

CERTIFICATE OF THE COURT IN RECORD NO. _____

SINDHI HIGH COURT

Spl. Co. A.T.A. No. 23 of 2015
Spl. Co. A.T.A. No. 30 of 2015
Single/D.B.

Composition of Bench.

Judge Muhammad Rasim Ikram Aghe
Judge Zulfiqar Ali Sami.

Dates of hearing: 7-4-2020

Decided on 16-4-2020

(a) Judgment approved for reporting.

Yes
No

[Signature]

CERTIFICATE

Certified that the judgment */Order is based upon or enunciates a principle of law */decides a question of law which is of first impression/distinguishes/over-rules/ reverses/explains a previous decision.

*Strike out whichever is not applicable.

NOTE:—(i) This slip is only to be used when some action is to be taken.

(ii) If the slip is used, the Reader must attach it to the top of the first page of the judgment.

(iii) Reader must ask the Judge writing the Judgment whether the Judgment is approved for reporting.

(iv) Those directions which are not to be used should be deleted.

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IN THE HIGH COURT OF SINDH AT KARACHI

117 23
Crl Appeal No. / 2015

PRESENTED
25-02-2015

MUHAMMAD TOOR KHAN @ ABDUL REHMAN

S/o. Abdul Ghaffar,

Muslim, Adult, Presently

Confined in Judicial Custody, & certified dangerous

Karachi ----- APPELLANT / ACCUSED

25/2/15
1159

VERSUS

The State ----- RESPONDENT

FIR No. 41 / 2009
U/s. 364/365-A/34 PPC
R/w. 7(e) ATA 1997
P.S. Bahdurabad,

APPEAL AGAINST CONVICTION U/S. 410 CR.P.C.
R/W. 25(I) OF ATA 1997

Being aggrieved and dissatisfied with the impugned joint Judgment of above crimes passed by the learned Anti Terrorism Court No. III Karachi dated 19-02-2015, whereby the Learned judge convicted the accused above named and convicted him in Crime No. 41/2009 for an offence punishable U/s. 364/365-A/34 PPC R/w. 7(e) ATA 1997 and sentenced him for life imprisonment, therefore the appellant / accused abovenamed prefers this appeal with the prayer that this Hon'ble Court may be pleased to set aside the order

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IN THE HIGH COURT OF SINDH AT KARACHI

Cr. Appeal NO. 30 /2015

PRESENTED
04-03-2015

413/15
1235

1. **Aamir Farooque S/O Muhammad Farooq Muslim Adult**
Resident of C.P Barear Society plot No-150 block 7 / 8
Dhorajee colony Karachi East *Presently in jail at Central prison Karachi*

Appellant / Convicted

VERSUS

The StateRespondent

F.I.R No. 41/2009
U/S 364 / 365-A/34 PPC
R/w Section 7 (e) of ATA 1997
P.S. Bahadurabad

CRIMINAL APPEAL UNDER SECTION 410 CR.P.C
R/W SECTION 25 (1) OF ANTI TERRORISM ACT 1997

Being aggrieved & dissatisfied with the judgment dated 19.02.2015
passed by Anti Terrorism Court NO. III; at Karachi in Special Case No.
25 of 2009 where by the appellant above named has been convicted
and sentence under section 7 (E) of ATA 1997 sentenced them for
imprisonment for life, with benefit of 382-B Cr.P.C so the appellants
through prefer the criminal appeal upon annexing the true certified

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IN THE HIGH COURT OF SINDH AT KARACHI

Present:

Mr. Justice Mohammad Karim Khan Agha
Mr. Justice Zulfiqar Ali Sangi.

SPL. CRL. ANTI-TERRORISM APPEAL NO.23 OF 2015.

Appellant: Muhammad Toor Khan @ Abdul Rehman son of Abdul Ghaffar through Abdul Rasheed Nizamani, Advocate.
Respondent: The State through Mr. Saleem Akhtar Buriro, Additional Prosecutor General.

SPL. CRL. ANTI-TERRORISM APPEAL NO.30 OF 2015.

