Acquitted : Only Confession Evidence

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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.200 OF 2022
Conf. Case No.09 of 2022.

Appellant:	Rizwanullah Khan son of Muhammad Ranbail Khan through M/s. Muzaffar Hussain Solangi and Irfan Ahmed Memon, Advocates
Respondent:	The State through Mr. Ali Haider Saleem, Additional Prosecutor General Sindh along with complainant Muhammed Imtiaz Khan.
Date of Hearing:	17.04.2023
Date of Judgment:	20.04.2023

JUDGMENT

Muhammad Karim Khan Agha, J. Appellant Rizwanullah Khan was tried in the Anti-Terrorism Court No.II, at Karachi in Special Case No.12 of 2021 in Crime No.777 of 2020 under Section 364/377-B/302/34 PPC r/w. Section 7 of ATA, 1997 registered at PS KIA Korangi, Karachi and vide Judgment dated 24.11.2022 appellant was convicted and sentenced as under:-

a) For murder of Ahmed Khan to death as Tazir under section 302 (b) PPC, Rizwanullah Khan S/o. Muhammad Ranbail Khan shall be hanged by neck till he is dead (subject to confirmation by the Hon'ble High court). Convict is also liable to pay rupees 02 Million to the Legal Heirs to the deceased under Section 544-A Cr.P.C. and in case failure to pay such fine, he shall further undergo simple Imprisonment of 06 months. Death sentence is also awarded to Rizwanullah u/s. 7(1) (a) of Anti-Terrorism Act of 1997 (he shall be handed by neck till he is dead-subject to confirmation by the Hon'ble High Court) and fine of Rs.50,000/- (fifty thousand), in case of non-payment of fine convict will further undergo S.I. for six months.

b) The appellant was awarded Rigorous Imprisonment for life for offence u/s.364-A PPC.

c) The appellant was also awarded Rigorous imprisonment for 7 years and fine of Rs.5,00,000/- (five hundred thousand) for offence u/s. 377-B PPC, in case of non-payment of fine convict will further undergo S.I. for six months.

2. The brief facts of the case are that child namely Ahmed Khan aged about 07 years son of complainant Muhammad Imtiaz Khan, left his house situated in Bilal Colony, Korangi Industrial Area in evening of 13.07.2020 for playing. As per complainant his son Ahmed Khan had not returned therefore, he started search but to no avail. Since, the child was not found therefore complainant Imtiaz Khan had finally lodged the FIR on 16.07.2020 under Section 363/34 PPC at PS KIA by narrating the same facts.

3. After usual investigation the matter was challaned and the appellant was sent up to face trial. He pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 07 witnesses and exhibited various items and other documents. The appellant recorded his statement under Section 342 Cr.P.C. whereby he claimed that he was innocent and had been falsely implicated by the complainant party on account of enmity. He did not give evidence on oath or call any witness in support of his defence.

5. After appreciating the evidence on record, the learned trial Court convicted and sentenced the appellant as set out earlier and hence, the appellant has filed this appeal against his conviction and sentence.

6. The facts and evidence of the case are set out in the impugned judgment and there is no need to reproduce the same in order to avoid unnecessary repetition and duplication.

7. Learned counsel for the appellant has contended that the appellant is completely innocent and has been falsely implicated in the case on account of enmity; FIR was lodged after an unexplained delay of 2 days; that the appellant was arrested only on suspicion after a considerable delay in lodging the FIR and the only other evidence against him is his

extrajudicial confession before the police which is inadmissible in evidence and the fact that he allegedly lead the police to the remains of the deceased and as such it was a case of no legally admissible evidence and for all or any 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 **Sajjan Solangi v The State** (2019 SCMR 872), **Mst. Askar Jan v Muhammad Daud** (2010 SCMR 1604), **Azeem Khan v Mujahid Khan** (2016 SCMR 274), **Fayyaz Ahmad v The State** (2017 SCMR 2026), **Muhammad Pervez v The State** (PLJ 2019 SC 512), **Naveed Asghar v The State** (PLD 2021 SC 600), **Mst. Asia Bibi v the State** (PLD 2019 SC 64) and an reported judgment passed by the Hon'ble High Court of Sindh in Cr. Jail Appeal No.234 of 2022 **Muhammad Arshad v The State.**

8. Learned Additional Prosecutor General Sindh and the complainant fully supported the impugned judgment as the prosecution had fully proved its case beyond a reasonable doubt through reliable trust, worthy and confidence inspiring evidence especially the fact that the appellant had lead the police to the place where the remains of the dead body was hidden which was a place which only he knew about from where the clothes of the deceased had also been recovered and through the appellant's extra judicial confession and that the death penalty was applicable to this case due to the grievous nature of the offence against a young child. In support of their contentions they placed reliance on the cases of **Gul Muhammad v. The State** (2011 SCMR 670),**Hamid Mahmood v the State** (2013 SCMR 1314), **Muhammad Siddique v Inspector General Frontier Corp. NWFP** (2002 SCMR 956) and **Muhammad Azad alias Javaid alias Jodi v the State** (2019 SCMR 1330).,

9. We have carefully considered the arguments of the learned counsel for the parties, scanned the entire evidence and reviewed the relevant case law.

