

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

Cr. Appeal No.D-26 of 2018.

PRESENT

Mr. Justice Naimatullah Phulpoto

Mr. Justice Shamsuddin Abbasi.

Date of Hearing: 16.05.2018

Date of Judgment: 16.05.2018

Appellant/accused: *Abdul Majeed s/o Gul Hassan.*
Through Mr. Muhammad Jamil Ahmed, Advocate

The State: *Through Mr. Muhammad Ayoob Kasar,*
Advocate/Special Prosecutor ANF.

JUDGMENT

NAIMATULLAH PHULPOTO, J:- Abdul Majeed Appellant was tried by learned Ist Additional Sessions Judge/ Special Judge CNS Hyderabad, in Special Case No.4 of 2016. On the conclusion of the trial vide Judgment dated 31.01.2018 Appellant was convicted under section 9(c) and sentenced to seven years R.I. and six months imprisonment and to pay fine of Rs.35000/-. In case of default in payment of fine the accused shall suffer simple imprisonment for the period of six months and fifteen days. Appellant/accused was extended benefit of section 382-B Cr.P.C.

2. Brief facts of the prosecution case as disclosed in the FIR are that on 30.12.2015 SIP Syed Salman of P.S. ANF was present at Police Station. He received spy information through his superior officers that one person namely Abdul Majeed was about to come at bus stop main super Highway carrying a huge quantity of narcotics to deliver the same to some customer. Upon such information, SIP Syed Salman constituted a party and left ANF Police Station vide roznamcha entry No.6 at 1300 hours and proceeded to the pointed place and reached there at 1330 hours. Where ANF officials saw a person who was carrying black colour shopper in his hand. On the pointation of spy informer, he was apprehended with black shopper. The persons available at the place of incident were asked to act as mashir of recovery but they refused. Thereafter,

SIP Syed Salman made HC Muhammad Umer and PC Kashan as mashirs and recovered plastic bag from the possession of the accused and enquired his name to which he disclosed his name as Abdul Majeed son of Gul Hassan District Sanghar. Black shopper was opened in presence of the mashirs it contained 07 slabs of charas out of it 04 small and big pieces charas was weighed it became 4.350 kg. recovered charas was sealed at the spot in presence of mashirs. Accused was arrested. Mashirnama of arrest and recovery was prepared in presence of mashirs. Thereafter, accused and case property were brought to the Police Station where F.I.R. was lodged against the accused on behalf of the State vide crime No.D040403815 under section 9(c) CNS Act, 1997.

3. After completion of usual investigation, challan was submitted against the accused under Section 9(c) Control of Narcotic Substances Act, 1997.

4. Trial Court framed the charge against the accused under Section 9(c) of CNS Act, 1997. Accused pleaded not guilty and claimed to be tried.

5. At the trial, prosecution examined P.W-1 SIP Syed Salman who produced entries No.6 and 7, mashirnama of arrest and recovery, copy of the F.I.R. letter for sending the case property and positive report of Chemical Examiner. Mashir H.C. Muhammad Umer. Thereafter, prosecution closed its side at Ex.5.

6. Statement of the accused under Section under Section 342 Cr.P.C. was recorded at Ex-06, in which the accused claimed his false implication in this case and denied the prosecution allegations.

7. Learned Trial Court after hearing the learned Counsel for the accused, D.P.P. for State on the assessment of the evidence, convicted and sentenced the accused as stated above. Hence, this appeal has been filed.

10. Mr. Muhammad Jamil Ahmed, learned Advocate for the appellant has mainly contended that trial Court has committed a number of illegalities while conducting the trial. It is argued by the Advocate for the Appellant that offence

under section 9(c) carries capital punishment but charge against accused was framed on 24.2.2016 in absence of the defence counsel. It is also pointed out that examination-in-chief of P.Ws. SI Syed Salman and H.C. Umer was recorded on 3.3.2017, in absence of the defence counsel. Learned counsel for the Appellant further contended that in case counsel for the Appellant failed to appear before the trial Court, trial Court was competent to provide him the services of the defence counsel on State expenses, as provided in rules. It is submitted that trial Court has conducted the trial in the violation of law and it has vitiated the proceedings, in support of his contentions he has relied upon the cases reported as **SHAFIQUE AHMED alias SHAHJEE v. THE STATE [PLD 2006 Karachi 377]** and **Syed WARIS KHAN v. THE STATE [2018 MLD 422]**.

11. Mr. Muhammad Ayooob Kasar, Advocate/Special Prosecutor ANF argued that accused was causing delay in the conclusion of trial. Trial Court to avoid further delay in the disposal of the case recorded examination-in-chief of SI Syed Salman. Learned Special Prosecutor ANF prayed for dismissal of Appeal.

12. We have carefully heard the learned Counsel for the parties and perused the evidence minutely.

13. Record reflects that charge was framed by the trial Court on 24.2.2016. Trial Court has mentioned in case diary dated 24.2.2016 that defence counsel was called absent. Trial Court was not supposed to frame the charge in absence of the defence counsel in of offence under section 9(c) CNS which is punishable for death or imprisonment for life. It is also the matter of record that examination-in-chief of P.W Syed Salman was recorded on 3.3.2017, in absence of the defence counsel. Law is settled that no case shall proceed in absence of the defence counsel which is punishable for death or imprisonment for life as held by this Court in the case of **SHAFIQUE AHMED alias SHAHJEE v. THE STATE [PLD 2006 Karachi 377]**.

