IN THE HIGH COURT OF SINDH CIRCUIT COURT MIRPUR KHAS
Criminal Appeal No.D-18 of 2025

(Kashif @ Kashi and others vs. The state)

Present;

Mr. Justice Zulfiqar Ali Sangi
Mr. Justice Nisar Ahmed Bhanbhro

Appellants	:	1. Kashif @ Kashi s/o Younis Masih 2. Nawaz s/o George Masih, 3. Dilshad s/o George Masih, 4. Dil Murad s/o George s/o Masih, 5. Shamshad s/o David Masih, Through Mr. Om Parkash H. Karmani, Advocate.
Complainant		Dur Muhammad s/o Muhammad Umar Through Mr. Tarique Mehboob, advocate.
Respondent	:	The State through Mr. Ghulam Abbas Dalwani D.P.G.
Date of hearing	:	12.11.2026
Date of Judgment	:	12.11.2026

JUDGMENT

ZULFIQAR ALI SANGI, J: Through this Criminal Appeal, the appellants have called in question the judgment dated 29.11.2025, passed by the learned 1st Additional Sessions Judge/MCTC, Sanghar, in Sessions Case No.144 of 2023, arising out of Crime No.64/2022, registered at Police Station Mangli, for offences punishable under Sections 302, 114, 337-A(i), 337-F(i), 337-H(ii), 147, 148, 149 and 504, PPC, whereby the appellants were convicted and sentenced as follows:

> (i) The appellants were convicted under Section 147, PPC, read with Section 149, PPC, and sentenced to pay a fine of Rs.10,000/- each, amounting to Rs.50,000/- collectively, and in default thereof, to suffer simple imprisonment for six months.
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> (ii) They were further convicted under Section 302(b), PPC, read with Section 149, PPC, and sentenced to death as *Ta'zir*, subject to confirmation by this Court in terms of Section 374, Cr.P.C. They were also

directed to pay compensation of Rs.1,000,000/- each, amounting to Rs.5,000,000/- collectively, to the legal heirs of the deceased under Section 544-A, Cr.P.C., and in default of payment, to suffer simple imprisonment for six months, with a further direction that the compensation amount shall be recoverable as arrears of land revenue in accordance with law.

(iii) They were also convicted under Section 337-F(v), PPC, read with Section 149, PPC, in respect of two injuries sustained by injured PW Zareef Mari, as reflected in the medical evidence and MLC, Exhibit 23/B, and were directed to pay Daman at the rate of Rs.100,000/- each, amounting to Rs.500,000/- collectively, to the injured person.

(iv) They were further convicted under Sections 337-A(i) and 337-L(ii), PPC, read with Section 149, PPC, in respect of the injuries sustained by injured PW Nazeer Hussain, and directed to pay Daman at the rate of Rs.20,000/- each, amounting to Rs.100,000/- collectively, in respect of the injuries attributed to the said occurrence.

The learned trial Court further directed that the convicted accused, namely, Kashif alias Kashi, Nawaz and Dilshad, who were on bail, be taken into custody and remanded to prison for serving their respective sentences, whereas the remaining convicted accused, namely, Shamshad and Dil Murad, who were already confined in District Prison, Sanghar, be informed of their conviction and sentences. The accused Suleman son of Azam Masih was, however, acquitted of the charge under Section 265-H(i), Cr.P.C., whereas proceedings against co-accused Azam Masih stood abated owing to his death during the pendency of the trial. Consequently, the bail bonds furnished by the accused who were on bail were cancelled and their sureties discharged.

2. The learned trial Court has also forwarded the requisite reference to this Court for confirmation of the death sentence awarded to the appellants in terms of Section 374, Cr.P.C.

3. At the very outset, learned counsel for the appellants submitted that the charge in the present case was initially framed on 14.03.2023. Subsequently, appellant/accused Dil

Murad absconded during the course of trial, whereafter the learned trial Court proceeded with the recording of evidence in his absence. In such circumstances, the depositions of PW Ali Murad Kerio (Tapedar), PC Faisal Altaf, PC Nasir Mehmood Pathan, WHC Din Muhammad, Dr. Abid Ali and Dr. Aneel Kumar were recorded without the presence of the said accused. Learned counsel further submitted that, after his subsequent arrest, appellant/accused Dil Murad was produced before the learned trial Court. Thereafter, the learned Additional District Public Prosecutor moved an application under Section 540, Cr.P.C., seeking recall and re-examination of the aforementioned witnesses so that the accused could be afforded an opportunity to participate in the proceedings and exercise his right of cross-examination. The application was allowed by the learned trial Court vide order dated 01.03.2024, and the witnesses were purportedly recalled for fresh examination. The principal contention advanced by learned counsel for the appellants is that, notwithstanding the order dated 01.03.2024, the aforesaid witnesses were not actually examined afresh before the learned trial Court. Rather, their earlier depositions, recorded in the absence of appellant Dil Murad, were reproduced verbatim by way of copying and pasting, with only the dates of recording altered, thereby creating an impression that fresh examination-in-chief and cross-examination had taken place. It was contended that such an exercise was wholly contrary to the mandatory requirements of law and had deprived the accused of a fair opportunity to confront and cross-examine the prosecution witnesses. On this premise, learned counsel sought setting aside of the impugned judgment and remand of the case to the learned trial Court for recording the evidence of the aforementioned witnesses afresh in accordance with law.

