

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

Cr. Appeal No. S — 06 of 2014.

PRESENT

Mr. Justice Naimatullah Phulpoto

Appellant: Waheed Ali s/o Haji Gul @ Gul Muhammad.
Through Mr. Shabbir Hussain Memon,
Advocate.

The State: Through Syed Meeral Shah Bukhari, A.P.G.

Date of Hearing: 11.05.2018.

Date of Judgment: 11.05.2018.

JUDGMENT

Naimatullah Phulpoto J. Waheed Ali son of Haji Gul alias

Gul Muhammad Appellant was tried along with Haji Gul alias Gul Muhammad s/o Imam Bux Shahani, Umed Ali s/o Imam Bux Shahani [since acquitted] by learned IVth Additional Sessions Judge Dadu in Sessions Case No.485 of 2009. Vide Judgment dated 23.12.2013 Appellant Waheed Ali was convicted under section 302 (b) PPC and sentenced to imprisonment for life. He was also directed to pay compensation of Rs.200,000/- to the legal heirs of the deceased. In case of the default he was ordered to suffer R.I. for one year. Appellant was extended benefit of Section 382 (b) Cr.P.C.

2. Brief facts of the prosecution case as disclosed in the F.I.R. are on 13.06.2009 at 11:45 hours complainant Imdad Shahani lodged his F.I.R. at P.S. T.R. Khan, alleging therein that there is dispute between complainant and Haji Gul Shahani and others over vacant plot situated in front of house of complainant. On 12.06.2009, complainant and his relatives Mohabat, Kamil, Pandhi and Sono all by caste Shahani were standing at plot it was about 5:00 PM, when accused (1) Irshad (2)

Waheed (3) Haji Ameer (4) Haji Gul (5) Umed Ali came there. Out of them it is alleged that accused Waheed was armed with hatchet and other accused had lathies in their hands. Accused persons asked the complainant party as to why they were standing at plot. Complainant replied accused that the plot belongs to them, accused were annoyed on it, who abused the complainant party. It is further alleged that accused Waheed caused back side of hatchet blow to P.C. Mohabat on his head with intention to commit his murder, accused Irshad caused Lathi blow on the head of complainant, Haji Gul caused lathi blow to P.W. Sono on his head. Accused Umaid Ali caused lathi blow to P.W Kamil, accused Haji Ameer caused lathi blow to P.W. Pandhi. P.W. Mohabat fell down and went unconscious. The complainant party raised cries on which women folk came along with Holy Quran Sharif. Then, accused persons went away. Complainant arranged for conveyance and came to P.S. injured Mohabat was referred to hospital where he succumbed to his injuries, while other injured were admitted in to Hospital. After post mortem of deceased Mohabat, complainant lodged an F.I.R. of incident. It was recorded vide crime No.09 of 2009 under sections 302, 324, 337-A (i), 504, 147, 148, 149 PPC at Police Station T.R. Khan.

3. After usual investigation challan was submitted against the accused under above referred sections. Accused Irshad was shown absconder. He was declared as proclaimed offender and the case was ordered to proceed against him under section 512 Cr.P.C.

4. Trial Court framed the charge against the Appellants Haji Gul alias Gul Muhammad, Waheed, Umed Ali and Amir alias Amir Bux at Ex.02. Accused pleaded not guilty and claimed to be tried.

5. At the trial, prosecution examined P.Ws. complainant Imam Dad Shahani at Ex.5, PW Kamil Shahani at Ex.6, SIP Jaro Khan Lashari at Ex.7 who produced mashirnama of place of incident at Ex.7-A, mashirnama of arrest of accused Haji Gul alias Gul Muhammad at Ex.7-B, mashirnama of arrest of accused Waheed Ali, Umed Ali and Haji Amir

alias Amir Bux Shahani at Ex.7-C, mashirnama of recovery from accused Haji Gul Muhammad and accused Haji Amir alias Amir Bux at Ex.7-D, mashirnama of recovery of clothes of deceased Mohabat at Ex.7-E and Chemical Report at Ex.7-F. Learned DDPP for the State gave up P.W Pandhi vide his statement at Ex.8, Dr. Mehboob Rind S.M.O. Taluka Hospital Johi at Ex.9 who produced provisional M.C. of injured Kamil at Ex.9-B, final Medical Certificate of Kamil at Ex.9-C, provisional M.C. of injured Sono at Ex.9-D, final M.C. of injured Sono at Ex.9-E, provisional M.C. of injured Imdad at Ex.9-F, final M.C. of Imdad at Ex.9-G, provisional M.C. of injured Pandhi at Ex.9-H, final M.C. of injured Pandhi at Ex.9-I, police letter for post mortem of Mohabat Shahani at Ex.9-J, post mortem report of deceased Mohabat Shahani at Ex.9-K, P.W. SIP Ghulam Hyderabad Thahim at Ex.10 who produced inquest report at Ex.10-A, P.W. Mashir Rahim Bux Shahani at Ex.11. Prosecution side was closed at Ex.12.

6. Thereafter, statement of the accused was recorded under section 342 Cr.P.C. in which accused claimed false implication in this case and denied the prosecution allegations.

7. Trial court after hearing the learned counsel for the parties and assessment of the evidence vide Judgment dated 23.12.2013 convicted the Appellant Waheed Ali and sentenced him as stated above and acquitted the co-accused and case of absconding accused Irshad was kept on dormant file.

