

## JUDGMENT SHEET

### ISLAMABAD HIGH COURT, ISLAMABAD, JUDICIAL DEPARTMENT

#### Criminal Appeal No. 110 / 2016

Rao Fahad Ali Khan

*versus*

Afzal Moeen Marwat, etc.

Appellant by: Mr. Shahid Shabbir, Advocate.

Respondents by: Mr. Usman Ali, Advocate for  
respondent No.1 to 4.  
Khadija Ali, State Counsel.  
Shafqat Inspector, P.S. Tarnol.  
Muhammad Nawaz, S.I. P.S Margallah.

Date of Hearing: 06.09.2022

MOHSIN AKHTAR KAYANI, J: Through this criminal

appeal, the appellant Rao Fahad Ali Khan has assailed the judgment dated 26.04.2016 passed by learned Judge Special Court No.1, Anti-Terrorism, Islamabad, whereby the respondents have been acquitted from the charge in case FIR No.302 / 2012 dated 10.06.2012, under Section 337-F(i) / 337-H(ii) / 148 / 109 / 149 / 365-A PPC, registered at Police Station Margallah, Islamabad.

2. Brief facts referred in the instant FIR lodged on the complaint of appellant / Rao Fahad Ali Khan PW-9 through his complaint Ex.PW-9/1 converted into FIR Ex.PA are that, his younger brother Rao Saad Ali Khan alongwith his friends Faisal Ejaz PW-10 and Asad Abbasi went to McDonald F-9 Park, Islamabad for refreshment in the Motor Car of Asad Abbasi. At about 10 p.m. on 10.06.2012. Accused Afzal Marwat, Anwar Marwat, Waleed and Noshawan appeared in three different

vehicles, among them two were Vigo Double Cabin, while third one was Honda Accord, alongwith 15 / 20 armed body guards. Afzal Marwat was having Kalashnikov in his hand. They all started beating his brother with rifle butts in presence of Faisal Ejaz and Asad Abbasi and kidnapped his brother Rao Saad Ali Khan and also made firing at the time of departure. The incident was narrated by Faisal Ejaz and Asad Abbasi to the complainant. Motive behind the occurrence was that the accused Afzal Marwat attempted to snatch BMW X-5 series motor car bearing registration No.BD-8222 from his brother Rao Saad Ali Khan and matter was reported to local police. PW-9 filed a written application for registration of FIR in police station Margallah, after registration of FIR the abductee contacted the complainant and he was taken to hospital by the complainant, where his medical was conducted. On his further information police has arrested the accused persons / respondents in this case, even recovered the vehicle used in abduction and also recovered white color blood stained bed sheet, black color blood stained torn shalwar, pieces of blood stained tissue paper, razor, shaved hair, one bottle of piodene, mobile I-Phone, cotton blood stained (Ex.P-2 to Ex.P-9), respectively from the place of abduction i.e. farm house, situated at Malot Road, Bara Kahu, identified by the victim. The Trial Court after recording of evidence of 11 prosecution witnesses and statement under Section 342 Cr.P.C. of the accused persons, acquitted the respondents from the charges. Hence, this appeal.

3. Learned counsel for the appellant contends that Trial Court has not appreciated the over whelming evidence in this case, where abduction has been proved from the place of occurrence i.e. McDonald F-9 Park, Islamabad, even subsequent recoveries of blood stained tissue paper, shaved hair, light black color blood stained bed sheet, torn shalwar, etc are the corroborative pieces of evidence, which were recovered from farm house, situated at Malot Road, Bhara Kahu, also confirms the abduction and detention of the victim by the respondent accused persons. It has further been argued that the ransom demand was also claimed by the accused persons from the victim, but that was not materialized, however, offence of abduction has been proved otherwise from the entire evidence, even non production of Magistrate who recorded statement under Section 164 Cr.P.C. of the victim and non recovery of Kalashnikov from the accused person is not a ground to discard entire testimony of the prosecution, whereas offence has otherwise proved in this case. It is lastly contended that the Trial Court has acquitted one of the respondent accused in this case in absentia, which is not permissible under the law and to that extent the order is perverse, illegal and fanciful.

