IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

Cr. Appeal No.S-277 of 2019

Date of Hearing: *28.09.2020*
Date of Judgment: *05.10.2020*

Appellant: *Gullab alias Aro S/o Rehmatullah Solangi, through Mr. Aziz Ahmed Leghari, Advocate.*

The State: *Through Mr. Shahzado Saleem Nahiyoon, Deputy Prosecutor General, Sindh.*

J U D G M E N T

NAIMATULLAH PHULPOTO, J.- Appellant was tried by learned 2nd Additional Sessions Judge, Shaheed Benazirabad in Sessions Case No.545 of 2018, arising out of Crime No.89 of 2018, registered at P.S. Daur for offence under Section 23(1)(A) of Sindh Arms Act, 2013. After regular trial, the appellant was convicted under Section 23(1)(A) of Sindh Arms Act, 2013 and sentenced to three (03) years R.I. and to pay the fine of Rs.30,000/-, in case of non-payment of fine amount, he was ordered to further suffer S.I. for one month. Appellant, however, was extended benefit of Section 382-B Cr.P.C.

2. Brief facts of the prosecution case as reflected in the impugned judgment are that on 24.11.2018 complainant ASI Muhammad Arif Lashari of P.S Daur left P.S alongwith his subordinate staff in police mobile for patrolling purpose vide

Roznamcha entry No.27 at 0130 hours. During patrolling, when they reached at Gajra Wah Mori, they saw a person (present appellant) was coming there, when he saw the police, tried to run away but was encircled and apprehended by the police party. On inquiry, the said person disclosed his name as Gulab alias Aro S/o Rehmatullah Machi Solangi, resident of Unar Village, Taluka Daur. ASI Muhammad Arif Lashari conducted the personal search of accused and recovered one Revolver of 30-bore with three live bullets from the fold of his Shalwar. The accused failed to produce its license. Thereafter, the ASI complainant sealed the property at spot and prepared such memo of arrest and recovery in presence of mashirs HC Muhammad Umar and Ehsan Ali. Thereafter, ASI brought the accused and case property at P.S Daur where he lodged F.I.R against the accused on behalf of State under Section 23(1)(A) of Sindh Arms Act, 2013.

3. On the conclusion of usual investigation, challan was submitted against accused under Section 23(1)(A) of Sindh Arms Act, 2013.

4. Learned Trial Court framed the charge against appellant at Ex.02 Accused pleaded not guilty and claimed to be tried.

5. At the trial, prosecution, in order to establish its` case, examined PW-1 complainant ASI Muhammad Arif at Ex.4; he produced copies of mashirnama, F.I.R, roznamcha entries and

report of ballistic expert at Ex.4/A to 4/F; PW-2 HC Muhammad Umar at Ex.5. Thereafter, prosecution side was closed.

6. Statement of accused was recorded under Section 342 Cr.P.C at Ex-6, in which accused claimed false implication in this case and denied the prosecution's allegation. He stated that police has foisted the weapon upon him after his refusal to pay illegal gratification. However, the accused neither examined himself on oath nor led any evidence in his defence.

7. Learned trial Court after hearing learned counsel for the parties and assessment of evidence vide judgment dated 05.09.2019 convicted and sentenced the appellant as stated in the foregoing paragraph.

8. Learned Advocate for the appellant mainly contended that police had sufficient time to call independent persons at busy road to act as mashirs in this case but police avoided without assigning the sound reasons; that this is a case of misreading and non-reading of evidence; that there are material contradictions in the evidence of prosecution witnesses; that the prosecution evidence has not been appreciated properly by the trial Court while passing the judgment; that description of the weapon is not mentioned in the mashirnama. He further contended that prosecution failed to produce any evidence with regard to safe custody and safe transmission of the weapon to Ballistic Expert. It is also submitted

that the weapon has been foisted upon the appellant. He lastly, prayed for acquittal of the appellant.

9. Mr. Shahzado Saleem Nahiyoon, learned Deputy Prosecutor General argued that prosecution has proved its' case that the appellant was found going with unlicensed revolver and report of the Ballistic expert was positive. Learned D.P.G. supported the impugned judgment of the trial Court. He prayed for dismissal of the appeal.

10. The facts of this case as well as evidence produced before the Trial Court find the elaborate mention in the judgment passed by the Trial Court dated 05.09.2019, hence, the same need not to be repeated here so as to avoid duplication and un-necessary repetition.

11. Heard learned Counsel for the parties and perused the evidence available on record, I have come to the conclusion that the prosecution has failed to prove its` case against the appellant for the reasons that appellant was arrested from the busy road but ASI Muhammad Arif failed to associate private persons for making them as mashirs in this case. ASI Muhammad Arif was examined at Ex-4; in his cross-examination he has admitted that the words N-35 and 32 bore were written on the revolver but mashirnama of arrest and recovery is silent with regard to such description of revolver. In the mashirnama of arrest and recovery, no where it is mentioned that the number of revolver was rubbed but the Ballistic Expert in his

report available at Ex-4/C has clearly mentioned that the number of revolver was rubbed. During investigation, the Investigation Officer failed to interrogate / investigate, as to why the appellant/accused was going armed with revolver at the odd hours of the night. According to ASI Muhammad Arif, after arrest and recovery, he brought the accused to the Police Station and kept the revolver in the *Malkhana* of Police Station but such entry of the *Malkhana* has not been produced before the trial Court. Incharge *Malkhana* was also not examined before the trial Court. The weapon was sent to the Ballistic Expert through PC Muhammad Hussain but said Muhammad Hussain has also not been examined by the prosecution. Safe custody and safe transmission of the weapon to the Ballistic Expert have not been established at the trial. More so, there was 09 days delay in sending weapon to the Ballistic Export. The weapon was recovered from the accused on 24.11.2018 but it was received by the ballistic expert on 03.12.2018. Prosecution has failed to explain such delay. Accused has claimed false implication in this case. In these circumstances, it would be unsafe to rely upon the evidence of the police officials without independent corroboration which is lacking in this case. It is also unbelievable that police caught hold the accused and accused did not open any fire upon police or in air and easily surrendered before police. Prosecution has failed to establish safe custody and safe transmission of the weapon to the Ballistic Expert and positive report of the Ballistic Expert in these circumstances would not improve the case of prosecution. Reliance is placed upon the case reported as ***KAMAL DIN alias KAMALA*** *v.*

The STATE (2018 SCMR 577), in which the honourable Apex Court has held 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."***

12. No doubt, the evidence of police officials cannot be discarded simply because they belong to police force. Where, however, the fate of the accused persons 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 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:-***
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> > ***"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."***

> ***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. He was arrested from busy road but Investigation Officer failed to examine any independent person of locality. Appellant has raised plea that weapon has been foisted upon him as he refused to give illegal gratification to the police party. It would be unsafe to rely upon the evidence of police officials without independent corroboration, which is lacking in this case. 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 a single circumstance, which creates reasonable doubt in a prudent mind about the guilt of 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:-

> ***"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. Considering these facts, I have been led to the conclusion that the appellant's conviction is not warranted by the evidence produced against him in this case. Accordingly, I allow the appeal, acquitting him and setting aside his conviction and sentence. The appellant who is in custody be released forthwith, if not required in any other case.

JUDGE

Shahid