

THE HIGH COURT OF SINDH, CIRCUIT COURT LARKANO

Cr. Conf. Reference No.D-19 of 2021

(Ali Afsar Mugheri and another Vs. The State)

Date Of Hearing	Order with Signature of Hon'ble Judge
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Mr. Justice Muhammad Saleem Jessar,

Appellants:

1. Ali Afsar
2. Ali Akbar alias Khalifo

Both sons of Abdul Fattah Mugheri

Through Mr. Asif Ali Abdul Razzak Soomro,
Advocate.

The State: Through Mr. Ali Anwar Kandhro,
Additional Prosecutor General, Sindh.

Complainant: Through Mr. Habibullah G. Ghouri Advocate

Date of Hearing: 07.10.2025

Date of Judgment: 07.10.2025

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JUDGMENT

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Nisar Ahmed Bhanbhro, J. Through instant Criminal Appeal, the appellants have challenged the Judgment dated 07.07.2021 (impugned judgment), passed by the Court of learned First Additional Sessions Judge/MCTC/Kamber vide Sessions Case No.209/2021, (*Re-State v/s. Ali Afsar Mugheri and another*)

emanating from F.I.R. No.33/2021, registered with P.P Lalu Raunk, Police Station Wagan for offence punishable under sections 302, 324, 34 PPC, whereby the appellants were convicted and sentenced as under:

- i. *For offence under sections 302(b) PPC r/w 34 PPC sentenced to death as Ta'zir for commission of murder (Qatl-e-amd) of deceased Muhammad Idreess son of Sher Dil Mugheri, therefore, ordered to be hanged by his neck till they are dead subject to confirmation by Honourable High Court of Sindh Circuit Court Larkana and they are also ordered to pay 5,00,000/-(Five Lac Rupees only) as compensation amount for payment to the legal heirs of deceased Muhammad Idreess son of Sher Dil Mugheri. In case of default in payment of compensation amount, they shall suffer S.I for six months.*
- ii. *For offence U/S 324- PPC they sentenced to R.I for five years as Tazir and fine of Rs. 50,000/-; in case of default in payment of fine amount they will suffer S.I for one year more.*
- iii. *For offence U/S; 337-(A-1) PPC for Shajjah-i-Khafifah with daman of Rs: 50,000/- for payment to injured P.W Zulfiqar All son of Khadim Hussain Mugheri.*
- iv. *For offence U/S 337-F-(1) PPC Jurh Ghyr-Jalfah Damiyah with Daman of Rs. 50,000/- for payment to injured P.W Zulfiqar Ali son of Khadim Hussain Mugheri.*
- v. *For offence U/S 337-F-(iii) PPC Jurh Ghyr-Jaifah Mutalahimah with Daman of Rs. 50,000/- for payment to injured P.W Zulfiqar All son of Khadim Hussain Mugheri.*

2. Precisely the facts of the prosecution case as portrayed in FIR are that accused Ali Afsar Mugheri purchased a buffalo from complainant's cousin Muhammad Idress Mugheri for consideration of Rs.150000/- but he did not pay such amount, which gave rise to a controversy between them. On 18-04-2021 in night hours the accused Ali Afsar called Muhammad Idress (deceased) to meet him outside the village for receiving outstanding consideration amount. Muhammad Idress (deceased) along with his cousin Sadaruddin (complainant) and Zulfiqar Ali came outside the village and went to the pointed place viz Attaullah Mugheri's land located beside village Qaim Khan Mugheri. At about 1:00 am (night) two identified accused namely Ali Afsar & Ali Akhtar Khalifo both sons of Abdul Fattah Mugheri, duly armed with

pistols along with an unknown armed accused with un-muffled face came and by sharing common intention accused Ali Afsar with his pistol targeted Muhammad Idress at his chest, who having raised cries fell down, Zuliquar Ali moved forward to hold him on which accused Ali Afsar with intention to commit murder fired with his pistol at Zulfiqar Ali which hit him at his right leg and accused Ali Akhtar Khalifo also injured him by using butt of his pistol and all accused escaped leaving complainant's cousin Muhammad Idress dead & PW Zulfiqar injured. Complainant approached police station, recorded his FIR.

3. Investigation followed by submission of final report under section 173 CrPC before the Court of Civil Judge & Judicial Magistrate-II, Warah by showing the present appellants under custody, ultimately the case was assigned to Learned Trial Court for disposal in accordance with law.

