

IN THE HIGH COURT OF SINDH, KARACHI

Present:

*Mr. Justice Mohammad Karim Khan Agha
Mr. Justice Omar Sial.*

CRIMINAL APPEAL NO.185 OF 2021.

Appellants 1. Owais S/o. Saeed
2. Saeed S/o. Noor Muhammad
3. Noor Muhammad S/o. Saeed
through Mr. Zakir Hussain
Bughio, Advocate.

Respondent The State through Mr. Ali Haider
Saleem, Additional Prosecutor
General Sindh.

CRIMINAL APPEAL NO.186 OF 2021.

Appellant Owais S/o. Saeed through Mr. Zakir
Hussain Bughio, Advocate.

Respondent The State through Mr. Ali Haider
Saleem, Additional Prosecutor
General Sindh.

CRIMINAL REV. APPLICATION NO.130 OF 2021.

Applicant None

Respondents 1. Owais S/o. Saeed
2. Saeed S/o. Noor Muhammad
3. Noor Muhammad S/o. Saeed
through Mr. Zakir Hussain
Bughio, Advocate.

State Mr. Ali Haider Saleem, Additional
Prosecutor General Sindh.

Date of hearing 26.09.2022.

Date of order 26.09.2022.

JUDGMENT

Mohammad Karim Khan Agha, J:- Appellants Owais, Saeed and Noor
Muhammad were tried in the Model Criminal Trial Court/Additional
District & Sessions Judge-I Karachi in Sessions Case No.1626 of 2020
under section 302/365/34 PPC pursuant to FIR No.243 of 2020 registered

at P.S. Aziz Bhatti, Karachi and vide Judgment dated 05.03.2021 the accused were convicted and sentenced as under:-

"All the accused persons namely Owais son of Saeed, Saeed son of Noor Muhammad and Noor Muhammad son of Saeed in furtherance of common intention abducted the deceased therefore, they are guilty of the charge of abduction hence convicted under section 365 read with section 34 PPC and sentenced to five years simple imprisonment. The prosecution has also proved that accused Owais opened fire upon the deceased with intention of co-accused Saeed and Noor Muhammad as a result of which the deceased was done to death. Thus, all the accused persons named above are also convicted under section 302(b) read with section 34 PPC and sentenced imprisonment for life. In addition to that all accused persons required to pay compensation to tune of Rs.500,000/- (Rupees Five Lac Only) each to the legal heirs of deceased as required under section 544-A Cr.P.C. in case of failure of payment of fine/compensation, the accused shall further undergo to simple imprisonment for six months. All the sentences are directed to run concurrently".

3. The brief facts of the case as narrated by Abdul Majid son of Ghulam Nabi (complainant) are that deceased Azhar was his younger brother. On 27.04.2020 at about 2045 hours he was present at his house. In the meanwhile, his brother Nabeel came and informed him that his younger brother Azhar (deceased) was abducted on the force of weapons by accused Owais son of Saeed, Saeed son of Noor Muhammad and Noor Muhammad son of Saeed. Nabeel further informed that when Azhar was coming back to his house after performing Esha prayer he was abducted near his house and taken away on two 125 motorcycles. Thereafter, he along with other people of mohallah went in search the deceased. They proceeded to plot No.193 in between Block-19 and 10 of Gulshan-e-Iqbal. He saw on the street light that Saeed had grappled the deceased from right arms, Noor Muhammad had grappled his left arms while Owais was having firearm and he saying to Azhar that *"you were police informer and giving information to police regarding them now you can see what are the consequences"*. As soon as they went near, accused Owais opened fire upon Azhar who sustained injuries on different parts of his body. At that time, it was 2115 hours. Accused persons fled from the scene on their motorcycles by brandishing the weapons. He saw his brother who was lying under the pool of blood. The entire people of mohallah gathered

They shifted Azhar to Liaquat National Hospital. The Doctor pronounced Azhar dead on arrival. Police arrived at Liaquat National Hospital from where they shifted dead body to JPMC for legal formalities. The complainant recorded his statement under section 154 Cr.P.C. nominating all the above accused, which was later incorporated in FIR.

