IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Spl. Anti-Terr. Jail Appeal No.D-46 of 2022

Present:-
Mr. Justice Omar Sial, J.
Mr. Justice Jawad Akbar Sarwana, J.

Appellants:	Shafiq-ur-Rehman and Ziauddin through Mr. Imdad Ali Malik, Advocate
Complainant:	Muhammad Hanif, through Mr. Iftikhar Ali Arain, Advocate
The State:	Through Mr. Aftab Ahmned Shar, Additional Prosecutor General Sindh.
Date of hearing:	07.06.2023
Date of announcement:	27.06.2023

J U D G M E N T

Jawad A. Sarwana, J.: The two appellants, Shafiq-ur-Rehman Malkani ("appellant"/"accused" no.1) and Ziauddin Abbasi ("appellant"/"accused" no.2), were convicted for offences under sections 365-A, 302(b) and 34 P.P.C. read with section 7(1)(e) of the Anti-Terrorism Act ("ATA"), 1997 by the learned Anti-Terrorism Court, Naushero Feroze on 16.03.2022 and sentenced to life imprisonment for each offence under section 365-A and 302(b) P.P.C. as well as section 7(1)(e) of the ATA. An order of forfeiture of their properties was also made.

2. On 24.11.2014 at 3:00 pm, the complainant, **Muhammad Haneef Arain ("PW-1")**, reported to the police that on 18.11.2014, he was standing outside his house with Mubashir (his son), Mohammad Aslam (his cousin) and Aijaz Ahmed (his nephew) when the two appellants, who were his son's friends, came there and then left on Mubashir's motorcycle with Mubashir. Mubashir did not return home till quite late. When the complainant tried to reach his son on his mobile phone, it was switched off. His efforts to look for his son were also unsuccessful. That same night, the complainant's nephew, **Sarfraz ("PW-5"),** informed the complainant

that at around noon, he had seen his son and the accused on Workshop Road heading towards Moro on a motorcycle. The same night at 10:00 pm, the complainant received a call from his son's cell phone. The caller informed him that his son had been kidnapped and asked him to arrange his ransom. The next day, i.e., on 19.11.2014 at noon, the complainant received another call from his son's cell phone. This time the caller inquired whether the complainant had arranged the ransom of PKR 50 lacs. The caller threatened to chop up his son and kill him if the ransom was unpaid. On the night of 19.11.2014, the police found an unidentified dead body, subsequently identified as Mubashir. FIR No.344 of 2014 was registered on 24.11.2014 under sections 365-A, 302 and 34 P.P.C. According to the prosecution story on 28.11.2014, accused no.2 allegedly made a confession before the learned Civil Judge & Judicial Magistrate, Dadu. However, he retracted the same subsequently. Both the appellants, however, pleaded not guilty and claimed trial.

3(a). At trial, apart from the prosecution witnesses identified above, the following witnesses were examined:

PW-2 Mohammad Aslam and **PW-3 Aijaz Ahmed** claimed to be witnesses of the last-seen together in front of the complainant's residence in Gareebabad Mohalla.

PW-5 Sarfraz Ahmed claimed to be the other witness of the last-seen together, spotting the appellants and the victim on the same day on Workshop Road in Gareebabad Mohalla, Dadu.

PW-4 P.C. Badruddin witnessed the inspection of the dead body at the place it was found, i.e., in front of Areeba Public School in Marvi Colony, Dadu, with the deceased wallet and CNIC card inside his side pocket, as well as the recovery and seizure of an empty red trunk in which allegedly

the accused had tried to stuff the dead body of Mubashir which was found near Qurban Chandio's Hotel; and the clothes of the deceased handed to him by the complainant.

PW-6 ASI Ghulam Muhammad Panhwar was heading the police party, which had recovered the dead body from where it was thrown, inspected it, and seized the red trunk and the deceased's clothes.

PW-7 Muhammad Shareef was a neighbour of the deceased and served as a witness to the recovery of the deceased's motorcycle, watch and purse.

PW-8 Inspector Akhtar Ahmed was the first investigating officer of the case.

PW-9 Dr Vijay Parkash was the Medico-Legal Officer who conducted the postmortem.

PW-10 SIP Naimatullah Babar was the police officer who arrested accused no.2. and prepared the memo of recovery of the deceased's motorcycle and a black dupatta.

PW-11 Pir Aijaz Ahmed was the tapedar who prepared the sketch of the place of the incident.

PW-12 Javed Hussain was the learned magistrate who recorded the confession made by appellant no. 2.

