IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Appeal No. 410 of 2011

Appellants	:	Mansoor & Shahzad through M/s. Khalid Ahmed Khan & Irshad Ali Jatoi, Advocates.
Respondent	:	The State through Mr. Talib Ali Memon, A.P.G.
Complainant	:	through Mr. Ahmed Ali Ghumro, Advocate
Dates of hearing	:	16th & 24th August, 2022

JUDGMENT

Omar Sial, J.: Mansoor and Shahzad, both sons of Abdul Sattar, were accused of murdering their friend Sajjad. Both were convicted on 28.09.2011 by the learned Sessions Judge, Karachi East for offences punishable under section 302(b) and 34 P.P.C. They were sentenced to a life in prison as well as directed to pay the legal heirs of the deceased Rs. 50,000 as compensation (or spend another three months in prison on default). It is this judgment which has been challenged in these proceedings.

2. A background to the case is that on 25.09.2008, Sajjad's father, namely Fida Hussain Lakho, complained to the Shahrah-e-Faisal police station that his son had been murdered on 19.09.2008 by unknown persons on account of an enmity. Lakho further narrated that his son Sajjad had left the house at 7:00 p.m. on 19.09.2008 to meet his friends but did not return home. At about 11:20 p.m. the appellant Mansoor came to Lakho's house and told him that Sajjad was unwell and was at his apartment. Lakho accompanied Mansoor to his apartment where he found Sajjad, who appeared dead to him. Sajjad was taken to a hospital where he was pronounced dead. F.I.R. No. 750 of 2008 was registered against unknown persons.

3. According to Lakho, he was told by his brother Imtiaz Hussain that on 19.09.2008 at about 8:30 p.m. he had met with Sajjad outside the elevator on the 4th Floor of the apartment building where the incident allegedly occurred. At that time Sajjad was with 4 other boys, out of whom he only introduced 2 boys to his

uncle, who were the two appellants. Sajjad told his uncle that they were going to the 5th Floor to their friend Mansoor's house. Later, on the *Chehlum* of Sajjad, one Ghulam Rasool, who lived on the 6th Floor of the same apartment building told the complainant that two persons who had come to visit him on 19.09.2008, namely Muhammad Khan and Mashooq Mugheri, had told him that when they were going down the stairs from Ghulam Rasool's flat they had seen through a window the two appellants pressing a pillow into Sajjad's face. The two visitors got scared and as Ghulam Rasool was not home that day, they both went to their home situated in Sachal Goth.

4. The two appellants pleaded not guilty and claimed trial. In order to prove its case, the prosecution examined **Fida Hussain as PW-1** (the complainant of the case and the father of the deceased); **Muhammad Khan as PW-2** (allegedly an eye witness); **Imtiaz Hussain as PW-3** (brother of the complainant); **Sarang Lakho as PW-4** (he was the brother of the deceased and had accompanied his father to Mansoor's apartment upon hearing that his brother was not well); **A.S.I. Dilawar Hussain as PW-5** (he was the police officer who first responded to the information that a dead body had come to the Darul Sehat Hospital. He also recorded the statement under section 154 Cr.P.C. of the complainant on 20.09.2008); **S.I. Adnan Khan as PW-6** (the first investigating officer); **Dr. Kaleem Shaikh as PW-7** (he was the doctor who conducted the post mortem on the deceased); **Inspector Abbas Ali Kolachi as PW-8** (he was the final investigating officer of the case); **Raj Kumar as PW-9** (the learned magistrate who conducted the identification parade); **Ghulam Rasool Mangi as PW-10** (he was the person to whose apartment the two alleged eye witnesses had come).

5. In their respective statements under section 342 Cr.P.C., both appellants professed their innocence. The learned trial court, at the end of the trial, convicted and sentenced the appellants as elaborated upon in paragraph 1 above. I have heard the learned counsels for the parties as well as the learned APG and with their able assistance have re-appraised the evidence. The counsels individual arguments for the sake of brevity are not being reproduced but are reflected in my observations and findings below. My observations and findings are as follows.

6. Learned counsels, as well as the learned APG, agree that there are two pieces of evidence against the appellants which form the basis of their

conviction. While re-appraising the entire evidence, I have concentrated on the two pieces of evidence primarily due to which the appellants were convicted. These are:

(i) The testimony of Muhammad Khan – the prosecution's 2nd witness who claimed that he had seen the 2 appellants attempting to muffle the deceased with a pillow.

