

IN THE HIGH COURT OF SINDH CIRCUIT COURT HYDERABAD

Cr. Jail Appeal No.D-41 of 2016

Cr. Jail Appeal No.D-43 of 2016

PRESENT

*Mr. Justice Naimatullah Phulpoto
Mr. Justice Shamsuddin Abbasi*

Date of Hearing: 18.04.2018

Date of Judgment: 18.04.2018

*Appellants/accused: 1. Irfan Ali S/o Ashique Parheri.
2. Anwar S/o Ali Muhammad Mallah
Through Mr. Shoukat Ali Pathan,
Advocate*

*The State: Through Shahzado Saleem Nahiyoon,
Deputy Prosecutor General, Sindh.*

J U D G M E N T

SHAMSUDDIN ABBASI, J:- By means of this judgment, we intend to dispose of instant criminal appeals filed by appellants Irfan Ali and Anwar, whereby they have impugned the judgment dated 08.04.2016 passed by the learned Judge, Anti-Terrorism Court, Hyderabad, in ATC Case No.23 of 2012, wherein both the appellants were sentenced to imprisonment for life and to pay fine of Rs.200,000/- each, in case of non-payment of fine amount, they were ordered to suffer simple imprisonment for 06 months. The fine, if recovered from the accused, was ordered to be given to the legal heirs of the deceased. In another offence, the appellants were also convicted and sentenced for 10 years R.I and to pay fine of

Rs.100,000/- each, and in case of non-payment of fine amount, to suffer S.I for 03 months. Both the accused were further convicted and sentenced to rigorous imprisonment for life and to pay fine of Rs.100,000/- each and in case of non-payment of fine, to suffer simple imprisonment for 06 months. Whereas, accused Ashraf Mallah and Nawaz alias Ali Nawaz were acquitted of the charge. However, the sentences awarded to the appellants were ordered to run concurrently with benefit of Section 382-B Cr.P.C.

2. Concisely, the facts of the prosecution case as narrated in the FIR are that on 10.07.2012 two abductees namely Intizar Ali and Nawaz Ali were abducted by dacoits Shero Teetri, Saleem Shah, Anwar Khalasani, Khan Jakhro, Anwar Pathan, Akbar Qandro, Baboo Qandro and the said abductees were kept in their captivity in Sugarcane Crops of one Yaroo Memon at Panah Bello. On receiving information, the police raided the pointed place and took position and after encounter abductee Ali Nawaz Solangi was recovered. During encounter, one dacoit namely Shero Teetri was killed, while the remaining dacoits by taking abductee Intizar Ali escaped away inside the forest. During search, dead body of abductee Intizar was recovered from sugarcane crop, hence the present FIR.

3. During the investigation, accused Irfan was arrested on the basis of 162 Cr.P.C statement of recovered abductee Nawaz Ali Solangi.

4. The police submitted interim challan before ATC Badin in which accused Bachayo Khaskheli, Hashim Qandar, Wazir Qandra, Akbar Qandra and Rasool Bux alias Baboo Qandar were shown in

Column No.2 and accused Saleem Shah, Khan Jakhro, Anwar S/o Ali Muhammad, Anwar S/o Soomar Pathan, Nawaz Samoo, Karo Khaskheli, Anwar Darss, Qadir Morio, Irfan Ali Parheri and Ashraf were shown as absconders. Thereafter final challan was submitted in which accused Saleem Shah, Khan Jakhro, Anwar S/o Ali Muhammad, Anwar S/o Soomar Pathan, Nawaz Samoo, Karo Khalasi alias Wichu, Anwar Dars, Qadir Morio, Irfan Ali Parheri and Ashraf Bughdo were shown as absconders.

5. The learned trial Court after submission of challan issued N.B.Ws against the absconding accused but the same could not be executed, however, the trial Court issued proclamation under Section 87 Cr.P.C by way of three different newspapers but of no avail. Thereafter, the proceedings against the absconders under Section 88 Cr.P.C were issued.

