

IN THE HIGH COURT OF SINDH, KARACHI

Present:

Mr. Justice Mohammad Karim Khan Agha

Mr. Justice Khadim Hussain Tunio,

Spl. Criminal A.T.A. No.173 of 2022

Confirmation Case No.08 of 2022

Appellant: Muhammad Sohail S/o.
Muhammad Sultan through
Khawaja Muhammad Tanoli,
Advocate.

Complainant: Javed S/o. Sultan through Mr.
Muhammad Hanif, Advocate.

Respondent: The State through Mr. Muhammad
Iqbal Awan, Additional Prosecutor
General.

Spl. Criminal A.T. Jail Appeal No.184 of 2022.

Appellant: Muhammad Qaiser S/o.
Muhammad Parvaiz through
Barrister Iftikhar Ahmed Shah,
Advocate.

Complainant: Javed S/o. Sultan through Mr.
Muhammad Hanif, Advocate.

Respondent: The State through Mr. Muhammad
Iqbal Awan, Additional Prosecutor
General.

Date of hearing 04.05.2023
Date of Judgment 08.05.2023.

JUDGMENT

MOHAMMAD KARIM KHAN AGHA, J:- The appellants Muhammad Qaiser S/o. Muhammad Parvaiz and Muhammad Sohail S/o. Muhammad Sultan have preferred the instant appeals against the judgment dated 29.09.2022 passed by the Learned Anti-Terrorism Court No.XV, Karachi (Judicial Complex ATCs, Central Prison, Karachi) in new Special Case No.23/2019 (Old Special Case No.436/2019 arising out of

Crime No.78/2019 U/s.365-A/302, 297, 201 & 34 PPC 1860 read with section 7 of the ATA, 1997 registered at P.S. Mominabad, Karachi whereby both the appellants were convicted and sentenced to death u/s. 302(b) PPC along with forfeiture of their property as well as R.I. for one year and 07 years under section 297 and 201 PPC respectively and fine of Rs.200,000/- (Rupees two lac) each to be paid to the complainant under section 544-A Cr.P.C. The appellants were also convicted and sentenced to death under section 7(1)(e) of the Anti-Terrorism Act, 1997. All the sentences were ordered to be run concurrently. The benefit of section 382-B Cr.P.C. was also extended to the appellants.

2. The brief facts of the case are that complainant Javed S/o. Sultan got FIR No.78/2019 registered at police station Mominabad, District West, Karachi under sections 365 read with section 34 of the Pakistan Penal Code, 1860, stating therein that he used to reside in house No.188, Haryana Colony, Sector 10, Orangi Town, Karachi. On 11.03.2019, Junaid aged about 15 years son of the complainant left the house at 08:00 pm while saying to his mother that food be made hot as he would take the same after his arrival. At the time of leaving the house Junaid also took with him a Samsung mobile phone model J-7 bearing IMEI No.355617085024091 containing SIM No.0316-2832217 but he did not return home. Information of the incident was furnished by the complainant at the PS on 12.03.2019. The complainant party till then were searching and enquiring for Junaid but without success. The complainant became certain that either unknown person or persons for unknown reasons had abducted his son Junaid and taken him away to some unknown place and hence an FIR was registered against unknown persons.

3. Firstly the I.O. had submitted the report under A-Class as no clue was found regarding involvement of any of the accused. On 06.04.2019 the I.O. came to know through SHO PS Mominabad that number of the abductee had come on. The I.O. left for CPLC, where he found Waseem Nadir, who on enquiry disclosed that he purchased the mobile phone from accused Sohail residing at Jhangvi Chowk, Ittehad Town. The mobile phone of the kidnaped was recovered from Waseem Nadir lying in his house and on his pointation the accused Muhammad Sohail and

Muhammad Qaiser were arrested on suspicion. Both the appellants were brought at the police station who during interrogation admitted the murder of Junaid by strangling him with a string and as such the complainant and his witnesses were called. The accused and witnesses were taken to the place on the pointation of the accused, where murder of Junaid was committed. The appellants took the I.O. and the witnesses to the place of incident and the I.O. recovered there from some human bones, skull and different parts of the body that were lying scattered because of eating by the animals which were seized by the I.O. hairs of the head bone and one chapel and jaw of the victim which were identified by Muhammad Afzal Khan to be of Junaid. The appellants were then formally arrested in this case.

