

IN THE HIGH COURT OF SINDH, KARACHI*Present:**Mr. Justice Mohammad Karim Khan Agha
Mr. Justice Mobeen Lakho,***CRIMINAL APPEAL NO. 763 OF 2019
CONFIRMATION CASE NO.40 OF 2019**

Appellant	Fazal Mehmood son of Hidayatullah through M/s. Muhammad Ashraf Kazi and Irshad Ahmed Jatui, Advocates
Respondent	The State through Mr. Mohammad Iqbal Awan, Deputy Prosecutor General.
Complainant	Through Shaikh Jawaid Mir, Advocate
Date of Hearing	25.03.2021
Date of Announcement	05.04.2021

JUDGMENT

MOHAMMAD KARIM KHAN AGHA, J:- The appellant Fazal Mehmood son of Hidayatullah has assailed the impugned judgment dated 08.11.2019 passed by Learned Model Criminal Trial Court / Additional District & Sessions Judge-1, Karachi (East) in Sessions Case No.391 of 2016 arising out of Crime No.314 of 2015 under Section 302/34 PPC registered at PS Bahadurabad, Karachi whereby the appellant was convicted and sentenced as under:-

"Accused is convicted under S.302(b) PPC and sentenced to death subject to confirmation by this court. Accused is also required to pay compensation amount of Rs.2,00,000/- (Rupees Two Lac Only) to the legal heirs of the deceased as required under section 544-A Cr.P.C. In case of failure of payment of fine, the accused shall further undergo simple imprisonment for six months."

- The brief facts of the case as stated by the complainant are that the complainant Abu Bakar was studying in Madrasah Jama Imran Abu Hanifa

Makka Masjid. On the same night he was sleeping inside the Masjid when Zahideen awakened and disclosed to him that in room No.4, someone had committed murder of his cousin namely Raziullah son of Abdul Saleem (deceased) by hitting cemented block on his head. The complainant reached at room No.4 and saw that the son of his maternal uncle namely Raziullah son of Abdul Saleem, aged about 19 years was lying on mattress bleeding from his head and near his head one cemented block was also lying. All the students woke up and the teacher Amir Yousuf and Shafiqullah arrived on the spot. On their arrival Zahid Din son of Hajjan and Mohibuddin son of Hazrat Wali disclosed to the complainant that they were sleeping, at about 0215 hours when they heard a sound and they woke up, as such, opened the light of the room and saw that Raziullah was lying in a pool of blood. It was found that blood was oozing from his nose and near the head; one cemented block was also lying, which was not present before the said incident. Accused Fazal Mehmood son of Hidayatullah who was residing near Raziullah was not present and for the last two days he had teased the deceased. Thereafter, police arrived and inspected the dead body and brought the dead body to JPMC for postmortem, where after completing all the legal formalities he received the dead body. Hence, such FIR was lodged against the above named accused.

3. After completing usual investigation charge sheet was submitted against accused under section 512 Cr.PC by showing him absconder. Subsequently he was declared proclaimed offender and case against him was kept on dormant file. Thereafter Investigation Officer submitted report against accused which was accepted by learned trial court, who sent up the case to the Model Criminal Trial Court/ Addl. Sessions Judge-1, (East) Karachi. The charge was framed against the accused on 29.04.2017, to which he pleaded not guilty and claimed trial of the case.

4. In order to prove its case, the prosecution examined 9 witnesses, who exhibited numerous documents and other items and thereafter prosecution side was closed. The statement of accused was recorded under Section 342 Cr.PC in which he denied the allegations against him and in effect took the defence of alibi in that at the time of the murder he was not present as he had gone to his village for treatment of his mother. The

accused however did not examine himself on oath or call any DW's in support of his defence case.

5. On conclusion of the trial, learned trial court after hearing learned counsel for the parties and appraisal of prosecution evidence brought on record, convicted and sentenced the appellant/accused as mentioned earlier in this judgment vide Judgment dated 08.11.2019 hence the appellant has filed this appeal against his conviction.

6. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the judgment dated 08.11.2019 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 was completely innocent; that this was an unwitnessed incident; that the main evidence against the accused was CCTV footage which showed the accused leaving room 4 where he and the deceased slept with others and then returning with a heavy object however this evidence was inadmissible because the USB from where the CCTV footage was saved initially did not work in court and only much later when it was produced by the IO did it show footage of the accused with a heavy object and as such had clearly been doctored to falsely implicate the accused and even otherwise had not been sent for forensic examination; that in fact he was not even present at the madrassa at the time of the murder; that it was irrelevant that the accused was an absconder as this question had not been put to him in his S.342 Cr.PC statement; that the accused was not even seen by any PW on the day of the incident which supported his alibi that he was absent at the time of the murder looking after his sick mother and that the whole prosecution case was based on presumptions and assumptions as opposed to evidence and for any of the above reasons the appellant should be acquitted of the charge by extending him the benefit of the doubt. In support of his contentions he has placed reliance on the case of **Ishtiaq Ahmed Mirza v. Federation of Pakistan** (PLD 2019 SC 675), **Yasir Ayyaz V The State** (PLD 2019 Lahore 366), **Muhammad Nadeem V The State** (SBLR 2019 Sindh 1633), **Fayyaz Ahmad V The State** (2017 SCMR 2026), **Muhammad Abid V The State** (PLD 2018 SC 813), **Taj Mohammad V The**

State (2020 P Cr. L J 1693), Abdul Sattar V The State (PLD 1976 SC 404) and Muhammad Ramzan V The State (PLD 1957(W.P.) Lahore 956).

8. On the other hand learned DPG and learned counsel for the complainant fully supported the impugned judgment; although the learned DPG did not rely on the CCTV footage he submitted that even otherwise there was sufficient last seen and other circumstantial evidence to fully prove that the accused had committed the offense for which he had been convicted including evidence of PW's, medical evidence, the recovery of the stone which was used to murder the deceased and the accused taking the police to the place where the stone was taken from and as such the appeal should be dismissed. Learned counsel for the complainant adopted the contentions of the learned DPG however he submitted that the USB which contained the CCTV footage was admissible and could be relied upon in order to convict the accused. In support of their contentions they placed reliance on **Muhammad Yaqoob V The State** (2020 SCMR 853) and **Akhtar V The State** (2020 SCMR 2020).

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 appellant's counsel, the impugned judgment with their able assistance and have considered the relevant law including that cited at the bar.

10. Based on our reassessment of the evidence of the PW's, including the medical evidence, the recovery of the dead body at the Madrassah in his bed where he usually slept and the blood stained stone which was found by his body, the blood recovered at the scene and the blood on the bed sheets of the deceased along with a positive chemical report we find that the prosecution has proved beyond a reasonable doubt that Raziullah (the deceased) was murdered by being hit on the head by a heavy object being a large cemented block at about 0215 hours on 05.11.2015 inside Room No.4 Madressa Jamia Imam Masjid Shabirabad Karachi. This finding is admitted by both parties.

11. The only question left before us therefore is who murdered the deceased by hitting him over the head with the large cemented block at the aforesaid time, date and location. Namely, was it the appellant or some other third party?

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12. After our reassessment of the evidence we find that the prosecution has proved beyond a reasonable doubt the charge against the appellant for which he was convicted for the following reasons;

(a) That PW 5 Amir Yousaf went to the PS about an hour after the incident and reported the same to the police who came immediately with him to the place of wardat which is corroborated by PW 7 Muhammed Khan who was on duty at the PS at that time and accompanied him to the scene of the vardat. The formal FIR was lodged by the complainant about 3 hours after that and as such the FIR was lodged with promptitude and thus left no time for the complainant to cook up a false story in collusion with the police to falsely implicate the accused. Even otherwise there was no enmity between the complainant PW 2 Abu Bakr and the accused and as such he had no reason to falsely implicate the accused in this case. The accused is named in the FIR for murdering the deceased with a stone according to the FIR because the deceased had annoyed the accused which is the alleged motive.

(b) In our view the main plank of the prosecution case rests on the CCTV footage which was saved in the USB and showed the accused leave room 4 and then return except this time carrying a heavy object which evidence we shall consider below;

(i) In today's world the use of science and technology such as DNA, forensic evidence, chemical reports, ballistic reports, tape recordings, video evidence and CCTV footage has proved vital in catching many criminals who may have gotten away with the crime in the past where essentially only finger printing was available in terms of forensic evidence. With the advancement of science and technology we are now not left largely in criminal cases to determine whether the eye witness is telling the truth or not to decide the guilt or innocence of the accused as we now have available scientific and all manner of other evidence which can be used if made available through electronic devices under for example Article 164 Qanoon-e-Shahdat Ordinance 1984 and as such we must strive to take advantage of such advancements in science and technology which can reduce the chance greatly of wrongful convictions of the innocent and the guilty escaping justice. We need to embrace such innovations in evidence and move forward with the times as was recently held by the Supreme Court in the case of **Ali Haider V Jameel Hussain** (unreported) dated 07.01.2021 in CrI.Petition 513/2020 subject of course to proper safeguards against such evidence being manipulated or tampered with.

