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IN THE HIGH COURT OF SINDH AT
KARACHI

Present:

Mr. Justice Mohammad Karim Khan Agha
Mr. Justice Khadim Hussain Tunio,

SPL. CR. A.T. JAIL APPEAL NO.72 OF 2019

Appellant:

1) Ali Hassan Magsi @ Akbar son
of Raheem Bux.
2) Umar Baloch Magsi son of
Mehboob Khan through
Muhammad Farooq, Advocate

Respondent:

The State through Mr.
Muhammad Iqbal Awan,
Additional Prosecutor General,
Sindh.

Date of Hearing:

03.03.2022

Date of Announcement:

10.03.2022

JUDGMENT

Mohammad Karim Khan Agha, J. Appellants Ali Hassan Magsi @ Akbar son of Raheem Bux and Umar Baloch Magsi son of Mehboob Khan were charge sheeted to face their trial in Special Case No.70(vii)/2018 arising out of FIR No. 185 of 2017 under section 392/397/302/34 PPC r/w section 7 of ATA 1997 registered at PS Sachal and appellant Umar Baloch Khan was also charged sheeted in another Special Case No.70-A(vii)/2018 arising out of FIR No. 228 of 2017 under section 23(1) (a) of Sindh Arms Act, 2013 registered at PS Sachal, Karachi. Appellants were convicted vide impugned judgment dated 28.02.2019 passed by the learned Judge, Anti-Terrorism Court No.VII, Karachi/Judicial Complex at Central Prison, Karachi, whereby the accused persons were convicted and sentenced as under:-

- (i) Accused Ali Hassan Magsi alias Akbar s/o Raheem Bukhsh alias Hussain Bukhsh was convicted for the offence under section 392/34 PPC and sentenced him to suffer R.I. for ten years and to pay fine amount of

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Rs.10000/- (Ten Thousand) in case of default he shall suffer S.I. for two months.

- (ii) Accused namely Umar Baloch Magsi S/o Mehboob Khan was convicted for the offence under section 392/34 PPC and sentenced him to suffer R.I. for ten years and to pay fine amount of Rs.10,000/- (Ten Thousand), in case of default he shall suffer S.I. for two months.
- (iii) Accused Ali Hassan Magsi alias Akbar s/o Raheem Bukhsh alias Hussain Bukhsh was convicted for the offence under section 302/34 PPC and sentenced him to suffer R.I. for life and to pay fine amount of Rs.5,00,000/- (Five Lacs) in case of default he shall suffer S.I. for two years.
- (iv) Accused Umar Baloch Magsi S/o Mehboob Khan was convicted for the offence under section 302/34 PPC and sentenced him to suffer R.I. for life and to pay fine amount of Rs.5,00,000/- (Five Lacs) in case of default he shall suffer S.I. for two years.
- (v) Accused Ali Hassan Magsi alias Akbar s/o Raheem Bukhsh alias Hussain Bukhsh was convicted for the offence punishable under section 7(a) of Anti-Terrorism Act, 1997 and sentenced him to suffer R.I. for life and forfeiture of his movable and immovable properties and to pay fine amount of Rs.5,00,000/- (Five Lacs) in case of default he shall suffer S.I. for two years.
- (vi) Accused Umar Baloch Magsi S/o Mehboob Khan was convicted for the offence punishable under section 7(a) of Anti-Terrorism Act, 1997 and sentenced him to suffer R.I. for life and forfeiture of his movable and immovable properties and to pay fine amount of Rs.5,00,000/- (Five Lacs) in case of default he shall suffer S.I. for two years.
- (vii) Accused Umar Baloch Magsi S/o Mehboob Khan was convicted for the offence punishable under section 23(i)(a) of Sindh Arms Act, 2013 and sentenced him to suffer R.I. for seven years and to pay fine amount of Rs.10,000/- (Ten Thousand), in case of default he shall suffer S.I. for six month years.

The sentences on both accounts were ordered to run concurrently. Accused persons were also extended benefit of section 382-B Cr.P.C.

