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IN THE HIGH COURT OF SINDH AT KARACHI

Present:

*Mr. Justice Mohammad Karim Khan Agha
Mr. Justice Khadim Hussain Tunio,*

SPECIAL CRIMINAL A.T. APPEAL NO.08 OF 2020

Appellant:

Tariq Mehmood son of
Muhammad Sharif through M/s.
Mushtaq Ahmed and Raja
Hassan Nawaz, Advocates.

Respondent:

The State through Mr.
Muhammad Iqbal Awan,
Additional Prosecutor General,
Sindh.

Date of Hearing:

24.03.2022

Date of Announcement:

31.03.2022

JUDGMENT

Mohammad Karim Khan Agha, J. Appellant Tariq Mehmood son of Muhammad Sharif was charge sheeted to face his trial in Special Case No. A-45 of 2013 arising out of FIR No. 793 of 2012 under section 365-A/302/34 PPC r/w section 7 of ATA 1997 registered at PS Ferozabad, Karachi and was convicted vide impugned judgment dated 10.01.2020 passed by the learned Judge, Anti-Terrorism Court No.I, Karachi whereby appellant was sentenced for the offence punishable u/s.365-A PPC to undergo R.I. for life. He was also convicted for the offence punishable u/s.7(1)(e) of ATA, 1997 to undergo R.I. for life. He was also convicted for the offence punishable u/s.302(b) PPC to undergo R.I. for life and to pay compensation of Rs.2,00,000/- (Rupees Two Lac) u/s.544-A Cr.P.C. to the heirs of the deceased and in default of payment he shall suffer S.I. for six months more. He was also awarded sentence for the offence punishable u/s. 7(1)(a) of ATA, 1997 to undergo R.I. for life with fine of Rs.2,00,000/- (Rupees Two Lac) and in default of payment he shall suffer S.I. for six months more. All the sentences were to run concurrently. The benefit of Section 382-B was also extended to the accused.

2. The brief facts of the prosecution case as narrated in the FIR are that on 18.12.2012 at 0010 hours, on the basis of statement u/s.154 Cr.P.C. of complainant Fayaz Hussain son of Allah Ditta, the FIR No.793/2012 u/s.365 PPC was registered at PS Ferozabad, Karachi wherein it was alleged that his son Muhammad Javed, aged about 18 years, student of B.Com and was studying in National Textile College, near Allah Wali Chowrangi, Tariq Road, Karachi on 15.12.2012 at about 8:00 a.m. he left house in college uniform in order to attend College. That at about 3:00 pm, mother of Muhammad Javed called him on his mobile phone No.0303-2983808 from her mobile phone No.0307-2126275 to which he replied that his friend was coming from Lahore and they were outside of his college at Tariq Road and would reach home soon. After one hour the complainant and his wife made calls on his mobile phone, but the same was found powered off and he did not return back, as such, present FIR was lodged.

3. After usual investigation the case was challaned and the appellant was sent up to face trial. He pleaded not guilty to the charge and claimed trial.

4. The prosecution in order to prove its case examined 11 PWs and exhibited various documents and other items. The statement of accused was recorded under Section 342 Cr.P.C in which he denied all the allegations leveled against him. The accused neither examined himself on oath nor produced any witness in his defence. After appreciating the evidence on record the trial court convicted the appellant and sentenced him as set out earlier in this judgment. Hence, the appellant has filed this appeal against his conviction.

5. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the impugned judgment dated 10.01.2020 passed by the trial court and, therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

6. Learned counsel for the appellant has contended that the FIR was lodged after a delay of three days which gave the complainant time to cook up a false case in collusion with the police; that there was no eye witness to either the abduction or the murder; that it had not been proven that the body which was recovered was that of the complainant's son; that

