

[Balochistan]

Before Muhammad Ejaz Swati ACJ and Muhammad Aamir Nawaz Rana, J

JAMSHAID HUSSAIN and 3 others---Appellants

Versus

The STATE---Respondent

Criminal Appeal No. 118 of 2022, decided on 15th July, 2024.

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

----S. 7---Explosive Substances Act (VI of 1908), Ss. 4 & 5---Pakistan Arms Ordinance (XX of 1965), S. 13(d)---Act of terrorism, making or possessing explosive substances under suspicious circumstances---Appreciation of evidence---Contradictions in the statements of witnesses---Effect---Prosecution case was that 9-mm pistols, live rounds, detonators, explosive substances and prima cord were recovered from the possession of accused persons---Complainant had stated in his Fard-e-Bayan that Bomb Disposal Team had accompanied him when they reached the place of recovery after receiving spy information, but the Incharge of Bomb Disposal Team, while recording his statement before the Trial Court, stated that already before their arrival, the Counter Terrorism Department (CTD) had been conducting search of vehicles by erecting a blockade---Apart from that, said Incharge of Bomb Disposal Team stated before the trial Court that his statement was recorded by Investigating Officer at the spot, whereas he was not the Investigating Officer of the case---Investigation Officer of the case deposed contrary to the statement recorded by Incharge of Bomb Disposal Team---Complainant had alleged that he separated the samples from the recovered explosive material and prepared the parcels, whereas the Incharge of Bomb Disposal Team, on the contrary, stated that he had separated the samples from recovered explosive material---Incharge of Bomb Disposal Team also failed to identify the appellants with their names before the Trial Court, though he alleged himself to be present at the spot when recoveries were made from the appellants as per prosecution version---Prosecution did not mention the name of the driver, in the calendar of witnesses, who allegedly had taken the Marasala i.e. Fard-e-Bayan to the CTD Police Station, as the police station was approximately 84/85 kilometers away from the alleged place of recovery and, as per prosecution witnesses, the driver did not return back to the place of incident, whereas the Investigating Officer stated contrary to the other statements of the prosecution witnesses and admitted that the driver received the copy of the FIR after its registration and took the same to the alleged place of incident---Appeal against conviction was allowed, in circumstances.

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

----S. 7---Explosive Substances Act (VI of 1908), Ss. 4 & 5---Pakistan Arms Ordinance (XX of 1965), S. 13(d)---Act of terrorism, making or possessing explosive substances under suspicious circumstances---Appreciation of evidence---Safe custody of the recovered explosive substances from the place of recovery till their handing over to laboratory not proved---Prosecution case was that 9-mm pistols, live rounds, detonators, explosive substances and prima cord were recovered from the possession of accused persons---Head Moharrir, CTD Police Station, was produced by the prosecution to prove the safe custody but neither he produced copy of the relevant entry as per Police Rules in register No.19 nor provided any explanation in that regard, therefore, it created serious doubts regarding the safe custody of the alleged recovered explosive substance---Appeal against conviction was allowed, in circumstances.

Faisal Qurashi for Appellants.

Abdul Karim Malghani, State Counsel for the State.

Date of hearing: 18th April, 2024.

JUDGMENT

MUHAMMAD AAMIR NAWAZ RANA, J.--- The appellants were tried by learned Special Judge, Anti-Terrorism Court-I, Quetta ('trial Court') and on conclusion of trial, they were found guilty and vide impugned judgment dated 24.02.2022, they were convicted and sentenced in the following terms:

"109. Hence, as the prosecution substantiated and established, beyond any shadow of doubt, the fact that the under trial Jamshaid Hussain, Hadi Hussain, Altaf Hussain and Shaukat Ali unlawfully possessed 9 mm pistols and live rounds each besides unlawfully possessing detonators, explosive substances and prima cord by the under trial Hadi Hussain and Shaukat Ali riding on the back seat of the motorcycles driven by the under trial Jamshaid Hussain and Altaf Hussain on the 29th April, 2021, at 02:50 p.m, at Nazar Muhammad Karez, Tehsil Punjrai under suspicious circumstances and in furtherance of common intention of them, all the afore named under trial co-accused persons, being the first offenders in view of the record, are convicted of the commission of the offence of possessing explosive substance under suspicious circumstances as envisaged by the provisions of section 5 of the Explosive Substances Act, 1908 and are sentenced there-under each to (04 years) rigorous imprisonment on the one hand and to (03- years) rigorous imprisonment each under section 13(d) of the Pakistan Arms Ordinance, 1965 on the other.

