IN THE HIGH COURT OF SINDH, CIRCUIT COURT, LARKANA

Criminal Jail Appeal No.D-37 of 2024

Criminal Confirmation Case No.D-19 of 2024

***Before*:**
Mr. Justice Shamsuddin Abbasi.
Mr. Justice Ali Haider 'Ada'.

Appellants	:	1). Muhammad Umar s/o Shah Muhammad Kurd Brohi, 2). Azizullah s/o Faqeer Ali Brohi *through* Mr. Irfan Badar Abbasi, Advocate.
The State	:	*through* Mr. Aitbar Ali Bullo, Deputy Prosecutor General, Sindh
Date of Hearing	:	07-10-2025.
Date of Decision	:	07-10-2025.

JUDGMENT

Ali Haider 'Ada';- Through this Criminal Jail Appeal, the appellants have assailed the judgment dated 04.05.2024, passed by the learned Additional Sessions Judge-I, Shikarpur (the trial Court) in Special Case No.573 of 2022, arising out of Crime No.04 of 2022, registered at Police Station Ghulam Shah, District Shikarpur, for an offence punishable under Section 9(c) of the Control of Narcotic Substances Act, 1997. By the impugned judgment, both appellants were convicted and sentenced to death, and further directed to pay a fine of Rs.1,000,000/- (Rupees One Million only) in equal shares; in case of default, they were to suffer simple imprisonment for ten (10) years. The learned trial Court also ordered that the appellants be hanged by their necks till death. As required under Section 374, Cr.P.C, the trial Court has submitted the reference for confirmation of the death sentence before this Court.

2. The precise facts of the prosecution case are that one ASI Imdad Ali, along with his subordinate staff, while conducting snap checking, apprehended the appellants Muhammad Umar Brohi and Azizullah, who were driving a Mazda Hino truck bearing registration No. AE-0877. Upon search of the vehicle, 99 kilograms of Charas were recovered, packed in plastic sacks concealed inside the oil tank of the said vehicle. Out of the

recovered contraband, 6 kilograms were separated for sample purposes, while the remaining quantity was sealed separately. After completion of the codal formalities, the FIR was lodged on 20.05.2022 at about 10:30 a.m., whereas the date and time of incident were recorded as 20.05.2022 at about 9:00 a.m.

3. After completion of the usual investigation, the challan was submitted before the competent Court of law, and the accused persons were sent up for trial. The learned trial Court thereafter complied with the mandatory provisions of Section 265-C, Cr.P.C, by supplying the requisite documents to the accused so as to enable them to prepare their defence in accordance with law.

4. On 03.12.2022, both the appellants engaged their private counsel, however, subsequently on 28.01.2023, the learned trial Court passed an order appointing defence counsel for both the appellants at state expense. Meanwhile, one of the co-accused, namely Anees Rehman, engaged his private counsel to conduct his defence.

5. The learned trial Court, vide order dated 10.06.2023, framed the charge against the appellants, to which they pleaded not guilty and claimed to be tried. It is pertinent to observe that at the time of framing of charge, the appellants were represented by counsel appointed at state expense. However, subsequently, on 10.07.2023, the appellants once again engaged their private counsel, namely Mr. Ghulam Nabi Durrani, Advocate, who filed his Vakalatnama on their behalf before the learned trial Court. This development indicates that the appellants, after having the benefit of state-appointed counsel at the initial stage of the proceedings, exercised their legal right to be defended by counsel of their own choice as guaranteed under Article 10A of the Constitution of the Islamic Republic of Pakistan, 1973, read with Section 340(1) of the Code of Criminal Procedure, 1898.

