

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

Cr.A No.108-M/2015.

JUDGMENT

Date of hearing: 02.11.2015.

Appellants (Muhammad Shah Khesro & Gul Muhammad)

by M/s Syed Abdul Haq & Aurangzeb Advocates.

Respondents (State etc) by Mr.Faheem Naeem Advocate as

State Counsel.

MUHAMMAD DAUD KHAN, J.- Through this single judgment, I intend to dispose of instant appeal (Cr.A No.108-M/2015) filed by Muhammad Shah Khisro and connected Cr.A No.112/2015, filed by Gul Muhammad, as both the appeals are directed against one and same Judgment dated 27.5.2015, passed by learned trial Court, whereby both the appellants involved in case FIR No.517 dated 26.5.2013 u/s 5/6 Explosive Substances Act, Police Station Timergara, were convicted and sentenced to undergo SI for five years each.

2. According to the prosecution case, the local police during Nakabandi intercepted Datsun bearing No.SWA-60151, being driven by the appellant/convict Gul Muhammad, the search of which led to the recovery of 400 meters safety fuse, 200 detonators and 150 dynamite sticks from the same, for which the appellant/convict failed to produce any permit or license. Consequently the above explosive materials alongwith Datsun

were taken into possession and a case vide FIR mentioned above was registered. During investigation, the arrested appellant also implicated Muhammad Shah Khisro(appellant/convict) and Zabih Ullah (now absconding) in the case as accused.

3. After completion of investigation, challan against all the accused submitted in the trial Court, where after framing of formal charge against the accused, the prosecution examined as many as 9 witnesses. At conclusion of trial, both the appellants were convicted and sentenced through impugned judgment whereas co-accused Zabih Ullah was declared Proclaimed Offender as during trial he remained fugitive from law. Hence both the appellants approached this Court by filing the instant appeal as well as connected appeal.

4. Arguments heard and record perused.

5. So far as the case of appellant/convict Gul Muhammad is concerned, though he was caught red handed while transporting huge quantity of explosive materials in his Datsun, but in his confessional statement recorded u/s 164/364 Cr.PC, he totally denied the knowledge of any explosive material concealed in the bags, which were handed over to him by the absconding co-accused for taking it to the appellant Muhammad Shah Khisro. The said statement cannot be treated as confessional statement because the appellant has not admitted his conscious knowledge regarding concealing of the explosive in the bags recovered from his Datsun. For the sake of arguments if it is presumed that it is a confessional statement, even then it has

no weight as the same has been recorded after remaining in police custody for three days and there is every possibility of having been persuaded by police by coercion, inducement or torture to give the confessional statement, therefore, the same cannot be made basis for conviction. Besides, as per cross examination of PW.1, the appellant Gul Muhammad after arrest was taken by Security Forces/ Army for investigation, who remained with them for 3/4 hours, so when a person remains first in the Army interrogation for some time and thereafter in the police interrogation, then confession of that person is not a big problem. It is pertinent to mention here that two days custody of the accused till 29.5.2013 was granted to the PW.1(First Investigation Officer) but as per PW.6, who also conducted investigation in the case, on the pointation of appellant Gul Muhammad, further two bags of explosive powder were recovered from the said datsun on 28.5.2013, who prepared pointation memo, recovery memo and conducted other proceedings in the instant case. It means that after custody of Army officials, the appellant was under investigation of PW.1 till 29.5.2013 but surprisingly PW.6 disclosing himself as I.O, on 28.5.2013, effected further recovery from the datsun on the pointation of appellant. So it is not clear as to under whose custody the appellant remained during that period as on 29.5.2013, he was produced for confessional statement before the Court. The above assertions shows that the appellant was under interrogation/investigation of several officials, who were turn by

turn shifting/throwing him to each other like a Football and after getting the desired result, the appellant was produced before the Court for recording confessional statement. No doubt, the conviction can be based on the retracted confession alone but if it is found voluntary, true and confidence inspiring. In *Aala Muhammad and another's* case reported in **2008 SCMR 649** it has been held that:--

"Retracted judicial confession should not be acted upon, unless corroborated by some other reliable evidence."