2. The brief facts of the prosecution case as narrated in the FIR are that on 06.04.2017 complainant Sohail Akhtar along with his friends Moeen

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Akhtar and Abdul Salam left the house in car bearing registration No.ARN-313 Cultus and were going towards Paradise Bakery for taking tea. In the meantime, Sarfaraz Ali and Arshad Hayat were also coming on their motorcycle to Paradise Bakery for taking tea with them. According to the complainant, he stopped his car near Islami Bank ATM, wherefrom, he withdrew Rs.1000/- and sat in the rear seat of the Cultus car. In the meantime, two persons arrived on a Bike and directed them to handover the withdrawn money from the ATM, to which they snatched Rs.1000/-, mobile phone (Samsung) from complainant, besides snatching mobile phone and purse from his friends Moeen Akhtar and Abdul Salam. They further directed them to sit in the car and not to follow them. When, however, accused sat on the Bike, Moeen started the car and hit them on the bike from behind on which both the accused alighted from the Bike and started firing from both sides upon the car. In the firing Moeen Akhtar and Abdul Salam received injuries on their person while the complainant, saved himself by bending down. The accused after firing made their escape good by leaving their bike at the scene. In the meantime, Sarfaraz Ali and Arshad Hayat also arrived there, shifted both the injured to Patel Hospital, where from they were shifted to Agha Khan Hospital, but succumbed to their injuries on the way to hospital. After necessary formalities at hospital, complainant lodged instant FIR.

3. After usual investigation the matters were challaned and both the appellants were sent up to face trial. They both pleaded not guilty to the charge and claimed trial.

4. The prosecution in order to prove its case examined 13 PWs and exhibited various documents. The statement of accused persons were recorded under Section 342 Cr.P.C in which they denied all the allegations leveled against them and claimed false implication. The accused neither examined themselves on oath nor produced any DW in support of their defence case.

5. After hearing the parties and appreciating the evidence on record the trial court convicted the appellants and sentenced them as set out earlier in this judgment. Hence, the appellants have filed these appeals against conviction.

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6. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the impugned judgment dated 28.02.2019 passed by the trial court and, therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

7. Learned counsel for the appellants has contended that there was a delay of two days in lodging the FIR which gave the complainant time to cook up a false case against the appellants and as such the complainant's story as per FIR could not be relied upon; that the so called sole eye witness was in fact not present at the time of the shooting and was a put up witness; that the eye witnesses identification of the accused before an identification parade was of no legal value as the identification parade was a joint one; that the incident itself was doubtful as there was no bullet marks on the car and only broken glass; that there was no independent mashir for the mashirnama's as required under S.103 Cr.PC; that the recovery of the pistol and allegedly robbed items had been foisted on the accused by the police; that this case did not fall within the purview of the ATA and that for any or all of the above reasons the appellants by being extended the benefit of the doubt should be acquitted of the charge. In support of his contentions, he placed reliance on the cases of *Ihsan Ullah and others v. The State and others* (2021 P.Cr.LJ 1470), *Muhammad Imran and others v. The State* (2021 YLR 95), *Mian Sohail Ahmed and others v. The State and others* (2019 SCMR 956), *Gulfam and another v. The State* (2017 SCMR 1189), *Muhammad Rashid and another v. The State* (2022 YLR 119) and *Ahmad Omar Sheikh and 3 others v. Government of Sindh and 6 others* (2022 YLR 217).

8. On the other hand learned Additional Prosecutor General Sindh has fully supported the impugned judgment and in particular contended that the delay in lodging the FIR had been fully explained as the body of the deceased had to be moved to their native village of Chitral for burial and thereafter the FIR was lodged; that the sole eye witness correctly identified the appellants and that his evidence could be safely relied upon; that the appellants were already in jail having been arrested on the spot in a similar kind of case which showed their propensity to commit such crimes; that the medical evidence supported the prosecution case; that recovery of pistol and robbed items on pointation of the appellants fully

