

THE HIGH COURT OF SINDH AT KARACHI

Special Criminal Anti-Terrorism Jail Appeal No163 of 2017
Special Criminal Anti-Terrorism Jail Appeal No164 of 2017
Special Criminal Anti-Terrorism Jail Appeal No139 of 2017
Special Criminal Anti-Terrorism Jail Appeal No140 of 2017

Present:

Mr. Justice Naimatullah Phulpoto

Mr. Justice Mohammad Karim Khan Agha

Appellants: Muhammad Jameed Ahmed son of Bashir Ahmed
(in Spl. Cr. ATJA Nos.163 & 164 of 2017)
Muneer Ahmed son of Abdul Majeed (in Spl. Cr.
ATJA Nos.139 and 140 of 2017)
Through Ms. Abida Parveen Channar, Advocate

Respondent: The State through Mr. Farman Ali Kanasro,
Additional Prosecutor General Sindh

Date of hearing: 29.01.2019

J U D G M E N T

NAIMATULLAH PHULPOTO, J.- Appellants Muhammad Jameel Ahmed and Muneer Ahmed were tried by the learned Judge Anti-Terrorism Court No.VI, Karachi on conclusion of trial, vide judgment dated 29.04.2017, the appellants were convicted under section 7(1)(a) of the Anti-Terrorism Act, 1997, read with section 302(b) PPC and sentenced to imprisonment for life and to pay fine of Rs.500,000/- as compensation in terms of section 544-A Cr.PC, to be paid to the legal heirs of the deceased, in case of default, appellants were ordered to suffer R.I. for 02 years each. They were also convicted under section 7(1)(c) & (h) of the Anti-Terrorism Act, 1997, read with sections 324, 353, 34 PPC and sentenced to 07 R.I. and to pay fine of Rs.100,000/-, in case of default in payment of fine, accused were ordered to suffer R.I. for 06 months. The appellants were also convicted under section 13(d) of the Arms Ordinance, 1965, and sentenced to 4 years R.I. and to pay fine of Rs.50,000/-, in case of default, accused were ordered to suffer R.I. for 06 months each. The appellants preferred the aforesaid appeals against the conviction and sentence recorded by the trial court.

2. The facts of the case as well as evidence produced before the trial Court find an elaborate mention in the Judgment dated 29.04.2017 passed by the learned trial Court, therefore, the same may not be reproduced here so as to avoid unnecessary repetition.

3. Ms. Abida Parveen Channar, learned counsel for the appellants argued that trial court has based conviction upon the piece of evidence of identification parade of accused but no such question was put to the accused in their statements recorded under section 342, Cr.PC for explanation. Ms. Channer prayed for remand of the case to the trial court for recording the statements of accused under section 342, Cr.PC afresh by putting all the incriminating pieces of evidence to the accused persons. In support of her contentions, she relied upon the case reported as 2016 SCMR 267 (MUHAMMAD NAWAZ and others Versus The STATE and Others).

4. Learned Additional Prosecutor General Sindh conceded to the contention raised by the learned advocate for the appellant that material piece of evidence with regard to the identification parade of accused had not been put to the accused in their statements recorded under section 342, Cr.PC. Learned Additional P.G. further argued that trial court has committed illegality and that is not curable. In support of his contentions, learned Additional P.G. relied upon the unreported judgment of the Honourable Supreme Court in Criminal Appeal No.292 of 2009 dated 28.10.2010 in the case of MUHAMMAD HASSAN versus THE STATE.

5. We have carefully heard learned counsel for the parties and perused the relevant record.

6. Prosecution has examined PW-8 Miss Zahida Parveen, Judicial Magistrate at Ex.13, she had conducted the identification parade of accused Muhammad Jameed Ahmed and Muneer Ahmed through eyewitnesses, namely, Muhammad Umer Qureshi, PC Ali Hussain Chandio and Ammad Sher Khan. They had identified the accused in the identification parade. All the above named eyewitnesses were examined before the trial Court and deposed about identification of accused in the identification parade but the question with regard to the identification parade of the accused through the above named eyewitnesses had not been put to the accused at the time of recording their statements under section 342 Cr.PC.

7. For the sake of reference, statements of accused Muhammad Jameel Ahmed and Muneer Ahmed recorded under section 342, Cr.PC at Ex. 19 and 20 are reproduced as under:

"STATEMENT OF ACCUSED MUHAMMAD JAMEEL U/S 342 CR.PC.

