

JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
ABBOTTABAD BENCH.

(Judicial Department)

Cr.A No. 37-A of 2016.

JUDGMENT

Date of hearing 11.09.2017.

Appellant-Petitioner (Mula ud Din and others) by Malik
Amjad Ali and Ms. Sehrish Habib,
Advocates.

Respondent (The State) by Mr. Yasir Zahoor Abbasi,
Assistant Advocate General.

SYED ARSHAD ALI, J.--- Through this single
judgment we intend to dispose of Criminal Appeal
No.37-A/2016 filed by Mula ud Din and another,
Criminal Appeal No.38-A/2016 filed by Abdul
Salam, Criminal Appeal Nos.50-A/2016 and 53-
A/2016 filed by the State, are the outcome of one and
the same Judgment dated 12.03.2016 recorded by
learned Judge Anti-terrorism Court, Hazara Division
Abbottabad, whereby the appellants have been
convicted and sentenced as under:

i) Accused Mula ud Din is convicted under section 5 ESA and sentenced to five years R.I, accused Abdul Salam is sentenced to six months R.I and Isam Khan sentenced to three years R.I.

ii) Accused Mula ud Din is further convicted under section 353 PPC and sentenced to one year.

All the sentences shall run concurrently. However, benefit of section 382-B Cr.PC was extended to the appellant/convict.

2. The prosecution case is that on 12.07.2015 complainant Raziq Khan SHO was on routine patrolling duty alongwith other police officials near Trace Banda when an informer informed them that a motorcar bearing No.PSLMS/UI Shangla Silver colour in which Abdul Salam, Mula ud Din, Asadullah alias Imtiaz resident of Tangir transporting arms ammunition for the purpose of terrorism. On the said information they made barricade on Matta Band Check Post. At about 02:00 a.m. motorcar in which

accused were boarded reached which was signaled to stop but persons sitting in the motorcar when saw the police party made firing upon them. Police party also made firing upon them, however, the accused made good their escape and left the motorcar. On search of trunk of motorcar, one rifle RPG-7 bearing No.1601560 alongwith 06 rocket, 06 fuse were recovered. Similarly, from the dashboard stamp paper, copy of registration morotcar, copies Afghani documents, two mobiles containing SIM S.Com and Telenor, One telephone diary alongwith copy of CNIC of Saadullah and Muhammad Usman were also recovered and case FIR No.10 dated 12.07.2015 under sections 324/353/34 PPC, section 4/5 ESA, section 6/7 ATA, section 15 AA of KPK at police station CTD, Hazara Region, Abbottabad was registered. The investigation of the case was handed over to Hamayun Khan, Inspector CTD PW-7. On 16.07.2015 the complainant arrested accused Mula ud Din and Abul Salam whereas accused Isam Khan,

who allegedly sold the weapon to accused Mula ud Din, was arrested on 22.07.2016. On 25.7.2015 the prosecution produced Musharaf Din PW-4 for recording his statement under section 164 Cr.P.C. He has narrated in his statement that he is plying a Jeep for the purpose of rent from palas to pattan. On 11.07.2015 he took accused Allauddin and Asadullah (whose names latter known to him) to Pattan in his Jeep.

3. After completion of investigation, challan was submitted against was submitted against accused. The accused were summoned and after providing relevant copies under section 265-C Cr.PC, charge was framed against them, to which they did not plead guilty and claimed trial. Asadullah died and proceedings him were abated. The prosecution in order to prove guilt of accused, produced and examined as many as eighteen (07) witnesses. After close of the prosecution evidence, statements of

accused were recorded under section 342 Cr.PC, wherein they professed innocence, they did not opt to produce defence evidence or to be examined on oath as provided under section 340 (2) Cr.PC. Learned trial Court after hearing arguments of learned counsel for the parties, vide impugned judgment dated 12.03.2016. We also noted that on 27.10.2015 the learned trial Court recorded the statement of accused Abdul Salam, wherein he stated that the accused Mula ud Din and Asadullah hired his care on rent of Rs.7000/- for taking them to Tangir on the way they were stopped by police at Matta Banda. Accused Mula ud Din and Asadullah forced him to continue. However, he had to stop the care and made good his escape.

4. Learned counsel appeared on behalf of the appellants has argued that the prosecution has failed to produce any cogent evidence to bring home charge against the appellants, the contents of FIR is

not supported by the site plan, although joint investigation team was constituted but no efforts have been made by the joint investigation team to trace the ownership and call data regarding the mobile and the SIM recovered from the vehicle. She further argued that indeed this was a case of no evidence and Musharaf Din PW was introduced to strengthen the prosecution case, however, if his statement is perused the same is full of contradiction and gives an impression that the prosecution has tutored the said witness against the appellants and no identification parade was carried to identify the appellants.

5. On the other hand, learned Assistant Advocate General while controverting the arguments of the learned counsel for appellants has argued that the prosecution has established the case beyond reasonable doubt and has successfully established the names of appellants with the recovered weapons. He further stated that Musharaf Din PW is a private and

independent witness, hence, no malafide can be attributed to him.

