

IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Jail Appeal No. 586 of 2018

Appellant : Muhammad Asif
through Mr. Muhammad Azhar Mehmood,
Advocate

Respondent : The State
through Mr. Talib Ali Memon, A.P.G.

Date of hearing : 31st October, 2022

JUDGMENT

Omar Sial, J. Muhammad Asif was accused of murdering Muhammad Kaleem on the night between the 18th and 19th of February 2010. He was tried and subsequently convicted for the murder and punished in accordance with section 302(b) P.P.C. to spend a life in prison. He was also directed to pay a fine of Rs. 50,000 or spend a further period of 6 months in prison. Asif has challenged this judgment of the learned 4th Additional Sessions Judge, Karachi East which was passed on 31.08.2018.

2. The case against Asif was initiated with the registration of F.I.R. No. 178 of 2010 on 19.02.2010 on the complaint of one Mohammad Waseem. Waseem recorded that his younger brother, Muhammad Kaleem, on 18.02.2010 left the house at about 6:00 p.m. but did not return. The next day, i.e. on 19.02.2010, a resident of the area in which Waseem lived knocked at his door and told him that the dead body of his brother Kaleem had been recovered from the 4th floor of an apartment building nearby. Waseem went to the place identified and identified the body as that of his brother. He expressed his suspicion that Asif had killed Kaleem.

3. On 21.02.2010 at about 9:55 p.m., Asif was arrested by A.S.I. Salahuddin Qazi on spy information that the accused was sitting at a certain place. The arrest was witnessed by P.C. Muhammad Shafiq and by P.C. Ghulam Mustafa. There and then Asif told A.S.I. Qazi that he had murdered Kaleem.

4. On 23.02.2010 at about 3:50 p.m. Asif, while being interrogated by S.I. Raja Ulfat Hussain, offered to show the police the place where he had murdered Kaleem. He took the police to the same apartment where the body had been found. The same day, at about 4:50 p.m. Asif took S.I. Raja Ulfat Hussain to a garbage dump near a wall (not specifically identified in the memo) where the crime weapon, a knife, was recovered.

5. Asif pleaded not guilty to the offence and claimed trial. At trial the prosecution examined, **PW-1 Ghulam Qadir**, who was the person from whom Asif had borrowed the knife, to go kill Kaleem. **PW-2 H.C. Mohammad Shafique Abbasi** was the policeman who witnessed Asif's arrest by A.S.I. Salahuddin Qazi. **PW-3 Amin Khan** was the person who witnessed inspection of the dead body by A.S.I. Salahuddin Qazi when he had first responded to the news of an unidentified dead body lying in an apartment. **PW-4 A.S.I. Salahuddin Qazi** was the first responder and the officer who registered the F.I.R. **PW-5 Mohammad Waseem** was the complainant. **PW-6 Dr. Ejaz Ahmed** was the doctor who conducted the post mortem. **PW-7 was M. Razzaq Hazaray**. This witness claimed that he had seen Kaleem and Asif together before the murder. **PW-8 was S.I. Imran Ahmed** who confirmed S.I. Raja Ulfat's signature on certain documents as by then S.I. Raja had been dismissed from service and could not be found.

6. In his section 342 Cr.P.C. statement, Asif denied all wrong doing attributed to him, professed his innocence and attributed the false allegation on a matrimonial dispute between the parties though he did not identify what exactly the dispute was.

7. The learned counsel for the accused has argued that Asif was innocent and that there is no evidence against him. The learned APG supported the impugned judgment. None effected an appearance on behalf of the complainant. My findings and observations are as follows.

8. The record reflects that the evidence against Asif is as follows:

- (i) PW-7 M. Razzaq Hazaray for the "last seen together";
- (ii) Extra-judicial confession made by Asif;
- (iii) Pointing out the place of incident to the police;
- (iv) Recovery of the crime weapon on Asif's pointation.

The last seen together

9. PW-7 Muhammad Razzaq was the witness who claimed that while he was sitting in his shop on 18.02.2010 he had seen Kaleem and Asif walking together. The dishonesty of this witness is exemplified from the fact that he testified that it was 19.02.2010 when the police had inspected the place of incident in his presence and recovered a mobile, a shoe and the knife used in the crime from the place of incident. The record does not support his assertion. The memo of inspection of the place of incident recorded on 19.02.2010 does not show that a knife was recovered. Neither does it show that blood samples were taken. How did the complainant point out the place of incident to the police when he himself had not seen it, remained a mystery.

