JUDGMENT SHEET.

IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

Jail Appeal No. 311 / 2024
Muhammad Zubair
Versus
The State.

Jail Appeal No. 343 / 2024
Daniyal alias Zulfiqar
Versus
The State

Criminal Appeal No. 292 / 2024
Daniyal alias Zulfiqar
Versus
The State and another

Appellants by:	Ms. Imaan Zainab Hazir, Mr. Javed Iqbal, Ms. Kaneez Zehra, & Zia ul Haq Kiani, Advocates.
State by:	M. Wajid Muneer DDPP. M. Ashraf DSP / CTD. Mr. Junaid SI / CTD.
Assisted by:	Ms. Ayman Azeem, Law Clerk.
Date of Hearing:	19.02.2025.

MOHSIN AKHTAR KAYANI, J:- By way of this common judgment we intend to decide above captioned appeals arising out of common judgment dated 09.07.2024 passed by learned Judge, Special Court (Anti-Terrorism), Islamabad, in case FIR No.01/2023, dated 03.01.2023 under section 13/20/65-Arms Ordinance, 120-B-Pakistan Penal Code, 4/5 Explosive Substance Act, R.W Section 7 of Anti-Terrorism Act, 1997, registered in police station CTD-Islamabad, whereby, both the appellants have been convicted and sentenced in the following manner:

> *" Accused Daniyal is convicted and sentenced under Section 4 of Explosive Act, 1908 read with Section 120-B PPC to* ***imprisonment for life to undergo RI****.*

In the light of charge accused persons Muhammad Zubair is convicted and sentenced under Section 4 Explosive Act, 1908 read with Section 120-B PPC to ***imprisonment for life to undergo RI****.*

In the light of charge accused person Daniyal is convicted and sentenced under Section 5 Explosive Act, 1908 read with Section 120-B PPC to ***imprisonment for fourteen years to undergo RI****.*

In the light of charge accused persons Muhammad Zubair is convicted and sentenced under Section 5 Explosive Act, 1908 read with Section 120-B PPC to ***imprisonment for fourteen years to undergo RI****.*

In the light of charge accused persons Daniyal is convicted under Section 7 (ff) of ATA, 1997 read with Section 120-B PPC and sentenced to ***imprisonment for life to undergo RI****.*

In the light of charge accused Muhammad Zubair is convicted under Section 7 (ff) of ATA, 1997 read with Section 120-B PPC and sentenced to ***imprisonment for life to undergo RI****.*

In the light of charge accused persons Daniyal is convicted under Section 13/20/65 AO read with Section 120-B PPC and sentenced to ***03 years imprisonment to undergo RI*** *and fine of Rs. 50,000/-and in case of default in payment of fine, to further undergo simple imprisonment of 03 months.*

In the light of charge accused Muhammad Zubair is convicted under Section 13/20/65 AO read with Section 120-B PPC and sentenced to ***03 years imprisonment to undergo RI*** *and fine of Rs.50,000/- and in case of default in payment of fine, to further undergo simple imprisonment of 03 months.*

All the substantive sentences shall run concurrently. Benefit under Section 382-B Cr.PC is extended to both the convicts."

2. Brief facts referred in the complaint / Exh.PW.1/E lodged by Tariq Rauf S.I / PW.1, converted into criminal case FIR No. 01/2023, dated 03.01.2023 under section 13/20/65-AO, 120-B-PPC, 4/5 ESA R.W Section 7 of ATA, 1997, registered in police station CTD-Islamabad / Exh.PW.6/A are that on 03.01.2023 at about 02:30 PM near Badana Union Council police party found the appellant Daniyal alias Zulfiqar in possession of a plastic bag containing 500 grams explosive substance, 04 detonators, prima cord wire (2 meter) colour sky blue, alongwith a 30 bore pistol Mauser No.2244 along with 07 live rounds. The other appellant Muhammad Zubair was found in possession of plastic bag containing 410 grams of explosive substance, 06 detonators, prima cord wire (3 meter) colour sky blue along with pistol 30 bore with 19 live rounds. Both the appellants were possessing the said explosive substance, detonators, arms ammunition and other components for committing terrorist activity in the backdrop of their connection with proscribed organization "*Tehreek e Taliban Pakistan*" and were making plan to launch an attack on Police, Security Agencies, Political Gathering, Prominent Personalities and Parliament. After registration of FIR, investigation was conducted by PW.6 / Muhammad Ashraf, Inspector, who recorded statement of prosecution witnesses under section 161 Cr.P.C. and obtained physical remand of accused persons from the court and transmitted the recovered explosive substance and pistol for transmission to NFSA through PW.4 / Constable Muhammad Ramzan. Similarly, he transmitted two mobile phones with complete data in saved USB, whereby, PW.8 / Abdul Qudoos, AD, FIA, prepared his report on the basis of two mobile phones. The NFSA report was placed on record as

Exh.PS. The charge was framed on 17.02.2023, whereby, the appellants have pleaded not guilty. The trial court record evidence of 08 PWs as well as statement of the appellants under section 342 Cr.P.C. and their defence evidence DW.1 / Umer and DW.2 / Muhammad Iqbal, whereafter, convicted appellants accordingly.

3. Learned counsel for the appellant contends that the prosecution has miserably failed to discharge its burden to sustain conviction awarded to the appellants. Despite having prior secret information, no proceedings under Section 103 Cr.P.C. were conducted. Furthermore, the charge was not framed in accordance with the law, nor was the sentence awarded in compliance with the requirements of the Criminal Procedure Code. Instead, the trial court is confused in awarding the sentence. The recovery of explosive substances and the weapon 30 bore pistol was not established in accordance with the legal standards set forth in multiple judgments of the superior courts. There are glaring contradictions in the statements of the prosecution witnesses, particularly regarding the recovery of the incriminating articles, as the explosives allegedly recovered were not produced in the court. Additionally, no sanction for prosecution was obtained in this case.

