

**IN THE HIGH COURT OF SINDH, CIRCUIT COURT, LARKANA**

*Present:*

**Mr. Justice Khadim Hussain M. Shaikh  
Mr. Justice Amjad Ali Sahito**

**Criminal Appeal No.D-27 of 2014**

Appellants : 1. Ghulam Sarwar son of Mehmood  
2. Rafique alias Muhammad Hanif son of  
Noor Muhammad alias Mir Muhammad.  
Through Mr. Athar Abbas Solangi,  
Advocate.

Complainant : Imtiaz Ali son of Ghulam Mustafa Tunio  
Through Mr. Ashfaque Hussain Abro,  
Advocate

State : Through Mr. Khadim Hussain Khooharo,  
Additional Prosecutor General.

Date of hearing: 15.05.2018 and 22.05.2018

Date of decision : 01.08.2018

**J U D G M E N T**

**AMJAD ALI SAHITO, J**-- The above named appellants were tried by learned Judge Anti-Terrorism Court, Larkana, in Case No.26 of 2011, Re. St. Vs. Ghulam Sarwar and another, for offence punishable U/S. 365-A, 324, 34, P.P.C r/w S-7 (e) Anti-Terrorism Act 1997, arisen out of Crime No.275 of 2011, registered with Police Station, Kamber, whereby appellants Ghulam Sarwar s/o Mehmood & Rafique alias Muhammad Haneef son of Noor Muhammad alias Mir Muhammad were convicted and sentenced as follows:

- a) Accused Ghulam Sarwar and Rafique @ Muhammad Haneef were convicted for an offence punishable U/S 365-A r/w S-34, P.P.C. and sentenced to suffer imprisonment for life, and the property of both accused is ordered to be forfeited to the Government.

- b) Accused Ghullam Sarwar and Rafique @ Muhammad Haneef were also convicted for an offence punishable U/S 7 (e) of Anti-Terrorism Act 1997, and sentenced to suffer imprisonment for life, and ordered to pay fine of Rs.1,00,000/- each (one lac each) and in case of default of payment of fine they shall suffer imprisonment for a period of R.I for one year more.
- c) Accused Ghullam Sarwar and Rafique @ Muhammad Haneef were convicted and sentenced for offence punishable U/S-337-F(v) r/w S-34 P.P.C, instead of S-324 P.P.C to suffer R.I for five years. They were also ordered to pay Daman of Rs.20,000/- each (twenty thousands each) to the injured Ali Hyder.
- However, all the above sentences awarded to the appellants/accused were ordered to run concurrently. The benefit of Section 382-B Cr. P.C. was also extended to them.

2. The brief facts of the prosecution case as depicted in the FIR are that on 12.09.2011 at about 1100 hours, complainant Intiaz Ali s/o Ghullam Mustafa Tunio, R/O Gharib Abad Muhalla, Kamber City, lodged his report with P.S, Kamber, stating therein that he owned Tunia Rice Mill, situated near Kamber Ghaibi Dero road. The said Rice Mill is being looked after/business by him and his brother Ali Hyder, nephew Waseem Hussain aged about 22/23 years, and Khalil both sons of Haji Mumtaz Ali Tunio, R/O Gharib Abad Muhalla, Kamber City. Ghullam Sarwar S/O Mehmood Brohi, Rafique S/O Noor Muhammad Brohi both R/O Sultan Kot, District Shikarpur, used to come with Abdul Waheed s/o Molvi Abdul Aziz Qureshi at his Rice Mill. Today he alongwith his brother Ali Hyder aged about 20 years, nephew Waseem Hussain and Khalil were present together in the office of their Rice Mill. The main door of the Rice Mill was open, when at about 10.30 A.M one light green colour Car bearing Registration No.AUU-039, came in their Rice Mill and stood near the office, from whom two armed persons namely; Ghullam Sarwar son of Mehmood Brohi, armed with Repeater Gun,

