

HIGH COURT OF SINDH CIRCUIT COURT, HYDERABAD

Cr. Appeal No.D-196 of 2019

[Confirmation Case No.43 of 2019]

[Asadullah versus The State]

BEFORE:

MR. JUSTICE MUHAMMAD KARIM KHAN AGHA

MR. JUSTICE MUHAMMAD SALEEM JESSAR

Appellant : Through Mr. Ayaz Hussain Tunio advocate

Complainant : Through Mr. Muhammed Jamil advocate

The State : Through Mr. Shahzade Saleem Nahiyoona A P G

Date of hearing: 06.06.2023

Date of judgment: 08.06.2023

J U D G M E N T

MUHAMMAD KARIM KHAN AGHA, J: Through this appeal, appellant has impugned the Judgment dated 31.10.2019 penned down by learned Model Criminal Trial Court-I Hyderabad (**Trial Court**) in Session Case No.448 of 2017 [**Re: The State versus Asadullah**], outcome of Crime No.93 of 2017 registered at P.S Airport Hyderabad for offence punishable under Section 302 PPC, whereby the appellant has been convicted under Section 265-H(ii) Cr.P.C and sentenced to death as tazir under Section 302(b) PPC subject to confirmation by this court with directions to pay compensation of Rs.2,00,000/- to the legal heirs of deceased as provided under Section 544-A Cr.P.C and in case of failure in payment thereof he has been directed to further suffer S.I for six months more.

2. Complainant Akbar Khan lodged the above FIR on 14.06.2017, stating therein that he is a rikshaw driver and he has six sons and two daughters; that his son Wasiullah (**deceased**) aged about 18/20 years is unmarried and he is a rikshaw mechanic; that on 11.06.2017 his son Wasiullah left the house at about 2030 hours for purchasing milk; that at about 1100 hours his younger son came home and informed him that when he was coming home he saw their rikshaw, standing at the shop of kaleji near Mehar Ali Housing Scheme Latifabad, but brother Wasiullah was not there; thereafter they started search of Wasiullah and also tried to contact him on his mobile number 0301-3343987, but the same was switched off; that at night time at about 02:00 am (12.06.2017) friends of Wasiullah namely Javed, Jahanzeb and Raees came at his house alongwith

rikshaw and informed that Wasiullah was not there as such they had brought the rikshaw of Wasiullah; thereafter they went in search of Wasiullah and at about 1500 hours their relatives Asadullah (**accused**), Azizullah and Hazrat also came at his house and enquired about his son Wasiullah; thereafter Asadullah, Azizullah and Hazrat also went in search of Wasiullah on motorcycle alongwith his another son Hadi; that at about 04:00 pm they (complainant party) received the call of Abdul Rehman that his son Wasiullah has been recovered, then they went at police station and informed them about incident: thereafter they alongwith police party reached at the place where dead body of his son Wasiullah was lying in bushes; that the head of Wasiullah was cut down with edged churri: thereafter police took the dead body in Ambulance and brought the same at Shah Bhitae Hospital and after postmortem it was handed over to them for its burial; Complainant alleged in FIR that Asadullah, who is his relative, had suspicion over his son Wasiullah that he had illicit relations with his wife, due to which he has killed his son.

3. After registration of FIR investigation was conducted and then challan was submitted before the learned Magistrate concerned, who took cognizance of the matter and sent the R&Ps to learned Sessions Judge. The copies were supplied to appellant at **Ex.01** and formal Charge was framed against him at **Ex.04**, to which he pleaded not guilty and claimed trial vide his plea at **Ex.05**. In order to prove the charge prosecution examined eight (08) witnesses at **Ex.07** to **14**, who exhibited and recognized certain documents at **Ex.07/A** to **14/A**, then prosecution closed its side at **Ex.15**. Statement of appellant, as required under Section 342 Cr.P.C was recorded at **Ex.16**, wherein he denied the allegations of the prosecution witnesses and alleged false implication, however, neither he examined himself on Oath nor produced any witness in his defense. Finally learned trial Court after hearing the arguments of the learned counsel for the parties convicted and sentenced the appellant, as mentioned supra, and also sent reference to this Court under Section 374 Cr.P.C for confirmation of death sentence awarded to the appellant. We therefore, decide the fate of captioned appeal as well as reference by this single judgment.

4. 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.

