

IN THE HIGH COURT OF SINDH AT KARACHI**Criminal Appeal No. 722 of 2019**

Khanzadi v. The State

Criminal Appeal No. 723 of 2019

Shagufta Mushtaq v. The State

Criminal Appeal No. 661 of 2019

Bashir Ahmed v. The State

Mr. Mehmood-ul-Hassan and Ms. Mumtaz Chandio, Advocates for Appellants in Crl. Jail Appeals No.922 & 723 of 2019.

Mr. Muhammad Rafiq Brohi, Advocate for appellant in Crl. Jail Appeal No.661/2019.

Mr. Nadeem Ahmed, Advocate for complainant.

Mr. Talib Ali Memon, APG.

JUDGMENT

Omar Sial, J.: On 9-10-2019 the learned 7th Additional Sessions Judge, Karachi Central, convicted the appellants Khanzadi, Shagufta Mushtaq and Bashir Ahmed under sections 302 and 34 P.P.C. and sentenced them to life imprisonment and a fine of Rs. 50,000 each or suffer a further period of imprisonment of 6 months. All three have impugned the said judgment.

Background

2. Syed Wasif Ali wrote a letter to the SHO, Gulberg police station on 9-2-2016 in which he narrated that he was out of the country when he received information on 12-1-2016 that his younger sister, Nabila Ali, had expired. Wasif came back to the country on 13-1-2016 and found that the dead body of his sister was at the Edhi cold storage facility. Wasif was told by his family that at 3:00 p.m., the maid of the house Khanzadi, had gone to Nabila's room and had informed the family that Nabila was lying lifeless on her bed. Wasif was not convinced that his sister had died a natural death and suspected his step mother, Shagufta Mushtaq, to be somehow involved in Nabila's death. He bugged the house and from the voice recordings he collected surreptitiously he prepared a USB which he provided to the police along with his letter. Wasif claimed that on the basis of the voice recordings, he suspected that Shagufta Mushtaq (his step mother), Khanzadi (the maid of the house), Asma (Khanzadi's daughter), Naveed Ali (Khanzadi's brother), Naila (Naveed Ali's wife) and Hammad (his step mothers nephew) had murdered Nabila. On 12-2-2016, the police registered F.I.R. No. 29 of 2016 at the Gulberg police station under sections 302 and 34 P.P.C.

Trial

3. Bashir Ahmed, Khanzadi, Shagufta Mushtaq (the three appellants) and Hammad Ahmed were sent for trial. All four pleaded not guilty to the charge against them. At trial the prosecution examined 12 witnesses. **PW-1 Zakaria Korejo** (the officer who registered the FIR); **PW-2 Syed Wasif Ali** (the complainant); **PW-3 Syed Razzaq Ali** (an uncle of the complainant who was privy to Wasif's plan to bug the house); **PW-4 Fareeda** (the officer who witnessed the arrest of Shagufta Mushtaq); **PW-5 Zeenat Zahoor** (the officer who witnessed the recovery of cushions made at Khanzadi's pointing); **PW-6 Sumera Hasan** (the magistrate who supervised the exhumation of the deceased's body); **PW-7 Dr. Summaiya Syed** (the doctor who conducted the post mortem of the deceased after the body had been exhumed); **PW-8 Muneer Ahmed Panhwar** (the magistrate who recorded the confession of Shagufta Mushtaq); **PW-9 Khursheed Khan** (the first investigation officer of the case); **PW-10 Syed Mohsin Hussain Zaidi** (the second investigation officer of the case); **PW-11 Ziauddin Pirzada** (the third investigation officer of the case); **PW-12 Dr. Qarar Ahmed Abbasi** (a member of the medical board that had examined the body after exhumation).

4. In their statements under section 342 Cr.P.C. all three appellants pleaded innocence. Shagufta Mushtaq also stated she had confessed to the crime because of duress and intimidation on the part of the police and the complainant.

Parties Heard

5. I have heard the learned counsel for the parties as well as the learned APG and have also perused the record with their able assistance. Their arguments are reflected in my observations below.

