

IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Appeal No. 903 of 2019

Appellant : Shahbaz Shah @ Dancer
through Mr. Moula Bux Bhutto, Advocate

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

Date of hearing : 9th February, 2023

JUDGMENT

Omar Sial, J: Mohammad Zubair at 4:30 p.m. on 24.10.2017 went to the Khawaja Ajmair Nagri police station and reported that the previous day at 9:00 a.m. while he was standing outside his house he saw his younger brother named Tayyab squabble with Shahbaz Shah (the appellant), which squabble resulted in a fight between the two. Two boys of the neighborhood by the names of Shahzad and Kausar Waseem, saved Tayyab from a beating but by the time they intervened Tayyab was unconscious. He was taken to a hospital but succumbed to his injuries. F.I.R. No. 292 of 2017 was registered under section 302 P.P.C.

2. The appellant was arrested at 1:15 p.m. on 25.10.2017 and was charged with having committed murder by the learned Sessions Judge, Karachi Central on 08.02.2018. The appellant pleaded not guilty and claimed trial. At trial the prosecution examined **Mohammad Zubair**, the complainant, as **PW-1**; **Dr. Mohammad Pervaiz Anwar**, the doctor who provided the initial medical care to the deceased, was **PW-2**; **A.S.I. Abdul Rab Khan**, the first police responder, was **PW-3**. **Mohammad Saleem**, claiming to be an eye witness, was **PW-4**. **Dr. Mohammad Saleem**, the doctor who conducted the post mortem, was **PW-5**; **Inspector Mohammad Farooq**, the scribe of the F.I.R., was **PW-6**; **Mohammad Anees**, who served a witness, at various steps of the investigation, was **PW-7**; **Shahzad Ali**, claiming to be an eye witness, was **PW-8**. **Ali Kouser**, claiming to be an eye

witness, was **PW-9. S.I. Rana Nisar-ul-Haq**, the investigating officer of the case was **PW-10**.

3. In his section 342 Cr.P.C. statement, the appellant denied all wrong doing and professed innocence. He did not opt to examine himself on oath nor did he produce any witness in his support. At the end of the trial the learned 7th Additional Sessions Judge, Karachi Central on 30.11.2019 found the appellant guilty of murder under section 302(b) P.P.C. and sentenced him to a life in prison as well as directed him to pay a fine of Rs. 50,000 or spend a further period of 6 months in prison.

4. I have heard the learned counsel for the appellant as well as the learned APG. Learned counsel for the appellant has argued that the medical evidence does not reconcile with the ocular version and that the court considers whether in the circumstances of the case the sentence awarded to the appellant is converted to the one he has already undergone. No one effected an appearance on behalf of the complainant despite several notices having been sent. My observations and findings are as follows.

5. There are 3 eye witnesses in this case. PW-1 Mohammad Zubair, PW-4 Mohammad Saleem and PW-8 Shahzad Ali. All 3 say that they saw the appellant have a fight with the deceased in which the appellant beat the deceased with fists and kicks. He continued the beating, according to them, even when the deceased was lying unconscious on the ground. It would be reasonable to presume that if a person got such a severe beating in a fight, in which he too must have resisted, struggled and fought, some injury would be seen on his body. Most surprisingly, this was not the case. PW-3 S.I. Abdul Rub Khan the police officer who first saw the body at the 12:30 a.m. on 24.10.2017 noted in the memo of the inspection of the dead body that "there was no mark of any injury on the body slain". In his testimony this witness further said that "*It is correct to suggest that there were no marks of scratches, blood staining and marks of torture on the body of the deceased when I had seen the body.*" PW-5 Dr. Mohammad Saleem, the doctor who conducted the post mortem, also noted that there were no

marks of injury or violence on the entire body of the deceased. He also did not note any blood on the body of the deceased. The doctor found no marks of injury on the outer or inner surface of the scalp. He found all the organs in the thorax and the abdomen cavities as well as the rib cage to be intact, with no collection of blood. In the final medical report which was issued on 24.10.2017 it was noted that the cause of death could not be ascertained. While a person could die due to a severe beating, I find it difficult to believe that after a quarrel as depicted by the eye witnesses, no mark, bruise or scratch was evident on the entire body of the deceased. While the medical evidence does not support the eye witness account, I have also taken into consideration whether it was possible that a kick on the testicles of the deceased could have killed the deceased. This aspect of the case was left unexplored by both, the defence and the prosecution, at trial. A bit of research shows that while it is possible for somebody to die due to a blow on their testicles, death in such a case is a rare phenomenon. Dr. Andrew J. Chang and Dr. Steven B Brandes in their paper *Advances in Diagnosis and Management of Genital Injuries* (published in the *Urologic Clinics of North America: Volume 40, Issue 3, August 2013, pages 427 to 438*) have noted that external genital trauma is uncommon and rarely-life threatening but warrants prompt evaluation for proper management, adding that injuries to the area can cause “devastating long term physical, psychological, and functional quality-of-life consequences.” The doctor conducting the post mortem should have examined the scrotum of the deceased to determine whether scrotal trauma could have been the cause of death. It also appears that main mechanism by which injuries to the testicles could cause death, in fact, is through a lack of appropriate treatment. After the prosecution witness, the doctor, had testified that the cause of death could not be ascertained, it was up to the prosecution to seek some clarification from him as to whether testicular trauma could have been the cause of death. This was not done. There is doubt whether it was the blow to the testicles of the deceased which could have caused his death. Another area that is in-explainable is that none of the witnesses or

the doctor saw blood on the body of the deceased, yet, the pant and shirt he was wearing was opined to be stained with blood. Where did those stains come from when the prosecution case was that there was no blood, creates further suspicion on the authenticity of the prosecution case. Two eye witnesses, PW-4 Mohammad Saleem and PW-8 Shahzad Ali also admitted at trial that they had made a misrepresentation earlier in their section 161 Cr.P.C. statements when they had said that they had accompanied the complainant to Shahid Clinic. This was the clinic where the deceased was first taken to. Quite conspicuous is the absence of any evidence to prove that the deceased was indeed taken to Shahid Clinic first.

6. The learned APG agrees that the evidence led at trial suggests that a sudden quarrel happened between the appellant and the deceased. Even if the appellant did hit the deceased, it was not with the intention to cause his death. While the medical evidence was inconclusive, there was a possibility that a blow to the testicles caused an unusual death which was catalyzed by inadequate, improper and delayed medical treatment. The learned APG further submits that keeping in view the evidence, it would be appropriate in the circumstances of the case that the conviction awarded to the appellant be converted from one under section 302(b) to 302(c) P.P.C. I tend to agree with the learned APG. A jail roll was called for that reflects that the appellant has completed 13 years and 3 months (including remissions) of his total sentence.

7. In view of the above, the appeal is dismissed with the following modification of sentence. The appellant is convicted under section 302(c) P.P.C. and sentenced to the period he has already spent in jail which period will also include the period in lieu of fine. The appellant may therefore be released if not required in any other custody case.

JUDGE