

ORDER SHEET
**IN THE HIGH COURT OF SINDH,
CIRCUIT COURT, HYDERABAD.**

Cr. Rev. Appln.No.D-13 of 2018

DATE	ORDER WITH SIGNATURE OF JUDGE(S)
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P R E S E N T:

Mr. Justice Muhammad Junaid Ghaffar.

Mr. Justice Amjad Ali Sahito.

1. *For katcha peshi.*
2. *For hearing of M.A-2853/2018*

Mr. Farhad Ali Abro, Advocate for applicants/accused.
Syed Meeral Shah Bukhari, Additional P.G.

O R D E R

AMJAD ALI SAHITO, J:- The instant Criminal Revision Application has been directed against the order dated 05.04.2018, passed by the learned Sessions Judge, Shaheed Benazirabad, in Sessions Case No.125 of 1992, whereby the applications under Article 47 of Qanun-e-Shahadat Order, 1984, filed by the learned Incharge D.P.P for the state, were allowed.

2. Briefly, the facts of the prosecution case are that, complainant Fida Hussain lodged FIR on 24.06.1991 at 11:00 p.m. alleging therein that on 24.06.1991 at 09:00 p.m. he and his brother Abdul Fateh were sitting in their Morcha and his cousin Saindad was sitting inside the Kot, armed with licensed rifle. He saw some persons wearing black cloths inside the

Kot, who were identified to be Sultan S/o Kando Jatoi, Ali Dost S/o Kando Jatoi, Sikandar @ Sikoo S/o Usman Hotipoto, Ghazi S/o Mobeen Jatoi and Sarwar S/o Meehon Jatoi armed with Kalashnikovs and Rocket Launcher. They fired bursts from their weapons. Accused Sultan Jatoi threatened the inmates of the house with dire consequences and he controlled upon him. Accused Sultoo further told that Sher Khan had killed his buffalos with gunshot about few years back and he has come to take revenge. Fida Hussain and Abdul Fateh while came down of the Morcha, accused Ali Dost fired bursts from his Kalashnikov and accused Sikandar fired from his Rocket Launcher, on which the complainant's cousin Saindad jumped from the wall of the Kot and went away outside the Kot. The bursts hit Saindand's son Ali Asghar, who died at the spot and then the accused took in their possession the licensed gun of complainant and licensed rifle of Saindad and also took away complainant Fida Hussain and his brother Abdul Fateh on the force of their weapons outside to western side. On the light of electric bulb, complainant saw accused Luqman S/o Mehboob Jatoi, Gulab S/o Ibrahim Chandio and Laiq S/o Sawal Jatoi, who were also standing armed with klashnikov outside of the Kot, who abducted the complainant party by firing in the air. The complainant after taking advantage of the dark night succeeded in running away from the clutches of the dacoits. Thereafter, the complainant returned to his house where he saw that his cousin's son Ali Asghar was lying dead, hence the present FIR.

3. After completing all the formalities, the report under Section 173 Cr.P.C was filed before the Special Judge (STA) Khairpur under Section 512 Cr.P.C, showing all the accused as absconders. Subsequently, the accused Ali Dost and Sikandar appeared before the learned trial Court and charge was framed against both the accused including the present applicants/accused by showing them as absconders. The trial of the case was conducted by the then Special Court (STA) Nawabshah. It is pertinent to mention here that at the time of framing charge, the learned trial Court appointed Mr. Abdul Hadi Khoso, Advocate for all the absconders accused including the present applicants/accused as defence Counsel on state expenses. At the trial, the learned Counsel represented the present applicants/accused and cross-examined the witnesses. After concluding the trial, the learned trial Court passed the judgment dated 22.08.1993, whereby all the accused including absconders were convicted. Thereafter, the present applicants/accused preferred Criminal Appeal No.D-90 of 2017 before this Court, which was allowed and the sentence awarded by the trial Court against the absconders/applicants/accused was set-aside and consequently the matter was remanded back to the learned trial Court for de-novo trial. The learned trial Court proceeded with the trial by framing the charge against the applicants /accused. During trial, the process server submitted the report before the trial Court that P.Ws Mashir Khuda Bux and Abdul Fateh have expired due to their natural death.

