

IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Jail Appeal No. 430 of 2020

Appellant : Muhammad Aslam @ Chingari
through M/s. Qaim Ali Memon and Waqar Ali,
Advocates.

Respondent : The State
through Mr. Zahoor Shah, D.P.G.

Date of hearing : 1st September, 2022

JUDGMENT

Omar Sial, J.: In the early hours of 30.07.2017, a sleeping Iftikhar Ahmed was woken up by his mother who told him that their neighbor, a man by the name of Rashid alias Laal Topi, had come and informed her that her younger son, Imtiaz, had been murdered by Aslam alias Chingari (the appellant in these proceedings) and identified the place where the body was lying. Iftikhar, along with a brother of his named Nisar, went to the place identified and saw Imtiaz lying dead in a pool of blood. Iftikhar was told by Rashid alias Laal Topi and one other named Syed Abdullah, that they were sitting in the nearby bushes indulging in substance abuse (heroin) when they had heard noise and when they came out of the bushes to investigate they saw the appellant coming from the place where Imtiaz was later found dead, and while leaving Aslam had thrown something in the nearby bushes. The Railway Police arrived on the spot and took the dead body to the hospital for a post mortem. F.I.R. No. 36 of 2017 was registered under section 302 P.P.C. against the appellant at the Railway Police Station at 6:30 p.m. on 30.07.2017.

2. The Appellant pleaded not guilty to the charge of murder and claimed trial. At trial the prosecution examined **Iftikhar Ahmed** (the complainant and the brother of the deceased) as PW-1. **Nisar Ahmed** (another brother of the deceased) was examined as PW-2. **H.C. Muhammad Asif** (he was the police officer who first responded to the information of a person having died) was PW-3. **Muhammad Rashid alias Laal Topi** (he was the witness to Aslam leaving

the scene of occurrence) was examined as PW-4. **Syed Abdullah** (also a witness to Aslam leaving the scene of occurrence) was examined as PW-5. **Dr. Shahzad Ali** (the doctor who conducted the post mortem) was examined as PW-6. **S.I. Ashfaq Ahmed** (he was the investigating officer of the case) was PW-7. The appellant in his section 342 Cr.P.C. statement denied any wrong doing and said that the police had falsely implicated him.

3. The learned 4th Additional Sessions Judge, Karachi South, announced his judgment in the trial on 18.09.2020 in terms of which the Appellant was convicted for an offence under section 302(c) Cr.P.C. and sentenced to 14 years in prison. He was also directed to pay a fine of Rs. 50,000 and if he defaulted in payment he would have to stay in prison another 6 months. The appellant being dissatisfied with the judgment has preferred this appeal.

4. I have heard the arguments of the learned counsel and the learned DPG. No one effected an appearance on behalf of the complainant as notice could not be served on him on account of him having given an incomplete address. Learned counsel for the Appellant argued that as witnesses Muhammad Rashid alias Laal Topi and Syed Abdullah were heroin addicts, they could not be believed. No law or case law was cited by learned counsel in support of his argument. Learned DPG supported the impugned judgment. My observations and findings are as follows.

5. The evidence in the case against the Appellant is the testimony of Muhammad Rashid alias Laal Topi and Syed Abdullah as well as the recovery of the stone that the Appellant allegedly used to hit and kill Imtiaz. It appears that the Appellant, the deceased as well as the 2 witnesses who saw the Appellant leaving the place of incident were all habitual heroin users and in fact, that night too, all were catering to their respective addictions at 1:00 a.m. The deceased was found dead in or on top of a Railway "Ghumti". A "ghumti" is a small cabin, as for the guard at a level-crossing, or even any small structure covering a lever frame or other fixed equipment. The ghumti was, in the words of the complainant, *in a dilapidated condition and almost inaccessible, therefore, we took one hour to shift the dead body to Jinnah Hospital*. According to witness Nisar Ahmed the surroundings of the tower where the dead body was found *were deserted places and in the night time drug addicts used to stay there for having drugs*. It was also acknowledged by both witnesses i.e. Iftikhar and Nisar,

that both Rashid alias Laal Topi and Syed Abdullah were rather unsavory characters, and according to Nisar, had been *arrested several times in connection with their bad habits*. Nisar also admitted that both were in jail when his testimony was recorded at trial. In fact Rashid alias Laal Topi had also been arrested for the murder of Imtiaz along with the present appellant. Syed Abdullah gave a similar account as Rashid alias Laal Topi at trial. His section 161 Cr.P.C. statement was recorded by police on 04.08.2017 i.e. 4 days after the incident. No reason was attributed as to why this delay occurred. It is in the background of the foregoing that I have considered the testimony of these 2 witnesses.

