

IN THE HIGH COURT OF SINDH, KARACHI

Before:

**Mr. Justice Mohammad Karim Khan Agha
Mr. Justice Zulfiqar Ali Sangi**

**Special Criminal Anti-Terrorism Appeal No.163 of 2018
Confirmation Case No.07 of 2018**

Appellant : Syed Mehroz Mehdi Zaidi S/o Syed Hassan
Muhammad Zaidi
Through Mr. Muhammad Farooq, Advocate

Respondent : The State
Through Mr. Khadim Hussain,
Addl. Prosecutor General, Sindh

Date of Hearing : 08-11-2019

Date of Judgment : 25-11-2019

J U D G M E N T

ZULFIQAR ALI SANGI---J., Appellant filed the instant Criminal Appeal on being aggrieved and dissatisfied with the impugned judgment dated 10.05.2018 passed by learned Judge, Anti-Terrorism Court No.XVII, Karachi in Special Case No.291/2017 [(Old Case No.45(VII)/2017) (New Special Case No.102/2017)] under FIR No.13/2014 for the offences under sections 302, 324, 34 PPC r/w section 7 of ATA, 1997 registered at PS Bahadurabad, Karachi; whereby appellant was convicted and sentenced as under:

- a) *Convicted under section 302(b) PPC and awarded death sentence with direction to pay Rs.200,000/- separately to the legal heirs of the each deceased (total Rs.600,000/-) by way of compensation u/s 544-A Cr.P.C. and in default of payment thereof, he shall further undergo S.I. for six months more.*
- b) *Convicted u/s 7(1)(a) of Anti-Terrorism Act, 1997 and sentenced to death with directions to pay of Rs.200,000/- and in case of default of payment thereof, he shall further undergo S.I. for six months.*
- c) *Convicted u/s 324 PPC and sentenced him to suffer R.I. for five years with directions to pay fine*

of Rs.50,000/- and in default of payment thereof, he shall further undergo S.I. for one month.

All the sentences were ordered to run concurrently. However, benefit of Section 382-B Cr.P.C. was extended to the appellant and sentence of death was subject to confirmation of this Court.

2. Brief facts of the prosecution case are that complainant SIP Ishtiaq Hussain posted at PS Bahadurabad has lodged the FIR on behalf of the State on 19.01.2014 at about 2120 hours and as per FIR it is stated that on 17.01.2014 he was available on his duty at PS Bahadurabad when Operator Aftab from SSP office informed him that MLO, Dr. Anjum Siraj of Jinnah Hospital had informed the incident of firing on a vehicle took place at Shahrah-e-Faisal in which three persons namely Muhammad Ali s/o Abu Bakar aged about 30 years, Muhammad Rafique s/o Fazal-ur-Rehman aged about 40 years and Usman s/o Asfandyar Khan aged about 48 years were killed and brought to the JPMC and their ML Numbers are 393/14, 394/14 and 395/14 while one Fahad Iqbal s/o Zahir Iqbal aged about 18 years also sustained bullet injuries vide ML No.392/14 and asked that any officer be sent for proceedings. He recorded such entry in the roznamcha as entry No.24 at about 2040 hours and handed over the charge to SI Muhammad Sarfraz and he himself proceeded to Jinnah Hospital, Karachi, where he met with MLO, Dr. Jagdesh Kumar and gave separate letters to the MLO for conducting 174 Cr.P.C. proceedings of the deceased and so also a separate letter for recording statement of injured Fahad Iqbal s/o Zahid Iqbal with reference to his ML No.392/2014. After getting such permission he went to Mortuary and inspected the three dead bodies of deceased in presence of witnesses Syed Muhammad Rafey Rafi s/o Muhammad Rafi and Muhammad Junaid s/o Abdul

