

JUDGMENT SHEET

IN THE PESHAWAR HIGH COURT,
PESHAWAR

(Judicial Department)

Cr.A. No.40-P/2015

Date of hearing: _____

Appellant (s) : _____

Respondent(s) : _____

JUDGMENT**ASSADULLAH KHAN CHAMMKANI, J.-**Through the instant appeal, appellant ***Khurram******Qazafi Mansoor***, has questioned the judgment dated

27.01.2015, rendered by learned Special Judge

Anti-Terrorism Court, Mardan, whereby he has been

convicted and sentenced under section 5 Explosive

Substance Act, 1908 readwith S.7 (ff) Anti-Terrorism

Act, 1997, to undergo 07 years R.I. and forfeiture of

his property in favour of the State.

2. The State through Advocate-General Khyber Pakhtunkhwa, Peshawar, has filed connected **Cr.A. No.240-P/2015**, titled, ***“The State Vs Khurram Qazafi Mansoor”***, seeking enhancement of sentence of the convict-respondent Khurram Qazafi Mansoor.

3. Since, both the appeals are the outcome of one and the same judgment of the learned Judge Special Court Ant-Terrorism Court Mardan, dated 27.01.2015, therefore, this common judgment shall govern the same.

4. Prosecution case as unfolded in First Information Report is that on 21.06.2014, Mushtaq Hussain Khan Inspector (PW.1) alongwith other police officials, during search operation against Proclaimed Offenders, on Malak Abad Babeni road, intercepted a young boy having a polythene bag, on search of which he recovered RPG-7 mortar, a hand grenade, a fuse electrical cell, a safety fuse alongwith

detonator, and a fuse wire from the same. The recovered explosive materials were defused through Bomb Disposal Squad and then taken into possession vide recovery memo Exh.PW.1/1. The accused, on query disclosed his name as Khurram Qazafi Mansoor (appellant-convict herein) was formally arrested. PW.1 drafted murasila Exh.PA/1, on the basis of which, FIR No.70 dated 21.06.2014, was registered against the appellant under section 5 Explosive Substances Act, 1908, and S.7 Anti-Terrorism Act, 1997, in Police Station IDS Gadoon, Swabi.

5. On completion of investigation, challan was submitted against the appellant before the learned Trial Court, where he was charge sheeted under section 5 Explosive Substances Act read with S.7 (ff) Anti Terrorism Act, 1997, to which he pleaded not guilty and claimed trial. To prove its case, prosecution examined as many as five

witnesses. After closure of the prosecution evidence, statement of the appellant was recorded under section 342 Cr.P.C. wherein he denied the prosecution allegations and professed his innocence. He, however, declined to be examined on oath under section 340 (2) Cr.P.C. or to produce evidence in defence. On conclusion of trial, the learned Trial Court, after hearing both the sides, vide impugned judgment convicted and sentenced the appellant as mentioned above, hence, these appeals.

6. We have heard the exhaustive arguments advanced from both the sides on merits of the case and perused the record with their able assistance.

7. Without dilating up the merits of the case in light of the available evidence, lest it may prejudice the case of either side, we have serious reservations in respect of charge with which the appellant has been confronted as it is quite

ambiguous and does not not speak specifically as to under which of the two laws, the appellant has been charged sheeted, which exercise has prejudiced him in his defence. Similarly, his conviction and sentence recorded by the learned Trial Court is also on same footing as it is not certain as to under which of the two offences of the two laws, the appellant has been convicted and sentenced. For convenience, we would like to first reproduce the charge framed against the appellant.

“That on 21.06.2014 at 1700 hours, you accused were arrested by the local police during search operation on Babeni Malak Abad road near Farsh and recovered a plastic bag from your possession which was containing 1 PRG-7 mortar Gola, one Energa grenade, one cell fuse electrical, one safety fuse alongwith detonator and one

fuse wire of red colour and the words”

Hamza Sugar Mills Limited Khanpur

etc” were written on the same bag

regarding which you could not furnish

any plausible explanation nor any valid

permit and your this act also created a

sense of fear and insecurity in the

society and thereby committed an

offence punishable under section 5

Explosive Substance Act readwith S.7

(ff) ATA which is within the cognizance

of this court”.

