

**IN THE HIGH COURT OF SINDH,
CIRCUIT COURT HYDERABAD**

Cr. Appeal No. D- 227 of 2019

Present:-

Mr. Justice Abdul Maalik Gaddi.

Mr. Justice Khadim Hussain Tunio

Date of hearing
& judgment:

26.02.2020

Appellant Muhammad
Ismail Dahri:

through M/s. Farooq H. Naek,
Muzamil Ali Soomro and Imtiaz Ali
Chanhio, Advocates.

State:

Through Mr. Shahzado Saleem
Nahiyoon, Deputy Prosecutor
General, Sindh.

JUDGMENT

ABDUL MAALIK GADDI, J- This criminal appeal has been preferred against the judgment dated 13.12.2019 passed by learned Judge Anti-Terrorism Court, Shaheed Benazirabad in Special Case No.11 of 2018 arising out of Crime No.39 of 2018 registered U/S 23-A of Sindh Arms Act, 4B, 5 of Explosive Substance Act, 1908 R/w Section 6/7 of Anti Terrorism Act, 1997 at Police Station Doulatpur District Shaheed Benazirabad. In terms of the said judgment, the appellant has been convicted and sentenced as follows:-

“u/s 4(b) and 5 of Explosive Substance Act to undergo for ten (10) years sentence.”

“u/s 23(i) of Sindh Arms Act, 2013, to undergo ten (10) years sentence with fine of Rs.1,00,000/- (Rupees one lac). In case of failure, the appellant shall serve the sentence more than six (06) months.”

AND

“u/s 7(ff) of the Anti-Terrorism Act in contraventions to the section 6(2)(ee) of the Anti-Terrorism Act, to undergo for fourteen (14) years sentence”.

The appellant was however extended the benefit of Section 382-B Cr.P.C. and all the sentences were ordered to run concurrently.

2. Brief facts of the prosecution case as disclosed in the FIR are that on 28.06.2018 at 0130 hours complainant SIP Imam Uddin Marfani SHO P.S Doulatpur, on behalf of State lodged F.I.R, stating therein that he along with police force consisting of ASI Roshan Ali Abbasi, HC Asghar Ali Solangi, Constable Imtiaz Ali Korai, Constable Muhammad Shareef Sohag in official uniform duly armed with weapons left Police Station in police mobile bearing No.SPO-770 having with driver PC Ali Hassan Khaskheli vide roznamcha entry No.13 dated 27.06.2018 at 1900 hours for routine patrolling in their area and during patrolling they received the orders from high officials that law-enforcement agencies had come within their jurisdiction and that they may reach and extend help to them near Raja CNG Pump situated at Daulatpur. It is stated that the complainant along with his above staff when reached at Raja CNG Pump where officers of Indus Rangers were already present and after accompanying them, they proceeded to Doulatpur Bypass and went inside the Otak of Muhammad Ismail Dahri at about 2130 hours where they found one person sitting on the chair who was captured on pointation. It is further mentioned that they saw on electricity light in front of that person on table weapons of various type were lying which were 05 Kalashnikovs with magazines, 01 pistol with magazine, 06 air craft gun shells which were secured by police and due to non-availability of private mashirs, ASI Roshan Ali Abbasi and HC Ali Asghar Solangi were deputed as mashirs. The name, caste and residence of the captured person was inquired, who disclosed his name as Muhammad Ismail S/o Muqeem Dahri R/o Village Salar Dahri at present near Bypass Doulatpur. From his personal search, nothing secured except necessary wearing cloths. The magazines of 05 Kalashnikovs were taken out and were unloaded and seen which were in working condition. The magazines lying in 05 Kalashnikovs and 07 magazines lying in 07 bandoleers were taken out and checked in all 12 magazines which

