

**JUDGMENT SHEET
IN THE HIGH COURT OF SINDH CIRCUIT COURT
HYDERABAD**

Criminal Jail Appeal No.D-152 of 2021
Confirmation Case No.D-32 of 2021

Present:

**Mr. Justice Shamsuddin Abbasi
Mr. Justice Amjad Ali Sahito**

Appellant: Muhammad Kashif through Mr. Imdad Ali Dahri, Advocate

Respondent: The State through Mr. Nazar Muhammad Memon, Additional Prosecutor General, Sindh.

Complainant: Liaquat Hussain, through Mr. Muhammad Jameel Ahmed, Advocate.

Date of hearing: 23.01.2024

Date of Judgment: 21.02.2024.

J U D G M E N T

AMJAD ALI SAHITO, J:- Through instant Jail Criminal Appeal filed by the above-named appellant/accused, assailing the judgment dated 30.11.2021, passed by learned Model Criminal Trial Court-II/IVth Additional Sessions Judge, Hyderabad in Sessions Case No.764 of 2014 (*Re.The State Vs. Muhammad Kashif and another*), the outcome of FIR bearing Crime No.113/2014, offence Under Sections 302 QDO and 34 P.P.C, registered with Police Station, B-Section Latifabad, whereby he was convicted for an offence punishable U/S. 302 (b) P.P.C for committing qatl-e-Amd of deceased Mst. Farhana, and sentenced to death as “Tazir” to hang by neck till he is dead subject to confirmation of this Court and to pay compensation

of Rupees five lac to the legal heirs of deceased u/s 544-A Cr.P.C or in default thereof, to undergo Simple Imprisonment for one year more. A reference for confirmation of the death sentence was also sent to this Court.

2. Briefly, the facts of the prosecution case are that on 20.08.2014, complainant Liaquat Hussain lodged an FIR at police station B-Section Latifabad Hyderabad alleging therein that in the year 2010, he got his two daughters Farhana and Aisha married with Aamir and Nadir being brothers inter se in the same house situated at Unit No.10 Hyderabad. His daughter Mst. Farhana whenever visited the house of the complainant, she used to complain that her mother-in-law and brother-in-law namely Kashif used to tease her by different means and her brother-in-law Kashif also maltreated her after her husband left the house for work. It is further alleged that a complaint was made by the complainant to his son-in-law and his father but they did not listen. It was 19th August 2014 when the complainant got information that his daughter Mst. Farhana has been tortured by her in-laws whereon he along with his brother-in-law (Sala) Muhammad Nisar arrived at the house of his son-in-law Aamir and noticed his daughter Mst. Farhana being seriously injured lying in her room who disclosed that she was in her room, it was 05:00 p.m. her mother-in-law (co-accused) and her brother-in-law Kashif holding Churri entered in her room whereas co-accused Mst. Sarwari caught hold her and Devar (brother-in-law) Kashif caused her Churri blows one after the other when her mother-in-law was saying not to leave her alive and Kashif was causing churri injuries to her then both left her in the room in injured condition and escaped away. Meanwhile, the complainant's son-in-law Aamir also arrived then they moved Mst. Farhana to Civil Hospital but she succumbed to her injuries at the gate of Civil Hospital Hyderabad and police of P.S B-Section Latifabad also arrived at the Hospital and, after conducting necessary formalities, handed over the dead body to the complainant party, hence

complainant after the funeral and burial as well as getting free from guests appeared at police station and lodged the FIR.

3. After completing the investigation of the case, the police report u/s 173 Cr. P.C (Challan) was submitted by the Investigating Officer against the above-named accused before the concerned Court.

