

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

Criminal Jail Appeal No.D- 43 of 2017
[Confirmation Case No. 13/2017]

PRESENT:

Mr. Justice Naimatullah Phulpoto
Justice Mrs. Rashida Asad

Date of Hearing : 17.09.2020 & 30.09.2020.
Date of Judgment : 07.10.2020

Appellant: Khamiso son of Punhoon by caste Bheel (new Muslim name Abdullah, Shaikh)
through Mr. Zaheeruddin S. Leghari, Advocate.

The State: through Mr. Shahzad Saleem Nahiyoon, D.P.G.

None appeared for complainant.

J U D G M E N T

NAIMATULLAH PHULPOTO, J:- Appellant Khamiso was tried by learned IInd Additional Sessions Judge, Mirpurkhas for offences u/s 302, 504 PPC. On conclusion of the trial vide judgment dated 18.04.2017, appellant was convicted u/s 302(b) PPC and sentenced to death for committing the murder of Haji Chhatto (nephew of complainant). Appellant was directed to pay the compensation of Rs.5,00,000/- to the legal of deceased in terms of Section 544-A Cr.P.C. He was also convicted u/s 504 PPC and sentenced to two years RI and to pay the fine of Rs.10,000/- In case of default in payment of fine, he was ordered to suffer SI for three months. However, death sentence awarded to the appellant was subject to confirmation by this Court in terms of Section 374 C.P.C.

2. Brief facts of the prosecution case as narrated by complainant Niaz Muhammad in his examination-in-chief before the trial Court are as under:-

***“I am complainant in this case. The incident took place on 9.11.2011. Deceased Haji Chhatto was my nephew, who was unmarried person. On the day of incident I, deceased Haji Chhatto, Muhammad Rahim s/o Abdul Wahid and Bhooro Khan s/o Ghulam Mustafa had gone to our agricultural land situated in Deh 128 at the distance of about 1-00 K.M away from our village. After doing work were coming back to our village and deceased Haji Chhatto had left the land about 15 or 20 minutes before our departure. We were behind the deceased Haji Chhatto for about 3 /4 acres from deceased. We saw that when the deceased Haji Chhatto reached on left bank of Water Course No.128R the accused Khamiso son of Punhoon Bheel having hatchet in his hand came in front of Haji Chhatto. On that occasion Haji Chhatto was having grass with him, who seeing the accused thrown it and tried to run away. Meanwhile, accused inflicted sharp side hatchet blows to Haji Chhatto. It was about 5-45 P.M. We raised hakals but the accused after inflicting the hatchet blows to deceased went away from the place of incident alongwith the hatchet. Thereafter, we went to the deceased and saw that he was having hatchet injuries on back side of head, left shoulder and left side of neck. The blood was oozing from his injuries and after few minutes he was expired at the place of incident. I informed the police and the villagers. The villagers came at the place of incident and at about 6-15 P.M the police also came there. Police after legal formalities, prepared the legal documents at the place of incident and collected blood stained earth from the place of incident. The police has inspected the place of incident and prepared Mashirnama of site and dead body of deceased in our presence and also in presence of mashirs namely Hussain Bux s/o Umar Din and Amanullah s/o Hussain Bux. The police has also prepared the Lashchakas form. Thereafter, the dead body of the deceased was brought in hospital at about 7-00 or 7-30 P.M. The postmortem of the deceased was conducted in hospital and after postmortem, the dead body of deceased was given to us in between 12-00 or 12-30 night. I received the dead body of my nephew and brought in the village*”**

near about 1-15 A.M night. After funeral, the dead body of the deceased was buried in graveyard at about 10-00 or 11-00 A.M on 10.11.2011. After duwa, I went to the police station and lodged the FIR at about 3-30 P.M on 10.11.2011.”

Complainant lodged FIR of the incident on 10.11.2011 at 1530 hours. It was recorded vide Crime No.42 of 2011 for offences u/s 302, 504 PPC.

