

IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Appeal No. 446 of 2017

Appellant : Wahab Khan
through Mr. Riaz Ahmed Bhatti, Advocate

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

Date of hearing : 15th September, 2022

JUDGMENT

Omar Sial, J.: On information provided by a woman named Amsia Naz to the Quaidabad police station, F.I.R. No. 323 of 2014 was registered under sections 302 and 34 P.P.C. at 10:15 a.m. on 05.08.2014. She narrated that 14 years ago she had married a man named Faqeer Sarwar and has one differently abled child from him. 3 years ago, her husband married another woman named Haleema and has 2 children from that marriage. Haleema had subsequently sought khula from Faqeer Sarwar. On 04.08.2014 when Amsia was asleep someone knocked at the house door and Faqeer Sarwar went out to see who it was. Faqeer did not come back and at 6:00 a.m. she learnt from a relative by the name of Sarwar that he had been told by Haleema that Faqeer Sarwar had been murdered and that his dead body was lying at the Jinnah Hospital. Amsia in the F.I.R. named Haleema, Taj Wali, Wahab (the appellant), Shereen Khan and 2 nephews of Haleema as being the culprits.

2. Out of the nominated accused, it was only Wahab Khan and Taj Wali who were finally charged on 30.05.2015 for the murder of Faqeer Sarwar. Both pleaded not guilty and claimed trial. At trial the prosecution examined 7 witnesses to prove its case. PW-1 was the complainant Amsia Khan. PW-2 Sarwar Deen was the person whom Haleema had called to inform of the murder of Faqeer Sarwar. PW-3 Sultan Ali was a witness to the recovery of pistol on the pointation of Wahab. PW-4 Nawab Gul witnessed the arrest of Wahab. PW-5 Dr. Jagdesh Kumar was the doctor who conducted the post mortem on the deceased. PW-6 S.I. Muhammad Pervaiz was the police officer who first responded to the news that a murder had been committed. PW-7 S.I. Zulfiqar

Haider was the investigating officer of the case. Wahab Khan recorded his section 342 Cr.P.C. statement in which he professed innocence and further stated that the only reason he was falsely implicated was because of the bad blood the complainant had with his family due to Faqeer Sarwar having married his sister.

3. The learned 4th Additional Session Judge, Malir on 27.09.2017 announced his judgment. Taj Wali was acquitted whereas Wahab Khan was convicted under section 302(b) P.P.C. and sentenced to a life in prison as well as directed to pay compensation of Rs. 200,000 and if he failed to do so he would have to spend another 5 months in prison. It is this judgment which has been challenged through this appeal.

4. I have heard the learned counsel for the appellant as well as the learned APG. The complainant had effected an appearance earlier and had confirmed that she would not engage an advocate but would rely upon the arguments of the learned APG. The individual arguments of the counsels for the sake of brevity are not being reproduced but are reflected in my observations and findings below.

Amsia Naz

5. She testified that her husband had left that fateful night with Taj Wali, Wahab, Amjad and one other unidentified person. I do not believe her version. The reason I do not is because I find it unbelievable that a knock is made at 2:00 a.m. on the door and that all the persons on the other side of the door would name themselves across a closed door. Amsia did not see these persons herself. Nor did her husband tell her that it was these people who had come to the door. Taj Wali and Wahab are both sons of Shereen Khan, who is the father of Haleema. Amjad was her nephew. Amsia's malice towards the family of her husband's second wife Haleema is evident from the fact that in the F.I.R. she had looped in all male members of Haleema's family. It was not explained as to how Amsia even identified the men who had come to the door that night. It appears that even if true, she had only heard someone take their names from across a closed door. She admitted that in the F.I.R. it had not been mentioned that Faqeer Sarwar had asked the men's names from the inside of the house. She admitted that she had married one Zakir. That is strange in itself because throughout the trial she did not state that Faqeer Sarwar had divorced her. Doubt

is created whether she herself had a motive to eliminate Faqeer Sarwar as she had married Zakir.

