

ORDER-SHEET
IN THE HIGH COURT OF SINDH, CIRCUIT COURT LARKANA

Crl: Jail Appeal No: D- 53 of 2015.

Date of hearing	Order with signature of Judge
1. For hearing of MA No.304 of 2016.	
2. For regular hearing.	

**Before: Mr. Zafar Ahmed Rajput-J &
Mr. Muhammad Iqbal Mahar-J.**

07th September 2016.

M/S. Safdar Ali G. Bhutto and Mr. Asif Ali Abdul Razak Soomro, Advocates for the appellant.
Mr. Muhammad Hanif Noonari Advocate for complainant.
Mr. Khadim Hussain Khooharo, DPG.

Muhammad Iqbal Mahar J:- This appeal is directed against judgment dated 29.05.2015, passed by learned District and Sessions Judge/Judge Anti-terrorism, Court Sukkur in special case No.129 of 2009, whereby the appellant and absconding accused were convicted and sentenced as under:-

1. For offence U/S 148 PPC to suffer R.I for three years.
2. For offence U/S 302(b) PPC r/w section 149 PPC to suffer R.I for life on two counts.
3. For offence U/S 324 r/w section 149 PPC to suffer R.I for 10 years and to pay fine of Rs.5000/- each and in case of default he shall suffer S.I for three months more.
4. For offence U/S 353 PPC r/w section 149 PPC to suffer R.I for two years.
5. For offence U/S 337-A(i) r/w section 149 PPC to suffer R.I for two years with fine of Rs.3000/ each and daman which shall be paid to the victims.
6. For offence U/S 337-F(i)r/w section 149 PPC to suffer RI for one year with fine of Rs.2000/ each as daman which shall be paid to the victims.
7. For offence U/S 337-F(iii) r/w section 149 PPC to suffer RI for three years with fine of Rs.5000/- each and daman which shall be paid to the victims.
8. For offence U/S 7 (A) of ATA 1997 to suffer RI for life.

9. Present accused/appellant was also liable to pay compensation of Rs.50,000/- each to legal heirs of both deceased and in case of default, they shall suffer SI for two years more.

2. The facts in nutshell are that on 03.11.2002 brothers of complainant namely Molan Dostain and Khuda Bux went to the house of complainant Faqeer Muhammad and after taking supper went to sleep alongwith family members. At about 0130 hours, complainant woke up and saw on bulb light and identified accused Sardar Zulfiqar, Budho, Master Manzoor (appellant), Baboo, Ali Nawaz, Rato having Kalashnikovs, Thabo, Abdul Rehman, and Bakht having rocket launchers, Moulo, Phuloo Jafri, Ismail, Mohammad Bux, Phuloo Hejwani Bugti, Hadsoo, Ghulam Muhammad, Qadir Bux, Rustam, Bhaloo, Abdul Rehman Sarki armed with Kalashnikovs and four unidentified persons with open faces armed with Kalashnikovs who will be identified on seeing again. Accused Zulfiqar challenged the complainant that he had murdered his guard namely Mazaar Sarki therefore, he would not be spared. Meanwhile, his brothers Moulam Dostain and Khuda Bux woke up and saw and identified the accused. It is alleged that accused Zulfiqar, Budho and Manzoor Sarki fired at complainant but he saved himself by falling down and fires hit his son Muqem who fell down by raising cries. In the meantime the other accused persons started firing upon his family members and the accused having rocket launchers targeted his house. On firing reports SHO Azizullah Channa, HC Allah Dino, HC Wajahuddin, PC Ghulam Abbas, PC Rahib Jakhro and PC Mehrab Dool went running there but the accused persons seeing them started firing upon them with intention to kill. The police party took position and returned the firing which continued for half an hour but accused persons went away by taking advantage of darkness of the night. The complainant party found Muqem, little daughter Rasheeda sustaining injuries and lying dead. They also found Abdul Hakeem, Shafique, Bashiran

and Mst. Dur Bibi, wife of complainant, sustaining injuries and bleeding. The complainant left his brothers over dead bodies and himself removed the injured persons to Police Station where he lodged the FIR.

3. The police after usual investigation submitted challan in the court. The learned trial court after completing formalities, framed the Charge as Ex.12, against accused Saeed Ahmed and Bhalo but after arrest of Master Manzoor, Qadir Bux and Muhammad Ismail amended the charge as Ex.19. The accused persons pleaded not guilty and claimed trial.