3(b). During the trail, accused no.2 in his section 342 Cr.P.C. statement denied all wrongdoing. He stated that the police had forcibly made him sign some documents, and the magistrate compelled him to record what

was then said to be his confession. Accordingly, he retracted the confession recorded before the magistrate. He alleged that one girl named Hina was involved, and after getting compensation, she was released by the police.

4. The learned counsel for the appellants has argued delay in lodging the F.I.R.; delay in recording the section 161 Cr.P.C. statements of witnesses; contradictions on witness statements regarding the last seen together evidence; and doubt in the veracity of the recoveries made. For the confession made by appellant no1, he submitted that it was not genuine and had been obtained through duress, coercion and torture. To the contrary, the learned counsel for the complainant and the learned APG supported the impugned judgment. We have heard the learned counsel for the appellants and the learned APG, who was assisted by the learned counsel for the complainant and have re-appraised the entire evidence. Our findings are given herein below.

Delay in the lodging of the F.I.R.

5. The record reflects that the complainant lodged the FIR on 24.11.2014, almost six (6) days after his son went missing on 18.11.2014. While some delay in reporting a kidnapping would perhaps be natural, keeping in mind the desire of a parent that their son is recovered without exposing him to any threats, what we find rather unusual is that the FIR was filed on 24.11.2014 at 3:00 pm, which was almost four-five (4/5) days after receiving the dead body of the deceased from the police, i.e. on 20.11.2014 @ 1:30 am. This delay was attributed to the time taken in the last rites and burial of the deceased. Even if a lenient view is taken in this regard, the F.I.R. had still not been registered till after a couple of days of the *soyem* of the deceased. Given the gravity of the offence, a murder of a young man, the delay causes doubt. It raises suspicion as to the motive

behind such delay. In ***Mehmood Ahmed & Others vs. the State & Another*** **(1995 SCMR 127)**, it was observed that:

> *"Delay of two hours in lodging the FIR in the particular circumstances of the case had assumed great significance as the same could be attributed to consultation, taking instructions and calculatedly preparing the report keeping the names of the accused open for roping in such persons whom ultimately the prosecution might wish to implicate"***.**

6. We find this delay unnatural and suggestive of the F.I.R. being registered after deliberations and consultations. What causes even further doubt is that the complainant, in his testimony, attributed the reason for the delay in filing the FIR to the two accused persons threatening him. Yet he mentioned no such threats in the FIR.

<u>Last seen together - Delay in the recording of section 161 Cr.P.C. statements</u>

7. A bird's eye view of the relevant dates is as follows:

S. No.	**Date and Time**	**Event**
(i)	18.11.2014 @ 1400 hrs	As per FIR, the deceased and the two accused are as seen by PW-1 and PW-5
(ii)	20.11.2014 @ 0130 hrs	The body received by Complainant
(iii)	24.11.2014 @ 1500 hrs	FIR filed by Complainant
(iv)	26.11.2014 @ 1500 hrs + evening time	Recording of Statements u/s161 Cr.P.C. of alleged last scene witnesses, namely "PW-1", "PW-2", "PW-3", and "PW-5".

8. The recording of statements of the last seen together witnesses is considerably delayed without any explanation. The witnesses assign no reasons for this delay. The above table shows that the witness statements were recorded seven days after the body's recovery and two days after the registration of the F.I.R. This aspect is vital as there are no eyewitnesses to the crime. The four (4) PWs mentioned in the table were the "last-seen together" witnesses. They all claim to have seen the deceased and the accused last on 18.11.2014. It was essential to establish the witnesses' veracity that they should have recorded their Statements promptly. Yet they did not do so. Another aspect associated with the delay in recording the statements raises doubt. The documents available on record reveal that on 24.11.2014 and again on 25.11.2014, SSP Dadu held a press conference in which he disclosed the arrest of the appellant no. 2 and a "lady". This effectively meant that the appellant had been arrested by 24.11.2014. The memo of arrest, however, shows the arrest on 26.11.2014. Learned APG most reluctantly acknowledged this anomaly but pinned the blame on a dishonest investigating officer. This delayed showing of the arrest suggests malafide on the part of the police and adversely impacts the supposed confession made (discussed later) by appellant no. 2. The Supreme Court of Pakistan has repeatedly held that delay in recording eyewitness statements (albeit, in this case, witnesses to the last seen together) without a plausible or cogent reason reduces their evidentiary value to a cipher. Reference in this regard may be made to ***Sajid Hussain alias Joji v. The State and another*, PLD 2021 Supreme Court 899; *Noor Muhammad v. The State and another*, 2020 SCMR 1049** and ***Abdul Khaliq v. The State*, 1996 SCMR 1553**.

