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# IN THE HIGH COURT OF SINDH, KARACHI

Present: **Mr. Justice Ahmed Ali M. Sheikh**
**Mr. Justice Mohammed Karim Khan Agha**

**Spl. Cr. A. T. Appeal No. 54/2015**

Naeemullah Niazi

V

The State

**Spl. Cr. A. T. Appeal No. 55/2015**

Naeemullah Niazi

V

The State

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| Date of hearing | 06.04.2016 |
| Date of judgment | 18.04.2016 |
| Appellant | Through Mr. Muhammad Ashraf Kazi, advocate |
| State | Through Mr. Abrar Ahmed Khichi, APG for the State |

## JUDGMENT

**MOHAMMED KARIM KHAN AGHA, J:** By this common judgment, we propose to dispose of the above appeals filed by Naeemullah Niazi (the appellant) which arise out of the same Judgment dated 21.03.2015 whereby the appellant was tried under FIR 338/14 under S.4/5 of the Explosive Substances Act and FIR 339/15 under S.21 (i) A SAA both registered at PS Preedy. The appellant being aggrieved and dissatisfied with the judgment dated 21.03.2015, passed by the learned Anti-Terrorism Court No.IX, Karachi in Special Case No. 175 (III) of 2014 whereby the appellant was convicted under Section 6(2)(ee) of the Anti Terrorism Act 1997 (ATA) r/w section 5 of Explosive Substance Act 1908 and for which he was convicted and sentenced to suffer R.I. for fourteen years and fine of Rs.50,000/- and in case of default he shall further suffer R.I. for four months and was also convicted of offence u/s 23(1)-A Sindh Arms Act and was convicted and sentenced to suffer R.I. for seven years and fine of Rs.30,000/- and in case of

default he shall further suffer R.I. for three months more (the impugned judgment) has filed the appeals against the same.

2. Both the sentences were ordered to run concurrently and the benefit of section 382-B was extended in favour of the appellant

3. The facts of the case are that the complainant ASI Rashid ur Rehman lodged the FIR's on 15-05-2014 stating therein that he along with HC Muhammad Riaz, PC Tariq and Driver PC Muhammad Yousuf were patrolling in government mobile No.SP-3236 under entry No.47. During patrolling they were busy in snap checking at Zaibunisa Street near Chotani Jewelers and it was at about 1740 hours time when they saw one car No. ARJ-182 Alto VXR of White Colour being driven by one suspect which was intercepted and the suspect was caught hold of. On inquiry, he disclosed his name as Naeemullah Niazi s/o Habibullah Niazi. From his personal search in presence of the police officials/mashirs which led to the recovery of one hand grenade from the right side pocket of his shirt and one 30 bore pistol alongwith three live rounds in its magazine from the fold of his shalwar. On demand of weapon's license from the appellant he failed to produce the same. The appellant was apprehended for the offenses u/s 4/5 Explosive Substance Act, 7 ATA and u/s 23(1)-A Sindh Arms Act. It was informed to the team of BDS regarding recovery of hand grenade for the purpose of inspection. The recovered weapon was sealed at the spot and the car was seized u/s 550 Cr.P.C. Thereafter the appellant along with case property was brought to PS Preedy where two separate FIR's were registered being Crime No.338 and 339 of 2014 against him, hence this case.

4. The learned trial court framed the charge against the appellant on 15.11.2014.The appellant pleaded not guilty and claimed trial.

5. In order to substantiate the charge, the prosecution examined 3 witnesses and produced certain relevant documents which had been exhibited and thereafter the learned prosecutor closed the side of the prosecution vide statement dated 21.01.2015.

6. Thereafter the statement of the appellant was recorded u/s 342 Cr.P.C. The appellant did not examine himself under oath nor did he call any witnesses in his defense.

7. After hearing the learned counsel for the parties, the learned trial court had pronounced the impugned judgment.

8. Learned counsel for the appellant submitted that the learned trial court erred in law as well as in facts, in convicting the appellant as such the impugned judgment dated 21.3.2015 is not maintainable under the law and liable to be set-aside. He further submitted that the learned trial court did not appreciate the evidence as well as the facts as such the evidence requires re-appraisal by this court, as the same is not sufficient for passing the impugned judgment and liable to be set-aside; he next argued that while awarding sentence to the appellant the Special Prosecutor also produced the interrogation report of the appellant which showed that in as many as 30 other incidents the appellant was involved which report was inadmissible under the law and should not have been relied upon by the trial court as it was of no evidentiary value; He further submitted that due to contradictions in the evidence the evidence produced by the prosecution was inconsistent, conflicting, untrustworthy, dishonest, fabricated and false and could not be relied upon as such the prosecution had miserably failed to establish any case against the appellant.

