

IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Appeal No. 205 of 2016
Criminal Jail Appeal No. 220 of 2016

Appellants : Ali Hasan & Sajid Ali
through M/s. Muhammad Rahib Lakho and
Shabbir Ahmed, Advocates

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

Date of hearing : 6th December, 2022

JUDGMENT

Omar Sial, J.: It was alleged by one Feroz Gul that on 11.06.2011 at about 7:00 p.m., Omer Mirjat and Sajjad Mirjat along with one other unidentified person had sodomised and strangled to death, his 10 year old son Pervaiz. F.I.R. No. 123 of 2011 was registered under sections 302 and 377 P.P.C. at the Thatta police station on 11.06.2011 at 8:30 p.m. The 3rd person was identified subsequently as being Ali Hassan Mirjat. One Eido Mirjat, who was the father of the accused Sajjad and Omer was also made an accused in the case on the ground that Pervaiz had been murdered by his sons on his encouragement.

2. All 4 accused pleaded not guilty and claimed trial. As both Omer and Sajjad were juveniles at that time, their trial was held separately from that of Ali Hassan and Eido Mirjat. The witnesses examined, the testimonies they recorded and the material brought on record was however the same in both trials. At trial the prosecution examined 10 witnesses to prove its case. **PW-1 was Feroze Gul**, the complainant. **PW-2 Abdul Razzak** and **PW-3 Ghulam Nabi** were both eye witnesses to the incident. **PW-4 Mohammad Azeem Mirjat** witnessed the inspection of the dead body, inspection of the place of incident as well as the arrest of the accused. **PW-5 A.S.I. Mohammad Bux** registered the F.I.R. on the complaint of PW-1 Feroz Gul. **PW-6 A.S.I. Ghulam Qadir** was the first police responder. **PW-7 Dr.**

Mohammad Yousuf did the post mortem of the deceased and also medically examined 2 accused. **PW-8 Dr. Inayat Rasool** examined accused Sajjad Ali. **PW-9 Mohammad Siddique** prepared the sketch of the place of incident. **PW-10 Inspector Saleem Jatoi** was the investigating officer of the case.

3. In his section 342 Cr.P.C. statement accused **Sajjad Ali** denied all wrong doing, professed his innocence and further stated that he was sitting at a hotel with Aijaz Ali and Gulsher Ali when the police arrested him. The false case had been filed against him due to previous enmity between his father and the complainant. Sajjad Ali gave a statement on oath under section 340(2) Cr.P.C. and also produced 2 witnesses, Aijaz Ali and Gulsher, to support his defence. Accused **Omar** also denied any wrong doing and also stated that enmity between his father and the complainant was the reason for the false accusation. He did not examine himself on oath nor did he produce any witnesses. Accused **Ali Hassan** denied any wrong doing and also stated that enmity between one of his relatives Ghulam Nabi and the complainant was the reason for the false accusation. He did not examine himself on oath nor did he produce any witnesses. Accused **Eido** also denied wrong doing. He also examined himself on oath and basically his stance was also that there was an enmity between the parties.

4. 2 separate judgments were announced by the learned 2nd Additional Sessions Judge, Thatta albeit both on 13.04.2016. Eido was acquitted whereas the remaining 3 accused were convicted and sentenced as follows:

- (i) under section 302 (b) P.P.C. to a life in prison as well as a compensation of Rs. 100,000 or a further 6 months in prison.
- (ii) under section 377 P.P.C. to 10 years in prison and a fine of Rs. 50,000 or a further 6 months in prison.

5. Both judgments have been challenged through these appeals. As both cases emanate from the same incident and the evidence led at both trials was similar, both appeals will be disposed of through this judgment.

6. I have heard the learned counsels for the appellants as well as the learned APG. A number of notices were sent to the complaint however he could not be found. The learned APG has argued that there are 3 eye witnesses to the occurrence and that the motive of the murder was enmity over a plot of land. It has also been argued that the medical evidence reconciles with the ocular evidence. The learned counsels for the appellants have argued the contrary. Neither produced any authority in support of their argument. My observations and findings are as follows.

Eye witnesses

7. PW-1 Feroze Gul (father of the victim), PW-2 Abdul Razzak (uncle of the victim) and PW-3 Ghulam Nabi (complainant's father-in-law) were eye witnesses to the throttling of the deceased but not to the sodomy.

