

JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
PESHAWAR
(Judicial Department)

Cr.A. No.135-P/2015

Date of hearing: 09/07/2015

Appellant (s) : Ayaz

Respondent (s) : State

JUDGMENT

ASSADULLAH KHAN CHAMMKANI, J.-

At a trial held by learned Anti Terrorism Court, Mardan, appellants Ayaz and Khurshid Nauman alias Hasnain, having been found guilty vide judgment dated 28.02.2015, have been convicted and sentenced under section 15 of the Khyber Pakhtunkhwa Arms Act, 2013 to undergo 07 years R.I. and to pay a fine of Rs.3000/- or in default thereof to undergo 01 month S.I. further, each. Similarly, under section 7 (i) of the Anti Terrorism Act, each of

them has been convicted and sentenced to undergo 07 years R.I. and to pay a fine of Rs.10,000/- or in default thereof to undergo 03 months S.I. each. Besides, under section 5 Explosive Substance Act, 1908 read with S.7 (ff) ATA, appellant Khurshid Nauman has been further convicted and sentence to undergo 14 years R.I. with forfeiture of his property to the State. The sentences have been directed to run concurrently. Benefit of S.382-B Cr.P.C. has been extended to the appellants-convicts.

2. Against their conviction and sentences, convict Ayaz has filed the instant appeal, and Cr.A. Nof.150-P/2015 by convict Khurshid Nauman, while, the State seeking enhancement of sentences of the convicts, has preferred Cr.A. No.190-P/2015. Since, all the three appeals are the outcome of one and the same judgment of the learned Trial Court dated 28.02.2015,

therefore, this common judgment shall govern all of them.

3. On 31.03.2014, on receipt of spy information qua presences of appellants Ayaz and Khurshid Nauman, in the Baithak of the former, wanted in case FIR No.45 dated 24.01.2014 under sections 302/353/34 PPC and S.7 ATA Police Station Kalu Khan, FIR No.229 dated 29.06.2013 under sections 324/427 PPC and 7 ATA Police Station Kalu Khan and FIR No.460 dated 17.11.2013 under sections 302/353/404/436/427 PPC and S.7 ATA Police Station Parmoli, Haji Muhamamd Khan SHO Police Station Parmoli District Swabi, alongwith other police officials, under the supervisions of DSP's Circle Lahore and Razar, conducted raid on the Baithak of appellant Ayaz. Both of them on seeing the raiding party, tried to flee away, but were

nabbed on the spot. On personal search of appellant Khurshid Nauman, a hand grenade alongwith 9 MM bore pistol containing 5 live rounds of the same bore and from appellant Ayaz 30 bore pistol alongwith fixed charger and 15 live rounds of the same bore were recovered. Haji Muhammad Khan SHO formally arrested the appellants and took into possession the recovered arms and ammunitions vide recovery memo. He drafted murasila Exh.PA./1 and sent the same to Police Station on the basis of which FIR Exh.PA No.95 dated 31.03.2014 was registered against the appellants under section 5 Explosive Substances Act, Sections 13 and 15 Khyber Pakhtunkhwa Arms Act, 2013, S.7 ATA and S.15 PPO, in Police Station Parmoli District Swabi.

4. Said Jameel Khan Inspector (PW.6), reached the spot and prepared site plan Exh.PB on the pointation of complainant SHO, recorded statements of the PWs under section 161 Cr.P.C., examined the arms and ammunitions through Armuror and BDS and submitted application for destruction of the hand grenade through BDS. He sealed the recovered arms and ammunitions and took the same into possession vide recovery memo Exh.PW.3/1, recorded statements of the PWs under section 161 Cr.P.C. and placed on file previous FIRs registered against the appellants. After completion of investigation, he handed over case file to the SHO, who submitted challan against the appellants before the learned Trial Court.

5. On receipt of challan by the learned Trial Court, appellants were summoned

and formally charge sheeted, to which they pleaded not guilty and claimed trial. To prove its case prosecution examined seven witnesses. After closure of the prosecution evidence, statements of the appellants were recorded under section 342 Cr.P.C. wherein they denied the prosecutions allegations and professed their innocence. Appellant Ayaz declined to be examined on oath or to produce evidence in defence. However, appellant Khurshid Nauman appeared as his own witness under section 340 (2) Cr.P.C. but did not opt to produce evidence in defence.

