

# HIGH COURT OF SINDH AT KARACHI

Special Criminal Anti-Terrorism Jail Appeal No.83 of 2017  
Confirmation Case No.03 of 2016

## Present

Mr. Justice Naimatullah Phulpoto  
Mr. Justice Mohammad Karim Khan Agha

Date of Hearing : 10.04.2019  
Date of Judgment : 19.04.2019  
Appellant : Muhammad Ismail through Mr. Khaleeq Ahmed Advocate.  
Respondent : The State through Mr. Mohammad Iqbal Awan Deputy Prosecutor General.

## JUDGMENT

NAIMATULLAH PHULPOTO, J.- Muhammad Ismail appellant was tried by Mr. Anand Ram D. Sairani, Judge, Anti-Terrorism Court No.IV Karachi (Special Case Nos. A-16 and A-17 of 2013). After full-dressed trial, vide judgment dated 17.03.2015, appellant was convicted under sections 302/324/337-A(III), 337-F(VI) PPC read with Section 7(a)(b)& (c) Anti-Terrorism Act, 1997 and sentenced to death. Appellant was also convicted under Section 13(d) Arms Ordinance, 1965 and sentenced to 05 years R.I and to pay fine of Rs.100,000/-. In case of default in payment of fine, he was ordered to suffer one year R.I. Trial Court has made reference under Section 374 Cr.P.C for confirmation of death sentence.

2. Brief facts of the prosecution case as narrated by the complainant in his evidence at trial are that on 19.02.2013 he was available in Masjid Rehmania situated in Moeenabad No.1 Landhi Malir, Karachi for prayers. When at 1840 hours, he heard fire reports, he came out from the Mosque and saw his nephew Arshad Khan who was coming to mosque while closing his shop, on the way accused Ismail fired upon him with pistol. His nephew rushed in the house of Nabi in order to save his life. Accused Ismail followed him in the house and accused again fired at his nephew, which hit him on his abdomen and on right leg. His nephew died at the spot. Thereafter, accused ran away. Complainant was



informed that prior to committing murder of his nephew, accused had committed murder of Siddique Kaprewala Memon at his shop and injured P.Ws Muhammad Ali and Taufiq. It was further informed that accused Ismail also committed murder of Shahjehan Sabziwala in presence of PWs Sardar, Abdur Rehman and Waqar. Deceased and injured persons were brought at Hospital where the postmortem examinations of the deceased were conducted and injured were admitted for treatment. Statement of complainant was recorded under Section 154 Cr.P.C book vide Crime No.46/2013 under sections 302/324/337-A(III)... 337F(III), 337-F(VI) PPC read with Section 7 Anti-Terrorism Act, 1997 registered at P.S Sharfi Goth.

3. During investigation, accused was arrested on 20.02.2013 at 3:30 am from his house by Inspector Rao Tahir. From the possession of accused a pistol loaded with six live bullets was recovered. Accused failed to produce the license of the pistol. Inspector prepared such Mashirnama of arrest and recovery in presence of mashirs. Accused and pistol were brought at police station Sharafi Goth, where FIR bearing Crime No. 47/2013 under section 13(d) Arms Ordinance, 1965 was also registered against accused on behalf of state.

4. SIO/SIP Abdul Wasay Jokhio inspected the place of Wardat and secured empties and blood stained earth such mashirnama was prepared in presence of mashirs. SIO also recorded statements of P.Ws. u/s 161 Cr.P.C I.O sent clothes of deceased persons to chemical examiner and also sent recovered pistol along with empties to the ballistic expert for expert report.

5. After usual investigation, challan was submitted against accused Muhammad Ismail under above referred sections.

6. Learned Trial Court amalgamated the aforesaid cases for joint trial, in terms of Section 21-M of Anti-Terrorism Act, 1997.

7. Trial Court framed Charge against accused at Ex. 4 under the above referred sections. Accused pleaded not guilty and claimed his trial.



8. At the trial, prosecution examined P.W-1 Complainant Afzal Khan at Ex.6, P.W-02 Attaur Rehman at Ex.7, P.W-03 Sardar at Ex.8, P.W-04 SIP Muhammad Ibrahim at Ex.09, P.W-05 Rayaitullah at Ex.11, P.W-06 SIP Rao Tahir Hussain at Ex.13, P.W-07 Dr. Jagdeesh Kumar Sr. MLO at Ex.14, P.W-08 Dr. Afzal Ahmed Sr. MLO at Ex.15, P.W-09 Hassan at Ex.16, P.W-10 Inspector Abdul Wasay Jokhio at Ex.17, who produced the relevant documents / reports before the Trial Court. Thereafter, prosecution closed its' side at Ex. 18.

