

Remand PW's not re-recorded after
Charge amended

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IN THE HIGH COURT OF SINDH, KARACHI

Present:

Mr. Justice Mohammad Karim Khan Agha

Mr. Justice Zulfiqar Ali Sangi

SPECIAL CRL. A.T. JAIL APPEAL NO.34 OF 2021

SPECIAL CRL. A.T. JAIL APPEAL NO.35 OF 2021

Appellant

Akhtar Ali s/o Ghulam Haider
Fariro through Mr. Shamsuddin
Rajpar, Advocates.

Respondent

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

Complainant

Through M/s. Aamir Mansoob
Qureshi and Iftikhar Ahmed Shah,
Advocates

Date of Judgment

19:10:2022

JUDGMENT

Mohammad Karim Khan Agha, J:- The appellant Akhtar Ali was tried in Special Case No.26 of 2006 in respect of FIR No.46 of 2006 for an offence u/s.302/504/337-H(2)/34 PPC r/w Section 7 ATA, 1997 registered at PS Mehrabpur and Special Case No.28 of 2006 in respect of FIR No.50 of 2006 for an offence u/s.13-E Arms Ordinance registered at PS Mehrabpur by the Court of Anti-Terrorism Court No.II, Karachi and vide judgment dated 16.02.2021 the appellant was convicted u/s.302 of PPC as 'Taazir' as well as u/s.7(a) ATA for Imprisonment for life and fine of Rs.2,00,000/- and in case of default in payment he would have to undergo imprisonment for 06 months more. Appellant/accused was ordered to pay compensation for Rs.2,00,000/- to the legal heirs of the deceased u/s.514-A Cr.PC and 06 months imprisonment in case of failure. Appellant Akhter Ali Fariro was also convicted for offence u/s.13-E Arms Ordinance to 07 years R.I. Both the punishments were ordered to run concurrently.

2 The brief facts of the prosecution case as per FIR that on 12.05.2006 at 06:00 pm accused Khadim Hussain (now deceased) and Akhtar Ali armed with pistols along with absconding accused Atto @ Atta Hussain

Marri and Riaz Shah who were armed with Kalashnikov and pistol in furtherance of their common intention to kill Khadim Hussain and absconding accused who was armed with pistol fired at Muhammad Suleman brother of complainant in their Otaq who died as a result of firing. During the investigation accused Khadim Hussain (now deceased) and Akhter Ali were arrested, who then on 16.05.2006 at 1557 hours voluntarily led the police in presence of Mashirs each of them produced un-licensed 30 bore pistol along with magazine when number of pistol of Khadim Hussain (now deceased) was found rubbed and on pistol of Akhter Ali words "CAL 30 AMSUER MADE AS CHINA BY NO RINCO" were written and they produced the same from under mango garden and mango plant situated near house of accused Akhtar Fariro after digging the earth. They were therefore respectively booked for offence u/s.13-F Arms Ordinance and FIR No.49/2006 and 50/2006 respectively registered.

3. After usual investigation the case was challaned and the appellant was sent up for trial. He pleaded not guilty to the charge and claimed trial.

4. The prosecution in order to prove its case examined 13 Prosecution Witnesses and exhibited various documents and other items. The statement of accused was recorded under Section 342 Cr.P.C in which he denied all the allegations levelled against him and claimed false implication by the police. The appellant did not examine ^{himself} on oath nor produced any DW in his defence.

5. After hearing the parties and appreciating the evidence on record, the trial court convicted the appellant and sentenced him as set out earlier in this judgment; hence, the appellant has filed this appeal against his conviction.

6. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the impugned judgment dated 16.02.2021 passed by the trial court and, therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

7. At the very outset it was noted initially the appellant was only charged for an offence committed u/s. 6(2)(a) of Anti-Terrorism Act, 1997 u/w Section 302 and 34 PPC punishable under Section 7(a) ATA, 1997.

Thereafter 06 PWs evidence was recorded. After recording the evidence of 06 PWs an amended charge was framed on 13.04.2009 which also includes offence u/s.13-E of the Arms Ordinance. Both the learned counsel for the appellant and defence at that time signed a statement that there would be no need to recall any of the witnesses and record the evidence which they had already given. Such statement has highly been deprecated by the Supreme Court of Pakistan. Since when a charge is amended all the PWs should be recalled and re-recorded their evidence as failing to recall such witnesses might prejudice the accused. In this case in particular we noted that PW-6 Deen Muhammad, who was the Mashir of recovery of pistol, was not recalled to give evidence despite at that time when he gave evidence the accused was not charged with an offence under Arms Ordinance. When confronted with this proposition learned counsel for the appellant, learned Addl. Prosecutor General and learned counsel for the complainant, ^{6,} conceded that based on the above facts and circumstances this is a case of remand.

8. We are in agreement with the contentions of learned counsel for the appellant, learned Addl. Prosecutor General and learned counsel for the complainant, in this regard for the reasons mentioned earlier.

9. Accordingly the impugned judgment is set-aside and this case is remand back to the Anti-Terrorism Court No.II Karachi for the limited purpose of recalling and re-recording the evidence of PW-1 to PW-6 in the presence of defence counsel and re-record the Statement u/s. 342 Cr.PC of the accused and thereafter writing a fresh judgment in this case. The Anti-Terrorism Court No.II Karachi is directed to complete the trial within 03 months of the date of this order. Copy of this order shall be sent to Anti-Terrorism Court No.II Karachi alongwith R&P for compliance.

10. Above appeals stand disposed of in the above terms.