IN THE HIGH COURT OF SINDH, AT KARACHI

Present:
Mr. Justice Salahuddin Panhwar; and
Mr. Justice Khadim Hussain M. Shaikh

Spl. Crl. A.T.A. No.110 of 2016

Gul Zada son of
Sher Bahadur Khan. ... ... Appellant

Versus

The State. ... ... Respondent

Spl. Crl. A.T.A. No.111 of 2016

Gul Zada son of
Sher Bahadur Khan. ... ... Appellant

Versus

The State. ... ... Respondent

Spl. Crl. A.T.A. No.112 of 2016

Gul Zada son of
Sher Bahadur Khan. ... ... Appellant

Versus

The State. ... ... Respondent

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Appellant — Through Mr. Ajab Khan Khattak, Advocate

Respondent — Through Mr. Abrar Ali Kitchi, DPG

Dates of hearing — 12.10.2017

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JUDGMENT

Salahuddin Panhwar, J: Impugned in the above appeal is the judgment dated 31.03.2016, passed by the learned Anti-Terrorism Court No.X, Karachi, whereby the appellant was convicted and sentenced in three different crimes i.e. (i) FIR No.356 of 2015 under

Section 353, 324, 427, PPC read with Section 7 of ATA, 1997, (ii) FIR No.357 of 2015 under Section 4/5 of Explosive Act read with Section 7 of ATA, 1997 and (iii) FIR No.358 of 2015 under Section 23(i)A of Sindh Arms Act, 2013 registered with Police Station Saeedabad, Karachi through a common judgment.

2. The facts giving rise to these appeals, briefly stated, are that on 27.08.2015 complainant ASI Nazeer Hussain of P.S. Saeedabad alongwith his staff was busy in patrolling of the area in official mobile. It was about 0200 hours when reached at Dawood Goth, near Saeedabad Bridge, they saw a person in suspicious condition. The complainant party signaled him to stop, but to evade his arrest, he resorted to firing on police with his weapon with intention to kill. In retaliation, the police returned the fires in self defence and in that succeeded in causing his arrest. However, during exchange of fires, two bullets hit the police mobile. On query the culprit disclosed his name as Gul Zada. The police recovered one 30 bore TT Pistol loaded with magazine containing two live bullets and one bullet loaded in chamber from his right hand, which was unlicensed. On further search, the police recovered one ball cracker from the pocket of his qameez, hence he was arrested on the spot and then taken to Police Station Saeedabad, where three FIRs were lodged against him.

3. Consequent upon registration of cases, the investigation was followed and in due course the challan was submitted before the Court of competent jurisdiction.

4. At trial, the prosecution proved the charges against the appellant and ultimately he was convicted and sentenced in all the three crimes, hence these appeals.

5. Learned counsel for the appellant, after arguing at length and sticking strongly with non-availability of Section 7 of the Anti-Terrorism Act, 1997 contends that he would not press the instant appeals, if this Court considers quantum of sentences, awarded to the appellant as already undergone inasmuch as the appellant is a first offender and sole supporter of his family. He referred to Section 5 of the Explosive Act, 1908, which provides punishment upto 14 years but same does not limit lesser punishment, hence awarding maximum punishment is unjustified. He also referred Section 24 of the Sindh Arms Act, 2013 and contends that Section 23 is misapplied by police and offence, if any, falls within the meaning of Section 24, which provides maximum punishment of 10 years. Learned counsel lastly submits that, in view of the background of the matter, the case warrants reduction of sentence.

6. In contra, learned DPG contends that evidence is unimpeachable and maximum punishment is awarded by the trial Court, however, if the sentence is reduced, he would not oppose that proposition.

7. We have examined the material available on record with the assistance of learned counsel for the appellant and State.

8. It is necessary to mention here that awarding punishment is only meant to have a balance in the society because all the divine laws speak about hereafter. Thus, conceptually, punishment to an accused is awarded on the concept of retribution, deterrence or reformation so as to bring peace which could only be achieved either by keeping evils away (criminals inside jail) or strengthening the society by reforming the guilty. The law itself has categorized the offences. There are certain offences, the punishment whereof is with phrase “not less than” while

there are other which are with phrase "may extend upto" Such difference itself is indicative that the Courts have to appreciate certain circumstances before setting quantum of punishment in later case which appear to be dealing with those offences, the guilty whereof may be given an opportunity of "reformation" by awarding less punishment which how low-so-ever, may be, will be legal. The concept of reformation should be given much weight because conviction normally does not punish the guilty only but whole of his family/dependents too. A reformed person will not only be a better brick for society but may also be helpful for future by properly raising his dependents. The plea of reduction in sentence however shall not be available to hardened criminals, guilty of serious offences.

