

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, LARKANA

**Criminal Appeal No. S-23 of 2017
&
Criminal Appeal No. S-24 of 2017**

Appellant Veeram Khan : through Mr. Asif Ali
in Cr. Appeal No.S-23/2017 Abdul Razzak Soomro,
Advocate

Appellant Abdul Rehman : through Mr. Asif Ali
in Cr. Appeal No.S-24/2017 Abdul Razzak Soomro,
Advocate

State in both Appeals : through Mr. Ali Anwar, Kandhro,
Addl: PG along with
ASI Aijaz Ali Thebo of PS New
Foujdari, Shikarpur, ASI Imamuddin
Khoso, Incharge Police Headquarters
Shikarpur, PC Abdul Majid Jatoy, I/C
Armory, Police Headquarters,
Shikarpur.

Date of hearing : 19.02.2024

Date of Judgment : 19.02.2024

JUDGMENT

Muhammad Saleem Jessar, J.- Through this single judgment, I propose to dispose of captioned two criminal appeals. Since, factual as well as legal aspects in both cases are almost same.

2. Through these two Cr. Appeals the appellants, Veeram Khan S/o Adam Khan and Abdul Rehman S/o Jamaluddin, have assailed two Judgments; both dated 16.02.2017, passed by learned Special Judge Anti-Corruption, (Provincial) Larkana vide Spl. Case No. 35 of 2011 and Spl. Case No.36 of 2011, being outcome of FIRs bearing Nos. 120 of 2011 and 121 of 2011 respectively, registered for offence under Section 409, PPC read with Section 5

(2) Act-II of 1947, registered with P.S. New Foujdari, Shikarpur, whereby both the accused / appellants were convicted for offences under aforesaid Sections and sentenced to undergo rigorous imprisonment for four (4) years and to pay fine of Rs.1,00,000/- each and in default to suffer six months more imprisonment. The benefit of Section 382-B, Cr. P.C. was extended to both the appellants.

3. Brief facts of the case relating to Cr. Appeal No.S-23 of 2017, as per F.I.R. No. 120/2011 lodged at P.S. New Foujdari, Shikarpur, under Section 409 PPC read with Section 5(2) Act-II of 1947, are; that on 18.6.2011 complainant ASI Gulzar Ahmed, who was posted as Incharge Kot Police Line Shikarpur, lodged instant FIR, stating therein that PC-No.1583 Taimor Ali and PC-No.1494 Dilshad Ahmed were posted as helpers with him and in their presence on 19.7.2008 ASI Gulzar Ahmed had issued and handed over G-3 Rifle bearing No.89346, with five magazines and 100 bullets of G-3 to accused / appellant PC Veeram Khan Luhar for performing his official duty, who remained absent from his duty from 27.7.2008 and did not deposit the Arm and Ammunition. Such reports were sent to the high-ups and on 01.9.2009 at 4.00 p.m. when complainant, PC Taimor and PC Dilshad were available at Kot, where accused Veeram Khan Luhar appeared at Police Line Kot for depositing G-3 Rifle No.90123 along with one magazine and two live bullets. It is alleged that complainant took the Arm and Ammunition, verified the same and found that Rifle was not with same number and was fake. The complainant intimated such fact to his high-ups, who directed him to get the Arm and Ammunition deposited, therefore, Rifle No.90123, one magazine and two bullets given by accused Veeram Khan Luhar, so also another rifle bearing No.90737 given by PC-1884 Abdul Rehman Bhutto were deposited by the complainant with WHC Abdul Ghafoor Dayo of New Foujdari Police Station against receipt for keeping the same as '*amanat*' by WHC Abdul Ghafoor Dayo and such entry was recorded at police station and such report No.4063 dated: 12.9.2009 was sent to the DPO through Line Officer for misappropriation of Service Rifle G-3, magazine and bullets. It is further alleged that thereafter on the orders of DPO, Shikarpur, he registered the above said FIR against accused Veeram Khan.

4. After usual investigation the accused was challaned by Investigation Officer of P.S. New Foujdari, Shikarpur before the Court showing him as

absconder and after issuance of NBWs he voluntarily surrendered before the Court and obtained bail.

5. A formal charge against the accused was framed vide Ex.2, to which he pleaded not guilty and claimed to be tried vide his plea Ex.3.

6. In order to prove the charge, process was issued against the PWs and process server reported vide his statement recorded as Ex.5 that PW Rab Dino had expired. However, prosecution examined PW Gulzar Ahmed at Ex.7, who produced copies of relevant registers, reports sent to the DSP and FIR as Ex.7-A to 7-D, PW Dilshad Ali was examined at Ex.8, who produced mashirnama as Ex.8-A. PW Taimor was given up vide statement of ADPP at Ex.9. PW Nazeer Hussain was examined at Ex.9, while PW Abdul Ghafoor was examined at Ex.10. PW Ali Muhammad was examined at Ex.11, who produced copy of his findings at Ex.11-A. PW Mehrab Ali was examined at Ex.12, whereas PW Toufique Ahmed was examined at Ex.13, who produced mashirnama as Ex.13-A. PW Aijaz Ali Thebo was examined at Ex.14, who produced report sent to the SSP and letter of expert as Ex.14-A & B. ADPP submitted statement enclosing therewith report of the expert at Ex.15, thereafter, he closed prosecution side vide statement at Ex.16.

