

**THE HIGH COURT OF SINDH BENCH AT SUKKUR**

*Cr. Jail Appeal No.S-86 of 2021*

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Date

Order with signature of Judge

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Date of hearing: **13.06.2023**

Date of Judgement: **20-06-2023**

Mr. Amjad Ali Gabol, Advocate for the Appellant  
Mr. Shafi Muhammad Mahar, Deputy Prosecutor General, Sindh

**JUDGMENT**

**Amjad Ali Bohio, J:-** This appeal has been filed impugning the judgment dated October 13, 2021, passed by the Court of Additional Sessions Judge-II (Gender Based Violence Court) Sukkur in Sessions Case No. 413/2020 arising out of Crime No. 121 of 2020, registered at Police Station Rohri, for offence under Section 364-A of the Pakistan Penal Code. Through the said judgment, appellant Farooq Ahmed has been found guilty thereby convicted for commission of offence under section 364-A PPC and sentenced to R.I. for seven (07) years with benefit of section 382-B Cr.P.C.”

2. Necessary facts of the case are that FIR was lodged on 19-07-2020 at 19:30 hours by complainant Altaf Hussain stating therein that he is a Railway employee having two sons namely Waris Ali (aged about 6 and a half years), Ahad Ali and one daughter namely Noor Fatima (aged about 3 and a half years old). On 19-07-2020 when he returned home after completing his duties, his brothers Aijaz Ali and Ameer Hussain informed him that his son Waris Ali and daughter Noor Fatima were missing as such he alongwith his brothers conducted search for children and also informed Police Constables Ali Bux and Saddam Jatoi who being on patrol duty accompanied them. When they reached at the back side of flats near Madni Masjid at around 6:00 p.m, they observed that one individual was taking away both children. Therefore with the help of police officials the said person was apprehended who identified himself as Farooq Ahmed son of Muhammad Nawaz Korai. Thereafter the accused was brought at police station where instant FIR was registered.

3. After registration of FIR, investigation was conducted and the Investigating Officer submitted report under section 173 Cr.PC sending up the appellant/accused Farooq Ahmed to face trial. Case then proceeded by

providing documents/police papers to accused followed by framing of charge at Exhibit 2 to which he pleaded not guilty and claimed for trial as indicated in his plea at Exhibit 2-A.

4. To establish its case, prosecution examined Complainant Altaf Hussain at Exhibit 3, PW-2 Ameer Hussain at Exhibit 4, PW-3 Investigating Officer ASI Jahangeer Ali Jagiraniat Exhibit 6 and PW-4 HC Dost Muhammad at Exhibit 7. After conclusion of recording of evidence of prosecution witnesses, the prosecution side of evidence was closed by concerned prosecutor at Exhibit 8.

5. Statement of accused under section 342 Cr.P.C. was recorded at Exhibit 9 wherein appellant/accused denied the prosecution evidence recorded against him and contended that there was a land dispute between him and the complainant who has falsely implicated him in this case. Appellant/accused neither testified on oath nor asserted for his right to produce the evidence in his defence.

6. After hearing the arguments advanced by the counsel representing both parties trial court delivered the judgment convicting the appellant/accused, the vires whereof are the subject of instant appeal.

7. I have heard the arguments of learned counsel for appellant and learned Deputy Prosecutor General (DPG) appearing on behalf of the State. I have also gone through the evidence brought on record during trial.

8. The learned counsel for appellant has argued that the appellant was not properly defended before trial court as evidence of two prosecution witnesses was recorded in the absence of the appellant's counsel. This, according to the appellant's counsel has resulted in significant prejudice to the appellant's case and deprived him of fundamental right to a fair trial, as guaranteed by The Constitution of the Islamic Republic of Pakistan, 1973. Furthermore, the appellant's counsel contends that the trial court mainly based its conviction on the prosecution evidence ignoring the evidence supporting the defence claim of a dispute over landed property. Learned counsel further asserts that the trial court has also failed to consider the lack of corroboration in the complainant's evidence. He has therefore prayed that the appeal may be allowed.

9. Learned Deputy Prosecution General (D.P.G.) asserted that both the complainant and Prosecution Witness (PW) Ameer Hussain provided consistent and credible evidence regarding the arrest and recovery of the children on July 19, 2020, at 6:00 p.m near Madni Masjid, behind Flats at Rohri and both witnesses were thoroughly cross examined but their testimony could not be shattered. He further contends that their evidence remained reliable, consistent, natural and as against it, the appellant failed to produce any documentary or oral evidence to substantiate claim of land dispute thereby failed to establish the complainant's malicious intent in falsely implicating him. Therefore trial court has rightly convicted the appellant/accused based on the available evidence.

