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

Criminal Appeal No. 71-M/2015

JUDGMENT

Date of hearing: **12.5.2015**

Date of announcement: **13.5.2015**

Appellant: (Ihsanullah) by
Mr. Rahimullah Advocate

Respondents: (State etc) by
Mr. Rafiq Ahmad, Assistant Advocate General.

HAIDER ALI KHAN, J.- This single judgment shall dispose of the instant appeal bearing Cr.A No.71-M/2015 titled Ihsanullah Vs. The State, as well as the connected Cr.A No. 73-M/2015 titled Tanvir Ahmad Vs. The State, as both the appeals arise from one judgment dated 10.4.2015 delivered in case F.I.R No. 19 dated 15.2.2012 under sections 380/406/411/109 PPC, sections 5 & 6 of the Explosive Substances Act, 1908 and section 5 of Explosive Act, 1884, by the learned Additional

Sessions Judge/Izafi Zilla Qazi, Chitral whereby the appellants Ihsanullah and Tanvir Ahmad have been convicted under section 380 PPC and sentenced to five years R.I with fine of Rs.20,000/- each.

2. Precise and relevant facts of the case per contents of the F.I.R are that on 15.2.2012 at 18:00 hours Muhammad Sohail, Admin SAMBO Construction Company Koghozi, Chitral, handed over an application/report addressed by Jae Gi Lim, Administration/Procurement Manager of the said Company, stating therein that at the previous night someone had stolen explosives containing 22 boxes, weighing 550 kilograms of Wabax Special worth Rs.700,821.5/- from Magazine located in Golen Gole Warehouse. The application/written report was incorporated into *Mursila* which later on converted in F.I.R, Ex.PW-12/1.

3. Investigation of the case started during the course whereof, one Dil Muhammad, who was working as a foreman in the Company, was

nominated in the case as an accused by availing the services of sniffer dogs but later on he was discharged on 25.2.2013 on application of the DPP. On further investigation of the case, the present appellants/accused alongwith their seven other co-accused were nominated in the case and after completion of the investigation, complete challan was submitted in the Court of learned Sessions Judge, Chitral who entrusted the case to the learned Additional Sessions Judge for trial of all the accused. The trial Court framed the formal charge against the accused but they did not plead guilty thereto and claimed trial. On commencement of the trial, the prosecution produced as many as 18 PWs in support of its case out of which 16 witnesses were examined and the prosecution closed the evidence. Thereafter, the trial Court recorded statements of the accused under section 342 Cr.P.C wherein they denied the allegations levelled by the prosecution, however, they felt no need either to be examined on

oath in terms of section 340(2), Cr.P.C or to produce any evidence in their defense.

After hearing the arguments, the learned trial Court found the appellants/accused and co-accused Muhammad Din guilty of the charge and on conviction, sentenced them as mentioned in para No.1. The appellant Ihasanullah has challenged his conviction through the criminal appeal in hand whereas appellant Tanvir Ahmad has impugned his conviction through the connected Cr.A No. 73-M/2015 which are being disposed of through this single judgment.

4. Learned counsel for the appellants argued that the impugned judgment of the learned trial Court is against the law and facts available on the record; that no direct evidence is available against the appellants and the trial Court has convicted them on the basis of weak and fabricated evidence; that the learned trial Court has not analyzed the prosecution evidence in its true

perspectives besides the same has been misread and mis-appreciated which has resulted in grave miscarriage of justice; that the prosecution has miserably failed to prove its case against the appellants beyond shadow of doubt and the evidence produced by the prosecution is full of contradictions; that the appellants have been convicted on the basis of statement of co-accused Muhammad Din against the settled principles of criminal law and finally the learned counsel concluded that through the same set of evidence other co-accused have been acquitted whereas the appellants were illegally awarded punishment by the trial Court.

5. As against the above, the learned A.A.G vehemently defended the impugned judgment of the trial Court and argued that sufficient material is available on the record which reasonably connects the appellants with the commission of the offence and is sufficient for conviction of the appellants, therefore, the impugned judgment cannot be termed

as illegal or perverse in any manner, whatsoever. He further contended that prosecution has successfully proved its case against the appellants beyond any shadow of doubt through credible and convincing evidence, hence the impugned judgment needs no interference by this Court.

6. Arguments heard and record perused.

7. Perusal of the record shows that while taking cognizance of the case, no sanction of the Provincial Government was obtained as required under section 7 of the Explosive Substances Act, 1908. For convenience sake, said provision of law is reproduced herein below:-

> "7. No Court shall proceed to the trial of any person for an offence against this Act except with the consent of the (Provincial Government)."

Admittedly, the learned trial Court has proceeded with the trial without any sanction in this regard on behalf of the Provincial Government which is the mandatory provision of Section 7 of the Act *ibid* and in case of non-compliance of the same,

the whole trial stands vitiated. It is well settled that where a thing was provided to be done in a particular manner, it must be done in that manner otherwise the act would not be lawful. In the present case, the trial Court has acted in violation of mandatory provision of law and hence the trial was vitiated. Reliance in this regard can be placed on ***(1)*** **1995 P.Cr.L.J (Karachi) 177** ***(2)*** **2011 YLR (Lahore) 522** ***(3)*** **2012 P.Cr.L.J (Peshawar) 844 and** ***(4)*** **1998 P.Cr.L.J (Karachi) 1262**.

8. Another important aspect of the case is that samples of the explosives were sent to the F.S.L and the report furnished in this regard is in positive, but neither the explosives nor the F.S.L report has been exhibited before the Court which is another glaring illegality committed by the trial Court.

9. Even on merits, perusal of the record shows that the appellants were charged one year after the occurrence which took place on 15.2.2012 and the trial Court convicted them on the statement

of their co-accused. Record also shows that there is no eye witness to the occurrence and no recovery of the explosives has been effected from the appellants.

10. As regards confession of the appellant Tanvir Ahmad, record shows that the appellant had recorded his confessional statement before the Court but later on he retracted the same. In such like situation the Court has to see whether the retracted confessional statement is corroborated by other circumstantial evidence or otherwise. The available material on the record shows that corroboration of the retracted statement of the appellant Tanvir Ahmad by the remaining evidence is not of the degree on the basis whereof his conviction could be recorded. Moreso, conviction of the appellants on the basis of statement of co-accused, their nomination in the case after the lapse of one year and non effecting recovery of the explosives from their possession, are the factors which create doubt

in a prudent mind, benefit of which must go to the accused.

11. For what has been discussed above, both the appeals are allowed, the impugned judgment dated 10.4.2015 of the trial Court is set aside and the appellants are acquitted of the charge levelled against them. The appellants are in jail, therefore, they be released forthwith if not required in any other case.

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

Announced.
Dt: 13.5.2015

JUDGE