7. Statement of accused under Section 342 Cr. P.C. was recorded at Ex.17, wherein he pleaded his innocence; however, he declined to examine himself on oath as provided under Section 340 (2) Cr. P.C. nor produced any witness in his defence.

8. The facts of the prosecution case relating to Cr. Appeal No.S-24 of 2017 are that on 18.6.2011 complainant ASI Gulzar Ahmed, Incharge Kot Police Line Shikarpur lodged FIR No. 121/2011 at P.S. New Foujdari, Shikarpur under Section 409 PPC, read with Section 5(2) Act-II of 1947, stating therein that he is posted at Police Line Shikarpur as Kot Incharge whereas PC-1583 Taimor Ali and PC-1494 Dilshad Ahmed were posted as helpers with him and in their presence on 31.01.2004 G-3 Rifle bearing No.90737, five magazines and 120 bullets of G-3, were issued according to the Register to PC-1884 Abdul Rehman Bhutto, who was performing his duties at that time at P.S. Lakhi Ghulam Shah. The accused remained absent from his duty and did not deposit the service weapon and ammunition, therefore, such report was sent to the high-ups. It was further stated that on 03.4.2006 complainant along with

PC Taimor and PC Dilshad was available at the Kot where PC Abdul Rehman, who was subsequently dismissed from service, brought G-3 Rifle without magazine along with bullets. It is further alleged that complainant got checked/ verified said Rifle through Armourer, Police Line, Shikarpur, who issued certificate that G-3 Rifle was not original Rifle and it did not possess same number and that number 90737 was punched thereon, thus it was a fake rifle. Thereafter, the complainant communicated such information to his high-ups who directed him to deposit said Rifle, so also other Rifle No.90123, one magazine and two bullets, brought by PC-1372 Veeram Khan Luhar. Accordingly, he deposited the same with WHC Abdul Ghafoor Dayo of New Foujdari Police Station for keeping the same as '*amanat*' but WHC Abdul Ghafoor Dayo replied that SHO was not available at that time, therefore, he would give receipt and entry of Roznamcha on his arrival and the above property was kept as '*amanat*' in Malkhana. Thereafter, order was received from DPO Shikarpur vide Letter bearing No. EO-EI-9163, dated 06.6.2011 for registration of case against PC Abdul Rehman Bhutto for misappropriation of G-3 Rifle No.90737, five magazines and 120 bullets and for depositing fake Rifle with punched No.90737, as such, FIR was registered.

9. After usual investigation the accused was challaned before the Court by Investigating Officer of P.S. New Foujdari, Shikarpur showing the accused as absconder and after issuance of NBWs the accused was arrested and produced before the trial Court.

10. A formal charge against accused was framed at Ex.2, to which he pleaded not guilty and claimed to be tried vide his plea Ex.3.

11. In order to prove the charge, process was issued against the prosecution witnesses and process server reported that P.W. ASI Rab Dino had expired, accordingly his statement was recorded at Ex.5.

12. In order to prove its case, prosecution examined PW Gulzar Ahmed at Ex.6, who produced copies of relevant registers, reports sent to the DSP and FIR as Ex.6-A to 6-H. PW Dilshad Ali was examined at Ex.7, who produced mashirnama as Ex.7-A. PW Taimor was given up vide statement of ADPP Ex.8. Thereafter, learned ADPP, appearing for the State, moved application Ex.9 for calling PW Mathar Ali. PW Nazeer Ahmed could not be examined as he had been dismissed from service and had shifted to some unknown place

as per statement of process server recorded vide Ex.10. PW Abdul Ghafoor was given up by ADPP vide his Statement Ex.12. PW Manthar Ali was examined at Ex.13, whereas PW Mehrab was examined at Ex.14. PW Toufique Ahmed was examined at Ex.15, who produced mashirnama as Ex.15-A. PW Ali Muhammad was examined at Ex.16, who produced copy of his findings and letter of expert sent by the Rabdino as Ex.16-A & B. Thereafter, learned ADPP closed prosecution side vide his statement at Ex.17.

13. The statement of accused under Section 342 Cr. P.C. was recorded at Ex.18, wherein he pleaded his innocence; however, he declined to examine himself on oath as provided under Section 340 (2) Cr. P.C. nor produced any witness in his defence.

14. After formulating the points for determination in above two cases, recording evidence of the prosecution witnesses and hearing counsel for the parties, learned trial Court convicted and sentenced both appellants by separate judgments, as stated above. Against said judgments these appeals have been preferred by the accused / appellant(s) respectively.

15. I have heard learned counsel for the appellants as well as learned Additional P.G. appearing for the State and perused the material made available before me on the record with their assistance.

