

IN THE HIGH COURT OF SINDH AT KARACHI

Present:

Mr. Justice Aftab Ahmed Gorar
Mr. Justice Amjad Ali Sahito

Spl.Crl.Anti-Terrorism Appeal No.142 of 2017

Appellant: Ahmed Saeed alias Bharam alias
Nagori S/o Muhammad Ismail
Through Khawaja Naveed Ahmed,
Advocate.

Respondent: The State
Through Mr. Ali Haider Salim,
Deputy Prosecutor General, Sindh

Mr. Sajid Mehmood,
Special Prosecutor for Rangers.

Dates of hearing: 11.03.2019, 10.04.2019 &
25.04.2019.

Date of judgment: _____.05.2019

J U D G M E N T

Amjad Ali Sahito, J.- Being aggrieved and dissatisfied with the judgment dated 13.06.2017 passed by the learned Judge, Anti-Terrorism Court No.IX, Karachi in Special Case No.1444 of 2016 arising out of the FIR No.330/2009 for the offence under section 302/34 PPC read with section 7 of Anti-Terrorism Act, 1997 registered at Police Station Nabi Bux, Karachi, whereby the appellant was convicted under section 7(1)(a) of the ATA 1997 read with section 302 PPC and sentenced him to life imprisonment with forfeiture of the property as required u/s. 7(2) of ATA 1997 with fine of Rs.100,000/- and in default whereof, to suffer R.I. for one year more. However, the benefit of Section 382-B Cr.P.C. was not extended to the appellant on the ground that he went underground after the commission of offence, as according to prosecution case, incident took place in the year 2009, whereas, the appellant was arrested in the year 2016 and,

therefore, looking to such period of his abscondance he does not deserve such concession of provision of section 382-B, Cr.P.C.

2. Briefly, the facts of the prosecution case are that on 01.10.2009 complainant Syed Afzal Hussain Zaidi, brother of deceased Syed Ibrar Hussain Zaidi received an information on his mobile phone that his brother Syed Ibrar Hussain had been murdered at the hands of some unknown culprits at Ranchor Line just opposite the Sukkur Hakery Karachi. After receipt of such information, he went at the pointed place but he was informed by the people available there that his brother, who was having the serious injuries on his person, shifted to the hospital and, therefore, he went there but he was informed by the hospital administration that his brother had succumbed to injuries and his dead body was kept in the cold storage of Edhi Centre. He, therefore, went there and received the dead body of his brother by producing such letter of PS Nabi Bux issued by them in this behalf. The complainant Syed Afzal Hussain Zaidi then lodged the FIR at PS Nabi Bux against unknown culprits about the murder of his deceased brother Syed Ibrar Hussain Zaidi.

3. On 21.6.2016 it is alleged that SIP Choudhry Tariq Mehmood received a letter from SSP Investigation Zone-II South karachi whereby it was disclosed that present accused Ahmed Saeed alias Bharam was detained by the Rangers personnel for ninety days under section 11EEEE of ATA 1997 and during the period of his detention accused Saeed alias Bharam made a disclosure about the commission of offence reported in the present case viz. Crime No.330/2009 wherein deceased Syed Ibrar Hussain Zaidi was shown to had been murdered in the year 2009. SIP Choudhry Tariq Mehmood was, therefore, required to take the custody of accused from the Rangers personnel as his detention period of ninety days was going to be expired and after receiving such direction of the SSP, accused was detained by the Rangers personnel where he interrogated the accused and during

such interrogation present accused allegedly confessed his guilt about the commission of offence as reported in the present case and, therefore, on the basis of such disclosure the arrest of accused was made and he was brought to PS Nabi Bux and on 25.6.2016 it is alleged that accused voluntarily led the police party to the very place where deceased Syed Ibrar Hussain Zaidi was murdered and disclosed that it was the same place where they committed his murder. On 27.06.2016 it is alleged that present accused was produced before the concerned learned Judicial Magistrate for the confessional statement of accused u/s. 164, Cr.P.C. wherefrom the learned Magistrate required the accused to be produced before him on 28.06.2016 for his confessional statement u/s. 164, Cr.P.C. and on 28.6.2016 the appellant was produced before the Magistrate where he voluntarily recorded his confessional statement u/s. 164, Cr.P.C. whereby he disclosed that on the date of incident, he alongwith his companions Haider Gaddi, Rasheed alias Doctor, Tahir Lamba and others had committed the murder of deceased Syed Ibrar Hussain Zaidi by giving him firearm injuries. After completing the remaining investigation the accused was sent up to stand trial accordingly before the Court having jurisdiction, whereas, the learned trial Court received R&Ps of this case by way of transfer for its disposal in accordance with law.

