

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

Criminal Appeal No.D-71 of 2017.  
Confirmation Case No.15 of 2017

**Present:**

***MR. JUSTICE NAIMATULLAH PHULPOTO  
JUSTICE MRS. KAUSAR SULTANA HUSSAIN***

Date of hearing: 06.04.2021  
Date of judgment: 06.04.2021  
Appellant: Munawar Ali  
through M/s Syed Shahzad Ali Shah and Syed  
Shafique Ahmed Shah Advocates.  
Respondent: The State through Mr. Shahzad Salim Nahyoon  
Deputy Prosecutor General Sindh  
Complainant: Mukhtiar Ali Present in person.  
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**J U D G M E N T**

**NAIMATULLAH PHULPOTO,J:-** Appellant Munawar Ali was tried by learned Additional Sessions Judge Shahdadpur in Sessions Case No.220/2008 for offence under sections 302, 114, 34 P.P.C. After full-dressed trial vide it's judgment dated 12.07.2017 appellant was convicted u/s 302(b) P.P.C. read with section 34 P.P.C. and sentenced to death on two counts as Tazir for committing qatl-e-amd of Mukhtiar Ali and Mst. Irshad Khatoon. Appellant was directed to pay compensation of Rs.2,00,000/-each in terms of section 544-A, Cr.P.C. to be paid to the legal heirs of both deceased persons and in default thereof appellant was ordered to suffer S.I. for six months.

2. Brief facts of the prosecution case as mentioned by the trial court in the impugned judgment are as under:-

“The facts of the prosecution case are that the brother of complainant Mukhtiar Ali residing with his father-in-law Fakir Muhammad (accused

herein) in Thaheem Colony, Tando-Adam who was being compelled by his father-in-law to divorce his daughter (the wife of Mukhtiar Ali) and due to said reasons, the differences started. The accused Fakir Muhammad had issued threats of murder to Mukhtiar Ali. On the eventful night, the complainant and his bother Attar had come at Tando-Adam town. They meet their brother Mukhtiar Ali and after taking meal and chit chatting, they left for the house of their cousins namely Khalid and Janib in the same street adjacent to the house of Mukhtiar Ali. They stayed over there for night. At about 05.00 a.m., the complainant and his brother Attar heard the cries from the house of their brother Mukhtiar Ali whereon they with their cousins rushed there and found the door of his house and locked from inside. As such, they while entering the house climbing the wall, found accused Munawar having DBBL gun in his hand, Fakir Muhammad empty handed and accused Ayaz having country made pistol in his hand who catching hold of Mukhtiar Ali from his arms. On the instigation of accused Fakir Muhammad, the accused Munawar straight away fired upon Mukhtiar Ali which hit him on his abdomen, resultantly Mukhtiar Ali fell down on the ground from the cot. The complainant and PWs raised cries and within their sight accused Munawar made second shot on his sister Mst. Irshad Khatoon which hit on her chest, resultantly, she also fell down. The accused seeing PWs and complainant fled away. The complainant and PWs found Mukhtiar Ali and Irshad Khatoon in dead condition. Meanwhile, so many neighbourers arrived at the vardat and leaving PWs at dead bodies, complainant went to PS and lodged the F.I.R. It was recorded on 17.07.2008 vide crime No.195/2008 for offences u/s 302, 114, 34 P.P.C.

3. After usual investigation, challan was submitted against accused Munawar Ali, Fakir Muhammad and Ayaz under the above referred sections.
4. It will not be out of place to mention here that learned Additional Sessions Judge Tando Adam in Sessions Case 220 of 2008 in the same case / crime, had framed charge against all the three accused namely Munawar, Fakir Muhammad and Ayaz for offences under Sections 302, 114, 34 P.P.C. All the accused pleaded not guilty and claimed to be tried.
5. At the trial, prosecution examined Dr. Mashkoor Ahmed (PW-1), Mumtaz (PW-2), Attur (PW-3) and Muhammad Saleem (PW-4). Thereafter,

compromise application was filed. The ADPP for the State filed an application u/s 227 Cr.P.C at Ex.49 for amendment of the charge, on the ground that due to oversight name of another deceased Mst. Irshad Khatoon could not be mentioned in the charge previously framed by learned trial court on 16.09.2008. By consent, application was allowed and amended charge was framed by the trial court on at Ex.50. All the accused pleaded not guilty and claimed to be tried. The ADPP for the State filed another application at Ex.54 whereby he adopted the evidence recorded after framing of the first charge. Advocate for the accused filed statement to adopt the same cross-examination. Trial court vide order dated 31.05.2011 decided the compromise application. Operative part is as under :