Appellant: Aamir Farooque son of Muhammad Farooq, through Chaudhry Faisal Iqbal, Advocate.
Respondent: The State through Mr. Saleem Akhtar Buriro, Additional Prosecutor General.
Date of hearing: 07.04.2020
Date of Judgment: 16.04.2020.

J U D G M E N T

MOHAMMAD KARIM KHAN AGHA, J:- Accused Muhammad Toor Khan @ Abdul Rehman son of Abdul Ghaffar and Aamir Farooque son of Muhammad Farooq were tried by learned Judge, Anti-Terrorism Court No.III, Karachi in Special Case No.25 of 2009 arising out of Crime No.41/2009 u/s. 364/365-A/34 PPC read with Section 7 (e) of Anti-Terrorism Act, 1997 registered at P.S. Bahadurabad, Karachi. After trial vide judgment dated 19.02.2015 the appellants/accused Muhammad Toor Khan @ Abdul Rehman and Aamir Farooque were convicted and sentenced for life imprisonment for the offence punishable under Section 365-A PPC read with Section 7(e) of Anti-Terrorism Act, 1997 with benefit of Section 382-B Cr.P.C. The moveable and immovable property of both the accused persons was forfeited to the Government.

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2. Being aggrieved and dissatisfied by the judgment passed by learned Judge, Anti-Terrorism Court No.III Karachi, these appeals have been preferred by the appellants against their convictions.

3. The brief facts of the prosecution case are that complainant Mohammad Sohail registered FIR on 07.03.2009, at about 1110 hours stating therein that on 06.03.2009, at about 8:10 pm he received a telephone call from his residence that his son Osama aged about 8 years, who was playing outside the house had been forcibly taken away. On receipt of such information he reached his house where he came to know that one white colour CULTUS car appeared in which 4/5 persons were sitting out of which one person wearing jeans and shirt with cap alighted from the said car and forcibly put his son in the said car and kidnapped him. He further contended in his FIR that such facts were informed to the police on "15" and one of his neighbours had witnessed the incident. He searched for his son but could not find him and on 07.03.2009, he registered FIR against 4/5 unknown persons who had kidnapped his son.

4. After registration of the FIR, usual investigations were carried out which lead to the submission of the challan before the competent court of law. The charge was also framed against the accused persons to which they both pleaded not guilty and claimed to be tried.

5. To prove its case the prosecution examined 15 prosecution witnesses and exhibited numerous documents and other items and thereafter the side of the prosecution was closed. The statements of the accused were recorded u/s 342 Cr.P.C wherein they denied all the allegations and claimed their false implication. They did not examine themselves on oath or call any witnesses in support of their defense case.

6. Learned Judge, Anti-Terrorism Court No.III, Karachi, after hearing the learned counsel for the parties and assessment of evidence available on record, vide the impugned judgment dated 19.02.2015, convicted and sentenced the appellants as stated above, hence these appeals have been filed by the appellants against their convictions.

7. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the judgment dated 19.02.2015 passed

by the trial court and, therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

8. Learned counsel for the appellant Muhammad Toor Khan contended that he has been falsely implicated in this case, that he made no judicial confession which in any event was retracted and made under coercion, that the identification parade was not carried out in accordance with the law, that his case was on the same footing as co-accused Umair Sami who was acquitted on the same evidence by the trial court and as such he should be treated equally and should also be acquitted and for any of the above reasons by extending him the benefit of the doubt he should be acquitted of the charge.

9. Learned counsel for the appellant Aamir Farooque has contended that he has been falsely implicated in this case, that he made no judicial confession which in any event was retracted and made under coercion and that there was no other evidence to connect him to the kidnapping for ransom and as such for any of the above reasons by extending him the benefit of the doubt he should be acquitted of the charge.

10. On the other hand learned Additional Prosecutor General has fully supported the impugned judgment and has contended that based on the judicial confessions of the accused, the identification parade where appellant Muhammad Toor was picked out by his abductee, the evidence of the tracking device which corroborated the complainant and the recovery of some of the ransom demand at the time of the arrest of the accused the prosecution had proved its case against the appellants beyond a reasonable doubt and that the appeals should be dismissed. In support of his contentions he placed reliance on **Sikandar Ali v. The State** (1999 MLD 1513), **Joygun Bibi v. The State** (PLD 1960 Supreme Court (Pak.) 313) and **Raz Muhammad v. The State** (PLD 2002 Supreme Court 56).

