Judgment Sheet

PESHAWAR HIGH COURT, MINGORA BENCH (DAR-UL-QAZA), SWAT.

JUDICIAL DEPARTMENT

Cr.A.No.222-M/2016.

JUDGMENT

Date of hearing 07/08/2017……

Appellant (Raees Khan) By Sahibzada Assadullah, Advocate……

State By Barrister Asad Hamidur Rehman……

MUHAMMAD NASIR MAHFOOZ, J:- By this common judgment, we shall also decide Cr.A No.260-M/2016, as both the appeals have arisen from the judgment dated 03.11.2016 of the learned Judge Anti-Terrorism Court-III, Swat at Timergara, Lower Dir, delivered in case FIR No.04 dated 15.01.2016 under sections 4/5 Explosive Substance Act, 15 Arms Act, read with Section 7 Anti-Terrorism Act, 1997 of police station CTD Malakand Region.

2. Through the impugned judgment, appellant Raees Khan has been convicted under Sections 4/5 Explosive Substance Act and sentenced to 7 & 3 years R.I, respectively and under section 15 AA for one year R.I. Benefit under Section 382-B, Cr.P.C has been given to him. The convict/appellant has impugned his

conviction and sentence by filing Cr.A.No.222-M/2016 whereas the complainant/State has prayed for enhancement of sentence of the convict/appellant through Cr.A.No.260-M/2016. As stated earlier, both the appeals are being decided through this single judgment.

3. Brief facts of the case are that on 15.01.2016 at 08:45 hours, during search operation at a place known as 'Terkha' Chakdara, the appellant was found in suspicious condition. From his personal possession, one 30 bore pistol with ten live rounds and one hand grenade were recovered. On the basis of ibid recovery, case under sections 4/5 Explosive Substance Act, 15 Arms Act, read with Section 7 Anti-Terrorism Act, 1997 was registered against him. After completion of investigation, complete challan was put in Court, which indicted the accused for the charge to which he pleaded not guilty and claimed trial. In order to prove its case, prosecution examined four witnesses whereafter statement of the accused was recorded wherein he professed innocence. On conclusion of the trial, the learned trial Court found the appellant guilty of the charge and on conviction sentenced him, as mentioned above.

4. Learned counsel for the convict/appellant contended that the impugned order is arbitrary and passed without application of judicial mind and legal formalities have not been fulfilled by the prosecution; that the prosecution has miserably failed to prove its case against the appellant and the learned trial Court has fallen in error to pass the impugned judgment of conviction; that there is no ground to believe that the accused has committed any act of terrorism as provided under sections 6 and 7 of ATA.

5. As against the above, learned counsel representing the State while supporting the judgment of conviction, argued that the prosecution has been able to prove its case against the convict through convincing evidence, which is worth reliable. He contended that there are strong grounds to believe that sections 6 (1) (b) ATA alongwith Sub-section (2) (EE) besides section 7 apply to the instant case but also contended that the learned trial court has wrongly passed a lesser sentence whereas accused-appellant deserves maximum sentence provided under the law.

6. We have heard learned counsel for the parties and also gone through the case record.

7. Prosecution in support of its case has produced four witnesses. Muhammad Iqbal Khan SI Investigation PS CTD Malakand was examined as P.W.1 who deposed that he had investigated the case and allegedly recovered one pistol of 30 bore marked P-1 country made with 10 rounds of the same bore P-2 and a hand grenade P-3. The recovery memo is Ex.PA. He stated to have drafted murasila EX.PA, which was sent to police station for registration of the case wherein FIR Ex.P.A/1 was registered.

8. P.W.2 Muhammad Aslam Khan, SI police station CTD Malakand Region had deposed that he is the marginal witness of recovery memo Ex.P.W.1/1.

9. P.W.3 Ajab Khan. Head Constable deposed that he had examined the alleged recovery of 30 bore pistol with 10 rounds vide his report Ex.P.W.3/1.

10. P.W.4 Ameer Shah, Inspector PS CTD Chitral deposed that after registration of the case, investigation was marked to him. He visited the spot and prepared the site plan Ex.PB. He also obtained expert opinion of the armourer regarding the pistol and also placed on file the FSL report regarding the hand grenade Ex.PC.

11. The contention of learned counsel for the appellant has got force that hand grenade alleged to be

recovered vide Ex.P.W.1/1 was in fact taken into possession on 15.01.2016 but by manipulation and overwriting it has been changed to 16.01.2016 and when the same was sent on the same day then why it took two days by sending the same to FSL for examination as apparent from the FSL report Ex.PC. As according to court query, learned State counsel could not give a satisfactory answer to this question. In addition to this, the said official besides the official who drafted murasila have also been abandoned and not examined so as to explain this position. Moreover, cross-examination of Muhammad Iqbal, SI Investigation shows that he had affixed the monogram with the words as in the seal but the same is not present even in the cross-examination the lacuna mentioned above has not been properly answered.

