

Judgment Sheet

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

Cr. Jail Appeal No.D-122 of 2019
[confirmation case No.21 of 2019]

Present:-

Mr. Justice Mahmood A. Khan.

Mr. Justice Zulfiqar Ali Sangi.

Appellant: Khemchand son of Bheru Mal through M/s. Altaf Shahid Abro and Muhammad Saad Saeed Qureshi advocates.

Complainant: Bheru Mal/legal heirs through Mr. Bharat Kumar Suthar advocate.

Respondent: The State through Mr. Shewak Rathore, Deputy Prosecutor General Sindh.

Dates of hearings: 15.08.2023 & 05.09.2023.
Date of Decision: 12.10.2023

J U D G M E N T

ZULFIQAR ALI SANGI, J.- Appellant named above was tried by learned Additional Sessions Judge-I/Model Criminal Trial Court, Tharparkar @ Mithi in Sessions Case No.46/2018 bearing FIR No.42 of 2018, registered at PS Mithi for offence under section 302, PPC, whereby appellant has been convicted U/s 302(b), PPC and sentenced to death as *tazir* and was directed to be hanged by neck till he is dead subject to confirmation by this Court as required under section 374 Cr.P.C. It was ordered that appellant shall also pay Rs.200000/- (rupees two lacs) as compensation to the legal heirs of the deceased Ramesh Kumar as provided under section 544-A Cr.P.C. In case of default thereof, appellant would further suffer simple imprisonment (S.I) for six months.

2. The facts as per FIR are that on 17.09.2018 at 2200 hours complainant Bheru Mal son of Walji Lohano resident of Lohano Mohalla, Mithi lodged FIR stating therein that he resides at address mentioned in FIR and his sons namely Khemchand, Nand lal, Ramesh Kumar, Mohan lal and Mukesh Kumar are residing in same house; while the family members of his son Khemchand reside at Thatta. On 16.09.2018 his son Khemchand quarreled with him, whereupon his son Ramesh Kumar said to Khemchand as to why he used to quarrel with old aged father, to which Khemchand exchanged hot words with

Ramesh Kumar. Thereafter all the family members went to sleep after taking meal. Khemchand also slept in his room. Ramesh Kumar also slept in his room along with his children and wife namely Sht. Nenu Bai. The room of Ramesh Kumar was without door and windows. On 17.09.2018 at 0530 hours he heard cries coming from the room of his son Ramesh Kumar, upon which he, his brother-in-law (Salo) Loung Mal son of Gopaldas and son Nand Lal rushed to the room of Ramesh Kumar. Meanwhile Sht. Nenu Bai also cried and saw that Khemchand having hatchet in his hand within their sight caused sharp side of hatchet blows to Ramesh Kumar with intention to cause his murder on his face and neck. On seeing them close, Khemchand fled away from the house alongwith hatchet. His son Ramesh Kumar due to hatchet injuries was crying. After arrangement of conveyance proceeded alongwith his injured son Ramesh Kumar towards Civil Hospital, Mithi but on the way his son Ramesh Kumar succumbed to injuries and his dead body was brought at Civil Hospital, Mithi and promptly informed to police and police came there, after legal formalities and conducting postmortem of the dead body, observed funeral process according to custom of Hindu religion. Thereafter he went to PS Mithi and lodged the FIR against the accused in the above terms.

3. After usual investigation, challan was submitted against the accused before the competent Court of law. On completion of legal formalities, charge was framed against accused, in which he pleaded not guilty and claimed to be tried. In order to prove its case, prosecution examined as many as eleven witnesses, who have produced relevant documents and the items in support of their evidence and then the prosecution closed its side.

4. Statement of accused U/S 342 Cr.P.C was recorded, to which he denied the prosecution's allegation and pleaded false implication. Accused neither examined on oath nor led defence evidence. Accused further stated that FIR is false, all PWs deposed falsely and all documents produced by PWs are managed. He further deposed that he did not confess voluntarily. Learned Magistrate had not understood him nor had he informed him about consequences of confession and at that time he was under fear of police. He further stated that I.Os did not investigate properly and challaned him dishonestly. He stated that all witnesses are interested. He further stated that he is innocent and case is false. His brothers hated him and they got applications filed against him through his sons and they also disturbed his family relationship with his wife and children and

they all are one and he is alone. He further stated that on the day of incident, he was sleeping in his room and he also heard cries of deceased and later on he was handed over to police, by his brother Nand Lal who is president of Press Club Tharparkar. He stated that he is old age person and he prayed for justice.

