

## **Cr.Appeal No.63 of 2012.**

**Appellants:** Waqar and another through Mr.Najamuddin  
Dharejo, Advocate.

**Respondent:** The State through Syed Sardar Ali Shah APG.

Date of Hearing 22<sup>nd</sup> October, 2012.

### **JUDGMENT.**

**NAIMATULLAH PHULPOTO,J-** This appeal is directed against the Judgment dated 07.07.2012 passed by the learned Ist Assistant Sessions Judge, Sukkur in Sessions Case No.474/2011 Re-The State v Waqar and another, arising out of Crime No.304/2011 of Police Station, Pano Akil registered for offences under Sections 324, 353, 34, PPC whereby appellants Waqar and Muhammad Hassan alias Aslam both by caste Shaikh were convicted and sentenced under Section 324, PPC for five years R.I and for offence under Section 353, they were also convicted and sentenced for three months R.I. Both the sentences were ordered to run concurrently. The benefit of Section 382-B, Cr.P.C was also extended in favour of the appellants/accused.

2. Brief facts of the prosecution case as disclosed in the F.I.R are that on 07.10.2011 SIP Rafiq Ahmed of Police Station, Pano Akil left the Police Station alongwith his subordinate staff namely PCs Naseer Ahmed, Hazaro Khan and Bahar Ali in Government Vehicle vide Roznamcha Entry No.15-1100 for patrolling duty. While patrolling at various places a Nakabandi was held at Pir Wah Bridge. It is alleged that at 1235 hours one Motorcycle appeared at

the bank of canal, on which two persons were sitting. It was stopped by the police officials. As soon as the Motorcycle was stopped, the accused persons started firing upon the police party, the police party also fired in self defense. The firing continued for five minutes. Thereafter it is alleged that the police caught hold of both the accused persons, who were armed with TT pistols. After arrest, TT pistols were secured from their possession. As the private mashirs were not available there, SIP Rafiq Ahmed made PCs Naseer Ahmed and Hazaro Khan as mashirs of arrest and recovery. Both the accused were enquired about their names, one accused disclosed his name as Waqar son of Qalander Bux Shaikh, resident of village Sadiq taluka Pano Akil and he admitted that he had no license for the pistol recovered from his possession, which contained 2 live bullets while another accused told his name as Muhammad Hussain alias Aslam son of Abdul Rasheed Shaikh resident of village Inayat, from his personal search a 30-bore pistol containing four live bullets was secured for which, he disclosed that he had no license. Regarding motorcycle both the accused disclosed that they had no documents of the Motorcycle. Mashirnama of arrest and recovery was prepared in presence of mashirs. Accused and case property were brought at the Police Station, where FIR on behalf of the State was lodged against both the accused as stated above and two other separate FIRs under Section 13(d) A.O. were also registered against the accused on behalf of the State at the same Police Station.

3. Thereafter copies of the FIR, custody of the accused and case property were handed over to ASI Quwant Ali for investigation. On the conclusion of the investigation challan was submitted against the accused under the above referred sections. Case was sent-up to the Court of Sessions, it was transferred to the Court of learned Ist Additional Sessions Judge, Sukkur for disposal according to law.

4. Formal charge against the appellants/accused Waqar was framed as Exb.2. Accused met the charge with denial.

5. In order to prove its case, the prosecution examined Complainant SIP Rafiq Ahmed at Exb.3. He produced mashirnama of arrest and recovery, FIR and attested copy of Roznamcha Entry at Exb 3-A to D. LPC Quwant Ali was examined at Ex.4. Mashir HC Naseer Ahmed at Exb.5. It is pertinent to mention here that accused were unrepresented during trial. Thereafter, prosecution side was closed.

6. Statements of both the appellants under Section 342, Cr.P.C were recorded in which, they claimed false implication in this case and denied the prosecution allegations, raising plea of innocence.

7. After hearing Miss. Ishrat Gul ADPP and accused in person, trial Court recorded the conviction and sentence against the appellants/accused as stated above. Said judgment has been impugned before this Court.

8. Mr. Najamuddin Dharejo, learned counsel for the appellants/accused argued that a fair opportunity was not provided to the appellants to engage defence counsel. Both the appellants did not cross examine all the three witnesses. The trial Court failed to discharge the primary duty to discover truth. He submitted that the case may be remanded back to the trial Court for providing a fair opportunity to cross examine the witnesses. In support of above contentions, he relied upon the case law reported as Abdul Ghafoor v The State (2011 S C M R 23) and Ghulam Rasool Shah and another v The State ((2011 S C M R 735).

9. Syed Sardar Ali Shah, learned APG appearing for the State conceded to the contentions raised by learned advocate for appellants.

