

IN THE HIGH COURT OF SINDH AT KARACHI

PRESENT:

Mr. Justice Mohammad Karim Khan Agha
Mr. Justice Amjad Ali Bohio

Spl. Criminal A .T. Appeal No.197 of 2022

Appellant : Taimoor @ Tanveer son of
Muhammad Irshad through
Mr. Muhammad Imran Meo, Advocate.

Respondent : The State through Mr. Muhammad
Iqbal Awan, Additional Prosecutor
General, Sindh.

Date of Hearing : 09.08.2023

Date of Judgment : 16.08.2023

J U D G M E N T

AMJAD ALI BOHIO, J: Appellant has challenged the judgment dated November 17, 2022, passed by Anti-Terrorism Court No. XV Karachi in Special Case No. 41 of 2020 (Old Special Case No. 372 of 2020), arising out of Crime No. 635 of 2020, registered at Police Station Zaman Town, Karachi. Through impugned judgment, appellant was convicted and sentenced to life imprisonment under Section 302(b) of the Pakistan Penal Code, 1860 and to life imprisonment under Section 7(1)(a) of the Anti-Terrorism Act, 1997 along with a fine of Rs. 2,00,000/- to be paid to the complainant under Section 544-A of the Code of Criminal Procedure and in case of default to suffer SI for 06 months. Both sentences were ordered to run concurrently and the benefit of Section 382-b of the Code of Criminal Procedure was

also granted. Through this judgment co-accused Jahanzaibson of Muhammad Irshad was acquitted under Section 265-H(1) of the Code of Criminal Procedure.

2. Precisely, the facts of the prosecution case as unfolded in the FIR, are that complainant Muhammad Waseem lodged FIR with police station Zaman Town, Karachi on 29.09.2020 at 1700 hours, stating therein that he and his family reside at House No. 777, Area-D, Korangi No.5 ½ in Karachi, where they have Kariyana Shop (Grocery). His elder brother Muhammad Umar also lives with them. It is alleged that a quarrel occurred on 13.08.2020 between his brother, accused Jahanzaib and Tanveer both sons of Irshad. During such quarrel, accused persons threw petrol on his brother and set him on fire. This resulted in serious burns on his brother who was then immediately taken to the hospital for treatment. But despite efforts, his brother's injuries proved fatal, and he passed away on 19.08.2020 while undergoing treatment. After consultation the complainant lodged an FIR on 29.09.2020 at 1700 hours for this tragic incident.

3. After registration of the FIR, usual investigation was carried out in the case and on completion of investigation the I.O. submitted report U/s 173 Cr.P.C. against the accused persons, who during trial pleaded not guilty and claimed to proceed with the trial.

4. To prove the charge, the prosecution examined witnesses ASI Sohail Ahmed Khan Ghori (PW-01), Mst. Zaitoon (PW-02), Mashir Muhammad Usman (PW-03), SIP/I.O. Saadan Ali Khan (PW-04), M.L.O./Dr. Aneel Das (PW-05) and Complainant

Muhammad Waseem (PW-06). During trial, the learned Additional Prosecutor General (APG) gave up the evidence of PW Muhammad Akram and Zain-ul-Abadeen due to concerns of their integrity being compromised. Another PW Ali Hasan was also given up on the pretext that he was a formal witness and was not examined by learned A.P.G. Thereafter evidence of IO/PI Raja Muhammad Shahbaz (PW-07) was recorded. Then PWs Zain-ul-Abedin, Additional Medical Superintendent Dr. Greece Kumar, and ASI Azhar Ali were summoned and examined as Court Witnesses No. 1 to 3, respectively.

5. Trial court then recorded the statements of the accused under section 342, Cr.P.C., wherein they denied the allegations and claimed false implication in this case and pleaded their innocence. Subsequently learned A.P.G., moved application U/S 540 Cr.P.C for production of USB through the complainant which was allowed on 06.04.2022 and complainant produced USB and transcript of conversation of his brother prepared by advocates namely Mr. Mushtaque and Mr. Abid Zaman as per order of the trial court. Later on learned APG closed the side of prosecution on 12.09.2022.

