

HIGH COURT OF SINDH AT KARACHI

Cr. Jail Appeal No.375 of 2020
Confirmation Case No.13 of 2020 along with
Cr. Acquittal Appeal No.319 of 2020

Date	Order with signature of Judges
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1. For orders on M.A. No.8271 of 2020
2. For hearing of main case.

02.12.2021.

Mr. Mohammad Farooq, Advocate for the Appellant.

Mr. Mohammad Iqbal Awan, Addl. Prosecutor General.

Mr. Ali Gohar Masroof, Advocate for the Complainant/ Appellant.

ORDER

Mohammad Karim Khan Agha, J. Appellant Aijaz alias Totta son of Aas Muhammad was convicted vide judgment dated 20.04.2020 passed by the Model Criminal Trial Court / Addl. District & Sessions Judge (East) Karachi for an offence under Section 302(b) PPC and sentenced to death on 02 counts. In addition he was required to pay compensation to the tune of Rs.5-lac each to the legal heirs of the deceased and in case of failure to pay such fine he was to undergo S.I. for a further period of 06 months. The appellant, therefore, filed this appeal against his conviction.

2. On the other hand vide aforesaid impugned judgment Usman and Samreen were acquitted. Complainant Mst. Bano in this case has filed an appeal against acquittal in respect of both the accused persons Usman and Samreen.

3. Before reading out the evidence learned counsel for the appellant, learned Addl. Prosecutor General and learned counsel for the complainant brought it to the court's attention that PW-1 Mst. Bano, who was the complainant in this case and an eye witness and also acted as Mashir of recovery of the alleged murder weapon being a pistol, was therefore a very important and material witness but her evidence in chief was recorded in absence of defence counsel. It is noted that a junior associate of defence counsel was present, however, he had not filed his Vakalatnama and he had

no right of audience. Under these circumstances, all the above learned counsels have contended that this is a fit case for remand to the learned trial Court. Respondents Usman and Samreen who were present in Court also agreed with this proposition as advised by counsel.

4. We have heard learned counsel for the parties and perused the record.

5. All learned counsel for the parties are correct that PW-1 Mst. Bano is a very material witness in this case and that her evidence was not recorded in front of the accused's duly appointed defence counsel. This omission of the trial Court has potentially caused serious prejudice to the appellant as he was not a professionally trained person and would not have been able to object to any questions which were not legally admissible being put to the witness and likewise would not have been able to object any document which might have been exhibited in her evidence. Such scenario was clearly prejudicial to the appellant potentially violating his right to a fair trial under Article 10-A of the Constitution of 1973.

6. We, therefore, find that this is a fit case to be remanded to the trial Court. In this regard reliance is placed on the case of **Rajab Ali v The State** (2019 MLD 1713). As such the impugned ^{Judgment} dated 20.04.2020 is hereby set aside, the confirmation reference is answered in the negative and this case is remanded back to the Model Criminal Trial Court / Addl. District & Sessions Judge (East) Karachi for the limited purpose of re-recording the evidence of PW-1 Mst. Bano (Complainant in the case) in the presence of all the accused and their counsel who shall also be given the opportunity to cross examine her. Thereafter the learned trial Court shall re-record the statements under Section 342 Cr.PC of all the accused and then re-write the judgment. It is noted that Usman and Samreen were acquitted by the learned trial Court, hence their appeal against acquittal has become infructuous and is disposed of.

7. Since Usman and Samreen had been acquitted we are of the view that until the end of the trial they shall remain on bail and the learned trial Court i.e. Model Criminal Trial Court / Addl. District & Sessions Judge (East) Karachi shall direct them to furnish appropriate surety and in the event they do not appear, learned trial court shall take appropriate steps and initiate proceedings in accordance with law. Usman and Samreen, present in Court on advice of counsel, state that they have no objection to this order. Office shall immediately return the R&Ps to the trial Court i.e. Model Criminal Trial Court / Addl. District & Sessions Judge (East) Karachi which shall summon the accused persons within 07 days of the receipt of the R&Ps and ensure that they all have defence counsel and thereafter summon PW-1 Mst. Bano for the limited purpose mentioned above in this order. This entire exercise shall be completed within a period of three (03) months from the date of this order. A copy of this order shall be sent to the Model Criminal Trial Court / Addl. District & Sessions Judge (East) Karachi for compliance.

8. The appeals and confirmation reference are disposed of in the above terms.