Consistently giving up on the recalling PW's leads to unfair trial

188

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, LARKANA

Crl. Revision Application No.D-13 of 2020

PRESENT:
Mr. Justice Mohammad Karim Khan Agha,
Mr. Justice Zulfiqar Ali Sangi,

Applicants	: Mohammad Sallah Khan & another, through Messrs Asif Ali Abdul Razak Soomro and Safdar Ali Ghouri, Advocates.
Respondent	: The State, through Mr. Mohammad Noonari, Deputy Prosecutor General.

Date of hearing : 18.02.2021.
Date of Judgment : 18.02.2021.

ORDER

Mohammad Karim Khan Agha, J:-- This criminal revision application is directed against the order dated 13.10.2020, passed by learned Judge, Anti-Terrorism Court, Larkana in Special Case No.11/2009 re-The State v. Ali Sher Leghari & others (the impugned order), whereby the applications/objections filed on behalf of applicants/accused with a prayer not to allow the prosecution to examine the PWs given up in the earlier rounds of trial was dismissed.

2. This issue very much revolves around the accused right to an expeditious and fair trial and the ability of the prosecution filling in lacuna's in its case over a prolonged period of time.

189

3. The applicants were booked in a very serious crime of murder where it is alleged that the applicants and about 50 others attacked a police check post which lead to the death and injury of a number of police officers and some of the attackers.

4. It is to be noted that this court had very recently granted post arrest bail on hardship grounds to two of the accused after they had been in custody for nearly 10 and 11 years respectively with the trial being no where in sight of conclusion due to no fault of their own.

5. The concise factual background as to how this case has been proceeding before the trial court is set out below for ease of reference;

(a) As many as 26 accused were nominated while 25/30 persons were shown as unknown accused in the FIR. Initially, two accused namely Ali Sher and Ali Hur *alias* Huroo were arrested and after usual investigation, the case was challaned, showing above-named two accused in custody while the remaining were shown absconders.

(b) After receipt, the **charge** was framed against two accused namely Ali Sher and Ali Hur *alias* Huroo on **29.01.2011** and their separate pleas were recorded, but in the meantime co-accused Fida Hussain *alias* Fidoo was arrested, hence **Amended Charge** was framed on **20.11.2011**. Thereafter, prosecution examined complainant Noor Mustafa and other PW's at Exs. 26, 28, 29, 30 and thereafter learned Prosecutor/ADPP for the State submitted a Statement dated **18.04.2013 whereby he gave up P.Ws (1) PC Zahid Ali, (2)PC Moula Bux, (3)PC Husain Bux, (4) PC Mohammad Siddique, (5) PC Zahoor, 6) PC Murtaza and 7) PC Bashir Ali, stating therein that they are formal witnesses.**

190

(c) Later on, another co-accused Asif *alias* Asoo was arrested and sent up to stand trial, as such **Amended Charge** dated **31.01.2014** was framed against four accused persons namely Ali Sher, Ali Hur *alias* Huroo, Fida Husain *alias* Fidoo and Asif *alias* Asoo. **Thereafter, the learned ADPP submitted a statement dated 30.08.2014, giving up P.Ws PC Zahid Hussain, PC Hussain Bux, PC Mohammad Siddique, PC Zahooruddin, PC Ghulam Murtaza, PC Bashir Ahmed and P.C Moula Bux.** Thereafter, deposition of P.W SIP Mohammad Sharif was recorded at Ex. 41 and of other P.Ws at Exs. 42, 45, 47, 48, 49, 50 and 51, and in the meantime vide statement dated 11.11.2014 at Ex. 43, **P.W SIP Ghulam Ali Leghari was given up on the ground that he is a formal witness and subsequently vide another statement dated 07.04.2015 at Ex.52 learned ADPP submitted statement of giving up P.W PC Nazeer on the ground of his mental ailment.**

(d) **It is worthwhile to pinpoint here that earlier vide statement dated 18.04.2013 learned Prosecutor had stated that PC Zahoor Ahmed and PC Ghulam Murtaza are formal witnesses and hence they were given up, but later on vide application u/s 540 Cr.P.C learned ADPP prayed for recalling P.Ws PC Zahoor Ahmed and PC Ghulam Murtaza as material witnesses.** Then, deposition of SIP Mehboob Ali Brohi was recorded, PC Zahoor Ahmed and **surprisingly vide another statement dated 15.05.2015 learned ADPP gave up PC Ghulam Murtaza.** Then, deposition of P.W Dr. Mushtaque Ahmed was recorded, P.W Dr. Muhammad Idrees, Dr. Aziz Ahmed and HC Mohammad Younis. **Thereafter, learned ADPP submitted a statement dated 04.02.2016 and gave up Inspector Muinuddin and PC Kamran, stating that both witnesses are formal in the case and also submitted a separate statement at giving up PC Noorullah Channa, then vide another statement at giving up Tapedar Riaz Hussain Ansari.**

(e) It is pertinent to mention that surprisingly learned ADPP submitted an application under Article 46 of Qanoon-e-Shahadat Order calling and examining same Tapedar Riaz Hussain Ansari, but **later on vide statement dated 20.04.2016 learned ADPP closed the**

191

side of prosecution, stating therein that the material witnesses have been examined.