(ii) In the case **Ishtiaq Ahmed Mirza** (Supra) the Supreme Court laid down certain safeguards with regard to video recordings being admitted into evidence. We are however of the view that these safeguards relate to a case where the genuineness of the video or tape recording was seriously disputed at trial or accusations were made of it being

tampered with. In this case the USB which contained the CCTV footage was not disputed by either party at trial with any vigor and there was no allegations of it being tampered with and as such in our view such safeguards can be safely watered down based on the particular facts and circumstances of this case.

PW 1 Faiz Muhammed in his evidence states as under regarding the CCTV recording around the time of the incident,

"Since, I was record incharge as such I was asked to see the actual position in the CCTV as to what happened on the relevant date and time. I opened the recording of CCTV and noticed that at about 02:16 a.m. (night) accused Fazal Mehmood was shown going to the washroom and thereafter he returned from the washroom and went back to his way and thereafter, he slightly away from his way and he was seen that he had taken something of being weighty in his hand. It was also shown that he was walking with a heavy thing in his hand but exactly it could not be shown because of some darkness and after sometime i.e. 02:27 a.m. (night) it was again noticed that the above named Fazal Mehmood was coming back briskly there. After two days i.e. on 07/11/2015 Aamir Yousuf asked me to save the above said recording and gave it to the police by copying the same in a USB. Thereafter, I copied the above said recording in the USB and on 07/11/2015 at about 03:00 p.m. I handed over the said USB to I.O. SIP Yaqoob in the office of our Madressah, who sealed the same under such memo and obtained my signature upon the memo and sealed parcel."

He knew the accused Fazal Mehmood as such there is no case of mistaken identity.

As noted above PW 1 Faiz Muhammed in his evidence was the keeper of the document and gave evidence that he saw the incident from the CTV footage which he down loaded onto a USB The safe custody of the USB was established and no one questioned the genuineness of the USB at trial. Even when the USB was unable to be played in court due to a virus in the system when the court ordered that the USB would be played by the IO when he gave his evidence the court noted as under,

"Showing the data and memory card process would be repeated at the time of evidence of the I.O. with consent of learned counsel for the Complainant, learned D.D.P.P. as well as learned counsel for the accused till then the USB and memory card be kept in the safe custody."

During his cross examination PW 1 Faiz Muhammed stated in his evidence;

"On 07/11/2015, I.O. came for the first time to me for getting USB. My statement was recorded once by the I.O. Yaqoob which was recorded in presence of Abu Bakar and Aamir Yousuf when I was handing over the USB to the I.O. I.O. came

to me at 03:00 p.m. I.O. came in the office of the Madressah, and I was called in the office of the Madressah where I handed over the USB to the I.O. Only I am posted in the record, and none is posted in the record for my help. When my statement was being recorded by the I.O. at the time of giving the USB to him, one police official was also with the I.O. but I do not know his name."

We find the evidence of this witness who saw the actions of the accused as shown in the USB a few days after it was recorded and kept in safety before handing over to the police to be reliable, trust worthy and confidence inspiring and thus believe his evidence regarding what he saw on the USB which went unchallenged. Furthermore, he had no enmity with the accused to lead to him falsely implicating the accused in this case, he is not a chance witness, his evidence remained undented during a lengthy cross examination and as such we believe his narration of what he saw on the USB a few days after the incident before he handed over the same to the IO and was shown to the court by the IO and as such there is no question of the USB being tampered with as it was viewed by this witness who we consider to be trust worthy, reliable and confidence inspiring even before it was handed over to the police. He was also the only person in charge of the recording room and produced the USB himself as evidence in effect being its keeper/maker. He was not a chance witness and was not related to the deceased and as such we believe his oral evidence of what he saw on the CCTV footage a few days after the incident and by implication also find as admissible and genuine the CCTV footage as played in the court which implicates the appellant in the murder and rely on the same.

