

Judgment Sheet

IN THE PESHAWAR HIGH COURT,
PESHAWAR

JUDICIAL DEPARTMENT

Cr.A No. 304-P of 2017.

JUDGMENT

Date of hearing.....09.10.2017.....

Appellant(s)...(Sher Rehman): By Mr. Muhammad Saeed Khan,
Advocate.

Respondent(s)/State: By Mr. Mujahid Ali Khan,
AAG.



QALANDAR ALI KHAN, J:- Having been convicted under Section 5 Explosive Substances Act and sentenced to five years R.I and also convicted under Section 7 ATA, 1997, and sentenced to five years R.I by the learned Judge, Anti Terrorism Court-II, Peshawar, vide impugned judgment/order dated 15.05.2017, the convict/appellant, Sher Rehman son of Fazal-ur Rehman resident of Utmanzai, Charsadda, preferred the instant

appeal for setting aside the impugned judgment as well as his conviction and sentences awarded to him by the learned trial Court in case vide FIR No.93 dated 18.07.2016 under Sections 5 Explosive Substances Act and 7 ATA, 1997, Police Station CTD, Peshawar.

2. The case was registered on the report of Muhammad Qayyum, Inspector P.S CTD Peshawar/complainant who, while purportedly acting on a prior information of intelligence wing, laid a barricade on ring road near Achini Cross and found a person coming on foot from the Tribal Territory, in suspicious condition, who reportedly tried to flee, but was overpowered and a cloth bag wrapped in another cloth/*chaddar* containing two green colour plastic bottles was recovered, showing some suspected wires in the bottles, which were shifted along with the accused, who disclosed his name as Sher Rehman son of Fazal ur Rehman resident of Utmanzai, Charsadda, P.S CTD, and BDU staff was

summoned, who defused the explosive material, weighing 4 1/2 kilograms, with nut bolts, two non-electric detonators, prima card measuring 4 feet and safety fuse measuring 5 feet, which were, allegedly, sealed; and murasila drafted by complainant/Inspector was sent to the P.S for registration of the case.

3. Although, the alleged recovery was made at 1030 hours on 18.07.2016, but the recovered so called explosive material were sent to the Incharge BDU for opinion/report vide application dated 19.07.2016; which were, however, received by the Assistant Inspector General of Police BDU Special Branch, KPK, Peshawar, on 29.07.2016 i.e. ten days after their dispatch. Anyhow, on the application dated 22.09.2016 of the Inspector P.S CTD, the articles mentioned in the application were destroyed, by the officials of Bomb Disposal Squad under the supervision of learned Judicial Magistrate-II, Peshawar, on 27.09.2016. After completion of investigation,

complete challan was submitted in the trial Court.

4. After framing of formal charge by the learned trial Court/Judge ATC-II, Peshawar, to which the accused/appellant pleaded not guilty and claimed trial, the prosecution produced a total of 8 PWs, including seizing officer, Muhammad Qayyum Inspector (PW.1); marginal witness Muhammad Ayaz SI (PW2); Member of BDU staff Irshad Ali SI (PW3); I.O Hastam Khan Inspector (PW.6); Judicial Magistrate-II, Peshawar, Ghulam Hamid (PW7) and AIG BDU KPK, Mr.Shafqat Malik (PW8), besides a couple of formal witnesses of CTD staff; where-after, statement of the accused was recorded under Section 342 Cr.P.C, wherein, he refuted charges of the prosecution against him, but declined to be examined on oath or produce defence evidence.

5. On the conclusion of trial, the learned trial Court/Judge ATC-II, Peshawar, heard arguments of learned PP and learned counsel

for the accused, and rendered the impugned judgment, thereby convicting the appellant/accused and awarding him the sentences, mentioned hereinabove; hence the instant appeal.

