

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

Criminal Jail Appeal No.S-213 of 2018
[Ubaid v. The State]

Appellant:	Ubaid through Ms. Urooj Aqeel, Advocate and Mr. Kamran Baig, Advocate.
The State:	Through Ms. Rameshan Oad, Deputy Prosecutor General, Sindh.
Complainant:	Aijaz Ahmed through Mr. Imtiaz Ali Channa, Advocate.
Date of hearing:	31.08.2026
Date of judgment:	31.08.2026

J U D G M E N T

ZULFIQAR ALI SANGI, J.- Through the instant Criminal Jail Appeal, the appellant/convict Ubaid son of Farooque has called in question the legality, propriety and correctness of the judgment dated 06.09.2018, passed by the learned IV-Additional Sessions Judge, Hyderabad, in Sessions Case No.342 of 2014, arising out of Crime No.169 of 2014 registered at Police Station Pabban/Husri, for an offence punishable under Section 302, P.P.C., whereby the learned trial Court, after finding the appellant guilty of an offence punishable under Section 302 (b), P.P.C., convicted him and sentenced him to imprisonment for life as Ta'zir, with a direction to pay an amount of Rs.200,000/- as compensation in terms of Section 544-A, Cr.P.C., and, in default thereof, to further undergo R.I. for one year. The appellant was also extended the benefit of Section 382-B, Cr.P.C.

2. Learned counsel for the appellant has assailed the impugned judgment primarily on the ground that the learned trial Court recorded the examination-in-chief of PW-1 Waseem Khan, Senior Medico-Legal Officer, who conducted the post-mortem examination of deceased Muhammad Nabeel, PW-2 Aijaz Ali, complainant and PW-3 Muhammad Sarwar, eyewitness, in the absence of learned defence counsel. She contended that, particularly in a case involving an offence punishable under Section 302, P.P.C., the accused is entitled to effective assistance of counsel and a meaningful opportunity to cross-examine the prosecution witnesses. She further contended that although the examination-in-chief of PW-1/Medical Officer was

recorded, he was not subjected to cross-examination at all. According to learned counsel, the proceedings were thus conducted in disregard of the appellant's right of defence and the learned trial Court proceeded to decide the case without ensuring compliance with the mandatory requirements governing a fair criminal trial. Learned counsel, therefore, contended that the impugned judgment cannot be sustained in law and that, instead of finally deciding the appeal on merits, the matter ought to be remanded to the learned trial Court with directions to recall the aforesaid prosecution witnesses, record their evidence afresh in the presence of learned defence counsel and afford the appellant a full and effective opportunity to cross-examine them, followed by completion of all remaining proceedings in accordance with law.

3. The above contentions have been fairly conceded by the learned D.P.G., Sindh, as well as learned counsel appearing for the complainant, though it has been contended on behalf of the State and learned counsel for the complainant that the absence of learned defence counsel was attributable to the defence itself, as it was the duty of learned defence counsel to remain present on each date of hearing and, despite opportunities having allegedly been afforded by the learned trial Court, learned defence counsel remained absent.

4. I have heard the learned counsel for the parties, examined the record and considered the relevant legal position.

5. At the outset, it would be appropriate to refer to Section 353, Cr.P.C., which provides as under:-

“353. Evidence to be taken in presence of accused. Except as otherwise expressly provided, all evidence taken under [Chapters XX, XXI, XXII and XXII-A] shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in presence of his pleader.”

6. The above provision makes it clear that the evidence of prosecution witnesses is required to be recorded in the presence of the accused or, where his personal attendance has been dispensed with, in the presence of his pleader. The expression “evidence” in the context of a criminal trial necessarily encompasses examination-in-chief, cross-examination and re-examination. The presence of defence counsel, particularly in a case involving an offence punishable under Section 302, P.P.C., assumes greater significance, as an accused facing such a

serious charge must be afforded a meaningful and effective opportunity to defend himself.

7. The question, therefore, is whether the recording of examination-in-chief of material prosecution witnesses in the absence of learned defence counsel has caused prejudice to the appellant and affected his right to a fair trial guaranteed under Article 10-A of the Constitution of the Islamic Republic of Pakistan, 1973.

8. The issue is not merely whether the accused was physically present during the proceedings, but whether he was afforded effective legal assistance enabling him to properly protect his rights while prosecution evidence was being brought on record.

9. In this respect reliance is placed on **Shafique Ahmed v. The State** (PLD 2006 Karachi 377), wherein the importance of representation of an accused by a competent legal practitioner in a case involving capital punishment was emphasized, wherein it was held:

“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.”

10. Likewise, in the case of **Abdul Ghaffar v. State** (2011 SCMR 23), the Supreme Court held that:-

"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."