Sarwar Deen

6. Seems odd that Haleema would call Sarwar Deen and tell him that her brothers have killed Faqeer Sarwar. Even if that was the case, why would he accompany Amsia to the police station and implicate, Haleema herself as well as her father, brothers and nephews. The net was thrown wide to bring within its ambit all the male members of Haleema's family. Sarwar's bonafide become dubious when he testified at trial that Faqeer Sarwar had married Haleema with the consent of his first wife i.e. Amsia. Amsia's testimony belies him. Haleema was not examined as a witness at trial to corroborate what Sarwar said i.e. she told him that her brothers had killed Faqeer Sarwar. If she was honest enough to call up a person she did not know in the middle of the night to tell him that her brothers had killed Faqeer, I see no reason why she could not have come at trial and testified the same. Be that as it may Sarwar's testimony, as far as him narrating what Haleema told him, without any evidence corroborating it, makes it hearsay which will not be admissible in evidence.

Sultan Ali

7. He was a witness to the recovery of the unlicensed pistol. It is a matter of record that a separate case was lodged (F.I.R. No. 331 of 2014 at the Quidabad police station) for the weapon's recovery in which Wahab has been acquitted (on 03.08.2016). Further, the sketch of the pistol produced as evidence at trial, does not indicate the number 31090906, which this witness claimed was inscribed on the weapon. One reason that the appellant was acquitted in the arms case was that Sultan Ali, who was a witness of the recovery did not appear in that case to record his evidence and it was reported that he had become untraceable. Sultan Ali seemed to have made a miraculous come back out of oblivion for the purpose of this present case.

Nawab Gul

8. He witnessed the arrest of Wahab Khan. I find it strange that Nawab Gul stated in his testimony that he was going for some personal work when he was stopped by some policemen and told that they are going to arrest somebody so could he please come along. It simply does not happen this way. It was only in his

cross examination that he admitted that he was Amsia's brother. After Wahab had been arrested, nobody came forward to identify him. I also find Nawab Gul's assertion (when asked whether the accused was already at the police station) that he was not inside the police station but had passed by from the outside, a little strange.

Dr. Jagdesh Kumar

9. The doctor's testimony only confirmed that the deceased had been shot 5 times.

Muhammad Pervaiz

10. The police officer who first responded to the information of the murder. This witness said that he had secured a knife and one screwdriver from the place where the dead body lay. He denied that there were any empties collected by him. Because he denied that he recovered empties, he was declared hostile and cross examined by the prosecution. In his cross examination he denied that he had collected empties and further said that in the memo of recovery, the details regarding the empties have been added by somebody else and that the same is also not in his hand writing. He also testified that he had found an NIC on the spot and that though he had seized and sealed it on the spot, the same was not available in the case property. No effort was made by the prosecution to show that his allegations vis-à-vis the manipulation in the memo.

S.I. Zulfiqar Haider

11. Not much value was added to the prosecution case by this witness.

Recovery of the crime weapon

12. According to the prosecution on 10.08.2014, the appellant during interrogation agreed to lead the police to the place where he had hidden the weapon. He took them to his house from where a pistol was recovered. The weapon was sent for examination to the Forensic Division along with the 6 empties allegedly recovered from the place of incident. The laboratory reported that the empties were from bullets fired with the same weapon sent to it for analysis. The learned APG has argued, correctly in my view, that the fact that the appellant was acquitted in the case arising out of section 23(1)(a) of the Sindh Arms Act, 2013 will not automatically mean that the weapon produced was not

the crime weapon. No doubt however that one will have to look at the evidence in connection with the recovery of the weapon with more care and caution. What is remarkable in the present case that the officer to whom recovery of the empties was attributed by the prosecution i.e. S.I. Muhammad Parvaiz, outright denied at trial that he had collected any empties from the place of incident. As mentioned above, he even asserted that the lines on the memo of recovery in which the recovery of empties was shown was also not written by him but that the same had been incorporated by somebody else in the memo. The fact that the maker of the memo denied that he had recovered any empties, coupled with the fact that neither of the two witnesses to the recovery i.e. Muhammad Waris and Abdul Latif were examined at trial, makes the memo of recovery rather dubious and unreliable. Similarly, witness Sultan Ali in whose presence the weapon was recovered also stated his inability to confirm whether the investigating officer of the case had sealed the pistol in his presence.

