2005 Y L R 915

[Karachi]

Before Rahmat Hussain Jafferi, J

RASOOL BUX and another---Appellants

Versus

THE STATE---Respondent

Cr. Appeal No.71 of 2003, decided on 1st July, 2004.

(a) Penal Code (XLV of 1860)---

---S.302(c)/34---Appreciation of evidence-- Case against accused persons rested upon alleged judicial confession of one of accused persons which since had been retracted---Validity---Retracted judicial confession could form sole basis of conviction, if it was found to be true and voluntary---Court must satisfy itself that confession was voluntary and true and it was corroborated by some independent, direct or circumstantial evidence to ensure safe administration of justice---Incident was un-witnessed and complainant did not shoe suspicion on any person that was why F. I. R. was lodged against unknown culprits---Accused were arrested merely on suspicion and Investigating Officer had no tangible evidence with him against accused---When accused were produce, before Magistrate for obtaining remand police had absolutely no evidence against them and Magistrate granted remand of accused to police in a mechanical, manner without going through material available in Police Diary---Further order of detention or granting remand by Magistrate was not justified---Such facts had affected voluntariness of alleged confession of accused as possibility of using third degree methods by police on accused for obtaining confession, could not be ruled out---Doubt having been created about voluntariness of confession, solitary retracted judicial confession of accused, could not be safely relied upon unless it was corroborated of material particulars---Co-accused was connected in occurrence through retracted judicial confession of main accused---If very confession of main accused could not be relied upon, then involvement of co-accused was also not proved especially when no other evidence was to connect co-accused in the occurrence---Conviction and sentence awarded to accused persons by Trial Court, were set aside and they were acquitted of charge against them and were released.

Wazir Khan v. The State 1989 SCMR 446; Muhammad Gul v. The State 1991 SCMR 942; Muhammad Ameen v. The State PLD 1990 SC 484: Muhammad Yousif v. The State 1995 SCMR 351 Muhammad Akram v. The State 199 SCMR 1359 and State 1995 SCMR 1359 and State v. Muhammad Naseer 1993 SCMR 1822 ref.

(b) Criminal Procedure Code (V of 1898)---

----S.54---Power of police to arrest a person---Police under S.54. Cr. P. C. had power to arrest a person without an order from a Magistrate or without warrant of arrest on nine conditions mentioned in the said section---Police Officer could arrest any person who had beat concerned in arrest cognizable offence or against whom a reasonable complaint had beers made or credible information had been received or a reasonable suspicion existed of his having been so concerned---No doubt under S. 54, Cr. P. C. wide powers had been given to Police Officer to arrest a person but those powers were subject to limitation mentioned in said section---Which did not mean that Police Officer at his own sweet twill would arrest anybody he liked although he could be peace loving citizen--- Intention of law makers while giving such potter to Police

Officer was that reasonable suspicion should at least be founded on some definite facts tending to throw suspicion on person arrested and not on a vague surmise---If Police Officer had no material with him against accused, then arrest of accused would be illegal.

PLJ 1996 Lah 189; PLD 1974 Azad J&K 90; Nazir Ahmed v. The State 1970 SCMR 7; Abdul Qayoom v. The S.H.O. Police Station Shalimar Lahore 1993 PCr. LJ 91: State v. Mst. Zuhra Bibi. 1996 PCrLJ 546; Muhammad Arshad v. S. H.O. 2001 MLD 132: Muhammad Zakarya v. The State 1999 SCMR 94.1 and Mazharuddin v. The State 1998 PCr.LJ 1035 ref.

(c) Criminal Procedure Code (V of 1898)---

---Ss.61 & 167---Remand of case---If investigation in the case was not completed within a period of 24 hours then police were required to produce accused before a Magistrate far obtaining remand as required under S.167, Cr. P. C.---Remand to police could not be granted can the ground that presence of accused was necessary to finish investigation or to get from accused a Confessional Statement or to force him to give a clue to stolen property---Remand could not be granted on as mere expectation that time would show, the guilt of accused--- Remand also could not be granted that accused had promised to tell the truth.

