

## IN THE HIGH COURT OF SINDH AT KARACHI

**Present:**

Mr. Justice Mohammad Karim Khan Agha

### Criminal Jail Appeal No.916 of 2019

Appellant: Muhammad Zeeshan @ Shani S/o. Muhammad Mubeen through Ms. Sara Malkani, Advocate.

Respondent/State: Mr. Muhammad Iqbal Awan, Addl. Prosecutor General, Sindh.

Date of hearing: 29.02.2024.

Date of Judgment: 06.03.2024

### J U D G M E N T

Mohammad Karim Khan Agha, J.- Appellant Muhammad Zeeshan @ Shani S/o. Muhammad Mubeen has preferred this appeal against the impugned judgment dated 29.11.2019 passed by the Model Criminal Trial Court/Ist Additional District & Sessions Judge Malir, Karachi in Sessions Case No.216/2019 arising out of F.I.R. No.11/2019 u/s. 302 PPC registered at P.S. Malir City, Karachi whereby the appellant was convicted and sentenced to Imprisonment for life as Tazir under section 302(b) PPC along with fine of Rs.300,000/- (Rupees three lac only). In case of default in payment of fine the appellant was ordered to suffer S.I. for 06 months.

2. The brief facts of the prosecution case appearing in the FIR are that Muhammad Ibrahim S/o. Abdul Rahim recorded his statement under section 154 Cr.P.C. that I alongwith my family reside at House No.17A/Q4, Street No.24, Gandhi Nagar, Garden West, Karachi and I am electrician. My daughter named Sadia aged 26/27 years had solemnized marriage with one Zeeshan S/o. Muhammad Mobin about 06 years ago, she had 3 girls from said wedlock and was living at House No.594/75 Ammar Yasir, Phase-I, near Aamir General Store, Malir Karachi. Today on 13.01.2019 I was available at my home I was informed that my daughter Sadia had been killed by her husband Zeeshan S/o. Muhammad Mobin by attacking her with a knife and whose dead body is lying at mortuary of Jinnah Hospital. On such information, I alongwith my other family members went at Jinnah Hospital where I saw knife wound injuries

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received under her neck from left side and on ribs beneath of left armpit. At Jinnah Hospital Muhammad Zeeshan @ Shani and Mobin's mother Ishrat Jehan and brother Muhammad Ameen told that today on 13.01.2019 at about 0630 hours Sadia and her husband Muhammad Zeeshan were sleeping in their room. Sadia called me for help, on which I went in room of Sadia which was closed. On knocking of door and witnessed that Zeeshan has a knife in his hand and Sadia is lying on her bed in injured condition and blood is oozing from wounds of knife attack. Zeeshan having caused serious injuries to Sadia and fled from house. Thereafter, I my son Ameen and one Mohallah people were shifting away her in injured condition to Jinnah Hospital but she expired on the way. The police officer after getting conducted postmortem of dead body of my daughter handed over her body to me for funeral. Now I am getting recorded my statement to the Police Officer. My complaint is against accused Muhammad Zeeshan S/o. Muhammad Mobin who has seriously injured my daughter Sadia by sharp edged object attack and committed her murder on unknown reasons. I want legal action against him, hence the instant FIR was registered.

3. After completion of usual investigation charge was framed against the accused person in which he pleaded not guilty and claimed to be tried.

4. The prosecution in order to prove its case examined 07 witnesses and exhibited various documents and other items. The appellant in his statement under Section 342 Cr.P.C denied the allegations against him. However, he did not give evidence on oath or call any DW in support of his defence case.

5. After hearing the learned counsel for the parties and assessment of evidence available on record, learned trial Court vide judgment dated 29.11.2019 convicted and sentenced the appellant as stated above, hence the aforesaid appeal has been filed.

6. The facts of the case as well as evidence produced before the trial Court find an elaborate mention in the impugned judgment, therefore, the same are not reproduced here so as to avoid duplication and unnecessary repetition.

7. Learned counsel for the appellant has contended that the appellant is innocent and was not present at the time of the incident; even if he was not present he was not culpable for his acts as he was suffering from depression; that there are no eye witnesses to the murder and the circumstantial evidence is too weak to lead to a conviction and as such based on any or all of the above reasons

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the appellant should be acquitted of the charge or in the alternative his sentence reduced for a conviction under S.302 © PPC instead of S.302 (b) PPC. In support of her contentions she has placed reliance on the cases of Azmatullah v. The State (2014 SCMR 1178), Muhammad Ajmal v. The State (2022 SCMR 88) and Gul Zarin and others v. Kamal-ud-Din and others (2022 SCMR 1085).

