

IN THE HIGH COURT OF SINDH, BENCH AT SUKKUR

Criminal Jail Appeal No. S- 303 of 2019

Before:-

Mr. Justice Zulfiqar Ali Sangi

Appellant: Irshad Ali Junejo,
Through Mr. Amanullah Bughti,
Advocate

Complainant: Mst. Amina
Through Syed Murad Ali Shah,
Advocate

The State Through Mr. Zulfiqar Ali Jatoi,
Additional Prosecutor General

Date of hearing: 21-11-2024
Date of Order: 21-11-2024

J U D G M E N T

Zulfiqar Ali Sangi, J.- This Criminal Jail Appeal is directed against the judgment dated 06.12.2019, passed by the Additional Sessions Judge-I/Model Criminal Trial Court, Khairpur, whereby the appellant was convicted and sentenced under Section 302(b) P.P.C for imprisonment for life and to pay fine of Rs.100,000/- as compensation, the compensation, if paid be given to the legal heirs of the deceased Javed Ali alias Sadaruddin as required u/s 544-A, Cr.P.C, in case of default in payment of fine, he shall further undergo S.I for six months more. The benefit of Section 382-B, Cr.P.C was also extended to him.

2. At the very outset, learned counsel for the appellant submits that the chief-examination of important witnesses namely Dr.Hola Ram (Ex. 7), PW Alam Khan (Ex. 8), PW Tarique Hussain (Ex. 9), PW Allah Nawaz (Ex. 10), PW Muhammad Hassan (Ex. 11) and PW Wahadat Ali (Ex. 12) was recorded in absence of defence counsel and the witnesses examined on that day also exhibited certain documents which were considered by the trial court and the appellant was convicted. Learned counsel further submits that fair opportunity was not provided to the appellant to make his defence and to object to exhibiting the documents, which were used against him. Lastly, he

submits that the statement under section 342 Cr.P.C of the appellant was also not recorded in accordance with law as the motive has not been put to the appellant in such statement and it was used against the appellant while awarding conviction and prayed that this is a fit case to be remanded back to the trial court for recording evidence of the above PWs and recording statement under section 342 Cr.P.C.

3. Learned counsel for the complainant and Additional P.G. have not rebutted the above facts and further pointed out that the judgment itself is defective having not been recorded following the law. Therefore, they frankly conceded that the judgment be set aside and the matter be remanded.

4. I have heard learned counsel for the parties and have gone through the material available on the record with their able assistance.

5. On perusal of the material available on the record and the case dairy dated: 17-09-2019, it appears that on that day the defence counsel was called absent and in his absence, chief-examination of witnesses namely Dr Hola Ram (Ex. 7), PW Alam Khan (Ex. 8), PW Tarique Hussain (Ex. 9), PW Allah Nawaz (Ex. 10), PW Muhammad Hassan (Ex. 11) and PW Wahadat Ali (Ex. 12) was recorded, who too exhibited certain documents. It is observed that the present case carries capital punishment and evidence (examination-in-chief, cross-examination and re-examination) of prosecution witnesses should be recorded in the presence of his advocate. This is but logical as most of the accused are laymen who would have little, if any, knowledge of the law and in the absence of defence counsel, they would be unable to adequately defend themselves. For example, during the examination-in-chief of a prosecution witness, the accused would not know which questions he could object to and which documents he could oppose being exhibited. Such inability on his part in my view would lead to an unfair trial and the same is in violation of Article 10-A of the Constitution of the Islamic Republic of Pakistan, 1973, which is reproduced as under:-

“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.”

6. The right of defend to the accused has also been provided in the Criminal Procedure Code, 1898, under section 340(1), Cr.P.C. and the same is reproduced 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."

7. Circular 6 of Chapter VII of Federal Capital and Sindh Courts Criminal Circulars provide that on the committal of the case, the Magistrate is required to ascertain from the accused as to whether he intends to engage a legal representative at his own expense otherwise the Sessions Court would provide an Advocate on State expenses to defend him. The said Circular is reproduced as under:-

"6. In all cases in a Court of Session in which any person is liable to be sentenced to death, the accused shall be informed by the Committing Magistrate at the time of committal, or if the case has already been committed by the Sessions Court that, unless he intends to make his own arrangements for legal assistance, the Sessions Court will engage a Legal practitioner at Government expense to appear before it on his behalf. If it is ascertained that he does not intend to engage a legal representative at his own expenses, a qualified Legal Practitioner shall be engaged by the Sessions Court concerned to undertake the defence and his remuneration, as well the copying expenses incurred by him, shall be paid by Government.

The appointment of an advocate or pleader for defence should not be deferred until the accused has been called upon to plead. The Advocate or pleader should always be appointed in sufficient time to enable him to take copies of the deposition and other necessary papers which should be furnished free of cost before the commencement of the trial. If after the appointment of such legal representative the accused appoints another Advocate or pleader, the Advocate or pleader appointed by the Court may still in its discretion be allowed his fee for the case."

8. The Sindh Chief Court Rules (Appellate Side) (Rule 35) also deals with the same subject and the same is reproduced as under:--

"35. In what matters Advocate appointed at Government cost. When on a submission for confirmation under section 374 of the Code of Criminal Procedure, 1898, or on an appeal from an acquittal or on an application for revision by enhancement of sentence the accused is undefended, an Advocate shall be appointed by the Division Court to undertake the defence at the cost of Government in accordance with the Government notification or rules relating thereto. Such Advocate shall be supplied a copy of the paper book free of cost."

