

IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

Criminal Appeal No. S-51 of 1998

Appellant(s): Ashraf, Arif and Altaf sons of Inayat Sarfaraz, through Mr. Muhammad Jameel Ahmed, advocate.
Complainant: Joseph through Mrs. Razia Ali Zaman Khan, advocate.
State: Ms. RameshanOad, A.P.G.

Date of hearing: 20.09.2021
Date of announcement: 11.10.2021

J U D G M E N T

Khadim Hussain Tunio, J-Appellants Ashraf, Arif and Altaf all sons of Inayat Sarfaraz were tried in Sessions Case No. 30 of 1994, emanating from Crime No. 21/1994, registered at PS Sanghar under sections 302, 324, 337-A(i), 337-F(i), 504 and 34 PPC, and vide judgment dated 05.05.1998, passed by learned Additional Sessions Judge Sanghar, whereby the appellants Ashraf and Altaf were convicted and sentenced to suffer life imprisonment and a fine of Rs. 20,000/- to be paid as compensation to the legal heirs of the deceased, in case of default of which they were ordered to suffer rigorous imprisonment for two years more. Appellant Arif was convicted u/s 337-F(i) to suffer RI for one year and to pay Daman of Rs.2000/- and in case of non-payment, he was ordered to stay in prison till payment of Daman amount. Appellants Ashraf and Arif were further convicted u/s 337-A(i) and 337-F(i) PPC to suffer RI for two years and to pay Daman of Rs.3000/- and in case of non-payment,

they were to stay in prison till the payment of Daman in full. However, benefit of S. 382 (b) Cr.P.C was extended to them.

2. Brief facts of the prosecution case are that three days prior to the incident, the complainant's buffaloes trespassed into the land of Inayat Sarfaraz, the father of the appellants. This led to a heated argument between the parties. On 01.04.1994 at about mid-day, complainant Joseph was passing by the land of the appellants/accused towards his village when they heckled him down and when he met with them, the appellants attacked him with wooden sticks and hit him on his left shoulder and he raised cries which attracted his brothers namely Ayoob and Paloos who were working in the fields nearby. When his brother Ayoob approached them, appellant Ashraf heckled him down and hit him over his head with the sharp side of a hatchet whereas appellant Altaf also hit him over his right arm and head with a wooden stick. The appellant Arif hit Paloos on his right arm as well. Thereafter, the appellants left and the injured were shifted to the hospital by the complainant where Ayoob (deceased) expired away, hence this FIR.

3. A formal charge was framed against the accused namely (1) Ashraf alias Babu (appellant), (2) Inayat Sarfaraz (co-accused) (3) Arif (appellant) and (4) Altaf (appellant) on 24.1.1996 at Ex.2. Prosecution, in order to prove its case against the appellants, examined PW-1 complainant Joseph at Ex-7, PW-2 Paloos at Ex-9, PW-3 Gabrael at Ex-10, PW-4 Dr. Hotoomal at Ex-20, PW-5 Dr. Din Mohammad at Ex-22, PW-6 PC Ghulam Rasool at Ex-27, PW-7 SIP

Abdul Haque at Ex-38 and PW-8 Tapedar Mohammad Alam at Ex-39. Thereafter, the prosecution side was closed at Ex-41. Subsequently, an application was submitted for the amendment of charge to correct the place of incident and the same was allowed vide order dated 14.7.1997. Thereafter, on 14.7.1997, amended charge was framed by the trial Court at Ex.44, to which the appellants pleaded 'not guilty' and claimed trial.

4. After framing of amended charge (Ex.44), counsel for the accused, vide statement at Ex.49, adopted the same evidence and cross-examinations of the witnesses. Thereafter, statements of appellants were recorded wherein they denied all the allegations levelled against them. However, they neither examined themselves on oath nor produced any witness in their defence. The learned trial Court, thereafter upon the assessment of evidence on record convicted the appellants and awarded sentences as mentioned above, vide impugned judgment, which has been assailed by the appellants in this appeal.

