

CERTIFICATE OF THE COURT IN REGARD TO REPORTING

Sp. Cr. ATJA 01 of 2014

M. Yousuf vs. The State

HIGH COURT OF SINDH

Composition of Bench: ~~S.B.~~/D. B.

Mr. Justice Mohammad Karim Khan Agha,
Mr. Justice Abdul Mobeen Lakho

Date(s) of Hearing: 14th & 15th Jan., 2020

Decide on: 20-01-2020

(a) Judgment approved for reporting:

Yes



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 / overrules / reverses / explains a previous decision.

* Strike out whichever is not applicable.

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- 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.

Date to which
hearing is
adjourned

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IN THE HIGH COURT OF SINDH AT KARACHI

SPL. CRIMINAL. A.T.A. APPEAL NO.

0/ 12013/4

Muhammad Yousuf
S/o Farman Khan
Muslim adult, presently confined
In central prisons at
Karachi.

.....APPELLANT

VERSUS

The state RESPONDENT

FIR NO.412/2011
U/S 365-A/395/34- PPC R/w section 7 ATA 1997
P.S. Shah Latif Town AVCC

APPEAL UNDER SECTION 25 (1) OF ANTI- TERRORISM ACT 1997.

Being aggrieved and dis-satisfied with order dated 26.09 2013 passed by the Learned Special judge A.T.C 11, Karachi in special case No. 193/2011 whereby convicting the appellant life impressments with the benefit of section 382-B, Cr.P.C is also given, this Hon,ble court may be pleased to call the R & P of the said proceeding the appellant preferred this appeal and pray that this Hon,ble court may be pleased to set-aside the impugned judgment and further be pleased to set him free at liberty inter alia on the following facts and grounds. *(The copy of*

IN THE HIGH COURT OF SINDH AT KARACHI

Spl. Crl. Anti-Terrorism Jail Appeal No.01 of 2014

Present:

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

Appellant: Muhammad Yousuf S/o. Farman Khan
through Mr. Muhammad Khalid, Advocate.

For State: Through Mr. Muhammad Iqbal Awan, Deputy
Prosecutor General.

Date of hearing: 14.01.2020 and 15.01.2020.
Date of Judgment: 20.01.2020.

J U D G M E N T

MOHAMMAD KARIM KHAN AGHA, J:- Accused Muhammad Yousuf S/o. Farman Khan was tried by learned Judge, Anti-Terrorism Court No.II, Karachi in Special Case No. 193/2011 arising out of Crime No.412/2011 u/s. 365-A/395/34 PPC R/w Section 7 of ATA, 1997 at P.S. Shah Latif Town (AVCC). After full dressed trial vide judgment dated 26.09.2013 the accused Muhammad Yousuf was convicted under Section 7(e) of ATA 1997 and sentenced to suffer imprisonment for life (the impugned judgment). The appellant was extended the benefit of section 382-B Cr.P.C.

2. Being aggrieved and dissatisfied by the impugned judgment passed by learned Judge, Anti-Terrorism Court No.II, Karachi, the aforesaid appeal has been preferred by the appellant against his conviction.

3. The brief facts of the case according to FIR No.412/2011 registered on 05.06.2011 at 1930 hours by the complainant Premchand are that he is Manager of Godown of Rice in the name of Mashah Allah Godown Bin Qasim Town, Karachi and the owner of the Godown is Seth Gangumal S/o. Bherumal. On 05.06.2011 he and Gangumal had come to the godown and he alongwith Gangumal and brother of Gangumal named Bheromal were having lunch in the office at about 3 pm when two persons armed

with pistols entered and told them to give whatever they have. From him they had taken Rs.40,000/- a watch and a mobile. From Gangumal Rs.5,000/-, one watch and mobile. From Navel Bheromal a watch, blackberry and Rs.5,000/-. Thereafter they took them to the guardroom where 04 of their accomplices were already present. The culprits made Seth Gangumal and Naval sit and thereafter they all were taken to the godown. From Jawaid Chowkidar the T.T. pistol, mobile phone and cash was taken and from godown Laptop, LCD, cash of Rs.26,000/- and other goods. Thereafter they tied all of them up and had taken Gangumal in his own car No.ATA-149 make Suzuki Alto on show of fire arms. The 6 accused persons were looking like Pathan and they are identifiable as such. Later on the appellant and his accomplices made a ransom demand of 20lacs for the return of the abductee which was paid and the abductee was safely returned. Thereafter the abductee remembered where he had been held in captivity and when he took the police to that place the appellant who was identified by the abductee as being the person who was guarding him whilst he was confined was found present and was arrested by the police. The appellant confessed to the crime and also implicated his co-accused.

