IN THE HIGH COURT OF SINDH AT KARACHI

Crl. Jail Appeal No. 587 of 2018
&
Crl. Jail Appeal No. 04 of 2019

Appellant	:	Mst. Shabana Kausar through M/s. Mehmood-ul-Hassan and Mumtaz Chandio, Advocates (in Cr.J.A.No. 587 of 2018)
Appellant	:	Habib-ur-Rehman through M/s. Mehmood-ul-Hassan and Mumtaz Chandio, Advocates (in Cr.J.A.No.04 of 2019)
The State	:	The State through Talib Ali Memon, Assistant. P.G
Date of hearing	:	04.05.2021
Date of decision	:	04.05.2021

JUDGMENT

SALAHUDDIN PANHWAR J.- Appellants/accused above named have challenged the impugned judgment dated 04.10.2018 passed by learned 1V- Additional Sessions Judge, Malir Karachi in Sessions Case No.105 of 2015 arising out of FIR No.35/2015, registered under sections 302/34, PPC at PS Shah Latif Town Karachi, whereby, after full-dressed trial the appellants were convicted under Section 302 (b) PPC as Tazir and sentenced to Life Imprisonment each. They were also directed to pay compensation of Rs.100,000/- (Rupees one hundred Thousand Only) each in terms of section 544-A Cr.P.C to the legal heirs of deceased Mohammad Asif and in case of default, they were ordered to suffer R.I. for six months more. Benefit of section 382-B, Cr.P.C was also extended to the appellants.

2. Relevant facts of the prosecution case are that on 19.01.2015 at 0530 hours, statement under section 154 Cr.P.C of complainant Munir Ahmed was recorded by ASI Abdul Kabeer of police station Shah Latif Town at Jinnah Hospital, Karachi, wherein the complainant has stated that he used to run Barber shop and his brother Asif alias Bashir was also working

with him in the said shop. On 18.01.2015, he and his brother were present at the shop, at night time after receiving a phone call, his brother left the shop. At 11:00 p.m., the complainant after closing the shop came at home where he came to know that his brother Asif did not reach. The complainant dialed number of his brother Asif, but it remained unattended, therefore, complainant started searching his brother and reached at the house of one Habib-ur-Rehman, who along with his family was residing in a house bearing No.LS-53-54, situated at Sector 17-A, Shah Latif Town. Complainant knocked the door of the house, but nobody responded, hence he returned back to home and after taking his mother and Bhabhi again reached at the house of Habib-ur-Rehman, knocked the door, but again it was not responded, hence they made cries, which attracted the Mohalla people, then Shabana Kausar wife of Habib-ur-Rehman opened the door, they entered into the house and saw Habib-ur-Rehman and one Ashiq Ali were standing in a room and his brother Asif was lying on the floor and blood was oozing from his mouth. Complainant noticed that the vein of his neck was functioning slowly, hence he informed Shafi Bangash on his cell phone and with the help of other people the complainant took his brother to Jinnah Hospital, where doctor declared him as dead. Postmortem examination of the deceased was conducted and the dead body was handed over to the complainant, thereafter, the complainant appeared at Police Station and lodged the FIR.

3. ASI Abdul Kabeer of police station Shah Latif Town inspected the dead body of deceased, prepared such memo and inquest report. He also arrested the accused persons in presence of mashirs. Investigation was entrusted to SIP Syed Zahid Hussain Shah who visited the place of occurrence on the pointation of PW Shafiullah Bangash and prepared such memo. He also recorded statements of prosecution witnesses u/s 161 Cr.P.C, sent blood stained clothes of deceased to the chemical examiner and on completion of investigation, submitted the charge sheet before the competent Court of law.

4. Charge was framed against the accused, to which accused did not plead guilty and claimed to be tried.

5. During trial, compromise arrived at between accused Aashiq Ali and the complainant party and such application was submitted which was duly allowed and he has been acquitted by the trial court under Section 345 (6) Cr.P.C vide order dated 19.04.2017.