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implicated them in this case as did the recovery of the car, bike, empties and blood recovered at the scene and a positive FSL report in respect of the recovered pistol with the recovered empties; that the case fell squarely within the purview of the ATA and as such the prosecution had proven its case against the appellants beyond a reasonable doubt and as such their appeals should be dismissed. In support of his contentions, he placed reliance on the cases of *Abdul Majeed v. The State* (2008 SCMR 1,28), *Muhammad Idress and others v. The State* (2008 SCMR 1544), *Muhammad Nadeem alias Deemi v. The State* (2011 SCMR 872), *Muhammad Ashraf and others v. The State* (2010 SCMR 407), *Muhammad Ilyas and others v. The State* (2011 SCMR 460), *Muhammad Yaqoob v. The State* (2021 SCMR 1387), *Ali Bux and others v. The State* (2018 SCMR 354), *Atta-ur-Rehman and another v. The State* (2018 SCMR 372), *Muhammad Farhan alias Irfan v. The State* (2021 SCMR 488) and *Muhammad Zaman v. The State* (2007 SCMR 813).

9. We have heard the arguments of the learned counsel for the appellants as well as learned Additional Prosecutor General and have gone through the entire evidence which has been read out by learned counsel for the appellants, and the impugned judgment with the able assistance of learned counsel and have considered the relevant law including the case-laws cited at the bar.

10. Based on our reassessment of the evidence of the PW's, especially PW 1 eye witness Sohail Akhtar (the complainant) and the other prosecution witnesses especially the medical evidence and other medical reports including the post mortem reports of the deceased, recovery of empties and blood stained earth at the crime scene as well as the car in which the deceased were travelling in and the motor bike driven by the assailants we find that the prosecution has proved beyond a reasonable doubt that Sohail Akhtar, Moeen and Abdul Salam were robbed and pursuant to that robbery Moeen and Abdul Salam (collectively referred to as the deceased) were shot and murdered by firearm on 06.04.2016 at about 2310 hours at Paradise Bakery Road opposite Islami Bank Karachi.

11. The only question left before us therefore is who robbed the complainant and the deceased and murdered the deceased by firearm at the said time, date and location?

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12. After our reassessment of the evidence we find that the prosecution has proved beyond a reasonable doubt the charge against the appellants for which they were convicted for the following reasons keeping in view that each criminal case must be decided on its own particular facts and circumstances;

(a) That the FIR was lodged after a delay of two days. The reason for the delay in lodging the FIR was that the injured had to be shifted to hospital whereupon they died, then post mortem had to be carried out before the bodies were released for burial in Gilgit which is a considerable distance from Karachi and after the funeral the FIR was lodged. As such the delay in lodging the FIR has been explained. Importantly the FIR is against unknown persons and as such there was no attempt to falsely implicate the accused or any other body or else the accused would have been specifically named in the FIR. Furthermore, the complainant had no enmity with the accused and had no reason to falsely implicate them and as such we find that the delay in lodging the FIR is not fatal to the prosecution case as the delay has been explained, the accused were not nominated in the FIR and as such the delay in filing the FIR has not benefited the prosecution or prejudiced the accused. In this respect reliance is placed on **Muhammad Nadeem alias Deemi v. The State** (2011 SCMR 872)

(b) We find that the prosecution's case primarily rests on the sole eye witness to the robbery and murder of the deceased and in particular his correct identification of the appellants as the persons who robbed and murdered the deceased whose evidence we shall consider in detail below;

(i) Eye witness PW 1 Sohail Akhtar. He is the complainant. In his evidence he states that on 06.04.2017 he along with his friends Moeen and Abdul Salam went to paradise bakery to have a cup of tea at about 11 to 11.30pm in the car owned by Moeen. That two other friends Sarfraz and Arshad were also coming behind them to the paradise bakery on motor bike. En route to the bakery Moeen stopped his car at the ATM and he (the eye witness) alighted and withdrew RS1000 to pay for the tea. He got back in the car where Moeen and Abdul Salam were sitting on the main road in between Bank Al-Islami and the ATM when a motor bike came on which two persons were sitting. Moeen and Abdul Salam were sitting on the front seats of the car whilst he was sitting on the back seat. One accused opened his door and asked him to hand over the money which he had taken from the ATM and loaded his chamber which he handed over along with his phone, purse and some documents. That person also took a phone and purse from Moeen who showed a little resistance who was warned that if he did not hand over the purse he would be shot. They took the mobile phone from Abdul Salam and told them to remain in the car and not to drive unless signaled by them. They remained in the car and

the accused also remained present. Then Moeen started the car and a push was given to the bike on the backside due to which the accused fell down. The accused then came to the car and fired upon them from both sides. Abdul Salam received a bullet injury to his forehead and Moeen received bullet injuries in his abdomen and throat. He saved himself by bending down and taking shelter behind the seats. The accused fired on the car for two to three minutes and Abdul Salam received two bullet injuries and Moeen received three to four bullet injuries. When the firing stopped he raised his head and saw the two accused running away having left their motor bike behind. Sarfraz and Arshad then arrived and the injured Abdul Salam and Moeen were taken to hospital where they were pronounced dead on arrival.

