

IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Appeal No. 526 of 2018

Appellants : Nazar Hussain Shah and Muhammad Shakir
through Mr. Muhammad Akbar, Advocate

Respondent : The State
through Mr. Muntazir Mehdi, DPG

Date of hearing : 14th December, 2022

JUDGMENT

1. Background to the case

1.1 On 21.10.2012 a watchman of a tract of land, **Haji Sawan (PW-7)**, saw the local police come to his land at about 7:30 p.m. and take out a decomposed dead body from a pond of dirty water. The unidentified, decomposed, dead body was brought to the Abbasi Shaheed Hospital in Karachi by an Edhi Foundation volunteer. **Dr. Zahoor Ahmed (PW-1)** informed A.S.I. Gul Mohammad of the receipt of the dead body and then at 8:40 p.m. the doctor conducted the post mortem. The body was of a 45 year old man who the doctor estimated had died 4 to 8 days ago. While no signs of poison in the body were found, the doctor opined that the person may have been tortured and his left hand and right toe amputated.

1.2 Earlier, on 13.10.2012, **Mumtaz Mai's (PW-2)** husband, **Khizar Hayat (the deceased)**, who worked for the Pakistan Navy, had left his house at 11:00 a.m. but had not returned home. His wife tried to contact him on his phone but found it switched off. She also tried to contact his friend, **Nazar Shah (the appellant)**, but was also unable to get in touch with him. She then contacted her husband's colleagues at the Pakistan Navy about Khizar's disappearance and they told her that Nazar was the person who had killed her husband. Mumtaz therefore lodged F.I.R. No. 431 of 2012 at the Kemari police station on 19.10.2012. For some unexplained reason the report was registered

under sections 365 and 34 P.P.C. Mumtaz, once again, from unknown sources, received information that Nazar Shah, Shakir, Nasreen, Sakina and Naik Mohammad had murdered Nazar Shah.

- 1.3 A police party led by S.I. Sajjad Ahmed went to Bahawalpur to arrest the accused and managed to arrest Nazar Shah, Shakir and Rashid however while returning to Karachi the vehicle in which the police, Navy officials and the arrested accused were travelling met with an accident in which several were injured and some died as well. As a consequence, another police party led by **S.I. Abdul Razzak Jokhio (PW-12)** had to go to Bahawalpur on 02.12.2012 and the accused were arrested in the presence of **A.S.I. Maqbool Ahmed (PW-10)**.
- 1.4 On 09.12.2012, 2 of the arrested accused i.e. Nazar Shah and Shakir jointly led the police to a house and said that this was the place where they had first given intoxicants in a cup of tea to Khizar Hayat and when he became a little groggy, they (Nazar Shah and Shakir) with the assistance of Nasreen, Sakina and Naik Mohammad, had strangled to death Khizar Hayat with a rope. Nasreen had held his feet, Sakina had put the rope around his neck, Naik Mohammad and Shakir had strangulated Khizar with the rope whereas Nazar Shah was standing in the corridor of the house. The 2 accused told the police that they had also burnt the service and identity card of the deceased along with his diary, the ashes of which they had buried in the courtyard of the house. The half burnt cards were recovered by the police. The accused also disclosed to the police that the mobile phone of the deceased had been taken by accused Nasreen. Immediately afterwards the 2 accused took the police to the pond where they had thrown the body. They then disclosed that the dead body of the deceased was brought from the house where he was killed to the pond by Naik Mohammad and Shakir and for this purpose they had used the motorcycle of the deceased, which motorcycle they had then taken to a tire puncture shop owned by **Muhammad Saeed Khan (PW-4)** and left it there. The entire recovery

process was witnessed by **Nazeer Ahmed (PW-5)** and **Akmal Nadeem (PW-11)**.