4. The charge was framed against accused in respect of offence punishable u/s.302/34 PPC read with section 7 of ATA 1997 at Ex.3, to which he pleaded not guilty and claimed to be tried vide his plea at Ex.4.

5. At the trial, in order to establish accusation against the accused, the prosecution examined ASI Muhammad Iqbal as PW-1 at Ex.5, who produced memo of pointation of place of incident at Ex.5/A. PC Amir Tanoli examined as PW-2 at Ex.6, who produced memo of arrest at Ex.6/A. MLO Dr. Qarar Ahmed examined as PW-3 at Ex.8, who produced receipt dated

01.10.2009 issued to MLO Civil Hospital Karachi at Ex.8/A, Medico-Legal Certificate at Ex.8/B and postmortem examination report at Ex.8/C. Prosecution also examined Syed Imran Imam Zaidi, learned Judicial Magistrate as PW-4 at Ex.9, who produced letter dated 27.6.2016 addressed him at Ex.9/A and confessional statement of accused at Ex.9/B. Complainant Syed Afzal Hussain Zaidi was also examined as PW-5 at Ex.11, who produced copy of FIR being Crime No.330/2009 at Ex.11/A and letter dated 01.10.2009 addressed to Incharge Edhi Centre at Ex.11/B. PW-6 ASI Riyasat Ali was also examined at Ex.12, who produced inquest report of deceased at Ex.12/A, memo of securing of last worn cloths of deceased at Ex.12/B, memo of inspection of dead body at Ex.12/C and memo of inspection of place of incident at Ex.12/D. PW-7 SIP Choudhry Tariq Mehmood was also examined at Ex.14, who produced NOC dated 21.6.2016 issued by Colonial Sector Commander at Ex.14/A, DD entry No.34 dated 21.6.2016 at Ex.14/B, DD entry No.12 dated 25.6.2016 at Ex.14/C and DD entry No.13 dated 25.6.2016 at Ex.14/D. PW-8 Investigating Officer Inspector Ghulam Ali was examined at Ex.15, who produced letter dated 03.9.2016 of SP Investigation-II South Karachi at Ex.15/A. Thereafter, the prosecution closed its side by SPP vide statement at Ex.16. Statement of the accused was recorded under Section 342 Cr.P.C. at Ex.17, wherein he denied the prosecution allegations leveled against him and claimed to be innocent. Appellant further disclosed that he did not make any judicial confession before any Magistrate and that confessional statement which is attributed to him was drafted and prepared by the police. However, the appellant was neither examined himself on oath in disproof of the charge under Section 340(2) Cr.P.C. nor led any evidence in his defence. The learned trial Court, after hearing the learned counsel for the parties and appraisal of the evidence, convicted and sentenced the appellant to vide judgment dated 13.06.2017. The conviction and sentence recorded by the learned trial Court have been impugned by the appellant before

this Court by way of filing the instant Spl.Crl.Anti-Terrorism Appeal.

6. Learned counsel for the appellant mainly contended that the impugned judgment is against the law and facts of the case; that the appellant is innocent and has falsely been implicated in this case; that learned trial Court has failed to appreciate the evidence available on record in its true perspective and given an arbitrary perverse and framed decision against the appellant causing him serious prejudice; that the judicial confession of the appellant was recorded on oath hence having no value in the eyes of law; that the appellant has retracted from his judicial confession hence the said judicial confession/statement has no value in the eyes of law and on the basis of retract judicial confession no conviction can be awarded; that there is a delay of recording confessional statement about 7 days which seems to be the same has obtained under pressure or coercion; that the impugned order is bad in law and resulted of misreading and non-reading of cross-examination of PWs, therefore, the impugned judgment is liable to be set aside and consequently acquitted the appellant from the charge; that there are major contradictions between the evidence of prosecution witnesses. He lastly argued that the prosecution has miserably failed to prove its case against the appellant and thus, according to him, under the abovementioned facts and circumstances of the case, the appellant is entitled to his acquittal. In support of his aforesaid submission, Khawaja Naveed Ahmed, learned counsel for appellant has referred the following decision of the Hon'ble Supreme Court of Pakistan in the cases of *(1) Azeem Khan Rodhi vs. Mujabir Khan (2016 SCMR 274)* wherein the Hon'ble Supreme Court referred High Court (Lahore) Rules and Orders provided guideline for recording judicial confession before the Magistrate, procedure and precautions to be observed by the Magistrate for recording judicial confession of an accused; in another case of *Nazir Ahmed vs. The State (2009 SCMR 523)* wherein the Hon'ble Supreme Court of Pakistan has held that,