12. As it is well established practice in criminal cases that slight doubt arising in the case of prosecution goes in favour of the accused and he gets benefit that is sufficient for acquittal. In the present case, prosecution has failed to bring home the guilt as charged against accused-appellant to prove that he had in fact intended to be involved in a case under section 7 ATA. So far as the alleged recovery and applicability of sections 4/5 Explosive Substance Act is concerned, the date of manipulation vide which the

subject hand grenade was sent to the FSL from 15.01.2016 to 16.01.2016 besides the lack of explanation of delay of two days for sending the same to FSL proved that the prosecution has failed to discharge the burden of proof heavily laid on them.

13. It may also be mentioned, that it is sine qua non for applicability of provision of Anti-Terrorism Act, 1997 that joint investigation team in compliance of section 19 of ibid Act has to be formed by District Police Officer. This essential pre-requisite is also lacking. Section 19 is reproduced below.

> ***"19. Procedure and powers of Anti-Terrorism Court.- (1) The offences under this Act shall be investigated by a police officer not below the rank of inspector. The Government, if deems necessary, may constitute a Joint Investigation Team (JIT) of the officers from other law enforcement agencies including intelligence agencies for assisting the investigation officer. The investigating officer or the JIT shall complete the investigation in respect of cases triable by the court within thirty working days and forward a report under section 173 of the Code directly to the court."***

Learned counsel for appellant referred to **Bashir Ahmed Vs. Muhammad Siddique & others (PLD 2009 S.C 11)** para 9 of the said judgment is reproduced as under;

> ***"9. From the entire resume, it is manifest on record that intention of the respondents was not at all to create sense of insecurity or destabilize the public-at-large or to advance any sectarian cause. Thus, we are of the view that the design or purpose of the offence as contemplated by the provisions of***

section 6 of the Act is not attracted. Reference can be made to the case of this court reported as Bashir Ahmad v. Naveed Iqbal PLD 2001 SC 521 whereby sprinkling of spirit on the person of victim was made within the boundary walls of the house of petitioner which was not a public place and accordingly the element of a striking terror or creating sense of fear and insecurity in the people or any section of the people was found missing, therefore, the order of transferring the case to the court of learned Sessions Judge passed by the High Court was upheld."

He further placed reliance on the case of **Aftab Ahmad Vs The State** (**2004 MLD 1337)** para 8 of which is reproduced as under;

"8. Another co-incidence which sets the court on its guards and constrains it to scrutinize the evidence against the appellants with much greater care and circumspection is that the recovery of hand-grenades from the possession of the appellants was not witnessed by any independent witness. No doubt Police Officials are as good witnesses as any other from the public but in the circumstances of the case, when the very occurrence on the alleged date and spot is highly doubtful, the recovery of the incriminating material in the absence of independent witness has to be looked askance at."

Reliance is also placed on **Muhammad Ahmad alias Danyal Vs. The State (2005 YLR 954)** para No.31 of which is reproduced as under;

"31. It is not out of place to mention here that the prosecution has cited three eyewitnesses namely Feroz Khan, Alain Sher and Abdul Fhaffar as disclosed by the investigation officer P.W.12 Pir Munawar Shah. Out of them two witnesses, Feroz Khan and Alain Sher were examined but the third witness Abdul Gaffar was not produced before the trial court for recording his statement. When one witness out of the two witnesses examined in the court was declared Hostile then it was incumbent upon the prosecution to have examined the third eye-witness namely Abdul Gaffar. The prosecution

> ***did not furnish any reason for not examining this witness. Theefore, a presumption under illustration "g" of Article 129 of Qanun-e-Shahadat Order can fairly be drawn that had the P.W Abdul Gaffar been examined in court, he would have not supported the prosecution case or his evidence would have not been favourable to the prosecution. Non-examination of P.W Abdul Gaffar in the circumstances of the present case has adversely affected the prosecution story."***

He further placed reliance on an unreported judgment of this court passed in Cr.A.No.114-P of 2014 para 9 of the judgment is reproduced as under;

> ***"9. Apart from above, it is also in the statement of Seizing Officer that the packets were having the seal of 'JK'but it is remained unexplained that why he didn't affix the monogram of his own stamp, which fact also makes the recovery doubtful. When this being the state of things, we come to the safe conclusion that the mode and manner of arrest of the accused and recovery of contraband are highly doubtful as the prosecution didn't prove its case beyond any shadow of doubt and any doubt, if arising in links of the chain of prosecution story, the benefit of same would go to accused and such like dents in the prosecution evidence doesn't justify the conviction and sentence of the appellant for the safe administration of criminal justice."***

Nevertheless, police officials could not be left free to misuse their official position in such like situation.

14. For what has been discussed above, we are of the view that the prosecution has failed to prove its case against the appellant and the learned trial court has fallen into error to convict the appellant on the present available evidence on record. Therefore, we accept the instant appeal, set aside the impugned judgment of sentence and acquit the appellant of the charges leveled against him. It

is directed that the appellant be released forthwith if not required to be detained in any other case.

Above are the reasons of our short order of even date.

J U D G E

Announced. ***J U D G E***
Dt.07/08/2017.