4. Conversely, learned counsel for the respondents accused contends that the ingredients of abduction qua the purpose of ransom has not been demonstrated in the entire trial, even the independent witnesses from a public place were not associated to justify the abduction from McDonald F-9 Park, Islamabad, nor the

taxi driver was brought on record who had given a ride to the victim from place of abduction till the place where he was dropped to complete the chain of evidence. The verified CDR was not produced which corroborates the allegation, even the farm house owner was not associated in this case to prove the chain of evidence against the respondents. No DNA has been conducted to the extent of recovered hairs and blood stained shawlar to justify the story of the victim. All these facts create a serious doubt in this case which seems to be a counter blast to a civil dispute of vehicle BMW X-5 series non paid custom, even that motive was not proved independently.

5. Arguments heard, record perused.

6. Perusal of record reveals that the appellant is mainly aggrieved with the acquittal of respondents in the above mentioned criminal case, which revolves around the alleged incident of abduction on 10.06.2012 at 10 p.m. from McDonald F-9 Park, Islamabad, where alleged abductee PW-8 Rao Saad Ali Khan alongwith his friends Faisal Ejaz PW-10 and Asad Abbasi were present in the parking area of McDonald, F-9 Park, Islamabad, in the meanwhile, two black color Vehicle Vigo, one silver color Honda Accord appeared on spot. Accused Afzal Marwat, Anwar Marwat, Raja Waleed, Imran Khattak, Noshawan and 10 / 12 body guards armed with Kalashnikov de-boarded from the vehicles and tried to abduct Rao Saad Ali Khan PW-8, who during the said attempt tried to rescue himself and started running

towards entrance gate of McDonald, but he was overpowered by the accused persons, who started beating him with riffle butts, stick and some other tools. All of the accused persons put him in Honda Accord car, he also heard two fire shots. The other witness of the incident Faisal Ejaz PW-10 also narrated the similar occurrence and confirms that he fled away from the scene alongwith Asad Abbasi, informed the abductees' brother Rao Fahad Ali Khan about the incident, whereafter, FIR has been lodged.

7. The abductee PW-8 has taken a specific stance that Afzal Marwat asked him to contact his father telephonically to pay sum of rupees five millions to him and when he refused, he was tortured.

8. The initial prosecution case was setup with reference to abduction for purpose of ransom in terms of Section 365-A PPC, but entire evidence is silent to that affect, as no call was made to the complainant or victim's family for ransom, nor such case was taken up before the court, therefore, the primary ingredient to exercise the jurisdiction under the Anti Terrorism Act, 1997, is missing, as a result whereof, Anti Terrorism Court lacks the jurisdiction to proceed with the matter. We have also gone through the charge sheet dated 19.06.2014 to the extent of Raja Waleed Shahid, Imran Khattak and Afzal Moeen Marwat, where the ingredient of Section 365-A PPC has not been adhered to nor any special reference has been made, even the Investigation Officer

Shafqat Mehmood S.I / PW-11 has not setup this case in terms of Section 365-A PPC in his final report under Section 173 Cr.P.C.

9. We have also gone through the report under Section 173 Cr.P.C. submitted by the Investigation Officer, which also highlights the investigation conducted in the supervision of a senior police officer namely Sultan Azam Taimoori A.I.G Operations, who confirms that offence under Section 365-A PPC was not made out rather it is *prima facie* an offence under Section 365 i.e. simple abduction, however, despite that Trial Court has proceeded with the trial knowingly that Anti Terrorism Court has no jurisdiction in this regard, such conduct of a Judicial Officer is not aboveboard who despite having knowledge of all the laws including the mandate of Section 23 of the Anti Terrorism Act, 1997, took cognizance of the offence.

10. The Court is under obligation to consider the allegation referred in the FIR, statement of witnesses under Section 161 Cr.P.C. and challan under Section 173 Cr.P.C. to confer jurisdiction at pre-trial stage, however, if Court comes to opinion that it has no jurisdiction to try such offence, then transfer of the case for trial of such offence to any court having jurisdiction under the Code is required under the law, as such law has not been considered in letter and spirit by the Trial Court, which is an illegality on the touchstone of principles set out in PLD 2005 [SC] 530 (Mirza Shaukat Baig Vs. Shahid Jamil), 2003 SCMR 472 (Nasir Abdul Qadir Vs. The State), 2016 PCRLJ [Peshawar] 879 (Muhammad

Faizan alia Faizi Vs. State), 2018 PCRLJ (N) [Karachi] 22 (25)  
(Afaq Shafqat Vs. State), PLD 2016 [SC] 1 (Shahbaz Khan alia  
Tippu Vs. Special Judge Anti Terrorism Court No.3, Lahore), 2017  
PCRLJ [Karachi] 1280 (Muhammad Akbar Khan Vs. SHO, P.S.  
Garhi Khairo, District Jacobabad), 2017 PCRLJ [Peshawar] 527  
(Ahmad Ali Vs. State).

