

IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Crl.Jail Appeal No.S - 08 of 2023.

Date	Order with signature of Judge
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Appellant: Khuda Bux Mangnejo
Through Mr.Amir Ali Bhutto
Advocate.

Respondent. Through Mr.Aftab Ahmed
SharAddl.P.G.

Date of Hearing : 09thJune, 2023.

Date of Announcement : 23rdJune, 2023.

JUDGMENT

AMJAD ALI BOHIO, J- The appellant has filed an instant Jail Appeal, challenging the impugned judgment dated 07.01.2023, passed by the Court of learned Additional Sessions Judge-I/(MCTC), Khairpur, in Sessions Case No. 578/2020 arising out of Crime No. 02/2020, registered at Police Station Phulloo, for an offense under Section 24 of the Sindh Arms Act, 2013.

2. According to the First Information Report (F.I.R.), the complainant SIP Allah Dino and his staff interrogated the appellant accused Khuda Bux son of Muharram Mangnejo, who was already in custody under Crime No.01/2020 under sections 302, 324, 427, 337-H(ii), 148, and 149 of the Pakistan Penal Code (PPC). Allegedly during

interrogation, the appellant/accused volunteered to lead the police so as to recover the weapon used in the aforementioned offenses. As a result, they left the police station through entry No.8 at 1530 hours and arrived at the abandoned machine of Jogi Shambani where allegedly appellant voluntarily lead them to recovery of unlicensed pistol with a magazine containing four live bullets from a hedge at 1600 hours. The recovered weapon was sealed on the spot, and a recovery memo was prepared in the presence of PC Barkat Ali and PC Allah Dino. Subsequently, such F.I.R. was registered as Crime No.02/2020 at 1645 hours on 14.05.2020.

3. After receipt of case sent up to trial court, relevant documents were supplied as required under Section 265-C of the Code of Criminal Procedure (Cr.P.C) and then formal charge was framed against the appellant/accused to which appellant pleaded not guilty.

4. During trial of case, prosecution examined Complainant SIP Allah Dino Odhano as P.W-1, I.O/Inspector Sikander Ali Bullo as P.W-2, and mashir PC Barkat Ali as P.W-3. Thereafter prosecution side of case was closed.

5. During recording of his statement under Section 342 of the Code of Criminal Procedure (Cr.P.C), appellant/accused refuted the allegations of production of unlicensed pistol along with a magazine containing four live bullets. However he neither expressed his desire to examine himself on oath under Section 340(2) of the Cr.P.C, nor did he produced any evidence in his defense.

6. After hearing the arguments of counsel of both parties, the trial court rendered judgment of conviction against the appellant/accused, which is now being challenged before this Court.

7. This Court has heard arguments and thoroughly reviewed the case record.

8. The learned counsel for the appellant contends that there are material contradictions in the evidence of the prosecution witnesses, which were not considered by the trial court when awarding the sentence. He has argued that since the appellant has been acquitted in the main case registered under section 302 PPC, as such appellant is entitled to his acquittal, as held in the case of Nizamuddin v. The State (2022 P.Cr.L.J.Note.2). Furthermore, he argues that the complainant alleged that the appellant/accused, who was already in custody during the interrogation agreed to produce the weapon used in the offense under section 302 PPC, Crime No.01/2020. However, there was a distance of approximately 2 kilometers between PS Phulloo and the place of recovery, and the complainant failed to associate independent witnesses despite hopeful about the recovery of the weapon, thus violating the provisions of Section 103 Cr.P.C. The counsel further argues that there was a delay in receipt of the parcel to the Forensic Lab in Larkana, as it remained at the police station until 18.05.2020 after the alleged recovery on 14.05.2020. This unexplained four-day delay raises sufficient doubt regarding the production of the weapon by the accused and its safe custody, particularly when both the I.O and the complainant have failed to produce the entry of Register No.19. In support of his contentions, he relies on the case of Samiullah v. The State (2021 YLR 452).

9. The learned Additional Prosecutor General (APG) supports the impugned judgment passed by the trial court and argues that the contradictions pointed out by the appellant's counsel are minor in nature. He asserts that the evidence provided by the complainant

and the mashirs regarding the recovery of the unlicensed pistol along with the magazine containing four live bullets remained consistent, trustworthy, and inspires confidence. Finally, he contends that the appeal should be dismissed.

10. Admittedly, the appellant/accused was already in custody and allegedly admitted his guilt for committing Crime No. 01/2020 during interrogation and then expressed readiness to produce the weapon he used to commit the offense. Thus, the complainant, being aware of the expected recovery of the crime weapon, left the Police Station with the appellant/accused during daylight. They covered a distance of about 2 kilometers. However, despite this, the complainant failed to associate any independent witnesses to witness the recovery, thereby creating sufficient doubt regarding the alleged recovery. During cross-examination, the complainant admitted that he did not associate private mashirs and failed to provide an explanation for such serious lapse. The reliance in this regard is placed on the case of *Ameer Bux v. The State* (2023 P.Cr.L.J 462) which reveals as under:-

