

IN THE HIGH COURT OF SINDH AT KARACHI*Present: Omar Sial, J***Criminal Appeal No. 385 of 2019****Criminal Appeal No. 386 of 2019**

Appellant : **Tauseef Khan @ Bona**
through M/s. Arshad Hussain Lodhi & Tajjamul
Hussain Lodhi, Advocates.

Respondent : **The State**
through Mr. Talib Ali Memon, A.P.G.

Date of judgment: **6th January, 2022**

JUDGMENT

Tauseef Khan the appellant has impugned two judgments passed by the learned 1st. Additional Sessions Judge, Karachi East on 28-5-2019. In terms of the said judgments the appellant was convicted and sentenced as follows:

- (i) For an offence under section 302(b) P.P.C. imprisonment for life and a fine of Rs.1,000,000 or a further imprisonment of 6 months in lieu thereof
- (ii) For an offence under section 23(1)(A) Sindh Arms Act, 2103 simple imprisonment for 7 years and a fine of Rs. 10,000 or a further imprisonment of 6 months in lieu thereof.

Both appeals will be disposed of through this common judgment.

2. A background to the case is that F.I.R. No. 211 of 2018 was registered on 20-6-2018 against unknown persons by Karim Bux. Bux recorded that earlier that day his niece Lal Khatoon had informed him over the phone that some unknown persons had shot dead his brother named Ghulam Akbar. When Bux reached the hospital he was told that all formalities had been completed and that the body had been sent to the Edhi morgue. Ghulam Akbar had left the house at 11:00 p.m. on his motorcycle to his friends but never returned. Subsequently, the accused were arrested on 21-6-2018 and one Brazilian made pistol (the crime weapon) with a magazine having four bullets was seized and secured from the

possession of Tauseef. F.I.R. No. 214 of 2018 under section 23(1)(a) of the Sindh Arms Act, 2013 was thus also registered against him.

3. Subsequently the police called up the complainant and told him that three persons (the appellant as well as one Syed Nauman Shah and one Waqar Ayub) already in their custody were the three persons who had killed his brother.

4. The three accused pleaded not guilty to the charge against them and claimed trial. At trial (in the case of F.I.R. No. 211 of 2018), the prosecution examined 9 witnesses to prove its case. **Karim Bux (PW-1)** was the complainant in the case; **A.S.I. Muhammad Rafiq (PW-2)** was the police officer who had first responded to the call of a dead body having being brought to the hospital. He also subsequently recorded Karim Bux's statement under section 154 Cr.P.C. and registered the F.I.R. **Sadrudin Mirani (PW-3)** was the police officer who arrested the accused and effected recovery from them. **P.C. Muhammad Nasir (PW-4)** was a witness to the arrest and recovery. **Dr. Ejaz Ahmed (PW-5)** was the doctor who conducted the post mortem on the deceased. **Lal Khatoon (PW-6)** was the sister of the deceased. **A.S.I. Amin Qurban Soomro (PW-7)** was the police officer who had recovered the corpse from where it was lying and had secured one empty and blood stained earth from the spot. **P.C. Aslam Jan Dad Khail (PW-8)** was the police officer in whose presence a call data record was handed over to the investigating officer. **S.I. Ikhtiar Bullo (PW-9)** was the investigating officer of the case.

In the trial arising out of F.I.R. No. 214 of 2018, the prosecution examined **Sadrudin Mirani (PW-1), P.C. Muhammad Nasir (PW-2) and Ikhtiar Bullo (PW-3)**.

5. The appellants in their section 342 Cr.P.C. statements professed innocence and stated that they had been picked up from their home by the police and severely tortured by the police while in custody until they were compelled to confess.

6. At the end of the trial, Syed Nauman Shah and Waqar Ayub were acquitted whereas Tauseef was convicted and sentenced.

7. I have heard the learned counsel for the appellant and the learned Assistant Prosecutor General. Their respective argument are not being

reproduced for the sake of brevity however are reflected in my observations and findings below.

