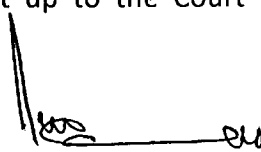



Form-A
FORM OF ORDER SHEET

Court of _____

Restoration Application No. 360 /2022

S.No.	Date of order Proceedings	Order or other proceedings with signature of judge
1	2	3
1	21.06.2022	<p>The application for restoration of appeal No. 461/2022 submitted today by Mr. Taimur Ali Khan Advocate may be entered in the relevant register and put up to the Court for proper order please.</p> <p> REGISTRAR</p>
2	5.7.2022	<p>This restoration application is entrusted to Division Bench at Peshawar to be put up there on <u>13.09.2022</u>. Original file be requisitioned. Notices to the appellant and his counsel be also issued for the date fixed.</p> <p> CHAIRMAN</p>

Counsel info — By
Telephone. 11-8-22

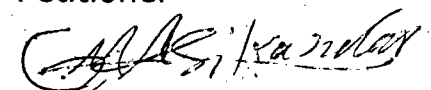
4. *That law favors decision on merit and avoid technicalities.*

It is, therefore, most humbly prayed that on acceptance of this application the above tilted case may kindly be restored for its decision on merit.

Dated:- 16/06/2022



Petitioner

Through:-


Mehtab Sikandar
Advocate, Peshawar.

AFFIDAVIT

I, Niaz Ali (the petitioner/appellant) do hereby solemnly affirm and declare on oath that the contents of this application for restoration are true and correct to the best of my knowledge and belief and nothing has been concealed from this Honourable Court.


DEPONENT

ATTESTED

16/6/22

16202-2835841-3
0314-9995049



Asim

(3)

BEFORE MUHAMMAD ASIM
ADDITIONAL SESSIONS JUDGE-I, SWABI

CASE NO. 57/SPL
DATE OF INSTITUTION: 27-11-2017
DATE OF TRANSFER: 25-11-2020
DATE OF DECISION: 24-05-2022

FIR No.30, Dated 12.06.2017 registered under section 3/4 of Explosive Substances Act at Police Station CTD Mardan.

THE STATE

Syed Mubasher Shah Advocate.

(Private counsel for the prosecution)

Mr. Omer Mehmood

*(Assistant Public Prosecutor for State/
Complainant)*

... VERSUS ...

1. Niaz Ali son of Zar Wali resident of Shah Mansoor, Tehsil and District Swabi .

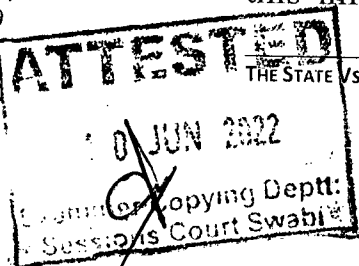
(Accused facing trial)

Mr. Muhammad Azam Khan
Advocate

(Counsel for the accused)

JUDGMENT

1. After having been charged in the above captioned case, the accused Niaz Ali son of Zarwali Khan resident of Shah Mansoor, Tehsil & District Swabi, faced trial in this Court.
2. On 12.06.2017 at 1045 hours, Sultan Mehmood Khan ASHO police station Swabi during the course of routine *gasht* along with other police officials, heard the noise of blast and came to know that the said blast took place in Officer Colony, Swabi. At this information, Sultan Mehmood Khan ASHO, proceeded to



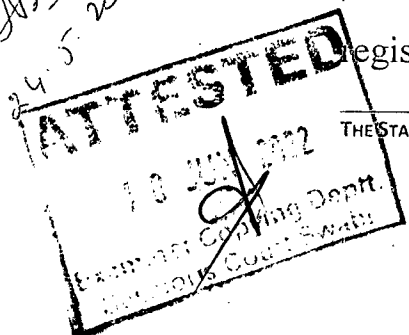
(4)

the place of occurrence and found that some unknown persons as an act of terrorism exploded hand grenade in the house of DSP Swabi due to which partial damage caused to the bungalow, however, no other causality has taken place. The said information was reduced into writing by the complainant in the shape of murasila which was later on culminated into FIR No.30 dated 12.06.2017 offences u/s 3/4 Explosive Act, 427 PPC read with 7 ATA at police station CTD Mardan.

