

Judgment Sheet

IN THE HIGH COURT OF SINDH, BENCH AT SUKKUR

**Special Anti. Ter. Jail Appeal No. D – 58 of 2022
Special Anti. Ter. Jail Appeal No. D – 59 of 2022
Special Anti. Ter. Jail Appeal No. D – 60 of 2022
Confirmation Case No. 03 of 2022**

Before:-

**Mr. Justice Naimatullah Phulpoto
Mr. Justice Amjad Ali Bohio**

Date of hearing: **01.08.2023**

Date of judgment : **01.08.2023**

Mr. Rukhsar Ahmed M. Junejo, Advocate for the Appellants
Syed Sardar Ali Shah Rizvi, Additional PG for the State

J U D G M E N T

NAIMATULLAH PHULPOTO, J.- Zaheer Ahmed and Waqar Hussain alias Waqar Ali, the Appellants were tried by learned Judge, Anti-Terrorism Court, Ghotki at Mirpur Mathelo in Special Cases No. 18, 18-A and 18-B of 2020 in the cases arising out of FIRs No.49 of 2020 under Sections 302, 324, 353, 404, 224, 225, 147, 148, 149 PPC and 7- Anti-Terrorism Act, 1997; 58 and 61 of 2020 under Section 25 Sindh Arms Act, 2013, respectively, registered at Police Station, Adilpur, District Ghotki. After regular trial, appellants were found guilty vide judgment dated 13.04.2022, they were convicted and sentenced as under;-

1. *For committing offence U/s 148 PPC, accused Zaheer Ahmed son of Ghulam Nabi and Waqar Hussain @ Waqar Ali son of Mushtaq Ahmed @ Mushtaq both by caste Chachar are convicted and sentenced to suffer R.I for one year.*
2. *For committing offence U/s 224 PPC r/ w section 149 PPC, accused Zaheer Ahmed son of Ghulam Nabi and Waqar Hussain @ Waqar Ali son of Mushtaq Ahmed @ Mushtaq both by caste Chachar are convicted and sentenced to suffer R.I for one year.*
3. *For committing offence U/s 225 PPC r/w section 149 PPC accused Zaheer Ahmed son of Ghulam*

Nabi and Waqar Hussain @ Waqar Ali son of Mushtaq Ahmed @ Mushtaq both by caste Chachar are convicted and sentenced to suffer R.I for one year.

- 4. For committing offence U/s 302(b) PPC r/w section 149 PPC accused Zaheer Ahmed son of Ghulam Nabi and Waqar Hussain @ waqar Ali son of Mushtaq Ahmed @ Mushtaq both by caste Chachar are convicted and sentenced to death. The accused Zaheer Ahmed son of Ghulam Nabi and Waqar Hussain @ Waqar Ali son of Mushtaq Ahmed @ Mushtaq both by caste Chachar shall be hanged by neck till death subject to the confirmation by Honourable High Court of Sindh and so also to pay compensation of Rs.500,000/- (Rupees five lacs) each which shall be paid to the L.Rs of the deceased PC Farzan Ali Kalwar and in case of default in payment of compensation/ fine shall be recovered as arrears of land revenue.*
- 5. For committing offence U/s 324 PPC r/w Section 149 PPC, accused zaheer Ahmed son of Ghulam Nabi and Waqar Hussain @ Waqar Ali son of Mushtaq Ahmed @ Mushtaq both by caste Chachar are convicted and sentenced to suffer R.I for seven years and fine of Rs.1,000/- (Rupees one thousand) each and in case of non-payment of fine, they shall serve R.I for one month more in prison.*
- 6. For committing offence U/s 353 PPC r/w Section 149 PPC, accused Zaheer Ahmed son of Ghulam Nabi and Waqar Hussain @ Waqar Ali son of Mushtaq Ahmed @ Mushtaq both by caste Chachar are convicted and sentenced to suffer R.I for one year.*
- 7. For committing offence U/s 404 PPC r/w Section 149 PPC, accused Zaheer Ahmed son of Ghulam Nabi and Waqar Hussain @ Waqar Ali son of Mushtaq Ahmed @ Mushtaq both by caste Chachar are convicted and sentenced to suffer R.I for one year and fine of Rs.1,000/- (Rupees one thousand) each and in case of non-payment of in prison.*
- 8. For committing offence U/s 25 Sindh Arms Act, 2013 accused Zaheer Ahmed son of Ghulam Nabi and Waqar Hussain @ Waqar Ali son of Mushtaq Ahmed @ Mushtaq both by caste Chachar are convicted and sentenced to suffer S.I for seven years and so also to pay fine of Rs.5,000/- each and in case of default in payment of fine, they shall suffer S.I for two months.*

