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Acquitted.

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## IN THE HIGH COURT OF SINDH AT KARACHI

Special Anti-Terrorism Acquittal  
Appeal No.37 of 2009

Present:

Mr. Justice Naimatullah Phulpoto  
Mr. Justice Mohammad Karim Khan Agha

Appellant: Iftikhar Ali Osto son of Haq Nawaz through  
Muhammad Farooq, Advocate.

Respondent No.1 Nemo.

Respondent No.2 The State through Mr. Muhammad Iqbal  
Awan Deputy Prosecutor General Sindh

Date of hearing: 23.11.2018

Date of announcement: 03.12.2018

### J U D G M E N T

**Mohammad Karim Khan Agha, J.-** Appellant Iftikhar Ali Osto son of Haq Nawaz has preferred this appeal against the impugned judgment dated 31.10.2009 passed by the learned Special Judge Anti-Terrorism Court No.III, Karachi in Case No.105/2008, F.I.R. No.392/2008 U/s.365-A, 302/34 PPC r/w section 7 of ATA, 1997, registered at police station Boat Basin, Karachi whereby the respondent No.1 has been acquitted of the charge leveled against him.

2. The facts of the prosecution case are that complainant Iftikhar Ali stated that on 18.09.2008 at about 07:00 p.m. his son Ali Nawaz left his house telling his mother that he is going to his friend Abid in Gulshan e Iqbal for Iftar. He further stated in his statement that at about 11:20 p.m. he received a call from the mobile number of his son 0322-6199145 and an unknown caller told him that his son has been kidnapped he should arrange Rs. One Crore and switched off his mobile. The Complainant contacted Abid who was a friend of his son on cell No.0343-3098394 and asked about his son Ali who told him that Ali had been to his house, along with Arsalan, Umar and Farhan, they took Iftar and were going to a hotel



and on the way Ali received call at about 10:30 p.m. and Ali told them that he had to go and left in his car. On 19.09.2008 he again at about 2:00 p.m. received miss call from mobile of his son and at about 03:45 p.m. he received call that a dead body is lying in Vitz Car APJ-988 white colour in front of Marine Drive where his visiting card is found. Then Complainant alongwith Shoukat Bhai reached there where he found dead body of his son lying in Ambulance and he filed report against unknown persons to have kidnapped and murdered his son.

3. The statement of complainant was incorporated in the FIR by ASI Raja Muhammad Jawed thereafter investigation was transferred to AVCC. During investigation it transpired that PW Syed Sajjad Ali had also seen Ali Nawaz along with accused Jehanzeb while going towards Sea side on the same night and thereafter Jehanzeb was joined in the investigation who admitted to have kidnapped Ali Nawaz and murdered him and had demanded ransom amount of Rs. One Crore from father of deceased.

4. After completion of investigation the present accused Jehanzeb was challaned. On 03.04.2009 charge was framed against the accused to which he pleaded not guilty and claimed trial.

5. In order to prove its case the prosecution examined 10 PW's who exhibited various documents in support of the prosecution case where after the prosecution closed its side. The accused person recorded his statement under S.342 Cr.PC whereby he claimed his false implication in the case. He also gave evidence on oath and called six witnesses in his defense.

6. Learned Judge, Anti-Terrorism Court-II, Karachi, after hearing the learned counsel for the parties and assessment of evidence available on record, vide the impugned judgment, acquitted the respondent as stated above, hence this appeal has been filed against his acquittal.

7. The facts of the case as well as evidence produced before the trial Court find an elaborate mention in the impugned judgment, therefore, the same are not reproduced here so as to avoid duplication and unnecessary repetition.

8. Learned advocate for appellant contended that he was out of contact with the appellant who had moved to Lahore and seemed to be no



longer interested in pursuing the appeal however the appeal had been admitted for hearing and as such it should be heard.

9. It was also brought to our attention that the respondent was not present and according to learned counsel for the appellant he had moved to Australia. The record revealed that the appeal was filed in 2009 nearly 10 years ago and as per the order sheets after issuance of bailable warrants on 05-04-2010 the respondent appeared before this court. On later dates he did not appear and notice was ordered to be served on him on 06.06.2016 through the concerned SHO. On 12-04-2017 the SHO reported that the respondent was not at his given address and as per his knowledge he had proceeded to Australia 4 years ago. On numerous dates thereafter counsel for the appellant sought time to furnish fresh address of the respondent which he was unable to do. Thereafter by order 18.12.2017 bailable warrants were ordered to be issued through concerned SHO in order to bring the respondent before the court. On 09.05.2018 it was reported once again that the Respondent was not residing at the address provided and that he had gone to Australia 4 years ago and as such once again the appellant was directed to file a fresh address. By order dated 31-08-2018 the bailable warrant was returned unexecuted because the respondent was in Australia and it was ordered that the appellant shall argue the acquittal appeal on the next day of hearing without fail. After so many failed attempts to serve the respondent who is clearly out of the country we have decided to proceed with this case today especially as the learned DPG can assist us in this matter.