11. We have heard the arguments of the learned counsel for the parties, gone through the entire evidence which has been read out by the appellants, the impugned judgment with their able assistance and have considered the relevant law.

12. After our reassessment of the evidence we find that the prosecution has proved its case beyond a reasonable doubt against the appellants for the following reasons:-

- (a) Despite this being a kidnapping for ransom case the FIR was lodged with promptitude being within one day of the incident which gave no time for the complainant to cook up a false case against the appellants. The FIR was against unnamed persons and as such there was no attempt to falsely implicate anyone and even otherwise there was no enmity between the complainant and the appellants so there was no reason for him to false implicate them.
- (b) In our view the foundation of the prosecution case against the appellants rests on **two key** pieces of evidence (i) Whether we can safely rely on the retracted judicial confessions of both the appellants **and** (ii) the eye witness evidence in terms of whether the eye witness has been able to correctly identify the appellant Toor Khan as one of the kidnappers. We will deal with each aspect individually in turn.
- (c) **Turning firstly to the retracted judicial confessions:**

(i) the two later retracted judicial confessions made by appellants (Amir and Toor Khan) for ease of reference are set out below:

S.164 Statement of Amir.

" I reside at C.P. Barar Society and I do cable work. I was required money as to return the loan amount. I said to my friends namely Abubakar & Umair that we do such work to kidnap the child of some rich man from area and after getting money will release him. Abubakar became afraid and refused the same but I and Umair made a plan to kidnap Osama, who is residing in the back lane and son of a rich man. As Osama known to us, therefore I said to my friend Islam, who resides at Patel-Para. I asked Islam, who became agree for this work. He said that this is not a work of two persons, so I will bring 3rd person. I asked my friend Farhan to arrange a white Cultus Car for picnic, who did the same. I asked my friend Umair as soon as you see Osama in the lane, inform me through phone, I alongwith the boys present in the car in other lane. I was driving the car and my face was muffled. Umair rang me that the child is standing out side the house. I immediately drove the vehicle near the child. Islam and his other unknown friends immediately picked up the child, put into

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vehicle and covered him with cloth sheet. Then took away the child Osama at Surjani Town and handed over to Toor Khan. Then we came back to factory. After passing two days, I went to Toor Khan, phoned to the father of child Osama and demanded Two Crore Rupees. The same talks remained continue up to six days and eventually done Rs. 15-lacs. Thereafter, they said that Rs.10-lacs is available in cash and besides some ornaments. We said OK, you come to Surjani Town near the factory. He came near the factory by taxi. We said to him through phone to leave the money and go away. I by taking money went towards Toor Khan. On the next day morning, Toor Khan made sit child in a Taxi and dropped him at home. I handed over the amount of Rs.250,000/- alongwith two gold bangles and 2/3 earrings as share to Toor Khan, Rupees One lac to Umair, Rs.250,000/- alongwith all the remaining ornaments to Islam, while I kept the remaining money. I gave Rs.3 lacs in loan and Rs.50000/- was spent by me while Rs.50000/- recovered by the police. I had given Rs.2 lacs alongwith ornaments to Islam instead of Rs.250,000/-. The police had arrested me, Umair & Toor Khan at near the factory. This much is my statement. (bold added)

S.164 Statement of Toor Khan.

" I know Aamir through my friend Shahid. Aamir said to me "would you do Labour work for whole life, why do not work of good earning". On my enquiry, he said to me, we will get good money by kidnapping some child. Firstly, I refused but later on being in greedy of good money I agreed with them. Aamir had come to me on 4th date. On 06.03.2009 at about 9 or 10 p.m. Aamir and two other unknown boys came to me along with a child in a white Car and said me to keep him as they have kidnapped this child. They said that they will come back after two days. I asked the name from child, who disclosed me as Osama. I kept the child Osama at my home for about 5/6 days. The house mates asked me about him, I replied them that he is child of my friend, who has left away him with me. After passing two days Aamir came to me, given me phone by saying to make phone call to the father of child Osama and demand ransom amount of Rs.2 Crore. From the mobile phone of Aamir, I phoned to the father of child Osama and demanded the ransom amount. I remain dealing with Bhai Sohail the father of Osama till two days on phone and then he agreed on Rs.1—lacs but Aamir was not agreeing. At last received the ransom amount of Rs.10 lacs alongwith some ornaments i.e. 4 bracelet, 4 earrings, and on 12th date I took the child at Nipa Chowrangi by bus. From where I sent him to his home at Dhooraji Colony through Taxi. I received the share of ransom amount of Rs.250,000/- Subsequently on 19-03-2009,