The IO of the case PW 9 Muhammed Yaqoob with regard to the CCTV footage/USB which was to be played (and was played) when he gave evidence due to the earlier virus malfunction states as under in his evidence;

"I took footages of CCTV of the place of incident which I produce on Ex.31 to Ex.36, these are same footages. From the CCTV footage one person can be seen who went to washroom and then block of cement from some place near the door of madrasah and thereafter he was seen going out of madrasah. From CCTV footage the persons appearing was identified as accused Fazal Mehmood by incharge madrasah and other witnesses. These witnesses have stated in their statement U/s 161 Cr.P.C. that the persons shown in the CCTV footage is accused Fazal Mehmood..... I had also secured one USB from one Faiz Muhammad in which the footages of the accused were recorded. I prepared such memo which was signed by Aamir Yousuf, Abu Bakar and Faiz Muhammad which already produce on Ex.06/A it is same correct and bears my signature. During investigation I deposited case property at Mallkhana of city court vide road certificate 08.12.2015 containing details of case property to incharge Mallkhana city court I produce such road certificate on Ex.42. The property was burnt inside Mallkhana in fire incident occurred and such FIR was registered bearing No. 123/2018 at PS City court

which I produce on Ex.43. Accused present in court is same. I produce USB under Article-A and memory card Article-B. The case property USB and Memory card are de-sealed in open court, property i.e. USB and one memory card lying in the court are same. (Note: USB was plugin the computer system and shown on the screen to the prosecution, counsel for the accused in open court.)

Once again we find that this witness, although a policeman, who saw the actions of the accused as shown in the USB a few days after it was recorded and handed over to him and kept it in safe custody to be a reliable, trustworthy and confidence inspiring witness, who had no enmity with the accused as to falsely implicate him in this case and such his evidence can be relied upon. In this respect reliance is placed on **Mustaq Ahmed V The State** (2020 SCMR 474). He was not a chance witness and was not dented despite a lengthy cross examination by the defense. As such we believe his narration of what he saw on the USB a few days after the incident once it was handed over to him in his capacity as IO and as was shown to the court by him during his evidence and as such there is no question of the USB being tampered with as it was viewed by this witness who we consider to be trust worthy, reliable and confidence inspiring prior to the court proceedings (as was the case with PW 1 Faiz Muhammed as mentioned above). He was not a chance witness and was not related to the deceased and no enmity has been suggested between him and the accused and as such we believe his oral evidence of what he saw on the CCTV a few days after the incident when he recovered the USB footage on the CCTV and by implication also find the CCTV footage/USB as admissible and genuine as played in the court which implicates the appellant in the murder and we rely upon the same.

PW 2 Abu Bakr who was the complainant and was also residing at the Madrassah and was not a chance witness stated in his evidence that on 07/11/2015 he also viewed the CCTV footage before it was handed over to the IO in the following terms;

"Thereafter, on 07/11/2015 at about 03:00 p.m. we checked the CCTV recording in the Madressah, in which we found that accused Fazal Mehmood was coming from the room and going towards the washroom at about 02:16 a.m. (night) having gone from the washroom, he was going towards a gate at the corner and having taken a cement block from there and was going back towards the room No.4. We also saw that at about 02:27 a.m. (night) he came down from the stairs and went outside by climbing over the wall. Thereafter, the above said recording in the USB was handed over to S.I.P. Muhammad Yaqoob in the office of Madressah under such memo upon which I, Faiz Muhammad, and Aamir Yousuf put our signatures. S.I.P. Yaqoob sealed the USB in the cloth in the office of

Madressah. My statement was also recorded by the I.O."

Admittedly this witness was related to the deceased however it has not come in evidence that this witness has any ill will or enmity towards the accused as such it is settled that his evidence can be relied upon. In this respect reliance is placed on **Zulfiqar Ahmed & another v. State** (2011 SCMR 492). He knew the accused as a fellow student and as such there is no case of mistaken identity. We find the evidence of this witness to be trust worthy, reliable and confidence inspiring and thus we believe his narration of what he saw on the CCTV footage a few days after the incident before it was handed over to the police and find the CCTV footage /USB to be admissible, genuine and also rely on the same especially as mentioned earlier the defense did not even raise any suggestion of tampering with the CCTV/USB at trial. He would also not want to substitute the accused for the murder of his real cousin and allow the actual murderer to go scott free. In this respect reliance is placed on **Allah Ditta V State** (PLD 2002 SC 52).