5. On assessment of evidence and after hearing the learned counsel for the parties, learned trial Court convicted and sentenced the appellant through impugned judgment as stated above.

6. Learned counsel for the appellant contended that complainant has admitted that Subedar recorded FIR at his own and then he signed thereon; that complainant has also admitted that in FIR it is wrongly mentioned that he, eye-witnesses Nand Lal and Loung reached on spot together; that complainant has also admitted that in FIR it is wrongly mentioned that he saw the accused Khemchand causing hatchet blows to deceased Ramesh with his own eyes; that in this case, motive is not established nor proved; that there is contradiction in location of place of wardat as each witnesses have given different account; that confession of accused recorded by learned Magistrate was not voluntarily; that wife of deceased Sht. Nenu was sleeping at the time of incident and she did not see the accused causing hatchet blows to deceased; that eye-witness Nand Lal reached much after the incident and therefore his evidence is false; that doctor prepared postmortem report under the influence of PW Nand Lal who is president of Press Club Tharparkar; that hatchet is foisted upon the appellant/accused and it was not produced by him; that all witnesses are interested witnesses. Lastly, he contended that there are material contradictions in this case and therefore, prosecution has failed to prove its case against the appellant beyond any reasonable doubt; that appellant was falsely implicated by the complainant party due to dispute over plot, therefore, he may be acquitted by extending him benefit of the doubt. In support of their arguments, they relied upon the cases of Muhammad Ismail & other v. The State (2017 SCMR 898), Abdul Jabbar @ Jabbari v. The State (2017 SCMR 1155), Muhammad Asif v. The State (2017 SCMR 486), Allah Dad Sanghrah & another v. The State (2018 YLR 2645 (Sindh), (PLD 2019 SC 527) and Bashir Muhammad Khan vs. The State (2022 SCMR 986).

7. Learned counsel for the complainant contended that appellant is nominated in FIR with specific role and in this case complainant Bheru Mal is real father of accused Khemchand and deceased Ramesh Kumar and eye-witness Nand Lal are real brothers

of accused and eye-witness Sht. Nenu Bai is wife of the deceased Ramesh Kumar; that medical evidence and postmortem report fully supports the ocular account furnished by the complainant and the eye witness; that appellant was arrested on 18.09.2018 and produced blood stained hatchet on 25.09.2018 voluntarily; that chemical report is positive showing that blood stained clothes, blood stained bed sheet and pillow, blood stained hatchet and blood with earth were having human blood; that besides ocular, medical and circumstantial evidence, accused had also voluntarily recorded his confessional statement U/S 164 Cr.P.C. before learned Judicial Magistrate-I, Mithi and such evidence is also brought on record; that no any enmity is proved for false implication and case is proved without any reasonable doubt. He lastly prayed that appellant within the sight of complainant and eye-witnesses brutally caused murder of his brother Ramesh Kumar by repeatedly causing sharp side of hatchet blows at his face and neck when he was sleeping in his room with his children and wife and therefore, his appeal may be dismissed.

8. Learned D.P.G for the State adopted the arguments advanced by the learned counsel for the complainant and further contended that prosecution has fully proved its case against appellant beyond any reasonable doubt, therefore, the learned trial Court has rightly convicted the appellant and his appeal may kindly be dismissed.

9. We have heard learned counsel for the parties and perused the material available on record with their able assistance.

