B/R

JUDGMENT SHEET

IN THE PESHAWAR HIGH COURT, MINGORA BENCH (DAR-UL-QAZA), SWAT
(Judicial Department)

Cr.A No. 56-M/2022
With Cr.M No. 327-M/2022

Said Afzal.....(Appellant)

vs

The State.....(Respondent)

Present: Mr. Azad Bakht Khan, Advocate for the appellant.

Mr. Sohail Sultan Asst: A.G for the State.

Date of hearing: 14.02.2023

JUDGMENT

Dr. Khurshid Iqbal, J.-

1. The Additional Sessions Judge/Izafi Zilla Qazi of Tehsil Warri, in District Dir Upper, tried Said Afzal (appellant) on the charge of possessing an unlicensed arm (Kalashnikov) punishable u/s. 15 of the Khyber Pakhtunkhwa Arms Act, 2013 (KP AA). By his judgment dated 23.02.2022, he convicted the appellant to three years rigorous imprisonment and fine of Rs.10,000/-, in default of payment of fine, he was further ordered to undergo one month simple imprisonment. He was extended the benefit of section 382-B, Cr.P.C. The appellant challenged his conviction before this Court.

2. Facts shortly are that Inspector Attaullah Khan (also the SHO) of Police Station (PS) Jaggam in Tehsil Warri of District Dir Upper, got spy information that Said Afzal (appellant) and his brother Naseeb Rawan, were present in their house. Both the accused were Proclaimed Offenders in a case FIR # 64, dated 18.04.2015 u/ss. 506/427/34, PPC. The information about their presence in their house created an opportunity for the local police to arrest them. Inspector Attaullah Khan, thus, led a police and rushed to the house of the accused. As the police party reached there, it saw both the accused armed with Kalashnikov were running away. As a result of a successful chase, the police party arrested them. Each accused had a Kalashnikov, a magazine loaded with 50 rounds and 20 rounds in pocket, which are taken into possession vide recovery memos (Ex:PW7/2 and 7/3). The incident was recorded in the form of a *murasila* (Ex:PW5/1) on the spot. The murasila was converted into the FIR.

3. Final report of investigation (Challan) against the appellant as well as the absconding co-accused was put for trial before the trial Court. Charge was framed against them, to which, they

didn't plead guilty and claimed trial. The prosecution examined a total of Nine (09) witnesses and then closed its evidence. The appellant as well as other co-accused recorded their statements u/s. 342, Cr.P.C, in which though they denied all the charges leveled against them and professed innocence, however, they didn't avail the opportunity to record evidence in defence; or to give statements on oath. During the course of trial, co-accused Nasib Rawan was on exempted from personal appearance. His exemption was recalled. However, he failed to appear. So, proceeding u/s.512, Cr.P.C were commenced against him. After hearing arguments of learned counsel for the appellant and learned APP for the State, the appellant was convicted u/s.15 AA, and sentenced him in the terms mentioned above vide impugned judgment dated 23.02.2022.

4. Arguments of counsel for the appellant and A.A.G for the State heard and record gone through.

5. Inspector Attaullah (PW7) prepared separate memos of recoveries made from both the accused. The contents of each memo, except names of the accused and numbers of the Kalashnikov,

are the same, including most notably its marginal witnesses. Each memo was signed by four witnesses. Two of them, constable Iqbal No.592 (PW3) and constable Rahman Uddin No. 663 (PW8) were police officials and two others, namely, Sher Muhammad Khan and Ali Khan (PW6), were private persons. The statement of Ali Khan, recorded in examination-in-chief reads as under:

> "برحلف بیان کیا کہ چند سال قبل میں دیہہ آڑی منزی میں موجود تھا کہ وہاں پر راستے میں پولیس مجھ سے ملاقی ہو کر مجھ سے کہا کہ بابا آپ ہمیں اپنا شناختی کارڈ دیدیں۔ میں نے پولیس کو اپنا شناختی کارڈ حوالہ کیا اور اُنہوں نے مجھ سے کاغذات پر نشان انگشت ثبت کیا۔ مجھے کوئی معلومات و علم نہ ہے کہ پولیس والوں نے ایسا کیوں کیا۔ یہی میرا بیان ہے۔"

6. The two police officials no doubt supported the recovery. However, in the light of the above statement of the private prosecution witness, the recovery stands not proved. The Seizing Officer (PW7) and the two constables (PWs-3 and 8) referred to Ali Khan and the other private witness, namely, Sher Muhammad Khan. There is a settled judicial opinion that police officials are as much good witnesses as any other. However, in the case in hand, this view could not be subscribed to.

