JUDGMENT SHEET

IN THE HIGH COURT OF SINDH,

CIRCUIT COURT, HYDERABAD.

Criminal Appeal No.S-98 of 2016

DATE	ORDER WITH SIGNATURE OF JUDGE

Date of hearing: 17.10.2016.

Date of judgment: 04.11.2016.

Mr. Abdul Latif Bhatti, Advocate for appellant.

Mr. Shahid Ahmed Shaikh, A.P.G. for the State.

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J U D G M E N T

MUHAMMAD FAISAL KAMAL ALAM, J:- The captioned appeal under Section 410 of Cr.P.C has been filed by the appellant, calling in question the judgment dated 26-05-2016 passed by the learned Additional Sessions Judge, Shahdadpur in Sessions Case No. 262/2015 in respect of Crime No. 136/2015 {FIR No. 136/2015} registered under Sections 24 and 25 of the Sindh Arms Act, 2013 at P.S Shahdadpur, whereby the Appellant was convicted and sentenced to suffer R.I for seven years and to pay fine of Rs.20,000/-, while extending the Appellant the benefit of Section 382-B of Cr. P.C.

2. Relevant facts leading to the filing of present appeal are that earlier present appellant was nominated as one of the co-accused in FIR No.131/2015 lodged under, inter alia, sections 302, 504 of PPC (Pakistan Penal Code) at Police Station Shahdadpur. Undisputedly, the said case was compromised between the parties, that is, all the accused nominated in the above FIR,

including the present Appellant and the complainant, who were the legal heirs of the deceased/victim, in terms of Section 345(2) of Cr.P.C, vide order dated 09.09.2015, which is at page 45 of instant appeal file.

3. In the intervening period the **subject FIR** (FIR No. 136/2015) was lodged under Sindh Arms Act, 2013 {**the Arms Act**}by police officials who have recovered the weapon- a 12 bore repeater from the appellant.

4. As per the case of the prosecution the subject FIR is in respect of a different crime in which during investigation of another case [which was later compromised], on appellant's pointation the weapon was recovered from his house. This weapon-a 12 bore repeater was used in the aforementioned crime committed under section 302 of PPC and thus is a case property. Since the Appellant did not possess the license for this weapon, hence this new case was registered against him.

5. Counsel for the appellant vehemently argued that in the Statement under section 342 Cr.P.C which is available at Page-73 as annexure-D/7 the appellant/accused while denying the charge against him had produced the license of the weapon which was seen and returned by the learned Judge of the trial Court. It was further contended that the FIR itself is defective as it was lodged by a Sub-Inspector of Police who was also the investigating officer. While making recovery of weapon, no independent mashir was present. Learned counsel relied upon the following cases to augment his arguments that the statement of the appellant/accused was never challenged in the evidence nor authenticity of the license of the weapon produced under the above statement under section 342 Cr.P.C; prosecution case has to stand on its own evidence, and that the Appellate Court has wide powers to suspend the sentence under Section 426 of Cr. P.C.

1. 2010 SCMR 1009
2. 1997 P.Cr.L.J 139

3. PLD 2013 Sindh 508

4. SBLR 2016 499

Since I have heard the entire appeal therefore, discussion on the cited case law relating to suspension of sentence is not necessary.

6. The above arguments of appellant have been controverted by Mr. Shahid Ahmed Shaikh, A.P.G. (for the State). He has fully supported the impugned judgment by making submissions, inter alia, that the forensic report which is available at Page-75 of the present file has confirmed the factum that the above weapon was used in committing a heinous crime of murder. Learned Prosecutor for the State further argued that it has been rightly observed by the learned trial court that merely by possessing a license of the weapon used in the crime does not absolve the present appellant of his guilt and he was rightly convicted by the learned trial court.

7. I have heard the arguments of the learned counsel for the parties and with their able assistance examined the case record.

8. Prosecution has examined three witnesses and all of them are police officials; PW-3 is Ali Muhammad Bajeer, who is the I.O [Investigation Officer] as well as complainant in subject FIR. It has also come in the evidence that the said PW-3 also headed the raiding party which had recovered the weapon from the house of the Appellant and according to aforesaid PW-3, he was also the seizing officer, as he himself prepared the recovery memo/mashirnama. Hence, said Ali Muhammad Bajeer has assumed multiple role; wearing four caps at the same time. But most damaging to the prosecution case is his dual role; admittedly he is a complainant and the investigation officer. By now it is a settled rule that in order to conduct an independent investigation it is necessary that the complainant and the investigation officer should be different person for a safe administration of justice. In a reported case 2010 YLR 2617 [THE

STATE/ANTI NARCOTICS FORCE V. MUHAMMAD SADIQ] the learned Division Bench of our Court has maintained the acquittal, ***inter alia,*** on the ground that the investigation became doubtful, rather *void ab initio*, as the I.O [in the cited case] was at the same time was the complainant, seizing officer, head of raiding party and Incharge Malkhana.