Raheem Administrator of Jamia Darul Khair Masjid-o-Madarsah and prepared such inquest reports u/s 174 Cr.P.C. separately and so also prepared such inspection of dead bodies separately and obtained the signatures of the mashirs. After the postmortem of three deceased he obtained PM certificate No.35/20147 of deceased Muhammad Rafique along with cause of death certificate, PM No.36/2014 of deceased Moulana Mufti Muhammad Usmanyar Khan along with cause of death certificate and PM No.37/2014 of deceased Muhammad Ali along with cause of death certificate and so also he received last wearing clothes of the deceased in separate sealed parcels from MLO. He has also asked the above named witnesses to lodge the FIR but they have replied that they are representative of the Madarsah and their elders shall lodge the FIR. He handed over the dead bodies to them after completing the legal formalities for funeral and burial. The MLO has endorsed on the letter that the injured Fahad Iqbal s/o Zahid Iqbal aged about 18 years due to the fire shot injuries is in Operation Theater and is not fit for statement. He informed the SHO about the entire proceedings at JPMC and then he went to the place of incident where he came to know that on 17.01.2014 a vehicle bearing registration No.AXU-054 Mazda in which the above named deceased and injured were going towards Airport through Main Shahrah-e-Faisal and when reached near Bungalow No.18, Bangalore Town, Bahadurabad, Karachi at about 1910 hours four unknown culprits were appeared on two motorcycles and started firing with fire arm weapons on the vehicle and targeted the persons sitting in the vehicle for unknown reasons and killed the above named three persons and injured one person. SIP Ishtiaq Hussain waited for legal heirs of the deceased persons but none has come and as such facts recorded by him vide

entry No.36 dated 18.01.2014 and entry No.23 dated 18.01.2014 as well as entry No.17 dated 19.01.2014. Thereafter, SIP Ishtiaq Hussain with the permission of high officials lodged FIR against unknown culprits on behalf of the State vide Crime No.13/2014 u/s 302/324/34 PPC r/w section 7 ATA, 1997.

3. Police Inspector Tahseen Baig visited the place of incident and secured vehicle bearing No.AUX-054 Mazda on which firing was made and so also recovered 16 empties of 9MM pistol, 04 pieces of lead / sika of the bullets, bloodstained seat covers and other articles and prepared such mashirnama in the presence of mashirs ASI Abdul Rehman and ASI Waheed Akhtar. The investigation officer SIP/SIO Sarfraz Alyana recorded statement of the witnesses namely SIP Ishtiaq, ASI Waheed, PI Tahseen Baig and injured Fahad Iqbal u/s 161 Cr.P.C. and he visited the place of incident. He also sent the bloodstained clothes and other bloodstained articles recovered from the vehicle to the chemical examiner and so also investigation was transferred to PI Zameer as the accused/culprits were not traced therefore the FIR was disposed of in "A" class. Later on, on 20.12.2016 the investigation was handed over to Inspector Arshad Mehmood of PS Ferozabad on the orders of SSP East Zone-1. During investigation he has received information that one person arrested by the police of PS Nabi Bux in case Crime No.146 & 147 of 2016 namely Mehroz Mehdi and he has made confession before the Judicial Magistrate and admitted about committing the offence in this case. On such information after getting NOC from the Court, I.O. has taken over the custody of accused from jail and brought him at PS Ferozabad. After interrogation, he has arrested the accused in this case. After

completing investigation he produced the challan against accused Mehroz Mehdi before the Court of law. In the challan the names of co-accused namely Haider, Saqib, Ibrar and Rizwan all by caste Bhangash written in blue ink as their personal data/Kawaef were incomplete and also mentioned in the challan that supplementary challan shall be produced as and when their complete personal data is traced.

4. After completing all the formalities the charge was framed against the accused to which he pleaded not guilty and claimed to be tried.

