

**ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI
Criminal Appeal No.51 of 2017**

Order with signature of Judge(s)

For hearing of case

28.1.2019

Appellant Talib Hussain present in person.
Ms. Rahat Ehsan, Additional P.G.
Mr. Muhammad Farooq, SSP (Investigation) East Karachi
Mr. Amin Ahmed, PDSP (Investigation).

NAZAR AKBAR, J. This appeal is against the conviction of Appellant awarded by X-Additional Sessions Judge, East Karachi in an accident case bearing Criminal Case No.1739/2009 arising out of FIR No.340 of 2009 under Section 320 and 337-G, PPC at PS Soldier Bazaar, District East Karachi. The Appellant has been convicted to undergo RI for three years and also to pay *Diyat* amounting of **Rs.16,80,320/-** (Rupees Sixteen lacs eighty thousand three hundred twenty Only) to the legal heirs of the deceased.

2. On perusal of the impugned judgment I have noticed that the prosecution was entrusted to **PW-9 SI Sarfaraz Aliyana**, who was examined by the prosecution as Ex.P-12, but he never produced the bus bearing No.JA-2312 involved in the offence under Section 320 PPC with challan in the trial Court nor he has produced any document of inspection of the said vehicle by the Motor Vehicle Inspector. He only produced entries before the trial Court as Ex.12-A and 12-B. The record shows that bus was taken into custody by the Investigating Officer on the same day (**13.11.2009**) and without inspection by the Motor Vehicle Inspector the said bus was probably handed over to the owner on

15.11.2009. The owner of bus was also supposed to be interrogated as he was co-accused since his employee has caused death by an accident while driving bus owned by him. The owner had vicarious responsibility of the consequences of the offence. The bus owner before entrusting the bus to his employee / driver was supposed to have a third party insurance. The I.O did not enquire about any insurance policy by the bus owner regarding third party risk. The owner was guilty of violating **Section 94** of the Insurance of Vehicle Against Third Party Risks (**Motor Vehicles Act, 1938**). I have also noticed that the learned trial Court has not even commented on the case property in the final judgment. May be it was so because the case property has never been produced before the learned trial Court. In these circumstances, on the first date of hearing when the Investigating Officer was called and he appeared on **18.1.2019**, I have passed the following order: -

*“Appellant Talib Hussain present in person.
Ms. Rubina Qadir, D.P.G.
I.O Sarfaraz Khan, Ameen Ahmed, PDSP
Investigation, S.I Tufail Ahmed, are present.*

*Before proceeding further it has been noticed by this Court that the I.O has been criminally negligent of his duties, he failed to produce the bus involved in the offence before the trial court despite the fact that it was mentioned in the diary sheet. He had no authority to release the bus and handover to the owner without permission of the trial Court and may be for some corruption and some other influence he failed to discharge his duty and handed over bus to the owner. He is directed to produce the bus on **21.01.2019** at **8:30 a.m** after arresting the bus and submit an explanation that under what authority he has not produced the bus before the trial Court as case property. After his explanation case may be sent to the DIG East, for disciplinary action and with direction to submit report of action against the I.O Sarfraz Khan to this Court within one week.”*

On **21.1.2019**, the I.O. failed to produce the bus, therefore, I was constrained to call the SSP (Investigation) East Karachi by following order: -

*“Appellant Talib Hussain, present in person.
Ms. Rahat Ahsan, Addl. P.G.
I.O Sarfaraz Aliyana and
Ameen Ahmed, PDSP Investigation are present.*

*In view of the fact that the prosecution especially I.O Sarfaraz Aliyana and Ameen Ahmed, PDSP Investigation have miserably failed to produce case property in the ten years before the trial Court and in this Court. SSP East should be present in Court on the next date of hearing alongwith vehicle on **28.01.2019** at **8:30 a.m.** In case of his absence on any account, I am afraid that he will face contempt of Court proceeding. This order may be sent to SSP East through Fax. Ms. Rahat Ahsan, Addl. P.G is also directed to inform the SSP East.*

*To come up on **28.01.2019** at **8:30 a.m.**”*

Today a report has been placed on record by the SSP (Investigation) East Karachi which confirms that SIP Sarfaraz Aliyana was entrusted with the investigation of an offence in Crime No.340/2009 under Section 320 PPC dated **13.11.2009** and he had handed over the said bus on **15.11.2009** in a hardly 48 hours to the owner Fazal on *Superdaginama*. This *Superdaginama* has not been produced before the trial Court. The report prepared by the same I.O reveals that the owner has scraped the bus in 2012 and died in 2015 and now the I.O. is negotiating with the legal heirs of the owner of the bus. Can he be trusted? What is the proof of scraping of the bus? Was I.O who gifted the bus to the owner was informed before scraping the case property?

