

CERTIFICATE OF THE COURT IN ACCORDANCE WITH

Spl. CrL-Anti-Terrorism Appeal NO.
113 of 2015

SINDH HIGH COURT

Composition of Bench.

Single/D.B.

HONORABLE MR. JUSTICE KARIM KHAN AGHA
HONORABLE MR. JUSTICE SALEEM JESSAR

Dates of hearing: 20-02-2020

Decided on 03-03-2020

(a) Judgment approved for
reporting.

Yes ✓
No

KJP

CERTIFICATE

Certified that the judgment */Order is based upon or enunciates a principle of law */decides a question of law which is of first impression/distinguishes/over-rules/ reverses/explains a previous decision.

*Strike out whichever is not applicable.

NOTE:—(i) This slip is only to be used when some action is to be taken.

(ii) If the slip is used, the Reader must attach it to the top of the first page of the judgment.

(iii) Reader must ask the Judge writing the Judgment whether the Judgment is approved for reporting.

(iv) Those directions which are not to be used should be deleted.

IN THE HON'BLE HIGH COURT OF SINDH AT KARACHI

SPL: ANTI TERRORISM APPEAL NO. 113 /2015

SPL: CASE NO. 33 of 2012
F.I.R. NO. 267 OF 2011
U/S. 364-A PPCRW 7 ATA 1997
P.S. JOHERABAD (CENTRAL)

BASHIR AHMED S/O. KARIM BUX,
Muslim, adult, Permanent Resident of
Punjab, and at Present residing at

Karachi (Central)

Presently Confined in

Central Prison, Karachi**APPELLANT**

PRESENTED

26-05-2015

26/5/15
269/

VERSUS

THE STATE.....RESPONDENT

**APPEAL UNDER SECTION 25 OF THE ANTI
TERRORISM ACT, 1997**

Being Aggrieved and dissatisfied with the impugned Judgment dated 20th May, 2015 passed by the Learned Special Judge Anti Terrorism Court NO. II at Karachi (Central) in Special Criminal Case No. 33 of 2012, (The State V/s. Bashir Ahmed) whereby the learned Trial Court was pleased to award Sentence to the Appellant/ Accused U/s. 7(e) of Anti Terrorism Act 1008 and sentenced him to suffer Imprisonment for life. The benefit of Section 382(b) of Cr.P.C. is also given to him. The appellant above named prefers this Appeal before this Honourable Court and respectfully prays that this Honourable Court may be pleased to call for Record and Proceedings of Special Case No. 33 of 2012 from the Court of Learned Special Judge Anti Terrorist Court No.II at Karachi and recall and set aside the impugned Judgment dated 20-05-2015 and Acquit the abovenamed Appellant/ Accused from the charge, on the following facts and grounds. **The True Copy of the Impugned Judgment dated 20-05-2015 is enclosed herewith and marked as Annexure "A").**

Contd.....on Page 2

Core of Simple Abduction u/s 363 PPC

THE HIGH COURT OF SINDH AT KARACHI

Spl. Crl. Anti-Terrorism Appeal No.113 of 2015.

Present:

Mr. Justice Mohammad Karim Khan Agha
Mr. Muhammad Saleem Jessar.

Appellant: Bashir Ahmed S/o. Karim Bux through Mr. Iftikhar Ahmed Shah, Advocate.

For State: Through Mr. Muhammad Iqbal Awan, Deputy Prosecutor General.

Date of hearing: 20.02.2020.

Date of Judgment: 03.03.2020.

JUDGMENT

MOHAMMAD KARIM KHAN AGHA, J:- Accused Bashir Ahmed S/o. Karim Bux was tried by learned Judge, Anti-Terrorism Court No.II, Karachi in Special Cases No. 33/2012 arising out of Crime No.267/2011 U/s. 364-A PPC R/w Section 7 of ATA, 1997 at P.S. Joharabad, Karachi. After trial vide judgment dated 20.05.2015 the appellant Bashir Ahmed was convicted under Section 7(e) of ATA 1997 and sentenced to suffer imprisonment for life. The appellant was extended the benefit of section 382- B Cr.P.C.

2. Being aggrieved and dissatisfied by the judgment passed by learned Judge, Anti-Terrorism Court No.II, Karachi, the aforesaid appeal has been preferred by the appellant.

