

JUDGMENT SHEET

IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

Cr. Appeal No.S-102 of 2007

Dates of hearing : 31.10.2022
Date of Judgment : 31.10.2022

Khair Muhammad : Through Mr. Muhammad Hashim,
son of Muhammad Advocate
Usman Khokhar

The Stare : Through Mr. Muhammad Ali Noonari,
Deputy Prosecutor General, Sindh.

JUDGMENT

Muhammad Saleem Jessar, J,- Through instant criminal appeal, appellant has impugned the judgment dated 04.05.2007 passed by learned IInd Additional Sessions Judge, Hyderabad vide Sessions Case No.34/2003, (re: The State v. Khair Muhammad), arising out of FIR No.57/2002 registered at P.S Matiari, under Sections 320, 337-G, 279, 427 PPC, whereby he has been convicted and sentenced to suffer rigorous imprisonment for 10 years and to pay Diyat amount of Rs.7,53,498/- to the legal heirs of deceased; and until he pays full amount of Diyat he shall remain in jail.

2. The facts of the prosecution case are already mentioned in the impugned judgment; therefore, same are not reproduced herein so as to save precious time of the Court.

3. After arguing the case at some length, learned Counsel submits that the appellant being pauper was not in a position to engage the Counsel on his behalf before the trial Court; therefore, entire set of the prosecution witnesses was examined exparte and they were not subjected to cross-examination. He next submits that appellant was not given an opportunity to defend his case nor any Counsel was provided to him by the trial Court on state expenses or even trial Court itself did not bother to conduct the

cross from the prosecution witnesses as envisaged under Article 161 of Qanun-e-Shahadat Order, 1984; therefore, he submits that appellant was condemned unheard and was not given proper opportunity of hearing as enshrined under Article 10-A of the Constitution of Islamic Republic of Pakistan, 1973. He lastly prayed that case may be remanded to the trial Court. He further submitted that appellant was all along on bail during trial; therefore, he may be admitted on bail before remanding of the case. He next submits that if case is going to be remanded, the trial Court may be directed to decide the case within shortest possible time.

4. Learned Deputy Prosecutor General, Sindh did not oppose the proposal so advanced by learned Counsel for the appellant/convict to the extent of remand of the case; however; he submits that entire judgment has been assailed; therefore, it will be appropriate to remand the case to the trial Court in order to give him chance to defend his case properly. He further argued that Presiding Officer of the trial Court was also duty bound to ascertain the truth by putting such questions from the prosecution witnesses as enshrined under Article 161 of Evidence Act / Qanun-e-Shahadat Order, 1984, but he opted to remain mum. He further argued that if the trial Court (Presiding Officer) would have acted in accordance with law, then this Court would not have been burdened. Besides, he has extended his no objection if appellant is admitted to bail.

5. Heard learned Counsel for the appellant as well learned Deputy Prosecutor General, Sindh and perused the record.

6. Admittedly, the appellant was not afforded proper opportunity to defend his case nor was provided the Counsel on state expenses as it was the duty of the trial Court to ascertain the truth by putting such questions from the prosecution witnesses as provided under Article 161 of Qanun-e-Shahadat Order, 1984, but he opted to remain mum. It is observed that the procedure adopted by the trial Court was not in accordance with the law because the accused was condemned unheard as he was not

provided an opportunity to cross-examine the prosecution witnesses and the trial Court taking such evidence into account convicted the appellant. The trial Court while convicting the appellant has also not taken into account the prescribed law as envisaged under Article 10-A of the Constitution, which guarantees for fair trial in order to determine the civil as well as criminal rights of any person / citizen under the obligation. Reliance is placed upon the case of GHULAM RASOOL SHAH and another v. The STATE (2011 SCMR 735) where the Hon'ble Supreme Court of Pakistan has held that;

14. Undeniably, to ascertain the truth or falsity to a charge the statements of the witnesses are judged by conducting cross-examination. It is always said to be the most powerful engine to test the credibility. Statements recorded without going through mill of cross-examination is bound to result in injustice and substantial injustice may occur to an accused. Safer principle is to allow cross-examination by granting reasonable opportunity. Similarly, provision of a defence counsel at State expenses should be out of lawyers having acumen, interest and some experience of trial of murder case. Though the accused have no choice claiming engagement of a particular counsel at State expenses yet he should be given the choice to select one of the counsel out of list of defence counsel maintained by the Court.

7. In view of the above observations as well the dictum laid down by the superior court, I am of the opinion that as the appellant has not been afforded an opportunity of fair trial and has been condemned unheard without giving him an opportunity of cross-examining the witnesses who have deposed against him, which is clear violation not only of law but also of Article 10-A of the Constitution of Islamic Republic of Pakistan, 1973. Therefore, instant appeal is partly allowed and conviction and sentence recorded by the trial Court against appellant vide impugned judgment dated 04.05.2007 handed down by learned IInd Additional Sessions Judge, Hyderabad vide Sessions Case No.34 of 2003, arising out of Crime No.57 of 2002 of P.S Matiari, are set

aside. Resultantly, the case is remanded to the learned trial Court / IInd Additional Sessions Judge, Hyderabad, with direction that the appellant should be given time to engage a private counsel of his own choice, failing which the learned trial Court shall provide him a defence Counsel on state expenses. If the appellant fails to engage a counsel of his own or refuse to be represented by a defence counsel provided on state expenses, the Court will be at liberty to proceed with the trial and the defence counsel so appointed shall be called upon to conduct cross-examination to the prosecution witnesses. Learned trial Court shall expedite the trial and conclude it within a period of 06(six) months under intimation to this Court.

8. Since the appellant all along was on bail before the trial Court; therefore, he is admitted to bail, for which learned D.P.G has extended no objection, subject to his furnishing solvent surety in the sum of Rs.100,000/- (Rupees One Hundred Thousand) and P.R Bond in the like amount to the satisfaction of learned trial Court. The surety should be furnished within two weeks' time. A copy of this judgment alongwith R&Ps of Sessions Case No.34 of 2003 (Re: the State v. Khair Muhammad) be sent to the trial Court for compliance. The appellant is directed to remain present before the trial Court on 21.11.2022.

JUDGE

Shahid

. In support of his contention, he placed reliance on the cases report as 2011 SCMR 735 (Ghulam Rasool Shah and another Vs. the State) relevant page (742), 2018 P.Cr.L.J 200 (Allah Dino and 2 others Vs. The State), 2011 SCMR 23 (Abdul Ghafoor Vs. The State), 2019 MLD 306 (Rajib Ali Naich and others Vs. The State) and 2013 MLD 244.