

CERTIFICATE OF THE COURT IN RECORD NO. —SINDH HIGH COURT

SP. CO. AT 4. No. 4 of 2014

Composition of Bench.Single/D.B.Mr. Justice Mohammad Kasim Jahan Agwa.
Mr. Justice Abdul Mubeen Lakhani.

Dates of hearing: 18.3.2020

Decided on 31.3.2020

(a) Judgment approved for reporting.

Yes
~~No~~

K.A.

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.

(1)

IN THE HIGH COURT OF SINDH AT KARACHI

Sp. Cr. Appeal No. **04** / 2014

1. Muhammad Jumman Brohi
S/o. Mir Muhammad Brohi,

2. Ghulam Yaseen Jarwar
S/o. Minhaj Khan,
both Muslims, adults,
presently confined
in Central Jail, Karachi.

Appellants

Versus

The State

Respondent

FIR NO.107/2012
U/S 365-A/395/34 PPC
R/W S. 7 of ATA 1997
P.S. Manghopir

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

Being aggrieved and dissatisfied with the impugned
Judgment, sentence and confiscation of movable /
immovable properties dated 30.01.2014, awarded to the

IN THE HIGH COURT OF SINDH, KARACHI

Special Criminal Anti-Terrorism Appeal No.04 of 2014.

Present:

Mr. Justice Mohammad Karim Khan Agha
Mr. Justice Abdul Mubeen Lakho.

Appellants: 1. Muhammad Jumman Brohi s/o.
Mir Muhammad Brohi.
2. Ghulam Yaseen Jarwar s/o Minhal Khan,
both through Mr. Asadullah Soomro, Advocate

Complainant: Through Mr. Nasarullah Malik, Advocate

Respondent/State: Through Mr. Muhammad Iqbal Awan,
Prosecutor General, Sindh

Date of Hearing: 18.03.2020.

Date of Judgment: 31.03.2020.

J U D G M E N T

MOHAMMAD KARIM KHAN AGHA, J:- Accused Muhammad Jumman Brohi son of Mir Muhammad Brohi and Ghulam Yaseen Jarwar son of Minhal Khan were tried by the learned Judge, Anti-Terrorism Court No V, Karachi in Special Case No.B-108/2012, arising out of Crime No.107/2012 u/s. 365-A/395/34 PPC r/w Section 7 of ATA, 1997, registered at P.S. Manghopir Karachi. After trial, vide judgment dated 30.01.2014 the appellants named above were convicted and sentenced as under:-

"Both accused Muhammad Jumman Brohi son of Mir Muhammad Brohi and Ghulam Yaseen Jarwar son of Minhal Khan were convicted for the offence as defined u/s.365-A PPC read with Section 6(2)(e) punishable u/s. 7(e) of Anti-Terrorism Act, 1997 and sentenced to undergo R.I. for life. All their movable and immovable properties be forfeited/confiscated".

The benefit of section 382-B Cr.P.C. was also extended to the appellants.

2. Being aggrieved and dissatisfied by the judgment passed by learned Judge, Anti-Terrorism Court No.V, Karachi, the aforesaid appeals have been preferred by the appellants.

3. The brief facts of the prosecution case as disclosed in the charge sheet are that on 11.04.2012, the complainant Atiqullah Shah s/o Noorullah Shah lodged an FIR at police station Manghopir stating that he was doing business of lands. On 08.04.2012 he along with Muhammad Qasim s/o Peer Muhammad, his son Abdul Karim, Abdul Raheem, Abdul Rehman, Akhtar Muhammad, Ehsanullah and Saifullah were present at his Dera Lal Muhammad Baloch Goth, Ban Murad at about 8:00 p.m when about 14/15 armed men appearing to be Sindhi Baloch climbed over the back wall of the Dera and over-powered them and made them sit in a room whilst tying their hands and legs together. They took away Rs.3,16,000/- one 7mm rifle, 07 mobile phone-sets and kidnapped son of complainant Ehsanullah and his brother-in-law's son Abdul Raheem in his Hi-Roof vehicle bearing Registration No.CR-2132. On 09.04.2012 the said Hi-Roof vehicle was found abandoned within the limit of PS Saeedabad but the two kidnapes could not be located. The FIR being Crime No.107/2012 was registered u/s.395/365/34 PPC and investigation was assigned to SIP Syed Ghulam Sibtain.