1973 PCr. LJ 156: 1872 Pun Re (Criminal) No. 17 p.21; 33 Cr.LJ 287 and 3 N W.P.H.C.R. 275 ref.

(d) Words and phrases--

----'Suspicion' and 'believe'---Connotation.

Ali Nawaz Ghanghro for Appellant.

Muhammad Ismail Bhutto for the State.

Date of hearing: 24th June, 2004.

JUDGMENT

The present appeal is directed against the judgment dated 11-6-2003 passed by the learned IVth Additional Sessions Judge. Shikarpur in Sessions Case No.49 of 1995 State v. Rasool Bux and others. Under the impugned judgment the learned Judge convicted the appellants under section 302(c), P.P.C. and sentenced each of them to suffer R.I. for 25 years with benefit of section 382-B. Cr.P.C. Whereas cat-accused Muhammad Sharif was acquitted.

The facts giving rise to the present appeal are that on 10-12-1994 at 4 p.m. deceased Qadir Bux left his village Bhirkan Taluka Lakhi District Shikarpur. He did not return to his house therefore, his younger brother complainant Loung made inquiries but he could not get any clue of his brother. On the next day, he carne to know that the dead body of deceased Ghulam Qadir was lying at the police station Bagarji. Therefore he went there and identified the dead body to be that of his brother Qadir Bux. The police took the complainant to the land of one Ghulam Mustafa near village Farash where the dead body of deceased was lying. Thereafter on 12-12-2004 at 6-30 p.m. the complainant lodged the report against unknown culprits.

Inspector Saeed Ahmed started the investigation. During investigation he came to know through spy/secret information that the appellants and acquitted accused Muhammad Sharif might be the offenders who had committed the murder of the

deceased. On 19-3-1995 he again received secret information that the appellants and acquitted accused were available at hotel of Dera therefore, he took Mashirs Muhammad Mithal and Muhammad Yousif and went to the said place where he found the appellants and acquitted accused present there. He arrested them but nothing was secured from their possession. At the police station he interrogated the appellants and the acquitted accused but they avoided to disclose any clue of the incident therefore, he obtained their police remand from a Magistrate. On 21-3-1995 the investigation officer while patrolling received information that the appellant Pathan was not feeling well therefore, he was taken to hospital Bagarjee for treatment but the doctor admitted him in the hospital for treatment. On 26-3-1995 the appellant Rasool Bux made confession before the police and took them to a hotel near village Dera and produced a country made pistol before him. The Investigating officer secured the pistol in presence of Mashir Muhammad Mithal and Muhammad Yousif. The property was brought at the police station where the investigating officer lodged F.I.R. under section 13(e) of Pakistan Arms Ordinance, 1965 against the appellant Rasool Bux. On the same date the appellant Rasool Bux was produced before the Magistrate for recording his judicial confession. After recording the judicial confession, the Magistrate remanded the appellant to judicial custody. The police after usual investigation challaned the appellants and acquitted accused in the Court of law.

On 14-12-1999, the trial Court framed the charge under section 302 read with section 34. P.P.C. against the appellants and acquitted accused, but they pleaded not guilty.

In support of the case the prosecution examined five witnesses. P.W.1 was complainant Loung. He stated that on 10-12-1994 at 4-00 p.m. his elder brother Qadir Bux left the village but did not return. On the next day he found the dead body of the deceased lying at the police station. After seeing the place of incident he lodged the report against unknown persons. He further added that he had no suspicion on the accused about the murder of the deceased. P. W.2 was Medical Officer Dr. Abdul Sattar. He conducted the post mortem of the deceased. He found following injuries on his person: --

(1) Fire-arm wound 5 cm x 2 cm x bone deep over right cheek 1.5 cm below the right eve on examination excavation present blackening and burning present (wound of entry).
(2) Fire-arm wound 3 c.m. x 2 c.m. x bone deep just below the right ear on examination no blackening nor burning and margins averted (wound of exit).

(3) Fire-arm wound 7 in numbers each measuring about 25 c.m. oval in shape over right lower chest and right hypochondric region on examination margins inverted no blackening and no burning (wound of entry).

(4) Fire-arm wound 5 in numbers each measuring about 25 c.m. oval in shape just left to the left nipple margin averted no blackening and no burning (wound of exit).

