

IN THE HIGH COURT OF SINDH, KARACHI

CRIMINAL APPEAL NO. 370 OF 2019

Appellant;	Abdul Hafeez s/o Ghulam Fareed through Mr. Amir Nawaz Waraich, Advocate
For State;	Mr. Muhammad Iqbal Awan, Additional Prosecutor General Sindh.
Complainant;	Mst. Nazra Khatoon through Mr. Muhammad Ishaque Khan, Advocate
Date of Judgment;	23.01.2024
Date of Announcement;	26.01.2024

JUDGMENT

Mohammad Karim Khan Agha, J:- Appellant Abdul Hafeez s/o. Ghulam Fareed was proceeded against in the Court of Additional Sessions Judge-VII/Model Criminal Trial Court-02 Karachi (Central) in respect of Crime No.140 of 2016 under section 302 PPC registered at P.S. Shahrah-e-Noor Jehan, Karachi whereby the appellant was convicted and sentenced vide judgment dated 27.06.2019 to undergo imprisonment for life along with fine of Rs.100,000/- as compensation payable to the legal heirs of deceased. However, in case of default in payment of such compensation the appellant shall undergo S.I. for six months more. The appellant was also extended the benefit of section 382-B Cr.P.C.

2. The brief facts of the prosecution case as narrated in the FIR are that complainant Mst. Nazra Khatoon lodged FIR at PS. Shahrah-e-Noor Jehan on 07.07.2016 at 2130 hours stating therein that on 05.07.2016 the daughter of complainant/deceased namely Faiqa Fatima had contracted love marriage with Abdul Hafeez and she had one son namely Muhammad Arham aged about 1½ years, and she had come at the house of complainant few days prior to Eid along with her son. On 05.07.2016 at about 07:30 hours she went at the house of her in-laws situated at Nusrat Bhutto Colony, North Nazimabad, Karachi, for taking clothes of her son Muhammad Arham leaving him behind



at the house of complainant. Thereafter, at about 08:30 hours, complainant received information that at about 08:00 hours her above named daughter was burned and her husband Abdul Hafeez shifted to her in Zia Uddin Hospital for treatment. On this information, complainant reached forthwith at Zia Uddin Hospital where treatment of her above named daughter already started. Later on, at about 10:30 hours the doctors of Zia Uddin Hospital informed that they had no Burn Ward, with direction to shift her above named daughter to Civil Hospital or Patel Hospital. Then, they shifted her daughter at Patel Hospital, Gulshan-e-Iqbal, Karachi. Thereafter, during treatment, her above named daughter died at 10:30 hours on 05.07.2016 in Patel Hospital. Hence, complainant lodged this FIR stating that since her above named daughter had quarrel with her husband Abdul Hafeez, thus, she had strong apprehension that her above named daughter was killed by her husband Abdul Hafeez setting her on fire.

3. After usual investigation the case was challaned and the matter was sent up for trial. The appellant pleaded not guilty to the charge and claimed trial.

4. The prosecution in order to prove its case examined 09 witnesses and exhibited various documents and other items. The statement of the appellant accused was recorded under Section 342 Cr.P.C in which he denied all the allegations leveled against him. He gave evidence on oath but did not call any DW in support of his defence case.

5. After hearing the parties and appreciating the evidence on record, the trial court convicted the appellant and sentenced him as set out earlier in this judgment; 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 impugned judgment dated 27.06.2019 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 contended that the appellant is completely innocent and has been falsely implicated in this case on account of enmity between him and the complainant hence the unexplained 2 day delay in lodging the FIR which gave the complainant a chance to cook up a false case against him; there is no eye witness to him throwing petrol or any other



inflammable substance over the deceased instead there is eye witness evidence of his neighbor suggesting that he was attempting to save the life of his wife/deceased when the fire broke out in the house; that the only evidence against him is the dying declaration which the deceased allegedly orally gave to the complainant (her mother) whilst the deceased was receiving treatment at Patel Hospital which according to the appellant is a complete fabrication; that there are material contradictions in the evidence of prosecution witnesses, which makes the case highly doubtful and as such for any or all of the above reasons the appellant be acquitted of the charge by being extended the benefit of the doubt. In support of his contentions he placed reliance on the record.

