Further in continuation S. 342 Legal

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CERTIFICATE OF THE HIGH COURT OF SINDH, KARACHI

Criminal Appeal No-729 of 2019

Zeeshan @ Shan

Vs.

The State

HIGH COURT OF SINDH

Composition of Bench. ***Single.***

Mr. Justice Mohammad Karim Khan Agha

Dates of hearing : 13-11-2024

Decided on : 19-11-2024

(a) Judgment approved for Reporting ***Yes***

CERTIFICATE.

Certified that the judgment */Order is based upon or enunciates a principle of law */decides a question of law which is of first impression/distinguishes/. Over-rules/ reverses/explains a previous decision.

* Strike out whichever is not applicable.

NOTE: - (i) This slip is only to be used when some action is to be taken.

(ii) If the slip is used, the Reader must attach it to the top of the first page of the judgment.

(iii) Reader must ask the Judge writing the Judgment whether the Judgment is approved for reporting.

(iv) Those directions which are not to be used should be deleted.

PRESENTED ON
05-11-2019
Deputy Registrar (Judl.)

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IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Appeal No. 728 /2019

ZEESHAN @ SHAN
S/o Suleman @ Chachoo
Presently confined in Central Jail,
at Karachi..... **APPLICANT/ACCUSED**

VERSUS

THE STATE ..... **RESPONDENT**

FIR No: 148/2013
U/S: 302 PPC
P.S: Garden, Karachi

APPEAL U/S 410 CRIMINAL PROCEDURE CODE

Being aggrieved and dissatisfied with the impugned judgment, sentenced and fined dated 10-10-2019 passed by the Learned Ist Additional Session Judge (Model Criminal Trial Court) at Karachi South in case No.992/2013 (The State V/S Zeeshan @ Shani S/o Muhammad Suleman) arising out of FIR No.148/2013 U/s 302 PPC at PS Garden, thereby convicting the Appellant, The Appellant/Accused Zeeshan @ Shani S/o Muhammad Suleman U/s 302 PPC R/w Section 265-H(ii) undergo life imprisonment with fine of Rs.300,000/- (Three Hundred Thousand) and in default of payment of fine Appellant/Accused shall undergo a six months, benefit of section 382 Cr.P.C which was also awarded to the Appellant/Accused. It is therefore prayed that this Hon'ble Court may be pleased to recall and proceed the above case from the Learned Ist Additional Session Judge (Model Criminal Trial Court) at Karachi South and after hearing the Appellant/Accused and his counsel, it may be pleased to set-aside the impugned Judgment dated

IN THE HIGH COURT OF SINDH AT KARACHI

Present:

Mr. Justice Mohammad Karim Khan Agha

CRL. APPEAL NO.729 OF 2019

Appellant:	Zeeshan @ Shan s/o Suleman @ Chachoo through Ms. Fariyal Ishaque and Mr. Sathi M. Ishaque, Advocates.
Respondent:	The State through Mr. Muhammad Iqbal Awan, Addl. Prosecutor General, Sindh
Complainant:	Through M/s. Muhammad Ashraf Kazi Irshad Ahmed Jatoi, Advocates.
Date of Hearing:	13.11.2024
Date of Announcement:	19.11.2024

JUDGMENT

Muhammad Karim Khan Agha, J. Appellant Zeeshan @ Shan was tried in the Court of Additional Sessions Judge-I/Model Criminal Trial Court Karachi South in Sessions Case No.992 of 2013 in respect of Crime No. 148 of 2013 registered under Section 302 at P.S. Garden, Karachi and after a full-fledged trial vide judgment dated 10.10.2019 he was convicted under section 265-H(2) Cr.P.C. and sentenced to life imprisonment for committing an offence punishable under Section 302 PPC. Appellant was directed to pay compensation to the legal heirs of the deceased u/s. 544-A Cr.P.C. in the sum of Rs.3,00,000/- and in default, he was directed to suffer SI for six months more. The benefit of section 382-B Cr.P.C. was also extended to the appellant.

