

**IN THE HIGH COURT OF SINDH CIRCUIT COURT  
LARKANA**

**Criminal Jail Appeal No.D-10 of 2022  
Criminal Conf.Case No.D-04 of 2022**

**Present:**

***Mr. Justice Amjad Ali Sahito  
Mr. Justice Jan Ali Junejo***

**Appellant** : **Rahib Ali s/o Sadaruddin Choliyani Chandio  
Through Mr. Javed Ahmed Soomro, Advocate**

**The State** : **Through Mr. Ali Anwar Kandhro, Addl.P.G**

**Date of hearing** : **15-05-2025**

**Date of Judgment** : **15-05-2025**

**JUDGMENT**

**Jan Ali Junejo, J:-** The instant criminal appeal is directed against the judgment dated 14.03.2022 (hereinafter referred to as the “*Impugned Judgment*”) passed by learned 1<sup>st</sup> Additional Sessions Judge/MCTC, Kamber (hereinafter referred to as the “*Trial Court*”), in Sessions Case No.39/2022 (Re.State v. Rahib Ali Choliyani & others), arising out of FIR No.127/2021, registered at Police Station, Warrah, for offence punishable under Sections 302, 337-H(ii), 148, 149 PPC, wherein the present appellant was convicted for offence punishable under section 302(b) PPC for having committed Qatl-i-amd of Mushtaque Ahmed, and sentenced to death as *Tazir*, with compensation of Rs.500,000/- in terms of section 544-A Cr.P.C to be paid to the legal heirs of the deceased, and in default thereof, to undergo six months simple imprisonment. Besides, a reference for confirmation of death sentence to the appellant was also transmitted to this Court.

2. Briefly, the prosecution case, as set forth in the FIR is that on 27.09.2021, at about 1800 hours, the present appellant together with co-accused Ghulam

Hussain, duly armed with a double-barrel guns, accompanied by rest of the accused, formed an unlawful assembly and due to a personal grudge, fired and killed Mushtaque Ahmed at western side bank of Naseer Shakh in Deh Gul Buriro, Taluka Warah. The incident was witnessed by the complainant and other prosecution witnesses. After investigation, the appellant was sent up for trial. Before commencement of trial, the formal Charge was framed against the Appellant, who did not plead guilty and claimed trial. The prosecution examined the following witnesses:

PW-1: Deedar Hussain Choliyani Chandio (Complainant)

- **Exhibit:** Exh-08 (Dated 12-3-2022)
- **Evidence:**
  - The complainant narrated the incident that occurred on 27.09.2021 at 1800 hours, stating that accused Rahib Ali Choliyani, armed with a double-barrel gun and accompanied by others, formed an unlawful assembly and, due to a personal grudge (arising from a dispute over irrigation water), shot and killed his brother Mushtaque Ahmed near Rahib's house.
  - He tendered the FIR (Crime No. 127/2021) as Exh-8/A.

PW-2: Fida Hussain Chandio (Eye-witness)

- **Exhibit:** Exh-09 (Dated 12-3-2022)
- **Evidence:**
  - Corroborated the complainant's account as an eye-witness to the murder.
  - Provided direct, substantive ocular evidence of the incident.

PW-3: ASI Hyder Bux Phulpoto (Investigating Officer, Author, Corpse-bearer)

- **Exhibit:** Exh-10
- **Evidence & Exhibits Produced:**
  - Incident intimation Entry No. 33 (2000 hours) and Departure Entry No. 34 (2010 hours) dated 27-9-2021.
  - Memo of inspection of the dead body and injuries (27-9-2021, 2030 hours).
  - Original Danishtnama of the deceased, Lash Chakas form.
  - FIR-related entries No. 15 & 16 (28-9-2021).

- Memo of site inspection and collection of blood-stained earth and 8 live cartridges (28-9-2021, 1700 hours).
- Investigation-related Departure Entry No. 07 (29-9-2021, 1300 hours).
- Memo of arrest of accused Rahib Ali & recovery of unlicensed DBBL gun and four live cartridges (29-9-2021, 1400 hours).
- Arrival & FIR and investigation-related entries No. 13, 14 & 15 (29-9-2021).
- Positive blood-stained earth material report No. SFDL-Case#2021-1608 (20-10-2021).
- Ballistic Examination Report No. FSL/FD/LRK/OR/FA/1916 (18-10-2021).
- Diagram of weapon and receipt (Exh-10/A to 10/N).
- FIR of off-shoot crime No. 128/2021 (29-9-2021).
- Verified all documents as correct.

PW-4: Dr. Ameer Ahmed Patujo (Medical Officer)

- **Exhibit:** Exh-11 (Dated 12-3-2022)
- **Evidence:**
  - Conducted the post-mortem of deceased Mushtaque Ahmed on 27-09-2021 at Taluka Hospital, Warrah.
  - Described multiple firearm entry and exit wounds, fractures, and damage to vital organs (brain, eye, bones).
  - Gave opinion that death was caused by severe hemorrhagic shock and damage to vital organs due to firearm injury, sufficient to cause death in the ordinary course of life.
  - Produced the original post-mortem report No.AP-19/21 (28-09-2021) and Lash Chakas form (Exh-11/A & 11/B).

