

IN THE FEDERAL SHARIAT COURT
(APPELLATE JURISDICTION)

PRESENT.

MR. JUSTICE CH.EJAZ YOUSAF CHIEF JUSTICE
MR. JUSTICE DR.FIDA MUHAMMAD KHAN
MR. JUSTICE ZAFAR PASHA CHAUDHRY

CRIMINAL APPEAL NO.36/K OF 2003.
CRIMINAL MURDER REFERENCE NO.2/K/03

Ashiq Ali S/o Ghulam Rasool,
R/o Jhugi No.368,
Sector 11-C, Godhra Camp,
New Karachi, presently
confined in Central Prison,
Karachi. Appellant.

VERSUS.

The State. Respondent.

Counsel for appellant	--	Syed Saeed Hasan Zaidi, Advocate
Date of Institution	--	08.08.2003
Counsel for the State	--	Mr.Arshad Hussain Lodhi, Assistant Advocate General Sindh.
No.date of FIR and Police Station	--	FIR No.04/97 dat.03.01.1997 Police Station Feeroz-abad, District East Karachi.
Date of the Order of Trial Court	--	12.06.2003
Date of hearing	--	27.05.2004
Date of decision	--	27.05.2004

JUDGMENT

CH.EJAZ YOUSAF, CHIEF JUSTICE:- This appeal is directed against the Judgment dated 12.06.2003 passed by the learned Ind -Additional Sessions Judge, Karachi East, whereby the appellant was convicted under section 302 PPC and sentenced to death. He was also convicted under section 392-PPC and sentenced to undergo four years R.I. alongwith a fine of Rs.1,00,000/- or in default of payment of fine to further undergo R.I. for one year.

2. Facts of the case, in brief, are that on 03.01.1997, report was lodged by Dr. Alia Hameed D/o Abdul Hameed with Police Station Feeroz-abad District East Karachi, wherein it was alleged that the complainant alongwith his grand-father namely Najibullah and grand-mother namely Mst.Sharifun Nisa, were residing in H.No.122-C Block No.2 P.E.C.H.S Karachi. In the night between 2nd and 3rd January, 1997, at about 4:00 A.M, while the complainant was sleeping in her room, the appellant in order to commit robbery, entered in the

house, killed her afore-named grand parents and inflicted dagger blows to her. Besides, taking away cash, prize bonds, golden ornaments and other valuable articles. On the stated allegation formal FIR bearing No.04/97, was registered at the said Police Station under sections 17 (4) (3) Offences Against Property (Enforcement of Hudood) Ordinance 1979, and investigation was carried out in pursuance thereof. On the completion of investigation the appellant was challaned to the Court for trial.

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

4. At the trial, the prosecution in order to prove the charge and substantiate the allegation leveled against the appellant produced thirteen witnesses in all. PW.1, Nasima Ashfaq, is maternal aunt of the complainant. She deposed that the complainant on 03.01.1997, in the morning, had conveyed to her information regarding the incident. PW.2, Saima Ashfaq, is the daughter of PW.1. She, at the trial,

corroborated her statement. PW.3 Muhammad Yasin, is the marginal witness of the site inspection note i.e. Ex-7. He is also a marginal witness of the inquest reports i.e. Ex-8 and Ex-9. PW.4 Muhammad Ashiq, is a formal witness. He had, after the postmortem examination, received the dead bodies from Abbasi Shaheed Hospital vide Ex-11/A. PW.5 Saeedullah, is witness to the arrest of the appellant and recovery of robbed articles from his possession vide Exs-13/A, 13/B and 13/C. He is also a marginal witness of the recovery memo Ex-19/C vide which the crime weapon i.e. blood stained dagger, was, at the instance and pointation of the appellant recovered from the bushes near Jeehl Park. PW.6 Muhammad Tahir, too, deposed that on 03.01.1997 in the morning, information regarding the occurrence was conveyed to him by the complainant. PW.7 Kashif Naeem, too is a marginal witness of the inspection note as well as the inquest reports i.e. Ex-7, Ex-8 and Ex-9. PW.8 Dr. Muhammad Tariq, had, on 03.01.1997, conducted postmortem examination on the dead

