

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

Cr. Jail Appeal No.D-193 of 2019

[Confirmation Case No.42 of 2019]

DATE	ORDER WITH SIGNATURE OF JUDGE(S)
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PRESENT

Mr. Justice Naimatullah Phulpoto

Justice Mrs. Rashida Asad

Date of Hearing: 31.08.2021

Date of Judgment: 31.08.2021

Appellant/Accused Akbar Ali S/o Noor Muhammad Parhiyar
Through Syed Tarique Ahmed Shah,
Advocate

The State: Through Mr. Shahzado Saleem Nahiyoon,
Additional P.G Sindh.

JUDGMENT

NAIMATULLAH PHULPOTO, J.- Appellants Akbar Ali and Gul Hassan were tried by learned Additional Sessions Judge / Model Criminal Trial Court-I, Hyderabad in Sessions Case No.678 of 2014. After full-dressed trial, appellant Ali Akbar was convicted under Section 302(b) PPC and sentenced to death. He was ordered to pay compensation of Rs.100,000/- to be paid to the legal heirs of deceased in terms of Section 544-A Cr.P.C. In case of default in payment of compensation, he was ordered to suffer S.I for 06 months. Appellant Gul Hassan was also convicted under Section 302(b) PPC; however, he was awarded life imprisonment and was directed to pay compensation of Rs.100,000/- to be paid to the legal heirs of deceased in terms of Section 544-A Cr.P.C. In case of default in payment of compensation, he was ordered to suffer S.I for 06

months. Appellant Akbar Ali was also convicted under Section 337-F(i) PPC and was directed to pay amount of Rs.10,000/- to complainant Lal Bux and injured Ghulam Sabbir respectively as Daman. In case of default, he was ordered to undergo simple imprisonment till Daman is paid. Trial Court made reference to this Court for confirmation of death sentence awarded to accused Akbar Ali in terms of Section 374 Cr.P.C.

2. Brief facts of the prosecution case as narrated in the impugned judgment by the trial Court are as under:-

“On 13.06.2014 the complainant Lal Bux alias Laloo appeared at the P.S and lodged his report at P.S Husri stating therein that on the same day he alongwith his family went to sleep after having taken meal in the night on 12.06.2012, where on the same night on 13.06.2014 at 4:15 a.m., he woke up upon the voice in the house while other family members were also woke up. He further disclosed that in the light of bulbs he saw that Ghulam Mustafa alias Minu Parhiyar armed with pistol, Gul Hassan Parhiyar armed with repeater, in the courtyard. In the meanwhile, one person came from the room having bag in his hand, who was wrapped towel on his face. The complainant’s son namely Muhammad Rafique pulled the wrapped towel from the face of that person and they saw and identified him to be Akbar Parhiyar. Upon such resistance said Akbar Parhiyar through the bag and pulled dagger from his fold and caused straight blow on the bally and chest of the complainant’s son. Then the complainant raised commotion “Chore Chore” and tried to rescue, then Akbar Parhiyar also made dagger blow to the complainant on right side of his chest. He further disclosed that in the meanwhile upon such commotions Ali Gul Panhwar, Gul Sher Panhwar and others while raising commotion came running and tried to rescue. Then Akbar Parhiyar caused straight dagger blow upon Bashir Panhwar on left side of his shoulder. During such resistance

Ghulam Mustafa alias Minu Parhiyar also received injury and the accused persons fled away through sugarcane crop. The complainant saw that blood was oozing from the bally of his son Rafique and he was lying on the ground. Thereafter, the complainant party ran behind thief but they could not bind. After considerable some time they came and saw that his son namely Muhammad Rafique was unconscious and blood was oozing out from his bally. Thereafter, they took him having made arrangement of the vehicle to Civil Hospital, Hyderabad, where the doctor told that his, the complainant's son, had been expired. Thereafter, such information was given at P.S Husri and the police reached at the hospital, where the complainant and injured Bashir Panhwar given letters for treatment. The postmortem of complainant's son was conducted and thereafter the dead body was handed over to the complainant for funeral proceedings. After funeral proceedings, the complainant appeared at police station and lodged the instant F.I.R against the above named accused persons.

3. After usual investigation, challan was submitted against the accused under the above referred sections.

4. Trial Court framed charge against accused Akbar Ali under Sections 460 and 337-F(i) PPC on 26.09.2014 at Ex-05. Trial Court framed amended charge against both the accused under Sections 460, 337-F(i) and 337D PPC on 06.10.2015 at Ex-07. The charges were framed against the accused in absence of the defence Counsel. Thereafter, trial Court recorded evidence of prosecution witnesses viz. PW-1 Lal Bux (complainant) on 25.02.2016 at Ex-08; PW-02 Ali Gul on 25.03.2016 at Ex-09 but his deposition was signed by the Presiding Officer on 26.03.2016; examination-in-Chief of PW-03 Ghulam Shabbir (injured) was recorded on 07.04.2016 at Ex-10; examination-in-chief of PW-4 Rashid Ali was recorded on 07.02.2017 at Ex-11. The evidence of above named witnesses was recorded

in absence of the defence Counsel respectively. Thereafter, examination-in-Chief of PW-05 Shahid Ali was recorded on 10.04.2017 at Ex-12 but on the said date services of the defence Counsel on state expenses were provided to the appellants, who cross-examined the witness without providing sufficient time to newly appointed Advocate in order to prepare the case. Thereafter, prosecution examined remaining witnesses and then closed the side.

