

JUDGMENT SHEET
IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

Present:

Mr. Justice Abdul Maalik Gaddi.
Mr. Justice Khadim Hussain Tunio.

Cr. Appeal No. D- 113 of 2018

Date of hearing 06.02.2020
Date of judgement: 06.02.2020.

Mr. Abdul Hameed Bajwa, Advocate for appellant.
Mr. Jehangir Khan Pathan, Advocate for complainant.
Ms. Rameshan Oad, A.P.G. for the State.

J U D G M E N T

ABDUL MAALIK GADDI, J- Through this criminal appeal, the appellant Khadim Hussain has challenged the judgment dated 31.05.2016 passed by learned 1st Additional Sessions Judge, Umerkot in Sessions Case No.117 of 2012 (Re-State v. Khadim Hussain and others) arising out of crime No.54/2012 for offences punishable u/s 302, 324, 337-A(i), 337-F(i), 147, 148, 149 PPC, registered at Police Station Pithoro, whereby the learned trial court after hearing the learned counsel for the parties as mentioned in the judgment, convicted the appellant Khadim Hussain u/s 302(b) PPC and sentenced him to suffer imprisonment for life and to pay the fine of Rs.1,00,000/- (one lac only), in default whereof he shall undergo for six months more. The fine if paid by the accused be given to the heirs of deceased. However, benefit of Section 382-B Cr.P.C was extended to the appellant. It may pertinent to mention that co-accused Pir Bux alias Peeru and Manjhi were convicted and sentenced to three years whereas co-accused Uris alias Naroo Shar, Sajjan Shar and Taj Muhammad were acquitted of the charge by extending them benefit of doubt.

2. Brief facts of the case are that complainant Nabi Bux lodged F.I.R on 23.09.2012 at 1310 hours alleging therein that they are haries of Pir Taj Hussain Shah Jeelani, earlier they had dispute with Khadim Hussain

Shar and such case is also pending. Khadim Hussain was issuing threats to them to withdraw from the case and if they will not withdraw the case it will not be better for them. On 22.09.2012 after purchasing house hold articles from Akri Pithoro, they were returning to village on motorcycle, complainant was riding motorcycle while his father Manthar and Abdul Karim Nohari were sitting behind him, when at about 1800 hours they reached at Rehmatullah Shah Kachi Rasti, saw Khadim Hussain armed with hatchet, Soomar with hatchet, Taj Muhammad with lathi on the southern side of the road, Peeru armed with hatchet, Habib with hatchet, Manjhi with lathi, Wali Muhammad @ Waloo with lathi, Uris with lathi, Sajjan with lathi were on northern side, when they reached near to them, all accused came in front of their motorcycle, they stopped the motorcycle. Accused Khadim Hussain asked as to why they have not withdrawn the case against them, saying so, Khadim Hussain in order to commit murder caused hatchet blow on the head of his father Manthar, Soomar Shar caused blunt side of hatchet on the back of his father, Taj Muhammad Shar inflicted lathi blow on the neck on his father, Peeru Shar caused hatchet blow on right side of back and other parts of body, Wali Muhammad Uris and Sajjan Shar inflicted lathi blows to Abdul Karim on his back and other parts of body. His father due to injuries fell down on the ground and went unconscious and blood was oozing from his head. On their cries Sher Khan Nohari and Hafiz Nazir Nohari who were coming from front side reached there, intervened and requested the accused persons and saved them thereafter accused persons went away towards jungle. They brought his father to Taluka Hospital Pithoro on motorcycle. Doctor after providing first aid referred his father to Hyderabad and after admitting him in the hospital at Hyderabad leaving Abdul Karim and Sher Khan there, he appeared at police station and lodged F.I.R.

3. Charge was framed against accused at Ex.21 to which they pleaded not guilty and claimed their trial vide their pleas at Ex.21/A to 21/F.

4. Prosecution in order to prove its case examined following witnesses at trial:

PW-1 Complainant Nabi Bux at Ex.10
PW-2 Abdul Karim at Ex.11

PW-3 Sher Khan at Ex.12
PW-4 Chaman Das at Ex.13
PW-5 mashir Yaseen at Ex.19
PW-6 Niaz Ali at Ex.23
PW-7 mashir PC Mumtaz Ali at Ex.24
PW-8 Dr. Muhammad Amin at Ex.25
PW-9 I.O SIP Fateh Muhammad at Ex.26

Thereafter prosecution side was closed at Ex.27.

5. Statements of accused were recorded under Section 342 Cr.P.C at Ex.28 to 33, wherein they denied all the prosecution allegations and did not lead any defence and declined to give statement on oath in disproof of prosecution allegation.

6. Learned trial court after hearing the learned counsel for the parties convicted and sentenced the present appellant to imprisonment for life whereas co-accused Pir Bux alias Peeru and Manjhi were convicted and sentenced to three years and co-accused Uris alias Naroo Shar, Sajjan Shar and Taj Muhammad were acquitted of the charge by extending them benefit of doubt.