10. The careful re-appraisal of the evidence brought on record is entailing that the case of the prosecution is hinged upon ocular evidence, medical evidence and circumstantial evidence which includes recovery of the crime weapon 'hatchet' from the appellant. To support its case, the prosecution examined all eleven witnesses. Of them, PW-01 Complainant Bheru Mal the father of the deceased and the appellant, PW-02 Nand Lal the brother of the deceased and the appellant and PW-03 Sht. Nenu Bai the wife of the deceased all three were the eye-witnesses of the incident while supporting the FIR and the statement under section 161 Cr.P.C have deposed that on 17.09.2018 at 5.00 a.m. they were sleeping in their house situated in Lohana Mohalla Mithi Town, Taluka Mithi, District Tharparkar and on the same day five sons of PW-01 namely Khemchand (Appellant), Ramesh Kumar (Deceased), Nand Lal (PW-02), Mohan Lal and Mukesh Kumar were present in the house. Sht. Nenu Bai PW-03 made hue and

cry, on which PW-01 woke up and went running towards the room of his son Ramesh Kumar where his wife Sht. Nenu was crying and his son Khemchand was causing blows of hatchet to his son Ramesh Kumar. Meanwhile Loung, Nand Lal and other inmates of the house also reached there. Ramesh Kumar was soaked in blood and Khemchand ran away from the spot alongwith his blood stained hatchet. Thereafter they arranged vehicle for shifting injured Ramesh Kumar to Civil Hospital, Mithi but on the way to hospital Ramesh Kumar succumbed to his injuries. They reached at the hospital police came and after legal formalities, postmortem of the dead body was conducted and after postmortem dead body was handed over to them and they brought the same at their house and thereafter his last rituals as per Hindu custom were conducted. On the same day at 10.00 p.m. PW-01 went at the police station Mithi where he lodged FIR. All the witnesses were residing in the same house therefore their presence at the relevant time and witnessing the incident was natural. They were cross-examined by the defence counsel but defence counsel failed to shetered their evidence. Admittedly the witnesses appeared to be interested as they all seem to be related to each other in one way or the other, however, no evidence has come on record that there was any open enmity or animus between the PWs and the appellant, however, it has come on record that all the witnesses were also relatives of the appellant being real father and the real brothers so also the one was the wife of the brother of the appellant and as such in our view, the evidence of the interested witnesses seems to be reliable and corroborated by other independent evidence and as such, We do not consider that the aspect of interested witnesses is relevant based on the particular facts and circumstances of this case and the evidence on record. Reliance is placed on the cases ***Khizar Hayat v. The State (2011 SCMR 429) and Faisal Mehmood v. The State (2010 SCMR 1025)***. It is a well-settled principle of law that the sole evidence of a material witness i.e an eyewitness is always sufficient to establish the guilt of the accused if the same is confidence-inspiring and trustworthy and supported by another independent source of evidence because the law considers the quality of evidence and not its quantity to prove the charge. However, the accused can be convicted if the Court finds the direct oral evidence of one eye-witness to be reliable, trustworthy and confidence-inspiring as has been by the Supreme Court in the cases of ***Muhammad Ehsan v. The State (2006 SCMR-1857)***, ***Niaz-Ud-Din v. The State (2011 SCMR-725)*** and ***Allah Bakhsh v. Shammi and others (PLD 1980 SC-225)***. There can be no denial of the legally established principle of

law that it is always the direct evidence which is material to decide a fact (charge). The failure of direct evidence is always sufficient to hold a criminal charge as 'not proved' but where the direct evidence holds the field and stands the test of it being natural and confidence-inspiring then the requirement of independent corroboration is only a rule of abundant caution and not a mandatory rule to be applied invariably in each case. Reliance can safely be placed upon the case of ***Muhammad Ehsan vs. the State (2006 SCMR-1857)***.

11. The medical evidence which is in the nature of supporting, confirmatory or explanatory of the direct or circumstantial evidence is also fully supporting the version so produced by the prosecution in the shape of eye-witnesses that the accused used the hatchet for murdering the deceased his real brother Mukesh Kumar coupled with recovery of said crime weapon from his possession. The prosecution examined Medical Officer **PW-6 Dr. Sartaj** who deposed that on 17.09.2018 at Civil Hospital, Mithi one dead body of deceased Ramesh Kumar son of Bheru Mal was brought by his relatives and police gave him letter for postmortem at 6.35 a.m. He started postmortem at 7.15 a.m. and completed the same at 9.30 a.m. Thereafter he furnished the detailed account of external appearance of deceased and external and internal examination of deceased. He deposed that he found following injuries on the dead body:

- (i) An incised wound of 12 cm x 1.5 cm on right side of frontal area with fracture of underlying bone reaching up to brain matter.
- (ii) An incised wound of 12 cm x 1.5 cm oblique in direction with fracturing of underlying bone on left cheek with oozing of fresh blood with red margin.
- (iii) An incised wound of 15 cm x 6 cm on lower jaw with fracture of mandible (multiple strokes) with oozing of blood and red margin.
- (iv) An incised wound of 4 cm x 1 cm in front of neck below circoid cartilage cutting esophagus & trachea (food particles coming out on compression of abdomen and blood coming out on compression of chest).
- (v) An incised wound 3 cm x 1.5 cm on right side of sternal notch with continuous abrasion of 12 cm x .1 cm.

Doctor further deposed that all injuries were ante-mortem and caused by sharp cutting weapon. From external and internal examination of deceased Ramesh Kumar son of Bheru Mal, Lohan, R/O Mithi, he was of the opinion that cause of his death was shock due to massive hemorrhage, (injury No. 1, 3 & 4), probable time had

elapsed between injuries and death was 10 to 15 minutes and between death& postmortem was two hours.

12. The appellant was produced before the Magistrate for recording his confessional statement by the investigation officer in respect of the murder committed by him which he confessed the same on 26.09.2018. The Civil Judge & JM-1, Mithi was examined by the prosecution who deposed that on 26.09.2018 Hameerji SIP CIA Mithi produced accused Kheemchand son of Bheru Mal by caste Lohano for recording his confession in crime No.42/2018 u/s 302 PPC of PSMithi through letter No.Cr-42/2018 dated 26.09.2018 for recording confession, whereon order was passed for recording his confession. The accused was placed in the custody of staff and police personnel were directed to leave premises. **The accused was warned he is not bound to make confession; however, his confessional statement will be taken down in writing and may be used against him.** Then accused was allowed time from 10-00 am to 1-00 p.m. had satisfied himself that there is no police personnel in his chamber or any other place where proceeding could be seen or heard. The accused replied that he is confessing guilt under his own free will, without any pressure or fear of anybody else. While confessing his guilt he stated that he has committed murder of his brother Ramesh Kumar in his room of house situated in Lohano Para, Mithi on 17.09.2018 at 0530 hours. He recorded his confessional statement with detail what he stated to him in Sindhi and then read over the confessional statement to the accused in Sindhi which he understands fully and accepted it to be same and correct. After recording detail confessional statement he took signature and thumb impression of accused on each page and then also put the certificate on the bottom of confessional statement. The confessional statement of accused Kheemchand was exhibited by the Magistrate by accepting it to be the same which he had recorded. Learned Magistrate was cross-examined by the defence counsel, but failed to shatter his evidence.

13. We have found that the confessional statement of the appellant Kheemchand recorded by the Judicial Magistrate has been made voluntarily and true which was not retracted and the same was admitted by the appellant in his statement under section 342 Cr.P.C but the only defence was taken in the said statement that the confession was not voluntary. The Magistrate had not informed him about the consequences of such confession. We have verified the deposition of the Magistrate in this respect but could not find any suggestion of the defence that the appellant was not informed about

the consequences of the confession, however in chief-examination learned Magistrate deposed that he informed the accused about its consequences that it would be used against him for awarding conviction. The defence counsel however by admitting that the confession was recorded had suggested that at the time of recording the confession the appellant was under stress and thus in the absence of any suggestion in this respect and by admitting that it was recorded there is no option except to believe the same as true and voluntary and as such his statement in his S.342 Cr.P.C statement the plea taken was an after thought. It is by now well settled that even a retracted judicial confession can be legally admissible and used against its maker in certain circumstances and conviction can be awarded on the basis of retracted judicial confession as has been held by Supreme Court in cases of **Muhammad Amin V. The State (PLD 2006 S.C 219)** and **Mst. JoygumBibi V. The State (PLD 1960 S.C(Pak)313)**. We have also found that there were no such irregularities in the recording of the confession which could lead us to believe that the relevant safeguards were not complied with.

