

IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD
Criminal Jail Appeal No.D-35 of 2015
Cr. Appeal No.D- 36 of 2015

Before:

Mr. Justice Muhammad Iqbal Mahar

Mr. Justice Irshad Ali Shah

Appellants : (1) Diloo son of Mohammad
(2) Asif son of Dilawar alias Diloo

Through Mr.Abdul Hameed Bajwa, Advocate

State : Ms. Sana Memon, A.P.G

Date of hearing : **07.08.2019**

Date of decision : **07.08.2019**

J U D G M E N T

IRSHAD ALI SHAH, J. The facts in brief necessary for disposal of instant appeals are that the appellants together with the rest of the culprits allegedly by committing trespass in the house of complainant Dr. Mst. Gulshad after keeping her and her witnesses under fear of death not only committed robbery but take away her husband Dr. Nasarullah for ransom by resorting to terrorism for that they were booked and challaned in the present case.

2. The appellants and co-accused Mukhtiar were charged for the above offence. It is jumble which is against the mandate contained by section 221 of the Cr.P.C which requires that the charge for every offence should be distinct and different. Be that as it may, at trial the

appellants and co-accused Mukhtiar (since acquitted) did not plead guilty to the said charge and prosecution to prove it, examined PW-1 ASI Siddique Dal (Ex.14), he produced FIR of the present case, TC Allahdino (Ex.15), PW-3 SIP / SIO Muhammad Ismail (Ex.16), he produced Roznamcha entry, memos of arrest of appellants Dilloo and Asif, PW-4 mashir PC Mehfooz (Ex.17), PW-5 SIO/SIP Muhammad Sharif (Ex.18), he produced memos of place of incident, identification of suspected culprits and foot tracing, PW-6 Dr. Nasarullah (Ex.19), PW-7 SIO/Inspector Akram (Ex.23), PW-7 complainant Dr. Mst. Gulshad (Ex.24), PW-8 mashir Abdul Ghafoor (Ex.25), PW-9 Masroor (Ex.26), PW-10 SIO / SIP Ghulam Fareed (Ex.29), he produced certain documents and prosecution then closed its side.

3. The appellants and co-accused Mukhtiar (since acquitted) in their statements recorded under Section 342 Cr.P.C denied the prosecution allegation by pleading innocence. They did not examine themselves on oath or anyone in their defence.

4. On conclusion of the trial co-accused Mukhtiar was acquitted while appellants were found guilty for offence of terrorism as defined under Section 6 of Anti Terrorism Act, 1997 and consequently were convicted and sentenced under Section 7(e) of Anti Terrorism Act, 1997 to undergo imprisonment for life with benefit of section 382-B Cr.P.C. Additionally appellant Dilloo was also found guilty for an

offence punishable under Section 23(a) of Sindh Arms Act, 2013 for being in possession of unlicensed 30 bore pistol and was convicted and sentenced to undergo R.I for 10 years with fine of Rs.50,000/- and in case of his failure to make payment of fine to undergo imprisonment for six months. The conviction and sentence on both counts however were ordered to run concurrently vide judgment dated 19.03.2015 passed by learned Judge, Anti Terrorism Court Hyderabad at Hyderabad, which is impugned by the appellants before this Court by way of captioned appeals.

5. It is contended by learned counsel for the appellants that the appellants being innocent have been involved in this case falsely by the police, there is unexplained delay of two days in lodgment of FIR; the names of the appellants are not taking place in FIR, the appellants have never been subjected to identification parade by police through the complainant and her witnesses during course of investigation; the appellants have been convicted and sentenced by learned trial court, on the basis of evidence which is disbelieved in respect of co-accused Mukhtiar. By contending so he sought for acquittal of the appellants.

6. Learned A.P.G for the State by supporting the impugned judgment has sought for dismissal of both appeals.

7. We have considered the above arguments and perused the record.

8. Admittedly, neither the names nor the description of the appellants are disclosed in FIR though it is lodged with unexplained and un-plausible delay of two days, which appears to be significant. The appellants on arrest have never been subjected to identification parade through the complainant or her witnesses without any lawful justification, such omission on part of police could not be overlooked. PW- Dr. Nasarullah did not implicate any of the accused before the Court excepting appellant Asif. The identity of appellant Asif during course of examination by a witness could not be made enough to connect him with the commission of incident beyond doubt most particularly when the complainant during course of her examination did not implicate any of the accused in commission of incident by stating that the accused present in court are not amongst the culprits. No evidence is brought on record by the prosecution which may suggest that any ransom was paid for release of abductee PW Dr. Nasarullah to anyone. PW mashir Abdul Ghafoor was declared hostile by the prosecution on account of his failure to support the case of prosecution. His evidence could not be lost sight of. As per SIO /SIP Muhammad Ismail memos of arrest were written by his Naib Mohrar / Munshi, such Naib Mohrar / Munshi has not been

examined by the prosecution for no obvious reason. His non examination could be resolved in favour of the appellants. The appellant Dilloo could hardly be connected with recovery un-licensed pistol simply for the reason that such recovery has been effected on 11th day of his arrest that too in presence of no independent witness. No finding either of the conviction or acquittal has been recorded against the appellants, for having abducted PW Dr. Nasarullah for ransom, such omission on part of learned trial court could not be overlooked. Surprisingly, the appellants have been convicted on the basis of evidence which has been disbelieved by learned trial court while recording acquittal of co-accused Mukhtiar. His acquittal apparently has not been impugned by the prosecution or anyone else before this court.

9. In case of **Sardar Bibi and others vs. Munir Ahmed and others (2017 SCMR-344)**, it was held by the Hon'ble Court that;

“When the eye-witnesses produced by the prosecution were disbelieved to the extent of one accused person attributed effective role, then the said eye-witnesses could not be relied upon for the purpose of convicting another accused person attributed a similar role without availability of independent corroboration to the extent of such other accused”.

10. Based upon above discussion the conviction and sentence recorded against the appellants by way of impugned judgment could not be sustained, it is set aside. Consequently, the

appellants are acquitted of the offence for which they were charged, tried and convicted by learned trial Court. The appellants shall be released forthwith in the present case.

11. The instant appeals are disposed of accordingly.

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