

Judgment Sheet
**IN THE HIGH COURT OF SINDH,
CIRCUIT COURT, HYDERABAD**

Cr. Jail Appeal No. D- 115 of 2015

BEFORE :

Mr. Justice Muhammad Shafi Siddiqui
Mr. Justice Irshad Ali Shah

Appellant : Vijay Kumar and others
through Syed Zeeshan Shah, Advocate

Complainant : through Mrs. Razia Ali Zaman, Advocate

Respondent : The State through. Mrs. Rameshan Oad, A.P.G.

Date of Hearing
& Decision : 24.11.2020

J U D G M E N T

MUHAMMAD SHAFI SIDDIQUI, J.- The appellants being aggrieved of the Judgment dated 5.12.2015 passed by learned Judge ATC, Hyderabad whereby they have been convicted and sentenced in the following terms, have preferred this appeal on the common facts and grounds.

“ Accused Vijay and Abbas Mallah are to be taken as having acted with common intention and preconcert are convicted for an offence falling under Section 62(a) ATA to life imprisonment and fine of Rs.2 lac each and one year simple imprisonment more in case of default in payment of fine and 10 years R.I and fine of Rs.1 lac and 6 months more in case of default in payment of fine under Section 377 PPC and five years R.I and fine of Rs.50,000 for offence falling under Section 201 PPC and 3 months S.I more in case of default in payment of fine. All the sentences are to run together and accused shall be entitled to benefit of Section 382 Cr.P.C.”

2. Brief facts, as narrated in the FIR, by complainant Gopal Charan residing in the addressed disclosed in the FIR are that he was an employ of Municipal Committee Talhar having four daughters and three sons out of whom Vishal, aged 6/7, was the eldest, studying in Class-I. The incident, as reported by him, was of 20.04.2013 when he had gone to Hyderabad for some work and returned in the evening. The inmates of the house informed

him that Vishal has though returned from the school but after taking meal at 5:00 p.m., left the house and has not returned. The complainant disclosed this to his brother Tillo and neighbour Mala Ram son of Heranand Meghwar and then they all searched for Vishal whole night in the streets, roads and isolated places but had no clue. On the following day i.e. 21.04.2013 early in the morning, Tejomal son of Govindo Charan, Mohan son of Hero Charan in presence of his brother Tillo and Mala Ram informed the complainant that Vijay Kumar (who was driving Rickshaw), and Abbas Mallah have taken Vishal with them in the Rickshaw towards northern direction. On hearing this, they took Vijay Kumar along with these witnesses and others to Mandir and made inquiries from him, who in presence of all disclosed that he and Abbas Mallah have abducted Vishal for ransom in a Rickshaw and that they have made an attempt to hide him at different places but could not find a suitable place whereas Vishal kept on crying, therefore, they beat him and put him in a big gunny bag and closed it with a 'dory' (rope) on top and when they went ahead and checked Vishal he was found dead and therefore they threw his dead body in Channel Wah from its Mori. On coming of this fact from Vijay Kumar, the complainant and his associates went on to search Channel Wah. They were informed by ASI Ghulam Shabbir that Badin police had recovered a dead body of a child in closed 'bori' (bag) from Kazi Wah and that they should go there and identify the body. The complainant with ASI Ghulam Shabbir then went to Civil Hospital Badin and identified dead body to be of Vishal.

3. After FIR, ASI Ghulam Rasool completed the paper work and got the postmortem of Vishal and then the complainant brought the dead body of Vishal to Talhar and got him buried. The complainant then appeared at police station on 23.04.2013 at 1630 hours and lodged FIR to the effect that Vijay Kumar and Abbas Mallah with common intention have abducted his son Vishal for ransom and after beating and closing him in a gunny bag have killed him and to hide their guilt they have thrown his dead body in Channel Wah.

4. The police investigated the case, arrested Vijay Kumar and Abbas Mallah. The challan was submitted and the accused persons were supplied documents in terms of Section 265 Cr.P.C. The Presiding Officer after taking oath framed the charge against the accused for the offences under section 6(2)(a) punishable under section 7(a) of Anti-Terrorism Act, 1997 read with

Section 302, 201 and 34 PPC to which both the accused person(s) pleaded not guilty.

5. The DDPP thereafter moved an application under section 227 Cr.P.C. for amending the charge with sodomy (337 PPC) in the light of chemical report, which revealed that human sperm and blood was found/detected the ano-rectal of dead body of the deceased. The Court after hearing both the parties allowed the application and consequently the charge was amended and reframed for the aforesaid offences to which both the accused pleaded not guilty.

