

IN THE HIGH COURT OF SINDH, BENCH AT SUKKUR

Spl. Anti-Terrorism Jail Appeal No. D-37 of 2017
Conf. Case (Anti-Terrorism) No. D-04 of 2017
Spl. Anti-Terrorism Jail Appeal No. D-39 of 2017
Spl. Anti-Terrorism Acq. Appeal No. D-78 of 2017

Present:-

**Mr. Justice Muhammad Iqbal Kalhoro &
Mr. Justice Arbab Ali Hakro.**

Appellants/Respondents: **Muhammad Momin, Mehboob Ali** and
(*Cr.L.A.T J.As.No.D-37 & 39/217*
& *Spl.A.T Acq.A.No.D-78/2017*) **Arshad Ali**, through Mr. Rukhsar Ahmed
M. Junejo, Advocate.

Appellant/complainant : **Iqbal Hussain Dayo**, through Mr.
(*Spl.A.T Acq. Appeal No.D-78/2017*) Muhammad Ali Dayo, Advocate.

Respondent No.5 : **Mir Yakoob Ali Shah** through Syed
(*Spl.A.T Acq.A. No.D-78/2017*) Muhammad Ali Shah Rizvi, Advocate.

The State : Through Mr. Zulfiqar Ali Jatoy, Additional
Prosecutor General.

Date of hearing(s): **17.08.2023 & 29.08.2023**
Date of decision: **07.09.2023**

J U D G M E N T

MUHAMMAD IQBAL KALHORO, J:- All these four captioned cases connected to each other and arising out of the same judgment dated 21.03.2017, passed by learned Judge, Anti-Terrorism, Sukkur in Special Case No. 73 of 2014 (*re: State-Versus Muhammad Momin and others*) Crime No. 90 of 2014, registered at P.S, C-Section, Sukkur, under Sections 302, 365-A, 201, 202, 212, 222, 338, 338-A, 148, 149 PPC read with Section 7 ATA, 1997, whereby appellants Muhammad Momin (in *Spl. A.T Jail Appeal No.D-37 of 2017*), Mehboob Ali and Arshad Ali (in *Spl. A.T Jail Appeal No.D-39 of 2017*) have been convicted and sentenced as under, are taken up together for disposal by means of this judgment.

- a) *For committing offence U/S 148 PPC, accused Muhammad Momin, Mehboob Ali and Arshad Ali are convicted and sentenced to suffer R.I for three years with fine of Rs.2000/- each and in case of default, they shall suffer S.I for 15 days more.*
- b) *For committing offence U/S 365-A PPC r/w Section 149 PPC accused Muhammad Momin, Mehboob Ali and*

Arshad Ali are convicted and sentenced to suffer R.I for imprisonment of life with forfeiture of their property.

- c) *For committing offence U/S 302(b) PPC r/w section 149 PPC, accused Muhammad Momin is sentenced to be hanged by his neck till his death while accused Mehboob Ali and Arshad Ali are convicted and sentenced to suffer R.I for imprisonment of life. All accused shall also have to pay compensation of Rs.100000/- (one lac) each which shall be paid to the legal heirs of deceased as required by section 544 (a) Cr.P.C.*
- d) *For committing offence U/S 201 PPC r/w section 149 PPC, accused Muhammad Momin, Mehboob Ali and Arshad Ali are convicted and sentenced to suffer R.I for seven years and fine of Rs.5000/- each and in case of default, they shall suffer S.I for one month more.*
- e) *For committing offence U/S 7(a) of A.T.Act, 1997, accused Muhammad Momin, Mehboob Ali and Arshad Ali are convicted and sentenced to suffer R.I for imprisonment of life and fine of Rs.50,000/- each and in case of default, they shall suffer S.I for six months more.*
- f) *For committing offence U/S 7(e) of A.T.Act, 1997, accused Muhammad Momin, Mehboob Ali and Arshad Ali are convicted and sentenced to suffer R.I for imprisonment of life.*

All the sentences have been ordered to run concurrently, with benefit of Section 382-B CrPC, duly extended to the appellants. Whereas, co-accused Rashid Ali, Abdul Haq alias Raja, Lal Bux, Mst. Marvi and Mir Yakoob Ali Shah have been acquitted on a benefit of doubt. The trial Court also has made a Reference to this Court for confirmation of death sentence awarded to appellant Muhammad Momin.

