IN THE HIGH COURT OF SINDH AT KARACHI

PRESENT:
MR. JUSTICE SALAHUDDIN PANHWAR, &
MR. JUSTICE MUHAMMAD SALEEM JESSAR

SPL. CR. A.T. APPEAL NO.43/2014

Appellant	:	Syed Irfan Qadri, through Mr. Shahab Sarki, advocate.
Respondent	:	1) The State, 2) The Learned Anti Terrorism Court No.II at Karachi (Sindh), through Mr. Muhammad Iqbal Awan, APG.

SPl. CR. A.T. APPEAL No. 55 of 2014

Appellant	:	Mustafa Siddiqui, through Mr. Nadeem Ahmed Azar, Advocate
Respondent	:	The Learned Anti Terrorism Court No.II at Karachi (Sindh), through Mr. Muhammad Iqbal Awan, APG. through Mr. Muhammad Iqbal Awan, APG.
Dates of hearing	:	12.04.2017.

JUDGMENT

SALAHUDDIN PANHWAR, J. Through captioned appeals, appellants Syed Irfan Qadri and Mustafa Siddiqui have impugned judgment dated 30.06.2014, passed by Anti-Terrorism Court No.II, Karachi, whereby they were convicted to undergo rigorous imprisonment of ten years each and forfeiture of their properties u/s 7(2) of the Anti-Terrorism Act, 1997 and further imprisonment of two years each under Section 353, PPC while a further sentence of seven years rigorous imprisonment was awarded to appellant Mustafa Siddiqui for recovery of unlicensed arm, however, they were extended with the benefit of Section 382-B, Cr.P.C.

2. Precisely relevant facts of the prosecution case are that the complainant Muhammad Azeem Qureshi lodged FIR No.76 of 2011 registered at P.S. Chawkiwara, Karachi, stating therein that his relative and business partner,

Shakiluddin's wife Sabiha Shahnaz had called him from mobile phone No. 0301-2716100 at about 8:30 p.m. and informed that on 12.04.2011 at about 03:00 O'clock Shakiluddin and his driver Saifur Rehman had gone to Capital Travel Agency, situated at Shahrah-e-Faisal, in Car No. ANZ-374 "ALTO blue colour, and from there they had to go with one Irfan Qadri to Chawkiwara, Lyari, Karachi. It was further informed that she was trying to contact her husband on two mobile phone Nos. 0303-2324669 and 0303-2124649 and also on the mobile phone of the driver i.e. 0334-3746535 but they were continuously switched off as such she had tried to contact Tracker Company, which informed that the car is parked in Lyari, Chakiwara. The lady further informed him that she was able to contact her husband Shakiluddin, who told her that they have been kidnapped for ransom and that she should arrange for Rs.8,00,000/- and reach Dacca Sweet at Gulshan-e-Iqbal where one person will contact her and receive the money and after that they would be released. The complainant informed CPLC and thereafter he had gone to PS and lodged a report.

3. Pursuant to the registration of FIR, the investigation was followed and in due course the challan was submitted before the Court of competent jurisdiction.

4. The Oath was taken by the Court on 28.07.2011 at Ex.1 and the copies u/s 265-C were supplied to the appellants on 28.07.2011 and thereafter a joint charge against the appellants was framed on 28.09.2011 and in reply thereof they pleaded not guilty and claimed to be tried.

5. At the trial, the prosecution has examined as many as thirteen witnesses including complainant of FIR No.76 of 2011, abductee Shakiluddin Khan and his driver Saif ur Rehman and closed its side.

6. The statements of the appellants Irfan Qadri and Mustafa Siddiqui under Section 342, Cr.P.C. were recorded at Exhibits P/39 and P/40 respectively,

wherein they have denied the allegations leveled against them and pleaded their innocence. Appellant Irfan Qadri examined himself on Oath under Section 342(2), Cr.P.C. and also produced Ghulam Khaliq and Khurram Abbas in his defence.

7. The trial Court, having found the evidence of the prosecution witnesses consistent, awarded conviction and sentences, explained herein above and feeling aggrieved by such conviction, the appellants have preferred the aforesaid appeals.

