

IN THE HIGH COURT OF SINDH, KARACHI

Present:

*Mr. Justice Mohammad Karim Khan Agha J.
Mr. Justice Zulfiqar Ali Sangi J.*

**Criminal Appeal No.152 of 2021 a/w Conf. Case No.06 of 2021.
Cr. Appeal No.151 of 2021**

Appellant Khalil Gabol s/o Ghulam Nabi
through Mr. Waqar Alam Abbasi,
Advocate.

Respondent The State through Mr. Ali Haider
Saleem, Additional Prosecutor
General Sindh.

Criminal Appeal No.111 of 2021.

Appellants Abdul Wahab & Abdul Latif
through Mr. Waqar Alam Abbasi,
Advocate.

Respondent The State through Mr. Ali Haider
Saleem, Additional Prosecutor
General Sindh.

Criminal Acquittal Appeal No.227 of 2021.

Appellant Muhammad Mushtaque s/o.
Ghulam Rasool through Mr.
Waqar Alam Abbasi, Advocate.

Respondent The State through Mr. Ali Haider
Saleem, Additional Prosecutor
General Sindh.

22.09.2022

JUDGMENT

Mohammad Karim Khan Agha, J:- Appellants Khalil Gabol, Abdul Wahab and Abdul Latif were tried by Model Criminal Trial Court (MCTC)/ Additional District & Sessions Judge-I, Karachi East in Sessions Case No.2793/2019 and vide judgment dated 12.02.2021 were convicted and sentenced as under:-

On the basis of discussion made hereinabove, I hold that the prosecution has successfully proved its case against accused persons beyond shadow of reasonable doubt except accused

Ghualm Nabi. The prosecution has well established that accused Abdul Wahab, Abdul Latif and Khalil are guilty for causing beating to Muhammad Jameel and Muhammad Bux in furtherance of common intention, therefore, they are convicted under S.337-A(iv) PPC and sentenced to pay Arsh which shall be 15% of Diyat amount of financial year 2019-2020 which comes to Rs.3,08,390/- (Three Lacs Eight Thousand Three Hundred and Ninety Rupees Only) jointly. The accused Abdul Wahab, Khalil and Abdul Latif are also convicted under S. 337-H(ii) PPC for causing injuries to Muhammad Jameel and Muhammad Bux on different parts of body (other hurts) and sentenced to simple imprisonment three months. Accused Khalil is guilty of committing Qatl-e-Amd of Muhammad Yaseen, therefore, he is convicted under S.302(b) PPC and sentenced to death as Tazir. Accused Khalil shall be hanged from neck till he is death. In addition to that the accused is required to pay compensation to tune of Rs.5,00,000/- (Rupees Five Lacs Only) to the legal heirs of the deceased. In case of failure of payment of fine/compensation, the accused shall further undergo simple imprisonment for six months.

Appellants were given benefit u/s 382-B Cr.P.C. It is noted that in the impugned judgment accused Ghulam Nabi Gabol was acquitted of the charge and appeal against his acquittal has been filed by the complainant bearing Cr. Acquittal Appeal No.227/2021.

2. In the connected matter which is off-shoot of the main case mentioned in the judgment, the appellant Khalil Gabol was also tried by the same court in Special Case No.2794/2019 in respect of FIR No.199/2019 U/s 23(i) (A), Sindh Arms Act, 2013 and vide judgment dated 12.02.2021 was convicted and sentenced as under:-

Consequently, the accused Khalil Gabol son of Ghulam Nabi is convicted under S. 23(2) of Sindh Arms At, 2013 and sentenced to five years simple with fine of Rs.10,000/- (Rupees Ten Thousand Only). In case of failure in payment of fine the accused shall further undergo simple imprisonment for six months

The appellant was extended benefit of section 382-B Cr.P.C.

3. Precisely stated, facts of the case as narrated by Muhammad Mushtaq son of Ghualm Rasool (complainant) are that on 11.10.2019 at about 1415 hours, he along with his brother Muhammad Yaseen after offering Friday prayer left the Masjid, his brother namely Muhammad Yaseen was just ahead of him. They had altercation with accused Khalil and others over keeping animals at courtyard of their house. Accused