3. During the course of investigation, Faiz ur Rahman gunman of DSP concerned and Farhan Sadiq working as sweeper in the official bungalow of DSP recorded their statements u/s 164 Cr.PC before the Judicial Magistrate on 14.07.2017, and placed the responsibility of blasting upon Niaz Ali accused facing trial. In the light of statements of above said persons, the accused facing trial was charged for blasting hand grenade in the bungalow of DSP. Resultantly, the accused Niaz Ali was arrested on 20.07.2017 and on the following day, he was produced before Area Judicial Magistrate for recording his confessional statement. The accused facing trial got recorded his confessional statement in which he stated that due to load of work in bungalow of DSP, he exploded hand-grenade to harass the family of DSP in order to get rid of household work.

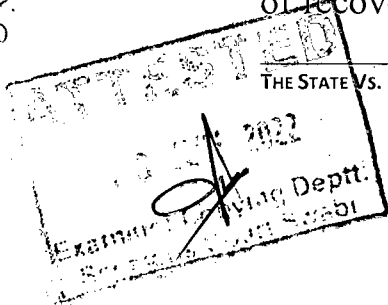
4. It is pertinent to mention here that initially, the present case was registered at CTD Mardan under section 7 of Anti-Terrorism

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Act, 1997. During the investigation, it was surfaced that the constable Niaz Ali working in official capacity in bungalow of DSP as cook has committed the alleged offence with intention to harass the family of DSP in order to reduce the burden of work upon him. In this connection, the Investigating Officer of CTD Mardan furnished progress report dated 15.06.2017 and in the light of said report, the District Public Prosecutor deleted section 7 of Anti-Terrorism Act, 1997 and suggested that the present case may be considered for trial being ordinary case.

5. After the completion of investigation, complete challan was submitted against the accused facing trial u/s 3/4 Explosive Substance Act and section 427-PPC. Copies of the relevant documents were provided to the accused facing trial in view of section 265-C Cr.P.C. The accused was charge-sheeted through which he pleaded not guilty and claimed trial.
6. The prosecution in order to prove its case, led the evidence through production of Fazli Akbar FC No.1219/PW-01, who was posted as security personnel on the bungalow of DSP. He along with other security personnel heard the noise of blast inside the bungalow of Izhar Shah DSP and called Niaz Ali and made search of surroundings and could not find any stranger or suspicious person in the vicinity. Daraz Khan head constable BDS Squad Swabi appeared as PW-02 who is marginal witness of recovery memo ExPW.2/1 vide which Omar Hayat Khan ASI



produced one Lever to Investigating Officer which was taken into possession by him and sealed into parcel in presence of PW-02. Omar Hayat Khan PW-03 deposed that on receiving information of the occurrence, he proceeded to the scene of occurrence and found Lever bearing No.82-2, 3-12-72 and some iron pieces which he presented to Sultan Mehmood Khan ASHO which were taken into possession by him and sealed into parcel vide recovery memo Ex.PW.2/1. PW-03 also inspected above mentioned articles and found to be China made vide ExPW.3/1. As per the statement of Muhammad Jehangir ASI/PW-04, he handed over 04 hand grenades (China made) to DSP Izhar Shah Khan at his request. Irshad Khan PW-05 chalked out the FIR of present case Ex-PA at the strength of murasila received through constable Majid Shah No.1259. Muhammad Salim retired Inspector PW-06 conducted initial investigation in the present case, prepared site plan Ex-PZ, recorded the statements of witnesses under section 161 Cr.PC and drafted the application ExPW.6/1 for sending the explosive material to the In-charge BDU Peshawar for expert opinion. Izhar Shah Khan SP CTD Malakand Division, the then DSP Swabi, in whose bungalow the hand grenade was exploded, appeared as PW-07. As per statement of PW-07, the accused Niaz Ali was deputed as cook in his official house who was not comfortable in attending his guests who used to come for greeting him as he came back from

