

## *JUDGMENT SHEET*

IN THE HIGH COURT OF SINDH, CIRCUIT COURT,  
HYDERABAD.

**Cr. J. Appeal No. D — 403 of 2011.  
Confirmation Case No.26 of 2011.  
Cr. Appeal No.D-406 of 2011.  
Confirmation Case No.29 of 2011.  
Criminal Jail Appeal No.409 of 2011.**

### ***PRESENT***

***Mr. Justice Naimatullah Phulpoto  
Mr. Justice Rasheed Ahmed Soomro.***

#### Appellants:

Cr. J. Appeal No.403 of 2011.

Allah Dino s/o Muhammad Ismail Magsi.  
Muhammad Hassan s/o Allah Dino Magsi.  
Asghique s/o Karim Dad.

Cr. J. Appeal No.409 of 2011.

Gul Sher Magsi s/o Muhammad Ismail

Through Mr. Hameedullah Dahri, Advocate.

Cr. Appeal No.D-406 of 2011.

Ashique Khaskheli s/o Karim Dad.

Through Mrs. Razia Ali Ahmed Patoli,  
Advocate.

#### The State:

Through Syed Meeral Shah Bukhari, D.P.G.

#### Date of Hearing:

30.01.2017 & 31.01.2017.

#### Date of Judgment:

31.01.2017.

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## **JUDGMENT**

**Rasheed Ahmed Soomro, J.** Appellants Gul Sher, Allah Dino, Muhammad Hassan, Ashique, Shabir, Ismail and Muhammad Siddique were tried along with absconding accused Ghulam Nabi, Bhutto and Saindad alias Chunhib by learned Judge Anti-Terrorism Court, District Shaheed Benazirabad at Nawabshah in Special Case No.50 of 2009 arising out of Crime No.134 of 2009, registered at Police Station Kazi Ahmed, for offences under section 365-A, 148, 149 PPC and 7 ATA,

1997. Accused Allah Dino Magsi, Muhammad Hassan Magsi, Ashique Khaskheli and Gul Sher were found guilty vide Judgment dated 23.12.2011. Appellants / accused named above were convicted under section 365-A and 7(1)(a) ATA 1997 and sentenced to death. Appellants / accused were also convicted under section 148 PPC and sentenced to suffer R.I. for three years and to pay the fine of Rs.10,000/- each. In case of the default in payment of the fine they were ordered to suffer S.I. for three months. Accused Gul Sher was convicted and sentenced to imprisonment for life. Learned trial court while extending benefit of doubt acquitted accused Muhammad Siddique, Ismail and Ghulam Shabir. However, the case against the absconding accused namely Ghulam Nabi Magsi, Bhutto Mari, Saindad alias Chunhib Mari was ordered to be kept in dormant file, till their arrest. Trial court has made 'Reference' to this court for confirmation of death sentence or otherwise.

2. Brief facts of the prosecution case as disclosed in the F.I.R. are that one Fakir Muhammad lodged his F.I.R. on 15.06.2009 at 4-00 p.m. at Police Station Qazi Ahmed alleging therein that on 15.06.2009, he was present at the lands alongwith his son Muhammad Shafique and one Muhammad Siddique Khaskheli. At 9-30 p.m. his son Muhammad Shafique and Muhammad Siddique left the lands for home to bring the meals for the father but they did not turn up. Complainant contacted his son on cell No.0300-3238342 but the same was 'off'. Thereafter, complainant contacted his nephew Javed Hussain at his residence and enquired about his son Muhammad Shafique and Muhammad Siddique. Javed replied to the complainant that both had not reached at home. Complainant contacted P.W. Javed Hussain, Zaheer Ahmed and other villagers and informed them about the missing of his son Muhammad Shafique and Muhammad Siddique. Thereafter, complainant party tracked the 'foot prints' but without any success. Finding no other way, complainant went to the Police Station and lodged the F.I.R. it was

recorded vide crime No.134 of 2009 under section 365-A, 148, 149 PPC and 7 ATA 1997.

