

**IN THE HIGH COURT OF SINDH,
CIRCUIT COURT, HYDERABAD.**

Cr: Appeal No.D-36 of 2006
Cr: Acq: Appeal No.D-46 of 2006

DATE	ORDER WITH SIGNATURE OF JUDGE
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For orders on application
For orders on application
For orders on M.A No.6237/13
For hearing of M.A No.2052/11 as well main case.

05-09-2017.

Mr. Zahoor A. Baloch & Syed Tarique Ahmed Shah Advocates for appellants in Cr. Appeal No.D-36/2006, as well for private respondents in Cr.Acq: Appeal No.D-46/2006.

Syed Madad Ali Shah, Advocate for appellant in Cr.Acq.A.No.D-46/2006 as well for complainant in Cr.Appeal No.D-36/2006.

Mr. Shahzado Saleem Nahiyoon, learned D.P.G

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At the outset, counsel for appellant Maherdin has emphasized over the charge which reads as under:-

That you on 25.10.1993 at about 0015 hours, in the court-yard of house of deceased and complainant Abdul Aziz, situated in Village Mir Khan Mehar, Deh Gujhern, taluka Sinjhoru, in furtherance of common intention of you all, committed Qatl-e-Amd of deceased Mugar and Mir Khan, by causing fire arm injuries to them and thereby you committed an offence punishable under section 302 PPC, (As amended by Qasas and Diyat Ordinance) read with section 34 PPC and within the cognizance of this Court.

And I hereby direct that you be tried by Court on the aforesaid charge”.

2. While referring this charge, he contends that in F.I.R the incident is narrated that two accused caused fire shots injuries to deceased Mir Khan while rest of accused persons caused fire shots injuries to deceased Mongal therefore, the court was required to frame the charge in such manner but while framing the charge the trial Court generalized the scene of offence by mentioning that all accused

persons caused fire shots injuries to both the deceased hence the appellant / accused was *materially* prejudiced in preparing his defence.

3. To counter this, the learned counsel for complainant has referred explanation provided to Section 537 Cr.P.C which reads as:

“In determining whether any error, omission or irregularity in any proceeding under this Code has occasioned a failure of justice, the court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings”.

and has emphasized over explanation and contends that at early stage, defence counsel was competent to raise objection, but that was not raised during whole trial; therefore, the illegality or irregularity if any, in charge can be cured in that section.

4. Learned D.P.G contends that appeal is continuity of trial therefore, this court has to frame the charge and decide the case on availability of record as well he contends that some of the witnesses may not be examined as might have died as one accused Sahib did.

5. We have heard the respective parties and have also examined the available material.

6. Needless to mention here that object and purpose of the charge is to put the accused onto a notice of the *allegations* which includes every material *particular* as is evident from the Section 222 of the *Code* which insists that *charge* should contain particulars as to time and place of offence and the person. The following provision further insists that if the nature of the case so requires it should contain the particulars of the manner in which the alleged offence is committed. The *lust* of the object shall not stand satisfied if charge is framed in a manner which may result in misleading the accused to prepare his defence. This was the reason because of which the Section 225 was

included in the *Code* which makes it quite clear that no *error* in stating either the offence or the particulars shall be regarded as '**material**' unless it misled the accused.

7. Here, it would be material to refer prosecution case. The perusal whereof would reflect that it was claim of the complainant party that:

"...while on the barking of dogs they awoke and found that accused Gulsher with pistol, Sahib Khan was standing by his side, whereas accused Mehardin with gun and by his side accused Alimdin was standing. Complainant seeing them had inquired about their presence in his house, in the meanwhile PW Ghulam Nabi also arrived, but at that moment accused Gulsher fired from his pistol upon Mir Khan, who was sleeping whereas accused Mehardin fired from his gun upon Moongar who was also sleeping and subsequently, all the four accused run away by saying....."

8. The prosecution charged all the accused persons for a *general* role i.e killing the deceased persons by *jointly* causing fire-arm injuries with an addition of *common intention* which (intention) *undeniably* could only be gathered from *circumstances* therefore, it was obligatory upon the learned trial Court to have framed the charge in that *fashion* so as to avoid plea of *misleading*. The *charge* framed against all accused persons was never standing well with the *material* provided to the accused persons because *legally* trial commences from framing of charge and not by supplying the copies. It needs not be mentioned that it is the *charge* which the prosecution has to prove therefore, the *defence* is always believed to be prepared with reference to such *framed* charge.