(5) Abrasion 2 cm x 1 cm over the right forehead just 3 c.ms. above the right eye.

He opined that the deceased died due to tire-arm injuries. P.W.3 was 1.0. Saeed Ahmed. He gave the details of the investigation. P.W.4 was Magistrate Abdul Shakoor. He recorded the judicial confession of the appellant Rasool Bux, after complying all the requirements of law. P.W.5 was Muhammad Yousif. He was Mashir of arrest of the appellants and acquitted accused and production of pistol by the appellant Rasool Bux. But he did not support the recovery of pistol produced by the appellant Rasool Bux.

The appellants in their statements recorded under section 342, Cr.P.C. denied all the allegations of the prosecution. They claimed to be innocent. They did not examine

themselves on oath or lead any evidence in their defence.

Learned IVth Additional Session Judge, Shikarpur after considering evidence and hearing the parties court convicted the appellants but acquitted accused Muhammad Sharif under impugned judgment, hence this appeal.

I have heard the Advocate appellants, State counsel and record of this case very carefully.

Learned counsel for the appellants has stated that the incident was un-witnessed, that there are no eye witnesses in the case; that the prosecution have relied upon the evidence of judicial confession of the appellant Rasool Bux which has been retracted; that the retracted judicial confession requires support and corroboration but there is no corroborative piece of evidence; that the Mashir of recovery of pistol has not supported the said recovery; that the empties and the pistol were not sent to Ballistic Expert for examination and report as such the conviction can not be based on solitary retracted and un-corroborative judicial confession of the appellant Rasool Bux; that the said judicial confess cannot be used against the appellant Pathan as there is no other evidence substantive or circumstantial against the appellant Pathan.

On the other hand, learned State counsel has conceded that the prosecution have relied upon only the judicial confession of the appellant Rasool Bux: that the judicial confession was property recorded by the Magistrate in accordance with law; that the judicial confession was true and voluntary therefore, the conviction can be based on the said confession without any corroborative piece of evidence: that the said judicial confession can be used against the appellant Pathan under Article 43 of Qanun-e-Shahadat Order. He has supported the impugned judgment.

I have given due consideration to the arguments, gone through the evidence with the help of learned Advocate for the appellant and find that the case rests upon the judicial confession of appellant Rasool Bux only. The said judicial confession has been retracted. Before I discuss the said judicial confession I would like to discuss the case the law on the above subject.

In the case of Wazir Khan v. The State, 1989 SCMR 446, it has been held that retracted judicial confession can form sole basis of conviction if it is found to be true and voluntary. In the case of Muhammad Gul v. The State 1991 SCMR 942, it has been held that a retracted judicial confession is sufficient for conviction but as a rule of procedure the Courts seek corroboration of the same on all material particulars. In the case of Muhammad Ameen v. The State PLD 1990 SC 484, it has been held that retracted judicial confession, and not corroborated by any other piece of independent evidence is not sufficient to convict the accused. In the case of Muhammad Yousif v. The State, 1995 SCMR 351, it has been observed that the Courts generally refrain from basing the conviction solely on retracted confession and always sought for some reliable corroborative evidence regarding material particulars in the confessional statement. In the case of Muhammad Akram v. The State, 1995 SCMR 1359, it has been held that the Court must satisfy itself that the confession was voluntary and true and it is corroborated by some independent direct or circumstantial evidence to ensure safe administration of justice.

Keeping in view the above principle of law, I have examined the evidence available on the record to satisfy myself whether the retracted judicial confession was voluntary and true. Admittedly, the incident was un-witnessed. The complainant did not show suspicion on any person as such the F.I.R. was lodged against unknown culprits. Even at the time of recording his evidence, he did not show any suspicion on the appellants. The police started investigation but they did not get any clue. According to the evidence of Investigating Officer Saeed Ahmed, he received secret information about the involvement of the present appellants and acquitted accused in this crime. After

more than 2 months of the incident, on 19-3-1995 the appellants, and acquitted accused were arrested on merely suspicion. Now the point arises as to whether the police were justified in arresting the appellants on mere suspicion. The police have power to arrest a person under section 54 of Cr.P.C., under which any police officer may without an order from a Magistrate or without a warrant of arrest can arrest a person on nine conditions mentioned in the section. The condition No. 1 is relevant for the present case which is as under:

> (1) firstly, any person who has been concerned in any cognizable offence or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists or his having been so concerned.

