*Judgment Sheet*

***IN THE ISLAMABAD HIGH COURT, ISLAMABAD.***

*JUDICIAL DEPARTMENT*

***Criminal Appeal No.299 of 2024***

*Abdullah. Versus. The State, etc.*

***J U D G M E N T***

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| *Date of hearing* | ***12.02.2025*** |
| *Appellant represented by:* | *Maulana Muhammad Wajeeh Ullah Khan, Advocate.* |
| *The State represented by:* | *Mr. Adnan Ali, DDPP for the State with Abdul S.I and Nabi Ullah S.I.* |
| *The complainant represented by:* | |

***Sardar Muhammad Sarfraz Dogar, J.:*** This judgment shall dispose of above captioned criminal appeal filed by appellant Abdullah son of Sher Ahmed Khan against his conviction and sentence awarded to him *vide* judgment dated 30.07.2024, rendered by the learned Special Judge, ATC, Islamabad upon the culmination of trial of case FIR No.02 dated 25.02.2024, registered for the offences under sections 4 & 5 of Explosive Substances Act, 1908 (hereinafter referred to be "ESA, 1908) read with Section 7 of the Anti-Terrorism Act, 1997 (hereinafter to be ATA, 1997) with the Police Station CTD, Islamabad. Through the impugned judgment, the appellant was convicted and sentenced under section 5 of ESA, 1908 as under:-

> "5 Years Rigorous Imprisonment with fine of Rs.50,000/-. In case of non-payment of fine, to further undergo for a period of 06-months SI. The whole property of the appellant was forfeited to the Government as provided under section 5 (a) of ESA, 1908. The sentence awarded to the appellant was ordered to run concurrently. He was also extended benefit of section 382-B of Cr.P.C.

**2**. Brief facts of the case as gleaned from the contents of FIR (Exh.P.D), which was registered upon the complaint (Exh.P.C) of

**PW.1** Khalid Khan ASI-CTD, Islamabad, are that on 25.02.2024 he alongwith Khalid Mehmood ASI, Moin Sikandar Constable, **PW.2** Zulfiqar Ali Constable, Ahmed Iqbal Constable and **PW.4** Muhammad Ramzan constable were on surveillance duty on official vehicle GAC-670 being driven by Shahid Zareef Constable. Khalid Khan ASI upon spy information apprehended the appellant at 01:00 p.m, from Green Belt Jungle Area near CDA Tube well Service Road, Sector G-13/1, Islamabad. Upon search of appellant's black colour bag, three maps of important installations, Explosive Substance colour brown wrapped in shopping bag, safety fuse wire, two detonators packed in match box and Ball Bearings, Nut-bolts and Nails all wrapped in shopping bag were recovered. Thereafter, BDS Team was called and PW.5 Riaz Ul Haq ASI alongwith his team reached at the spot, who conducted procedure upon explosive substance and detonators and defused them. It was further alleged in the FIR that the appellant disclosed his link/association with Tehreek-e-Taliban Pakistan and further disclosed that he was planning to target the important installations.

**3.** After the conclusion of the formal investigation, the report under section 173 Cr.P.C was submitted. On 20.05.2024, appellant was formally charged under section 4/5 of ESA read with Section 7 of ATA, 1997 to which he pleaded not guilty and claimed trial.

**4**. In order to prove its case, the prosecution produced as many as six PWs.

**5**. The prosecution gave up PWs Khalid Mehmood ASI, Moin Sikandar Constable and Shahid Zareef 5972/C being unnecessary and tender Report of explosive material issued by NFSA as (Exh.P.F).

**6**. After completion of prosecution evidence, the statement of the appellant under section 342 of the Code of Criminal Procedure, 1898 was recorded by the learned trial court on 25.07.2024

wherein he refuted the allegations levelled against him and professed his innocence. While answering to a question that *"**Why the PWs deposed against you**?"* the appellant replied as under: -

> ***"I am Hafiz e Quran and was working as veldor at Attock City. On 07.07.2023 at about 12:30 a.m, I was present at my house, H.No.F-190, Mohallah Shahabad Attock City. Some officials of law enforcement agencies came at my house, they forcibly abducted me after muffling my face and shifted to an unknown place. They kept me in illegal confinement at different places till the registration of instant case. On 25.02.2024, neither I visited the alleged place of recovery nor any incriminating material was recovered from my possession. All the recoveries as shown by the CTD Police Islamabad are fake and planted upon me. I have no link with any Proscribed Organization. All the PWs belongs to the Police and they deposed against me to show their fake efficiency before their high-ups. I am innocent, please acquit me from this case."***

The appellant, in his defence, produced his father Sher Ahmed Khan as DW.1, who tendered Mark-DA, Exh.D.B and Mark.DB. The appellant, however, did not opt to make statement on oath as envisaged under section 340(2) Cr.P.C.