8. Heard and perused the record.

9. On behalf of the appellants, it has been argued that the conviction and sentences awarded to them is illegal, unlawful and contrary to law, hence liable to be set-aside; that the trial Court while passing the impugned judgment did not consider that no incriminating articles were recovered from the possession of the appellants at the time of their arrest and the recovery is foisted one; that the trial Court failed to take into account that the alleged abductees themselves reached to their homes, which creates doubt in the prosecution case and such fact was disregarded by the trial Court; that the Complainant is the Nephew and Partner of alleged abductee and other person Saifu-Ur-Rehman is his Driver and so also the third one Mst. Sabiha Shahnaz is his real wife and all the persons (prosecution witnesses) are interested mushirs, and in order to achieve their nefarious designs they made out this fake case with ulterior motives, which aspect of the matter was not considered by the trial Court; that police has badly failed to associate any single independent person as Mashir of the alleged arrest of the appellants and mushir of alleged recovery of Pistol, despite the fact that the alleged place of incident is a very thickly populated area; that the witnesses have contradicted each other on material points and made certain additions and alterations, but the learned trial Court did not consider this aspect of the matter and recorded conviction without any lawful justification. In this context, the learned counsel for the appellants referred the statements of

complainant, abductee and his wife. According to the learned counsel it has come in the evidence that there exists business relations between Shakiluddin and Irfan Qadri, who had invested certain amount and against such investments Shakiluddin had given him cheques and later some issues were developed and based on such issues Shakiluddin has fabricated a false case. He contended that all these aspects were not taken into consideration by the trial Court while awarding the sentence, which create serious doubt in the prosecution's case and such benefit ought to have been extended to the appellants by the trial Court instead of recording conviction; that the appellants have been falsely implicated in this case out of malice and personal grudge of the complainant inasmuch as the dispute arose between them on business affairs. The learned counsel lastly submitted that the case of the prosecution is full of doubt and the conviction that has been awarded is liable to be set-aside in circumstances.

10. In contra, learned APG contends that the prosecution has successfully proved its case beyond any reasonable doubt and the learned trial Court has rightly awarded conviction and sentences and prays that the appeals may be dismissed.

11. So as to reach a fair and just decision, we deem it appropriate to discuss the evidence of the prosecution witnesses as well as defence.

12. At the very outset, it may *safely* be added that prosecution story / case is always a *root* hence it must always stand well with the test of *reasonable* as well *believable.* In the instant case, the wife of the *abductee* namely Sabiha Shahnaz (PW-3) on 3:00 pm her husband, the *abductee* Shakiluddin had told her that he is going to meet appellant Irfan Qadri for some business *deal* but when after 6:00 pm (only after *three hours)* the *abductee* did not return and his phone was switched off; at 8:15 pm he (abductee) contacted her while asking her to bring Rs.800,000/- at *certain* place; appellants were arrested and then *both* abductees themselves reached home. Such story was always having number of *infirmities.* The PW-3 Sabiha

Shahnaz never claimed in her *evidence* that she had received a call of *ransom* rather she admitted in her cross-examination as:-

> "**she had not received any call from any person that her husband has been kidnapped**."

but per her *own* examination-in-chief she states that:

> "At about 8.15 pm her husband picked up her call and she enquired about him. He told her to get Rs.8 Lac and come to Dacca Sweet shop at Gulshan-e-Iqbal and that 2 people will come and will enquire how she was and that she should give that amount to them."

Not only this but the complainant also admits as:

> "He admitted that he did not hear any accused demanding ransom from Sabiha Shahnaz."

The above does not reflect that such amount was as *ransom* for their release particularly when he *(abductee)* had gone for a business deal. Surprisingly, she and complainant did not attempt to contact with appellant Irfan Qadri for whom the *abductee* had gone for business deal but preferred to lodge FIR when per *abductee* , as he admitted in his cross-examination that:

> "He admitted that his family knew about the Irfan Qadri as when he was going to Irfan Qadri he had told his wife that he was going to him."

She *however* claimed that:

> "She was receiving those calls on her mobile. **She does not remember whether she was receiving those calls from the mobile of the caller."**
>
> "She stated that she was receiving call **every after 5 minutes between 9 to 10 pm**. Her mobile No. is 03012716100. The caller had not given her his name to reach Agha Khan Hospital."
>
> "She admitted that she has not produced any documents either before the police or before this Court to prove that the mobile number which she had given in her examination in chief is her's."
>
> "She does not remember with whom she had conversed from Tracker Company. **She admitted that she has not given in her statement u/s 161 whether the calls were coming from mobile number or PTCL number"**.