Observations and Findings

6. There is admittedly no eye witness in this case. The appellants have been convicted and sentenced on the basis of 3 pieces of evidence:

- (i) The audio recordings that Wasif had made by bugging the house;
- (ii) A judicial confession made by Shagufta Mushtaq; and,
- (iii) Khanzadi leading the police to the cushions that were used to suffocate Nabila.

Audio Recordings

7. As mentioned above, Wasif had bugged his own house and put the audio file on a USB. The USB was produced at trial though the record reveals that it was not immediately seized by the police but that the police conducted an “inquiry” first on the basis of the said USB. The legal basis of conducting such an “inquiry” before the registration of the FIR was not explained. Zakia Korejo admitted at trial that she had recorded prosecution witnesses statements during the “inquiry” stage as well. None of those statements was produced at trial. Manipulation of evidence cannot be ruled out.

8. In the case reported as **Ishtiaque Ahmed Mirza vs The Federation of Pakistan (PLD 2019 SC 675)**, the Honorable Supreme Court has laid down certain guidelines for audio and video recordings to be admitted as evidence. To facilitate reference the relevant portion of the said judgment is as follows:

“11. The precedent cases mentioned above show that in the matter of proving an audio tape or video before a court of law the following requirements are insisted upon:

- (i) No audio tape or video can be relied upon by a court until the same is proved to be genuine and not tampered with or doctored.*
- (ii) A forensic report prepared by an analyst of the Punjab Forensic Science Agency in respect of an audio tape or video is per se admissible in evidence in view of the provisions of section 9(3) of the Punjab Forensic Science Agency Act, 2007.*
- (iii) Under Article 164 of the Qanun-e-Shahadat Order, 1984 it lies in the discretion of a court to allow any evidence becoming available through an audio tape or video to be produced.*
- (iv) Even where a court allows an audio tape or video to be produced in evidence such audio tape or video has to be proved in accordance with the law of evidence.*
- (v) Accuracy of the recording must be proved and satisfactory evidence, direct or circumstantial, has to be produced so as to rule out any possibility of tampering with the record.*

- (vi) *An audio tape or video sought to be produced in evidence must be the actual record of the conversation as and when it was made or of the event as and when it took place.*
- (vii) *The person recording the conversation or event has to be produced.*
- (viii) *The person recording the conversation or event must produce the audio tape or video himself.*
- (ix) *The audio tape or video must be played in the court.*
- (x) *An audio tape or video produced before a court as evidence ought to be clearly audible or viewable.*
- (xi) *The person recording the conversation or event must identify the voice of the person speaking or the person seen or the voice or person seen may be identified by any other person who recognizes such voice or person.*
- (xii) *Any other person present at the time of making of the conversation or taking place of the event may also testify in support of the conversation heard in the audio tape or the event shown in the video.*
- (xiii) *The voices recorded or the persons shown must be properly identified.*
- (xiv) *The evidence sought to be produced through an audio tape or video has to be relevant to the controversy and otherwise admissible.*
- (xv) *Safe custody of the audio tape or video after its preparation till production before the court must be proved.*
- (xvi) *The transcript of the audio tape or video must have been prepared under independent supervision and control.*
- (xvii) *The person recording an audio tape or video may be a person whose part of routine duties is recording of an audio tape or video and he should not be a person who has recorded the audio tape or video for the purpose of laying a trap to procure evidence.*
- (xviii) *The source of an audio tape or video becoming available has to be disclosed.*

- (xix) *The date of acquiring the audio tape or video by the person producing it before the court ought to be disclosed by such person.*
- (xx) *An audio tape or video produced at a late stage of a judicial proceeding may be looked at with suspicion.*
- (xxi) *A formal application has to be filed before the court by the person desiring an audio tape or video to be brought on the record of the case as evidence”.*

