

IN THE HIGH COURT OF SINDH, CIRCUIT COURT LARKANA

Criminal Jail Appeal No.D- 79 of 2019.

Criminal Conf. Case No.D- 45 of 2019.

Criminal Jail Appeal No.D- 115 of 2019.

Criminal Jail Appeal No.D- 116 of 2019.

Criminal Jail Appeal No.D- 117 of 2019.

Criminal Jail Appeal No.D- 118 of 2019.

Present:

Mr. Justice Mohammad Karim Khan Agha -J

Mr. Justice Zulfiqar Ali Sangi -J

Appellants	Riaz, Fida, Ghulam Mustafa and Sabir through Mr. Habibullah G. Ghouri, Advocate in Cr. Jail Appeals No.D-79 2019.
Complainant	Qurban Ali Khoso through Mr. Rafique Ahmed K. Abro, Advocate.
Respondent	The State through Mr. Ali Anwar Kandhro, Addl. P.G.
Date of hearing:	26.01.2021.
Date of judgment:	03.02.2021

J U D G M E N T

Mohammad Karim Khan Agha -J:- By this common judgment, we intend to dispose of these five Criminal Jail Appeals filed by appellants Riaz, Fida, Ghulam Mustafa, and Sabir respectively who have assailed impugned judgment dated 16.11.2019 passed by learned 1st Additional Sessions Judge, Mehar in Sessions Case No. 601 of 2015 re: State v. Qasim and others arising out of Crime No.177 of 2015 of Police Station Mehar District Dadu registered for offences under Sections 302, 324, 148, 504 and 337-H(ii) PPC, whereby appellants Riaz, Fida, Ghulam Mustafa, and Sabir have been convicted for offence under Section 148 r/w Section 149 PPC and sentenced to suffer R.I for three years and to pay fine of Rs.10,000/= each and in case of default in payment thereof, they shall suffer S.I for six months more, appellants Riaz,

Fida, Ghulam Mustafa, and Sabir have also been convicted for offence of committing murder of deceased Muhammad Saleh and Ashique Ali under Section 302(b) PPC r/w Section 149 PPC and sentenced to suffer imprisonment for life and pay fine of Rs.100,000/= each, in case of default in payment thereof they shall suffer S.I for six months more, appellant Riaz has been convicted for offence of committing murder of Muhammad Saleh under Section 302(b) PPC and sentenced to death subject to confirmation by this court and to pay a fine of Rs.100,000/= as required U/S 544-A Cr.P.C to the legal heirs of deceased Muhammad Saleh, in case of default in payment of fine, he shall suffer S.I for six months more. Appellant Ghulam Mustafa is further convicted for committing attempt to murder and sentenced to suffer imprisonment for 10 years and pay an amount of Rs.100,000/= as compensation which shall be paid to the injured Muhammad Bachal, in case of default in payment thereof, he shall suffer S.I for six months more and all the appellants have also been convicted for committing aerial firing and sentenced to suffer imprisonment for three months and pay fine of Rs.5000/= each, in case of default in payment of fine, they shall suffer S.I for one month more and the appellants are also granted benefit of Section 382(b) Cr.P.C.

2. Briefly the facts of the prosecution case are that on 21.7.2015 complainant along with his witnesses were standing in his village when at about 2.30 pm accused party duly armed with deadly weapons came there and in the background of previous landed dispute, they used abusive language where upon accused Qasim instigated other accused to kill them on which accused Riaz made fires from his pistol upon Mohammad Saleh which hit him on his testicles, accused Fayaz fired from his pistol upon Ashique Ali which hit him on his backside, accused Anwar fired from his pistol upon Mukhtiar which hit him on right side of his testicles, accused Ghulam Mustafa made fires from his pistol upon Bachal which hit him on the back side and rest of accused also made aerial firing on which people of village came running and then accused went away. Thereafter injured were shifted to Taluka Hospital Mehar but Ashique succumbed to injuries on the way and the rest of three injured after providing them first aid were referred to Larkana hospital for further treatment but on the way injured Muhammad Saleh also succumbed to his injuries. After getting free from postmortem of deceased, lodged FIR to the above effect.