6. In order to prove its case against the appellants, prosecution examined PW-1 complainant Muhammad Munir at Ex.No.3, who produced inquest report, mashirnama of inspection of dead body, statement under section 154 Cr.P.C, receipt for handing over the dead body and FIR respectively at Ex.No.3/A to Ex.No.3/E. PW-2 Muhammad Iftikhar and PW-3 Abdul Razzaq were examined respectively at Ex.No.4 & Ex.No.5. Evidence of PW-4 Muhammad Yousuf was recorded at Ex.No.6, who produced memo of arrest & recovery of sleeper and mobile phone and memo of arrest of accused persons respectively at Ex.No.6/A & Ex.No.6/B. PW-5 Muhammad Ishaq was examined at Ex.No.7. PW Kamran was given-up by the learned ADPP vide his statement at Ex.No.8. PW-6 Muhammad Tahir was examined at Ex.No.9, who produced memo of site inspection at Ex.No.9/A. PW Tanveer Ahmed was given-up by the learned ADPP vide his statement at Ex.No.10. Evidence of PW-7 MLO Dr. Aijaz Ahmed was recorded at Ex.No.11, who produced memorandum of Post Mortem Report No. 106/15 dated: 19.01.2015 and medical certificate of cause of death respectively at Ex.No.11/A & Ex.No.11/B. PW-8 SIP Syed Zahid Hussain Shah (I.O.) was examined at Ex.No.12, who produced departure entry No.22, photographs of place of incident and deceased, application addressed to Chemical Examiner, report of Chemical Examiner, application addressed to Mukhtiarkar Ibrahim Hyderi and applications addressed to the concerned Magistrate for recording 164 Cr.P.C. statements of accused respectively at Ex.No.12/A to Ex.No.12/K. Evidence of PW-9 ASI Muhammad Akbar was recorded at Ex.No.13, who produced departure entry 52 and arrival entry No. 53 respectively at Ex. No. 13/A & Ex.No. 13/B. PW-10 ASI Abdul Kabeer was examined at Ex. No.14, who produced application addressed to MLO Jinnah Hospital, Karachi and entry No.55 respectively at Ex.No.14/A & Ex.No.14/B. Thereafter, prosecution side was closed vide statement at Ex.15.

7. Statements of accused under section 342, Cr.P.C. were recorded at Ex. 16 & 17 respectively, wherein they denied the allegations leveled against them by the prosecution and pleaded their innocence. They neither examined themselves on Oath as required under Section 340(2) Cr.P.C nor adduced any evidence in their defence.

8. Thereafter, learned trial Court after hearing the learned counsel for respective parties, convicted and sentenced appellants as mentioned above. Appellants being aggrieved and dissatisfied with the judgment have filed the aforesaid jail appeals, which are being disposed of through this single judgment.

9. Learned counsel for the appellants, *inter alia*, has contended that it was an un-witnessed occurrence; that the witness produced in order to prove evidence of last seen has made dishonest improvements; that the case of the prosecution is fraught with material contradictions; that the FIR of the alleged incident was lodged after the delay of 06 hours for which no plausible explanation has been furnished by the complainant; that there are dishonest improvements made by the complainant and other witness in their evidence which have not been taken care by the learned trial Court; that there is conflict between ocular and medical evidence; that no blood stained earth or blanket was produced before the trial Court which also creates doubt in the prosecution case; that the case of the prosecution is doubtful and benefit of doubt must be extended in favour of the accused, therefore, it is prayed that appellants may be acquitted.

10. Conversely, learned Assistant Prosecutor General Sindh has vehemently opposed the contentions raised by the learned counsel for the appellant with the averments that the prosecution through leading cogent and confidence inspiring evidence proved its case against the appellant; that admittedly, it was an unseen occurrence but PW-05 Muhammad Ishaq is the witness of last seen to whom deceased informed that he was going to the house of appellants; that death of deceased was done to death by strangulating him and such fact has also been proved through postmortem, according to which the cause of death was by asphyxia due

to strangulation; that the learned trial court while appreciating the prosecution evidence in its true perspective was well justified in convicting/sentencing the appellants, hence he prayed for dismissal of appeal.