4. The trial Court framed the charge against the appellant/accused and co-accused Mst. Sarwari, to which they pleaded not guilty and claimed to be tried. To establish accusation against the accused, the prosecution examined as many as 08 witnesses, PW-01 Dr. Shahida at Ex:3, she produced police letter, Lash Chakas Form and post-mortem report at Ex.03/A to Ex.03/C; PW-02 complainant Liaquat Hussain at Ex:4, who produced receipt of dead body and FIR at Ex.04/A to Ex.04/B; PW-3 witness Muhammad Nisar at Ex.05, he produced Danistnama , memo of dead body, memo of clothes at Ex.05/A to Ex.05/C; PW-4 Muhammad Aamir at Ex.06, he produced memo of recovery at Ex.06/A while PWs Noor Ellahi and Muhammad Asif were given up by learned ADPP vide statement at Ex.07; PW-5 Muhammad Waqar at Ex.08, he produced memo of arrest of accused at Ex.08/A; PW-6 SIP Muhammad Arif at Ex.09, he produced notice issued to complainant, arrival and departure entry and memo of place of incident and recovery at Ex.09/A to Ex.09/C; PW-7 Ahsan A. Malik, the then Civil Judge and Judicial Magistrate at Ex.10, he produced application for recording confessional statement of accused, confessional statement, copy of application for recording statement u/s 164 Cr.P.C of PW Muhammad Amir along-with order, copy of notice, copy of statement u/s 161 Cr.P.C, copy of statement u/s 164 Cr.P.C in original at Ex.10/A to Ex.10/F; PW Manzoor Ellahi was given up vide statement and finally PW-8 SIP Zahid Siraj at Ex.11, he produced entry No.32, entry No.20, entry No.13, letter to Mukhtiarkar and notice dated 02.09.2024 at Ex.11/A to Ex.11/E. Thereafter the prosecution closed its side vide statement at Ex:13.

5. The statement of the appellant and co-accused were recorded under Section 342 Cr.P.C. at Ex:14 & 15, wherein they denied the prosecution allegation levelled against them and claimed their innocence. However, they neither examined themselves on oath under section 340(2) Cr.P.C. nor led any evidence in their defence.

6. The learned trial Court, after hearing the learned counsel for the parties and appraisal of the evidence, convicted and sentenced the appellant in a manner as stated above. The conviction and sentence, recorded by the learned trial Court, have been impugned by the appellant before this Court by way of filing the instant Criminal Jail Appeal.

7. Learned counsel for the appellant has mainly contended that the appellant is innocent and has falsely been implicated in this case; that the confessional statement of appellant was recorded by a Magistrate is inadmissible in the evidence as no reflection time was given to him nor any counsel provided to the appellant; that after recording the confessional statement of appellant the custody was handed over to the same I.O; that there is no evidence against the appellant except the confessional statement which was recorded with delay of about six days and having no value in the eyes of law; hence it cannot be believed that the confessional statement recorded was voluntarily and true; that the appellant retracted from his confessional statement and it is well-settled law that the retracted confession required corroboration which was lacking, thus, the confession could not have been recorded on the basis thereof; that from the evidence on file no offence whatsoever has been made out against the appellant. Lastly, he prayed for the acquittal of the appellant.

8. On the contrary, the learned Additional Prosecutor General, Sindh as well as learned counsel for the complainant made submissions on the dismissal of instant appeal for the reason that there is no illegality or irregularity appears to have

been committed by the learned Trial Court and impugned Judgment is well reasoned & speaking one.

9. We have heard learned counsel for the respective parties and gone through the material available on record.

10. Admittedly, there is no ocular evidence is available on the record to connect the appellant with the commission of the offence as the incident is unseen and F.I.R was lodged on the statement/dying declaration of the deceased Mst Farhana when she was found injured condition by her father Haji Liaquat Hussain (PW-2)/Ex:04. The complainant had disclosed in the FIR that on 19.08.2014 he was present in his house along with his brother-in-law namely Muhammad Nisar and received a call from someone, who informed him that Mst. Farhana became injured. After receiving such information, he along with his brother-in-law reached at the house of in-laws of his daughter and found his daughter seriously injured and blood oozing from her injuries. The deceased Farhana informed him that at the instigation of her mother-in-law, her brother-in-law caused knife/churri blows to her. The complainant further disclosed in his evidence as well as in the FIR that he along with his brother-in-law went outside the house to take the vehicle and in the meanwhile the husband of the injured/deceased Mst Farhana namely Aamir had taken injured to Hilal Ahmer Hospital, and then to Civil Hospital Hyderabad where she succumbed to the injuries.

