

IN THE HIGH COURT OF SINDH AT KARACHI

Present:

Mr. Justice Mohammad Karim Khan Agha

CRIMINAL JAIL APPEAL NO.77 OF 2019

Appellants:

1. Alta Khan S/o. Muhammad Yar Khan
2. Altaf Hussain S/o. Sher Bahadur
3. Wajid Khan S/o. Sher Bahadur
through Mr. Muhammad Altaf Khan, Advocate
assisted by Mr. Imtiaz Hussain Abbasi, Advocate

Respondent/State:

Through Mr. Muhammad Iqbal Awan, Additional
Prosecutor General, Sindh

Date of hearing: 22.02.2024

Date of announcement: 01.03.2024

JUDGMENT

Mohammad Karim Khan Agha, J.- Appellants Atta Khan S/o. Muhammad Yar Khan, Altaf Hussain S/o. Sher Bahadur and Wajid Khan S/o. Sher Bahadur have preferred this appeal against the impugned judgment dated 28.02.2018 passed by the learned 11th Additional Sessions Judge (South) Karachi in Sessions Case No.2387/2014 arising out of F.I.R. No.320/2014 u/s. 302/393/34 registered at PS Baloch Colony, Karachi; whereby the appellants were convicted under Section 393 and 302 PPC respectively and all the appellants were sentenced to undergo R.I. for seven (07) years for the offence punishable u/s.393 of PPC and awarded Imprisonment of Life as Tazir u/s. 302(b) PPC for committing Qatl-i-Amd. Both the sentences were ordered to run concurrently. However, the benefit of Section 382-B Cr.P.C. was extended to the appellants.

2. The brief facts of the prosecution case as per FIR are that on 29.07.2014 complainant Khalid Mahmood lodged above FIR while stating that he and his brother Arif resided together. That on 29.07.2014 he was available at his home when one security guard came and informed his nephew Rashid Mahmood that during robbery at Summit Bank in Manzoor Colony, unknown offenders had committed murder of his brother Arif. Complainant accordingly rushed to said bank and found dead body of his brother Arif having feet towards east and head towards west was lying on sofa while he was bleeding from nose and he had rope around his neck and there were wounds on his nose and chest. Police were

already available in the bank who had found that offenders had failed to break ATM machine and had only opened its outer cover hence cash had remained safe. The police then prepared inquest report in his presence and of co-mashir Muhammad Yousif and they also recorded his statement u/s.154 of Cr.PC. The police then taking his son and other relatives left for further action. Some unknown offenders had killed his brother Arif on his offering them resistance to robbery hence legal action be taken in the matter.

3. After completion of usual investigation charge was framed against the accused persons to which they pleaded not guilty and claimed to be tried.

4. In order to prove its case, the prosecution examined 10 witnesses who exhibited various documents and other items in support of the prosecution case where after the prosecution closed its side. The statements of the appellants/accused persons were recorded under Section 342 Cr.P.C. wherein they denied the prosecution allegations and claimed themselves to be innocent. However, the appellants neither examined themselves on oath nor produced any witness in their defence.

5. After hearing the learned counsel for the parties and assessment of evidence available on record, learned trial Court vide judgment dated 28.02.2018 convicted and sentenced the appellants as stated above, hence this appeal has been filed.

6. The facts of the case as well as evidence produced before the trial Court find an elaborate mention in the impugned judgment, therefore, the same are not reproduced here so as to avoid duplication and unnecessary repetition.

7. Learned counsel for the appellants has contended that appellants are innocent; that with regard to all the appellants there is no eye witness to the murder and it is a case which revolves around unreliable circumstantial evidence and a retracted judicial confession made by one appellant against the other appellants which is exculpatory in nature and cannot be relied upon especially as it was retracted at trial; with regard to appellant Atta it was only natural for him to be at the crime scene as he was called there after the deceased who was also a security guard at the bank was unresponsive where he found the dead body of the deceased along with tools used to break into the ATM machine; that as he was present at the time it is only natural that he was on the CCTV footage and his finger prints were found on certain items; that the confession which

implicates him in the case cannot be safely relied upon as it is exculpatory in nature, was made by a co-accused and was later retracted. That appellant Altaf was not present at the scene of the crime; that his confession was retracted and cannot be used against him and as such there is no other evidence against him; that with regard to appellant Wajid there is no evidence against him at all except the retracted judicial confession which was made by a co-accused and as such is of no evidentiary value and as such for any or all of the above reasons the appellants be acquitted of the charge by extending them the benefit of the doubt. In support of his contentions he placed reliance on the cases of Asfandiyar and another v. Kamran and another (2016 SCMR 2084), Kaleemullah v. The State and another (2018 YLR 2363), Gohar Khan v. The State and another (2020 YLR 195), Hayatullah v. The State (2018 SCMR 2092), Muhammad Hashim Shah and others v. The State (2023 YLR 1768) and Shah Faisal v. The State (2021 YLR 244).

