

IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Appeal No. 222 of 2011

Appellant : Rizwan
through Mr. Muhammad Islam Leghari, Advocate

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

Date of hearing : 15th November, 2022

JUDGMENT

Omar Sial, J: Amar and Rizwan Jumani on 16.04.2010 asked their friend Mehran Qureshi to accompany them to Amar Waqar Jumani's otaq. In the afternoon, Mehran's father, Muhammad Aslam received a phone call informing him that Mehran had been seriously injured. Aslam reached the hospital to only find that his son had died of a firearm injury. F.I.R. No. 18 of 2010 was registered under section 302 and 34 P.P.C. at the Darro police station in which both Amar and Rizwan were nominated accused.

2. Both accused pleaded not guilty and claimed trial. **PW-1 Muhammad Aslam Qureshi** was the complainant. **PW-2 Shah Nawaz alias Shani** was a friend of the boys who claimed to be present on 16.04.2010 when the incident occurred. **PW-3 Muhammad Ibrahim Qazi** was a relative of the complainant who had informed him that Mehran was injured. **PW-4 A.S.I. Allah Jurio** was the first responder. **PW-5 Ali Murtaza Qureshi** was a witness to the inspection of the place of incident, inspection of the dead body by the police and arrest of the accused. **PW-6 Dr. Abdul Rahim** did the post mortem. **PW-7 S.I. Nooruddin Brohi** registered the F.I.R. **PW-8 Niaz Hussain Kandar** was the tapedar who prepared the sketch of the place of incident. **PW-9 P.C. Abdul Aleem Gujjo** was a witness to the recovery of the repeater on the pointation of Rizwan. **PW-10 Muhammad Anwar Memon** was the investigating officer of the case. **PW-11 Ramoon Machi** was a person who himself has been arrested as an accused. **PW-12 Shakeel**

Molani was the learned magistrate who recorded a confessional statement. In his section 342 Cr.P.C. statement the appellant professed innocence and denied all allegations against him.

3. At the end of the trial, the learned 1st Additional Sessions Judge, Thatta, found the appellant guilty of an offence under section 319 P.P.C. and sentenced him to the period he had already been in custody till the date the judgment was announced i.e. 19.04.2011. He was also ordered to pay diyat in the amount of Rs. 1,094,816. It is this judgment of the learned trial court that has been impugned in these proceedings.

4. I have heard the learned counsel for the appellant as well as the learned APG. The complainant did not effect an appearance despite several notices. The learned counsel for the appellant has argued that the learned trial judge has erred as he himself has held in the impugned judgment that neither was the complainant's testimony or that of Shah Nawaz satisfactory and that the confession statement was also suffering from irregularities. In view of this, learned counsel argued, even a conviction under section 319 P.P.C. was not maintainable. The learned APG has supported the impugned judgment and has argued that the testimony of the complainant and Shah Nawaz together with the confession of the appellant and the recovery of the crime weapon which matched the cartridge found from the place of evidence was sufficient evidence for the conviction. I have heard the learned counsels and reviewed the record. My findings and observations are as follows.

5. There are 4 pieces of evidence against the appellant: (i) the testimony of the complainant (ii) the testimony of PW-2 Shah Nawaz (iii) the judicial confession and (iv) the recovery of the crime weapon.

Statement of the complainant

6. The complainant acknowledged that Rizwan, a student, was a poor boy and that he was very good friends with Mehran and that they two had no enmity. He also admitted that he had told the print and electronic press after registering the F.I.R. that the police was not doing enough to catch the

real culprits of the crime. He also categorically conceded that he did not know whether Rizwan was the real culprit. The father apart from being uncertain whether Rizwan was the culprit, also indicated through his testimony that Rizwan had no reason to kill Mehran. The complainant's accusation against Rizwan was diluted when PW-11 Ramoon Machi testified that he had been arrested in the case as the complainant had wanted him implicated. Machi also stated that the complainant had moved an application before the Sessions Judge, Thatta in which he had recorded that Machi, and not the accused i.e. Amar and Rizwan, were the actual culprits.

