

ORDER SHEET  
IN THE HIGH COURT OF SINDH, KARACHI

**Special Criminal A.T. Appeal No.152 of 2019**  
**Confirmation Case No.06 of 2019**

Date	Order with signature of Judge
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**Present:**

Mr. Justice Nazar Akbar  
Mr. Justice Zulfiqar Ahmad Khan  
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Appellants: Syed Mehroz Mehdi Zaidi, through  
Mr. Muhammad Farooq, advocate.

**Versus**

Respondents: The State, through  
Ms. Rahat Ahsan, Additional P.G.

Date of hearing: **19.11.2020**

**J U D G M E N T**

**NAZAR AKBAR, J.-** This Special Criminal A.T. Appeal is directed against the judgment dated **31.05.2019**, whereby the learned Judge Anti-Terrorism Court No.XVII, Karachi in Special Case No.46/2017 arising out of FIR No.879/2011 under Section 302/324/34 PPC r/w Section 7 ATA, 1997, registered at P.S Shahra-e-Faisal, Karachi, has convicted the appellant under section 265-H(2) Cr.P.C and sentenced as under:-

Under Section 302(b) P.P.C & sentenced to death as (Tazir). Accused be hanged with the Neck till his death with directions to pay Rs.1,00,000/- (One Lac) to the legal heirs of deceased by way of compensation u/s 544 Cr.P.C and in default of payment thereof, shall undergo S.I. for six months more.

Under Section 7(1)(a) of Anti-Terrorism Act, 1997 and sentenced to Death. Accused be hanged with the Neck till his death with directions to pay fine of Rs.1,00,000/- (One Lac) and in case of default of payment thereof, shall undergo S.I for six months more.

Under Section 324 PPC sentenced him to suffer R.I for five years with directions to pay fine of Rs.50,000/- (Fifty thousands) and in default of payment thereof, further undergo S.I for one month more.

I also order for forfeiture of moveable and immovable property of accused to the extent of Rs.5,00,000/- (Five Lacs).

The death sentences are subject to confirmation from the Hon'ble High Court of Sindh. All the sentences shall run concurrently and accused shall be entitled to benefit u/s 382-B Cr.P.C. The accused Mehroz Mehdi Zaidi is produced in custody by jail authorities is remanded back to the jail along with conviction warrant to serve out the above sentences in accordance with law.

2. Precisely, the facts of prosecution case are that SIP Muhammad Ajmal Awan of P.S Shakra-e-Faisal, Karachi recorded statement of complainant Muhammad Nasir under section 154 on **02.11.2011** and same was incorporated in FIR No.879 of 2011 wherein the complainant stated that he is doing construction work where one Abdul Jabbar Qureshi also worked with him and belongs to Ahle-Sunat wal-Jamat and performed his duty as President in District Malir. On **30.10.2011** the complainant received information through unknown person from mobile phone of Abdul Jabbar Qureshi that two persons on Motorcycle registration No.KDI-8472, maker Unique, have received fire shot injuries and got injured, were shifted to Agha Khan Hospital by the persons standing there. On such information, he rushed towards Agha Khan Hospital along with colleagues of Ahle-Sunnat wal-Jammait and in the emergency room he was informed by the doctors that Abdul Jabbar Qureshi was brought in dead condition as he has died at the spot, whereas Imdadullah Farooqi was lying injured in emergency room. Complainant communicated the message to the relatives of both persons. After funeral and burial, he came to know on his own accord that on 30.10.2011 his friends Abdul Jabbar and Imdadullah Farooqi were coming on motorcycle, maker Unique, registration No.KDI-8472 after attending religious sitting in Siddique Akbar Masjid, situated at Nagan Chowrangi, when they reached on the flyover bridge of Johar

Mour near Sunny Pride Apartment, Block-20, Gulistan-e-Johar in the evening time at about 1830 hours where two persons by following them on motorcycle without number started firing upon them with firearm weapons due to which both were seriously injured. The act of the assailants was seen by other members of Ahle-Sunnat-wal-Jammait and they can identify the assailants if they are brought before them. Due to firing, Abdul Jabbar succumbed to the injuries and died on the spot while Imdadullah was providing medical treatment in Liaquat National hospital. The complainant, after consultation, lodged FIR against two unknown culprits identifiable from their faces for killing of his friends Abdul Jabbar Qureshi by firing and injuring his other friend Imdadullah Farooqi by firing.

