

**IN THE HIGH COURT OF SINDH AT KARACHI**  
**Spl. Cr. A.T.A. No.89 of 2020**

**Present:**

*Justice Zafar Ahmed Rajput*  
*Justice Amjad Ali Bohio*

Appellant : Muhammad Sharif s/o Kareem Bux @  
Raheem Bux, through Ms. Farzana Mateen,  
advocate

Respondent : The State, through Mr. Zafar Ahmed Khan,  
Additional Prosecutor General, Sindh.

Date of hearing : 16.10.2023  
Date of order : 16.10.2023

**ORDER**

**AMJAD ALI BOHIO, J:-** This Special Criminal Anti-Terrorism Appeal is directed against the judgment, dated 18.05.2020, whereby the learned Judge, Anti-Terrorism Court No. X, Karachi convicted the appellant for the offence under section 376(2), P.P.C. and sentenced him to undergo rigorous imprisonment for life with fine of Rs.200,000/- to be paid to the victim and/or her family in Special Case No.273 of 2015, arising out of FIR No.110/2015, registered under sections 364, 376(ii), 114, 34, P.P.C., read with Section 7 of the Anti-Terrorism Act, 1997 at P.S. Memon Goth, Karachi.

2. At the very outset, learned counsel for the appellant and Addl. P. G, while referring to the deposition of PW-04 Mst. Mariam (*victim*) contend that instead of recording evidence of the said P.W regarding alleged incident in her examination-in-chief, her version recorded in her statements under section 161 & 164, Cr. P.C. and statement recorded earlier during trial of co-accused Noor Ahmed was treated as her examination-in-chief, and on the basis thereof the appellant was convicted, therefore, the impugned judgment is not sustainable in law and matter is liable to be remanded to trial Court for recording proper examination-in-chief of the said P.W.

3. Record reflects that P.W-4 Mst. Mariam during her examination-in-chief deposed that her version was same which she narrated earlier in her statements under Section 161 & 164, Cr. P.C. and the statement recorded during trial of co-accused Noor Ahmed and the counsel for the appellant cross-examined her on such examination-in-chief, which is apparently in violation of the provisions laid down under Section 512, Cr. P.C. and Article 47 of the Qanun-e-Shahadat Order, 1979, which read as under:

*512. Record of evidence in absence of accused: (1) if it is proved that an accused person has absconded, and that there is no immediate prospect of arresting him, the Court competent to try of send for trial to the Court of Session or High Court such person for the offence complained of may, in his absence, examine the witnesses (if any) produced on behalf of the prosecution and record their depositions. Any such deposition may, on the arrest of such person, be given in evidence against him on the inquiry into, or trial for the offence with which he is charged if the deponent is dead or incapable of, giving evidence or his attendance cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable,*

*(2) Record of evidence when offender unknown : if it appears that an offence punishable with death or imprisonment for life has been committed by some person or persons unknown, the High Court may direct that any Magistrate of the First Class shall hold an inquiry and examine any witnesses who can give evidence concerning the offence*

*47. Relevancy of certain evidence for proving, in subsequent proceeding, the truth of facts therein stated.— Evidence given by a witness in a judicial proceeding, or before any person authorised by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable:*

*Provided that –*

*the proceeding was between the same parties or their representatives-in-interest;*

*the adverse party in the first proceeding had the right and opportunity to cross-examine;*

*the questions in issue were substantially the same in the first as in the second proceeding.*

*Explanation: – A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this Article.*

4. It appears from the perusal of above provision of section 512, Cr. P.C. that the trial Court is duty bound to record the deposition of the witness in presence of the accused and it only competent to record the same in his absence if he (*accused*) has absconded and there is no immediate prospect of arresting him. Such deposition may, on the arrest of such person, be given in evidence against him on the inquiry into, or trial for the offence with which he is charged if the deponent is dead or incapable of, giving evidence or his attendance cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable. Similarly, Article 47 of the Qanun-e-Shahadat Order, 1979 contemplates that the evidence given by a witness in a judicial proceeding, or before any person authorised by law to take it, is relevant for the purpose of proving in a later stage of the same judicial proceeding, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable.

5. In the instant case, it is an admitted position that the P.W. 4 Mst. Mariam appeared in court for recording her evidence, so also the

appellate/accused was present. She was quite capable to record her evidence which she recorded not by narrating the facts of the incident but by asserting that her versions recorded in 161 & 164, Cr. P.C. statements by the I.O and Judicial Magistrate concerned and her evidence recorded during trial of co-accused be adopted, which were adopted by the trial Court in violation of Article 47 (*ibid*) which specifically provides that the evidence given by a witness in a judicial proceeding, or before any person authorised by law to take it, is relevant for the purpose of proving in a later stage of the same judicial proceeding on attaining prescribed eventualities. It goes without saying that if law provides a particular thing to be done in a particular manner, then it should be done in that manner.

5. In view of aforementioned provisions of law, the procedure adopted by the trial Court for recoding evidence of said P.W-04 is illegal and the conviction and sentence awarded to the appellant on the basis thereof is not sustainable in law. Accordingly, the impugned judgment and conviction are hereby set aside. The case is remanded to trial Court with direction to record the evidence of PW-4 Mst. Mariam afresh, thereafter, the statement of appellant/accused under section 342, Cr. P.C. shall be recorded as per law and then the trial Court shall pass fresh judgment in accordance with law after hearing the counsel for the appellant/accused and the prosecutor on behalf of the State. Since the matter is old one of 2020, the trial Court shall proceed with the mater expeditiously and conclude the trial preferably within three months hereof.

Instant appeal stands disposed of in above terms.

JUDGE

JUDGE