IN THE HIGH COURT OF SINDH AT KARACHI

Present:

Mr. Justice Mohammad Karim Khan Agha

CRIMINAL APPEAL NO.156 OF 2020

Appellant:	Saeed Muhammad S/o Deen Muhammad through Mr. Khalid Hussain Chandio, Advocate.
Complainant:	Kashif through Mr. Muddasir Iqbal, Advocate.
Respondent/State:	Mr. Muhammad Iqbal Awan, Addl. Prosecutor General, Sindh.
Date of hearing:	02.04.2024
Date of announcement:	15.04.2024

JUDGMENT

Mohammad Karim Khan Agha, J.- Appellant Saeed Muhammad S/o Deen Muhammad has preferred this appeal against the impugned judgment dated 16.01.2020 passed by the Model Criminal Trial Court 1st Additional Sessions Judge, Karachi South in Sessions Case No.1321/2016 under F.I.R. No.244/2016 u/s. 302 PPC registered at P.S. Aram Bagh, Karachi South; whereby the appellant was convicted and sentenced to undergo imprisonment for life and to pay compensation of Rs.500,000/- to the legal heirs of deceased Shahid as provided under Section 544-A Cr.P.C. In case of default of such compensation, the appellant shall suffer six months more S.I. However, benefit of section 382-B Cr.P.C. is extended.

2. The brief facts of the prosecution case are that complainant Kashif registered FIR for murder of his brother on 23.09.2016 at mortuary of Civil Hospital, Karachi. The complainant stated that his elder brother Shahid got a shop on rent on 5th Floor of Taj Paper Market about two months ago, with whom one Saeed Muhammad was working as "Shagird". The complainant further stated that on that day i.e. 23.09.2016 at about 1430 hours Muhammad Aasim informed him on phone that one Usman informed him (Aasim) at about 1400 hours **that one bearded man committed murder of his brother,** while attacking upon him with scissor, therefore, he (complainant) rushed to Civil Hospital

Karachi, where he saw dead body of his brother, hence, **he alleged against Saeed Muhammad son of Deen Muhammad for committing murder of his deceased brother.**

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

4. In order to prove its case the prosecution examined 08 witnesses who exhibited various documents and other items in support of the prosecution case where after the prosecution closed its side. The appellant/accused recorded his statement under section 342 Cr.P.C.where by he denied the prosecution allegations. However, the appellant neither examined himself on oath nor led any evidence in his defence.

5. After hearing the learned counsel for the parties and assessment of evidence available on record, learned trial Court vide judgment dated 16.01.2020 convicted and sentenced the appellant as stated above, hence this appeal has been filed by the appellant 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, therefore, the same are not reproduced here so as to avoid duplication and unnecessary repetition.

7. Learned counsel for the appellant contended that impugned judgment is result of misreading and non-reading of material available on record; that the learned trial court has failed to consider that a single reasonable doubt in the case is sufficient to bring the golden rule of benefit of doubt into operation; that there are material contradictions in the evidence of prosecution witnesses which makes the case highly doubtful and the evidence of the sole eye witness is unreliable and that for all or 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 placed reliance on the record.

8. Learned APG and learned counsel for the complainant fully supported the impugned judgment and contended that the prosecution had proved its case beyond a reasonable doubt against the appellant and as such the appeal be dismissed. In support of their contentions they placed reliance on the record.

9. I have heard the learned counsel for the appellant as well as learned APG and learned counsel for the complainant and have also perused the material available on record.

10. Based on my reassessment of the evidence of the PW's especially the medical evidence and other medical reports, recovery of blood stained scissors and blood at the crime scene I find that the prosecution has proved beyond a reasonable doubt that Shahid (the deceased) was murdered by a sharp cutting instrument on or about 23.09.2016 at about 2pm at Shahrah-e-Liaquat, Taj Paper Centre, 5th Floor, Karachi.

11. The only question left before me is whether it was the appellant who murdered the deceased by with a sharp cutting instrument at the said time, date and location?