8. Learned Assistant Prosecutor General Sindh on behalf of the State, and learned counsel for the complainant contended that the prosecution had fully proved its case beyond a reasonable doubt against the appellant through reliable and cogent evidence, and in particular the dying declaration of the deceased to the complainant and as such fully supported the impugned judgment and contended that the appeal be dismissed. In support of their contentions, they placed reliance on the cases of *Majeed v The State* (2010 SCMR 55), *Sultan-e-Room v The State* (2018 YLR 2535) and *Qasim Shahzad v The State* (2023 SCMR 117).

9. I have heard the arguments of the learned counsel for the appellant, learned Additional Prosecutor General Sindh and learned counsel for the complainant and have gone through the entire evidence which has been read out by the learned counsel for the appellant and the impugned judgment with their able assistance and have considered the relevant law including the case law cited at the bar.

10. I am acutely aware that this is a very heinous crime whereby a young lady has died in a most terrible and horrific manner by being burnt to death whilst leaving a young daughter behind. However, as a Judge I have to put such considerations aside and decide the guilt or innocence of the appellant by dispassionately assessing the evidence before me and coming to a decision which is supported by the evidence on record and the governing law and not by my emotions or own personal feelings. I can only be guided by the evidence and the law and nothing else. In this respect I refer to the case of *Azeem Khan V Mujahid Khan* (2016 SCMR 274) which held as under;



*"Similarly, mere heinous or gruesome nature of crime shall not detract the Court of law in any manner from the due course to judge and make the appraisal of evidence in a laid down manner and to extend the benefit of reasonable doubt to an accused person being indefeasible and inalienable right of an accused. In getting influence from the nature of the crime and other extraneous consideration might lead the Judges to a patently wrong conclusion. In that event the justice would be casualty".*

11. Based on my reassessment of the evidence of the PW's especially the medical evidence and other medical reports I find that the prosecution has proved beyond a reasonable doubt that Mst.Faiqa Faṭima (the deceased) received severe burn injuries on 05.07.2016 at about 8am at her house which lead to her death the same day in Patel Hospital.

12. The only question left before me is whether the prosecution has proved beyond a reasonable doubt that it was the appellant who caused the severe burn injuries to the deceased or whether such burns could have been caused by an accidental fire, self immolisation or some other cause at the said time, date and location?

13. After my reassessment of the evidence I find that the prosecution has NOT proved beyond a reasonable doubt the charge against the appellant keeping in view that each criminal case must be decided on its own particular facts and circumstances in accordance with the relevant law for the following reasons;

(a) The FIR was lodged two days after the incident. The prosecution has attempted to explain the delay in lodging the FIR because the complainant was in shock. I do not find this to be a particularly well explained reason for the delay as the complainant was at home and she also had a son and sister in addition to the police who were at the hospital when the deceased died who were quite capable of lodging the FIR. In fact a day after the incident when the police came to record her statement she refused. She also refused for a postmortem to be conducted on the body of the deceased. It is well settled by now that any unexplained delay in lodging the FIR can be fatal to the prosecution case as it gives the opportunity for the complainant to cook up a false case against the accused. In this respect reliance is placed on the cases of Farman Ahmed V State (2007 SC MR 1825). Hence at the very outset I am put on caution as to the complainants version of events.

