

# IN THE HIGH COURT OF SINDH CIRCUIT COURT HYDERABAD

***Cr. Appeal No.D-256 of 2010***  
*Confirmation Reference No.13 of 2010*

**PRESENT**

*Mr. Justice Naimatullah Phulpoto*  
*Mr. Justice Shamsuddin Abbasi*

*Date of Hearing:* 10.04.2018

*Date of Judgment:* 19.04.2018

*Appellants/accused:*

- 1.Allah Jurio @ Jurio S/o Abdul Sattar Chandio*
- 2.Mashooq Ali S/o Muhammad Soomar Chadnio*
- 3.Muhammad Soomar S/o Meero Chandio, through Syed Madad Ali Shah, Advocate*

*Complainant:* *Muhammad Essa S/o Haji Abdullah Khore, through Mr. Bharat Kumar Suthar, Advocate.*

*The State:* *Through Syed Meeral Shah Bukhari, Additional Prosecutor General, Sindh.*

## **JUDGMENT**

**SHAMSUDDIN ABBASI, J:-** By this judgment, we intend to dispose of Criminal Appeal No.D-256 of 2010 filed by appellants Allah Jurio alias Jurio, Mashooque Ali and Muhammad Soomar, whereby the appellants have impugned the judgment dated 14.07.2010 passed by the learned Ist Additional Sessions Judge, Badin in Sessions Case No.99 of 2006, in which appellants Allah Jurio alias Jurio and Mashooque Ali were sentenced to death, subject to confirmation by this Court under Section

374 Cr.P.C, and to pay compensation of Rs.200,000/- each, to be paid to the legal heirs of deceased Moula Bux alias Abloo Khore as envisaged under Section 544-A Cr.P.C, and in case of non-payment of the compensation amount, they were ordered to suffer S.I for 06 months. Whereas, appellant Muhammad Soomar was convicted under Section 114 PPC and also sentenced to life imprisonment with fine of Rs.100,000/-, and in case of non-payment of fine amount, he was also ordered to suffer S.I for 06 month. However, the benefit of Section 382-B Cr.P.C was extended to appellant Muhammad Soomar only.

2. The learned trial Court has also made a reference for confirmation of death sentence of appellants Allah Jurio alias Jurio and Mashooque Ali being Reference No.13 of 2013.

3. The brief facts of the case are that complainant Muhammad Essa lodged the present FIR, stating therein that about 5 / 6 months prior to this incident a buffalo of Soomar Chandio was stolen and such allegations were leveled upon Moula Bux alias Abloo (nephew of complainant). Such Faisla was made between the parties by Haji Sher Jamali but Soomar Chandio was annoyed with Moula Bux alias Abloo, thereby they had also exchanged hot words with each other. On 16.05.2006 at 3:00 p.m., Moula Bux alias Abloo and Amb S/o Ghulam Hussain Khore came at Kadhan Town on motorcycle and complainant Muhammad Essa had also come at Kadhan Town, with whom one Jumoo S/o Ahmed Khoso met there. They all met with each other. Thereafter, deceased Moula Bux alias Abloo, Amb and Jumoon left on motorcycle by saying that they were going to purchase some commodities from Kadhan Bus Stand. At about 4:30 p.m., Amb Khore

came to Muhammad Essa and informed him that they after taking tea at the hotel of Rafique Marho and when came out of the hotel at the road, they saw accused Soomar S/o Miro Chandio, Allah Jurio alias Jurio S/o Abdul Sattar Chandio, armed with pistol and Mashooque S/o Soomar Chandio armed with TT pistol came there. On the instigation of accused Muhammad Soomar, it was alleged that accused Allah Jurio fired upon Moula Bux, which hit him on forehead near the ear. Accused Mashooque also fired upon Moula Bux, which hit him on his left side lumber region, who fell down on the road, blood was oozing. Accused after abusing and firing in the air went away alongwith weapons. On hearing such news from Amb, the complainant party rushed there and saw Moula Bux alias Abloo was lying on the road in unconscious condition. They took Moula Bux in a Datsun to Civil Hospital Badin but on the way he succumbed to the injuries near the Army Sugar Mill Badin. Thereafter, the complainant left the dead body of deceased Moula Bux at Civil Hospital Badin and went to lodge FIR with the police on the same date at about 1800 hours, hence the present FIR, it was recorded vide Crime No.13 of 2006 under Sections 302, 337-H(ii), 114, 504, 34 PPC at P.S Kadhan.

4. After completing the investigation, the Investigating Officer submitted challan before the competent Court of Law against the accused under above referred sections.