6. In pursuance of the framing of charge, the prosecution examined its witnesses in support of the case. PW-01, ASI Imdad Ali, being the complainant of the case, was examined and he produced the memo of arrest and recovery, relevant roznamcha entries, and copy of FIR. His examination was recorded on 06.04.2024. On the same date, another prosecution witness, Ghulam Asghar, who acted as mashir of arrest and recovery, was also examined and produced the memo of visit to the place of incident. Similarly,

PW-03, SIP Nizakat Ali, the Investigating Officer, was examined on the same day, who produced the letter sent to the Chemical Examiner, the Chemical Examiner's report, and other relevant roznamcha entries. It is noteworthy that during the course of the evidence, the learned trial Court made a note that the learned defence counsel for the appellants remained absent till 02:00 p.m., and with the consent of the accused, the counsel earlier appointed on state expenses was permitted to conduct the cross-examination of the witnesses. Subsequently, on 26.04.2024, the prosecution examined PW-04, Incharge Malkhana, WHC Hazoor Bux, who exhibited the relevant entry from Register No.19. On the same day, PW-05, ASI Abdul Ghafoor, being the dispatch rider, was examined, and PW-06, SIP Muhammad Ameen, the second Investigating Officer, was also examined, who produced a letter addressed to the Excise Officer along with the registration documents of the vehicle used in the offence.

7. After completion of the examination of all prosecution witnesses, the learned State Counsel, on behalf of the prosecution, submitted a statement on 26.04.2024, closing the side of the prosecution evidence.

8. On 26.04.2024, the statements of the appellants/accused were recorded under Section 342, Cr.P.C. by the learned trial Court, wherein they professed their innocence and claimed to have been falsely implicated in the case, while also praying for justice. One of the co-accused, namely Anees Rehman, however, opted to examine his defence witness and produced certain documents in his defence. So far as the case of the present appellants is concerned, they neither opted to be examined on oath under Section 340(2), Cr.P.C. nor chose to produce any witness in their defence. Consequently, the side of the defence was treated as closed.

9. That on 04.05.2024, an application was moved by the learned defence counsel for the appellants, seeking recall and re-examination of the prosecution witnesses on the ground that the appellants were deprived of an effective opportunity to defend themselves properly. It was contended that due to the counsel's serious illness at the relevant time, he could not appear during the examination of the prosecution witnesses, and in support thereof, a medical prescription was annexed with the application. However, the learned trial Court, vide order dated 04.05.2024, dismissed the said application and, on the same day, proceeded to pronounce the impugned

judgment convicting the appellants. The said conviction and sentence are now under challenge through this Criminal Jail Appeal.

10. Learned counsel for the appellants contends that the appellants were not afforded a proper and fair opportunity of defence as guaranteed under Article 10-A of the Constitution. He submits that once the appellants had engaged their private counsel at their own choice, there was no justification for the learned trial Court to appoint a counsel at State expense. It is further argued that the trial Court, without assigning cogent reasons, dismissed the adjournment application moved on personal medical grounds of the defence counsel and proceeded to record the evidence of material prosecution witnesses on the same day, thereby depriving the appellants of their right to an effective defence. The learned counsel further points out that the record shows the note in the deposition that with consent of the accused, the counsel on State expenses conducted the cross-examination, but no such written consent of the accused is available on record. Hence, when the case involves capital punishment, the trial Court was required to act with greater care and caution to ensure a fair trial and proper representation. In such circumstances, he prays that the matter be remanded for retrial.

11. Conversely, the learned Deputy Prosecutor General, while affirming the factual position, submits that the appointment of a counsel at State expense despite the appellants having already engaged their private counsel does not reflect a fair and proper conduct of trial. He therefore raises no objection if the matter is remanded for retrial in accordance with law.

12. Heard arguments and perused the material available on record.

13. First and foremost, it is pertinent to note that the learned counsel for the appellants, before advancing arguments on merits, raised a preliminary objection that the trial was not conducted in a fair manner. It was contended that although the appellants had already engaged their private counsel of choice, the learned trial Court did not afford them an opportunity to defend their case through their duly appointed pleader. On such aspect, it becomes necessary to examine the legality of this contention in light of the relevant statutory provision. To properly ascertain this issue, reference may be made to **Section 340(1) of the Code of Criminal Procedure, 1898,** which reads as under:

> ***340. Right of person against whom proceedings are instituted to be defended and his competency to be a witness.*** *(1) Any person accused of an offence before a Criminal Court or against whom proceedings are instituted under this Code in any such Court, may of right be defended by a pleader.*

14. This provision confers a statutory right upon every accused person to be defended by a pleader of his own choice. It embodies one of the fundamental principles of criminal jurisprudence that no person shall be deprived of the right to representation in a criminal proceeding. Hence, the Court is required to ensure that the accused is represented by a counsel of his choice and that no proceedings are conducted in his absence or through a counsel not duly engaged, unless with his free and informed consent recorded in writing.

