

IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Cr. Jail Appeal No.S-40 of 2013

Ilahi Bux Gurgio

Versus

The State

Mr. Zulfiqar Ali Sangi, Advocate for the Appellant

Mr. Zulfiqar Ali Jatoi Deputy Prosecutor General for the State

Date of hearing: **03-7-2017**

Date of Judgment: **03-7-2017**

JUDGMENT

Naimatullah Phulpoto, J: Appellant Ilahi Bux alias Gurgio alongwith acquitted co-accused Ashique Ali, Muharram Ali, Dadan and Mutaz Ali was tried by learned 3rd Additional Sessions Judge, Khairpur for offences under sections 302, 34 PPC. After full-dressed trial, vide judgment dated 14.6.2007, appellant Illahid Bux @ Gurgio was convicted under section 302 PPC and sentenced to suffer imprisonment for life and to pay compensation of Rs.100,000/-(rupees one lac) to the legal heirs of deceased Lal Bux. In case of default in payment of compensation the accused shall suffer one year more R.I. Benefit of section 382-B Cr.P.C. was extended to the appellant. Remaining accused namely Ashique Ali, Dadan, Muharram Ali and Mumtaz Ali were acquitted of the charge.

2. Brief facts leading to the filing of the appeal are that on 01.6.2007, at 6.00 p.m complainant, his brother Muhammad Hassan and relatives Ghulam Nabi and Lal Bux came in village Naseer Fakir. It is alleged that Lal Bux (now deceased) went for the purpose of purchasing cigarettes from the shop when complainant party saw five accused persons namely Illahi Bux @ Gurgio, Ashique Ali, Dadan, Mumtaz armed with pistols and accused Muharram armed with gun. It is alleged that they caught hold of Lal Bux and declared that he would not be spared. Saying so all the accused persons fired upon Lal Bux with intention to kill him and the fire opened by accused Illahi Bux hit to Lal Bux

who fell down. It is alleged that complainant party tried to rescue the deceased and offered resistance but accused persons went away while raising slogans that they had taken revenge of Ghulam Akbar. After the incident, complainant party saw that Lal Bux had sustained fire arm injuries and he had expired. Thereafter complainant went to Police Station and lodged report. It was recorded by SHO Police Station Kotdiji on 01.6.2007, vide Crime No.85/2007, under sections 302, 148, 149 PPC.

3. During investigation accused Illahi Bux @ Gurglo and Ashique Ali were arrested. Accused Illahi Bux @ Gurglo prepared to produce pistol used by him in the commission of offence and led the police party on 29.6.2007 to the pointed place and produced country made pistol of 12 bore and one live cartridge of 12 bore of red colour. After usual investigation challan was submitted against the accused Illahi Bux @ Gurglo and Ashique Ali. Accused Muharram Ali and Mumtaz were shown as absconders while name of accused Dadan was placed in column-II of the final report. Subsequently accused Mumtaz Ali was joined to face the trial.

4. Charge was framed against accused Illahi Bux @ Gurglo, Ashique Ali, Mumtaz Ali and Dadan on 06.8.2008 at Ex.2 under section 302, 34 PPC by learned III-Additional Sessions Judge, Khairpur. Accused pleaded not guilty and claimed to be tried. Thereafter, accused Muharram Ali was joined as accused and amended charge was framed at Ex.8. Accused pleaded not guilty and claimed to be tried.

5. At the trial, prosecution examined following witnesses:

- i. PW-1 complainant Mir Khan Qambrani at Ex.15.
- ii. PW-2 Muhammad Hassan Qambrani at Ex.16
- iii. PW-3 Ghulam Nabi Qambrani at Ex.17
- iv. PW-4 author of FIR/ASI Qadir Bux Shar at Ex.18
- v. PW-5 I.O/SIO Abdul Sami Waseer at Ex.19
- vi. PW-6 masir Budhal Qambrani at Ex.19
- vii. PW-7 Dr.Syed Hassan Shah at Ex.20
- viii. PW-8 I.O/SIP Sikander Ali Chang at Ex.21. Thereafter, prosecution side was closed.

6. Statements of accused were recorded under section 342 Cr.P.C. at Ex.23 to 27, in which they claimed false implication in this case and denied the allegations of prosecution. Accused have stated that PWs have deposed against them due to enmity. Accused declined to examine themselves on oath in disproof of prosecution allegations. Accused have also not led evidence in defence.

7. Learned trial court after hearing the learned counsel for the parties and assessment of evidence vide judgment dated 14.6.20-2007 convicted the appellant Illahi Bux @ Gurglo u/s 302 PPC and sentenced him to suffer imprisonment for life and co-accused Ashique Ali, Muharram Ali, Dadan and Mumtaz Ali were acquitted of the charge. Thereafter appellant Illahi Bux @ Gurglo preferred this appeal.