Absence of motive or failure on the part of prosecution to prove the same, does not affect the testimony of the eye witnesses, if they are otherwise reliable and in case of Iftikhar Ahmad vs. The State (2005 SCMR 272) wherein the Hon'ble Supreme Court has held that:

“In the event of proof of charge of Qatli-Amad normal penalty under the law is death and exceptional circumstance must be shown to exist for taking a lenient view and for the award of lesser penalty.”

(4) Mst. Naseem & Other Vs. the State (1994 SCMR 1744) wherein the Hon'ble Supreme Court has held that delay of 12 days recording the confession of the case had not rendered the same inadmissible. Further observed that any lapse on the administrative side on the part of A Magistrate recording the confession may not be fatal as to evidentiary value of such confession, provided the Court is satisfied that the lapse on his part has not in any way adversely effected the voluntariness and truthfulness of the confession. He has also relied following case laws which are not supporting to his contentions: (1) Tarique Pervaiz Vs. the State (1995 SCMR1345), (2) Mst. Nazakat Vs. Hazrat Jamal and another (PLD 2007 SC 453), (3) Fazal Rehman and others Vs. The State (PLD 4004 SC 250) & (4) Ghulam Qadir alias Khairai Vs. The State (1979 PCr.LJ 113).

7. While rebutting the above contentions, learned Deputy Prosecutor General, Sindh has supported the prosecution case by contending that the entire case is based upon the confessional statement of the appellant which was recorded by the learned Judicial Magistrate and the other evidence collected by the I/O of the case which connects the appellant with commission of offence; that no proof of enmity was brought by the learned counsel for the appellant which may justify his false implication in this case at the hands of complainant party being interested witness. He further argued that no material contradictions and discrepancies were pointed out by the learned counsel for the appellant to show

his false implication in this case; learned trial Court has rightly recorded the conviction and sentenced against the appellant in accordance with law and thus, he lastly prayed for dismissal of the instant appeal.

8. We have heard the learned counsel for the parties and have perused the record available with their able assistance. On evaluation of the materials brought on record, the case of prosecution depends upon the judicial confession made by the appellant before the Judicial Magistrate and pointation of the place of incident by the accused. The case of prosecution is that the incident took place on 01.10.2009 and the brother of complainant Syed Afzal Hussain lodged FIR at PS Nabi Bux that some unknown persons have committed murder of his brother Syed Ibrar Hussain Zaidi by giving him firearm injuries. The appellant was arrested by the Rangers personnel in the year 2016, who detained him under the provision of Section 11-EEEE of ATA 1999 for ninety days and during his detention the accused made a disclosure about the commission of offence which was already reported in Crime No.330/2009 at PS Nabi Bux (present case), during the course of his detention the accused made a disclosure that he and his companions committed the murder of deceased Syed Ibrar Hussain Zaidi by giving him fire arm injuries. On the basis of such disclosure the arrest of the accused was made by the police. During course of investigation appellant pointed out the place of incident, where they committed the murder of the deceased. Further he voluntarily confessed his guilt before the learned Magistrate whereby he recorded the statement of the appellant u/s 164 Cr.P.C. wherein he admitted that he and his companions have committed number of murders including the deceased Syed Ibrar Hussain. The entire case of the prosecution depends upon the judicial confessional statement of the accused. Now question is this whether on the basis of confessional statement recorded by Magistrate under Section 164 Cr.P.C. the conviction can be awarded to the accused? The judicial confession

