

IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

Cr. Appeal No.D-70 of 2018.

Criminal Jail Appeal No.D-71 of 2018.

Confirmation case No.13 of 2018.

Criminal Appeal No.D-74 of 2018.

Cr. Jail Appeal No.D-76 of 2018.

Cr. Appeal No.S-172 of 2018.

Cr. Appeal No.S-173 of 2018.

Cr. Appeal No.D-07 of 2019.

Cr. Appeal No.D-08 of 2019.

Cr. Appeal No.D-09 of 2019.

PRESENT

Mr. Justice Naimatullah Phulpoto

Justice Mrs. Rashida Asad.

Date of Hearing: 07.09.2021.

Date of Judgment: 07.09.2021.

Appellant(s)/accused: Through M/s Farhad Ali Abro and Sajjad Ali Gopang, Advocates.

The State: Through Mr. Shawak Rathore Deputy P.G. Sindh.

JUDGMENT

NAIMATULLAH PHULPOTO, J:- Appellants Irshad Ali, Muhammad Kashif, Muhammad Anwar, Muhammad Nadeem and Mukhtiar Ali were tried by Mrs Zahida Sikandar IInd Additional Sessions Judge, Shaheed Benazirabad, in Sessions Case No.258 of 2013 for offences under sections 302, 324, 353, 34 PPC arising out of crime No.98 of 2012, registered at Police Station Airport. After regular trial vide Judgment dated 05.07.2018 appellant Irshad Ali s/o Amanat Ali Qazi was convicted for the offence under section 302 PPC and sentenced to death. He was directed to pay compensation of Rs.100,000/- to be paid to the legal heirs of deceased. In case of default, the appellant/accused Irshad Ali was directed to suffer S.I. for six [06] months more. Trial Court made

Reference for confirmation of death sentence as required by the law. The other appellants/accused persons (1) Muhammad Kashif s/o Muhammad Anwar Khoja, (2) Muhammad Anwar s/o Aftab Ahmed Rajput, (3) Muhammad Nadeem s/o Abdul Ghaffar Leelgar and (4) Mukhtiar Ali s/o Ghulam Mustafa Rajpar were also convicted under section 302 PPC and sentenced to imprisonment for life and to pay compensation of Rs.100,000/- each to be paid to the legal heirs of deceased. In case of default, the appellants/accused were directed undergo S.I. for six [06] months more. Appellants named above were extended benefit of section 382-B Cr.P.C.

2. In the connected/offshoot case bearing crime No.01 of 2013, registered at Police Station Airport for offences under sections 397, 450, 337-A(ii), H-(ii) PPC appellants Irshad Ali, Muhammad Kashif, Muhammad Anwar, Muhammad Nadeem and Mukhtiar Ali faced trial in Sessions Case No. No.259 of 2013. After regular trial, vide separate judgment dated 05.07.2013 appellants were convicted under section 397 PPC and sentenced to five [05] years R.I. They were directed to pay fine of Rs.10,000/- each. In case of default thereof they were ordered to undergo S.I. for one month. They were also convicted under section 450 PPC and sentenced to five [05] years R.I. and to pay fine of Rs.10,000/- each. Both sentences were ordered to run concurrently. Benefit of section 382(b) was given to the appellants. Separate appeals were filed by the appellants.

3. This Court vide orders dated 24.01.2019 connected Criminal Appeal No.S-159 of 2018, Criminal Appeal No.S-172/2018 and Criminal Appeal No.S-173/2018 with main case. By this single Judgment, we intent to decide Cr. Appeal No.D-70 of 2018, Criminal Jail Appeal No.D-71 of 2018 [Confirmation case No.13 of 2018], Criminal Appeal No.D-74 of 2018, Criminal Jail Appeal No.D-76 of 2018, Criminal Appeal No.S-172 of 2018, Criminal Appeal No.S-173 of 2018, Criminal Appeal No.D-07 of 2019, Criminal Appeal No.D-08 of 2019, Criminal Appeal No.D-09 of 2019.