The above *replies* were sufficient that the *claim* though was raised on *phone-calls* but no attempt was made to establish the same by producing such *data.* Not only did this but the complainant (PW-2) also not give details of *phone-record* which is evident from admissions made by him i.e:

> "His mobile No. 03218213511. He admitted the suggestion that he has not produced any documentary proof that this sim is in his name. Vol. said nobody asked him. He admitted that he had not shown to I.O. his mobile sim that he had received the call from Sabiha Shahnaz."

Not only these both these witnesses but the abductee also admitted the suggestion that:

> "He had not given documentary proof of his residence to the police. He also admitted that he has not given his mobile phone and his number to the police.'

13. Thus, it was always evident that though much *stress* was on phone-calls to substantiate the *kidnapping* for *ransom* but at no time such data was produced to establish the claim. This had brought clouds over such *claim* of the prosecution. Reference may be made to case of ***Azeem Khan v. Mujahid Khan*** [2016 SCMR 274] wherein it was observed as:-

> "22. The Cell phone call data is of no help to the prosecution for the reasons that numerous calls have been made indicating continuous interaction between the two cell phones, contrary to the evidence given by Muhammad Wali (PW-3), who has stated at the trial that the unknown caller made calls on his cell phone four times. No competent witness was produced at the trial, who provided the call data, Ex.P-1 to Ex.P-5. No voice record transcript has been brought on record. Similarly from which area the caller made the calls, is also not shown in it. Above all, the most crucial and conclusive proof that the cell phone was owned by the accused and SIM allotted was in his name is also missing. In this view of the matter, this piece of evidence is absolutely inconclusive and of no benefit to the prosecution nor it connects the accused with the crime in any manner."

It is also a matter of record that *ocular* account never left a room for any body else but the PW Sabiha Shahnaz attempted to justify by making improvement as:

> "The Car No.ANZ-374 is not in the name of her husband. It is under their use for the past 2 to 3 years. **She does not remember exactly what tracker company had installed in the car**. **She had phone Imran in whose name the car as and had taken the number of tracker.**

> "She admitted that in her statement u/s 161 Cr.P.C. she has not mentioned that she had taken the number of tracker from Imran".

The above reflects that she claims possession of the Car for more than ***two years*** but never knew about tracker and company which is quite *illogical* rather appears to be an attempt to bring the case in line. Even otherwise, such Imran was never produced during trial. The witness remained making improvements and *omissions* so as to bring the case in *line* which attitude was always sufficient to bring her out of meaning of a *truthful witness.* Reference may be made to case of *Sardar Bibi and another v. Munir Ahmed and others* 2017 SCMR 344 wherein it is held as:

> "2. ….. So the improvements and omissions were made by the witnesses in order to bring the case of prosecution in line with the medical evidence. Such dishonest and deliberate improvement and omission made tem **unreliable and they are not trustworthy witnesses.** It is held in the case of *Amir Zaman v. Mahboob and others (1985 SCMR 685)* that testimony of witnesses containing material improvements are not believable and trustworthy. Likewise in *Akhtar Ali's case (2008 SCMR 6) it was held that when a witness made improvement dishonestly to strengthen the prosecution's case then his credibility becomes doubtful on the well-known principle of criminal jurisprudence that improvement once found deliberate and dishonest, case serious doubt on the veracity of such witness. …."*

There has also been an *illogical* rather un-natural conduct through which the news of release of the *abductee* was received. Per PS Sabiha Shahnaz :

> "**It was 2.30 am** when her husband called to say that he has been released. She does not remember from which number her husband had called to say that he has been released. **Her husband had called from the mobile of the children.** She did not find out from the children who had received the call of their father of his release. **She cannot give the mobile number on which her husband had called to say that he has been released."**

However, the *abductee* claimed as:

> "He must have reached 3.0 a.m, 3.15, 3.30 a.m. He had stayed at home for 5 to 7 minutes and then proceed to AVCC. **When he reached home he had telephoned his wife and enquired where she was**. He was gone to his **brother in law at Dastagir and from where he had called his wife.**

14. These both witnesses do not support each other with regard to timing of *phone call;* place of phone-call and even phone. Further, it is also quite

unbelievable that the *abductee* after his release did not attempt to *immediately* inform his wife. The abductee further admitted that:

> "Number of his wife must have been saved in the mobile of his brother in law. He did not ask his brother in law as to where his wife was therefore he cannot say whether his brother in law knew about as to where his wife was."

