

IN THE HIGH COURT OF SINDH, KARACHI

Present:

*Mr. Justice Mohammad Karim Khan Agha
Mr. Justice Mobeen Lakho,*

**CRIMINAL APPEAL NO. 129 OF 2020
CONFIRMATION CASE NO.04 of 2020**

Appellant	Khalil Ahmed son of Habib Raza through Syed Amir Shah, Advocate
Respondent	The State through Mr. Mohammad Iqbal Awan, Deputy Prosecutor General.

**CRIMINAL APPEAL NO. 142 OF 2020
CONFIRMATION CASE NO.04 of 2020**

Appellant	Shabana Akmal daughter of Muhammad Akmal, through Syed Muhammad Ali Bukhary, Advocate
Respondent	The State through Mr. Muhammad Iqbal Awan, Deputy Prosecutor General.
Date of Hearing	13.04.2021
Date of Announcement	20.04.2021

JUDGMENT

MOHAMMAD KARIM KHAN AGHA, J:- The appellants namely Khalil Ahmed son of Habib Raza and Shabana Akmal daughter of Muhammad Akmal have assailed the impugned judgment dated 25.01.2020 passed by learned Additional Sessions Judge / Model Criminal Trial Court Karachi Central in Sessions Case No.1413 of 2019 arising out of Crime No.127 of 2019 under Section 302/201/34 registered at PS Gulberg, Karachi whereby the aforesaid appellants were convicted for offences falling under section 265-H (ii) Cr.P.C. for offence u/s.302/34 PPC and both were sentenced to death as Ta'zir u/s.302 (b) PPC subject to confirmation by this court. Both accused were further ordered under section 544-A Cr.P.C. to pay compensation to the legal heirs of deceased Hamza s/o Ashfaq Ahmed to the sum of Rs.1,000,000/ (Rupees Ten Lacs each). In case of default in payment they shall suffer SI for six months more.

2. The brief facts of the prosecution case are that on 06.06.2019 complainant ASI Salman Amjad received entry at 0740 hours from MLO regarding burnt dead body of boy of unknown aged about 25/26 years brought by EDHI driver Nawaz from Katchra Kundi in front of Qasr-e-Abu Talib Imam Bargah. On such information, he reached at Abbasi Shaheed Hospital and conducted legal formalities, thereafter, lodged such FIR against unknown accused regarding murder of unknown person/boy.

3. The investigation was carried out by SIP Sohail Ahmed who submitted A-class report before the concerned trial court. Thereafter he came to know that one person namely Ashfaq Ahmed moved an application for missing of his son Hamza at PS Sharifabad then he sent his sample for DNA and DNA report was received positive. During investigation on spy information accused Khalil and Shabana were arrested who confessed their guilt hence case was reopened and challan was submitted against both the accused persons. A formal charge was framed against the accused persons to which they pleaded not guilty and claimed trial of the case.

4. The prosecution in order to prove its case examined 10 witnesses and exhibited various documents and other items. The statements of accused persons were recorded under Section 342 Cr.P.C in which they denied all the allegations leveled against them and claimed false implication. They did not give evidence on Oath or call any DW in support of their defence case. After appraising the evidence on record the trial court convicted the appellants and sentenced them as set out earlier in this judgment. Hence, the appellants have filed this appeal against their convictions.

5. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the impugned judgment dated 25.01.2020 passed by the trial court and, therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

6. Learned counsel appearing on behalf of the appellants contended that the appellants were both innocent of any wrong doing and had been falsely implicated in this case by the police in order to show their efficiency; that there was no eye witness evidence against them; that there was no last seen evidence against them and in effect the prosecution case revolved around an inadmissible confession made before the police him by one of the appellants (Mst.Shabana) which implicated the other appellant (Khalil) in the murder of Hamza and some

items which were allegedly recovered on their pointation to link them to the murder of Hamza which had been planted by the police; that this was a case of no evidence and that for any of the above reasons the appellants should be acquitted of the charge by being extended the benefit of the doubt. In support of their contentions they placed reliance on **Mst.Askar Jan V Muhammed Daud** (2010 SCMR 1604) and **Hayatullah V State** (2018 SCMR 2092)

7. On the other hand learned DPG fully supported the impugned judgment and contended that there is overwhelming circumstantial evidence to lead to the conviction of the appellants based on the recoveries which had been made on the pointation of the appellants which linked them to the murder of the accused including the recovery of the Suzuki which was used to transport the body of the strangled deceased; the appellants pointation of the petrol pump where they went to buy the petrol which they used to burn the body of the deceased; the appellants taking the police to the scene of the murder at their flat and the place where the body was burned and the medical evidence which showed that the deceased had been murdered by strangulation before his body was 100% burnt by the appellants and as such the appeals should be dismissed.