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Umrah. PW-07 stated that the accused facing trial comp
 regarding his inability to work in his house at which he
 asked to go on leave but he refused. As per his statement, one
 day prior to the occurrence, he shifted his family members to
 Mardan and he himself, on the day of occurrence was at
 Peshawar in connection with official work with his gunman
 Amjad and driver Qurban Ali. As per his narration, a vehicle was
 parked in locked condition in his official residence having
 ammunition while the keys were kept in the room of his driver.
 PW-07 while at Peshawar received information about the blast in
 his official residence and rushed back to Swabi where local
 police had already prepared the report of incident and sent to
 CTD. PW-07 disclosed that on his return to his official residence
 he inspected the vehicle parked inside his house and found one
 of the hand-grenades missing. PW-07 stated that Faiz U
 Rahman his gunman told him that Niaz Ali accused facing tri
 exploded the hand-grenade in order to harass and terrorize h
 family members. He charged the accused facing trial for t
 commission of blast through hand-grenade to terrorize his fam
 members. The initial report regarding the alleged occurrence v
 furnished by Sultan Mehmood CTD PW-08 in shape of mura
 ExPA/1. PW-08 also witnessed the recovery memo ExPW
 vide which the accused facing trial in police custody pointed
 the spot and on his pointation a safety pin of hand grenade

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recovered from the plants in the official residence of DSP Swabi. PW-08 prepared recovery memo ExPW.2/1 through which the BDS staff produced one hand-grenade Lever and few iron pieces in presence of marginal witnesses and sealed into parcel. Farhan Sadiq PW-09 and Qurban Ali PW-10 in their statements deposed that Niaz Ali accused facing trial has exploded the hand grenade in the official residence of DSP Izhar Shah Khan. Miss Saima Asim, learned Additional Sessions Judge, Peshawar, the then learned Senior Civil Judge/Judicial Magistrate, Swabi, who recorded the confessional statement of accused facing trial, examined as PW-11 through video link conferencing. Said Jameel Khan SP Investigation Swabi, the then Inspector at police station Swabi carried out the investigation in the present case. PW-12 inspected the crime venue and recorded the statements of witnesses u/s 161. On 14.07.2017, he produced the witnesses Amjad and Farhan Maseeh before the Judicial Magistrate concerned to record their statements u/s 164 Cr.PC and got recorded their statements. After arrest of accused facing trial, he was interrogated and as per statement of PW-12, he pointed out the spot vide pointation memo ExPW.8/1. PW-12 also recovered safety pin Ex-P1 at the pointation of accused facing trial. The Investigating Officer produced the accused vide application ExPW.11/1 before the Court for recording his confessional statement whose confessional statement was recorded by the then

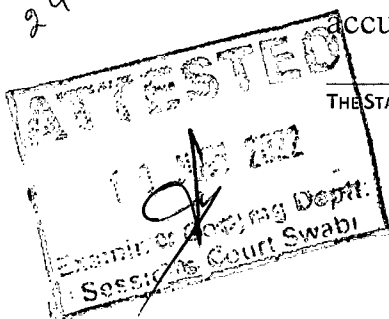
THE STATE Vs. NIAZ ALI, FIR # 30 DATED 12.06.2017, U/S ¼ EXPLOSIVE SUBSTANCE, PS: CTD MARDAN

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learned Senior Civil Judge/Judicial Magistrate. PW-12 received the opinion of AIG, BDU, ADU and placed it on record which is Ex-PK. After completion of investigation, PW-12 submitted the record of case to SHO Munsif Khan for submission of complete challan Ex-PD.

7. After the completion of prosecution evidence, the statement of accused recorded u/s 342 Cr.P.C. wherein he denied the charge leveled against him, yet he did not opt to be examined on oath or produce evidence in his defense.
8. Arguments heard and record perused.
9. Admittedly, initially the present case was registered against unknown persons and the accused facing trial indicted as accused on 14.07.2017 at the statements of Faiz Ur Rahman FC and Farhan Sadiq recorded u/s 164 Cr.PC after 28-days of the registration of present case. As, there is no direct evidence connecting the accused with the commission of alleged offence; therefore, the genesis of prosecution case is entirely based upon circumstantial evidence besides confession made by the accused during the course of investigation before Area Judicial Magistrate. The statements of Faiz Ur Rahman FC No.880 (Gunman) and Farhan Sadiq (Sweeper) attached to the bungalow of DSP Izhar Shah Khan are of vital importance, because both the witnesses provided clue regarding the involvement of accused facing trial in the commission of alleged offence. As per



