

THE HIGH COURT OF SINDH AT KARACHI

Special Criminal Anti-Terrorism Acquittal Appeal No.44 of 2009

Present:

Mr. Justice Nazar Akbar
Mr. Justice Zulfiqar Ahmad Khan

Appellant: The State, through Mr. Muhammad Iqbal Awan, Deputy Prosecutor General Sindh.

Respondents 1 & 2: Nemo.

Respondents 3 & 4: Muhammad Wajid son of Noor Muhammad and Mehboob Illahi son of Abdul Hameed through Mr. Ashfaq Rafiq Janjua, Advocate.

Date of hearing: **02.11.2020**

Date of announcement: **15.06.2021**

J U D G M E N T

NAZAR AKBAR, J.-- Respondents/accused (i) Muhammad Aamir, (ii) Ahmed Raza alias Kami, (iii) Muhammad Wajid and (iv) Mehboob Illahi were tried by learned Judge, Anti-Terrorism Court-II, Karachi, in Special Case No.06 of 2009. On conclusion of trial, vide judgment dated **18.09.2009**, all the respondents/accused were acquitted of the charge, hence the State through learned Prosecutor General Sindh has filed instant Special Criminal Anti-Terrorism Acquittal Appeal.

2. We are surprised to note that this Spl. CrI. Acquittal Appeal was filed some time in **2009** and it was listed in Court for katcha peshi on **11.01.2010** when none was present on behalf of the State. After four months on **23.4.2010** this Court had admitted the instant appeal by the following orders:-

“The points raised, require consideration. Admit. Issue B.Ws against the respondents in the sum of Rs.50,000/- to procure their attendance in the Court on the next date. The warrant shall be executed by the concerned SHO. The paper book be prepared within two months”.

3. From **23.4.2010** to **05.2.2019** the paper book could not be prepared for non-payment of charges of paper book. Then pursuant to the order dated **05.7.2019** paper book charges were deposited in the branch and bailable warrants were issued and only Respondents No.3 & 4 were served after 10 years of filing of this appeal. The prosecution has failed to serve bailable warrants on Respondents No.1 & 2 till date. Even last report of SHO Bilal Colony dated **02.11.2020** the bailable warrants have remained un-served, therefore, we have decided to hear this appeal without further loss of time in the name of service on respondents No.1 and 2 since two other respondents were represented by Mr. Ashfaq Rafiq Janjua. This very conduct of the prosecution is indicative of the fact that they knew there is hardly any life in this case for the prosecution. The complainant too has not been served nor he has pursued the case after the acquittal of the Respondents.

4. Brief facts leading to the filing of instant appeal are that according to FIR on **11.01.2009** at **04:00 p.m.**, complainant's son, namely, Zohaib (*aged five years*) left home to play but did not return. At *Maghrib* time complainant went in search of his son, but could not find him, therefore, he informed mohalla people about missing of his son and announced the same from Mosque loudspeakers. Complainant at **2000 hours** also reported the police about missing of his son and continued search. Next day (**12.01.2009**), the complainant came to know through mohallah people that there was an ambulance bearing No.CS-0199 in which two persons were fighting, police personnel of P.S. Billal Colony searched the said Ambulance and recovered one bag from which, hidden under newspapers, dead body of a young boy was recovered. Complainant later on came to know that it was body of his son Zohaib. Police had arrested both the individuals, who disclosed their names as Ahmed Raza son of Muhammad Iqbal and Aamir son of Muhammad

Hanif. Ahmed Raza turned out to be the complainant's paternal nephew whereas Aamir is his maternal nephew. Both these persons after abducting his son, demanded ransom on Cell Phone 0312-2111255 and thereafter, they killed Zohaib.

5. After usual investigation, police instead of two nominated four respondents/accused in challan namely Muhammad Aamir, Ahmed Raza alias Kami, Muhammad Wajid and Mehboob Illahi, under sections 365-A, 302, 34, PPC read with section 7 of the Anti-Terrorism Act, 1997. Trial court framed charge against all the accused to which none pleaded guilty and claimed to be tried.

6. At trial, prosecution examined seventeen witnesses PW-1 J.M-IV, Central Karachi Muhammad Ahsan Khan as Ex.12, PW-2 complainant Muhammad Imran as Ex.13, PW-3, Sabiha Khanum, as Ex.14, PW-4 SIP Abdul Wahab as Ex.15, PW-5 Shehzad Hussain as Ex.16, PW-6 Syed Muhammad Hasnain Rizvi as Ex.17, PW-7 HC Nadeem Ahmed as Ex.18, PW-8 PC Abdul Naeem as Ex.19, PW-9 PC Muhammad Farooq as Ex.20, PW-10 HC Tariq Mehmood as Ex.22, PW-11 Sami Uddin as Ex.23, PW-12 Muhammad Kamran as Ex.24, PW-13 MLO Dr.Zahoor Ahmed as Ex.25, PW-14 Muhammad Noman as Ex.26, PW-15 Rahat Ullah Khan as Ex.29, PW-16 Dr. Masood Ahmed as Ex.30 & PW-17 SIP Muhammad Arif as Ex.31. Thereafter, prosecution side was closed vide statement dated **22.08.2009** at Ex.35.