5. At the commencement of trial, prosecution examined Judicial Magistrate Ayaz Ahmed as PW-1 at Ex.6, who produced application of the I.O. on which order passed thereon at Ex.6/A, photocopy of FIR at Ex.6/B, statement at Ex.6/C, copy of application moved by accused for reserving the cross at Ex.6/D, copy of CNIC of the witness at Ex.6/E. (PW-2) Syed Imran Imam Zaidi, Judicial Magistrate Court No.11 South at Ex.7, who produced photocopy of confessional statement of the accused at Ex.7/A (11 pages) as the original confessional statement is produced by him in Case No.43/2017. (PW-3) HC Waheed Akhtar at Ex.8, who produced memo of arrest and recovery at Ex.8/A, memo of pointation of wardaat at Ex.8/B. (PW-4) SIP Ishtiaq Hussain at Ex.9, who produced roznamcha entry at Ex.9/A, permission for 174 Cr.P.C. inquest report of three deceased persons at Ex.9/B as well as report regarding the recording of the statement of injured at Ex.9/E, inquest report of three deceased persons at Ex.9/F to Ex.9/H, mashirnama of inspection of three dead bodies at Ex.9/I to Ex.9/K, medical certificate of cause of death at Ex.9/L to Ex.9/N and

medico-legal certificate at Ex.9/O to Ex.9/Q as well as MLC of injured Fahad Iqbal at Ex.9/R, dead bodies were handed over to Rafey Rafi and Muhammad Junaid at Ex.9/S to Ex.9/U, roznamcha arrival entry No.33 at Ex.9/V as well as departure entry No.14 at Ex.9/W, application to MLO for recording statement at Ex.9/X, arrival entry No.23 at Ex.9/Y, two entries Nos. 29 and 36 on one page at Ex.9/Z, entry No.17 that he went to the house of injured person at Ex.9/A-A, then he lodged the FIR No.13/2014 on behalf of State against four accused persons as per entry No.31 at Ex.9/B-B & FIR Ex.9/C-C respectively. (PW-5) ASI Abdul Rehman at Ex.10, who produced mashirnama of site inspection and seizure of vehicle at Ex.10/A. (PW-6) Inspector Tahseen Baig at Ex.12. (PW-7) SIP Sarfraz Alyana at Ex.13, who produced entry No.32 at Ex.13/A, entry No.9 for sending articles for FSL and chemical examination at Ex.13/B and letter at Ex.13/C he had sent the vehicle and empties of 9MM to FSL through letter at Ex.13/D, arrival entry No.28 at Ex.13/E, departure entry at Ex.13/F, arrival entry No.37 at Ex.13/G, chemical examination report at Ex.13/H, FSL examination report at Ex.13/I, roznamcha entry No.28 at Ex.13/J. (PW-8) Teacher Muhammad Imran at Ex.14, who produced copy of notice u/s 160 Cr.P.C. at Ex.14/A. (PW-9) Muhammad Junaid at Ex.15. (PW-10) PI Arshad Mehmood at Ex.18, who produced departure entry No.33 at Ex.18/A, copy of application for NOC and order at Ex.18/B and Ex.18/C, departure entry No.7 at Ex.18/D, as per roznamcha entry No.14 he took the custody of accused and brought at PS Ferozabad at Ex.18/E, arrest of accused as per entry No.26 at Ex.18/F, as per roznamcha entry No.07 for getting remand of the accused from Administrative Judge, ATCs at Ex.18/G, arrival entry at PS at Ex.18/H, copy of notice at

Ex.18/I. (PW-11) MLO, Dr. Jagdesh Kumar at Ex.19, who produced three postmortem reports at Ex.19/A, 19/B & 19/C respectively and (PW-12) MLO, Dr. Anjum Ali Soomro at Ex.21. Lastly, prosecution closed its side wide statement at Ex.22.