4. After completing the investigation Inspector Akhtar Aziz submitted charge sheet against both the accused under sections 365-A, 302, 297, 201 and 34 of the Pakistan Penal Code, 1860 read with section 7 of the Anti-Terrorism act, 1997 to which to which they pleaded not guilty and claimed trial.

5. The prosecution in order to prove its case examined 10 witnesses and exhibited various documents and other items. The statements of both the accused were recorded under Section 342Cr.P.C in which they denied all the allegations leveled against them and claimed their innocence. However, they did not give evidence on oath and did not call any D.W. in support of their defence case. After hearing the parties and appreciating the evidence on record the trial court convicted the appellants and sentenced them as stated above, hence, the appellants have filed these appeals against their convictions.

6. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the impugned judgment dated 29.09.2022 passed by the trial court, therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

7. Learned counsel for the appellants have contended that the appellants are completely innocent and have been falsely implicated in the case; that the FIR was lodged after an unexplained delay of 4 days;

that there is no eye witness to the abduction or murder; no last seen evidence; that no ransom demand was made and no ransom paid; that the judicial confessions of the appellants were not voluntarily made and as such are of no evidentiary value; that the murdered abductee's phone had been foisted on appellant Sohail; that the appellants did not lead the police to the place of the murder and recovery of the deceased's bones and for any or all of the above reasons the appellants should be acquitted of the charge by extending them the benefit of the doubt. In support of their contentions they placed reliance on the cases of **Bashir Ahmed Vs. The State** (2022 YLR Note 106), **Fazal Haq Vs. The State and another** (2014 YLR 2109), **Naqibullah and another Vs. The State** (PLD 1978 Supreme Court 21), **Nadeem Hussain Vs. The State** (2019 SCMR 1290) and **Ghulam Akbar and another Versus The State** (2008 SCMR 1064

8. On the other hand learned Additional Prosecutor General Sindh and the complainant fully supported the impugned judgment and contended that the prosecution had fully proved its case beyond a reasonable doubt through reliable trust, worthy and confidence inspiring evidence especially the judicial confessions of both the accused which proved that the appellants had abducted, demanded a ransom and murdered the deceased; the fact that the deceased's recovered mobile phone could be traced back to the appellant Sohail; that the appellants had lead the police to the place of the murder, to the remains of the dead body and the place where the clothes of the deceased were burnt which was a place which only they could have known about and that the death penalty was applicable to this case due to the grievous nature of the offence against a young child. In support of their contentions they placed reliance on the cases of **Khan Muhammad and others Vs. The State** (1999 SCMR 1818), **Akhtar Vs. The State** (2020 SCMR 2020), **Gul Muhammad Vs. The State** (2011 SCMR 670), **Sh. Muhammad Amjad Vs. The State** (PLD 2003 Supreme Court 704), **Mst. Aksar Jan and others Vs. Muhammad Daud and others** (2010 SCMR 1604), **Gulzar Ahmed Vs. The State** (2002 SCMR 596), **Muslim Shah Vs. The State** (PLD 2005 Supreme Court 168), **Nizamud-Din Vs. Riaz** (2010 SCMR 457), **Muhammad Azad alias Javaid alias Jodi Vs. The State** (2019 SCMR 1330), **Hamid Mahmood and another Vs. The State** (2013 SCMR 1314) and **Ahmed Saeed alias Bharam alias Nagori Vs. The State** (2020 YLR Note 88).