3. On the same day i.e. 30.10.2011 ASI Jawad Akhtar mobile officer of P.S Shahra-e-Faisal while on patrolling in the area along with his staff received information on wireless that two persons have been injured in the firing of unknown culprits at Johar Mour bridge Sunny Pride, Block-20. Gulistan-e-Johar and rushed there and secured the motorcycle No.KDI-8472, maker Unique, black color and so also four empties of 9mm pistol under the memo in presence of ASI Jamsehd Ali and PC Muhammad Imran at about 1845 hours. During investigation, Inspector Ghulam Abbas visited the place of incident prepared such memo and handed over the motorcycle of injured Imdadullah Farooqi to his brother Sharafatullah Farooqi on superdginama, thereafter he recorded statements of the witnesses under section 161 Cr.P.C. Since no clue of the culprits was found, therefore, the FIR was disposed of in "A" class.

4. On **20.12.2016** after five years of disposal of case as "A" class, suddenly SSP East Zone by order No.SSP/INV/E/ORDER/2569/2016 Karachi assigned the investigation to Inspector Farooq

Azam who added **Section 7** of ATA, 1997 and on the same day the new I.O received information that one person, namely Mehroz Mehdi Zaidi (the present appellant) who was arrested by the police of **P.S Nabi Bux** in **Crime No.146/2016** has confessed before the Judicial Magistrate about committing the offence in this case. However, surprisingly on receiving such information, the I.O went to **P.S Ferozabad** instead of P.S Nabi Bux where the appellant/accused was already arrested in yet another **Crime No.13/2014** and took him out from the lockup and interrogated him and then re-arrested him in this case.

5. The new I.O. within a month or so completed the investigation and on **30.01.2017** submitted challan against the appellant under the above referred sections and added names of co-accused Ibrar Bangash, Saqib Bangash, Rizwan and Khurram without showing any material even their parentage and address were not known while placing their name in column No.2 of the challan. On **09.10.2017** the trial Court framed charge against the accused at Ex:5. Accused pleaded not guilty and claimed to be tried.

6. In order to prove its case, prosecution examined **PW-1** Shoaib Ellahi, as Judicial Magistrate at Ex:06; **PW-2** Syed Imran Imam Zaidi, Judicial Magistrate at Ex:07; **PW-3** PC Abdul Rehman at Ex:08; **PW-04** SIP Jamshed Ali at Ex:09; **PW-05** MLO Kaleem Siddiqi at Ex:10' **PW-06** Security Supervisor Javed Iqbal at Ex:12.

7. I.O has recorded his statement at Ex:11 that three police officials, ASI Javed Akhtar, SIP Muhammad Ajmal and first I.O/PI Ghulam Abbas have died. He also recorded his statement at Ex:13 that the witnesses, namely Muhammad Bilal, Najeebuddin, Muhammad Nasir and Abdul Razak have shifted to some unknown

places, therefore, could not be served and there is no possibility to be served in near future. In this regard, proclamation under sections 87 and 88 Cr.P.C were also issued against them and duly published in daily newspapers. Prosecution also examined PW-07 SIP Muhammad Raza Zaidi at Ex:15. PW-08 I.O of the case Insepector Farooq Azam at Ex:16. Thereafter, the learned APG closed the prosecution side vide statement at Ex:17.

8. Statement of accused was recorded under Section 342, Cr.P.C at Ex:18 to which he denied and claimed that the prosecution has falsely implicated and also stated that he was in custody of P.S Ferozabad when I.O of this case arrested him. He categorically stated that he has not recorded any confessional statement before any Magistrate. However, neither he examined himself on oath nor produced any witness in his defense.

9. Learned trial Court after formulating the points for determination, hearing learned counsel for the parties, by judgment dated **31.05.2019**, convicted and sentenced the accused/ appellant as stated above. Against the said judgment the appellant has preferred the instant Spl. Cr. A.T.J. Appeal.

