

HIGH COURT OF SINDH AT KARACHI

Special Criminal Anti-Terrorism Appeal No. 27 of 2006
Special Criminal Anti-Terrorism Jail Appeal No. 30 of 2006
Confirmation Reference No. 08 of 2006

Mr. Justice Naimatullah Phulpoto
Mr. Justice Aftab Ahmed Gorar

JUDGMENT

Date of Hearing : 19th January 2016

Announcement of Judgment : 26th January 2016

Appellants : Asif Ali @ Asif Patel through Mr. Abdul Mujeeb Pirzada Advocate.
: Ali Raza through Mr. Khalid Shah Advocate.
: Faisal Ansari @ Soni and Qaisar @ Kala through Mr. Muhammad Farooq Advocate.

Respondent : The State through Ms. Akhtar Rehana Additional Prosecutor General.

NAIMATULLAH PHULPOTO, J.—Appellants Asif Ali @ Asif Patel, Ali Raza, Faisal Ansari @ Soni and Qaisar @ Kala were tried by learned Judge Anti-Terrorism Court No.V, Karachi Division in Special Case No. 14 of 2006 (Crime No. 34/2005) registered at Police Station Bahadurabad for offences under sections 365-A/34 PPC read with Section 7 of Anti-Terrorism Act, 1997. By judgment dated 21st September 2006, learned Judge, Anti-Terrorism Court No.V, Karachi Division convicted appellants under Section 7 (e) of the Anti-Terrorism Act, 1997 read with Section 365-A PPC and awarded death sentence and forfeited their property to the extent of Rs.100,000/- each to Government. Appellants were also convicted under section 7(i) of Anti-Terrorism Act, 1997 and sentenced to 05 years R.I. each and to pay fine of

Rs.50,000/- each. Reference for confirmation of death sentence was made to this Court by the trial court. Appellants have preferred appeals against the impugned judgment. By this single judgment, we intend to dispose of the aforesaid appeals filed by the above named appellants and Reference made by the trial Court for confirmation of death sentence.

2. Brief facts of the prosecution case are that on 26.03.2005 at 0900 hours, FIR was lodged by Mufazil Hussain, alleging therein that his father Safdar Hussain and brother Zulfiqar Ali (abductees) were going from their house to the factory, in Suzuki car bearing registration No. CN-3226. On the way, they went to the bank at Shabbirabad. Thereafter, both father and son, were proceeding to factory. One person called PW-Abbas Ali (uncle of the complainant) from the number of the father of the complainant that Safdar Hussain and Zulfiqar Ali have been kidnapped for ransom and demanded Rs. 50 lacs for their release. It is alleged that PW-Abbas Ali showed inability to pay such huge amount. Thereafter, 5/6 calls were made by unknown caller to PW-Abbas Ali for ransom. Complainant went to police station and lodged F.I.R of the incident. On the same day, it is alleged that culprits released Safdar Hussain with his commitment that he would make arrangement of the ransom for the release of his son Zulfiqar Ali. Thereafter, in the negotiations, culprits agreed to receive Rs.198,000/- as ransom for release of abductee Zulfiqar Ali. Ransom was paid to the accused and Zulfiqar Ali was released on 28.03.2005.

3. After registration of the FIR, SI Samee Jan started investigation of this Crime and inspected the place of wardat on the pointation of complainant and abductees on 30.03.2005 in presence of mashirs. Abductee Zulfiqar Ali also pointed out place from where he was released. Such mashirnama was

also prepared in presence of mashir. I.O had also inspected place where PW Safdar Hussain was released. Such mashirnama was prepared. I.O also inspected place where complainant paid ransom to the accused and prepared such mashirnama in presence of mashirs. I.O recorded statements of P.Ws u/s 161 Cr.P.C. I.O. Atiq-ur-Rehman received further investigation of crime on 26.05.2006. He was informed that all the four accused wanted in the above crime were under arrest in Crime No. 93/2005 registered against them at Police Station Garden under Sections 365-A/34 PPC. I.O proceeded there and interrogated them in the lockup and accused admitted the commission of the present offence and accused were arrested in this case in presence of mashirs. I.O moved an application before the concerned Judicial Magistrate on 30.05.2006 for conducting identification parade of the accused through P.Ws. Safdar Hussain, Zulfiqar Ali and Mufazil Hussain. I.O produced all the four accused before Judicial Magistrate on 31.05.2006 for conducting their identification parade with muffled faces. Judicial Magistrate conducted identification parade through prosecution witnesses. Inspector Raja M. Amjad has also partly investigated the case. During interrogation accused pointed out place where abductees were detained. Such mashirnama was prepared in presence of mashirs. He had also collected data of mobile phone Nos. 0304-2184506 and 0304-2083352.