14. Offence under section 9(c) of the Control of Narcotic Substances Act,

1997 is punishable for death or imprisonment for life. For the sake of convenience, section 9(c) of the Control of Narcotic Substances Act, 1997 is reproduced as under:--

9(c) death or imprisonment for life, or imprisonment for a term which may extend to fourteen years and shall also be liable to fine which may be upto one million rupees, if the quantity of narcotic drug, psychotropic substance or controlled substance exceeds the limits specified in clause (b):

Therefore, the appellant was required to be defended by a counsel and trial was required to be conducted in presence of his counsel. If appellant was unable to engage an advocate, then trial court was required to provide facility of a counsel on State expenses before framing of the charge but in the present case, charge and examination-in-chief of PW-1 was recorded in absence of the advocate for the appellant. In case of some inadmissible piece of evidence if defence counsel would have been present, he would have objected to it. The trial in absence of the advocate for the appellant is an illegal trial which cannot be cured under section 537, Cr.P.C.

15. Now it is to be seen whether trial conducted by learned Special Judge, CNS in the above manner has been vitiated or otherwise.

16. Article 10-A of the Constitution of Islamic Republic of Pakistan, 1973 reads as under:--

"10-A Right to fair trial.---For the determination of his civil rights and obligations or in any criminal charge against him a person shall be entitled to a fair trial and due process"

Above article provides that the accused shall not be denied the right to consult and be defended by a legal practitioner of his choice.

17. Under section 340(1), Cr.P.C. accused is entitled, as a matter of right, to be defended by a pleader. The said provision reads as under:--

"340. Right of person against whom proceedings are instituted to be defended and his competency to be a witness.--(1) Any person accused of an offence before a Criminal Court or against whom proceedings are instituted under this Code in any such Court, may of right be defended by a pleader."

18. Circular 6 of Chapter VII of Federal Capital and Sindh Courts Criminal Circulars provides that on the committal of the case the Magistrate is required to ascertain from the accused as to whether he intends to engage a legal representative at his own expenses otherwise the Sessions Court would provide an Advocate on State expenses to defend him. The said Circular reads as under:--

"6. In all cases in a Court of Session in which any person is liable to be sentenced to death, the accused shall be informed by the Committing Magistrate at the time of committal, or if the case has already been committed by the Sessions Court that, unless he intends to make his own arrangements for legal assistance, the Sessions Court will engage a Legal practitioner at Government expense to appear before it on his behalf. If it is ascertained that he does not intend to engage a legal representative at his own expenses, a qualified Legal Practitioner shall be engaged by the Sessions Court concerned to undertake the defence and his remuneration, as well the copying expenses incurred by him, shall be paid by Government.

The appointment of an advocate or pleader for defence should not be deferred until the accused has been called upon to plead. The Advocate or pleader should always be appointed in sufficient time to enable him to take copies of the deposition and other necessary papers which should be furnished free of cost before the commencement of the trial. If after the appointment of such legal representative the accused appoints another Advocate or pleader, the Advocate or pleader appointed by the Court may still in its discretion be allowed his fee for the case."

19. Rule 35 of Sindh Chief Court Rules (Appellate Side) also deals with the same subject which reads as under:--

"35. In what matters Advocate appointed at Government cost. When on a submission for confirmation under section 374 of the Code of Criminal Procedure, 1898, or on an appeal from an acquittal or on an application for revision by enhancement of sentence the accused is undefended, an Advocate shall be appointed by the Division Court to undertake the defence at the cost of Government in accordance with the Government notification or rules relating thereto. Such Advocate shall be supplied a copy of the paper book free of cost."

20. From the above legal position, it is clear that an accused is required to be defended by a counsel of his choice as a matter of right. If an offence involves capital punishment, the law protects the right of the accused as a duty has been cast upon the State to bear the expenses of the advocate. If accused has not engaged an advocate then the Sessions Court/Special Court is duty bound to provide a legal practitioner on State expenses to defend the accused. It is one of the duties of the trial court to see that accused is represented by a qualified experienced legal practitioner in the cases involving capital

punishment. Thus, it is the mandate of the law that cases involving capital punishment shall not be tried in the absence of advocate for the accused or proceeded with, without first appointing an Advocate for the accused to defend him if he is unable to do so. It was the duty of the trial court in trying the case containing capital punishment to be very cautious and careful in examining the witness as such trial court should have inquired from the accused about absence of his advocate before examining the witnesses. From the record it appears trial court did not perform its functions diligently so as to protect the rights of the Appellant in the case involving the capital punishment when counsel for the accused was absent.

21. We have no hesitation to hold that the Appellant was prejudiced in his trial and defence, therefore, a miscarriage of justice has occurred in this case. The procedure adopted by the trial Court is an illegal procedure, that cannot be cured under section 537, Cr.P.C. as held in the case of **SHAFIQUE AHMED ALIAS SHAHJEE V. THE STATE (supra)**. Hence impugned judgment is liable to be set-aside.

22. For what has been discussed above appeal is partly allowed. The conviction and sentence awarded to the appellant under the impugned judgment dated 31.01.2018 are set aside. The case is remanded back to the trial court for retrial from the stage of framing fresh charge and that too in presence of the advocate of the appellant. Counsel for the parties shall appear before the trial Court on 31.5.2018, without fail.

23. At this stage learned Advocate for the Appellant submits that Appellant is in Jail since the date of his arrest. Since we have decided to remand the case back, Appellant would be at liberty to apply before the trial Court for bail and trial Court shall decide the same strictly in accordance with law.

24. Trial Court is further directed to decide the case within two months under intimation to this Court.

JUDGE

JUDGE