(ii) The testimony of Imtiaz Hussain – the prosecution's 3rd witness who claimed that he had seen the deceased in the company of 4 boys on the day of his death. 2 of these boys he had identified to be the 2 appellants.

I will first address the above two aspects after which I will give my observations on the remaining evidence.

The testimony of Muhammad Khan

7. According to Muhammad Khan (**Khan**), on 19.09.2008 he, along with one other named Mashooq Ali Mugheri (**Mugheri**) had gone to visit a friend of theirs named Ghulam Rasool Mangi (**Mangi**), who lived in the same building where the incident occurred. Khan told the court that Mangi was not at home when they went to visit him but while climbing up the stairs to his apartment, he and Mugheri heard some noise from an apartment and when they peeked through a window, they saw the 2 appellants sitting on top of the deceased and muffling him with a pillow. The two visitors however did not inform anybody of what they saw and they both went home. The 2 then left to celebrate Eid at their village. When the 2 returned from the village they once again went to visit Mangi and noticed that a Quran Khwani was taking place in the apartment building. Mangi informed them that the Quran Khwani was being held for a boy who had been murdered in the apartment before Eid. When Khan informed Mangi of what they had seen the last time he had come to visit Mangi, Mangi introduced them to the complaint and told him that he would be happy to record his statement if need be. The record reflects that nearly six and a half months later i.e. on 03.04.2009, the complainant called him and said that he would like Khan to accompany him to the investigating officer of the case so that his statement could be recorded. Khan did record his statement the next day i.e. on 04.04.2009. 8 days later on 17.04.2009 Khan recorded a statement under section 164 Cr.P.C. before a

learned judicial magistrate and also identified the 2 appellants in an identification parade held the same day. I find it unusual and unnatural that it took nearly 7 months after he had informed the complainant of what he saw, for Khan to record his section 161 Cr.P.C. statement. The F.I.R. had earlier been lodged against unknown persons with a delay of 6 days and the likely behavior of a father who had just lost his son would have been to immediately take Khan to the investigating officer so that his account of witnessing the murder in progress could be recorded. This not being done for nearly 7 months raises doubts whether Khan was being honest in claiming that he had seen the murder in progress. 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)**. The learned APG attempted to justify this inordinate delay in the recording of the section 161 Cr.P.C. statement by arguing that the complainant had been endeavoring to have Khan's statement recorded from the time the revelation was made to the complainant but that successive investigating officers declined to do so. Apart from the fact that the record is silent on the specific assertion made by the learned APG, with much respect, I am also not convinced with the argument raised by him. The complainant had the investigation officers changed twice during this period and at least 3 officers had investigated the case (being S.I. Adnan of the Shahrah-e-Faisal police station, Inspector Badar of the Sharafi Goth police station, S.I. Abid Hussain Shah of the S.I.T East) before the 4th investigating officer Abbas Ali (who recorded the section 161 Cr.P.C. statements) hence if he was of the view that he had an eye witness to the murder, his plea of having the eye witness statement would not have gone unattended to. Senior police officials were involved during the process and I see no reason why all police officers would blatantly refuse to record Khan's statement while acceding to the complainant's request of changing investigating officers. I am not satisfied that the nearly 7 months delay was plausibly explained and therefore the principle enunciated by the Supreme Court of Pakistan in the aforementioned cases will come into play.

8. As mentioned above Khan also identified the 2 appellants in an identification parade held by the learned 5th Judicial Magistrate, Karachi East on 17.04.2009. For starters, it seems rather surprising that a person who appears to have had a fleeting glimpse at the appellants, who he had never seen before, through a window would have the memory of correctly identifying the appellants after a lapse of nearly 7 months, especially when the witness previously had not even given a cursory description of the persons he had seen. It would be appropriate at this stage to cite a paragraph out of the **Javed Khan alias Bacha and another vs The State and another (2017 SCMR 524)**, which paragraph speaks for itself and the observations made therein impact the present case. The Court observed:

