

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

J.Cr.A No. 73-M/2018

Abdul Ahad alias Idress (Appellant)

Versus

The State (Respondent)

Present:

Mr. Rahimullah Chitrali, Advocate for the appellant.

Mr. Wilayat Ali Khan, A.A.G for the State.

Date of hearing: **12.03.2019**

JUDGMENT

SYED ARSHAD ALI, J.- This jail criminal appeal is directed against the judgment dated 17.01.2018 rendered by the learned Judge Anti-Terrorism Court, District Buner, whereby the accused/appellant was convicted and sentenced under different sections of law in the following manner:-

- *U/S 324 PPC read with 7 (1) (B&C) ATA to 10 years imprisonment along with fine of Rs. 50,000/-, or in default thereof, shall further suffer 3 months simple imprisonment.*
- *U/S 337 A (i), 337 (F-i-ii-v) PPC to one year imprisonment along with*

compensation of Rs. 10,000/- payable to each victim, or in default thereof, shall further suffer simple imprisonment of 10 days.

- *U/S 427,148 PPC to one (1) years imprisonment and to pay fine of Rs. 20,000/-, or in default thereof, shall further suffer simple imprisonment of one month.*
- *U/S 148 PPC to 3 years imprisonment.*
- *All the sentences shall run concurrently, however, the appellant was extended the benefit of section 382-B Cr.P.C.*

2. Brief, but essential facts of the prosecution case are that Malak Zada, SHO, Police Station Chinglai Buner, who appeared as PW-1 before the trial court, made a 'Murasila' report that on the eventful day, while they were escorting the then Minister Mr. Sardar Hussain Babak, some unknown culprits started firing at them with the aim of murderous assault. As a result of the said firing, the Minister as well as the other persons sustained injuries. Accordingly, the

FIR No. 233 dated 21.08.2011 under sections 324,353 and 427 of the Pakistan Penal Code 1860 ("PPC") read with section 7 of Anti-terrorism Act, 1997 ("ATA") was registered against the unknown accused at Police Station Chinglai District Buner. Later, sections 337 A (ii), 337 F (i),(ii), (v), 148,149 of the PPC, section 5 of the Explosive Substances' Act, 1908 ("ESA") and section 13 of the Arms Ordinance, 1965 ("A.O") were also added in the FIR.

3. During initial investigation seven (7) accused including the present appellant were nominated for the commission of offence. Out of said seven (7) accused, five (5) accused were earlier arrested, interrogated and were sent for trial, however, they were acquitted by the learned Judge Anti-Terrorism Court vide judgment dated 12.12.2012. Whereas the present appellant and one another accused were proceeded under section 512 of Code of Criminal Procedure, 1898 ("Cr.P.C").

4. On arrest of the appellant, he was indicted and upon completion of the trial he was finally convicted and sentenced through the impugned judgment dated 17.01.2018 in the mode and manner as stated above by the learned Judge Anti-Terrorism Court District Buner. Hence, the present jail criminal appeal.

5. Arguments heard and record of the case was perused.

6. Admittedly, in the initial FIR no one was charged for the murderous assault on the police personnel as well as the then Minister, Mr. Sardar Hussain Babak. Later, the present appellant along with five (5) acquitted accused and one absconding accused were charged. On arrest of the present appellant, supplementary *challan* was submitted before the learned Anti-Terrorism Court and the present appellant was summoned from jail for compliance with the provision of section 265-C Cr.P.C. On 24.5.2017 charge was framed against the present appellant, to which he pleaded guilty.



However, from physical appearance of the appellant, the learned trial Court reached at the conclusion that the present appellant had some mental disease, therefore, regarding ascertainment of his mental illness he was sent for a medical opinion. The Medical Board examined the present appellant on 16.11.2017 and according to the medical opinion he was found fit and able to understand the Court proceedings.

7. Resultantly, the Court proceedings were resumed and the prosecution witnesses were summoned. Accordingly, the prosecution has produced 10 witnesses, however, none of the witness was cross-examined for the reason that the present appellant was not represented through an Advocate. On the basis of this one sided prosecution evidence and the fact that the present appellant had pleaded guilty, he was convicted and sentenced through the impugned judgment by the learned trial Court.



8. Thus, without going into the merit of the case, we hold that the present appellant was not provided appropriate opportunity to defend himself before the Court. Indeed, under Articles 4 and 10-A of the Constitution of the Islamic Republic of Pakistan, 1973 (“**Constitution**”), it is inalienable right of every citizen to be treated in accordance with law and he/she has a right to a fair trial and due process of law to face any criminal charge. For ready reference Articles and 4 and 10-A of the Constitution are reproduced as under:-

Article 4:-

“Right of individuals to be dealt with in accordance with law, etc... (1) To enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Pakistan.

