

## IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Jail Appeal No. 547 of 2020  
Criminal Appeal No. 510 of 2020

Appellants : Iftikhar & Aasiya  
through Ms. Sara Malkani & Mr. Habib-ur-Rehman  
Jiskani, Advocates.

Respondent : The State  
through Mr. Siraj Ali Chandio, Addl.P.G.

Date of hearing : 1<sup>st</sup>. September, 2022

### JUDGMENT

**Omar Sial, J.:** Yaqoob Gill was asleep in his house on 20.08.2018 when gunshots was heard by him. When he went out of his house to investigate the source of the gun fire, he was told by some people who had gathered in the street that Gill's uncle, a man by the name of Sohail, had been shot and injured by some unknown persons. Gill along with others went to where the firing had occurred and saw his uncle Sohail lying dead in a pool of blood. Gill was further informed by the area people that Sohail had an affair with a woman named Aasiya (one of the two appellants in the present case) for the last 15 years and that the previous day an altercation had occurred between Sohail and Aasiya over some other man who had come into Aasiya's life and which man she had married. Gill was suspicious that it was Aasiya and her alleged partner who were somehow behind his uncle's murder. F.I.R. No. 498 of 2018 was registered under sections 302 and 109 P.P.C. at the Surjani Town police station in Karachi at 11:30 a.m. on the same day i.e. 20.08.2018. Subsequent events unveiled that Aasiya's alleged partner was Iftikhar (the second appellant in this case). Prior to the registration of the F.I.R., at 8:00 a.m. on 20.08.2018, the police had recovered from the place of occurrence, 3 spent shells fired from a .30 bore pistol. Both accused were arrested at 10:00 p.m. on the same day. A 0.3 bore pistol was also recovered from Iftikhar.

2. The learned 1<sup>st</sup> Additional Sessions Judge, Karachi West on 05.01.2019 charged the 2 accused with an offence punishable under sections 302 and 34 P.P.C., to which charge both accused pleaded “not guilty” and claimed trial. At trial the prosecution examined **Yaqoob Gill as PW-1** (he was the nephew of the deceased as well as the complainant); **Elvan Ishaq as PW-2** (he was a person who apparently lived in the same neighborhood, who had come to the place of incident after the incident had occurred and who had also witnessed the police inspecting the place of incident); **Nawaz Iqbal Masih as PW-3** (he was a rickshaw driver who happened to be at a nearby hotel when the incident occurred. He claimed that he had seen the accused walking from the place of incident to their respective homes immediately after the gun shots were heard). **Arif Johnson was PW-4** (he was a person who lived in the neighborhood and saw the 2 accused walking from the lane where the incident occurred to their house after the sounds of gunfire was heard); **Deedar Hussain as PW-5** (was the police officer who had first responded to the information regarding the shooting and who had conducted the preliminary investigation at the place of incident as well as arrested the accused); **Dr. Abid Haroon as PW-6** (he was the doctor at the Abbasi Shaheed Hospital who conducted the post mortem upon the deceased); **Muhamad Ismail Afridi as PW-7** (he was the police officer who witnessed the arrest of and recovery from the accused); **Abdul Sattar Kanjra as PW-8** (he was the police constable who witnessed the inspection of the dead body, preparation of the inquest report, recovery of empties and the blood stained earth from the place of incident); **Inspector Fida Hussain Noonari as PW-9** (he was the investigating officer of the case).

3. In their respective section 342 Cr.P.C. statements the 2 accused denied all allegations against them and stated that both were previously Christians but that they had converted to Islam and married each other. Their conversion followed by their marriage was the reason that their previous community had implicated them falsely in this case.

4. At the end of the trial both accused were found guilty of having committed the murder of Sohail and were sentenced under section 302(b) P.P.C. to spend a life in prison as well as pay Rs. 500,000 each to the legal heirs of the deceased as compensation. It is this judgment dated 24.10.2020 passed by the learned 6<sup>th</sup> Additional District & Sessions Judge, Karachi West which has been challenged through these appeals.

5. I have heard the learned counsels for the appellants as well as the learned Addl.P.G. With their able assistance I have also re-appraised the evidence. None appeared on behalf of the complainant in spite of repeated notices. It was reported by the police that the complainant has become untraceable. The arguments of the counsels are not being reproduced here however are reflected in my observations and findings below.

6. Learned counsels agree that the evidence against the 2 accused primarily on the basis of which the 2 accused were convicted is as follows:

(i) the testimonies of Nawaz Iqbal Masih (PW-3) and Arif Johnson (PW-4), who both claimed that they had seen the 2 accused walking from the lane where the incident occurred to their respective homes. Their evidence is on the lines of the "last seen together".

(ii) the recovery of a 0.30 bore pistol from the accused Iftikhar and 2 out of 3 empties being opined as having been fired from that weapon.

7. It is an admitted position that there are no eye witnesses to the murder. Sohail was killed, not inside his house but outside in the lane next to his house. Yaqoob Gill had shown his suspicion on the 2 accused in the F.I.R. he registered however at the time of the incident there was nothing to support his suspicion and he was told by the neighborhood people that Sohail had been killed by unknown persons. It is evident from Gill's testimony that even the foundation of his suspicion was based on what he had learnt from other people (as is evident from his statement under section 154 Cr.P.C.) i.e. Aasiya and Sohail were having an affair for the last 15 years however Iftikhar was the person who Aasiya had married. The source of his information was not divulged at trial.