9. While reviewing the evidence I am of the view that the conditions listed at serial numbers (i), (ii) – no expert opinion was sought, (v), (x), (xii), (xiii), (xv), (xvi), (xvii), (xix) and (xxi) were not complied with. The admitted fact that in spite of 5 family members including children living in an 80 square yard house, the recording only contains 2 voices, that of Khanzadi and Shagufta, also creates doubt about the accuracy and the genuineness of the recordings. The learned counsel however justified this aspect by submitting that the voice recorder was installed only in the kitchen. Be that as it may, I find it difficult to believe that no other voice but that of the 2 appellants was recorded. It is a reflection of the complainant's malafide that even though there were only 2 voices in the recording and at best a reference to one other person, the complainant intended to implicate other family members of the accused as well in the FIR. The USB in question contains recording for over 4 hours. Though the learned court started to hear it but it appears that soon thereafter a written transcript was given to it by the complainant and the learned court relied upon the transcript. It was not determined whether what was in the transcript was actually contained in the recording. The portions heard by this court during these proceedings do not contain any incriminating evidence. To the contrary the content reflects the possible involvement of an unknown person who allegedly may have been in a clandestine relationship with the deceased. The correct course would have been to send the said USB to an expert for the requisite forensics and obtain an official transcript. The evidence, if one can term it as that, in the shape of the audio recordings, could not be safely relied upon for the conviction.

Judicial Confession

10. An application was moved by the investigation officer of the case before the learned 11th Civil Judge & Judicial Magistrate, Karachi Central on 23-2-2016

for recording the confessional statements of the 3 appellants. Bashir and Khanzadi declined to confess before the learned magistrate whereas Shagufta agreed to. On 27-2-2016, Shagufta recorded her statement. At trial however the confession was retracted by her.

11. In **Hashim Qasim vs The State (2017 SCMR 986)** the Honorable Supreme Court has observed that for accepting a confession, two essential requirements must be fulfilled, first, that the confession was made voluntarily and was based on a true account of facts leading to the crime and, second, the same was proved at trial.

12. As regards the voluntariness of the confession, I notice that the answer to the question "*The accused is asked if she is disposed to make a confession of her own free will?*", has been left blank. Though there are follow up questions on this aspect, even those are in English, a language that the accused was not conversant with as is obvious from her statement recorded subsequently. I am also not convinced that the entire confession of the accused could have been recorded with the smooth flow of language, which it has, without any alterations or corrections and then end her statement by stating that she has made the statement happily with her own free will. Indeed the Honorable Supreme Court has also made such observations (apart from the doubtful ending of the statement) in the case titled **Muhammad Fazil vs The State (2006 SCMR 1432)**.

13. I do not also see the reasoning behind the accused going into details about having killed the grandmother of the complainant. The confession speaks about a "drug" having been mixed in the deceased's food. No evidence was led at trial to corroborate these aspects. Hammad was said to have played a role in the post murder scenario however his role was not proved at trial and he was acquitted. The husband of the accused, who was the father-in-law of the deceased, was not examined at trial in order to corroborate the events ascribed to him. The confession includes the story of how doctors were summoned to the house when Nabila was found lifeless and that they came and checked her. No doctor was called as witness to corroborate this story nor was this aspect highlighted at trial by any witness.

14. The accused was also not told that irrespective of whether she confesses or not, she will not be handed over to the police and will be sent to judicial custody.

15. A retracted confession if corroborated by independent evidence of reliable nature could be made basis for conviction. In this particular confession though I do not see that any part of it has been corroborated by independent evidence. I also do not believe that this was a confession given voluntarily.

Recovery

16. The third piece of evidence relied upon by the learned trial court are the cushions recovered at the pointation of Khanzadi, which were used to suffocate Nabila. The prosecution alleged that on 26-2-2016, Khanzadi took the police to the roof of the house where there was a store room and in that storeroom was a washing machine which was in perfect working order. The "cushions" were recovered from there. At trial however it was admitted that what had been produced in court were not cushions but merely cushion covers. Zeenat Zahoor, one of the witnesses to the recovery also stated that when they went to the house for the recovery, there was nobody there. I find it immensely unusual that the covers stayed in a fully operational washing machine for 45 days and were lying intact when the same were recovered. The house was admittedly in use of the family of the deceased and thus it was not a place accessible exclusively by the accused. The recovery is doubtful and cannot, in any case, be used as the sole basis for conviction.

Conclusion

17. In view of the above observations, I am of the view that the prosecution did not prove its case beyond reasonable doubt. The concession of such doubt, in accordance with the well settled principles of law, should have gone to the accused. Accordingly, the appeals are allowed. The appellants are acquitted of the charge. They should be released forthwith if not required in any other custody case.

JUDGE