16. Learned counsel for the appellants submitted that the offence in two cases had taken place on 19.7.2008 and 31.1.2004 respectively, whereas FIRs were lodged on 18.6.2011, with a delay of about more than two years and seven years respectively, and no plausible explanation was furnished by the prosecution for such an inordinate delay. He further submitted that offence under section 409, PPC is a scheduled offence; however, it was registered at P.S. New Foujdari, Shikarpur and was also investigated by the ordinary police of same police station instead of Anti-Corruption Establishment, therefore it being a material illegality on the part of prosecution is not curable. He next submitted that PW Taimoor, who was mashir of recovery, was not examined by the prosecution in both cases, whereas PW Abdul Ghafoor, who was entrusted the rifle by the complainant Gulzar Ahmed as *amanat*, was not examined in the case of appellant Abdul Rahman, thus there is strong presumption that if said witnesses had been examined, they would not have supported the case of prosecution. He drew attention of the Court towards

evidence of WHC Abdul Ghafoor in the case of appellant Veeram Khan and stated that he admitted in his cross-examination that alleged G-3 Rifle produced by ASI Gulzar Ahmed was not sealed and no mashirnama was prepared at that time in respect of the rifle bearing No. 89346 to be G-3 Rifle. He also drew attention of the Court towards evidence of PW Nazir Hussain, at page 59 of the Paper Book, and submitted that he had stated in clear terms before the trial Court that on 18.6.2011 ASI / Kot Incharge came along with letter of the then SSP and disclosed that the rifle had been stolen away from the Kot, hence he got registered F.I.R. and produced the same before the trial Court at Ex.7-E. Learned counsel further contended that most of the prosecution witnesses denied to have witnessed the incident, hence, the impugned judgment suffers from illegalities and is liable to be set aside. As far as chemical report submitted in the case of appellant Veeram Khan, available at page 81 of the paper book, is concerned, learned counsel submitted that it was issued in the year 2011, viz. two years after the incident, hence no sanctity could be attached to said report.

17. Learned Addl. P.G. appearing for the State, opposed the appeals and stated that the appellants were handed over official rifles by the complainant, which they did not return and instead they produced fake rifles, which fact has been affirmed by the chemical examiner and Armourer respectively, as such, there is no illegality or infirmity, which may warrant interference by this Court in the impugned judgments. As far as registration of the case and its investigation by local police is concerned, he referred to Section 4 of Pakistan Criminal Law Amendment Act, 1958, which, according to him, provides that the ordinary police is also competent to register and investigate the case in respect of scheduled offences and upon completion of investigation the Court concerned was competent to take cognizance of the case.

18. Before discussing the merits of the case, it seems appropriate to first deal with the legal objection raised by the appellants' counsel with regard to the investigation conducted by local / ordinary police of PS New Foujdari, Shikarpur in respect of the offence under section 409 PPC, being a scheduled offence.

19. According to learned Additional P.G., Section 4 of Pakistan Criminal Law Amendment Act, 1958, provides that the ordinary police is also

competent to register and investigate the case in respect of scheduled offenses and upon completion of investigation the Court concerned is competent to take cognizance of the case. I am of the firm view that the assertion made by learned Additional P.G. is totally devoid of force / weight, in view of the well-settled principle enunciated by the Superior Courts in this regard from time to time.

20. In this context, it would be advantageous to refer at this juncture certain judgments pronounced by the Superior Courts.

21. In the case reported as *JALEES AHMAD and 21 others Vs. SPECIAL JUDGE, ANTI-CORRUPTION, D.G. KHAN and 9 others (2015 P Cr. L J 379 [Lahore])*, while dealing with this legal point, Lahore High Court held as under:-

"10. So far as the other aspect of the case is concerned i.e. direction to the S.P.(Investigation), D.G. Khan to conduct investigation and to file report seems to be in excess of jurisdiction exercised by the respondent No.1.

11. The impugned order reveals that the learned respondent No.1 has exercised this power under section 5(6) of the Pakistan Criminal Law Amendment Act, 1958. Same is being reproduced herein under:--

"5(6) for the purpose of trial before a Special Judge, the provisions of Chapter XVIII of the Code of Criminal Procedure 1898 shall not be applicable, but a Special Judge may, in any case where he deems it necessary, order an investigation by any police officer in whose jurisdiction the offence was wholly or partly committed."

12. I am afraid that the said provision of law has been wrongly interpreted by the respondent No.1. Section 5(6) of the Amendment Act, 1958 provides that the Special Judge may order the investigation by any police officer in whose jurisdiction the offence was wholly or partly committed. The object of the Legislature in respect of the said provision of law is very clear. In the instant case, since case F.I.R. was got registered by the Anti-Corruption Establishment, D.G. Khan Division at Muzaffargarh. The learned respondent No.1 could have ordered an officer of the Anti-Corruption Establishment to inquire the case afresh and not the ordinary Punjab Police. The jurisdiction and powers of Punjab police have been contemplated in the Police Order, 2002. According to section 18 of the Police Order, 2002 a mechanism has been provided for the transfer of investigation from one police officer to another and that too after the recommendations of a duly constituted Standing Board. Reliance is placed on the case of "Dr. Ishtiaq Hussain and another v. Special Judge, Anti-Corruption (Provincial), Rawalpindi Division, Rawalpindi and 3 others" (2004 YLR 716). The relevant part of the judgment is reproduced herein under:--

"It is important to mention that it is cordial principle of administration of justice that when law prescribes a particular manner and procedure in which things are required to be done the same must be done in that way and not otherwise at all. From the reading of provision of Anti-Corruption Ordinance, rules framed thereunder in 1985 of the survey of case law, would clinch the issue that the local police has neither jurisdiction nor the powers to investigate the case in respect of the scheduled offences committed by the public servants."