6. Again statements U/s 342 of appellants were recorded wherein, they refuted the allegations and did not opt to examine themselves on oath but desired to produce DWs Asif Meo S/o Islam and Bilal Meo S/o Babu Khan as defence witnesses who were then examined vide Ex-26 & Ex-27 respectively. Consequently, the defence counsel closed their side.

7. Learned Judge Anti-Terrorism Court No. XV after hearing learned counsels for the parties and assessment of evidence brought on record, vide impugned judgment dated 17.11.2022 convicted and sentenced appellant Taimoor @ Tanveer whereas accused Jahanzeb was acquitted as stated herein above, hence this appeal.

8. The appellant's counsel has contended that there is inordinate delay of forty-seven (47) days in lodging the FIR, for which no plausible explanation has been provided by the complainant. The prosecution witnesses have failed to prove the charge as there are glaring discrepancies in their evidence. It is argued that the deceased Muhammad Umar committed suicide and all the prosecution witnesses are interested and their testimonies lack corroboration from independent witnesses, despite their availability. The incident occurred during daylight hours in a public place in the street. The appellant's counsel has pointed out contradiction between the testimonies of the complainant, Muhammad Waseem and PW-1 Mst. Zaitoon. The complainant's evidence is self-contradictory and cannot be relied upon for a conviction. Moreover, the trial court neglected to consider important discrepancies between the evidence of the prosecution witnesses. Additionally, the trial court failed to take into account the testimonies of the Medical Officer, Investigating Officer (I.O), and Court Witnesses Zain-ul-Abidin and Azhar Khan. These witnesses stated in their testimonies that the deceased, Muhammad Umar, had personally taken a bottle of petrol, poured it on himself, and set himself on fire. Dr. Greece

Kumar, called as a Court Witness, also provided medical records from the burns ward of Indus Hospital, which indicated that the patient had self-inflicted burns using petrol due to personal issues and a history of suicidal tendencies.

9. The appellant's counsel has further argued that the trial court permitted the complainant to introduce a USB and its transcript, prepared by advocates Mushtaque Ahmed and Muhammad Jeewani. It has been pointed out that the complainant neither mentioned about recording of video of deceased Muhammad Umar by his sister on his cell phone nor was his sister's statement recorded during the investigation of the case. The authenticity of the video recording is questionable and lacks evidentiary value, particularly in the absence of a forensic report concerning the USB produced as evidence. The case revolves around a suicide and the co-accused was acquitted based on the same set of evidence. Therefore, the appellant's counsel contends that the impugned judgment is liable to be set aside. In support of his contentions he has relied upon the cases of Amir Muhammad Khan v. The State (2023 SCMR 566), Abdul Ghafoor v. The State (2022 SCMR 1527), Pervaiz Khan and another v. The State (2022 SCMR 393), Muhammad Arif v. The State (2019 SCMR 631) and Wajid Hussain and others v. The State and others (2020 P Cr.L.J 543).

10. Learned Addl. Prosecutor General for the State has supported the impugned judgment and argued that the contradictions pointed out by the defence counsel are minor in

nature. He contends that deceased Muhammad Umar admittedly succumbed to injuries at the Burns Ward of the Indus Hospital. Prosecution established the motive against the accused. Mere delay in lodging the FIR would be no ground to set-aside the judgment passed in an offence of capital punishment. Lastly he has contended that the prosecution has successfully proven the guilt of the accused beyond any reasonable doubt and the appeal in hand is liable to be dismissed.