110. However, both the foregoing sentences of imprisonment arising, by and large, out of the same transaction, would run concurrently. The benefit of section 382-B, Cr.P.C i.e the period of their detention in judicial custody during the course of formal trial in this Court is also extended to the convicts as a matter of legal right".

2. The appellants, being aggrieved and dissatisfied from their conviction, have filed the instant Criminal Appeal and professed their innocence.

SUMMARY OF FACTS:

3. PW-1, Muhammad Arif SI/DO, PS CTD Quetta sent a written report/Fardbayan (Exp/1-A) to Officer Incharge, PS CTD Quetta stating therein that on the eventful day he was present in his office, a spy information was received that one Jamshaid Hussain and his accomplices, who belong to and finance the Jihadi organization 'Zainebiyoun Brigade' and are involved in sending armed men to Iraq and Syria for Jihad against the proscribed organization Daesh (ISIS), are coming from Afghanistan to Quetta with huge quantity of explosive substance, arms and ammunitions. This information was formally conveyed to the senior officers of CTD and subsequently the team of police officials was prepared who reached at Nazar Muhammad Karez near Panjpai and at about 01:45 p.m., constituted a blockade/checking point at a Kacha pathway. At or about 02:50 p.m., two motorcycles, being ridden by four persons, were coming from North; the persons were identified by the spy as Jamshaid and his accomplices. The riders, while seeing the police, tried to flee but were apprehended. On query, the person riding the 1st motorcycle disclosed his name as Jamshaid Hussain, whereas the person sitting behind him disclosed his name as Hadi Hussain. The rider of 2nd motorcycle disclosed his name as Shaukat Ali, whereas the person sitting behind him disclosed his name as Altaf Hussain. The personal search of Jamshaid Hussain resulted into recovery of one unlicensed 9mm pistol along with 8 live cartridges, whereas the personal search of Hadi Hussain resulted into recovery of one unlicensed 9mm pistol along with 9 live cartridges. Hadi Hussain was also carrying a black school bag, which was checked by the Bomb Disposal ('BD') team, resultantly 4 live detonators, 2 kilograms explosive substance, 3 feet long prima cord wire and two pairs of clothes were recovered. The personal search of Altaf Hussain, who was riding the 2nd bike, resulted into recovery of one unlicensed 9mm pistol along with 11 live cartridges, whereas the personal search of Shaukat Ali, who was sitting behind him, also resulted into recovery of one unlicensed 9mm pistol along with 12 live cartridges. Besides that Shaukat Ali was also carrying a black school bag, which was also checked by the BD team, resultantly 1 kilogram explosive substance and 2 feet long prima cord wire were recovered. The motorcycles, explosive substance as well as pistols were taken into custody through recovery memos and samples from explosive substance were separated for chemical

examination. As a consequence, FIR No.30/2021, dated 29.04.2021 under sections 4, 5 of the Explosive Substances Act, 1908 read with section 7 of the Anti-Terrorism Act, 1997 read with section 13-D of the Pakistan Arms Ordinance, 1965 (Exp/3-A) was lodged.

