

JUDGMENT SHEET IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Appeal No.106 of 2020

Date of hearing : 25.02.2021
Date of Judgment : 25.02.2021

Appellant Faheem @ Bara : through Mr. Qaim Ali Memon,
Advocate.

The State : through Mr. Talib Ali Memon,
Assistant Prosecutor General, Sindh.

JUDGMENT

MUHAMMAD SALEEM JESSAR, J.- Through instant criminal appeal, appellant Faheem @ Bara has assailed judgment dated 22.01.2020 passed by learned IXth Assistant Sessions Judge, Karachi (South) in Sessions Case No.1776/2019, (re: State v. Faheem @ Bara), arising out of F.I.R No.228/2019 registered at P.S Chakiwara, Karachi, under Section 23(i) (a) of Sindh Arms Act, 2013, whereby he was sentenced to suffer imprisonment for six months with benefit of Section 382-B Cr. P.C.

2. The crux of the prosecution case is that on 02.08.2019, the complainant ASI Asghar Khan lodged FIR and stated that he was busy in snap checking at Miranaka Chowk with Rangers officials. During snap checking, they received spy information that two persons are standing at Miranaka near Fire Brigade having weapons. On such information, the police party along with the Rangers officials reached at the pointed place at about 1800 hours, encircled the area and apprehended two suspected persons pointed out by informer, who disclosed their name as Faheem @ Bara son of Muhammad Iqbal and Uzair son of Abdul Rauf. Their personal search was conducted by the police due to non-cooperation of private persons and during personal search of accused Faheem @ Bara, they recovered one 30-bore pistol without number along with a magazine containing 02 live rounds from the right side of pent of accused and on further search Rs.120/- were also recovered. The other person Uzair son of Abdul Rauf was also searched and one 30-bore pistol was recovered from his possession.

On query, they remained fail to produce license of recovered weapons, such memo of their joint arrest and recovery was prepared and signed in presence of mashirs. Thereafter, instant FIR was lodged against accused persons to the above effect.

3. A formal charge was framed against the accused Faheem @ Bara as Ex.02 and plea was recorded as Ex.2/A, in which he pleaded not guilty and claimed for trial.

4. In order to prove its case prosecution examined as many as three witnesses namely, PW-1 Complainant ASI Asghar Khan as Ex.03, who produced departure entry No.24 as Ex.3/A, memo of arrest and recovery as Ex.3/B, FIR No.228/2019 under Section 23 (i) (a) as Ex.3/C, memo of site inspection as Ex.3/D respectively. PW-2 Mashir PC Naeem Abbas as Ex.4.PW-3 I.O/S.I Muhammad Bachal as Ex.5. Thereafter, prosecution side was closed vide statement Ex 6.

5. Statement of accused was recorded under Section 342 Cr. P.C as Ex.7, in which he denied prosecution allegations and claimed to be innocent; however, the accused neither examined himself on oath nor produced any defense witness.

6. Pursuant to directions contained under order passed in earlier part of the day, VIIIth Senior Civil Judge, Karachi (South) submitted its report dated 25.02.2021 whereby has affirmed the acquittal of co-accused Uzair through Judgment dated 19.11.2019. The report furnished by VIIIth Senior Civil Judge/Assistant Sessions Judge, Karachi (South) is also hereby taken on record.

7. I have heard learned counsel for the appellant, learned counsel for the complainant as well learned Deputy Prosecutor General, Sindh, appearing for the State and perused the material available on record.

8. Learned counsel for the appellant submits that appellant along with co-accused Uzair was arrested under one and same memo of their respective arrest and recovery; however, the appellant was tried by the Court of IXth Assistant Sessions Judge, Karachi (South) and co-accused Uzair was tried by VIIIth Assistant Sessions Judge, Karachi (South) vide Sessions Case No.1824/2019. He next submits that co-accused Uzair after full dressed trial

