

**JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT, MINGORA
BENCH**

(Judicial Department)

J.Cr.A No.110-M/2019

Appellant (s): (Laiq Zada) by
Barrister Asad-ur-Rehman, Advocate.

Respondent (s): (State) by
Mr. Haq Nawaz Khan, A.A.G.

(Muhammad Siyasat Khan) by
Mr. Rahman Ali Khan, Advocate.

Date of hearing: 06.10.2021

JUDGMENT

ISHTIAQ IBRAHIM, J.- Through this criminal appeal, the appellant has challenged judgment dated 08.02.2019 rendered by learned Additional Sessions Judge, Chakdarra, Camp Court at Timergara, District Dir Lower, in case F.I.R No.539 dated 20.11.2007 registered u/s 302 PPC at Police Station Balambat, District Dir Lower, whereby he was convicted u/s 302 (b) PPC and sentenced to life imprisonment. The benefit of section 382-B Cr.P.C was extended to him.

2. According to the contents of *murasila* Ex.PA, on 20.11.2007 at 11:30 hours, complainant Muhammad Siyasat Khan (PW-6) reported the matter before the police in his house to the effect that his deceased daughter namely Mst. Risalat Bibi was married

to the appellant some 9/10 years ago. Out of said wedlock, four children were born. On fateful day, her dead body was brought on a cot to his house. There was a sign of fire shot on her dead body, while her husband (appellant) has fled away. The complainant has alleged in his report satisfaction regarding murder of her daughter deceased Mst. Risalat Bibi by her husband/appellant due to some unknown motive. On the basis of report/*murasila* (Ex.PA), the instant FIR (Ex.PW1/1) was registered against the appellant.

3. Initially, the appellant was absconding. *Challan* u/s 512 Cr.P.C was submitted before the learned trial Court. After recording the prosecution evidence in absentia of the appellant, vide order dated 30.01.2008, the appellant was declared as proclaimed offender and perusal warrant of arrest was issued against him, in execution whereof, on 30.06.2016, he was arrested vide his card of arrest (Ex.PW9/1). After completion of investigation, supplementary *challan* was submitted against the appellant before the learned trial Court. On 10.08.2016, the appellant was charged sheeted, to which he did not plead guilty and claimed trial. The prosecution produced and examined as many as ten (10) witnesses in support of its case besides transposition of statement of

lady Dr. Rukhsana Bashir recorded during proceedings u/s 512 Cr.P.C as PW-7. Then, statement of the accused was recorded u/s 342 Cr.P.C, wherein he denied the allegations of prosecution, however he neither wished to be examined on oath nor desired to produce evidence in defence. On conclusion of trial, the trial Court vide judgment dated 08.02.2019 convicted & sentenced the appellant in the manner mentioned above, hence, this appeal.

4. Arguments heard and record perused.

5. It is evident from the impugned judgment that the report of Lady Dr. Rukhsana Bashir, who had examined the dead body of the deceased, was considered by the learned trial Court only on the strength of her transposed statement recorded during proceedings u/s 512 Cr.P.C as PW-7. However, she was not examined before the learned trial Court. She was alive and posted at H.M.C Peshawar. In this regard, the learned trial Court has examined Iqbal-ud-Din, Junior Clerk DHQ Hospital *Timergara* as CW-2, which is reproduced for ready reference;

حلفا بیان کیا کہ میں نے عدالت حضور کے حکم پر گواہ لیڈی ڈاکٹر رخسانہ بشیر سے متعلق charge assumption اور relinquishment چارج لیا ہوں۔ جو بالترتیب Ex.CW2/2 و Ex.CW2/1 ہیں۔ ہمارے اطلاع کے مطابق لیڈی ڈاکٹر مذکورہ حالیہ دنوں HMC پشاور میں تعینات ہے۔ یہی میرا بیان ہے۔

