JUDGMENT SHEET

PESHAWAR HIGH COURT,
MINGORA BENCH (DAR-UL-QAZA), SWAT
(Judicial Department)

Cr.A No. 166-M/2017

Ibrahim Khan son of Faqir Muhammad (Appellant)

Versus
The State through A.A.G
Muhammad Bilal Khan son of Zahir Shah

(Respondents)

Present: *Muhammad Raziq Khan, Advocate, for the appellant.*

Mr. Rahim Shah, Astt: Advocate General.

Date of hearing: **04.11.2019**

JUDGMENT

WIQAR AHMAD, J.- This order of ours is directed to dispose of Criminal Appeal No. 166-M of 2017 filed against judgment dated 08.07.2017 of the Court of learned Additional Sessions Judge/Izafi Zila Qazi Malakand at Batkhela, whereby the appellant namely Ibrahim Khan was convicted and sentenced as follows;

- ***U/S 302 (b) PPC to life imprisonment along with compensation of Rs. 200,000/- under section 544-A Cr.P.C payable to the legal heirs of the deceased, or in default thereof to suffer six months simple imprisonment.***
- ***U/S 324 PPC to seven years rigorous imprisonment.***
- ***U/S 337 A (i) PPC to payment of Daman of Rs. 20,000/-, or in default thereof to suffer one month simple imprisonment.***
- ***All the sentences shall run concurrently.***

- ***The appellant was however extended the benefit of section 382-B Cr.P.C.***

2. IHC Siraj Muhammad (PW-9) went to the emergency ward of civil hospital Thana along with other police *'Nafri'* on receipt of information of the occurrence and found a young boy on the hospital bed, who was not in his senses. Muhammad Bilal Khan companion of the injured reported the matter to the police officer that he closed his shop and went to the shop of fish seller Khalil-ur-Rehman along with his injured companion namely Manzoor son of Shah Rome, that night. They were gossiping and laughing with each other while sitting in the said shop. The convict namely Ibrahim who was servant in the said shop came towards them and asked them as to why they had been laughing and started quarreling with the complainant and his companion Manzoor. The complainant further alleged that he got injuries on his lips and face with the blows which he received during the scuffle. The convict was stated to have taken out a pistol from the trouser-fold of his *Shalwar* and fired at Manzoor, who received the fire shot on

his face and got injured, while the complainant escaped un-hurt miraculously. Other people present there were stated to have witnessed the occurrence. The complainant charged the convict Ibrahim for firing at him and his companion namely Manzoor. Later on, the said Manzoor died in the hospital and FIR was registered against the convict on the basis of the above stated information under sections 302,324,337 A (i) PPC at Levy Post Thana District Swat.

3. Investigation started in the case, the accused could not be arrested and *challan* was submitted against him under section 512 Cr.P.C in the Court of learned Sessions Judge/Zila Qazi Batkhela on 10.08.2015. The statements of the prosecution witnesses were recorded and the accused was declared proclaimed offender on 08.10.2015. Later on the accused was arrested on 10.02.2016 after six (6) months and 18 days of the occurrence. Supplementary *challan* was submitted against the accused on 17.02.2016. Evidence of the rest of the prosecution witnesses was recorded while statement of PW Muhammad Bilal, which had been recorded in the

proceedings under section 512 Cr.P.C was transposed to the record of the trial by the learned trial Court. On conclusion of evidence of prosecution, statement of the appellant was recorded under section 342 Cr.P.C. Arguments were heard and the accused/appellant was later on convicted and sentenced to the punishment given in the opening Para of this judgment.

4. The learned counsel for the appellant invited the attention of this Court towards the statement of the DFC recorded on 04.05.2017 and stated that the subsequent proceedings of transposition of the statement of Muhammad Bilal PW to the record of the instant case was with *malafide* intention preventing the counsel for the accused in the trial from conducting cross-examination of the said witness. He further added that a single statement of the DFC was made the basis for transposing the statement of the PW Muhammad Bilal and the trial Court did not make any further efforts for ascertaining the fact stated in the statement of the DFC or procuring the attendance of the PW Muhammad Bilal. He placed reliance on the

judgment in the case of ***"Mrs. Shagufta Shaheen v/s The State"*** reported as reported ***"2019 SCMR 1106"*** and submitted that the accused had not been given a fair trial and was thus materially prejudiced in the defence of his case.

