

IN THE HIGH COURT OF SINDH AT KARACHI  
Criminal Appeal No.S-104 of 2024

Date	Order with signature of Judge
Appellants:	1. Qaimuddin son of Jeewan. 2. Khalid Hussain son of Qaimuddin. 3. Javed son of Daim. 4. Mehtab son of Daim. All Bycaste Kobhar. Through Mr. Shamsuddin Kobhar, advocate.
The Complainant:	Through Mr. Shabbir Ali Bozdar advocate.
The State:	Through Syed Sardar Ali Shah Rizvi, Additional Prosecutor General.
Date of hearing.	20-03-2025.
Date of decision.	20-03-2025.

J U D G M E N T.  
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Ali Haider 'Ada',J:- Through instant appeal, the appellants named above impugned the judgment dated 12-09-2024 passed by learned Additional Sessions Judge Daharki in Sessions Case No. 237/2023 (Re. The State Vs Qaimuddin Kobhar & others", Crime No. 239/2022, offence u/s 324, 337A(i), 337A(i), 337A(ii), 337L(ii), 114, 504 PPC registered at Police Station Daharki, whereby they have been convicted u/s 324 PPC r/w section 114 and 34 PPC and sentenced to suffer R.I for seven years and fine of Rs. 20,000/- (twenty thousand rupees) each, in case of default, they shall suffer S.I for three months more, for offence u/s 337A(i) r/w section 114, 34 PPC, as they were convicted and sentenced to pay Daman of Rs. 10,000(ten thousand) each to injured, in case of default, they shall sentenced to suffer S.I for three months, for offence u/s 337A(ii) PPC r/w section 114, 34 PPC, they were convicted and sentenced to pay Arsh equivalent to one fifth 5% of Diyat to injured Barkat Ali, in case of default, they shall suffer S.I for three months, they were convicted and sentenced for offence u/s 337L(ii) r/w section 114, 34 PPC to pay Daman of Rs. 10,000/- (Ten thousand) to injured, in case of default, they shall suffer S.I for two months, further they were convicted u/s 504 PPC r/w section 114, 34 PPC and sentenced to suffer R.I for one year and to pay fine of Rs. 5000/- (five thousand) each, in case of default, they shall suffer S.I for one month more with benefit of section 382-b Cr.P.C.

2. Brief facts of the prosecution case are that complainant Barkat Ali Pitafi lodged the FIR on 29-07-2022 stating therein that on 28-09-2022 he along with his brother Muhammad Ramzan and nephew Sadaqat Ali went towards their relative Saindad Pitafi on charitable event on motorcycle. At about 1300 hours, when they reached railway crossing on Khenjo link road, where they saw accused Qaimuddin armed with lathi, Khalid Hussain armed with iron road, Javed armed with lathi and Mehtab armed with lathi. The accused persons forcibly got stopped and alighted the complainant party from their motorcycle. Accused Qaimuddin abused and instigated co-accused to caught the complainant and commit his murder. Accused Javed caused lathi blow to complainant at his right side of back, accused Mehtab caused lathi blow to him at his right should, accused Qaimuddin caused him lathi blow at his ear and left side of head; complainant party raised cries and beseeched the accused, then accused Kahlid Hussain caused iron blow to complainant at his head with intention to commit his murder, then all the accused escaped away from the scene of offence. Then complainant party appeared at Police Station, obtained the letter for treatment and certificate, thereafter then proceeded to Taluka Hospital Daharki and after issuance of final medical certificate on 29-07-2022, complainant appeared at Police Station and lodged the above said FIR. After completion of investigation, I.O submitted the challan before the Court having jurisdiction.

3. On 13-06-2023 learned trial Court framed the charge against the appellants u/s 324, 114, r/w section 34 PPC, to which they pleaded not guilty and claimed to be tried vide their pleas recorded as Ex. 2/A to 2/D respectively.

