IN THE HIGH COURT OF SINDH AT KARACHI

CR. APPEAL NO.2/2020

Appellant : Kashif Jameel,

Respondent : The State,

CR. APPEAL NO.67/2020

Appellant : Muhammad Irfan,

Respondent : The State,

APPEARANCE

M/s. Muhammad Shahid Qadeer, Muhammad Zahid and Salahudin Chandio advocates for appellant in Cr. Appeal No.2/2020.

M/s. Muhammad Aslam Bhutta, Muhammad Zareef Lakho, Saqib Nazeer and Samia Maroof advocates for appellant in Cr. Appeal No.67/2020.

Mr. Talib Ali Memon, APG.

Date of hearing : 28th April, 5th, 7th& 27th May 2021.

Date of short order : 27th May 2021.

JUDGMENT

SALAHUDDIN PANHWAR, J. Appellants through their respective appeals have impugned judgment dated 05.12.2019 passed by learned Vth Additional Sessions Judge, Karachi East, in S.C.No.1524/2017 arising out of FIR No.140/2017 under section 302/397/34 PPC, PS Brigade; whereby both appellants were convicted for offence u/s 302(c)/34 PPC and sentenced to suffer R.I. of 15 years each and to pay Rs.100,000/- compensation each, u/s 544-A Cr.P.C to legal heirs of deceased and for offence u/s 397/34 PPC to suffer R.I. of 7 years each; with benefit of section 382(B) Cr.P.C.

2. Briefly stated, facts of prosecution case are that complainant Fakharul-Hassan lodged FIR that on 26.06.2017 at about 12.00 p.m. night that he received a call from his niece Nargis that on same night some unknown persons entered into the flat of Aunty Zeba being Flat No.2, Amir Liaquat Building, Khudadad Colony, Karachi and committed her murder by throttling; that on such information, the complainant reached at the house of his deceased sister where he came to know that the dead body of his sister has been shifted by the police, to JPMC, therefore, the complainant reached at JPMC and found her dead body in mortuary; that the complainant had noted the sign of strangulation on the neck of his deceased sister; that the complainant further stated that his deceased sister had no enmity with anyone; he lodged present FIR against unknown accused persons. As reflected from the record, during investigation present appellants/accused were found involved in the crime hence were arrested. After completion of investigation, *challan* was submitted against the above named accused persons in the competent court. To the charge framed, both appellants/accused pleaded not guilty and claimed trial.

3. Prosecution examined ten witness namely PW-1 Fakhrul-Hassan Bami examined at Exhibit 3 who produced receipt of dead body, his statement under Section 154 Cr.PC, FIR, mashirnama of site inspection and recovery of crime weapon, memo of arrest and seizure at exhibits 3/A to 3/E; PW-2 WMLO Dr. Noorun-Nissa at Exhibit 5 who produced letter to MLO postmortem report and cause of death certificate at Exhibit 5/A to 5/C; PW-3 Jawed, Security Guard at Exhibit 6; PW-4 Mashood Ali, Electrician at Exhibit 7; PW-5 Zeeshan Ahmed at Exhibit 8 who produced mashirnama of inspection of dead body and inquest report at mashir of memo of inspection of dead body and inquest report 8/A and 8/B; PW-9 PC Rasheed Ahmed at Exhibit 9 who produced mashirnama of seizure of mobile phone and *roznamcha* entry No.6 at Exhibit 9/A and 9/B; PW-7 SIP Jawed Ahmed / duty officer at Exhibit 10 who produced roznamcha Entries No.8 , 12 & 16 at exhibits 10/A to 10/C respectively; PW-8 Muhammad Shariq at Exhibit 11 who produced copy of CNIC of accused Muhammad Irfan at Exhibit 11/A; PW-9 PC Ghulam Rasool at Exhibit 12 who produced mashirnama of arrest of accused Muhammad Irfan at Exhibit l2/A and PW-10 SIP Ehsan Ahmed I/O at Exhibit 13 who produced roznamcha entries No.17 & 18, letter to chemical examiner and his report, letter to FSL, roznamcha entries No.10, 12, 27, 29, 31, and 35, and letter to Incharge Malkhana at Exhibits 13/A to 13/K.

Statements of accused persons were recorded u/s. 342 Cr.P.C at Exhibits 14 and 15 wherein they had denied the allegations leveled stating that they have been falsely implicated in present case by the complainant with malafide intention and ulterior motives. They have neither opted to depose on oath as provided u/s. 340 (2) Cr. P.C. nor examined any defence witness.