Article 10-A:-

Right to fair trial

[10A. For the determination of his civil rights or in any criminal charge against him a person shall be entitled to a fair trial and due process.]

The phrase 'fair trial' has been explained in "Advance Law Lexicon Encyclopedia of Law" by referring the judgment titled "Kalyani Bask vs M.S. Sampooram reported as 2007 Indian Supreme Court 258", wherein it was held that:-

"The expression 'fair trial' includes fair and proper opportunities allowed by law to prove her innocence. Denial of right of an accused to adduce evidence in support of the defence would amount to denial of 'fair trial'.

Similarly, the Indian Supreme Court in case titled "Rattiram v/s State of M.P. through Inspector of Police reported as AIR 2012 S.C. 1285" has observed that denial of fair trial is crucifixion of human life and has held that:-

"A 'fair trial' is the heart of criminal jurisprudence and, in a way, an important factor of a democratic

polity that is governed by Rule of Law. Denial of 'fair trial, is crucifixion of human rights. It is ingrained in the concept of due process of law. While emphasizing the principle of 'fair trial' and the practice of the same in the course of trial, it is obligatory on the part of the Courts to see whether in an individual case or category of cases because of non-compliance of a certain provision, revision of judgment of conviction is inevitable or it is dependent on arriving at an indubitable conclusion that substantial justice has in fact occurred. The seminal issue is whether protection given to the accused under the law has been jeopardized as a consequence of which there has been failure of justice or causation of any prejudice."

The aforesaid phrase 'fair trial' has further been expounded in 'Words and Phrases Legally Defined' authored by Lexis Nexis in 4th Edition as following:-

"The right to prosecute and the right to lead admissible evidence in support of its [the prosecution's] case are not subject to judicial control. Of course when the prosecutor reaches court he becomes subject to the directions as to the conduct of the trial by the judge, whose duty it then is to see that the accused has a fair trial according to law. What does 'fair' mean in this context? It relates to the process of trial. No man is to be compelled to incriminate himself: nemo tenetur se ipsum prodere. No man is to be convicted save on the probative effect of legally admissible evidence. No admission or confession is to be received in evidence unless voluntary. If legally admissible evidence be

tendered which endangers these principles the judge may exercise his discretion to exclude it, thus ensuring that the accused has the benefit of principles which exist in the law to secure him a fair trial; but he has no power to exclude admissible evidence of the commission of a crime, unless in his judgment these principles are endangered."

Whereas the Black Law Dictionary has very precisely but aptly defined the phrases 'fair trial' as under:-

"A trial by an impartial and disinterested Tribunal in accordance with the regular procedure; especially a criminal trial in which the defendant's constitutional and legal rights are respected.

The Indian Supreme Court while faced with the similar situation has emphasized on providing of legal aid being the inherent responsibility of the trial Court in 'Muhammad Hussain v/s the State (Govt: of NCT) Dehli reported as 2012 SCMR 1610' in the following words:-

"In my view, every person, therefore, has a right to a fair trial by a competent Court in the spirit of the right to life and personal liberty. The object and purpose of providing competent legal aid to undefended and unrepresented accused persons are to see that the accused gets free and fair, just and

reasonable trial of charge in a criminal case.”

9. From the afore-referred case law as well as the explanation of the phrase fair trial as provided in the aforesaid Legal dictionaries and from the introduction of the Article 10-A in our own Constitution, it is now incumbent upon the trial Court to ensure that the interest of the accused facing criminal prosecution is fully protected and if the said accused is unable to engage a counsel or the Court feels that the accused cannot represent himself, it is duty of the Court to provide the assistance of the competent legal practitioner to the accused to defend himself because by now it is his fundamental right in view of Article 10-A of the Constitution to have the opportunity of a fair trial and due process of law.

10. Thus, in view of the above and the law laid down in the afore-referred judgments, the impugned judgment is not sustainable in the eye of law, therefore, on



acceptance of this appeal, the impugned judgment is set aside and the case is remanded to the learned trial Court with direction for *de novo* trial including framing of charge afresh. However, before framing of charge, the learned trial Court shall ensure that a pauper counsel be provided to the appellant at the State expenses and he shall be treated as under trial prisoner.

Announced
Dt. 12.03.2019


JUDGE


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