IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Appeal No. 782 of 2019

Appellant : Mubarak Ali
through Mr. Mohsin Khan, Advocate

Respondent : The State
through Ms. Robina Qadir, D.P.G.

Date of hearing : 21st November, 2022

JUDGMENT

Omar Sial, J.: F.I.R. No. 61 of 2014 was registered at the Super Market police station on 11.05.2014 under sections 302 and 34 P.P.C. on the complaint of one Abdul Khalid. Khalid recorded that his son Umar had left the house on 10.05.2014 but did not return. His body was later found at the Edhi morgue with 2 bullet wounds; one on the head and the other in his abdomen. The F.I.R. was registered against unknown persons.

2. 18 months later i.e. on 21.11.2015, the appellant who was in jail, was arrested in the present crime ostensibly on a confession he had made to the police. The record shows however that the appellant was arrested in the prison at 4:00 p.m. on 21.11.2015. The record further shows that the appellant had been detained in prison on the orders of the Sector Commander, Sachal Rangers for a period of 90 days on 24.08.2015 under section 11 EEEE of the Anti-Terrorism Act, 1997. On 20.11.2015, his detention order was recalled and he was arrested in the present crime.

3. The appellant pleaded not guilty to the charge and claimed trial. The prosecution in order to prove its case examined 9 witnesses. **PW-1 Abdul Khalid** was the complainant. **PW-2 H.C. Shahid Hussain** was witness to recovery of blood stained earth and empties from the place of incident. **PW-3 S.I. Ali Sher** arrested the appellant while he was in jail. **PW-4 H.C. Muhammad Rehan Khan** witnessed the arrest of the appellant. **PW-5**

Sanam Baloch was the sister of the deceased who claimed that she had last seen Umar in the company of the appellant. **PW-6 Muhammad Faheem** was the first responder to the news that a person had been injured in a firing incident. He also effected the recovery of empties and blood stained earth and registered the F.I.R. **PW-7 Muhammad Jaffar** was the investigating officer of the case. **PW-8 Dr. Shahid Nezam** conducted the post mortem. **PW-9 Aziz-ur-Rehman** was the magistrate who conducted the identification parade. In his section 342 Cr.P.C. statement the appellant denied all wrong doing and professed innocence.

4. The learned 7th Additional Sessions Judge, Karachi Central in 12.10.2019 held the appellant guilty of an offence punishable under section 302(b) P.P.C. and sentenced him to a life in prison as well as pay a fine of Rs. 50,000 or stay a further period of 6 months in prison. It is this judgment that has been challenged in these proceedings.

5. I have heard the learned counsel for the appellant as well as the learned DPG. None appeared on behalf of the complainant despite notice. My observations and findings are as follows.

6. Apart from an ostensible extra judicial confession, the only other piece of evidence against the appellant was the testimony of PW-5 Sanam Baloch. She claimed that she had last seen her brother with the appellant.

PW-5 Sanam Baloch

7. Sanam said at trial that in the evening of 10.05.2014 she was returning home when she saw her brother on a motorcycle with a bearded man. There was another motorcycle with her brother's on which 2 people were also riding. 18 months later after the appellant had been arrested in the present crime, an identification parade was held in which Sanam identified the appellant. I am of the view that this piece of evidence was not sufficient to convict the appellant on the charge of murder. My reasons for so concluding are as follows:

8. For no apparent reason, the section 161 Cr.P.C. statement of Sanam was recorded 5 days after the incident i.e. on 16.05.2014. When the F.I.R. was registered, Sanam had not told her father what she had seen. She claimed that her mother was also with her when they had seen the deceased in the company of the appellant; however, the mother was not examined at trial. Sanam herself stated at trial that when she saw her brother her focus was on him but that she had seen the appellant as he had looked at her. This would mean that she fleetingly had seen the person riding with her brother. The only feature of her brother's companion that she caught was that he had a beard. She admitted that she had neither given the description of the appellant in her section 161 Cr.P.C. statement nor had she mentioned a mark on the nose of the appellant. The mark on the nose of the appellant perhaps was the most glaring identification mark on the appellant.