From the above provision it is clear that the police officer can arrest any person who has been concerned in any cognizable offence or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been so concerned.

In the present case the names of the appellants and acquitted accused were not mentioned in the F. I. R. There was no credible information received by the I.O. against the appellants but he on spy or secret information suspected that the appellants were concerned in the F.I.R. No doubt under section 54, Cr.P.C. vide powers have been given to the police officer to arrest a person but those powers are subject to the above mentioned limitations. Nevertheless this does not mean that the police officer at his own sweet will arrest anybody he likes although he may be peace loving citizen. The intention of law makers while giving such powers to the police officer is that the reasonable suspicion should at least be founded on some definite facts tending to throw suspicion on the person arrested and not on a vague surmise. It has been held in PLD 1996 Lah.189 and PLD 1974 Azad J&K 90 that secret information in no way sufficient to bring the matter within the scope of section 54 of Cr.P.C. The powers of police officer to arrest a person under section 54 Cr.P.C. have been discussed in several authorities, as such, cases of Nazir Ahmed v. The State 1970 SCMR 7; Abdul Qayoom v. The S. H.O. Police Station Shalimar Lahore, 1993 PCr.LJ 91: State v. Mst. Zuhra Bibi 1996 PCr.LJ 546; Muhammad Arshad v. S.H.O. 2001 MLD 132; Mohammad Zakarya v. The State 1999 SCMR 944 and Mazharuddin v. The State 1998 PCr.LJ 1035. The ratio of the authorities is that if the police officer has no material with him against the accused: then the arrest is illegal.

From the statement of investigating officer it is clear that at the time of arrest of the appellants they were arrested merely on suspicion. He had no tangible evidence with him at all. Under section 61 Cr.P.C. if the investigation is not completed within a period of 24 hours then the police are required to produce the accused before a Magistrate for obtaining remand as required under section 167, Cr.P.C. In this case the appellants were produced before the Magistrate for obtaining remand. The Magistrate granted the remand. From this position it is clear that during 24 hours of the interrogation of the appellants and through other sources the investigating officer was not able to complete the investigation but he was not able even to collect a single piece of evidence about the involvement of the appellants with the commission of this crime. The investigating officer has categorically stated that he produced the appellants before the Magistrate as they did not disclose anything before him. Thus when the accused 'were produced before the Magistrate at that time the police had absolutely no evidence with E them against the appellants. The wordings of section 167, Cr.P.C. are clear that when the police officer had "grounds for believing" that the accusation or information received by him against the appellant is well founded then he was required to produce the accused before the Magistrate. Under section 54 Cr.P.C. the wordings are that the police officer has "reasonable suspicion" of the accused having being concerned in the crime. Thus it is required that there should be some sort of evidence with the police officer, after 24 hours of the arrest of the accused which converts his opinion from a

