IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

PRESENT:
Mr. Justice Muhammad Karim Khan Agha
Mr. Justice Khadim Hussain Tunio

Criminal Jail Appeal No. D-120 of 2021
[Confirmation Case No. 25 of 2021]

Appellants:	Dadan and Muhammad Saleem through Syed Tarique Ahmed Shah along with Ammar Ahmed, advocates.
Respondent:	The State through Mr. Nazar Muhammad Memon, APG Sindh.
Complainant:	Muhammad Malook Unar through Ali Asghar Laghari, advocate.
Date of hearing:	30.11.2023
Date of decision:	07.12.2023

J U D G M E N T

KHADIM HUSSAIN TUNIO, J,- Through instant appeal, Dadan and Muhammad Saleem ("**the appellants**") have challenged the judgment dated 04.10.2021 ("**impugned judgment**") passed by the-then Fifth Additional Sessions Judge /MCTC, Shaheed Benazirabad ("**trial Court**") in Sessions Case No. 320/2014 which culminated from FIR No. 24/2014 lodged with Police Station Khadhar u/s 302 and 34 of the Pakistan Penal Code ("**PPC**"). By way of the impugned judgment, they were convicted for the offence punishable u/s 302(b) PPC and were sentenced to death. They were also ordered to pay an amount of Rs. 200,000/- (rupees two lac) each as compensation to the legal heirs in terms of S. 544-A of the Code of Criminal Procedure (CrPC).

2. The incident as set out in case[1] is that on 20.02.2014, local police[2] found a dead body by the bank of a sewage water stream (Sim Nalo) which they moved, got its post-mortem conducted and then moved it through Edhi to their morgue at Nawabshah. This body was later on identified by the complainant Muhammad Malook while he was searching for Talib Hussain ("**the deceased**") who had disappeared from his house after leaving in the company of his friends. He appeared at the police station and disclosed such facts, as such got the FIR lodged. Dadan and Saleem were arrested by the investigating officer ("**IO**") on 06.03.2014 and three days later, during interrogation, they led the police to Dadan's house and produced the crime weapons.

[1] FIR No. 24 of 2014, registered with Police Station Khadhar
[2] Police Station, ibid

3. Upon completion of all requisite procedural formalities, a formal charge was framed against the appellants. Responding to the charge, the appellants asserted their innocence and pleaded not guilty.

4. At trial, prosecution examined nine witnesses, all of whom produced various documents in their evidence. Of these, the complainant Muhammad Malook and PW Noor Ali were the only ones to disclose the ocular account in the shape of last-seen evidence. Thereafter, prosecution side was closed. Statement of the appellants u/S 342 CrPC were recorded in which they denied all the allegations levelled against them and claimed to have been falsely implicated in the case while asserting that they had been tortured by the police. However, they neither examined themselves on oath nor produced any evidence in their defence.

5. On conclusion of the trial, trial Court after hearing the learned counsel for the parties convicted and sentenced the appellants as stated in paragraph-1 (supra).

6. Learned counsel for appellants has primarily contended that the appellants have been falsely implicated in the present case and nothing was recovered from their exclusive possession; that there are various contradictions in the evidence of the prosecution witnesses; that the complainant Muhammad Malook and Noor Ali are not eye-witnesses of the incident; that the incident is unseen and unwitnessed and the trial Court has based its conviction on the basis of managed confessional statements and last seen evidence, neither of which is sufficient for a conviction in the absence of ocular account; that no motive for the alleged incident has been established by the prosecution and even in that respect, reliance is placed on the managed confessional statements; that the case of the prosecution is not free from doubt and benefit of the same is to go with the appellants as a matter of right. In support of his contentions, he has cited the cases reported as “Sarfaraz v The State” (2023 SCMR 670), “Kashif Ali v The State” (2022 SCMR 1515), “Muhammad Azhar Hussain v The State” (PLD 2019 SC 595), “Muhammad Abid v The State” (PLD 2018 SC 813), “Muhammad Asif v The State” (2017 SCMR 486), “Sardar Bibi v The State” (2017 SCMR 344), “Azeem Khan v The State” (2016 SCMR 274), “Akhtar Ali v The State” (2008 SCMR 6), “Khalid Javed v The State” (2003 SCMR 1419), “Muhammad Anas v The State” (2023 PCrLJ Note 59) and “Ali Gul v The State” (2020 MLD 952).

