

**IN THE HIGH COURT OF SINDH,
CIRCUIT COURT HYDERABAD**

Before:

Mr. Justice Mohammad Karim Khan Agha

Cr. Jail Appeal No.S-135 of 2011

Arbelo alias Papoo

Versus

The State

Appellant : Arbelo alias Papoo	Through Mr. Ashfaq Ahmed Lanjar, Advocate
Respondent : The State	Through Mr. Shahid Ahmed Shaikh, A.P.G.
Complainant : Nazeer	Through Mr. Hussain Bux Solangi, Advocate
Date of hearing	20.04.2017.
Date of judgment	21.04.2017

J U D G M E N T

MOHAMMAD KARIM KHAN AGHA, J.- Appellant Arbelo alias Papoo was tried by learned Sessions Judge, Umerkot, in Sessions Case No.104 of 2009, arising out of crime106/2009, registered at Police Station Kunri, under section 302 PPC. Accused / appellant was found guilty by judgment dated 07.03.2011 (the impugned judgment) and was convicted and sentenced to suffer rigorous imprisonment for 25 years under section 308 PPC and also to pay amount of Diyat Rs.11,02,680/- (Rupees one million, one hundred two thousand, six hundred and eighty only). The amount of Diyat if recovered was ordered to be paid to the heirs of the deceased. The benefit of section 382-B Cr.P.C. was also extended to the appellant.

2. Briefly the facts of the prosecution case are that the complainant Nazeer son of Lakhmeer on 03.11.2009 lodged F.I.R. at Police Station Kunri stating therein that he got his daughter namely Pashman aged about 17/18 years married with Arbelo alias Papoo son of Bashir by caste Oad about 16 months ago in village Faqeer Abdullah. On said

day, he was available in village when his cousin Arbelo son of Sajjan told him on telephone that Arbelo alias Papoo after maltreating his daughter Pashman has killed her by hanging her with the girder. On such information he reached at village Fakeer Abdullah where dead body of his daughter Shirimati Pashman was lying on the cot. His cousins Arbelo and Shabir both sons of Sajjan told him that at about 9-30 am husband of his daughter Pashman after coming in anger has maltreated Mst. Pashman and committed her murder by hanging her with girder. On receiving such information complainant went to Police Station and lodged F.I.R.

3. After completing necessary formalities charge was framed against accused / appellant, to which he pled not guilty and claimed for trial.

4. In order to substantiate its case the prosecution examined 07 prosecution witnesses (PWs) and thereafter learned DPP closed its side.

5. Thereafter, statement of accused / appellant under Section 342 Cr.P.C was recorded wherein he denied the prosecution case claiming his innocence. He neither examined himself on oath nor led any evidence in his defence.

6. The learned trial court after hearing the learned counsel for the parties and on the assessment of the entire evidence convicted and sentenced the accused / appellant as stated above through the impugned judgment.

7. The facts of this case as well as evidence produced before the trial Court find an elaborate mention in the impugned judgment passed by the trial court therefore the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

8. Learned counsel for the appellant contended that the sole eye witness PW Arbelo was not reliable and that his evidence should be disbelieved; that there was no motive for the appellant to murder the deceased; that there were major contradictions in the evidence of the PW's; that all the PW's were interested parties; that no independent mashirs had been associated with the case; that the medical evidence did not support the prosecutions case and that the appellant has been falsely implicated on account of family dispute; that there is doubt in

the prosecutions case which the appellant is entitled to the benefit of and for all the above reasons the appellant should be acquitted.

9. In support of his contentions, learned counsel for appellant has relied upon the cases of **Noor Muhammad v. The State and another** (2010 SCMR 97), **Wali Muhammad and others v. The State and another** (2015 YLR 2622), **Qadeer Hussain v. The State** (2017 P Cr. LJ Note 18) [Lahore], **Habib Ur Rehman v. The State and others** (2017 YLR 32), **Abid and others v. The State** (2017 YLR 267), **Arshad Khan v. The State** (2017 SCMR 564), **Mst. Rukhsana Begum and others v. Sajjad and others** (2017 SCMR 596), **Khan Zaman v. The State** (2000 P Cr. LJ 447), **Chakar Jaffari and 2 others v. The State** (2011 MLD 524) and **Muhammad Yaqoob v. Allah Rakha and 4 others** (2012 P Cr. LJ 1942).