Khalil and others used to abuse them on this matter. On the day of incident accused Khalil and Latif had altercation with his brother Muhammad Yaseen. Accused Khalil, Latif and Wahab had scuffled with his brother Muhammad Yaseen and in the meanwhile their father Ghulam Nabi arrived at the scene. During scuffle Jameel and Muhammad Bux came there to rescue Muhammad Yaseen but they were also inflicted with Danda blows by the accused persons. During scuffle Ghulam Nabi had asked accused Khalil Ahmed to bring pistol from house. Accused Khalil Ahmed proceeded to his house brought pistol and fired at his brother Muhammad Yaseen at the instance of accused Ghulam Nabi. His brother sustained four bullets on different parts of his body. Accused Wahab inflicted hammer blow on backside head of his brother. Accused Latif was also giving beating to Muhammad Yaseen. This incident was witnessed by Jahangir, Abdul Salam and others. His brother was shifted to hospital in injured condition, who on the same day succumbed to his injuries and died at the hospital. After competing formalities and other proceedings the dead body was handed over to him. Hence, such FIR was lodged against the above named accused persons.

4. With regard to offshoot case, the appellant Khalid Gabol was found in possession of an unlicensed firearm with which he allegedly murdered deceased Muhammad Yaseen.

5. In the main case, all the appellants pleaded not guilty to the charge and claimed their trial.

6. In order to prove its case, the prosecution examined 11 P.Ws and exhibited various items and other documents. All the appellants in their 342 Cr.P.C statements denied prosecution allegations and claimed their innocence. None of the appellants examined himself on oath or examined any D.W in his defence.

7. After appreciating evidence on record, the trial court convicted the appellants in the main case but acquitted accused Ghulam Nabi Gabol and appeal against his acquittal has been filed. Hence the appellants have filed appeals against their conviction.

8. In the offshoot case, the prosecution examined three P.Ws and produced various documents and items in order to prove its case.

/

Appellant Khalil Gabol in his 342 Cr.P.C statement denied all the allegations leveled against him. However, he neither examined himself on oath nor examined any DW in support of his defence case.

9. After appreciating the evidence on record, the trial court convicted and sentenced the appellant Khalil Gabol as stated above and as such appellant has filed appeal against his conviction in the offshoot case.

10. At the very outset learned counsel for the appellants and learned Addl. P.G. drew our attention to the fact that P.W.7 Shamsuddin in the main case has been examined as P.W.1 in offshoot case, whose evidence is identical in all respects. Whereas evidence of P.W.8 PC Umair ur Rehman in the main case is identical in all material respects in the offshoot case as P.W.2. Likewise P.W.11 SIP Mushtaque Ahmed's examination in chief in the main case is identical with his evidence in offshoot case as P.W.3 except that his part in the main case as I.O was deleted. Cross examination of all these three witnesses was identical. In these circumstances, learned counsel for appellants has informed the court that this defect is not curable u/s 537 Cr.P.C and that the impugned judgments may be set-aside and cases may be remanded back to the trial court. Learned Addl. P.G has fully supported his contention as a matter of law. It is noted that there were separate judgments in respect of each case which were connected as in the main case pistol recovered from the appellant Khalil Gabol was also used in the main case and as such these cases could have been amalgamated, tried together and decided by common judgment.

11. We have considered the contentions of the parties and the relevant law. We have also compared the evidence of PW Shamsuddin, PW Umair ur Rehman and P.W. Mushtaque Ahmed and we are satisfied that deposition of all above three prosecution witnesses were copied and pasted in the two separate judgments which under the law is not permissible. In each separate case each witness has to appear in the witness box to give/record his evidence and cannot be copied and pasted into another case. This is a defect which is incurable as was held in the case of **Azad Khan v. The State** (2004 YLR 1076):-

"4. We have heard the Advocate for the appellants, State counsel and perused the record of this case very carefully. Learned Advocate for the appellants has stated that the procedure adopted by the trial Court in the trial of both the cases was against the

provision of law as after recording the statement of witnesses in one case the copies of the said statements were placed on the record of another case, which is not permissible under the law as such, the appellants have been prejudiced, therefore, he has prayed that the cases may be remanded to the trial Court for retrial.

5. Learned State counsel after going through the depositions of witnesses in both the cases has conceded the above position and has further added that the trial Court has committed illegality in placing the copies of the depositions of witnesses recorded in one case, in the file of second case and that the said illegality is not curable under section 537, Cr.P.C.

