

IN THE HIGH COURT OF SINDH, KARACHI

Present:

*Mr. Justice Mohammad Karim Khan Agha
Mr. Justice Zulfiqar Ali Sangi,*

**CRIMINAL JAIL APPEAL NO.707 OF 2021.
CONF. CASE NO.18 OF 2021.**

Appellant: Ghulam Rasool S/o. Ghulam
Hussain through Mr. Iftikhar
Ahmed Shah, Advocate.

Respondent: The State through Mr. Muhammad
Iqbal Awan, Additional Prosecutor
General Sindh.

Date of hearing: 15.09.2022.

Date of Announcement 20.09.2022.

JUDGMENT

MOHAMMAD KARIM KHAN AGHA, J:- The appellant Ghulam Rasool S/o. Ghulam Hussain has preferred the instant appeal against the judgment dated 30.11.2021 passed by Learned VIth Additional District & Sessions Judge, Karachi West in Special Case No.103 of 2019 arising out of Crime No.450 of 2018 U/s. 302 PPC registered at P.S. Docks Karachi whereby the appellant was convicted and sentenced to death subject to confirmation by this court.

2. The brief facts of the case are that on 03.11.2018 at about 0255 hours, complainant namely Qari Hilal Ahmed son of Muhammad Chan lodged FIR No.450/2018, u/s. 302 PPC at police station Docks wherein he stated that he is residing along with his family at House No.721, Siraji Chowk, Muhammaadi Colony, Karachi. His sister namely Mumtaz Begum aged about 28 years, who was divorcee and from that wedlock had three children about eight months ago got love marriage with Ghulam Rasool son of Ghulam Hussain and they started to reside in a rented house where they mostly quarreled. Six days ago his sister was angry due to such quarreling and came to his house. Three days before, his brother-in-law Ghulam Rasool came at his house and asked his wife to come home and she went along with him. On 02.11.2018, the complainant after offering Asar prayer, came out from masjid when his nephew (bhanja) Rafiq son,

of Mumtaz came to him and told him that people have gathered outside the house where his mother is residing so he immediately reached there where he came to know that three days before one lady who came at rented house had been strangled by her husband. The complainant went inside and saw that his sister's dead body was lying on bed, whose both hands and feet were tied up and rope was available on her neck. The complainant enquired from the owner of the house who informed him that today at the time of Jumma prayer, a quarrel was ongoing between the husband and wife and the sound of music was coming and after that at about 0400 hours, there were no any sound coming and Ghulam Rasool locked the house from the outside and went away. The son-in-law of the owner namely Noor us Salam stated to the complainant that the women of his house, saw from the window that Mumtaz Begum's feet have been tied up, on which mohalla people gathered and broke the lock and found the complainant's dead sister which information was given to 15 emergency. Meantime police reached there and conducted proceedings. Thereafter, the complainant brought his sister's dead body through Edhi Ambulance to Civil Hospital where due to non-availability of lady MLO, he has brought the same to Jinnah Hospital, hence the FIR was lodged.

3. After completion of investigation I.O. submitted charge sheet against the accused person to which he pleaded not guilty and claimed trial.

4. The prosecution in order to prove its case examined 11 witnesses and exhibited various documents and other items. The statement of accused was recorded under Section 342 Cr.P.C in which he denied all the allegations leveled against him. After appreciating the evidence on record the trial court convicted the appellant and sentenced him as stated earlier in this judgment hence, the appellant has filed this appeal against his conviction.

5. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the impugned judgment dated 30.11.2021 passed by the trial court and, therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

6. Learned counsel for the appellant has contended that the appellant is innocent and has been falsely implicated in this case; that there was no eye witness to the murder; that the last seen evidence is not sufficient to convict the appellant without corroboration from an unimpeachable source of which there is none; that the confession of the appellant is not actually a confession at all as he

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does not confess to the murder of his wife and thus for any or all of the above reasons the appellant should be acquitted of the charge by being extended the benefit of the doubt. He however contended in the alternative that if we were to find the appellant guilty of the charge it was a case which warranted life imprisonment as opposed to the death sentence. In support of his contentions he placed reliance on the cases of **Muhammad Abid v The State** (PLD 2018 SC 813), **Muhammad Pervaiz v The State** (PLD 2019 SC 592), **Nazir Ahmad v The State** (2018 SCMR 787), **Nasrullah alias NASRO v The State** (2017 SCMR 724), **Raza and another v The State** (PLD 2020 SC 523) and **Muhammad Abbas v The State** (PLD 2020 SC 620).