13. *There is no cavil with the proposition that under the Pakistan Criminal Law Amendment Act, 1958 certain powers have been conferred upon the learned Special Judges in terms of section 5(6) of the law *ibid*. The respondent No.1 has failed to interpret the provisions of section 5(6) of the Act, 1958 and has wrongly ordered the S.P. (Investigation), D.G. Khan to investigate the case arising out of the provisions of the Punjab Anti-Corruption Establishment Rules, 1985 framed under section 6 of the Anti-Corruption Ordinance, 1961.*

14. *As held in the above said judgment, the local police neither has the jurisdiction nor the powers to investigate the case in respect of the schedule offences punishable under the Anti-Corruption Ordinance, 1961.*

15. *Moreover, according to the provisions of the Police Order, 2002 an altogether different mechanism has been provided to conduct and regulate a criminal investigation. A police officer can only investigate a criminal case after resorting to the provisions of the said Order and not by any other law. The impugned order dated 16-5-2013 passed by the learned respondent No. 1 is against the spirit of provision of section 5(6) of the Pakistan Criminal Law Amendment Act, 1958, the Anti-Corruption Ordinance, 1961, the Punjab Anti-Corruption Rules, 1958 and the Police Order, 2002. In the wake of these provisions of law the impugned order cannot sustain.*

16. *For what has been discussed above, it is declared that the learned Special Judge Anti-Corruption, D.G. Khan Division at Muzaffargarh while invoking provision of section 5(6) of the Pakistan Criminal Law Amendment Act, 1958 has wrongly exercised jurisdiction while ordering that investigation be conducted by the local/ordinary police, in a case which squarely falls within the ambit of Anti-Corruption Establishment. The impugned order dated 16-5-2013 is hereby set-aside to the extent of orders passed by respondent No.1 to the Superintendent of Police (Investigation), D.G. Khan to conduct investigation into the crime arising out of F.I.R. No.7 dated 19-10-2010 under section 409, P.P.C. and section 5(2)/47, P.C.A. registered at police station Anti-Corruption Establishment, Muzaffargarh."*

22. In the case of *Mohammad Afzal Vs. The State*, reported in PLD 2000 Supreme Court 816, learned Apex Court held as under:

"The record reveals that though C.L.A. personnel knew it very well that they were not empowered to investigate this matter, yet, they had done so and in this way deliberately violated the provisions of section 156, Cr.P.C. Although they had prior information about the offence which was

likely to be committed, yet, they had not passed on this information to the concerned police and took upon themselves the task of investigation which, we feel, was not proper. What they had done was in violation of law and was also against the principle of supremacy of law.

23. Yet in another case reported as **MUHAMMAD ZAMAN Vs. ADDITIONAL SESSIONS JUDGE and others**, reported in **2023 P Cr. L J 834 [Lahore (Multan Bench)]**, it was held by Lahore High Court as under:

"Therefore, police was not authorized to seize non-custom paid vehicle; The Honourable Peshawar High Court has held in case reported as "Additional Director, Intelligence and Investigation v. Banaras Khan" (2013 PTD 1988) [Peshawar High Court] as follows:-

17. The police personnel who seized the vehicles in question, were not authorized officer under the Custom Act, and they were never conferred with such power of seizer, in case when there was no tempering of chassis etc. since then all the further proceeding conducted in consequence thereof in regard to illegal seizure falls to ground and the vehicles shall not be out rightly confiscated in the shield of S.R.O. 499(I)/2009.

In the same judgment further reliance was upon an earlier decided case in the context of this query, which the court has referred as under:-

18. This proposition has been already settled by the learned Tribunal Karachi Bench, Karachi in case of Sheikh Nazir Ali v. Customs Central and Excise and others (PTCL 2002 CL 340) and thereafter consistently followed by courts of the country in this regard. This court in an unreported case of "Additional Director Intelligence and Investigation, Peshawar v. Sartaj Khan" [T.R. 5-P/20120] decided on 5-6-2012 has held similar view as:--

"It was also held that under the relevant provision of Customs Act, 1969, the police have no power to take into possession of the said vehicle."

24. In view of above legal position, it can safely be held that in instant case the investigation carried out by the police of P.S. New Foujdari, Shikarpur was not warranted under the law and, in fact, the same should have been conducted by the police of Anti-Corruption Establishment.

25. Now I advert to the merits of the case. It seems that in the case relating to Cr. Appeal No.S-23 of 2017, the FIR was registered after a delay of about more than two years as, according to the complainant ASI Gulzar Ahmed, on 19.7.2008 he had issued and handed over G-3 Rifle bearing No.89346, with five magazines and 100 bullets of G-3 to accused / appellant PC Veeram Khan Luhar for performing his official duty who remained absent from his duty from 27.7.2008 and did not deposit the Arm and Ammunition, therefore, such report was sent to the high-ups and on 01.9.2009 the accused appeared and

brought the rifle etc. in presence of PC Dilshad and PC Taimur. On checking, it was found that the Rifle was not with same number and that it was a fake rifle. However, F.I.R. was lodged on 18.6.2011. No explanation has been furnished by the prosecution as to why F.I.R. was not registered when the rifle and magazines etc. were not deposited by the accused/appellant on the day when the same were to be deposited under the relevant procedure / practice and even on the day when the accused / appellant had brought and produced a fake rifle etc. before the complainant. In the circumstances, apparently, in the case of appellant Veeram Khan FIR was registered after an inordinate delay of more than two years. Same is the position in other case relating to appellant Abdul Rahman, wherein the delay is even for a longer period i.e. about seven years, as the Arms and Ammunition were issued to this accused on 31.01.2004. No explanation, at all, has been furnished by the prosecution for such a long delay in both the cases. Needless to emphasize that unexplained delay in lodging the FIR creates doubts about the involvement of actual culprits as the probability of manipulation in such circumstances cannot be ruled out. On the point of delay in lodging FIR, reference may be made to a judgment pronounced by Hon'ble Supreme Court in the case of *Ayub Masih v. The State*, reported in PLD 2002 SC 1048, held as under:

*“The unexplained delay in lodging the F.I.R. coupled with the presence of the elders of the area at the time of recording of F.I.R. leads to the inescapable conclusion that the F.I.R. was recorded after consultation and deliberation. The possibility of fabrication of a story and false implication thus cannot be excluded altogether. **Unexplained inordinate delay in lodging the F.I.R. is an intriguing circumstance which tarnishes the authenticity of the F.I.R., casts a cloud of doubt on the entire prosecution case and is to be taken into consideration while evaluating the prosecution evidence.** It is true that unexplained delay in lodging the F.I.R. is not fatal by itself and is immaterial when the prosecution evidence is strong enough to sustain conviction but it becomes significant where the prosecution evidence and other circumstances of the case tend to tilt the balance in favour of the accused.”*

26. In the case reported as *Sabir Hussain V. The State* (2022 YLR 173), it was held as under:

“9. The complainant has knowledge about missing of the deceased on 13.07.2019, but despite that, the complainant did not lodge the report, and he lodged the report on 16.07.2019 at 10:30 a.m. Nothing came on record about lodgment of the report of missing of the deceased by the complainant in Levies Thana. It has also come on record that the dead body of the deceased was recovered from the water bank of the Madrasa on 16.07.2019 at 6:30 a.m., and the FIR was lodged on the same date at 10:30 a.m., with a delay of four hours

from the recovery of dead body of the deceased. The lodgment of the FIR with delay by the complainant creates a reasonable doubt in the prosecution case. Reliance in this behalf is placed on the case of Mehmood Ahmed and 3 others v. The State and another (1995 SCMR 127)."

27. From scrutiny of the evidence of prosecution witnesses, it seems that they have made certain material admissions from which discrepancies / lacunas emerge in the investigation / prosecution case, which create serious doubts, therefore, benefit whereof is to be extended in favour of the accused as a matter of right.

28. In case of appellant Veeram Khan (Criminal Appeal No.S-23 of 2017), complainant namely ASI Gulzar Ahmed has admitted in his cross-examination that the rifle produced by the accused was kept with WHC Abdul Ghafoor Dayo of P.S New Foujdari as 'Amanat', FIR was lodged with the delay of about fifteen months. As far as the admission that accused produced rifle before him bearing No.90123 is concerned, it was taken by him to DSP Headquarter, Shikarpur along with the accused; however, this fact was not stated in the FIR nor he deposed in his examination-in-chief. He further admitted that the rifle bearing No.90737 allegedly produced by P.C Abdul Rehman was also taken by him to DSP Headquarter and PC Dilshad as well as PC Taimour were its attesting mashirs/witnesses, who are subordinates to him. He further admitted in his cross-examination that the then DSP Headquarter in his enquiry report mentioned that; WHC Abdul Ghafoor Dayo was responsible for misappropriation and changing of the rifle which was produced by the accused... No receipt was issued by WHC Abdul Ghafoor Dayo as at the time of depositing rifle with him even no entry in respect of depositing of rifle was made by ASI Abdul Ghafoor Dayo in daily diary of the police station on the pretext that SHO was not available and it will be recorded after arrival of the SHO. He further admitted that no mashirnama was prepared by him regarding production of fake rifle by the accused before him, even he did not remember as to whether the rifle allegedly produced by the accused was got checked by him through Armourer. PW/PC Dilshad in his cross-examination admitted that he do not know whether the rifle bearing No.90123 produced in the Court, was the same and was produced by the accused. He as well as PC Taimour being subordinates to ASI Gulzar Ahmed were made witnesses / mashirs of the case; however, no mashirnama of recovery of the rifle was prepared by ASI Gulzar Ahmed. The rifle so

