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Incident and ID doubtful

IN THE HIGH COURT OF SINDH, KARACHI

Present:
Mr. Justice Mohammad Karim Khan Agha
Mr. Justice Zulfiqar Ali Sangi.

SPECIAL CRIMINAL A.T. APPEAL NO.11 OF 2021

Appellant:	Mumtaz s/o Ghulam Haider Mugheri through Mr. Tariq Ali Jakhrani, Advocate.
Respondent:	The State through Mr. Muhammad Iqbal Awan, Additional Prosecutor General Sindh.
Date of Hearing:	29.09.2022
Date of Announcement:	05.10.2022

JUDGMENT

Mohammad Karim Khan Agha, J:- Appellant Mumtaz was tried in the Court of XII Anti-Terrorism Court, Karachi in Special Case No.09/2011 under FIR No.10 of 2011 u/s. 365-A/148 and 149 PPC r/w section 7 ATA, 1997 registered at PS Rasheed Waggan, Larkana and vide judgment dated 26.12.2020 the appellant was convicted u/s. 265-H(2) Cr.P.C. and awarded sentence for the offence u/s.365 PPC to suffer R.I. for 07 years with fine of Rs.2,00,000/- and in default of payment of fine he shall undergo S.I. for Six months more. The appellant was also convicted for an offence punishable u/s 7(1)(e) of ATA 1997 and awarded sentence of life imprisonment.

2. The brief facts of the prosecution case as per F.I.R. are that complainant SHO Muhammad Mor Chandio received spy information that one Mashooq son of Nabi Bux Mangi and Mehtab s/o Ghulam Hussain have been kidnapped near to village Bulhirra situated on road leading from Larkana to Waggan and then for its confirmation police contacted with the cousin of Mehtab kidnapee, who confirmed that on 08.0.2.2011 at about 1900 hrs (1) Ramzan @ Jeet s/o Unknown Mugheri resident of Pahanja near Aabri (2) Nang s/o Unknown r/o. Jalal Mugheri

Taluka Naseerabad (3) Deedar @ Wado s/o Unknown Mugheri r/o. Jalal Mugheri Goth (4) Gul Bahar s/o Unknown Mugheri r/o Jala Mugheri Goth (5) Sikandar @ Siko s/o Unknown Chandio r/o. Batyoon Taluka Qamber (6) Fouji s/o Unknown Mugehri r/o Ghar Pahanja near Pakho Taluka Qamber (7) Rashid @ Rasho s/o Unknonw Mugheri r/o Pahanja Ghar near Aabrio (8) Masti s/o Unknown r/o Jalal Mugheri Goth Taluk Naseerabad (9) Mumtaz s/o Unknown Mugheri r/o Jalal Mugheri, Taluka Naseerabad and one unidentified accused armed with deadly weapons kidnapped the above named persons on the force of weapons and demanded ransom of Rs.10,00,000/- for their release. Hence this FIR.

3. After usual investigation, the case was challaned and the charge was framed against the accused. Thereafter he was sent-up to face the trial where he pleaded not guilty to the charge.

4. The prosecution in order to prove its case examined 08 witnesses and exhibited various documents and other items. The statement of accused was recorded under Section 342 Cr.P.C in which he denied the allegations leveled against him and claimed false implication by the police. However, the appellant did not give evidence on oath nor produce any DWs in support of his defence case.

5. After hearing the parties and appreciating the evidence on record, the trial court convicted the appellant and sentenced him as set out earlier in this judgment; hence, the appellant has filed this appeal against his 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 26.12.2020 passed by the trial court and, therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

7. Learned counsel for the appellant has contended that the appellant is innocent and has been falsely implicated in this case by the police hence the late lodging of the FIR; that the appellant although named in the FIR was not named by the eye witness abductee in his S.164 Cr.PC statement; that the kidnapping of the abductees never took place and it is a made up

story; that the eye witness evidence especially in terms of correct identification of the appellant by one of the abductees cannot be safely relied upon; that no ransom demand was proven and for any or all of the above reasons the appellant should be acquitted by extending him the benefit of the doubt. In support of his contentions he placed reliance on the cases of **The State v Ahmed Omar Sheikh** (2021 SCMR 873), **Zafar v The State** (2018 SCMR 326), **Iftikhar Ahmed alias Imtiaz v The State** (2022 YLR 84) and **Master Juman Buriro v The State** (2022 YLR 299).

