

IN THE HIGH COURT OF SINDH, CIRCUIT COURT
LARKANA

(1) Crl. Appeal No. S- 49 of 2021.

Appellant: Misri Shah, through Mr. Tahir Abbas Shah,
Advocate.

(2) Crl. Appeal No. S- 50 of 2021.

Appellants: 1. Suhnal Shah, 2. Shakeel Shah and 3. Jameel
Shah, through Mr. Safdar Ali Ghouri, Advocate.

Respondent: The State, through Mr. Aitbar Ali Bullo, Deputy
Prosecutor General.

Complainant: Syed Zamir Hussain Shah, present in person.

Dates of hearing: 21.12.2023.

Date of the judgment: 10-01-2024.

Judgment

Khadim Hussain Soomro, J- The captioned two criminal appeals are being disposed of by this single judgment, as they both stem from the same case, F.I.R., as well as the impugned judgment.

2. The appellants were tried by the learned Additional Sessions Judge-III, Larkana, in Sessions case No.284 of 2017, re; State v. Shakeel Shah and others, emanating from F.I.R No.08 of 2017, registered at Police Station Aqil (District Larkana). By judgment dated 23.08.2021, the appellants were convicted and sentenced under Section 302 (b) P.P.C to suffer life imprisonment as "Taa'zir" and to pay compensation of Rs.200,000/- each to the legal heirs of the deceased and in case of default whereof to suffer R.I for six months more. However, the appellants were extended the benefit of Section 382-B Cr.P.C.

3. The facts of the case of prosecution are that the complainant, Syed Zameer Hussain, resident of Ali Abad Muhalla, Larkana, lodged F.I.R at P.S Aaqil on 14.03.2017, stating therein that her sister, Bibi Rasheeda Khatoon, aged about 34/35 years, was married to Ghulam Abbas Shah since 12/13 years. The complainant's sister had three children from this

wedlock and used to reside in the village of Syed Bachal Shah. He alleged that his sister was subjected to maltreatment, and she had apprehended concerns about her life at the hands of the accused party, but the complainant party ignored. However, on a fateful night, Rasheeda Khatoon called the complainant on his mobile phone, expressing imminent danger to her life at the hands of her husband and brothers-in-law who were collectively making consultations against her life. Responding to this distress call, the complainant, accompanied with his brothers Ameer Shah and Ghafoor Shah, promptly travelled to the residence of Ghulam Abbas Shah. Upon arrival around 11:00 p.m. at the house of the accused party., they heard Rasheeda's cries and witnessed a brutal scene. The complainant party saw accused Ghulam Abbas had a hoe (Kodar) in his hand, 2. Accused Misri Shah having sickle (Datro), and 3. Suhnal Shah, all three sons of Bakhshal Shah, 4. Shakeel Shah having bat, 5. Jameel Shah, both sons of Suhnal Shah having "Chhurri" and Suhnal Shah, instigated the other accused persons to commit the murder of Bibi Rasheeda Shah, to which Syed Ghulam Abbas Shah caused injury with a hoe (Kodar) to Rasheeda Bibi at side of her right eye and it popped out; accused Misri Shah caused injury with sickle (Datro) at her right cheek; accused Shakeel Shah caused injury with a bat at her right side chin; accused Jameel Shah caused injures with "Chhurri" at her right and left side of the chest, and blood was oozing. The complainant party challenged the accused persons, who, along with their respective weapons, fled away. The complainant party, being empty-handed, did not chase the accused persons and took Rasheeda to Causality (Hospital) for immediate treatment, where she succumbed to injuries at 11.30 p.m. Thereafter, the complainant, leaving his brothers at the dead body of deceased Rasheeda, went to the police station and lodged the F.I.R, further alleging therein that, the accused persons, namely Suhnal Shah, Ghulam Abbas Shah, Misri Shah, Shakeel Shah and Jameel Shah in prosecution of their common object by causing injuries with hoe (Kodar), sickle (Datro), Bat and "Chhurri" committed her murder.