5. The learned trial Court framed the charge against the accused at Ex-2. Accused pleaded not guilty and claimed to be tried.

6. The prosecution, in order to prove it's case, had examined P.W-1 complainant Muhammad Essa at Ex-13, who produced FIR at Ex-13/A. P.W-2 Amb was examined at Ex-14. P.W-3 Jumoon was

examined at Ex-15. P.W-4 Moula Bux was examined at Ex-16, who produced mashinama of dead body and injury at Ex-16/A, danishnama at Ex-16/B, mashinama of place of vardat at Ex-16/C, mashinama of cloth of the deceased at Ex-16/D, mashinama of arrest of accused Mashooque at Ex-16/E, mashinama of arrest of accused Muhammad Soomar at Ex-16/F. P.W-5 Abdul Razzak was examined at Ex-17, who produced letter at Ex-17/A, postmortem report at Ex-17/B. P.W-6 Rasool Bux was examined at Ex-18, who produced sketch of the vardat at Ex-18/A. P.W-7 Gul Hassan was examined at Ex-19. P.W-8 Mashir Sulleman Mallah was called by learned ADPP vide his statement at Ex-20. P.W-9 Mashir Hamzo was called by ADPP vide his application under Section 540 Cr.P.C at Ex-21 and statement at Ex-21/A. P.W-10 Abdul Qadir, who was Sub-Inspector, was examined at Ex-22, who produced mashinama of arrest and recovery of Allah Jurio at Ex-22/A. P.W-11 Sulleman was examined at Ex-23. P.W-12 Rasool Bux was examined at Ex-24, who produced letter of postmortem of deceased Moula Bux alias Abloo at Ex-24/A, receipt at Ex-24/B. P.W-13 Shah Nawaz, DSP Headquarter, was examined at Ex-25. P.W-14 SIP Saddik Khawaja, Sub-Inspector, was examined at Ex-26, who produced chemical examiner's report at Ex-26/A. Thereafter, the learned ADPP vide application under Section 540 Cr.P.C called SIP Saddique Ali to produce Ballistic Export report, which was produced by ADPP at Ex-27. Thereafter, the learned ADPP by statement at Ex-28 closed it's side.

7. The learned trial Court recorded the statements of the accused under Section 342 Cr.P.C at Ex-29 to 31 respectively, whereby all the accused denied the allegations leveled by the prosecution. Accused Allah Jurio alias Jurio examined D.W Satram Meghwar, Budho

Meghwar and Kishwar Meghwar in his defence. He also produced certified copy of the judgment passed in Criminal Case No.Old-06 of 2006 and New No.39 of 2009 arising out of Crime No.14 of f2006 of P.S Kadhan, under Section 13-D Arms Ordinance at Ex-29/A. Accused Mashooque Ali and Muhammad Soomar neither examined themselves on oath nor led any evidence in their defense but at the same time they adopted the same defense as led by co-accused Allah Jurio. Thereafter, the accused closed their side.

8. After full-dressed trial, the learned trial Court, vide judgment dated 14.07.2010, convicted the accused and sentenced to them as stated in the foregoing paragraph, hence, the appellants / accused have filed the instant appeal.

9. Learned Counsel for the appellants / accused has vehemently contended that the judgment passed by the trial Court is perverse and the same is against the settled principles of criminal justice. It is further contended that appellant Muhammad Soomar was convicted for life imprisonment under Section 114 PPC, which is also against the scheme of criminal justice as no one can be convicted independently under Section 114 PPC. In fact, Section 114 PPC is enabling section which is to be read with main offence and the trial Court had not gone through the relevant provision of the Law. Learned Counsel further contended that the trial Court had committed another illegality while recording the statements of the accused to the extent that the learned trial Court did not put all the questions / materials regarding incriminating pieces of evidence to the accused in their statements recorded under Section 342 Cr.P.C, which were brought by the prosecution on the

record. He further pointed out that no question in respect of the report of chemical examiner and report of Tapedar has been put forth by the trial Court to the accused in their statements under Section 342 Cr.P.C while considering the evidence brought by the prosecution on record. He also contended that the judgment passed by the learned trial Court is not sustainable under the law to the effect that the illegalities have been committed by the learned trial Court, therefore, he at the last prayed for remand of the case to the trial Court from the stage of recording statements of the accused under Section 342 Cr.P.C afresh keeping in view the illegalities committed by the learned trial Court.

