

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD**Criminal Appeal No. S - 35 of 2003**

Appellant : **Khuda Bux**
through M/s. Syed Tarique Ahmed Shah & Shakir Ali
Talpur, Advocates.

Respondent : **The State**
through Ms. Sana Memon, Assistant Prosecutor General,
Sindh

Complainant : **Ghulam Raza Kolachi**
through Mr. Qazi Naveed Ahmed, Advocate

Date of hearing : 28th September, 2020

Date of judgment : _____

JUDGMENT

Omar Sial, J.: Khuda Bux and Karam Ali were charged with committing the murder of Mohammad Azeem on 16-7-1983. Both pleaded not guilty to the charge and were tried. Karam Ali died during the pendency of the trial whereas Khuda Bux was convicted under section 302(b) P.P.C. and sentenced to life imprisonment by the learned 4th Additional Sessions Judge, Hyderabad on 18-1-2003. It is this judgment that has been impugned in these proceedings.

Background

1. Ghulam Raza lodged an F.I.R. No. 78 of 1983 under sections 302, 109 and 114 P.P.C. at the Tando Muhammad Khan police station on 16-7-1983. He recorded that earlier the same day he was present on his land along with his brother Aslam and his brother-in-law Mehtab Kolachi, when at about 4:00 p.m., another brother of his, Azeem, brought lunch for them, After eating lunch the 4 men were returning home when they were waylaid by Khuda Bux, armed with a 12 bore country made pistol. Khuda Bux fired at, and killed Azeem on the spot, and then ran away. Ghulam Raza, leaving Aslam and Mehrab with the dead body of Azeem, first went to his village where he informed his maternal uncle, Peeral,

of the incident and then he along with Peeral went to the police station to report the murder. This point onwards the story of Ghulam Raza becomes a bit sketchy and is not contained in the F.I.R. According to Ghulam Raza when he came back to the spot, he was told by Aslam and Mehrab that after Ghulam Raza had left the spot, Karam Ali had come to the spot and congratulated his son Khuda Bux on him having murdered the "dog". Karam Ali was also armed with a gun and before leaving the place of incident made an aerial fire from his gun. This last development (i.e. emergence of Karam Ali), Ghulam Raza claimed, was told by him to the police with the request that it be recorded as a further statement of his and incorporated in the F.I.R., but the police had not done so.

Trial

2. At trial the prosecution examined **Ghulam Raza (PW-1** - the complainant and brother of the deceased); **Mehrab (PW-2** - brother in law of the complainant and an eye witness); **Aslam (PW-3** - brother of the complainant and an eye witness); **Peeral (PW-4** - uncle of the complainant who was first informed of the murder by Ghulam Raza and who accompanied Ghulam Raza to the police station to lodge the F.I.R.; **Soof (PW-5** - a relative of the complainant who acted as witness to the inspection of the place of incident, search of the house of the accused, arrest of the accused, recovery of the crime weapon); **Fazal Mohammad (PW-6** - the tapedar who sketched the place of incident); **Shamsuddin (PW-7** – the police officer who registered the F.I.R. on the complaint of Ghulam Raza and carried out the initial investigation); **Dr. Abdul Hameed (PW-8** - the doctor who conducted the post mortem on the dead body); **Ali Mohammad (PW-9** – the police officer who took the dead body from the place of incident to the hospital for its post mortem); **Aziz Jehanzeb (PW-10** – the investigating officer of the case); **Ghulam Nabi (PW-11** – the Mukhtiarkar who recorded the confession made by Khuda Bux); **Abdul Rehman (PW-12** – the police officer who was a witness to the seizure of the clothes of the deceased).

3. The appellant recorded his statement under section 342 Cr.P.C. and outrightly denied the charge against him. He denied that he had ever made a confession and further stated that he was nominated an accused in this case due to the inimical relationship between the parties. He produced various documents evidencing litigation between them.

Parties heard

4. I have heard the learned counsel for the appellant as well as the learned APG and the learned counsel for complainant. My observations are as follows.

Observations

5. This is one of those unfortunate cases that took 37 years since the incident occurred to reach a stage where the appeal has finally been heard. As mentioned above, one of the accused Karam Ali, who was the father of the present appellant, and one of the accused, died in the intervening period.

6. The evidence against the appellant Khuda Bux is in the shape of (i) 3 eye witnesses to the incident (ii) confession made before the mukhtiarkar, and (iii) recovery of the crime weapon upon his pointation.

