

Not for reporting

S. 342 + S. 367(2) C.P.C Remand

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IN THE HIGH COURT OF SINDH AT KARACHI

Special Criminal AT Appeal No.05 of 2014
Special Crl. Ant Terr. Jail Appeal No.09 of 2014
Special Crl. Ant Terr. Jail Appeal No.10 of 2014
Special Crl. Ant Terr. Jail Appeal No.11 of 2014
Confirmation Case No.02 of 2014

Present:

Mr. Justice Naimatullah Phulpoto

Mr. Justice Mohammad Karim Khan Agha

Appellants:

1. Zafar Ali S/o. Adil Shah through Ajab Khan Khattak, Advocate.
2. Noor Muhammad Shah S/o. Muhammad Hussain through Khawaja Muhammad Azeem, Advocate.
3. Zahoor Khan S/o. Khan Badshah, through Syed Zakir Hussain, Advocate.
4. Zaheer Mirza S/o. Mawara Khan, through Mr. Khalid Ahmed Khan presently all confined in Central Prison, Karachi.

Complainant:

Mr. Shaukat Hayat and Mr. Abdul Hafeez Advocates.

Respondent/State:

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

Date of hearing:

16.01.2019, 07.02.2019, 13.02.19 and 18.02.2019.

Date of Judgment:

21.02.2019

JUDGMENT

MOHAMMAD KARIM KHAN AGHA, J.- Appellants Zafar Ali, Noor Muhammad Shah, Zahoor Khan and Zaheer Mirza were tried by learned Judge, Anti-Terrorism Court No.III, Karachi for offences under Sections 302/34 PPC R/w Section 6(2)(a) punishable u/s. 7(a) of ATA 1997 in Special Case No.07/2009 arising out of Crime No.32/2009 registered at P.S. Ferozabad, Karachi vide judgment dated 12.02.2014 whereby, the appellants were convicted under section 6(2)(a) punishable U/s. 7(a) ATA, 1997 R/w. section 302/34 PPC and awarded death sentence in four counts under section 302(b) PPC read with section 6/7 ATA and also ordered to forfeit the movable and immovable properties of all the accused with the Government (the impugned judgment). However, such convictions and sentences were subject to confirmation by this court.

2. The brief facts of the prosecution case are that complainant Haji Lal Khan in the FIR stated that his son Zainuddin and 3 others namely Mohammad Tahir, Ubaidullah and Mohammad Ibrahim left from Quetta on 27.12.2008 in the vehicle of Zainuddin which was driven by Zainuddin, and reached Karachi in the evening time where those in the vehicle had stayed on the backside of showroom of Haji Essa situated at Khalid Bin Waleed Road, known as Tawakal Motors. Haji Abdul Baseer was working as Chowkidar of residence of Haji Essa and Nazar Jan was working as cook. He further stated that his son Zainuddin left the residence of Haji Essa at 8.00 p.m on 30.12.2008 and told Abdul Baseer and Nazar Jan that they are going to Quetta the following day and will return to Tawakal motors after having dinner. As per Majeed and Nida Mohammad, who were also staying there as guests, Zainuddin and others returned in their vehicle after dinner and gave horn at the gate of Tawakal motors at about 0030 hours and as per the chowkidar when he got up to open the gate all of a sudden firing started, when at that time lights of the car and indicators were on and a police mobile was seen behind that car. They further disclosed that they went upstairs and saw endless firing on the car and then police personnel alighting from the police mobile and told Zainuddin, Mohammad Tahir and Mohammad Ibrahim to get down from their car. Zainuddin alighted from the car with his hands up. Ubaidullah sitting behind Zainuddin also alighted from the car and then there was firing as a result of which Zainuddin fell down and Ubaidullah hid himself by taking shelter behind two cars but the police came and fired straight and killed him; mostly firing hit the car. The police then registered a false and fabricated FIR to conceal their highhandedness. He further stated that thereafter he remained busy with funeral rituals for 10 days and after 10 days he reached Karachi he came to know that he was called by Honourable Supreme Court at Islamabad. He then went to Honourable Supreme Court Islamabad which had taken suo moto notice of this incident which initially according to the police version was the result of an encounter whereby the deceased were killed by the police in self defense, where he was told that his case would be proceeded in the ATC against the police for murder. He then lodged his FIR on 10.01.2009 at P.S. Ferozabad which was contrary to the original FIR lodged by the police on

the day of the incident which in essence stated that the police had fired upon and killed the deceased in self defense after an encounter.