In finding the CCTV footage/USB admissible, genuine and upon which reliance can be placed we are fortified by a recent Divisional Bench Judgment of this court in the case of **Rajesh V State** dated 08.03.2021 (un reported) in criminal Appeal No.702 of 2019 concerning the admissibility, genuineness and reliability of CCTV evidence in similar circumstances except the instant case concerns last seen and circumstantial evidence which held as under in the following terms:

"19. From the close scrutiny of the evidence, we have come to the conclusion that prosecution proved its case against the appellant beyond any shadow of doubt. Dr. Qamaruddin (PW.1) and Abdul Sattar (PW.4) have clearly stated that they had identified the appellant in CCTV footage while causing knife blows to the deceased, in Saima General Hospital. It may be mentioned here that appellant was sweeper in the Saima General Hospital and deceased was receptionist/dispenser in the said hospital. PWs 1 and 4 knew the appellant since long. Evidence of Abdul Sattar (PW.4), CCTV operator of the Saima General Hospital is quite reliable and trustworthy. He had no motive to falsely implicate the appellant in the murder of the deceased. **Whole prosecution case is basically structured upon his evidence.** Examination-in-chief of PW.4 Abdul Sattar is reproduced as under:

"I am working as Monitor of CCTV installed at Saima General Hospital since 2015. The incident of murder of one Nawab Deen was committed in our hospital and I had taken such CCTV footage and recorded in one USB of 16gb Kingston. I see Article-A is same USB. On 01.10.2017 I handed over the same USB Recording to IO through memo on which I signed as a witness. I produce such memo at Ex.14 which is same, correct and bears my signature. The USB was sealed in the Parcel. I see the parcel present in Court from which USB is produced bears my signature. Accused present in Court is Rajesh and he is also clearly visible in the footage who had committed murder."

Accuracy of recording of CCTV footage in the hospital has been proved through the evidence of Abdul Sattar (PW-4), he was the person

who was monitoring the CCTV footage in the hospital. Video was played before the trial court, appellant was visible in the video, he was identified by Abdul Sattar (PW.4) and Dr. Qamaruddin (PW.1) as the appellant was sanitary worker in the hospital. Safe custody of the CCTV footage after its preparation till production before the trial court has been proved. We have no hesitation to rely upon the piece of CCTV footage against the appellant.

20. Dr. Qamaruddin (PW.1), the owner of Saima General Hospital had also watched the CCTV footage and identified the appellant, he was causing churri blows to the deceased. Medical evidence corroborated the CCTV footage evidence. Churri used in the commission of offence was voluntarily produced by the accused from the corner of water tank, on third floor of the hospital, it was bloodstained and report of the chemical examiner was positive. As regard to the piece of CCTV footage is concerned, not a single question has been put by the defence counsel to the prosecution witnesses regarding tampering with the USB. It is already observed that prosecution has proved safe custody of USB/CCTV footage. A judge and more so a trial judge, acts as a gatekeeper of the scientific evidence and must, therefore, enjoy a good sense and understanding of science. As science grows so will the forensic techniques, tools and devices; therefore, courts must be open to developments in forensic science and embrace new techniques and devices to resolve a dispute, provided the said technique and device is well established and widely accepted in the scientific community as a credible and reliable technique or device. Article 164 of the Qanun-e-Shahadat Order, 1984, is our gateway allowing modern forensic science to come into our courtrooms. Article 164 provides that courts may allow to be produced any evidence that may have become available because of modern devices and techniques. Proviso to Article 164 read with Article 59, *inter alia*, allows modern forensic science to enter courts through the credible and valued scientific opinions of experts as evidence, in order to arrive at the truth as held by the Hon'ble Supreme Court in the case of Ali Haider alias Pappu vs. Jameel Hussain, etc. (Criminal Petition No.513/2010) decided on 07.01.2021.

