Identification not proven

574

CERTIFICATE OF THE COURT IN REGARD TO REPORTING

CRIMINAL JAIL APPEAL NO. S-89 OF 2014

MASHOOQUE ALI V/S THE STATE

SINDH HIGH COURT, CIRCUIT COURT HYDERABAD

COMPOSITION OF BENCH

HON'BLE MR. JUSTICE MOHAMMAD KARIM KHAN AGHA

(S.B.)

Date of last hearing (heard/reserved): 18-12-2023

Decided on: 21-12-2023

(a) Judgment approved for reporting YES

CERTIFICATE

Certificate that the Judgment/Order is based upon or enunciates a principle of law/decide a question of law which is of first impression/distinguishes over-rules/explains a previous decision.

Strike-out whichever is not applicable.

NOTE:
(i) This slip is only to be used when some action is to be taken.
(ii) If the slip is used, the Reader must attach it to the top of the first page of the Judgment.
(iii) Court Associate must ask the Judge written the judgment whether the judgment is approved for reporting.
(iv) Those directions which are not to be used should be deleted.

SGP, Kar-L (iii) 773-2000-4-2003-III

BY BAILIFF / POST / FAX

IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

Cr. Jail Appeal No. S – 89 of 2014

5775

MASHOOQUE

S/o IMAM BUX METLO.

THROUGH SUPERINTENDENT, YOUTHFUL OFFENDERS INDUSTRIAL SCHOOL, HYDERABAD.

===== APPELLANT

VERSUS

THE STATE ===== RESPONDENT

Crime No.36 of 2009,
Police Station Daulatpur,
District Shaheed Benazirabad,
U/Ss. 302, 34 P.P.C.

576

ORDER SHEET

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

Cr. Jail Appeal No.S-89 of 2014

DATE	ORDER WITH SIGNATURE OF JUDGE

18.12.2023.

Mr. Muhammad Jameel Ahmed, Advocate for appellant.

Mr. Shahid Ahmed Shaikh, Addl. Prosecutor General, Sindh.

==

Mr. Abdul Hameed Bajwa, learned counsel for the complainant withdraws his Vakalatnama, as such, the complainant Abdul Ghaffar present in Court reposes his full faith and confidence in learned A.P.G.

I have heard the learned counsel for the appellant as well as learned A.P.G for State. Reserved for judgment.

Hafiz Fahad

Identification not proved

577

IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

Criminal Jail Appeal No. S- 89 of 2014

MASHOOQUE ALI

Versus

THE STATE

Appellant : Mashooque Ali s/o Imam Bux Metlo	Through Mr. Muhammad Jameel Ahmed, Advocate.
Respondent : The State	Through Mr. Shahid Ahmed Shaikh, Addl. Prosecutor General, Sindh
Complainant : Abdul Ghaffar	Present in person and placed reliance on APG.
Date of hearing	18.12.2023
Date of judgment	21.12.2023

JUDGMENT

MOHAMMAD KARIM KHAN AGHA, J.- This Criminal Jail Appeal is directed against the Judgment dated 10.12.2013, passed by the learned IInd Additional Sessions Judge, Shaheed Benazirabad in Sessions Case No.135 of 2009 (re: The State v. Mehboob and another), emanating from Crime No.36 of 2009, registered at Police Station Daulatpur, under sections 302, 34 PPC, whereby the appellant Mashooque Ali along with co-accused Mehboob Ali has been convicted u/s 302(b) PPC as Ta'zir and 34 PPC and sentenced to suffer imprisonment for life and to pay the compensation of Rs.1,00,000/- [Rupees One Lac] each. On realization, it shall be paid to the legal heirs of deceased Mukhtiar Ahmed. In case of non-payment of the said compensation, the appellants shall further undergo S.I for 06 months. However, they were awarded benefit of Section 382-Cr.P.C. It is noted

that co-accused Mehboob Ali has already been released from the Prison after completing his sentence and therefore, his appeal bearing Criminal Jail Appeal No.S-222 of 2017 was dismissed as not pressed vide order dated 29.11.2023.