10. After considering the arguments, evidence and record has been carefully read and perused. On reading of evidence, it is observed that the complainant Altaf Hussain and PW Ameer Hussain were cross-examined by the counsel representing the appellant/accused. However during recording of evidences of I.O/ASI Jahngeer Jagirani on 16.08.2021 and HC Dost Muhammad on 30.08.2021, the counsel for the appellant/accused, Mr. Dilawar Ali Jatoi was absent. On further perusal of case diaries, it is evident that complainant Altaf Hussain and PW Ameer Hussain were initially examined on 11.02.2021 and the case was then adjourned multiple times due to the non-appearance of remaining prosecution witnesses leading to a repetition of the process for approximately thirteen (13) hearings. ASI Jahangeer finally appeared on 16.08.2021, and his evidence was recorded in the absence of the counsel for the appellant/accused. Similarly, on 30.08.2021, the last witness, Dost Muhammad was examined in the absence of the counsel for the appellant/accused as well. It is important to note that the appellant/accused remained in custody during the period of trial.

11. In such circumstances, prima facie it appears that due opportunity to cross examine above two witnesses was not provided to the appellant/accused, as their evidence was recorded in the absence of his counsel. It is also evident that appellant/accused was neither offered nor asked about engaging a new counsel to defend the case before recording the evidence of the aforementioned two prosecution witnesses. Additionally, the appellant is admittedly an illiterate person as is evident from his statement recorded under section 342 Cr.P.C, which bears his Left Thumb Impression (L.T.I) and he cannot be expected to be familiar with the art of cross-examination to defend his case legally. Thus, the appellant has been deprived

of his legal right without being provided a proper opportunity for cross-examination, as held in the case of Mukhtiar alias Mukho versus The State (2018 P.Cr.L.J 943).

It is important to note that our Constitution guarantees the "Right to Fair Trial" for every citizen of the country as provided under Article 10-A of the Constitution of the Islamic Republic of Pakistan, 1973. For reference, Article 10-A is reproduced below:

“ Right to Fair Trial[10A. For the determination of his civil rights and obligations or in any criminal charge against him a person shall be entitled to a fair trial and due process.]“

11. The appellant/accused has a statutory right to legal representation. The trial court was duty-bound to ask the appellant if he required proper representation by a pleader, but there is no information available on record whether such an opportunity was given to the appellant. After the introduction of Article 10-A in the Constitution of the Islamic Republic of Pakistan, 1973, a fair trial has become a fundamental right. Section 340(1) of the Criminal Procedure Code (Cr.P.C) also stipulates the right of a person against whom proceedings are instituted to be defended by a lawyer, which reads as follows:

“340. Right of person against whom proceedings are instituted to be defended and his competency to be a witness.(1) Any person accused of an offence before a Criminal Court or against whom proceedings are instituted under this Code in any such Court, may of right be defended by a pleader.”

It is well-known to all presiding officers of the District Judiciary in this province that a list of advocates from each district is duly approved by the Chief Justice of the High Court of Sindh, in accordance with Rule 8(1) of the District Legal Empowerment Committee (DLECs). These advocates, who provide free legal aid to deserving litigants, are entitled to receive their professional fees from the funds allocated under the Head of DLEC. The Finance Department of the Government of Sindh also provides funds for advocates appointed to represent pauper accused individuals at the state's expense. A list of counsel for representing pauper accused individuals in each district has been circulated, and this information is known to every presiding officer of the District Judiciary. It is worth mentioning that a relevant decision of this Court on a similar issue has been reported as Allahdino alias Baboo versus The State (2019 P. Cr.L.J Note 161).

12. Furthermore, Article 161 of the Qanoon-e-Shahadat defines the powers of a judge to ask relevant questions in order to discover facts, especially when the accused is not represented during the recording of evidence. In this particular case, the appellant was an undertrial prisoner, who typically does not have proper access to contact their counsel on each court date. If the court needs to examine witnesses who have suddenly appeared after thirteen hearings, it becomes the court's responsibility to ensure that the accused, who is imprisoned as an undertrial prisoner, is given a fair opportunity for cross-examination. Alternatively, the court itself is obligated to cross-examine the witness on behalf of the accused, as established in the case of Qalandro vs State.

13. In view of above discussion and the circumstances, the impugned judgment cannot be maintained as the same has caused serious prejudice to the rights of the accused to be properly defended. The impugned judgment is therefore set-aside and the case is therefore remanded to trial court with directions to re-summon PWs ASI Jahangeer and HC Dost Muhammad so that they are cross examined by the counsel for the appellant/accused or in case the accused requests for advocate on state expenses then the same may be provided. After such cross examination, the statement of accused shall be recorded and after hearing the accused and prosecution, judgment shall be pronounced by the trial court. The trial court is required to ensure conclusion of case within 45 days after receipt of this judgment. Office to ensure quick delivery of copy of judgment alongwith R&Ps to trial court.

**JUDGE**

SSuleman Khan/PA