there was no evidence of any ransom demand; that no ransom money was recovered; that nothing was recovered from the appellant on his arrest; that the identification of the appellant at the identification parade where the complainant identified the appellant could not be safely relied upon as it was not in accordance with the law on conducting identification parades; that this was a case of no evidence and as such the appellant for any or all of the above reasons should be acquitted of the charge by extending him the benefit of the doubt. In support of his contentions, he placed reliance on the cases of Kanwar Anwaar Ali, Special Judicial Magistrate in the matter of Criminal Miscellaneous Application No.183 of 2019 in Criminal Appeal No.259 of 2018 (PLD 2019 Supreme Court 488), Muhammad Ayaz and others v. The State (2011 SCMR 769), Mian Sohail Ahmed and others v. The State and others (2019 SCMR 956), Javed Khan alias Bacha and another v. The State and another (2017 SCMR 524), Azhar Mehmood and others v. The State (2017 SCMR 135), Kamal Din alias Kamala v. The State (2018 SCMR 577), Muhammad Fayyaz v. The State (2012 SCMR 522), Muhammad Yameen alias Raja v. The State and others (2009 SCMR 84), Muhammad Afzal alias Abdullah and others v. The State and others (2009 SCMR 436), Nazir Ahmad v. Muhammad Iqbal and another (2011 SCMR 527), an unreported Judgment of High Court of Sindh in Special Criminal A.T.A. No.306 of 2018 dated 18.01.2022 Syed Aijaz Shah Qadri v. The State, another unreported Judgment of High Court of Sindh in Special Criminal A.T.A. No.29 of 2006, 27 & 28 of 2007 dated 15.11.2019 Muhammad Shaukat and another v. The State, Azeem Khan and another v. Mujahid Khan and others (2016 SCMR 274), Mian Khalid Perviz v. The State through Special Prosecutor ANF and another (2011 SCMR 522), Orangzaib v. The State (2018 SCMR 391), Basharat Ali v. Muhammad Safdar and another (2017 SCMR 1601), Muhammad Zubair and 2 others v. The State (2010 P. Cr.LJ 1892), Muhammad Fazil v. Bashir Ahmad and another (2009 SCMR 1382), Hayatullah v. The State (2018 SCMR 2092), Fazal Subhan and another v. The State and others (2019 SCMR 1027), Sajjan Solangi v. The State (2019 SCMR 872), Mst. Sughra Begum and another v. Qaiser Pervez and others (2015 SCMR 1142), Muhammad Ramzan and 3 others v. The State (2011 YLR 2379), Muhammad Tufail v. The State (2013 SCMR 768), Salman Akram Raja and another v. Government of Punjab

through Chief Secretary and others (2013 SCMR 203), Abdul Jabbar and another v. The State (2019 SCMR 129), Muhammad Akram v. The State (2009 SCMR 230) and Tariq Pervez v. The State (1995 SCMR 1345).

7. On the other hand learned APG who was also representing the complainant fully supported the impugned judgment and contended that since the prosecution had proved its case beyond a reasonable doubt the appeal should be dismissed.

8. We have heard the arguments of the learned counsel for the appellant as well as learned Additional Prosecutor General Sindh and gone through the entire evidence which has been read out by the learned counsel for the appellant, and the impugned judgment with their able assistance and have considered the relevant law including the case law cited at the bar.

9. After our reassessment of the evidence we find that the prosecution has NOT proved beyond a reasonable doubt the charge against the appellant for which he was convicted for the following reasons;

(a) Admittedly the FIR was lodged after a delay of about three days however in kidnapping for ransom cases this is not always fatal to the prosecution case as in such type of cases the most usual reaction is for the loved ones to try and search out the missing persons before lodging any FIR.

(b) There was no eye witness to the abduction or murder of the deceased.

(c) There was no last seen evidence in respect of the deceased.

(d) That the case of the prosecution is that the deceased dressed in his college uniform and headed off for College that morning. Yet it has come on record that there was a strike that day and that the College was not open which also begs the question how he could have gone shopping on Tariq Road where the shops would also have been closed.

(e) We are not entirely convinced that the prosecution has proved that the body which was found was even that of the deceased. Apparently he was identified by the complainant through pictures of his teeth as his face was unrecognizable. We hardly consider that identification by photo's of a person's teeth by a loved one is a meaningful way of identifying a dead person. Significantly the complainant in his FIR states that his son is 18 years of age but most other documentary evidence on record place the deceased as being about 35 years of age which is a significant discrepancy. In fact,

when the body was later exhumed no DNA match was found between the deceased and the complainant.

(f) That the medical evidence tends to indicate that the cause of death of the deceased was him being hit by a blunt instrument to the head. However no recovery was made of any such instrument where the body was found or on the appellant at the time of his arrest.

