

IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

Cr. Appeal No.D-163 of 2007

PRESENT

Mr. Justice Naimatullah Phulpoto

Mr. Justice Muhammad Karim Khan Agha

Date of Hearing: 04.05.2017

Date of Judgment: 04.05.2017

*Appellant/accused: Khadim Hussain S/o Arab Kapri:
Through Mr.Ghulam Qadir Deshak,
Advocate.*

*The State: Through Mr. Shahzado Saleem
Nahiyoon, Assistant Prosecutor
General, Sindh.*

JUDGMENT

NAIMATULLAH PHULPOTO, J:- Appellant Khadim Hussain was tried by learned Additional Sessions Judge/Special Court, STA, Sanghar in Special Case No.17 of 2000 arising out of Crime No.27 of 2000 for offence under Section 13(d) of Arms Ordinance. By judgment dated 12.07.2007, the appellant was convicted under Section 13(d) of Arms Ordinance and sentenced to 03 years R.I and to pay a fine of Rs.50,000/-, in case of default in payment of fine, he was ordered to suffer R.I for 06 months more. Benefit of Section 382(B) Cr.P.C was extended to the appellant.

2. Brief facts of the prosecution case as disclosed in the FIR are that on 10.11.2000 SIP Pir Allah Rakhio SHO P.S Berani alongwith his subordinate staff namely ASI Moula Bux Sangrasi, LHC Muhammad Dawood, PCs Haji Khan and Anwar Ali left police station in a Government vehicle vide roznamcha entry No.17 at 1745 hours for patrolling duty. While patrolling at various places, when the police party reached at Village Mazar, they received spy information that the present accused was present in the Otaq of Muhammad Amin Rind and he was armed with Kalashnikov. On receipt of such information, the police party proceeded to the pointed place and reached at the said Otaq at 2110 hours, where on the head lights of vehicle, they saw the present accused standing in the Otaq and he was armed with Kalashnikov. He was surrounded and caught-hold. Kalashnikov was recovered from his possession. On inquiry, he disclosed his name as Khadim Hussain S/o Arab Kapri, resident of Village Muhammad Ali Kapri Chamber, Taluka Tando Allahyar. SIP inquired about license/permit of Kalashnikov, he disclosed that it was without license and the accused was arrested in presence of mashirs namely ASI Moula Bux Sangrasi and LHC Muhammad Dawood. Thereafter, the accused and case property were brought to the police station, where FIR was lodged on behalf of the State; it was recorded vide Crime No.27 of 2000 for offence under Section 13(d) of Arms Ordinance.

3. During the investigation, 161 Cr.P.C statements of P.Ws were recorded. On conclusion of usual investigation, the challan was submitted against the accused under Section 13(d) of Arms Ordinance before the learned Special Judge, STA, Sanghar.

4. Trial Court framed the charge against the accused under Section 13(d) of Arms Ordinance at Ex-02. Accused pleaded not guilty and claimed to be tried.

5. At the trial, the prosecution in order to substantiate the charge, examined P.W-1 SIP Pir Allah Rakhio Qureshi at Ex-4, who produced the mashirnama of arrest and recovery at Ex-4/A and FIR at Ex-4/B. P.W-2 mashir ASI Moula Bux Sangrasi was examined at Ex-5 and P.W-3 LHC Haji Khan at Ex-6. Thereafter, the prosecution side was closed.

6. Statement of accused was recorded under Section 342 Cr.P.C at Ex-8, in which the accused claimed his false implication in this case and denied the prosecution allegations and further stated that Kalashnikov has been foisted upon him by the police at the instance of DSP Amin Rind. Accused claimed that he was Hari of Amin Rind with whom he had some dispute regarding settlement of amount. Accused did not lead any evidence in defence and declined to examine himself on oath in disproof of the prosecution allegations.

7. Learned Special Judge STA, Sanghar after hearing the learned Counsel for the parties and assessment of evidence,

convicted the appellant under Section 13(d) of Arms Ordinance and sentenced as stated above, hence, this appeal.