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the statement of Farhan Sadiq PW-09, he was present along Niaz Ali in the official residence of Izhar Shah Khan DSP at the time when the blast took place. He deposed that at hearing the noise of blast he was jolted due to fear and remained halted and by that time, cook constable Niaz Ali rushed from blast site and none else was present towards or on the blast site except Niaz Ali. He is the only witness who was present inside the bungalow of DSP at the time of occurrence. As per record and statement of complainant, the complainant along with other police officials reached to the place of occurrence within 30 minutes of the occurrence and at that time Farhan Sadiq was present there. It is very strange that at the time when complainant reached to the place of occurrence and even after during the inspection of the spot by the Investigating Officer the said witness i.e. Farhan Sadiq PW-09 did not disclose anything regarding the occurrence. The said witness remained silent for 28 days and thereafter he recorded statement u/s 164 in which he nominated the accused facing trial for the commission of alleged occurrence. No reason has been furnished by the PW-09 for inordinate delay in recording his statement u/s 164 Cr.P.C. in which for the first time the involvement of the accused in the present occurrence has been surfaced on record. The presence of Farhan Sadiq PW-09 at the time of blast inside the bungalow of DSP Izhar Shah Khan is also doubtful in the light of his statement recorded in the Court

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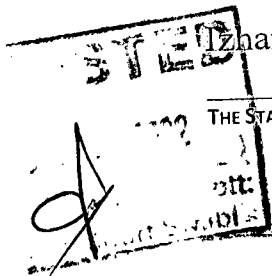
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as PW-09. PW-09 admitted in his cross examination that he has not seen the accused facing trial at the time of blast. He further stated that the family members of DSP Izhar Shah Khan were present in the room where the blast took place. While, Izhar Shah Khan DSP in whose bungalow the blast had taken place appeared as PW-7 and categorically stated in his examination in chief that his family was not present in bungalow at the time of blast. This statement of PW-07 clearly negates the presence of PW-09 at the place of occurrence when blast was taken place. Admittedly Farhan Sadiq being sweeper in the police department and deputed to bungalow of DSP Izhar Shah Khan is under the direct control of DSP and under his influence, therefore, his statement against the accused facing trial cannot be considered against the accused facing trial when same was recorded with inordinate delay of 28 days without assigning any reason. The other witness who stated regarding the motive behind the occurrence in his statement recorded u/s 164 Cr.PC is Faiz-ur-Rehman FC who has not been produced by prosecution during the course of trial. As the case of prosecution entirely hinges upon circumstantial evidence, therefore, motive behind the occurrence is strong circumstance to be proved by the prosecution. In the present case, the motive behind the occurrence has been stated to be that accused facing trial deputed as cook in the bungalow of DSP

Izhar Shah Khan was not comfortable with his work in the sa

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bungalow and he in order to take refuge from his
 committed the alleged offence. Faiz ur Rehman FC No.808
 Gunner of the DSP Izhar Shah Khan stated in his statement
 recorded u/s 164 Cr.PC that Niaz Ali accused facing trial told
 him that he was fed up from the services of DSP family
 members. Said Faiz ur Rehman Gunman of DSP was only
 independent witness knowing the motive behind the occurrence
 has not been produced by the prosecution, therefore, adverse
 inference can be drawn from non-production under article 129
 (g) of the Qanun-e-Shahadat Order, 1984. Thus, no nexus of
 accused facing trial with the commission of offence has been
 established from the deposition of private witnesses.

10. The present case being entirely based upon circumstantial
 evidence, the prosecution was burdened to prove each and every
 circumstance connecting the accused facing trial with the
 commission of present occurrence. As per prosecution case, the
 accused facing trial took hand grenade from the bandolier kept
 inside the official vehicle of the DSP Izhar Shah Khan which
 parked in his house at the relevant time. The entire prosecution
 evidence is silent regarding the fact that when and under what
 capacity the hand grenades were allotted to DSP Izhar Shah
 Khan, as no record in black and white has been produced during
 trial. The registration No of the official vehicle in which the
 hand grenades were kept has not been mentioned by the investigation

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officer. Further, investigating officer did not collect evidence how accused facing trial has managed to take the hand grenade from inside the official vehicle which was reportedly locked at the relevant time. Whether the accused facing trial has taken the hand grenade from inside the official vehicle by breaking window or opening the locks by keys?, is shrouded in mystery. Furthermore, it does not appeal to the prudent mind that the sensitive explosive material like hand grenades were kept in the vehicle parked unattended in the bungalow of DSP. It is pertinent to mention here that the First Information Report as well as the investigation are silent regarding the fact that the hand grenades were kept in the official vehicle parked inside the bungalow of DSP. The said fact was introduced for the first time in the statement of Faiz ur Rehman gunman of DSP recorded u/s 164 CrPC after 28 days of registration of the present case. The above mentioned facts of the case lead to an escapable conclusion that the story of presence of hand grenades in the official vehicle, taking one hand grenade from the bandolier by the accused facing trial and effected blast has been cooked up by the police in order to nominate the accused facing trial in the present case after 28 days of occurrence for showing progress, when local police failed to trace out the actual culprits.