6. It is also surprising that the first I.O/complainant started investigation at his own after drafting the murasila without assigning to him by his highups. The other I.O, has also not been mentioned in the FIR regarding investigation in the matter, who in his cross examination admitted that it is not mentioned in the FIR that to whom the investigation of the case was entrusted. He added that he was orally directed by the highups for conducting investigation in the case and it is not necessary to be entrusted in writing. Such act of both the Investigation Officers, creates doubt regarding mode and manner of recovery advanced by the prosecution.

7. Admittedly in the instant case Khaista Khan ASI (PW.1) acted as complainant, witness, and Investigating Officer. Under the law, complainant and accused are two opponent parties. In other words, they are two contesting parties. Role of an Investigating Officer is of a neutral authority whose object is to unearth the truth. The Investigating Officer cannot be a part or

a member of a party in a case which he is investigating. In this regard, guidance may be sought from Chapter 25 of Investigation from Police Rules, 1934. Rule 25.2(3) reads as under:---

"It is the duty of an Investigating 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 or offenders. He shall not commit himself prematurely to any view of the facts for or against any person."

The language of Rule 25.2 above noted clearly requires of an Investigating Officer not to commit himself prematurely to any view of the facts for or against any person. This cannot be expected from an Investigating Officer who himself is a party. As a matter of fact, concept of honest investigation is based on non-partisanship and neutrality. The reason and spirit of separating investigation wing from the operation wing of police also emanates from the same fact which reflects in Article 18 of the Police Order, 2002, therefore, this Court feels that element of honest, transparent and fair investigation lacks in the instant case. Reliance is placed on **2009 P.Cr.L.J, 1334**. The same point has been discussed by the learned Sindh High Court reported in **Nazir Ahmad v. The State** **PLD 2009 Kar. 191**. The Honourable Supreme Court has analyzed the above point from another angle also. According to the Honourable Supreme Court, Investigating Officer is an important witness for the defence also and in case he acts as a

complainant and raiding officer, the defence is deprived of his very precious right at the same time and is forced not to depend upon the same. The Federal Shariat Court also observed that such an investigation is biased investigation. **(Ashiq alias Kaloo v. State 1989 PCr.LJ 601).** In **State v. Bashir and others 1998 SC 408,** the Honourable Supreme Court observed that

"as observed above, Investigating Officer is as important witness for the defence also and in case the head of the police party also becomes the Investigating Officer, he may not be able to discharge his duties as required of him under the Police Rules".

8. As per assertion PW.6, the other recovery of explosive materials was made on the pointation of appellant Gul Muhammad from his Datsun but in respect of the said recovery, no formal charge has been framed against the appellant by the learned trial Court and only to the extent of initial recovery, formal charge has been framed, creating doubt in the prosecution case.

9. The prosecution witnesses are also not consistent on material points. According to PW.1, he prepared the site plan at the instance of eye witnesses but according to PW.2 (eye witness), the site plan has not been prepared at his instance. PW.1 asserts that he took 30 minutes on preparation of murasila and recovery memo whereas PW.2 states that 10/15 minutes were consumed on the same. According to PW.1, he measured the safety fuse with measurement tap(feetha) while as per PW.2,

no such measurement has been conducted by the PW.1. As per stance of PW.6, the explosive were sealed by him but during his examination in the Court, on opening of two bags on the order of trial Court, it was found unsealed. The said witness also deposed that the latter recovery was made on the day of first recovery of explosive however he again stated that it was made on 28.5.2015. PW.6 stated that further recovery was effected at 'Maspakheen Vela' whereas according to PW.8, the same was effected at 9/10 AM. According to PW.1, there are separate Check Posts of Army personnel and police at some distance from each other whereas PW.2 asserts that Army and police officials are standing together on the Checkpost. PW.1 who after drafting murasila, started investigation without assigning to him, did not bother to record statements of any Army official who were present at the relevant time.

10. The samples from explosive material earlier recovered were sent to the BDU, Special Branch KPK, Peshawar on 28.4.2013, which date is more than one month prior to the present occurrence as the present occurrence has taken place on 26.5.2013, but in the application Ex.PW.6/4, the date of FIR is written as 26.4.2013 and beneath the signature of scribe, date 28.4.2013 has been mentioned, which shows that the sample sent to the BDU were not of present case rather it was of another criminal case registered one month prior to the recovery, and arrest of present appellants, creating doubt in the prosecution case. Besides, in the reports Ex.PW.6/10 and Ex.PW.6/17, the

date of its receiving has not been mentioned however, it was examined on 17.6.2013, which also creates doubt as to in whose custody, it was lying during this period nor any statement of concerned official in this regard has been recorded. This controversy could have been resolved by examining the Bomb Disposal Expert but the prosecution did not bother to examine Khanzada ASI, who had examined the referred explosive in the BDU, which shows lack of interest of prosecution in the matter. In the absence of date of receipt of samples in the BDU, and non-production of Expert, the said report has got no weight and on the basis of such report accused cannot be convicted. The prosecution was bound to prove the recovery of alleged explosive material by producing the Expert etc but they did not bother to do so for the reason best known to them.

