

IN THE HIGH COURT OF SINDH, AT KARACHI

Criminal Appeal No.748 of 2019

Criminal Appeal No.792 of 2019

Appellant: **Mansoor Mujahid** through M/s. Shaukat Hayat, Muhammad Khalid, Syed Muhammad Abdul Kabeer, and Ms. Amna, advocates

Appellant: **Mst. Anab Zehra Hameed** through M/s. Kashif Hanif, Zafar Iqbal Arain, Sarmad Ali, Ms. Shaista Parveen, Ali Hyder and Yogesh Balani, advocates

The State: Ms. Rubina Qadir, DPG for the State

Dates of hearing: 02.09.2024, 09.09.2024, 23.09.2024, 30.09.2024 and 07.10.2024

Date of judgment: 07.10.2024

J U D G M E N T

IRSHAD ALI SHAH, J- It is the case of the prosecution that the appellants and absconding accused Mst. Masooma Zainab Abidi in furtherance of their common intention murdered Faisal Nabi Malik by causing him fire shot and dagger injuries and then poured acid on his dead body and then thrown it in open space adjacent to Sun Rise Apartments, Shireen Jinnah Colony, Karachi, to save themselves from legal consequences, for which the present case was registered. The appellant and absconding accused Mst. Masooma Zainab Abidi did not plead guilty to the charge and the prosecution to prove the same examined twenty witnesses and then closed its side. The appellants in their

statements recorded under Section 342 Cr.PC denied the prosecution's allegation by pleading innocence; they did not examine anyone in their defence or themselves on oath, however, produced certain documents to prove their innocence. On completion of trial, they were convicted u/s. 302(b) r/w 34 PPC and sentenced to undergo imprisonment for life and to pay compensation of Rs.2,00,000/- to the legal heirs of the deceased and in default in payment whereof to undergo simple imprisonment for six months; they were further convicted u/s. 297 r/w 34 PPC and sentenced to undergo rigorous imprisonment for one year and to pay fine of Rs.10,000/- each and in default in payment whereof to undergo simple imprisonment for one month; both the sentences were directed to run concurrently with benefit of Section 382(b) Cr.PC by learned 1st Additional Sessions Judge (MCTC) Karachi South vide judgment dated 29.10.2019, which they have impugned before this Court by preferring two separate appeals.

2. It is contended by learned counsel for the appellants that the appellants are innocent and have been involved in this case falsely by the police at the instance of the complainant party; there is no eye witness to the incident; the recoveries are doubtful; the circumstantial evidence being weak has been relied upon by the learned trial Court without lawful justification,

therefore, they are entitled to their acquittal by extending them the benefit of the doubt. In support of their contentions, they have relied upon the cases of *SAK Rehmani v. the State* (2005 SCMR 364), *Muhammad Nadeem alias Banka v. the State* (2011 SCMR 1517), *Nasir Javed v. the State* (2016 SCMR 1144) and *Mst. Asiya v. the State* (2023 SCMR 383).

3. Learned DPG for the State and learned counsel for the complainant have sought dismissal of the instant appeals by contending that there is the judicial confession of appellant Anab Zehra though it is exculpatory yet it proves the factum of the incident; there is recovery of crime weapon, the diaries and every circumstances implicate the appellants in commission of the incident. In support of their contentions, they relied upon the cases of *Talib Hussain v. the State* (1995 SCMR 1538), *Nazir Shehzad and another v. the State* (2009 SCMR 1440) and *Mobashir Ahmad v. the State* (2009 SCMR 1133).

4. In rebuttal, it is contended by learned counsel for appellant Mansoor Mujahid that he has already been acquitted by learned V-Assistant Sessions Judge Karachi South in case relating to recovery of crime weapon from him and such acquittal has been maintained by this Court even.

5. Heard arguments and perused the record.

6. Admittedly, there is no eyewitness to the incident. Evidence of P.W Saeed Amin who happened to be the driver of the deceased with no driving license is to the extent that on 20.06.2013 he took the deceased and absconding accused Mst. Masooma Zainab Abidi in car to the house/apartment of appellant Mansoor Mujahid wherefrom he did not return; on inquiry, he was told by the appellants and the absconding accused Mst. Masooma Zainab Abidi that the deceased has already gone; he intimated such fact to P.W Mst. Nadia, then went to the house of the deceased with his car and related such fact to P.W Mst. Narmeen who happened to be wife of the deceased. On 21.06.2013, it was intimated to him by P.W Mst. Narmeen that she had received a message from absconding accused Mst. Masooma Zainab Abidi that Mansoor Mujahid had murdered the deceased; on such intimation, he and relatives of the deceased went to the PS Clifton and reported the incident there. It was done on 21.06.2013, was with a delay of about one day to the actual missing of the deceased. It was recorded by I.O/SIP Amir Khan Niazi under Roznamcha entry No.46; technically it was a First Information Report of the incident. On asking, it was stated by the said P.W that the deceased was addicted to liquor and other contraband addiction and was fond of friendship with the girls. After recording such an entry in