8. According to all 3 witnesses when Pervaiz did not return home they went to look for him. Feroz and Razzak, who both lived within the same hedge boundary wall, testified that it was about 4:00 p.m. when Pervaiz had gone to play outside the home. The neighborhood boys playing outside had told both Feroz and Razzak that Omer and Sajjad had taken Pervaiz to Azeem Mirjat's poultry farm and when they reached there they had seen the 3 accused trying to subdue Pervaiz and throttling him with Pervaiz's shalwar tied around his neck. Ghulam Nabi was informed by his 2 sons as to what had happened and then he too had accompanied his sons to the place of incident. He too narrated the same details of what they saw. All 3 said that they told their fellow villagers as to what had happened and that the policemen at a nearby police post were also informed of the incident. Feroz had then gone alone to the Thatta police station to report the occurrence while Razzak and Ghulam Nabi stayed with the body. The dead body was taken away by the policemen deployed at the police post.

9. When PW-1 Feroz Gul went to the police station and registered the F.I.R. he recorded that he had seen Omer, Sajjad and one unknown who were sitting on Pervaiz and strangulating him. The third person was subsequently said to be Ali Hassan. Feroz Gul said that he could identify the

third person if he saw him again. Substantial doubt arose in the complainant's allegation when at trial he categorically admitted that "*It is correct to suggest that accused Ali Hassan is resident of our village and I know him from his childhood.*" There was evidence led at trial by the prosecution itself that there was sufficient light at the time of the incident. In those circumstances I do not believe the complainant that he did not recognize the third person. If the light was good enough for him to recognize 2 accused, it was also good enough to recognize the third. The complainant implicating him at a later stage reflects malafide and ill intent on his part. I also find it unnatural that PW-1 Feroz Gul, being the father of Pervaiz, did not make any effort to take him to a hospital immediately. It would be a natural reaction for a father upon seeing his son in the condition that he was that he be taken to hospital as a first step in the hope that he would survive. I also find it equally strange that none of the relatives of the deceased attempted to cover his nude body with any cloth and that when the body reached the hospital it was naked. None of the eye witnesses made any attempt to chase and apprehend the unarmed accused. Feroz Gul said at trial that upon seeing his son in the condition he was he was "not in his senses" for 25 minutes and that it was during this time that some unknown person had informed the police at the Bhagar Mori post about the incident. This does not reconcile at all with what PW-6 A.S.I. Ghulam Qadir said at trial. According to Qadir, PW-1 Feroz Gul had come himself to the post and informed him that his son had been murdered by someone and asked him to see the dead body. Feroz Gul had reached the post at 8:00 p.m. and 5 minutes later had left for the Thatta police station. This also does not reconcile with PW-1 Feroz Gul's statement.

10. PW-2 Abdul Razzak, who also had not identified Ali Hassan at the time of the incident admitted at trial that "*accused Ali Hassan was residing in our village and grew up in our village.*" Strange that he could not identify him then. PW-3 Ghulam Nabi also misrepresented at trial that the children

had told the complainant party that Ali Hassan was one of the 3 persons with whom Pervaiz had gone.

11. Another important aspect is that how did the 3 eye witnesses see the incident happening. The poultry farm was surrounded by trees and bushes. The height of the trees according to PW-1 and PW-2 was that of the height of a man and therefore one could see from top of them. According to PW-3 Ghulam Nabi; however, *“it is correct that poultry farm of Azeem Mirjat is surrounded by jungle and height of jungle is very much high and if any person go inside no one can see from outside.”* Although he corrected himself in the next sentence by saying that if a person went very close to the trees/bushes he could see inside. One does not know who to believe, although all 3 witnesses were said to be present together. PW-4 Mohammad Azeem who witnessed the inspection of the place of incident admitted that *“it is correct to suggest that no one can see through the jungle inside the abandoned poultry farm while standing outside.”*

12. The witness to the inspection of the dead body and the place of incident, as well as the arrest of the accused, i.e. PW-4 Mohammad Azeem got nearly all the time wrong when the memos were prepared. He tried to defend himself by saying that he did not have a watch and therefore was giving estimates. Perhaps this was true but getting the time off by 5 hours seems to be a stretch. He acknowledged at trial that his signatures on the memos as well as his signatures between his national identity card and the memos were different. He however still claimed that they were all his. A bare look at the signatures on the memos and the signature of this witness on his testimony reveals that they are massively different. I do not believe that this witness was honest at trial. The other witness to the inspection i.e. Qadir Bux, in such a situation should have been called to be examined. He was however given up by the prosecution.