6. Arguments heard and record perused.

7. The prosecution case mainly hinges on the evidence of PW Musharaf Din. As per record PW Musharaf Din recorded his statement on 25.7.2015 after 09 days of the arrest of appellants. The question that how Musharaf was associated with the investigation and why his statement was recorded on 25.7.2015 is the questions which remained unanswered before the trial Court and investigation. Since PW Musharaf Din is a material witness, hence his testimony has been viewed in the primes of guidelines settled by the superior Court for appreciating evident. The close perusal of his first statement recorded under section 164 Cr.P.C would suggest that he took the Allauddin and Asadullah accused in his Jeep to Pattan. The accused were not earlier known to him. His this statement if assumed to

be correct, even then does not connect the appellants with the incident as narrated in the FIR. While appearing as PW in the present case, he in cross examination has admitted that he did not remember that who told him the names of accused Mula ud Din and Asadullah. He further stated that the same might have been provided to him by SHO. In such situation it was incumbent upon the prosecution to have conducted identification parade of the accused under the supervision of Judicial Magistrate to establish at least the presence of accused Asadullah and Mula ud Din at evening time in palas. As per statement of Muhammad Raziq Khan PW-2 he received spy information wherein he names of accused were disclosed who would transport arms ammunitions in a non-custom vehicle bearing registration No.PSLMS/UI just half an hour before the alleged time of intercepting the said vehicle. The most important aspect of the case is the identity of the accused Mulauddin, Asadullah and Abdul Salam. The

perusal of site plan would reveal that the investigation officer has given specific place/point to Mulauddin and Asadullah. In the site plan Ex:PW7/1. However, neither in FIR nor Muhammad Raziq Khan S.I and Abdul Wahab S.I in their statements have uttered a single word about the identity of the aforesaid accused in their statements in the Court. They do not say that either the accused were known to them or had identified them while they were decamping from the place of occurrence. It is not the case of prosecution that the complainant had identified the accused, however, he was provided the names of accused. Hence in order to strengthen the prosecution case against the appellants who were arrested 16.7.2016 having no evidence against them except the spy information. The possibility of planting Musharaf Din cannot be ruled out as his association with the investigation at belated stage in an un-answered query which creates doubt in the prosecution case. Now moving to the case of Isam Khan, the only evidence

disclosed by the investigating officer against him is that accused Mulauddin had disclosed his name to have purchased rocket launcher from him. Other than statement of co-accused there is no evidence against Isam Khan. The prosecution has not bothered to investigate that whether Isam Khan was involved in such like business or not. The statement of co-accused during the police custody is inadmissible. Article _____ case law _____. Now coming to the statement of Abdul Salam recorded before the trial Court. In the said statement he has stated that:-

“I am driver of Taxi vehicle No.PS-LMS-U-1. I drive the taxi on the local route. Five days prior to the occurrence two persons who were then not known to me but later ii came to know them as Mulah-ud-Din and Asad Ullah took my car on payment of Rs.5000/-. They again after about five days on 11/07/2015 came to me and again asked me to give them my car for going to Tangeer from Pattan. We struck the bargain for Rs.7000/- and I told them that I shall take them myself. From Pattan they loaded some bag wrapped in a blanket which was put in the trunk of the car and we started our return journey. On the way we were stopped by the police at Mata Banda but Mulah-ud-Din and Asad Ullah forced me to continue but then exchange of gun fire started taking place and I went in the vehicle and ran away. I returned to my village from where I

was later arrested. I did not know that the accused were carrying any contraband.”

The said statement was recorded on 27.10.2015 by the learned trial Court much before the framing of charge against him on 24.10.2016. From such statement it does not appear that the learned trial Court has made any effort that the accused was made to understand the meaning and consequences of his statement. Even the certificate at the bottom of the statement does not mention that the such statement was recorded in the presence of prosecution officer, the accused was made to understand the consequences of his statement or either accused would read the said statement. Since at the relevant time the accused was not represented by his learned counsel, hence the Presiding Officer was requested to have ensured that the statement was voluntary and the accused understand the consequences of the statement. Even otherwise, subsequent to the said statement at the time of framing charge the accused denied the allegation. Even the said Musharaf Din in his statement under

section 164 Cr.P.C did not give any description of the accused. He did not mention anything about the age, height or the language being spoken by the persons who boarded in his Jeep.

8. For what has been discussed above a conclusion is irresistible and unavoidable that the prosecution had failed to prove its case against the appellants beyond reasonable doubt. These appeals are, therefore, allowed, the conviction and sentence of the appellants are set aside and they are acquitted of the charges by extending benefit of doubt to them. They shall be released from Jail forthwith if not required to be detained in connect with any other case.

Announced.

J U D G E

J U D G E

The requirement of the criminal case is that prosecution is duty bound to prove its case beyond any reasonable doubt and if any single and slightest doubt is created, benefit of the same must go to the accused

and it would be sufficient to discredit the prosecution story and entitle the accused for acquittal. It is well embedded principle of criminal justice that there is no need of so many doubts in the prosecution case, rather any reasonable doubt arising out of the prosecution evidence, pricking the judicial mind is sufficient for acquittal of the accused. In case titled, "Tariq Pervaz v. The State" (1995 SCMR 1345) the august Supreme Court was pleased to ruled that for giving the benefit of doubt, it is not necessary that there should be many circumstances, creating doubt. If there is circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, the accused would be entitled to the benefit of doubt not as a matter of grace or concession but as a matter of right. The same principle was reiterated by the apex Court in case titled, "Muhammad Akram v. The State" (2009 SCMR 230) and it was observed that it is an axiomatic principle of law that in case of doubt, the benefit thereof must occurred in favour of the accused as a matter of right and not of grace. The above principles laid down by the apex Court are fully in consonance with a famous maxim that "it is better that ten guilty persons be acquitted rather than one innocent person be convicted". Moreover, accused is always considered as the most favourite child of law and every benefit of doubt goes to him regardless of fact whether he has taken any such plea or not. Reliance placed on case titled, "Faryad Ali v. State" (2008 SCMR 1086).