

IN THE HIGH COURT OF SINDH AT KARACHI

Special Criminal Anti-Terrorism Jail Appeal No.173 of 2015
Special Criminal Anti-Terrorism Jail Appeal No.174 of 2015
Confirmation Case No.02 of 2015

Present:

Mr. Justice Naimatullah Phulpoto

Mr. Justice Mohammad Karim Khan Agha

Appellants: Muhammad Nawaz son of Muhamamd Zareen
through Mr. Amjad Hussain, Advocate

Respondent: The State through Mr. Muhammad Iqbal
Awan Deputy Prosecutor General Sindh

Date of hearing: 22.10.2018

Date of announcement: 31.10.2018

J U D G M E N T

Mohammad Karim Khan Agha, J.-- Appellant Mohammad Nawaz S/o. Mohammad Zareen has preferred these appeals against the impugned judgment dated 03.07.2015 passed by the learned Special Judge Anti-Terrorism Court No.V, Karachi in Special Case No.A-114/2014, F.I.R. No.101/2014 U/s. 302, 324, 353, 393, 427 PPC R/w section 7 of ATA, 1997, registered at police station Sharafi Goth and Special Case No.A-115/2014, F.I.R. No.102/2014 U/s. 23(1)(a) of the Sindh Arms Act 2013 registered at police station Sharafi Goth, whereby the appellant has been convicted and sentenced as under:-

- (i) The accused Mohammad Nawaz S/o. Mohammad Zareen is convicted for the offence under section 7(1) (a) of A.T.A. 1997 read with section 302/34 PPC and sentenced to death for causing death of Sub-Inspector Mohammad Ishaq and to pay fine of Rs.100, 000/- and compensation U/S 544/a Cr.P.C. Rs.100, 000/- payable to the legal heirs of the deceased SIP Mohammad Ishaq Abbasi and in default of payment of fine he shall further undergo S.I. for two years. The sentence of death shall not be executed unless confirmed by the Honourable High Court of Sindh u/s. 374 Cr.P.C.
- (ii) The accused Mohammad Nawaz S/o. Mohammad Zareen is also convicted for the offence under section 7(1) (c) of A.T.A. 1997 and sentenced to undergo R.I. for 10 years and to pay fine of Rs.50, 000/- and compensation U/S. 544-A Cr.P.C. Rs.50, 000/- payable to injured and in default of payment of fine he shall further undergo S.I. for one year.

- (iii) The accused Mohammad Nawaz S/o. Mohammad Zareen is also convicted for the offence u/s. 7(1)(h) of A.T.A. 1997 and sentenced to undergo R.I. for 05 years and to pay fine of Rs.50,000/- and in default of payment of fine he shall further undergo S.I. for six months.
- (iv) The accused Mohammad Nawaz S/o. Mohammad Zareen is convicted for the offence u/s. 23(1) (a) of the Sindh Arms Act, 2013 and sentenced to undergo R.I. for 14 years and to pay fine of Rs.50,000/- and in default of payment of fine he shall further undergo S.I. for one year.

2. The facts of the prosecution case are that on 01.04.2014 at about 1626 hours the appellant/accused Mohammad Nawaz S/o. Mohammad Zareen along with deceased accused Faizan S/o. Saleem tried to enter Apna bank situated at Future More Moeenabad No.2, District Malir, Karachi with intent to commit robbery along with weapons and made firing. The bank guard Anwar Saeed and SIP Mohammad Ishaq Abbasi sustained bullet injuries on account of such firing. P.C. Mohammad Fayyaz of P.S. Sharafi Goth who was deployed there, opened fire upon both the culprits and as a result both culprits sustained injuries and fell down. The manager of the bank Rehatullah Khan informed the police about this incident and SIP Rao Tahir with his police party arrived at the bank. SIP Rao Tahir found that on the road in front of the gate of the bank two persons were lying injured, whereas bank guard and SIP Mohammad Ishaq Abbasi were lying injured inside the bank gate. Injured constable Fayyaz was standing pointing a weapon at the culprits. Constable Fayyaz told the SIP that two culprits tried to enter the bank and when stopped by the bank guard and SIP Abbasi they fired at them who sustained bullet injuries. SIP Rao Tahir prepared memo of arrest of culprits and he took the injured culprits to JPMC and got them admitted in emergency ward. SIP Mohammad Ishaq Abbasi and bank guard Mohammad Anwar Saeed were also referred to the hospital for treatment. The condition of SIP Mohammad Ishaq Abbasi was critical and he was taken to Aga Khan hospital but he died from his injuries. SIP Rao Tahir completed formalities as required u/s 174 Cr.P.C. and brought the death body of Mohammad Ishaq Abbasi to JPMC and obtained the cause of death. He also recorded the statement of P.C. Fayyaz u/s 154 Cr.P.C. which was incorporated in FIR as Crime No./114/2014 u/s 302/353/324/393/427 PPC. He also registered two separate FIRs u/s 23(1) (a) of Sindh Arms Act being Crimes

