ORDER SHEET

IN THE HIGH COURT OF SINDH AT KARACHI

SPL. CR. A.T. JAIL APPEAL NO.65/2023

Date Order with signature of Judge

BEFORE: MR. JUSTICE SALAHUDDIN PANHWAR, &
MR. JUSTICE ADNAN-UL-KARIM MEMON

For hearing of case.

04.12.2024

Mr. Muhammad Arshad Tariq advocate for appellant.
Mr. Abrar Ali Khichi, APG.

O R D E R

Salahuddin Panhwar, J: Appellant has challenged impugned consolidated judgment dated 22.03.2023 passed in (1) amalgamated S.C. No.51/2023 *(arising out of FIR No.1242/2022, under section 324, 353, 186, 34 PPC read with section 7 of the ATA 1997, Police Station Zaman Town)*, whereby the appellant having been convicted, sentenced to suffer as under:-

a. U/s 324 PPC, R.I. for ten years and fine of Rs.50,000/- in default of payment whereof to further suffer R.I. for four months.
b. U/s. 353 PPC, R.I. for two years.
c. U/s. 7(h) ATA 1997, R.I. for ten years and fine of Rs.50,000/- in default of payment whereof to further suffer R.I. for six months.

With direction that sentences to fun concurrently, with benefit of section 382-B Cr.P.C.

and (2) amalgamated SC No.51-A/2023 *(arising out of FIR No.1243/2022, under section 23(i)A of S.A.A 2013, Police Station Zaman Town)*, whereby the appellant having been convicted, sentenced to suffer R.I. for seven years and fine of Rs.20,000/- and in case of default of payment, to further suffer R.I. for two months.

2. Precisely, relevant facts are that complainant alongwith police party while being busy in patrolling the area, saw two suspected persons on a motorcycle, police signaled them to stop but they turned their motorcycle and started to make direct firing over the police with their respective weapons to deter the police from performing their duty and creating obstruction and also to kill them, in retaliation police party also made firing in their defence,

resultantly one of the accused received firearm injury and fell down while his companion fled-away; injured accused was apprehended; he disclosed his name as Shahzad Ali; on his personal search one pistol of 30 bore in black colour alongwith magazine containing four live bullets was recovered for which he could not produce any licence; after necessary proceedings, FIR was lodged. After full dressed trial, trial court found him guilty as aforesaid.

3. Since Mr. Iftikhar Ahmed advocate was appointed as counsel for pauper appellant, however, Mr. Muhammad Arshad Tanoli advocate subsequently, filed his Vakalatnama on behalf of the appellant. Accordingly, order dated 18.12.2023 is modified and services of Mr. Iftikhar Ahmed advocate are hereby withdrawn.

4. At the outset learned counsel for the appellant contended that on same mushirnama two cases were registered against appellant, one case under section under section 324, 353, 186, 34 PPC read with section 7 of the ATA 1997 and another one under section 23(i)A of the Sindh Arms Act, 2013, there is violate of section 103 CrPC; case does not fall within section 7 of ATA 1997 as injuries were not sustained by complainant but by appellant, impugned judgment is based on misreading and non-reading of facts, therefore, is not maintainable.

5. In contra, learned APG contends that appellant was arrested on the spot; provisions of ATA 1997 do apply in present case as convict opened fire on police and then arrested in injured condition when faced retaliation from police party, a police official is as good witness as any private witness is, that appellant was rightly convicted in both cases based on testimony of witnesses as the offences committed by appellant were proved; that appellant is also booked in another FIR under section 23(i)A AAA 2013 registered in the year 2016.

6 At this juncture, learned counsel for the appellant contends that has served for more than two years and fine months including remission, he is sole bread earner for his family. Learned counsel for the appellant agreed for reduction of sentence to the one already undergone in view of case reported in 2018 P.Cr.L.J. 959

(Suneil vs. the State). Learned APG extended his no objection regarding reduction of sentence.

7. ***Quantum of punishment*** is an independent aspect of Criminal Administration of Justice which, *too,* requires to be done keeping the concept of ***punishment*** in view. Therefore, reference to lodgment of other case in determining ***questions*** of guilt / innocence or *even* punishment would be of no significance.

8. At this juncture, it would be conducive to refer paragraphs 6 and 7 of aforesaid judgment, which are that:-

> "6. As per prosecution case, the Appellant was arrested in the night time with the allegation that he was possessing pistol and riffle grenade but it was never proved by prosecution that such allegedly 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 never established 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 Act. Reliance can safely be placed on the case of *Kashif Ali v. Judge, ATA Court No.II* PLD *2016 SC 951* wherein it is held as:-
>
> > "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 of 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 motives 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."

Let us, be *specific* a little further. The Appellant has been convicted under Section 5 of Explosive Substances Act so also under 7 subsection (1)(ff) of Anti-Terrorism Act, 1997 i.e. second part of section 6(2)(ee) which reads as:

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

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 prosecution by *first* establish '<u>object</u>' thereby bringing an act of 'possessing explosive' to be one within meaning of second part of section 6(2)(ee) of the Act as held in the case of <u>*Kashif Ali*</u> supra in absence whereof the punishment under Section 7(1)(ff) would not be legally justified particularly when accused is convicted independently for such act (offence) under Explosive Substance Act. In such circumstances, the conviction awarded against the Appellant under Section 7(i)(f) is hereby set aside.

7. The Appellant has been convicted for fourteen (14) years for offences, punishable under Section 5 of Explosive Substances Act, 1908 which itself provides as **'be punishable with imprisonment for a term which may extend to (fourteen 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 first offender which the *prosecution* did not dispute; and also claimed to be the *only* bread earner of family, which includes five sisters. The *detention* of only bread earner shall compel the *females* to step-out for survival least bread which it result in bringing a *slightest* spot towards such *helpless* ladies shall ruin their lives."

9. Since, the offences wherein the appellant has been convicted fall within category of offences ***'may extend upto'*** ; the appellant claims himself to be sole bread earner; these are circumstances which justify reduction in sentence.

10. In view of above, it would be in the interest of justice to reduce the sentence awarded to appellant to already undergone. Accordingly, conviction is maintained but sentence is reduced to one already undergone by the appellant including fine. Appellant shall be released forthwith if not required in any other custody case.

J U D G E

J U D G E

IK