8. The threadbare reading of the charge mentioned above, reveals that it does not specifically determine as to whether the appellant has been charge sheeted under S.5 of Explosive Substance Act, 1908 or under Section 7 (ff) of the Anti-Terrorism Act, as it has been framed under a single head. It is well settled principle of law that charge against

accused shall be specific, fair and clear in all respects to provide an opportunity to the accused to defend himself/herself in due course of trial. The charge shall be clear and by no means, confused to prejudice the accused. Charge is a precise formulation of specific accusations made against an accused person, who is entitled to know its nature at the early stage. Its aim is to explain to the accused as correctly and precisely as well as concisely as possible the allegations with which the accused is to be confronted. The charge must convey to the accused with sufficient transparency and in clear terms what the prosecution intends to prove against the accused. It shall contain all essential details as to time, place as well as specific manner of the alleged offence, the manner in which the offence was committed with full description of the accusation so as to afford the accused an opportunity to explain the accusations with which he is confronted. The prime object and

the principle of framing charge shall be, to make aware the accused, of the substantive accusations which are to be proved by the prosecution with clear intention and with unambiguous description of the offence so as to enable the accused to defend himself. Guidance in this regard may be derived from **S.A.K Rehmani's case (2005 SCMR 364)**. Section 232 of the Cr.P.C. empowers the appellate Court that in case it is found that on account of omissions of particulars in framing charge, the accused has been prejudiced and has not been provided an opportunity of clear understanding of the charge to defend himself, it may direct a fresh trial or even quash the conviction. For convenience, section 232 Cr.P.C. is reproduced below:-

**“S.232. Effect of material error:- (1) If
any Appellate Court, or the High Court
or [Court of Session] in the exercise of
power of revision or or its power under**

Chapter XVII, is of opinion that any person convicted of an offence was misled in his defence by the absence of a charge by any error in the charge, it shall direct a new trial to be held upon a charge framed in whatever manner it thinks fit.

(2) If the Court is of opinion that the facts of the case are such that no valid charge could be preferred against the accused in respect of the facts proved, it shall quash the conviction”.

As per mandatory provisions contained in S.233 Cr.P.C. for every distinct offence, a separate charge shall be framed in order to enable the accused to defend the accusation leveled against him. Section 233 Cr.P.C. runs as under:-

“S.233. Separate charges for distinct offences: For every distinct offence of

which any person is accused there shall be a separate charge and every such charge shall be tried separately, except in the cases mentioned in sections 234, 235, 236 and 239 Cr.P.C.

S.235 Cr.P.C. provides a proper mechanism for trial of an accused, charged for more than one offence.

According to which if, in one series of acts so connected together as to form the same transaction, more offences than one are committed by the same person, he may be charged with, and tried at one trial for, every such offence. Sub-section (2) of S.235 Cr.P.C. further clarifies the situation, according to which if the alleged acts constitute an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, the person accused of them may be charged with, and tried at one trial, for each of such offence. Sub-section 3 of S.235 says that if

several acts, of which one or more than one would by itself or themselves constitute an offence, constitute when combined a different offence, the person accused of them may be charged with and tried at one trial for, the offence constituted by such acts when combined and for any offence constituted by any one, or more, of such acts. The following illustrations shall clear more the above provision of S.235 Cr.P.C.

1. A commits house-breaking by day with intent to commit adultery, and commits in the house so entered adultery with B's wife. A may be separately charged with, and convicted of, offences under section 454 and 497 PPC.

