

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

Cr. Rev. Appln. No. D-10 of 2013
 Cr. Acq. Appeal No. D-12 of 2013
 Cr. Jail Appeal No. S- 20 of 2013

Present:

Mr. Justice Zafar Ahmed Rajput,
 Mr. Justice Shamsuddin Abbasi,

Cr. Rev. Appln. No. D-10 of 2013

Applicant: Shahnawaz Gadehi through Mr.Habibullah G. Ghouri,
 Advocate.
 Respondent: Qamber Ali Gadehi through Mr. Ahsan Ahmed
 Qureshi, Advocate.
 Respondent: The State through Mr. Ali Anwar Kandhro,
 Addl.P.G.

Cr. Acq. Appeal No. D-12 of 2013

Appellant: Shahnawaz Gadehi through Mr.Habibullah G. Ghouri,
 Advocate.
 Respondents: Sikandar Ali Gadehi and Manzoor Ali Gadehi,
 Qamber Gadehi (Absent).
 Respondent: The State through Mr. Ali Anwar Kandhro,
 Addl.P.G.

Cr. Jail Appeal No. S- 20 of 2013

Appellant: Qamber Gadehi through Mr. Ahsan Ahmed Qureshi
 Advocate.
 Complainant: Shahnawaz Gadehi through Mr.Habibullah G. Ghouri,
 Advocate.
 Respondent: The State through Mr. Ali Anwar Kandhro,
 Addl.P.G.

Date of hearing. 12.02.2020.
 Date of order. 12.02.2020.

[Handwritten signature]

SHAMSUDDIN ABBASI-J:- By this single order, we would like to dispose of following three matters, arising out of same judgment dated 01.02.2013, passed by the learned III-Additional Sessions Judge, Dadu in Sessions Case No 514 of 2008 re: The State v Qamber Ali Gadehi arisen out of Crime No.260 of 2008 registered at Police Station K.N Shah for an offence under Section 302, 504, 114, 34 P P C

- i) Through Cr. Rev. Appln. No. D-10/2013, the applicant/complainant Shahnawaz has challenged the above judgment and prayed that the same may be set-aside and the sentence awarded to the respondent No.1 be enhanced upto death.
- ii) Through Cr. Acquittal Appeal No. D-12/2013, the appellant/complainant Shahnawaz has challenged the above judgment and prayed that the same may be set-aside and the accused Sikdhanar Ali and Manzoor Ali be convicted and sentenced.
- iii) Through Criminal Jail Appeal No.S-20/2013, the appellant Qamber Gadehi has challenged the above said judgment, whereby he has been convicted for offence under Section 302 (b) PPC as Tazir to suffer imprisonment for life and pay compensation for an amount of Rs.100,000/= to be paid to the legal heirs of deceased Rahib Ali as required under Section 544-A Cr.P.C and in case of default in payment of compensation, he shall suffer S.I for six months more.

2. Briefly the facts of prosecution case are that in the background of matrimonial dispute, accused were annoyed with complainant party. On 08.9.2008 the complainant alongwith his brother Shah Passand and son Rahib Ali went to their lands and when at about 1400 hours, they reached in common street near house, they saw accused Qamber Ali armed with pistol, 2.Manzoor Ali armed with rifle, 3. Waseem armed with hatchet, all by caste Gadehi who asked the complainant party that since they were filing applications in Court over matrimonial dispute, they would not be spared. Saying so, accused Manzoor Ali instigated accused Qamber Ali to commit murder of Rahib on which accused Qamber Ali fired from his pistol upon Rahib Ali with intention to commit his murder who fell down by raising screams and other accused asked the complainant party not to come near them on which complainant party kept away due to fear. Then the villagers were attracted to the cries and came running on which all the accused fled away. It was seen that Rahib Ali having been received firearm injury was lying dead. Complainant took dead body to hospital and after postmortem the FIR was lodged to the above effect.

3. After registration of FIR the investigation followed and applicant was sent up to stand trial while showing co-accused Manzoor Ali, Sikander Ali

Sh. A.

and Waseem as absconders who were later on arrested and the charge was framed against the appellant and co-accused at Ex.03 to which they pleaded not guilty and claimed trial. Their pleas were recorded at Ex:3/A to 3/C.

