IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

Criminal Jail Appeal No.S- 107 of 2017

Date of Hearing:	*12.04.2021*
Date of Judgment:	*16.04.2021*
Appellant:	*Mehrab @ Mehro s/o Yar Muhammad Kalyar (present on bail) through M/s Muhammad Jameel Ahmed and Adnan Shakeel Shaikh, Advocates.*
The STATE:	*Through Mr. Nazar Muhammad Memon, Additional P.G.*

J U D G M E N T

NAIMATULLAH PHULPOTO, J.- Appellant Mehrab @ Mehro was tried by learned 4th Additional Sessions Judge, Shaheed Benazirabad in Sessions Case No.93/2016, arising out of Crime No.04/2016 registered at P.S Mirzapur for offence u/s 23 (1) (a), 25 of Sindh Arms Act, 2013. On conclusion of the trial, vide its` judgment dated 21.04.2017, he was convicted for offence u/s 23(1)(a) of Sindh Arms Act and sentenced to suffer RI for five years and to pay the fine of Rs.10,000/- In case of default in payment of fine, the appellant was directed to undergo SI for three months more. Appellant was extended benefit of Section 382-B Cr.P.C.

2. Brief facts of the prosecution case as mentioned in the impugned judgment are as follows:-

> ***"The brief facts of the prosecution case are that on 30.01.2016 SIP Syed Qasim Ali Shah lodged FIR at PS Mirzapur stating therein that accused Mehrab alias Mehroo Kalyar was under arrest in crime No.02/2016 u/s 302, 324, 147, 148 PPC of PS Mirzapur and during interrogation accused has admitted his guilt and voluntarily prepared to produce weapon used in crime. On that complainant alongwith his staff took the accused in custody and proceeded in official vehicle vide entry No.12 at 07:10 hours. At about 08:20 hours when they reached in common street of village Yousif Kalyar accused signaled to stop. On that vehicle was stopped and then accused came down from vehicle and led the police party to room of his house after opening the trunk took out one 7mm Rifle and disclosed with same rifle he injured the Mir Hassan Kalyar. Complainant took the Rifle in custody and checked it, one empty shell was lying in the Rifle and it was with smell of gun powder. On enquiry accused disclosed Rifle is licensed. Due to non-availability of private***

witness, complainant engaged PC Muhammad Ali and PC Bashir Ahmed as mashir, sealed Rifle and prepared such mashirnama of recovery. Thereafter complainant alongwith accused and recovered weapon returned to Police Station and lodged FIR."

3. After usual investigation, challan was submitted against accused under Sections 23(1)(a) Sindh Arms Act, 2013.

4. Trial Court framed charge against appellant at Ex.2. Appellant pleaded `not guilty` and claimed trial. Prosecution in order to prove its` case, examined complainant SIP Qasim Ali Shah (PW-1) and mashir PC Muhammad Ali (PW-2). Thereafter, prosecution side was closed.

5. Trial court recorded the statement of accused under section 342 Cr.P.C, in which he claimed false implication in this case and denied the prosecution allegation of producing unlicensed 7mm rifle from his house. Appellant did not lead any evidence in his defence and declined to give statement on Oath. He however, produced a copy of discharge slip issued by South City Hospital, Karachi. Trial court on the assessment of evidence convicted and sentenced the appellant, as stated above. Hence, this appeal is filed.

6. Facts of this case in detail as well as evidence find an elaborate mention in the judgment of the trial Court, hence, I avoid repetition and duplication.

7. Mr. Muhammad Jameel Ahmed, learned advocate for appellant mainly contended that murder case bearing crime No.02 of 2016 P.S Mirzapur u/s 302, 324, 114, 504, 34 PPC was registered against the appellant and others and 7mm Rifle has been foisted upon the appellant to strengthen the main case. It is further submitted that murder case was tried by the learned Vth Additional Sessions Judge/MCTC Shaheed Benazirabad in which the appellant and others were acquitted vide judgment dated 05.01.2021 and this offshoot case proceeded by the learned 4th Additional Sessions Judge, Shaheed Benazirabad and appellant was convicted u/s 23(1)(a) Sindh Arms Act, 2013 and sentenced to suffer five (05) years R.I; that according to the prosecution case, rifle was used in the commission of murder but its` safe custody and safe transmission to the Ballistic expert have not been established before the trial court, incharge Malkhana was not examined; that description of the rifle has also not been mentioned. In support of his contentions, he has placed reliance on the cases reported as Kamal Din alias Kamala v. The State (2018 SCMR 577), Khadim Hussain v. The State (2020 YLR Note 139), Kashif Ali and another v. The State (2019 YLR 1573) and Syed Maroof Shah v. The State (2019 P.Cr.L.J Note 108).

