

**N THE HIGH COURT OF SINDH AT KARACHI**

Spl. Criminal A.T. Jail Appeal No.237 of 2018.

**Present:**

**Mr. Justice Mohammad Karim Khan Agha**  
**Mr. Justice Abdul Mubeen Lakho.**

Appellant: Muzammil Arif S/o. Muhammad Arif through  
Mr. Javed Ahmed Rajput, Advocate.

Respondent: The State through Mr. Muhammad Iqbal  
Awan, Deputy Prosecutor General.

Complainant: Muhammad Tariq Iqbal through Mr. Nadeem  
Ahmed Azar, Advocate

Date of hearing: 01.04.2021

Date of announcement: 07.04.2021

**JUDGMENT**

**Mohammad Karim Khan Agha, J.-** Appellant Muzammil Arif s/o. Muhammad Arif has preferred this Criminal Jail Appeal against the impugned judgment dated 31.07.2018 passed by the learned Judge, Anti-Terrorism Court No.II, Karachi in Special Case No.B-239/2013, F.I.R. No.72/2013 u/s. 302/365-A PPC r/w. Section 7(a) ATA, 1997 registered at P.S. Sharifabad, Karachi whereby the appellant has been convicted and sentenced for life imprisonment u/s. 7(a) and 7(e) of ATA, 1997 as the appellant was juvenile offender. The appellant was also given benefit of section 382-B Cr.P.C.

2. The brief facts as mentioned in the FIR lodged by complainant Muhammad Tariq Iqbal on 07.05.2013 are that he lives in Flat No.23, Block-6, New Zeenat Square FC Area, Sharifabad, Karachi, and does private job as Computer Operator. On 06.05.2013 he was coming from home in the evening when at about 5:45 pm his nephew Mohsin called him on his mobile phone, asking him to come home quickly. He reached the flat at 4<sup>th</sup> floor and found out from his daughters that his son Sohail Tariq had gone to read Quran but had not returned home. He stated that his elder brother Hafiz Muhammad Khalid Iqbal and his younger brother

Shahid Iqbal live along with his mother at 5/13 Zeenat Square, 2<sup>nd</sup> floor and were present at their flat and were in search of his son. He also started looking for his son, during which on the mobile of his paternal nephew Mohsin Khalid having number 0343-4018123 somebody started messaging from the Zong SIM No. 03112088508 and demanding Rs. 3 Lacs as ransom for the release of his son Sohail Tariq. His nephew Mohsin told his younger brother Shahid Iqbal about these messages. While these messages were going on, meanwhile mobile number 0336-0850764 in the name of Muzamil Arif resident of Flat No. 9, block-6, Zeenat Square, 2<sup>nd</sup> Floor was saved in the mobile of his nephew, from this phone number also a message came while these messages were coming. The complainant and his family became terrorized. His younger brother Shahid Iqbal had lodged missing report of his son Sohail Tariq and were searching for him when at about 9:30 p.m. the dead body of his son Sohail Tariq was found near the flat of accused Muzamil Arif near Flat No.9, Block-6 on 2<sup>nd</sup> Floor on the ground. He had taken his son to Sindh Government Hospital Liaquatabad and thereafter to Habib Medical centre Karimabad and then to Abbasi Shaheed Hospital where the doctors declared that his son had died about 2 hours before. The complainant filed the complaint that his son Sohail Tariq aged 13 to 14 years was kidnapped for ransom and killed him by putting "phanda".

3. After usual investigations charge was framed against the accused to which the accused pleaded not guilty and claimed trial.

4. The prosecution in order to prove its case examined 07 witnesses and exhibited various documents and other items. The statement of the accused was recorded under Section 342 Cr.P.C in which he claimed his innocence and that he had been falsely implicated in this case. He gave evidence under oath where he elaborated on his innocence but did not call any DW in support of his defence case.

5. 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 conviction.

6. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the impugned judgment dated 2



31.07.2018 passed by the trial court and, therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

7. Learned counsel appearing on behalf of the appellant contended that he was innocent of any wrong doing and had been falsely implicated in this case by the police in collusion with the complainant; that there was no eye witness evidence against him, that there was no last seen evidence against him and the only evidence against him was that he allegedly on his own pointation took the police to the recovered items used in the murder of the accused which he denied and his confession which was recorded by SAMMA T.V which had been retracted by him and had been made because the police had beaten him so much they he was prepared to say anything to avoid any further beatings which confession was not made voluntarily, was not truthful and could not be relied upon against him; that this was a case of no evidence and that for any of the above reasons he should be acquitted of the charge by being extended the benefit of the doubt.

8. On the other hand learned DPG and the complainant have fully supported the impugned judgment and have contended that there is sufficient circumstantial evidence to lead to the conviction of the accused based on the prompt filing of the FIR, his early arrest and the recoveries which he lead the police to on his pointation including the duppata and shopper used to strangle the deceased, the almari where the accused kept the deceased before dumping his body and the deceased's Qoran and the accused SIM card and his confession as played on SAMMA T.V which was produced and played before the court in CD form and as such the appeal should be dismissed.