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11. The only evidence against the accused facing trial in the present case is his confessional statement. A general criminal principle

THE STATE VS. NIAZ ALI, FIR # 30 DATED 12.06.2017, U/S ¼ EXPLOSIVE SUBSTANCE, PS: CTD MARDAN
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known as the "corpus delict" rule provides that a confession standing alone is not enough for a conviction. With its design of preventing wrongful conviction, the rule implicitly acknowledges the phenomenon of false confession. In the present case accused facing trial was arrested on 20.07.2017 and was produced before the Area Magistrate on 21.07.2017 for recording his confessional statement. The learned Judicial Magistrate on the same date recorded his confessional statement which is available on the record as Ex PW11/3. The accused facing trial being police official and was under the subordination of Izhar Shah Khan and deputed as cook in his bungalow when blast had taken place, therefore, the confessional statement made by the accused facing trial is to be seen with extra care and caution qua voluntary nature of the statement. The learned Judicial Magistrate before recording of confessional statement of the accused facing trial, put certain questions vide questionnaire Ex PW11/2. Question No.9, of the questionnaire Ex PW1/2 is of vital importance which is reproduced as under;

Q. No.9. "Do you know that after making statement before me, you will not be handed over/remanded to police agency"?

Ans. Yes.

12. All relevant questions, before recording the confessional statement by the Magistrate are not formalities but mandate of

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THE STATE VS. NIAZ ALI, FIR # 30 DATED 12.06.2017, U/S 4 EXPLOSIVE SUBSTANCE, PS: CTD MARDAN

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the law to ascertain the voluntaries of the confessional statements.
 Any question shedding doubts regarding the voluntary nature of
 the statement ultimately affects the prosecution case. From above
 question, it is garnered that the learned Judicial Magistrate asked
 the accused facing trial that, if he makes the statement then he
 will not be handed over/remanded to the police agency.
 According to the rules and precedent of higher forums, the
 proper question being put to the accused would be as under:-

*“Do you know that, if you make confession or not, you
 will not be handed over/remanded to the police
 agency”*

13. It is inferred from question No.9, that accused was given
 impression that, if he does not make statement then he will be
 handed over to the local police. This question alone affects the
 veracity of confessional statement regarding its voluntary nature.
 Furthermore, the answer to question No.11 “do you wish to
 consult to lawyer or relative?” of the questionnaire Ex.PW.11/2
 was “yes”. But, there is nothing on record to suggest that any
 arrangement was made by the Judicial Magistrate to hold the
 meeting of accused facing trial with his relative or lawyer. These
 infirmities in recording the confessional statement of the accused
 facing trial by learned judicial Magistrate definitely affect
 voluntary nature of retracted confession which ultimately casts
 doubt upon the prosecution case.

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14. Various infirmities and contradictions have been noticed in the prosecution evidence which makes the present case highly doubtful. As per statement of Sultan Mehmood inspector CTD Swabi, who is informer of the present case, deposed that during patrolling at Swabi Bazar he heard the noise of blast and rushed to the place of occurrence. Daraz Khan HC police station Swabi PW-02, by negating the stance of complainant PW-08, stated that he alongwith Sultan Mehmood ASHO was present in police station when heard the noise of blast and he accompanied him to the spot. PW-09 Farhan Sadiq, who was allegedly present at the time of occurrence stated in his cross examination that family members of DSP Izhar Shah Khan were present in the bungalow at the relevant time. While, Izhar Shah Khan PW-07 himself stated that on the day of occurrence, his family members were not present in the spot house. These infirmities and contradictions occurring in the statements of material witnesses cast doubts on the prosecution case.

15. In view of facts and circumstance narrated above while analyzing evidence adduced by the prosecution witnesses, the case of prosecution cannot be viewed as entirely free from doubts and, thus, it would be unsafe to convict the accused facing trial. Consequently, by extending benefit of doubts to the accused facing trial, he is acquitted from the charge levelled against him. The accused Niaz Ali is on bail; therefore his

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24.5.2022

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sureties are discharged from the liabilities of their bail bonds. Case property be disposed of in accordance with law after the expiry of period of appeal/revision.