10. Mr. Muhammad Farooq, learned counsel for the appellant has contended that the appellant is innocent and has been falsely implicated in this case with malafide intention by the police when the appellant was already in custody of police in another case. He argued that there is no eye witness of the alleged incident and the trial court has sentenced the appellant only on alleged judicial confession of the appellant recorded on **16.11.2016** in crime Nos.146 and 147 of 2016 registered at P.S Nabi Bux and not in present case and uncorroborated statement of so-called injured Imdadullah Farooqi,

despite the fact that neither doctors who provided treatment to the injured was examined nor any medical certificate was produced to even identify the injuries, if any, were received by him. Learned counsel has contended that though the appellant was also alleged to have been involved in other cases on the basis of one and the same confessional statement recorded on **16.11.2016** in crime No.146/2016 he has been acquitted by this Court in other cases on the ground that confessional statement was neither voluntary nor it was corroborated by any independent evidence and it has been recorded after delay of 9 days. He has placed on record certified copies of the following judgments:-

- (1) Special Criminal A.T. Appeal No.163 of 2018 a/w confirmation Reference No.07 of 2018 arising out of FIR No.13/2014 under section 302/324/34 PPC registered at P.S Bahadurabad, Karachi.
- (2) Spl. CrI. A.T.A No.356 of 2018 arising out of FIR No.146/2016 under section 4/5 Explosive Substances Act, 1908 registered at P.S Nabi Bux, Karachi;
- (3) Spl. CrI. A.T.A No.357 of 2018 arising out of FIR No.147/2016 under section 23(1)(a) Sindh Arms Act, 2013 registered at P.S Nabi Bux, Karachi;

In all the above cases the prosecution has heavily relied on confession of appellant in crime No.146 and 147 of 2018 and the appellant has been acquitted on the ground that it was not voluntary. He lastly prayed for acquittal of the appellant.

11. Conversely, Ms. Rahat Ahsan, learned Additional Prosecutor General argued that prosecution had examined 08 PWs and they had fully supported the prosecution case. She further argued that after confessional statement of appellant before the learned Judicial Magistrate, he was arrested in this case and the trial Court for the sound and valid reasons convicted and sentenced the accused/appellant. She further contended that the appellant is also involved

in several other cases, however, she could not controvert the factual position that the appellant has been acquitted in all other cases by this Court, amongst others, on the ground that the sole confessional statement was not in accordance with law and otherwise not free of doubts.

12. We have heard learned counsel for the appellant as well learned Additional Prosecutor General and perused the record.

13. The case of the appellant is that the reliance placed by the trial Court on the evidence of two Judicial Magistrates, namely PW-1, Shaoib Elahi and PW-2, Syed Imran Imam Zaidi who respectively recorded statement of witness/injured Imdadullah Farooqi and the statement of appellant/accused under **Section 164 Cr.P.C** was erroneous, illegal and even contrary to the settled principles of criminal jurisprudence whereby such confessions as evidence ought to have been out-rightly discarded by the trial court. The learned trial court failed to appreciate that none of the two Judicial Magistrates have fulfilled the basic requirements of **Section 164 Cr.P.C** for recording the statement of accused as well as the statement of witness. It has been contended by the learned counsel for the appellant and rightly so that PW-1, who recorded statement of injured witness Imdadullah Farooqi, has not given an opportunity of cross-examination to the appellant and this fact has been established from the statement of learned Judicial Magistrate (PW-1) and the Investigating Officer, (PW-8). Learned Judicial Magistrate PW-1 Shoaib Elahi in his examination-in-chief stated that at the time of recording of statement of witness under section 164 Cr.P.C, the witness and the accused/ appellant both were produced before him after fulfilling all legal requirements but in his examination-in-chief neither he has confirmed that he has not informed the accused that

he is entitled to engage a counsel to cross-examine the witness nor he verified from the accused or the I.O. that accused has been served with the notice under **section 160** Cr.P.C. Even copy of statement of witness Imdadullah Farooqi under **section 161** Cr.P.C was not provided to the accused before recording statement of the witness. The record does not show that even learned Magistrate himself had with him copy of statement of witness under **section 161** Cr.P.C at the time of recording his statement under section 164 Cr.P.C. Learned Magistrate in cross-examination has stated as under:-

“It is correct to suggest that in the order dated 17.1.2016 learned Magistrate has not mentioned for direction to accused to engage any counsel, Voluntarily says, that the order for notice to accused was passed and in the notice, it is mentioned that the accused may engage any counsel. **It is correct to suggest that the notice was given by the I.O is not produced by me. .... It is correct to suggest that the statement of the witness cannot be recorded without advocate.**”

