye-witness and mashir namely, PC Mohammad Khan in their respective depositions admitted that the accused made straight fires from their K.Ks at the police officials when they were still sitting in the police mobile from a distance of 60/70

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paces. They have also admitted that neither any of the police officials sustained any injury as a result of such firing, nor even any fire-shot hit the police mobile. It may be noted that alleged incident took place at evening time at 5.00 p.m. The sunset time on the date of incident was about 7.00 p.m. meaning thereby that there was sufficient sun-light at the time of alleged incident. It is also noteworthy that the distance between the accused and the police party was also very short i.e. 60/70 paces. Despite such a situation, very strangely and unbelievably, neither any police official sustained any injury, nor even any fire-shot hit to the police vehicle. In such circumstances, it was a case of ineffective firing, thus making the alleged incident itself very doubtful and suspicious.

18. In this connection, reference may be made to case of **WAZEER Vs. THE STATE**, reported in 2020 P Cr. L J Note 188 [Sindh (Hyderabad Bench)], wherein it was held as under:

"30. It is also an admitted position that even otherwise it was a case of ineffective firing as none of the police officials has sustained any injured at the hands of accused persons, nor any fire shot hit even the police mobile/vehicle. In this connection reference may be made to the case of *Nazira v. Mukhtar Ahmed* reported in 2003 SCMR 538, wherein honourable Supreme Court held that no injury was attributed to accused who had allegedly made ineffective firing. It was further held that High Court had justifiably and competently acquitted the accused on the charge for the reasons based on correct application of law and proper evaluation of evidence existing on record."

19. In another case of **Syed ALAM Vs. The State**, reported in 2023 Y L R 1470 [Sindh] a Division Bench of this Court held as under:

"In the instant case, we find certain mitigating circumstances which warrant reduction of sentences awarded by the trial court for the aforesaid offences. For instance; there is admittedly ineffective firing and none of the members of police party has / have sustained any injury, even no fire shot hit the police vehicle; besides while in running position on a motorcycle it is very difficult to fire upon police officials, who admittedly were inside the police mobile at the time when the accused started firing, so that it could hit on any vital part of their body which may cause their death which is the main ingredient of section 324, P.P.C.; moreover, it has not been explained as to which of the accused was driving the motorcycle because it was nearly, impossible for the accused who was driving the motorcycle to have fired upon the police, party and even from the perusal of FSL report it is clear that the empties secured from the place of incident matched only two pistols and not three, meaning thereby that only two accused who were sitting on the rear side of the driver had opened fire upon the police party; according to complainant and P.W. Usman Ali Khan, at the time when the injured accused were being taken to hospital blood was not oozing from their injuries, whereas according to MLO when he examined the injuries of the injured accused blood was oozing from the injuries; it has been admitted by P.W. mashir Usman Ali Khan, "It is correct to suggest that it is mentioned in my statement that on our arrival at P.S. the ASI prepared memo of arrest and recovery." and lastly that the clothes of the injured accused were not secured/ sealed by the MLO and/or the police."

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II) From perusal of mashirnamas of arrest and recovery, it is evident that both mashirs are police officials namely PC Mohamamd Khan and PC Abdul Nabi. Besides, the complainant in his cross-examination admitted, "Chand Shakh is located on main road leading towards Jacobabad, Rato dero, Garhi khairo. Traffic use to ply on said / road. During encounter no any vehicle passed from road.... P.S Mola dad is situated in thickly populated area. I do not remember whether LO made any efforts for associating private person on the way proceeding towards place of vardat."

20. P.W. PC Khan Mohammad also made similar admissions.

21. The I.O. Inspector, Ghazanfar admitted, "Some shops are situated at the distance of about 200/300 paces from PS Mola Dad. I tried to associate private person to act as mashir on the way while going to place of vardat but they did not become ready to act as mashir. I did not initiate legal proceeding / against them.....There is road leading from Jacobabad to Garhi Khairo. Traffic use to ply on that road."

