

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:

Mr. Justice Sardar Tariq Masood
Mr. Justice Amin-ud-Din Khan
Mr. Justice Muhammad Ali Mazhar

CRIMINAL APPEAL NO.139 OF 2022

(On appeal against the judgment dated 30.10.2018 passed Peshawar High Court, Peshawar, in Crl. Appeal No.335-P of 2018)

Javed Iqbal		Appellant
	Versus			
The State		Respondent

For the appellant	:	Mr. Arshad Hussain Shah, ASC Syed Rifaqat Hussain Shah, AOR
For the State	:	Mian Shafaqat Jan, Addl. AG KP.
Date of hearing	:	25.10.2022

JUDGMENT

SARDAR TARIQ MASOOD, J.-

Crl. Misc. Application No.2231 of 2018 For reasons set out in the application for condonation of delay, the same is allowed and the delay of five days in filing of the petition is condoned.

2. **Crl. Appeal No.139/2022.** Through this appeal by leave of the Court, appellant Javed Iqbal has impugned the judgment dated 30.10.2018 of the Peshawar High Court, Peshawar, whereby his appeal was dismissed and his sentence of imprisonment for life under section 9(c) of the Control of Narcotics Substances Act, 1997 (**'the CNSA'**) was maintained.

3. Precise facts of the case are that the appellant was indicted in case FIR No.676 dated 18.12.2013, registered at Police Station Sardheri, Charsadda, under section 9(c) of the CNSA. After a full-flagged trial vide judgment dated 20.03.2018, the petitioner was convicted under the section 9(c) of the CNSA for recovery of 25 kilograms *charas pukhta* and sentenced to imprisonment for life with fine of Rs.1,00,000/- or in default there of to further suffer S.I., for six months. Benefit of section 382-B of the Code of Criminal Procedure 1898 (**'the Code'**) was also

extended to him. Hence, this appeal by leave of the Court granted on 03.03.2022.

4. We have heard the learned counsel for the appellant, learned Addl. AG KP, perused the record and observed that in this case, the recovery was effected on 18.12.2013 and the sample parcels were received in the office of chemical examiner on 20.12.2013 by one FC No.1007 but the said constable was never produced before the Court. Even the *Moharrar* of the *Malkhana* was also not produced even to say that he kept the sample parcels in the *Malkhana* in safe custody from 18.12.2013 to 20.12.2013. It is also shrouded in mystery as to where and in whose custody the sample parcel remained. So the safe custody and safe transmission of the sample parcels was not established by the prosecution and this defect on the part of the prosecution by itself is sufficient to extend benefit of doubt to the appellant. It is to be noted that in the cases of 9(c) of CNSA, it is duty of the prosecution to establish each and every step from the stage of recovery, making of sample parcels, safe custody of sample parcels and safe transmission of the sample parcels to the concerned laboratory. This chain has to be established by the prosecution and if any link is missing in such like offences the benefit must have been extended to the accused. Reliance in this behalf can be made upon the cases of **Qaiser Khan Vs. The State through Advocate-General, Khyber Pakhtunkhwa, Peshawar** (2021 SCMR 363), **Mst. Razia Sultana vs. The State and another** (2019 SCMR 1300), **The State through Regional Director ANF Vs. Imam Bakhsh and others** (2018 SCMR 2039), **Ikramullah and others Vs. The State** (2015 SCMR 1002) and **Amjad Ali Vs. the State** (2012 SCMR 577) wherein it was held that in a case containing the above mentioned defects on the part of the prosecution it cannot be held with any degree of certainty that the prosecution had succeeded in establishing its case against an accused person beyond any reasonable doubt. So the prosecution has failed to prove the case against the petitioner and his conviction is not sustainable in view of the above mentioned defects.