4. After usual investigation the matter was challaned and charge was framed against the three appellants, all of whom pleaded not guilty and claimed trial.

5. In order to prove its case the prosecution examined 10 Prosecution Witnesses and exhibited numerous documents and other items. All the appellants in their section 342 Cr.P.C statements denied the allegations leveled against them and claimed false implication. None of the appellants gave evidence on oath nor produced any DWs in support of their defence.

6. After hearing the parties and appreciating the evidence on record, the trial court convicted the appellants as mentioned earlier in this judgment, hence the appellants have filed appeals against their convictions. Since the appellants convicted to life imprisonment the complainant filed Criminal Revision Application No.130/2021 for enhancement of their sentences to that of death penalty.

7. The trial court in the offshoot case in respect of appellant Owais in Special Case No.3565 of 2020 in respect of FIR No.249 of 2020 U/s. 23(i)(A) of Sindh arms act, 2013 of P.S. Aziz Bhatti and vide impugned Judgment dated 05.03.2021 convicted and sentenced the appellant Saeed to 07 years R.I. and fine of Rs.10,000/- and in case of failure to pay fine, the accused would undergo S.I. for 06 months more. Benefit of section 382-B Cr.P.C. was also extended to the accused.

8. At the very outset of hearing these two appeals, learned counsel for the appellants and learned Additional Prosecutor General have submitted that two of the PWs namely PW-7 Asghar Hussain in the main case and PW -1 Asghar Hussain in the offshoot case the evidence in effect has been copied and pasted and PW-10 Tufail Ahmed in the main case and PW-2 Tufail Ahmed in the offshoot case the evidence has also been virtually copied and pasted in the two separate judgments which under

the law is not permissible. They have contended that under these circumstances copy and pasting of evidence of one to another case is incurable defect u/s.537 Cr.P.C. and as such the case needs to be remanded for a denovo trial.

9. Learned counsel for the complainant in the Criminal Revision Application No.130/2021 has been called absent without intimation despite his name appearing in the cause list. Even if he had been present and we had heard his criminal revision and decided, it one way or the other we might have remanded the cases to the trial court based on the copy and pasting of the evidence mentioned above as a matter of law. Since he had notice of these appeals and criminal revision and has preferred to remain absent, we have continued to decide these appeals.

10. At the very outset, we note that the main case and the offshoot case ought to have been tried together and decided by way of one common judgment as they arose out of the same transaction which would also ensure that there were no conflicting judgments. We have also reviewed PW-7 Asghar in the main case and in the offshoot case PW-1 Tufail and we find that contentions of learned counsel for the appellant and learned Additional Prosecutor General are correct. We find that such copy and pasting of evidence is a defect which is not curable under section 537 Cr.P.C. and as such remand the case for a denovo trial. In this regard reliance is placed on the case of **Azad Khan v. The State** (2004 YLR 1076) in which it is held as under:-

"4. We have heard the Advocate for the appellants, State counsel and perused the record of this case very carefully. Learned Advocate for the appellants has stated that the procedure adopted by the trial Court in the trial of both the cases was against the provision of law as after recording the statement of witnesses in one case the copies of the said statements were placed on the record of another case, which is not permissible under the law as such, the appellants have been prejudiced, therefore, he has prayed that the cases may be remanded to the trial Court for retrial.

5. Learned State counsel after going through the depositions of witnesses in both the cases has conceded the above position and has further added that the trial Court has committed illegality in placing the copies of the depositions of witnesses recorded in one case, in the file of second case and that the said illegality is not curable under section 537, Cr.P.C.

