

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD.

Criminal Jail Appeal No.D-140 of 2019
Confirmation Case No.34 of 2019
Criminal Acquittal Appeal No.D-90 of 2019

Present:-

Mr. Justice Muhammad Iqbal Kalhoro.
Mr. Justice Amjad Ali Sahito.

Date of hearing: 28.03.2023
Date of decision: 28.03.2023
Appellant: Ashique Hussain,
Through Mr. Samiullah Rind, advocate.
Respondent: Dr. Anwar Palari,
Through Mr. Shahnawaz Bughio advocate.
Complainant: Abdul Salam,
Through Mr. Muhammad Jamil Ahmed advocate.
The State: Through Mr. Shahzado Saleem Nahiyoon, APG.

JUDGMENT

MUHAMMAD IQBAL KALHORO, J:- On 28.03.2014 complainant Abdul Salam appeared at Police Station Baldia District Hyderabad and registered FIR No.20/2014 u/s 365, 302, 109, 34 PPC of murder of his brother namely Qalander Bux against unknown persons. In FIR he has narrated that on 25.03.2014 he and his deceased brother Qalander Bux and PW Bachal Khan were sitting in the home where his brother received a telephone call at about 10:00 a.m. from some unknown person asking him to come to Hyderabad. His brother then left in his car and he got busy in his routine work. His brother Qalander Bux however did not return in the evening. Apprehending some untowardness, he started calling his friends but to no avail and his whereabouts could not be known. Then complainant party tried to search Qalander Bux but could not find any clue about him and when they tried to contact on his phone the same was found switched off. On 26.03.2014 complainant received a call from WHC of Police Station Kotri informing him that a car bearing No.BBG-153 was found at Khursheed Colony Thatta Road in which a paper chit containing his name and mobile number was found. Responding to that call, complainant reached Police Station Kotri and met with said WHC and informed him that the car belonged to his brother who had gone missing since last night.

2. On 27.03.2014 at about 10:00 a.m. when complainant was available in his home and watching TV. He read a ticker disclosing finding of an unknown dead body of a person lying in the bag on bypass road Bhitai Nagar. The complainant further came to know that such body had been taken by the police to civil hospital Hyderabad. On such information complainant came at the hospital along with his brother Bachal Khan and relative Motio Khan and other relatives where he identified the body available in mortuary to be of his brother Qalander Bux. The condition of the dead body showed that it was 2/3 days old. This led to conduction of postmortem of the deceased disclosing that the deceased Qalander Bux had died unnatural death due to head injury, involving vital organ like brain causing shock sufficient to cause death, from hard and blunt substance.

3. After such chain of events, complainant appeared at Police Station, as stated above, and registered FIR. After registration of FIR investigation started and initially the case was disposed of under 'A' class as no accused was found. However, on 09.05.2014 complainant appeared at Police Station and disclosed that his cousin / relative PW Moula Bux had informed him a day earlier i.e. 08.05.2014 that he had met deceased Qalander Bux on 25.03.2014 at a petrol pump who had told him that he was going to meet his friend Ashique Kashmiri, appellant, at Hyderabad. PW Rashid and Shah Baig who are also relatives of the complainant also informed him that on 25.03.2014 at about 03:00 p.m. they had seen the car of Qalander Bux at the road near Bhitai Nagar petrol pump towards Karachi Road. He was sitting on the back seat of his car, two unknown persons were sitting with him, whereas Ashique Kashmiri was sitting on front seat of the car and one unknown person was driving the said car. On the basis of such information, police succeeded in arresting accused Ashique Kashmiri on 12.05.2014.

4. He was produced before the Magistrate concerned for recording of his confessional statement on 24.05.2014 which was accordingly done in which he has revealed that at the instance of co-accused Dr. Anwar Palari he had brought the deceased in his quarter: of Dr. Anwar Palari, where co-accused Shah Ali, Akhtar and Zakir had caused danda (club) blows on the head of Qalander Bux killing him at the spot. His body was disposed of by Dr. Anwar Palari using an ambulance on the same night. After his confession the co-accused were also arrested and put to

the trial. After submission of the challan, the Charge vide Ex.06 on the allegation of murdering deceased Qalander Bux and hatching conspiracy for the said purpose was framed against them. The accused pleaded not guilty. Subsequently absconder Shah Ali was also arrested and against him an amended charge was framed vide Ex.7/A.