8. It appears from the testimony of Karim Bux, the complainant, that the police forced him to implicate the appellant as an accused in this case. He recorded at trial that on 23-6-2018 he was called to the police station and told by the police that three men in their custody, being Tauseef Khan, Syed Noman Shah and Waqar Ayub were the people who had murdered Ghulam Akbar – *“On 23.6.2018 police called me and Saeed at PS Aziz Bhatti and informed us that they have arrested three accused in the case and their names were disclosed as Waqar, Nauman and Tauseef Khan. Thereafter police again asked me to lodge F.I.R. against these persons but I told them that without verification of facts I cannot implicate them”; “I.O. of the case asked me to lodge F.I.R. against accused persons”*. Karim Bux was then taken to the lock up where the accused were in custody and apparently saw Tauseef Khan emerge from the lock-up accompanied by a police officer and say that he had killed Ghulam Akbar. Karim Bux also told the court that he was made to sign two statements by the police, one at his home and the other at the police station. Why was he made to sign two statements and what were the contents of those statements were not known to Karim Bux. Karim Bux then recorded that when he went to the hospital to see the dead body, he was told by the police that the person who was killed was not Ghulam Akbar but somebody else by the name of Akbar Ali. The dead body was not handed over to Karim Bux but was instead given to Edhi. The place where the incident was said to have occurred was also pointed out to Karim Bux by the police (as stated in his cross-examination, though in his examination-in-chief he had said that Tauseef Khan had taken the police to the place of incident in his presence). The record also reveals that when Tauseef Khan had supposedly pointed out the place of incident, Karim Bux had travelled alone on his motorcycle whereas Tauseef Khan was accompanied by the S.H.O. in a police mobile. Whether or not it was Tauseef who pointed out the place of incident to the police or, keeping in view the insistence of the police that the three men in their custody were the culprits, it was the police itself who took Tauseef to the place where the body had been found, remained unclear. Not much weight can be given to this aspect of the case. Malafide is also highlighted when one finds in the memo written that it was Karim Bux who had pointed out the place of

incident to the police. Karim Bux at trial categorically stated that *“Police of P.S Aziz Bhatti took me to the place of incident and not vice versa.”* Karim Bux also testified that nothing was recovered from the place of incident although earlier, one A.S.I. Amin Qurban had “recovered” blood stained sand, one spent 9 mm cartridge and one mobile phone. What is remarkable also is that there are two memos of the inspection of the place of incident on record – one was made on 20-6-2018 at 2330 hours which says that the Karim Bux pointed out the place of incident (which he denied he had at trial) and the other one is made at 1800 hours on 23-6-2021 which too states that Karim Bux pointed out the place of incident though this memo purportedly was made to show that the accused persons had pointed out the place of occurrence. Both pertain to the same place of incident. No explanation has been provided for this stark anomaly. Karim Bux’s testimony at trial exposed extreme irregularities and illegalities on the part of the police in its investigation. Malafide on the part of the police was apparent. It almost seems after reading Karim Bux’s testimony that the police not only forced him to implicate the accused in the murder but that incorrect and manipulated papers were concocted by the police in a bid to strengthen its case. Further Lal Khatoon (PW-6) the sister of the deceased at trial was also skeptical that the accused were the ones who had killed the deceased. She said that they were the deceased’s friends and how could they have killed him.

9. After reading the testimony of A.S.I. Muhammad Rafiq (PW-2) further doubt regarding the identification of the dead body are created (the complainant having already stated that he was told at the Edhi Centre that the dead person was not his nephew). The inquest report as well as the memo of inspection of dead body are both witnessed by Edhi officials. It is quite odd that the Edhi ambulance driver and the In Charge of the Edhi Centre could identify the dead body with its name, alias and father’s name when it is also a part of record that an unknown dead body was found lying on a street. The roznamcha entry of 20.6.2018 made at 6:00 a.m. reflects that an unknown body was found with a 9mm empty lying next to it. However by the time the body was brought to the hospital the exact details of the dead man were known by 7:15 a.m. It appears that it was the police who already knew the identity of the dead body when it was brought to the hospital. No explanation is on record as to how the police

identified the dead body when it was claimed that nothing was found from the body when it was recovered by the police.

10. P.C. Aslam Jan Dad Khail (PW-8) testified that the investigating officer *himself* had prepared and seized the USB on which were the sodomy videos. Such fact is also reflected in the memo of seizure prepared by the investigating officer on 5-7-2018. The USB was not played at trial.

