

**IN THE HIGH COURT OF SINDH,
CIRCUIT COURT, HYDERABAD**

Cr.Jail Appeal No. D- 107 of 2013

Present:

Mr. Justice Muhammad Iqbal Kalhoro

Mr. Justice Zulfiqar Ali Sangi

Ali Nawaz and others ----- Appellants

Versus

The State ----- Respondents

Date of Hearing : 03.09.2019 & 11.9.2019

Date of Decision : 11-09-2019

Mr. Mohsin Almani, advocate for appellants

Mrs. Rameshan Oad, A.P.G.

JUDGMENT

ZULFIQAR ALI SANGI, J.--- This Appeal has been filed by the appellants against judgment dated 20.12.2013 passed by learned Special Judge Anti-Terrorism Court, Hyderabad in Special Case No. 22 of 2012, Crime No. 174 of 2011 registered at Police Station Sujawal District Thatta, under Section 365-A, 109, 34 P.P.C. read with Sections 6, 7 ATA 1997, whereby the learned trial court convicted the appellants to suffer life imprisonment under Section 7(e) of the said Act. Since the appellants were in custody from the date of their arrest, therefore, benefit of Section 382-B, Cr.P.C. was extended to them.

2. We have heard learned counsel for the parties and have gone through the record with their assistance.

3. According to prosecution case, as narrated in the FIR which was registered by complainant namely Syed Ashfaq Hussain Shah on 17.12.2011 at about 0010 hours, his brother Khalid Hussain Shah had come to Badin from Saudi Arabia to see complainant. On 24.11.2011, his younger brother namely Sheeraz Hussain Shah and younger son namely Najeel Hyder Shah and other family members were going to Karachi airport in two cars to drop Syed Khalid Hussain Shah there as he was returning to Saudi Arabia. It was about 7:00 or 7:15 am when complainant made a phone call to Syed Khalid Hussain Shah and enquired about their location who informed that he is near Bathoro whereas Sheeraz and Najeel have reached near Sujawal, upon which complainant called his son Najeel Hyder Shah but his cell phone was not responding. After some time complainant again called Khalid Hussain Shah

who informed him that he had reached airport but Sheeraz Hussain Shah and Najeel Hyder Shah are not there. On such information Complainant along with Tanweer Hussain Shah, Yaseen Khatri and Noor Hassan Abro proceeded toward Sujawal in search of Najeel and Sheeraz and also informed the police of Sujawal and Badin district about their missing. In the evening police informed complainant that the car of Sheeraz and Najeel had been found from Yaroo Shah Dargah near Sujawal which was handed over to complainant. Complainant party thereafter was searching Sheeraz and Najeel and after five days elder brother of complainant namely Syed Ishtiaq Hussain Shah received a phone call from accused persons who demanded ransom of Rs. 5 Crores. Complainant immediately informed the police of Sujawal and Badin about the phone call. In order to recover the abductees police conducted raids and recovered the abductees from Sarhari forest. Complainant also received information that nominated accused are the real culprits hence the FIR was registered. After usual investigation, the case was challaned showing three accused arrested while accused namely Faqero Soomro, Shamoo Soomro and Syed Mushtaq Shah as absconders.

4. During trial absconding accused Faqero Soomro and Shamoo Soomro were also arrested whereas accused Syed Mushtaq Shah remained absconder therefore the trial court separated his case and given separate number as ATC Case No: 22-A/2012 and ordered for trial on his arrest.

5. Accused Ali Nawaz, Abdul Aziz, Faqero, Shamoo and Ali Ahmed were supplied copies of documents in compliance of Section 265-C, Cr.P.C. by ATC Badin under receipts at Exs: 01 and 2 and also took oath as required under Section 16 of Act 1997 at Ex:3. Then charge was framed against accused at Ex:4 for offence punishable under Sections 6(2)(e) & 7(e) ATA, 1997 read with Sections 365-A/109/34, P.P.C. to which they pleaded not guilty and claimed trial by their pleas as Exs: 5 to 9. During trial the Anti-Terrorism Court Badin was shifted to Naushahro Feroze vide Notification No.REG(HD)/1-299/2011/76, dated 9th April, 2012 and the case was transferred to Anti-Terrorism Court Hyderabad where separate oath under Section 16 of the Act was taken by P.O which is at Ex:27.

