

CERTIFICATE OF THE COURT IN REGARD TO REPORTING

Sp. Cr ATA 07 to 09 of 2008

Iftikhar Ahmed vs The State
& Another

HIGH COURT OF SINDH

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

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

Date(s) of Hearing: 3rd & 5th Sept., 2018

Decide on: 13-09-2019

(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.

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IN THE HIGH COURT OF SIND AT KARACHI

Criminal Spl.^{AT} Appeal No. 07/2009

Iftikhar Ahmed @ Imtiaz
S/O Niaz Ahmed, Muslims, adult,
Presently confined at Central Prison
Karachi.

Appellant

Versus

The State

Respondent

F.I.R No. 223/2008
U/S 365-A/302/109/34
PPC r/w 7 ATA 1997
PS. Darakhshan Karachi.

**APPEAL UNDER SECTION 25 OF THE
ANT-TERRORISM ACT, 1997**

Being aggrieved and dissatisfied with the Judgment dated 31-1-2009 passed by Learned Judge of Anti-Terrorism Court No.2, Karachi, convicting and sentencing the Appellant to life imprisonment and fine of Rs.2,00,000/- is also imposed upon him, in case of non-payment of the fine he shall undergo further imprisonment of R.I. of 2 years, more under section 6 (2) (a) of ATA 1997 r/w section 34 PPC, sentencing the Appellant to life imprisonment and forfeiture of his properties for the offence 7 (e) ATA 1997. It is respectfully beg to prefer this Appeal Inter Alia on facts and grounds mentioned hereunder and pray that this Hon'ble Court may be pleased to call for the record and proceedings of the above case from the Court of Anti-Terrorism Court No.2 Karachi and after perusing the same be further pleased to set-aside the impugned Judgment and acquit the appellant in this case.

Certified copy of judgment dated 31-1-2009
Passed by Anti-Terrorism Court No.2
Karachi is annexed herewith and marked
as Annexure "A"

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**IN THE HONORABLE HIGH COURT OF SINDH
AT KARACHI**

Spl. AT Cr. Appeal No. 08 /2009

Muhammad Nawaz S/O Ahmed Yar,
R/O Bangla No.173/D, Block No.2,
P.E.C.H.S, Tariq Road,
Karachi. *presently confined in Central Prison*.....Accused

VERSUS

The state.....Respondent.

FIR No.223/2008
U/S 365-A/302/109/34 PPC
R/W Section 7 ATA, 1997.
P.S Darakhshan, Karachi.

**APPEAL AGAINST CONVICTION
UNDER SECTION 410 Cr.P.C**

Being aggrieved and dissatisfied with the impugned judgement dated 31-01-90 passed by the Anti Terrorism Court No.II, Karachi Division, whereby the Learned trial Court has convicted the appeals to life imprisonment and fine of Rs.2 Lacs each and two years rigorous imprisonment more case of default in payment of fine for offence falling U/S 6(2)(a) R/W Section 34 PPC. Both of them are also convicted to life imprisonment and forfeiture of property of each of them for offences U/S 6(2)(e) R/W Section 34 PPC punishable under section 7(e) Anti-Terrorism Act 1997.

The appellant, therefore, prays that this Honorable Court may be pleased to set-aside the impugned judgement dated 31-01-90 and acquit the accused/appellants in the interest of justice on consideration of the following facts and grounds:

(Photocopy of Judgement dated 31-01-90 is filed herewith and marked as annexure "A").

FACTS

Facts of the case as per the Fir are that complainant Shaharyar S/O Shaikh Muhammad Aslam lodged the FIR at P.S Darakhshan on 25-04-2008

Cont/P.2

IN THE HIGH COURT OF SINDH AT KARACHI

Spl AT Cr. Appl. No. 09 of 2009

The State,
Through the Prosecutor General Sindh
having its office Building No.6.
Sindh Secretariat Karachi.....Appellant

Versus

1. Iftikhar Ahmed @ Imtiaz S/o Niaz Ahmed
R/o Gali No.17, Katchiabadi, Bhittaiabad,
Karachi.
2. Muhammad Nawaz S/o Ahmed Yar,
R/o Bangla No.173/D,
Block No.2, P.E.H.S Tariq Road,
Karachi.....Respondents.
Both are at present lodged in custody
at Central Prison Karachi

