

## IN THE HIGH COURT OF SINDH AT KARACHI

Present:

Mr. Justice Nazar Akbar

Mr. Justice Zulfiqar Ahmad Khan

**Special Cr. Anti-Terrorism Jail Appeal No.268 of 2018**

**Special Cr. Anti-Terrorism Jail Appeal No.287 of 2018**

**Special Cr. Anti-Terrorism Jail Appeal No.288 of 2018**

Appellants : Through M/s. Abdul Razzak, Allah Warayo Khan and Ms. Abida Parveen Channar, Advocate

State : Through Mr. Hussain Bux Baloch, Additional Prosecutor General

Date of Hearing : 15.12.2020

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

**Zulfiqar Ahmad Khan, J:-** Through instant appeals, Appellants have assailed their conviction and sentences recorded by the learned Anti-Terrorism Court No.-XV, Karachi, by judgment dated 11.09.2018, passed in New Special Case No.85 of 2017 (Old Special Case Nos.A-138 of 2013), arising out of FIR No.91 of 2013 for offence under section 365-A/34 PPC read with section 7 ATA, 1997, registered with P.S Memon Goth (AVCC), Karachi. On conclusion of the trial, accused were found guilty and consequently convicted and sentenced under section 265-H(ii) Cr.P.C as under:

- i) For the offence under section 7(i)(e) of ATA read with section 365-A/34 PPC appellants were convicted and sentenced to undergo life imprisonment.

However, benefit of section 382-B Cr.P.C. was also extended to the accused.

2. The prosecution story unfolded in the FIR is that on 28.08.2013 at 16:30 hours complainant got registered FIR bearing No.91/2013 under section 365-A/34 PPC read with section 7 of ATA, 1997 at P.S Memon Goth, Karachi, stating therein that he deals with the business of Chaff (Bhoosa) with his brothers. His younger brother namely Javed Abbasi, who resides in Shah Latif Town, Karachi, on 27.08.2013 at about 10:30 a.m., left his house and at 11:00 a.m. he collected an amount of Rs.59,000/- from a party of Gulshan-e-Hadeed and proceeded to Kathore via link road on his bike bearing Registration No.KFM-1573. When he reached at the link road of Nestle Company, unknown culprits abducted him for ransom in a car, leaving his bike over there. On seeing the aforementioned bike at link road, one Khadim informed the complainant about its presence. Thus, the complainant tried to contact with Javed on his mobile No.0300-2474863, but it was switched off.

3. After usual investigation, challan was submitted against the accused before the competent court of law. Then, trial court framed charge against the accused/appellants namely, **(1)** Abdul Razzak, **(2)** Ghulam Sarwar, **(3)** Nisar, **(4)** Ghulam Mustafa, **(5)** Nisar Ahmed, **(6)** Shahbaz @ Khurram and **(7)** Mumtaz Husain at Exh.13, to which they pleaded not guilty and claimed to be tried.

4. In order to substantiate its case, prosecution examined twelve (12) witnesses namely PW-1 Javed Abbasi at Exh.16, PW-2 complainant Riaz Hussain Kalhoro at Exh.17, PW-3 Hajan Kalhoro at Exh.21, PW-4 Khadim Hussain Kalhoro at Exh.22, PW-5 ASI Muhammad Moosa Brohi at Exh.23, PW-6 SIP Ghulam Asghar Abbasi at Exh.24, PW-7 Mushtaq Ahmed Kalhoro at Exh.25, PW-8 SIP Deedar Hussain at Exh.26, PW-9 Inspector Muhammad Uris Rajjar at Exh.27, PW10 PC Sarfaraz at Exh.28, PW-11 SIP Hakim Ali Khoso at Exh.30 and PW-12 Inspector Amjad Javed Kalyar at Exh.31, who produced certain documents during their evidence. Thereafter, prosecution side was closed vide statement at Exh.32.

Statements of accused under Section 342 Cr.P.C were recorded (Exh.34 to Exh.40), in which they denied all the allegations leveled against them and claimed that they are innocent and have been falsely implicated in these cases. They however did not examine themselves on oath.