5. The learned Astt: Advocate General appearing on behalf of the State defended the mode and manner in which the trial was conducted before the learned trial Court as well as the conviction and awarding of the punishment to the accused and stated that since the Court could not procure the attendance of PW Muhammad Bilal, therefore it was justified in transposing his statement to the record of the instant case.

6. We have heard arguments of learned counsel for the appellant and learned Astt: A.G for the State and perused the record. Father of the deceased namely Shah Rome had appeared before the Additional Registrar of this Court on 31.12.2018 and had stated that he did not want to engage a private counsel in the case in hand. His thumb impression, has also been

obtained on the relevant order sheet of the day, as token of his presence.

7. Perusal of record reveals that Muhammad Bilal was the sole eye-witness available with the prosecution. Statement of the DFC was recorded on 04.05.2017 as SW-1 and on that very day the statement of the PW Muhammad Bilal which had earlier been recorded in the proceedings under section 512 Cr.P.C was transported to the record of the instant case. The learned trial Court had not made any further efforts for procuring the attendance of the said PW. The statement of the DFC that the said PW had gone to Saudi Arabia for earning his livelihood, was considered as sufficient evidence of the fact itself. No further evidence of the fact that he had in-fact left the country for Saudi Arabia could be called by the learned trial Court so as to satisfy itself that the accused had in-fact left the country. In quite similar situation the Hon'ble Supreme Court of Pakistan in the case of ***"Fazal Muhammad and another v/s The State"*** reported as ***"1970 P Cr. LJ 858"*** dealt the matter in the following manner;

"Mr. A.K Brohi contended that no sufficient evidence was led to prove the non-availability of the doctor or that his attendance could not be procured without an amount of unreasonable delay or expense. On this point, all that the prosecution managed to establish from the evidence of Muhammad Habib was that Dr. Azhar had left the country since the year 1966, but on cross-examination, he said that he had left Rawalpindi from Zafarwal on transfer and he did not know where he went afterwards. The post-mortem reports prepared by Dr. Muhammad Azhar could be admitted into evidence under section 32 (2) of the Evidence Act, being statements which he had prepared in the discharge of his professional duty, provided it was shown that the witness could not be found or his attendance could not be procured without unreasonable delay or expense. This requirement of law was not adequately satisfied in this case."

In the case of ***"Ali Haider v/s The State"*** reported as ***"PLD 1958 Supreme Court (Pak) 392"***, the Hon'ble Court expressed the following view;

The point was raised before them that the statements of Muhammad Husain (P. W. 1), Noor Hussain (P. W. 2) and Kala Khan, foot constable (P. W. 3), as recorded by the Committing Magistrate, were illegally transferred to the Sessions record. The learned trial Judge had ordered those statements to be read as evidence at the trial on the ground that their depositions were of a formal nature. Apparently the witnesses in question were not summoned at the trial, at the suggestion of the Public Prosecutor, in order "to avoid unnecessary expenses" to the State. The learned Judges considered that the objection raised had no merit. The procedure adopted by the trial Judge was held to be not illegal and it was observed that if it could, "by any stretch of imagination be said to be irregular", the defect was curable under S. 537, Criminal Procedure 'Code, because no prejudice had been caused to the accused.