4. At trial, Prosecution in terms of section 265-F CrPC examined following witnesses:

- i). Complainant Sadaruddin, (PW-01 Exh-03)
- ii). Injured Eye witness Zulfiqar Ali (PW-02 Exh-04)
- iii). Private Mashir Jameel Ahmed Mugheri (PW-03 Exh-05)
- iv). HC/3179 Zaffar Ali Chandio (PW-04 Exh-06)
- v). Dr. Ashok Kumar Nanwani (PW-05 Exh-7)
- vi). Tapedar Muhammad Talib Khushk (PW-06 Exh-8)
- vii). Author cum I.O SIP Qurban Ali (PW-07 Exh-9)

5. Prosecution closed evidence in terms of section 265-G CrPC (Exh-17). The statements of the accused in terms of section 342 CrPC were recorded, they denied the prosecution charge but neither opted to examine on oath U/S 340 (2) CrPC nor opted to produce any defense evidence.

6. Learned Trial Court after hearing the parties through their Learned Counsel, convicted and sentenced the appellants for death as Ta'zir, hence this appeal.

7. Mr. Asif Ali Abdul Razaq Soomro Learned Defence Counsel, Mr Habibullah Ghouri Learned Counsel for the Complainant and Mr Ali Anwer

Kandhro Learned Prosecutor were heard at length. With their able assistance the material available on record was perused and evidence was re – appraised. During reappraisal of the evidence following discrepancies were noticed in the impugned judgment.

- i. The Copy of the judgment filed along with the memo of appeal by the appellants was different to that of the copy of judgment available in the paper book. It appears that after pronouncement of judgment, Learned Trial Court supplied the copies of judgment to the appellants and thereafter noticed certain errors in the judgment, therefore, made corrections in the impugned judgment without giving any notice either to the prosecution or the defence.
- ii. The appellants were convicted and sentenced to death as Ta'zir, Learned Trial Court was required to submit proceedings of the case to this Court for confirmation of sentence through District and Sessions Judge Kamber at Shahdadkot through letter dated 13.07.2021 of the Learned Trial Court and letter dated 15.07.2021 of District and Sessions Court Larkana. The reference was submitted after 9 days, though Learned Trial Court was cognizant of the fact that period of appeal before this Court.
- iii. Appellant Ali Akbar @ Khalifo was indicted for the charge of sharing common intention with accused Ali Afsar who was alleged to have fired at the deceased Muhammad Idrees, he was also convicted and sentenced to death, but Learned Trial Court did not tender its deliberations that how the accusation of common intention was established beyond reasonable doubt.

8. Taking up the issue of alterations in the impugned judgment. The Trial Court on delivering the judgment became *functus officio*. The term "*functus officio*" comes from Latin Language and means "having fulfilled one's duty." This concept when applied in legal contexts it lays down that once a decision was delivered as a final ruling in a case, the judge cannot go back and change its decision or revisit the case having become "*functus officio*". This means that judge cannot lay hands on the final decision once made. *Functus officio* is important doctrine of law, because it helps maintain the finality of decisions made, promotes stability and certainty in the legal system. It ensures that once

a matter is finally decided through a final verdict it cannot be reopened without valid reasons.

9. From perusal of paragraph No 34 of the impugned judgment submitted before this Court with memo of appeal, it transpired that only one appellant was convicted to death as Ta'zir. It appears after that after supplying the copy of judgment to the appellants, the alterations were made in paragraph 34 of the judgment, which Learned Trial Court lacked powers to do. Initially as per the copy of judgment annexed with the memo of appeal it revealed that only one accused was convicted and sentenced to death as word "He" was used and after correction, word "They" was substituted by hand, even in the original judgment surname of the accused was wrongly mentioned. If it transpired that there was any clerical error, the Trial Court was required to extend notice of the same to the accused / convicts and prosecution. On removing clerical errors, the copies of earlier judgment supplied to the accused would have been got returned and fresh copy of judgment would have been supplied to the appellants / accused.

10. Section 369 of the CrPC empowers the Court to correct clerical errors, section 371 CrPC obligated the court to supply the copy of judgment to the convict free of cost. On reading down the statute, impliedly an error free copy of the judgment is supplied to the convict free of cost after pronouncement of judgment.

11. Moreover, both the appellants have been convicted and sentenced to death as Ta'zir. The role ascribed to the appellant Ali Asfar is that of causing fatal blow to the deceased. However appellant Ali Akbar @ Khalifo has been assigned the role of causing injury to the injured Zulfiqar Ali. Since there was an allegation against appellant Ali Akber of sharing common intention with co-accused Ali Asfar therefore Trial Court was required to render specific findings that charge under section 34 PPC for common intention stood established beyond reasonable doubt. Learned Trial Court convicted the appellants for the charge of section 34 PPC without giving any findings on the question of sharing of common intention in the impugned judgment.