> *"As regards the identification proceedings and their context there is a long line of precedents stating that identification proceedings must be carefully conducted. In Ramzan v Emperor (AIR 1929 Sind 149) Perceval, JC, writing for the Judicial Commissioner's Court (the precursor of the High Court of Sindh) held that, "The recognition of a dacoit or other offender by a person who has not previously seen him is, I think, a form of evidence, which has always to be taken with a considerable amount of caution, because mistakes are always possible in such cases" (page 149, column 2). In Alim v. State (PLD 1967 SC 307) Cornelius CJ, who had delivered the judgment of this Court, with regard to the matter of identification parades held, that, "Their [witnesses] opportunities for observation of the culprit were extremely limited. They had never seen him before. They had picked out the assailant at the identification parades, but there is a clear possibility arising out of their statements that they were assisted to do so by being shown the accused person earlier" (page 313E). In Lal Pasand v. State (PLD 1981 SC 142) Dorab Patel J, who had delivered the judgment of this Court, held that, if a witness had not given a description of the assailant in his statement to the Police and identification took place four or five months after the murder it would, "react against the entire prosecution case" (page 145C). In a more recent judgment of this Court, Imran Ashraf v. State (2001 SCMR 424), which was authored by Iftikhar Muhammad Chaudhry J, this Court held that, it must be ensured that the identifying witnesses must "not see the accused after the commission of the crime till the identification parade is held immediately after the arrest of the accused persons as early as possible" (page 485P)."*

9. Had the image of the perpetrators been "hardwired" into his brain in the seconds he had seen them, of which there is always a possibility, the witness

would be expected to have described to the police what the accused looked like. The Supreme Court of Pakistan in the case of **Kanwar Anwaar Ali: In the matter of (PLD 2019 SC 488)** while giving comprehensive guidelines regarding the conduct of an identification parade has observed that "*Memories faded and visions got blurred with passage of time. Thus, an identification test, where an unexplained and unreasonably long period had intervened between the occurrence and the identification proceedings, should be viewed with suspicion. Therefore, an identification parade, to inspire confidence, must be held at the earliest possible opportunity after the occurrence.* In his arguments on the impact of the 7 month delay in the identification parade on the prosecution case, the learned APG has relied on the case of **Rafaqat Ali and others vs The State (2016 SCMR 1766)**. With much respect, I am not swayed by his argument. My reasons are that what the Honorable Supreme Court observed in this case was that if an eye witness remained absent during an identification parade but identified the accused in court, in some cases, that identification will be good enough. In the **Rafaqat Ali (supra)** case the argument raised by the counsel was that 2 of the accused were not identified by the eye witnesses. They were not identified because the 2 injured eye witnesses were in hospital and hence were not able to come for the identification parade. The Court held that just because the accused were not identified at the parade did not mean that they were not present at the place of incident. In that case, the F.I.R. contained descriptions of the accused and had assigned them specific roles. Further, the Court observed that the 2 eye witnesses who had remained absent in the parade had identified the accused in Court and assigned them specific roles. The 2 eye witnesses in that case had themselves been critically injured in the incident. The point for adjudication in the present case is different. The present case is not about an eye witness not appearing in an identification parade but about alleged eye witness who not only fleetingly saw an incident but also remained silent for nearly 7 months. It is also pertinent to observe that though Khan and Mugheri said that they had seen the murder in progress through a "window" the memo of inspection of the place of incident shows that there was no window. In the **Kanwar Anwaar Ali (supra)** case, the Honorable Supreme Court has held "*that Identification of an accused person by eye-witnesses before the trial court during a trial was generally considered to be quite unsafe because before such identification during the trial the eye-witnesses got many opportunities to see the accused persons appearing*

before the court in connection with their remand, distribution of copies of statement of prosecution witnesses, framing of the charge and recording of statements of other prosecution witnesses.

Asghar Ali alias Sabah and others v. The State and others 1992 SCMR 2088; Muhammad Afzal alias Abdullah and another v. The State and others 2009 SCMR 436; Nazir Ahmad v. Muhammad Iqbal 2011 SCMR 527; Shafqat Mehmood and others v. The State 2011 SCMR 537; Ghulam Shabbir Ahmed and another v. The State 2011 SCMR 683 and Azhar Mehmood and others v. The State 2017 SCMR 135 ref."