This eye witness lived close to the deceased and was a friend of the deceased and was not a chance witness as is corroborated by PW Sarfraz and Arshad. He saw the appellants from close range at the time he and the deceased were robbed by the appellants which would have taken a few minutes, he saw the accused whilst he and the deceased were sitting in the car from close range, he saw them when Moeen drove into the back of their motor bike, he saw them when they opened fire on their car murdering the deceased which firing went on for a couple of minutes. All of this took place from close range. At least two witnesses (PW 10 Nisar Ahmed and PW 12 Niaz Hussain) have deposed that there was street lights at the time. The car lights would also have been on as well as light surrounding the ATM and those in their shops who looked up after the incident out of fear. The appellant's faces were uncovered and thus this eye witness would have been able to get a good clear unobstructed view of them over a reasonable period of time. He recorded his FIR within 48 hours of the incident where he gave a brief hulia of the appellants and stated they he could recognize them by face if he saw them again. He had no enmity with the appellants and thus had no reason to implicate them in a false case and hence he did not name them in his FIR. PW's Sarfraz and Arshad are also named in the FIR as following the car as they were also going to have tea with them and arrived at the scene and helped in taking the deceased to hospital.

He appeared before an identification parade on 05.05.2017 which was less than one month after the incident and picked out both the appellants with a specific role 7 days after their arrest. Although it seems that the identification parade was not carried out strictly in accordance with the law in that it was a joint identification parade and thus we are put to caution as to its legal validity. The slight delay (7 days) in holding the identification parade is not of much consequence and in this respect reliance is placed on the case of *Muhammad Zaman v. The State* (2007 SCMR 813). The factum of the eyewitness picking out the appellants at the identification parade with the specific role of shooting the

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deceased is corroborated by PW 8 Ali Bux Mashori who was the Judicial Magistrate who carried out the identification parade along with his memo of identification.

There are no material improvements in his evidence from his earlier FIR. That he gave his evidence in a natural and straightforward manner and was not dented despite a lengthy cross examination. He is not related to the deceased being only a friend.

Thus, for the reasons mentioned above, whilst being on caution, we find the evidence of the eyewitness to be reliable, trustworthy and confidence inspiring and we believe the same especially with regard to the correct identification of the appellants as the persons who shot and murdered the deceased and can convict on the evidence of this eye witness alone though it would be of assistance by way of caution if there is some corroborative/ supportive evidence. In this respect reliance is placed on the case of **Muhammad Ehsan v. The State** (2006 SCMR 1857). As also found in the cases of **Farooq Khan v. The State** (2008 SCMR 917) and **Niaz-ud-Din and another v. The State and another** (2011 SCMR 725). That what is of significance is the quality of the evidence and not its quantity and in this case we find the evidence of this sole eye witness to be of good quality.

Thus, based on our believing the evidence of the PW eyewitness especially in terms of him correctly identifying the appellants as the persons who robbed and murdered the deceased what other supportive/corroborative material is there against the appellants? It being noted that corroboration is only a rule of caution and not a rule of law. In this respect reliance is placed on the case of **Muhammad Waris v The State** (2008 SCMR 784)

(c) That PW 2 Sarfraz and PW 3 Arshad who are both named in the FIR as following the car of the deceased in order to have a cup of tea with the deceased at paradise bakery both gave evidence to this effect as well as the fact that they saw the accused running away almost immediately after the firing incident and assisted the complainant take the deceased to hospital. They gave their S.161 Cr.PC statements within two days of the incident which they did not improve on in their evidence. They are not related to the deceased or the complainant and they had no reason to falsely implicate the appellants in this case who they did not know and had no enmity with. They both gave their evidence in a straightforward and natural manner and were not dented at all during cross examination and as such we believe their evidence in so far as it corroborates the eye witness evidence of the complainant except in respect of the actual shooting which they did not witness. Their truthfulness is enhanced by the fact that they did not claim that they saw the shooting from close range or could recognize the appellants which they could easily have done if they were put up witnesses.