11. The appellant was arrested on 21.08.2014 and his confessional statement was recorded on 27.08.2014 with a delay of about six (6) days, except the confessional statement made by appellant Muhammad Kashif and there is no other evidence available on record, later on the appellant retracted from his confessional statement while recording his 342 Cr.P.C. statement. As regards the evidentiary value of the confession it may be pointed out here that by law, it is well-settled that a confession alone cannot form the basis of a conviction unless it finds strong corroboration from independent and reliable

evidence in material particulars. In the case of ***State v. Munir alias Gul Hassan PLD 1964 SC 813***, it was held that though retracted confessions whether judicial or extra-judicial can legally be taken into consideration against the maker of those confessions yet, in a criminal case it is not prudent to base conviction on its strength alone unless it is corroborated in material particulars. In the case of ***Nadir Hussain v. The Crown 1969 SCMR 442*** it was observed that the rule of caution universally applied to the cases of retracted confession requires that such confessions should not be acted upon unless corroborated in material particulars by reliable evidence. The above view was also affirmed in the case reported as ***Habib Ullah v. The State 1971 SCMR 341***. In the case of “***The State v. Waqar Ahmed 1992 SCMR 950***”, it was further observed that there was no rule of law that confessions whether retracted or not, could not be made the sole basis for conviction, but the principle of procedure and rule of caution required that a retracted confession must be supported by some connecting evidence. In the above-referred case, it was also observed that no basis difference exists between a confession or a retracted confession if the element of truth is not missing and it is always a question of fact which is to be adjudged by the Courts on the attending circumstances of a particular case. Subsequently, in the case of Abdul Latif v. The State reported as ***PLJ 1999 SC 264 and 1999 SC 413***, the Hon’ble Supreme Court of Pakistan was pleased to lay down that though no hard and fast rule as to acceptability of retracted confession can be laid down yet, a conviction cannot be based entirely on retracted confession and that such a confession, apart from satisfying the requirements of law has also to be corroborated by other evidence leading to the satisfaction that crime must indeed have been committed by the accused. In the case of ***HASHIM QASIM and others V. The State 2017 SCMR 986*** the Hon’ble Supreme Court of Pakistan was pleased to lay down that it was observed that retracted confession is corroborated by independent evidence of reliable nature, could be made the basis for conviction on a capital charge. It thus follows that though it is not prohibited to record

a conviction based on a retracted confession yet, in the absence of strong and independent corroboratory evidence it cannot be solely, made the basis of a conviction.

12. That being so, now, therefore, it has to be seen on record, as to what sort of corroboratory evidence is available to believe the confession. The prosecution examined the father/complainant Haji Liaquat Hussain (PW-2) of the deceased Mst. Farhana. He deposed that has received a call from someone who informed him that Mst. Farhana was seriously injured, as her mother-in-law Mst. Sarwari Begum had instigated her son Kashif, who caused Churri blows to Mst. Farhana. After hearing such information he along with brother-in-law Muhammad Nisar (PW-3) reached at the house of in-laws of his daughter and found his daughter seriously injured and blood was oozing from her injuries. His daughter informed him that at the instigation of her mother-in-law, her brother-in-law caused knife/Churri blows to her. Based on the dying declaration of the deceased the complainant involved both the accused in the commission of offence. The complainant went outside the house to take the vehicle meanwhile the husband of Mst. Farhana namely Aamir had taken his injured daughter to Hilal Ahmer Hospital Hyderabad and then to Civil Hospital Hyderabad where she succumbed to the injuries. Pw-2 Muhammad Nisar deposed that after receiving the injuries the injured was lying and she was semi-conscious and disclosed that her brother-in-law had caused injuries to her at the instigation of her mother-in-law/co-accused. Such a fact has not been disclosed by the doctors of Hilal Ahmer Hospital Hyderabad where she was first shifted and thereafter the injured was shifted to Civil Hospital Hyderabad. In cross-examination, the complainant admitted that *"I reached at the house of inlaws of my daughter within 15 to 20 minutes."* Further, he has admitted that his daughter was lying on the ground portion of the house whereas her inlaws were on the upper portion of the house. He did not find any person from the upper portion of the house; they had searched the vehicle for 10

