IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Jail Appeal No. 121 of 2015

Appellant	:	Mehboob Ali @ Bobby through M/s. Abida Parveen Channer and Bilal Hussain, Advocates
Respondent	:	The State through Ms. Robina Qadir, D.P.G.
Complainant	:	through Mr. Shoukat Ali Shehroze, Advocate
Date of hearing	:	13th December, 2022

JUDGMENT

Omar Sial, J.: Mehboob Ali alias Bobby, his wife Qurat-ul-Ain alias Reema and one Mohammad Rashid alias Hazir were accused of murdering Aliya on 24.11.2009.

2. A background to the case, as portrayed by the prosecution, is that one Naveed Ahmed Qureshi on 24.11.2009 was informed over the phone by his neighbor, Nazakat, that Qureshi's wife, Aliya, was missing. Qureshi, who was not at home at that time, went back and found the main entrance to the building in which his apartment was situated, locked. Qureshi broke the lock with the assistance of Nazakat and Nazakat's wife. The door to Qureshi's apartment was also locked and the trio had to remove a window grill and enter the home. Once inside, they found Aliya's burka and a chaddar but the wife herself was nowhere to be seen. Qureshi informed his brother Kamran and brother-in-law Zeeshan over the phone about Aliya being missing. The three men searched for Aliya but their efforts were futile. The next day, they learnt through the newspaper that an unidentified body of a woman had been found in the Nazimabad area in a gunny bag. Subsequently, Qureshi discovered that the dead body was that of his wife Aliya and that she had been strangled to death with a rope. F.I.R. No. 412 of 2009 was registered under sections 302 and 34 P.P.C. at the Nazimabad police station.

3. Qureshi showed suspicion on his former brother-in-law Tanveer (the brother of Naveed's first wife) for having committed the murder with the collusion of Qurat-ul-Ain alias Reema. Tanveer was arrested on 23.04.2010 whereas Qurat-ul-Ain was arrested on 24.04.2010. While the 2 were in custody, Qurat-ul-Ain disclosed to the police that it was Mehboob alias Bobby who had first snatched Aliya's jewellery and had then murdered her. Mehboob Ali was therefore arrested on 25.04.2010. Mehboob Ali, while in custody, further disclosed that after killing Aliya he had put her dead body in a rickshaw driven by Mohammad Rashid alias Hazir and that the 2 of them had then thrown the body near a park. Mohammad Rashid was therefore also arrested on 26.04.2010.

4. On 27.04.2010 Mehboob Ali and Mohammad Rashid, separately led the police to the place where they had thrown Aliya's dead body. On 02.05.2010 Mehboob Ali led the police to a house in Ghazi Nagar from where the police recovered Aliya's stolen jewellery. Tanveer was let off. The trial therefore proceeded against Mehboob Ali alias Bobby, his wife Qurat-ul-Ain alias Reema and one Mohammad Rashid alias Hazir.

5. All 3 accused pleaded not guilty and claimed trial. At trial the prosecution examined 14 witnesses in order to prove its case. **PW-1 Naveed Ahmed Qureshi** was the complainant. **PW-2 Kamran Qureshi**, who according to his brother Naveed Qureshi, had entered the building initially with him. **PW-3 Qurat-ul-Ain** was accused turned approver. **PW-4 Inspector Manzoor Ahmed Rajput** was the first investigating officer of the case. **PW-5 Zahida Parveen** was the learned magistrate who recorded Qurat-ul-Ain's confessional statement. **PW-6 P.C. Syed Qazim** witnessed the recovery of the dead body. **PW-7 Mohammad Ifrahim** was not the driver, but the owner of the rickshaw which was used in disposing of the dead body. **PW-8 Shahabuddin Memon** was the learned District Public Prosecutor who recommended that Qurat-ul-Ain becomes an approver. **PW-9 Asghar Ali** was the learned magistrate who recorded Qurat-ul-Ain's statement as an approver. **PW-10 Ameer Afsar** witnessed the recovery of Aliya's gold ornaments on Mehboob's pointation. **PW-11 Inspector Shabbir Hussain**

was the officer who first saw the dead body at the hospital. **PW-12 Dr. Zakia Khursheed** was the lady who had conducted the post mortem on the dead body. **PW-13 Zahida Parveen** was the learned magistrate who recorded Mohammad Rasheed's confessional statement. **PW-14 Inspector Mohammad Bashir** was the second investigating officer of the case.

