

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

Cr. Appeal No.S- 271 of 2019

Date of Hearing: 26.03.2021
Date of Judgment: .03.2021

Appellant: Ameer Bux s/o Arbab Ali Mallah (present on bail)
through Mr. Allah Bux Shar, Advocate.

The STATE: Through Mr. Shewak Rathore,
D.P.G Sindh.

J U D G M E N T

NAIMATULLAH PHULPOTO, J.- Ameer Bux Mallah appellant was tried by learned 2nd Additional Sessions Judge, Shaheed Benazirabad in Sessions Case No.617/2018, arising out of Crime No.05/2018 registered at P.S Khan for offence u/s 23(a) Sindh Arms Act, 2013. On the conclusion of the trial, vide judgment dated 02nd October 2019, the appellant was convicted for offence u/s 23(1)(a) of Sindh Arms Act and sentenced to suffer RI for one year and to pay the fine of Rs.20,000/-, in case of default in payment of fine, the appellant was directed to undergo SI for one month more. Appellant was extended benefit of Section 382-B Cr.P.C.

2. Brief facts leading to the filing of appeal are that on 25.11.2018 at 1600 hours, complainant / SIP Nabi Bux alongwith his subordinate staff left police station vide roznamcha entry No.8 for patrolling. After patrolling from different places when they reached at abandoned Meckaro Bungalow near Bacha Band at 1630 hours, they saw one person standing there who on seeing the police party tried to slip away but was apprehended. Due to non-availability of private persons PCs Ghulam Mustafa and Hakim Ali were made as mashirs. On enquiry accused disclosed his name as Ameer Bux son of Arbab Ali Mallah (the present appellant). From his personal search one 12 bore pistol from the right fold of his shalwar and two cartridges were recovered from his side pocket and cash of Rs.100/- were secured by complainant in presence of the mashirs PCs Ghulam Mustafa and Hakim Ali. Mashirnama of arrest and recovery was prepared at spot. Thereafter, accused and case property were brought at police station where FIR bearing crime No.05/2018 was registered against the accused on behalf of State for offence u/s 23(1)(a) of Sindh Arms Act, 2013.

3. After usual investigation, challan was submitted against accused under Sections 23(i)(a) Sindh Arms Act, 2013.

4. Trial Court framed charge against appellant at Ex.2. Appellant pleaded 'not guilty' to the charge. Prosecution in order to prove its case examined complainant SIP Nabi Bux (PW-1) and mashir PC Ghulam Mustafa (PW-2). Thereafter, prosecution side was closed.

5. Trial court recorded the statement of accused under section 342 Cr.P.C, in which he claimed false implication in this case and denied the prosecution allegation of recovery of 12 bore pistol from his possession. Appellant did not lead any evidence in his defence and declined to give statement on Oath. Trial court on the assessment of evidence brought on record convicted and sentenced the appellant, as stated above. Hence this appeal is filed.

6. Facts of this case as well as evidence find an elaborate mention in the judgment of the trial Court, hence I avoid repetition and duplication.

7. Mr. Allah Bux Shar, learned advocate for appellant mainly contended that all the PWs are police officials; that appellant was arrested from the main road on 25.11.2018 at 1630 hours but the SHO did not call any independent person of the road to make them as mashir in this case. It is further submitted that according to mashirnama of arrest and recovery two (02) cartridges were recovered from the possession of appellant but surprisingly five (05) cartridges were sent to the Ballistic Expert as per his report. Lastly, it is submitted that description of the pistol has not been mentioned in the mashirnama and weapon has been foisted upon the accused. In support of his submissions he has relied upon the case reported as Muhammad Achar v. The State (2001 P.Cr.L.J 1762), Kamal Din alias Kamala v. The State (2018 SCMR 577).

8. Mr. Shewak Rathore, learned D.P.G half heartedly supported the impugned judgment and stated that prosecution has no explanation with regard to sending of five (05) cartridges to the Ballistic Expert when only two (02) cartridges were recovered from the possession of accused.

9. I have carefully heard the learned counsel for the parties and scanned entire evidence available on record.

10. Record reflects that police party left for patrolling on 25.11.2018 at 1600 hours. According to prosecution case accused was found going armed at abandoned Meckaro Bungalow near Bacha Band at about 1630 hours. He was surrounded and caught hold and pistol was recovered from him. Sub Inspector Nabi Bux made no efforts to associate any private person to witness the recovery proceedings though the availability of private persons during day hours around the place of recovery could not be ruled out. I am conscious of the fact that provisions of

Section 103, Cr.P.C are not attracted to the case of personal search but in the instant case, omission to take independent witnesses cannot be brushed aside lightly. After all, preparation of mashirnama is not a formality but its object is to prevent unfair dealings. 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 when 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 alongwith pistol when only two (02) cartridges were recovered from the possession of accused according to the case of prosecution. From where these three (03) more cartridges were sent to the Ballistic Expert. Deputy Prosecutor General rightly replied that prosecution has no explanation for such ambiguity. Case property was sent to the Ballistic Expert through 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. 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 relevant time. In this case, availability of the private witnesses could have been easily arranged, but it was avoided by the complainant. Accused in his statement recorded under section 342 Cr.P.C has claimed false implication in this case. 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:-

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12. 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).”

13. 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 accused. Keeping in view the above facts and circumstances, the instant appeal is allowed. Conviction and sentence recorded by the trial court vide impugned judgment dated 02.10.2019 are hereby set aside. Appellant Ameer Bux son of Arbab Ali Mallah is acquitted of the charge. He is present on bail, his bail bond stands cancelled and surety discharged.

JUDGE

Tufail