6. Thereafter, the learned trial Court framed charge against all the aforesaid 10 absconding accused at Ex-5 and they were tried in absentia.

7. In order to prove it's case, the prosecution examined P.W-1 M.O Dr. Jethanand at Ex-6, who produced copy of the letter of I.O addressed to him for conducting postmortem of deceased Sher Muhammad alias Shero Teetri at Ex-6/A, another letter of the Police regarding examination of dead body of abductee Intizar Ali Solangi at Ex-6/B and postmortem report at Ex-6/C. During trial, accused Muhammad Anwar, Irfan and Ashraf were arrested and their pleas were recorded at Exs-12, 13 and 14, wherein they pleaded not guilty and claimed to be tried. The prosecution also examined P.W-2 Nawaz Ali

Solangi at Ex-15. On notification issued by the Home Department, the proceedings of the case were conducted inside Central Prison, Hyderabad. The prosecution then examined P.W-3 SHO Aijaz Ahmed Shaikh at Ex-21, who produced roznamcha entry No.30 at Ex-21/A, mashirnama of recovery of abductee at Ex-21/B, mashirnama of recovery of Gun at Ex-21/C, mashirnama of dead body of deceased abductee Intizar Ali Solangi at Ex-21/D, roznamcha entry No.9 at Ex-21/E and FIR at Ex-21/F. P.W-4 SIP Sajjad Hussain Jatui was examined at Ex-22. P.W-5 Tapedar Arsalan Ahmed Khati was examined at Ex-23, who produced letter sent to him for visiting the place of wardat at Ex-23/A and site sketch in triplicate at Ex-23/B. The prosecution also examined P.W-6 SIP Abdul Aziz Soomro at Ex-25 and P.W-7 Gul Hassan Solangi at Ex-26. Thereafter, accused Ali Nawaz was arrested during the proceedings

8. The learned trial Court framed the amended charge against accused Anwar Mallah, Irfan Ali Parheri, Ashraf Mallah and Nawaz alias Ali Nawaz at Ex-33, to which all the accused did not plead guilty and claimed to be tried.

9. Thereafter, the prosecution in order to prove the above charge examined P.Ws namely Ali Nawaz Lashari at Ex-39, Haji Eissa at Ex-40, HC Muhammad Uris Khudai at Ex-42, HC Mumtaz Ali Junejo, at Ex-43, ASIP Saleem Raza Mirjat at Ex-44, ASIP Syed Ghulam Hyder at Ex-46 and ASI Zafar Ali Zounr at Ex-47. Thereafter, the prosecution side was closed.

10. The learned trial Court recorded the statements of the accused under Section 342 Cr.P.C at Exs-49 to 52 respectively,

whereby all the accused denied the allegations leveled by the prosecution. The accused neither examined themselves on oath, nor examined any witness in their defense.

11. After full-dressed trial, the learned trial Court, vide judgment dated 08.04.2016, convicted the accused and sentenced them as stated in the foregoing paragraph, hence, the appellants / accused have filed the instant appeal.

12. Learned Counsel for the appellants / accused contended that the judgment passed by the trial Court is perverse and the same is against the settled principles of criminal justice. He further contended that the evidence recorded by the trial Court in absence of the accused is illegal and unwarranted and the same evidence whatsoever cannot be considered to be taken against the appellants / accused until and unless such evidence is recorded in their presence. He also contended that the judgment passed by the learned trial Court is not sustainable under the law to the effect of illegalities having been committed by the learned trial Court. At the last, he prayed for setting aside the judgment and remanding the case to the trial Court to record the evidence of the prosecution witnesses afresh.

13. On the other hand, learned Deputy Prosecutor General conceding the proposal of the learned Counsel for the appellants admitted that the learned trial Court has committed illegality, which is not curable under the law. He further admitted that the trial Court after amending the charge should have recorded evidence of the prosecution witnesses afresh when the accused after arrest were present before the

Court. He, however, raised no objection to the proposal made by the learned Counsel for the appellants for remand of the case.