7. The statements of appellants were recorded under section 342, Cr.P.C at Exhs.36, 37, 38 and 39. Accused Muhammad Wajid under section 340(2), Cr.PC recorded his statement on oath at Ex. 40 and depositions of his defence witnesses Shehla and Majid were recorded at Ex.44 and 45 and DWs. Haji Muhammad Abid and Abdul Hameed for accused Mehboob Illahi and Ahmed Raza were examined at Ex.41 and

42. Appellant Muhammad Aamir has denied the prosecution allegations and stated that due to panic torture he got his confessional statement recorded, however, before the Magistrate he has stated that he is innocent. They further stated in their statements that PC Naeem and PC Farooq are police officials whereas other witnesses are relatives of complainant and they are interested witnesses, they have involved him falsely in the instant case due to family dispute; he has no concern with the alleged offence. Accused Mehboob Illahi also denied the prosecution allegations and stated that IO of the instant case has roped him falsely. Accused Ahmed Raza and Muhammad Wajid also denied the prosecution allegations and claimed false implication by the IO.

8. Learned trial Court, after hearing counsel for the parties and assessment of evidence available on record, acquitted all the accused of the charge vide impugned judgment dated **18.09.2009**. Therefore, State has preferred this appeal.

9. Mr. Muhammad Iqbal Awan, learned Deputy Prosecutor General Sindh, argued that incident took place on 11.01.2009 at 04:00 p.m.; after missing of complainant's son Zohaib call for ransom during night at 02:05 a.m. was received by the complainant. He argued that mohallah people saw two persons fighting in an Ambulance bearing No.CS-1099, who were intercepted by the police and upon search dead body of Zohaib was recovered from the bag lying in the Ambulance, which was undoubtedly in the possession of accused Ahmed Raza and Aamir. He further argued that complainant and accused persons are closely related as accused Ahmed Raza is complainant's nephew whereas accused Aamir is his real sister's son whereas Muhammad Wajid is his maternal cousin. During investigation accused Mehboob Illahi pointed out the house where the boy Zohaib was killed;

confessional statements of accused persons were also recorded in police custody on **20.01.2009**, which was fully corroborated by medical evidence. Learned D.P.G. argued that accused/ respondents Ahmed Raza and Aamir were arrested on the spot, when dead body of the boy was recovered from their possession in presence of witnesses and so many other peoples and the trial court on the conclusion of trial made gross error of acquitting the accused. Mr. Awan, D.P.G. submitted that acquittal was perverse and the same may be converted into conviction as murder of a child aged about five years caused serious fear in the locality, that too by his relatives.

10. Mr. Ashfaq Rafiq Janjua, appearing on behalf of respondents Muhammad Wajid and Mehboob Illahi submits that trial Court has already disbelieved the evidence produced by the prosecution; findings of the trial court are neither perverse nor capricious. He argued that there is allegation of demanding ransom by the accused however, the same has not been proved by producing the call data. It is further argued that there are material contradictions and discrepancies in the evidence of prosecution witnesses. He supported the impugned judgment passed by the learned trial court and prayed for dismissal of instant acquittal appeal. In support of his contentions learned counsel for respondents relied on the cases of MUHAMMAD ASLAM versus SAHIR HUSSAIN and others (2009 SCMR 985) ASGHAR ALI alias SABAH versus The STAE (1992 SCMR 2088) and MUHAMMAD MANSHA KAUSAR versus The STATE (2003 SCMR 477).

11. In addition to the reasoning given by the learned trial Court in the impugned judgment, we have also noted that the evidence of the complainant and the police officials who claimed to have arrested the accused was also not confidence inspiring to convict the appellants/