(f) Thereafter, statements of accused were recorded and then D.W Manzoor Ahmed Leghari was examined, D.W Abdul Hameed and D.W Gul Hassan and then the defence side was closed vide statement dated 31.05.2016.

(g) At this stage in our view the prosecution should have heard arguments on behalf of the parties and rendered a judgment since many years had already passed whilst the accused remained in custody.

(h) At this stage however instead of hearing arguments and rendering judgment as is so often the case when at the end of the trial the prosecution realised that there are lacuna's in its case and most likely had not proven its case beyond a reasonable doubt the learned ADPP submitted an application us/ 540 Cr.P.C **requesting to open case of prosecution and recalling and examining given up witnesses namely SIP Noor Mustafa, P.W Dr. Abdul Rauf, PC Pandhi Khan, HC Ashique Ali, PC Abdul Kareem, which was allowed** and then complainant Noor Mustafa was examined, P.W Pandhi Khan, P.W Ashique Ali, P.W Abdul Kareem, P.W Dr. Abdul Rauf and then **vide statement dated 27.10.2016 the prosecution side was closed and again statements u/s 342 Cr.P.C were recorded and again depositions of D.Ws Gul Hassan, Abdul Hameed, Manzoor Ahmed were recorded and then defence side was closed vide statement dated 29.10.2016.**

(i) At this stage however once again it was incumbent on the trial court to have heard the final arguments of the parties and rendered judgment especially as the accused had spent even more time in custody and the prosecution had been given the chance by the trial court to call some previous given up witnesses to give evidence in order to fill in any lacuna's in its case.

192

(j)Unfortunately, this was not the case. Instead during final arguments, it was pointed out by the prosecution that injured P.W SIP Ghulam Ali Leghari was given up, as such the learned trial Court vide order dated 24.12.2016 exercised powers u/s 540 read with section 265-F Cr.P.C. and invited objections from all the parties and then vide order dated 09.03.2017 issued directions to summon injured P.W SIP Ghulam Ali. **Thereafter, P.W Ghulam Ali was examined as Court witness and again the prosecution side was closed and again statements of four accused were recorded u/s 342 Cr.P.C and again depositions of D.Ws Gul Hassan, Abdul Hameed and Manzoor Ahmed were recorded.**

(k) Once again in our view again it was incumbent on the trial to have heard the final arguments of the parties and rendered judgment especially as the accused had spent even more time in custody and the prosecution had been given yet another chance to fill up the lacuna's in its case by the trial court to call some previous given up witnesses to give evidence in order to fill in any lacuna's in its case.

(l) Once again however this did not happen and before the pronouncement/delivery of judgement, another accused Zulfiqar Ali (applicant No.2) was arrested and sent up to stand trial.

(m) As a matter of their right to an expeditious trial under Article 10(A) of the Constitution and as a part of the right to a fair trial where the accused is always regarded as the favoured child under the law especially as the prosecution had been given countless chances to fill up any lacuna's in its case and a number of accused had already spent years in custody we find that at this point for the reasons mentioned above the trial court should have separated the trial of the existing accused from the newly arrested accused and pronounced judgment in respect of the accused who had already under gone trial.

(n) Unfortunately, the trial court decided not to adopt this course and instead framed **yet another amended charge** against five accused (the four whose trial had virtually been completed twice over and the

193

newly arrested accused) and in this new round of trial, firstly complainant Noor Mustafa was examined, PW Abdul Karim, P.W Pandhi Khan, P.W Ashique Ali Gopang, Dr. Abdul Rauf, P.W Mumtaz Ali, P.W Zahooruddin, P.W Riaz Ahmed, PW Zahid Ali, P.W Ghulam Ali Leghari, P.W Mehboob Ali, P.W Moula Bux,P.W ASI Mohammad Ismail, P.W Dr. Mushtaque Ahmed, P.W Dur Mohammad, P.W Safdar Ali Brohi, P.W SIP Mohammad Sallah Gopang, and P.W Dr. Aziz Ahmed.

