

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI

Special Criminal A.T. Appeal No.275 of 2019
Confirmation Case No.10 of 2019

Date	Order with signature of Judge
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Present:

Mr. Justice Nazar Akbar
Mr. Justice Zulfiqar Ahmad Khan

Appellant No.1: Syed Ahmed Hassan s/o Syed
Muhammad Hassan

Appellant No.2: Muhammad Naeem Khan s/o
Muhammad Sarwar Khan, through
Mr. Hashmat Khalid, advocate.

Versus

Respondents: The State, through
Mr. Hussain Bux Baloch, Addl: P.G.

Ms. Shahnaz Akhtar, Advocate for
complainant.

Date of hearing: **18.12.2020**

J U D G M E N T

NAZAR AKBAR, J.- This Special Criminal A.T. Appeal is directed against the judgment dated **26.09.2019**, whereby the learned Judge Anti-Terrorism Court No.VI, Karachi in Special Case No.319/2014 arising out of FIR No.68/2014 under Section 302/109/34 PPC r/w Section 7 ATA, 1997, registered at P.S P.I.B Colony, Karachi, has convicted appellants under Section 265-H(2) Cr.P.C and sentenced as under:-

- 1) Accused Syed Ahmed Hassan is convicted u/s 302(b) PPC and he is awarded death sentence as hanged till to his death with compensation of Rs.200,000/- (Two Lacs) to be paid to the legal heirs of the victim.
- 2) Accused Muhammad Naeem Khan is also convicted u/s 302(b) PPC and he is awarded death sentence as hanged till to his death with compensation of Rs.200,000/- (Two Lacs) to be paid to the legal heirs of victim.

- 3) Accused Syed Ahmed Hassan is convicted u/s 7(1)(a) ATA 1997 and he is awarded death sentence, to be hanged till his death.
- 4) Accused Muhammad Naeem Khan is also convicted u/s 7(1)(a) ATA 1997 and he is awarded death sentence, to be hanged till his death.

2. Precisely, the facts of prosecution case are that on **15.6.2014** at about 0425 hours complainant Syed Rakim Abbas Rizvi s/o Syed Sardar Abbas Rizvi recorded his statement u/s 154 Cr.P.C stating therein that on **14.06.2014**, he was present in his home when at about 2120/2125 hours his younger brother namely Fahad received a phone call on his cell phone and he left home taking the car keys. The complainant made a phone call to Sheryar Abbas Rizvi (brother of complainant) on his cell phone No.0321-2802551 but the call was received by one Irfan who disclosed that Sheryar had sustained bullet injuries. On such information, complainant went to the shop of Sheryar, where he saw his brother was sitting on a chair with his head and face bleeding. The complainant suspected that Sheryar had died but for confirmation, he took Sheryar in his car to Liaquat Hospital along with Azam and Fahad where the doctors confirmed that Sheryar had died and issued his death certificate. The complainant took the dead body of his brother in an ambulance to Imam Bargah Shah-e-Najaf. Thereafter Police officials of P.S, P.I.B Colony reached the Imam Bargah, Shah-e-Najaf and took the complainant and the dead body to Jinnah Hospital for postmortem. After completing the legal formalities, police obtained the reports of postmortem No.478/14, and the complainant again brought the dead body back to Imam Bargah Shah-e-Najaf. Subsequently, complainant came to know that two unknown persons came on motorcycle and shot his brother to death, therefore, he got FIR registered against unknown persons.

3. After registration of the case, the investigation was assigned to PI/SIO Jaffer Baloch who inspected the place of incident on the pointation of complainant and prepared such memo and recorded 161 Cr.P.C statements of witnesses. He also sent the empties to FSL and obtained reports. The I.O with the help of spy informers kept on searching the accused persons but could not succeeded as they went into hiding and case was declared as **A-Class**. On **10.10.2014**, the I.O received information that accused Syed Ahmed Hassan s/o Syed Muhammad Hassan and Muhammad Naeem Khan s/o Muhammad Sarwar Khan (the present appellants) had been arrested in **crime No.369/2014** and **370/2014** of P.S CID, who disclosed their involvement in the instant crime. On such information, I.O Jaffer Baloch went there and interrogated both the accused/appellants separately and they revealed that on **14.06.2014** they along with their accomplices Kshif s/o unknown, Khan Sahab s/o unknown and Abbas s/o unknown being armed with 9mm pistols, on the instigation of Dr. Rehan committed murder of Syed Sheryar Abbas Rizvi when he was sitting in a chair outside his shop named Fahad Communication and Easy Load and escaped from the scene. The accused further offered to point out the place of incident, therefore, both the accused were re-arrested in the present crime. On **21.10.2014** identification parade of the accused persons to eyewitness Muneer Ahmed was held before the learned Judicial Magistrate. After completion of investigation, I.O submitted challan before the trial Court against the appellants under the above referred sections. The trial Court framed charge against the accused at Ex:5. Accused pleaded not guilty and claimed to be tried.