(g) That the appellant had no linkage/connection to the place where the body was found

(h) That allegedly the complainant sent a ransom amount by easy paisa but there is no evidence of this whatsoever.

(i) That although the complainant and his wife and daughter state that a ransom demand was made and paid at Hyderabad. There is no CDR record to support such a demand being made and no recording of such demand despite the CPLC having provided the complainant with the relevant recording equipment. No SIM was also recovered from the appellant on his arrest. In this respect reliance is placed on the cases of *Azeem Khan (Supra)* and *Mian Khalid Pervez (Supra)*

(j) That there is no evidence where the complainant got the alleged 5 lacs ransom from which he allegedly paid to the appellant and no ransom amount was recovered from the appellant.

(k) It is alleged that the complainant and two other of his family members witnessed the handing over of the ransom to the appellant at Hyderabad but admittedly it was **dark and no hulia of the appellant was given by any of the three witnesses** to the handing over of the ransom. **Most surprisingly** two of the witnesses who saw the ransom being given to the appellant did not appear before the identification parade. What is even of **greater significance** is that the complainant in his own evidence admits knowing the appellant and having him to his house so how was it possible for him not to recognize the appellant and name him to the police especially as he could apparently pick him out at a later identification parade. This aspect of the case was concealed by the complainant and his other family members from the police which would have negated the necessity of an identification parade. This conduct in and of itself raises doubt as to the identification of the appellant.

With regard to the importance of an eye witness giving **hulia** of a suspect the case of *Javed Khan V State (2017 SCMR 524)* concerning the necessity for an early hulia/description of an accused by an eye witness before an identification parade and the need to strictly follow the rules governing identification parades held as under at P.528 to 530:

"7. We have heard the learned counsel and gone through the record. The prosecution case rests on the positive identification proceedings and the Forensic Science Laboratory report which

states that the bullet casing sent to it (which was stated to have been picked up from the crime scene) was fired from the same pistol (which was recovered from Raees Khan in another case). We therefore proceed to consider both these aspects of the case. As regards the identification proceedings and their context there is a long line of precedents stating that identification proceedings must be carefully conducted. In *Ramzan v Emperor* (AIR 1929 Sid 149) Perceval, JC, writing for the Judicial Commissioner's Court (the precursor of the High Court of Sindh) held that, "The recognition of a dacoit or other offender by a person who has not previously seen him is, I think, a form of evidence, which has always to be taken with a considerable amount of caution, because mistakes are always possible in such cases" (page 149, column 2). In *Alim v. State* (PLD 1967 SC 307) Cornelius CJ, who had delivered the judgment of this Court, with regard to the matter of identification parades held, that, "Their [witnesses] opportunities for observation of the culprit were extremely limited. They had never seen him before. They had picked out the assailant at the identification parades, but there is a clear possibility arising out of their statements that they were assisted to do so by being shown the accused person earlier" (page 313E). In *Lal Pasand v. State* (PLD 1981 SC 142) Dorab Patel J, who had delivered the judgment of this Court, held that, if a witness had not given a description of the assailant in his statement to the Police and identification took place four or five months after the murder it would, "react against the entire prosecution case" (page 145C). In a more recent judgment of this Court, *Imran Ashraf v. State* (2001 SCMR 424), which was authored by Iftikhar Muhammad Chaudhry J, this Court held that, it must be ensured that the identifying witnesses must "not see the accused after the commission of the crime till the identification parade is held immediately after the arrest of the accused persons as early as possible" (page 485P).

8. The Complainant (PW-5) had not mentioned any features of the assailants either in the FIR or in his statement recorded under section 161 Cr.P.C. therefore there was no benchmark against which to test whether the appellants, who he had identified after over a year of the crime, and who he had fleetingly seen, were in fact the actual culprits. Neither of the two Magistrates had certified that in the identification proceedings the other persons, amongst whom the appellants were placed, were of similar age, height, built and colouring. The main object of identification proceedings is to enable a witness to properly identify a person involved in a crime and to exclude the possibility of a witness simply confirming a faint recollection or impression, that is, of an

