

IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

PRESENT:

Mr. Justice Aqeel Ahmed Abbasi

Mr. Justice Muhammad Faisal Kamal Alam

Criminal Appeal No.105 of 2015

Appellants : Saifullah & another
Through Mr. A.R. Faruq Pirzada, Advocate.

Respondent : The State
Through Mr. Zulfiqar Ali Jatoi, D.P.G.

Date of Hearing : 21.04.2016

J U D G M E N T

Aqeel Ahmed Abbasi, J :-- Being aggrieved and dissatisfied with the judgment dated 13.11.2015 passed by the learned Judge of Anti-Terrorism Court, Khairpur Mir's, in Special Case No.43/2010 arising from Crime No.63/2010 under Sections 365/A, 344, 506/2, 148, 149-PPC & 7 of Anti-Terrorism Act, 1997, registered at P.S. Gambat, District Khairpur Mir's, whereby, the appellants Saifullah and Asadullah both sons of Faiz Muhammad Gilal, have been convicted under Section 365-A read with Section 149 PPC and sentenced to suffer R.I for life each, and the moveable or immoveable properties of both accused stood forfeited to the State; further convicted under Section 344 read with Section 149 PPC and sentenced them to suffer R.I. for Three Years each with fine of Rs.10,000/- each and in default of payment of fine to further suffer R.I. for six months each; further convicted under Section 506/2 read with Section 149 PPC and sentenced them to suffer R.I. for two years each; further convicted under Section 7(e) of ATA and sentenced them to suffer

R.I. imprisonment for life each; all the sentences awarded to both the accused shall run concurrently and the benefit of section 382 Cr.P.C. was also extended; thereafter, the appellants have filed instant appeal under Section 25 of the Anti-Terrorism Act, 1997, with the prayer to set-aside the impugned judgment and to acquit them in the instant crime.

2. Instant Criminal Appeal has been filed as a matter of right against the impugned judgment, which was admitted to regular hearing, whereas, office was directed to prepare the paper book vide order dated 03.02.2015, thereafter, matter was fixed in Court for hearing on various dates, when it was argued at length by the learned counsel for the appellants as well as learned DPG on behalf of the State. During the course of hearing of instant appeal the complainant Sanaullah and abductee Mushtaq Hussain son of Khadim Hussain, the prosecution witnesss were summoned through concerned SHO, who shown appearance on 11.02.2016 along with counsel for the appellants and stated that whatever they have stated in their cross-examination before the Special Judge, ATC, Khairpur Mir's is correct, whereas, the appellants namely, Saifullah and Asadullah were implicated on the basis of suspicious, whereas, they are innocent. In support of their submission they have also filed duly sworn affidavit to this effect, which are available in the case file.

3. Briefly the facts as stated in the FIR are that the complainant party are zamindar by profession and they also run the other business. On the day of incident i.e. 04.03.2010 at 1630 hours in the evening time complainant alongwith his brother Attaullah, counsin Ghulam Shabbir Arejo and Mushtaque Ali Arejo left their village

Baharo for going towards Gambat side in their Alto car being registration No.571 driven by Attaullah. When they reached on the link road from Ripri to Khuhra and passing from village Raidher and then proceeding a little ahead, where one Mehran car after overtaking the car of complainant party stopped in front of his vehicle. From the said Mehran car five persons armed with Kalashnikovs alighted down and all the accused persons surrounded the vehicle of complainant party. Complainant party identified two of the culprits, namely, Saifullah and Asadullah, both sons of Faiz Muhammad Gilal, while remaining three persons were unidentified and they were clearly seen by the complainant party and can be identified if seen again. All the accused forcibly got down the complainant party from their car and on the force of deadly weapons dragged and caused blows to Attaullah and ultimately made him to sit in their car and directed the complainant party to arrange the payment of ransom amount of Rs.10 lacs for the release of abductee Attaullah, and thereafter accused persons abducted away the abductee in their car towards northern side. Due to threats of accused for dire consequences the complainant party did not chase the car of accused persons and remained silent. Thereafter the complainant party returned to their village and met with Manzoor Hussain Gilal the paternal uncle of accused Saifullah and Asadullah, and narrated the facts of incident to him who told them that he will contact his nephew and will get returned the abductee. After one week Manzoor Hussain told that his nephew had refused to release the abductee without payment of ransom. Thereafter, the complainant paid ransom of Rs.100,000/- to Manzoor Hussain in presence of the above witnesses and then Manzoor Hussain