6. The prosecution in order to prove its case examined (i) PW Tilo Charan as Ex.15 and (ii) PW Maloo Meghwar as Ex.16, (iii) Complainant Gopal Charan was thereafter examined as Ex.17, (iv) PW Mohan Charan was examined as Ex.18, (v) PW Tejo Charan was examined as Ex.19, (vi) PC Muhammad Bux, who received the dead body of Vishal and handed over it to the complainant along with sealed carton and sealed bottle from Dr. Tariq Aziz on 25.04.2013, was examined as Ex.20, (vii) HC Ashoo Khan Lashari who took the accused to Karachi was examined as Ex.21 and (viii) mashir Muhammad Ayoub of mashirnama of dead body, danishnama, place of wardat and arrest of accused, mashirnama of inspection of place from where dead body was thrown, mashirnama of pointation of place of wardat by accused, mashirnama of property received from Civil Hospital Badin and mashirnama of place from where dead body was recovered as Ex.22, (ix) ASI Ghulam Shabbir was examined as 23, (x) PW Assistant Mukhtiarkar Badin Noor Nabi as Ex.24, (xi) PW ASI Muhammad Yasin was examined as Ex.25,(xii) PC Fazil Ali Mendro as Ex.26/A and (xiii) PW Abdul Razzak Tapedar of Tapoo Talhar as Ex.28.

7. Learned DDPP the State then gave up PW PC Gulab as well as PW Civil Judge Talib Abbasi as Ex.P/27 and P/29 respectively. Lastly, I/O Muhammad Asghar who conducted the investigation was examined as Ex.30. Thereafter, statements of accused persons were recorded under Section 342 Cr.P.C. as Ex.33 and 34 wherein they denied the allegations.

8. The learned Presiding Officer framed following points of determination:-

- (1) Whether accused Vejay Kumar and Abbas Mallah on 20.4.13 at about 17.00 hours and in furtherance of their common intention kidnapped Vishal Charan aged 6/7 years from outside of house of Complainant situated at main Talhar in order to obtain ransom from the Complainant and took the body in a rickshaw in presence of PW Tejomal and Mohan and thereafter demanded ransom money from the Complainant and committed carnal intercourse against the order of nature and putting him in a gooni bag tied its mouth and with spurn rope / dori and threw dead body in the canal?
- (2) Whether act of the accused person committed terrorism and created sense of fear, insecurity amongst the Muhalla people and the Complainant and their act is a terrorist act?
- (3) What conviction, if any, should be awarded to the accused?

9. Let us now examine the prosecution witnesses' statements in order to scrutinize the judgment of the trial Court to the effect whether conviction recorded against the appellant vide impugned judgment is in consonance with the evidence available on record.

10. PW-1 Tilo (Ex.15) who recorded his examination-in-chief is brother of complainant Gopal. He deposed that Gopal had gone to Hyderabad with some work and he was informed in the evening by inmates of his house about victim's missing. He was informed of such fact by complainant himself. They claimed to have searched but all in vain. Tejo and Mohan came early in the morning and disclosed that on last evening (day of incident) they had seen Vijay and Abbas Mallah taking Vishal in the Rickshaw. He repeated the story as mentioned in the FIR. In the cross-examination PW Tilo disclosed that accused Abbas was driving his own separate Rickshaw and Vijay Kumar was driving his own separate Rickshaw but he did not know about their (Rickshaws') registration numbers. This is first major contradiction as compared to the contents of the FIR, which disclosed only one Rickshaw at the place of incident. In the cross-examination he disclosed nothing about the caretaker of the 'Mandir'. He also stated in the cross-examination that whenever people visit 'Mandir' it normally remain locked and it is only unlocked when people visit the 'Mandir' for Puja. These facts were allegedly disclosed to him by P.Ws Mohan and Tejo who came to them early in the morning hence it is only hearsay.

11. Similarly PW-2 Maloo (Ex.16) stated in his examination-in-chief that his wife disclosed to him that the son of Gopal namely Wassal (Vishal) was missing and when he came out of his house, he found Taboo, Charan and other neighbors and when he inquired, they confirmed that Vishal was missing. He further stated in his examination-in-chief that on the next morning i.e. 21.04.2013 at about 7.00 a.m. Teejo son of Gomdo and Mohan son of Veero informed him that they had seen Vishal sitting in the Rickshaw and he was driven out towards northern direction at 6.00 p.m.

