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

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

Cr. Jail Appeal No. D- 07 of 2013

Date of hearing 25.02.2020
Date of judgement: 25.02.2020.

Mr. Mian Taj Muhammad Keerio, Advocate for appellant.

Ms. Rameshan Oad, A.P.G. for the State.

None present for complainant.

J U D G M E N T

ABDUL MAALIK GADDI, J- Through this criminal jail appeal, the appellant Javed Qazi has challenged the judgment dated 29.01.2013 passed by learned 2nd Additional Sessions Judge, Hyderabad in Sessions Case No.168 of 2008 (Re-State v. Javed Qazi) arising out of crime No.11/2008 for offences punishable u/s 302 PPC, registered at Police Station Tando Yousuf, whereby the learned trial court after full dressed trial convicted and sentenced the appellant to suffer death penalty as Ta'zir. However, benefit of section 382-B Cr.P.C was awarded to the appellant.

2. Brief facts of the case are that on 14.03.2008 at about 11:00 pm complainant was loading balance in his mobile. In the meantime, his brother namely Muhammad Khalid along with Abdul Majeed Bhagar, Muhammad Farooque and Muhammad Javeed Choori were also coming there for the purpose of loading mobile balance. Majeed Bhagar was standing at Rafiq's shop. Javed Choori was standing with my brother while Muhammad Farooque was standing 20 ft away near cabin. Suddenly accused Javed Choori took out his pistol made firing and put pistol on the fore head of his brother and inflicted fire shot on his brother and tried to fled away towards Railway Phatak and stated that he is

vagabond of that area. Accused Majeed Bhagar also having a pistol in his hand. Complainant and his cousin Saleem took his brother in a rickshaw to Civil Hospital, where doctor declared him dead. Thereafter, on 15.03.2008, at about 11:30 p.m complainant lodged such F.I.R of the incident at PS Tando Yousuf.

3. It may be pointed out that accused Abdul Majeed Bughar was also sent-up to face trial. However, on his death, the proceedings against him were abated.

4. Charge was framed against accused at Ex.5 to which he pleaded not guilty and claimed his trial.

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

PW-1 Complainant Muhammad Raees at Ex.9
PW-2 Muhammad Essa at Ex.10
PW-3 Abdul Hameed at Ex.11
PW-4 Muhammad Saleem at Ex.15
PW-5 Muhammad Farooque at Ex.16
PW-6 Faisal at Ex.17
PW-7 Fakir Muhammad at Ex.18
PW-8 Dr. Shakeel Ahmed at Ex.19
PW-9 Incharge Special Team Mubashar Ali at Ex.20
PW-10 Inspector Sardar Khan at Ex.21.
PW-11 Jan Muhammad at Ex.22.
PW-12 Syed Muhammad Naeem Shah at Ex.24.

Thereafter prosecution side was closed at Ex.25.

6. Statement of accused was recorded under Section 342 Cr.P.C at Ex.26, wherein he denied all the prosecution allegations and did not lead any defence however, intended to give statement on oath in disproof of prosecution allegations. Thereafter, his statement on oath was recorded and same was cross examined by DDPP for State at Ex.27.

7. Learned trial court after hearing the learned counsel for the parties convicted and sentenced the present appellant to death penalty.

8. Mr. Mian Taj Muhammad Keerio, 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

Tufail