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

Criminal Appeal No.S- 10 of 2020.

Appellant:	Raja s/o Abdul Rehman Rahpoto (present on bail). Through Mr. Nazeer Ahmed Bhatti, Advocate.
The State:	Through Mr. Nazar Muhammad Memon Additional P.G.
Date of Hearing:	14.01.2022.
Date of Judgment:	14.01.2022.

J U D G M E N T

Naimatullah Phulpoto J. Appellant Raja son of Abdul Rehman was tried by learned Additional Sessions Judge, Sehwan in Sessions Case No.214 of 2019 arising out of crime No.111 of 2019 of Police Station Bhan under section 23(1)(a) Sindh Arms Act, 2013. After regular trial vide Judgment dated 28.12.2019, appellant Raja was convicted under section 23(1)(a) Sindh Arms Act, 2013 and sentenced to 03 years R.I. Appellant was also directed to pay fine of Rs.10,000/-. In case of default in payment of fine, he was ordered to suffer S.I. for two months more. Appellant was however, extended benefit of Section 382 (b) Cr.P.C.

2. Brief facts of the prosecution case as disclosed in the F.I.R. are that on 26.08.2019 at 2230 hours, accused Raja voluntarily appeared at Police Station Bhan and produced one DBBL gun, disclosing that he has committed the murders of Mst. Sheena and Akbar by means of said weapon, by declaring them as “Karo Kari”. On such disclosure, the appellant / accused was arrested and crime weapon viz. unlicensed DBBL gun and one bag containing five live cartridges were recovered from his possession, by ASI Qamaruddin of P.S. Bhan in presence of mashirs HC Muhammad Essa and PC Muhammad Sadiq. Such memo of arrest and recovery was prepared. Case property was sent to ballistic expert for report. After usual investigation challan was submitted against the accused under the above referred sections.

3. Trial Court framed the charge against appellant / accused Raja at Ex.02/A, to which he pleaded not guilty and claimed to be tried.

4. At the trial, prosecution examined PW.1 Mashir HC Muhammad Essa at Ex.03, who produced the memo of arrest and recovery at Ex.3/A, PW-02 complainant ASI Qamaruddin at Ex.04. Thereafter, prosecution closed its' side vide statement at Ex.05.

5. Trial court recorded the statement of accused under section 342 Cr.P.C. at Ex.06 in which accused claimed false implication in this case and denied the prosecution allegations.

6. Trial court after hearing the learned counsel for the parties and assessment of evidence vide its' judgment dated 28.12.2019 convicted the appellant Raja and sentenced him in the terms as stated above. Hence, this appeal.

7. Mr. Nazeer Ahmed Bhatti, learned advocate for appellant argued that number of gun is mentioned in mashirnama produced in evidence as 18280 but in the final report, the number of said gun has been shown as 19280; that H.C. Muhammad Essa (PW-1) in his cross examination has admitted that there was some printing over the barrel of the gun but its' description has not been mentioned in mashirnama of arrest and recovery. Learned Advocate for the appellant has also pointed out that there are material contradictions in the evidence of the prosecution witnesses. PW-1 HC Muhammad Essa has deposed that mashirnama was prepared by PC Muhammad Umer but ASI Qamaruddin has stated that mashirnama was prepared by him. He further contended that in main case accused / appellant has already been acquitted by way of compromise hence in the case in hand being off shoot, he is also entitled to be acquitted of the charge. In support of his contentions, learned counsel has relied upon the case reported as Muhammad Qasim v. The State (2018 P.Cr.L.J Note 67), 2. Akhtar Islam v. State (PLJ 2006 Cr.C (Peshawar) 966 (DB), 3. Nabi Bux Jakhrani v. The State (2021 MLD 1657), 4. Rasool Bux v. The State (2021 YLR 1906) and 5. Samiullah v. The State (2021 YLR 452).

8. On the other hand, Mr. Nazar Muhammad Memon, Additional P.G. argued that prosecution has proved its` case against the appellant as he was found in possession of unlicensed DBBL gun which he voluntarily produced before the police. However, he could not controvert the omissions and contradictions in the evidence of prosecution witnesses as highlighted by the defence counsel. Lastly, he has prayed for dismissal of the appeal.

9. The facts of this case as well as evidence produced before the Trial Court find an elaborate mention in the judgment passed by the Trial Court

dated 28.12.2019, hence, the same need not to be repeated here so as to avoid duplication and un-necessary repetition .

10. After hearing the learned counsel for the parties and having gone through 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 appeared at Police Station on 26.08.2019 and stated that he had committed the murder of his sister Mst. Sheena and one Akbar by declaring them on illicit terms and he produced gun No.18280 before ASI Qamaruddin but said gun which was used by the appellant in the commission of offence was not kept in Malkhana of the Police Station. PW Qamaruddin had failed to mention the number of gun produced before him by the appellant. Prosecution has also failed to produce before the trial court evidence regarding safe custody of the gun at the Police Station and its safe transmission to the ballistic expert for the report. Surprisingly, report of the ballistic expert has also not been produced in the evidence. Learned advocate for the appellant has rightly pointed out that the number of gun is mentioned in mashirnama which is produced in evidence as 18280 but in the final report the number of said gun has been shown as 19280. He has also pointed out some material contradictions in the evidence of prosecution witnesses of the case. HC Muhammad Essa PW-1 in his cross examination has admitted that there is some printing over the barrel of the gun but its description has not been mentioned in the mashirnama of arrest and recovery. Further PW-1 HC. Muhammad Essa has deposed that mashirnama was prepared by PC Muhammad Umer but ASI Qamaruddin has stated that mashirnama was prepared by him. When these contradictions were confronted with the learned Additional P.G, he had no reply. It has also been pointed out that in main case bearing crime No.110 of 2019 registered at Police Station Bhan for offences under section 302, 311, 114, 34 PPC the appellant / accused has already been acquitted by way of compromise vide order dated 28.12.2019 and this is the off shoot of said main case.

11. Apart from above, there is also delay in sending the gun to the Ballistic Expert which has not been explained. Prosecution has utterly failed to prove the safe custody and safe transmission of gun to the Ballistic Expert and no reliance can be placed upon such positive report of the Ballistic Expert as held by Honourable Supreme Court of Pakistan in the case of KAMAL DIN alias KAMALA v. The STATE (2018 SCMR 577), wherein 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. As regards the evidence of the 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 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 the time. In this case availability of the private witnesses could have been easily arranged, but it was avoided by the complainant/ investigation officer. Accused in his statement recorded under Section 342, Cr.P.C. has claimed false implication in this case and raised plea that crime weapon has been foisted upon him by the police. 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."***
>
> ***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 appellant. Keeping in view the above facts and circumstances, the appeal is allowed. Conviction and sentence recorded by the trial Court vide impugned judgment dated 28.12.2019 passed by the learned Additional Sessions Judge, Sehwan in Sessions Case No.214 of 2019 are set aside and appellant Raja son of Abdul Rehman Rahpoto is acquitted of the charge. He is present on bail, his bail bond stands cancelled and surety is hereby discharged.

JUDGE

Tufail