contacted the accused persons and the accused persons made arrangement for talks in between complainant party and the abductee on mobile phone, and thereafter Manzoor Hussain kept the complainant party on false hopes and promised to get released the abductee. On the day of lodging of FIR in morning accused Manzoor Hussain told the complainant party that the accused persons had refused to release the abductee for payment of ransom of Rs.100,000/- as the accused were demanding more payment of ransom amount; furthermore he told the complainant party that they may make complaint to anybody they like. Later on in the evening of that day complainant party came to know that accused Saifullah Gilal had been arrested by Gambat Police in some other case, and then the complainant went to police station and lodged the report of incident against the accused persons that above named accused with their common intention on the point of weapons had abducted his brother Attaullah for ransom and accused Manzoor Hussain Gilal had taken from him Rs.100,000/- for return of his brother Attaullah but did not get returned his brother. After usual investigation, the challan was submitted against appellants/accused and co-accused Manzoor Hussain Gilal before the competent Court of jurisdiction, where charge was framed against the appellants/accused on 16.02.2012, for having committed an offence under Section 365-A, 344, 506/2, 148, 149 PPC punishable under Section 215 PPC in Crime No.63/2010, however, both the appellants pleaded not guilty and claimed trial. Vide statement dated 26.03.2012, the prosecution give up to one PW i.e. SIP Zafar Ahmed Bajor in the interest of justice, whereafter, examination-in-chief as well as cross-examination of both the accused persons was conducted.

4. The prosecution in order to establish its case examined PW-1 Complainant Sanaullah Arejo, PW-2 Attaullah Arejo, PW-3 Mushtaq Hussain Arejo, PW-4 Shamsuddin Arejo and then side of the prosecution was closed, the learned trial Court has formulated following points for determination:-

1. *Whether on 04.03.2010 at 1630 hours; the present accused namely Saifullah Gilal and Asadullah along with 03 unidentified accused persons duly armed with deadly weapons viz: Kalashnikovs being the members of unlawful assembly and in prosecution of their common object; forcibly abducted away the brother of complainant namely Attaullah Arejo on the point of said respective weapons from link road leading from Khora to Ripri situated in Deh Phouri and wrongfully confined the said abductee for the purpose of extorting ransom and deceased accused Manzoor Hussain received the ransom amount of Rs.One Lac from the complainant party in presence of witnesses for the release of abductee Attaullah, as alleged by the prosecution?*
2. *Whether on the above said date, time and place the abovenamed accused persons while committing the aforesaid offences had created panic, terror and sense of insecurity in the mind of persons of the locality?*
3. *What offence, if any is committed by the accused persons and what should the judgment be?*

5. It has been argued by the learned counsel for the appellants that the incident is of 04.03.2010, whereas, complaint was made on 06.04.2010, without explaining the delay. According to learned counsel for the appellants, there is no eye witness of the alleged incident. According to learned counsel, the prosecution examined PW-1 i.e. complainant Sanaullah and PW-2 i.e. abductee Attaullah, however, both the witnesses exonerated the appellants from the alleged offence. PW-1 complainant Sanaullah Arejo, deposed before the learned trial Court and submitted that the name of above witnesses was mentioned due to inadvertence and suspicious. PW-2 abductee Attaullah Arejo during his cross-examination before the trial Court categorically stated that at the time of his abduction both

the appellants Saifullah and Asadullah were not present at the place of incident. PW-3, namely, Mushtaq Ahmed Arejo, did not support the prosecution case and categorically stated that he had not identified any of the accused persons at the scene of offence, and that both the accused present in Court were not the same.

6. It has been further contended by the learned counsel that the impugned judgment is based on gross misreading and non-reading of the evidence, whereas, the learned Judge, while convicting the appellant under Section 7 of the Anti-Terrorism Act, 1997, has placed reliance merely on the Examination-in-Chief of prosecution witnesses, whereas, the evidence of the PW1, wherein, he has exonerated the appellants with the alleged crime has been ignored. Per learned counsel, the examination-in-chief in the absence of cross examination has no evidential value, hence the learned Judge of Anti-Terrorism Court, has seriously erred in law and fact, while convicting the appellants in the instant crime by ignoring the evidence of the eye witnesses. It has been further contended by the learned counsel for the appellant that the learned Judge of Anti-Terrorism Court, Khairpur Mir's, has further erred in law and fact by taking into consideration the evidence of the complainant in piecemeal, while ignoring the entire evidence, particularly when the learned Judge himself has observed that the complainant and prosecution witnesses have resiled from their statement. It has been contended by the learned counsel for appellants that once the complainant and the prosecution witnesses have not implicated the present appellants with the alleged crime, whereas, there is no material whatsoever, which otherwise could connect the appellants with the alleged offence, therefore, the learned trial Court was not

justified to convict the appellants on mere suspicion. It has been further argued that the entire judgment is based upon presumptions, whereas no incriminating material was placed by the prosecution, which could connect the present appellants with the alleged crime. Learned counsel while concluding his arguments has submitted that since the impugned judgment is erroneous in law and based on gross misreading and non-reading of the evidence, therefore, the same is liable to be set-aside. Learned counsel for the appellants submitted that the complainant and the abductee, namely, Attaullah, have filed their Affidavits even before this Court, wherein, they have exonerated the present appellants with the alleged crime, therefore, there remains no doubt that such statements of the complainant and the abductee were per their own free-will without any pressure or coercion, hence the apprehension of the learned trial Court that such statements would have been given under some pressure or coercion is totally misconceived. According to the learned counsel, this is a case of no evidence whatsoever against the present appellants, therefore, the impugned judgment is liable to be set-aside and the appellants are entitled to be acquitted from the alleged crime. In support of his contention, learned counsel for the appellants has placed reliance in the following case law:-