10. Learned A.P.G. with the assistance of learned counsel for the complainant submitted that the prosecution had proved its case beyond a reasonable doubt; that the impugned judgment was well reasoned and had correctly found the appellant guilty based on the evidence; that the eye witness was confidence inspiring and that the appellant could be convicted on his evidence alone especially as he was a disinterested witness whose account was corroborated by other PW's ; that the medical evidence supported the prosecutions case and that for all the above reasons this court should dismiss the appeal.

11. In support of his contentions, learned A.P.G. relied upon the cases of **Naik Muhammad alias Naika and another v. The State** (2007 SCMR 1639) and **Muhammad Ehsan v. The State** (2006 SCMR 1857).

12. I have considered the arguments of learned counsel, perused the record and the case law cited by them at the bar.

13. It is worth mentioning at this stage that the defense does not seem to have disputed the rough time of the incident, the place of incident, and the cause of death of the deceased (Ms Pashwan) namely by hanging. The issue before me therefore appears to be whether based on the evidence produced at trial the prosecution has been able to prove beyond a reasonable doubt that it was the appellant who murdered the deceased by hanging her or whether she took her own life by hanging herself.

14. PW Arbelo was the only eye witness who gave evidence for the prosecution. The deceased was his niece and he stated that he went to the house of the appellant and saw him maltreating the deceased and hanging her with a pink colour cloth in the garden of the appellants house and she died. It was morning time and he knew the appellant as they were neighbors and worked together at the brick kiln. His evidence has largely been corroborated by PW Nazeer who was the complainant and father of the deceased and PW Shabir who was the brother of the eye witness neither of whom are eye witnesses and both of whom were informed about the incident by PW Arbelo. Admittedly this evidence is hearsay but it is still of some corroborative value under the circumstances especially as PW Nazeer lodged the FIR and gave similar evidence at trial. PW Arbelo's evidence is also corroborated by the medical report and the evidence of PW Dr. Leela Pardeep. Although the corroboration of the medical evidence based on the particular facts and circumstances of this case seems in my view to be of lesser value than would normally be the case as it appears to be the admitted position that the deceased died through hanging.

15. It is quite possible to convict an accused based on the evidence of a sole eye witness provided that the **eye-witness account is unimpeachable and confidence-inspiring character and is corroborated by medical evidence** as was held by the Supreme Court in the case of **Muhammad Ehsan v. The State** (2006 SCMR 1857) provided that there are no other circumstances which could be fatal to the prosecution case or cause a doubt in a prudent mind as to the guilt of the appellant.

16. The question is therefore whether I find the evidence of PW Arbelo to be confidence inspiring. In my view I do **not** find his evidence to be confidence inspiring. This is for a number of reasons, which I set out below, when read as a whole lead me to doubt the evidence of PW Arbelo:

- (a) He was the niece of the deceased and as such was closely related to her and would not want her death to be classified as suicide.
- (b) Admittedly there seems to have been a quarrel between the appellant and the deceased during breakfast at the brick kiln and the appellant and the deceased went home along with the appellant's father. However, PW Arbelo then says that "he heard commotion" and that is why he went to the appellant's house. It has come on record that the appellants house was at a minimum 455 feet from the

noisy brick kiln and potentially a maximum of 1 and 1/2 KM's away (PW Nazeer) and as such I do not find it believable that PW Arbelo heard any commotion which caused him to go to the house of the appellant. Furthermore, he is not corroborated by his brother PW Shabir who in his evidence does not say that he heard any commotion and that he sent PW Arbelo to the house for unexplained reasons.

- (c) Furthermore, PW Shabir states that his brother went to the brick kiln and returned after about 5 minutes. This does not seem possible bearing in mind the distance from the brick kiln to the house, time spent at the house witnessing the mal treatment and hanging of the deceased and then the time taken to return to the brick kiln.
- (d) Most importantly, the 30 year old male PW Arbelo who was related to the deceased did not intervene to stop the appellant from hanging his niece. According to him he watched the appellant mal treat her and then hang her and did not raise a finger to help her let alone come to her rescue despite being 10 years older than the appellant and the appellant not using a weapon of any sort against the deceased. In my view this does not appeal to reason and seems to be completely unnatural conduct on the part of PW Arbelo in respect of what he was witnessing happening to his niece. In this respect reliance is placed on **Muhammad Asif v. The State** (2017 S C M R 486) which found as under in respect of such incidents at Para's 7 and 10.