4. Conversely, the learned DDPP, along with officials of the CTD, claims that the prosecution has successfully discharged its burden. They assert that the appellants' activities were verified through FIA report, which explicitly declared them to be members of *Tehreek-e-Taliban Pakistan*.

5. Arguments heard, record perused.

6. Perusal of record reflects that the appellants were apprehended by Tariq Rauf SI (PW-1). It was alleged that on 03.01.2023, he was present at the CTD police station along with other police officials when they set out in an official vehicle towards Fateh Jang Road for the search and arrest of terrorists belonging to a proscribed organization. They received spy information that two terrorists were approaching near Badana Union Council Link Road. At about 2:30 p.m., PW-1 and the other police officials reached the designated location, where they spotted two pedestrians. Both individuals were apprehended and later identified as Zubair and Daniyal. Upon searching the bag carried by accused Daniyal in his right hand, the police recovered an explosive substance wrapped in a plastic envelope, weighing approximately 500 grams. A sample of 10 grams was separated and sealed with a stamp "AS.". Further inspection of the bag led to the recovery of four detonators wrapped in white paper recovered from a matchbox which were taken into possession and sealed parcels carrying a stamp of "AS" was prepared. In addition to this prima cord (measuring 2 meters) was recovered. Three inches of prima cord blue in color was separated and recovery memo Exh.PW/1-A was prepared. On further search of accused Daniyal a .30 bore pistol along with seven live bullets were recovered from the string of his shalwar. While from the right armpit pocket of the accused two magazines carrying 14 live bullets were recovered. The recovered pistol being unlicensed was taken into possession through recovery memo Exh.PW/1-B. From personal search of Daniyal cell phone, Rs.35/- cash, ID card and a paper containing phrase

"*Tehree-e-Labaik Taliban Pakistan we are coming*" was recovered and taken into possession.

Police investigation and recoveries from accused persons:

7. During search of bag carried by the appellant Zubair in his right hand from a black shawl (chadar), explosive substance wrapped in plastic envelope was recovered weighing 410 grams. Out of which 10 grams sample was separated with seal "AS". 06 detonators wrapped in white paper were also recovered from cigarette box which were also taken into possession through recovery memo and sample was prepared through seal "AS". A prima cord (measuring 3 meters) recovered in blue color was separated. The explosive material, prima cord and detonators have been taken into possession through separate recovery memo Exh.PW/1-C. From personal search of accused Zubair a .30 bore pistol alongwith 07 live bullets was recovered from the string of his shalwar. While from the right armpit pocket, 01 magazine carrying 07 live bullets and 19 other (total 26 bullets) were recovered. The said recovered pistol being unlicensed was taken into possession through recovery memo Exh.P.W/1-D. During further personal search of accused Zubair, cell phone, Rs.2200/- cash, and ID card were also recovered referred as Exh.PW.7/E. As per stance taken by PW.1 / Tariq Rauf S.I both the appellants have disclosed their association with "*Tehreek-e-Taliban Pakistan*" and they were planning to attack security agencies, Prime Minister house, etc. and other government institutions. Similar statement was given by the second recovery witness PW.7/Adnan Ali S.I who reiterated the facts earlier narrated by PW.1 in his affirmative evidence. As such both the star witnesses confirm that:

I. *"During search of a bag carried by accused Daniyal in his right hand from the clothes, explosive substance wrapped in plastic envelope was recovered ,which was measured 500 grams"*.

II. *"During further search of bag, 04 detonators wrapped in white paper were recovered from a match box"*.

III. *"During further search of the bag, prima cord (measuring 2 meters) was recovered. Three inches of prima cord blue in colour was separated."*

IV. *"During further personal search of accused Daniyal from the string of his Shalwar, a 30 bore pistol alongwith 07 live bullets was recovered, while from the right armpit pocket of the accused, 02 magazines carrying 14 live bullets were recovered"*.

V. *"During further personal search of accused Daniyal, a cell phone, Rs.35/Cash, ID card and a paper containing following writing/phrase "Tehreek-e-Labaik Pakistan were are coming" was recovered and taken into possession through personal search memo."*.

From the statements of PW.1 & 7 it is highlighted that a particular bag in the right hand of accused Daniyal of clothes, the plastic envelope in which explosive substance was wrapped, the white paper in which detonator was wrapped, string of Shalwar and Shalwar from where pistol and magazines were recovered and at last piece of paper with phrase "*Tehreek-e-Labaik Pakistan were are coming*", but astonishingly these recoveries have not been exhibited in the trial court which are the key evidence to conclude the entire chain of evidence against the appellant Daniyal.

8. While considering recovery from the appellant Muhammad Zubair, as per stance of PW.1 / Tariq Rauf SI and PW.7 / Adnan Ali ASI, following was recorded in affirmative evidence of PW.7 / Adnan Ali ASI:

I. *"During search of a bag carried by accused Zubair in his right hand from a black shawl (chadar), explosive substance wrapped in plastic envelope was recovered which was measured 410 grams P.14."*

II. *During search of bag, 06 detonators P.15/1-6 wrapped in white paper were recovered from a cigarette box P.16.During further search of the bag, prima cord (measuring 3 meters) was recovered. Three inches of prima cord blue in colour was separated.*

III. *Further personal search of accused Zubair from the string of his Shalwar, a 30 bore pistol P.18 alongwith 07 live bullets P.19/1-7 were recovered, while from the right armpit pocket of the accused, 01 magazine carrying 07 live bullets P.20/1-7 and 19 other (total 26 bullets(P.21/1-12 were recovered.*

