

IN THE HIGH COURT OF SINDH, KARACHI

Criminal Appeal No. 701 of 2024

Appellant : **Asif Ali** through Mr. Hammadullah Buriro,
Advocate

Respondent : The State, through Mr. Mohammad Mohsin
Mangi, Addl. Prosecutor General

Date of Hearing : 27.10.2025.

Date of Judgment : _____

J U D G M E N T

TASNEEM SULTANA-J.:- Through this Criminal Appeal appellant/accused Asif Ali has assailed judgment dated 16.09.2024 passed by the learned Additional District & Sessions Judge-I, Karachi East, in Session Case No.5561/2022 arisen out of Crime No.341 of 2022 registered with P.S Alfalah, Karachi, whereby the appellant was convicted under Section 23(1)(a) of the Sindh Arms Amendment Act, 2021, and sentenced to suffer 10 years rigorous imprisonment with a fine of Rs.50,000/- and in case of default, to suffer additional six months simple imprisonment.

2. The brief facts of the prosecution case are that on 14.07.2022, complainant SIP Peer Muhammad of Police Station Alfalah, while on patrolling duty, received spy information that three persons were present outside a shrine situated inside Azeem Pura Graveyard, Malir, Karachi. Upon reaching at the spot, the complainant allegedly apprehended three accused persons namely Asif Ali (present appellant), Abdullah, and Asadullah. During the body search of the appellant, one 30 bore pistol with rubbed number bearing words "DIAMOND NEW FRONTIER ARMS CO PESHAWAR CAL-30" alongwith magazine and 05 live bullets was allegedly recovered. The appellant failed to produce any valid license. Hence the instant FIR was lodged on behalf of the state. Similar recoveries were allegedly made from co-accused Abdullah (charas weighing 1065 grams) and Asadullah (one 30 bore pistol with magazine and 04 live bullets) for which separate FIRs were lodged against each accused person.

3. After completion of investigation, charge-sheet was submitted. The learned trial court framed charge against the present appellant Asif Ali, to which he pleaded not guilty and claimed trial.

4. The prosecution examined four witnesses including the complainant SIP Peer Muhammad (PW-1), mashir PC Khalid Hussain (PW-2), WHC Ayaz Ahmed (PW-3), and IO SIP Zulfiqar Ahmed (PW-4). Thereafter learned ADPP closed prosecution side vide statement at Ex-7.

5. The statement of the appellant was recorded under Section 342 Cr.P.C., wherein he professed his innocence and claimed false implication. However, he neither examined himself on oath nor produced any defense witness.

6. After hearing learned counsel for the parties, the learned trial court, vide impugned judgment dated 16.09.2024, convicted the appellant and sentenced him as stated above.

7. Learned counsel for the appellant contended that the conviction rests upon misreading of evidence and disregard of fundamental principles of criminal law; that no independent witness was associated despite the alleged recovery being made outside a shrine located inside Azeempura graveyard which is a public place; that crucial details regarding receipt of spy information and route of patrol were omitted in the FIR creating serious doubt; that the co-accused Abdullah and Asadullah arrested at the same time, place, and on identical evidence were acquitted by the IInd Additional Sessions Judge, Karachi East, vide judgments dated 18.11.2022 and 24.10.2022 respectively, on findings that the memos of arrest and recovery were prepared at the police station and not at the spot. It was argued that the same police officials were witnesses including complainant and I.O in all three cases; PC Khalid Hussain acted as Mashir in this case while in other two cases PC Niaz Hussain acted as mashir however; both are mashirs of same memo used in all three cases, and thus the prosecution evidence, already disbelieved in other two connected trials, cannot sustain conviction in the case in hand, therefore, impugned judgment being not maintainable is liable to be set aside and appellant may be acquitted of the charge on benefit of doubt.

8. The learned Additional Prosecutor General, appearing for the State, has supported the impugned judgment and submitted that the prosecution successfully proved its case beyond reasonable doubt; minor contradictions referred to by learned counsel are not fatal to the prosecution case and that the recovery of the unlicensed weapon was established. He further submitted that the acquittal of co-accused in separate trials should not benefit the appellant as each case must be decided on its own merits.

9. Heard. Record perused.

10. It is an admitted position that all three accused namely Asif Ali (present appellant), Abdullah and Assadullah (co-accused) were apprehended simultaneously on 14.07.2022 at the same spot when allegedly pistol was recovered from appellant Asif Ali and from co-accused Abdullah and Asadullah charas weighing 1065 grams and one 30 bore pistol with magazine and 04 live bullets were recovered respectively for which separate FIRs were lodged against each accused person. However; the same complainant, mashirs, and investigating officer were involved in all three cases being outcome of same memo of arrest and recovery covering arrest of all three accused who were tried separately on same set of evidence.