6. Prosecution in order to prove the case against accused examined complainant Syed Ashfaq Hussain Shah as Ex.10, PW Syed Sheeraz Hussain Shah (Abductee) as Ex. 11, PW Syed Najeel Hyder Shah (Abductee) as Ex.12, PW Muhammad Yaseen as Ex. 13, then special prosecutor filed application for recalling abductee as Ex.14 and the same was withdrawn, PW Abdul Kareem as Ex.16, PW Ishtiaq Hussain Shah as Ex.17, PW Muneer Ahmed as Ex.18, PW Tanweer was given up vide statement as Ex.19, PW Muhammad Nawaz DSP as Ex. 20, PW Noutak Khan as Ex.21, PW Muhammad Hashim as Ex.22, PW Shakeel Moulani (Civil Judge) as Ex. 23, PW Asghar Ali as Ex.24, PW Abdul Majeed as Ex.25, and then prosecution closed side

vide statement as Ex.26. Thereafter statements under Section 342, Cr.P.C. of accused persons were recorded as Ex.28 to 32. After hearing the parties learned trial court passed judgment as Ex.34 and convicted the appellants as mentioned above.

7. Learned counsel for the appellants contended that appellants are innocent and have been implicated falsely at the instance of police which is even admitted in the FIR so also in deposition of the Complainant who categorically stated that he was informed by the police about involvement of accused persons in the case. He next contended that there is delay of 23 days in registration of FIR which was not explained by complainant properly. He next contended that prior to registration of FIR police started investigation and on recovery of abductees FIR was registered. Learned counsel further contended that identification parade was not conducted according to principles settled by Apex courts and further only on the basis of identification parade conviction cannot be awarded. He lastly prayed for acquittal of the appellants.

8. Learned APG for the State contended that delay in registration of FIR is not fatal in cases of abduction as the relatives remain busy in searching the abductees and they always remain apprehensive of lives of abductees. In the present case after recovery of abductees FIR was promptly registered. She further contended that after recovery of abductees, an identification parade was held in presence of Judicial Magistrate and during identification parade appellants were identified by the abductees. She further stated that even otherwise there is no need of identification parade as the abductees were in custody of abductors and had clearly seen them for about 23 days: that in the present case identification parade was held in accordance with the principles settled by Honourable Supreme Court of Pakistan in the case reported in PLD 2019 SC 488. Lastly she contended that abductees were recovered from the custody of appellants, therefore, prosecution has successfully proved its case beyond shadow of doubt against the appellants and trial court has rightly convicted the appellants. She requested that the appeal may be dismissed.

9. We have considered the submissions of learned counsel for the parties and perused the material available on record.

10. Normally the delay in registration of FIR in cases of abduction for ransom occurs as the relatives of abductees at the first instance remain busy in searching them or in some cases they wait for the contact to be established by abductors and always feel apprehensive of lives of their beloved ones. Therefore, delay in cases of such like nature is not fatal to the prosecution. But such delay has to be explained and is required to be considered with other evidence produced by the prosecution for safe administration of justice. If the evidence is free from all doubts, then delay alone would not be sufficient to disbelieve the case of prosecution. But if there is sufficient material available in the evidence that shows that accused has not committed offence

with which he is charged, then the delay too would be fatal to the prosecution case. In the present case incident took place on 24.11.2012 and complainant stated that after five days of incident his elder brother Syed Ishtiaq Hussain Shah received a phone call from accused persons who demanded the ransom of Rs. 05 crore. Such fact was immediately informed by him to the police of Sujawal and Badin. But he does not disclose that any threat was issued by the abductors, and we are surprised to note that even after that demand the FIR was not registered nor police recorded any entry at both police stations, which has put clouds over entire episode of arrest of accused and recovery, therefore, delay in registration of FIR in present case cuts the roots of prosecution case.

11. It is the case of prosecution that on suspicion three accused namely Ali Nawaz Soomro, Abdul Aziz Soomro and Ali Ahmed Brohi were arrested by the police and on their pointation abductees were recovered which too is doubtful. As on careful scrutiny of evidence of both the abductees and DSP Muhammad Nawaz Seerahi, the recovery of abductees on pointation of appellants does not seem to be proved. All the three appellant are stated to be arrested on 17.12.2011 at 0010 hours and on the same day led police party to the place wherefrom police recovered the abductees at 0530 hours. It is stated that at the time of raid for recovery, three other accused persons who were the guards upon abductees were present but ran away on seeing police party. Whereas before the trial court abductee Syed Najeel Hyder Shah in his examination in chief stated that "**They kept us for about 21 days and during that period shifted us from one place to another nearby place. During that period the culprits received phone call about the arrest of co-accused. Thereafter they shifted us to Sarhari. Police raid the place and on arrival of police they ran away after leaving us there.**" On this point other abductee Syed Sheeraz Hussain Shah in his chief examination has stated the same words that "**They kept us for about 21 days and during that period shifted us from one place to another nearby place. During that period the culprits received phone call about the arrest of co-accused. Thereafter they shifted us to Sarhari. Police raid the place and on arrival of police they ran away after leaving us there.**"

