THE HIGH COURT OF SINDH, CIRCUIT COURT LARKANA

Criminal Appeal No.D-42 of 2017
Criminal Reference No.D-07 of 2017
Criminal Appeal No.S-73 of 2017

Present:
Mr. Justice Zafar Ahmed Rajput,
Mr. Justice Khadim Hussain Tunio.

Date of Hearing: 21.11.2017
Date of Decision: 21.11.2017.

Appellants: (1) Rajib Ali Naich in Criminal Appeal No.D-42/2017.

(2) Ghulam Mustafa Naich & others in Criminal Appeal No.S-73 of 2017.

Respondent: The State in both Criminal Appeals.

Mr. Ghulamullah Memon, advocate for appellants in both appeals.
Mr. Sardar Ali Shah, Deputy Prosecutor General for the State.

J U D G M E N T.

KHADIM HUSSAIN TUNIO, J: These appeals are directed against the judgment, dated 09.09.2017, passed by Additional Sessions Judge-IV, Dadu in Sessions Case No.192 of 2011, whereby appellant Rajib Ali was convicted u/s 302(b) PPC and sentenced to death in terms of section 265-H(ii) Cr.P.C and to pay compensation of Rs. 3,00,000/- to the legal heirs of the deceased in terms of section 544-A PPC and in default thereof to suffer S.I for six months more, whilst appellants Ghulam Mustafa Naich, Ali Akbar, Haji Saffar and Ali Hassan were convicted u/s 302(b), PPC read with Section 149, PPC and sentenced to undergo imprisonment for life. Appellant Ghulam Mustafa was also convicted for the offence u/s 324, PPC read with Section 149, PPC and sentenced to suffer R.I. for 7 years and to pay fine of Rs.50,000/- and in default thereof he should suffer six months' S.I. The benefit of section 382-B, Cr. P.C was extended to the accused and all the sentences were ordered to run concurrently. Trial Court has sent the above-mentioned reference to this

Court for confirmation of death sentence, awarded to appellant Rajib Ali Naich.

2. Both the appeals and criminal reference being outcome of same judgment have been heard together and are being disposed of by this common judgment.

3. Briefly the facts of the prosecution case, as disclosed in the F.I.R lodged by complainant Muhammad Khan are that on 31.10.2010 the complainant, along with his brother Sheral Naich and his cousins, namely, Ghulam Abbas and Roshan were returning from Dubai Hotel after having tea and when they reached Johi Barrage curve at 7:00 p.m., they found the present appellants/accused duly armed with different weapons. On the instigation of accused Ali Akbar, accused Haji Rajib fired directly on Sheral, which hit him on his back and he fell to the ground. Then accused Ghulam Mustafa fired at Ghulam Abbas, which hit him on his shoulder and wrist, who also fell down. Afterwards, the accused persons making aerial firing fled away from the scene. The complainant found his brother as dead while Ghulam Abbas was lying injured. The police was informed at first by the complainant on phone and later on after the postmortem of deceased and treatment of injured, FIR was lodged.

4. A formal charge was framed against the accused, namely, (1) Ali Akbar, (2) Ghulam Mustafa (appellant No.2), (3) Haji Saffar, and (4) Ali Hassan on 03.8.2011 at Ex.4. Subsequently absconding accused Rajib Ali (appellant No.1) was arrested and produced before the trial Court. Hence, on 29.8.2016 amended charge was framed by the trial Court at Ex.22. Subsequently again on 22.12.2016 further amended charge was framed at Ex.23 against the appellants, as previously

appellant/accused Rajib Ali was not being represented by a Counsel, to which they pleaded 'not guilty' and claimed their trial.

5. After framing of further amended charge (Ex.23), learned ADPP for the State adopted the same examination-in-chief of already examined PW ASI Ghulam Mustafa Tunio vide statement at Ex.25, learned ADPP for the State also adopted same examination-in-chief of already examined PW Ghulam Abbas except identification of accused Rajib vide statement at Ex.26. The advocate for accused Ali Akbar also adopted same cross-examination vide his statement at Ex.27. Learned ADPP for the State adopted same examination-in-chief of already examined witness Mukhtiar Ali vide statement at Ex.28. Advocate for accused Haji Rajib and Ghulam Mustafa also adopted same cross-examination of mashir Mukhtiar vide statement at Ex.30. Learned ADPP for the State gave up PW/Tapedar vide statement at Ex.32. Learned ADPP for the State adopted same examination-in-chief of already examined PW ASI Ghulam Mustafa Bughio vide statement at Ex.33, however, advocate for accused Rajib and Ghulam Mustafa cross-examined PW ASI Ghulam Mustafa Bughio. Learned ADPP for the State gave up PW ASI Safdar Ali vide statement at Ex.34. Learned ADPP for the State adopted same examination-in-chief of PWs Dr. Muhammad Ishaque and SIP Faiz Muhammad Kandhro vide his statement at Ex.35, learned advocate for accused Rajib and Ghulam Mustafa cross-examined both witnesses, whereas counsel for rest accused adopted same cross-examination of both witnesses and then learned ADPP for the State closed prosecution side vide statement at Ex.37. Thereafter, statements of accused, namely, Ghulam Mustafa, Ali Hassan, Haji Saffar, Rajib Ali and Ali Akbar were recorded at Ex.38 to 42, respectively. They, however, neither appeared on oath as their own witness nor even produced any