made by the appellant is the material piece of evidence in the prosecution case, therefore, we would deal with the same in the first instance. In the case in hand, prosecution examined PW-4 Judicial Magistrate Imran Zaidi, before whom confessional statement of appellant was recorded and he has taken all mandatory precautions for recording his confessional statement. The appellant was placed in the custody of Court staff and the police was directed to leave the premises. Thereafter first warning was administered that he (accused) is not bound to make a confession and if any statement he makes, will be taken down in writing and will be used against him. The sufficient time for reflection was given to the appellant and during that period police have no access to the appellant and after reflection time again the appellant was brought before the Magistrate and on inquiry he disclosed that he is ready to make confession on his own freewill. The second warning was administered that he/accused will be remanded to the Judicial Custody in both cases, either he makes confessions or not, his reply was "Yes Sir" body of the appellant was examined but no mark of torture or violence was found. Another question was put to appellant that has he (accused) been given any inducement, threat or promise by the police or anyone else, which induced him/accused to make confession, he replied "No Sir". All material questions were put by the learned Judicial Magistrate to satisfy himself that confession is to be made by the accused/appellant was voluntarily and without inducement, threat or promise and finally Judicial Magistrate informed the accused that if he is ready to make confession, he is required to record it and then the appellant has given his statement u/s.164 Cr.P.C. which was recorded by the learned Magistrate as per verbatim of the appellant. Lastly, the learned Judicial Magistrate read over and explained the confessional statement to the appellant, who accepted the same as true and correct and put his signature on it. After recording his confessional statement, he was remanded to judicial custody. From perusal of the confessional

statement of the appellant, it appears that he had constituted a target killing team and committed several murders and attempted murders and he has given the total details of that murders which are total number about 67 including murder of deceased Syed Ibrar Hussain Zaidi, who belongs to MQM Haqiqi. He further admitted that he has also committed murder of police officials and people of opposite group. In our humble view, we are satisfied that the confession made by the appellant for commission of offence before the learned Magistrate was voluntarily and true without any pressure, influence, coercion, fear or force.

9. Reverting to the contentions of the learned counsel for the appellant, that confession made by accused on oath, having no value. From perusal of confessional statement recorded under section 164 Cr.P.C. nowhere it is mentioned that the learned Magistrate before recording statement administered oath to the appellant but in the confessional statement the appellant has disclosed his name and thereafter he says "I am on oath giving statement" hence it cannot be said that it was recorded on oath. While recording the statement u/s 164 Cr.P.C. it is the duty of Magistrate to write down each and every word spoken by accused/witness in its true prospective. PW-4 Syed Imran Imam Baider Judicial Magistrate deposed in his examination in chief "on the following day viz. 28.06.2010 the I.O. appeared in the morning alongwith the custody of accused for recording his concessional statement u/s 164 Cr.P.C. After observing all codal formalities as required for recording the confessional statement he had recorded the confessional statement of accused Ahmed Saeed u/s 164 Cr.P.C. and recorded such certificate over it as per required law. In his examination-in-chief, nowhere the witness deposed that before recording the statement the oath was taken/administered to the appellant to believe that the statement was recorded on oath. No suggestion was made to the learned Magistrate that you have recorded confessional statement on oath. Furthermore, in the case of **Nazeer alias Wazeer Vs. The State (PLD 2007 SC**

202) it has been observed by the Hon'ble Supreme Court of Pakistan with regard to the admissibility of the confession made by the accused on oath, that the confession of accused on oath would be only a procedural mistake which is merely an irregularity. The confessional statement recorded on oath can be used as legal evidence subject to the test of its being true. The related para of the judgment is as follows:

“12.... Therefore, in the given facts, the recording of confessional statement on oath would only be procedural mistake which is merely an irregularity.”

10. The next contention of the learned counsel for the appellant was that the appellant had retracted from his confessional statement before the trial Court, hence, no conviction can be awarded. It is suffice to say that in order to judge the evidentiary value of a retracted confession, the court has to advert to this question whether the same appears to have been made voluntarily without any inducement, duress or coercion with the object to state the truth in this context reliance is placed on the case of **Ch. Muhammad Yaqoob & others Vs. the State (1992 SCMR 1983)**.

“20....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 are some irregularities in recording of a confession, would not warrant disregarding of the same.

The above alleged irregularities in respect of recording of the confessions highlighted by Mr. Abid Hassan Minto, referred to hereinabove, in our view, would not be fatal as to the evidentiary value of the same if we were to be satisfied that the same have not, in any way, adversely affected the voluntariness or truthfulness of the retracted confessions.”

11. The last contention of the learned counsel for the appellant was that there was delay of seven days for recording the judicial

confession which affects its reliability. The delay in recording the confessional statement is not itself sufficient to discard the same in number of cases. The Hon'ble Supreme Court of Pakistan has held that no hard and fast rule can be laid down about the period within which confessional statement should be recorded. Reference in this regard may well be made to the case of **Majeed Vs. the State (2010 SCMR 55)** wherein the Hon'ble Supreme Court of Pakistan has held that:

“10.....No doubt there was delay of 12 days in recording the confession but this by itself its not sufficient to discard the same. This Court in the case of Nabi Bakhsh v. State 1999 SCMR 1972 held that delay in recording the confessional statement by itself is not sufficient to affect its validity. However, no hard and fast rule can certainly be laid down about the period within which the confessional statement of the accused ought to be recorded during investigation. Reference is also invited to Muhammad Yaqoob v. State 1992 SCMR 1983.”

