

THE HIGH COURT OF SINDH, CIRCUIT COURT LARKANA

Cr. Appeal No.D-59 of 2014

Cr. Jail Appeal No. D-61 of 2014

Date

Order with signature of Judge

Present:

Mr. Justice Muhammad Iqbal Kalhoro &
Mr. Justice Fahim Ahmed Siddiqui.

Appellant in Cr. Appeal No.D-59 of 214

Abdul Hameed alias Hasti, son of Abdul Sattar Buririo, through Mr. Athar Abbas Solangi, advocate.

Appellant in Cr. Jail Appeal No.D-61 of 2014

Muhammad Shabban s/o Kajlo Dashti, through Mr. Rashid Mustafa Solangi, advocate

Complainant

Muhammad Nawaz Soomro
Through Mr. Safdar Ali Ghouri, advocate

The State

Through Syed Sardar Ali Shah, D.P.G.

Date of hearing : 07-02-2018

Date of judgment : 27.02.2018

J U D G M E N T

MUHAMMAD IQBAL KALHORO-J:- Through this common judgment, we are disposing of captioned two criminal appeals. The Cr. Appeal No.D-59/2014 has been filed by appellant Abdul Hameed @ Hasti, whereas Cr. Jail Appeal No.D-61/2014 has been filed by appellant Muhammad Shahban Dasti. Both the appellants have challenged impugned judgment dated 13.12.2014 passed by Judge, Anti-Terrorism Court Shikarpur convicting and sentencing them to undergo life imprisonment U/S 365/A r/w Section 149 P.P.C; R.I for four years under section 392 r/w Section 149 P.P.C; and R.I for two years under section 342 r/w Section 149 P.P.C. All the said sentences have been ordered to run concurrently with benefit of section 382-B Cr.P.C. extended to them.

2. Briefly the prosecution case is that on 24.08.2011, the complainant along with his nephew Talha Fareed in his Coure Car No.ASC-218 was going to Jacobabad from his village Mirpur in Taluka Thull. And when they reached main road leading to Thull near telephone exchange Hamayoon at

about 10-00 a.m., they were intercepted by persons riding on a motorcycle and a Mehran Car. The persons on the motorcycle were identified as Muhammad Shahban Dashti (appellant) and Saleem Khoso, both were armed with K.K. Five unknown persons armed with T.T. pistols were present in the Mehran Car, who alighted from it and overpowered the complainant party, three of them sat inside his car and one of them started driving it. The remaining accused went away towards eastern side. The complainant and his nephew realized that they were abducted by the accused for ransom. Meanwhile the accused snatched mobile phones, cash and some documents from them and after blindfolding them, they brought them at unknown place and confined there. The accused used to contact complainant's brother Wahid Bux and other relatives on mobile phones for ransom. On 05.10.2011 at about 07: p.m. when the accused were shifting complainant and his nephew to another place by road, the police arrived there and rescued them after an encounter with the accused. However, no one from amongst the accused was arrested. The police brought complainant and his nephew at police station, but he due to illness did not register FIR and went to Karachi for treatment. After his return, he appeared at Police Station and registered FIR to the above effect. A usual investigation ensued which led to filing of challan in the court showing all the accused as absconders. On 22.02.2012, appellant Muhammad Shahban was arrested and on 05.03.2012 appellant Abdul Hameed @ Husti was arrested. Both the appellants were sent up for trial, wherein a formal charge was framed against them at Ex-7. They pleaded 'not guilty' and opted to face the trial.