2. The brief facts of the case as per FIR lodged by the complainant are that he is retired from his service in police department as Sub-Inspector and his son namely Syed Afsar Shah aged about 34 years was serving as constable in Police Department and was posted at Security Zone-I, Karachi and was performing his duty in Sindh High Court, who left his house on 18.07.2013 after Iftar for his duty and at about 2100 hours his other son namely Syed Tayab Shah informed him that Afsar Shah had received injuries and he was taken to Civil Hospital Karachi. Thereafter sons of complainant and his relatives went to Civil Hospital and found that his son was in Operation Theater who succumbed to his injuries

during medical treatment. After some inquiry, complainant came to know that his son was sitting with his friends namely Waqar Ahmed and Ghulam Mustafa for taking tea at Tea Cabin near Nishtar Road, Shoe Market, Nagori Mailk Shop when at about 2030 hours all of sudden one person came and caused knife blows to his son on right side of his neck, who fell down, thereafter he was shifted to Civil Hospital by Waqar Ahmed, Ghulam Mustafa and Nadeem where his son succumbed to injuries. Complainant submitted that accused / appellant Zeeshan @ Shan caused fatal injuries to his son which resulted in his death. Hence aforesaid FIR was lodged.

3. After usual investigation the matter was challaned and the appellant was sent up to face trial. He pleaded not guilty and claimed trial.

4. In order to prove its case the prosecution examined 10-PWs and exhibited various items and other documents. The appellant recorded his statement under Section 342 Cr.P.C. whereby he claimed that he was innocent. However, he did not give evidence on oath or call any witness in support of his defence.

5. After appreciating the evidence on record, the learned trial Court convicted and sentenced the appellant as set out earlier and hence, the appellant has filed this appeal against his conviction and sentence.

6. After the entire evidence had been read out by learned counsel for the appellant an issue arose as to whether the S.342 Cr.PC statement of the appellant was in accordance with the law and what the legal consequences might be.

7. The prosecution case primarily rests on the evidence of three eye witnesses who according to their evidence all saw the accused stab the deceased to death.

8. With regard to the question of the murder of the deceased by the appellant in respect of the eye witnesses who gave evidence that they saw the appellant stab the deceased the following question was put to the appellant in his **first** S.342 Cr.PC statement;

> **Q.01.** *You have heard the prosecution evidence recorded in your presence during trial of the case and it has come in evidence that on 18.07.2013 at about 2030 hours at Nishtar Road, Shoe market near Nagori Milk Shop, Garden, Karachi, you attacked upon deceased Syed Afsar Shah knowingly and intentionally and caused Churri injuries to him with intent to kill him due to which he expired thereby you have committed Qatl-e-Amd of the deceased punishable under section 302, PPC. What have to say?*
>
> **Ans.** *It is false allegation.*

9. Thereafter the Prosecution moved an application to call two further PW's being the MLO in respect of the medical evidence and the judicial magistrate in

respect of three S.164 Cr.PC statements which he recorded. Such application was allowed and the two aforesaid witnesses gave evidence.

10. Thereafter the trial court recorded a **second "Further** statement of accused under S.342 Cr.PC" where at Question one the following question was asked amongst other questions;

> **Q.01.** *Have you heard prosecution evidence recorded after allowing on application under section 540 Cr.PC, moved by learned DDPP for the State, in your presence?*
>
> **Ans.** *Yes Sir.*

11. The question therefore arose as to the legal effect of the S.342 Cr.PC statements.

12. All parties were in agreement (learned counsel for the applicant, learned counsel for the complainant and learned APG) that after recording two new PW's the **first** S.342 Cr.PC statement was of no legal effect and a second **fresh** S.342 Cr.PC statement had to be recorded.

13. I agree with the parties and note that the trial court has tried to record a *further* statement under S.342 Cr.PC apparently *in continuation* of the first S.342 Cr.PC statement of the appellant. There is however no provision in law/concept which allows *a further* S.342 Cr.PC statement to be made *in continuation* of the first S.342 Cr.PC statement which is limited to new witnesses which have been recorded and after the evidence of two witnesses had been recorded in between the two separate S.342 Cr.PC statements. The S.342 Cr.PC statement must be recorded afresh, if it has not already been recorded, at the completion of the prosecution case which would lead to their being **one final S.342 Cr.PC statement** encompassing each piece of evidence which the prosecution intended to rely on to convict the accused. There is no provision in law which enables the court to record S.342 Cr.PC statements in a piece meal manner say after 3 witnesses have been examined and then another S.342 Cr.PC statement limited only to the latest S.342 Cr.PC statement with the result that all the S.342 Cr.PC statements are read together as one in continuation of each other. For ease of reference S.342 Cr.PC is set out below;

> "342. ***Power to examine the accused.*** (1) For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the Court may, at any stage of any inquiry or trial without previously warning the accused, put such questions to him as the Court considers necessary, and shall, for the purpose aforesaid, question him generally on the case **after the witnesses for the prosecution have been examined and before he is called on for his defence."**

14. Thus, the language of S.342 Cr.PC is clear and unambiguous that the S.342 Cr.PC statement of the accused is to be recorded **after the witnesses for the prosecution have been examined and before he is called on for his defence (and not in a piecemeal manner throughout the trial)** although the court can ask him questions during the trial if it considers it necessary but all pieces of evidence against him must be put to him after the close of the prosecution case and before he starts his defence case.