4. In order to prove its case, prosecution examined **11 witnesses** i.e **PW-1** Muhammad Wasi Ex:06; **PW-2** SIP Abdul Rauf at Ex:07;

PW-3 Abdul Majeed at Ex:08; **PW-04** complainant Syed Raqim Abbas at Ex:09; **PW-05** ASI Nazim Baig at Ex:10; **PW-06** SIP Syed Nazar Hussain Shah at Ex:11; **PW-07** Doctor/Senior MLO Jagdesh Kumar at Ex:14; **PW-08** Senior Civil Judge Abdul Razzak Bughio at Ex:16; **PW-09** Muneer Ahmed at Ex:17; **PW-10** Ex.SIP Syed Zia Hussain Shah at Ex:18; and **PW-11** DSP Jaffer Khan Baloch at Ex:19. Thereafter, the learned APG closed the prosecution side vide statement at Ex:20.

5. Statements of accused were recorded under Section 342, Cr.P.C at Ex:21 and 22 to which they denied the allegations leveled against them and claimed themselves to be innocent. They stated in their statement that all the PWs are untruthful, interested and inimical to them. They also stated that on **22.09.2014** they were picked up by the Pakistan Rangers from Gulistan-e-Johar and after few days they were handed over to the CTD who booked them in this false case. However, neither they examined themselves on oath nor produced any witness in their defense.

6. Learned trial Court after hearing learned counsel for the parties, by judgment dated **26.09.2019**, convicted and sentenced the accused/ appellants as stated above. Against the said judgment the appellants have preferred the instant Appeals.

7. Mr. Hashmat Khalid, learned counsel for the appellants has contended that the appellants are innocent and have been falsely implicated in this case with malafide intention by the police when the appellants were already in custody of police in another case. He argued that Muneer Ahmed, eyewitness of the alleged incident is a planted witness and the trial court has sentenced the appellant only on alleged judicial confession of the appellant recorded in **crime**

No.369/2014 and 370/2014 registered at P.S CID Sindh. Learned counsel has contended that the appellants have been acquitted by this Court in the said FIRs and he has placed on record certified copy of judgment dated **03.08.2017** passed by this Court in Spl. CrI.ATA Nos.80, 81 and 83 of 2015. He lastly prayed for acquittal of the appellant.

8. Conversely, Mr. Hussain Bux Baloch, learned Additional Prosecutor General argued that prosecution had examined 11 PWs and they had fully supported the prosecution case. He further argued that after confession statement of appellants before the police officials, they were re-arrested in this case and the trial Court for the sound and valid reasons convicted and sentenced the accused/appellants. He further contended that the appellants are also involved in other cases, however, he could not controvert the factual position that the appellants have been acquitted in Crime No.369/2014 and during investigation of the said crime No.369/2014 they had allegedly confessed guilt of committing the offence in the instant appeal.