7. On the other hand learned Additional Prosecutor General Sindh appearing on behalf of the State has fully supported the impugned judgment. In particular he has placed reliance on the last seen evidence which was corroborated by the judicial confession of the accused and the medical evidence and has preyed for the dismissal of the appeal and the confirmation reference to be answered in the affirmative. In support of his contentions he has placed reliance on the cases **The State v. Manzoor Ahmed and others** (PLD 1966 Supreme Court 664), **Fayyaz Ahmad v. The State** (2017 SCMR 2026), **Saeed Ahmed v. The State** (2015 SCMR 710), **Muhammad Amin v. The State** (PLD 2006 Supreme Court 219), **Khan Muhammad and others v. The State** (1999 SCMR 1818), **Muhammad Ishaq v. The State** (PSC (Crl.) 1) and **Shamshad Ali v. The State** (2011 SCMR 1394).

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

9. At the outset based on our reassessment of the prosecution oral evidence and medical evidence including post mortem report we find that the prosecution has proved beyond a reasonable doubt that on 02.11.2018 at 1630 hours Mst Mumtaz Begum (the deceased) was murdered through strangulation inside a house at Saddam Chowk Muhammadi Colony Karachi.

10. The only question left before us therefore is whether it was the appellant who murdered the deceased at the said time, date and location?

11. After our reassessment of the evidence we find that the prosecution has

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 and uphold his conviction;

(a) Although the FIR was registered with promptitude and the appellant was named in the FIR as the person who murdered the deceased this allegation has been made against the appellant on the basis of **hearsay evidence** as there was no eye witness to the murder and as such the case is based on **circumstantial evidence** which the court must view with great care and caution. In this respect reliance is placed on the case of **Azeem Khan V Mujahid Khan** (2016 SCMR 274) which held as under;

"In cases of circumstantial evidence, the Courts are to take extraordinary care and caution before relying on the same. Circumstantial evidence, even if supported by defective or inadequate evidence, cannot be made basis for conviction on a capital charge. More particularly, when there are indications of design in the preparation of a case or introducing any piece of fabricated evidence, the Court should always be mindful to take extraordinary precautions, so that the possibility of it being deliberately misled into false inference and patently wrong conclusion is to be ruled out, therefore hard and fast rules should be applied for carefully and narrowly examining circumstantial evidence in such cases because chances of fabricating such evidence are always there. To justify the inference of guilt of an accused person, the circumstantial evidence must be of a quality to be incompatible with the innocence of the accused. If such circumstantial evidence is not of that standard and quality, it would be highly dangerous to rely upon the same by awarding capital punishment. The better and safe course would be not to rely upon it in securing the ends of justice."

(i) Likewise in the case of **Fayyaz Ahmed V State** (2017 SCMR 2026) the great care and caution in which circumstantial evidence needed to be scrutinized was emphasized especially when dealing with a capital case in the following terms;

"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 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".

It may also be kept in mind that sometimes the investigating agency collects circumstantial evidence seems apparently believable however, if the strict standards of scrutiny are applied there would appear many cracks and doubts in the same which are always inherent therein and in that case Courts have to discard and disbelieve the same." (bold added)

(b) Turning to the circumstantial evidence in terms of last seen evidence. The test for last seen evidence has been set out in the following cases in the following terms;

(i) In Fayyaz's case (Supra) at P.2030 at Para 7 it was held as under regarding last seen evidence;

"The last seen evidence is one of such categories of evidence. In this category of cases some fundamental principles must be followed and the Prosecution is under legal obligation to fulfill the same, some of which may be cited below:-

- (i) There must be cogent reasons that the deceased in normal and ordinary course was supposed to accompany the accused and those reasons must be palpable and prima facie furnished by the Prosecution.
- (ii) The proximity of the crime scene plays a vital role because if within a short distance the deceased is done to death then, ordinarily the inference would be that he did not part ways or separated from the accused and onus in this regard would shift to the accused to furnish those circumstances under which, the deceased left him and parted ways in the course of transit.
- (iii) The timing of that the deceased was last seen with the accused and subsequently his murder, must be reasonably close to each other to exclude any possibility of the deceased getting away from the accused or the accused getting away from him.
- (iv) There must be some reasons and objects on account of which the deceased accompanied the accused for accomplishment of the same towards a particular destination, otherwise giving company by the deceased to the accused would become a question mark.