Rafique s/o Noor Muhammad Brohi, armed with Klashinkov, both R/o Sultan Kot, District Shikarpur, and on driving seat of the car Abdul Waheed s/o Molvi Abdul Aziz Qureshi, R/O Baer Sharif, Taluka Kamber, was sitting and inside wind screen of the Car Pistol was lying. The accused Ghullam Sarwar and Rafique on their arrival pointed their weapons and directed them to remain silent. The accused on show off weapons abducted his nephew Waseem Hussain and took away him. His brother Ali Hyder followed and offered resistance with the accused Rafique, on which accused Abdul Waheed Qureshi duly armed with pistol alighted from the car and fired straight shots from his pistol upon his brother Ali Hyder which hit him on his left leg above knee on thigh, hence, he while raising cry fell down. The all accused while boarding his nephew Waseem Hussain in the Car, asked them to pay ransom and got release Waseem Hussain. They due to fear of weapons remained silent and accused abducted his nephew Waseem Hussain for ransom and decamp. The complainant saw that his brother Ali Hyder, who sustained fire arm injury through and through on left thigh above ankle and blood was oozing from his injury this was also witnessed by his nephew Khalil then they arranged conveyance and through their relatives sent him for treatment to Taluka Hospital, Kamber. He informed 15 Madadgar Police, and then went to PS and lodged his report.

3. A.S.I-Aijaz Ali Gopang has registered the FIR of the complainant and started investigation of this case. He went to the hospital where he inspected the injuries of injured Ali Hyder and prepared such mashirnama of seeing injuries of injured in presence of mashirs Mumtaz Ali and Qadeer Hussain. He visited the place of

Vardat/occurrence and prepared such memo in presence of above named mashirs. On 12.09.2011, he arrested the accused Ghullam Sarwar and Rafique from the lockup of P.S, Drigh and prepared such mashirnama in presence of mashirs H.C-Habibullah and P.C-Mir Hazar Khan. On 13.09.2011, the Senior Superintendent of Police, Kamber Shahdadkot, has constituted the Joint Investigation Team. ASI-Aijaz Ali Gopang then handed over the case papers to SIP Zahid Hussain for further investigation. The Investigation Officer after completion of usual investigation submitted the report u/s 173 Cr. P.C. before the competent Court of law by showing the appellants in custody.

4. On 22.11.2011, the learned trial Court after observing all the legal formalities, framed the charge against both the accused at Exh.04 to which they pleaded not guilty and claimed trial.

5. In order to establish the accusation against both the accused, the prosecution then led its' evidence and examined (PW-01) Dr. Guru Dino at Exh.07, he produced letter of treatment issued by police at Exh.07/A, provisional medical certificate at Exh.07/B, X-ray plates at Exh.07/C, final Medicolegal Certificate at Exh.07/D, inquest report at Exh.07/E & postmortem report at Exh.07/F. (PW-02) complainant Imtiaz Ali at Exh.08, he produced FIR at Exh.08/A. (PW-03) Ali Hyder at Exh.11, (PW-04) Waseem Hussain at Exh.12, statement under section 164 Cr. P.C. at Exh.12/A, (PW-05) Mumtaz at Exh.14, he produced memo of injuries at Exh.14/A, memo of place of incident at Exh.14/B, (PW-06) Zahid Hussain at Exh.15, (PW-07) Aijaz Ali at Exh.16, carbon copy of roznamcha entry at Exh.16/A, memo of arrest of accused at Exh.16/B respectively. Thereafter the side of

prosecution was closed by learned DDPP for the State wide statement at Ex.17. Oath taken by learned Presiding Officer, he produced oath under Section 16 of ATA Exh. 18.

6. Statements of both the accused were recorded under Section 342 Cr. P.C. at Ex.19 to 20 respectively, wherein they denied the prosecution allegations leveled against them by pleading their innocence and they examined themselves on Oath in terms of Section 340(2) Cr. P.C., accused Ghullam Sarwar examined at Exh.21 & Rafique @ Muhammad Haneef at Exh.22. However, they did not produce any witness in their defense.

7. After recording the statements of both the accused persons under Section 340(2),Cr.P.C., the learned DDPP had moved an application under Section 540,Cr.P.C. praying therein for recording evidence of HC-Muhammad Ramzan & PC-Subhan Ali which is at Exh.23. Statement of (PW-08) HC Muhammad Ramzan was recorded at Ex.24, he produced photocopy of roznamcha entry No.5 at Exh.24-A, memo of arrest of accused and recovery at Exh.24-B, (PW-09) HC-Muhammad Rafique well conversant of ASI Muhammad Sharif at Exh.25, he produced attested photocopy of F.I.R No.130/2011 at Exh.25/A, that of FIR No.131/2011 at Exh.25/B. Thereafter the side of prosecution was closed by learned DDPP for the State wide statement at Ex.26.