5. Learned counsel for the appellants/accused has contended that the impugned judgment is contrary to the law and the same is in complete departure of the procedural and substantial law, as the trial Court while conducting the trial and convicting the appellants has committed an illegality; that although the motive is shown in the FIR, but no one has spoken of the same in detail and it is a legal principle of law that the same is to be proven by the prosecution; that there are many contradictions in the evidence of the PWs and all the eye-witnesses are

relatives of the deceased, hence interested. He prayed that the case may be remanded for de-novo trial as the evidence has been adopted by the prosecution.

6. Conversely, learned counsel for the complainant and the learned A.P.G have not seriously opposed the remand of case for de-novo trial.

7. I have heard the learned counsel for the parties and perused the material available on the record. Undoubtedly, the first formal charge was framed against the appellants on 24.01.1996, available at E-2 for the offences punishable u/S 302, 324, 337-A(i), 337-F(i), 504 and 34 PPC. The prosecution, after framing of the charge, examined all eight witnesses. Thereafter, application for amendment of charge was filed which was allowed vide order dated 14.07,1997 and the amended charge was framed on the same day. The evidence recorded previously as well as the witnesses examined were adopted and after framing of amended charge, prosecution witnesses were neither recalled nor their examination-in-chief were recorded and the appellants were convicted on the basis of adopted evidence in violation of Article 10-A of the Constitution of Islamic Republic of Pakistan, 1973. The learned trial Judge has not assigned the reasons for resorting to such exceptional procedure, which, otherwise, is not within spirit of safe administration of Justice. Thus, in absence of such reason the trial Judge has committed illegality while adopting the evidence of P.Ws. Such practice is completely departure from the procedural law. The re-examination of witnesses is governed by the provisions of S. 231 Cr.P.C which provides that

whenever a charge is altered or added to by the Court after the commencement of the trial, the prosecutor and the accused shall be allowed to recall or re-summon, and examine with reference to such alteration or addition, any witness who may have been examined, and also to call any further witness whom the Court may think to be material. Such an exercise by the trial Court was patently illegal. In this respect, reliance is placed on the case of **Zubair Ahmed v The State** in **Criminal Jail Appeal No. D-81 of 2019**, the case of **Zubair Ali Naich and others v The State** in **Criminal Appeal No. D-42 and 73 of 2017** and the case of **Zahid Ali v The State** in **Criminal Appeal No. D-95 of 2019**. Unless the trial Court justifies the exceptional circumstances which compelled the Court to depart from the mandatory provision of S. 231 of the Code, the Court must, at first instance, make all efforts to secure evidence afresh otherwise this may result in a departure from the true meaning of the word **fair trial** on which the Criminal Administration of Justice rests.

8. In the light of what has been discussed above, criminal appeal No. S-51 of 1998 is partly allowed. Conviction and sentence recorded by the trial Court, vide impugned judgment dated 05.05.1998 is set aside to the extent of the present appellants, however not co-accused Inayat as the same has attained finality since the complainant has not filed an appeal against the said acquittal and therefore the co-accused enjoys double presumption of innocence. Case is remanded back, learned trial Court is directed

to re-summon and re-examine PWs for recording of their examination in chief and providing an opportunity to the appellants/accused to cross-examine them. Thereafter, statements of appellants/accused u/s 342 Cr.P.C be recorded afresh and trial Court shall pass a fresh judgment after hearing the respective parties and allowing both the prosecution and defence to examine/adduce any further evidence or witnesses if needed, within three months. Trial Court is further directed to proceed with the matter on day to day basis and such compliance report shall be submitted through the Additional Registrar of this Court for perusal in chamber. The appellants are on bail after suspension of their sentences, they shall remain on bail against the same surety furnished by them before this Court. However, they shall execute fresh PR bonds before learned trial Court for their appearance. Parties are directed to appear before the trial Court on 16.10.2021 without claiming further notice. It is, however, made clear that if either of the parties apply tactics to delay the proceedings, trial Court would be competent to appoint counsel on State expenses and proceed with the matter.

JUDGE

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