3. The brief facts of the case according to FIR No.267/2011 filed by complainant Ahsan Mehmood on 19.12.2011 at about 1900 hours are that he lives in House No.359, Block-15, Joharabad, Dastagir F.B. Area, Karachi stating therein that he drives pickup. That his niece baby Nimra aged about 8 to 9 years old D/o. Gofran had come home from School and thereafter had gone out to play and up till 6'O clock she did not return upon which they were very worried and started searching for her but she could not be found as such he reported the kidnapping of his niece to the police and requested them to take action for her recovery. His claim was again unknown person or persons who due to some enmity kidnapped his niece and requested that legal action be taken in this regard.

4. In presence of witnesses, S.I. Sohail Iqbal posted at P.S. Joharabad being busy in the investigation of the FIR which had been registered as Case Crime NO.267/2011 U/s. 364-A PPC, whilst being accompanied by the complainant and police party was busy in search of baby Nimra when two persons namely (1) Jahangir Khan S/o. Muhammadullah Khan and (2) Muhammad Ali S/o. Muhammad Rafiq informed SI Sohail Iqbal that from one house situated adjacent to the street of Madni Masjid, hues and cries of a child are being heard. On such information, S.I. Sohail Iqbal accompanied by the police party and the complainant at 0030 hours on pointation of aforesaid persons reached at House No.A-335, Goharabad Block-15, F.B. Area, Karachi. The door of house was locked. SI Sohail Iqbal knocked the door then heard screaming of a child, upon which SI Sohail Iqbal forcibly pushed the door open. Inside the room one baby aged 10 years wearing school uniform of Blue Colour Qameez and white Shalwar was sitting on the floor and crying. Both her hands were tied with a scarf. The complainant identified her as his daughter Nimra. Inside the room one person was available who was apprehended on the spot by the police who on inquiry disclosed his name as Bashir Ahmed S/o. Karim Bux. The gathered Mohalla people started to beat the accused but he was saved by SI Sohail Iqbal who arrested him on the spot. Thereafter baby Nimra on enquiry stated that this person (the accused) brought her to the house by saying her brother was drowning in the river and they needed to save him whereupon he tied her, gagged her and threatened her to keep quiet. Upon conducting physical search of the accused one mobile phone -Q Mobile, coloured photocopy of original National Identity Card in the name of Bashir Ahmed S/o. Karim Bux, cash amount of Rs.370/- were recovered which were seized by the police. The kidnapped baby Nimra was recovered along with the scarf which had been used to tie her up.

5. After usual investigation the case was challoned and sent up for trial. The charge was framed against the accused on 16.04.2013 to which he pleaded not guilty and claimed trial of the case.

6. To prove its case the prosecution examined 08 prosecution witnesses and exhibited numerous documents and other items thereafter the side of the prosecution was closed. The statement of the accused was recorded u/s 342 Cr.P.C. in which he claimed false

implication at the hands of the police who had arrested him at a bus stop as he was going to the Punjab. He did not give evidence under oath or call any DW in support of his defense case

7. Learned Judge, Anti-Terrorism Court No.II, Karachi after hearing the learned counsel for the parties and assessment of evidence available on record, vide judgment dated 20.05.2015, convicted and sentenced the appellant as stated above, hence this appeal has been filed by the appellant against his conviction.

8. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the judgment dated 20.05.2015 passed by the trial court and, therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

9. Learned counsel for the appellant has contended that the appellant is completely innocent and has been falsely implicated in this case by the police, that there are contradictions in the prosecution evidence, that the fact that the abductee was able to scream despite being gagged does not appeal to reason like wise the fact that the abductee was recovered so soon after her alleged abduction and thus for any of the above reasons the appellant should be acquitted by extending the benefit of doubt to him. In the alternative he submitted that at the most this case fell within the purview of S.363 PPC. In support of his contentions he has placed reliance on the case of **Azeem Khan and another v. Mujahid Khan and others** (2016 SCMR 274), **Ata Muhammad and another v. The State** (1995 SCMR 599), **Tariq Pervez v. The State** (1995 SCMR 1345), **Mst. Shamim and 2 others v. The State and another** (2003 SCMR 1466), **Mst. Rukhsana Begum and others v. Sajjad and others** (2017 SCMR 596), **Muhammad Aslam and 3 others v. The State** (2008 SCMR 1040), **Sikandar Ali v. The State** (1971 SCMR 52), **Notice to Police Constable Khizar Hayat son of Hadaitullah on account of his false statement in the CrI. Misc. Appln. No.200 of 2019 in Criminal Appeal No.238-L of 2013** (PLD 2019 Supreme Court 527) and **Abdul Hafeez v. The State** (1983 SCMR 1143).