*“Keeping in view the material available on record I do hereby partly accept the application u/s. 345(2) Cr.P.C. and grant permission to compound the offence to the extent to two accused Ayaz and Fakir Muhammad while partly reject the same to the extent of accused Munawar, in view of his brutal act of committing murders of two innocent and sleeping persons on the baseless charge of KARO KARI falls within purview of Fasad-Fil-Arz as such he does not deserve any leniency. Accordingly accused Munawar son of Allah Rakhio is convicted and awarded death sentence u/s. 311 P.P.C. on each count. He shall be hanged by neck till he is dead. Let reference for confirmation of death sentence be made u/s. 374 P.P.C. to the Honourable High Court. Accused Munawar is present in custody and he is remanded back to C.P. Hyderabad for execution of sentence, however, accused may file appeal within 7 days. Since I have already allowed application u/s. 345(2) Cr.P.C. and granted permission to compound the offence to the extent of accused Ayaz and Fakir Muhammad as such there is no impediment for acquittal of these two accused. However, there are two minor legal heirs of deceased Mukhtiar Ali and all other legal heirs of both deceased are adults and they have forgiven the accused without claiming any compensation. Therefore, I also allow this application u/s. 345(6) Cr.P.C. partly and acquit accused Ayaz and Fakir Muhammad subject to deposit Diyat amount of share of minors sons of deceased Mukhtiar Ali namely Bilawal and Abdul Sattar as per Muhammadan Law.”*

6. Trial court made reference to this court for confirmation of death sentence and appellant filed Criminal Jail Appeal NO.D-190 of 2011 before this court, the same was disposed of vide order dated 20.02.2015 with the following observation :

*“Perusal of impugned judgment reflects that the contentions of learned counsel for appellant are cogent, patently trial court without proceeding further, while deciding the compromise applications convicted the appellant. Worth to add here, the exercise undertaken by the trial court is against the spirit of fair trial as enshrined under Article 10-A of the Constitution of Islamic Republic of Pakistan, 1973. Consequently, impugned judgment to the extent law with regard to the plea of learned counsel that they have been deprived from the right of preferring revision application with regard to acceptance of compromise and intends to agitate that compromise can be accepted and section 311 P.P.C. was misapplied; learned trial court shall decide the aspect of “Fasad’Fil-Arz” after, considering the evidence, providing the opportunity of hearing to the parties and without being influenced by earlier order on compromise application while passing final judgment. Consequently, death reference filed u/s. 374 Cr.P.C. is answered as negative.”*

7. After remand of the case, trial court recorded evidence of Mr. Abdul Hakeem, the then Civil Judge and Judicial Magistrate-I Tando Adam at Ex.58. PW-6 Dr. Najma Begum was examined at Ex.59. PW-7 SIP Piyar Ali Hingoro was examined at Ex.60. PW-8 SIP Muhammad Saleem was again examined at Ex.61. PW-9 Janib was examined at Ex.62. PW-10 Khalid was examined at Ex.63. PW-11 Mangliyo was examined at Ex.64. Trial court issued process against remaining witnesses which returned un-served with the endorsement that they have shifted to some unknown place. Thereafter, prosecution side was closed. Statement of the accused Munawar Ali was recorded u/s 342 Cr.P.C at Ex.68 in which he denied the prosecution allegations. Trial court after hearing the learned counsel for the parties and assessment of evidence convicted appellant Munawar under Section 302(b) / 34 P.P.C. and sentenced him to death on two counts as Tazir for committing murder of Mukhtiar Ali and Mst. Irshad Khatoon with compensation of Rs.2,00,000/-each in terms of section 544-A, Cr.P.C. to be paid to the legal heirs of both deceased persons. In case of default thereof appellant was ordered to undergo S.I. for six months as stated above. Reference was made to this Court for confirmation of death sentence.

8. Learned advocate for the appellant mainly contended that after amendment of the charge evidence of 04 PWs namely Dr. Mashkooor Ahmed,

Mumtaz, Attur and Muhammad Saleem already recorded was adopted by the prosecutor and defence counsel endorsed it. It is submitted that such procedure adopted was illegal and it is prayed that case may be remanded back. In support of his submissions, he relied upon the judgments of this Court reported as RAJIB ALI NAICH and others versus The STATE (2019 MLD 306), MUHAMMAD ASIF versus The STATE (2019 P.Cr.L.J. 521), NAIMATULLAH versus The STATE (2018 P.Cr.L.J Note 64), ALLAH DINO and 2 others Versus The State (2018 P.Cr.L.J. 200) and SIBGHATULLAH versus The STATE (2020 MLD 776).

