

Retracted Judicial Confession

STo

CERTIFICATE OF THE COURT IN REGARD TO REPORTING

CRIMINAL APPEAL NO. S-47 OF 2014
PIRBHU V/S THE STATE

SINDH HIGH COURT, CIRCUIT COURT HYDERABAD

COMPOSITION OF BENCH

HON'BLE MR. JUSTICE MOHAMMAD KARIM KHAN AGHA

(S.B.)

Date of last hearing (heard/reserved): 05-12-2023

Decided on: 12-12-2023

(a) Judgment approved for reporting

YES

KAG

C E R T I F I C A T E

Certificate that the Judgment/Order is based upon or enunciates a principle of law/decide a question of law which is of first impression/distinguishes over-rules/explains a previous decision.

Strike-out whichever is not applicable.

- NOTE: -
- (i) This slip is only to be used when some action is to be taken.
 - (ii) If the slip is used, the Reader must attach it to the top of the first page of the Judgment.
 - (iii) Court Associate must ask the Judge written the judgment whether the judgment is approved for reporting.
 - (iv) Those directions which are not to be used should be deleted.

SGP, Kar-L (iii) 773-2000-4-2003-III

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IN THE HIGH COURT OF SINDH AT
HYDERABAD

Criminal Appeal No. S - 47 Of 2014

PIRBHU SON OF LACHMAN

Hindu, Adult,
Residents of Land Ali Shair Rajjer,
Deh Dhandhoro, Taluka, Khipro,
District *Sanghar*
Presently confined at
Central Prison Hyderabad

.....

Appellant

V e r s u s

The State
Respondent

.....

F.I.R No. 36/2007
U/s. 302/ P.P.C
P.S Khipro.

S 12

ORDER SHEET
**IN THE HIGH COURT OF SINDH,
CIRCUIT COURT, HYDERABAD.**

Cr. Appeal No.S-47 of 2014

DATE	ORDER WITH SIGNATURE OF JUDGE
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For hearing of main case.

05.12.2023.

Syed Zeeshan Hyder Shah, Advocate for appellant.

Ms. Rameshan Oad, Asst. Prosecutor General, Sindh.

I have heard the learned counsel for the appellant and learned A.P.G.

Reserved for judgment.

Hafiz Fahad

**HIGH COURT OF SINDH, CIRCUIT COURT
AT HYDERABAD**

Criminal Appeal No.S-47 of 2014
[Pirbhu versus The State]

Appellant : Through Syed Zeeshan Hyder, Advocate
Complainant : None present
State : Through Ms. Rameshan Oad, Assistant P.G
Date of hearing : 05.12.2023
Date of decision : 12.12.2023

J U D G M E N T

MUHAMMAD KARIM KHAN AGHA J.- Through this appeal the appellant Pirbhu has impugned the Judgment dated 26.02.2014 passed by learned Sessions Judge, Sanghar (**Trial Court**) in Sessions Case No.117 of 2007 [The State versus Pirbhu], outcome of Crime No.36 of 2007 registered at P.S Khipro for offence punishable under Section 302 PPC, whereby he has been convicted and sentenced u/s 302(b) PPC to suffer imprisonment for life with further directions to pay Rs.2,00,000/- each as compensation to legal heirs of deceased Karoo and Sht. Hajiri, and in case of default in payment thereof he has to further suffer simple imprisonment one year more, however, he was been extended benefit of Section 382-B Cr.P.C.

2. Complainant Harchand Bheel lodged the aforesaid FIR on 16.05.2007, stating therein that he is serving as Darogha whereas his brother Karoo aged about 28/29 years as Belder in Irrigation Department; that his brother Karoo was residing with him and was performing his duties at Nara Canal Khipro from Mudho Pattan to Aqil Shah Pattan; that on 15.05.2007 in the morning his brother Karoo went to perform his duties and up to late night he did not return back, as such his brother Akk and cousin Bhojo went in search of Karoo; that at about 02:00 am (night) his cousin Bhojo returned back and disclosed

that at about 01:00 am when he and Akk reached near the house of Pirbhu Bheel situated on the path of Nara Canal, they heard the cries of brother Karoo, which attracted them and they saw on torch light that accused Pirbhu S/o Lachman Bheel was causing blows on sharp side of his hatchet to brother Karoo on which they raised hakkals and the accused Pirbhu ran away with his hatchet and then they saw dead body of Sht. Hajiri W/o Pirbhu aged about 24 years having hatchet injuries and Karoo had also hatchet injuries, who also died within their sight; that after receiving such information he alongwith cousin Bhojo rushed towards place of incident and saw the dead bodies of Sht. Hajiri and his brother Karoo, hence aforesaid FIR was lodged.