4. After usual investigation the case was challanned and sent up for trial.

5. The 05 co-accused namely (1) Umar Gul, (2) Farooq, (3) Rafiq, (4) Zahid and (5) Asghar were shown as absconders. The charge was framed against the appellant alone on 22.02.2012 whereas the amended charge was framed on 13.04.2012 and section 449 of PPC was added to which the appellant pleaded not guilty and claimed trial of the case.

6. To prove its case the prosecution examined 11 prosecution witnesses and exhibited numerous documents and other items and thereafter the side of the prosecution was closed. The Statement of the appellant was recorded u/s 342 Cr.P.C. whereby he claimed his innocence in the case and that he had been falsely implicated by the complainant and the police. He did not examine himself on oath or call any witnesses in support of his defense case.

7. Learned Judge, Anti-Terrorism Court-II, Karachi, after hearing the learned counsel for the parties and assessment of evidence available on record, vide the impugned judgment dated 26.09.2013, convicted and sentenced the appellant as stated above, hence the appellant has filed this appeal against his conviction through the impugned judgment.

8. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the impugned judgment dated 26.09.2013 passed by the trial court and, therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

9. Mr. Muhammad Khalid, learned counsel for the appellant has contended that although it is an admitted position that PW 6 Seth Gangumal was abducted there is no evidence that any ransom demand was made in the initial statements of the PW's and as such this is an improvement in their evidence which makes it unreliable, that the phone recovered from the appellant did not belong to any PW, that there is no evidence that any ransom demand was made or that any ransom was paid, that there was no identification parade of the appellant and as such the correct identification of the appellant is in doubt and that the abductee took over 4 months to remember where he was detained after he was released and as such the abductee in collusion with the police had falsely implicated the appellant in this case and as such for any of the above reasons the appellant should be acquitted of the charge by extending him the benefit of the doubt. In support of his contentions he placed reliance on **Rahat Ali v. The State** (2010 SCMR 584), **Farman Ahmed v. Muhammad Inayat and others** (2007 SCMR 1825), **Lal Khan v. The State** (2006 SCMR 1846), **Zafar Iqbal and another v. The State** (2016 YLR 1891) and **Amjad Ali v. The State** (2017 YLR 594).

10. On the other hand Mr. Muhammad Iqbal Awan, learned DPG has fully supported the impugned judgment. In particular he has contended that the prosecution witnesses through their evidence have proved that the abductee was abducted from the Godown; that ransom demands were made by the appellant and his accomplices, that a ransom was paid to the appellant and his accomplices and that the prosecution witnesses have correctly identified the appellant as being one of the culprits involved in

the kidnapping for ransom of the abductee and as such the impugned judgment should be upheld and the appeal dismissed. In support of his contentions he placed reliance on **Abdul Wali v. The State** (2010 P. Cr.LJ 1182), **Junaid Rehman and others v. The State and others** (PLD 2011 Supreme Court 1135), **Zakir Khan and others v. The State** (1995 SCMR 1793), and **The State v. Haider Zaidi and others** (2002 SCJ 311).

11. Notice had been served on the complainant a number of times as revealed by the diary sheets however he failed to put in an appearance. We were of the view that the hearing of the appeal had already been delayed for too long with the appellant being in custody for about 9 years already and that the appeal should not be held up further on account of the absence of the complainant whose position could be protected by the DPG who was instructed to do the same.

12. We have heard the arguments of the learned counsel for the parties, gone through the entire evidence which has been read out by the appellant and the impugned judgment with their able assistance and have considered the relevant law including that cited at the bar.

13. Based on the prompt registration of the FIR which gave no time for concoction and the evidence of eye witnesses PW 1 Prem Chand, PW 2 Naval Rai, PW 5 Naval, PW 6 Seth Gangumal (abductee), the other PW's, (who corroborate each other in all material respects as to the robbery and kidnapping and in our view are reliable, trust worthy and confidence inspiring witnesses who were not damaged during lengthy cross examination and in this respect reliance is placed on **Muhammad Ehsan V The State** (2006 SCMR 1857)) and are not chance witnesses as they were all meant to be at the factory as they were employees of the factory at the time of the robbery and kidnapping and had no reason to falsely implicate any of the accused, the CDR data, the recovery of the phone from the appellant from where some of the ransom demands were coming from, the recovery of Alto Reg ATA 149 which was used to kidnap Seth Gangumal we have come to the conclusion that the prosecution has proved beyond a reasonable doubt that on 05-06-2011 Seth Gangumal was kidnapped for ransom from Masha-Allah Rice Godown in Karachi

especially as it is by now settled that no ransom even has to be paid in order to commit this offense. In this respect reliance is placed on **State V Farman Ali** (PLD 1995 SC 1) and with regard to the evidence proving kidnap for ransom in this case reliance is placed on **Junaid Rehman** (Supra)

14. The only issue therefore before us is whether the appellant has correctly been identified as being involved in the kidnapping for ransom of Seth Gangumal.