Now the question arises that how the arrested accused knew about the shifted place of abductees while in the custody of police. No material is available to suggest that after the arrest, the appellants were in any way in contact with other accused guarding the abductees and therefore had knowledge about the place where the abductees were shifted. In such circumstances, the question would be how the police came to know about the new place where abductees were shifted. In these circumstances, the recovery appears to be setup by the prosecution and shown to have been made on the pointation of appellants.

12. The arrest of all the three accused person is also doubtful as police have shown their arrest on 17.12.2011, such mashirnama of arrest is available as Ex.20/B, complainant has stated during cross-examination that **"Police informed us that three culprits namely Ali Nawaz Soomro, Abdul Aziz Soomro and Ali Ahmed Brohi already arrested on 15.12.2011 are involved in the present crime."** This major contradiction goes to the roots of prosecution case and makes it doubtful. In the case of Muhammad Dawood and others v. The State reported as 2015 PCr.LJ 316 this court has held as under:-

Now coming to the facts of the case, we have noted major contradictions and material irregularities in the case of prosecution, hence we are of the view that the prosecution has not been able to bring home the case for convicting the accused persons. It is a settled proposition of law that while dealing with the criminal cases, it is not necessary that the bundle of facts for acquitting a person are required, rather a single evidence, which is material is enough to put a dent in the case of the prosecution and to entitle acquittal of the accused persons. The reliance in this regard may be made to the cases of 2010 PCr.LJ 261 (Ghulam Murtaza v. The State) and 2010 PCr.LJ 477 (Syed Muatasim Wasit alias Momi v. The State".

13. PW Ishtiaq Hussain Shah Ex.17 in his chief examination has stated that **"on 15/12/2011, a telephone call received from Thatta police that they had arrested some persons and they were interrogated them in connection with our case. After two days of that phone, we were informed that our kidnapes were recovered from Sarhari and we were called at the Sujawal P.S. where my brother and nephew were present. The police informed me that accused Ali Nawaz, Ali Ahmed and Abdul Aziz had kidnapped my brother and nephew."** This piece of evidence too suggests that complainant party was informed about the abductors by the police and entire case was set-up by the police.

14. The demand of ransom from elder brother of complainant namely Syed Ishtiaq Hussain Shah is also not supported by any independent evidence. Though the complainant in his chief examination has stated that **"After five days of the incident my elder brother Syed Ishtiaq Hussain Shah received phone call from culprits who demanded ransom in the sum of Rs.5 crores for release of Najeel and Sheeraz. I immediately informed to police of Police Station Sujawal and Badin about the phone call."**

15. Record shows that Syed Ishtiaq Hussain Shah has not disclosed the phone number to his brother or police from which he received phone call for ransom, nor he stated on which number he had received the said call. Surprisingly police officers who were conducting investigation of a heinous offence failed to trace out the number, and

collected CDR though they had enough time till recovery of abductees to find out such fact which cuts at the roots of prosecution case and makes it doubtful. Honourable Supreme Court of Pakistan in case of Azeem Khan and others v. Mujahid Khan and others reported as 2016 SCMR 274 held as under:-

"The cell phone call data collected is of no help to the prosecution for the reason that numerous calls have been made indicating continuous interaction between the two cell phones, contrary to the evidence given by Muhammad Wali (PW-3), who has stated at the trial that the unknown caller made calls on his cell phone four times. No competent witness was produced at the trial, who provided the call data, Ex.P-1 to Ex.P-5. No voice record transcript has been brought on record. Similarly from which area the caller made the calls, is also not shown in it. Above all, the most crucial and conclusive proof that the cell phone was owned by the accused and SIM was allotted was in his name is also missing. In this view of the matter, this piece of evidence is absolutely inconclusive and of no benefit to the prosecution nor it connects the accused with the crime in any manner".

