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

Cr. Appeal No.S-170 of 2022

Date of hearing	:	23.12.2022
Date of Judgment	:	23.12.2022
Appellant Ibrahim S/o Arab Noohani	:	Through Mr. Altaf Hussain Solangi, Advocate.
The State	:	Through Mr. Shahid Ahmed Shaikh, Additional P.G Sindh.

J U D G M E N T

Muhammad Saleem Jessar. J- Through instant criminal appeal, appellant named above has assailed judgment dated 01.04.2022 passed by learned Sessions Judge, Umerkot, in Sessions Case No.112 of 2020, (Re: the State v. Ibrahim), arising out of F.I.R No.106 of 2020 registered at P.S Kunri District Umerkot, under Section 23(i)(a) of Sindh Arms Act, 2013, whereby he has been convicted and sentenced to suffer rigorous imprisonment for seven years and to pay fine of Rs.20,000/-, in default thereof, to suffer S.I for one year more; however, with benefit of Section 382-B Cr.P.C.

2. Concisely, the facts as disclosed in F.I.R are that on 30.05.2020, complainant ASI Bahadur Khan Khaskheli of P.S Kunri left Police Station in official vehicle at 1730 hours alongwith his subordinate staff for patrolling in the area. During patrolling, when they reached behind Khalid Colony on Katcha Path at 1830 hours, they arrested present appellant and from his possession secured 30-bore pistol. Such Mashirnama of arrest and recovery was prepared at spot in presence of Mashirs namely, PCs Aamir Farooque and Heeralal. Thereafter, the appellant and case property was brought to P.S and lodged F.I.R against him.

3. After completion of legal formalities, challan was submitted against the appellant before the Court of law having

jurisdiction, where a formal charge was framed against accused at Ex-2, to which he pleaded not guilty and claimed his trial.

4. In order to establish the charge, the prosecution examined 03(three) witnesses namely ASI Bahadur (complainant), Aamir Farooque and ASI Sajad Iqbal, who produced various documents including copy of F.I.R, Roznamcah Entries, ballistic expert report, memos etc.

5. Thereafter, statement of the accused under Section 342 Cr.P.C, was recorded at Ex.7, wherein he denied the allegations leveled by the prosecution and prayed for justice. The accused neither examined himself on oath as provided under Section 340(2) Cr.P.C nor led evidence in his defense in disproof of the charge.

6. After formulating the points for determination, recording evidence of the prosecution witnesses and hearing learned Counsel for the parties, trial Court, vide impugned judgment, convicted and sentenced the appellant in the terms as stated above and the appellant through this appeal has challenged his conviction.

7. Learned Counsel for the appellant submits that appellant is aged about 60 years and has been implicated in this case falsely by the police at the instance of one Choudhry Sarwar who is his neighbourer. The issue which made basis of lodgment of F.I.R against him is that son of appellant was laboring where Choudhry Sarwar had exchanged filthy language with him which attracted the appellant who reached at the place where his son was laboring. On his arrival, Choudhry Sarwar had also insulted him and in retaliation thereof Choudhry Sarwar felt insult; hence, called upon police and implicated him in this case. He further submits that said plea was raised by appellant before the trial Court which was responded by the complainant in negative; however, the trial court did not keep it in juxtaposition and has convicted him straightaway. He next submits that alleged weapon was sent to Laboratory with delay of about one day and no Malkhana entry was exhibited in evidence, nor Incharge of Malkhana was examined. He next argued that alleged recovery was effected in day time; yet the police did not associate any

private person to witness recovery proceedings. In support of this argument, he places reliance upon the cases of MUHAMMAD YOUNIS v. The STATE (2021 P.Cr.LJ 851), DAIM v. The State (2021 P.Cr.LJ 1061), MUHAMMAD SHAKEEL alias BANARASI v. The STATE (2021 P.Cr.LJ 1887). He further submits that there are contradictions in between the statements of PWs to the effect that alleged cloth bag in which alleged weapon was sealed was prepared by police party on spot for which no material has been shown before the trial Court. Lastly submits that appellant is not previous convict and has not been dealt with in any criminal case. He; therefore, submits that by considering submissions advanced by him as well lacunas left by the prosecution, appeal may be allowed.

8. Learned Additional P.G appearing for the State has no objection on factual side; otherwise the prosecution has proved its charge against the appellant. He; however, could not controvert the fact that plea taken by the appellant before trial Court has not been discussed or kept in juxtaposition, if it could have been kept in juxtaposition then the plea raised by appellant was of much weight than the version of the prosecution.

