

IN THE HIGH COURT OF SINDH, KARACHI

Present:

Mr. Justice Mohammad Karim Khan Agha

Criminal Appeal No.651 of 2019

Appellants:	i. Muhammad Faizan ii. Muhammad Noman Both sons of Shakeel Ahmed through Mr. Iftikhar Ahmed Shah, Advocate
Respondent:	The State through Mr. Muhammad Iqbal Awan, Additional Prosecutor General Sindh.
Date of Hearing:	12.03.2024
Date of Judgment:	19.03.2024

JUDGMENT

MOHAMMAD KARIM KHAN AGHA, J:- Accused Muhammad Faizan and Muhammad Noman were tried before the Xth Addl. Sessions Judge, Karachi West in Special Case No.2108/2017 under FIR No.216/2017 u/s 302/34 PPC at PS Sher Shah, Karachi and vide judgment dated 23.09.2019 the accused were convicted and sentenced to R.L. for life. The accused were also fined Rs.200,000/- each to be paid to the legal heirs of deceased as compensation as provided under section 545 Cr.P.C. U/s subsection (a) and (b). In case of failure to pay the fine, the accused were further to undergo simple imprisonment for six months in addition. The benefit of section 382-B Cr.P.C. was also extended to the appellants.

2. The brief facts of the prosecution case as per FIR are that on 14.10.2017 at about 0126 hours, at street No.75, Jinnah Road, Karachi the accused persons namely Muhammad Faizan, Rizwan and Noman with the help of their friend namely Zohaib committed the murder of their real father Shakeel Ahmed by causing churi injuries due to reason that Shakeel Ahmed was involved in immoral/sexual harassment of their sisters, hence, the instant FIR was lodged.

3. After usual investigation, the case was challaned and the accused persons were sent up for trial where they pleaded not guilty and claimed to be tried.

4. The prosecution in order to prove its case examined 06 witnesses and exhibited various documents and other items. The statement of accused was recorded under Section 342 Cr.P.C in which they denied the allegations leveled against them and stated that they are innocent and have falsely been implicated in this case by the police. However, the accused did not give evidence on oath nor produce any DWs in support of their defence.

5. After hearing the parties and appreciating the evidence on record, the trial court convicted the appellants and sentenced them as set out earlier in this judgment; hence, the appellants have filed this appeal against their conviction.

6. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the impugned judgment dated 23.09.2019 passed by the trial court and, therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

7. Learned counsel for the appellants has contended that appellants are innocent; that there is no eye witness to the murder; that the recovery of the churri, blood stained earth and blanket was not put to the appellants during their S.342 Cr.PC statements and as such cannot be used to convict them; that their confessions before the judicial magistrate were not voluntary and as such could not be relied upon and as such the appellants should be acquitted of the charge by being extended the benefit of the doubt. In the alternative, he contended that it was either a case of self defence which justified the acquittal of the appellants of an offence under S.302 © PPC not S.302 (b) PPC. In support of his contentions he placed reliance on the cases of **Javed Iqbal v the State** (2023 SCMR 139), **Malik Waris Khan v Ishtiaq alias NAGA** (PLD 1986 SC 353), **Muhammad Pervaiz v The State** (PLD 2019 SC 592), **Raza and another v The State** (2020 SCMR 1185) and **Alamgir v Gul Zaman and others** (2019 SCMR 1415).

8. Learned APC Sindh on behalf of the State 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 there is no eye witness the appellants retracted judicial confessions can be safely relied as they were made voluntarily with the object to tell the truth and fit in with the prosecution case; that the appellants were arrested on the spot in their own house; that the murder weapon was recovered from the appellant Faizan on the spot at the time of his

arrest; that the medical evidence fully supported the prosecution case; that it was not a case of self defence and it was not a case of S.302 (c) PPC but one of 302 (b) PPC and the appeal be dismissed. In support of his contentions, he placed reliance on the cases of *Arshad Mehmood vs. The State* (2005 SCMR 1524), *Saeed Ahmed vs. The State* (2015 SCMR 710), *Jafar Ali vs. The State*, (1998 SCMR 2669), *Muhammad Amin vs. The State* (PLD 2006 Supreme Court 219) and *Akhtar vs. The State* (2020 SCMR 2020).