9. The last seen witness, "PW-1", in his examination in chief, deposes that he was physically present in front of his house on 18.11.2014 at 1400 hours along with "PW-2" and "PW-3". This was also echoed by the "PW-2" and "PW-3". All three family members confirmed their presence

outside the deceased house and, having seen the two accused and the deceased on the said date, leave with Mubashir on a motorcycle. Another family relative, “PW-5”, is also a last-seen witness. As per the FIR and his testimony , he saw the deceased and the two accused going towards Moro while he was coming from Moro Road. As mentioned above, all the last-seen witnesses are related. No independent witness was examined at trial. Further, when they identified the accused no.1 father; Habib-ur-Rahman, as Pesh Imam at the mosque; no one stated that anyone approached him to find out if he knew the whereabouts of his son and his friends (the deceased and co-accused). None mention any stolen property, missing cell phone or watch of the deceased. The FIR states that “PW-5” saw the witness on 18.11.2014 at noon time but in the evidence, the witness states that the time was 2:30 pm. This also creates doubt in “PW-5”s testimony. All these items remain missing without any mention in the Statements and emerge only when the Police claim to recover the same. It almost appears that the PWs mirror each other’s stances. Such common positions running across the statement and testimony of the last-seen family PWs neither lend credibility nor inspire confidence in the evidence collected/relied upon to advance the prosecution’s case. All the last seen prosecution witnesses have deposed that the complainant/deceased family was neither affluent nor persons of means. Everyone, including the accused, lived in the same mohalla and most likely knew the economic and financial position of each other. As such, it does not seem logical that the two accused would demand such a fantastic ransom amount that is well beyond the credible zone of the complainant/deceased family.

10. In **Fayyaz Ahmed vs The State (2017 SCMR 2026),** it was held that:

> *"For a conviction based on last seen evidence the following fundamental principles must be followed and the prosecution was under-legal obligation to fulfill the same:-*

(i) There must be cogent reasons that the deceased in normal and ordinary course was supposed to accompany the accused and those reasons must be palpable and prima facie furnished by the prosecution.
(ii) The proximity of the crime scene played a vital role because if within a short distance the deceased was done to death then, ordinarily the inference would be that he did not part ways or separate from the accused and onus in such regard would shift to the accused to furnish those circumstances under which, the deceased left him and parted ways in the course of transit.
(iii) The timing when the deceased was last seen with the accused and subsequently his murder, must be reasonably close to each other to exclude any possibility of the deceased getting away from the accused or the accused getting away from him.
(iv) There must be some reasons and objects on account of which the deceased accompanied the accused towards a particular destination, otherwise deceased being in the company of the accused would become a question mark.
(v) There must be some motive on the part of the accused to kill the deceased otherwise the prosecution had to furnish evidence that it was during the transit that something abnormal or unpleasant happened which motivated the accused to kill the deceased.
(vi) 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 person.
(vii) 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.
(viii) The recovery of the crime weapon from the accused and the opinion of the expert must be carried out in a transparent and fair manner to exclude all possible doubts.
(ix) If the murder was not a pre-planned and calculated, the court had to consider whether the deceased had any contributory role in the cause of his death.

11. In the present case, the two appellants were said to have left with the deceased on 18.11.2014 at 2:00 p.m. from Ghareebabad Mohallah in

Dadu. The body was found on 19.11.2014 at 10:30 p.m. close to Areeba Public School in Marvi Colony, which is a short distance away from the house of the complainant. What is confusing is that the three were ostensibly spotted by witness Sarfraz on the Dadu-Moro Road, roughly 10-15 kilometers away from where the body was found, and they were found going towards Moro. It does not make sense that after taking Mubashir to a considerable distance, the two appellants would bring him back so close to his house and throw his dead body there. According to the confession made by Ziauddin Abbasi, Shafiq had strangled the deceased in the house of Abbas Korai, which is in Marvi Colony. On the one hand, the IO, "PW-8", and Muhammad Sharif, "PW-7" testified that the place of "vardat" and "incident" was right opposite the house of the complainant, which is in Gareebabad Mohalla. While the two neighbourhoods in Dadu, i.e. Marvi Colony and Gareebabad, are nearby as locations, they cannot be reconciled as being right opposite of the house of the complainant. On this score, too, doubt arises. In **Mohammad Abid vs The State (PLD 2018 SC 813),** it was held that "*the foundation of the "last seen together" theory is based on principles of probability and cause and connection and requires 1. cogent reasons that the deceased in normal and ordinary course was supposed to accompany the accused. 2. proximity of the crime scene. 3. small time gap between the sighting and crime 4. no possibility of third person interference 5. motive. 6. time of death of victim. The circumstance of last seen together does not by itself necessarily lead to the inference that it was the accused who committed the crime. There must be something more establishing connectivity between the accused and the crime.*"

