

IN THE SUPREME COURT OF AZAD JAMMU AND KASHMIR
(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE KHAWAJA M. NASIM
MR. JUSTICE RAZA ALI KHAN

CRIMINAL APPEAL No. 09 OF 2023

(Against the Judgment dated
21.12.2022 passed by the
High Court of AJ&K in Crim.
Appeal. No. 337 of 2022)

Husnain Nazir s/o Nazir Ahmed Mir, at present confined in
Central Jail Rarra, Muzaffarabad, Azad Jammu and Kashmir.

...Appellant

VERSUS

1. The State through Advocate-General of Azad Jammu and Kashmir, office situated at Supreme Court Building New Secretariat, Muzaffarabad.
2. Station House Officer (SHO), Police Station Saddar Muzaffarabad.

...Respondents

Appearances:

For the Petitioner: Sardar K. D. Khan, Advocate.

For the Respondents: Kh. Maqbool War, Advocate-General.

Date of hearing: 11.05.2023

JUDGMENT

RAZA ALI KHAN, J:- Impugned herein, is the order dated 21.12.2022, rendered by the learned High Court, passed in Cri. Appeal No.337 of 2022, whereby the appeal filed by the appellant, herein, has been dismissed.

2. The brief facts of the case are that a case in the offences under section 9(C), 32 & 15 of CNSA, 1997, was

registered against the accused-appellant, herein, at the Police Station, Saddar Muzaffarabad, on 16.02.2022 and Challan was submitted before the learned Additional Session Judge, Muzaffarabad. The case was at the stage of recording the prosecution evidence, meanwhile on 29.08.2022, the learned counsel for the appellant moved an application for seeking permission to bring on record the compact disk (CD) of the CCTV footage pertaining to the arrest of the accused-petitioner near the Shell Petrol Pump, Plate. The learned Additional Session Judge after necessary proceedings, rejected the application through order dated 05.09.2022. Feeling dissatisfied from the order of the learned Additional Session Judge, the appellant challenged the same before the learned High Court. The learned High Court while upholding the order of the trial Court dismissed the same through the impugned order dated 21.12.2022.

3. Sardar Karam Dad Khan, Advocate, the learned counsel for the appellant argued that the impugned order of the learned High Court is against law, facts and the record of the case. He further submitted that the appellant was arrested on 16.02.2022, by the Police from Shell Petrol Pump, thus the said CCTV footage of camera fixed at the petrol pump is an important piece of evidence in the Court and police witnesses need to be confronted on this point. He further submitted that both the Court below have committed gross illegalities while interpreting the law and deprived the appellant from his fundamental right of fair trial, therefore, the impugned judgments are liable to be set-aside. He finally submitted that the impugned judgment of the High Court is quite against law and justice which are liable to be set aside.

4. Conversely, Kh. Maqbool War, the learned Advocate-General, appearing for the State, submitted that the High Court after detailed deliberation of the facts and record

of the case, has passed the impugned judgment which does not call for any interference by this Court. He further submitted that the case is at the stage of recording evidence, therefore, it is proper for the defence side to produce the relevant record after the completion of the prosecution evidence. He added that CCTV footage is even otherwise not admissible evidence in eye of law, so giving the chance of submission of such inadmissible piece of evidence will not serve any purpose. He finally prayed that this appeal may kindly be dismissed.

5. We have heard the learned counsel for the appellant as well as the learned Advocate-General and gone through the record of the case. Before heading towards the merits of the case, we would like to observe here that the right to a fair trial is a fundamental right enshrined in the Constitution. It is an essential component of the rule of law, administration of justice and a democratic society. This right ensures that everyone is entitled to a fair and impartial trial before an independent and competent Court. A fair trial is not only essential for the protection of the rights of the accused but also for the credibility and legitimacy of the justice system. It ensures that justice is not only done but is also seen to be done. This right is essential to protect individuals from arbitrary and unjust treatment by the State and to ensure that the legal system operates in a transparent and accountable manner. The right to a fair trial includes several important principles, including the right to be presumed innocent until proven guilty, the right to be heard, the right to a competent and impartial tribunal/Court, the right to legal representation, the right to examine witnesses, the right to present evidence, and the right to a public hearing. The right to cross-examine prosecution witnesses and present evidence in his support means that the accused has the right to challenge the evidence presented against him and to present evidence in rebuttal presented by prosecution and to prove his innocence in

defense. The Court must consider all the evidence presented and make a decision based on the facts of the case.