9. *For committing offence of terrorism U/s 7 (1) (a) Anti-Terrorism Act, 1997 accused Zaheer Ahmed son of Ghulam Nabi and Waqar Hussain @ Waqar Ali son of Mushtaq Ahmed @ Mushtaq both by caste Chachar are convicted and sentenced to death. The accused Zaheer Ahmed son of Ghulam Nabi and Waqar Hussain @ Waqar Ali son of Mushtaq Ahmed @ Mushtaq both by caste Chachar shall be hanged by neck till they are dead, subject to the confirmation by Honourable High Court of Sindh and so also to pay compensation of Rs. 100,000/- each which shall be paid to the L.Rs of the deceased and in case of default in payment of compensation/ fine shall be recovered as arrears of land revenue.*

10. *For committing offence U/s 7 (h) of Anti-Terrorism Act 1997, accused Zaheer Ahmed son of Ghulam Nabi and Waqar Hussain @ Waqar Ali son of Mushtaq Ahmed @ Mushtaq both by caste Chachar are convicted and sentenced to suffer S.I for seven years.*

All the sentences were ordered to run concurrently. The trial Court made Reference for confirmation of death sentence of appellants Zaheer Ahmed and Waqar Hussain alias Waqar Ali.

2. Brief facts of the prosecution case as deposed by Complainant SIP Shahid Hussain before the trial Court are that on 09.07.2020, he was posted as Additional SHO at Police Station Adilpur on the said date he along with his subordinate staff left police station for patrolling duty. During patrolling the above SIP received spy information that some armed persons were going towards village Sachedino Kalwar with intention to commit some crime. On receipt of such information, the police party proceeded to Iqbal Shah check post, where police staff, namely, Police Constable Farzan Ali Kalwar and Zakir Hussain were taken and then police proceeded to village Sachedino Kalwar. It is alleged that on the head light of the police mobile police saw six unidentified persons, out of them, three were armed with Kalashnikovs, one had pistol in his hand and two were armed with lathies. The accused who were armed with lathies had muffled their faces. The culprits were proceeding towards Jamia Masjid Village Sachedino, when they reached near to the culprits and got down from the vehicle. The accused who were armed with firearm weapons fired upon the police party with intention to commit their murder. Police party also fired in their self-defence. During the cross firing one

Manshad Ali Kalwar and Noman Ali Kalwar came out of their houses, they had also seen the culprits. During firing PC Farzan Ali Kalwar apprehended one of the culprits, who was armed with lathi and other culprits in order to rescue the culprit gave lathi blows to PC Farzan Ali and other culprits also gave lathi blows to PC Farzan Ali Kalwar; one of the accused who was armed with Kalashnikov fired upon PC Farzan Ali Kalwar, which hit him on his right side of the abdomen. The accused who was armed with pistol also fired upon PC Farzan Ali Kalwar and fire hit him on his chest, resultantly, PC Farzan Ali fell-down and the culprit who was caught hold by PC Farzan Ali was rescued by his accomplices. He has further deposed that the culprits had taken away G-3 Rifle of PC Farzan Ali. The accused who was armed with pistol took away the magazine of the G-3 Rifle of PC Farzan Ali. Thereafter, all the accused by taking advantage of the dark night succeeded in running away from the scene of the offence. Then the police party saw that PC Farzan Ali had sustained firearm injuries and some blows by means of the firearm. It was 0330 hours PC Farzan Ali succumbed to the injuries. Mashirnama of the place of vardhat was prepared and then dead body was referred to hospital for conducting post-mortem examination and report. SIP lodged FIR against unidentified culprits vide Crime No.49 of 2020 at Police Station, Adilpur for offences under Sections 302, 324, 353, 404, 224, 225, 147, 148, 149 PPC and 7-Anti-Terrorism Act, 1997.

3. On conclusion of the investigation, final report was submitted against appellants Zaheer Ahmed and Waqar Hussain alias Waqar Ali, whereas, accused, namely, Babar Ali and Muhammad Nawaz were show as absconders. It may be mentioned here that the final reports against appellants Zaheer Ahmed and Waqar Hussain alias Waqar Ali were also submitted for offence under Sections 25 of the Sindh Arms Act, 2013. The trial Court amalgamated the off shoot cases with the main case Crime No.49 of 2020 under Sections 302, 324, 353, 404 224, 225, 147, 148, 149 PPC and 7-Anti-Terrorism Act, 1997.

4. The learned Judge, Anti-Terrorism Court, framed charge against appellants under the above referred Sections at Ex.9 to which they pleaded not guilty and claimed to be tried. At the trial, prosecution examined complainant SIP Shahid Hussain at (Ex.12) and the evidence of remaining 14 witnesses was also recorded. Thereafter prosecution side was closed.