11. After meticulously evaluating evidence in the light of the arguments put forth by both sides and perusing the record, it has become evident that the prosecution has not succeeded in substantiating the charges against the appellant. This conclusion is arrived at due to the following reasons:

(a). The prosecution's case states that the incident occurred on August 13, 2020, at 1600 hours, yet the matter was reported to the police on September 29, 2020, at 1700 hours. The distance between the incident location and the Police Station is approximately 3 ½ kilometers. This reporting delay of Forty-Seven (47) days lacks a credible explanation. This delay cannot be overlooked and it cannot be treated as mere delay but wilful delay without any explanation for such delay. In our society if any such incident is occurred then the same is immediately reported so that complainant party may feel sigh of relief when criminal law comes into motion and culprits are arrested. Moreover, the complainant's testimony indicates that the appellant, Taimoor, used a bottle containing petrol and poured it

on Muhammad Umar. However, the Investigating Officer (I.O.) failed to collect such bottle from the scene during the investigation. Despite the significant delay of Forty-Seven (47) days in reporting the matter, the names of crucial eyewitnesses were not included in the First Information Report (FIR) by the complainant. No reason has been put forth for such lapse as such the same has to be treated as fatal to prosecution case. These witnesses include the complainant's mother, sister-in-law Mst. Sehrish Usman (who brought water and poured it over Muhammad Umar) and an individual named Raza who transported the victim to the hospital.

(b) Admittedly, apart from Mst. Zaitoon Khatoon (the deceased's mother), the I.O. did not include Mst. Sehrish and neighbor Raza as witnesses in the case. This omission by the prosecution resulted in withholding of essential evidence from the witness, who were present at the time of the incident. The prosecution failed to provide an explanation for this omission. Consequently, under Illustration (g) of Article 129 of the Qanun-e-Shahdat Order, 1984, it is reasonable to infer that an adverse assumption can be drawn: had these witnesses been produced before court, they would not have corroborated the prosecution's version. Reliance is placed on Judgments of Supreme Court of Pakistan in cases of “Riaz Ahmed v. The State” (2010 SCMR 846), “Khalid @ Khalidi and two others v. The State” (2012 SCMR 327) and “Muhammad Asif v. The State” (2017 SCMR 486).

(c) PW Mst. ZaitoonKhatoon, the real mother of the deceased Muhammad Umar, testified during her examination in chief that she was at her residence. However, her narrative of the incident suggested that she had come out of the house and witnessed the occurrence. This inconsistency raises doubts about Mst. ZaitoonKhatoon's presence at the scene, especially considering that her name is not mentioned as an eyewitness in the FIR. Given the gravity of the incident, involving the horrifying act of setting her son on fire within her view, how can it be believed that delay of 47 days in lodging the FIR was an oversight. How can a mother have a sound sleep when culprits of her son's death witnessed by her would be moving freely and matter is not reported to police. PW Mst. ZitoonKhatoon also admitted during her evidence that there is dispute on the house, in which the accused were residing alongwith their mother and she authorized one Adnan to file the suit. Thus by deposing so, she appears to be interested witness in this case. This matter finds relevance in the case of Muhammad Aslam and others v. The State and others (2021 P Cr.L.J 1256).

(d) Furthermore, the complainant, in his testimony, introduced dishonest improvements by claiming the presence of his mother (PW Mst. ZaitoonKhatoon), sister-in-law Mst. Sehrish Usman, and neighbor 'Raza'. However, the presence of these individuals was not mentioned in the FIR. His accusations against the appellant Taimoor and both accused Jahanzaib and Taimoor@ Tanveer are inconsistent. Such embellishments in his testimony undermine its reliability. The complainant also alleged