(o) In the meantime, applicant/accused Mohammad Sallah was arrested and sent up to stand trial. Once again instead of separating his trial from the other accused who had suffered in effect a third trial and spent 7 to 8 years in jail **yet another amended charge** was framed and prosecution examined numerous witnesses, who were examined in previous rounds of trial and the learned trial court straightaway **and without request of learned prosecutor issued summons to all the prosecution witnesses, including those who were already given up and for whom the learned prosecutor had already stated that their evidence was formal, as such, objections/ application on behalf of applicants dated 07.09.2020 was filed in the learned trial Court, praying therein to cancel summons for recording depositions/evidence of already given up witnesses, but the same was dismissed vide impugned order dated 13.10.2020.**

6. Learned counsel for the applicants contended that the impugned order be set aside as it violated the rights of the applicants to a fair and expeditious trial under Article 10 (A) of the Constitution and that the learned trial court was consistently through its conduct allowing the prosecution to fill in the lacuna's in its case to the prejudice of the applicant and other co-accused. On the other hand leaned DPG fully supported the impugned order.

7. We have heard the parties, carefully considered the record as well as the relevant law.

194

8. At the outset we would like to emphasize that under Article 10 (A) of the Constitution the accused are entitled to both a fair and expeditious trial and the onus always lays on the prosecution to prove its case beyond a reasonable doubt without being given opportunities to fill in lacuna's in its case which would benefit the prosecution and prejudice the accused. Trials cannot be never ending where an accused who under the law is innocent until proven guilty remains unnecessarily in jail pending conclusion of their trial. As mentioned earlier in this case we have already granted bail to two of the accused who have spent almost 10 and 11 years in jail with the trial being no where in sight of completion.

9. We find that based on the background of the case as narrated above this situation could have been avoided because the trial court had at least two opportunities to separate the trial of the accused from those accused who were later arrested especially as all the evidence in such trials had already been lead. By such course of action in effect the accused are being denied their right to an expeditious trial as per command of the Constitution.

10. It appears that the charge has been framed and reframed at least on 4 separate occasions and on at least two occasions all the prosecution and defence evidence had been lead and the trial was ripe for rendering judgment. This potentially gave the prosecution an advantage to their witnesses as when on each occasion the trial started from scratch they had the opportunity to improve their evidence and be ready to counter the cross examination of the defence which they had heard on numerous occasions which prejudiced the defence. As mentioned above by continually re starting the trial from scratch on 4 separate occasions the applicants had to under go

195

years on end in custody despite having the right of an expeditious trial. Further prejudice was also caused to the accused as since the trial had been completed twice and was ready for arguments and judgment the prosecution had advance notice of the entire defence case prior to the trial restarting from scratch when the charge was amended once again and as such the prosecution were given a considerable advantage to the detriment of the accused.

11. Before a case is prosecuted the IO's are bound to collect sufficient evidence to prove the prosecution case beyond a reasonable doubt, this evidence is then scrutinized by the Prosecutor Generals' office and once the prosecution is satisfied that there is sufficient evidence to prove the offences so charged the case is challaned before the trial court. Before the court accepts such challan it must also be satisfied that there is a case to answer by the accused for the offence so charged and thereafter a charge is framed. Thus, through this process there ought to be no need for the prosecution to so frequently move applications to call further witnesses once it has finished with its calendar of prosecution witnesses. Such applications prima facie would tend to show that in a number of cases where such applications are made that the prosecution case had not been properly prepared and at the end of its case it had concerns that it might not have been able to prove its case against the accused based on the evidence on record up to the time of moving its S.540 Cr.PC application. It appears that now a days instead of thoroughly preparing its case the prosecution relies on S.540 Cr.PC as a fall back when it is not the purpose of S.540 Cr.PC to be used as a routine but in our view only **in exceptional cases** to meet the ends of justice. The object of S.540 Cr.PC is **NOT** to fill in the lacuna's in the prosecution case which prejudices the accused and rewards the prosecution for its lack of

196

preparedness, trial preparation and trial management. In this case we find that in each round of the de novo trial after a fresh charge has been framed the trial court has given countless chances for the prosecution to fill in the lacuna's in its case by not only liberally allowing S.540 Cr.PC applications but also in allowing witnesses who had been originally given up by the prosecution and classified as non material to be recalled without adequate reason. When a PW is consciously and deliberately given up by the prosecution it is for a good reason. For example, their evidence is not necessary or they would not have supported the prosecution case. Now when we have a trial such as this which has been going on for over 11 years with 4 amended charges and in effect 4 de novo trials to allow PW's who had been given up in the past by the prosecution for good reasons to now give evidence it leads to the inference/perception that the prosecution have been able to win over by inducement or otherwise witnesses who were not initially prepared to support the prosecution case which leads to the perception of the accused not being given a fair trial and being unfairly prejudiced by such conduct aside from further elongating an already lengthy trial where the accused have been in jail for years on end and another absconding accused could be arrested before judgment is rendered and once again as per past practice of the trial court the trial would go back to square one by reframing the charge and a de novo trial occurring.