8. On the other hand learned APG has fully supported the impugned judgment and in particular contended that the appellant was one of the kidnappers who played a role in kidnapping the abductee and his identification by the abductee as one of the kidnappers has been correctly made and as such the prosecution has proved its case against the appellant beyond a reasonable doubt and the appeal should be dismissed. In support of his contention, he has placed reliance on the cases of **Danish Javed v The State** (2018 MLD 394), **Abdul Adeel v The State** (2009 SCMR 511), **Shahid alias Kaloo v The State** (2009 SCMR 558) and **Shah Zaib v The State** (2022 SCMR 1225).

9. We have heard the arguments of the learned counsel for the appellant and learned Additional Prosecutor General Sindh and gone through the entire evidence which has been read out by the learned counsel for the appellant and the impugned judgment with their able assistance and have considered their arguments and the relevant law including the case law cited at the bar.

10. After our reassessment of the evidence we find that the prosecution has **NOT** proved beyond a reasonable doubt the charge against the appellant for which he was convicted keeping in view that each criminal case is based on its own particular facts, circumstances and evidence for the following reasons;

(a) The first aspect of the case is whether the kidnapping actually took place which we shall consider in detail below;

(i) That according to the evidence of PW 1 Muhammed Mor who was SHO PS Rasheed Waggan on 08.02.2011 at about 1950 hours on that day he received spy information that on

the road leading from Larkana to Waggan dacoits abducted Mashhooq Managi and Mehtab Lakhair which was confirmed to him by cousin of Mehtab Lakair namely Nasir Ahmed Lakhair **however** he did not lodge any FIR and start any investigation even against unknown persons in order to recover the abductees. On 04.03.2011 Nisar Lakhair came to the PS and informed him that the abductees had been taken by the appellant and his gang who had demanded a ransom of RS10 lacs who also told him the names of the dacoit group however he refused to lodge an FIR so he (PW 1 Muhammed Mor) lodged the FIR containing all the names of the alleged abductors. This delay of 3 weeks in lodging the FIR has not been explained at all and significantly Nisar Lakhair who gave the complainant PW 1 Muhammed Mor the names of the 9 suspects who were named in the FIR was not examined as a witness to corroborate this fact. So we do not know how the 9 persons named in the FIR came to be suspects in the eyes of Nisar Lakhair or were simply added to the FIR by the complainant on his own whim in order to falsely implicate them as they allegedly belonged to a dacoit group. In kidnapping cases generally a few days delay in lodging the FIR is permissible as the courts appreciate that the initial concern of the family is in tracing out the missing person rather than immediately going to the police. In this case however the police knew of the incident 3 weeks in advance and did not do anything. This is a long delay in lodging the FIR even in a kidnapping for ransom case and has not been explained adequately at all which gave the police plenty of time to cook up a false case against the appellant which delay we find to be extremely damaging to the prosecution case especially as it is well settled that such long unexplained delays in lodging FIR's are often fatal to the prosecution case. In this respect reliance is placed on the case of **Zafar** (Supra). Intriguingly the FIR was lodged on the same day as the abductees were released from the dacoits following a police encounter which begs the question why one of the abductees did not lodge the FIR?

(ii) That the complainant and other police PW's went to the place of wardat after registration of the FIR but how did they know where the wardat was as no one pointed it out to them. At the place of wardat they made no recovery. No police officer who allegedly was involved in the encounter with the dacoits which lead to the release of the abductees gave evidence about the encounter. Nothing was recovered at the time of the encounter so did an encounter actually take place which lead to the release of the abductees or is it a made up story?

(iii) That there is no evidence of any ransom demand being made or paid or recovered from the appellant or any alleged member of his gang.

