

**IN THE HIGH COURT OF SINDH AT KARACHI**

Present:

*Mr. Justice Mohammad Karim Khan Agha  
Mr. Justice Khadim Hussain Tunio,*

**SPL. CR. A.T. APPEAL NO.58 OF 2019**

Appellant: PC Madad Khan son of Ameer Abdullah Khan Niazi through Nawab Jawad Hussain Larik and Ms. Farhana Shamim, Advocates.

Respondent: The State through Mr. Abrar Ali Khichi, Additional Prosecutor General, Sindh.

Complainant: Muhammad Shabbir son of Hassan Ali through Mr. Ali Gohar Masroo, Advocate

Date of Hearing: 09.03.2022

Date of Announcement: 16.03.2022

**JUDGMENT**

Mohammad Karim Khan Agha, J. Appellant PC Madad Khan son of Ameer Abdullah was charge sheeted to face his trial in Special Case No. <sup>A-294</sup> ~~A-90~~ of 2015 arising out of FIR No. 155 of 2015 under section 302/34 PPC r/w section 7 of ATA 1997 registered at PS Bahadurabad Karachi. Appellant was convicted vide impugned judgment dated 12.02.2019 passed by the learned Judge, Anti-Terrorism Court No.I, Karachi whereby he was awarded sentence for life imprisonment u/s.302(b) PPC and to pay compensation of Rs.2,00,000/- (Rupees Two Lac) u/s.544-A Cr.P.C. to the heirs of the deceased and in default thereof he shall suffer S.I. for one year more. The appellant /accused was also convicted and sentenced for offence u/s.7(a) of ATA, 1997 to undergo R.I. for life and to pay fine of Rs.1,00,000/- (Rupees One Lac) to the heirs of each deceased and in default thereof he shall suffer S.I. for six months more. All the sentences were directed to be run concurrently. The appellant was also extended the benefit of section 382-B Cr.P.C.

2. The brief facts of the prosecution case are that on 19.05.2015 at 1700 hours, the complainant Muhammad Shabbir son of Hassan Ali lodged FIR of this case at police station Bahadurabad, wherein he has stated that on



17.05.2015, at about 2:30 a.m. (night), he received a phone call from Muhammad Bilal, a friend of his son Muhammad Ali, that Muhammad Ali had become injured in an accident and has been shifted to Jinnah Post Graduate Medical Centre (JPMC), Karachi, as such, the complainant went to the JPMC and found that his son Muhammad Ali and his friend Muhammad Danish had died. He was informed by Bilal and Mushtaq that they had gone on three motorcycles to Dhoraji to eat Golaganda. On Motorcycle No.KFC-6597 maker Speed, Muhammad Ali and Muhammad Danish were riding and at about 2:15 a.m. (night) at the signal of Tipu Sultan Road, a police party with white Car, bearing registration No.SP-051A of PS Bahadurabad, comprising HC Nadeem Ahmed, PC Madad Khan, driver HC Sarfaraz, with motorcycle rider police officials namely Sher Khan and Faizan Hussain, signaled them to stop and due to not stopping the motorcycle by deceased Muhammad Ali, PC Madad Khan fired, which caused Muhammad Ali and Muhammad Danish injuries in front of bungalow No.42, Al-Hamra Society and fell down, who were shifted to Jinnah Post Graduate Medical Centre, Karachi through ambulance for medical treatment, but both succumbed to their injuries, hence this FIR.

3. After thorough investigation the matter was challaned and the appellant was sent up to face trial. He pleaded not guilty and stated that he was implicated in this case falsely with malafide intention.

4. The prosecution in order to prove its case examined 10 PWs and exhibited various documents and other items. The statement of accused person was recorded under Section 342 Cr.P.C in which he denied all the allegations leveled against him. The accused neither examined himself on oath nor produced any DW in support of his defence case.

5. After appreciating the evidence on record the trial court convicted the appellant and sentenced him as set out earlier in this judgment. Hence, the appellant has filed this appeal against conviction. It is worth mentioning that his co-accused police officials who were alleged to be with him at the time of the incident and were also sent up to stand trial were acquitted vide the impugned Judgment and neither the State nor the complainant has filed any appeal against their acquittal. Neither the State nor the complainant has filed any application for enhancement of the appellant's sentence.



6. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the impugned judgment dated 12.02.2019 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 appellant has contended that there was an unexplained delay of 2 days in lodging the FIR which enabled the complainant and the police to cook up a false case against the appellant; that there was no eye witness to the incident; that no PW deposed against the appellant; that the appellant's confession before the judicial magistrate was retracted and it was made after a delay of 14 days and as such could not be relied upon and thus for any or all of the above reasons the appellant should be acquitted of the charge by extending him the benefit of the doubt. Learned counsel for the complainant Muhammed Shabbir whose son Muhammed Ali was murdered by the appellant contended that the complainant had forgiven the appellant and as such he had no objection if the appellant was acquitted in the case relating to the murder of his son Muhammed Ali.

8. On the other hand learned Additional Prosecutor General Sindh has fully supported the impugned judgment. In particular he has contended that the delay in lodging the FIR has been explained and as such this delay in lodging the FIR is not fatal to the prosecution case; that the appellant made a voluntary and truthful confession before a judicial magistrate which despite being retracted this court can and should rely upon; that a weapon which had been issued to the appellant had been recovered from him and that fire shots had been made from the ammunition which was recovered from him; that there was a positive FSL report in respect of the recovered weapon; that the medical evidence supported the prosecution case; that this was not a case of accidental firing which lead to the loss of two precious lives and that as such the prosecution had proved its case against the appellant beyond a reasonable doubt and the appeal should be dismissed. In support of his contention, he placed reliance on the cases of **Raza and another v. The State and others** (2020 SCMR 1185), **Muhammad Mushtaq v. The State** (PLD 2001 Supreme Court 107), **Majed v. The State** (2010 SCMR 55), **Ghulam Nabi v. The State** (2007 SCMR 808) and **Ch. Muhammad Yaqoob and others v. The State and others** (1992 SCMR 1983).



9. We have heard the arguments of the learned counsel for the appellant, learned counsel for the complainant and learned Additional Prosecutor General Sindh and 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.

10. At the very outset we would like to point out that if we find this to be a case which does not fall within the purview of the ATA the complainant would be free, if so advised, to enter into a compromise agreement in accordance with law with the appellant in respect of the murder of his son Muhammed Ali if we uphold the appellant's conviction in respect of his murder but it would be for the legal heirs of the deceased Muhammed Danesh to decide whether or not they wanted to enter into a compromise agreement in accordance with law with the appellant in respect of the murder of Muhammed Danesh if we uphold the appellant's conviction in respect of Muhammed Danesh's murder.

11. Based on our reassessment of the evidence of the PW's who reached the scene where the bodies were lying after being shot, the other witnesses including medical evidence and medical reports and the recovery of the bike of the deceased at the place of the incident we find that the prosecution has proved beyond a reasonable doubt that Muhammed Ali and Muhammed Danesh (the deceased), were shot and injured by firearm which firearm injuries lead to their death by the time they were transported to hospital on 17.05.2015 at 0215 hours at Tipu Sultan Road Bahadurabad Karachi. This fact is not disputed by either party

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

13. 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 and sentenced **except** in respect of the conviction and sentence under the ATA for the following reasons;

(a) It is true that the FIR was lodged after a delay of two days. However the complainant was informed about the shooting by which time he went to the JPMC where the bodies were identified before being subject to post mortem and then released to him for burial



purposes and was thereafter informed that it was a police party who was responsible for the murder of the deceased. Under these circumstances where an FIR is to be lodged against the police it is quite understandable that it took some time for a final decision to be made before lodging the FIR as generally it is hard to get an FIR lodged at all in this country let alone against serving policemen and as such based on the particular facts and circumstances of this case we do not find the delay in lodging the FIR to be fatal to the prosecution case. With respect to an explained delay in lodging the FIR not being fatal to the prosecution case reliance is placed on the cases of **Muhammad Nadeem alias Deemi v The State** (2011 SCMR 872) and **Muhammed Mushtaq** (Supra).

