

IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Appeal No. 140 of 2016

Appellant : Muhammad Asif
through Mr. Patras Piyare, Advocate

Respondent : The State
through Ms. Robina Qadir, D.P.G.

Date of hearing : 25th November, 2022

JUDGMENT

Omar Sial, J.: A couple identified as Mohammad Farooq (63 years of age) and Fouzia (53 years of age), were found murdered in their apartment on 13.07.2010. The brother of the deceased male, a gentleman by the name of Mohammad Zubair, recorded a statement under section 154 Cr.P.C. seeking registration of an F.I.R. against unknown persons. F.I.R. No. 401 of 2010 was registered against unknown persons under sections 302 and 34 P.P.C. at the Aziz Bhatti police station on 14.07.2010 at 1:55 a.m.

2. Mohammad Asif, the couple's son-in-law married to their daughter Beena, was arrested on 07.09.2010 and the very next day he had confessed to the police that he had murdered the couple on 10.07.2010 because they would not give his wife the share in their property. The prosecution case is that on 12.09.2010, Asif led the police to some bushes from where the police recovered the crime weapon – a wooden rod. Asif's wife Beena was also arrested on a date which is not clearly borne out from the record.

3. Both Asif and Beena pleaded not guilty and claimed trial. The prosecution examined 10 witnesses in order to prove its case. **PW-1 Hina Farooq** was a daughter of the couple whom they had visited last. **PW-2 Mohammad Zubair** was the old man's brother who was the complainant of the case as well as one who witnessed the inspection of the dead bodies and the making of the inquest report. **PW-3 Mohammad Sumair** was PW-2 Mohammad Zubair's son and was the first person from the family to arrive

on the scene and discover the dead bodies. **PW-4 S.I. Mohammad Ismail Bhatti** was the first police responder and the officer who registered the F.I.R. **PW-5 A.S.I. Jamil Ahmed** was the officer who witnessed the arrest of the appellant and then the recovery of the wooden rod on his pointation. **PW-6 Abid Yousuf** ran a business close to the scene of the crime and had reached the spot when the dead bodies were being removed from the scene of the crime. **PW-7 Asadullah Nai** was the husband of the youngest daughter of the deceased couple. **PW-8 Dr. Farida Mobin** was the doctor who did the post mortem on the deceased female. **PW-9 Dr. Abdul Razzaq** did the post mortem of the deceased male. **PW-10 M. Raza Zaidi** was the investigating officer of the case.

4. In their respective section 342 Cr.P.C. statements, both Beena and Asif denied any wrong doing, professed innocence and further stated that they had been falsely implicated in the case due to inheritance issues. The learned 4th Additional Sessions Judge, Karachi East on 30.03.2016 announced his judgment in terms of which Beena was acquitted whereas Asif was convicted for an offence punishable under section 302(c) and sentenced to 25 years in prison on 2 counts. He was also directed to pay the legal heirs of the deceased Rs. 200,000 each as compensation or spend a further 12 months in prison.

5. I have heard the learned counsel for the appellant as well as the learned DPG. Despite repeated notices none appeared on behalf of the complainant. The learned counsel has argued that there was no evidence against the appellant whereas the learned DPG has supported the judgment impugned. My observations and findings are as follows.

Evidence against the appellant

6. The record reflects that the appellant was convicted on 3 pieces of evidence. These were:

- (i) Suspicion by Beena's sister PW-1 Hina Farooq;
- (ii) Last seen evidence in the shape of PW-6 Abid Yousuf,
- (iii) extra Judicial confession leading to recovery of wooden rod;

Suspicion by Beena's sister PW-1 Hina Farooq

7. Hina Farooq on 15.09.2010, 2 months after the incident, had recorded a statement under section 164 Cr.P.C. before the learned Judicial Magistrate No. 16, Karachi East in which she had shown suspicion on Asif. However, at trial she categorically and frankly conceded that she had implicated Asif in the case as she had been influenced by the neighborhood people saying that Asif had come to visit the couple and because Asif had confessed to the police. It is a matter of record that the learned magistrate was not examined at trial; however, even Hina herself at trial basically confirmed that her suspicion was based on hearsay. Doubt is also created in Hina's version because there was no real reason why Hina could not have told the police the same thing earlier and had to wait 2 months to make the disclosure. Recording of section 164 Cr.P.C. statement in such a situation raises further doubt as to the accuracy and genuineness of the contents of the statement. It is also pertinent to point out that PW-2 Mohammad Zubair and his son PW-3 Mohammad Sumair, both stated at trial that they had never heard from the couple that Asif was demanding a share from their property. It seems to me that the police arrested Asif only on the statement of PW-1 Hina Farooq, who herself would have been a beneficiary of her parents wealth if her sister Beena and her husband Asif were eliminated from the equation. The police had no real evidence against Asif and it appears that later in the investigation an effort was made by the investigating officer to create a ground for Asif's involvement in the offence. This involvement came through suspicion cast upon him and his wife by Hina Farooq. Asif could not have been convicted on the basis of such testimony.

