

IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD.

Crl. Appeal No.S-79 of 2009.

Abdul GhaffarAppellant.

Versus.

The State.Respondent.

Syed Qamarul Hassan, Advocate for the appellant.

Mr. Fazal Hussain Jamali, Assistant Attorney General of Pakistan.

Date of hearing and judgment: 11.06.2018.

JUDGMENT

IRSHAD ALI SHAH, J.-The appellant by way of instant appeal has impugned judgment dated 28.05.2009 of learned Special Judge (Central) Hyderabad, whereby he convicted and sentenced the appellant to undergo R.I. for a period of five years and to pay fine of Rs.30,000/- and in case of his failure to deposit the fine amount to undergo S.I. for period of three months, without specifying the penal section for which the appellant was convicted and sentenced.

2. The facts in brief as per FIR, are that the appellant being a police constable in Pakistan Railways was found committing theft of 25 Kg. of scrap material for that he was booked and challaned in the present case before the learned trial Court.

3. At trial, the appellant denied the charge and prosecution to prove it, examined P.W-1 complainant Javed Shahid, produced through him his report, P.W-2 Gul Bahar, P.W-3 Abdul Shahid, P.W-4 Muhammad Ateeq, produced through him Mashirnama of arrest and recovery, P.W-5 SIP Ahmed Ali, P.W-6 SIP Pir Muhammad, produced through him FIR of the present case, letter containing legal opinion and

mashirnama of place of incident, P.W-7 Anwar Hussain, produced through him the latter with regard to the determination of rate of the stolen scrap material and then closed the side.

4. The appellant during course of his examination under section 342 Cr.P.C. denied the prosecution allegations by pleading innocence. He did not examine anyone in his defense or himself on oath in disproof of the prosecution allegations.

5. Learned trial Court, on evaluation of evidence so produced before it, convicted and sentenced the appellant by way of impugned judgment, as stated above.

6. It is contended by learned counsel for the appellant that he being innocent was involved in this case falsely by the police due to official grudge, nothing was secured from the appellant, the 161 Cr.P.C. statements of the witnesses were recorded with delay of three days to the actual incident without plausible explanation, the property was not shown to the complainant or mashirs at the time of their examination before learned trial Court. By contending so, he sought for acquittal of the appellant. In support of his contention, he relied upon the case of **Muhammad Asif v. the State**, which is reported at **2017 SCMR 486**.

7. The learned Assistant Attorney General did not support the impugned judgment.

8. I have considered the above arguments and perused the record.

9. It was stated by complainant Javed Shahid that on 14.03.2006 when he, P.W. Muhammad Ateeq and P.W. Abdul Shahid were on way to Work Manager, they found a police constable in uniform behind Goods Oil Tanker. On inquiry, he told them that he was making water and then admitted that he was collecting the scrap material. It was

further stated by the complainant that he then secured two bags containing scrap material, forwarded such report alongwith the appellant and recovery so made from him to police for further action. On point of recovery, during course of his cross-examination, it was admitted by the complainant that he did not see the appellant taking away the bags containing the scrap material. The complainant in that respect was belied by P.W. Ahmed Shahid by stating that the appellant was found taking away the bags containing the scrap material in his hands. P.W. Muhammad Ateeq came with a different version, as according to him, the bags containing scrap material were found in bushes. In presence of such inconsistent replies the appellant could be hardly be connected with the recovery of scrap material lying in bags. Significantly the bags containing scrap material were neither shown to the complainant nor to any of the witness as named above, during course of their examination, which appears to be significant, such omission too could not be lost sight of. P.W. Gul Bahar came with a unique version by stating before the learned trial Court that he does not know anything against the appellant. It is apparent of the evidence of SIP Ahmed Ali that mashirnama of arrest and recovery was prepared by him at his office in presence of mashirs when appellant was brought there with the recovery of alleged scrap material. The preparation of mashirnama of arrest and recovery at the place other then the place of incident smells of something wrong. P.W. SIP Pir Muhammad, who conducted the investigation of the present case during course of his cross-examination before the learned trial Court, was fair enough to admit that he recorded 161 Cr.P.C. statements of the witnesses on 17.02.2006. No explanation to such delay is offered by the prosecution.

The recording of 161 Cr.P.C. statements of the P.Ws. with delay without any plausible explanation is enough to render the version of the witnesses to be doubtful, as has been held to be in case of **Muhammad Asif** (Supra).

In case of **Abdul Khaliq v. the State (1996 SCMR 1553)**, it is also held that;

----S.161---Late recording of statements of the prosecution witnesses under section 161 Cr.P.C. Reduces its value to nil unless delay is plausibly explained.”

10. In view of the facts and reasons discussed above, the conviction and sentence recorded against the appellant by way of impugned judgment could not be sustained, it is set aside. Consequently, the appellant is acquitted of the offence for which he was charged, tried and convicted by learned trial Court.

The instant appeal is disposed of in above terms.

J U D G E

S