4. After the usual investigation, the police submitted the challan to the concern court. Thereafter, the trial Court framed the charge against the appellants at Ex.2, to which they pleaded not guilty and claimed trial vide their pleas at Ex.2-A to 2-D.

5. At trial, the prosecution examined PW-1, Women Medico Legal Officer Dr. Samreen Panah, who produced a postmortem report. PW-2 ASI Muhib Ali (author of F.I.R) was examined at Ex.4; he produced Entries Nos. 15 and 16 and F.I.R. PW-3 P.C Iqbal Ahmed (Corpse bearer) was examined at Ex.5; he produced Receipts. PW-4 complainant Syed Zameer Hussain Shah was examined at Ex.6. PW-5 (eye-witness) Syed Ameer Ali Shah was examined at Ex.7. PW-6 Syed Ghafoor Shah (eye-witness) was examined at Ex.8. PW-7 Yasir (Tapedar) was examined at Ex.9; he produced letter containing directions for preparation of sketch of the place of incident; he also produced sketch. PW-8, the Investigation Officer of the case namely Ali Gohar, was examined at Ex.10; he produced entry No.16, memo of the inspection of the dead body, Danistnama, memo of the place of incident, Road Certificate, Entry No.16, Entry No.9, Entry No.12, memo of the arrest of accused Shakeel Shah and Jameel Shah, Suhnal Shah, and Misri Shah. PW-9 Fayaz Ali (mashir) was examined at Ex.11. Thereafter, the side of the prosecution was closed by the Prosecutor vide statement at Ex.12.

6. The appellants' statements were recorded under Section 342 Cr.P.C. at Ex.13 to 16, respectively, in which they denied the allegations of prosecution and pleaded their innocence. Appellant Shakeel Shah neither opted to examine himself on oath nor led evidence in defence. However, the rest of the appellants opted to examine them on oath as well as they examined witnesses in defence. The statement of appellant Misri Shah was recorded at Ex.17; DW Nadeem Shah at Ex.18, D.W. Azeem Shah at Ex.19, D.W. Khan Muhammad alias Haji Khan at Ex.20. Appellant Suhnal Shah was examined at Ex.21; DW Abdul Razzak at Ex.22. Thereafter, the side of accused party was closed vide statement at Ex.23.

7. The learned trial Court, after hearing the parties and on the assessment of evidence, convicted and sentenced the appellants as stated above. Hence, these appeals have been preferred against the impugned judgment by the appellants.

8. Learned counsel for the appellants contended that there was a delay of one day in lodging the F.I.R, as such question of due deliberation and false implication of the appellants cannot be ruled out, and this very crucial aspect of the case was not considered by learned trial Court in its true sense. Per learned counsel, the prosecution examined related and interested witnesses, while no any independent person was examined by the prosecution as a witness or as a mashir. Learned counsel further contended that there is inconsistency in ocular and medical evidence, as these are not in line with each other. Per learned counsel, neither mobile number was mentioned in F.I.R., nor was a call record produced on record to prove the version of the complainant and his witnesses that the deceased had called them through mobile phone. Learned counsel further contended that the alleged incident is said to have taken place at odd hours of the night, and the source of identifying the accused is shown to be the bulb, but such bulb was not recovered by the investigating officer. Learned counsel further added that there were material contradictions and improvements in the evidence of the prosecution witnesses, and their evidence is not worthy of reliance and confidence-inspiring. Per learned counsel, if the prosecution version and the defence version are placed in juxtaposition, the latter seems to be more confidence-inspiring. Lastly, learned counsel prayed for the acquittal of the appellants.

9. The complainant, who is present in person, submits that he has no objection if the appellants are acquitted of the charges.