7. Learned Additional Prosecutor General Sindh and counsel for the complainant, in one voice, have supported the impugned judgment while contending that sufficient material is available on the record to connect the appellants with the alleged offence; that the crime weapons have been recovered by the police after they were led there by the appellants; that medical evidence has supported the prosecution case in that the weapons used matched the

weapons recovered. Learned counsel for the complainant cited the case of "Imran Mehmood v The State" (2023 SCMR 795) in support of the contentions.

8. We heard the learned counsel for the appellants and the learned APG assisted by the learned counsel for the complainant and perused the material available before us with their assistance. We have also given due consideration to the cases referred to by them.

9. After a careful reappraisal of evidence, in the light of material contradictions we found going through the same as rightly pointed out by the counsel for the appellants, and a perusal of the other material available on the record, we have come to the irresistible conclusion that prosecution failed to establish the guilt of the appellants beyond a reasonable shadow of doubt. That so in light of the fact that even though the disappearance is said to have occurred on 19.02.2014 when the complainant Muhammad Malook came to know that the deceased had been gone since noon, he did not immediately approach the police to inform them of his son's disappearance. Early morning of the 20th, he came to know of his son's death and identified his body, but still waited an additional day to get the FIR lodged. The FIR was also lodged in the name of two unknown accused shown as the friends of the deceased. Neither of the two witnesses of the prosecution, the complainant Muhammad Malook and PW Noor Ali deposed with regard to the fact that they actively saw the appellants killing the deceased. Reliance on last-seen account of the complainant in the absence of names or description or marks of identification by the complainant, despite him claiming to have seen the appellants, is of no help to the prosecution case, as such his account needs no further consideration. Noor Ali provided the other last seen account and claimed to have met with the deceased while he was accompanied by two people of their community (*zaat*). However, the evidentiary value of his depositions is brought to nil considering his admission while being cross-examined that all the contents of his statement u/s 164 CrPC are not the same as those present in his statement recorded by the police u/s 161 CrPC. He also admitted that the names of the two accused were not known to him, but he came to know them later on, but failed to disclose the source wherefrom he received such information. Such deliberate improvements can only be seen from the spectacle of dishonesty and cast serious doubts on the veracity of the prosecution case. In the case of ***Naveed Asghar v. The State***[3], the august Supreme Court observed that:-

> "17. Deliberate and dishonest improvements made by a witness in his statement to strengthen the prosecution case cast serious doubts on his veracity, and makes him untrustworthy and unreliable. It is quite unsafe to rely on testimony of such witness, even on facts deposed by him other than those improvements unless it receives

[3] PLD 2021 SC 600

> corroboration from some other independent piece of reliable evidence."

10. Not only this, neither of the witnesses saw the appellants actively committing the murder of the deceased. Their relationship with the deceased, coupled with the fact that their evidence was improved to strengthen the prosecution case which has, attached with it, the element of dishonesty, makes them interested witnesses and as such their evidence is suspect evidence which cannot be relied upon lightly.[4]

11. As for the reliance on the confessional statements of the appellants recorded before PW-7/Judicial Magistrate Sakrand. The first issue with this confessional statement is that the appellants, in their statements[5] stated that they were presented for their remand and the Magistrate had taken their signs after they disclosed to him that they had been tortured by the police. While recording confessional statements, there are certain safeguards that the concerned Magistrate (PW-7) ought to have adhered to and before discussing these safeguards, it would be pertinent to note here that the confessional statements of the appellants were recorded five days after their arrest i.e. on 11.03.2014 even though before that they had been presented before the Magistrate prior. No explanation as to why this exercise was resorted to by the IO has been furnished by the prosecution. The august Supreme Court, in the case of ***State v. Ahmed Omar Sheikh***[6] observed with respect to delay in recording confessional statements that:-

