IN THE HIGH COURT OF SINDH, KARACHI

CRIMINAL APPEAL NO.334 OF 2010

Present:
Mr. Justice Mohammad Karim Khan Agha
Mr. Justice Khadim Hussain Tunio,

Appellant:	Umair Ashraf S/o. Muhammad Ashraf through Syed Junaid Alam, Advocate.
Respondent:	The State through Mr. Abrar Ali Khichi, Additional Prosecutor General.
Complainant:	Muhammad Qaisar through Mr. Jamal Ahmed Mufti, Advocate.

Criminal Rev. Application No.78 of 2010.

Applicant:	Muhammad Qaisar through Mr. Jamal Ahmed Mufti, Advocate.
State:	Through Mr. Abrar Ali Khichi, Additional Prosecutor General.
Respondent:	Umair Ashraf S/o. Muhammad Ashraf through Syed Junaid Alam, Advocate.
Date of hearing:	18.01.2022.
Date of Announcement:	26.01.2022.

JUDGMENT

MOHAMMAD KARIM KHAN AGHA, J:- The appellant Umair Ashraf S/o. Muhammad Ashraf has preferred the instant appeal against the judgment dated 13.05.2010 passed by Learned IVth Additional Sessions Judge, Karachi South in Special Case No.555 of 2004 arising out of Crime No.99/2004 u/s. 302/380 PPC registered at P.S. Artillery Maidan, Karachi whereby the appellant was awarded R.I for 10 years along with fine of Rs.5,000/-. In default of payment of fine he has to undergo further S.I. for 06 months more. The benefit of section 382-B Cr.P.C. has also been extended to the appellant. The complainant has also filed a

Revision Application No.78 of 2010 for enhancement of sentence awarded to the accused/appellant.

2. The brief facts of the case as narrated in the F.I.R. lodged by the complainant Muhammad Qaisar are that he resides in Peshawar and runs his private school. On 08.08.2004 Fazal-e-Rabbi who resides in Hina Palace Karachi from Telephone No.5683533 informed him that at about 6.30pm the brother of the complainant Bashir working in customs as customs officer and residing in Hina Palace was murdered in his flat by an unknown person. That person who committed the murder of the brother of the complainant according to the statement of the watchman came with the deceased to the deceased's flat and murdered the complainant's brother due to unknown enmity and according to the watchman the person who murdered the complainant's brother also stole the car No.ED-067 maker Mitsubishi Lancer of the deceased which was parked in Railway Compound in front of Hina Palace. On checking of the flat, the briefcase in which precious articles and cash were lying along with Rado wrist watch and mobile phone was also found missing. According to the statement of the watchman of Hina Palace that person who had committed the murder was about 21/22 years old and wearing pant and shirt.

3. After completion of investigation of the case, the I.O. submitted the charge sheet against the accused person to which he pleaded not guilty and claimed trial.

4. The prosecution in order to prove its case examined 27 witnesses as well as 02 CWs and exhibited various documents and other items. The statement of the accused was recorded under Section 342 Cr.P.C in which he denied all the allegations leveled against him and claimed false implication by the police. He neither examined himself on oath nor produced any witness in support of his defence case.

5. After appreciating the evidence on record the trial court convicted the appellant and sentenced him as set out above, hence, the appellant has filed this appeal against conviction. As mentioned earlier in this judgment the complainant has already filed a criminal revision application for enhancement of the appellant's sentence

6. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the impugned judgment dated 13.05.2010 passed by the trial court and, therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