5. The learned trial Court after hearing learned counsel for the parties and assessment of evidence as well as perusal of record by judgment dated 11.09.2018 convicted and sentenced the appellants, as stated above. Hence these present appeals.

6. Mr. Abdul Razzak, learned counsel for appellants contended that evidence of the police personnel is false and fabricated, which could not be appreciated, as appellants namely Mumtaz Hussain, Muhammad Saleh and Nisar Ahmed were shown to the complainant as well as abductee prior to identification parade as so also they have been acquitted in cases under of 23(1)(a) of Sindh Arms Act, 2013, vide impugned judgment. He further contended that no evidence of treatment of the abductee was produced before the trial Court; that the statement of accused given before the police officer about his involvement is inadmissible in terms of Articles 38 and 39 of Qanun-e-Shahdat Order, 1984. He next contended that PW-1/abductee in his cross examination admitted that he had not nominated Mustafa, Abdul Razzaq, Khurram, Nisar, Subhan and Fareed as accused in his 161 Cr.P.C statement; that the prosecution has failed to prove payment of ransom, so also neither any police officer, nor any person was associated in the evidence for the purpose of payment, which could not be relied upon as prosecution case contains host of doubts. He further contended that PW-8 in his cross examination admitted that the place of arrest of appellant Abdul Rasheed is thickly populated area and he did not associate any private witness as mashir of his arrest. In support of his arguments, he placed reliance on the cases reported as 2018 SCMR 2092 (Hayatullah v. the State), 2010 SCMR 1604 (Mst. Askar Jan and others v. Muhammad Daud and others), 2016 SCMR 274 (Azeem

Khan and others v. Mujahid Khan and others), 2018 SCMR 313 (Ulfat Husain v. the State), 2010 SCMR 1706 (Muhammad Asghar alias Nannah and another v. the State), 2019 SCMR 129 (Abdul Jabbar and another v. the State), 2010 SCMR 1009 (Muhammad Shah v. the State), 2011 SCMR 629 (Sabir Ali v. the State) and PLD 2008 SC 513 (Muhammad Asghar v. the State).

7. Mr. Allah Warayo Khan, learned counsel for appellants contended that the FIR has been lodged against unknown persons with delay of one day, so also the incident is not seen by any eye witness and there are contradictions in the evidence of PW-01 and PW-02 regarding quantum of ransom amount. He further contended that the abductee returned back to home on 28.09.2013, however, he did not inform the area police about his safe recovery and after 12 days he came to the police station on 18.10.2013, where PW-1 and PW-2 allegedly identified the accused persons. Nonetheless, no identification parade was conducted before any Magistrate. It is alleged by the abductee that his right leg was broken by the kidnapers, but no medical treatment document(s) were produced before the I.O as well as before the trial Court to corroborate his version. He next contended that the evidence of PW-3, who allegedly received abductee from northern bypass, is silent regarding abductee's recovery; that there is no mention of any departure or arrival entry in the memo of arrest and recovery of accused persons and no any private witness has been cited as mashir in this regard; that nothing was recovered from appellant Nisar; that the CDR produced by the I.O does not pertain with the appellants and that too no recovery of alleged ransom amount has been made. He lastly contended that in the connected cases registered under section 23(1)(a) of Sindh Arms Act, 2013, the appellants have already been acquitted vide judgment impugned herein, which created serious dents in the prosecution story. In support of his arguments, he placed reliance on the case of Faiz-ur-Rehman v. the State (SCMR 2012 538) and 2019 YLR 1777 (Muhammad Sarwar v. the State and others).