3. ASI Kamran of P.S. Dilbar Khan Mahar had received the telephonic information from the complainant Niaz Muhammad on 09.11.2011 at 1815 hours that the appellant Khamiso Bheel has committed murder of his nephew namely Haji Chhatto by means of hatchet blows. On receipt of such information, he recorded this information in Roznamcha entry No.11 at 1815 hours and vide entry No.12 at 1820 hours he alongwith his subordinate staff proceeded to the Village Khair Muhammad Jarwar where incident had occurred. He inspected the dead body of deceased lying there in presence of mashirs Hussain Bux and Amanullah and prepared such mashirnama at 1840 hours. I.O. collected the blood stained earth and sealed it and prepared mashirnama of place of wardat in presence of same mashirs. He shifted dead body of deceased Haji Chhatto to the Civil Hospital Mirpurkhas for conducting postmortem examination and report. After conducting the postmortem examination dead body was handed over to the legal heirs of deceased and complainant asked I.O. that after funeral ceremony FIR of the incident would be lodged. Complainant after funeral ceremony appeared at police station on 10.11.2011 at 1530 hours and lodged FIR against the accused. It was recorded against the accused under above referred Sections. I.O recorded 161 Cr.P.C statements of P.Ws. On 11.11.2011 Investigation Officer received information that accused involved in this case was present at Dosoo Mori. On such information Investigation Officer took the mashirs Hussain Bux and Amanullah and arrested the accused in presence of mashirs on the pointation of complainant at 1030 hours. Mashirnama of arrest and recovery was

prepared. Thereafter, accused was brought to the police station. The clothes of the deceased were blood stained, same were also recovered by I.O. in presence of mashirs. During interrogation appellant prepared to produce the crime weapon used by him in the commission of offence. Such entry was made by I.O. at police station as entry No.9 at 1200 hours. Investigation Officer took accused and PCs Zakir, Shafique and DPC Muhammad Ashraf in the police mobile for recovery of the hatchet and on the way, also took mashirs Hussain Bux and Amanullah. Accused led the police to sugarcane crop of Ali Bux Mari wherefrom he produced hatchet used by him in the commission of offence. Mashirnama of recovery was prepared. Hatchet was sealed at spot in presence of the mashirs. Thereafter, he brought the accused at police station back. On 12.11.2011, I.O. produced accused before the Magistrate for recording his confessional statement. Magistrate granted two days time for recording the confessional statement of accused. On 14.11.2011 he alongwith SHO Chattan Lal produced accused before the incharge Magistrate who recorded the confessional statement of accused. After recording the statement of accused he was remanded to judicial custody. I.O sent the recovered articles to the chemical examiner for report. On completion of the investigation I.O handed over case papers to the SHO for submission of challan before the competent court of law. Challan was submitted against the accused u/s 302, 504 PPC.

4. Trial Court framed charge against the appellant at Ex.2 to which he pleaded not guilty and claimed to be tried.

5. In order to prove its` case, prosecution examined in as much as eight (08) witnesses who produced the relevant record. Thereafter, prosecution side was closed.

6. Trial Court recorded the statement of accused u/s 342 Cr.P.C. at Ex.14 in which he claimed false implication in this case and denied the prosecution

allegations. Appellant however, did not examine himself on Oath nor led any evidence in his defence in disproof of the prosecution allegations.

7. Learned trial Court after hearing the learned counsel for the parties, assessment of the evidence available on record, found the appellant guilty and convicted and sentenced him as stated above and made Reference to this Court for confirmation of the death sentence. It is in these circumstances, the present appeal has been filed.

8. We have heard Mr. Zaheeruddin S. Leghari, learned counsel for appellant and Mr. Shahzado Saleem Nahiyoon, learned D.P.G. for State.

9. The facts of this case as well evidence produced before the trial Court find an elaborate mention in the judgment passed by the trial Court and therefore, the same may not be reproduced here so as to avoid duplication and un-necessary repetition.