6. Statement of accused was recorded u/s 342 Cr.P.C. at Ex.23, to which he denied the prosecution case and attributed the false implication at the hands of police and also stated that he was arrested from outside of his house on 04.08.2016 at about 1400 hours by the Rangers. He has also stated that he was falsely shown arrested. He has denied that he has recorded any confessional statement before the Judicial Magistrate Court No.11th and he produced the photocopy of application dated 05.08.2016 at Ex.23/A and photocopy of Headquarters Pakistan Rangers Sindh press release on 05.11.2016 at Ex.23/B and copy of news published at Ex.23/C, 23/D, 23/E & 23/F respectively. However, neither the appellant recorded his statement on oath nor examined any witness in his defense.

7. Learned trial court after assessment of evidence and hearing the appellant and prosecution passed the impugned judgment and convicted the appellant as stated above.

8. Learned counsel for appellant contended that appellant was convicted by the trial court in a case of no evidence; that appellant was not named in FIR; that nothing incriminating was recovered from the appellant which connected him to this offence; that the prosecution failed to produced its star witness namely Fahad Iqbal who was the only eye witness of the incident; that confessional statement relied upon by the trial court was neither true nor

voluntary and was retracted during statement under section 342 Cr.P.C of the appellant; that no blood relative of deceased persons came forward for registration of FIR; that prosecution failed to established case against appellant; that all the witnesses are interested and put up witnesses; that entire case of prosecution is doubtful; He lastly contended that appellant may be acquitted by extending him the benefit of the doubt.

9. Learned DPG for the state contended that police received information from hospital about the incident and availability of the dead bodies then immediately rushed towards their so also towards place of wardat; that police recovered empty bullets used in the commission of offence; that blood stained seat covers were also secured by police from the car; that some articles belonging to the deceased were also secured by the police from the car; that police has explained by submitting certain documents that LRS of deceased person not come forward for registration of FIR therefore on behalf of the state FIR was registered; that appellant made his confessional statement before the Judicial Magistrate in which he admitted that he along with his companions committed the murders; that all witnesses supported the case of the prosecution; that medical evidence supported the ocular evidence; Lastly he submitted that the prosecution had proved its case beyond reasonable shadow of doubt therefore appellant was rightly convicted by the trial court and he contended that the appeal of appellant may be dismissed.

10. We have heard the arguments of learned counsel for appellant and DPG for the state and have gone through the entire record with their able assistance.

11. Delay of two days in lodging the FIR in the present case is not fatal to the prosecution as it was explained by the complainant who deposed that he was waiting for relatives of the deceased persons but they did not come to register the FIR and in the end refused to do so and resultantly FIR was registered by him on behalf of State. We have noticed that such a situation is not unusual in heinous offences like targeted killing as extremely few people come forward to lodge FIR or to depose against hardened, disparate and dangerous criminals as they remain in apprehension of their lives.

12. The evidence produced by the prosecution in shape of ocular and medical evidence coupled with documentary evidence, recovery of empties from the place of wardat, recovery of blood stained seat covers from the car, one Muffler white and black color, one Chapal, one Sandle, one Chashma, one Jinnacap, one cap black and red color, one mobile phone Nokia with Jazz sim, blood stained pieces of glass of the windows of the car and other articles belonging to deceased, established beyond any reasonable doubt that on 17-01-2014 at about 1910 hours at main Shahra-e-Faisal road near Bungalow No: 17 and 18, Benglower Town, Mufti Usman, Muhammad Ali and Muhammad Rafique were murdered and Fahad Iqbal received fire arm injury.

13. The question before us is whether the appellant committed these murders and caused injuries to the injured with his other assailants and whether the prosecution has proved its case against the appellant beyond a shadow of reasonable doubt.

14. On our reassessment of evidence and entire material produced before the trial court by the prosecution we are of the

view that the prosecution has failed to establish the charge against the present appellant beyond reasonable doubt.

15. Admittedly the name of appellant does not transpire in the FIR, nor features were mentioned in the FIR. The sole eye-witness of the prosecution was injured Fahad Iqbal who actually saw the assailants while committing the murders and causing him injuries but the said witness did not appear before the trial court for recording his evidence and as such there is no eye witness to the murders as per the prosecution evidence.