11. The same principle was reiterated by a Division Bench of this Court in the case of Ghulam Ali and another v. The State (Crl. Appeal No.D-36/2019 and Confirmation Case No.D-10/2019, decided on 23.12.2020), wherein it was observed at para-11 as under:-

"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."

12. The importance of effective legal representation in a capital case has further been recognized in Circular 6 of Chapter VII of the Federal Capital and Sindh Courts Criminal Circulars, Rule 35 of the Sindh Chief Court Rules (Appellate Side) and Rajab Ali v. State (2019 MLD 1713). These provisions and authorities underline the obligation of the trial Court to ensure that an accused facing a serious charge is not deprived of effective legal assistance at any material stage of the trial.

13. Turning to the facts of the present case, perusal of the record reveals that the examination-in-chief of PW-1 Waseem Khan, Senior Medico-Legal Officer, PW-2 Aijaz Ali, complainant, and PW-3 Muhammad Sarwar, eyewitness was recorded in the absence of learned defence counsel. The matter becomes more serious in respect of PW-1 Waseem Khan, the Medical Officer, as the record presently available does not contain his cross-examination. Although the impugned judgment states that PW-1 was cross-examined by the defence counsel, the alleged cross-examination is neither available in the Court file nor in the R&Ps, while the case diaries also do not disclose that such cross-examination was recorded.

14. The aforesaid discrepancy cannot be treated as a mere technical or inconsequential irregularity. Cross-examination is a valuable substantive right of the accused and constitutes an important safeguard for testing the truthfulness, accuracy and credibility of a prosecution witness. Where the evidence of a material witness is relied upon by the prosecution and the record does not establish that the accused was afforded an effective opportunity to cross-examine such witness, serious prejudice is caused to the defence.

15. I have also considered the submission of learned D.P.G., Sindh that the absence of defence counsel was attributable to the defence and that opportunities had been afforded by the learned trial Court. Even if such contention is accepted, the ultimate responsibility of ensuring a fair trial in a case involving an offence punishable under Section 302, P.P.C. rests with the trial Court. If the engaged counsel was persistently absent, the Court was required to take appropriate steps to ensure that the appellant was effectively represented before recording material prosecution evidence. The absence of such safeguard assumes particular significance where the examination-in-chief of material witnesses was recorded without the participation of defence counsel and, in the case of PW-1, the record does not establish the availability of his cross-examination.

16. In the circumstances discussed above, the appellant has been deprived of an effective opportunity to defend himself against material prosecution evidence. Such omission has caused serious prejudice to the appellant and strikes at the fairness of the trial.

17. In view of the above discussion, I am of the considered view that the impugned judgment cannot safely be sustained. The appropriate course is to set aside the conviction and sentence and remand the matter to the learned trial Court for the limited purpose of curing the aforesaid defect and thereafter proceeding with the case in accordance with law. Accordingly, the instant Criminal Jail Appeal is **allowed**. The judgment dated 06.09.2018, passed by the learned IV-Additional Sessions Judge, Hyderabad, in Sessions Case No.342 of 2014, arising out of Crime No.169 of 2014 registered at Police Station Pabban/Husri, and the conviction and sentence awarded thereunder are **set aside**. The matter is remanded to the learned trial Court with the following directions:

- a) The learned trial Court shall recall PW-1 Waseem Khan, Senior Medico-Legal Officer, PW-2 Aijaz Ali, complainant, and PW-3 Muhammad Sarwar, eyewitness, and record their evidence afresh in accordance with law and in the presence of the appellant/accused and his learned defence counsel, with full and effective opportunity to the defence to cross-examine the said witnesses.
- b) After completion of the evidence of the aforesaid witnesses, the learned trial Court shall proceed further in accordance with law, including recording the statement of the appellant/accused under Section 342, Cr.P.C., recording his defence evidence, if any, and thereafter hearing the learned counsel for the parties.
- c) Upon completion of the aforesaid proceedings, the learned trial Court shall reappraise the entire evidence in accordance with law and pronounce a fresh judgment on merits, uninfluenced by any observation made herein, within a period of three months from the date of receipt of a copy of this judgment.
- d) The appellant shall be treated as an under-trial prisoner during the pendency of the proceedings before the learned trial Court and the trial Court shall issue P.O. for accused for a date to be fixed by the trial Court and issue summons to the said witnesses.

18. It is clarified that the observations made herein are confined solely to the procedural infirmity necessitating remand.

Nothing contained in this judgment shall be construed as an expression of opinion on the merits of the prosecution case or the defence and the learned trial Court shall decide the matter independently, strictly on the basis of the evidence and material available before it and in accordance with law.

19. The Criminal Jail Appeal stands disposed of in the above terms.

JUDGE

Abdullahchanna/PS