

IN THE HIGH COURT OF SINDH, KARACHI

*Criminal Jail Appeal No. 115 of 2022 a/w
Confirmation Case No. 13 of 2021*

Before:

Mr. Justice Mohammad Karim Khan Agha
Mr. Justice Khadim Hussain Tunio

Appellant: Sohail Abdul Salam Mughal
through Mr. Iftikhar Ahmed Shah, advocate.

Respondent: The State through Mr. Ali Haider Saleem,
APG Sindh.

Date of hearing: 16.05.2023
Date of decision: 18.05.2023

JUDGMENT

KHADIM HUSSAIN TUNIO, J- The appellant Sohail Abdul Salam Mughal has challenged the vires of judgment dated 10.07.2021, passed by the learned Additional Sessions Judge I, Karachi-East in Sessions Case No. 416 of 2019 culminating from FIR No. 06 of 2019 of P.S. New Town, Karachi registered under sections 302 PPC. Vide impugned judgment, the appellant was convicted u/s 302(b) PPC and sentenced to death and further ordered to pay Rs.1,000,000/- as compensation to the legal heirs of the deceased u/s 544-A Cr.PC, defaulting in the same whereof he was to suffer imprisonment for six months.

2. The appellant, Sohail Abdul Salam Mughal, was a litigant before this Court in Constitutional Petition No. D-6902 of 2019 which he had filed to obtain custody of his children from deceased Munawar Ali with whom Sohail's estranged wife was residing. Inspector Raja Muhammad Tanveer had been appointed by the Court to serve the deceased along with the appellant and to direct him to present the children before the Court. On the eventful day, Inspector Raja Muhammad Tanveer accompanied the appellant and visited the deceased at his apartment numbered 146, 207, New Town Karachi. On their arrival, the Inspector along with the appellant apprised him of the Court order and in the meanwhile, the appellant took his licensed 9mm pistol and shot the deceased Munawar Ali four times before the police. He was immediately apprehended and Munawar Ali was boarded in a

police mobile and taken to Liaquat National Hospital where he was declared dead. Sohail was booked at Police Station New Town along with the case property.

3. In order to establish its case, the prosecution examined an array of witnesses, numbering nine. These individuals, namely: PW-1 Tanveer Ali, PW-2 Babar Ai, PW-3 SIP Muhammad Zubair, PW-4 Inspector Raja Muhammad Tanveer, PW-5 Dr. Abdul Ghaffar, PW-6 Abdul Majeed, PW-7 Khadim Hussain, PW-8 Rehmat Khan and PW-9 SIP Muhammad Iqbal, brought forth a multitude of artefacts and documents, all ostensibly incriminating the appellant. The appellant's statement, recorded under S. 342 Cr.PC, was one of proclaimed innocence. He posited that the police officers were the actual culprits, having slain the deceased in a police encounter, and subsequently, had falsely implicated him in this tragic narrative. However, the appellant refrained from testifying under oath or offering any substantiating evidence that might help his defence, although he moved an application at a later date for correction and re-recording of his statement u/s 342 Cr.PC which shall be discussed herein.

4. Learned counsel for the appellant has mainly contended that various applications for summoning of roznamcha entry, for correction in statement of accused and re-recording of the statement of accused u/s 342 Cr.PC were pending before the trial Court which were completely ignored and without hearing the parties and deciding the same, the learned trial Court passed the impugned judgment which is against the law; that the deceased was killed by the police in an encounter and the appellant was arrested and falsely implicated in the matter. In support of his contentions, learned counsel for the appellant has cited the case of Haji Nawaz v. The State (2020 SCMR 687) and Nadeem Ramzan v. The State (2018 SCMR 149).

5. Learned APG for the State did not controvert such contentions raised by the learned counsel for the appellant and did not object to the remand of the case.

6. We have heard the learned counsel for the appellant, the learned APG and have perused the record available before us.

7. Without entering into the merits of the case, from the perusal of the record we have noted and as has been contended by the learned counsel for the appellant that the appellant made various applications, one dated 17.04.2021 which was not signed by his counsel which raises various questions as to whether he was ill-advised or prejudiced in violation of Article 10-A of the Constitution of Islamic Republic of Pakistan. In the said application, he prayed, with reference to the statement of accused recorded u/s 342 Cr.PC on the same day, as follows:-

“Pray to state with oath as well for re-recordance of my statement, as missing of important, improvements due to my low hearing ailment, please pray also again for verification of witnesses NIC’s through NADRA please.”

8. Accordingly, the learned trial Court marked the statement of the accused at question No. 12 as ‘No’ while observing that *“Accused later on refused to record his statement on oath”*. This exercise cannot be deemed sufficient for all intents and purposes of the application filed by the appellant in the absence of an order of the Court thereon. Even if the same were deemed sufficient, the appellant through his application had raised three different prayers, for his statement to state on oath, for re-recording of his statement and for verification of NICs of witnesses, however the learned trial Court failed to pass an order on the said application, nor heard the parties on the said application and proceeded to convict the appellant, vide the impugned judgment.