PW-5: WHC Deedar Ali Phulpoto (In-charge Malkhana, P.S. Warah)

- **Exhibit:** Exh-12 (Dated 12-3-2022)
- **Evidence:**
  - Produced original record and tendered in evidence:
    - Copy of Register No. 19, Entry No.390 regarding crime property.
    - Roznamcha Entries.
    - Road certificates No. 324 (11-10-2021) & 317 (06-10-2021) (Exh-12/A to 12/H).
  - Verified all documents as correct.

PW-6: PC/1754 Muhammad Farooque (Dispatch Official)

- **Exhibit:** Exh-13 (Dated 12-3-2022)
- **Evidence:**

- Saw and verified Road Certificate (R.C) regarding dispatch of empty cartridges, etc. (Exh-12/H).

PW-7: H.C. Muzafar Ali (now ASI, Dispatch Official)

- **Exhibit:** Exh-14 (Dated 12-3-2022)
- **Evidence:**
  - Saw and verified Road Certificate (Exh-12/C) regarding dispatch of blood-stained earth material.

PW-8: Tapedar Muhammad Talib Khushk

- **Exhibit:** Exh-15
- **Evidence:**
  - Produced and verified original site sketch (Exh-15/A), bearing his and the I.O's signature and stamp.

Notably, the learned defence counsel, on instructions, did not cross-examine any of the prosecution witnesses.

3. Learned counsel for the appellant contended that the impugned judgment is unsustainable in law and facts. He argued that the right to fair trial as guaranteed by Article 10-A of the Constitution of Islamic Republic of Pakistan, 1973, has been flagrantly violated as no cross-examination of any prosecution witness was conducted by the defence counsel. He further submitted that the trial court failed to exercise its duty under Article 161 of the Qanun-e-Shahadat Order, 1984, to put material questions to the witnesses to elucidate the truth, especially in a case involving capital punishment. He placed his reliance upon the cases reported as 2017 SCMR 1524 and 2023 SCMR 603. Lastly, the learned counsel prayed for setting aside the conviction and sentence and remanding the case for a fair trial.

4. Conversely, the learned Additional Prosecutor General (A.P.G) supported the impugned judgment, contending that the prosecution had proved its case beyond reasonable doubt through un-impeached ocular, medical, and documentary evidence. He submitted that the appellant, through his counsel,

deliberately chose not to cross-examine the witnesses and even admitted his guilt at various stages. He argued that the accused cannot take advantage of his own conduct and that the conviction is well-founded and does not call for interference.

5. We have heard the learned counsel for the parties and examined the record with their assistance. It is an undisputed fact that the defence counsel did not conduct cross-examination of any of the prosecution witnesses. The trial Court, having noted this omission, proceeded to convict the appellant solely on the basis of the unchallenged prosecution evidence. It is a well-established principle that cross-examination constitutes a fundamental safeguard of the right to a fair trial. In criminal proceedings, particularly those where capital punishment is involved, the trial Court bears an enhanced responsibility to ensure that the right of cross-examination is not rendered illusory. Even in instances where the defence fails to cross-examine, Article 161 of the Qanun-e-Shahadat Order, 1984, empowers the Presiding Judge to pose any question, at any stage, to any witness or party, provided such questions are material and relevant to the discovery of truth or to securing proper proof. The Judge may also direct the production of documents or items, notwithstanding any objections by the parties. However, the ultimate adjudication must rest exclusively on facts that are relevant and legally proved, in order to ensure that the trial is fair and just. Moreover, Article 10-A of the Constitution of the Islamic Republic of Pakistan guarantees the right to a fair trial as a fundamental right. In the present case, the trial Court failed to discharge its duty under Article 161 of the Qanun-e-Shahadat Order, 1984, by neglecting to put any material questions to the prosecution witnesses, despite the complete absence of cross-examination. This omission is particularly grave given that the case entails the imposition of the death penalty. The failure of the trial Court to uphold the procedural safeguards essential to a fair trial has resulted in a miscarriage of justice, thereby

necessitating intervention by this Court. In analogous circumstances, the Honourable Supreme Court of Pakistan, in the case of *Abdul Ghafoor v. The State (2011 SCMR 23)*, has been pleased to observe as follows:

*“7. 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 State 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”.*

6. For the foregoing reasons, the conviction and sentence recorded by the learned trial Court vide *Impugned Judgment* dated 14.03.2022 are set aside. The case is remanded to learned trial Court for deno-vo trial, with a proper opportunity to cross examine the witnesses through the defence counsel or, if the accused is unrepresented, to appoint a counsel for him on State expenses or, as a last resort, to exercise its own powers under Article 161 of the Qanun-e-Shahadat Order, 1984, by putting all material questions necessary for elucidating the truth. The trial Court is further directed to record statement of the appellant u/s.342 Cr.P.C and then to pass the judgment afresh, strictly in accordance with law, after providing a fair opportunity of hearing to all the concerned. Consequently, the instant criminal appeal is disposed of in above terms.

As result to above, the reference for confirmation of death sentence to the appellant is answered in “**Negative**”.

**JUDGE**

**JUDGE**