

PESHAWAR HIGH COURT PESHAWAR
ORDER SHEET

Date of Order of Proceedings	Order of other Proceedings with Signature of Judge.
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23.10.2019	<p><u>Cr. A. No.1016-P of 2019</u></p> <p>Present: Mr. Muhammad Saleem Mardan, Advocate for the appellant</p> <p>Syed Sikandar Hayat Shah, AAG for the State</p> <p style="text-align: center;">*****</p> <p><u>AHMAD ALI, J.</u> - Through the instant appeal under section 410 Cr.P.C, the appellant namely Nasar Shah has called in question the judgment dated 27.07.2019 passed by learned Judge Anti-Terrorism Court Matta (Swat) at Mardan, whereby the appellant was convicted under sections 324/34, 353/34 PPC, 7(c), 7(h) of ATA and 15-AA in a case FIR No.198 dated 16.09.2016 registered at Police Station Kharkai, District Mardan.</p> <p>2. The prosecution story in brief is that the complainant received an information that some proclaimed offenders namely Shah Khalid, Nasar Shah and Akbar Shah are present in the house of on Zarin Shah situated in village Jewar Banda Alo. Thus,</p>

	<p>the complainant along with police party headed by Fazal Malik Shah raided that place and found there Dilawar Shah, Zarin Shah along with other proclaimed offenders. They all, on seeing the police party started firing upon the police personnel as a result whereof SHO Fazal Malik and constable Fayaz Bacha got hit and sustained serious injuries. The police party in self-defence counter the attack due to which one proclaimed offender Shah Khalid got hit and died on the spot; Nasir Shah was arrested along with arm & ammunition while other proclaimed offenders namely Akbar Shah, Dilawar Shah and Zareen Shah made good their escape.</p> <p>3. After completion of usual investigation, complete challan against the accused/appellant along with accused Zarin Shah was submitted. They were formally charged to which they did not plead guilty and claimed trial. In order to establish the charges, the prosecution examined sixteen witnesses. The accused were also examined under section 342 Cr.P.C wherein they professed innocence and false implication. However, they neither examined themselves on Oath as required under section 340(2) Cr.P.C nor produced</p>
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	<p>any evidence in their defence. After hearing the arguments, the learned Judge Anti-Terrorism Court Matta (Swat) at Mardan acquitted co-accused Zarin Shah, whereas, appellant was convicted and sentenced under the above-mentioned charges vide impugned judgment dated 27.07.2019, however, he stood acquitted to the extent of remaining charges.</p> <p>4. During the course of arguments, it transpired that the learned trial court while recording the conviction of appellant under sections 324/34, 353/34 PPC, 7(c), 7(h) of ATA and 15-AA, acquitted him under section 302 PPC and also acquitted him to the extent of remaining charges levelled against him by extending him benefit of doubt. The relevant excerpt from the impugned Judgment is reproduced here-under:</p> <p><i>“As a result of foregoing decision it is held that the <u>prosecution except offence u/s 302 PPC has proved its case against the accused facing trial Nasar Shah</u>. He is, therefore, convicted and sentenced as follows:</i></p>
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	<ol style="list-style-type: none">1. <i>For offence u/s 324/34 PPC to undergo R.I. for 10 years. He is also liable to pay fine of Rs.50,000/- (fifty thousand) and in default thereof to undergo SI for three months.</i>2. <i>For offence u/s 7(c) ATA to undergo R.I for 10 years with a fine of Rs.25,000/- and in default thereof to undergo SI for three months.</i>3. <i>For offence u/s 353/34 PPC to undergo R.I for one year with a fine of Rs.2,000/- and in default thereof to undergo SI for fifteen days.</i>4. <i>For offence u/s 7(h) ATA to undergo R.I. for seven years with a fine of Rs.25,000/- and in default thereof to undergo SI for three months.</i>
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	<p><i>5. For offence u/s 15-AA to undergo R.I for one year with a fine of Rs.2,000/- and in default thereof to undergo SI for fifteen days.</i></p> <p><i>All the sentences shall run concurrently. Benefit of Section 382-B Cr.PC is also extended to the convict.</i></p> <p><i><u>He is, however, acquitted to the extent of remaining charges levelled against him</u> by extending him the benefit of doubt.”</i></p> <p>5. From the above underlined sentences, it came to lime light that the learned trial court on one hand held that, “prosecution except offence u/s 302 PPC has proved its case against the accused facing trial Nasar Shah.” meaning thereby that the prosecution succeeded in proving the remaining charges against him. Whereas, on the other hand, after recording the conviction of appellant under sections 324/34, 353/34 PPC, 7(c), 7(h) of ATA and 15-AA, acquitted him to the extent of remaining charges and there is no finding with regard to Sections 148 & 149</p>
