

IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

Before:

Mr. Justice Mohammad Karim Khan Agha
Mr. Justice Zulfiqar Ali Sangi

1. Cr. Appeal No.D- 134 of 2016
[Confirmation Case No.26 of 2016]

Amjad and another

Versus

The State

2. Cr. Jail Appeal No.D- 136 of 2016
[Confirmation Case No.26 of 2016]

Amjad and another

Versus

The State

Appellants Amjad and Irfan;	through Mr. Mumtaz Alam Laghari Advocate
Respondent the State;	through Ms. Rameshan Oad, A.P.G
Complainant Ali Hyder;	through Mr. Ayaz Khaskheli, Advocate and Associate of Mr. Sajjad Ahmed Chandio, Advocate
Date of hearing	16.06.2021
Date of judgment	23.06.2021

JUDGMENT

MOHAMMAD KARIM KHAN AGHA, J.-The captioned Cr. Appeal No.D-134/2016 has been filed by the appellants Amjad and Irfan through their counsel whereas Cr. Jail Appeal No.D-136/2016 has been filed by the said appellants through Superintendent Central Prison, Hyderabad.

2. Both the aforementioned criminal as well as jail appeals are directed against one and the same judgment dated 20.12.2016, passed by learned II-Additional Sessions Judge, Dadu, in Sessions Case No.575 of 2014 (re: The State V Amjad and others), emanating from Crime No.59 of 2014, registered at Police Station Rukkan, under sections 302, 377, 341, 147, 148, 149 PPC, whereby the accused / appellants have been convicted u/s 302(b) PPC and sentenced to death subject to confirmation by this Court. They were also directed to pay Rs.500,000/- each as compensation to the legal heirs of deceased in terms of section 544-A Cr.P.C, and in failure thereof they were directed to suffer 01 year simple imprisonment more. Both the accused / appellants were also convicted under sections 377 and 341 r/w section 149 PPC, and sentenced to suffer imprisonment for life coupled with fine of Rs.50,000/- each and Simple Imprisonment for 01 month, respectively. In case of non-payment of fine, they were directed to suffer Simple Imprisonment for 06 months more.

3. The facts of the prosecution case as stated in the F.I.R, lodged by complainant Ali Hyder Panhwar on 23.06.2014 at 2300 hours at P.S Rukkan, are that he is labourer by profession and accused Amjad Panhwar and others were annoyed with him. On 22.06.2014 at afternoon time, he/complainant along with his son Altaf Hussain aged about 10/11 years who was student of fourth class and his (complainant's) brother Ghulam Muhammad left their village Tajo Panhwar and were going to village Nawazio Kandi in order to meet with their second cousin (Masat) Muhammad Juman for some personal work. When at about 03:30 p.m, they (complainant party) reached at sugarcane crop of Meer Panhwar, they saw accused Amjad son of Saban with hatchet, Irfan son of Ghulam Abbas with sickle, Ghulam Abbas son of Shadi Khan having gun in his hand and two unidentified accused armed with guns who can be identified if seen again who came out from sugarcane crop and all accused on the force of weapons took the complainant party into sugarcane crop where accused persons having torn their kerchiefs (Roomal) lying on their shoulders, tied the arms and mouths of complainant and his brother Ghulam Muhammad with the same, while accused who were armed with guns stood over them by aiming their weapons upon them. Then accused Amjad and Irfan within their sight, got the complainant's son Altaf Hussain fallen down on earth, tied his mouth with said kerchief, removed his shalwar and both accused committed Zina with him turn by turn. The complainant and witness could not raise any cry as their hands and mouths were tied. Thereafter accused Amjad in order to commit the murder of Altaf Hussain inflicted sharp side hatchet blows to him / Altaf on his right side flank and other parts of body, while accused Irfan cut the neck of Altaf Hussain with sickle and also inflicted sickle blows on his head and other parts of body so he (Altaf) succumbed to his injuries at the spot. Thereafter accused Amjad

