

**2011 P Cr. L J 1424**

**[Karachi]**

**Before Sajjad Ali Shah and Muhammad Ali Mazhar, JJ**

**MUHAMMAD SHAFI alias PAPAN---Appellant**

**Versus**

**THE STATE---Respondent**

Cr. Spl. ATA Jail Appeal No. D-127 of 2005, decided on 31st May, 2011.

**(a) Penal Code (XLV of 1860)---**

---S. 365-A---Anti-Terrorism Act (XXVII of 1997), Ss.6 & 7---Abduction for extorting property, valuable security etc. and terrorism---Appreciation of evidence---Recovery of alleged abductee, itself appeared to be doubtful in view of glaring contradictions and discrepancies available in the evidence of two prosecution witnesses---Prosecution, in circumstances, had not proved the case against accused---Main charge was against father of alleged abductee who was a natural guardian, but he was acquitted by the Trial Court, on whose alleged pointation alleged abductee was recovered---Trial Court had found that no direct evidence was available on record to connect the father and his co-accused with the commission of offence---Accused was convicted due to circumstantial evidence on the sole ground that alleged abductee was recovered from his otaq, which was totally doubtful in view of evidence of two prosecution witnesses---Mother of alleged abductee never appeared in the court despiteailable warrants, for recording evidence who received telephonic calls from the kidnappers for the demand of ransom---Father

could not be held liable for kidnapping his own son being a natural guardian---Prosecution having failed to prove its case against accused beyond reasonable doubt; impugned judgment was set aside and accused was acquitted of the charge and was released, in circumstances.

Muhammad Ashgar v. State 2010 SCMR 1706; Sabir Ali v. State 2011 SCMR 629; The State v. Mushtaq Ahmad PLD 1973 SC 418 and Khalid Mehmood v. State 2011 SCMR 664 ref.

**(b) Islamic law---**

---Guardianship---Responsibility of parents to bring-up children and their welfare---Children were focus of gravity in Islamic family tradition and law---When spouses were together, upbringing their children was paramount joint responsibility---Not only physical care and health, but emotional, educational and religious welfare and well being, were mutual responsibility---When spouses would separate by divorce or annulment, said responsibilities, get split according to best abilities of each parent---While fathers were vested with financial burden and legal guardianship roles, mothers were given role of physical care and emotive guardian of children---Inherently, Islamic system balances between multitude levels of children's need---Father should have access to his children and would remain financially responsible for their maintenance and education, even though they could be under the care of their divorced mother or one of her relations.

Muhammad Ashraf v. S.H.O. and others 2001 PCr.LJ 31; Mst. Mehnaz v. Judicial Magistrate Ist Class/Civil Judge, Attock and 2 others 2008 YLR 1669; Amjad Shah v. Station House Officer Police Station Sukheki and another 2008 YLR 1507 and Muhammad Mukhtar v. S.H.O. and 3 others 2008 YLR 2665 ref.

Aslam Pervez for Appellant.

Syed Meeral Shah Deputy Prosecutor-General Sindh for the State.

Date of hearing: 19th May, 2011.

## JUDGMENT

**MUHAMMAD ALI MAZHAR, J.**---This Jail Appeal is brought to challenge the impugned judgment dated 30-8-2005, passed by the learned Judge Anti-Terrorism Court Hyderabad and Mirpurkhas Divisions, Hyderabad in Special Case No.31 of 2002, (Crime No.70 of 2001, Police Station Pinyari), whereby the appellant was convicted and sentenced under section 365/A, P.P.C. read with section 6(2), (e) and 7 (e) of Anti-Terrorism Amendment Ordinance, 2001 to imprisonment for life, forfeiture of his property and to pay compensation of Rs.100,000 and in case of default in payment of fine, the appellant has to suffer R.I for one year more.

