

[Balochistan]

**Before Muhammad Kamran Khan Mulakhail and Muhammad Najam-ud-Din Mengal,
JJ**

YAR MUHAMMAD alias Zakar---Appellant

Versus

The STATE---Respondent

Criminal Appeal No. 90 of 2024, decided on 25th March, 2025.

(a) Anti-Terrorism Act (XXVII of 1997)---

----Ss. 11-F, 11-H, 11-J, 11-OOO & 11-N---Prohibition of acts intended or likely to stir up sectarian hatred, membership, support and meetings relating to a proscribed organization, funding arrangements---Fund raising---Appreciation of evidence---Benefit of doubt---Defective investigation---Accused was arrested for providing his services to the proscribed organization and an amount was recovered meant for the assistance of martyr activists of the banned organization---Complainant of the case who mostly reiterated the contents of his fard-e-bayan, but during the course of cross-examination he derailed from his earlier statement and contradicted the case of prosecution to some extent---Complainant admitted that the alleged taxi driver was not associated in the recovery proceedings, in whose taxi accused was de-boarded---Complainant further admitted that except the appellant five other persons were also present at the time of recovery in the taxi---Said witness admitted that in his presence the Investigating Officer neither included the said persons in the list of investigation nor recorded their statements---Complainant showed his ignorance with regard to conducting business in Pakistani currency across the Pak-Afghan Border---Complainant also admitted that the place of occurrence was a populated area, but despite of the fact no independent witness was associated in the recovery proceedings---While, Incharge of Maalkhana/Head Moharar received the sealed parcels from the Investigating Officer, subsequently made entries whereof in the Register No.19, but he had also failed to produce and exhibit the copy of Register No.19 during trial---Eye-witness as well as the member of raiding team stated that complainant handed over him the accused (appellant), the letter of DAESH written in Pashto language containing monogram of proscribed organization and the recovered amount---Pashto letter was translated and was sealed in a parcel, while the amount was sealed in other parcel, but that witness had also failed to produce the sealed parcel of Pashto letter and to exhibit it before the Trial Court nor the same was available on record---Other eye-witness produced the recovery memo. and admitted that the letter of proscribed organization was neither having any reference number nor the same was duly signed and stamped by the banned organization---Investigating Officer of the case, who counted the steps taken by him during the course of investigation, in his cross-examination, admitted that he neither associated the driver of the Taxi nor any private person as witness in the proceedings---Thus, such negligence on the part of the prosecution created serious dents in the case of prosecution---Appeal against conviction was allowed, in circumstances.

(b) Anti-Terrorism Act (XXVII of 1997)---

----Ss. 11-F, 11-H, 11-J, 11-OOO & 11-N---Prohibition of acts intended or likely to stir up sectarian hatred, membership, support and meetings relating to a proscribed organization, funding arrangements---Fund raising---Appreciation of evidence---Benefit of doubt---Material discrepancies---Accused was arrested for providing his services to the proscribed organization and an amount was recovered meant for the assistance of martyr activists of the banned organization---Bare perusal of record revealed that the Incharge of Maalkhana had failed to produce the Register No.19, while the column 5 & 6 of the Register No.19 provided that every article placed in the storeroom shall be entered and removal of any such article shall also be noted in the appropriate column---In the instant

case, the prosecution had failed to adopt the principles of law by producing the Register No.19 from which it could be ascertained that whether the signatures of the Investigating Officer of the case were obtained in the Register No.19 at the time of receiving the sealed parcels as well as while handing over the parcels for onward transmission, which could support the case of the prosecution---Such material discrepancies showed that the prosecution had compromised the safe custody of the sealed parcels and created a reasonable doubt in the case of the prosecution---Appeal against conviction was allowed, in circumstances.

Ahmed Ali and another v. The State 2023 SCMR 781 rel.