9. In particular the appellant also relied on three very significant and according to him fatal defects in the prosecution case. Firstly, that the hand grenade did not fall within the definition of explosive substance as defined in the Explosive Substances Act 1908 and as such he could not be tried for this offense; secondly that as both the Mushirs were police officers S.103 Cr.PC had been violated and thirdly that there had been no approval by the Provincial Government as provided in S.7 of the Explosive Substances Act 1908 to try the case and the trial therefore stood vitiated.

10. The appellant submitted that for all the above reasons the impugned judgment was not sustainable in law and should be set aside.

11. On the other hand the learned APG for the State has supported the impugned judgment which he contended had been rightly decided based on the evidence before the trial court and therefore it should be upheld and the appeals dismissed.

12. We have considered the contentions raised by the learned counsel for the parties and carefully considered the record pertaining to the trial on which the impugned judgment is based.

13. PW 1 was ASI Rashid Ur Rehman who had intercepted the appellant in his car and on search had found the pistol and ammunition and hand grenade on the person of the appellant. He had prepared the arrest and recovery memo and registered the FIR's and recorded his S.161 statement. He exhibited Roznamcha entry 47 showing the time of his departure for patrolling from PS Preedy with other police officials as 1635 on 15-5-14 and entry No.51 noting his time of return. He arrested the appellant and took the property back to the PS where the hand grenade was checked by BDS.He deposed that Ghanzafar Ali was the IO who visited the place of wardat and prepared memo of wardat in the presence of himself and HC Mohammed Riaz.His evidence was similar to the FIR's which he had filed and he was not damaged on cross examination yet alone shattered.

14. PW 2 was HC Mohammed Riaz who was present at the time of the stop and search of the appellant by PW 1. He corroborated PW 1 in almost all respects and like PW 1 he was not damaged on cross examination yet alone shattered.

15. PW 3 was again ASI Rashid Ur Rehman as IO Ghanzafar Ali was dead having been martyred by a target killing. ASI Rashid Ur Rehman being closely associated with the case was able to recognize the signature of IO Ghanzafar Ali on a number of documents which he exhibited. Such documents included the FSL Report which had concluded that the recovered pistol was in working order and BDS Report which observed that:

> "As per possible and readable observation that the above mentioned inspected 01 in number Hand Grenade was ARGES-69, plastic body without detonator, **with detonating assembly and lever in green colour**. If terrorist used this Hand Grenade with proper technique alongwith detonator gives loss of life and damaged to property. The said Hand Grenade handed over to ASI Rashid-ur-Rehman of PS Preedy for case property alongwith clearance certificate signed by BD team, with the advised of safe handling".(bold added)

16. In his S.342 statement the appellant had alleged that the police were falsely implicating him in this case because he was the son of a retired head constable who the police held a departmental grudge against. However, no such allegation was put to any of the PW's during cross examination and no witness was called by the appellant to support this version which tends to suggest that it is an afterthought. Furthermore, during cross examination of the PW's it was not suggested that no recovery had been made from him of either the hand grenade or the pistol.

17. We do not find any substance to the appellant's objection to the admissibility of the FSL and BDS Reports being exhibited. They were exhibited through PW 3 Rashid Ur Rehman because the IO Ghanzafar Ali was dead and PW3 was able to recognize the signature of the IO Ghanzafar Ali and was also closely associated with the case (he was also PW 1 who had filed both of the FIR's). The contents of the reports were not challenged.

18. It is true that there are some minor discrepancies/inconsistencies in the evidence of the PW's however in our view none of these discrepancies/inconsistencies are of a material nature so as to effect the outcome of the case and as such can be overlooked. In this regard reliance is placed on the case of **Zakir Khan & others v. The State** (1995 SCMR 1793) which held as under:-

> "The rule is now well established that only material contradictions are to be taken into consideration by the Court while minor discrepancies found in the evidence of witnesses, which generally occur, are to be overlooked.

