116

ORDER SHEET

IN THE HIGH COURT OF SINDH,
CIRCUIT COURT, HYDERABAD.

Cr. Special ATA No.D-63 of 2010

DATE	ORDER WITH SIGNATURE OF JUDGE(s)

For hearing of main case.

24.01.2023

Mr. Pervaiz Tarique Tagar, Advocate for appellant.

Mr. Shahzado Saleem Nahiyoon, Addl. P.G Sindh.

Complainant Muhammad Arshad present in Person.

=

We have heard the learned counsel for appellant and learned A.P.G as well as complainant Muhammad Arshad who has appeared in person and argue his own case as he does not want to engage counsel. Reserved for judgment.

"Hafiz Fahad"

117

Questions not put u/s 342
No record to fill in lacuna's in pros Case

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

Present:-

Mr. Justice Mohammad Karim Khan Agha
Justice Mrs. Kausar Sultana Hussain

Cr. Spl. ATA Appeal No.D- 63 of 2010

Appellant : Muharram Ali Brohi	through Mr. Pervez Tarique Tagar, Advocate
Respondent : The State	through Mr. Shahzado Saleem Nahiyoon, Additional Prosecutor General, Sindh
Complainant : Muhammad Arshad	In person
Date of hearing	24.01.2023
Date of judgment	31.01.2023

JUDGMENT

MOHAMMAD KARIM KHAN AGHA, J.-Appellant Muharram Ali along with other co-accused Ghulam Qadir alias Qadroo, Nazir and absconding accused Ismail, Muhammad Ashraf and one unknown accused was tried by the learned Special Judge, Anti-Terrorism Court, Shaheed Benazirabad in Special Case No.18 of 2009, culminating from Crime No. 88 of 2008, registered at Police Station Kazi Ahmed, under sections 365-A, 342 PPC and section 7 Anti-Terrorism Act, 1997; and, vide judgment dated 18.02.2010, (the impugned Judgment), convicted under section 365-A PPC and sentenced to suffer life imprisonment and to pay fine of Rs.200,000/-, in default whereof he was directed to suffer R.I. for 03 years more. He was also convicted u/s 342 PPC and sentenced to suffer R.I for 01 year and to

5

118

pay fine of Rs.1000/-, in default thereof he was also directed to suffer R.I for 01 month more. He was further convicted and sentenced u/s 7(e) of A.T.A 1997 to suffer life imprisonment and his immovable property worth of Rs.200,000/- was ordered to be forfeited to the State. All the sentences were ordered to run concurrently. Benefit of section 382-B Cr.P.C was awarded to him; whereas the other co-accused namely Ghulam Qadir alias Qadroo and Nazir Ahmed were acquitted of the charge while extending benefit of doubt. As regard the case against absconding accused namely Ismail, Muhammad Ashraf and one unknown accused, the case against them was proceeded in absentia.

2. Brief facts of the prosecution case as per FIR are as under:-

"That on 04.07.2008 at about 1900 hours, complainant Muhammad Arshad appeared at Police Station and lodged report, stating therein that he is by profession a school teacher and his brother namely Muhammad Aslam has owned cloth merchant shop at Sakrand town. On 31.05.2008 at about 07:30 evening time, the complainant, his brother Muhammad Aslam and cousin Muhammad Saleem had accompanied from Sakrand and went towards their village in Datsun pickup and then alighted from the said Datsun near the bridge of Rin Minor and were going towards their village by foot, while they reached near Banana Garden of one Syed Ghulam Ali Shah, six persons emerged from said garden, the complainant along with their companion identified the said persons who were armed with kalashnikoves and pistols, out of them four were with muffled faces and two were with open faces, the complainant party could identify if seen again. They took them towards northern side in the Banana Garden on the point of their weapons and they forced them to sit in the crop. The dacoits have tied them with ropes and looted cash, mobile phone and wrist watch from the complainant and thereafter they talked on mobile phone that work has been completed and send vehicle, after one hour a vehicle came and they took the brother of the complainant Muhammad Aslam with them and by saying that the complainant should make arrangement for money for the release of his brother.