produced by the accused was got checked through Armourer by ASI Gulzar Ahmed. He might have obtained such certificate from the Armourer; however, accused with fake rifle then taken by ASI Gulzar Ahmed to DSP Headquarter; however, all above has not been stated by him in his 161 Cr.P.C statement. He further admitted that no certificate was issued nor any entry was kept in Roznamcha by WHC Abdul Ghafoor Dayo. PC/HC Nazeer in his examination-in-chief deposed on 18.06.2011 that he was posted at P.S New Foujdari as WHC and at about 1800 hours ASI/Kot Incharge came along with a letter issued by the then SSP and disclosed that rifle had been stolen from the Kot, therefore, he registered the FIR. In his cross-examination, he admitted that ASI came with a letter of DPO with directions to lodge the FIR, but no such facts were incorporated in the FIR even said letter was not produced or exhibited in this case. He further admitted that the offence had allegedly occurred in the year 2009 and the FIR was registered in the year 2011. As far as entry as well as receipt with regard to keeping rifle as 'amanat' was also not produced before him. PW/ASI Abdul Ghafoor had admitted in his cross-examination that G-3 rifle produced by Gulzar Ahmed was not sealed and no mashirnama was prepared at that time. He further admitted that ASI Gulzar Ahmed was the Kot Incharge and he was not expert; however, his duty was only to issue and receive the arms and ammunitions. He had admitted that rifle issued to PC Abdul Rehman / appellant, produced by ASI Gulzar Ahmed was not in sealed condition and ASI Gulzar Ahmed taken back the rifle with him unofficially even no entry was made nor he signed any receipt. He further admitted that DSP Headquarter had conducted the inquiry regarding missing of the rifle. PW Inspector / SHO Ali Mohammad in his cross-examination admitted that he had not sent G-3 rifle to the expert nor he had gone through the opinion of the expert. He further admitted that said rifle was not sealed nor its mashirnama was prepared by ASI Gulzar Ahmed. At the time of inquiry, the case was not registered against the accused. He further admitted that incident had occurred in the year 2001 and the FIR was lodged on 18.11.2006. He further admitted that accused being Government official and the offence with which he was charged, was a scheduled offence, therefore, case should have been registered with Anti-Corruption Police regarding misappropriation. PW/ASI Mehrab Ali in his cross-examination had admitted that WHC Abdul Ghafoor had handed over the rifle to him which was not in sealed condition even no certificate of the Armourer was given to him. He was

not in position to disclose the entry number nor produced the same while producing G-3 rifle before the I.O. PW/ PC Toufique Ahmed in his cross-examination admitted that the rifle as well as bullets were not sealed prior to production to ASI Rab Dino; besides, the police station is situated in heart of the city where houses and shops are around the P.S as well as main road and traffic was plying thereon but the ASI did not ask any person to act as mashir. Though ASI had prepared mashirnama at Malkhana of the property G-3 rifle, he was not expert to recognize it to be genuine or otherwise. PW/PC Aijaz Ali in his cross-examination had admitted that he had not produced expert opinion and the letter wrote to DPO was not attested. He admitted that rifle was produced by WHC Abdul Ghafoor and the same was deposited by the present accused as 'amanat'. He did not know in respect of any entry in the Roznamcha.

29. Likewise, in the case of appellant Abdul Rahman (Criminal Appeal No.S-24 of 2017) too, prosecution witnesses have made certain material admissions which go in favour of the accused. Complainant, ASI Gulzar Ahmed in his cross-examination admitted that P.S Anti-Corruption is situated just adjacent to the office of DPO, Shikarpur. The offence is punishable under Section 409 PPC and being scheduled one is cognizable offence. He was directed by DPO Shikarpur to lodge the FIR at P.S Foujdari which he did. No mashirnama was prepared by him when the present accused produced fake G-3 rifle. The incident allegedly occurred on 03.04.2006 while the FIR was registered on 18.06.2011. G-3 rifle produced by the accused was kept with WHC Abdul Ghafoor Dayo as 'amanat', but no receipt was obtained from him as the same would be issued after arrival of his SHO. PW/PC Dilshad in his cross-examination admitted that no private person was called by the I.O to act as mashir. The Armourer was available there at the time of production of rifle by the accused, which was sent to him for verification, he on verification issued such certificate within 1/2 days and no mashirnama was prepared by ASI Gulzar Ahmed when rifle was produced by the present accused. Fake rifle was produced by the present accused and such report was made by ASI Gulzar Ahmed and submitted with the high ups, probably to Line Officer or DSP. The enquiry in respect of production of fake rifle by the present accused was conducted by DSP, Headquarter Shikarpur. PW/PC Manthar Ali, who was posted at the relevant time as Armourer, deposed in his cross-

examination that property viz. rifle is G-3 and is in working condition. The certificate Ex.6-D was issued by him; however, his name was not placed in the charge-sheet as prosecution witness nor was he examined by the I.O during investigation; besides, he admitted that he was not a qualified ballistic expert and he had not checked the bullets. The rifle produced before him by the Kot incharge was not in sealed condition and he had not made any entry in the Roznamcha regarding checking of the weapon nor produced the same in this case. ASI Gulzar Ahmed had not produced any mashirnama of the weapon even it was not specifically mentioned in the mashirnama from whom the rifle was seized. PW/ASI Mehrab Ali in his cross-examination admitted that WHC Abdul Ghafoor had handed over the instant rifle to him which was not in sealed condition at the time of its handing over and no such certificate of the expert/Armourer was given to him even he did not know the number of entry nor produced the same while producing G-3 rifle before the I.O. P.W/PC Toufique Ahmed admitted in his cross-examination that rifle and the bullets were not sealed prior to production to ASI Rab Dino. The police station is situated in the heart of the city where many people used to remain available; however, no person was available there. ASI did not ask any person to act as mashir and ASI had prepared the mashirnama at Malkhana though he had admitted that property is G-3 rifle; however, he was not expert in respect of its genuineness. PW/ Inspector Ali Mohammad in his cross-examination admitted that he had not sent G-3 rifle to expert and it was not in sealed condition nor its mashirnama was prepared by ASI Gulzar Ahmed. At the time of enquiry, the case was not registered against the accused. According to FIR, incident had occurred in the year 2011. According to record produced by ASI Gulzar Ahmed, the rifle bearing No.90737 was issued to the PC Abdul Rehman. He did not remember whether the Kot incharge shown him receiving receipt of the accused at the time of enquiry.