8. Again statements of both the accused were recorded under Section 342 Cr. P.C. at Ex.27 to 28 respectively, wherein they again denied the prosecution allegations leveled against them by pleading their innocence.

9. The learned Trial Court, after hearing the counsels for the

parties and going through the material brought on record, awarded conviction and sentenced to both accused/appellants Ghulam Sarwar son of Mehmood & Rafique alias Muhammad Hanif son of Noor Muhammad alias Mir Muhammad, as stated above, vide judgment dated 12.06.2014, which the present appellants have impugned before this Court by way of filing appeal as detailed above.

10. Mr. Athar Abbas Solangi, learned counsel for the appellants, contended that the impugned judgment is against the law and facts of the case; that the present appellants are innocent and have falsely been implicated in this case by the complainant party that all the witnesses cited in the case are closely related inter-se and are hostile against the appellants; that there are several other material contradictions in the evidence of witnesses; that the complainant failed to disclose the motive of the incident when, the complainant and appellants' parties are known to each other and the complainant has disclosed the names of the appellants alongwith their parentage addresses in the FIR; that the prosecution failed to prove that how much amount was demanded as a ransom, hence demand of ransom has not been proved; that the prosecution has miserably failed to produce any criminal record against the appellant that they are habitual offenders/kidnappers; hence the Trial Court has wrongly convicted the appellants under Section 7(e) of Anti-Terrorism Act, 1997 as the case does not fall within the jurisdiction of the Anti-Terrorism Court. He lastly contended that the prosecution has miserably failed to prove the case against the present appellants and thus, according to him, under the above mentioned facts and circumstances, the appellants are entitled for their acquittal.

11. Mr. Ashfaque Hussain Abro, learned counsel for the complainant, on the other hand, argued that the appellants are named in the FIR with specific role of causing fire shot injuries to the injured Ali Hyder; that the ocular version is consistent with medical evidence; however, he admitted that nothing has been brought on the record by the prosecution to believe that how much amount was demanded by the appellants for release of abductee Wasim Hussain. On query, he has also not denied the relationship between the appellants and the complainant party.

12. Mr. Khadim Hussain Khooharo, Additional P.G. for the State, supported the arguments advanced by learned counsel for the complainant and prayed for disposal of captioned appeals in accordance with law.

13. We have heard learned counsel for the parties and have minutely perused the record with their able assistance.

14. On evaluation of the material brought on the record, it appears that the case of prosecution mainly depends upon the ocular testimony furnished by the prosecution in shape of statements of complainant (PW-02) Imtiaz Ali and eye witnesses Ali Hyder (PW-03) and Waseem Hussain (PW-04) and their evidences are corroborated by HC-Muhammad Ramzan (PW-08), Sub-Inspector Zahid Hussain (PW-06), A.S.I. Aijaz Ali (PW-07), so also supported by medical evidence of Dr. Guru Dino (PW-01) including circumstantial evidence of rest of the witnesses.

15. There can be no denial to the legally established principle of law that it is always the direct evidence which is material to decide a fact (charge). In this case, Imtiaz Ali (PW-02), who in his evidence deposed that on 12.09.2011 he alongwith PWs Ali Hyder and Waseem Hussain were present at their Rice Mill at about 10.30