10. However, the learned D.P.G. appearing for the State sluggishly opposed these appeals. He, however, argued that the evidence produced at trial is natural and confidence-inspiring. The delay in registration of F.I.R. (if any) was explained properly, and the names of the appellants are mentioned in the F.I.R. with specific roles of causing injuries to the deceased, which resulted in her death. He further argued that the defence has failed to create dents in the prosecution case. The defence counsel has pointed out no material contradictions or discrepancies. He lastly contended that the prosecution has established its case beyond any shadow of doubt against the appellants and learned trial Court has rightly convicted the appellants, and appeals are liable to be dismissed.

11. Heard the learned counsels for the respective parties and gone through the entire evidence and other material available on the record.

12. The FIR's plain review demonstrates that the same was registered after 25 hours, whereas the distance between the place of the incident and the police station is about 3/4 kilometres. Such a delay has not been properly explained which can be attributed to consultation, taking instructions and calculatingly preparing the report. While forming above view, I am enlightened from the observation of the Hon'ble Supreme Court of Pakistan expressed in case reported as Abdul Ghafoor v. The State (2022 SCMR 1527) which for reference sake is being referred hereunder:-

"This Court while holding that the delay of two hours in lodging the FIR has assumed great significance as the same can 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 may wish to implicate charge and put to trial."

Reliance can also be placed in the case of MEHMOOD AHMAD and 3 others V/S THE STATE and another, 1995 SCMR 127.

13. It is worth noting that the FIR was registered on 14.03.2017, whereas the statement of eye-witnesses was recorded on 19.07.2017, indicating a delay of seven days. The police file lacks a reasonable explanation for this delay that could provide justification. There are a plethora of case laws/precedents of the Hon'ble Supreme Court wherein Hon'ble Court holds that an unexplained delay of even one or two days in recording the statements of eye-witnesses would be deemed critical, rendering the testimony of such witnesses unreliable and unsafe to rely upon. Reliance is placed upon the cases titled "Rahat Ali v. The State" (2010 SCMR 584) and "Muhammad Asif v. The State" (2017 SCMR 486).

14. Perusal of evidence shows that complainant Syed Zameer Hussain Shah had deposed that, he along with his brothers namely, Ameer Shah and Ghafoor Shah, were present in their residence, they received a distress call from their sister, Mst. Rasheeda Khatoon. She reported a perceived threat to her life, alleging a conspiracy by her in-laws to commit

her murder. In response to this call, the complainant and his brothers proceeded towards their sister's residence; arriving at the door around 11:00 p.m, they heard cries emanating from the house. Subsequently, they entered the premises and, with the aid of an electric bulb, saw their sister lying on the floor. The accused persons were identified as follows: Abbas Shah, wielding a hoe (Kodar); Misri Shah, holding a sickle (Datro); Suhnal Shah, without any weapon; Shakeel Shah, equipped with a bat; and Jameel Shah, carrying a knife (Chhurri). The complainant further deposed that accused Suhnal Shah abetted other accused persons to commit the murder of Mst. Rasheeda Khatoon. In response thereto Abbas Shah struck her with his hoe near her right eye, resulting in a profound injury causing her eye to protrude. Misri Shah inflicted a blow with his sickle on her right cheek, Shakeel Shah struck her right chin with a bat, and Jameel Shah attacked both the right and left sides of her chest with a knife. The complainant further deposed that his sister, Mst. Rasheeda Khatoon started bleeding; they raised cries and "hakals" to the accused, but they did not pay heed to them and all the accused, on seeing Mst. Rasheeda, writhing, ran out of the house, and the complainant did not chase the accused due to fear and being empty-handed; they then took Mst. Rasheeda for medical treatment to the Casualty of Hospital, where at about 11.30 p.m. she succumbed to injuries and died. P.Ws (eye-witnesses) Syed Ameer Shah and Syed Ghafoor Shah have also deposed in the same line, as deposed by the complainant regarding the happening of the incident.

