R/B

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

Cr.A No. 150-M/2022
With Cr.M 202/2022 (N)

Aftab v. The State and another

Present: Mr. Sher Muhammad Khan, Advocate for the appellant.

Mr. Haq Nawaz, Asst:A.G for the State.

Date of hearing: **01.11.2022**

JUDGMENT

Dr. Khurshid Iqbal, J.-

1. This Criminal Appeal is directed against the judgment of the learned Judge, Anti-Terrorism Court-II, Malakand Division at Swat, dated 26.05.2022, whereby he has convicted Aftab (the appellant) and sentenced him as under:

> **"U/s. 7 (ff) of the Anti-Terrorism Act, 1997, to undergo 14 years rigorous imprisonment."**

The appellant was extended the benefit of section 382-B, Cr. PC.

2. Facts of the case shortly are that on 15.04.2021, the complainant, Bahadar Khan, Inspector (PW-2), received information that the appellant, Aftab, had kept explosive substances in a rented shop situated at Osak to Janjarait road of District Chitral. Pursuant to such information, the complainant alongwith officials

of the CTD and police personnel searched the appellant in the area. When he alongwith other officials reached the Osak Bridge, he found the appellant there. His body search was conducted, during which the complainant recovered from him a citizenship card and interrogated him on the spot. The appellant disclosed himself to be a member of Jaish-e-Mohammed, a proscribed organization. He also disclosed that he has kept certain explosive substances in a rented shop. He made pointation of the shop in question, wherefrom the complainant recovered 12 plastic bags, containing safety fuse in the shape of 95 bundles, each bundle, having 230 meters of safety fuse and 6 plastic bags, containing dynamite in the shape of 49 packets, each packet of which having 39 dynamites. The complainant prepared a memo of the recovery. He drafted Murasila on which the instant case was registered against the appellant in the Police Station.

3. After completion of investigation, challan was submitted against the appellant before the learned trial Court, whereas, against the absconding co-accused, challan u/s. 512, Cr. P.C. was submitted. Copies were supplied to him u/s. 265-C, Cr. PC. Charge was farmed against him, to which he pleaded not guilty and claimed trial.

4. The prosecution examined as many as ten (10) PWs. Statement of the appellant u/s. 342, Cr. PC, was also recorded, in which he was afforded an opportunity of evidence in defence and/or statements on oath but he did not avail it.

5. After hearing arguments of the learned P.P. and learned counsel for the appellant, the learned trial Judge vide the impugned judgment dated 26.05.2022, convicted the appellant as mentioned in para-1 of this judgment.

6. We have heard arguments of Mr. Sher Muhammad Khan, learned counsel for the appellant and Mr. Haq Nawaz, learned Assistant Advocate General, for the State and perused the record.

7. To begin with, it is open to question as to how Inspector Bahadar Khan/complainant (PW-2) recognized the appellant when he came across him on Osak Bridge. He mentioned in the Murasila that there was spy information regarding the appellant. The features of the appellant were not mentioned in the Murasila. His testimony shows that when he, alongwith other officials, reached the Osak Bridge, he found the appellant, conducted his body search during which he recovered from him a card showing that he

was an Afghan citizen and interrogated him on the spot. There is no mention whatsoever of the fact that the appellant was the same person regarding whom he had received spy information. It appears that it was per chance that he found the appellant on the Osak Bridge. It is further astonishing to note that the appellant very quickly disclosed himself as a member of Jaish-e-Mohammed, a proscribed organization, and further disclosed that he has kept certain explosive substances in a rented shop. Inspectors Gul Fazil Khan and Meftah-ud-din (PWs-8 and 10), who conducted investigation also did not attend to such key aspects of the case as the appellant was in fact the same person regarding whom there was a spy information, what was his intention while he was allegedly keeping the explosive substances in the rented shop and whether he really belonged to the aforesaid proscribed organization. Inspector Meftah-ud-din (PW-10) stated even this much that he was handed over the investigation at a later stage and that he never met the appellant. It is beyond our understanding as to how did he conduct the investigation when he did not interrogate the appellant. It was also not investigated as for what purpose the appellant, who according to the prosecution version, is a resident of Dalazak road,

Peshawar, happened to be in Chitral. It needs no emphasize that in an anti-terrorism case like this one, these aspects were of fundamental importance to have been investigated. By making no investigation in this perspective, the prosecution failed to prove the charge under the Anti-Terrorism Act, 1997, coupled with the Khyber Pakhtunkhwa explosive substances Law. The investigation, thus, could not be termed as specific and even fair. The importance of fair and honest investigation has been discussed by higher courts in numerous cases, particularly in cases like the present one. Reference may be made to a recent case of **Asadullah v. The State** reported as **2022 P Cr. LJ 774 [Sindh]**. In this case, a similar situation was before the Court. A police official had received spy information regarding a suspicious person, who came across him. The suspected person disclosed his name. His personal search led to recovery of a hand grenade in the right pocket of his trouser as well as a Kalashnikov without number and cash money. A case was registered against him. The learned Court observed:

> **"The I.O. had also failed to interrogate the appellant that with what intention, appellant was carrying such explosive substance."**

The learned Court further noted:

> **"It appears to be very illogical that though appellant being allegedly armed with deadly weapons like Kalashnikov and hand grenade but he did not resist and calmly surrendered himself before the police. Discrepancies pointed out by the learned Counsel have created a reasonable doubt in the case of the prosecution."**

8. Seeing the above infirmities being material warranting acquittal, the learned Court relied on **Tariq Pervez v. The State (1995 SCMR 1345)** and referred its relevant paragraph as under:

> **"It is settled law that it is not necessary that there should be many circumstances creating doubts. If there is a single circumstance, which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right."**

9. Reference may also be made to Chapter-XXV (On Investigation) of Police Rules, 1934, Rule 25.2(3) read as under:

> **"25.2(3): It is the duty of an investigation officer to find out the truth of the matter under investigation. His object shall be to discover the actual facts of the case and to arrest the real offender of the case not commit himself prematurely to any view of the fact for or against any person.**

This legal position was discussed in the case of **Muhammad Shah Khesro and another v. The State and others** reported as **2016 P Cr. LJ 606 [Peshawar]**. The Court held that it is not the job of an investigating officer to commit himself to the stance of

just one party, particularly of the prosecution. The law requires that investigation shall be conducted honestly and fairly on the basis of non-partisanship and neutrality. The Court observed that it was for this reason that the operation wing was separated from the investigation wing under Article 18 of the Police Order, 2002. This aspect has been analyzed by the Courts in several other cases. Reference may be made to the cases of **Agha Qais v. The State** reported as **2009 P Cr. LJ 1334** and **Nazeer Ahmed v. The State** reported as **PLD 2009 Karachi 191**. In cases before Police Order, 2002, for example, **Ashiq alias Kaloo v. The State (1989 P Cr. LJ 601) [Federal Shariat Court]** and **The State v. Bashir and others (PLD 1997 Supreme Court 408)**, it was opined that a police officer could not be a complainant/raiding officer and investigating officer at the same time. Although in the instant case, two other police officers namely, Gul Fazil Khan and Meftah-ud-din, conducted investigation. It is fully established that the key proceedings, such as search of the shop and the recovery were effected by the PW Bahadar Khan complainant and the other PWs, namely, Gul Fazil Khan and Meftah-ud-din did not carry out any meaningful investigation. Rather, they simply toed the

line drawn by the complainant Bahadar Khan. Reference may be made to the case of **Taj Wali and 6 others v. The State (PLD 2005 Karachi 128)**. Although the investigating officers recorded the statements of PWs u/s. 161, Cr. P.C., issued memo of nomination of the appellant as an accused, obtained warrants u/s. 204, and proclamation u/s. 87, Cr. P.C., against the acquitted co-accused and the CDR of the appellant, however, key proceedings, such as, drafting of the Murasila, the recovery memo and the sealing of the explosive substances in parcel, were carried out by PW Bahadar Khan complainant. All the PWs in the case are police officials. It is a settled principle that evidence of the police officials shall be scrutinized closely and cautiously.

10. The next aspect of the prosecution case is that the appellant allegedly took the police party to the shop where he had kept the explosive substances in question. Bahadar Khan (PW-2) recovered the explosive substances in the presence of three marginal witnesses, namely, S.I. Adil Ahmad Baig, constable Zahir Khan and IHC Islam-ud-din. Amongst them constable Islam-ud-din was produced as PW-3, who confirmed his signature on the memo Ex PW 2/1, as one of its marginal witnesses. Two points are worth

mentioning in respect of the recovery. Firstly, no private witnesses were associated with the recovery proceedings despite the fact that the recovery was allegedly made from a shop, which required association of private witnesses u/s. 103, Cr. P.C. Secondly, it was not established that the shop from which the recovery was made, was actually rented with the appellant. The prosecution examined one Hazrat Gul (PW-4), a tenant of one Waqar-ul-Mulk, a landlord, under a rent deed. He deposed that he has sublet the shop to the appellant through an oral agreement. Thus, the prosecution failed to prove on the basis of solid, cogent and convincing evidence that the appellant was legally in possession of the shop. It is in this perspective that the mere fact that the appellant had a key of the shop at the relevant time is also not believable, especially when there is no independent witness of the recovery proceedings. Hazrat Gul deposed that he pays the rent to the landlord Waqar-ul-Mulk. He admitted that as a tenant, he could not rent out the shop to another person. The I.Os did not inquire through independent witness whether the appellant carries out some business in the shop or not. The evidence of the prosecution is silent on the fact as to what else Bahadar Khan (PW-2), the complainant,

found in the shop other than the explosive substances, as the site plan depicts two adjacent shops to the North and South of the shop in question were found to be vacant. The three shops are situated on the main Osak-Janjarait road. Other shops also owned by Waqar-ul-Mulk were stated to exist though not specifically shown. The appellant in his statement recorded u/s. 342, Cr. P.C., specifically, denied any rent agreement in respect of the shop.

11. For the reasons stated hereinabove, we have reached to the conclusion that the prosecution has failed to bring home the charge against the appellant. Hence, we allow the instant appeal, set aside the conviction and sentence of the appellant recoded by the learned Judge, Anti-Terrorism Court-II, Malakand Division at Swat, vide his judgment dated 26.05.2022 and acquit him of the charge leveled against him. He be released forthwith, if not required in any other case.

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

Announced
Dt: 01.11.2022

JUDGE

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