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IN THE HIGH COURT OF SINDH, CIRCUIT COURT LARKANA
Crl. Appeal No. D- 31 of 2014.

Present:
Mr. Justice Zafar Ahmed Rajput.
Mr. Justice Muhammad Iqbal Mahar.

1. Saddam Hussain Brohi.
2. Mashooque Brohi.
3. Abdul Hakeem Khoso.

.....Appellants.

Versus

The State. .....Respondent.

Messrs Rafique Ahmed Abro and Ahsan Ahmad Quraishi, Advocates for the appellants.
Mr. Yasir Arafat Seelro, Advocate for complainant.
Mr. Sardar Ali Rizvi, A.P.G.

Date of hearing: 16.08.2016.
Date of Judgment: 16.08.2016.

JUDGMENT

Muhammad Iqbal Mahar, J-. The above named appellants, through instant appeal have challenged the judgment dated 27.6.2014 passed by learned Judge, Anti-Terrorism Court, Larkana, in Special Case No. 4/2013, emanating from Crime No.198/2012 of P.S A-Section Shahdadkot for offences punishable under Sections 365-A, 342, 148, 149 PPC read with Section 7 (e) of Anti-Terrorism Act, 1997, whereby they and proclaimed offender Ali Khan alias Jhandi have been convicted and sentenced as under:

(a) For offence punishable under Section 365-A, read with Section 149 PPC to suffer imprisonment for life with forfeiture of their property to the Government;

(b) For offence punishable under Section 7 (e) of Anti-Terrorism Act, 1997, to suffer imprisonment for life;

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(c) For offence punishable under Section 342 read with Section 149 PPC to suffer R.I for one year and pay fine of Rs.3000/- each and in case of default of payment of fine to suffer S.I for one month more;

(d) For offence punishable under Section 148 PPC to suffer R.I for two years.

All the sentences were ordered to run concurrently and benefit of Section 382-B Cr.P.C. was extended in favor of the appellants.

2. Briefly the case of prosecution is that on 27.11.2012 complainant Sikander Ali, his son Sarfraz Ali and Ali Gul were present in thrashing-yard "Dera" of Dr. Muzafar Ali for looking-after the paddy crop. On 28.11.2012 at 2.00 a.m. they heard noise and saw on torch light six accused persons. Out of them the complainant party identified four persons to be Ali Khan alias Jhandi, Saddam Hussain armed with Kalashnikovs, Mashooque and Abdul Hakeem armed with guns, while two unknown persons were armed with T.T pistols. The accused persons over powered the complainant party and forcibly took Sarfraz and Ali Gul towards road side and got them sit in car, standing near the road, and went away. The accused persons asked the complainant to arrange for ransom amount for the release of abductees. The unidentified accused stood over the complainant for sometime and thereafter they also went away. The complainant tried to trace the abductees and accused but could not find any clue, therefore, he lodged F.I.R on 28.12.2012.

3. The Police after completing investigation submitted the challan. The learned trial Court after observing all legal formalities framed the charge against appellants, who did not plead guilty and opted to face the trial. Prosecution in order to prove its case, examined complainant Sikander Ali at Ex.12, who produced F.I.R at Ex.12-A; PW Abdul Haleem at Ex.14, who produced mashirnama of place of vardat, mashirnama of arrest of accused Saddam Hussain and Mashooque, mashirnama of arrest of

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accused Abdul Hakeem at Ex.14-A to Ex.14-C; P.W Sarfraz Ali/abductee at Ex.16, who produced true copy of his 164 Cr.P.C. statement at Ex.16-A; PW Ali Gul/abductee at Ex.17; P.W/SIP Muzafar Ali, the I.O of the case at Ex.19, who produced copy of roznamcha entry at Ex.19-A, mashirnama of recovery of abductees and inspection of injuries of injured at Ex.19-B, letter No. DB/-11 Dated 2.1.2013 of SSP Kamber-Shahdadkot for constitution of J.I.T at Ex.19-C; and P.W Head Constable Ghulam Mustafa/mashir at Ex.20. Thereafter, learned DDPP closed the prosecution side vide statement at Ex.21.

4. The statements of appellants were recorded under Section 342 Cr.P.C. at Ex. 28 to 30, whereby they denied the allegations of the prosecution and claimed their innocence. However, they did not examine themselves on oath under Section 340 (2) Cr.P.C, but examined D.W, namely, Ghulam Nabi Brohi, who was injured/PW in the case but was given-up by the prosecution. Statement of D.W Ghulam Nabi Brohi was recorded by learned trial Court.

5. After hearing the learned counsel for the parties, DDPP and considering the material available on record, the learned Trial Court passed impugned judgment. Feeling aggrieved by the same, the appellants filed the instant appeal.

6. Learned counsel for the appellants contended that the impugned judgment passed by learned special Judge is against the law; that there is unexplained delay of one month in lodging the F.I.R; that the identification of appellants is shown on torch light but said torch has not been produced by complainant before investigating officer of the case or before learned trial Court. He added that abductee Ali Gul has not supported the case of prosecution; that the abductees were shown recovered during encounter, in which Sarfraz Ali Brohi (TMO) and Ghulam Nabi allegedly sustained injuries but they were given up by learned DDPP and Ghulam Nabi was examined by appellants in

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their defence, who denied the encounter and recovery of abductees from the appellants. Learned counsel further submitted that as per prosecution case Ghulam Nabi and Sarfraz sustained injuries but their medical certificates have not been produced in evidence; that neither empties were secured from vardat nor crime weapons were recovered from the appellants. Learned counsel further contended that entire incriminating evidence was not confronted to the appellants in statements under Section 342 Cr.P.C.; that there are material contradictions in the evidence of P.Ws but learned trial Judge did not consider the same. He lastly submitted that the prosecution has failed to prove its case against the appellants beyond any shadow of doubt, hence they may be acquitted. In support of their contentions, they relied upon case of *Tanveer alias Rabail and another Vs. The State* (**2012 YLR-2026**), *Saifullah V. The State* (**2012 YLR-2173**) and *Zafar Iqbal alias Zafri and another Vs. The State* (**2015 P.Cr.L.J-285**).

