

IN THE HIGH COURT OF SINDH, KARACHI

Before:

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

**Criminal Appeal No. 419 of 2016
alongwith Confirmation Case No.11 of 2016**

Babar Masih son of SabirMasih appellant through	:	Mr. Javed Ahmed Chattari, Advocate
The State, respondent	:	Mr. Farman Ali, Addl. Prosecutor General.
Date of Hearing	:	24-10-2019
Date of Judgment	:	04-11-2019

J U D G M E N T

ZULFIQAR ALI SANGI---J., This judgment will dispose of Criminal Appeal No. 419 of 2016 and confirmation reference No: 11 of 2016 as the same has arisen out of Judgment dated 31.10.2016. The appellant was convicted by the learned IIIrd Additional Sessions Judge, Karachi (Central) in Sessions Case No. 245 of 2010, Crime No. 182 of 2010 registered at PS Shahrah-e-Noor Jehan, Karachi under Sections 302 & 34 PPC; whereby appellant Babar Masih was convicted under section 302(b) PPC and awarded death sentence as Tazir for the offence of murder of Yousif Masih subject to confirmation by this Court.

2. Brief facts leading to the prosecution case are that on 18.03.2010 complainant ASI Aamir Azam Siddiqui was posted at PS Shahrah-e-Noor Jehan Karachi as ASI/Duty officer. At about 1500 hours he received information through police control noted by Dr. Zahoor that one dead body was brought at Abbasi Shaheed Hospital by ASI Ghulam Mustafa and Edhi driver Imdad from Green Belt opposite Parri Shopping Mall. Upon such information, he went to Abbasi Shaheed Hospital where he met with Dr. Zahoor and with permission

inspected the dead body of deceased, prepared memo of inspection of dead body so also prepared inquest report, MLO conducted post mortem No.13310 so also given him case property (Gala ka phanda ka kapra) in sealed condition. The dead body was sent to Edhi Centre mortuary. After completion of formalities, returned back to P.S and lodged FIR against unknown accused persons under Section 302/34 PPC.

Investigation of this case was entrusted to SI Muhammad Imtiaz, who during investigation arrested present accused under Section 54 Cr.P.C and on his admission during interrogation arrested the present accused in present crime. After completion of investigation, I.O. submitted the challan before the court of law and shown the accused Willium Masih @ Iqbal @ Billo s/o Khazian Masih as absconder in charge sheet.

3. Record shows that police papers were supplied to the accused at Ex.1. Charge was framed against the above named accused at Ex.2 to which accused pleaded not guilty and claimed to be tried, vide plea at Ex.2/A.

4. The prosecution in order to prove the charge against the accused examined Eight (08) witnesses. PW complainant Aamir Azam Siddiqui examined at Ex.4, who produced Roznamcha Entry No.28 at Ex.4/A, memo of inspection of dead body at Ex.4/B, inquest report at Ex.4/C, letter moved to MLO Abbasi Shaheed Hospital at Ex.4/D, letter moved to in charge Edhi at Ex.4/E, Roznamcha Entry No.30 at Ex.4/F, copy of FIR at Ex.4/G, memo of inspection place of incident at Ex.4/H. PW James examined at Ex.5, who produced memo of identification of dead body at Ex.5/A, memo of pointation of place of wardat at Ex.5/B,

memo of seizure of letters at Ex.5/C and letters as Ex.5/D. PWs Babar and Danish were given up by the learned ADPP for the State vide Statement at Ex.6. PW Paveen examined at Ex.7. PW Pervaiz Masih also given up by the learned ADPP for the State vide Statement at Ex.8. PW HC Muhammad Imran examined at Ex.09 and PW ASI Abdul Hameed examined at Ex.10, who produced memo of arrest under Section 54 Cr.P.C at Ex.10/A, memo of re-arrest as Ex.10/B. PW Senior Civil Judge Mr. Ahsan A. Malik examined at Ex.11, who produced letter dated 09.04.2010 at Ex.11/A, confessional statement of accused at Ex.11/B. PW SI Muhammad Imtiaz examined at Ex.12, who produced letter moved to the incharge Edhi Home at Ex.12/A, receipt for handing over dead body at Ex.12/B, Roznamcha entry No. 48 at Ex.12/C, Roznamcha entry No. 25 at Ex.12/D, Roznamcha entry No. 27 at Ex.12/E, Report of Chemical examiner at Ex.12/F. PW Retired MLO Dr. Zahoor Ahmed examined at Ex.13, who produced ML No.1628/10 at Ex.13/A, P.M. NO. 133/10 at Ex.13/B, medical certificate of cause of death at Ex.13/C. Thereafter, the learned ADPP for the State closed the side of prosecution vide his Statement at Ex.15.

5. The statement of the accused was recorded under Section 342(1) Cr.P.C. by the learned trial Court at Ex.16, in which he denied the allegations as leveled against him by the prosecution. However, the accused neither examined himself on oath in disproof of the charge nor led any evidence in his defence.

