

IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Appeal No. 482 of 2018

Appellant : Muhammad Shabbir
through Mr. Bashir Ahmed Channa, Advocate

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

Date of hearing : 21st November, 2022

JUDGMENT

Omar Sial, J.: At about 3:00 p.m. on 17.11.2011, Sabir Khan was sitting with his cousin Ahmed Jan and one other named Abdullah when Ahmed Jan after receiving a phone call got up and left. He did not tell his friends where he was headed for; however, when he did not return till 9:00 p.m., his friends attempted to contact him on his phone but to no avail. After searching for Ahmed Jan at hospitals and police stations, Ahmed's dead body was ultimately found at about 12:15 a.m. on 18.11.2011 lying at the Edhi Centre. Sabir Khan learnt that Ahmed had been hit on his head with a hard and blunt substance by unknown persons and then his body was thrown in a gunny bag in a little lane. F.I.R. No 1062 of 2011 was registered under sections 302 and 34 P.P.C. at the KIA police station at 11:10 a.m. on 18.11.2011.

2. On 20.11.2011, Sabir Khan received a phone call from S.I. Aslam Khan asking him to come to the police station. When Sabir reached the station, Aslam Khan along with 8 other persons asked him to accompany him to the place of incident. When he reached there he saw that one Shabbir was already standing there in the custody of police officials. Shabbir was identified as being one of the customers of the deceased. The whole contingent then went to Shabbir's house where the deceased's motorcycle number plate and his mobile phone were found. Later that day, the police was led by Shabbir to some bushes where the motorcycle of the deceased

was found. On 21.11.2011, once again on Shabbir's pointation the police was taken to the Malir river where Shabbir said that he had thrown a wooden piece with which he had killed Ahmed Jan. When Sabir went back home that day, he discovered in his home, ownership documents of a plot of land owned by Shabbir.

3. Shabbir pleaded not guilty and claimed trial. At trial the prosecution examined 9 witnesses. **PW-1 Sabir Khan** was the complainant. **PW-2 Abdul Nasir** was a friend of the deceased who claimed that he had dropped of Ahmed Jan at the house of Shabbir on the day Ahmed went missing. **PW-3 Dr. Jagdesh Kumar** did the post mortem. **PW-4 Umer Hayat** registered the F.I.R. **PW-5 Syed Ameen** witnessed the recovery of the wooden piece used ostensibly for the killing. **PW-6 Muhammad Aslam Mughal** was the investigating officer of the case. **PW-7 Ghulam Rasool** was the first responder to the news that an unidentified body in a gunny bag had been found. **PW-8 Sohail Ahmed** was the learned magistrate who recorded the section 164 Cr.P.C. statement of the appellant. **PW-9 Naveed Ahmed** witnessed the recovery of the body as well as the arrest of the appellant.

4. In his section 342 Cr.P.C. statement the appellant professed innocence and further stated that while no recovery was made from him, he did appear for a confessional statement before the magistrate only because he had been beaten by the investigating officer of the case.

5. At the end of the trial, the learned 1st Additional Sessions Judge, Karachi East on 08.09.2018 convicted the appellant for 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 spend a further 6 months in prison) and a compensation of Rs. 300,000 to the legal heirs of the deceased. It is this judgment that has been called in question through this appeal.

6. I have heard the learned counsel for the appellant as well as the learned APG. None effected an appearance on behalf of the complainant despite notice. The individual arguments of the counsel are not being

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

7. Counsels are in agreement that there were 3 pieces of evidence against the appellant: (i) last seen together (ii) recovery of the deceased's motorcycle number plate and mobile phone from the appellant's house and recovery of the deceased's motorcycle and the crime weapon on the pointation of the appellant (iii) a judicial confession.

Last seen together

8. PW-2 Abdul Nasir testified that on 17.11.2011 at about 3:15 p.m. Ahmed Jan had asked him to accompany him to a house for recovery of some money. He had then accompanied Ahmed Jan, who was on his motorcycle whereas Nasir was on his own. Where the two parted ways was a house in which Ahmed Jan had gone in while Nasir Khan left to do some work. Nasir at trial further testified that the next day i.e. on 18.11.2011 he witnessed the inspection of the place of incident by the police; on 20.11.2011 he was called by his cousin to a place where the accused Shabbir was already present in the custody of the police. The same day i.e. 20.11.2011, Nasir witnessed the recovery of the number plate, a mobile phone and Rs. 6,000; later the same day he also witnessed the recovery of the deceased's motorcycle.