contained 260 live bullets which were sealed at the spot. The magazine of pistol was taken out and checked the pistol was of 9mm and was in working condition. The magazine contained 10 live bullets which were sealed, 05 live shells of air craft gun of the description were sealed. It is further mentioned that the captured person was inquired about Kalashnikovs, pistol, bullets and shells who disclosed that the said arms and ammunitions belong to him and are without license. Since the accused has retained huge quantity of arms and ammunitions without license therefore, he has committed offence punishable u/s 23-A of Sindh Arms Act, 4-B and 5 of Explosive Substance Act R/w Section 6/7 of Anti-Terrorism Act, 1997. Therefore, after preparing such mashirnama, the police party arrested accused along with case property and brought him to Police Station Doulatpur where such F.I.R was registered against him by the complainant SIP Imam Uddin Marfani on 28.06.2018 at 1030 hours. On the same date the F.I.R of the case along with case property secured and arrested accused were hand over to Inspector Muhammad Siddique Bughio incharge ATMC Shaheed Benazirabad for further investigation, who after obtaining physical remand of the accused and verifying the case papers, wrote a letter to Home Department, Government of Sindh for seeking permission to make compliance of Section 7 of Explosive Substance Act, to conduct investigation and trial of the case. The required formalities of visiting place of wardat and making memos were completed including the taking photographs of place of wardat and recording the statements of PWs u/s 161 Cr.P.C. The JIT incharge also written letter to SSP Shaheed Benazirabad to accord permission for examination of the recovered property and ammunition including shells, whereby such permission was given to him by the SSP Shaheed Benazirabad for sending letter to Forensic Science Laboratory Hyderabad and after completion of all codal formalities, the above named accused was challaned before the trial Court.

3. It appears from the record that on 05.11.2018 the required Oath u/s 16-A of Anti-Terrorism Act was taken by the Presiding Officer of the trial Court and on the same day charge against accused was framed at Ex.03, wherein he pleaded himself to be innocent and claimed trial of the case vide his plea at Ex.3/A.

4. In order to prove its case, the prosecution examined the following witnesses:

1. PW-1 Complainant Imam Din Marfani examined at Ex.04, who produced memo of arrest, personal search and recovery at Ex.04/A, F.I.R bearing crime No.39 of 2018 at Ex.04/B, entries No.13, 14, 15, 16 and 17 written on one page at Ex.04/C.
2. PW-2 Muhammad Sharif examined at Ex.05.
3. PW-3 ASI Roshan Ali examined at Ex.06, who produced mashirnama of place of wardat at Ex.06/A.
4. PW-4 Inspector Muhammad Siddique Bughio examined at Ex.07 (I.O of the case) who produced letter for seeking permission at Ex.07/A, four (04) photographs at Ex.07/B, 07/C, 07/D and 07/E, two letters one addressed to the Incharge Forensic Science Laboratory Hyderabad at Ex.07/F, second addressed to the Incharge Bomb Disposal Squad at Ex.07/G; letter addressed to the Forensic Laboratory Forensic Division Hyderabad bearing No.LB/5740/ dated 02.06.2018 at Ex.07/H, a letter addressed to Incharge Bomb Disposal Squat dated 03.07.2018 at Ex.07/I, an examination report bearing No.FSL/FD/OR/F.A/736/2018, Hyderabad dated 05.7.2018 at Ex.07/J, a letter addressed to the Bomb Disposal Unit Special Branch Shaheed Benazirabad dated 07.07.2018 at Ex.07/K, a letter addressed to the Assistant Director NADRA dated 06.07.2018 at Ex.07/L, a letter issued by Assistant Director NADRA to the incharge ATMC Shaheed Benazirabad dated 11.07.2018 at Ex.07/M, a verification report of arms licenses dated 29.08.2018 at Ex.07/N, copy of F.I.R bearing Crime No.05/2004 of P.S Doulatpur at Ex.07/O, copy of F.I.R bearing No.12 of 2014 of P.S Doulatpur at Ex.07/P, copy of F.I.R No.34 of 2005 of P.S Doulatpur at Ex.07/Q, copy of F.I.R bearing No.49 of 2005 of P.S Doulatpur at Ex.07/R, copy of F.I.R bearing No.56 of 2006 of P.S Doulatpur at Ex.07/S, copy of F.I.R No.125 of 2009 of P.S Doulatpur at Ex.07/T, copy of F.I.R No.108 of 2011 of P.S Doulatpur at Ex.07/U, copy of F.I.R No.25 of 2018 of P.S Doulatpur at Ex.07/V, copy of order dated 21.04.2015 issued by Home Department, Government of Sindh at Ex.07/W along with letter U/S: 3 MPO and mashirnama of arrest dated 21.04.2015 and making Hulya Form. Thereafter, prosecution closed its side vide statement dated 19.03.2019 at Ex.08.