10. On the other hand, the learned Counsel for the complainant as well as learned Additional Prosecutor General have frankly conceded to the proposal made by the learned Counsel for the appellants for remand and they further admitted that the learned trial Court had committed illegality, which is not curable under the law and raised no objection to the proposal made by the learned Counsel for the appellants for remand of the case at the stage of recording statement under Section 342 Cr.P.C.

11. Heard the learned Counsel for the appellants, learned Counsel for the complainant and learned A.P.G and perused the record minutely.

12. It is a matter of record that the learned trial Court had convicted appellant Muhammad Soomar under Section 114 PPC as role of abetment has been assigned to appellant Muhammad Soomar, who was awarded conviction and sentenced for life imprisonment on the

ground that appellant Muhammad Soomar was aged about 70 years. The relevant portion of the judgment is reproduced as under:-

“The case of accused Muhammad Soomar is concerned, he was only abettor and instigator in this case, therefore, he is equally responsible and liable to punish with the same punishment of accused Allah Jurio and Mashooque. The accused is aged about 70 years as per his statement under Section 342 Cr.P.C, therefore, taking lenient view, I convict the accused Soomar under Section 114 PPC and sentence him to life imprisonment and to pay fine of Rs.100,000/-“

13. Section 114 PPC reads as under:-

**114. Abettor present when offence is committed.**—Whenever any person, who if absent would be liable to be punished as an abettor, is present when the act or offence for which he would be punishable in consequence of the abetment is committed, he shall be deemed to have committed such act or offence.”

14. The learned trial Court has awarded the sentence to appellant Muhammad Soomar on the role of abetment / instigation during occurrence of the incident as he instigated to co-accused Allah Jurio alias Jurio and Mashooque to commit murder of deceased Moula Bux alias Abloo and on his instigation both the accused made firing on deceased. The finding of the learned trial Court, in which the appellant was held responsible only for the charge under Section 114 PPC, is not correct as Section 114 PPC is not an independent section but an enabling section which is to be read with main offence. We are of the considered view that the learned trial Court, while awarding the sentence to appellant Muhammad Soomar, has not gone through the relevant provision of law, therefore, conviction under Section 114 PPC is not sustainable under the law. Rightly, reliance has been placed upon the case of *GHULAM RASOOL & ANOTHER V/S. THE STATE*, reported as 2013 YLR 1779, the relevant portion thereof is reproduced as under:-

“The punishments which are awarded to the appellants / accused are novel. Against accused Ghualm Rasool to suffer imprisonment for life for offence committed under section 114, PPC. Section 114, PPC is not an independent Section but an enabling Section which is to be treated with main offence.”

15. We have also gone through the depositions of P.Ws and the record produced by them and examined the statement under Section 342 Cr.P.C of the accused recorded by the trial Court and observed that the learned trial Court has failed to put forward the specific questions to the accused regarding incriminating piece of evidence in the shape of report of chemical examiner and the report of Tapedar. The scheme of law provides the opportunity to an accused to defend himself on the allegations made by the prosecution through the evidence as envisaged under Section 364 Cr.P.C, which is reproduced as under:-

**“364. Examination of accused how recorded.** (1) Whenever the accused is examined by any Magistrate or by any court other than a High Court the whole of such examination, including every question put to him and every answer given by him, shall be recorded in full, in the language in which he is examined, or, if that is not practicable, in the language of the Court or in English; and as such record shall be shown or read to him or, if he does not understand the language in which it is written, shall be interpreted to him in a language which he understands, and he shall be at liberty to explain or add to his answers.”

16. It is the primary responsibility of the trial Court to ensure that truth is discovered in a case dealt by it. Article 10-A of the Constitution of Islamic Republic of Pakistan, 1973, provides guarantee for fair trial in order to determine civil as well as criminal rights of any person under the obligation or in any criminal charge. It is settled principle of law that if any piece of evidence brought by the prosecution on record is not put to an accused person at the time of recording statement under Section 342 Cr.P.C, then it could not be considered against him. Same position has



been created in the case at hand by the trial Court as the trial Court while recorded statement of the accused under Section 342 Cr.P.C has not put the relevant questions regarding the report of chemical examiner as well as Tapedar.