2. A entices B, the wife of C, away from C, with intent to commit adultery with B, and then commits adultery with her. A may be separately charged with,

**and convicted of, offences under sections
498 and 497 PPC.**

S.5 of the Explosive Substance Act, 1908, has been added a schedule offence in third Schedule attached to Anti Terrorism Act, 1997, and has been made exclusively triable by the Anti Terrorism Court, in the following manner:-

“Without prejudice to the generality of the above paragraphs, the Anti Terrorism Court to the exclusion of any other Court shall try the offence relating to the following, namely:-

- i) Abduction or kidnapping for ransom;
- ii) Use of firearms or explosives by any device, including bomb blast in a mosque, imambargah, church, temple or any other place of worship, whether or not any hurt or damage is caused thereby; or

- (iii) Firing or use of explosive by any device including bomb blast in the court premises.
- (iv) Hurt caused by corrosive substance or attempt to cause hurt by means of a corrosive substance; and
- (v) Unlawful possession of an explosive substance or abetment for which an offence under the Explosive Substances Act, 1908 (VI of 1908).,

9. S.5 Explosive Substance Act and S.7 (ff) of the Anti Terrorism Act, are similar offences except that the quantum of punishment of both the offences vary from each other, therefore, accused would be charged either under section 7 (ff) of ATA or under the schedule offence but could not be convicted under both the offences, S.5 Explosive Substances Act, 1908, is scheduled offence, attached to the third Schedule of the Anti Terrorism Act. The

Anti Terrorism Courts have been established in view of the provisions contained in S.13 of Anti Terrorism Act, 1997. All offences with regard to use or threats of actions, as enunciated under section 6 of the Act and all offences mentioned under third schedule, shall be exclusively triable by the Anti Terrorism Court alongwith other offences with which the accused may, under the Code be charged at the same trial, as provided under S.17 of the Act, 1997. The Anti-Terrorism Court can also try other offences with which an accused may under the Cr.P.C. be charged at the same trial if the offence is connected with such other offence. For instance, if an accused is charged under section 7 (a) Anti-Terrorism Act and under S.302 PPC, he shall be separately charge sheeted under section 7 (a) of the Act, 1997 and under section 302 PPC and on proof of the charges can be convicted and sentenced under each of the two sections of law, as the one relates to Special Law

while the other relates to ordinary law. This instance can be found in Ex-Governor of Punjab Salman Taseer's murder case, wherein accused Malik Muhammad Mumtaz Qadari was charged under section 302 PPC and S.7 (a) Anti Terrorism Act, 1997. On conclusion of trial, learned Special Judge(Court No.11) Anti Terrorism Court Rawalpindi Division and Islamabad Capital Territory, awarded him death sentence under section 302 (b) PPC and ordered him to pay Rs.1,00,000/- , as compensation to LRs of deceased under section 544-A Cr.P.C. Similarly, under section 7 Anti Terrorism Act, 1997 he was also awarded death sentence and to pay a fine of Rs.1,00,000/- vide judgment dated 01.10.2011, against which appellant Malik Muhammad Mumtaz Qadri, preferred Crl.Appeal No.90 of 2011, before the august Islamabad High Court, Islamabad, which was decided on 09.03.2015. The Islamabad High Court Islamabad, vide judgment dated

09.03.2015, maintained the conviction and sentence of the appellant under section 302 (b) PPC, however, set aside his conviction and sentence under section 7 (a) of the Anti Terrorism Act, 1997 by holding that charge under section 7 (a) ATA, could not be proved against the appellant.

10. We have observed in plethora of cases that the learned Anti Terrorism Courts of this Province (Khyber Pakhtunkhwa), usually frame a charge in cases where an accused is charged under the Anti Terrorism Act, 1997 alongwith corresponding offences of the Pakistan Penal Code connected with the offences of ATA or schedule offence, under single head by simply mentioning at the end of the charge **“and you thereby committed an offence punishable under section 302 PPC read with S.7 Anti Terrorism Act, 1997”**, which is a wrong exercise of law on the subject because Anti Terrorism Act, 1997, is a special and a separate

enactment and section 302 PPC is even under a separate Code. In such like cases, separate charge-sheets should be formulated under each offence of both the Statute. Similar, should be the case, in other offences relating to Anti-Terrorism Act, 1997 and general law with which an accused is charged and is being tried alongwith the special law or schedule offences in one trial.