15. The first point to note is that none of the PW's have given any hulia of the appellant and the appellant was not put before any identification parade. Since the appellant was not known to any of the PW's prior to this incident this would usually raise red flags as to the correctness of his identification. However, we have also considered that in this case it was a daylight incident and the lighting was good, that PW's 1 Prem Chand and PW 5 Naval Rai have stated in their evidence that the appellant and his accomplices remained between 1 and 2 hours in the godown and as such all the PW's would have had a good look at the appellant and his accomplices at close range especially as their faces were not muffled and all recognized the appellant in court. The abductee PW 6 Seth Gangumal remained for 4 days with the appellant and his accomplices in close proximity to the appellant who was his guard whilst in captivity and he would also have seen the appellant's unmuffled face over this extended period of time for long and frequent periods of time. Again he gave no hulia but stated in his evidence that he could recognize the appellant if he saw him again. About 4 months after his release abductee PW 6 Seth Gangumal lead the police to the place where he was held captive where the appellant was present and was identified by him as one of the people who had guarded him during his 4 days of captivity. Thus, keeping in view the prolonged period of time both at the godown (2 hours) and whilst in captivity (4 days) and the short interval between the abductees release and identification of the appellant (4 months) when he was arrested on the spot and the fact that the abductee (or any other PW) had no reason to falsely implicate the appellant we are of the view that the prosecution through its witnesses especially abductee PW 6 Seth

Gangumal has been able to correctly identify the appellant as one of the persons involved in his kidnapping for ransom and as such based on the particular facts and circumstances of this case we do not consider that a lack of hulia and identification parade precludes the correct identification of the appellant as being one of those persons involved in the kidnapping for ransom of PW 6 Seth Gangumal. In this respect reliance is placed on the case of **Zakir Khan (Supra)** and **State V Haider Zaidi (Supra)**

16. We have also taken into account the fact that initially on his release the abductee could not remember where he was held captive but remembered the place of his captivity 4 months later and lead the police to his place of captivity but in our view consider this slight aberration as not being a sufficient a doubt as to amount to giving the benefit of the doubt to the appellant in the face of all the other evidence against him especially as was held in the case of **Mian Sohail Ahmed V State (2019 SCMR 956)** when discussing the issue of memory and estimator variables that different circumstances can effect the memories of different persons in different ways and as such based on the particular facts and circumstances of this case where the abductee had initially been beaten, terrorized and traumatized and thus was only later able to think more clearly about his place of captivity when he had got over such trauma does not make him an unreliable witness in this respect especially as he had no ill will towards the appellant and it has not even come in evidence that the police or any other PW had any enmity or ill will towards the appellant which would lead them to falsely implicate him in this case. In this respect the taking by the abductee and recognition of the appellant at the place of his captivity is recorded in the police memo of arrest and recovery and in this context it also needs to be considered that the mobile and SIM from which some of the ransom demands were made and which belonged to one of the PW's who was robbed of the mobile at the time of the abduction was recovered from the appellant at the time of his arrest for which the appellant had no explanation. Although it is undoubtedly the burden of the prosecution to prove its case beyond a reasonable doubt we find no substance in the appellant's defense which is mainly that of false implication.

17. We are also of a view that in criminal cases and in particular kidnapping for ransom cases the courts should not take an over technical approach but rather a dynamic approach and if it is found from the evidence that the appellant has committed the crime then he should be convicted for the same and no leniency should be shown in sentencing. In this respect reliance is placed on **Noor Muhammed V State** (1999 SCMR 2772) where it was held as under at P.2725

"However, we may observe that the people are losing faith in the dispensation of criminal justice by the ordinary criminal Courts for the reason that they either acquit the accused persons on technical grounds or take a lenient view in awarding sentence. It is high time that the Courts should realize that they owe duty to the legal heirs/relations of the victims and also to the society. Sentences awarded should be such which should act as a deterrent to the commission of offences. One of us (Ajmal Mian, C.J., as he then was) has highlighted this aspect, inter alia in the case of State through the Advocate-General Sindh, Karachi v. Farman Hussain and others (PLD 1995 SC 1), relevant portion whereof at page 19 reads as follows:-

- (3) *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 insecure. 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."*

The above aspect may be kept in view by the Courts below while deciding the question of guilt or sentence"
(bold added).

18. We note that in the instant case the trial court has already taken a lenient view in sentencing by sentencing the appellant to life imprisonment as opposed to imposing the harsher death sentence

19. Thus, since we are also satisfied that the appellant has been correctly identified as one of the persons involved in the kidnapping for ransom of abductee Seth Gangumal we hereby dismiss the appellant's appeal against conviction and uphold the conviction and sentence as handed down by the trial court through the impugned judgment.

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

Arif