

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

Criminal Jail Appeal No.S-66 of 2013

Appellant : Attaullah son of Wali Muhammad Sehto through M/s Aijaz Shaikh and Kamran Baig, advocates.

Respondent : The State through Mr. Siraj Ahmed Bijarani, Assistant Prosecutor General Sindh.

Complainant : Shoban through Mr. Mehmood Alam Abbasi, advocate.

Date of hearing : 14.07.2023
Date of decision : 21.07.2023

J U D G M E N T

KHADIM HUSSAIN TUNIO, J- Through captioned criminal jail appeal, the appellant has challenged the judgment dated 27.06.2013 (*'impugned judgment'*), passed by the learned Additional Sessions Judge, Matiari in Sessions Case No. 04/2012 (*Re: The State v. Attaullah son of Wali Muhammad Sahito*), emanated from Crime No. 06/2000, registered at Police Station Khybrani for the offence punishable u/S 302, 147, 148, 114 and 504 PPC, whereby the appellant has been convicted for the offence punishable u/s 302(b) PPC and sentenced to suffer rigorous imprisonment for life and to pay compensation u/s 544-A Cr.PC of Rs.100,000/-, defaulting in payment of which he was to suffer rigorous imprisonment for six months more.

2. It is the case of the prosecution that one Ghulam Mustafa, an alleged associate of the current appellant, had sought the hand of Mst. Sadori in marriage, a proposal that was declined by Master Tooh, the brother of the complainant. This rejection engendered significant displeasure among the proposers and consequently, on the 24.05.2000, while the complainant, along with his brother Master Tooh, Rasool Buksh, and Muhammad Buksh was available at the Khyber bus stop, Master Tooh was attacked by a group of individuals identified by the complainant as Ghulam Mustafa, Attaullah (the present appellant), Shaukat, Mahar, Suleman, and Wali Muhammad, all

armed with hatchets. After inflicting multiple injuries, the assailants absconded from the scene, leaving the complainant to discover his brother lifeless, bearing injuries on the left side of his head, the right side of his neck and other injuries over his arms. After the incident, the complainant proceeded to the police station to get the FIR lodged concerning the incident while Rasool Buksh and Muhammad Buksh remained at the scene, standing over the deceased's body.

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

4. At the trial, prosecution examined in all seven witnesses namely complainant Shoban, eye-witness Muhammad Buksh, eye-witness Rasool Buksh, mashir Allah Rakhio, Dr. Muhammad Aslam, SHO Muhammad Usman and Judicial Magistrate Shahabuddin, all of whom produced various documents and artefacts in their evidence whereafter prosecution side was closed. Statement of the appellant/accused u/S 342 Cr.P.C was recorded in which he denied all the allegations levelled against him and claimed to have been falsely implicated in the case due to enmity of his elders. He also stated that at the time of incident, he was only 13 years and at the time of confession he disclosed to the concerned judicial magistrate that he was forced to confess by the police. He did not examine himself on oath, but produced judgment dated 09.08.2004 pertaining to this case.

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

6. Learned Counsel for appellant has primarily contended that the trial Court has failed to consider that the appellant was a minor and his confession was recorded under duress and threat by the police; that there are significant contradictions in the evidence of the prosecution witnesses. In support of his contentions, he has cited the cases reported as Sanaullah v. The State (2020 MLD 659).

7. Learned counsel for the complainant and learned Assistant Prosecutor General Sindh has supported the impugned judgment while

contending that the contradictions in the evidence of the prosecution witnesses are minor in nature and can be ignored; that there is sufficient material available on the record against the appellant. In support of his contentions, learned counsel for the complainant has cited the cases reported as Roshan and 4 others v. The State (PLD 1976 SC 557), Mehrban and 3 others v. The State (1995 SCMR 259), Rasool Baksh v. The State (2000 SCMR 731), Shoukat Ali v. The State (PLD 2007 SC 93), Sheraz Tufail v. The State (2007 SCMR 518) and Sajid Mehmood v. The State (2022 SCMR 1882).