21. As it is observed above, we find that evidence of Abdul Sattar (PW.4), CCTV operator and Doctor Qamaruddin (PW.1) is quite reliable and beyond any doubt. Evidence of Dr. Afzal Ahmad (PW.8), who produced the postmortem report, fully supports the prosecution case. The chain of circumstantial evidence, including the recovery of churri, positive reports of the chemical examiners is firm and continuous, leaving no margin for the hypothesis of the innocence of the appellant. The prosecution has thus proved its case against the appellant beyond reasonable doubt."(bold added)

Furthermore as was held in the case of State V Farman Hussain (PLD 1995 SC 1, although this case concerned kidnapping for ransom, the courts were

urged to take a dynamic approach in criminal cases and to avoid technicalities and we consider this finding to be equally applicable to other criminal cases including the one before us and the issue of the admissibility, genuineness and reliability of the CCTV/USB footage provided that such an approach does not lead to a miscarriage of justice. In the aforesaid case it was held as under;

"It is a matter of public knowledge that in Sindh, on account of kidnapping for ransom, commission of dacoities and other offences, the people are feeling insecure. The learned trial court has dilated upon these aspects in detail. I am inclined to subscribe to the view found favour with it. The approach of the Court in matters like the case in hand should be dynamic and if the Court is satisfied that the offence has been committed in the manner in which it has been alleged by the prosecution, the technicalities should be overlooked without causing any miscarriage of justice."

Thus, for the reasons mentioned above we find the CCTV/USB footage showing the accused moving around the Madrassa with a heavy object in his hand at around the time when the accused was murdered to be admissible, genuine and we rely upon the same.

(c) This primarily appears to be a case of last seen evidence. In **Fayyaz Ahmed V State** (2017 SCMR 2026) at P.2030 at Para 7 it was held as under regarding last seen evidence;

"The last seen evidence is one of such categories of evidence. In this category of cases some fundamental principles must be followed and the Prosecution is under legal obligation to fulfill the same, some of which may be cited below:-

- (i) There must be cogent reasons that the deceased in normal and ordinary course was supposed to accompany the accused and those reasons must be palpable and prima facie furnished by the Prosecution.
- (ii) The proximity of the crime seen plays a vital role because if within a short distance the deceased is done to death then, ordinarily the inference would be that he did not part ways or separated from the accused and onus in this regard would shift to the accused to furnish those circumstances under which, the deceased left him and parted ways in the course of transit.
- (iii) The timing of that the deceased was last seen with the accused and subsequently his murder, must be reasonably close to each other to exclude any possibility of the deceased getting away from the accused or the accused getting away from him.

- (iv) There must be some reasons and objects on account of which the deceased accompanied the accused for accomplishment of the same towards a particular destination, otherwise giving company by the deceased to the accused would become a question mark.
- (v) Additionally there must be some motive on the part of the accused to kill the deceased otherwise the Prosecution has to furnish evidence that it was during the transit that something happened abnormal or unpleasant which motivated the accused in killing the deceased.
- (vi) The quick reporting of the matter without any undue delay is essential, otherwise the prosecution story would become doubtful for the reason that the story of last seen was tailored or designed falsely, involving accused person.

Beside the above, circumstantial evidence of last seen must be corroborated by independent evidence, coming from unimpeachable source because uncorroborated last seen evidence is a weak type of evidence in cases involving capital punishment.
- (vii) The recovery of the crime weapon from the accused and the opinion of the expert must be carried out in a transparent and fair manner to exclude all possible doubts, which may arise if it is not done in a proper and fair manner.
- (viii) The Court has also to seriously consider that whether the deceased was having any contributory role in the cause of his death inviting the trouble, if it was not a pre-planned and calculated murder."(Bold added)

In the later case of **Muhammed Abid V State** (PLD 2018 SC 813) which delved further into the doctrine of "last seen together" evidence it was held as under at P.817 Para 6:

"The foundation of the "last seen together" theory is based on principles of probability and cause and connection and requires 1. cogent reasons that the deceased in normal and ordinary course was supposed to accompany the accused. 2. proximity of the crime scene. 3. small time gap between the sighting and crime. 4. no possibility of third person interference 5. motive 6. time of death of victim. The circumstance of last seen together does not by itself necessarily lead to the inference that it was the accused who committed the crime. There must be something more establishing connectivity between the accused and the crime" (bold added).

In this case we have through believing the CCTV/USB footage already

found that the accused was present in the Madrassa at the time of the incident. PW 6 Jameel ur Rehman gave evidence that the beds of the accused and the deceased were at the end of the room in which both the accused and deceased and others were sleeping. PW 7 Muhammed Khan in his evidence states that the sleeping mattress of the accused was lying beside the mattress of the deceased and this position is even admitted by the accused in his S.342 Cr.PC statement. Hence, the accused and the deceased had their beds next to each other in the same room.