12. The proximity in time was certainly lacking. It is challenging to pin if the closeness in physical space was present. As discussed above, if the prosecution witnesses are to be believed, then according to the prosecution, the deceased was killed in the house opposite the

complainant in Gareebabad. Yet if Ziauddin's confession is to be considered, then the murder took place at Abbas Korai's home in Marvi Colony. Yet we are not satisfied that this was even the house (Abbas Korai's house) where the deceased was done to death. The reason for our conclusion is in our observations below. The motive was lacking. None of the other conditions stipulated by the Supreme Court was fulfilled in this case upon which a conviction could be made on the last seen together the evidence.

Confession of Ziauddin Abbasi

13. The record reflects that Ziauddin was arrested on 26.11.2014. However, as mentioned above, the concerned S.P. disclosed his arrest in a press conference held on 24.11.2014. This appellant was produced before the learned magistrate for recording his confession on 28.11.2014. We have closely scrutinised the alleged confession, albeit the same was retracted.

14. According to the confession, appellant no. 1 Shafiq-ur-Rehman had rented a house from a friend, Abbas Korai. On the 17th or 18th of November, Shafiq called appellant no. 2 to bring tea. Shafiq made three cups of tea and put ten tranquilliser tablets into Mubashir's cup. After drinking the tea, 10-15 minutes later, Mubashir fell unconscious. Both appellants then tied his hands and feet and wrapped tape on his face. Shafiq then strangled him to death. The following day, the two brought a trunk to help them dispose of the dead body, but the body did not fit in the trunk; thus, the accused took the dead with them on a motorcycle with the trunk put over him. They threw the dead body where it was found and the trunk in another location.

15. The story narrated in the confession, apart from sounding immensely suspicious, also does not reconcile with the prosecution case. Ten tranquilizer tablets in a teacup would have raised the suspicion of the deceased after the very first sip. No investigation was conducted to find out where Shafiq got the tranquilizers from. The post-mortem report is silent on intoxicants having been found in the deceased's body. No visceras were taken to corroborate what Ziauddin said. The opinion of the doctor viz-a-viz the time between death and post-mortem, i.e. 8 hours, does not reconcile with the prosecution case. No investigation was carried out on the rented house where the murder is said to have taken place. The owner of the house, a Abbas Korai, was not examined as a witness, nor was any reason given for his absence. His absence in these circumstances would give rise to the presumption that had Abbas Korai been examined; he would not have supported the prosecution case. In his confession, Ziauddin admits to aiding and abetting Shafiq and blames Shafiq for murdering Mubashir. According to the confession, Shafiq and Mubashir were already at the house owned by Abbas Korai when Ziauddin was called over the phone to come to that house with tea. This revelation is not in line with the prosecution case, which claimed that both appellants had come to the deceased's home and taken him with them. The body, when found, was tied up using at least two colourful ladies' dupattas. However, no lady was said to be present at the crime scene. The confession records that the face of the deceased was taped up, yet the body did not have tape on the mouth when found.

16. The confession must be accepted as a whole, and selecting portions from the confession is not permissible while discarding the rest. Rule of prudence requires that a court, while examining evidence in a retracted confession, looks at section 164 confession with great care and caution. Ground realities of weaknesses in the criminal justice system make it further necessary for a Court to be doubly sure when it intends to rely on

a retracted confession to convict a person of murder. It would be unsafe to convict if what the confessor states in the confession does not match the facts claimed by the prosecution or shown by the evidence gathered during the investigation. Parts of the confessional statement favourable to the accused or the trial cannot be looked at in isolation. Reference in this regard may be made to *Javed Iqbal v, The State,* 2023 SCMR 139. The appellant has said several things in his purported confession that do not reconcile with the facts of the matter, apart from the inconsistency between the time of death mentioned in the post-mortem report and the confession statement. We are not satisfied that the confession was genuine or voluntary.

Recoveries made

17. The body, when recovered, had its hands and feet tied up. The Memo describes that the hands of the victim were tied with a maroon-coloured dupatta; whereas his feet were tied with a yellow and blue-coloured dupatta. This was according to the prosecution witnesses Badaruddin and A.S.I. Ghulam Mohammad claimed they had untied the hands and feet, and the body was then sent for post-mortem. The post-mortem report also indicates that the body was not tied up. What is recorded in the F.I.R. is entirely contradictory to this. The complainant has recorded in the F.I.R. that when he first saw the dead body in the Civil Hospital, the hands and feet were still tied up. Either the F.I.R. or the other record presented by the prosecution had been manipulated. There is an apparent disconnect between the two.

