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ORDER-SHEET
IN THE HIGH COURT OF SINDH, CIRCUIT COURT LARKANA
Crl: Jail Appeal No: D- 54 of 2015.

Date of hearing	Order with signature of Judge
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**Before: Mr. Zafar Ahmed Rajput-J &
Mr. Muhammad Iqbal Mahar-J.**

07th September 2016.

M/S. Shuhab Sarki and Mr. Asif Ali Abdul Razak
Soomro, Advocates for the appellant.
Mr. Muhammad Hanif Noonari Advocate for
complainant.
Mr. Khadim Hussain Khooharo, DPG.

JUDGMENT

Muhammad Iqbal Mahar J:- This appeal is directed against judgment dated 29.05.2015, passed by learned District and Sessions Judge/Judge Anti-terrorism, Court Sukkur in special case No.129 of 2009, arising out of FIR No.146/2002, P.S Thull, whereby the appellant and other accused were convicted and sentenced as under:-

1. For offence U/S 148 PPC to suffer R.I for three years.
2. For offence U/S 302(b) PPC r/w section 149 PPC to suffer R.I for life on two counts.
3. For offence U/S 324 r/w section 149 PPC to suffer R.I for 10 years and to pay fine of Rs.5000/- each and in case of default he shall suffer S.I for three months more.
4. For offence U/S 353 PPC r/w section 149 PPC to suffer R.I for two years.
5. For offence U/S 337-A(i) r/w section 149 PPC to suffer R.I for two years with fine of Rs.3000/ each and daman which shall be paid to the victims.

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6. For offence U/S 337-F(i)r/w section 149 PPC to suffer R.I for one year with fine of Rs.2000/ each as daman which shall be paid to the victims.
7. For offence U/S 337-F(iii) r/w section 149 PPC to suffer RI for three years with fine of Rs.5000/- each and daman which shall be paid to the victims.
8. For offence U/S 7 (A) of ATA 1997 to suffer RI for life.
9. Present accused/appellant was also liable to pay compensation of Rs.50,000/- each to legal heirs of both deceased and in case of default, they shall suffer SI for two years more.

2. The facts in nutshell are that on 03.11.2002 brothers of complainant namely Molan Dostain and Khuda Bux went to the house of complainant Faqeer Muhammad and after taking supper went to sleep along with family members. At about 0130 hours, complainant woke-up and saw on bulb light and identified accused Sardar Zulfiqar(appellant), Budho, Master Manzoor, Baboo, Ali Nawaz, Rato having Kalashnikovs, Thabo, Abdul Rehman, and Bakht having rocket launchers, Moulo, Phuloo Jafri, Ismail, Mohammad Bux, Phuloo Hejwani Bugti, Hadsoo, Ghulam Muhammad, Qadir Bux, Rustam, Bhaloo, Abdul Rehman Sarki armed with Kalashnikovs and four unidentified persons with open faces armed with Kalashnikovs who would be identified on seeing again. Accused Zulfiqar challenged the complainant that he had murdered his guard, namely, Mazaar Sarki therefore, he would not be spared. Meanwhile, his brothers Moulam Dostain and Khuda Bux woke up and saw and identified the accused. It is alleged that accused Zulfiqar, Budho and Manzoor Sarki fired at complainant but he saved himself by falling down and fires hit his son Muqem who fell down by raising cries. In the meantime the other accused persons started firing upon his family members and the accused having rocket launchers targeted his house. On firing reports SHO Azizullah Channa, HC Allah Dino, HC Wajahuddin, PC Ghulam

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Abbas, PC Rahib Jakhro and PC Mehrab Dool went running there but the accused persons seeing them started firing upon them with intention to kill. The police party took position and returned the firing which continued for half an hour but accused persons went away by taking advantage of darkness of the night. The complainant party found Muqem, little daughter Rasheeda sustaining injuries and lying dead. They also found Abdul Hakeem, Shafique, Bashiran and Mst. Dur Bibi, wife of complainant, sustaining injuries and bleeding. The complainant left his brothers over dead bodies and himself removed the injured persons to Police Station where he lodged the FIR. The police after usual investigation submitted interim challan in the Court of law wherein the appellant was shown as absconder.