4. During pendency of the case before the learned Sessions Judge, Shaheed Benazirabad, application under Article 47 of Qanun-e-Shahadat Order, 1984 was filed by the Incharge District Public Prosecutor, Shaheed Benazirabad. Notices were issued to the applicants/accused and after hearing the parties, the applications under Article 47 of Qanun-e-Shahadat Order, 1984 were allowed and it was directed by the learned trial Court that the evidence of deceased P.W Adul Fatah (Ex-6) and Mashir Khuda Bux (Ex-8) already recorded by the trial Court have been placed on record. In view of the order both the applications were disposed of. Being aggrieved and dissatisfied of the said order, the applicants/accused have preferred this revision application.

5. Learned Counsel for the applicants/accused contended that the impugned order passed by the trial Court is against the law and facts of the case; that the learned trial Court has not taken into consideration the order of this Court dated 25.09.2017 passed in Criminal Appeal No.D-90 of 2017 wherein this Court has ordered for de-novo trial; that as per law the trial in absentia is illegal and in violation of Article 10-A of Constitution of Islamic Republic of Pakistan, 1973, as the same provides a fair trial but the learned trial Court has not considered such aspect and passed the impugned order, which is absolutely illegal and unlawful. Lastly, he prayed for setting aside the impugned order and requested to allow this revision application.

6. On the contrary, the learned A.P.G, while supporting the impugned order, has argued that the order passed by the learned trial Court does not suffer from any illegality or material irregularity, hence, the same may be maintained.

7. We have heard the learned Counsel for the applicants/accused as well as learned A.P.G and perused the entire record with their assistance.

8. It has been borne out from the record that after completing the investigation, report under Section 173 Cr.P.C was submitted before the Court of Special Judge (STA) Khairpur under Section 512 Cr.P.C showing all the accused as absconders, the trial Court issued proclamation and attachment under Section 87/88 Cr.P.C. Subsequently, accused Ali Dost Jatoi and Sikandar Halepoto surrendered before the learned trial Court and then charge was framed on 15.04.1993 wherein the present applicants/accused alongwith others were shown as absconders. Applicants/accused were tried in absentia by the Special Court (STA), Khairpur as provided under Section 5-A(4) of the Act, 1975. Mr. Abdul Hadi Khoso was appointed as an Advocate for absconding accused on state expenses. Thereafter, P.W-3 Abdul Fatah (Ex-6) was examined on 16.05.1993 and P.W-5 Khuda Bux (Ex-5) was examined on 28.05.1993 wherein the learned Advocate cross-examined the said witnesses at length on behalf of the applicants/accused.

9. Now, the question arises as to whether the evidence recorded in earlier proceedings can be applied and considered upon the successive proceedings. In this regard, provision of Article 47 of the Qanun-e-Shahadat Order, 1984 is very much clear. In this context, it is appropriate to reproduce the relevant article here-under:-

47. Relevancy of certain evidence for proving, in subsequent proceeding, the truth of facts therein stated. *Evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it is relevant for the purpose of proving, in a subsequently judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable”*

Provided that;

the proceeding was between the same parties or their representatives-in-interest;

the adverse party in the first proceeding had the right and opportunity to cross-examine;

the question in issue were substantially the same in the first as in the second proceeding.

