# IN THE HIGH COURT OF SINDH AT KARACHI

**Criminal Appeal No. 141 of 2015**

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| Appellants | : | 1. Dildar;<br>2. Mumtaz @ Kala Khan;<br>3. Mst. Shifai<br>through Mr. Habib-ur-Rehman Jiskani, Advocate |
| Respondent | : | The State<br>through Mr. Zahoor Shah, DPG |
| Complainant | : | Sarfraz Khan<br>through Mr. Ali Asghar Awan, Advocate |
| Date of decision | : | 14th January, 2019 |

## JUDGMENT

**Omar Sial, J.**: On 26-8-2010 the learned 3rd Additional Sessions Judge, Karachi South framed the following charge against the appellants:

> "That on or before 11.05.2010, inside the House No. 2597, Gali No. 33, Hijrat Colony, Karachi, you accused **Dildar** being the husband of Mst. Noreen daughter of Sarfaraz, aged about 26 years, you accused **Mumtaz** @ Kala Khan, being father-in-law, and you **Mst. Shifai** being the mother-in-law hatched a conspiracy and in furtherance of your common intention subjected Mst. Noreen to torture, which caused her amongst other the head injuries which in ordinary course of nature likely to cause death of any person and/or said act of torture was so imminent dangerous, that it must in all probability cause death of Mst. Noreen and in the result thereof Mst. Noreen D/o Sarfaraz died on 11.05.2010. Thereby you accused persons committed offence of Qatl-e-Amd, punishable under Section 302/34 PPC, and within the cognizance of this court."

2. After trial, the learned 3rd Additional Sessions Judge, Karachi South convicted the appellants for an offence punishable under section 302(b) P.P.C and sentenced them to a life of imprisonment and a fine of Rs. 50,000 each or in case of default in paying the fine, to suffer a further period of imprisonment of one year. It is this judgment that has been impugned in this appeal.

3. The background to this case is that Sarfaraz Khan Tanoli (who appeared as the **first prosecution witness** at trial) recorded in a written statement under section 154 Cr.P.C. on 12-5-2010 at 1:00 a.m. that his daughter Noreen was married to his nephew Dildar (one of the appellants in this appeal) and that Dildar was the son of his brother Mumtaz and his wife Shifai (both Mumtaz and Shifai are also appellants in these proceedings). He further stated that Noreen had an unhappy marriage and that she would often complain of maltreatment and abuse from Dildar and Shifai. Three years ago Noreen had come home and complained that her in-laws would torture her and thus decided to stay on at her father's home. After nine months of her living with her father, the father took her back to her husband's home. The previous day i.e. 11-5-2010 at about 8:15 p.m., Sarfaraz received a phone call from another nephew of his named Shoukat who informed him that Noreen had died. Sarfaraz with some other members of his family (which included his wife **Parveen**, who was examined as the **second prosecution witness**) went to Noreen's house and saw that she was been given a death bath inside the house and that there were torture marks on her body. F.I.R. No. 228 of 2010 under sections 302 and 34 P.P.C. was registered at the Artillery Maidan police station at 1:45 a.m. on 12-5-2010. The appellants were arrested but pleaded not guilty to the charge and claimed trial.

4. In an effort to prove its case against the appellants, accused Mumtaz's niece, a lady named **Khalida Shaukat Malik** (who appeared as the **third prosecution witness**) testified at trial that on 11-5-2010 her uncle, the accused Mumtaz, had come to her house and told her that Noreen had died because of Hepatitis C. Upon being asked by Khalida whether Noreen had died of Hepatitis or whether Mumtaz had killed her, Mumtaz got infuriated and said to her that this was just one murder and that he was capable of ten such murders. She stated that after this conversation she had informed her uncle Sarfaraz as well as her husband Shaukat of Noreen's death. Khalida also testified that on a previous visit to Noreen's house she had seen blood stains inside the house but when she asked Shifai about the said stains Shifai had said that they had slaughtered a chicken. According to Khalida, however, she had seen Noreen standing inside with blood oozing from her nose and while Shifai hurled abuses at Noreen, she did not let Khalida meet Noreen.

