

IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD***Crl. Appeal. No. S- 259 of 2018.***

Appellants: Sadique and others
Through Mr. Ahsan Gul Dahri, advocate.

The State: Through Mr. Siraj Ahmed Bijarani APG.

Date of hearing: **01.10.2024.**
Date of Order: **01.10.2024.**

J U D G M E N T

Zulfiqar Ali Sangi, J.- Appellants were tried and convicted in Sessions Case No.44/2016 arising out of FIR No.24/2015 PS Drigh Bala vide judgment dated 01.11.2018, whereby the appellants No.1, 3 and 4 were convicted and sentenced under section 302(b) P.P.C. to R.I. for life imprisonment and were directed to pay 100,000/ each to be paid to the Legal heirs of the deceased and in default thereof were further to undergo S.I. for six months, however, the appellant No.2 was convicted and sentenced under Section 114 PPC to R.I. for five years and to pay an amount Rs. 50,000/ to be paid to the legal heirs of the deceased and in default thereof was further to undergo SI for six months. Against that Judgment, this appeal has been preferred.

2. At the very outset, counsel for appellants submits that initially on 29.03.2016 charge was framed against appellants Sadique, Rafique and Haji Kalo and two witnesses were examined namely PW-1 Dr. Hamzo Khan, who exhibited certain documents in his evidence so also Tapedar Dhani Bux as PW-2, who too exhibited certain documents in his evidence and thereafter co-appellant Muhammad Haneef @ Haneef was arrested and on 19.08.2017 amended charge was framed and remaining PWs were examined. However, PWs who were already examined were not examined in presence of appellant Muhammad Hanif and their evidence was used against him while awarding conviction,

therefore, submits that the case may be remanded to the trial court to examine the two witnesses PWs 1 and 2 in presence of appellant Muhammad Hanif as case being of capital punishment.

3. After going through the record, learned A.P.G. has conceded for remand of the case.

4. I have heard learned counsel for the parties and have gone through the material available on record with their able assistance.

5. From perusal of record, it reflects that the charge was framed initially on 29.03.2016 charge was framed against appellants Sadique, Rafique and Haji Kalo and two witnesses were examined namely PW-1 Dr. Hamzo Khan, who exhibited certain documents in his evidence so also Tapedar Dhani Bux as PW-2, who too exhibited certain documents in his evidence and thereafter co-appellant Muhammad Haneef @ Haneef was arrested and on 19.08.2017 amended charge was framed and remaining PWs were examined. However, PWs who were already examined were not examined in presence of appellant Muhammad Hanif and their evidence was used against him while convicting him and there is nothing on record that the evidence of PWs 1 and 2 was recorded in presence of appellant Muhammad Hanif. However, perusal of judgment reflects that the same was used against him while awarding conviction that is totally against the scheme of law and procedure prescribed u/s 353 Cr.P.C. which provides that the evidence shall be taken in presence of accused or when his personal attendance dispensed with, in presence of his pleader. In view thereof, the trial court has committed an illegality which is not curable under the law.

6. For the above reasons, the appeal is allowed to the extent that the impugned judgment dated 01.11.2018 is set aside. The case is remanded to the trial Court for recording evidence of PWs 1 & 2 in presence of accused and counsel and thereafter record u/s 342 Cr.P.C. statements afresh after affording opportunity of hearing to the parties and deliver the judgment within a period of two months positively.

7. It is pointed out that appellant Haji Kaloo is on bail granted

by suspending his sentence by this court vide order dated 05.03.2019 and his presence was exempted vide order dated 31.08.2023 being oldage and infirm person. Under the circumstances, appellant Haji Kaloo shall remain on same bail and surety furnished before this Court. Counsel submits that he will file application u/s 540 Cr.P.C. before the trial court for recording evidence in presence of his counsel; however, appellant will be produced before the trial court at the time of announcement of judgment.

8. The appeal is, therefore, disposed of in the above terms.

J U D G E