10. Mr. Zaheeruddin S. Leghari, learned counsel for the appellant argued that before proceeding with the trial, copies of statements and documents were not supplied to the accused by learned trial Court, which was a condition precedent under section 265-C of Criminal Procedure Code. It has been vehemently contended that omission so made by trial Court has materially prejudiced the case of appellant; that prosecution has failed to prove its` case against the accused; that there was delay of 23 hours in lodging the FIR for which no plausible explanation has been furnished by the prosecution; that PWs were chance witnesses; confessional statement of accused was not true and voluntarily; that recovery of hatchet has not been proved by prosecution; that there were material contradictions in the evidence of prosecution witnesses and prosecution case was highly doubtful; that incriminating pieces of evidence regarding judicial confession, motive, blood stained clothes and reports of the chemical examiners were not put to accused. Lastly,

alternatively it is argued that case may be remanded back to the trial Court for recording the statement of accused u/s 342 Cr.P.C afresh. In support of his contentions reliance is placed upon the cases reported as 1. Naveed Asif v. The State (PLD 1988 Supreme Court 99), 2. Maj.(Retd.) Tariq Mehmood and others v. The State and others (2002 SCMR 1493), 3. Nadeem Ahmed Khan and others v. The State (2007 P.Cr.L.J 233), 4. Abdul Jabbar v. The State (2011 YLR 2169), 5. Mst. Nusrat Mai (Tahira Sultana) and another v. The State (1997 MLD 2869), 6. Muhammad Zia v. The State (2007 P.Cr.L.J 359), 7. Ashiq Ali v. The State (2005 P.Cr.L.J 48), 8. Muhammad Ayub v. The State (2006 P.Cr.L.J 257) and 10. Gul Jehan v. The State (1998 MLD 288).

13. Mr. Shahzado Saleem Nahiyoon, learned D.P.G. argued that non-supply of copies of requisite documents to accused under provisions of Section 265-C Cr.P.C. will not vitiate the trial; Provisions of Section 265-C Cr.P.C. are directly not mandatory in nature; that the prosecution has proved its` case against the appellant, ocular evidence was corroborated by medical evidence; appellant had produced the blood stained hatchet and report of the chemical examiner was positive.; that the confessional statement of the appellant was true and voluntarily. However, learned D.P.G. very rightly and frankly conceded to the submissions made by learned counsel for the appellant that all incriminating pieces of evidence were not put to accused while recording his statement u/s 342 Cr.P.C. He therefore, prayed for remand of the case to the trial Court for recording statement of accused afresh by putting all incriminating pieces of evidence to the accused.

14. As regards to the first contention of Mr. Leghari that accused / appellant was not supplied the copies of statements and documents in terms of Section 265-C Cr.P.C, we have perused the R&Ps. There is receipt at Ex.01 in which it is mentioned that appellant / accused received the following documents in presence of Sessions Judge, Mirpurkhas on 10.12.2011:-

1. Photostat copy of FIR.
2. Photostat copy of Challan.
3. Photostat copy of Mashirnamas.
4. Photostat copy of statement of P.Ws u/s 161 Cr.P.C.

From the aforesaid receipt which bears LTI of the accused, we are satisfied that trial Court had supplied the copies of statements of witnesses and other documents to the accused as required under the law, therefore, contention of non-supply of the copies is without any legal force.

15. It appears from the record that in the statement of accused recorded u/s 342 Cr.P.C, all the incriminating pieces of evidence were not put to the accused for his explanation. It is argued that according to the case of prosecution, appellant had made confession during interrogation before the Magistrate but question regarding such piece of evidence was not put to the accused. Question regarding motive was also not put to the accused. Questions / incriminating pieces of evidence regarding blood stained clothes and reports of the chemical examiners were also not put to the accused. At this juncture, it would be conducive to reproduce the statement of accused recorded before the trial Court u/s 342 Cr.P.C. which reads as under:-

“ **STATEMENT OF ACCUSED U/S 342 Cr.P.C** ”

Q.No.1. It has come on record through evidence that on 09.11.2011 at 1745 hours at water course No.R-128 near Abdul Aleem Jarwar Taluka Sindhri, accused you having hatchet had intentionally committed Qatl-e-Amd of Haji Chhutto the nephew of complainant Niaz Muhammad by causing sharp side hatchet injuries to him and then fled away from the spot along with hatchet by abusing the complainant party. What have you to say?

