IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

Present:
MR. JUSTICE NAIMATULLAH PHULPOTO
MRS. JUSTICE RASHIDA ASAD

Cr. Jail Appeal No. D-11 of 2018
Confirmation Case No.04 of 2018

Date of hearing:	13.08.2020
Date of Judgment:	03.09.2020
Appellant:	Dadan and others. Through Mr. Omparkash H. Karmani, advocate.
Complainant:	Muhammad Malook Unar, Through Mr. Wahid Bux Aajiz Laghari, advocate.
State:	Through Mr. Shahzado Salim Nahyoon, D.P.G.

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J U D G M E N T

RASHIDA ASAD, J: The appellants have impugned the judgment dated 22.01.2018, passed by II-Additional Sessions Judge, Shaheed Benazirabad, in case Crime No.24 of 2014, registered at Police Station Khadhar, whereby they were convicted by the trial court for an offence under section u/s 302(b), P.P.C. read with section 34, P.P.C. and were sentenced to death.

2. Brief facts of the prosecution case as disclosed in the FIR by the complainant Muhammad Malook Unar, are that his married son Talib Hussain, resident of Mehar Colony Sakrand City left the house on 19.02.2014, along with his friends towards Khadhar. He came to know about this fact from Talib's family, on phone, when he called them. The family of Talib Hussain further informed him that he had not yet returned to the house. That during search his nephew Noor Ali told him that he met Talib Hussain, who was going to Khadhar along with two friends whose names were not known to him. On

21.02.2014, the complainant suspecting murder of his son visited Edhi Center Nawabshah, with his other sons, and identified a body as his son Talib Hussain, lying unidentified, shifted by police of Khadhar. Thereafter, they went to PS Khadhar and were informed by the police officials that dead body of deceased was found on 20.02.2014 at 0930 hours from Sim Nallah having hatchet below on Head, the blood was oozing from head and other parts. The police also shown them clothes of deceased and told that they shifted the body being unclaimed to Edhi Center, after the post-mortem examination was conducted. Hence aforementioned FIR registered against two unknown persons / friends of his son Talib Hussain, who were lastly seen with deceased, and murdered him by causing hatchets blows.

3. After completing the usual investigation, the investigation officer submitted challan against accused Dadan and Muhammad Saleem for offence u/s 302,34 PPC.

4. The learned trial court framed charge against both accused at Ex.2 to which they pleaded not guilty and claimed their trial.

5. In order to prove its' case, the prosecution examined nine (9) prosecution witnesses and exhibited numerous documents, in support of its case whereafter the prosecution closed its' side.

6. Trial court recorded statements of accused under Section 342 Cr.P.C. at Ex.17 and Ex.18 respectively, wherein they denied the allegations of the prosecution and professed their innocence. However, they neither examined themselves on oath under section 340(2), Cr.P.C. nor led any evidence in their defense. Finally at the conclusion of trial, the learned trial Court after hearing the parties

convicted and sentenced the appellants vide impugned judgment in the terms as stated above. Hence this appeal.

7. Learned counsel for the appellants mainly contended that the trial Court had not recorded statements under section 342, Cr.P.C. of both appellants in accordance with law. He has referred to certain incriminating pieces of evidence, which the trial court later relied upon to convict the appellants had not been put to them for their explanation, He further contended that alleged story of “found together” (last seen evidence) deposed by P.W Noor Ali, medical evidence, confessional statements of accused, recovery of the incriminating articles and call data record, on which the learned trial court relied and convicted the appellants by awarding capital punishment must be put to accused persons / appellants, enabling them to offer such explanation but the accused persons were not given opportunity of fair trial and in view of above defects/omissions appellants are entitled to acquittal.

8. Mr. Shahzado Saleem Nahiyoon learned D.P.G conceded to the contentions raised by learned counsel for appellants and stated that besides above stated pieces of evidence, no question regarding recovery of dead body, search of house on pointation and recovery of cellular phone and recovery of purse of accused in presence of mashirs so also recovery of knife on pointation of accused Saleem, recovery of motorcycle, used in the crime, report of chemical examiner, were not confronted with both accused. He contended that it is the mandatory requirement of law that every incriminating piece of evidence is to be put to the accused in his statement u/s 342 Cr.P.C in order to seek explanation which has not been done in this case, therefore, the case may be remanded back to the trial

court to re-record the appellants' statements u/s 342 Cr.P.C afresh in order to give opportunity of furnishing explanation.

9. We have carefully heard the learned counsel for the parties and perused the relevant record.

10. From the perusal of record, it appears that prosecution has brought on record the following pieces of evidence against the appellants:

1. Last seen evidence,
2. Medical evidence (Ex.9/A and 9/B)
3. Confessional statements of accused recorded before the Judicial Magistrate (Ex.8/H and 8/I) and incriminating articles,
4. Recovery of crime weapons (Ex.7/B),
5. Call data record (Ex.8/B and 8/D))
6. Recovery of Cell phone and purse on pointation of accused Dadan from his house, in presence of witnesses, and
7. Chemical report regarding blood stained clothes of deceased.

We are surprised to note that almost all the aforesaid incriminating evidence and circumstances against both accused were not put for explanation during statements of accused recorded u/s 342 Cr.P.C. To prove the aforesaid accusation, it is necessary to refer to the evidence produced against the accused persons by prosecution. It appears that the trial court in very casual manner recorded stereotype statements of both the appellants. For the sake of convenience, statement of one accused is reproduced as under:-

"STATEMENT OF ACCUSED U/S. 342 CR.P.C. at Ex.18.