the police apprehended me. This much is my statement.
(bold added)

(ii) It is settled law that a retracted judicial confession can be legally admissible and used against its maker in certain circumstances. In the case of **Muhammad Amin v. The State** (PLD 2006 Supreme Court 219), it was held at P.224 Para 9 as under;

"9. There is no cavil to the proposition that conviction could have been awarded on the basis of retracted confession which proposition was examined in case of Mst. Joygun Bibi v. The State PLD 1960 (SC (Pak) 313 as under:-

*"We are unable to support the proposition of law laid down by the learned Judges in this regard. The retraction of a confession is a circumstance which has no bearing whatsoever upon the question whether in the first instance it was voluntarily made, and on the further question whether it is true. The fact that the maker of the confession later does not adhere to it cannot by itself have any effect upon the findings reached as to whether the confession was voluntary, and if so, whether it was true, for to withdraw from a self-accusing statement in direct face of the consequences of the accusation, is explicable fully by the proximity of those consequences and need have no connection whatsoever with either its voluntary nature, or the truth of the facts stated. The learned Judges were perfectly right in first deciding these two questions, and the answers being in the affirmative, in declaring that the confession by itself was sufficient, taken with the other facts and circumstances to support Abdul Majid's conviction. **The retraction of the confession was wholly immaterial once it was found that it was voluntary as well as true.**"*

10. Similarly in the case of *the State v. Minhum alias Gul Hassan* PLD 1964 SC 813 this Court has observed as under:-

"As for the confessions the High Court, it appears, was duly conscious of the fact that retracted confession whether judicial or extra judicial, could legally be taken into consideration against the maker of those confessions himself, and if the confessions were found to be true and voluntary, then there was no need at all to look for further corroboration. It is well-settled that as against the maker himself his confession, judicial or extra

judicial, whether retracted or not retracted, can in law validly form the sole basis of his conviction, if the Court is satisfied and believes that it was true and voluntary and was not obtained by torture or coercion or inducement." (bold added)

(iii) Thus, the court laid down a two pronged test as under (a) whether the retracted judicial confession appears to have been **made voluntarily**, without any inducement, duress or coercion **and** (b) was made with the **object to state the truth**.

(iv) Notably it was also held that if both (a) and (b) were satisfied that even if there were some irregularities in recording of a confession it would not warrant disregarding of the same.

(v) In our view therefore we are not in any doubt that a retracted confession before a magistrate can be the basis of convicting in a capital case however it must be;

(a) Voluntary i.e. without threat or inducement **and**

(b) Its object must be to state the truth; assistance for which can be ascertained from (i) whether the confession appears truthful within the context of the prosecution case and (ii) whether there is any other evidence on record which tends to corroborate the truthfulness of the confession **and**

(c) Only minor irregularities regarding the rules concerning the recording of judicial confessions can be permitted as determined on a case to case basis the main criteria being that such irregularities have not adversely effected the voluntariness or truthfulness of the confession.

(vi) In our view based on the evidence of **PW 2 Shabbir Ahmed** who was the judicial magistrate who recorded the confessions of the appellants the judicial confessions have been made voluntarily without threat or inducement and the confessions are truthful when based in the context of the prosecution case and other corroborative material which we will discuss later. The voluntariness of the confessions in our view is given more weight by the fact that when co-accused Umair Sami (who was later acquitted) was brought before the magistrate after reflection time he refused

to confess and was sent to judicial custody. If the other appellants had refused to give a confession it is only logical that they would have been treated the same way. **If the confessions were coerced or made up then confessions of all the three accused would have been forced out of them rather than just two of the accused.**