Honourable Supreme Court of Pakistan in the case of Mst. Mehboob Bibi and others v. The State reported as 2017 SCMR 1835 has acquitted the appellants, inter alia on this ground. Para 6 of the judgment is reproduced as under:-

"it was also challenged by the complainant that ransom amount was demanded by the abductors through his cell phone number. No call data was produced before the learned trial court to establish whether any telephone calls were received at the mobile number of the complainant what to speak of the contents of the telephone calls, the persons in whose names the SIM cards used for demanding ransom were issued".

16. On a close scrutiny of the evidence of PW 11 as Ex.23 Shakeel Moulani learned Civil Judge and Judicial Magistrate Mirpur Bathoro in whose presence the identification parade was held suggests that identification parade was not conducted properly and principles settled by Honourable Supreme Court of Pakistan were not followed. The names of dummies are not mentioned, only one identification parade was held in respect of two abductees, the dummies were the same, identification parade of three accused persons was not conducted separately. In the identification parade no specific role has been assigned to appellants. Only putting hands on the accused persons by witnesses is not sufficient to believe that these are the same accused persons who have committed the offence. In such circumstances identification parade loses its value and cannot be relied upon for awarding punishment of imprisonment of life. In case of Kanwar Anwar reported in PLD 2019 SC 488 the Honourable Supreme Court of Pakistan held as under:

- "4. It may also be observed that during test identification parade the requirement regarding specifying by witness the role of an individual accused person in commission of an offence had also been identified and emphasized by this Court in the cases of *Ismail and another v. The State* (1974 SCMR 175), *Khadim Hussain v. The State* (1985 SCMR 721), *Ghulam Rasul and 3 others v. The State* (1988 SCMR 557), *Asghar Ali alias Sabah and others v. The State and others* (1992 SCMR 2088), *State/ Government of Sindh through Advocate-General, Sindh, Karachi v. Sobharo* (1993 SCMR 585), *Mehmood Ahmad and 3 others v. The State and another* (1995 SCMR 127), *Siraj-ul-Haq and another v. The State* (2008 SCMR 302), *Ghulam Qadir and 2 others v. The State* (2008 SCMR 1221), *Muhammad Afzal alias Abdullah and another v. The State and others* (2009 SCMR 436), *Shafqat Mehmood and others v. The State* (2011 SCMR 537), *Sabir Ali alias Fauji v. The State* (2011 SCMR 563), *Muhammad Fayyaz v. The State* (2012 SCMR 522), *Azhar Mehmood and others v. The State* (2017 SCMR 135), *Hakeem and others v. The State* (2017 SCMR 1546) and *Kamal Din alias Kamala The State* (2018 SCMR 577).
5. Identification of many accused persons in one line in one go during a test identification parade has also repeatedly been held by this Court to be improper and it has been clarified by this Court on number of occasions that every accused person is to be put to a separate identification test parade and a reference in this respect may be made to the cases of *Lal Pasand v. The State* (PLD 1981 SC 142), *Imran Ashraf and 7 others v. The State* (2001 SCMR 424), *Ziaullah alias Jajj v. The State* (2008 SCMR 1210), *Bacha Zeb v. The State* (2010 SCMR 1189), *Shafqat Mehmood and others v. The State* (2011 SCMR 537), *Gulfam and another v. The State* (2017 SCMR 1189), *Hakeem and others v. The State* (2017 SCMR 1546) and *Kamal Din alias Kamala v. The State* (2018 SCMR 577).

17. Co-accused Faqero Soomro, Shamoan Soomro and Mushtaq Shah were implicated by accused Ali Nawaz Soomro, Abdul Aziz and Ali Ahmed while in custody of police. They are stated to be the guards upon abductee and at the time of raid they made their escape good. No identification parade was held in respect of their identity to connect them with this crime.

18. It is well settled principle of law that burden to prove the guilt lies upon the shoulders of prosecution and prosecution is bound to prove its case beyond shadow of reasonable doubt. If a single circumstance creates doubt in the prosecution case it's benefit must go to the accused not as a matter of grace but as a matter of right. In this regard, we would like to place reliance on the case of *Tariq Pervez v. The State* (1995 SCMR 1345) wherein Honourable Supreme Court of Pakistan held as under:-

"The concept of benefit of doubt to an accused person is deep rooted in our country. For giving him benefit of doubt, 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."

19. In the above facts and circumstances we are of the view that prosecution has failed to prove its case beyond shadow of reasonable doubt against the appellants. Therefore, conviction awarded by Anti-Terrorism Court, Hyderabad vide judgment dated 20-12-2013 to the appellants is set-aside and appellants are acquitted from the charge.

These are the reasons of our short order dated 11.9.2019