4. Brief facts of the prosecution case as narrated by the trial Court in the impugned Judgment dated 05.07.2018, in the main case under sections 302, 324, 353, 34 PPC are as under:-

“Brief facts of FIR/crime No.98/2012 lodged by complainant ASI Muhammad Azam Bhangwar are that on 25.12.2012 he started patrolling in his P.S jurisdiction vide entry No.16 dated 25.12.2012 along with his subordinate staff and went to Ghulam Rasool Shah Colony picket where H.C Muhammad Chuttal, P.C Tanzeem-ul-Hassan, P.C Muhammad Sulleman were present at the picket when they received spy information that near Government Primary School Ghulam Rasool Shah Colony, near the house of Muhammad Asif Qureshi dacoity has been committed by three culprits and on receiving this information the complainant proceeded towards pointed place from where they saw on the street light and light of mobile three unidentified persons having pistols in their hands, who came out from the house of Muhammad Asif Qureshi and after seeing the police party they came out from the mobile and wanted to arrest the culprits but all the three unidentified persons went away attempting to kill the police party and fire hit P.C Tanzeem-ul-Hassan who fell down on the ground. It is alleged that police also fired at culprits but ultimately all the three culprits made their escaped good in the narrow streets of Nawabshah town. The complainant then took the injured towards PMCH Nawabshah and on the way PC Tanzeem-ul-Hassan succumbed to the injuries and left the dead body in hospital. After postmortem the complainant went to P.S and lodged an FIR.

5. After usual investigation, challan was submitted against accused persons namely Irshad Ali, Muhammad Kashif, Muhammad Anwar and Muhammad Nadeem under sections 302, 324, 353, 34 PPC while accused Mukhtiar Ali was shown as absconder. The accused Mukhtiar Ali was declared as proclaimed offender.

6. Trial Court framed charge against the accused Irshad Ali, Muhammad Kashif, Muhammad Anwar and Muhammad Nadeem on 30.01.2014 Ex.6, to which they pleaded not guilty and claimed to be tried. After framing of charge against the abovenamed accused persons, prosecution examined (P.W.1) Naseer Noor Khan at Ex.11 and (P.W.2) Muhammad Azam at Ex.12. Thereafter, absconding accused Mukhtiar Ali was arrested and amended charge was framed on 06.10.2016 at Ex.13. Thereafter, evidence of (P.W.3) Muhammad Chuttan at Ex.14, (P.W.4) Doctor Zainuddin at Ex.16, (P.W.5) Mehar Ali Tappeddar at Ex.17, (P.W.6) Saghir Hussain Shah Judicial Magistrate at Ex.18, (P.W.7) Muhammad Tahir, (P.W.8) Muhammad Sultan at Ex.20, (P.W.9) Rajab Ali at Ex.23, (P.W.10) WPC Aftab Hussain Ex.24 and (P.W.11) SIP Muhammad Iqbal at Ex.25. thereafter, prosecutor / ADPP on 08.05.2018 filed statement Ex.27 for adopting the evidence of P.W.1 Naseer Noor Khan already recorded before amendment of the charge and closed the side of the prosecution vide statement dated 10.05.2018 at Ex.28.

7. Trial Court recorded statements of accused under section 342 Cr.P.C. Accused claimed false implication in this case and denied the prosecution allegations. Accused did not lead any evidence in their defence and did not examine themselves on Oath in disproof of the prosecution allegations.

8. Trial Court after hearing the learned counsel for the parties and assessment of the evidence available on record vide its Judgment dated 05.07.2018 convicted and sentenced the appellant Irshad Ali s/o Amanat Ali to death as stated above and made Reference to this Court for confirmation of death sentence of appellant Irshad Ali. However, co-accused were convicted and sentenced to imprisonment for life.

9. Learned Advocate for the appellants argued that evidence of P.Ws. Naseer Noor Khan and ASI Muhammad Azam was recorded when co-accused Mukhtiar Ali was not present before the Court and after his arrest

the charge was amended thereafter, the prosecutor/ADPP adopted the evidence of prosecution witnesses namely Naseer Noor Khan and ASI Muhammad Azam which was earlier recorded. Learned Advocate for the appellants further argued that all the incriminating pieces of the evidence were not put to the appellants/accused in their statements recorded under section 342 Cr.P.C. for explanation which is an illegality committed by the trial Court, it is not curable in law. Lastly, it is argued that learned Additional Sessions Judge had no jurisdiction to try this case as offence involved serious violence against police as in the incident P.C. Tanzeem-ul-Hassan was murdered, as such, according to defence Counsel this case should have been tried under the provisions of ATA 1997.