5. **Sajid Mehmood Tanoli** (examined as the **fourth prosecution witness**) testified that he was a nephew of Sarfaraz and that he too had accompanied

Sarfaraz and Parveen to the deceased's house and seen the dead body as well as the torture marks on the body of Noreen.

6. **S.I. Altaf Hussain Rajput** (examined as the **fifth prosecution witness**) was a police officer posted at the Artillery Maidan police station to whom Sarfaraz had gone and informed about the death of his daughter Noreen. Altaf's testimony at trial was at odds with that of the other witnesses, in that he stated that immediately upon reaching the house of the deceased he had gone to the first floor and seen the dead body lying and he had inspected the same.

7. **Dr. Fareeda Mubeen** (**prosecution witness six**) had conducted the post mortem on the deceased Noreen at the JPMC. She admitted that she had changed the time between death and post mortem from 7 to 19 hours to 12 to 24 hours. She testified that according to the Chemical Examiner's report poison was eliminated as a cause of death According to the doctor's opinion the death had occurred due to a head injury caused by a hard and blunt substance.

8. The investigation of the case was entrusted to **S.I. Abdul Malik** (who was examined as the **seventh prosecution witness**).

9. In their statements under section 342 Cr.P.C. the appellants pleaded innocence and stated that Noreen had died due to ill health. Fazal Mohammad Jan who was a neighbor of the accused appeared as the first defence witness and testified that he had never heard or witnessed any altercation between the residents of the accused household. Mohammad Shareef Awan was examined as the second defence witness. He was the Union Council Nazim to whom Noreen had gone with an application stating that her parents did not want her to live with Dildar even though she was happily married. She further requested him to intervene and resolve the issues between her and her parents. Awan had phoned Noreen's family but none had appeared before him in connection with the dispute until his tenure as Nazim finished in August 2009. Noreen had told him that she did not have jaundice but that she was not feeling well.

10. I have heard the learned counsel for the appellants, the learned counsel for the complainant as well as the learned D.P.G. and have examined the record with their able assistance. My observations are as follows.

11. In a nutshell, the charge against the appellants was that all three of them had conspired to kill Noreen and subsequently with a common intention had murdered her. The dead body of Noreen was found in the house of her husband, the female members of which were giving her a death bath. No witness who could testify that he or she saw

Noreen being killed was produced by the prosecution. The accused insisted that Noreen had died of an illness but could not produce any evidence to substantiate the same. The accused were convicted and sentenced on evidence that Noreen and her husband and in-laws had not had a happy relationship and that prosecution witness Khalida had testified that appellant Mumtaz had said to her that this was only one murder and that he can commit ten such murders.

12. There is a slight discrepancy in the statement recorded by Sarfaraz while registering the F.I.R. and the one he gave at trial. At trial he said that his wife and him had first gone to the police station and then went to Noreen's house; whereas, in his section 154 Cr.P.C. statement he had not mentioned the pit stop that the couple made at the police station.

13. The other discrepancy that emerges is that in his section 154 Cr.P.C statement Sarfaraz had recorded that Noreen had been poisoned to death but later at trial he took the position that she had been tortured to death. Either way, Parveen's testimony at trial shows that it was only the women folk of the family who had gone to see Noreen's dead body while she was being given her death bath. Sarfaraz appears to have wrongly testified at trial that he too saw the dead body with the torture marks on it.

14. Yet another discrepancy in the evidence recorded by Sarfaraz and his wife Parveen is the manner in which the couple was informed about Noreen's death. According to Sarfaraz he had received a phone call from his nephew Shaukat whereas according to Parveen, the information was first given to them by a lady named Khalida. Further Sarfraz testified that "as per my information none of witness of nine stated about the act of commission of murder of my deceased daughter."