4. Conversely, learned counsel for the complainant as well as the learned Deputy Prosecutor General, after examining the relevant depositions available on the trial Court record, fairly conceded the factual position pointed out by learned counsel for the appellants.

5. We have heard learned counsel for the appellants, learned counsel for the complainant and the learned Deputy Prosecutor General for the State, and have carefully examined the available record with their assistance. The controversy requiring determination, in the circumstances of the present case, primarily relates to the legality and validity of the procedure adopted by the learned trial Court while recalling and re-examining the prosecution witnesses after the arrest of appellant Dil Murad, particularly where the earlier depositions had been recorded in his absence.

6. Perusal of the record reveals that the charge against accused Kashif alias Kashi, Nawaz, Azam, Dilshad, Dil Murad, Suleman and Shamshad was framed on 14.03.2023. Subsequently, appellant/accused Dil Murad absconded, whereafter the learned trial Court proceeded with the recording of evidence in his absence. During that period, the depositions of PW Ali Murad Kerio (Tapedar), PC Faisal Altaf, PC Nasir Mehmood Pathan, WHC Din Muhammad, Dr. Abid Ali and Dr. Aneel Kumar were recorded. Subsequently, upon the arrest of appellant Dil Murad and his production before the learned trial Court, the learned Additional District Public Prosecutor moved an application under Section 540, Cr.P.C., seeking recall and re-examination of the witnesses whose statements had already been recorded. The said application was allowed by the learned trial Court vide order dated 01.03.2024, apparently with the object of providing the accused an opportunity to participate in the proceedings and exercise his right of cross-examination.

7. In this regard, it would be appropriate to observe that Section 540, Cr.P.C. confers wide powers upon a Criminal Court to summon any person as a witness, examine any person in attendance, or recall and re-examine any person already examined, where such evidence appears to be essential for the just decision of the case. The underlying object of this provision is to ensure that the Court arrives at a just conclusion on the basis of complete and properly tested evidence. The power vested under this provision is not merely discretionary in its nature;

rather, the latter part of the section imposes an obligation upon the Court to examine or recall a witness where his evidence appears essential to the just decision of the case. Such power, however, must be exercised judicially and consistently with the procedural safeguards available to the accused under the law. It is equally well settled that the right of an accused to confront and cross-examine prosecution witnesses constitutes one of the fundamental safeguards of a fair criminal trial. The purpose of cross-examination is not confined merely to formal compliance with procedural requirements; rather, it provides an effective opportunity to test the veracity, credibility, memory and reliability of a witness, as well as the correctness of the facts stated by him. A deposition recorded in the absence of an accused cannot, merely by reproducing its contents in the subsequent proceedings, be treated as evidence freshly recorded in his presence, particularly where the Court has specifically ordered recall and re-examination of the witness to afford the accused an opportunity of cross-examination.

8. The aforesaid principle also finds support from Section 353, Cr.P.C., which requires that evidence in a criminal trial shall ordinarily be taken in the presence of the accused, or, where his personal attendance has been dispensed with, in the presence of his pleader. The object underlying this provision is to ensure transparency in the proceedings and to afford the accused a meaningful opportunity to hear, understand and challenge the evidence produced against him. This requirement is not an empty formality, but a substantive procedural safeguard, the observance of which is essential to the administration of criminal justice. Furthermore, the constitutional guarantee of a fair trial and due process, embodied in Article 10-A of the Constitution of the Islamic Republic of Pakistan, 1973, requires that every person facing criminal proceedings be afforded a fair and meaningful opportunity to defend himself. The right to a fair trial encompasses, inter alia, the right to know the evidence brought against an accused and to challenge such evidence through cross-examination. Any procedure which, in substance, deprives

an accused of this valuable right cannot be regarded as a proper compliance with the requirements of law.

9. Applying the above principles to the facts of the present case, we have carefully examined the depositions of PW Ali Murad Kerio (Tapedar), PC Faisal Altaf, PC Nasir Mehmood Pathan, WHC Din Muhammad, Dr. Abid Ali and Dr. Aneel Kumar, which were purportedly recorded afresh pursuant to the order dated 01.03.2024. A comparative examination of their earlier statements and the subsequent depositions reveals that the latter are not the result of actual fresh examination of the witnesses before the learned trial Court; rather, the earlier depositions have been reproduced verbatim, with only the dates of recording changed. Thus, despite the specific order passed under Section 540, Cr.P.C., no genuine exercise of recalling and re-examining the witnesses appears to have been undertaken. Such a course adopted by the learned trial Court cannot be regarded as substantial compliance with its own order dated 01.03.2024 or with the mandatory procedural safeguards governing the recording of evidence in a criminal trial. Once the learned trial Court had allowed the application under Section 540, Cr.P.C. for the purpose of recalling and re-examining the witnesses, it was incumbent upon it to ensure their actual presence and fresh examination, followed by an effective opportunity to the accused to cross-examine them. Mere reproduction of previously recorded depositions, without the witnesses being actually examined afresh, defeats the very object and purpose for which the application was allowed.