11. Heard and perused record.

12. *Prima facie,* the instant case is based on circumstantial evidence as there is no direct evidence regarding commission of the murder by the present appellants in collusion with acquitted accused, so was rightly found by the learned trial Court while discussing the evidences in following words:-

> "*After hearing arguments advanced by the learned counsel for the parties, I have carefully perused the evidence available on record.* **The case of prosecution entirely rests upon the circumstantial and medical evidence**….

13. Since, the case is one of *circumstantial evidences* hence it is necessary to refer the settled principle of law for appreciation of such evidences (*circumstantial evidences)* which, chalked out in the case of *Azeem Khan & another v. Mujahid Khan & Ors* 2016 SCMR 274 as:-

> "In cases of circumstantial evidence, the Courts are to take extraordinary care and caution before relying on the same…… To justify the inference of guilt of an accused person, the circumstantial evidence must 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.

14. Though the allegation of the complainant has been that the deceased was found near to death inside the house of the present appellants wherefrom he (deceased) was removed for treatment. First statement of the complainant was recorded on 19.01.2015 @ 0530 hours at ***mortuary of Jinnah Hospital, Karachi*** U/s 154 Cr.PC wherein the complainant stated as:-

> "I reside at above address and running Hair Dresser shop in the name & style of Nadeem Hair Dresser in sector 17/A, Shah Latif Town near Aman Masjid. On 18.11.2015, in night hours, I and my brother Asif alias Bashir s/o Wali Muhammad aged about 19/20 years who also works with me at shop were present at shop. In the meantime my brother received a phone call on his cell number and after few moments, my brother asked me that he has to go for some work and will come back soon. However, after closing shop at 11:00 PM, I arrived at home but found my brother Asif was not available at home, so I made call on my brother's cell number 0308-4414059 but he did not receive a call. I became worry and **while enquiring, reached at the house of Habib-Ur-Rehman s/o Abdul Hameed** who accompanied with his wife & children resides at 3rd floor in House NO.LS-53-54, Sector 17/A at Shah Latif Town on rented premises and knocked the door but nobody opened. **Then I came back at my home and while accompanying to my mother & my brother's wife, again reached at the door of Habib-Ur-Rehman** and knocked the door but nobody opened hence started hue & cry, upon which Mohallah people gathered then Mst. Shabana Kousar wife of Habib-ur-Rehman opened the door very scarcely; thus found that Habib-Ur-Rehman S/o Abdul Hameed and one another person whose name later came to known as Ashique Ali s/o Falak Sher were standing inside a room while my brother Asif was lying on floor and blood had oozed from his mouth. However, on checking to my brother and found his neck vein was pulsing slowly, I informed to Shafi Bangash on phone…"

15. *Prima facie,* in said statement the complainant does not give reference of source through which he *exactly* reached the door of the accused persons. The complainant *even* while recording his FIR on same date i.e 19.01.2015 @ **0715 hours** reiterated the same facts wherein the source or reason for direct reaching door of the accused persons is missing. The complainant, however, while giving his evidence *surprisingly* claimed that it was ***Muhammad Ishaque Paracha*** who had told him that:

> "..I reached Utility Store of Mangal Bazar where one person namely Muhammad Ishaq Paracha met with me and he informed that my brother Asif was going in the house No.LS-53/54 which was situated at the Upper side of Utility Store…"

16. This could be nothing but a *pure* improvement which, *too,* with intention to justify *surprising* direct approach, particularly when per admission of the complainant *himself* :-

> "It is fact that my deceased brother did not complaint against the present accused regarding any dispute."

Not only the said complainant but PW-5 Muhammad Ishaq (brother of deceased) also admitted in his cross-examination as:-

> "Prior to this incident, I was not in knowledge about any transaction between the deceased and accused Habib-ur-Rehman. It is fact that I did not see anytime the accused Habib-ur-Rehman and deceased altoghether. .."