19. Thus, we find that the PW's evidence is corroborative, reliable and trustworthy and contain only a few minor inconsistencies which have no effect on the outcome of the case and that the learned trial judge has correctly appreciated and assessed the evidence in this case.

20. Turning to the question of whether a hand grenade can fall within the definition of an explosive substance under the Explosive substances Act 1908.

21. S.2 of the Explosive Substances Act 1908 provides as under:

> "2. Definition of "**explosive substance**". In this Act the expression "explosive substance" shall be deemed to include any materials for making any explosive substance; also any apparatus, machine, implement or material used, or intended to be used, or adapted for causing, or aiding in causing, any explosion in or with any explosive substance; **also any part of any such apparatus, machine or implement**." (bold added)

22. Apparently the hand grenade was made safe as such in our view it would definitely fall within the definition of an explosive substance especially bearing in mind that in the BDS Report it is described as "High explosive (EOD Device)" and taking into account the observations made in the DBS

report as reproduced earlier. Even if the hand grenade had no detonator in our view it would fall within the definition of an explosive substance in terms of the words, **"also any part of any such apparatus, machine or implement"**

23. We should also consider S. 5 of the Explosives Substances Act 1908 which makes even possessing an explosive substance under suspicious circumstances an offence which tends to show how serious an offense illegal involvement in explosives is. S.5 provides as under:

> "5. **Punishment for making or possessing explosive under suspicious circumstances.** Any person who makes or knowingly has in his possession or under his control an explosive substance, under such circumstances as to give rise to a reasonable suspicion that he is not making it or does not have it in his possession or under his control for a lawful object, shall, unless he can show that he made it or had it in this possession or under his control for a lawful object, be punishable with imprisonment for a term which may extend to fourteen years." (bold added)

24. Even otherwise, the appellant was being tried under the Anti Terrorism Act 1997 which at S.2 (f) defines "explosives" as under:-

> "(f) "explosive" means any bomb, **grenade**, dynamite, or explosive substance capable of causing an inquiry to any person or damage to any property and includes any explosive substance as defined in the Explosive Act, 1884 (IV of 1884);" (bold added)

25. "Explosive" as defined in the Explosives Act 1884 is defined as under:

> "(a) Means gunpowder, nitroglycerine, nitroglycol, gun cotton, dinitroptoluence, trinitro toluene, picric acid, dinitro-phenol, trinitro resorcinol (styphnic acid), cyclo trimethylence trinitramine, penta erythritol-tetranitrate, tetryl, nitroguanidine, lead azide, lead styphynate, fulminate of mercury or any other mental, diazo dinitro phenol, coloured fires or any other substances whether a single chemical compound or a mixture of substances, whether solid or liquid or gaseous used or manufactured with a view to produce a practical effect by explosion or pyrotechinic effect; and
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> (b) Includes:-
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> (i) Chemical compounds, compositions or mixtures of which will produce, upon release of its potential energy, a sudden outburst of gasses, thereby exerting high pressure on its

surroundings. Explosives may be solid, liquid or gas, nitro compounds or in the form of water gel or slurry;

(ii) Fog signals, fireworks, fuses, rockets, percussion-caps, detonators, cartridges, ammunition of all descriptions and every adaptation or preparation of an explosives as defined in this clause; and

(iii) Such other substance as the Federal Government may, by notification in the official Gazette, specify for the purposes of this sub-section."

26. Thus, in our view as mentioned above we have no doubt that the hand grenade which was recovered from the appellant qualifies as an explosive substance and as such this offense was rightly tried under S.4/5 of the Explosive Substances Act 1908 and this argument of the appellant is repelled.

27. The appellant also argued that the failure to have two independent mushirs (witnesses) present during his search also vitiated the trial. S.103 Cr.PC in essence provides that searches are to be made in the presence of 2 or more independent and respectable witnesses and in relevant part provides as under:

"S. 103. Search to be made in presence of witnesses. (1) Before making a search under this Chapter, the officer or other person about to make it shall call upon two or more respectable inhabitants of the locality in which the place to be searched is situate to attend and witness the search and may issue an order in writing to them or any of them so to do.

(2) The search shall be made in their presence, and a list of all things seized in the course of such search and of the places in which they are respectively found shall be prepared by such officer or other person and signed by such witnesses; **but no person witnessing a search under this section will required to attend the court as a witness of the search unless specifically summoned by it"** (bold added)

(3).....
(4)...