3. When confronted with the above facts and circumstances Mr. Amin Ahmed PDSP (Investigation) in presence of the SSP (Investigation) East Karachi states at the bar that since it is established from the record of the case that the bus involved in the

accident has never been produced before the trial Court, therefore, without examining the bus the conviction of the bus driver was not justified. He also states that the I.O. had no authority to hand over the bus to the owner. The awful performance of Investigation East, Karachi may be appreciated from the record that the accident took place on **13.11.2009**, challan was submitted on **01.12.2009** and even charge was framed on **06.7.2010**, but prosecution took eight years to complete trial on **07.1.2017** in a simple case of an offence under Section 320, PPC. In the cases like the one in hand the prosecution cannot allege non-cooperation of witnesses for want of Law for protection of witnesses.

4. Be that as it may, it is not within the domain of this Court to call the legal heirs of the bus owner, since this is a case of criminal liability which could not be passed on the legal heirs. The trial Court has ordered payment of *Diyat* amount as the death was caused by accident in which bus No.JA-2312 was case property. The payment of diyat is in the nature of liability of “the driver of the vehicle or **other person** Incharge of the vehicle” under **Section 94** of the West Pakistan Motor Vehicles Ordinance, 1965. The owner was “other person Incharge of the Vehicle” and he was under mandatory duty to secure the consequence that may occasion from the accident by fulfilling the mandatory requirement of **Section 94** of the Motor Vehicles Act, 1938. It reads as under:-

94. Necessity for Insurance against third party risk.—(1) No person shall use except as a passenger cause or allow any other person to use a motor vehicle in a public place, unless there is in force in relation to the use of the vehicle by that person or that other person, as the case may be, **a policy of insurance complying with the requirements of this Chapter.** (Chapter VIII of Motor Vehicle Act, 1938).

Explanation. A person driving motor vehicle merely as paid employee, while there is in force in relation to the use of the vehicle such policy as is required by this sub-section, shall not be deemed to act in contravention of the sub-section unless he knows or has reason to believe that there is no such police in force.

The use of the word “shall” for the person to use or allow any other person to use motor vehicle means it was statutory duty of the owner of vehicle to have covered the third party risk otherwise he should not have allowed his driver to use the vehicle. The appellant was merely a paid employee. Therefore, in my humble view the payment of DIYAT was liability of the “**other person Incharge of Vehicle**” and that other person was the owner and he has violated the mandatorily provision of law reproduced above.

Be that as it may, had the bus been arrested and kept in the custody of the Court, the Court in absence of third party risk could have ordered payment of *Diyat* amount to the legal heirs by selling the bus, the case property. Otherwise, the Court could have released the bus handed over the bus to the owner subject to the surety at least to the extent of DIYAT amount pending the trial. In the given facts and circumstances of the case, the custody of bus has always remained in the custody of the police investigation section of District East Karachi. The Investigation Officer cannot be trust for whatever he has reported to the SSP and reproduced in the report. Therefore, the learned SSP (Investigation) present in Court besides taking action against the I.O. and any other officer is directed to deposit or cause to deposit within 15 days the *Diyat* amount of **Rs.16,80,320/-** (Rupees Sixteen lacs eighty thousand three hundred twenty Only) ordered in the impugned judgment which was passed in **2009**. Though the amount should have been increased by virtue of lapse of ten years by now, however, only an

amount of **Rs.16,80,320/-** should be deposited within **15** days from today by the Police Investigation Department District East, Karachi. The amount may be appropriated the police Investigation Wing/ Section, East Karachi from the salary/ service benefits of various police officers who were involved/ responsible for such a serious lapse. In case of failure to deposit the *Diyat* amount by the concerned police Investigation department, the Nazir is directed to attach the salaries of District East Investigation Department to the tune of **Rs.16,80,320/-** and submit report accordingly.

To come up after two weeks.

JUDGE

Zahid/*