body of Najibullah Khan. He produced the postmortem report as Ex-17/A. PW.9 Jawaid Anwar, ASI, had incorporated contents of the complainant i.e. Ex-18/A into the formal FIR i.e. Ex-18/B. PW.10 Sharafuddin, SHO Feeroz-abad, is the investigating officer of the case. PW.11 Muhammad Ahsan Malik, SHO Feeroz-abad had recorded statement of the complainant u/s 154 Cr.P.C. He produced the same as Ex-18/A. PW.12 Dr.Rohina Hassan, had, on 03.01.1997, conducted postmortem examination on the dead body of Mst.Sharifan w/o Najibullah Khan. She produced the postmortem report as Ex-22/A. PW.13 Abdul Latif, Judicial Magistrate, had on 19.01.1997 recorded statement of the complainant u/s 164 Cr.P.C. He produced the same as Ex-23/B. He had also recorded statement of PW. Naseem Ashfaq u/s 164 Cr.P.C, which he produced as Ex-23-C. On the completion of prosecution evidence Khizar Hayat, ASI, who was entrusted with the summons for service upon PWs Dr.Alia Hameed, Fida Hussain, Kamran, SI Asghar Baig and SI Arif Usman, was

examined as CW.1. He deposed that since Dr. Alia Hameed, had gone to America, SI Asghar Baig was dead and rest of the witnesses had changed their places of abode, therefore, he could not serve the summons. Thereafter, the appellant was examined under section 342 Cr.P.C. as well as under section 340(2) Cr.P.C. In his above statements the appellant denied the charge and pleaded innocence. However, he failed to lead any evidence in his defence.

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

6. We have heard Syed Saeed Hasan Zaidi, Advocate learned counsel for the appellant, Mr.Arshad Hussain Lodhi, Assistant Advocate General Sindh, for the State and have also perused the record of the case, minutely, with their assistance.

7. Learned counsel for the appellant, at the very outset, has contended that though the recovery of the crime weapon i.e. the

dagger at the instance of the appellant from the bushes situated near Jeehl Park, and the recovery of bag containing the robbed articles from the house of the appellant, at his instance, have been taken as incriminating pieces of evidence against the appellant yet, the appellant, at the trial, was neither specifically questioned with regard thereto within the purview of section 342 Cr.P.C, nor his attention was invited to the same thereby enabling him to explain his position, hence, the omission so made by the learned trial Judge, having materially prejudiced the appellant in his defence, has rendered the impugned Judgment as unsustainable.

8. Mr.Arshad Hussain Lodhi, Assistant Advocate General Sindh, has candidly conceded that the recovery of crime weapon and other robbed articles has contributed towards conviction of the appellant, therefore, learned trial Court ought to have question^{ed} him with regard thereto in the course of his statement under section 342 Cr.P.C. He has submitted that since the omission so made was fatal, therefore, the

case may be remanded to the learned trial Court, for rectification of the defect.

9. A perusal of the impugned Judgment shows that recoveries of the crime weapon i.e. blood stained dagger and the bag containing robbed articles i.e. a sum of Rs.55277/-, American Dollars, prize bonds, Passport and photo copy of the NIC of the appellant, photographs, hand gloves, NIC of Dr.Alia, Golden ornaments viz chain, locket, ear ring, tops and wrist watches vide recovery memo Ex-19/C, Exs-13/B and 13/C, have been taken as incriminating pieces of evidence against the appellant and have contributed heavily towards his conviction. Following portion of the impugned Judgment which is reproduced herein below for ready reference, is explicit in this regard:-

“The case of the prosecution as it would appear from the evidence discussed above is entirely based on circumstantial evidence such as (1) the recovery of blood stained clothes of accused (2) the recovery of blood stained dagger, (3) robbed articles and the fact that accused was on visiting terms of the family of deceased. The above piece of circumstantial evidence if considered cumulatively they had to only one conclusion that it is

only accused and no one else caused the death of two deceased and also committed robbery as alleged by the prosecution.”

