

JUDGMENT SHEET
IN THE HIGH COURT OF SINDH, BENCH AT
SUKKUR

Criminal Jail Appeal No.S-90 of 2019

Appellant: Liaquat Ali son of Nazar Ali Mallah, Azher and Parvez sons of Mithal Mallah, through Mr. Muhammad Qayoom Arain, Advocate.

The State: Through Mr. Zulifqar Ali Jatoi, Additional Prosecutor General.

Date of hearing: 04.11.2021

Date of decision: 04.11.2021

JUDGMENT

Khadim Hussain Tunio, J.- Through captioned criminal appeal, appellants have assailed the judgment dated 31.05.2019 passed by learned Sessions Judge, Naushehro Feroze, in Sessions Case No. 151 of 2018 (*Re: the State v. Liaquat Ali and others*), emanating from Crime No. 11 of 2018, registered at P.S Mithiani, District Naushehro Feroze, under Section 302, 392 and 34 PPC, whereby they have been convicted and sentenced to suffer rigorous imprisonment for life under section 302(b) PPC as Ta'zir and Rs.600,000/- (Rupees six lac) which shall be paid to the legal heirs of deceased as compensation. In case of default in payment of said amount, they shall undergo R.I for one year more. Moreover benefit of section 382-B Cr.P.C was extended to the appellants.

2. Briefly, facts of the prosecution case are that on 30.03.2018 at about 1500 hours, complainant Muhammad Yaseen Gadehi lodged his FIR stating therein that on 26.03.2018 he along with his father and other family members was available in the house when at about 5.45 p.m a call was received on mobile phone of his father and said call was of his friend Azher Ali Mallah, who asked him to meet at Tharu Shah road outside of the town for a personal work. His father became ready and took out a motorcycle. He along

with his uncle Imdad Ali got another motorcycle bearing No. 3249, Chasis No. CA-789377, Engine No. 8516199 CD-70 Model 2016. His father asked for his whereabouts at Dargah Ghulam Shah leading to link road Tharushah, who told them that he was stood at the bushes of Babul trees at Tharushah road. They came there at about 7.30 p.m and his father called and informed him that he is stood there. They came to leading link road Moli Dino where they saw Liaquat Ali, Parvez alias Paru, Azher all having dandas and one unknown person. They stopped their motorcycle and got down. His father shook hands with accused Azher and asked him why he had called them. In the meantime they overpowered the complainant party and beat the complainant's father and disclosed that the accused had called him to commit his murder. Accused Pervez inflicted danda blows at the right arm of his father. Accused Azher inflicted danda blows at the right elbow of his father. Accused Liaquat inflicted danda blows at back side of head of his father with intention to commit his murder. His father fell down and was bleeding. Accused Liaquat robbed one mobile phone and cash of Rs. 100/- from the pocket of his father and started their motorcycle. Accused Pervez and Azher made the complainant sit over his father. Accused Azher and one unknown person stood upon them. After some time, they ran away after extending threats to commit their murder. After completing all formalities and postmortem, dead body was handed over to the complainant. He buried the dead body and appeared at police station where he lodged the FIR against accused persons.

3. After registration of the FIR, investigation was conducted. Upon conclusion of investigation, I.O submitted charge sheet before the competent Court of law. After arrest of the appellants, trial was commenced against them.

4. After compliance of Section 265(C) Cr.P.C a formal charge against the accused was framed, to which accused pleaded not guilty and claimed to be tried. In order to prove its case,

prosecution examined in all eight witnesses namely complainant Muhammad Yaseen Gadehi, mashir Imdad Ali Gadehi, ASI Ghulam Abbass, Medical Officer Dr. Tameezuddin Memon, I.O /SIP Muhammad Ashraf Memon, Kouro Khan Gadehi, HC Haji Khan and Tapedar Shahid Hussain Chandio. They have produced number of documents during their evidence and thereafter prosecution side was closed.

5. Statement of accused were recorded under Section 342 Cr.P.C, denied the allegations leveled against them and produced news clip of newspaper, however, neither examined themselves on oath nor adduced any evidence in their defense and prayed for justice.

6. After hearing learned counsel for the respective parties, learned trial Court convicted and sentenced the appellants as stated in preceding para hence this appeal has been preferred.