9. Statement of accused was recorded under Section 342 Cr.P.C at Ex.18/A. Accused claimed his false implication in the present case and denied the prosecution allegations. Accused declined to give statement on oath in disproof of the prosecution allegations. No evidence has been led in defence.

10. Trial Court after hearing the learned counsel for the parties and assessment of evidence, by judgment dated 17.03.2015, convicted and sentenced the appellant as stated above. Being aggrieved and dissatisfied, the appellant has preferred this Jail Appeal on 28.03.2017. Since appeal is statutory right of the appellant, delay in filing of appeal is condoned.

11. Mr. Khaleeq Ahmed learned counsel for the appellant contended that there was eight hours delay in lodging of the FIR for which no plausible explanation has been furnished; that prosecution failed to produce two injured eye witnesses and non-examination of such material witnesses would be fatal to the case of the prosecution; that ocular evidence was materially contradicted with other pieces of evidence; that there was no medical evidence with regard to the deceased Muhammad Siddiq. It is further contended that recovery of the T.T pistol from the possession of the accused was highly doubtful as private mashirs did not support the case of prosecution; that positive report of the Ballistic Expert would not improve the case of the prosecution, for want of evidence of the safe custody and safe transmission of the weapon and empties to the Ballistic Expert. It is also argued that brutality has been displayed in the commission of the offence but prosecution has failed to prove any design or motive on the



part of the accused as contemplated by the provisions of Section 6(1)(b) or (c) of Anti-Terrorism Act, 1997, as such it is submitted that offence triable under Anti-Terrorism Act, 1997 has not been proved. He contended that prosecution has failed to prove motive and it is a mitigating circumstance for reducing the quantum of sentence if Court comes to the conclusion that case is proved against appellant. In support of the contentions, reliance has been placed upon the cases reported as **Abdul Jabbar and another vs. The State (2019 SCMR 129)**, **Riaz Ahmed vs. The State (2010 SCMR 846)**, **Khalid @ Khalidi and 2 others vs. The State (2012 SCMR 327)** & **Lal Khan vs. The State (2006 SCMR 1846)**.

12. Mr. Mohammad Iqbal Awan, learned Deputy Prosecutor General argued that incident had occurred in the evening time on 19.02.2013, appellant committed triple murders and caused injuries to others. The ocular evidence is corroborated by the medical evidence. Learned DPG argued that pistol recovered from the possession of the accused along with empties was sent to the Ballistic Expert and positive report was received. Learned D.P.G submitted that appellant displayed brutality at the time of incident, as such, case was rightly tried under the provisions of Anti-Terrorism Act, 1997. He has argued that prosecution has proved its' case. However, he concedes that real cause of occurrence was shrouded in mystry. Learned DPG prayed for dismissal of the appeal.

13. The fact that deceased Muhammad Arshad, Shah Jehan and Muhammad Siddiq died unnatural deaths by means of fire arm injuries, is not disputed by defense counsel so also fire arm injuries sustained by other members of the public. Now, we would discuss the evidence of the medical officers, who conducted the postmortem examination of deceased persons and examined the injured persons. P.W-8 Dr. Afzal Ahmed has deposed that on 19.02.2013, he was posted as Senior MLO at JPMC, Karachi, three dead bodies of Muhammad Arshad, Shah Jehan and Muhammad Siddiq were brought in the hospital by Inspector Muhammad Ramzan. Firstly, deceased Muhammad Arshad was on autopsy table, he examined and found following injuries on his person:-

- i) Fire arm wound of entry size 0.5 cm diameter at right side abdomen blackening negative margins inverted. Fire arm

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would of exit size. 1 cm in diameter at right lumbar region margins everted.

- ii) Fire arm would of entry size 0.5 cm in diameter expect left leg blackening negative margin inverted. Fire arm would of exit size 1 cm in oval shape at lateral expect of left leg.

