

Agreed: Priso jeep kidnap for ransom

192

IN THE HIGH COURT OF SINDH AT KARACHI

Spl. Criminal Anti-Terrorism Appeal No.03 of 2013
Confirmation Case No.10 of 2016

Present:

Mr. Justice Naimatullah Phulpoto
Mr. Justice Mohammad Karim Khan Agha

Appellant: Wali Muhammad S/o. Lal Jurio, presently confined
in Central Prison, Karachi through Mr. Hasan
Feroz, Advocate.

Respondent: The State through Farman Ali Kanasro,
Additional Prosecutor General Sindh.

Date of hearing: 29.03.2019.
Date of Judgment: 05.04.2019.

JUDGMENT

MOHAMMAD KARIM KHAN AGHA, I.- Appellant Wali Muhammad S/o. Lal Jurio was tried by learned Judge Anti-Terrorism Court, Mirpurkhas in Special Case No.01 of 2012 arising out of Crime No.102/2011 U/s. 365-A, 506(2), 34 PPC read with section 6/7 of Anti-Terrorism Act, 1997 registered at Taluka Mirpurkhas vide judgment dated 24.12.2012, and the appellant was convicted for the kidnapping for ransom of Irfan Usman and Jan Muhammad U/s 7(e) of Anti-Terrorism Act, 1997 and sentenced to death subject to confirmation by this court, with further order to forfeit his movable and immovable properties in favour of Government (the impugned judgment).

2. The case of the prosecution is that on 13.10.2011 at 11.00 a.m. one Irfan Usman along with his driver Jan Muhammad was going to inspect his agricultural land situated near village Haji Wali Muhammad Khatyan in his Prado Jeep No.BD-1768. On the way adjacent to Dargah Chand Morio his jeep was stopped by a white corolla car from which four persons armed with Kalashnikovs came out and surrounded his jeep. Irfan Usman tried to come out from his jeep which was resisted by the culprits who forced Irfan Usman to re-occupy his seat in his jeep after causing him rifle butt injury in the face. They also caused injuries to Jan Muhammad the driver of the jeep. This incident was witnessed by Nauman Ali cousin of Irfan Usman who came on

a motor cycle from Mirpurkhas. The culprits occupied the jeep and blind-folded Irfan Usman and Jan Muhammad. After 20 minutes journey they abandoned the jeep and made Irfan Usman and Jan Muhammad sit in another car and after about 4/5 hours journey they stopped the car at unknown place where they confined Irfan Usman and Jan Muhammad in a room for about 45 days. The culprits demanded ransom money from Muhammad Usman father of Irfan Usman. They also shifted Irfan Usman and Jan Muhammad from place to place. After total detention of about 90 days, the kidnappers set Irfan Usman and Jan Muhammad free telling them that this was because their Murshid Pir Pagara had expired by leaving them on the road and gave them rupees one thousand and went away. After opening their eyes Irfan Usman and Jan Muhammad came to know that they were left on a road near Sindh University Jamshoro. Thereafter Irfan Usman and Jan Muhammad came to their house.

3. FIR of the incident had already been lodged at Police Station Taluka Mirpurkhas by Abdullah Khan uncle of Irfan Usman on 16-11-2011. The appellant/accused Wali Muhammad Syed was arrested on 05.4.2012 and put to identification parade where he was correctly identified by abductees Irfan Usman and Jan Muhammad and PW2 Nauman Ali.

4. After completing the usual investigation, the Investigation Officer submitted the challan against the appellant/ accused for trial in accordance with law. To prove its case, the prosecution examined 11 witnesses and exhibited numerous documents and other items. The accused recorded his statement under S.342 Cr.PC whereby he denied the allegations against him and claimed that he had been falsely implicated in this case by the eye witnesses on the pressure of the police who had shown him to the eye witnesses before the identification parade and that he had been taken into illegal police custody on 07-02-2012 where he was tortured and told to admit his guilt to the offense which he refused to do. He did not give evidence under oath but did call both his sons as defense witnesses who corroborated his story about being arrested from his house by the police where he and his sons were living on 07-02-2012. DW 1 being his son Lal Jurrio also corroborated the accused statement of being subject to police torture and being pressurized to admit his guilt as he was also kept with his father in illegal detention by the police and also saw his father being shown to the eye