went away while other accused remained over the complainant and his brother Ghulam Muhammad. Accused untied the mouths of complainant and his brother and asked them to remain silent, due to fear of weapons, complainant party remained silent. On 23.06.2014 at about 05:30 a.m all accused having left the complainant party went away towards western side. After departure of accused the complainant party untied their hands and having left his brother Ghulam Muhammad over the dead body of deceased Altaf, he/ complainant went to his village where he narrated the facts of incident to his Nekkard namely Ghulam Mustafa and his uncle Ali Gohar, who disclosed that they remained in search of complainant party whole night, thereafter Nekkard Ghulam Mustafa, complainant's uncle Ali Gohar and other villagers went to place of incident and saw dead body of deceased Altaf Hussain. The complainant's uncle Ali Gohar went to P.S Phulji Station for informing the police regarding incident, from where HC Sikandar Ali came at place of wardat and conducted necessary proceedings of the dead body. Thereafter the complainant party took the dead body of deceased to Civil Hospital, Dadu and after getting conducted the postmortem of deceased brought the dead body at their village, having buried the deceased, the complainant went to P.S and lodged FIR of the incident.

4. Police arrested the accused / appellants Amjad and Irfan and after usual investigation, submitted the challan before the concerned court while showing co-accused Ghulam Abbas as absconder. After completing necessary formalities, learned trial court framed charge against the accused / appellants, to which they pleaded not guilty and claimed trial.

5. In order to prove its case the prosecution examined 8 witnesses, who exhibited numerous documents and other items and thereafter prosecution side was closed. The statements of the accused were recorded under Section 342 Cr.P.C in which they denied the allegations leveled against them and claimed their false implication, however, they neither examined themselves on oath nor called any DW's in support of their defence case.

6. On conclusion of the trial, learned trial court after hearing learned counsel for the parties and appraisal of prosecution evidence brought on record, convicted and sentenced the appellants / accused as mentioned earlier in this judgment vide Judgment dated 20.12.2016 hence the appellants have filed these appeals against their conviction.

7. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the judgment dated 20.12.2016 passed by the trial court and,

therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

8. Learned counsel for the appellants has contended that they are innocent of any wrong doing and that they have been falsely implicated in this case by the complainant party on account of enmity; that the evidence of the PW eye witnesses is doubtful as they are both closely related to the deceased and as such cannot be safely relied upon; that the FIR was lodged after a delay of 32 hours which enabled the complainant party to cook up a false case against the accused in collusion with the police; that no independent mashir was associated with the investigation; that no recovery was made from the accused at the time of their arrest and the alleged recoveries were later foisted on them and that there are major contradictions in the evidence of the PW's which as such cannot be safely relied upon and that for any of the above reasons the appellants should be acquitted of the charge by extending them the benefit of the doubt. In support of his contentions he has placed reliance on the cases of **Mst. Asia Bibi V The State and others** (PLD 2019 Supreme Court 64), **Altaf Hussain V The State** (2019 SCMR 274), **Muhammad Imran V The state** (2020 SCMR 857), **Muhammad Asif V The State** (2017 SCMR 486), **Hashim Qasim V The State** (2017 SCMR 986) and **Muhammad Akram V The State** (2009 SCMR 230).

9. On the other hand learned Addl. Prosecutor General as well as the learned counsel for the complainant have fully supported the impugned judgment and contended that there was no unexplained delay in lodging the FIR; that the evidence of the PW eye witnesses to the incident were reliable and confidence inspiring and had fully implicated the appellants with the allegations of sodomy and the murder of the deceased; that the eye witnesses were corroborated by the medical evidence; that the appellants produced the murder weapons on their own pointation which were hidden in a secret place which only they could have known about; that the chemical report relating to the samples / swabs and blood stained earth recovered at the wardat, blood on the recovered crime weapon and blood on the deceased clothes and the appellants' clothes were all positive and as such the prosecution had proved its case beyond a reasonable doubt against the appellants and as such their appeals should be dismissed and their conviction and sentence(s) be maintained. In particular they stressed that due to commission of the offence of sodomy and then cold blooded murder of the deceased in a brutal manner the death sentence as well as other sentences awarded to the appellants by the trial court through the impugned judgment were fully attracted in this case. In support of their contentions they have placed reliance on the cases of **Ali Haider alias Papu V Jameel Hussain and others**

(PLD 2021 Supreme Court 362), **Imran Ali V The State** (2018 SCMR 1372) and **Gul Muhammad V The State** (2011 SCMR 670).