7. At the very outset learned counsel for the appellants has contended that learned trial Court has committed illegalities and irregularities while recording statement of the appellants under Section 342 Cr.P.C (Ex-13 to Ex.15). He has also contended that all the incriminating pieces of the evidence have not been put to the appellants in their statement under Section 342 Cr.P.C. He lastly argued that serious prejudice has been caused to the appellants; therefore, the impugned judgment may be set-aside and the matter may be remanded to the trial Court for recording statements of the accused in terms of Section 342 Cr.P.C afresh.

8. Conversely learned Additional Prosecutor General has recorded no objection if the case is remanded to the trial Court while citing the case reported as **Muhammad Bilal vs. The State (2019 MLD 1291)** and **Sholo alias Rasool Bux vs. The State (2021 MLD 1577)**.

9. On 30.04.2021, complainant Muhammad Yaseen Gadehi was present in person and submitted in Court that he is unable to engage counsel and he has no objection if the state counsel proceeds with the case on his behalf.

10. From the perusal of record, it is revealed that learned trial Court convicted and sentenced the appellants to suffer imprisonment for life and with compensation to the tune of Rs.600,000/- to be paid to the legal heirs of deceased. It also reveals from the perusal that learned trial Court while recording statement of appellants/accused under section 342 Cr.P.C has not put all material incriminating pieces of evidence which is against the principle of natural justice and has caused serious prejudice to the appellants. Such material pieces of incriminating evidence being the recovery of motorcycle No. FD-3249, Chasis No. 89377, Engine No. 8516199 CD-70 of red colour, Model 2016, recovery of one black Vigo-Tel mobile phone, one currency note of Rs.100/- and one red Vigo-Tel mobile phone, one danda of Babul, one white Q-mobile phone and one black Q-mobile phone used in the commission of crime as emphasized by the learned trial Court while discussing circumstantial evidence in the impugned judgment. Same have not been put to the appellants while recording their statements, enabling them to explain each and every circumstance appearing in the evidence against them.

11. It may also be observed that the purpose of recording statement of accused as provided by Section 342 Cr.P.C. is to inform the accused about the prosecution case so as to enable them to explain the circumstances created in the evidence against them and also for the purpose of preparing their defence, which is a fundamental right of the appellants as per law and failure to comply with such mandatory requirement of law, being incurable under the provisions of Section 537 Cr.P.C, would vitiate the conviction and sentence awarded to the appellants. In this respect, the Hon'ble

Apex Court in various pronouncements has observed that any incriminating piece of the evidence which, if not put to the accused at the time of recording of statement under Section 342 Cr.P.C., cannot be used as evidence against them. The Hon'ble Supreme Court of Pakistan in an unreported judgment passed in *Criminal Appeal No.292 of 2009* dated 28.10.2010 in the case of **Muhammad Hassan v. The State** has maintained as under:-

“It is by now a settled principle of criminal law that each and every material piece of evidence being relied upon by the prosecution against an accused person must be put to him at the time of recording of his statement under section 342 Cr.P.C so as to provide him an opportunity to explain his position in that regard and denial of such opportunity to the accused person defeats the ends of justice. It is also equally settled that a failure to comply with this mandatory requirement vitiates a trial. The case in hand is a case of murder entailing a sentence of death and we have truly been shocked by the cursory and casual manner in which the learned trial Court had handled the matter of recording of the appellant's statement under Section 342, Cr.PC which statement is completely shorn of the necessary details which were required to put to the appellant. We have been equally dismayed by the fact that even the learned Judge of the learned Division Bench of the High Court of Sindh deciding the appellant's appeal have failed to take notice of such a glaring illegality committed by the trial Court. It goes without saying that the omission on the part of the learned trial Court mentioned above was not merely an irregularity which had vitiated the appellant's conviction and sentence recorded.”

12. In view of the above, the instant appeal was partly allowed and the conviction and sentence awarded to appellants Liaquat Ali, Azher and Pervez alias Paroo vide judgment dated 31.05.2019 is set-aside and the case was remanded back to the learned trial Court for recording statement of the appellants under Section 342 Cr.P.C afresh and confronting them with each and every material incriminating piece of the evidence as discussed above so as to enable them to furnish their explanation and then to pass a fresh judgment after providing an opportunity of hearing to the counsel for the parties vide short order even dated. These are the reasons thereof.

JUDGE