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ORDER SHEET

THE HIGH COURT OF SINDH, CIRCUIT COURT LARKANO

Cr. Appeal No. S-97 of 2017

Date	Order with signature of Judge

For hearing of main case.

04-02-2019

Appellant Mukhtiar Kakepoto (In custody) in Cr. Appeal No.S-97 of 2017).

Mr. Aitbar Ali Bullo, D.P.G for the State.

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Heard arguments. The appellant stand booked in Crime No.27/2017 of P.S. Garhi Yasin Shikarpur, under Section 23(i)(a) of Sindh Arms Act, 2013, which as per F.I.R is the off shoot of main Crime No.24/2017, under Section 302 P.P.C and 25 of 2017, under Section 324,353,148,149 P.P.C of P.S. Garhi Yasin. The appellant Mukhtiar has been acquitted from the charge of Crime No.25/2017 by means of judgment dated 06.09.2017 handed down by III-Additional Sessions Judge, Shikarpur in Sessions Case No.264/2017, re: State V/S Hafeez and others, (copy of such judgment is available in case file at annexure along with statement dated 06.04.2018. It seems that there was joint memo of recovery and arrest of the appellant.

For the detailed reasons recorded to be later-on, instant criminal appeal is allowed. Consequently Impugned Judgment dated 02.10.2017, handed down by III-Additional Sessions Judge, Shikarpur in Sessions Case No.237/2017, re: State V/s Mukhtiar Kakepoto, being outcome of Crime No.27/2017 of P.S. Garhi Yasin, U/S 23(i)(a), Sindh Arms Act, 2013 is hereby set-aside. The appellant Mukhtiar s/o Muhammad Bachal by caste Kekepoto is acquitted of all the charges. The appellant is in custody, therefore, he shall be released forthwith if his custody is no more required by the jail authorities in any custody case.

Judge

Abdul Sattar/P.A

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IN THE HIGH COURT OF SINDH, CIRCUIT COURT LARKANO

Cr. Appeal No.S-97 of 2017.

Appellant : Mukhtiar Kakepoto, present in person (in custody).

Respondent : The State, through Mr. Aitbar Ali Bullo, DPG.

Date of hearing : 04.02.2019.
Date of Decision : 04.02.2019.

JUDGMENT

Muhammad Saleem Jessar, J.- Through this Criminal Appeal, appellant Mukhtiar son of Mohammad Bachal Kakepoto has challenged the Judgment dated 02.10.2017 passed by the learned III[rd] Additional Sessions Judge, Shikarpur, in Sessions Case No.237 of 2017 (Re: The State v. Mukhtiar Kakepoto), outcome of Crime No.27 of 2017 of P.S Garhi Yasin, District Shikarpur, whereby he convicted the appellant for offence under Section 23(1)(a) of Sindh Arms Act, 2013 and sentenced him to suffer R.I. for 02 (two) years and to pay fine of Rs.10,000/- (Rupees Ten Thousand only) and in case of non-payment of fine to undergo S.I. for one month more.

2. Succinctly, the facts of the prosecution case, as unfolded by complainant SIP Mumtaz Ai Channa in FIR No.27 of 2017, registered at P.S. Garhi Yasin, are that on 26.5.2017, at about 1420 hours, accused/appellant Mukhtiar Kakepoto, who was already in custody, led the police party voluntarily to handover the crime weapon of Crime Nos.24/2017 and 25/2017 of P.S Garhi Yasin and took out one unlicensed TT Pistol of 30 bore Pakistani in working condition, with erased number, in presence of mashirs, namely, PC Imamuddin and PC Saeed Ahmed from the heap of grass situated in village Maroon Kakepoto near the house of accused Hafeez. Such mashirnama was prepared. Thereafter, they returned back along with accused and secured property at P.S., where complainant registered the FIR, of this case against the accused on behalf of the State.

3. The charge against the accused/appellant was framed under Section 265(d), Cr.P.C. as Ex.2, to which he pleaded 'not guilty' and claimed to be tried vide his plea as Ex.3.

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4. In order to prove the charge against the accused, the prosecution examined PW-1 complainant/I.O SIP Mumtaz Ali Channo at Ex.4, who produced FIR, entries, memo of arrest and recovery, memo of site inspection, permission for FSL and FSL report at Ex.4-A to 4-F respectively. PW-2 PC Imamuddin, who acted as mashir, was examined at Ex.5. Thereafter, prosecution side was closed vide statement at Ex.6.

5. Statement of the accused under Section 342, Cr.P.C was recorded at Ex.7, wherein he denied the prosecution allegations and professed his innocence. However, neither did he examine himself on oath under Section 340(2), Cr.P.C, nor produced any witness in his defence.

6. After formulating the points for determination, recording evidence of the prosecution witnesses and hearing the learned counsel for the parties, the learned trial Court, vide impugned judgment, convicted and sentenced the appellant, as stated above. Against the said judgment, appellant has preferred instant appeal.