6. Coming to the case in hand, the appellant has claimed in the application that the appellant was arrested at 12:00 o'clock, on 16.02.2022, near the Shell Petrol Pump, Neelum View Hotel, but the arrest and other proceedings have been shown as made at another place, i.e., Samabandi. The appellant wants to place on record a CCTV footage of the camera fixed at Neelum Petrol Pump, to confront the statement of police witness No.1. The learned trial Court rejected the application on the ground that the accused-appellant would be given an opportunity to present the evidence at the time of defence evidence. The learned High Court has also upheld the order of the trial Court.

7. It may be observed here that, in the ongoing trial, it was the prosecution witnesses who played a crucial role in apprehending the accused, thereby making them the most pertinent individuals when it comes to addressing inquiries related to the specific location of the arrest during the cross-examination phase. These witnesses, who were present at the scene and actively involved in the arrest, possess first-hand knowledge and direct insight into the circumstances surrounding the event. Their presence during the arrest places them in a unique position to provide detailed information regarding the chronological order of events leading up to the accused's apprehension, the specific actions taken by the arresting authorities, any statements or reactions made by the accused at the time, as well as any significant observations related to the physical environment or the presence of other individuals nearby. As such, the cross-examination will likely focus on extracting precise and comprehensive details from these prosecution witnesses to establish a clear picture of the circumstances surrounding the accused's arrest and to evaluate

the legality and appropriateness of the entire procedure. By questioning these witnesses about the place of arrest, the defense aims to ascertain any potential discrepancies, inconsistencies, or irregularities that may have occurred during the process, with the ultimate goal of challenging the validity of the prosecution's case.

8. It appears that this application was erroneously disallowed by the trial Court and unfortunately, this decision was subsequently upheld by the High Court, thereby depriving the accused-appellant, herein, of his legal right. It is crucial to highlight that the implications of such a decision can have a far-reaching impact on the outcome of the trial. The primary issue in hand pertains to the failure to confront a specific witness during the proceeding of cross-examination and seeking an explanation for any contradictions that might have emerged from the testimony. This procedural oversight becomes a significant cause for concern, as it essentially hampers the pursuit of justice and undermines the integrity of the trial proceedings. Cross-examination serves as a fundamental mechanism within the legal system, allowing the opposing party to scrutinize and challenge the testimonies provided by the prosecution witnesses. It provides an opportunity to question the credibility, accuracy, and consistency of the statements of prosecution's witnesses. However, in this particular instance, the failure to confront the witness and seek an explanation during cross-examination severely limits the ability to address potential contradictions or inconsistencies in their testimony. The consequence of this oversight is particularly troubling. If a witness is not appropriately confronted and questioned during cross-examination, any contradictions or discrepancies in their testimony cannot be taken into consideration later on. This restriction significantly hampers the ability to fully examine the veracity of the witness's statements, potentially allowing unreliable or inaccurate information to go unchallenged.