3. The learned counsel for the appellant submitted that after re-investigation final challan was submitted by SHO on 21.5.2003 stating therein that the case has been re-investigated on the orders of the Government of Sindh Home Department in which the appellant was found innocent and his name was placed in Column No: 2 of the Challan and consequently the Govt: of Sindh withdrew the prosecution against the appellant vide letter No: SO (J-11) 2-53/2003, dated 3-1-2004 and subsequently the learned Public Prosecutor filed an application u/s 494 Cr.P.C which was allowed by learned Trial Court vide order dated 26.1.2004 discharging his name from the case. He further submitted that the discharge order of the appellant was challenged in CrI. Rev: Appl: No D- 19/2004 before this Court which was withdrawn by the learned counsel for complainant on 20.5.2008. On 24.10,2013 learned ADPP filed an application u/s 227 Cr.P.C for alteration of Charge whereupon an erroneous order dated 30-11-2013 was passed and word "discharged" was substituted with word "absconder" in the charge, hence the appellant was included in the judgment and was sentenced in absentia to suffer imprisonment for life. He also contended that Section 21 -L of the ATA, 1997,

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provides punishment for an absconder but the maximum imprisonment in case of abscondance/ conviction in absentia is ten years or with fine or with both while the learned trial Court has not properly appreciated this section and has convicted the appellant which is totally against the spirit of law, therefore he prayed for the setting aside the impugned Judgment.

4. On the other hand learned D.P.G assisted by learned counsel for the complainant conceded to the arguments of learned counsel for appellant and tendered their no objection to the acquittal of the appellant.

5. Heard the arguments of learned counsel for the parties, learned DPG and perused the record minutely.

6. Perusal of record reflects that the name of appellant was placed in Column No: 2 of the final challan received by learned trial Court on 22.5.2003 from Administrative Judge. Thereafter, an application u/s 494 Cr.P.C was filed by learned Public Prosecutor for the withdrawing of the name of appellant from the prosecution. The learned trial Court after issuing the Notice to complainant and hearing him allowed the public prosecutor to withdraw from the prosecution of accused Sardar Zulfiqar Ali Sarki vide order dated 26.1.2004, which is reproduced as under:

"Hence for my above stated reasons, while respectfully relying upon above authorities, I allow the public prosecutor to withdraw from the prosecution of accused Sardar Zulfiqar Ali Sarki for the offences with which he is tried by this Court. As yet charge has not been framed, I, therefore, discharge accused Sardar Zulfiqar Ali in respect of above mentioned offences. Case against the remaining accused will be proceeded in accordance with the law. Resultantly, application is allowed".

M. Blaker

7. The record further reveals that the learned counsel for the complainant challenged the above order in CrI: Revision Application No: D-19/2004 before this Court but said Rev: Appl: was subsequently not pressed and therefore, the same was disposed of vide order dated 20.5.2008. Operative part of the order is reproduced as under:

"Learned counsel for the applicant/complainant, after making some arguments, does not press the revision as, according to him, he intends to request the Court to join the respondent No: 1 as accused after some evidence comes on record against him.

In view of his such statement, the revision stands disposed of."

Thereafter learned ADPP filed application u/s 227 Cr.P.C on 24.10.2010 without waiting for recording of evidence and the learned trial Court passed the following order:-

"In view of the above, the learned ADPP has rightly pointed out that proceedings against accused Zulfiqar Sarki was not let of but accused was declared as proclaimed offender by this Court. Accordingly the office is directed that for the word "discharged" the word "absconder" shall be substituted with red ink.

Accordingly the instant application is disposed of."

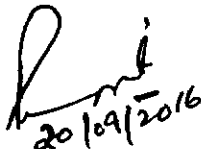
8. It is apparent that the learned trial Court without going through the record of the case, amended the charge showing the appellant as absconder instead of "Discharged", in existence of earlier order of discharge passed by the predecessor of the learned Presiding Officer, which attained finality up to this Court as the Revision filed against said order before this Court was withdrawn by the learned counsel for the complainant by stating that he intends to request the Court to join the respondent No:1 (appellant) as accused after some evidence comes on record against him but as per record neither evidence was recorded before learned trial Court, nor any application was moved by complainant under Section 193 Cr.P.C. for the joining of the appellant as accused in the proceedings

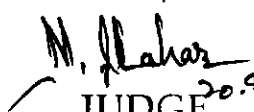
M. Akbar

in any way but the learned Special Judge without going through the record allowed the application of learned ADPP, amended the charge and proceeded the case and convicted the appellant in absentia. We are of the firm view that the learned Presiding Officer was not competent to sit over the order passed by his predecessor without any fresh material, therefore, not only his trial in absentia but conviction awarded to him is also against the law as the learned Public Prosecutor was allowed to withdraw from the prosecution of appellant. He was discharged and he was not accused before the trial Court at the time of announcement of judgment.

9. The instant appeal was allowed and the appellant was acquitted by our short order dated 07.9.2016, his bail bond was cancelled and surety discharged and above are the reasons of our short order.

10. M.A. No.2138/2015 stands dismissed being infructuous.


20/09/2016
JUDGE


JUDGE 20.9.16.

S.Ashfaq