The investigating officer PW-8, Farooque Azam, categorically stated in his cross-examination as under:-

“I have not recorded 161 statement of Imdadullah Farooqi but his statement was recorded by first I.O/PI Ghulam Abbas (late). **I have not supplied copy of 161 Cr.P.C statement of Imdadullah Farooqi to accused at the time of serving notice u/s 160 Cr.P.C. It is correct to suggest that statement u/s 161 Cr.P.C of Imdadullah Fafooqi was recorded after about 5 years two months and 18 days of the incident.**”

14. The learned trial Court failed to appreciate that according to the prosecution story, two unidentified persons have suddenly opened fire at around Maghrib prayer time from their back and without any identification parade after more than 5 years, the prosecution has produced the accused before the Magistrate and the witness who was injured with one bullet in his back and two in his neck after five years of incident claimed that the suspected accused



present in Court is one of them who fired upon them. Learned trial Court failed to appreciate that the statement of injured Imdadullah Farooqi was not subjected to the test of cross-examination and it was even otherwise unbelievable because it was not supported with medical evidence regarding his injuries and his treatment. A brief statement of the witness recorded on **18.11.2016** relied upon by trial Court in the conviction order is reproduced below:-

On 30.10.2011 I was coming after attending religious ceremony at Sioddiqu-e-Akbar Masjid near Nagan Chowrangi along with my friend Abdul Jabbar on motor cycle. When we reached near Millennium Mall on the bridge adjacent to Johar Mor two motorcycles chased us on which 4 people were riding and suddenly opened fire on us at around maghrib namaz time which resulted immediate death of my friend abdul jabbar who received unlimited bullets where as I received three bullets; 02 in my neck and 01 on my back. After bullets were fired upon me I stood and saw people firing and running away. A suspected accused who is present in the court is one of the who fired upon me. Subsequently I was taken to hospital. Whatever I am stating is true.

It does not attract the prudent mind that the victim who has received three bullets, two in his neck and one on his back was in a position to stand up and see people who were firing and running away. The man injured in the back and neck stood up is unbelievable. Not only these circumstances render the evidence of the witness unfit and unreliable but the failure of the witness himself and the prosecution to produce any medical certificate confirming injuries, if any, to the PW Imdadullah Farooqi renders the entire incident and his injury unbelievable. An uncorroborated statement of injured PW Imdadullah Farooqi has been relied upon by the learned trial Court to inflict capital punishment on the accused/appellant. In view of these facts, in addition to the legal defect in recording of the statement of Imdadullah Farooqi under section 164 Cr.P.C in absence of the

counsel for the accused was even otherwise not confidence inspiring to implicate the appellant in the case.

15. The perusal of evidence of PW-2, Judicial Magistrate Syed Imran Imam Zaidi manifests another major dent in the prosecution story against the appellant. Learned Judicial Magistrate violated mandatory requirement of **Section 164** Cr.P.C that once statement of accused under section 164 Cr.P.C was recorded he was to be remanded to judicial custody but the learned Magistrate handed over custody of the appellant back to the same investigating officer. The learned counsel for the appellant has pointed out that the confessional statement was recorded on **16.11.2016** and as stated by the investigating officer in his examination-in-chief on **10.1.2017** he interrogated the accused in the lockup of **Ferozabad P.S** where the appellant was confined in some other case and re-arrested him in presence of mashirs though he has confessed his guilt in the present case before the I.O of **crime No.13/2014** of **P.S Bahadurabad**. It means after his confessional statement on **16.11.2016**, the appellant was not sent to judicial lockup. The Hon'ble Supreme Court in the case of Muhammad Parvez and others vs. the State and others (**2007 SCMR 670**) has held that when the accused after recording of his confessional statement is handed back to the police, his confession would not be relevant for awarding punishment on the basis of such statement. It cannot be considered voluntary confession. The relevant observation of the Hon'ble Supreme Court from the said judgment is reproduced below:-

“6. ....  
.....  
..... **It is admitted fact that after recording the confessional statement of the appellants was handed back to the police. Such type of confession keeping in view the peculiar circumstances highlighted hereinabove appears to be**

**irrelevant as law laid down by this Court in Khuda Bakhsh's case 1969 SCMR 390.** It is an admitted fact that convict remained in police custody before and after recording confessional statement for 24 hours and the Magistrate, had taken only one hour to record the confession of the convict. Such type of confession would not fall in the category of voluntary confession.....”