(iv) That if it was a genuine case of kidnapping the only

reason advanced for it was one of ransom of 10 lacs which was never paid. It therefore does not appeal to logic, reason or common sense that a gang of dacoits would look after and feed at their own expense the two abductees for a period of 25 to 27 days without receiving any ransom. Under such circumstances they most likely would have either killed or released them after such a long period if there ransom demand had not been met and there is no evidence that any negotiation was going on to even demand let alone pay a ransom for the release of the abductees.

(v) That one of the abductees namely Mashooq did not give evidence who could have supported the prosecution case as such no corroboration as to the events of the abduction can be garnered from this star witness. His wife Basheera who was also present at the time of the abduction also did not give evidence as such no corroboration as to the abduction can be garnered from this star witness. The prosecution therefore failed to produce and in fact with held two of the best witnesses regarding the abduction which further dents the prosecution case.

(vi) There is no medical evidence or ocular evidence to prove that after a period of 25 to 27 days in the captivity of the abductors living rough in a tent that the alleged abductees had been mal treated e.g through beatings or that they had even lost weight due to a lack of food which might be expected in such type cases.

For the above reasons we have **doubts** that the abduction for ransom even took place

(b) **The second next aspect of the case is that if the abduction for ransom did take place can we safely rely on the identification of the appellant as one of the abductees which aspect we shall consider in detail below;**

(i) According to the prosecution case there were two abductees. Mashhooq and Mehtab Ali however one of the abductees as mentioned above Mashooq who was a star witness did not give evidence for the prosecution which left only one eye witness. Mashooq's wife Basheera who was also present at the time of the abduction also did not give evidence and such we are left with only one eye witness namely PW 6 Mehtab.

(ii) According to the evidence of abductee Mehtab he was kept in confinement by the abductors for between 25 to 27 days. Very often in kidnapping for ransom cases it is held that when a abductee has been in confinement for so long he would be able to identify his abductor and those who played a role in his abduction and thus no identification parade is needed and identification in court will suffice. Each case however must be decided on its own particular facts and

circumstances. In this case the abductees were released by the police after an alleged encounter on 04.03.2011. On 14.03.2011 abductee Mehtab gave his S.164 Cr.PC statement before a magistrate in which he narrated the incident. He did not name the appellant in his S.164 Cr.PC statement and did not give any hulia of any of the persons who had held him in captivity. For instance he could easily have said that one of them had a crippled hand which was a feature which would have stood out but he failed to do so. He identified the appellant in the court room **9 years** after the incident. During cross examination however he states as under,

*"It is correct to suggest that police disclosed that out of two alive accused persons one is present Mumtaz Mugheri (the appellant) **who is crippled from one hand**. It is correct to suggest that accused present today before this court is not one who abducted us"*

Although during re examination he states that he did correctly identify the accused but he had forgiven him **what is of significance is that he was told that the appellant had a crippled hand by the police** (a feature which he had not noted before) so he could easily identify him in court as he was distinguishable from the others in the court which is similar to the appellant being shown to the accused before identifying him in court which makes his in court identification of the appellant suspect.

(iii) That **after a lapse of 9 years** when the appellant gave no hulia or the appellant, did not mention that one of them had a crippled hand in his S.164 Cr.PC statement which was recorded after the incident but was later told this by the police. The fact that he did not draw any sketch of the appellant and did not pick him out of any picture which was shown to him with other dacoits gives us severe doubts based on the particular facts and circumstances of this case that the appellant was able to correctly, safely and reliably identify the appellant in court as one of the persons who played a role in his abduction 9 years ago.

(iv) There is no other corroborative/supportive evidence in respect of the appellant's story of abduction and that the appellant was one of the persons involved in his abduction.

11. That the prosecution must prove its case against the accused beyond a reasonable doubt and that the benefit of doubt must go to the accused by way of right as opposed to concession. In this respect reliance is placed on the case of **Tariq Pervez V/s. The State** (1995 SCMR 1345).

12. For the reasons discussed above we find doubt in the prosecution case in terms of whether the abduction actually took place and even if it did we find that the identification of the appellant by abductee Mehtab cannot be safely relied upon as being one of the abductors and by extending the benefit of the doubt to the appellant he is acquitted of the charge, the impugned judgment is set aside, the appeal is allowed and the appellant shall be released unless wanted in any other custody case.

13. The appeal stands disposed of in the above terms.