5. Both the Courts below have relied upon the judicial confession of the appellant recorded by the Judicial Magistrate (PW-5) and even learned Addl. AG KP appearing in Court also tried to persuade us to rely upon such confession but we observed that the appellant in the said judicial confession stated that he was sent by one Imran son of Sultan to Peshawar for bringing luggage from one 'Haji Sahib' and gave him some money; that in pursuance of that direction he went there where said Haji Sahib put luggage in the diggi of the vehicle and when he was returning he was stopped by the police and narcotics was recovered from the said

luggage. He categorically stated that he was not aware of presence of said narcotics in the said luggage. Even the Judicial Magistrate (PW-5) admitted that:

"....Imran shown by the accused in his confessional statement has not disclosed to him that what kind of luggage that Haji Saib hand over to him near Motorway Interchange, Peshawar. The accused expressed that he was not in the knowledge that what sought of luggage was put in the Diggi of the Motor car."

The above statement indicates that even before the Judicial Magistrate his claim was that he was not aware of the narcotics concealed in the luggage which was put by one, Haji Sahib in the said vehicle. Learned Addl. AG KP tried to persuade us that as he has taken an amount from Imran S/o Sultan for bringing the luggage from Haji Sahib, hence it can easily be presumed that he was aware that he was trafficking the narcotics. It is to be noted that the criminal cases cannot be decided on presumptions when there is no direct evidence available on record to indicate the exclusive knowledge of presence of narcotics in the luggage lying in the diggi of vehicle. We have already found the prosecution story doubtful and in that eventuality, the judicial confession of the petitioner is to be taken as a whole and not in parts. It is settled by now by this Court that any confession cannot be taken into consideration in pieces. The argument of the learned Addl. AG KP is that some part of the judicial confession can be taken into consideration but we have already observed in number of cases that any confession made by an accused, whether judicial or extra-judicial, should be taken into consideration in *toto* and could not be split into pieces, nor any part of the same can be taken to favour the prosecution. There is no doubt that any such confession may be taken into consideration but the court cannot select out of the statement, the passage, which goes against the accused. Such confession must be accepted or rejected as a whole. No scrutiny is required by this Court of such a confession.

6. The proper and the legal way of dealing with a criminal case is that the Court should first discuss the prosecution case and evidence in order to come to an independent finding with regard to the reliability of the prosecution witnesses, particularly the eye-witnesses and the probability of the story told by them, and then examine the version of the accused whether in the shape of confession, judicial or extra judicial, or statement recorded under section 342 or 340(2) of the Code (hereinafter

called '**the statement**'). If the Court disbelieves or rejects or excludes from consideration the prosecution evidence, then the Court must accept 'the statement' of the accused as a whole without scrutiny. If 'the statement' is exculpatory, then he must be acquitted. If 'the statement' when believed as a whole, constitutes some offence punishable under the law, then the accused should be convicted for that offence only.

7. In the present case we have already excluded the prosecution story being doubtful and there remained only exculpatory confession of the petitioner, which if taken into consideration as a whole, no case is made out against him because according to his confession, he was not having any knowledge of presence of narcotics in the luggage placed in the vehicle by one Haji Sahib on the asking of one Imran. The confessional statement in this case being the only material left on which the petitioner was convicted, had to be either accepted as a whole by the Court or rejected as a whole. It is not open to accept only a part of the confessional statement of the petitioner and reject the other part while maintaining his conviction. It is a well recognised principle that confession has to be read as a whole and not by relying only on the inculpatory part of the confession/the statement.

8. It is further to be noted that the prosecution must prove its case against the accused beyond reasonable doubt irrespective of any plea raised by the accused in his defence. Failure of prosecution to prove the case against the accused, entitles the accused to an acquittal. The prosecution cannot fall back on the plea of an accused to prove its case. Where the prosecution succeeds in establishing its case against the accused beyond reasonable doubt, then the stage arrives for consideration of the plea of accused in defence and the question of burden of proof becomes relevant. Before, the case is established against the accused by prosecution, the question of burden of proof on the accused to establish his plea in defence does not arise. However, if the Court decides to convict the accused on the basis of his confessional statement or his plea under section 342, Cr.P.C. then it is not open to the Court to accept a part of the statement of the accused and reject another part for the purpose of convicting him for the offence.