09. It has also been argued by the learned Advocate-General that CCTV footage is not admissible evidence in eye of law. We may refer here Article 164 of the Qanun-e-Shahdat Order (*to be referred as QSO*), which provides that in such cases as the Court may consider appropriate, the Court may allow to produce any evidence that may have become available because of modern devices or techniques. It stipulates that the court has the discretion to allow the introduction of any evidence that has become available through modern devices or techniques, as deemed appropriate by the court. It is important to note that the QSO primarily functions as a procedural law, and therefore its provisions should be interpreted liberally rather than restrictively in order to serve the purpose of justice. According to Article 2(1)(c) of the QSO, unless there is anything contradictory in the subject matter or context, the term "evidence" encompasses all statements made by witnesses before the court in relation to factual matters under consideration, known as oral evidence, as well as any documents presented for the court's examination, known as documentary evidence. In a case reported as *Ch. Rukhsar Ahmed vs. Ch. Arshad Hussain and 9 others*¹, this Court while dealing with the identical matter, held as under: -

“20. The last argument of Ch. Muhammad Taj in rebuttal was that the requirement of law in Pakistan is different than what is demanded of a contesting candidate in Azad Jammu and Kashmir. Suffice it to say that we have already held that the trial of election petitions is akin to that of civil cases and the Court have to see the preponderance or probability to be derived from other legal evidence. Sufficient material was brought on record by at least three contenders opposing the appellant in the general elections that he is disqualified to contest the election. The reply to their objection was vague, evasive and to some extent misleading. We wonder why the appellant did not ask the Returning Officer, Chief Election Commissioner, Election Tribunal or for that matter this Court to get his stand confirmed

¹ [2010 SCR 329]

through modern devices. Production of evidence that has become available because of modern devices etc. is admissible under section 164 of Qanun-e-Shahadat.”

In an identical case, the Supreme Court of Pakistan in judgment titled *Meera Shafi vs. Ali Zafar*², has made the same observation that: -

“17. Article 164 of the QSO provides that in such cases as the court may consider appropriate, the court may allow to be produced any evidence that may have become available because of modern devices or techniques. The QSO is mainly a procedural law; its provisions are therefore to be construed liberally, not restrictively, to advance the remedy. As per Article 2(1)(c) of the QSO, unless there is anything repugnant in the subject or context, the term "evidence" used in the QSO is to include: (i) all statements which the Court permits or requires be made before it by witnesses, in relation to matters of fact under inquiry- such statements are called oral evidence; and (ii) all documents produced for the inspection of the Court - such documents are called documentary evidence. The learned counsel for the respondent could not point out to us anything in the subject or context of Article 164, that may be repugnant to the said inclusive meaning of the term "evidence" in Article 164. We are, therefore, not persuaded to agree with his contention and are of the view that the oral evidence of a witness that may become available because of the modern technique of video conferencing, does fall within the scope of the provisions of Article 164 of the QSO.

18. Article 164 of the QSO is actually our gateway to allowing modern science and technology to come into our courtrooms. If justice is to be done, then law must not become stagnant or archaic while society moves forward. It must be accessible, intelligible and must change with the time, responding to the realities of modern life." In the present age of information technology, no can dispute the one advantages of the use of this technology in courts for improving the efficiency of the judicial process and reducing the delay in the dispensation of justice As the ultimate objective of the law is to serve society, the courts need to embrace and use technological developments with a pragmatic and dynamic

² [PLD 2023 Supreme Court 211]

approach in case management and court proceedings, for dispensing justice more efficiently and expeditiously. The above interpretation of the various provisions of law allowing modern technology of video conferencing to be read into the existing enactments enhances access to justice, promotes fair trial and introduces inexpensive and expeditious justice thereby advancing the fundamental rights under articles 9 and 10A and principle of policy under article 37(d) of the Constitution of the Islamic Republic of Pakistan, 1973.”

In view of the above discussion, while accepting this appeal, the impugned judgments of both the Courts below i.e., the High Court and the Additional Sessions Judge, are set-aside. Consequently, the application filed by the appellants before the trial Court is accepted and the appellant is allowed to place the CCTV footage for making confrontation of the witness, however, the trial Court is at liberty to scrutinize the authenticity of the CCTV footage at the time of final adjudication of the case.

JUDGE

JUDGE

Rawalakot,
19.05.2023.
Approved for reporting.