



submitted an application at concerned police station on 10.11.2014. It was further stated that on 11.11.2014 at 1400 hours at New Muzzafarabad Colony, Landhi, Karachi, complainant and his brother Muhammad Ayoub Khan were coming from Masjid after offering Zohar prayer, they saw their father Ali Shah and complainant's stepbrother Waqar Shah on motorcycle waiting for complainant and his brother, they started firing at complainant and his brother with intention to kill, due to firing complainant's younger brother injured and died at the spot, accused fled away.

2. Both accused persons were sent up to face the trial. During trial, accused pleaded not-guilty to the charge framed. The prosecution examined PW-1 Umer Ali, PW-2 Mst. Rabia, PW-3 Mst. Asia, PW-4 Muhammad Ashraf (at exhibit 8), PW-5 PI Syed Sadaquat Ali, PW-6 SI Muhammad Pervez, PW-7 PI Zulfiqar Haider, PW-8 Fateh Muhammad, PW-9 Muhammad Younus, PW-10 SIP Suleman abbasi, PW-11 Dr. Afzal Ahmed (at exhibit 29) and then closed side for evidence. Statements of accused Ali Shah and Waqar Shah were recorded u/s 342 CrPC in which they denied the allegations against them and stated that deceased was killed by *Taliban*. After full-dress trial and hearing the parties, trial court delivered the judgment dated 06.07.2019 finding them guilty of the offence and awarding life imprisonment to them with direction to make payment of Rs.500,000/- each to legal heirs of deceased under section 544-A CrPC.

3. I have heard learned counsel for appellants and learned Assistant Prosecutor General.

4. At the outset learned counsel for appellants *inter alia* contends that trial court has committed grave illegality while not conducting cross-examination of PW-4 Muhammad Ashraf who was mashir of arrest and recovery, though his examination in chief was recorded and referred in the judgment while awarding conviction but the trial court failed to cross-examine him. The learned has further contended that the instant case is of capital punishment, no proper cross-examination of medical officer was conducted and the doctor was not cross examined by the trial court, even learned judge failed to put necessary questions to meet with the ends of justice.

5. Learned APG, in contra, has taken plea that non-examination of PW Muhammad Ashraf shows only that trial court failed to cross examine said witness.

6. It is settled principle of law in criminal administration of justice that trial court is duty bound to put every piece of evidence on record. The trial court's judgment refers evidence of PW Muhammad Ashraf that he produced memo of arrest and recovery but he was not cross-examined and nothing has come on record that under what circumstances his cross-examination was withheld; though cross examination was reserved and case was adjourned due to application filed by counsel. Whether cross-examination **was beyond the control** of the trial court and no prejudice is caused to the appellants who are undergoing life imprisonment? It is settled principle that right of cross-examination is not an empty formality but a valuable right is conferred by law and it is the best method of ascertaining the truth **(1997 MLD 1358)**.

7. Under Article 133 of Qanun-e-Shahadat Order, 1984 comparative Article 138 of Evidence Act. Cross-examination is a valuable right guaranteed by legislature to an accused to challenge veracity of a witness and is entitled to cross-examine the prosecution witness to adduce the facts in support of his defense from said witness. It has been held in the case of **Jan Sher Khan v. The State** reported as **2013 MLD 1554** that;

***“The principle to observe veracity of witness and credibility of evidence is that the witness who enters in the witness box, states whatever he has to say on oath and the subject to cross-examination constitute a complete statement made by witness, however, if opportunity of cross-examination was declined to accused, such evidence as a general rule of evidence is not legally admissible against the accused.”***

In the case in hand nothing is available on record that as to why the cross examination of the PW-4 was not recorded. Thus in view of the dictum laid down in the above case law, his evidence is not legally admissible against the appellant and the same cannot be used for conviction of the appellant.

8. Chapter X of the Qanun-e-Shahadat Order, 1984 deals with examinations of witnesses. Article 133 of the order envisages order of examination. It is worth to mention that cross examination of a witness is not just a formality but is a valuable right and best method to ascertain forensic truth. Therefore, if the learned defence counsel was not available at the relevant time, the Court was under obligation to cross-examine the witness in order to ascertain the truth. Reliance is placed on **2010 P.Cr.LJ. 1253**.

9. Section 537 of Criminal Procedure Code 1898 provides as under: -

**“Finding or sentence when reversible by reason of error or omission in charge or other proceedings:**

**Subject to the provisions hereinbefore contained, no finding, sentence order passed by a Court of competent jurisdiction shall be reversed or altered under Chapter XXVII or on appeal or revision on account----**

**(a) of any error, omission or irregularity in the complaint, report by police-officer under section 173, warrant, charge, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code, or**

**(b) of any error, omission or irregularity in the mode of trial, including any misjoinder of charges unless such error omission or irregularity has in fact occasioned a failure of justice.”**

10. As discussed above, the learned trial Court while not cross examining of the prosecution witness (PW-4), without assigning any reason has committed illegality. Thus there is an error not only in the trial of the case but in the impugned judgment which amounts to failure of justice. It was held in case of ***Abrar Hussain Shah*** reported as ***PLD 1987 SC (AJ&K) 65*** that; “the provisions of Code obeyed and the Courts are not expected to ignore its provision in the hope that they might find shelter under section 535 and 537 of Cr.PC.” The Dacca High Court in case of ***The State v. Abdul Rahim Sikder (PLD 1958 Dacca 257)*** that; “where trial is conducted in a manner not authorized by law and the rules of procedure relating to the matters of fundamental character, the decision in such a trial, whether of conviction or acquittal is of little, consequences and the entire proceeding must be set-aside irrespective of any question of prejudice to anyone. Reliance can be placed on ***2005 YLR 2032***.”

11. Under these circumstances, judicial propriety demands remand of this case to the learned trial Court, hence impugned judgment is set aside, case is remanded back to the trial court with

direction that the trial Court shall ensure cross-examinations of PW-4 Muhammad Ashraf as well as to meet with the ends of justice allow further cross examination of PW-11 Dr. Afzal Ahmed, thereafter record 342 Cr.P.C. statement afresh, shall provide opportunity of hearing to learned counsel for appellant and the prosecution and shall decide the fate of the case without being influenced by the earlier judgment (impugned judgment).

The instant appeal is disposed of in above terms.

**J U D G E**

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