that accused Jahanzaib used offensive language and instigated the appellant to assault his brother Muhammad Umar twice. During cross-examination, he conceded that these details were not mentioned in his FIR and his statement under section 161 Cr. P.C. He also admitted about not mentioning of his sister-in-law Mst. Sehrish's arrival, who had poured water upon Muhammad Umar for extinguishing the fire. The FIR and statement under section 161 Cr. P.C. are silent regarding the presence of neighbor Raza, who transported Muhammad Umar to the hospital. Substantial discrepancies were noted in the testimony of complainant Muhammad Waseem. These inconsistencies, along with his failure to account for the substantial delay in lodging the FIR, cast doubts on his credibility as a reliable witness. He acknowledged his inability to produce a person from the vicinity before the IO (Investigating Officer) despite issuance of notice by IO Raja Shahbaz. He also conceded that his siblings, Muhammad Usman and Faiza, were present at the hospital with Muhammad Umar, but he claimed ignorance regarding their statements to doctors, wherein they stated that Muhammad Umar had attempted suicide and they did not intend to pursue legal action. This claim corroborates with the testimony of Medical Officer Dr. Aneel Das, who corroborated these facts in his evidence in following manner:

“According to patient attendant, patient burnt himself, using petrol as he was angry on some personal issues. Patient had suicidal tendencies and harmed himself. In the meanwhile, we got opinion from the psychiatrist, he advised for corrections of sepsis then follow in OPD”. The summary

of the patient is of Civil Hospital, Karachi. The paper of Indus Hospital is also with me. In the summary of Indus Hospital it is written "Patient received in emergency department with complaint of fire burn, according to attendant, patient self-burnt himself using patrol as was angry on some personal issue. The patient has suicidal tendencies in past also and harmed himself."

Such narrations are part of official record coming from mouth of responsible medical officer and there appears no reason to overlook such statements and believe the prosecution version of the case.

(e).During trial, the complainant was granted permission to submit a USB containing a video recording portraying the account of the deceased, recorded by Mst. Faiza, the sister of the complainant. However, Mst. Faiza was not associated as a witness in this case, and consequently, her testimony was not documented. It is noteworthy that mere submission of a video recording by an individual who did not create the recording, as in the case of Mst. Faiza, raises the requirement for her to be produced as a witness so as to be cross examined as it is she who actually had recorded the statement of the deceased, Muhammad Umar. It should be noted that this recording has been introduced without undergoing a forensic examination, audit, or testing process. While Article 164 of the Qanun-e-Shahadat, 1984 permits the presentation of evidence derived from modern devices, it is pertinent to mention the relevant excerpt:

164. Production of evidence that become available because of modern devices etc. *In such cases as the Court*

may consider appropriate, the Court may allow to be produced any evidence that may have become available because of modern devices or techniques:

(Provided that conviction on the basis of modern devices or techniques may be lawful).

In this context, the absence of a proper forensic examination, audit, or test of the video recording seriously diminish the reliability and authenticity of such evidence. While Article 164 allows for the admissibility of electronic records, the lack of verification and the unavailability of the person responsible for the recording, Mst. Faiza, cast doubt on the credibility and accuracy of the content contained in the recording.

The method and procedure for establishing such evidence has been delineated in the case of *Ishtiaq Ahmed Mirza and 2 others v. Federation of Pakistan and others* (PLD 2019 Supreme Court 675), and can be summarized as follows:

“I hold that the tape-record and its transcript are not admissible in evidence for the following reasons namely:-

(1) The tape-record had been prepared and preserved by the nephew of the petitioner. He is not an independent person and he does not belong to independent authority.

(2) The transcript from the tape-record was not prepared under independent supervision and control. The P.W. Haji Taj Din who prepared the tape-record stated in his affidavit that he handed over the cassette or tape-record to the petitioner. It was not annexed to the petition but it was produced before me by the witness himself.

(3) The voice of the person alleged to be speaking must be duly identified by the maker of the record or by others who know it.

(4) Accuracy of what was actually recorded had to be proved and satisfactory evidence, direct or circumstantial had to be there so as to rule out possibilities of tampering with the record.

(5) The witness who had made the tape-record was not part of his routine duties in relation to election speeches but it was actually made for the purpose of laying trap to procure evidence.