(b) In our view the prosecution's case mainly rests on the judicial confession of the appellant under S.164 Cr.PC which is reproduced below for ease of reference;

**IN THE COURT OF V CIVIL JUDGE &  
JUDICIAL MAGISTRATE EAST**  
**CONFESSIONAL STATEMENT OF ACCUSED**  
**MADAD KHAN U/S 164 Cr.PC.**

*On 16.06.2015 at 2100 Hrs., I was deputed as PC on the mobile of PS Bahadurabad for patrolling. I was accompanied by driver Sarfaraz and HC Nadeem and Sher Khan and Faizan Hussain were riding a motorcycle.*

*In the night at 0215 hrs., we were carrying out snap checking on the Tipu Sultan Road in the night between 16.06.2015 and 17.06.2015. During this time two boys came on a bike and informed us that six boys riding three motorcycles are carrying out snatching at Muskan Roundabout and at this time a message was also received on mobile wireless. After his we sat in the mobile and went towards the roundabout. Before arriving at the Muskan Roundabout as soon as we stopped at the signal, three boys were coming on three motorcycles. We tried stopping them and also called them but they did not stop and sped up the motorcycle. I made fire in order to scare them and I fired two shots at the tyre of the motorcycle but accidentally a bullet after hitting the ground, injured both the suspects. On the spot we did not realize that they were hit by the bullet". (bold added)*

After a review of the relevant law on the legal validity of judicial confessions the Hon'ble Supreme court in the case of **Ch. Muhammad Yaqoob V The State** (1992 SCMR 1983) reached the following conclusion:

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*"The legal position, which has emerged from the above reports, seems to be that in order to judge the evidentiary value of retracted confession, the Court is to advert to the question, whether the same appears to have been made voluntarily, without any inducement, duress or coercion with the object to state the truth. If the Court is satisfied on the above aspect, the mere fact that there were some irregularities in recording of a confession, would not warrant disregarding of the same".(bold added)*

It is settled law that a retracted judicial confession can be legally admissible and used against its maker in certain circumstances. In the later 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)

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. Notably it was also held that if both (a) and (b) were satisfied that even if there were some irregularities in recording of a confession it would not warrant disregarding of the same.

Now when we consider the judicial confession of the appellant and the evidence on record we find that it was made voluntarily with the object to state the truth as per the case of the prosecution as set out in the FIR and the evidence of the complainant and other PW's. We also find that nearly all the procedural safe guards were carried out by the magistrate e.g hand cuffs were taken off, reflection time was given, he was informed of the consequence of his confession and he was sent straight to judicial remand after the confession and if there were any procedural defects these were only very minor in nature and would not effect the voluntariness or truthfulness of the confession as was held in the case of **Majeed** (Supra). The fact that the judicial confession was carried out on the last day of police remand is also irrelevant as was held in the case of **Ghulam Nabi** (Supra). The fact that the judicial confession was made after 14 days also does not impact on its voluntariness and truthfulness as was held in **Ch. Muhammad Yaqoob's case** (Supra).

As such we believe the retracted judicial confession as it has been made voluntarily with the object of telling the truth and its content fits in with the prosecution case and there are no material defects in the manner in which it was recorded by PW 5 Abdul Razzak who was the concerned judicial magistrate. His evidence also fully corroborates the content of the confession and that all necessary procedural safe guards were adhered to.

**What other supportive/corroborative material is there on record to support the judicial confession of the appellant.**

(c) As mentioned earlier the FIR which was lodged within a reasonable time based on the particular facts and circumstances of the case names the present accused at the crime scene with the specific role of firing on the deceased which supports the confession of the appellant.

(d) PW 3 Mushtaq who is named in the FIR as stating that he was going for tea at Dhorajee with the deceased and other friends on the day of the incident in his evidence states that he and some others had arranged with the deceased to go for tea at Dhorajee on the day of the incident. That he, Amand and Ahmed reached Dhorajee first and waited for the deceased. He was informed on his mobile phone about the shooting incident at Tipu Sultan Road so he went there and saw the deceased lying on the road and footpath before being shifted to JPMC. This corroborates the confession of the appellant whereby he shot at two motor bike riders who refused to stop when signaled to do so by the police at Tipu Sultan Road. He has no enmity or ill will against the accused and hence had no need to give false evidence regarding the



incident. His evidence was not challenged at all during cross examination and thus we believe the same.

(e) PW 7 Sajjad Hussian was the first IO and arrested all 5 accused on 20.05.2015. He seized an SMG each from 4 of the accused three of which returned all the 30 rounds which were issued to them. The SMG issued to the appellant was also seized with 26 rounds indicating that 4 had been fired. The appellant's SMG lead to a positive FSL report. This witness had no enmity with the appellant or any other of the co-accused to falsely implicate him/them in this case. He was not dented during cross examination and his evidence is fully corroborated by PW 8 Abdul Hammed who was the mashir of the arrest and recovery. A document showing that the SMG and 30 rounds had been issued to the appellant was also duly exhibited.