10. It is a settled principle of criminal jurisprudence that procedural requirements relating to the recording of evidence are intended to secure fairness and reliability in the adjudicatory process. A criminal trial must not only be fair in appearance but must also be fair in substance. The Court is under an obligation to ensure that the evidence relied upon for determining the guilt or innocence of an accused has been recorded in accordance with law and that the accused has been afforded an effective opportunity to test the same. Where such an opportunity is

denied, the defect cannot be cured merely by observing that the witnesses had previously been examined or that their depositions form part of the judicial record. In the present case, the irregularity assumes greater significance because the evidence of the aforesaid witnesses was relied upon in proceedings which ultimately culminated in the conviction of the accused, including the award of the extreme penalty of death. In a case involving capital punishment, the Court is required to exercise the utmost caution and ensure strict adherence to the procedural safeguards prescribed by law. The gravity of the charge or the seriousness of the alleged offence cannot, by itself, justify departure from the established requirements of a fair trial. On the contrary, the more serious the consequences of a criminal conviction, the greater the responsibility of the Court to ensure that the proceedings are conducted strictly in accordance with law. It is also pertinent to observe that the concession made by learned counsel for the complainant and the learned Deputy Prosecutor General, upon examination of the relevant record, lends further support to the factual position highlighted by learned counsel for the appellants. Nevertheless, our conclusion is founded upon the independent examination of the judicial record and the procedural irregularity apparent therefrom.

11. In view of the foregoing discussion, we are of the considered view that the purported re-examination of the aforesaid prosecution witnesses did not satisfy the requirements of Section 540, Cr.P.C., read with the safeguards contemplated under Section 353, Cr.P.C., and Article 10-A of the Constitution. The procedure adopted by the learned trial Court has materially affected the fairness of the proceedings and cannot be treated as a mere technical or curable irregularity, particularly in the circumstances where the accused was required to be afforded an effective opportunity to confront and cross-examine the witnesses. Consequently, the impugned judgment cannot be sustained in law and is liable to be set aside, with the matter remanded for rectification of the aforesaid procedural defect.

12. For the foregoing reasons, this Criminal Appeal is allowed to the extent indicated herein. Consequently, the impugned judgment dated 29.11.2025, passed by the learned 1st Additional Sessions Judge/MCTC, Sanghar, in Sessions Case No.144 of 2023, is hereby set aside, and the case is remanded to the learned trial Court for proceeding afresh in accordance with law, subject to the following directions:

(i) The learned trial Court shall summon and record the evidence (chief-examination) of PW Ali Murad Kerio (Tapedar), PC Faisal Altaf, PC Nasir Mehmood Pathan, WHC Din Muhammad, Dr. Abid Ali and Dr. Aneel Kumar afresh, in accordance with law, ensuring their actual presence before the Court and providing the accused an effective opportunity to cross-examine them.

(ii) The learned trial Court shall ensure that the examination-in-chief and cross-examination of the aforesaid witnesses are actually recorded in the judicial proceedings and that no previously recorded deposition is merely reproduced or copied in place of fresh evidence.

(iii) Upon completion of the aforesaid exercise, the statements of the accused under Section 342, Cr.P.C. shall be recorded afresh, after putting to each accused all incriminating circumstances appearing against him in the evidence.

(iv) Thereafter, the learned trial Court shall afford the parties an opportunity of hearing and decide the case afresh, strictly in accordance with law, on the basis of the evidence available on record, without being influenced by any observations made in this judgment, which are confined solely to the procedural defect discussed herein.

(v) The learned trial Court shall endeavour to conclude the proceedings expeditiously, preferably within a period of three months from receipt of this judgment, subject to the availability of the witnesses and other unavoidable circumstances.

13. It is clarified that the observations made hereinabove are confined to the procedural irregularity in the recording of evidence and shall not be construed as an expression of opinion on the merits of the prosecution case or the defence of the accused. The learned trial Court shall independently assess the entire evidence in accordance with law and reach its own conclusion, uninfluenced by the findings recorded in the impugned judgment, which have been set aside.

14. Consequently, the Criminal Appeal stands disposed of in the above terms. The Reference made by the learned trial Court under Section 374, Cr.P.C., for confirmation of the death sentence is answered in the negative, as the conviction and sentence forming the subject matter of the reference have been set aside and the matter remanded for fresh adjudication. The question of confirmation of the death sentence, therefore, does not survive for determination at this stage.

JUDGE

JUDGE