

*It to to ensure that guilty pleas /  
Confessions are truthful.*

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## IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Jail Appeal No.501 of 2017  
Confirmation Case No.10 of 2017

### Present:

Mr. Justice Naimatullah Phulpoto  
Mr. Justice Mohammad Karim Khan Agha

Appellant: Muhammad Sabir S/o. Allah Ditta, presently  
confined in Central Prison, Karachi through Mr.  
Abdul Razzaq, Advocate.

Respondent: The State through Muhammad Iqbal Awan,  
Deputy Prosecutor General Sindh.

Complainant: Mr. Shamsul Hadi, Advocate for Complainant.

Date of hearing: 17.04.2019

Date of Judgment: 08.05.2019

## J U D G M E N T

**MOHAMMAD KARIM KHAN AGHA, J.-** Appellant Muhammad Sabir S/o. Allah Ditta was tried by the learned Ist Additional District & Sessions Judge at Karachi Malir in Sessions Case No.111/1996 arising out of Crime No.51/1996 U/s. 302, 201, 109 PPC, registered at P.S. Airport Malir, Karachi against accused Zahoor Ahmed S/o. Khuda Bux and Muhammad Sabir S/o. Alla Ditta and the learned Ist Additional District & Sessions Judge vide judgment dated 31.10.2017 found appellant Muhammad Sabir guilty of the offences and sentenced him to death subject to confirmation by this court for the offences punishable under section 302(b) PPC read with section 109 PPC for committing murder of deceased Mst. Fozia daughter of Syed Iftikhar. The appellant was also convicted for an offence u/s 201 PPC, read with section 34 PPC for disappearance of evidence of offence and sentenced to R.I. for three (3) years. The benefit under section 382-B Cr.P.C. was also extended to him (the impugned judgment). The co-accused Zahoor Ahmed absconded after recording his S.342 Cr.PC statement and is still at large and as such the case against him has been left on the dormant file

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2. The brief facts of the prosecution's case are that on 29.11.1995 in case/crime No.362/1995 under section 11, 16 Zina E.H.O. 1979 was registered at Police Station Musafir Khana, District Bhawalpur by complainant Syed Iftikhar Ali Shah, regarding the abduction of his daughter Ms. Fozia in which accused Zahoor Ahmed was arrested in the said case on 25.03.1996, who during interrogation disclosed that he along with his companion Muhammad Sabir had abducted Mst. Fozia Bibi on the night between 23<sup>rd</sup> and 24<sup>th</sup> November, 1995 at the insistence/instigation of his companion co-accused Muhammad Sabir with intention to commit zina and sent the abducted girl to Karachi along with Muhammad Sabir. After some days, he himself came to Karachi and both he and the appellant committed zina with Mst. Fozia, when Mst. Fozia asked him to marry her, Muhammad Sabir advised accused Zahoor Ahmed to kill her, upon which he brought Mst. Fozia in house No.E-168, Gali No.1, Bhattaiabad, Karachi and committed her murder on the night between 23<sup>rd</sup> and 24<sup>th</sup> January, 1996 by pressing her neck and buried her dead body in the courtyard of the said house. On the disclosure of such facts the arrested accused Zahoor Ahmed in FIR No.362/1995 under section 11, 16, Zina EHO of Police Station Musafir Khana, District Bhawalpur was brought at Karachi where on the pointation of accused Zahoor Ahmed in presence of S.D.M. Saqib Soomro and Syed Iftikhar Hussain father of Mst. Fozia, S.I. Muhammad Bashir of Police Station Airport, the earth was dug up and the dead body of Mst. Fozia was exhumed from the courtyard of the house where proceedings under section 174 Cr.P.C. were conducted and board was constituted and postmortem was also conducted and the FIR was registered against the accused persons and after investigation the accused Zahoor Ahmed was challaned, whilst the appellant was shown as an absconder.

3. The charge was framed against accused Zahoor Ahmed but not against the appellant who was declared a proclaimed offender and the trial thus proceeded in the appellant's absence and only in the presence of accused Zahoor Ahmed.

4. The prosecution examined 7 witnesses and exhibited numerous documents and other items in order to prove its case.

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5. The appellant who had been absconding was arrested and on 13.08.2008 an amended charge against the accused persons was framed. The appellant pleaded not guilty and claimed for trial.

6. According to the impugned judgment when the PWs Dr. Aftab Azizi Ex. 13, Dr. Hamid Z. Jelani Ex.14 and ASI Ghulam Mustafa Ex. 19 were examined at the time appellant Sabir was declared proclaimed offender. As such after the appellants arrest these witnesses were re-examined.

