THE IN HIGH COURT OF SINDH AT KARACHI.

Criminal Appeal No. 65 of 2002.

PRESENT: Mr. Justice Shabbir Ahmed.
Mr. Justice Muhammad Sadiq Laghari

JUDGMENT

Date of hearing: **20.11.2002.**

Appellant: **Syed Musaddiq through Mr. Khalid Mehmood, Advocate.**

Respondent: **State through Mr. Arshad Lodhi, A.A.G.**

SHABBIR AHMED, J.- ***The appellant Syed Musaddiq s/o. Syed Mehmood Ali has been convicted for the offence under Section 13-Darms Ordinance on alleged recovery of unlicensed T.T. Pistol without number and live bullets on 2.11.1996 sentence of three years RI was awarded to him.***

2. The appellant has assailed judgment of conviction through the present appeal. The brief facts of the prosecution case according to the FIR lodged by SI Qaiser Ali Shah at Police Station Liaquatabad on 2.11.1996 at o415 hours are that the informant while posting in CIA Civil Lines was investigating Crime No. 536/96, under Section 365-A PPC of P.S. Gulshan-e-Iqbal, alongwith Sub-Inspector Choudhry Asad Aleem. One accused namely Muhammad Umer Farooq was in police custody during his

interrogation he disclose the present accused and led the police party to the house No. 15/1 B Liaquatabad 'B' area and the police party arrested the applicant with two other persons namely Babar s/o Siraj Ali and Rauf Ahmed Nagori s/o Muhammad Ismail, all wanted in the aforesaid crime. On their personal search one T.T. Pistols without number and few bullets were recovered from each of them. Combined memo of arrest and recovery was prepared by Sub-Inspector Syed Qaiser Ali Shah in presence of ASI Muhammad Siddiq Abbas and PC Saleem Shah. The appellant failed to produce the licence to Sub-Inspector Qaiser Ali Shah who recorded own statement u/s 154 Cr.P.C. and dispatched the same to the PS Liaquatabad. On the basis of his 154 Cr.P.C. statement the FIR was registered and the investigation was given to him. After investigating the case he sent the investigation papers to the Police Station Liaquatabad. On 15.12.1996 ASI Ghulam Habib submitted the challan before STA Court No. III Karachi. The matter was subsequently transferred to Sessions Judge Karachi Central who was assigned the jurisdiction under STA, subsequent to the Court STA No. III Karachi, Central.

3. At the trial the accused denied the charge. The prosecution, in order to prove the charge against the appellant examined P.W. Muhammad Siddiq (P.W.2), recovery Musheer P.W. Syed Qaiser Ali (P.W.3). They claimed that during investigation of the Crime No. 536/1996, the applicant was arrested and the unlicensed Pistol with

five bullets in its magazine was recovered from him under the recovery memo as Ex.5A.

4. The appellant met the prosecution with bear denial and pleaded his innocence and false implication by police. He examined himself under the provision of Section 340(2) on oath wherein he deposed that he was arrested from his house at about 9 or 9:30 A.M. No weapon was recovered from his possession and police has falsely implicated him in the case as he acted witness of Nikah of one Shamila with Rauf.

5. After completion of the trial the trial Court recorded the findings of conviction and sentence as stated hereinabove by judgment dated 9.3.2002 which is impugned through the present appeal.

6. We have heard the learned counsel for appellant and learned AAG for the State and with their assistance appraised the evidence recorded during the trial.

7. The learned Advocate representing the appellant argued that according to prosecution, the appellant was arrested on 2.11.1996 and FIR was also registered on the same date but the Charge sheet/challan was presented on 16.12.1996 which was in contravention of mandatory requirement of Section 173 Cr.P.C. therefore entire proceeding against the appellant stand vitiated. In support of his contention learned Advocate referred to the case of Asma Khatoon Vs. Syed Shabbir Shah, ACM & FCM Court-IV,

Karachi West and two others, PLD 1996 Karachi 517, Mooso Vs. The State, 1996 P.Cr.L.J. 361 and Abdul Karim @ Raja and another Vs. The State, 1996 P.Cr.L.J. 503. It is also contended by the learned Advocate that the search of the house from where the appellant is said to have been arrested and recoveries made was effected without associating two respectable persons of the locality, therefore these proceedings were in violation of Section 103 Cr.P.C. According to him the house was situated in a thickly populated area and private persons could be joined for witnessing the arrest and recoveries but the police did not make attempt to associate them therefore the only evidence of police official can not be believed.

8. The learned Advocate further argued that the weapon was neither sealed nor sent for examination to Ballistic expert in order to prove it to be serviceable one . In absence of any positive report from the fire arm expert it can not be said that the weapon allegedly recovered was in working order. Fourth and the last ground agitated was that the alleged recovery was made individually from three persons under a joint Mashirnama therefore it lost evidentiary value.

9. The learned State counsel defended the conviction. He was however very brief in making his submissions. He contended that the trial proceeding do not vitiate for belated submission of challan. That the house was not searched and only arrest of appellant was effected and the recovery was in the result of his personal search therefore the compliance of Section 103 was not essential. He

contended further that the weapon was also not required to be sealed or sent for examination in case for possessing the arms only when no allegation of its use was levelled.