7. Appellant present in person submits that he was falsely involved in the present case. He further submits that there are material contradictions in the evidence of the prosecution witnesses, which make the prosecution case highly doubtful. He also submits that neither he led the police to the place of recovery of the crime weapon nor produced the same before the police, but the same was arranged by the police in collusion with complainant of main case viz. Crime Nos.24/2017 of same police station and foisted against him.

8. Conversely, learned DPG supports the impugned judgment and contends that the prosecution has succeeded in proving its case against the accused and both the prosecution witnesses i.e. complainant and recovery mashir have implicated the appellant in the commission of the alleged offence. He further submits that the accused himself led the police party and produced the crime weapon. According to him, minor contradictions in the evidence of the prosecution witnesses are ignorable. He, however, could not controvert the fact that any inmate from the place of recovery i.e. house of the accused was made/associated as witness nor justification has been given by the I.O for non-joining of the said independent person(s). He prayed for dismissal of the appeal and maintaining the conviction and sentence awarded to the appellant vide impugned judgment.

9. I have heard the appellant in person as well as learned DPG appearing for the State and have perused the material available on the record.

10. It seems that there are contradictions in the depositions of the complainant SIP Mumtaz Ali Channo and PW PC Imamuddin, who acted as mashir of recovery. Complainant in cross-examination stated that accused was in custody about 7/8 days before registration of FIR of this case, while as per mashir PC Imamuddin accused was in custody about 2/3 days before present FIR. Complainant could not disclose the time when he interrogated the accused, while the mashir has specified the time of interrogation. Complainant has stated that he conducted interrogation in SHO office, while mashir stated that interrogation was conducted in the courtyard of police station. Complainant stated that he called appellant and co-accused Mukhtiar together for interrogation, while mashir stated that accused persons were taken out for interrogation one by one. According to complainant, the accused persons took out weapon from southern side of grass heap, while mashir stated that the same were taken out by the accused from eastern side of grass heap.

11. Another important point worth consideration in this case is that during their evidence the complainant and mashir PC Imamuddin could not identify the appellant specifically before the trial Court. Moreover, the complainant and mashir unanimously admitted in cross-examination that village of the accused, namely, Village Maroo Kakepoto is a big village, but even then the complainant/I.O. failed to associate any independent person from the said village to witness and attest the alleged recovery. The recovery was allegedly made on 26.5.2017, but the weapons were sent for FSL on 07.6.2017. Though complainant tried to explain the delay in sending the weapon for FSL, by stating that the same occurred in obtaining permission from SSP and that the property was lying in Malkhana at PS from 26.5.2017 till sending it for FSL, but he failed to produce any entry of Register No.19 being prepared regarding keeping the property at Malkhana of PS. The complainant and mashir also admitted that there was murderous enmity between the Brohi and Kakepoto communities.

12. In this view of the matter, it is clear that the complainant and mashir could not identify the accused before the trial Court, the weapon was sent for FSL with considerable delay and no serious efforts were made by the Investigating Officer to associate independent persons of the locality as mashir.

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No doubt the applicability of Section 103, Cr.P.C is ousted by means of Section 34 of the Act, but when the person was going to be charged with an offence, which carries punishment in the shape of sentence, then it was incumbent upon the police officer / I.O to associate independent persons of the locality. The place of recovery was a thickly populated area, no justification has been furnished by the I.O for non-joining of independent witnesses. No doubt, the police persons are the good witnesses as like anyone good from the public but in presence of independent persons of the area, it was essential rather incumbent upon the police officer to have associated such uncontroversial persons as mashirs of recovery proceedings only to abstain himself from any adverse or animosity ought to be occurred on his part but that has not been done by police officer. Needless to emphasize that in view of the provisions of Section 103, Cr.P.C. the officials making searches, recoveries and arrests, are reasonable required to associate private persons, more particularly in those cases in which the presence of private persons is admitted so as to lend credence to such actions, and to restore public confidence. This aspect of the matter must not be lost sight of indiscriminately and without exception. In the case reported as ***The State v. Bashir and others (PLD 1997 S.C 408)***, the Honourable Supreme Court has held as under:-

> *"As regards above second submission of Mr. M.M. Aqil, it may be observed that it has been repeatedly held that the requirements of section 103 Cr.P.C. namely, that two Members of the public of the locality should be Mashirs of the recovery, is mandatory unless it is shown by the prosecution that in the circumstances of a particular case it was not possible to have two Mashirs from the public."*

13. There is yet another legal flaw/lacuna in the prosecution evidence/case. The I.O. in his evidence stated that the crime weapon was allegedly recovered on 26.5.2017 vide memo Ex.4/E prepared on 26.5.2017 at 1400 hours; however, he sent the crime weapon to the Ballistic Expert for examination and report on 07.6.2017 i.e. after a delay of about 12 (twelve) days, which is evident from the report of the Ballistic Expert (Ex.4/D), which shows the *"Date Received"* as *"07.6.2017"*. No explanation has been offered by the prosecution for such delay. Such delay also weakens the prosecution case. In the case reported as ***Samandar @ Qurban and others v. The State*** reported in ***2017 MLD 539 Karachi***, while dealing with the point of delay in sending the weapon to Ballistic Expert, this Court has observed as under:-

> *"Apart from above sending of crime weapon to ballistic expert for forensic report with delay of 20 days of their recovery also added*

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further doubt into the prosecution case, thus in view of above coupled with non-compliance of section 103, Cr.P.C., it can safely be presumed that alleged recovery of crime weapon was not made from the possession of the appellants as alleged by the prosecution."