- 1.5 On 09.12.2012, the motorcycle of the deceased was recovered from the New Sabzi Mandi police post by S.I. Abdul Razzak in the presence of **P.C. Kamran Abbasi (PW-8)**. **S.I. Ahmed Asim (PW-12)** told the S.I. Abdul Razzak that on 16.11.2012 Muhammad Saeed had come and dropped of the motorcycle at the post saying that a few days back a couple of boys had left the motorcycle at his shop .
- 1.6 Nasreen was arrested on 20.01.2013 from Khanewal. On 22.01.2013, accused Nasreen led the police to the same house where the earlier accused had and said that this was the place where they had murdered Khizar Hayat. Her version of events was different to the co-accused. She did not mention the tea or the intoxicants mixed it and that she had held the head of the deceased whereas Nazar Shah and Sakina had held his feet and that it was Shakir and Naik Mohammad had strangled the deceased (not with a rope) but with Nasreen's dupatta. She had thrown the mobile phone of the deceased over the wall of the house in a plastic bag. The phone of the deceased in a blue color plastic bag was found from across the wall. The entire operation was witnessed by **Javaid Iqbal (PW-4)** and Akmal Nadeem (PW-11).

2. The trial

- 2.1 On 25.09.2013 the learned 4th Additional Sessions Judge, Karachi West charged Nazar Hussain, Muhammad Shakir and Nasreen for having murdered Khizar Hayat on 13.10.2012 at 9:00 a.m. All 3 accused pleaded not guilty and claimed trial.
- 2.2 At trial, apart from the witnesses whose names have been highlighted above, the prosecution examined a total of 14 witnesses. **Muhammad Siddiq (PW-6)** gave the motive of the murder; **Noorzada (PW-7)** had rented out the place where the murder occurred to

accused Shakir; **D.S.P. Jehan Khan Niazi (PW-13)** (was the second investigating officer of the case).

2.3 On 23.12.2016 while the trial was ongoing, the legal heirs of the deceased forgave accused Nasreen in the name of Allah.

2.4 The accused recorded their section 342 Cr.P.C. statements on 11.02.2017 in which they professed innocence, denied all wrong doing and further stated that the false implication was because of family issues, some details of which they specified in their respective statements.

3. The judgment impugned

3.1 On 10.09.2018 the learned trial court acquitted Nasreen under section 345(6) Cr.P.C. whereas both Nazar Shah and Mohammad Shakir were convicted for offences under section 302(b) and 364 P.P.C. and sentenced to imprisonment for life as well as directed to pay compensation of Rs. 200,000 each. If they did not pay the compensation they would have to stay in prison for a further period of 6 months. It is this judgment that has been called into question by the 2 convicted accused.

4. Parties heard

4.1 The learned counsel for the appellants as well as the learned DPG have been heard. None effected an appearance on behalf of the complaint despite notice as well as intimation notice to their counsel. The record of proceedings had also been reviewed and the evidence re-appraised with the assistance of counsels. Learned counsel for the appellants has argued that the entire case is based on hearsay; that how did Mumtaz Mai get to know who the killers were was shrouded in mystery; extra judicial confessions allegedly made were not admissible in evidence; the entire recovery is doubtful; the dead body was not even identified as that of Khizar Hayat; nobody saw the body and that the medical evidence does not reconcile with the

ocular version. To the contrary the learned DPG argued that it was the recoveries that connected the accused with the crime and hence he supported the impugned judgment. My observations and findings are as follows.

- 4.2 A retracted extra judicial confession combined with pointing out the place of occurrence, the recovery of the deceased's motorcycle, half burnt cards and a mobile phone at the pointation of the appellants was the evidence against the appellants which formed the basis of their conviction. I have looked at these aspects and the evidence connected with it closely. It would be appropriate if the recovery of the deceased's belongings is addressed first, as the admissibility or otherwise of the extra judicial confession as evidence would largely depend on the findings connected with recovery.

