

IN THE HIGH COURT OF SINDH, KARACHI

Present:

*Mr. Justice Naimatullah Phulpoto,
Mr. Justice Mohammad Karim Khan Agha*

Spl. Cr. A.T. Appeal No. 112 of 2018 ✓
Spl. Cr. A.T. Appeal No. 168 of 2018
Confirmation case 01/2019

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| Appellants | Bashir Ahmed and Abdul Majeed through Mr. Abdul Razzak, Advocate |
| Respondent | Through Mr. Muhammad Iqbal Awan, Deputy Prosecutor General. |
| Date of Hearing | 24.01.2019 |
| Date of Announcement | 06-02-2019 |

JUDGMENT

Mohammad Karim Khan Agha, J:- The appellants Bashir Ahmed son of Karim Bux and Abdul Majeed alias Bhoro son of Rehmat Ali, were tried by Anti-Terrorism Court No.II, Karachi for offence under Sections 302/376-II, 364-A/34 PPC r/w S.7(e) of the Anti-Terrorism Act, 1997 (ATA) registered at PS Joharabad, Karachi. After full-dressed trial vide judgment dated 20-05-2015 (the impugned judgment) appellant Bashir Ahmed was convicted and awarded death penalty subject to confirmation by this court and appellant Abdul Majeed alias Bhora, who had common intention with accused had kidnapped deceased Alishba and raped her as such he was awarded imprisonment for life under Section u/s.7 (e) of ATA, 1997. The benefit of Section 382-B Cr.P.C. was also given to appellant Abdul Majeed.

2. The brief facts of the case according to FIR No.261/2011 lodged by one Muhammad Nazeer, who is complainant, at PS Joharabad on 14.12.2011 at about 1800 hours are that he lives in

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House No.314, Block-15, F.B. Area, Karachi Joharabad. On 12.12.2011 he was in his house when he received information at 5:00 pm that his niece Alishba aged about six years at about 05:00 pm had gone out of the house to play at Eidgah ground but had not returned home. Since she had not returned the whole family was worried and tried to find out her whereabouts but without success. The children of the Mohalla told him that she had gone for a camel ride and on 14.12.2011 the family of Jamal Mirza who had come to his house informed him that two camel people had taken one child on the camel hence his case is against those accused persons whose name and residence were unknown and requested that action be taken against them for kidnapping his niece.

3. After completion of investigation, police submitted challan against the accused in the Anti-Terrorism court No.II, Karachi. The charge was framed against the accused on 16.04.2013 to which they pleaded not guilty and claimed trial of the case.

4. The prosecution in order to prove its case examined 12 PWs and tendered a number of exhibits in evidence.

5. Statements of accused were recorded u/s. 342 Cr.P.C. in which they have denied the allegations and claimed/professed their innocence. They have neither examined themselves on oath nor led any defence.

6. After a full blown trial the trial court convicted and sentenced the appellants as mentioned earlier in this judgment.

7. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the impugned judgment dated 25.05.2015 passed by the trial court, therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

8. During the reading of the evidence and the impugned judgment we observed that the trial court has erred in sentencing and convicting the appellants in not recording separate convictions in respect of each offense for which the accused were convicted in violation of S.367 (2) Cr.PC. As such, we sought the assistance of the learned counsel on this issue. Learned counsel for the Appellants and the State both conceded that the convictions recorded did not appear to be in accordance with the law and as such contended that the case should be remanded to the trial court for re-writing the convictions and sentences in accordance with the law.

9. We have taken into account the contentions of learned counsel for the parties and have also considered the relevant law.

10. S.367 Cr.PC which appears in Chapter XXVI of the Cr.PC under the heading "Of Judgments" provides as under:

*"367. Language of judgment. Contents of judgment.
(1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by the presiding officer of the Court [or from the dictation of such presiding officer] in the language of the Court, or in English; and shall contain the point or points for determination, the decision thereon and the reasons for the decision; and shall be dated and signed by the presiding officer in open Court at the time of pronouncing it and where it is not written by the presiding officer with his own hand every page of such judgment shall be signed by him.*

(2) It shall specify the offence (if any) of which, and the section of the Pakistan Penal Code or other law under which, the accused is convicted, and the punishment to which he is sentenced.

(3) Judgment in alternative. When the conviction is under the Pakistan Penal Code and it is doubtful under which of two sections, or under which of two parts of the same section of that Code the offence falls,

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the Court shall distinctly express the same, and pass judgment in the alternative.

(4) If it be a judgment of acquittal, it shall state the offence of which the accused is acquitted and direct that he be set at liberty.

(5) If the accused is convicted of an offence punishable with death, and the Court sentences him to any punishment other than death, the Court shall in its judgment state the reason why sentence of death was not passed.

(6) For the purposes of this section, an order under section 118 or section 123, sub-section (3), shall be deemed to be a judgment".

11. For our purposes S.367 (2) Cr.PC which we have emphasized by adding in bold above is the most relevant and is again set out below for ease of references.

"S.367 (2) It shall specify the offence (if any) of which, and the section of the Pakistan Penal Code or other law under which, the accused is convicted, and the punishment to which he is sentenced".