No.102/2014 and 103/2014 against both the accused regarding recovery of weapons. Accused Faizan also died from his injuries.

3. The investigation as above was initially carried out by Inspector Abdul Salam Okarwi. It was later on transferred to Inspector Saleem Shah who completed the investigation and submitted the challan.

4. Charge was framed by the trial court on 20-08-2014 to which the accused pleaded not guilty and sought trial.

5. In order to prove its case the prosecution examined 9 PW's who exhibited various documents in support of the prosecution case where after the prosecution closed its side. The accused gave his statement under S.342 Cr.PC whereby he claimed his false implication in the case as he was simply a passer by when the incident took place. However, he did not examine himself on oath or call any witnesses in his defense. After hearing argument of the parties the learned trial court convicted and sentenced the accused as mentioned earlier. Hence, this appeal by the accused against the impugned judgment.

6. During the arguments of learned counsel for the appellant, the court pointedly asked him whether there was any legal defect in the impugned judgment in violation of section 367 Cr.PC and brought his attention to the fact that at typed page 13 Point 5 of the impugned judgment the accused had been sentenced as under:

(i) The accused Mohammad Nawaz S/o. Mohammad Zareen is convicted for the offence under section 7(1)(a) of A.T.A. 1997 read with section 302/34 PPC and sentenced to death for causing death of Sub-Inspector Mohammad Ishaq and to pay fine of Rs.100,000/- and compensation U/S 544/a Cr.P.C. Rs.100,000/- payable to the legal heirs of the deceased SIP Mohammad Ishaq Abbasi and in default of payment of fine he shall further undergo S.I. for two years. The sentence of death shall not be executed unless confirmed by the Honourable High Court of Sindh u/s. 374 Cr.P.C.

And whether or not the appellant should have been convicted and sentenced separately for offenses under S.7 (1) (a) ATA and S.302/34 PPC keeping in view that the appellant had been charged with both offenses and the fact that an offense under the ATA 1997 was non compoundable whereas an offense under S.302/34 PPC was compoundable based on the

dicta as laid down by the Hon'ble Supreme court in the case of **Irfan v. Mohammad Yousuf** (2016 SCMR 1190).

7. After considering the aforesaid judgment both learned counsel for the appellant and the DPG conceded that as a matter of law the trial court should have given a separate conviction and sentence in respect of **each** offense charged and that since the death penalty had been awarded "for offence under section 7(1)(a) of A.T.A. 1997 read with section 302/34 PPC" this had not been done as in effect one death penalty had been given for two separate offenses and as such this was a defect in the impugned judgment in violation of section 367 Cr.PC and they agreed that the case ought to be remanded back to the trial court on this ground alone for decision afresh as per spirit of section 367 Cr.PC.

8. In our view, it is the duty of this court to ensure that judgments are handed down strictly in accordance with the law and it is incumbent on this court to ensure that if any legal errors are found that they are not ignored **if they may cause prejudice to either party** and if such errors are curable appropriate steps are taken to rectify the same. As was held in the case of **Mohammed Mumtaz Qadri V the State** (PLD 2016 Supreme Court 17) it is the duty of the judges to decide a case in terms of their calling and vocation and in accordance with their oath of office in accordance with the law of the land as it exists and not as some may consider it should be.