30. From perusal of the evidence adduced by the prosecution as well as discrepancies and admissions/lacunas left by the prosecution itself, the prosecution itself had dented its own case by not following the practice, procedure and the law. Moreover, alleged rifles were not sealed at the time of their recovery nor such memos were adduced in evidence at the time of trial. Due to such discrepancies and faults on the part of prosecution, evidentiary value of the prosecution witnesses has been vitiated by the prosecution itself

which creates a lot of doubts into its veracity, thus, by following the dictum laid down by the Apex Court in its numerous esteemed judgments, benefit of doubt ever goes to favour the accused. It further seems that PW Taimoor Ali was the mashir of recovery in both the cases; however, he was given up and was not examined by the prosecution. Likewise, PW Abdul Ghafoor who, according to the complainant, was handed over the Arm and Ammunition to be kept as 'amanat' was also given up in the case of appellant Abdul Rahman. In this view of the matter, in the light of Article 129(g) of the Qanoon-e-Shahadat Order, 1984, strong inference / presumption could be gathered that had the said witnesses been examined, they would not have supported the case of prosecution.

31. In this connection, reference may be made to a dictum laid down by Honourable Supreme Court in the case of *Abdul Ghani Vs. The State* reported in **2022 SCMR 2121**, wherein a Full Bench of Honourable Supreme Court held as under:

"Thereafter, according to Noor Ullah Khan, S.I. (PW-4) on 08.06.2011 he sent the sample parcels to the office of Chemical Examiner but according to the report of Chemical Examiner the sample parcels were delivered there by one Head Constable No. 25 on 10.06.2011 but the said Head Constable was not produced by the prosecution during the trial. The learned State Counsel could not explain as to why the said Head Constable was not produced to confirm the safe transmission of the sample parcels to the office of Chemical Examiner so an adverse presumption under Article 129(g) of the Qanun-e-Shahadat Order, 1984 can be drawn against that person that he is not supporting the prosecution case."

32. It is also noteworthy that in the case of appellant Veeram Khan, report of Chemical Examiner was issued in the year 2011. In fact, the rifle and magazines etc. were brought and produced by the accused Veeram Khan before the complainant on 01.9.2009, whereas report of the ballistic expert was issued on 01.7.2011 i.e. after a delay of 22 months, hence no sanctity could be attached to said report.

33. In this connection, reference may be made to a recent decision of this Court rendered in the case of *GULLAB alias ARO Vs. The State*, reported in **2023 P Cr. L J 958**, wherein it was held as under:

"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. Moreso,

there was 09 days delay in sending weapon to the Ballistic Expert. 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."

34. In the case of *Amanullah Vs. The State*, reported in **2022 YLR 1681**, this Court held that *positive forensic science laboratory report qua the crime empties and weapons being delayed without furnishing any plausible explanation, would not advance the prosecution case.*

35. In other case relating to appellant Abdul Rahman, the Rifle allegedly brought and produced by the accused before the complainant, was not even sent to the ballistic expert. In fact, according to the complainant himself, it was sent for verification to the Armourer namely, PW Manthar Ali who, as stated above, has categorically admitted in his cross-examination that he is not a qualified ballistic expert, despite that he issued the certificate Ex.6-D. He also admitted that neither his name was mentioned in the charge sheet as a witness, nor his statement was recorded during the investigation by the I.O. According to him, the Rifle was not sealed at the time when the same was produced before him, and that he did not make any entry in the roznamcha regarding the checking of weapons, nor produced the same before the trial Court. He also admitted that he had remained with ASI Gulzar in order to assist him.

36. In view of above, the certificate issued by this witness in respect of the rifle allegedly deposited by accused Abdul Rehman is also of no evidentiary value.

37. Apart from above, there also seems to be violation of Section 103 Cr.P.C. as no private person was associated as mashir, although it has categorically been admitted by prosecution witnesses that private persons were available at the relevant time. PW Dilshad admitted in his cross-examination, "No private person was called to act as mashir." In other case, he admitted, "No private person was called by the Investigating Officer to act as mashir in this case."

38. Besides, PW WHC Abdul Ghafoor in his cross-examination admitted that alleged G-3 rifle produced by Gulzar was not sealed and no mashirnama

was prepared at that time in respect of rifle bearing No.89346 to be G-3 rifle. He admitted as under:

“It is correct to suggest that the Rifle G-3 produced by the Gulzar Ahmed was not sealed and no mashirnama was prepared at that time.”

39. Likewise, P.W. Manthar also made similar admission. According to him, *“The Rifle was not sealed at that time.....Gulzar had not produced any mashirnama of the weapon.”* This also creates doubt in the prosecution case.

