

IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Appeal No. 495 of 2023

Criminal Appeal No. 443 of 2023

Appellants : Abid Hussain and Abdullah
through M/s. Riaz Hussain Soomro, Jehangir
Rahujo and Obaidullah Malik, Advocates.

Respondent : The State
through Mr. Talib Ali Memon, A.P.G.

Date of hearing : 24th October, 2023

Date of Judgment : 30th October, 2023

JUDGMENT

Omar Sial, J.: The then District and Sessions Judge, Malir, Karachi on 14.01.2016 wrote a letter to the Anti-Corruption Establishment that case properties in the cases registered under the Sindh Arms Act, 2013 were being misappropriated by the staff of the Maalkhana instead of being disposed of per law. A magistrate was appointed to visit the Maalkhana to determine whether case properties ordered to be disposed of in October, November and December 2015 were available in the Maalkhana. The magistrate inspected the Maalkhana and reported that 41 case properties (all pistols) were missing and had not been disposed of per law. F.I.R. No. 8 of 2016 was registered against the In Charge of the Maalkhana A.S.I. Abdullah and his assistant P.C. Abid.

2. Both accused pleaded not guilty and claimed trial. At trial, the following witnesses appeared:

3. **PW-1 A.S.I. Mohammad Riaz Tanoli** was of not much help to the prosecution as his testimony was limited to the fact that In Charge of the Maalkhana was A.S.I. Abdullah and his assistant were P.C. Abid. **PW-2 S.I. Sajid Mehmood, PW-3 A.S.I. Ali Mohammad's, PW-4 A.S.I. Suhail Ahmed, PW-5 A.S.I. Mumtaz Ali, PW-12 A.S.I. Manzoor Niazi's, PW-14 S.I. Ali**

Asghar Abro's, PW-16 P.C. Liaquat Ali, PW-17 Sikander Ali, PW-18 S.I. Badar Din, PW-19 Loung Khan, PW-20 S.I. Aslam Dad, PW-21 S.I. Nizam Din, PW-22 S.I. Mohammad Akram, PW-23 (wrongly numbered as PW-24) S.I. Nazar Ali, PW-24 S.I. Ghulam Akbar (wrongly numbered as PW-25), PW-25 Mohammad Anwar (wrongly numbered as PW-26) and PW-26 S.I. Shabbir Hussain (wrongly numbered as PW-27) testimony was limited to them confirming that he had deposited three pistols in the Maalkhana. They did not implicate any person nor record anything meaningful. **PW-6 S.I. Syed Zahid Hussain** testified that he had deposited some pistols in the Maalkhana and that they were received by A.S.I. Abdullah. **PW-7 Khan Bahadur** was the person who took over as In Charge of the Maalkhana after A.S.I. Abdullah was arrested. He testified that when he took over, the properties forming the subject matter of the present case were not available except for one weapon, which was not claimed by its owner on the ground that it was not his weapon. **PW-8 Deputy Director A.C.E. Rato Khan** was the case's complainant and investigation officer. **PW-9 Nadir Khan Burdi** was the Magistrate who had inspected the Maalkhana. **PW-10 A.S.I. Mohammad Akbar** testified that on the date of the inspection, A.S.I. Abdullah had not come to work as he was sick. **PW-11 A.S.I. Iftikhar Ali's** testimony did not add any weight to the prosecution case. **PW-13 Hussain Bux** testified that he had deposited a weapon in the Maalkhana, which was ordered to be returned to the accused of the case he had investigated as it was a licensed weapon; however, the accused had declined to take it back on the ground that it was not the same weapon that had been seized from him. **PW-15 Process Server Iftikhar Ahmed** acted as In Charge Maalkhana for a brief period after the arrest of A.S.I. Abdullah, in this case, and before PW-7, Khan Bahadur took over as the In Charge.

4. In section 342 Cr.P.C., the accused denied wrongdoing and professed innocence. At the end of the trial, the learned Special Judge Anti-Corruption (Provincial) Karachi on 25.08.2023 convicted and sentenced the accused as follows:

“Abdullah and Abid Hussain were sentenced to four years imprisonment for an offence under sections 409 and 34 P.P.C. They were also directed to pay a fine of Rs. 50,000 each or stay a further period of four months in prison. They were also sentenced to one year prison term for an offence under section 5(2) Prevention of Corruption Act, 1947 as well as pay a fine of Rs. 30,000 each or spend a further period of one month in prison.”

5. I have heard the learned counsels for the appellants and the learned Additional Prosecutor General. Their respective arguments are not being reproduced but are reflected in my observations and findings below.

6. The prosecution put a lot of time and energy into examining witnesses whose testimony was limited to the extent that they had deposited weapons in the Maalkhana. That weapons were deposited in the Maalkhana was not in dispute. The issue was what happened to some weapons lying in the Maalkhana after the cases they belonged to had been disposed of. A total of 26 witnesses were examined, of which only one (PW-6 S.I. Syed Zahid Hussain) said that he had deposited a weapon with A.S.I. Abdullah. One witness PW-5 A.S.I. Mumtaz Ali noted at trial that neither of the two appellants was posted at the Maalkhana when he had deposited weapons.