witnesses whilst in illegal detention. DW 2 the accused's other son Noor Mohammed Shah who was not taken by the police also gave evidence that on the next day he filed a petition in the Hyderabad High Court about his father's and brother's illegal detention by the police and later filed an application under S.491 Cr.Pc before the Sessions court. DW 3 Fareed Ahmed also gave evidence that he did not see the police come to the accused's Otaque on 08-04-2012 when they allegedly came and made various recoveries. After considering the evidence on record the trial court handed down the conviction and sentence to the accused as mentioned earlier in this judgment. Hence this appeal against conviction by the appellant.

5. The facts of the case as well as evidence produced before the trial Court find an elaborate mention in the impugned judgment dated 24.12.2012 passed by the trial court and, therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

6. Learned advocate for appellant contended that the appellant is innocent and had been falsely implicated in this case; that the eye witness evidence in respect of his abduction and identification was not trust worthy and confidence inspiring and as such could not be safely relied upon; that in fact no such abduction had taken place; that there was an inordinate and unexplained delay in lodging the FIR which gave the opportunity for the complainant and the police to concoct the case against the accused; that the identification parade was not held in accordance with the law; that there was no evidence of any ransom demand and thus for one and/or all the above reasons the impugned judgment should be set aside and the accused be acquitted of the charge by extending the benefit of the doubt to him. In support of his contentions he placed reliance on the cases of **Muhammad Fazal v. The State** (1983 SCMR 1), **Asif Hussain v. The State** (2005 MLD 1911), **Rahat Ali v. The State** (2001 P. Cr.L.J. 98), **Hatim Ali Sheikh v. The State** (PLD 1994 Karachi 414), **Umar Farooq v. The State** (1993 P. Cr.L.J. 709), **Kamil Zaman v. The State** (1999 P. Cr.L.J. 1546), **Muhammad Riaz v. The State** (1988 MLD 38), **Abdul Sattar v. The State** (PLD 1976 Supreme Court 404), **Muhammad Tazeem and others v. The State and others** (2000 YLR 1542), **Ghulam Abbas v. The State** (2002 YLR 1759) and **Sher Dil alias Sher Gul and another v. The State** (1973 P. Cr.L.J. 802).

7. On the other hand, Mr. Farman Ali Kanasro, learned Additional Prosecutor General fully supported the impugned judgment. He contended that it was a day time incident; that the eye witness evidence was reliable and confidence inspiring and was sufficient to convict the accused; that there was no untoward delay in registering the FIR based on the particular facts and circumstances of the case; that the eye witness testimony was corroborated by the recovery of the 222 Rifle, cassette and photo's which had been found on the pointation of the accused; that other witnesses proved that a ransom demand was made; that the accused was arrested on spy information whilst riding in a rickshaw and had not been illegally detained in police custody. He conceded that there were some defects in the identification parade but these were not material and despite such minor defects the prosecution had proved its case against the accused beyond a reasonable doubt and the impugned judgment should be upheld and the appeal dismissed. In support of his contentions he placed reliance on **Ghulam Hussain Soomro v. The State** (PLD 2007 SC 71), **Zakir Khan and others v. The State** (1995 SCMR 1793), **Muhammad Akbar v. The State** (1998 SCMR 2538), **Rashid Aslam and another v. The State** (2017 YLR 2052), **Khan Ali v. The State** (1999 MLD 2477) and **Ghulam Waris v. The State** (2003 YLR 2273).

8. 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 the case law cited at the bar.

9. From the evidence in our view it seems that the case of the prosecution is that Irfan Usman was kidnapped on 13-10-2011 at about 11.30 am along with his driver Jan Muhammed by the accused and other absconding co-accused who detained them against their will and demanded a ransom for their safe return from Irfan Usman's father. The abductees however, were later released although no ransom was paid after about 90 days in captivity who later along with eye witness Noman Ali identified the accused as one of the person's who kidnapped the abductees at an identification parade carried out by the judicial magistrate. The prosecution case was further bolstered by the recovery on the pointation of the accused of

a hidden and buried 222 Rifle, 33 photographs and cassettes concerning the abductees.