9. Similarly, while considering the above three different recovers PW.7 / Adnan Ali ASI in his affirmative evidence referred a "bag" in the right hand of the appellant Muhammad Zubair, black shawl (chadar), plastic envelope, detonators wrapped in white paper and string of Shalwar as well as right armpit pocket of the accused. All these incriminating materials carrying explosive as alleged by the prosecution as well as pistol and live bullets are missing in this case neither the same were produced in the court nor any recovery memo was prepared by the investigation officer in this case to that extent. In all kind of recoveries in any criminal case whether of narcotics or of explosive substance the police authorities are under obligation to discharge their duties in terms of Police Rules 1934

dealing with the case property, especially, Rule 22.16 of Police Rules 1934 which specifically provide that:

> *"each weapon, article or property (not being cattle) seized under the above sub-rule shall be marked or labeled with the name of the person from whom, or the place where, it was seized, and reference to the case diary or other report submitted from the police station"*

The said Rule *inter alia* casts duty upon police officer if read in conjunction with other Rules that all these materials being incriminating articles have to be produced before the competent court and shall be made part of the challan. Similarly, Rule 22.18 of the Police Rules, 1934, deals with custody of property exceeding in value of Rs.500/-, whether relating to a case or seized on suspicion, or taken as unclaimed, shall be forwarded as soon as possible to district headquarters for deposit in the treasury in accordance with Police Rule 27.18 (2) or, in the case of property connected with a case to be tried at an outstation or Tehsil, to the Tehsil Treasury. All these recovered articles are put in numbers and referred with full description of each article as a case property and same should have been placed in a store room register which has to be examined twice a month by the Government. The Rule 22.70 of the Police Rules provides that Register No.XIX shall be maintained, wherein, with the exception of articles already included in Register No.XVI, every article placed in the store-room shall be entered and the removal of any such article shall also be noted in the appropriate column. While appreciating these Police Rules, case property be kept in Mall Khana and entry of the same be recorded in Register No.XIX, therefore, prosecution, especially, police / IO in this case is required to establish that the case property was kept in safe custody, and

then he is under obligation to establish its safe transmission by producing relevant register including road certificate in order to demonstrate transparency and non-tampering with the evidence of the case property.

Effect of non-production of incriminating material:

10. The above discussion has been made in order to demonstrate responsibility of the police officials who initially apprehended appellants with alleged incriminating articles. The second part of the scheme under which the recovered articles have to be placed on record in a criminal case is to be dealt in terms of Lahore High Court Rules and Orders noted in Part-B of Chapter XXIV, Volume-III in terms of Rule 14.F, the clothes, weapons, money, ornaments, food and every article which forms a part of the circumstantial evidence should be produced in court and their connection with the case and identity should be proved by witnesses referred in the recovery memo. The most important Rules in this case are Rule 14.H. which provides that all exhibits should be marked with a letter or numbers, hence, under these High Court Rules and Orders all incriminating articles which are to be produced in the trial court in evidence should be labeled with number and to be referred with that number in the trial court or in appellate court. The accumulative effect of Rule.14.F and 14.H placed heavy duty upon the prosecution to conduct the trial in a specific manner for the purpose of clarity, transparency and due process of law while sharing every incriminating article with the appellant and accused in every case so that they may defend themselves, but surprisingly, in the present case PW.1 / Tariq Rauf SI and PW.7 / Adnan Ali ASI, the prime recovery witnesses as well as investigation officer PW.6 / Muhammad Ahraf Inspector are not able to demonstrate as to why the

bag from where explosive substance was recovered from both the appellants, the cloth, shawl (chadar), white paper, and plastic bag were not produced to complete the chain of evidence. In absence of these crucial part of evidence when the same were not produced or exhibited in the trial same could not be considered proven and conviction could not be made as held in **2004 SCMR 1209 (*Qamar Zaman Vs. Waseem Iqbal and others)*** and **2005 SCMR 594 (*State of Islamic Republic of Pakistan through Deputy Attorney General Vs. Kenneth Marshal and others)***. Even it is settled law that if the case property in any case was not produce or exhibited in the trial the entire prosecution case crumbles down as held in **2009 SCMR 431 (*Gul Dast Khan Vs. The State)*** and **2012 SCMR 577 (*Amjad Ali Vs. State)***, therefore, non-production of case property was fatal to the prosecution case and same has destroyed the very foundation of the case rather created a serious doubt as held in **2017 P.Cr.L.J [Lahore] 14 (*Abrar Hussain Vs. State)***. Similar view was rendered in **PLD 2006 [Peshawar] 39 (*Muhammad Mushtaq Vs. State)*** and **2015 YLR [Peshawar] 2189 (*Fayyaz Shah Vs. State)*** and the Supreme Court of Pakistan in **2023 SCMR 781 (*Ahmed Ali Vs. State)*** went one step further where it was held that when material (narcotics) is neither produced nor exhibited, the presumption can be drawn that it is not in existence at all. It has further been reiterated that when the best evidence in such type of cases is withheld by the prosecution and there is no plausible explanation for the non-production or withholding of the same in court, an adverse inference or assumption against the prosecution could be drawn under Article

129(g) of the Qanun-e-Shahadat, 1984, and it can easily be presumed that no such material / narcotics is in existence.