has been acquitted of the charge by way of judgment dated 19.11.2019. In support of his contention, he submits simple copy of said judgment alongwith Photostat copy of release writ, same are hereby taken on record. Learned counsel further points out that pistol allegedly recovered from the appellant were containing some description over its body which was not mentioned by the complainant in the memo of recovery and arrest. He, therefore, submits that when the description available upon body of the pistol were not mentioned in the memo then pistol produced before the trial Court cannot be termed to be same. Hence, submits that prosecution has failed to prove its charge against appellant, therefore, appellant may be acquitted of the charge by extending benefit of doubt to him. Learned Counsel further submits that the evidence adduced by the prosecution was disbelieved by the trial Court in respect of co-accused Uzair, whereas, same set of evidence has been believed by the other trial Court in respect of present appellant; hence, submits that such appreciation on the part of Courts below entitles present appellant with his acquittal. In support of his contention, he places reliance upon the cases (i) *MUHAMMAD IMRAN Versus The STATE (2020 SCMR 857)*, (ii) *ALI MUHAMMAD Versus The STATE (2020 P.Cr.L.J 1104)*, (iii) *WARIS and another Versus The STATE and others (2020 SCMR 2044)*, (iv) *MUHAMMAD AKRAM Versus THE STATE (2009 SCMR 230)*, (v) *YASIN alias GHULAM MUSTAFA Versus THE STATE (2008 SCMR 336)*, (vi) *SHAMOON alias SHAMMA Versus THE STATE (1995 SCMR 1377)*, (vii) *AZEEM KHAN and another Versus MUJAHID KHAN and others (2016 SCMR 274)* and (viii) *IMTIAZ alias TAJ Versus The STATE and others (2018 SCMR 344)*.

9. On the other hand, learned Assistant P.G, Sindh opposes the appeal on the ground that no material contradictions are available on record; besides, PWs have supported their case and no malafide has been alleged against police officials. He; however, admits that upon evidence of same PWs, co-accused Uzair has been acquitted and therefore no such appeal against his acquittal has been filed by the prosecution.

10. Heard and record perused. From perusal of the FIR, it appears that police party headed by complainant ASI Asghar Khan of P.S Chakiwara, upon receipt of spy information, apprehended the appellant as well as co-accused Uzair and during their bodily search secured a 30-bore pistol from the appellant as well as from co-accused Uzair, such joint memo of their

arrest and recovery was prepared on spot in presence of official witnesses. Unfortunately, the case of co-accused Uzair was assigned to VIIIth Senior Civil Judge/Assistant Sessions Judge, Karachi (South) vide Sessions Case No.1824/2019 being outcome of FIR No.227/2019 under Section 23(i)(a) of Sindh Arms Act, 2013 of P.S Chakiwara, Karachi (re-the State v. Uzair) and the case against appellant was assigned to IXth Assistant Sessions Judge, Karachi (South) vide Sessions Case No.1776/2019. It may be pertinent to mention here that memo of recovery and arrest in respect of present appellant as well as co-accused Uzair was handed down by same set of PWs, who had deposed in the same line and manner before two Courts. The trial Court, who tried the case of co-accused, disbelieved the evidence of prosecution witnesses against accused Uzair (since acquitted on the basis of same set of evidence) while the Court trying the case against present appellant, has convicted the appellant on the basis of same set of evidence furnished by the same PWs, which is in clear violation of rule of consistency. Needless to emphasize that rule of consistency demands that if prosecution has disbelieved the evidence in respect of a co-accused, the same cannot be relied upon for convicting other accused. On the point of *rule of consistency*, it would be advantageous to refer to a judgment of the Honourable Supreme Court passed in the case of **Mohammad Asif Vs. The State reported in 2017 SCMR 486**, wherein it was held as under:

“It is a trite of law and justice that once prosecution evidence is disbelieved with respect to a co-accused then, they cannot be relied upon with regard to the other co-accused unless they are corroborated by corroboratory evidence coming from independent source and shall be unimpeachable in nature but that is not available in the present case.”

11. In another case reported as **Umar Farooque v. State (2006 SCMR 1605)**, the Honourable Supreme Court has held as under:

“On exactly the same evidence and in view of the joint charge, it is not comprehensible, as to how, Talat Mehmood could be acquitted and on the same assertions of the witnesses, Umer Farooque could be convicted.”

12. In the case of Mohammad Asif Vs. The State (*supra*) it was held by the Honourable Supreme Court that *“once prosecution witnesses were disbelieved with respect to a co-accused then, they cannot be relied upon*

with regard to the other accused unless they were corroborated by corroboratory evidence which came from an independent source and was also unimpeachable in nature. In another case reported as **Mohammad Akram vs. The State (2012 SCMR 440)** the Apex Court while holding that same set of evidence which was disbelieved qua the involvement of co-accused could not be relied upon to convict the accused on a capital charge, acquitted the accused.