(d) That the medical evidence of PW 6 Ali Raza and medical reports as discussed above fully support the eye-witness/prosecution evidence. It confirms that both the deceased were brought to hospital suffering from multiple firearm injuries and expired on account of those injuries. Significantly mild blackening was seen on the forehead injury to Abdul Salam which ties in with the appellants returning to the car and firing at close range (hence the eye witness sitting in the car was able to get a good look at them). The fact that most of the injuries were not on the legs but other vital upper parts of the body also supports the prosecution evidence that the shots were fired whilst the deceased were sitting in the car as their legs would have been shielded by the car.

(e) That the car was recovered from the spot which had blood stains inside which lead to a positive chemical report and also had glass inside it from broken windows which also supports the prosecution case.

(f) Logically as the appellants had been knocked off their bike they could not escape on it and had to run away on foot. The bike which was left behind was found to belong to the brother of appellant Umer Baloch who had not reported it missing. The recovery of the bike at the scene therefore provides a direct link to appellant Umer Baloch being present at the crime scene.

(g) That appellant Umer Baloch lead the police to the pistol on his own pointation which he had hidden in a place which the police would not know about. Notably the empties recovered at the scene were sent for FSL before the pistol was recovered and sent to FSL yet the FSL report revealed that the empties recovered at the scene had been fired from the pistol which once again links appellant Umer Baloch's presence directly to the scene of the murder and shows that the empties matching the pistol were not managed in any way.

(h) That the appellant Ali Hasan on his own pointation took the police to the place where they had hidden the items which had been stolen from the deceased including deceased Abdul Salam's mobile phone which provides a direct link to the presence of appellant Ali Hassan to the robbery and murder scene.

(i) Most of the relevant police entries have been exhibited concerning dacoity and shooting and place of burial which fully support the prosecution's case.

(j) That the police PW's had no enmity or ill will towards the appellants and had no reason to falsely implicate them in this case for example by foisting a pistol or stolen items on them and in such circumstances it has been held that the evidence of the police PW's can be fully relied upon and as such we

rely on the police evidence. In this respect reliance is placed on **Mushtaq Ahmed V The State** (2020 SCMR 474).

(k) That all the PW's are consistent in their evidence and even if there are some contradictions in their evidence we consider these contradictions as minor in nature and not material and certainly not of such materiality so as to effect the prosecution case and the conviction of the appellants. In this respect reliance is placed on the cases of **Zakir Khan V State** (1995 SCMR 1793) and **Khadim Hussain v. The State** (PLD 2010 Supreme Court 669). The evidence of the PW's provides a believable corroborated unbroken chain of events from the complainant and his friends and other PW's driving to have tea at the paradise bakery to the complainant stopping to get some cash from an ATM to the appellants robbing the complainant and the deceased to the deceased Moeen driving at the appellants bike to the appellants then firing upon the car and murdering the deceased to the deceased being taken to hospital to the appellants being identified by the eye witness to the appellants respectively leading the police on their pointation to the unlicensed pistol used in the murders which lead to a positive FSL report with the empties recovered at the scene to the recovery of the robbed items on the pointation of the other appellant.

(l) That the appellants were already under arrest in a similar type case which indicates that they had a propensity to commit such like crimes.

(m) Undoubtedly it is for the prosecution to prove its case against the accused beyond a reasonable doubt but we have also considered the defence case to see if it at all can raise doubt on or dent the prosecution case. The defence case is simply one of false implication by the police at the behest of the rangers as each of the appellants had been earlier detained by the rangers and fixed in this case. Neither of the appellants gave evidence on oath. Neither of the appellants produced any DW in support of his defence case nor produced any document whereby any family member or neighbor or other person had complained to any authority regarding such illegal detention. Thus, for the reasons mentioned above we disbelieve the defense case as an afterthought in the face of a reliable, trust worthy and confidence inspiring eye witness and other corroborative /supportive evidence against the appellants which has not at all dented the prosecution case.