6. In his section 342 Cr.P.C. statement, Mehboob Ali denied wrong doing and further stated that the false case against him had been orchestrated by Qurat-ul-Ain's father as he was not happy over his daughter marrying Mehboob against her father's wishes.

7. The learned 3rd Additional Sessions Judge, Karachi Central on 28.02.2015 convicted Mehboob under section 302 P.P.C. and sentenced him to a life in prison for having committed the murder of Aliya. The learned trial court did not in the impugned judgment identify the sub-clause of section 302 P.P.C under which the sentence was given, however it appears from the sentencing that he was convicted for an offence punishable under section 302(b) P.P.C. Qurat-ul-Ain was acquitted on the ground that she had become an approver and therefore the legal heirs of Aliya had pardoned her. Mohammad Rashid was declared an absconder. Tanveer, who had also been arrested, was let of earlier.

8. I have heard the learned counsels for the appellant as well as complainant and the learned DPG. Neither the learned counsel for the appellant nor the learned counsel for the complainant nor the learned DPG have given any argument on the legality of Qurat-ul-Ain being made an approver. Learned counsel for the appellant has argued that he was convicted on the basis of Qurat-ul-Ain's statement at trial and that recovery of the jewelery was suspicious. She also raised a blanket argument that Mehboob was innocent and that in fact Qurat-ul-Ain subsequently married Naveed and that was the bait given to her by Naveed to falsely implicate her own husband. She further argued that neither was it determined whether the dead body found was that of Aliya nor did any independent witness even see the place from where the body was recovered. To the

contrary the learned DPG simply argued that Mehboob was the culprit and that she supported the impugned judgment. Learned counsel for the complainant could also not provide much assistance in the matter and also gave blanket arguments basically supporting the impugned judgment. My observations and findings are as below.

9. Mehboob Ali and Qurat-ul-Ain were admittedly husband and wife. It was 24.11.2009 when Aliya disappeared from the house. It was 25.11.2009 when her dead body was said to have been discovered. For reasons best known to the husband of the deceased, the F.I.R. was not registered by him nor did he record a statement under section 161 Cr.P.C. till 5 days after the discovery of the dead body. No reason for this delay was given by Naveed Ahmed Qureshi. It appears that it was for the first time when his section 161 Cr.P.C. was recorded that Naveed recorded how events had unfolded on the day when he discovered that his wife was missing. This very delay in stating the facts, as he alleged, makes it important that his testimony is looked at with great care and caution. Late recording of section 161 Cr.P.C. statement without any plausible reason for the delay would inevitably adversely impact the accuracy and genuineness of what is stated in that statement. It is also pertinent to mention that the Supreme Court of Pakistan has repeatedly held, in the case of an eye witness, that unexplained delay would reduce the evidentiary value of that statement to zero. It is true that Naveed Ahmed Qureshi was not an eye witness to the murder, yet, the principle laid down by the Honorable Supreme Court in the case of delayed recording of eye witness statement would nonetheless impact delays in statements of persons who are not eye witnesses to the occurrence. Even when Naveed Ahmed Qureshi recorded his section 161 Cr.P.C. he had suspected that his former brother-in-law Tanveer was the culprit.

10. Qurat-ul-Ain was arrested nearly 5 months after the incident i.e. on 24.04.2010 and 2 days later, on 26.04.2010 things took a turn in this case when Qurat-ul-Ain was produced before the learned 12th Judicial Magistrate, Karachi Central and recorded what was termed as a

"confession statement". The entire case hinges on the fact that Qurat-ul-Ain who was Mehboob's accomplice in the crime, made a confession, was tendered pardon, made an approver, recorded her testimony at trial and whatever she said was used to convict and sentence Mehboob. Apart from this piece of evidence the prosecution alleged that jewelery stolen from Aliya when she was killed was also recovered at Mehboob's pointation.