4. After registration of FIR, on 16.4.2012 a phone-call was received from snatched mobile phone of the complainant, demanding Rs.Six Crore ransom for the release of the kidnapes hence Section 365-A PPC was inserted in the FIR and the investigation was transferred to AVCC. Muhammad Jumman Brohi, Ghulam Yasin were arrested by CID Civil Lines in crime No.292/2012 u/s.353/324/34 PPC and Section 13-D of Arms Ordinance and during interrogation they disclosed the commission of Crime No.107/2012. They admitted their action on 08.4.2012 along with their companions who are absconders in this case. Inspector arrested the said two accused in this case and on 20.06.2012 identification parade was conducted before Judicial Magistrate West and Kidnapes Ehasanullah identified both the accused. The complainant disclosed that on 04.06.2012 he had paid Rs.25,00,000/- as ransom and on the same night the kidnapes were released by the accused.

5. After completion of the investigation, the charge against the accused persons was framed to which they pleaded not guilty and claimed trial of the case.

6. To prove its case the prosecution examined 07 prosecution witnesses and thereafter the side of the prosecution was closed. The statement of the accused u/s 342 Cr.P.C. was also recorded in which they denied all the allegations

leveled against them and claimed to false implication. They did not examine themselves on oath or call any DW's in support of their defense case.

7. Learned Judge, Anti-Terrorism Court No.V, Karachi after hearing the learned counsel for the parties and assessment of evidence available on record, vide the impugned judgment dated 30.01.2014, convicted and sentenced the appellants as stated above, hence these appeals have been filed by the appellants against their convictions.

8. 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.

9. Learned counsel for the appellant has contended that the accused are innocent and have been falsely implicated in this case, that the accused are not nominated in the FIR, that their identification cannot be safely relied upon as it was a night time incident and no hulia was given and that there are also defects in the identification parade, that there was no proof of any ransom demand being made or any ransom being paid and as such for any of the above reasons the appellants should be acquitted of the charge by this court extending to them the benefit of the doubt. In support of his contentions he placed reliance on the case of **Gulfam V State** (2017 SCMR 1189)

10. Learned Deputy Prosecutor General has half heartedly supported the impugned judgment but when confronted by this court concerning the weaknesses in the identification evidence of the accused he has not been able to rebut the same.

11. Learned counsel for the complainant has fully supported the impugned judgment and has contended that the prosecution has proved its case beyond a reasonable doubt. He has contended that the accused have been correctly identified by one of the abductees at an identification parade and that the complainant has proved that both a ransom demand was made and paid and as such the appeals should be dismissed.

12. 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.

13. After our reassessment of the evidence in particular that of the PW's we are of the view that the prosecution has proved beyond a reasonable doubt that on 08.04.2012 at about 8pm Ehasannullah and Abdul Raheem were kidnapped from the complainant Atiqullah's Dera at Lal Muhammed Baloch Goth Ban Murad by a number of persons.

14. The only issue therefore before us is whether the accused were a part of that kidnapping and have been correctly identified as being involved in the kidnapping.

15. After our reassessment of the evidence we are of the view that the prosecution has **not** proved beyond a reasonable doubt that the appellants were involved in the kidnapping of the abductees for the following reasons;

(a) In our view the case revolves around the correct identification of the accused at the time of the kidnapping and whilst the abductees were held captive. Thus, we shall consider the evidence of each eye witness on the point of identification in order to ascertain whether we can safely rely on it vis a vis correctly identifying the accused as being a part of the group which kidnapped the abductees as set out below;

(i) **Eye witness PW 1 Atiqullah** was the complainant and father of the abducted Ehsannullah. He registered the FIR by his own admission 3 days after the incident against unknown persons. In his FIR he states that the unknown persons were muffled and gives no hulia except that the persons appeared Sindhi Baloch. In his FIR and own evidence by his own admission it was 8pm at night and therefore would have been dark. In his evidence he states that two persons in his kitchen had unmuffled faces and one outside had a muffled face. He also says that the culprits were dark skinned and sindhi Baloch but again fails to give any hulia. In his S.161 statement he gave no hulia of the accused and did not even state that he could recognize the accused if they were produced before him. He did not appear before an identification parade. He had not known the accused before the incident, he got only a fleeting glimpse of the accused at the time of the incident and to confuse the matter even more there were 12 to 15 persons who were a part of the gang who carried out the kidnapping present at his Dera and about 11 of his own people present at the time of the incident making up to 26 different persons. He admits that the abductees were not recovered

7

from the accused but identified the accused in court as being part of the kidnapping gang. The supreme Court has deprecated in court identification and in this respect reliance is placed on **Gulfam's case** (Supra). Keeping in view the case of **Javed Khan V State** (2017 SCMR 524) and for the reasons discussed above we find that we cannot safely rely on this eye witness PW as having correctly identified the accused as being involved in the kidnapping.