8. Learned APG Sindh on behalf of the State, who was also looking after the interests of the complainant, after going through the entire evidence of the prosecution witnesses as well as other record of the case has fully supported the impugned judgment. In particular, he has contended that there was no delay in lodging the FIR; that although it is a case of circumstantial evidence when the evidence is read in a holistic manner coupled with the confession of appellant Altaf which corroborates the prosecution case the prosecution has proved its case against all three appellants beyond a reasonable doubt and as such all their appeals should be dismissed. In support of his contentions, he placed reliance on the cases of Ayyas Ahmed v. Allah Wasaya and others (2004 SCMR 1808), Athar v. The State (2020 SCMR 2020), Syed Mohsin Ali and others v. The State (2022 P Cr.LJ 1511), Manjeet Singh v. The State (PLD 2006 Supreme Court 30), Jafar Ali v. The State (1998 SCMR 2669) and The State/ANF v. Muhammad Arshad (2017 SCMR 283).

9. I have heard the learned counsel for the appellants as well as learned APG and have also perused the material available on record and the case law cited at the bar.

10. Based on my reassessment of the evidence of the PW's, especially the medical evidence, recovery of body of the deceased and rope at the crime scene I find that the prosecution has proved beyond a reasonable doubt that Arif (the deceased) was murdered by strangulation on 29.07.2014 between 12 midnight to

191

9:00 am inside Summit bank Manzoor Colony Branch and an attempt was made to rob the bank through breaking open its ATM.

11. The only question left before me therefore is who murdered the deceased by strangulation and attempted to rob the bank through breaking open its ATM at the said time, date and location?

12. After my reassessment of the evidence on record, I find that the prosecution has proved beyond a reasonable doubt the charge against the appellants Atta Khan and Altaf Hussain for which they were convicted for the following reasons;

- (a) That the case is an unseen one which is primarily based on a retracted judicial confession and other circumstantial evidence.
- (b) Initially appellant Atta Khan was arrested by the police on suspicion of committing the crime on 05.08.2014 as he was seen in the CCTV footage at the bank around the time of the crime. Appellant Atta Khan then confessed to the attempted robbery and murder of the deceased before the police. Although his confession before the police is inadmissible in evidence significantly on his pointation his co-accused were arrested on 11.08.2014 namely Altaf Hussain and Wajid both of whom were real brothers and were appellant Atta Khan's cousins and thus all knowing each other and related through blood living in the same area. On 15.08.2014 4 days after his arrest appellant Altaf Hussain made a judicial confession (later retracted) which is reproduced as under for ease of reference.

"JUDICIAL CONFESSION OF APPELLANT ALTAF HUSSAIN U/S
164 CR.P.C.

Question: What you have to say?

Answer: My cousin Atta Khan on 22nd 23rd Ramadan came to our house situated at Sherpao Colony, Nawaz Sharif Chowk for living, he was doing job of Security Guard in bank since two years, he told me that he has to break ATM of the bank and wants to take out money, thereafter, first I shared this with my cousin Shahzad, then told to my brother Wahid and Wahid said this is not good thing, than Atta said nothing to worry I will switch off camera, thereafter, I and Atta went to Quaidabad and purchased chisel and hammer for breaking the lock. Thereafter Atta through mobile phone at 03.00 p.m afternoon fixed moon night for committing wardat.

Than on moon night at about 10.30 p.m. Atta on phone specified the bank that the bank is near furniture market, thereafter, I, Shahzad and Wahid all three together at 11.00 p.m. Atta opened the door of the bank, we went inside, Atta was available there and one person was lying unconscious, Atta disclosed that he has given high power dosage of tranquillizer to him, thereafter, we all together tried to break the ATM machine but we could not break it through

142

chisel, meanwhile Atta stated that he has apprehension from guard, than Atta in our presence tied the rope around neck of that person and committed his murder, at that time Shahzad caught hold legs of deceased, at time of dying the person was moving, than at about 01.00 am. We returned and Atta returned later on."

