

IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Jail Appeal No. 616 of 2024

Confirmation Case No.09 of 2024

Present:

Justice Zafar Ahmed Rajput

Justice Ms. Tasneem Sultana

Appellant	:	Ali Muhammad s/o Khamiso Jiskani, through Mr. Sagar Ali Sathio, Advocate
Respondent	:	The State, through Mr. Khadim Hussain Khuhro, Addl. Prosecutor General, Sindh.

Date of hearing	:	26.02.2025
Date of decision	:	26.02.2025

JUDGMENT

ZAFAR AHMED RAJPUT, J.- The Criminal Jail Appeal is directed against the judgment, dated 26.08.2024, passed in Sessions Case No.186 of 2023, arising out of F.I.R. No.67 of 2023, registered at P.S. Chuhar Jamali, Dist. Sujawal, under sections 302/311, P.P.C., whereby the 1st Additional Sessions Judge, Sujawal, convicted the appellant for the offence under Section 302(a), P.P.C., and sentenced him to death. While the Reference under section 374, Cr. P.C. has been submitted by the learned Sessions Judge, Sujawal for confirmation of death sentence.

2. At the very outset, learned counsel for the appellant as well as learned Addl. P.G have drawn our attention to the fact that at the time of examination of PW-2 Abdul Hameed, PW-3 Shabana and PW-4 Allah Dito, the appellant was unrepresented by a defence counsel; hence, the case is liable to be remanded to the Trial Court.

3. It is an admitted position that the appellant faced the trial in a case involving capital punishment. Under Paragraph-6 of Chapter VII of the

Federal Capital and Sindh Courts Criminal Circulars, such like cases can only be proceeded with on the appearance of a qualified legal practitioner engaged by the accused himself or engaged for the accused by the court at Government expense. For the sake of convenience, the above referred Paragraph is reproduced, as under: -

In all cases in a Court of Sessions 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 expense, 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.

4. It may be observed that Paragraph-6 *ibid* casts a duty on the trial court in the cases punishable with death, where the accused does not intend to make his own arrangement for legal assistance, then the court should make arrangement to engage a counsel at Government expenses.

5. In the case of *Shafique Ahmed vs. The State (PLD 2006 Kar. 377)*, it has been held that *it is one of the duties of the Court of Sessions to see that the accused is represented by a qualified legal practitioner in 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 without first appointing an Advocate for the accused to defend him if*

he is unable to do so". In the case of *Sadam Hussain vs. The State* (2018 MLD 1025), this Court has observed that *"the trial Court is legally obliged to ensure that the accused has counsel of his choice or one appointed at State expenses, in the case involving capital punishment, if he could not afford"*. In the case of *Syed Waris Khan vs. The State* (2018 MLD 422), this Court has held in a case of death sentence that *"accused is entitled to be defended by a pleader as a matter of right and trial in absence of counsel for accused would become illegal and such illegality cannot be cured under section 537, Cr. P.C.*

6. Article 10(1) of the Constitution of Islamic Republic of Pakistan, 1973 (the "**Constitution**") also provides that the accused shall not be denied the right to consult and be defended by a legal practitioner of his choice. Under section 340(1), Cr. P.C., an accused has the right to be defended by a pleader in his trial before any criminal court. This right is of paramount importance and must be zealously guarded to protect the life and liberty of the citizens. If adequate opportunity of defense through a pleader is not provided to an accused, it will also be violative of the fundamental right regarding security of person enshrined under Articles 9 and 10A of the Constitution which provide, respectively, *"No person shall be deprived of life or liberty save in accordance with the law"* and *"a person shall be entitled to a fair trial and due process"*. In the absence of proper opportunity of defence through counsel, an accused may be deprived of his life or liberty in violation of the law and would be denied fair trial and due process. Enjoying the protection of law and to be treated in accordance with the law is an inalienable right of every citizen as laid down under Article 4 of the Constitution.

7. We have examined the facts of the present case in the light of the above provisions of law and laid down principles. It reflects from the perusal of the record that earlier Mr. Abbas Ali Jamari Advocate was appearing on behalf of the appellant before the Trial Court, who subsequently withdrew his power and, thereafter, the Trial Court examined three PWs; recorded statement of the appellant under section 342, Cr. P.C. and convicted and sentenced him to death on the basis of evidence partly recorded in absence of a counsel to which the appellant was entitled under the law; as such, the conviction and sentence is not sustainable due to violation of above mentioned provision.

8. For the foregoing facts and reasons, we allow this appeal and set aside the impugned judgment and remand the case to the Trial Court with directions to enquire from the appellant if he intends to make his own arrangements for legal assistance, if not, a counsel be employed at Government expenses, in whose presence three aforesaid PWs shall be re-examined after recalling them. After cross-examination the appellant be re-examined under section 342, Cr. P.C and if he wants to examine himself on oath and lead defence, opportunity be given to him, and after hearing final arguments from both sides shall decide the case afresh in accordance with law

9. The instant Criminal Jail Appeal stands allowed in the above terms. The Reference stands answered accordingly.

JUDGE

JUDGE