

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

Criminal Appeal No.D-93 of 2019.  
Confirmation Case No.13 of 2019

**Present:**

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

Date of hearing: 24.03.2021

Date of judgment: 31.03.2021

Appellants: Shoukat Ali and Abdul Rasheed  
through Mr. Abdul Hameed Bajwa, advocate

Respondent: The State through Mr. Shahzado Salim Nahyoon  
Deputy Prosecutor General Sindh

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**J U D G M E N T**

**KAUSAR SULTANA HUSSAIN,J:-** Appellants Shoukat Ali and Abdul Rasheed have impugned the judgment dated 01.06.2019, passed in Sessions Case No.19/2014 arising out of Crime No.182/2013 u/s 302, 114 P.P.C. by 1<sup>st</sup> Additional Sessions Judge / Model Criminal Trial Court, Shaheed Benazirabad whereby appellant Shoukat Ali was convicted under section 302(b) PPC and sentenced to death and to pay Rs.200,000/- as compensation in view of section 544-A Cr.P.C to the legal heirs / walis of deceased Ahmed Khan failing which to undergo further simple imprisonment of six months, he was also convicted u/s 324 P.P.C. and sentenced to undergo R.I for five (05) years and to pay fine of Rs.50,000/- and in case of default in payment of fine, to undergo S.I. for eight (8) months more, whereas, appellant Abdul Rasheed was convicted u/s 302(b) P.P.C. and sentenced to R.I. for life and to pay Rs.200,000/- as compensation in view of section 544-A Cr.P.C to the legal heirs / walis of deceased Ahmed Khan failing which to undergo further S.I. for six months, he was also convicted u/s 324 P.P.C. and sentenced to undergo R.I. for five (05) years and to pay fine of Rs.50,000/- and in case of default in payment of fine, to undergo S.I for eight

(8) months. All the sentenced shall run concurrently. Both accused were extended benefit of section 382-B Cr.P.C.

2. The brief facts of the prosecution case as narrated in F.I.R. No.182/2013 of P.S Sakrand lodged on 14.10.2013 by Shamsuddin son of Muhammad Fazal Laghari are that on 14.10.2013 at evening time altercation occurred between Ahmed Khan Laghari, brother of complainant and Shoukat son of Suhrab Laghari who stated that they would see Ahmed Khan and commit murder. On the same day in the evening, complainant along with his brother Ahmed Khan, Bashir Ahmed and Rasool Bux were going towards their home. At about 07:15 p.m. the complainant and his companions were intercepted by Suhrab son of Abdullah Laghari, Shoukat son of Suhrab Laghari, Shamsuddin son of Suhrab Laghari, Abdul Rasheed son of Suhrab Laghari who were all armed with pistols. Suhrab Laghari instigated his sons to commit murder and on such instigation all three accused fired pistol shots with intent to commit murder. Pistol shots fired by Shoukat Laghari hit on right eye of Ahmed Khan who fell down while other fire arm shots missed and hit on walls. The complainant and his companions raised cries and all the accused decamped. After departure of accused the complainant and his companions saw that Ahmed Khan had sustained fire arm injury on right eye which was bleeding and Ahmed Khan had expired. The complainant with the help of above named witnesses shifted the dead body of Ahmed Khan to Taluka Hospital Sakrand where post mortem of deceased was conducted. Thereafter the complainant lodged F.I.R.

3. After registration of F.I.R. and conducting usual investigation of the case, the I.O submitted charge sheet in the Court of Civil Judge and Judicial Magistrate-I, Sakrand in which accused Shoukat son of Suhrab Laghari and Abdul Rasheed son of Suhrab Laghari were shown to be in custody while accused Suhrab son of Abdul Laghari and Shamsuddin son of Suhrab Laghari were mentioned as absconders. After initiating proceedings u/s 87 & 88 Cr.P.C., absconding accused Suhrab son of Abdullah Laghari and Shamsuddin son of Suhrab Laghari were declared as proclaimed offenders vide order dated

23.12.2013 passed by Civil Judge and Judicial Magistrate-I, Sakrand. The case being Sessions trial was sent up to the Sessions Court Shaheed Benazirabad, wherefrom the same was made over to the Court of 3<sup>rd</sup> Additional Sessions Judge Shaheed Benazirabad, where formal charge was framed. Thereafter the case was transferred to the Court of 2<sup>nd</sup> Additional Sessions Judge, Shaheed Benazirabad where evidence of all prosecution witnesses was recorded, prosecution side of evidence was closed and statement of both accused u/s 342 Cr.P.C. were recorded. On inception of Model Criminal Trial Court, the instant case was transferred to the 1<sup>st</sup> Additional Sessions Judge / Model Criminal Trial Court, Shaheed Benazirabad, for disposal in accordance with law.