10. Learned Deputy P.G. conceded to the contentions raised by the learned Advocate for the appellants. Learned A.P.G. further submitted that this is the case fit for remand to trial Court mainly on the ground that there is no provision in the law to adopt the same evidence of the prosecution witnesses particularly in the circumstances when evidence of the witnesses was recorded in absence of the accused Mukhtiar Ali who was not present at the time of recording of evidence of said witnesses. Learned D.P.G. also conceded to the legal position that all the incriminating pieces of evidence were not put to the accused persons in their statements under section 342 Cr.P.C. As regards to the jurisdiction of learned Additional Sessions Judge to try this case is concerned learned D.P.G. is also of the view that under the provisions of Anti-Terrorism Act 1997, this case should have been tried under the provisions of A.T.A. 1997 as serious violence against police official was committed and P.C. Tanzeem-ul-Hassan has been murdered in the incident.

11. After hearing the learned counsel for the parties we have perused the entire record with the able assistance of learned counsel for the parties. Syed Tariq Ahmed Shah Advocate present in the Court has also been heard.

12. We have noted with deep concern that firstly appellants/accused Irshad Ali, Muhammad Kashif, Muhammad Anwar and Muhammad Nadeem were arrested and charge was framed, at trial two prosecution witnesses namely Naseer Noor Khan and ASI Muhammad Azam were examined, thereafter accused Mukhtiar Ali was arrested and then the charge was amended. After amendment of the charge, learned trial Court on the statement of prosecutor/ADPP adopted the same evidence of prosecution witnesses namely Naseer Noor Khan and ASI Muhammad Azam earlier recorded. Such procedure adopted by the trial court was an illegality and in violation of the mandatory provisions of section 353, Cr.P.C. Such contravention of the provisions of section 353, Cr.P.C. cannot be termed as an error, omission or irregularity so as to be curable under section 537, Cr.P.C. as such a violation of the mandatory provisions of section 353, Cr.P.C. was nothing but a downright illegality vitiating the relevant proceedings of the appellants' trial. Reliance can be placed upon the case of Zahid Karim and others Vs. The State and others (2005 P Cr.L.J-998).

13. We have carefully gone through the statement of appellant Irshad Ali and others recorded by trial Court u/s 342 Cr.P.C. It is observed that Trial Court has recorded the statements of accused under section 342 Cr.P.C. in a very casual manner and committed several illegalities, which are not curable under the law. Scanned copy of the statement of appellant Irshad Ali recorded u/s 342 Cr.P.C. is pasted hereunder:-

**STATEMENT OF ACCUSED U/S 342 CR.P.C
IN THE COURT OF 2ND ADDITIONAL SESSIONS JUDGE,
SHAHEED BENAZIR ABAD,
SC No: 259 of 2013.**

The State
VERSUS
Irshad Ali Qazi and others.

U/s 397, 450, 337-A01 H00
P.C.
Crime No. 01 of 2013.
P.S. Airport.

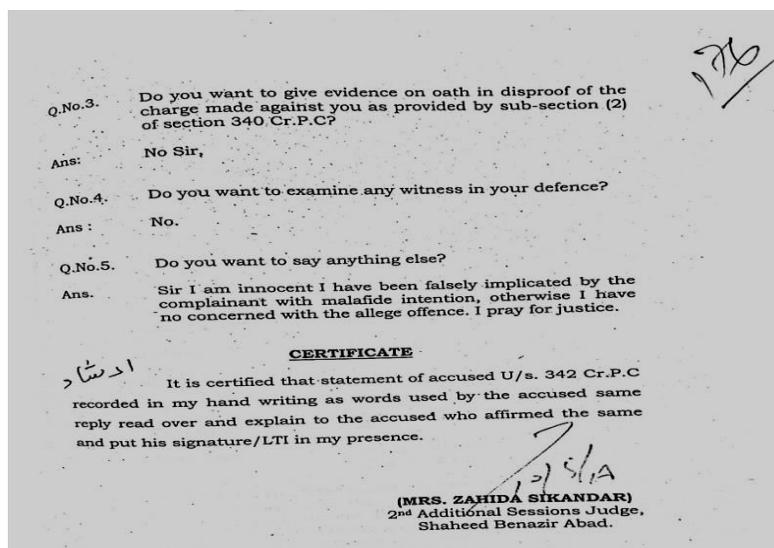
Name : Irshad Ali
Father's Name : Amanat Ali.
Religion : Islam.
By-caste : Qazi.
Age about : 35 Years
Occupation : Private Security Gaud.
Residence : Isserpura, Nawabshah.
District Shaheed Benazir Abad.