2. The gist of prosecution case is that the complainant Muhammad Qasim had reported that his cousin Mst. Zahida was married with Muhammad Ashraf. Mst. Zahida has two sons namely Ali aged about 5 years and younger son namely Muhammad Asad aged about 3 years. On 7-8-2001, he was sitting in his house when Mst. Zahida told him that her son namely Asad who had gone out from the house for playing has not returned back. Thereafter the complainant along with Muhammad Anwer and Muhammad Akram, went for searching Muhammad Asad but he was not found. When he came back at the house Mst. Zahida told him that her husband Muhammad Ashraf who had gone in the morning for doing labour, has not yet returned. Meanwhile Mst. Zahida received a phone call from an unknown person who told her that her boy namely Muhammad Asad is with them and if she wants the boy alive then she should obtain Rs.3,00,000 from her father and pay it through her husband namely Muhammad Ashraf at Mirpurkhas Railway Platform. After some time Muhammad Ashraf also came at the house but he did not pay any heed then a doubt was created that it might be Muhammad Ashraf himself who may have got kidnapped his son for extorting money from his father-in-law. On 8-8-2001 at about 3 hours, another phone call was received by Mst. Zahida whereby she was again asked that she did not send the money through Muhammad Ashraf. Next day Muhammad Ashraf had disappeared from the house, thereafter report was lodged that Muhammad Asad has been kidnapped by Muhammad Ashraf and Pappan Negar.

3. The formal charge was framed by the trial Court under sections 365/A, 34, P.P.C., 6(2)(e) Anti-Terrorism (Amendment) Ordinance 2001 and 6/7 Anti-Terrorism Act to which the appellant and other co-accused pleaded not guilty and claimed the trial.

4. To substantiate its case, prosecution examined P.W.1 Complainant Muhammad Qasim, P.W.2

Muhammad Anwar, P.W.3 Muhammad Akram, P. W.4 Jan Muhammad, P.W.5 Muhammad Rafique, P.W.6 Wahid Bux, P.W.7 Syed Hyder Abbas and closed its side.

5. The statements of the appellants and co-accused under` section 342, Cr.P.C. were recorded wherein they denied the prosecution allegations and claimed their innocence. The appellant also pleaded his false implication, however, he did not examine himself on oath nor led any defence evidence.

6. The trial Court passed the impugned Judgment and sentenced the appellant, however, co-accused Muhammad Ashraf and Amjad Ali were acquitted while extending benefit of doubt to them.

7. We have considered the evidence produced by the prosecution. The P.W.1 was Muhammad Qasim (Exh.11), the complainant who deposed that Mst. Zahida is his sister and also sister-in-law. She was married with accused Muhammad Ashraf. About 4 years back he had gone for work and when he returned to his house Mst. Zahida disclosed him that her son Asad was missing. The announcement of missing was made in the local Mosque but the abductee Asad could not be traced out. Then he along with his brother Akram and Anwar tried to search out the missing son of Mst. Zahida then he went to lodge the F.I.R. at the Police Station. He exhibited F.I.R. as Exh.11/A. He further adduced that Mst. Zahida disclosed him that she had received a telephonic message that Rs.300,000 be arranged as ransom through Badaruddin, father of Mst. Zahida. Accused Ashraf, husband of Mst. Zahida also came in the house and he was also informed about the incident but he had not taken any notice. Then complainant went to Police Station and informed the police that he had suspicion of abduction with the aid of accused Muhammad Ashraf and then police arrested accused Ashraf. Police then as per admission of Ashraf had one to Mirpurkhas and Ashraf had also gone with police and according to complainant he had also gone with police and Akram and Anwar had also accompanied with him to Mirpurkhas. The boy was recovered by police from the house situated at Village and the abductee Asad was recovered from the possession of accused Papan and the police delivered the custody of recovered boy to the complainant. Accused Papan present in Court had disclosed his name as Muhammad Shaft. In the cross-examination he admitted that place of recovery of abductee was situated in the village and there were also other houses in Village. Police had taken us to the Village directly. He further admitted that on reaching at the Village he and police at the pointation of accused Ashraf went inside the house. The door of the house was opened and accused Papan was found sleeping on the cot. Police had not called Mohalla people but they had themselves arrived. Mst. Zahida had not given her statement under section 161, Cr.P.C; to the police. Voluntarily stated that because our ladies are Parda Nasheen.

