

IN THE HIGH COURT OF SINDH, CIRCUIT COURT LARKANA

Criminal Appeal No. D-97 of 2010
Criminal Reference No. D-09 of 2010

Present:

Justice Zafar Ahmed Rajput
Justice Khadim Hussain Tunio

Appellants : 1) Gulzar Ali s/o Haleemullah Sanghro
2) Mohammad Sharif s/o Haleemullah Sanghro
3) Zulfiqar Ali s/of Shafan Sanghro
4) Akhtiar Ali s/o Mohammad Qasim Sanghro,
through M/s. Ahsan Ahmed Qureshi & Saleem
Raza Jakhar, advocates.

Complainant : Buxal Khan Sanghro, through Mr. Rashid Mustafa
Solangi, advocate

The State : through Mr. Khadim Hussain Khooharo, Addl. P.G.
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Date of hearing : 25.10.2017

Date of Judgment : 22.01.2018
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JUDGMENT

KHADIM HUSSAIN TUNIO, J- By this single judgment, we intend to dispose of the above captioned Criminal Appeal and Reference, which are directed against the judgment, dated 30.06.2010, passed by the learned Sessions Judge, Kambar-Shahdadkot @ Kambar in Sessions Case No. 281 of 2005 (Re-The State V. Gulzar Ali & others) culminated from F.I.R. No. 04 of 2005, registered under Section 302, 148, 149 P.P.C. at Police Station Nasirabad, whereby appellants were convicted for the offences punishable under section 302(b), P.P.C. and sentenced to death subject to confirmation by this Court.

2. Briefly stated facts of the case are that, on 28.01.2005 at 0145 hours, complainant Buxal Khan lodged aforesaid F.I.R., alleging therein that accused Mohammad Sharif had declared his son Abdul Hameed as



'Karo', it was further alleged that on fateful day he, along with his sons, namely, Walidino, Badal and Abdul Hameed, was sleeping in his house and woke up at 0030 hours on hearing fire shots, he saw accused Gulzar and Akhtiar armed with guns, Zulfiqar armed with rifle, Mohammad Sharif and one unidentified accused armed with hatchet, inflicted numerous hatchet blows and fired shots on the body of his son Abdul Hameed, who succumbed to the injuries.

3. After usual investigation, police submitted the challan against the accused/appellants and after completing the pre-requisites, the formal charge was framed against them to which they pleaded not guilty and claimed to be tried.

4. In order to prove its case, the prosecution examined in all 10 witnesses, namely; (i) complainant Buxal (ii) Walidino (iii) ASI Akhtiar Ali Jagirani (iv) SIO Mumtaz Ali Janwri (v) PC Mehboob Ali Janwri (vi) ASI Muhammad Hassan (vii) Muhammad Ismail (viii) Tapedar Abdul Ghani (ix) Dr. Jai Kirshan and (x) Muhammad Ahsan (Magistrate), who produced various documents in their evidence. Thereafter, statements of accused/appellants were recorded under Section 342 Cr.P.C, wherein they denied all allegations being false and professed their innocence. They however, neither examined themselves on oath under Section 340(2) Cr.P.C nor produced any witness in their defence. On the assessment of evidence on record, the trial court convicted the accused/appellants and awarded the sentence as mentioned above vide judgment, impugned in this criminal appeal.



5. The learned counsels for the appellants have mainly contended that the appellants are innocent and have been falsely implicated in this case due to enmity; that the trial Court has committed gross illegality in trial; that the ocular and medical evidence are at variance; that complainant and other P.Ws examined by the prosecution are related inter se, as much as, the complainant is father of deceased and P.Ws; that the case property has not been produced before the court.

6. Conversely, learned counsel for the complainant has maintained that the illegality referred to by the counsel for the accused/appellants are immaterial and the conclusion drawn by the trial Court does not require any interference of this Court in its appellate jurisdiction; that there are some contradictions, but the same are minor in nature and may be ignored while deciding the appeal on merits.

7. Learned Addl. P.G, however adopting the arguments of learned counsel for the complainant has supported the impugned judgment.

8. We have considered the arguments of learned counsel for the appellants, complainant and Addl. P.G for the State and have gone through the record carefully with their valuable assistance.