7. Once again during the trial, the appellant Muhammad Sabir absconded away in October, 2010 and was declared as a proclaimed offender vide order dated 07.01.2011. PW-ASI Muhammad Bashir (R) was examined at Ex.19. Thereafter, the prosecution side was closed on 27.11.2010. Thereafter, the statement of accused Zahoor Ahmed was recorded under S.342 Cr.PC whereby he denied all the allegations and claimed false implication but he too then also jumped bail and absconded on 24.12.2010. After completing the legal formalities the case was kept on dormant file on 07.01.2011.

8. On 10.12.2016 the appellant was again arrested and the case was re-opened. On 20.12.2016, the appellant through his counsel made statement in writing that he admits/confesses his guilt and also does not want to cross-examine any witness of the prosecution side. On 29.12.2016 learned DDPP closed the prosecution side.

9. The statement under section 342 Cr.P.C. of the appellant Muhammad Sabir was recorded in which he confessed his guilt to the offense. On 25.03.2017, the appellant Muhammad Sabir in custody made an application in writing admitting his guilt and also admitted the contents of his S.342 Cr.P.C statement, which was earlier recorded and further stated that he did not want to examine himself on oath and he was given the opportunity of hearing and finally the defense side was closed.

10. After appreciating the evidence on record the learned 1<sup>st</sup> Additional District & Sessions Judge at Karachi Malir vide the impugned judgment

dated 31.10.2017 sentenced the appellant as mentioned earlier in this judgment.

11. That through this appeal the appellant has challenged the impugned judgment. It is essentially his case that he is innocent; that there is no evidence against him and that he only confessed because both the complainant and prosecution had told him if he did so he would be let off by way of compromise and that being an illiterate and gullible person he agreed to plead guilty but since the complainant and the prosecution have backed out of their commitments/false promises he now files this appeal so that he can receive justice.

12. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the impugned judgment dated 31.10.2017 passed by the trial court and, therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

13. Learned advocate for the appellant has contended that the appellant is innocent of the charge; that there is no evidence against the appellant; that the appellants so called confession is no confession at all in the eyes of the law and even otherwise it was made on account of inducements and as such the appellant be acquitted. In support of his contentions he has placed reliance on **Muhammad and 9 others** (PLD 2003 SC 271), **Imran Ali v. The State** (2018 SCMR 1372), **Muhammad Shafquat v. The State** (2005 P.Cr.LJ 1884) and **Shera v. The State** (1991 P.Cr.LJ 365).

14. On the other hand, Mr. Muhammad Iqbal Awan, learned Deputy Prosecutor General fully supported the impugned judgment. He conceded that there was no evidence brought on record by the prosecution to prove the guilt of the appellant but that the guilt of the appellant had been established through his confession of guilt as submitted through his advocate and his own confession of guilt in his S.342 Cr.PC statement and as such the impugned judgment should be up held and the appeal dismissed. He did however concede that based on the particular facts and circumstances of the case it was a case which attracted the sentence of life imprisonment rather than the death penalty and it may even be a case

justifying remand to the trial court for re hearing. In support of his contentions he placed reliance on **Nasir Mehmood and another v. The State** (2015 SCMR 423).

15. Learned counsel for the complainant submitted that the appellant's confessional statement through his advocate was voluntary and truthful and could be safely relied upon especially as the trial court gave him some reflection time. Likewise was the position of his S.342 Cr.PC statement whereby he admitted his guilt to the offense. As such the appellant had made two confessions which could be safely relied upon to convict him and as such the impugned judgment should be upheld and the appeal dismissed. In support of his contentions he placed reliance on **Fazal Wadood V The State** (2006 SCMR 1911), **Nazir Ahmed V The State** (1994 SCMR 58) and **Daulat Ali V Muhammed Aslam** (1998 MLD 944)

16. We have heard the arguments of the learned counsel for the parties, gone through the entire evidence which has been read out by the appellant, the impugned judgment and minutely scrutinized the record with their able assistance and have considered the relevant law.