12. 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 for the following reasons;

(a) Admittedly the S.154 Cr.PC Statement of the complainant was given with promptitude whilst he was at the hospital which later became the FIR so there is no question of any delay in lodging the FIR. What does raise eye brows is that the appellant is named in the FIR with the specific role of murdering the deceased by causing him scissor injuries when at that time nobody could have known the identity of the murderer was and indeed as we will see from the evidence never could have known with any degree of certainty. Surprisingly, during his cross examination the complainant states that he did not nominate the appellant on account of suspicion which in fact seems to be the case as the complainant was not an eye witness and nobody at the time of recording his S.154 Cr.PC statement had informed him that the accused had committed the murder. He had only been informed that two bearded men were fighting and as result his brother/deceased had died. It seems that the complainant proceeded on the assumption that because the accused worked with the deceased as his apprentice he committed the murder despite no ill will or enmity coming on record between the deceased and the accused and no motive being alleged. In any event the investigation proceeded with its sole focus on the appellant who was arrested a day after the incident and from whom no recovery was made and no confession was made either before the police or the magistrate.

(b) I find that the prosecution's case rests on the evidence of the sole eye witnesses to the murder of the deceased and whether I believe his evidence whose evidence I shall consider in detail below;

(i) **Eye witness PW 3 Muhammed Usman. He is an independent witness.** According to his evidence the incident took place on 23.09.2016 at about 2/2.30pm when he was available on the 5th floor of the Taj Paper centre where he used to do screen printing work. He heard hue and cries and went to where the noise was coming from. **He saw one person with beard giving scissor blows to another person with beard** who was badly injured and lying on the ground in a pool of blood. He went to the ground floor and collected people and when he returned to the place of incident he found the Karkhana of garments locked. He called Asim who was a relative of the deceased who came with the police who broke open the lock and they saw the injured lying.

This eye witness was an independent witness who had no enmity or ill will with the appellant and as such had no reason to implicate him in a false case and was also not chance witness as he worked in the same building and gave his S.161 Cr.PC eye witness statement within a day. He gave his evidence in a straight forward manner and as such I believe his evidence as regards him witnessing the incident.

The next issue is whether I believe that he correctly identified the appellant as the person who murdered the deceased. Admittedly, it was a day light incident so seeing the appellant ought not to have been an issue however he admitted during his cross examination, *"that he did not know the deceased and the accused prior to the incident"*.In his S.161 Cr.PC statement he gave no hulia or description of the appellant as the person who he saw attacking the deceased with scissors. He only knew that he had a beard which would have in part covered his face. He gave no sketch of the appellant to the police immediately after the incident. It has not even come in evidence whether the appellant had a beard or not at the time of the incident.The appellant was not arrested on the spot but a day after the incident because he was nominated in the FIR simply it appears because he worked with the deceased. Under the circumstances narrated above it was **imperative** for their to have been an identification parade to be sure that it was in fact the appellant who this eye witness saw murdering the deceased with **scissors however no such identification parade was ever held.**

In this respect reliance is placed on the case of **Javed Khan V State** (2017 SCMR 524) concerning the necessity for an early hulia/description of an accused by an eye witness before an identification parade and the need to strictly follow the rules governing identification parades where it was held as under at P.528 to 530:

"7. We have heard the learned counsel and gone through the record. The prosecution case rests on the positive identification proceedings and the Forensic Science Laboratory report which

states that the bullet casing sent to it (which was stated to have been picked up from the crime scene) was fired from the same pistol (which was recovered from Raees Khan in another case). We therefore proceed to consider both these aspects of the case. As regards the identification proceedings and their context there is a long line of precedents stating that identification proceedings must be carefully conducted. In Ramzan v Emperor (AIR 1929 Sid 149) Perceval, JC, writing for the Judicial Commissioner's Court (the precursor of the High Court of Sindh) held that, "The recognition of a dacoit or other offender by a person who has not previously seen him is, I think, a form of evidence, which has always to be taken with a considerable amount of caution, because mistakes are always possible in such cases" (page 149, column 2). In Alim v. State (PLD 1967 SC 307) Cornelius CJ, who had delivered the judgment of this Court, with regard to the matter of identification parades held, that, "Their [witnesses] opportunities for observation of the culprit were extremely limited. They had never seen him before. They had picked out the assailant at the identification parades, but there is a clear possibility arising out of their statements that they were assisted to do so by being shown the accused person earlier" (page 313E). In Lal Pasand v. State (PLD 1981 SC 142) Dorab Patel J, who had delivered the judgment of this Court, held that, if a witness had not given a description of the assailant in his statement to the Police and identification took place four or five months after the murder it would, "react against the entire prosecution case" (page 145C). In a more recent judgment of this Court, Imran Ashraf v. State (2001 SCMR 424), which was authored by Iftikhar Muhammad Chaudhry J, this Court held that, it must be ensured that the identifying witnesses must "not see the accused after the commission of the crime till the identification parade is held immediately after the arrest of the accused persons as early as possible" (page 485P).