No doubt, several summons were issued in the name of the said PW/lady doctor, however, coercive measures for procuring her attendance were not adopted by the learned trial Court and on 19.01.2019, her statement recorded during proceedings u/s 512 Cr.P.C as PW-7 was transposed to the present trial on the basis of an unjustified ground on record that she could not be traced. Thus, said transposition would not be conclusive because the witness was alive, healthy and still serving at HMC Peshawar. Hon'ble Supreme Court of Pakistan while giving its judgment in the case of "Naseer Khan v/s Said Qadeem & others" (2020 SCMR 293) in a situation where statement of the prosecution witness was transposed for the reason that he was living abroad and upheld the decision of this Court, wherein transposition of statements of witnesses under section 512 Cr.P.C was not approved by observing that;

"Be that as it may the fact remains that before the trial in the present criminal case had come to a close and before a stage was reached when the learned trial court could consider the evidentiary value of the un-cross-examined statements of the prosecution witnesses recorded under section 512, Cr.P.C. respondent No. 1, had been arrested and he was brought before the learned trial court to face his trial. This, therefore, was a case where before conclusion of his trial respondent No. 1 had appeared before the learned trial court and he wanted an opportunity to cross-examine the above mentioned prosecution witnesses which opportunity was denied to him by the learned

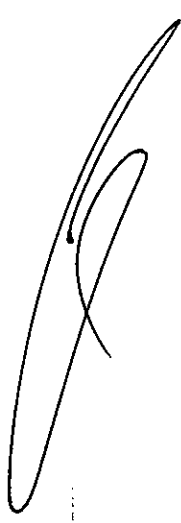
trial court. After introduction of Article 10A in the Constitution of the Islamic Republic of Pakistan, 1973 fair trial has become a fundamental right and now in all situations wherein an apparent injustice may appear to be imminent a trial court is to resolve such issues in the light of the cherished principles of fairness, particularly when no serious prejudice is likely to be caused to the opposite party. The learned counsel for the petitioner has maintained before us that the prosecution witnesses who had got their statements recorded under section 512, Cr.P.C. are presently working out of the country and, thus, the complainant party is in no position to produce them before the learned trial court again. We have, however, remained unable to subscribe to this submission of the learned counsel for the petitioner because the case in hand is a State case and it is not the responsibility of the complainant party to produce witnesses before the trial court. In such a case it is the responsibility of the State to produce its witnesses before the trial court and if the State fails to do that then it is for the court itself to use all permissible methods for procuring attendance of such witnesses even if it has to resort to some coercive measures."

(Underlined supplied)

This Court too while rendering judgment in the case of "Ibraheem Khan v/s The State through A.A.G & another" (2021 YLR 995) has observed that;

"In the case in hand also the mere statement of DFC was made the basis for transporting the statement of the prosecution witness recorded under section 512, Cr.P.C, which was not a safer course and cannot be allowed in the circumstances of the case. It was a serious issue as the accused had been facing trial under the charge of commission of an offence carrying a capital punishment. The importance of the witness both for the prosecution as well as the defence also required that the learned trial Court should have exercised due diligence in the matter. Being the sole eye-witness of the occurrence as well as complainant in the case he was not only important for the prosecution but for the defence as well (for the purpose of his cross-examination). His cross-examination would


have also been beneficial for the trial Court as well as this Court for achieving its due satisfaction for the purpose of safe administration of justice.