Medical evidence

13. None of the witness saw the accused commit sodomy with the deceased. However, the witness claimed that they saw the accused

“throttling” the deceased to death. A bruise mark on the anal passage was the only sign on the deceased which made the doctor conclude that there had been sodomy. The perpetrator however could not be identified due to shabby investigation.

14. Coming to the medical evidence. The post mortem report shows that the deceased was identified by PW-2 Abdul Razzak and PW-3 Ghulam Nabi. PW-3 Ghulam Nabi however categorically admitted in his cross examination that he had not gone to the hospital with the dead body. How then did he identify it there remained unanswered. All 3 eye witnesses testified that all 3 accused were throttling Pervaiz when they saw him. The medical evidence however reveals one ligature mark around the neck. There were no finger marks or injuries on the neck of the deceased and no marks of resistance were seen. The one ligature mark would mean that Pervaiz died of ligature strangling or hanging. The width of the ligature mark in strangling would roughly correspond to the thickness of the material with which one is strangled. The witnesses did say at trial that although they saw all 3 accused throttling the deceased, the shalwar of the deceased was around his neck. If the case would have been that Pervaiz was strangled with his shalwar, the ligature mark would not have been 1 cm in width, as the post mortem report indicates.

15. In response to question 7 “Description of clothes or ornaments on the body”, the doctor wrote “Naked”. How did he then send the clothes of the deceased for chemical analysis as stated in response to question 23 remained unanswered. In his cross examination however he admitted that the body was received naked and that he did not receive any clothes of the deceased. A set of shalwar kameez, said to be that of the victim, which were not seized under a memo nor did any witness explain as to how they came in possession of the investigating officer was sent for chemical analysis. While, none of the witnesses said that the victim was bleeding from anywhere when found dead, oddly enough the chemical analysts report shows that there was blood on both, the shalwar and the kameez of the victim.

16. Both PW-1 Feroz Gul and PW-3 Ghulam Nabi testified that when they saw the deceased lying on the ground after the incident his neck was broken. The post mortem report revealed that this was not true.

Motive

17. The motive for the murder as Feroz Gul claimed was a dispute between him and accused Eido over a plot of land. Oddly, enough throughout the trial he or any one of his witnesses could not identify which plot it was and what was the dispute about. PW-1 Feroz Gul admitting at trial that *"It is correct to suggest that I have not stated the number and area of the plot and the description of the plot in my deposition."* His brother, PW-2 Abdul Razzak also stated that *"It is correct to suggest that I have not stated the number and description of the plot in my statement under section 161 Cr.P.C."* PW-3 Ghulam also stated that *"It is correct to suggest that I have not given the number, area and description of the disputed plot in my statement."* Motive was thus not proved.

Conclusion

18. It appears from the evidence that the naked boy Pervaiz strangled to death was found from within bushes at the Azeem Mirjat poultry farm. The body was taken to the hospital by Abdul Razzak. The incident did not however unfold in the manner in which it was depicted by the witnesses, all related to each other inspite of the claim that 100 to 200 villagers had gathered on the spot. In light of the observations made above and keeping in view the obviously false allegation leveled against Ali Hassan as well as Eido Mirjat, I am not inclined to agree that the sole statements of the eye witness, which remained uncorroborated, was sufficient to convict and sentence the accused. It does appear that the defence version of why the false case was filed against the accused did have weight and did deserve to be investigated. Sadly this was not done. The accused were therefore also denied their fundamental right of being treated in accordance with law without discrimination. While re-appraising the evidence, there is doubt

created in my mind, especially in light of the medical evidence. It is well established that the benefit of any doubt must go to the accused.

The appeals are allowed. The appellants are acquitted of the charge. If the appellants are not confined in custody in some other case, they may be released.

JUDGE