minutes on the road but could not succeed, therefore, they again came to the house of inlaws of his daughter without taking any vehicle where he was informed by Muhalla people that his daughter had been brought by her husband to the Hospital. He first went to the Hilal Ahmer Hospital to see his daughter where got information that she was brought to Civil Hospital Hyderabad. He has also admitted in cross-examination that his other daughter namely Mst. Aisha was also married to another brother of the accused and the marriage of both daughters was arranged on the same date. On the day of the incident when he reached the house of inlaws of his daughter but her daughter namely Mst. Aisha had also not been with him. The husband of his daughter namely Aamir was also arrested by the police; they remained in the hospital for one or one and a half hours and thereafter the dead body was handed over to them. Though the suggestion was given to the complainant that before the incident so many times his daughter tried to commit suicide but he has denied such a suggestion. The other daughter of the complainant Mst. Aisha is still living in her in-law's house on the upper portion with her children happily, however, he admits that he lodged an FIR on 19.08.2014.

13. The motive set up by the prosecution is/was that there was a quarrel between their sister-in-law (Bhabhi) and her brother-in-law on the ground that she used to quarrel with her in-laws but no material has been brought on the record to believe that there was a quarrel between the parties on matrimonial affairs. The complainant in his cross-examination admitted that *"It is correct that I had not stated in my examination in chief that my daughter had made complaints against her mother-in-law and her brother-in-law prior to this incident for so many times when she visited my house."* From the evidence of the complainant, it appears that after receiving the injuries she/deceased nearly about 40/45 minutes alive and thereafter she succumbed to her injuries but as per evidence of P.W-1 Dr Shahida duration between death and injuries was

instantaneously, hence the evidence of P.W-1 that in presence of complainant's brother-in-law the injured informed him that she has received the injuries at the hands of the appellant on the instigation of Mst. Sarwari Begum having no force as the complainant claimed that he reached at house of the in-laws of Mst. Farhana within 15 to 20 minutes and thereafter she disclosed such facts.

14. In support of the contention, the prosecution examined P.W-3 (Muhammad Nisar) who is stated to be the brother-in-law of the complainant in his deposition has stated that on the day of the incident between 04:00 or 04:30 p.m., he was present in his house where he was informed that Mst. Farhana had been killed by her in-laws after receiving the information he along with the complainant rushed towards the house of the in-laws of the deceased Mst. Farhana. His two sons and nephew were also coming behind them. She was lying on the ground floor of the house in semi-conscious thereafter the husband of the deceased namely Aamir and his brother took the injured Mst. Farhana to the Hospital, in the ambulance and they also went behind them when they reached Civil Hospital they came to know that Mst. Farhana had expired on the way and her husband had tried to run away by leaving the dead body in the ambulance but he was arrested by one police constable. The police also made further proceedings in the hospital by preparing the Danistnama which was produced as Ex.05-A so also police prepared the memo of a dead body at Ex.05/B. The dead body was handed over by police after conducting the post-mortem. Police have also recorded his statement under section 161 Cr.P.C. In cross-examination, he admits that the mother-in-law and husband of the deceased and other muhalla people gathered at the house when they reached there. They remained at the house of the in-laws of the deceased for about one hour or one and a half hours. They remained in the Civil Hospital Hyderabad up to 08:30 or 09:00 p.m. The complainant claimed that P.W-3 (Muhammad Nisar) was with him but he narrated another story and stated that when they reached the house of