9. Another application was filed on 04.03.2021 through his counsel, duly signed by the appellant, with the prayer for production of original roznamcha registers pertaining to the date 13.01.2019 of Police Station Drakshan and Police Station New Town while contending in the same application that the roznamcha entry produced did not have any stamps though the prosecution side was closed vide statement dated 05.04.2021 at Ex. 37. The same is reproduced hereunder for ready reference:-

“Humble pray that it will be highly the prayer please, if and until provision of in-original condition of roznamcha registers of both the P.S re: Drakshan & New Town, for day of incident 13-1-19, because on 30-3-2021 the photo-copy provided of P.S Darakshan roznamcha was only single entry & there was no

entry of my name, as departmental person alongwith Darakshan mobile, only written was petitioner ko lekar jaon ga (urdu).

Sd. Appellant

04.03.2021

Sd. Appellant's counsel"

10. On 06.03.2021, the following diary entry was made by the learned trial Court:-

"DC verbally request for next date. In the interest of justice, matter is adjourned to 08.03.2021 for Evidence at 10:00 AM and hearing on application (to) call roznamcha from PS Darkshan and New Town."

11. These diary entries kept getting filled with the same observations; i.e. hearing of the application for calling roznamcha on the date of hearings: 08.03.2021, 09.03.2021, 11.03.2021, 18.03.2021, 20.03.2021, 22.03.2021, 27.03.2021, 05.04.2021, 13.04.2021, 17.04.2021, 24.04.2021, 07.05.2021, 25.05.2021, 02.06.2021 and ultimately on 07.06.2021 as follows:-

"Matter is adjourned to 12-06-2021 for final arguments and hearing on application (to) call roznamcha from PS Darkshan and New Town."

12. No order on this application was passed nor were any remarks given on the same in the final judgment rendered by the trial Court on 10.07.2021. Needless to say, several adjournments were made for one reason or another, but the case kept getting fixed for hearing of the said application. On the final date of hearing i.e. 12.06.2021, the arguments of the parties were heard. The record fails to mention whether the relevant official was present with the original roznamcha entry or whether the trial Court deemed such production of the record necessary or not and instead of accepting or rejecting such application for additional evidence, the impugned judgment of conviction was passed. This Court is well aware of the inordinate duration these proceedings have taken, and under usual circumstances, remanding the case could risk contravening the principles of due process. Nevertheless, the peculiar circumstances surrounding this case nullify such apprehensions. S. 540 Cr.PC is indicative of its broad intended scope. It bifurcates into two distinct parts: the initial part confers discretionary

powers, whereas the succeeding part imposes mandatory obligations. This in itself is discernible in the linguistic shift from 'may' to 'shall.' Under the initial discretionary segment, the Court is accorded three pathways: (a) summoning any person as a witness, (b) examining any person in court sans summoning, and (c) recalling or re-examining a previously examined witness. The latter obligatory segment, however, obliges the Court to undertake one or more of these actions if the just adjudication of the case necessitates such measures. The statutory interpretation, as it currently stands, does not impose any limitations on the Court's powers, irrespective of the stage of the trial, provided the Court genuinely opines that such an action is indispensable for a just resolution. This interpretation implies that the trial Court had only two appropriate responses to the application as stipulated by S. 540 of the Cr.PC for production of the relevant roznamcha entry through any relevant official to be examined as a Court witness; to either allow the same or dismiss it. In the event of a contrary decision, it was incumbent upon the trial Court to document its reasons for refraining from exercising this prerogative. Disregarding an application without passing an order is not a viable alternative for the Court, as it undermined the appellant's interests, thus infringing upon the right to a fair trial enshrined in Article 10-A of the Constitution of the Islamic Republic of Pakistan. In this respect, reliance is placed on the case of *The State through A.G NWFP v. Abdul Latif and another (1990 PCr.LJ 113)*. Learned trial Court had also failed to pass a property order u/s 517 Cr.PC further showing the hasty manner in which this case was handled.

13. For the foregoing reasons, the captioned appeal is partly allowed, the impugned judgment passed by the learned trial Court dated 10.07.2021 is set aside and the case is remanded back to the learned trial Court with directions to decide all pending applications moved by the appellant and then proceed in the matter in accordance with law. To alleviate concerns of further delay, learned trial Court is directed to expedite with the matter within two months from the date of this order under intimation to this Court. Parties are directed to appear before the learned trial Court on 23.05.2021 without claiming further notice.

14. Resultantly, instant criminal appeal is disposed of in the above terms and Confirmation Case No. 13 of 2021 is answered in the negative.

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