

Confession not relied upon

CERTIFICATE OF THE COURT IN REGARD TO REPORTING

Cr. APPEAL No. D-527/2011

a/w Cr. Rev No. D-207/2011

SINDH HIGH COURTComposition of Bench.Single/D.B. ✓

HONORABLE MR. JUSTICE KARIM KHAN AGHA

HONORABLE MR. JUSTICE MUHAMMAD SALEEM JESSAR

Dates of hearing: 27-02-2020

Decided on 12-03-2020

(a) Judgment approved for reporting.

Yes ✓

CERTIFICATE

Certified that the judgment */Order is based upon or enunciates a principle of law */decides a question of law which is of first impression/distinguishes/over-rules/ reverses/explains a previous decision.

*Strike out whichever is not applicable.

NOTE:—(i) This slip is only to be used when some action is to be taken.

(ii) If the slip is used, the Reader must attach it to the top of the first page of the judgment.

(iii) Reader must ask the Judge writing the Judgment whether the Judgment is approved for reporting.

(iv) Those directions which are not to be used should be deleted.

SGP., Kar.—L (iii) 1459—5,000—6-93—T.S.S.

IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Appeal No. 527

PRESENTED

07-12-2011

7/12/2011

Shafqat S/O Attah Muhammad,
Muslim, adult, resident of
Karachi presently confined
In Landhi Jail, Karachi.
and r/o House No.1985, Labour Colony,
Sector F-2, Karachi, Landhi.

APPELLANT

4504

VERSUS

The State.

RESPONDENT

F.I.R.NO.357/2009
U/S 302/364/A,34 R/W
380,201,202 PPC
P.S. Qaidabad,
Karachi.

CRIMINAL APPEAL UNDER SECTION 410
OF CRIMINAL PROCEDURE CODE

Being aggrieved with and dissatisfied by the order dated 14.11.2011 Passed by the Learned 2nd Additional Sessions Judge, Malir, Karachi, in Sessions Case No.627/2009, (The State V/s. Shafqat Hussain), whereby the Learned Trial Court, has convicted the appellant to undergo rigorous prison of ~~5 years~~ ^{Life Imprisonment} by benefit of Section 382-B Cr.P.C., hence this appeal is being preferred for and on behalf of the above named appellant on the facts and grounds amongst others which will be argued at the time of hearing of this appeal.

(Certified Copy of the impugned judgement dated 14.11.2011 is attached herewith and marked as annexure "A-1")

Continued...

(08/08)

فیمیلٹ عورت ماہر چیف جسٹس سندھ ہائی کورٹ سندھ راجی

CASE NO 627/09

Cd. Rev. App. No. 207/11

①

FIR NO. 357/09

P.S. QAID-ABAD.

ACCUSED: SHAFQAT HUSSAIN.

COMPLAINENT: - SHARAFAT HUSSAIN

C/S- 302, 364, 380, 381/34

INWARD NO. 8-130
BRANCH NO. 809
DATE 10/12/11
FROM

عنوان: درخواست برائے حصول الصاف

Regd. Pros.
M. J. Khan
C. M. I. II

مہربان!
محرم چیف جسٹس سندھ ہائی کورٹ سندھ راجی میں، عدالت کی عدالت میں آپ کے عدالت میں ایک درخواست / اپیل ارسال کر رہا ہوں۔
میں یہ درخواست خود آپ کے عدالت میں پیش کرنا لیکن بد قسمتی سے میں
سینٹرل جیل راجی میں پابند سلاسل ہوں۔

محرم چیف جسٹس صاحب! محترمہ بالائے سال 2009 سے زیر سماعت
ہے۔ اس کیس کے اندر میں بطور عدالتی حوزہ (COMPLAINENT) -

اس کیس میں میری اہلیہ صفیہ بی بی کو تین روزہ صفت افراد نے

سال 2009 کے مہینہ کھانہ رمضان کے 24 ویں روزے کو
(یعنی رمضان کے آخری عشرے) میں انتہائی دردناک کے ساتھ ظلم و تشدد
کے بعد تین روزہ (چھپے) سے ذبح کر کے شہید کیا۔