(c) Anti-Terrorism Act (XXVII of 1997)---

---Ss. 11-F, 11-H, 11-J, 11-OOO & 11-N---Qanun-e-Shahadat (10 of 1984), Art. 129(g)---Prohibition of acts intended or likely to stir up sectarian hatred, membership, support and meetings relating to a proscribed organization, funding arrangements---Fund raising---Appreciation of evidence---Benefit of doubt---Failure to produce important case property before court---Effect---Accused was arrested for providing his services to the proscribed organization and an amount was recovered meant for the assistance of martyr activists of the banned organization---Prosecution had failed to produce the Pashto written letter containing the stamp of banned organization i.e. DAESH before the Trial Court on the basis whereof the appellant was arrested and convicted---Definitely, the letter in question was required to be produced by the prosecution in support of its version, but admittedly the prosecution had failed to produce the case property i.e. the Pashto written letter containing the monogram of proscribed organization DAESH before the trial Court---Once the recovery memos. was prepared, the next step for the prosecution was to produce the same before the Trial Court to prove the recovery of the material and preparation of the memo. through the scribe and marginal witnesses---Thus, best piece of evidence was not produced before trial Court, meaning thereby the prosecution withheld the best evidence, which undermined the prosecution's credibility, contributing to the acquittal of the accused---Appeal against conviction was allowed, in circumstances.

Zafar Khan v. The State 2022 SCMR 864 and Muhammad Ijaz alias Billa v. The State 2024 SCMR 1507 rel.

(d) Anti-Terrorism Act (XXVII of 1997)---

---Ss. 11-F, 11-H, 11-J, 11-OOO & 11-N---Prohibition of acts intended or likely to stir up sectarian hatred, membership, support and meetings relating to a proscribed organization, funding arrangements---Fund raising---Appreciation of evidence---Benefit of doubt---Tangible and high quality evidence, lack of---Accused was arrested for providing his services to the proscribed organization and an amount was recovered meant for the assistance of martyr activists of the banned organization---Present case against the appellant was initiated upon a secret information and the such information should be reduced in writing, while in the case in hand, such information was not reduced into writing---Besides, the equity and fairplay demanded that spy information should be reduced into writing in order to safeguard innocent persons against frivolous and false allegations to be implicated---Manner in which the appellant was involved in the case was not free from doubt---Notable that in several cases, police arrest or harass innocent persons for ulterior motives or on the basis of suspicion, on the pretext of terrorism, without any solid or cogent evidence---Keeping in view the significance and seriousness of the offences, the prosecution was required to produce tangible and high-quality evidence to prove the offence, in order to get conviction of a person arrested, which was lacking in this case---Appeal against conviction was allowed, in circumstances.

Zain Shahid v. The State 2024 SCMR 843 rel..

(e) Criminal trial---

---Benefit of doubt---Principle---Accused is entitled to get the benefit of even the slightest doubt.

Tariq Pervaiz v. The State 1995 SCMR 1345 rel.

Syed Abdul Salam for Appellant.

Muhammad Younas Mengal, A.P.G. for the State.

Date of hearing: 5th March, 2025.

JUDGMENT

MUHAMMAD NAJAM-UD-DIN MENGAL, J.---This appeal is directed against the judgment dated 29th March 2024 ("impugned judgment"), passed by learned Special Judge, Anti-Terrorism Court-I, Quetta ("trial Court"), whereby the appellant Yar Muhammad alias Zakar son of Lal Muhammad, was convicted and sentenced as under:

"Under section 11-F(1) (affiliation) and under Section 11-F (5) (raising/arranging money) of the ATA, 1997 and sentenced to (06) six months R.I. and fine of Rs.5000/- under section 11-F (2) of the ATA, 1997 and in default thereof, to further undergo One month S.I. on the one hand and sentenced to one year (01) R.I under section 11-F (6) and the payment of fine of Rs.5000/- and in default of the payment to further suffer One month S.I.. Sentenced to five/five (05/05) years each under sections 11-J and 11-H punishable under section 11-N of the ATA, 1997 and the payment of fine of Rs.5,000/- each in default of payment of fine eight months S.I, with the benefit of Section 382-B, Cr. P.C. While, kept the case file in dormant till the arrest of absconding co-accused persons namely Moulana Muhammad Khair alias Idrees alias Arshad son of Abdul Qadir and Moulana Muhammad Shereen alias Anwar Muhammad son of Ghulam Muhammad".

