

**JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
MINGORA BENCH (DAR-UL-QAZA), SWAT
(Judicial Department)**

Cr.A No. 351-M/2019

(Akhtar Ali and 02 others ~~versus~~ Amir Hatam and another)

Present: M/S Hafiz Ashfaq Ahmad and Humayoon Khan
Toorwali, Advocates for the appellants/convicts.

Mr. Haq Nawaz, Assistant A.G for State.

Malak Shouban Khan, Advocate for the
complainant.

Date of hearing: **28.01.2021**

JUDGMENT

ISHTIAQ IBRAHIM, J.- Though this appeal, the appellants/convicts Akhtar Ali, Muhammad Ali and Muhammad Rehman have challenged the judgment dated 27.07.2019 of the learned Additional Sessions Judge-III/Judge Model Criminal Trial Court, Swat rendered in case FIR No. 179 dated 29.06.2015 u/s 302/324/34 P.P.C, 15 A.A of P.S Bahrain, District Swat whereby they were convicted and sentenced as under:

(a) Akhtar Ali

- i) Life imprisonment as Tazir u/s 302 (b) PPC with compensation of Rs.1,000,000/- payable to LR's of the deceased or to undergo further six months S.I in case of non-recovery of compensation.
- ii) One year imprisonment u/s 15 AA with fine of Rs.5000/- or in case of default to suffer further 02 months S.I.

(b) Muhammad Rehman


Life imprisonment as Tazir u/s 302 (b) PPC with compensation of Rs.1,000,000/- payable to LRs of the deceased or to undergo further six months S.I in case of non-recovery of compensation.

(c) Muhammad Ali

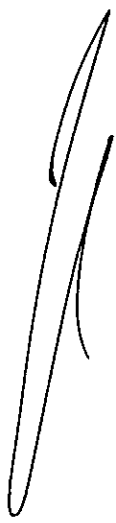
Life imprisonment as Tazir u/s 302 (b) PPC with compensation of Rs.1,000,000/- payable to LRs of the deceased or to undergo further six months S.I in case of non-recovery of compensation.

Benefit of section 382-B, Cr.P.C was extended to all the appellants.

Complainant has filed the connected Cr.R No. 74-M/2019 for enhancement of the sentences awarded to the appellants through the impugned judgment.


 2. According to the first information report lodged at the instance of complainant Amir Hatam (PW-12) on 29.06.2015 at 21:45 in emergency ward of civil hospital *Madyan*, his brother Muhammad Afzal had invited them to his house for *Aftari* for which the complainant alongwith Shahb-ud-Din, Atta Ullah, Shah Muhammad and Momin Khan were going to the house of Muhammad Afzal. When they reached to the thoroughfare near the house of Badar Munir, the appellants, who were already present there, started firing at them resultantly Shahab-ud-Din was hit and died on the spot whereas

Atta Ullah became seriously wounded. According to the complainant, he as well as Shah Muhammad (PW-13) and Momin Khan (PW-14) had witnessed the occurrence whereas motive behind the occurrence was mentioned an altercation that had taken place between appellants and deceased and injured at afternoon on the same day. It is noteworthy that, as per prosecution, injured Atta Ullah had later died because of the injuries he had sustained on his body in the same occurrence.



3. After arrest of the appellants and completion of investigation, challan was submitted against them before the trial Court. On commencement of trial, they were formally indicted on 17.02.2016 for commission of the murders to which they did not plead guilty and opted to face the trial. Prosecution examined as many as 15 witnesses including PW-14 Momin Khan whose examination-in-chief was recorded on 14.06.2017 but he was abandoned by prosecution on 25.04.2018. It is pertinent to mention here that sentence of appellant Muhammad Ali was suspended by this Court vide order dated 10.02.2020. While deciding bail

application of accused Muhammad Rehman on 31.01.2018, it also came into the notice of this Court that injured Atta Ullah had later succumbed to the injuries but the charge had not been altered from section 324 to 302 PPC to his extent. Thus, the trial Court was directed to re-visit the charge and alter the same in accordance with law if need be. The learned trial Court altered the charge vide order dated 13.02.2018, on the same date learned APP and learned counsel for the complainant recorded their joint statement to the effect that they do not want to re-examine PW-1 to PW-15 in view of the altered charge, however, counsel for the accused submitted an application for re-cross examination of PWs Amir Hatham Khan, Shah Muhammad, Momin Khan and Shah Faisal Khan. The learned trial Court turned down the said application vide order dated 17.04.2018 against which the appellants filed Cr.R No. 23-M/2018 before this Court which was allowed vide order/ judgment dated 19.07.2018 and the defence was allowed to re-cross examine the PWs on the altered charge. In compliance with the order of this Court, the learned trial Court summoned the PWs for re-cross examination, however, during re-