5. Learned counsel for the appellant has contended that the appellant is completely innocent and has been falsely implicated in the case by the

complainant; that the FIR was lodged after an unexplained delay of 3 days; that there is no eye witness to the murder ; no last seen evidence; that the judicial confession of the appellant was not voluntarily made as he was subject to torture by the police and as such it is of no evidentiary value; that the deceased phone had been foisted on the appellant and for any or all of the above reasons the appellant should be acquitted of the charge by extending him the benefit of the doubt. In support of his contentions he placed reliance on the cases of of (i) **HASHIM QASIM and another versus The STATE** [2017 SCMR 986], (ii) **BASHIR MUHAMMAD KHAN versus The STATE** [2022 SCMR 986], (iii) **MUHAMMAD ADNAN and another versus The STATE** [2021 SCMR 16], (iv) **MUHAMMAD SHOBAN versus The STATE** (2022 SCMR 1606], (v) **GHULAM and another versus The STATE** [2022 YLR Note 36], (vi) **KASHIF ALI alias KALU versus The STATE** [2022 SCMR 1515], (vii) **MUHAMMAD IFTIKHAR versus The STATE** [2022 SCMR 973] and (viii) **MEHMOOD AHMAD and 3 others versus The STATE** [1995 SCMR 127].

6. On the other hand learned Additional Prosecutor General Sindh and the complainant fully supported the impugned judgment and contended that the prosecution had fully proved its case beyond a reasonable doubt through reliable trust, worthy and confidence inspiring evidence especially the judicial confession of the appellant which could be fully relied upon as against the accused despite being retracted at trial; that none of the witnesses had any reason to falsely implicate the accused; that the delay in the FIR had been explained; that the phone of the deceased had been recovered on the pointation of the appellant which was hidden in a place which only the appellant could have known about and that the death penalty was applicable to this case due to the brutal nature of the offence. In support of their contentions they placed reliance on the cases of (i) **KHAN MUHAMMAD and others versus The STATE** [2011 SCMR 705] and (ii) **TANVEER AHMED versus The STATE** [2011 P Cr. L.J 677].

7. We have heard the arguments of the learned counsel for the parties, gone through the entire evidence which has been read out by the 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.

8. Based on our reassessment of the evidence of the PW's, especially those who discovered the decapitated body and the medical evidence and other medical reports including the post mortem report of the deceased, recovery of blood stained earth and churri at the crime scene we find that the prosecution has proved

beyond a reasonable doubt that Wasiullah Pathan (the deceased) was murdered by being stabbed in the chest and then beheaded by a churri on 11/12.11.2016 in between 2030 and 1610 hours in an open plot situated near Gulistan-e-Sarmast to University Road.

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

10. After our reassessment of the evidence we find that the prosecution has proved its case beyond a reasonable doubt against the appellant for the following reasons keeping in view that each criminal case must be decided on its own particular facts and circumstances and evidence on record;

(a) The FIR was delayed by a period of 3 days however we do not consider this to be fatal to the prosecution case as usually when a person goes missing the priority is to search him out and only then if the search is unsuccessful usually is the FIR lodged. In this case the search was successful after three days when the dead body was recovered by the complainant's relatives along with the accused who immediately reported the matter to the police which lead to the FIR being lodged. As such based on the particular facts and circumstances of this case we find that the delay in lodging the FIR is not fatal to the prosecution case. The accused was named in the FIR as according to the complainant the accused had suspicion that the deceased was having illicit relations with the accused wife and hence murdered the deceased.

(b) Admittedly, there is no eye witness or last seen evidence relating to the murder of the deceased which is not that surprising as the deceased was murdered during the night time when it was dark.

(c) The case against the appellant is therefore based on circumstantial evidence as conceded by the prosecution. 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) at P.2030 para's 5 and 6 which are reproduced as under;

"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

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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)

11. Thus, keeping in view the law on circumstantial evidence what evidence is there to link the accused to the murder of the deceased through an unbroken chain of evidence.

- (i) The **first link** is the FIR lodged in respect murder of the deceased. As mentioned above the accused was named in the FIR as according to the complainant the accused had suspicion that the deceased was having illicit relations with the accused wife and hence murdered the deceased.
- (ii) The **next link** is the arrest of the accused on the next day 15.06.017 after the lodging of the FIR (14.06.2017) on the pointation of the complainant's side. The accused then confessed his involvement to the crime before the police. Although this confession before the police is inadmissible its importance is that he later made a similar confession before a judicial magistrate.
- (iii) The **next link** is that three days after his arrest the accused lead the police to the place where he had hidden the mobile phone of the deceased after murdering him. The phone was retrieved from a place which none of the witnesses knew about and which only the appellant could have known about.
- (iv) The **next link** is the confession which the accused made before judicial magistrate PW 8 Zaheer Hussain (retracted at trial) which is reproduced as under for ease of reference;