8. Mr. Nazar Muhammad Memon, Additional Prosecutor General, Sindh has argued that prosecution had proved its case against the appellant and he has supported the impugned judgment and prayed for dismissal of the appeal.

9. I have carefully heard the learned counsel for the parties and scanned entire evidence available on record.

10. In my considered view, prosecution had utterly failed to prove its case against the appellant for the reasons that appellant has been acquitted in main case / crime No.02 of 2016 for offences u/s 302, 324, 114, 504, 34 PPC registered at P.S Mirzapur by the learned Vth Additional Sessions Judge / MCTC, Shaheed Benazirabad vide judgment dated 05.01.2021. Unfortunately, the instant case against the appellant was separately tried by the learned IVth Additional Sessions Judge, Shaheed Benazirabad. According to the case of prosecution, appellant was under arrest on 30.01.2016 in the main case / crime and on the same date he voluntarily led police to him and produced rifle but the case property viz. rifle was sent to the Ballistic expert on 10.02.2016 after 10 days. Prosecution at the trial failed to prove the safe custody and safe transmission of the weapon to the expert. There is no evidence that after arrest of the accused crime weapon was kept at Malkhana. Incharge of Malkhana has also not been examined. According to report of the Ballistic expert weapon was dispatched by SHO PS Mirzapur District Shaheed Benazirabad after the delay of 10 days without any explanation on his part. It may be observed here that crime weapon was used in the commission of murder but safe custody and safe transmission of crime weapon were not established at trial which is the requirement of law as held by Honourable Supreme Court of Pakistan in the case of *KAMAL DIN alias KAMALA v. The STATE (2018 SCMR 577)*. The relevant observations read as under:-

> ***"4. As regards the alleged recovery of a Kalashnikov from the appellant's custody during the investigation and its subsequent matching with some crime-empties secured from the place of occurrence suffice it to observe that Muhammad Athar Farooq DSP/SDPO (PW18), the Investigating Officer, had divulged before the trial court that the recoveries relied upon in this case had been affected by Ayub, Inspector in an earlier case and, thus, the said recoveries had no relevance to the criminal case in hand. Apart from that safe custody of the recovered weapon and its safe transmission to the Forensic Science Laboratory had never been proved by the prosecution before the trial Court through production of any witness concerned with such custody and transmission."***

11. Moreover, it is observed that prosecution failed to describe the description of the rifle allegedly recovered from the house of appellant. In the mashirnama of arrest and recovery complete description of the weapon has not been mentioned. It is also not mentioned in mashirnama that number of the weapon was rubbed. Evidence of the I.O and mashir is silent on description of the weapon. Appellant has claimed false implication in this case and raised plea that he was admitted in hospital. Under these circumstances, independent corroboration was required but the prosecution failed to examine any independent person of the locality to prove the recovery. Record shows that appellant was under arrest in main case / crime when

he voluntarily prepared to produce the crime weapon from the room of his house but the complainant SIP Syed Qasim Shah made no efforts to associate any private person to witness the recovery proceedings though the availability of private persons at the place of recovery could not be ruled out. After all, preparation of mashirnama is not a formality but it`s object is to prevent unfair dealings.