9. Heard and perused the record.

10. After making minute scrutiny and scanning of the evidence available before me on record, I find that appellant has specifically put the question from complainant of this case that he had implicated the appellant at the instance of Choudhry Sarwar; however, perusal of impugned judgment does show that trial Court has not kept it in juxtaposition with prosecution evidence, nor made any discussion at length. Besides, appellant has taken plea in his statement recorded under Section 342 Cr.P.C to the extent that in evening of the day of incident, one man namely Choudhry Sarwar came to him and asked that his cattle are grazing in his field to whom he replied that he has no cattle. Subsequently, after lapse of some-time police came to his house where he was cutting wood and arrested him. Later, he has been booked in this false case. This plea has also not been taken in juxtaposition with the evidence by the trial Court which is against criminal jurisprudence. To this respect, I am fortified by the dictum laid down by the Hon'ble Supreme

Court in case of RAZA and another v. The STATE and 2 others (PLD 2020 Supreme Court 523) wherein it has been held as under:

11. Further, the incident had occurred in broadness of the day at public thoroughfare where so many people used to remain available; however, no effort was taken by the police party to associate any independent person of the area to witness recovery proceedings. No doubt, the application of Section 103 Cr.P.C stands ousted under the Act, yet the police party was going to charge a person for the offence which carries punishment in shape of imprisonment; therefore, it was incumbent upon the police officer to associate an independent and respectable person from the locality. Section 103 Cr.P.C embodies rule of prudence and justice, it is intended to eliminate and guard against “chicanery” and “concoction” to minimize manipulation and false implication. It is for these reasons that there is a consensus in the superior Courts that compliance with Section 103 Cr.P.C should not be bypassed nor that its applicability be restricted to proceedings under Chapter VII only. The principle of Section 103 Cr.P.C has been applied and practiced during investigation in crimes for so long and with such irregularity and force that any attempt to restrict it to proceedings under Chapter VII only will unsettle the settled law.

12. The provisions of Chapter VII make it clear that they relate to the search of any place but it cannot be restricted only to house or a closed place, it can be an open place, open area, a. playground, field or garden from where recovery can be nude for which search is conducted. Although in strict sense the provisions of section 103 are restricted to searches under Chapter VII of Cr.P.C. it has become a practice to apply it to all recoveries made by the Police Officers while investigating any crime. The rules of justice enunciated by section 103 Cr.P.C are so embedded in our criminal, jurisprudence and so universally accepted that in all criminal cases two mashirs are always cited for recovery and reliance is placed on these witnesses in the ordinary course provided they are independent, respectable and inhabitants of the locality. The residence of the mashirs

becomes relevant depending on the facts of the case. The emphasis should be on respectability."

13. Moreover, the appellant is a person of advanced age, who is 60 years old; therefore, it cannot be believed that a person on such advanced age may commit such crime more particularly when throughout his career he had never been booked in any criminal activity or crime. In view of aforesaid factual and legal position, recovery of alleged firearm weapon from the appellant has lost its evidentiary value; besides there is delay in sending weapon to Laboratory which has also not been appreciated by the Superior Courts. Reliance can be placed upon the case of SAMANDAR alias QURBAN and others v. The STATE (2017 MLD 539). Moreover, the Roznamcha entries produced in evidence were not original; however, carbon copies thereof have been adduced; such practice has been deprecated by the Superior Courts. In case of YAQUB SHAH v. the STATE (1995 SCMR 1293), the Honourable Supreme Court has held that the report of firearm expert is of no avail to the prosecution as the crime empties and the firearm allegedly recovered from the accused were sent to Forensic Laboratory after delay. Reliance may also be placed upon the case of GHULAM HUSSAIN and 2 others v. The STATE (1998 P.Cr.LJ 779).

14. The accumulative effect of the aforesaid infirmities as well legal flaws in the prosecution case is that the prosecution has not established its case beyond reasonable shadow of doubt. It is well settled principle of law that the prosecution is bound under the law to prove its case against the accused beyond any shadow of reasonable doubt. In view of aforesaid defects and lacunas, it can safely be held that the prosecution has not succeeded in discharging such obligation on its part. Needless to emphasize the well settled principle of law that the accused is entitled to be extended benefit of doubt as a matter of right. In the present case, there are many circumstances which create doubts in the prosecution case. Even an accused cannot be deprived of benefit of doubt merely because there is only one circumstance which creates doubt in the prosecution story. In

the case reported as Tariq Pervaiz v. The State 1995 SCMR 1345 the Honourable Supreme Court held as under;

> "The concept of benefit of doubt to an accused person is deep-rooted in our country. For giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts. If there is a 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."

15. For what has been discussed hereinabove, instant appeal is allowed and the impugned judgment dated 01.04.2022, handed down by learned Sessions Judge, Umerkot in Sessions Case No.112 of 2020 (re: The State v. Ibrahim), being outcome of F.I.R No.106 of 2020 registered at Police Station Kunri, Umerkot, under Section 23-(i)(a) Sindh Arms Act, 2013, is set aside and the appellant is acquitted of the charge. Appellant shall be released forthwith if he is no more required in any other custody case.

JUDGE

Shahid