12. In recent times the supreme court has deprecated any opportunity given by the trial court/High Court to the prosecution to fill in any lacuna's in its case to the detriment of the accused and has even refused to remand such cases to enable the prosecution to fill in lacuna's if allowing the filling in of lacuna's will prejudice the accused.

197

13. In the case of **Muhammad Naeem V The State** (unreported) dated 10.05.2019 in Criminal Appeals 81-L and 82-L of 2017 the Supreme Court held as under:-

> *"In an adversarial system the role of the judge is that of a neutral umpire, unruffled by emotions, a judge is to ensure fair trial between the prosecution and the defence on the basis of the evidence before it. The judge should not enter the arena so as to appear that he is taking sides.* ***The court cannot allow one of the parties to fill lacunas in their evidence or extend a second chance to a party to improve their case or the quality of the evidence tendered by them. Any such step would tarnish the objectivity and impartiality of the court which is its hallmark. Such favored intervention, no matter how well-meaning, strikes at the very foundations of fair trial, which is now recognized as a fundamental right under article 10-A of our Constitution.***
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> *In the present case the direction of the High Court for obtaining fresh samples of the alleged intoxicating substance and preparing a fresh report of the Chemical Examiner* ***amounts to granting the prosecution a premium on its failure to put up a proper case in the first instance. Such judicial intervention is opposed to the adversary principle and offensive to the fundamental right of fair trial and due process guaranteed under the Constitution.*** *See Dildar v. Sate; Painda Gul v. State and State v. Amjad Ali". (hold added).*

14. Likewise in this respect in the recent Supreme Court case of **Nusrat Ali Shah and other V The State** (unreported) dated 20-02-2019 in Criminal Appeal No.24-26-K of 2018 it was held as under:-

> *"The law is settled by now that a piece of evidence or a circumstances not put to an accused person at the time of recording of his statement under section 342, Cr.P.C. cannot be considered against the accused person facing the trial.* ***In the case in hand through an act or omission of the Court a serious lacuna in that regard had crept into the case of the prosecution and the accused persons could not be prejudiced on account of the said act or omission of the Court. Through the impugned judgment passed by it the High Court had allowed that lacuna to be filled through remand to the detriment of the appellants. The High Court was expected to hold the scales of justice in balance and not to tilt the same in favour of the prosecution. In this view of the matter remand of the case by the High Court to the trial court to fill that lacuna to the detriment of the accused persons has been found by us to be militating against the interests of justice.*** *These appeals are, therefore, allowed, the impugned judgment passed by the*

S

198

High Court remanding the case to the trial Court is set aside, the matter is remanded to the High Court for deciding the appeals filed by the convicts against their convictions and sentences on their merits on the basis of the existing record and in accordance with law." (bold added)."

15. In summary as discussed earlier in this judgment where the background of the case was set out we find that the state is on the verge of violating the rights of the accused under Article 10 (A) of the constitution in respect of a fair and expeditious trial and potential prejudice is being caused by the prosecution to the accused by allowing witnesses who were previously given up by the prosecution again to give evidence which raises the inference/perception that these already given up prosecution witnesses may have been won over by the prosecution or induced by the prosecution in favor of the prosecution to the prejudice of the accused and are filling up the lacuna's in the prosecution case. In particular the first two accused who were originally arrested and whose case was ripe for final arguments and rendition of judgment as these given up witnesses would not have even been a part of their case but are now being used against them.

16. Thus, based on the particular facts and circumstances as narrated in the background to this case and above discussion we set aside the impugned order and **direct** the trial court not to allow any of the PW's who had already been given up by the prosecution on 24.04.2016 at which time the prosecution filed a statement closing its side as based on the particular facts and circumstances of this case there is a high chance that by allowing them to give evidence at this belated stage for the reasons mentioned above is likely to cause severe prejudice to the accused. The trial court is also directed to expedite and complete this extremely old trial at the earliest and if any other accused absconder is arrested or surrenders consider separating his trial

199

from the current trial in the interests of an expeditious and fair trial where no undue advantage is given to the prosecution and no prejudice is caused to the accused. **In short no prosecution witness who had already been given up by the prosecution at some stage of this case between the original charge being framed until the latest charge being framed (even if he was subsequently allowed to give evidence) can be called to give evidence at this trial.**

17. These are the reasons for our short order dated 18.02.2020 which is set out below for ease of reference;

> " For reasons to be recorded later, the impugned order dated 13.10.2020 is set-aside. The trial Court is directed to complete the trial expeditiously without calling witnesses, who have already been given up, in the past by the prosecution. A copy of this order be sent by fax to trial Court, who shall expeditiously decide this matter since it has been pending for many years."