11. The CDR data collected by the prosecution could not establish any link of the appellants with each other as according to PW.6 he had not pointed out in the CDR about any contacts of the appellants and that he has not annexed any CNIC of the appellants or any record on which the SIMs were registered. The CDR data has also not been exhibited during trial which could support the prosecution case and only it has been placed on file just to strengthen the fake prosecution case. PW.1 asserts in his cross examination that as per his investigation, appellant Gul Muhammad being Taxi driver used to take goods of people from lower area to upper area for which a good amount was paid to him. He added that according to his investigation,

accused is not previously involved in any terrorist or illegal activities. The record is also silent regarding any contact of the appellants with any Terrorist Organization or Taliban etc. There is also nothing available on file as to whether the appellants are dangerous, hardened or desperate criminals.

12. As per PW.2, the vehicle of appellant was signaled by the Constable Farman whereas Constable Irshad had conducted search of the vehicle but surprisingly both the witness have not been examined by the prosecution in order to strengthen the prosecution case rather they were abandoned by the prosecution being won over. Non-production of such material witnesses further makes the story of prosecution dubious. It is well-settled principle of law that if a best piece of evidence is available with a party and the same is withheld by him, then it is presumed that the party has some evil motive behind it in not producing the said evidence. Even otherwise, a presumption under illustration (g) to Article 129 of Qanun-e-Shahadat Order can fairly be drawn in the matter. Reliance is placed on the case of **Darwesh & others Vs The State (2014 YLR 2233).**

13. The Datsun from which the alleged explosive materials were recovered, has not been produced in the trial Court for exhibition and non production of case property throws doubt on the credential of the prosecution story, which has rendered the foundation of the case shaky, on the basis of which conviction and sentence passed by trial cannot be sustained.

Reliance is placed on the case of *Said Muhammad Vs The State* reported in **2009 P.Cr.L.J 604**.

14. Apart from the above, Muhammad Rasool, the father of appellant Muhammad Shah Khisro, produced the license and other documents Ex.PW.6/13 renewed upto 4.6.2015, to the I.O, regarding Drill Machine installed in his shop, according to which they were allowed to possess small quantity of explosive for own use. Besides, no private person has been associated to the recovery proceedings which is clear violation of mandatory provision of Section 103 Cr.PC, though as per prosecution witnesses, there were shops at some distance and Army officials were also present with them but they did not bother to associate any of the person from the public nor any effort was made for the same. The prosecution was bound to prove its case beyond any shadow of doubt against the appellant which they failed to do so, the benefit of which must go to the appellant.

15. So far as the appellant/convict Muhammad Shah Khisro is concerned, admittedly there is nothing on record against him except the exculpatory confessional statement of co-appellant which was also not proved by the prosecution. No recovery has been made from the immediate possession of the appellant or at his instance. Besides, in the light of above material contradictions of prosecution witnesses as well as loop holes in the prosecution case, the conviction and sentence of appellant Muhammad Shah Khisro is also liable to be set aside.

In view of what has been observed above, the prosecution case is full of doubt and material contradictions the benefit of which would go to the accused as it is settled law that for creating doubt single circumstance is sufficient and not many circumstances are required. Therefore, the prosecution has badly failed to prove its case against the appellants beyond shadow of reasonable doubt and the learned trial Court has not appreciated the prosecution evidence in its true perspective and has erred in convicting the appellants vide impugned judgment which cannot be held intact. Resultantly, the instant Criminal Appeal and connected Appeal are allowed, the impugned judgment is set aside and both the appellants are acquitted of the charges leveled against them. They are in custody, be released forthwith if not wanted in any other case.

These are reasons of my short order of even date.

Announced
Dt: 02.11.2015.

J U D G E