9. We have heard learned counsel for the appellant as well learned Additional Prosecutor General and perused the record.

10. The question of unnatural death of deceased Shahryar is undisputed and the issue before the Court is that whether the appellants have been found guilty in accordance with proper appreciation of prosecution evidence against them. In this context we first examine the arrest of appellants in the instant crime No.68/2014 registered on **15.06.2014** at P.S P.I.B Colony. PW-11 DSP Jaffer Khan Baloch who was I.O in the instant case. He deposed that on **10.10.2014**, he received information from CTD Garden

Karachi that accused, namely, Syed Ahmed Hassan and Naeem Akhtar (the appellants herein) were arrested in **FIR No.369/2014**, under **Section 4/5** of the Explosive Substances Act, 1908 and **FIR No.370/2014** under **Section 23(1)(a)** of the Sindh Arms Act, 2013 of CID Sindh, who were making disclosure of their involvement in the instant case as well as in other crimes. He then made Entry No.38 and left the P.S. in police mobile along with SIP Muhammad Arif, ASI Momin Ali Mirani. He also deposed that he interrogated the accused persons separately at CTD Garden, during interrogation, accused persons disclosed that on **14.06.2014**, they along with their accomplices, namely, Kashif, Khan Sahab and Abbas being armed with 9mm pistols on two motorcycles, on instigation of Dr. Rehan, committed murder of Syed Sharyar Abbas Rizvi when he was sitting in a chair outside his shop named Fahad Communication and Easy Load and escaped; on such disclosure accused persons were formally arrested in the instant case.

11. Perusal of evidence of PWs clearly shows that the present appellants have been falsely implicated on the pretext of his alleged extrajudicial confession before police officers on **10.10.2014** during investigation of some other case. The Investigating Officer claimed that the appellants have admitted their guilt, however, he made no efforts to immediately record their Confessional Statement under **Section 164 Cr.P.C** when arrested him in this case. The I.O, however, preferred to arrange Identification Parade of the appellant through eyewitness Muneer Ahmed, whose name was not even mentioned in the FIR. The Police has even failed to recover 9MM pistol said to have been used in the crime from the appellants.

12. We have observed that there is a delay of **11** days in holding the identification parade before the Judicial Magistrate as the

appellants were arrested in the instant case on **10.10.2014** whereas identification parade was held on **21.10.2014**. No explanation has been placed on record by the prosecution with regard to holding the identification parade with a delay of 10 days. It is also pertinent to mention here that the proceedings of the identification parade brought on the record of this case clearly show that the eyewitness in that parade has not described the role played by appellants during the occurrence in incident. It has repeatedly been held by the apex Court that identification of an accused person without reference to the role allegedly played by him during the occurrence is shorn of any evidentiary value and a reference in this respect may be made to the cases of AZHAR MEHMOOD and others v. The STATE (2017 SCMR 135), MUHAMMAD FAYYAZ v. The STATE (2012 SCMR 522), SHAFQAT MEHMOOD and others v. The STATE (2011 SCMR 537) and SABIR ALI alias Fauji v. The STATE (2011 SCMR 563).

13. It is also clear from the record that in crime **No.369/2014** in which appellants' confession was allegedly recorded it was after delay of 9 days. The appellants in crime No.369/2016 were said to have been arrested on **04.10.2014** at **0200 hours** and confession, if at all, was made on **10.10.2014**. The perusal of the impugned judgment shows that the trial Court has even failed to appreciate that confessional statement cannot be used as substantive evidence of fact when there is clear unexplained delay of nine (9) days in recording the same. In this context the Hon'ble Supreme Court in the case of Muhammad Parvez (**2007 SCMR 670**) supra has also observed as under:-

“6. In case all the facts are put in a juxtaposition, then it is crystal clear that confessional statement was recorded after five days as the appellant Pervez was remained in the custody of the local police. It is a settled law the delay of over 24 hours would normally be fatal

to the acceptance of judicial confession as law aid down by this Court in Naqeebullah's case **PLD 1978 SC 21** coupled with the fact that prosecution had failed to explain the delay in recording the confessional statement. This fact created doubt qua the confessional piece of evidence. See Khan Muhammad's case **1981 SCMR 597**. It is no doubt that mere delay of 24 hours in recording the confessional statement is not fatal but surrounding circumstances are also to be considered qua believing or not believing the confessional statement.....”

It is also settled law 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.

14. In view of the above discussion, we were unable to uphold the conviction and sentence of appellants recorded by the trial Court vide judgment dated **26.09.2019**, therefore, we allowed this appeal, set aside the impugned judgment and acquitted the appellants of the charge through short order dated **18.12.2020**. The confirmation reference sent by the trial court is answered in the “Negative”. These are the reasons for the said short order.

JUDGE

JUDGE

Karachi, Dated: .04.2021

Ayaz Gul