4. Learned trial court framed and answered the issues as under:-

1	Whether deceased namely Mst. Zeba died on 26.06.2017 her un-natural death?	In affirmative
2	Whether on 26.06.2017 at night hours at inside Flat No.2, Amir Liaquat Building, Khudadad colony, Second Floor, Karachi, both the accused persons in furtherance of their common intention committed robbery of Nokia mobile phone C-5 from Mst. Zeba, the sister of complainant Fakhrul-Hassan and also committed her murder by means of strangulation?	As discussed
3	What offence, if any, has been committed by the accused?	Accused persons convicted under section 265-H(ii) Cr.P.C.

5. I have heard both learned counsel for appellants, learned Assistant Prosecutor General Sindh and perused the record.

6. Learned counsel for the appellants/accused persons contended that the accused persons have been falsely implicated in this case by police with malafide intentions and ulterior motives; that there is no eyewitness of the alleged incident; that the complainant has lodge FIR against unknown accused persons, even *hulia/* description of accused persons is not mentioned in the FIR; that it is alleged that the complainant came to know about murder of his sister when he got phone call from his niece namely Nargis but she was not examined; that alleged robbery of mobile phone is not mentioned in the FIR and foisted on appellants and they were involved on the statement before police which has legally no value; that during trial prosecution kept improving their version and created alleged motive for murder; that the accused were not produced before concerned Magistrate for recording of their confessional statement in any way; that no eyewitness was produced before the Magistrate for recording his statement under section 164 CrPC. That the prosecution case is highly doubtful and

there are material contradictions in evidence of prosecution witnesses as with regard to recovery of dead body one witness excluded the presence of other witnesses at the time of recovery of dead body while others claimed contrary to that; that the trial court failed to appreciate the material on record in its true perspective and erred while recording its findings as well also failed to appreciate various points as raised before it hence is liable to be set aside.

7. In contra, learned Assistant Prosecutor General Sindh argued that there is no dispute that deceased died an unnatural death due to *asphyxia* resulting from construction of neck by ligature marks around the neck due to strangulation; that as many as ten witnesses were examined by the prosecution. PW-3 Jawed, who was security guard of the same building where murder was committed, had seen accused Kashif and Irfan in the building who were confused, PW-4 Mashooq Ali who went to collect some amount from a resident in the building deposed in his evidence that he saw accused Kashif standing with deceased Zeba; that inspite of lengthy cross examination defence was unable to bring any material on record to create a dent on the case of prosecution, malafide though alleged but was not proved; that ocular testimony of witnesses cannot be discarded; that mobile phone of deceased was recovered on the pointation of accused Kashif from his house; that both accused persons had kept that mobile phone alongwith copy of CNIC as security at the shop of PW-8 Muhammad Shafi against loan of Rs.1300/- on 26.06.2017 at about 9.30/10.00 p.m. and on next day they returned said loan and took back the mobile phone which was subsequently recovered from accused Kashif; that the prosecution has succeeded to establish its case through sufficient ocular, circumstantial and medical evidence hence the appeals are liable to be dismissed.

8. The perusal of the available record as well the judgment of conviction has compelled me to *first* insist upon the settled principles of ***Criminal Administration of Justice*** which every Criminal Court has to keep in mind while evaluating the evidences for recording the concluding judgment(s) which are:-

> *Asia Bibi v. State* PLD 2019 SC 64
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> > 41. All these contradictions are sufficient to cast a shadow of doubt on the prosecution's version of facts, which itself entitles the appellant to the right of benefit of the doubt. It is a well settled principle of law that for the accused to be afforded this right of benefit of the doubt, it is not

necessary that there should be many circumstances creating uncertainity. If a single circumstance creates reasonable in a prudent mind about the apprehension of guilt of an accused then **he/she shall be entitled to such benefit not as a matter of grace and concession, but as of right....**

Azeem Khan & another v. Mujahid Khan & ors 2016 SCMR 274

32. It is also a well embedded principle of law and justice that no one should be construed into a crime on the basis of presumption **in the absence of strong evidence of unimpeachable character and legally admissible one**. Similarly, mere heinous or gruesome nature of crime shall not detract the Court of law in any manner from the due course to judge and make the appraisal of evidence in a laid down manner and to extend the benefit of reasonable to an accused person being indefeasible and inalienable right of an accused. In getting influence from the nature of the crime and other extraneous consideration might lead the Judges to a patently wrong conclusion. In the event the justice would be casualty.