4. The prosecution in order to prove its case examined PW-1, SIP Muhammad Khan at Ex.26, he produced mashirnama of imaginary arrest of accused Qadir Bux and mashirnama of arrest of appellant Master Manzoor at Ex.26A and 26-B, PW-2, Mashir HC Palyo Khan at Ex.27, he produced mashirnama of arrest of accused Muhammad Ismail at Ex.27-A, PW-3 SHO, Ghulam Sarwar at Ex.29, he produced mashirnama imaginary arrest of accused Bhaloo at Ex.29-A, PW-4, PC Naseer Ahmed at Ex.30. PW-5, Inspector Azizullah at Ex.32, he produced copy of roznamcha entry at Ex.32-A. PW-6, PC Beyar Khan at Ex.33, he produced receipt of handing over the dead bodies at Ex.33-A. PW-7 complainant Faqeer Muhammad at Ex.35, he produced FIR at Ex.35-A, PW-8 Khuda Bux at Ex.36, he produced mashirnamas of dead bodies, inquest reports, at Ex.36-A to 36-E. PW-9, Arbab at Ex.38, he produced mashirnama of arrest of accused Saeed Ahmed and recovery of Kalashnikov at Ex.38-A and 38-B. PW-10, SHO Niaz Ahmed at Ex.39, PW-11, Dr. Assadullah at Ex.40, he produced Medical certificates of injured witnesses, postmortem reports of deceased at Ex.40-A to 40-I. PW-12, SHO Aijaz Ahmed at Ex.41, he produced letter to learned Magistrate for conducting identification parade, FIR No.02/2003, letter alongwith sketch at Ex.41-A to 41-D. PW 13-Mr. Ghulam Yaseen, Judicial Magistrate at

Ex.42, he produced memo of identification parade of accused Saeed Ahmed at Ex.42-A. The learned ADPP submitted statement alongwith ballistic report at Ex.43. Thereafter learned ADPP closed the side of prosecution vide statement at Ex.44. Statements of accused Saeed Ahmed, Bhalo, Master Manzoor, Muhammad Ismail were recorded under section 342 Cr.PC at Ex.45 to Ex.48, in which they denied the allegations leveled against them however, claimed their innocence. The accused persons intended to examine D.Ws, HC Allah Dino, PC Mehrab Dool and PC Ghulam Abbas Bijarani, they also intended to examine themselves on oath. Thereafter, accused Saeed Ahmed, Bhalo and Muhammad Ismail jumped the bail. The learned trial court after hearing the learned counsel for the parties and learned ADPP for the State passed the impugned judgment.

5. Learned counsel for the appellant after arguing at some length on merits, submitted that there is violation of section 16 of Anti-Terrorism Act, 1997, according to which the learned Special Judge was required to take oath before commencement of proceedings but in the instant case the learned Judge has not taken oath before commencement of the trial. He further submitted that further chief-examination of PW-Khuda Bux was reserved on the application of learned ADPP, later on he was re-called and re-affirmed but his further chief-in-examination was not recorded and he was directly cross-examined by the learned defence counsel. He also submitted that in statement of accused/appellant recorded under section 342 Cr.PC specific questions were put to appellant that:

Q. No.4. "Do you want to lead evidence in defence?"

Ans. "Yes, as given by co-accused Saeed".

Q. No.5. "Do you want to examine himself on oath?"

Ans. "Yes".

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But neither his statement on oath was recorded as required under section 340 (2) Cr.PC nor he was given chance to produce defence witnesses but after hearing the learned counsel for the parties the learned Special Judge passed impugned judgment. Therefore, he submitted that provisions of section 16 of Anti-Terrorism Act, 1997 and Section 340(2) Cr.PC were mandatory and non-compliance thereof vitiates proceedings, hence he would be satisfied and would not press the instant appeal on merits, though according to him he has good case for acquittal, if the case is remanded to the trial court for de-novo trial.

6. Learned D.P.G assisted by learned counsel for the complainant tendered their no objection to the above proposal.

7. Heard the arguments of learned counsel for the parties, learned DPG and perused the record.

8. Perusal of record reflects that the learned Special Judge, Anti-terrorism Court, before commencement of proceedings did not take oath which was mandatory requirement under section 16 of the Anti Terrorism Act, 1997. Furthermore, it was also duty of learned Special Judge to continue further chief-examination of PW Khuda Bux which was reserved on the application but the learned Special Judge did not care and allowed cross-examination to learned defence counsel. Apart from that it was also mandatory to examine the accused on oath as required under section 340(2) Cr.PC so also his witnesses, whose names have been given by him in his statement recorded under section 342 Cr.PC. Denial of said opportunity to accused amounted to denial of fair trial, which was not a mere irregularity but an illegality not curable under Section 537 Cr.P.C.

9. It is also noted that the learned Special Judge did not append certificate on statement of accused in his own hand writing as

required under mandatory provision of Section 364(2) Cr.P.C. so non compliance of Section 364(2) Cr.P.C. was also an irregularity.

10. These are the irregularities, which are not curable under section 537 Cr.P.C, therefore, by the consent of the learned counsel for the parties and learned DPG impugned judgment is set-aside and the case is remanded back to learned trial Court with directions to conduct de-novo trial by taking oath before commencement of proceedings and conclude the trial expeditiously, preferably with a period of three months. The perusal of judgment reveals that appellant Master Manzoor was on bail during trial and at the time of announcement of the impugned judgment he was taken into custody; as such he shall remain on bail subject to furnishing fresh affidavit of same surety or furnishing of fresh surety to the satisfaction of learned trial Court.

11. This criminal jail appeal stands disposed of in above terms.