5. Recovery of the motorcycle

- 5.1 The most important witness in this regard was PW-3 Muhammad Saeed Akakhel. Akakhel testified that he was at his tire puncture repair shop on 15.10.2012 when at midnight, 2 persons came there to get their motorcycle tire repaired. They told him that they were going to eat and that after they had eaten they would come and pick up the motorcycle. The 2 boys however did not return and that after about one week of the them not coming back to pick the motorcycle, he reported it to police. The police of the New Sabzi Mandi police station had come to his shop on that report and had seized the motorcycle under a memo, which memo was also signed by him. On 09.12.2012, the police had come again to his shop with a boy in custody and asked for the motorcycle. Akakhel told them that it had already been handed over to the police. The boy was identified as one of the boys who had dropped of the motorcycle at his shop and subsequently identified him as being Shakir. What emerged from this witnesses cross examination was that earlier in his section 161 Cr.P.C. statement he had told the police that 2 boys had come to his

shop, left the motorcycle there and had “run away” but that he had not reported the occurrence to the police. He acknowledged that after he had initially given information to the police about the motorcycle, the police had come only once to his shop, when he was not made to sign any paper; however, later the police made him sign some papers at the police station. He admitted that the first time he had seen Shakir was on 15.10.2012 when he had come to drop of the motorcycle. The witness had not given any description of the person who had come to drop of the vehicle to the police. Admittedly, no identification parade was held for the witness to identify Shakir. He also admitted that the motorcycle had no number plates on it and its indicators were also all missing, he had however not told the police these details too.

- 5.2 Apart from the improvements that the witness made at trial in his statement, I find it improbable that the witness could recognize Shakir, a person he had seen fleetingly, at midnight, and who had run away immediately thereafter. It is also baffling as to how the witness gave the registration number of the motorcycle when admittedly it had no number plates or papers. I find it equally strange and unnatural that the accused would come to a puncture shop at midnight on a motorcycle without number plates and leave it a tire repair shop and then run away. If they had no intention of stealing the motorcycle, they could have left it anywhere. Why would they first steal it from the scene of offence or the pond where the allegedly dumped the body and then drive it to a tire puncture shop and then leave it and run away when they knew the act would be witnessed by the shop personnel, 3 of whom were admittedly present there at that time.
- 5.3 Akakhel’s account became further unreliable when the memo of recovery of the motorcycle was produced. The memo shows that recovery of the motorcycle being effected on 16.11.2012 i.e. one month after the motorcycle was allegedly left at the witnesses shop.

This was confirmed by PW-11 S.I. Ahmed Asim in his testimony when he told the court that it was 16.11.2012 when Muhammad Saeed had come with a motorcycle to him and said that 2 to 3 days ago some boys had left it at his shop. The motorcycle at that time did have a number plate on it. Both, assertions were in complete conflict with the prosecution case. PW-8 P.C. Kamran Abbasi came a different twist to the story contrary to what Akakhel had said. Kamran said at trial that on 09.12.2012 while he was on duty at the Maripur police station, the investigating officer of this case i.e. Abdul Razzak Thahim had taken him with him to the Sabzi Mandi police station, where they had found the motorcycle. Upon inquiry he was informed by A.S.I. Ahmed Asim that the motorcycle had been seized by him under section 550 Cr.P.C. The investigating officer had then taken possession of the same as being case property in the present case. Kamran Abbasi however told the investigating officer that when the motorcycle was seized, it had a number plate on it and that it was in working condition. He did not explain why if it was in perfect working condition was it brought to the police station in a police mobile. Kamran drew a blank at trial as to how and from whom the motorcycle was recovered earlier. It is also pertinent to note that PW-8 P.C. Kamran Abbasi was not made to identify the motorcycle which was seized as the same was in the maalkhana when he was examined at trial. No registration details of the motorcycle were obtained by the investigating officer to establish that the motorcycle indeed belonged to the deceased. PW-11 Ahmed Asim also told the court that when he was handed over possession of the motorcycle, he had verified from the CPLC that there was no report that the motorcycle had been stolen. This to me sounds very strange. If the prosecution case was that the motorcycle was taken away by the appellants on 13.10.2012 the fact that no report was made to the police that the motorcycle was missing for nearly a month is not only unusual but further points towards police malafide. PW-11 Ahmed

Asim further acknowledged that the memo of seizure prepared by the investigating officer when taking over possession of the motorcycle contained no specifications of the motorcycle being seized.