In cases of circumstantial evidence, the Courts are to take extraordinary care and caution before relying on the same…… To justify the inference of guilt of an accused person, the circumstantial evidence must 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.

9. Having reaffirmed the well-settled principles, on which the ***Criminal Administration of Justice*** rests, I would say that the instant case was an unseen incident so is evident from referral to operative parts of the evidences of witnesses which are:-

PW-1 complainant Fakhrul Hassan Barni

"On 26.06.2017, at about 1200 hours time, I received a phone call of **my niece Nargis** who informed me that somebody had committed murder of Aunty Zeba by throttling."

"My niece Nargis was not used to reside with my deceased sister at her house."

"It is correct to suggest that my niece Nargis is not witness in this case."

"Nargis did not disclose how she entered the flat. Vol. says that later, she disclosed such fact to me, how she entered the flat."

The complainant (PW-1) in his statement under section 154 Cr.P.C states as:-

"… On 26.06.17 at 1200 hours my niece Nargis informed me through phone that tonight **some unknown person (s)** having entered into the house of Phuppi Zeba Khala situated at Flat

> NO.2, Amir Liaquat Building, Khudadad Colony, **strangled her to death with something**. … My **complaint is against unknown person (s)** for entering into my sister's house at night and strangulating my sister to death over unknown reasons. Legal action may be taken.

10. *Prima facie,* there can be no denial that it was a case, lodged against unknown accused persons. Where the case is lodged against unknown accused persons, then the prosecution was / is duty bound to bring the *culprit* within light by showing chain of circumstances justifying that he is the unknown accused who *did* the crime. The prosecution (investigating agency) never enjoys a liberty to name anybody as ***culprit / accused*** unless it (investigation agency) collects such material. In the case of *Sughran Bibi v. State* PLD 2018 SC 595 it is held as under:-

> Rel. P 628
> …Rule 25.2(3) which reads as under
>
> > "(3) It is the duty of an investigating officer to find out the truth of the matter under investigation. **His object shall be to discover the actual facts of the case and to arrest the real offender or offenders**. He shall not commit himself prematurely to any view of the facts for or against any person"

11. I shall also add that cognizance is always taken regarding the offence while trial is conducted of the **'man'** whom the investigation agency claims to be possessing *sufficient* material justifying trial of such person as ***'accused'*** of the crime/ offence. In the instant matter, the names of the appellants/accused *first* came to surface by witnesses namely PW-3 Jawed; PW-4 Mashooq Ali and PW-8 Muhammad Sharif. The relevant portions of their examination-in-chief are made hereunder:-

PW-3 Jawed

> "I am security guard at Dr. Amir Liaquat Shaikh building, Khudadad Colony. On 25.06.2017, I was on my duty. An incident of fire had taken place in my building and I informed K-Electric. The electricity was restored at 0200 hours of night. I saw accused Kashif in the building and **he was confused**. Accused Irfan was standing at the front of building and **he too was confused**…. On 30.06.2017, police recorded my statement. Both the accused present in the Court are same."
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> **PW-4 Mashooq Ali**
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> "On 26.06.2017, at about 03:00 a.m (night) I went to the house of Aamir Liaquat where the fire was set about two days ago, where the manager namely Asim of Amir Liaquat disclosed that Palestinian were residing at the upper story (storey) of the building. Asim asked me to

> collect amount from Palestininians, then I went there rang the bell of the door of the house, and in the house of Palestinians I saw that accused Kashif and Zaiba Aunty (who had been murdered) were standing. After collecting Rs.1000/- from Palestinian I returned from there. Thereafter, I went to my house. **After three days I came to know that Zaiba Aunty had been murdered. Thereafter, police called me at police station Brigade where my statement was recorded. The accused Kashif present in Court in custody is same"**

12. The examination-in-chief(s) of both said witnesses, nowhere, give any impression that the appellants/convicts, *at the most,* were seen near place of incident as **'confused'** or in company of deceased (with Palestinians in their flat) which, *legally,* can never be sufficient to hold one guilty for a capital charge. It is also worth adding here that FIR of present incident was lodged on **28.06.2017** while the offence happened on 26.06.2017 which, too, per PW-7 SIP Jawed Ahmed that:

> "… Meanwhile one Fakhar-ul-Hassan, brother of deceased lady Zeba, reached at the Hospital. I asked Fakhar-ul-Hassan for recording his statement if he wanted, but he stated that he did not known (know) the facts **as such he would give his statement after consultation of his brothers and sisters.**
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> "… Thereafter on 28.06.2017 I contacted Fakhar-ul-Hassan on telephone, who told me that he had come at the flat / place of incident at Khudadad Colony, and I may meet with him over there. I went to the place of incident where Fakhar-ul-Hassan was available, I recorded his statement U/s 154 Cr.PC.