Statement of Shah Nawaz

7. PW-2 Shah Nawaz is the only person who indirectly implicated Rizwan. He testified that all the friends had gathered together at the otaq of Amar Waqar Jumani. Amar said that he wanted to go get ready for his prayers and left. Shah Nawaz claims he went to bathe and while bathing he heard a gunshot. There was a knock on the bathroom door and he saw Rizwan standing with a repeater who told him that by accident the gun had gone off and Mehran had been injured. Rizwan has been convicted basically on the statement (apart from a confession) given by Shah Nawaz. I find this witness suspicious. My reasons are as follows: (i) the complainant in his evidence said that Mehran had left for the otaq of Waqar Jumani on a motorcycle along with Amar and Rizwan. Shah Nawaz gave a different version, he said that it was he (Shah Nawaz) who had accompanied Amar Waqar and Mehran on one motorcycle and when they had reached the otaq, they had found that Rizwan was already present there. This contradiction creates doubt as to the whether the father of the deceased was incorrect in his identification of Rizwan or that Shah Nawaz was a witness "created". I find it odd that Shah Nawaz said that even after the gun fire was heard no body came to the place of incident. The complainant in his testimony had already admitted that the otaq where the incident is said to have occurred was surrounded with houses of a number of communities. I find it odd, specially keeping in mind the trait of our people

to immediately gather at a spot of commotion. Such a reaction is more pronounced in rural set ups. Further suspicion is raised at this witness when he admitted that though the incident happened on 16.04.2010 it was not until 22.04.2010 that his statement was recorded by the police. Shah Nawaz explanation was that he was frightened and therefore went away home. Not once did he say at trial that he had seen the dead body. His reaction of leaving the place only on a statement allegedly made by Rizwan, even if one accepts that he was too frightened at the time, does not still explain his silence for a 7 day period. One can understand that if such a situation developed, a person can panic, but what I find difficult to reconcile is that after leaving the bathroom, he did not see anything on the spot. It was a tiny otaq with one person shot to death in it, and not once did Shah Nawaz mention that he had seen the dead body lying on the ground. Doubt is also created in Shah Nawaz's version when one takes a look at the memo of site inspection made by the police on 16.04.2010. The memo shows no bathroom at the scene of the crime. To the contrary, the memo records that the otaq consisted of one constructed room only. It would also be natural for a person who may have run away in panic that the first thing he would go and do at home would be to tell his family and friends as to what he had seen unless he himself was guilty of something. His remaining silent could not have been due to any love for the appellant as 7 days later, it seems he did not blink an eyelid in recording his statement indirectly implicating the appellant. It appears to me that this witness was created by the prosecution in order to provide a reason for Amar Waqar's innocence in the matter. This is further supported by the fact that contrary to what Shah Nawaz said at trial i.e. Amar Waqar had gone away before the fire was shot, Dr. Abdul Rahim testified that when Mehran was brought to the hospital, 3 boys, Tanveer, Amar Waqar and Rizwan were with him. The killing could have been done by Amar Waqar or Shah Nawaz himself and as Rizwan was the weakest link, he was accused of it. Shah Nawaz's unusual stress on stating that Amar had gone away before the shooting, to me sounds suspicious. Mehran could himself also have accidentally shot himself. Who

was Tanveer, where did he come from and why was he not examined, were all questions left unanswered by the prosecution. It is such unanswered questions which create doubt in the prosecution case.