14. Heard the learned Counsel for the appellants and learned D.P.G and perused the material whatever available before us.

15. It is a matter of record that the learned trial Court had recorded the evidence of some of the prosecution witnesses in absence of the appellants / accused. It may be noted here that evidence of P.W Dr. Jethanad was recorded in absence of all the accused and during the proceedings, accused Muhammad Anwar, Irfan and Ashraf were arrested and after their arrest the trial Court proceeded with the case and recorded evidence of P.Ws Ali Nawaz Solangi, Inspector Aijaz Ahmed Shaikh, SIP Sajjad Hussain Jatoi, Arsalan Ahmed, SIP Abdul Aziz Soomro and Gul Hassan Solangi. After recording the evidence of these witnesses, accused Ali Nawaz was arrested. Thereafter, the learned trial Court framed amended charge against the accused at Ex-33 to which all the four accused pleaded not guilty and claimed to be tried. It is pointed out that the trial Court recorded the evidence of as many as seven prosecution witnesses in absence of the accused. It is observed that the procedure adopted by the trial Court was not in accordance with the law because the accused were condemned unheard as they were not provided an opportunity to cross examine the prosecution witnesses whose evidence was recorded in their absence and the trial Court taking such evidence into account convicted the appellants / accused. The trial Court while convicting the appellants / accused has not taken into account the prescribed law as envisaged under Article 10-A of the Constitution, which guarantees for fair trial in

order to determine the civil as well as criminal rights of any person / citizen under the obligation. Reliance is placed on the case of *ALLAH DINO & 02 OTHERS V/S. THE STATE (2018 P.Cr.L.J 200)*, wherein this Honourable Court has observed as under:-

“It is basic principle of administration of criminal justice that examination of the witnesses must be recorded in presence of accused or his pleader as provided under section 353, Cr.P.C, which reads as under:-

“353. Evidence to be taken in presence of accused.
Except as otherwise expressly provided, all evidence taken under (Chapter XX, XXI, and XXIIA) shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in presence of his pleader.”

16. Reliance is also placed on the case of *MUHAMMAD SADDIQUE V/S. THE STATE* reported as 2018 SCMR 71, wherein the Honourable Supreme Court has maintained as under:-

8. *The law on the point is very much clear and settled. When an accused is absconding, the trial Court has to issue proclamation and attachment under sections 87/88, Cr.P.C. When the absconsion is established and proved on the record, then the trial Court can proceed with the mater under section 512, Cr.P.C. and record the evidence of all the witnesses which later on can be used against the accused in the circumstances provided in section 512(1), Cr.P.C. But it was not the case where proceedings under section 512, Cr.P.C were to be initiated and completed against the appellant rather the appellant was tried in absentia by the Special Court under the Act of 1975 as provided under section 5-A(4) of the said Act. The basic difference between the two is that in the former case, only evidence in absentia is recorded under section 512(1), Cr.P.C. whereas in the latter case, it is full fledged trial of the accused in absentia under section 5-A(4) of the Act of 1975 and the Court under Special Law is empowered to record conviction of the person in absentia as was done in the earlier trial of the appellant. While coming back to the facts and circumstances of the case, the High court in earlier Jail Appeal after arrest of the appellant had set aside the conviction so recorded in absentia and sent back the case to the trial Court for fresh regular trial. Here in this situation the prosecution again was duty bound to lead entire evidence to prove its case beyond any shadow of doubt against the appellant. Prosecution has again produced available evidence but has not bothered to look after the ocular*

account earlier furnished by the injured eye-witness Jumma Khan who according to report met a natural death before initiation of the trial de novo. Such an evidence was necessary to prove the charge against the appellant. The law also caters for such like situation that when a witness meets a natural death or other circumstances as provide in Article 47 of the Qanun-e-Shahadat Order, 1984 before recording of his statement before the Court, then in that case the evidence of such person earlier recorded in any judicial proceedings or before any person authorized under the law to record the same becomes relevant for the purpose of proving those facts but it should be between the same parties or their representatives and that person is cross-examined during that process. Article 47 of the Qanun-e-Shahadat Order, 1984 caters the situation which is reproduced for ready reference:-