10. In evaluating the evidence on record we consider that the main issues before us are;

- (a) Whether the abductees (Irfan and Jan Muhammed) were kidnapped and if so
- (b) Whether the appellant was one of the kidnappers especially keeping in view whether his identification parade was held in accordance with law and if so
- (c) Whether any ransom demand was made.

Turning to the issue of the kidnapping of the abductees.

11. In this respect the prosecution has relied on 3 eye witnesses (a) PW 3 Irfan Usman one of the abductees and (b) PW 4 Jan Muhammed another abductee and (c) PW 2 Noman Ali. The other PW's who narrated the incident of the abduction give hearsay evidence which is inadmissible in law

12. All these eye witnesses corroborate each other as to the date, time and manner of the kidnapping of PW 3 Irfan Usman and PW 4 Jan Muhammed at about 11.30 am on 13-10-2011. We note however, that PW Noman Ali is related to abductee PW 3 Irfan Usman and is also a **chance witness** whose presence at the time of the incident has not been adequately explained especially as rather surprisingly the kidnappers left him alone and did not even take his motor bike key let alone disable his motorbike so that he could not give chase to the kidnappers or quickly inform the police about the kidnapping, nor did they demand his mobile phone which conduct on the part of the kidnappers does not particularly appeal to reason. It is also strange that instead of following the jeep or reporting the matter immediately to the police he instead went to his uncle's house and told him about the incident. Keeping these factors in view we give his evidence hardly any weight. Thus, with regard to the actual abduction we have only given weight to the evidence of the abductees

13. The evidence of the abductees concerning their kidnapping is corroborated by the fact that human blood was discovered in the recovered jeep and that PW 3 Irfan Usman had been hit by the rifle butt on his face

which led to his bleeding, the fact that the jeep in which the abductees were driving was found dumped, the fact that it seems to be undisputed that the abductees were missing for about 90 days and thus we do find **on balance** that the abductees were kidnapped. We use the words "on balance" because we note that the FIR was lodged after an unexplained delay of 30 days. We appreciate that in cases such as this where initially a search is made for the abducted person, panic sets in and the complainant is warned not to contact the police by the kidnappers otherwise dire consequences might follow, as in this case, may cause some delay in lodging the FIR however an unexplained delay of over 30 days as in this case based on the particular facts and circumstances of this case does appear to be rather an unreasonably long time especially as during this period there does not appear to be any evidence of any ransom negotiations or continuing further threats against the abductees vis a vis their safety. Thus, on balance we find that the prosecution has proved that the abductees were kidnapped at the time, date and location as alleged.

The next issue and most significant in our view is whether the accused was actually one of the kidnappers of the abductees.

14. We have already decided to give hardly any weight to the evidence of chance eye witness PW 2 Noman so the question arises whether the accused has been correctly identified by the abductees.

15. According to both abductees at the time of the day light kidnapping there were 5 kidnappers who were carrying Kalashnikov's whose faces were opened. Thus, there was a possibility that both the abductees could have seen and later recognized the accused. This however, needs to be considered taking into account the fact that abductees admittedly did not know the accused before this incident; that it is not known how far the accused was from the abductees at the time of the incident and with other kidnappers the question arises as for how long the abductees saw the accused at the time of the abduction and admittedly the abductees were kept blind folded throughout the rest of their duration in captivity before they were released. **Importantly**, after their release neither of the abductees in their S.161 statements (or PW 2 Noman) have given any features or description of the accused.