14. In the case reported as ***Yaqoob Shah v. The State (1995 SCMR 1293)***, the Honourable Supreme Court has held that; *"the report of the Fire-Arm Expert was of no avail to the prosecution as the crime empties and the fire-arms allegedly recovered from the accused were sent to Forensic Science Laboratory after delay."*

15. Furthermore, original report of the Ballistic Expert has not been produced in the evidence. It is settled principle of law that without establishing a case where photostat copies could be accepted in evidence as envisaged under the law, the same could not be produced in the Court, thus, the same are not admissible in evidence. In this connection, reference may be made to the case of ***Sanaullah v. the State*** reported in ***1990 P.Cr.L.J. 466,*** wherein it was held that without having made out a case for production of secondary evidence as envisaged by Section 63 of the Evidence Act, 1872, the same could not be produced in Court and that the Court should have sent for the originals and after comparing photocopies with them should have placed the same on file, which was permissible in law. It was held that the photostat copies were not admissible in evidence. In the instant case too, no such exercise as prescribed under the law was undertaken by the trial Court, as such, the attested copies of the report of Ballistic Expert was not admissible in evidence, thus, such piece of evidence is liable to be discarded from consideration, which would ultimately create heavy dents in the prosecution case.

16. It is also worth-importance that in the instant case, complainant namely, SIP Mumtaz Ali Channo himself conducted the investigation of the case without offering any explanation/justification as to why he did not handover the case papers to any other police officer for conducting investigation. In the case of ***Nazeer Ahmed v. The State*** reported in ***PLD 2009 Karachi 191,*** this Court did not appreciate such conduct on the part of a police officer and held that Police Officer, who himself is the complainant cannot be expected to collect and preserve the evidence, which goes against his case and that such Investigating Officer cannot properly perform the duties like an independent and fair investigating officer. Reference in this connection can also be made to the cases reported as ***Mohammad Siddique v. The State (2011 YLR 2261***

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[Karachi] and ***Mohammad Akram v. The State (1995 MLD 1532 [Peshawar]).***

17. It is also settled principle of law that a criminal case is to be decided on the basis of totality of impressions gathered from the circumstances of the case and not on the basis of single element. Reference in this regard can be made from the case of ***Nadeem Ramzan v. The State (2018 SCMR 149).***

18. Independent persons were available and were not joined in the recovery proceedings, therefore, no implicit reliance could be placed on the evidence of police witness. In this regard, reference can be made from the cases of ***Mohammad Shafi v. Tahirur Rehman (1972 SCMR 144)*** and ***Ghulam Shabbir v. Bachal and another (1980 SCMR 708).***

19. In view of the aforesaid contradictions in the evidence of the prosecution witnesses, so also admissions made by them coupled with the legal flaws and lacunas in the prosecution case, as pointed out above, it can safely be held that the prosecution has not succeeded in proving its case against the accused / appellant beyond reasonable shadow of doubt. It is settled principle of law that a single circumstance, which creates doubt in the prosecution case, is sufficient to extend benefit of doubt to the accused but in this case there are several circumstances, which have created doubt in the prosecution story but unfortunately the prosecution evidence has not been appreciated by the trial Court according to the settled principle of law. Even an accused cannot be deprived of benefit of doubt merely because there is only single circumstance, which creates doubt in the prosecution case as has been observed by the Honourable Supreme Court of Pakistan in the case reported as ***Tariq Pervaiz v. The State (1995 SCMR 1345),*** wherein it has been held as under:-

> *"The concept of benefit of doubt to an accused person is deep-rooted in our country. For giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts. If there is a 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."*

20. For what has been discussed above, it can safely be held that the prosecution has miserably failed to prove its case beyond reasonable shadow of doubt and this Court in absence of the prosecution version cannot take step forward in upholding the impugned judgment, hence, the same needs to be interfered in presence of the reasonable doubts in the prosecution story as well

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as keeping in view the observance of the Apex Court as referred to above. The appellant has also been acquitted from the charge of Crime No.25/2017, u/s 324, 353, 148, 149, PPC of P.S Garhi Yasin, by means of judgment dated 06.9.2017 passed by learned III[rd] Additional Sessions Judge, Shikarpur, in Sessions Case No.264/2017 re-State vs. Hafeez & others.

21. For the foregoing reasons, instant Criminal Appeal was allowed by short order dated 04.02.2019 the impugned judgment dated 02.10.2017, handed down by the learned 3[rd] Additional Sessions Judge, Shikarpur, was set aside and the appellant / accused was acquitted of the charges.

JUDGE

20.02.2019.