In another case reported as Azeem Khan and another vs. Mujahid Khan and others (**2016 SCMR 274**) the Hon'ble Supreme Court has observed as under:-

17. The Recording Magistrate committed successive illegalities one after the other as after recording the confessions of the appellants on oath, both were handed over to the same police officer, who had produced them in the Court in handcuffs. This fact speaks volumes that the Recording Magistrate was either not knowing the law on the subject or he was acting in the police way desired by it, compromising his judicial, obligations. This careless attitude of the Magistrate provided premium to the Investigating Agency because it was thereafter, that the recoveries of the so-called incriminating articles were made at the instance of the appellants, detail of which is mentioned above.

18. In our considered view, the confessions of both the appellants for the above reasons are of no legal worth, to be relied upon and are excluded from consideration, more so, when these were retracted at the trial. Confessions of this nature, which were retracted by the appellants, cannot mutually corroborate each other on the principle that one tainted evidence cannot corroborate the other tainted piece of evidence. Similar view was taken by this Court in the case of Muhammad Bakhsh v. The State (**PLD 1956 SC 420**), while in the case of Khuda Bux v. The Crown (**1969 SCMR 390**) the confession made, was held not voluntary because the accused in that case was remanded back to the police after making confession.

16. It is also clear from the evidence of P.W-02 on record that no confession has been recorded by him in **crime No.879/2011** of P.S Shakra-e-Faisal, Karachi under Section 302, 324 and 34 PPC. That is why even the original copy of the confession recorded in **crime No.146/2016** has not been produced by the PW in his evidence and a photocopy of judicial confession was produced by him. Even in

crime **No.146/2016** in which appellant’s confession was allegedly recorded it was after delay of 9 days. The appellant in crime No.146/2016 was said to have been arrested on **07.11.2016** at **0100 hours** and confession, if at all, it was recorded on **16.11.2016**. The perusal of the impugned order shows that the trial Court has even failed to appreciate that the confessional statement cannot be used as substantive evidence of fact when there is clear unexplained delay of nine (9) days in recording the same. In this context the Hon'ble Supreme Court in the case of Muhammad Parvez (**2007 SCMR 670**) supra has also observed as under:-

“6. In case all the facts are put in a juxtaposition, then it is crystal clear that confessional statement was recorded after five days as the appellant Pervez was remained in the custody of the local police. It is a settled law the delay of over 24 hours would normally be fatal to the acceptance of judicial confession as law aid down by this Court in Naqeebullah's case **PLD 1978 SC 21** coupled with the fact that prosecution had failed to explain the delay in recording the confessional statement. This fact created doubt qua the confessional piece of evidence. See Khan Muhammad's case **1981 SCMR 597**. It is no doubt that mere delay of 24 hours in recording the confessional statement is not fatal but surrounding circumstances are also to be considered qua believing or not believing the confessional statement.....”

17. It is also settled law that a judicial confession recorded in one case cannot be relied/used in another case as each and every case has its own particular facts and circumstances. It is also clear from the deposition of Judicial Magistrate Syed Imran Imam Zaidi, who in his examination-in-chief has deposed that he has recorded confession in the case bearing Crime No.146 and 147 of 2016 under section 4/5 of Explosive Substances Act, 1908 and 23(1)(a) of Sindh Arms Act 2013, registered at **P.S Nabi Bux**. It means neither any application for recording confession of the appellant was made in

respect of the **FIR No.879/2011** relating to the instant case nor such confession was recorded by him in the instant case.

18. In view of the above discussion, we were unable to uphold the conviction and sentence of appellant Syed Mehroz Mehdi Zaidi son of Syed Hassan Muhammad Zaidi recorded by the trial Court vide judgment dated **31.05.2019**, therefore, we allowed this appeal, set aside the impugned judgment and acquitted the appellant of the charge through short order dated **19.11.2020**. The confirmation reference sent by the trial court is answered in the “Negative”. These are the reasons for the said short order.

JUDGE

JUDGE

Karachi, Dated:14.12.2020

Ayaz Gul