INVESTIGATION:

4. PW-8, Syed Rahiq Ali Shah, Inspector Police, was appointed as Investigation Officer, who investigated the matter, went at the place of incident, received recovery memo along with parcel Nos.1 to 10 and two motorcycles from the complainant and arrested the appellants. At the spot, prepared site plan (Exp/8-A), and recorded the statement of witnesses who were present at the spot. He handed over parcels Nos. 1 to 14 and two motorcycles to the Head Moharar and recorded the statement of Head Moharar. He sent the parcels containing recovered pistols and live cartridges to the Forensic Science Laboratory ('FSL'), Police Crime Branch Balochistan, Quetta for forensic analysis. Similarly, he also sent the parcels containing explosive substances for chemical analysis to Panjab Forensic Science Agency ('PFSA'), Lahore; he recorded the statement of Constable Imran Khan, who had delivered the explosive substance to PFSA, Lahore as well as the statement of Constable Ramzan, who had delivered the pistols and live cartridges to FSL Police Crime Branch Balochistan, Quetta. The acknowledgement receipt issued by PFSA along with tickets etc were also made part of the record. Finally, after receiving FSL report (Exp/8-B) from FSL, Police Crime Branch Balochistan, Quetta and the Trace Chemistry Analysis Report (Exp/8-C) from PFSA Lahore, submitted report under section 173, Cr.P.C before the trial Court.

TRIAL:

5. The prosecution, in order to prove the charge against the appellants, produced PW-1, Muhammad Arif SI, the complainant of the case, who got exhibited his written report/Fardbayan (Exp/1-A) and deposed according to his written report/Fardbayan. Rafique Shah, Inspector Police/Incharge BD team appeared before the trial Court as PW-2. He stated before the trial Court that he checked the explosive substances etc and separated samples for FSL, which were handed over by him to the investigation Officer. He identified the appellants before the trial Court. Ahmed Nawaz, SI appeared before the trial Court as PW-3. He deposed before the trial Court that he was performing his duties at PS CTD Quetta, when he received the written report/ Fardbayan and accordingly he lodged the FIR (Exp/3-A). PW-4, Mumtaz Ahmed ASI, is witness to the recovery memos. of explosive substance, pistols along with live cartridges and motorcycles i.e. Exp/4-A as well as witness to the recovery memos of CNIC cards of appellants and cash amount i.e. Exp/4-B. PW-5, Farhan Qayum is Head Moharar of PS CTD Quetta. He received sealed parcels Nos.1 to 14 from the Investigation Officer, incorporated them in Register No.19 and kept them in the Malkhana of PS CTD Quetta. Besides that he also received the two motorcycles from the Investigation Officer which were parked by him in the premises of PS CTD Quetta. PW-6, Constable Imran Khan took sealed parcels Nos. 3, 4, 8 and 9 and delivered the same to the concerned Branch of PFSA in Lahore. PW-7, Constable Muhammad Ramzan took sealed parcel Nos.1, 2, 6 and 7 of the arms and ammunitions to the FSL Police Crimes Branch Quetta for forensic analysis. PW-8 Syed Rahiq Ali Shah is the Investigating Officer who got exhibited the site plan as (Exp/8-A), FSL report of firearm expert (Exp/8-B), Trace Chemistry Analysis Report issued by Panjab Forensic Science Agency (Exp/8-C), prosecution sanction order (Exp/8-E) and incomplete challans (Exp/8-D) and (Exp/8-F). He also produced two copies of the tickets and Rahdari as Mark/1, Mark/2 and Mark/3.

6. The appellants recorded their statements under section 342, Cr.P.C and denied all the allegations levelled by the prosecution. The appellants produced one witness i.e. DW-I, Amjad Ali, in their defense and also got recorded their statements on oath under section 340(2), Cr.P.C. On conclusion of the trial, the appellants were convicted and sentenced in the terms mentioned in Para No.1.

ARGUMENTS:

7. Learned counsel for the appellants strongly disputed the alleged recovery of explosive substances as well as arms and ammunitions from the possession of appellants and contended that the appellants have falsely been implicated in the instant case as they were already in the

custody of law enforcement agencies and subsequently recovery of explosive material and arms and ammunition have been foisted upon them. Learned counsel further contended that the prosecution has failed to establish connection of appellants with any terrorist organization. Per learned counsel, there are material contradictions amongst the witnesses of the prosecution which render the prosecution case unreliable and untrustworthy. Apart from that learned counsel contended that no private witness was associated which further creates doubts in the prosecution story as independent corroboration is completely missing in the instant case. While concluding his arguments, learned counsel contended that no effort was made by the prosecution to associate the local levies at the time of recovery which has created dent in the prosecution case.