8. Elvan Ishaq claimed to have reached the place of incident soon after the firing. He himself acknowledged that he was not an eye witness and that he had been told by Yaqoob Gill that Aasiya and her husband had killed Sohail. For all practical purposes, Elvan's testimony was based on hearsay.

9. Nawaz Iqbal Masih was a rickshaw driver who happened to have parked his rickshaw that night close to the scene of the incident that night and had seen the 2 accused walking from the place of incident towards their houses. He claimed he had known the accused for the last 12 or 13 years. While in his examination-in-chief, this witness stated that he had seen the 2 accused walk away, in his cross examination he changed his story to claim that he was an eye witness and that he had seen the 2 accused fire upon the deceased from a distance of 30 to 32 feet away. He acknowledged that when his section 161 Cr.P.C. statement was recorded, he had stated in it that he had only seen the 2 accused leave the place of incident. What casts doubt on the veracity of Masih's statement is though he claimed that he knew Yaqoob Gill well and that he was present when the neighbourhood, people along with Gill, had gathered at the place of incident, his statement was not recorded by the police till 01.09.2018 i.e. 12 days after the incident. The reason he gave for the delay in recording his statement under section 161 Cr.P.C. was that he had gone to Gujranwala in the interim. He was unable to provide any evidence or explanation for his visit to Gujranwala. Keeping in view the fact that a murder had occurred, he was present on the spot and saw the murder being committed and he knew all the parties involved, apparently for more than a decade, the late recording of his statement makes it suspicious and it seems it was an attempt by the investigating officer and the complainant to create evidence where none existed.

10. Arif Johnson did not claim he was an eye witness but said that he had seen the 2 accused leaving the place of occurrence soon after the firing. He acknowledged during his cross examination at trial that in his section 161 Cr.P.C. he had recorded that he had seen two men at the place of incident and further admitted that in the same statement he had said that he had

not known the two persons who he had seen leaving from the place of incident. He however justified the improvement made at trial by saying that he had told the police officer who had recorded his statement that he could identify the accused but that the police officer on his own had written that he had seen unknown persons. Like the preceding witness i.e. Nawaz Iqbal Masih, this witness too did not record a statement under section 161 Cr.P.C. with promptitude but in fact recorded it 21 days later. The reason he gave for the delay was that he had a job and that he had gone to work. I do not find the reason given by Johnson satisfactory or plausible. The other prosecution witness i.e. Shamshad Ilyas, who had also claimed to have seen the 2 accused was dropped as a witness by the prosecution on the ground that his testimony was same as Arif Johnson. If Shamshad Ilyas was an eye witness to the last seen together, his absence at trial, in the circumstances would give to rise to the presumption under Article 129 illustration g that had Shamshad testified he would have not supported the prosecution case.

11. It has been successively held by the Supreme Court of Pakistan that the late recording of a section 161 Cr.P.C. statement reduces its value to nil unless the delay is plausibly and justifiably explained. Reference may be made to **Bashir Muhammad Khan vs The State (2022 SCMR 986)**, **Abdul Khaliq vs The State (1996 SCMR 1553)**, **Muhammad Asif vs The State (2017 SCMR 486)**, **Noor Mohammad vs The State (2020 SCMR 1049)** and **Sajid Hussain Jogi vs The State (PLD 2021 SC 898)**. As mentioned above I do not find the reason for the delay given by Masih or Johnson to be plausible or justifiable.

12. The murder is said to have occurred and the dead body seen by many, including the complainant, in between 3:00 a.m. to 3:15 p.m. However, it was not until 5:00 a.m. that the police were informed. S.I. Deedar Hussain was the police officer who received the information and responded. The reason for the complainant and others simply standing over the body of a murdered person for nearly 2 hours without informing the police is odd. Gill did not record his statement under section 154 Cr.P.C. till 10:00 a.m. It was not until 9:15 a.m. that the dead body was brought to

the hospital. The F.I.R. was not registered till 11:30 a.m. These unexplained delays, though perhaps not on their own strong enough grounds to upset a conviction, yet when the entire evidence is looked at holistically, the delays do raise suspicion that the F.I.R. was registered after due consultation and deliberations and whether the incident occurred in the manner claimed by the prosecution.

13. Although the memo of recovery prepared by S.I. Deedar Hussain shows that 3 empties were recovered from the place of incident, Deedar in his examination-in-chief stated that he had recovered only 1 empty from the place of incident. Deedar also acknowledged at trial that after having inspected the dead body he had written that the deceased had been shot in the back of his head. This was not the case, as doctor examinations and medical reports revealed. Deedar also went wrong on the color of the clothes the deceased wore. He recorded at trial that the deceased was wearing a maroon colored shalwar kameez however the post mortem report showed that the deceased was wearing a green shalwar kameez. According to the memo of arrest prepared by Deedar Hussain, the accused were arrested at 10:00 p.m. on 20.08.2018. However, according to the investigating officer it was 21.08.2018 when Deedar arrested the 2 accused. Be that as it may the important contradiction in his evidence was that the discrepancy in the number of empties recovered from the place of incident. I do not find Deedar to be a trustworthy witness. It also appears from the jail roll that the appellant Iftikhar was acquitted in the case involving possessing an unlicensed weapon.

14. In view of the above, it is my opinion that the prosecution was unable to prove its case against the appellants beyond reasonable doubt. The appeal is therefore allowed and the appellants acquitted of the charge. They may be released forthwith if not required in any other custody case.

JUDGE