

IN THE HIGH COURT OF SINDH, KARACHI

Crl. Spl. Anti-Terrorism Acqtl. Appeal No. 14 of 2009.

PRESENT

Mr. Justice Sajjad Ali Shah,
Mr. Justice Naimatullah Phulpoto,

Appellant : Raza Khan through Mr. Muhammad Ashraf Kazi,
Advocate.

Respondents : The State & 2 others.

Mr. Ali Haider, Assistant Prosecutor General.

Mr. Liaquat Ali Khan, advocate for accused/
Respondents No.2 & 3.

Date of hearing : 12.03.2014.

Date of Judgment :

J U D G M E N T.

NAIMATULLAH PHULPOTO, J.- The respondents/accused Syed Ghulam Mustafa Shah DSP and Mohammad Sarfraz were tried by learned Judge, Anti-Terrorism Court No.II, Karachi in Special Case No.46/2004, bearing crime No.01/2004, registered at Police Station Sachal, Karachi, for offences under Sections 365-A, 342, 347, 392, 506, 34, PPC read with Section 6(2)(e) of the Anti-Terrorism Act, punishable under Section 7(e) of the Anti-Terrorism Act, 1997. After full-dressed trial, both the respondents/accused were acquitted by the trial Court by judgment dated 28.2.2009. Appellant Raza Khan has filed the instant acquittal appeal against the impugned judgment. We intend to dispose of the same by this judgment.

2. Facts are exhaustively mentioned in the aforesaid judgment. To recapitulate briefly, it may be noted that on 07.1.2004 appellant Raza Khan filed an application under Section 22-A read with Section 100, Cr.P.C before the learned Sessions Judge, Malir Karachi, stating therein that his brother Gul Farooq son of Muhammad Khan had been kidnapped/detained by the Investigation Cell of Police Station Sachal Malir at midnight from his house, since 22/23 days he was in

illegal detention of the police. On the said application, learned Sessions Judge, Malir directed Mr. Abdul Qudoos Memon, Judicial Magistrate, Malir to conduct the raid at the said Police Station. During raid conducted by the Magistrate, detinue Gul Farooq, brother of the appellant, was recovered from the room in the possession of the Investigation Team of Police Station Sachal. Thereafter, Judicial Magistrate directed the duty officer to register the case against the accused persons/respondents. The duty officer recorded statement of detinue Gul Farooq and on the basis of such statement F.I.R No.01/2004, under Sections 342, 344, 347, 506 and 382, PPC was registered at Police Station Sachal, but Mr. Abdul Qudoos, Judicial Magistrate, has been shown complainant in the aforesaid F.I.R. In the F.I.R, it is mentioned that Gul Farooq was illegally detained by the police since 22/23 days and he was taken by SIP Sarfraz Khan from his home. He was enquired, but he did not disclose anything. It is further alleged in the F.I.R that DSP Ghulam Mustafa Shah of investigation had come to him two times and issued threats that in case, his brother failed to pay Rs.500,000/- (Rupees Five Lac) for his release, he would be involved in heinous offences, such as, abduction and murder. On the refusal to pay him the aforesaid amount, DSP confined him at the police station and SIP used to ask him how much he could pay. As per F.I.R, SIP Sarfraz had snatched his Sony Ericson Mobile Phone, Rado Watch with black chain, having value of Rs.21000/-, some cash and copy of his NIC.

3. After usual investigation, at the time of submission of the challan, Judicial Magistrate directed the Investigation Officer to insert Section 365-A, PPC in the challan-sheet. It may be mentioned here that initially investigation officer submitted final report for disposal of the F.I.R under "A" Class, but learned Judicial Magistrate did not accept the report. After adding Section 365-A, PPC, challan was accepted and case was sent up to the Court of Sessions. Case was made over by the