9. Now, we would proceed further. The Section 23(i)A of Sindh Arms Act, 2013 is prima facie not made out as recovery from the possession of the appeals falls within meaning of Section 24 of the Sindh Arms Act, 2013 which legal position is even not disputed by the learned APG when confronted. Thus, the sentence awarded to the appellant under Section 23(i)A of the Sindh Arms Act, 2013 is converted to one under Section 24 of the Act. The quantum whereof (sentence) to be set inter.

10. It is the case of the prosecution that the appellant was arrested in night time duly armed with pistol while ball cracker was also recovered from the pocket of his qameez but it was never proved by the prosecution that the alleged recovered articles were either used prior to alleged date of offence nor it is established that appellant was intending to use the same at subsequent date. In short, the prosecution though established recovery but failed to discharge its burden that such recovery was in fact an act of "terrorism" for which the object, design or purpose behind the said act (offence) is also to be established so as to

justify a conviction under Section 7 of the Anti-Terrorism Act, 1997. In this context, reliance can be placed on the case of *Kashif Ali v Judge, ATA Court No.II* (PLD 2016 SC 951, wherein it is held as under:-

> *"12..... In order to determine whether an offence falls within the ambit of Section 6 of the Act, it would be essential to have a glance over the allegations leveled in the FIR, the material collected by the investigating agency and the surrounding circumstances, depicting the commission of offence. Whether a particular act is an act of terrorism or not, the motivation, object, design or purpose behind the said act has to be seen. The term "design" which has given a wider scope to the jurisdiction of the Anti-Terrorism Courts excludes the intent or motive of the accused. In other words, the motive and intent have lost their relevance in a case under Section 6(2) of the Act. What is essential to attract the mischief of this Section is the object, for which the act is designed"*

11. Let us, be specific a little further. The appellant has been convicted under Section 353 & 324, PPC so also under Section 4 & 5 of the Explosive Substances Act read with Section 6(2)(cc) and Section 7(i)(ff) of the ATA, 1997 and also under Section 23(i)A of the Sindh Arms Act, 2013 directing all the sentences to run concurrently and extending the benefit of Section 382-B, Cr.P.C. Section 7(i)(ff) is the second part of Section 6(2)(ee), which reads as under:-

> *"6(2)(ee) involves use of explosives by any device including bomb blast(....)"*

12. If one is convicted for one offence i.e. "merely possessing explosive" twice i.e. one under Explosive Substances Act and under the Arms Act, it shall seriously prejudice the guarantee, provided by Article 13 of the Constitution, therefore, it would always be obligatory upon the prosecution to first establish "object" thereby bringing an act of possession explosive to be one within the meaning of second part of Section 6(2)(ee) of the Act, as held in the case of *Kashif Ali* supra. In absence whereof the punishment under Section 7(1)(ff) would not be legally justified particularly when accused is convicted independently

for such an act (offence) under Explosive Substances Act. In such circumstances, the conviction and sentence awarded to the appellant under Section 7(i)(ff) is hereby set-aside.

13. The maximum sentence that has been awarded to the appellant in all the three crimes is fourteen (14) under Section 5 of the Explosive Substances Act, which itself provides as "be punishable with imprisonment for a terms which may extend to fourteen (14) years", therefore, it was obligatory upon the trial Court to have appreciated the attending circumstances too while awarding maximum sentence which prima facie is not done. The appellant has pleaded himself to be a first offender which is not disputed by the prosecution and also claimed to be the only bread earner of his family. The detention of only bread earner shall compel the families to step-out for survival least bread which if result in bringing a slightest spot towards such helpless family shall ruin their lives.

14. Keeping in view, the phrase "may extend upto" and the circumstances explained herein above, we find it appropriate to reduce the sentence from fourteen (14) years to two (02) years for offence under Section 5 of the Explosive Act, 1908. Insofar as the punishment of seven (07) years for offence under Section 23(i)(A) of the Sindh Arms Act is concerned, the same is converted to one under Section 24 of the Act and is reduced to two (02) years. However, the sentence awarded under Section 353 & 324, PPC shall remain intact. The jail authorities be informed accordingly.

15. With the above directions, the appeals in hand stand disposed of.

JUDGE

JUDGE

Sajid