4. Formal charge was framed upon accused Shoukat and Abdul Rasheed vide Ex.07 to which accused Abdul Rasheed and Shoukat pleaded not guilty vide Ex.8 and 9 respectively and claimed trial.

5. In the trial, the prosecution in order to prove its case, in all examined eight (8) witnesses. Evidence of P.W-1 Shamsuddin (complainant) was recorded vide Ex.10. He produced F.I.R. as Ex.10/A. Evidence of P.W-2 Bashir Ahmed (eyewitness) was recorded as Ex.11. Evidence of P.W-3 Rasool Bux (eyewitness) was recorded as Ex.12. Evidence of PW-4 Nabi Bux (Tapedar) was recorded as Ex.13. He produced sketch of place of incident as Ex.13/A. Evidence of P.W-5 Ghulam Mustafa (mashir) was recorded as Ex.14. He produced mashirnama of dead body, danishtnama, mashirnama of place of incident and mashirnama of blood stained clothes of deceased as Ex.14/A, 14/B, 14/C & 14/D respectively. Evidence of P.W-6 Dr. Nadeem Azhar (Medical Officer) was recorded as Ex.15. He produced lash chakas form as Ex.15/A and post mortem report of deceased Ahmed Khan as Ex.15/B. Evidence of PW-7 ASI Ghulam Qadir (Investigation Officer) was recorded as Ex.16. He produced receipt of handing over dead body to Muhammad Rafique, mashirnama of arrest and recovery, daily diary entries No.17, 24 and 25, report of ballistic expert, report of chemical examiner as Ex.16/A, 16/B, 16/C, 16/D, 16/E, 16/F and 16/G respectively. Evidence of PW-8 HC Abdul Razzaque was recorded as

Ex.17. Vide statement at Ex.18, ADPP for the State closed prosecution side of evidence.

6. Statements of appellants were recorded under section 342 Cr.P.C at Ex.18 and 19 respectively in which they have denied the case of prosecution and stated that they have been falsely implicated in this case. However, the accused neither examined themselves on oath u/s 340(2) Cr.P.C. nor produced any evidence in defense, except copy of F.I.R. No.136/2013 of P.S. Sakrand, copy of order dated 10.12.2013 passed by District & Sessions Judge, Shaheed Benazirabad, four photographs regarding demolition of their house, copy of F.I.R. No.217 of 2011 of P.S Sakrand, copy of F.I.R. No.218 of 2011 of P.S Sakrand, Muster Roll of Pakistan Agricultural Storage and Services Corporation Limited, application submitted by Mst. Amnat wife of Suhrah Laghari in the Court of Civil Judge & Judicial Magistrate-I, Sakrand etc.

7. Vide application u/s 227 Cr.P.C. (Ex.20) ADPP for the State requested for altering/amending the charge as proper sections were not applied in the charge framed earlier on 23.12.2014. Notice of application was given to the advocate for the complainant and accused. After hearing both the counsel for the parties and with their mutual consent, the application was allowed and amended charge was framed vide Ex.21 on 20.05.2019 to which accused Shoukat and Abdul Rasheed once again pleaded not guilty vide Ex.21/A and 21/B respectively and claimed trial. ADPP for the State vide statement dated 20.05.2019 at Ex.22 adopted same evidence of prosecution witnesses which was already available on record. Advocates appearing on behalf of accused Shoukat and Abdul Rasheed also adopted same cross-examination of P.Ws which was already available on record. Vide statement dated 20.05.2019 at Ex.23 ADPP for the State closed prosecution side of evidence.

8. As charge was altered / amended, therefore, statements of accused Shoukat Ali and Abdul Rasheed were recorded under section 342 Cr.P.C as Ex.24 and 25 respectively, afresh. Both the accused again denied the case of prosecution and stated that they have been falsely implicated in this case due

to enmity. However, the accused neither examined themselves on oath u/s 340(2) Cr.P.C, nor produced any evidence in defense.

9. The learned trial Court after concluding the evidence and hearing the parties, convicted the accused in the manner as stated above. Hence this appeal.