2. Facts of the case in brief are, on 12.05.2014 complainant Iqbal Hussain Dayo reported to the police that his cousin, namely, Niaz Hussain Dayo had contracted love marriage with Mst. Marvi d/o Momin Ali Dayo and that they were declared as 'Karo-Kari' by parents of Mst. Marvi. Thereafter, in the month of February, 2014, the parents of Mst. Marvi forcibly brought her to Sukkur from the complainant's house and tried to kill her in the name of honour. But, as Niaz Hussain immediately informed the relevant police station as well as 15 Madadgar about the incident, the police official succeeded in recovering her and producing her before the Court of 1st Additional Sessions Sukkur. After her statement, she was handed over to her husband Niaz Hussain Dayo by the Court. However, relatives of Mst. Marvi were not happy with such

decision and had issued threats to complainant party of dire-consequences.

3. On 05.05.2014, in the early morning, accused namely Momin Ali, Mehboob Ali, Roshan Ali, Arshad Ali and 10/12 unknown persons came at the complainant's village Bhirkan in a Suzuki and at the show of weapons forcibly kidnapped Mst. Marvi. The complainant party conveyed such message to police of P.S, Chak. On the same day, complainant along with his cousin namely Niaz Hussain, Athar Hussain and Mir Muhammad came at Sukkur for an interview of Niaz Hussain for the post of Health Technician. At about 1100 hours, they reached Health Technical School, Sukkur. Niaz Hussain went inside for his interview and they stood outside near office of 15 Madadgar. Meanwhile, accused Momin Ali, Roshan Ali and Arshad Ali, armed with pistols came there in a car and within their sight, they went inside the school and at the show of weapons dragged Niaz Hussain out and took him away. Complainant party remained silent due to fear of weapons. The incident was also watched by many people gathered there.

4. The complainant party conveyed such message to their elders through phone. After some time, the community elders came there and Muhammad Shahban Dayo made a call from his mobile No.0313-8341397 to accused Momin Ali on his Mobile No.0315-3459061. Accused Momin Ali abused him and demanded that either Niaz Hussain shall divorce his daughter Mst. Marvi or pay the ransom amount of Rs.10,00,000/- for his release, else he would be murdered in the name of honour. Complainant party narrated such facts to the police but in vain and later-on, on the orders of Additional Sessions Judge, lodged the FIR.

5. After usual investigation, charge-sheet was submitted showing accused Muhammad Momin, Mehboob Ali, Arshad Ali, Rashid Ali and Mst. Marvi in custody, while accused Roshan Ali, Sikandar Ali, Mukhtiar and Mir Yakoo Ali Shah as absconders. However, accused Mir Yakoob Ali Shah surrendered before the trial Court on 24.06.2015 after obtaining protective bail. Names of accused Abdul Haq @ Raja and Lal Bux were placed in column-II of the charge-sheet, but they were joined as accused by the trial Court vide order dated 23.07.2014.

6. In the trial, prosecution, to prove its case, has examined 10 witnesses, who have produced all the necessary documents: FIR, mashirnamas of place of incident, raiding the house of accused, arrest of accused, recovery of dead body, securing of clothes of the deceased, receipt of handing over dead body, questioner form, postmortem report of the deceased, chemical report, order dated 03.06.2014 of this Court, letter of DIGP, Sukkur dated 04.06.2014, letter dated 14.03.2014, list of candidates, absence report of accused Muhammad Momin, issued by Principal, GMC, Sukkur, copies of entries, CDR report, reports of Analysis, letter for Civil Judge, Sukkur, copy of order dated 23.06.2014 of Civil Judge, Sukkur, letter of Additional Sessions Judge, Sukkur, statements of Mst. Naseeban, Muhammad Hussain, Mst. Marvi, OPD slips, Ultrasound report and letter for Medical Officer etc.

7. After closure of prosecution evidence, statements of accused u/s 342 CrPC were recorded, in which they have denied the prosecution case and have pleaded innocence. However, neither appellants examined themselves on oath nor led any evidence in their defense. The trial court vide impugned judgment has convicted and sentenced appellants Muhammad Momin, Mehboob Ali and Arshad Ali in the manner, as stated above and acquitted accused Rashid Ali, Abdul Haq alias Raja, Lal Bux, Mst. Marvi alias Maria and Mir Yakoob Ali Shah by giving them benefit of doubt.

8. Complainant by means of captioned Spl. ATA Acquittal Appeal No.D-78 of 2017 has challenged the acquittal of respondents/accused Rashid Ali, Abdul Haq alias Raja, Lal Bux, Mst. Marvi alias Maria and Mir Yakoob Ali.