FIR No.223/2008
U/S 365-A/302/109/34 PPC
R/W Section 7 ATA 1997
P.S Darakhshan, Karachi

APPEAL FOR ENHANCEMENT OF SENTENCE UNDER SECTION 25 (4) OF ANTI-TERRORISM ACT,1997

Being aggrieved and dissatisfied with judgment, dated 31-01-2009 passed by the Learned Anti-Terrorism Court No.II, Karachi Division, whereby the Respondents were convicted to life imprisonment and fine of Rupees Two Lacs each and two years rigorous imprisonment more in case of default in payment of fine for offences falling U/s 6 (2) (e) R/W Section 34 PPC. Both of them were also convicted to Life Imprisonment and forfeiture of property of each of them for offences falling U/S 6 (2) (e) R/W Section 34 PPC punishable Under Section-7 (e) Anti-

IN THE HIGH COURT OF SINDH AT KARACHI

Special Cr. Anti-Terrorism Appeal No.07 of 2009
Special Cr. Anti-Terrorism Appeal No.08 of 2009
Special Cr. Anti-Terrorism Appeal No.09 of 2009

Present:

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

Appellants/Respondents: Iftikhar Ahmed @ Imitaz and Muhammad Nawaz through Syed Zakir Hussain and Mr. Azam Khan, Advocates.

Respondent/Appellant The State through Mr. Muhammad Iqbal Awan Deputy Prosecutor General Sindh

Complainant Shahar Yar s/o. Sheikh Muhammad Aslam through Mr. M. Naeem, Advocate.

Date of hearing: 03.09.2019 and 05.09.2019

Date of announcement: 13.09.2019

JUDGMENT

Mohammad Karim Khan Agha, J.- Appellants Iftikhar Ahmed @ Imitaz son of Niaz Ahmed and Muhammad Nawaz son of Ahmad Yar have preferred the above appeals against the judgment dated 31.01.2009 passed by the learned Judge Anti-Terrorism Court No.II, Karachi in Special Case No.87/2008, F.I.R. No.223/2008 u/s.365-A/302/109/34 PPC r/w section 7 of ATA, 1997, registered at police station Darakhshan, Karachi whereby the appellants have been convicted and sentenced to life imprisonment and fine of Rs.2-lacs each and two years rigorous imprisonment more in case of default in payment of fine for offence falling u/s. 6(2) (a) r/w. section 34 PPC. Both of them have also been convicted and sentenced to life imprisonment and forfeiture of property of each of them for offence falling u/s.6(2) (a) r/w. Section 34 PPC punishable under Section 7(e) of A.T. Act, 1997. (the impugned judgment). The sentences were, however, to run concurrently and both the accused were given the benefit of Section 382-B Cr.P.C. However, the State also filed an appeal against the impugned judgment dated 31.01.2009 for enhancement of sentences awarded to the appellants by the learned trial Court from life imprisonment to the death penalty.

2. The brief facts of the prosecution case as per FIR are that complainant Shahar Yar son of Sheikh Muhammad lodged an FIR on 25.4.2008 and stated in the same that he was residing on the address given by him in FIR along with his family members and is doing CA. It is stated that his father Sheikh Aslam aged 48 years is doing business at New Crystal Jewelers situated at Tariq Road and used to go to the shop at 11:00 a.m and return at 8:00 p.m. after closing the shop. It is stated in the FIR that on 25.04.2008 as usual his father went to the shop and at usual time at night after closing the shop was returning in his car No.AGB-364 Corolla GLI Blue colour to their residence situated at Phase-V Defence, but he did not return to his house on which the complainant and his family members got worried. As per the FIR the complainant phoned his father on his mobile phone No.0302-25377214, but the phone was found switched off. As per the FIR he repeatedly tried to contact him on the phone and that on 26.4.2008 at about 2:00 a.m contact on his father's mobile phone was made but instead of his father an unknown person received the call and from his tone he sounded Sindhi and informed that his father's car was lying parked at Khada market and that his father was in their custody and that they should take the car from there and pay Rs.30-lacs for release of his father and further that he would contact again after two days. As per the FIR the complainant gave such information to the police and the police accompanied him to Khada Market and saw that the car was lying parked in front of Jameel Studio, the key of the car was not there, but the car was in proper condition. As per the FIR the complainant then sent for another key and brought the car to their house. As per the FIR the complainant continued searching for his father and asked the police also to search for his missing father and that he would later on lodge the report. As per the FIR he on that day lodged the report with the claim that unknown accused have abducted his father for ransom amount and that the report read out to him is correct. The FIR was registered at PS Darakhsan under Section 365-A PPC.