8. I have heard the learned counsel for the respective parties and perused the record available before me.

9. After a careful perusal of the material available on the record, I have come to the conclusion that the prosecution has miserably failed to establish the guilt of the appellant-accused beyond a reasonable shadow of doubt. I have scanned the evidence of the witnesses. The incident is said to have taken place at 0715 hours at a busy bus stop, yet no one from the public reacted to the incident or claimed to have witnessed the same despite the time of day being the start of business and office hours. It was admitted by PW-4 Allah Rakhio who is also a mashir of arrest and recovery while being cross-examined that *"It is correct to suggest prior to incident I have seen the entire city viz. Khyber Village. Shops of clothes, vegetables etc are situated in Khyber Village."* Not only this, the complainant and both the eye-witnesses have given stereotypical statements while deposing with regard to the incident, merely stating the identity of the assailants and collectively assigning them the role of causing injuries. Moreover, the complainant and both the alleged eye-witnesses have failed to disclose the reason for their presence at the place of incident. The complainant Shoban to this effect deposed that *"PW Rasool Buksh and Muhammad Buksh were going towards Khyber town for their personal work."* Whereas, PW-2 Muhammad Buksh deposed that *"We were following Master Tooh and Shoban with the distance of 50/60 feet behind. Crossing some space, we heard the cries to the effect to save our brother Tooh."* The day of the incident was a Tuesday and Muhammad Buksh was admittedly working as an Ocry Clerk with the Government of Sindh at the time. He deposed that *"I received the salary remaining at the House. Again says I used to go to my office and signed the Mastroll and without performing the duty returned to my house."* If his depositions are taken on face value, this witness has failed to disclose why he did not go to work on the relevant day, making him a chance witness.

Similarly, PW-3 Rasool Buksh deposed that he cultivated his agricultural land and on the relevant day he had went to the city to purchase fertilizer, again making him a chance witness. Reliance on the testimony of chance witnesses requires the exercise of extreme caution and the same cannot be accepted unless believable reasons are shown to establish such a witness' presence at the crime scene at the relevant time. A perusal of their reason, as examined above, proves to be not satisfactory as such the same cannot be relied on. In this respect, reliance is placed on the case of *Khalid Mehmood and another v. The State and others (2021 SCMR 810)* wherein it was observed by the Hon'ble Apex Court that:-

"8. All the circumstances highlighted above lead us to a definite conclusion that the presence of eye-witnesses at the place of occurrence at the relevant time is not above board and prosecution has failed to prove its case against the petitioner beyond reasonable doubt. Therefore, the instant jail petition is converted into an appeal and the same is hereby allowed. The conviction and sentence of appellant Khalid Mehmood is set aside. He is acquitted of the charge framed against him. He is behind the bars and is ordered to be released forthwith, if not required to be detained in any other case."

10. Not only this, certain contradictions surfaced on the record between the depositions of the witnesses and their 161 Cr.PC statements recorded before the concerned magistrate regarding the geographical location of the crime scene where in 161 Cr.PC statements, the witnesses are admittedly seen stating that the school at which Master Tooh was working was close to the crime scene, but then this statement is changed to state that the same was at a distance. Such deliberate improvements can only be seen from the spectacle of dishonesty and cast serious doubts on the veracity of the prosecution case. In this respect, reliance is placed on the case of *Naveed Asghar v. The State (PLD 2021 SC 600)*. Moreover, the parties are allegedly inimical with each other over matrimonial disputes. This makes the witnesses, who are both related to the complainant and deceased, not only chance witnesses but also interested witnesses and as such their evidence is suspect evidence. In this respect, reliance is placed on the case of *Sughra Begum v. Qaisar Pervaiz (2015 SCMR 1142)*. As for the recovery of the crime weapon, the same were allegedly recovered after having been pointed out by co-convict Ghulam Mustafa who is the main perpetrator of the crime. These weapons were also recovered from some bushes (*devis*) and as such not from the exclusive possession of the appellant Attaullah,

as such the same having been stained with human blood cannot be the sole consideration to connect the appellant with the same.