9. Learned counsel in defence has argued that the prosecution has failed to prove motive part of the story; there is no direct evidence against appellants for committing murder of the deceased; no evidence to show them throwing dead body of the deceased in 'Old Karo Naro' has come on record; identity of dead body as the deceased Niaz Hussain has not been established by the prosecution in the trial; the cause of death has not been established either; the Anti-Terrorism Court had no jurisdiction to try the case as the alleged incident is outcome of personal vendetta; there is delay of seven days in registration of FIR, hence case against appellants is full of doubts. Notwithstanding, while closing his arguments, learned counsel stated that if the Court is not

inspired by his arguments then he would request for conversion of death penalty of appellant Muhammad Momin into imprisonment for life as the points raised by him above show presence of multiple mitigating circumstances to justify the same. To support his arguments, learned counsel has relied upon cases reported as **2022 SCMR 1577, 2019 SCMR 2009, 2014 SCMR 1464, 2014 SCMR 1658, 2018 SCMR 911, 2018 SCMR 354, PLD 2020 SC 57, PLD 2019 SC 528, PLD 2017 SC 681, 2017 SCMR 724, 2016 SCMR 1628, 2011 SCMR 941, 2021 PCr.LJ Note 5, 2020 MLD 1218 (Sindh DB) and 2012 YLR 2026 (Sindh DB).**

10. Learned Additional P.G has supported the impugned judgment by referring to the evidence against the appellants; however, he has not opposed request made in defence about conversion of death penalty of appellant Muhammad Momin into imprisonment for life. Further, to support his arguments, he has relied upon cases of *Ali Taj and another v. The State (2023 SCMR 900)* and *Qasim Shehzad and another v. The State and others (2023 SCMR 117)*.

11. On the other hand, learned counsel for complainant has opposed even request of conversion of death sentence of appellant Muhammad Momin to life imprisonment and has cited case of *Nazir Shehzad and others v. The State*, reported in **2009 SCMR 1440** to support his contentions.

12. We have considered submissions of parties, perused material available on record and taken guidance from the case law cited at bar. The prosecution has examined complainant Iqbal Hussain as PW-1, Athar Hussain as PW-2 and Pir Muhammad as PW-3 as eyewitness of certain events happening in the course of offence. Complainant in his evidence has reiterated the facts revealed by him in FIR. He has been supported by PWs 2&3 on all the material facts germane to the charge against the appellants. They have been subjected to a lengthy cross-examination, but no material contradiction appears to have come on record. They have stood the ground, on essential aspects, to the relevant questions in cross-examination. In fact, learned defence counsel in his arguments could not point out any discrepancy, material in nature, to predicate his case on for acquittal. To further support their testimony, these witnesses have produced relevant documents including FIR and relevant memos.

13. Evidence of PW-4 Atta Muhammad, posted as ASI at relevant police station, is to the extent of receiving FIR for investigation and recording statements of witnesses in the course of which, he visited place of incident in presence of mashirs and prepared such documents which he has produced in his evidence. Evidence of PW-5 ASI-Atta Muhammad is confined to registration of FIR under directions of the Court as per narration disclosed by complainant. PW-6 Muhammad Shahban, a relative of the deceased, has deposed that when he was informed by complainant and witnesses about abduction of the deceased. He rushed to place and talked with appellant Muhammad Momin on his cell phone, who demanded ransom of Rs. 10,00,000/- or divorce to his daughter as a cost for releasing the deceased; and in the wake of which approaching the police for FIR, but without any result. He is one of the mashirs and has further revealed in his evidence that after registration of FIR, finally under the directions of the Court, all the memos were prepared in his presence.

14. PW-7 Fayaz Hussain is the witness of recovery of abductee Mst. Marvi from a Flat No.405 Waqas Apartment, Gulistan e Johar, Karachi and arrest of appellant Muhammad Momin and others from there. He has produced such memos in his evidence. He has further revealed detailed account of interrogation of appellant Muhammad Momin by the police in his presence, in which he had unfolded entire chain of events from abducting the deceased from Health Technical School to bringing him at the cattle shed of Mehboob, situated in village Rajib Dayo, brutally beating him to death and finally chucking his dead body to 'Old Karo Naro'; and visiting such places on pointation of appellant in presence of police and recovering dead body on his pointation on 06.07.2014 after two months of the incident.