15. I find that after recording the two additional PW's pursuant to the prosecutions application under S.540 Cr.PC the first S.342 Cr.PC statement fell away **entirely** and the S.342 Cr.PC statement of the appellant had to be recorded a fresh putting to him any question which tended to implicate him in the offence and give him the opportunity to explain each and every question before it could be relied upon to convict the appellant. Thus, only the **second** S.342 Cr.PC statement can be relied upon in this case.

16. It is well settled by now that if a question regarding a piece of evidence is not put to an appellant in his S.342 Cr.PC statement for explanation that piece of evidence cannot be relied upon by the trial court in order to convict the accused. In this respect reliance is placed on the case of **Muhammed Nawaz V State** (2016 SCMR 267) which held as under in material part;

> *"There is yet another aspect of the case. While examining the appellants under section 342, Code of Criminal Procedure, the medical evidence was not put to them. **It is well settled by now that a piece of evidence not put to an accused during his/her examination under section 342, Code of Criminal Procedure, could not be used against him/her for maintaining conviction and sentence."*** (bold added)

17. Learned APG and learned counsel for the complainant have argued that even if a piece of evidence has not been put to the accused in his S.342 Cr.PC statement it can still be used to convict him as the complainant should not be made to suffer on account of the negligence of the prosecution and that the case should be decided on the evidence on record. In this respect reliance was placed on the cases of **The State/ANF v. Muhammad Arshad** (2017 SCMR 283) and **Ansar Mehmood v. Abdul Khaliq** (2011 SCMR 713).

18. I find that I cannot agree with the above contention of the prosecution. The question that was not put to the appellant when his S.342 Cr.PC statement was re recorded (their being no legal concept of a further S.342 Cr.PC statement in continuation of an earlier S.342 Cr.PC statement) went to the heart of the prosecution case. i.e. that the appellant stabbed the deceased and thereby

committed his murder had to be put to the appellant for his explanation. The fact that it was not done means that this piece of eye witness evidence stands excluded from consideration which I find leads to the conclusion that the prosecution has failed to prove its case against the appellant beyond a reasonable doubt.

19. I am fortified by my finding by the fact that when say an appeal is remanded for the limited purpose of re recording the evidence of one particular PW because the accused was denied the opportunity to cross examine him the courts almost always remand the case to the trial court for the limited purpose of re recording the witnesses' evidence before the defence counsel and allowing the defence counsel the chance to cross examine the witness **and there after record a fresh the accused S.342 Cr.PC statement** and then after hearing the parties re writing the judgment. The courts as a rule do not remand the case with a direction to further record a section S.342 Cr.PC statement in continuation of the earlier S.342 Cr.PC statement limited only to what the re examined witness gave evidence about.

20. I find that I cannot remand the case back to the trial court to record a fresh the appellants S.342 Cr.PC statement as this would amount to filling in the lacuna's in the prosecution case which would prejudice the appellant and benefit the prosecution which would be violative of Article 10 (A) of the Constitution. In this respect reliance is placed on the case of **Muhammed Naeem V State** (PLD 2009 SC 689) where it was held as under in material part;

> *"In an adversarial system the role of the judge is that of a neutral umpire, unruffled by emotions, a judge is to ensure fair trial between the prosecution and the defence on the basis of the evidence before it. The judge should not enter the arena so as to appear that he is taking sides. The court cannot allow one of the parties to fill lacunas in their evidence or extend a second chance to a party to improve their case or the quality of the evidence tendered by them. Any such step would tarnish the objectivity and impartiality of the court which is its hallmark. Such favoured intervention, no matter how well-meaning strikes at the very foundations of fair trial, which is now recognized as a fundamental right under Article 10-A of our Constitution."* **(bold added)**

21. Thus, after the exclusion of the eye witness evidence which was not put to the appellant in his S.342 Cr.PC statement for explanation I find that the prosecution has not proved its case against the appellant beyond a reasonable doubt and as such the appellant is acquitted of the charge, the appeal is allowed and the impugned judgment is set aside. The appellant shall be released unless he is wanted in any other custody case.

JUDGE 10/11/24