

Remand : No Counsel at time of Pw evidence S.S'o

IN THE HIGH COURT OF SINDH, KARACHI

Present:

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

SPL. CR. A.T. J. APPEAL NO.190 OF 2022

Appellants : Pervaiz Ali s/o Kamil Khan and  
Khalid Hussain Morio s/o. Rajab  
Ali through Mr. Ghulam Sarwar  
Thebo, Advocate

Respondent : State through Mr. Muhammad  
Iqbal Awan, Additional Prosecutor  
General Sindh.

Date of Hearing : 27.04.2023

Date of Judgment : 27.04.2023

JUDGMENT

Mohammad Karim Khan Agha, J:- Appellants Pervaiz Ali, Khalid Hussain Morio, Allah Bux and Asghar Ali were tried before the Anti-Terrorism Court No.XX, Karachi in Special Case No.33/2016 under FIR No.58/2016 u/s 365-A/302/34 PPC at PS Bin Qasim, Karachi and vide judgment dated 25.10.2022, appellants Allah Bux and Asghar Ali were acquitted of the charge, however, Pervaiz Ali and Khalid Hussain Morio were convicted and sentenced as under:-

01.u/s.7(1) of ATA 1997 Accused Khalid Morio and Pervaiz Ali are  
r/w section 365-A PPC convicted and sentenced to Life Imprisonment  
for Kidnapping of deceased Rafiq for ransom  
with forfeiture of their property also as  
required u/s.7(2) of ATA 1997. The accused  
are also ordered to pay the fine of Rs.500,000/-  
(five lac) in case of default of payment of fine  
and they shall have to undergo R.I. for six  
months.

02.u/s.7(1)(a) of ATA Accused Khalid Morio is convicted and  
1997 r/w section sentenced to Life Imprisonment for murder of  
302/34/PPC deceased Rafiq for ransom with forfeiture of  
their property also as required u/s.7(2) of ATA  
1997. The accused is also ordered to pay the  
fine of Rs.500,000/- (five lac) in case of default  
of payment of fine and they shall have to  
undergo R.I. for six months.

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03.u/s.7(1)(e) of ATA 1997 r/w section 365-A PPC Accused Khalid Morio and Pervaiz Ali are convicted and sentenced to Life Imprisonment for Kidnapping of Mst. Naseeban and her son namely Shafiq for ransom with forfeiture of their property also as required u/s.7(2) of ATA 1997. The accused are also ordered to pay the fine of Rs.500,000/- (five lac) in case of default of payment of fine and they shall have to undergo R.I. for six months.

All the sentences were ordered to run concurrently and the accused persons were given the benefit of Section 382-B Cr.P.C.

2. Brief facts of the prosecution case as per FIR lodged by complainant Nadeem Kolachi on 09-04-2016, are that on 04-04-2016 at about 10-00 am his son Rafiq aged about 12 years had gone to purchase household items however he did not return back whereas two days' prior to this incident complainant had received a threatening phone call from mobile phone No: 03-480215047. Thereafter, complainant went at PS and registered his FIR regarding kidnapping of his son Rafia against unknown person. It is further alleged that on 11.04.2016 the investigation of this case was transferred to ASI Ayaz Hussain and on 27.04.2016 complainant Nadeem had received phone call from mobile phone No: 0301-2345929 on his mobile phone No: 0305-1283150 and the caller demanded ransom amount of Rs: 500,000/therefore, the section 365-A of PPC was added in the case and the investigation of this case was transferred to SIP Basheer Ahmed. SIP Basheer Ahmed Junejo went to PS Kashmor and tried to make arrest of accused Allah Bux s/o Sajan but SHO of PS Kashmor restrained him from the arrest of accused. Thereafter, he submitted his report before the court whereupon the inquiry was assigned to DIGP Larkana and SIP Basheer Junejo on 21.06.2016 had made the arrest of accused Allah Bux from DIGP Larkana. It is further alleged that on 23.06.2016 the investigation was again transferred to Inspector Anwar Ali Gopang and on 28.06.2016 he made arrest of accused Asghar Ali from the office of DIGP Larkana. During investigation on 02-07-2016 complainant Nadeem Kolachi appeared before I.O. and disclosed that on 30.06.2016 when he returned back to his home where he found his wife namely Mst: Naseeban and his son namely Shafiq aged about 11 years were not present over there. He further disclosed that he has a doubt about their kidnapping by