9. Before proceeding further, we would like to reproduce section 540, Cr.P.C, as under:

"Any Court may, at any stage of any inquiry, trial or other proceeding under this code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or re-call and re-examine any person already examined and the court shall summon and examine or re-call and re-examine any such person if his evidence appears to it essential to the just decision of the case."



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In the case of Pervaiz Ahmed v. Munir Ahmad and another (1998 SCMR 326), it was held that "the Court under section 540 Cr. P.C has plenary powers for summoning a person as witness or re-examining any person already examined at any stage of the proceedings, if such evidence appears essential for just determination of controversy involved in the matter. It has also been held in the case of The State V. Muhammad Yaqoob and others (2001 SCMR 308) that "Calling of additional evidence under section 540, Cr.P.C, is not always conditional on defence or prosecution making an application for this purpose. It is duty of the court to do complete justice between the parties' carelessness and ignorance of one party or other or delay that may result in conclusion of the case should not be a hindrance in achieving object of doing complete justice by allowing additional evidence. Further in this respect it has been observed by the Hon'ble Supreme Court of Pakistan in the case of Nawabzada Shah Zain Bugti and others V. The State (PLD 2013 SC 160) that "for the purposes of section 540 Cr.P.C, the court even without any formal application from the prosecution or accused, could summon any person as witness or examine any person in attendance as a witness or re-call and re-examine any person already examined."

10. In the instant case, we have observed that the trial court has not performed its duty as required under the law while conducting the trial and thus committed error while passing impugned judgment. As it reflects from the deposition of PW-5 Mehboob Ali (Ex. 13) that his evidence has been shown recorded on 09-06-2009 but this fact does not reflect from the case diary of said date if the said witness had appeared on the said date and examined by the trial Court. It further reflects from



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represented through any counsel and the opportunity of the cross examination was provided to one accused only, whose name even not mentioned in the deposition. It may further be observed that the offence carries death sentence or imprisonment for life and in absence of the defence counsel same cannot be proceeded. In this regard, the trial court did not notice the implicit language of section 540 Cr.P.C, and failed to re-examine the said witness. It may be relevant to mention here that after the insertion of Article 10-A of the Constitution of Islamic Republic of Pakistan, 1073 the right of fair trial has been guaranteed as a fundamental right of an accused person which right is meaningless unless the veracity of the prosecution witnesses is properly thrashed and weighed through the art of cross-examination.

11. It may also be seen that the purpose of recording statement of accused under section 342, Cr.P.C is to inform him of the prosecution case, so that he may be able to explain any circumstances appearing in the evidence against him and also for the purpose of preparing his defence. In the case in hand, the incriminating pieces of evidence i.e. chemical examiner's report as well as ballistic expert's report, recovery of two empty cartridges one red and one white and blood stained mud, recovery of hatchet from accused Muhammad Sharif and 164 Cr.P.C statements of PWs Badal and Walidino have not been put to the accused/ appellants while recording their statements under section 342 Cr.P.C. Consequently, in our view, they have been prejudiced, as they were not able to explain themselves in the facts and circumstances of the case.



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12. Under the circumstances, in order to meet the ends of justice and more-so for doing substantial justice, the remand of the case becomes essential in view of the peculiar circumstances of the case when neglect and failure to perform duty by the trial Court has become the hallmark of the present case which has thus attracted our attention at the appellate stage.

13. Accordingly, we accept this appeal, set-aside the impugned judgment of conviction and sentences awarded to the accused/appellants and remand the case to the trial Court for decision afresh after re-calling and re-examining prosecution witness Mehboob Ali and providing opportunity of cross-examination to the accused/appellants through counsel of their choice and; thereafter, recording statements of accused/appellants under section 342 Cr. P.C by putting questions in respect of all the incriminating evidence which has come on record against them in accordance with law. This exercise should be completed by the trial Court expeditiously and preferably within the period of three months after receipt of record.

14. Cr. Appeal No. D-97/2010 and Cr. Reference No. 09/2010 stand disposed of in the foregoing terms.

[Redacted]

22/01/2018
JUDGE

[Redacted]

25-1-2018