10. The record reflects that the learned magistrate, who appeared as the 9th prosecution witness at trial, may have erred at several places in conducting the identification parade. For one, he fixed the same day for the recording of the eye witness statements under section 164 Cr.P.C. as well as for the identification parade. He proceeded to record the statements just before he held the identification parade. In his testimony the learned magistrate himself acknowledged that the investigating officer had appeared along with the witnesses and the accused. No sanctity can be attached with an identification parade where the witnesses and the accused are all exposed to each other before the parade is held, in fact, the accused's counsel was also given an opportunity to cross examine the witnesses – prior to the holding of the identification parade. Another error that the learned magistrate fell prey to was that he had both the accused identified in the same parade. A joint identification parade has been disapproved by the Supreme Court of Pakistan and has been held to be unsafe. Reference in this regard, in addition to the **Kanwar Anwaar Ali (supra)** may also be made to the case of **Gulfam and another vs The State (2017 SCMR 1189)**. It was noted by the Court in this case that "*The prosecution had maintained that the present appellants had correctly been identified by the above mentioned eye-witnesses during a test identification parade conducted and supervised by a Magistrate but we note that the parade so conducted and held was a joint parade in which both the present appellants had been made to stand along with many other dummies. Holding of a joint identification parade of multiple accused persons in one go has been disapproved by this Court in many a judgment and a reference in this respect may be made to the cases of Lal Pasand v. The State (PLD 1981 SC 142), Ziaullah alias Jaji v. The State (2008 SCMR 1210),*

Bacha Zeb v. The State (2010 SCMR 1189) and Shafqat Mehmood and others v. The State (2011 SCMR 537). The record reflects that the identifying witness, at the identification parade only stated that the person they identified were at the "place of incident" – no specific role was assigned to them. In **Kanwar Anwaar Ali (supra)**, it was observed that during a test identification parade the witness had to specify the role allegedly played by an accused person in commission of the offence.

11. Because of the above observations I am of the view that the assertion that the appellants were recognized by Mohammad Khan at the identification parade is not sufficient to maintain their conviction. Although the same observations apply to the other identifying witness Mugheri, I have not named him as he died before his testimony was recorded at trial.

The testimony of Imtiaz Hussain

12. The learned APG and the learned counsel for the complainant have relied on the testimony of this witness in support of their argument that he was the person who last saw the deceased and the appellants together.

13. Imtiaz Hussain, the prosecution's 3rd witness was the brother of the complainant Fida Hussain. He recorded at trial that while he lives in Qambar (a town approximately 500 km away) he had come to visit his brother on 19.09.2008. While his brother's apartment was on the 5th Floor, for some unknown reason he had come down to the 4th Floor to catch the elevator down to the Ground Floor when he bumped into the deceased who was in the company of 4 other boys out of which he was introduced to only 2 who were the appellants. While I find the fact that Imtiaz would climb down a staircase to catch the elevator, for no explained reason, odd yet the observation is not sufficient to discard Imtiaz's testimony. I also find strange the fact that the deceased would introduce only the 2 appellants to his uncle and not the remaining 2 boys, but once again I am not inclined to discard Imtiaz's testimony on this ground too. However, why I do not find Imtiaz's testimony trustworthy, is for the following reason. According to Imtiaz, he had told his brother of meeting the deceased and his friends the same day. 5 days later, according to Imtiaz, someone (who remained unidentified, in fact Imtiaz admitted at trial that he did not know who that person was) had told him that appellant Mansoor had liked the deceased's