15. The dead body to be the deceased was identified by complainant and others on the basis of wrist watch in his arm and clothes on it; otherwise as per report, it was reduced to only skeleton. He further in his evidence has produced memos concerned with his role as a witness/mashir. Evidence of PW-8 HC Muhammad Bachal is to the extent of bringing dead body to the hospital for postmortem and handing over the same to the relevant doctor for such purpose. Medico-Legal Officer's evidence is recorded at Exh.24. He has described the true condition of the dead body received by him, which according to him,

was completely putrefied and reduced to the skeleton. He has produced postmortem report and relevant lab reports. PW-10 is Inspector Abdul Qudoos Kalwar, I.O of the case, who has described entire account of investigation in his evidence, recovery of Mst. Marvi, arrest of appellants on 22.06.2014, disclosure of chain of events by appellant Muhammad Momin starting from abduction of the deceased to doing away with him and throwing his dead body in 'Old Karo Naro', and recovery of dead body on his pointation.

16. These all remaining witnesses except first three ones have also been subjected to a lengthy cross-examination, but we have seen, no shocking discrepancy has come on record suggestive of the fact that preparation of documents, conduction of investigation, arrest of appellants, recovery of dead body etc. have been faked by the prosecution for the purpose of arraigning appellants falsely in the case. In the statements of appellants, recorded under Section 342 Cr.P.C, nothing denting the prosecution case has been suggested by them except that they have been falsely implicated in the case.

17. From such unimpeachable evidence of witnesses, we are of the view that the prosecution has succeeded in establishing abduction of the deceased on 05.05.2014 by appellants in presence of witnesses and subsequently recovery of his dead body from 'Old Karo Naro' on 06.07.2014 on the pointation of appellant Muhammad Momin. Role of appellants and absconder accused in abducting the deceased from Health Technical School, Sukkur has been established beyond a reasonable doubt, from evidence of first three witnesses. The fact that the deceased was lastly seen being kidnapped by them has not been shattered in the course of cross-examination. The fact that he was thereafter not spotted by any one is also a matter of undisputed record. His abduction, murder and recovery of his dead body from 'Old Karo Naro' are interconnected and point to the active role of the appellants in first abducting him to a Cattle Shed of Mehboob, situated in village Rajib Dayo, beating him to death and then disposing of his dead body by throwing it in 'Old Karo Naro'.

18. Recovery of Mst. Marvi subsequently by the I.O on 22.06.2014 from a flat in Karachi from custody of appellants further strengthens motive part of the story: Karo Kari. In the cross-examination, relation of Mst. Marvi with the deceased to be her husband and marrying him

without consent of her parents has not been denied either. These facts narrated by the witnesses in their evidence as a cause of murder of the deceased have almost gone unchallenged. The two pieces of evidence, abduction of the deceased and his unnatural death, demonstrated by medical evidence, have been sufficiently brought home by the witnesses. We do not find any weakness in the depositions of the eyewitness qua these facts and relevant recoveries effected during the investigation including recovery of dead body: to give benefit thereof to the appellants insofar as request of acquittal by defence counsel is concerned.

19. Insofar as jurisdiction of Anti-Terrorism Court and applicability of Section 365-A PPC is concerned, we find ourselves persuaded to agree with the propositions of learned defence counsel. Although in FIR and evidence, it has been stated that in response to a phone call made by PW-Muhammad Shahban, appellant Muhammad Momin had demanded Rs. 10,00,000/- as ransom or divorce to his daughter for release of the deceased. But neither Call Data Record (CDR) of such a call has been produced nor the transcript thereof. There is absolutely no record that on a given date any call was made by PW Muhammad Shahban to appellant Muhammad Momin and he had demanded Rs. 10,00,000/- as ransom for releasing the deceased. Absence of such record, when enquired from learned Additional P.G and learned counsel for complainant, they both could not deny. Nature of enmity between the parties: Karo-Kari, even otherwise negates any such prospect as demand of ransom for release of Karo is simply unbelievable. More so, the appellants had not called the complainant party on phone, but it was the latter who had contacted the former so demand of ransom by appellant is not confidence-inspiring. We, therefore, are of a firm view that the trial Court erred, and was misled, in believing that Section 365-A PPC was applicable in the facts and circumstances of the case. The incident appears to be emanating from personal vendetta/enmity and was outcome of freewill marriage of the deceased with the daughter of appellant Muhammad Momin. No question of terrorism was involved.

