

THE HIGH COURT OF SINDH, KARACHI

Present:

*Mr. Justice Mohammad Karim Khan Agha
Mrs. Justice Kausar Sultana Hussain*

**CRIMINAL JAIL APPEAL NO. 202 OF 2020
CONFIRMATION CASE NO. 05 OF 2020**

Appellant:	Muhammad Waqas through Mr. Iftikhar Ahmed Shah, Advocate
Respondent:	The State through Mr. Mohammad Iqbal Awan, Additional Prosecutor General
Date of hearing:	20.10.2021
Date of announcement:	26.10.2021

JUDGMENT

MOHAMMAD KARIM KHAN AGHA, I- Appellant Muhammad Waqas son of Muhammad Sadiq has preferred the instant appeal against the impugned judgment dated 28.01.2020, passed by learned Ist Additional Sessions Judge (Model Criminal Trial Court) Karachi East in Session Case No.1926 of 2016 (State Vs. Muhammad Waqas) arising out of FIR No.81/2016 for an offence punishable under Section 302 PPC registered at PS Korangi Karachi, whereby, after full-dressed trial, the appellant was convicted under Section 302(b) PPC and sentenced to death subject to confirmation by this court. Appellant was also directed to pay compensation of Rs.2,00,000/- (Rupees Two Lacs Only) to the legal heirs of deceased. In case of default in payment of compensation, he was ordered to further undergo S.I. for six months.

2. The brief facts of the prosecution case as per FIR lodged by complainant Inayatullah son of Muhammad Iqbal are that on 19.02.2016 he was present at Malir Cantonment Karachi in his Unit when he received information through telephone from his brother Ramzan that Mst. Samina was killed by her husband Muhammad Waqas by stabbing. On the same date he could not proceed to PS for registration of FIR because he could

not get leave from his unit. On 20.02.2016 he proceeded to PS Korangi and lodged FIR at 1130 of the incident against accused Muhammad Waqas for stabbing Ms Samina to death.

3. During investigation the I.O. visited place of incident, prepared site inspection memo and took photographs of the place of the incident. The Investigation Officer arrested the accused on 21.02.2016. The accused confessed his guilt and shown willingness to get recovered the crime weapon which was recovered on his pointation. After completion of usual investigation charge sheet was submitted against the accused for offence punishable u/s.302 PPC to which the accused plead not guilty and claimed trial.

4. The prosecution in order to prove its case examined 07 witnesses and exhibited various documents and other items. The statement of the accused was recorded under Section 342 Cr.P.C in which he denied all the prosecution allegations and claimed false implication. The accused did not examine himself on oath and did not lead any evidence in his defence.

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 his conviction.

6. The evidence produced before the trial court finds an elaborate mention in the impugned judgment dated 28.01.2020 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 one day in lodging the FIR which lead to a false case being concocted by the complainant in league with the police against the accused; that the eye witness was not present and he was a planted witness; that the accused confession before the judicial magistrate cannot be safely relied upon as it was not made voluntarily and was extracted through torture in addition to procedural safe guards being violated; that there were material contradictions in the prosecution evidence which made it unreliable; that the churri had been foisted upon the accused by

the police and that for any of the above reasons the appellant should be acquitted by extending him the benefit of the doubt. In the alternative he submitted that even if we upheld the conviction of the accused the sentence should be reduced to one of life imprisonment instead of the death penalty. In support of his contentions he has placed reliance on the cases reported as **Haji Muhammad Sadiq V. Liaquat Ali and others** (2014 SCMR 1034), **Nazir Ahmed V. The State** (2018 SCMR 787), **Muhammad Mansha V. The State** (2013 P Cr.L.J. 1674), **Sartaj V. The State** (2021 MLD 963), **Muhammad Azhar Hussain and another V. The State** (PLD 2019 Supreme Court 595), **Noor Ahmed and 2 others V. The State** (2017 YLR 515), **Sajjad Ali and 3 others V. The State** (PLD 2005 Karachi 213), **Muhammad Ashraf V. The State** (2016 YLR 1543), **Muhammad Kashif Iqbal V. The State** (2021 YLR Note 102), **Muhammad Pervaiz V. The State** (PLD 2019 SC 592).