47. RELEVANCY OF CERTAIN EVIDENCE FOR PROVING, IN SUBSEQUENT PROCEEDING, THE TRUTH OF FACTS THEREIN STATED.---Evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if expense which, under the circumstances of the case, the Court considers unreasonable:

Provided that:

the proceeding was between the same parties or their representatives-in-interest,

the adverse party in the first proceeding had the right and opportunity to cross-examine;

the questions in issue were substantially the same in the first as in the second proceedings.

By keeping in mind the above provision of law and facts and circumstances of the earlier judicial proceedings against the appellant though in absentia but under the Special Law, it was the bounden duty of the prosecution to have brought the said evidence on the judicial record. The statement of said Jumma Khan was neither before the Court nor was brought on the record in accordance with law. The record of the case is completely silent in this regard. No doubt the statement of said Jumma Khan was recorded in the trial in absentia but that cannot be considered / looked into by the trial Court on its own especially when that has not been brought legally on the judicial file and is there in the file of trial in absentia. Besides the above all, not a single question of earlier statement of Jumma Khan

recorded during the trial in absentia was every put to the appellant during his statement recorded under section 342 Cr.P.C. Law on the subject is very much clear and settled that any piece of incriminating evidence must be put to accused in his statement under section 342 Cr.P.C, otherwise the same cannot be used against him. Here in this case, the trial court has based its judgment of conviction by keeping in mind the earlier statement of the ocular account of Jumma Khan which legally was not before the court and the longstanding ascendance of the appellant. There is nothing on the record to establish the ascendance of the appellant in the shape of proceedings under sections 87/88 Cr.P.C. So, for that matter the appellant in reply to the question of his abconsion has simply denied.

9. *Prosecution in this case has also failed to bring on record any supportive or corroborative piece of evidence to prove the guilt of accused. There is no recovery of weapon of offence. No motive is brought against the appellant. Though the question of Article 47 was agitated before the High Court in appeal but that was not appreciated by the High Court.*

10. *So, far what has been discussed above, we are of the considered view that the prosecution has failed to prove the guilt of appellant to the hilt. Resultantly, this appeal is allowed. The sentence and conviction of the appellant are set aside. He is acquitted of the charges. He shall be released forthwith, if not required or detained in any other case."*

17. In view of the observations made herein above, we are of the considered opinion that as the appellants / accused have not been afforded a fair trial and they have been condemned unheard without giving them an opportunity of cross examine the witnesses who have deposed against the appellants / accused, which is clear violation not only of law but also of Article 10-A of the Constitution of Islamic Republic of Pakistan, 1973, therefore, the instant appeals are partly allowed and conviction and sentence recorded by the trial Court vide judgment dated 08.04.2016 are set aside and consequently the case is remanded to the learned trial Court with direction to record the evidence of the prosecution witnesses namely (i) Dr. Jethanand (ii) Nawaz Ali Solangi (iii) Inspector Aijaz Ahmed Shaikh (iv) SIP Sajjad Hussain Jatoi

(v) Arsalan Ahmed (vi) SIP Abdul Aziz Soomro and (vii) Gul Hassan Solangi afresh by affording the opportunity to the appellants / accused to cross-examine the said witnesses. Thereafter, the learned trial Court shall pass the judgment afresh within three months positively after hearing both the parties, in accordance with law. Needless to mention that trial Court shall consider the bail application of the appellants, if moved, strictly in accordance with law.

JUDGE

JUDGE

Shahid