8. Appellant Waheed Ali has filed the appeal challenging the conviction and sentence recorded against him by the trial Court.

9. Mr. Shabbir Hussain Memon, counsel for the Appellant argued that trial Court has committed illegality while recording the statements of accused under section 342 Cr.P.C. He further argued that all the incriminating pieces of evidence were not put to the accused at the time of recording statement of accused but trial Court based conviction upon those pieces of evidence. Counsel for the Appellant submitted that trial

Court in the Judgment dated 23.12.2013 has relied upon the motive and recovery of the hatchet on the pointation of the accused but such incriminating pieces were not put to the accused for his explanation. He next contended that medical evidence, was produced in evidence trial Court has based conviction by relying upon that piece of evidence also but it was also not put to the accused. Lastly, it is argued that trial Court has committed illegality and argued that case may be remanded to the trial Court for providing an opportunity to the accused to explain all the incriminating pieces of evidence brought on record against him. In support of his contention he relied upon the case reported as **MUHAMMAD SHAH v. THE STATE** (2010 SCMR 1009).

10. Syed Meeral Shah Bukhari, A.P.G. after going through the evidence and judgment of the trial Court conceded to the contentions raised by learned Advocate for Appellant and recorded no objection for remand of the case to the trial Court.

11. I have carefully heard the learned counsel for the parties, perused the evidence minutely so also statement of accused recorded under section 342 Cr.P.C.

12. It is the primary responsibility of the trial Court to ensure that truth is discovered in a case dealt by it. Article 10-A of the Constitution of Islamic Republic of Pakistan, 1973, provides guarantee for fair trial in order to determine civil as well as criminal rights of any person under the obligation or in any criminal charge. It is settled principle of law that if any piece of evidence brought by the prosecution on record is not put to an accused person at the time of recording statement under Section 342 Cr.P.C, then it could not be considered against him. Same position has been created in the case at hand by the trial Court as the trial Court while recorded statement of the accused under Section 342 Cr.P.C has not put the relevant questions.

13. From the perusal of the Judgment of the trial Court it appears that trial Court has relied upon ocular evidence, medical evidence, recovery of

the hatchet and motive but these incriminating pieces of evidence were not put to the accused at the time of recording his statement under section 342 Cr.P.C. for his explanation. It is the requirement of law that each and every incriminating piece of evidence shall be put to the accused for his explanation. In case such incriminating pieces are not put to the accused those pieces cannot be used against the accused for recording conviction. Learned counsel for the petitioner has rightly placed reliance on the case of **MUHAMMAD SHAH (supra)** in which the Honourable Supreme Court has held as under:-

“11. It is not out of place to mention here that both the Courts below have relied upon the suggestion of the appellant made to the witnesses in the cross-examination for convicting him thereby using the evidence available on the record against him. It is important to note that all incriminating pieces of evidence, available on the record, are required to be put to the accused, as provided under section 342, Cr.P.C in which the words used are “For the purpose of enabling the accused to explain any circumstances appearing in evidence against him” which clearly demonstrate that not only the circumstances appearing in the examination-in-chief are put to the accused but the circumstances appearing in cross-examination or re-examination are also required to be put to the accused, if they are against him, because the evidence means examination-in-chief and re-examination, as provided under Article 132 read with Articles 2(c) and 71 of Qanun-e-Shahadat Order, 1984. The perusal of statement of the appellant, under section 342, Cr.P.C., reveals that the portion of the evidence which appeared in the cross-examination was not put to the accused in his statement under section 342, Cr.P.C. enabling him to explain the circumstances particularly when the same was abandoned by him. It is well-settled that if any piece of evidence is not put to the accused in his statement under section 342, Cr.P.C. then the same cannot be used against him for his conviction. In this case both the Courts below without realizing the legal position not only used the above portion of the evidence against him, but also convicted him on such piece of evidence, which cannot be sustained.

14. Reliance can also be placed on the case of **MUHAMMAD NAWAZ & OTHERS V/S. THE STATE & OTHERS**, reported as 2016 SCMR 267, wherein the Honourable Apex Court has observed as under:-

“6(c).....There is yet another aspect of the case. While examining the appellants under section 342, Code of Criminal Procedure, the medical evidence was not put to them. It is well settled by now that a piece of evidence not put to an accused during his/her examination under section 342, Code of Criminal Procedure, could not be used against him/her for maintaining conviction and sentence”.

15. In another case of *QADDAN & OTHERS V/S. THE STATE* reported as *2017 SCMR 148*, the Honourable Apex Court has held as follows:-

3.....Apart from that the motive set up by the prosecution had never been put to the present appellants at the time of recording of their statements under section 342, Cr.P.C. The law is settled that a piece of evidence not put to an accused person at the time of recording of his statement under section 342, Cr.P.C. cannot be considered against him."

For the above stated reasons, without discussing the evidence on merits the appeal is partly allowed. The conviction and sentence recorded by the trial Court vide judgment dated 23.12.2013 are set-aside. Case is remanded back to the trial Court with direction to record statement of accused under section 342 Cr.P.C. afresh by putting all incriminating pieces of evidence for his explanation/reply. A fair opportunity shall be provided to Appellant. Thereafter, trial Court after hearing the learned counsel for the parties shall pass the judgment within one month strictly in accordance with law.

JUDGE

Arif.