A.M. when they noticed that one car bearing Registration No. AAU-039 entered into Rice Mill and saw appellants Ghulam Sarwar, Rafique Ahmad and Abdul Waheed Qureshi duly armed with their weapons abducted Waseem Hussain by saying after payment of ransom, he will be released. On resistance of PW Ali Hyder, accused Abdul Waheed Qureshi straightaway fired shot from his Pistol, which hit at his left thigh above the knee. Fortunately on the main road the above car of the main witness Waseem Ahmed was being taken away due to high speed while crossing donkey cart near the house of one Abdul Ghaffar Chandio toppled down, resulting that one accused, namely, Abdul Waheed died due to such accident and the appellants Ghulam Sarwar and Rafique @ Muhammad Hanif were arrested and the abductee Waseem Hussain was recovered. However, in his cross-examination, PW Imtiaz Ali admitted their relationship with the appellants' party. PW-3 Ali Hyder, who in his evidence supported the contention of complainant Imtiaz Ali, deposed that he alongwith the complainant and Waseem Hussain were present and saw one car bearing Registration No. AUU-039 entered into the Rice Mill wherein appellants alongwith Abdul Waheed having weapons in their hands entered into the Floor Mill and abducted Waseem Hussain in their car by directing them to pay the ransom and got him released. In cross-examination, he admitted their relationship with the appellants/accused party. PW-4 Waseem Hussain, who is a star witness of this case being abductee also supported the version of the PWs Imtiaz Ali and Ali Hyder, deposed that on eventful day viz. 12.09.2011 he alongwith his brother Khalil Ahmad, uncles Imtiaz Ali and Ali Hyder were present at Tunia Rice Mill at about 10.30 A.M, when one light green colour



car bearing registration No.AUU-039 came and stopped in front of our office. The appellants/accused used to come in their Mill. The appellants including Abdul Waheed with their respective weapons entered into the office and on show of the weapons abducted him, as such, his uncle Ali Hyder resisted, meanwhile accused Abdul Waheed Qureshi having pistol in his hand fired straight upon him, which hit his left leg and thigh above his knee, thereafter, the appellants including Abdul Waheed kidnapped him by saying to the complainant party after payment of ransom, he will be released. In cross-examination, he admitted that the appellants used to visit his elders.

16. The prosecution in order to prove the version of the eyewitnesses also examined Mumtaz as PW-5 (mashir of the case), who has produced mashirnama of injuries of PW Ali Hyder and mashirnama of place of incident. SHO Zahid Hussain, Investigation Officer, conducted the investigation. PW-7 Aijaz Ali lodged the FIR of the complainant per his verbatim. PW-8 Muhammad Ramzan in his evidence, deposed that on 12.09.2011 he was working as Head Constable at PS Drigh, on the same day he alongwith other police officials, were available at P.S. when he received wireless message from PS Kamber that three persons boarded in a car are taking away one person after causing injury to a person, in the green colour car. After receipt of such message, they left police station and reached near the Village Abdul Sattar Ghaibani Chandio, and saw that a car hit to a donkey cart and fell down on the side of road and found four persons lying injured in the car. On inquiry, they disclosed their names as Ghulam Sarwar Brohi having a KK alongwith magazine containing twenty five live bullets, second disclosed his name as Rafique @ Muhammad

Hanif, who was armed with pistol and seven live bullets and third one disclosed his name as Abdul Waheed s/o Moulvi Abdul Aziz, **who later on expired on the spot**, fourth one disclosed his name as Waseem Hussain, stated that he is an abductee. ASI Sharif Sandilo prepared the mashirnama of arrest and recovery of abductee and lodged the FIR against them.

17. The direct evidence, as detailed above of complainant Imtiaz Ali and eyewitnesses Ali Hyder and Waseem Hussain and duly supported by other witnesses, undoubtedly established. The availability of the eyewitnesses at the venue of occurrence at the relevant time, which in the circumstances, is quite natural and they have categorically stuck with their claims from beginning that they all were present at Tunia Rice Mill at Ghaibi Dero Road when the appellants entered into the Mill and kidnapped Waseem Hussain and so also injured Ali Hyder and that has been fully supported by the abductee. These witnesses legally cannot be termed to be the interested witnesses rather they would fall within the category of natural witnesses. We would not hesitate to hold that the evidence of these witnesses carries worth because first part i.e. their presence at the spot in support of their claims to have witnessed the incident has been established. Needless to mention that in absence of first part such a witness would never qualify the requirement necessary for direct evidence as required by Article-71 of Qanoon-e-Shahadat Order, 1984. In the instant matter, all these witnesses has explained the date, time and place of occurrence as well as each and every event of occurrence in a clear cut manner. Besides this, these eyewitnesses including abductee have also explained the mode and manner of the occurrence qua the capability of the appellants. Although, they were cross

examined by the defense at length wherein the learned counsel for the defense asked multiple questions to shatter their confidence and presence at the scene of occurrence, but he could not be able to extract anything from them. In so far the relation of eye witnesses with the complainant is concerned, an interested witness is not one, who is relative or friend, but is one, who has motive to falsely implicate an accused. The reliance in this context is placed upon the case of **Zulfiqar Ahmed and others Vs. The State (2011 SCMR 492)**, wherein the Hon'ble Supreme Court of Pakistan has held that:

*“..... it is well settled by now that merely on the ground of inter se relationship the statement of a witness cannot be brushed aside. The concept of “interested witness” was discussed elaborately in case titled Iqbal alias Bala V. The State (1994 SCMR 1) and it was held that friendship or relationship with the deceased will not be sufficient to discredit a witness particularly when there is no motive to falsely involve the accused.”*

Thus, mere relations of these eyewitnesses with each other alone would not label them interested. In the case of capital punishment, the accused would not stand absolved by making a mere allegation of false implication. In the instant matter, abductee Waseem Hussain is a star witness and PWs Ali Hyder is an injured eyewitness and Imtiaz Ali is eyewitness and complainant in this case, hence it does not appear to be believable that all these eyewitnesses could substitute the real culprits with innocent person when undeniably the time of incident is daylight incident.

18. The minor discrepancies in statements of the witnesses are not enough to demolish the case of prosecution because these discrepancies always occurs on account of lapse of time which can be ignored, more particularly in the cases like case one have

discrepancy(ies) on the alleged minor acquittal of the accused of such a case cannot justify, however, the defence has to bring on record the contradictions and discrepancies of a nature to cut at the root of the prosecution towards incident and manner of incident. It is settled principle that the variations in the statements of witnesses, which are neither material nor serious enough to affect the case of the prosecution adversely, are to be ignored by the court. It is also a settled principle that statements of the witnesses have to be read as a whole and the court should not pick up a sentence in isolation from the entire statement and ignoring its proper reference, using the same against or in favour of a party. The contradictions have to be material and substantial so as to adversely affect the case of prosecution.

19. Furthermore, from the evidence of the eyewitnesses it reveals that accused Abdul Waheed having pistol in his hand directly fired upon Ali Hyder which, hit him on left leg thigh above knee and who fell down. The ocular account of above said eye witnesses is substantiated with the medical evidence of Medical Officer Dr. Guru Dino who examined injured Ali Hyder and found lacerated punctured wound measuring about 2 CM x 2 CM length and breadth with inverted margins, charring present over lateral side of left thigh region through and through with outward margins. The injury was declared as Jurh-Ghayr-Jaifah-Hashimah. Thus, from the above evidence it is suffice to say that the abductee Waseem Hussain was abducted by the appellants alongwith late Abdul Waheed, who was accompanied with them at the time of abduction, and

20. The complainant failed to disclose the  **motive** of the incident

when he has named the accused in the FIR and evidence alongwith their parentage and residential addresses, if there was any motive of abduction for ransom of abductee Waseem Hussain then the Investigation Officer was obliged to collect past antecedent of the accused/appellants to believe that they belonged to a gang dacoits/kidnappers. In the case of **Azeem Khan and another vs. Mujahid Khan & others** 2016 SCMR 274, the Hon'ble Supreme Court of Pakistan has held that:

*“29. The plea of the learned ASC for the complainant and the learned Additional Prosecutor General, Punjab that because the complainant party was having no enmity to falsely implicate the appellants in such a heinous crime thus, the evidence adduced shall be believed, is entirely misconceived one. It is a cardinal principle of justice and law that only **the intrinsic worth and probative value of the evidence would play a decisive role in determining the guilt or innocence of an accused person. Even evidence of uninterested witness, not inimical to the accused may be corrupted deliberately while evidence of inimical witness, if found consistent with the other evidence corroborating it, may be relied upon.** Reliance in this regard may be placed on the case of Waqar Zaheer v. The State (PLD 1991 SC-447).*

21. Complainant PW-2 Imtiaz Ali in his evidence deposed that

***“I know accused Rafique and Sarwar about two/three years prior to the incident of this case. The accused Rafique and Ghullam Sarwar visit our Rice Mill, therefore I know them. The only purpose of the visit of accused Ghullam Sarwar and Rafique was to see me. Voluntarily says that the deceased accused Abdul Waheed was son of Moulvi Abdul Aziz Qureshi of Ber Sharif and I have religious affiliation with him, therefore the accused Rafique and Sarwar used to come with said deceased accused Abdul Waheed. I do not remember how many times the accused Rafique and Sarwar meet with me in said two/three years prior to the incident of this case.”***

