IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

Criminal Appeal No.S-176 of 2012

Appellant:	Ibrahim alias Abu through Mr. Mumtaz Sachal Awan, advocate.
Respondent:	The State through Mr. Siraj Ahmed Bijarani, APG Sindh.
Complainant:	Allahditto through Mr. Zahid Ali Khoso, advocate.
Dates of hearing:	11.12.2023, 15.12.2023 & 18.12.2023.
Date of decision:	22.12.2023

J U D G M E N T

KHADIM HUSSAIN TUNIO, J,- Through instant appeal, Ibrahim ("**the appellant**") challenged the judgment dated 17.05.2012 ("**impugned judgment**") passed by the-then Second Additional Sessions Judge, Badin ("**trial Court**") in Sessions Case No. 245/2009 which culminated from FIR No. 16/2009 lodged with Police Station Kario Ganhwar u/s 302 and 396 of the Pakistan Penal Code ("**PPC**"). By way of the impugned judgment, he was convicted for the offence punishable u/s 302(b) and 396 PPC and was sentenced to imprisonment for life. However, benefit of section 382-B Cr.P.C was extended to him.

2. The incident as set out in case is that on 19.03.2009, one Ahmed Khan Noohani found dead bodies of Yousuf Kumbhar and Ramzan Kumbhar, the complainant Allahditto Kumbhar's brother and son, respectively. He informed the complainant who arrived at the place of incident, identified the bodies, secured a live bullet and one bullet empty himself and went to the police station to disclose of such information. Appellant Ibrahim and co-convict Allahditto Khaskheli[1] were arrested by the investigating officer ("**IO**") while the rest remained absconders.

3. Upon completion of all requisite procedural formalities, a formal charge was framed against the appellant. Responding to

[1] Already served out his sentence and was released after payment of compensation amount.

the charge, the appellant asserted his innocence and pleaded not guilty.

4. At trial, prosecution examined fifteen witnesses, all of whom produced various documents in their evidence. Of these, the complainant Allahditto, Ahmed Khan, Muhammad Hassan, Lakhadino and Jumoo have provided an ocular account, the latter two in the shape of last-seen evidence while the accused were admittedly returning after the murder. Thereafter, prosecution side was closed. Statement of the appellant u/s 342 CrPC was recorded in which he denied all the allegations levelled against him and claimed to have been falsely implicated in the case while asserting that he had been tortured by the police. However, he neither examined himself on oath nor produced any evidence in his defence.

5. On conclusion of the trial, trial Court after hearing the learned counsel for the parties convicted and sentenced the appellant as stated in paragraph-1 (supra).

6. Learned counsel for appellant contended that the appellant were falsely implicated in the present case and that there are various contradictions in the evidence of the prosecution witnesses; that the only evidence available on the record against the appellant is last seen evidence; that the incident is unseen and unwitnessed and the trial Court has based its conviction on the basis of extra-judicial confession and last seen evidence, neither of which is sufficient for a conviction in the absence of ocular account; that the case of the prosecution is not free from doubt and benefit of the same is to go with the appellant as a matter of right. In support of his contentions, he has cited the cases reported as "Fayyaz Ahmad v. The State" (2017 SCMR 2026), "Khalid @ Khlidi and 2 others v. The State" (2012 SCMR 327), "Noor Muhammad v. The State and another" (2010 SCMR 97), "Tahir Javed v. The State" (2009 SCMR 166), "Ghulam Akbar and another v. The State" (2008 SCMR 1064), "Wazir Muhammad and another v. The State" (2005 SCMR 277), and "Wazir Muhammad and another v. The State" (2005 SCMR 277).

7. Learned Assistant Prosecutor General Sindh and counsel for the complainant, in one voice, have supported the

impugned judgment while contending that sufficient material is available on the record to connect the appellant with the alleged offence; that medical evidence has supported the prosecution case; that a pistol has been recovered from the appellant Ibrahim. Learned counsel for the complainant cited the case of "Mukhtar Alam v. Fazal Nawab and another" (2020 SCMR 618), "Nazir Ahmad and another v. The State" (1994 SCMR 58) and "Farooq Khan v. The State" (2008 SCMR 917) in support of the contentions.

8. I heard the learned counsel for the appellant and the learned APG assisted by the learned counsel for the complainant and perused the material available before me with their assistance. I have also given due consideration to the cases referred to by them.

9. After a careful reappraisal of evidence, in the light of material contradictions I found going through the same as rightly pointed out by the counsel for the appellant, and a perusal of the other material available on the record, I have come to the irresistible conclusion that prosecution failed to establish the guilt of the appellant beyond a reasonable shadow of doubt. That so in light of the fact firstly the incident was unwitnessed. No one had seen the appellant Ibrahim be a part of the assailants that killed the deceased. The complainant came to know of the death of his brother and son ("**the deceased**") through PWs Ahmed Khan and Muhammad Hassan, both of whom recalled the incident as having initially heard gunshots and then going out to see the dead bodies. Undoubtedly, the case is of a robbery gone wrong as these PWs noted missing belongings of the deceased. None of the witnesses, as already observed, saw the actual incident unfolding. The other two witnesses namely, Lakhadino and Jumoon also did not witness the incident, rather deposed that the appellant had went to them to ask them to accompany him to the complainant where he admitted his guilt and sought forgiveness while admitting that they had tried to stop the deceased and get them off the motorcycles, but they did not do so and were shot. Reliance on such ocular account is of no help to the prosecution case and such account is no further consideration. Learned counsel for the appellant contended that

this was a case of last-seen evidence which is incorrect. The present case has a better footing than a case of last-seen evidence as last-seen evidence would be one where the deceased was seen by the witnesses in the presence of the appellant and other assailants; that is not the case here. None of the witnesses deposed as to this aspect this case is un-witnessed.