Cause of death as disclosed by the Doctor was due to cardio respiratory failure due to hemorrhagic shock due to abdominal injury resulting from fire arm projectile.

14. From postmortem of deceased Shah Jehan, the Sr. MLO found the following injuries:

- i) Fire arm would of entry size 0.5 cm diameter at right side face blackening negative margin inverted. Fire arm would of exit size 1 cm in oval shape at left side neck margins everted.
- ii) Fire arm would of entry size 0.7 cm oval in shape blackening negative at right side chest interiorly margins inverted. Fire arm would of exit size 1 cm in diameter at posteriorly expect of right side chest margins everted. Fire arm gutter shape wound size 2 cm into 1 cm at right arm.

Cause of death as disclosed by the Doctor was due to cardio respiratory failure due to hemorrhagic shock due to neck and chest injuries resulting from fire arm projectile.

15. In the cross examination, the efficiency and integrity of the Doctor have not been questioned, therefore, we have no hesitation to hold that both the deceased died unnatural death as described by the medical officer.

16. However, it is very surprising to note here that though the postmortem of deceased Muhammad Siddiq was also conducted by Doctor Afzal Ahmed and the same is produced at Ex.15-C, but in his evidence he has not deposed a single word regarding unnatural death of deceased Muhammad Siddique.

17. So far as the ocular evidence is concerned, we firmly believe that it is prime duty of prosecution to prove its case against the accused beyond any shadow of doubt. Complainant Afzal has deposed that on 19.02.2013



incident took place in Moeenabad No.1, Landhi, Malir Karachi. It was 6:40 PM, when he was in Masjid Rehmania for offering prayers, he heard firing. He came out from mosque where many persons were also present and saw his nephew Arshad Khan, who was coming towards Mosque while closing his shop, on the way accused Ismail fired upon him with pistol. His nephew in order to save his life rushed into the house of Nabi situated in the Mohalla. He further deposed that accused Ismail chased his nephew in the house and again fired upon him with pistol which hit him on his abdomen and on right leg and his nephew died at the spot. Complainant further deposed that he also came to know that prior committing murder of his nephew, accused Ismail had also committed murders of Siddique Kaprewala Memon at his shop and Shah Jehan Sabziwala and also caused fire arm injuries to Muhammad Ali and Waqar. Thereafter, complainant got shifted the dead body at hospital. After conducting postmortem examination, dead bodies were handed over to legal heirs of deceased persons at night time. On the next morning at 5:00 AM, police inspected place of wardat with complainant and collected blood stained earth. Police also collected three empties of pistol in his presence. He further deposed that his statement u/s 154 Cr.P.C was recorded by the police at his house. Inspector Abdul Wasay Jokhio prepared mashirnama of wardat and recovery of empties in his presence. In cross examination, complainant denied the suggestion that accused had not committed murders of his nephew and other deceased persons Siddiq and Shah Jehan.

18. P.W-2 Attaur Rehman deposed that on 19.02.2013, he was available at the place of occurrence i.e. at the vegetable shop of deceased Shah Jehan. PWs Sardar and Waqar were accompanying him. At 6:35 PM, accused Ismail came there from street he was armed with pistol. As soon as accused reached at the spot, he made 03 fires upon deceased Shah Jehan who was standing at his vegetable shop. Thereafter, accused fled away from the scene of occurrence. He further deposed that on 20.02.2013, he along with P.W Sardar was available at the place of occurrence where Inspector Abdul Wasay Jokhio came along with his subordinate staff. P.W Attaur Rehman further deposed that he had shown place of occurrence to the Inspector, from where Inspector

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collected three empties of bullets and he also collected blood stained earth in presence of mashirs. The empties and blood stained earth were sealed at spot. In his cross-examination, he deposed that he did not see murders of other deceased persons at the hand of the accused.

19. P.W-3 Sardar has deposed that on 19.02.2013 he was standing at his shop at evening time. P.Ws Attaur Rehman and Waqar were also standing at their shops. In the meantime accused Ismail appeared from cloth market and took out pistol and opened 03 fires upon deceased Shah Jehan. Thereafter, accused ran away. P.W Sardar further deposed that accused was arrested by police on 20.02.2013 from his house in his presence and one unlicensed pistol with six rounds were recovered from him. Pistol was sealed in his presence. Police made him mashir of arrest and recovery. P.W further deposed that SIO inspected place of wardat where Shah Jehan was murdered in his presence and secured blood stained earth and 03 empties. The same were sealed and such Mashirnama was prepared in his presence. However, in his cross-examination, he deposed that he did not see the accused while causing fire arm injuries to Taufiq, Muhammad Ali and others.