8. Ms. Abida Parveen Channar, learned counsel for the appellant Ghulam Sarwar has contended that nothing was recovered from the appellant Ghulam Sarwar and no any corroborative evidence was produced by the I.O to prove its case against the appellant. She further contended that no any confessional statement of the appellants/accused was recorded before any Magistrate and so also no identification parade was held before the Magistrate. She also contended that no medical treatment papers were produced before the trial Court; that no site plan/map was prepared by the I.O; that no private person has been cited as witness. It was alleged that one Nokia mobile phone alongwith SIM was recovered from appellant Abdul Razzaque, however, neither said mobile phone, nor CDR of mobile number (0300-2593520) of PW-7 Mushtaq Ahmed from which, as alleged, communication was done with accused/appellants and ransom amount was paid, was produced and that no ransom amount was recovered. Appellants and complainant party have same business of selling Bhoosa and had dispute on payment. She lastly contended that the appellants have been acquitted in the cases registered under section 23(1)(a) of Sindh Arms Act, 2013.

9. On the other hand, learned Additional Prosecutor General has fully supported the impugned judgment and contended that the trial Court has rightly convicted the accused on the basis of evidence brought on record by the prosecution. Lastly, he prayed for dismissal of these present appeals.

10. We have heard learned counsel for the appellants as well as learned Additional Prosecutor General for the State and have minutely scanned the entire evidence available on record.

11. There appear material contradictions in the prosecution evidence. PW-2 and PW-7 deposed that Khadim informed them about the bike of abductee Javed Abbasi lying at link road of Nestle Company, but PW-4 namely Khadim Hussain Kalhoro did not disclose in his evidence that he

had made any phone call to the said PW-2 and PW-7. Instead, he deposed that he had made call to Haajan Abbasi on the information of Paryal Solangi, who has been cited as one of the absconders in the challan. PW-1 (abductee) in his examination in chief stated that his brother Riaz Hussain Kalhoro (PW-2) has paid ransom amount of Rs.2,000,000/- (rupees twenty lac), but latter PW-2 deposed that he had paid ransom amount of Rs.1,525,000/-. Also, there are contradictions in the evidence of PW-1 and PW-2 as to the date of identification of accused persons before I.O, as PW-1 in his examination in chief stated that on 18.10.2013 I.O called his brother for identification of some arrested accused persons. Thereafter, he alongwith PW-2 reached at AVCC office and identified the accused namely Muhammad Saleh, Mumtaz and Nisar on 18.10.2013 at 12:00 hours. Later, on 23.10.2013 he identified more accused persons namely Mustafa, Razaq, Khurram Iqbal, Nisar, Subhan and Fareed. While PW-2 in his examination in chief stated that on 23.10.2013, I.O called him as well as Javed Abbasi (PW-1), where said Javed Abbasi, identified 9 accused persons. In addition, aforementioned so identified accused were never produced before any Magistrate for identification parade, so also the prosecution never filed any application for holding identification parade of the appellants. Thus, authenticity of such an identification of accused before the police, which being contrary, is not beyond a doubt and does not inspire confidence.

**12.** We have noted that as per deposition of PW-2, he called PW-3 for receiving abductee from northern bypass, however, said PW-3 in his evidence has nowhere uttered even a single word about receiving the abductee or transporting him to Moro. It was alleged by the abductee that his right leg was broken by the appellants however admittedly he did not produce a single document before the trial Court which could prove that his leg was broken. On the contrary, he admitted in his cross examination that it was not mentioned in his 161 Cr.P.C statement that his leg was broken by the kidnapers. As per memo of arrest and recovery of accused

persons, there is no mention of any departure or arrival entry and that too no private witness has been cited to act as mashir in this regard. Moreover, PW-10 in his cross examination admitted that during arrest of appellant Nisar Kolachi, SIP Asghar Abbasi did not associate any private person of the locality as mashir of the arrest and recovery of the accused and also not prepared any sketch of the place of incident. Admittedly, the place from which accused Abdul Rasheed was arrested was a thickly populated area and PW-8 did not associate any private person to be witness of his arrest.

**13.** The incident is unseen and significantly based on the evidence of PW-2/complainant and PW-1/abductee, who on one hand have deposed contradictory to each other with regard to the payment of ransom and date of identification of accused (even before the police), on the other hand, abductee in his cross examination admitted that he did not nominate accused Mustafa, Abdul Razzaque, Khurram, Nisar, Subhan and Fareed in his 161 Cr.P.C statement. Thus, their evidence is fatal to the prosecution story and could not be relied upon on the principle of safe administration of justice.