5. Statement under Section 342 Cr.P.C of the accused was recorded at Ex.09, wherein he denied all the allegations levelled against him by the prosecution and claimed his false implication and foistation of huge quantity of arms and ammunitions from his possession. However, he did not examine himself on Oath nor led any evidence in his defence.

6. Mr. Farooq H. Naek, learned counsel for the appellant mainly contended that appellant is innocent and has falsely been implicated in this false case due to political enmity; that all police officials are interested and there is no independent witness against the appellant though the alleged place of incident was a thickly populated area; that whole prosecution story is false, concocted and managed by Rangers personnel against the appellant due to political enmity as the appellant has remained as Special Assistant to Chief Minister Sindh in past; that alleged arms and ammunitions have been foisted upon the appellant and he has no concern with the same; that there is delay of Seven (07) days in receiving the weapons for forensic examination and report without any plausible explanation; that there is clear violation of Section 103 Cr.P.C and all witnesses are police officials and no independent witness has been cited to witness the event though were present, therefore, false implication of appellant in this case cannot be ruled out; that there is violation of Section 7 of Explosive Substance Act as the required permission to initiate investigation or trial has not been accorded by the Home Department, which vitiates the entire proceedings and trial against the appellant but this aspect of the case has not been considered by the trial court while passing the impugned judgment. While elaborating this arguments he submits that basic judgment is without lawful authority and void abinitio as required permission was no accorded by the Provincial Government as such the entire super structure raised thereon fall on the ground automatically. During the course of arguments he has also pointed out number of contradictions between the evidence of prosecution witnesses and was of the view that in view of the contradictory evidence no reliance could be placed on interested witnesses therefore, according to him present appellant is entitled for extending him benefit of doubt and he may be acquitted by allowing this appeal. In support of his contentions, learned counsel has placed reliance on the cases reported as **Syed Mukhtar Hussain v. The State (1984 P.Cr.L.J 2181)**, **Rashid Ahmed v. The State (PLD 1972 Supreme Court 271)** and **Sohail Ahmed v. The State (1995 P.Cr.L.J 177)**.

7. Conversely, Mr. Shahzado Saleem Nahiyoon, learned D.P.G. appearing for the State while supporting the impugned judgment submits that prosecution has fully established its case beyond any reasonable doubt by producing consistent / convincing and reliable

evidence and the impugned conviction and sentence awarded to the appellant are the result of proper appreciation of evidence brought on record which needs no interference by this Court. He further submits that a huge quantity of arms and ammunitions was recovered from the possession of appellant which proved to be unlicensed and the question of false implication does not arise as the police party had no enmity whatsoever with the appellant. He contended that required permission u/s 7 of Explosive Substance Act for initiating proceedings was obtained from the competent authority. He also contended that all the prosecution witnesses have fully supported the case of prosecution and prayed for dismissal of this appeal.

8. We have given our anxious thoughts to the contentions raised at bar and have gone through the case papers so made available before us.

9. After careful consideration and meticulous examination of the available record, suffice to say that mere heinous nature of offence is not sufficient to convict the accused because the accused continues with presumption of innocence until found otherwise at the end of the trial. It is settled principle of law that burden is always upon the prosecution to prove the case beyond shadow of doubt. Keeping in view of this basic touchstone of criminal administration of justice, we have examined the ocular and documentary evidence on record alongwith impugned judgment.

10. From the perusal of record, we have come to the conclusion that the prosecution has failed to prove its' case against the appellant for the reasons that on the relevant date and time, the police party was on patrolling duty and during patrolling they received information from their high officials that law-enforcement agencies / Rangers had come within their jurisdiction and they were directed to accompany them near Raja CNG Pump situated at Daulatpur for conducting raid on the Otaq of appellant. On such information, police party reached at the pointed place and recovered arms and ammunitions as mentioned in the FIR and made ASI Roshan Ali Abbasi and HC Ali Asghar Solangi as mashirs. It has also been brought in evidence that the place of incident was a thickly populated area which is surrounded by houses and there was also a CNG Pump and people were available there but despite of this fact, police did not bother to associate any independent person of