learned Sessions Judge, Malir to learned Additional Sessions Judge, Malir for disposal, but learned the Additional Sessions Judge returned the challan to the investigation officer on the legal ground that offence under Section 365-A, PPC was exclusively triable under the provisions of Anti-Terrorism Act, 1997. Thereafter, challan was submitted before the learned Administrative Judge, A.T.Cs, High Court of Sindh, Karachi and the case was transferred to the Anti-Terrorism Court No.1, Karachi for disposal according to law. Record further reflects that Home Department, Govt. of Sindh passed an order for deleting Sections 344, 347, 382, 506 and 365-A, PPC. Application was moved by SPP for the State before the Anti-Terrorism Court No.1, Karachi. Consequently, by order dated 07.11.2006 the case was sent to Judicial Magistrate, Karachi for trial under Section 342, PPC only. This order was challenged in Criminal Revision Application No.02/2007, by consent it was ordered for sending case to learned Administrative Judge ATC for passing appropriate orders in the matter. Thereafter, learned Administrative Judge, A.T.Cs opined that the case was not triable by Anti-Terrorism Court and ordered that the challan be returned to the concerned Investigation Officer for presentation before regular Court for adjudication in accordance with law. Against the said order Criminal Revision Application No.72/2007 was filed before this Court, in which it was held that from the material available on the record, prima facie, case required trial under the provisions of Anti-Terrorism Act, 1997. Subsequently, case was entrusted to Anti-Terrorism Court No.II, Karachi for trial in accordance with law.

4. The respondents/accused denied the charge, which was framed by the trial Court for offences under Sections 6(2)(e) Anti-Terrorism Act, 1997 read with Section 365-A, PPC punishable under Section 7(e) of the Anti-Terrorism Act, 1997 and Section 342, 344, 347, 392 and 506 read with section 34, PPC. Since the Home Department Sindh by notification had deleted Sections 344, 347, 382 and 506, PPC,

therefore, the learned trial Court treated the charge only for offences under Sections 6(2)(e) of Anti-Terrorism Act, 1997 read with Section 365-A, PPC, and under Section 7(e) of Anti-Terrorism Act, 1997 and under Sections 342, 344, 347, 392, 506/34, PPC.

6. During trial, the prosecution examined its witnesses, namely, PW-1 SI Javed Mughul, who produced memo of place of wardat, PW-2 Wakeel Ahmed Khan, PW-3 SIP Iqbal Hussain Jatoi, PW-4 ASI Ali Akbar Arain, PW-5 ASI Gul Baig and PW-6 Mr. Abdul Qudoos Memon, Judicial Magistrate, who produced statement on oath of detinue Gul Farooq, memo of recovery of detinue, report submitted by the Magistrate to the District & Sessions Judge, Malir, Certified true copy of Criminal Petition No.02/2002 filed under Section 22-A, Cr.P.C read with Section 100, Cr.P.C by Raza Khan alongwith affidavit of Raza Khan, his order dated 07.1.2004 maintained in the Roznamcha, Roznamcha entry dated 07.1.2004. Then PW-7 Taj Muhammad Siyal, PW-8 Raza Khan Pathan, PW-9 Syed Badshah Khan Afridi, PW-10 Zuhrab Gul Afridi were also examined by the prosecution. Lastly, prosecution examined PW-11 SIP Tariq Ali, Investigating Officer of the case, who produced Roznamcha entry No.22, certified true copy of order of District & Sessions Judge, Malir Karachi, Roznamcha entry No.9 dated 22.12.2003, Roznamcha entry No.9 dated 27.12.2003 and then side of the prosecution was closed by the learned SPP by giving up the remaining witnesses.

7. Thereafter, the statements of the respondents/accused were recorded under Section 342, Cr.P.C, in which they denied the allegations. However, neither they examined themselves on oath nor produced any witness in their defence and the learned trial Court after going through the evidence on record and hearing the arguments acquitted the respondents/accused vide impugned judgment dated 28.2.2009, as mentioned hereinabove.

8. We have heard the learned Counsel for the appellant, learned Counsel for respondents/accused, the learned Assistant Prosecutor General and gone through the entire evidence.

9. PW-1 SIP Javed Mughal has stated that on 07.1.2004 he was duty officer at P.S Sachal, when at 3.00 p.m., raid was conducted by Mr. Abdul Qudoos Memon, Judicial Magistrate, who recovered the detenu Gul Farooq, recorded his statement and registered F.I.R against DSP Ghulam Mustafa and SIP M. Sarfraz. F.I.R is produced at Ex.15/B.

10. PW-2 PC Wakeel Ahmed Khan stated that on 07.1.2004 he was on duty as Santry Barracks at PS Sachal and was available outside the P.S, where one person came and inquired about SIP M. Sarfraz, who was not available at the P.S, therefore, the said person waited for said SIP with own wish and in meantime, Magistrate conducted raid at P.S.

11. PW-3 SIP Iqbal Hussain Jatoi stated that on 22.12.2003 he was posted at PS Sachal. He had interrogated one person, namely, Gul Farooq son of Muhammad Khan Afridi in connection with crime No.168/2003, u/s 302/34 PPC and after interrogation he allowed said person to leave P.S with direction to appear again before him on 26th and then he did not see that person.