2. The brief facts of the prosecution case are as under:-

> *"That, on 24.03.2009 complainant Abdul Ghaffar Arain lodged FIR with Police Station Daulatpur, stating therein that Mukhtiar Ahmed aged about 06 years was his son who used to go for offering prayer alongwith his grandfather Muhammad Sulleman. It is further stated that on 23.03.2009 his son Mukhtiar went for offering sunset prayer / Maghrib Namaz along with his grandfather but could did not return back. The complainant, his brother Abdul Sattar and cousin Haji Musaib started search for his son and when reached near the wheat crop of Siddique Arain at about 2100 hours, they heard cries of his son, they flashed their torch lights and saw and identified Mehboob Ali along with two unidentified persons standing there who seeing the complainant party succeeded to decamp taking advantage of darkness and wheat crop. The complainant party then went near his son and saw his son Mukhtiarkar was lying in naked condition and marks of scratches were also found on his neck and cheeks and he was dead. He informed Daulatpur police and police reached there, with the help of police he brought dead body to Rural Health Centre Daulatpur and after his burial he went to police station and lodged FIR that accused* ***Mehboob Ali Metlo along with two unknown persons*** *with their common intention had committed the murder of his son Mukhtiar Ahmed."* (bold added)

3. After usual investigation police submitted the challan before the Court concerned and after completing necessary formalities, learned trial Court framed the charge against the appellant, to which he pleaded not guilty and claimed trial.

4. At trial, the prosecution in order to prove its case examined 08 witnesses and exhibited numerous documents and other items. The statement of accused was recorded under section 342 Cr.P.C whereby he denied the allegation leveled against him and claimed his false implication by the complainant on account of enmity. However, neither the appellant examined himself on Oath nor led any evidence in his defense.

5. Learned trial Court after hearing the learned counsel for the parties and examining the evidence available on record convicted and sentenced the appellant and co-accused, as stated above. Hence, the appellant has filed this appeal against his conviction.

6. It is noted that learned counsel for the complainant Mr. Abdul Hameed Bajwa withdrews his Vakalatnama, as such, the complainant Abdul Ghaffar present in Court reposed his full faith and confidence in learned APG to argue this appeal on his behalf.

7. Learned trial Court in the impugned judgment has already discussed the evidence in detail and there is no need to repeat the same here, so as to avoid duplication and unnecessary repetition.

8. Learned counsel for the appellant contended that the FIR was lodged with a delay of one day and that the appellant was not named in the FIR but rather was referred to as an unknown person which makes the involvement of the appellant doubtful as the co-accused was specifically named in the FIR; that the sole eye witness who identified the appellant as being involved in the murder was unreliable as it was too dark for him to make a correct identification; that there was no evidence of any abduction of the deceased boy; that important eye witnesses were given up and as such the best evidence was with held by the prosecution with out explanation; that there was enmity between the witnesses and the accused and all the witnesses were related which also made their evidence unreliable and that for all or any of the above reasons the appellant should be acquitted of the charge by extending him the benefit of the doubt.

9. Learned A.P.G, who was also representing the complainant, vehemently opposed the appeal and prayed for its dismissal by arguing that the appellant was clearly identified by one eye witness in committing the crime whose evidence could be safely relied upon as his S.161 Cr.PC statement was given with promptitude; that he is named in the FIR as an eye witness which was also lodged with promptitude; that the eye witness knew the appellant from before and as such there was no case of mistaken identity and no need to hold an identification parade; that the medical evidence corroborated the

ocular evidence and as such the prosecution had proved it case beyond a reasonable doubt and as such the appeal be dismissed. In support of his arguments he placed reliance upon the reported cases of **Qasim Shahzad and another versus The State and others** [2023 SCMR 117] and, **Muhammad Bashir and another versus The State and others** [2023 SCMR 190].

10. I have heard the learned counsel for the appellant as well as learned APG and have also perused the material available on record and considered the case law cited at the bar.

11. Based on my reassessment of the evidence of the PW's especially the medical evidence and other medical reports I find that the prosecution has proved beyond a reasonable doubt that Mukhtiar Ahmed (the deceased) was murdered by strangulation on 23.03.2009 at about 9.30pm in the wheat crop of Sidique Arain situated in ward No.8.

12. The only question left before me is whether it the appellant participated in the murder of the deceased at the said time, date and location?

13. After my reassessment of the evidence I find that the prosecution has **NOT** proved beyond a reasonable doubt the charge against the appellant keeping in view that each criminal case must be decided on its own particular facts and circumstances for the following reasons;

(a) Admittedly, the FIR was lodged within a day of the incident and the delay has been reasonably explained by deceased being taken to hospital for post mortem and then released for burial and as such is not fatal to the prosecution case. The appellant however is not named in the FIR.

(b) I find that the prosecution's case primarily rests on the evidence of the eye witnesses to the murder of the deceased and whether I believe their evidence whose evidence I shall consider in detail below;

(i) **Eye witness PW 1 Abdul Ghaffar. He is the complainant and father of the deceased.** According to his evidence on 23.03.2009 the grandfather (Muhammed Sullemen) of the deceased took the deceased to Maghrib

prayers however when he returned back he informed the complainant that the deceased was not with him. Hence the complainant, his brother Haji Abdul Sattar and his cousin Haji Museeb Ahmed went in search of the deceased. When they reached the masjid they heard cries of his son from the wheat crop adjacent to the Masjid. On torch light he saw Mehboob Metlo (convicted co-accused) **and two unknown persons**. He also saw the deceased/son in naked position with his face towards the ground. The deceased/ son died on the spot and he saw marks of strangulation and bruising on the deceased. He informed the police who reached the crime scene and the deceased's body was taken to hospital for post mortem.