Q. No.1. You have heard the prosecution story, it has come in evidence that on 25.12.2012 at 2100 hours, near government Primary School Muhalla Ghulam Rasool Shah Colony, you accused along with co-accused with your common intention duly armed with weapons you accused running from the house of Muhammad Asif and police party of P.S. Airport encircled you and you accused made firing upon police party headed by ASI Muhammad Azam Bhangwar and during encounter one fire hit to P.C Tanzeem-ul-Hassan and you accused decamped in the street and injured P.C Tanzeem-ul-Hassan succumbed injuries and died? What you have to say?

Ans: No Sir, it is false.

Q. No.2. Why the PWs have deposed against you?

Ans. All the P.Ws are police officials they have deposed falsely with mala fide intention.



14. It has been held time and again by the Hon'ble Supreme Court that a piece of evidence produced by the prosecution against an accused, if not put to accused while examining him/her u/s 342 Cr.P.C cannot be used against that accused. The rationale beyond is that the accused must know and respond to the evidence brought against him/her by the prosecution. The accused must have firsthand knowledge of all the aspects of the prosecution case being brought against him/her, as held by the Hon'ble Supreme Court in the case of Jan Muhammad vs. The State (Criminal Appeal No.77 of 2020). The relevant para-5 is re-produced below:-

“5. It has been observed by us with concern that none of the afore mentioned pieces of evidence has been put to the appellants while examining him under section 342, Code of Criminal Procedure. It has been laid down many a time by this Court that a piece of evidence produced by the prosecution against an accused if not put to accused while examining him under section 342, Code of Criminal Procedure cannot be used against him. The rationale behind it is that the accused must know and then respond to the evidence brought against him by the prosecution. He (accused) must have firsthand knowledge of all the aspects of the prosecution case being brought against him. It appears that even the learned Judge in chambers, of High Court while reappraising evidence available on record did not consider this aspect of the matter. Keeping in view the peculiar circumstances of the case, learned Counsel for the appellants and learned Additional Prosecutor General, Sindh assisted by widow of deceased are in agreement that the matter needs to be remanded to the learned trial Court for re-recording statement of appellants under section 342, Code of Criminal Procedure while putting all pieces of prosecution evidence produced during trial to him, giving him an opportunity to know and respond to the same.”

15. For the above stated reasons learned counsel for the appellants and learned Deputy Prosecutor General are in agreement that matters need to be remanded to the learned trial Court for recording evidence of PWs Naseer Noor Khan and Muhammad Azam afresh in presence of all accused and recording the statements of appellants u/s 342 Cr.P.C. afresh in both cases while putting all pieces of prosecution evidence produced during trial to them, giving them an opportunity to know and respond to the same. Accordingly, the captioned appeals are partly allowed. Resultantly, conviction and sentence awarded to the appellants/accused by Trial Court through impugned judgment are set-aside. The confirmation Reference made by the trial Court is answered in **NEGATIVE**. These case shall be deemed to be pending before the trial Court.