9. It may be added here that it is the *charge* not the investigation papers which the Court has to explain to the accused by reading the same out and then the *plea* is recorded, therefore, normally it (charge) should give a complete *picture* of the allegation which the prosecution has to prove and accused would be required to defend it. The position

shall stand clear from a referral to Section 265-E of the Code which reads as:

“Plea (1) The charge shall be read and explained to the accused and he shall be asked whether he is guilty or has any defence to make.

10. One out of number of accused, though allegedly was present, but played no *role* in commission of the offence, therefore, framing of *charge* by generalizing the allegations may *mislead* the accused in preparing his defence which (defence) may be different in justifying the presence or *absence* from that of defending a general allegation of *actively* committing offence. There would be no cavil to proposition that cross-examination is *normally* done keeping in view the *defence* therefore, importance of framing of a *proper* charge cannot be denied particularly with reference to Section 537 (b) of the Code which reads as :

“(b) of any error, omission or irregularity in the mode of trial, including any misjoinder of charges, unless, such error, omission or irregularity has in fact occasioned a failure of justice”.

Though the language of Section 537 is *negative* i.e ‘**no finding, sentence shall be reversed**’ however when it comes to *failure of justice* the negativity shall not stand in the way because convenience or inconvenience shall always be ignored when the question of **justice** or ***fair-trial*** is involved.

11. In the instant matter though the FIR *prima facie* shows four persons to have trespassed but the case speaks that six persons were sent up as ‘**accused**’ hence in such eventuality the charge must have been framed to given complete picture of *role* of each accused persons which *prima facie* was never done therefore, the plea of the appellant to have been *misled* in preparing the defence appears to be carrying

weight. *Misleading*, if, once is established shall always leave a room for an accused to take a *plea* of having been *prejudiced* while proceedings with *trial* because of *initial* misleading (charge).

12. The above discussion makes us to conclude that there was *material* defect in the charge which may have resulted in materially prejudicing the guaranteed right of the accused, as enshrined by Article 10-A of the Constitution of Islamic Republic of Pakistan, 1973. We would not hesitate in saying that even if a *plea* regarding *prejudice* to right of **fair-trial** on examination of all circumstances seems to be having possibility of it (plea) being true then **Safe administration of justice** shall tilt the scale in favour of such *plea* else the concept of '**fair-trial**' may be frustrated.

13. As regard the reference made by the counsel for complainant while referring to explanation, provided to Section 537 of the Code, it would suffice to say that since it was the duty of the Court to frame *proper* charge hence failure of the appellant to raise such *objection* would not help to dislodge the consequences of well established principle of law i.e **an act of the court shall prejudice none**'. Thus, mere failure to object at *initial* stage would not be sufficient to ignore the demand of **safe criminal administration of justice** which in all circumstances requires conduct of **fair-trial** before declaring one *guilty* or *innocent*.

14. With regard to plea of learned D.P.G that appeal is continuity of trial hence this court may alter the charge and proceed further, it would suffice that though *appeal* is continuity of trial yet a decision by this court as *trial court* shall take away the right of *aggrieved* party to prefer appeal before this Court. As regard, non-availability of witnesses or even in case of death of some of them (witnesses) the trial court may competently resort to Section 350 of the Code within meaning of *spirit*

thereof as well guidelines, so sketched in the case of Miran @ Mir Muhammad v. State 2013 p Cr.LJ 244.

15. In consequence of above discussion, the impugned judgment is hereby set-aside as denovo proceedings with direction to decide the same within 6 months. Since appellants were on bail at the time of trial and conviction awarded to the appellants vide judgment dated 28.02.2006; therefore, appellants are admitted on post arrest bail in the sum of Rs.2,00,000/- (Two Lacs) to the satisfaction of trial Court.

16. In result of acquittal appeal No.46 of 2006 is allowed. However, it has agitated that trial court shall retry the accused persons including who were acquitted. At this juncture accused Alam contends that accused Sahib has passed away. Accordingly trial Court shall call report from concerned department, in case he is not alive, proceedings against him would be abated. Appeal is disposed of accordingly.

JUDGE

JUDGE

Fahad Memon