The foundation of the prosecution case rests with the grandfather (Muhammed Sullemen) of the deceased who took the deceased to Maghrib prayers however when he returned from prayers he did not have the deceased with him who presumably as per prosecution case was abducted. Muhammed Sullemen however did not even have his S.161 Cr.PC statement recorded let alone being called to give evidence which cuts away at the foundation of the prosecution case. It is also surprising, to say the least, that a grandfather who was entrusted to take his 6 year old grandson to prayers who would have preyed beside him got lost or was allowed to be abducted. This aspect of the caste puts me on caution especially as an adverse inference can be drawn under Article 129 (g) Qanon-e-Shahadat 1984 that he would not have supported the prosecution case and means that there is no evidence of abduction of the deceased.

Be that as it may, it is notable that this eye witness did **NOT** name the appellant in the FIR lodged a day later. Instead he was only able to recognize the convicted co-accused in the FIR who he knew and was able to see by torch light. This again I find surprising as the convicted co-accused was the brother of the appellant so if he was able to recognize the convicted co-accused under the torch light how was he not able to recognize the appellant who was his brother who he also knew who were standing together if in fact the appellant was present. He also failed to give any hulia of the unknown persons which included the appellant. He also does not witness the act of sodomy (for which the appellant was not convicted and is not mentioned in the FIR) nor the murder. The torch light was also not recovered. Thus, although the complainant might have been present I find that the complainant failed to identify the appellant which he ought to have been able to do. As such I find his evidence insufficient to convict the appellant.

(ii) **PW Haji Museeb. He is the cousin of the complainant and is also related to the deceased.** He corroborated the evidence of the complainant in all material respects **except** that he says that he identified both the convicted

c-accused and the appellant under the torch light of the complainant at the crime scene. He knew the appellant from before and he gave his S.161 Cr.PC statement identifying the appellant with promptitude. The difficulty I have with this witness in terms of his correct identification of the appellant is that he had enmity with the appellant and was related to the deceased and had reason to implicate him in a false case. **More significantly,** however, when this eye witness immediately recognized the appellant at the crime scene when he was with the appellant he would have immediately told the appellant who he had seen. Yet he appears to have remained mum for over a day as the appellant's name does not find mention in the FIR. Keeping mum for over a day based on the particular facts and circumstances of the case does not appeal to reason, logic or commonsense and is against natural human conduct. He was bound to have told the complainant immediately on the spot who he had seen committing such a heinous crime against his relative. The fact that he remained mum leads me to doubt his correct identification of the appellant whom he may have falsely implicated especially as there was enmity between them and it was dark and the appellant was allegedly seen by him by an unrecovered torch light. Thus, although this witness might have been present I have doubt that he was able to correctly and honestly identify the appellant.

Other evidence and considerations.

(c) Another alleged eye witness in the FIR Haji Abdul Sattar who was the brother of the complainant and who was also present as an eye witness at the time of the incident was also given up by the prosecution without explanation as such under Article 129 (g) Qanoon-e-Shahadat Ordinance 1984 the inference can be drawn that he would not have supported the prosecution case as I have already found in respect of the grandfather Muhammed Sullemen.

(d) That the appellant was not convicted for sodomy.

(e) That the prosecution has not proved that the appellant had any motive to murder the deceased. On the contrary it was the complainant's side who had enmity with the appellant's side.

(f) That the alleged date of arrest can also be discarded as alleged by the prosecution as this question was not put to the appellant at the time of recording his S.342 Cr.PC statement and it is well settled by now that any question not put to the accused in his S.342 Cr..PC cannot be used to convict him and as such there is no clarity as to the date of arrest of the appellant.

(g) That although the medical evidence supports the prosecution case it can only identify the nature of the injury, the seat of the injury and type of weapon used but is of no assistance in identifying the perpetrator.

(h) In essence the only piece of evidence against the appellant was eye witness PW 2 **Haji Museeb** whose evidence in respect of the correct identification of the appellant I have already found doubtful.

14. Thus, based on the above discussion, I find that the prosecution has NOT proved its case against the appellant beyond a reasonable doubt and by extending the appellant the benefit of the doubt for the reasons discussed above, which he is entitled to as a matter of right as opposed to concession, I hereby set aside the impugned judgment, **allow** the appeal and acquit the appellant of the charge who shall be released unless wanted in any other custody case.

15. The appeal stands disposed of in the above terms.

"Hafiz Fahad"