Explanation: *A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this Article.*

10. By virtue of Article 47 of Qanun-e-Shahadat Order, 1984, the evidence given by a witness in a judicial proceeding or before any person authorized by law to take it, is relevant for the purpose of proving in a subsequent judicial proceeding or in a later stage of the same judicial proceeding. Since both the witnesses namely Abdul Fatah and Khuda Bux, who according to report made natural death before initiation of the de-novo

trial, therefore, such evidence was necessary to prove the charge against the applicants/accused. In this context, the reliance is placed on the case of **MUHAMMAD SIDDIQUE V/S. THE STATE (2018 SCMR 71)** wherein the Honourable Supreme Court of Pakistan has held that;

“The law also caters for such like situation that when a witness meets a natural death or other circumstances as provided in Article 47 of the Qanun-e-Shahadat Order, 1984 before recording his statement before the Court then in that case the evidence of such person earlier recorded in any judicial proceeding or before any person authorized under the law to record the same becomes relevant for the purpose of proving those facts but it should be between the same parties or their representatives and that person is cross-examined during that process.”

11. Keeping in view the above case law as well as facts and circumstances of the earlier proceeding against the applicants/accused though the trial was held in absentia but under the special law it was bounden duty of the prosecution to have brought the said evidence on judicial record. If the evidence of P.Ws Abdul Fatah and Mashir Khuda Bux has not been brought on record in accordance with law then their evidence cannot be considered for deciding the case. So far, the contention of the learned Counsel that there is violation of Article 10-A of the Constitution of Islamic Republic of Pakistan, 1973 is concerned which stipulates that ***“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”*** but in this case after completing all the formalities the trial Court issued proclamation and

attachment under Section 87/88 Cr.P.C against the applicants/absconders when their absconion was established/proved on the record and then the learned trial Court proceeded with the matter under Section 512 Cr.P.C. It may further be observed that at the same time the purpose and intent of Article 10A cannot be construed so as to hold the criminal adjudication system hostage or to provide an opportunity to an accused to take benefit by creating mere irregularities. If permitted then it would lead to promote crime instead of thwarting it. The Hon'ble Supreme Court in the case reported as ***Zafar Iqbal v The State (PLD 2015 SC 307)*** in more or less similar facts has discussed the implication of Article 10A in the following terms;

8. That Article 10(1) of the Constitution of the Islamic Republic of Pakistan ("the Constitution") stipulates that an accused shall not, "be denied the right to consult and be defended by a legal practitioner of his choice", but it does not stipulates that, if the accused cannot afford the service of such legal practitioner, the public or State shall bear the professional fee of such legal practitioner. The trial court had provided the appellant the services of a counsel, and had further indulged him by offering him the services of any of the other available counsel if he had any reservations with the counsel appointed for the appellant, but the appellant remained obdurate

10. Under such circumstances it cannot be stated that the appellant was not provided a fair trial or his right to a fair trial was in any manner vitiated. Article 10A of the Constitution (inserted into Constitution by the Eighteenth Amendment Act, 2010) enshrines the right, "to a fair trial and due process", however this does not mean that an intransigent accused can be allowed to hold the criminal adjudication system hostage or create irregularities in the trial with a view to earn a future benefit. If this be permitted then every accused with either not engage a counsel or not permit the counsel appointed by the State to do his job and disrupt the trial with a view to induce an irregularity to gain a subsequent benefit. We have noted that the learned trial judge took abundant care to safeguard the

interest of the accused at every juncture, but the appellant remained adamant.

12. The record shows that the learned trial Court had appointed an Advocate to represent the applicants/accused and learned Counsel appeared on behalf of the applicants/accused had cross-examined the witnesses, hence, they have availed the opportunity of cross-examining the witnesses produced before the learned trial Court. The only remedy available with the applicants/accused was that, in earlier judicial proceedings if both the witnesses namely Abdul Fatah and Khuda Bux were not cross-examined during that process, then the said evidence cannot be used against the applicants/accused but in the case in hand through their Counsel the P.Ws were cross-examined during that process. Moreover, the accused will also have an opportunity to present its case in his statement under Section 342 Cr.P.C.

13. In view of the above stated facts and circumstances, the impugned order dated 05.04.2018 passed by the learned Sessions Judge, Shaheed Benazirabad, does not suffer from any material irregularity and accordingly the same is hereby maintained and the instant criminal revision application is dismissed being meritless.

JUDGE

JUDGE