Roznamcha I.O /SIP Amir Khan Niazi investigated the present case; it was stated by him that he with the police party proceeded to the place of the incident; it was a flat; it was found locked from the outside; in the meanwhile there came the appellant Mansoor Mujahid; he unlocked the flat, inside of it was found sitting appellant Mst. Anab Zehra; both were interrogated; on which it was disclosed by appellant Mansoor Mujahid that he has caused fire shot injuries to the deceased with his revolver; such fact as per him was affirmed by appellant Mst. Anab Zehra by stating that she has also caused dagger injuries to the deceased. If for the sake of the arguments, it is believed that such a disclosure was made by the appellants before the said I.O/SIP even then it could hardly be used against them as evidence in terms of Article 39 of Qanun-e-Shahadat Order, 1984. It was further stated by the said I.O/SIP that on the pointation of the appellants, he went towards Sun Rise Apartments at Shireen Jinnah Colony, Karachi and found the dead body of the deceased lying there; it was secured under a memo prepared at the spot in presence of P.Ws /Mashirs Zahid Siddiqui and complainant Nael Khan who also identified the dead body of the deceased. Both the appellants were apprehended; the car used in the commission of the incident was secured under the memo prepared at the spot in presence of the

same P.Ws/Mashirs. The dead body of the deceased was then shifted to Civil Hospital Karachi for postmortem. The death of the deceased being unnatural is confirmed by Dr. Partosham with the narration that the time between the death of deceased and postmortem was about 36 to 48 hours. It was further stated by the said I.O/SIP that he then recorded 154 Cr.PC statement of complainant Nael Khan; it was recorded on 22.06.2013 with a further delay of one day; the same later on was incorporated into FIR. Indeed, it was the Second Information Report of the same incident. Further investigation of the case as per him was conducted by I.O/SIP Muhammad Saleem. On asking it was admitted by him that Zamzama is a commercial area having watchmen; no incriminating piece of evidence was collected by him either from the car used for the commission of the incident or from the Flat/place of the incident though he remained there for about 03 to 03.30 hours and SSP Shoukat Imran helped him to solve the issue of interrogation and recovery of the dead body. SSP Shoukat Imran has not been examined by the prosecution. It is said by appellant Mansoor Mujahid in his statement recorded u/s. 342 Cr.PC that he was his ex-stepfather and was instrumental in his involvement in the present case to satisfy with him his matrimonial dispute. Surprisingly, on further investigation, the incriminating articles viz. blood-stained plow,

two cloth bad sheets, two churries, and a piece of foam having blood marks separated from the mattress were secured by I.O/SIP Muhammad Saleem under memo. How this happened? It is a mystery. Those articles as per receipt produced by Dr. Abdul Hameed were delivered in his office for Forensic Examination on 06.09.2016 with a delay of more than three years. No explanation to such delay is offered by the prosecution. In such a situation, the appellants could hardly be connected with such recovery. It was further stated by I.O/SIP Muhammad Saleem that on interrogation appellant Mansoor Mujahid led him to the Flat of his mother and produced an unlicensed pistol allegedly used by him in the commission of the incident; it was secured under memo. As per the memo, it was the pistol of 22 bores; such figure is tempered to be of 32 bores. For such recovery, as per him, a separate case was registered. The letter whereby such pistol is sent to Forensic Expert speaks that it was a pistol of 22 bores. Such inconsistency could not be overlooked; even otherwise appellant Mansoor Mujahid has already been acquitted of the charge relating to recovery of an unlicensed weapon from him and such acquittal has attained finality up to the stage of this Court, therefore, he could not be connected with such recovery. It was further stated by the said I.O/SIP that on further interrogation appellant Mansoor Mujahid led to the

recovery of the belongings of the deceased from the flat of his mother, which he secured under the memo prepared at the spot. The perusal of such a memo reveals that it was prepared by I.O/SIP Muhammad Mubeen. His name and signature have been tempered with and substituted the name of I.O/SIO Muhammad Saleem with the addition of the name of 3rd witness to recovery as Zahid Siddiqui. Such tempering/substitution could not be lost of sight and it has made the very recovery to be doubtful. It was further stated by him that on 23.06.2013 he recorded 161 Cr.PC statement of Mst. Narmeen; it was disclosed by her that Mst. Masooma Zainab Abidi is an eyewitness to the incident. On such disclosure, he called Mst. Masooma Zainab Abidi recorded her 161 Cr.PC statement and also wrote a letter to the Magistrate having jurisdiction for recording her 164 Cr.PC statement; the same could not be recorded as he was suspended and further investigation was conducted by I.O/SIP Irshan Karim. It was stated by him that on investigation he recorded 161 Cr.PC statements of Shaikh Usman and Nasir Kazmi concerning the flat wherein the incident took place which was let out by them to appellant Mansoor Mujahid; dispatched the property to Forensic Expert for report; obtained the tracker data concerning car used in the commission of the incident; recorded 161 Cr.PC statement of Mst. Amina wife of the complainant;

