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ORDER SHEET
IN THE HIGH COURT OF SINDH, AT KARACHI.

Spl. CrI. A.T.J.A. No.38 of 2021
Spl. CrI. A.T.Acq.A. No.23 of 2021
Cr. Revision Application No.33 of 2021 and
Spl. CrI. A.T.J.A. No.41 of 2021

Date	Order with signature of Judge
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Present:

Mr. Justice Mohammad Karim Khan Agha J.

Mr. Justice Zulfiqar Ali Sangi J.

26.10.2022.

Mr. Muhammad Aslam, Advocate for the appellant in Spl. CrI. A.T.J.A. No.38 of 2021.

Mr. Muhammad Farooq, advocate for the appellant Spl. Cr. A.T.Acq. Appeal No.23 of 2021 and Cr. Revision Application No.33 of 2021.

Mr. Amir Nawaz Warraich, advocate for the appellant in Spl. Cr.A.T.Jail. Appeal No.41 of 2021.

Mr. Muhammad Iqbal Awan, Additional Prosecutor General.

Mohammad Karim Khan Agha, J;- Appellants Azhar Ahmed S/o Shoukat Ali, Irfan S/o Abdul Ahad and Faisal S/o Syed Ishtiaq Ali were proceeded against before the Anti-Terrorism Court No.IV, Karachi Division in Special Case No.36 of 2019 in respect of FIR No.376 of 2013, under Section 302/34 PPC r/w 7 ATA-1997, P.S Shahrah-e-Faisal, Karachi and in Special Case No.36-A of 2019 Azhar Ahmed was proceeded against FIR No.131/2015, under Section 23(1) (a) of Sindh Arms Act, 2013, P.S SIU Sindh Karachi, whereby accused Azhar Ahmed and Irfan were convicted and sentenced as under:-

- a) Accused Azhar Ahmed S/o Shoukat Ali and Irfan S/o Abdul Ahad found guilty for the charge of the offence u/s 302(b)/34-PPC award imprisonment for life, each, and to pay sum of Rs.100,000/- (Rupees one hundred thousand) each, as compensation u/s 544-A Cr.P.C to the legal heirs of the deceased Shaikh Naveed Raza, which shall be recovered by way of arrear of land revenue and in default of payment / recovery thereof undergo further imprisonment for six months, each.
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- b) Accused Azhar Ahmed S/o Shoukat Ali and Irfan S/o Abdul Ahad found guilty of offence u/s 6(1) (b) of ATA 1997 and convicted u/s 7(1) (a) of ATA 1997, for life imprisonment, each, and fine of Rs.50,000/- (Rupees Fifty Thousand) each, in case of default in payment of the fin, they shall further suffer for six month imprisonment.
- c) Accused Azhar Ahmed S/o Shoukat Ali found guilty of the charge of offence punishable u/s 23(1)(a) of Sindh Arms Act 2013, he is convicted and sentence to suffer for three years and fine of Rs.10,000/- (Rupees Ten Thousand) in case of default he shall further suffer imprisonment for three months.

All the sentences were ordered to run concurrently and both appellants were given the benefit of section 382-B Cr.P.C.

However, accused Faisal was acquitted vide impugned Judgment dated 23.01.2021.

2. Brief facts of the case just unfolded by the complainant Kazim Raza as in FIR No.376/2013 are that he was residing at Flat No.905, Block-A, West Point Tower, Defence Housing Authority, Phase-II, Karachi, on 27.06.2013, received a mobile phone call from wife of his brother that her son namely Sabih phoned her that Shaikh Naveed Raza (real brother of complainant) was gunned down by unknown arm^{ed} persons at about 07:45 hours, when they were on the way in vehicle bearing No.ANB-747, Suzuki Liyana, at Habib Ibrahim Rehmatullah Road, near National Stadium Bridge, and they were shifted to Agha Khan Hospital. Complainant reached the hospital and come up with dead body of his brother Shaikh Naveed Raza in Emergency Ward. Thus, FIR was lodged against unknown culprits.