(5) Any person who, without reasonable cause, refuses or neglects to attend and witness a search under this section, when called upon to do so by an order in writing delivered or tendered to him, shall be deemed to have committed an offence under section 187 of the Pakistan Penal Code."

28. The Cr.PC was passed into law in 1898 over 115 years ago. At that time it was likely that such heinous crimes such as kidnapping for ransom, terrorism etc were less prevalent and citizens were more likely to come forward and act as mushirs since they regarded it as their public duty. Today, in 2016 the position is vastly different. Karachi alone has a population of approximately 20 million, serious crime is prevalent in the city where target killing by organized criminal gangs is often used to protect vested interests. In our view such intimidation or even target killing may extend to persons witnessing a search. Although they may not be called as witnesses at trial the possibility remains by virtue of S.103 (2) Cr.PC.

29. Not withstanding the sanction for refusing to act as a witness under S.103 (5) the law, like society, must adapt to the times. In this day and age hardly anyone for the reasons mentioned above would want to be a witness under S.103 and it may even be considered to be unfair to ask them to do so since they may be putting themselves or family members in danger by acting as witnesses especially in terrorism related crimes. As such in our view, even in searches which take place in broad day light in crowded areas it should not be fatal to a case if independent witnesses are not associated with the search. The law cannot of course be ignored on this issue but in our view its lack of application should not be fatal to a case where the crime is serious and the other evidence is compelling. In this case no enmity, bias or malafide has been shown against the PW's (who happen to be police officers) involved in the case and as such the police officers are as good as any other witness in respect of searches. In our view to make the non association of independent witnesses fatal to the case in cases of searches in today's environment would not meet the ends of justice and we must take into consideration the prevailing ground realities.

30. As such the appellant's contention that the failure to have present two independent witnesses as provided in S.103 at the time of his search is not fatal to his trial especially in view of the serious nature of the offense and the other oral and documentary evidence which is available against him.

31. The appellant has also contended that the trial stood vitiated since S.7 of the Explosive Substances Act 1908 had not been followed i.e. no consent of the Provincial Government had been obtained to try the offense under the Explosive Substances Act 1908. S.7 provides as under:

> "S.7 Restriction on trial of offenses. No Court shall proceed to the trial of any person for an offense against this Act except with the consent of the Provincial Government"

32. It would appear from the evidence that some kind of consent had been acquired from the Provincial Government.

33. Even if such consent had not been obtained from the Provincial Government since this trial was being conducted under the Anti Terrorism Act 1997 before the Anti Terrorism Court we do not consider that it was necessary to obtain such consent in the light of S.19(8b) of the ATA which provides as under;

> **"19(8b) Notwithstanding anything contained in section 7 of the Explosive Substances Act, 1908 (VI of 1908), or any other law for the time being in fore, if the consent or sanction of the appropriate authority, where required, is not received within thirty days of the 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**." (bold added)

34. The ATA is a special law and will prevail over other laws when in conflict and due to the specific wording of S.19(8b) ATA we find that the prosecution had deemed consent to proceed with the trial and the appellants argument in respect of the lack of consent under S.7 of the Explosive Substances Act 1908 is misconceived.

35. The Appellant also relied on certain findings in a bail application of the appellant which went in his favour but which had been ignored by the trial Court. As is well known an appeal against conviction can only be based on the evidence which was adduced before the trial Court and as such any reference to any finding in any bail application is irrelevant to the appeal especially as bail applications themselves only concern a very tentative assessment of the evidence and do not go into the merits of the case which is to be determined by the trial Court based on the evidence before it.

36. In conclusion, even if we are to exclude the interrogation reports which were referred to by the trial Court in the impugned judgment we are of the view that the prosecution has proved its case against the appellant beyond a reasonable doubt based on reliable and corroborative oral and documentary evidence which was not dented during cross examination and as such the impugned judgment is upheld however since the appellant is said to be a first offender and the sole bread winner of his family in view of the above whilst dismissing the appeals in respect of FIR 338/14 under S.4/5 of the Explosive Substances Act his sentence is reduced from 14 years to 10 years whilst the sentence in respect of FIR 339/15 is maintained. The sentences shall run concurrently and will both have the benefit of S.382 (B) Cr.PC. Subject to the above observations on the sentences the Appeals stand dismissed.

Dated: 18-04-2016