3. During investigation, accused Gul Sher, Allah Dino, Muhammad Hassan and Ashique were arrested while accused Ghulam Nabi, Bhutto Mari, Shabir, Ismail and Muhammad Siddique were shown as absconders. Thereafter accused Muhammad Siddique and Shabbir were arrested. After usual investigation challan was submitted against the accused under section 365-A, 148, 149 PPC and 7 ATA 1997.

4. After completion of the formalities against the absconding accused charge against accused Gul Sher, Allah Dino, Muhammad Hassan, Ashique, Muhammad Siddique and Shabir was framed under section 365-A, 148, 149 PPC & 7 ATA 1997 at Ex.11. Accused pleaded not guilty and claimed to be tried. At the trial prosecution examined P.Ws Fakir Muhammad at Ex.13, Shafiqullah at Ex.14 and Shafique Ahmed at Ex.16. Thereafter, it appears that absconding accused Ismail after obtaining bail appeared before the trial court and Amended charge was framed at Ex.18. Accused pleaded not guilty and claimed to be tried.

5. After amendment of the charge, learned advocate for the complainant filed statement before the trial court dated 02.09.2010 in which he adopted the same evidence of complainant Fakir Muhammad and P.Ws Shafique Ahmed and Saleemullah. Advocate for the accused recorded no objection. Learned trial court passed the following orders:-

**“Statement allowed. Alongwith the statement of the defence counsel who has also recorded no objection and also adopted the same evidence as earliest recorded by this court.”**

6. On the same date (2.9.2010), same evidence of prosecution witnesses namely Fakir Muhammad, Shafiqullah and Shafique Ahmed was placed on record only date was changed. Thereafter, prosecution side was closed vide statement at Ex.34.

7. Statements of accused were recorded under section 342 Cr.P.C, in which accused claimed false implication. Accused did not lead defence and declined to give evidence on oath. Trial court after hearing the learned counsel for the parties and assessment of evidence convicted and sentenced the appellants namely Allah Dino, Muhammad Hassan, Ashique, Gul Sher Magsi and Ashique Khaskheli and acquitted accused Ismail, Siddique and Ghulam Shabbir and made Reference to this court for confirmation. Thereafter, appellants have filed the above appeals against the impugned judgment.

8. Learned advocates for the appellants mainly contended that there was no provision in the law to adopt the same evidence as evidence of the prosecution witnesses was recorded in absence of absconding accused Ismail. It is further contended that under Article 47 of Qanun-e-Shahadat 1984 such evidence cannot be treated as legal evidence. It is further contended that under section 353 Cr.P.C. evidence is to be taken in presence of accused. It is argued that all incriminating pieces of evidence available on record were not put to accused for explanation; the same could not be used for conviction. Lastly, it is contended that the judgment of trial court is not sustainable under the law. In support of their contentions they relied upon the cases of (i) MOONDHA v. THE STATE (P.L.D. 1958 Supreme Court 275), (ii) MUHAMMAD SHAH v. THE STATE (2010 S.C.M.R. 1009) and (iii) QADDAN and others v. THE STATE (2017 S.C.M.R. 148)

9. Syed Meeral Shah Bukhari, learned D.P.G. for the State submitted that trial court has committed illegality by adopting the same evidence. He argued that trial court was required to record the evidence of prosecution witnesses already examined afresh after framing of the amended charge. Learned D.P.G. submits that this is a fit case for remand to the trial court for recording the evidence afresh and deciding the same in accordance with law.

10. We have carefully heard learned counsel for the appellants learned D.P.G. for the State and perused the record.

11. It is basic principle of administration of criminal justice that examination of the witnesses must be recorded in presence of accused or his pleader as provided under section 353, Cr.P.C, which reads as under:-

**“353. Evidence to be taken in presence of accused.**

Except as otherwise expressly provided, all evidence taken under (Chapters XX, XXI, XXII and XXIIA) shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in presence of his pleader.”