8. On the other hand Learned Additional Prosecutor General appearing on behalf of the State has fully supported the impugned judgment. In particular he has contended that any delay in lodging the FIR has been fully explained; that the eye witness evidence is reliable, trustworthy and confidence inspiring which fully implicated the accused in the murder of his wife; that the accused confession was made voluntarily with all procedural safe guards being observed and as such can be safely relied upon to convict the accused; that there are no material contradictions in the prosecution evidence and as such the prosecution had proved its case against the appellant beyond a reasonable doubt and as such the appeal should be dismissed. In support of his contentions, he placed reliance on **Abdul Majeed V. The State** (2008 SCMR 1228), **Muhammad Ishaq V. The State** (2009 PSC (CrL.)1), **Muhammad Ehsan V. The State** (2006 SCMR 1857), **Khan Muhammad and others V. The State** (1999 SCMR 1818), **Shamshad Ali V. The State** (2011 SCMR 1394), **Muhammad Imran V. The State** (2021 SCMR 69), **Muhammad Amin V. The State** (PLD 2006 Supreme Court 219).

9. The complainant was reluctant to appear at trial in order to give evidence as is shown by P.229 of the paper book although he eventually did give evidence as referred to earlier in this judgment. Attempts were

made to serve the complainant in this appeal however his whereabouts could not be traced out and as such we proceeded to hear this appeal to avoid any further delay which was causing prejudice to the appellant who remained locked up behind bars without his appeal being heard on account of the complainant's conduct. Instead the learned APG represented the interests of the complainant during this appeal.

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

11. Based on our reassessment of the evidence especially of the PW eye witness, the other PW witnesses, PW 3 Dr.Noorun Nisa WMLO at JPMC and the medical reports including the post mortem of the deceased, we find that the prosecution has proved beyond a reasonable doubt that Ms Samina (the deceased) was stabbed to death on 19.02.2016 at about 1500 hours inside House No.54 Gali No.4, Sector 32/ A Labour Square Korangi Karachi.

12. The only question left before us therefore is who stabbed the deceased with a churri which lead to her death (murder) 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 for the following reasons;

(a) That the FIR was lodged within 24 hours of the incident. That any delay in lodging the FIR has been explained by the complainant PW 7 Inayatullah in his evidence who was the cousin of the deceased. According to his evidence he was a soldier based at Malir Cant and was informed by telephone that the accused had murdered the deceased by stabbing on the day of the incident however he was not granted leave on that day but was only granted leave the next day whereupon he went to the PS and lodged the FIR and collected the dead body of his cousin from the chippa mortuary. The accused is named by him in the FIR and he had no apparent enmity with the accused and thus had no reason

to implicate him in a false case. Furthermore, during this delay the prosecution obtained no benefit.

(b) In our view the prosecution's case rests on the evidence of the eye witness to the murder and the confession made by the accused before the judicial magistrate both of which we will consider in detail below;

(i) **Eye witness PW 5 Muhammed Yaqoob.** The accused is his elder brother. According to his evidence the accused and the deceased who was his wife were initially living in the Punjab and only came to Karachi 15 days prior to the incident which has not been disputed. According to his evidence the accused and the deceased did not maintain a good relationship and used to quarrel a lot. He was present in his house along with the accused and the deceased when the incident had occurred. Since the accused and the deceased were not getting along well he had brought them train tickets to travel to the Punjab where they could resolve their difficulties. He exhibited the train tickets. On the day of the incident at 1500 to 1530 hours he saw the accused scuffle with the deceased. **The accused pushed him over and he saw the accused take a churri and stab the deceased with it in her heart who then fell down and according to the post mortem report died instantaneously.**