9. I have heard the learned counsel for the appellants as well as learned APC 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 and especially the medical evidence I find that the prosecution has proved beyond a reasonable doubt that Shakeel Ahmed (the deceased) was murdered by churri on 14.10.2017 at 0126hrs at Street No.75 Jinnah Road, Shershah, Karachi.

11. The only question left before me therefore is who murdered the deceased by churri at the said time, date and location?

12. After my reassessment of the evidence on record, I find that the prosecution has **not** proved beyond a reasonable doubt the charge against the appellants u/s 302 (b) PPC but has proved beyond a reasonable doubt the charge against the appellants u/s 302 (c) PPC for which I now convict them both for the following reasons;

- (a) That the FIR was lodged with promptitude by the State based on the particular facts and circumstances of the case where after responding to the crime the police found the dead body of the deceased at the house of the accused which the police then sent to hospital for post mortem and thereafter on returning to the PS lodged the FIR.
- (b) Both the appellants are named along with their co-accused in the promptly lodged FIR as being at the house where the body of the deceased was recovered along with the churri (murder weapon) and were arrested on the spot.
- (c) Admittedly, the case is an unseen one which is primarily based on retracted judicial confessions and other circumstantial evidence.
- (d) The appellants were arrested on 14.10.2017 and made judicial confessions respectively on 19.10.2017 which are set out below for ease of reference;

Section 164 Cr.P.C confession before Magistrate of Muhammad Faizan.

"Question: What have you to say?

My father Shakeel Ahmed (slain) had raped my sister Asma, who now resides in Boraywala, 16 years ago and for this act my mother had got him jailed. Then he got released from the jail after four years and in the meanwhile my mother had married off my sister but my father due to the fact that he raped her kept saying that Asma belongs to me and shall remain mine and 12 years ago also got my brother-in-law killed. Then when my younger sister Uzma grew up, so my father also raped her and when my mother once again got an FIR registered against him so he escaped away and when he turned up after five years. Now since our youngest sister was growing up whose name is Shumaila and she is 12 years old, she attracted my father's attention. On 14-10-17 an incident occurred at 1230 hours when my sister Shumaila called from the upper floor that father Shakeel is trying to rape her. After listening to her calls, my younger brother Noman called me and when we arrived at the spot so father Shakeel was about to tear up Shumaila's clothes. He attacked on me with a knife due to which my right hand got seriously injured. He also punched me in the eye but then I, in order to save myself and Noman, snatched the knife from him and when he was about to hit us by picking up some other thing, I and Noman killed him and when he once again tried to get up to kill us while being injured, Noman stabbed him in the neck due to which he eventually died and his dead body fell into the street. Then ambulance came and took away the dead body. The ambulance had been called by Zohaib and Rizwan. Rizwan is our brother and Zohaib is the contractor. Both have been forcibly implicated in this crime by the police although I and Noman have carried but this murder in the name of honor because our father had a bad character and if we had not stopped him that day, he not only would have raped Shumaila but also would have stabbed us to death. Therefore, have mercy on us." (bold added)

Section 164 Cr.P.C confession before Magistrate of Muhammad Nauman.

"Question: What have you to say?

Our father Shakeel had been a bad person since the beginning. In 2001 he raped our sister Asma. After that my mother got him sent to jail and after some years, when he got released from the jail so he killed my brother-in-law (Asma's husband) and said she only belonged to him and then he remained at large for several years. Then he, having resurfaced after seven/eight years, raped another sister Uzma. Then my mother got him confined in our village Akora Khattak. Recently he claimed that he has mended his ways and then he started living with us but he started teasing our youngest sister Shumaila regarding which she had complained us but on the night of 14-10-17 when I went to fetch water from home so my sister Shumaila sought my attention and told me that father Shakeel is trying to rape her and then I immediately called brother Faizan then stopped and controlled father Shakeel but since he was holding a knife, he

attacked Faizan with it due to which his right hand started bleeding and also punched him in the eye. After that in order to save his life, brother Faizan snatched away the knife from him and stabbed him in his stomach and when he showed further resistance so I came at the fore and having obtained the knife stabbed it in his neck due to which he eventually died. When Shakeel's dead body fell outside the gate, my brother Rizwan and contractor Zohaib arrived and then they, having called the ambulance, put the dead body in it but the police have needlessly arrested Faizan and Zohaib as myself and Faizan have committed this murder in the name of honor. We killed our father in the name of honor because there was no other way to stop his unethical practices. Therefore, have mercy on us." (bold added)

