

CERTIFICATE OF THE COURT IN REGARD TO REPORTING

Sp. ATA 193 of 2017

M. Nawaz vs. The State

HIGH COURT OF SINDH

Composition of Bench: S.B./D. B.

Mr. Justice Mohammad Karim Khan Agha,
Mr. Justice Khadim Hussain Tameer

Date(s) of Hearing: 18-08-19

Decide on: 22-08-2019

(a) Judgment approved for reporting: Yes



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 / overrules / reverses / explains a previous decision.

* Strike out whichever is not applicable.

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- 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.

Appellant is in custody

IN THE HON'BLE HIGH COURT OF SINDH AT KARACHI

CR. Antiterrorism APPEAL No. of 2017

Muhammad Nawaz
Son of Abdullah Khan,
Resident of Karachi,
Presently confined in Central Jail,
Karachi.....

183

PRESENTED
10-08-2017
[Signature]
Appellant 2300

VERSUS

The State..... Respondent

Special Case No. B-669/2015

FIR No. 120/2015

Under Sec. 385/387/377-H/427/34 PPC

R/w Sec. 25 of Tel Graph Act.

R/w Sec. 7 of ATA 1997

PS. Orangi Town, Karachi.

Decided by the IXth Anti Terrorism Court, Karachi Division, Karachi.

CRIMINAL APPEAL UNDER SECTION 410 Cr. PC R/W SECTION 25 OF THE ANTI-TERRORISM ACT, 1997.

Being aggrieved off and dissatisfied with the judgment dated 27-07-2017 passed by the learned trial court/ IXth Anti Terrorism Court, Karachi Division, Karachi, in the above cited case, convicting the Appellant above named and sentenced him U/S 7(1)(h) of ATA 1997 and sentenced the Appellant to suffer R.I for ten years and to pay fine of Rs.50,000/- or in default to undergo R.I for one year more. However, the benefit U/S 382-b Cr.P.C is also extended in favour of the Appellant, hence this Appeal on consideration of the following facts amongst other grounds:-

R.
A
10.8.17
[Seal of the Director General Sindh Office]

Copy of Impugned Judgment Dated 27.07.2017 is hereby enclosed and marked as Annexure "A"

THE HIGH COURT OF SINDH AT KARACHI

Spl. Crl. Anti-Terrorism Appeal No.193 of 2017.

Present:

*Mr. Justice Mohammad Karim Khan Agha
Mr. Justice Khadim Hussain Tunio.*

Appellant: Muhammad Nawaz S/o. Abdullah Khan
through Mr. Muhammad Farooq, Advocate.

Complainant: Mr. Ghulam Muhammad Khan, Advocate.
Mr. Muhammad Iqbal Awan, D.P.G. for State.

Date of hearing: 19.08.2019.

Date of Judgment: 22.08.2019.

J U D G M E N T

MOHAMMAD KARIM KHAN AGHA, J:- Accused Muhammad Nawaz and Muhammad Aijaz were tried by learned Judge, Anti-Terrorism Court No.IX, Karachi in Special Cases No. B-669/2015 arising out of Crime No.120/2015 U/s. 385/387/377-H/427/34 PPC R/w Section 7 of ATA, 1997 at P.S. Orangi Town, Karachi. After trial vide judgment dated 27.07.2017 (the impugned judgment) the co-accused Muhammad Aijaz was acquitted and the appellant Muhammad Nawaz was convicted under Section 7(1)(h) of ATA 1997 and sentenced to suffer R.I. for ten years and to pay fine of Rs.50,000/- and in case of failure to pay such fine he was ordered to undergo R.I for one year more. The appellant Muhammad Nawaz was extended the benefit of section 382-B Cr.P.C. Case against absconding accused persons was kept on dormant file.

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

3. Brief facts of the prosecution case as per FIR No.120/2015 lodged by the complainant are that he was having his own motorcycle showroom located at Jamshed Pump MPR Colony Karachi. On 20.03.2015 it is alleged that the complainant went to offer Maghrib (sunset) prayers and as and when he came back to his showroom he was informed by Abdul Rehman

and Abdul Salam, his sons that two youngsters came there on a motorcycle who took out pistols and made fire shots at the showroom and disappeared from the spot. Abdul Salam, who is son of the complainant, received serious injuries. It is further alleged that on 21.03.2015 at about 03:30 pm when complainant Meer Kalam was sitting at his showroom he received a phone call on his mobile No.0300-2778592 whereby the caller had asked him to arrange Rs.5,00,000/- as bhatta failing which he will face dire consequence. The complainant further disclosed in the FIR that similar calls for the payment of bhatta were received from Cell No.0306-3133164, 0331, 2010957 and 0337-0459906 and he was threatened that in case of non-payment of bhatta he would be murdered. It is further alleged that on 07.5.2015 some unknown persons/culprits made fire shots at about 4:00 a.m. and as a result of which car bearing No.T-0905 belonging to the complainant parked in a street outside of his house received damage. On 27.05.2015 at about 10:30 am a call was received by the complainant from SIM No.0315-0228528 and 0321-2261838 whereby the caller asked the complainant to arrange bhatta amount otherwise he will face the consequences. On the same day i.e. 27.05.2015 accused Muhammad Nawaz was arrested by the police at about 1800 hours and recovered a double SIM mobile bearing Nos.0315-0228528 and 0321-2261838 which were allegedly used by the accused while making the demand of bhatta whereas after receiving the CDR of the relevant mobile SIM numbers the police came to know that the same were issued and registered in the names of accused Muhammad Nawaz, Muhammad Aijaz, Naseeb Kamal, Zobar Khan, Naveed Hussain and Lal Bukhsh, but except accused Muhammad Nawaz the remaining accused could not be arrested by the police and therefore, only accused Muhammad Nawaz was sent up to face the trial under such charge sheet filed by the police showing therein the names of remaining accused as absconders. But subsequently one of them namely Muhammad Aijaz appeared voluntarily before the court and he was therefore, also put at trial along with accused Muhammad Nawaz.