(b) Despite lodging her FIR 2 days after the incident completely inexplicably the complainant fails to mention the alleged dying declaration which the deceased gave to her in Patel hospital on the day she died (2 days after the complainant lodged the FIR) that it



was the appellant who set her on fire. In the FIR she only casts suspicion on the appellant nothing more. This I find to be completely unbelievable. How could a mother forget the most important piece of evidence which the deceased who was her daughter gave to her before her death. Namely, that it was her husband /the appellant who had sent her on fire and caused her severe burn injuries which lead to her death. Such a statement would have been engraved in the complainant/mothers mind and could not have been forgotten. This is more so since she was a teacher and was an educated lady.

- (c) There is no eye witness in this case and the prosecution's evidence primarily revolves around the alleged dying declaration of the deceased to the complainant. The existence of this dying declaration only came to light when the complainant gave evidence at trial. I find this to be a massive dishonest improvement in her S.154 Cr.PC statement which became the FIR and as such I cannot believe her evidence at trial on this point especially as it had come in her own evidence that she disliked the appellant who had married and then remarried his daughter and thus had every reason to implicate the appellant in a false case also keeping in view the fact that she was related to the deceased being her mother. In this respect reliance is placed on the cases of **Muhammed Arif V State** (2019 SCMR 631), **Sardar Bibi V Munir Ahmed** (2017 SCMR 344) and **Muhammed Mansha V State** (2018 SCMR 772).

- (d) I also disbelieve the evidence of the complainant in respect of the dying declaration of the deceased as according to the evidence of the complainant the dying declaration of the deceased was given at Patel Hospital. However PW 8 Dr. Jawad Ali Shah who treated the deceased at Patel hospital gave evidence as under;

*"It is correct that the face of the deceased was completely burned.....The patient was referred to Patel Hospital as it has a burn unit so also in Civil Hospital therefore, Zia Uddin Hospital referred the patient who has a burn inhalational history and her trachea was swollen severely. Patient was put on ventilator in Patel Hospital due to her condition. Doctor Mohsin has recorded the history as he had given treatment to patient during day time which was briefed by the attendant as the patient was in critical condition and could not speak"*(bold added)

Thus, it is quite apparent from the medical evidence that the deceased was unable to speak at Patel hospital (which is hardly surprising as she had 80% burns and was put on a ventilator) and as such could not have given a dying declaration to the complainant which was not heard by any other person at the hospital which completely undermines her evidence about the deceased giving a dying declaration.

Furthermore, PW 4 ASI Umer Hyat corroborates the medical evidence about the deceased not giving a dying declaration to the complainant at the hospital in his evidence as under;

*"It is correct that it is mentioned in the statement u/s.154 Cr.PC that complainant did not talk to the deceased till her death nor*



*it is mentioned in the FIR. It is correct that complainant nowhere before me stated that her daughter was burnt through acid." (bold added)*

- (e) the only other evidence of a dying declaration comes from related witnesses who gave hearsay evidence about the dying declaration based on what the complainant had told them which is inadmissible in evidence.
- (f) Admittedly, as set out in the case of *Majeed (Supra)* there are no hard and fast rules to believe a dying declaration however based on the above discussion I find that I cannot safely rely on the dying declaration and find it to be fabricated by the complainant. Once the evidence of the dying declaration is disbelieved, as in this case, there is hardly any evidence against the appellant.
- (g) That police recovered a petrol bottle, burnt sheet and clothes of the deceased but only the petrol bottle (as would be expected) had petrol in it as per chemical report and none of the other items had petrol or kerosene stains which is strange as the deceased was allegedly on the bed at the time of her being burnt. A scarf was also found in the chemical examiners report but there is no mention of any scarf being recovered which is also strange. Even then no finger prints were taken from the petrol bottle to find out if the appellant had handled it or the deceased.
- (h) The appellant opted to give evidence on oath to disprove the charge against him. According to his evidence he entered into love marriage with the deceased which was not liked by the complainant. On the day of the incident the appellant argued with the deceased as to whether they would spend Eid at the complainant's house or at their own home. When the appellant left the room where the argument took place he heard shouting of the deceased who was burning in the room. He tried to set out the fire and received burns himself while attempting to save his wife who he took to Ziauddin hospital for treatment and then to Patel hospital for specialized burns treatment. His presence at both the hospital's is corroborated by PW's and he even paid for his wife's/deceased treatment. **Most significantly**, his evidence of trying to put out the fire and of rescuing his wife from the fire is also corroborated by independent PW eye witness Muhammed Jabbar who was a neighbor and was not a chance witness and who was not declared hostile by the prosecution. This eye witness to the fire and the rescue by the appellant also saw that the appellant got burnt whilst trying to rescue his wife which burns are supported by the medical evidence of PW 6 Dr. Muhammed Khalid and are not denied by the prosecution during the cross examination of the appellant during which his evidence was not dented and in fact I find was given in a very straightforward manner. If the appellant was truly guilty I do not believe that he would have acted in the manner in which he did; rather his conduct appears to be that of an innocent person i.e he attempts to put the fire out and save his wife, exposes himself to being burnt (which he was), takes his wife to two hospitals and pays for the treatment most of which was witnessed by an independent prosecution witness and the remainder by the complainant who

