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IN THE HIGH COURT OF SINDH AT KARACHI

Special Criminal AT Appeal No.214 of 2017
Special Criminal AT Appeal No.215 of 2017
Special Criminal AT Appeal No.216 of 2017
Special Criminal AT Appeal No.235 of 2017
Special Criminal AT Appeal No.236 of 2017
Special Criminal AT Appeal No.237 of 2017
Special Criminal ATJ Appeal No.238 of 2017
Confirmation Case No.10 of 2017

Present:

Mr. Justice Naimatullah Phulpoto

Mr. Justice Mohammad Karim Khan Agha

Appellants:

1. Abdul Aziz Ansari S/o. Abdul Naseer Ansari
2. Azhar Ali @ Uncle S/o. Abdul Rehman,
3. Noor Mohammad @ Bangali S/o. Mian Mohammad Jaseem presently all confined in Central Prison, Karachi through Khawaja Naveed Ahmed, Advocate.

Respondent/State:

The State through Mr. Mohammad Iqbal Awan,
Deputy Prosecutor General Sindh.

Date of hearing:

18.01.2019

Date of Judgment:

25.01.2019.

J U D G M E N T

MOHAMMAD KARIM KHAN AGHA, J.- Appellants Abdul Aziz Ansari, Azhar Ali @ Uncle and Noor Mohammad @ Bangali were tried by learned Judge, Anti-Terrorism Court No.IV, Karachi for offences (1) under Sections 302/392/427/109/34 PPC r/w Section 7-ATA, 1997 in Special Case No.84/2009 arising out of Crime No.726/2010 registered at P.S. Ferozabad, Karachi, (2) under Sections 353/324/427/34 PPC in Special Case No.85/2010 arising out of Crime No.179/2010 registered at P.S. CID, Karachi, (3) under Sections 13-(d) Pakistan Arms Ordinance, in Special Case No.86/2010 arising out of Crime No.180/2010 registered at PS CID Sindh, Karachi and (4) under Sections 13-(d) Pakistan Arms Ordinance, in Special Case No.87/2010 arising out of Crime No.181/2010 registered at PS CID Sindh, Karachi vide judgment dated 29.09.2017 (the impugned judgment) the appellants were convicted as follows:-

1. Accused Abdul Aziz found guilty for the charge of the offence punishable u/s 302/34 PPC r/w section 7(a) of Anti-Terrorism

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Act 1997 and awarded death sentence to him and to pay Rs.100,000/- (Rupees one lac) as compensation to the legal heirs of the deceased and in case of default to pay compensation to the legal heirs of the deceased he shall further suffer R.I. for one year. The accused Abdul Aziz Ansari S/o. Abdul Naseer Ansari is ordered to be hanged by neck till his death.

2. Accused Azhar Ali @ Uncle found guilty for the charge of the offence punishable u/s 302/109/34-PPC R/W Section 7(a) of Anti-Terrorism Act 1997, awarded imprisonment for life sentence to him and to pay Rs.50,000/- (Rupees fifty thousand) as compensation to the legal heirs of the deceased and in case of default to pay he shall further suffer R.I. 06 months.
3. Accused Noor Muhammad @ Bangali found guilty for the charge of the offence punishable u/s 302/109/34-PPC R/W Section 7(a) of Anti-Terrorism Act 1997, awarded imprisonment for life sentence to him and to pay Rs.50,000/- (Rupees fifty thousand) as compensation to the legal heirs of the deceased and in case of default to pay compensation to the legal heirs of the deceased he shall further suffer R.I. 06 months.
4. Accused Abdul Aziz Ansari also found guilty for the charge of the offence punishable u/s. 392-PPC read with Section 7 ATA 1997, he is convicted and sentenced to suffer R.I. for seven (07) years.
5. Accused Abdul Aziz Ansari and Azhar Ali @ Uncle also found guilty for the charge of the offence punishable u/s. 427-PPC read with Section 7 ATA 1997, they are convicted and sentenced to suffer R.I. for two (02) years.
6. Accused Azhar Ali @ Uncle and accused (2) Abdul Aziz found guilty of the charge of offence U/s. 353/34-PPC R/W Section 7 ATA 1997 they are convicted and sentenced to suffer R.I. for one year and fine of Rs.5000/- (Five thousand rupees) each in case of default they shall further suffer R.I. for two months more.
7. Accused Azhar Ali @ Uncle and accused (2) Abdul Aziz found guilty of the charge of offence U/s. 324 R/W Section 7 ATA 1997 they are convicted and sentenced to suffer R.I. for five years and fine of Rs.10,000/- (Rupees ten thousand) each in case of default they shall further suffer R.I. for six months more.
8. Accused Azhar Ali @ Uncle found guilty of the charge of offence punishable U/s. 13(d) of Arms Ordinance is convicted and sentenced to suffer R.I. for seven (07) years and fine of Rs.25,000/- (Rupees twenty five thousand) in case of default he shall further suffer R.I. for six months.

9. Accused Abdul Aziz also found guilty of the charge of the offence punishable U/s 13(d) of Arms Ordinance is convicted and sentenced to suffer R.I. for seven (07) years and fine of Rs.25,000/- (Rupees twenty five thousand) in case of default he shall further suffer R.I. for six months.