9. In spite of the fact that Nasir dropped Ahmed Jan allegedly at Shabbir's house on 17.11.2011 and by 10:00 a.m. on 18.11.2011 he knew that Ahmed Jan had died, Nasir seems to have told neither the complainant nor the police about the events of the previous day. In fact, no document records what he had seen until he was examined at trial 3 years later. It was 21.11.2011 when the complainant claimed that he had found documents to a property owned by Shabbir which had been mortgaged to Ahmed Jan. These documents were not produced at trial, so the prosecution failed to prove that Shabbir had indeed mortgaged his property documents to Ahmed Jan. It appears from the examination-in-chief of Nasir that even if he did drop of Ahmed Jan at Shabbir's house, he must have had a fleeting

look at the person, whom Nasir admitted he had not known before. No identification parade was held for Nasir to identify the appellant to ensure that it was the same person. No description of the appellant was given earlier. Nasir, seems to have gone along with what the police told him.

10. The evidence led at trial to prove last seen was not trustworthy for the aforementioned reasons. The same cannot be used as basis of conviction without any corroborating evidence.

Recoveries

11. It is extremely odd that keeping in view the post mortem report which shows 5 injuries on the head of the deceased and brain matter oozing out, no blood or any other sign of a scuffle were found at the place of incident. It is equally odd that the appellant would take off the number plate of the deceased's motorcycle and preserve it at home as if it was a souvenir. The investigation officer did not determine whether the number plate actually belonged to the motorcycle of the deceased and who was the owner of that motorcycle in the Excise records. The motorcycle number plate and the mobile phone seized was not produced at trial and no reason was given. S.I. Mughal, the investigating officer, stating in his testimony that *"It is correct to suggest that the recovered number plate and the mobile phone of the deceased recovered on the pointation of the accused are not present at the moment before the court."*

12. I also find it odd that a full grown man was done to death by a wooden piece that was 2 foot long and 3 inches wide (according to Syed Ameen, the witness to the recovery of the wooden piece). No other part of the deceased's body had received any injury as the post mortem report showed. I find it odd that the wooden piece was recovered from the Malir river, which according to Syed Ameen, the witness of the recovery was full of water and sewerage water as well as garbage. Syed Ameen acknowledged that the packet of the wooden piece which was produced in court did not have his signature on it and that at the time of recovery the police had written something on a paper and had made him and Sabir sign.

The other witness to the recovery of the wooden stick, i.e. Sabir, stated that the wooden piece, when found, was tainted with blood. The investigating officer S.I. Mughal admitted at trial that the wooden stick produced at trial had no blood stains on it as it had been found from a sewerage. He also admitted that the wooden stick had been produced at trial in a covering that did not have either his signatures or the signatures of the witnesses to the recovery. Perhaps a faux pas, but S.I. Mohammad Aslam Mughal, the investigating officer of the case in his testimony stated *"It is also correct to suggest that there is also no eye witness regarding recoveries on the pointation of the accused."* According to the Daily Diary Entry No. 58 when the appellant was arrested he had some keys in his possession, presumably the keys to the motorcycle. These keys were not seized under a memo nor were they produced as evidence in court.

13. It was also alleged by the prosecution that the deceased's motorcycle was also found on the pointation of the appellant. The record shows that a motorcycle was recovered however the record does not show who the owner of the motorcycle was? No investigation was carried out by the investigation officer in this regard. The motorcycle was found in some bushes, though the prosecution case was that the appellant had told the police that the motorcycle is parked in his home. Each time the investigating officer has prepared a memo he has tinkered with its contents to reconcile with his version of the case. When found, the motorcycle did not have its rear number plate and the number in front had been rubbed off.

13. In view of the above observations, the recovery said to have been made on the pointation of the appellant is shrouded in doubt and cannot be relied upon safely to uphold the conviction of the appellant.

Confession

14. The prosecution case is that on 23.11.2011 the appellant confessed to his crime before the learned 14th Judicial Magistrate, Karachi East. The appellant at trial said that he had been picked up along with his wife and

children by the investigating officer Mughal and asked for a bribe, when he was unable to pay Mughal, Mughal had falsely implicated him in this case. I tend to believe that the appellant was picked up by Mughal at an earlier date than what the record shows. I find it extremely unusual that the circumstances of his arrest were that a police party on patrol duty found him to be "suspicious". At that point in time, the police had no clue or lead that the suspicious person walking on the road was Ahmed Jan's killer. This makes it extremely suspicious that the moment the appellant was apprehended he confessed that he had murdered Ahmed Jan. It is not plausible or logical. Even if the appellant was the correct person, I find it unbelievable that a man stopped on account of being suspicious, would confess within minutes to a murder, which was at that point nowhere on the radar of the police. The arrest is also suspicious on the ground that no witness saw the appellant being arrested. Both, Sabir and Nasir, the 2 witnesses to the arrest acknowledged that they were called by the police, where the appellant was already in custody, and that they were told that this is the man who killed Ahmed Jan.