13. In such eventuality, the learned trial Court was required to keep in view the legal position which, stood affirmed in the recent judgment by the Honourable Apex Court in the case of *Asia Bibi v. State* PLD 2019 SC 64 that:-

> 29. ... There is no cavil to the proposition, however, it is to be noted that in absence of any plausible explanation, **this Court has always considered the delay in lodging of FIR to be fatal and castes a suspicion on the proseuction story, extending the benefit of to the accused**. It has been held by this Court that a FIR is always treated as a cornerstone of the proseuction case to estabish guilt against those involved in a crime ; thus, it has a significant role to play. If there is any delay in loging of a FIR and commencement of investigation, it gives rise to a doubt, **which, of course, canot be extended to to anyone else excpet to the accused**. Furthermore, **FIR lodged after conducting an inquiry losses its evidentiary value**.

> 47. .. **The mere presence of the appellant as well as the witnesses at the place of alleged occurence alone is not sufficient to prove the occurence of the offence**. ….

Even otherwise, mere standing of one near place of incident in ***'confused condition'*** shall never be sufficient to hold him guilty because *normally* the accused shall always prefer leaving the place after committing offence or shall try to keep himself under veil before committing a crime. Here, it is worth adding that even if the words of these two witnesses are believed as *gospel* truth yet it is evident that they never disclosed such facts till **28.06.2017** as statement of PW-3 Jawed was recorded on **30.06.2017** while that of PW-4 Mashooq Ali was recorded after ***'three days of incident'*** hence can't be before or on **28.06.2017,** therefore, it is quite *safe* to conclude that till such date i.e **28.06.2017** the investigating agency had no knowledge of names of appellants / accused for their involvement in the offence.

14. Now, it is time to refer examination-in-chief of PW-8 Muhammad Shariq which reads as:-

> "On 26.06.2017, I was present at my shop of Mobile Accessories and Easy load situated at behind Jacob Line Karachi, on same day at about 9:30 pm or 10:00 pm accused Irfan and Kashif came at my shop and Kashif told me that he is in dire need f Rs.1300/- therefore I gave him Rs.1300/- and he kept his mobile phone set alongwith CNIC of accused Muhammad Irfan with me as a surety. … Thereafter, on next day at about 10:00 pm both the accused Irfan and Kashif came at my shop and returned back Rs.1300/- to me and I returned back them the mobile Nokia C5 Color Black which was kept my me as surety, but I did not return the CNIC of accused Kashif due to rush of work at my shop. Later on I came to know that accused Irfan and Kashif both are cousins and had committed the murder of one lady and thereafter, came to me and kept the mobile phone of the said lady with me as a surety and borrowed Rs.1300/- from me. Later on I came to know that the FIR was lodged at PS Brigade of said murder case and I/O recorded my statement U/s 161 Cr.P.C.

This witness claims that before recording his statement to police, he had acquired knowledge that both appellants committed murder of lady and her robbed phone was kept with him for taking Rs.1300/-. This portion is not worth believing because *normally* no accused shall prefer to create evidence against himself by putting robbed article as **surety** which, *too,* on very day of incident. Guidance is taken from case of *Haq Nawaz & others v. State & others* 2018 SCMR 95 wherein it is held as:-

> "5. … It does not appeal to a prudent mind that the appellants and their co-accused would allow a person to hear out the alleged conspiracy of committing the murder of Mst. Nooran and be a witness against them. If at all it is admitted that Mst. Husina Mai was allowed to hear out the conspiracy being hatched by the appellants and their co-accused, then as per her own stance (as reproduced above), after preparing meal for the appellants and their co-accused by 8.00 p.m, she slept by 8/9.00 p.m, how come she came to know of the alleged conspiracy being hatched by the appellants and their co-accused between 9.00 p.m to 12.00 midnight when she was already sleeping.
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> "6. …. It is hard to believe why the appellants and their co-accused would let Mst. Husin Bibi (PW5) go when she not only herd out the conspiracy but also witnessed the crime. Another important aspect of the matter is that after the alleged occurrence, appellant No.2 Hayat took her to his parent's house where she remained for a period of 14 days but she did not tell anybody about the occurrence, that thereafter she was taken by her father to his house at Bhai Phairoo but even during her travel with her father or during her stay at her parent's house, she did not disclose the real facts of the case to anyone. She admitted before the trial Court that her statement was recorded by the police after about two months of the occurrence..."

