

Report - No Counsel during recording of evidence  
in Capital Case 153

IN THE HIGH COURT OF SINDH, CIRCUIT COURT LARKANA

Criminal Jail Appeal No.D- 39 of 2017.

Criminal Reference No.D- 06 of 2017.

Present:

Mr. Justice Mohammad Karim Khan Agha-J

Mr. Justice Zulfiqar Ali Sangi -J

Appellant: Mashooque Wains through Mr. Habibullah G. Ghouri, Advocate.

Complainant: Muhammad Ishaque through Mr. Athar Abbas Solangi, Advocate.

Respondent: The State through Mr. Ali Anwar Kandhro, Addl. P.G.

Date of hearing: 27.01.2021.

Date of judgment: 09.02.2021

J U D G M E N T

Mohammad Karim Khan Agha -J:- Through this Criminal Appeal, appellant Mashooque Wains has assailed impugned judgment dated 12.8.2017 passed by learned Additional Sessions Judge, Mehar in Sessions Case No. 718 of 2012 re: State v. Mashooque Wains arising out of Crime No.22 of 2012 of Police Station Shah Panjo Sultan District Dadu registered for offence under Sections 302 and 504 PPC, whereby appellant has been convicted for offence under Section 302(b) PPC and sentenced to death subject to confirmation by this court and accused/appellant was also directed to pay fine of Rs.100,000/= to be paid to the legal heirs of deceased Gulab Khan as compensation within the meaning of Section 544-A Cr.P.C, in case of default in payment thereof he shall undergo S.I for six months more.

2. The facts of the prosecution case as unfolded in the FIR are that:

"Complaint is that I have Tailor Master work and reside in the above address. My brother Gulab Khan aged about 33 years had private Clinic at village Daud Dero. Some days back my maternal cousin Mashooque Ali Vains had levelled false allegations upon my brother Gulab Khan regarding illicit terms with his wife Mst.Nusrat and he used to say to the people that he would kill Gulab Khan at any time."



On yesterday i.e. 7.9.2012, I along with my brother Gulab Khan, my cousin Manzoor Ali S/O Muhammad Hussain and relative Mohammad Bux S/O Muhammad Ramzan Vains, R/O. Daud Dero were sitting at the hospital of my brother Gulab Khan and we had become late, therefore, we closed the Hospital and were going to our houses, the electricity bulbs were shining in the street. At 8-00 A.M time we reached near the house of Ghulam Nabi Vains, where we saw and identified accused on the head light of bulb's namely 1. Mashooque S/o Jan Mohammad alias Janan by caste Vains, R/o Daud Dero Taluka Mehar with Pistol, who abused my brother Gulab by saying that he had not made good with him, today he (accused Mashooque) kills him. By saying so accused made straight fire from his Pistol at complainant's brother Gulab with intention to kill him, which hit him on his right side below armpit who after receiving fire shot injury fell down on the ground while raising cries. After that the accused went near Gulab and made another straight fire at his left side shoulder. The accused issued threats to us not to come close to him and then accused went away towards city side. After departure of accused the complainant party found that his brother Gulab had sustained fire shot injuries on his right side below armpit and left side shoulder, blood was oozing from his injuries and he had become unconscious. We tried to shift my injured brother towards Hospital but he succumbed to his injuries before reaching at Shah Panjo Hospital. After that my brother Mushtaque intimated about the incident to police. The police after conducting necessary formalities of post mortem, handed over the dead body to us. We waited for our blood relatives and when they reached, the funeral ceremony was done. After that I had gone to P.S where I got registered the FIR to the effect that accused Mashooque Vains has committed murder of my brother Ghulab Khan by making straight fires from his Pistol at him on the allegation of "Karap".

3. During investigation of above case, accused Mashooque Wains was arrested and sent up to stand trial. Charge was framed against accused/appellant to which he plead not guilty and claimed trial.

4. In order to prove its case the prosecution examined 8 PW's who exhibited numerous documents and other items and thereafter the prosecution side was closed. Thereafter statement of the accused was recorded under Section 342 Cr.PC in which he denied the allegations against him. However, the accused neither examined himself on oath nor led evidence in his defence.

5. On conclusion of trial, the learned trial court after hearing learned counsel for the parties and appraisal of prosecution evidence brought on record, convicted and sentenced the appellant/accused as above vide impugned judgment dated 12.08.2017, hence the appellant has filed this appeal against his conviction.



6. At the very outset it came to our attention that when the charge was framed against the appellant on 05.04.2013 that no counsel was present on behalf of the appellant and indeed the record reveals that no counsel had been appointed by either himself or the court at the time when the charge was framed, that **PW 1** (wrongly named as PW 4 in the paper book) **Mohammed Ishaque who was the complainant and an eye witness in this case and PW 2 Mazhar Ali who was also an eye witness in this case** and hence very important witnesses had given their evidence in chief in the presence of the accused **but in the absence of his counsel**. The question therefore arose what the effect of this might be keeping in view that this was a capital case and the charge formed the foundation of the case against the appellant and both the complainant's evidence and PW 2 Mazhar Ali's evidence being eye witnesses was crucial in leading to the conviction of the appellant.

7. Learned counsel for the appellant and APG contended that in a capital case the appellant had to be represented by counsel at all times especially when the charge was framed against him and whilst evidence was being recorded against him especially if this evidence was prejudicial to him and in this case since the appellant had not been represented by counsel at the time when the charge was framed against him and the complainant, PW 2 Mazhar Ali and PW 4 Mumtaz (mashir) gave their evidence in chief the former of the two were both eye witnesses and the later was mashir the case should be remanded back to the trial court. In support of their contentions they placed reliance on **Shafique Ahmed v. The State** (PLD 2006 Karachi 377) and **Abdul Ghafoor v. The State** (2011 S C M R 23).