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

10. After our reassessment of the evidence we find that the prosecution has **NOT** proved its case beyond a reasonable doubt against the appellant for the following reasons:-

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(a) Although the FIR was registered with promptitude based on the particular facts and circumstances of the case it was registered against unknown persons.

(b) There was no eye witness to the deceased being abducted or murdered by the appellant or any one else.

(c) There was no last seen evidence to connect the deceased with the appellant. According to the prosecution the deceased left for Qoran classes with a lady who lived nearby. That lady was not produced as a PW and as such there is no evidence that he even attended his Qoran classes. No one saw him alive again after he left for his Koran studies until his dead body was found.

(d) That we find major anomalies and material contradictions in the evidence of the police PW's and disbelieve their evidence when placed in juxtaposition with other PW's whose evidence we also find doubtful for the following reasons;

(i) According to PW 2 Shahid Iqbal the accused was arrested from his house and the police told him on the same day that the accused was the killer which they could not have known in the absence of eye witnesses. PW 4 Malik Rasheed SIP who the incident was first reported to went out looking for the accused straight away which is not usual police practice in such cases who usually wait for a formal FIR to be registered before investigating the matter in the early stages of a missing child who may be found. That he stated that PW 2 Shahid pointed out the accused as the killer which completely contradicts PW 2 Shahid's evidence who stated that it was the police who told him that the accused was the killer.

(ii) As per memo of arrest PW 4 Malik Rasheed SIP arrested the accused from the gali and not from his house and made all the relevant recoveries on the pointation of the accused. However as per IO PW 7 Abdul Hameed who was the IO he arrested the accused and made the recoveries which is completely contradictory to the evidence of PW 4 Malik Rasheed on these points

(iii) Some of the recoveries were made from the roof of the flats on the pointation of the

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accused when it was dark and it would not have been possible to see clearly. The story that the light was provided by the police mobiles is not believable as car lights shine straight ahead they do not bend up into the sky and then come down again to throw light on the roof of a building. This is a completely unbelievable story.

(iv) As for the recoveries themselves these are not linked to either the accused or the deceased and it cannot be ruled out that these were planted by the police. For example, a shopper could easily be brought from anyone or from any where, there was no evidence that the duppata and Qoran belonged either to the accused or the deceased. There is also no forensic evidence that the body of the deceased was kept in the almirah of the accused. The fact that the accused according to the prosecution story strangled the deceased in the basement and kept him in the almirah and then a few hours later carried the body out of the flat and dumped him some where else does not appeal to natural human conduct as the appellant could be easily seen in such a crowded area whilst doing this and would not have taken such a risk of being caught.

(v) A crucial witness PW 3 Mohsin Khalid who was receiving text messages about the kidnapping for ransom when confronted during his evidence stated the following in terms of his evidence contradicting his S.161 Cr.PC statement which was given shortly after the incident and was more likely to be true stated as under in his evidence;

"The learned Advocate has read over the statement u/s 161 of Cr.P.C of the witness Muhammad Mohsin Khalid and he admits that he had given the statement that when he had received first message on his mobile from the mobile No. given in the statement for arranging Rs.3 Lacs and when the first message had come Muzammil was standing at his shop".

Thus, as the accused was standing in his shop when he received the ransom demand how could it possibly have been sent by the accused. The answer was that it was not possible and the **deliberate omission** in his evidence renders the evidence of PW 3 Mohsin Khalid completely unreliable. The deliberate omission

was made for the obvious reason that it tends to exonerate the accused.

**The law on circumstantial evidence.**

(e) With regard to circumstantial evidence, upon which the prosecution case/ evidence is based, to lead to a conviction in a capital case it was held as under in **Fayyaz Ahmed V State (2017 SCMR 2026)** at P.2030 para's 5 and 6 which are reproduced as under;

**"To believe or rely on circumstantial evidence, the well settled and deeply entrenched principle is, that it is imperative for the Prosecution to provide all links in chain an unbroken one, where one end of the same touches the dead body and the other the neck of the accused. The present case is of such a nature where many links are missing in the chain.**

To carry conviction on a capital charge it is essential that courts have to deeply scrutinize the circumstantial evidence **because fabricating of such evidence is not uncommon as we have noticed in some cases thus, very minute and narrow examination of the same is necessary to secure the ends of justice and that the Prosecution has to establish the case beyond all reasonable doubts, resting on circumstantial evidence. "Reasonable Doubt" does not mean any doubt but it must be accompanied by such reasons, sufficient to persuade a judicial mind for placing reliance on it. If it is short of such standard, it is better to discard the same so that an innocent person might not be sent to gallows. To draw an inference of guilt from such evidence, the Court has to apply its judicial mind with deep thought and with extra care and caution and whenever there are one or some indications, showing the design of the Prosecution of manufacturing and preparation of a case, the Courts have to show reluctance to believe it unless it is judicially satisfied about the guilt of accused person and the required chain is made out without missing link, otherwise at random reliance on such evidence would result in failure of justice.**