Thereafter, complainant and his cousin Muhammad after untying them reached their village and informed their Nek Mard about the incident. The accused on mobile phone themselves as well as through his brother Muhammad Aslam asked the complainant to arrange Rs.35,00,000/- for release of his brother. Thereafter, complainant lodged FIR with police."

119

3. The investigation of the crime was conducted by the I.O, who recorded the statements of the P.Ws as well as prepared other documents and after completing the same, challaned the case before the Court having jurisdiction.

4. The charge against the accused Muharram Ali (appellant) and arrested co-accused Ghulam Qadir alias Qadroo and Nazir was framed, to which they pleaded not guilty and claimed to be tried.

5. In order to substantiate its case, the prosecution examined 06 witnesses and exhibited numerous documents and other items. The statements of the accused were recorded u/s 342 Cr.P.C, wherein they have denied the prosecution allegations and claimed their false implication in this case. However, they neither examined themselves on oath in order to disprove the prosecution case nor led any evidence in defense.

6. Learned trial Judge after hearing the learned counsel for the parties and appreciating the evidence on record convicted and sentenced the accused/appellant Muharram Ali and acquitted the arrested co-accused as set out in the earlier in this judgment. Hence the appellant has filed this appeal against his conviction

7. Learned trial court in the impugned judgment has already discussed the facts and the evidence in detail and there is no need to repeat the same here, so as to avoid duplication and unnecessary repetition.

8. Learned counsel for the appellant has contended that the appellant is innocent and has been falsely implicated in this case at the hands of the complainant party in collusion with the police and hence the long unexplained delay in lodging the FIR; that the eye witnesses have not correctly identified the appellant as one of the kidnappers; that no ransom demand was made and no ransom was paid or recovered and as such for any or all of the above reasons the appellant should be acquitted of the charge by being extended the benefit of the doubt. In support of his contentions, he placed reliance

120

on the case of **Suleman Shah alias Sunny and another V The State** (2020 YLR 2226).

9. On the other hand, learned A.P.G, as well as the complainant (present in person) fully supported the impugned judgment and contended that the appellant belongs to a gang of dacoits; that he has been correctly identified by the eye witnesses; that the ransom demand was proven; that prosecution witnesses have fully supported the case against the appellant; that if there was any contradiction in the evidence of the prosecution witnesses the same were only a result of passage of time and only of minor in nature hence cannot be taken as a ground for acquittal of the appellant. In the alternative he submitted it was a case of remand as the case had to be referred back to the trial court so that all the material/evidence could be put to the accused so that he could respond to the same as not all incriminating material/evidence had been put to the accused whilst recording his S.342 Cr.PC statement.

10. We have considered the arguments of learned counsels as well as the complainant in person, scanned the entire evidence available on record with their assistance and considered the relevant law including the authority cited by learned counsel for the appellant at the bar.

11. After our reassessment of the evidence we find that the prosecution has **NOT** proved beyond a reasonable doubt the charge against the appellant keeping in view that each criminal case must be decided on its own particular facts and circumstances for the following reasons;

(a) That although some delay in lodging FIR's is not uncommon in kidnap for ransom cases as the first priority is to trace out the missing kidnapped person based on the particular facts and circumstances of this case the delay in lodging the FIR of over one month and 13 days is damaging to the prosecution case as this delay has not been explained and the complainant knew immediately that the abductee had been taken away by dacoits as he was allegedly with the abductee when the dacoits took him away and demanded a ransom.

121

(b) That allegedly the complainant, the abductee and Saleem were together when they were confined by the appellant and other abductees for about one hour in semi darkness. According to the FIR two of the four persons who confined them had muffled faces. They did not know any of the alleged abductees prior to the incident however they gave no hulia or description of any of the abductees either in the FIR or their Section 161 Cr.PC statements (two of whom had muffled faces according to the FIR).The appellant also claims that he was shown to the alleged eye witnesses before the identification parade as he remained in police custody during this period. Under these circumstances the eye witnesses picking out the appellant at the identification parade we give little, if any, weight to especially as there is no evidence that the appellant was with the abductee during his alleged 35 day abduction period and the eye witnesses could easily have been mistaken as to his identity as they only saw him for an hour in the semi dark. In terms of the importance of an early huila for ensuring safe identification of an accused at an identification parade reliance is placed on the case of **Javed Khan V State** (2017 SCMR 524).