16. As for the identification parade it is note worthy that this took place during the period when the accused was not remanded in judicial custody but was in police custody and thus the police had every chance of showing the accused to the abductees prior to the identification parade as indeed is one of the defenses put forward by the accused in his S.342 Cr.PC statement. The learned APG has already conceded that the identification parade was not conducted in accordance with the law. We have also noted **additional** defects in the identification parade (a) the magistrate did not ask how long the accused had been in police custody, (b) the magistrate did not note any injuries on the abductees (c) CNIC Numbers, occupations and addresses of the dummies were not taken by the magistrate. The magistrate even noted in his report that the accused had claimed that he had been shown to the PW's who identified him which is consistent with his defense case. Thus, keeping all these factors in view we are of the opinion that the identification parade of the accused cannot be safely relied upon to prove that he was one of the kidnappers. Even the identification of the accused before the trial court was not safe to maintain his conviction. In this respect reliance is placed on **Order of the Supreme Court dated 22-02-2019 (Unreported) Criminal Miscellaneous Application No.183 of 2019 in Criminal Appeal No.259 of 2018. Notice in compliance with the order dated 12.02.2019 passed in Criminal Appeal No.259 of 2018 to Mr. Kanwar Anwaar Ali, Special Judicial Magistrate on account of dereliction of duty and lack of sufficient legal knowledge. This Order in effect re-iterated and approved the guidelines that need to be followed for an identification parade to be safely relied upon as laid down in the case of Muhammed Yaqoob V State (1989 P.Cr.LJ 2227)**

17. Even otherwise we do not consider that the prosecution has proved beyond a reasonable doubt that the accused was present at the scene at the time of the kidnapping. The accused's case as set out in detail in his S.342 Cr.PC statement is that he was in unlawful confinement of the police from 07-02-12 and during the time when he was allegedly arrested by the police whilst riding in a rickshaw. He consistently put his case to the relevant PW's during cross examination. His defense as set out in his S.342 Cr.PC statement is supported by the evidence of his two sons who have also placed on record applications moved to the High Court and Sessions Court as to the wrongful

confinement of the accused which the prosecution has not been able to refute. Furthermore, according to the prosecution case the accused was arrested by PW 11 IO Jawaid Iqbal on 5-04-2012 whilst riding in a Rickshaw along with 3-4 others on the basis of spy information however no statement of any of the other 3-4 persons who were riding in the rickshaw at the time when the accused was arrested from the rickshaw had their statements taken nor were they made mashirs or PW's and thus the prosecution deprived itself of the best evidence to show that the accused was in the rickshaw as opposed to police custody as alleged by him at the time of his arrest. Notably the mashirs were related to the complainant and had been brought along with the arresting IO. No person from the local area was made mashir who could have been collected either en route to the place of arrest or at the place of arrest. For ease of reference the S.342 Cr.PC statement of the accused is set out below in material part:

"Question No.9. Why the PWs have deposed against you?"

Answer: All the PWs are interested one and are deposing against me at the instance of PW 11 inspector Jawaid Iqbal.

Question No.10. Have you anything else to say?"

Answer: Sir I say that on 7.2.2012 it was about 12 O'clock at midnight the door of my house was knocked. My son Noor Mohammad opened the door and saw DSP Younis Baloch of Aamri Police Station. The said police official pushed my son Noor Mohammad. The said police officer, SHO and Hajan Panhwar of police station Sun and Qaisar Panhwar police guard of said DSP alongwith other police officials who were without uniform entered my house. They all broke a cupboard of my house and took out case amount. After that they forcibly took me and my son Lal Juria Shah alias Baboo Shah and brought both of us at police station Sun from where they were brought both of us at the office of SSP Jamshoro where SSP Riaz Soomro and other police of Mirpurkhas came who brought me and my son Lal Juria Shah alias Baboo Shah at Mirpurkhas. There they confined us in a quarter of police station Taluka Mirpurkhas for about a week and tortured me and my son. They further forced us to admit our guilt that we had abducted PWs 3 and 4 namely Irfan Usman and Jan Muhammad but we both refused. After that SSP Riaz Soomro brought there persons whose names were disclosed to us as Irfan Usman, Jan Mohammad and Noman and disclose that we had abducted Irfan Usman and Jan Mohammad in presence of Noman to which we replied that we had seen all the three for the first time. These three persons disclosed that I and my son were not with the abductors. After that our