It may also be kept in mind that sometimes the investigating agency collects circumstantial evidence seems apparently believable however, if the strict standards of scrutiny are applied there would appear many cracks and doubts in the same which are always inherent therein and in that case Courts have to discard and disbelieve the same." (bold added)

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In the case of **Azeem Khan V Mujahid Khan** (2016 SCMR 274) the following was reiterated with respect to circumstantial evidence at P.290 as under;

**"In cases of circumstantial evidence, the Courts are to take extraordinary care and caution before relying on the same. Circumstantial evidence, even if supported by defective or inadequate evidence, cannot be made basis for conviction on a capital charge. More particularly, when there are indications of design in the preparation of a case or introducing any piece of fabricated evidence, the Court should always be mindful to take extraordinary precautions, so that the possibility of it being deliberately misled into false inference and patently wrong conclusion is to be ruled out, therefore hard and fast rules should be applied for carefully and narrowly examining circumstantial evidence in such cases because chances of fabricating such evidence are always there. To justify the inference of guilt of an accused person, the circumstantial evidence must be of a quality to be incompatible with the innocence of the accused. If such circumstantial evidence is not of that standard and quality, it would be highly dangerous to rely upon the same by awarding capital punishment. The better and safe course would be not to rely upon it in securing the ends of justice."**

So what evidence has the prosecution produced which provides all links in chain an unbroken one, where one end of the same touches the dead body and the other the neck of the accused in this case so as to lead to a conviction based on circumstantial evidence.

- (i) In this case we have already discarded the recoveries on the pointation of the accused as we disbelieve the police evidence and such recoveries could easily have been planted.
- (ii) No CDR was obtained to link the phone allegedly recovered from the accused with PW 3 Mohsin Khalid's phone from which the alleged ransom demand were received and no messages/SMS's were exhibited from any of the recovered phones to support the fact that the appellant had sent an SMS by way of ransom demand to the phone of PW 3 Mohsin Khalid.
- (iii) In short there is no reliable circumstantial evidence to link the accused to the murder as would fulfill the legal requirements of a conviction based on circumstantial evidence as mentioned above.

(f) With regard to the alleged film by SAAMA T.V which showed the CD of the alleged confession of the accused. This CD was inadmissible in the first place since it was not introduced by its maker in to evidence. It is also apparent that once the again the police were illegally maneuvering matters

behind the scenes as otherwise it was impossible for SAAMA T.V to have filmed the accused's confession with his father at the PS. Thus, we find the CD of the alleged confession/admission of the accused to be inadmissible and do not rely on the same. In any event as indicated by the Statement under oath of the appellant it cannot be relied upon as it was not made voluntarily since it was procured through torture. In this respect we reproduce the evidence of oath of the accused below which was not dented on cross examination;

*"I am innocent. On 06.05.2013 I was standing down my building. It was night time. It was after Isha and the police had come had taken me and my father in the police mobile and had taken me to the PS. Police told me that Sohail Tariq had died and that I had killed him. I told them that I had not killed him. The police told me that the dead body was found near my flat they told me that I have to tell them who were my accomplice. I told them I have not killed him when I refused to confess they tied my hands and feet and in between my legs they put danda and tied me up side down and kept hitting me on sole of my feet. They had threatened me that if I did not confess before that Court or the SAMA TV they will pick my mother and sister. SHO Saleemullah Qureshi had called my mother and my elder sister and they told me that if I do not confess they will lockup my sister. They had removed my clothes and gave me beating on my hips. They told me to say as they want him to say. I told them that I will do whatever they say. They had taken me to the room of Saleemullah Qureshi where I was told to speak before media. Thereafter I was brought before this Court they had taken me to the hospital before bringing me to the Court. At the hospital police told me that if the Dr. ask me as to what happen to my feet I should tell them because I was running I got injured. They also told me that they are taking me to the Court and to tell the court that I have committed the crime".*

It is significant that when the accused was taken into police custody he was in a fit condition however after his arrest when he was medically examined he was found to have been injured as if he had fallen down a flight of stairs. Thus, we have little if any doubt that the accused was maltreated by the police whilst in custody and that his confession was beaten out of him and as such it cannot be safely relied upon as it was not made voluntarily. Significantly, was never brought by the police before a judicial magistrate in order to record his confession in accordance with the law.

(g) We have also examined the defence case which we find to be quite plausible when put in juxtaposition with the lack of trust worthy, confidence inspiring and reliable and



incriminating evidence brought by the prosecution against the accused.

(h) The appellant had no ill will or enmity with the deceased nor vice a versa so there was no reason for the accused to have kidnapped and killed the deceased. The prosecution has neither put forward nor proved any motive as to why the accused would kidnap and kill the deceased.

(i) 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), wherein the Supreme Court has observed as follows:-

"It is settled law that it is not necessary that there should be many circumstances creating doubts. If there is a single circumstance, which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right."

11. We find the prosecution case for the reasons discussed above to be riddled with doubt and that the prosecution has failed to prove its case against the appellant and as such the appeal is allowed, the appellant is acquitted of the charge and he shall be released forthwith unless he is wanted in any other custody case.

12. The appeal is disposed of in the above terms.

