

IN THE HIGH COURT OF SINDH AT KARACHI**Criminal Appeal No. 448 of 2017**

Appellant : Tahir Khan @ Babu
through Syed Suleman Badshah, Advocate

Respondent : The State
through Mr. Zahoor Shah, DPG

JUDGMENT

Omar Sial, J.: On 6-1-2003, a man named Rana Sajid Anwar (**P.W.-1**) was standing outside his house talking to a friend named Syed Kashif Ali (**P.W.-2**) when one man on a motorcycle came looking for Sajid's brother, Rana Shahid Anwar. Shahid who was a moviemaker emerged from inside the house with his camera etc. and left with the man on the motorcycle. The family kept waiting for Shahid to return but he did not come back that evening. The next morning the family heard news that a dead body had been found in a gunny bag by the police. Sajid went to the police station and was informed that the body had been sent to the Edhi Centre and that he may go there to identify the same. At the Edhi Centre, Sajid identified the dead body as that of his brother Shahid.

2. Akhtar Muhammad and Ishaque Gul, were the two persons, who on 7-1-2003 had informed A.S.I Asif Zia (**P.W.-9**) that a dead body was lying near Yasmeen Heights and upon whose information F.I.R. 4 of 2003 under section 302 P.P.C was registered at the Khawaja Ajmer Nagri police station. Both, Akhtar Muhammad and Ishaque Gul were not examined at trial on the ground that they were Afghan nationals and could not be located.

3. The post mortem on the dead body was conducted on 7-1-2003 in the Abbasi Shaheed Hospital by Dr. Syed Mazharuddin (**P.W.-11**). According to his opinion the deceased had died due to asphyxia possibly by throttling.

4. An owner of a pharmacy shop, Irshad Alam (**P.W.-4**) testified that on 6-1-2003, appellant Tahir had come to his store and purchased three tablets of a drug named Ativan and two tablets of Panadol.

5. On 25-1-2003, the appellant, Tahir Khan and another Afzal Ahmed were stopped and searched on spy information that they were involved in a murder. The national

identity card of the deceased Rana Shahid Anwar was recovered from the pocket of Afzal Ahmed and thus both the individuals were arrested for Shahid's murder. P.C. Mamrais Khan (**P.W.-6**) was a witness to the arrest.

6. On 25-1-2003, one person named Jamil Qureshi (**P.W.-3**) testified that he had seen the two individuals were in handcuffs identifying to the police the place where they had thrown a dead body.

7. Mujeeb-ur-Rehman (**P.W.-5**) was a prosecution witness who testified that on 25-1-2003 he was called to the police station and told by S.I. Rana Sarfraz that the police had arrested the actual culprits of the crime and that his younger brother Habeeb-ur-Rehman who had been in police custody for the previous ten days on the suspicion of the murder of Shahid was released.

8. A.S.I. Manzoor Ali Lashari (**P.W.-8**) accompanied S.I. Rana Sarfraz to a house in Surjani Town where, appellant Tahir had said that the camera of Shahid was lying. Lashari was a witness to the memo of seizure.

9. On 30-1-2003, an identification parade was held before the learned magistrate in which, Syed Kashif Ali (P.W-2) identified Tahir Khan as being the person who had come to pick up the deceased from his home. Sultan Mohammad Awan (**P.W.-13**) was the magistrate who conducted the parade.

10. Shaikh Sirajuddin (**P.W.-10**), who was the owner of a car rental business by the name of Nafees Rent-A-Car, testified that Tahir and Afzal had rented a car from him on 6-1-2003.

11. The investigation of the case was carried out by S.I. Rana Sarfraz Ali (**P.W.-12**).

12. At some point during trial accused Afzal Ahmed absconded and was declared as proclaimed offender. Appellant Tahir recorded his statement under section 342 Cr.P.C. pleading innocence and then examined himself on oath as well under section 340(2) Cr.P.C. In support of his defence plea he also produced Mohammad Yousuf (**D.W.-1**) as a witness. For the sake of brevity the statement on oath of the appellant is not being reproduced as it forms part of the record.

13. The learned Sessions Judge, Karachi Central announced her judgment on 7-10-2011 in terms of which she convicted and sentenced the appellant to a life of rigorous imprisonment and Rs. 200,000 fine (or six months imprisonment in default) for an offence punishable under section 302 P.P.C. Against the said judgment, the appellant went in appeal and the case was remanded back to the learned trial court vide

judgment dated 31.1.2017 with directions to frame fresh charge and announce fresh judgment within 20 days. The learned trial court i.e. 5th Additional Sessions Judge, Karachi (Central) vide his judgment dated 23.2.2017 awarded the same sentences to the appellant on the same set of evidence. It was not specified as to under which part of section 302 P.P.C. the sentence was awarded. It is this judgment which has been impugned in these proceedings.

14. I have heard the learned counsel for the appellant as well as the learned D.P.G. The complainant did not effect an appearance despite notices. My observations are as follows.