custody was handed over to SHO Inayat Ali Zardari of police station Kot Ghulam Muhammad who confined both of us in a private quarter. The said SHO two times called Irfan Usman, Jan Mohammad and Noman and disclosed to us that we had abducted both Irfan Usman and Jan Mohammad in presence of Noman but we declined. Even these three persons disclosed that I and my son were not with the abductors. After that we had shifted to Digri police station where DSP Mir Aftab Talpur confined us for 20 days in a room who also called Irfan Usman, Jan Mohammad and Noman and forced us to admit our guilt that we had abducted both Irfan Usman and Jan Mohammad in presence of Noman but we again declined to admit the alleged guilt. These three persons also disclosed before DSP Mir Aftab Talpur that we were not involved in the abduction of Irfan Usman and Jan Mohammad. After that our custody was handed to Sanghar Police Station Tando Adam under the supervision of SHO Yar Mohammad Rind who later on handed over our custody to PW 11 second investigating officer Jawaaid Iqbal Chandio. The said police officer confined us at police station Manglia and Head Jamshoro and later on confined us in a quarter at Sanghar. He also called these three persons and disclosed to them that I and my son were the real culprits and to identify us in identification parade but they again told that I and my son were not the real culprits. On this PW 11 Jawaaid Iqbal Chandio threatened them that in case if they refused to identify us they will be booked under Section 201 PPC. Lastly he had stated that he will release my son Jurial Shah alias Baboo Shah and they would identify me in identification parade. Later on at the undue pressure of police, PW 2, 3 and 4 namely Noman Ali, Irfan Usman and Jan Mohammad identified me during the identification. The police had not recovered iron chains, locks, photographs and video cassettes from my Otaque nor on my pointation he had recovered 222 bore rifle. All these articles were foisted upon me. I further say that I had not abducted both the abductees nor I had caused injuries to them nor I had confined them in my Otaq. I further say that Muhammad Shah is my relative. He is being Zamindar and at his instance Aamri Police had arrested me. PW 11 investigating officer Jawaaid Iqbal Chandio is resident of District Dadu. He has terms with Zamindar Muhammad Shah. They both in collusion with each other involved me falsely in this case. I am innocent and pray for justice."

18. The manner in which the police came to know the name and identity of the accused also seems to us to be rather doubtful. According to the case of the prosecution PW 3 abductee Irfan Usman states in his evidence at typed P.3 as under in material part;

"I say that after about 1 & ½ months I hade gone to Sehwan District Jamshoro for offering Fateha at the Mazar

of Hazrat Lal Shahbaz Qalandar. Before my arrival at the Mazar when I reached on a road at a distance of about 2 kilo meters from Sun town I stopped my vehicle to fill the petrol where a hotel was also situated where I saw a person on motorcycle was standing, I had identified him to be one of the culprits who had abducted me and my driver Jan Muhammad. The said person proceeded towards Sun town. I followed him and saw that the said person went in a house situated adjacent to the road of the Mazar of G.M. Syed. I then enquired from three persons who were present there about the said person they disclosed to me that it was Ali Muhammad son of Lal Jurio Shah. After offering Fateha at the Mazar of Lal Shahbaz Qalandar I returned to my house at Mirpurkhas.

On 25.3.2012 a Police Officer called me at Police Lines Sanghar and disclosed to me that he wanted to enquire form me about the incident. I repeated the same facts to him as stated by me above and further disclosed to him that I had identified accused Wali Muhammad son of Lal Jurio Shah resident of Sun town District Jamshoro to be the same person who abducted me and Jan Muhammad. The said Police Officer had recorded my further statement and obtained my signature on it". (bold added)

19. Thus, according to the evidence of abductee Irfan Usman he, by chance, saw and recognized the accused at a petrol pump and then followed him home and found out his name and then **quite incredibly** did not go straight to the police to tell them about this identification of the person who had abducted him but instead went home and did nothing. Instead he waited for the police to call him on the off chance before giving this most crucial information to the police. Even in his further statement before the police having informed the police about his identification of the accused again **quite incredibly** he does not relate the manner in which he came across the accused in his **further** S.161 Cr.PC statement as noted above. In our view such conduct does not appeal to reason, logic or commonsense and is in fact contrary to usual human conduct when considered in terms of the significance of this newly discovered **most crucial information** which in our view casts severe doubt again on how the accused was identified. Interestingly, the accused is finally arrested, as mentioned above riding with 3-4 others in a rickshaw based on spy information when according to the information provided by abductee Irfan Usman he could have simply been arrested by the police from his house which the abductee had found out and

informed the police about. In our view this whole aspect of the case does not ring true.