12. PW-4 ASI Ali Akbar stated that on 22.12.2003 during investigation of crime No.165/2003, u/s 337-H, PPC he had called PWs Zulfiqar and Taj Muhammad, where SIP Sarfraz was available in the same room, who was interrogating a person, whose name he later-on came to know as Muhammad Farooq, in crime No.168/2003, u/s 302/34 PPC and that after completing interrogation SIP Sarfraz allowed the said person to go away from PS.

13. PW-5 ASI Gul Baig stated that on 27.12.2003 he was on duty at PS Sachal, where one person came and inquired about SIP

Sarfraz, and met him and said person was interrogated by SIP Sarfraz in connection with crime No.168/2003, u/s 302, 34, PPC, then he allowed said person to leave the police station. He stated that he had disclosed the name of said person in his 161, Cr.P.C as Gul Farooq.

14. P.W-6 Abdul Qudoos Memon, Judicial Magistrate, in his evidence, deposed that on 07.1.2004 he was posted as Judicial Magistrate, Court No.II, Malir. On that day, in pursuance of direction of the District & Sessions Judge, Malir, he conducted raid at Police Station Sachal and found detainee Gul Farooq in the office of Investigation room of said PS. He checked roznamcha and found no entry or F.I.R against the detenue. He further deposed that the detainee was identified by complainant Raza Khan, and he recorded statement of Gul Farooque (detainee) and order was passed by him with the direction to the duty officer to get such F.I.R registered in light of statement of detenue, same was registered accordingly. He then in compliance of direction of District and Sessions Judge submitted report on 08.01.2004.

In cross-examination, the learned Magistrate replied that accused Ghulam Mustafa Shah was not present at the time of raid at Police Station. Magistrate has admitted that detenue was not in custody of any body, but was sitting in investigation room. Learned Magistrate has replied that he has conducted raids at Police Stations but in this case for the first time he has been shown as complainant in F.I.R. Magistrate denied suggestion that detenue was coming to Police Station in connection with crime No.168/2003.

15. PW-7 Taj Muhammad Siyal deposed that he was called by ASI Ali Akbar at PS Sachal in connection with some matter, who recorded his statement. He further deposed that in his presence at PS ASI Sarfraz came there and made inquiry from a person, however, he could not hear the conversation between ASI Sarfraz and that person.

16. PW-8 Raza Khan deposed that on 20.12.2003, at about 12.30 midnight time door of his house was knocked, on which his chowkidar and neighbourer woke up. His wife awakened him. He went outside the house, where the Chowkidar and his neighbourer Zuhrab Gul were available alongwith his brother Jamal Khan. Jamal Khan, Chowkidar and Zuhrab Gul informed him that the police had come and when his brother Gul Farooq opened the door, the police took him away. He was then informed by his co-villager Syed Kamal that his brother was confined at Sachal P.S. He went to Sachal P.S. where he was informed that his brother was brought by SIP Sarfraz and that he at that time was not available at the Police Station. He then went to PS Sachal continuously for 2/3 days to search for his brother and contacted SIP Sarfraz, who went on keeping him on hopes that his brother would be released. He has deposed that SIP Sarfraz asked him that the DSP was prepared to release his brother subject to payment of Rs.5 lacs. He deposed that he filed Habeas Corpus Petition on 07.01.2004 in the Sessions Court Malir and then Mr. Abdul Qudoos Memon, Judicial Magistrate, raided the Police Station Sachal and recovered his brother. He further deposed that he had accompanied the Magistrate to the Police Station. The Civil Judge & Judicial Magistrate then got released his brother.

In cross-examination he denied the suggestion that he has given false evidence in this case. He has also denied the suggestion that he had given incorrect facts in the Habeas Corpus Petition. He has admitted that he has stated in 161, Cr.P.C statement that accused SIP Sarfraz had demanded 25 lac as bribe.

17. PW-9 Syed Badshah Afridi Pathan he was deployed as Chowkidar at Ittehad Town and about six years prior he was available at the gate of house of Raza Khan and performing duty as chowkidar, at that time the electricity was powered off, at midnight time a police

mobile came there, knocked the door of house of Raza Khan, Gul Farooq opened the door and he was taken away by the police.