sister. As in the case of the alleged 2 eye witnesses, Imtiaz too did not record his statement under section 164 Cr.P.C. till nearly 7 months later i.e. till 04.04.2009. No reason was given by the prosecution as to why such a delay occurred. It is also pertinent to mention that there appears to be no record that a statement under section 161 Cr.P.C. was even recorded as claimed by Imtiaz. He did not mention the description, the age or the complexion of the 2 boys he had been introduced to. Like the 2 alleged eye witnesses, who lived in Qamber and happened to be around on the day of the murder in the apartment building, this witness Imtiaz too lived and worked in Qambar but happened to be in the apartment on the day of the murder on casual leave from his workplace. Further, no explanation was given as to what was the fate of the remaining 2 boys who were seen in the company of the deceased along with the 2 appellants. The record seems silent on those 2 and as to why the 2 appellants were singled out, even if Imtiaz could be termed as a witness for the last seen together. In the case of **Fayyaz Ahmed vs The State (2017 SCMR 2026**) it was observed by the Supreme Court of Pakistan that in cases where conviction hinged on a "last seen together" quick reporting of the matter without any undue delay was essential, otherwise the prosecution story would become doubtful for the reason that the last seen evidence was tailored or designed falsely to involve the accused persons. Further, the Court observed that last seen evidence must be corroborated by independent evidence, coming from an unimpeachable source because uncorroborated last seen evidence was a weak type of evidence in cases involving capital punishment. The present case, does not satisfy the foregoing conditions. The Court also held in the same case that if a murder was not pre-planned and calculated, the Court had to consider whether the deceased had any contributory role in the cause of death. I will make my observations on this later in this opinion while addressing the medical evidence. The fact that Imtiaz Hussain, like the 2 alleged eye witnesses, was from the same town i.e. Qambar, as the complainant, and was a chance witness, in the absence of no other witness from the entire apartment building raises doubt whether these witnesses have been "planted" as an afterthought after 7 months of the incident.

Medical Evidence

14. Dr. Kaleem Sheikh, who appeared as the 7th prosecution witness was the doctor who conducted the post mortem on the deceased. The doctor found ethyl

alcohol in the viscera of the deceased sent for examination as well as signs of broncho-pneumonia. He was however of the view that the concentration of alcohol detected in the body of the deceased could not cause his death. While the basis of his final conclusion in which he concludes that death occurred due to asphyxia leading to cardio respiratory failure, does not appear obvious from his report, he also opined that ethyl alcohol and pathological lesions had precipitated the cardio-respiratory failure. The post mortem report leaves a lot to be desired. Asphyxia could be caused for a number of reasons, which include, hanging, strangulation, suffocation and drowning. A generalized conclusion has been made by the doctor. The report does not opine whether the deceased was suffocated with a pillow or whether the substance which the deceased consumed was responsible for the asphyxia caused as a consequence of the alcohol consumed, though, to give the doctor his due credit he has written that the asphyxia was "precipitated" by the alcohol as well as pathological lesions. Modi, A Textbook of Medical Jurisprudence and Toxicology (at page 531 of the XXVIth Edition) has commented that asphyxia can be caused by choking or obstruction of the air passages from within. Vomited matter may regurgitate into the larynx, and by inspiratory efforts may be aspirated into the smaller bronchi and may cause suffocation. In essence, the medical report itself does not clearly support the ocular version. Death may have been caused due to regurgitation.

Testimony of Ghulam Rasool and Mashooq Mugheri

15. Ghulam Rasool Mangi, the person to whose apartment the two alleged eye witnesses had come, was not examined by the police till 7 months after the incident. No reason for this delay was given. Even when he recorded his statement under section 161 Cr.P.C. he himself admitted that neither Mohammad Khan nor Mashooq Mugheri had told him that that "2 boys were pressing pillow on the face of the deceased". He seems to have improved drastically on his statement at trial. Mashooq Mugheri could not be examined at trial as he was shot dead by the police during an encounter that had ensued in connection with a completely separate incident.

Motive

16. The learned APG as well as the learned counsel for the complainant have argued that had the complainant any malice towards the 2 appellants he would

have nominated them when he registered the F.I.R. Perhaps the complainant did not have any ill-will towards the 2 appellants when the incident occurred however with the passage of time he seems to have believed that the 2 appellants were guilty on the basis of what he was told by others. One cannot hold this against a distraught father who was exposed to one of the biggest sadness a person can be inflicted. However, the case against the 2 appellants had to be proved on the basis of satisfactory evidence, which was not available in the present case. It was alleged that appellant Mansoor liked one of the sisters of the deceased. No evidence was recorded to support this assertion. Further no evidence was recorded as to why Mansoor would kill Sajjad even if he liked his sister. None of the witnesses testified that Sajjad was creating any hurdles in this regard and hence had to be killed.

Conclusion

17. In view of the above observations, I am of the view that the prosecution was unable to prove its case beyond reasonable doubt. The benefit of such doubt should have gone to the appellants is accordance with well established principles. The impugned judgment is set aside and the appeal allowed. The 2 appellants are on bail. Their bail bonds stand cancelled and sureties discharged.

JUDGE