13. In view of this legal position, present appellant should have also been extended same benefit as given to the acquitted accused, which was not done by the trial Court.

14. Another significant point in this case is that the particular words are mentioned /engraved over the pistol; however, said script /words were not noted down by the complainant at the time of preparation of memo of recovery and arrest and this fact was admitted by the PWs including complainant as well as I.O before the trial Court and no explanation has come forward from the prosecution side for not mentioning of admitted words over the pistol in memo as well as in subsequent FIR, shows that either the offence had not occurred in a manner as reported or the weapon shown to have allegedly been recovered from the possession of appellant was not recovered or is not the same as produced by the prosecution before trial Court. From perusal of evidence of prosecution witnesses, it appears that they have made certain very material admissions in their evidence which are fatal to the prosecution case and go in favour of the accused, yet the trial Court did not consider/appreciate while dictating the impugned judgment. The acquittal of co-accused Uzair on the basis of same set of evidence has not been challenged by the prosecution by filing any appeal against his acquittal and he was acquitted by extending benefit of doubt. As has already discussed that the material evidence adduced by the prosecution is excluded from consideration by the trial Court then, the conviction of the appellant on same set of evidence, where other accused charging similarly, was acquitted, was altogether unjustified under the law. I do not find iota of evidence to connect the appellant with recovery in issue. It is well settled principle of law that prosecution has to stand on its own legs to prove charge against accused and the benefit of doubt, even a slightest shall go in favour of the accused.

15. What to speak of a single doubt, case in hand replete with doubts, which is sufficient to stilt of justice in favour of the appellant. Reliance can be placed upon the case titled Muhammad Akram V. The State (2009 SCMR 230), wherein at page-236, it has been held as under;_

“ It is an axiomatic principle of law that in case of doubt, the benefit thereof must accrue in favour of the accused as matter of right and not of grace. It was observed by this Court in the case of Tariq Pervez v. The State 1995 SCMR 1345 that for giving the benefit of doubt, it was not necessary that there should be many circumstances creating doubts. If there is circumstance which created reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of doubt not as a matter of grace and concession but as a matter of right.”

16. Now, going to the evidence of recovery qua the pistol from the appellant/ convict. According to FIR, recovery was effected in presence of Rangers officials at thickly populated area; however, none from the Ranger personnel was associated as witness or attesting witness of the recovery proceedings.

In other words, witnesses, in whose presence, alleged recovery was effected, were not produced during trial. So the evidence of PWs who have been examined before the trial Court against appellant was of no consequence more particularly when their evidence had not been believed by the other trial Court against co-accused Uzair. Further, if same set of evidence has been disbelieved against co-accused, which is being believed against present convicted appellant by another trial Court, then how the recovery of pistol would come to an effect against the appellant, which even otherwise appears to be managed as no script / words of such pistol have been furnished by the prosecution in the memo of recovery and such being a legal position the case of recovery of pistol from present appellant becomes doubtful as the pistol is alleged to have been recovered from the appellant and such joint memo of recovery was made against appellant. However, the joint memo of recovery has always been considered by the courts to be fatal to the prosecution case in so many cases, one of those cases is the case of RASHID KHAN v. The STATE & another (2019 MLD 675). Therefore, the prosecution case is not free from doubt and the benefit of such doubt according to the dictum laid down by the honourable Supreme Court in the case referred *supra* shall absolutely go in favour of the appellant.

17. The nutshell of entire discussion is that prosecution case is not free from doubt. It is an axiomatic principle of law that if there creates single doubt in any case against any accused, the benefit thereof must accrue in favour of the accused as a matter of right but not a matter of grace or concession. Accordingly, by a short order dated 25.02.2021, instant appeal was allowed. Consequently, impugned judgment dated 22.01.2020, handed down by learned IXth Assistant Sessions Judge, Karachi (South) in Sessions Case No.1776/2019 (re: The State Vs. Faheem @ Bara), being outcome of FIR No.228/2019 registered at Police Station Chakiwara, Karachi, under Section 23(i)(a) of Sindh Arms Act, 2013, was set aside. Above are the reasons for the said short order.

JUDGE