IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Appeal No. 370 of 2020

Appellant	:	Naseeb-ur-Rehman through M/s. Burhan Latif Khaisori and Muhammad Asghar Malik, Advocates
Respondent	:	The State through Mr. Siraj Ali Khan Chandio, Addl. P.G
Date of hearing	:	15.02.2021
Date of decision	:	15.02.2021

JUDGMENT

SALAHUDDIN PANHWAR J.- Naseebur Rehman appellant/accused was tried by learned VIII-Additional District & Sessions Judge/Addl. Model Criminal Trial Court, Karachi West in Sessions Case No.1634 of 2016 arising out of FIR No.178/2016, under sections 302, PPC, PS Organi Town Karachi. After full-dressed trial, vide judgment dated 21.07.2020, appellant was convicted under Section 302(b) PPC and sentenced for imprisonment for life as Ta'zir. Appellant was ordered to pay compensation of Rs.5,00,000/- (Five Lacs) under Section 544-A Cr.P.C to the legal heirs of the deceased. In case of default in payment of compensation to suffer S.I. of six months more. Appellant was extended benefit of Section 382-B, Cr.P.C.

2. Relevant facts of the prosecution case are that on 14.05.2016 at 1535 hours, ASI Rizwan Ahmed received information on 15 Madadgar that at Kali Pahari one person murdered his step mother. ASI went to the place of incident where he was informed that accused Naseeb-ur-Rehman had caused injuries to his step mother Mst. Shaheen and injured was shifted to the Abbasi Shaheed Hospital by people. ASI went to the hospital where he came to know that injured succumbed to her injuries. He inspected the dead body of deceased and prepared memo and inquest report.

Thereafter, ASI went to the place of incident and came to know that accused Naseeb-ur-Rehman was arrested by police and taken away to PS. ASI went to PS and lodged such FIR under Section 302 PPC. Thereafter, ASI arrested the accused in presence of mashirs and prepared such memo. He inspected the site, secured a piece of plastic and one brown color chadar and handkerchief of accused. On the pointation of accused, I.O also recovered scissor and danda, which were used in the commission of offence. I.O received positive report of chemical examiner. After completing the investigation, challan was submitted against accused under Section 302 PPC.

3. After usual investigation, challan was submitted and accused were sent up to face the trial

4. Charge was framed to which accused did not plead guilty and claimed to be tried.

5. In order to prove its case, prosecution examined PW-1 ASI Rizwan as Ex.3, PW-2 PC Naseem Baig as Ex.4, PW-3 SIP Muhammad Bashir Jut as Ex.6, PW-4 Imran Ahmed as Ex.7, PW-5 Naveed as Ex.08, PW-10 Dr. Rubina Hassan (WMLO) as Ex.10, PW-7 Zar Ali as Ex.11, PW-8 Mst. Shabana as Ex.12, PW-9 Nadir Khan as Ex.13, PW-1 PC Vingus as Ex.14, W-01 Inspector Gulzar Ahmed as Ex. 15. PW-16 Inspector Gulzar Ahmed as Ex.16. Thereafter, prosecution side was closed vide statement at Ex.17.

6. Statement of appellant/accused under section 342, Cr.P.C. was recorded wherein he denied the allegations leveled against him by the prosecution. He neithered examined himself on Oath under Section 340(2) Cr.P.C nor adduced any evidence in his defence.

7. Thereafter, learned trial Court after hearing the learned counsel for respective parties, convicted and sentenced appellant as mentioned above. Appellant being aggrieved and dissatisfied with the judgment has filed the aforesaid appeal.

8. The evidence produced before the Trial Court finds an elaborate mention in the judgment dated 21.07.2020 passed by the Trial Court and

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

9. Learned counsel for the appellant, *inter alia*, has contended that the case of the prosecution is fraught with material contradictions; that no recovery has been effected on the pointation of appellant and the alleged crime weapons have been foisted upon him; that even postmortem was not conducted; that there is delay in sending crime weapon to FSL; that doctor in cross examination has admitted that such type of injuries can be caused by road accident; that though there were several persons were available at the time of alleged incident but prosecution has produced the evidence of a single eye witness, thus, on solitary eye witness conviction cannot be based unless corroborated by evidence of other independent persons; that prosecution has failed to make a case against the appellant. Lastly, he prayed for acquittal of the appellant. In support of his contentions he relied upon case law reported as 2010 SCMR 846, 2010 P.Cr.L J 1646, 2018 SCMR 772, PLJ 2019 SC (Cr.C) 265 and 2020 P.CrL.J. Note 129.