22. No explanation has been offered that despite above, as to why police officials were made mashirs of the memo of arrest and no private person was associated as mashir.

23. In this view of the matter, it is clear that the mandatory requirement as envisaged under Section 103 Cr. P.C. was not fulfilled. The purpose of associating independent mashirs of the locality is to ensure the transparency of the recovery process. Needless to emphasize that in view of provisions of section 103 Cr. P.C. the officials making searches, recoveries and arrests, are reasonably required to associate private persons, more particularly in those cases in which presence of private persons is admitted, so as to lend credence to such actions, and to restore public confidence. This aspect of the matter must not be lost sight of indiscriminately and without exception. Only cursory efforts are not enough merely in order to fulfill casual formality, rather serious and genuine attempts should be made to associate private mashirs of the locality.

24. Superior Courts have not appreciated such conduct on the investigating agency. In this connection, reference may be made to the case reported as *State Vs. Bashir and others* (PLD 1997 S.C. 408) Honourable Supreme Court held as under:

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"As regards above second submission of Mr.M.M. Aqil, it may be observed that it has been repeatedly held that the requirements of section 103 Cr.P.C. namely, that two Members of the public of the locality should be Mashirs of the recovery, is mandatory unless it is shown by the prosecution that in the circumstances of a particular case it was not possible to have two Mashirs from the public."

25. In the case of *Sarmad Ali Vs. The State* reported in 2019 MLD 670, relied upon by learned counsel for the appellant, it was observed that the place of incident was thickly populated area but no independent person from said area was called to act as mashir of recovery and, therefore, it was held that the prosecution case suffered from lack of independent evidence regarding recovery of the pistol.

26. Yet in another case reported as *Yameen Kumhar Vs. The State* (PLD 1990 Karachi 275) this Court after discussing various case-laws on this point held as under:

"A perusal of the aforesaid authorities and a catena of judgments of various High Courts which we have not quoted here clearly lay down that Section 103 Cr. P.C. is to be applied to recovery, search and arrest made during investigation of a crime. It has been termed as mandatory but not absolute and its non-compliance in certain circumstances will not render search and recovery illegal. However, where during investigation of a crime recovery is made from any inhabited locality compliance with section 103 must be made. It cannot be ignored or brushed aside on the whims and caprices of the Investigating Officer except on well-founded grounds and in exceptional cases. If recovery has been made in contravention of section 103, it is the duty of the prosecution to explain it and give valid and reasonable explanation for such digression. Recovery is an important piece of evidence which is to be proved by disinterested, independent and respectable witnesses. Such witnesses should be of the locality if the circumstances of the case permit. Section 103 embodies rule of prudence and justice. It is intended to eliminate and guard against 'chicanery' and 'concoction', to minimise manipulation and false implication. It is for these reasons that there is a consensus in the Superior Courts that compliance with section 103 should not be bypassed nor that its applicability be restricted to proceedings under Chapter VII only. The principles of section 103 have been applied and practised during investigation in crimes for so long and with such regularity and force that any attempt to restrict it to proceedings under Chapter VII only will unsettle the settled law.

The provisions of Chapter VII make it clear that they relate to the search of any place but it cannot be restricted only to house or a closed place, it can be an open place, open area, a playground, field or garden from where recovery can be made for which search is conducted. Although in strict sense the provisions of section 103 are restricted to searches under Chapter VII of Cr. P.C. it has become a practice to apply it to all recoveries made by the Police Officers while investigating any crime. The rules of justice enunciated by section

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103 are so embedded in our criminal, jurisprudence and so universally accepted that in all criminal cases two mashirs are always cited for recovery and reliance is placed on these witnesses in the ordinary course provided they are independent, respectable and inhabitants of the locality. The residence of the mashirs becomes relevant depending on the facts of the case. The emphasis should be on respectability."