in-laws of Mst. Farhana her husband had brought an ambulance and she was shifted to Civil Hospital Hyderabad. Further in cross-examination, he admits that the muhalla people also reached the house of her in-laws but not a single independent person was examined by the I.O of the case to believe the prosecution story. The prosecution also examined the husband of the deceased Mst. Farhana and the brother of the appellant Muhammad Aamir (P.W-4) and he has deposed in his evidence that near about 04:30 or 04:00 p.m. he received a telephone call from his brother Manzoor Ellahi who told him to immediately arrived at home, therefore, he came at his house and saw his wife Mst. Farhana is in injured condition. He brought his wife in injured condition to Hilal Ahmer Hospital, where doctors referred his wife to the Civil Hospital then he brought his injured wife to the Civil Hospital in an ambulance where his wife succumbed to the injuries. After two hours his brother-in-law Noman also reached at Hospital. The police also reached at Hospital and arrested him (Aamir) but nowhere he has stated that complainant Haji Liaquat Hussain and P.W-3 Muhammad Nisar were present there only the husband of the injured Mst. Farhana disclosed that brother-in-law Noman was present. Police recorded his statement under section 161 Cr.P.C and on 03.09.2014, his statement under section 164 Cr.P.C was recorded before the concerned Magistrate. The police had informed him that his brother Muhammad Kashif had confessed his guilt that he had murdered his wife. The police had obtained his signature on mashirnama of recovery of a crime weapon i.e. knife at the police station. The crime weapon had not been recovered from the accused in his presence. He has produced a memo of recovery at Ex.06-A and says it only bears his signature. The P.W-4 admitted that the case property viz. knife present in the Court and seen by him at the police station and the same had not been recovered from his house. Learned ADPP declared the witness as hostile and with permission of the Court he was cross-examined and he has denied the suggestion that a crime weapon was recovered by police in his presence from their house. In cross-examination, the husband of the deceased

admitted that his wife was abnormal and he also admitted that before 19.08.2014 his wife had attempted to commit suicide. He remained in the police custody from 19.08.2014 to 25.08.2014. He has also admitted that police had arrested the co-accused and his other family members.

15. The prosecution also examined the most important witness viz. P.W-7 Ahsan A. Malik the then Civil Judge & Judicial Magistrate-VI Hyderabad wherein he has deposed that on 27.08.2014 he was posted at Civil Judge & Judicial Magistrate-VI Hyderabad. On the same day, the I.O of the case ASI Zahid Siraj submitted an application for recording the confessional statement of the accused Muhammad Kashif same was allowed and the handcuffs of the accused were removed. He was got sit in the chamber. He produced the application for recording the confessional statement of the accused with an order dated 27.08.2014. The accused was placed in the custody of the Court staff and he was warned that he is not bound to record a confessional statement and if he records his confessional statement the same may be treated against him. He was also informed that he is a Judicial Magistrate. The reflection time was given to him from 1200 hours to 1400 hours. After reflecting time again he was called and he was also informed that if he confessed the same would be used against him. The accused replied that he was ready to confess voluntarily without any coercion. The accused was examined with his consent. The accused informed the Magistrate that he was in police custody for five days and his confessional statement was recorded thereafter accused was remanded to Judicial custody.

16. The confessional statement was produced at Ex.10/B. In cross-examination, he admitted that the accused was remanded to judicial custody through the same I.O. after recording his confessional statement. We have also perused the confessional statement which is available at Ex.10/B wherein all the questions are written in English and the reply so made by the accused/appellant was written also in English and in the last

question what has to say he has replied in Urdu but in the footnote/memorandum nowhere it is written that the questions so made to him were translated into Urdu or in the language which he understands but simply said by the learned Magistrate that contents were read over to the person making it and admitted by him to be correct.

17. According to the Magistrate, the custody was handed over to the I.O of the case after recording the statement for sending him to Central Prison. Furthermore, the evidence given by the learned Civil Judge & Judicial Magistrate nowhere stated that any access of advocate or any relative was given to the accused. When the co-accused /witness Muhammad Aamir stated that he is the brother of the appellant and his other family members were arrested by the police the learned Judge did not inquire from the appellant or he did not depose in his evidence that he inquired from the appellant whether his any members are in illegal detention or not. In the instant case, the entire family was booked by the police while arresting him, his brother their mother and other family members, as such, it cannot be said that the confessional statement is voluntary. Furthermore the real sister namely Mst. Aisha of deceased Farhana also residing in the upper portion of the house and after hearing the noises father, mother and younger brother of the appellant came there but nowhere the complainant and Muhammad Nisar deposed that Mst. Aaisha the real sister of the deceased had seen this incident. In the case of **SADI AHMED and another Vs. The State, [2019 SCMR 1220]**, the Hon'ble Supreme Court of Pakistan while acquitting the accused has held that the confessional statement is not in line with the prosecution case set up in the crime report. A perusal of the confessional statement, it transpired that the same has been recorded by the learned Magistrate in proforma in English and the last question in Urdu. It is not disclosed therein that the contents of the confessional statement were explained to the accused in the Urdu language. Apart from the above defects in the confessional

statement, the accused had retracted from it (confessional statement).