5. The trial Court recorded the statements of the appellants under Section 342, Cr.P.C in which they claimed false implication and denied the prosecution allegations. However, they did not examine themselves on oath nor led any evidence in defence in disproof of the prosecution allegations.

6. The trial Court after hearing the learned counsel for the parties and assessment of the evidence vide judgment dated 13.04.2022 convicted and sentenced the appellants to the death and other sentences were also awarded to them in the main as well as in the off shoot cases. Being dissatisfied the appellants preferred these appeals through Superintendent, Central Prison, Sukkur. By this common judgment, we intend to decide aforesaid appeals along with confirmation reference.

7. Mr. Rukhsar Ahmed M. Junejo, Advocate filed power on behalf of the appellants and at the very outset argued that the trial Court had recorded the examination-in-chief of PW-1 Complainant SIP Shahid Hussain in absence of the defence counsel and the illegality committed by the trial Court was not curable under the law. Learned counsel also referred the case diary dated 04.11.2021 in order to show that Mr. Ali Anwer Chachar, Advocate for the Appellants Zaheer Ahmed and Waqar Hussain alias Waqar Ali was not present on the said date and in support of his contentions relied upon the case of **case of Shafique Ahmed v. The State (PLD 2006 Karachi 377)**. .

8. Learned Additional PG after going through the evidence confirmed that the examination-in-chief of PW-1 SIP Shahid Hussain was recorded by learned trial Court in absence of the defence counsel and prayed that case may be remanded to the trial Court for recording examination-in-chief of PW-1 SIP Shahid Hussain in presence of the defence counsel.

9. After hearing the learned counsel for the parties, we have re-examined the evidence recorded by the trial Court. It appears that the evidence of PW-1 Complainant Shahid Hussain was recorded by the trial Court in absence of the defence counsel.

10. It is settled principle of law in the cases of capital punishment examination-in-chief and cross-examination of the prosecution witnesses shall be recorded in presence of the defence counsel. For

any reason, if the defence counsel fails to appear then it is duty of the trial Court to appoint Counsel for the appellant on State expenses, but trial Court cannot record the examination-in-chief of the witnesses in absence of the defence counsel. By such act of the trial Court rightly it is contended that serious prejudice has been caused to the appellants and provisions of Article 10-A of the Constitution of Islamic Republic of Pakistan, 1973, right to fair trial have not been kept in mind, which guarantees the due process and rights of the accused. **The right to a fair trial is a fundamental right protected by the Constitution. In criminal cases where the accused faces the possibility of capital punishment, the right to legal representation and a fair trial becomes even more crucial. The accused has the right to be represented by a defence counsel, and his counsel plays a vital role in examining and cross-examining witnesses and presenting the defence case. In general, evidence obtained in the absence of the defence counsel may be considered inadmissible or unreliable in court, as it can be seen as a violation of the accused's right to a fair trial.** It is submitted before us that the appellants are laymen having no knowledge about the law and their rights that examination-in-chief should have been recorded in presence of the defence counsel, but in this case it has not been done. In case of *Shafique Ahmed (Supra)*, it has been held that it is duty of the courts of Sessions to see that accused is represented by a qualitative legal practitioner in the cases involving capital punishment and it is mandate of the law that the 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.

11. After re-examination of the evidence of PW-1 SIP Shahid Hussain, we have come to the conclusion that the trial Court made error, that affected the fairness of the trial and violated legal rights of accused during trial. Trial Court committed illegality, which is not curable under the law.

12. In the above stated circumstances, impugned judgment which has caused serious prejudice to the appellants is not sustainable under the law, same is set-aside. The case is remanded back to the trial Court with directions to record the evidence of PW-1 Complainant SIP Shahid Hussain **only**. After recording the evidence of the complainant

the trial Court shall record the statements of the appellants under Section 342, Cr.P.C afresh. It is observed that evidence of remaining fourteen (14) prosecution witnesses has been recorded in presence of the defence counsel, they shall not be summoned again. Thereafter, the trial Court after hearing the learned counsel for the parties shall pass judgment afresh in main case as well as in the connected cases in accordance with law.

13. For the above stated reasons, the appeals are allowed to the extent of the remand, consequently, the conviction and sentences recorded by the trial Court vide judgment dated 13.04.2022 are set-aside. The Confirmation Reference No.03 of 2022 made by the trial Court is answered in negative. The appellants Zaheer Ahmed and Waqar Hussain alias Waqar Ali shall be treated as under trial prisoners and they shall be produced before the trial Court on 10.08.2023. Office is directed to send a copy of this judgment along with R & Ps immediately to the concerned trial Court for information and compliance.

14. The appeals as well as confirmation reference are disposed of in the above terms.

Judge

Judge

ARBROHI