

IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Appeal No.543 of 2017

Confirmation Case No.12 of 2017

Present:Mr. Justice Naimatullah PhulpotoMr. Justice Mohammad Karim Khan Agha

Appellants: Muhammad Bilal son of Ghulam Hussain through Mr. Munawar Ali Memon, Advocate.

Complainant Through Mr. Ghulam Rasool Mangi, Advocate

Respondent: The State through Mr. Mohammad Iqbal Awan, Deputy Prosecutor General, Sindh

Date of hearing: 23.10.2018

Date of announcement: 30.10.2018

J U D G M E N T

Mohammad Karim Khan Agha, J.- Appellant Mohammad Bilal S/o. Ghulam Hussain has preferred this appeal against the impugned judgment dated 08.11.2017 passed by the IXth Additional Sessions Judge (South) at Karachi in Session Case No.464/2011, F.I.R. No.260/2011 U/S. 302 PPC, registered at police station Baloch Colony, Karachi whereby the appellant has been convicted under section 302(b) PPC and sentenced to death. The accused is also directed to pay compensation of Rs.100,000/- to the legal heirs of deceased Mohammad Waseem. In case of default he was ordered to suffer S.I. for 04 months. The trial court has also made Reference for confirmation of death sentence.

2. Brief facts of the prosecution case are that on 29.09.2011 at about 2000 hours while Waseem along with PW Mohammad Siddiq Niazi was sitting at the corner of Street No.2, sector I, Manzoor Colony, Liaquat Ashraf Colony No.2, Mehmoodabad, Karachi, the accused came there and fired with his pistol at Waseem which hit his right thumb and clavicle region and went through and through which resulted in the death of Waseem. During the course of investigation, on 08.10.2011 at 2010 hours, the accused while under arrest with police disclosed about the crime weapon viz. pistol and voluntarily led the police party headed by SIP Imran Saad to Street No.18, Sector-I, Manzoor Colony, behind wall of Fire Brigade where he had hidden the pistol in debris and got recovered the crime weapon viz. pistol loaded magazine

containing 3 live bullets wrapped in a white colour plastic bag. On demand, accused failed to produce the valid arms license, hence separate F.I.R. was registered for offence punishable under section 13-(I) (a) of Sindh Arms Act 2013.

3. After completing the usual investigation, the Investigation Officer submitted challan against the accused for trial according to law.

4. The necessary case papers were supplied to the accused in compliance of provisions contained in section 265-C, Cr.P.C. The charge against the accused was framed at Ex. 2, to which the accused pleaded not guilty and claimed for trial.

5. In order to prove its case the prosecution examined 08 prosecution witnesses and exhibited numerous documents in support of its case whereafter the prosecution closed its side. The statement of the accused U/S 342 Cr.P.C. was recorded at Ex. 15 wherein he has denied the allegations of the prosecution and professed his innocence. However, he neither examined himself on oath U/s. 340(2) Cr.P.C. nor led any evidence in his defense. After hearing final arguments of the parties and examining the evidence on record the trial court convicted and sentenced the appellant in accordance with the impugned judgment as set out above.

6. Prior to the start of the arguments by learned counsel for the appellant the DPG for the State very fairly drew this court's attention to a defect in the impugned judgment. Namely, that when the appellant recorded his S.342 Cr.PC statement certain pieces of evidence which the trial court later relied upon to convict the appellant had not been put to him for his explanation which was a mandatory requirement of the law. For example, it was the prosecution case as per its evidence that the pistol which was used to kill Waseem was recovered by the police on the pointation of the appellant which was not put to the accused in his S.342 Cr.PC statement and that the FSL report was also not put to the appellant in his S.342 Cr.PC statement. According to the learned DPG since this was a mandatory requirement of the law the case should be remanded to the trial court to re-record the appellants statement u/s 342 Cr.PC. In support of his contentions he placed reliance on **Muhammed Shah V The State** (2010 SCMR 1009) and **Qaddan V The State** (2017 SCMR 148)

7. When confronted with this position learned counsel for the appellant was of the view that on account of this defect the appellant was entitled to be acquitted. In this respect he placed reliance on **Nadeem alias Kala V The State** (2018 SCMR 153). However, if his above contention was not accepted by this court he conceded in the alternative that if in the view of the court the above defect was curable he had no objection to the case being remanded to the trial court to be reheard from the time when the charged was framed against the accused.

8. We have considered the contentions of both learned counsel and reviewed the relevant law on this legal point.

9. In the case relied on by learned counsel for the appellant **Nadeem alias Kala** (Supra) the appellant was acquitted not solely on account of the fact that not all material had been put to him whilst recording his S.342 Cr.PC statement but for a whole host of other legal infirmities in the judgment in issue in that case. Never the less it is well settled law that every piece of evidence which is used against the accused to form a part of his conviction must be put to him in his S.342 Cr.PC statement so that he may have the opportunity to explain the same otherwise it cannot be relied upon to convict him. For example in the case of **Muhammed Shah** (Supra) it was held as under at P.1015 at Para 11;

"It is not out place to mention here that both the Courts below have relied upon the suggestion of the appellant made to the witnesses in the cross-examination for convicting him thereby using the evidence available on the record against him. It is important to note that all incriminating pieces of evidence, available on the record, are required to be put to the accused, as provided under section 342, Cr.P.C. in which the words used are "For the purpose of enabling the accused to explain any circumstances appearing in evidence against him" which clearly demonstrate that not only the circumstances appearing in the examination-in-chief are put to the accused but the circumstances appearing in cross-examination or re-examination are also required to be put to the accused, if they are against him, because the evidence means examination-in-chief, cross examination and re-examination, as provided under Article 132 read with Articles 2(c) and 71 of Qanun-e-Shahadat Order, 1984. The perusal of statement of the appellant, under section 342, Cr.P.C. reveals that the portion of the evidence which appeared in the cross-examination was not put to the accused in his in his statement under s.342 enabling him to explain the circumstances particularly when the same was abandoned by him. It is well-settled that if any piece of

evidence is not put to the accused in his statement under section 342, Cr.P.C. then the same cannot be used against him for his conviction. In this case both the Courts below without realizing the legal position not only used the above portion of the evidence against him, but also convicted him on such piece of evidence, which cannot be sustained."

10. Under these circumstances and in the interests of justice we hereby set aside the impugned judgment and remand the case back to the concerned trial court which shall continue with the trial from the point at which the appellants S.342 Cr.PC statement is to be recorded afresh after putting all incriminating pieces of evidence to the accused for his explanation (as we see no valid legal justification to recommence the trial after framing of the charge and thus it is made clear that all other evidence on record up to the point of recording the accused's S.342 Cr.PC statement shall remain in the field and will not need to be re recorded) and thereafter decide the trial on merits in accordance with law **within two months** of receipt of this Judgment. On the first date of hearing the trial court shall issue P.O for the accused who shall on his appearance record his S.342 Cr.PC statement where he shall be confronted with all the evidence against him in accordance with the law. The office shall send a copy of this judgment along with R&P's immediately to the concerned trial court for information and compliance.

11. This appeal stands disposed of in the above terms and the confirmation reference is answered in the negative.

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