

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

Criminal Appeal No.D- 220 of 2019.
[Confirmation case No.52 of 2019]

Present.
Mr. Justice Naimatullah Phulpoto.
Justice Mrs. Kausar Sultana Hussain.

Date of hearing: 18.05.2021.
Date of judgment: 18.05.2021.

Appellant: Naeem Akhtar son of Muhammad Akram,
through Mr. Aijaz Shaikh, Advocate.

Complainant: Ghulam Hussain son of Sher Dil Bhurgari,
Through Mr. Sameeullah Rind, Advocate.

The State: through Mr. Shevak Rathor, D.P.G.

J U D G M E N T

NAIMATULLAH PHULPOTO, J:- Appellant Naeem Akhtar was tried by learned 1st Additional Sessions Judge/Model Criminal Trial Court, Hyderabad in Sessions Case No.672 of 2014 for offences under Section 302, 34 PPC. After regular trial vide its` judgment dated 03.12.2019, the appellant Naeem Akhtar was convicted u/s 302(b) PPC and sentenced to death for committing Qatl-e-Amd of Amjad Bhurgari. He was directed to pay compensation of Rs.100,000/- (One lac) in terms of section 544-A Cr.P.C to be paid to the legal heirs of deceased. In case of default thereof to suffer S.I for six months. Trial Court made reference to this Court for confirmation of death sentence as required by section 374 Cr.P.C.

2. Brief facts of the prosecution case as mentioned by the trial court in para No.2 of the impugned judgment are as follows:-

“on 21.07.2014 one Ghulam Hussain s/o Sher Dil Bhurgari resident of old power house Tando Mir Mehmood got

lodged FIR No.28/2014 at P.S Fort, Hyderabad U/s 316, 392, 322, 114, 34 PPC alleging therein that he is working at showroom of vehicles at about 11:30 hours (night time) Aaqil Samoo on his mobile phone informed him that he bullet of police hit to Amjad Ali Bhurgari and reached immediately at civil hospital Hyderabad, at about 12:20 hours at night time he reached to civil hospital where noticed that Amjad Ali who is his phupha the husband of his paternal aunt, sustained bullet injury on his head and has been expired, after than Aaqil Samoon apprised him that 11:00 hours (night), he and Amjad Ali Bhurgari riding on motorcycle proceeded towards railway station to meet with the driver of Amjad Ali Bhurgari at about 11:30 hours (night) all of sudden three unknown persons riding on 125 motorcycles with intention to robbed and on the force of weapon stopped them loaded weapons and pointed their pistols towards them started their search and from the pocket of Amjad Bhurgari robbed mobile one black berry phone, one purse containing NIC, and one ATM card. They seeing the two police personnel present on the other side of road and suddenly said started to escape away and went away about 50/20 meters, meanwhile the police personnel pointed their weapons towards them on which they told them that the robber are escaping away and to catch them and they are not robber but the police personnel did not listen their request and one police personnel out of them stated and meanwhile other police personnel started straight firing upon them, resultantly, one bullet hit to the head of his friend Amjad Ali Bhurgari who fell down on the ground, on which he started shouting said that what you have done? But the police personnel seeing astonishingly went away. Thereafter, he informed to the SHO PS Phuleli on his mobile phone he reached few minutes the police mobile P.S Phuleli came there and the Qayoom Niazi driver of mobile P.S Phuleli taken away the injured to civil hospital. After hearing such facts Aaqil Samoo, and after taken the dead body of Amjad Ali from police then we have came to know that the PC Ghulam Muhammad Memon and PC Naeem Akhtar are the murders of Amjad Burgari. Thereafter he went to PS and lodged FIR that the above police personnel fired upon Amjad Ali and murdered him. Complaint is that investigation be made into the matter .”

3. The FIR was lodged by Ghulam Hussain on 21.07.2014 at 1700 hours at PS Fort, Hyderabad against appellant and absconding accused for offence u/s 316, 392, 322,114, 34 PPC.

4. During investigation, official weapon allotted to the appellant viz. SMG Rifle bearing No.10013 along with [17] rounds and empties collected from the place of wardat were sent to the Ballistic expert and positive report was received.

4. On the conclusion of the investigation, challan was submitted against appellant/accused Naeem Akhtar; however co-accused PC Ghulam Muhammad was shown as absconder. Trial Court declared PC Ghulam Muhammad as proclaimed offender and framed charge against the appellant/accused Naeem Akhtar for offences u/ss. 319, 34 PPC. Appellant/accused pleaded not guilty and claimed to be tried. After framing of charge against appellant/accused Naeem Akhtar, prosecution examined SIP Muhammad Asif as (PW-1) at Ex. 08, Inspector Tahir Hussain (PW-02) at Ex.09, Farman Ali (PW-03) at Ex.10, Shahzad Muhammad (PW-04) at Ex.11, Muhammad Yaseen (P.W-05) at Ex.11, Ghulam Hussain (P.W-06) at Ex.12, Qayoom (P.W-07) at Ex.13, Baldev (P.W-08) at Ex.14, Abdul Kareem (PW-09) at Ex.15, DSP Sabir Ali Gaddi (P.W-10) at Ex.16. Learned DDPP closed prosecution side vide his statement dated 20.11.2019 at Ex.17. Thereafter, the same learned Judge amended the charge on the next day for offence u/s 302 r/w section 34 PPC. It is very strange joint application was submitted by Prosecutor, Advocate for the complainant and Advocate for the accused for adopting the same evidence, which was already recorded before framing of charge. Thereafter, trial Court recorded statement of the accused under Section 342 Cr.P.C at Ex.20. Appellant/accused claimed his false implication in this case and denied the prosecution allegations. Accused did not lead any evidence and declined to give any evidence on oath in disprove of prosecution case. Trial Court after hearing the learned counsel for the parties and examination of the evidence vide judgment dated 03.12.2019, sentenced appellant Naeem Akhtar to death for offence u/s 302(b) PPC and case of co-accused PC Ghulam Muhammad was kept on dormant file.

