

Not for reporting

Separate

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Remark (a) S. 342 defect (b) sentence defect

## IN THE HIGH COURT OF SINDH AT KARACHI

Special Criminal AT Appeal No.36 of 2015

Special Criminal AT Appeal No.37 of 2015

Confirmation Case No.01 of 2015

### Present:

Mr. Justice Naimatullah Phulpoto

Mr. Justice Mohammad Karim Khan Agha

Appellants:

1. Mohsin Baloch S/o. Haji Hassan
2. Abid Kaloo S/o. Dur Muhammad, presently all confined in Central Prison, Karachi through M/s. Mushtaq Ahmed, Raja Hassan Nawaz & Ms. Samwra Hashmi, Advocates.

Respondent/State:

The State through Mr. Mohammad Iqbal Awan, Deputy Prosecutor General Sindh.

Date of hearing:

22.01.2019

Date of Judgment:

29.01.2019.

## J U D G M E N T

MOHAMMAD KARIM KHAN AGHA, J.- Appellants Mohsin Baloch and Abid Kaloo were tried by learned Judge, Anti-Terrorism Court No.IV, Karachi for trial of case crimes No.47 of 2012 U/s. 302/109/34 PPC r/w section 7 ATA 1997, P.S. Malir City, Karachi, Crime No.83 of 2012 u/s.353/324/302/324/34 PPC r/w section 7 ATA, 1997 and crime No.84 of 2012 u/s 13-(A) Arms Ordinance of P.S. Malir City, Karachi vide judgment dated 25.02.2015 convicted them for offences punishable U/s. 302/353/324/34 PPC and 13-A Arms Ordinance r/w section 7(a)(b)(h) & (i) of ATA 1997 and awarded death sentence to them and also convicted and sentenced accused Abid @ Kaloo ten years for an offence u/s. 324 PPC with fine of Rs.50,000/- and also convicted and sentenced him for five years with fine of Rs.20,000/- for offence under section 13-A of Arms Ordinance, 1965 (the impugned judgment). The sentences were ordered to run concurrently and in case of non-payment of fine accused Abid @ Kaloo was ordered to suffer S.I. for one month more. They were both ordered to be hanged by neck till their death subject to confirmation by this court.

4



2. Brief facts of the prosecution case are that on 24.03.2012, at 0845 hours Complainant Syed Kazim Raza lodged FIR No.47/2012, u/s. 302/109/34 PPC r/w section 7 ATA, 1997 at Malir City, Karachi, stating therein that on the day of incident he was available in his house while his father Syed Salahuddin Hyder and his brother Syed Ali Raza, advocates were going to Court in Rikshaw No.D-16865 at Ghazi Town Road, adjacent Bakra Piri, Near Speed Breaker where accused Mohsin Baloch and Abid @ Kaloo Baloch fired upon them at the instigation of deceased accused Fida @ Fidu Maliri and they were taken to Jinnah Hospital where they succumbed to their injuries and then complainant lodged F.I.R. Thereafter on 27.04.2012 at 2230 hours, I.O/Inspector Muhammad Ismail Lashari arrested accused Mohsin Baloch, who led the police party at the house of deceased accused Fida @ Fidu Maliri situated in Salar Village, where an encounter took place and during the encounter PC Pervez Iqbal, PC Khan Muhammad, PC Sabir Ali and Inspector Muhammad Ismail Lashari received bullet injuries and PC Pervez due to his injuries died. During the encounter the police arrested co-accused Abid @ Kaloo Baloch but other accomplices of accused managed to escape from the place of incident. Inspector Muhammad Ismail Lashari conducted the personal search of accused Abid @ Kaloo Baloch and recovered one Kalashnikov without license along with 20 live rounds. He was also arrested u/s 13-(A) Arms Ordinance and separate FIRs were registered against them.

3. After usual investigation challan was submitted before the trial court and the charge was framed against both accused to which they plead not guilty and claimed trial.