2. Facts of the case are that on 8th July 2022, the complainant Muhammad Iqbal, Customs Inspector, lodged FIR No.43 of 2022 at Police Station CTD Quetta, under Sections 11-F, 11-H, 11-J, 11-OOO, 11-N of the Anti Terrorism Act, 1997; alleging therein that on the day of occurrence he received spy information that a person namely Yar Muhammad, who provides his services to the proscribed organization i.e. DAESH and regularly comes from Afghanistan to Pakistan, presently coming to Pakistan having huge cash amount. Pursuant to such information, the CTD officials erected blockade at Babe-e-Chaman and started checking of the vehicles, in the meanwhile, at about 03:30 p.m. on the pointation of spy they stopped a Taxi and deboarded a person seated at the back seat of vehicle. On query he disclosed his name as Yar Muhammad alias Zakar son of Lal Muhammad. His personal search was conducted, which resulted into recovery of a white color envelop wrapped in a black color shopper from his right-side pocket of his shirt containing 50-Pakistan currency notes of one thousand total Rs.50,000/- and one piece of paper written in Pashto language and upon which the monogram of proscribed organization DAESH was formed, besides Rs.3300/- were also recovered from his front pocket. He further disclosed that he belongs to DAESH and the said recovered amount brought for the assistance of martyr activists of DAESH.

3. In pursuance of above FIR, the appellant was arrested, investigated and on completion thereof, he was remanded to judicial custody. On receipt of challan, the trial Court after initiating proceedings under Sections 87 and 88 Cr.P.C. declared the absconding accused Moulana Muhammad Khair alias Idrees alias Arshad son of Abdul Qadir and Moulana Muhammad Shereen alias Anwar Muhammad son of Ghulam Muhammad as proclaimed offenders. Whereafter, the trial Court indicted the charge and on denial by the appellant, the prosecution produced Nine (09) witnesses, whereafter the appellant was examined under Section 342 Cr.P.C. The appellant did not record his statement on oath under Section 340(2) Cr.P.C, however, produced Lal Muhammad (his father) in his defence as DW-1. On conclusion of trial, the appellant was convicted and sentenced as mentioned above. Whereafter the instant appeal has been filed.

4. Learned counsel for appellant stated that the prosecution has failed to substantiate the charge against the appellant beyond any shadow of reasonable doubt; that the statements of ocular witnesses are lacking independent corroboration; that not a single piece of evidence has been produced during trial from which it could be presumed that the

appellant having affiliation with the banned organization i.e. DAESH; that the prosecution has failed to produce the alleged letter written in Pashto language containing the monogram of DAESH, which made basis for arresting the appellant; that the statements of the prosecution witnesses are not consistent and same are suffering from material contradictions, dishonest improvements and infirmities rendering their testimony doubtful, but the benefit of doubt has not been extended in favour of the appellant.

5. Learned Additional Prosecutor General while supporting the impugned judgement stated that the prosecution through consistent and confidence inspiring evidence has proved the charge against the appellant beyond any shadow of doubt; that the prosecution evidence is not suffering from material contradictions, infirmities or dishonest improvements; that there are no mitigating circumstances to award lesser punishment to the appellant and that after proper appraisal of the evidence available on record the trial Court has rightly sentenced and convicted the appellant, which is not open for any interference.