10. I have scanned the entire evidence. It is crystal clear that not a single question has been put by both the appellants from the prosecution witnesses in the cross examination. Case file indicates that the learned trial Court has

made no efforts to discover the truth. Though under the law, it is primarily duty of the Court to ensure that justice is done to the parties before the Court. Offence under Section 324, PPC is punishable for imprisonment for life, the appellants were entitled to a fair trial and due process. The case diaries reveal that no fair opportunity was provided to the appellants to engage a defence counsel. Moreover the appellants had no requisite expertise to cross examine the witnesses resultantly no question was put-up by accused from witnesses it was for the trial Court to ensure that truth was discovered but not a single question was put to satisfy about credibility of witnesses by the Court. It is not the intention of the law that criminal case should be decided on technicalities but the law is meant for the advancement of justice and justice can only be done if both the parties are provided fair opportunity in deciding the case on merits. Article 10-A inserted in the Constitution (Eighteenth Amendment) Act X of 2010 provides 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".**

11. Learned counsel for the appellants has rightly relied upon the case of Abdul Ghafoor (supra), in which Honourable Supreme Court has observed as under:-

**"With immense respect to the learned Judges of the High Court, we are persuaded to hold that it is the primary responsibility of the court seized of a matter to ensure that the truth is discovered and the accused are brought to justice. If the learned trial Court found that the counsel engaged by the appellant had sought too many adjournments, even then he was not appearing, the court could either have directed that a defence counsel be provided to the appellant at Stage expense or could have given last opportunity to the appellant to make alternate arrangements failing which the court would proceed to decide the matter. This course was not adopted by the learned trial Court and instead on 2.12.1999 gave a total surprise to the appellant by asking him to cross-examine those witnesses for which obviously neither the appellant had the requisite**

expertise nor he was prepared to do so. In these circumstances and in view of the fair concession given by the State, we find that the procedure adopted by the learned trial Court is reflective of miscarriage of justice and the appellant be provided one opportunity to have the afore-referred witnesses cross-examined. Consequently, this appeal succeeds on this short ground. The impugned judgment of the learned High Court dated 19-3-2000 and that of the learned trial Court dated 30-5-2000 are set aside. The case is remitted to District and Sessions Judge, Rawalpindi who shall either proceed with the matter himself or entrust the same to Additional District and Sessions Judge. The appellant shall be treated as under trial prisoner. He shall be given one opportunity to cross-examine the two witnesses referred to in paragraph 6 above and thereafter the court shall decide the matter within 15 days of the said opportunity given. The parties are directed to appear or arrange representation before the District Judge for 20-5-2010 who shall proceed with the matter in terms of this order”.

In the case of Ghulam Rasool Shah and another (supra), the Honourable Supreme Court was pleased to observe as under:-

“15. Having considered the case of appellants, we are of the view that the appellants should be given time to engage a counsel privately of their own choice, failing which the learned trial Court shall provide them the defence counsel at State expenses of their choice, out of the list maintained by the Court. If the appellants fail to engage a counsel of their own or refuse to be represented by a defence counsel provided at State expenses, the Court will be at liberty to proceed with the trial and the defence counsel so appointed shall be called upon to conduct cross-examination prosecution witnesses and call for evidence in defence.

16. For what has been discussed above, we allow the appeals, set aside the judgment of the learned Courts below and remit the case back to the trial Court for denovo trial. Learned trial Court shall consider the question of its jurisdiction in terms of section 38 of the Anti-Terrorism Act, 1997, before framing of charge. The appellants shall be treated as, under trial prisoners”.

12. For my above reasons, while respectfully relying upon the case law referred to above and after close scrutiny of the evidence, I have come to the conclusion that learned trial Court did not adopt the legal course and instead

gave a total surprise to the accused by asking them to cross-examine the police officials for which obviously the appellants/accused had no requisite expertise. More particularly in this case the prosecution witnesses were police officials, trial Court was also supposed to put up certain questions from the prosecution witnesses in order to discover truth and credibility of witnesses but that exercise was also not carried out. The statements of appellant u/s 342, Cr.P.C were also recorded in a mechanical manner and no incriminating pieces of evidence were put to accused in violation of settled principle of law. I therefore, hold that the procedure adopted by the trial Court clearly reflects the miscarriage of justice. I therefore, set aside the conviction and sentence awarded to the appellants under the impugned Judgment dated 07.07.2012 by the trial Court and remit the case back to the trial Court to decide the same afresh after providing ample opportunity to the accused to cross examine the prosecution witnesses and decide the case strictly in accordance with law by appreciating prosecution evidence according to settled principle of law. It is pointed out that accused were on bail during the trial, therefore the appellants/accused shall furnish requisite surety before the trial Court for their release during trial, the trial Court shall conclude the trial within 02 months. Appeal stands disposed of accordingly.

JUDGE

Akber.