8. The Complainant (PW-5) had not mentioned any features of the assailants either in the FIR or in his statement recorded under section 161, Cr.P.C. therefore there was no benchmark against which to test whether the appellants, who he had identified after over a year of the crime, and who he had fleetingly seen, were in fact the actual culprits. Neither of the two Magistrates had certified that in the identification proceedings the other persons, amongst whom the appellants were placed, were of similar age, height, built and colouring. The main object of identification proceedings is to enable a witness to properly identify a person involved in a crime and to exclude the possibility of a witness simply confirming a faint recollection or impression, that is, of an old, young, tall, short, fat, thin, dark or fair suspect....

9. As regards the identification of the appellants before the trial court by Nasir Mehboob (PW-5), Subedar Mehmood Ahmed Khan (PW-6) AND Idress Muhammad (PW-7) that too will not assist the Prosecution because these witnesses had a number of opportunities to see them before their statements were recorded. In State v. Farman (PLD 1985 SC 1), the majority judgment of which was authored by Ajmal Mian J, the learned judge had held that

an identification parade was necessary when the witness only had a fleeting glimpse of an accused who was a stranger as compared to an accused who the witness had previously met a number of times (page 25V). The same principle was followed in the unanimous judgment of this Court, delivered by Nasir Aslam Zahid J, in the case of Muneer Ahmad v State (1998 SCMR 752), in which case the abductee had remained with the abductors for some time and on several occasions had seen their faces. In the present type of case the culprits were required to be identified through proper identification proceedings, however, the manner in which the identification proceedings were conducted raise serious doubts (as noted above) on the credibility of the process. The identification of the appellants in court by eye-witnesses who had seen the culprits fleetingly once would be inconsequential." (bold added)

The case of **Mian Sohail Ahmed V State** (2019 SCMR 956) has also emphasized the care and caution which must be taken by the courts in ensuring that an unknown accused is correctly identified.

As such for the reasons mentioned above I find that I cannot place reliance on this eye witness as to the correct identification of the person who murdered the deceased being the appellant.

Other evidence and considerations

(c) There was no other eye witness to the incident.

(d) No recovery was made from the appellant after his arrest.

(e) The appellant had no motive to murder the appellant.

(f) That although the medical evidence supports the prosecution case it can only identify the nature of the injury, the seat of the injury and type of weapon used but is of no assistance in identifying the perpetrator.

(g) It is irrelevant that the appellant after his arrest took the police to the scene of the crime as the police already knew where the crime was committed.

(h) The appellant does not appear to have given a confession before the police and even if he had done so this would have been inadmissible in evidence. If the appellant did give such confession to the police then it begs the question as to why the appellant was not produced before the magistrate in order to record his confession.

(i) The appellant admits in his S.342 Cr.PC statement that he did work with the deceased at the shop but on that day he was on leave and was playing cricket whilst the appellant was to attend a wedding. The wedding and the working together is supportive by other PW's however the prosecution has not been able to prove beyond a reasonable doubt that the appellant was present at the shop at the

time of the murder. The prosecutions evidence ultimately boils down to the assumption that because the appellant worked with the deceased as his apprentice he must have killed him but the prosecution have failed to produce sufficient evidence to show that it was actually the appellant who murdered the accused. Admittedly, the scissors and iron which were recovered at the crime scene would have been at the garment factory any way for use in such like work and could have been used by anyone to murder the appellant.

13. 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 shall be released unless he is wanted in any other custody case.

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