

IN THE HIGH COURT OF SINDH, AT KARACHI

Criminal Appeal No. 732 of 2019

Appellant: Tanveer Hassan through Mr. Salahuddin Khan
Gandapur, advocate

The State: Mr. Khadim Hussain, Addl. P.G

Complainant: Umair through Mr. Shahadat Awan advocate

Date of hearing: 06.09.2023

Date of judgment: 06.09.2023

J U D G M E N T

IRSHAD ALI SHAH, J- The appellant is alleged to have committed murder of Daniyal by way of strangulation, for that he was booked and reported upon by the police. The appellant denied the charge and prosecution to prove the same, examined in all 15 witnesses and then closed its side. The appellant in his statement recorded u/s 342 Cr.P.C denied the prosecution's allegations by pleading innocence by stating that at the time of incident rooftop of the building was not in his possession. In order to prove his innocence, he produced certain documents. However, he did not examine himself on oath or anyone in his defence. On conclusion of trial, he was convicted under Section 302(b) PPC and sentenced to undergo life imprisonment and to pay compensation of Rs.300,000/- to the legal heirs of the deceased and in default whereof to undergo simple imprisonment for six months with benefit of section 382(b) Cr.P.C by learned Ist Additional Sessions Judge/ MCTC Karachi South vide judgment dated 15.10.2019, which he has impugned before this Court by way of instant criminal appeal.

2. It is contended by learned counsel for the appellant that the appellant being innocent has been involved in this case falsely by the police at the instance of the complainant party on the basis of last seen evidence which itself is weak piece of evidence; more so, the evidence of the P.Ws being doubtful in its character has been believed by learned trial Court without assigning cogent reasons, therefore, the

appellant is entitled to be acquitted of the charge by extending him benefit of doubt. In support of his contention, he relied upon cases of *Irfan Ali v. the State* (2015 SCMR 840) and *Muhammad Hussain v. the State* (2011 SCMR 1127).

3. Learned Addl. P.G for the state and learned counsel for the complainant by supporting the impugned judgment have sought for dismissal of the instant criminal appeal by contending that the last seen evidence is supported by circumstantial evidence and the prosecution has been able to prove its case against the appellant beyond shadow of doubt. In support of their contentions, they relied upon cases of *Nazir Ahmad and another vs. The State* (1994 SCMR 58) and *Iftikhar Ahmad vs. The State* (2019 SCMR 1224).

4. Heard arguments and perused the record.

5. It was stated by complainant Umair that on the night falling between 2nd and 3rd of June 2015, his brother Daniyal by handing over his bike to Chowkidar Ateequr Rehman left for meeting with his friend; subsequently, his cell phone went off and they started to search for him. On night falling between 3rd and 4th of June 2015, he reported the matter to police, same as per I.O/SIP Khamiso Khan was recorded at his instance vide Roznamcha Entry No.44 of PS Garden. It was further stated by the complainant that it was told to him by P.Ws Muhammad Iqbal and Junaid that they had seen Daniyal going on a motorcycle with the appellant; subsequently, he was intimated by police of PS Garden that dead body of deceased Daniyal has been found on the terrace of Zulekha Manzil, Ramswami; on such information, he, his uncle Gulzar and few others went at PS Garden there they were intimated that police party has been dispatched to terrace of Zulekha Manzil, therefore, they also went there and found lying beneath the water tank the dead body of Daniyal, duly wrapped in cloth sheet; his mouth was shut up with the piece of cloth and electric wire was found around his neck; one pet dog and few birds were found available there, the dead body of the deceased was

secured under memo it then was referred to Civil Hospital Karachi for postmortem and after postmortem, it was handed over to him and then at about 0500 hours, his statement under Section 154 Cr.P.C was recorded by I.O/SIP Muhammad Abdullah, which subsequently was incorporated into FIR. It was further stated by the complainant that the appellant was tenant on the place of incident and he has killed the deceased for some motive unknown to him. On investigation, as per him, from the appellant was secured the mobile phone of the deceased. The evidence of the complainant prima facie suggests that neither he is witness to the actual incident nor he has seen the deceased going in the company of the appellant lastly. It was stated by P.W Muhammad Irshad that he saw the deceased and the appellant on tea shop; subsequently he came to know that the dead body of the deceased was secured from the terrace of Zulekha Manzil, it was under tenancy of the appellant. As per him his 161 Cr.P.C statement was recorded by the police twicely. It was stated by P.W Junaid that he saw the deceased going with the appellant on a motorcycle on the night of the incident. His 161 Cr.P.C statement as per him was also recorded twicely. Why 161 Cr.P.C statements of the above named witnesses were recorded twicely? No plausible explanation to it has been offered. On asking, it was stated by P.W Muhammad Irshad that he knew the deceased and the complainant since childhood. On asking it was stated by P.W Junaid that he is working with the complainant since 10/12 years. Apparently, both the witnesses were close to the complainant party, if they were having information about the deceased to have gone with the appellant then they ought to have communicated such information to the complainant party promptly with no loss of time and not to have waited till the time the dead body of the deceased was secured by the police. Such omission on their part, prima facie suggests that they are managed witnesses. It was stated by PW Amir Shahzad that he too saw the appellant standing with the deceased taking juice. As per him, his 161 Cr.P.C was recorded on 11.08.2015, it was recorded with