9. It is the prosecution who has to prove the case against an accused beyond any doubt and accused is not required to establish his plea (stated in his confessional statement or in his statement recorded under section 342 or 340(2) of the Code) and it is the duty of the Court to examine as to whether such plea was reasonably possible and the benefit of doubt arising out of such plea/ confession must be extended to the

accused. The confession especially exculpatory of an accused person with a different version is not a confession of guilt and the Court without splitting up it is supposed to reject the same, especially, when prosecution failed to establish the case against the said accused. Reliance can be made upon the case of **Sultan Khan v. Sher Khan and others** (PLD 1991 SC 520) wherein it was held that the statement of an accused recorded under section 342 of the Code may be taken into consideration but the Court cannot select out of the statement the passage which goes against the accused. Such statement must be accepted or rejected as a whole.

i) In the case of **Ashiq Hussain alia Muhammad Ashraf v. the State** (PLD 1994 SC 879) it was held that while deciding a case, the Court should first discuss the prosecution evidence in order to come to an independent finding with regard to the reliability of the prosecution witnesses, particularly the eye-witnesses and the probability of the story told by them, and then examine the statement of the accused under section 342 of the Code, statement under section 340(2) of the Code and the defence evidence. If the Court disbelieves or rejects or excludes from consideration the prosecution evidence, then the Court must accept the statement of the accused as a whole without scrutiny. If the statement under section 342 of the Code is exculpatory, then he must be acquitted. If the statement under section 342 of the Code believed as a whole, constitutes some offence punishable under the Code/law, then the accused should be convicted for that offence only.

ii) In the case of **Naseer Hussain v. Nawaz and others** (1994 SCMR 1504) it was held that where prosecution story was rejected by the Court and the confessional statement is the only material on which the accused is convicted, the same has to be either accepted as a whole or rejected as a whole. It is not open to the Court to accept only some part of the confessional statement and reject the other part while awarding conviction.

iii) In the case of **Bahadur Khan v. The State** (PLD 1995 SC 336)] that confession has to be read as a whole and not by relying only on the inculpatory part of the statement. It was further held that the corroborative pieces of evidence support the confessional statement though retracted. However, well recognized principle is that confession has to be read as a whole and not by relying only on the inculpatory part of the statement.

iv) In the case of **Shamoon alias Shamma v. the State** (1995 SCMR 1377) it was held that the prosecution has to prove its case against the

accused beyond reasonable doubts irrespective of any plea raised by the accused in his defence and the prosecution cannot fall back on the plea of an accused to prove its case. In case prosecution fails to prove its case against the accused, the accused becomes entitled to an acquittal. However, where the prosecution succeeds in establishing its case against the accused beyond reasonable doubts, then the stage arrives for consideration of the plea of accused in defence and the question of burden of proof becomes relevant. If the Court decides to convict the accused on the basis of his confessional statement or his plea under section 342 of the Code then it is not open to the Court to accept a part of the statement of the accused and reject another part for the purpose of convicting him for the offence.

v) In the case of **Faqir Ullah v. Khalil-uz-Zaman and others** (1999 SCMR 2203) it was held that the basic principle of Islamic Law is that the Bayyinah or evidence is a proof whose implications may extend to others while the confession is a proof whose implications are limited to the one who makes it. Under this principle the confessional statement of a person can only inculcate himself and no other person can be inculpated merely because some other person has made any admission. Another possibility appears to be that the statement of the convict-respondent recorded under section 342 of the Code confessing his guilt on the ground of '*Ghairat*' was taken to be a voluntary and true. Even if it be so, whether it is not a sine qua non for such a confession to be true and voluntary because it has to be either accepted as a whole or rejected in toto.

vi) In the case of **Shera Masih and another v. the State** (PLD 2002 SC 643) it was held that the admission of occurrence by the accused with a different version is not confession of guilt and the Court, without splitting up it, can reject or accept the same in toto but if the admission in part or full is of the nature which provides support to prosecution case, the same can be used for the purposes of corroboration.

vii) In the case of **Ayyaz Ahmed v. Allah Wasaya and others** (2004 SCMR 1808) it was held that the solitary judicial confessions, if made the basis for conviction, it had to be relied upon in *toto* without any pick and choose.