Q.No.1. You have heard the prosecution evidence, it has come in evidence that on 04.11.2011 at about 1230 hours at Block No.5, Gulshan-

e-Iqbal, Karachi, in front of Bungalow No.B-158 and B-163, you accused Muhammad Jameel Ahmed S/o Bashir Ahmed and Muneer Ahmed son of Abdul Majeed along with absconding accused Abdullah and Ghulam Muhammad son of unknown, in furtherance of your common object/intention caused murder of deceased Zain-ul-Abideen son of Noor-ul-Abdin by making firing from deadly weapons, while he alighted from his car bearing registration No.ASD-149, Honda City, Silver Colour in front of Bungalow No.158 and B-163, however in the meantime, police came there, but you accused persons also deter the police party from discharging their lawful duties and started firing upon them and consequently police also made fires in retaliation and then apprehended you accused Muhammad Jameel Ahmed and Muneer Ahmed. What you have to say?

Ans. No Sir, it is false.

Q.No.2 It has also come in evidence that the case property present in the court viz. one unlicensed 30 bore pistol like a stain gun without number loaded with magazine, containing five live bullets were recovered from your possession. What you have to say?

Ans. No Sir, it is also false.

Q.No.3. It has also come in evidence that the present case property viz. one unlicensed 30 bore pistol, like a stain gun and five live bullets, which were recovered from you were sent to FSL and the report of FSL is positive against you. What you have to say?

Ans. The report is managed and false.

Q.No.4. It has also come in evidence that the present case property viz. six empties out of them two empties were matched as per FSL report with the 30 bore pistol like a stain gun which was recovered from you accused Muhammad Jameel and the said report against you has been placed on record. What you have to say?

Ans. The report is managed and false.

Q No.5. It has also come in evidence that your above acts created sense of fear, and insecurity in the society and in the minds of general public. What you have to say?

Ans. No sir, it is false.

Q No.6. It has also come in evidence that bloodstained cloth of deceased Zain-ul-Abdin was sent to Serologist for analysis and the positive report has come, which suggests that it was human blood. What you have to say?

Ans. I have no concern with the said report.

Q No.7. Why PWs have deposed against you?

Ans. They have falsely deposed against me in order to save the actual culprits.

Q No.8. Do you want to examine any witness in your defence?

Ans. No Sir.

Q. No.9. Do you want to examine yourself on oath?

Ans. No Sir.

Q. No.10 What else you want to say.

Ans. I am innocent. On 03.11.2011 I was arrested by SIP Sarfraz during checking from Disco Bakery, Gulshan-e-Iqbal. Police demanded Rs.50,000/- as bribe, which I could not satisfy hence the false case was registered against me. I pray for justice.

"STATEMENT OF ACCUSED MUNEEER AHMED U/S 342 CR.PC.

Q.No.1. You have heard the prosecution evidence that it has come in evidence that on 04.11.2011 at about 1230 hours at Block No.5, Gulshan-e-Iqbal, Karachi, in front of Bungalow No.B-158 and B-163, you accused Muneer Ahmed son of Abdul Majeed and Muhammad Jameel Ahmed S/o Bashir Ahmed along with absconding accused Abdullah and Ghulam Muhammad son of unknown, in furtherance of your common object/intention caused murder of deceased Zain-ul-Abideen son of Noor-ul-Abdin by making firing from deadly weapons, while he alighted from his car bearing registration No.ASD-149, Honda City, Silver Colour in front of Bungalow No.158 and B-163, however in the meantime, police came there, but you accused persons also deter the police party from discharging their lawful duties and started firing upon them and consequently police also made fires in retaliation and then apprehended you accused Muneer Ahmed and Muhammad Jameel Ahmed. What you have to say?

Ans. No Sir, it is false.

Q.No.2 It has also come in evidence that the case property present in the court viz. one unlicensed 30 bore pistol without number loaded with magazine, containing five live bullets were recovered from your possession. What you have to say?

Ans. No Sir, it is also false.

Q.No.3. It has also come in evidence that the present case property viz. one unlicensed 30 bore pistol and five live bullets, which were recovered from you were sent to FSL and the report of FSL is positive against you. What you have to say?

Ans. The report is managed and false.

Q.No.4. It has also come in evidence that the present case property viz. six empties out of them two empties were matched as per FSL report with the 30 bore pistol like a stain gun which was recovered from you accused Muneer Ahmed and the said report against you has been placed on record. What you have to say?

Ans. The report is managed and false.

Q No.5. It has also come in evidence that your above acts created sense of fear, and insecurity in the society and in the minds of general public. What you have to say?

Ans. No sir, it is false.

Q No.6. It has also come in evidence that bloodstained cloth of deceased Zain-ul-Abdin was sent to Serologist for analysis and the positive report

has come, which suggests that it was human blood. What you have to say?

Ans. I have no concern with the said report.

Q No.7. Why the PWs have deposed against you?

Ans. In order to save the actual culprits, they have falsely deposed against me.

Q No.8. Do you want to examine any witness in your defence?

Ans. No Sir.

