IN THE HIGH COURT OF SINDH AT KARACHI

CR. JAIL APPEAL NO.614/2018

Date | Order with signature of Judge

---

1. For hearing of MA No.10773/2018.
2. For hearing of case.

29.03.2019

Mr. Ajab Khan Khattak advocate for appellant.
Mr. Faheem Hussain Panhwar, DPG alongwith ASI Nadeem Akhtar, CRO Branch, CIA.

O R D E R

SALAHUDDIN PANHWAR, J: Appellant has assailed judgment dated 5th March, 2018 passed in S.C. No.267/2012 arising out of FIR No.24/2011, u/s 302, 353, 324, 427, 34 PPC, PS CID, Karachi.

2. At the outset learned counsel for appellant contends that this is a case of erroneous observations; charge was framed in murder case on 06.05.2011 wherein accused pleaded not guilty, such plea was recorded and signed, thereafter official witnesses were examined. During trial appellant moved application that he is confined in jail since seven years, he is from KPK, therefore sentence undergone may be considered and he may be released. On such application, ADPP filed statement for closing of side on the plea that since accused has pleaded guilty therefore there is no need to examine the witnesses hence statement under section 342 CrPC was recorded wherein accused admitted the question with regard to commission of offence and he was convicted and sentenced for five years with fine of Rs.50,000/-. According to counsel though appellant was charged under section 302 PPC on account of murder, conviction is awarded under sections 353, 324, 427 PPC. It is further contended that conviction is illegal, eye witnesses were not traceable hence trial court was competent to defer the trial as sine die. On a query that

why appellant has preferred to file this appeal when admittedly in a murder case he has succeeded to get conviction as already undergone, learned counsel replied that since accused is convicted for life in another case of narcotic he has preferred appeal but due to conviction of this case he is not able to get benefit in that appeal.

3. Learned DPG contends that since this is a murder case and required to be adjudicated properly. In case witnesses are not appearing, proper course was to take all coercive measure and then adjourn the matter for sine die.

4. What has been argued and acknowledged has surprised me *seriously* and has left me with a question that how can one, (*Judge)* holding the power to decide fate of a *dead victim* as well accused *(living person),* can be so negligent that to bring such a picture of a *Criminal Administration of Justice?.* The question, so surfaced, has forced me to *first* say that: **the Courts are not the *mechanical-places* so as to reduce the numbers but are always meant to do justice (*balance of scale)* on things, brought before them. The *Islam* as well all the civilized cultures on *earth* are unanimous that no society can survive without *justice.*** It is the concept of *justice (*balancing of scales in saying a **wrong** a **wrong** and **right** a **right).** In the case of *Shabbir Hussain v. Registrar, Lahore High Court* (PLD 2004 SC 191) while affirming importance of a **'judge'** with reference to Holy Quran it was observed as:-

> '5. The contentions raised by the learned counsel for the parties have received our anxious consideration. However, before proceeding to determine the question involved in these appeals we deem it necessary to observe that although the civil servants are bound to be honest having unblemished integrity, the Judicial Officers are supposed to excel in this trait of character in view of the sacred and sensitive nature of their duties and the pivotal position which justice occupies in Islam according to the following verse of the Holy Qur'an:-

> " 'O' You who believe, **the maintainers of justice,** bearers of witness for Allah's sake though it may be against your own selves or your parents or near relations, be he rich or poor, Allah is most competent to deal with them both, therefore, do not follow your low desires least you deviate, and if you swerve or turn aside then Allah is aware of what you do."
> (Surah 4, Verse 135).
>
> Islam also enjoins that those who perform the functions of Judges must not only possess profound knowledge and deep insight but also be men of integrity **and capable of holding the scales of justice even under all circumstances**. .."