Qurat-ul-Ain as approver

11. Who is an "approver" or an "accomplice" or what is a "confession" is not defined in the Code or the Order. Black's Law Dictionary (7th Edition) defines an "approver" as "*a criminal who confesses and testifies against his or her accomplices.*" The word "accomplice" is defined in the Dictionary as "*a person who knowingly, voluntarily, and intentionally unites with the principal offender in committing a crime and thereby becomes punishable by it.*" The Dictionary further defines "confession" as "*a criminal suspect's acknowledgment of guilt usually in writing and often including details of the crime.*"

12. Article 16 of the Order provides that an accomplice shall be a competent witness against an accused person, except in the case of an offence punishable with hadd; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. The second portion of this Article i.e. "*a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice*" however conflicted with Article 129 illustration (b) which provided that a court may presume that an accomplice is unworthy of credit, unless he is corroborated in material particulars.

13. In **Haider Hussain and others vs The Government of Pakistan (PLD 1991 FSC 139)** it was held, however, that Article 16 was repugnant to the injunctions of Islam to the extent that an accomplice is not a competent witness in offences punishable with Qisas, and a conviction based on uncorroborated testimony of an accomplice even in the matter of Ta'zir will be illegal.

14. The decision in *Haider Hussain* (supra) was challenged in appeal before the Honorable Supreme Court of Pakistan in the case of **Federation of Pakistan vs Muhammad Sham Muhammadi, Advocate (1994 SCMR 932).** The conflict between Article 16 and Article 129 (b) was also observed by the Supreme Court of Pakistan, which held:

> "17. *We may observe that Article 16 and illustration (b) of Article 129 of the Order are apparently in conflict. In such a case the Court is required to place such construction, which may harmonize the above two provisions. Though by virtue of the above Article 16 it is permissible that the Court may, convict an accused person on the basis of uncorroborated evidence of an accomplice, but the Court as a rule of prudence and because of above illustration (b) to Article 129 of the Order insists upon for having the testimony of an accomplice corroborated in material particulars, and, thereby harmonize the above two provisions*.
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> *18. The upshot of the above discussion is that we are inclined to hold that the evidence of an accomplice is not admissible at all in case of an offence punishable with Hadd and Qisas. However, in case of an offence, which entails punishment of Ta'zir, his testimony is admissible and furnish the basis for conviction provided it is corroborated in material particulars. However, in exceptional cases for the reasons to be recorded by the Court, his testimony may be acted upon as sufficient for warranting recording of conviction.*"

15. Maulana Muhammad Taqi Usmani, J, one of the Honorable members on the Bench in the above case, in a separate note expressed his reservations to the concession given i.e. "*However, in exceptional cases for the reasons to be recorded by the Court, his testimony may be acted upon as sufficient for warranting recording of conviction."* His Lordship (as he then was) was of the view that even in the cases of Ta'zir the conviction cannot be based on the solitary testimony of an accomplice until it is corroborated by some other piece of evidence which may include the circumstantial evidence also.

16. The first question that arises in my mind in the present case is whether the statement under section 164 Cr.P.C. recorded by Qurat-ul-Ain and termed a confession was indeed confession. A bare read of the statement shows that Qurat-ul-Ain does not make an admission of guilt. Throughout her statement Qurat-ul-Ain has taken the plea that she herself was a victim of Mehboob's aggression and cruelty. Not once did she say that she had aided, abetted or helped Mehboob in any manner whatsoever or that she was complicit. Based on what she recorded, Qurat-ul-Ain could not be said to be an accomplice but rather, it is an account of what she saw Mehboob doing with Aliya and subsequently her dead body.

17. The next question that arises is that if she could not be termed as an accomplice, could she have been given a tender of pardon? In this regard sections 337 to 343 of the Code are relevant. Section 337 originally empowered a District Magistrate or a Sub-Divisional Magistrate to tender a pardon subject to the conditions stipulated in the section; however, through an amendment made by Order 37 of 2001 the magistrate was replaced with the "Officer In Charge of the prosecution in the district" with effect from 14.08.2001. Section 338 of the Code empowers the High Court or the Court of Session trying the case to either tender the pardon itself or direct the Officer In Charge of the prosecution in the district to do so. In the current case it was the District Public Prosecutor in his capacity as In Charge of the prosecution in the District who tendered the pardon to Qurat-ul-Ain hence section 337 Cr.P.C. was invoked. Though section 337 in itself does not mention the word "accomplice", the short title to the said section says "Tender of pardon to an *accomplice*" (emphasis provided). While the language within the section extends the concession of pardon to a person who was "privy to the offence" and there would be an argument that Qurat-ul-Ain (according to her own version) was privy to the offence allegedly committed by Mehboob, the Honorable Federal Shariat Court has observed in the *Haider Hussain* (supra) case that:

> "*In the Pakistan Law of Evidence and Pakistan Criminal Procedure Code, one comes across two terms: One is accomplice and the other*

is approver. Sometimes these terms appear to have been used interchangeably. The distinction, however, remains that an approver is always an accomplice whereas an accomplice is not necessarily an approver, as an accomplice or co-accused becomes an approver after he has been tendered pardon or granted concession on the condition that he will reveal the truth and will not hide anything in relation to the offence or offences which he and the other accused are alleged to have committed."

The court further held that:

"*Tendering pardon to an accomplice and making him approver on the condition to disclose all the facts and parts played by his co-accused as provided in sections 337, 338 and 339 of Criminal Procedure Code, according to Islamic haw, is not permissible in an offence liable to Hadd as Hadd cannot be waived, reduced, enhanced or altered in any case by anyone. But as far as tendering pardon to him in case of ta'zir is concerned, it is permissible if it is based on "public interest" because ta'zir can be waived by a ruler, legislature or Judge if he deems it necessary in the circumstances of a particular case.*

The difference between Hadd and Ta'zir is that contrary to Ta'zir no recommendation can be accepted in Hadd that a ruler cannot waive it and it is (also) dropped by the delay. So far as pardoning of an accomplice in matter of ta'zir is concerned, it is only permissible when ta'zir relates to the right of Allah and thus it will not be permissible if ta'zir relates to the right of an individual unless the victim himself pardons him like the offence of murder and hurt.

Therefore, in case of an approver, his evidence against his co-accused shall not be accepted unless it is corroborated with other evidence because in this case his evidence is not only unacceptable on the ground that he is accused but also on the ground that he gains benefit on his evidence which is not permissible in Islamic law."

18. The Court went to hold that section 337 and 338 of the Code were repugnant to the Injunctions of Islam as laid down in the Holy Quran and Sunnah of the Holy Prophet (p.b.u.h.) to the extent that no tendering of pardon to an accomplice can be made in case of offence punishable with hadd and ta'zir, which relates to Haq al-Abd, the right of an individual. The Court however noted that the section 337 and 338 of the Code had already been amended by the Criminal Law (Amendment) Act, 1991, in order to bring in in conformity with the injunctions of the Holy Quran and Sunnah.

19. It emerges from the above that:

(i) An approver is always an accomplice

(ii) An accomplice is a person who knowingly, voluntarily, and intentionally unites with the principal offender in committing a crime and thereby becomes punishable by it.

(iii) An accomplice's testimony in spite of the provisions of Article 16 of the Order needs to be corroborated to be admissible even in cases of tazir.

(iv) An accused can only be pardoned if the legal heirs of the victim give their consent.

20. In the present case, Qurat-ul-Ain based on her statement made before the learned magistrate, does not indicate in any manner that she knowingly, voluntarily, and intentionally united with Mehboob, the alleged principal offender, in committing a crime and thereby became punishable by it. To the contrary she said that the reason she was "confessing" was because although she had been silent due to fear, she now thought that Mehboob would kill her too. The other condition precedent to a tender of pardon is that the legal heirs of the deceased should have given their consent to the tender of pardon. This exercise was done for optics however as it was done in an extremely casual and non-serious manner. The learned District Public Prosecutor as well as the learned trial court appear to have given this important aspect much thought. The lack of attention is demonstrated by the fact that no proceeding or inquiry was held to