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3. During investigation of above case, accused Qasim, Fida, Ghulam Mustafa, Riaz and Sabir Ali were arrested and sent up to stand trial under charge sheet in which rest of accused were shown as absconders and after proceedings under Section 87/88 Cr.P.C they were declared proclaimed offenders. Charge was framed against accused Qasim, Fida, Ghulam Mustafa, Riaz and Sabir Ali all by caste Magsi to which they all plead their innocence and claimed trial.

4. In order to prove its case the prosecution examined 7 PW's who exhibited numerous documents and other items and thereafter the prosecution side was closed. Thereafter statements of accused were recorded under Section 342 Cr.PC in which they all denied the allegations against them and claimed that they have been falsely implicated by the complainant party due to enmity on account of a long standing land dispute and that recovery of crime weapons have been foisted upon them. However, the accused neither examined themselves on oath nor led evidence in defence.

5. On conclusion of trial, the learned trial court after hearing learned counsel for the parties and appraisal of prosecution evidence brought on record, convicted and sentenced the appellants/accused as above while acquitting co-accused Muhammad Qasim by extending to him the benefit of the doubt vide impugned judgment dated 16.11.2019, hence the appellants have filed these appeals against their convictions.

6. At the very outset it came to our attention that **PW 1 Qurban Ali who was the complainant and an eye witness** in this case and hence a very important witness had given his evidence in chief in the presence of the accused **but in the absence of their counsel**. The question therefore arose what the effect of this might be keeping in view that this was a capital case and the complainant's evidence was crucial in leading to the conviction of the appellants.

7. Learned counsel for the appellants and DPG contended that in a capital case the appellants had to be represented by counsel at all times whilst evidence was being recorded against them especially if this evidence was prejudicial to them and in this case since the appellants had not been represented by counsel at the time when the complainant gave his evidence

in chief the case should be remanded to the trial court. In support of their contentions they placed reliance on **Shafique Ahmed v. The State** (PLD 2006 Karachi 377) and **Abdul Ghafoor v. The State** (2011 S C M R 23).

8. On the other hand learned counsel for the complainants contended that it made no difference at all whether the appellants counsel were present at the time when a witness gave his evidence in chief provided that the appellants counsel had the opportunity to cross examine that witness and thereby test his evidence and as such this omission did not justify the case being remanded. In support of his contentions he placed reliance on S.353 Cr.PC, **Ali Dino v. The State** (2018 P Cr. L J 200), **Irfan Ali v. The State** (2018 Y L R 2128) and **Hidayatullah v. The State** (2000 Y L R 2330).

9. We have heard the parties, reviewed the record and considered the relevant case law.

10. At the outset it would be of assistance to set out S.353 Cr.PC which is reproduced as under for ease of reference;

"S.353. Evidence to be taken in presence of accused. Except as otherwise expressly provided, all evidence taken under [Chapters XX, XXI, XXII and XXII-A] shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in presence of his pleader."

11. Before moving further let us remind ourselves as to what constitutes oral evidence given by a witness during trial. Such evidence includes evidence in chief, cross examination and re examination. S.353 Cr.PC no doubt states that the evidence must be recorded in his presence or the presence of his pleader if the accused has been exempted.

12. The authorities cited by the complainant support S.353 Cr.PC in that no evidence can be recorded in the absence of the accused however they do not appear to us to address the question of whether the counsel of the accused must also be present at the time when evidence is recorded even when the accused is present.

13. The question therefore emerges however as to how the courts have interpreted the right to counsel and the necessity or otherwise of the accused's counsel being present at the time of recording evidence especially in a capital case keeping in view Article 10 (A) of the Constitution which in

effect guarantees the due process rights of the accused and his right to a fair trial inline with the concept that the accused is the favored child of the law.

14. The real issue to our mind is whether the accused has been prejudiced by the absence of his counsel at the time when evidence is recorded against him especially in terms of the examination in chief. In this case it is particularly significant that the appellants are all illiterate and have no idea about the law and the parameters in which an examination in chief is conducted. During an examination in chief we are of the view that it is mandatory for the accused to be represented by legal counsel in a capital case so that his/her rights can be protected. For example, without his own counsel inadmissible documents can be admitted into evidence, the witness can be tutored and many other prejudicial things to the accused can come on the record since they have not been objected to/challenged by the accused which may not have formed a part of the record if his counsel had been present and may have weakened the prosecution case against him. Thus, in the absence of counsel for the accused during the evidence in chief of an accused in a capital case we find that this would lead to the case being remanded back to the trial court.