Recovery of the crime weapon

10. The prosecution case is that Asif borrowed the knife he used for the murder from PW-1 Ghulam Qadir. The knife was recovered on Asif's pointation on 23.02.2010 at 4:50 p.m. in the presence of PW-5 Mohammad Waseem and PW-7 Mohammad Razzaq. It was said that the knife was recovered from garbage dump near a wall. PW-1 Ghulam Qadir, from whom Asif allegedly borrowed the knife, also testified that on 23.02.2010 at about 4:45 p.m., the police had come to the garbage dump with Asif and had recovered the knife from there. The dishonesty of the prosecution witnesses becomes evident from the fact that PW-7 Mohammad Razzaq testified that on 19.02.2010, the police had recovered the knife, along with a mobile and a shoe, from the place of incident i.e. the apartment from where the body was recovered. No sanctity can be given to such a recovery where the witness to the recovery gives a different place from where the knife was recovered. I also find the testimony of PW-1 Ghulam Qadir rather dubious. I find it odd that Asif would come to him and want to borrow a knife from him. The doubt gets further magnified when Ghulam Qadir testified that he had not given a description of the knife in his section 161 Cr.P.C. statement nor was a sketch of the knife made and that similar knives could easily be found in the market. Even further doubt is cast when on the one hand the prosecution claimed that the case property could not be produced at trial as the same had been burnt in a fire but on the other, for unexplainable reasons, the knife somehow was produced at trial. It is also odd that it was not any concerned police official who stated at trial that the case property had been burnt but in fact

it was the highly suspicious PW-7 Muhammad Razzaq who testified the same. How did he know that the property had been burnt and how was he authorized to make such a statement was not explained.

Pointing out the place of incident to the police

11. By the time the place of incident was allegedly pointed out to the police by Asif, it was public knowledge that a body had been found which the police claimed was found from a specific apartment in a specific building. Not much value was added to the prosecution case by this discovery, even if it was one. It is pertinent to point out that no record of who the owner or occupier of the apartment was collected by the investigating officer nor was any produced at trial. The statement of none of the building residents was recorded to show that the body was indeed found from that apartment. The watchman of the building, Abdul Wahid, was dropped as witness by the prosecution on account of the fact that he had gone to his native village. A weak justification was given for his absence and thus an adverse inference would be drawn that had Abdul Wahid testified, he would have not supported the prosecution case. It is also important to note that neither did the complainant nor A.S.I. Salahuddin Qazi see the dead body in the apartment it is claimed it was found in. The dead body, according to the complainant was lying in an Edhi ambulance when he saw it first, whereas A.S.I. Salahuddin first saw the body at the hospital. By whom and how, the body was found and shifted to the hospital was not disclosed at trial.

Extrajudicial Confession

12. The extra judicial confession becomes meaningless in view of the above findings. Article 40 of the Qanun-e-Shahadat Order, 1984 cannot be relied upon by the prosecution in these circumstances. An extra judicial confession therefore would be inadmissible in evidence pursuant to Article 38 and 39 of the Order.

Investigating officer of the case

13. The investigating officer of the case was not examined at trial because he had been removed from service. PW-8 Imran Ahmed could only verify that the memo of place of incident inspection and memo of recovery were in the writing of the investigating officer. The memos ostensibly prepared by the S.I. are in themselves dubious.

Opinion of the court

14. I am saddened to see that the learned trial court has merely reproduced the evidence recorded at trial and without any meaningful analysis of evidence has gone ahead and convicted a person to a life in prison. A court must not treat the fundamental right of a person, in particular his right to life, so casually. Evidence must be picked up, analyzed and a finding given. A court higher in the hierarchy may, or may not, agree with the view in accordance with its wisdom, yet there can be no excuse for forming a view without indicating the grounds for such a view.

15. Because of the observations and findings given above, I am of the view that considerable doubt had crept into the prosecution case, the benefit of which doubt should have gone to the accused. The appeal is therefore allowed. The appellant may be released forthwith if not required in any other custody case.

JUDGE