4. On the conclusion of the investigation, challan was submitted against accused Asif Ali @ Asif Patel, Ali Raza, Faisal Ansari @ Soni, Qaiser @ Kala under sections 365-A/34 PPC read with section 7 of Anti-Terrorism Act, 1997. Remaining accused namely Waseem Saeed @ Waseem Rana, Aqeel @ Chappar, Shahid Michal, Sohail @ D.C, Wascemullah @ Waseem Lakho, Fareed Baloch and Papoo Ganja were shown as absconders. After completing

all the legal formalities against absconding accused, they were declared proclaimed offenders. Proceedings under Sections 87 & 88 Cr.P.C were concluded against them.

5. Learned trial Court framed charge against appellants Asif Ali @ Asif Patel, Ali Raza, Faisal Ansari @ Soni and Qaiser @ Kala at Ex.3 under the above referred sections. Accused did not plead guilty and claimed to be tried.

6. In order to prove its case, prosecution has examined the following witnesses at trial:

- (1) P.W-1 SIP Muhammad Iqbal at Ex.8. He produced FIR No. 34/2005 registered at P.S Bahadurabad under Sections 365-A/34 PPC at Ex.9.
- (2) P.W-2 Mrs. Aalia Malik Judicial Magistrate at Ex.10. She produced identification parade memo at Ex.12.
- (3) P.W-3 SIP Ali Muhammad at Ex.14. He produced mashirnama of arrest of accused at Ex.15.
- (4) P.W-4 Inspector Raja M. Anjad at Ex.16. He produced mashirnama where accused detained abductees at Ex.17, mashirnama of seizure of recorded cassette at Ex.18, mobile data at Ex. 19.
- (5) P.W-5 Mufazil Hussain at Ex.20. He has produced mashirnama of place of release of abductee Zulfiqar Ali at Ex.21, mashirnama of place of release of P.W-Safdar Hussain at Ex.22, mashirnama of place where ransom was paid at Ex.23 and mashirnama of seizure of Suzuki bearing No.CM-3226 at Ex.24.
- (6) P.W-6 Abbas Ali at Ex.26.
- (7) P.W-7 Safdar Hussain at Ex.27. He has produced mashirnama of place of abduction at Ex.28 and mashirnama of place of detention at Ex.30.
- (8) P.W-8 Zulfiqar Ali at Ex.31.
- (9) P.W-9 Sub-Inspector Samee Jan at Ex.33.
- (10) P.W-10 Salman Ahmed Assistant Controller CPLC at Ex.36.
- (11) P.W-11 I.O/Inspector Atiq-ur-Rehman at Ex. 38.

Thereafter, learned Prosecutor gave up remaining prosecution witnesses and closed the prosecution side vide his statement at Ex.42.

7. Statements of the accused were recorded by Trial Court under Section 342 Cr.P.C at Ex. 43 to 46. All the accused denied the prosecution allegations. Accused Asif Ali in reply to question No. 15 raised plea that P.Ws had seen him before holding of the identification parade and accused stated that it was not held as per rules. Accused Asif Ali has replied that he has been falsely implicated in this case by the police. Accused Muhammad Faisal has also denied the prosecution allegations and has replied that he was shown to the prosecution witnesses before identification parade and he had raised such objection before Judicial Magistrate. He has also raised plea that he has been falsely involved by police in this case due to political enmity. Accused Muhammad Qaiser has also denied all the incriminating pieces of evidence against him and claimed innocence. Accused Ali Raza has also denied the prosecution allegations and stated that he was shown to the prosecution witnesses before identification parade and raised plea that he has been involved in this case falsely at the instant of ASI Arif of CID against whom, he had made application to Mohtasib. All the four accused declined to give statement on oath in disproof of the prosecution allegations. Accused did not examine any witness in their defence.

