IN THE HIGH COURT OF SINDH, BENCH AT SUKKUR

Criminal Appeal No.D-33 of 2018
Constitutional Petition No.D-636 of 2018

Before;
Mr. Justice Muhammad Saleem Jessar
Mr. Justice Khadim Hussain Tunio

For hearing of main case

Date of hearing : 16.11.2021
Date of decision : 16.11.2021

Mr. A.R. Faruq Pirzada, Advocate for appellants
Mr. Aftab Ahmed Shar, Additional Prosecutor General
Mr. Iftikhar Ali Arain, Advocate for complainant

JUDGMENT

Appellants Shafiq-Ur-Rehman and Zia-Ud-Din were tried by the Anti-Terrorism Court, Naushahro Feroz in Special Case No.95/2014 Re- The State Vs. Shafiq-Ur-Rehman and another, outcome of FIR bearing Crime No.344/2014 registered for the offences punishable under Sections 365-A, 302 and 34 PPC r/w Section 6/7 ATA 1997 at Police Station A-Section Dadu. The trial Court, vide judgment dated 14.03.2018, convicted and sentenced the appellants as under;

> *"i). Both accused are convicted for the offence punishable u/s 365-A, 34 PPC R/W Section 7(1)(e) of Anti-Terrorism Act, 1997 and sentenced to suffer R.I for life imprisonment.*
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> *ii). Both accused are convicted for the offence punishable u/s 302 (b), 34 PPC R/W Section 7(1)(a) of Anti-Terrorism Act, 1997 and sentenced to suffer Imprisonment for Life and pay compensation of Rs.2,00,000/- each u/s 544 CrPC."*

2. Brief fact of the prosecution case as per FIR bearing Crime No.344/2014 are that the complainant was present outside his house alongwith his son Mubashir, his cousin Muhammad Aslam and his nephew Aijaz. The appellants came to meet complainant's son Mubashir at 2.00 p.m. and asked him to accompany them, which he did. Mubashir did not return despite that some time had passed, hence the complainant tried to contact him, but found his phone switched off. They went to the appellants' house, searching for Mubashir but found no one there. Later that night, complainant

received the news of his son's abduction from his nephew. On 19.11.2014, after a few days, the complainant received a ransom demand from his son's phone of Rs.50,00,000/-. The same night he came to know police had found a dead body from Marvi Colony, Dadu and brought it to the civil hospital. When he reached at the hospital, he identified the body to be of his son. After the burial proceedings, the complainant got the FIR lodged on 24.11.2014.

3. After usual investigation, challan was submitted against the appellants. A formal charge was framed against them by the trial Court to which they both pleaded not guilty and claimed to be tried.

4. In order to substantiate the charge, prosecution examined PW-1 complainant/Muhammad Hanif Arain at Ex.6, PW-2 Muhammad Aslam Arain at Ex.7, PW-3 Aijaz Ahmed Arain at Ex.8, PW-4 PC Badaruddin Samo at Ex.9, PW-5 Sarfraz Ahmed Arain at Ex.10, PW-6 ASI Ghulam Muhammad Panhwar at Ex.11, PW-7 Muhammad Shareef Abbasi at Ex.12, PW-8 I.O / Inspector Akhtar Ahmed Abbasi at Ex.13, PW-9 Medical Officer Dr. Vijay Parkash at Ex.14, PW-10 SIP Naimatullah Babar at Ex.15, PW-11 Tapedar Pir Aijaz Ahmed Arif at Ex.16, PW-12 Judicial Magistrate Dadu Javed Hussain Mirbahar at Ex.17, who produced various documents in their evidence. Thereafter, prosecution side was closed; vide statement at Ex.18.

5. Statements of accused of both appellants u/s 342 Cr.P.C were recorded at Ex.19 and at Ex.20, wherein appellant Zia-ud-din denied the prosecution allegations, whereas appellant Shafiq-ur-Rehman remained quiet as per the statement on file, recorded by the trial Court.

6. Learned counsel for the appellants submitted that the trial Court has committed illegality while recording the statements of the appellants under S. 342 Cr.P.C which is not curable and that the prosecution has heavily relied on material incriminating pieces of evidence that were never properly put before the appellants to seek their explanation at the time of recording of their statement u/s 342 Cr.P.C. He prayed for the remand of the case back to the learned trial Court. Learned counsel further submitted that the learned trial Court passed the impugned judgment during pendency of Cr. Revision Application No.66/2016 Re- Shafique-Ur-Rehman Vs. the State & others filed by the appellant/accused against Habib-Ur-Rehman against the order passed by learned trial Court on the application under Section 23 ATA-1997 for transferring the case to the ordinary Court. Learned counsel has further contended that the learned trial Court has not justified while rejecting the

transfer application under Section 23 of ATA, 1997 without taking into the consideration of the contents of FIR, Charge Sheet, statement of witnesses examined before the learned trial Court. Learned counsel has further contended that the impugned judgment has been passed by the learned trial Court during the pendency of Cr. Revision Application No.66/2016.