Further, it is also a matter of record that disclosure of such *Nokia Mobile* was introduced much after lodgment of FIR, as is evident from the cross-examination of the PW-1 wherein he admitted that:-

> "..It is correct to suggest that in the FIR there is nothing mentioned about Nokia mobile phone. It is correct to suggest that I have not disclosed Nokia mobile phone I.M.E.I number in the F.IR. It is correct to suggest that I have not produced Nokia mobile phone box before the I/O. ….
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> "..It is correct to suggest that after the F.I.R., I disclosed to the police about the Nokia mobile."

Therefore, introduction of such portion of the evidence was never *safe* to be relied upon for recording conviction on a capital charge but this aspect was not properly appreciated by the learned trial Court because of conduct of the witnesses always matter for believing their words or *otherwise.* Guidance is taken from the case of ***Zafar v. State*** 2018 SCMR 326 wherein such aspect was appreciated as:-

> 6. **The conduct of the witnesses of ocular account also deserves some attention**. According to complainant, he along with Umer Daraz and Riaz (given up PW) witnessed the whole occurrence when their father was being murdered. It is against the normal human conduct that the complainant, Umer Daraz and Riaz (PW since given up) did not make even an abortive attempt to catch hold of the appellant and his co-accused particularly when the complainant himself has stated in the FIR and before the learned trial court that when they raised alarm, the accused fled

> away. Had they been present at the relevant time, they would not have be waited for the murder of their deceased father and would have raised alarm the moment they saw the appellant and his co-accused standing near the cot of the their father.

If the mobile phone of the deceased was missing / robbed on **26.06.2017** then this must have come in notice and knowledge of the complainant *least* till **28.06.2017** but no such thing was introduced while recording his statement U/s 154 Cr.PC on **28.6.2017 at 1830 hours,** hence later introduction thereof was / is always doubtful, particularly when nothing in proof was brought on record that such *mobile phone,* in fact, was of deceased.

15**.** **Further,** it is also well settled principle of law that in absence of *direct* evidence mere recovery *alone* has never been found sufficient to hold conviction, as held in the case of *Hayatullah v. State* 2018 SCMR 2092 that:-

> 5. So far recoveries from the accused are concerned, we have observed that the amount of Rs.98,000/- was recovered from different persons although on the pointing out of the accused. The statements of said persons ere never recorded and there is no evidence on the file that it was the same amount, which according to prosecution, was robbed form the deceased. It was never the case of the prosecution that the deceased was having such huge amount with him when he left the house. Much reliance was placed on the recovery of pistol from the appellant and empty from the place of occurrence, we observe that the empty was recovered on 11.02.2006 and pistol was recovered on 22.02.2006 and till the recovery of the said pistol the empty was not sent to the firearm expert and the empty and the pistol both remained together in the Malkhana and thereafter transmitted to the office of the Forensic Science Laboratory. So the recovery is inconsequential. **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**.

Further, as per I/O PW-10 Ehsan Ahmed :

> "It is correct that I have not recorded the statement of one Nargis.
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> "It is correct that the recovered Mobile phone was not sealed at the spot. It is correct that as per CRO record accused persons were not involved in any case in the past."
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> "It is correct that there is no eye witness of the incident. It is correct that no any article recovered from the possession of accused Irfan."

These admissions were also not given any weight by the learned trial Court while recording the conviction against the appellants/convicts. The instant case was full of dents because the person, through whom the complainant claimed to have acquired knowledge, was never a witness i.e niece **Nargis;** there was no ***'witness of occurrence';*** case, if any, was that of ***'having seen appellants near place of incident in confused condition'; story of robbed Nokia mobile was introduced much late; keeping such robbed mobile as surety for loan of Rs.1300/- on same date of incident was always not worth believing; I.O. failed in making a chain of unbroken chain of links to connect the accused with offence; electricity wires were also secured with delay even after lodgment of FIR,*** therefore, it was never a case for recording the conviction but it was always requirement of ***golden principle of doubt*** that such benefits must have been extended to the appellants / accused which, *too,* not as grace but as ***right.***

These had been the reasons for the short order dated 27.05.2021 whereby captioned appeals were allowed.

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