10. Mr. Abdul Hameed Bajwa learned counsel for appellants mainly contended that after amended charge, it was the duty of the prosecution to recall the prosecution witnesses before the trial Court for recording their fresh evidence to substantiate the charge but it was not done. It is further argued that trial Court without applying judicial mind acted upon the statement of the Prosecutor. Learned advocate for the appellant also submitted that illegality committed by the trial Court in fact has vitiated the trial and same is not curable hence judgment of trial Court is not sustainable in law. He has relied upon the judgment authored by one of the member of this bench my brother Judge Mr. Justice Naimatullah Phulpoto reported in 2018 P Cr. L J Note 64 (Sindh) wherein it was observed that:-

*“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.”*

11. Mr. Shehzado Saleem Nahiyoon learned D.P.G. appearing on behalf of the State conceded to contentions of defence counsel to the extent of remand of the case and submitted that proper course would be to remand the case to the trial Court for recording evidence after amendment of the charge afresh, in accordance with law.

12. We have heard the arguments of learned counsel for the parties with due care and caution and perused the evidence recorded by the learned trial Court. It is

an admitted position of the case that the first charge was framed against the accused by learned trial Court under wrong sections 376, 511, 451/1, 34 P.P.C. at Exhibit 7. Accused pleaded not guilty and claimed to be tried. Prosecution examined P.W-1 Shamsuddin (complainant) at Ex.10, P.W-2 Bashir Ahmed (eyewitness) at Ex.11, P.W-3 Rasool Bux (eyewitness) at Ex.12, PW-4 Nabi Bux (Tapedar) at Ex.13, P.W-5 Ghulam Mustafa (mashir) at Ex.14, P.W-6 Dr. Nadeem Azhar (Medical Officer) at Ex.15, PW-7 ASI Ghulam Qadir (Investigation Officer) at Ex.16, PW-8 HC Abdul Razzaque at Ex.17. Vide statement at Ex.18, ADPP for the State closed prosecution side of evidence. Statements of appellants were recorded under section 342 Cr.P.C at Ex.18 and 19 respectively. Thereafter learned ADPP submitted an application under section 227, Cr.P.C. at Ex.20 for amending / altering the charge dated 20.05.2019, which was allowed by learned trial Court on the same day. Amended charge was framed by the learned trial Court under section 302, 324, 114, 34 P.P.C. at Exhibit 21 on 20.05.2019. After amended charge ADPP filed statement dated 20.05.2019 and adopted same evidence of prosecution which was already available on record. Counsel for the accused also adopted the same cross examination of P.Ws which was already available on record. Thereafter, ADPP vide statement dated 20.05.2019 closed the evidence side of prosecution. Learned trial Court recorded statements of accused u/s 342 Cr.P.C and after hearing the learned counsel for the parties passed the impugned judgment.

13. Section 231, Cr.P.C. provides that whenever a charge is altered or added by the court after commencement of the trial, the prosecution and the accused are to be allowed to recall or re-summon and re-examine with reference to such alterations or additions, any witness who might have been examined. Section 231, Cr.P.C. is mandatory in nature. 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 correct and relevant provision of law i.e. sections 302, 324, 114, 34 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."*

14. We have gone through the record with reference to such alteration, the procedure adopted by the learned trial Court after altering the charge we are of the view that trial Court had opted illegal procedure by allowing the prosecution to rely upon the same evidence which was taken before amended charge instead to recall the witnesses and re-examine them. In the amended charge correct and relevant provisions have been applied by the trial court, hence, it was the duty of the trial Court to re-call witnesses already examined for examination afresh in order to avoid consequences of non-compliance of mandatory provisions of Section 231, Cr.P.C.

15. Per record of instant case, after altering the charge the learned trial court has recorded fresh statements of the accused u/s 342 Cr.P.C. while no fresh evidence of prosecution witnesses has been recorded which is again an illegality committed by the trial Court. We, therefore, come to the conclusion that impugned judgment passed by the learned trial Court is not sustainable under the law, and as such the conviction and sentence of the accused are set aside. The case is remanded to the trial court with direction to re-call, re-examine and cross examine the prosecution witnesses already examined by providing a fair opportunity to the defence, record statement of accused afresh and to pass the judgment afresh in accordance with law.

16. In view of above, appeal is allowed to above extent and the reference is answered in negative. Appellants shall be treated as under trial prisoner. However, trial court is directed to decide the case within a period of two months from the receipt of a copy of this judgment under intimation to this Court.

JUDGE

JUDGE