6. We have given due consideration to the arguments and have minutely examined the statements of three witnesses recorded in both the cases. They are P.W.1, A.S.-1. Mehar Ali, Shah, Mashir, P.W.2, S.H.O. Muhammad Aslam, complainant, and P.W.3 Line Officer Muneer Ahmed, Investigating Officer. We find that the said three witnesses are common in both the cases. Their statements were recorded on the one and same date in both the cases. The examination of the statements reveals that examination-in-chief, cross examination, paragraphs, sentences, construction and placement of each sentences and words of each sentence are same, '(except opening sentence and one word in 15th line of the deposition of P.W.2) which is not possible when the statements of same witnesses are recorded on the same date but at different times. Therefore, it is clear that after recording the statements of witnesses in one case, the copies of the depositions of the said witnesses were prepared and placed in the record of other case. The said procedure is in violation of provisions of section 353, Cr.P.C. and Articles 70 and 71 of the Qanun-e-Shahadat Order, 1984. From the said procedure, the trial Court, in fact has read the evidence of one case in other case which is not permissible under the law. The said procedure is highly objectionable and has no sanctity of law.

7. In view of the above circumstances, the submissions made by the learned advocate for the appellants have great force, as such; the mode adopted by the trial Court in conducting these cases is illegal, which has vitiated the trials.

8. In the case of Noor Muhammad v. State PLD 1981 Lahore 60, where some portion of the statements of witnesses were copied from one case and placed on the record of another case then in such situation it was held that the trials of both the cases were illegal and the said defect was not curable under section 537, Cr.P.C., therefore, the Court ordered for the retrial of both the cases.

9. In the case of Alam Sher v. State 1977 PCr.LJ 1078 in the similar situation the Court ordered for the retrial of the cases and at page 1085 observed as follows:--

"..... In all the above five cases, the evidence consists of the statements of Khan Mir, P.W.1 and Ch. Ahmad Ali, S.H.O. P.W.2 and recoveries. The evidence has been recorded in a mechanical fashion. It appears that the entire evidence was recorded once and five copies were prepared

and filed in different cases. The judgments have also been written in that mechanical fashion.

In case of *Muhammiad Younis v. State* PLD 1953 Lahore 321, it is reported that if there are common judgments and evidence is copied, the trial was said to be illegal, viz. in violation of mandatory provisions of section 353, Cr.P.C. and sections 137 and 138 of the Evidence Act. Similarly, in *Nur Illahi v. State* PLD 1966 SC 708 the Supreme Court disapproved the procedure whereby the evidence of common witnesses was recorded once only and their statements were read out in the other cases. Similarly, in *Abdul Waheed v. State* 1968 PCr.LJ 776 where the evidence of Handwriting Expert, who was common in two cases, and whose original deposition was placed on the record of the other case through a carbon copy; the procedure adopted had invalidated the trial, and retrial was ordered. In case of *Qalandar Khan v. State* PLD 1971 Peshawar 119 the statement of common witnesses were recorded only in one case and the carbon copies thereof were placed on the record of the other cases. It was held that the procedure adopted was illegal."

10. We agree with the above proposition of law. Consequently, we set aside the convictions and sentences awarded to the appellants, without touching the merits of the case and remand both the cases for retrial from the stage of recording of the evidence. The appeals are allowed in the above terms."

12. In the above circumstances, we deem it appropriate to remand the case back to the trial Court for a *denovo* trial. Accordingly we hereby set aside the impugned judgments and direct learned Model Criminal Trial Court / 1st Additional Sessions Judge (East) Karachi to carry out *denovo* trial in respect of all the appellants as well as accused Ghulam Nabi, who was acquitted, by amalgamating the cases into one charge and deciding the case on merits after recording evidence of P.Ws in main case within three months. It is noted that learned counsel for appellants Abdul Wahab and Abdul Latif has informed that both the appellants have served out their sentence. Accordingly, we grant bail to said appellants as well as accused Ghulam Nabi, who was acquitted and against him acquittal appeal has been filed, subject to their furnishing surety in the sum of Rs.50,000/- each and P.R bond in the like amount to be furnished before the trial court within 10 days of date of this judgment.

13. The above Criminal Appeals No.151, 152, 111 of 2021, and Criminal Acquittal Appeal No.227 of 2021 are disposed of in the above terms. The confirmation reference No.06/2021 is answered in negative.

4

14. The R & PS alongwith copy of this judgment shall be sent to Model Criminal Trial Court / 1st Additional Sessions Judge (East) Karachi for immediate compliance.

15. The MIT of this court shall circulate a copy of this judgment to all District & Sessions Judges, Additional District & Sessions Judges or any other Judge/Presiding Officer of an Anti-Terrorism Court in Sindh for information and compliance.