9. Learned D.P.G. assisted by complainant conceded for remand of the case in the view of illegality committed by the trial court while relying upon the above cited judgments.

10. Record reflects that after amendment of the charge surprisingly evidence of 04 PWs namely Dr. Mashkooor 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.

11. In the case of NAIMATULLAH versus The STATE (2018 P Cr. L J Note 64), it has been held as under :

"12. We have carefully heard the arguments of learned counsel for the parties and perused the evidence recorded by the learned trial Court. It is a matter of record that charge was framed against the accused Naimatullah by learned trial Court under section 9(c), Control of Narcotic Substances Act, 1997 at Exhibit 4. Accused pleaded not guilty and claimed to be tried. Prosecution examined P.W.-1 Muhammad Asim Raza Inspector ANF at Exhibit 6, P.W.-2 ASI Rashid Ali ANF at Exhibit 7. Thereafter, learned SPP closed prosecution side at Exhibit 8. Statement of accused Naimatullah was recorded under section 342, Cr.P.C. at Exhibit 9. Thereafter learned SPP submitted application under section 227, Cr.P.C. for altering the charge dated 27.12.2015. Application was allowed by learned trial Court vide order dated 01.01.2016. Amended charge was framed by the learned trial Court under section 9(c), Control of Narcotic Substances Act, 1997 at Exhibit 10. **After amended charge Special Public Prosecutor ANF filed statement dated 08.01.2016 that prosecution did not want to examine witnesses more and closed the prosecution side. Defence counsel also submitted statement on the same date for not cross-examining the prosecution witnesses more. Learned trial Court recorded statement of accused on oath and after hearing learned counsel for the parties passed the impugned judgment.**

13. 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 would 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 description of samples. 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.

14. We have carefully perused the relevant provisions of the law regarding recording of the evidence by the learned trial Court. 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 taken before amended charge. In the amended charge sufficient description of samples has been mentioned. It was the duty of the trial Court to re-call witnesses already examined for re-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. Reliance is placed upon the case of S. Hifazat Hussain v. The State (1987 PCr.LJ 403) in which this Court had observed as under:-*

*"Mr. Rafique Khanzada, learned counsel for accused Deedar Ali placed reliance on 1986 PCr.LJ 1236 where a Division Bench of this Court held that where the Special Court had framed second charge in which the misappropriated amount was increased and offences were also changed except one and the statement of the prosecution witness whose statement was transferred on record of Special Court had not been re-summoned as accused was said to have stated not to examine him, in these circumstances the provisions of section 231 of Cr.P.C. with regard to recalling of witness when charge is altered had not been properly complied with, hence conviction of the accused was set aside and the case was remanded for trial. The learned counsel for the respondents concedes to this position.*

*Consequently, the impugned judgment is set aside and the case is remanded to the Special Court (Offences in Banks) Karachi for retrial from the stage of 13.11.1985. P.W. Khamiso Khan would be summoned for cross-examination and thereafter the case will proceed in accordance with law."*

12. In the view of above legal position, we have no hesitation to hold that trial court has committed illegality while adopting the same evidence which was recorded after framing of the first charge, therefore, conviction and sentence recorded against appellant by trial court vide judgment dated 12.07.2017 is not sustainable in the law and same is set-aside. Case of the appellant is remanded back to trial court for recording the evidence of 04 PWs namely Dr. Mashkooor Ahmed, Mumtaz, Attur and Muhammad Saleem afresh (examination-in-chief, cross-examination and re-examination). Remaining evidence shall remain same. On the conclusion of the trial, when the prosecution will close the side, statement of the accused will be recorded u/s 342 Cr.P.C. After hearing the learned counsel for the parties, learned trial court shall decide the case within three (03) months under intimation to this Court. Appellant shall be treated as under trial prisoner. Office is directed to return the R & Ps to the trial court forthwith. Trial court shall issue P.O for the accused for 19.04.2021. Complainant is present before the Court. He is directed to appear before the trial court on

the said date.

13. For the above stated reasons, appeal is partly allowed in the above terms and confirmation reference is answered in negative.

JUDGE

JUDGE

Ali Haider