witness in their defence. The learned trial Court, thereafter upon the assessment of evidence on record convicted the appellants/accused and awarded sentence as mentioned above, vide impugned judgment, which has been assailed by the appellants in the appeals.

6. Learned counsel for the appellants/accused has contended that the impugned judgment is contrary to the law and the same is complete departure of the procedural and substantial law, as the trial Court while conducting the trial and convicting the appellants has committed an illegality in relying on the evidence of P.Ws recorded earlier during trial of co-accused persons, which could not be used against the present accused/appellants; that although the motive is shown in the FIR, but no PW has spoken of the same and it is a legal principle of law that the same is to be proved by the prosecution; that the learned Court while passing the impugned judgment relied upon the evidence of Ghulam Abbas who had passed away later on due to natural causes, hence he was not cross-examined by appellant Rajib Ali, who had surrendered himself voluntarily. He has prayed that the case may be remanded to the trial Court for decision afresh after examination of P.Ws.

7. Conversely, learned counsel for the complainant as well as the learned Deputy Prosecutor General did not dispute the procedural lapses committed by trial Court in trial and raised no objection to remand the case to the trial Court.

8. Heard the learned counsel for the respective parties on the issue, which gives rise to the below legal proposition:--

> "Whether earlier evidence, recorded in trial of other accused persons, can be used against the accused persons, who subsequently joined the trial?

9. The above legal proposition can further be parted into two parts i.e. recording of evidence in absentia and its legal value in using the same against the other accused persons.

10. To respond the first part of the proposition it will be conducive to reproduce the relevant provisions, dealing with the manner of recording of the evidence during trial, and that under what circumstances evidence can be recorded in absence of accused.

Section 353, Cr.P.C:--

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

11. Plain reading of the above provision of law leaves nothing ambiguous that legislatures, in their wisdom, have made it mandatory by using the word "Shall" that all evidence should be recorded in the presence of the accused or when his personal attendance is dispensed with and accused is represented through pleader. The logic behind this could be nothing but to ensure providing a full and fair opportunity to the accused while eliminating all chances of a subsequent plea(s) of accused being prejudiced. This would stand well with meaning of fair trial as provided by Article 10-A of the Constitution.

12. We are conscious of the fact that the legislature has provided an exception to this mandatory provision by enacting the provision of section 512, Cr.P.C and Article 46 of Qanun-e-Shahadat Order 1984, while keeping in view certain natural facts and elements. The provision of section 512, Cr.P.C., the exception, being material, is reproduced hereunder:--

Section 512 Cr.P.C:--

"512. Record of evidence in absence of accused. (1) If it is proved that an accused person has absconded, and that there is no immediate prospect of arresting him the Court competent to try or [send for trial to the Court of Session or High Court] such person for the offence complained of may, in his absence, examine the witnesses (if any) produced on behalf of the prosecution, and record their depositions. Any such deposition may, on the arrest of such person, be given in evidence against him on the inquiry into, or trial for the offence with which he is charged, if the deponent is dead or incapable of giving evidence or his attendance cannot be procured without an amount of delay, expenses or inconvenience which, under the circumstances of the case, would be unreasonable".

13. A bare perusal of above provision shows that this exception is available in matter(s) where the accused is absconder, and the purpose of recording of depositions under section 512, Cr.P.C. is that same could be used against the absconder accused on his arrest or as per sub-clause (2) thereof, against the person or persons, who may subsequently be accused of the offence. This seems to be with an intent to preserve the deposition keeping in view the chances of deponent being dead or incapable of giving evidence at such time. However, such evidence(s) cannot be of such weight as recorded in presence of the accused person(s) whereby the accused is provided a fair opportunity to cross-examine the deponent to test the veracity of deponent and Article 46 of Qanun-e-Shahadat Order also makes it clear that procedure for recording evidence and its evidentiary value is available in the statute with certain conditions. On these legal grounds, a view can be found from case of Hidayatullah and others v. The State (2000 YLR 2330), wherein it is held as under:--

"A bare perusal of above provision would show that depositions recorded under section 512, Cr.P.C. can only be used against the absconder accused on their arrest or as per sub-clause (2) thereof, against the person or persons, who may subsequently be accused of the offence, provided the deponent is dead or is incapable of giving evidence"

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further it was held:--

> Needles to point out that the procedure provided for under section 512(2), Cr.P.C. apply only to cases of great gravity and can be put in force only under order of High Court, expense or inconvenience in obtaining the presence of deponent is not sufficient ground for accepting the deposition against the person subsequently accused".