4. Before commencement of trial against present accused Muhammad Nawaz and Muhammad Aijaz the proceedings u/s 87 & 88 CrP.C. were initiated against remaining accused who are absconding and after completing such proceedings against them accused Naseeb Kamal, Zobar

Khan, Naveed Hussain and Lal Bukhsh were declared as proclaimed offenders and the case was ordered to proceed in their absence u/s 512 Cr.P.C.

5. After usual investigation the accused were sent up to stand trial in respect of the offences allegedly committed by them u/s.385/387/337-H/427/34 PPC r/w section 25 of Telegraph Act and section 7 of ATA 1997.

6. On 07.9.2016 the trial of the case commenced whereby the charge against the accused was framed in respect of offences punishable u/s. 6(2)(k) of ATA 1997 punishable u/s 7(h) of ATA 1997 r/w section 385 PPC to which the accused pleaded not guilty and claimed to be tried.

7. To prove its case the prosecution examined 06 prosecution witnesses and exhibited numerous documents and thereafter closed it side. Statements of the accused were recorded u/s 342 Cr.P.C. and the appellant gave evidence under oath and called one DW in his defense. The accused in essence claimed false implication. After completion of the trial accused Muhammad Aijaz was acquitted whilst appellant Muhammad Nawaz was convicted and sentenced as set out earlier in this judgment and hence his appeal against conviction.

8. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the impugned judgment dated 27.07.2017 passed by the trial court and, therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

9. We have heard the arguments of the learned counsel for the appellant, DPG and the complainant, 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.

10. The issue before us is primarily whether the appellant was demanding bhatta from the complainant.

11. The first point to note is that the FIR was filed by the complainant after a delay of over two months for which no compelling explanation has been put forward by the complainant except that he was afraid. Such long unexplained delay in lodging an FIR is very often fatal to the prosecution

case as it gives the complainant the opportunity to concoct a false case against the accused. In this respect reliance is placed on **Muhammed Siddique V State** (2019 SCMR 1048)

12. The next issue is the identity of the person who was demanding bhatta. Admittedly no PW including the complainant ever saw the face of the person(s) who were demanding bhatta even when they allegedly fired at the complainant's shop and on the complainant's car and no one ever came to the complainant's shop to demand any bhatta in person. The only pieces of evidence which the DPG and the complainant themselves admit link the appellant to the demand for bhatta is that there was no enmity between the complainant and the appellant and as such the complainant had no reason to falsely implicate the appellant, hence the delay in filing the FIR is irrelevant and there can be no question of him cooking up a false story along with the police; that the appellant made an extra judicial confession before the police; that the phone and two SIMs recovered from the appellant match with two calls found on the CDR which were made to the complainant at the time when the bhatta demands were made.

13. In our view the fact that there was no enmity between the parties is not sufficient to explain why the complainant delayed in filing the FIR for over two months especially when according to him the threats were made to his life and were continuing; it is trite law that a confession made before the police is of no evidentiary value.

14. With regard to the CDR evidence the appellant has claimed in both his S.342 statement and on oath that he has been falsely implicated in this case and that he was already in the custody of the law enforcement agencies when these bhatta calls were made and has produced one DW to support his case. Whether this is true or not is uncertain however what cannot be categorically proved without a voice recording is that it was the appellant, as opposed to some one else who could have had access to the appellant's phone, who made such bhatta calls to the complainant. In this respect, although it was a case of kidnapping for ransom, as opposed to bhatta demands reliance is placed on the case of **Azeem Khan V State** (2016 SCMR 274). Even in his own evidence the complainant states that he has a bad memory and cannot remember from which phone numbers the bhatta calls were made. ↵

15. Furthermore, when we consider the case of the prosecution in a holistic manner it does not appeal to reason or natural human conduct. For example, despite the bhatta demands being made over a period of two months it seems unbelievable that the appellant was arrested within 5 hours of the FIR finally being lodged based on spy information. Even then, at the time of his arrest the appellant informed the police that he is waiting for his potential accomplices yet the police instead of waiting to round up the whole gang simply arrest the appellant and leave the place of his arrest without waiting to either interrogate or arrest the others. In this respect reliance is placed on **Fayyaz Ahmed V State** (2017 SCMR 2026)

16. Furthermore, since no pistol has been recovered the recovery of empties from the shots which were allegedly fired outside the shop are of no relevance in this case without even considering the aspect that there was no evidence that these empties were kept in safe custody. Likewise the car of the complainant was not inspected for bullet marks so again this aspect of the case is of no relevance. It is also surprising that despite this two month period of intense threats that no bhatta was actually paid. The injuries caused to the complainant's son are not relevant as according to the evidence these occurred when he fell off his motorbike and had nothing to do with the appellant.

17. Based on the above discussion we are of the view that it has not been proven that any demand for bhatta was actually made from the complainant and that even if such a demand was made from the complainant it has not been proved by the prosecution beyond a reasonable doubt that the appellant made the demand for bhatta.

18. Under these circumstances by extending the benefit of the doubt to the appellant we acquit the appellant of the charge who shall be released from custody unless he is wanted in any other custody case.

19. The appeal is disposed of in the above terms.