

IN THE HIGH COURT OF SINDH, KARACHI

Present:

Mr. Justice Mohammad Karim Khan Agha

Mr. Justice Khadim Hussain Tunio

SPECIAL CRIMINAL A.T. JAIL APPEAL NO.11 OF 2022
CRIMINAL REVISION APPLICATION NO.22 OF 2022

Appellants

1) Muhammad Asif s/o Liaquat Ali Bhatti
2) Abbas Ali s/o Ali Nawaz
3) Ali Asghar s/o Muhammad Urs through Mrs. Farzana Abbasi, Advocate.

Complainant

Muhammad Shahbaz through Mr. Aftab Ali Panhwar, Advocate

Respondent

The State through Mr. Muhammad Iqbal Awan, Additional Prosecutor General Sindh.

Date of Hearing : 05.05.2023

Date of Judgment : 05.05.2023

JUDGMENT

MOHAMMAD KARIM KHAN AGHA, J:- Mr. Aftab Ali Panhwar, advocate files Vakalatnama on behalf of the complainant in Special Cr. A.T. Jail Appeal and in Criminal Revision Application.

2. Accused Muhammad Asif, Abbas Ali and Ali Asghar were tried before the Anti-Terrorism Court No.V, Karachi in Special Case Nos.18/2021, 18-A/2021, 18-B/2021 and 18-C of 2021 arising out of FIR Nos.314/2016, u/s.365-A, 302/34 PPC R/w Section 7 ATA, 1997, No.03/2017 u/s.4/5 Explosive Substance Act, 1908 r/w Section 7 ATA, 1997, No.04/2017 u/s. 23(1)-A of SAA and No.05/2017 u/s. 23(1)-A SAA and vide judgment dated 17.11.2021 all the accused persons namely Muhammad Asif, Abbas Ali and Ali Asghar were convicted and sentenced as under:-

- i) All the three accused persons were convicted for the offence u/s.364 read with Section 34 of PPC and sentenced for 10 years with fine of Rs.50000/- each and in case of default in payment accused persons was ordered to undergo SI for six months more.

- ii) All the three accused persons were convicted for the offence u/s 302(b) read with Section 34 of PPC and sentenced for R.L. 10 years with directions to pay Rs.50000/- each to the legal heirs of the deceased Hafiz Paryad as compensation u/s 544-A Cr.P.C. In case of default in payment accused persons was ordered to undergo SI for six months more.
- iii) Accused Muhammad Adil son of Liaquat Ali was convicted for an offence u/s 5 of the Explosive Substance Act, 1908 and sentenced for R.L. 7 years with direction to forfeit his property to the State u/s 5 A of the Ibid Act.
- iv) Accused Abbas Ali son of Ali Nawaz was convicted for an offence u/s 23(1)A of Sindh Arms Act, 2013 and sentenced for R.L. 7 years with direction to pay fine of Rs.50000 each and in case of default of payment in payment he was ordered to undergo one year Simple Imprisonment.
- v) Accused Ali Asghar son of Muhammad Urs was convicted for an offence u/s 23(1)A of Sindh Arms Act, 2013 and sentenced for R.L. 7 years with direction to pay fine of Rs.50000 each and in case of default of payment in payment he was ordered to undergo one year Simple Imprisonment.

All the sentences were ordered to run concurrently. The benefit of Section 382 were also extended to the appellants.

3. Brief facts of the case as narrated in the FIR are that the complainant resides at above mentioned address and does private job. On 12.12.2016 he was present in his house while his father Muhammad Paryad and brother Owais had gone to visit the under construction house at Madina Town, Quaidabad Landhi. Complainant called his brother Owais on his Cell No.0321-2807107 at about 8:30 PM and asked about his father to which he said that father is coming home with brother-in-law Shabbir Hussain on his motorcycle. After a short while, my brother-in-law Shabbir Hussain called me from someone's phone and narrated that when they were coming on motorcycle and reached at un-metalled road near Malir Nadi Bridge near Malir Home in Malir City around 8:45 pm suddenly three young men ridding on motorcycle came from back, out of them two holding pistols in their hands and they caught hold us and they caused me pistol butt blow and got me escaped and have forcibly taken my father. Thereafter complainant contacted with his father on his Cell No.0324-2985462 but call attended by some other person and asked that your father is with us and demanded extortion of rupees 10/15 lakh then he will release my father. I told him that we have no more money and on next day dated 13.12.2016, the above persons murdered my father with a sharp edged weapon inside the bushes of