He knew the accused as he was his brother and as such there is no case of misidentification and no need for an identification parade especially as it was a day light incident and he witnessed the attack from a short distance. He was not a chance witness as the incident took place in his house where the accused and the deceased were staying. He had no enmity or ill will with the accused and had no reason to implicate him in a false case. He gave his S.161 Cr.PC eye witness statement on the same day whereby he named the accused and thus there was no time to concoct a false case. His evidence contained no material improvements from his S.161 Cr.PC statement and his evidence was not dented despite a probing cross examination. His presence at the scene was not challenged. Although the eye witness is related to the deceased it is well settled that his evidence cannot be simply discarded on this basis alone unless some enmity, ill will or reason to falsely implicate the appellant has come on record and nothing of the kind has come on record in this case. In this respect reliance is placed on **Ijaz Ahmed V The State** (2009 SCMR 99) and **Nasir Iqbal alias Nasra and another v. The State** (2016 SCMR 2152). In fact in some cases the superior courts have held that based on the particular facts and circumstance of the case related witnesses may be more reliable as they want to see justice done for their relatives by ensuring that the correct person is held to account.

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It would also be highly unlikely for him to falsely implicate his real brother in the murder and enable the real culprit of his relative to go free.

He gave his evidence in a natural and straight forward manner and we have no reason to disbelieve the same. We find his evidence to be reliable, trust worthy and confidence inspiring and we believe the same especially in terms of his correct identification of the appellant and can convict on this evidence provided that there is some corroborative / supportive evidence. In this respect reliance is placed on **Muhammad Ehsan v. The State** (2006 SCMR 1857). As also found in **Farooq Khan v. The State** (2008 SCMR 917) and **Niaz-ud-Din V The State** (2011 SCMR 725), what is of significance is the quality of the evidence and not its quantity and in this case we find the evidence of this eye witness to be of good quality.

Thus, based on our believing the evidence of the PW eye witness and his correct identification of the appellant what other supportive/corroborative material is their against the appellant?

(c) The appellant confessed his guilt to the crime before PW 2 Zohaib Ahmed who was the judicial magistrate who recorded his S.164 Cr.PC statement in the following terms;

"CONFESSION OF ACCUSED PERSON UNDER SECTION 164 OF THE CODE OF CRIMINAL PROCEDURE IN THE COURT OF JUDICIAL MAGISTRATE.

Q. What have you to say?

Answer. Sir I tried to counsel her a lot but the victim (Samina) never repented from her wrongdoings. She used to go out of the house in night for hours. I used to ask her, but she used to quarrel with me and while lifting her shirt (showing her private hairs of private part) used to say, "Whether you have plugged off my private hairs of private part". I have told the same thing to my Mamoo (Khokhar Rasoola), Imran (son of my mamoo), her (victims') mother (Haqo Bibi), her elder sister (Rakhmat), her brother in law (Mumtaz - Behnoi). However my ex Mother-in-law (Haqo Bibi) and ex-sister-in-law (Rakhmat) who were informed via phone instead of counseling the victim rather fought with me over the phone. And my Mamoo (Khokhar Rasoola), Imran (son of my mamoo) advised me to come to Khushab where they will try to resolve the dispute. I booked tickets on 18.02.2016 at 09.00 pm of 19.02.2016 from Karachi Cantt to Sargodha for reaching Khushab. In the night I went to my father and showed him tickets to people (including my father, landlord and neighbours). At 11:00 am the victim went out of house. I called her brother in law (Mumtaz - Behnoi) and talked to him and her elder sister (Rakhmat). I informed them that she is not at house since 11:00 am and its

02:00 pm- she was not come back. Then her brother in law (Muntaz - Behnoi) called me about at about 2:00 pm to whom I said, "I will kill her as soon as I find her". But he said just come to Khushab one time they will resolve the matter. Then I found the victim at Chamra Chowrangi at 04:45 pm and took her to home. When we reached home she again lifted her shirt (showing her private hairs of private part) and said, "Whether you have plugged off my private hairs of private part". I grabbed knife and stabbed in her body. This is all what I have to say. I am illiterate person." (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 **Muhammed Amin** (Supra). In this case the appellant has claimed that his confession was not voluntary and was a result of torture and coercion. No mention of this was made at the time of recording the confession before the magistrate and such questions were not even put to the magistrate during cross examination. This issue of torture and coercion only arose during the recording of the S.342 Cr.PC statement of the appellant which we consider to be an after thought.