3. After usual investigation police submitted the challan before the Court concerned and after completing necessary formalities, learned trial Court framed the charge against the accused/appellant, to which he pleaded not guilty and claimed trial.

4. At trial, the prosecution in order to prove its case examined nine (09) witnesses and exhibited numerous documents and other items. The statement of accused was recorded under section 342 Cr.P.C whereby he denied the allegations leveled against him and claimed his false implication in the case. However, neither he examined himself on oath nor led any evidence in his defence.

5. Learned trial Court after hearing the learned counsel for the parties and examining the evidence available on record convicted and sentenced the appellant as stated earlier in this judgment. Hence the appellant has filed this appeal against his conviction.

6. Learned trial court in the impugned judgment has already discussed the evidence in detail and there is no need to repeat the same here, so as to avoid duplication and unnecessary repetition.

7. As is appearing from the impugned judgment the complainant had died his natural death during trial, as such he could not be examined before learned trial Court and his legal heirs neither engaged a private counsel before the learned trial Court nor effected appearance before this Court despite issuance of various notices at the given

address of complainant. Since the appellant had been in custody for a long time and the interest of the complainant/legal heirs could be looked after by the learned State Counsel, as such in the interest of justice I proceeded with this old appeal of 2014 and have decided the same through this judgment.

8. Learned counsel for the appellant has contended that the appellant is innocent and has been falsely implicated in this case; that that this was a blind murder and that the alleged eye witnesses were not present at the time of the murder and as such their evidence cannot be relied upon; that the retracted confession of the appellant was made under duress and is contrary to the eye witness evidence and as such it cannot be safely relied upon; that the murder weapon (hatchet) was foisted on him by the police; and that for any or all of the above reasons the appellant be acquitted of the charge by extending him the benefit of the doubt. In support of his contentions he placed reliance on the cases of (i) **DILMEER and another versus The STATE** [2000 YLR 781], (ii) **ZAFFAR versus The STATE** [2012 MLD 466], (iii) **FAZAL MAULA and another versus AKHTAR JAMEEL and another** [2013 MLD 825], (iv) **IMRAN versus The STATE** [2015 MLD 46], (v) **NIAZ AHMED versus The STATE** [2015 YLR 1204], (vi) **AZEEM KHAN and another versus MUJAHID KHAN and others** [2016 SCMR 274] and (vii) **MUHAMMAD ISMAIL versus The STATE** [2017 SCMR 713].

9. Learned Assistant Prosecutor General Sindh on behalf of the State, who was also looking after the interests of the complainant, after going through the entire evidence of the prosecution witnesses as well as other record of the case has fully supported the impugned judgment. In particular she has contended that there was no delay in lodging the FIR; that there are two eye witnesses both of whose evidence can be safely relied upon who directly implicate the appellant in the murder of the deceased; that the appellant made a judicial confession which albeit was retracted at trial could be relied upon as it was voluntarily made with the object of telling the truth; that the medical evidence supports the ocular evidence; that the hatchet

(murder weapon) was recovered on the pointation of the appellant and as such the prosecution had proved its case against the appellant beyond a reasonable doubt and the appeal be dismissed. In support of her contentions, she placed reliance on the cases of **MUKHTAR ALAM versus FAZAL NAWAB and another** [2020 SCMR 618] and **GHAFFAR MAHESAR versus The STATE** [2022 SCMR 1280].

10. I have heard the learned counsel for the appellant as well as learned A.P.G and have also perused the material available on record and the case law cited at the bar.

11. Based on my reassessment of the evidence of the PW's, especially the medical evidence, recovery of bodies of the deceased and blood at the crime scene which lead to a positive chemical report I find that the prosecution has proved beyond a reasonable doubt that Karo and Sht Hajiri (the deceased) were both murdered by a sharp cutting weapon on 16.05.2007 at about 1am at the path of Nara Canal Khipro in front of Landhi of the accused.

12. The only question left before me therefore is who murdered the deceased by firearm at the said time, date and location?

13. After my reassessment of the evidence on record, I find that the prosecution has proved beyond a reasonable doubt the charge against the appellant for which he was convicted for the following reasons;

(a) That the FIR was lodged with a delay of about 10 hours however based on the particular facts and circumstances of the case I do not find such delay fatal to the prosecution case. This is because after the witnessing the murder and discovery of the dead bodies the complainant was informed by an eye witness who reached the wardat and then proceeded to the PS which was about 5 to 6 KM's from the wardat as such the delay in lodging the FIR has been fully explained. In this respect reliance is placed on the case of **Muhammad Nadeem alias Deemi v. The State** (2011 SCMR 872).

(b) The appellant is named in the promptly lodged FIR with the specific role of murdering the deceased by hatchet. Even otherwise no specific/proven enmity has come on record between the appellant and the complainant which would motivate him to lodge a false case against the appellant.