Q. No.9. Do you want to examine yourself on oath?

Ans. No Sir.

Q. No.10 What else you want to say.

Ans. I am innocent. Actually I was arrested by SIP Sarfraz during checking from Disco Bakery, Gulshan-e-Iqbal on 03.11.2011 at 10:30 a.m. and I have no concern with this case. Police also demanded Rs.50,000/- as bribe, which I could not satisfy hence I was booked in this case. I pray for justice."

8. It is clear that in the statements of accused recorded under section 342, Cr.PC, at Ex.19 and 20, question with regard to the identification parade had not been put to them but the trial court in paras 30 and 31 of its judgment has relied upon such piece of evidence and convicted them. Paras 30 and 31 of the judgment of the trial court are reproduced as under:-

"30. On 11.11.2011 he submitted an application in the Court of Magistrate concerned for identification parade of accused persons and he produced the same as Ex.17/D, verified its contents and recognized his signature. On 14.11.2011, identification test was conducted, he verified the contents of his application as well as identification test as Ex.11/A, Ex.12/A and Ex.13/A and verified the contents of the same and signature appearing on the above application and he stated that these are the same application, these were submitted before the court of Magistrate concerned for identification test. He has further deposed that he made to get the identification test through eye witnesses. On 15.11.2011 he deposited cloth of deceased in the office of chemical analyzer, he produced the application as Ex.17/F, verified its contents and recognized signature, thereafter, he also produced FSL ballistic report and chemical analyzer report as Ex.17/G and Ex.17/H. He also verified the case property available before the Court so also recognized the accused present before the Court.

31. Needless to mention here that in present case prosecution has produced ocular, circumstantial and corroborative evidence. PW-07 PC Hassan Ali and PW-10 Faisal Mehmood, complainant had given detailed account of the evidence and they in clear terms have deposed the manner of arrival of culprits at the scene of offence so also they pointed out the manner of commission of offence of present crime by the present accused persons along with their absconding companions. During identification test of PW-07 and PW-10 they also identified the accused

Muhammad Jameel and Muneer Ahmed as culprits. Besides above PW-01 SIP Muhammad Sarfraz who on patrolling duty in the surrounding area of the incident, when attracted the firing reports, he rushed at the place of incident and on pointation of the complainant who is eye witness chased the culprits and after encounter SIP Muhammad Sarfraz and his team succeeded to capture two culprits along with arms and ammunition is also empties were secured from the same place so also car of the culprits was seized."

9. It is well settled by now that a piece of evidence not put to an accused during his examination under section 342, Cr.PC could not be used against him for maintaining the conviction and sentence. In the present case, there is no occasion for going into the factual aspects of this case as it may suffice to observe that case of prosecution is based on different pieces of evidence but material pieces of evidence such as identification parade was not put to the accused at the time of recording their statements under section 342, Cr.PC so as to provide them an opportunity to explain and such illegality committed by the trial Court is not curable under the law as held in the cases of MUHAMMAD MUMTAZ versus the STATE (1997 SCMR 1011) and MOHAMMAD SHAH v. The STATE (2010 SCMR 1009). In the case of Mohammad Shah (supra) it has been held as under:

"11. It is not out of place to mention here that both the Courts below have relied upon the suggestion of the appellant made to the witnesses in the cross-examination for convicting him thereby using the evidence available on the record against him. It is important to note that all incriminating pieces of evidence, available on the record, are required to be put to the accused, as provided under section 342, Cr.P.C. in which the words used are "For the purpose of enabling the accused to explain any circumstances appearing in evidence against him" which clearly demonstrate that not only the circumstances appearing in the examination-in-chief are put to the accused but the circumstances appearing in cross-examination or re-examination are also required to be put to the accused, if they are against him, because the evidence means examination-in-chief, cross-examination and re-examination, as provided under Article 132 read with Articles 2(c) and 71 of Qanun-e-Shahadat Order, 1984. The perusal of statement of the appellant, under section 342, CrP.C., reveals that the portion of the evidence which appeared in the cross-examination was not put to the accused in his statement under section 342, Cr.P.C. enabling him to explain the circumstances particularly when the same was abandoned by him. 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."

10. We have also noticed that the trial court has also failed to specify the offences and sentences separately. Provisions of Section 367, Cr.PC are mandatory in nature.

11. In view of the illegalities and omissions committed by the trial Court, we have no option except to set aside the conviction and sentence recorded by the trial court vide judgment dated 29.04.2017 and remand the case back to the trial Court for re-recording the statements of accused under section 342, Cr.PC by putting all the incriminating pieces of evidence against the accused for their explanation/replies. Trial Court shall decide the case on merits in view of above observations within two months in accordance with law.

Appeals are disposed of in above terms.

29.1.2019
JUDGE


JUDGE

Gulsher/PS