16. File be consigned to record room after its completion and compilation.

ANNOUNCED
Dated 24-May-2022

(MUHAMMAD ASIM)
ADDITIONAL SESSIONS JUDGE-I,
SWABI

CERTIFICATE:

Certified that this judgment consists of 15 pages, each and every page has been signed by me after making necessary correction therein.

(MUHAMMAD ASIM)
ADDITIONAL SESSIONS JUDGE-I,
SWABI

ATTESTED
10 JUN 2022
Examiner/Copying Deptt:
Sessions Court Swabi

Certified to be true copy.

Attestor
Sessions Judge Swabi
Under Article 87 of
Qanun-e-Mahadat Order 1974

S.No of Application: 20435
Date of Presentation of application: 25-5-2022
Date on which copy prepared: 10-6-2022
Date of filing: 10-6-2022
Page No: 15
Signature of:
10-6-2022

(18)



BEFORE THE KHYBER PAKHTUNKHWA SERVICE TRIBUNAL PESHAWAR.

Service Appeal No.....461.../2018

Niaz Ali s/o Zar Wali r/o Village Shah Mansoor Tehsil & District Swabi.
.....Appellant

Versus

1. Government of Khyber Pakhtunkhwa through Secretary Home & Tribal Affairs Department, Civil Secretariat, Peshawar.
2. Deputy Inspector General of Police, Mardan Region Mardan.
3. Additional Inspector General of Police Establishment, Civil Secretariat Peshawar.
4. District Police Officer Swabi.
5. Deputy Superintendant of Police, Tehsil Swabi.

Khyber Pakhtunkhwa Service Tribunal

Case No. 474

Dated 3/4/2018

.....Respondents.

APPEAL AGAINST THE FINAL ORDER BEARING No.5/920/18 DATED PESHAWAR 06.03.2018 PASSED BY RESPONDENT REJECTING DEPARTMENTAL APPEAL FILED BY THE APPELLANT AND AGAINST THE ORIGINAL ORDER DATED 14.11.2017 WHEREBY WHILE AWARDING MAJOR PUNISHMENT OF DISMISSAL FROM SERVICE FROM THE DATE OF SUSPENSION DATED 13.10.2017.

Respectfully Sheweth:-

Prayer:-

On acceptance of this appeal the impugned order of dismissal dated 14.11.2017 passed by DPO Swabi and order on departmental appeals dated 05.12.2017 passed by PRO Mardan and I.G Police Peshawar rejecting both the appeals may graciously be declared as illegal and appellant be reinstated in service with back benefits.

Facts:

1. That the appellant was appointed as constable in the respondent department on 28.07.2011 and was awarded belt No.488.
2. That from the initial date of appointment the appellant was posted as cook with number of officers and lastly in the house of DSP Swabi where an unfortunate occurrence took place which culminated into registration of FIR and subsequently in the shape of dismissal of the petitioner. (Copies of the FIR and dismissal order dated 14.11.2017 are annexed as annexure "A" and "B").
3. That the criminal case is pending adjudication and is yet to be decided, but the service matter has matured in the shape of rejection of departmental

Filed to...
3/4/18

Khyber Pakhtunkhwa Service Tribunal

5/11/18
Dep. of Police

Appeal No. 461/2018
Niaz Ali vs Govt

(19)

09.03.2020

Counsel for the appellant present. Asst: AG for respondents present. Major penalty of dismissal from service was imposed on the appellant on the allegations of involvements in criminal case vide FIR no. 30 U/S 3/4 Exp, 427, 7ATA. During the pendency of this Service Appeal, learned counsel for the appellant submitted an application for Sine-die adjournment till decision/conclusion of criminal case.

Arguments on application heard.

Admittedly the major penalty of dismissal from service was imposed on the appellant due to involvement in a criminal case vide FIR mentioned above, therefore, it would be in the interest of justice to adjourn sine-die the instant service appeal till the decision of the criminal case. As such, we accept the application and the instant service appeal is adjourned sine-die till the disposal of the criminal case. After the decision of criminal case, the appellant may submit application/apply for restoration of appeal. File be consigned to the record room.

Announced:
09.03.2020

(Mian Muhammad)
Member

Muhammad Amin
(M. Amin Khan Kundi)
Member

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