

Remand : No Defence Counsel During

eyewitness evidence in chg

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IN THE HIGH COURT OF SINDH, KARACHI

Criminal Appeal No.149 of 2021.
Conf. Case No.07 of 2021.

Present:

*Mr. Justice Mohammad Karim Khan Agha
Mr. Justice Zulfiqar Ali Sangi,*

Appellant	Sami Khan @ Pappu S/o. Abdul Hameed, through Mr. Muhammad Farooq, Advocate.
Complainant	Mst. Nabeela through Mr. Naimatullah Marwat, Advocate.
Respondent	The State through Mr. Ali Haider Saleem, Additional Prosecutor General Sindh.
Date of hearing	28.09.2022.
Date of Judgment	28.09.2022.

JUDGMENT

MOHAMMAD KARIM KHAN AGHA, J:- The appellant Sami Khan alias Pappu S/o. Abdul Hameed has preferred the instant appeal against the judgment dated 04.03.2021 passed by the Additional Sessions Judge-I, Karachi West (Model Criminal Trial Court) in Special Case No.968 of 2017 arising out of Crime No.89 of 2017 U/s. 302/324 PPC registered at P.S. Surjani Town, Karachi whereby the appellant was convicted and sentenced to death under section 302(b) PPC along with fine of Rs.500,000/- payable to the legal heirs of deceased as provided under section 544-A Cr.P.C. In case of default in payment of such compensation he shall suffer S.I. for six (06) months. The appellant was also sentenced to undergo R.I. for five (05) years under section 324 PPC with fine of Rs.100,000/-. In case of default in payment of fine he shall suffer S.I. for six (06) months more. All the sentences were ordered to run concurrently. Benefit of section 382-B was also extended to the appellant.

2. The brief facts of the prosecution case are that on 10.03.2017 at 1900 hours complainant Mst. Nabeela wife of deceased Nayab Alam recorded her 154 Cr.P.C. statement at Abbasi Shaheed Hospital, Karachi subsequently incorporated in FIR No.89 of 2017 at P.S. Surjani Town, Karachi stated that she is residing with her family at House No.I./459, Sector 36/B, LERP, Surjani Town Karachi. On the latetul day i.e. 10.03.2017 at 02:00 p.m. she along with her husband and kids was present at her home, in the meantime, door of the house was knocked. Her daughter Alisha aged about 15/16 years opened the door; she saw one Samiullah alias Pappu who entered inside the house, came in the room and demanded his articles from her husband Nayab Alam on which her husband replied that his belongings had been deposited with the police. He (Nayab Alam) asked him (Samiullah) why he had entered into the house and further asked him to stand out of the house, where he will talk to him. Samiullah came out of the room and till reaching of her husband after him caused fire shot of pistol upon her husband Nayab Alam as she (Mst. Nabeela) was behind her husband, she also received bullet shot injuries on her breast. Thereafter, someone informed to 15-Maddadgar and called Chippa Ambulance but her husband Nayab Alam succumbed to his injuries[✓] on the way to hospital and he expired. She was operated for her injury in the hospital. She claimed that accused Samiullah alias Pappu son of not known who is relative of Mst. Farha the first wife of her Husband Nayab Alam has committed murder of her husband by causing firearm shot and also injured her, hence this FIR.

3. After usual investigation, the case was challaned and the appellant pleaded not guilty to the charge and claimed trial.

4. In order to prove its case the prosecution examined 09 Prosecution Witnesses and exhibited numerous documents and other items. The statement of accused was recorded under Section 312 Cr.P.C in which the appellant claimed his innocence however, he did not give evidence on oath nor produce any DWs in support of his defence case. ⁴

5. After hearing the parties and appreciating the evidence on record, the trial court convicted the appellant and sentenced him as set out earlier in this judgment; hence, the appellant has filed this appeal against his conviction.

6. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the impugned judgment and there is no need to reproduce the same so as to avoid duplication and unnecessary repetition.

7. At the very outset, learned counsel for the appellant, learned Additional Prosecutor General Sindh and learned counsel for the complainant pointed out that PW-2 Mst. Ghazala had her evidence-in-chief recorded in the absence of her defence counsel and since this was a capital case, this case should be remanded to the ^{trial} court.

8. We have considered the contentions of parties as well as the record of the case and find that PW-2 Mst. Ghazala had her evidence-in-chief recorded in absence of her defence counsel. PW-2 Mst. Ghazala is an important witness as she is an eye-witness of the alleged incident and as such in a capital case it was incumbent upon the trial court to ensure that all evidence-in-chief, cross-examination and examination, if any was recorded in the presence of defence counsel. This is because under section 353 of the Cr.P.C. the evidence of all the witnesses (evidence-in-chief, cross-examination and re-cross-examination) must be recorded in the presence of the accused and his defence counsel especially in a capital case. The idea behind this is that the appellants shall have fair trial as guaranteed by Article 10-A of the Constitution. For example, if the counsel of the defence had been present when the aforesaid important witness was giving evidence in chief, he may have objected certain questions being put and certain documents being exhibited.

9. Since the defence counsel was absent during her evidence-in-chief, we find that the appellant has been prejudiced and his rights under Article 10-A of the Constitution of a fair trial have prima-facie been

violated and as such we agree with the propositions of learned counsel for the appellant, Additional Prosecutor General and learned counsel for the complainant and set-aside the impugned judgment and answer the confirmation reference in the negative. We direct that this case be remanded to the court of Additional Sessions Judge-I, Karachi West (Model Criminal Trial Court) for the limited purpose of only re-recording the entire evidence of PW-2 Mst. Ghazala in presence of defence counsel of the accused and thereafter record appellant's section 342 Statement afresh and then re-write the judgment based on the evidence on record. The court of Additional Sessions Judge-I, Karachi West (Model Criminal Trial Court) in Sessions Case No.968 of 2017 is directed to undertake the above exercise within 03 months of the date of this order. A copy of this order along with R&PS shall be sent by the office to the court of Additional Sessions Judge-I, Karachi West (Model Criminal Trial Court) for compliance.

10. The appeal and confirmation reference are disposed of in the above terms.

Muhammad Arif