**14.** It is well settled law that the confession made before police is inadmissible under Articles 38 and 39 of the Qanun-e-Shahadat Order. In the case at hand, the accused were never produced before any Magistrate for recording their confessional statements and their confession is only before the police, which is inadmissible under Articles 38 and 39 of the Qanun-e-Shahadat Order. The Hon'ble Supreme Court in the case of Hayatullah v. the State (2018 SCMR 2092) has been pleased to hold that the statement before the police was absolutely inadmissible hit by Article 39 of the Qanun-e-Shahadat Order, 1984.

**15.** CDR of the abductee and appellant Rasheed Brohi produced before the trial Court at Exh.31/B and 31/C is of no help to the prosecution

for the reason that the abductee was recovered on 28.09.2013 and it was alleged that the communication between accused and brother of abductee were made from 03.09.2013 till his release through abductee's SIM on the SIM of PW-7, however, no CDR of abductee's SIM for the aforesaid date was produced before the trial Court, rather its CDR was produced only from 27.08.2013 to 18.09.2013 and that too CDR of PW-7's SIM was also not produced before the trial Court. Moreover, allegedly communication between PW-7 and appellant Rasheed Brohi (who otherwise claimed to be engaged in the said business of selling Bhoosa) took place for about nine days from 29.08.2013, but CDR of SIM of said Rasheed Brohi was produced before the trial Court only from 27.08.2013 to 30.08.2013. In view of the production of incomplete CDR by the I.O before the trial Court, this piece of evidence is absolutely inconclusive and of no benefit to the prosecution. Nor it connects the appellants with the crime in any manner.

**16.** It is also noteworthy that the FIR of the present crime was lodged under section 365-A/34 PPC with delay of one day, however, on account of alleged recovery of weapons, separate cases under section 23(1)(a) of Sindh Arms Act, 2013 were also registered against the appellants and for the same they were tried jointly through point No.2 of the impugned judgment. By answering the said point, the learned trial Court acquitted the appellants. By such acquittal, it could be believed that the recovery of the alleged crime weapons could not be established and the same is also fatal blow to the present prosecution case. Reliance in this regard could be placed in the case of Kashif Ali and another v. the State reported as 2019 YLR 1573.

**17.** Review of the impugned judgment shows that essential aspects of the case have slipped from the sight of the learned trial Court which are sufficient to create shadow of doubt in the prosecution story. It is settled law that for creating doubt, many circumstances are not required and if a single circumstance creates a reasonable doubt in a prudent mind, then its



benefit be given to the accused not as matter of grace or concession but as a matter of right. In the case of **Muhammad Mansha vs. The State** (2018 SCMR 772), the Hon'ble Supreme Court has observed as follows:-

**“4. Needless to mention that while giving the benefit of doubt to an accused it is not necessary that there should be many circumstances creating doubt. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of such doubt, not as a matter of grace and concession, but as a matter of right. It is based on the maxim, "it is better that then guilty persons be acquitted rather than one innocent person be convicted". Reliance in this behalf can be made upon the cases of Tariq Pervez v. The State (1995 SCMR 1345), Ghulam Qadir and 2 others v. The State (2008 SCMR 1221), Muhammad Akram v. The State (2009 SCMR 230) and Muhammad Zaman v. The State (2014 SCMR 749).”**

**18.** In view of the above stated reasons, we have no hesitation to hold that there are several infirmities in the prosecution case, as discussed above, which have created doubt, therefore, we reached to a conclusion that the prosecution has failed to prove its case against the appellants and the trial Court failed to appreciate the evidence according to the settled principles of law. False implication of the appellants could not be ruled out. Resultantly, this appeal was allowed by our short order dated 15.12.2020, whereby conviction and sentences recorded by the learned trial Court were set aside and appellants were acquitted of the charges.

**19.** Above are the reasons for our short order dated 15.12.2020.

JUDGE

JUDGE

Karachi,  
Dated \_\_\_03.2021  
Barkat Ali, PA