9. As has been discussed above, the legal position is clear that a fair opportunity was not provided to the appellant at the time of recording the Examination-in-Chief of the PWs. If counsel for the accused would have been present, the possibility could not be ruled out that he might have raised objections on some legal issues. It is the mandate of the law that the cases involving capital punishment shall not be tried in the absence of the counsel for the accused as has been held by this court in the case of **Shafique Ahmed v. The State (PLD 2006 Kar. 377)** wherein this court has held as under:-

"It is one of the duties of the Court of Session to see that the accused is represented by a qualified legal practitioner in the cases involving capital punishment. Thus, it is the mandate of the law that 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"

10. I have carefully examined the case diary dated:17-09-2019 and noted that the advocate for the appellant was not present on such date and the above-named witnesses were examined in his absence without adjourning the matter for some other date considering the fact that learned counsel for the appellant was not available and the case carried capital punishment. In these circumstances, I am of the considered view that the trial court did not perform its functions diligently and recorded examination-in-chief of witnesses named above in absence of the defence counsel by ignoring Article 10-A of the Constitution of Islamic Republic of Pakistan, 1973, section 340(1), Cr.P.C. and Circular 6 of Chapter VII of Federal Capital and Sindh Courts Criminal Circulars so also settled principles of law. As such, the appellant was prejudiced in the trial and defence. Therefore, a miscarriage of justice has been committed in the case. The procedure adopted by the trial court was illegal and was not curable under section 537, Cr.P.C. and has vitiated the trial. Therefore, the impugned judgment is required to be set-aside.

11. Besides, the above illegality committed by the trial court, the trial court also did not record the statement under section 342 Cr.P.C of the appellant in accordance with the law. The trial court in its judgment at typed page 05 in the second paragraph discussed about the motive and observed that it was gone un-challenged and the

same was established by the prosecution against the appellant but on perusal of the statement under section 342 Cr.P.C of the appellant, it reflects that the motive was not put to him for the explanation which is the mandatory requirement of law. It is settled law that all the incriminating pieces of evidence available on record in the shape of examination-in-chief, cross-examination or re-examination of witnesses are required to be put to the accused, if the same is against him while recording his statement under Section 342 Cr. P.C in which the words used *“For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him.”* which demonstrate that not only the circumstances appearing in the examination-in-chief are put to the accused but circumstances appearing in cross-examination or re-examination are also required to be put to the accused, if they are against him because the evidence means examination-in-chief, cross-examination and re-examination, as provided under Article 132 read with Articles 2(c) and 71 of Qanun-e-Shahadat Order, 1984. The Supreme Court of Pakistan vide order dated 04-03-2021 in the case of **Jan Muhammad vs. The State and others (Crl. Appeal No. 77 of 2020)** while remanding the case to the trial Court has observed as under:-

“5. It has been observed by us with concern that none of the afore-mentioned pieces of evidence has been put to the appellant while examining him under section 342, Code of Criminal Procedure. It has been laid down many a time by this Court that a piece of evidence produced by the prosecution against an accused if not put to accused while examining him under section 342, Code of Criminal Procedure cannot be used against him. The rationale behind it is that the accused must know and then respond to the evidence brought against him by the prosecution. He (accused) must have firsthand knowledge of all the aspects of the prosecution case being brought against him. It appears that even the learned Judge in chambers of High Court while reappraising evidence available on record did not consider this aspect of the matter. Keeping in view the peculiar circumstances of the case, learned counsel for the appellant and learned Additional Prosecutor General, Sindh assisted by widow of deceased are in agreement that the matter needs to be remanded to the learned trial Court for re-recording statement of appellant under section 342, Code of Criminal Procedure while putting all pieces of prosecution evidence produced during trial to him, giving him an opportunity to know and respond to the same.

6. For the foregoing, the instant criminal appeal is allowed. The impugned judgments of the learned High Court and that of the learned trial Court are set aside. Resultantly, the conviction and sentence of the appellant is also set aside. He shall be treated as an under-trial prisoner. The learned trial Court shall record the statement of appellant under section 342, Code of Criminal

Procedure afresh by putting him all pieces of prosecution evidence, enabling him to know and respond to the same and shall decide the case after hearing the parties, within one month of the receipt of this order. In case of conviction of appellant by the trial Court and in the event of filing a criminal appeal by him before the learned High Court, the same shall be decided within one month of its filing. A copy of this order shall be sent to the Registrar, High Court of Sindh, Karachi for its circulation among all the Judges of trial Courts in the Province of Sindh for perusal and strict compliance.

12. As has been discussed above, the criminal jail appeal is partly allowed. The conviction and sentence awarded to the appellant through impugned judgment dated: 06-12-2019 are set-aside, and the case is remanded back to the trial Court for recording evidence of the PWs Dr Hola Ram (Ex. 7), PW Alam Khan (Ex. 8), PW Tarique Hussain (Ex. 9), PW Allah Nawaz (Ex. 10), PW Muhammad Hassan (Ex. 11) and PW Wahadat Ali (Ex. 12) in presence of the Advocate of the appellant by affording an opportunity of cross-examination and thereafter record the statement under section 342 Cr.P.C a fresh as observed above and after giving the full opportunity of hearing to both the parties and to decide the case expeditiously in accordance with the law. If the trial court observes that the witnesses are not cooperating in recording evidence the trial court may take coercive action against them to ensure the recording of their evidence as being an old case pertaining to the year of 2013. The trial court completes such exercise within two months by adjourning the case on a day-by-day basis and no necessary adjournment should be granted. It is further clarified that if the defence counsel does not appear for the proceeding the trial court may appoint any other advocate on State expenses to defend the case of appellant.

13. The above criminal jail appeal is disposed of in the above terms.

JUDGE