12. While dealing with cases of qatl-i-amd embodied under section 300 PPC, the Trial Court is bound to evaluate as to whether the act is committed in furtherance of common intention or on the basis of individual liability to press in the provision of section 302(a)(b) or 302(c), PPC. Court has to give a definite finding of the guilt of the accused qua the same. Any judgment which concludes that the offence of qatl-i-amd under section 302(b), PPC was committed in furtherance of common intention (34 PPC for accused less than five in number) or common object (148 PPC for accused five or more) then it is required to render findings specifying that the elements of common intention and common object were established. In case the accusation of common intention was not established each accused would be dealt with according to their individual role and severity of allegations and would be sentenced accordingly by the Court exercising its discretionary powers. In the present case Learned Trial Court did not render any findings as to the sharing of common intention by appellant Ali Akber to attract the ingredients of Section 34 PPC, in absence of which, awarding the capital punishment for sharing common intention was not tenable under the law.

13. Honorable Supreme Court of Pakistan in the case of Bashir Ahmed versus The State reported as 2022 SCMR 1187 has held as under:

"13. A careful analysis of the aforesaid categories falling under the provision of section 302, P.P.C. abundantly makes it clear that the provision of section 302(a), P.P.C. is a distinct provision having different mode and manner of application with different considerations exclusively derived from the Islamic judicial system. The proceeding under the aforesaid provision is a rare phenomenon whereas the majority of the cases dealt with by the courts below fall under section 302(b), P.P.C. As stated above, provision of section 302(b), P.P.C. provides two sentences i.e. death, (ii) imprisonment for life. Murder cases exclusively falling within the ambit of section 302(b), P.P.C. would be dealt with in a manner exclusively depending upon the number of assailants. Undeniably a single assailant can commit the aforesaid offence but if the number of assailants is more than one and the offence is committed in furtherance of common intention then the provision of section 34, P.P.C. would certainly attract. Similar to that if the tally of the accused is five or more and the offence is committed in

furtherance of common object then the provision of sections 148/149, P.P.C. would be applicable. The learned Trial Court seized of the matter depending upon the number of accused has to render a definite finding qua the applicability of section 34, P.P.C. (common intention) or sections 148/149, P.P.C. (common object). These two legal aspects are to be addressed with the application of the aforesaid provision of section 302(b), P.P.C. depending upon the number of assailants. It is bounden duty of the courts below to ascertain the aspect of common intention or common object primarily at the time of framing of the charge on the basis of contents of FIR, statements under sections 161 and 164, Cr.P.C, if any, final report under section 173, Cr.P.C. and other attending documents collected by the Investigating Officer during investigation. The Trial Court is equally responsible to give a definite finding qua the applicability of section 34, P.P.C. or sections 148/149, P.P.C. at the time of conclusion of the trial while handing down the judgment. Now adverting to the moot point which was raised during the proceedings that if anybody is found guilty of commission of offence attracting the provision of section 302(b), P.P.C., the co-accused can be saddled with the responsibility on the basis of individual liability or the whole occurrence has to be decided keeping in view that the offence was committed in furtherance of their common intention and the provision of section 302(b), P.P.C. would be applied conjointly against the persons joining hands falling under either of the categories i.e. common intention or common object falling under section 34 or 148/149, P.P.C. depending upon the number of persons facing charge. We may observe that any judgment which concludes the commission of offence falling under section 302(b), P.P.C. in furtherance of common intention or common object but decides the lis on the basis of individual liability would be squarely in defiance of the intent and spirit of law on the subject."

14. Honorable Supreme Court endorsed the dictum laid down in the case of Bashir Ahmed (Supra) in the cases of Muhammad Nawaz versus The State reported as **PLD 2022 SC 523** and Muhammad Iqbal and others versus the State and others reported as **2023 SCMR 750**.

15. For the aforementioned reasons, we are of the considered view that the impugned judgment is not sustainable under the law. Consequently, instant appeal is allowed. The impugned judgment dated 07.07.2021 is set aside. The matter is remanded back to the Learned Trial Court for decision afresh on the basis of available evidence after providing an opportunity of hearing to both the parties within a period of two months from the date of receipt of copy of this judgment.

16. It is expected that Learned Trial Court will take into consideration all the facts and circumstances of the case and will render its findings on the accusation of common intention. Learned Trial Court will tender specific findings, that the accusation against the appellants for the charge of common intention (34 PPC) was established through confidence inspiring evidence. As such the appellants were liable to be convicted under sections 302/34, P.P.C. Learned Trial Court will follow the guidelines of Honorable Apex Court in the case of Bashir Ahmed (Supra).

17. The Reference No D - 19 of 2021 sent by the Learned Trial Court under section 374 CrPC seeking confirmation of death sentence, in view of the judgment passed in main appeal No D 19 of 2021 became infructuous and accordingly declined. The Petitioners would be treated as under trial prisoners till the fresh pronouncement in the matter by Learned Trial Court.

Confirmation Reference No D - 19 of 2012 is replied in negative.

Judge

Judge

Manzoor

Approved for reporting

Dated:07.10.2025