Judicial Confession under Section 164 Cr.PC by Asadullah,

"Before 03 to 04 months, an unknown person used to phone on my number at night at about 03 to 04 AM and when I called him, he did not attend and thereafter when I again phoned him then Waris elder son of my maternal uncle (Mamo) attended the Phone on that number who disclosed that this number belongs to Wasiullah (deceased), the younger son of my maternal uncle (Mamo), for which I met the Wasiullah and he replied by lying that he (Wasiullah) was talking with his Seth (Master/Lord) and by mistake your number was being dialed. After it, about 09 or 10 days before, I was sleeping after Zuhri Prayer in my house by keeping fasting and about in afternoon at 01:00 PM, I was listening the speech of Molana Sahib on Mobile Phone, then all of sudden, an Audio became on/continue by me in which a man and a woman were talking romantically (in romance mood). I recognized that voice in which the sound of man was of Wasiullah son of my maternal uncle and second sound was of my wife. After it, I became sure that Wasiullah son of my maternal uncle has some illicit/un-fair relationship with my wife. At that time, I was in a condition that what I should do. I went to the narrow street at Naya Pull (Market Place) and I bought a dagger from there and kept under my custody. I returned back to house and threatened the wife and attacked her and from my dragger she sustained the injury in her hand. After it I felt mercy for her as she was pregnant and I took her to hospital. Thereafter we returned back to home and put off the fasting by eating and after offering prayer. I dialed the noted number on phone which Wasiullah himself attended and I called him to come at Mehar Ali Scheme at where he came and parked his Rikshaw there and then I took Wasiullah and went to Patrol pump by abiding on my motorcycle and after filling the patrol in the Motorcycle, I alongwith Wasiullah went to Daman-e-Kohsar where I asked Wasiullah that my wife is your Bhabhi in relation then why you play with her. Wasiullah became threatened/wondered to hear it and tried to run away from there by tiding his Chappal (Shoes) and for threatening him I put the knife/dagger on his abdomen but mistakenly that knife went inside in his abdomen he at once fallen down. After it I myself became threatened and consciousness and put the knife at his neck and his whole neck became cut due to fast sharpness of knife and head became separated from the body. I did everything on the name of honour and I was not in my sense this is my statement". (bold added)

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Asadullah

12. It is settled law that a retracted judicial confession can be legally admissible and used against its maker in certain circumstances. In the case of **Muhammad Amin V The State** (PLD 2006 SC 219) it was held at P.224 Para 9 as under;

"9. There is no cavil to the proposition that conviction could have been awarded on the basis of retracted confession which proposition was examined in case of Mst. Joygun Bibi v. The State PLD 1960 (SC (Pak) 313 as under:-

"We are unable to support the proposition of law laid down by the learned Judges in this regard. The retraction of a confession is a circumstance which has

*no bearing whatsoever upon the question whether in the first instance it was voluntarily made, and on the further question whether it is true. The fact that the maker of the confession later does not adhere to it cannot by itself have any effect upon the findings reached as to whether the confession was voluntary, and if so, whether it was true, for to withdraw from a self-accusing statement in direct face of the consequences of the accusation, is explicable fully by the proximity of those consequences and need have no connection whatsoever with either its voluntary nature, or the truth of the facts stated. The learned Judges were perfectly right in first deciding these two questions, and the answers being in the affirmative, in declaring that the confession by itself was sufficient, taken with the other facts and circumstances to support Abdul Majid's conviction. **The retraction of the confession was wholly immaterial once it was found that it was voluntary as well as true.**"*

10. Similarly in the case of the State v. Minhun alias Gul Hassan PLD 1964 SC 813 this Court has observed as under:-

*"As for the confessions the High Court, it appears, was duly conscious of the fact that retracted confession whether judicial or extra judicial, could legally be taken into consideration against the maker of those confessions himself, and if the confessions were found to be true and voluntary, then there was no need at all to look for further corroboration. **It is well-settled that as against the maker himself his confession, judicial or extra judicial, whether retracted or not retracted, can in law validly form the sole basis of his conviction, if the Court is satisfied and believes that it was true and voluntary and was not obtained by torture or coercion or inducement.**" (bold added)*

13. Thus, the court laid down a two pronged test as under (a) whether the retracted judicial confession appears to have been made voluntarily, without any inducement, duress or coercion and (b) was made with the object to state the truth.