15. In his purported confession, Shabbir revealed that he had hit the deceased twice on his head with a wooden stick. The medical evidence does not reconcile with this statement because it shows that the deceased had been struck a number of times on his head.

16. This court has on a number of occasions deprecated the practice of pre-printed forms of confessions being used for such recordings. Learned magistrates seem to treat the process of recording confessions in a mechanical manner, which it should not be as the same can be the sole basis of conviction. In the present case too, the learned magistrate has used a pre-printed questionnaire and a fill in the blanks exercise carried out. Such recordings then give rise to doubts as to whether the confessor was told about the importance of his confession and also comforted that even if he does not confess he will not be given into police custody. The value of a confession, when subsequently challenged, is diluted when pre-printed questionnaires are used. The questions have been asked in English while

the appellant did not read, write or speak English. The learned magistrate did not confirm, either in his certificate appended with the confession or in his testimony as to in which language the appellant was asked the questions and whether he understood the same.

17. Chapter VI Part C of the Sindh Criminal Court Circulars provides that one important point which the magistrate should invariably question the accused person is as to the length of time during which he (the accused person) has been in the custody of the police. This requirement further requires that it is not sufficient to note the date and hour recited in the police papers at which the accused is said to have been formally arrested. Regrettably, this was not done by the learned magistrate although a vague question was asked as to how long had the accused been with the police.

18. It appears from the judgment of the learned trial court, that the learned trial court was not completely satisfied with the prosecution version on recoveries effected; however, convicted the accused based on his retracted confession.

19. The Supreme Court of Pakistan in **Hashim Qasim vs The State (2017 SCMR 986)** has held that for accepting a confession, two essential requirements must be fulfilled; first, that the confession was made voluntarily and was based on true account of facts leading to the crime, second, the same was proved at trial. In the present case, the appellant denied at trial that his confession was voluntary. To the contrary it was claimed by the appellant that he had confessed as a consequence of a beating given to him by the investigating officer of the case. Unimpeachable corroboration of his confession was also lacking. As mentioned above, the allegation (and confession) that he had borrowed money from the deceased formed a basis of the murder. This aspect was not proved at trial, even though it was claimed by the prosecution that property documents ostensibly mortgaged by Shabbir to the deceased were found at his home. In his confession, Shabbir recorded that he struck the deceased one blow on his head with the stick he had, on which he fell

down. The second strike killed him. The medical evidence however reflects that the deceased had sustained several blows to his head. As mentioned above, I find it very difficult to believe that a full grown man like the deceased would not put up any resistance and would in fact die with 2 strikes of a 2 feet by 3 inches wide wooden stick. In his recorded confession, Shabbir has said that he had parked the motorcycle of the deceased in front of a hotel. In the supposed extra judicial confession he told the police that the motorcycle was parked in his home. The motorcycle, according to the police was recovered from some bushes. The contradictions raise doubt as to whether Shabbir's confession was a genuine one. In his recorded confession Shabbir gave the awakening of his conscience as a reason for confessing. The conscience, did not remain awake too long, as immediately upon the commencement of the trial, he pleaded not guilty. A retracted confession is a weak piece of evidence. I do not find myself convinced with the genuineness and the voluntariness of the confession.

20. The evidence reflects that the complainant party was told by the police as to who had murdered Ahmed Jan, where the murder had occurred and what had been recovered from him. The complainant party seems to have gone along with what was told to them by the police.

21. The learned counsel for the appellant as an alternate prayer has pleaded that if this court is not satisfied to set aside the impugned judgment, it may consider reducing the sentence of the appellant from life imprisonment to the one he has already undergone i.e. 20 years and 8 months. In the alternate he has argued that even if the confession is to be believed, it shows that the murder was not pre-meditated or planned and that the deceased had been struck as a consequence of the insults he threw at the appellant in the shape of asking his women to indulge in prostitution to pay back the loan he had taken from the deceased. I have considered his alternate plea; however I am not satisfied in the first place that the evidence led at trial was of such quality which would justify the appellant's conviction and sentence.

22. In view of the above observations, the appeal is allowed on the ground that the prosecution was unable to prove its case beyond reasonable doubt. The appellant may be released if not required in any other custody case.

JUDGE