8. We have carefully heard M/s. Abdul Mujeeb Pirzada, M. Khalid Shah and Muhammad Farooq Advocates for the appellants as well as Ms. Akhtar Rehana Additional Prosecutor General for state and perused the evidence on record.

9. It may be mentioned here that facts of this case as well as evidence produced before the learned Trial Court find an elaborate mention in the impugned judgment passed by learned Judge, Anti-Terrorism Court-V, Karachi and therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

10. Learned counsel for the appellants mainly contended that names of accused and their description have not been mentioned in FIR. No ransom was recovered from them. It is argued that learned Trial Court has convicted accused on the basis of identification parade. It is further argued that incident occurred on 26.03.2005, accused were arrested on 27.05.2006 and identification parade was held on 31.05.2006, possibility that witnesses might have mistakenly pointed out the accused could not be ruled out. Lastly, it is argued that identification parade was not held in proper manner and number of dummies were not proportionate to the number of accused persons. In support of the contentions, reliance has been placed on the cases reported as *Asghar ali alias Sabah and others vs. The State and others* (1992 SCMR 2088), *State through Advocate General Sindh Karachi vs. Farman Hussain and others* (PLD 1995 SC 01), *Kirir vs. The State* (PLD 1996 Karachi 246), *Sabir Ali alias Fauji vs. The State* (2011 SCMR 563) and *Ameer Bux and another vs. The State* (2012 P.Cr.L.J. 500).

11. Ms. Akhtar Rehana learned Additional Prosecutor General argued that prosecution has proved its case against the appellants beyond any shadow of doubt. Learned Prosecutor argued that it is not case of momentary glimpse of the accused, but abductee Zulfiqar Ali was in the captivity of the accused for two days and abductee Safdar Hussain was in the detention of accused for 16 hours. It is further argued that in the cases of kidnapping for ransom role of

each accused in the crime is not essential. As regards to the delay in holding of identification parade is concerned, learned Prosecutor argued that identification parade was held after the arrest of the accused as such delay was immaterial. Lastly, argued that learned trial Court has appreciated the evidence according to settled principles of law and there is no merit in the appeals. In support of her contentions, reliance has been placed upon the cases reported as *Solat Ali Khan vs. The State (2002 SCMR 820)*.

12. After hearing the learned counsel for the parties, we have scanned the entire evidence.

13. P.W-Safdar Hussain has categorically stated that on 26.03.2005, he along with his son Zulfiqar Ali left house as usual in his Suzuki for office at 9:00 am. First of all, he went to Al-Habib Bank, Adanjee Nagar from where, son and father were proceeding to the office when they reached at Hassan Square Chowrangi, traffic was jam. As soon as they turned vehicle to the old Subzi Mandi and reached at the corner of Sabzi Mandi, one Suzuki Hi-roof red color hit their Suzuki and three persons got down from it. One of them put TT pistol at the temple of his son and asked Safdar Hussain to occupy the rear seat of his Suzuki. One of the culprit sat at the driving seat and one sat beside the driver and took father and son in the Suzuki and drove to the unknown place. P.W-Safdar Hussain before the Trial Court at the time of recording of his evidence pointed out that accused Ali Raza, Asif and Qaiser had kidnaped them. P.W-Safdar Hussain further stated that accused snatched Rs.60,000/- from his pocket in the Suzuki. After 20 to 25 minutes, Suzuki was stopped at one old building and he and his son were made to sit in a room where two persons were already present they were carrying pistols in their hands. P.W-Safdar Hussain and his son were informed that they have been