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6. We have given due consideration to the arguments and have minutely examined the statements of three witnesses recorded in both the cases. They are P.W.1, A.S.-1. Mehar Ali, Shahi, Mashir, P.W.2, S.H.O. Muhammad Aslam, complainant, and P.W.3 Line Officer Muneeb Ahmed, Investigating Officer. We find that the said three witnesses are common in both the cases. Their statements were recorded on the one and same date in both the cases. The examination of the statements reveals that examination-in-chief, cross examination, paragraphs, sentences, construction and placement of each sentences and words of each sentence are same, 'except opening sentence and one word in 15th line of the deposition of P.W.2) which is not possible when the statements of same witnesses are recorded on the same date but at different times. Therefore, it is clear that after recording the statements of witnesses in one case, the copies of the depositions of the said witnesses were prepared and placed in the record of other case. The said procedure is in violation of provisions of section 353, Cr.P.C. and Articles 70 and 71 of the Qanun-e-Shahadat Order, 1984. From the said procedure, the trial Court, in fact has read the evidence of one case in other case which is not permissible under the law. The said procedure is highly objectionable and has no sanctity of law.

7. In view of the above circumstances, the submissions made by the learned advocate for the appellants have great force, as such; the mode adopted by the trial Court in conducting these cases is illegal, which has vitiated the trials.

8. In the case of Noor Muhammad v. State PLD 1981 Lahore 60, where some portion of the statements of witnesses were copied from one case and placed on the record of another case then in such situation it was held that the trials of both the cases were illegal and the said defect was not curable under section 537, Cr.P.C., therefore, the Court ordered for the retrial of both the cases.

9. In the case of Alam Sher v. State 1977 PCr.LJ 1078 in the similar situation the Court ordered for the retrial of the cases and at page 1085 observed as follows:--

"..... In all the above five cases, the evidence consists of the statements of Khan Mir, P.W.1 and Ch. Ahmad Ali, S.H.O. P.W.2 and recoveries. The evidence has been recorded in a mechanical fashion. It appears that the entire evidence was recorded once and five copies were prepared and filed in different cases. The judgments have also been written in that mechanical fashion.

In case of Muhammad Younis v. State PLD 1953 Lahore 321, it is reported that if there are common judgments and evidence is copied, the trial was said to be illegal, viz. in violation of mandatory provisions of section 353, Cr.P.C. and sections 137 and 138 of the Evidence Act. Similarly, in Nur Illahi v. State PLD 1966 SC 708 the Supreme Court disapproved the procedure whereby the evidence of common witnesses was recorded once only and their statements were read out in the other cases. Similarly, in Abdul Waheed v. State 1968 PCr.LJ 776 where the evidence of Handwriting

Expert, who was common in two cases, and whose original deposition was placed on the record of the other case through a carbon copy; the procedure adopted had invalidated the trial, and retrial was ordered. In case of Qalandar Khan v. State PLD 1971 Peshawar 119 the statement of common witnesses were recorded only in one case and the carbon copies thereof were placed on the record of the other cases. It was held that the procedure adopted was illegal."

10. We agree with the above proposition of law. Consequently, we set aside the convictions and sentences awarded to the appellants, without touching the merits of the case and remand both the cases for retrial from the stage of recording of the evidence. The appeals are allowed in the above terms."

11. Under these circumstances, we hereby set-aside the impugned judgment in Sessions Case No.1626 of 2020 dated 05.03.2021 and impugned judgment in Sessions Case No.3565 of 2020 dated 05.03.2021 and remand both the cases back to the Model Criminal Trial Court/Additional District & Sessions Judge-I Karachi East for denovo hearing. The learned District & Sessions Judge-I Karachi East shall hear the cases together under one common charge and re-record the evidence in the case and pass a judgment on merits within 03 months of the date of this order.

12. Copy of this order along with R&Ps of above appeals shall be returned to Model Criminal Trial Court/Additional District & Sessions Judge (East) Karachi for compliance with this judgment. By virtue of this order the Criminal Revision Application No.130 of 2021 has become infructuous and is hereby dismissed.

13. The above appeals are disposed of in the above terms.