Recovery of the dead body

13. Learned APG while admitting that the evidence against the appellant is weak, has stressed greatly on the fact that the dead body was found from inside the house of the appellant and thus he is liable for the murder. The record appears to show that the dead body of the deceased was found 4 steps inside the house with the address 337, Street No. 4, D-Area, Muzaffarabad Colony, Landhi, Karachi. This house was said to be that of Shereen Khan, who is the father of the appellant, even though Amsia in her testimony said that *"it is incorrect to suggest that the dead body of my deceased husband was thrown in the house of his father-in-law Shereen Khan."* Whether the house was actually owned by Shereen Khan was not confirmed at trial. Sher Ali, the person who allegedly had come to the police station to tell the police about the dead body and the murder was not examined at trial. He was said to be untraceable. The only person who could have confirmed where the body was found was S.I. Muhammad Parvaiz and the 2 witnesses to the memo of inspection of the dead body i.e. Muhammad Waris and Abdul Latif. While Muhammad Pervaiz stated at trial that he had found the body 4 steps inside the house with the aforementioned house, he denied that he had collected any blood samples from where the body lay. Either Muhammad Pervaiz was lying or in the absence of any blood at the place of incident, it becomes highly doubtful whether the murder took place at the place the prosecution

alleged it did. Muhammad Pervaiz was the only link to establish the place of occurrence. It was he who saw it, recovered the body and then he who pointed it out to the investigating officer. When Pervaiz became hostile and denied that he had ever collected empties or blood from the place of incident, sufficient doubt had been created in the prosecution case, which doubt could have been clarified had the witness to the memo been examined to discover what was the truth. Strangely enough, as mentioned above, neither of the two witnesses was examined. Muhammad Pervaiz single handedly demolished the prosecution case. In the event he is still in service, the Inspector General of Police should closely scrutinize his investigations to determine the honesty or otherwise of such investigations. One of the defence witnesses i.e. Shams-ur-Rehman also stated that the body had been found in the street outside the house. I also find it unnatural that the appellant and his family, if they had killed Faqeer Sarwar would let the dead body lie in their house till the police came and recovered it. Even otherwise, the house was said to be that of Shereen Khan and not of the appellant. How could the appellant be burdened with the murder when Shereen Khan was let go of. Perhaps the factor that swayed the learned trial judge to hold Wahab guilty was exclusively that in his section 342 Cr.P.C. statement he had mentioned his address as 337, Street No. 4, D-Area, Muzaffarabad Colony, Landhi, Karachi. In my view however he cannot be held guilty solely on this account. If his statement regarding his address is to be believed then there is no reason why the rest of his statement should be disbelieved. It was the prosecution that was obliged to prove its case beyond reasonable doubt, which in my opinion it failed to do.

The acquittal of Taj Wali

14. The case primarily proceeded from the allegation made by Amsia that Taj Wali, Wahab and Amjad and others had come to her house and that Faqeer Sarwar had left with them. Apart from the fact that a pistol was allegedly recovered at the pointation of Wahab, on the same set of evidence Taj Wali was acquitted. The case of the appellant was also on the same footing and if Amsia's statement regarding who took her husband that night was to be believed, and Taj Wali was still acquitted, then the appellant too deserved the same concession.

In conclusion:

- (i) The witness testimonies were not confidence inspiring or trustworthy. To the contrary, it appears that the prosecution witnesses have thrown the net wide.
- (ii) The place of occurrence was not proved.
- (iii) Recovery of empties was not proved.
- (iv) There was sufficient doubt whether the weapon recovered was indeed the crime weapon.
- (v) Non-appearance of witnesses at trial who were important to determine the alleged place of incident as well as the recovery of empties causing doubt.
- (vi) Taj Wali being acquitted on the same set of facts and no acquittal appeal being filed.

all make me conclude that the prosecution was unable to prove its case beyond reasonable doubt. The benefit of such doubt should have gone to the appellant in accordance with now well established principles of law. The appeal is therefore allowed and the appellant acquitted of the charge. He may be released forthwith if not require in any other custody case.

JUDGE