3. After completion of formal investigation, final report under "A" Class was submitted before the concerned Court. On the orders of Inspector General of Police, Sindh, on 27.09.2013, investigation was transferred from Shahrah-e-Faisal PS to SIU/CIA, Karachi, where, first, investigation was entrusted to SI Rashid Alvi and then it was transferred to SI Zulfiqar Hyder. During investigation, complainant Kazim Raza, brother of deceased Shaikh Naveed Raza, disclosed to SI Zulfiqar Hyder, that murderer of his brother, Azhar Ahmed S/o Shoukat Ali had been apprehended by the police of

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Defence PS. On 09.10.2015, accused Azhar during interrogation confessed his guilt that he along with his accomplices namely Owais, Irfan and Faisal Chaudhry demanded extortion money to the tune of Rs.20,00,00,000 (rupees twenty million) from the owner of Makkah Motors, on his refusal they committed his murder.

4. In order to prove its case, the prosecution examined 13 P.Ws and exhibited various items and other documents. All the appellants in their 342 Cr.P.C statements denied prosecution allegations and claimed their innocence. None of the appellants examined themselves on oath or examined any D.W in their defence.

5. After appreciating evidence on record, the trial court convicted the appellants Azhar and Irfan but acquitted accused Faisal and appeal against his acquittal has been filed. The complainant has also filed Revision Application for enhancement for their sentence from life imprisonment to death sentence. Hence the Appellants Azhar and Irfan have filed appeals against their conviction.

6. At the very out set learned counsel for the appellants and learned Addl. P.G. drew our attention to the fact that as many as 06 PWS i.e. PW-1 Kazim Raza, PW-8 Muhammad Lateef, PW-9 Muhammad Ayub, PW-10 Sadiq Shah, PW-11 Zulfiqar Hyder and PW-12 Javed Maseeh were examined and their examination in chief was recorded in absence of learned defence counsel and this has caused prejudice to the appellants during course of the trial and as such the case, as matter of law, should be remanded back to the concerned trial Court.

7. We find that based on the above contentions made by learned counsel for the appellants including the learned Additional Prosecutor General, this is a case which warrants remand back to the concerned trial court. This is because under section 353 of the Cr.P.C. the evidence of all the witnesses (evidence-in-chief, cross-examination and re-cross-examination) must be recorded in the presence of the accused and his defence counsel especially in a capital case. The idea behind this is that the appellants shall have

fair trial as guaranteed by Article 10-A of the Constitution. For example, if the counsel of the defence had been present when the aforesaid important witnesses were giving evidence in chief, they may have objected certain questions being put and certain documents being exhibited, as such the fact that the appellants defence counsel was not present during this process has caused prejudice to the appellants in their defence case. We note that this Court has already in such like cases for example reported in SBLR 2021 Sindh 112 and 2019 MLD 1713 adopted the following approach of remand. As such we set-aside the impugned judgment and remand the case back to the ATC Court No.IV Karachi for limited purposes of recording evidence of aforesaid 06 PWs mentioned in this order afresh in the presence of the counsel of both the appellants who shall also be present during the cross-examination and examination-in-chief. Thereafter the trial court shall record afresh section 342 Cr.P.C. statements of the appellants and after hearing the parties render a fresh Judgment. This process shall be completed within three months of the date of this order. This order along with the R&PS shall be sent by the office forth with to the ATC Court No.IV, Karachi for compliance.

8. Learned counsel for the complainant under instructions does not press his appeal against acquittal in respect of accused Faisal, which is hereby dismissed as withdrawn and as such the acquittal of Faisal will remain in field and he will not be subject to fresh trial. It is made clear that only the appellants Azhar and Irfan shall face the trial in this case. The Revision Application is also dismissed as infructuous.

9. The appeals against conviction, acquittal and revision application stand disposed of in the above terms.