

IN THE HIGH COURT OF SINDH, AT KARACHI

Criminal Jail Appeal No. 409 of 2018

Appellant: Asif through Mr. Muhammad Munir Ahmed,
advocate

The State: Mr. Muhammad Anwar Mahar, DDPP

Complainant through M/s. Muhammad Iqbal Baloch and
Shakeel Ahmed, advocates

Date of hearing: 17.08.2023

Date of judgment: 17.08.2023

J U D G M E N T

IRSHAD ALI SHAH, J- It is alleged that the appellant with rest of the culprits took away with them Zahid and then committed his murder by strangulating his throat with electric wire, for that the present case was registered. At trial, the appellant, co-accused Ikram and Kamran were charged for the said offence, which they denied and prosecution to prove the same, examined complainant Khamiso and his witnesses and then closed its side. On conclusion of trial, co-accused Ikram and Kamran were acquitted while the appellant was convicted u/s 302(b) PPC and sentenced to undergo imprisonment for life and to pay compensation of Rs.100,000/- to the legal heirs of the deceased and in default whereof to undergo simple imprisonment for 01 year with benefit of section 382(b) Cr.P.C by III-Additional Sessions Judge, Malir, Karachi vide judgment dated 03.02.2016. On filing of appeal, the conviction and sentence so awarded to the appellant was set aside by this Court vide judgment dated 23.11.2017 with direction to learned trial Court to record statement of the appellant under Section 342 Cr.P.C afresh and then to pass fresh judgment, the statement of the appellant was recorded afresh and then fresh judgment was passed against the appellant on 03.04.2018 by learned III-Additional Sessions Judge, Malir, Karachi whereby he was again convicted under Section 302(b) PPC and sentenced to undergo imprisonment for life and to pay compensation of Rs.100,000/- to the legal heirs of the deceased and in default whereof to undergo simple imprisonment for 01 year with benefit of section 382(b) Cr.P.C, which he has impugned before this Court by preferring the instant Criminal Jail Appeal.

2. It is contended by learned counsel for the appellant that the appellant being innocent has been involved in this case by the police at the instant of the complainant party; on the basis of same evidence co-accused Ikram and Kamran have been acquitted and even otherwise, inclusive of remission, he has already undergone more than 22 years of the sentence. By contending so, he sought for acquittal of the appellant by extending him benefit of doubt.

3. It is contended by learned DDPP for the state and learned counsel for the complainant that the appellant during course of investigation has made a judicial confession and his case is distinguishable to that of acquitted accused. By contending so, they sought for dismissal of the appeal. In support of their contentions, they relied upon case of **Sulleman vs. The State (2006 SCMR 366)**.

4. Heard arguments and perused the record.

5. Admittedly, complainant Khamiso is not eye witness to the incident therefore; his evidence is of little help to the case of prosecution. It was stated by P.Ws Abdul Karim and Muhammad Amin that on the date of incident they saw the appellant and the above named co-accused taking away with them the deceased on their Suzuki pickup. On the next day, they were informed that the dead body of Zahid has been found lying adjacent to Madarsa at Landhi. If their version is believed to be so, then their evidence is only to the extent that they saw the appellant and the acquitted accused to be in company of the deceased lastly. Last seen evidence obviously is a weak type of evidence. Surprisingly, it has been disbelieved even by learned trial Court while recording acquittal of above named co-accused. Initial investigation of the case was conducted by I.O/SIP Sagheer Ahmed Baig, he has not been examined by the prosecution for the reason that he has retired from the service, the retirement of the employee may not be a valid reason for his non examination. By such act, the appellant obviously has been prejudiced in his defence seriously. It was stated by I.O/SIP Shahid Mehmood that on investigation, he produced the appellant before the Magistrate having jurisdiction for recording his confessional statement; such production of the appellant was on 3rd day of his arrest. No explanation to such delay is offered. It was stated by Mr. Nadir Khan Burdi, the Magistrate, that he

recorded the confessional statement of the appellant on the next day of his production before him, whereby it was stated by him that he and above named acquitted co-accused had committed the death of the deceased by strangulating his throat. The confessional statement of the appellant has been recorded on a computerized printed proforma, containing the pre-written questions in English language, it does not satisfy the requirement of law. On asking, I.O/SIP Shahid Mehmood was fair enough to admit that after recording confessional statement of the appellant, his custody was handed over to him for jail. It was against the spirit of law. It would be hard to maintain conviction against the appellant on the basis of his judicial confession, which is hit by defects as are detailed above. The appellant has pleaded innocence by denying to have made any judicial confession. In these circumstances, it would be safe to conclude that the prosecution has not been able to prove the involvement of the appellant in present case beyond shadow of reasonable doubt and to such benefit he too is found entitled.

6. In the case of **Muhammad Azhar Hussain and another vs. The State and another (PLD 2019 S.C 595)**, it has been held by Apex Court that:

“We have also not felt comfortable with the printed form, purportedly used to administer warnings to the accused before recording of their statements. A confession may entail formidable consequences for an accused facing indictment and thus it is incumbent upon the Magistrate to ensure that the maker consciously comprehends the consequences of his choice and thus it is most important that the Magistrate himself, face to face, faithfully communicates to the accused all the relevant warnings, as contemplated by Section 364 of the Code of Criminal Procedure, 1898, a surer way to establish that the confession is free from all taints, thus we would not approve convenience procuring accused's signature on a printed format. On an overall analysis of the prosecution case, confessional statements cannot be relied upon without potential risk of error.”

7. In the case of **Naqibullah and another vs. The State (P L D 1978 Supreme Court 21)**, it has been held by Apex Court that:

“The prosecution has also failed to give any explanation for the considerable delay in the production of the two accused before the Magistrate for the purposes of recording their confessions. It is rather unfortunate that even the learned Magistrate did not satisfy himself about the causes of this delay before proceeding to record the two confessional statements in question.”

8. In the case of **Muhammad Pervez and others vs. The State and others (2007 SCMR 670)**, it has been held by Apex Court that:

“It is admitted fact that after recording the confessional statement of the appellants was handed back to the police. Such type of confession keeping in view the peculiar circumstances highlighted hereinabove appears to be irrelevant as law laid down by this Court in Khuda Bakhsh's case 1969 SCMR 390.”

9. In the case of **Muhammad Mansha vs. The State (2018 SCMR 772)**, it has been held by the Apex court that;

“4....Needless to mention that while giving the benefit of doubt to an accused it is not necessary that there should be many circumstances creating doubt. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of such doubt, not as a matter of grace and concession, but as a matter of right. It is based on the maxim, "it is better that ten guilty persons be acquitted rather than one innocent person be convicted".

10. The case law which is relied upon by learned DDPP for the state and learned counsel for the complainant is on distinguishable facts and circumstances. In that case, the judicial confession of the accused was recorded on the very next day of his arrest.

11. In view of the facts and reasons discussed above, the conviction and sentence awarded to the appellant are set aside, consequently, he is acquitted of the offence for which he was charged, tried, convicted and sentenced by learned trial Court and shall be released forthwith, if not required to be detained in any other custody case.

12. The instant Criminal Jail Appeal is disposed of accordingly.

JUDGE