10. We have heard the arguments of the learned counsel for the parties, gone through the entire evidence which has been read out by the appellants' counsel, the impugned judgment with their able assistance and have considered the relevant law including that cited at the bar.

11. Based on our reassessment of the evidence of the PW's, especially the PW eye witnesses, the medical evidence of PW 4 Dr. Niaz Ahmed along with post mortem report, recovery of blood at the wardat, positive chemical reports in respect of blood at the wardat and clothes on the deceased and human sperm on the deceased we find that the prosecution has proved beyond a reasonable doubt that on 22.06.2014 at about 3.30pm in the sugar cane crop cultivated in the land of Meer Muhammed situated in Deh Kandi Taluka Dadu Altaf Hussain (the deceased) was sodomised and murdered by sharp cutting objects.

12. The only question left before us therefore is who sodomised and murdered the deceased by hitting him with sharp cutting objects at the said time, date and location.

13. After our reassessment of the evidence on record we find that the prosecution has proved beyond a reasonable doubt the charge against the appellants for which they have been convicted for the following reasons;

(a) That the FIR was lodged within just over 24 hours of the incident and any delay in lodging the FIR has been fully explained. According to the evidence of PW 1 Ali Haider who was also the complainant and an eye witness the complainant and his party which included the deceased were abducted by the appellants and other co-accused at about 3.30pm on 22.06.2014 where they were held captive until about 6 am on 23.06.2014 when he managed to escape, he then had to reach his village where he informed the nekmard and other relatives who had been out searching for him, who then all returned to the wardat where the dead body was laying, the police was called and carried out necessary formalities at the wardat (which proves that the incident was reported to the police even before the FIR was lodged and thus were aware of the incident) the body was then taken to the hospital where the post mortem was conducted where after the body was released for burial and after burial of the dead body the FIR was lodged on 23.06.2104 leaving no time to cook up a false case against the appellants and their co-accused. As such any delay in lodging the FIR was been fully explained based on the particular facts and circumstances of this case and the delay in filing the FIR by the complainant is not fatal to the prosecution's case. In the FIR the appellants and their co-accused are named with specific roles. Even otherwise no specific/proven enmity has come on record between the complainant party and the appellants which would motivate the complainant to lodge a false case against the appellants.

(b) In our view the prosecution's case rests on the eye witnesses to the abduction, sodomy and murder of the deceased whose evidence we shall consider in detail below;

(i) **Eye witness PW 1 Ali Haider.** He is the complainant in the case and the father of the deceased. According to his evidence on 22.06.2014 he along with PW Ghulam Muhammed and the deceased who was his son were going from their village to village Kandi Nawazio and when they reached the lands of Meer Muhammed at about 3.30pm 5 accused abducted them on gun point including the appellants who took them into the sugar cane field. He and Ghulam Muhammed were tied with a romel and it was placed in their mouths as a gag. He saw the appellants remove the shalwar of the deceased from about 10 to 11 feet (such distance has been supported by the sketch exhibited by PW 5 Niaz Hussain who was the tapedar) and forcibly commit Zina on him. He saw appellant Amjad inflict sharp hatchet blows to the deceased and appellant Irfan cut the neck of the deceased with a sickle and also inflict sickle blows on the deceased who succumbed to his injuries on the spot. He and Ghulam Muhammed were detained over night and were told that if they raised a hue and cry they would meet the same fate. This was a day light incident and the eye witness knew the appellants who abducted them, tied them up and then committed Zina on the deceased before killing the deceased 10 to 11 feet away from him and as such there is no case of mistaken identity especially as the whole ordeal lasted many hours and the appellants had open faces and thus there was no need for an identification parade. The eye witness was a natural witness who was going to his village with his son and brother and was not a chance witness. He had no enmity with the appellants and therefore had no reason to falsely implicate them in the murder of his son. It is true that the eye witness is a related witness being the father of the deceased but it is well settled by now that a related witnesses evidence can be safely relied upon if there is no ill will and/or enmity between the parties as in this case. In this respect reliance is placed on **Ijaz Ahmed V The State** (2009 SCMR 99) and **Nasir Iqbal alias Nasra and another v. The State** (2016 SCMR 2152)