12. In essence, S.367 (2) Cr.PC provides that for each offense for which the accused is charged and convicted the separate sentence as prescribed by law must be recorded for each conviction. The logic behind this section is that some offenses may be compoundable whilst others may not be and thus if all the sentences are jumbled up for each conviction it will be unclear whether the offence/sentence is compoundable or not.

13. For example, in the instant case the appellant Bashir Ahmed was tried by Anti-Terrorism Court No.II, Karachi for an offence under Section 302/376-II, 364-A/34 PPC r/w. S.7(e) of the Anti-

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Terrorism Act, 1997 (ATA) registered at PS Joharabad, Karachi and was convicted and awarded death penalty.

14. Thus, the appellant Bashir Ahmed appears to have been convicted u/s 302/376-II, 364-A/34 PPC and u/s 7 (e) ATA and awarded the death penalty subject to confirmation by this court.

15. The aforesaid sections under which he has been convicted read as under:

"302 PPC. Punishment of qatl-i-amd. Whoever commits qatl-i-amd shall subject to the provisions of this Chapter, be -

(a) punished with death as qisas;

(b) punished with death or imprisonment for life as ta'zir having regard to the fact and circumstances of the case, if the proof in either of the forms specified in section 304 is not available; or

(c) punished with imprisonment of either description for a term which may extend to twenty-five years, where according to the Injunctions of Islam the punishment of qisas is not applicable.

Provided that nothing in this clause shall apply to the offence of Qatl-I-Amd if committed in the name or on the pretext of honour and the same shall fall within the ambit of clause (a) or clause (b), as the case may be".

"376 PPC. Punishment for rape. (1) Whoever commits rape shall be punished with death or imprisonment of either description for a term which shall not be less than ten years or more than twenty-five years and shall also be liable to fine.

(2) When rape is committed by two or more persons in furtherance of common intention of all, each of such persons shall be punished with death or imprisonment for life".

"364-A PPC. Kidnapping or abducting a person under the age of fourteen. Who ever kidnaps or abducts any person under the age of fourteen, in order that such person may be murdered or subjected to grievous hurt, or slavery, or to the lust of any person or may be so disposed of as to be put in danger of being murdered or subjected to grievous hurt, or slavery, or to the lust of any person shall be punished with death or with imprisonment for life or with rigorous imprisonment for a term which may extend for fourteen years and shall not be less than seven years".

*"S.7 ATA 1997. Punishment for acts of terrorism. -
(1) Whoever commits an act of terrorism under section 6, whereby*

(e) the offence of kidnapping for ransom or hostage-taking has been committed, shall be punishable, on conviction, with death or imprisonment for life.

16. As can be seen the above sections of the PPC and ATA respectively deal with separate offenses which provide for separate punishments/sentences upon conviction. Thus, when a person is convicted of any offense the trial court u/s 367 (2) Cr.PC is obliged under law to record a separate sentence for each and every offense for which he is convicted. Such sentences may run concurrently or consecutively. The benefit of S.382 (B) Cr.PC may be applicable for some offenses; likewise S.544-A Cr.PC relating to compensation may be applicable to other cases. In any event, a sentence in accordance with law must be recorded in respect of each and every offense for which the accused is convicted.

17. It is settled law that under S.367(2) Cr.PC it is **mandatory** for the court to record a separate conviction and sentence for each offense for which the accused has been charged which has not been done in this case through the impugned judgment.

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18. In this respect reliance is placed on the case of **Irfan V Muhammed Yousaf** (2016 SCMR 1190) which held as under at P.1191.

"In terms of section 367, Cr.P.C. it was mandatory for the Court to record separate conviction and sentence for each offence. It could neither be construed nor was it permissible to hold that the accused persons were impliedly sentenced under section 7(a) of Anti-Terrorism act, 1997. Such legal aspect of vital importance, conveniently escaped from the notice of the Trial Court and the High Court. Both the offences under sections 302 and 404, P.P.C. were compoundable and when the State/prosecution had not taken any exception to the legal error, so committed by the Trial Court and thereafter by the High Court in the first round of litigation then, at present belated stage of compromise before the Supreme Court, it could not agitate that the necessary modification be made in the conviction and sentences of the accused persons and they be further convicted and sentenced under section 7(a), Anti-Terrorism Act, 1997, as well, because the matter was not past and closed transaction and could not be re-opened".(bold added)

19. Thus, as a matter of law we agree with the contentions of the learned counsel and order that the case be remanded back to Learned Administrative Judge of the ATC's at Karachi through MIT II of this court and order that the Administrative Judge immediately transfer the case along with R&P's to the author of the impugned judgment and if the author is no longer a sitting ATC Judge to a new sitting ATC Judge with a direction that the convictions and sentences in the judgment be properly recorded in all respects in accordance with the relevant law within two months of receipt of the case and R&P's. As such, the confirmation reference is answered in the negative.

20. We have observed that such an error in law is not uncommon when the trial courts are convicting the accused for offenses and then handing down sentences. As such the office shall transmit a

copy of this judgment to all ATC Judges in Sindh for information and compliance.

21. In view of the above all the appeals and confirmation reference are disposed of in the above terms.