9. We have heard the arguments of the learned counsel for the parties, gone through the entire evidence which has been read out by the learned counsel for the appellants and the impugned judgment with their able assistance and have considered the relevant law including the case law cited at the bar.

10. After our reassessment of the evidence we find that the prosecution has proved its case beyond a reasonable doubt against the appellants for the following reasons in respect of the offences under Section 365, 297, 201, and 302 (b)/34 PPC keeping in view that each criminal case must be decided on its own particular facts and circumstances and evidence on record.

(a) The FIR was delayed by a period of 4 days however we do not consider this to be fatal to the prosecution case as usually when a young child goes missing the priority is to search him out and only then if the search is unsuccessful usually is the FIR lodged as in this case and as such the delay of four days has been fully explained especially as it has come in evidence that the complainant reported his missing son to the police on the day of the incident. What is of importance is that the FIR was lodged against unknown persons as the complainant did not know who had abducted his son and as such there was no intention to falsely implicate any body.

(b) There is no eye witness or last seen evidence relating to the abduction of the deceased and no eye witness to his murder. To some extent this is understandable as the deceased was abducted after 7.30pm at night when it was dark as per the evidence on record.

(c) The case against the appellants is therefore based on circumstantial evidence as conceded by the prosecution. With regard to circumstantial evidence leading to a conviction in a capital case it was held as under in *Fayyaz Ahmed V State* (2017 SCMR 2026) at P.2030 para's 5 and 6 which are reproduced as under;

"To believe or rely on circumstantial evidence, the well settled and deeply entrenched principle is, that it is imperative for the Prosecution to provide all links in chain an unbroken one, where one end of the same touches the dead body and the other the neck of the accused. The present case is of such a nature where many links are missing in the chain.

To carry conviction on a capital charge it is essential that courts have to deeply scrutinize the circumstantial evidence because fabricating of such evidence is not uncommon as we have noticed in some cases thus, very minute and narrow

examination of the same is necessary to secure the ends of justice and that the Prosecution has to establish the case beyond all reasonable doubts, resting on circumstantial evidence. "Reasonable Doubt" does not mean any doubt but it must be accompanied by such reasons, sufficient to persuade a judicial mind for placing reliance on it. If it is short of such standard, it is better to discard the same so that an innocent person might not be sent to gallows. To draw an inference of guilt from such evidence, the Court has to apply its judicial mind with deep thought and with extra care and caution and whenever there are one or some indications, showing the design of the Prosecution of manufacturing and preparation of a case, the Courts have to show reluctance to believe it unless it is judicially satisfied about the guilt of accused person and the required chain is made out without missing link, otherwise at random reliance on such evidence would result in failure of justice.

It may also be kept in mind that sometimes the investigating agency collects circumstantial evidence seems apparently believable however, if the strict standards of scrutiny are applied there would appear many cracks and doubts in the same which are always inherent therein and in that case Courts have to discard and disbelieve the same." (bold added)

11. Thus, keeping in view the law on circumstantial evidence what evidence is their to link the accused to the abduction and murder of the deceased through an unbroken chain of evidence.

(i) The starting point is the FIR lodged in respect of the abductee who was later murdered. As mentioned above this is against unknown persons so there was clearly no intention by the complainant to falsely implicate any body. Indeed after the initial investigation the report was lodged in "A" Class.

(ii) The first break which the police got in the case, and which forms the first link in the chain of circumstantial evidence, is provided by PW 4 Wasseem Nadir who was a neighbor of the accused Sohail who according to his evidence brought the deceased's mobile phone from accused Sohail for RS 3,000 on 23.03.2019 in which he inserted his SIM. This activated the phone which lead to the next link in the chain when on 06.04.2019 he was called by the CPLC where he met PW 5 SIP Muhammed Faris at CPLC's offices who he explained to how he acquired the phone i.e he brought it from accused Sohail. PW 4 Wasseem Nadir who was a policemen then took PW 5 Muhammed Faris who was the IO of the case to his

house where PW 5 Muhammed Faris seized the phone which PW 4 Waseem Nadir had brought from accused Sohail under seizure memo. The complainant identified the phone as belonging to his son (abductee/deceased)