Veracity of data recovered from modern devices:

11. The investigation officer PW.6 / Muhammad Ashraf Inspector also refers specific view while establishing a factum of stance taken from video of the accused mobile Daniyal in the following manner:

> *"On the same day, Rashid Mehmood HC got saved the video from the Mobile of accused Daniyal in the Computer of P.S CTD-Islamabad and handed over the said video to me in USB P.1 (at this stage learned prosecutor requested the court to play the video and record its contents. The request seems genuine, same is allowed. Court observed that in the video "Parliament Islamabad is written in urdu alongwith picture of parliament" and an anthem jab takht uthae jain gay zindan girae jain gay. A writing in Urdu on a small page in Urdu is shown by a person containing "Tehrik e Taliban Pakistan we are coming". A full anthem is played-in the background till the end of video containing 2 minutes 47 seconds)."*

The above mentioned statement of PW.6 refers recorded message from mobile phone by Rashid Mehmood Head Constable after obtaining 07 days physical remand on 04.01.2023 when appellant Daniyal was taken into custody on 03.01.2023. Recording of video form mobile was also confirmed by PW.3 / Rashid Mehmood who produced USB P.1 through recovery memo Exh.PW./3-A. During course of cross examination he acknowledges that:

> *"... A lay man can also make editing in video if he has any criminal mind like a white color crimes."*

Even PW.3 acknowledges that he was computer expert but whether he is allowed to record some information from the recovered mobile of

alleged accused and use the same while appearing as expert witness; the answer is in negative, specially, when PW.6 acknowledges that:

> *"Mobile phones were merely taken into possession but no sealed by Tariq Rauf SI. I am not Computer Expert, therefore, I do not know the procedure through which the video was transferred into USB. On 04.10.2023, the said video was transferred in USB and I do not remember the time when the said video was transferred in USB."*

The above admission on part of the investigation office reflects poor understanding of law as well as investigation of any case.

12. In addition to above the prosecution produced PW.8 / Abdul Qudoos, AD, FIA, who received request to examine two mobile phone one Infinix and another Techno color blue and stated that "*I performed all the forensic procedures upon the mobiles and prepared my report comprising upon 10 pages Exh.PW8/A(1-10)*". He was not aware qua IMEI numbers of two mobiles, even he acknowledges that:

> *"It is correct that I being expert do not receive the mobile phones however the mobile phone / hard disk were sent to me through a procedure."*

He also acknowledged that:

> *"It is correct that all the messages, audios and the videos are not attached with the forensic report. I do not remember the details of data available in Techno mobile."*

While considering this aspect the surprising feature and glaring mistake conducted by the investigation officer PW.6 / Muhammad Ashraf Inspector is that he did not seal the mobile phone after alleged recovery from the appellant rather the same was transmitted to PW.8 on 11.01.2023 after 08 days of the alleged incident. Over and above the PW.4 has been declared an expert who had recorded 01 USB P.1 through computer to

prove something which is not in line with the procedure, especially, when the role of an expert in cybercrime is separately identified under the law and PW.3 or the I.O is not relevant authority to issue any report at their own without having technical expertise in this regard. This court is mindful of the fact that sealing of mobile phone is a necessary event to secure integrity of the recovered incriminating article, especially, to prove such a heinous offence of terrorism against the appellants. PW.6 / Muhammad Ashraf Inspector admitted that Tariq Rauf SI / PW.1 has not sealed mobile phones and even PW.1 acknowledged that:

> *"It is correct that I stated in my examination in chief that I also recovered a cell phone from the possession of accused Muhammad Zubair. The stance pertaining to recovery of mobile not mentioned in FIR, however, it is the independent material and the same is not narrated in the FIR."*

Such aspect excluded the veracity of entire prosecution and the integrity of mobile phone and its data has been compromised. The investigation officer has also not verified mobile numbers nor placed any identity of any SIM or IMEI relating to any of the appellant to prove there ownership and reference. Despite the fact that prosecution has heavily relied upon statement or video content from the alleged recovered mobile phone, however, in such scenario the the veracity of any video is to be seen in light of Article 164 of Qanun-e-Shahadat Order, 1984, which allows to produce evidence that may have become available because of modern devices or techniques. As such there is no bar on production of any evidence collected from modern means but mere production of CCTV video as a piece of evidence and its watching in open court was not sufficient to be relied upon unless and until corroborated and proved to be

genuine. A proof of genuineness of such CCTV video, it was incumbent upon prosecution to examine the person who recorded the video to testify the same. Investigation officer who received CCTV video stated in his evidence that he received it from a person who did not want to disclose his name or identity being a man of some surveillance. In such scenario the guiding principles have been referred in **PLD 2019 [SC] 675 (*Ishtiaq Ahmed Mirza Vs. Federation of Pakistan)*** to prove admissibility of an audio tape or video in evidence before a court of law. The rules settled in the judgment are as under:

i. *No audio tape or video could be relied upon by a court until the same was proved to be genuine and not tampered with or doctored.*
ii. *A forensic report prepared by an analyst of the Provincial Forensic Science Agency in respect of an audio tape or video was per se admissible in evidence in view of the provisions of section 9(3) of the Punjab Forensic Science Agency Act, 2007.*
iii. *Under Article 164 of the Qanun-e-Shahadat Order, 1984 it laid in the discretion of a court to allow any evidence becoming available through an audio tape or video to be produced.*
iv. *Even where a court allowed an audio tape or video to be produced in evidence, such audio tape or video had to be proved in accordance with the law of evidence.*
v. *Accuracy of the recording must be proved and satisfactory evidence, direct or circumstantial, had to be produced so as to rule out any possibility of tampering with the record.*
vi. *An audio tape or video sought to be produced in evidence must be the actual record of the conversation as and when it was made or of the event as and when it took place.*

vii. The person recording the conversation or event had to be produced.

viii. The person recording the conversation or event must produce the audio tape or video himself.

ix. The audio tape or video must be played in the court.

xi. The person recording the conversation or event must identify the voice of the person speaking or the person seen or the voice or person seen may be identified by any other person who recognized such voice or person.

xv. Safe custody of the audio tape or video after its preparation till production before the court must be proved.

xvi. The transcript of the audio tape or video must have been prepared under independent supervision and control.

xviii. The source of an audio tape or video becoming available had to be disclosed.

xx. An audio tape or video produced at a late stage of a judicial proceeding may be looked at with suspicion.