15. S.I. Altaf In his testimony stated that while inspecting the body he had seen marks of injury on the right calf, on the left knee, blue marks on her neck and other injuries on the body. He admitted at trial that the complainant had not mentioned in his section 154 Cr.P.C. statement that there were injuries on the neck and head of the deceased nor that there was a swelling on her nose and an injury on her lip. He also admitted that in the memo of inspection of the dead body that he had prepared he had not mentioned any head injury on the deceased nor had he specifically mentioned the injuries to the nose and lips of the deceased. Given the culture and traditions prevailing in our society, I find it strange that a male police officer was permitted to inspect the

body of a female without any lady constable being present. This observation is fortified by the testimony of the investigating officer of the case who admitted that "*it is a fact that at every P.S. lady police staff is also appointed and specifically in the cases where the ladies are accused/injured the duties of search and other connecting with the ladies are to be performed by the police officials with the help of those lady police staff.*" Police Rules 25.30 provides that when an officer in charge of a police station receives information of a sudden or unnatural death of any person, he is to immediately send such information to the nearest magistrate authorized to hold inquests and then proceed to the place where the body is said to be to investigate under section 174 of the Cr.P.C. Section 174 of the Cr.P.C. in itself stipulates that when a police officer receives information of, inter alia, an unnatural or suspicious death, he shall immediately give intimation to the nearest magistrate empowered to hold inquests and in the presence of two or more respectable inhabitants of the neighbourhood, make an investigation, and draw up a report of the apparent cause of death, describing such wounds, fractures, bruises and other marks of injury as may be found on the body and stating in what manner, or by what weapon or instrument (if any), such marks appear to have been inflicted. Apart from the fact that S.I. Altaf did not deem it appropriate that a lady constable accompany him, it appears that he also did not comply with the laws and rules applicable in the situation. The inquest report he prepared does not show any injury to the head or the face of the deceased. The complainant and his close relatives who were inimical to the accused were chosen as witnesses to the inspection. No independent person from the neighborhood was asked to be witness. In fact the investigating officer of the case went to the extent of stating that the S.I. Altaf Hussain had not examined the dead body at all – "*I may add that S.I.P. Altaf Hussain being male police officer did not examine the dead body of deceased to ascertain the nature of injury.*"

16. The Chemical Examiner's report that was produced at trial by the investigating officer shows that the same was received by the laboratory on 19.5.2010 whereas the samples were collected by the doctor on 12-5-2010. It was not explained as to why the delay occurred and how were the samples preserved in the interim. The letter under cover of which the samples were received was not exhibited at trial. However, the Chemical Examiners Report suggests that it was dated 17-5-2010. H.C, Wahid Bux, who was the officer who took the said samples to the Chemical Examiner's office was not examined at trial.

17. The investigating officer of the case admitted that the memo of inspection of dead body prepared by S.I. Altaf did not mention the head injury – "*it is fact that in Ex. 6/C the injury sustained by the deceased at her head being serious in nature is no where mentioned therein being head injury.*" He testified that he had not called any neighborhood people to ask them to be witnesses (as they were afraid according to him) and that he had also not enquired from them as to whether the deceased was mistreated by her in-laws or not. He admitted that none of the prosecution witnesses in their section 161 Cr.P.C. statements had said that the accused maltreated Noreen. He admitted to several other contradictions between the description of the injuries to Noreen given by the prosecution witnesses and the medical evidence. He justified contradictions in dates on 161 Cr.P.C. statements that he had made as "bonafide errors".