(iii) The next link is that PW 4 Wasseem Nadir took PW 5 SIP Muhammed Faris to where Sohail was at Jhangvi Chowk where accused Sohail was arrested with accused Qaiser (who was the son in law of the complainant and brother in law of the deceased). Based on accused Sohail having sold the deceased phone to PW 4 Wasseem Nadir PW 5 Muhammed Faris arrested both the accused in connection with the abduction of Juanid under memo. Notably on Sohail's search a balance of the RS3,000 was recovered which he had used for medical treatment which ties in with PW 4 Wasseem Nadir seeing accused Sohail injured and in need of medical treatment at the time when he sold his phone. Both PW 4 Waseem and PW 5 Muhammed Faris corroborated each other in all material respects during their evidence in respect of the recovery of the phone and arrest of the accused. The evidence of both these witnesses remained undented despite a lengthy cross examination. They gave their evidence in a natural manner. PW 4 Waseem Nadir's evidence was not materially improved from his Section 161 and Section 164 Cr.PC statements and neither of them had any reason to falsely implicate the accused for by example foisting the phone on him and as such despite them being police officers we can rely on their evidence which we do as we find it reliable, trust worthy and confidence inspiring. In this respect reliance is placed on the case of *Mushtaq Ahmad v The State* (2020 SCMR 474).

(iv) The next link is that on the same day of the arrest of the accused being 06.04.2019 the accused lead the police to the place where they had murdered Junaid and on their pointation showed the police his skull and hair in a place which only they could have known about which were sealed and taken for DNA. The accused also returned the next day with the police and pointed out other body parts to the police which had been eaten by animals and the place where the clothes of Junaid were burnt by them.

(v) The next link is the positive DNA report which proved that the recovered bones belonged to the abductee Junaid.

(vi) The next links are the confessions which each of the accused made before judicial magistrate PW 1

Abid Ali (both retracted at trial) which are reproduced as under for ease of reference;

CONFESSONAL STATEMENT OF ACCUSED
SOHAIL RECORDED UNDER SECTION 164
CR.P.C.

I and accused Qaiser used to work together in Haroonabad and about one or one and a half month ago accused Qaiser told me that we would kidnap his brother-in-law namely Junaid, age 15-16 years and then seek ransom of Rs.500,000/- from Junaid's father and would then release him. I was not content at this and after a week I agreed and after that accused Qaiser told me that he would let me know as soon as he got an opportunity. One week after that accused Qaiser contacted me and asked me to come near his house at Faqeer Colony near Wajid Shaheed Chowk at about 07:00 or 07:30 pm. After that I reached there and contacted him and asked him to come outside of his house. After that accused Qaiser took my motorcycle from me and asked me to wait on the road for him. Accused Qaiser asked me arrange for a rope and the hands and legs of Junaid are to be tied and we would then record his video. After that Qaiser brought his brother-in-law on the road on the pretext of mobile phone and asked me to ride the motorcycle. Junaid was sitting in the middle. I was riding the motorcycle and Qaiser was sitting at the back. After that both of us set off for Raja Tarveer Colony and then I parked my bike in the street of the mosque and after covering the distance of about 5 minutes we arrived on a plot and then Qaiser took the rope from me and cut it into two pieces and then tied the hands and legs of Junaid. Junaid asked Qaiser what he was doing. You had informed me that you are going to purchase mobile phone but Qaiser asked him to stay quiet and after that Junaid became quiet due to fear. After that Qaiser took Junaid's mobile phone out of his pocket and then we recorded his video and Qaiser asked me to ask Junaid to tell his father to give us Rs.500,000/- and after that Junaid two to three times that "Dad give these people Rs.500,000/- otherwise they will not spare me". Qaiser having recorded this video, kept the mobile in his pocket and I said to him that the video has been recorded so shall we leave but Qaiser said if we took him home so he will tell everyone there and I will now kill him. Although I asked him not to do so Qaiser opened Junaid's rope and tightened it around his neck and killed him before me. Junaid had died in five to 10 minutes. After that Qaiser removed Junaid's clothes and the rope and burned them in the fire in the garbage lying next to the mosque. After that we went to Muhajir Camp by my bike. There, Qaiser switched Junaid's mobile phone off. After that I dropped Qaiser near his house and there he gave me Junaid's switched off mobile phone and asked me to go my home and