15. It is an admitted position that there are no eye witnesses or any direct evidence against the appellant. The conviction appears to be based on circumstantial, including last seen together evidence.

16. The last seen evidence is based exclusively on the testimonies of Rana Sajid Anwar (P.W.-1) and his friend Syed Kashif Ali (P.W.-2), who according to their versions, were present outside the deceased's house on 6-1-2003 when the appellant is said to have come and taken the deceased for some camera work. The deceased was not seen in the company of the appellant ever since.

17. The Hon'ble Supreme Court in Hashim Qasim and another vs The State (2017 SCMR 986) has observed that:

Placing reliance on circumstantial evidence, in cases involving capital punishment, the superior Courts since long have laid down stringent principles for accepting the same. It has been the consistent view that such evidence must be of the nature, where, all circumstances must be so inter-linked, making out a single chain, an unbroken one, where one end of the same touches the dead body and the other the neck of the accused. Any missing link in the chain would destroy the whole and would render the same unreliable for recording a conviction on a capital charge. Reference is made to the cases of Muhammad Aslam v. The State (PLD 1992 SC 254) and Ch. Barkat Ali v. Major Karam Elahi Zia (1992 SCMR 1047).

18. In Fayyaz Ahmad vs The State (2017 SCMR 2026) the Hon'ble Supreme Court laid down certain guidelines in connection with cases in which last seen together evidence was the basis of conviction. The Hon'ble Court observed that:

It may also be kept in mind that sometimes the investigating agency collects circumstantial evidence seems apparently believable however, if the strict standards of scrutiny are applied there would appear many cracks and doubts in the same which are always inherent therein and in that case Courts have to discard and disbelieve the same.

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 scene 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 when 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.

19. It is in the backdrop of the above observations and guidelines of the Supreme Court that I have analysed the evidence in this case.

20. As mentioned above the only two people who saw the deceased leave with Tahir are the deceased's brother Rana Sajid Anwar and his friend Syed Kashif Ali. However, both of them only testified that Shahid had picked up his camera and some other equipment and left with Tahir on the bike. Kashif was termed as a "fast friend" by the complainant in his testimony hence his aligning his story with that of the complainant cannot conclusively be ruled out.

21. The complainant admitted in his cross-examination that the first version about the incident which he had given the police and that which was recorded in his section 161 Cr.P.C. statement was that he (the complainant) had sent the deceased to buy some

things from a medical store and that he had not returned since. The complainant testified that he was informed by the police, it seems nearly after a month of the dead body being found, that the deceased had been murdered in the house of co-accused Afzal. No attempt was made by the complainant to justify this material contradiction between his two statements. The complainant changing his version at trial created a doubt in his credibility.

22. The complainant admitted that the photographs of the accused were published in various newspapers prior to the holding of the identification parade and that their videos were also played on television. According to his own testimony, the complainant kept visiting the police station where the accused were in custody for a period of 15 to 20 days before the identification parade was held. Even in these circumstances, on which I have commented later, the learned magistrate Sultan Mohammad Awan, in his testimony stated that the complainant could not identify either Tahir or the co-accused Afzal but that it was Kashif only who had identified Tahir. Further, it was acknowledged by the complainant that the two accused were standing in handcuffs (though in his cross examination he resiled from this statement) on the day of the identification parade. The learned magistrate also acknowledged at trial that he himself had noticed that “at the time of holding identification parade I myself had noted that the accused were not with muffled faces and they were in handcuffs and they were found outside the court with PWs. It is correct that similar objections were raised by the counsel for accused Afzal. The fact that no role was attributed to the accused in the identification parade and that a joint identification parade was held in which both the accused were made to stand in line with 20 or 25 other people completely corrodes the value of the identification parade in fact reflects badly on the intentions of the investigating officer and the prosecution. In this regard it would not be out of place to refer to the observations of the Hon’ble Supreme Court in Kamaldin alias Kamla vs The State (2018 SCMR 577) which were as follows:

It has repeatedly been held by this Court that identification of an accused person without reference to the role allegedly played by him during the occurrence is shorn of any evidentiary value and a reference in this respect may be made to the cases of Azhar Mehmood and others v. The State (2017 SCMR 135), Muhammad Fayyaz v. The State (2012 SCMR 522), Shafqat Mehmood and others v. The State (2011 SCMR 537) and Sabir Ali alias Fauji v. The State (2011 SCMR 563). Apart from that the test identification parade held in this case was a joint parade wherein two accused persons had been made to stand with dummies in two lines and their identification had taken place simultaneously in one go. This Court has also clarified in the cases of Lal Pasand v. The State (PLD 1981 SC 142), Ziaullah alias Jaji v. The State (2008 SCMR 1210), Bacha Zeb v. The State (2010 SCMR 1189), Shafqat Mehmood and others v. The State (2011 SCMR 537) and Gulfam and another v. The State (2017 SCMR 1189) that identification of many accused persons in one go is not proper besides being unsafe.