determine as to who, and how many, were the legal heirs of the deceased. The application filed by the District Public Prosecutor on 14.10.2010 for grant of pardon shows that Qurat-ul-Ain was accused only of an offence under section 202 P.P.C. This section provides that whoever, knowing or having reason to believe that an offence has been committed, intentionally omits to give any information respecting that offence which he is legally bound to give, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both. This was not the correct statement made by the D.P.P. Qurat-ul-Ain along with Mehboob was charged for offences under section 392, 303, 201, 411 and 34 P.P.C. Only 3 persons appeared, claiming to be the legal heirs, one was a woman by the name of Rubina, who claimed to be the mother of the deceased though no longer married to the deceased's father; the second was Naveed Ahmed Qureshi, as the deceased's husband; the third was a man by the name of Zeeshan who claimed to be Aliya's brother. All referred to Qurat-ul-Ain as an abettor to the murder although not once had Qurat-ul-Ain claimed to be an abettor. All along she had said that she was put under fear and duress by Mehboob and hence she did not tell anybody what had transpired. As noted before it was not conclusively determined if the 3 persons who swore affidavits were indeed all the legal heirs of Aliya or not. Further, the affidavits that were filed by these supposed legal heirs were unreliable to say the least. All the affidavits say that the deponents swore and signed the affidavits after being identified by the learned counsel appearing on their behalf, on 24.11.2011 in Hari Pur. If that was true then no explanation was provided to me as to how the same deponent on the same date was swearing the affidavit in front of the learned trial judge in Karachi. How could the Commissioner for taking Affidavits certify that the affidavit was sworn before him when the Commissioner himself was not present either in Hari Pur or in Karachi. Section 337(1A) provides that the District Public Prosecutor who tenders the pardon has to record his reasons for so doing.

21. It appears that the learned D.P.P. as well as the learned trial judge erred in approving the tender of pardon to Qurat-ul-Ain. Her statement, at best would be the statement of one accused made against a co-accused or a statement made by an eye witness to the occurrence or a statement by a victim of the crime (as she herself alleged that she was forcibly moved from one place to another by Mehboob).

22. Reverting to the statement made by Qurat-ul-Ain. A bare reading of the statement does not inspire an iota of confidence nor does it sound trustworthy. A far-fetched, unrealistic and implausible account of how events unfolded has been given by Qurat-ul-Ain. It is obvious from the statement that she has made the statement to rid herself of the allegation against her. The statement has been made not due to the fear of Allah but to save her own skin. Further doubt is raised when she admitted at trial that she and Mehboob lived in a rented house in Orangi for 4 to 5 months after which police recorded her statement. She justified her conduct by saying that Mehboob would often lock her in the house when he went out. Her uncle lived next door but she did not tell him what had happened. I find the entire statement recorded by Qurat-ul-Ain a fictitious one made with the sole purpose to benefit herself.

23. If one accepts the statement of Qurat-ul-Ain as one of an eye witness not much weight can be given to it keeping in view the fact that it was made 5 months after the incident and the reason given by her for delay was simply unbelievable and illogical. The Supreme Court of Pakistan in a number of cases has held that the delayed recording of an eye witness statement without a plausible reason reduces its value to zero. Reference in this regard can be made to the cases of **Sajid Hussain alias Jogi vs The State (PLD 2021 SC 898), Abdul Khaliq vs The State (1996 SCMR 1553), Noor Mohammad vs The State and another (2020 SCMR 1049) and Muhammad Asif vs The State (2017 SCMR 486)**.

24. If one was to categorize Qurat-ul-Ain's statement as a statement of a co-accused then in the case of **Muhammad Sarfraz Ansari vs. The State and others (PLD 2021 SC 738)** it was held:- "*No doubt, as per Article 43 of the Qanun-e-Shahadat Order, 1984 when more persons than one are being jointly tried for the same offence and a confession made by one of such persons admitting that the offence was committed by them jointly, is proved, the court may take into consideration the confessional statement of that co-accused as circumstantial evidence against the other co-accused (s). However, this Court has, in several cases, held that conviction of a co-accused cannot be recorded solely on the basis of confessional statement of one accused unless there is also some other independent evidence corroborating such confessional statement.*" Qurat-ul-Ain's statement and confession was not corroborated. The pistol allegedly used by Mehboob to subdue Qurat-ul-Ain and Aliya was not recovered; the gunny bag in which Aliya's body was ostensibly put for disposal was not produced in court rather a small gunny bag (measuring 1 feet 11 inches in width and 1 feet and 10 inches in height) was produced, which would not fit a body was produced; the sheet with which Aliya was covered was not produced at trial; the ropes and azarbunds used by Mehboob to tie up the 2 women were never recovered; Qurat-ul-Ain could not prove that Mehboob would maltreat her; she admitted that she had not told the police that Mehboob had used a clothes line to strangulate Aliya; the pillow with which Aliya was smothered was not recovered; the cousin who Qurat-ul-Ain had called and told about the murder and from whose house she said she was recovered by the police was not examined at trial; the police, contrary to what Qurat said, has recorded that she was arrested on 24.04.2010 from the Government Girls School; Qurat-ul-Ain denied that she was ever arrested and that she surrendered to the police herself; however, the investigating officer negated her by testifying that it was not correct that she had surrendered but that he had arrested her from the Government Girls School; no evidence was given that Mehboob had locked up Qurat-ul-Ain in the house in Orangi.

