

Judgment Sheet

IN THE HIGH COURT OF SINDH, BENCH AT SUKKUR

Crl: Jail Appeal No. S – 41 of 2020

Before:-

Mr. Justice Naimatullah Phulpoto, J

Date of hearing: **24.07.2023**

Date of judgment : **24.07.2023**

Mr. Alam Sher Bozdar, Advocate for the Appellant
Mr. Rukhsar Ahmed M. Junejo, Advocate for the complainant
Syed Sardar Ali Shah Rizvi, Additional PG for the State

J U D G M E N T

NAIMATULLAH PHULPOTO, J.- Rab Nawaz alias Raboo, the Appellant was tried by learned 1st. Additional Sessions Judge / Model Criminal Trial Court, Sukkur in a case arising out of FIR No.30 of 2010 registered at Police Station, Baiji Sharif, District Sukkur for offence under Sections 302, 324 and 34 PPC. After regular trial, vide judgment dated 17.03.2020, the appellant was convicted under Section 302(b) PPC as *Ta'zir* for imprisonment for life and to pay compensation of Rs.200,000/- (Two lac) in terms of Section 544-A, Cr.P.C to be paid to the legal heirs of deceased Qamaruddin.

2. Brief facts leading to the filing of the appeal are that deceased Qamaruddin was brother of the complainant. In the year 2009, it is alleged that appellant Rab Nawaz alias Raboo trace passed into the house of the complainant with intention to commit theft, such FIR was lodged by father of the complainant; the appellant had issued threats to withdraw the theft case against him. It is alleged that on 15.5.2010,

complainant along with his brother, namely, Qamaruddin, Abdul Wahab, Rehmatullah and Muslimuddin was sitting at the hotel of Sher Muhammad Panhiyar situated at Sadhuja bypass, it was 10:20 pm four accused persons appeared there and out of them, it is alleged that complainant identified appellant Rab Nawaz alias Raboo on the bulb light and three were unknown. Complainant alleged that appellant Rab Nawaz alias Raboo fired from his pistol at Qamaruddin with intention to kill him and fire hit him and he fell down. PW Muslimuddin had also sustained firearm injury at the hands of the appellant. Thereafter, appellant succeeded to run away. Qamaruddin the brother of the complainant succumbed to the injuries at the spot; however, PW Muslimuddin in injured condition was shifted to hospital. After post-mortem examination of the deceased, the complainant brought dead-body to home and funeral ceremony took place on 13.05.2010. On 14.05.2010, the complainant lodged FIR against the appellant and others at police station, Baiji Sharif, which was recorded, vide Crime No.30 of 2010 on 14.05.2010 at 1000 hours for offence under Section 302, 324, 34 PPC.

3. After usual investigation, challan was submitted against appellant Rab Nawaz alias Raboo, whereas, co-accused were shown as absconders.

4. The trial Court framed charge against appellant under the above referred Sections at Ex.8 to which he pleaded not guilty and claimed to be tried. At the trial, the evidence of 09 prosecution witnesses was recorded. It appears that cross-examination of the prosecution witnesses was reserved due to absence of the defence counsel. Thereafter, learned advocate for the appellant submitted an

application under Section 540 Cr.P.C before the trial Court for recalling the P.Ws for their examination-in-chief as well as cross-examination as evidence of all the 09 witnesses was recorded in absence of the advocate for accused. The trial Court after hearing the learned counsel for the parties vide order dated 25.09.2019 dismissed the said application while holding that mere absence of the advocate for the appellant at the time of recording examination-in-chief of the witness was not sufficient ground to recall and reexamine the prosecution witnesses at subsequent stage. Thereafter, prosecution side was closed.

5. The trial Court recorded the statement of the appellant under Section 342, Cr.P.C in which prosecution allegations were denied. The appellant examined one DW Chakar S/o Ali Muhammad in his defence, however, the appellant also examined himself on oath in disproof of the prosecution allegations.

6. The trial Court after hearing the learned counsel for the parties and assessment of the evidence convicted and sentenced the appellant as stated above, hence preferred the instant Criminal Jail Appeal.

7. Learned advocate for the appellant mainly argued that examination-in-chief of PWs, namely, HC Sher Dil, Dr. Gul Hassan, Shamsuddin, Muslimuddin, Abdul Wahab, Rehmatullah, Tapedar Zainul Abdin Shah, ASI Ali Hassan, PC Muhammad Murad and Inspector Hazoor Bux, was recorded in absence of the defence counsel, it caused prejudice to accused, and illegality committed by trial Court was not curable.

8. Learned Additional PG after going through the evidence submitted that examination-in-chief of above named witnesses was recorded by trial Court in absence of the defence counsel, it was illegality, hence he prayed that the case may be remanded back to trial Court for recording examination-in-chief as well as cross-examination of the witnesses in presence of the defence Counsel.

9. It is settled principle of law that examination-in-chief, cross-examination and re-examination of the prosecution witnesses shall be recorded by the trial Court in presence of the defence counsel in the cases of capital punishment for the reasons that defence counsel may raise objections on inadmissible pieces of evidence. Even otherwise, recording of examination-in-chief and cross-examination by the trial Court in presence of the defence counsel is the requirement of law, if this right is denied, serious prejudice would be caused to the accused. In this case, learned advocate for the accused had rightly moved an application under Section 540, Cr.P.C before the trial Court for recalling the witnesses whose examination-in-chief was recorded in absence of the defence counsel, unfortunately such application was dismissed by the trial Court. The trial Court ought to have allowed such application. The illegality committed by the trial Court while recording the examination-in-chief of the prosecution witnesses in absence of defence counsel is not curable under the law. The trial Court had failed to provide fair trial to the appellant in terms of Article 10-A of the Constitution of Islamic Republic of Pakistan, 1973.

10. For the above stated reasons, I hereby set aside the impugned judgment passed by the trial Court and remand back the case to the concerned trial Court, with direction to summon the above named

prosecution witnesses for their examination-in-chief and cross-examination and re-examination, in presence of the defence Counsel. It may be observed that a fair opportunity is the right of the accused as well as the State. After recording evidence, the statement of the accused under Section 342, Cr.P.C shall be recorded afresh in accordance with the law. Thereafter, the trial Court shall decide the case purely on merits within two months hereof. In the meanwhile, the appellant shall be treated as under trial prisoner and shall be produced before the trial Court on 02.08.2023. Office is directed to send a copy of this judgment along with R & Ps immediately to the concerned trial Court for information and compliance.

11. The appeal is disposed of in the above terms.

Judge

ARBROHI