

IN THE HIGH COURT OF SINDH, AT KARACHI

Criminal Jail Appeal No. 853 of 2019

Appellant: Siraj-ul-Islam @ Siraji through Mr. Muhammad Farooq, advocate
The State: Mr. Muhammad Anwar Mahar, DDPP
Complainant: Through Syed Suleman Badshah, advocate
Date of hearing: 14.09.2023
Date of judgment: 14.09.2023

J U D G M E N T

IRSHAD ALI SHAH, J- It is alleged that the appellant with rest of the culprits committed murder of Wazir Khan @ Waris Khan after abducting him, for that the present case was registered. The appellant and co-accused Noor Muhammad @ Javed @ Khoya, Amin @ Qurban, Umerullah @ Munna and Noor-ul-Islam @ Noori were charged for the said offence, which they denied and the prosecution to prove the same, examined in all 13 witnesses including complainant Haji Muhammad Nazar and then closed its side. The appellant and above named co-accused in their statements recorded under Section 342 Cr.PC denied the prosecution's allegation by pleading innocence; they examined none in their defence or themselves on oath, however, the appellant produced certain documents to prove his innocence. On conclusion of trial, the appellant was convicted under Section 365 PPC and sentenced to undergo rigorous imprisonment for 05 years; he was further convicted under Section 302(c) PPC and sentenced to undergo rigorous imprisonment for 15 years; he and above named accused were convicted under Section 201 r/w 34 PPC and sentenced to undergo rigorous imprisonment for 05 years, with benefit of Section 382(b) Cr.P.C; no order however was passed, which may suggest that the sentences awarded to the appellant were directed to run concurrently or consecutively by learned IV-Additional Sessions Judge/MCTC-Ext, Karachi South, vide judgment dated 25.09.2019, which he has impugned before this Court by preferring the instant Crl. Jail Appeal.

2. As per office note, no appeal was preferred for above named co-accused against the sentence awarded to them and they as per learned DDPP for the State have already been released by jail authorities on completion of their jail term.

3. It is contended by learned counsel for the appellant that the appellant has been involved in this case falsely by the police at the instance of the complainant party; the FIR has been lodged with delay of about 06 days; none has seen the appellant committing the alleged incident; the confessional statement of co-accused Noor Muhammad @ Javed @ Khoya is exculpatory in nature and evidence of the PWs being doubtful in its character has been believed by the learned trial Court without lawful justification, therefore, the appellant is entitled to be acquitted of the charge by extending him benefit of doubt. In support of his contention, he relied upon case of *The State through P.G Sindh and others vs. Ahmed Omar Sheikh and others* (2021 SCMR 873).

4. Learned DDPP for the State and learned counsel for the complainant have sought for dismissal of the instant CrI. Jail Appeal by contending that the exculpatory confessional statement of co-accused Noor Muhammad @ Javed @ Khoya could not be rejected out rightly; on arrest from the appellant has been secured the pistol which has been found matched with the empty secured in the present case and prosecution has been able to prove its case against the appellant beyond shadow of doubt. In support of their contention, they relied upon cases of *Mst. Naseem Akhtar and another vs. the State* (1999 SCMR 1744) and *Shoukat Ali vs. the State* (PLD 2007 SC 93).

5. Heard arguments and perused the record.

6. As per narration made by the complainant in his FIR, which was lodged by him on 07.09.2013, his son Wazir Khan @ Waris Khan who was working in Fishery, went out for the work but did not return; on search PW Sabaz Ali Khan intimated him that his son was taken away by Sultan Bangali to have a race of motorcycles, who on inquiry told him that his son was taken away at the instance of the appellant and was delivered to him, his associates Noor Alam, Furqan, Raza, Jamal, Samad Farooq and others. It was stated by I.O/SIP Maqsood Qureshi and I.O/DSP Sohail Ahmed Khan that on 23.11.2013, they apprehended accused Noor-ul-