3. That after usual investigation challan was submitted. As per challan accused Iftikhar, Nawaz and Abdul Rasheed were found to be involved in this crime. Accused Iftikhar and Nawaz were arrested. NBW was issued against the absconding accused namely Abdul Rasheed but he could not be arrested, hence on the basis of report of process server his

case was ordered to be proceeded in absence of accused Abdul Rasheed and he was declared as proclaimed offender.

4. In order to prove its case the prosecution examined 10 PW's who exhibited various documents and other items in support of the prosecution case where after the prosecution closed its side. The accused persons recorded their statements under S.342 Cr.PC whereby they claimed their false implication in the case and plead not guilty. However, they did not examine themselves on oath nor produce any defense witnesses in support of their defense.

5. 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 31.01.2009 convicted and sentenced the appellants as stated above, hence these appeals against conviction have been separately filed. By this common judgment we intend to decide the same. The State has also filed an appeal for enhancement of the sentence from life imprisonment to the death penalty which we shall also decide.

6. The detailed facts of the case as well as evidence produced before the trial court find an elaborate mention in the impugned judgment, therefore, the same are not reproduced here so as to avoid duplication and unnecessary repetition.

7. Learned counsel for appellant Iftikhar Ahmed contended that there was an unexplained delay of 27 days in lodging the FIR which enabled the complainant along with the police to fabricate the case against him; that there was no evidence of any kidnapping; that there was no evidence as to the identity of the dead body as it was decomposed at the time of its recovery ; that there was no eye witness to the murder of the deceased; that there was no evidence that the deceased had been murdered as he could have drowned himself without any assistance; that simply recovering a dead body did not mean that the deceased had been murdered; that there was no evidence that any ransom demand had been made; that the inquest report showed no marks around the neck of the deceased and as such there was no evidence that the deceased had been strangled especially in the absence of a medical report stating the cause of death; that PW 3 cannot be relied upon as he admits signing a blank paper

and was also a interested witness; that PW 7 Majid Khan who allegedly saw the deceased entering the bungalow where he was allegedly killed cannot be safely relied upon; and that for one or all the above reasons the accused be acquitted of the charge by extending the benefit of the doubt. In support of his contentions he placed reliance on **Naeem Akhtar and others v. The State** (1993 P. Cr.LJ 769), **Muhammad Khan and another v. The State** (1999 SCMR 1220), **Muhammad Sajjad v. The State** (2009 SCMR 1248), **Mst. Askar Jan and others v. Muhammad Daud and others** (2010 SCMR 1604), **Shahzad Tanveer v. The State** (2012 SCMR 172), **Gul Noor Ali v. The State** (2015 SCMR 279), **Irfan Ali v. The State** (2015 SCMR 840), **Muhammad Mushtaq v. Mustansar Hussain and others** (2016 SCMR 2123), **Azeem Khan and others v. Mujahid Khan and others** (2016 SCMR 274), **Mst. Rukhsana Begum and others v. Sajjad and others** (2017 SCMR 596), **Zahir Yousaf and another v. The State and another** (2017 SCMR 2002) and **Ali Sawar V State** (2019 P.Cr.LJ 1142).

8. Learned counsel for appellant Muhammad Nawaz contended that he was not chowkidar of the house where the body was found and that no evidence had come on record to that effect; that no witness had mentioned his name or given him a specific role; that the phone allegedly recovered from him had no SIM and that his confession before the police was inadmissible in law and in effect that this was a case of no evidence against him and as such he be acquitted from the charge and his appeal allowed.