Eye witnesses

7. One aspect of the prosecution case which I have had a difficulty in believing is the manner in which Karam Ali, who was Khuda Bux's father, was involved as an accused in this murder. Ghulam Raza in the FIR he lodged had informed the police that Khuda Bux after shooting Azeem had run away immediately. Indeed this is also what Shamsuddin (the officer who registered the F.I.R.) testified at trial. Aziz Jehanzeb, the investigating officer of the case also testified that eye witness Mehrab had not told him this part of the story while the case was being investigated. However, at trial, Ghulam Raza's story had changed and he testified that Khuda Bux after killing Azeem had continued to stand on the spot when Ghulam Raza had left to inform Peeral of the murder. When he returned with the police, he was told by Aslam and Mehrab (the two eye witnesses) that after he (Ghulam Raza) had left the place of incident, Karam Ali had also emerged from the bushes (from which Khuda Bux had emerged earlier) and then both, Karam Ali and Khuda Bux, had an exchange of dialogues in which Karam Ali had congratulated Khuda Bux over the murder. While leaving Karam Ali had also fired one shot. The police had found no empty from the aerial shot fired by Karam Ali. This was a material improvement in the case made at trial. The eye witnesses were all closely related and it appears unnatural that while their brother was killed and the killers remained on the spot for "5 to 10 minutes" none of the eye witnesses attempted to apprehend the killers or raise hue and cry over the murder so as to attract the attention of the inmates of the

houses close by. Mehrab, to justify the absence of any independent witness, testified that after the police arrived at the place of incident *“many people of different castes collected there belonging to the locality. But we did not narrate facts of incident to any of them.”* I do not believe the story as narrated by the eye witnesses and doubt their very presence on the spot as told by them. I am of the view that it was concocted solely with the view of throwing the net wide and getting both, the father and the son.

8. The eye witnesses and Peeral, all narrated at trial that Ghulam Raza had first gone to Peeral and then Peeral had accompanied him for the lodging of the F.I.R. Shamsuddin, the officer who registered the F.I.R. however did not corroborate their statements and testified that Ghulam Raza had come alone to the police station.

9. Shamsuddin did not also corroborate the eye witnesses version that when the police came to the place of incident the eye witnesses were present. To the contrary Shamsuddin testified that *“when I reached the place of incident, none of the eye witnesses was present there, and the people of the nearby locality were guarding the dead body”*.

10. The testimony of Ghulam Raza reveals that not only did he know exactly who the accused were but also knew where they lived i.e. *“2 to 3 acres”* away. Yet, most surprisingly, when the police came to the spot with Ghulam Raza, none of them went to the house of the accused in order to arrest them. Ghulam Raza confirmed this by stating *“Police did not go to the house of the accused persons from the place of incident.”*

11. The statements of the prosecution witnesses (at least those of the 2 supposed eye witnesses Aslam and Mehrab) were recorded on 31-7-1983 i.e. nearly 15 days after the incident. Aziz Jehanzeb, the investigating officer, when asked about the delay testified at trial that *“When I got the investigation papers from the ASI the statement of no P.W. was recorded. The ASI told me that he could not record the statements of the P.W’s as they were not available at the time when he visited the vardat.”* The testimony of the investigating officer in this regard is in complete conflict with the eye witness version and creates massive doubt regarding their credibility.

12. The presence of the 2 witnesses to the various memos is also doubtful. According to Soof *“After hearing the news of death of Azeem, I was going to the police station where police met me and then they picked me to act as mashir”*. According to Peeral - after having lodged the F.I.R. - *“thereafter we took the police with ourselves for going to the place of vardat and on the way Soof and Hyder Bux met us who told us that they learnt about the murder of Azeem and then we narrated the above facts to both of them. Then we took them also with ourselves and we all proceeded to the place of vardat along with the police.”* However, contrary to the statements of these 2 witnesses, the investigating officer of the case testified that when he reached the place of vardat, several people had collected there and *“I asked the people collected there to act as mashirs and these two persons volunteered themselves to act as mashirs. These were among the people collected at the spot.”*

13. In **Notice to police constable Khizar Hayat (2019 PLD SC 527)** the Honorable Supreme Court has held as follows:

“It can be seen from the analysis of the judgments mentioned above that the main reasoning given for not applying the rule relates to the social conditions prevalent in the country. It seems that because it was felt by the superior Courts that generally witnesses testifying in criminal cases do not speak the whole truth and have a tendency to exaggerate or economise with the real facts, there is a danger of miscarriage of justice in the sense that a real culprit may go scot free if a court disbelieves the whole testimony on account of reaching the conclusion that the testimony was false in some respect. With all due respect, we feel that such an approach, which involves extraneous and practical considerations, is arbitrary besides being subjective and the same can have drastic consequences for the rule of law and dispensation of justice in criminal matters.”

Later the Court observed:

“Therefore, in light of the discussion made above, we declare that the rule falsus in uno, falsus in omnibus shall henceforth be an integral part of our jurisprudence in criminal cases and the same shall be given effect to, followed and applied by all the courts in the country in its letter and spirit. It is also directed that a witness found by a court to have resorted to a

deliberate falsehood on a material aspect shall, without any latitude, invariably be proceeded against for committing perjury.”

14. In view of the principle enunciated by the Honorable Supreme Court that the latin maxim *falsus in uno, falsus in omnibus* is to be an integral part of criminal jurisprudence in the country and further in view of the observations made above regarding the eye witnesses, I am of the view that there is no room left but to discard the testimony of the said eye witnesses.