(c) That Saleem who was one of the best eye witness to the confinement and abduction however for unexplained reasons he did not give evidence at trial and as such the prosecution deliberately withheld some of the best evidence which under Article 129 (g) Qanoon-e-Shahadat Ordinance an adverse inference can be drawn that the witness would not have supported the prosecution case.

(d) That there is no evidence that any ransom demand was ever made by phone or otherwise as no phone was recovered from the appellant who was already in jail in another case at the time of his arrest. There is also no evidence that any money was withdrawn by the complainant for payment or was even paid.

(e) According to the prosecution the abductee was released after 35 days in captivity following an encounter with the police who rescued him however no police officer was examined to prove this aspect of the case.

(f) Even otherwise in the appellants Section 342 Cr.PC statement no question of any ransom demand was put to him, no question of the abductee being taken away after his initial confinement and being kept in captivity for over 35 days was put to him, no question about the abductee being released following a police encounter was put to him and **most importantly** no question of him ever taking part in or being picked out by any one at an identification parade was put to him. It is well settled by now that if any material/evidence is not put to an accused whilst recording his section 342 Cr.PC statement in order to give him a chance to explain that piece of evidence then that evidence cannot be used to convict him. As such we exclude all such evidence including that in respect of the identification of the appellant by the alleged eye witnesses as one of the persons

122

who confined and abducted the abductee which is virtually the entirety of the prosecution case. In this respect reliance, if any is needed, is placed on the case of **Haji Nawaz v The State** (2020 SCMR 687) where it was held as under in material part at para 3;

> "*.....The prosecution had maintained that samples had been secured from each and every packet of the recovered substance which samples had subsequently been tested positive by the Chemical Examiner but we note that at the time of recording the appellant's statement under Section 342, Cr.P.C. the report of the Forensic Science Laboratory had not been put to him at all.* ***The law is settled by now that if a piece of evidence or a circumstance is not put to an accused person at the time of recording his statement under Section 342, Cr.P.C then the same cannot be considered against him for the purpose of recording his conviction.....***"

Learned APG has argued that under these circumstances it is a case of remand however we disagree with his contention as the days of remanding cases back to the trial court in order to enable the prosecution to fill up any lacuna's in its case to the prejudice of the accused under Article 10(A) of the Constitution are now long gone especially in cases such as this where the appellant has already spent over 15 years in jail. In this respect reliance is placed on the case of **Muhammad Naeem V The State** (PLD 2019 SC 669) where the Supreme Court held as under:

> *"In an adversarial system the role of the judge is that of a neutral umpire, unruffled by emotions, a judge is to ensure fair trial between the prosecution and the defence on the basis of the evidence before it. The judge should not enter the arena so as to appear that he is taking sides.* ***The court cannot allow one of the parties to fill lacunas in their evidence or extend a second chance to a party to improve their case or the quality of the evidence tendered by them. Any such step would tarnish the objectivity and impartiality of the court which is its hallmark.Such favoured intervention, no matter how well-meaning, strikes at the very foundations of fair trial, which is now recognized as a fundamental right under article 10-A of our Constitution.***
>
> *In the present case the direction of the High Court for obtaining fresh samples of the alleged intoxicating substance and preparing a fresh report of the Chemical Examiner* ***amounts to granting the prosecution a premium on its failure to put up a proper case in the first instance. Such judicial intervention is opposed to the adversary principle and offensive to the fundamental right of fair trial and due process***

4

123

guaranteed under the Constitution. *See Dildar v. State; Painda Gul v. State and State v. Amjad Ali". (bold added)*

12. Based on the reasons mentioned above by extending the benefit of the doubt to the appellant, the appeal is allowed, the appellant is acquitted of the charge and the impugned judgment is set aside. The appellant shall be released unless he is wanted in any other custody case.

13. The appeal stands disposed of in the above terms.