(c) In my view the prosecution's case primarily rests on the eye witnesses to the murder whose evidence I shall consider in detail below;

- (i) **Eye witness PW 3 AKK. He is brother of the complainant who died of natural causes before giving evidence at trial and the brother of the deceased Karoo.** According to his evidence the deceased Karoo was working in the irrigation department and posted at Dharo nara canal. On 15.05.2007 the deceased went to his post but did not return home. Thus, he and his cousin Bhojo went out in search of deceased Karoo. At about 1am they both came to where deceased Karoo was posted when they heard Karoo's cries. On torchlight they saw the appellant inflicting hatchet blows on deceased Karoo. They gave hakals and the appellant ran away with the hatchet. Deceased Karoo had died and they also found body of deceased Hajira who had received hatchet blows and was dead. He then sent Bhojo to inform his elder brother Harchand who came to the wardat and then went to inform the police and lodge the FIR. Police came to the wardat and the dead bodies were taken to hospital.

This eye witness knew the appellant before the incident, and saw the appellant from a few feet a way over a few minutes when the appellant was murdering deceased Karoo by hatchet so there is no case of mistaken identity and no need to hold an identification parade especially as the accused with specific a role was named in the promptly lodged FIR. In this respect reliance is placed on the cases of **Amanullah v State (2023 SCMR 527), Qasim Shazad V State (2023 SCMR 117).**

Admittedly the eye witness was related to the deceased Karoo who was his brother however it is well settled by now that evidence of related witnesses cannot be discarded **unless** there is some ill will or enmity between the eye witnesses and the accused which has not been proven in this case by any reliable evidence. In this respect reliance is placed on the cases of **Ijaz Ahmed V The State (2009 SCMR 99) Nasir Iqbal alias Nasra and another v. The State (2016 SCMR 2152) and Ashfaq Ahmed v. The State (2007 SCMR 641),**

This eye witness is not a chance witness as he was the brother of the deceased Karoo residing in the same house as him in the nearby village and went to look for him where he was posted when he did not return home. He is named in the promptly lodged FIR. He

saw the appellant murder the deceased Karo by torch light. **He knew the deceased from before and as there is no case of mistaken identity.** The witness saw the appellant by torch light. Admittedly the torch was not recovered but we must be practical and use our commonsense in respect of this aspect of the case. Namely, no one goes out at night in rural areas to look for some one with no source of light. Obviously they would take a torch with them so they could find their way to the place where Karo was posted. What use would it be searching for some one in the dark with no source of light? The fact that the torch was not recovered was not the fault of the eye witness who had no idea that he had to hand it over to the police. This was the job of the IO and once again the ground reality in our society/environment is that the police rarely recover light bulbs or torches in the rural areas where it is taken for granted that at night people use torches because it is dark and on account of excessive load shedding. Admittedly he gave his section 161 eye witness statement after a delay of 10 days but once again this was not his fault. Such delay is often fatal to the prosecution case but the fact that his name was mentioned in the promptly lodged FIR as an eye witness leads me to giving some weight to his evidence. He also gave his evidence in a straightforward manner and was not dented during cross examination. He had no enmity with the appellant and as such had no reason to implicate him in a false case. As such I believe his evidence especially in respect of the identification of the appellant but give it lesser weight than is usual on account of the delay in recording his S.161 Cr.PC statement.

- (ii) **Eye witness PW 4 Bhojo. He was cousin of the complainant and PW 3 AKK and was also related to the deceased Karoo.** His evidence corroborates the evidence of eye witness PW 3 AKK in all material respects and the same considerations apply to his evidence as to the evidence of PW 3 AKK. Namely, I believe and rely on it but give it lesser weight than usual due to the delay in his recording his S.161 Cr.PC statement.

Having believed the eye-witnesses evidence, albeit with lesser weight than usual, I turn to consider the corroborative/supportive evidence whilst keeping in view that it was it was held in the case of **Muhammad Waris v. The State** (2008 SCMR 784), at P.786 para 4 as under;

"Corroboration is only a rule of caution and is not a rule of law and if the eye witness account is found to be reliable and trust worthy there is hardly any need to look for any corroboration"

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Thus, based on my believing the evidence of the 2 PW eye mentioned above, although giving their evidence lesser weight than is usual, what other supportive/corroborative material is their against the appellant?

- (d) Shortly after his arrest the appellant made a judicial confession (later retracted at trial) which is reproduced as under for ease of reference.

