

IN THE HIGH COURT OF SINDH, KARACHI

Present:

Mr. Justice Mohammad Karim Khan Agha

Mr. Justice Zulfiqar Ali Sangi

CRIMINAL APPEAL NO.334 & 336 OF 2021.

Appellant	Waqar Ali alias Bantoo s/o Irshad Ali through M/s. Maroof Hussain Hashmi and M.S. Anjum, Advocates.
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Respondent	The State through Mr. Ali Haider Saleem, Additional Prosecutor General Sindh.
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CRIMINAL APPEAL NO.335 OF 2021.

Appellant	Asad alias Chota s/o Muhammad Irshad through M/s. Maroof Hussain Hashmi and M.S. Anjum, Advocates.
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Respondent	The State through Mr. Ali Haider Saleem, Additional Prosecutor General Sindh.
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CRIMINAL ACQUITTAL APPEAL NO.383 OF 2021.

Appellant	Muhammad Waqar-ul-Islam s/o. Muhammad Irshad Abbasi through Syed Lal Hussain Shah, Advocate.
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Respondent	The State through Mr. Ali Haider Saleem, Additional Prosecutor General Sindh.
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CRIMINAL REVISION APPLICATION NO.152 OF 2021.

Appellant	Muhammad Waqar-ul-Islam s/o. Muhammad Irshad Abbasi through M/s. Maroof Hussain Hashmi and M.S. Anjum, Advocates
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Respondent

1) Waqar Ali alias Bantoo s/o Irshad Ali through M/s. M/s. Maroof Hussain Hashmi and M.S. Anjum, Advocates
2) The State through Mr. Ali Haider Saleem, Additional Prosecutor General Sindh.

Date of Judgment

19.09.2022

JUDGMENT

Mohammad Karim Khan Agha, I:- Syed Lal Hussain Shah, Advocate files Vakalatnama on behalf of Waqar Ali alias Bantoo s/o Irshad Ali, who is respondent in appeal against acquittal bearing No.383 of 2021.

2. Appellants Waqar Ali alias Bantoo and Sikandar alias Babloo were tried in the Model Criminal Trial Court / Court of 1st Additional Sessions Judge (East) Karachi in Session Case No.2327 of 2020 in respect of Crime No.275/2018 u/s 302/397/34 PPC registered at PS Brigade, Karachi and vide judgment dated 14.06.2021 Waqar Ali @ Bantoo was convicted u/s.302-B PPC and sentenced to life imprisonment. In addition he was directed to pay compensation to the tune of Rs.10000/- to the legal heirs of the deceased and if he fails to make such payment he would suffer S.I. for 06 months more in addition to the substantive sentence. Accused Sikandar @ Babloo was acquitted.

3. The brief facts of the prosecution case as narrated by the complainant Muhammad Waqar-ul-Islam Abbasi son of Muhammad Irshad Abbasi are that Muhammad Imad ul Islam Abbasi (deceased) was his younger brother. On 28.12.2018 he was present at his house. At about 0142 hours he heard sound of fire. He saw from the window of his house which was constructed on first floor that two persons one was wearing helmet and other was without helmet. Both were having pistols. The person with helmet was fighting with his brother Imad while the person without helmet was standing on his bike. His brother was holding hand of the person with helmet and the person without helmet fired at his brother. In the meanwhile, he went down stairs and saw the person without helmet was making continuous firing on his brother. When he tried to follow them, they fled away on motorcycle. His elder brother Ansar-ul-Islam also arrived with other people of mohallah. They brought

injured Imad to Jinnah Hospital on motorcycle. The doctor was making treatment during which his brother expired. The police arrived and examined dead body of Imad and SIP Javed arrived and recorded his statement u/s.154 Cr. P.C. Thereafter, after post mortem they received dead body of his brother. Hence, on the basis of statement under Section 154 Cr.P.C. such FIR was lodged two unknown accused persons.

4. After completion of investigation the challan was submitted against both the accused to which they pleaded not guilty and claimed trial.

5. The prosecution in order to prove its case examined 12 Prosecution Witnesses and exhibited various documents and other items. The statements of accused were recorded under Section 342 Cr.P.C in which they denied the allegations leveled against them and claimed false implication.