17. In order to appreciate the contentions raised by learned Advocate for the appellant, we have carefully perused the statement of the accused under Section 342 Cr.P.C recorded by the learned trial Court at Ex-8, which is reproduced as under:-

*Q.No.1. You have heard the prosecution evidence. It has come on record that on 16.5.2006 at 1630 hours in front of shop of Juman Wahro Ali Bandar Raod Kadhan, you accused armed with pistol. Accused Soomar instigated you, you opened Pistol fire at Moula Bux alias Abloo on his above ear and accused Mashooque opened pistol fire on left side abdomen on which Moula Bux fell down on road and on the way to Civil Hospital in Datsun, who succumbed injuries near Army Sugar Mills Badin. What have you to say?*

*Ans: No Sir, it is false.*

*Q.No.2. It has further come in evidence that on the same date, time and place you accused in furtherance of common object abused the complainant party escaped away while making air fires. What you have to say?*

*Ans: No Sir, it is false.*

*Q.No.3. It has further come in evidence that on the same date, time and place you accused Mashooque opened fire caused injuries to deceased Moula Bux. What have you to say?*

*Ans: No Sir, it is false.*

*Q.No.4. It has further come in evidence that police had arrested you on 17.5.2006 at 1810 hours at Kadhan-Ali Bandar main road near General Sar Anjam Link Road in presence of mashirs Sulleman S/o Lakhadino Mallah and Hamzo S/o Khudadino Jat. What have you to say?*

*Ans: No Sir. I was arrested from my house.*

Q.No.5. *It has further come in evidence that police had recovered one T.T Pistol in running position alongwith magazine in which 5 bullets of 30 bore from your possession in presence of mashirs Sulleman S/o Lakhadino Mallah and Hamzo S/o Khudadino Jat. What have you to say?*

Ans: *No Sir, it was foisted upon me by Police and Police also registered case under Section 13-D in which it have*

Q.No.6. *Why the P.Ws have deposed against you?*

Ans: *They are setup and interested and also related.*

Q.No.7. *Do you want to be examined on oath in disproof the charge leveled against you?*

Ans: *No Sir.*

Q.No.8. *Do you want to lead any defence?*

Ans: *Yes, I want to produce witnesses (1) Satram Maghwar, Nazim U.C Kadhan (2) Set Budho Meghwar, Shopkeeper, Kadhan (3) Kishwar Meghwar, Shopkeeper, Kadhan.*

Q.No.9. *Do you want to say anything else?*

Ans: *I am innocent. I was falsely implicated. I produce certified copy of judgment passed in Cr. C. No.Old-06/2006 and New 39/2009 in Crime No.14/2006 P.S Kadhan U/s. 13-D of Arms Ordinance. I pray for mercy.*

18. It is noticed that accused Allah Jurio has been put the questions in his statement under Section 342 Cr.P.C as mentioned above, however, the same questions were also put to other accused, needless to reproduce the same to avoid repetition.

19. It is the case of the prosecution that a T.T Pistol alongwith magazine with 05 bullets of 30 bore was recovered from the possession of accused Allah Jurio in presence of mashirs Sulleman and Hamzo; it was sent to the ballistic expert; positive report was produced in evidence but the learned trial Judge was bound to put specific question to the accused in respect of the report of the ballistic expert. Prosecution

had also produced report of chemical examiner in this case and the question was also not put to the accused in his statement under Section 342 Cr.P.C.

20. Learned Counsel for the complainant as well as learned Additional Prosecutor General conceded to the above legal position that the trial Court has committed illegality in recording statement of the accused under Section 342 Cr.P.C, and have frankly raised no objection for remand of the case to the learned trial Court to record statement of the accused under Section 342 Cr.P.C afresh.

21. It is made clear that the statement of accused was recorded under Section 342 Cr.P.C by the learned trial Court in a very stereotype manner. Relevant and very important questions of incriminating pieces of evidence have not been put to the accused for their explanation / reply. Perusal of the statement of accused under Section 342 Cr.P.C reveals that all the incriminating pieces of evidence brought on record were not put to the accused, while their statements were recorded under Section 342 Cr.P.C, enabling them to explain and reply the same, notwithstanding that the trial Court used such piece of evidence for convicting the accused. Under the law, if any piece of evidence is not put to the accused in his statement recorded under Section 342 Cr.P.C, the same cannot be used for his conviction. Exactly the same position is in the case at hand. The legal position has also been admitted by the learned Additional Prosecutor General appearing for State as stated above as well as learned Counsel for complainant.

22. Reliance is placed on the case of *ISHAQUE ALIAS KAKAN V/S. THE STATE* reported as SBLR 2016 Sindh 1157, wherein this Honourable Court has observed as under:-

10. We have carefully perused the statement of accused. In question No.1 trial Court has not put incriminating pieces of evidence against accused which were brought on record by the prosecutor witnesses. It is the case of the prosecution that TT pistol used by the accused in the crime was also recovered from him but no question regarding recovery of TT pistol was put to the accused. TT pistol and empties were sent to ballistic expert, positive reports have been tendered in the evidence but no question was put to accused in that regard. Rightly it is contended that serious prejudice has been caused to the accused as the accused was not provided fair opportunity to explain his position regarding incriminating pieces of evidence brought on record against him.