6. The learned trial Court, after hearing the parties and on assessment of the evidence, convicted and sentenced the appellant vide judgment dated 31.10.2016, which is impugned before this Court by way of filing the instant Appeal.

7. Learned counsel for the appellant mainly contended that name of appellant does not transpire in the FIR; that incident was unseen incident; that love letters were not sent to hand writing expert for verification; that nothing was recovered from the appellant; that confessional statement was recorded while appellant was in custody of police; that confessional statement was retracted by the appellant in his statement under section 342 Cr.P.C; that prosecution has completely failed to prove its case beyond reasonable doubt but trial Court convicted the appellant. Learned counsel relied upon the cases of Syed Sharifuddin Pirzada V. Sohbat Khan and 3 others [PLD 1972 SC 363], Majeed V. The State [2010 SCMR 55], Muhammad Amin V. The State [PLD 2006 SC 219], Shahzado V. The State [PLD 2005 SC 477], The State through A.G N.W.F.P Peshawar V. Waqar Ahmed [1992 SCMR 950], Manjeet Singh V. The State [PLD 2006 SC 30], Sain Gul Wali Khan V. The State [2003 P.Cr.L.J 1264]. Lastly he prayed for acquittal of appellant based on the benefit of the doubt.

8. Learned Deputy Prosecutor General contended that appellant himself pointed out the place of incident where deceased was killed by him alongwith other his companions; that appellant made confession before the Magistrate which is true and voluntary; that confession was retracted by appellant at belated stage; that love letters produced by the prosecution supported the case; that the motive is proved by the prosecution; that there is circumstantial evidence against the appellant; that trial Court has rightly held that prosecution has proved the case against the appellant beyond any reasonable doubt. He by supporting the judgment of trial court prayed for dismissal of the appeal.

9. We have heard the arguments of counsel and perused the material available on record.

10. Admittedly appellant was not named in the FIR and the incident was unseen incident. It was ASI Aamir Azam who on information went to Abbasi Shaheed hospital where he inspected the dead body and prepared the memo and after completing other proceedings sent the dead body to Edhi center mortuary and went to P.S where he registered the FIR against unknown accused persons. He was examined before the trial court as PW-1 and did not depose a single word against the appellant due to such reason he was not cross-examined by the defense counsel.

11. PW-2/James stated in his examination-in-chief that on 21-03-2010 S.I Muhammad Imtiaz came to his house and shown him a picture which he identified to be of his brother Yousuf Masih. Whereas PW-7/Muhammad Imtiaz in his examination-in-chief stated that on 21-03-2010 he found the legal heirs of deceased and handed over the dead body to them; however, he did not disclose the source that where from he came to know about the legal heirs of the deceased. He further stated in his examination-in-chief that on 04-04-2010 he went to P.S where he saw accused Babar Masih who was already in custody, police told him that that accused made confession before them that he and his uncle William had murdered his brother as the deceased had affair with the sister of accused. He further in his examination-in-chief stated that on 06-04-2010, he gave the love letters to police written by Saima sister of accused, police prepared such mashirnama of taking letters in custody which creates doubt in the prosecution case as letters were produced by him to police on 06-04-2010. Whereas, he had already seen the appellant in police custody on 04-04-2010 but

was silent till 06-04-2010 which suggests that such letters were managed subsequently. The love letters were not sent to hand writing expert for verification of hand writing nor said Saima was joined in investigation to prove the letters written by her, which also creates very serious doubt in the case of prosecution. PW-2/James further stated in his examination-in-chief that he also disclosed to police that deceased was living with him in his house and having affairs with sister of deceased then he shifted the deceased to the house of Danish at Khuda Ki Basti because of accused Babar Masih.

12. PW-3/Paveen in her examination-in-chief stated that there was love affair between the deceased and sister of accused namely Saima. Mother of Saima came at their house and informed about the affair. On such, they demanded rishta but were refused and they issued threats due to which they shifted deceased to the house of Danish. She further stated that Babar Masih had also maltreated to deceased as he found him in his house with his sister. She in her cross-examination admitted that they had not made any complaint to police about the maltreatment so also for missing of deceased, which suggests that entire story was managed by them.

13. Entire case of prosecution was based on love letters of Saima, postmortem report and confessional statement of appellant recorded before the Magistrate. No other evidence is available with prosecution which connects the appellant with the commission of offence. Admittedly love letters were not sent to hand writing expert nor Saima was examined during investigation, which creates very serious doubt in the case of prosecution in this respect.

14. Medical evidence is evidence which may help in ascertaining the cause of death but it does not identify the culprits; however, death of deceased is not deniable but question is that who killed the deceased for which prosecution is bound to prove its case beyond reasonable doubt by producing confidence inspiring evidence which is lacking in the present case.