kidnapped for ransom of Rs.50 lacs. P.W-Safdar Hussain has stated that his brother Abbas Ali called him on mobile. He has further stated that accused Faisal @ Soni was with them. He has further deposed that culprits talked Abbas Ali and demanded Rs.50 lacs. However, his son informed them about the inability of his uncle to arrange such huge amount and told them to release P.W-Safdar Hussain. At 6:00 pm, culprits informed P.W-Safdar Hussain that they have decided to release him and brought him out of the house where he was detained and he was released at Shaheed-e-Millat Road near Pizza Hutt. He came home and narrated the whole story to the family members and on the next morning, he went to CPLC along with his brother Abbas Ali and Mufazil Hussain. On 28.03.2005, he received call of his son Zulfiqar Ali, who asked his father to make arrangement of the ransom else he would be murdered at the hands of culprits. P.W-Safdar Hussain finalized deal with accused persons in the sum of Rs.198,000/-. Ransom amount was handed over to P.W-Mufazil Hussain to deliver the accused persons at the pointed place. At 10:00 pm, Zulfiqar Ali made call from PCO to home that he has been left at Bahadurabad Chowrangi. PW-Mufazil Hussain brought him to home. P.W identified the accused before the Magistrate and also clearly stated that accused present in Court were same.

14. P.W-Zulfiqar Ali, star witness of the case, was in the captivity of the accused persons for two days. He has also given entire episode of the incident as narrated by his father and stated before the trial Court that present accused kidnapped him for ransom along with his father Safdar Hussain on 26.03.2005. By giving the details of the incident, he has stated that he was released by the accused after receipt of ransom. He was produced before the

Magistrate where he identified the accused persons. He has also stated before the Trial court that all the four accused present in the Court were same.

15. P.W-Mufazil Hussain has deposed that incident occurred on 26.03.2005. On the relevant date, his father Safdar Hussain and brother Zulfiqar Ali as usual left in the vehicle for the office. They went to deposit cheque at Al-Habib Bank wherefrom they proceeded to the office. They did not reach at office till 10:15 am, his uncle contacted his father Safdar Hussain on his Cell No. 0304-2184506 and his father replied that he was in market. After half an hour, some unknown person called from the mobile of his father to the mobile of his uncle Abbas Ali and informed him that they have kidnapped Safdar Hussain with his son Zulfiqar Ali for ransom and demand of Rs.50 lacs was made. His uncle replied that they were not in a position to pay such huge amount. Thereafter, he went to the police station for lodging report of kidnapping of his father and brother for ransom. He has stated that his father returned home on the same night at 1:00 am and informed him that he has been released by the accused for making arrangement of ransom. On 27.03.2005, one culprit called him on mobile No. 0300-2277608 for ransom. He has further stated that they made arrangement of Rs.198,000/- and he took ransom amount along with two ladies in Suzuki FX and proceeded to the pointed place. When he reached at Nazimabad Bridge, two persons appeared on Honda motorcycle and car of P.W-Mufazil Hussain was stopped. He paid them ransom of Rs.198,000/-. He identified both accused Faisal @ Soni and accused Ali Raza.

16. P.W-Ms. Aalia Malik Civil Judge/ Judicial Magistrate has deposed that she held identification parade of accused Asif Ali, Faisal @ Soni, Ali Raza and Qaiser @ Kala through P.Ws Safdar Hussain, Zulfiqar Ali and Mufazil

Hussain on 31.05.2006. Accused were produced before her with muffled faces. Their handcuffs were removed. P.Ws were made to sit in Varanda and she asked her staff to arrange 10 dummies. Thereafter, she has stated that after completing formalities she called one by one P.Ws Safdar Hussain, Zulfiqar Ali and Mufazil Hussain and they identified the accused persons in the identification parade. In the cross-examination Magistrate has denied the suggestion that dummies were arranged by the police. She has also stated that list of the dummies was prepared by her staff.

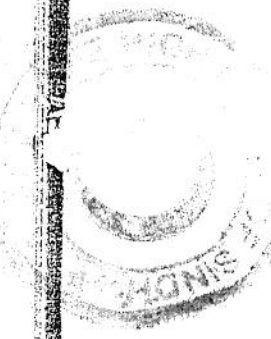
17. Evidence of complainant, who paid ransom to the accused, abductees Safdar Hussain and Zulfiqar Ali is quite reliable and confidence inspiring. P.Ws/abductees had no enmity to falsely implicate the appellants in this heinous crime. Judicial Magistrate held identification parade in which all four appellants were identified by the P.Ws. Safdar Hussain, Zulfiqar Ali and Mufazil Hussain. Magistrate was cross-examined at length. It appears that identification parade was held by Judicial Magistrate after observing all the legal formalities. Accused were also identified in Court. As regards to the delay in holding of the identification parade of accused is concerned, it appears that accused were arrested in some other case and were arrested in this case on 27.05.2006. During interrogation, they admitted commission of the present offence and they were put to the identification parade through above named witnesses on 31.05.2006. We have no reason to disbelieve such identification parade on the ground of holding it after one year for the reason that accused were arrested after one year on 27.05.2006. P.W/abductee Zulfiqar Ali was in the captivity of the accused persons for two days and P.W/abductee Safdar Hussain was in the captivity of accused for 16 hours. P.W-Mufazil Hussain stated that two accused persons came on motorcycle