"Para 7.....This lady was aged about 50/51 years, while her husband was 70 years of age and when the two eye-witnesses not produced at the trial namely Iftikhar and Tajammal, were close friends of the deceased then why she being an aged lady and her husband, who was at the advanced age of his life followed them. If they were apprehending something abnormal, they would have conveniently told the above two friends of the deceased that being late dark night time, it was not advisable to take the deceased outside. **No convincing and plausible reason has been advanced as to why they both followed the deceased and his two friends and what was the object behind it. The conduct of both these alleged eye-witnesses runs counter to normal human behaviour and habit in the given circumstances and in the absence of plausible explanation, no prudent mind would believe such fantastic story which appears to be the hand-Art of the local police because in a night occurrence of this nature, remaining un-witnessed, the police imprudently indulges in such like tactics to mislead the court of law and justice.** (bold added)

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10. We fail to understand that in the presence of the two close friends accompanying the deceased and parents, how such tragedy with a son could happen without any intervention on their part to come to rescue of the

deceased when they were not far away as shown in the site plan." (bold added)

17. Having not found the evidence of the eye witness PW Arbelo to be confidence inspiring or unimpeachable and in fact highly doubtful this in my view puts the corroborative evidence of PW Nazeer who was the complainant and father of the deceased and PW Shabir who was the brother of the eye witness regarding whether the appellant murdered the deceased in doubt since their evidence is based on the hearsay as narrated to them by PW Arbelo the alleged eye witness and if he is disbelieved on this aspect how can the PW Nazeer and Shabir provide any corroborative value in this respect as their evidence is based on what PW Arbelo told them which is being disbelieved in respect of the crucial issue of the appellant murdering the deceased.

18. In fact once PW Arbelo's eyewitness evidence is removed there is no evidence that the appellant and the deceased ever went back to their house or if they did whether after a quarrel the appellant again left the house while the deceased was still alive.

19. If PW Arbelo is to be believed according to his evidence the appellant, the deceased and the father of the appellant all went home together however the prosecution did not cite the appellant's father as a witness to prove this point or even suggest him as a court witness. Furthermore, when PW Arbelo allegedly reached the house he does not mention seeing the father of the appellant.

20. It is true that PW Arbello appears to have no apparent reason to lie and falsely implicate the appellant **apart** from perhaps saving his family the shame and dishonor of one of their relatives committing suicide or perhaps as mentioned by the appellant in his S.342 Statement for denying his sister's hand to a relative of his family. He appears even to a certain extent to be a chance witness as a part from him allegedly hearing a commotion he had no reason to go to the home of the appellant.

21. With regard to the appellant's motive to murder his wife this in my view seems extremely weak. Admittedly it seems that they quarreled during breakfast time and left for home together but no threats from the appellant to the deceased during this quarrel have come in evidence. According to the complainant who was the father of the deceased at no time did the deceased complain to him about the appellant. He heard that there existed ill will between them 3 months

earlier based on information from one Sabib however he was not called to give evidence. Likewise PW Arbelo in his evidence in chief, who was the alleged eyewitness, says that prior to the incident there was no ill will between the appellant, the deceased and her in laws however in his cross examination he contradicts himself by saying that prior to the incident the relationship between the deceased and the appellant was not good as the deceased complained to him that the appellant used to beat her. However he did not tell this to anyone and he is not corroborated in this respect by any other witness. It was also put to PW Sabair which he denied that 3 days prior to the incident that the deceased asked the appellant to allow her to go to the house of her parents which the appellant did not allow although this is stated to be the position by PW Nazeer.

22. Such evidence in my view cuts both ways. On the one hand it could suggest that the appellant and the deceased had an unhappy marriage and it was on this account following his quarrel that the appellant maltreated and hung her or it could be if this evidence is to be believed (of which there appears to be very little) that the deceased was so miserable in her marriage that she committed suicide. In my view the evidence for such motive on the part of both the appellant murdering the deceased on account of their unhappy marriage and the deceased taking her own life on account of the unhappy marriage seems extremely weak. This is more so in respect of the appellant as no witness has given any evidence that he ever threatened the deceased or her life in the past or personally witnessed the appellant maltreating or beating the deceased prior to the incident.