Ans: No Sir it is false.

Q.No.2. It has also come on record through evidence that on 11.11.2011 at about 1030 hours police of PS Dilbar Khan Mahar has arrested you from Doso Shakh Mori Bus Stop Sindhri road in presence of mashirs Hussain Bux S/o Umardin and Amanullah S/o Hussain Bux. What have you to say?

Ans: No Sir it is false.

Q.No.3. It has also come on record through evidence that during interrogation conducted by police of PS Dilbar Khan

Mahar you voluntarily agreed to produce hatchet used in murder of Haji Chhutto and led the police party of PS Dilbar Khan Mahar to the sugarcane cultivation of Ali Bux Mari Deh 127 Taluka Sindhri and produced one hatchet from Sugar Cane crop of Ali Bux Mari in presence of mashirs Hussain Bux and Amanullah. What have you to say?

Ans: No Sir it is false.

Q.No.4. Why the P.Ws have deposed against you?

Ans: Sir the P.Ws are inimical to me and are interested witnesses.

Q.No.5. Do you want to examine yourself on oath?

Ans: No Sir.

Q.No.6. Do you want to lead defence evidence?

Ans: No Sir.

Q.No.7. Do you want to say anything else?

Ans: Sir I am innocent and has been falsely implicated in this case when I demanded my due amount I have not committed the murder of deceased. I pray for justice.

***Sd/14/3/2017
IInd Additional Sessions Judge,
Mirpurkhas"***

16. 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 death penalty without providing him opportunity with regard to material questions to be put to him in statement of accused u/s 342 Cr.P.C.

17. There is no occasion for going into factual aspects of this case as we have decided to remand the case. It may suffice to observe that case of prosecution against the appellant was based upon F.I.R recorded on 10.11.2011 at 1530 hours at P.S Dilbar Khan Mahar, statements of three eyewitnesses, medical evidence, motive, recovery of weapon of offence and report of the Chemical Examiner. Confessional statement of accused, motive, recovery of crime weapon, positive reports of the Chemical Examiner which

were relied upon by prosecution for his conviction were not put to the appellant at the time of recording of his statement u/s 342 Cr.P.C. Trial Court has relied upon the above pieces of evidence for convicting and sentencing the appellant to death.

18. 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.P.C 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.P.C which statement is completely shorn of the necessary details which were required to be put to the appellant. 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.P.C but the same was a downright illegality which had vitiated the appellant's conviction and sentence recorded by trial Court.

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).

19. We have carefully perused the statement of accused recorded u/s 342 Cr.P.C. The trial Court had not put incriminating pieces of evidence against accused which were brought on record by the prosecution witnesses, such as confessional statement, motive, recovery of crime weapon and positive reports of the chemical examiner. Rightly, it is contended that serious prejudice has been caused to the accused as the accused was not provided a fair opportunity to explain his position regarding aforesaid incriminating pieces of evidence brought on record against him. Unfortunately, trial Court recorded conviction against the accused, on the pieces of evidence which were not put to accused, in his statement recorded u/s 342 Cr.P.C. 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 cured under section 537, Cr.P.C. Thus, it has vitiated the trial. Hence, impugned judgment is liable to be set aside.

20. The upshot of the above discussion is that since in the instant case the trial Judge has not adopted the mandatory procedure in the conduct of trial and has failed to question the appellant on material points of the case, inferences, adverse to him, on account whereof were drawn, therefore, the impugned judgment dated 18.04.2017 passed by learned IInd Additional Sessions Judge, Mirpurkhas is set aside and the case, with consent of the parties, is remanded to the trial Court for its decision afresh within 03 months in accordance with law, with direction that the appellant be re-examined u/s

342 Cr.P.C. and he be confronted with all the incriminating circumstances /evidence available on record. Needless to emphasize that the appellant shall be at liberty to lead evidence in his defence with regard thereto or to get recorded his own statement under section 340(2), Cr.P.C. if he so desires. Criminal Jail Appeal No.D-43 of 2017 stands disposed of in above terms. Criminal murder reference is answered in **Negative**.

JUDGE

JUDGE

Tufail