5.4 A review of the evidence led at trial is full of substantial contradictions and does not sound believable. Whether the motorcycle seized was the same as the motorcycle produced at trial was also not established as PW-8 Kamran Abbasi had not identified it at trial. In my opinion whether the motorcycle was that of the deceased and whether events unfolded as alleged by the prosecution are both extremely doubtful.

6. Recovery of ashes and the place of recovery

6.1 Here the prosecution story is that on 09.12.2012 PW-5 Nazeer Ahmed and PW-10 Akmal Nadeem accompanied the police and the 2 appellants to the house where the 2 appellants said that they had murdered Khizar Hayat. Nazeer Ahmed testified that the appellants showed the place where they had burnt and buried "documents" belonging to the deceased. The ashes of one burnt CNIC of the deceased was then recovered. In his cross examination however, Nazeer Ahmed said that it was 10.12.2012 at 10:00 a.m. when he had actually accompanied the police for the recovery proceedings. This was in conflict with what he stated in his examination-in-chief i.e. he had gone on 09.12.2012. PW-10 Akmal Nadeem apparently saw more than his co-witness. According to Akmal Nadeem the appellants told the police that they had burnt the NIC, service card and diary of the deceased and that they had buried the ashes in the corridor of their house. They had then dug out the ashes however only a half burnt NIC and 2 half burnt visiting cards of the deceased were recovered. I find this account most unusual and unrealistic. It makes no logical sense for the appellants to have killed Khizar, then take out his diary and CNIC, service card and visiting cards and then partially

burn them in the same house and bury the half burnt cards in the corridor of their very house. There was no witness to this recovery except the 2 very close associates of the deceased. What I also find unusual is that the investigating officer of the case PW-12 Abdul Razzak Jokhio testified that the house where the ashes were recovered from was rented to appellant Shakir by a man called Saeed. When the police had reached there, they had found the house vacant with the door of the house locked. Saeed had to be called who then came and opened the door. PW-10 Akmal Nadeem who claimed he was present at the time of recovery and was one of the witnesses on the memo however saw different things when they reached the alleged place of incident. He said at trial that *"the house was occupied by a family. The family was asked to come out of the house. Thereafter we all entered the house."* It is obvious that the prosecution had brought dishonest witnesses to trial. It is also pertinent to note that not only who the family was but as a matter of fact who was the owner of the house was not shown at trial. A man named Noorzada was examined by the prosecution as its 7th witness. He claimed that he had rented out that house to Mohammad Shakir however he was not the owner of the house and had rented it out on behalf of a friend of his Hafeez-ur-Rehman. Hafeez-ur-Rehman was not examined at trial and no reason was given for his absence. This very story of the house being rented out to Mohammad Shakir is suspicious to say the least. Noorzada acknowledged at trial that he had not identified who the owner of the house was prior to his testimony in court however when the police had come there Hafeez-ur-Rehman was present and that he had told the police that it was Hafeez-ur-Rehman who was the owner of the house. This assertion makes it even more suspicious as to why Hafeez-ur-Rehman himself did not testify or corroborate what Noorzada claimed. I find it equally unbelievable that Noorzada claimed, apart from the fact that he was not the owner of the house he rented out but that when he rented it

out to Mohammad Shakir he had not asked for any reference or guarantee from him although he had never seen Shakir before in his life. He had also not asked Shakir what his name was and rented out the house to him. He admitted that he had not even told the police or the court during his testimony that what the number of the house he rented out even was.

- 6.2 It appears from the evidence that once again the police as well as the prosecution witnesses who claim that they saw recovery of the ashes were dishonest and the entire story was maliciously created by the investigating officer in order to find support for his legless case.