Furthermore, complainant Imtiaz Ali PW-02 in his evidence deposed that “the accused asked us that they are kidnapping Waseem and we should arrange and pay ransom amount for release of Waseem” such evidence was adduced by PWs Ali Hyder

and abductee Waseem Hussain but they all failed to disclose that how much amount was demanded by the appellants for the release of abductee Waseem Hussain.

On the other hand, PW-8 HC Muhammad Ramzan in his evidence deposed that

***“We enquired from fourth person about his name etc., who disclosed his name to be Waseem Hussain, and further disclosed that he is abductee, he also disclosed that he was abducted by these injured persons.”***

Therefore, the prosecution has failed to prove the motive (abduction for ransom) hence, **real cause of occurrence remained shrouded in mystery**. In this context, reliance is placed on the case of **Mst. Nazia Anwar V. The State (2018 SCMR 911)** wherein the Hon’ble Supreme Court has held that:

***“4..... I have, thus entertained no manner of doubt that the real cause of occurrence was something different which had been completely suppressed by both the parties to the case and that real cause of occurrence had remain shrouded in mystery.***

22. The conviction under Section 7(e) of ATA, 1997, being legally not maintainable, on two counts i.e. ‘in absence of ransom mere established kidnapping will bring the offence out of the ambit of Anti-Terrorism Act and on consideration of the legal position that when in independent sections sentence is provided then punishment under Section 7(e) of ATA, 1997 is not maintainable unless offence is otherwise established to be an act of terrorism within meaning of Section 6 of the Act. In presence of such doubts, it would not be safe to award punishment for life imprisonment to the appellants. In the present circumstances, the case of the appellants do not fall within the ambit of Anti-Terrorism Act and fall only within the purview of Section 365 P.P.C. In this context, reliance is placed on the case of **Orangzaib V. The State (2018 SCMR 391)** wherein the Hon’ble Supreme Court has held that:

***“3. .... That as far as the offence under section 365-A, PPC is concerned it is admitted at all hands that there was no evidence led by the prosecution showing that the appellant was involved in the act of abduction of the alleged abductee. It is also not disputed that no evidence had been brought by the prosecution on the record establishing that the appellant had demanded ransom for release of all alleged abductee. Some evidence brought by the prosecution on the record regarding making of telephone calls about ransom had been discarded by the High Court after recording cogent reasons in that regard.”***

23. We are of the humble view that there is no criminal history of the appellants, admittedly allegation of ransom is not substantiated by the prosecution, hence, in absence whereof (payment of ransom) the proved kidnapping even will bring the case one within of Section 365 P.P.C. which provides punishment as:-

**“Shall be punish with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine”**

24. Considering the facts and circumstances discussed above, the conviction and sentence awarded to the appellants Ghulam Sarwar and Rafique alias Muhammad Hanif for life imprisonment and fine of Rs.100,000/- each (Rupees One Lac each) for an offence under Section 7(e) of Anti-Terrorism Act, 1997, by the trial Court are set aside and the conviction and sentenced awarded to appellants Ghulam Sarwar and Rafique alias Muhammad Hanif for offence under sections 365-A, PPC read with Section 34 PPC are altered and converted into conviction for offence under section 365 read with Section 34 PPC and they are sentenced for the said offence to suffer rigorous imprisonment for five years with fine of Rs.50,000/- each (Rupees Fifty Thousand) each and in case of failure of payment of fine, to suffer S. Imprisonment for six months more and whereas, the conviction and sentence awarded to the appellants under Section 337-F (v) read with Section 34 PPC, R.I.

for five years and to pay Daman of Rs.20,000/- each (twenty thousand each) to the injured Ali Hyder by the trial Court, are maintained. All the aforesaid sentences awarded to the appellants shall run concurrently. The appellants are also extended the benefit of Section 382-B Cr. P.C. The instant appeal filed by the appellants is dismissed with the above modifications.

JUDGE

JUDGE

Karachi  
Dated 01-07-2018.