6. Arguments of learned counsel for the convict/appellant and learned AAG heard; and record perused.

7. It may be observed, at the very outset, that all the witnesses of the prosecution are not only police officials but they are also from the same CTD Peshawar; of course, with the exception of Ghulam Hamid, Judicial Magistrate-II Peshawar (PW7), but only a witness to the destruction of the case property, and Mr. Shafqat Malik AIG BDU KPK (PW8), though not from CTD Peshawar, but nevertheless a Senior Police Officer. No doubt, police officials are as good witnesses as anyone else may be, as aptly observed by the learned trial Court, but their testimony for conviction is to be accepted with great care and caution, and discrepancies/contradictions

in their testimony is to be keenly observed and the benefit of any such discrepancies/contradictions, invariably, extended to the accused; which is even otherwise the cherished principle of criminal justice system.

8. Moreover, it sounds something strange that a person would enter settled area from T.T after covering distance of 2 to 3 K.M on foot while carrying a cloth bag wrapped in another cloth/*chaddar* containing explosive material weighing more than 4/5 kilograms. Besides, there are two more striking feature of the case, which cannot be so conveniently overlooked. The so-called explosive material, allegedly recovered on 18.07.2016, was dispatched to the Incharge BDU, KPK, Peshawar vide application dated 19.07.2016, and received in the office of AIG BDU on 29.07.2016, without any evidence with regard to the safe custody of the articles during the intervening period.

9. Apart from the above unexplained delay in sending the explosive material to Incharge BDU, KPK, Peshawar, for opinion/report, thus casting doubt on the report of Incharge BDU, there was another damaging aspect of the case of prosecution, which was overlooked by the learned trial Court while convicting the appellant/accused and awarding him the impugned sentences. The complainant/Inspector (PW1) himself stated in his statement before the Court that "the explosive material was blasted on the spot by the BDU official for defusing", if so, what was then inspected by the Incharge BDU and what was later on destroyed by the BDU official under the Supervision of Learned Judicial Magistrate-II, Peshawar (PW7). Obviously, it was not simple defusing of the explosive material, as sound of explosion was heard by the complainant and his staff present at a distance of 40 to 50 paces. It is also a fact, admitted by the marginal witness Muhammad Ayaz (PW2), that recovery memo

and murasila were prepared after defusing i.e. blasting. The above referred admissions on the part of the PWs assume importance for the case in favour of the defence in the light of statement of SI BDU Irshad Ali (PW3) to the effect that there was difference between defusing and destruction/exploding/blasting of the IED, (allegedly recovered from the appellant/accused). Besides, nothing was brought on the record to show either departure or arrival of complainant/Inspector and his staff in the P.S. Likewise, no entry was made in the relevant register (Register No.19), showing receipt of the explosive material by the Muharrir and dispatch of the same to Incharge BDU. Even if the explosive material was destroyed, no explanation is forthcoming for not producing and exhibiting in the Court the cloth/*chaddar* and the cloth bag, allegedly, containing the explosive material. It is also an admitted fact that there were shops as well as residential property near the place of alleged recovery, but not

even an attempt seems to have been made by the complainant/Inspector to procure attendance of witness/witnesses from the general public to lend credence to the recovery of the so-called incriminating articles from the possession of the appellant/accused, despite prior information received by the complainant/Inspector about transportation of explosive material from T.T to the settled area. Furthermore, nothing was brought on record to establish nexus of the appellant/accused with a terrorist organization.

10. To say the least, these glaring discrepancies should not have escaped notice of the learned trial Court while convicting the appellant/accused and awarding him the impugned sentences. Therefore, the impugned judgment as well as conviction and sentences awarded to the appellant/accused are not sustainable in law, and ought to be set aside. Consequently, the appeal is accepted, and the impugned judgment of the learned

trial Court as well as conviction of the appellant/accused and sentences awarded to him by the learned trial Court are set aside. The appellant is acquitted of the charges while extending him the benefit of doubt; and be set free forthwith if not required in any other case.

Announced.
09.10.2017.

J U D G E

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Ayub

*(D.B) Hon'ble Mr. Justice Lal Jan Khattak.
Hon'ble Mr. Justice Qalandar Ali Khan.*