Not only this, but even the Investigating Officer (PW SIP Syed Zahid Hussain) admitted in his cross-examination as:-

> "It is fact that there was no any dispute between deceased and accused party prior to incident."

In absence of any previous relations or *enmity* within knowledge of the real brothers, the act of going of the deceased into house of the accused persons was also requiring an *explanation,* particularly when per the complainant *himself* and other witnesses admitted as:-

Complainant:-

> "..It is fact that **accused was not seen in injured position at their house** but the eyes of **accused Shabana Kausar were seen as red"**

PW-3 Abdul Razzaq

> "The blood was oozing from the nose and mouth from the dead body of my brother **and we have also noted the nail injuries on the face of deceased."**

17. *Normally,* there appears no justification for lady to cause nail-injury on face of any person unless she is alone to defend her or may be attacking but when two **mal persons** (convict Habib-ur-Rehman and accused) were there then there appears no reason for such move. This was also making the prosecution story doubtful. It is also worth adding that on a small issue of money, as was lately introduced by complainant party (during trial), it is not worth believing that accused persons (parents) would go to commit the murder when admittedly their small children were found available in the house, so is evident from the mashirnama of arrest of the accused which shows that:-

> "… While, fresh injury mark is found on the forehead of accused Habib-Ur-Rehman which suffered due to public beatings, besides that children of accused Habib-Ur-Rehman & lady accused Shabana Kausar namely Munib aged about 06 years, Mujeeb-Ur-Rehman aged about 1 ½ years & Faizan aged about 04 months were taken into safe custody…"

This makes it quite evident and patent that the complainant *did* not come forward with whole truth. At this juncture, a referral to relevant portion of PW-9 ASI Muhammad Akbar which reads as:-

> "On 18.01.2015 I was posted at P.S Shah Latif Town. My duty timings were from 2000 hrs to 0800 hrs. On such date at 0210 hrs I received a telephonic call from Shafi Bangash **who informed me that a quarrel has been occurred at Block 17/A, near Mangal Bazar, House No.LS-53/54 wherein a person had seriously injured."**

18. The above makes it quite evident that truth was not so as was introduced by the complainant party and this has been the reason that PW-Shafi Bangash was not examined by the prosecution. It is legal position that what does not fit in the circumstances can't be believed. Reference is made to case of *Muhammad Tufail v. The State* 2013 SCMR 768 wherein it is held as:-

> "7. The abduction for ransom is, no , a very serious charge. There are many actors on, off and behind the scene . In any case the actor who is already known and takes caution and pre-caution to conceal his identity. Else he has to face the scourage of charge after release of the abductee on payment of ransom. **The story that the appellant identified the abductee so called as the person desired to be abducted neither agrees to truth, nor conforms to common human experience and observations nor fits in with the surrounding circumstances**. Who paid the amount of ransom, who received it, what evinced and who mentioned the complicity of the appellant in the crime are the questions which find no answers from the evidence on the record. The complainant or for that matter any other person, may have suspicion as to the complicity of the appellant in the crime but suspicion however strong it may be cannot take the place of truth.

Because the true test of examining the credibility of a witness is not his relation but whether the evidence of a witness is probable and consistent

with the circumstances of the case or not?. Guidance is taken from the case of *Lal Khan v. State* 2006 SCMR 1846 wherein at Rel. P-1854 it is held as:-

> … The mere fact that a witness is closely related to the accused or deceased or he is not related to either party, is not a sole criteria to judge his independence or to accept or reject his testimony rather the true test is whether the evidence of a witness is probable and consistent with the circumstances of the case or not.