cross examination of constable Umar Rehman (PW-9) on 25.09.2018, a question of the defence counsel was disputed by prosecution which prompted the accused to file Cr.R No. 52-M/2018 before this Court which was dismissed vide order dated 23.05.2019. In light of the said order of this Court, the learned trial Court vide order dated 24.06.2019 only summoned complainant Amir Hatham Khan (PW-12) for re-cross examination. Similarly another application of the accused dated 01.07.2019 for summoning all the eye witnesses for re-cross examination was turned down by trial Court vide order dated 01.07.2019 with the observations that only the relevant witness i.e complainant Amir Hatham Khan (PW-12) was sufficient for the purpose of re-cross examination, hence, he was re-cross examined on 08.07.2019. After examination of the appellants/convicts u/s 342, Cr.P.C, they were convicted and sentenced vide judgment dated 27.07.2019, hence, this appeal and the connected revision petition.

4. We have heard the arguments of learned counsel for the parties including the learned

Assistant A.G representing the State and perused the record with their able assistance.

5. The record depicts that examination-in-chief of PW Momin Khan was recorded as PW-14 on 14.06.2017 but he was abandoned by learned APP and learned counsel for the complainant on 25.04.2018 on the ground that other eye witnesses had already been examined. Even his statement was relied upon by trial Court at the time of passing the impugned judgment. The observations of learned trial Court vide Order Sheet No. 34 dated 25.04.2018 that mere production of a PW and recording his examination-in-chief would not take away from prosecution the right to abandon a witness save in exceptional cases, are misconceived. During the course of arguments, a question arose before this Court that once a witness, whose examination-in-chief is recorded before the trial Court, can be abandoned by prosecution? No doubt, prosecution or a party to a *lis* is at liberty to abandon a witness but once a witness comes into the dock and he opens his mouth with regard to facts of the case then in that eventuality he could not be

abandoned by prosecution rather it is the duty of the Court to take the proceedings into its own hands. The Court has prime duty to steer, control and regulate the course of examination of a witness on proper lines and to strike a fair balance between the parties before it for bringing uniformity and consistency in process of examination. Courts are also required to act vigilantly and not to remain oblivious of their duty in controlling and regulating the process of examination of a witness. But in the present case the Court has not discharged its duty and has acted as a silent spectator by allowing the prosecution to deal with the witnesses according to their own whims. While highlighting the role of Court at the time of recording evidence, it was observed by Karachi High Court in the case of "Ghulam Muhammad Vs. The State" reported as PLD 1989 Karachi 144 that:

During the whole process of recording the evidence the Presiding Officer is expected to be mentally alert and aware of what is going on so that he should be in a position to exercise some control in the process of recording evidence so that everybody should play his part as required under the law within the limits of legal restrictions imposed for each stage. It is the duty of the trial Judge to see that justice is dispensed with strictly according to law. Trial Judge is not supposed to play a passive role at the stage of recording of evidence and leave it entirely to the


Advocates who are appearing for prosecution and defence. He has to preside over proceedings in order to see that evidence is recorded in perfect accord with legal requirements which control the process at different stages. Lack of concern and interest in the recording of evidence by Presiding Officer can result into destroying of evidence and gross injustice. If care, caution and interest is taken by the trial Judge at the time of recording evidence, he can see to it that correct and legitimate evidence which is collected comes on the record and 'everybody including Police Officers, who have to play an important role at the time of investigation, do their duties in the Court in accordance with law.

6. Admittedly, PW Momin Khan has appeared before the Court as PW-14 and he recorded his examination-in-chief but he was abandoned by prosecution on the sole reason that other eye witnesses have been examined. Abandonment of a witness after recording his examination-in-chief is not within the powers of prosecution rather it is the duty of Court to handle such situation with care and caution. The learned trial Court in sub-para (1) of Para 14 of the impugned judgment has observed that prosecution has produced three eye witnesses including Momin Khan (PW-14) by making a special reference to his name in the beginning of the said sub-para despite the fact that prosecution had abandoned the said witness after recording his examination-in-chief and defence could not get any opportunity to cross-examine him. In other words,

the learned trial Court has acted in violation of Article 133(1) of the Qanun-e-Shahadat Order, 1984 which reads.

