

46

IN THE PESHAWAR HIGH COURT, PESHAWAR

Cr. A No. 831 P /2019

Habib Hassan S/o Mir Hassan,
R/o Mani, Mastali Khel, Lower Orakzai

.....Accused/ Appellant

V E R S U S

The State.....Respondent

case information report No.1045,
dated 25.11.2018, charges u/s 3, 4
& 5 explosive Act, 1908/11 FCR,
APA Lower Orakzai, Kalaya

Appeal u/s 410 Cr.P.C against the order/
judgment dated 04.09.2015 by the
Assistant Political Agent/ADM Lower
Orakzai, whereby the appellant has been
convicted and sentenced u/s 3, 4, 5
explosive Act, 1908/11 FCR convicted for
7 years R.I and also fine Rs.200000/-
in default of payment the appellant shall be
further R.I for (2) years. Benefit of Section
382-B Cr.P.C will be extended to the
appellant.

PRAYER:

On acceptance of this appeal, the
judgment dated 04.09.2015 of learned
Assistant Political Agent/ADM Lower
Orakzai may kindly be set aside and the
appellant may kindly be acquitted from
the charges levelled against him.

FILED TODAY
24.11.2019

48

JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
PESHAWAR

[JUDICIAL DEPARTMENT]

Criminal Appeal No. 831-P/2019.

Date of hearing. 01.11.2019.

Appellant (Habib Hassan) by Mr. Sanaullah Khan,
Advocate.

Respondent (s) (The State)) by Mr. Atif Ali Khan,
AAG.

JUDGMENT

MUHAMMAD NAEEM ANWAR, J.- Appellant through this criminal appeal has questioned the judgment dated 04.9.2015 of Assistant Political Agent/ADM, Lower Orakzai, whereby he was convicted and sentenced under Section 3/4/ 5 of the Explosive Act, 1908 along with section 11 of the Frontier Crimes Regulation, 1901 for seven (07) years rigorous imprisonment and fine of Rs. 2,00000/- or in default of which he was directed to further undergo RI for two years, however, the benefit of section 382-B Cr.P.C was extended to him.

Handwritten mark

SCANNED

2. Substantial facts of the case are that on 25.11.2014, it was reported to the Assistant Political Agent, Lower Orakzai, Kalaya, that some unknown offenders planted explosive material in Garo Mani khel area, which was exploded on the

same day i.e., 25.11.2014, at about 1100 hours, whereby Shahid Hussain son of Itan Hussain, Bar Muhammad Khel r/o Tarangi, Karim Ali son of Niqab Ali, Bar Muhammad Khel, r/o Kurez, Amin Ali son of Shabir Hussain, Bar Muhammad Khel and Muhammad Janan son of Satar khan of Mani khel were injured. The aforementioned injured were shifted to kohat Hospital for further treatment. The said information was reduced into writing at serial No. 1045 on 25.11.2014. Process of investigation started and elders of the Mani Khel were summoned for 27.11.2014.

3. In response to process of investigation, the Grand Jirga was held on 03.12.2014 with the elders of Mani khel for determination of the following issues:-

1. Explosion in Garo Mani Khel area occurred on 25.11.2014,
2. Murder of Yaqub Ali resident of Shalozan, Kurram Agency.

The elders were directed to hand over the actual accused within three days. On the basis of aforementioned direction, Habib Hassan son of Mir Hassan, Mani Khel Mastali Khel was arrested and was put behind the bars in Kalaya Head Quarters,

however, his father Mir Hassan was released on 04.12.2014. Likewise, in continuation of investigation, on 09.12.2014, the following persons being accused were arrested:-

1. Nisar Ali son of Sarwar Hussain, Mani khel mastali khel,
2. Mir Hassan son of Mir Baz,
3. Ghafar Ali son of Shaz Ali,
4. Muhammad Nawaz son of Muhammad Baz,
5. Gul Sarwar son of Ali Sarwar,
6. Awan Ali son of Ahmed Ali,
7. Muhammad Hassan son of Khial Hassan all resident of Mani Khel, Sabzi khel,
8. Ikhtiar Ali son of Sultan Ali, Mani Khel, Zakria khel,
9. Noorjaf Ali son of Sardar Ali,
10. Muqadas Khan son of Amre Mehdi, Mani khel, Ahmed Khel

4. The arrest of above named accused resulted in convening of Jirga, wherein an agreement was scribed to the effect that the matter shall be resolved till 16.12.2014. The said agreement was signed by elders of Mani Khel tribe, however, they requested that Malik Noor, Ikhtiar, Muqadas Khan and Awan Ai may be released and as against them Nowsher Ali son of Sardar Ali, Qaim Ali son of Ikhtiar Ali, Nawaz Ali son of

Muqadas Khan and Askhat Ali son of Asad Ali were arrested. Later on, the above ten accused were released on bail and it was handed down that till 16.12.2014, the hidden truth shall be brought on surface. The elders of Mani Khel as per their commitment have given in writing on 06.12.2014 that real culprit of incident of 25.11.2014 was Habib Hussain, as such, he was handed over to Orakzai scouts for investigation on 11.01.2015.

5. It appears from record that statement of accused was recorded wherein he has categorically denied the allegations levelled against him. However, Malik Ikhtiar, Malik Nisar Ali and Malik Nawaz were appointed as elders/members of the council of elders by the accused, besides Malik Saifoor Khan and Malik Muqadas Khan were appointed by Assistant Political Agent as members of the council of elders. The aforementioned council of elders have given their opinion and found the accused involved in the commission of offence, resultantly, the Assistant Political Agent through its judgment dated 04.9.2015 convicted and sentenced him as mentioned above. The attested copy of the judgment was given to the appellant on 3.1.2019 and this appeal was filed on

29.1.2019, which was admitted for hearing on 29.7.2019 by this Court and record was requisitioned.