13. Thus, based on the above discussion especially in the face of reliable, trustworthy and confidence inspiring eyewitness evidence and other corroborative/supportive evidence mentioned above, we have no doubt that the prosecution has proved its case against the appellants beyond a reasonable doubt for the offences for which they has been convicted and hereby maintain their convictions and sentences except

with regard to the ATA offences for the reasons set out below.

14. We do **not** find that this case falls within the purview of the ATA as defined by a larger bench of the Supreme Court in the case of *Ghuilam Hussain V State* (PLD 2020 SC 61) where in essence for their to be an act of terrorism there had to be an object, intent, purpose and design to create terror on account of their act. Whether people were terrorized as a product of the act did not convert the act into one of terrorism nor the fact that it may have been of a particularly brutal nature. Based on the particular facts and circumstances of this case it appears that the initial intent of the appellants was to rob the deceased and the complainant which they did however after the robbery when the deceased rammed the appellants motor bike the appellants became furious with the deceased and opened fire on them with intent to kill them **but not** with the design, intent or purpose to create terror and as such all offences under the ATA are dismissed.

15. Before parting with this judgment we note that street crime in Karachi has reached alarming proportions and very often even the slightest resistance by a victim to a robbery of even a most trivial item usually leads to the culprit murdering the person who resisted in cold blood. In such type of cases **deterrent sentences** are fully justified and attracted to deter such acts in order to safe guard the public and enable the public to have confidence in the criminal justice system. For example, at one time when kidnapping for ransom became a major problem in Sindh the following finding was made by the Supreme Court in the case of *Dadullah and another v. The State* (2015 SCMR 856) as under;

"10. This Court in *Noor Muhammad v. State* (1999 SCMR 2722) has also adverted to this aspect of the matter and has observed as under:-

"However, we may observe that the people are losing faith in the dispensation of criminal justice by the ordinary criminal Courts for the reason that they either acquit the accused persons on technical grounds or take a lenient view in awarding sentence. It is high time that the Courts should realize that they owe duty to the legal heirs/relations of the victims and also to the society. Sentences awarded should be such which should act as a deterrent to the commission of offences".

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16. In this case the trial court has already taken a lenient view in sentencing the appellants and we summarize below the convictions and sentences which have been upheld in this judgment;

(i) Accused Ali Hassan Magsi alias Akbar s/o Raheem Bukhsh alias Hussain Bukhsh is convicted for the offence under section 392/34 PPC and sentenced to suffer R.I. for ten years and to pay fine amount of Rs.10000/- (Ten Thousand) in case of default he shall suffer S.I. for two months.

(ii) Accused namely Umar Baloch Magsi S/o Mehboob Khan is convicted for the offence under section 392/34 PPC and sentenced to suffer R.I. for ten years and to pay fine amount of Rs.10,000/- (Ten Thousand), in case of default he shall suffer S.I. for two months.

(iii) Accused Ali Hassan Magsi alias Akbar s/o Raheem Bukhsh alias Hussain Bukhsh is convicted for the offence under section 302/34 PPC and sentenced to suffer R.I. for life and to pay fine amount of Rs.5,00,000/- (Five Lacs) in case of default he shall suffer S.I. for two years.

(iv) Accused Umar Baloch Magsi S/o Mehboob Khan is convicted for the offence under section 302/34 PPC and sentenced him to suffer R.I. for life and to pay fine amount of Rs.5,00,000/- (Five Lacs) in case of default he shall suffer S.I. for two years.

(v) Accused Umar Baloch Magsi S/o Mehboob Khan is convicted for the offence punishable under section 23(i)(a) of Sindh Arms Act, 2013 and sentenced to suffer R.I. for seven years and to pay fine amount of Rs.10,000/- (Ten Thousand) in case of default he shall suffer S.I. for six month years.

All the sentences are ordered to run concurrently. The appellants are also extended the benefit of section 382-B Cr.P.C and any remissions available under the law.

17. The appeals are dismissed and the impugned judgment is upheld with the convictions and sentences handed down to the appellants being maintained except as modified in this judgment.

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