23. Jamil Ahmed Qureshi was said to be the independent person who had witnessed the accused identifying to the police the place where they had thrown the dead body. He justified his presence on the spot by saying that he had a butcher shop close by and that he was returning home when he saw the scene. The investigating officer did not deem it appropriate to inquire and establish whether the statement made by Jamil was correct. What I also find confusing about Jamil's testimony is that perhaps in an apparent bid to establish his neutrality he testified that *"I don't remember the name of the police man who prepared the mashirnama."* But in the very next breath he testified that *"It is incorrect that I am deposing falsely that Exh 5/A [the mashirnama] was prepared by Rana Sarfraz"*. At trial he testified that the two accused revealed that they had thrown the body at that place but he admitted that in his section 161 Cr.P.C. statement he had recorded that the police were already standing on the spot along with the two handcuffed people and that he crossed over but the police said nothing. Jamil's bias is further evidenced by him stating at trial that *"it is incorrect that accused is innocent."* Jamil was not privy to any investigation that took place hence his categorical statement regarding the guilt of the accused reflects adversely as his neutrality. I do not believe that Jamil Ahmed Qureshi was honest at trial and that his testimony can be accepted as unimpeachable.

24. Irshad Alam was the chemist from whom it was alleged that Tahir bought 3 Ativan tablets and 2 Panadols. Even if he did, that will by no stretch of imagination mean that he also killed Sajid. Irshad claimed at trial that Ativan is a prescription drug and that he only sells it on a prescription being made available, yet, he could not produce the prescription or even recall the name of the doctor who had issued it for Tahir. Obviously, the investigating officer did not investigate the crime from this aspect. Admittedly no identification parade was held for Irshad to identify Tahir as the person who had come to buy the drugs. I also find it hard to believe that after a passage of one and a half years Irshad could identify Tahir so accurately at trial especially when *"accused Tahir present before the court is same at that time he was without beard."* The credibility of Irshad's testimony is further put in doubt when he acknowledged during his cross examination that *"It is correct when I went to the P.S. police officer showed me both accused persons and informed me that they purchased Ativan tablet from my storeIt is correct investigating officer informed me that accused persons purchase tablet Ativan 1 mg from my medical store."* The testimony of Irshad Alam shows that it was the police who told him what Tahir had done rather than Irshad making a statement on his own. It comes as no surprise therefore that Irshad could not remember the date or the time or the name of the police officer who recorded his statement or as a matter of fact

the name of any police officer he encountered during this episode. Finally, Irshad admitted that *"It is correct in my statement u/s 161 Cr.P.C. it has not been stated that at P.S. I identified the accused person."*

25. The murder is said to have happened on the 6th night or at the latest on the 7th. On 25-1-2003, the appellant, Tahir Khan and co-accused Afzal Ahmed were stopped and searched on spy information that they were involved in a murder. I find it extremely unnatural and do not believe that even after 19 days after the murder, co-accused Afzal Ahmed would be roaming around with the original national identity card of the deceased in his pocket. Obviously, the first thought which would strike a murderer is to destroy all evidence that may have the potential of linking him with the crime rather than proudly carry it around like a trophy. Even if the card was recovered, it was from the pocket of the co-accused Afzal. Similarly, the ostensible recovery of the video camera and the phone of the deceased from the house of Tahir upon Tahir pointing out the same is something I cannot come to terms with. To me it would seem a natural part of investigation that the house of a potential accused of a murder would be searched at the first instance rather than wait for 3 days and then go there to see what things were like. No private witness was included in the search of the house. Even if the recovery was made, there was no evidence led at trial that the same belonged to the deceased. Conveniently, none of the case property was produced at trial on the ground that the same had been burnt in a fire.

26. Then we have the testimony of H.C. Mujeeb-ur-Rehman. It was revealed by the investigating officer during his evidence that the camera in question which was being used by the deceased actually belonged to the younger brother of Mujeeb. He further disclosed that the complainant party had initially cast their doubt on Mujeeb and his family for the murder of the deceased hence the younger brother of Mujeeb was arrested. Mujeeb was a witness to the memo of arrest of the accused. At trial he outright denied that the arrest and recovery was witnessed by him. He was declared hostile by the prosecution. Even though he was declared hostile and his testimony would not be of much evidential value, the fact remains that nowhere in the case was it alleged that the camera which was allegedly found in the house of Tahir did not belong to Tahir at all.

27. In the entire case the prosecution did not reveal the motive behind the accused killing the deceased. No effort was even made by the investigating officer to inquire into this aspect. Further, the circumstances and place where the dead body was found could

not be convincingly established as both witnesses who had reported it were not examined.

28. In view of the above I am unable to conclude that the evidence in the case was of *“the nature, where, all circumstances must be so inter-linked, making out a single chain, an unbroken one, where one end of the same touches the dead body and the other the neck of the accused.”* (Kamaldin case *supra*). The prosecution was unable to prove its case against the appellant beyond reasonable doubt. Accordingly, the appeal is allowed and the appellant acquitted of the charge. He may be released forthwith if not required in any other custody case.

JUDGE