

ORDER SHEET
IN THE HIGH COURT OF SINDH KARACHI

Spl. Cr. A.T.Appeal No. 267 of 2019
Conf. Case No. 12 of 2019 alongwith
Spl. Cr. A.T.Appeal No.s 268, 269, 270, 271,
272, 273 and 274 of 2019

DATE	ORDER WITH SIGNATURE OF JUDGES
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1. For hearing of main case.
2. For hearing of M.A. No.1044/2019.

30.11.2021:

Mr. Muhammad Farooq, Advocate for appellants.
Mr. Muhammad Iqbal Awan, Addl. P.G alongwith Anila APG
Mr. Khawaja Naveed, Advocate for the complainant.

Mohammad Karim Khan Agha-J. The appellants were convicted by learned ATC Judge-II at Karachi in Special Cases No. 05, 06, 07,08 and 09 of 2012 vide judgment dated 28.09.2019 whereby appellant Abdul Ghaffar and Abdullah were sentenced to death subject to confirmation by this Court and appellant Zahid Hussain and Ali alias Ali Dino were sentenced to life imprisonment for the offences respectively under section 6(2) punishable under Section 7(a) ATA and under Section 7 ATA. The above named four appellants were also convicted under Section 13-E of the Arms Ordinance and sentenced to four years imprisonment each.

2. The appellants have moved appeals against their conviction in respect of the impugned judgment.

3. Before starting the reading of the evidence, learned counsel for the appellants Abdullah and Abdul Ghaffar, learned Addl.P.G and learned counsel for the complainant drew attention of the Court to the evidence of four PWs whose evidence had not been recorded in accordance with law namely, PW-3 Khalid Hussain, who was author of the FIR, whose cross examination did not take place in the presence of his defence counsel. Likewise PW-4, Ghazi Khan, who was Tepedar, PW-6 Allah Dad

(corpse bearer) and most importantly PW-7 Nazeer Hussain, who was a material witness and was mashir of recovery of the dead body whose evidence was not recorded in the presence of defence counsel. All the learned counsel contended that these appeals under the above circumstances needed to be remanded to the trial Court. There are two other appellants in this case. The father of one of them (Ali Dino) is present in court who after having been explained the situation by the learned defence counsel has agreed on behalf of his son that this case be remanded. Likewise he has also intimated that appellant Zahid Hussain's father would also want this case be remanded to the trial court.

4. It is a settled law that evidence (which includes evidence in chief, cross examination and re-examination (if any)) must be recorded in the presence of the defence counsel and that the defence counsel must also be present and given the opportunity to cross examine the witness especially in a case which carries the death penalty such as the case before us. This is because the absence of the defence counsel might cause prejudice to the case of the accused which would be in violation of Article 10 (A) of the Constitution which guarantees due process and the right to a fair trial. For example, if the defence counsel was absent when the examination in chief was recorded of the witness the accused being a layman and potentially illiterate would not know which kind of question could be asked by the prosecutor of the witness and would not be in a position to object to any document being exhibited which might prejudice him on account of his lack of legal training. Likewise the defence counsel must be present during the cross examination of the witness as the main purpose of cross examination is to test the evidence of the witness who if cross examined by a professionally trained advocate might well be damage if not destroy the evidence of the witness in terms of the witnesses credibility and reliability which might have a bearing on the judgment handed down by the trial court. Under these circumstances, we agree with the learned counsel for the parties that for the reasons mentioned above as a matter of

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law this case should be remanded to the trial court. In this regard, we place reliance on (2010 MLD 1713) and (2021 SBLR 113).

5. With regard to the absence of the counsel for the appellant Ali Dino and Zahid Hussain today, we have already noted in this order that their respective fathers have agreed to the remand of the case. Even otherwise if we continue to wait for them to appoint a lawyer, this would only incur unnecessary expense for them in engaging a lawyer and all the appellants (including them) being prejudiced by this continued delay in hearing these appeals because these appeals are being remanded on a point of law which we discussed above which would still stand even if they have appointed counsel and to continue to delay this matter will ultimately cause prejudice to all the appellants.

6. We, therefore, set aside the impugned judgment and answer the confirmation reference in the negative and remand this case back to the learned Administrative Judge of Anti Terrorism Court Karachi who shall either hear this case or assign the same to another ATC judge for disposal in accordance with law. We make it clear that this case is not being remanded for a complete re-trial but only for the limited purpose of recording the evidence of PW Khalid Hussain, PW-Ghazi Khan, PW Allah Dad and PW Nazeer Hussain in the presence of the learned counsel for each of the accused who shall be at liberty to cross examine such PW. Thereafter the learned trial court shall record the Section 342 Cr.P.C statement afresh of each accused and each accused if so desired will be at liberty to recall any defence witness and thereafter the learned trial judge shall re-write the judgment based on the evidence on record.

7. The learned trial Court shall issue a production order for each of the accused within seven days of receipt of this order who shall either appoint a lawyer of their choice or a lawyer shall be appointed by the Court for him and thereafter within one week the trial court shall summon the first of the aforesaid PWs and record his evidence in presence of the defence counsel of each of the accused. This entire

exercise shall be completed within three months from the date of this order. Office is directed to return the R&Ps immediately to the learned Administrative Judge, ATC Karachi. A copy of this order shall also be sent by fax to the Administrative Judge, ATC Karachi for compliance.

8. The appeals and confirmation reference stand disposed of in the above terms.