40. It is also astonishing, rather fantastic on the part of the prosecution that although in the case of appellant Abdul Rehman the alleged offence relate to the year 2004 whereas in other case the alleged incident pertains to the year 2008, despite that the FIRs in both the cases were registered on one and same day in the year 2011. It is not understandable that what was the fun in not taking any action in respect of the former case which allegedly took place in the year 2004 and then registering the FIR in said case along with the latter case simultaneously. This gives strength to the plea raised on behalf of the accused/appellants that the rifles were changed by other police officials/prosecution witnesses. Besides, admittedly a departmental enquiry was also conducted in respect of alleged offence, but neither any enquiry report has been produced during course of evidence, nor the enquiry officer who allegedly conducted the enquiry was examined by the prosecution. This also puts a dent in the prosecution case.

41. 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. It has also been held by the Superior Courts that conviction must be based and founded on unimpeachable evidence and certainty of guilt, and any doubt arising in the prosecution case must be resolved in favour of the accused. In instant cases prosecution does not seem to have proved the allegations against the accused/appellants by producing **unimpeachable** evidence, thus doubts have been created in the prosecution version. In the case reported as Wazir Mohammad Vs. The State (1992 SCMR 1134) it was held by Honourable Supreme Court as under:

*“In the criminal trial whereas it is the duty of the prosecution to prove its case against the accused to the hilt, but **no such duty is cast upon the accused, he has only to create doubt in the case of the prosecution.**”*

42. In another case reported as *Shamoon alias Shamma Vs. The State (1995 SCMR 1377)* it was held by Honourable Supreme Court as under:

“The prosecution must prove its case against the accused beyond reasonable doubts irrespective of any plea raised by the accused in his defence. Failure of prosecution to prove the case against the accused, entitles the accused to an acquittal.”

43. Since, the prosecution had alleged that appellants had misappropriated the official weapons viz. the rifles but said charge had not been established by the prosecution through its evidence. In case of Veerum Khan, WHC Ali Ghafoor stated and admitted in his cross that alleged G-3 rifle produced by ASI Gulzar Ahmed was not in sealed condition nor its mashirnama was prepared at the time of its recovery. Moreover, one of the PWs namely Nazir Hussain had stated in clear terms before the trial Court that on 18.06.2011 ASI/Kot Incharge came along with a letter issued by the then SSP, and disclosed that the rifle had been stolen away from the Kot. Most of the witnesses denied to have witnessed the incident; besides, the laboratory report was also issued in the year 2011 viz. two years after the incident. Though per prosecution case, appellants allegedly had produced alleged rifles before the concerned yet no such entry was kept by the WHC nor any memo of its recovery was prepared. Even the officer before whom, the appellants had allegedly produced the rifles, did not issue any receipt or acknowledgement duly signed / verified by the appellants over the memo/register or any document; hence, it cannot safely be said that the appellants had produced alleged rifles as per claim of the prosecution. Even at the time of producing of rifles before the concerned, no other witness was available or arranged to witness the recovery proceedings from the appellants; hence, in such a situation, question of misappropriation as defined under Section 409 PPC was not established by the prosecution.

44. 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 and not as a grace or concession. In present cases, there are various admissions in the evidence of the prosecution witnesses which created doubts and put dents in the prosecution case. In instant cases, recovery memos of alleged misappropriated rifles were not prepared by the concerned nor were adduced / exhibited before the trial Court at the time of recording evidence.

The appellants had allegedly returned / deposited alleged G-3 rifles to the Kot Incharge; however, no such entry or memo was prepared by ASI Gulzar Ahmed nor subsequent entry was brought on record that on which date SHO allegedly had returned (to his office) and then the rifles being kept under Amanat were shown to have been produced by the appellants. Such discrepancy on the part of prosecution has vitiated veracity of its evidence, therefore, no sanctity could be attached to the evidence. The delay so occasioned by the police in discharging their lawful duties more particularly showing recoveries of the rifles from the appellants with an unexplained delay had casted serious doubts on the veracity of prosecution evidence. Such factors created reasonable suspicion which entitled the appellants to acquittal. It is settled principle of law that an accused cannot be deprived of benefit of doubt merely there is only one circumstance; however, in instant case, a lot of doubts have been created by the prosecution itself and benefit of the same should be extended in favour of the appellants. Reliance can be placed upon the case of *Muhammad Akram v. The State* (2009 SCMR 230), wherein Honourable Supreme Court has held as under :-

"It is axiomatic principle of law that in case of doubt, the benefit thereof must accrue in favour of the accused as matter of right and not of grace. It was observed by this Court in the case of Tariq Pervez v. The State 1995 SCMR 1345 that for giving the benefit of doubt, it was not necessary that there should be many circumstances creating doubts. If there is circumstance which created reasonable doubt I a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of doubt not as a matte of grace and concession but as a matter of right."

45. For the forgoing reasons, by two short orders both dated 19.02.2024 these Criminal Appeals were allowed. Consequently, the conviction and sentence(s) awarded to appellants in both cases, vide impugned judgments dated 16.02.2017, penned down by Special Judge Anti-Corruption (Provincial) Larkana in Special Cases No.35 of 2011 of 36 of 2011 arising out of F.I.Rs No.120 of 2011 and 121 of 2011 registered at P.S New Foujdari, Shikarpur were set aside and both appellants were acquitted of the charges by extending benefit of doubt to them. The appellants were present on bail, their bail bonds stand cancelled and sureties were directed to be discharged. These are the reasons for said short order(s).

Office is directed to place a copy of signed judgment in the connected file.

JUDGE