میرا اہلیہ کو جب دردناک کے ساتھ ذبح کیا گیا تو اس وقت میرے دونوں
بیٹے اپنی ماں کے ساتھ قہر سے بھرپور تھے اور میں (یعنی ان بچوں کے باپ)

اپنی ملازمت پر گیا ہوا تھا۔ جس وقت میری اہلیہ صفیہ بی بی کو ان دنوں
نے ذبح کر کے شہید کیا اس وقت میرے دونوں بیٹوں کی عمریں

بالترتیب بڑا بیٹا 3 سال اور چھوٹا بیٹا صرف آٹھ ماہ (8 ماہ)
کا تھا۔ ظالم درندوں نے جب میری اہلیہ کو ذبح کر کے شہید کیا

تو میرے بڑے بیٹے جلی عمر 3 سال تھی اس کے ساتھ اغواء کر کے لے

Confession not relied upon

IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Appeal No.527 of 2011

Present:

Mr. Justice Mohammad Karim Khan Agha
Mr. Justice Muhammad Saleem Jessar.

Appellant : Shafqat Hussain S/o. Atta Muhammad Khan through
 Mr. Mallag Assa Dashti, Advocate.

For State: Mr. Muhammad Iqbal Awan, Deputy Prosecutor
 General.

Criminal Revision Application No.207 of 2011

Applicant : None.

For Respondent: Shafqat Hussain S/o. Atta Muhammad Khan through
 Mr. Mallag Assa Dashti, Advocate.

State: Mr. Muhammad Iqbal Awan, Deputy Prosecutor
 General.

Date of hearing: 27.02.2020

Date of announcement: 12.03.2020

JUDGMENT

Mohammad Karim Khan Agha, J.- Appellant Shafqat Hussain S/o. Atta Muhammad Khan has preferred this Criminal Appeal against the impugned judgment dated 14.11.2011 passed by the learned IInd Additional Sessions Judge Malir Karachi, in Sessions Case No.627 of 2009, F.I.R. No.357 of 2009 u/s. 302/364-A/34 PPC registered at P.S. Quaidabad, Karachi whereby the appellant has been convicted and sentenced to R.I. for life imprisonment under section 302(b) PPC as Tazeer. The benefit of section 382-B was also extended to the appellant.

2. Being aggrieved and dissatisfied with the Judgment of learned IInd Additional Sessions Judge Malir Karachi dated 14.11.2011 the Complainant has also filed the Criminal Revision Application for modification and enhancement of sentence to award major punishment of death under Section 302 PPC to the appellant instead of life imprisonment.

3. The brief facts of the prosecution case as narrated in the FIR are that on 16.09.2009, the complainant Sharafat Hussain, lodged the captioned FIR, alleging inter alia therein that, he is residing at the address given in the FIR and serving in Karachi Port. That about four years ago, he had entered in to tie of Nikah with Mst. Safia Bibi daughter of Gohar Rehman and out of the said wedlock two male issues, namely Muhammad Ammad aged about 3 years and Muhammad Hamza aged about 9 months were born. On 15.09.2009, at about 08-45 am, the complainant proceeded towards his job, whereas his wife and both children named above were present in the house. At about 06-00 pm, he came back at his house and knocked the outer door but nobody responded him and thus he then went on the roof of his neighbour's house and peeped from the grill installed on the roof of complainant's house. He noticed blood and saw his son weeping. He came inside his house and informed the subject facts to Hakeem and other neighbours. Thereafter, the complainant with the help of Iftikhar broke the lock of the grill of the house and entered into his house and found the dead body of his wife Mst. Safia Bibi in a pool of blood, his younger son Muhammad Hamza was weeping near the dead body and elder son of complainant Muhammad Ammad was missing. Consequently the complainant informed to police of PS Quaidabad as well as neighbouring people and relatives, thereafter, along with his elder brother Shafqat Hussain arrived at police station Quaidabad where he lodged instant FIR of this case against unknown persons.