14. The circumstantial evidence so produced by the prosecution in the shape of evidence of a duty officer **PW-10 ASI Khenraj** who deposed that on 17.09.2018, he was informed by Nand Lal through phone that his brother Kheemchand caused hatchet blows to his another brother namely Ramesh Kumar and while shifting injured to Civil Hospital, Mithi he was succumbed to injuries in the way. ASI kept such entry No.23 and then 24 at 0620 hours and he along with staff left PS in official vehicle and reached at Civil Hospital Mithi, where they saw the dead body of deceased Ramesh Kumar and at 0635 hours, prepared mashirnama of inspection of dead body, Lash Chakas Form and Danishnama in presence of mashirs namely Saroop and Vishandas. Thereafter letter for conducting postmortem of deceased Ramesh Kumar was issued by him. After conducting postmortem the dead body of deceased was handed over to him by the doctor which he handed over to his brother Mukesh Kumar. Thereafter doctor delivered the clothes of deceased to him in sealed condition for which he prepared mashirnama. Thereafter they directly went to the place of Wardat situated in the house of Bheru Lal Lohano in Lohano Mohalla Mithi and on the pointation of Mukesh Kumar visited the same and collected blood stained Chadar, pillow and the blood from spot which he sealed the blood in plastic jar and also sealed `Chadar and pillow separately and prepared such mashirnama of inspection of

place of inspection of Wardat and recovery. On return the complainant Bheru Mal appeared at PS and disclosed the facts of cognizable offence, whereupon he lodged FIR vide crime No.42/2018 u/s 302 PPC. On 18.09.2018 vide entry No.27 at 0615 hours he alongwith his subordinate and both mashirs namely Vishandas and Saroop proceeded from PS for arresting the accused in private vehicle when reached at Lakhi petrol pump situated near Mithi Naukot road at about 0730 hours and arrested the accused Kheemchand on the pointation of mashirs. On 19.09.2018 he recorded statements u/s 161 Cr.P.C of witnesses namely Nand Lal and Loung at PS. On 24.09.2018 vide entry No.25 at 0330 hours proceeded from PS along with three sealed parcel containing clothes of deceased, blood Chadar and pillow for depositing the same at the office of chemical examiner, Karachi and the same was deposited. Thereafter, on 24.09.2018 on the directions of SSP, Tharparkar he handed over the case papers to SIP Hameerji for further investigation. **SIP Hameerji was examined as PW-11** who deposed that on 24-09-2018 while posted at CIA Tharparkar was directed to carried out further investigation of the present case and during investigation on 25-09-2018 accused agreed to produce crime weapon viz hatchet and the same was recovered in presence of the private mashirs which accused took out from Devi bushes at the vacant plot of Veerji Mehraj it was blood stained and the same was sealed. He further deposed that on 26-09-2018 accused was produced before the Magistrate for recording his judicial confession and it was recorded wherein accused confessed his guilt. He recorded statement under section 161 Cr.P.C of the witnesses and sent the parcel of hatchet to the chemical examiner for report which later on he received report ffrom the examiner. **PW-08 PC Kewal** was also examined who deposited the hatchet at the chemical lab. The evidence of investigation officers is further supported by the **PW-07 Saroop Ji** the mashir and they were cross-examined by the defence counsel but the same was not shattered. Thus based on the particular facts and the circumstances of the case in hand it is established that the prosecution has succesfully proved the case against the appellant beyond a reasonable doubt by producing reliable, trustworthy and confidence inspiring evidence and the appellant was rightly convicted by the trial court for committing the murder of his real brother.