6. Heard the learned counsel for the parties and have gone through the record with their able assistance. The prosecution in order to establish the charge has produced the evidence of nine witnesses. The minute scrutiny of the statements of PWs transpire that the same are neither consistent, confidence inspiring nor corroborating rather contradictory to each other on material counts. The complainant of the case namely Muhammad Iqbal, Inspector Customs Department appeared as PW-2, who mostly reiterated the contents of his fard-e-bayan Ex.P/2-A, but during the course of cross-examination he derailed from his earlier statement and contradicted the case of prosecution to some extent. In reply of question No.9 of his cross he admitted that the alleged Taxi driver was not associated in the recovery proceedings. He further admitted that except the appellant five other persons were also present at the time of recovery in the Taxi. This witness admitted that in his presence the I.O. neither included the said persons in the list of investigation nor recorded their statements. He further showed his ignorance with regard to conducting business in Pakistani currency across the Pak-Afghan Border. The complainant also admitted that the place of occurrence is a populated area, but despite of the fact no independent witness was associated in the recovery proceedings. While, Incharge of Maalkhana Farhan Qayyum, Head Moharar appeared as PW-3, who on 8th July 2022 received the sealed parcels Nos.1 and 2 from the Investigating Officer, subsequently made entries whereof in the Register No.19, but he has also failed to produce and exhibit the copy of Register No.19 during trial, thus created serious doubts in the case of prosecution.

7. Now adverting to the statement of PW-4 Abdul Malik, SI, who is the eye-witness as well as the member of raiding team. According to his Court statement that PW-2 handed over him the accused (appellant), the letter of DAESH written in Pashto language containing monogram of proscribed organization and the recovered amount of Rs.50000/- and Rs.3300/-, Pashto written letter was translated by the ASI Saleh Muhammad and the letter was sealed in parcel No.1, while the amount of Rs.3300/- was sealed in parcel No.2, but this witness has also failed to produce the sealed parcel No.1 and to exhibit it before the learned trial Court nor the same is available on record. PW-6 Abdul Zahir, SI is the eye-witness produced the recovery memo. He admitted that the letter of proscribed organization neither having any reference number nor the same was duly signed and stamped by the banned organization. PW-9 Abdul Sattar, DSP is the Investigating Officer of the case, who counted the steps taken by him during the course of investigation. The I.O. in his cross-examination admitted that he neither associated the driver of the Taxi nor any private person as witness in the proceedings. Thus, such glaring contradictions and certain admissions and the negligence on the part of the prosecution created serious dents in the case of prosecution.

8. The bare perusal of record reveals that the PW-3, who being the Incharge of Maalkhana has failed to produce the Register No.19, while the columns 5 and 6 of the Register No.19 provides that every article placed in the storeroom shall be entered and removal of any such article shall also be noted in the appropriate column, but in the instant case the prosecution has failed to adopt the principles of law by producing the Register No.19 from which it could be ascertained that whether the signatures of the Investigating Officer of the case are obtained in the Register No.19 at the time of receiving the sealed parcels as well as while handing over the parcels for onward transmission, which could support the case of the prosecution. The above material discrepancies show that the

prosecution has compromised the safe custody of the sealed parcels and created a reasonable doubt in the case of the prosecution. In this regard reliance is placed on the case of "Ahmed Ali and another v. the State, (2023 SCMR 781)" wherein held as under:

"Thus, the Police Rules mandate that case property be kept in the Malkhana and that the entry of the same be recorded in Register No. XIX of the said police station. It is the duty of the police and prosecution to establish that the case property was kept in safe custody, and if it was required to be sent to any laboratory for analysis, to further establish its safe transmission and that the same was also recorded in the relevant register, including the road certificate, etc. The procedure in the Police Rules ensures that the case property, when is produced before the court, remains in safe custody and is not tampered with until that time. A complete mechanism is provided in Police Rules qua safe custody and safe transmission of case property to concerned laboratory and then to trial Court.

9. The prosecution has also failed to produce the Pashto written letter containing the Stamp of banned organization i.e. DAESH before the learned trial Court on the basis whereof the appellant was arrested and convicted. Definitely, the letter in question was required to be produced by the prosecution in support of its version, but admittedly the prosecution has failed to produce the case property i.e. the Pashto written letter containing the monogram of proscribed organization DAESH before the learned trial Court. It is settled law that once the recovery memo. is prepared, the next step for the prosecution is to produce the same before the trial Court to prove the recovery of the material and preparation of the memo. though the scribe and marginal witnesses. Reliance in this regard is placed on the case of "Zafar Khan v. The State, 2022 SCMR 864". The relevant portion whereof is reproduced herein below:

"The main object of preparing the recovery memo. at the spot and with signatures of the witnesses is to ensure that the recovery is effected in presence of the marginal witnesses, honestly and fairly, so as to exclude the possibility of false implication and fabrication. Once the recovery memo. is prepared, the next step for the prosecution is to produce the same before the Trial Court, to prove the recovery of the material and preparation of the memo. through the Scribe and the marginal witnesses.