20. P.W-5 Rayaitullah deposed that on 19.02.2013 he went to Rehmania Masjid for offering prayers where Arshad (now deceased), PWs Hassan and Rashid were also present. Present accused fired at Arshad out of mosque, however, Arshad in order to save his life ran to house of Nabi. The accused followed him and committed murder of deceased Arshad. Thereafter, deceased was shifted at hospital. P.W Rayaitullah came out of Mosque he came to know that accused had also committed murder of Shah Jehan. On 20.02.2013 at 5:00 am Inspector Jokhio came there where P.W Afzal Khan showed the place of occurrence. Inspector collected three empties and blood stained earth. The same were sealed in presence of the mashirs and their statements were recorded.

21. P.W-9 Hassan deposed that on 19.02.2013, he was going to Rehmania Masjid for offering prayers. PW Rohitullah, Rashid Khan and deceased Arshad were accompanied with him. In the meantime, accused Ismail came from a street and fired upon Arshad, who in order to save

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his life rushed into the house of Nabi. Accused Ismail followed him and made two fires on deceased Arshad at his abdomen and on his left leg. Arshad fell down. Accused ran away from the place of occurrence. He along with Rashid Khan, Adil Khan and Anwar Khan shifted Arshad to the hospital, who succumbed to injuries on the way to hospital.

22. P.W-4 SIP Muhammad Ramzan deposed that on 19.02.2013 he was duty officer at P.S Sharafi Goth. He received entry issued by MLO Jinnah Hospital Karachi at 8:20 PM regarding murder of one Arshad and two injured namely Taufiq and Muhammad Ali. He proceeded to JPMC and found that three dead bodies were lying in mortuary of the hospital, Deceased were Arshad, Shah Jehan and Siddique. He prepared separate inquest reports in presence of mashirs. He issued letters to MLO for ascertaining the cause of death of the deceased persons. He also referred injured Muhammad Taufiq and Muhammad Ali to medical officer for treatment and certificate. After conducting postmortem of three deceased persons, the police handed over dead bodies to their legal heirs. SIP further deposed that on 20.02.2013, he recorded statement of complainant Afzal Khan u/s 154 Cr.P.C and thereafter, he came back to police station where FIR No.46/2013 was registered u/s 302 read with section 7 Anti-Terrorism Act, 1997 against accused Ismail. He handed over statements, mashirnamas sealed parcels of clothes to the SIO for further investigation.

23. P.W-6 SIP Rao Tahir Hussain deposed that on 19.02.2013, he received spy information that present accused involved in Crime No.46/2013 was present at his house. He along with subordinate staff left police station and reached at Katchi Abadi and called two private persons namely Sardar and Rashid and entered into the house of accused. Police caught hold accused and recovered unlicensed pistol with six live bullets from his possession in presence of mashirs. Mashirnama of arrest and recovery was prepared at the spot. Case property was sealed. He came back at police station where FIR No.47/2013 u/s 13(d)Arms Ordinance was registered against accused on behalf of state. Thereafter, relevant documents were handed over to SIO Abdul Wasay who recorded his statement. I.O sent pistol and empties to expert and received positive report.

24. P.W-10 Inspector Abdul Wasay Jokhio deposed that on 20.02.2013, he was posted as Inspector/ SIO at PS Sharafi Goth. He started investigation of both the crimes. Complainant met him and pointed out the place of wardat where deceased Arshad Khan was murdered. He prepared memo of inspection in presence of Rashid Khan and Rayiat Khan and took photographs. He also recorded statements of P.Ws Rashid Khan, Rayait Khan and complainant Afzal Khan u/s 161 Cr.P.C. Thereafter, on the pointation of P.Ws Sardar and Attaur Rehman he inspected place of incident and collected three empties and blood stained earth. He sealed the empties and blood stained earth in presence of mashirs. Thereafter, he visited place of wardat where deceased Muhmmad Siddique was murdered, on the pointation of Zainulabdin and Asif and prepared such Mashirnama. He also collected four empties and sealed the same in presence of mashirs. He sent clothes of deceased to chemical examiner and pistol and empties to ballistic expert for reports.