Capability of holding the scale of justice is not meant to possess a ***degree / certificate*** but awareness of law and procedure without which the **scale of justice** cannot be believed to be held. In the case of *Government of Sindh v. Saiful Haq Hashmi* (1993 SCMR 956) the duty of a **'judge'** has further been emphasis as:-

> "11-A. It is well settled that as long as the jurisdiction is exercised in good faith free from ulterior motives, contamination or taint of dishonesty or corruption a judicial officer cannot render himself liable to disciplinary action for mistakes committed in the course of decisions made by him honestly and bona fide. .....**A Judge has delicate position of vulnerable nature on whom eyes from both sides are set**. According to well settled principle, **justice is not only to be done but it should be seen to be done**. It should be seen to be done by the conduct of the Judge, the manner he entertains, proceeds and hands over the written decision. **Each and every step in a judicial proceeding should demonstrate the integrity, honesty, bona fides and impartiality of the Judge**. As observed in Muhammad Hussain Kazi v. Government of the Punjab PLD 1983 SC 187, 'the propriety or impropriety of conduct had to be determined by reference to the officer, his work and duties and the service discipline governing him. In case of a judicial officer the hierarchical arrangement of Courts, the handing down of written judgments and the collection of precedents in law, all control and guide his functioning.'. The Courts presided over by Judges are institutions which command respect, faith and confidence for **implementation of rule of law, justice and equity**. If at any stage justice is tainted, tarnished or contaminated with dishonesty and corruption or abhors the judicial conscience, the blame squarely lies upon the Judge for behaving in a manner unbecoming of a Judge or a gentleman. Purity of the fountain of justice has to be maintained and protected zealously from corruption, contamination and pollution which distorts its angelic and divine face."

I would further add that a **'Judge'** is entrusted to perform *divine* duty but with earthly wisdom hence **'Adl'** may not be expected from him but he is not supposed to be guilty of miscarriage of justice (improper balancing of scale by putting things in each arm of scale, per dictate of law and procedure) nor any negligence from him is expected. One may err in placing things in proper arm of the scale thereby erring in wrong conclusion / decision but should never be guilty of ***'negligence'*** in following the dictates of settled law and procedure because negligence of a ***judge*** shall be a precursor of doom and disaster for the society, so was held in the case of *Imran Ahmed Khan Niazi v. Mian Muhammad Nawaz Sharif* (PLD 2017 SC 265) as:

> **"19.** ... Courts of law decide the cases on the basis of the facts admitted or established on the record. Surmises and speculations have no place in the administration of justice. **Any departure from such course, however well-intentioned it may be, would be a precursor of doom and disaster for the society**. ..

The Criminal Administration of Justice, always demands from a Judge (trying a criminal charge) that no **'conviction'** can be recorded on a criminal charge unless the decision (balancing) is done, as insisted in the case of *Azeem Khan & another v. Mujahid Khan & Ors* (2016 SCMR 274), that:-

> "32. It is also a well embedded principle of law and justice that no one should be construed into a crime on the basis of presumption in the absence of strong evidence of unimpeachable character and legally admissible one. Similarly, mere heinous or gruesome nature of crime shall not detract the Court of law in any manner from the due course to judge and make the appraisal of evidence in a laid down manner and **to extend the benefit of reasonable doubt to an accused person** being indefeasible and inalienable right of an accused. In getting influence from the nature of the crime and other extraneous consideration might lead the Judges to a patently wrong conclusion. In the event the justice would be casualty."

I shall further add that there had never been any doubt to the legal position that every accused, regardless of charge against him, was / is entitled for a ***expeditious*** trial which (expeditious), *however,* never allows the **'judge'** to make departure from mandatory procedure and to ***ignore*** settled principles of law rather invites capacity of the *judge* to ensure legal disposal of the case by using all available *legal* courses, provided by the law and procedure themselves. This is so, because a delayed **justice** is not a **justice** at all and even may compel the accused to accept what he never *did.*

5. Having said so, now I would revert to merits of the case. At this juncture it would be conducive to refer the charge which is that:-