8. Learned Additional Prosecutor General Sindh on behalf of the State, after going through the entire evidence of the prosecution witnesses as well as other record of the case has supported the impugned judgment. He mainly contended that any delay in lodging the FIR had been explained; that although there is no eye witness in this case it is a case of last seen evidence which legal requirements have been fully met which has been corroborated/supported by the recovery of a knife on the pointation of the appellant; that the murder took place in the house in which the accused was residing with the deceased; that the medical evidence supported the prosecution case; that it was not a case which on its own particular facts and circumstances fell within the offence under S.302 © PPC as opposed to S.302 (b) PPC and that there is no evidence to suggest that the appellant was unaware of his acts on account of depression or any other mental illness when he committed the murder and as such the prosecution had proved its case against the appellant beyond a reasonable doubt and the appeal be dismissed. In support of his contentions, he placed reliance on the cases of Arshad Mehmood v. The State (2005 SCMR 1524), Saeed Ahmed v. The State (2015 SCMR 710), Muhammad Imran v. The State (2021 SCMR 69), Khalid Mehmood v. The State (2017 SCMR 201), Mst. Safia Bano and another v. Home Department, Government of Punjab through Secretary and others (PLD 2021 Supreme Court 488), Muhammad Abid v. The State and another (PLD 2018 Supreme Court 813) and Fayyaz Ahmad v. The State (2017 SCMR 2026).

9. Based on my reassessment of the evidence of the PW's especially the medical evidence and other medical reports, recovery of blood on the bed sheet and knife at the crime scene I find that the prosecution has proved beyond a reasonable doubt that Mst.Sadia (the deceased) was murdered by knife on or about 13.01.2019 at about 0630am inside House No.594/95, Ammar Yasir Phase I, near Aamir general store Malir city Karachi.

10. The only question left before me is whether it was the appellant who murdered the deceased by causing her knife injuries at the said time, date and location?

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11. After my reassessment of the evidence I find that the prosecution has 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 and in accordance with the settled law for the following reasons;

- (a) That the FIR was lodged with promptitude after 7 hours of the incident. The slight delay in lodging the FIR was on account of the injured being taken to hospital for life saving treatment who died at the hospital where her father had been called who after her post mortem and receipt of the dead body for burial immediately lodged the FIR. As such any slight delay in lodging the FIR has been fully explained and is not fatal to the prosecution case. In this respect reliance is placed on the case of Muhammad Nadeem alias Deemi v. The State (2011 SCMR 872).
- (b) The appellant is named in the promptly lodged FIR with the specific role of murdering his wife/the deceased by knife.
- (c) Admittedly there is no eye witness to the murder.
- (d) The prosecutions case primarily revolves around the doctrine of last seen evidence i.e that according to a number of prosecution witnesses the deceased was last seen in the house with the appellant immediately before and after her murder which leads to the only possible inference that the appellant was the person who murdered the deceased.

The law on last seen evidence is well set out in the case of Fayyaz Ahmed V State (2017 SCMR 2026) where it was held as under;

*"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;

*“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 the last scene evidence is provided by PW 2 Muhammed Ameen the brother of the appellant and PW 3 Ishrat Begum the mother of the deceased. In his evidence PW 2 Muhammed Ameen states as under;

*“Accused Zeeshan is my real brother and deceased Sadia was my Bhabi and they used to live with us but our kitchen was separate. On the fateful day I along with my mother was sleeping in one*

room while Sadia and Zeeshan were in adjoining room. At about 0500 hours my mother woke up on the voice of Sadia which came from her room that "Ammi Bachao". My mother ran towards the room of Sadia and she started beating the door of room on which I also followed her. My mother was continuously asking as to "Kia Hutva", I also kicked the door but it did not open. Thereafter room was opened from inside and I saw that Sadia was bleeding from her neck and Zeeshan was available inside the room. My mother asked me to bring some Rickshaw. I arranged one Rickshaw and meanwhile one Shabbir also accompanied me and we both went to our house. When I returned Zeeshan was not there and Sadia had already collapsed. Then I along with my mother and Shabbir took Sadia and went to Khumaini Hospital. At Khumaini Hospital Sadia gave statement to lady doctor that my husband had injured me. The doctors referred her to Jinnah Hospital. However, Sadia died before reaching Jinnah Hospital. At Jinnah Hospital police arrived". During cross examination he also indicates that he saw the appellant with the knife in his hand which he threw away.

The evidence of PW 3 Ishrat Begum corroborates that of PW 2 Muhammed Ameen in all material respects and also sees Zeeshan with the knife in his hands.

Both the witnesses were close relatives of the appellant and knew him and thus there is no need for an identification parade. They had no ill will or enmity with the appellant and no reason to implicate him in a false case. They were both living in the same house as the appellant and as such were natural witnesses. They gave their S.161 Cr.PC statements within a day of the incident which were not materially improved upon during their evidence. They gave their evidence in a natural manner and were not dented during cross examination. In fact the honesty of these witnesses is shown in the fact that they both reveal that the appellant had been diagnosed with depression which might have been a potential defence for him. Thus I believe their evidence which I find to be trust worthy, reliable and confidence inspiring in respect of the last seen evidence.

In essence their evidence reveals that whilst living on the first floor of their house on the fateful night they heard the deceased crying for help. They both went to her room which was locked and when it was opened the appellant who was the husband of the deceased was standing with a knife in his hand whilst the deceased was lying on the bed with serious injuries and on seeing them the appellant threw away the knife and ran away whilst they arranged to take the deceased to hospital.