17. At the outset, we would observe that the offense charged attracts the capital penalty which was indeed handed down to the appellant on his conviction. On scrutinizing the record it would appear that a charge was framed against accused Zahoor Ahmed on 31-5-1999 in which it is specifically recognized that the appellant was absconding. The accused Zahoor Ahmed entered a plea of not guilty. Thereafter it appears that the evidence of the first 4 PW's was recorded in the absence of both the appellant and his counsel. When the appellant was arrested on 13-08-2008 an amended charge was framed against both the accused and the appellant whereby both the accused and the appellant plead not guilty. It is apparent from the record that a number of witness's evidence was recorded in the absence of the appellant and his counsel and it was not simply possible for the appellant to waive off his cross examination rights to these witnesses by a blanket application giving up such right in a

capital case. In this respect reliance is placed on **Shafique Ahmed V State** (PLD 2006 Kar 337).

18. We also note that when framing the charge against the appellant the appellant pleaded not guilty and did cross examine some witnesses which indicated that at least initially he was contesting the case which to a certain extent are in line with his contentions as only later did he confess to his guilt on the basis of false promises/inducements made to him.

19. It is note worthy that under S.265 -E Cr.PC when the charge is read and explained to the accused if he opts to plead guilty the court shall record the plea and may in its **discretion** convict him thereon. In this case the appellant did **not** plead guilty at the time when his plea was recorded. In some jurisdictions such as England and the Wales and the USA when an accused enters a guilty plea the court **must** accept it provided that the accused is of sound mind, makes the plea voluntarily and has been advised of the consequences of such plea by his legal counsel. Often such pleas are made with a view to the accused getting some reduction in his sentence in terms of mitigation if the sentence has a certain range, for example, if the offense carries a potential sentence of not less than 7 years imprisonment but not more than 14 years. In such cases since the accused by pleading guilty has saved the courts time, costs, allowed other cases to proceed more expeditiously and spared witnesses from giving evidence his expectation is to get the lower range of sentence. As can be seen under S.265-E Cr.PC on a guilty plea under Pakistani law the court has the **discretion** whether to convict the accused or not. As is well settled such discretion must be exercised reasonably and in our view such exercise of discretion would most likely necessitate the court at least reading some S.161 statements of PW's or recording some prosecution evidence against the accused to be sure that he was actually the guilty person rather than an innocent person taking the blame for some one else on account of some extraneous reason e.g. receiving money. Thus, there is a logic behind this discretionary power. Namely to ensure that the actual culprit is punished and is not allowed to go free by allowing some one else to stand in his shoes. In a developing country such as Pakistan where there is a great deal



of poverty and is often governed by highly influential persons such considerations cannot be ruled out. Such an approach in our view only enhances the rule of law and the safe administration of criminal justice

20. When we consider the "so called" confessions/admissions of the accused we must also consider that he is an illiterate man as is shown by the fact that his signature is a thumb impression. In this respect there are two "so called" confessions (a) one through his lawyer and (b) one in his S.342 Cr.PC statement.

21. Turning to the confession sent through his lawyer. This simply states in the English language that the applicant/accused admits/confesses his guilt and has the thumb impression of the appellant by way of signature. In our view by no stretch of the imagination can any reliance be placed on this "so called" confession. Firstly, it has not been recorded in accordance with S.164 Cr.PC and has not been subject to the safe guards concerning confessions as laid down in the case of **Azeem Khan V Mujahid Khan** (2016 SCMR 274). Furthermore, the "so called" confession is simply an admission of guilt. No where in the "so called" confession does it give any detail of the murder which would again fit in with the appellants contention that he only agreed to confess because he was mislead/induced into believing that in doing so he would get some kind of benefit by way of compromise.

22. Turning to the "so called" confession in the appellant's S.342 Cr.PC statement when asked what he had to say about the statement filed by his advocate whereby he admitted his guilt he simply states again in the English language;

" Yes Sir. It has been filed voluntarily"

23. Again absolutely no detail is given in the manner in which the murder was committed so there is no way of telling whether his acts fit in with the prosecution case theory of how the deceased came to be

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murdered. In short there is no yardstick on which we can measure whether the accused has actually committed the offense.

24. Learned DPG has argued that in **Nasir Mehmood's case** (Supra) it was held that the accused S.342 Cr.PC statement carried more weight than his S.164 statement and this lead to the conviction of the accused. However, in that case apart from the accused S.342 Cr.PC statement there was **additional evidence** against the accused whereas in this case, as we shall come to later, there is no such additional evidence and as such the case is distinguishable.