10. Conversely, learned Additional Prosecutor General Sindh argued that prosecution has proved charge against accused beyond any shadow of reasonable doubt; all the PWs have supported the prosecution case; that evidence of eye witness Mst. Shabana is natural and confidence inspiring; that the ocular evidence is corroborated by the medical evidence coupled with recovery of the crime weapons. He further submitted that trial Court has already taken lenient view in the sentence of the appellant therefore, appellant does not deserve any leniency; that non-examination of postmortem is immaterial. He lastly prayed for dismissal of the instant appeal. In support of his contentions he has relied upon case law reported as Abdur Rehman vs. The State [1998 SCMR 1778].

11. Heard and perused record.

12. *Firstly*, I discuss medical evidence. In order to prove unnatural death of deceased Mst. Shaheen, the prosecution examined PW-1 Dr. Rohina Hassan (Senior Medical Legal Officer), who deposed that *"On 14-5-2016, I was posted as Sr. WMLO at Abbasi Shaheed hospital. On that day*

injured Shaheen wife of Bakhati Rehman aged about 45 years was brought by Cheepa ambulance driver Nisar, She was unstable condition. The injuressustained on her body were sharp edge as follows.

Her genial condition was semi conscious, her condition was serious with GCS level 9/15.

1. Incise wound 3 cm x 0.1 cm over left side of forehead. Skin deep.

2. Incise wound 3 cm x 4 cm left angle of the mouth, angel cut into two pieces.

3. Incise wound 3 cm x 0.1 cm over left side face standing towards left ear structure was deep. Profuse bleeding noted.

4. Swelling on right hand, tenderness was positive. The injuries were reserved of X-ray and treatment record. Patient expired after half an hour of medical treatment. The injuries were fresh and kind of weapon was sharp edge."

The cause of death was opined as cardio respiratory paly trama (cause of Assault as alleged)

It is clear from medical evidence that deceased Mst. Shaheen died her unnatural death.

13. An affirmative answer to a question regarding death of the deceased to be *unnatural* or otherwise shall burden the prosecution to establish *only* that it were the sent up accused only who caused *unnatural* death. I would further add that in matter (s) of single culprit / accused in murder case (s) the presumption of charge normally carries weight unless proved otherwise or the witnesses are shown to be *inimical* and *interested.* The ***'interested witness'*** is one, who has motive to falsely implicate or has previous enmity with the person, involved. Reference is made to the case of *Farooq Khan v. The State* 2008 SCMR 917 as:-

> 11. PW.8 complainant is real brother of the deceased who is a natural witness but not an interested witness. An interested witness is one, who has motive, falsely implicates an accused or has previous enmity with the person involved. There is a rule that the statement of an interested witness can be taken into consideration for corroboration and mere relationship with the deceased is not "sufficient' to discredit

> the witness particularly when there is no motive to falsely involve the accused. The principles for accepting the testimony of interested witness are set out in Nazir v. The State PLD 1962 SC 269 and Sheruddin v. Allhaj Rakhio 1989 SCMR 1461.

14. In the instant matter, the convict is charged to have killed his **'step-mother'** inside the house hence *logically* the house-inmate (s) and neigbourers are most natural witnesses. On *undisputed* unnatural death of the deceased, it is now the ***'ocular account'*** which is to be examined as to whether the same is convincing and believable or otherwise?. The ocular account was furnished by star witness Mst. Shabana (PW-08), neighbor of deceased, deposed that:

> "The deceased of this case was my neighbor. On 14-5-2016 at about 2:45 p.m. ***sister of accused namely Asma*** *came out of her house by raising hue and cry on which me and other women came out our houses and went inside the house of deceased saw (accused) brother of Asma was beating his mother with Danda on her; when we tried to stop the accused who also threatened us to get out otherwise, he will also kill us. I came out and called on 15 Madadgar. Police came there, meanwhile 3/4 boys of mohalla apprehended the accused and brought him outside the house where they tied him with a poll. Thereafter, police took the accused whereas deceased shifted to the hospital but in the way she expired. My statement under Section 161 Cr.P.C was recorded by the police. Accused Naseebullah present in Court is same.*

15. *Prima facie,* there came nothing sufficient enough to discard the claim of said witness as **'neighbour'** except mere suggestion which, *alone,* can't be taken as a proof. She, being a neighbour, is a natural witness hence her direct testimony, if finding support from medical and other corroborative evidence (s), was rightly given due weight. Guidance is taken from the case of *Nadeem Ramzan v. State* 2018 SCMR 149 wherein it is held as:-

> 3. A bare look at the site-plan of the place of occurrence shows that the incident in issue had taken place inside the house of the complainant party in a thickly populated area. The occurrence had taken place in broad daylight and an FIR in respect of the same had been lodged with sufficient promptitude wherein the appellant was nominated as the sole perpetrator of the alleged murder. The ocular account of the incident in question had been furnished before the trial court by two eye-witnesses namely Zubair Iqbal complainant (PW7) and Muhammad Ramzan (PW8) who were the husband and a brother-in-law of the deceased who resided in the same house with the deceased. **The said eye-witnesses were inmates of the houses wherein the occurrence had taken place and, thus, were nothing but natural witnesses. The record of the case shows that the present appellant was also closely related to the above mentioned eye-witnesses as well as to the deceased and, thus, the case in hand could not be a case of a mistaken identity. The consistent ocular account furnished by the above mentioned eye witness had received full support from the medical evidence inasmuch the date and time of occurrence, the weapon used and the locale of the injuries stated by the eye-witnesses had all been confirmed by the medical evidence**..