8. On the other hand learned counsel for the complainant contended that it made no difference at all whether the appellant's counsel was present at the time when the charge was framed against the accused and when a witness gave his evidence in chief against him and as such we could continue to decide the appeal and opposed the remand of the case back to the trial court.

9. We have heard the parties, reviewed the record and considered the relevant case law.



10. The question is how the courts have interpreted the right to counsel and the necessity or otherwise of the accused's counsel being present at the time when the charge is framed against him and the recording of evidence against him by PW's especially in a capital case keeping in view Article 10 (A) of the Constitution which in effect guarantees the due process rights of the accused and his right to a fair trial inline with the concept that the accused is the favored child of the law.

11. The real issue to our mind is whether the accused has been prejudiced by the absence of his counsel at the time when the charge was framed and evidence was recorded against him especially in terms of the examination in chief. In this case it is particularly significant that the appellant is a laymen and has no idea about the law, his rights under the law, the manner in which a charge is to be framed and the parameters in which an examination in chief is to be conducted under the law. During the framing of the charge and examination in chief of any PW we are of the view that it is **mandatory** for the accused to be represented by legal counsel in a capital case so that his/her rights can be protected. This is more so in respect of the charge which forms the very foundation of the case against the accused to which he has to defend. For example, during the framing of the charge it may be factually in correct or legally defective especially in terms of the required particulars for which the accused counsel needs to be present to ensure that the rights of the accused are protected. For example, when the evidence in chief is recorded in the presence of the accused but without the presence of his counsel inadmissible documents can be admitted into evidence, the witnesses can be tutored and many other prejudicial things to the accused can come on the record since they have not been objected to/challenged by the accused which may not have formed a part of the record if his counsel had been present and may have weakened the prosecution case against him especially in cases such as this when the **two concerned witnesses were crucial witnesses being eye witnesses against the appellant whose evidence mainly lead to his conviction** and thus the absence of his counsel during their evidence in chief where they fully implicated the appellant in the murder **caused great prejudice to the appellant**. Thus, in the absence of counsel for the accused when the charge is framed against him and/or during the evidence in chief of a PW in a capital case we find that this would lead to the case being remanded back to the trial court.



12. In this respect reliance is placed on **Shafique Ahmed V. The State** (PLD 2006 Kar 377) which held as under at P.383

*"It is one of the duties of the Court of Sessions to see that the accused is represented by a qualitative legal practitioner in the cases involving capital punishment. That, it is the mandate of the law that cases involving capital punishment shall not be tried in the absence of Advocate for the accused or proceeded without first appointing an Advocate for the accused to defend him if he is unable to do so."*

13. Likewise in the case of **Abdul Ghaffar v. State** (2011 SCMR 23) at P.26, it was held as under in this respect.

*"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 allowed one opportunity to have the above-referred witnesses cross-examined. Consequently this appeal succeeds on this short ground. The impugned judgment of the learned trial Court dated 29.03.2000 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 the 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 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 20.5.2000 who shall proceed with the matter in terms of this order."*

14. In the Crl. Appeal No.D36/2019 and Confirmation case No.D.10/2019 **Ghulam Ali and another V State** (unreported) dated 23.12.2020 on the same point another Division Bench of this court recently held as under at Para 11;

*"Para 11. We also observed that learned trial Court recorded examination-in-chief of official witnesses in absence of the advocate for the appellants and it is observed that the present case carries capital punishment and evidence (examination-in-chief, cross examination and re-examination) of prosecution witnesses should be recorded in presence of his advocate. This is but logical and most of accused are laymen who would have little, if any, knowledge of the law and in the absence of defence counsel would be unable to adequately defend themselves. For examine, during examination-in-chief of a prosecution*



witness the accused would not know which questions he could object to and which documents he could oppose being exhibited. Such inability on his part in our view would lead to an unfair trial and the same is in violation of Article 10-A of the Constitution of Islamic Republic of Pakistan, 1973, the same is reproduced as under:-

*"10-A. Right to fair trial.--- For the determination of his civil rights and obligations or in any criminal charge against him a person shall be entitled to a fair trial and due process."*

15. The importance of an accused having a counsel appointed by either himself or if he is too poor to do so on State expense, especially in a capital case, has been further empathized in Circular 6 of Chapter VII of the Federal Capital and Sindh Courts Criminal Circulars, the Sindh Chief Court Rules (Appellate Side) (Rule 35) and the case of **Rajab Ali V State** (2019 MLD 1713).

16. Thus, for the reasons mentioned above the convictions and sentences awarded to the appellant through impugned judgment dated 12.08.2017 are set aside and the confirmation case is answered in the negative with the **direction that the case be remanded back to the trial court to conduct a de novo trial** since the very foundation of the prosecutions case being the charge was framed in the absence of the appellant's counsel from which the prosecution's case subsequently flowed through its PW's. The trial court shall frame a fresh charge in the presence of the accused and counsel of the accused either engaged by the accused or counsel appointed on State expenses if the accused is too poor to afford to appoint counsel and then conduct the de novo trial in accordance with law **and render a fresh judgment within three months of the date of this judgment which trial shall be heard on a day to day basis.** Both parties are directed to appear before trial court on 22.02.2021. The Trial Court is directed to issue P.O for accused for the said date when either he shall appoint counsel of his choice or a counsel be appointed to represent him at trial on State expenses and summons to the complainant and his witnesses.

17. The above appeal and the confirmation reference are disposed of in the above terms.

*Annul by us in open court*