10. In essence learned counsel for the appellant submitted that there had been a misreading non reading of the evidence and as such the appeal should be allowed

11. Mr. Muhammad Iqbal Awan, Deputy Prosecutor General, supported the impugned judgment which he submitted had been decided in accordance with the law and that there were no legal infirmities in respect of the same.

12. We have heard the learned counsel for the parties and scanned the entire evidence.



13. At the outset we would like to observe that it is settled law that the grounds on which a criminal acquittal appeal will succeed are very narrow. A presumption of double innocence attaches to the respondent and even then for the appeal to succeed this court must be satisfied on the evidence that the impugned Judgment was arbitrary, capricious or against the principles of natural justice. The respondent is also entitled to any benefit of doubt which may have arisen in the prosecution case.

14. After considering the arguments of the parties and perusing the record, we are of the opinion that the prosecution has failed to prove its case against the respondent for the main reasons that in this case all pieces of evidence produced by the prosecution are weak in nature and the whole case of the prosecution is based upon contradictory evidence adduced by the prosecution. There is no confidence inspiring and trustworthy evidence on record to implicate the respondent; overall the reasoning given in the impugned judgment for the acquittal of the respondent which is set out below is in our view sound and does not require any interference on our part:

*"The prosecution has failed to prove how accused is involved in this case when there is no eye witness of the incident, no motive is available there is no enmity between the complainant and the accused who actually are close relatives, no record of mobile is produced that at the relevant time calls or messages was received by the complainant.*

*The evidence which has been led by the prosecution mainly rests upon deposition of PW-3 Syed Sajjad Ali and PW-4 Abid Hussain. Evidence of Syed Hajj Ali is of last seen which is a very weak type of evidence and the law produced by the defence on last seen is very important. Syed Sajjad Ali deposed that he had informed the complainant that he had seen deceased and accused at 10:45 p.m. in car having 2 doors whereas the complainant stated that he had received the call for the demand of ransom at 10:45 p.m. which I think cannot be believed. The interestedness of the PW Syed Sajjad Ali with the complainant is also clear from Ex.25/D produced through DW-7 Asif Naeem of Warid Telecommunication Company which is call data of Cell number of this PW Syed Sajjad Ali that many calls were made by him to the complainant.*

*Evidence of PW-4 Abid Hussain also seems to be interested. He acted as mashir to the recovery of mobile and key, recovery of Azarband and pointation of dead body. He had produced an application Ex.8/D attached with his CV and CV shows his address as 435,437 Central Commercial Area Block-2 PECHS, Tariq Road, Karachi*



and in Professional Experience Column it shows he is working in Ali's & Company a Construction Company as Site Incharge and purchase officer. This Ali's Company is company of complainant as admitted by the complainant and for the above address, witness has deposed that he does not know the said address, moreover the I.O. of the case has deposed that PW Abid Hussain is servant of the complainant and the complainant has said that PW Abid Hussain had attended Soyam between Zuhur and Maghrib whereas the PW Abid denies. Admittedly Abid Hussain acted as mashir to three memo prepared at 2 to 4 p.m. whereas the Soyam time is also between Zuhur and Maghrib prayers. This all creates doubt that either PW was not present at the time of recoveries or he being interested witness and servant of complainant telling lies therefore evidence of both the witnesses in my opinion is not trustworthy.

The I.O. of this case who claims to be a police officer having 19 years of experience has also not properly investigated the case, as already said Irfan Baloch who is first informant to police was neither cited as witness nor traced, PW Umar who is also an important witness was never brought in the evidence box, I.O. never produced the car before this Court as PW-02 ASI said that the dead body was lying in the car having 04 doors, and the car is shown in the property column of the charge sheet. He had admitted that he had not collected the call data of the complainant also admitted that according to data no call was received on the cell number of deceased after 6.30 p.m. on 18.08.2008 then how the present accused is being connected with the offence. The investigation made by I.O. is not only defective and improper but he has destroyed the case and has failed to reach to the real culprits. I have found him an inefficient officer and his highups may be informed.

The upshot of the above discussion is that when direct evidence is not available conviction cannot be based and the recoveries made in this case being defective cannot play a decisive role and circumstantial evidence is not so convincing that the accused has committed the present offence therefore I am of the opinion that the prosecution has miserably failed to prove the case against the accused beyond shadow of doubt as such the points No.3 & 4 are replied in negative." (bold added)

15. Thus, from a perusal of evidence recorded by trial court as well as the impugned judgment, it appears that the impugned judgment of the trial court is based upon sound reasons and does not require any interference especially as when mentioned above it is considered that the impugned judgment is neither perverse nor arbitrary and in this case there appear to be no legal infirmities in the impugned judgment. If

anything the prosecutions evidence is unreliable and riddled with contradictions which cannot be safely relied upon by any stretch of the imagination. It is settled law that in a criminal case the accused is entitled to even the slightest benefit of doubt in the case against him. In this case there are many doubts in the prosecution evidence and the trial court has rightly extended the benefit of doubt to the respondent in the impugned judgment.

16. For what has been discussed above, we are of the considered view that the impugned judgment is based upon valid and sound reasons and is entirely in consonance with the law and as such we find this Criminal Acquittal Appeal to be without merit and the same is dismissed along with any listed applications.