The recovery of the gold ornaments

25. As mentioned above, the story narrated by Qurat-ul-Ain as to how Aliya's jewellery reached Mehboob Ali; does not sound realistic or convincing. Be that as it may, the prosecution case is that on 24.11.2009 the murder took place and that was the same time when Mehboob had taken Aliya's jewelery. The fact that Aliya's husband could not realize till 5 months that jewelery had been taken off is odd in itself. If Mehboob stole the jewelery on 24.11.2009 it appears strange that he did nothing to try and dispose of the jewelery rather kept it safely in his home for 5 months even when he had shifted to Orangi, as claimed by Qurat-ul-Ain. Naveed Ahmed Qureshi at trial said that he was a witness to the recovery of jewelery on the pointation of Mehboob on 02.05.2010 from his own house. I find this not believable. Naveed Ahmed Qureshi himself said that he lived in the same building as Mehboob and that they both had a one room house with a verandah. If he lived in the same building then how was it possible that the recovery of the jewelery was made from a building the number of stories in which, Naveed claimed, he did not know. The address of the house where Mehboob lived and the address of the house where recovery was effected which are on record are not the same. In fact, whose house was the recovery made from was not identified throughout the trial. It also makes no sense that Rashid's (the rickshaw driver) national identity card was also recovered from Mehboob's house. The memo of recovery was prepared on 02.05.2010 ostensibly on the spot; however, neither does the memo reflect that the recovered jewelery was sealed nor does it list the keys, mobile phone, Rashid's CNIC and a gunny bag which were also ostensibly recovered. It is pertinent to mention that all these items came out of the one sealed bag which was produced as evidence at trial. How did the other items enter the sealed bag remained un-explained. The recovery was therefore doubtful.

Section 342 Cr.P.C. statement

26. Another strange and unexplained thing in this case is that there are 2 section 342 Cr.P.C. statements on record for Mehboob Ali. One is recorded on 21.11.2013 whereas the second one is recorded on 05.09.2014. The counsels for both the appellant and the complainant nor the learned DPG have been able to answer as to why this happened. A perusal of the case diaries of the trial court also do not reveal why this was done. In the first section 342 Cr.P.C. statement Mehboob was hardly confronted with any evidence. All of a sudden in the second 342 Cr.P.C. recorded on 05.09.2014 the requisite questions have been asked. The prosecution failing completely to offer an explanation opens up the door of doubt as to whether Mehboob was denied his right under Article 10-A of the Constitution.

Conclusion

27. In light of the above observations I am of the opinion that:

(i) Qurat-ul-Ain was a dishonest witness who should not have been treated as an approver; her evidence was inadmissible in evidence;

(ii) The procedure followed to give her a tender of pardon was flawed.

(iii) No trustworthy and reliable evidence corroborating what Qurat-ul-Ain alleged was collected;

(iv) Recovery of the jewelery was highly doubtful;

(v) The place of incident and the identity of the dead body remained doubtful;

(vi) Naveed Ahmed Qureshi was an unreliable witness whose testimony itself is tainted with doubt.

(vii) No explanation was provided as to why 2 section 342 Cr.P.C. statements were recorded.

28. It is because of the above reasons that I conclude that the prosecution failed to prove its case against Mehboob beyond reasonable doubt. The appeal is therefore allowed and he is acquitted of the charge. He may be released forthwith if not required in any other custody case.

JUDGE