11. In the present case, PW-1 Peer Muhammad deposed that during patrolling he received spy information regarding presence of accused persons on which he reached at pointed place and in presence of his mashirs PC Niaz Hussain and PC Khalid Hussain arrested present appellant Asif Ali with pistol of 30 bore, other two accused Asadullah and Abdullah with charas weighing 1065 grams and pistol of 30 bore with magazine containing four live bullets respectively. In his cross examination he admitted that no details were given by him in the FIR regarding places through which he patrolled, colour of recovered pistol, or time, place and mode of receiving spy information.

12. PC Khalid Hussain repeated same story as stated by complainant. Through he claimed the memo of arrest was prepared inside police mobile He also admitted in cross examination that no details were given regarding places through which they patrolled and colour of weapon recovered.

13. Perusal of record reveals that **Co-accused Asadullah s/o Gul Hassan** was acquitted in Session Case No. 3976/2022 (FIR No. 342/2022) by the IInd Additional Sessions Judge, East, Karachi vide judgement dated 24.10.2022 while extending him benefit of doubt. It was observed by learned trial Judge that mashir of arrest and recovery (PW-2 Niaz Hussain) admitted during cross-examination that the memo of arrest and recovery was prepared at the police station and not at the spot; the memo of site inspection was also prepared at the police station; the signatures on the memo were obtained at the police station hence the prosecution case suffered from material contradictions and lacunas and the story did not inspire confidence. It further reveals that **Co-accused Abdullah s/o Gul Ahmed** was acquitted in Session Case No. 4107/2022 (FIR No. 340/2022) vide judgment dated 18.11.2022 passed by the same trial court (IInd Additional Sessions Judge, East, Karachi) on the ground that the prosecution story was doubtful. These acquittal judgments are based on findings that the prosecution case was inherently flawed, the memos were prepared at the police station rather than at the spot of recovery and

arrest, and the entire story lacked credibility. These findings directly and fundamentally undermine the credibility of the same witnesses and the same police officials who deposed in the present case.

14. The most damaging contradiction, as noted in the acquittal judgment of co-accused Asadullah, is the admission by mashir PW-2 Niaz Hussain that the memo of arrest and recovery was prepared and signed at the police station and not at the spot. This fundamental flaw goes to the root of the prosecution case and creates serious doubt about whether any recovery was made at all.

15. In the present case, although PW-2 PC Khalid Hussain was examined (not Niaz Hussain), however; both mashirs were present during the same incident and were witnesses/mashirs to the same memo of arrest and recovery. The admission by one mashir Niaz Hussain in his evidence recorded during trial in separate case of co-accused Abdullah (arisen out of same memo of arrest and recovery) that the memo was prepared at the police station necessarily taints the entire recovery proceedings and casts serious doubt on the prosecution version.

16. The prosecution's case against the appellant rests on the testimony of the same police officials whose credibility has been rejected by coordinate courts in the cases of co-accused. When the foundation of the prosecution case has been found to be unreliable in relation to co-accused arrested in identical circumstances, it defies logic and principles of consistency to uphold the conviction of the present appellant based on the same evidence. In absence of such explanation, same set of evidence which was disbelieved qua the involvement of co-accused could not be relied upon to convict the appellant on the same set of charges. The principle of parity also demands equal treatment of similarly placed accused persons. The Supreme Court has repeatedly emphasized that disparity in treatment of identically situated accused undermines the integrity of justice and equality before law, protected under Article 25 of the Constitution. Reference can be made to the case of **Muhammad Ali V. The State' (2015 SCMR 137)** wherein it is held:-

“The same set of evidence has been disbelieved qua the involvement of Noor Muhammad, Riaz and Akram co-accused who were ascribed specific roles of causing injuries on the person of the deceased. Reliance in this regard is placed on Muhammad Akram v. The State (2012 SCMR 440) wherein this Court while considering other actors held that same set of evidence which was disbelieved qua the involvement of co-accused could not be relied upon to convict the accused on a capital charge and acquitted the accused.”

17. The occurrence allegedly took place during daylight hours yet no private witness was associated with the arrest and recovery nor any effort was made

to arrange private person to attest the recovery and arrest despite the fact that the alleged place of occurrence was outside a shrine in a graveyard, which is ordinarily a public place. Besides, the complainant had received prior spy information, giving him ample opportunity to arrange for independent witnesses. All these aspects show that non-association of private person to act as mashir was deliberate and willful act on the part of prosecution. Thus, there is clear violation of section 103 Cr.P.C. For the sake of convenience Section 103 Cr.P.C is reproduced as under:

103. Search to be made in presence of witness (1) Before making a search under this Chapter, the officer or other person about to make it shall call upon two or more respectable inhabitants of the locality in which the place to be searched is situate to attend and witness the search and may issue an order in writing to them or any of them so to do.