6. After hearing the parties and appreciating the evidence on record, the trial court convicted the appellant Waqar Ali as set out earlier and acquit the appellant Sikandar hence Waqar Ali @ Bantoo has filed this appeal against conviction. In respect of appellant Sikandar @ Babloo complainant has filed an appeal against his acquittal bearing No.383 of 2021 and he has also filed a Cr. Revision Application No.152 of 2021 for enhancement of sentence of Waqar Ali @ Bantoo from life imprisonment to death penalty.

7. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the impugned judgment dated 14.06.2021 passed by the trial court and, therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

08. At the very out set we note that appellant Waqar Ali @ Bantoo also tried separately before the same trial Court in Session Case No.2015 of 2020 under FIR No.54 of 2020 u/s.23(i)A SAA 2013 of PS Brigade, Karachi vide judgment dated 14.06.2021 he was convicted and sentenced to suffer 07 years imprisonment with fine of Rs.50000/- and in case of default in payment he would undergo SI for 02 months more. He was also extended benefit of Section 382-B.

09. It is noted that there were two separate judgments in respect of each case which were in connected as in the main case pistol recovered from the appellant Waqar Ali @ Bantoo was also used in the main case and as such there was no reason why both these cases should not have been amalgamated and tried together. However, in order to avoid conflicting judgments.

10. Be that as it may, learned counsel for the appellant Waqar Ali, Learned counsel for the complainant, learned counsel for the appellant Sikandar for whom appeal against acquittal has been filed and learned Additional Prosecutor General Sindh pointed out that the evidence of 03 PWs in the main case bearing No.2327 of 2020 and 2015 of 2020 are identical in all respects. These are PW-1 ASI Sahib Khan, PW-2 PC Arshad and PW-3 I.O. Abdul Khaliq. According to them, the evidence of all above three witnesses have been copied and pasted in both judgments and as such this has led to defect which is not curable u/s.537 Cr.P.C. and as such the case needs to be remanded for a denovo trial.

11. We have been considered the conventions of the parties and the relevant law. We have also compared the evidence of PW Sahib Khan, PW Arshad and PW Abdul Khaliq and we are satisfied that deposition of all above three prosecution witnesses were copied and pasted in the two separate judgments which is under the law is not permissible. In each separate case each witness has to appear in the witness box to give/record his evidence and cannot be copied and pasted into another case. This is a defect which is incurable as was held in the case of **Azad Khan v. The State** (2004 YLR 1076):-

“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.

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, Shah, Mashir, P.W.2, S.H.O. Muhammad Aslam, complainant, and P.W.3 Line Officer Muneer 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 h 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."

12. In the light of the above, it justifies a remand of the case back to the trial Court for a denovo trial. Accordingly we are set aside the judgment passed in Criminal Appeal No.334 of 2021 and No.336 of 2021 and direct a denovo trial of the same which shall be held by the Model Criminal Trial Court / 1st Additional Sessions Judge (East) Karachi whereby the learned trial Court shall frame a common charge in respect of all the offences and whereafter carry out a denovo trial and repeat the same within 03 months of the date of this order.

13. We note that appeal against acquittal has been filed against appellant Sikandar, who was acquitted in the main case. We considered that it will meet the ends of justice if Sikandar @ Babloo is granted bail after furnishing a solvent surety in the sum of Rs.50000/- and PR bonds in the like amount to the satisfaction of the Nazir of the learned trial Court i.e. Model Criminal Trial Court / 1st Additional Sessions Judge (East) Karachi. Having remanded both the cases we hereby disposed of Criminal Acquittal Appeal No.383 of 2021 and Criminal Revision Application No.152 of 2021 as become infructuous. With regard to the Criminal Appeal No.335 of 2021 this appeal shall be separated from this bunch and shall be put up before single bench of this Court for hearing as per roster on 04.10.2022.

14. The above Criminal Appeals No.334 of 2021, No.336 of 2021, Criminal Acquittal Appeal No.383 of 2021 and Criminal Revision Application No.152 of 2021 are disposed of in the above terms.

15. Copy of this order along with R&Ps of above disposed of appeals shall be returned to Model Criminal Trial Court / 1st Additional Sessions Judge (East) Karachi for compliance.

JUDGE JUDGE