> "That you on or about 26th day of January 2011 about 0130 at Karachi Tool Plaza, Super Highway, Gadap City, you accused alongwith absconded accused namely Gul Zaman, Sardar and Mst. Gulshan Bibi, being duly armed with TT pistols, have attacked upon the complainant with intention to commit Qatl-e-Amd of police party, as a result, HC Syed Yousuf and Muhammad Sabir have received bullets injuries respectively subsequently Muhammad Sabir has been expired and thereby you have committed an offence under sections **324, 302 and 34 PPC** within the cognizance of this court.
>
> I further charge you, on the same day, time and place, you accused alongwith absconded accused being duly armed with TT pistols, by criminal force to deter public servant from discharge of their duties and thereby you have committed an offence under sections **353 and 34 PPC** within the cognizance of this court.
>
> I further charge you, on the same day, time and place, you accused alongwith absconded accused being duly armed with TT pistols, have damaged the property and thereby you have committed an offence **punishable u/s 427 and 34 PPC** within the cognizance of this court.
>
> And I hereby direct that you be tried by this court on the above mentioned charge."

From above referral, it is quite clear that the learned trial Court had framed the charge against the accused (appellants) for offences, punishable under section ***324, 302, 34 PPC; 353 and 34 PPC; 427***

and 34 PPC hence at all material times the trial Court was required to decide fate of every single charge (**offence)** which could, *legally,* either be in **acquittal** or **conviction** from such charge (**offence).** Such legal position was / is always clear from *plain* language of section 367 (2) & (4) of Code which are:-

> (2) It shall specify, the **offence (if any)** of which, and the section of the Pakistan Penal Code or other law under which, the **accused is convicted**, and the punishment to which he is sentenced.
>
> (4) If it be a judgment of acquittal it shall state the offence of which the accused is **acquitted**, and direct that he be set at liberty.

Thus, the above legal position makes it quite clear and obvious that learned trial Court judge, having framed the charge (starting trial for specific offences) for specific offences, was left with no *option* but to make *legal* determination of such offence i.e either by recording findings of acquittal or conviction for each **offence.** However, available record speaks otherwise. Such reflection from record not only a material *illegality* but also speaks how learned trial Court deals with matter, involving question of life. It would be convenience to refer Point No.2 of the impugned judgment as under:-

> "**Point No.2:**
>
> As accused Akhtar Zareen s/o Shah Zain voluntarily plead his guilt during recording his statement u/s 342 CrPC, however he request for mercy and lenient view, I, therefore, pass sentence under section 265-H(ii) Cr.P.C for an offence punishable under section u/s **353/324/427/34 PPC** and convict the accused with five years R.I. and the accused shall also pay Rs.50,000/- fine and in default of payment of fine the accused shall suffer three months more S.I. The benefit of section 382-B Cr.P.C is also extended to accused. The accused is present in judicial custody, he is remanded to jail alongwith conviction warrant with directions to the jail superintendent to serve out the conviction according to law. The accused Akhtar Zareen s/o Shah Zain also

> convicted in Session Case No.268/2012, FIR No.26/2011, u/s 13-E Arms Ordinance of PS CID, Karachi, therefore both the sentences will run concurrently."

Conviction and **sentence**, so awarded by trial court judge as:

> "….. for an offence punishable under section u/s **353/324/427/34 PPC** and convict the accused with five years R.I. and the accused shall also pay Rs.50,000/- fine."

Manner of recording conviction in such fashion, *prima facie,* is in utter disregard to what has been insisted by Section 367(2) of the Code which requires specification of each ***offence*** and ***punishment*** thereof. However, without prejudice to legal consequences of such an ***illegality,*** it is quite obvious that the learned trial Court judge spoke nothing about offence, punishable under section 302 PPC, though the accused / appellant was specifically charged & tried for such offence *too* hence legal presumption shall be nothing but that there came no legal **'disposal'** for charged offence of section **302 PPC** yet the learned trial Court judge **terminated** the case by recording the judgment, *impugned.* Such act or omission, as the case may be, is not worth appreciating nor can legally be approved because all the *jointly* charged & tried offences are legally required to be determined through one single judgment because the law permits only a **'single'** trial of one for an **'offence'**. All these are the basic *procedural* knowledge which, every trial judge, is believed to possess except the author of judgment *impugned.* Even in points of determination issue regarding murder, natural or unnatural, was not framed. Without going into question that as to whether it was result of ignorance of such basic procedure or was a result of **negligence** the *prima facie* conclusion could be nothing but that writer of *impugned* judgment is either incompetent or devoid of any judicial knowledge/approach.