accused. The complainant who claimed to have received a phone call at 2:05 a.m. for ransom has not even disclosed the phone number from which he has received the phone call. Despite the claim of the police that hundreds people of the area were gathered at the place of arrest of accused and recovery of dead body not a single private witness was shown to be witness of arrest of the accused. The place of arrest of accused as per memo of arrest is shown to be police station. Two police personnel said to have reached on the spot namely PW-8, PC Abdul Naeem and PW-9 PC Muhammad Farooq claimed to be on security duty of Imam Bargah. PC Farooq also stated that on that day they were on patrolling duty and they saw two persons fighting inside the ambulance and they went towards the ambulance to ask for reason of fighting. But they have failed to produce entry of their patrolling duty or duty at Imam Bargah. Even roznamcha entry of their departure from police station on the day of incident was not produced. They claimed to be on motorcycle but they have not been able to disclose registration number of motorcycle. In his cross-examination PW-9 Farooq admitted that he has left the motorcycle at the spot and then gone to thana in the ambulance. If the ambulance was taken to thana, then where the dead body has gone? In case they were posted at security of some Imam Bargah in Sector 5-D, New Karachi then how they started making enquiry of the persons in the ambulance and then instead of going to their place of duty they drove the ambulance to police station. It is also stated by the said PW Farooq that they arrested accused and put them in police mobile but neither police mobile number has been shown nor it is disclosed that how and when the police mobile reached there. The accused persons as per examination in chief of PW-9 were put in police mobile and in his cross-examination PW-9 stated that they have gone to thana in the ambulance. But PW-8 PC Abdul Naeem stated that “4/5

hundred people had gathered there.....I then started the vehicle and took them to the thana and handed over to duty officer". PC Abdul Naeem did not utter a single sentence about what happened to the dead body. P.C Farooq about dead body stated only one fact that *"At the spot one person had come and disclosed that it was his son therefore he should be handed over to him and taking the child he went here and there"*. It means both the police men were interested in accused and they left the body of the child in the hands of unidentified person instead also taking the custody of dead body in their possession and sending it to the hospital for treatment according to law. The FIR, too, should have been lodged by them as they were first to spot the dead body and accused before anyone else. The FIR has been lodged at 1530 hours and arrest of accused has been shown at 1540 hours at police station not at the place of incident.

12. The prosecution claimed that accused and dead body were in the ambulance when two police men on motorcycle found the accused were quarrelling in the ambulance on the road at house No.15, block No.68, Sector 5/D, near Lal Market (Ex:13/B) near Babar Clinic at Kachra Kundi. But according to another memo of dead body and inspection of place of occurrence (Ex:15/B) by PW-4 SIP Abdul Wahab at **11:30** hours he found dead body inside House No.ST-55-L-15, Sector 5/D, New Karachi on a cot and stated that it is also place of occurrence. The evidence of the Magistrate PW-1 who recorded confession of all the four accused also has no evidentiary value for several reasons. The accused Aamir and Ahmed Raza were arrested on **12.01.2009** and other two accused on **15.01.2009**, but confessional statements of all the four accused was recorded on one and the same day (**20.01.2009**) when the accused persons were in police custody for more than one week or so. The confessional statement cannot be used as substantive evidence of

fact when there is clear unexplained delay of eight (6 to 8) days in recording the same. In this context the Hon'ble Supreme Court in the case of Muhammad Parvez (**2007 SCMR 670**) supra has also observed as under:-

“6. In case all the facts are put in a juxtaposition, then it is crystal clear that confessional statement was recorded after five days as the appellant Pervez was remained in the custody of the local police. It is a settled law the delay of over 24 hours would normally be fatal to the acceptance of judicial confession as law aid down by this Court in Naqeebullah's case **PLD 1978 SC 21** coupled with the fact that prosecution had failed to explain the delay in recording the confessional statement. This fact created doubt qua the confessional piece of evidence. See Khan Muhammad's case **1981 SCMR 597**. It is no doubt that mere delay of 24 hours in recording the confessional statement is not fatal but surrounding circumstances are also to be considered qua believing or not believing the confessional statement.....”

13. In our view, trial court has assigned sound reasons for disbelieving the prosecution evidence. Trial court has examined all pieces of evidence deeply and has assigned sound reasons while recording the acquittal. Trial court has rightly mentioned in the judgment that there are number of discrepancies in the prosecution case; the prosecution case was doubtful and its benefit has rightly gone in favour of accused.

14. In the case of **State versus Government Sindh through Advocate General Sindh, Karachi versus Sobharo (1993 SCMR 585)** Honourable Supreme Court has laid down the principle that in the case of appeal against acquittal while evaluating the evidence distinction is to be made in appeal against conviction and appeal against acquittal. Interference in the latter case is to be made when there is only gross misreading of evidence, resulting in miscarriage of justice. Relevant portion is reproduced as under:-

“14. We are fully satisfied with appraisal of evidence done by the trial Court and we are of the view that while evaluating the evidence, difference is to be maintained in appeal from conviction and acquittal appeal and in the latter case interference is to be made only when there is gross misreading of evidence resulting in miscarriage of justice. Reference can be made to the case of Yar Muhammad and others v. The State (1992 SCMR 96). In consequence this appeal has no merits and is dismissed.”

15. For what has been discussed above, we are of the considered view that impugned judgment dated **18.09.2009** is based upon valid and sound reasons. Neither, there is misreading, nor non-reading of material evidence or misconstruction of facts and law. Resultantly, the appeal is without merit and the same is ***dismissed***.

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Karachi, Dated: 15.06.2021

Ayaz Gul