

IN THE HIGH COURT OF SINDH CIRCUIT COURT LARKANA

**Criminal Appeal No.D-12 of 2020
Cr. Confirmation Case No. D- 12 of 2020**

**Present: Mr. Justice Shamsuddin Abbasi
Mr. Justice Jan Ali Junejo**

Appellant: Ali Hassan son of Hazoor Bux Brohi, through Mr. Akbar Ali Dahar, Advocate.

The State: Mr. Aitbar Ali Bullo, DPG.

Date of hearing: 08-04-2025

Date of Judgment: 08-04-2025

JUDGMENT

Jan Ali Junejo, J.—This criminal appeal challenges the judgment dated 03.02.2020 (hereinafter referred to as the “*Impugned Judgment*”) passed by the learned First Additional Sessions Judge/MCTC, Kambar, (hereinafter referred to as the “*Trial Court*”) in Sessions Case No. 315/2018, whereby the appellant, Ali Hassan Brohi, was convicted under Section 302(b) PPC and sentenced to death for the murder of his wife, Mst. Sihat Khatoon with compensation to be paid by him to the legal heirs of deceased to be tune of Rs.500,000/- in default whereof to undergo SI for six months more. The Murder Reference has been made to this Court under Section 374 of the Criminal Procedure Code for confirmation of the death sentence.

2. The prosecution’s case, as per F.I.R No. 48/2018 (Police Station Wagan), alleged that on 01-09-2018, the appellant strangled his wife to death in his home due to domestic disputes. The conviction relied heavily on ocular evidence from the complainant (the deceased’s brother) and an eyewitness, corroborated by medical evidence confirming death by

strangulation. The trial court rejected the defense's claim of suicide and concluded that the prosecution proved its case beyond doubt.

3. The appellant's Counsel mainly argues that the trial court recorded the examination-in-chief of two prosecution witnesses on 23.1.2020 and five prosecution witnesses on 01.2.2020 without the presence of defense Counsel. Constituting a legal violation. He emphasizes that capital punishment cases mandate the presence of defense Counsel during proceedings. The court record indicates that the trial court recorded the examination-in-chief in absence of defense counsel. Further he contended that the trial court flagrantly violated Article 10-A of the Constitution by depriving the appellant of his fundamental right to a fair trial, particularly his entitlement to legal representation of his choice in a capital case. Highlighting procedural irregularities, counsel emphasized that the cross-examination of key witnesses, including PW-1, was conducted by an unauthorized advocate (Mr. Asad Ali Buledi), whose appointment lacked judicial approval and the appellant's consent, rendering the defense ineffective. Further, the trial court permitted abrupt changes in Counsel first Mr. Muhammad Ali Pirzada was engaged by accused and later Mr. Asad Ali Buledi without ensuring continuity, preparation time, or access to case documents, thereby vitiating the cross-examination process. Counsel argued that the State's failure to safeguard the appellant's right to competent, prepared counsel constituted a miscarriage of justice, warranting acquittal or remand for a retrial compliant with due process.

4. The learned DPG countered that the prosecution's case buttressed by credible ocular evidence (PW-1 and PW-2), medical corroboration (PW-5's post-mortem report). While conceding minor procedural lapses. It was argued that the appellant's frequent changes in counsel reflected dilatory tactics, and the trial court acted reasonably to prevent undue delays. Citing the appellant's failure to produce evidence supporting his suicide defense or rebut the prosecution's motive theory, the DPG urged dismissal of the appeal, contending that the conviction rested on unimpeachable proof of guilt beyond reasonable doubt, unaffected by technical oversights.

5. We have carefully considered the arguments put forth by the learned counsel for the appellant and the learned Deputy Prosecutor General (DPG) for the State. We have also meticulously examined the available evidence on record. A review of the case file indicates that the matter was transferred from the Court of the learned IInd Additional Sessions Judge, Kambar @ Shahdadt, to the Ist Additional Sessions Judge on 23-01-2020. On the same day, the trial Court recorded the depositions of the complainant, Abdul Rasool Brohi (PW-1, Exh.03), and an eyewitness, Zahoor Ahmed (PW-2, Exh.04). However, their cross-examinations were deferred due to the absence of the appellant's original defense counsel, Mr. Muhammad Ali Pirzada, who had cited health concerns. The case was then adjourned to 01-02-2020, but on that date, Mr. Pirzada remained absent. Instead, Mr. Asad Ali Buledi, an advocate assigned to represent the pauper accused, appeared before the court. There is no record confirming whether Mr. Buledi was appointed or provided with the case documents or granted sufficient time to prepare for the defense. Despite this, the trial court proceeded with the following steps:

- Conducted cross-examinations of PW-1 and PW-2 under the same exhibits (Exh.03 and Exh.04).
- Recorded the depositions of the remaining prosecution witnesses:
 - PC Ghulamullah Panhwar (PW-3, Exh.05)
 - Tapedar Gadda Hussain Bhatti (PW-4, Exh.06)
 - Dr. Roshan Jehan Waggan (PW-5, Exh.07)
 - Co-mashir Illahi Bux (PW-6, Exh.08)
 - IO ASI Nader Bhangar (PW-7, Exh.09)

All these witnesses were cross-examined by Mr. Buledi on the same day. Notably, the case diary indicates that Mr. Muhammad Ali Pirzada later submitted a statement withdrawing his Vakalatnama. However, the record remains silent on the following crucial aspects:

- When and how Mr. Buledi was briefed or prepared to take over the defense.
- Whether the appellant had been consulted or consented to Mr. Buledi's representation.

- Whether the mandatory procedural requirement under Section 342 Cr.P.C. was fulfilled—there is no entry in the case diary for 01-02-2020 or 03-02-2020 reflecting that the appellant's statement was recorded to confront him with the prosecution's evidence, a fundamental safeguard in criminal trials.

6. The sudden assumption of defense responsibilities by Mr. Asad Buledi, without documented access to the case files or adequate preparation time, rendered the cross-examinations ineffective and merely perfunctory. This failure directly compromised the appellant's right to effective legal representation, particularly in a capital punishment case. The withdrawal of Mr. Pirzada's Vakalatnama and the subsequent appointment of Mr. Buledi were executed without judicial scrutiny or the appellant's explicit consent, thereby violating the right to counsel of choice under Article 10-A of the Constitution. The right to a fair trial entails not only access to legal representation but also the right to competent and adequately prepared counsel. The procedural lapses in this case reduced the trial to a mere formality, depriving the appellant of a meaningful defense. The absence of proper preparation in cross-examinations resulted in a miscarriage of justice. It is a fundamental right of every accused to be represented by legal counsel of their own choosing. In cases involving capital punishment, the law mandates that the accused must be provided with legal representation, and in situations where the accused cannot afford a lawyer, the State bears the responsibility of covering the legal expenses. Accordingly, the Sessions Court or Special Court is duty-bound to appoint a legal practitioner at the State's expense to defend the accused. The procedure adopted by the trial court was irregular and unlawful, and such defects cannot be cured under Section 537 Cr.P.C. This principle was firmly established in *Shafique Ahmed alias Shahjee v. The State (PLD 2006 Karachi 377)*, where it was held that:

“...an accused is required to be defended by a counsel of his choice as a matter of right. If an Advocate appears on behalf of the accused then he is required to be allowed to defend the accused. In an offence involves capital punishment, the law protects the rights of the accused as a duty has been cast upon the State to bear the expense of the Advocate if the accused is unable to engage an Advocate. When the committal proceedings were being conducted then at the time of committing the accused to the Court of Session the Magistrate was required to inquire from the accused as to whether he would like to engage Advocate of his choice and in case he was unable to do so then the accused was required to be

informed that the Sessions Court would provide him an Advocate on State expense to defend his case.”

7. In a similar set of circumstances, the Honourable Supreme Court observed in the case of *Abdul Ghafoor v. The State (2011 SCMR 23)* as follows:

“With immense respect to the learned Judges of the High Court, we are persuaded to hold that it is the primary responsibility of the court seized of a matter to ensure that the truth is discovered and the accused are brought to justice. If the learned trial Court found that the counsel engaged by the appellant had sought too many adjournments, even then he was not appearing, the court could either have directed that a defence counsel be provided to the appellant at State expense or could have given last opportunity to the appellant to make alternate arrangements failing which the court would proceed to decide the matter. This course was not adopted by the learned trial Court and instead on 2-12-1999 gave a total surprise to the appellant by asking him to cross-examine those witnesses for which obviously’ neither the appellant had the requisite expertise nor he was prepared to do so. In these circumstances and in view of the fair concession given by the State, we find that the procedure adopted by the learned trial Court is reflective of miscarriage of justice and the appellant be provided one opportunity to have the afore-referred witnesses cross-examined. Consequently, this appeal succeeds on this short ground. The impugned judgment of the learned High Court dated 19-3-2000 and that of the learned trial Court dated 30-5-2000 are set aside. The case is remitted to District and Sessions Judge, Rawalpindi who shall either proceed with the matter himself or entrust the same to Additional District and Sessions Judge. The appellant shall be treated as under trial prisoner. He shall be given one opportunity to cross-examine the two witnesses referred to in paragraph 6 above and thereafter the court shall decide the matter within 15 days of the said opportunity given. The parties are directed to appear or arrange representation before the District Judge for 20-5-2010 who shall proceed with the matter in terms of this order.”