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 appellants have retracted their judicial confessions claiming that they were not voluntarily made and were made on account of police torture. However this was not informed to the magistrate at the time of their confessions; that there was no marks of torture on their bodies at the time of giving the confession. Neither appellant gave evidence on oath in support of this contention. The confessions fully fit in with the prosecution case. Namely that the appellants murdered the deceased with a knife which is also supported by the medical evidence. As such I find that both the confessions were made voluntarily with the object to tell the truth and fit in with the prosecution case and even virtually corroborate each and as such I believe the confessions and place reliance on them vis a vis each accused.

I also find that the magistrate committed no material procedural irregularities in recording the judicial confessions which I have placed reliance on which can be seen from the evidence of the PW 5 Muhammed Siddique who was the judicial magistrate who recorded separately the confessions of the appellants.

Now we need to consider what other circumstantial/supportive evidence there is to connect the 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

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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".(bold added)

- (c) The appellants lived in the same house as the deceased who they murdered and were arrested on the spot by the police.
- (f) That the medical evidence and post mortem report fully support the prosecution evidence and the confession of the appellants that the deceased died from stab wounds.
- (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 foisting the churri on the appellants. 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 continually sexually assaulting the women relatives of the appellants as per FIR and confessions.
- (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 house of the appellants to the arrest of the appellants on the spot to the judicial confessions of the appellants to the recovery of the churri from appellant Faizan.
- (j) Having believed the confessions of the appellants in their entirety it is only fair and in the interest of justice to see whether such confessions could lead to any kind of defence or difference offence when considered in a holistic manner. In this respect reliance is placed on the case of **Javed Iqbal** (supra).

i. The first defence raised by the learned counsel for the appellants was that the case was one of self defence on the part of the appellants as they were attacked first by the deceased. I do not find this to be a case of self defence as the act of the appellants was not proportionate to the use of force against them. Namely, the appellant Faizan was stabbed once by the deceased however as per the medical evidence the deceased was stabbed 9 times by the appellants which I find to be disproportionate and not in line with a plea of self defence as the appellants could have run away and saved their sister after stabbing the deceased once or twice especially as the deceased was now unarmed and no longer posed a threat to the lives of the appellants. Furthermore, the plea of self defence was never taken at the trial. As such I do not find this to be a case of self defence although it has the seeds of one.

ii. Secondly, it was contended that this was a case of S.302 © and not S.302 (b) PPC. A detailed examination of each of the confessions shows that they are as one on the fact that their father (the appellants being his sons) had a history of sexually abusing female relatives of the appellants. That both the appellants went to save their sister Shumila (who did not give evidence) from being raped by the deceased. That when both the appellants went to rescue their sister from the deceased neither of them was armed and hence there was no premeditation on their part. Rather they both saved their sister and in so doing appellant Faizan was stabbed by their father on his hand which is supported by the prosecution evidence and exhibits. The deceased was then disarmed but despite being stabbed by one of the appellants on account of the sudden provocation of seeing his sister about to be raped by their father the deceased kept on coming at the appellants with a view to killing them hence he was stabbed by the other appellant to finally stop him. As such I find that this is a case of sudden provocation under S.302 (c) PPC especially when alluded to above the seeds of self defence were also present. In this respect reliance is placed on the cases of Raza (supra) and Alamgir (Supra)

13. Based on the above discussion I find that the prosecution has not proved its case against appellants under S.302 (b) PPC ~~for which the appellants are acquitted~~ but the prosecution has proved its case against the appellants under S.302 (c) PPC beyond a reasonable doubt and as such the appellants ~~are convicted~~ ^{by the court} ~~under S.302 (b) PPC~~ ^{are convicted under S.302 (c) PPC} and are each sentenced to RI for 12 years with the benefit of S.382 (B) Cr.PC.

S.302(c) PPC
and the
appellants
are

14. The appeals are disposed of as modified above.