viii) In the case of **Mst. Gul Nissa and another v. Muhammad Yousuf and another** (PLD 2006 SC 556) it was held that the confession or admission made by an accused when made sole basis of conviction must be considered as a whole and the accused can be convicted on his own statement, even if the prosecution evidence is rejected.

ix) In the case of **Allah Nawaz v. The State** (2009 SCMR 736) it was held that a confession is to be rejected or accepted as a whole. however, when one of the deceased was unarmed and the other deceased was carrying a Lathi, while the accused was equipped with fire-arm and inflicted injuries to both the deceased at the vital part of the body, the accused exceeded his right of self-defence.

x) In the case of **Muhammad Azam and others v. The State** (2009 SCMR 1232) it was held that the confessional statement of accused recorded under section 342 of the Code has to be accepted or rejected as a whole. However, the accused exceeded in his right of self-defence and suppressed the real story with regard to injuries caused to injured.

xi) In the case of **Mushtaq and others v. The State** (2012 SCMR 109) it was held that the confessional statement of an accused can be made the basis of his conviction for the crime, however, the confessional statement of a co-accused can only be taken as circumstance against an accused, but no conviction can be recorded upon it.

xii) In the case of **Ali Ahmad and another v. the State and others** (PLD 2020 SC 201) it was held that where there is no other evidence to show affirmatively that any portion of the exculpatory element in the confession is false, the Court must accept or reject the confession as a whole and cannot accept only the inculpatory element while rejecting the exculpatory element as inherently incredible. Once the prosecution evidence is disbelieved, rejected or excluded from consideration, and the facts explained by the accused in his statement under section 342 of the Code are accepted entirely, the court is then to examine the said facts to give due effect to the statement of the accused, under the law, whether in favour of or against the accused.

xiii) In the case of **Muhammad Abbas v. the State** (PLD 2020 SC 620) it was held that two rules of criminal jurisdiction have been consistently observed without any attempt to engraft as exception, firstly, where there is other evidence a portion of the confession may, in the light of that evidence, be rejected while acting upon the remainder with the other evidence and secondly, where there is no other evidence, the Court cannot accept the inculpatory element and reject the exculpatory element as inherently incredible.

10. In the light of forgoing discussion, following principles emerged from the above case law:

- (a) the solitary judicial confession, if made the basis for conviction, it had to be relied upon in *toto* without any pick and choose;
- (b) where there is no other evidence and the confessional statement is only material on which an accused is convicted, then it has to be either accepted as a whole or rejected as a whole;
- (c) the exculpatory portion of a confession cannot be discarded while proceeding to rely upon the same for decision of the case;
- (d) a confession has to be read as a whole and not by relying only on the inculpatory part of the statement;
- (e) the confessional statement of a person can only inculcate himself and no other person can be inculpated merely because some other person has made any admission;
- (f) the admission of occurrence by the accused with a different version is not a confession of guilt and the Court, without splitting up it, can reject or accept the same in *toto*, but if the admission in parts or full is of the nature which provides support to prosecution case which is proved through reliable evidence, thus of course such statement/confession can be used for the purpose of corroboration and supporting evidence; and
- (g) where there is other prosecution evidence in field which is believable then of course a portion of the confession may, in the light of that evidence, be rejected while acting upon the remainder with the other evidence.

11. The crux of the above analysis is that where the prosecution fails to prove its case through cogent, reliable and trustworthy evidence, the court can base the conviction on the confessional statement of the accused, however, the same has to be considered in *toto* and the exculpatory parts of the confession cannot be rejected. In the present case we have already found the prosecution evidence doubtful and while considering the confessional statement as a whole, observed that the

same was exculpatory confession and from the said confession, conscious knowledge and conscious possession of the narcotics, qua the appellant, is not established; hence, his conviction on such exculpatory statement/confession is not sustainable.

12. For the forgoing, this appeal is allowed. The conviction and sentence awarded by the trial Court and upheld by the High Court is set aside. The appellant Javed Iqbal is acquitted of the charge in this case by extending the benefit of doubt to him. He be released forthwith from jail if not required to be detained in connection with any other case.

Judge

Judge

Judge

Islamabad
25.10.2022
M.Saeed

APPROVED FOR REPORTING

Judge