15. After the conclusion that the appellant was rightly convicted by the trial court only issue remains that what sentence was/is to be awarded to the appellant. The normal penalty is a death sentence for murder; however, once the Legislature has provided for

awarding alternative sentence of life imprisonment, it would be difficult to hold that in all cases of murder, the death penalty should be applied. If the intent of the Legislature was to take away the discretion of the Court, then it would have omitted from clause (b) of section 302, P.P.C. being the alternative sentence of life imprisonment. As such the court must carefully exercise its discretion in determining whether to award the death sentence or life imprisonment based on the particular facts and circumstances of each case. A single mitigating circumstance, available in a particular case, would be sufficient for not awarding the penalty of death but life imprisonment if the Judge/Judges entertain some doubt, *albeit* not sufficient for acquittal, judicial caution must be exercised to award the alternative sentence of life imprisonment, lest an innocent person might not be sent to the gallows. So it is better to respect the human life, as far as possible, rather than putting it at an end, by assessing the evidence, facts and circumstances of a particular murder case, under which it was committed as has been held by Supreme Court of Pakistan in case of ***Ghulam Mohy-UD-Din alias Haji Babu and others V. The State (2014 S C M R 1034)***. Here in the present case the motive setup by the prosecution in FIR was that on 16-09-2018 there was some altercation in between the accused and the complainant and deceased asked the accused why he had made such altercation with father on such this incident took place on 17-09-2018, PW-01 complainant, PW-02 Nand Lal and PW-03 Sht. Nenu also deposed the same during their chief-examination. The complainant during cross-examination admitted that the relations in between the family members (inmates of the house where all brothers were residing together) were not good. Complainant also admitted that deceased got filed application against accused through the sons of accused. It was also admitted by the complainant that deceased and the accused use to quarrel with each other and his other sons use to settle their disputes time by time. The PW-02 who is the real brother of deceased and the accused had denied the above all altercations stated by the complainant in between the accused and the deceased during the cross-examination. It is observed that after the FIR investigation officers not investigated the motive setup in the FIR nor report under section 173 Cr.P.C disclosed any clue about the motive. The investigation officers also does not deposed a single word in respect of the motive asserted in FIR. The confessional statement of the appellant was scanned in respect of the motive what appellant stated that some time before the incident he was having dispute with deceased on the plot of house and deceased was asking him that he will not allow him to reside in the house. At the night of incident

deceased also made altercation with him and it was ended when his father intervene. When the entire evidence in respect of the motive which includes the confessional statement of the appellant is assessed it is difficult to believe any of the version brought on record either by the accused and or by the prosecution. The motive was also not put to the appellant at the time of recording his statement under section 342 Cr.P.C and in absence of it at the same cannot be used against him for awarding capital punishment. It is also settled law that if the prosecution asserts a motive but fails to prove the same then such failure on the part of the prosecution may react against a sentence of death passed against a convict on the charge of murder and lead to the alternate sentence of life imprisonment being awarded. In this respect reliance is placed on the cases of ***Ahmad Nawaz and another v. The State (2011 SCMR 593)***, ***Iftikhar Mehmood and another v. Qaiser Iftikhar and others (2011 SCMR 1165)***, ***Muhammad Mumtaz and another v. The State and another (2012 SCMR 267)***, ***Muhammad Imran alias Asif v. The State (2013 SCMR 782)***, ***Sabir Hussain alias Sabri v. The State (2013 SCMR 1554)***, ***Zeeshan Afzal alias Shani and another v. The State and another (2013 SCMR 1602)***, ***Naveed alias Needu and others v. The State and others (2014 SCMR 1464)***, ***Muhammad Nadeem Waqas, and another v. The State (2014 SCMR 1658)***, ***Muhammad Asif v. Muhammad Akhtar, and others (2016 SCMR 2035)*** and ***Qaddan and others v. The State (2017 SCMR 148)***.

16. Thus, based on the particulars facts and circumstances of this case and by relying on the above-cited precedents and the evidence of the prosecution witnesses as discussed above, the Cr. Jail appeal filed by the appellant Khemchand is **dismissed** to the extent of the appellant's conviction for the offence under section 302(b), P.P.C, but the same is partly allowed to the extent of his sentence of death which is reduced to imprisonment for life. The order passed by the trial court regarding payment of compensation by the appellant to the heirs of the deceased as well as the order in respect of imprisonment in default of payment of compensation is, however, maintained. The benefit under section 382-B, Cr.P.C. shall be extended to the appellant. The confirmation reference made by the trial court answered as **negative**.

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