27. In view of aforesaid factual and legal position, the prosecution has not succeeded to prove in letter and spirit the arrest of the accused/appellant and recovery etc.

III) Another note-worthy aspect of the case is; according to prosecution case, at the time of alleged incident complainant ASI Inayat Ali Channa was accompanied by P.C. Mohammad Khan and P.C. Abdul Nabi, whereas police vehicle was being driver by PC Noor Mohammad, meaning thereby PC Abdul Nabi and PC Noor Mohammad were also the eye-witnesses of the alleged incident and PC Abdul Nabi also acted as mashir of arrest and recovery etc. However, both these police officials, particularly PC Abdul Nabi, have not been examined and produced before the trial Court although they being alleged eye witnesses of the incident, their evidence was very material and essential.

28. This is also injurious to the prosecution case as it is settled principle of law that despite availability of essential witnesses, non-examination of such witnesses in the case gives an inference that in case such witnesses had been examined, they would not have supported the prosecution case, as envisaged under Article 129(g) of Qanoon-e-Shahadat Order, 1984.

29. In this connection, reference may be made to a decision of Honourable Supreme Court given in the case of *Abdul Ghani Vs. The State* reported in 2022 S C M R 2121, wherein a Full Bench of Honourable Supreme Court held as under:

*"Thereafter, according to Noor Ullah Khan, S.I. (PW-4) on 08.06.2011 he sent the sample parcels to the office of Chemical Examiner but according to the report of Chemical Examiner the sample parcels were delivered there by one Head Constable No. 25 on 10.06.2011 but the said Head Constable was not produced by the prosecution during the trial. The learned state counsel could not explain as to why the said Head Constable was not produced to confirm the safe transmission of the sample parcels to the office of Chemical Examiner so an adverse presumption under Article 129(g) of the Qanun-e-Shahadat Order, 1984 can be drawn against that person that he is not supporting the prosecution case. Non-production of the said Head Constable No. 25 indicates that safe transmission has also not been established by the prosecution. It has already been held by this Court in the cases of *Amjad Ali v. The State* (2012 SCMR 577), *Ikramullah and others v. The State* (2015*

SCMR 1002), *Taimoor Khan and another v. The State and another* (2016 SCMR 621), *The State through Regional Director ANF v. Imam Bakhsh and others* (2018 SCMR 2039) and *Khair-ul-Bashar v. The State* (2019 SCMR 930) that in a case containing the above mentioned defect on the part of the prosecution, it cannot be held with any degree of certainty that the prosecution had succeeded in establishing its case against an accused person beyond the shadow of doubt."

30. Prior to above decision, in the case of *Bashir Ahmed alias Manu vs. The State* reported in 1996 SCMR 308 it was held by Honorable Supreme Court that *despite presence of natural witnesses on the spot they were not produced in support of the occurrence an adverse inference under Article 129(g) of Qanun-e-Shahadat Order, could easily be drawn that had they been examined, they would not have supported the prosecution version.* In another case reported as *Mohammad Shafi vs. Tahirur Rehman* (1972 SCMR 144) it was held that *large number of persons had gathered at the place of occurrence but prosecution failing to produce single disinterested Witness in support of its case, therefore no implicit reliance could be placed on the evidence of interested eye-witnesses.*

IV) The complainant in his evidence deposed, *"I spent 25 rounds from my officials SMG during encounter with accused persons."* P.W. Khan Mohammad also made exactly same statement. For the sake of argument, if the shots fired by only these two police officials are counted, then it comes to be 50 shots. Although both these witnesses have also admitted, *"I cannot give numbers of fires made by other police officials."*, however, even if the shots fired by PC Abdul Nabi and PC Noor Mohammad are ignored, even then the admitted figure comes to 50 shots and if 25 empties of the fire-shots allegedly fired by accused persons and secured from the spot are also counted, then the total figure would come to 75, whereas the number of empties sent to the FSL was only 50 i.e. 25 empties in each of the two parcels. This also creates doubt in the prosecution story.