"suspicion' (section 54) to "believe" (section 167) about the involvement of the accused and for that `believe" there should he some grounds and then only he is required to produce the accused before Magistrate. The word 'suspicion" according to 'The Chambers Dictionary" means "imagining of some thing without evidence or on slender evidence". The word 'Believe" according to the said dictionary means "to regard as true; to accept as true what is said by (someone); to firmly convinced." Thus when the accused is produced before a Magistrate for obtaining remand then the police should have some tangible evidence with them on which the "suspicion" about the involvement of the accused is conversed to "believe" and for that there should be grounds to show that the accusation or information is well founded. However in such tangible evidence was available wit the police against the appellants when they were produced before the Magistrate. It appears that the Magistrate in a mechanical manner had granted remand without going through the material available in the police diaries. Had he examined the police diaries properly then he would have come to know that there was no evidence whatsoever against the appellants or any ground for forming the opinion by the police officer that the accusation or information received by him against the appellants was well founded or his "suspicions" was converted to "believe". In the above circumstances, the Magistrate should not have granted the remand. It has been held in 1973 PCr. LJ 156; that the remand to police may not be granted on the ground that the presence of accused is necessary to finish the investigation or to get from the accused a confessional statement or to force him to give a clue to stolen property. It has been held in 1872 Pun Re (criminal) No. 17 P. 21 (D.B.); that the remand may not be granted on a mere expectation that time will show the guilt of the accused. It has been observed in 33 Cr.LJ 287 (DB) that the remand ma) not be granted that the accused has promised to tell the truth. It has further been held in 3 N.W.P. H.C.R. 275(DB) that the remand mar not be granted that the police repeatedly asked the accused hilt he did not give any clue. As such the Magistrate should never have trade an order for further detention of the appellants. Thus the further order of detention or granting remand was therefore clearly wrong. It is such orders by Magistrates that make the police disregard the direction of the law and make them feel that they can take whatever they like. This practice should be curbed. Thus the initial arrest of the appellants was not legal and further detention on the orders of Magistrate was also wrong. These facts have affected the voluntarliness of the confession. Thus the possibility of using third decree methods by the police on the appellants cannot be ruled out.

Not only that the accused remained in police custody up to 26-3-1995 but in the meantime appellant Pathan became sick on 21-3-1995 as per investigating officer. His sickness was so serious that he had to be admitted in the hospital. This was an extraordinary circumstance that within two days of the arrest of the appellant Pathan he became seriously sick. The allegation of the appellants is that they were maltreated by the police. The appellant Rasool Bux was continuously interrogated, but he did not give any due. When he found that the appellant Pathan was admitted in Hospital, which might have created psychological impact upon him then he led the police to produce a pistol which the police had secured in presence of Mashirs Muhammad Mithal and Muhammad Yousif. The investigating Officer supported the said recovery but the Mashir Mohammad Yousif clearly stated in his deposition that the appellant Rasool Bux did not produce the pistol in this presence or in presence of co Mashir. The prosecutor did not declare Mashir Muhammad Yousif hostile which, establishes the fact that the prosecution also accepted his evidence. Thus it is only the police officer's evidence on the above point which is neither supported nor corroborated by the Mashir of recovery but falsified by the Mashir. This has also put me on guard to examine the case very minutely and see whether the confession was made voluntary or not. It appears to me that if the confession was voluntary then the appellant Rasool Bux could not have waited for 7 days for agreeing to make judicial confession. The appellant Rasool Bux might have seen the serious condition of co -accused Pathan who was admitted in hospital. The appellant Rasool Bux must have mentally affected by such fact. Therefore, a doubt has been created about the voluntarliness of the confession: This fact gets support from the fact that the complainant who was younger brother of

the deceased categorically stated in the examination-in-chief that he was not suspecting the present appellants to be the culprits. This admission has come on the record when the appellant Rasool Bux had already made judicial confession and the complainant knew that the appellant had confessed the guilt. In spite of that, the complainant is not showing any suspicion on the appellants about the commission of the murder of his brother. Under these circumstances, I am of the considered view that the solitary retracted judicial confession of the appellant cannot be safely relied upon unless it is corroborated on material particulars. The confession of the appellant Rasool Bux reads as under:--

> "I, Muhammad Sharif, Pathan Leghari and deceased Kadir Bux were fast friends to each other. Deceased Kadir Bux was used to visit the house Pathan Leghari on which Pathan suspected illicit terms in between Kadir Bux and his sister Mst. Pathani. Thereafter we all three decided for murder of Kadir Bux. On 10-12-1994 at evening time I brought deceased Kadir Bux from village Rhirkan at the shop of Pathan at village Dreha where Pathan and Sharif were already available there as per program and some time we told to deceased Kadir Bux that we have some work at village Farash and deceased Kadir Bux was also accompanied us, I was armed with pistol and Pathan was armed with single barrel gun where as Sharif was empty-handed then we proceeded to village Farash where we reached near village Farash in the meanwhile Pathan Laghari asked to deceased Kadir Bux that you will be killed as you are karo and Pathan opened the straight gun fire upon deceased Kadir Bux which hit deceased and I also opened pistol fire. Deceased Kadir Bux raised cries and also fell down and died away then we ran away."