until I ask you, do not turn the mobile phone on. 10 days after Junaid's murder I took Junaid's mobile phone to a policeman, namely Wasim Nadir, who is my friend and is deputed in Nazimabad and asked him to purchase the mobile from me but he refused and said he did not have this much amount and then he agreed and having taken the mobile phone from me, he gave me Rs.3000/-. After that he switched on the cell phone after three to four days and when the police called Wasim and as soon as Qaiser got to know about this, he came to me and asked for the mobile. In the meanwhile, the police arrived and arrested both of us. (bold added)

**CONFESSONAL STATEMENT OF ACCUSED
MUHAMMAD QAISER RECORDED UNDER
SECTION 164 CR.P.C.**

"Accused Sohail is my friend and 10-12 days before the murder of Junaid I asked Sohail let's kidnap Junaid and then we would seek ransom from his father and some of which he could keep while I would also keep some amount. And after that on the night of 11.03.2019 I called Sohail near my house. After that I went to get Junaid from his house. Junaid was my brother-in-law. I told Junaid that I have to purchase a mobile phone and asked him to come along with me. After that we took Junaid to Raja Tanveer Colony by Sohail's motorcycle and having taken him to a plot, tied his hands and feet. Then I recorded a video with Junaid's mobile phone in which Junaid at our behest said "Dad give these people Rs.500,000/- otherwise they will kill me". And after that I stopped the recording and then both of us i.e. I and Sohail jointly killed Junaid by strangulating his neck with the rope. After that I took of Junaid's clothes and then burned his clothes along with the rope in the fire. Then I went to Muhajir Camp along with Sohail by his motorcycle where I switched of his mobile phone and after that I and Sohail came back to my house. I gave Junaid's mobile phone to Sohail who is co-accused with me and then Sohail went away. After that on 06.04.2019 I and Sohail were arrested by the police. I had kidnapped Junaid for ransom along with Sohail and later killed him".(bold added)

12. It is settled law that a retracted judicial confession can be legally admissible and used against its maker in certain circumstances. In the case of Muhammad Amin V The State (PLD 2006 SC 219) it was held at P.224 Para 9 as under;

"9. There is no cavil to the proposition that conviction could have been awarded on the basis of retracted confession which proposition was examined in case of Mst. Joygun Bibi v. The State PLD 1960 (SC (Pak) 313 as under:-

"We are unable to support the proposition of law laid down by the learned Judges in this regard. The retraction of a confession is a circumstance which has no bearing whatsoever upon the question whether in the first instance it was voluntarily made, and on the further question whether it is true. The fact that the maker of the confession later does not adhere to it cannot by itself have any effect upon the findings reached as to whether the confession was voluntary, and if so, whether it was true, for to withdraw from a self-accusing statement in direct face of the consequences of the accusation, is explicable fully by the proximity of those consequences and need have no connection whatsoever with either its voluntary nature, or the truth of the facts stated. The learned Judges were perfectly right in first deciding these two questions, and the answers being in the affirmative, in declaring that the confession by itself was sufficient, taken with the other facts and circumstances to support Abdul Majid's conviction. The retraction of the confession was wholly immaterial once it was found that it was voluntary as well as true."