15. The meticulous re-assessment of the material brought on record reveals that the eye-witnesses of the incident were residing at a distance of 5 to 6 km away from the place of the incident. As per the prosecution's version, the deceased Rasheeda Khatoon called through a cell phone to the complainant at about 10:30 p.m, and informed him that she was feeling a threat to her life from all of her in-laws thereafter, they reached the place of the incident at 11:00 p.m, the eye-witnesses came to the place of the incident on motorcycle, but neither had they disclosed the number of said motorcycle nor the same was produced by the I.O in order to establish their presence. The source of information is the mobile call allegedly received by the complainant. Neither the eye-witnesses

disclosed the number from where the deceased lady called the complainant, nor the complainant produced his mobile phone to the investigation officer nor was C.D.R. of that number collected during the investigation, which makes the presence of the witnesses highly doubtful. The justification for the presence of the aforementioned eye-witnesses at the scene of the incident remains unsubstantiated in the record, lacking any corroborative evidence and relying solely on uncorroborated statements devoid of supportive proof. In this regard, I have been guided by the apex court judgment passed in the case of Abdul Jabbar alias Jabbari V/S The State (2017 S C M R 1155). The relevant portion of the judgement is reproduced as under:-

"4. Both the eye-witnesses produced by the prosecution, i.e. Madad Ali complainant (PW5) and Muhammad Abbas (PW6) were very closely related to Manzoor Ahmed deceased inasmuch as the complainant was the son of the deceased and the other eye-witness was a nephew of the deceased. Both the said eye-witnesses were chance witnesses who had failed to establish the stated reason for their availability at the scene of the crime at the relevant time through any independent evidence. An F.I.R. in respect of the incident in issue had not been lodged at the local Police Station giving rise to an inference that the F.I.R. had been chalked out after deliberations and preliminary investigation at the spot. The Medico-legal Certificate issued in respect of Manzoor Ahmed deceased when he was alive shows that the injured victim was brought to the hospital not by the above mentioned eye-witnesses but by a police official which showed that in all likelihood the said eye-witnesses had been procured and planted in this case at some subsequent stage. Postmortem Examination Report pertaining to the deadbody of Manzoor Ahmed deceased revealed that despite the deceased having breathed his last in the hospital postmortem examination of the deadbody had been conducted after about 12 hours of his death which again indicated that time had been consumed by the local police in procuring and planting eye-witnesses and in cooking up a story for the prosecution. According to the F.I.R. the place of occurrence ought to have been a field wherein the deceased and the complainant were grazing their cattlehead but the site-plan of the place of occurrence shows that the murder of the deceased had been committed inside a compound of an lhata which surely was not a proper place for cattlehead to graze. Apart from that the above mentioned eye-witnesses had claimed to have seen the occurrence from a distance of about 117 and a half feet and still they had claimed to have witnessed every detail of the incident including the different weapons being used by the accused party which was a claim too tall to be accepted".

16. The credibility of witnesses being present at the crime scene is cast into doubt due to their unnatural conduct, rendering their testimony highly untrustworthy. Consequently, explicit reliance cannot be made on their statements, predominantly because, as per the prosecution's case, the eye-witnesses to the incident in question are identified as real brothers of the deceased, and they saw all the accused armed with a hoe, sickle, bat, and knife and they were inflicting injuries to the deceased with weapons, but the eye witnesses who were real brothers, three in numbers remained as a silent spectator. The weapons allegedly possessed by the accused do not qualify as firearms and cannot generate such circumstances, which may potentially act as a deterrent, impeding the willingness of eye-witnesses to come forward and save their sister. It is implausible that real siblings would witness the physical assault and demise of their real sister without intervention. These instances involve situations where brothers can use maximum effort to protect the life of their sister. As per Article 129 of the Qanun-e-Shahadat Order, the Court is empowered to make presumptions about the presence of any fact that it deems likely to have happened, taking into deliberation the ordinary course of natural events and human behaviours. For the ready reference Article 129 of the Qanun-e-Shahadat Order is reproduced as under:-

"S. 129. Court may presume existence of certain facts.---The Court may presume the existence of any fact which it thinks likely to have happened" regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case--"

17. In similar circumstances, the evidence of such eye-witnesses was disbelieved by the Supreme Court of Pakistan in the case of Masood Ahmed and another v. The State (1994 SCMR 6).