10. Undisputedly, the charge sheet in the present case was submitted 26 days after expiry of 17 days period prescribed under Section 173 Cr.P.C. However delay in submission of challan in disregard of Section 173 Cr.P.C. by itself does not vitiate the entire proceedings. No doubt it is a statutory requirement to submit the report under Section 173 Cr.P.C. at the most within seventeen days, but due to absence of proper discipline in the police department and lack of sense of responsibility in the officials delay in submission of such report has become a common feature now a days .On such failings on the part of police only the continued confinement of a person if any beyond the period of detention authorised by Magistrate will amount to be an unlawful confinement and will not reduce to nullity the entire proceedings including the registration of FIR, collection of evidence and the taking of the cognizance by the competent Court and trial proceedings. The disobedience of the direction of Section 173 by the Investigating Officer, if causes or is likely to cause injury to any person may warrant action u/s 166 PPC against him.

In the cases of Manu " Minthar V. The State of Dehli, reported in AIR 1955 SC 196 the requirement of Section 173(1) has been held to be directory. Submission of belated report after the expiry of the period fixed by Section 173 although not the

compliance is directed by the provision, can be considered substantial compliance. Even other wise, taking of cognizance by the Court on a belated police report is not prohibited under the provision of Section 190(1) Cr.P.C. It can not be maintained that only the report submitted within prescribed period can be the foundation of jurisdiction of Court for taking cognizance.

11. In Asma Khatoon V. Syed Shabbir Shah's case (Supra) the accused was set at liberty for the reason that his continued confinement had become unlawful due to non compliance with the acquirement of Section 137 Cr.P.C. and for violation of constitutional guarantees. It was the case where the matter was dealt with before submission of the report under Section 173.

12. With much regards for our brothers having passed the judgments in two other cases of Karachi referred to by the appellant's learned Advocate we are unable to subscribe the view expressed by them which is not in harmony with the correct and settled legal position

13. The arrest of the appellant is alleged to have been made from a house No. 15/1, B. Area, Liaquatabad on the pointation of co-accused already in police custody and not in the result of search of the house. The recovery was incidental in consequence of the arrest. In such circumstances the compliance of Section 103 Cr.P.C. was not imperative. In the case of Mir Muhammad v. The State (1995

SCMR 614), it was held that the recovery on the pointation of accused was relevant under Article 40 of the Qanoon-e-Shahadat 1984 and association of two respectable of the inhabitant of locality was not required in. It was further held that the plain reading of Section 103 Cr.P.C. would show that the provision of this section apply to a case where the police conduct search of a house/place to recover the article for which search is to be made. The same opinion was re-affirmed in the cases of State V. Shanker (1979 SCMR 1000) and Muhammad Akber Vs. the State (1975 SCMR 693).

14. The objection about sealing of the weapon and its examination by the fire arm expert also does not have force. Present case is of possessing the Arms and ammunitions and not the use thereof. Where matching of empties with the weapons is felt necessary for establishing the fact that the weapon recovered was used in the crime. It is nobody's case that the weapon produced before the Court was not serviceable. Normally, when the weapon is produced before the Court, it can easily form an opinion about its capability to fire. Ordinarily it is not the point of science or art indicated in Article 59 of Qanoon-e-Shahadat Order 1984 In cases like present one the opinion of expert become necessary when the Court requires it in view of the controversy about the condition of weapon finding it difficult to take decision in that respect. Otherwise, in the cases of possession of the arms, the sending of the weapon for expert opinion is not the requirement of law. Moreover in present case bullets/ammunition are also said to have been

recorded together with the weapon, therefore, absence of expert opinion regarding the weapon is not of much significance.

15. Now we come to the last ground agitated by the appellant's learned Advocate, this ground has much weight in it. Although the making of a combined mashirnama in respect of recovery made from three persons at same time by itself is not fatal to the prosecution. But here one T.T. Pistol and some bullets alleged to have been recovered from three persons each at the same time and the memo of arrest/recovery does not indicate, any feature distinguishing the pistol or bullets from each other nor it shows that articles recovered from each of the persons were sealed/packed separately or any steps were taken at the time of recovery for their individual identification with reference to the person from whose possession those were recovered. In evidence also nothing such came from the witnesses which could prove that the weapon and bullets produced before the Court were recovered from the appellant. In absence of clear and categorical evidence in that respect it will be absolutely unsafe to believe that the appellant had been possessing the pistol produced before the trial Court. The question of joint recovery memo and evidentiary value thereof was dealt with by the Supreme Court in State Vs. State Vs. Bashir, PLD 1997 Sc. 408, observed as under:-

> **"Simpliciter the fact that there is a joint Mashirnama of recoveries of incriminating articles, may not be fatal if the same identifies each of the recovery with the accused concerned with all relevant particulars but if**

such a joint Mashirnama is vague and cannot identify with certainty the articles recovered from a particular accused, such a Mashirnama cannot be relied upon."

16. Thus the prosecution evidence does not prove beyond any reasonable doubt that the pistol and bullets produced before the Court were actually recovered from the possession of the appellant. He therefore, deserves benefit of doubt. Consequently, we set aside the judgment of conviction. Resultantly, the appellant is acquitted to the charge. He be released forthwith if not required in any other case. With this order the appeal is accepted.

JUDGE

JUDGE