In terms of last seen evidence the CCTV footage is significant as well as the fact that both the accused beds were next to each other and in the same room and the murder was committed when both of them should have been sleeping next to each other.

In terms of last seen evidence we find the evidence of **PW 8 Mohibuddin** (who is named as a witness in the FIR) to be crucial which is set out below in material part;

"I was studying in Madarash Jamia Imam Abu Hanifa situated Muhammad Ali Housing Society in the year 2015. I used to stay at room No.4 of the said Madarash. There were about 15 to 16 person staying in said room and their names are Zahid Uddin, Fazal Mehmood, Fasiullah, Imamuddin and others whose names I do not remember. On 04.11.2015 I went to bed in between 2200 to 2300 on my mattress for sleep. I got up at 0030 hours for washroom when I proceeded to washroom I found accused Fazal Mahmood sitting at stairs in puzzle condition. When I returned to my bed accused Fazal Mehmood was already lying on his bed. There was a distance of about two to three bed between my mattress and mattress of accused Fazal Mehmood. At about 0230 hours I heard sound as something had fallen. Due to intensity of sound all the students got up from their sleep the lights were turned on by one of the students and found Raziullah was lying on his mattress and blood was oozing from his head. We suddenly got surprised as to what had happened. At that time Fazal Mehmood was not present in the same room. Adjacent to the mattress of Raziullah I found one cement block was lying."

This witness is not related to the deceased or the accused. He is not a chance witness and he had no reason to falsely implicate the accused. His evidence is straight forward and he was not dented during cross examination and thus we find the evidence of this witness to be trustworthy, reliable and confidence inspiring and we believe the same and rely upon the same.

The effect of this witness's evidence is;

- (a) that it corroborates the CCTV evidence that the accused was present in the Madrassa at the time of the incident.
- (b) that he, the accused, the deceased and other PW's were present in Room 4 at about 2300 hours.
- (c) that when he got up to go to the washroom he saw the accused sitting on the stairs looking puzzled at 0030am.
- (d) that he saw the accused already on his bed when he returned to his bed which would been at around 1am.

- (e) that at about 2.30 am he and some of the other students woke up when they heard a sound as if something had fallen when they found that the deceased was lying on the mattress with blood oozing from his head
- (f) that at 2.30am when they woke up and found the body of the deceased the accused was gone.
- (g) that a cement block was found adjacent to the mattress of the deceased which had not been there before.
- (h) that significantly the timings given by this witness tie in roughly with the timings mentioned by PW 2 Abu Bakr in his evidence whilst watching the CCTV footage and the footage itself as played in court.

Thus, keeping in view the fact that it has already come in evidence that the beds of the accused and the deceased were next to each other in the same room from the above discussion it would appear that the last seen evidence test has been met. Namely, at about 1am the accused was seen sleeping beside the deceased and within one and a half hours the accused was gone and the deceased was dead in the bed next to the accused where a cement block was found which the accused had already been found carrying in the CCTV/USB footage back towards his room where the deceased was sleeping next to him.

In addition the accused on his surrender lead the police to where he had collected the cement block which was used to kill the deceased which was from a place which only the accused could have known about.

(d) We now come to circumstantial evidence. In the case of **Azeem Khan V Mujahid Khan** (2016 SCMR 274) the following was reiterated with respect to 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."

In this case we are of the view that the test for circumstantial evidence has been proven whereby the evidence the prosecution produced provides all links in an unbroken chain where one end of the same touches the dead body and the other the neck of the accused.