4. The investigation of this crime was conducted by Sub Inspector Zulfiqar Haider, he inspected the place of incident in presence of mashir and secured blood stained clothes of the deceased, blood stained earth and recorded statement of complainant as well as prosecution witnesses u/s 161 Cr.P.C. He recovered missing child Ammad under mashirnama. On 28.09.2009, he got arrested accused Abid from bus stop 89 on the pointation of the complainant and prepared memo of arrest in presence of mashirs. Thereafter, he also arrested accused Shafqat and Ilyas and prepared their memo of arrest. He also secured one pistol from the house of accused Abid on the pointation of accused Shafqat and prepared memo of recovery in presence of mashirs. He sent the recovered articles to chemical examiner. On 05.10.2009, the investigation was transferred to S.I. Zulfiqar Haider Bajwa who prepared memo of sketch of the place of incident. He released the accused Muhammad Ilyas u/s 497(ii) Cr.P.C. On 12.10.2009, he

produced accused Abid before the concerned magistrate, where from accused Abid recorded his confessional statement. On completing of other procedural formalities submitted charge sheet against the present accused who was sent up for trial before the concerned trial court.

5. The charge was framed against the appellant Shafqat Hussain and accused Abid Khan to which they both pleaded not guilty and claimed to be tried. Subsequently accused Abid Khan was murdered and proceedings against him were abated on 07.05.2011 and the trial proceeded only against the appellant Shafqat Hussain.

6. The prosecution to prove its case examined 9 PW's who exhibited various documents and other items in support of the prosecution case where after the prosecution closed its side. The statement under S.342 Cr.PC of accused Shafqat Hussain was recorded where he claimed false implication in the case. He also examined himself on Oath in support of his defense case however he did not produce any witness in his defence.

7. Learned IInd Additional Sessions Judge Malir, Karachi after hearing the learned counsel for the parties and assessment of evidence available on record, vide the impugned judgment dated 14.11.2011, convicted and sentenced the appellant Shafqat Hussain as stated above, hence this appeal has been filed by the appellant against his conviction.

8. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the impugned judgment, therefore, the same are not reproduced here so as to avoid duplication and unnecessary repetition.

9. Learned counsel for the appellant has contended that he is completely innocent and has been falsely implicated in this case on account of enmity which exists between himself and the complainant who is his brother concerning the sale of some land, that the only evidence against him is the judicial confession of his co-accused Abid (deceased) before the judicial magistrate which he submitted is not believable and should be discarded and as such by this court extending him the benefit of the doubt the appellant be acquitted of the charge. In support of his contentions he placed reliance on the case of **Naqibullah and another v. The State** (PLD 1978 Supreme Court 21), **Muhammad Perez and others v. The**

State (2007 SCMR 670) and **Mst. Roshan Bibi and another v. The State** (2007 P. Cr.LJ 1792).

10. On the other hand learned Deputy Prosecutor General has fully supported the impugned judgment. He has contended that the prosecution has proved its case against the appellant beyond a reasonable doubt as the appellant has been fully implicated in the murder through the judicial confession of Abid which is voluntary, truthful and can be safely relied upon, that the dagger being the murder weapon was recovered at the scene and also a pistol which was stolen from the complainant's house was recovered on his pointation and as such his conviction and sentence should be upheld and the appeal dismissed. In support of his contentions he has placed reliance upon the case of **Ijaz Ahmad v. The State** (2009 SCMR 99). When confronted by this court whether this was a case which justified enhancement in sentence he was of the view that it did not as the offense was not carried out with any particular brutality.

11. We have also observed that a criminal revision application has been made by the complainant for enhancement of sentence. The complainant has been served on numerous occasions but neither he nor any counsel on his behalf have put in any appearance. The appellant has been behind the bars for about 11 years and as such we do not consider it just to wait any further for the complainant whose interest can be safe guarded by the learned DPG and this court.

12. We have heard the arguments of the learned counsel for the parties, gone through the entire evidence which has been read out by the appellant, the impugned judgment with their able assistance and have considered the relevant law including that cited at the bar.

13. In our view after our reassessment of the evidence based on the evidence of the PW witnesses, PW MLO, post mortem report and other medical evidence, IO's evidence, recovery of dagger at the scene of the offense and a positive chemical report, we are satisfied that the prosecution has proved beyond a reasonable doubt that on or about 15.09.2009 at 8.45am inside House No.1949/50 Sector F-II, Labour Colony Landhi Quaidabad Karachi Mst.Safia Bibi was

murdered by churri. Indeed learned counsel for the appellant admitted this position.