6. Arguments heard and record perused.

7. It transpires from the record that on 9.12.2014 Assistant Political Agent had arrested ten persons namely, Nisar Ali, Mir Hassan, Ghafar Ali, Muhammad Nawaz, Gul Sarwar, Awan Ali, Muhammad Hassan, Ikhtiar Ali and Muqadas Khan as accused besides appellant. However, it was very strange that on 10.12.2014, four of the above were substituted as such, Malik Noor was substituted by Nowsher Ali, Ikhtiar Ali was substituted by Qaim Ali (brother), Muqdas Khan was substituted by Nawaz Ali (brother), Awan Ali was substituted by Askhat Ali and then on the following day all the above ten accused were released on bail.

8. Intriguingly enough, the accused named above, who were substituted along with co-accused being released on 11.12.2014, had become Judges against accused/appellant and had given a verdict against the appellant. Over and above, three of them, namely, Malik Ikhtiar Ali, Malik Nisar Ali and Malik Muhammad Nawaz were appointed/nominated as members of the

council of elders , however, all were accused along with appellant a day ago and now they were the Judges against appellant and they have given their verdict against appellant/convicts as under:-

بیان مثران قوم مانی خیل۔

بیان کیا۔ کہ مورخہ ۲۰۱۴۔۱۱۔۲۵ کو بمقام گرو مان خیل جو دھماکہ ہوا تھا۔ اسمیں کچھ افراد زخمی ہوئے تھے۔ ہم قوم مانی خیل نے جرگے کے۔ اور کافی تفشیش کی۔ اور ہم اس نتیجے پر پہنچے کہ مذکورہ دھماکہ میں حبیب حسین ولد میر حسن قوم مانی خیل ملوث ہے۔ ہم قوم مانی خیل کی طرف سے تپہ مسقلی خیل ان کا زمہ دار ہے۔ ہم قوم مانی خیل کسی طرح بھی مجرم حبیب حسن یا تپہ مسقلی خیل کے افراد کی ضمانت یا سفارش نہیں کریں گے۔

لہذا ہماری طرف سے متفقہ فیصلہ ہے۔ کہ حبیب حسن ولد میر حسن اس دھماکہ کا مجرم ہے۔ جسکا جو بھی سزا اسکو دینا ہے۔ دیدے۔ ہمارا کوئی اعتراض نہیں ہے۔

ملک مہمد نواز ملک نثار علی مسقلی خیل

ملک غمگین علی۔ ملک اعوان علی

ملک اعوان علی نمبر ۲۔

9. Obviously, apart from the above, nothing was available on record to connect the accused with the commission of the offence. Admittedly, it was an unseen occurrence, however, when four persons were injured, who could be examined either as witness of the explosion

(occurrence) or for the purpose of determining as to whether anyone was in fact injured or not but none of them was examined by the council of elders. Secondly, the members of council of elders were accused but were made Judges not only against the appellant/convict but in fact they have become Judges for themselves which was against the basic principle of natural justice that no person can judge a case in which he has an interest, i.e, *Nemo judex in causa sua*. Guidance was also drawn from the judgment of apex Court in case titled Govt of NWFP vs Hassan Ahmad Haroon (2003 SCMR 104).


|||

“In dealing with cases of bias attributed to members constituting Tribunals, it is -necessary to make a distinction between pecuniary interest and prejudice so attributed. It is obvious that pecuniary interest, however, small, it may be in a subject-matter of the proceedings, would wholly disqualify a member from acting as a Judge. But where pecuniary, interest is not attributed but instead a bias is suggested, it often becomes necessary to consider whether there is a reasonable ground for assuming the possibility of a bias and whether it is likely to produce in the minds of the litigant or the public at large a reasonable doubt about the fairness of the administration of justice. It would. always be a question of fact to be decided in each case. The principle, says Halsbury, *nemo debet esse judex*

in causa propria sua precludes a justice who is interested in the subject-matter of a dispute, from acting as a justice therein."

Similarly, in suo moto case No. 04 of 2010-P/2012 P L D 2012 Supreme Court 553 the apex Court has held that:-

"25. The principle of right to 'fair trial' has been acknowledged and recognized by our Courts since long and is by now well entrenched in our jurisprudence. The right to a 'fair trial' undoubtedly means a right to a proper hearing by an unbiased competent forum. The latter component of a 'fair trial' is based on the age-old maxim "*Nemo debet esse judex in propria sua causa*" that "no man can be a judge in his own cause". This principle has been further expounded to mean that a Judge must not hear a case in which he has personal interest, whether or not his decision is influenced by his interest, for "justice should not only be done but be seen to have been done".

10.  Though at the time of conviction of appellant the Frontier Crime Regulation was applicable and the case was tried thereunder but even then the common law should have been considered by the Assistant Political Agent, while considering the opinion of council of elders, which was not only against the Islamic law but also the law of the land. Even in FCR it was not permissible for Assistant political Agent to have awarded the conviction on such like opinion of council of elders constituted under section 10 of the FCR.

9. In view of the above discussion, I have no doubt in my mind that in the present case, the prosecution has not been able to prove its case against the convict/appellant beyond reasonable doubt and, therefore, the appeal is allowed, resultantly, the conviction and sentences recorded by the learned trial court is set aside and as a consequent thereof appellant is acquitted of the charge levelled against him. He be set at liberty forthwith if not required in any other case.

Above are the reasons of short order of even date.

Announced
01.11.2019.
M.Zafar PS


JUDGE

(SB: Hon'able Mr. Justice Muhammad Naeem Anwar)

off. 10.11.19