

IN THE HIGH COURT OF SINDH, KARACHI

Present:

Mr. Justice Mohammad Karim Khan Agha

CRIMINAL APPEAL NO.241 OF 2018

Appellant:	Muhammad Ali alias Jawed s/o Abdul Rasheed through M/s. Moula Bux Bhutto and Rao Zahid Ali, Advocates.
Respondent:	The State through Mr. Mohammad Iqbal Awan, Addl. Prosecutor General Sindh
Date of Hearing:	18.04.2024
Date of Announcement:	19.04.2024

JUDGMENT

Mohammad Karim Khan Agha, J:- Appellant Muhammad Ali alias Jawed has assailed the impugned judgment dated 02.04.2018 passed by learned Ist Additional Sessions Judge Karachi-East in Sessions Case No.79 of 2012 arising out of Crime No.431 of 2011 under Section 302/34 registered at PS Shah Faisal Colony, Karachi whereby the appellant was convicted under section 377 PPC and sentenced to R.I. for 05 years with fine of Rs.50,000/- and in case of default in payment he shall suffer SI for 02 months more. Appellant was also convicted under Section 302 PPC and awarded sentence for life imprisonment and also liable to pay a fine of Rs.50,000/- and in case of default in payment of fine he shall suffer SI for 02 months more. Both the sentences were ordered to run concurrently. Appellant was also extended benefit of section 382-B Cr.P.C.

2. The brief facts of the prosecution case as narrated in the FIR are that on 11.12.2011 at about 07:00 a.m. the complainant's nephew Muhammad Kamran aged about 14 years went to purchase milk and did not come back. His brother reported the matter at P.S. about the said incident. On 14.12.2011, somebody informed on telephone that a dead body is found near the Nala, in front of the fire brigade office and the brother of the complainant namely Pervaiz went to see the dead body at Edhi Home Cold storage and found that the said dead body was of Kamran, the

nephew of complainant, therefore, the complainant has lodged the FIR of the incident against unknown accused persons.

3. After completing all the legal formalities, the charge was framed against the accused to which he pleaded not guilty and claimed trial of the case.

4. The prosecution in order to prove its case examined 12 prosecution witnesses and exhibited various documents and other items. The statement of accused was recorded under Section 342 Cr.P.C in which he denied all the allegations leveled against him. He did not give evidence on oath or call any DW in support of his defence case.

5. After appreciating the evidence on record the trial court convicted the appellant and sentenced him as set out earlier in this judgment. Hence, the appellant has filed this appeal against conviction.

6. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the impugned judgment dated 02.04.2018 passed by the trial court and, therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

7. Learned counsel for the appellant contended that the appellant is innocent and has been falsely implicated in this case in order to save the real culprits; in essence he has argued that there is no evidence to link him to the offences for which he has been convicted; there is no eye witness to the offences; there is no last seen evidence to the offences; the appellant was not arrested from the spot; that the phone which was recovered from him did not contain any SIM 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. In support of his contentions he placed reliance on the cases of *Tariq Pervez v The State* (1995 SCMR 1345), *Wazir Muhammad v The State* (1992 SCMR 1134), *Shamoon alias Shamma v The State* (1995 SCMR 1377), *Ayub Mashih v The State* (PLD 2002 SC 1048), *Muhammad Javed v The State* (2019 SCMR 1920), *Naveed Asghar v The State* (PLD 2021 SC 600) and *Saleem and others v The State* (2021 MLD 1184).

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8. Learned APG who was also representing the complainant who had preferred to remain absent despite service on him being held good fully supported the impugned judgment and contended that the prosecution had proved its case beyond a reasonable doubt against the appellant based on strong circumstantial evidence and as such the appeal be dismissed. In support of his contention he placed reliance on the case of *Akhtar v The State* (2020 SCMR 2020).

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

10. 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 Muhammed Kamran (the deceased) was subject to sodomy and murdered by asphyxiation by putting pressure on his neck between 10.12.2011 and 11.12.2011 between 0700 and 0135 hours inside Ganda Nala Shah Faisal Colony No.1 behind fire brigade station Karachi.

11. The only question left before me is whether it was the appellant who sodomised and murdered the deceased by asphyxiation by putting pressure on his neck at the said time, date and location?

12. 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 S.154 Cr.PC Statement was lodged after a delay of three days however this is not unusual in cases where a child goes missing as the first priority is to find the child rather than lodge an FIR who may have gone off to play with friends without telling his/her parents. In any event on the same day a report was made to the police station about the missing child and as such the delay in lodging the FIR based on the particular facts and circumstances of this case is not of huge significance. The FIR is also lodged against unknown persons.
- (b) There is no eye witness to the abduction, sodomy or murder of the deceased.

- (c) There is no last seen evidence to the abduction, sodomy or murder of the deceased.
- (d) The case against the accused took shape after the accused was arrested in another crime a few days later and allegedly confessed before the police that he had abducted, sodomised and murdered the deceased. This statement before the police is inadmissible in evidence. Such confession before the police does not appeal to logic, reason or commonsense as why would a person arrested on a separate minor offence confess to a case which carried the death penalty when there was no evidence against him in the death penalty case. Furthermore, if the appellant was so eager to confess to the sodomy and murder of the appellant why was his confession not recorded before a judicial magistrate which would then potentially have some evidentiary value? Furthermore, PW 4 Muhammed Amjad who repeats the confession of the accused which he heard in his evidence makes no mention of any specific details of the confession in his promptly taken S.161 Cr.PC statement which I find to be a massive improvement just to bolster the prosecutions case and as such disbelieve the fact that he heard the accused confess.
- (e) With regard to the murder there was nothing to link the appellant to the crime scene through any recoveries.
- (f) Like wise no semen sample/DNA was taken from either the appellant or the clothes of the deceased which could link the appellant to the sodomy of the deceased. No chemical reports were even put to the accused during his S.342 Cr.PC statement and as such any reports are to be excluded from consideration.
- (g) Apart from the inadmissible confession before the police the prosecution case then revolves around a phone which was recovered from the appellant when he was arrested in the earlier case prior to his confession. There is no evidence of where this phone was kept. This phone however did not have a SIM in it. No CDR was collected to link the recovered phone to the accused and the deceased. Indeed, PW 12 Irshad Ali in his evidence admits that he brought the phone and that the SIM was in his own name which he then gave to his son Dabeer Ali who told him that he had given the SIM to the accused whom PW 12 Irshad Ali was unaware of. Significantly Dabeer Ali was not called as a prosecution witness to give evidence to this effect which leaves a dent in the prosecution case in linking the SIM to the accused which is purely based on hearsay evidence.
- (h) The appellant had no motive to murder the deceased.
- (i) The fact that the appellant took the police to the wardat is of no relevance as the police already knew where the wardat was.

- (j) No witness had seen the appellant in the mohalla before at any time before the incident so it is also difficult to link him to the abduction, sodomy and murder as he appears not to live in the area and had no knowledge that the deceased when each day to collect milk for his breakfast.
- (k) I find that the circumstantial evidence woefully inadequate based on the particular facts and circumstances of the case to reach the legal standard required to uphold a conviction based on circumstantial evidence in this case alone.

13. 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. The appellant shall be released unless he is wanted in any other custody case.

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