V) Admittedly, the alleged recovery of grenade shells and the crime empties was effected on 02.8.2023 whereas the secured empties were sent by the I.O. through PC Saddam to FSL Larkana on 07.2.2023 i.e. after a delay of five days. Likewise, the grenade shells were also got defused through ASI Mohammad Ismail on 20.8.2023 i.e. after 18 days of the recovery of such grenade shells. No explanation has been furnished by the prosecution for such an inordinate delay, which is also injurious to the prosecution case.

31. In a recent decision in the case of **RAMESH KUMAR VS. THE STATE**,

RS

reported in 2024 MLD 608 [Sindh], a Division Bench of this Court has elaborately dealt with similar case. It would be advantageous to reproduce hereunder relevant portions from the said judgment:

*"12. We have come to the conclusion that prosecution has failed to prove its' case against the appellant for the reasons that SHO had failed to associate with him private persons to witness recovery proceedings."
"... explosive substance was sent to the expert after 03 days without explaining the delay."*

"13. 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 the present case, SHO had prior information, it was not difficult for him to call independent persons but he deliberately avoided. No reliance can be placed upon the evidence of the police officials without independent corroboration, which is lacking in this case, particularly, when appellant/accused in his statement recorded under Section 342, Cr.P.C. has claimed false implication in this case. 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,...."

32. The appellant has taken specific plea that SHO Abdul Qadir Chandio had shown the case property viz. hand grenades at the time of press conference he conducted and at the time of his evidence, he was confronted with certain photographs by the defense counsel which all the PWs had admitted and recognized to be of SHO Abdul Qadir Chandio as well as appellant; however, had denied to identify other persons and the property properly. The appellant had also taken such a plea in his evidence under Section 342 Cr.P.C that though a copy of such press conference or the photographs shown to the PWs at the time of their evidence before the trial Court were not exhibited yet being part and parcel of the defense evidence, the trial Court has not discussed it properly nor kept it in juxtaposition with the prosecution case; hence, the specific plea put-forth by the defense was discarded. By not keeping the defense version in juxtaposition with the prosecution case, the trial Court has not appreciated the material placed before it properly which creates a lot of doubt into veracity of the prosecution evidence and thus entitles the appellant to acquittal, more particularly when the trial Court has disbelieved the evidence of same witnesses by acquitting him from the charge of Sections 324, 353 & 34 PPC and has believed the

remaining portion of the evidence to the extent of alleged recovery of grenade shells which cannot be said to be confidence inspiring piece of evidence as the alleged grenade shells were defused by the BDU experts after about 18 days. The trial Court while discarding specific defense plea, held and observed that the matter of photographs was not produced or examined by the defense but the trial Court did not appreciate that the PWs had admitted and recognized photographs of SHO as well as the appellant. Since the admission on the part of prosecution was brought on record, therefore, by following mandatory plea needs not to be discussed, the prosecution has admitted photographs to be of appellant as well as SHO Abdul Qadir Chandio against whom the appellant had alleged that at the time of press conference he disclosed the photographs to media, was sufficient to believe that the property allegedly secured, was not sealed on spot and later it was managed to strengthen the rope of their false case.

33. The accumulative effect of above lacunas and defects in the investigation / prosecution case is; that prosecution has not succeeded in proving its case against the accused / appellant beyond shadow of reasonable doubt which is requirement of the law.

34. It is well settled principle of law that the prosecution is bound under the law to prove its case against the accused beyond any shadow of reasonable doubt. It has also been held by the Superior Courts that conviction must be based and founded on unimpeachable evidence and certainty of guilt, and any doubt arising in the prosecution case must be resolved in favour of the accused. In the instant case prosecution does not seem to have proved the allegations against the accused/appellant by producing unimpeachable evidence, thus doubts have been created in the prosecution version. In the case reported as *Wazir Mohammad Vs. The State* (1992 SCMR 1134) it was held by Honourable Supreme Court as under:

"In the criminal trial whereas it is the duty of the prosecution to prove its case against the accused to the hilt, but no such duty is cast upon the accused, he has only to create doubt in the case of the prosecution."