Further in Para-48 of the Judgment the learned trial Judge, has though referred to the chemical examiners report regarding presence of human blood stains on the crime weapon i.e. dagger and has drawn adverse inference, against the appellant, on account thereof, yet, has not bothered to question him with regard to the recovery of the above referred articles as well as the report, within the purview of Section 342-Cr.P.C. which, in our view, was necessary because the object of examination of the accused is to give him an opportunity of explaining the circumstances which are likely to influence mind of the Judge in arriving at a conclusion adverse to him. Attention of the accused, therefore, must have been invited to the inculpatory pieces of evidence or circumstances surfaced on record. It may be noted here that since examination of accused under section 342 Cr.P.C. is not a mere formality but a necessity so that the principle contained in Judicial Maxim “Audi Alteram Partem” is fully complied with,

therefore, howsoever scanty or weak the prosecution evidence in regard to certain incriminating material may be, it is duty of the Court to seek explanation of the accused by confronting him with the same.

Here, it would be advantageous to have a glance at section 342(1),

Cr.P.C. which reads as follows:-

"S.342. Power to examine the accused...(1) For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the Court may, at any stage of any inquiry or trial without previously warning the accused, put such questions to him as the Court considers necessary, and shall, for the purpose aforesaid, question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence."

No doubt, in some cases it has been held that a Judgement is not required to be set-aside merely by reason of inadequate compliance with section 342 Cr.P.C. unless it is shown that the accused was prejudiced, in his defence, on account thereof yet, in our view, the use of word "shall" in later part of Sub-section-1 of Section 342 Cr.P.C. suggests that the Court while examining the accused thereunder is not only bound to question him on material points of the case but, is under legal obligation to confront him with all those

pieces of evidence which may tend to criminate him, prejudice having

been presumed to be caused otherwise. This view receives support

from the following reported Judgments:-

(1)Munir Ahmad alias Munni v. The State 2001 SCMR 56, (2) Asif Ali Zardari and another v. The State PLD 2001 SC 568, (3) Din Muhammad v. Crown 1969 SCMR 777, (4) Munawar Ahmed v. The State PLD 1956 SC 300, (5) Abdul Salam v. Crown PLD 1955 FC 129, (6) Abdul Latif v. Crown PLD 1952 FC 113, (7) Abdul Wahab v. Crown PLD 1955 FC-88, (8) Rattan Singh v. State of H.P. AIR 1997 SC 768, (9) Sharad Birdhichand Sarda v. State of Maharashtra AIR 1984 SC 1622, (10) State of Maharashtra v. Sukhdeo Singh 1992 Cr.LJ 3454 (SC), (11) Tanviben Pankaj Kumar Divetia v. State of Gujarat AIR 1997 SC 2193, and Ranjit Mondal v. State of West Bengal 1997 Cr.L.J 1586 (Cal);.

10. The upshot of the above discussion is that since in the instant case the trial Judge has not adopted the mandatory procedure in the conduct of trial and has failed to question the appellant on material points of the case, inferences, adverse to him, on account whereof were drawn, therefore, the impugned Judgment dated 12.06.2003 passed by the learned Jnd-Additional Sessions Judge, Karachi East, is set-aside and the case, with consent of the parties, is remanded to the trial Court for its decision afresh in accordance with law, with the

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direction that the appellant be re-examined under section 342 Cr.P.C

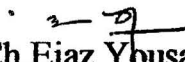
and he be confronted with all the incriminating


circumstances/evidence available on record. Needless to point that the


appellant shall be at liberty to lead evidence in his defence with regard

thereto or to get recorded his own statement under section 340 Cr.P.C

Cr.P.C. if he so desires. Criminal murder reference is answered
in negative.


(Ch.Ejaz Yousaf)
Chief Justice


(Dr.Fida Muhammad Khan)
Judge


(Zafar Pasha Chaudhry)
Judge

Karachi dated the
27th May, 2004.
S.M.Ismail/**

FIT .


(Chief Justice)