4. In order to prove the charge against the accused, the prosecution examined PW/1 complainant Barkat Ali at Ex. 03, who produced FIR, further statement recorded on 29-07-2022, PW/2 Muhammad Ramzan at Ex. 4, who produced memo of injuries, memo of place of incident, PW/3 ASI Nazar Hussain at Ex. 05, who produced daily diary entries, PW/4 ASI Muhammad Yousif at Ex. 06, who produced copy of letter issued for medical treatment of injury, , PW/5 Medical Officer Bheesham Lal at Ex. 7, who produced medical certificate and X-ray plats of injured. After examining the witnesses, learned DDPP filed application u/s 227 Cr.P.C on 22-02-2024 before learned trial Court to amend the charge u/s 337A (i)

337 A(ii), 337L(ii) PPC, which was allowed by learned trial Court vide order dated 29-02-2024, thereafter, amended charge was framed by learned trial Court on 14-03-2024 against the accused.

5. After framing of amended charge, the complainant and PWs were re-called and they were examined, whereby stated that earlier their evidence was recorded and they have also produced the documents, it may be adopted and treated as part and parcel of their evidence, then side of the prosecution was closed.

6. That, then after, the Statement of accused were recorded by the Learned trial Court u/s 342 CrPC and after hearing of parties, passed the judgment which assails through this appeal.

7. Learned counsel for the appellants despite to argue the case on merits contends that learned trial Court committed serious error by way of adopting the previous evidence of the prosecution witnesses as the learned trial Court has failed to adopt the legal procedure; therefore, he prays to remand back the matter to trial Court for recalling and re-examining all the prosecution witnesses and after hearing the parties decide the matter afresh as provided under the law.

8. On the other hand learned counsel for the complainant affirms such facts and learned Additional P.G for the State has also recorded no objection on the proposal of learned counsel for the appellants.

9. Heard learned counsel for the parties and perused the material available on record.

10. Upon reviewing the case, it has been established that the evidence of prosecution witnesses was recorded much prior to amendment of the charge and after amendment of the charge, learned trial Court recalled and re-examined PW/1 Complainant Barkat Ali wherein he deposed as under:-

*"My evidence was already recorded on 08-12-2023 and I produce some documents, which may kindly be treated as part and parcel of his this evidence'.*

11. PW/2 Muhammad Ramzan was recalled and re-examined and he deposed as under:-

*“My evidence already was already recorded on 08-12-2023 and I produce some documents, which may kindly be treated as part and parcel of his evidence”.*

12. PW/3 Nazar Hussain Shah and PW/4 ASI Muhammad Yousif were recalled and re-examined who have almost deposed on same footing, while PW/5 Medical Officer Bheesham Lal was recalled and reexamined, who deposed as under:-

*“My examination in chief was already recorded by this Court on 04-01-2024 and I produced original medical certificate and four X-ray films, which kind may be treated as part and parcel of my evidence”.*

13. In order to determine such legal aspects, it is beneficial to refer to the reported case law, as in case of *Munwar Ali Vs. The State* reported as 2023 P.Cr.L.J 648 in Para No.10, this Court held as under:-

*“10. Record reflects that after amendment of the charge surprisingly evidence of 04 PWs namely Dr. Mashkoor Ahmed, Mumtaz, Attur and Muhammad Saleem already recorded after framing of the first charge was adopted not only by the prosecution but learned counsel for the appellant as well. Such adoption of evidence is against the spirit of section 231, Cr.P.C which prescribes that if the charge is altered, added or amended, then the witnesses already examined are to be re-called and re-examined/cross-examined on the point of alteration, addition or amendment so made in the charge. In the present case, in the first charge there was mention of only one deceased namely Mukhtiar but in the amended charge, another deceased namely Mst. Irshad Khatoon was also added. Legal position is very much clear that adoption of evidence is contrary to the law. The procedure adopted by the trial court being incurable has not only occasioned in failure of justice, as is defined under subsection (b) of section 537, Cr.P.C. but has prejudiced the appellant in his defence seriously, which is against the mandate contained by Article 10-A of the Constitution of Islamic Republic of Pakistan, 1973, which guarantees chance of fair trial and due process to every citizen/accused for determination of his civil/criminal rights and obligations”.*