15. Admittedly appellant was arrested on 04-04-2010 and his confessional statement was recorded on 09-04-2010 while he was in police custody for about 05 days. In the confessional statement appellant stated that he along with his uncle took the deceased at hotel where they give him tranquilizer in cold drink then made him sit in Mazda bus and brought him at water board where they made him eat lunch at hotel, when deceased was going unconscious, they took him in Raksha and brought to the Hyderi main road and brought him in park where his uncle strangulated him with vest. After two days he informed his father and then he himself appeared at police station for arrest.

16. Turning to the confessional statement of appellant as to whether it was true and voluntary, the circumstances which lead the accused to make confession are to be seen carefully. Appellant stated in his confessional statement that he voluntarily appeared at police station and surrendered before the police; whereas, PW-5 Abdul Hameed in his examination-in-chief stated that on 04-04-2010 he was posted as ASI at PS Sh: Noor Jehan Karachi, he was called by SI Imtiaz. On such call, he arrived at Yousuf Bakery in his presence SI Imtiaz arrested appellant U/S 54 Cr.P.C and brought him at Police Station. Further in confessional statement appellant disclosed that his uncle strangulated the deceased with vest (Baniyan); whereas, ASI Aamir Azam Siddique

in his examination-in-chief stated that on information he went Abbasi Shaheed Hospital inspected the dead body of deceased and issued some letters for postmortem etc. MLO gave him case property (gala ka pundha ka kapra) in sealed condition. Learned Magistrate who recorded the confessional statement during cross-examination admitted that accused was referred for medical examination in order to ascertain injuries but prosecution had not produced such medical certificate which suggests that there were some injuries on the person of accused, therefore, he was referred. It is necessary to mention here that when due to fear of accused, deceased was shifted to some other area, deceased also knew about the threats then how the deceased was easily walking with accused and his uncle taking cold drinks and lunch etc, appellant also retracted his confession during his examination U/S 342 Cr.P.C. On careful scrutiny of all these facts and circumstances, we are of the view that confessional statement was neither true nor was voluntary, such type of confession cannot to be used for awarding conviction especially in a capital case without the strongest of corroboration which is lacking in this case.

17. It is well settled principal of law that all the incriminating piece of evidence available on record in shape of examination-in-chief, cross-examination or re-examination of witnesses are required to be put to the accused, if the same are against him while recording his statement under section 342 Cr.P.C in which the words used “**For the purpose of enabling the accused to explain any circumstances appearing in evidence against him.**” which clearly demonstrate that not only the circumstances appearing in the examination-in-chief are put to the accused but circumstances appearing in cross-examination or re-examination are also required to be put to the accused, if they are

against him, because the evidence means examination-in-chief, cross-examination and re-examination, as provided under Article 132 read with Articles 2(c) and 71 of Qanun-e-Shahadat Order, 1984. From the careful perusal of statement of the appellant, under section 342 Cr.P.C. it reveals that the medical evidence, love letters of Saima, piece of cloth recovered from place of incident which was used for committing murder, reports of chemical examiner, motive, and the evidence of Magistrate regarding confessional statement on the basis of which trial court convicted the appellant, were not put to him in his statement under section 342 Cr.P.C enabling him to explain the circumstances, as has been held by Honourable Supreme Court of Pakistan in the case of **Muhammad Shah v. The State** (2010 SCMR 1009).

18. The piece of evidence which is not put to the accused in statement under section 342 Cr.P.C. cannot be used against him nor on this point can the case be remanded back to the trial Court for recording statement U/S 342 Cr.P.C. afresh so that the prosecution can fill in the lacunas in its case as has been held by Honourable Supreme Court of Pakistan in case of **Nusrat Ali Shar etc. v. The State in Cr. Appeal Nos. 24-K, 25-K and 26-K of 2018, Honourable Supreme Court of Pakistan**. The Honourable Supreme Court has held in the case of **Imtiaz @ Taj v. The State 2018 SCMR 344 (2) Qadan and others v. The State 2017 SCMR 148 and Mst: Anwar Begum v. Akhtar Hussain alias Kaka and 2 others 2017 SCMR 1710** that a piece of evidence or a circumstance not put to an accused person at the time of recording his statement under Section 342 Cr.P.C. could not be considered against him.

19. As discussed above, we are of the view that prosecution has failed to establish its case against appellant beyond any reasonable doubt. The concept of benefit of doubt to an accused person is deep rooted in our country. For giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts. If there is a single circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right as has been held by Honourable Supreme Court of Pakistan in case ***Tariq Pervez v. The State*** (1995 SCMR 1345).

20. We, therefore, allow the instant appeal and acquit the appellant Babar Masih by extending to him the benefit of doubt and set aside the judgment dated:-31-10-2016 passed by the Court of IIIrd Additional Session Judge Karachi (Central) in Session Case No. 245 of 2010, (Re;The State V/S Babar Masih), Crime No: 182/2010 of P.S Shara-e-Noor Jehan, Karachi, U/S 302.34 P.P.C. The appellant is directed to be released forthwith, if not required in any other custody/case. As a result thereof, the confirmation reference sent by the trial Court is answered in negative.

JUDGE

JUDGE