16. The only evidence against the appellant in the present case is his confessional statement which was recorded in another case bearing crime No: 146 and 147 of 2016 registered at police station Nabi Bux for offences under the Explosive Substance Act, 1908 and Sindh Arms Act, 2013 and was relied upon by the trial court in the present case in order to convict the appellant.

17. It is well settled by now that an accused can be convicted based on even a retracted judicial confession provided that it is (a) made voluntarily, (b) Is truthful and (c) fits in with the prosecution case and is corroborated by other independent evidence. In this respect reliance is placed on the case of [Azeem Khan Vs. Mujahid Khan 2016 SCMR 274].

18. Turning to each aspect of the confession in turn;

(a) Voluntariness: We have doubts as to the voluntariness of the confession since it seems to have been made whilst the appellant was in rangers or police custody and was made two years after the incident along with confession in respect of a number of other crimes. The appellant was also kept in police custody

for an unexplained period of 09 days before he made his confession.

(b) Truthfulness: We also have doubts as to the truthfulness of the confession as it does not accord with the prosecution case as set out in the F.I.R. The confessional statement in effect states that the incident took place on 23.02.2014 at about 02:00 PM whereas according to the prosecution case the incident took place on 17.01.2014 at 07:10 PM. In our view, the appellant may have got the days mixed up but it would not have been possible for him to be so far out in respect of the time of the incident. He would have known whether it was a lunch time or evening incident.

19. Furthermore, it was the case of the appellant that he was in illegal custody and in this respect he exhibited application dated 05.08.2016 submitted to SHO PS Gulberg Karachi by his brother and a press release issued by HQ Pakistan Rangers (which has not been denied) dated 05.11.2016 showing his arrest by Pakistan Rangers.

20. As such we place no reliance on the judicial confession which we deem to be neither voluntary nor truthful.

21. Even otherwise it is well settled principal of law that a retracted judicial confession cannot alone form the basis for convicting an accused in case of capital punishment without independent corroborative evidence linking him to murders. In this case, there does not appear to be any as the murder weapon was not recovered from anyone, let alone the accused which in turn would make even a positive FSL report inconsequential. Admittedly there is no eye witness to the incident and there appears to be no circumstantial evidence linking the appellant to the murder.

22. It is also the legal position 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 clear from the deposition of Judicial Magistrate Syed Imran Imam Zaidi who in examination in chief deposed that on 16.11.2016, he was posted as 11- Judicial Magistrate South, where investigation officer SI Saleem Khan of the case bearing crime No. 146 of 2016 and 147 of 2016 u/s 4/5 Explosive Substance Act and 23(i)(a) SAA lodged at police Station Nabi Bux moved an application for recording confessional statement of the accused namely Mehroz Mehdi S/O Hassan Muhammad u/s 164 Cr.P.C, along with accused who was in police remand granted by the Honourable High Court of Sindh. The said application was allowed and the statement of accused was recorded by him after observing all the legal formalities. The confession was **not** made in respect of the FIR in the instant case.

23. It is well settled principal of law that the prosecution has to prove its case beyond a reasonable doubt and where even a single circumstance which creates reasonable doubt in the mind of a prudent man comes in the evidence of the prosecution the benefit must go to accused not as a matter of grace or concession but as a matter of right. In this regard reliance is placed on the case of Tariq Pervez v. The State (1995 SCMR 1345).

24. Based on the above discussion and our reassessment of the evidence on record we are of the view that the prosecution has failed to prove its case against the appellant beyond any reasonable doubt, therefore, we allow the instant appeal and set-aside the

conviction and sentences awarded by the trial court vide judgment dated 10.05.2018 and acquit the appellant by extending him the benefit of doubt, who shall be released forthwith unless wanted in any other custody case. In view of above the confirmation reference sent by the trial court is answered in the negative.

JUDGE

JUDGE