6. The above *glaring* illegality cannot be said to be result of some *oversight* because while writing a *full judgment* the author thereof is believed to have *carefully* gone through all available record else there can be no legal ***decision/judgment.*** The learned trial court judge through impugned judgment did attempt to give an impression of having gone through available record carefully but what he proved, stood discussed above. However, such attempt of learned trial Court judge, being relevant, is referred hereunder:-

> "**Point No.1.**
>
> "From the perusal of record shows that during course of evidence six witnesses were examined by the prosecution, **although the charge was framed in year 2011**. Thereafter, this court repeatedly issued summons/BWs against PWs but remaining PWs were not produced by the prosecution.
>
> However, today case was fixed for further evidence, the accused Akhtar Zareen s/o Shah Zaman moved an application, in which he voluntarily pleads his guilt and request to the court for mercy and lenient view.
>
> From the perusal of record shows that accused was arrested on 26.01.2011, thereafter the documents were supplied to the accused and **in year 2011 a formal charge was framed** therefore, this court repeatedly issued summons/BWs against PWs and only six witnesses were examined by the prosecution.
>
> As today accused Akhtar Zareen s/o Shah Zain voluntarily pleaded his guilt during recording statement of accused required u/s 342 CrPC and even such application was also moved by the accused before court, therefore, looking into the circumstances and in the light of **application/admission of accused** I hold this ***point No.1 to be answered in affirmative***."

From above, it is quite obvious that learned trial court judge did claim to have sailed through the record; specific reference to framing of **'formal charge'** , if be taken as proof of such claim, then it can safely be deduced that learned trial Court judge had active knowledge of fact that of **'trial of accused/appellant'** for **offence under**

section 302 PPC yet, as discussed above, there is nothing about legal termination of such **offence** which, as already defined, is not an *irregularity* but a prima facie ***illegality and colourful exercise.*** If it is believed that learned trial Court Judge did go through the record then failure in responding to **charge** for offence of murder **(section 302 PPC)** could be nothing but a deliberate action or knowing **omission**. Needless to add that leaving an **'offence'** determined, in disregard of commandment of section 367 Cr.PC, would always be sufficient for setting aside of the impugned conviction and **'retrial'** of the case.

7. Without prejudice to above, pertinent to mention that at stage of recording of 342 Cr.P.C statement if the accused admits evidence, came against him yet the trial Court judge would not be competent to *straight away* record a **'conviction'** rather shall be required to serve a **'show-cause notice'** thereby making it quite clear and obvious to the accused (*person pleading guilt)* that as to what sentence / punishment may fall upon him as well the trial Court judge before proceeding on any such *plea* must satisfy itself that such *plea* is not result of any coercion or other influence. In the instant case neither the accused / appellant was ever served with such show cause nor the learned trial Court ever made any effort to satisfy itself that whether such an admission is voluntary or *otherwise?* because it would never satisfy the requirement of **Safe Criminal Administration of Justice** to use such an **evidence** as a **'base'** to record conviction without *first* making the maker thereof aware of consequences thereof. Such failure on part of the learned trial Court judge would always be sufficient to declare such conviction as **illegal.**

8. I shall further add that law never binds the trial Courts to record convictions on such *pleas* rather leaves things open for the trial Court and the trial Courts can competently prefer to try the accused even on such pleas, so is evident from a bare perusal of the Section 243 of the Code. However, once an accused denies to a charge and asks for his trial then it is not advisable to record conviction on an application of pleading guilt/admitting allegation during examination of accused under section 342 Cr.P.C as it would always be *hard* to attach truthfulness to such subsequent plea nor it *alone* would be sufficient to deny benefits of doubts, came on surface during trial. Worth to add here that procedure law provides only a single opportunity to accused for ***'pleading guilt or trial'*** therefore, any subsequent *plea* of guilt would not be a **'confession'** but would, *at the most,* fall within meaning of **'admission'.** Such difference needs to be kept in view by all Criminal Courts. In the case of *Muhammad Ismail v. State* (2017 SCMR 713), while dealing with similar question, it has been observed by honourable Apex Court at Rel. P-721 as:-