and got from him the ransom. It is not the case of momentary glimpse. Such delay would not be fatal to the prosecution case as held by Honourable Supreme Court in the case of *Solat Ali Khan vs. The State* (2002 SCMR 820), relevant portion is reproduced as under:

"The identification of the appellant conducted under the supervision of Muhammad Rafiq, Judicial Magistrate (P.W. 14) has been brought on record by Mrs. Shahnaz Hamid (P.W. 4), Mirza Tariq Jawed (P.W. 9) and Umer Shahid (P.W. 12). The argument of the learned counsel for the appellant that the same was held after more than 530 days of the present occurrence and 9 days after arrest of the appellant would not advance the case of the defence. It has come on record that the appellant left the country and came back on 10-12-1998 when, as earlier stated, he was apprehended at the Jinnah International Terminal, Karachi. Mrs. Shahnaz Hamid (P. W. 4) and Umer Shahid (P.W. 12) in their evidence have categorically stated that it was the appellant who committed this gruesome offence. Mrs. Shahnaz Hamid (P. W 4) in her deposition stated that during identification parade she had a constant look on the appellant and identified him to be the same person who had been seen by her in a white car at the site of occurrence. She further stated that she had only pointed out the appellant on the day of holding of identification parade and had told the Magistrate that "This is the man". In an answer to a Court question she further elaborated that the person sitting in the Court was the same who had been seen by her in the car at the site of occurrence on the material date and time. In the concluding portion of her testimony to a Court question she answered as follows:--

"From the word 'unidentified' appearing in Exh. D. I meant was that I did not know the accused by name then seen by me who was driving the alleged car, now sitting here before the Court about whom I have not even the slightest doubt if he is not the same individual." (Underlining is ours).

Similarly, Umer Shahid (P.W. 12) had stated that he identified the appellant during the identification parade conducted by Muhammad Rafiq, Judicial Magistrate on 19-12-1998. He also stated in his cross-examination that prior to the identification parade he had not seen the appellant. He further reiterated his stance by saying that he had seen the appellant for a moment on the date and place of occurrence and then saw him in the identification parade held on 19-12-1998. The figure and features of the, appellant must have been imprinted on the minds of Mrs. Shahnaz Hamid (P.W. 4) and Umer Shahid (P.W. 12), widow and son respectively of deceased Shahid Hamid. How they can forget the person who had committed this gruesome act of killing Shahid Hamid alongwith his driver and gunman? It is expecting too much from the complainant to point out the detailed description and features of the accused in the F.I.R. as at that moment she must be undergoing a very traumatic condition. In this regard, the learned Division Bench of the High Court of Sindh has observed as under:--



"The arguments that P. Ws. had only momentary glimpses and it, was difficult for them to identify the culprits after such a long period has no merit. Suffice it to say that each criminal case has its own facts and circumstances and the value of evidence of identification is to be evaluated by the Court. It may be mentioned that the power to identify varies according to the power of observation and the observation is based upon minor details which a witness cannot describe and explain himself. In the instant case the incident has taken place in the day time just near the house of complainant party, who were receiving constant threats and they were conscious of the consequences. As soon as the lady and her son heard the fire shots, they came out of their bungalow and saw the incident and culprits. P.W. Mrs. Shahid Hamid and the other P.Ws, who were at the relevant time at the spot and seen the appellant/culprit and incident which was of immense importance, extending serious and saddest in one's life, therefore, the culprits to whom they saw could remain in memory as photo for sufficient long period hence there could be no mistaken identity."