(f) That the medical evidence supports the prosecution case in that one of the deceased received two fire arm injuries whilst the other received one fire arm injury. There was no blackening around their wounds which fits in with the appellant's confession of the shots not being fired from relatively close range and the three bullet wounds roughly tallies with 4 rounds being fired by the appellant leaving him with only 26 out of the 30 rounds which were issued to him. Both the deceased also received abrasion type injuries which is consistent with them both falling off from the motorbike which they were riding when they were shot which bike was recovered at the scene.

(g) The deceased were both unarmed and no weapon was recovered from them when they were taken to the hospital from the spot from where they had been shot and there is no evidence that they ever fired at any time at the police which again fits in with the appellant's confession.

(h) That the appellant has admitted his guilt in respect of murdering deceased Muhammed Ali as he has since attempted to enter into a compromise agreement with the complainant whose counsel has stated in open court that the complainant had forgiven him and thus had no objection to the appellant's acquittal in respect of the murder of Muhammed Ali.

(i) That all the PW's are consistent in their evidence and even if there are some contradictions in their evidence we consider these contradictions as minor in nature and **not** material and certainly **not** of such materiality so as to effect the prosecution case/evidence and the conviction of the appellant. 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 deceased leaving with friends for tea to the deceased refusing to stop when being signaled by the police to the appellant shooting and murdering the deceased to the judicial confession of the appellant to



the supportive medical evidence to the recovery of the SMG issued to the appellant with 4 rounds less than were issued to a positive FSL on the weapon.

(j) That the police PW's had no enmity or ill will towards the appellant and had no reason to falsely implicate him in this case and in such circumstances it has been held that the evidence of the police PW's can be fully relied upon. In this respect reliance is placed on **Mushtaq Ahmed V The State** (2020 SCMR 474).

(k) That it does not appeal to logic, commonsense or reason that a father would let the real murderer of his son get away scott free and falsely implicate an innocent person by way of substitution.

(l) The case of the acquitted co-accused is on a different footing to the appellant as they did not make any confession before a judicial magistrate, even in the appellant's confession they are only said to be present and were not attributed any firing role which was corroborated by the fact that when they returned their SMG's they also returned all the rounds that had been issued them. They also denied their presence at the scene throughout and as such they were rightly acquitted by the trial court by being extended the benefit of the doubt and no appeal has been filed against their acquittal

(m) Undoubtedly it is for the prosecution to prove its case against the accused beyond a reasonable doubt but we have also considered the defence case to see if it at all can cast doubt on or dent the prosecution case. The defence case is one of non presence at the scene however this defence is completely belied by the appellant's judicial confession and other supportive and corroborative evidence as discussed above. He did not give evidence on oath or call any DW as an alibi witness to support his defence case. Thus in the face of his judicial confession and other prosecution evidence linking him to the murder of the deceased we disbelieve his defence case as an after thought in order to save his skin.

14. Thus, based on the above discussion we have no doubt that the prosecution has proved its case against the appellant beyond a reasonable doubt for the offence for which he has been convicted and hereby maintain his convictions and sentences **except** with regard to the ATA offences for which he is acquitted for the reasons set out below.

15. We do **not** find that this case falls within the purview of the ATA as defined by a larger bench of the Supreme Court in the case of **Ghulam Hussain V State** (PLD 2020 SC 61) where in essence for their to be an act of terrorism there had to be an object, intent, purpose and design to create terror



on account of that act. Whether people were terrorized as a by product of the act did not convert the act into one of terrorism nor the fact that it may have been of a particularly brutal nature. Based on the particular facts and circumstances of this case it appears that the intent of the appellant was to stop the deceased who refused to obey his signal to stop their motor bike for checking and instead rode on and as such he became furious and fired upon them with intention to kill for disobeying his order to stop **but not** with the design, intent or purpose to create terror and as such all offences under the ATA are dismissed especially as it was a night time incident when no member of the public was even around to be terrorised.

16. As such the appellant is convicted **only** for the offence u/s 302(b) PPC and **only** sentenced to RI for Life and to pay compensation of RS 200,000 u/s 544-A Cr.PC to the legal heirs of each of the deceased and in default thereof to suffer SI for one year more. The appellant shall have the benefit of S.382 (B) Cr.PC and any remissions applicable to him under the law

17. The appeal is dismissed subject to the modification of convictions and sentences as set out in this judgment.