25. From close scrutiny of the evidence, it transpires that P.W-01 Afzal and P.W-05 Rayaitullah have clearly deposed that on the day of incident at 6:40 pm appellant appeared at Moeenabad armed with pistol and fired upon Arshad. Arshad rushed in the house of Nabi in order to save himself but appellant followed him and again fired at Arshad which hit at his abdomen and right leg and he died at spot. P.W-02 Attaur Rehman and P.W-03 Sardar have deposed that on the day of incident at evening time, they were present at shop, appellant/accused appeared armed with pistol and fired at deceased Shah Jehan and he succumbed to the injuries. Medical evidence has provided full support to the ocular evidence furnished by above mentioned witnesses. Pistol and empties were sent to expert, ballistic report was positive (Ex.17-C). As regards unnatural death of deceased Muhammad Siddiq is concerned, no eye witness has deposed that appellant committed murder of deceased Muhammad Siddiq in their presence. Unfortunately, trial Court failed to undertake exhaustive analysis of the evidence available on record and came to the conclusion regarding guilt of the appellant having been established for all three deceased persons as well as injured persons. Upon our independent evaluation of the evidence, we have



come to the conclusion that appellant committed murders of deceased Shah Jehan and Arshad. However, prosecution has failed to prove charge of remaining deceased person namely Muhammad Siddiq against appellant. Prosecution has also failed to establish that appellant fired upon injured persons namely Muhammad Ali and Taufiq, mainly for the reasons that both injured witnesses have not been examined by prosecution at trial. In this case only it is mentioned in FIR that offence was committed by the accused for committing terror but no P.W has deposed that act of the accused was designed to chaos or overawe the Government, the public, destruction of public or community or create sense of fear or insecurity in society. The case in hand, despite brutality displayed by the appellant and the consequent horror, shock, fear and insecurity perpetrated by the offender, has not appeared to us to be a case of "terrorism" as motivation on the part of the appellant was not to overawe or intimidate the Government, etc. or to destabilize the society at large or to advance any sectarian cause etc. Therefore, conviction of the appellant under Section 7(a) of Anti-Terrorism Act, 1997 is not sustainable under the law. We are supported by the view taken by the Honourable Supreme Court in the case of **Waris Ali and 5 others vs. The State (2017 SCMR 1572)**.

26. We have particularly attended to the sentence of death passed against appellant and have noticed in that context that motive set up by the prosecution has not been established. According to FIR, appellant committed offence to create terror and insecurity but at trial prosecution failed to prove the motive as alleged in the FIR. Thus, the motive for commission of the offence has remained absolutely unproved. In a chain of case law, the view held is that normal penalty is death sentence for murder, however, once the Legislature has provided for awarding alternative sentence of life imprisonment, it would be difficult to hold that in all the cases of murder, the death penalty is a normal one and shall ordinarily be awarded. If the intent of the Legislature was to take away the discretion of the Court, then it would have omitted from clause (b) of section 302, P.P.C. the alternative sentence of life imprisonment. In this view of the matter, we have no hesitation to hold that the two sentences are alternative to one another, however, awarding one or the other sentence shall essentially depend upon the facts and circumstances

of each case. There may be multiple factors to award the death sentence for the offence of murder and equal number of factors would be there not to award the same but instead a life imprisonment. A single mitigating circumstance, available in a particular case, would be sufficient to put on guard the Judge not to award the penalty of death but life imprisonment.

27. We have come to the conclusion that appellant has committed the offence to the extent of murders of deceased Shah Jehan and Arshad, but his intention and or motive to commit such offence has remained shrouded in mystery and is therefore unproven. In such like cases where the motive is not proved or is not alleged by the prosecution, the Court for the sake of safe administration of justice, adopts caution and treats the lack of motive as a mitigating circumstance for reducing the quantum of sentence awarded to a convict. Reference is made to the case of **Amjad Shah vs. The State (PLD 2017 S.C 152)**, wherein the Honourable Supreme Court has held as under:

*“Notwithstanding that the participation of the appellant in the commission of offence is duly established, his intention, guilty mind or motive to commit the same remains shrouded in mystery and is therefore unproven. In such like cases where the motive is not proved or is not alleged by the prosecution, the Court for the sake of safe administration of justice, adopts caution and treats the lack of motive as a mitigating circumstance for reducing the quantum of sentence awarded to a convict. Reference is made to Zeeshan Afzal v. The State (2013 SCMR 1602).”*