3. In order to prove its case, the prosecution examined complainant Muhammad Nawaz Soomro at Ex-8, who produced original FIR; abductee Talha Fareed Soomro at Ex-9; Mashir Faisal Bahadur Soomro at Ex-10 who produced memo of place of incident; I.O. Imran Ali Bhayo at Ex-12; SHO Abdul Ghani Abro at Ex-13 who produced memo of arrest of accused Shahban, memo of arrest of accused Abdul Hameed. Investigating Officer Imran Ali Bhayo was again examined at Ex-14, this time he produced a photostat copy of FIR No.68/2011; Miss Sadaf Khokhar I-Additional Sessions Judge, Shikarpur at Ex-15, she produced a copy of identification parade of accused Abdul Hameed and original statements of complainant and P.W. Talha Fareed recorded under section 164 Cr.P.C. After the prosecution evidence, the statements of the appellants U/S 342 Cr.P.C. were recorded, wherein they have denied the case of prosecution and pleaded their innocence. Appellant Abdul Hameed has stated that prior to this case cousin

of Complainant, Abdul Qayoom had enmity with him. He has produced certified copies of two FIRs bearing crime No.38/2007 and 16/2008 lodged by Abdul Qayoom Soomro at P.S Mirpur Buriro and copies of 'H' Forms issued by Pakistan Election Commission. The appellants did not examine themselves on oath nor led any evidence in their defence. After hearing the parties, learned trial court convicted the appellants vide impugned judgment dated 13.12.2014 in the terms as stated in Para No.1. Being aggrieved by the same, the appellants have preferred this appeal.

4. While arguing the case of appellant Abdul Hameed @ Husti, Mr. Athar Abbas Solangi, learned advocate contended that the appellant is innocent and has been falsely implicated in this case on the basis of enmity; that there is an inordinate delay in registration of FIR which has not been explained; that the incident took place on 24.08.2011, the alleged abductees were released on 05.10.2011 yet the FIR was registered on 16.11.2011 which is after almost three months of the incident, and 41 days of recovery of the alleged abductees; that name of the appellant is neither mentioned in the FIR nor in the challan and he was arrested on suspicion on 05.03.2012 which was after submission of the challan and then through an identification parade he was introduced in the case as an accused; that such a procedure is alien to law and creates suspicion over the entire exercise; that the appellant is co-villager of the complainant and is already known to him, therefore, his identification by him through a parade is simply a farce and has no value in law; that prosecution has not shown any material on the basis of which the appellant was suspected to be accused and arrested after submission of the challan when his description is not mentioned in any of police papers; that the memo of identification parade does not show addresses and occupation of the dummies, hence the same is unreliable; that the trial against the appellant has not been held in accordance with law as on the day when he was provided the police papers in compliance of Section 265-C Cr.P.C., the charge was framed against him, which is against the mandate of the said provision of law requiring supply of such documents to the accused not later than 7 days before commencement of the trial.

5. Mr. Rashid Mustafa Solangi, learned counsel for appellant Muhammad Shahban Dashti besides adopting the above arguments contended that appellant has been arraigned in this case at the instance of his Sardar (Chieftain) with whom he has enmity; that there are material contradictions in the evidence of prosecution witnesses which have rendered the entire case doubtful; that although the name of appellant is mentioned in



the FIR but the complainant has not been able to satisfactorily explain as to how he knew the appellant; that no specific role has been assigned to the appellant. He further submitted that although the abductees are shown to have been recovered during an encounter with the police but such fact was not proved by the prosecution, and though in the case of encounter empties are shown to have been recovered from the place of incident but during the trial no empties were produced, which has also made the prosecution case highly doubtful.

6. Mr. Safdar Ali Ghori learned counsel for the complainant has supported the impugned judgment and has submitted that prosecution has been able to prove its case against the appellants through unimpeachable evidence; that there are no major contradictions in the evidence to give benefit of which to the appellants who are involved in a heinous offence of abduction; that there are only minor discrepancies in the evidence which do occur due to passage of time in between the incident and recording of evidence of the prosecution witnesses.

7. Learned D.P.G. has conceded to the case of appellant Abdul Hameed @ Hasti on the ground that it is unclear how and on what basis he was arrested when neither his name was mentioned in the FIR nor in the challan and there was no description of any unidentified accused mentioned in any document to help the police arrest him. However, he has supported the impugned judgment to the extent of appellant Muhammad Shahban.