Though the police official is as good witness as anybody else from the public, but it was incumbent upon the police officer/investigating officer to associate some independent /private persons but they opted not to take any effort to arrange private person to act as mashir whereby they have committed deliberate violation of Section 103 Cr.P.C hence their testimony being biased could not have been safely relied upon to pass conviction against the appellant. While it is true that Section 34 of the Sindh Arms Act excludes the applicability of Section 103 Cr.P.C., the deliberate absence of private witnesses assumes significance when viewed in conjunction with the acquittal of co-accused Abdullah and Asadullah in the cases arisen out of common memo of arrest and recovery. The reliance solely on police officials, whose testimony has been disbelieved in connected cases, creates serious doubt about the genuineness of the prosecution story.

18. Record further reveals that the pistol allegedly recovered from the appellant on 14.7.2022 was sent to Forensic Expert on 15.7.2022 and he furnished his report on 11.8.2022 i.e after delay of 26 days of its receipt. As far as conclusion drawn by Forensic Expert, the pistol was not matched with the available data base of the division. However, it is settled principle of law when substantive evidence failed to connect the accused person with the commission of offence or was disbelieved, corroborative evidence was of no help to the prosecution as the corroborative evidence could not by itself prove the prosecution case. Reliance is placed on the case of Naveed Asghar and 2 others vs The State (PLD 2021 Supreme Court 600) as held that:

“---Recovery of weapon of offence was only a corroborative piece of evidence; and in absence of substantive evidence, it was not considered sufficient to hold the accused person guilty of the offence charged---When substantive evidence failed to

connect the accused person with the commission of offence or was disbelieved, corroborative evidence was of no help to the prosecution as the corroborative evidence could not by itself prove the prosecution case. Saifullah v. State 1985 SCMR 410; Ali Muhammad v. Bashir Ahmed 2003 SCMR 868; Israr-ul-Haq v. Muhammad Fayyaz 2007 SCMR 1427; Hayatullah v. State 2018 SCMR 2092; PLD 1956 FC 123 and 1985 SCMR 410 ref.”

19. The rule of giving benefit of doubt to an accused person is essentially a rule of caution and prudence and is deep-rooted in our jurisprudence for the safe administration of criminal justice. In common law, it is based on the maxim, ***"It is better that ten guilty persons be acquitted rather than one innocent person be convicted"***. While in Islamic criminal law it is based on the high authority of sayings of the Holy Prophet of Islam (Peace Be Upon Him): “Avert punishments (hudood) when there are doubts” and “Drive off the ordained crimes from the Muslims as far as you can. If there is any place of refuge for him [accused], let him have his way, because the leader's mistake in pardon is better than his mistake in punishment.” The Hon’ble Supreme Court has quoted probably the latter part of the last-mentioned saying of the Holy Prophet (PBUH) in the case of **Ayub Masih v. State (PLD 2002 SC-1048)** as under:

“Mistake of Qazi (Judge) in releasing a criminal is better than his mistake in punishing an innocent.” The same principle has also been followed by the Honourable Supreme Court of Pakistan in the recent Judgment in case of **Naveed Asghar and 2 others v. The State (PLD 2021 SC-600).**”

20. It is a cardinal principle of criminal jurisprudence that a single reasonable doubt in the prosecution story is sufficient to acquit the accused. Reliance is placed in the In the case of **Ahmad Ali and another Vs. The State (2023 SCMR 781)**, has held as under:

“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 Mansha v. The State (2018 SCMR 772), Muhammad Zaman v. The State 14. - 13- (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).

21. In view of the above discussion, this Court is satisfied that the prosecution has failed to prove its case against the appellant Asif Ali also beyond reasonable doubt. Prosecution evidence based on same set of witnesses and same memos have already been disbelieved by competent courts in connected cases of co-accused Abdullah and Asadullah, whose acquittal findings carry strong persuasive value, therefore, the prosecution evidence in the case in hand, does not inspire confidence. Consequently, this Criminal Appeal is **allowed**. The impugned judgment dated 16.09.2024 passed by the learned Additional District & Sessions Judge-I, Karachi East, in Sessions Case No.5561 of 2022 is **set aside**. The appellant Asif Ali s/o Jorail is **acquitted** of the charge under Section 23(1)(a) of the Sindh Arms Amendment Act, 2021, by extending him the benefit of doubt. He shall be released forthwith if not required in any other case.

JUDGE

Shabir/P.S