9. In this respect it is worthwhile referring to the case of **Irfan** (Supra) whereby the trial court had convicted an accused under both the ATA 1997 and S.302 PPC but had only handed down one death sentence and the parties entered into a compromise. In that case both the trial court and the High Court had failed to notice this error in law and the Supreme Court allowed the trial court to deal with the compromise agreement despite a conviction under the ATA since this was a past and closed transaction but indicated that this point should have been addressed by the High Court in the following terms at page 1193 at para-6 which reads as under:-

"Under the provisions of section 367(2) and (3), Cr.P.C. it is mandatory for the Court that after finding the accused guilty of one or more offences, upon recording conviction, separate sentence must be clearly awarded to the accused so convicted

otherwise it would be illegal being in violation of the mandatory provisions cited above. In this case, no separate sentence was awarded to the appellants under section 7(a), A.T.A. by the Trial Court or the High Court, as explained above. This legal aspect of vital importance, conveniently escaped from the notice of the Trial Court and the learned High Court in the second round when the appellants were seeking acquittal on the basis of compromise under section 302(b), P.P.C. alone, because it cannot be construed nor it is permissible under the law to hold that the appellants were impliedly sentenced to imprisonment for life under section 7(a), A.T.A. as well. The provision of section 367, Cr.P.C. provides that the Court determine first the guilt of the accused and then to pass judgment of conviction where after the sentence shall follow.

Being inseparable and integral part of conviction, unless specifically awarded, it cannot be assumed to the prejudice of the accused that he/they were also sentenced under section 7(a), A.T.A. by applying the rule of implication because the law provides the passing of specific sentence for a distinct offence and if it is not awarded, it cannot be construed that same was impliedly awarded as the very judgment to that extent becomes illegal and violative of the mandatory provisions of subsections (2) and (3) of section 367, Cr.P.C" (bold added)

10. We have also noted that the charge has not set out a separate charge (Headwise) for each offense as required by law. However, since the failure to do so based on the particular facts and circumstances of this case **will not cause any prejudice to the appellant** we do not consider it necessary to remand the case back for the reframing of the charge and the re recording of evidence. In this respect reliance is placed on the case of **Mohammed Mumtaz Qadri (Supra)** where it was held as under at P.49 Para 21:-

"21. It has been argued by the learned counsel for the appellant that the Charge framed in this case contained only one count in respect of committing "the offence of qatl-e-amd punishable under clause (a) of section 7 of the Anti-Terrorism Act, 1997 read with sections 302 and 109, PPC" and as no separate charge had been framed by the trial court in respect of an offence under section 6 read with section 7(a) of the Anti-Terrorism Act, 1997, therefore, after recording the appellant's conviction and sentence for an offence under section 302(b), PPC the trial court could not separately and additionally convict and sentence the appellant under section 7(a) of the Anti-Terrorism Act, 1997. We have examined this argument with reference to the record of the case and have observed that at no stage of his trial the appellant had ever raised any objection in the above mentioned regard or had ever claimed that he had been misled or prejudiced on the basis of any irregularity in the Charge framed or on account of any misjoinder of charges. In view of such conduct of the

appellant before the trial court the provisions of section 537, Cr.P.C. provide a complete answer to the argument advanced by the learned counsel for the appellant in this regard" (bold added)

11. However, with regard to the need to record separate convictions for each offense, we set aside the impugned judgment and direct the learned Administrative judge of the Anti Terrorism Courts Karachi to transfer the case to a different ATC judge at Karachi to the one who passed the impugned judgment and direct him based on the R&P's and evidence already recorded to write a fresh judgment in accordance with the law without being influenced by the impugned judgment **within two months of receiving the R&P's**. In the meantime, the appellant shall remain in custody. The office shall immediately provide a copy of this judgment to the learned Administrative Judge of the Anti Terrorism Courts at Karachi for information and compliance.

12. The Appeals stand disposed of in the above terms. Confirmation Reference No.02/2015 is answered in the negative.