8. We have considered submissions of the parties and perused the material including the case law cited at bar. The incident allegedly occurred on 24.08.2111, the abductees were rescued by the police on 05.10.2011 after an encounter during which none of the parties received any scratch and all the accused escaped unscathed and unidentified; hence a case bearing crime No.68/2011 was registered against unknown accused. The complainant's counsel and learned deputy prosecutor general during their arguments were not able to inform in reply to a query as to what happened to that case and whether any accused was ever identified and arrested or not. The casings of fired bullets allegedly recovered from the place of encounter were not made property in the present case or produced as supporting evidence to prove recovery of abductees from the dacoits after an encounter as alleged. The complainant of said FIR, ASI Imran Ali when examined in this case at exhibit 12 was not even able to remember any encounter taking place between police and dacoits in which he along with his staff succeeded to rescue the abductees. On the contrary, in his cross-examination he has denied a

suggestion that the abductees were recovered by him during an encounter, and has disclosed that the complainant and other abductee appeared at police station after about three months of registration of crime No.68/2011 (The encounter case). It is strange to note that although he remembered the exact crime number of said case but was not able to recall the incident reported therein. Only in his further evidence at exhibit 14 recorded pursuant to an order on an application under section 540 Cr.P.C. for his re-examination, he was able to depose about the encounter and resultant release of the abductees. The reason which he has given for not mentioning the facts about the encounter in his earlier evidence is that he was not provided with the copy of FIR No.68/2011 for refreshing his memory despite his request. This could hardly be taken as a satisfactory reply to his earlier evidence in which he did not mention anything about encounter and even denied a suggestion that the abductees were recovered by him after any such encounter. It may be noted that on 08.03.2012 when the identification parade of appellant Abdul Hameed was conducted, statements of the abductees under section 164 Cr.P.C. were also recorded by the learned Magistrate who in her evidence at Ex.15 has produced the same in original. A perusal thereof shows that the abductee have spoken not a single word about any police encounter with the dacoits and their resultant release from them. They have simply stated that on their hue and cry in shifting from one place to another on 05.10.2011, they were left. Therefore, the factum of the encounter and the release of the abductees resultantly as alleged by the prosecution is not free from doubt. Seen in this backdrop, the delay in registration of the FIR does not seem to be plausible because it is the case of the complainant that after release from the accused after alleged encounter they (he and other abductee) initially went to Karachi for treatment and after return therefrom, he appeared at police station and lodged the FIR. In our view when the prosecution has not been able to satisfactorily establish the fact of encounter, the question of release of the abductees and them going to Karachi for treatment immediately thereafter does not arise. We have also noted that the complainant and the abductees have contradicted each other over their stay in Karachi for treatment. The complainant has disclosed in cross-examination that he stayed about one month in Karachi for his treatment and then as soon as he returned, he lodged the FIR. His nephew has revealed that after staying for about 3/4 days in Karachi they returned to the village and thenafter consultation with their Nek Mards they went to police station for FIR. If nephew of the complainant, who himself is abductee, is believed about their stay (3/4 days) in Karachi, the delay in the FIR not only stands unexplained but the FIR itself appears to be a result of



consultation as deposed by him. But even if his said assertions are ruled out of consideration, the delay in FIR does not appear to be fully justified because there is nothing on record to establish the complainant's stay in Karachi for treatment for such a long period.

9. The complainant and his nephew's evidence reflects that after alleged release from the dacoits in the alleged encounter, they were brought at police station, where according to the complainant none of their relatives arrived, but his nephew has said that their relatives had arrived. They are not unanimous even on this point, which has further consolidated our view about unreliability of episode of encounter and resultant release of the abductees. Be that as it may, we are not able to understand that when the abductees were at police station and evidence shows that they were there for 30/40 minutes, why they did not lodge the FIR or why the police did not proceed to lodge the FIR of their abduction, particularly so when two of the accused including appellant Muhammad Shaban were already known to the abductees and their disclosure about their names would have led to their immediate arrest. The excuse that they were not feeling well and therefore did not lodge the FIR does not seem to dovetail in the story because the question would be that if it was so, why not any of their relatives lodged the FIR during their long captivity or after their release when they were away for treatment. Non-registration of FIR by the abductees immediately after their release when they were at the police station appears to be against natural human conduct. In our estimation, normally the abductees in such a situation after being rescued would have immediately declared names of two accused to the police and the FIR lodged. Such an exercise not only would have seemed a result of natural demeanor but at the same time would have ruled out any chance of false implication of any accused.