7. Learned counsel for the appellant has contended that the appellant is completely innocent and that he has been falsely implicated in this case by the police who have let off the real culprits because he refused to pay them a bribe; that there are no eye witnesses to the murder; that there is no last seen evidence to the murder; that the identity of the accused as being the actual person who committed the murder has not been established; that there are major contradictions in the evidence of the PW's especially in relation to the place of the arrest of the accused; that no murder weapon has been recovered from the accused and that for any or all the above reasons the appellant should be acquitted of the charge by extending him the benefit of the doubt and as such there is no question of any enhancement in sentence. In support of his contentions, he has placed reliance on the cases of **Ghulam Qadir and 2 others v. The State** (2008 PSC (Crl.) 691), **Hashim Qasim and another v. The State** (2017 SCMR 986), **Fayyaz Ahmad v. The State** (2017 SCMR 2026), **Imran alias Dully and another v. The State and others** (2015 SCMR 155), **Shahbaz v. The State** (2016 SCMR 1763), **Muhammad Ishaq and another v. The State** (1997 SCMR 596), **Qaddan and others v. The State** (2017 SCMR 148), **Imtiaz alias Taj v. The State and others** (2018 SCMR 344) and **Altaf Hussain v. Fakhar Hussain and another** (2008 PSC (Crl.) 573).

8. On the other hand learned Additional Prosecutor General appearing on behalf of the State and the complainant have fully supported the findings in the impugned judgment however based on the charge and the evidence lead by the prosecution they have contended that the appellant should have been convicted under S.302 (b) PPC and sentenced to life imprisonment instead of imprisonment for only 10 years under S.302 (c) PPC based on the particular facts and circumstances of the case and the evidence on record. In particular they have contended that based on the last seen evidence, the recovery of the stolen items from the house of the accused on his pointation; the arrest of the accused whilst sitting in the deceased car which he stole from the deceased after murdering him and robbing valuable items from his apartment; the fact that he was in the car,

when it had a road accident and he was taken to the police station where he compromised the accident claim and later gave the car to his friend PW Shiraz for repairs and as such the prosecution had proved its case beyond a reasonable doubt and the appeal should be dismissed and the conviction and sentence to be modified to murder under S.302 (b) PPC and the accused be handed down a sentence of life imprisonment. In support of their contentions they have placed reliance on the cases of **Muhammad Aslam v The State** (PLD 2009 SC 777), **Farrukh Sayyar v Chairman NAB, Islamabad** (2004 SCMR 1), **Meem Bahadar v The State** (2013 P Cr. L J 1490), **Mian Khan v The State** (PLD 2014 Peshawar 127), **Faisal Aleem v The State** (PLD 2010 SC 1080), **Sultan Ahmed v Addl. Sessions Judge-I, Mianwali** (PLD 2004 SC 758), **Syed Hamid Mukhtar Shah v Muhammad Azam** (2005 SCMR 427), **Muhammad Ishaq v The State** (2009 SCMR 135), **Mst. Sabeeha v Ibrar** (2012 SCMR 74), **Khurshid v. The State** (PLD 1996 Supreme Court 305), **Talib Hussain v. The State** (1995 SCMR 1538) and **Iftikhar Ahmad v. The State** (20-19 SCMR 1224).

9. We have heard the arguments of the learned counsel for the appellant as well as learned APG and the complainant, gone through the entire evidence which has been read out by learned counsel for the appellant along with the impugned judgment who have ably assisted us and have considered the relevant law including the case law cited at the bar.

10. At the outset we find that based on our analysis of the evidence the appellant could not have been convicted for an offence under S.302 © PPC but only for an offence under S.302 (b) PPC and as such if we find that the prosecution has proved its case against the appellant beyond a reasonable doubt he would need to be convicted u/s 302 (b) and sentenced either to life imprisonment or death as per the enhancement application filed by the complainant.

11. Based on our reassessment of the evidence of the PW's, medical evidence and recovery of blood at the scene, we find that the prosecution has proved beyond a reasonable doubt that on 08.09.2004 inside flat No.B-417 Hina Palace, Civil Lines, Karachi Muhammed Bashir (the deceased) was murdered by blunt injuries and had stolen from him a brief case, a licensed pistol ,cash, VCD, mobile phone car bearing registration No.ED-0667.

12. The only question left before us therefore is who murdered the deceased and stole the aforesaid items at the said time, date and location?