18. As mentioned above, Khalida was one of the prosecution witnesses whose testimony appears to have been the basis of the conviction. She had testified to the past maltreatment of Noreen by her in-laws and the supposed "confession" by Mumtaz. Not much weight can be given to her testimony as her statement under section 161 Cr.P.C. was recorded, for no apparent reason, after a lapse of one month. The incident occurred on 11-5-2010 and the statement was recorded on 12-6-2010. Similarly, Parveen's statement and that of the fourth witness Sajid were also recorded after a month though Sajid himself at trial testified that it was recorded even later i.e. on 20-6-2010. In other words, the statements of the private prosecution witnesses were recorded after one month of the incident. The unexplained delay corrodes the evidentiary value of such statements. The Hon'ble Supreme Court in **Rahat Ali vs The State (2010 SCMR 584)** has observed that:

> Delay of 24 hours, 4 days and 15/20 days in reporting the matter to the police or recording the statement of witnesses by the police has been found adversely affecting the veracity of witnesses as held in the cases of Muhammad Sadiq v. The State PLD 1960 SC 223, Sahib Gul v. Ziarat Gul 1976 SCMR 236 and Muhammad Iqbal v. State 1984 SCMR 930, respectively. It has also been observed by this Court that delay in recording the statement without furnishing any plausible explanation is also fatal to the prosecution case and the statement of such witness was not relied upon in the case of Syed Muhammad Shah v. State 1993 SCMR 550.

19. It is also pertinent to observe that the investigating officer of the case S.I. Abdul Malik acknowledged that the prosecution witnesses had made a number of improvements in their testimonies as compared to the statements that they had given

earlier in their section 161 Cr.P.C. statements. These included, Parveen not stating that injuries on Noreen that she saw were fresh ones; Sajid had not specified any particular injuries; that none of the prosecution witnesses during investigation had disclosed that they ever saw the in-laws of Noreen mistreat her. The Hon'ble Supreme Court in **Mohammad Mansha vs The State (2018 SCMR 772)** has observed that:

> Once the Court comes to the conclusion that the eye-witnesses had made dishonest improvements in their statements then it is not safe to place reliance on their statements. It is also settled by this Court that when ever a witness made dishonest improvement in his version in order to bring his case in line with the medical evidence or in order to strengthen the prosecution case then his testimony is not worthy of credence. The witnesses in this case have also made dishonest improvement in order to bring the case in line with the medical evidence (as observed by the learned High Court), in that eventuality conviction was not sustainable on the testimony of the said witnesses. Reliance, in this behalf can be made upon the cases of Sardar Bibi and another v. Munir Ahmad and others (2017 SCMR 344), Amir Zaman v. Mahboob and others (1985 SCMR 685), Akhtar Ali and others v. The State (2008 SCMR 6), Khalid Javed and another v. The State (2003 SCMR 1419), Mohammad Shafiqe Ahmad v. The State (PLD 1981 SC 472), Syed Saeed Mohammad Shah and another v. The State (1993 SCMR 550) and Mohammad Saleem v. Mohammad Azam (2011 SCMR 474).

20. The blow, that according to the doctor, was the cause of death of Noreen, is in itself doubtful. It is surprising that none of the prosecution witnesses who were said to have seen the dead body first, including the police officer who prepared the memo of inspection and the inquest report, did not see the injury and did not mention the same in their statements or the documents prepared in the case. In fact, the complainant himself, who also claimed to have seen the dead body, in his section 154 Cr.P.C. statement to the police has mentioned the cause of death as poisoning. Witnesses have also claimed that the wounds on the legs of Noreen were fresh and oozing puss whereas the post mortem report indicates that they were old wounds. There is a difference between the ocular and medical evidence. Even if there was a blow on Noreen's head which the doctor thought was the reason for her death, the same could have been caused in many ways and would certainly not mean that it was the appellants who had intentionally hit and killed her.

21. Shaukat Ali, the person who ostensibly informed the complainant of the murder as well as Tazeem, who ostensibly accompanied the complainant party to the house of the deceased upon hearing the information of her death, were not examined as

witnesses at trial. It appears though that a section 161 Cr.P.C. statement was recorded by Shaukat on 10-6-2010, nearly a month after the incident. The circumstances of the case would give rise to a Qanun-e-Shahadat Order, 1984's Article 129 illustration g presumption that had these witnesses been examined they would have not supported the prosecution case.