14. In case of *Zubair Ahmed Vs. The State* reported as PLD 2023 Sindh 151, it was held by Learned Division Bench of this Court that:-

*“6. Admittedly, on remand of the case, the charge against the appellant was framed afresh by the learned Trial Court. Surprisingly, the evidence already recorded in first round of litigation was adopted not only by the prosecution but learned counsel for the appellant as well, such adoption of the evidence is against the spirit of Section 231, Cr.P.C. which prescribes that, if the charge is altered, added or amended, then the witnesses already examined are to be re-called and re-examined, on point of alteration, addition or amendment so*

*made in the charge. Adoption of evidence is also contrary to the mandate contained by Section 353 Cr.PC, which prescribes that the evidence of witnesses shall be taken in presence of accused facing trial.*

*7. The procedure adopted by learned trial Court being incurable, have not only occasioned in failure of justice, as is defined under Sub-Section (b) to Section 537, Cr.P.C. but have prejudiced the appellant in his defence seriously, which is against the mandate contained by Article 10-A of the Constitution of Islamic Republic of Pakistan, 1973, which guarantees chance of fair trial and due process to every citizen for determination of his civil/criminal rights and obligations”.*

15. In case of *Naeem Akhtar Vs. The State* reported as PLD 2021 Sindh 533, the Learned Division Bench of this Court held as under:-

*8. Further as discussed above, section 231, Cr.P.C. is mandatory in nature, therefore, whenever a charge is amended, the Court is bound to allow the prosecution and the accused to re-call and re-examine witnesses, already examined. Filing of statement by the Prosecutor and accused that they will not examine the witnesses already examined would not fulfill the requirements of section 231, Cr.P.C. In the present case, charge was amended by adding section 302, P.P.C. Section 231, Cr.P.C is reproduced as under:-*

*"231. Recall of witnesses when charge altered. Whenever a charge is altered or added to by the Court after the commencement of the trial, the prosecutor and the accused shall be allowed to recall or re-summon, and examine with reference to such alteration or addition, any witness who may have been examined, and also to call any further witness whom the Court may think to be material."*

*9. Looking to the above legal position, we have come to the conclusion that trial Court had adopted illegal procedure by allowing the prosecution to rely upon the same evidence which was recorded before amended charge. In the amended charge section 302, P.P.C. was added. It was the duty of the trial Court to re-call witnesses already examined for re-examination and cross-examination afresh. Slipshod method adopted by trial Court in no way could be appreciated, procedure adopted by trial Court which led to a miscarriage of justice.*

*10. For the aforesaid reasons and circumstances of the case, learned Counsel for the appellant as well as learned Deputy Prosecutor General, Sindh assisted by learned counsel for the complainant are in agreement that the matter needs to be remanded back to the trial Court for recording the evidence of*

*prosecution witnesses afresh after amendment of the charge. Accordingly, case is remanded, trial Court is directed to re-call the prosecution witnesses for evidence (examination-in-chief, cross-examination and re-examination). On conclusion of the trial, learned trial court is directed to record the statement of appellant Naeem Akhtar under section 342, Cr.P.C. afresh in accordance with law.*

16. Perusal of record reflects that the appellants were convicted and sentenced as per the charge, which was amended, so keeping in view the legal position, the trial Court did not adopt the proper procedure by allowing the prosecution to rely upon the evidence which was recorded before framing of amended charge. As such procedure is not incurable and also contra with Article 10-A of the Constitution of Islamic Republic of Pakistan 1973.

17. Considering the legal position, the impugned judgment is hereby set aside, the case of the appellants is remanded back to trial Court to recall and re-examine the prosecution witnesses and further proceed as procedure prescribed as per law and decide the case afresh within a period of three months under intimation to this Court. Office is directed to return the R & Ps to learned trial Court.

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