

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD
Criminal Jail Appeal No.D-81 of 2019
[Confirmation case No.10 of 2019]

Before:

Mr. Justice Muhammad Shafi Siddiqui
Mr. Justice Irshad Ali Shah.

Appellant : Zubair Ahmed son of Abdul Latif,
Through Mr.Khawaja Naveed Ahmed,
Advocate

Complainant: Waqas Ahmed in person.

The State : Through Ms. Sana Memon, A.P.G.

Date of hearing : 17.11.2020

Date of decision : **17.11.2020.**

J U D G M E N T

IRSHAD ALI SHAH-J; The facts in brief leading to passing of instant judgment are that the appellant with rest of the culprits is alleged to have committed *Qatl-e-amd* of Hassam after abducting him, for that he was booked and reported upon.

2. After due trial the appellant was found guilty for the said offence and was convicted and sentenced vide judgment dated 31st August, 2016 by learned 4th Additional Sessions Judge, Hyderabad as under;

“Accordingly, accused Muhammad Zubair son of Abdul Latif is convicted under section 265-H(ii) Cr.P.C for offence under section 302(b) PPC read with section 34 PPC and sentenced for life imprisonment as Ta’zir. The accused Muhammad Zubair is also directed to pay an amount of Rs.200,000/- (Rupees Two Lac) as compensation as provided under section 544-A Cr.P.C. In case of failure to pay the compensation amount, the accused shall undergo for two years R.I, if the amount of compensation is recovered, the same shall be disbursed amongst the legal heirs of deceased

Hassam Ahmed. Accused Muhammad Zubair son of Abdul Latif is also convicted under section 364 PPC and sentenced to suffer R.I for ten years and to pay fine of Rs.50,000/- (Rupees Fifty Thousand) only. In case of failure to pay fine amount, accused Zubair shall undergo for six months R.I. Both the sentences shall run concurrently.”

3. On appeal, the conviction and sentence awarded to the appellant was set-aside by this Court vide order dated 17.09.2018 with direction to learned Trial Court to proceed with the case afresh. Consequently, the appellant was charged afresh by learned Trial Court. The examination-in-chief of the witnesses already recorded was **adopted** with opportunity to the appellant to make fresh cross examination to the witnesses already examined through his counsel. Significantly the cross examination already made to the witnesses was also adopted by learned counsel for the appellant. The statement of the appellant under section 342 Cr.P.C was recorded afresh and consequently vide judgment dated 22nd May, 2019 was convicted and sentenced by learned Model Criminal Trial Court / Ist. Additional Sessions Judge, Hyderabad, as under;

“302[b] PPC

Accused Zubair s/o Abdul Latif is sentenced to death, with order that he be hanged by neck till his death, on commission of murder of deceased Hassam. The accused Muhammad Zubair is also directed to pay an amount of Rs.2,00,000/- (Rupees Two Lac) as compensation as provided U/s 544-A Cr.P.C. In case of failure to pay the compensation amount, the accused shall further undergo for six months S.I, if the amount of compensation is recovered, the same shall be disbursed amongst the legal heirs of deceased Hassam.

364 PPC

Accused Muhammad Zubair S/o Abdul Latif is sentenced to suffer R.I for ten years and to pay fine of Rs.50,000/-(Rupees Fifty Thousand) only. In case of failure to pay fine amount, accused Zubair shall undergo for six months."

4. The appellant by preferring an appeal had impugned the above said judgment while learned trial Court had made a reference with this Court in terms of section 374 Cr.P.C for confirmation of death sentence to the appellant.

5. We have heard learned counsel for the parties and perused the record.

6. Admittedly, on remand of the case, the charge against the appellant was framed afresh by the learned Trial Court. Surprisingly, the evidence already recorded in first round of litigation was adopted not only by the prosecution but learned counsel for the appellant as well, such adoption of the evidence is against the spirit of **Section 231 Cr.PC** which prescribes that, if the **charge** is altered, added or amended, then the witnesses already examined are to be re-called and re-examined, on point of alteration, addition or amendment so made in the **charge**. Adoption of evidence is also contrary to the mandate contained by **Section 353 Cr.PC**, which prescribes that the evidence of witnesses **shall** be taken in presence of accused facing trial.

7. The procedure adopted by learned trial Court being incurable, have not only occasioned in failure of justice, as is defined under **Sub Section (b) to Section 537 Cr.PC** but have prejudiced the **appellant** in his defence **seriously**, which is against the mandate contained by **Article 10-A of the Constitution of Islamic Republic of Pakistan, 1973**, which guarantees chance of fair trial and due process to every citizen for determination of his civil/criminal rights and obligations.

8. In case of **Zahid Karim and others Vs. The State and others (2005 P Cr.L.J-998)**, it has been held by Honourable Lahore High Court that;

“Ss.353 & 537---Trial held in absence of accused at a place other than the notified place---Validity---Trial Court had recorded the statements of five prosecution witnesses in the absence of accused and at a place other than the notified place of the trial, i.e., Central Jail, in violation of the mandatory provisions of S.353, Cr.P.C.--- Such contravention of the provisions of S.353, Cr.P.C. could not be termed as an error, omission or irregularity so as to be curable under S.537, Cr.P.C., as it was nothing but a downright illegality vitiating the relevant proceedings of the trial of accused---Convictions and sentences of accused were set aside in circumstances and the case was remanded to the Trial Court for recording the statements of the said five prosecution witnesses afresh within the premises of the relevant jail in the presence of accused and then to decide the case afresh in accordance with law.”

9. The learned counsel for the appellant and learned A.P.G for the State who is assisted by the complainant in person, when were confronted with the above said legal infirmities, were fair

enough to consent for remand of the case for *fresh/denovo* trial in accordance with law.

10. Based upon above discussion, the impugned judgment is set-aside and the case is remanded to learned trial Court for *fresh/denovo* trial, in accordance with law with direction to dispose of the same expeditiously, preferably within three months, after receipt of copy of this judgment.

11. The instant appeal and reference are disposed of accordingly.

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