8. The evidence produced before the Trial Court find the elaborate mention in the judgment passed by the Trial Court dated 12.07.2007, therefore, there is no need to reproduce such evidence here, so as to avoid duplication and un-necessary repetition.

9. Mr. Ghulam Qadir Deshak, learned Advocate for the appellant mainly argued that it was the case of spy information and the place of arrest of the accused was surrounded by the village but no private person was associated as a mashir to witness the recovery proceedings. He further contended that the departure and arrival entries of the concerned police station have not been produced before the Trial Court. It is also argued that Kalashnikov was not sealed at the spot. Counsel for the appellant further argued that there are material contradictions in the evidence of the prosecution witnesses on material particulars of the case. Counsel for the appellant highlighted the contradictions and argued that the complainant in his evidence has deposed before the Trial Court that the accused was arrested in the Otaq but the prosecution witnesses have stated that the accused was arrested outside the Otaq. He has pointed out other contradiction that complainant Pir Allah Rakhio Qureshi in his evidence has deposed that there is no village around the Otaq but on this point the prosecution witnesses have stated that there is village around the Otaq.

Counsel for the appellant also submitted that there is contraction regarding place of patrolling in the evidence of the prosecution witnesses. Lastly, it is contended that admittedly the appellant was a Hari of one Amin Rind, who was DSP and there was dispute between the appellant and Amin Rind regarding settlement of amount, that's why this case has been lodged falsely against the appellant at the instance of DSP Amin Rind. In support of his contentions, learned Counsel for the appellant has relied upon the case of *SHOUKAT ALI V/S THE STATE (2004 YLR 356-Karachi)*.

10. Mr. Shahzad Saleem Nahiyoan, learned A.P.G conceded to the contentions raised by learned Counsel for the appellant and further pointed out that according to mashirnama case property was not sealed at the spot. Arrival and departure entries have also not been produced; the description of Kalashnikov has also not come in evidence. In these circumstances, learned A.P.G did not support the judgment of the Trial Court.

11. We have carefully heard the learned Counsel for the parties and scanned the entire evidence.

12. We have come to the conclusion that the prosecution has failed to prove its case against the appellant for the reasons that it was the case of spy information and it has come on record that there was village around the place of arrest of the accused but the SHO Pir Allah Rakhio Qureshi failed to associate the independent and respectable persons from the village to make

them as mashirs to witness the recovery proceedings. It is also admitted position that Kalashnikov, after its recovery, was not sealed at the spot. Moreover, Kalashnikov was not sent to the Ballistic Expert in order to ascertain, whether it was in working condition or not. It is matter of record that arrival and departure entries have not been produced before the Trial Court for its satisfaction that the police party had actually left for patrolling at the relevant time. It was night time incident. According to the case of the prosecution, accused was standing in the Otaq of Amin Rind and he was armed with Kalashnikov. It was unbelievable that without any resistance or opening fire upon the police, appellant was arrested alongwith Kalashnikov and the description of the said Kalashnikov has not been given by prosecution witnesses in the evidence. There is also background of the enmity as alleged by the accused in his statement recorded under Section 342 Cr.P.C that accused was farmer of Amin Rind, who was DSP at that time; Kalashnikov has been foisted upon him at the instance of DSP Amin Rind. In these circumstances, we are unable to rely upon the evidence of the police officials without independent corroboration, which is lacking in this case. In this case, there are several circumstances, which created doubt in the prosecution case. It is well settled law that it is not necessary that there should be many circumstances creating doubts. If there is a 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 as held

by Honourable Supreme Court in the case of *TARIQ PERVEZ V/S. THE STATE (1995 SCMR 1345)*.

13. In view of the foregoing reasons, we have come to the conclusion that the prosecution has failed to prove its case against the appellant beyond reasonable shadow of doubt. Consequently, the instant appeal is allowed; impugned judgment dated 12.07.2007 is *set aside* and the appellant is acquitted of the charge. Appellant is present on bail, his bail bond stands cancelled and surety is hereby discharged.

JUDGE

JUDGE

Shahid