12. As regards to the evidence of police officials is concerned, no doubt, evidence of the police officials cannot be discarded simply because they belong to police force; however, where the fate of the accused person hinges upon the testimony of police officials alone, it is necessary to find out if there was any possibility of securing independent persons at the relevant time. In this case, availability of the private witnesses could have been easily arranged, but it was avoided by SIP Syed Qasim Shah. Accused in his statement recorded under section 342 Cr.P.C has claimed false implication in this case. In these circumstances, evidence of the police officials without independent corroboration would be unsafe for maintaining the conviction. Judicial approach has to be cautious in dealing with such evidence, as held in the case of *SAIFULLAH v. THE STATE (1992 MLD 984 Karachi)*. Relevant portion is reproduced as under:-

> ***"8. The evidence of police officials cannot be discarded simply because they belong to police force. In Qasim and others v. The State reported in PLD 1967 Kar. 233, it was held:***
>
> > ***"A police officer is as good a witness as any other person. The standard of judging his evidence is the same on which the evidence of any other witness is judged."***
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> ***However, in a case of this nature where the fate of an accused person hinges upon the testimony of police officials alone, it is necessary to find out if there was any possibility of securing independent persons at that time. Judicial approach has to be cautious in dealing with such evidence."***

13. In my considered view, prosecution has failed to prove its case against the appellant. Circumstances mentioned above have created reasonable doubt in the prosecution case. It is settled law that it is not necessary that there should be many circumstances creating doubts. If there is 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. In this regard reliance can be placed upon the case of *MUHAMMAD MANSHA* v. *THE STATE (2018 SCMR 772),* wherein the Honourable Supreme Court has observed as follows:-

> ***"4. Needless to mention that while giving the benefit of doubt to an accused it is not necessary that there should be many circumstances creating doubt. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of***

such doubt, not as a matter of grace and concession, but as a matter of right. It is based on the maxim, "it is better that ten guilty persons be acquitted rather than one innocent person be convicted". Reliance in this behalf can be made upon the cases of Tariq Pervez v. The State (1995 SCMR 1345), Ghulam Qadir and 2 others v. The State (2008 SCMR 1221), Muhammad Akram v. The State (2009 SCMR 230) and Muhammad Zaman v. The State (2014 SCMR 749).”

14. In view of what has been discussed above, I have no hesitation to hold that the prosecution has failed to prove its` case against the accused beyond shadow of doubt, therefore, the instant appeal is allowed. Conviction and sentence recorded by the trial court vide judgment dated 21.04.2017 are hereby set aside. Appellant Mehrab @ Mehro son of Yar Muhammad Kalyar is acquitted of the charge. He is present on bail, his bail bond stands cancelled and surety is hereby discharged.

15. Before parting with the judgment, it is observed that Circuit Court Larkana while deciding the appeals of Safeer alias Ali Dino (Criminal Appeal No.S-148/2019) and Irfan Ali (Criminal Appeal No.S-149/2019) by judgment dated 04.12.2020, held that where an accused is alleged to have used the Arm in the commission of offence triable by the Court of Sessions, his trial of offshoot case under the Sindh Arms Act, 2013 must be jointly held by Sessions Judge / Additional Sessions Judge (same Court) to avoid conflicting judgments. Relevant para No.24 is reproduced hereunder:-

“To avoid cropping up of such a situation, Government of Sindh has taken the steps and The Sindh Arms Act, 2013 has been enacted. In case, Sessions Judge/Additional Sessions Judge try both cases (main case as well as case under the Sindh Arms Act, 2013) separately, a number of legal complications will arise, mainly evidence of one case cannot be read in another case. The prosecution deserves protection of law so as to prosecute the case with least inconvenience and without unnecessary hardship; equality before law without equal protection is a travesty; scales must be held strictly in balance. The provisions of Sections 233 and 239 of the Criminal Procedure Code, 1898 vest a discretion in the Court to try offences of the kinds indicated therein jointly. Even under the provisions of Anti-Terrorism Act, 1997, learned Judge, Anti-Terrorism Court while trying any offence under Anti-Terrorism Act, may also try other offence which an accused may, under the Code of Criminal Procedure, 1898, be charged at the same trial, if the offence is connected/offshoot with such other offence. Under Section 21-M of Anti-Terrorism Act, 1997 main offence and offence under the provisions of Sindh Arms Act, 2013 committed in the course of same transaction are jointly tried. Joint trial by same Court would not cause any prejudice to the accused. The Sindh Arms Act, 2013 has been promulgated, which is triable by Court of Sessions under Section 35 ibid.”

Let the copy of judgment be sent to learned Sessions Judge concerned for future guidance.

JUDGE

Tufail