“It is the matter of record that according to prosecution witnesses in the mashirnama Ex.4/A, it is mentioned that the pistol without number and two (02) cartridges were recovered from the possession of accused for which he had no license. But description of the pistol and company of the cartridges have not been mentioned in the mashirnama. Property was also not marked by the Investigation Officer. Report of the Ballistic Expert at Ex.4/A reflects that the Expert had received five (05) cartridges along with pistol when only two (02) cartridges were secured from the possession of accused, according to the case of prosecution. As to how these three (03) more cartridges were sent to the Ballistic Expert has not been explained. Deputy Prosecutor General rightly replied that prosecution has no explanation for such ambiguity. Case property was sent to the Ballistic Expert through PC Majid Ali but he has not been examined. Incharge of Malkhana was also not produced before the trial Court to prove the safe custody and safe transmission of the weapon to the expert, which is the requirement of law, as held by the Honourable Supreme Court of Pakistan in the case of *Kamal Din alias Kamala v. The State* (2018 SCMR 577). The relevant observations read 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."

11. According to the complainant, he, along with his staff and the appellant/accused, left the Police Station in his private car as per entry No. 8. However, entry No. 8 presented as Exhibit 3-A does not mention if the car belonged to the complainant. In contrast, Mashir PC Barkat Ali contradicted the aforementioned evidence and stated that the SHO himself called a private car from the Taxi Stand. Thus according to him, the car in which they left the Police Station was not owned by the complainant. This creates a doubt that perhaps Mashir PC Barkat did not accompany them during the alleged recovery since, according to him, a taxi was called by the SHO contradicting the complainant story. Both the complainant and the mashir also provided contradictory specifications about location from where the accused/appellant retrieved the pistol. The complainant stated that the pistol was lying in the center of the hedge without any cover, while Mashir PC Barkat testified that the appellant/accused retrieved the pistol from the bottom of the hedge. Inspector Sikander Ali, the investigating officer, contradicted the evidence of SIP Allah Dino and stated that the complainant disclosed to him that the recovered pistol was lying on the lower surface of the hedge, not in the center. Even otherwise no sort of evidence in any manner was brought on record to indicate that such place of recovery was in exclusive possession or occupation of appellant or if he had dominion or control over such place of recovery. Therefore these contradictions show that either the complainant or the mashir

was not present during the alleged recovery. The complainant also admitted that he did not mention the description of the pistol in the mashirnama. According to the evidence of complainant he prepared the mashirnama first and then sealed the property. However, the mashirnama presented by the complainant as Exhibit 3-B states that it was prepared when the property was sealed.

12. According to complainant, after lodging the FIR, he handed over a copy of the FIR, the appellant/accused, and the case property for further investigation to Inspector Sikander Ali Bullo. This means that after May 14, 2020, the investigation was conducted by Inspector Sikander Ali Bullo. However, he failed to testify about keeping the sealed parcel containing the recovered pistol along with four live bullets as mentioned in the mashirnama of recovery, for four days. He also did not mention anything about dispatching the parcel through PC Waheed Ali to the laboratory in Larkana. On the contrary, the complainant stated that he sent the property through Waheed Ali, who was not responsible to dispatch the case property as Inspector Sikander Ali Bullo being I.O was responsible for the same. After May 14, 2020, the parcel was dispatched with delay of four day on May 18, 2020, for which no entry of Register No.19 for keeping the parcel in Malkhana in order to establish its safe custody has been produce. Even, dispatcher WHC Waheed Ali has not been examined to corroborate such fact, therefore, the prosecution failed to prove safe custody of the parcel. Report of Forensic lab Larkaka produced at Ex.3-H by the complainant instead of I.O who was responsible to produce the same and I would like to reproduce the opinion incharge Forensic Lab larkana as under:-

“1. Three 30 bore crime empties already marked as “C1, C2 and C3” were **NOT FIRED** from the above mentioned 30 bore pistol No. rubbed in question in view of the following major points i.e.

Strike pin marks, breech face marks, ejector marks and chamber marks etc are **Dissimilar**.

2. Thirteen 7.62 mm bore crime empties already marked as "C4 to c16" are fired empties of 7.62 mm bore fire arm/weapon."

13. The above opinion of Ballistic Expert further negates that the empties were not fired from allegedly recovered pistol. Moreover proper description for the purpose of identification of pistol were not incorporated in memo of recovery. In such circumstances material evidence as mentioned above has created reasonable doubt in the prosecution case as held in (2023 P.Cr. L.J 462).

14. Besides all above facts, the complainant failed to associate any private individual as a witness to the recovery, and there are significant contradictions in the testimony of the prosecution witnesses, which raise reasonable doubt regarding the alleged recovery. The memo of recovery lacks description of the recovered pistol, and the evidence so deposed by both the complainant and the mashir is inconsistent as to whether the property was sealed before or after the preparation of the mashirnama. Furthermore, there is no proof that the parcel remained in safe custody for four days, and the delay in its delivery has not been explained. Additionally, the entries of the departure and the arrival of the dispatcher have not been produced to establish its delivery.

15. Based on the above discussion, the trial court's judgment dated January 7, 2023, is set-aside and the appellant Khuda Bux, son of Muharram Mangnejo, is acquitted of the charges. As the appellant is in custody, a release writ be issued to the relevant Jail Superintendent, directing the immediate release of the appellant/accused if his custody is not required in any other case.

JUDGE

Sulaman Khan/PA