It is settled by now that even a retracted judicial confession can be relied upon if it is found to be voluntary and is truthful and fits in with the prosecution case. In this respect reliance is placed on the case of Muhammad Amin V. The State (PLD 2006 Supreme Court 219). In the instant case the appellant has claimed that his confession was not voluntary and was a result of him being maltreated by the police. No mention of this was made in the appellant's Section 342 Cr.PC statement and no sign of maltreatment was seen on him at the time of making his confession. He did not give evidence on oath to support his claim. He was not in an injured condition at the time of the confession. The confession fully fits in with the prosecution case. Namely that an attempt was made to break open an ATM inside a bank in order to rob it and the bank guard was killed during such attempted robbery. As such I find that the confession was made voluntarily with the object to tell the truth and as such I believe the confession and place reliance on it although I am put to some caution as it is partly exculpatory in nature in that the appellant Altaf takes the blame for the attempted robbery with the other co-accused but places the blame of the murder of the deceased on appellant Atta Kahn alone.

I also find that the magistrate committed no material procedural irregularities in recording the judicial confession which I have placed reliance on which can be seen from his cross examination.

Now we need to consider what other circumstantial evidence there is to connect the three appellants to the offences.

With regard to circumstantial evidence leading to a conviction in a capital case it was held as under in Fayyaz Ahmed V State (2017 SCMR 2026);

"To believe or rely on circumstantial evidence, the well settled and deeply entrenched principle is, that it is imperative for the Prosecution to provide all links in chain an unbroken one, where one end of the same touches the dead body and the other the neck of the accused. The present case is of such a nature where many links are missing in the chain. To carry conviction on a capital charge it is essential that courts have to deeply scrutinize the circumstantial evidence because fabricating of such evidence is not uncommon as we have noticed in some cases thus, very minute and narrow examination of the same is necessary to secure the ends of justice and that the Prosecution has to establish the case beyond all reasonable doubts, resting on circumstantial evidence. "Reasonable Doubt" does not mean any doubt but it must be accompanied by such reasons, sufficient to persuade a judicial mind for placing reliance on it. If it is short of such standard, it is better to discard the same so that an innocent person might not be sent to gallows. To draw an inference of guilt from such evidence, the Court has to apply its judicial mind with deep thought and with extra care and caution

143

and whenever there are one or some indications, showing the design of the Prosecution of manufacturing and preparation of a case, the Courts have to show reluctance to believe it unless it is judicially satisfied about the guilt of accused person and the required chain is made out without missing link, otherwise at random reliance on such evidence would result in failure of justice".(bold added)

- (c) Whether or not the appellant Atta Khan has been correctly identified in the CCTV as being present at the time of the incident I do not find to be of huge significance as most of the witnesses in their evidence have placed the appellant at the crime scene who had no reason to falsely implicate the appellant and whose evidence can be safely relied upon. In any event appellant Atta Khan was also a security guard at the bank who was due to come on duty in the morning so his presence at the bank when the body was discovered was not particularly unusual. Likewise the finger prints of the appellant being found at the scene of the crime and his CDR data indicating that he was in touch with the deceased and co-accused during the night as the deceased was a security guard and the other co-accused were his relatives might not appear to be unusual when taken individually however when taken all together along with the judicial confession of appellant Altaf Hussain I find that they provide sufficient corroboration to prove beyond a reasonable doubt that the appellant Atta Khan attempted to rob the bank and murdered the deceased for the obvious reason that the deceased was a co-worker and would have been able to identify him as attempting to rob the bank especially when read with the other evidence discussed below.
- (d) With regard to appellant Altaf Hussain admittedly he is not shown at the bank on the CCTV footage at the time of the attempted robbery and murder however I have already believed his judicial confession which is corroborated by his finger print being found at the crime scene especially as he was not a security guard, did not work for the bank and did not hold a bank account at the bank and as such the only reason why his finger print could have been at the bank was on account of his presence during the attempted robbery of the bank and murder of the deceased and as such I find that his confession, which I have already believed, is corroborated by his finger print being found at the crime scene and therefore I find that the prosecution has proved beyond a reasonable doubt that the appellant Altaf Hussain attempted to rob the bank and murdered the deceased especially when read with the other evidence discussed below.