11. Now coming to the last piece of evidence available against the appellant; the confession recorded before PW-7/Judicial Magistrate Shahabuddin. The first issue with this confessional statement is that the appellant, in his statement of accused recorded u/s 342 Cr.PC (Ex. 13) that at the time of the incident, he was 13 years old and he had made this confessional statement due to pressure of the police and had also disclosed to the Magistrate that he was maltreated. The appellant was reportedly 25 years old on 29.12.2012 which is the time when his statement of accused was recorded. The incident pertains to the year 2000, as such even if roughly 12 years are taken away from that date, the appellant would still have been somewhere around the age of 13. Being a juvenile, there are certain safeguards that the concerned Magistrate (PW-7) ought to have exercised before recording the confession of the appellant. Before discussing these safeguards, it would be pertinent to note here that the confessional statement of the appellant was recorded ten days after his arrest even though before that he had been presented before the Magistrate to obtain his remand. No indication as to why this exercise was done in the manner it was by the I.O has been made by the prosecution. The Hon'ble Apex Court, in the case of *State v. Ahmed Omar Sheikh (2021 SCMR 873)* has been pleased to observe 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.”

(emphasis supplied)

12. In addressing the safeguards that ought to have been adhered to by the concerned Judicial Magistrate during the recording of the confessional statement from a minor, it was revealed that PW-7/Judicial

Magistrate Shahabuddin acknowledged that the appellant was not extended the opportunity to consult with either a legal counsel or a guardian before the recording of his confessional statement during his deposition. It would have been judicious and suitable that the appellant, given his juvenile status, should have been granted access to the advice of a guardian or an attorney of his preference. Regrettably, no such opportunity was extended to him by the Judicial Magistrate preceding the recording of his confessional statement. Juveniles are recognized by law as individuals who might not completely apprehend the legal consequences of their conduct, frequently lacking the requisite experience, maturity and judgment to fully comprehend the severity and aftermath of their actions and decisions, especially within legal frameworks. Even when a minor is informed about the potential consequences of a confession of guilt, they might not wholly understand the legal subtleties and long-term effects it might bear on their life. A guardian or legal counsel can explain these complexities in a language and demeanor minors can comprehend. In this respect, reliance is placed on the case of *Hashim Qasim and another v. The State (2017 SCMR 986)*. Not only is there a risk of misinformation, but there also lies an inherent risk that police might inadvertently coerce or manipulate a minor into confessing to an act they did not commit. It is also firmly established that prior to recording the confessional statement of **any** accused (not just a minor), the Judicial Magistrate must scrupulously observe all obligatory precautions as per the High Court Rules and Orders to ensure all semblance of fear implanted in the accused's mind by the investigating agency, is completely dissipated. Reference is made to the case of *Azeem Khan and another v. Mujahid Khan and others (2016 SCMR 274)* in such respect. Unfortunately, this particular case mirrored the exact scenario. The concerned Judicial Magistrate adhered to a highly formulaic line of questioning, ultimately undermining the prosecution's case. The rule of thumb in cases involving confessions of a minor, as set out in the case of *State through Advocate General Sindh v. Farman Hussain and others (PLD 1995 SC 1)*, should always be that such confessions should be treated on the same wavelength as testimonies of child witnesses; utmost care and caution needing to be exercised in both cases. When perusing the confessional statement of the appellant, the same does not include any details regarding the incident, rather the same appears to be a copy of what has been stated by the witnesses in their depositions in

Sindhi, ditto. This, too, suggests that this confession was not voluntary rather one that the appellant was made to rehearse overtime by an interested party. Therefore, the confession is not safe for reliance while ascertaining the culpability of the appellant.

13. If cases were to be decided merely on high probabilities regarding the existence or non-existence of a fact to prove the guilt of a person, the golden rule of giving "benefit of doubt" to an accused person would be reduced to a naught. Prosecution is under an 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 given to the accused person as of right, not as of concession. In this respect, reliance is placed on the case of *Tariq Pervez v. The State (1995 SCMR 1345)*.

14. For what has been discussed above, the guilt of the appellant 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 sentences awarded to the appellant. The appellant be released immediately if not detained in custody of any other case.

JUDGE