

**HIGH COURT OF SINDH, CIRCUIT COURT  
HYDERABAD**

**Cr. Jail Appeal No.S-187 of 2016**  
[Noor Ahmed versus The State]

Appellant : Through Mr. Mashooque Ali Burgri advocate

Complainant: After being served placed reliance on learned APG

The State : Through Mr. Shahid Ahmed Shaikh Addl: P.G

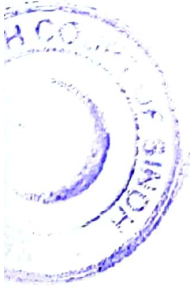
Date of hearing: 27.05.2024

Date of decision: 31.05.2024

**J U D G M E N T**

MUHAMMAD KARIM KHAN AGHA, I.- Appellant has challenged the Judgment dated 30.08.2016 passed by the learned 1<sup>st</sup> Additional Sessions Judge Badin in Sessions Case No.07 of 2014 (*Re: The State versus Noor Ahmed*), outcome of Crime No.313 of 2013 registered at P.S Badin under Section 302 PPC, whereby he has been convicted and sentenced to suffer imprisonment for life and has also been directed to pay compensation of Rs.2,00,000/- to the legal heirs of deceased and in case of non-payment thereof he has to suffer R.I for two years more, however, benefit of Section 382-B Cr.P.C has been extended to him.

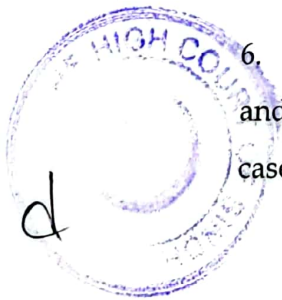
2. The brief facts of the case are that on 21.12.2013 at 1400 hours complainant Muhammad Uris appeared at P.S Badin and lodged the subject FIR by stating that he is labourer by profession; that his brother Muhammad S/o Muhammad Ibrahim aged about 60 years was residing with his son-in-law Yousif Soomro; that one daughter of deceased Muhammad namely Mst. Zulekhan had married with Noor Ahmed S/o Sulleman Soomro; that about 08/10 days prior to this incident daughter of deceased Muhammad namely Mst. Zulekhan came to her father and disclosed that her husband Noor Ahmed ousted her from the house after maltreating her as such she



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does not want to live with her husband and now will reside with him, due to which Noor Ahmed Soomro became annoyed; that on 20.12.2013 at sunset accused Noor Ahmed Soomro came and stayed in the house of Shafi Muhammad Soomro whereas deceased Muhammad after taking meal slept in the house of Yousif on cot; that at about 0630 hours on commotion from the house of Yousif, he his son Ibrahim, Mst. Zulekhan D/o Muhammad and Mst. Niamat D/o Muhammad woke up and within their sight accused Noor Ahmed fired three shots from his pistol at Muhammad with intention to commit his murder, which hit on his head and then accused fled away; that they saw that Muhammad became unconscious; that they took him to Civil Hospital Badin from where he was referred to Hyderabad but he did not succumb to injuries and died in the way near Talhar.

3. After usual investigation police submitted the challan and the trial court after completing necessary formalities framed the charge against the appellant to which he pleaded not guilty and claimed trial.
4. In order to prove its case the prosecution examined eight (08) witnesses, who exhibited numerous documents and other items. Then statement of accused under Section 342 Cr.P.C was recorded whereby he denied the allegations leveled against him and claimed his false implication. However, he neither examined himself on Oath nor led any evidence in his defense.
5. After hearing the parties and assessing the evidence on record the trial Court convicted and sentenced the appellant as mentioned in opening paragraph of this Judgment, hence the appellant has preferred captioned appeal against his conviction.
6. Vide order dated 08.05.2023 complainant reposed his full faith and confidence in learned State Counsel for proceeding with this case on his behalf.



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7. After reading of the evidence by the appellant it was noticed that none of the material questions relating to the murder of the deceased had been put to the appellant in his S.342 Cr.PC statement which were used to convict him. For example, it was not even put to him that according to the eye witness he shot the deceased.

8. On this basis learned counsel for the appellant claimed that this would result in the acquittal of the appellant as he could only be convicted on the basis of the evidence for which he was confronted with when recording his S.342 Cr.PC statement and he was given the opportunity to respond to. On the other hand learned APG submitted that under these circumstances it was a case of remand to the trial court for re recording a fresh the S.342 Cr.PC statement of the appellant and then re writing the judgment based on the evidence on record.

9. I have heard the parties, considered the record as well as the relevant law.

10. The issue revolves around the legal question as to what should be the legal consequences if certain pieces of evidence are not put to the accused whilst recording his S.342 Cr.PC statement and whether these pieces of evidence not put to him for explanation can be used to convict him for the offense for which he is charged.