22. No witness from the neighborhood was examined as a witness who could prove that Noreen and her in-laws had an unhappy relationship. The complainant relied on a 3 year old unpleasantness between the couple in support of his assertion. To the contrary, the defence produced a witness who was a neighbor and who testified that he had never heard any altercation or quarrel. The UC Nazim who was examined as a defence witness also testified that Noreen had complained to him about her parents being unhappy with her marriage to Dildar. The application produced by the Nazim has Noreen's signature on it though the investigating officer of the case did not deem it appropriate to carry out any forensics on the same or determine its genuineness. The foregoing, coupled with the substantially late statements under section 161 Cr.P.C. recorded by the prosecution witnesses suggests that the motive, as assigned by the prosecution, was also not proved.

23. No weapon or any other instrument used in the offence was recovered by the police. There is no record how and from where the appellants Mumtaz and Dildar were even arrested in the crime. Only one memo of arrest and search – that pertaining to Dildar – has been brought to the Court's notice. Appellant Dildar was arrested on 10-6-2010, and it appears that after his arrest Parveen, Khalida and Shaukat were introduced as witnesses which perhaps explains the delay in their statements.

24. The primary ground agitated by the learned D.P.G. is that Noreen was found dead in the house of the appellants and thus the onus of proof was on them to explain as to how she had died and in the absence of a cogent explanation, it is the appellants who are guilty. Coincidently, the Hon'ble Supreme Court in Nazir Ahmed vs The State (2018 SCMR 787) was faced with a similar situation. The Hon'ble Court in that case observed:

> It has been argued by the learned Deputy Prosecutor-General, Punjab appearing for the State that the deceased in this case was a vulnerable dependent of the appellant and, thus, by virtue of the law declared by this Court in the cases of Saeed Ahmed v. The State (2015 SCMR 710) and Arshad Mehmood v. The State (2005 SCMR 1524) some part of the onus had shifted to the appellant to explain the circumstances in which his wife had died an unnatural death in his house

> during the fateful night which part of the onus had not been discharged by the appellant. We have attended to this aspect of the case with care and have found that when every other piece of evidence relied upon by the prosecution has been found by us to be utterly unreliable then the appellant could not be convicted for the alleged murder simply on the basis of a supposition. The principle enunciated in the above mentioned cases of Saeed Ahmed v. The State (2015 SCMR 710) and Arshad Mehmood v. The State (2005 SCMR 1524) was explained further in the cases of Nasrullah alias Nasro v. The State (2017 SCMR 724) and Asad Khan v. The State (PLD 2017 SC 681) wherein it had been clarified that the above mentioned shifting of some part of the onus to the accused may not be relevant in a case where the entire case of the prosecution itself is not reliable and where the prosecution fails to produce any believable evidence. It is trite that in all such cases the initial onus of proof always lies upon the prosecution and if the prosecution fails to adduce reliable evidence in support of its own case then the accused person cannot be convicted merely on the basis of lack of discharge of some part of the onus on him.

25. In my opinion, keeping in view the number of lacunas in the present case (as mentioned above), weak investigation, doubtful testimonies and the fact that the appellants also identified the doctor who had come to examine Noreen before she died but whose presence could not be procured at trial because he had shifted lock, stock and barrel to Oman, the observation made by the Hon'ble Supreme Court as regards the onus of proof would apply squarely to the present case. Further, not an iota of evidence in the present case was led to establish conspiracy or common intention on the part of the appellants to kill Noreen.

26. In view of the above, the prosecution was unable to prove its case against the appellants beyond reasonable doubt. The appellants are entitled to the benefit of such doubt. Accordingly, the appeal is allowed and the appellants acquitted of the charge. They may be released forthwith if not required in any other custody case.

JUDGE