Though defence counsel cross examined her at length but nothing favourable to the accused could be brought on record. However, she denied that she was not eye witness and she was deposing falsely. The evidence of Mst. Shabana is natural and confidence inspiring. She was neighbor of the deceased and defence has failed to bring on record anything to suggest that P.W Shabana was not residing in the neighbourhood of the deceased and that she has an enmity against the convict/ appellant to falsely implicate the convict / appellant. The evidence of above *star-witness* does find support from evidence (s) of Nadir Khan as well PW SIP Muhammad Bashir with regard to his presence at spot as well arrest; there is also recovery which further has advanced the case against the appellant / convict.

16. Nadir Khan P.W has deposed that on 14-05-2016, he was coming at home from his job for taking meal. In the way, he saw a little baby who was crying and saying that her brother was beating her mother and she was asking for help. He further deposed that when he reached at her house, he saw so many people were also gathered and holding accused. He saw injured mother of said girl who was being shifted in ambulance.

In his cross-examination he denied the suggestion that he was deposing falsely.

17. PW-3 SIP Muhammad Bashir after receiving information of incident, went to the place of incident and found that people were beating a person who was saved by him. People informed him that accused had caused scissor and danda blows to his own mother who was shifted to Abbasi Shaheed Hospital in injured condition. Accused produced scissor and danda, which were sealed at the spot and such memo was prepared in presence of mashirs.

18. In this case I have found the evidence of eye witness Mst. Shabana confidence inspiring and trustworthy and her presence being neighbor at the time of incident was not disputed. It is observed that in such like criminal cases, the whole fate depends on the authenticity of the ocular account and in the instant case, Mst. Shabana has given a straightforward account of the occurrence which took place in a daytime. Furthermore, it is not expected from an independent person/ neighbor of the deceased to involve appellant falsely and let the real culprit to go scot-free. During her statement before the learned trial court, she remained stuck to her statement and she firmly and successfully faced rigor of cross-examination made by the defence. P.W Mst. Shabana is sufficiently reliable witness and her evidence cannot be discredited in any manner as she remained firm during the cross-examination after making a straightforward and crystal clear statement against the appellant having no malice prior to the occurrence against him which is fully trustworthy, cogent and confidence inspiring. There are neither any glaring contradictions in her statement nor any dishonest exaggeration, omission or concealment could be found. Further her evidence is corroborated by the medical evidence as well as recovery of crime weapons on the pointation of appellant.

19. I would add that once the prosecution *discharges* initial burden then the accused, if takes a special plea in his defence, then it is him to prove the same or *least* possibility of his defence plea being true.

Reference is made to the case of *Muhammad Mumtaz Qadri v. State* PLD 2016 SC 17 wherein at relevant Page-35 it is observed as:-

> "Grave and sudden provocation offered by a victim to the assailant is surely one of the exceptions within the contemplation of the above mentioned Article 121 which exception was previously recognized by Exception No.1 to the erstwhile section 300, PPC and is now covered by the provisions of section 302(c), PPC. The law is quite settled by now that if an accused person wants the court to believe that some words or actions of the victim had provided him and on the basis of such provocation he had killed the victim then in all such cases the court is to presume the absence of the circumstances being asserted by the accused person in support of his plea and **it is for the accused to prove through positive and legally admissible evident that some provocation was actually offered to him by the victim and such provocation was grave and sudden. ..."**

20. The perusal of the record shows that that the evidence (s) of PW Shabana and Nadir Khan did contain referral to house inmate (s) of the appellant / convict i.e his own sister and brother whose presence at spot was never challenged therefore if said witnesses were not speaking the truth then it was always easy for the appellant / convict to have brought his own **blood-relations** (brother and sister) before the Court to prove otherwise which he (appellant / convict) never opted. The legal presumption in such a situation would be against the appellant / convict within permissible meaning of Article 129(g) of Qanun-e-Shahadat Order, 1984.