Other evidence against appellants Atta Khan and Altaf Hussain

- (e) That the medical evidence and post mortem report fully support the prosecution evidence and the confession of appellant Altaf Hussain

that the deceased died from strangulation and the rope around his neck was recovered by the police at the crime scene around his neck.

- (f) No non police witnesses including the bank officials and other security guards had no ill will or enmity against the appellants and as such had no reason to implicate the appellants in a false case which in fact they did not do. They simply gave their evidence in a straight forward manner and were not damaged during cross examination. The only reason why suspicion fell on the appellant Atta Khan was because of his potential identification in the CCTV and it was he himself who fingered his co-accused. Hence I believe the evidence of such witnesses (non police).
- (g) That there was no ill will or enmity between the police and the appellants and as such they had no reason to falsely implicate the appellants in this case, for instance, by falsifying CDR records, or finger prints or CCTV footage. Under these circumstances it is settled by now that the evidence of police witnesses is as good as any other witness. In this respect reliance is placed on the case of *Mustaq Ahmed V The State* (2020 SCMR 474). Thus, I believe the evidence of the police witnesses who were not dented during cross examination whose evidence of arrest and recovery is supported by the mashir's evidence.
- (h) The motive for the murder was that the deceased Arif being a security guard would have been able to recognize/identify fellow security guard appellant Atta Khan who he knew when he woke up as being the person who tried to rob the bank and hence he needed to be silenced by appellant Atta Khan.
- (i) That all the PW's are consistent in their evidence and even if there are some contradictions in their evidence I consider these contradictions as minor in nature and not material and certainly not of such materiality so as to effect the prosecution case and the conviction of the appellants. In this respect reliance is placed on the cases of *Zakir Khan V State* (1995 SCMR 1793) and *Khadim Hussain v. The State* (PLD 2010 Supreme Court 669). The evidence of the PW's provides a believable corroborated unbroken chain of events from the discovery of the dead body at the bank along with the damaged ATM along with appellant Atta Khan's presence at the scene to appellant Atta Khan's arrest on suspicion of robbery and murder to appellant Atta Khan pointing out the co-accused who were arrested on his pointation to co-accused Altaf Hussain confessing to the crime before a judicial magistrate to appellant Atta Khan's and Altaf Hussain's finger prints being found at the crime scene along with their CDR record linking them to the deceased and the co-accused on the night of the robbery and murder.
- (j) Undoubtedly it is for the prosecution to prove its case against the accused beyond a reasonable doubt but I have also considered the defence case to see if it at all can caste doubt on or dent the prosecution case. The defence case is simply one of innocence however neither appellant gave evidence under oath or called any DW in support of their defence case. Thus, in the face of appellant Altaf Hussain's judicial confession and other

circumstantial/supportive/corroborative evidence I disbelieve the defence case which has not at all dented the prosecution case.

13. Based on the above discussion I find that the prosecution has proved its case against appellant Atta Khan and Altaf Hussain beyond a reasonable doubt and as such their convictions and sentences are maintained and their appeals are dismissed.

14. With regard to appellant Wajid the only evidence against him is the judicial confession of his co-accused Altaf Hussain which is not corroborated by any other single piece of evidence. He is not shown on the CCTV at the bank. His finger print was not found at the bank and as such by extending him the benefit of the doubt appellant Wajid is acquitted of the charge.

15. Before parting with this judgment I would like to observe that I was troubled in the manner in which the Section 342 Cr.PC statements of the accused were recorded by the trial court. Namely, virtually the whole of the evidence was put to the accused in one block paragraph which was copied and pasted in respect of each accused which I reproduce below in order to clarify precisely what I mean.

"STATEMENT OF ACCUSED ATTA KHAN UNDER SECTION 342 CR.P.C.