8. We have heard the arguments of the learned counsel for the appellant as well as learned DPG, gone through the entire evidence which has been read out by the counsel for the appellants, and the impugned judgment with their able assistance and have considered the relevant law.

9. After our reassessment of the evidence we find that the prosecution has NOT proved its case beyond a reasonable doubt against the appellants for the following reasons:-

(a) Although the deceased was unidentifiable on sight as the body had been 100% burnt we find that the identity of the deceased as being Hamza has been proven through the use of DNA testing with the body of the deceased and that of his father. In respect of relying on DNA testing and other modern techniques reliance is placed on the recent Supreme Court case of **Ali Haider V Jameel Hussain** in CrI.A.No.436 of 2017 dated 07.01.2021.

(b) There was no eye witness to the deceased being murdered or burnt.

(c) There was no last seen evidence to connect the deceased with the appellants. Apart from the appellant Mst.Shabana admitting in her S.342 Cr.PC statement that the deceased left her flat at about 1800 hours on

06.06.2019 and was never seen alive again. We do not find this particularly unusual as according to appellant Mst.Shabana she was married to the deceased which is a position which the prosecution has not been able to refute and as such it was quite natural for him to be with her and leave the flat albeit on his own.

(d) The medical evidence has found that the deceased was strangled and then his body was burnt 100% and when found was decomposed and unidentifiable. Thus, we have doubts as to how the MLO could have reached the conclusion that the deceased died first of strangulation before being burnt. How was he able to see any ligature marks on a 100% burnt and decomposed body which was unidentifiable and had to be identified through DNA?

(e) No rope or string or other item was recovered which proved the strangulation from any of the appellants.

(f) The complainant of the case ASI Amjad who was the policemen who registered the FIR was not examined simply because he was on Ex Pakistan leave for two months. The complainant's evidence is always significant especially as in this case he was alive and was returning to Pakistan within two months and as such the trial ought to have been adjourned to enable him to give evidence and also enable the appellants to cross examine him. The importance of the evidence of the complainant has recently been underlined by the Supreme Court in the majority verdict in the case of **State V Omar Ahmed Sheikh** dated 28.01.2021(unreported)

(g) The prosecution theory that the deceased was put to sleep by the use of tranquilizers so that he could then be strangled is also not bourn out by the medical evidence which found no intoxicating substance in the body of the deceased during his postmortem.

(h) The main plank of the prosecution case rests on the confession which appellant Mst.Shabana made whilst in police custody. Interestingly, it was not even known why she was in police custody and why she would out of the blue decide to confess before the police and implicate the other co-accused Khalil (which in any event cannot be used against him without independent corroboration of an unimpeachable source with there was none in this case).It is also significant that no effort was made to bring the appellant Mst.Shabana before a magistrate to record her confession under S.164 Cr.PC keeping in view that it is well settled by now that a confession before the police is inadmissible in evidence especially when that person is in police custody. In this respect reliance is placed on **Hayatullah's case** (Supra) where it was held as under at P.2094 and 2095;

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"The said statement before the police and the said memo of disclosure were absolutely inadmissible hit by Article 39 of the Qanun-e-Shahadat Order, 1984."

The prosecution case therefore rests on circumstantial evidence.

The law on circumstantial evidence.

(i) With regard to circumstantial evidence, upon which the prosecution case/ evidence is based, to lead to a conviction in a capital case it was held as under in **Fayyaz Ahmed V State** (2017 SCMR 2026) at P.2030 para's 5 and 6 which are reproduced as under;

"To believe or rely on circumstantial evidence, the well settled and deeply entrenched principle is, that it is imperative for the Prosecution to provide all links in chain an unbroken one, where one end of the same touches the dead body and the other the neck of the accused. The present case is of such a nature where many links are missing in the chain.

To carry conviction on a capital charge it is essential that courts have to deeply scrutinize the circumstantial evidence because fabricating of such evidence is not uncommon as we have noticed in some cases thus, very minute and narrow examination of the same is necessary to secure the ends of justice and that the Prosecution has to establish the case beyond all reasonable doubts, resting on circumstantial evidence. "Reasonable Doubt" does not mean any doubt but it must be accompanied by such reasons, sufficient to persuade a judicial mind for placing reliance on it. If it is short of such standard, it is better to discard the same so that an innocent person might not be sent to gallows. To draw an inference of guilt from such evidence, the Court has to apply its judicial mind with deep thought and with extra care and caution and whenever there are one or some indications, showing the design of the Prosecution of manufacturing and preparation of a case, the Courts have to show reluctance to believe it unless it is judicially satisfied about the guilt of accused person and the required chain is made out without missing link, otherwise at random reliance on such evidence would result in failure of justice.