This eye witness lodged the FIR on the same day with promptitude as discussed above and named both the appellants in the FIR with specific roles. No material improvement has been made in this eye witnesses evidence from the content of his FIR and he was not dented let alone damaged despite a lengthy cross examination. He did not intervene to save his son as he was unarmed, tied up and held at gun point. We find his evidence to be reliable, trust worthy and confidence inspiring and believe the same. We can convict the appellants on this evidence alone provided that there is some supportive/corroborative evidence. In this respect reliance is placed on **Muhammad Ehsan v. The State** (2006 SCMR 1857). As also found in **Farooq Khan v. The State** (2008 SCMR 917), what is of significance is the quality of the evidence and not its quantity and in this case we find the evidence of this eye witness to be of good quality.

(ii) **Eye witness PW 2 Ghulam Muhammed** was the brother of the complainant eye witness PW 1 Ali Haider. His evidence corroborates the evidence of eye witness PW 1 Ali Haider in all material respects. His eye witness S.161 Cr.PC statement was given within a day of the incident and no material improvements were made in respect of the

same during his evidence. He is named in the FIR as being present and the same considerations apply to his evidence as to PW 1 Ali Haider.

14. Thus, based on our believing the evidence of the 2 PW eye witnesses what other supportive/corroborative material is there against the appellants in respect of the sodomy and murder of the deceased?

(c) That the medical evidence of PW 4 Dr. Niaz Ahmed and his post mortem report fully supports the eye witness/prosecution evidence as he states in his evidence that he carried out the post mortem of the deceased where he found incised wounds on the neck, head and right lumber region which was caused by a sharp cutting weapon which is consistent with the oral evidence of the eye witness PW's. With regard to Zina it is significant that PW1 Ali Haider states in his eye witness evidence that the accused made his son fall to the ground having face towards ground before Zina was committed on him. The medical evidence of PW 4 Dr. Niaz Ahmed reveals that there was abrasions on both elbows and knee joints of the deceased which would be consistent with the position he was in whilst Zina was committed on him. With regard to Zina PW 4 Dr. Niaz Ahmed states in his medical evidence as under;

"5.) Genitals: Anal region was red and inflamed 5c.m in diameter with following injuries:

- (1) Lacerated injuries measuring 1 c.m x 0.2 c.m at posterior and inside of anal regions (Mucosa).
- (2) Lacerated injuries measuring 0.7 c.m x 0.2 x 0.3 c.m at right lateral and inner side of anal region.
- (3) Lacerated injuries measuring 1.5 c.m x 1 c.m x 0.3 c.m at upper side of anal region.

On the basis of clinical examination I am of the opinion that the sodomy act has been performed however anal swabs taken at the time of examination and sent to the Laboratory for chemical examination.

His post mortem report also notes in manuscript as under with respect to Zina;

"Noted: Sodomy act

Basis of clinical examination I am of the opinion that the sodomy act has been performed, and anal swabs taken at the time of examination and sent to Laboratory for chemical examination.

(d) That the chemical report also found human sperm on the anal swabs taken from the deceased.

(e) That the murder weapons being the sickle and hatchet/axe were recovered by the police on the pointation of the appellants after their arrest from a hidden place which only the appellants could have known about. Namely from a boring machine and thus could not have been foisted on them.

(f) That the blood stained earth taken from the wardat, clothes of the deceased, romal used to tie the deceased and recovered from the wardat, the sickle and the hatchet/axe recovered on the pointation of the appellants as per chemical report were all found to be stained with human blood.

(g) PW 7 Sikander Ali and PW 8 Qurban Ali who were both police officers the former being the first responder and the latter being the IO fully corroborate the prosecution case except in respect of witnessing the incident and give natural believable evidence in respect of the conduct of the investigation in terms inspection of wardat, relevant mashirnama's, arrest of the appellants, recovery of the weapons on their pointation. All relevant mashirnama's are signed by PW 3 Muhammed Khan who is an employee of the police department.