15. In this respect reliance is placed on **Shafique Ahmed V The State** (PLD 2006 Kar 377) which held as under at P.383

"It is one of the duties of the Court of Sessions to see that the accused is represented by a qualitative legal practitioner in the cases involving capital punishment. That, it is the mandate of the law that cases involving capital punishment shall not be tried in the absence of Advocate for the accused or proceeded without first appointing an Advocate for the accused to defend him if he is unable to do so."

16. Likewise in the case of **Abdul Ghaffar v. State** (2011 SCMR 23) at P.26 it was held as under in this respect.

"With immense respect to the learned Judges of the High Court, we are persuaded to hold that it is the primary responsibility of the Court seized of a matter to ensure that the truth is discovered and the accused are brought to justice. If the learned trial Court found that the counsel engaged by the appellant had sought too many adjournments, even then he was not appearing, the Court could either have directed that a defence counsel be provided to the appellant at State expense or could have given last opportunity to the appellant to make alternate arrangements failing which the court would proceed to decide the matter. This course was not adopted by the learned trial Court and instead on 2.12.1999 gave a total surprise to the appellant by asking him to cross-examine those witnesses for which obviously neither the appellant had the requisite expertise nor he was prepared to do so. In these circumstances and

in view of the fair concession given by the State, we find that the procedure adopted by the learned trial Court is reflective of miscarriage of justice and the appellant be allowed one opportunity to have the above-referred witnesses cross-examined. Consequently this appeal succeeds on this short ground. The impugned judgment of the learned trial Court dated 29.03.2000 and that of the learned trial Court dated 30.5.2000 are set aside. The case is remitted to District and Sessions Judge, Rawalpindi who shall either proceed with the matter himself or entrust the same to the Additional District and Sessions Judge. The appellant shall be treated as under trial prisoner. He shall be given one opportunity to cross examine the two witnesses referred to in paragraph 6 and thereafter the Court shall decide the matter within 15 days of the said opportunity given. The parties are directed to appear or arrange representation before the District Judge for 20.5.2000 who shall proceed with the matter in terms of this order."

17. In the Crl. Appeal No.D36/2019 and Confirmation case No.D.10/2019 **Ghulam Ali and another V State** (unreported) dated 23.12.2020 on the same point another Division Bench of this court recently held as under at Para 11;

"Para 11. We also observed that learned trial Court recorded examination-in-chief of official witnesses in absence of the advocate for the appellants and it is observed that the present case carries capital punishment and evidence (examination-in-chief, cross examination and re-examination) of prosecution witnesses should be recorded in presence of his advocate. This is but logical and most of accused are laymen who would have little, if any, knowledge of the law and in the absence of defence counsel would be unable to adequately defend themselves. For examine, during examination-in-chief of a prosecution witness the accused would not know which questions he could object to and which documents he could oppose being exhibited. Such inability on his part in our view would lead to an unfair trial and the same is in violation of Article 10-A of the Constitution of Islamic Republic of Pakistan, 1973, the same is reproduced as under:-

"10-A. Right to fair trial.--- For the determination of his civil rights and obligations or in any criminal charge against him a person shall be entitled to a fair trial and due process."

18. The importance of an accused having a counsel appointed by either himself or if he is too poor to do so on State expense, especially in a capital case, has been further empathized in Circular 6 of Chapter VII of the Federal Capital and Sindh Courts Criminal Circulars, the Sindh Chief Court Rules (Appellate Side) (Rule 35) and the case of **Rajab Ali V State** (2019 MLD 1713).

19. Thus, for the reasons mentioned above the convictions and sentences awarded to the appellants through impugned judgment dated 16.11.2019 are

set aside and the confirmation case is answered in the negative with the direction that the case be remanded back to the trial court for the limited purpose of re-recording the evidence of **PW 1 Qurban Ali who is the complainant** (whose chief-examination was recorded in absence of advocate of the appellants) in presence of the advocates for the appellants in accordance with law and thereafter record the statements of the accused under section 342 Cr.P.C afresh and after giving full opportunity of hearing to all parties decide the case on merits in accordance with law within three months of the date of this judgment. Both parties are directed to appear before trial Court on 15.02.2021. Trial Court is directed to issue P.O for accused for the said date and summons to the complainant when the accused shall ensure the presence of their counsel.

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