18. The rule of prudence requires that retract confessional statement should not be acted upon and made the basis of conviction unless it is corroborated in material particulars. The record reflects that no corroboration has been made by the prosecution to support its case. It is by now well settled that a confessional statement has to be received holistically without quantification, once it is found unreliable, it cannot furnish the basis for the appellant's conviction as well. In this context, reliance can safely be placed on the case of **WAZIR Vs. The State [2019 SCMR 1297]**. The Hon'ble Supreme Court of Pakistan has held that:

“Once prosecution opts to rely upon a confessional statement of an accused to his detriment it must come forward with the disclosure above all suspicions and taints: it is not a case in hand. Findings recorded by the medical officer with regard to cause of death are not in line with the details purportedly furnished by the appellant. According to the confessional statement, the deceased was tortured and he became unconscious when the accused put a quit on him and found dead when removed, whereas according to Dr. Nisar Ahmed, PW-7 the death “occurred due to extraordinary violence, choking and fracture of cervical spine (due to trauma and fracture choking) (asphyxial death)”. Confessional statement cannot be favourably received without being imprudent for yet another reason; it has been disbelieved qua Ibrahim, Muhammad Zaib, Hassan Shah, Javed, Shah Zaman, Wali Khan, Sajid Khan and Ghani Khan, co-accused. It is by now well settled that a confessional statement has to be received holistically without quantification; once it is found unreliable qua majority of the accused notwithstanding different roles it cannot furnish the basis for appellant's conviction as well.”

19. Further accused cannot be convicted solely based on confession; the Court must see corroboration of an independent nature against such confession before recording any conviction on the basis thereof. The complainant claimed that the deceased had informed him about the incident but his claim was not supported by Dr Shahida, P.W Muhammad Nisar his nephew Noman and P.W Muhammad Aamir, Further the complainant disclosed that she was alive for more than 20 minutes when he reached the place of the incident but finding recorded by the medical officer concerning duration between death and injuries was instantaneously, hence the ocular evidence did not find support from medical evidence. According to P.W Muhammad Nisar, she was semi-conscious but the complainant disclosed that Mst. Farhana has disclosed the details of the incident in a manner that took place. The most important witness Mst. Aaisha the sister of the deceased was available in the upper portion of the house and after hearing the noises all the family members rushed to the place of the incident even Muhalla people were there but neither she was examined nor her statement was recorded to believe the version of the complainant that the deceased was murdered by the appellant on the instigation of her mother. The entire family was roped in the instant case and the confessional statement was recorded with a delay of about seven days without any explanation.

20. The overall discussion involved a conclusion that the prosecution has failed to prove the guilt against the present appellant beyond any reasonable doubt and it is a well-settled principle of law that for creating the shadow of a doubt, there doesn't need to be many circumstances. If a single circumstance creates reasonable doubt in the prudent mind, then its benefit is to be extended in favour of the accused not as a matter of grace or concession, but as a matter of right. The reliance is placed on the case of **Muhammad Masha v. The State (2018 SCMR-772)**, wherein the Hon'ble Supreme Court of Pakistan has held that:

“4. Needles 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 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”. Reliance in this behalf can be made upon the cases of Tariq Pervez v. The State(1995 SCMR-1345), Ghulam Qadir and 2 others v. The State(2008 SCMR-1221), Muhammad Akramv.The State(2009 SCMR-230) and Muhammad Zaman v.The State(2014 SCMR-749).

21. In this case, the learned trial Court has not evaluated the evidence in its true perspective and thus arrived at an erroneous conclusion by holding the appellant guilty of the offence. Resultantly, the instant jail appeal is **allowed**. The conviction and sentence awarded to the appellant is **set-aside** and he **is acquitted** of the charge by extending the benefit of the doubt. He shall be released forthwith if he is not required in any other custody case/crime.

22. As a result of our above findings, the reference bearing No.32/2021 submitted by the trial Court for confirmation of the death sentence to the appellant is answered in **NEGATIVE**.

JUDGE

JUDGE