18. PW-10 Zuhra Gul Afridi deposed that his house is situated in front of house of Gul Farooq. On 20.12.2003 at midnight time door of house of Gul Farooq was knocked, he went to the roof of his house and saw one police mobile standing in front of gate of house of Gul Farooq. When Gul Farooq opened the gate of his house, he was made to sit in the mobile by the police officials and was taken away.

19. PW-11 SIP Tariq Ali Syed, I.O of the case, deposed that on 07.01.2004 he was posted at P.S S'achal. On that day, he received investigation of case crime No.01/2004. After receipt of the F.I.R, he prepared the memo of place of wardhat in presence of ASI Javed Mughal, duty officer and PC Vakeel, which was a room situated adjacent to the room of duty officer of the same police station. He further deposed that on arrival of SIP Sarfraz at PS he disclosed that accused Gul Farooq was previously called two times at PS in connection with crime No.168/2004, under section 302/34 PPC. Thereafter, he found such entries of arrival and departure of Gul Farooq in the roznamcha on two dates viz., 22.12.03 and 27.12.2003. He then recorded the statements of police officials, who also confirmed arrival and departure of Gul Farooq at the PS on those dates. Thereafter, he submitted 'A' class report before J.M IV Malir, who directed him to submit challan against the accused. Thereafter, in compliance of the Court order the challan was submitted by him u/s 365-A, PPC.

In cross-examination, this witness stated that for recording the statements of complainant party he had gone to their residence and they had given their statements in writing in their own hand. Some of them had put their signatures and some LTIs.

20. The learned trial Court based its findings of acquittal in favour of respondents/accused by assigning following reasons :-

“No involvement of DSP Ghulam Mustafa Shah in this crime is shown excepting the words of PW Raza Khan, who happens to be brother of the detainee/abductee that he had once happened to come to thana and utter these words that they were big party and good amount could be extracted from them and that at his office he was called by SI Sarfraz who had told him to forget about DSP and he should pay Rs.5 lacs, but the very admission on his part that he had stated in 161 Cr.P.C statement that Rs.25 lacs were demanded from him, has falsified this aspect also.

It is settled law that every case has its own merits and circumstances and a case law on same facts or circumstances is always not of universal application. Therefore in the circumstances of the case law relied upon by learned Counsel for complainant and private witnesses will have to give way to the facts and circumstances favourable to the accused persons discussed and pointed out above.

For above reasons I am clear in my mind that the prosecution has not been able to prove case against the accused persons beyond slightest reasonable doubt on this capital charge. My finding on point No.1 therefore is in “Negative”.

Point No.2.

Stated act of the accused persons if any apparently is likely to affect mind of the section of people in the manner stated and to create sense of fear and security in the society is therefore terrorist Act, but subject to my finding on point No.1 above.

Point No.3.

In view of my finding on point No.1 above both the accused above named are acquitted.

Both the accused are on bail, their bail bonds are cancelled and sureties discharged.”

21. After scanning the entire prosecution evidence, we have come to the conclusion that prosecution has miserably failed in its primary duty to establish its case and bring home the guilt against the respondents/accused beyond reasonable doubt, for the reasons that star witness/detenué Gul Farooq has not been examined by the prosecution. Non-examination of such material witness/victim would be beneficial circumstance for accused. Judicial Magistrate has produced statement of detenué Gul Farooq recorded on 7.1.2004 at Ex.15-A. No reliance can be placed upon such statement mainly for the reasons that Gul Farooque did not appear in Court for cross-

examination, moreover such statement of Gul Farooq was not recorded by Judicial Magistrate in the course of investigation as required under Section 164, Cr.P.C. Evidence of PW Raza Khan is self-contradictory on the point of amount of the money. He has deposed that SIP Sarfraz told him that DSP was prepared to release his brother subject to the payment of Rs.5 lacs, but in the cross-examination he has admitted that he has stated in 161, Cr.P.C statement that SIP Sarfraz had demanded Rs.25 lac from him as bribe for the release of his brother. The evidence produced by the prosecution of above-named witnesses is highly discrepant and suffers from serious infirmities on so many material points, particularly amount which was demanded from complainant party. Magistrate has stated that detinue was not in the custody of any body at the time of raid. He has further deposed that accused Ghulam Mustafa Shah was not present at the time of raid. Moreover, there is no evidence regarding payment of the ransom to the accused/respondents. We also find legal force in the submission of the learned advocate for the respondents/accused that no case of kidnapping for ransom is made out from evidence and ingredients of offences punishable under Section 365-A, PPC and Section 7(e) of the Anti-Terrorism Act, 1997 are not attracted in this case. In the evidence there is allegation against the accused/respondents that they demanded illegal gratification for the release of the detinue, as such, ingredients of Section 365-A, PPC from the evidence are not satisfied.