7. The learned counsel for the complainant and A.P.G. supported the impugned judgment.

8. We have heard the learned counsel for the parties, learned A.P.G. and have gone through the material available on record and also examined the case-law, cited by the learned counsel for the appellants.

9. Perusal of record reflects that the case against the appellants is based on the evidence of complainant Sikander Ali, his son abductee Sarfraz and abductee Ali Gul. Out of them abductee Ali Gul did not implicate the appellants and stated that ***"We eat food and then Sikander Brohi took away the utensils back to his house. We then went to sleep. .... Three accused present in the Court are not same culprits who abducted us"***. He was declared hostile by learned DDPP and was cross-examined but the learned DDPP could not be able to get any favorable statement. So far the evidence of

complainant Sikander Ali and his son abductee Sarfraz is concerned they have given divergent statements on many counts and there is no sort of corroboration. As per prosecution case PW Sarfraz Brohi (TMO) and Ghulam Nabi, the witnesses of recovery of abductees, who sustained fire arm injuries at the time of recovery of abductees but both injured witnesses were not produced before learned Trial Court and were given up by learned DDPP. It is well-settled principle of law, that if a best piece of evidence is available with a party and same is withheld by him, then it is presumed that either the witness was not ready to support the prosecution case or the party has some evil motive behind it in not producing the said evidence. Since the private/injured witnesses who are relative of abductee have not come forward to support the recovery of abductees from the custody of appellants, therefore, the evidence of S.I.P Muzafar Ali and mashir HC Ghulam Mustafa, which is contradictory, can not be relied upon without independent corroboration which admittedly is lacking in this case.

10. Another aspect of the case is that the alleged incident took place on 28.11.2012 at 2.00 a.m. but same was reported on 28.12.2012 at 1730 hours after one month of the incident, though as per evidence of complainant the Police Station was at the distance of 700 paces and per statement of abductee Sarfraz the P.S was at distance of 40/50 paces from the place of incident and on next day of the incident complainant had gone to Police Station. He not only informed the Police about the incident but disclosed the names of accused persons. S.I.P Muzafar Ali Abro accompanied the complainant to place of wardat and inspected the same but the complainant did not register the FIR and after one month of the incident lodged the FIR, therefore, due deliberation, consultation and possibility of false implication of appellants can not be ruled out. Not only this but as per prosecution case the abductees were recovered on 29.12.2012

and 164 Cr.P.C statement of abductee Sarfraz was recorded on 23.1.2013 after about 25 days of the recovery and there is also no explanation of such delay at-all, as to why the complainant remained silent for one month and the abductee for 25 days.

11. Furthermore the case of prosecution is that at the time of incident, the pitch dark hours of the night, the accused persons were seen and identified on torch light. Evidence relating to identification of accused in the torch light has always been treated as weak piece of evidence. In this respect we would like to rely upon a case of Muhammad Bux and others Vs. The State reported in 1968 P.Cr.L.J 590 wherein it was held by a Division Bench of this Court that the identification of the assailants by witness in dark night through his torch may lead to the possibility of mistaken identity. Further more the said torch was admittedly not produced before investigating officer or before learned trial Court, hence identification on torch light creates doubt.

12. Apart from that neither the appellants were arrested by the Police from the place of encounter nor even empties were recovered from the spot to prove the recovery of abductees after an encounter.

13. Adverting to the contention of learned counsel for the appellants that entire incriminating evidence was not confronted to the appellants in statements under section 342 Cr.P.C, therefore same can not be used against them. We agree with the submission of learned Counsel for the appellants because it is settled law that if any incriminating piece of evidence is not put to the accused in their statements under section 342 Cr.P.C, the same can not be used against him. In case of *Tanveer alias Rabail* cited supra a Division of Bench of this Court has observed in Para No: 21 that ***"All incriminating pieces of evidence available on record in examination-in-chief, cross-examination or re-examination of witnesses are required to be put to the accused if the same are against him while recording***

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his statement under section 342 Cr.P.C." In this respect we are also fortified by the decision in the case of *Muhammad Shah Vs. The State* (**2010 SCMR 1009**), wherein honorable Supreme Court has held that ***"It is well-settled that if any piece of evidence is not put to the accused in his statement under section 342 Cr.P.C then the same cannot be used against him for his conviction."*** The perusal of statements of the appellants recorded under Section 342 Cr.P.C. reflects that no question regarding recovery of abductees from their custody was put to them, hence in the light of above cited case-law this piece of evidence cannot be used against the appellants.

14. In view of above discussion we are of the firm view that the prosecution has miserably failed to prove its case against the appellants beyond any shadow of doubt and it is well-settled law that for giving benefit of doubt to an accused, there need not be a number of circumstances to create doubt but single circumstance creating doubt in a prudent mind about the guilt of accused is sufficient for acquittal. In this respect reference can also be made to case of *Tarique Parvez v. The State* (**1995 SCMR-1345**).

15. Resultantly, while extending the benefit of doubt the impugned judgment passed by the learned trial Court was set aside and the appellants were acquitted of the charge by our short order dated 16.8.2016 and these are the reasons of our short order.

Judge 23-8-16

Judge 23/08/2016