12. The evidence of PW-3 (Ex.17) complainant Gopal could be sum up as a hear-say. He was also cross examined in which he admitted that on the alleged confession at `Mandir` by Vijay they did not lodge the FIR. In the cross-examination he further admitted that Vishal was his adopted son as he had four daughters earlier and consequently he adopted Vishal. In the cross-examination to a query of Mr. Nasiruddin Abro, counsel for accused Abbas Mallah, this witness stated that when they identified the dead body it was with cloths and that since he was not in proper senses he could not gather whether the cloths were stained with blood or otherwise.

13. As per evidence of Pw-5 Tejo Ex.19, the complainant is his sister's son. Tejo was stated to be accompanying Mohan and stated to have left around 6:00 or 6:15 a.m. whereas the time reported by Mohan in his deposition was 6:00 or 6:50 whereas the incident took place in the evening of 20.04.2013. PW Tejo stated that they left early in the morning on 24.04.2013 and returned on next day early in the morning around 6:30 to 7:00 a.m. when they saw people around the house of the complainant. The evidence of Tejo is similar to that of Mohan except the fact that he deposed in cross the time when they returned from the job at 5:00 or 5:30 p.m. This witness reported the time of incident as 6 or 6:15 a.m whereas incident took place in the evening when victim was found missing.

14. PW-8 Mohan examined as Ex. 18 deposed that he is mason by profession and in terms of his normal schedule he goes for mason work at 7:00 or 7:30 a.m. and returned at 7:00 or 7:30 p.m. On the day of incident he had to go out for labour work at 6:00 or 6:50 with a view to go to village Rajo Khanani to see his aunt. They left village Rajo Khanani at 6:00 a.m. and reached at Talhar that morning at 7:00 a.m.

15. The outcome of deposition of Mohan is such that they left early in the morning on 20.04.2013 and came back a day after i.e. 21.04.2013. We, therefore, do not consider evidence of this witness as confidence inspiring as according to his deposition/cross-examination at around 5 p.m. when Vishal left the house he (PW Mohan) was not available at the place of incident at the crucial time.

16. PW-11 Muhammad Yasin Ex.25 who was an ASI at Training Center Shahdadpur deposed that on 22.04.2013 while he was working as ASI at police station Badin left the station around 1710 hours under Roznamcha Entry No.24 along with PC Fazal Ali, PC Gulab and DPC Zainul Abdin Shah for patrolling. They received information that a dead body was lying contained in a `bori` at Qazia Wah near Hashim Hingoro Hotel. They reached there at around 2010 hours. The `bori` was taken out from Qazia Wah whose upper portion was tied up with a dori of top "Lato". When the bori was opened they found a dead body of a boy aged around 6 or 7 years wearing light blue Qameez and Shalwar having brown colour `Nara` having marks of injury on his left leg. Mashirnama was prepared as Ex.25/A and it was stated to have his signature, which was produced. It was deposed that they had the information about the missing child from Talhar police station. They contacted Talhar police station where duty officer ASI Ghulam Shabbir Khoso was informed about the recovery of the dead body. It was kept at mortuary room of the hospital. ASI Ghulam Shabbir and father of deceased Gopal came to the mortuary room and identified the dead body. Further procedure was then conducted.

17. What was deposed by this witness in the examination-in-chief was that a dead body was lying contained in a `bori` whereas when witness Muhammad Yasin reached the site the body was found in a bori tied from the top is again not confidence inspiring; how and who identified it to be the dead body lying inside bori, which is tied and lying in Wah, is a missing puzzle. Did someone opened it and closed it again? In the cross-examination he (PW Yasin) deposed that he received the information on his own mobile phone. He further deposed that the police officer who had given him the information, knew that dead body was in the `bori` as only then he could have given him such information. He further stated that the bori was found stuck by the side of the pillar and in the bushes, (which is not mentioned in the mashirnama). The `bori` was taken out from Qazia Wah with the

assistance of people available which were 3/4 or five in number. Incidentally none of them was cited as a witness. While being cross examined by defence counsel Mr. Sher Muhammad for accused Abbas, he stated that it is not correct that the `bori` in which dead body was lying was already opened. He deposed that the `bori` was lying on the backside of Hashim Mangrio Hotel in the Wah, which was taken by his "Sahib" i.e. Muhammad Yasin ASI.