Based on the above discussion I find that their evidence meets all the requirements of last seen evidence.

Corroborative/supportive or other evidence to support the last seen evidence.

- (e) The complainant who is the father of the deceased gave his FIR with promptitude. Although it is based on hearsay it fully supports the evidence given by the last seen evidence witnesses discussed above.

- (f) The medial evidence corroborates/supports the evidence of the last seen witnesses evidence discussed above.
- (g) The appellant who was arrested the next day by the police lead the police to the murder weapon in the house on his pointation which he had thrown behind a box which was a place the police would not have know about being the knife which on chemical analysis was found to be blood stained with human blood. Likewise the deceased bed sheet and clothes.
- (h) That there was no ill will or enmity between the police and the appellant and as such the police had no reason to falsely implicate the appellant in this case, for instance, by foisting the knife on him. Under these circumstances it is settled by now that the evidence of police witnesses is as good as any other witness. In this respect reliance is placed on the case of *Mustaq Ahmed V The State* (2020 SCMR 474). Thus, I believe the evidence of the arresting officer and mashirs of arrest and recovery and duty officer who were not at all dented during cross examination.
- (i) The murder took place in the house where the appellant and his wife/deceased were living together but the only explanation the appellant gives for her death as can be seen through his cross examination is that his brother Ameen PW 2 committed the murder of the deceased as he wanted an illicit relationship with his wife whilst he the appellant was not present at the time of the murder. He however did not give evidence on oath, did not mention this in his S.342 Cr.PC statement and did not produce a single DW to prove his defence of absence at the time of the incident. In such like circumstances of murders in houses where husband and wife lived together murder convictions have been upheld. In this respect reliance is placed on the case of *Arshad Mehmood* (Supra). In the case of *Saeed Ahmed* (Supra) such lack of explanation by the appellant lightened the burden of proof on the prosecution.
- (j) Both the last seen evidence witnesses whose evidence was discussed above in their evidence stated that the deceased gave a dying declaration that it was the appellant who murdered her. There are no hard and fast rules concerning a dying declaration and in what format it needs to be and as such I give some, if little, corroborative weight to the dying declaration of the deceased. In this respect reliance is placed on the case of *Majeed v The State* (2010 SCMR 55).
- (k) That all the PW's are consistent in their evidence and even if there are some contradictions in their evidence I consider these 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 the cases of *Zakir Khan V State* (1995 SCMR 1793) *Khadim Hussain v. The State* (PLD 2010 Supreme Court 669) and *Maskeen Ullah and another versus The State and another* (2023 SCMR 1568). The evidence of the PW's provides a believable corroborated unbroken chain of events from the last seen witnesses going to the room of the appellant and his wife/deceased on hearing the wife/deceased cries for help to the appellant opening the bedroom door to the last seen witnesses seeing the appellant with a knife in his hand and his wife

/deceased lying seriously injured to the appellant running away and being arrested by the police the next day to the appellant pointing out the murder weapon to the police in a place which they would not have known about.

12. Thus for the reasons mentioned above I find that the prosecution has proved its case against the appellant beyond a reasonable doubt and up hold his conviction.

13. With regard to sentencing the usual sentence for murder is the death penalty however if some mitigating circumstances exist the death penalty can be reduced to life imprisonment as has already happened in this case.

14. Learned counsel for the appellant has sought to have the conviction altered to one under S.302 © PPC as this carries a lesser sentence than life imprisonment and has produced authorities to show that in cases of sudden provocation convictions under S.302 (b) PPC can be converted to convictions under S.302 (c) PPC. This is the correct legal position but as was held in the case of *Muhammed Abbas V State* (PLD 2020 SC 620) the onus lies on the prosecution to lead evidence and prove that it was a case of sudden provocation. In this case there is no evidence that the appellant murdered the deceased on account of sudden provocation. Rather the motive for the murder remains shrouded in mystery. As such the conviction under S.302 (b) PPC is maintained as there is no legal justification to convert it into a conviction under S.302 (c) PPC.

15. The learned counsel for the appellant also sought some reduction in sentence on account of the fact that the appellant was suffering from depression at the time of the incident. The evidence does reveal that the appellant was taking medicine for depression at the time of the incident however the evidence also shows that he was leading a totally normal life whilst taking his medication. In that he was going to work, mixing with the mohalla people, saying his prayers and happily enjoying family life. In fact if the murder had been committed on account of depression then logically having murdered his wife when he opened his bedroom door to his mother and brother since he still had the knife in his hand he would also have murdered them on account of his depression. However he did not do so, instead he threw the knife away and ran away from the crime scene which shows that this was a single targeted attack only against his wife and not on account of any depressive illness. He did not even raise the defence of ?

depression at the trial where he cross examined with a different defence that he was not present and his brother committed the crime. Furthermore, in similar circumstances it was held in the case of *Muhammed Uzlar Jamal V State* (2020 SCMR 1862) that even if a person was suffering from depression this could not be used as a reason to deprive the victims of justice.

16. Thus, the conviction and sentence of the appellant is upheld and the appeal is dismissed.