IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Appeal No.655 of 2019

Appellant No.1:	Farman Ali through Mr. Muhammad Wasif Raza, Advocate.
Appellants No.2&3:	Shoukat Ali and Tasawar Abbas through Mr. Raja Jawad Ali Saahar, Advocate.
The State:	Through Syed Meeral Shah, Addl. Prosecutor General, Sindh.
Complainant:	Through Mr. Shiraz Ahmed Bhatti, Advocate.
Date of hearing:	21.09.2021.
Date of judgment:	21.09.2021.

JUDGMENT

MUHAMMAD SALEEM JESSAR, J.- Through this criminal appeal, appellants Farman Ali, Shoukat Ali and Tasawar Abbas, have assailed the judgment dated 23.08.2019 passed by learned 1st Additional Sessions Judge/MCTC, Malir Karachi in Sessions Case No.618 of 2018 re: State v. Farman Ali and others arisen out of Crime No.141/2018 of P.S Bin Qasim, Karachi, registered for offence under Section 302/34 PPC, whereby appellants have been convicted and sentenced for life imprisonment with fine of Rs.5,00,000/- each and in case of default in payment of fine, they shall undergo S.I for six months more. They are also extended benefit of section 382-b Cr.P.C.

2. Precisely, the facts of prosecution case are that on 27.07.2018 at about 1230 hours, inside Ayesha Steel Mills Country Club, Bin Qasim Karachi, the present accused persons in furtherance of their common intention, knowingly, committed Qatl-i-Amd of deceased Shahid Ali son of Meva Khan aged about 28 years, by causing blows with hard and blunt substance to him, hence, instant FIR was registered.

3. The Investigating Officer after usual investigation, submitted challan before the Court of law and thereafter learned trial Court after completing all legal formalities, framed the charge against appellant to which they pleaded not guilty and claimed trial.

4. At the trial, prosecution in order to prove its case, examined complainant Zahid Ali, PWs SIP Muhammad Usman, Muhammad Saleem, Chuttal, MLO Dr. Afzal Ahmed, Muhammad Ajmal, SIP Manzoor Chandio and then learned ADPP closed the side of prosecution. On conclusion of prosecution evidence, learned trial Court recorded the statements of accused u/s 342 Cr.P.C, in which they denied the allegations and pleaded their innocence, however, neither they examined themselves on oath nor produced any witness in their defense.

5. The learned trial Court after hearing learned counsel for the appellants, learned ADPP and appraising the evidence, passed impugned judgment, which arose instant appeal.

6. Learned counsel for the appellants submit that statements of accused recorded before the trial Court in terms of section 342 Cr.P.C, are not in consonance with section 364(2) Cr.P.C as the learned Judge has not appended necessary certificate in bottom of the statements of accused with his own hand writing. Learned counsel, therefore, submit that such omission on the part of trial Court is not mere irregularity but a illegality which is not curable under section 537 Cr.P.C. They further submit that the charge as well as points for determination framed by the trial Court, are not according to the facts of the prosecution case even material questions were not put to the accused at the time of recording their statements under section 342 Cr.P.C nor incriminating material was confronted with them. In support of their contention, they have referred to the relevant pages from paper book and confronted same to learned Addl. P.G, Sindh as well as counsel for the complainant.

7. I have heard learned counsel for the appellants, learned Addl. P.G, Sindh as well as counsel for the complainant and have gone through the record minutely.

8. I have carefully perused the statement of accused. In question No.1 trial Court has not put incriminating pieces of evidence against accused which were brought on recorded by the prosecution witnesses. It is the case of the prosecution

that a wooden stick 1.5 feet 2 inches width was recovered at the pointation of appellant Farman Ali but no question regarding recovery of said wooden stick which has been tendered in the evidence but no question was put to accused in this regard. Rightly it is contended that serious prejudice has been caused to the accused as the accused were not provided fair opportunity to explain their position regarding incriminating pieces of evidence brought on record against them.

9. In the present case trial court did not perform it's function diligently and has taken the matter lightly and in a casual manner awarded sentence to the accused. As such, appellants were prejudiced in their trial and defence. Therefore, a miscarriage of justice has occurred in the case. Procedure adopted by trial court is an illegal procedure that cannot be ordered under Section 537 Cr.P.C. Thus, it has vitiated the trial. Hence, impugned judgment is liable to be set aside. Reliance can be placed upon cases of ***ALLAH RAKHIO v. THE STATE (2001 P.Cr.L.J 1959), MUHAMMAD NAWAZ and other Versus The STATE and others (2016 SCMR 267) and Qaddan and others Versus The State (2017 SCMR 148)***.

10. 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 them"* 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 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 their statement under section 342, Cr.P.C. enabling them to explain the circumstances. It is well-settled that if any piece of evidence is not put to the accused in his/their statement under section 342, Cr.P.C. then the same cannot be used against him/them for his/their conviction.

11. In view of what has been observed herein above and in view of the dictum laid down by the Honourable Apex Court in the cases referred to above, I am of the considered opinion that the learned trial Court while passing the impugned judgment has committed illegality and violated the provisions of Section 342 R/w Section 364 (2) Cr.P.C as well as Article 132

of Qanun-e-Shahadat Order, 1984. Consequently, the judgment dated 23.08.2019 passed by the learned trial Court is hereby set-aside. Resultantly, Case is remanded to the learned trial Court with direction to record statement of the accused under Section 342 Cr.P.C afresh in accordance with provisions contained under section 364(2) Cr.P.C and to decide the case afresh after hearing the parties, without being prejudiced from the earlier judgment. Thereafter, the learned trial Court shall pass the judgment afresh within three (3) months after hearing both the parties, in accordance with law.

JUDGE