ORDER SHEET

IN THE HIGH COURT OF SINDH AT KARACHI

SPL CR. AT APPEAL NO.42/2018

Date	Order with signature of Judge

18.09.2019

Mr. Muhammad Nadeem Khan advocate alongwith Mr. Irfan Aziz advocate
Mr. Hussain Bukhsh Baloch, Addl. P.G.

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Appellant Fahim Ali has challenged impugned judgment dated 26.01.2018 passed in Special Case No.470(vii).2015 arising out of FIR No.281/2013, u/s 353, 324, 34 PPC read with section 3/4 Explosive Substance Act read with section 7 ATA PS Soldier Bazar, the appellant was convicted for offence u/s 7(b) ATA and sentenced him to suffer R.I. for ten years and to pay fine of Rs.5000/-in case of default to suffer S.I. for two months more and also u/s 7(n) of ATA and sentenced him to suffer R.I. or five years and to pay fine of Rs.10,000/- and in case of default to suffer S.I. for two months more.

2. Precisely, relevant facts are that complainant received spy information that accused persons are proceeding towards soldier Bazar in a car, on such information police party proceeded towards pointed place where saw that that specified car was parked opposite Pepsi sales depot shop where four culprits found going towards the shop who on seeing police party made direct firing upon them with intention to commit their murder and started running towards Nazarat road, complainant informed this position to another police mobile and also chased them, one culprit picked hand grenade and threw to police party which exploded near that culprit who died at the spot, other one accused made his escape good away after leaving his repeater gun; out of two other accused persons one was injured and succumbed to the injured whereas the other one made his scape good in injured condition. After full dressed trial, trial court found the appellant/accused Fahim Ali guilty as aforesaid.

3. At the outset learned counsel for the appellant contended that learned trial court misread the evidence came on record as well did not appreciated the evidence brought on record, therefore

impugned judgment is illegal, based on misappropriation of facts and having no value in the eyes of law, hence liable to be set aside.

4. In contra, learned APG contends that impugned judgment is just and proper where allegations against present appellant were proved beyond shadow of doubt

5. At this juncture, learned counsel for the appellant contends that appellant is a young boy and has served for more than 6 years one month and 17 days 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 DPG extended his no objection regarding reduction of sentence.

6. ***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 (s) in determining ***questions*** of guilt / innocence or *even* punishment would be of no significance.

7. 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:-
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> > "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 'object' 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 *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 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."

8. 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; appellant is of young age; these are circumstances which justify reduction in sentence.

9. 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.

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