Last seen evidence in the shape of PW-6 Abid Yousuf

8. Abid Yousuf testified that he ran a cable company in Mohammad Ali Society and that he was at his shop when he received a phone call from the watchman of the apartment building where the murder occurred informing him of the murder. He said that 4 or 5 days prior to the discovery of the dead bodies i.e. prior to 13.07.2010 he had seen Asif and Beena visiting the

couple. There was nothing odd about the visit as at the end of the day Beena was the couple's daughter and Asif their son-in-law. They were not estranged, except according to PW-1 Hina Farooq, and it would seem perfectly normal for a daughter to visit her parents. In fact Abid himself admitted that "the accused persons as well as other relatives of the deceased used to visit the deceased persons normally." Abid Yousuf's testimony, as far as its use against Asif is concerned, became further diluted when he admitted at trial that not only Asif and Beena, he had also seen other relatives of the deceased visiting the couple. He too acknowledged that he had never heard any complaint against Beena or Asif. He also said that the accused couple was very well behaved and courteous and that he had not seen either of them carry anything in their hands when he saw them, except a baby, who was with them. One does not need to go into last seen evidence too deeply in view of what the evidence recorded by Abid Yousuf in itself was.

Extra Judicial confession leading to recovery of wooden rod

9. The extra judicial confession made by Asif was retracted. I find it odd that the moment Asif is arrested he would confess immediately that it was he who had murdered the couple. Had his confession been motivated by genuine remorse there was nothing stopping him from making a judicial confession. A confession made to the police is inadmissible as evidence in accordance with the provisions of the Qanoon-e-Shahadat Order, 1984. It appears that the police made an effort to make the confession admissible by claiming that the crime weapon was found subsequently and hence Article 40 of the Order would be applicable. Article 40 may have come in play if the recovery was free from doubt. The record reflects that it was not. Abid Yousuf recorded that the couple held nothing in their hand except a baby when he had last seen them visit the deceased couple; it was alleged that prior to strangling the couple, Asif had hit them on their head with the wooden stick. The post mortem report shows that injuries were such that there would have been excessive bleeding. In fact the post mortem report shows that parts of the brain were oozing out of the skull. The clothes of

the deceased sent for chemical analysis reflects that their entire clothes were stained with blood. Yet, when the wooden stick with which the blows were said to have been inflicted, was recovered there was no signs of any blood on it. The stick was not sent for analysis however the witness to the recovery PW-5 Jamil Ahmed testified *"It is a fact no blood stain mark can be seen on the surface of the wooden rod present in court. It is a fact that no blood stains were seen or observed at the time danda was recovered from the bushes."* I also find nearly unbelievable that the danda, would lie in the same place outside the main gate of the apartment building where the deceased lived for a period of nearly 2 months before Asif pointed it out to the police. It was not an abandoned place from where the recovery was made. What makes the recovery even more doubtful is that no independent person was associated with the recovery though admittedly where the recovery was made was a place surrounded with shops though PW-5 Jamil Ahmed attempted to justify it by saying that the wooden rod was actually found from a 200 feet of wild bush. The circumstances in which the wooden stick was recovered were shrouded in doubt and to the contrary it appears that the same was foisted upon Asif by the investigating officer.

Opinion of the court

10. I am a little surprised that based on the evidence which was led at trial, Asif was convicted for the murder of the couple albeit under section 302(c) P.P.C. when on the same set of evidence (except the recovery of the crime weapon) Beena was acquitted. The evidence produced at trial was certainly not of a nature that would justify Asif's conviction for murder. The appeal is therefore allowed and the appellant acquitted of the charge. He may be released forthwith if not required in any other custody case.

JUDGE