7. Recovery of the mobile phone

- 7.1 Yet another unbelievable story was given by the prosecution in this regard. Nasreen was arrested on 20.01.2013. On 22.01.2013 she is said to have taken the police to the same house which had been pointed out earlier by the co-accused as being the scene of the crime. She told the police that after the murder she had put the mobile phone in a shopping bag and thrown it over the wall of the house. The dead body was found on 21.10.2012. Obviously he was murdered before. This would mean that the mobile phone lay on the ground in the plastic bag for 3 months. For obvious reasons this was absolutely unbelievable.

8. Extra judicial confession

- 8.1 The extra judicial confession that the prosecution relied upon, and primarily put forward by PW-12 Abdul Razzaq Jokhio, the investigating officer was that the 2 appellants told the police that they had first administered intoxicants to the deceased, when he became unconscious, the 2 appellants along with Nasreen, Sakina and one other named Shahid had strangled him to death. PW-10 Akmal Nadeem heard a different confession. According to him the 2 appellants had confessed that they had given intoxicants to the deceased and after he became unconscious Nasreen, Sakina and Naik

Mohammad put a rope around his neck. Nasreen then held him by his hair, Sakina by his feet while Naik Mohammad and Shakir strangled him whereas Nazar Shah just stood in the corridor. The third witness i.e. PW-5 Nazeer Ahmed heard something even different, he heard that 2 appellants confessing that 2 appellants had killed Khizar with the assistance of Nasreen, Sakina and Naik Mohammad after having given him intoxicants. Apart from the fact that 3 persons said to be present at the same time heard different things being confessed. The only thing that the 3 coincided was that intoxicants were administered to the deceased and after he went unconscious he was strangled. Chemical analysis of the deceased's viscera did not reveal the presence of any poison in them. The medical evidence reveals that the hand and toe of the deceased had been amputated and that he had been severely tortured. This does not reconcile with the confession or the prosecution case. No blood was found from the scene of the offence. No blood was found on the motorcycle ostensibly used to take the dead body to the pond where it was thrown. No investigation was carried out to determine how the hand and toe of the deceased got amputated. The supposed extra judicial confession does not reconcile with the prosecution case and in any case would be inadmissible in evidence pursuant to the Qanoon-e-Shahadat Order, 1984 and Article 40 of the Order will also not come to the aid of the prosecution keeping in mind that I have already discarded the evidence connected with recovery ostensibly made after the confession.

9. Involvement of the accused

- 9.1 The record is completely and uncannily silent on how it was discovered that the persons accused in the case were made suspects in the case. What little can be gaged from the record seems to be that officials of the Pakistan Navy told the police that it was these people who had murdered Khizar Hayat and then the police has dishonestly and maliciously created evidence in order to implicate

the appellants. It appears to be very obvious that the police has simply buckled down under the pressure of the Pakistan Navy officials and has acted completely on their whims and fancies. No official of the Pakistan Navy except the relatives of the deceased were examined however in their personal capacities. The Pakistan Navy officials seem to have dictated arrests and recoveries and the Sindh police by rubber stamping what they were told, in my opinion, have brought a bad name to their department. The case is replete with contradictions, illogical theories and on the face of it smacks of malafide. Akmal Nadeem, the brother of the complainant seems to have had an axe to grind of his own. At trial he could not deny that on 21.10.2012 the wife of the deceased and his own sister had themselves written to the SHO of Maripur police station and stated that the deceased had a monetary dispute with Razi & Co. and that they suspected that it was them who had kidnapped the deceased. He however professed ignorance that the wife and sister had categorically named one Zakauddin and Aamir Zaka Khan in that same application. This link was not investigated by the police. Akmal Nadeem was a dishonest witness.

- 9.2 The Inspector General of Police Sindh is directed to look into the service record of Inspector Abdul Razzaq Jokhio and D.S.P. Jehan Khan, if they are still in service and determine whether they have the ability to investigate cases of this nature. They should be confronted with the evidence in this case and be asked about their conclusions based on such evidence.

10. Conclusion

I have no hesitation in concluding that the prosecution miserably and completely failed to prove its case against the 2 appellants. The appeal is allowed. The appellants should be released forthwith if not required in any other case.

JUDGE