3. After completing the investigation, the Investigation Officer submitted challan against the accused for trial according to law. The charge was read out to the accused to which they pleaded not guilty and claimed for trial.

4. To prove its case, the prosecution examined 21 prosecution witnesses and exhibited various documents and other recoveries. The statements of the accused u/s. 342 Cr.P.C. were recorded wherein they have denied the allegations of the prosecution and professed their innocence. None of the accused gave evidence under Oath but the accused called 3 DW's in their defense.

5. After assessing the available evidence on record the learned trial judge convicted and sentenced the accused as per the impugned judgment as set out earlier in this judgment hence these appeals

6. After the evidence and the impugned judgment were read out by learned counsel for the appellants and during the course of arguments by learned counsel for the appellants it was observed that the trial court has erred in sentencing and convicting the appellants (a) by relying on evidence which was not put to them during the course of their S.342 Cr.PC statements such as the medical evidence, the FSL report of the car of the deceased, the FSL report of the recovered weapons and weapons allegedly used by the accused that night; the chemical report on the blood stained clothes of the deceased and other pieces of evidence which the trial court used to convict the accused under the impugned judgment and (b) in awarding convictions to the appellants it appeared not to have recorded separate convictions in respect of each offense 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 certain pieces of evidence which the trial court had relied upon to convict the accused as mentioned above had not been put to the accused for their explanation whilst recording their S.342 Cr.PC statements and 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 recording the S.342 Cr.PC statements of the accused in accordance with the law and re writing the convictions and sentences in accordance with the law.

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

8. From the record, it is apparent that at least the pieces of evidence alluded to above which the trial court relied upon to convict the accused were not put to the accused for their explanation whilst recording their S.342 Cr.PC statements which material seems to have been put to the accused in a generalized manner rather than a specific manner which in our view is not sufficient for the purposes of S.342 Cr.PC whereby the accused must be given an opportunity to explain each and every piece of incriminating evidence which is relied upon by the trial court to convict him.

9. It is settled law that every piece of incriminating evidence which is used against the accused to form a part of his conviction must be put to him in his S.342 Cr.PC statement so that he may have the opportunity to explain the same otherwise it cannot be relied upon to convict him. In this respect reliance is placed on **Muhammed Shah V The State** (2010 SCMR 1009).

10. It is also 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. In this respect reliance is placed on the case of **Irfan V Muhammed Yousaf** (2016 SCMR 1190). For ease of reference the conviction and sentences in the impugned judgment read as under:-

"judgment dated 12.02.2014 whereby, the appellants were convicted under section 6(2)(a) punishable U/s. 7(a) ATA, 1997 R/w. section 302/34 PPC and awarded death sentence in four counts under section 302(b) PPC read with section 6/7 ATA and also ordered to forfeit the movable and immovable properties of all the accused with the Government"

11. 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 S.342 Cr.PC Statements of the appellants be re-recorded and each and every piece of evidence be put to them so that they may have the opportunity to explain the same and thereafter if the prosecution has proved it's case the convictions and sentences in the judgment be properly recorded in all respects in accordance with the relevant law within three months of receipt of the case and R&P's. As such, the confirmation reference is answered in the negative.

12. In view of the above all the appeals and confirmation reference are disposed of in the above terms. However before parting with this judgment we are constrained to observe that the incident took place in 2009 and the case is remanded back on the ground that the learned trial judge failed to record the statement of the accused u/s 342 Cr.PC in accordance with the law. The office is therefore directed to send a copy of this judgment to the learned trial judge, where ever he is now posted, so that he may be more careful in the future.