133. Order of examination. (1) Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined then (if the party calling him so desires) re-examined.

(2)



Bare reading of the above provision shows that statement of a witness, which is to be considered as admissible evidence under the law, shall commence from examination-in-chief and thereafter the opposite party shall have the right to cross-examine him because it is settled law that cross-examination of a witness is not just a formality but is a valuable right of accused. However, it is a different matter if the accused waives off his right to cross-examine a witness who appears in support of the prosecution case. In the present case the situation is altogether different because there is nothing on the record to show that the defence have ever give up its right of cross-examination rather the defence counsel has time and again requested the trial Court for re-summoning of the PWs for cross-examination. Thus, in view of the above stated scenario, we

cannot proceed further with this appeal for its decision on merits.

7. It is also pertinent to mention here that while hearing bail petition of accused Muhammad Rehman and Akthar Ali (now appellants), it transpired that charge was framed against the appellants wherein they were indicted u/s 302 PPC only for murder of Shahab-ud-Din and u/s 324 PPC for causing firearm injuries to Atta Ullah though he had already succumbed to the injuries on the same day. This Court, on observing the afore-referred error in the formal charge, decided the bail petition with the following observations.


"7. Before parting with this order, it is pertinent to mention here that the charge was framed down on 17.02.2016 wherein the accused were indicted under section 302 PPC only for the murder of deceased Shahab-ud-Din while it is a matter of record that the other injured namely Attaullah also succumbed to the injuries later on. It is required under the law that the learned trial Court shall revisit the charge and alter/add the same in accordance with law if need be".

It would not be out of place to note that the controversy in question mainly cropped up due to the reason that the initial charge was defective which not only caused delay in conclusion of trial but also spawned numerous complications in the

case. No doubt, the afore-referred error in the formal charge was curable under section 537, Cr.P.C, but on the contrary section 232 also provides that:

232. Effect of material error. – (1) If any Appellate Court, or the High Court or Court of Session in the exercise of power of revision or of its powers under Chapter XVII, is of opinion that any person convicted of an offence was misled in his defence by the absence of a charge or by any error in the charge, it shall direct a new trial to be held upon a charge framed in whatever manner it thinks fit.

(2) If the Court is of opinion that the facts of the case are such that no valid charge would be preferred against the accused in respect of the facts proved, it shall quash the conviction.



Thus, the learned trial Court had framed the initial charge in an oblivious and stereotype manner against the record. The said practice generally adopted by the trial judges with regard to framing of charge against the law on the subject could not be left unattended.

8. In view of the above, this appeal is allowed, the judgment dated 27.07.2019 of the learned trial Court is set aside and the case is remanded to the learned trial Court with directions to summon PW Momin Khan for his cross-examination and thereafter decide the case after hearing the parties. Appellant Muhammad Ali was on bail, hence, he shall remain on bail, however, he

shall furnish fresh bail bonds in the sum of Rs.200,000/- (rupees two hundred thousand) with two trustworthy and reliable sureties to satisfaction of the learned trial Court within two weeks from 18.02.2021. The Remaining appellants shall be treated as under trial prisoners. Needless to mention that the learned trial Court shall complete the proceedings within 03 months positively from 18.02.2021 if not possible earlier. Parties are directed to appear before the trial Court on 18.02.2021. The connected Cr.R No. 74-M/ 2019, being infructuous for the time being, is accordingly dismissed.

9. Before parting with this judgment, in order to avoid such like complications in future, the trial Courts throughout the province shall revisit the charges already framed against the accused in the pending/ running cases and shall, in case of any errors or omissions, make alterations or amendments in accordance with section 227, Cr.P.C. It is further reiterated that the learned trial judges shall frame the charge themselves and shall not rely on the formal charge framed by stenographers or

steno-typists otherwise the same would be considered as negligence on the part of Presiding Officer concerned.

10. Copy of this judgment be placed before Hon'ble the Chief Justice, Peshawar High Court, Peshawar, for approval of his lordship to circulate the judgment among all the trial Courts in the province.

Announced.
Dt: 28.01.2021

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