18. PW-14 Muhammad Asghar Ex.30 who registered FIR falling under offence under ATA was his first FIR after having experience of investigation for more than 20 years. He further deposed that the incident took place on 20.04.2013 and the FIR was lodged on 23.04.2013. There was no NC report recorded in roznamcha during this intervening period. He deposed that there is no witness available about the allegation of sodomy and death by throttling of the deceased. He also stated this fact to be correct that prosecution witnesses of this case have not seen the accused killing/abducting the deceased and throwing his dead body in Channal Wah. The dead body was first recovered and then FIR was registered.

19. PW-15 Dr. Ashfaq Ahmed was examined as Ex.31. He was working with Dr. Tariq Aziz as his colleague in Civil Hospital Badin and produced the postmortem report as Ex.31/A, being conversant with the signatures of late Dr. Tariq Aziz. The postmortem report dated 24.04.2013 produced by Dr. Ashfaq Ahmed in the column of wounds, bruises position, size, nature states "(1) *wound sloughing of flesh form right leg from thigh (mid) to ankle;* and (2) *examination of Anas: Red and swollen area (abrasion on the left anterolateral side of Anas).*

20. The Chemical Examiner's report dated 13.05.2013 (E.30/G) which examined one sealed white cloth big parcel (Gatta) and one sealed bottle found following result:

"Human sperm detected into the above mentioned article No.(6) (i.e. Three Anal swab);

Human Sperm not detected into the above mentioned article No.(1)&(2) (i.e. light greenish blue coloured shalwar and qameez of the same colour);

Human Blood detected into the above mentioned article Nos.(1)to(6) [i.e. shalwar, qameez, small dori (piece of rope), jharian (Kekar Thorn's), bori (jute) and three Anal swab]

The postmortem report available as Ex.31/A also disclosed in the column of wounds, bruises position, size, nature as under:

“(1) wound sloughing of flesh form right leg from thigh (mid) to ankle;

(2) examination of Anas: Red and swollen area (abrasion on the left anterolateral side of Anas)

In column 13 of postmortem report titled as “Organs of generation”; it is disclosed as “circumcised penis and swollen scrotum”.

21. The remarks of medical officer (though not examined) in the postmortem report were that from external and internal examination of dead body of Vishal son of Gopal Charan, in his opinion the death occurred due to neurogenic shock as a result of injuries No.1 and 2, which were sufficient to cause death and all those injuries, individually as well as collectively were antemortem in nature.

22. When the cause of death was found to be the incident on account of neurogenic shock of injuries No.1 and 2 i.e. wounds sloughing of flesh form right leg from thigh (mid) to ankle and abrasion on the left anterolateral side of Anus, it was inevitable for the prosecution to have obtained the sperm report of the sample found on the body and of the accused. It cannot be confidently said that the victim Vishal was subjected to humiliation of sodomy by the accused Vijay Kumar and Abbas Mallah since no such report of sperm test is available.

23. Furthermore, there is no eye witness of the incident as to how the victim was beaten and how he was kept in a gunny bag and thrown in Channel Wah. The incident allegedly took place on 20.04.2013 whereas the FIR was lodged on 23.04.2013. What happened in between is a mystery as even the lost seen incident was not corroborated to award life imprisonment. Even the alleged motive of ransom is not confidence inspiring as the Complainant’s family was a poor one.

24. The trial Court determined point No.1 on the basis of mitigating circumstances and the act of terrorism was also found in terms of point No.2. The trial Court based his findings/judgment on circumstantial evidence and the mitigating circumstances. There is no eye witness at all and even the story of the prosecution is not confidence inspiring as the boy who was allegedly abducted belongs to a poor class and it does not inspire confidence

that somebody could abduct a child who belongs to a family from whom there are remote chances of any financial benefit.

25. The conclusion, which could be drawn by the above discussion, would be that the prosecution has not been able to prove its case against the appellants beyond shadow of doubt and to such benefit they are entitled.

26. In view of the facts and reason discussed above, the conviction and sentence recorded against the appellants by way of impugned Judgment are set-aside; consequently, the appellant are acquitted of the offence for which they have been charged, tried and convicted by learned trial court, he shall released forthwith in the subject case, if not required in any other custody case.

27. Above are the reasons of short order dated 24.11.2020 whereby the instant Cr. Jail Appeal was allowed.

JUDGE

JUDGE