10. Besides, the letter in question containing the monogram of banned organization on the basis of which the appellant (convict) was arrested and convicted which was required to be produced during the trial as the same being best piece of evidence, but perusal of record reveals that the same was not produced before trial Court, meaning thereby the prosecution withheld the best evidence, which undermines the prosecution's credibility, contributing to the acquittal of the accused. In this regard reliance is placed on the case of "Muhammad Ijaz alias Billa v. The State (2024 SCMR 1507), relevant portion whereof reproduced as under:

"We believe that the prosecution withheld the best evidence, which undermines the credibility of its account. It is well established that whenever a party withholds the best evidence available, it is presumed under Article 129(g) of the Qanun-e-Shahadat Order, 1984, that if such evidence had been produced, it would not have supported the stance of that party. Furthermore, the alleged occurrence took place in daylight in a populated area; however, no one from the locality came forward to support the story of the prosecution."

11. Under the such circumstances, trusting upon such a weak evidence, which can cause into injustice, as the instant case against the appellant was initiated upon a secret information and the such information should be reduced in writing, while in the case in hand, such information was not reduced into writing. Besides, the equity and fairplay demands that spy information should be reduced into writing in order to safeguard innocent persons against frivolous and false allegations to be implicated. The manner in which the appellant is involved in the case, is not free from doubt. We have noticed in several cases that police arrest or harass innocent persons for ulterior motives or on the basis of suspicion, on the pretext of terrorism, without any solid or cogent evidence. Keeping in view the significance and seriousness of the offences, the prosecution is required to produce tangible and high-quality evidence to prove the offence, in order to get conviction of a person charged, which is lacking in this case. Reliance in this regard is placed on the case of "Zain Shahid v. The State, (2024 SCMR 843), for facilitation the relevant part whereof is reproduced as under:

"The case against the petitioner was initiated upon a spy information, but such information was not reduced into writing. Fair play demands that spy information should be reduced into writing in order to safeguard innocent persons against false implication. The manner in which the petitioner is involved in the case, is not free from doubt. We have noticed in number of cases that police arrest or harass innocent persons for ulterior motives or on the basis of suspicion, on the pretext of terrorism, without any solid or cogent evidence. Keeping in view the gravity and seriousness of the offences, the prosecution is required to produce tangible and high quality evidence to prove the offence, in order to get conviction of a person charged, which is lacking in this case. The Trial Court as well as the learned Judges of the High Court have failed to consider the material available on the record and did not apply the law discussed herein above, in its true perspective, hence reached a wrong conclusion by convicting the petitioner. Under such circumstances, the judgments of the Trial Court and that of the High Court are not sustainable.

12. The discrepancies so pointed out by the learned counsel for the appellant cannot be taken lightly. It is a well settled principle of law that an accused is entitled to get the benefit of a slightest doubt, whereas in the instant case there are certain legal defects and discrepancies apparent on the face of record, which rendered the entire case as doubtful, but the trial Court while delivering the impugned judgment has failed to extend the benefits of such doubts in favour of the appellant. Reliance in this regard is placed on the case of "Tariq Pervaiz v. The State, 1995 SCMR 1345", wherein the Hon'ble apex Court has held as under:

"The concept of benefit of doubt to an accused is deep-rooted in our country. For giving him benefit of doubt 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 accused will be entitled to the benefit not as a matter of grace and concession but as matter of right."

For the above reasons, the appeal is allowed; the impugned judgment dated 29th March 2024 passed by the learned Special Judge Anti-Terrorism Court-I, Quetta is set aside and the appellant Yar Muhammad alias Zakar son of Lal Muhammad, is acquitted of the charge. The appellant being in custody is ordered to be released forthwith, if not required in any other case.

JK/59/Bal.

Appeal allowed.