the locality to witness the recovery proceedings. During the course of arguments we have specifically asked the question from learned D.P.G. that when the private persons were available at the place of incident why their services were not obtained to witness the event. He submits that u/s 34 of Sindh Arms Act, 2013, it was not necessary to obtain the services of private person and he was of the view that evidence of police officials is as good as that of a private person. No doubt the evidence of police officials is as good as that of a private person and the evidence of police officials cannot be discarded simply because they belong to police force and the court should not start with any presumption against them. However, in a case of recovery of arms where the fate of an accused person hinges upon the testimony of police officials alone, it is essential to find out if there was any possibility of securing independent persons at the time of recovery. The conviction or acquittal of an accused person depends upon the credibility of the witnesses as assessed by the Court but where it was possible for the police officials to call independent witnesses to act as mashir but he deliberately avoided, the Court has to be very careful in weighing such evidence. It is settled principle of law that judicial approach has to be cautious in dealing such type of evidence. In this respect reliance can be made to the case of **Shahid Iqbal v. The State (2016 MLD 230)**.

11. It is significant to mention that Section 34 of Sindh Arms Act, has not expressly excluded the provision of Section 103, Cr.P.C. but on the contrary, Section 34 has provided a legal cover that police officials also can act as witnesses of recovery besides the private persons. The proviso of Section 34 of Sindh Arms Act provides that any police officer or person present on the spot can be witness of search and recovery, therefore, it was prime duty of the police to prefer a private witness if available at the spot to maintain transparency and fairness of the alleged recovery. It is the prime duty of Courts to ensure during the course of the administration of justice that there must be a plausible explanation for non-association of witnesses from public. Adverting to the merits of the case in hand, no valid reason or plausible explanation has been furnished by the prosecution for non-association of independent witnesses by the police when independent people were available at the place of recovery, which was a thickly populated area. Therefore, on this ground false implication of the appellant in this case could not be ruled out.

12. It is noted that raid was conducted by police party alongwith rangers but no one from the side of rangers has been cited as a witness of the alleged incident. No reason whatsoever in this regard has been furnished by the prosecution. It is also noted that raid was conducted in the night time at about 09-30 p.m. and it is surprising to note that door of Otaq was opened and weapons were lying on a table openly and the appellant was sitting on a chair beside the weapons. This aspect of the case does not appeal to a prudent mind that in night time particularly in a village, the door of Otaq was opened and weapons were openly lying on a table. It is also noted that no resistance whatsoever has been made from the appellant side.

13. It has also come on record that the present appellant has remained as Special Assistant to Chief Minister Sindh and he had political enmity with his rival groups. So far as the contention of learned D.P.G. that present appellant was / is also involved in number of criminal cases, therefore, he is not entitled for the relief claimed, we are not impressed with this argument for the reasons that mere pendency of certain criminal cases against the accused does not disentitle him for the relief if otherwise he is entitled for. In this regard, we are also of the humble opinion that prior to conviction, it is presumed that every accused is innocent. Insofar as the case in hand is concerned, despite repeated queries by this Court learned D.P.G. has failed to establish that the appellant was ever convicted in any case registered against him, therefore, he cannot be refused the relief merely on the ground that certain other criminal cases have been registered against him.

14. We have also gone through the evidence of prosecution witnesses with the able assistance of learned counsel for the parties and found that the same is contradictory on material particulars of the case to each other. For instance, PW-3 ASI Roshan Ali, mashir of the case has deposed in his evidence that weapons were lying on cot whereas complainant SIP Imamuddin has contradicted this fact by saying that weapons were lying on table. PW-3 further deposed that raid was conducted in bungalow of accused and not in Otaq whereas complainant stated that it was Otaq.

15. It further appears from the record that alleged weapons recovered from the possession of appellant were received by the Forensic

Laboratory on 03.07.2018 after the delay of about Seven (07) days for which no explanation has been furnished by the prosecution. Moreover, the recovered arms and ammunitions were retained by whom during this intervening period has also not been explained by the prosecution that after its recovery under whose custody, the same were lying. For the sake of arguments, if it is assumed that the case property was lying in Malkhana then no report/entry of Malkhana has been produced to corroborate the version of prosecution. No official from Forensic Laboratory has been examined in this case. Even PC Feroze Ali through whom the case property was sent to the Forensic Science Laboratory, Hyderabad has not been examined before the trial court.