25. With regard to the authorities relied upon by the complainant we find these to be of little, if any, assistance to the complainant. In the case of **Fazal Wadood** (Supra) the confession was recorded before a judicial magistrate and there was also **other additional prosecution evidence** to prove the prosecution case on record. Likewise in the cases of **Nazir Ahmed** (Supra) and **Daulat** (Supra) additional prosecution evidence was available against the accused. In this case there is no other additional legally admissible evidence against the appellant and we certainly harbour doubts as to both the voluntariness and truthfulness of the so called confessions especially as they are without any detail as to the offense whatsoever.

26. Thus, in our view both these "so called" confessions for the reason's mentioned above carry absolutely no weight and are excluded by us from consideration.

27. Even if we were to rely on these "so called" confessions we must keep in view that it is a fundamental principle of criminal law that the prosecution must prove its case beyond a reasonable doubt against the accused and any benefit of the doubt must go to the accused no matter how heinous the offense and its consequences. This is a positive obligation placed on the prosecution to prove its case which was emphasized in the case of **Waqar Ahmed V Shaukat Ali** (2006 SCMR 1139) especially in



terms of the accused S.342 Cr.PC statement in the following manner at P.1141 para 4;

*"We have heard the learned counsel for the petitioner and have also gone through the evidence so produced by the prosecution before the trial Court to substantiate accusation against accused. First of all it is to be noted that in the criminal cases it is always primary duty of the prosecution to establish its own case independently instead of depending upon the weaknesses of the defence. No doubt, Asghar Ali in his statement under section 342, Cr.P.C. has stated that he fired in self-defence but his such assertion would not be sufficient to conclude that for this reason the prosecution has succeeded to establish the guilt against the appellant. Of course such statement of the accused can be accepted under section 342, Cr.P.C. in toto, if there is no other prosecution evidence and the case is to be decided only on the statement of the accused as it has been held in the judgment reported in "The State v. Muhammad Hanif and 5 others 1992 SCMR 2047. But in the instant case prosecution had other incriminating evidence therefore, it was its duty to establish the guilt against the accused notwithstanding the fact that what plea was taken by them during the trial of the case. It is equally noteworthy that plea of self-defence of the respondents was denied by the prosecution witnesses itself during their cross-examination, therefore, if examined from this angle as well prosecution case has to be examined independently on the evidence whatever has been produced before the Court"(bold added)*

28. A similar view was taken by the supreme court in the later case of **Azhar V State** (2013 SCMR 383) in the following terms:-

*"After hearing the learned counsel for the appellant and the learned Additional Prosecutor-General, Punjab appearing for the State and having gone through the record of the case with their assistance it has straightaway been observed by us that both the learned courts below had rejected the version of the prosecution in its entirety and had then proceeded to convict and sentence the appellant on the sole basis of his statement recorded under section 342, Cr.P.C. wherein he had advanced a plea of grave and sudden provocation. It had not been appreciated by the learned courts below that the law is quite settled by now that if the prosecution fails to prove its case against an accused person then the accused person is to be*

*acquitted even if he had taken a plea and had thereby admitted killing the deceased". (bold added)*

29. Turning to the evidence produced by the prosecution against the appellant. Whether or not the appellant was present or his counsel was present at the time when the evidence was recorded or whether or not the appellant gave up his right to cross examine some of the PW's through his written application we have none the less minutely examined all the evidence adduced by the prosecution in order to prove its case against the appellant. After considering the same we are of the view that there is **not** an iota of legally admissible direct evidence against the appellant and no circumstantial evidence so as to connect the appellant to the offense so charged and certainly not reaching the threshold as required by law as set out in the case of **Fayyaz Ahmed V State** (2017 SCMR 2026). The co-accused under his S.342 Cr.PC statement Zahoor Ahmed (who thereafter absconded) does not even implicate the appellant in any manner whatsoever in the offense. This position concerning the prosecution adducing no evidence against the appellant during his trial was also conceded to by learned DPG.

30. With regard to remanding the case we consider that this would serve no useful purpose as there is absolutely no evidence against the appellant on record and based on his contentions in this appeal he would almost certainly not give any kind of confession. To remand the case in our view in these circumstances and based on the particular facts and circumstances of the case would only give the prosecution another bite at the cherry which would not be fair on the accused and as such we find this not to be a case of remand back to the trial court to hear any further aspect of the case.

31. Thus, since we have discarded the "so called" confessions of the appellant and found that even if we had relied on them the prosecution through other evidence has completely failed to prove its case we for the reasons discussed above hereby allow the appeal, acquit the accused of

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the charge, answer the confirmation reference in the negative and order the release of the appellant unless he is wanted in any other custody case.

32. The appeal is disposed of in the above terms with the confirmation reference being answered in the negative.

Arif