Islam @ Noori under Section 54 Cr.PC and he during course of interrogation admitted to have committed the murder of Wazir Khan @ Waris Khan, on that they called the complainant and PW Jan Asghar at Police Station and the said accused led them, the complainant and P.W Jan Asghar to recovery of dead body of the deceased from mangroves forest. It was found decomposed and was beyond its recognition yet was identified by the complainant and PW Asghar Jan, on the basis of his clothes, buttons and keys to be of Wazir Khan @ Waris Khan, it was referred to Civil Hospital Karachi for postmortem. PW Dr. Qamar Ahmed Abbasi, who conducted postmortem on the dead body of the deceased was also fair enough to say that it was beyond recognition. In that situation, the DNA test was essential for recognition of the dead body of the deceased, it was not done, therefore, identity of the dead body of the deceased by the complainant and PW Jan Asghar on the basis of clothes, buttons and keys to be of Wazir Khan @ Waris Khan could reasonably be judged with doubt. It was further stated by them that on interrogation accused Noor-ul-Islam @ Noori disclosed that he, appellant, Umerullah @ Munna, Noor Muhammad @ Javed @ Khoya, Bashir Bangali, and Amin @ Qurban have committed the murder of the deceased. It was further stated by the said I.Os/SIPs that accused Noor Muhammad @ Javed @ Khoya was apprehended and further investigation of the case conducted by SIP Abdul Ghaffar Niazi, he produced accused Noor Muhammad @ Javed @ Khoya before Mr. Azizullah Khoso, VIIth Judicial Magistrate Karachi West for recording his confession. It was recorded by him accordingly whereby he inter-alia stated that it was accused Bashir Bangli who while taking pistol from accused Amin fired at and killed the deceased at the instance of the appellant, his dead body was buried in mangroves forest. If for the sake of arguments, it is believed that confessional statement of accused Noor Muhammad @ Javed @ Khoya was made by him voluntarily, even then it is exculpatory in nature, therefore, same could hardly be used against the appellant. I.O/SIP Abdul Ghaffar Niazi, who actually got recorded confessional statement of accused Noor Muhammad @ Javed @ Khoya has not been examined by the prosecution on account of his illness. PW Sabaz Ali Khan, who actually intimated the complainant about the deceased being in company of Sultan Bangali lastly has not been

examined by the prosecution. Sultan Bangali, who actually was apprehended on investigation was let off by I.O/SIP Jahan Khan by making disposal of the FIR under `A` Class. If it is believed that the appellant actually confessed his guilt before the complainant party and above named Investigating Officers even then such confession in terms of Article 39 of Qanun-e-Shahadat Order, 1984, could not be used against him as evidence. On arrest from the appellant after encounter as per I.O/SIP Muhammad Nasir was secured pistol, such pistol on its forensic examination was found matched with the empty secured in the present case. There is no allegation that the appellant has used the pistol in commission of the incident, therefore, the appellant could hardly be connected with such recovery. In these circumstances, it would be safe to conclude that the prosecution has not been able to prove its case against the appellant beyond shadow of doubt and to such benefit he is found entitled.

7. In the case of *Faqir Ullah vs. Khalil-uz-Zaman and others* (1999 SCMR 2203), it has been held by Apex Court that;

“18. The first question is whether the confessional statement of the convict was to be accepted in toto or might have been accepted in part. The basic principle of Islamic Law is provided in Majallah-al-Ahkam-al-Adliyyah, (section 78) that the Bayyinah or evidence is a proof whose implications may extend to others while the confession is a proof whose implications are limited to the one who makes it. Under this principle the confessional statement of a person can only inculcate himself and no other person can be inculpated merely because some other person has made any admission. This principle is based on the well-known incident reported by almost all the compilers of the Ahadith in which the Holy Prophet (p.b.u.h.) punished a person with Hadd on the confession of the commission of Zina. But in spite of the fact that he had mentioned a particular woman by name with whom he had admitted to have committed Zina, the Holy Prophet (p.b.u.h.) did not convict the woman on the basis of this confession by the co-accused. He appointed a judicial officer to investigate and to independently find out whether the woman had committed Zina or not. The Holy Prophet (p.b.u.h.) directed the judicial officer to punish the Woman only, on her own free and independent admission. On the basis of this Hadith and several other Ahadith, Muslim Jurists have developed the principle that the implications of the confession of a person are confined to himself and cannot be extended to some body else. It also means that the confession made by a person may be accepted to the extent to which it affects himself and may be rejected to the extent to which it implicates somebody else.”

8. In case of *Muhammad Jamil vs. Muhammad Akram and others* (2009 SCMR 120), it has been held by the Apex Court that;

"When the direct evidence is disbelieved, then it would not be safe to base conviction on corroborative or confirmatory evidence."

9. In the case of *Muhammad Mansha vs. The State* (2018 SCMR 772), it has been held by the Apex court that;

"4....Needless to mention that while giving the benefit of doubt to an accused it is not necessary that there should be many circumstances creating doubt. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of such doubt, not as a matter of grace and concession, but as a matter of right. It is based on the maxim, "it is better that ten guilty persons be acquitted rather than one innocent person be convicted".

10. The case law which is relied upon by learned DDPP for the State and learned counsel for the complainant is on distinguishable circumstances. In none of the case law so relied upon the conviction was maintained against one accused on the basis of exculpatory confessional statement of other accused.

11. In view of the facts and reasons discussed above, the conviction and sentence awarded to the appellant under impugned judgment are set aside, he is acquitted of the offence, for which he was charged, tried, convicted and sentenced by learned trial Court and shall be released forthwith, if not required to be detained in any other case.

12. Above are the reasons of short order of even date, whereby the instant Criminal Jail Appeal was allowed.

JUDGE