4. At the trial, prosecution examined PW-1 doctor Abdul Hameed at Ex:04 who produced police letter and postmortem report at Ex:04/A and 4/B, PW-2 complainant Shahnawaz at Ex:5, who produced FIR at Ex:5/A PW-3 eye witness Shah Pasand at Ex:6. Learned DDPP for the State given up PW-Muhammad Ameen vide statement at Ex:7, PW-4/mashir Shamsuddin at Ex:08 who produced memo of dead body, memo of place of incident, memo of last worn clothes of deceased, memo of arrest of accused Qamber at Ex:8/A to 8/D, PW-5 SIO Ameer Bux at Ex:9 who produced inspection memo of dead body at Ex:9/A, Danistnama at Ex:9/B. PW-6 Inspector Ghulam Sarwar Babar at Ex:10, who produced memo of recovery at Ex:10/A. Learned DDPP thereafter closed prosecution side vide statement at Ex:11.

5. The statement of appellant as well as co-accused Sikander and Manzoor were recorded under Section 342 Cr.P.C. After recording the evidence and hearing the counsel for the parties, the trial court while acquitting co-accused Sikander and Manzoor convicted and sentenced the appellant Qamber Ali Gadehi under impugned judgment, giving rise to filing of instant Criminal Jail Appeal.

6. It is mainly contended by learned counsel for the appellant that he is innocent and has been falsely implicated in this case; that admittedly eye witness Shah Pasand is real brother of complainant thus they are interested, inimical and set up witnesses; that the appellant was not afforded chance to cross examine Dr. Abdul Hameed at the trial and other material witnesses viz. mashirs of recovery nor the chemical expert report was brought on record and besides there are multiple major contradictions in the prosecution evidence, therefore, prosecution failed to bring home guilt of appellant beyond shadow of reasonable doubt hence the conviction and sentence awarded to him is not sustainable under the law, therefore, impugned judgment may be set aside and case be remanded to learned trial Court for denovo trial.

7. The learned Deputy Prosecutor General submitted that since chance of cross examination of PW/Dr. Abdul Hameed was not afforded to the appellant, he was deprived of his right to fair trial, therefore, matter may be remanded to trial Court for denovo trial. Learned counsel for the complainant faced with the above legal position extended no objection to the above proposal.

[Handwritten signature]

8 Perusal of record reflects that the role attributed to the appellant is that allegedly on the instigation of co-accused Manzoor Ali, he fired from his pistol upon Rahib Ali which hit him on left side of rib who died on the spot. Admittedly only eye witness of the occurrence PW Shah Pasand is real brother of complainant hence their testimony required strong corroboration by independent evidence. At the trial, although PW/ Doctor Abdul Hameed was examined but he was cross-examined by learned counsel for co-accused Manzoor Ali and Sikander only while his cross-examination by present appellant was reserved on his request for want of his counsel and thereafter no chance of cross examination of Dr. Abdul Hameed was afforded to his counsel.

9. In view of the above discussion, we have reached to an irresistible conclusion that the appellant has been prejudiced by not affording him chance to cross examine Dr. Abdul Hameed and thus he was denied right of fair trial as envisaged under Article 10-A of the Constitution of Islamic Republic of Pakistan before passing of impugned judgment. Even record shows that at the time of recording examination-in-chief of P.W/Dr. Abdul Hameed, appellant Qambar had not engaged any counsel. It is well settled law that in case of capital punishment case could not be proceeded without giving him opportunity to engage counsel of his choice or court can provide him advocate on State expenses. Therefore, evidence so recorded could be of no significance as the conviction cannot be based on the basis of such evidence unless the credibility of witnesses is tested on the touchstone of cross-examination. Injustice highly becomes in a case of capital punishment where cross-examination of prosecution witnesses was not conducted by advocate for accused. The right of cross-examination in a criminal case is a valuable right of accused, therefore, under the above circumstances, the conviction and sentence recorded by the learned trial Court under impugned judgment, in the circumstances, cannot be held to be in accordance with law. We, therefore, by allowing this appeal, set aside the conviction and sentence awarded to the appellant by the learned trial Court vide impugned judgment and remand the case to the learned trial Court to decide the case afresh after providing opportunity to accused Qambar through his counsel to cross-examine the Medical Officer Dr. Abdul Hameed, who conducted postmortem of deceased Rahib Ali and pass judgment in accordance with law within three months. However, it is made clear that accused who were on bail before announcement of judgment will remain on bail and shall submit their surety to the satisfaction of learned trial court.

De. Hameed

10. In view of the order passed in Cr. Jail Appeal No.S- 20 of 2013 whereby the impugned judgment dated 01.02.2013 has been set aside and the matter has been remanded to learned trial Court, connected criminal revision application No.D-10 of 2013 and Cr. Acquittal Appeal No.D-12 of 2013 have become infructuous hence the same are dismissed accordingly.


JUDGE


JUDGE

shabr