16. The perusal of record shows that the statement under section 342 Cr.P.C. of the appellant / accused recorded by the trial court was not in accordance with law as it is well settled that every incriminating piece of evidence must be put to the accused while recording his statement under section 342 Cr.P.C. But in the case in hand no question with regard to weapons allegedly recovered from the possession of accused whether the same were licensed or unlicensed and also whether the same were sent to Forensic Science Laboratory for examination and its report, has been asked from the appellant while recording his statement under section 342 Cr.P.C.

17. It also appears that the statement of appellant recorded u/s 342 Cr.P.C. do not bear the certificate of the trial Judge in his own hand which is mandatory requirement under section 364(2) Cr.P.C. It will be pertinent to reproduce herein-below the section 364(2) Cr.P.C for convenience sake:-

"Section 364(2) when the whole is made conformable to what he declares is the truth the record shall be signed by the Court, and such Magistrate or Judge shall certify under his own hand that the examination was taken in his presence and hearing and that the record contains a full and true account of the statement made by the accused."

The said statement does not bear the certificate of the trial Judge in his own hand, which is a clear illegality. This defect is not curable under section 537 Cr.P.C.

It is also settled principle of law that if a method is prescribed to do a thing in particular manner, same must be followed in letter and spirit. Reference can be drawn from the case of **Khalid Saeed v.**

Shamim Rizvan and others (2003 SCMR 1505). In another case of **Tehsil Nazim TMA, Okara v. Abbas Ali and 2 others (2010 SCMR 1437)**, same view has been taken by the Apex Court by holding that when a thing is to be done in a particular manner it must be done in that way and not otherwise. But here in this case, as observed above, the requirement of Section 364(2) Cr.P.C. has not been complied with by the learned trial Judge in its letter and spirit.

18. Admittedly, in this case, there are number of infirmities/lacunas, which have created serious doubt in the prosecution case. It is settled principle of law that for extending benefit of doubt, it is not necessary that there should be multiple circumstances creating doubt. If a single circumstance, which creates reasonable doubt in a prudent mind about the guilt of accused, then he will be entitled to such benefit not as a matter of grace and concession, but as a matter of right, as has been held in the case of **Tariq Pervez v. The State [1995 SCMR 1345]** wherein it has been held by Honourable Supreme Court of Pakistan that:

"For giving benefit of doubt to an accused it is not necessary that there should be many circumstances creating doubts. If a simple circumstance creates reasonable doubt in a prudent mind about the guilt of accused, then he will be entitled to such benefit not as a matter of grace and concession but as a matter of right".

19. For the above stated reasons, while respectfully relying upon the above cited case laws, we have no hesitation to hold that prosecution has failed to prove its' case against the appellant beyond any shadow of reasonable doubt.

20. Since the point as raised by learned counsel for the appellant with regard to permission to be obtained before proceeding the trial from Home Department is concerned, it was not raised by appellant before the trial court till pronouncement of judgment and since the instant appeal has been allowed by us on merits beside other grounds therefore without dilating upon the scope and applicability of the provisions of section 7 of Explosive Substance Act, 1908, applied by police in this case any further, we leave the matter to be discussed in detail in some other appropriate case as while hearing the present matter this issue has cropped up only incidentally and we have not received any proper assistance on this issue so as to comfortably resolve the same.

21. Above are the reasons of our short order dated 26.02.2020, whereby the captioned criminal appeal was allowed, the impugned judgment dated 13.12.2019 passed by learned Judge Anti-Terrorism Court, Shaheed Benazirabad in Special Case No.11/2018 (Re- The State v. Muhammad Ismail Dahri) arising out of Crime No.39/2018 u/s 23-A Sindh Arms Act, 4B, 5 of Explosive Substance Act, 1908 r/w Section 6/7 of Anti-Terrorism Act, 1997 registered at Police Station Doulatpur District Shaheed Benazirabad was set aside and the appellant was acquitted of the charge. Since the appellant was in custody, therefore, he was ordered to be released forthwith if not required in any other custody case.

JUDGE

JUDGE

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