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	<p>PPC.</p> <p>6. The prosecution case mainly hinges upon Sections 148 & 149 PPC on the score that the appellant being the member of unlawful assembly, in prosecution of the common object of that assembly, being armed with firearms, rioted the police party and as a result thereof two police personnel got injured, which establishes aggression of the accused party and therefore Sections 148 & 149 PPC were added in the instant case. As per prosecution episode, the firing at police party was made by five number of persons, of whom the appellant was arrested on the spot. The learned trial court left these important sections unattended as the appellant can be awarded sentence under sections 324/34, 353/34 PPC and sections 7(c), 7(h) of ATA only when section 148 & 149 PPC are proved.</p> <p>7. Although the learned trial court has specifically mentioned that prosecution proved its charges against accused/appellant except section 302 PPC which means that Section 148 & 149 PPC are also proved but no finding with regard to section 148</p>
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	<p>& 149 PPC are there. The ambiguity popped-up further from a later verdict where learned trial court is acquitting the appellant to the extent of remaining charges levelled against him. Thus, we are of the view that the mandatory provisions of section 367 Cr.P.C. have not been followed by the learned trial court. Section 367, Cr.P.C., reads as follows:-</p> <p>367. Language of judgment: Contents of judgment. (1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by the Presiding Officer of the Court (or from the dictation of such Presiding Officer) in the language of the Court, or in English; and shall contain the point or points for determination, the decision, thereon and the reasons for the decision; and shall be dated and signed by the Presiding Officer in open Court at the time of pronouncing it (and where it is not written by the Presiding Officer with his own hand, every page of such judgment shall be</p>
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	<p>signed by him).</p> <p>(2) It shall specify by offence (if any) of which and the section of the Pakistan Penal Code or other law under which, the accused is convicted, and the punishment to which he is sentenced.</p> <p>(3) When the conviction is under the Pakistan Penal Code and it is doubtful under which of two sections, or under which of two parts of the same section, of that Code, the offence falls, the Court shall distinctly express the same, and pass judgment in the alternative.</p> <p>(4) If it be a judgment of acquittal, it shall state the offence of which the accused is acquitted and direct that he be set at liberty.</p> <p>(5) If the accused is convicted of any offence punishable with death, the Court sentences him to any punishment other than death, the Court shall in its judgment state the reason why sentence of death was not passed.</p> <p>(6) For the purposes of this section, an order under section 118 or section 123, subsection (3) shall be deemed to be a judgment."</p>
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	<p>8. It is the mandate of sub-section (2) and (3) above that when the Court finds accused guilty of one or more offences, then separate sentence must explicitly be awarded at the time of recording conviction. An accused person cannot be presumed or implied to be convicted under any offence rather the sentence should be distinct for each and every offence in which the accused found guilty.</p> <p>9. Being inseparable and integral part of conviction, unless specifically awarded, it cannot be assumed to the prejudice of the accused that he was also sentenced under sections 148 & 149 PPC by applying the rule of implication because the law provides the passing of specific sentence for a distinct offence and if it is not awarded, it cannot be construed that same was impliedly awarded as it is violative of the mandatory provisions of subsections (2) and (3) of section 367 Cr.P.C. which cannot be cured by the provisions of under section 537 Cr.P.C. Guidance derived from the judgments of august Apex Court, reported as 2016 SCMR 1190 titled <i>Irfan and another Vs. Muhammad Yousaf and another</i>, 2004 SCMR 1 titled <i>Farrukh Sayyar and 2 others Vs. Chairman,</i></p>
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	<p><i>NAB, Islamabad and others</i>, and 1997 SCMR 871 titled <i>Sahab Khan and 4 others Vs. The State and others</i>.</p> <p>10. Without going into the merits of the case, we deem it appropriate to remand the case to the learned trial court for re-writing of the Judgment. Therefore, appeal is allowed, impugned judgment of the learned trial court is set aside and the case is remanded back to the learned trial court with the direction to re-write the Judgment in view of the above observations, within one month of the receiving the case-file. Appeal disposed of accordingly.</p> <p>Announced. 23.10.2019</p> <p style="text-align: right;">SENIOR PUISNE JUDGE</p> <p style="text-align: right;">J U D G E</p> <p><small>DB Mr. Justice Qaiser Rashid & Mr. Justice Ahmad Ali</small></p>
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