23. The medical report in my view is also significant in that it opines that death was caused **by hanging which is suicidal in nature.**

24. Another aspect to be considered is that if the eye witness PW 2 Arbelo witnessed the appellant mal treating the deceased before he hung her and that he had beaten her in the past presumably there ought to have been fresh bruises on her body. Likewise if the appellant took off the deceased's duperta and used it to hang her over the girder it would have been expected that the deceased would have resisted and would have had fresh bruises on some parts of her body. The medical report however does **not** reveal any such fresh or old injuries/bruises or that any recent acts of violence had been carried out against the deceased. Even her hyoid bone in her neck is intact.

This in my view again tends to undermine the prosecutions case against the appellant that he mal treated the deceased and then hung her.

25. Furthermore if the appellant knew that PW Arbelo had witnessed him beating and hanging his wife with the pink cloth why did he not destroy or hide this pink cloth? Instead it was left behind in the house to be found. It also seems strange that he hung his wife in the presence of PW Arbelo who had told him to stop and did not even threaten PW Arbelo to keep quiet about the incident or else he would fix him as well. This is because if PW Arbelo is telling the truth the appellant must have known that PW Arbelo would alert his other relatives and give evidence against him. It is also in my view of some relevance that despite knowing that PW Arbelo had seen him murder his wife the appellant made no effort to hide the deceased's body, burn it or even flee the area himself. In my view if the appellant did in fact murder his wife the above conduct would not seem to appeal to the mind of a reasonable man.

26. With regard to other aspects of the case all the PW's in one way or another apart from the Dr. and the IO seem to be related/interested witnesses, no independent mushirs were called despite them being available, there also appears to be a number of procedural irregularities in Mashirnama's not being signed or witnessed and some contradictions in the evidence of the PW's and a delay in filing the FIR.

27. If these other aspects were taken alone or even together I would not necessarily consider them to be fatal to the prosecution's case however when they are **added** to the evidence of PW Arbelo the only eye witness who I do not consider for the reasons explained above either to be a trustworthy, reliable or confidence inspiring witness I am of the view that there is doubt in the prosecution case that the appellant murdered the deceased as opposed to the deceased committing suicide. In fact if PW Arbelo's evidence is discounted there would be hardly any evidence whatsoever to prove that the appellant had murdered the deceased by hanging her.

28. It is a well settled principle of criminal law that it is for the prosecution to prove its case against the accused beyond a shadow of a doubt and if there is any doubt in the prosecution's case the benefit of such doubt, as set out in the case of **Tariq Pervez v. The State** (1995 SCMR 1345) must go to the appellant as of right as opposed to

concession. However in considering this aspect of the case I am also guided by the case of **Faheem Ahmed Farooqui V State** (2008 SCMR 1572) where it was held as under at P.1576 at Para D

"It needs no reiteration that for the purpose of giving benefit of doubt to an accused person, more than one infirmity is not required, **a single infirmity creating reasonable doubt in the mind of a reasonable and prudent mind regarding the truth of the charge makes the whole case doubtful.** Merely because the burden is on the accused to prove his innocence it does not absolve the prosecution from its duty to prove its case against the accused beyond any shadow of doubt."(bold added)

29. In the recent supreme Court case of **Hashim Qasim V State** (Criminal Appeals No.115 and 116 of 2013) dated 12th April 2017 the Hon'ble supreme Court in respect of the benefit of doubt held as under at Para 20:

"Even a single doubt, if found reasonable, would entitle the accused person to acquittal and not a combination of several doubts is bedrock principle of justice. Reference may be made to the case of **Riaz Masih @ Mithoo v. The State (NLR 1995 CrI. 694).**"

30. In this case for the reasons discussed above primarily being the non confidence inspiring evidence of the sole eye witness PW Arbelo who seems to be the cornerstone of the prosecution case and the lack of any other independent corroborative evidence that it was the appellant who murdered the deceased I am of the view that when the evidence is read and considered in totality there would be a reasonable doubt in a reasonable and prudent person's mind that the appellant was not guilty of the offense for which he has been convicted by the trial court.

31. Thus, for the reasons discussed above I find that the prosecution has failed to prove its case beyond a reasonable doubt against the appellant and that the appellant is entitled to the benefit of the doubt and as such set aside the impugned judgment and up hold this appeal.

32. As such the appellant is hereby acquitted and he is ordered to be immediately released by the concerned jail authorities unless he is in custody in respect of some other case.

Hyderabad:

Dated: 21-04-2017