5. Statements of the accused were recorded under Section 342 Cr.P.C at Exs.24 and 25 respectively on 28.09.2021. After appreciating the evidence on record, Trial Court vide judgment dated 19.10.2019 convicted and sentenced the appellants as set out earlier in the impugned judgment, hence, this appeal has been preferred only by appellant Akbar Ali.

6. The facts of this case as well as evidence produced before the Trial Court find the elaborate mention in the impugned judgment dated 19.10.2019 passed by the Trial Court, therefore, the same may not be reproduced here so as to avoid duplication and un-necessary repetition.

7. Syed Tarique Ahmed Shah, learned Advocate for appellant Akbar Ali has raised preliminary legal issues that appellants were not properly defended before the trial Court; that amended charge was framed against the appellants on 06.10.2015 in absence of the defence Counsel and examination-in-chief of PWs namely Lal Bux, Ali Gul, Ghulam Shabbir and Rashid Ali was also recorded in absence of the defence Counsel. Lastly, it is argued that statements of the accused were recorded under Section 342 Cr.P.C. without putting of the incriminating pieces of evidence to the appellants for their explanation and trial Court has committed several illegalities during trial and such illegalities are not curable under the law.

In support of his contention, he has relied upon the case of SHAFIQUE AHMED alias SHAHJEE v. The STATE (PLD 2006 Karachi 377).

8. Mr. Shahzad Saleem Nahiyoan, learned Additional P.G conceded to the above legal position and recorded no objection for remand of the case to the trial Court to proceed afresh in accordance with law.

9. We have carefully heard learned Counsel for the appellant and perused the record of this case.

10. The offence under Section 302 PPC is punishable for death or imprisonment for life, therefore, the appellants were required to be defended by a Counsel and trial was required to be conducted in presence of their Counsel. If the appellants were unable to engage the Advocate then trial Court was legally required to provide them the facility of a Counsel on State expenses before framing of the charge but in the present case charge was framed in absence of the defence Counsel and examination-in-chief of the prosecution witnesses namely, Lal Bux, Ali Gul, Ghulam Shabbir and Rashid Ali was also recorded in absence of the Advocate for the appellants. These are the illegalities, which have been committed by the trial Court, which cannot be cured under Section 537 Cr.P.C.

11. From the above legal position, it transpires 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 casted 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 engage 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 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.

12. We have also observed that statements of the accused have been recorded under Section 342 Cr.P.C in the stereotype manner. For the sake of convenience, statement of accused Akbar Ai is reproduced as under:-

- Q.No.1. You have heard the prosecution evidence, it has come in evidence that on 13/06/2014 at about 0415 hours, at the house of complainant, Chuttay Ji Koh, you accused (Akber), Gul Hassan, alongwith absconding accused Ghulam Mustafa duly armed with deadly weapons committed house lurking trespass, and you accused (Akber) caused dagger blow to the Muhammad Rafique, Shabir Panhwar, Lal Bux and Ghulam Mustafa. Subsequently, Muhammad Rafique succumbed to his injuries. What have you to say?
- Q.No.2. It is come in evidence that the death of deceased Muhamamd Rafique as occurred due to damage to vital organ and bleeding from the vessels which is sufficient to cause death in ordinary course of nature by sharp cutting weapon (Exh.19/H). What have you to say?
- Q.No.3. It has also come in evidence that articles/properties were send for chemical examination to the laboratory as per chemical examination report (Exh.22/F) the articles had human blood stained. What have you to say?
- Q.No.4. It has also come in evidence that during house lurking trespass you also inflicted dagger blows to PWs Lal Bux, Shabbir and Ghulam Mustafa. What have you to say?
- Q.No.5. It has also come in evidence that on 23-06-2014 the statements U/s. 164 Cr.P.C of eye witnesses namely Ali Gul and Ghulam Shabbir were recorded before CJ & JM-X Hyderabad in your presence, wherein they have implicated you in commission of crime. What have you to say?

- Q.No.6. Why the PWs have deposed against you?
- Q.No.7. Do you want to lead any evidence in your defence?
- Q.No.8. Do you want to examine yourself on Oath as envisaged U/s. 3040(2) Cr.P.C.
- Q.No.9. Do you want to say anything else?

13. Learned Advocate for the appellant has rightly pointed out that incriminating pieces of evidence such as recovery of the crime weapon and positive reports of the chemical examiner were not put to the appellant for his explanation, which is requirement of the law as recently held in the case of(Mr. Justice Manzoor A. Malik)

14. We have no hesitation to hold that the appellants were prejudiced in their 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 (PLD 2006 Karachi 377). Hence, impugned judgment is liable to be set-aside.

15. For what has been discussed above, the conviction and sentence awarded to the appellants under the impugned judgment dated 19.10.2019 are set aside and confirmation reference made by trial Court is answered in negative. Resultantly, the case is remanded to the trial Court for retrial from the stage of framing fresh charge and that too in presence of the Advocate of the appellants. If the appellants engage their Advocate then they may be allowed to do so. If appellants do not engage an Advocate, then Advocate on State expenses be provided to the accused to defend them. Appeal as well as confirmation reference are accordingly disposed of with further direction to the trial Court to decide the case within a period of

03(three) months under intimation to this Court. Additional Registrar of this Court is directed to send copy of this judgment to Mr. Muhammad Ahsan Khan Durrani, Ist Additional Sessions Judge, Hyderabad, for his further guidance.

JUDGE

JUDGE

Shahid