19. Be that as it may, needless to add that any improvement or omission, if attempted, to bring the case of prosecution in line would render improvement and omission as nothing short of ***dishonest*** and ***deliberate.*** This would render such witness as not trustworthy. Reliance is made on the case of *Sardar Bibi & another v. Munir Ahmed & Ors* 2017 SCMR 344 (plaucitum G) which reads as:-

> "2…. According to doctor , there was only one fire-arm entry wound on the chest of the deceased Zafar Iqbal. In order to meet this situation, witnesses for the first time , during trial made omission and did not allege that the fire shot of Sultan hit at the chest of Zafar Iqbal, deceased. So the improvements and omissions were made by the witnesses in order to bring the case of prosecution in line with the medical evidence. Such dishonest and deliberate improvement and omission made them unreliable and they are not trustworthy witnesses. **It is held in the case of *Amir Zaman v. Mehboob & Ors* (1985 SCMR 685) that testimony of witnesses containing material improvements are not believable and trustworthy**. Likewise in *Akhtar Ali's case (2008 SCMR 6)* it was held that **when a witness made improvement dishonestly to strengthen the prosecution's case then his credibility becomes doubtful on the well-known principle of criminal jurisprudence that improvement once found deliberate and dishonest, caste serious on the veracity of such witness**. In *Khalid Javed's case (2003 SCMR 149)* such witness who improved his version during the trial was found wholly unreliable. Further reference in this respect may be made to the cases of *Muhammad Shafique Ahmed v. The State (PLD 1981 SC 472), Syed Saeed Muhammad Shah and another v. The State 1993 SCMR 550) and Muhamamd Saleem v. Muhammad Azam (2011 SCMR 474).*

20. Be that as it may, the conduct of the complainant as well the accused persons remained quite *surprisingly* which logically is not expected from any prudent *mind.* It is quite illogical and unbelievable that the complainant, having firm belief, first knocked the door of the accused persons when the door was not opened then he (complainant) went to his

own house so as to bring his mother and sister-in-law (*Bhabhi)* yet the accused persons remained waiting for return of the complainant and made no effort for their escape as well to remove the deceased. This, being not logical and worth believing, was always begging for an explanation from the prosecution but it is evident on record that no such explanation was ever produced / submitted by the prosecution. The benefit thereof always tilts the scale in favour of the accused. I am guided in such view with the case of *Haq Nawaz & others v. State & others* 2018 SCMR 95 wherein it is held as:-

> "5. … It does not appeal to a prudent mind that the appellants and their co-accused would allow a person to hear out the alleged conspiracy of committing the murder of Mst. Nooran and be a witness against them. If at all it is admitted that Mst. Husina Mai was allowed to hear out the conspiracy being hatched by the appellants and their co-accused, then as per her own stance (as reproduced above), after preparing meal for the appellants and their co-accused by 8.00 p.m, she slept by 8/9.00 p.m, how come she came to know of the alleged conspiracy being hatched by the appellants and their co-accused between 9.00 p.m to 12.00 midnight when she was already sleeping.
>
> "6. …. It is hard to believe why the appellants and their co-accused would let Mst. Husin Bibi (PW5) go when she not only herd out the conspiracy but also witnessed the crime. Another important aspect of the matter is that after the alleged occurrence, appellant No.2 Hayat took her to his parent's house where she remained for a period of 14 days but she did not tell anybody about the occurrence, that thereafter she was taken by her father to his house at Bhai Phairoo but even during her travel with her father or during her stay at her parent's house, she did not disclose the real facts of the case to anyone. She admitted before the trial Court that her statement was recorded by the police after about two months of the occurrence.

21. I am also to add here that per complainant *himself* as well other witnesses the deceased was removed from the house of the accused persons by complainant on *motorcycle* and in the way the ambulance had come. It is stated by complainant in his examination-in-chief as:-

> "… I and Iftikhar had taken our injured brother on motorcycle upto the curve of Bhains Colony where ambulance reached then he was shifted to Jinnah Hospital, Karachi. Police also reached there…

22. The PW-2 Muhammad Iftikhar stated in his examination-in-chief as:-

> "…I and complainant had taken the body of Muhammad Asif on our shoulders and brought on the earth where we boarded in the motorcycle. We reached at the curve of Shah Latif Town where ambulance was available. We went to Jinnah Hospital where doctors examined…."

while PW-10 ASI Abdul Kabeer negated whole such claimed story while deposing in his examination-in-chief as:-