11. Various provisions provided under the Act of 1997, confer exclusive jurisdiction upon the Anti Terrorism Court to take cognizance and try not only scheduled offence, but also those connected with or arising out of the schedule offence. All the offences under section 6 of the Anti Terrorism Act, 1997 and offence under the third schedule attached to Anti Terrorism Act, 1997, would be exclusively triable by the Anti Terrorism Court or offences connected with the schedule offence. The Anti Terrorism Court can inflict punishment upon the

accused, if found guilty under any provision contained in S.6 of the Anti Terrorism Court with the corresponding punishment provided under S.7 of the Act or provided under schedule offence, but cannot award sentence under both the offences i.e. under section 7 of the Act as well as the schedule offence. However, in case of an offence under the Anti Terrorism Act and general law, the Court can inflict separate punishments under each offence of the two enactments.

12. In this particular case, on the one hand, it is not certain as to under which offence, the appellant has been charge sheeted and then convicted and sentenced. For convenience sake, we would like to reproduce the operative part of the judgment of the learned Trial Court:-

“Resultantly, the accused facing trial is found guilty for the offence and as such is convicted and sentenced to undergo

**rigorous imprisonment for 7 years u/s 5
Explosive Substances Act, 1908 read
with S.7 (ff) ATA with forfeiture of his
property to the State”.**

Section 367 Cr.P.C. speaks about language of judgment and its contents. According to sub-section (2) of Section 367 Cr.P.C. the judgment shall specify the offence (if any) of which and the section of the Pakistan Penal Code or other law under which the accused is convicted and the punishment for which he is sentenced.

13. As stated above, S.5 Explosive Substances Act, by itself is a scheduled offence having similarity with section 7 (ff) Anti Terrorism Act 1997, except that both vary in terms of quantum of sentence. Both the offences are exclusively triable by the Anti Terrorism Court. The Anti Terrorism Court can try other offence with which an accused may under the PPC be charged at the same trial if the

offence is connected with the offences of Terrorism or the schedule offence attached to ATA, but in such a situation charge under each offence shall be distinct and separate and similar would be the position of punishment under each offence separately and unambiguously. The Anti Terrorism Court can inflict punishment upon the accused, if found guilty under any provision contained in section 6 of the Anti Terrorism Court with the corresponding punishment provided under S.7 of the act or punishment provided under the schedule offence, but cannot inflict sentence upon an accused for an offence under S.7 ATA as well as under schedule offence, identical to the offence under section 7 ATA. In such circumstances, punishment under one offence shall be inflicted.

14. For what has been discussed above, we are firm in our view that the appellant has been prejudiced by not confronting him with specific

charge and has been deprived of his right of defence.

Similarly, his conviction and sentence recorded by the learned Trial Court, in the circumstances, cannot be held in accordance with law, therefore, we by allowing this appeal, set aside the conviction and sentence of the appellant, recorded and awarded by the learned Trial Court vide impugned judgment dated 27.01.2015 and remand the case to the learned Trial Court for trial de novo, right from the stage of framing fresh formal charge against the appellant. During this period the appellant shall remain as an under trial prisoner. The learned Trial Court shall conclude the trial expeditiously. Office is directed to send the record to the learned Trial Court within two days, without fail.

15. On setting aside the conviction and sentence of the appellant, connected Cr.A. No.240-P/2015, for enhancement of sentence of the convict

has become infructuous which stands dismissed as such.

16. The Additional Registrar (Judicial) of this Court is directed to send copy of this judgment forthwith, with intimation to this Court, to the Judges of the Anti-Terrorism Courts Khyber Pakhtunkhwa, for their future guidance and strict compliance in cases pending trial before their Courts and in the freshly submitted cases, so as to decrease the agonies of the accused involved in such like cases because if the exercise of formulation of ambiguous charge sheets, remain in field, it will open a Pandora's box through remand of cases to the Anti Terrorism Courts in the Province, and the accused already in custody in such like cases, will suffer for no fault on their part.

Announced.
16.09.2015.

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