8. By now the right to a fair trial has been included in the fundamental rights of a citizen by insertion of Article 10(A) in the Constitution of Islamic Republic of Pakistan, 1973. Safeguards earlier taken by the Hon'ble Courts in our jurisdiction were mostly anchored in criminal procedural laws, beside those developed in judge made laws in pursuance to the intrinsic desire of the Hon'ble Courts for ensuring right of fair trial to the accused. But now the situation requires added care and caution as the nature of right to fair trial has been converted from a legal right to a fundamental right by way of the Constitution (Eighteenth Amendment) Act 2010. Right to cross-examination is the most cherished part of the right of an accused during the trial. The said right may or may not prove beneficial to the accused in a particular case but same has always been beneficial to the Courts in deciphering the hidden facts, in discovering the real issues, in uncovering the buried realities and thus reaching at the right and just conclusions. It is due to the efficacy of this practice of cross-examination that Courts of law are able to unearth the reality and discover the facts even from mouths of untruthful witnesses. section 512, Cr.P.C. is not the normal course but an exception to the normal practice of conducting a criminal trial. As held by the Hon'ble Apex Court in the case of "Arbab Tasleem v. The State" reported as "PLD 2010 Supreme Court 642" the general rule of evidence is that only such statement is legal and admissible which is given during the course of judicial proceedings on oath and is taken by a person authorized under the law to take down the evidence and it is made in the presence of the adverse party giving him right to cross-examine the deponent. It further provided that there were two exceptions to the general rule one being an exception provided by Article 46 of the Qanun-e-Shahadat Order, 1984 which is commonly known as dying declaration and the other being a statement of a witness recorded under section 512, Cr.P.C. A statement under section 512, Cr.P.C. being an exception to the general rule can only be resorted to when the conditions precedent for adopting such a practice are adhered to."

The perusal of record transpires that the learned trial Court has not taken concrete steps for procuring attendance of the prosecution witness namely lady Dr. Rukhsana Bashir. The essential precautions to be taken before allowing transposition of statement of a PW have not at all been taken into consideration by the learned trial Court. In such circumstances, reading of her statement as evidence of the prosecution would definitely have the potential of causing prejudice to the case of the appellant. In this case, the witness was admittedly alive and the only factor that she was posted at Peshawar is not a satisfactory excuse of the prosecution qua her not production before the Court. Needless to say that no substantial evidence was brought on record by the prosecution to prove that the transposed PW namely lady Dr. Rukhsana Bashir was living abroad or due to any other valid reason, she was unable to appear before the learned trial Court during trial. In other words, procuring attendance of the transposed PW was neither impossible, nor inconvenient for the prosecution. It was also not the case that her attendance could be procured only with an inordinate delay. Undeniably, statement of a witness recorded under section 512 Cr.P.C may be allowed to be

transposed to the record of trial of an absconding accused who is arrested later on, but only in the cases where procuring of attendance of such a witness is really a difficult task for the prosecution in a sense that the amount of delay or expense required for procuring his attendance is found unreasonable in circumstances of the case, which is not the case before us.

 6. In view of the foregoing discussion, we do not find anything on the record that the learned trial Court has made sufficient efforts for procuring attendance of the witness namely lady Dr. Rukhsana Bashir before ordering her statement to be transposed to the record of trial of the appellant and thus considering her statement in the impugned judgment has prejudiced the appellant. Hence, remand of the case to the learned trial Court for procuring attendance of the lady doctor in accordance with law is inevitable. This appeal is therefore allowed, the impugned judgment is set aside and case is remanded to the learned trial Court with directions to adopt all possible & coercive measures for procuring attendance of PW lady Dr. Rukhsana Bashir, including attachment of her salary. It is responsibility of the State to procure attendance of a witness as held by Hon'ble Supreme Court of Pakistan in the case of *Naseer Khan Supra*, as

such, a copy of this judgment should be forwarded to the Worthy Director General Prosecution Khyber Pakhtunkhwa as well as worthy Director General Health Khyber Pakhtunkhwa for ensuring attendance of the witness before the learned trial Court, without any amount of delay. Even then, if the PW is either untraceable or her attendance cannot be procured without an amount of delay, expense or inconvenience or she is incapable of giving statement then the learned trial Court shall pass an appropriate order regarding transposition of her statement recorded during proceedings u/s 512 Cr.P.C in accordance with law. Thereafter statement of the accused shall also be recorded u/s 342 Cr.P.C. The parties shall appear before the learned trial Court on 20.10.2021. The appellant shall be treated as under trial prisoner. The needful be done positively within a period of 02 months positively after the above referred date i.e. 20.10.2021.

Announced
06.10.2021

14/10 WK

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