18. The prosecution further claims that a red trunk (in which the appellants had attempted to put the body), a plastic shopper containing one Nokia Mobile No.210 in a black casing, one Q Mobile No.A-6 with black casing and one wrist watch in silver colour; the deceased's

motorcycle; and a black scarf used to strangle the deceased was recovered upon the appellants pointation.

19. We find it strange that the father of the deceased nor any other witness told the police that the mobile phones and watch of the deceased were missing. The first time these items were heard of was when Shafiq led the police to where the appellants had thrown these items – a bush next to an open plot of land. Effectively, these valuables lay in the bush from 18.11.2014 to 03.12.2014 without anyone taking them away. Not a natural conduct of our people. The police did not investigate to obtain the call data record to establish the locations where the deceased had been. No record was presented at trial to indicate as to what were the numbers of the SIM placed in the phone. No record was presented to show in whose name the SIMs were issued. The record further does not reflect that the phones, the watch or the black scarf were sealed on the spot. Whatever sanctity this recovery had was eliminated when the witness to the recovery at trial testified that the property was not sealed in his presence; and Inspector Akhtar Ahmed, the IO ("PW-8") confirmed the same in his evidence. It appears that recovery was foisted upon the appellants.

20. The recovery of the red trunk, as the prosecution claims, is also doubtful. The recovery memo states that when the recovery was made, it was at the pointation of appellant Shafiq. It was found lying on the road near Qurban Chandio's hotel in Marvi Colony on 20.11.2014. At the time of recovery, Shafiq told the police a somewhat different story than Ziauddin's. According to Shafiq, the body had fallen out of the trunk, and thus, they had thrown the red trunk a kilometre away. We think it unnatural that while the dead body had fallen out, the appellants hung on to the trunk until they were a kilometre away before throwing it too. We also fail to understand how the appellants, together with one dead body, could also carry a trunk which was 3 feet wide and have a height of 1 foot

on a motorcycle, and why would the appellants especially go to get a box of this size to dispose of a dead body of a young man who was indeed not 3 feet tall. Finally, as expressed earlier, it is most surprising that for over two days, from 18.11.2014 to 20.11.2014, a sizeable red trunk lying on a busy road was not picked up by anyone. Hence, the recovery item connected with the crime also carries doubt.

21. As mentioned earlier, the motorcycle was ostensibly recovered from the house of Abbas Korai. Ziauddin had also stated in his confession before the magistrate that Abbas Korai, who had rented out the place where Mubashir's motorbike was found, and the crime was committed, was a friend of appellant no.1. Yet he was never questioned. The IO did not bother to call the owner to ask and corroborate the several pieces of evidence gathered concerning the crime. The upshot of the same is that because of the doubts discussed above, none of the crime property may be relied upon by the prosecution and the trial court to establish the guilt of the two accused.

Weak investigation

22. An extremely weak and biased investigation appears to have been conducted. No effort was made to establish where and how the ransom calls were made. No call data record of the complainant was collected to determine the numbers from where the calls were made. The case property was not sealed. The investigation should have made more effort to connect an independent person with the inquiry. Unfortunately, no such attempt was made. The appellants kept mentioning a girl named Hina, who was never investigated. This is more surprising as the SSP, in his press conference, seems to have referred to her. The body having been found tied with dupattas should have made the investigator look at this aspect of the story. He ultimately failed to do so. The investigator made

no effort to find the real truth of the matter. These lapses left lacunas in the case, which had the impact of creating doubt.

Conclusion

23. A re-appraisal of the record reflects that the F.I.R. was delayed due to consultations and deliberations. Section 161 Cr.P.C. statements were recorded with unjustified delay. The last-seen together evidence needed to be more potent and trustworthy or confidence-inspiring to enable it to base a conviction. Confession made by one of the appellants was not voluntary or genuine. The recoveries made during the investigation and ostensibly on the pointation of the appellants were doubtful. Immensely weak, and a biased investigation took place. Witnesses essential to establish the prosecution case were not brought to testify at trial. When put in juxtaposition, the defence story appears more plausible than the prosecution story.

24. Given the above, we conclude that the prosecution could not prove its case beyond a reasonable doubt. Following well-settled principles, the benefit of such doubt should have gone to the appellants. The appeal is therefore allowed, and the appellants are acquitted of the charge. They may be released forthwith if not required in any other custody case.

JUDGE

JUDGE