18. There is material contradictions and improvements in the evidence of the prosecution witnesses testimony undermine its reliability and confidence-inspiring nature. For instance, the corpse bearer's account conflicts with S.I.P. Ali Gohar's timeline, and the complainant's version

about the time of shifting the deceased to the hospital contradicts earlier statements, further diminishing the credibility of the evidence.

19. A conflict subsists between the ocular evidence and the medical findings, and instead of presenting corroborative proof. As per the ocular version, it is asserted that the accused person, Abbas Shah, struck a hoe (Kodar) onto the deceased Mst. Rasheeda Khatoon, impacting near her right eye. Accused Misri Shah allegedly delivered a blow with his sickle (Datro) to her right side cheek, accused Shakeel Shah purportedly administered a bat blow to the right side of chin, and accused Jameel Shah allegedly inflicted knife (Chhurri) blows on both the right and left sides of her chest. It is accurate to assert that sharp cutting edges characterize weapons such as a spade, sickle, and knife. A spade typically features a sharp, flat blade, a sickle is equipped with a curved and sharp blade, and a knife is specifically crafted with a sharp edge. PW-1 Women Medico Legal Officer Dr. Samreen Panah; who conducted the autopsy on the dead body of deceased Mst. Rasheeda Khatoon and she deposed that **"it is correct that my opinion mentioned in the bottom of the postmortem report is that death occurred due to hard and blunt substance"**. An aspect relates to the medical evidence, which not only serves as a fundamental for the prosecution's case but is also promptly recognized and acted upon by the learned Courts below. In this context, the reliance can be placed upon the case of Jehangir Elahi V/S Shoab Ahmed and others, 2017 S C M R 986.

" 18. The next is the medical evidence, not only relied upon by the prosecution but readily accepted and acted upon by the learned Courts below. True, that the deceased child was done to death by strangulating him after he was subjected to sodomy, however, to establish the individual participation of each one of the accused, in the crime, it was all the more necessary that samples of semen of the accused should have been sent to chemical examiner with swabs for cross matching. Only one swab in the parcel was found to be stained with the human semen, while the rest were not so. No sample of semen was obtained from the three accused for cross-matching. On this point, the case law has settled the standard of proof, however, quick reference may be made to the cases of Mst. Ehsan Begum v. The State (PLD 1983 FSC 204), Ghulam Abbas v. S.H.O. Police Station City Chiniot Jhang (1996 PCr.LJ 1661) and Waqar-ul-Islam v. State (1997 PCr.LJ 1107). The medical evidence is only confirmatory or of supporting nature and is never held to be corroboratory evidence, to identify the culprit(s)".

20. There is a discrepancy in the ocular account unanimously provided by all witnesses, and it is in direct conflict with the medical evidence. The reliance can be placed on the recent judgment in the case of ISHTIAQ HUSSAIN and another V/S Versus The STATE and others, 2021 SCMR 159.

"it is hard to suspect his presence at the crime scene, nonetheless, discrepancy in the ocular account unanimously furnished by all the witnesses including the injured himself is most intriguing; with one voice they blamed Hassan Raza, acquitted co-accused, for a dagger blow on the left thigh whereas according to the medical examination, the witness sustained a firearm injury on the stated locale; the accused is shown to have led to the recovery of a dagger, a circumstance further compounding the confusion; a witness discredited and disbelieved qua his own tormentor is of little relevance to sustain the remaining structure of the case. A confirmed presence by itself is not equivalence of truth"

21. Now turning to the memorandum of recovery lists purported weapons, including a hoe (Kodar in Sindhi), sickle (Datro in Sindhi), bat and knife (Chhurri), which were allegedly recovered from the place of the incident on 14-03-2017, at about 0230 hours. However, the information in the F.I.R. indicates, in the seventh line from the bottom on the second page, that the accused escaped with their weapons, raising doubt about the trustworthiness of the claimed weapon recovery.