1. Ghazidino v. The State (1988 SCMR 637)
2. Qutba v. The Crown (PLD 1954 Federal Court 197)
3. Muhammad Moosa and others v. The State (2011 SCMR 1612)
4. Muhammad Nawaz alias Najja v. The State (1991 SCMR 111)
5. Muhammad Ashraf v. The State (2001 P.Cr. L.J. 412)

7. Conversely, learned DPG though, formally supported the impugned judgment, however, could not controvert the contention of

the learned counsel for appellants that the prosecution has failed to establish the case against the present appellants without reasonable doubt.

8. We have heard the learned counsel for appellants, learned DPG for the State, perused the impugned judgment and also examined the entire record and evidence of the prosecution witnesses recorded in the instant case. Admittedly, there is a delay of more than one month in registration of the FIR, whereas, no plausible explanation has been given by the complainant party for such delay. The prosecution examined the complainant and the abductee, who during cross examination recorded on 07.03.2015 have exonerated the appellants/accused persons from the commission of the alleged crime and have categorically stated that names of present appellants/accused persons were mentioned in FIR merely on account of suspicion, (see cross of PW-1 namely Sanaullah Exh. No.5 and PW-2 namely, Attaullah Exh. No.7). Whereas, remaining prosecution witnesses namely, Mushtaq Ahmed PW-3 and Shamsuddin PW-4 have also denied the involvement of the present appellants in the alleged offence, however, such witnesses have not been declared as hostile by the prosecution or the complainant party for the reason best known to them. No incriminating material has been produced by the prosecution, which would otherwise implicate or connect the present appellants with the commission of the alleged offence, whereas, it has also come on record that there is previous enmity between the complainant and appellants/accused party in the shape of criminal cases. After examining the entire evidence on record, we have no hesitation to observe that the prosecution did not produce any concrete material

or credible evidence against the appellants, whereas, complainant and the abductee, during their cross-examination have completely exonerated the present appellants from the alleged crime, therefore, prosecution has miserably failed to prove its case beyond reasonable doubt against the present appellants. From perusal of the impugned judgment passed by the learned trial Court in the instant case, it appears that the learned trial Court has placed entire reliance on the examinations-in-chief of complainant and abductee, whereas, their statements after cross-examination have been totally ignored. It is settled legal position that examination-in-chief of a witness in the absence of cross-examination cannot be considered as a valid piece of evidence, nor can be relied upon for the purposes of conviction of an accused, in the absence of any incriminating material or evidence connecting the accused with the alleged offence, particularly when during cross-examination, prosecution witnesses have exonerated the accused persons from the commission of the alleged offence. In the instant case, the prosecution has failed to produce any material or evidence which could otherwise suggest that the evidence of the complainant and the abductee during their cross examination recorded before the learned trial Court was the result of some undue pressure or coercion by the accused persons, on the contrary, complainant and the abductee have filed their Affidavits before this Court wherein it has been categorically stated that the present appellants are not the main culprits and their names were mentioned only on account of suspicion. We are of the view that the possibility of any threat, pressure or coercion upon the complainant and the abductee, after a lapse of several years otherwise seems remote, therefore, any

presumption to the contrary would be totally unwarranted. In this context, reliance can be placed in the cases of **Ghazidino v. The State (1988 SCMR 637)** and **Muhammad Nawaz alias Najja v. The State (1991 SCMR 111)**.

9. In view of hereinabove facts and circumstances of the case we are of the view that it is a case of no evidence against the appellants, whereas, both the prosecution witnesses i.e. Sanaullah PW-1, (complainant) and Attaullah PW-2 (abductee) have exonerated the present appellants from the commission of the alleged offence, therefore, the learned trial Court was not justified to convict them on the basis of examination-in-chief of complainant and abductee, who admitted that their names were mentioned merely on account of suspicion. Accordingly, instant appeal was allowed vide our short order dated 21.04.2016 while setting aside the impugned judgment passed by the learned trial Court dated 13.11.2015 with directions to acquit the appellants Saifullah and Asadullah from the charge, by extending them benefit of doubt, further directing that they shall be released forthwith, if not required in any other criminal case.

10. These are the reasons of the said short order.

JUDGE

JUDGE