13. After our reassessment of the evidence we find that the prosecution has **NOT** proved beyond a reasonable doubt the charge against the appellant for which he was convicted and has also not proved the offence under S.302 (b) PPC against the appellant for the following reasons;

(a) That although the FIR was lodged a day after the incident we do not find this delay to be fatal to the prosecution case as the delay has been explained by the complainant having to travel from Peshawar to Karachi and the complainant has not tried to falsely implicate the appellant in the case as the FIR was lodged against unknown persons.

(b) That there is no eye witness to the murder of the deceased.

(c) That there is no reliable last seen evidence to the murder.

According to the evidence of PW 3 Muhammed Qasim who was watchman in the bungalow of officer of Railway colony and performed his duties as chowkidar around the clock and knew the deceased on 07.08.2004 at 12.15 midnight he woke up on the horn of the deceased car which he let in for parking. The deceased was with a young boy who was carrying a brief case whilst the deceased was carrying a shopping bag. After parking the car they both **proceeded towards** the flat and neither of them spoke to him. On the next day which was 08.08.2004 at about 5.30pm he saw the same boy holding the same brief case enter the parking area who told him that the deceased was coming. He did not know if the boy was injured.

This witness did not know the accused and only got fleeting glances of him at night when it was dark and later one evening. He could not see whether he was injured (which apparently he was according to other PW's), he did not give any hulia of the boy in his S.161 Cr.PC statement, he was not brought before any identification parade to identify the boy and could not confidently identify him in court and in his evidence could not even say whether the accused who was present during the recording of his S.164 Cr.PC statement before the magistrate (the original of which was missing)was the same boy who he saw with the deceased and as such we find that we cannot safely rely on his evidence that the accused was the boy who was last seen with the deceased. Furthermore, no witness saw the accused enter the flat with the accused which included PW 3 Muhammed Qasim who conceded in his evidence that from within the boundary walls of the bungalow he could not even see the flats where the deceased lives and did not even see him leave the parking lot. The actual chowkidar of the flats PW 8 Dildar did not see the boy enter the flats with the deceased or leave. Thus, so far as last seen evidence is concerned no one saw the boy enter the flat with the deceased or leave from the deceased flat where the deceased was found dead the next day in the evening as such we find that we cannot safely rely on the evidence of this

witness that it was the accused who entered flat with the deceased on the night of 07.08.04 or it was the same person who he again saw in the parking lot the next day and even otherwise most of the legal requirements for a conviction in last seen evidence cases has not been made out as laid down in the cases of **Fayyaz Ahmed V State** (2017 SCMR 2026) and **Muhammed Abid V State** (PLD 2018 SC 813).

(d) That a number of PW's who were playing cricket outside the flats gave evidence that they saw a person trying to drive a car which later was established belonged to the deceased and that they took him to hospital for treatment for a hand injury (which injury PW 3 Muhammed Qasim did not see) and who dropped them off an hour later after receiving treatment. None of these witnesses gave any hulia of the accused as being the injured person in the car in very belated S.161 Cr.PC statements, they were not taken before an identification parade to identify the accused as the injured person driving the car and only one of these witnesses were able to identify the accused in court (in court identification has been deprecated by the Supreme Court on numerous occasions)which in our view heavily breaks the linkage of the accused to the stolen car of the deceased which the accused was allegedly driving.

(e) That the place of the arrest and recovery of the accused and the stolen vehicle are also in doubt. According to PW 2 Muhammed Aijaz on 19.08.2004 PW 3 chowkidar Muhammed Qasim had pointed out the car and the accused to the police near Bombay Hotel where the accused was arrested and car recovered on PW 3 Muhammed Qasim's pointation whose name appears on the memo of arrest and recovery. However according to the evidence of PW 3 chowkidar Muhammed Qasim he was **not** present at the time of arrest and recovery and did **not** sign any memo of arrest and recovery and according to CW 2 Rafique Junejo the accused was arrested from his house. This is a major contradiction which castes doubt on the evidence of all these PW's

(f) That the accused confessed before the police numerous times that he murdered the deceased however a confession before the police is inadmissible in evidence. What we do find suspicious however is that the accused was prepared to confess to all and sundry and yet he was not taken before a judicial magistrate to record his confession. It has even come in evidence that one IO was prevented by his superiors from having the judicial confession of the accused recorded. This begs the question why? Perhaps the answer lies in the fact that the accused maintained that police officers were involved in the crime and he was falsely implicated. It has also come in evidence that even the relatives of the deceased were of the view that the accused might not be the real culprit and the real culprits were being shielded by the police and hence the IO was changed twice and generally the record shows indications of a shoddy and potentially unfair investigation by the police and it is in this light that the recoveries allegedly made from the home of the accused on his pointation have become doubtful especially as it does not appeal to reason, logic and common that the accused would keep all the stolen items unhidden at his house where anybody could find them.