20. Other doubts also arise when we consider the failure of the police to take the statement of any person near the home of the accused where allegedly the abductees were detained for many days and who might have seen some unusual activity let alone the people who were staying in the accused's otaque at the time when the IO inspected the same. The fact that the IO found chains in the accused's otaque which were used to chain up the abductees does not particularly appeal to reason, logic or common sense as any potential kidnapper would have disposed of these chains once the abductees had been released or even otherwise they could have been left there by the labourers who were working at the otaque whose statements were not taken or even those who opened the doors of the otaque or even planted by the police keeping in view that on 08-04-2012 when Wali Muhammed allegedly took the police to his otaque his neighbour DW 3 Fareed Ahmed whose shop is situated in front of the otaque states in his evidence that he did not see the accused or any police come to the otaque on that day. It is also quite surprising that the abductees recognized the room when according to them they had been blind folded the whole time that they were in captivity.

21. The fact that the 222 rifle was allegedly found on the pointation of the accused along with 33 photo's and a number of cassettes we also consider to be inconsequential as no roznamcha entry was made before the accused left the police station along with the police stating where they were going and what they intended to recover. In such circumstances it cannot be ruled out that these recoveries were not foisted on the accused by the police. In any event the accused saw Kalashnikov's and not a 222 Rifle and none of the photo's or Cassettes ever reached the complainants side. With regard to the photo's and the tapes it does not appeal to reason that despite keeping the abductees in detention for almost 90 days none of these photo's or tapes were sent to the complainant's side as proof that they had kidnapped the abductees in support of their ransom demand. Even otherwise no expert analysis has been made of the tapes and there is no evidence of safe recovery of these items. As for the alleged extra judicial confession of the accused given to the police while in police custody this is of no evidentiary value and

in any event was retracted by the accused at trial. That most of the mashirs are either related to the complainant or are his employees and no serious effort seems to have been made by the police to associate any independent mashir even when they were available despite this being a requirement under S.103 Cr.PC. We also note that some of the PW's have given further statements which in our view appear to be nothing but dishonest improvements in their original S.161 Cr.PC statements on which little reliance can be placed. For instance the star prosecution witnesses PW 3 abductee Irfan Usman and PW 4 abductee Jan Muhammed. Even in their S.164 Cr.PC statements the abductees do not name the kidnappers, nor give any description of them and since the accused was not arrested at the time when the abductees made their S.164 Cr.PC statements they were not subject to cross examination by the accused and as such are of little evidentiary value.

22. Thus, when the above discussion is considered we are of the firm view that the prosecution has not proved beyond a reasonable doubt that the accused was one of the kidnappers who abducted Irfan Usman and Jan Muhammed.

23. Having made the above finding the aspect of whether any ransom demand was made now becomes irrelevant but in any event by way of completeness since there is no evidence that any specific ransom amount was ever demanded or paid; that the phone from which the ransom call was allegedly made was never recovered and even the CDR of that phone was not produced; that the reason for the release of the abductees by the kidnappers after about 90 days of detention without receiving any ransom when potentially some of the kidnappers could have been identified by the abductees also does not particularly appeal to reason, logic or commonsense and thus we are also of the view that the prosecution has failed to prove beyond a reasonable doubt that a ransom demand was made by any of the kidnappers.

24. Thus, based on our above assessment of the evidence and keeping in view the relevant law, since the prosecution has been **unable** to prove beyond a reasonable doubt that the accused was one of the kidnappers of the abductees the impugned judgment is set aside, the accused is acquitted of the

charge and the confirmation reference is answered in the negative. The accused shall be released if he is not required in any other custody case.

25. The appeal is therefore allowed and disposed of in the above terms with the confirmation reference being answered in the negative.

Arif