21. As regard non-examination of other claimed present person (s), it would suffice to say that it is always prerogative of the prosecution to choose witnesses as well examination of *material* witnesses out of them because the defence always enjoys full right and opportunity to call / name anybody, if finds necessary for bringing the truth on surface. I am guided in such view with the case of *Farman Ali v. The State & another* 2020 SCMR 597 wherein it is held as:-

> "4. .... Non-examination of Jamshed PW is not fatal to the prosecution because it is prerogative of prosecution to produce the witnesses of its own choice. In the case prosecution had produced two witnesses of ocular account, who had been found reliable by the Courts below. Even otherwise, the requirement for proving the case is **quality and not quantity."**

22. With regard to conviction on the evidence of solitary eye witness, by now, it is settled proposition of law that the conviction can be based upon the statement of even a solitary witness if it inspires confidence and carries unimpeachable character. Reliance is placed in a case reported as **Muhammad Mansha v. The State (2001 SCMR 199)** wherein, at page 204, it was enunciated as under:-

> "6. …The question as formulated hereinabove as to whether conviction could have been awarded on the basis of solitary statement of a witness has been examined at first instance in the light of Article 17 of the Qanun-e-Shahadat Order, 1984, (section 134 of the Evidence Act, 1872). The said Article is reproduced herein below for ready reference:--
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> > "17. Competence and number of witnesses.---(1) The competence of a person to testify and the number of witnesses required in any case shall be determined in accordance with the Injunctions of Islam as laid down in the Holy Qur'an and Sunnah.
> >
> > (2) Unless otherwise provided in any law relating to the Enforcement of Hudood or any other special law—
> >
> > > (a) in matters pertaining to financial or future obligations, if reduced to writing, the instrument shall be attested by two men, or one man and two women, so that one may remind the other, if necessary, and evidence shall be led accordingly; and
> > >
> > > (b) in all other matters, the Court may accept, or act on, the testimony of one man or one woman, or such other evidence as the circumstances of the case may warrant."
>
> 7. A bare perusal would reveal that the language as employed in the said Article 17(1)(b) is free from any ambiguity and no scholarly interpretation is required. The provisions as reproduced hereinabove of the said Article would make it abundant clear that particular number of witnesses shall not be required for the proof of any fact meaning thereby that a fact can be proved only by a single witness "it is not seldom that a crime has been committed in the presence of only one witness, leaving aside those cases which are not of uncommon occurrence, where determination of guilt depends entirely on circumstantial evidence. If the Legislature were to insist upon plurality witnesses, case where the testimony of a single witness only

> could be available in proof of the crime, would go unpunished. It is here that the discretion of Presiding Judge comes into play. The matter thus must depend upon the circumstances of each case and the quality of the evidence of the single witness whose testimony has to be either accepted or rejected. If such a testimony is found by the Court to be entirely reliable, there is no legal impediment to the conviction of the accused person on such proof. Even as the guilt of an accused person may be proved by the testimony of a single witness, the innocence of an accused person may be established on the testimony of a single witness, even though considerable number of witnesses may be forthcoming to testify to the truth of the case for the prosecution. The Court is concerned with the quality and not with the quantity of the evidence necessary for proving or disproving a fact". (Principles and Digest of the Law of Evidence by M. Monir, page 1458)."

23. I am further fortified by another pronouncement of the Hon'ble Supreme Court of Pakistan in the case of **Niaz-ud-Din and another v. The State and another (2011 SCMR 725)** wherein, the Hon'ble Supreme Court was pleased to observe as under:

> "11. …There is apt observations appearing in Allah Bakhsh v. Shammi and others (PLD 1980 SC 225) that "even in a murder case conviction can be based on the testimony of a single witness, if the Court is satisfied that he is reliable." The reason being that it is the quality of evidence and not the quantity which matters…"

24. With regard to the plea of learned counsel for the appellant that in this case postmortem was not conducted, hence, appellant is entitled for acquittal, suffice to say that mere non-examination of postmortem can't be sole ground for acquittal. Reference can be made to the case ABDUR REHMAN vs. THE STATE [1998 SCMR 1778], relevant paragraph whereof are reproduced as under.

> 15. It may be seen that case-law relied upon by learned counsel for parties has been discussed above. We have thoroughly compared and scrutinized the ratio decidendi in afore-quoted reported judgments and relevant law. We cannot subscribe to the observations which may suggest that failure to conduct post mortem would demolish the prosecution case. Obviously there would be numerous situations when post-mortem may not even be conducted. In various parts of the country on account of long-standing customs and established traditions tribesmen do not allow

> post-mortem of the deceased. Thus, keeping in view all the relevant factors and law, we are pursuaded to hold that in cases where prosecution through convincing evidence can establish that death was immediate, proximate and direct cause of injuries sustained without being any element of negligence or other intervention, the non-performance of post mortem would not be fatal.

25. For what has been discussed above, I have come to irresistible conclusion that the learned trial Court passed the well-reasoned judgment which does not require any interference by this Court. Consequently, this appeal is dismissed and the conviction and sentence awarded to him by the learned trial court are maintained. These are the reasons for the short order announced on 15.02.2021.

JUDGE

SAJID