

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

29

PRESENT

MR.JUSTICE CH. EJAZ YOUSAF CHIEF JUSTICE
MR.JUSTICE Dr.FIDA MUHAMMAD KHAN

CRIMINAL APPEAL No.7/K OF 2002

Ashraf son of Qabool -- Appellants
Peeral alias Peeru son of Qabool
Ghousu alias Ghous Bux son of
Muhammad Soomro.
Budho son of Mohabbat

All by Caste Chandias, residents of village
Sobho Chandio, Taluka K.N.Shah,
District Dadu.

Versus

The State -- Respondent

Counsel for the appellants -- Mr.Allah Bachayo Soomro,
Advocate

Counsel for the State -- Mr.M.Arshad Lodhi,
Asstt;Advocate General,Sindh.

No.date of FIR and -- No.35 ; 7.6.1987
Police station P.S.Rukkan.

Date of the order of -- 30.1.2002
Trial Court

Date of institution -- 19.2.2002

Date of hearing -- 25.9.2003

Date of decision -- 25.9.2003

JUDGMENT

CH. EJAZ YOUSAF, CHIEF JUSTICE.- This appeal is directed against the judgment dated 30.1.2002 passed by the learned II-Additional Sessions Judge, Dadu whereby appellants were convicted under sections 396/397 PPC read with section 17(4) of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979 and sentenced to life imprisonment each alongwith a fine of Rs.25,000/- each or in default thereof to further undergo R.I. for two years each. Benefit of section 382-B Cr.P.C. was, however, extended to the appellants.

2. The facts lie in a small compass. The appellants were challaned to face trial under section 396/397 PPC read with section 17(4) of the Offence Against Property (Enforcement of Hudood) Ordinance, 1979 on the charge that they had on 7.6.1987 at 8.45 p.m. allegedly committed dacoity on the road near Dadu canal and in course thereof murdered one Abdul Hameed.

3. Charge was accordingly framed to which the appellants pleaded not guilty and claimed trial.

4. At the trial, the prosecution in order to prove the charge and substantiate the allegations leveled against the accused persons produced six witnesses, in all, thereafter statements of the accused persons under section 342 Cr.P.C. were recorded. They, however, failed to lead any evidence in their defence or to appear as their own witnesses in terms of section 340(2) Cr.P.C.

5. After hearing the arguments of the learned counsel for the parties the learned trial Court convicted the appellants and sentenced them to the punishments as mentioned in the opening para hereof.

6. We have heard Mr.Allah Bachayo Soomro, Advocate, learned counsel for the appellants, Mr.Muhammad Arshad Lodhi, Assistant Advocate General, Sindh, and have also perused the entire record with their assistance, carefully.

7. It has been, mainly, contended by the learned counsel for the appellants that though the appellants were charged for committing murder in course of dacoity by inflicting gun shot wounds and recovery of weapons from their possession has been taken as an incriminating

piece of evidence in recording convictions against the appellants yet, the trial Court has omitted to specifically question the appellants with regard thereto within the purview of section 342 Cr.P.C. thereby rendering the impugned judgment as untenable. He has pointed out that the learned trial Judge has only questioned appellant Peeral on the point of recovery of hatchet and has provided no opportunity to the rest of the appellants to explain their position with regard to the recoveries, especially of weapons, allegedly effected from them. It is further his grievance that trial of the case has been conducted in a hotchpotch manner inasmuch-as the same question which was earlier put to appellant Peeral was repeatedly put to the rest of the appellants and in doing so the learned trial Judge has not even bothered to change language of the question which implies that he was absolutely unaware of the evidence led by the prosecution at the trial. He has maintained that since omission to specifically question the appellants on substantial points of incriminating pieces of evidence has gravely prejudiced the appellants in their defence. rather misled, therefore, the impugned judgment is not sustainable.

8. Mr.Muhammad Arshad Lodhi, Assistant Advocate General, Sind, after going through the record has confirmed that except Peeral none of the appellants have, in the course of their statements recorded under section 342 Cr.P.C, been questioned by the learned trial Judge with regard to the recoveries effected from them. He, has, however, pleaded that since, the omission so made appears to have taken place due to inadvertence, therefore, the prosecution may be afforded an opportunity to rectify the defect by remanding the case to learned trial Judge for re-examination of the appellants under section 342 Cr.P.C.

9. Notwithstanding the fact that the learned counsel for the State has not controverted the contention raised by the learned counsel for the appellants, we have ourselves, minutely gone through the record of the case. It reveals that a 12 bore shot gun, an automatic pistol, nine lives cartridges alongwith a magazine were recovered on the pointation of accused Allu vide Exh.11-A whereas another SBBL gun was recovered on the pointation of appellant Aslam from his house vide exh.17-B. Likewise, one SBBL gun, allegedly used in the crime, was recovered

is proscriptive in the sense that if, it is found by the trial Court that any circumstance appearing in evidence against the accused is likely to contribute towards his conviction then the Court would not be competent to take the same into account without questioning him on that point.

Perusal of section 342(1) Cr.P.C. further leads to the inference that the object of the examination of the accused is, to give him an opportunity of explaining the circumstances, which tend to incriminate him or likely to influence mind of the judge in arriving at a conclusion adverse to him.

Likewise, the addition of the words "for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him" in section 342(1) further suggest that examination of the accused is not a mere formality but a necessity. To our mind, the above words have

been thoughtfully inserted in the section to ensure that the principle contained in the Judicial Maxim "Audi Alteram Partem" is fully complied with. It would be worthwhile to mention here that section 342 Cr.P.C. which for the purpose of ready reference and convenience is reproduced hereinbelow, has two parts. The first part gives a discretion

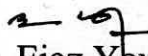
38

appear themselves as their own witnesses, in terms of section 340(2)

Cr.P.C. if they choose to do so.

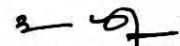


(Dr. Fida Muhammad Khan)
Judge


(Ch. Ejaz Yousaf)
Chief Justice

Karachi, dated the
25th September, 2003
ABDUL RAHMAN/**

FIT FOR REPORTING


CHIEF JUSTICE