7. On the other hand, learned Additional Prosecutor General, assisted by learned counsel for the complainant have conceded to the remand of the case back to the trial Court.

8. We have given due consideration to the arguments advanced by learned counsel for the appellants, learned counsel for the complainant, learned Additional Prosecutor General and perused the record.

9. Without entering into the merits or demerits of the case, at the very outset, we have perused the statements recorded u/s 342 Cr.P.C of the accused and have found that the trial Court committed grave infirmities and illegalities while recording the statement of appellants and did not observe due care and caution. The statements, prima facie, appear to be patently stereotypical / stereotyped wherein only routine questions were put to the appellants, but material pieces of incriminating evidence have not been put to them by the learned trial Court. Such a practice is against the principles of natural justice.

10. At the very outset, it would be observed that the purpose of recording statement of accused in terms of Section 342 Cr.P.C. is to inform him of the prosecution's evidence brought on record, so that he may be able to explain any circumstances appearing in the evidence against him and also for the purpose of preparing his defence. It is well settled law by now that each and every material incriminating piece of evidence being relied by the prosecution against the accused must be put to the accused at the time of recording his statement in terms of Section 342 Cr.P.C, providing him an opportunity to explain his position and failure to comply with such mandatory requirement of law being incurable under the provisions of Section 537 Cr.P.C, would vitiate the conviction and sentence awarded to the accused. Under these circumstances, in our view the conviction and sentence awarded to the appellants cannot sustain. The Hon'ble Supreme Court in an unreported judgment dated 28.10.2010 passed in **Criminal Appeal No.292 of 2009 (Muhammad Hassan v. The State)** has held as under:

> "4. It is by now a settled principle of criminal law that each and every material piece of evidence being relied upon by the prosecution against an accused person must be put to him at the time of recording of his statement under section 342, Cr.P.C so as to provide him an opportunity to explain his position in that regard and denial of such opportunity to the accused person defeats the ends of justice. It is also equally settled that a failure to comply with this mandatory requirement vitiates a trial… we have truly been shocked by the cursory and casual manner in which the learned trial Court had handled the matter of recording of the appellant's statement under section 342, Cr.P.C which statement is completely shorn of the necessary details which were required to put to the appellant. We have been equally dismayed by the fact that even the learned Judges of the Division Bench of the High Court of Sindh deciding the appellant's appeal had failed to take notice of such a glaring illegality committed by the trial Court. It goes without saying that the omission on the part of the learned trial Court mentioned above was not merely an irregularity curable under section 537, Cr.P.C but the same was a downright illegality which had vitiated the appellant's conviction and sentence recorded and upheld by the learned Courts below."

11. Such a futile exercise has prejudiced the case of the appellants especially when, despite not putting the material questions to the appellants, the learned trial Court has used the same evidence to convict them which is against the mandate of Article 10-A of the Constitution of the Islamic Republic of Pakistan, 1973, which guarantees fair trial for determination of civil and criminal liabilities of every citizen. It is also a matter of record that all these proceedings took place while an application for transfer of case to a Court of normal jurisdiction was pending, however the learned trial Court hastily recorded the statements and then passed the impugned judgment. In the case of **Habibullah alias Bhutto and 4 others v. The State (PLD 2007 Karachi 68)**, this Court has observed that:-

> "……From this fact alone it appears that the learned trial Judge did not go through the evidence while recording the statements under section 342, Cr.P.C. so as to put all

incriminating pieces of evidence to the appellants to obtain their explanation. Under section 342, Cr.P.C. a duty is cast upon the trial Judge to put questions to the accused persons on the incriminating facts which have come in the evidence enabling the accused persons to explain circumstances appearing on the evidence against them. Thus the Provisions of section 342, Cr.P.C. have not been fully complied with."

12. Keeping in view of above position and circumstances coupled with no objection recorded by the learned Additional Prosecutor General and learned counsel for the complainant captioned Special Anti-Terrorism Appeal is partly allowed, conviction and sentence recorded against the appellants vide impugned judgment dated 14.03.2018 are set-aside. The matter is remanded back to the learned trial Court with direction to record the statements of the appellants namely Shafiq-Ur-Rehman and Zia-Ud-Din u/s 342 Cr.P.C afresh, confronting them with each and every material incriminating piece of evidence to enable them to furnish their explanation thereto and then to pass a fresh judgment within a period of three (03) months from the date of receipt of R&Ps after giving the parties a fair opportunity of hearing, under intimation to this Court.

13. Since, the impugned judgment has been set aside and the matter is remanded back to the learned trial Court, as such Constitutional Petition No.D-636/2018 filed by the petitioner for enhancement of sentence awarded to the respondents/accused, has become in-fructuous, therefore, the same is dismissed accordingly.

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Ghulam Muhammad / Stenographer