**7**. Upon the conclusion of trial, the appellant was acquitted of the charges under section 4 of ESA, 1908 and Section 7 of ATA, 1997, however, the learned trial court found the prosecution's case against the appellant to have been proved beyond reasonable doubt to the extent of offence under section 5 of ESA, 1908 and, thus, he was convicted and sentenced as mentioned and detailed above. Hence, the present appeal.

**8**. We have heard the arguments of learned counsel for the parties and also gone through the record with their able assistance.

**9**. Before discussing the merits of instant case, it is needless to say that a blinkered approach is wholly undesirable from the standpoint of the safe administration of justice as has been observed and emphasized by the august Supreme Court of

Pakistan in the case reported as "Naveed Asghar and 2 others v. The State" [1] that:-

> "……An accused person is presumed to be innocent till the time he is proven guilty beyond reasonable doubt, and this presumption of his innocence continues until the prosecution succeeds in proving the charge against him beyond reasonable doubt on the basis of legally admissible, confidence inspiring, trustworthy and reliable evidence. No matter how heinous the crime, the constitutional guarantee of fair trial under Article 10A cannot be taken away from the accused. It is, therefore, duty of the court to assess the probative value (weight) of every piece of evidence available on record in accordance with the settled principles of appreciation of evidence, in a dispassionate, systematic and structured manner without being influenced by the nature of the allegations. Any tendency to strain or stretch or haphazardly appreciate evidence to reach a desired or popular decision in a case must be scrupulously avoided or else highly deleterious results seriously affecting proper administration of criminal justice will follow. It may be pertinent to underline here that the principles of fair trial have now been guaranteed as a Fundamental Right under Article 10-A of the Constitution and are to be read as an integral part of every sub-constitutional legislative instrument that deals with determination of civil rights and obligations of, or criminal charge against, any person."

Now, adverting to the instant case, since, the appellant has already been acquitted of the charge for the offences falling under section 4 of ESA, 1908 and Section 7 of ATA, 1997 and has only been convicted under section 5 of ESA, 1908, which is hereby reproduced as under for ready reference:-

> **5. Punishment for making or possessing explosives under suspicious circumstances**.--- Any person who makes or knowingly has in his possession or under his control any 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 his possession or under his control for a lawful object, be punishable with transportation for a term which may extend to fourteen years, to which fine may be added, or with imprisonment for a term which may extend to five years, to which fine may be added.
>
> (Emphasis added)

Therefore, keeping in view the spirit of section 5 supra, the prosecution case carries immense importance with regard to

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[1] **PLD 2021 SC 600**

role of Bomb Disposal Squad in respect of alleged recovered explosive substance from the possession of appellant. In this respect, it is noted that although, it is the stance of prosecution that Bomb Disposal Squad was called at the spot and Riaz-Ul-Haq ASI (PW.5) conducted the procedure upon explosive substance and detonators, however, the statement of said Riaz Ul Haq ASI in respect of vital aspects of the case, has shaken the veracity of prosecution story as in his examination in chief, he has not mentioned the recovery of explosive substance from exclusive possession of appellant, rather he only narrated that he was informed about recovery of explosive substance from Green Belt, Jungle Area near CDA Tube well, G-13/1, Islamabad. Rather, quite astonishingly, he deposed contrarily in his cross-examination that when he reached at the alleged place of recovery, Khalid Khan ASI alongwith 4-5 officials of CTD were present there and he does not remember that any other person was present at the spot or not. This plain statement of important prosecution witness casts doubt on the prosecution story about presence of appellant at the alleged place of occurrence.

**10**. Another aspect of the matter, which *prima facie* lends support to the defence version about foisting the fake recovery upon the appellant by the prosecution, is that statement under section 161 of Cr.P.C of the PW.5/Riaz Ul Haq ASI, who allegedly defused the detonators, admittedly his statement was not recorded by the investigating officer in this case. This fact of non-recoding of statement under section 161 Cr.P.C has candidly been admitted by the PW.5. It is observed that in a number of precedents, august Supreme Court has not appreciated recording of statements under section 161 Cr.P.C of PWs at belated stage but, here in this case, the same has

altogether not been recorded by the investigating officer, which aspect of the matter unequivocally shakes the veracity of prosecution story.

**11**. Apart from above, PW.5, in his cross-examination, made certain statements, which further trembled the story narrated by prosecution as he deposed during cross-examination that he did not prepare any report regarding the explosive material and detonators nor submitted the same to IO and that he did not retrieve explosive material from inside the detonators. He also deposed that the alleged parcels were not prepared in his presence at the spot. These facts when evaluated in juxtaposition with the earlier discussed aspects of the case, further pull the case of prosecution into the sphere of dark clouds of doubts in respect of recovery of alleged explosive material from the exclusive possession of appellant from the alleged place of recovery.