10. As for the reliance on extra-judicial confessional of the appellant before the complainant and the witnesses, the same was made before PWs Jumoon and Lakhadino, but both these witnesses failed to disclose the time and date of when the said disclosure was made to them. The person who was allegedly brought by the appellant for the payment of compensation was also not examined. There is no cavil to the proposition that extra-judicial confession is a very weak type of evidence and reliance on the same alone in the absence of other corroboratory and straightforward evidence is not safe administration of justice.[2] Moreover, another reason why this extra-judicial confession was inadmissible is because the same was a joint confession before multiple people.[3] The reason behind consideration of extra-judicial confession is because the same is bound to the words of the one such confession was allegedly made;[4] to take it at face value means for such a witness to take on the role of the Judge which needs to be admonished. Alas, that is exactly what unfolded in the present case where the trial Court entirely relied on the extra-judicial confession made before two witnesses while ignoring the seminal judgment of the Supreme Court in the case of ***Allah Ditta***[5] where it was categorically held that extra-judicial confession alone could not be used as the sole basis of conviction, especially in cases involving the capital punishment. Where no ocular account is available, circumstantial evidence can be relied upon on the condition that such circumstantial evidence must be like an unbroken chain having unbroken links, where even a single link was broken, recording a conviction would be unsafe.[6] Admittedly, the complainant himself

[2] See Mst. Asia Bibi v. The State, PLD 2019 SC 64
[3] See Muhammad Ismail v. The State, 2017 SCMR 898
[4] See Nasir Javaid v. The State, 2016 SCMR 1144
[5] 2012 SCMR 184
[6] See Munawar Shah v. Liaquat Hussain, 2002 SCMR 713

had recovered an empty bullet and a live bullet from the place of incident which he picked up himself instead of waiting for the police, contaminating the place of incident and diminishing the sanctity of such a recovery. Blood stained earth was recovered by the police at which time the complainant handed the recovered empty and the live bullet to the police. The mashir of recovery, PW-10 Ramzan, who was also declared hostile by the prosecution deposed that police had not sealed the bullet empty and the live bullet at the place of incident and also did not prepare the mashirnama at the place of incident. He also stated that he did not know the contents of the memo of recovery. The other mashir, PW-13 Muhammad Siddique, however, contradicted him on every aspect while also admitting that their signatures were obtained at the police station and the complainant also handed the empty bullet and the live bullet to the police at the station. Undoubtedly, this in itself destroys the credibility of the recovery of the blood stained earth, clothes of the deceased and the bullets recovered. Admittedly, a pistol had also been recovered from the appellant Ibrahim at the time of his arrest and mashir Qasim was examined in this regard who deposed that the said recovery of the pistol was made from Ibrahim and the memo in this regard was not read over to him rather LTIs on blank papers were obtained from him. This also strikes at the core of the prosecution case. The recovered pistol along with the crime empty was sent to the chemical examiner on 08.12.2009 whereas the pistol was recovered on 22.11.2009 and the empty was recovered on 19.03.2009. No record has been presented in terms of deposit of these in the malkhana, as such safe custody for such a prolonged period is doubtful coupled with the fact that these recoveries were also not sealed on the spot nor were the memos prepared therefor at the place of incident, leading to the unmistakeable conclusion of the appellant Ibrahim's acquittal.

11. The findings of guilt of any accused must rest on sound evidence, viewed from any angle to be trustworthy and rested surely and firmly on the evidence produced and not conjectures or probabilities. Cases cannot be decided merely on high probabilities regarding the existence or non-existence of a fact to prove the guilt

of a person because if that were the case, the golden rule of giving "benefit of doubt" to an accused would be reduced to a naught as held in the case of ***Naveed Asghar***.[7] Prosecution is under obligation to prove its case against the accused person at the standard of proof required in criminal cases, that being beyond reasonable doubt. Moreover, the benefit of any doubt is to be given to the accused person as of right, not as of concession as held in the landmark case of ***Tariq Pervez v. The State***.[8]

12. For what has been discussed above, the guilt of the appellant has not been proven to the hilt and is not free from doubt. Therefore, captioned criminal appeal is allowed, the judgment impugned herein is set aside along with the conviction and sentence awarded to the appellant. The appellant is ordered to be released forthwith if not required in any other custody case.

JUDGE

[7] PLD 2021 SC 600
[8] 1995 SCMR 1345