Arrest

8. Police dishonesty is evident from the fact that the memo of arrest records that the arrest was made on 20.04.2010. PW-5 Ali Murtaza Qureshi was the person who was shown as witness to the arrest. This witness himself said that he had not witnessed the arrest of the 2 accused but that they were already under arrest when he was called to the police station. Obviously, that would mean that the arrest, at least in front of Qureshi, was made at the police station. The memo however records that the 2 accused were arrested on 20.04.2010 from a road in front of Qureshi. Dishonesty of the police was confirmed when S.I. Nooruddin confirmed at trial that the 2 accused had voluntarily appeared before the police when the F.I.R. was registered i.e. on 16.04.2010. The same was also testified by PW-11 Ramoon Machi who also said that *"it is correct that both accused persons went to the police station at their own at about 1700 hours on the day of the incident."* Such dishonest conduct on the part of the police also depicts malafide creating doubt as to accuracy and veracity of the police witnesses.

Recovery

9. The prosecution case is that the day Rizwan was arrested (according to the documents prepared by the investigating officer) i.e. 20.04.2010 he led the police to a graveyard from where the repeater was recovered. A separate case was filed under the Pakistan Arms Ordinance, 1965, in which Rizwan was acquitted. The police claims that one fired empty cartridge was recovered from the scene of the offence on the same day i.e. 16.04.2010. The repeater allegedly was recovered at Rizwan's pointation on 20.04.2010. It was however not until 06.05.2010 that the repeater and the cartridge were both sent for analysis. The delay was not explained. Delay would be meaningful because, suspicion is created as to whether the police itself fired a shot from the repeater and then sent the empty and repeater to the

laboratory for analysis. In any case, the appellant in his section 342 Cr.P.C. statement was not confronted by either the recovered cartridge or the forensic expert's opining that the cartridge matched the weapon. In such a situation, it is well settled now that this piece of evidence cannot be used to uphold a conviction.

Confession

10. The prosecution claims that on 21.04.2010, Rizwan recorded a confession before a learned judicial magistrate. For his part, Rizwan denied it and said that he was taken to a magistrate's court but that his thumb impressions and signatures were taken on paper he did not know what was written on. The learned judicial magistrate erred in recording the confession. He admitted at trial that he had not inquired from Rizwan as to when and from where he had been arrested; that he had forgot to mention in the statement that though handcuffed, whether his handcuffs were ordered to be removed before he recorded the confession; he had not asked the appellant what language he was comfortable in and had presumed that the appellant understood and spoke Sindhi; he had not informed the appellant that what he would say could be used against him; he had not told the appellant that irrespective of what he said or did not say he would be sent to judicial remain; that although he had written that the appellant was not tortured or maltreated by the police and that his body had been examined, in fact, he had not checked his body for any signs of violence. The appellant was also not asked if he would like to seek legal advice before recording the confession. I have also had a close look at the actual confessional statement recorded. I am surprised that the confessional statement has the exact details of the appellant's arrest, though the learned magistrate acknowledged at trial that he had not asked the appellant these details. As mentioned above, contrary to the learned magistrate's admission at trial that he had not checked the body of the appellant for torture marks, the confession statement records that his body was checked and no marks of violence were found. I also find it out that when asked as to how long and at what places had the appellant been kept

in custody, he did not give an answer to the question but replied that he had gone to the police himself. Further doubts about the veracity and accuracy of the confession statement is raised when it records that the appellant was told that if he recorded a confession it will be used against him – the learned magistrate in his testimony recorded that he had not asked such a question from the appellant. The column of what offence the appellant had committed remained blank in the second last question he was asked. Further disparity between the confession statement and witness testimony is seen when the A.S.I. Mohammad Anwar, at trial said that when the confession was recorded the court staff was not present with the magistrate in the court room. The magistrate recorded that his staff was present. In view of the foregoing observations and the fact that not once but twice (once while pleading not guilty and second time in his section 342 Cr.P.C. statement) the appellant retracted his confession, I am inclined to conclude that it would be unsafe to base a conviction on such a retracted confession.

Opinion of the court

11. In light of the above observations, I am of the view that the prosecution failed to prove its case against the appellant beyond reasonable doubt. He is present on bail. His appeal is allowed and he is acquitted of the charge. His bail bonds stand cancelled and surety discharged, which may be returned to its depositor upon identification.

JUDGE