4. The prosecution in order to prove its case examined 14 PWs and tendered a number of exhibits in evidence.

5. Statements of accused were recorded u/s. 342 Cr.P.C. in which they have denied the allegations and claimed/professed their innocence. They have neither examined themselves on oath nor led any defence.

6. After a full blown trial the trial court convicted and sentenced the appellants as mentioned earlier in this judgment.

5



7. The facts of the case as well as evidence produced before the trial Court find an elaborate mention in the impugned judgment dated 25.02.2015 passed by the trial court, therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

8. During the reading of the evidence and the impugned judgment we 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 FSL Report, chemical report, recovery of Kalashnikov SMG from Abid and empties 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 in accordance with the law and re writing the convictions and sentences in accordance with the law.

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

10. From the record, it is apparent that at least the following pieces of evidence which the trial court relied upon to convict the accused being the FSL Report, chemical report, recovery of Kalashnikov SMG and empties were not put to the accused for their explanation whilst recording their S.342 statements.

11. 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. For



example in the case of **Muhammed Shah V The State** (2010 SCMR 1009) it was held as under at P.1015 at Para 11;

*"It is not out place to mention here that both the Courts below have relied upon the suggestion of the appellant made to the witnesses in the cross-examination for convicting him thereby using the evidence available on the record against him. It is important to note that all incriminating pieces of evidence, available on the record, are required to be put to the accused, as provided under section 342, Cr.P.C. in which the words used are "For the purpose of enabling the accused to explain any circumstances appearing in evidence against him" which clearly demonstrate that not only the circumstances appearing in the examination-in-chief are put to the accused but the circumstances appearing in cross-examination or re-examination are also required to be put to the accused, if they are against him, because the evidence means examination-in-chief, cross examination and re-examination, as provided under Article 132 read with Articles 2(c) and 71 of Qanun-e-Shahadat Order, 1984. The perusal of statement of the appellant, under section 342, Cr.P.C. reveals that the portion of the evidence which appeared in the cross-examination was not put to the accused in his statement under s.342 enabling him to explain the circumstances particularly when the same was abandoned by him. It is well-settled that if any piece of evidence is not put to the accused in his statement under section 342, Cr.P.C. then the same cannot be used against him for his conviction. In this case both the Courts below without realizing the legal position not only used the above portion of the evidence against him, but also convicted him on such piece of evidence, which cannot be sustained."*

12. 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 as the conviction and sentences read as under;

*"judgment dated 25.02.2015 convicted the accused under section 265-H(ii) Cr.P.C. for offences punishable U/s. 302/353/324/34 PPC and 13-A Arms Ordinance r/w section 7(a)(b)(h) & (i) of ATA 1997 and awarded death sentence to them and also convicted and sentenced accused Abid @ Kaloo ten years for an offence u/s 324 PPC with fine of Rs.50,000/- and he is also convicted and sentenced for five years with fine of Rs.20,000/- for offence under section 13-A of Arms Ordinance, 1965".*

13. In this respect reliance is placed on the case of **Irfan V Muhammed Yousaf** (2016 SCMR 1190) which held as under at P.1191.

4



*"In terms of section 367, Cr.P.C. it was mandatory for the Court to record separate conviction and sentence for each offence. It could neither be construed nor was it permissible to hold that the accused persons were impliedly sentenced under section 7(a) of Anti-Terrorism act, 1997. Such legal aspect of vital importance, conveniently escaped from the notice of the Trial Court and the High Court. Both the offences under sections 302 and 404, P.P.C. were compoundable and when the State/prosecution had not taken any exception to the legal error, so committed by the Trial Court and thereafter by the High Court in the first round of litigation then, at present belated stage of compromise before the Supreme Court, it could not agitate that the necessary modification be made in the conviction and sentences of the accused persons and they be further convicted and sentenced under section 7(a), Anti-Terrorism Act, 1997, as well, because the matter was not past and closed transaction and could not be re-opened".(bold added)*

14. 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 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 both 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 two months of receipt of the case and R&P's. As such, the confirmation reference is answered in the negative.

15. In view of the above all the appeals and confirmation reference are disposed of in the above terms.