While following the above mentioned tests laid down by the Supreme Court of Pakistan it appears that entire case based upon the USB content played in the trial court is inadmissible which was not proved in accordance with law nor have any sanctity in eye of law to award capital sentence to the appellant through such tainted piece of evidence.

No case under Explosive Substance Act:

13. Now adverting towards the charge under section 4 /5 of Explosive Substance Act, 1908 which deals with any act with intent to cause by an explosive substance, or conspires to cause by an explosive substance in Pakistan of a nature likely to endanger life or to cause serious injury to property or any person who is in possession or under his control any explosive substance with intent by means thereof to endanger life, or cause

serious injury to property in Pakistan, or having knowledge that he is in possession or in control of any substance is liable for punishment with imprisonment of life under section 4 and fourteen years under section 5 of the Act, however, the said law is to be applied after fulfillment of requirement of section 7 of the Act, which is as follows:

> *"No court shall proceed to the trial of any person for an offence against this Act except with the consent of Provincial Government to which intimation shall be sent within two days of the registration of case provided that if consent is neither received nor refused within 60 days of registration of case by the government such consent shall be deemed to have been duly given"*

While dealing with the said provision of law the stance taken by the investigation officer / PW.6 is silent with reference to receiving of any sanction at the first stance from any government or any authority under the law. Even I.O is negligent who had not referred a single request within two days of registration of case for sanction to be obtained. The legislative intent if seen in the provision highlighted with the use of word "shall" which reflects mandatory provision of law that must be complied with as held in **2023 YLR [Balochistan] 1821 (*Abdul Aziz alias Sadam Vs. The State)*** wherein the mandatory condition precedent for prosecution under the law has not been observed and high court declared entire proceedings as void and without jurisdiction in explanation to the word "shall" used in sanction of law leaves no room for any departure therefrom, resultantly, the super structure built upon void structure collapses to the ground when sanction was not even initiated. Therefore, while relying upon **PLD 1990 [SC] 1070 (*Ahmed Khan Vs. Member Consolidation Board of Revenue*),**

PLD 1958 [SC] 104 (*Yousaf Ali Vs. Muhammad Aslam Zia*), PLD 1982 [Lahore] 606 (*Fakhra Malik Vs. Secretary to Government of the Punjab*), 2007 SCMR 818 (*Muhammad Tariq Khan Vs. Khawaja Muhammad Jawad Asami*), 2003 SCMR 549 (*Talib Hussain Vs. Member Board of Revenue*), 2003 YLR [Lahore] 1277 (*Pakistan Industrial Promotors Ltd. Vs. Nawazish Ali Jafari)*, and **PLD 1982 [Lahore] 1 (*Crescent Sugar Mills & Distillery Ltd, Faisalabad Vs. Central Board of Revenue, Islamabad),** the entire prosecution conducted under charges of 4/5 of Explosive Substance Act, 1908 crumbles down.

14. We have confronted DDPP to explain the delay recorded in the transmission of explosive material to NFSA and non-production of Roznamcha as well as register No.19 of mallkhana, especially, in light of contents referred in prosecution case wherein the appellants have been taken into custody on 03.01.2023 and all the recoveries have been effected on the said date by PW.1 and NFSA report / Exh.PS in respect of explosive substance reflects that same was received on 09.01.2023 after delay of 06 days, wherein the submitting authority referred in the report was SSP Investigation Islamabad through constable Moeen Sikandar / PW.5 who only received report wherein Muhammad Ramzan / PW.5 has transmitted two prima cord and two sample parcels said to contain explosive substance each vide Road Certificate No.05/23 to NFSA, but surprisingly, the NFSA report is silent with reference to Muhammad Ramzan Constable / 4860 / PW.4 and no justified explanation has been rendered in this regard. Ordinarily the delay in sending samples goes against the prosecution case, especially, in case of narcotics under Chemical Analyst Rules, where 72 hours timeline was provided which was directory in

nature but in this case where a capital sentence is required to be passed the prosecution is under obligation to show their extra ordinary vigilance and expertise to perform all lawful obligation within shortest possible time to avoid any unnecessary objection in the trial by the defence and to demonstrate transparency in such type of sensitive cases failing which adverse inference has to be drawn. The DDPP has not been able to demonstrate any justiciable reasons as to why register No.19 was not produced or entries of said parcels in Roznamcha which is an admitted phenomena by PW.2 / Akbar Ali ASI who acknowledges that *he remain present in police station 24/7 and the concerned entries were made in the Roznamcha about sending of the sample parcels to NFSA, Islamabad, however, said Roznamcha is not available at the moment*. The Roznamcha was not produced in the court and the impugned judgment is silent to that effect. PW.2 also acknowledged that he was delivered 10 parcels and did not make entries of said parcels in the Roznamcha, however, the entries were made in register No.19, but such statement has no effect when neither the said register nor road certification No.5/23 produced in the court to demonstrate that all required processes were completed in the best manner to exclude all kinds of doubts on the safe transmission and custody of the explosive material / substance, resultantly, the recovery is inconsequential having no effect.