> "On 18.01.2015 I was posted at P.S Shah Latif Town. My duty timings were from 2000 hrs to 0800 hrs. On such date I along with subordinate were busy in mobile for patrolling purpose. During patrolling at midnight I got information that peoples were gathered at House No.LS-53/54. Another police mobile headed by ASI Muhammad Akbar was also on patrolling. On this information we proceeded to such place where on 34d floor a person was lying on the earth. Blood was oozing from his mouth and nose. One Munir Ahmed who was present there and stated that the injured namely Muhammad Asif was his brother. **The ambulance was called by complainant and us. After coming of the ambulance, the injured was shifted to Jinnah Hospital.** Accused were present in the home and they were taken into custody by ASI Muhammad Akbar. I went to the Jinnah Hospital. I had given the letter to MLO for medical certificate of the injured. .."

If the versions of the complainant's party and that of said official witnesses are examined by putting them in *juxta-position* it becomes evident that story, so narrated while recording 154 Cr.PC statement, was not the complete and full truth; nor the same fits in totality of circumstances, hence the same brings cloud over the prosecution story. Needless to add here that benefit of *even* a single reasonable circumstance was / is to be extended in favuor of the accused. The reference may be made to the case of *Najaf Ali Shah v. State* 2021 SCMR 736.

23. Be that as it may, it is also worth adding here that place of incident is within house of the accused/convict where the deceased was not brought by them but he (deceased) *himself* came there therefore, motive was to be established which was never *even* attempted by complainant party. It is also added that mere availability of deceased within house of accused persons can't be sufficient to hold them guilty unless the prosecution, *otherwise,* establishes its allegations which, I am to say, per

available material was full of dents. Guidance is taken from the case of *Abdul Majeed v. The State* (2011 SCMR 941) wherein it is held as:-

> 7. The basic principle of criminal law is that it is the burden of the prosecution to prove its case against the accused beyond reasonable. This burden remains throughout and does not shift to the accused, who is only burdened to prove a defence plea, if he takes one. The strangulation to death of the appellant's wife in his house may be a circumstance to be taken into account along with the other prosecution evidence. **However, this by itself would not be sufficient to establish the appellant's guilt in the absence of any other evidence of the prosecution connecting him to the crime**. ..

I am to further add that per PW-3 Abdur Razzaq there were found **two mobile phones of deceased ,** so it appears from his examination-in-chief as:-

> "… My wife and mother had sit on the bed lying in the room and **mobile of my deceased brother was found from the little cupboard adjacent to the bed.** My younger brother Tanveer walso accompanied with me and we went to another room where I opened the door of washroom and saw accused Aashiq and Habib-ur-Rehman. **Another mobile phone of my brother Asif was in the hand of accused Habib-ur-Rehman.**

However, as per evidence of PW ASI Muhammad Akbar only **one mobile phone** was recovered from the place of incident. The relevant portion of cross-examination of said PW reads as:-

> ".. I recovered one chappal with name of 'Plazza Company' and **one mobile from the place of incident.** It is fact that recovered articles were not sealed on spot. "

24. The PW Shafi Bangash was not only material witness because he (Shafi Bangash) was allegedly *first* called by complainant at place of incident and it was he (Shafi Bangash) who had called the police. Not only this, but he was first mashir of number of place of incident which affirms his presence but he (Shafi Bangash) was *surprisingly* was not examined. With-holding / non-examination of such material witness also goes to support legal presumption that had he been examined he would not have supported the prosecution *rather* would have supported to what was told

by ASI Muhammad Akbar that ***'there had occurred quarrel'.*** Such presumption, needless to add, is permissible within meaning of Article 129(g) of Qanun-e-Shahadat Order, 1984.

25. The above discussion makes it clear that case of prosecution was never *safely* established beyond reasonable doubt therefore, the accused persons were / are entitled for benefit of doubt which, *too,* not as matter of grace but right. Accordingly, the appeal is accepted and the impugned conviction is hereby set-aside. The appellants/convicts, if not required in any other case crime, would be released forthwith. These are the reasons of the short order whereby the appeal was allowed. Office shall place a copy of this judgment in the connected matter.

J U D G E

SAJID