"On 16.05.2007, I returned back to my home from Chanaseri Mori, when at about 10/11 P.M night, I saw that my son was sleeping on a Cot but my wife was not available on her Cot. Then, I heard some noise from Hut. I was having hatchet and spade in my hands. I kept spade there and took hatchet with me and went inside the Hut where I saw that Karo and my wife Sht. Hajri, were naked and were committing intercourse then I became anger and firstly caused hatchet blows to Karo on his shoulder who died at the spot and thereafter I also caused hatchet blows to my wife Sht. Hajro on her shoulder, who also died then and there. Then after keeping the hatchet on Cot I went to sleep. Thereafter, I called my maternal uncle namely Makhan to whom I narrated the above facts who asked to call the Nek Mard and then our Nek Mard came at Otaq and called me to whom also I narrated the same facts then he took me on his motorcycle to the Police Station" (bold added)

It is settled by now that even a retracted judicial confession can be relied upon if it is found to be voluntary and is truthful and fits in with the prosecution case. In this respect reliance is placed on the case of **Muhammad Amin V. The State** (PLD 2006 Supreme Court 219). In the instant case the appellant has claimed that his confession was not voluntary and was a result of coercion as his family was kept in police custody to ensure that he confessed. No mention of this was made at the time of recording the confession before the magistrate. No mention of it was made in the appellant's Section 342 Cr.PC statement. He did not give evidence on oath and did not call any of the alleged detained relatives as DW's. As such I find that the confession was made voluntarily with the object to tell the truth. No doubt there is some discrepancies with the evidence of the eye witnesses but I do not consider that such discrepancies shake the prosecution case as the confession supports the core of the prosecution case namely that the appellant murdered the deceased with a hatchet and as such I believe the confession and place reliance on it and find that it is corroborative of the eye witnesses version of events.

I also find that the magistrate committed no material procedural irregularities in recording the judicial confession which I have placed reliance on.

- (e) That the bodies of both the deceased were found in the hut of the appellant for which he was not able to give any explanation.
- (f) That it does not appeal to logic, commonsense or reason that a brother would let the real murderer of his brother get away scot free and falsely implicate an innocent person by way of substitution. In this respect reliance is placed on the case of **Muhammed Ashraf V State** (2021 SCMR 758).
- (g) That the medical evidence and post mortem report fully support the eye-witness/ prosecution evidence and the confession that both the deceased died from receiving wounds from a sharp cutting instrument i.e a hatchet.
- (h) That on his arrest a day after the incident the accused immediately lead the police to the murder weapon which was a hatchet on his own pointation which was hidden in the roof of his house in a place which the police would not be aware of.
- (i) That there was no ill will or enmity between the police and the appellant and as such they had no reason to falsely implicate the appellant in this case, for instance, by foisting the hatchet on him. Under these circumstances it is settled by now that the evidence of police witnesses is as good as any other witness. In this respect reliance is placed on the case of **Mustaq Ahmed V The State** (2020 SCMR 474). Thus, I believe the evidence of the IO who was not dented during cross examination whose evidence of arrest and recovery is supported by the mashir's evidence.
- (j) That the blood stained earth recovered at the wardat and clothes recovered from the deceased were sent for chemical examination which report found the blood recovered at the scene and on the clothes to be human blood.
- (k) The motive for the murder has come on record. Namely, that the deceased Karoo was caught having intimate relations with the wife (deceased Hajira) of the appellant which angered him and lead to him murdering them.
- (l) That all the PW's are consistent in their evidence and even if there are some contradictions in their evidence I consider these contradictions as minor in nature and not material and certainly not of such materiality so as to effect the prosecution case and the conviction of the appellant. In this respect reliance is placed on the cases of **Zakir Khan V State** (1995 SCMR 1793) and **Khadim Hussain v. The State** (PLD 2010 Supreme Court 669). The evidence of the PW's provides a believable corroborated unbroken chain of events from the eye witnesses searching for the deceased Karoo at his post

to them seeing the appellant murdering the deceased Karoo with a hatchet and finding next to him the body of the wife of the appellant deceased Sht Hajira also with hatchet wounds to the arrest of the appellant to the recovery of the hatchet on his pointation to the retracted judicial confession of the appellant.

- (m) Undoubtedly it is for the prosecution to prove its case against the accused beyond a reasonable doubt but I have also considered the defence case to see if it at all can cast doubt on or dent the prosecution case. The defence case as set out by the appellant during his cross examination was that he was not present at the time of the murder and he has been falsely implicated however he did not give evidence under oath or call any DW in support of his defence case or even produce an iota of evidence in support of his defence case. Thus, in the face of eye witness evidence, his confession before judicial magistrate and other supportive/corroborative evidence I disbelieve the defence case which has not at all dented the prosecution case.

14. Thus, based on the above discussion, I find that the prosecution has proved its case against the appellant beyond a reasonable doubt for the offence for which he has been convicted and sentenced and as such his appeal is **dismissed**.

"Sajjad Jessar/P.A"