**12**. There is yet another intriguing aspect of the matter is that the prosecution has failed to establish safe custody of the allegedly recovered explosive substance from the appellant. In this regard, it is noted that PW.5/Riaz-ul-Haq ASI, who conducted procedure upon explosive substance and detonators, deposed that the alleged parcels were not prepared in his presence at the spot. Furthermore, allegedly, the explosive substance was recovered from the appellant on 25.02.2024, however, as per statement of Moharar/PW.3 Akbar Ali ASI, two sample parcels were handed over to Muhammad Ramzan constable for its onward transmission on 01.03.2024 i.e. after a delay of about 5 days. There is no explanation as to why the samples were kept in Police Station and why the same were sent to NFSA, Islamabad after such a delay rather during the course of cross-examination, it has been admitted by the PW.3

that he has not given any reason for such delay. This aspect of the matter, unequivocally, casts doubt on the safe custody of alleged recovered explosive material. Reliance is placed on case titled "Abdul Samad v. The State"[2].

**13**. So far as the report of NFSA, Islamabad is concerned, as has been discussed above, the prosecution has been failed to establish safe custody of the sample and even it is also an admitted fact that there is no mentioning of weight of samples which were sent to laboratory for analysis. As such, no implicit reliance can be placed on the report of NFSA.[3]

**14**. Last but not the least, as per Section 7 of ESA, 1908, no Court shall proceed to the trial of any person for an offence against this Act except with the consent of Government. Although, sanction of prosecuting the appellant is available on the record in shape of memorandum bearing No.7-1/Home/2024-980 dated Islamabad, the May 07, 2024, which has been issued in consequence of letter No.426-R-SSP/CTD, dated 11.03.2024. However, in this respect, it is observed that firstly, the said document has never been exhibited by the prosecution during the course of trial. Secondly, none of the PWs have mentioned in their statements about making of any effort in this regard. Furthermore, the said document has also not been put to the accused in his statement under section 342 Cr.P.C. Needless to mention in this regard that if the accused facing the trial is not confronted with incriminating circumstance, no conviction can be awarded on the basis thereof. While holding so, this Court is guided by the observation of the Hon'ble Supreme Court of Pakistan in the

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[2] **Criminal Petition No.972-C of 2017.**
[3] **2018 SCMR 495, 2019 YLR Note 109, 2024 MLD 608, 2024 MLD 1740.**

case of "*Muhammad Shah v. The State*"[4], which is being reproduced below for advantage sake:-

> "It is well settled that if any piece of evidence is not put to the accused in his statement under section 342 Cr.P.C then the same cannot be used against him for his conviction. In this case both the Courts below without realizing the legal position not only used the above portion of the evidence against him, but also convicted him on such piece of evidence, which cannot be sustained."

**15**. It is a known and settled principle of law that primarily prosecution is bound to establish guilt against the accused without shadow of reasonable doubt by producing trustworthy, convincing and coherent evidence enabling the Court whether the prosecution has succeeded in establishing accusation against the accused or otherwise and if it comes to the conclusion that charges so imputed against the accused have not been proved beyond reasonable doubt, then the accused becomes entitled for his release on getting benefit of doubt in the prosecution case. In such situation the Court should not abridge such right of the accused. After considering all the pros and cons of this case, this Court has come to this irresistible conclusion that the prosecution could not prove its case against the appellant beyond the shadow of doubt. In a recent pronouncement in case titled as "Muhammad Hassan and another v. The State and others"[5], august Supreme Court of Pakistan has held as under:-

> "….once a single loophole/ lacuna is observed in a case presented by the prosecution, the benefit of such loophole/lacuna in the prosecution case automatically goes in favour of an accused. Reference in this regard may be made to the cases of Daniel Boyd (Muslim Name Saifullah) and another v. The State **(1992 SCMR 196)**; Gul Dast Khan v. The State **(2009 SCMR 431)**; Muhammad Ashraf alias Acchu v. The State **(2019 SCMR 652)**; Abdul Jabbar and another v. The State

[4] **2010 SCMR 1009 & 2018 SCMR 344**
[5] **2024 SCMR 1427**

> **(2019 SCMR 129)**; Mst. Asia Bibi v. The State and others **(PLD 2019 SC 64)** and Muhammad Imran v. The State **(2020 SCMR 857)**".
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> (Emphasis supplied)

**16**. In the light of above discussion, instant criminal appeal is **accepted** and conviction and sentence recorded by the learned Judge Special Court-II (Anti-Terrorism), Islamabad *vide* impugned judgment dated 30.07.2024 is set aside and appellant is acquitted of the charge by extending him the benefit of doubt. The appellant is in jail, he be released forthwith if not required in any other case.

***(Muhammad Asif)*** *JUDGE*

***(Sardar Muhammad Sarfraz Dogar)*** *JUDGE*

***APPROVED FOR REPORTING***

*JUDGE* *JUDGE*

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