

**IN THE HIGH COURT OF SINDH, CIRCUIT COURT,
LARKANA**

Crl. Appeal No. D- 36 of 2019.

Crl. Confirmation Case No. D- 10 of 2019.

Present:

Mr. Justice Naimatullah Phulpoto.

Mr. Justice Zulfiqar Ali Sangi.

Appellants:

1. Ghulam Ali alias Lami S/o Dost Ali
2. Dost Ali S/o Malhar
Through Mr. Asif Ali Abdul Razzak Soomro,
Advocate.

Respondent:

The State, through Mr. Aitbar Ali Bullo, Deputy
Prosecutor General.

Dates of hearing: 08.12.2020.

Date of the decision: 23-12-2020.

JUDGMENT

Zulfiqar Ali Sangi, J: Through Crl. Appeal No. D-36 of 2019 appellants Ghulam Ali alias Lami and Dost Ali have impugned the judgment dated 23.5.2019, passed by learned 2nd Additional Sessions Judge, Jacobabad, in Sessions case No.452/2015, re; State v. Ghulam Ali and others, arisen out Crime No.19/2015 of P.S Bahoo Khoso, under Sections 302, 324, 311, 148 and 149 P.P.C., whereby they have been convicted and sentenced to death for offence under Section 302 (b) P.P.C and to pay Rs.100,000/- each to legal heirs of deceased in terms of Section 544-A Cr.P.C and in case of default of payment to suffer imprisonment for four months more.It was also ordered that the fine is be recovered as arrears of land revenue and for offence under Section 337-F (v) P.P.C read with section 149 P.P.C to R.I for three years each and to pay Rs.30,000/- each as “Daman” to be paid to injured Nabi-dad alias Nabi Bux.Whereas Crl. Confirmation Case No. D- 10 of 2019 has been made by the learned trial Court for confirmation of ***death-sentence***.

2. The case of prosecution is that, on 27.5.2015 complainant SIP Ali Muhammad Odho lodged F.I.R on behalf of the State, stating therein that on fateful day he alongwith his subordinate staff left Police-station vide entry No.10 for patrolling purpose and during patrolling when they reached near village Haibat Bangulani, they heard gunshot reports and cries from the house of accused Ghulam Ali alias Lami, to which they proceeded towards the specific place, where they saw and identified accused Ghulam Ali alias Lami, Gulab alias Dero, Dost Ali duly armed with T.T pistols and two unidentified

culprits, who were armed with guns were firing upon a person, who received injuries and fell down on the ground. The police party disclosed their identity to be police and proceeded towards accused, to which all the accused went towards the house. Then police party saw on the light of vehicle that accuse Ghulam Ali alias Lami, Gulab alias Dero and Dost Ali were firing upon a woman, who received injuries and fell down. Thereafter, all the accused raised "hakals" of "Karo-Kari" and made their escape good while taking benefit of darkness. The police party enquired from injured, who disclosed his name to be Nabi Bux and further disclosed that, he was declared as "Karo" with Mst. Lakhan wife of Gulab, by above named accused and they caused injuries to him. The police party noticed that Mst. Lakhan died within their sight, hving firearm injuries on her chest and injured Nabi Bux having injuries on his left leg. The police party then returned to police-station where instant F.I.R was registered on behalf of the State vide Crime No.19/2015 of P.S Bahoo Khoso, under Sections 302, 324, 311, 148 and 149 P.P.C. against the accused.

3. After usual investigation challan was submitted before the court having jurisdiction under the above referred sections. The trial court after completing all the formalities framed the charge against the appellants, to which they pleaded not guilty and claimed to be tried.

4. At the trial prosecution in order to prove its case, examined P.C Sikander Ali PW-1 at Ex.19, H.C Ali Sher PW-2 at Ex.20, Nabi Dad alias Nabi Bux PW-3 at Ex.21, Dr. Liaquat Ali PW-4 at Ex.22, who produced Provisional MLC and Final MLC of injured at Ex.-7-C, WMO Dr. Rabia Khan PW-5 at Ex.23, she produced postmortem report, Tapedar Qaimuddin Noonari PW-6 at Ex.24, who produced sketch at Ex.24-A., Inspector Ali Muhammad PW-7 at Ex.25, who produced inquest report, memo of injuries of injured Nabi Bux, memo of place of incident, F.I.R, memo of recovery of last wearing clothes of deceased, memo of arrest of accused Ghulam Ali alias Lami and recovery of pistol so also chemical examiner report at Ex.14-A to Ex.14-J. Lastly, the prosecution closed its side vide Ex.27.

5. The trial court recorded the statements of appellants under Section 342 Cr.P.C. at Ex.28 and Ex.29 in which they denied the prosecution allegations against them and also denied to examine themselves on oath and to lead evidence in their defence.