the same kidnappers, who had already kidnapped his son Rafiq. On 07.07.2016 accused Khalid Hussain Morio and Pervaiz Ali came to complainant Nadeem Kolachi and directed him to arrange Rs: 500,000/ ransom for release of his wife as well as his both sons. Thereafter, complainant informed to I.O/Inspector Anwar Ali Gopang regarding such demand and on 08.07.2016 accused Khalid Hussain Morio and Pervaiz Ali were arrested and on the pointation of accused Pervaiz Ali the kidnapes namely Mst. Naseeban and Shafiq were recovered, by the police from Mohalla Haroonabad Radhan Station Taluka Mehar District Dadu. It is further alleged that on 13.07.2016 Mst. Naseeban had got recorded her statement u/s.164 Cr.PC before Judicial Magistrate VIII Karachi Malir. During the course of investigation accused Khalid Hussain Morio pointed out the place of murder of kidnapes Rafiq from where a slipper/Chappal of kidnapes rafiq was recovered under a memo. On 18.07.2016 accused Khalid Morio had recorded his confessional statement u/s. 164 Cr.P.C. before Judicial Magistrate VIII Malir Karachi wherein he confessed his guilt regarding kidnapping, murdering and dumping of dead body of kidnapes Rafiq.

3. After usual investigation, the case was challaned and the accused persons were sent up for trial where they pleaded not guilty to the charge.

4. The prosecution in order to prove its case examined 12 Prosecution Witnesses and exhibited various documents and other items. The statement of accused was recorded under Section 342 Cr.P.C in which they denied the allegations levelled against them and claimed false implication. However, the accused did not give evidence on oath nor produce any DWs in support of their defence.

5. After hearing the parties and appreciating the evidence on record, the trial court convicted the appellants and sentenced them as set out earlier in this judgment; hence, the appellants have filed this appeal against their conviction.

6. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the impugned judgment dated 25.10.2022 passed by the trial court and, therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.



7. At the very outset learned counsel for the appellants stated that it was a case of remand in respect of appellants Pervaiz Ali and Khalid Hussain Morio on the basis of 05 PWs; namely PW-1 Aziz Sultana, PW-3 ASI Mehar Mohammad Aslam, PW-9 Nadeem, who was the complainant, PW-11 Asit Ilyas and PW-12 Inspector/DSP Anwar Gopang whose evidence in chief was recorded in absence of the defence counsel and this was a violation of mandatory provision of Section 353 Cr.P.C. which was not curable under Section 537 Cr.P.C. In support of his contentions, he has placed reliance on the case of **Rajab Ali vs. The State** (SBLR 2019 Sindh 967) and **Bashir Ahmed vs. The State** (SBLR 2021 Sindh 112) and contended that under these circumstances, this case was of remand.

8. Learned Addl. Prosecutor General Sindh after considering the record was in agreement with learned counsel for the appellants.

9. We have also considered the record and gone through the relevant law and agree with the learned counsel for the appellants and learned Addl. P.G. for the reasons mentioned above, this case warrants remand to the trial Court.

10. Under these circumstances, we hereby set aside the impugned judgment dated 25.10.2022 and remand the case back to the Judge Anti-Terrorism Court No.XX, Karachi for the limited purpose of re-recording the entire evidence of PWs mentioned above in the presence of defence counsel, who shall also be given an opportunity to cross-examine the witnesses, who shall be re-examined, if so desired, by learned Addl. Prosecutor General Sindh. Thereafter, fresh statements under Section 342 Cr.P.C. of the appellants shall be recorded and after hearing the parties, learned trial Court shall re-write a fresh judgment based only on the evidence on record. This process shall be completed within a period of three months of the date of this judgment. A copy of this judgment alongwith R&P's shall be immediately sent to the learned trial Court which shall comply with this judgment.

11. The instant appeal stands disposed of in the above terms.