With regard to the procedure followed in recording the appellant's confession before PW 2 Zohaib Ahmed we find that in his evidence and through the written proscribed pro forma all the necessary procedural safeguards for making a confession were followed and as such we find the confession to be voluntary, truthful and fully fitting in with the prosecution case and as such rely on the appellant's confession against himself which is corroborated by the eye witness evidence discussed above.

(d) That PW 6 Muhammed Sadiq who was the father of the accused was initially declared hostile however during cross examination he admitted the matrimonial dispute between the accused and his wife who was the deceased, that the accused and the deceased had been advised to return to the Punjab to settle their differences and that train tickets for them had been bought for that purpose and that when he returned to the house he saw the accused with churri in his hand and the deceased in dead condition. His evidence during cross examination tends to corroborate/support the prosecution case and thus we give it some weight in terms of corroborative/supportive value. In this respect reliance is placed on **Muhammed Sadiq V Muhammed Sarwar** (PLD 1973 SCMR 214) and **The State V Abdul Ghaffar** (1996 SCMR 678)

(e) That the medical evidence and reports as discussed above fully support the eye-witness/ prosecution evidence. It confirms that the deceased was brought to the hospital suffering from a stab wound to the chest and that she died on account of the stab wound to the chest as evidenced by the post mortem and death certificate.

(f) That the appellant on his arrest lead the police to the murder weapon i.e churri on his pointation.

(g) 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 and the conviction of the appellant. In this respect reliance is placed on **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 matrimonial disharmony between the accused and the deceased to the accused stabbing the deceased in her chest to the deceased being taken to hospital to the accused arrest by the police and leading the police to the murder weapon on his pointation to the confession of the accused before the judicial magistrate and the death of the deceased by stab wound as confirmed by the medical evidence.

(h) That the police PW's had no proven enmity or ill will towards the appellant and no reason to falsely implicate him in this case by for example making up his arrest or foisting the churri on him 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 **Mustaq Ahmed V The State** (2020 SCMR 474).

(i) 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 caste doubt on or dent the prosecution case. The defence case is simply one of false implication for which the appellant has given no cogent reason. The appellant did not give evidence under oath and did not call any defence witness in support of his defence. Thus, for the reasons mentioned above we disbelieve the defense case as an afterthought in the face of reliable, trust worthy and confidence inspiring eye witness evidence and the appellant's own confession before a judicial magistrate and as such the appellant's case has not at all dented the prosecution case.

14. Thus, based on the above discussion especially in the face of reliable, trust worthy and confidence inspiring eye witness evidence and other corroborative/supportive evidence mentioned above including the appellant's own confession before a judicial magistrate which we have already found was made voluntarily , was truthful and fitted in with the prosecution case which we have believed and relied upon 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 conviction.

15. With regard to sentencing the motive for the murder has been proved by the appellant's own confession. Although we find the murder of a young lady of 18 years of age to be quite shocking we have noted a few discrepancies in the prosecution case which although not of any material significance have persuaded us to follow the case of **Ghulam Mohy-ud-din V State** (2014 SCMR 1034) whereby by way of abundant caution it is better in such type of cases to preserve life and award the lesser sentence of life imprisonment. Thus we hereby reduce the appellant's sentence from death to that of RI for Life with all other compensation and fines in the impugned judgment remaining in place with the confirmation reference being answered in the negative.

16. As such the appeal is dismissed, the conviction is maintained but the sentence is modified from death to RI for life along with all other compensation and fines imposed in the impugned judgment with the confirmation reference being answered in the negative.

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