IN THE HIGH COURT OF SINDH, KARACHI

Present:
Mr. Justice Mohammad Karim Khan Agha

CRIMINAL JAIL APPEAL NO.204 OF 2020

Appellant	:	**Ali Hassan S/o Baboo Mirbahar through Mr. Nadeem Ahmed Azar, Advocate**
Respondent	:	**The State through Mr. Muhammad Iqbal Awan, Addl. Prosecutor General, Sindh a/w SIP Ali Naeem Haider, PS Mirpur Sakro**
Date of Hearing	:	**19.03.2024**
Date of Judgment	:	**19.03.2024**

JUDGMENT

MOHAMMAD KARIM KHAN AGHA, J:- Appellant Ali Hassan son of Baboo Mirbahar was tried before the Court of Addl. Sessions Judge-I/MCTC, Thatta in Sessions Case No.315 of 2017 under FIR No.76/2017 U/s 302/427/504 PPC at PS Mirpur Sakro, Karachi and vide judgment dated 28.01.2020, the appellant was convicted under Section 302(b) PPC as Ta'zir and sentenced for rigorous imprisonment for life. He was directed to pay Rs.1,000,000/- to the legal heirs of deceased as compensation. Such compensation shall be recoverable as arrears of land revenue. However, in case of default in payment of such compensation, the appellant shall undergo S.I. for six months more. However, he was extended benefit of Section 382-B Cr.P.C.

2. The brief facts of the prosecution case are that on 27.08.2017 at 08:30 hours at Katcha Path/road near house of complainant Ramzan Mirbehar located in village Baboo Mirbehar Taluka Mirpur Sakro District Thatta, accused Ali Hassan son of Baboo Mirbehar caused death of deceased Moula Bux Mirbehar by causing sharp sided hatchet blows.

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3. After usual investigation, the matter was challaned and the accused was sent up to face trial. He pleaded not guilty to the charge and claimed trial.

4. The prosecution in order to prove its case examined 07 Prosecution Witnesses and exhibited various documents and other items. The statement of accused was recorded under Section 342 Cr.P.C in which he denied the allegations levelled against him and claimed false implication. However, the accused did not give evidence on oath nor produce any DWs in support of his defence.

5. After hearing the parties and appreciating the evidence on record, the trial court convicted the appellant and sentenced him as set out earlier in this judgment; hence, the appellant has filed this appeal against his conviction.

6. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the impugned judgment dated 28.01.2020 passed by the trial court and, therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

7. At the very outset, learned counsel for the appellant started reading out the evidence of the prosecution witnesses; however, during the reading, it was noted that the appellant had a counsel appointed for him on State expense in this capital case. However, when the evidence in chief of the first three PWs was read out, counsel for the appellant was present when he was given opportunity to cross-examine the witnesses but it was recorded as follows:

"Nil. Though chance given".

8. As such, not only the counsel appointed for the appellant on State expense was present during the evidence in chief but he was also given the chance of cross-examination. Under these circumstances, usually the trial Court ought to have called the next witness as it was the decision of the appellant's counsel whether or not he wanted to cross-examine the witness. However, the Court took the unusual step of cross-examining the witness in detail on behalf of appellant/defence. This practice was repeated in respect of first three PWs, who prima facie are the most

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important witnesses in this case i.e. complainant and eye witnesses. Admittedly, the Court has the power under Article 161 Qanoon-e-Shahadat Ordinance, 1984 to put questions, to a witness which are usually covered in the evidence of the question being reproduced followed by the answer being reproduced in the evidence. This approach of the trial Court cross-examining the witness in detail on the failure of the defence counsel to do so does not appear to be legal as the trial Court is meant to be a neutral, independent arbitrator of the proceedings and is not meant to be perceived to be favouring one side or the other. It is also contrary to Article 132 and 133 of the Qanoon-e-Shahadat Ordinance 1984 which deals with Examination-in-Chief etc. (of witnesses) and Order of Examination (of witnesses) respectively. In fact Chapter-X of the Qanoon-e-Shahadat Ordinance 1984 which deals with the Examination of Witnesses through its various Articles tends to indicate that with regard to the evidence of witnesses the trial judge remains a neutral umpire between the parties. In this case while recording evidence of first three witnesses, the learned Judge has prima facie acted as a defence counsel by cross-examining them all in detail after the appellants counsel after being given the opportunity to do so declined. I find that such conduct of the trial Judge is not permissible under the law. In my view, the learned trial Judge ought to have either given the appellant's counsel time to cross-examine these important witnesses on the next date of hearing or he should have changed him with another more experienced counsel, who could have carried out the cross examination if the trial judge deemed it absolutely necessary to ensure that the interests of the accused were protected. It is noted that the counsel appointed for the appellant was not entirely incapable of proceeding with the case as he then proceeded to cross-examine the remaining four other prosecution witnesses.

9. This leads me to the second aspect of the case whereby the trial Court Judge while appointing counsel on State expense or pauper counsel for the appellant in capital cases must ensure that the counsel appointed for the appellant are experienced and seasoned defence counsel in capital cases so that the rights of the accused to a fair trial under Article 10-A of the Constitution can be adequately protected at the time of trial as per law and constitution. In this respect reliance is placed on the cases of

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Shafique Ahmed v The State (PLD 2006 Kar 377) and **Abdul Ghafoor v The State** (2011 SCMR 23).

10. I have also considered submissions of learned counsel for the appellant, learned Addl. P.G. and two Senior counsel, Mr. Shoukat Hayat and Iftikhar Ahmed Shah, present in Court as to the consequence of the conduct of the proceeding in this case and all of them were in agreement based on the above discussion that the case ought to be remanded back to the trial Court for re-recording the evidence of PW-1, 2 and 3 based on the defects discussed above.

11. For the reason discussed above, I am in full agreement with this proposal as I find that it was not lawful for the Judge to usurp the role of the defence counsel by cross-examining (as opposed to asking a question) all three of the most important witnesses in the case despite giving the opportunity of doing so to the defence counsel who declined to do so. If the Judge thought that the Court appointed defence counsel was failing in his duty to adequately defend the accused and the accused was being prejudiced he might have considered changing the pauper counsel rather than cross-examining the witness himself which tended to erode his impartiality.

12. Based on the above discussion, I hereby set aside the impugned judgment and send back the case to Addl. Sessions Judge-I/Model Criminal Trial Court, Thatta for the limited purpose of re-recording the evidence of PW-1 Ramzan, PW-2 Abdul Majeed and PW—3 Ghulam Nabi in the presence of defence counsel, who is well-experienced and competent in dealing with the capital cases who shall then be given opportunity to cross-examine each of these witnesses. Thereafter, Section 342 Cr.P.C. statement of the appellant shall be recorded afresh and the learned trial Court shall re-write the judgment based on the evidence on record. This exercise shall be completed within three months of the date of this judgment. A copy of this judgment shall be sent to Addl. Sessions Judge-I/Model Criminal Trial Court, Thatta alongwith R&PS for compliance.