We are constrained to observe that there was a flagrant dis regard of the provisions of S. 33 of the Evidence Act in transferring the statements of the three witnesses in question to the Sessions record, without laying the foundation for that course, by adducing strict proof that the witnesses were incapable of giving evidence or that their presence could not be secured without an amount of delay or

expense which under the circumstances o1 the case, the Court could justifiably regard as unreasonable. The procedure adopted was clearly not warranted by the reasons mentioned by the learned trial Judge. Reference in this connection may be made to Chanchal Singh v. Emperor (AIR 1946 P C 1) and Aminul Haq v. Crown (P L D 1952 F C 63). The order of the learned Judge in this respect appears to have been acquiesced in by the learned counsel for the accused, but it is clear that in a criminal case the provisions of S. 33 of the Evidence Act could not have been waived. As a result, the statements of these three witnesses must be kept out of consideration as they cannot be said legally to form part of the evidence in the case.

In the case of ***"Allah Ditta v/s The State"*** reported as ***"PLD 1958 Supreme Court (Pak) 290"***, the statement had been transported on the basis of statement of the Investigating Officer. The Hon'ble Apex Court did not approve the practice and observed as follows;

The Public Prosecutor requested that Lala's evidence in the committing Court should be transferred to the record of the trial under section 33 of the Evidence Act. Counsel appearing for the accused persons stated that he had no objection if the request was granted, and thereupon the trial Judge made an order admitting the evidence in which he declared that Lala's evidence could not be procured "without delay and unnecessary adjournment" and he noted particularly that the defence counsel had no objection to the course which he was asked by the Public Prosecutor to take, Accordingly the evidence was read in the case as evidence against the accused. It is con-, tended with great force that the trial Court misapplied section 33 of the Evidence Act and on this point reference was made to the observations of the Judicial Committee in the case of Chainchall Singh (L R (72) 1 A 270). The action of the trial Judge was not supported before us by the Advocate-General of West Pakistan, and we consider that it was clearly not within the provisions of section 33 aforesaid. On this point, it will be sufficient to cite the observations made by the Privy Council in the case mentioned above, with which we are in full agreement. These are as follows :-

"Where it is desired to have recourse to section 33 of the Evidence Act on the ground that a witness is incapable of giving evidence that fact must be proved, and proved strictly. It is an elementary right of an accused person, . . . that a witness who is to testify against him should give his evidence before the Court trying the case, which then has the opportunity of seeing the witness and observing his demeanour and can thus form a far better opinion as to his reliability than is possible from reading a statement or deposition. It is necessary that provision should be made for exceptional cases where it is impossible for the witness to be before the Court, and it is only by a statutory provision that this can be achieved. But the Court must be careful to see that the conditions on which the statute permits previous evidence given by the witness to be read are strictly proved".

The case before their Lordships of the Judicial Committee was one where a Police-officer had testified with regard to the absent witness that he found him ill and unable to move from his house, as he was suffering from tuberculosis. Their Lordships held that the officer (presumably a constable) was not a proper person to prove from what disease the witness was. suffering and could only speak from hearsay on the point. Moreover, as to the witness's incapacity he could only speak of illness on a date 13 days before the date for which the witness was summoned to give evidence. On these facts it was held that there was no evidence before the Court that the witness was incapable of giving evidence on the later date."

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/s 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 said conditions require great degree of care and caution at the following two stages;

a). When the Court proceeds against an accused and allows the prosecution to produce evidence under section 512 Cr.P.C, it must satisfy itself that the accused had knowledge of the proceedings and had gone into absconsion;

b). When such a statement is transposed to the trial of an accused after his arrest. The latter being a situation which may have serious consequences for the accused, requires more care in adopting it.

As held earlier we could not find the learned trial Court to have taken the required care and caution, in the case in hand.

9. In view of what has been discussed above, on partial acceptance of the instant appeal, the conviction and sentence awarded to the appellant by the learned Additional Sessions Judge Malakand at Batkhela vide his judgment dated 08.07.2017, impugned herein is set aside and the case is remanded back to the learned trial Court with the direction to make all-out efforts to procure the attendance of PW Muhammad Bilal for recording his testimony in the Court, before resorting to the measure of transposition of the statement recorded under section 512 Cr.P.C.

Announced
Dt. 04.11.2019

JUDGE

JUDGE

Office
16/11/2019
W/R

NAWAB DB Mr. Justice Syed Arshad Ali
Mr. Justice Wiqar Ahmad