20. The Supreme Court in the case of *Ghulam Hussain and others v. The State and others* (**PLD 2020 Supreme Court 61**) has finally set at rest controversy surrounding definition of terrorism and has eloquently elaborated as to what action or threat of an action constitutes terrorism

with reference to section 6 of ATA, 1997. In paragraph 10 and 11 thereof has recalled all the precedent cases available on either side of divide defining constituents of terrorism in the background of section 6 of ATA, 1997. And finally after an erudite discussion in paragraph 13, 14 and 15 examining, among others, preamble to ATA, 1997 and jurisdiction of Anti-Terrorism Court under section 12 of said Act coupled with definition of scheduled offence in relation to the Third Schedule to said Act has declared in paragraphs 16 of said judgment as under:-

“16. For what has been discussed above it is concluded and declared that for an action or threat of action to be accepted as Criminal Appeal No. 95 of 2019, etc. 58 terrorism within the meanings of section 6 of the Anti-Terrorism Act, 1997 the action must fall in subsection (2) of section 6 of the said Act and the use or threat of such action must be designed to achieve any of the objectives specified in clause (b) of subsection (1) of section 6 of that Act or the use or threat of such action must be to achieve any of the purposes mentioned in clause (c) of subsection (1) of section 6 of that Act. It is clarified that any action constituting an offence, howsoever grave, shocking, brutal, gruesome or horrifying, does not qualify to be termed as terrorism if it is not committed with the design or purpose specified or mentioned in clauses (b) or (c) of subsection (1) of section 6 of the said Act. It is further clarified that the actions specified in subsection (2) of section 6 of that Act do not qualify to be labeled or characterized as terrorism if such actions are taken in furtherance of personal enmity or private vendetta”.

21. We in view of above deem that the conviction and sentence of the appellants under Section 365-A PPC, under Section 7(a) and 7(e) ATA, 1997 are not justified in law and do not appear to be based on correct appreciation of the facts involved in the case, the same therefore are set aside. Notwithstanding, from evidence as disclosed, it is established that appellants have committed offences under Sections 302, 201, 148 & 149 PPC, besides Section 364 PPC i.e. ‘kidnapping or abduction in order to murder’. Further, it may be noted that appellant Muhammad Momin has been awarded death penalty only because on his pointation, dead body of the deceased from ‘Old Karo Naro’ was recovered, otherwise, there is no difference in his case and the case of remaining appellants, namely, Mehboob Ali and Arshad Ali insofar as charge of abduction and murder of the deceased is concerned. They all were part of an unlawful assembly who had abducted the deceased on 05.05.2014

for the purpose of his murder and then they disposed of his body by dumping it in 'Old Karo Naro', from which it was ultimately recovered. Besides, it is not disputed that incidence of murdering the deceased and dumping his dead body in 'Old Karo Naro' connected as they are, are unseen. In such facts and circumstances, giving death penalty to appellant Muhammad Momin and taking a lenient view against remaining appellants: awarding them life imprisonment whose case apparently is within the same ambit, with identical allegations, does not appear to be a result of correct appreciation.

22. We, therefore, while maintaining conviction of appellants under Section 302(b), 201, 148 & 149 PPC convert death penalty of appellant Muhammad Momin into imprisonment for life with benefit of Section 382-B Cr.P.C and convert conviction and sentence of life imprisonment of all appellants from 365-A PPC to Section 364 PPC. All the sentences are ordered to run concurrently.

23. Learned counsel for appellant/complainant in Spl. Anti-Terrorism Acquittal Appeal No.D-78 of 2017 has not taken us to any material justifying reversing findings of acquittal against respondents Rashid Ali, Abdul Haque alias Raja, Lal Bux, Mst. Marvi and Mir Yakoob Ali Shah. Even learned Additional P.G has not supported him and has stated that in absence of any evidence or medical record of miscarriage, the respondents cannot be held guilty of the alleged offences. We, therefore, have no reason to disagree with him or the trial Court insofar as acquitting the respondents under aforesaid charge is concerned. Finding no merit in the Spl. Anti-Terrorism Acquittal Appeal No.D-78 of 2017, we **dismiss** the same.

24. With above modification in sentences, Spl. Anti-Terrorism Jail Appeal No.D-37 of 2017, Spl. Anti-Terrorism Jail Appeal No.D-39 of 2017 and Spl. Anti-Terrorism Acq. Appeal No.D-78 of 2017 are dismissed and **disposed of** accordingly. Resultantly, Conf. Case (Anti-Terrorism) No.D-04 of 2017 is replied in negative and **disposed of** also.

JUDGE

JUDGE