12. The Medical Officer Dr.Qarar Ahmed in his evidence deposed that on 01.10.2009 he received the dead body of deceased Syed Ibrar Hussain for his post mortem examination. On the external examination of the dead body of the deceased he found the following injuries on his person:-

1. *Lacerated penetrating wound 01 cm X 01 cm on left cheek with blackening and charring (contact shot) wound of entry-exit would 01 cm X 0.5 cm on back of neck lower end.*
2. *Lacerated penetrating wound 0.5 cm X 0.5 cm on right cheek anterior to ear with blackening and charring and tattooing-wound of entry-exit would 02 cm X 02 cm on left occipital region.*
3. *Lacerated penetrating wound 0.5 cm X 0.5 cm on left scapular region and exit wound 02 cm away from entry latterly – no blackening and charring.*
4. *Two entry wounds lacerated penetrating on left side chest 0.5 cm X 0.5 cm each and exit wound posteriorly on scapular region.*
5. *Lacerated penetrating wound 0.5 cm X 0.5 cm on left lateral side chest lower end no blackening and charring-wound of entry and exit wound 1 cm X 1 cm on scapular region.*
6. *Two lacerated penetrating wounds 0.5 cm X 0.5 cm each on right lateral side chest no blackening and charring wound of entries and two partially exit wounds below right scapular region bullet projectiles removed from wounds of exit.*

7. *Lacerated penetrating wound 1cm X 1cm on left lateral side chest wound of entry and exit posteriorly back of chest.*
8. *Two entry wounds 0.5cm X 0.5 cm each on left side abdomen and iliac region and exit wounds on left buttocks 01 cm X 01 cm each.*
9. *Lacerated penetrating wound 0.5 cm X 0.5 cm on left thigh anteriorly and exit wound 01 cm X 01 cm posteriorly with fracture of left femer.*
10. *Lacerated penetrating wound 01 cm X 0.5 cm on left thigh interiorly and exit on left hip latterly 3 cm X 1 cm.*

13. On the external as well as internal examination of the dead body of the deceased, he was of the opinion that the cause of death was due to cardio respiratory failure as a result of acute head injury and hemorrhagic shock resulting from fire arm. All the injuries were antemortem in nature and whereas the probable time in between injury and death was instantaneously and the time between death and post mortem was about two hours.

14. The confessional statement finds corroboration from the medical evidence that the death of the deceased Syed Ibrar Hussain was unnatural. The prosecution also examined PW-1 Muhammad Iqbal, who has arrested the accused and prepared such memo of arrest and recovery. PW-5 Complainant of this case also confirmed the death of the deceased was unnatural. Prosecution also examined PW-6 Riyasat Ali, PW-7 Ch. Tarique Mehmood SIO of the case and produced all relevant documents so also no objection certificate Ex.14/A which shows that the appellant was involved in number of murder case. By recording the statement under section 342 Cr.P.C. wherein he has denied from his confessional statement.

15. The overall discussions involved a conclusion that the Magistrate, who recorded the confessional statement of the appellant, had informed him that he was not bound to make confessional statement, and if would he make such a statement, it can be used against him as an evidence, and also informed him that after recording the confessional statement he would be sent to the judicial lockup. The appellant, despite having been told that he was under no compulsion to make the confession, was volunteered to make a such confessional statement and the Magistrate, after putting all necessary questions to the appellant

in the prescribed manner and completing necessary formalities of law, ascertained his willingness and recorded his confessional statement, which would sufficiently show that the confession of the appellant was free from any inducement, outside influence or pressure and was true and voluntarily. Learned counsel for the appellant has failed to point out any material illegality or serious infirmity made by learned trial Court while passing the impugned judgment, which in our humble view, is based on an appreciation of the evidence and the same does not call for any interference by this Court. Thus, the conviction awarded to the appellant by the learned trial Court is maintained and the instant Special Criminal Anti-Terrorism Appeal filed by the appellant Ahmed Saeed @ Bharam being meritless is dismissed.

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