Our conclusion is based on the following factors arising from the evidence when read in a holistic manner;

- (a) that the CCTV/USB footage clearly shows the presence of the accused in the Madressa around the time of the murder.
- (b) that the CCTV/USB footage was confirmed by 3 reliable, trust worthy and confidence inspiring witnesses who had viewed the footage a few days after the murder.
- (c) that in the footage the accused is shown carrying a heavy object
- (d) that the accused's bed was next to the deceased.
- (e) that an independent witness PW 8 Mohibuddin had seen the accused, deceased and other PW's going to bed that night in room 4 which they all shared. He had also seen the accused looking puzzled at 0030am outside the bedroom
- (f) that when PW 8 Mohibuddin returned to room 4 at about 1am he saw the accused sleeping
- (g) that the accused bed was opposite the deceased bed
- (h) that approx 1 hour and 30 minutes after last seeing the accused asleep he and others in the room awoke to find the deceased dead by a smashed in head
- (i) that a cement block was close by with blood on it which on the basis of a chemical report turned out to be human blood which cement block had not been in the room earlier
- (j) that the medical evidence confirms that the deceased died on account of him being hit on the head by a hard object.
- (k) that after his arrest the accused took the police to the place where he had collected the cement block which he used to kill the deceased on his own pointation which was a place which only he could have known about.
- (l) that the accused disappeared immediately after the incident and did not return until a year later. If he was innocent and had gone to see his mother as he had claimed in his S.342 Cr.PC statement why did he then not come back to the Madressa to continue his studies until over a year later?.
- (m) that the alleged motive was that the deceased had teased the accused for the last two or three days and wanted to commit sodomy with him

Other corroborative/supportive evidence against the accused.

- (a) That the blood stained earth recovered at the wardat was sent for chemical examination which report found the blood recovered at the scene to be human blood. Likewise the stone and bedding of the deceased.
- (b) That all the PW's are consistent in their evidence and even if there are some contradictions in their evidence we consider these

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contradictions as minor in nature and not material and certainly not of such materiality so as to effect the prosecution case and the conviction of the appellant. In this respect reliance is placed on **Zakir Khan V State** (1995 SCMR 1793) and **Khadim Hussain v. The State** (PLD 2010 Supreme Court 669).

(c) The evidence of the PW's provides a believable corroborated unbroken chain of events from the accused seen in room 4 with the deceased and others at about 11pm to the accused being seen mulling over matters until about 1am when he returned to bed, the CCTV showing him with a heavy object returning to his room to his bed being next to the deceased to the others in the room being awoken by noises to the accused disappearance to the recovery of the dead body in the bed next to the accused along with the bloodied cement block which was used to smash his head in to the accused on his surrender taking the police to the place where he had picked up the cement block which he had used as a murder weapon as per CCTV footage.

(d) All the PW's gave there S.161 Cr.PC statements to the police with promptitude which left no time for collusion or concoction and there were no improvements in the evidence which they gave in court as PW's under oath so as to render their evidence at trial unreliable.

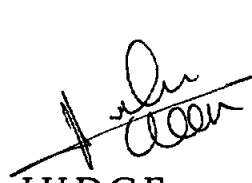
(e) Undoubtedly it is for the prosecution to prove its case against the accused beyond a reasonable doubt but we have also considered the defence case to see if it at all can cast doubt on or dent the prosecution case. The defence case is one of alibi. Namely that the accused was with his mother at the time of the incident however the accused did not give evidence under oath nor did he call any DW including his mother to support his alibi. Thus, for the reasons mentioned above we disbelieve the defense case as an afterthought. Thus, in the face of the CCTV/USB footage corroborated by reliable, trust worthy and confidence inspiring witnesses who saw the same we find that the defence case (which we disbelieve) has not at all dented the prosecution case.


13. Thus, based on the above discussion when all the evidence such as last seen, circumstantial, CCTV/USB footage, PW's, the accused showing from where he had got the cement block on his own pointation and other evidence discussed in this judgment is taken together and considered in a holistic manner we have no doubt that the prosecution has proved its case against the appellant beyond a reasonable doubt for the offence for which he has been convicted and hereby maintain his conviction.

14. With regard to sentencing the prosecution has not asserted and has not been able to prove the motive for the appellant murdering the deceased apart from some unsubstantiated allegations of the deceased teasing the accused and wanting to commit sodomy with the accused and in such type

of cases usually the death penalty is reduced to life imprisonment. In this respect reliance is placed on **Mst.Nazia Anwar V State** (2018 SCMR 911). This is more so in a case like this where circumstantial and last seen evidence largely form the basis of conviction which is evidence which one must view with great caution and as such we hereby reduce the sentence of death imposed on the accused to one of life imprisonment but maintain any other sentences such as compensation, fines etc (if any) handed down by the trial court to the appellant.

15. The appeal stands dismissed except as modified above in terms of sentencing with the confirmation reference being answered in the negative.


JUDGE

 JUDGE 05/11/21