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Samu Goth. While original CNIC of father of complainant and mobile phone were also lying with above accused persons. Brother-in-law Shabbir Hussain can identify the accused persons on seeing again. Now I have appeared at P.S. for reporting after burial ceremony and lodged the complaint against three unknown identifiable accused persons who kidnapped my father Haji Faryad on gunpoint, demanded extortion and murdered him due to non-payment of extortion money. Hence the instant FIRs lodged.

4. After usual investigation, the case was challaned and the accused persons were sent up for trial where they pleaded not guilty to the charge.

5. The prosecution in order to prove its case examined 12 Prosecution Witnesses and exhibited various documents and other items. The statement of accused was recorded under Section 342 Cr.P.C in which they denied the allegations levelled against them and claimed false implication. However, the accused did not give evidence on oath nor produce any DWs in support of their defence.

6. After hearing the parties and appreciating the evidence on record, the trial court convicted the appellants and sentenced them as set out earlier in this judgment; hence, the appellants have filed this appeal against their convictions.

7. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the impugned judgment dated 17.11.2022 passed by the trial court and, therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

8. At the very outset of hearing of this appeal, learned counsel for the appellants stated that it was a case of remand in respect of all the three appellants on the basis that four PWs; namely PW-2 Ghulam Akbar @ Asif Ali, PW-3 Shah Nawaz Panhwar, PW-4 Muhammad Waqas and PW-5 Muhammad Aijaz, whose evidence had not been recorded in the presence of defence counsel and this was a violation of mandatory provision of Section 353 Cr.P.C. which was not curable under Section 537 Cr.P.C. In support of her contentions, she has placed reliance on the cases *Rajab Ali vs. The State* (SBLR 2019 Sindh 967, *Bashir Ahmed vs. The State* (SBLR 2021 Sindh 112) and *Sibghatullah v The State* (2020 MLD 776.

9. Learned Addl. Prosecutor General Sindh after considering the record was in agreement with learned counsel for the appellant.

10. We have also considered the record and gone through the relevant law and agreed with the learned counsel for the appellants and learned Addl. P.G. for the reasons mentioned above this case warrants remand to the trial Court for re-recording the evidence of the said witnesses as the right of appellants have been violated under Article 10-A of the Constitution and other certain mandatory provisions of law had not been complied with. However, when the Court confronted learned counsel appearing on behalf of the complainant Mr. Aftab Ali Panhwar, he had nothing to say on this point.

11. Under these circumstances, we hereby set aside the impugned judgment dated 17.11.2022 and remand the case back to Anti-Terrorism Court No.V, Karachi for the limited purpose of re-recording the evidence of PW-2 Ghulam Akbar @ Asif Ali, PW-3 Shahnawaz Panhwar, PW-4 Muhammad Waqas and PW-5 Muhammad Aijaz in presence of learned counsel for the appellants, who shall also be given an opportunity to cross-examine the witnesses, who shall be re-examined, if so desired by learned DDP. Thereafter, fresh statement under Section 342 Cr.P.C. of appellants shall be recorded and after hearing the parties, learned trial Court shall render a fresh judgment in respect of the appellants. This process shall be completed within a period of three months of the date of this judgment. A copy of this judgment alongwith R&Ps shall be immediately sent to Anti-Terrorism Court No.V, Karachi for information and compliance.

12. Since the impugned judgment passed in the instant Special Criminal AT Jail Appeal is set-aside and remanded to the trial Court hence Criminal Revision Application No.22 of 2022 is disposed of as infructuous.

13. The instant appeal alongwith criminal revision application stand disposed of in the above terms.