8. The superior Courts have frequently held that in cases involving capital punishment, it is the duty of the trial Court to ensure that the accused is represented by the Counsel of his own choice. Such matters, specially the stage of evidence, must always proceed in the presence of the counsel for the accused. Proceeding of such cases with accused being unrepresented has been held to be an illegality not curable under section 537 Cr.P.C. The Courts have insisted upon this right of accused as per Article 10-A of the Constitution of Pakistan 1973, section 340(1) of the Code of Criminal Procedure 1898, Circular 6 of Chapter VII of Federal Capital and Sindh Courts Criminal Circulars and Rule 35 of the Sindh Chief Court Rules (Appellate Side). The Hon’ble Superior Courts have also

ruled that in case the accused is using the absence of his counsel as delaying tactic, the trial Court must proceed with the case after giving some reasonable adjournments in order to avoid the abuse of process of law. In a case reported as Ghulam Rasool Shah and another v. The State (2011 S C M R 735), Hon'ble Supreme Court of Pakistan has held that "***Notwithstanding the afore-stated observation, we are of the view that in a case of capital punishment a Court cannot come to a just decision unless the credibility of the witnesses is tested on the touchstone of cross-examination, Injustice is likely to occur in a case where cross-examination on the witnesses was not conducted either by the Counsel provided at State expenses on account of unwillingness of the accused or by the accused themselves. Even, the cross-examination conducted by the accused himself has not been considered to be substitute of cross examination conducted by a Counsel***". There is no evidence on record to indicate that the cross-examinations of the prosecution witnesses were conducted by a duly authorized counsel representing the appellant. Instead, the record merely reflects that an advocate, whose formal appointment is not documented anywhere in the case files, undertook the cross-examinations. This raises a strong presumption that the cross-examinations were either not conducted properly or not conducted at all, especially given the fact that on 01-02-2020, the court recorded the testimonies of prosecution witnesses and also conducted their cross-examinations of seven prosecution witnesses on the same day. Furthermore, there is no mention in the record of whether the subsequently appearance of appointed advocate, Mr. Asad Buledi, was properly appointed or provided with the necessary case documents or given adequate time to prepare. This concern is particularly critical since his appointment coincided with the same day on which the prosecution evidence was recorded. A defense counsel plays a pivotal role in safeguarding an accused' rights, including raising objections to improper questions, challenging the admissibility of evidence, and ensuring that the accused receives a fair trial. When an accused is deprived of competent legal representation or when a defense counsel is appointed without proper preparation, it severely undermines the fairness of the trial. This issue becomes even more critical in cases where capital

punishment is at stake, as the right to effective legal representation is a fundamental constitutional and legal safeguard.

9. In light of the aforementioned deficiencies, the appellant's conviction and sentence cannot be sustained. The trial Court's failure to adhere to procedural safeguards necessitates a remand for a de novo trial. Accordingly, the appeal is partly allowed, and the impugned judgment is set aside. The case is remanded to the Trial Court with the following explicit directions:

- The trial shall recommence from the stage of recording prosecution evidence, beginning with PW-1 and onwards.
- The appellant shall be granted the opportunity to engage a counsel of his own choice. If he is unable to do so, the State shall appoint and fund a defense counsel after consulting the appellant.
- The Trial Court must ensure strict compliance with Section 342 Cr.P.C., recording the appellant's statement in a manner that properly confronts him with all the prosecution evidence.
- The newly appointed counsel shall be granted sufficient time to review the case documents and conduct fresh cross-examinations of the prosecution witnesses.
- The entire trial proceedings must be concluded within three months from the date of this judgment.
- The Additional Registrar shall ensure that this order is immediately communicated to the Trial Court for strict compliance.

10. In view of the foregoing reasons, since the conviction and sentence of the appellant have been set aside, the Murder Reference is answered in the negative. Consequently, the death sentence awarded to the appellant by the Trial Court stands vacated.

JUDGE

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