Question 1: You have heard the evidence of prosecution witnesses Khalid Mehmood, Muhammad Saleem Mirza, Badardin, Jehangir Javed, Shafiq ur Rehman, Sadaruddin, Ghulam Raza, Imtiaz Hussain, Dr. Rohina Hassan, ASI Sagheer Ahmed wherein it is alleged that in the night 29th day of July, 2014 security guard of Summit Bank in Manzoor Colony, Karachi namely Muhammad Arif having been strangled was found lying dead in the room of cabin of Bank Manager while ATM machine was found having some damage and tools of hammer, 02 chisel, plies, plas and screw driver were lying near it. Atta Khan was arrested vide memo at Ex-10-A, mobile phone data of deceased Muhammad Arif and accused Atta Khan was seized vide Ex-10-B. Accused Altaf Hussain and Wajid Khan were arrested vide memo of arrest 10-B, mobile phone data and call record of their mobile phone was seized vide memo at Ex-10-F, CCTV footage of the offence was seized vide memo at Ex-10-I, finger-prints of Atta Khan and Altaf Hussain matched with samples taken from it vide report of Forensic Division at Ex-13-N, death of security guard Muhammad Arif through strangulation is confirmed

146

by his postmortem report at Ex-13-Q and cause of death certificate at Ex-13-R, 13-S. During investigation Atta Khan was identified from CCTV footages for the relevant time of the incident and on arrest you accused Atta Khan, Altaf and Wajid admitted your guilt in police station in presence of private witnesses Khalid Mehmood and Badruddin while stating that you, co-accused and one Shahzad had committed offence and during attempted robbery Atta Khan who was then serving as security guard in the same bank for the day time had killed security guard Muhammad Arif during the offence. Investigation officer also collected call data of mobile phones in your use and of co-accused which established your inter se communication during relevant time before and after incident. Accused Altaf further recorded his confessional statement at Ex-11/B wherein he has deposed that you and co-accused had committed the offence at the instance of Atta Khan. During investigation fingerprints taken from wardat were also matched with the finger prints of Atta Khan and Altaf. What have you to say about incriminating evidence against you?

Answer: Sir, this is false. Police have falsely involved me in this case at the instigation of bank officials of private security company. Judicial confession of Altaf was obtained by police through coercion.

16. Section 342 Cr.PC provides as under;

"342. Power to examine the accused. (1) For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the Court may, at any stage of any inquiry or trial without previously warning the accused, put such questions to him as the Court considers necessary, and shall, for the purpose aforesaid, question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence.

*(2) The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them; but the Court***** may draw such inference from such refusal or answer as it thinks just.*

(3) The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed.

(4) Except as provided by sub-section (2) of section 340, no oath shall be administered to the accused.

17. The object of this section is to give the accused, even if he chooses not to give evidence under oath, the opportunity to explain every single piece of evidence which has come on record against him and enable the court to consider his explanation in juxtaposition with the prosecution evidence. The importance of this section is that it is well settled that even if one piece of evidence is not put to an accused during his S.342 Cr.PC statement that piece of evidence cannot be used to convict him.

18. My initial feeling was that the appeal should be remanded to the trial court to record the S.342 Cr.PC statements of each of the accused a fresh by ensuring that each and every piece of evidence was put to them individually to explain but then I realized that this would probably be giving a premium to the prosecution to fill up this potential lacuna in its case. I also took into account that each of the accused had already been in jail for about 10 years and this would only prolong their agony.

19. I then considered that if the S.342 statements had been recorded unlawfully whether the appellants should all be acquitted since in effect this would mean that no piece of evidence was put to the appellants and as such they could not be convicted.

20. Finally I came to the conclusion, keeping in view the above considerations, that there was no set legal format in which the evidence was to be put to the accused in the Section 342 Cr.PC statement i.e whether en bloc as in this case or by careful simple independent separate questions in respect of each piece of evidence. As even in this case the accused could have broken up the long en block question and given an individual answer to each part of it or given one long answer answering the whole en bloc question.

21. The main issue appeared to me in the end was whether or not each and every piece of evidence which was used to convict the accused had been put to him in even the en bloc format as reproduced above and I found that it had and as such there was no clear violation of S.342 Cr.PC as per letter of the law and as such I found the manner in which the S.342 Cr.PC statement was recorded in this appeal to be permissible under the law.

22. I would however reiterate that in my humble opinion in order to comply

with the object, purpose and spirit of Section 342 Cr.PC and to ensure that no prejudice is caused to the accused in failing to comprehend or miss a part of the bloc question the preferred approach is to put each piece of evidence to the appellant by short, simple and separate questions which he can easily understand and reply to.

In summary.

- (1) The appeals of appellants Atta Khan and Altaf Hussain are dismissed
- (2) The appeal of appellant Wajid is allowed and he shall be released unless he is wanted in any other custody case.

23. The Criminal Jail Appeal is disposed of in the above terms.