

**IN THE HIGH COURT OF SINDH, CIRCUIT COURT  
HYDERABAD**

Criminal Appeal No.D-112 of 2017  
Criminal Appeal No.D-114 of 2017  
Criminal Jail Appeal No.D-117 of 2017  
Criminal Jail Appeal No.D-119 of 2017

Present:

**Mr. Justice Muhammad Iqbal Kalhoro, J**  
**Mr. Justice Khadim Hussain Tunio, J**

- Appellants:
- 1) Hafiz Irshad Ali Shah Son of Farooq Shah, through Mr. Noor Ahmed Memon, Advocate in Criminal Appeal No. D-112 of 2017.
  - 2) Mukhtiar Ahmed Son of Maqsood Pali, through Mian Taj Muhammad Keerio, Advocate in Criminal Appeal No. D-114 of 2017.
  - 3) Mumtaz @ Ali Asghar @ Bhoro Son of Hakim Ali Lund, through Mr. Niaz Hussain Laghari, Advocate in Criminal Jail Appeal No.D-117 of 2017.
  - 4) Mst. Parveen Wife of Mukhtiar Ahmed Pali, through Mr. Muhammad Hassan Chang, Advocate in Criminal Jail Appeal No.D-119 of 2017.
- Complainant: Manzoor Ahmed Son of Qalandar Bux, through Mr. Afzal Karim Virk, Advocate along-with PW Nayyara Noor.
- The State: Ms. Rameshan Oad, Assistant Prosecutor General, Sindh.
- Dated: 14.05.2020.

**JUDGMENT**

**MUHAMMAD IQBAL KALHORO, J-** With the assistance of learned defence counsels as well as learned counsel for the complainant and learned Assistant Prosecutor General, Sindh, we have gone through the material available on record. Appellants Mumtaz alias Ali Asghar alias Bhoro Lund, Mukhtiar Ahmed Pali and Mst. Parveen, have been convicted for offence punishable u/s 302(b), vide impugned judgment dated 31.10.2017, to suffer imprisonment for life and to pay fine of Rs.100,000/- for each murder total Rs.300,000/- (Rupees Three Lacs only) to be paid to the legal heirs of deceased Noor Alam, Mst. Maryam and baby Fatima Noor, in case of default thereof to suffer R.I for two years. They have also been convicted for the offence under sections 6 (2) (1) (a) of Anti-Terrorism Act, 1997 and sentenced under section 7 (1) (a) of Anti-Terrorism Act, 1997 to suffer R.I. for life imprisonment and to pay fine of Rs.100,000/- for each murder total Rs.300,000/- (Rupees Three Lacs only) to be paid to the legal heirs of deceased Noor Alam, Mst. Maryam and baby Fatima Noor, in case of default thereof

to suffer R.I for two years. Besides they have been sentenced for three years for committing offence u/s 392 P.P.C with fine of Rs.20,000/= (Rupees Twenty Thousands only) each in case of non-payment of fine amount, to suffer R.I for three months. In addition their moveable and immovable property, if any, has been forfeited in favour of Government of Sindh. However, they have been extended benefit of section 382-B Cr.P.C and all the sentences have been ordered to run concurrently. Appellant Hafiz Irshad Ali Shah has been sentenced R.I. for three years for committing offence under section 411 P.P.C.

2. The allegations against the appellants are that they with their common intention at night between 15/16.03.2014 entered the house of deceased Noor Alam situated in Johar Colony Mirpurkhas, committed his murder and murder of his wife Mst. Maryam and his daughter baby Fatima aged about four years during the course of robbery, and took away several articles including gold ornaments, one digital camera, one handy camera, one LCD Monitor with complete set of computer, etc. In the F.I.R. no one is nominated, however during investigation when accused Mst. Parveen was arrested, the facts of the case got unfolded. She made a statement before the Magistrate u/s 164 Cr.P.C disclosing the facts concerning mode and manner the offence was committed by. Further, on her pointation and later on pointation of co-accused some of the robbed articles were recovered from their respective houses. On the basis thereof, they were referred to the trial and have been returned guilty verdict through impugned judgment dated 31.10.2017 to suffer the sentences in terms as stated above.

3. The record reflects that initially Mst. Parveen, and her husband Mukhtiar Ahmed, and Hafiz Irshad Ali Shah were referred to the trial and against them the charge was framed on 06.06.2014. In pursuance thereof, prosecution examined complainant on 08.09.2014, PW-2 Pathan (Ex.44) on 08.09.2014, PW-3 Muhammad Sharif on 08.09.2014, PW-4 Munawar Ahmed on 24.10.2014 and PW-5 Muhammad Siddique on 20.12.2014. Thereafter, co-accused Mumtaz alias Ali Asghar alias Bhoro was arrested and accordingly the charge was amended on 02.12.2016. However, learned Trial Court instead of seeking evidence of aforesaid witnesses afresh, which was admittedly recorded in absence of newly arrested accused namely Mumtaz alias Ali Asghar alias Bhoro, at the instance of learned Prosecutor allowed adoption of examination-in-chief of those

witnesses, and provided an opportunity of cross examination to accused Mumtaz alias Ali Asghar alias Bhoro. Such procedure is not recognized by law and is against the mandatory provision of section 353 Cr.P.C requiring recording of evidence in presence of accused. It is well settled that provisions of section 353 Cr.P.C are mandatory in nature and any departure therefrom will vitiate the trial. The evidence, which is recorded in absence of accused cannot be made basis of his conviction. This scheme fully synchronizes with the mandate sought out under Article 10-A of the constitution admitting right of the accused to fair trial. In a case reported in **2012 P. Cr. LJ 1308**, it has been held that mere cross examination of the witness in presence of the accused would not be sufficient and its mandatory that examination-in-chief of the witness must be recorded in presence of the accused or his pleader. Admittedly, this obligatory legal course has not been adopted by the Trial Court while convicting the accused Mumtaz alias Ali Asghar alias Bhoro along-with co-accused.

4. Confronted with such legal position, all the counsel including daughter of victim namely Nayyara Noor have consented to the remand of the case to the Trial Court with directions to reexamine the above stated witnesses in presence of accused or their pleader, if it is ordered. Accordingly the impugned judgment is set aside. The trial court is directed to record the evidence of aforesaid witnesses afresh, and after the evidence, the trial court shall record statement of accused under section 342 Cr.P.C as required, and after affording an opportunity of hearing to all the parties announce the judgment. This exercise shall be completed within a period of two (02) months and compliance report submitted through Additional Registrar of this Court. The impugned judgment reflects that appellant Hafiz Irshad Ali Shah (in Criminal Appeal No.D-112 of 2017) was on bail during the trial and after filing of the appeal was granted bail by this Court vide order dated 26.06.2018. The said appellant shall remain on bail against the same surety furnished by him before this court. However, he shall execute a fresh P.R bond before the learned Trial Court for his appearance.

5. All the appeals are disposed off in above terms.

JUDGE

JUDGE