15. The record in the present case clearly demonstrates that on 03.12.2022, the appellants had already engaged their private counsel. In such circumstances, there was no legal necessity for the learned trial Court to appoint a counsel at State expense through its order dated 28.01.2023. Furthermore, before the commencement of the prosecution evidence, the appellants once again changed their counsel and engaged another private counsel on 18.05.2023, which itself manifests their dissatisfaction and lack of confidence in the counsel appointed by the Court. Despite this, the learned trial Court proceeded to examine the material witnesses on a single day, allowing representation through the State-appointed counsel, which was not in consonance with the law nor with the principles of fair trial. The statutory right of an accused, particularly where the charge entails capital punishment, cannot be diluted, substituted, or edited by such appointment of counsel. The essence of criminal justice demands that an accused person must have the satisfaction that his counsel, engaged by his own choice, has had adequate time and opportunity to prepare and present his defence effectively. Failure to ensure this right amounts to a serious infraction of natural justice and renders the trial proceedings vitiated. Support for this view is drawn from the judgment in **Muhammad Sharif v. The State (PLD 1973 Lahore 365 (DB)**, wherein it was observed:

> *4. The only point of distinction between the cases cited by the learned counsel and the case before us is that in the precedent cases the lawyers had been appointed on the day of the trial, but in the present case the counsel was appointed two days before, the start of the trial. We do not know at what point of time the order of his appointment was passed on 2nd of January 1971. However, there is no proof that he was supplied with full record on that*

> *day. There is no indication that the lawyer had any consultation with the accused and took instructions from him. Under section 340, Cr. P. C. an accused had a statutory right to be defended by a counsel. The rule of the High Court, quoted above, says that the counsel is to be appointed "in time to enable him to study necessary documents". The time to be allowed in each case would vary but we feel that in a case entailing capital sentence at least a week's time has to be allowed to the counsel concerned. The statutory right of an accused, particularly in a charge entailing capital punishment, cannot be abridged by appointment of counsel a day or two before the trial. We, therefore find that this trial was conducted against the spirit of the instructions contained in rule 2 of the High Court Rules and Orders, referred to above. This Rule is based on the principle that a person arraigned for trial for an offence entailing capital punishment should have the satisfaction that the counsel engaged on his behalf had enough time to prepare his case. This is one of the fundamental principles of the administration of criminal justice which we feel has not been kept in view in this case.*

16. Moreover, the power exercised under Section 540, Cr.P.C. to summon, recall, or re-examine any witness is indeed one of the ample and plenary powers vested in the trial Court, designed to ensure that justice is done and that the truth is brought before the Court. This provision enables the Court to summon or re-examine a witness at any stage of the proceedings if it considers such evidence essential to the just decision of the case. Although the power is discretionary in nature, it is a judicial discretion, not to be exercised arbitrarily, but strictly in the interest of justice. For ready reference, **Section 540, Cr.P.C.** is reproduced below:

> *540. Power to summon material witness or examine persons present. Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case.*

17. As the grievance of the appellants is concerned, it has been contended that the learned trial Court, while appointing a counsel at State expense, did not obtain their consent, nor did they said counsel seek any instructions from them. Consequently, important and material questions were not put to the prosecution witnesses during cross-examination. It is well-settled that cross-examination is the most vital instrument through which truth can be elicited, and for the safe administration of justice, technicalities must not be allowed to defeat substantial rights. In the present case, the witnesses sought to be recalled are essential for the just and proper adjudication of the matter. On the same day, when their privately engaged counsel was absent due to illness, the trial Court allowed the counsel appointed at State expense to

conduct the cross-examination without any form of written consent or authorization from the appellants. Such conduct has rightly prejudiced the appellants in their defence and cannot be treated as a fair or lawful trial. For consideration, reliance is placed upon the case of **Ali Hassan and another v. The State (1999 YLR 141),** wherein it was held that:

> *"…The applicants/accused are admittedly illiterate and are facing trial in a case entailing capital punishment. The grievance of applicants is that the Trial Court while appointing Mr. Channa, learned Advocate did not obtain their consent nor learned counsel of pauper accused sought instructions from them with the result that important and essential questions were not put to the prosecution witnesses. Cross-examination is the only key by which truth could be elucidated and for the safe administration of justice technicalities must be avoided. The power under section 540, Cr.P.C. is discretionary but discretion has to be exercised judicially and not arbitrary. Consequently Criminal Revision application is allowed and the impugned order, dated 4-10-1995 is set aside, with the result that the application under section 540, Cr.P.C. filed by the applicants for recalling the witnesses stands allowed.*

Further support is drawn from the case of **Muhammad Yaseen alias Mithou and another v. The State (2010 PCr.LJ 1253),** wherein it was observed that, in view of Section 340(1) of the Criminal Procedure Code and Rule (1) of Chapter 24-C, Volume III of the Lahore High Court Rules and Orders, every accused person has an inviolable right to be defended by a counsel of his own choice. It was further held that a person arrested and facing trial possesses a constitutional right to the services of counsel, and therefore, must be afforded a reasonable opportunity to engage one. Likewise, once such counsel is engaged, he must be provided adequate and fair opportunity to prepare and defend the accused effectively. The underlying principle governing this rule is the cardinal maxim of natural justice that no one should be condemned unheard. Denial of such opportunity, or proceeding with the trial without ensuring that the accused is properly represented and heard through his chosen counsel, constitutes a violation of the right to fair trial and renders the proceedings vulnerable to serious legal infirmities.

18. Finally, it is of utmost significance to note that the appellants were awarded the major penalty of death, which is the strictest form of punishment. Therefore, it was imperative that their defence be presented firmly through their own counsel and in accordance with their own version of events, rather than through a counsel appointed on state expense without their consent or proper consultation. Such deviation has seriously undermined the right to a fair trial, which stands as both a statutory and

Constitutional safeguard for every accused person. The fairness of a criminal trial cannot be compromised, particularly in cases involving capital punishment, where the consequences are irreversible. For clarity, the right to a fair trial has been explicitly guaranteed under **Article 10-A of the Constitution of the Islamic Republic of Pakistan,** which provides that:

> *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.*

This constitutional mandate ensures that justice must not only be done but must also be seen to be done. Any departure from the principles of fair opportunity, legal representation of choice, and proper defence preparation vitiates the sanctity of trial proceedings and amounts to a miscarriage of justice.

19. For the foregoing reasons and in view of the discussion made hereinabove, it is held that the appellants were not afforded a fair opportunity to defend themselves through counsel of their own choice, which has resulted in a miscarriage of justice. The circumstances clearly establish that the impugned judgment is the outcome of a trial conducted in a narrow and improper manner; hence, the same cannot be sustained in the eye of law. Accordingly, the impugned judgment is hereby set aside, and the conviction and sentence awarded to the appellants are set aside as well. However, the learned trial Court is directed to re-examine the prosecution witnesses and provide a fair and full opportunity to the learned defence counsel to cross-examine and conclude the trial in accordance with law. It is further directed that the appellants and their counsel shall cooperate with the trial proceedings and shall not seek adjournments, except in rare circumstances. The learned trial Court shall ensure that the trial is conducted with complete fairness and independence, uninfluenced by any earlier findings, and concluded expeditiously as per the prescribed procedure.

20. Keeping in view the above, this Criminal Jail Appeal is partly allowed in the terms mentioned hereinabove. Consequently, the reference made by the learned trial Court for confirmation of the death sentence is answered in the negative.

JUDGE

JUDGE