8. Conversely, learned State Counsel appearing on behalf of the State supported the impugned judgment and contended that the prosecution has successfully drove home the charge against the appellants without any shadow of doubt, therefore, the appeal is liable to be dismissed straightaway.

Arguments heard and record perused.

DETERMINATION:

9. The prosecution built up the case against the appellants on the premise that the appellants have nexus with the proscribed organization i.e. Zainebiyoun Brigade and not only they are providing financial support to the said organization but also sending arms and ammunitions and fighters to Syria and Iraq, and in this endeavor, the appellants recruit persons from Quetta.

10. The prosecution, in order to support its contentions and to establish nexus of the appellants with the alleged terrorist organization, has not been able to bring on record single evidence which could substantiate the allegations levelled by the complainant in the FIR; since the prosecution witnesses, particularly the Investigating Officer, admitted that no evidence of whatsoever nature was found against the appellants regarding their involvement in any kind of illegal activities, therefore, the alleged recovery of arms and ammunitions has to be carefully examined.

11. The prosecution case rests upon recovery of weapons and explosive substance from the possession of the appellants. The scrutiny of the prosecution evidence transpires number of material contradictions in the statements recorded by witnesses produced by the prosecution. The complainant has stated in his Fard-e-Bayan (Ex.P/1-A) that BD Team had accompanied him when they reached to the place of recovery after receiving spy information, but the PW-2, Rafique Shah, incharge of BD Team, while recording his statement before the Trial Court, stated that already before their arrival, the CTD had been conducting search of vehicles by erecting blockade. Apart from that, the said PW-2 stated before the trial Court that his statement was recorded by Investigating Officer, Muhammad Arif, at the spot; Whereas, Muhammad Arif was not the Investigating Officer of the case, rather PW8, Syed Rahat Ali Shah, was the Investigation Officer of the case who deposed contrary to the statement recorded by PW-2. The complainant has alleged that he separated the samples from the recovered explosive material and prepared the parcels, whereas the PW-2, on the contrary, stated that he had separated the samples from recovered explosive material. The PW-2 also failed to identify the appellants with their names before the trial Court, though he alleged himself to be present at the spot when recoveries were made from the appellants as per prosecution version.

12. The prosecution did not mention the name of the driver, Samiullah, in the calendar of witnesses, who allegedly had taken the Marasala i.e. Fard-e-Bayan (Ex.P/1-A) to the CTD Police Station Quetta, as the police station was approximately 84/85 kilometers away from the alleged place of recovery and, as per prosecution witnesses, the driver did not return back to the place of incident, whereas the PW-3 stated contrary to the other statements of the prosecution witnesses and admitted that the driver Samiullah received the copy of the FIR after its registration and took the same to the alleged place of incident.

13. The prosecution has also not been able to prove the safe custody of the alleged recovered narcotic substance from the place of recovery till its handing over to Punjab

Forensic Science Laboratory Lahore; Though PW-5, Head Moharrir CTD Police Station, was produced by the prosecution to prove the safe custody but neither he produced copy of the relevant entry as per police rules in register No.19 nor provided any explanation in this regard, therefore, created serious doubts regarding the safe custody of the alleged recovered explosive substance.

14. There are number of other contradictions noticed in the statements of prosecution witnesses with regard to time and the manner in which alleged recovery has been made which contradictions have further damaged the prosecution case. The appellants have recorded their statements on oath and, while denying the allegation of the prosecution, stated that alleged recoveries have been foisted upon them without any justification.

The careful reappraisal of the prosecution evidence leads to the conclusion that the prosecution has not been able to prove the case against the appellants beyond reasonable doubt, therefore, by extending the benefit of doubt, the appellants are acquitted of the charge. The impugned judgment as well as conviction by the trial Court is set aside. The appellants are already on bail, their bail bonds stand discharged.

JK/117/Bal.

Appeal allowed.