7. Mr. Abdul Hameed Bajwa, learned counsel for appellant while reading the prosecution evidence pointed out that statement of accused was not recorded in accordance with law and argued that all incriminating pieces of evidence were not put to the accused even question was not put to the accused with regard to the postmortem report of the deceased, alleged recovery of hatchet from the appellant whether it was blood stained and sent to the chemical examiner or not and its report etc have not been asked from the appellant. He further contended that the certificate mentioned at the bottom of statement is not written in handwriting of learned Presiding Officer which is mandatory under the law, therefore, the said statement has been recorded in violation of Section 364(2) Cr.P.C. and accused has not been awarded fair opportunity of being heard on material points of the case. He therefore, prays that instant appeal may be allowed and the impugned judgment

may be set aside and the case may be remanded back to the trial court for proceeding with trial afresh from the stage of recording of statement u/s 342 Cr.P.C. of the appellant Khadim Hussain. In support of his contention, he has placed reliance upon the case of SHAFIQUE AHMED alias SHAHJEE v. THE STATE (PLD 2006 Karachi 377).

8. On the other hand, learned counsel for complainant and learned A.P.G. conceded the contentions raised by learned counsel for appellant and have recorded their no objection on the above proposition.

9. We are persuaded to hold that it was the primary responsibility of the trial court to ensure that truth is discovered. The procedure adopted by the trial court is reflective of miscarriage of justice. Offence is punishable for death or imprisonment for life and appellant has been awarded imprisonment for life without providing him opportunity with regard to material questions to be put to him in statement of accused u/s 342 Cr.P.C. As regards to the contention of learned counsel for appellant that all the pieces of evidence were not put to accused under section 342, Cr.P.C for his explanation, Honourable Supreme Court in an unreported judgment in Criminal Appeal No.292 of 2009 dated 28.10.2010 in the case of MUHAMMAD HASSAN v. THE STATE, held as under:-

“3. In view of the order we propose to pass there is no occasion for going into the factual aspects of this case and it may suffice to observe that the case of the prosecution against the appellant was based upon prompt lodging of the F.I.R., statements of three eyewitnesses, medical evidence, motive, recovery of weapon of offence and a report of the Forensic Science Laboratory regarding matching of some of the crime-empties with the firearm allegedly recovered from the appellant’s possession during the investigation but we have found that except for the alleged recovery of *Kalashnikov* from the appellant’s possession during the investigation no other piece of evidence being relied upon by the prosecution against the appellant was put to the

appellant at the time of recording of his statement under section 342, Cr.PC.

4. It is by now a settled principle of criminal law that each and every material piece of evidence being relied upon by the prosecution against an accused person must be put to him at the time of recording of his statement under section 342, Cr.PC so as to provide him an opportunity to explain his position in that regard and denial of such opportunity to the accused person defeats the ends of justice. It is also equally settled that a failure to comply with this mandatory requirement vitiates a trial. The case in hand is a case of murder entailing a sentence of death and we have truly been shocked by the cursory and casual manner in which the learned trial Court had handled the matter of recording of the appellant's statement under section 342, Cr.PC which statement is completely shorn of the necessary details which were required to put to the appellant. We have been equally dismayed by the fact that even the learned Judges of the Division Bench of the High Court of Sindh deciding the appellant's appeal had failed to take notice of such a glaring illegality committed by the trial Court. It goes without saying that the omission on the part of the learned trial Court mentioned above was not merely an irregularity curable under section 537, Cr.PC but the same was a downright illegality which had vitiated the appellant's conviction and sentence recorded and upheld by the learned Courts below."

In the case of **MUHAMMAD NAWAZ and others Versus The STATE AND OTHERS** (2016 SCMR 267), Honourable Supreme Court of Pakistan has observed as under:-

".....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."

In this context, we are also supported with the case of Muhammad Shah v. The State (2010 SCMR 1009) and Qaddan v. The State (2017 SCMR 148).

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 prosecution witnesses. It is the case of prosecution that hatchet used by accused in the crime was also recovered from him. Said blood stained hatchet was sent to chemical examiner, positive report has been tendered in 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. Furthermore, there is also violation of Section 364(2) Cr.P.C while writing the certificate at the bottom of statement of accused not in handwriting but it was typed one.

11. In the present case trial Court did not perform it's function diligently and has taken the matter lightly and in a casual manner awarded life imprisonment 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 cured under section 537, Cr.P.C. Thus, it has vitiated the trial. Hence, impugned judgment is liable to be set aside.

12. Under these circumstances and in the interests of justice we hereby set aside the impugned judgment and remand the case back to the concerned trial Court which shall continue with the trial from the point at which the appellant's S.342 Cr.P.C statement is to be recorded afresh after putting all incriminating pieces of evidence to the accused for his explanation (as we see no valid legal justification to recommence the trial after framing of the charge and thus it is made clear that all other evidence on record up to the point of recording accused's S.342 Cr.P.C statement shall remain in the field and will not need to be re recorded) and thereafter decide the trial on merits in accordance with law within forty five (45) days of receipt of this judgment. On the first date of hearing the trial Court shall issue P.O for the accused who shall on his appearance record his S.342 Cr.P.C statement where he shall be confronted with all the evidence against him in accordance with the law. The office shall send a copy of this judgment along with R&P's immediately to the concerned trial Court for information and compliance.

Criminal Appeal No.D-113/2018 stands disposed of in the above terms along with pending application[s].

JUDGE

JUDGE