

**JUDGMENT SHEET**

**IN THE PESHAWAR HIGH COURT,  
MINGORA BENCH (DAR-UL-QAZA), SWAT  
(Judicial Department)**

**Criminal Appeal No.246-M/2017  
With Cr. M No. 277-M/2017**

**ALI ASKAR V/S The State**

**JUDGMENT**

Date of hearing: 06.02.2018

**Appellant:- (Ali Askar) by Mr. Sher Muhammad Khan, Advocate.**

**Respondent:- (The State) by Malak Sarwar Khan, State Counsel.**

**MOHAMMAD IBRAHIM KHAN, J.-** This is a

criminal appeal within the meaning of Section 410 of the Code of Criminal Procedure coming-out of conviction of the accused/Appellant Ali Askar for a sentence to undergo 3 years rigorous imprisonment with fine of Rs.10,000/- or in default thereof shall further suffer one month SI, else-ways extending him the benefit of Section 382-B Cr.P.C. This judgment is edict dated 21.08.2014 in case FIR No. 55 dated 31.01.2013 charged U/S 13 Arms Ordinance registered at Police Station Nawagai, District Buner in Case No. 05/AO of the year 2013 decided by the Court of learned Additional Sessions Judge-II/Izafi Zila Qazi Buner.

2. The '*Murasila*' followed by lodging of the First Information Report would reveal that during routine patrolling of the area the local police received spy information with regard to proclaimed offender Ali Askar being involved in case FIR No. 351 dated 04.09.2011 under section 302 PPC registered at PS Nawagi. Therefore, in view of such information, the police rushed to the spot arrested the accused/Appellant. During his personal search from the trouser-fold of his *Shalwar* the police recovered 30 bore pistol along with magazine and 3 cartridges. Since the accused could not produce any license or permit in respect of the same pistol, therefore, it was taken into possession vide recovery memo Ex. PW-1/1. Hence, on the strength of '*Murasila*' Ex. PA/1, FIR Ex. PW-PA was chalked-out against the accused/Appellant at the same Police Station Nawagi.

3. In a full dressed trial, after framing of charge against the accused/Appellant by the learned Trial Court on 27.02.2013 when the asservations were not acceptable to him, he claimed trial. Thereby the prosecution examined Muhammad Shah Khan SHO as PW-1, Umar Rahim official of Frontier

Constabulary bearing No. 725 as PW-2 and Ghulam Khan SI as PW-3. At the end, the statement of the accused/Appellant Yousaf Khan was recorded u/s 342 of the Code of Criminal Procedure, thereby denied the charge, posed innocence and stated to have falsely been implicated in the case. He, however wished to produce defence within the meaning of section 340 (2) Cr.P.C. After hearing the parties at length the decision under conviction for the sentences was delivered.

4. Having heard arguments of learned counsel for the accused/Appellant and learned State counsel, record was gone through with their valuable assistance.

5. Perusal of the record would reveal that on 30.01.2013 at 16:45 hours Muhammad Shah Khan SHO PS Nawagi, PW-1 during routine *Ghast* of the Illaqa received spy information that proclaimed offender Ali Askar wanted in case FIR No. 351 dated

04.09.2011 under section 302 PPC registered at PS Nawagi has been present at Jangai road near Ambela Petrol Pump. So, in view of such clue, the said SHO along with police party proceeded to the spot and arrested the accused/Appellant. During his personal

search one 30 bore pistol along with magazine and 3 cartridges were recovered. However, during cross-examination this PW admitted that the alleged recovery of pistol was made from the accused/Appellant near the petrol pump. Yet no independent or impartial witness has been associated with the recovery process in order to further authenticate the version of prosecution with regard to the alleged recovery of pistol being weapon of offence in the main case. It is further evident from the cross-examination of this PW that at the time of arrest of the accused/Appellant on sighting the police vehicle in close approximate of 10/12 paces he did not try to escape from the spot. So, from such act of the accused/Appellant an inference could be gathered that he might have surrendered himself to the local police and thereafter the alleged recovery of pistol might have been attributed to him being proclaimed offender. Otherwise, in ordinary parlance the accused being involved in murder case and that too when had been declared proclaimed offender, thus, in all possibilities would have tried to whisk off his presence at least from public places. PW-2 Umar Rahim Frontier Constabulary official though