9. Mr. Muhammad Iqbal Awan, Deputy Prosecutor General, contended that the appellants had been rightly convicted by the impugned judgment which did not require interference since it was not unusual in kidnap cases for the FIR to be delayed; that the accused had confessed to the crime before the police and had taken the police to the place where the dead body was; that PW 7 Majid Khan had seen the accused enter the house with the deceased; that another PW had sold the SIM to accused Iftikhar from which the ransom calls were made and the CDR record supported the prosecution case against the accused. He did however concede that there was no evidence of any kidnapping and that the case related to murder. He stated that it was a case of enhancement from life imprisonment to death with respect to Iftikhar who had actually murdered the deceased but not a case of enhancement with respect to

Nawaz whose conviction of life imprisonment should be maintained. In support of his contentions he placed reliance on **Said Muhammad v. The State** (1999 SCMR 2758), **Dr. Javaid Akhtar v. The State** (PLD 2007 Supreme Court 249), **Rajab alias Rajoo alias Nang and another v. The State** (2006 SCMR 175), **Ajab alias Rajab and another v. The State** (2004 MLD 180), **Ghulam Hussain Soomro v. The State** (PLD 2007 Supreme Court 71), **Sh. Muhammad Amjad v. The State** (PLD 2003 Supreme Court 704), **Nazir Shehzad and another v. The State** (2009 SCMR 1440), **Muhammad Nadeem alias Deemi v. The State** (2011 SCMR 872), **State through Advocate-General Sindh, Karachi v. Farman Hussain and others** (PLD 1995 Supreme Court 1),

10. Learned counsel for the complainant adopted the arguments of learned DPG but submitted that both the accused sentence should be enhanced to death due to the heinousness of the crime. In support of his contention he placed reliance on **Miss Najiba V Ahmed Sultan** (2001 SCMR 988).

11. We have heard the arguments of the learned counsel for the appellants, DPG and the complainant and have gone through the entire evidence which has been read out by the appellant's counsel, the impugned judgment with their able assistance and have considered the relevant law including the cases cited at the bar.

12. After our reassessment of the evidence we have come to the conclusion that the prosecution has not been able to prove its case against the accused beyond a reasonable doubt and that the accused are entitled to the benefit of the doubt for the following reasons;

(a) That there has been an unexplained delay of registering the FIR of 27 days. According to the complainant he reported his missing father to the police which was corroborated by the police but no missing report has been tendered in evidence. It is true that in kidnap for ransom cases some latitude has been given in immediately lodging the FIR as usually, especially in the case of children, the parents frantically spend time initially searching for the abductee however in this case an unexplained delay of 27 days is too long a period to be ignored as it gives the complainant the chance to cook up a false case against the accused with the assistance of the police.

It is also to be noted that the complainant did not state in the FIR the mobile numbers from which he had been receiving ransom demands from but disclosed them in his evidence and appears to have improved his evidence in this respect. This unexplained long delay in registering the FIR therefore weighs heavily against the prosecution case. In this respect reliance is placed on **Zafar V State** (2018 SCMR 326)

(b) There is no evidence that Sheikh Muhammad Aslam (the deceased) was abducted by the accused. The evidence is that he left his shop at the usual time but did not return home. No one actually saw him being abducted by the accused or any one else a part from some last scene evidence which we shall discuss later in this judgment. This position has been admitted by the DPG during his submissions before this court.

(c) That there is no evidence that any ransom demand was actually made since there is no voice recording available despite the caller allegedly calling many times for the payment of ransom and the involvement of the CPLC and its negotiation and that no ransom has ever been recovered. The Nokia phone recovered from PW 2 Shaher Yar who is the son of the deceased when it was taken in to custody by the police was not sealed and there is no evidence of its safe custody there after. In this respect reliance is placed on **Azeem Khan V Mujahid Khan** (2016 SCMR 274)

(d) The case of the prosecution is that the deceased was strangled before being dumped into the water tank at the house. The cause of death however has not been established by the medical report which does not state the deceased was strangled and there appears to be no final cause of death certificate on record. The inquest report also shows no marks on the neck of the accused and as such the cause of death cannot be established and as such the recovery of the rope at the scene of the crime is of no relevance. The accused could have drowned in the water tank at the house by falling in it himself by accident which would not make this a case of murder. We are however satisfied based on the DNA evidence that the dead body was that of the deceased despite its decomposition.

(e) That the confessions made by the accused before the police are inadmissible in law and no reliance can be placed on them.