10. Similarly in the case of the State v. Minhun alias Gul Hassan PLD 1964 SC 813 this Court has observed as under:-

"As for the confessions the High Court, it appears, was duly conscious of the fact that retracted confession whether judicial or extra judicial, could legally be taken into consideration against the maker of those confessions himself, and if the confessions were found to be true and voluntary, then there was no need at all to look for further corroboration. It is well-settled that as against the maker himself his confession, judicial or extra judicial, whether retracted or not retracted, can in law validly form the sole basis of his conviction, if the Court is satisfied and believes that it was true and voluntary and was not obtained by torture or coercion or inducement." (bold added)

13. Thus, the court laid down a two pronged test as under (a) whether the retracted judicial confession appears to have been made voluntarily, without any inducement, duress or coercion and (b) was made with the object to state the truth.

14. We find that there is no evidence that the retracted judicial confessions were not made voluntarily. There is no evidence of coercion or torture. It is true that they were made 14 days after their arrest but there is no hard and fast rule as to when a judicial confession needs to be made and in this respect reliance is placed on Khan Muhammed (Supra). The judicial confessions as seen from their content also have the object of

telling the truth and fit in with the prosecution case as being a case of kidnap for ransom and also corroborate PW 4 Wasseem Nadir's evidence as to how he came into possession of the mobile phone of the deceased. Even the complainant states in his evidence that,

"After about 15 days my son in law (accused Qaiser) told me to arrange some money if some one demand or call for return of my son in lieu of the money. Then I contacted my brother Fida Hussain at my village Manselhra who sent me two lacs in my account on 02.04.2019. I produce NBP statement of my account in this regard containing 2 leaves AT Ex 5/C. And my nephew Gul narwaz who is residing in Dubai also sent me money"

15. This we find clearly corroborates the confessions of the accused who worked together and lived close to each other that they planned to abduct Junaid and demand a ransom from the complainant for the safe return of his son Junaid but they killed Junaid instead of returning him because he could identify them both as he knew accused Qaiser. We also find that all material safeguards regarding the recording of the judicial confessions were complied with by the magistrate.

16. Thus we place reliance on both the judicial confessions as against their respective makers.

(vii) Accused Sohail's motorbike which was used to abduct Junaid was found at his house on his pointation.

(viii) That there are no material contradictions in the evidence of the PW's and exhibits and it is well settled by now that minor contradictions which do not effect the materiality of the evidence can be ignored. In this respect reliance is placed on the case of *Zakir Khan V State* (1995 SCMR 1793).

17. Thus, for the reasons mentioned above the prosecution has *proved an unbroken chain of evidence, where one end of the same touches the dead body and the other the neck of the accused and we convict the appellants for the offences mentioned earlier.*

18. With regard to the ATA offences there is no evidence that the abduction and murder of the deceased was made with the design, intent or purpose to create terror but rather to extort money by way of ransom and as such the provisions of the ATA are not applicable in this case. In

this respect reliance is placed on the case of **Ghulam Hussain (2020 PLD SC 61)** and as such the appellants are acquitted of all the ATA offences for which they were convicted.

19. Although the evidence suggests that the motive behind the abduction was to receive a ransom for the return of the abducted Junaid we find that although money may have been collected in case that situation arose **no actual demand for ransom has been proven by the prosecution through either ocular evidence or other forms of evidence for example audio recording** and as such we acquit the appellants for the offence under Section 365 A PPC.

20. With regard to sentencing for the offences for which the appellants were convicted all such sentences shall remain in place however since this a case based on circumstantial evidence and the need to show extra caution we hereby reduce the death penalty in respect of each of the appellants to Life Imprisonment for the offence under S.302 (b)/34 PPC and impose a sentence of 7 years RI for the offence under section 365 PPC for which we have found the appellants guilty of.

21. All the sentences shall all run concurrently, the appellants shall have the benefit of Section 382 (B) Cr.PC and any other remissions available under the law now that they have been acquitted of the ATA offences.

22. The appeals stand disposed of in the above terms with the confirmation reference being answered in the negative.