11. Sadruddin Mirani (PW-3) in his testimony recorded that while he was the duty officer at the Aziz Bhatti police station, he received information of the whereabouts of the accused (who surprisingly were all together having allegedly committed a murder the previous day). Mirani arrested the accused and recovered one Brazilian made pistol with a number THR-42555 and the words "*Made in Brazil for Jas Taurus S.A. P2PT2 AFSDAL-9mm-Fara*" written on it. The magazine inserted contained four live bullets in it. The pistol was sent to the forensic expert for a report in it but the report does not contain any mention of the words written on the said pistol which was sent to it. This witness also admitted at trial that the memo of recovery nor the sketch of the pistol he made contains the entire inscription that was on the pistol produced at trial. The learned trial judge further noted that the sketch of the pistol made on the memo has a disparity as far as the length of the nozzle of the pistol is concerned. The one seized being longer than that reflected in the sketch. Further, according to this witness at the time of arrest of the accused, one telephone each was also recovered from them. This recovery is where the prosecution has attempted to establish the nexus of the accused with the case. According to this witness, accused Waqar and Noman told him that the phones which had been recovered from them belonged to the deceased Ghulam Akbar and that one of the phone contained a video which showed co-accused Tauseef committing sodomy with an unknown person. This video they claimed was the motive for the accused to kill Ghulam Akbar as Ghulam Akbar was blackmailing Tauseef over it. The witnesses' credibility and claims were shattered when he admitted that he had not stated this story in the section 161 Cr.P.C. statement he had recorded with the investigating officer of the case. He very reluctantly also admitted (after saying that he sealed the recovered property on the spot) that photos shown to him at trial reflected the case property lying open before the concerned S.S.P. in a press conference, where the accused was also shown present. This witness

acknowledged that he was not the investigating officer of the case and that after causing the arrest and recovery he had not given any information to the investigating officer of the case. P.C. Muhammad Nasir (PW-4) further exposed the lies of Sadruddin Mirani (PW-3) when he testified at trial that the recovery made from the appellants was not sealed by Mirani on the spot but was wrapped in a cloth, taken to the police station, shown to the S.H.O., who then sealed the same. Nasir also said that the property was not sealed in front of him nor was the memo made read out to him but that he was told to sign the same in the police station. S.I. Ikhtiar Bullo (PW-9) admitted that the motorcycle that was seized from the accused at the time of their arrest was not produced at trial and no reason was given for this lapse. Similarly, he admitted that he had not investigated the SIMs recovered from the accused to determine as to who was the owner of those SIMs; in his cross examination however he somersaulted on his previous statement and admitted that the SIM seized from the phone recovered from Tauseef was actually owned by one Junaid but that he (the investigating officer did not investigate Junaid or his whereabouts; he admitted that though according to him the three mobile phones recovered from the accused belonged to the deceased and that the same were identified by witness Lal Khatoon and though IMEI numbers of those phones were on record, Lal Khatoon had not testified that it was she who had provided the boxes of the phones to the investigating officer – as claimed by the investigating officer. In view of the foregoing observations absolutely no reliance can be made on the basis of the recovery effected to uphold the conviction awarded to the accused.

12. To summarise the above, the evidence against the appellant was as follows:

- (a) Recovery of three mobile phones said to be those of the deceased and a sodomy video on one of the phones.
- (b) Recovery of a motorcycle.
- (c) Recovery of a weapon.
- (d) Ostensible confession of Tauseef given in police custody.

13. The recovery effected in this case, in light of the observations made above, cannot form the basis of a conviction.

14. The USB containing the video said to be the motive for the crime did not comply with the standards of admissibility laid down by the Honorable Supreme Court in *Ishtiaq Ahmed Mirza vs Federation of Pakistan* (PLD 2019 SC 675).

15. The ostensible extra judicial confession was inadmissible in evidence under Article 38 and 39 of the Qanun-e-Shahadat Order, 1984. Pointing out the place of incident by the appellant is doubtful in light of the above observations, however, even if it were true the same cannot be termed as a discovery as a consequence of information provided by the accused within the meaning of Article 40 of the Order of 1984. Reference to *Hayatullah vs The State* (2018 SCMR 2092).

16. The testimonies given at trial are not confidence inspiring nor trust worthy.

17. For the foregoing reasons I am of the view that the prosecution was unable to prove its case against the appellant beyond reasonable doubt. The appeals are therefore allowed and the appellant acquitted of the charge. He may be released forthwith if not required in any other case.

JUDGE