obtained the postmortem report; arrested P.W Mst. Masooma Zainab Abidi as an accused. Probably it was done by him based on the judicial confession of appellant Mst. Anab Zehra whereby she stated that it was Mst. Masooma Zainab Abidi who had murdered the deceased by causing him fire shot injuries. It was further stated by the said I.O/SIP that he recovered a diary on the pointation of appellant Mst. Anab Zehra. It was written therein by her that she has been subjected to rape by the deceased and was red by appellant Mansoor Mujahid. It was alleged to be a motive for the incident. Such a diary has never been produced in evidence before the Court under the deception that it has been burnt on account of a fire in *Malkhana* of District Court Karachi. No entry is produced by any of the Investigating Officers which could have suggested that such a diary was kept by them in *Malkhana*. In such a situation, none of the appellants could be connected with such a diary. It was further stated by the said I.O/SIP that the further investigation of the case was conducted by I.O/DSP Muhammad Mubeen. It was stated by him that on investigation he recorded 161 Cr.PC statements of P.W Tariq Ali Pathan and others, then furnished interim challan of the case before the Magistrate having jurisdiction, whereby absconding accused Mst. Masooma Zainab Abidi was let off by him; it was not consented by the Magistrate having jurisdiction.

He obtained a CD of the CCTV recording; the diary of Mst. Anab Zehra was sent for Forensic opinion, dispatched the cell phones to a forensic expert for forensic examination and obtained such data/report, obtained the mobile data of the appellants and witnesses and then furnished final challan of the case before the Magistrate having jurisdiction against the appellants and absconding accused Mst. Masooma Zainab Abidi. He was fair enough to say that he did not obtain the cell phones of appellant Mst. Anab Zehra and absconding accused Mst. Masooma Zainab Abidi. Evidence of the complainant, P.Ws Nadia and Qamar Zahid Siddiqui is based on information which was communicated to them by P.W Saeed Amin, therefore, it hardly needs discussion. If for the sake of arguments, evidence of P.W Saeed Amin is believed to be true, then it is only to the extent that he dropped the deceased and absconding accused Mst. Masooma Zainab Abidi at Zamzama to go into the flat of appellant Mansoor Mujahid. His evidence being weak could hardly be relied upon to base conviction simply for the reason that the very information was communicated by him to the police officials with delay having not been explained plausibly, which reflects deliberation and consultation. Surprisingly, none had seen the appellants shifting the dead body of the deceased from their flat to the place of its recovery though it was a

populated area. The memos of arrest and recovery have already been discussed; therefore, evidence of Mashirs/witness to the recovery appears to be immaterial to be discussed. Evidence of Dr. Dileep Kumar Khatri is only to the extent that he obtained the blood samples of Sajid Nabi Malik for DNA purposes to confirm the identity of the dead body and the articles containing blood marks. His evidence is of little value to be discussed. Evidence of Mr. Hatim Aziz Solangi is only to the extent that he recorded the judicial confession of appellant Mst. Anab Zehra; it was recorded at her request without the involvement of the police. It was exculpatory. P.Ws Mst. Narmeen, Mst. Amina, Muhammad Azeem and Sajid Nabi Malik have been given up by the prosecution for no valid reason. The presumption which could be drawn from their non-examination in terms of Article 129(g) of Qanun-e-Shahadat Order, 1984 would be that they were not going to support the case of the prosecution. In these premises, it would be hard to maintain the conviction and sentence against the appellants on the basis of call data, CDR reports and track record, which is alleged to be doubtful.

7. The discussion involves a conclusion that the prosecution has not been able to prove its case against the appellants beyond a shadow of a reasonable doubt and to such benefit, they are found entitled.

8. In case of *Mehmood Ahmed & others vs. the State & another* (1995 SCMR-127), it was observed by the Apex Court 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".

9. In case of *Abdul Khaliq vs. the State* (1996 SCMR 1553), it has been observed by the 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."

10. In case of *Tahir Javed vs. the State* (2009 SCMR-166), it has been held by Apex Court that;

"---Extra-judicial confession having been made by accused in the presence of a number of other persons appeared to be quite improbable, because confession of such a heinous offence like murder was not normally made in the public".

11. In case of *Muhammad Jamil vs. Muhammad Akram and others* (2009 SCMR 120), it has been held by the Apex Court that;

"When the direct evidence is disbelieved, then it would not be safe to base conviction on corroborative or confirmatory evidence."

12. 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".

13. The case law which is relied upon by learned DPG for the State and learned counsel for the complainant is on distinguishable facts and circumstance.

14. Under the discussed circumstances, the conviction and sentence awarded to the appellants under impugned judgment are set aside; they are acquitted of the offence charged and shall be released forthwith, if not required to be detained in any other custody case.

15. Above are the reasons for a short order dated 07.10.2024, whereby both the Criminal Appeals were allowed.

JUDGE

Nadir/PA*