(h) Nearly all relevant police entries have been exhibited.

(i) That all the PW's are consistent in their evidence and even if there are some contradictions in their evidence we consider these contradictions as minor in nature and not material and certainly not of such materiality so as to effect the prosecution case and the conviction of the appellant. In this respect reliance is placed on **Zakir Khan V State** (1995 SCMR 1793) and **Khadim Hussain v. The State** (PLD 2010 Supreme Court 669). The evidence of the PW's provides a believable corroborated unbroken chain of events from the abduction of the deceased with the eye witness PW's to the sodomy and murder of the deceased to the lodging of the FIR to the post mortem of the deceased to the arrest of the appellants to the recovery of the murder weapons on their pointation to the positive chemical reports.

(j) That the police PW's had no enmity or ill will towards the appellants and had no reason to falsely implicate them in this case by for example making up their arrest or foisting the sickle and hatchet on them and in such circumstances it has been held that the evidence of the police PW's can be fully relied upon. In this respect reliance is placed on **Mustaq Ahmed V The State** (2020 SCMR 474).

(k) That it does not appeal to reason, logic or commonsense that a father who was an eye witnesses would let the rapists and murderers of his son go scot free by substituting them with innocent persons (the appellants). In this respect reliance is placed on **Allah Ditta V State** (PLD 2002 SC 52).

(l) Undoubtedly it is for the prosecution to prove its case against the accused beyond a reasonable doubt but we have also considered the defence case to see if it at all can cast doubt on or dent the prosecution case. The defence case is simply one of false implication based on enmity which has not been substantiated whatsoever by the appellants. Neither of the appellants gave evidence on oath or called a single witness in support of their defence case and thus for the reasons mentioned above we disbelieve the defence case as an afterthought. Thus, in the face of two reliable, trust worthy and confidence inspiring eye witnesses the defence case (which we disbelieve) has not at all dented the prosecution case.

15. Thus, based on the above discussion especially in the face of reliable, trust worthy and confidence inspiring eye witness evidence and other corroborative/supportive evidence mentioned above we have no doubt that the prosecution has proved its case against the appellants beyond a reasonable doubt for the offences for which they have been charged and thus maintain the appellant's convictions.

16. With regard to sentencing the deceased was viciously sodomised by the appellants in front of his father and uncle before being brutally murdered by the appellants again in front of his father and uncle through sickle and hatchet blows mainly to the neck and head. Such a cruel, vicious and barbaric sodomisation and murder of a 11 year old boy who was yet to enjoy the prime of his life in front of his father and uncle is not deserving of any leniency on the part of the courts and a deterrent sentence is fully warranted based on the particular facts and circumstances of this case. On particularly brutal crimes justifying the death sentence reliance is placed on **Tariq Iqbal V State** (2017 SCMR 596) which at P.596 held as under:

"3. Leave to appeal had been granted in this case only to consider as to whether the appellant deserved the sentence of death on the charge of murder or not and the stage of granting leave to appeal the merits of the appellant's case had not been pressed before this Court. This shows that the question of the appellant's guilt as well as all the factual allegations leveled by the prosecution against the appellant now conclusively stand settled and accepted. The appellant had trespassed into the complainant's house, had killed the complainant's wife and had robbed different articles available in the complainant's house which articles had later on been recovered from the appellant's custody. The appellant had made an extra-judicial confession before two witnesses and had also made a judicial confession before a Magistrate. The murder in issue had been committed by the appellant in furtherance of a robbery and a young lady in her prime had been butchered by the appellant inside her house by giving as many as 10 *churri* blows on different parts of her body. Such conduct displayed by the appellant clearly shows that the appellant is a cruel desperate person who deserves no sympathy in the matter of his sentence. This appeal is, therefore, dismissed." (bold added)

17. Under these circumstances due to the particular brutality and callousness of the sodomy and murder of the deceased by the appellants we hereby uphold the death sentence in respect of each appellant. Thus, the appeals are dismissed, the impugned judgment is upheld along with its convictions and sentences and the confirmation reference is answered in the **affirmative in respect of both of the appellants**.

18. The appeals and confirmation reference stand disposed of in the above terms.