8. The P.W.2 was Muhammad Anwar (Exh.12). This witness in his evidence deposed that he knew accused Muhammad Ashraf and his son Muhammad Asad. About four years back son of accused Muhammad Ashraf was missing and when witness returned to his house, came to know about the incident. Qasim and Akram both were standing and they disclosed to him that son of accused Ashraf was missing. The witness along with Muhammad Qasim and P.W. Akram went for search of missing son but they could not trace out him. He produced the mashirnama of place of occurrence as Exh.12/A and mashirnama of arrest of accused Muhammad Ashraf as Exh.12/B. In the cross-examination the witness deposed that he had signed the white paper before the police while preparing the mashirnama. He further admitted that he had not gone to Mirpurkhas with the police and had only signed the blank paper.

9. The P.W.3 was Muhammad Akram (Exh.15) who deposed that he knew accused Muhammad Ashraf and his abductee son Muhammad Asad. Asad was about 2-1/2 years when the incident had taken place. About four years back, the witness was informed that Asad was missing and this fact was narrated to him by the complainant. Police had not examined him. Police had not visited the place of occurrence in his presence. He further deposed that mashirnama for place of occurrence did not bear his signature but his name was mentioned. He further stated that police had not arrested accused Ashraf in his presence. He was shown the mashir of arrest but he clearly stated that same does not bear his signature but his name is only mentioned. He further stated that his signatures were obtained on the blank paper. He had further stated that recovery of abductee was not taken place in his presence. He further stated that his statement under section 164, Cr.P.C. was recorded before the Magistrate but it has not been read over to him but his signature was obtained. The S.P.P declared the witness hostile and requested for cross-examination and his request was allowed by the Court. In the cross-examination he denied the suggestion that he is deposing falsely and he further denied that all the mashirnamas bear his signature genuinely. In the cross-examination conducted by counsel for accused Amjad, the witness admitted that he does not know the contents of his statement recorded under section 164, Cr.P.C.

10. The P.W.4 was Jan Muhammad (Exh.16) who deposed in his statement that he was posted as A.S.-I. at Police Station Pinyari. On 15th March, 2002 accused Amjad was arrested on which he acted as mashir. The witness produced the mashirnama as Exh.16/A and stated that comashir was Safdar. No cross was conducted though opportunity was given.

11. The P.W.5 was Muhammad Rafiq, (Exh.17) who deposed that he knows Muhammad Ashraf. He had gone to Mirpurkhas along with police where Investigating Officer Samander Khan and accused Ashraf were also with him. Police had recovered the son of accused Muhammad Ashraf at about 4 or 5 midnight from the possession of accused Shafi Muhammad alias Papan. Police prepared the mashirnama of recovery in his presence. He was shown the mashirnama Exh.16/A and he admitted his signature. In his cross-examination, the witness stated that he had gone to

Mirpurkhas in a car. Accused Ashraf and mashir Akram and police officials and the witness, all were travelling in a car to Mirpurkhas. They reached Mirpurkhas at about 11-00 p.m. midnight. The witness further stated that they reached Mirpurkhas within one hour. Due to rain in Mirpurkhas the light was off. On the pointation of another person namely Farhad, the recovery of missing son was made by the police from Otaq. The witness further stated that they spent 5/6 hours in completing the proceedings. He further stated that he does not know who was the owner of Otaq or that the police had made any efforts to get the witnesses from the locality. After the recovery, the witness along with other police officials arrived at Hyderabad at about 6-00 a.m.

12. The P.W.6, was Wahid Bux (Exh.18). He stated that he is posted as SHO Police Station Pinyari. B.Ws. were issued against P.Ws. Mst. Zahida wife of Ashraf Qazi and SIP Samander Khan for evidence purpose on 20-8-2005. He further deposed that Mst. Zahida had gone to Karachi and her actual address is not known to any one while P.W. SIP Samander Khan had retired from his service and he had gone to Punjab side and his actual address is not known. The B.Ws. were remained unexecuted as Exh.18/A.