11. In the present case trial court did not perform its function diligently and has taken the matter lightly and in a casual manner awarded death sentence to the accused. As such, appellant was prejudiced in his trial and defence. Therefore, a miscarriage of justice has occurred in the case. Procedure adopted by trial court is an illegal procedure that cannot be ordered under Section 537 Cr.P.C. Thus, it has vitiated the trial. Hence, impugned judgment is liable to be set aside.

12. In the light of what has been discussed above, the conviction and sentence awarded to appellant under impugned judgment are set aside. Appeal is partly allowed. Reference for confirmation of death sentence is answered in negative. Case is remanded to trial Court for re-trial for recording evidence (Examination-in-Chief and Cross-Examination) of P.W-5 ASI Abdul Waheed and statement of accused under Section 342 Cr.P.C afresh within three (03) months, in accordance with law.

23. Reliance is also placed on the case of *MUHAMMAD SHAH V/S. THE STATE*, reported as 2010 SCMR 1009, in which the Honourable Supreme Court has held as under:-

“11. It is not out of place to mention here that both the Courts below have relied upon the suggestion of the appellant made to the witnesses in the cross-examination for convicting him thereby using the evidence available on the record against him. It is important to note that all incriminating pieces of evidence, available on the record, are required to be put to the accused, as provided under section 342, Cr.P.C in which the words used are

*“For the purpose of enabling the accused to explain any circumstances appearing in evidence against him” which clearly demonstrate that not only the circumstances appearing in the examination-in-chief are put to the accused but the circumstances appearing in cross-examination or re-examination are also required to be put to the accused, if they are against him, because the evidence means examination-in-chief and re-examination, as provided under Article 132 read with Articles 2(c) and 71 of Qanun-e-Shahadat Order, 1984. The perusal of statement of the appellant, under section 342, Cr.P.C., reveals that the portion of the evidence which appeared in the cross-examination was not put to the accused in his statement under section 342, Cr.P.C. enabling him to explain the circumstances particularly when the same was abandoned by him. It is well-settled that if any piece of evidence is not put to the accused in his statement under section 342, Cr.P.C. then the same cannot be used against him for his conviction. In this case both the Courts below without realizing the legal position not only used the above portion of the evidence against him, but also convicted him on such piece of evidence, which cannot be sustained.*

24. Reliance can also be placed on the case of *MUHAMMAD NAWAZ & OTHERS V/S. THE STATE & OTHERS*, reported as 2016 SCMR 267, wherein the Honourable Apex Court has observed as under:-

*“6(c).....There is yet another aspect of the case. While examining the appellants under section 342, Code of Criminal Procedure, the medical evidence was not put to them. It is well settled by now that a piece of evidence not put to an accused during his/her examination under section 342, Code of Criminal Procedure, could not be used against him/her for maintaining conviction and sentence”.*

25. In another case of *QADDAN & OTHERS V/S. THE STATE* reported as 2017 SCMR 148, the Honourable Apex Court has held as follows:-

*3.....Apart from that the motive set up by the prosecution had never been put to the present appellants at the time of recoding of their statements under section 342, Cr.P.C. The law is settled that a piece of evidence not put to an accused person at the time of recording of his statement under section 342, Cr.P.C. cannot be considered against him.”*

26. In view of what has been observed herein above and in view of the dictum laid down by the Honourable Apex Court in the cases referred to above, we are of the considered opinion that the learned trial Court while passing the judgment has committed illegality and violated the provisions of Section 342 Cr.P.C as well as Article 132 of Qanun-e-Shahadat Order, 1984. Consequently, the judgment dated 14.07.2010 passed by the learned trial Court is hereby set-aside and Reference for confirmation of death sentence is declined. Case is remanded back to the learned trial Court with direction to record statement of the accused under Section 342 Cr.P.C afresh by putting all incriminating pieces of evidence including the reports of chemical examiner as well as evidence of Tapedar. A fair opportunity shall be provided to the accused for explanation / reply as well as to the prosecution. Thereafter, the learned trial Court shall pass the judgment afresh within two months after hearing both the parties, in accordance with law. It may be mentioned here that appellant Muhammad Soomar was on bail prior to announcement of judgment, therefore, his enlargement on bail shall stand continued and the appellant shall appear before the trial Court on 30.04.2018.

**JUDGE**

**JUDGE**