> ".The confession would be voluntarily if it was made without any threat, inducement, promise, torture etc. In the present case, admittedly, accordingly to the prosecution's own case, the statements under section 164, Cr.P.C. were recorded after 17/18 days to the extent of Syed Salman Saqib and about 10/11 days of the arrest of Fahad Nasim Ahmed and if keeping in mind the date of arrest as 4.2.2002, as argued by the learned counsel for the parents of Daniel Pearl, then this delay will be 25 days to the extent of Syed Salman Saqib and 17 days to the extent of Fahad Nasim Ahmed. ***This delay by itself is indicative of the fact that the confessional statements were not made voluntarily.*** If the object of the accused person to tell the truth and they were volunteered to make such statement the same must have been recorded on the first or second day of their arrest. ***Keeping them in such long detention clearly made both the retracted judicial confession doubtful and non-voluntarily.***"
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> ***(emphasis supplied)***

12. It was also observed by the august Supreme Court in the case of ***Naqeebullah v. The State***[7] that under normal circumstances, delay of over

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[4] See Sughra Begum v. Qaiser Pervaiz, 2015 SCMR 1142
[5] Recorded under section 342 CrPC
[6] 2021 SCMR 873
[7] PLD 1978 Supreme Court 21

twenty four hours in recording confessional statement of an accused is fatal to the prosecution case coupled with other circumstances.

13. In addressing the safeguards that ought to have been adhered to by the concerned Judicial Magistrate during the recording of the confessional statement from the appellants, it was revealed by the concerned Magistrate himself that the custody of the appellants after their confessional statements were recorded was handed over to the same police officials that had brought them. The august Supreme Court in the case of ***Azeem Khan v. The State***[8] observed with regard to such an exercise that:-

> "17. The Recording Magistrate committed successive illegalities one after the other ***as after recording the confessions of the appellants on oath, both were handed over to the same police officer, who had produced them in the Court in handcuffs***. This fact speaks volumes that the Recording Magistrate was either not knowing the law on the subject or he was acting in the police way desired by it, compromising his judicial, obligations…
> 18. In our considered view, ***the confessions of both the appellants for the above reasons are of no legal worth, to be relied upon and are excluded from consideration, more so, when these were retracted at the trial.*** Confessions of this nature, which were retracted by the appellants, cannot mutually corroborate each other on the principle that one tainted evidence cannot corroborate the other tainted piece of evidence. Similar view was taken by this Court in the case of Muhammad Bakhsh v. The State (PLD 1956 SC 420), while in the case of Khuda Bux v. The Crown (1969 SCMR 390) the confession made, was held not voluntary because the accused in that case was remanded back to the police after making confession."
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> ***(emphasis supplied)***

14. Not only this, a bare perusal of the confessional statements seem to contradict the recoveries made by the police as well because in the same confessional statements, the crime weapon is shown to be a brick which is in direct conflict of medical evidence and the recovery of a hatchet and a knife from the house of appellant Dadan on the alleged disclosure by both the appellants during interrogation. The findings of guilt of any accused must rest on sound evidence, viewed from any angle to be trustworthy and rested surely and firmly on the evidence produced and not conjectures or probabilities. Cases cannot be decided merely on high probabilities regarding the existence or non-existence of a fact to prove the guilt of a person because if that were the case, the golden rule of giving "benefit of doubt" to an accused would be reduced to a naught as held in the case of ***Naveed Asghar***.[9] Prosecution is under obligation to prove its case against the accused person at the standard of proof required in criminal cases, that being beyond reasonable doubt. Moreover, the benefit of any doubt is to be

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[8] 2016 SCMR 274
[9] *ibid*, 3

given to the accused person as of right, not as of concession as held in the landmark case of ***Tariq Pervez v. The State***.[10]

15. The case of Imran Mehmood (2023 SCMR 795) cited by the learned counsel for the complainant is distinguishable on facts as in the same case, medical evidence had fully supported the prosecution case, the incident was witnessed and the parties were known to each other. All these circumstances are missing in the present case.

16. For what has been discussed above, the guilt of the appellants has not been proven to the hilt and is not free from doubt. Therefore, captioned criminal jail appeal is allowed, the judgment impugned herein is set aside along with the conviction and death sentence awarded to the appellants. As a consequence, the captioned death reference is also answered in the negative. The appellants are ordered to be released forthwith if not required in any other custody case.

JUDGE

JUDGE

[10] 1995 SCMR 1345