(g) That no murder weapon was recovered from the accused.

(h) That according to the charge and the case of the prosecution the deceased was stabbed however this is not supported by the medical evidence which notes that the injuries were caused by a blunt instrument not a sharp instrument.

(i) That when the accused was taken for medical examination it appears that he had an incision injury on his arm which **might** have supported him being the injured person seen by the PW's who allegedly took the accused to hospital. However he had at least 7 other bruise type injuries most likely caused through beatings whilst in police custody (who-the police-might even have caused the incised injury on him) which is an indication that the police might have been trying to beat a confession out of him and falsely implicate him in this case in order to hide their own wrong doings.

(j) That the prosecution has asserted no motive as to why the accused would murder the deceased or if they even knew each other.

(k) That it appears from the evidence that at some time or other the accused **might** have been driving the stolen vehicle as it was involved in a crash that was reported to the concerned PS and the accused allegedly compromised the claim and he even may have attempted to get a friend PW 14 Muhammed Shiraz to repair it or was it PW 14 Muhammed Shiraz who committed the murder and stole the car as suggested by the accused especially as they were of similar ages?

(l) This is a case based purely on circumstantial evidence. 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 with regard to the great deal of care and caution which must be taken before the courts can rely on circumstantial evidence in order to convict an accused;

> *"**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.*
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> *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.***
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> *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)

In the case of **Azeem Khan** V **Mujahid Khan** (2016 SCMR 274) the following was reiterated with respect to the care and caution which needed to be taken by the court before convicting in a case of circumstantial evidence at P.290 as under;

> ***"In cases of circumstantial evidence, the Courts are to take extraordinary care and caution before relying on the same.*** *Circumstantial evidence, even if supported by defective or inadequate evidence, cannot be made basis for conviction on a capital charge. More particularly, when there are indications of design in the preparation of a case or introducing any piece of fabricated evidence, the Court should always be mindful to take extraordinary precautions, so that the possibility of it being deliberately misled into false inference and patently wrong conclusion is to be ruled out, therefore hard and fast rules should be applied for carefully and narrowly examining circumstantial evidence in such cases because chances of fabricating such evidence are always there.* ***To justify the inference of guilt of an accused person, the circumstantial evidence must be of a quality to be incompatible with the innocence of the accused. If such circumstantial evidence is not of that standard and quality, it would be highly dangerous to rely upon the same by awarding capital punishment. The better and safe course would be not to rely upon it in securing the ends of justice."***

Thus based on the above reasons we find that **prosecution has failed 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 and in fact there are many broken links in the prosecution evidence in so far as its chain touches the dead body and the neck of the accused and as such we find that it is unsafe to convict the accused on the basis of the circumstantial evidence produced by the prosecution in this case.**

14. That the prosecution must prove its case against the accused beyond a reasonable doubt and that the benefit of doubt must go to the accused by way of right as opposed to concession. In this respect reliance is placed on the case of

Tariq Pervez V/s. The State (1995 SCMR 1345), wherein the Supreme Court has observed as follows:-

> *"It is settled law that it is not necessary that there should be many circumstances creating doubts. If there is a single circumstance, which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right."*

15. For the reasons discussed above by extending the benefit of the doubt to the appellant he is acquitted of the charge, the impugned judgment is set aside, his appeal is allowed, the criminal revision application is dismissed and the appellant shall be released unless wanted in any other custody case.

16. The appeal and criminal revision application stand disposed of in the above terms.

Muhammad Arif