14. In the case of Arbab Tasleem Vs. The State, reported in PLD 2010 SC 642, it is held that:--

> "As a general rule of evidence only such statement is legal and admissible which is given during the course of judicial proceeding on oath and it is taken by a person authorized under the law to take down the evidence and it is made in the presence of the adverse party, giving him right to cross-examine deponent. There are two exceptions to the said general rule, where a statement made admissible one exception is covered under Art.46, Q.S., when a person makes a statement as to the cause of his death and the second exception is under section 512, Cr.P.C. when an accused absconds and law makes it permissible to preserve the evidence of witness with a view that if at his trial any such witness is either dead or incapable of giving evidence or his presence cannot be acquired without unnecessary delay, his statement previously recorded at the back of accused can be taken into evidence. Further it is held that "evidence recorded will be legal/admissible, however its evidentiary value cannot be equated with such statement which has been subjected to cross-examination, therefore, for giving weight to the statement of such witness, it has to be seen whether such statement: intrinsically rings true and whether or not same is supported by circumstantial evidence through any source. If such witness is supported by independent evidence in shape of any circumstances or corroboration from any source, it will be good piece of evidence."

15. Reverting to the second part of the proposition that whether such evidence recorded in absentia can be used against the absconding accused on his

arrest without providing him an opportunity to cross-examine the witness, this may result in a departure from the word of fair trial on which the Criminal Administration of justice rests. Unless the Court or the prosecution justifies the exceptional circumstances which compelled them to depart from such mandatory requirement of the law. Therefore, on subsequent arrest of an absconding accused the prosecution and Court, at first instance, should make all efforts to secure evidence in presence of the accused as the same is established principle through precedents. In the case of Atta Muhammad and 3 others Vs. The State (1999 PCr.LJ 1140), it is held that:--

> "the purpose and the intent of recording the evidence of all prosecution witnesses afresh and that of statement under sections 342 and 340, Cr.P.C. and defence witness if any, would be that the appellants should know as to what was the evidence against them and as to in which manner he will have to answer the same and prepare his defence, having not done so the very purpose of dispensation of criminal justice would fail".

In another case of The State Vs. Ali Zaman (1981 PCr.LJ 194), it has been observed that;

> "basic principle of administration of criminal justice is that examination of witnesses must be carried out in presence of accused or his pleader or attorney and if the same is not done, conviction on such evidence would be illegal."

In case of Mahmood Ahmed Vs. The State (PLD 1983 Lahore 612), it was observed that:

> "accused was absconding on the day when statement of witnesses were recorded, on joining proceedings by accused, such witnesses were never summoned again for recording evidence and for cross-examination .the trial held was thus conducted in violation of section".

16. The ratio of above case-law is that trial Court should record evidence in presence of accused, as the earlier recorded evidence cannot be used against absconding accused except in exceptional circumstances and that the previously recorded evidence can be taken

into consideration, however its evidentiary value cannot be equated with such statement which has been subjected to cross-examination, therefore for giving weight to the statement of such witness it is to be seen whether such statement intrinsically rings true and whether or not supported by circumstances through any sources.

17. Perusal of the impugned judgment reveals that in the instant case, after framing of amended charge (Ex.23) prosecution witnesses were neither recalled nor their examination-in-chief were recorded in presence of appellant Rajib and he was convicted on the basis of adopted evidence in violation of Article 10-A of the Constitution of Islamic Republic of Pakistan, 1973. The learned trial Judge has not assigned the reasons for resorting to such exceptional procedure, which, otherwise, is not within spirit of safe administration of Justice. Thus, in absence of such reason the trial Judge has committed illegality while adopting the evidence of P.Ws. Such practice is completely departure from the procedural law. In such circumstances, it would meet the ends of justice to allow these appeals setting aside the conviction and sentences awarded to appellants vide impugned judgment and remand the case. Accordingly, impugned judgment dated 9-09-2017 is hereby set aside, case is remanded to the trial Court for its decision afresh in accordance with law within period of three months after recalling the P.Ws for recording of their examination-in-chief and providing an opportunity to appellants/accused to cross-examine them and thereafter, appellants/accused be re-examined under section 342, Cr.P.C. The appellants shall be permitted to lead evidence in their defence or to get recorded their statements within the purview of section 340(2), Cr.P.C, if they choose to do so.

18. Before parting with this judgment, it may be observed that appellants Ghulam Mustafa, Haji Saffar, Ali Hassan and Ali Akbar were on bail during trial, they were taken into custody and remanded to jail at the time of pronouncement of impugned judgment. They are directed to be released on same bail subject, however, to furnishing fresh affidavit/surety bond by their surety before the learned trial Court.