

P L D 1995 Supreme Court 1

Present. Ajmal Mian, Sajjad Ali Shah and Saleem Akhtar, JJ

STATE through Advocate-General, Sindh, Karachi--- Appellant

versus

FARMAN HUSSAIN and others--- Respondents

Criminal Appeals Nos. 107-K and 108-K of 1992, decided on 9th October, 1994.

(On appeal from the judgment and order of the High Court dated 26-11-1991 passed in Criminal Appeals Nos. 4 and 65 of 1991).

Per Sajjad Ali Shah, J.--

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

___Ss, 365-A & 109 ---Offence of kidnapping ---Duty of Courts: --[Criminal trial].

While trying a criminal case, it is the duty of the Court to appraise evidence strictly according to the legal requirements- described by law without being swayed away emotionally for any other extraneous reasons, which fall outside the pale of legal jurisdiction of appraisal of evidence. In the criminal jurisprudence which is followed, it is invariably the duty of the prosecution to prove the case against the accused beyond doubt and the accused is presumed to be innocent until the case is fully proved against him and in that process not only if there is room for doubt, benefit thereof is to go to the accused but if any legal provision, which is open to two interpretations, one beneficial to the accused is to be adopted. The Court is to administer the laws as are operative in the country and if such laws fail to achieve the desired results, then it is the duty of the legislature to amend them suitably to make them effective. The Court is not permitted to deviate from the principles and guidelines laid in the law for appraisal of evidence. To bring home guilt to the accused, legal evidence is required to be of incriminating nature to connect the accused with the commission of crime beyond the shadow of reasonable doubt.

Per Ajmal Mian, J.--

The duty of the Court is to administer the laws as are operative in the country and if such laws fail to achieve the desired result, then it is the duty of the legislature to make necessary amendments therein. However, at the same time, it is also a well-settled proposition of law that while applying a particular law, the Court should take into consideration the objection for which it has been enacted. The interpretation of the law should be placed in a manner which may advance the object and suppress the mischief for which the law in question might have been enacted and not to construe it in a manner which may defeat the object of the law.

The approach of the Court in matters like the case of kidnapping for ransom should be dynamic and if the Court is satisfied that the offence has been committed in the manner in which it has been alleged by the prosecution, the technicalities should be overlooked without causing any miscarriage of justice.

Per Sajjad Ali Shah, J: -

(b) Interpretation of statutes--

---- Criminal trial---If in a criminal trial any legal provision, which is to be relied upon in the appraisal of evidence and is open to two interpretations, one beneficial to the -accused is to be adopted: --[Criminal trial].

(c) Criminal Procedure Code (*V of 1898*)-

---S. 162---Qanun-e-Shahadat (10 of 1984), Arts. 22 & 153-- -Identification parade---When essential---If witness gets a momentary glimpse of accused and claims that he would be able to

identify him, then after arrest, identification test becomes very essential which is to be conducted strictly according to guidelines and- legal requirements enunciated by law.

Muhammad Yousuf Zai v. The State **PLD 1988 Kar. 539** distinguished.

(d) Qanun-e-Shahadat (10 of 18,4)--

---Art. 3---Child witness---Evidentiary value---Evidence of child witness is to be assessed with care and caution: -[Witness].

(e) Criminal Procedure Code (V of 1898)--

---S. 162---Qanun-e-Shahadat (10 of 1984), Arts. 22 & 153---Identification parade--
-Description-- -To say that one person was in pant and shirt and two were in Shalwar -Qameez is not the description, which can be helpful at the time of identification test.

Lal Pasand v. The State PLD 1981 SC 142 and Abdul Sattar and another v. The State 1981 SCMR 678 ref.

(f) Criminal Procedure Code (V of 1898)--

---S. 162---Qanun-e-Shahadat (10 of 1984), Arts. 22 & 153 --- Identification test---If the identification test was held after ten days, identification was not held in proper manner and where number of dummies was not proportionate to number of accused persons, evidence of such identification test was assailable and not fit to be relied upon.

Lal Pasand v. The State PLD 1981 SC 142 and Abdul Sattar and another v. The State 1981 SCMR 678 ref.

(g) Criminal Procedure Code (V of 1898)--

---S. 162---Qanun-e-Shahadat (10 of 1984), Arts. 32 & 153---Identification parade---If the accused and witnesses knew well each other then there is no need of identification test.