16. Before parting with this Judgment, we must observe that we have been dismayed by the fact that Presiding Officer of the trial Court failed to determine the jurisdiction to try this case. We have observed that crucial issue is involved in this case with regard to the jurisdiction of learned Additional Sessions Judge/Court of ordinary jurisdiction to try this case. For determining the issue whether an offence with which accused have been charged falls within the ambit of section 6 of the Anti-Terrorism Act 1997, it is essential to have a glance over the allegations made in the FIR, 161 Cr.P.C. statements, material collected during investigation and surrounding circumstances as well as ingredients of terrorism as provided under sections 6 & 7 of Anti-Terrorism Act 1997. It is the matter of the record that during incident, PC Tanzeem-ul-Hassan was murdered. Trial Court framed the charge against appellants regarding Qatl-e-Amd of the above named police constable. Prima facie offence falls under section 6(n) of Anti-Terrorism Act 1997, despite that trial Court took the cognizance of the offence, tried the case and decided the same. Apparently, it was the case which should have been tried under the provisions of Anti-Terrorism Act, 1997. This Court in the case of Qaiser

Baloch and 3 others v. The State [2013 P.Cr.L.J. 1259] in which one of us [Naimatullah Phulpoto,J] was a Member has already held as under:-

“10. The record reflects that applicants/accused had fired upon the police party and deterred them from discharging their official duties. From the place of wardat empties of automatic weapons used by the accused have been recovered. The act of applicants/accused clearly shows the serious violence against the members of police force and accused created terror by such act in the area. Offence clearly falls under section 6(n) of the Anti-Terrorism Act 1997. Reliance can be placed upon the case of Nadim Butt v. Special Court Anti-Terrorism Lahore and others (2000 SCMR 1086). Therefore, on the basis of material available on record learned trial Court has rightly rejected the transfer application.”

17. It may be observed here in case, learned trial Court comes to the conclusion after hearing the learned counsel for the parties on the point of jurisdiction that main case bearing crime No.98 of 2012 for offence under sections 302, 324, 353, 34 PPC should be tried by learned Judge Anti-Terrorism Court concerned, under the provisions of Anti-Terrorism Act 1997, then connected case bearing crime No.01 of 2013 under sections 397, 450, 337-A(ii), H(ii) PPC may be jointly tried by Anti-Terrorism Court as required under section 21-M of A.T.A. 1997 with the main case. Learned Additional P.G. has conceded that all the offences were committed in the same transaction. It is settled principles of the law that accused charged of similar offence during same transaction are to be jointly tried. Section 235 Cr.P.C. for the sake of convenience is reproduced as under:-

“235. Trial for more than one offences.--(1) If, in one series of acts so connected together as to form the same transaction, more offence than one are committed by the same person, he may be charged with, and tried at one trial for, every such offence.

(2) Offences falling within two definitions.--If the acts alleged constitute on offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, the person accused of them may be charged with, and tried at one trial for, each of such offences.

(3) Acts constituting one offence, but constituting when combined, a different offence.--If several acts, of which one or more than one would by itself or themselves constitute an offence, constitute when combined a different offence, the person accused of them may be charged with, and tried at one trial for, the offence constituted by such acts when combined, and for any offence constituted by any one, or more, of such acts."

18. For the above stated reasons, captioned appeals as well as confirmation Reference are disposed of in the above terms.

JUDGE

JUDGE

Arif

Trial Court is directed to record evidence of P.Ws Naseer Noor Khan and ASI Muhammad Azam afresh in presence of all the accused by providing a fair opportunity to both the parties, on the conclusion, statements of accused shall be recorded under section 342 Cr.P.C. afresh by putting all the incriminating pieces of evidence brought on record against the accused. Thereafter, trial Court after hearing the Counsel for the parties shall decide the case afresh in accordance with law.

Before parting with the judgment it is observed that crucial issue of the jurisdiction is involved in this case. For determining the issue whether an offence with which accused have been charged falls within the ambit of section 6 of the Anti-Terrorism Act 1997, it is essential to have a glance over the allegations made in the FIR, 161 Cr.P.C. statements, material collected during investigation and surrounding circumstances as well as ingredients of terrorism as provided under sections 6 & 7 of Anti-Terrorism Act 1997. It may be mentioned here that PC Tanzeem-ul-Hassan has been murdered in the incident. Apparently, this case is to be tried under the provisions of Anti-Terrorism Act 1997. Point of jurisdiction needs to be decided by the trial Court after hearing the Counsel for the parties in accordance with law before proceeding further in the matter on priority basis.