9. In the circumstances of the case I find it odd that the police was not told immediately as to what Sanam had seen. Strange how such an important lead was not recorded at the earliest opportunity. The delay does open a door of doubt, however, in the circumstances of the case, the delay may not be material. At the end of the day the record reflects that the appellant confessed a year later. So it could not be that a 6 day delay was with the intent to manipulate details and evidence. May be she did see a bearded man. But that would not necessarily mean that that bearded man was the appellant. As mentioned before, Sanam also seemed to have missed out on a glaring feature on his face. Even if I give Sanam some leniency on this ground, I am not convinced that her identification of the appellant in such circumstances was necessarily not erroneous.

10. The identification parade was held 5 days after the formal arrest of the appellant in the present crime and at least a 100 days after the Rangers had detained the appellant on an unidentified date. The 5 day delay in holding the parade was not explained. It appears from the record of the identification parade that the dummies selected by the learned magistrate

did not have beards. Apart from the fact that there could be a number of reasons how Sanam could have seen the appellant before the parade, it would not have been difficult to pull out a bearded man from the line-up.

11. The memo of the Test Identification Parade reflects that the NIC card numbers nor the residential addresses of any of the dummies was noted by the learned magistrate. The certificate appended by the learned magistrate to the memo of the test identification parade is not in accordance with the rules. Sanam's signature on the memo also appears different to the signature on her testimony.

12. The Supreme Court of Pakistan in **Kanwar Anwaar Ali, Special Judge Magistrate, In the matter of (PLD 2019 SC 488)** gave extensive guidelines on the conduct of an identification parade which were not complied with by the learned magistrate. These included, lax precautions taken by the learned magistrate impacting the efficacy and accuracy of the parade; the learned magistrate did not inquire from the appellant as to when he was arrested, since when he was in custody; the occupation and addresses of the dummies were not recorded; he did not record the objections of the appellant; he did not record the precautions that had been taken to ensure confidentiality; the certificate annexed by the learned magistrate is not in the form specified in Chapter V Part C of the Sindh Courts, Criminal Circulars. It would be appropriate at this stage to also cite a paragraph out of the **Javed Khan alias Bacha and another vs The State and another (2017 SCMR 524)**, which paragraph speaks for itself and the observations made therein impact the present case. The Court observed:

> *"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 Sind 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)."

13. Had the image of the appellant been "hardwired" into his brain, of which there is always a possibility, the witness would be expected to have described to the police what the accused looked like. The Supreme Court of Pakistan in ***Kanwar Anwaar Ali*** **(supra)** has observed that "*Memories faded and visions got blurred with passage of time. Thus, an identification test, where an unexplained and unreasonably long period had intervened between the occurrence and the identification proceedings, should be viewed with suspicion. Therefore, an identification parade, to inspire confidence, must be held at the earliest possible opportunity after the occurrence."*

14. The memo of identification parade states that the "accused was on police custody remand" when produced before the magistrate. There is nothing on record to show that the appellant who was admittedly in jail custody when arrested in the present crime was taken out of jail to be brought before the magistrate or that he was given into police custody. In fact, there is nothing on record, apart from a memo of arrest claiming that

the appellant was arrested from jail signed by all policemen, to show that the appellant was indeed confined in jail when arrested. No record from the prison was produced by the investigating officer of the case. In the circumstances of the present case I am not satisfied that the identification was correct.

15. The role assigned to the appellant by Sanam, at best, was him sitting with her brother on a motorcycle in the company of 2 other persons on a separate motorcycle. Even if true, this would indicate that the appellant and the deceased were on friendly terms. No motive for the killing was given by the prosecution and the act of the 2 men riding together would suggest that they were on friendly terms. This leads me to analyze the strength of the last seen together evidence. The allegation in the present case is that Sanam saw her brother with the appellant and 2 others at about 5:00 p.m. on 10.05.2014. The body was found 8 hours later. The Honorable Supreme Court in **Fayyaz Ahmed vs The State (2017 SCMR 2026)** has given certain principles in cases where last seen together is pleaded. It was held that, inter alia, 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. No such evidence to establish the reasons was produced at trial in the present case. The apex court also held that there must be some motive on the part of the accused to kill the deceased otherwise the prosecution had to furnish evidence that it was during transit that something abnormal or unpleasant happened which motivated the accused to kill the deceased. In the present case not an iota of evidence to establish motive was produced at trial. The apex court also held that the last seen evidence must be corroborated by independent evidence, coming from an unimpeachable source because uncorroborated last seen evidence was a weak type of evidence in cases involving capital punishment. The prosecution, in the present case, did not produce any independent evidence from an unimpeachable source to corroborate the last seen together theory. The Honorable Supreme Court in the case of **Muhammad**