This is also quite unnatural that abductee went to house of his brother but did not tell his brother about his kidnapping. This being *improbable* and not fitting with human behaviour also makes case doubtful. Reference may be made to the case of *Muhammad Ismail v. State* 2017 SCMR 898. However, such claim of the *abductee* Shakiluddin *however* was not supported by other alleged *abductee* as he has not spoken about going of his boss *abductee* Shakiluddin to house of his brother and even anywhere but stated that on reaching home:

> "There was no body in the house of Shakiluddin when they went after release. There were only two maid servants. His boss met his wife in the morning."

Further, as per the complainant:

> "**It was about 11.15 p.m**. Police mobile was parked inside the hospital and the officials had scattered near the main gate some in plain cloth and some in official uniform."

Both persons were arrested and then:

> "Thereafter he was told to proceed to office of AVCC. His car was behind the mobile and was signal to come forward and to follow them. They reached Chawkiwara. It was Sarbazi Mohallah. The injured Mustafa was sent to hospital whereas Irfan Qadri was in mobile. Irfan Qadri had led them to the place where he had kept Shakiluddin Khan and Saifur Rehman as **hostage but the place was locked which was double storied**. He had taken them to the first floor which was locked. I.O. had prepared memo and his signature was taken. He produce the memo as Ex.P-2/B. **It was about 0045 hours when they came back to AVCC."**

From above, it *prima facie* appears that the police, having arrested the accused, directly went to place of *captivity* i.e before 12:00 pm or *least* before 0045 hours but none was found although per *abductee* :-

> **“At about 1.15 p.m. a man came in the room on 13.04.2011** and opened his hand and gave Quran First in his hand and then to his driver Saifur Rehman that they will not speak a word against them or less their family will be finished. At 2.30 a.m. they asked them to go and they came home”

This *prima facie* means that one of *two* claims is false. Thus, benefit thereof was always requiring to be given to accused.

The *abductee* claimed during his cross that:-

> “He admitted the suggestion that no negotiation had taken place between Irfan Qadri and those people before him. He had talked to his wife more than three times as the culprits wanted money and was getting late. *“*

but PW Sabiha Shahnaz denies such claims and had categorically claimed to have come into contact *once* with abductee. She stated in her examination-in-chief as:-

> “At about 8.15 pm her husband picked up her call and she enquired about him. He told her to get Rs.8 Lac and come to Dacca Sweet shop at Gulshan-e-Iqbal and that 2 people will come and will enquire how she was and that she should give that amount to them. Thereafter he cut off the line. She rang again but he cut the line.”

Further, release of the *abductees* merely after an Oath is also against normal *behaviour* because appellants never had made an attempt to conceal their identity hence it was sure that *abductee* shall depose against them. Not only this but the admission made by the *abductee* that *“ the matter of Irfan Qadri was settled by those people and he was allowed to go”* was always making the claim of *kidnapping* for ransom as doubtful, rather is the one of settlement of some business disputes. This finds support from the record that none of the PWs, including the abductee Shakiluddin, claimed to have issued any cheque to the appellant Irfan Qadri but as per complainant himself at time of arrest of the appellant Irfan Qadri :

> **“One cheque of Rs.8 lac, one of 4 lac & one and two cheques of 3 lac each. These cheques were of Shakiluddin** but it was found from the wallet of Irfan Qadri.”

15. This also goes against the claim of the prosecution and had tilted the scale towards pleaded *defence* but this was not properly appreciated by the learned

trial Court Judge while convicting the appellants although the principle is by now settled that if on putting cases of prosecution and defence in *juxta-position* there appears possibility of defence version to be *true* then same would be sufficient for acquittal by giving benefit of doubt. Worth to add here that it is by now a well settled principle of law that if the ocular account fails the other *corroborative* evidence, including recovery also fails.

16. The case of prosecution was full of doubts; lacked independent corroboration and even defence was appearing to be more reasonable, hence, it was never a case to hold conviction. Accordingly, in view of what has been discussed above, the appeal is accepted. These are reasons of the short order dated 12.04.2017 whereby appeals were allowed.

JUDGE

JUDGE

Karachi.
Dated:_____
Sajid