The first part of the confession is that the appellants and the deceased were fast friends. There is no evidence led by the prosecution to show that the appellants and the deceased were fast friends. The: complainant who was younger brother of the deceased did not say anything about the said friendship. On the contrary I find that there is vast difference of ages between the appellants Rasool Bux, Pathan, acquitted accused Muhammad Sharif and the deceased. Complainant has given his age as 65 years at the time of recording his evidence viz. 9-4-2002. The incident took place about 8 years back therefore if we calculate-his age then at the time of incident his age was 57 years. The deceased was his elder brother therefore, he must be over 57 years at the time of incident. The age of appellant Rasool Bux was 35 years at the time of recording his statement on 10-4-2003. Therefore, his age would' be about 26 years at the time of incident. The age of appellant Pathan was 55 years at the time of recording his statement on 10-4-2003. As such he was 46 years at the time of incident. The age of acquitted accused Muhammad Sharif was 30 years at the time of recording his statement on 10-4-2003. As such he was of 22 years of age at the time of incident. It is not appealing to the common sense that the appellant Rasool Bux, Muhammad Sharif having ages of 26 and 22 years would be having fast friendship with the deceased having more than 57 years of age. Thus the first part of the confessional statement is neither supported nor corroborated by any piece of evidence but appears to be very doubtful and untrue.

The second part of the confession is that the appellant Rasool Bux took the deceased Qadir Bux from his house situated in village Bhirkan to the shop of appellant Pathan in village Dera and from there they went towards village Farash. It was evening time at 4-00 p.m. in the month of December, therefore, several persons must have seen them together while going towards village of Dera and Farash. But none has been examined to slow that any body had seen the deceased in the company of the appellants. As such this part of the confessional statement is neither supported nor corroborated by any piece of evidence.

The third part of the confessional statement is that the appellant Pathan was suspecting the deceased carrying illicit terms with his sister Pathani. No evidence has been led on

his point also to prove such allegation.

Last part of the confession is that the appellant Pathan fired from his gun at the deceased which hit him and then the appellant Rasool Bux fired from his pistol. The seats of the injuries have not been mentioned by the appellant in the confessional statement. Medical Officer found two injuries caused by fire arm weapon on the person of the deceased. One on the right cheek having wound of 5 cm x 3 cm bone deep with blackening and charring marks present and second, 7 fire arms wounds measuring 25 cm over right lower chest and right hypochondric region and third injury was abrasion 2 cm x 1 cm over the right forehead above the right eye, appears to have been caused by hard and blunt substance. The Medical Officer opined that the Injuries Nos.1 and 2 were caused by fire-arm weapon. The medical evidence only supports the prosecution to the extent that the deceased had died due to fire arm injuries. The said evidence does not show that the accused had caused the said injuries. In, the case of State v. Muhammad Naseer, 1993 SCMR 1822 the honourable Supreme Court of Pakistan examined a confession in which the appellant admitted that he committed Zina with the deceased. The medical evidence proved the commission of Zina with, the dead body but there was no-other evidence collected against the accused. In these circumstances it was observed that the said medical evidence hardly proved any corroboration to the most important part of the retracted confession of the respondent namely that the accused/respondent was responsible for committing the act of the Zina with the dead body. Therefore, the honourable Supreme Court took the view that very material part of the retracted confession that the accused committed the act of Zina with the dead body remained uncorroborated by any other evidence in the case. Therefore, the confession was not relied upon.

From the evidence available on the record there is absolutely no evidence corroborating the retracted judicial confession of the appellant Rasool Bux. As such it is very unsafe to rely upon such type of confession in the circumstances of the present case.

The appellant Pathan is being connected through the retracted judicial confession of the appellant Rasool Bux. If the said confession is not relied upon then the involvement of the appellant Pathan is also not proved. There is no other evidence connecting the appellant Pathan with the commission of this crime to warrant his conviction.

In the light of what has been stated above, the conviction and sentence awarded to the appellants under the impugned judgment are set aside. The Appellants are acquitted. They are in custody. They should be released forthwith if not required in any other custody case. The appeal is allowed.

H.B.T./R-31/K Appeal allowed.

;