8. Mr. Zulfiqar Ali Sangi learned Advocate for the appellant Illahi Bux @ Gurglo mainly contended that PWs Sikander Ali and Abdul Sami were not cross-examined by the Advocate for the appellant before the trial court on material points for just decision of the case. He also contended that serious prejudice has been caused to the appellant for not cross-examining the witnesses on material points of the case. It is also contended that the trial was conducted in a very casual manner by the trial court, cross-examinations of PW-4 Qadir Bux and PW-5 Abdul Sami were reserved and they were never cross-examined by the accused. It is also argued that trial court in the judgment has relied upon the medical evidence and corroborative pieces of evidence but report of ballistic expert and chemical examiner were not produced in the evidence. It is also contended that all the incriminating pieces of evidence were not put to the accused in the statement of accused recorded u/s 342 Cr.P.C. It is also contended that motive for the commission of offence was also not put to the accused while recording his statement under section 342 Cr.P.C at Ex.23. He submits that this is a fit case for remand to the trial court for cross-examination of PW-4 Qadir Bux and PW-5 SIO Abdul Sami Wasir and for recording statement of accused under section 342 Cr.PC afresh. In support of his contention he has relied upon the case of **Muhammad Shah Vs. The State (2010 SCMR 1009)**.

9. Mr. Zulfiqar Ali Jatoti leaned Deputy Prosecution General conceded to the contentions raised by learned counsel for the appellant and after going

through the evidence argued that the cross-examination of PW-4 Qadir Bux and PW-5 Abdul Sami was reserved but these two PWs never appeared before the trial court for cross-examination and trial court did not bother to call these witnesses for cross-examination. He further submits that in this case empties were recovered so also the country made pistol from the appellant and blood stained earth was also sent to chemical examiner. Positive report of chemical examiner is available in the police papers but it was not produced in evidence. He further submits that SIO Abdul Sami has also not produced the report of ballistic expert. As regard to the motive, learned Deputy Prosecutor General submits that question regarding motive was also not put to accused Illahi Bux in his statement under section 342 Cr.P.C.

10. I have carefully heard learned counsel for the parties and scanned the entire evidence.

11. From perusal of evidence it transpires that cross-examinations of PW-4 Qadir Bux and PW-5 Abdul Sami have been reserved as Advocates for accused Ashique, Mumtaz and Dadan were not present but trial court failed to call these witnesses for cross-examination. So far cross-examination of PWs on behalf of accused Illahi Bux is concerned, only a few questions have been put to the witnesses. Apparently, these two witnesses were not cross-examined by the Advocate for accused appearing before the trial court on material points for just decision of the case. Moreover, case was proceeded by the trial court in absence of the defence counsel of accused Ashique, Mumtaz and Dadan. It is settled principle of law that murder case cannot be proceeded in absence of the defence counsel but in this case trial court proceeded in absence of the defence counsel of some of the accused persons. In the case of **Shafique Ahmed alias Shahjee Vs. The State (PLD 2006 Karachi 377)** this court has observed as under:

“In the present case the trial Court did not perform its function diligently as in the beginning trial commenced in the absence of Advocate of both the appellants. Only two witnesses were examined in the presence of Advocate for the appellant Shafique. The remaining witnesses were also examined in the absence of Advocates for the appellants. As such, the appellants were prejudiced in their trial and

defence, therefore, a miscarriage of justice has occurred in the case. The procedure adopted by the trial Court is an illegal procedure, that cannot be cured under section 537, Cr.P.C. Thus, it has vitiated the trial. Hence the impugned judgment is required to be set aside.”

12. Moreover, as regard to the motive, no question was put to the accused for explanation. In the case of **Muhammad Shah** (supra) Hon’ble Supreme Court has laid down following principle:

“It is important to note that all incriminating pieces of evidence, available on the record, are required to be put to the accused, as provided under section 342, Cr.P.C in which the words used are “For the purpose of enabling the accused to explain any circumstances appearing in evidence against him” which clearly demonstrate that not only the circumstances appearing in the examination-in-chief are put to the accused but the 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 perusal of statement of the appellant, under section 342, Cr.P.C., reveals that the portion of the evidence which appeared in the cross-examination was not put to the accused in his statement under section 342, Cr.P.C. enabling him to explain the circumstances particularly when the same was abandoned by him. IT is well settled that if any piece of evidence is not put to the accused in his statement under section 342, Cr.P.C, then the same cannot be used against him for his conviction. In this case both the Courts below without realizing the legal position not only used the above portion of the evidence against him, but also convicted him on such piece of evidence, which cannot be sustained.”

13. For the above stated reasons, I have no hesitation to hold that a fair opportunity was not provided to the appellant for explaining all the incriminating evidence against him on the record. After hearing leaned counsel for the parties I hold that conviction and sentence recorded by learned trial court against the appellant Illahi Bux vide judgment dated 14.6.2007, are not sustainable in law and same are set-aside. Appeal is partly allowed. Case is remanded back to trial court for cross-examination of PW-4 Qadir Bux and PW-5 SIO Abdul Sami Waseer afresh and recording statement of accused under section 342 Cr.P.C strictly in accordance with law, in the light of observations made hereinabove by putting all incriminating pieces of evidence to appellant including motive for explanation/reply in statement. Prosecution would be at liberty to produce the chemical and ballistic report before the trial court through I.O, however, in accordance with law. The accused would be at liberty to cross-examine the prosecution witnesses with regard to the chemical examiner and ballistic report. Trial court is further directed to decide the case within three months. Learned Advocate for the appellant submits that the appellant was on bail during trial. The appellant may apply for bail before the trial court and his bail application shall be decided by the trial court in accordance with law.

The appeal is disposed of in the above terms.

JUDGE