reiterated the stance of prosecution in his statement before the Court, however during cross-examination admitted that the accused/Appellant was arrested at *Shahi* road and at the relevant time the concerned SHO did not give him any instruction with regard to association of any independent or private witnesses with the recovery process. The last witness of prosecution is Ghulam Khan SI PW-3, who has conducted the investigation in this case. This PW during cross-examination admitted that in the site plan there was a reference of the house of Qalandar yet he has not been examined as witness during Court proceedings.

6. No doubt, these statements of the prosecution witnesses have created a serious dint in the version of prosecution with regard to the alleged recovery of pistol from the person of accused/Appellant. Thus, in all probabilities it can be said with certainty that the prosecution has badly <sup>١٥</sup> failed to bring home charges against the accused/Appellant for the recovery of crime weapon (pistol) along with magazine and 3 cartridges, therefore, the accused/Appellant deserves to be given liberty by way of his acquittal.

7. Even otherwise, it is settled by now that the recovery of crime weapon and empties etc are always considered to be corroborative piece of evidence and such kind of evidence by itself is not sufficient to bring home the charges against the accused especially when the other material put-forward by the prosecution in respect of guilt of the accused/Appellant has already been disbelieved.

This view has been affirmed by the Hon'ble Supreme Court of Pakistan in case cited as 2001 SCMR 424 " Imran Ashraf and 7 others vs the State" in the following manner:-

*"Recovery of incriminating articles is used for the purpose of providing corroboration to the ocular testimony. Ocular evidence and recoveries, therefore, are to be considered simultaneously in order to reach for a just conclusion."*

Likewise, if any other judgment is needed on the same analogy, reference can be placed on 2007 SCMR 1427 " Dr. Israr-ul-Haq vs Muhammad Fayyaz and another", wherein the relevant citation (c) enunciates:

*"Direct evidence having failed, corroborative evidence was of no help. When ocular evidence is disbelieved in*

*a criminal case then the recovery of an incriminating article in the nature of weapon of offence does not by itself prove the prosecution case.*

8. In view of the above discussion, we are of the absolute view that the prosecution failed to prove its case against the accused/Appellant beyond any shadow of doubt; therefore, his conviction cannot be maintained, ergo, while extending the benefit of doubt, we accept this appeal by setting aside his conviction and sentences recorded by the learned trial Court through the impugned judgment dated 21.08.2014 and acquit him of the charges leveled against him. He be set free forthwith, if not required in any other case.

9. These are the reasons of our short order of even date.

10. Before parting with this judgment, it is <sup>۱۹۹۷</sup> necessary to give reference of the criminal miscellaneous application bearing No. 277-M of 2017 preferred by the applicant/Appellant for condonation of delay with regard to filing of appeal against his conviction before this Court.

Besides the grounds advanced in this application there is judgment of the Hon'ble Lahore High Court cited as 1985 MLD 647 " Abdul Ghaffar V/S The State, wherein it has been held:-

*" Application for condonation of delay in filing appeal against conviction under Arms Ordinance. Accused under impression that he was only convicted under s. 302,323,34, Penal Code, in which his sentence was suspended. Accused when approaching jail authorities knowing that he was also convicted under Arms Ordinance. Application for condonation of delay granted in circumstances.*

Keeping in sight the *ratio decidendi* settled in the above dictum of the Hon'ble Lahore Court a specific ground has been taken by accused/Appellant that he came to know about his conviction under section 13 A.O at the time of arguments of before this Court, therefore, the present appeal against his conviction was not preferred within time. Even otherwise, the Appellant served out his sentence of 3 years RI



awarded u/s 13 A.O impugned herein. Hence, in such scenario, this petition is allowed and the delay occurred during filing of appeal before this Court is hereby condoned.

Announced.  
Dt: 06.02.2018

  
**JUDGE**

  
**JUDGE**

07/16  
15/02/18  
W/R