18. In the above stated circumstances, we have come to the conclusion that prosecution had collected sufficient evidence to establish the charge of kidnapping for ransom against appellants. Learned Trial Court rightly came to the conclusion prosecution has proved its case against appellants. There was no substantial in the statements of the appellants recorded under section 342 Cr.P.C to discredit such confidence inspiring evidence. Plea raised by the accused in their statement has been rightly discarded by the trial Court.

19. We have given due consideration to the question of reduction of sentence and find that appellants Asif Ali @ Asif Patel, Ali Raza, Faisal Ansari @ Soni and Qaisar @ Kala have been convicted by the Trial Court under Section 7(e) of the Anti-Terrorism Act, 1997 read with Section 365-A PPC and have been awarded death sentence. According to the prosecution case, complainant Mufazil Hussain paid Rs.198,000/- ransom to appellants Faisal @ Soni and Ali Raza, but ransom amount has not been recovered from the appellants. The confinement of P.W Safdar Hussain was for about 16 hours and of P.W-Zulfiqar Ali was for 02 days but there was no allegation of torture/harm to the bodies of the victims. Mr. Muhammad Farooq learned

counsel for the appellants Faisal Ansari @ Soni and Qaisar @ Kala rightly relied upon the case of *Shiraz-ul-Haq vs. The State* (2010 SCMR 646).

Relevant Paras 8 and 9 are reproduced as under:

8. We have given due consideration to the question of reduction of sentence and find that the acquitted accused Khawaja Muhammad was released though allegation against him was that he was providing meal to the victim at the place of his detention. Thus it appears that he was involved in the case but the learned trial Court gave benefit of doubt to him. The finding of acquittal was accepted by the prosecution, as they did not prefer any appeal to challenge his acquittal. The prosecution alleged that incident of abduction was witnessed by P.W. Zeeshan Siddiqui he has not been examined as such on this aspect of the case there is evidence of victim only. The ransom amount has not been recovered from the appellants. Furthermore, the prosecution alleged that the culprits had used the Credit and Debited Cards and lacs of rupees were taken out from the account of the victim but no cogent evidence through any Bank official has been produced to prove such allegation. The confinement of the victim is of two days only with no allegation of torture. In the case of *Ansar Ahmed Khan Barki v. State* 1993 SCMR 1669 this Court observed that the accused who had succeeded in casting some doubt on the version of prosecution case was entitled to its benefit in matter of sentence. This Court in the case of *Qasim v. State* 1999 SCMR 2841 maintained the sentence of imprisonment for life by not finding any irregularity or legal infirmity in awarding such sentence by Courts below when 5 dacoits abducted 2 persons and released them after seven days of receiving ransom amount. In the case of *State v. Nazir Ahmed* 1999 SCMR 610 seven accused abducted a boy of 16 years and after receiving ransom amount of Rs.3,00,000, which was secured from one of the accused and the trial Court awarded maximum sentence of life imprisonment (before amendment through Ordinance XIV of 1990). Two accused were acquitted. The learned High Court, in appeal, acquitted the accused. The State preferred appeal before this Court. The Court allowed the appeal in respect of Nazir Ahmed as he was only present before the Court because the other accused were either dead or absconders. The allegation against the accused was of abduction, receiving ransom amount and its recovery as clear from para 21 of the said judgment. The Court observed that the case was of not such where maximum sentence should be awarded.

9. Keeping in view the above decisions, we are of the view that this is not an extreme case of abduction, therefore, in such a case the sentence of death to three persons appears to be harsh one. Hence we reduce the sentence of the appellants from death to imprisonment for life. With the said modification in the sentence, the appeals are dismissed.

20. While respectfully relying upon the dictum laid down by the Honourable Supreme Court in the aforesaid case, we are of the considered view that this is not an extreme case of abduction for ransom, therefore, in

such a case, sentence of death to four persons awarded by the Trial Court appears to be harsh one.

21. For what has been discussed above, appeals are partly allowed, death sentence awarded to the appellants is reduced from death to imprisonment for life. Benefit of Section 382-B Cr.P.C is extended to the appellants. However, remaining sentences and fine are maintained. Consequently, Reference made by the Trial Court for confirmation of death sentence is answered in negative.


Sd. JUDGE 26.1.2016


Sd. JUDGE 26/01/2016



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