35. In another case reported as *Shamoon alias Shamma Vs. The State* (1995 SCMR 1377) it was held by Honourable Supreme Court as under:

"The prosecution must prove its case against the accused beyond reasonable doubts irrespective of any plea raised by the accused in his defence."

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Failure of prosecution to prove the case against the accused, entitles the accused to an acquittal."

36. Needless to emphasize the well settled principle of law that the accused is entitled to be extended benefit of doubt as a matter of right and not as a grace or concession. In present case, there are various admissions in the evidence of the prosecution witnesses which create doubts and put dents in the prosecution case. Even an accused cannot be deprived of the concession of the benefit of doubt merely because there is only one circumstance which creates doubt in the prosecution story. In the case of *Ahmed Ali and another Vs. The State* reported in 2023 SCMR 781, a Full Bench of Honourable Supreme Court has held as under:

"12. Even otherwise, it is well settled that for the purposes of extending the benefit of doubt to an accused, it is not necessary that there be multiple infirmities in the prosecution case or several circumstances creating doubt. A single or slightest doubt, if found reasonable, in the prosecution case would be sufficient to entitle the accused to its benefit, not as a matter of grace and concession but as a matter of right. Reliance in this regard may be placed on the cases reported as *Tajamal Hussain v. The State* (2022 SCMR 1567), *Sajjad Hussain v. The State* (2022 SCMR 1540), *Abdul Ghafoor v. The State* (2022 SCMR 1527 SC), *Kashif Ali v. The State* (2022 SCMR 1515), *Muhammad Ashraf v. The State* (2022 SCMR 1328), *Khalid Mehmood v. The State* (2022 SCMR 1148), *Muhammad Sami Ullah v. The State* (2022 SCMR 998), *Bashir Muhammad Khan v. The State* (2022 SCMR 986), *The State v. Ahmed Omer Sheikh* (2021 SCMR 873), *Najaf Ali Shah v. The State* (2021 SCMR 736), *Muhammad Imran v. The State* (2020 SCMR 857), *Abdul Jabbar v. The State* (2019 SCMR 129), *Mst. Asia Bibi v. The State* (PLD 2019 SC 64), *Hashim Qasim v. The State* (2017 SCMR 986), *Muhammad Marsha v. The State* (2018 SCMR 772), *Muhammad Zaman v. The State* (2014 SCMR 749 SC), *Khalid Mehmood v. The State* (2011 SCMR 664), *Muhammad Akram v. The State* (2009 SCMR 230), *Faheem Ahmed Farooqui v. The State* (2008 SCMR 1572), *Ghulam Qadir v. The State* (2008 SCMR 1221) and *Tariq Pervaiz v. The State* (1995 SCMR 1345)."

37. In the recent case of *RAMESH KUMAR* (supra), it was held:

"15. 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 Pervaiz 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)."

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38. For the foregoing reasons, by a short order dated 01.01.2025, instant criminal appeal was allowed and the conviction and sentence awarded to the appellant vide impugned judgment dated 18.4.2024 passed by learned Special Judge, Anti-Terrorism Court, Shikarpur, in Special Case No.44/2023, re-The State v. Khawand Bux & others, based on Crime No.60/2023 of PS Mouladad, District Jacobabad, were set aside to the extent of appellant Khawand Bux Shaikh only. Consequently, the appellant Khawand Bux Shaikh was acquitted of the charge. The appellant was in custody, therefore, he was ordered to be released forthwith, if not required to be detained in any other case. The case of absconding accused Imam Din @ Imoo son of Bahar Jagirani and Ali Khan son of Bangul Golo was ordered to remain on dormant file, as ordered in the impugned judgment.


JUDGE
JUDGELarkanaApproved for reportingDated: 01st January, 2025