(6) The first respondent disputed that the tape-recorded voice was his and stated that there had been interpolation in the record.”

The case of AmmarYasir Ali v. The State (2013 P Cr.L.J 783) was also cited in the above mentioned authority as follows:

“(Mere producing of CCTV video as piece of evidence and its watching in open court was not sufficient to be relied upon unless and until corroborated and proved to be genuine; as a proof of genuineness of such CCTV video, it was incumbent upon prosecution to examine the person who recorded the video to testify the same; prosecution even failed to point out the source of providing CCTV video; investigating officer who received CCTV video stated in his evidence that he received it from a person who did not want to disclose his name or identity being a man of some surveillance; investigating officer admitted that nothing was visible and identifiable in the video as such the CCTV was not reliable piece of evidence)”

(f) The prosecution's case fails to meet the necessary prerequisites for the admission of the USB through the complainant, as he is not the individual who recorded the account of the deceased Muhammad Umar, one day prior to his death. Notably, the video recording was not played in court, but a transcript of it was prepared by Advocates Abid-uz-Zaman and Mushtaq Ahmed as per the court's directives. However, these advocates were not examined to testify regarding their prepared transcript. Given these circumstances, the video recording and its transcript, presented in court by a third party without undergoing forensic examination, audit, or testing, is deemed unreliable as a piece of evidence in this case and is hereby excluded. Even otherwise the transcript seems to suggest that deceased set fire to himself.

12. Furthermore, the significant contradictions, flaws, adverse admissions against the prosecution's case, and deliberate improvements made by prosecution witnesses during the trial to bolster the case were overlooked rather even not addressed by the trial court. These issues cast serious doubts on the reliability of the evidence and the credibility of witnesses. Such a lack of attention to

crucial details in the evidence resulting in serious doubt was not taken into account by the trial court when rendering the impugned judgment. Additionally, it is a well-established principle that if a set of witnesses is deemed untrustworthy to a certain extent for one accused, the same set of witnesses cannot be considered reliable for the remaining accused, if their evidence cannot be believed. In this context, reference is made to the case of "Altaf Hussain v. The State" (2019 SCMR 274), from where the relevant excerpt is reproduced as follows:

“7. There is another aspect of the case. As stated earlier besides the appellant three other persons were also indicted in this case three of whom namely Nisar Ahmad, Muhammad Aslam and Mst. Amiran were acquitted by the learned trial court. PSLA No.67 of 2013 filed by the complainant against their acquittal was dismissed by the learned appellate court which was not assailed any further either by the complainant or the State and as such their acquittal attained finality. It is well settled by now that if a set of witnesses is disbelieved to the extent of some accused the same cannot be believed to the extent of remaining accused facing the same trial without there being any independent and strong corroboration. Upon scrutiny of the material available on record we have not been able to find any corroboration to maintain conviction and sentence of the appellant on a capital charge.”

13. In last, the crux of the entire discussion underscores that the prosecution's case is riddled with doubts and uncertainties. As per established legal principle, in cases of doubt, the benefit should unequivocally lean in favor of the accused, not as a mere concession, but as an inherent right. This principle was underscored by the Hon'ble Supreme Court of Pakistan in the case of "Tariq Pervaiz v. The State" (1995 SCMR 1345), wherein it was affirmed that even a single circumstance capable of raising reasonable doubt in a prudent mind regarding the accused's guilt warrants extending the benefit of doubt.

14. In light of the aforementioned considerations, the instant appeal filed by Taimoor @ Tanveer, son of Muhammad Irshad, is allowed. The conviction and sentence pronounced against him in the

judgment dated November 17, 2022 delivered by Anti-Terrorism Court No. XV, are hereby set aside. Appellant Taimoor @ Tanveer is acquitted of the charges against him by extending him benefit of doubt and he is ordered to be released forthwith unless required in any other custody case.

JUDGE

JUDGE

Imran