> "As the above procedure was not adopted, therefore, it was incorrectly construed by the Courts below as **confession** of the accused. Under the law, it may be treated as an **admission** of the appellant, however, on the basis of admission alone, accused person cannot be awarded a capital punishment because **admission,** as has been defined by Article 30 of the **Qanun-e-Shahadat Order, 1984,** is only a relevant fact and not a proof by itself, as has been envisaged in Article 43 of the Order, 1984, where a proved, voluntary and true confession alone is held to be a proof against the maker therefore, both the Courts below have fallen in error by treating this **halfway admission** to be a **confession** of guilt on the part of the appellant.
>
> 13. ..... Therefore, it is held that the **admission** of the appellant cannot be a substitute for a true and voluntary **confession,** recorded after adopting a due process of law and it cannot be made the sole basis of conviction on a capital charge."

From above, it is quite obvious that since the learned trial Court judge gave not a single **reason** for conviction except that of **admission** of accused which, as discussed, was never sufficient to record the conviction or to avoid the legal obligation of the trial Court to appreciate all available material while evaluating the evidence for a judgment of *full-dress* trial. In the case of *Muhammad Ismail* supra it was also observed as:-

> "12. True, that under section 265-E, Cr.P.C, the Trial Court in a session case, has a discretion to record the plea of the accused and if he pleads guilty to the charge, it may convict him in its discretion. Nevertheless, it is also provided in section 265-F, Cr.P.C that if the Trial Court does not convict him on his plea of guilt, it shall proceed to hear the complainant (if any) and take all such evidence as may be produced in support of the prosecution. This discretion is to be exercised with extra care and caution, and ordinarily on such admission, awarding capital sentence of death shall be avoided and to prove the guilt of an accused, evidence of the complainant or the prosecution has to be recorded, in the interest of safe administration of justice".

9. There is another surprising aspect which requires to be added too. The perusal of the findings on point-1 shows that accused (appellant) allegedly made an application for pleading guilt (admitting guilt); which resulted in closure of prosecution side and conviction upon him (accused), however, perusal of the record shows that diary of relevant date i.e 14.02.2018 reads as:-

> *"Case called. Accused Akhtar Zareen is produced in custody by jail authority in the court at judicial complex. ADPP for the State is present. DC is also present. Process returned un-served. No. BW is present. Put off to 05.03.2018 for evidence. Accused is remanded to judicial custody with direction to be produced on the next date of hearing. Process re-issued and handed over to process server."*

The *diary,* meant to reflect complete proceedings of a particular date, does not speak about such application of the accused nor it, ever,

was made part of the record of proceedings by marking / exhibiting. It, however, was attached with *misc part* of proceedings. The perusal whereof shows that same was neither identified by his counsel nor was supported by any affidavit so as to safely accept the same as ***voluntarily*** one. The diary of next date of hearing viz. 05.03.2018 shows that accused was present. **PWs were present**. ADPP filed statement for closing of the side. Statement under section 342 CrPC was recorded. Final arguments heard. Judgment passed and announced in open court. Such diary even reflects nothing about application of the accused (appellant) which, *otherwise,* was used for all subsequent acts i.e **'avoiding process for remaining witnesses; closing prosecution side and even a base for conviction.** Such manner, being in complete negation to settled procedural law, cannot be approved rather was always *impliedly* prohibited. When, per such diary, the witnesses were in attendance then it was always advisable to have examined the available witnesses rather than disposing the criminal case on claimed **'admission'.** It is important to add that when admittedly the **witnesses** were in attendance on relevant date then it was never permissible for the *prosecutor* to have closed the prosecution side merely while referring to so called statement of **admission** of accused because provision of Section 265-F, *no where,* provides such an authority to close prosecution side except when prosecutor finds to have brought all. The Prosecutor, needless to add, should prove to have discharged their duties, as per commandments of law and procedure. I may further add that even an act of closing of prosecution side would never relieve the Court to attempt to achieve the ultimate objective i.e avoid failure of ends of justice (540 Cr.PC). *Prima facie,* the learned trial Court judge departed from mandatory

procedural requirements which *legally* he was not competent to do. In the case of *Muhammad Ismail* supra, it was also held as:-