- (v) Additionally there must be some motive on the part of the accused to kill the deceased otherwise the Prosecution has to furnish evidence that it was during the transit that something happened abnormal or unpleasant which motivated the accused in killing the deceased.
- (vi) The quick reporting of the matter without any undue delay is essential, otherwise the prosecution story would become doubtful for the reason that the story of last seen was tailored or designed falsely, involving accused person.

Beside the above, circumstantial evidence of last seen must be corroborated by independent evidence, coming from unimpeachable source because uncorroborated last seen evidence is a weak type of evidence in cases involving capital punishment.

- (vii) The recovery of the crime weapon from the accused and the opinion of the expert must be carried out in a transparent and fair manner to exclude all possible doubts, which may arise if it is not done in a proper and fair manner.
- (viii) The Court has also to seriously consider that whether the deceased was having any contributory role in the cause of his death inviting the trouble, if it was not a pre-planned and calculated murder."(Bold added)

(ii) In the later case of **Muhammed Abid V State** (PLD 2018 SC 813) which delved further into the doctrine of "last seen together" evidence it was held as under at P.817 Para 6:

"The foundation of the "last seen together" theory is based on principles of probability and cause and connection and requires 1. cogent reasons that the deceased in normal and ordinary course was supposed to accompany the accused. 2. proximity of the crime scene. 3. small time gap between the sighting and crime. 4. no possibility of third person interference 5. motive 6. time of death of victim. The circumstance of last seen together does not by itself necessarily lead to the inference that it was the accused who committed the crime. **There must be something more establishing connectivity between the accused and the crime**" (bold added).

(iii) **Returning to the case in hand.** According to the evidence of PW 6 Manun Nihar on 01.11.2018 her husband PW 7 Ali Hussain handed over one room of the ground floor of their house on rent to the appellant and the deceased and thus was able to recognize him as she had seen him on and off for two days as he was living in a room in her house with his wife and as such no question of mistaken identity arises. The next day she saw the accused cleaning clothes and then heard him exchanging hot words with his wife whilst loud music was playing. She then saw the accused lock the room and leave the house. She then went down to the room where

the window was open and saw the feet of the deceased tied with the bed. Meanwhile the complainant arrived and broke the lock of the door where they found the hands and feet of the deceased were tied with dupata and narra and her neck was tied with rope and that she was dead. Her husband PW 7 Ali Hussain in his evidence confirms the letting of the room in his house to the accused and the deceased on 01.11.2018 and that he saw the accused in the room on 02.11.2018 at 11am eating breakfast which corroborates his wife's evidence of the accused and the deceased both being at home on the day of the incident and for the same reasons as his wife this was not a case of mistaken identity. Both of these witnesses were independent witnesses and had no reason to falsely implicate the accused and gave their evidence in a straightforward manner and were not dented during cross examination and we find their evidence to be reliable, trust worthy and confidence inspiring and we believe the same.

(iv) We find that in all respects the law in respect of last seen evidence has been met in respect of the accused especially as PW 6 Manun Nihar went down to the room where the argument was coming from between the accused and the deceased immediately after the accused left and saw the body of the deceased and thus since only the accused was living in the house with his deceased wife no one else had the opportunity to enter the house after the accused left and the motive of the murder is set out in the appellants own judicial confession which we shall come to later. As mentioned above however last seen evidence is the weakest type of evidence and needs to be supported by some corroborative evidence from an unimpeachable source to lead to a conviction in a capital case. So does the judicial confession of the appellant amount to such corroboration?

(c) The Judicial Confession of the Appellant.

(i) It is well settled by now that a retracted confession before a magistrate can be the basis of convicting in a capital case however it must be; (reliance is placed on **Ch. Muhammad V Yaqoob V The State** (1992 SCMR 1983); **Muhammad Amin V The State** (PLD 2006 SC 219); **Azeem Khan V Mujahid Khan** (2016 SCMR 274); **Bahadur V State** (PLD 1996 SC 336) and **Manjeet Singh V State** (PLD 2006 SC 30))

(a) Voluntary i.e. without threat or inducement and

(b) Its object must be to state the truth; assistance for which can be ascertained from (i) whether the confession appears truthful within the context of the prosecution case and (ii) whether there is any other evidence on record which tends to corroborate the truthfulness of the confession and

(c) Only minor irregularities regarding the rules concerning the recording of judicial confessions can be permitted as determined on a case to case basis the main criteria being that such irregularities have not adversely effected the voluntariness or truthfulness of the confession.