15. In order to secure a conviction under Section 4, Explosive Substance Act, 1908, the prosecution was to establish that the possession of explosive substance was accompanied with a malicious intent to endanger life or cause serious injury to property. This is in fact the key difference between Sections 4 and 5, ESA in that the latter criminalizes mere possession of

explosive substance, without there being any condition of the same being with a malicious intent to endanger life or cause serious injury to property. There is nothing in the entirety of the prosecution evidence or the impugned Judgment which establishes this "*malicious intent*". Reliance in this regard is placed on Judgment reported as **2024 SCMR 1959 *(Muhammad Asjad v. The State & others).***

Private witness and requirement of section 103 Cr.P.C. :

16. In such type of sensitive cases the rectory proceedings are the most crucial. Though it is admitted position that police witness are as good as any other witness as held in **2010 SCMR 1962 *(Salah-ud-Din Vs. The State)***, however, section 103 Cr.P.C. requires that before making search under the said provision the office shall call upon two or more respectable inhabitants of the locality in which the place to be searched and recovery memo shall be prepared which is required to be signed by such witness. Despite the fact that PW.1 / Tariq Rauf SI can easily arrange the witness as he conducted raid on spy information, even otherwise he acknowledges that:

> *"It is correct that at the place of arrest in the surrounding area there is buildings and population was there. At the time of arrest of present accused there were public as well. It is correct that at the place of arrest in the surrounding areas there was shops and shopkeepers were also present"*

He further acknowledged in his cross examination that:

> *"people from the general public were performing their regular works on the relevant day of occurrence. It was the duty of the investigation officer to join the investigation from the people from general public"*

Similar aspect was also acknowledged by PW.6 / Muhammad Ashraf I.O who confirms that:

> *"place of occurrence was a public place and one person was standing there and rest of the people were passing the place of occurrence"*

Further acknowledged that:

> *"It is correct that so many people from general public were present at the place of occurrence, but I did not incorporate any private person as a witness"*

The same was further confirmed by PW.7 / Adnan Ali ASI in the following manner:

> *"The IO did not ask anyone from the public who were present at the spot to become witness of the alleged occurrence"*

While considering these technical aspects and requirements of section 103 Cr.P.C. all three prosecution witnesses stated that the public witnessed the raid / arrest, yet there is nothing available on record to even remotely indicate that the prosecution attempted to associate any independent / private witness, despite ample availability of the same. The impugned judgment is entirely silent on this, and accordingly, is in contravention of the jurisprudence in this regard laid down in judgment reported as **2024 YLR [Sindh] 1436 *(Bashir Ahmed Vs. The State)***, wherein it was held that non-association of private witness during the arrest of accused and during recovery proceedings cast significant doubt on the veracity of the prosecution version of events. It is also settled law that when police had prior information regarding the accused persons, it was not difficult to call independent persons as witnesses but the police had deliberately avoided in this case, therefore, arrest, search and recovery proceedings without independent corroboration lacks transparency as

required in **2024 MLD [Sindh] 608 (*Ramesh Kumar Vs. The State*),** therefore, in light of principles settled in judgments reported as **1995 SCMR 1345 (*Tariq Pervez VS. The State*), 2008 SCMR 1221 (*Ghulam Qadir and others Vs. The State*), 2009 SCMR 230 (*Muhammad Akram Vs. The State*)** and **2014 SCMR 749 (*Muhammad Zaman Vs. The State*)**, serious doubt emerges on record which shatters entire case of the prosecution.

Defense under section 342 Cr.P.C.:

17. Now adverting towards defence taken by the appellants in their statement under section 342 Cr.P.C. which clearly state that the appellants have been kidnapped. The appellant Daniyal in his statement under section 342 Cr.P.C. has answered question No.1 in the following manner:

> *"It is incorrect and no such like occurrence ever took place. One FIR No.1024/22 of PS Westridge has been lodged for the missing of co-accused Zubair on 24.12.2022. Co-accused Zubair was missing / abducted by security agencies which puts a dark shadow and suspicion on the said occurrence. The whole episode becomes suspicious and doubtful"*

Similarly, appellant Muhammad Zubair has stated following in answer to question No.1 in statement under section 342 Cr.P.C.:

> *"It is incorrect, concocted, bogus, and frivolous and fact is, no such like occurrence took place. That fact is that the accused was kidnapped from Rawalpindi on 21-12-2022 at 04:10 PM and all the details briefly described vide FIR No. 1024, dated 24-12-2022 at 07:00 AM, under section 365 PPC, Police Station Westridge, District Rawalpindi. After the registration of FIR No. 1024, the local police started its investigation but the kidnappers (officials of CTD Islamabad) registered concocted and frivolous FIR on*

03-01-2023 to get rid of the investigations of FIR No. 1024 of PS Westridge Mark B.

The investigation officer of the case FIR No. 1024 cancelled the case with the observation that as the abductee is in the possession of CTD Islamabad Police, hence no need of further investigation. On behalf of the accused, an application for change of investigation was filed before City Police Officer which was marked to SP Pothohar rather than District Standing Board Mark-C, hence 22-A Mark-D(1-6) was filed which was disposed of and the same order was challenged in the writ petition before Lahore high court, Lahore, Rawalpindi bench Mark-E(1-9). The same was allowed and the operative para is as follows.

> *At the very outset learned counsel opted not to press this petition, however, requested for issuance of direction to CPO Rawalpindi (Respondent No. 1) for deciding the ultimate fate of pending application for the transfer of investigation. Be that as it may, instant petition is dismissed as withdrawn, however, CPO, Rawalpindi is directed to decide the pending application of the petitioner for the transfer of investigation strictly on merits.*'

As the case of investigation is pending and its fate has to be still decided. As reasonable doubt is there that CTD Islamabad Police abducted the applicant and then involved him in the instant case for their ulterior motives"

If the above statements are compared with the case of prosecution it is clearly established that the CTD officials have kidnapped appellants and separate criminal case was registered for alleged enforced disappearance / abduction and in order to support their case the appellants have produced

defence evidence in shape of DW.1 Umer (minor nephew of the appellant) and DW.2 / Muhammad Iqbal (brother of appellant Muhammad Zubair) who corroborated the version of the defense regarding enforced disappearance of appellant in an ambulance on 21.12.2002. statement of both these witnesses reflects Muhammad Zubair was kidnapped in ambulance. The defense version in terms of criminal case FIR No. 1024, dated 24-12-2022, under section 365 PPC, Police Station Westridge, District Rawalpindi, confirms that the appellant was abducted much prior to the present incident and he remained under illegal detention and later on he has been involved in criminal case, therefore, this Court has to place the defense version in juxtaposition with the prosecution case to ascertain which story hold more credence as held in **2024 P.Cr.L.J [Balochistan] 190 *(Ibrahim alias Taig Vs. The State)***, where it was held that:

> "*It has been observed with pain that in several cases law enforcement agencies cause the disappearance of citizens and subsequently involve them in baseless cases of explosive material or drugs. Such a trend must be noticed and curtailed.*"

Even otherwise, prosecution has miserably failed to connect appellants with the proscribed organization i.e. "*Tehreek-e-Taliban Pakistan*" when they have not confirmed in their own case as to whether it is "*Tehreek Labaik Pakistan*" as recorded in the confusion highlighted in evidence of PW.1 / Tariq Rauf who used phrase "*Tehreek-e-Labaik*" in his evidence and later on has changed as "*Tehreek-e-Taliban Pakistan*" but surprisingly, not a single evidence is available to substantiate the allegation of involvement of appellants with proscribed organization, therefore, the prosecution case is cast with serious doubts and the

appellants had taken a plea disputing their arrest that has been supported with FIR as well as defence version.

In cases where the accused claims that he is victim of enforced disappearance, and alleges that the state institutions or law enforcement agencies were involved in his abduction and subsequent incarceration without being production before a court of law, despite the constitutional guarantees under Articles 8, 9, 10, and 14 of the Constitution of Pakistan, 1973, read with section 61 of Criminal Procedure Code, in this situation the State/Prosecution bears the burden to refute such allegations, wherein, any person arrested by a law enforcement agency must be produced before the court within 24 hours. In such cases, the prosecution and the investigating officer have to demonstrate the following key factors:

i. *That the accused was not detained by any law enforcement agency illegally, as alleged in his criminal case or complaint before the Commission on Enforced Disappearances.*
ii. *If the accused had filed any case or complaint regarding his unlawful detention, either at a police station, a court of a Magistrate, Sessions, or the High Court, and what was the outcome of that case.*
iii. *The statement of the investigating officer or any other official who handled the matter of the accused's alleged abduction or unlawful detention, and whether he was produced as a witness in the subsequent case.*
iv. *If the accused's complaint regarding his disappearance / abduction was not decided by any court of law, investigating officer, Joint Investigation Team (JIT), or the Enforced Disappearances Commission, then the burden shifts to the prosecution to prove that the State*

has not failed in ensuring the protection as to life and liberty of the accused.

v. *Whether the period of illegal detention was ever declared false by a competent court of law or an investigating agency and whether a documentary proof from a competent court or agency/JIT has been exhibited in the criminal case where the missing person has been subsequently nominated as an accused.*

vi. *The onus is upon the prosecution to prove that the detention of the accused was not illegal, and this burden of proof must be discharged by the prosecution. Failure to do so would invoke an adverse presumption under Article 129(g) of the Qanoon-e-Shahadat Order, 1984, against the prosecution.*

In view of above yard stick it is apparently clear that in this case the prosecution is not able to answer any one of the questions referred above and despite our best efforts the prosecution failed to dispel the allegation of illegal detention of the accused who was a missing person in terms of settled international standards for enforced disappearance as he was forcibly disappeared by the State institution. In this regard, the State is bound by the mandate of international law, whereby, the arrest, detention or abduction of any person by agents of the State or by persons or groups of persons acting under the authority of State is termed as enforced disappearance. And not just this illegal deprivation of liberty but also its refusal and concealment of fate or whereabouts of missing person also put such a person out of protection of law (see. Article 2 of Enforced Disappearance Convention (2008). Hence, the state obligation under international law as well as domestic law has not been fulfilled in this case

and the entire case against the appellant is based upon the serious misconduct of the officials of law enforcement agencies.

The version taken by the prosecution if compared with the stance taken by appellants qua their arrest the testimony of PW.6 / Muhammad Ashraf Inspector who acknowledged that:

> *" It came into my knowledge in February 2024 during a hearing at Honorable Supreme Court of Pakistan that an FIR was registered regarding missing of one of the co-accused Muhammad Zubair at PS Westridge Rawalpindi. It is correct that 24.12.2022, an FIR No.1024/2022 at P.S. Westridge, Rawalpindi was registered regarding missing of co-accused Muhammad Zubair who is booked in instant FIR No.01/2023 of PS CTD-Islamabad."*

Such aspect put bad name on the investigation agency who are not able to conclude complete facts and put a serious charge upon the appellants where they are not able to demonstrate safe recovery, custody and transmission of explosive substance allegedly recovered from appellants neither fulfilled requirement of section 103 Cr.P.C. and tried to prosecute appellants on false charges of involvement with proscribed organizations with the help of so called computer expert Rahisd Mehmood / PW.3 and Muhammad Ramzan Constable / PW.4.

