IN THE HIGH COURT OF SINDH KARACHI

CIMINAL APPEAL NO.592 OF 2019

Appellants	:	Aziz-ur-Rehman & another through Mr. Shamsul Hadi Advocate
Respondent	:	The State through Mr. Zahoor Shah, Additional Prosecutor General for the State
Complainant	:	Abdul Rasheed through Mr. Ghulam Rasool Shaikh Advocate
Date of hearing	:	2nd November 2023

JUDGMENT

Omar Sial, J.: Before reading the paper book, learned counsel has submitted that this case should be remanded back to the learned trial court for a de novo trial. He has based this request on the backdrop of the following:

(i)   On 02.08.2019, the case was sent to be tried by the learned 1st Additional Sessions Judge, Malir. 08.08.2019 was the first date assigned to the case;

(ii)   On 08.08.2019, a lawyer was appointed at State expense for the accused in the morning. Sometime later, another counsel came, stating that he had been privately engaged by the accused and thus wanted to file his vakalatnama. Between an advocate on State expense being appointed and the privately hired counsel to appear, both events on the same date, the learned trial court had framed the charge and

recorded the testimony of five witnesses while one witness was given up;

(iii)   Learned counsel for the appellant is of the view that because an advocate was "forced" upon the appellant. At the same time, he had engaged a private counsel, and the former had cross-examined important witnesses; material and grave injustice was done to the appellant and his right to a fair trial was violated;

2.   Learned counsel for the complainant states that he will have no objection if the case is remanded back, while the learned Additional Prosecutor General says that the case should be remanded back to the learned trial court.

3.   I have heard the counsels, and my findings are as follows.

4.   The situation indicates some haste by the learned trial court in the proceedings conducted on 08.08.2019. This occurred when cases were being heard on a fast-track basis. Pressure on trial courts to resolve cases in the shortest possible time, when combined with limited resources and ground realities, has the potential to be disastrous. A balance has to be drawn behind the maxims of justice delayed is justice denied, and justice hurried is justice buried. The learned trial court on 08.08.2019, while under the pressure of a quick resolution, perhaps treated the case on a "super-fast" track basis instead of merely a "fast-track". The learned trial courts act in a more vulnerable environment, and delaying tactics deployed by litigants and counsels are also not a secret phenomenon. In

my opinion, however, ends of justice would have been met had the case been adjourned for one day and private counsel warned that if he did not appear, a counsel at State expense would be appointed, and the case would proceed. Despite the preceding, I cannot fault the learned trial court entirely. The record reflects that private counsel was present at every proceeding after 08.08.2019 and delivered his final arguments. From a cursory review of the record, it seems that no objection to the proceedings on 08.08.2019 was ever recorded by the appellant in writing, even though counsel argues that he had made objections verbally. The appellant cannot be absolved of all liability, and his failure to mount a timely challenge to the proceedings on 08.08.2019 could also be construed as his acquiescence.

5.   The dilemma this court now faces is that, on the one hand, legal counsel for the appellant did not make a timely objection; on the other, this court must also ensure a fair trial for the appellants. Both the learned counsels for the appellants, the complainant, and the learned Additional Prosecutor General agree that the case be remanded back for a safer administration of justice. Learned counsel for the complainant, however, reiterates that the objection raised in the appeal is an afterthought and that there is a possibility that a witness may also have died. I partially agree with the counsels; however, with much respect, I am not convinced that the situation merits a remand for a *de novo* trial. The learned trial court has run the trial competently and well. The only hiccup was on 08.08.2019,

which was not all the fault of the trial court. It is purely from the viewpoint that nowhere in their hearts and minds should the doubt linger in the minds of the appellants that justice was not meted out to them that I find myself convinced to make the following order:

(i) remand the case to the extent that the witnesses not cross-examined on 08.08.2019 be permitted to be cross-examined by the private counsel for the appellants. The charge framed on that date and the examination-in-chief recorded that day shall remain intact;

(ii) fresh arguments are held, which will only entertain those areas of the case which arise out of the fresh cross-examination;

(iii) the evidence produced in the fresh cross-examination will be put to the appellants in their section 342 Cr.P.C. statements, and the earlier section 342 Cr.P.C. statement will also remain valid;

(iv) opportunity be given to all counsels to present fresh arguments;

(v) a fresh judgment is rendered;

(vi) learned trial court should notify the parties of the date on which the witnesses are to be present. No adjournment should be granted to the State, the complainant, or the appellants unless the learned trial court cannot hear the case on that particular date for its reasons. The diary of the court should record such a development.

(vii) as the appellants and their counsel are also partially responsible for the lacuna which has emerged, if any witness cannot be re-summoned due to his death, his earlier cross-examination will remain valid and intact. The learned trial court shall mention this in its judgment and give its findings. Absence due

to death will not adversely impact the prosecution case.

6.   The conviction and sentence awarded to the appellants vide judgment dated 16.09.2019 is set aside, and the case remanded for the above purpose.

JUDGE