5. Learned counsel for the appellant mainly contended that charge was framed by the learned trial Court for offences u/ss. 319, 34 PPC against appellant/accused and whole evidence was recorded. Thereafter, the charge was amended by the trial Court and section 302 PPC was added, but the same evidence was adopted before the trial Court. He submitted that after amended charge, it was the duty of the prosecution to produce prosecution witnesses before the trial Court for recording their evidence to substantiate the charge but it was not done. It is further argued that trial Court without applying judicial mind acted upon the statement of the Prosecutor,

counsel for accused as well as complainant. Learned advocate for the appellant also submitted that illegality committed by trial Court has vitiated the trial and same is not curable under the law and judgment of trial Court is not sustainable in law.

6. Learned D.P.G for the State assisted by learned counsel for the complainant conceded to contentions of defence counsel to the extent of remand of the case and submitted that proper course would be to remand the case to the trial Court for recording evidence afresh after amendment of the charge, in accordance with law.

7. We have carefully heard the arguments of learned counsel for the parties and perused the R&Ps. Record reflects that the charge was framed against the appellant/accused at Ex.02 under section 319 r/w Section 34 PPC and prosecution examined all the prosecution witnesses and prosecution side was closed. On the next day, amended charge was framed by the trial Court and section 302 PPC was added. Thereafter, Prosecutor submitted application for adopting the same evidence, which was recorded before framing of the amended charge. Advocate for the accused as well as complainant also recorded no objection hence, learned trial Court proceeded to record the statement of the accused u/s 342 Cr.P.C. We have no hesitation to hold that the procedure adopted by the trial Court was illegal and unwarranted for the reasons that in the amended charge section 302 PPC was added. The trial Court was legally bound to recall the witnesses for their evidence by providing opportunity to the defence for cross examination, but it was not done. In this regard we are fortified with the case law reported in 1987 P.Cr.L.J [Karachi] page-403 which reads as under:

“Mr. Rafique Khanzada, learned counsel for accused Dedar Ali placed reliance on 1986 P.Cr.L.J 1236 where a Division Bench of this Court held that where the Special Court had framed second charge in which the misappropriated amount was increased and offences were also changed except one and the statement of the prosecution witness whose statement was transferred on record of Special Court had not been re-summoned as accused was said to have stated not to examine him. In these circumstances the provisions of section 231 of Cr.P.C. with regard to recalling of witness when charge is altered had not been properly complied with, hence conviction of the accused was set aside and the case was

remanded for trial. The learned counsel for the respondents concedes to this position.

Consequently, the impugned judgment is set aside and the case is remanded to the Special Court (Offences in Banks) Karachi for retrial from the stage of 13.11.1985. P.W. Khamiso Khan would be summoned for cross-examination and thereafter the case will proceed in accordance with law.”

8. Further as discussed above, section 231 Cr.P.C is mandatory in nature, therefore, whenever a charge is amended, the Court is bound to allow the prosecution and the accused to re-call and re-examine witnesses, already examined. Filing of statement by the Prosecutor and accused that they will not examine the witnesses already examined would not fulfill the requirements of section 231, Cr.P.C. In the present case, charge was amended by adding section 302 PPC. Section 231 Cr.P.C is reproduced as under:-

“231. Recall of witnesses when charge altered. 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.”

9. Looking to the above legal position, we have come to the conclusion that trial Court had adopted illegal procedure by allowing the prosecution to rely upon the same evidence which was recorded before amended charge. In the amended charge section 302 PPC was added. It was the duty of the trial Court to re-call witnesses already examined for re-examination and cross examination afresh. Slipshod method adopted by trial Court in no way could be appreciated, procedure adopted by trial Court which led to a miscarriage of justice.

10. For the aforesaid reasons and circumstances of the case, learned Counsel for the appellant as well as learned Deputy Prosecutor General, Sindh assisted by learned counsel for the complainant are in agreement that the matter needs to be remanded back to the trial Court for recording the evidence of prosecution witnesses afresh after amendment of the charge. Accordingly, case is remanded, trial Court is directed to re-call the prosecution witnesses for evidence (examination-in-chief, cross examination and

re-examination). On conclusion of the trial, learned trial court is directed to record the statement of appellant Naeem Akhtar under section 342 Cr.P.C afresh in accordance with law.

12. In the view of above discussion, instant criminal appeal is partly allowed. Impugned judgment of the trial court is set aside. Resultantly, the conviction and sentence of the appellant Naeem Akhtar are set aside. Appellant Naeem Akhtar shall be treated as an under-trial prisoner. Learned trial Court in the view of above observation on the conclusion of trial and recording statement of accused under section 342 Cr.P.C afresh shall decide the case within three months of the receipt of this judgment. Confirmation reference made by the trial court is answered in **NEGATIVE**.

13. In view of the above, appeal as well as confirmation reference are accordingly disposed of.

JUDGE

JUDGE

Ahmed/Pa