(ii) Notably in this case the appellant's judicial confession was not retracted. The appellant simply states in his S.342 Cr.PC statement that he gave his statement on the saying of the police. It appears that as he had confessed before the police when asked by the police the appellant appeared before the magistrate and recorded his confession. It find that all the procedural safeguards were followed by the judicial magistrate as required under the law at the time the appellant was produced before him for recording his confession and in our view his confession could not have been dictated to him by the police because it is too long and detailed and covers some aspects which the police did not even know about. His confession has been made voluntarily with the object of telling the truth and is in line with the prosecution case especially as the appellants matrimonial difficulties/disputes have been corroborated by other evidence and his confession is in line with the prosecution case and thus we rely on the appellant's judicial confession which we find corroborates the last scene evidence. The slight delay in recording the judicial confession we find of no relevance based on the particular facts and circumstances of this case. In this respect reliance is placed on the case of **Khan Muhammed (Supra)**

(iii) For ease of reference the judicial confession of the appellant u/s 164 Cr.PC is set out below;

"CONFESSIONAL STATEMENT OF ACCUSED GHULAM RASOOL S/O GHULAM HUSSAIN"

I work as a fisherman in the fishery. I was married to the deceased Mumtaz in February of this year and this was my second marriage and this was also her second marriage. The deceased Mumtaz was following me for about a year before the marriage and finally she managed to persuade me for marriage. She even threatened me to marry her else she will implicate me in a case of adultery and once a lawyer came to my house to threaten me. Then I was compelled to marry her and for the first two months my marriage with Mumtaz went well, but she also started going to her job every day and I also went to work but she should have come back from by 6/7 hours however she would come either at 12 or 1 o'clock. When I asked the reason for coming late every day then sometimes she said she was at her aunt's and sometimes at her sister's. Then the neighbors also started to notice her coming late every day and told me that your wife arrives with a man by motorcycle late at night. When I asked her the same question, she replied that he is an employee of the company. Then when she was constantly seen with the same motorcycle guy, finally I asked her, "Tell me the truth, what is the reason?" she replied, "You are doubting for no reason." Then I said, "Whatever it is." You will stay at home then she said I get bored that's why I go out. On which I slapped her and went out. When I returned in evening, her brothers beat me up, which worsened my condition. Then on the 1st November I shifted to machar colony along with lady deceased Mumtaz but on Friday, the 2nd of November, at two o'clock I saw a Pathan like person leave my house and then when I entered my house then I saw my wife listening to loud music and also saw two cups of tea lying there. Then when I asked her who had come, she replied that my friend had come. I said to her, to act up. Don't you feel ashamed of listening loud music on Fridays and if he came, you should have made me meet him, because whoever he is, I am your husband." so an argument ensued at which she misbehaved. Then I slapped her in anger, in response she grabbed my collar, in response I kicked her left arm, which forcefully hit her neck with the iron bed and then

she started making noises in pain. Then I said that if she has not done anything with this person, then get herself checked because I am her husband, but she was not showing. Being angry with her, I tied her right and left hands to the bed because I suspected her of wrongdoings. Then I took off her shalwar and saw a man's sperm which was stuck around her shalwar and thighs then she was not getting her thighs checked so I tied her legs too with the drawstring. Then she was resisting so I tied a rope around her neck and tightened so that she may stopped resisting and then I locked the door and left to bring her family members so that they could come and see their sister's doing. Then when I reached the round about, I thought that if I called her family so seeing her in this condition, they might start beating me. So I thought I would go back and show her family her shalwar to show her doings. But when I came back, I saw that there was a commotion and then I thought that my wife got herself released and is raising hue and cry so I ran away from there then I spent the night on the road but the next day I was caught by the Docks police and I came to know that Mumtaz had died. I accept my act. I really did not know that Mumtaz would be strangled to death. Please, have mercy upon me.(bold added)

Sd/-(In English)"

(d) the confession and last scene evidence is further supported/corroborated by the medical evidence and the recovery of the narra, dupetta and rope at the scene which were sent for DNA testing.

12. With regard to sentencing it appears that there was no premeditation in the murder and since the case is based on circumstantial evidence we would veer on the side of caution and reduce the death sentence imposed on the appellant to Life Imprisonment and to pay compensation of RS100,000 to the legal heirs of the deceased under S.544-A Cr.PC.The benefit of S.382(B) is also extended to the appellant.

13. For the reasons discussed above the appeal is dismissed but the sentence is reduced from the death penalty to life imprisonment with the result that the confirmation reference is answered in the negative.

14. The appeal and confirmation reference stand disposed of in the above terms.