11. It is settled by now that if a question is not put to an accused for his answer whilst recording his S.342 Cr.PC statement that piece of evidence cannot be used to convict him and must be excluded from consideration. In this respect reliance, if any is needed, is placed on the case of *Haji Nawaz v The State* (2020 SCMR 687) where it was held as under in material part at para 3:-



*".....The prosecution had maintained that samples had been secured from each and every packet of the recovered substance which samples had subsequently been tested positive by the Chemical Examiner but we note that at the time of recording the appellant's statement under Section 342, Cr.P.C. the report of the Forensic Science Laboratory had not been put to him at all. The law is settled by now that if a piece of evidence or a circumstance is not put*

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*to an accused person at the time of recording his statement under Section 342, Cr.P.C then the same cannot be considered against him for the purpose of recording his conviction....."*

12. In the past when certain crucial questions were not put to an accused in his S.342 Cr.PC statement it was common for the courts to remand such cases back to the trial for the re recording of the accused S.342 Cr.PC statement and for then re writing the judgment which gave the prosecution the opportunity to fill in the lacuna's in its case to the prejudice of the accused. This position was to the detriment of the accused and benefited the prosecution and is contrary to Article 10 (A) of the Constitution where the accused is in essence guaranteed the right to a fair trial whereby the courts would not interfere to the prejudice of the accused and to the benefit of the prosecution by remanding back the case to the trial court for filling in the lacuna's in the prosecution case as the role of the court was to remain as a neutral umpire and not to take sides leaving it to the prosecution to prove its case beyond a reasonable doubt without the courts active assistance especially in cases like this where the accused had already spent over 10 years in jail (excluding remissions).

13. As such the position now adopted by the Supreme Court is that in such like cases the courts should not remand the case back to the trial court in order to fill up the lacuna's in the prosecution case and will generally only remand the case, often for limited purposes, where an accused has been deprived/prejudiced by being denied one of his rights to a fair trial during the course of his trial which is contrary to Article 10 (A) of the Constituting. In this respect reliance is placed on the case of **Muhammad Naeem V The State** (PLD 2019 SC 669) where the Supreme Court held as under in material part.



*"In an adversarial system the role of the judge is that of a neutral umpire, unruffled by emotions, a judge is to ensure fair trial between the prosecution and the defence on the basis of the evidence before it. The judge should not enter the arena so as to appear that he is taking sides. The court cannot allow one of the parties to fill lacunas in their evidence*

*or extend a second chance to a party to improve their case or the quality of the evidence tendered by them. Any such step would tarnish the objectivity and impartiality of the court which is its hallmark. Such favoured intervention, no matter how well-meaning, strikes at the very foundations of fair trial, which is now recognized as a fundamental right under article 10-A of our Constitution.*

*In the present case the direction of the High Court for obtaining fresh samples of the alleged intoxicating substance and preparing a fresh report of the Chemical Examiner amounts to granting the prosecution a premium on its failure to put up a proper case in the first instance. Such judicial intervention is opposed to the adversary principle and offensive to the fundamental right of fair trial and due process guaranteed under the Constitution. See Dildar v. State; Painsa Gul v. State and State v. Amjad Ali". (bold added)*

14. Thus, I find that the appeal cannot be remanded to the trial court to re record the accused's S.342 Cr.PC statement a fresh as this will amount to the court granting a premium to the prosecution and by enabling it to fill in the lacuna's in its case to the benefit of the prosecution and to the detriment/prejudice of the accused especially as the appellant has already spent more than 10 years in jail (excluding remission) which is contrary to Article 10(A) of the Constitution.

15. That since no questions concerning the actual murder of the deceased was put to the appellant in his S.342 Cr.PC statement. For example, that the appellant shot the deceased as evidenced by eye witnesses at a particular time, date and location, medical evidence, the death of the deceased etc this evidence must be excluded from consideration and cannot be used to convict the appellant. The recovery of the pistol (murder weapon) on the pointation of the accused is also doubtful as according to most of the eye witnesses only the appellant fired yet only one empty matched his pistol while two did not which indicates that two weapons were fired which is contrary to the eye witness evidence and as such based on the reasons mentioned above by extending the benefit of the doubt to the appellant, the appeal is allowed, the appellant is acquitted of the

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charge and the impugned judgment is set aside. The appellant shall be released unless he is wanted in any other custody case.

16. The appeal stands disposed of in the above terms.

Compared by NADEEM.

Sd/-MUHAMMAD KARIM KHAN AGHA.  
JUDGE. 31.05.24.

Prepared by ASEF.

CERTIFIED TO BE TRUE COPY

30/10/2024  
(KHAN BUK BROHI)  
JC Assistant Registrar  
High Court of Sindh  
Circuit Court, Hyderabad.



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