11. The most glaring element noted by this Court is the acquittal of respondent No.4 Anwar Moeen Marwat, who has been acquitted in absentia , who never appeared before the Trial Court, even a charge was not framed to his extent, which is a glaring illegality committed by the Trial Court. Learned counsel for the appellant has drawn attention of this Court towards the glaring mistake of the Trial Court with reference to Section 265-H Cr.P.C, where order of acquittal or conviction could only be passed if charge has been framed, therefore, the court has not adhered to the procedures of the trial, such, illegality is not curable in light of the judgment reported as 2010 SCMR 755 (Arbab Khan Vs. State), PLD 2006 [SC] 343 (Manzar Qayyum Vs. State).

12. There is no denial on record that application has been filed by the appellant side before the Trial Court on 26.11.2015 for summoning of Anwar Moeen Marwat, who is nominated accused in this case, however, despite pendency of the said application, no order was passed and case has been decided in slipshod manner in complete disregard to the law and rules of procedure provided in the criminal procedure code.

13. While considering the above illegalities committed by the Trial Court from the very inception qua the assumption of jurisdiction under Anti Terrorism Act, 1997, despite the fact that the offence under Section 365-A i.e. kidnapping for the purpose of ransom is not demonstrated from any angle and then proceeding with the Trial Court without framing of charge to the extent of Anwar Moeen Marwat / respondent No.4, who has been acquitted in absentia, such aspects are glaring illegalities which are not curable in these proceedings, rather de novo trial is required.

14. The above mentioned criminal case should have been proceeded with the ordinary court and after framing the complete charge on the basis of allegation mentioned in the final report under Section 173 Cr.P.C., hence, in such eventuality, this is a fit case to be remanded to the ordinary court in terms of the principles set out in 2020 SCMR 293 (Naseer Khan Vs. Said Qadeem), 2019 SCMR 1079 (Abdullah Jan Vs. State), 2018 SCMR 511 (Shakeel Ahmad Siddiqui Vs. Muhammad Nauman Siddiqui), 2018 SCMR 141 (Muhammad Ajmal Vs. State), PLD 2018 [SC] 837 (State Vs. Haji Nabi Bux), PLD 2018 [SC] 351 (Muhammad Jibran Nasir Vs. State), 2017 SCMR 1946 (Tahir Javed @ Tara Vs. State), 2017 YLR [Peshawar] 1376 (Zuhrab Gul Vs. State).

15. In view of the above guiding principles set out by the superior Courts, instant appeal is ALLOWED. The judgment of acquittal dated 26.04.2016, passed by learned Judge Special Court No.1, Anti-Terrorism, Islamabad is hereby SET-ASIDE without



touching the merits of the case and the matter is remanded to learned Sessions Judge (West), who shall entrust the same to the competent Court having jurisdiction in this regard and the transferee Court shall proceed with the trial to the extent of respondent No.04/ Anwar Moeen Marwat after framing the fresh charge and thereafter decide the matter jointly with other three respondents accused namely Afzal Moeen Marwat, Imran Khattak, Raja Waleed Shahid and shall pass the judgment in accordance with the law within the period of six months. The evidence earlier recorded in the trial of three respondents namely Afzal Moeen Marwat, Raja Waleed Shahid, Imran Khattak, shall remain intact.

16. All the respondents accused shall submit fresh bail bonds in the sum of Rs. 30,000 (Thirty Thousand Rupees Only) each with one surety each in the like amount to the satisfaction of the learned Trial Court for their appearance in the Trial Court till the final judgment.

(BABAR SATTAR)  
JUDGE

(MOHSIN AKHTAR KAYANI)  
JUDGE

Announced in the open Court on : 18th Oct-2022.

JUDGE

JUDGE

A.Waheed.