(vii) When confronted by the court to point out any illegalities in recording the judicial confessions learned counsel for the appellants were unable to do so. Even otherwise, in our view if there are any irregularities in recording the confessions these are only minor in nature and do not effect the voluntariness and truthfulness of the confessions and can be ignored **and thus we rely on both of the retracted judicial confessions in respect of the appellants kidnapping the abductee (PW 4 Usma Suhail) for ransom.** In the case of **Raz Muhammad v. The State** (PLD 2002 Supreme Court 56) it was held that a delay in recording a judicial confession would not be fatal. In this case the judicial confessions were made within 5 to 6 days of the arrest of the appellants which was a relatively short period.

(d) Turning to the identification of the appellants.

(i) **Eye witness PW 4 Usma Suhail (the abductee)** is the star prosecution witness. According to his evidence he was abducted on 06.03.2009 outside his house when two persons in a white cultus car grabbed him and abducted him. Initially he was taken to an abandoned place which was like a big hall where another person took him to a house where he remained for 6 days where he was told that he would not be released unless his father paid money to them. After this time he was taken to Nippa Chowrangi bus stop and then put in a taxi which took him home. His evidence corroborates the judicial confessions of the appellants.

(ii) **At an identification parade he picked out appellant Toor Khan as one of his abductees.** In fact the magistrate due to the young age of the abductee took him two times before the identification parade to ensure the reliability and correctness of his identification of Toor Khan whom he picked out on both occasions. Amir Khan was not placed before him for identification. It was logical that he would be able to pick out appellant Toor Khan at the identification parade as he was the person who had kept him at his house for 6 days and then taken him to Nippa Chowrangi and put him in a taxi for home. Thus, he would have got a good look at appellant Toor Khan

over this 6 day period which would not even have made the identification parade necessary. In this respect reliance is placed on **Ghazanfar Ali v. State** (2012 SCMR 2015). Even otherwise when confronted by the court to point out any illegalities in the identification parade learned counsel for appellant Toor Khan was unable to do so. Even if there were some slight irregularities in the identification parade in our view these will not affect the correctness of the identification. In this respect reliance is placed on **Muhammed Siddique V State** (2020 SCMR 342). The case which we are currently deciding attracts the above case as it is a case of abduction.

(iii) There was a slight delay in holding the identification parade however even a delay in holding an identification parade of over a year was not fatal to the identifier correctly identifying the accused. In this respect reliance is placed on the case of **Solat Ali Khan v. The State** (2002 SCMR 820) and in any event evidence flowing from an identification parade is **only a corroborative piece of evidence** and cannot supersede reliable, trustworthy, confidence inspiring direct evidence. In this respect reliance is placed on **Muhammad Ehsan v. The State** (2006 SCMR 1857). It is correct that at trial eye witness PW 4 Usma Suhail (the abductee) could not pick out either of the appellants but in our view this is understandable as he gave evidence at trial **3 years after** his kidnapping so it was quite natural being a young man of only 12 years of age that he may not remember the appellants after such a long time and hence the benefit of the identification parade which was **held shortly after the release of the abductee and arrest of appellant Toor Khan.** Although he did in his evidence state that he had identified appellant Toor Khan at the identification parade. He also pointed out the factory and house where he was kept for 6 days to the police which house belonged to the father of appellant Toor Khan

(e) We also find that the following pieces of corroborative/supportive evidence link the appellants to the offense;

(i) The white cultus car used in the abduction was rented by PW 5 Farhan Ghaffar from PW 6 Muhammed Ishaque and was handed over to appellant Amir on 06.03 2009 which was the day of the kidnapping and was returned by Amir the next day. PW 5 Farhan Ghaffar was an old friend of Amir and had no reason to falsely implicate him in this case. This car ties in with Amir's confession and the evidence of abductee PW4 Usama who was abducted by persons from that car which was recovered by the police. 4

(ii) The complainant PW 1 Muhammed Sohail's route and dropping off of the ransom money by the factory is corroborated by the tracker in the car of PW 13 Muhammed Haneef Tabani whose car the complainant borrowed because it had a tracker in order to drop off the ransom amount at the factory which tracker was recovered by the police and corroborated the route which he said he took in evidence whilst making the ransom drop according to PW 12 Akhtar Abbass who worked for the tracker company and provided the movement of the tracker on the night that the complainant paid the ransom.