> "13. It is a bedrock principle of law that, once a Statute or rule directs that a particular act must be performed and shall be construed in a particular way then, acting contrary to that is impliedly prohibited. **That means, doing of something contrary to the requirements of law and rules, is impliedly prohibited.**"

Be that as it may, if the learned trial Court judge was of the view that **'admission'** of the accused was sufficient to record conviction even then it was obligatory upon him to have recorded punishment for each **'offence'** because application does not reflect it to be for **'part-offence'**, therefore, it was never within competence of the learned trial Court judge to have ignored / avoided punishment for charged offence of **murder** which is not less than one, provided by law itself. In the case of *Muhammad Jumman v. State* 2018 SCMR 318 it is observed as:-

> "7. ... Inflicting conviction and imposing sentence is not a mechanical exercise but it is onerous responsibility to inflict, fair, reasonable and adequate sentence, commensurate with gravity and or severity of crime, looking at the motive, attending and or mitigating circumstances that provoked or instigated commission of crime and it involves conscious application of mind. No mathematical formula, standard or yard stick could be prescribed or set out to inflict conviction and sentence, such factors vary from case to case and while undertaking such exercise **Court must keep in sight provisions contained in Chapters-II and IV of the P.P.C**."

> "10. As noted above, through impugned order, appellate court while maintaining the conviction under section 302(b) P.P.C modified the sentence to *"already under gone",* without application of mind and in a mechanical fashion, as noted above either of the two legal sentence for an offence under section 302(b) P.P.C, is provided viz. *"death"* OR *"imprisonment for life"* and nothing in between, shorter or greater. In case the Appellate Court, looking at the attending and mitigating circumstances was convinced that the sentence warded is severe and or that mitigating and or other attending circumstances existed or that the case is covered by any of the legal exception or that case of the respondent fell under clause (c) to section 302 PPC and also beyond the pale of proviso thereto, it was only then Court could have exercised the

> discretion to award any term of sentence or punishment 'with imprisonment of their description for term which my extend to twenty five years. ...."

Here, I would be safe in adding that inflicting conviction and imposing sentence is not a mechanical exercise but onerous responsibility which shall continue even in matters of **'admission of guilt / pleading guilt'** because right of an appeal, otherwise with-held in matter of pleading guilt, is not applicable when it comes to extent of **sentence** and legality thereof. Besides, ADPP closed side in a murder case, because of application filed by accused, even state failed to file appeal/revision against impugned judgment which shows that besides judge, ADPP was also in league to favour the accused and apparently all were on same page to undergo the appellant though law and record, *both,* were never justifying such move.

10. All the examined angles, leave me with no option but to set aside the illegally recorded conviction (*judgment)* and to remand the same for trial of the case from the stage as it was on 05.03.2018. Trial court shall ensure to conclusion of trial within six months.

11. With regard to plea of sine die, apparently this case is not falling within that category as eye witnesses who are police officials have been examined, medical evidence is available with prosecution and case can be heard.

12. In view of above, suffice to say that impugned judgment is not only shocking but same has sufficiently given the picture of its author as well his competence, legal knowledge and attention in deciding **criminal matters.** The Criminal Administration of Justice always asks for *firm* hands and shaky hands should have no room in

such administration. The trial judge (Mr. Sikander Ameer Pahore) from his conduct has proved to be either incompetent / negligent or that impugned judgment is result of some hidden motive, hence office shall place this matter before competent authority for departmental proceedings. As well as copy shall be communicated to P.G. Sindh for action against the then ADPP.

J U D G E

IK