14. The learned counsel for the appellant has contended that the appellant was tortured into making the confession by the police and as such his confession was not made voluntarily; however, his stance is totally belied by the fact that the appellant was brought from judicial custody and not police custody to make his confession. Even in the appellant's Statement under Section 342 Cr.PC the appellant only states the confession is false and not that he was tortured or otherwise pressurized or coerced into making it. We find that there is no evidence that the retracted judicial confession was not made voluntarily. There is no evidence of coercion or torture. The confession was made a few days after the

appellant was sent to judicial custody on 19th June and was brought back from Judicial custody on 21 June 2017 to record his confession which was recorded only 7 days after his arrest: however, there is no hard and fast rule as to when a judicial confession needs to be made. The judicial confession as seen from its content also has the object of telling the truth and fits in with the prosecution case and thus we believe and place reliance on the retracted judicial confession as against the accused who is its maker especially as we find that all material safeguards regarding the recording of the judicial confession were complied with by the magistrate who also in his evidence corroborates the essence of the confession.

15. To safely rely on this judicial confession we are also of the view that it needs to be corroborated or supported but other evidence. In this respect reliance is placed on the case of **Muhammad Ismail and others v. The State** (2017 SCMR 898). Such corroborative/support evidence is as follows:

- (a) As already mentioned in the FIR the fact that the deceased was having illicit relations with the wife of the appellant.
 - (b) As already mentioned the recovery of the deceased phone as identified by the complainant's witnesses by the police on the pointation of the appellant at a place which only he would have known about.
 - (c) The medical evidence corroborates the confession that the deceased was murdered with a sharp cutting instrument which ties in with the appellant buying the knife which he used to murder the deceased and which was recovered at the crime scene.
 - (d) The medical evidence also corroborates the confession in that that incised wound to the abdomen was the fatal injury accompanied by the cutting off of the head of the deceased.
 - (e) The appellant was riding his motor bike at the time of his arrest which was seized by the police and also ties in with his confession of him using his motor bike to meet the deceased.
- (v) That there are no **material** contradictions in the evidence of the PW's and exhibits and it is well settled by now that minor contradictions which do not effect the materiality of the evidence can be ignored. In this respect reliance is placed on the case of **Zakir Khan V State** (1995 SCMR 1793).
- (vi) That none of the witnesses (who all gave their Section 161 Cr.PC statements with promptitude which were not materially improved on at trial) whether police or otherwise had any ill will or enmity with the appellant and as such had no reason to falsely implicate the appellant and under such circumstances it is well settled by now that inter related witnesses evidence must be taken at its own worth and cannot simply be discarded for this reason. In this respect reliance is placed on the cases of **Amal Sherin v The State** (PLD 2004 SC 371) and **Dildar Hussain v Muhammad Afzaal alias Chala** (PLD 2004 SC 663). Like wise is the position with the evidence of the police officers

who also had no enmity or ill will with the appellant and as such had no reason to falsely implicate the appellant in a false case. For example, by planting the deceased phone on the appellant. Most of the witnesses gave their evidence in a straight forward manner. were not dented despite a lengthy cross examination and as such we believe their evidence. With regard to us believing the evidence of the police witness's reliance is placed on the case of **Mushtaq Ahmed V The State** (2020 SCMR 474).

(vii) The motive for the murder as per the FIR and the judicial confession is the fact that the accused believed that the deceased was having illicit relations with his wife.

(viii) As for the defence case of false implication simpliciter the appellant did not give evidence under oath and did not call any DW, not even his wife who he names in his confession, to support his defence case. Thus we disbelieve the defence case in the light of the prosecution evidence discussed above.

16. Thus, for the reasons mentioned above, we find that the prosecution has *proved an unbroken chain of evidence, where one end of the same touches the dead body and the other the neck of the accused and we maintain the conviction of the appellant.*

17. With regard to sentencing this is a case where a young man with his whole life a head of him was murdered in a pre meditated and cold blooded manner. In fact the murder was of the most brutal manner whereby after stabbing the deceased in the chest with his knife the accused then proceeded to cut off his head from his body with his knife. We can maintain the death penalty in cases such as this which are based on circumstantial evidence. In this respect reliance is placed on the case of **Muhammed Amjad V State** (PLD 2003 SC 704). Such brutality cannot be condoned under any circumstances and as such by way of deterrent to those who are inclined to carry out the most brutal of murders we hereby maintain the death sentence imposed on the appellant.

18. The appeal is dismissed and the confirmation reference is answered in the affirmative.