10. Before proceeding further we are acutely aware that this is a very heinous offence whereby a minor boy has been abducted, raped and murdered in a most brutal manner which crime offends the very core of

society and humanity however, as Judges we have to put such aspects aside and decide the guilt or innocence of the appellant by dispassionately assessing the evidence before us and coming to a decision which is supported by the admissible evidence on record and the governing law and not by our emotions or own personal feelings. We can only be guided by the evidence and the law and nothing else. In this respect we refer to the case of **Azeem Khan V Mujahid Khan** (2016 SCMR 274) which held at P.290 Para 32 as under;

> *"Similarly, mere heinous or gruesome nature of crime shall not detract the Court of law in any manner from the due course to judge and make the appraisal of evidence in a laid down manner and to extend the benefit of reasonable doubt to an accused person being indefeasible and inalienable right of an accused. In getting influence from the nature of the crime and other extraneous consideration might lead the Judges to a patently wrong conclusion. In that event the justice would be casualty".*

11. This position was reiterated in the later case of **Naveed Asghar v State** (PLD SC 2021 P.600) in the following terms;

> *"The ruthless and ghastly murder of five persons is a crime of heinous nature; but the frightful nature of crime should not blur the eyes of justice, allowing emotions triggered by the horrifying nature of the offence to prejudge the accused. Cases are to be decided on the basis of evidence and evidence alone and not on the basis of sentiments and emotions. Gruesome, heinous or brutal nature of the offence may be relevant at the stage of awarding suitable punishment after conviction; but it is totally irrelevant at the stage of appraising or reappraising the evidence available on record to determine guilt of the accused person, as possibility of an innocent person having been wrongly involved in cases of such nature cannot be ruled out. An accused person is presumed to be innocent till the time he is proven guilty beyond reasonable doubt, and this presumption of his innocence continues until the prosecution succeeds in proving the charge against him beyond reasonable doubt on the basis of legally admissible, confidence inspiring, trustworthy and reliable evidence. No matter how heinous the crime, the constitutional guarantee of fair trial under Article 10A cannot be taken away from the accused. It is, therefore, duty of the court to assess the probative value (weight) of every piece of evidence available on record in accordance with the settled principles of appreciation of evidence, in a dispassionate, systematic and*

structured manner without being influenced by the nature of the allegations. Any tendency to strain or stretch or haphazardly appreciate evidence to reach a desired or popular decision in a case must be scrupulously avoided or else highly deleterious results seriously affecting proper administration of criminal justice will follow. It may be pertinent to underline here that the principles of fair trial have now been guaranteed as a Fundamental Right under Article 10A of the Constitution and are to be read as an integral part of every sub-constitutional legislative instrument that deals with determination of civil rights and obligations of, or criminal charge against, any person."

12. After our reassessment of the evidence we find that the prosecution has NOT proved its case beyond a reasonable doubt against the appellant for the following reasons:-

(a) The FIR was delayed by a period of 2 days however we do not consider this to be fatal to the prosecution case as usually when a young child goes missing the priority is to search him out and only then if the search is unsuccessful usually is the FIR lodged as in this case and as such this slight delay of two days has been fully explained. What is of importance is that the FIR was lodged against unknown persons as the complainant did not know who had abducted his son.

(b) That with regard to the abduction of the deceased who was taken from a busy park in broad day light there is no eye witness.

(c) That although it is alleged that the appellant used to use the park and was a local person of the mohalla there is no last seen evidence. i.e that the appellant was seen with the deceased on the day on which he went missing as would fulfill the requirements as laid done In Fayyaz's case (supra) and the later case of **Muhammed Abid V State** (PLD 2018 SC 813).