(f) PW-3 Muhammad Nasir Shaikh who is the son of the deceased is an interested witness who went to the scene of the crime with the police and was present when the rope which was allegedly used to strangle his father was recovered along with his father's body. However it is **significant** that this important piece of evidence of him going to the house with the police on the pointation of the accused where the crime was committed and recovering the evidence of the rope was **not** recorded in his S.161 statement which tends to show that he has dishonestly improved his evidence which in our view makes it highly unreliable. Same is the case of PW 5 Faiz Ahmed who is the arresting officer. Reliance in this respect is placed on **Muhammad Mansha V State** (2018 SCMR 772).

(g) PW-8 Muhammed Ishaque who accused Iftikhar allegedly purchased the SIM for his phone did not even take the CNIC of Iftikhar at the time of selling him the SIM which is a legal requirement and casts further doubt on the prosecution case as it cannot be proved that the SIM was purchased by accused Iftikhar.

(h) PW-7 Majid Khan says that he knew all three accused and that he saw two of them enter the bungalow with the deceased. However there is no evidence that he knew all the three accused let alone the deceased and as such the safer course was to hold an identification parade in order to establish his identification of the accused which was not done. He appears to be a chance witness as no record of his employment in that area has been tendered in evidence. Even otherwise since there is no evidence on record that he knew the deceased before the incident his identification of the deceased cannot be safely relied upon especially as he does not state in his evidence which day the deceased went into the bungalow with the accused and that the deceased was taken into the bungalow by the accused by force or against his will. The fact that it was 9pm and that it would have been dark and it was not known how far away he was from the accused and the deceased when they allegedly entered the house also casts further doubt on

his ability to safely identify any of the accused or the deceased. In our view his allegedly last seen evidence cannot be safely relied upon in order to convict the accused. In this respect reliance is placed on **Muhammad Abid V State** (PLD 2018 SC 813)

(i) The prosecution therefore is only really left with the evidence that Iftikhar lead them to the bungalow on whose pointation the dead body and rope were recovered. There is no evidence that the rope was kept in safe custody or even that the deceased died by strangulation from the MLO, as discussed earlier, and as such the recovery of the rope does not link the accused to the cause of death. Even if we accept that the accused did take the police to the house and showed them the dead body and the rope we are of the view that without any other cogent, reliable corroborative evidence which is lacking in this case it would be unsafe to convict the accused on this evidence of pointaion of the bungalow where the dead body and rope were found especially as due to a lack of medical evidence it has not been conclusively established how the deceased died and whether it indeed was a case of murder.

(j) There is no eye witness to the murder of the deceased and the case is very much based on circumstantial evidence which in our view does not fully meet the requirements of a case based on circumstantial evidence to enable a conviction as there appear to be many breaks in the chain of evidence linking the accused from the foot of the deceased to his neck. For example, there is no evidence of abduction or of a ransom being made or even a motive. Reliance in this respect is placed on the case of **Fayyaz Ahmed V State** (2017 SCMR 2026)

(k) With regard to accused Nawaz the only evidence against him appears to be Iftikhar's confession before the police and since Iftikhar is a co-accused this confession before the police is inadmissible in respect of co-accused Nawaz. Likewise Nawaz's own alleged confession before the police is inadmissible

13. It is a cardinal principle of criminal jurisprudence that the prosecution must prove its case beyond a reasonable doubt and it is not

for the accused to disprove the case against him who may take any and as many defenses as he likes to the allegations against him as the onus rests on the prosecution to prove its case beyond a reasonable doubt as was held in the case of **Muhammed Shah V State** (2010 SCMR 1009) and if there is any doubt in the prosecutions case the benefit must go to the accused. As was held in the case of **Tariq Pervez V The State** (1995 SCMR 1345) that 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. Such principle was recently reiterated by the Supreme court in the case of **Abdul Jabbar V State** (2019 SCMR 129)

14. In our view for the reasons mentioned above the prosecution has failed to prove its case against the appellants beyond a reasonable doubt and the appellant's are both entitled to the benefit of the doubt and as such their appeals are allowed and the appellants are acquitted of the charge and shall be released unless wanted in any other custody case. Since we have acquitted the appellants of the charge and upheld their appeals it follows that the enhancement appeal fails and is dismissed

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