delay of more than three months to the incident. No explanation to such delay is offered by the prosecution, therefore, his evidence could hardly be relied upon. I.O/SIP Khamiso Khan, at whose instance Entry No.44 was kept in Roznamcha, on asking was fair enough to admit that the complainant did not disclose the name of the person, who had seen the deceased with the appellant on motorcycle. In order to prove that the place of incident was in tenancy of the appellant P.Ws Sadqain and Mst. Sarwar Jahan Begum have been examined. As per them, the place of incident was in use of the appellant at the time of incident. As per the appellant, the place of incident was left by him at least four months back to the incident. Nothing has been brought on record by the prosecution which could have suggested that the tenancy between the appellant or his father and owner of the place of incident was existing even at the time of incident. I.O/SIP Abdul Sattar who actually has arrested the appellant has not been examined by the prosecution. His non-examination could not be overlooked. I.O/SIP Muhammad Abdullah who had conducted the initial investigation of the case too has not been examined by the prosecution. His non-examination too could not be overlooked. PW SIP Munir Ahmed, who has conducted further investigation of the case, even after its cognizance by the Court having jurisdiction stated that on further investigation he came to know that the appellant was wanting to marry with the sister of the deceased which the deceased was resisting and it was motive of the incident. It was further stated by him that cell phone used by the deceased was purchased by him from SZ Communication. By stating so, he produced such receipt. No much reliance could be placed upon such receipt for the reason that its author has not been examined by the prosecution. Evidence of P.W/Mst. Samina Yousuf is to the extent that the SIM card used by the deceased in his cell phone was given by her to him. It is surprising to note that a lady who was not relative of the deceased permitted him to use her SIM card. It was stated by I.O/SIP Mir Kalam Khan that on investigation, he secured from the appellant the cell phone

allegedly used by the deceased. Its ownership as said above was doubtful. It was stated by him that on interrogation, the appellant admitted before him to have committed the present incident. If for the sake of arguments, it is believed that such admission was actually made by the appellant before the said I.O/SIP, even it could not be used against him as evidence in terms of Article 39 of Qanun-e-Shahadat Order, 1984. In these circumstances, it would be safe to conclude that the prosecution has not been able to prove its case against the appellant beyond shadow of doubt and to such benefit he is found entitled.

6. In case of *Abdul Khaliq vs. the State* (1996 SCMR 1553), it was observed by Apex Court that;

“---S.161---Late recording of statements of the prosecution witnesses under section 161 Cr.P.C. Reduces its value to nil unless delay is plausibly explained.”

7. In the case of *The State through P.G. Sindh and others vs. Ahmed Omar Sheikh and others* (2021 SCMR 873), it has been held by the Apex Court that:

“66. "Last seen" evidence is merely a circumstantial evidence, and that too a weak type of evidence, which alone cannot sustain the weight of a capital punishment, and would require other independent corroborative evidence to effect conviction. In a case of murder, where the prosecution case rests on "last seen" evidence, then corroboration would be required from other circumstantial evidence; each piece of such evidence would have to be proved to complete the chain, stemming from the accused being "last seen" with the deceased, leading to his death. To achieve this, the prosecution has to prove that the death of the deceased took place in close proximity to the time and place, where the accused was "last seen" with the deceased. Thus, the evidentiary value of the "last seen" evidence of an accused with the deceased will depend upon the facts and circumstances of each case, and for a court to reach a conclusion of guilt of the accused, such circumstances must not only be proved, but must also be found to be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt.”

8. In the case of *Muhammad Mansha vs. The State* (2018 SCMR 772), it has been held by the Apex court that;

"4....Needless to mention that while giving the benefit of doubt to an accused it is not necessary that there should be many circumstances creating doubt. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of such doubt, not as a matter of grace and concession, but as a matter of right. It is based on the maxim, "it is better that ten guilty persons be acquitted rather than one innocent person be convicted".

9. The case law which is relied upon by learned Addl. P.G for the state and learned counsel for the complainant is on distinguishable facts and circumstances. In case of Nazir Ahmed (*supra*), the recovery of cycle and wrist watch of the deceased from the accused was found to be strong incriminating corroborative piece of evidence against the accused. In the instant case, the ownership of the cell phone of the deceased allegedly secured from the appellant, on account of failure to examine the author of its sale receipt has become doubtful. In case of Iftikhar Ahmed (*supra*), after abduction of the victim, a demand was made for ransom by unknown caller. On investigation, the calls were found to have been generated from that SIM card recovered from the accused. In the instant case, no call was made to the complainant party by the accused involved in the incident.

10. In view of the facts and reasons discussed above, the conviction and sentence awarded to the appellant under impugned judgment are set aside, he is acquitted of the offence for which he was charged, tried, convicted and sentenced by learned trial Court; the appellant shall be released forthwith if not required to be detained in any other custody case.

11. Above are the reasons of the short order of even date, whereby the instant Criminal Appeal was allowed.

JUDGE