

IN THE HIGH COURT OF SINDH AT KARACHI

Present:

Mr. Justice Mohammad Karim Khan Agha
Mr. Justice Irshad Ali Shah

**CRIMINAL APPEAL NO. 304 OF 2019
CONFIRMATION CASE NO. 10 OF 2019.**

Appellant Waseem Faraz son of Mohammad Saleem
 through Mr. Mehmood Akhtar Qureshi,
 Advocate

For State: Mr. Muhammad Iqbal Awan, Deputy
Prosecutor General.

Date of hearing: 24.08.2021

Date of announcement: 24.08.2021

JUDGMENT

Mohammad Karim Khan, J. Appellant Waseem Faraz was tried by Model Criminal Trial Court/Court of Addl. District & Sessions Judge-I Karachi (East) in respect of FIR No.853 of 2010 u/s.302/397/324/34 PPC registered at PS Gulshan-e-Iqbal, Karachi and after a full dressed trial appellant was convicted and sentenced vide judgment dated 13.05.2021.

2. Whilst reading out the evidence of PWs today when we were hearing the appeal against conviction, it transpired that PW-7 Mohammad Aslam, who was the I.O. of the case and an important witness, his evidence in chief was recorded in the absence of learned defence counsel for the appellant/accused. Even otherwise as per date narrated in his deposition, his deposition was recorded on 26.09.2018. As per diary sheet on the said date he was called absent. If this is the position on the said date, then recording of his evidence in his absence also appears to be surprising and potentially doubtful.

3. The appellant has his right to fair trial as is guaranteed under Article 10-A of the Constitution especially as some of the offences charged in this case carry the death penalty for which the accused was convicted and sentenced and as such it was essential that his main defence counsel be present at all times during recording of the evidence of the prosecution witnesses (evidence-in-chief, cross-examination and re-examination). The

fact that the evidence of PW-7 Mohammad Aslam, who is I.O. of the case and an important witness, lead his evidence in the absence of his defence counsel has led us to the conclusion that the appellant has been prejudiced in his defence. This is because if he had a well versed defence counsel present during recording of the evidence in chief of PW-7 Mohammad Aslam he may have objected to certain questions which were asked to him and even to the admissibility of certain documents which were exhibited by him and as such the entire complexion of his examination in chief might have changed and been more favorable to the appellant as certain exhibited documents might have even been excluded. In the past this Court under similar circumstances has remanded such cases back to the learned trial court for the limited purpose to re-record certain segments of the evidence where the accused has been prejudiced. In this respect reliance is placed on **Bashir Ahmed v The State** (SBLR 2021 Sindh 112). Learned counsel for the appellant and learned Additional Prosecutor General both agreed that the defect pointed out above justified the remand of the case back to the trial court for re-recording the evidence of PW-7 Muhammad Aslam in the presence of defence counsel.

4. Under these circumstances, we hereby set-aside the impugned judgment and answer the confirmation reference in the negative and hereby remand the case back to the Model Criminal Trial Court/ Court of Addl. District & Sessions Judge-I Karachi (East) for the limited purpose of re-recording the evidence of PW-7 Muhammad Aslam, I.O. of the case, which evidence shall be re-recorded in the presence of learned defence counsel. It is made clear that PW-7 Muhammad Aslam's entire evidence including evidence in chief, cross examination and re-examination shall be re-recorded. Thereafter the appellant shall record his statement u/s. 342 Cr.P.C whereafter the trial Court shall re-write the judgment in accordance with law and ensure that it makes findings in respect of all offences for which the appellant / accused has been charged by considering the evidence on record.

5. Office is directed to return this appeal along with R&Ps to the learned trial court i.e. Model Criminal Trial Court/ Court of Addl. District & Sessions Judge-I Karachi (East) which shall carry out the aforesaid exercise within 04 weeks of the date of the receipt of the R&Ps.

6. Copy of this order shall be sent through facsimile to the learned Judge, Model Criminal Trial Court/Court of Addl. District & Sessions Judge-I Karachi (East) for compliance.

7. The appeal and confirmation reference stand disposed of in the above terms.

JUDGE

JUDGE