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disliked him. If the appellant was guilty his most likely conduct would have been to flee the crime scene.

- (i) Thus, when I consider the defence case in juxtaposition with the prosecution case I find doubt in the prosecution case especially in respect of what actually transpired at the appellant's house in connection with how the deceased actually came to suffer her severe burn injuries on the fateful day. In this respect I place reliance on the case of *Sabir Ali V State* (2011 SCMR 629 which held as under in material part;

"13. At this juncture, reference to the case *Abdul Haque v. The State* (PLD 1996 SC 1) may be made, where the appellant therein had taken the plea of provocation, it was observed by Sajjad Ali Shah, C.J. (as he then was) that "In this case Abdul Haque, who is accused of murder, claims the plea of grave and sudden provocation and states that he was deprived of power of self-control. In criminal jurisprudence general principle is that prosecution is to prove the case against the accused beyond doubt and this burden does not shift from prosecution even if accused takes up any particular plea and fails in it. If there is any room for benefit of doubt in the case of prosecution, the same will go to accused and not to prosecution. Section 105 of the old Evidence Act came up for detailed examination in the case of *Safdar Ali v. The Crown* (PLD 1953 FC 93) and it was held that it is the duty of the Court to review entire evidence that has been produced by the prosecution and defense and after examination of the whole evidence if the Court is of the opinion that there is reasonable possibility that the defense put forward by the accused might be true, then such view would react on the whole prosecution case and accused would be entitled to benefit of doubt not as a matter of grace but as a right because prosecution has not proved its case beyond reasonable doubt". (bold added)

A similar view was taken in the case of *Raza V State* (PLD 2020 SC 523) which held as under in material part;

"15. In a criminal trial, it is now jurisprudentially settled that the proper course for the court is to first discuss and assess the prosecution evidence in order to arrive at the conclusion as to whether or not the prosecution has succeeded in proving the charge against the accused on the basis of the evidence. In case where the accused has taken a specific plea the court is to appreciate the prosecution evidence and the defence version in juxtaposition in order to arrive at a just conclusion." (bold added).

If anything the conduct of the complainant, as opposed to the appellant, raises eye brows in that she did not allow a post mortem of the deceased and when the deceased went into cardiac arrest she



refused to allow the medical staff to carry out CPU which lead to her daughter dying of cardio vascular failure (on account of her burns). If CPU had been given, as advised by the Dr's at the hospital, the deceased might have survived.

14. Thus, based on the above discussion, I find that the prosecution has NOT proved its case against the appellant beyond a reasonable doubt and by extending the appellant the benefit of the doubt for the reasons discussed above, which he is entitled to as a matter of right as opposed to concession, I hereby set aside the impugned judgment, allow the appeal and acquit the appellant of the charge. The appellant's bail bonds stand discharged and he is free to go.

15. The appeal stands disposed of in the above terms.