14. In our view therefore the only issue before us is whether the appellant was one of the persons who murdered by Churri Mst Safia Bibi whilst she was in her home on 15.09.2009.

15. After our reassessment of the evidence we are of the view that the prosecution has **not** been able to prove beyond a reasonable doubt that the appellant murdered Mst Safia Bibi by Churri whilst she was in her home on 15.09.2009 for the following reasons;

(a) **Admittedly this was an unwitnessed incident.** The main plank of the prosecution case rests on the judicial confession of co-accused Adnan who is now deceased. Admittedly we can convict the appellant on the confession of Adnan if we find it to be voluntary, truthful and in line with the prosecution case and the confession has been made in accordance with law **and** is corroborated by some unimpeachable evidence from an independent source. In this respect reliance is placed on **Azeem Khan V Muhahid Khan** (2016 SCMR 274) and **Bahadur V State** (PLD 1996 SC 336)

(b) Turning to the judicial confession;

- (i) The judicial confession has been made by one co-accused against another and as such this in and of itself creates some doubt as to its reliability in the absence of any corroborative evidence.
- (ii) It's voluntariness is also in doubt as it was made about a month after its maker's arrest during which period he was in police custody so why would he choose to make it now especially as there was hardly any other evidence against him and he would have been aware that it may lead to a potential death sentence when used in evidence against him as he was so warned.
- (iii) We also have some concerns about the truthfulness of the confession as it does not particularly appeal to reason that he would wait in the house when the accused with his co-

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accused was tying up the deceased and then murdering her with a dagger especially as the deceased who had no gag in her mouth would probably have screamed out. The presence of two minor children in the house at the time also militates against his conduct especially as he did not even know why he was going to meet the accused at the house.

(c) Thus, we have doubts whether the confession of Abid can be safely relied upon.

(d) We also find other corroborative evidence against the appellant to be lacking and the case of the prosecution to contain doubts. For example;

- (i) One of the key witnesses to the prosecution case who could have identified the appellant namely a Mr.A.Khan as purchasing the dagger which was used to murder the deceased was not called before an identification parade in order to identify the accused and was not even called as a PW without any explanation. No finger prints were taken from the dagger and as such there is no evidence to link the appellant to the murder weapon i.e the dagger.
- (ii) Iftikhar his neighbour who the complainant allegedly called to help him enter his house by breaking the locks was not called to corroborate this evidence. Neither the locks, grill or hammer and chisel which was used to break the lock were exhibited in evidence which creates doubt as to whether the complainant actually broke into his house as he had a key.
- (iii) The wire used to tie his wife was also not exhibited into evidence.
- (iv) From the evidence there appears to have been enmity between the accused and the complainant over the payment of money and the sale of inherited land which provided a motive for the complainant to fix the appellant in a false case which is the appellants plea in his S.342 Statement and evidence under oath.
- (v) If the accused had enmity with the complainant then in our view it does not appeal to logic, common sense or reason that he would murder the complainant's wife. Instead he would have murdered the complainant.
- (vi) The recovery of the pistol at Abid's house by the accused on his pointation in our view is not relevant as the appellant was the complainant's brother and could have stolen the pistol from his brother's house at any time and as such this is not evidence which will link him to the murder especially as the pistol was recovered from Abid's house and not the house of the accused.

- (vii) There is no last seen evidence.
- (viii) Circumstantial evidence linking the appellant to the offense is almost entirely lacking and will certainly not meet the guidelines which would enable a conviction based on circumstantial evidence in the absence of direct ocular evidence. In this respect reliance is placed on **Wazir Muhammad and another v. The State** (2005 SCMR 277) and **Azeem Khan and another v. Mujahid Khan and others** (2016 SCMR 274),

16. Thus, since we are of the view that the judicial confession cannot be safely relied upon and as discussed above we have found no corroborative evidence but rather doubts in the prosecution case and thus by extending the benefit of the doubt to the appellant we hereby allow the appeal, acquit him of the charge and he shall be released unless he is wanted in any other custody case. Having acquitted the appellant of the charge the criminal revision application is also dismissed.

17. The appeal and criminal revision application are disposed of in the above terms.