(iii) That appellant Toor Muhammed is linked to the factory where the abductee was dropped off and taken to his house and where the ransom money was delivered as he used to work as Chowkidar to that factory and his house was opposite the factory according to PW 14 Hamid Nawaz who was the owner of the factory and this was the house where the abductee was taken and held captive as pointed out by the abductee. It was also the factory where the appellants were arrested. PW 14 Hamid Nawaz was an independent witness who had no enmity with the appellants and had no reason to give false evidence in this case. Like wise the police witnesses (PW 11 Adeel Ahmed and PW 15 IO Moinuddin) who arrested the appellants at the factory with the ransom money and in respect of PW 15 IO Moinuddin who brought the appellants before the magistrate for recording their confessions and the identification parade of appellant Toor Khan.

(iv) That the ransom demand is corroborated by the complainant PW 1 Muhammed Sohail who dropped off the ransom amount and the release of the abductee who was told that he would be released if his father paid the ransom and was in fact released when his father paid the ransom. On their arrest the appellants were also found in possession of large sums of money which they could not account for which based on the particular facts and circumstances of the case where both the appellants were according to their judicial confessions not well off and looking to make fast money a part of the ransom amount and which ties in with their judicial confessions. In addition a CD was recovered where the ransom demand is discussed with the complainant which has not been denied by learned counsel for the appellants.

(f) All PW's corroborate themselves in all material respects. Even if there are any contradictions in their evidence and that of any other prosecution witness we consider these

contradictions as minor in nature and not material and certainly not of such materiality so as to effect the prosecution case and the conviction of the appellants. In this respect reliance is placed on **Zakir Khan V State** (1995 SCMR 1793).

(g) None of the private witnesses had any enmity or ill will or any reason to falsely implicate the appellants and thus we have no reason to disbelieve their evidence.

(h) It is well settled by now that police witnesses are as good as any other witness provided that no ill will, enmity, malafide or personal interest is proven against him vis a vis the appellant. In this respect reliance is placed on **Riaz Ahmad V State** (2004 SCMR 988), **Zafar V State** (2008 SCMR 1254) and **Abbas V State** (2008 SCMR 108). In this case there was none and the police witnesses had no reason to falsely implicate the appellants.

(i) In kidnapping for ransom cases courts need to take a dynamic approach in assessing the evidence. In the case of **Advocate General Sindh, Karachi v. Farman Hussain and others** (PLD 1995 SC 1), in a kidnapping for ransom case it was observed as under:-

"It is a matter of public knowledge that in Sindh, on account of kidnapping for ransom, commission of dacoities and other offences, the people are feeling unsecured. The learned trial court has dilated upon these aspects in detail. I am inclined to subscribe to the view found favour with it. The approach of the Court in matters like the case in hand should be dynamic and if the Court is satisfied that the offence has been committed in the manner in which it has been alleged by the prosecution the technicalities should be overlooked without causing any miscarriage of justice". (bold added).

(j) Although it is for the prosecution to prove its case beyond a reasonable doubt we have also considered the defense case which in effect is false implication. We disbelieve this defense case as the appellants have not been able to put a single dent in the prosecution case and have not given evidence on oath or called any witness in their defense and even been able to produce any evidence to suggest their lack of guilt.

(k) It is also noted by us that co-accused Umair Sami was acquitted of the charge because his case for acquittal was on a much stronger footing than that of the appellants as he did not give a judicial confession, was not identified by any one and there was little, if any, other evidence connecting to him to the offense and as such he was acquitted based on being extended the benefit of the doubt which is not applicable to the appellants as there is far more compelling evidence against them.

13. Thus, for the reasons mentioned and discussed above and in particular the confessions of the appellants, and correct identification of appellant Toor Khan by the abductee and the other corroborative supportive evidence we find that the prosecution has proved its case beyond a reasonable doubt against both appellants for the offense charged and as such both appeals are dismissed.

14. The appeals are disposed of in the above terms.

MAK/PS