7. Another question that arises in my mind is as to why was A.S.I. Abdullah was not summoned to the Maalkhana when the Magistrate came for his surprise inspection. He was sick that day. The Magistrate testified, *"It is correct to suggest that I did not call accused Abdullah at the time of the surprise visit, nor enquired anything from him."* If he was the In Charge of the Maalkhana, how did the Magistrate enter the Maalkhana and inspect it? Would it not have been proper that the inspection was carried out in his presence? The prosecution case is silent on this aspect. It is apparent from the record that the list prepared by the Magistrate was not accurate. For example, one weapon which the Magistrate had listed in his report as missing was confirmed by PW-15 Iftikhar Ahmed as being present in the

Maalkhana in a sealed condition. Still, when the successor In Charge opened the seal, the person who ordered it to be returned declined to take it because it was not the same weapon. The witness confirmed that this weapon was in a sealed condition. Irrespective of the owner's refusal to accept the weapon, the truth is that the weapon was lying in the Maalkhana, which the Magistrate noted as not present. Another weapon reported as absent was confirmed by PW-18 S.I. Badaruddin, who testified that *"Accused had produced licence in court and court had released the said pistol and gave to the accused."* PW-20, PW-21, PW-22, PW-24, PW-26 and PW-27 stated that Shakeel was In Charge of the Maalkhana when they had deposited the weapons in the case he had handled. No handing and taking over the Maalkhana from Shakeel to Abdullah was produced at trial. Such lapses had made it incumbent upon the investigating officer to check the inventory; as mentioned above, he failed to do so. It was the investigating officer's duty to confirm whether the inventory taken by the Magistrate was accurate. However, the investigating officer failed to do so and confirmed his failure at trial by stating, *"It is correct to suggest that I did not visit the police Maalkhana of District Malir, Karachi, nor got the checked the case properties personally."* He also conceded that he was in his role as investigating officer who was *"liable to check the case properties personally that whether they were missing or not."*

8. Whether or not A.S.I. Abdullah was even In Charge of the Maalkhana, which was not established at trial. No documentary evidence was produced in this regard. On the contrary, the record reflects that PW-7 Khan Bahadur and PW-15 Process Server Iftikhar Ahmed were also assigned In Charge Maalkhana on the verbal directions of the police high-ups. It also came in evidence that an unknown person was also roaming around in the Maalkhana when the Magistrate went for his inspection. The case property register records that all transactions of the case property was not produced at trial. The entire focus of the investigation was the appellants, and it was not explained why previous Maalkhana In Charge, specifically a man named Shakeel, were not investigated or examined at trial. No details as to when

the cases (except dates in a spreadsheet prepared by the Magistrate) to which the properties belonged were disposed of and what the final disposal orders of the relevant court were provided at trial. I do not exclude the possibility that some weapons disappeared during the period Abdullah was the In Charge of the maalkhana; however, I believe it was unfair to check whether a weapon was available in the maalkhana only for three months—a substantial period lapses after the last time a weapon is produced in court and the final judgment. Weapons could disappear and be replaced by unscrupulous elements within the ranks of the police. This could only have been conclusively decided if evidence showing the complete trail of the weapon in and out of the maalkhana was shown at trial. Unfortunately, it was not. The benefit of the doubt created must go to the appellants.

9. The appellants were sentenced, among other things, for an offence under section 409 P.P.C. This section is invoked when a person being in any manner entrusted with property or with any dominion over the property in his capacity of a public servant or in the way of his business as a banker, merchant, factor, broker, attorney or agent, commits criminal breach of trust in respect of that property. The term “criminal breach of trust” is defined in section 405 P.P.C. to mean a person who (i) is in any manner entrusted with property or with any dominion over property and who (ii) dishonestly misappropriates or converts to his use that property, or (iii) dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or (iv) of any legal contract, express or implied, which he has made touching the discharge of such trust, or willfully suffers any other person so to do, commits “criminal breach of trust”. The record reflects that no evidence was led at trial to establish that the case properties were misappropriated or converted to the personal use of the appellants. No investigation was done to determine where the weapons went, even if the accused were liable. The investigation was weak and lop-sided. There is always a possibility that the appellants were involved in the offence; however, an inadequate and incomplete investigation created doubts in the prosecution

case. What is also highlighted by going through the record is that the procedures that have been deployed for case property to be deposited and taken out of the Maalkhana were weak. Staff deployed at the Maalkhana on an ad hoc basis.

10. Given the above, the prosecution failed to establish its case beyond reasonable doubt. Doubt emerged as a consequence of poor investigation. The appellants are, therefore, acquitted of the charge. They may be released forthwith if not required in any other custody case.

JUDGE