9. The other incurable infirmity in the prosecution case which came on record is that during recovery and seizure of the weapon from the accused house, which is located in a thickly populated area and is around half a kilometer away from the concerned Police Station, no persons from the locality were joined in recovery proceedings, as envisaged by Section 103 of Cr. P.C. This material aspect of the case was never taken note of by the learned Trial Court, apparently in view of Section 34 of the said Arms Act, wherein applicability of above Section 103 of Cr. P.C has been excluded. However, the said Section 34 has a proviso, wherein, inter alia, it is mentioned that any 'police officer' or 'person' present on the spot can be a witness of search and recovery. This provision has been expounded in a very recent judgment of this Court in Criminal Appeal No. S-01 of 1015 and Criminal Jail Appeal No. S-110 of 2015 and I am inclined to follow the same view, that when the premises which was raided is located in a thickly populated area, which is admittedly the present case, and the raid is conducted on a prior information; again the same factor is also present in the instant appeal, then recovery should be effected in the presence of independent private persons/witnesses. This is necessary for an impartial investigation. Hence, in my considered view, the learned Trail Court has not exercised the jurisdiction in a judicious manner. However, this aspect of the case has been dealt with in the impugned judgment from a different perspective, by placing a reliance on a reported case of *MUHAMMAD SHARIF v. THE STATE*- PLD 1992 (Lahore) 56, and by holding that reluctance on the part of the members of public to offer themselves as witness during recovery and seizure is not fatal and no

adverse inference can be drawn against the prosecution. With due deference, the rule laid down in the above referred judgment is not applicable to the peculiar set of facts of the present case. It is an admitted fact which can be deduced from the testimony of all the three prosecution witnesses that no attempt was made on their part to involve independent witnesses/mashirs while carrying out the exercise of recovery and seizure of the weapon from the house of present appellant. The testimony of P.W-2 shows that in his cross-examination the said police witness (Tanveer Hussain-H.C) has admitted that "the SHO did not call any private person from the locality for evidence." The said P.W-2 has further admitted that no lady constable accompanied the raid party and the appellant had to inform the inmates of his house to observe parda. When police officials had prior information about search and recovery proceedings at the house/residence of Appellant whereat his family was/is also residing, then they should have taken the Lady Constable alongwith the raiding party, which again is an illegality committed on their part.

10. Another inescapable aspect of the case is the Statement of the Appellant recorded under Section 342 of Cr. P.C, in which the Appellant has not only categorically denied the case of prosecution, but has produced the original License of the weapon/gun. It is a well-settled principle that Prosecution case should stand on its own evidence. Learned Trial Court erred in drawing an adverse inference in the impugned judgment that the present Appellant had neither examined himself on oath nor led any sort of evidence in his defence. In this regard a decision of Hon'ble Supreme Court reported in 2010 SCMR 1009 is relevant and its ratio is applicable to the facts of present Appeal. It has been held, that ***"It is important to note that all incriminating pieces of evidence, available on the record, are required to be put to the accused, as provided under section 342, Cr.P.C. in which the words used are "For the purpose of enabling the accused to explain any circumstances appearing in evidence against him"***

which clearly demonstrate that not only the circumstances appearing in the examination-in-chief are put to the accused but the circumstances appearing in the cross-examination or re-examination are also required to be put to the accused, if they are against him, because the evidence means examination-in-chief, cross-examination and re-examination, as provided under Article 132 read with Articles 2(c) and 71 of Qanoon-e-Shahdat Order, 1984. The perusal of statement of the appellant, under section 342, Cr.P.C., reveals that the portion of the evidence which appeared in the cross-examination was not put to the accused in his statement under section 342, Cr.P.C. enabling him to explain the circumstances particularly when the same was abandoned by him. It is well-settled that if any piece of evidence is not put to the accused in his statement under section 342, Cr.P.C. then the same cannot be used against him for his conviction. In this case both the Courts below without realizing the legal position not only used the above portion of the evidence against him, but also convicted him on such piece of evidence, which cannot be sustained."

{Underlining is to supply emphasis}

11. Prosecution did not examine any of the officials of Forensic Science Laboratory, which has given the examination report.

12. It is an admitted fact that earlier case in which the present weapon stated to be used has admittedly been compromised by a judicial order (as mentioned above). The reason mentioned by the learned trial court for passing the impugned judgment is that a licensed weapon is for self defense and not to kill innocent people. The language of Section 25 of the above Act also weighed with learned Court for passing the impugned judgment. It would be advantageous to reproduce hereunder the Sections 24 and 25 of the Sindh Arms Act, 2013:-

> ***24. Punishment for possessing arms with intent to use for unlawful purposes:-*** *Whoever possesses arms or ammunition licensed or unlicensed with the aim to use them for any unlawful purpose or to facilitate any other person to use them for any*

unlawful purpose shall, whether such unlawful purpose has been materialized or not, the license holder, the user and the person who has no license, be punishable with imprisonment for a term which may extend to ten years and with fine.

25. Punishment for use and possession of firearms or imitation firearms in certain cases:- *Whoever uses or attempts to use firearm licensed or unlicensed or an imitation firearm with the purpose to commit any crime, any unlawful act or to resist or prevent his lawful arrest or detention or of any other person shall be punishable with imprisonment for a term which may extend to ten years and with fine.*

13. Although it is a settled principle that an acquittal in a criminal case should not influence the other criminal case sub judice before a Court in which separate evidence has to be recorded, similarly, the present appellant cannot be convicted on the ground that in the earlier Crime No. 131/2015 (which was subsequently compromised), he was one of the co-accused and the recovered weapon was used in commission of crime, as that earlier case in respect of Crime No.131/2015 was compromised and it was not proved in that case that the present appellant was involved in commission of the offence. Thus the guilt of Appellant was not proved. Appellant is already behind bars even before the time of his conviction, as explained in the preceding paragraphs, as he was in custody of Police in connection with the above referred earlier case, which was later compromised.

14. The learned Trial Court has also erred in holding that the prosecution has successfully proved its case. Conversely, the prosecution has failed to prove its case beyond the reasonable doubt. It is a basic principle of criminal jurisprudence that element of ***mens rea*** and **actus reus** should be present to saddle someone with a criminal liability. The above mentioned provisions of Section 24 and 25 of the Sindh Arms Act, 2013 are to be read in conjunction with the afore referred basic ingredients of mens rea and actus reus.

15. The upshot of the above is that the appeal is allowed and the impugned judgment is set aside. The appellant/convict is acquitted and is ordered to be released forthwith if not required in any other case.

JUDGE