(h) Criminal Procedure Code (V of 1898)--

---S. 162---Qanun-e-Shahadat (10 of 1984), Arts. 22 & 153---Identification parade---Description---Discrepancies---Effect---Discrepancies in statements of witnesses and improbabilities were inherent in their versions, particularly there was contradiction in descriptions of height of assailants as given by them and mentioning them as boys of young age---Evidence of such witnesses could not be accepted.

Abdul Sattar and another v. The State 1981 SCMR 678 ref.

(i) Criminal trial--

--- Presumption beneficial to the accused has to be drawn.

(j) Criminal trial--

--- Non-production of Mashirs---Effect---Non-production of the Mashirs without valid reasons would react adversely on the recovery of weapons and arrest of accused persons---Reliance, therefore, cannot be placed on the evidence of Investigating Officer if it is alleged by the defence that investigation was not conducted in an honest and impartial manner.--[Witness].

(k) Qanun-e-Shahadat (10 of 1984)---

---Art. 47---Essentials---Who could make a statement of fact that efforts were made to locate the Mashirs---Satisfaction of condition of Art. 47, Qanun-e-Shahadat, 1984 necessary---Mere declaration that "delay and unnecessary adjournment" would be involved in procuring the appearance of witness was not sufficient compliance of condition of Art. 47 of the Qanun-e-Shahadat, 1984.--[Witness].

Only such a person could make a statement of fact on the point that efforts were made to locate Mashirs as has been engaged in the task of searching for witness for the purpose of serving the summons for his appearance. In the absence of any direct evidence, the mere declaration that "delay and unnecessary adjournment" would be involved in procuring the appearance of witness was not sufficient for satisfying the relevant condition of Article 47, Qanun-e-Shahadat, 1984 which is to the effect that it should have been proved that the witness could not be found.

Allah Ditta v. The State PLD 1958 SC (Pak.) 290 ref.

(l) Qanun-e-Shahadat (1.0 of 1984)---

---Art. 3---Child witness, evidence of---Value---Evidence of a child witness being a delicate matter, was not safe to rely upon unless corroborated.-[Witness].

Evidence of child witness is a delicate matter and normally it is not safe to rely upon it unless corroborated. It is a rule of prudence. Great care is to be taken that in the evidence of child element of coaching is not involved.

Children are a most untrustworthy class of witnesses, for, being of tender age, they often mistake dreams for reality, repeat glibly as of their own knowledge what they have heard from others and are greatly influenced by fear of punishment, by hope of reward and by desire of notoriety. In any case the rule of prudence requires that the testimony of child witness should not be relied upon unless it is corroborated by some evidence on the record.

Amir Khan and others v. The State PLD 1985 Lah. 18 ref.

Per Ajmal Mian, J: --

Abdullah Shah v. The State 1968 SCMR 852; Umar v. The Crown 1969 SCMR 600; Bashir v. The State PLD 1974 Pesh. 113; Amir Khan and 3 others v. The State PLD 1985 Lah. 18 and Outlines of Criminal Law by Dr. Kenny, Downing Professor of the Laws of England, Cambridge University ref.

(m) Criminal trial---

--- Where all the pieces of evidence produced by prosecution were defective and tainted, such evidence could not be used to corroborate each other.-[Evidence].

Per Sajjad Ali Shah, J.--

(n) Constitution of Pakistan (1973)---

---Art. 185(3)---Appeal before Supreme Court arising from acquittal--Appraisal of evidence---Principles: -[Evidence].

There is difference between appraisal of evidence in Supreme Court in appeal arising from conviction and in appeal arising from acquittal recorded by High Court. In appeal arising from acquittal, appraisal of evidence in Supreme Court is not so rigid as in the appeal arising from conviction and normally in the former case Supreme Court hesitates to interfere unless it becomes necessary on the ground of gross misreading of evidence resulting into miscarriage of justice.

Supreme Court would not interfere with acquittal merely because on re-appraisal of the evidence it comes to the conclusion different from that of the Court acquitting the accused, provided both the conclusions are reasonably possible. If, however, the conclusion reached by that Court was such that no reasonable person would conceivably reach the same and was impossible then Supreme Court would interfere in exceptional cases only to avoid miscarriage of justice and for no other purpose.

Ghulam Sikandar and another v. Mamaraz Khan and others PLD 1985 SC 11 ref.