6. While appearing as his own witness under section 340 (2) Cr.P.C. Khurshid Nauman deposed as under:-

**“My name is Khurshid Ali son of
Umbaras Khan and am residing in Swabi
Khas. I am educated upto Masters and**

am serving in education department as Theology Teacher in GMS Seen Khel Maneri District Swabi. I produced certified extracts of my academic qualification as Exh.D.3 consisting of 14 sheets in which my name is mentioned as Khurshid Ali. I am also Pesh Imam for Masjid Nimra Swabi. On 21.02.2014, the local police arrested me after Maghrib prayer from near the Mosque and covered my face and took me to the PS. Then on 31.03.2014, they formally showed my arrest and during this period they subjected me to sever torture and kept me in various police Stations and compelled me to confess my guilt. I am innocent and the local police on some ill information arrested and implicated me in the present case. I have never confessed my guilt before any court of law or police nor any incriminating recovery was effected from

me and the one attributed to me is the result of plantation”.

7. On conclusion of trial, the learned Trial Court, after hearing both the sides convicted and sentenced the appellants as mentioned above, hence, this appeal.

8. Learned counsel for the appellants argued that prosecution case is a cock and bull story having no nexus with the reality; that the two appellants have been shown arrested in the Baithak of appellant Ayaz, situated in Asota Sharif Swabi, but arrest card of appellant Khurshid Nauman squarely negates the story of arrest of the appellant in the Baithak of Ayaz, where his arrest has been shown from his own baithak situated in Swabi Khas i.e. at a distance of 27 to 30 Kilometers from the Baithak of appellant Ayaz; that the alleged recovered arms and ammunitions had not been sealed on the

spot, which create serious doubt about its recovery; that both the appellants being innocent have already been acquitted in all the cases mentioned in the FIR in which they were allegedly wanted; that alleged hand grenade has not been produced before the court nor any destruction certificate in respect thereof has been brought on record nor any sanction for prosecution as required under section 7 of the Explosive Substance Act, has been obtained therefore entire proceedings would be void and without jurisdiction; that the defence plea of appellant Khurshid Nauman in his statement under section 340 (2) Cr.P.C. has been proved; that the prosecution evidence being suffering from material contradictions and discrepancies has wrongly believed and relied upon by the learned Trial Court, therefore, the impugned judgment is liable to be reversed.

9. Conversely, learned AAG contended that appellants have been arrested red handed and recovery of the arms and ammunitions have been effected from their direct possession, who were already involved in so many criminal cases pertaining to terrorism; that police officials had no ill will or enmity to falsely implicate them; that there is clerical mistake in the arrest card of Khurshid appellant, which would not damage the entire prosecution case; that under Sub-section (8b) of Section 19 of the Anti Terrorism Act, 1997, if sanction within the meaning of S.7 of the Explosive Substance Act, has not been received within thirty day, the Trial Court shall proceed with the trial; that the same exercise has been adopted by the learned Trial Court, therefore, non-availability of sanction for prosecution, would not damage the prosecution case, he

added. He while supporting the impugned judgment sought dismissal of the appeal.

10. We have given our anxious consideration to the respective arguments advance from both the sides and perused the record.

11. It appears from the record that a recovery of a hand grenade and 9 MM bore pistol loaded with five rounds has been shown from personal possession of appellant Khurshid Nauman, while a 30 bore pistol alongwith fixed charger containing 15 live rounds of the same bore, from possession of appellant Ayaz. Both the appellants have been shown arrested in the Baithak of appellant Ayaz in a raid, as manifest from the First Information Report. The Baithak of appellant Ayaz is situated in Asota Swabi. Haji Muhammad Khan complainant SHO while appearing as PW.1 reiterated the same story of

arrest of the appellants in the Baithak of Ayaz and recovery from their personal possession, but Exh.D.1 i.e. arrest card of appellant Khurshid Nauman, shows that he had been arrested on 31.03.2014, from his own Baithak situated in Sawabi Khas, at a distance of 27/30 Kilometers from the Baithak of appellant Ayaz. We are confronted with two versions qua arrest of appellant Khurshid Nauman, which one is correct, would be best known to the complainant/SHO, however, it create serious doubt which goes to the very roots of the prosecution case.