28. In the case of **Mst. Nazia Anwar vs. The State and others (2018 SCMR 911)**, the Honourable Supreme Court has held as under:

*“4. I have particularly attended to the sentence of death passed against the appellant and have noticed in that context that the motive set up by the prosecution had remained far from being established. According to the FIR as well as the statement of the complainant the motive was based upon borrowing of a sum of Rs. 5,000/- by the appellant from the deceased and on the issue of repayment of that loan a heated exchange had taken place between the appellant and the deceased. Mst. Sadiqa Bibi complainant (PW2) was the only witness produced by the prosecution regarding the alleged motive but in her deposition made before the trial court the complainant had admitted that the appellant and the deceased were on very good and friendly terms, no date or time of borrowing of the relevant amount by the appellant from the deceased had been specified by the complainant, the complainant was not present when the money had been borrowed by the appellant from the deceased, no date, time or place of the altercation taking place between the appellant and the deceased over repayment of the borrowed amount had been specified by the*

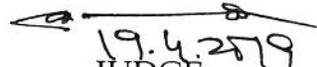
complainant and admittedly the complainant was not present when the said altercation had taken place. In these circumstances it is quite obvious to me that the motive asserted by the prosecution had remained utterly unproved. The law is settled by now that if the prosecution asserts a motive but fails to prove the same then such failure on the part of the prosecution may react against a sentence of death passed against a convict on the charge of murder and a reference in this respect may be made to the cases of Ahmad Nawaz v. The State (2011 SCMR 593), Iftikhar Mehmood and another v. Qaiser Iftikhar and others (2011 SCMR 1165), Muhammad Mumtaz v. The State and another (2012 SCMR 267), Muhammad Imran alias Asif v. The State (2013 SCMR 782), Sabir Hussain alias Sabri v. The State (2013 SCMR 1554), Zeeshan Afzal alias Shani and another v. The State and another (2013 SCMR 1602), Naveed alias Needu and others v. The State and others (2014 SCMR 1464), Muhammad Nadeem Waqas and another v. The State (2014 SCMR 1658), Muhammad Asif v. Muhammad Akhtar and others (2016 SCMR 2035) and Qaddan and others v. The State (2017 SCMR 148). After going through the entire record of the case from cover to cover and after attending to different aspects of this case I have found that although it is proved beyond doubt that the appellant was responsible for the murder of the deceased yet the story of the prosecution has many inherent obscurities ingrained therein. It is intriguing as to why the appellant would bring her four months old baby-boy to the spot and put the baby-boy on the floor and then start belabouring the deceased with a dagger in order to kill her. I have, thus, entertained no manner of doubt that the real cause of occurrence was something different which had been completely suppressed by both the parties to the case and that real cause of occurrence had remained shrouded in mystery. Such circumstances of this case have put me to caution in the matter of the appellant's sentence and in the peculiar circumstances of the case I have decided to withhold the sentence of death passed against the appellant."

29. We have also noticed that injured namely Muhammad Taufeeq and Muhammad Ali have also not been examined by the prosecution at trial. We have thus, entertained no manner of doubt that real cause of occurrence was something different which had been suppressed by the parties and that real cause of action has remained shrouded in mystery.

30. In the view of above circumstances, we are constrained to alter sentence of appellant from death to imprisonment for life on each count for the murders of deceased Shah Jehan and Arshad with direction that the appellant shall pay Rs.200,000/- each as compensation as provided under Section 544 Cr.P.C to the legal heirs of deceased Shah Jehan and Arshad. In case of default in payment of compensation, the appellant shall suffer six months S.I on each count. So far sentence of conviction under Section 13(d) Arms Ordinance, 1965 and fine are concerned, the same are maintained. All the sentences to run concurrently. Benefit of Section 382-B Cr.P.C is also extended to the appellant.

31. Special Criminal Anti-Terrorism Jail Appeal No. 83 of 2017 stands disposed of in the above terms and Confirmation Case No. 03 of 2016 is replied in negative for the reasons mentioned hereinabove.

  
JUDGE

  
19.4.2019  
JUDGE