Criminal conspiracy not proved:

18. In the above backdrop the entire prosecution case is filled with multiple defects in the investigation as well as in the trial conducted by the trial court where legal procedure and processes have not been taken into account to complete chain of circumstantial evidence against the appellants, even otherwise charge under section 120-B PPC for criminal conspiracy has also not been fulfilled as under Article 23 of Qanun-e-

Shahadat Order, 1984, certain requirements have been laid down for proof of conspiracy which states that:

i. *"Where there shall be a prima facie evidence affording a reasonable ground for a Court to believe that two or more persons are members of a conspiracy;*
ii. *If the said condition is fulfilled, anything said, done or written by anyone of them in reference to their common intention will be evidence against the other;*
iii. *Anything said, done or written by him should have be said, done or written by him after the intention formed by anyone of them.*
iv. *It would also be relevant for the said purpose against another who entered the conspiracy whether it was said, done or written before he entered the conspiracy or after he left it.*
v. *It can only be used against a conspirator and not in his favour"*

As such in the entire proceedings of this case prosecution has not tendered any such evidence to prove minimum requirement of criminal conspiracy as where to constitute a criminal conspiracy there must be an agreement of two or more persons to do an act which was illegal or which was to be done by illegal means as held in **1998 P.Cr.L.J [Sindh] 1486 (*Muhammad Ashfaque alias Chief and others Vs. State)***. The most important ingredient of agreement is also missing in this case as required in **PLD 1979 [SC] 53 (*Zulfiqar Ali Bhutto Vs. The State).***

19. It is pertinent to mention here that the Anti-Terrorism Court, while rightly exercising its jurisdiction, tried and convicted the accused under the Anti-Terrorism Act (ATA) along with offences under the Explosive Substances Act, Arms Ordinance, and the Pakistan Penal Code (PPC) in combined form. However, the manner in which the sentence was

pronounced—for instance **combining Section 4 of ESA with Section 120-B of PPC and others**—is legally incorrect. As established in **PLD 2017 [Peshawar[55** ***(Akhtar Muhammad v. The State)***, offences under ATA and scheduled offences must be separately charge-sheeted, and in cases involving both special and general law, the accused may be convicted under each statute separately. The judgment explicitly states that combining multiple offences into a single sentencing phrase, such as "**under Section 365-A PPC read with Section 7(e) ATA**," is a misapplication of law. Instead, separate charge sheets and independent sentencing under each provision should be followed. The division bench of Peshawar High court further held that:

> *"14. 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 section 6 of the Anti-Terrorism Court with the corresponding punishment provided under section 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."*

20. Lastly, to summarize our findings and the loopholes in the impugned judgment it is concluded that the impugned judgment has not taken into consideration the facts that the police officials remained unable to dispense their investigatory duties under police rules satisfactorily and all the incriminating articles allegedly recovered from the appellants were not placed on record with other case property in the court neither a recovery memo was prepared of the missing incriminating recovered articles as we mentioned in para Nos. 8 and 9. Due to this non-production, the deeming effect of non-existence is established as there was no plausible explanation for non-production which gave rise to an adverse inference or assumption against the prosecution. Moreover, the alleged video recovered from the mobile phones of the appellant is also not admissible as it is not fulfilling the requirements of admissibility laid down by the Supreme Court in *Ishtiaq Ahmed Mirza* case (supra) also, the identity of SIM or IMEI numbers of the mobile phones are also missing to prove ownership or reference. Furthermore, prosecution remained unable to establish the case under Explosive Substance Act, as there was no sanction received from the government and no request was made for the registration of case, thus there was a legal flaw since inception of the case under Explosive Substance Act. Similarly, there were several lacunas discovered for non-production of registers and delay in transmission of explosive materials to NFSA, such as discussed by us in para No.14 and no "*malicious intent*" was established. The delay in transmission of samples to the NFSA vitiates the NFSA's report itself and that the same cannot thus be used as a basis of sustaining conviction as held in **2024 P.Cr.L.J [Lahore]**

1579 (*Muhammad Hanif Tayyab and another v. Insha Ullah and others)*, wherein it has been stated that:

> *"The prosecution must establish that the chain of custody was unbroken, unsuspicious, indubitable, safe and secure. Any break in the chain of custody or lapse in the control of possession of the sample, will cast doubts on the safe custody and sale transmission of the sample(s) and will impair and vitiate the conclusiveness and reliability of the Report of the Government Analyst, thus, rendering it incapable of sustaining conviction"*

Further reliance is placed on **2012 SCMR 577 (*Amjad Ali v. The State)*** and **2015 SCMR 1002 (*Ikramullah v. The State),*** wherein it was held that where safe custody or safe transmission of the alleged drug is not established, the Report of the Government Analyst becomes doubtful and unreliable. Moving forward, it was a daylight occurrence and from the statements of all PWs there was public in the surrounding and some of them also witnessed the whole incident, however, police officials never made anyone a private witness and never asked someone to become a witness. Besides the relation of appellants with the proscribed organization also not proved as no evidence is produced in this regard. That the prosecution version of events, which cannot reasonably appeal to any prudent mind, has been blindly accepted by the Learned Trial Court without any application of mind, resulting in an arbitrary and perverse Judgment which has turned the presumption of innocence on its head; and disregarded basic minimum standards of proof.

21. In view of above all the captioned appeals are **ALLOWED** and the impugned judgment dated 09.07.2024 is hereby **SET-ASIDE**. The appellants are hereby acquitted from the charge and directed to be

released forthwith if not required in any other case. Copy of this judgment may also be transmitted to Inspector General Police, Islamabad for his information qua conduct of CTD-Officials who violated the personal guarantees available to citizens of Pakistan in such a blatant manner in which citizens have been abducted and crime of enforced disappearance has been constituted with the help of law enforcement agencies which put a bad name in the entire comity of nations against Pakistan. The police officials particularly are bound to observe law and shall not act in a manner prejudicial to the rights of the citizens of Pakistan who get victimized, and shall not register false cases against the citizens who have already been victims of enforced disappearance, therefore, this Court recommends a non-binding observation to the Federal Government that enforced disappearance shall be declared crime and the officials involved shall be prosecuted with harsher punishments.

(SARDAR EJAZ ISHAQ KHAN)
JUDGE

(MOHSIN AKHTAR KAYANI)
JUDGE

Announced in the open court on: 05.03.2025

JUDGE **JUDGE**

A.Waheed/-

Approved for reporting.