22. In the case of *Faheem Ahmed Farooqui v. The State*, (PLJ 2008 SC 859), the Hon'ble Supreme Court has observed as under :-

"10. Having considered the available evidence from all corners, we are of the view that prosecution has miserably failed in its primary duty to establish the case and bring guilt home to the appellant beyond reasonable doubt. The evidence produced by the prosecution is highly discrepant and suffers from serious infirmities and contradictions and except the bare allegations in the F.I.R, there is nothing incriminating on the file to connect the appellant with the commission of crime. It may be observed that neither Fahad Hamdani, alleged abductee has been

recovered from the custody of the appellant nor there is evidence regarding passing of the ransom amount to the appellant. The mere assertion of the complainant that appellant had a hand in the affair and he is author of the crime, without a positive attempt on his part to substantiate the same, is of no consequence. We find force in the submission of learned counsel for the appellant that no case of abduction or kidnapping is made out and ingredients of offences punishable under Section 365-A, PPC and Section 7(e) of the Anti-Terrorism Act, 1997 are not attracted in this case. Fahad Hamdani P.W. clearly stated at the trial that appellant took him in his care to his house, located in Fatima Sunrise City, Karachi. He was sitting outside the bungalow within the compound for about 35/40 minutes where chowkidar was also present. From the above alleged acts of the appellant, it is quite clear and evident that the alleged detention of the abductee was to extort illegal gratification and not the ransom amount. So far as identification parade is concerned, same is held after six days of the arrest of the appellant and without satisfying the requirements of law.”

23. It is settled law that the scope of interference in appeal against acquittal is most narrow and limited, because in an acquittal the presumption of innocence is significantly added to the cardinal rule of criminal jurisprudence, that an accused shall be presumed to be innocent until proved guilty; in other words, the presumption of innocence is doubled. The Courts shall be very slow in interfering with such an acquittal judgment, unless it is shown to be perverse, passed in gross violation of law, suffering from the errors of grave misreading or non-reading of evidence; such judgments should not be lightly interfered and heavy burden lies on the prosecution to rebut the presumption of innocence which the accused has earned and attained on account of his acquittal. Interference in a judgment of acquittal is rare and the prosecution must show that there are glaring errors of law and fact committed by the Court in arriving at the decision, which would result into grave miscarriage of justice; the acquittal judgment is perfunctory or wholly artificial or a shocking conclusion has been drawn. Judgment of acquittal should not be interjected until the findings are perverse, arbitrary, foolish, artificial, speculative and ridiculous. The Court of appeal should not interfere simply for the reason that on the reappraisal of the evidence a different conclusion

could possibly be arrived at, the factual conclusions should not be upset, except when palpably perverse, suffering from serious and material factual infirmities. Said accused have acquired now a triple presumption of innocence which could not be dispelled by complainant's Counsel on any score. Detenue has not been examined by prosecution during trial, prosecution has also failed to establish that the accused/respondents kidnapped detenue for ransom. Evidence of PW Raza Khan is self-contradictory on the point of amount of money. Learned Civil Judge & Judicial Magistrate has deposed that detenue was not in the custody of anybody at the time of raid. Even accused Ghulam Mustafa Shah was not present at Police Station. Therefore, the above-mentioned infirmities have created reasonable doubt regarding the truth of charge and prosecution case has become doubtful. It is settled principle of law that benefit of doubt always goes to an accused and for that purpose it is not necessary that there must be multiple circumstances to create doubt. Even a single circumstance creating a reasonable doubt as to the guilt of the accused entitles him to such benefit, not as a matter of grace and concession but as a matter of right. Reliance in this respect can be placed on the reported case of *Tariq Parvez v. The State*, (1995 S C M R 1345). The learned trial Court has assigned sound reasons while acquitting the accused. The Counsel for the appellant has also not been able to point out any material piece of evidence, which has not been considered or discussed by the learned trial Court in the impugned judgment. No case has been made out against accused for interference in their acquittal.

24. For the above-stated reasons, while relying upon the above cited authorities, we find no merit in the above acquittal appeal. Consequently, the same is, therefore, hereby dismissed.

JUDGE

JUDGE