Confession

15. In support of its case, the prosecution relied on a confession made by Khuda Bux before the Mukhtiarkar. In **Azeem Khan and another vs Mujahid Khan and others (2016 SCMR 274)** it has been held by the Honorable Supreme Court that:

“Before recording confession and that too in crimes entailing capital punishment, the recording Magistrate had to essentially observe all the mandatory precautions (laid down in the High Court Rules and Orders). Fundamental logic behind the same was that, all signs of fear inculcated by the investigating agency in the mind of the accused were to be shed out and he was to be provided full assurance that in case he was not guilty or was not making a confession voluntarily then in that case, he would not be handed over back to the police. Thereafter, sufficient time for reflection was to be given after the first warning was administered. At the expiry of such time, recording Magistrate had to administer the second warning and the accused shall be assured that now he was in the safe hands. All police officials whether in uniform or otherwise, including Naib Court attached to the Court must be kept outside the Court and beyond the view of the accused. After observing all these legal requirements if the accused person was willing to confess then, all required questions as formulated by the High Court Rules and Orders should be put to him and the answers given, be recorded in the words spoken by him. Statement of accused should be recorded by the Magistrate with his own hand and in case there was a genuine compelling reason then, a special note was to be given that the same was dictated to a responsible official of the Court like stenographer or reader and oath shall also be administered to such official that he would correctly type or write the true and correct version. In case, the

accused was illiterate, and made a confession, which was recorded in another language i.e. Urdu or English, then the same should be read-over and explained to him in the language he fully understood, and thereafter a certificate, as required under section 364, Cr.P.C. with regard to these proceedings should be given by the Magistrate under his seal and signatures and the accused shall be sent to jail on judicial remand and during this process at no occasion he shall be handed over to any police official/officer whether he was Naib Court wearing police uniform, or any other police official/officer, because such careless dispensation would considerably diminish the voluntary nature of the confession, made by the accused.”

16. The confessional statement reflects that the due process was not followed by the Mukhtiarkar for its recording. The appellant was placed in the custody of the revenue peon; police (albeit the court police) was present during the recording and the appellant was not informed that if he does not make a confession he will not be handed over to the police. The confession itself narrates a different story than what the prosecution alleged. Khuda Bux did not mention the presence of the eye witnesses as is the prosecution case. He did not talk about Karam Ali being there. He recorded that he shot Azeem on the face whereas the medical evidence showed that Azeem was shot in the back of the head. Even the motive for the murder, as assigned by the prosecution was different in the confession made. The confession so made, which was retracted at trial in any case, was not independently corroborated by any evidence. If the confession is to be believed then the entire prosecution case is put in doubt. In any case the voluntariness and genuineness of the confession is not beyond doubt in the circumstances.

17. In **Muhammad Ismail and others vs The State (2017 SCMR 898)** it was held that:

“The only other piece of evidence remaining in the field was a judicial confession allegedly made by Muhammad Iqrar, Khalid Hussain and Shakir Ali appellants before a Magistrate under section 164, Cr.P.C. but admittedly the said judicial confession had been retracted by the appellants before the trial court and in the absence of any independent corroboration such retracted

judicial confession could not suffice all by itself for recording or upholding the appellants' convictions."

18. Similarly in **Allah Nawaz vs The State (2009 SCMR 736)** it was held that "*Now it is settled law that confession is to be rejected or accepted as a whole.*"

Recovery of weapon

19. The case property was sent to the chemical examiner and the ballistic expert on 11-10-1983 i.e. nearly 3 months after the incident. No explanation was given by the investigating officer for the delay or the safe keeping of the property in the interim. He did however confirm that the said property was sent on 11-10-1983. The report of the ballistic examiner was not produced in original in the trial. Although an objection was raised at trial, the learned trial judge had accepted the photo copy and had noted that the validity of the objection will be determined in the final judgment. Unfortunately, it does not appear that the learned judge gave any reason as to why secondary evidence was accepted in non-compliance of the provisions of the Qanoon-e-Shahadat Order, 1984. The appellant was not confronted in his section 342 Cr.P.C. statement with even the photo copy of the report which was used as evidence against him. It is well settled now that unless and until the accused is confronted with the incriminating material to be used against him, the same cannot form basis of a conviction.

Summary

20. In view of the above:

- (i) The evidence of the alleged eye witnesses cannot form the basis of conviction following the principle of *falsus in uno falsus in omnibus* as laid down by the Honorable Supreme Court in the **Khizar Hayat** (supra) case.
- (ii) The voluntariness and genuineness of the confession made was doubtful.
- (iii) The recovery of the weapon as claimed by the prosecution was doubtful.

Conclusion

21. The appeal stands allowed. The appellant is acquitted of the charge. As he is on bail, his bail bonds stand cancelled and surety discharged.

JUDGE