Per Ajmal Mian, J: --

The Supreme Court would not on principle ordinarily interfere with an acquittal judgment and instead would give due weight and consideration to the finding of the Court acquitting the accused and that the mere fact that Supreme Court might have taken a different view on the re-appraisal of the same evidence, would not be a ground- for interference. If the conclusion reached by the acquitting Court was such that no reasonable person could conceivably reach the same and was impossible, then Supreme Court would interfere in exceptional cases on overwhelming proof resulting in conclusive and irresistible conclusion.

Allah Ditta v. The State PLD 1958 SC (Pak.) 290 and Ghulam Sikandar and another v. Mamaraz Khan and others PLD 1985 SC 11 ref.

Per Ajmal. Mian, J: --

(o) Qanun-e-Shahadat (10 of 1984)---

---Art.3---Witness---Who may testify.--[Witness].

Article 3 of the Qanun-e-Shahadat, 1984 provides that all persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them or from giving rational answers to those questions by tender years, extreme old age, disease, whether of body or mind or any other cause of the same kind. The explanation to the above Article lays down that a lunatic is competent to testify unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them. In other words, the above provision of the Act makes all persons competent to testify unless the Court considers it otherwise on account of above reasons which includes tender age.

(p) Criminal Procedure Code (V of 1898)--

---S. 162---Qanun-e-Shahadat (10 of 1984), Arts. 22 & 153---Identification parade---Ratio of dummies---Rule of prudence---Court in a proper case, may dispense with the required ratio of dummies if identification by the witness is not doubtful, and there are other corroborative pieces of evidence available on record.

As a rule of prudence the Court insists upon having the ratio of dummies eight to ten per accused, but there is no statutory provision fixing the number of dummies in the Code of Criminal Procedure. It is not an inflexible rule. The Court in a proper case may dispense with the above required ratio if identification by the witnesses is not doubtful, and there are other corroborative pieces of evidence available on record. The question, whether any identification parade was warranted, depends on the facts of each case.

Lal Pasand v. The State PLD 1981 SC 142; Abdul Sattar and another v. The State 1981 SCMR 678 and Muhammad Yousuf Zai v. The State PLD 1988 Kar. 539 ref.

(q) Criminal Procedure Code (V of 1898)--

---S. 162---Qanun-e-Shahadat Order (10 of 1984), Arts. 22 & 153--Identification parade---Case in which a witness has had only a fleeting glimpse of the accused who happened to be stranger and a witness who had known the accused previously or who had met the accused several times---Distinction.

A distinction is to be made between a case in which witness has had only a fleeting glimpse of the accused who happened to be stranger and a witness who had known the accused previously or who had met the accused several times. In the former case, the Court insists upon having proper identification parade, whereas in the latter case the identification parade can be dispensed with as the witness can identify the accused even in the Court.

Lal Pasand v. The State PLD 1981 SC 142; Abdul Sattar and another v. The State 1981 SCMR 678 and Muhammad Yousuf Zai v. The State PLD 1988 Kar. 539 ref.

(r) Penal Code (XLV of 1860)--

---Ss. 365-A & 109---Kidnapping---Omission to produce Mashirs by prosecution---Effect:-(Witness)].

The omission on the part of the prosecution to produce the Mashirs is a serious lapse on its part. However, one should not overlook the factum that since the offence of kidnapping is committed by organised gangs, the members of the public are scared of appearing as witnesses against them. Keeping in view the above fact and if there is sufficient evidence on record to prove the prosecution case against some of the accused persons, the said lapse on the part of the prosecution cannot vitiate the whole trial.

(s) Appeal (criminal)--

--- Appreciation of evidence by Trial Court has to be given full weight by an Appellate Court---If the Appellate Court is to take a different view in respect of a particular witness or witnesses than what found favour with the Trial Court, it should give cogent reason.--[Evidence--Witness].

Allah Ditta v. The State PLD 1958 SC (Pak.) 290 and Ghulam Sikandar and another v. Mamaraz Khan and others PLD 1985 SC 11 ref.

(t) Penal Code (XLV of 1860)--

---S. 365-A---Kidnapping---Fact that none of the accused persons contacted the parents of the kidnapped child for payment of ransom, is of no consequence as this is not the requirement of S.365-A, P.P.C. to be attracted to a case---Determining factor is as to the object of kidnapping.

A. G. Mangi, Additional Advocate-General, Sindh for Appellant (in both Appeals).

A. A. Siddiqui, Advocate-on-Record for Respondents (in both Appeals).

Date of hearing: 29th March, 1994.