12. A bare perusal of the above provisions of the law clearly demonstrate that evidence of the prosecution witnesses has to be taken in presence of the accused but in this case it is the matter of record that after framing of the charge, evidence of three (03) prosecution witnesses was recorded at that time accused Ismail was absconder. After his appearance before the trial court charge was amended. Learned advocate for the complainant filed statement to adopt the same evidence which was recorded in absence of absconding accused Ismail and trial court without application of Judicial mind allowed that application. It is very strange that on the same date depositions already recorded in absence of accused Ismail were placed on record. Procedure adopted by the trial court was absolutely illegal particularly in the circumstances when the accused were facing trial in the offence punishable for death or imprisonment for life. It may be mentioned here that trial court has acquitted accused Ismail. Learned counsel for the appellants were asked that what prejudice has been caused to them. They replied that a fair opportunity has not been provided to them by adopting such illegal procedure in recording evidence of the prosecution witnesses. Provisions of Section 353 Cr.P.C. are mandatory in nature and taking of evidence of prosecution witnesses in absence of the accused had vitiated the trial.

13. There is also another aspect in this case, statements of the accused have been recorded under section 342 in the stereotype manner as all the incriminating pieces of evidence have not been put to the accused. This fact has also been admitted by the learned D.P.G. appearing for the State. All the incriminating pieces of evidence available on record in examination-in-chief, cross-examination or re-examination of witnesses are required to be put to the accused, if the same are against him, while recording his statement under S.342, Cr.P.C. In the case of MUHAMMAD SHAH v. THE STATE reported in 2010 SCMR 1009, it is held as under:-

“It is not out of place to mention here that both the Courts below have relied upon the suggestion of the appellant made to the witnesses in the cross-examination for convicting him thereby using the evidence available on the record against him. It is important to note that all incriminating pieces of evidence, available on the record, are required to be put to the accused, as provided under section 342 Cr.P.C. in which the words used are “For the purpose of enabling the accused to explain any circumstances appearing in evidence against him” which clearly demonstrate that not only the circumstances appearing in the examination-in-chief are put to the accused but the circumstances appearing in cross examination or re-examination are also required to be put to the accused, if they are against him, because the evidence means examination-in-chief, cross-examination and re-examination, as provided under Article 132 read with Articles 2(c) and 71 of Qanun-e-Shahadat Order, 1984. The perusal of statement of the appellant, under section 342, Cr.P.C., reveals that the portion of the evidence which appeared in the cross-examination was not put to the accused in his statement under section 342, Cr.P.C. enabling him to explain the circumstances particularly when the same was abandoned by him. It is well-settled that if any piece of evidence is not put to the accused in his statement under section 342, Cr.P.C. then the same cannot be used against him for his conviction. In this case both the Courts below without realizing the legal position not only used in the above portion of the evidence against him, but also convicted him on such piece of evidence which cannot be sustained.”

14. In another case of QADDAN and others v. THE STATE (2017 S.C.M.R. 148) it is observed as follows:-

***“Apart from that the motive set up by the prosecution had never been put to the present appellants at the time of recording of their statements under section 342 Cr.P.C. The law is settled that a piece of evidence not put to an accused person at the time of recording of his statement under section 342, Cr.P.C. cannot be considered against him.”***

15. In the above circumstances, learned counsel for the appellants as well as D.P.G. prayed for remand back the case to the trial court for trial of appellants afresh in accordance with law except accused Ismail, Siddique and Ghulam Shabbir who have already been acquitted earlier. For the above stated reasons appeals are allowed. The conviction and sentence awarded to the appellants vide Judgment dated 23.12.2011 are set-aside. The Reference for confirmation of sentence awarded to the appellants namely Allah Dino, Muhammad Hassan, Ashique is answered in negative. The case is remanded back to the trial court with direction to record the evidence of prosecution witnesses afresh by providing a fair opportunity to the appellants for cross examination. After recording of the evidence of the prosecution witnesses, statements of the accused Allah Dino, Gul Sher and Ashique shall be recorded under section 342 Cr.P.C. by putting all the incriminating pieces of evidence to the accused. Thereafter, trial court shall pass the judgment after hearing both the parties in accordance with law. The trial court is further directed to decide the case expeditiously under intimation to this court.

JUDGE

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