2. Brief facts of the prosecution case as per FIR 726/2010, under Sections 302/34 P.P.C registered at P.S. Ferozabad, Karachi are that the complainant is Head Constable in Police Department, his elder brother Muhammad Ishaque Meo son of Chahat Khan aged about 38 years was Assistant Superintendent in Central Prison, Karachi. On 14.06.2010, the complainant received telephonic message at about 1930 hours, that his brother Muhammad Ishaque Meo was going in his Car No.Z-8966, white colour, Margala, and when he reached at Shaheed-e-Millat Road, near Memon Masjid, near Medicare Signal, on one unknown number motorcycle two young boys, wearing pants shirt, fired from their weapons on brother of the complainant, who was injured and had been taken to Liaquat National Hospital. On such information, the complainant immediately reached Liaquat National Hospital, and saw that his brother had received three bullet injuries on stomach, right arm and right side of the back and was seriously injured and later succumbed to his injuries, as such FIR No.726/2010 under Section 302/34 PPC was lodged against unknown culprits. Further challan was submitted u/s 302/392/427/109/34 PPC r/w section 7 ATA 1997

3. Precisely the facts of the prosecution as narrated in FIR No.179 of 2010 are that on 17.07.2010, complainant SIP Muhammad Shoaib Qureshi of PS AEC/CID Sindh, Karachi alongwith his subordinate staff was busy in patrolling duty in government mobiles in search of target killers within Karachi, he received spy information about presence of armed accused persons at opposite Darakhshan Society, Railway Track, for the purpose of target killing. On such information he reached alongwith his subordinates at the pointed place at about 01:30 hours, on seeing three accused persons on railway track police party stopped mobiles for arresting accused persons. The accused persons when they saw the police party, started firing upon them with intention to kill them and 02 bullets hit police mobile No. SP-5988, in retaliation police party also made aerial firing then encircled and arrested two accused persons with their weapons namely

(1) Azhar Ali @ Uncle s/o. Abdul Rehman and (2) Abdul Aziz s/o. Abdul Naseer, whereas accused Noor Khan while making firing made his escape good, his name was disclosed by arrested accused persons. Personal body search of accused persons was made by SIP Shoaib Qureshi in presence of mashirs, and he recovered from right hand of accused Azhar @ Uncle one unlicensed pistol of 30 bore without number, loaded magazine with 02 live rounds and one live round in chamber, one mobile phone, cash of Rs.210/- and 03 SIMs, and from the right hand of accused Abdul Aziz one unlicensed pistol of 30 bore loaded magazine with 03 live round and one round in chamber and from his pocket one mobile phone of Nokia 1112 with SIM, Cash of Rs.80/-. The police party secured 06 empties of 30 bore from the place of incident. After completing legal formalities three FIRs (1) FIR No.179/2010 u/s.353/324/427/34-PPC (2) FIR No.180/2010 and (3) FIR No.181/2010 u/s. 13-(d)Arms Ordinance were registered at PS CID, Sindh against accused persons.

4. Supplementary challan was submitted before the learned trial court wherein accused Noor Muhammad @ Bangali was shown in custody. After completion of all formal proceedings, joint charge was framed against accused persons namely Azhar Ali @ Uncle s/o Abdul Rehman, Abdul Aziz Ansari son of Abdul Naseer Ansari, Syed Mehmood Ali @ Guddu son of Syed Ishtiaq Ali and Noor Muhammad @ Bengali son of Mian Muhammad Jaisum, to which they pleaded not guilty and claimed trial.

5. The prosecution in order to prove its case examined 17 PWs and tendered a number of exhibits in evidence.

6. All the accused denied the allegations against them in their S.342 Cr.PC statements claiming false implication.

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

8. During the reading of the evidence and the impugned judgment we observed that the trial court may have erred in awarding convictions to the appellants in that it appeared not to have recorded separate convictions in respect of each offense in violation of S.367 Cr.PC and that

even the convictions may not have been in accordance with law as in some cases a fine was not imposed when it should have been and periods of RI to be completed if compensation was not paid did not appear to be in accordance with the law. As such we sought guidance of the learned counsel on this issue. Both learned counsel for the Appellants and the State 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. As per the convictions set out earlier in this judgment against each appellant it appears that each appellant was in some cases convicted under both S.7 of the ATA 1997 and S.302 of the PPC and yet rather than being given a separate conviction in respect of each offense was given one conviction for both offenses. For example Appellant Adbul Aziz was convicted and sentenced as under:

"Accused Abdul Aziz found guilty for the charge of the offence punishable u/s 302/34 PPC r/w section 7(a) of Anti-Terrorism Act 1997 and awarded death sentence to him and to pay Rs.100,000/- (Rupees one lac) as compensation to the legal heirs of the deceased and in case of default to pay compensation to the legal heirs of the deceased he shall further suffer R.I. for one year imprisonment. The accused Abdul Aziz Ansari S/o. Abdul Naseer Ansari is ordered to be hanged by neck till his death"

11. It is settled law that under S.367 Cr.PC it is mandatory for the court to record a separate conviction and sentence for each offense which has not been done in this case through the impugned judgment. In this respect reliance is placed on **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)

12. Thus, as a matter of law we agree with the contentions of the learned counsel and order that the case be remanded back to the Administrative Judge of the ATC's at Karachi and order that the Administrative Judge immediately transfer the case along with R&P's to a new sitting ATC Judge (since the author of the impugned judgment is no longer an ATC Judge) with a direction that the convictions and sentences in the impugned 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.

13. In view of the above all the appeals are disposed of in the above terms