13. The P.W.7 was S. Hyder Abbas (Exh.21), who deposed that on 12-8-2001 he was posted as SIP Police Station Pinyari and SIP Samander Khan was also working under his subordination who has now retired and gone to his native place. He was shown F.I.R. Exh.11/A, mashirnamas as Exh.12/A, 12/B and 15/A and he admitted that it is in the handwriting of SIP Samander Khan. He was also shown statement of P.Ws. Muhammad Akram, Muhammad Anwar and Mst. Zahida recorded under section 161, Cr.P.C. and the witness confirmed that same were also recorded by SIP Samander Khan. In the cross-examination conducted by the counsel for accused Amjad Shah, the witness admitted that name of accused Amjad is not mentioned in the F.I.R. and he further confirmed that in the final challan name of Mst. Zahida was mentioned as witness but name of Badaruddin was not mentioned.

14. The learned SPP closed the prosecution side, thereafter, the statements of accused were recorded under section 342, Cr.P.C. Accused Amjad Ali denied all the allegations. However, he has not shown any interest to examine himself on oath or to examine any witness in his defence. In response to a question as to why P.Ws. deposed against him, he replied that due to property dispute with the complainant he has been involved in this case falsely. He further stated that at the time of alleged offence, he was present on his duty. He produced documents in support of his denial as Exh.25/A. The accused Muhammad Ashraf, the father of abductee Asad had also denied all the allegations and further stated that child was available with his mother and he further denied the recovery of child from the otaq of co-accused Muhammad Shafi. He did not examine himself on oath nor examined any witness in his defence. The accused Ashraf stated that due to property dispute, he has been falsely involved in this case because his mother-in-law wanted to usurp his gifted house and also implicated his close friends including Shafi alias Papan

and there was no such incident took place. The third accused Muhammad Shafi has also denied all the allegations against him. He further denied that the child was recovered from his otaq. Finally, he deposed that he resides in the same Muhalla and he is close friend of Muhammad Ashraf co-accused and due to enmity he has been falsely implicated in the case.

15. The trial Court passed the impugned judgment on 30th August, 2005 and observed in the judgment that there is no direct evidence against the accused persons on the point of kidnapping of boy Asad, but there is circumstantial piece of evidence which includes the recovery of abductee from the possession of accused Muhammad Shafi alias Papan. He further observed in the impugned judgment that against the remaining accused person Amjad Ali and Muhammad Ashraf, there is no evidence from the mouth of P.Ws. to connect them with the commission of alleged offence. This circumstantial evidence of recovery of abductee appears to be sufficient to connect accused Muhammad Shafi, therefore, the involvement of remaining accused persons Muhammad Ashraf and Amjad Ali appears to be doubtful. The benefit of doubt therefore must go to these accused persons. Finally the accused Muhammad Shafi was convicted for life imprisonment. While remaining accused persons Muhammad Ashraf and Amjad were acquitted on the ground of benefit of doubt.

16. The learned counsel for appellant argued that entire case was false and there was no tangible evidence available on record to connect the present appellant with the commission of crime. He further argued that there are clear contradictions and discrepancies in the evidence of P.Ws. which are not trustworthy and liable to be discarded. The main allegation of kidnapping was attributed to accused Muhammad Ashraf who is father of alleged abductee Muhammad Asad. A father cannot be held liable for abduction of his child who is a natural guardian. He further argued that there was a dispute between the parties on some property issues therefore, the appellant who is a friend of Muhammad Ashraf was implicated in this case. The learned counsel further averred that case of prosecution states that after the arrest of Muhammad Ashraf and on his pointation, the child was recovered from Mirpurkhas from the alleged Otaq of present appellant but while passing the impugned judgment, the principal accused Muhammad Ashraf was acquitted against whom the specific charge of kidnapping was levelled but the appellant has been convicted on the basis of circumstantial evidence which is otherwise not available on record to prove the guilt of the appellant.

17. The learned Deputy Prosecutor-General in response to the arguments did not support the impugned judgment on the ground that a father who is a natural guardian cannot be held responsible; for abduction of his own son. He further averred that custody of a child with his father cannot be treated abduction or kidnapping. Finally the learned Deputy Prosecutor-General is also of the view that there, are some material contradictions in the statements of P.Ws. therefore, he is of the view that prosecution had failed to prove the guilt of present appellant without reasonable doubts.