Had PW Ali Khan not been examined then the evidence of the police officials could have been worthy of credit.

7. PW Ali Khan was neither cross examined by the defence counsel nor was he declared as a hostile witness by the prosecution. This single statement alone is sufficient for the acquittal of the appellant. A negative inference could be drawn in respect of the non-production of Sher Muhammad Khan, the other private witness of the recovery to the effect that had he been produced, he, too, would have not supported the prosecution version. Constable Iqbal (PW3) confirmed his signature on the recovery memo as its marginal witness. He also deposed that he obtained the signatures and thumb impressions of one Rahman-ud-Din and other private witnesses. The murasila shows that lady constables also included in the police personnel. But their presence was not shown in the site plan. His deposition shows that the places of presence of the lady constables at the crime scene were not shown in the site plan.

8. The case properties were not produced in evidence before the trial Court. The PWs

categorically admitted this material aspect of the case. For example, Constable Iqbal (PW3) stated:

"یہ درست ہے کہ آج میرے سامنے مبینہ کلاشنکوف ہائے و
کارتوس ہائے موجود نہ ہے۔"

9. Similarly, ASI Ziaullah (PW4), the Moharrir of the Police Station, who received the case property, also admitted this fact as follows:

"آج میرے روبرو مبینہ مال مقدمہ موجود نہ ہے۔ از خود کہا کہ
متذکرہ پارسل ہائے تھانہ جاگام کے مال خانہ میں موجود ہے۔"

10. The same was the statement of ASI Samiullah (PW5) and the Seizing Officer (PW7).

11. Non-production of the case property in evidence by the prosecution has come up for judicial consideration in many cases before the higher courts. Reference may be made to a few rulings as in the case of ***Gul Dast Khan v. The State*** **(2009 SCMR 431)**, the non-production of case property was considered a material dent in the prosecution case. Other cases are ***Muhammad Khan and another v. The State through Arman Gul, S.H.O. and another***, **(2016 MLD 1850) [Peshawar High Court]** and ***Ali Asghar Lashari v. The State***, **2019 PCr.LJ Note 53 [Sindh (Hyderabad Bench)]**.

12. ASI Ziaullah (PW4) though stated in his examination-in-chief that after receipt, he made entries in respect thereof in the relevant register (No.19). But the relevant extract was not produced. Armourer Wajid Ullah No.193 (PW1) did not mention in his statement that the case property was sealed when it was produced before him. He stated only this much that on 08.04.2016 he opened the Kalashnikov, which he examined in front of the Investigating Officer and constable Bahramand. ASI Ziaullah could not answer a question regarding the Seals put on the parcels containing the case property.

13. Inspector Attaullah (PW7) admitted that the D.Ds in respect of departure from and arrival back into the Police Station were not produced. In a case like this one, notably for the reason that the case has been registered on the report of the police official, non-production of DDs would be fatal for the prosecution case. Reference may be made to the cases ***Ghulam Mustafa alias Mushtaq Ali v. The State*** **(2013 P Cr. L.J 860) [Sindh]**, and ***Wahab Ali and another v. The State*** **(2010 P Cr. LJ 157) [Federal Shariat Court].**

14. Finally, I shall advert to the confession of the appellant recorded by a Judicial Magistrate on 07.04.2016, the next day of the occurrence. The confessional statement of the appellant and other relevant documents such as questionnaire and certificate pertaining to fulfilment of procedural formalities coupled with the statement of the Judicial Magistrate (PW9) would show that the accused was produced for confessional statement at 01:30 pm. They were given 30 minutes time to think over his willingness to confess their guilt. As per the certificate, the confessional statement of the appellant was recorded at 01:30 pm, but in reply to the last question, the Judicial Magistrate noted that 30 minutes from 01:30 pm to 02:00 pm was given to the appellant to seriously think over his decision to record confession. His statement was supposed to be recorded after 02:00 pm, instead of 01:30 pm. It is thus clear that the 30 minutes time given to the appellant for thinking is not proved. In his application dated 07.04.2016 for recording confessional statement of the appellant, the I.O stated that the appellant was arrested yesterday. The Judicial Magistrate put question No.8 to the appellant regarding the duration of his custody with the police. The appellant replied that he remained in police custody for one day. In order to fully ensure

that the appellant was voluntarily confessing to his guilt, the Judicial Magistrate could have demonstrably endeavoured to discover as to which time exactly the appellant was arrested. Then, the Judicial Magistrate did not record as to whether both the appellant and the co-accused were made to sit at one and the same place in the Court Room or not. Such an entry was necessary in order to ascertain that the appellant individually got an opportunity to seriously think over the warning of the Judicial Magistrate. In such circumstances, the Judicial Magistrate fulfilled the procedural requirements in a mechanical fashion. The appellant was a proclaimed offender in a 2015 criminal case, which means that he was under a constant threat of his arrest by the police. Had the Judicial Magistrate perused the record of the case, he would have definitely come across this aspect of the case viz-a-viz the voluntariness of the appellant to confess to his guilt. It needs no emphasis that in order to be believed doubtlessly, a confession must be voluntary and true. In **Hashim Qasim and another v. The State (2017 SCMR 986),** the Apex Court observed:

> **"It is trite law that for accepting a confession, two essential requirements must be fulfilled i.e. that the confession was made voluntarily, it was based on true account of facts, leading to the crime and the same was proved at the trial.**

The superior Courts have also given strict guidelines for the Magistrate, recording confession, to be followed without any exception which need not be repeated herein, because long line of authorities on this point is already in the field."

In ***Azeem Khan and another v. Mujahid Khan and others*** **(2016 SCMR 274),** it was held:

"Keeping in view the High Court Rules, laying down a binding procedure for taking required precautions and observing the requirements of the provision of section 364 read with section 164, Cr.P.C. by now it has become a trite law that before recording confession and that too in crimes entailing capital punishment, the Recording Magistrate has to essentially observe all these mandatory precautions. The fundamental logic behind the same is that, all signs of fear inculcated by the Investigating Agency in the mind of the accused are to be shedded out and he is to be provided full assurance that in case he is not guilty or is not making a confession voluntarily then in that case, he would not be handed over back to the police. Thereafter, sufficient time for reflection is to be given after the first warning is administered. At the expiry of that time, Recording Magistrate has to administer the second warning and the accused shall be assured that now he was in the safe hands. All police officials whether in uniform or otherwise, including Naib Court attached to the Court must be kept outside the Court and beyond the view of the accused. After observing all these legal requirements if the accused person is willing to confess, then all required questions formulated by the High

Court Rules should be put to him and the answers given, be recorded in the words spoken by him. The statement of accused be recorded by the Magistrate with his own hand and in case there is a genuine compelling reason then, a special note is to be given that the same was dictated to a responsible official of the Court like Stenographer or Reader and oath shall also be administered to such official that he would correctly type or write the true and correct version, the accused stated and dictated by the Magistrate. In case, the accused is illiterate, the confession he makes, if recorded in another language i.e. Urdu or English then, after its completion, the same be read-over and explained to him in the language, the accused fully understand and thereafter a certificate, as required under section 364, Cr.P.C. with regard to these proceedings be given by the Magistrate under his seal and signatures and the accused shall be sent to jail on judicial remand and during this process at no occasion he shall be handed over to any police official/officer whether he is Naib Court wearing police uniform, or any other police official/officer, because such careless dispensation would considerably diminish the voluntary nature of the confession, made by the accused."

16. By a Cr.M No.327-M/2022, counsel for appellant sought acquittal of co-absconding accused. An absconder cannot be given the benefit of his absence. Whatever the merits are, his case could only be considered after his surrender to lawful authority.

17. The conclusion of the above discussion is that the prosecution has failed to prove the charge against the appellant beyond reasonable shadow of doubt. There are more than one material doubts, as discussed above in the prosecution case. Even a single reasonable doubt is sufficient for acquittal of an accused person. Reliance is placed on the case of ***Najaf Ali Shah vs. The State (2021 SCMR 736)***, wherein it was held as infra:

> ***"It is a well settled principle of law that for the accused to be afforded this right of the benefit of the doubt it is not necessary that there should be many circumstances creating uncertainty and if there is only one doubt, the benefit of the same must go to the petitioner."***

18. The same principle was reiterated in the case of ***"The State through P.G. Sindhand others versus Ahmed Omar Sheikh and others***, reported as ***2021 SCMR 873***.

> ***"It is settled since centuries that benefit of doubt automatically goes in favour of an accused. Even if a single circumstance creates reasonable doubt in a prudent mind regarding guilt of an accused then the accused shall be entitled to such benefit not as a matter of grace and concession but as a matter of right and such benefit must be extended to the accused person(s) by the Courts without any reservation."***

19. As sequel to the above reappraisal of evidence, the instant appeal succeeds. Resultantly, it is allowed. Consequently, the conviction and sentence awarded to the appellants by the trial Court vide judgment dated 23.02.2022 is set aside and the appellant is acquitted from the charge. Furthermore, the appellant is on bail, therefore, he and his sureties are absolved from the liability of bail bonds.

Announced
Dt: 14.02.2023

JUDGE

Office W/R
10/04/23