22. Admittedly, the deceased had three offspring; however, none of them were presented as witnesses to the incident. Notably, Nadeem Shah, the elder son among the three, testified in the Witness Box not as a witness of the prosecution but rather as a witness aligned with the appellant/accused. In his deposition, he asserted the innocence of his uncles while attributing culpability to his father as the actual wrongdoer. It is not reasonable or prudent to believe that a son would accuse his own father of a crime, specifically the murder of his mother while absolving other culprits (if any). Moreover, the prosecution was provided an

opportunity for cross-examination, but the evidence of said Nadeem shah prove to be consistent and confidence-inspiring.

23. The prosecution is under responsibility to prove its case against the accused person at the standard of proof obligatory in criminal cases, namely, beyond a reasonable doubt, and cannot be said to have cleared this obligation by producing evidence that merely meets the preponderance of prospect standard applied in civil cases. If the prosecution fails to discharge, then the benefit of that doubt is to be given to the accused person as a right, not as a concession. The rule of giving the benefit of doubt to the accused person is basically a rule of thoughtfulness and farsightedness, and is deep-seated in jurisprudence for the safe administration of criminal justice. The Supreme Court of Pakistan has firmly established that a single circumstance that casts doubt on the prosecution's narrative is sufficient to acquit the accused. In the case of *Tariq Pervez v. The State*, 1995 SCMR 1345, for giving the benefit of doubt it is unnecessary that there should be numerous doubt-raising from circumstances. In this context, the reliance can be placed on the case of "*Muhammad Adnan and another v. The State and others*" (2021 SCMR 16), "*Ghulam Abbas and another v. The State and another*" (2021 SCMR 23), and "*Zulfiqar Ali v. The State*" (2021 SCMR 1373).

24. In common law, there is a very famous saying, "Ten guilty persons should be acquitted rather than one innocent person be convicted". While in Islamic criminal law, it is founded on the tall authority of sayings of the Holy Prophet of Islam (peace be upon him): "Avert punishments [hudood] when there are doubts" and "Drive off the ordained crimes from the Muslims as far as you can. If there is any place of refuge for him [accused], let him have his way because the leader's mistake in pardon is better than his mistake in punishment", reliance is placed on cases reported as "*Muhammad Luqman v. State*" PLD 1970 SC 10, *MOHAMMAD MANSHA V. THE STATE* (2018 SCMR 772), *SAJJAD HUSSAIN v. The STATE* (2022 SCMR 1540), *ABDUL GHAFUOR v. The STATE* (2022 SCMR 1527) and *PERVAIZ KHAN v. The STATE* (2022 SCMR 393). Musnad Abi Huthayfa, Hadith No.4. Kitab ul Hadood, p. 32, relied upon by the Federal Shariat Court in *Kazim Hussain v. State*, 2008

P.Cr.L.J 971, Mishkatul Masabili (English Translation by Fazlul Karim) Vol. II, p. 544, relied upon by the Federal Shariat Court in State v. Tariq Mahmood, 1987 PCrLJ 2173; Sunnan Tarimzi, Hadith No. 1344, Kitab ul Haddood. Jail Petition No.147 of 2016 30 him) in Ayub Masih v. State³⁷ in the English translation thus: "Mistake of Qazi (Judge) in releasing a criminal is better than his mistake in punishing an innocent."

25. It is a well-established principle of criminal administration of justice that no conviction may be handed to an accused unless and until the prosecution presents credible, trustworthy, and unimpeachable evidence with no contradiction, throwing doubt on the validity of the prosecution account. In the current instance, I believe that the prosecution's account is surrounded by dense mists of doubt, and that the learned trial Court did not examine the evidence in its real context, arriving at an incorrect result by finding the appellant guilty of the charge. As a result, both the appeals are allowed. The appellants are acquitted of the charge. They shall be released forthwith if not required in any other custody case.

26. The above appeals are disposed of in the above terms

Judge