6. The learned trial Court on conclusion of trial and hearing the advocate for the appellants passed the impugned judgment whereby convicting and sentencing appellants, as stated above.

7. Learned counsel for the appellant criticized the impugned judgment and argued that, most of the prosecution witnesses are police personnel of the same police-station. Per learned counsel the prosecution witnesses have made contradictions, improvements and omissions in their evidence on the very material points, therefore, their evidence is un-reliable and un-trustworthy. He further contended that examination-in-chief of most of the witnesses was recorded in absence of the advocate of the appellant which caused prejudice to the appellants in their defence, he further submitted that the case may be remanded to the trial court for recording evidence in presence of advocate of the appellants, being case of capital punishment. Lastly, learned advocate for the appellants submitted that case pertaining to the year 2015 and in case if the case is remanded to the trial court, the appellants may be released on bail.

8. Learned Addl. P.G. could not controvert the arguments of learned appellant's counsel that the examination-in-chief of most of the witnesses was recorded in absence of the advocate of the appellants. He further submitted that a fair trial is right of the accused guaranteed under the Constitution of Pakistan and raised no objection for remand of the case to the trial court for recording evidence of the witnesses afresh in presence of defence counsel and deciding the case afresh on merits in accordance with law.

9. We have heard the learned counsel for the appellants, learned D.P.G. and perused the record and have read the evidence of prosecution witnesses.

10. We have examined the evidence recorded by the trial court and found that on 21-09-2017, charge was amended. Thereafter on 12.12.2017 evidence of PC Sikander Ali was recorded and he was cross-examined, on 05-01-2018 evidence of HC Ali Sher and Nabi Dad @ Nabi Bux was recorded and they were cross-examined by learned advocate for the appellants **(Injured PW Nabi Dad @ Nabi Bux had not supported the case of prosecution)**. However, on 08-03-2018 examination-in-chief of Dr. Liaqat Ali and lady Dr. Rabia Khan was recorded in absence of the advocate of the appellants, on 30-03-2018 examination-in-chief of Qaimuddin Tapedar and Inspector Ali Muhammad **(complainant/eye witness)** was recorded in absence of advocate of the appellants.

11. We also observed that learned trial court recorded examination-in-chief of official witnesses in absence of the advocate for the appellants and 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 presence of his advocate. This is but logical as most of accused are laymen who would have little, if any, knowledge of the law and in the absence of defence counsel 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 our view would lead to an unfair trial and the same is in violation of Article 10-A of the Constitution of Islamic Republic of Pakistan, 1973, the same 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.”

12. 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."

13. 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 expense 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."

14. The Sindh Chief Court Rules (Appellate Side) (Rule 35) is 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."

15. As has been discussed above, the legal position is clear that a fair opportunity was not provided to the appellants at the time of recording Examination-in-Chief of the PWs. If counsel for the accused would have been present, possibility could not be ruled out that he might have raised objection on some legal issues. It is the mandate of the law that the cases involving capital punishment shall not be tried in absence of the counsel for the accused as has been held by this court in 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"

16. We have carefully examined the case diaries from the date of amendment of the charge viz 21-09-2017 till the date of final arguments viz 10-08-2018 and noted that the advocate for the appellants was present on each and every date and only on two dates viz 08-03-2018 and 30-03-2018 was absent and the trial court recorded the chief-examination on both the dates without adjourning the matter for some other date considering the fact that learned counsel for the appellants was regularly attending the court and was proceeding the case. In these circumstance, we are 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 appellants were prejudiced in the trial and defence. Therefore, a miscarriage of justice has been committed in the case. Procedure adopted by the trial court was illegal that was not curable under section 537, Cr.P.C. and has vitiated the trial. Therefore, the impugned judgment is required to be set aside.

17. As has been discussed above, appeal is partly allowed. The conviction and sentence awarded to the appellants through impugned judgment dated: 23.5.2019 are set aside, the case is remanded back to the trial Court for re-trial from the stage of recording of evidence of prosecution witnesses (whose chief-examination was recorded in absence of advocate of the appellants) in presence of the advocate for the appellants in accordance with law. Thereafter, to record statement of accused under section 342 Cr.P.C afresh and after giving full opportunity of hearing to both the parties and to decide the case expeditiously in accordance with law. Both parties are directed to appear before trial court on 06.01.2021. Trial Court is directed to issue P.O for accused for the said date.

18. Since we have remanded the case to the trial court therefore, the plea of bail is also to be decided by the trial court if the appellants moved their bail application. In these circumstances trial court is further directed to decide the bail application of the appellants if they file expeditiously in accordance with law.

19. The above appeal and the confirmation reference are disposed of in the above terms.

JUDGE

JUDGE