(d) That according to the complainant's evidence he had suspected the appellant from day one though he gave no basis for such suspicion apart from the hearsay evidence that apparently the appellant used drugs and his father who was an old friend asked for progress reports of the case. Significantly despite this suspicion on the appellant from day one he did not mention this to the IO despite the IO interrogating other suspects to his knowledge during this period which does not appeal to logic, reason or commonsense. Instead he informed the IO of his suspicions 15 days after the lodging of the FIR. Suspicion can never replace legally admissible evidence which proves the commission of an offence. In this respect reliance is based on the cases of **Muhammed Pervaiz** (Supra) and the case of **Asia Bibi** (PLD 2019 SC 64)

(e) The case against the appellant is therefore based on circumstantial evidence. 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 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 judicint 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)

In the case of **Azeem Khan** (Supra) the following was reiterated with respect to circumstantial evidence at P.290 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." **(bold added)**

13. **Thus, keeping in view the law on circumstantial evidence what evidence is there against the appellant after the points mentioned above.**

(i) That the appellant made a confession before the police the day after his arrest on suspicion. It is well settled by now that confessions before the police are inadmissible in evidence. In this respect reliance is placed on Sajjan (Supra) as followed by this court in an reported judgment passed by the Hon'ble High Court of Sindh in Cr. Jail Appeal No.234 of 2022 **Muhammad Arshad v The State.** Significantly the police made no effort to produce the appellant before a judicial magistrate in order to record his confession.

(ii) It does not appeal to logic, commonsense or reason that the appellant would confess to a capital case when there was no evidence against him and he had only been arrested on suspicion.

(iii) It is the prosecution case that the appellant a day after his arrest lead the police to the hidden remains of the alleged deceased which was in a place which only he would know about. However the police made no entry that the appellant had agreed to take them to the place where the body was and where that place was prior to leaving the PS which castes some doubt on this solitary piece of corroboratory evidence. Others might have known where the remains were along with the clothes of the remains which any one could have found after 15 days as they were not buried. In this respect reliance is placed on the cases of **Sajjan** (Supra) and **Askar Jan** (supra)

(iv)With regard to the body only remains were found such as a skull, other bones and teeth. This even castes doubt on whether this was the correct body as

in usual course a body does not decompose to such a state within 17 days. In this respect reliance is placed on the case of Azeem Khan (Supra) which held as under;

> *"The abductee was killed probably 2/3 days after 16.07.2006 while pieces of bones were recovered on 17.08.2006 which were also overrun by the flood water of the channel and mud as well. According to the well-known medico-legal jurist, MODI such like destruction of entire body of human being, even of teenager is not possible within two months because some of viscera made of tough tissues and full skeleton of human body remain intact. This opinion of the jurist is based on practical experience in many cases of this nature, instances of which are given by him in the Chapter "STAGES OF PUTREFACTION OR DE-COMPOSITION OF BODY". In this case, only scattered pieces of bones were recovered and not full skeleton of human body, which by itself is unbelievable, being against the well established and universally recognized juristic view on the subject".*(bold added)

(v) Even though the DNA report found that the body was the deceased it stated that it could not be excluded that it was not the body of the deceased. i.e the DNA match was not 100% certain.

(vi) That no cause of death has been established by any medical examiner or medical or other report and as such whether the remains were actually of the deceased is not categorically proven **whilst his cause, date and time of death remain unknown.**

(vii) With regard to rape of the deceased there was no semen found on the remains or the recovered clothes or any other evidence to show that any rape had taken place let alone to link such rape to the appellant.

(viii) With regard to the ATA offence there is no evidence that the abduction and murder of the deceased was made with the design, intent or purpose to create terror and as such the provisions of the ATA are not applicable in this case. In this respect reliance is placed on the case of **Ghulam Hussain (2020 PLD SC 61)**

(ix) That the appellant had no motive to abduct and murder the deceased.

(x) As for the recovery of the motor bike at the accused's home this is inconsequential as no one saw the accused abduct the deceased on a motor bike or even see the accused abduct the deceased at all.

(xi) That the appellant claims enmity with the complainant due to an old family dispute.

14. Thus, we find that the prosecution has not been able to prove the charge against the appellant based on the circumstantial evidence which it has produced against the appellant keeping in view the law in respect of circumstantial evidence the prosecution has failed *to create an unbroken chain, where one end of the same touches the dead body and the other the neck of the accused.*

15. Even otherwise the appellant is entitled to the benefit of the doubt not as a concession but as a matter of right and in this case we find numerous doubts in the prosecution case and thus by extending the benefit of the doubt to the appellant he is acquitted of the charge, the appeal is allowed, the impugned judgment set aside and the appellant released unless he is wanted in any other custody case.

16. The appeal is therefore allowed and the confirmation reference is answered in the negative.