10. It may be stated that complainant has nominated appellant Muhammad Shaban in FIR and in evidence has disclosed that he came to know of him about a month prior to the incident as he (the appellant) was sitting in a hotel where he took tea and food. It does not appear to be probable to us that complainant would come to know the name of said appellant by simply sitting in the same hotel where he was present. The hotel is a public place where many people always remain present and hence to know a name of a particular person there who does not have any distinct identity is impossible. More strangely, the same claim has been made by the other abductee that he had seen appellant Muhammad Shaban in a hotel where he used to take tea or food. It is hard to believe that the two abductees living entirely a



different life with different preoccupations, one was officer in education department and the other was a student in a college, spotted the appellant on different times in a hotel where they used to take tea or food and came to know of his name. Nonetheless, we have noted that none of them has disclosed how often he would visit the said hotel and how he had come to know of name of the appellant there or what is the name of the hotel or what is its location. In our view, the evidence of the abductees that they knew the appellant because he used to sit in the hotel where they would go for taking food and tea is not trust worthy and hence the false implication of the said appellant cannot be ruled out. The complainant has also deposed that he was abducted when he was travelling in his car which was also taken by the dacoits. But he has not produced any proof of ownership of any such a car and that at the time of his abduction he was travelling in it. The call data record (CDR) of phone calls allegedly made by the accused with the relatives of the complainant demanding Bhutta from them was not produced either. The record does not reveal that during the investigation any effort was made to collect the same.

11. Regarding the case of appellant Abdual Hameed, it has come on record that he is co-villager of the complainant. In the FIR registered after almost 3 months of the incident his name is not mentioned. Only two accused namely appellant Muhammad Shahban and accused Saleem have been nominated in the FIR along with 5 unknown accused, but their description has not been given. The challan of the case was submitted on 03.12.2011 showing only above named two accused as absconder. We therefore fail to understand on what basis appellant Abdul Hameed was suspected to be culprit of this crime and arrested on 05.03.2011 by SHO P.S. Hamayun namely Abdul Ghani Ex.13 who even was not the investigating officer of the case. In his cross-examination this witness has admitted that before arrest of the appellant he was not even known to him and that after arrest of the accused, he had called complainant and P.W. at police station where they identified him to be accused. If he was not even aware of the name of this appellant, then it remains unexplained what led him to suspect appellant Abdul Hameed to be involved in this case. His evidence also reflects that before identification parade, the appellant was shown to the witnesses at the police station. In law such an identification parade has no value and cannot be used as a reliable piece of evidence against the appellant. We have perused evidence of the abductees minutely. In fact in their evidence they have said nothing against the appellant, they have not made even a slightest reference to any particular role he played in the entire episode of abduction. At the fag-end of their



examination-in-chief, they have simply said that they were called by the police for identification of the accused before the Judicial Magistrate where they identified him and accused present in court are same. In our estimation, on the basis of such evidence the appellant cannot be held guilty of the subject offence and punished. This to us appears to be the reason why learned deputy prosecutor general appearing for the state candidly conceded to the case of this appellant (Abdul Hameed).

12. For foregoing discussion, we are of the view that the prosecution has not been able to prove case against the appellants beyond a reasonable doubt. Resultantly we allow the appeals in hand and acquit the appellants by extending them benefit of doubt. They shall be released forthwith, if not required in any other custody case.

H. H. H.
Judge

[Signature]
Judge

Amended by us

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Abdul Salam/PA