- (ii) **Eye witness abductee Eshannullah** despite returning home safely did **not** give evidence before the trial court. Although he picked out both the accused as being his kidnappers from an identification parade held by PW 4 Azizullah who was the judicial magistrate who held the identification parade we find that we cannot safely rely on such identification of the accused by this abductee as being correct as the abductee did not give any hulia of the accused in any statement before the identification parade and he also did not give evidence **which meant that the accused were deprived of their right to cross examine him which may have resulted in his evidence being completely shattered**. We also find it surprising that the other eye witness abductee PW 6 Abdul Raheem who did give evidence and who we will deal with next could not recognize the accused as he was kept blind folded. This begs the question as to why abductee Ehsanuallah was able to remain in captivity with a clear view of all his kidnappers which does not appeal to reason, logic or commonsense. There are also doubts that the identification parade itself was conducted in accordance with the law vis a vis the relevant guidelines as laid down in the case of **Kanwar Anwaar Ali** (PLD 2019 SC 488). For example, the names, addresses and CNIC's of the dummies were not taken. As such for the reasons discussed above we find that we cannot safely rely on the correctness of the identification of the accused by this eye witness.
- (iii) **Eye witness abductee PW 6 Abdul Raheem** in his evidence states that his eyes were blind folded. He did not give any hulia of the accused. He did not appear before an identification parade and did not even identify the accused in court. **In short this eye witness gave no evidence concerning the correctness of the identification of the accused.**
- (iv) **Eye witness PW 5 Muhammed Qasim** who was present when his son Abdul Raheem was kidnapped from the Dera states in his evidence that he cannot give a description of the culprits and thus does not identify the accused as being a part of the gang who kidnapped the abductees. **In short this eye witness gave no evidence concerning the correctness of the identification of the accused.**
- (v) Thus, we find that after having considered the eye witness evidence relating to the identification of the accused that we cannot safely rely on it as correctly identifying the accused who were a part of the gang who kidnapped the abductees.

(b) It is also strange that there were many eye witnesses to the kidnapping but none of them came forward to give identification evidence about the accused or even about the incident itself.

© That the complainant sold his vehicle in which the abductees were kidnapped which was case property prior to the trial.

(d) That the accused just happened to confess their involvement in the offense before the police (which is inadmissible in evidence) whilst in custody in another case when the police had no evidence against them in this case despite knowing full well that the offense in hand may lead to a sentence of capital punishment. This does not appeal to reason, logic or common sense.

(e) That despite allegedly confessing to the offense the accused did not take the police to where the abductees were held in captivity.

(f) Nothing was recovered from the accused and they did not lead the police to any recovery which was linked to the offense e.g. ransom money.

(g) That the only evidence of any ransom demand being made is from the evidence of the complainant. No CDR has been produced in support of his evidence. No recording of the ransom demand being made has been produced despite him admitting that he approached the CPLC regarding this issue. Thus we find that the prosecution has also not proved that a ransom demand was made.

(h) As to the payment of any ransom there is no evidence who paid the ransom, where it was paid, how much was paid, that any ransom money was withdrawn from any bank account. No ransom money was recovered. Thus we find that the prosecution has also not proved that any ransom was paid which supports the fact that no ransom demand was made.

(i) As there is no reliable ocular evidence as to the correct identification of the accused the next question is whether there is any circumstantial evidence which would meet the legal requirements as laid down in the cases of **Fayyaz Ahmed V State** (2017 SCMR 2026) and **Azeem Khan V Mujahid Khan** (2016 SCMR 274). In our view on the basis of circumstantial evidence there are many missing links in the chain of evidence from the abductions to the release of the abductees to the arrest of the accused to connect them to the abduction and as such the accused cannot be convicted on the basis of circumstantial evidence.

16. It is a cardinal principle of criminal jurisprudence that the prosecution must prove its case beyond a reasonable doubt and it is not for the accused to disprove the case against him who may take any and as many defenses as he likes to the allegations against him as the onus rests on the prosecution to prove its case beyond a reasonable doubt as was held in the case of **Muhammed Shah V State** (2010 SCMR 1009) and if there is any doubt in the prosecutions case the

benefit must go to the accused. As was held in the case of **Tariq Pervez V The State** (1995 SCMR 1345) that if there is a **single circumstance**, which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right. Such principle was recently reiterated by the Supreme court in the case of **Abdul Jabbar V State** (2019 SCMR 129)

17. Thus, based on our reassessment of the evidence for the reasons mentioned above the prosecution has not been able to prove its case against the appellants for the offenses for which they have been charged beyond a reasonable doubt and as such the appellants are acquitted of the charge by extending to them the benefit of the doubt. The appeals are therefore allowed and the impugned judgment is set aside with the result that the appellants shall be released unless wanted in any other custody case.

18. The appeals stand disposed of in the above terms.