5. Prosecution in order to support its case has examined 10 witnesses. They have produced all the necessary documents including memos of arrest of accused, place of incident, recovery of certain articles from the place of incident. After recording of evidence, the statements of the accused u/s 342 CrPC were recorded in which they have denied the prosecution case and have pleaded innocence. The trial court vide impugned judgment has convicted and sentenced appellant Ashique Hussain to death penalty u/s 302(b) PPC, and has acquitted all the co-accused. Aggrieved by the said judgment complainant has filed Criminal Acquittal Appeal No.D-90/2019 against the acquitted accused; whereas appellant has filed Criminal Jail Appeal No.D-140 of 2019 against his death penalty.

6. We have heard both the appeals together. Learned counsel for appellant Ashique Hussain has submitted that he is innocent and has been falsely implicated in this case; there is no evidence except his confession which does not ring true; the story stated in FIR is quite different than the chain of events figured out by the IO during investigation. He has further submitted that on the basis of sole confession which has been subsequently retracted by appellant, his conviction and sentence cannot be maintained. His arguments have been rebutted by learned counsel for complainant and Additional Prosecutor General Sindh. Additional Prosecutor General Sindh, however, has submitted that death penalty is not justified in the given facts and circumstances of the case as such the same may be converted into life imprisonment.

7. We have considered submissions of parties and perused material available on record. In our view, the prosecution has not been able to bring home guilt of the appellant, for the reason that there is no direct evidence against appellant Ashique Hussain except his confessional statement. When we look at the confessional statement, it becomes clear that he has not charged himself for killing of the deceased. His part as disclosed by him is confined to bringing the deceased at the quarter of Dr. Anwar Palari, a co-accused, where the deceased was done

to death by co-accused Shah Ali, Akhtar and Zakir who have been acquitted. The trial court while convicting and sentencing the appellant has accepted only one part of his confession i.e. bringing the deceased in the quarter; and has rejected the other part of his confession i.e. the deceased was caused fatal danda (club) blows by co-accused Shah Ali, Akhtar and Zakir and they were in fact responsible for causing his death.

8. Insofar as identification of appellant Ashique Hussain to be the culprit of the case on the basis of further statement of complainant is concerned, we also find the same to be full of suspicion. PWs Moula Bux, Rashid and Shah Baig are close relatives of the complainant and therefore presumably were aware of his missing, the dead body of the deceased was found after two days of the incident viz. on 28.03.2014 and this should have alarmed them to disclose events about him to the complainant. But for more than one and a half month they did not come forward and tell the complainant about identification of the appellant being the culprit in this case. Further, although the complainant has claimed in his evidence that on the day of incident viz. 25.03.2014 his deceased brother had received a phone call at about 10:00 a.m. from some unknown person and responding to that call he had left for Hyderabad. But Call Data Record (CDR) of the deceased's phone collected during investigation does not indicate that he had received any phone call at about 10:00 a.m. which impelled him to leave for Hyderabad. Apart from above, it is not ignorable that appellant Ashique Hussain was arrested on 12.05.2014 and after 12 days, his confessional statement was recorded, such delay would put cloud over the voluntariness and truthfulness of the confession and its authenticity therefore would not be without a question.

9. The Civil Judge in his evidence at Ex.16 has admitted that in the proforma of confession it is not mentioned that accused was informed before the confession that after his statement, confessing the guilt or otherwise, he would be remanded to judicial custody. In such circumstances the very authenticity of the process of recording the confessional statement becomes doubtful.

10. So when we look at the case from all the angles, we find that the prosecution has not been able to bring forth tangible and cogent evidence identifying the appellant to be connected with the alleged offence. The prosecution has not been able to even collect any

circumstantial evidence against the appellant either. The Call Data Record (CDR) collected by the prosecution does not show that appellant Ashique Hussain at relevant time was in contact with the deceased. The confessional statement in the circumstances as above particularly when it is not supported by any independent evidence and has been retracted, is not free from doubt and cannot be relied upon. It is a trite law that for giving a benefit of doubt to an accused, presence of multiple circumstances creating doubt is not necessary. If there is a single circumstance which is sufficient to create a doubt in the prudent mind, the benefit of which will be given to the accused not as a matter of grace but as a matter of right.

11. In above circumstances, we find the prosecution case as weak against the appellant and therefore giving him benefit of doubt acquit him allowing Criminal Jail Appeal No.140/2019 and setting aside the conviction and sentence awarded to him vide impugned judgment. The death reference No.34 of 2019 is replied in negative and is accordingly disposed of. In view of the above, Criminal Acquittal Appeal No.D-90/2019 is dismissed. These are the reasons of our short order dated 28.03.2023.

JUDGE

JUDGE