18. We have considered the entire evidence adduced by the prosecution to connect the present appellant with the commission of offence. The complainant in his testimony, deposed that after lodging F.I.R. and arrest of father of abductee Muhammad Ashraf, he went with the police to Mirpurkhas and Akram and Anwar both had also accompanied with him and the boy was recovered by police from the Otaq situated at the village. The witness further stated that statement of Mst. Zahida was not recorded under section 161, Cr.P.C. being a Parda Nasheen lady. He further admitted that name of accused Amjad is not nominated in the F.I.R. and recovery of abductee was not made from the possession of accused Amjad. He further admitted that there was no eye-witness of the incident for kidnapping the boy. The complainant further deposed that Akram and Anwar both had accompanied with him while going to Mirpurkhas but in the statement of Muhammad Anwar, he clearly denied that he had gone to Mirpurkhas with the police on contrary he admitted that he had only signed a white paper before the police while preparing the mashirnama therefore, this witness totally belies the assertion of the complainant that the alleged abductee was recovered in presence of Muhammad Anwar. So far as next P.W. Muhammad Akram is concerned, he deposed the same thing that his signature was obtained on a blank paper and he also denied that recovery of abductee was taken place in his presence. He further admitted that mashirnama was not read over to him and his statement recorded before the Magistrate was also not read over to him and finally he admitted that he does not know the contents of his statement recorded under section 164, Cr.P.C. Though the SPP declared this witness hostile and cross-examined him but his statement was not shattered to bring out anything material in favour of the prosecution.

19. It is a matter of record that the P.W. Muhammad Ratique deposed that he had gone to Mirpuikhas in a car in which accused Muhammad Ashraf and mashie Muhammad Akram and police officials were travelling to Mirpurkhas. Though on the record the mashirnama of recovery has been exhibited as Exh.15/A on which signature of Muhammad Rafiq and Muhammad Akram are present but in the evidence of Muhammad Akram he has clearly denied that he was present at the time of recovery and he further clearly stated that police had obtained his signature on blank paper and even his statement recorded under section 164, Cr.P.C. was not read over to him and he does not know about anything about his statement. Due to glaring contradiction and discrepancies available in the evidence of two prosecution witnesses Muhammad Anwar and Muhammad Akram who have been shown the witnesses of recovery, the recovery itself appears to be doubtful, therefore, it cannot be said that prosecution has proved the case against the present appellant.

20. The main charge was against Muhammad Ashraf who is father of abductee and is a natural guardian but he was acquitted by the trial Court on whose alleged pointation the child was recovered from Mirpurkhas and the trial Court in the impugned judgment held that there is no direct evidence available on record to connect the father and another accused Amjad with the commission of offence but due to circumstantial piece of evidence the present appellant was



convicted on the sole ground that child was recovered from his Otaq which is totally doubtful keeping in view the evidence of Muhammad Anwar and Muhammad Akram. Another important aspect of the case cannot be lost sight that the mother of alleged abductee Mst. Zahida never appeared in the court in spite ofailable warrants for recording evidence who received telephonic calls from the kidnappers for the demand of ransom.

21. A father cannot be held liable for kidnapping his own son being a natural guardian. Children are focus of gravity in Islamic Family tradition and law. When spouse are together, upbringing their children is paramount joint responsibility. Not only physical care and health, but emotional, educational, and religious welfare and well being are mutual responsibility. When spouses separate by divorce or annulment, these welfare responsibilities get also split according to best abilities of each parent. While fathers are vested with financial burden and legal guardianship roles, mothers are given role of physical care and emotive guardian of children. Inherently, Islamic system balances between multitude levels of children's need. The father should have access to his children, and he remains financially responsible for their maintenance and education even though they may be under the care of their divorced mother or one of her relations. (Islamic Sharia Council, [www.Islamicsharia.org](http://www.Islamicsharia.org)), At this juncture, we would also like to refer to the following case-law:--

(i) 2001 PCr.LJ 31 (Muhammad Ashraf v. S.H.O and others), it was held in this case that a father of a child is always a natural guardian along with mother and lie can never be ascribed or attributed the offence of kidnapping of his own child.