old, young, tall, short, fat, thin, dark or fair suspect. There is yet another aspect to the matter of identification of the culprits of this case. The Complainant had named three other persons who could recognize the assailants, but he did not mention Subedar Mehmood Ahmad Khan (PW-6) as one of them. Nonetheless Subedar Mehmood Ahmad Khan came forward to identify the appellants. Significantly, none of the three persons mentioned by the Complainant participated in the identification proceedings and two were not even produced as witnesses by the Prosecution. During the identification proceedings both the appellants had informed the Magistrates who were conducting the identification proceedings, and before the identification proceedings commenced, that they had earlier been shown to the witnesses. The Magistrates recorded this objection of the appellants in their reports but surprisingly did not attend to it, which can only be categorized as a serious lapse on their part. Therefore, for all these reasons reliance cannot be placed upon the report of the identification proceedings in which the appellants were identified.

9. As regards the identification of the appellants before the trial court by Nasir Mehboob (PW-5), Subedar Mehmood Ahmed Khan (PW-6) AND Idress Muhammad (PW-7) that too will not assist the Prosecution because these witnesses had a number of opportunities to see them before their statements were recorded. In State v. Farman (PLD 1985 SC 1), the majority judgment of which was authored by Ajmal Mian J, the learned judge had held that **an identification parade was necessary when the witness only had a fleeting glimpse of an accused who was a stranger as compared to an accused who the witness had previously met a number of times** (page 25V). The same principle was followed in the unanimous judgment of this Court, delivered by Nasir Aslam Zahid J, in the case of Muneer Ahmad v State (1998 SCMR 752), in which case the abductee had remained with the abductors for some time and on several occasions had seen their faces. In the present type of case the culprits were required to be identified through proper identification proceedings, however, the manner in which the identification proceedings were conducted raise serious doubts (as noted above) on the credibility of the process. The identification of the appellants in court by eye-witnesses who had seen the culprits fleetingly once would be **inconsequential.**" (bold added)

The recent supreme court case of Mian Sohail Ahmed V State (2019 SCMR 956) has also emphasized the care and caution which must be taken by the courts in ensuring that an unknown accused is correctly identified. In fact such extra care and caution in

relying on identification parades is an accepted global phenomena in most criminal jurisdictions as the possibility of deliberately or mistakenly picking out a wrong person from an identification parade and sending an innocent man to jail or in this country potentially to the gallows is very much recognized and thus most jurisdictions (including Pakistan) have put in place mandatory guidelines to greatly limit the chances of such incorrect identification.

In this case we note that the rules governing a safe identification parade were also **largely not followed** as for instance all of the dummies were different and not the same which would make the appellant stand out and no CNIC's or address was taken from most of the dummies. In this respect reliance is placed on the case of **Kunwar Anwar Ali** (Supra)

Even in the identification parade the complainant gave no specific role to the appellant although such role was **later** given in evidence by the complainant. In this respect reliance is placed on the case of **Azher Mehmood** (Supra)

Thus, keeping in view the above discussion we have doubt that the complainant correctly identified the appellant as the person who he handed over the ransom to if he even did hand over any ransom.

(l) The CDR is not of much assistance to the prosecution case as there appears to be only one call to the complainant and this was on 15th December **before** any ransom demand was made and otherwise the CDR does not link the appellant to the complainant.

(m) We also find that a number of prosecution witnesses have made substantial improvements in their evidence at trial e.g. PW 3 Mahnez Anjum who was the sister of the deceased which casts doubt on the reliability of their evidence. In this respect reliance is placed on the case of **Muhammed Fazil** (supra).

(n) The appellant's confession before the police is inadmissible in evidence and the appellant was not taken before a magistrate to have his confession recorded.

(o) The fact that the appellant allegedly took the police to the place where the body was discovered is irrelevant as the police already knew where that place was and had already removed the body. In this respect reliance is placed on the case of **Hayatullah** (Supra)

10. It is a golden principle of criminal jurisprudence that the prosecution must prove its case against the accused beyond a reasonable doubt and that the benefit of doubt must go to the accused by way of right as opposed to concession. In this respect reliance is placed on the case of **Tariq Pervez V/s. The State** (1995 SCMR 1345).

11. Thus, for the reasons discussed above by extending the benefit of the doubt to the appellant the appellant is acquitted of the charge, the impugned judgment is set aside, the appeal is allowed and the appellant shall be released unless wanted in any other custody case.
12. The appeal stands disposed of in the above terms.