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10. On the other hand learned Deputy Prosecutor General has initially fully supported the impugned judgment. However when he was confronted by the court whether the ingredients of S.364 A PPC had been made out he candidly conceded that they had not been. Instead he submitted that the offense under S.363 PPC had been made out. In support of his contentions he placed reliance on the evidence of the PW's and the recovery of the scarf which had been used to tie up the abductee. When confronted by the court whether this case fell within the purview of the ATA he candidly conceded that it did not.

11. We have heard the arguments of the learned counsel for the parties, gone through the entire evidence which has been read out by the appellant, the impugned judgment with their able assistance and have considered the relevant law including that cited at the bar.

12. Based on our reassessment of the evidence we are of the view that prosecution through its evidence have **not** been able to make out a case under S.364 A PPC. For ease of reference S.364 A PPC is set out below;

"S.364-A. Kidnapping or abducting a person under the age of fourteen. Whoever kidnaps or abducts any person under the age of fourteen in order that such person may be murdered or subjected to grievous hurt, or slavery, or to the lust of any person or may be so disposed of as to be put in danger of being murdered or subjected to grievous hurt, or slavery or to the lust of any person shall be punished with death or with imprisonment for life or with rigorous imprisonment for a term which may extend to fourteen years and shall not be less than seven years."

13. In our view the evidence shows that the abductee was kidnapped (which we will come to later in this judgment) but does **not** show that (a) the abduction was to murder the abductee or (b) subject the abductee to grievous bodily harm or (c) subject the abductee to slavery or (d) subject the abductee to the lust of any person and thus the offense under S.364 A PPC has not been proved beyond a reasonable doubt.

14. However we are of the view after our reassessment of the evidence that the prosecution has proved beyond a reasonable doubt that the

appellant has committed the offense under S.363 PPC which is set out below for ease of reference.

"S.363. Punishment for kidnapping. Whoever kidnaps any person from [Pakistan] or from lawful guardianship, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine".

15. In our view the evidence of the star witness PW 3 Nimra who specifically names the appellant as the abductee who abducted her, took her to his home against her will and tied her up and whom she knew is reliable, trust worthy and confidence inspiring. Her S.164 statement accords with her evidence. She was not damaged at all during cross examination and she had no reason to falsely implicate the accused and as such we believe her evidence and can convict on the basis of this evidence alone. It should however be noted that even in her own evidence she has admitted that she was not molested by the appellant or any one else during the time when she was confined by and with the appellant. In this respect reliance is placed on **Muhammad Ehsan V The State** (2006 SCMR 1857).

16. Her evidence is corroborated by PW 5 Sohail Iqbal who arrested the accused on the spot at his house where he found the accused tied up in the presence of the abductee and no other person. No enmity has been suggested against him. He had no axe to grind with the appellant and once again he had no reason to falsely implicate the accused. He was not a chance witness and it is well settled by now that police witnesses are as reliable as any other witnesses as long as no enmity has been suggested against them as in this case. The arrest of the accused on the spot is also corroborated by PW 4 Muhammed Jahangir who was an independent witness from the mohalla who was mashir to the memo of arrest and recovery and had no enmity or ill will towards the appellant and had no reason to falsely implicate him. As such based on the evidence before us there is no doubt that the appellant was found in his house with the abductee who was tied up and that he kidnapped her.

17. Further corroborative/supportive evidence is found against the appellant in terms of the scarf which was recovered from him at the time of arrest and used to tie up the abductee and the evidence of PW 8 Dr. Ghulam Sarwar Channa who was the MLO who examined the

appellant and found that his injuries were consistent with him being beaten by the crowd which ties in with the prosecution evidence and prosecution case.

18. We are of the view that this case does not fall within the purview of the ATA since according to the evidence there was no design, object or intent to cause terror and thus the provisions of the ATA will not apply. Even otherwise the provisions of the ATA do not apply to offenses under S.363 PPC.

19. Thus, based on our reassessment of the evidence on record and our above discussion we find that the prosecution has proved its case against the appellant beyond a reasonable doubt in respect of S.363 PPC and convict the appellant of the same.

20. Thus, by exercising our judicial discretion under S.423 Cr.PC hereby modify the conviction and sentence of the appellant as under:

"The appellant stands convicted U/s. 363 PPC and is sentenced to under go RI for 7 years and is ordered to pay a fine of Rs. 100,000 and if the appellant is in default of payment of fine he shall undergo SI for a further 6 months".

The appellant shall have the benefit of S.382-B Cr.PC.

21. The appeal stand dismissed **except** as modified above.