(ii) 2008 YLR 1669 (Mst. Mehnaz v. Judicial Magistrate Ist Class/Civil Judge, Attock and 2 others). In this case, it was held that the object of provisions of sections 361, 363 and 364-A, P.P.C. was to protect rights of parents with regard to custody of minor. Guardianship of father under Islamic Laws did not cease even when minor child was in the custody of mother and similarly guardianship of mother did not extinguish while the minor child was with father. Father was also legal guardian of his minor children and legal guardian had in law constructive custody of his minor children. If a father had removed his child from the custody of his wife, the father could not be tried or convicted on the charge of kidnapping.

(iii) 2008 YLR 1507, (Amjad Shah v. Station House Officer Police Station Sukheki and another). In this case, it was held that there is a consensus on the basis of case-law that no mens rea can be attributed to the father for abduction of his children. He being a natural guardian, case under provisions of section 363, P.P.C. is not maintainable against him.

(iv) 2008 YLR 2665, (Muhammad Mukhtar v. S.H.O and 3 others). In this case, it was held that petitioner being father of alleged abductee was also a natural guardian therefore, provisions of section 363, P.P.C. are not applicable against the father. Consequently the F.I.R. registered under section 363, P.P.C. was ordered to be quashed.

22. We would further like to quote a judgment reported in 2010 SCMR 1706, (Muhammad Asghar v. State), in which, it was held by the honorable Supreme Court that onus rests on prosecution to prove guilt of accused beyond a reasonable doubt throughout the trial. Presumption of innocence remains throughout the case until such time, the prosecution on the evidence satisfies the Court/Judge beyond a reasonable doubt that the accused is guilty. Two concepts i.e., "proof beyond reasonable doubt" and "presumption of innocence" are so closely linked together that the same must be presented as a unit. Presumption of innocence is the golden thread of criminal justice then proof beyond a reasonable doubt is silver and these two threads are forever intertwined in the fabric of criminal justice. As such the expression "proof beyond reasonable doubt" is of fundamental importance to criminal justice system; it is one of the principles, which seeks to ensure that no innocent person is convicted. In another case, reported in 2011 SCMR 629, (Sabir Ali v. State), it was held that the general principle in criminal jurisprudence is that prosecution is to prove the case against the accused beyond doubt and this burden does not shift from prosecution, even if accused takes up any particular plea and fails in it. Any room for benefit of doubt in the prosecution case will go to accused and not to prosecution. Where the court after examination of the whole evidence is of the opinion that there is reasonable possibility of the defence put forward by the accused being true, then such view would re-act on the whole prosecution case and accused would be entitled to benefit of doubt not as a matter of grace but as a right, because prosecution has failed to prove its case beyond reasonable doubt. The rule of benefit of doubt, which described as the golden rule, is essentially a rule of prudence which cannot be ignored while dispensing justice in accordance with law. It is based on the maxim, it is better that ten guilty persons be acquitted rather than one innocent person be convicted. In simple words it means that utmost care should be taken by the court in convicting the accused. It was held in "The State v. Mushtaq Ahmad", (PLD 1973 SC 418) that this rule is antithesis of haphazard approach or reaching a fitful decision in a case. It will not be out of place to mention here that this rule occupies a pivotal place in the Islamic Law and that is enforced rigorously in view of the saying of the Holy Prophet (PBUH) that the mistake of Qazi (Judge) in releasing a criminal is better than his mistake in punishing an innocent." Reference can be made to 2011 SCMR 664, (Khalid Mehmood v. State).

23. The upshot of this discussion is that the prosecution has failed to prove its case beyond reasonable doubt. Resultantly, this appeal is allowed, the impugned judgment is set aside and the appellant is acquitted of the charge. He shall be released forthwith unless he is detained in any other case.

H.B.T./M-85/K

Appeal allowed.