Name: *Dadan*
F/Name:- *Muhammad Ismail*
Religion: *Islam*
Caste: *Unar*
Age about: *36 years*
Occupation: *Cultivation.*

Residence: Village Bago Unar, Taluka Sakrand.

Q.No.1. You have heard the prosecution story, it has come in evidence that on 20.02.2014 at Simnala, Deh Kumb Taluka Sakrand, you along with co-accused committed murder of Talib son of complainant Muhammad Malook by causing him fire arm injuries on his temporal region. What you have to say?

Ans. No Sir, it is false case, it is registered against us at the instigation of complainant party by police.

Q.No.2. What the P.Ws deposed against you?

Ans. P.W have deposed against me falsely at the instance of complainant who are his set-up persons. Complainant party demanded our land to sell out them for which we did not agree, therefore they registered false case against us.

Q.No.3. Do you want to give evidence on oath in disproof of the charge made against you as provided by sub-section (2) of section 340 Cr.P.C?

Ans. No Sir.

Q.No.4. Do you want to examine any witness in your defence?

Ans. No sir.

Q.No.5. Do you want to say anything else?

Ans. Sir I am innocent. I pray for justice as complainant involved us because we reused to sell out our land to complainant party whereas whatever investigation was made against us and papers produced by complainant and police party all were prepared at the instigation of complainant.

Sd/-27.10.2017
2nd Additional Sessions Judge, Shaheed Benazirabad."

11. From the perusal of the aforesaid statement of the accused recorded u/s 342 Cr.P.C, it is clear that the questions with regard to alleged recovery of hatchet and knife on pointation of appellants, the last seen evidence, un-natural death of deceased, collection of call data record, medical evidence and confessional statements of the

accused, positive reports of expert were not put to the accused for their explanation which certainly has caused serious prejudice to the accused. It is an established law that provisions of section 342 Cr.P.C. are mandatory in nature and if any piece of evidence is not put to an accused in his statement u/s 342 Cr.P.C. The Honourable Supreme Court of Pakistan in an unreported judgment in Criminal Appeal No.292 of 2009 dated 28.10.2010 in the case of Muhammad Hassan v. The State was pleased to hold as under:-

> *"3. In view of the order we propose to pass there is no occasion for going into the factual aspects of this case and it may suffice to observe that the case of the prosecution against the appellant was based upon prompt lodging of the FIR, statements of three eyewitnesses, medical evidence, motive, recovery of weapon of offence and a report of the Forensic Science Laboratory regarding matching of some of the crime empties with the firearm allegedly recovered from the appellant's possession during the investigation but we have found that except for the alleged recovery of a Kalashnikov from the appellant's possession during the investigation no other piece of evdience being relied upon by the prosecution against the appellant was put to the appellant at the time of recording of his statement under section 342, Cr.P.C.*
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> *4. It is by now a settled principle of criminal law that each and every material piece of evidence being relied upon by the prosecution against an accused person must be put to him at the time of recording of his statement under section 342, Cr.P.C. so as to provide him an opportunity to explain his position in that regard and denial of such opportunity to the accused person defeats the ends of justice. It is also equally settled that a failure to comply with this mandatory requirement vitiates a trial. The case in hand is a case of murder entailing a sentence of death and we have truly been shocked by the cursory and casual manner in which the learned trial court had handled the matter of recording of the appellant's statement under section 342, Cr.P.C which statement is completely shorn of the necessary details which were required to put to the appellant. We have been equally dismayed by the fact that even the learned Judges of the Division Bench of the High Court of Sindh deciding the appellant's appeal had failed to take notice of such a glaring illegality committed by the learned trial court. It goes without saying that the omission on the part of the learned trial court mentioned above was not merely an irregularity curable under section 537, Cr.P.C. but the same was a downright illegality which had vitiated the appellant's conviction and sentence recorded and upheld by the learned courts below.*

> *5. For what has been discussed above this appeal is allowed, the impugned judgments of the learned courts below are set aside and the case is remanded to the learned trial court for recording the appellant's statement under section 342, Cr.P.C afresh and then to proceed further in the matter in accordance with the law."*

12. In the case of Muhammad Nawaz and others v. The State and others (2016 SCMR 267) Honourable Supreme Court of Pakistan has observed as under:--

> *"……..While examining the appellants under section 342, Code of Criminal Procedure, the medical evidence was not put to them. It is well settled by now that a piece of evidence not put to an accused during his/her examination under section 342, Code of Criminal Procedure, could not be used against him/her for maintaining conviction and sentence."*

13. The omission committed by the trial Court in recording the statements u/s 342 Cr.P.C as highlighted above is not curable under the law, the same has vitiated the trial. As such the impugned judgment is not sustainable in law, the same is therefore, set aside and the case is remanded back to the trial Court for recording the statements of accused u/s 342 Cr.P.C afresh by putting all the incriminating pieces of evidence to the accused as reflected in the evidence and to decide the case after hearing the counsel for the parties. We take notice of the fact that the occurrence in this case had taken place way back in the year 2014, i.e. about six years ago and, thus, the learned trial court is directed to complete the post-remand proceedings of this case within two months of receipt of a copy of this judgment.

Aforesaid appeal is disposed of in the above terms. Confirmation Reference made by the trial Court is answered in negative.

JUDGE

JUDGE

Ali Haider