12. Haroon Khan SHO PW.2, who acted as a marginal witness to recovery memo Exh.PW.1/1 deposed that the case property was not sealed by the complainant SHO in his presence on the spot. Awal Sher Khan HC while appearing as PW.3 deposed that he stood

as a marginal witness to recovery memo Exh.PW.3/1, vide which in his presence the I.O. took into possession a hand grenade, a 9 MM bore pistol, containing 5 live rounds, recovered from accused Khurshid Nauman, and 30 bore pistol alongwith 15 live rounds, recovered from appellant Ayaz; that the same were sealed into parcel by affixing 3 seals in the name of SJ; that the above recovery had not been effected in his presence from the appellants, rather the arms and ammunitions were produced by Chief Investigating Officer (C.I.O.), and he himself sealed the same into parcel and these were not sealed at the time of its production before the CIO; that recovery memo was prepared on the following day of the occurrence and the parcels were prepared in the Police Station and sealed there and then. This aspect of the case creates serious doubts about the alleged recovery.

13. Besides, sanction for prosecution has not been obtained in respect of charge under 5 Explosive Substance Act against appellant Khursheed Nauman, which was mandatory under section 7 of the Explosive Substance Act, 1908. In case titled, **“Said Muhammad Vs the State” (2009 P Cr L J Peshawar 604)**, this Court while declaring the trial in violation of S.7 of Explosive Substance Act, 1908, acquitted the accused in the circumstances. Section 7 of the Act *ibid* is unambiguous, and by word **“shall”** compliance thereof has been made mandatory. For convenience we reproduce the same below:-

“S.7 Restriction on trial of offences:

No court shall proceed to the trial of any person for an offence against this Act except with the consent of the Provincial Government”.

Thus word **“Shall”** used in section 7 of the Explosive Substances Act, leaves no room for any departure therefrom. Though sub-section (8b) of Section 19 of the Anti Terrorism Act, provides way for the Trial Court to proceed with the trial in absence of any such sanction if not received within the period specified therein, but from the language of sub-section (8b) of Section 19 ATA, it is very much evident that the prosecution would apply for such sanction, and if the same is not received within thirty days of submission of challan, it shall be deemed to have been given or accorded and the court shall proceed with the trial of the case. For convenience we deem it appropriate to reproduce sub-section (8b) of Section 19 of the ATA, 1997:-

**“Notwithstanding anything contained in
section 7 of the Explosive Substance Act,**

1908 (VI of 1908) or any other law for the time being in force, if the consent or sanction of the appropriate authority, where required, is not received within thirty days of submission of challan in the Court, the same shall be deemed to have been given or accorded and the Court shall proceed with the Trial of the case”.

Had there been no need or any consent or sanction of the appropriate authority under subsection (8b) of Section 19 of the ATA, the Legislature in its wisdom would not have mentioned about receipt of consent or sanction within certain specified period, rather would have mentioned that without any consent or sanction the Trial Court could proceed with the trial. When there is mention of receipt of consent or sanction within thirty days, it impliedly indicates to sending and seeking consent or sanction. In the instant case, the

prosecution has not sought consent or sanction for prosecution from the competent authority, much less receipt of the same within thirty days.

Had the prosecution sought consent or sanction, and the same had not been received within the specified period, then in such circumstances, the situation would have been different and the provisions of sub-section (8b) of Section 19 of the ATA, would cater to such situation. So on this score too appellant Khurshid Nauman is entitled to acquittal straightaway under section 5 Explosive Substance Act.

14. For what has been discussed above, prosecution has miserably failed to bring home the guilt of the appellants through cogent and confidence inspiring evidence beyond shadow of reasonable doubt, therefore, we do not deem it appropriate to dilate upon the defence plea of appellant Khurshid Nauman, which otherwise,

has been substantiated by him in his statement under section 340 (2) Cr.P.C. There are so many circumstances in the prosecution case which create serious doubt about the arrest of the appellants and recovery from their possession. Consequently, we while allowing both the appeals of the appellants-convicts and extending benefit of doubt to the appellants, hereby acquit them of the charge leveled against them. They be set at liberty forthwith, if not required in any other case. On acquittal of the convicts ***Cr.A. No.190-P/2015, titled, "The State Vs Ayaz etc"*** having become infructuous, stands dismissed.

15. These are reasons of our short order of even date.

16. The Additional Registrar (Judicial) of this Court is directed to send copy of this judgment to the Additional Inspector General (Investigation) and the Director General

Prosecution, Khyber Pakhtunkhwa, Peshawar
for future guidance about sanction for
prosecution in cases registered under the
provisions of Explosive Substances Act, with
intimation to this Court.

Announced.
01.07.2015

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