It may also be kept in mind that sometimes the investigating agency collects circumstantial evidence seems apparently believable however, if the strict standards of scrutiny are applied there would appear many cracks and doubts in the same which are always inherent therein and in that case Courts

have to discard and disbelieve the same." (bold added)

In the case of **Azeem Khan V Mujahid Khan** (2016 SCMR 274) the following was reiterated with respect to circumstantial evidence at P.290 as under;

"In cases of circumstantial evidence, the Courts are to take extraordinary care and caution before relying on the same. Circumstantial evidence, even if supported by defective or inadequate evidence, cannot be made basis for conviction on a capital charge. More particularly, when there are indications of design in the preparation of a case or introducing any piece of fabricated evidence, the Court should always be mindful to take extraordinary precautions, so that the possibility of it being deliberately misled into false inference and patently wrong conclusion is to be ruled out, therefore hard and fast rules should be applied for carefully and narrowly examining circumstantial evidence in such cases because chances of fabricating such evidence are always there. To justify the inference of guilt of an accused person, the circumstantial evidence must be of a quality to be incompatible with the innocence of the accused. If such circumstantial evidence is not of that standard and quality, it would be highly dangerous to rely upon the same by awarding capital punishment. The better and safe course would be not to rely upon it in securing the ends of justice."

So what evidence has the prosecution produced which provides all links in an unbroken chain, where one end of the same touches the dead body and the other the neck of the accused in this case so as to lead to a conviction based on circumstantial evidence.

(i) The pointation evidence we disregard as it flowed from tainted evidence being the inadmissible confession of appellant Mst.Shabana before the police whilst in custody for unknown reasons. In this regard reliance is placed on **Hayatullah's case** (Supra) where it was held as under at P.2094 and 2095;

"Even otherwise recovery alone is not sufficient for conviction and it is always termed as a corroborative piece of evidence. It is settled law that one tainted piece of evidence can't corroborate another tainted piece of evidence."

(ii) The CDR evidence is completely irrelevant as it is an admitted position by the appellant Mst.Shabana that she and the other appellant and the deceased were all friends and as such there was no reason why they should not be in touch with each other on the night of the incident. Even otherwise no recording of their conversations have been produced. They could have simply been discussing the cricket or any other subject under the sun.

(iii) In short there is no reliable circumstantial evidence to link the accused to the murder as would fulfill the legal requirements of a conviction based on circumstantial evidence as mentioned above. Namely, that the prosecution must provide all links in one unbroken chain of evidence where one end of the same touches the dead body and the other the neck of the accused. In this case there are many missing links.

(j) We have also examined the defence case which we find to be quite plausible when put in juxtaposition with the prosecution evidence against the appellants. Namely, that appellant Mst. Shabana married the deceased after an on line marriage from KSA and there after they lived together and were friends with appellant Khalil as well and that one day the deceased left her flat never to return despite her hectic efforts to trace him out by moving applications etc. She has even pointed the finger at her ex husband but the IO choose not to pursue this avenue of inquiry.

(k) The appellants had no ill will or enmity with the deceased nor vice a versa so there was no reason for the appellants to have murdered the deceased. Rather as mentioned earlier they were all friends. The prosecution has neither put forward nor proved any motive as to why the appellants would murder the deceased.

(l) It is a golden principle of criminal jurisprudence that the prosecution must prove its case against the accused beyond a reasonable doubt and that the benefit of doubt must go to the accused by way of right as opposed to concession. In this respect reliance is placed on the case of *Tariq Pervez V/s. The State* (1995 SCMR 1345), wherein the Supreme Court has observed as follows:-

"It is settled law that it is not necessary that there should be many circumstances creating doubts. If there is a single circumstance, which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused will be entitled to the benefit not as a **matter of grace and concession but as a matter of right.**" (bold added)

10. We find the prosecution evidence for the reasons discussed above to be riddled with doubt and that the prosecution has failed to prove its case against the appellants beyond a reasonable doubt and as such the appeals are allowed, the appellants are acquitted of the charge, the confirmation reference is answered in the negative and the appellants shall be released forthwith unless wanted in any other custody case.

11. The appeals and confirmation reference are disposed of in the above terms.


JUDGE


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