Abid vs The State and another (PLD 2018 SC 813) has further observed that last seen together evidence must be "*scrutinized minutely so that no plausible conclusion could be drawn therefrom except the guilt of the accused*". The Court also observed that "*The circumstance of last seen together does not by itself necessarily lead to the inference that it was the accused who committed the crime. There must be something more establishing connectivity between the accused and the crime*". The facts of the present case also lack such probability, cause and connectivity. To conclude, the last seen together evidence, even if correct, was not strong enough that a conviction in a capital punishment case could be justified on it. Even otherwise, there is nothing on record to show how the case of the appellant differs from the other 2 companions of her brother who Sanam had seen.

16. Apart from the above findings the record also reveals that no crime weapon was found from the appellant hence the empties ostensibly recovered from the place of incident became meaningless. The deceased was not subject to post mortem, hence the cause of death could not be conclusively determined, though it was claimed that the deceased had been shot. The supposed extra judicial confession, which led to no discovery of fact, could not be used as evidence against the appellant in view of the bar contained in the Qanun-e-Shahadat Order, 1984.

17. I am unable to agree with the prosecution argument that the crime record of the appellant is such that he does not deserve leniency. For starters, no solid evidence was given to support this argument. To the contrary, the investigating officer of the case, S.I. Muhammad Jaffar quite categorically testified at trial that "*it is correct that there is no previous criminal record of the accused*". The prosecution's argument, it appears, arises from a JIT report; a copy of which is on record having been produced by the investigating officer S.I. Muhammad Jaffar. This 2 page report basically says that the man confesses to several crimes. The details of these "crimes" are vague, to say the least. Even then, the crimes that the appellant ostensibly confessed to does not include the present one. Yet, the

report quite arbitrarily and without any reason concludes by saying "*His legal arrest in criminal case vide F.I.R. No. 61 of 2014 u/s 302/34 PPC is essentially required.*" There were 5 members of the JIT. The report on record shows that it has not been signed by even one member of the JIT let alone any member coming to court to produce the document. The report is signed by one Muhammad Arab Mahar, SSP Investigation, who too was not examined as a witness. Learned DPG, though trying hard, also seemed at a loss to justify what value such a report would legally hold and how could it be used as a basis for convicting a person to life. The other reason I disagree with the prosecution argument is that a court of law cannot convict any person on the basis of perceptions. A court must decide on the basis of evidence before it. An accused may be a "bad" person yet, he is entitled to his fundamental rights. He is entitled to enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen. No person shall be deprived of life or liberty save in accordance with law.

18. This seems to be one of the many cases where allegedly persons, perhaps lawfully detained by the Rangers, after having provided the required intelligence, were handed over to the local police, which then registered cases against such individuals. The level of investigation, once handed over to the police, regrettably has been mere mechanical. No meaningful investigation was conducted to capitalize on the intelligence and investigation leads provided to the police by supporting law enforcement agencies.

19. Identification after 18 months of the incident. Initial description given being extremely broad and vague. A faulty and unreliable parade. Mysterious circumstances of arrest. Weak last seen together evidence. Cause of death not authoritatively opined as no post mortem was held. Complete lack of motive. A non-admissible alleged extra judicial confession. Non-existent investigation - all contribute for me to conclude that it will not be safe to convict. I am unable to conclude that it was proved beyond reasonable doubt that the appellant was guilty of the offence from which

this case arises. The appeal is allowed. The appellant is present on bail. His bail bonds stand cancelled and surety discharged.

JUDGE