6. The presumption made by the prosecution was that as the 2 witnesses had seen the Appellant leaving the place of incident, according to them 2 to 3 minutes after a commotion was heard, and immediately thereafter they had seen the dead body, it must necessarily be the Appellant who had killed Imtiaz. The learned counsel referred to this situation as “last seen” evidence. The ‘last seen together’ theory comes into play when the time gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead, is so small that the possibility of any person other than the accused being the perpetrator of the offence, is inconceivable. The present case is not one of “last seen together” as the prosecution has not even alleged that the appellant and the deceased were seen together when the deceased was alive. The case is purely based on circumstantial evidence i.e. as the place was deserted and the last person seen leaving the ghumti was the appellant, the body being found 2 to 3 minutes later from the ghumti must necessarily mean that it was the appellant who committed the murder. The appellant’s defence has been that he was nowhere near the place where the body was found and that the police had framed him. Why would the police and his fellow substance abusers do that was not explained nor was an attempt made by the appellant to explain it.

7. The question that arises is whether the testimony of a person who is a habitual user of heroin can be taken into account. Article 3 of the Qanun-e-Shahadat Order, 1984 provides that all persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender year, extreme old age, disease, whether of body or mind, or any other

cause of the same kind. The exceptions to this are provided in the same section which are (i) that a person shall not be competent to testify if he has been convicted by a Court for perjury or giving false evidence unless he has mended his ways; (ii) that the Court shall determine the competence of a witness in accordance with the qualifications prescribed by the Injunctions of Islam as laid down in the Holy Quran and Sunnah for a witness, and, where such witness is not forthcoming, the Court may take the evidence of a witness who may be available. It has not been argued before me that the 2 witnesses were unable to understand the questions put them at trial neither has it been argued that the injunctions of Islam prevent a user of drugs to be incompetent as a witness. The issue however is not whether the 2 witnesses were competent witnesses but whether they can be trusted in what they saw when under the influence.

8. According to the National Institute on Drug Abuse people who use heroin typically report feeling a surge of pleasurable sensation—a "rush." The intensity of the rush is a function of how much drug is taken and how rapidly the drug enters the brain and binds to the opioid receptors. With heroin, the rush is usually accompanied by a warm flushing of the skin, dry mouth, and a heavy feeling in the extremities. Nausea, vomiting, and severe itching may also occur. After the initial effects, users usually will be drowsy for several hours; mental function is clouded; heart function slows; and breathing is also severely slowed, sometimes enough to be life-threatening. Slowed breathing can also lead to coma and permanent brain damage. Repeated heroin use changes the physical structure and physiology of the brain, creating long-term imbalances in neuronal and hormonal systems that are not easily reversed. Studies have shown some deterioration of the brain's white matter due to heroin use, which may affect decision-making abilities, the ability to regulate behavior, and responses to stressful situations. The same conclusions as those of the National Institute on Drug Abuse are echoed by Lowinson, Ruiz, Millman, Langrod in the 4th Edition of their book, *Substance Abuse: A Comprehensive Textbook*. An Australian Government funded agency, Health Direct states similar short and long term functions. In addition, Health Direct also opines that heroin is a central nervous system depressant, which means it slows down brain activity and produces feelings of relaxation and drowsiness. People who take heroin may have slurred speech, slow breathing and trouble concentrating.

Identification of accused

9. The appellant was arrested the very next day i.e. 01.08.2017. A question to which the answer is not satisfactory is how the appellant was recognized as being the person who had killed Imtiaz. The complainant in his cross examination had acknowledged that *it is a fact that the accused was not known to me prior to the incident. It is correct to suggest that in the FIR I have not stated that I can identify the accused on seeing.* He also told the court that it was after the soym rites of his dead brother that he had gone to the police station and identified the accused. The same account was given by Nisar Ahmed, who was the brother of the complainant. How did he identify the appellant when he had not known who he was raised doubts on the impartiality of the police in its investigation. Doubt on the bonafide of the police is further magnified when the memo of arrest prepared by S.I. Ashfaq Ahmed records that the appellant was arrested sitting in a demolished railway room and that the complainant was accompanying the police and that the complainant was one of the persons who had identified the appellant as being Aslam alias Chingari. This misrepresentation opens the doors of doubt regarding the truth and veracity of the prosecution case.

Recovery of crime weapon

10. Admittedly, nothing was recovered from the place of incident when the police had prepared the memo of inspection of the place of incident. It will be helpful to examine what the witnesses stated at trial. It was alleged by Muhammad Rashid alias Laal Topi that the appellant while leaving the crime scene had *something* in his hand which he threw besides a tree. Syed Abdullah said that he had a *heavy* object which he had thrown, however, he admitted that he had earlier not told the police any description of what had been thrown by the appellant. The memo of recovery records that a *small stone* was recovered on the appellant's pointation. The investigating officer of the case acknowledged at trial that he had not described the stone recovered in the memo of recovery and he further testified that both the witnesses, Laal Topi and Syed Abdullah had told him that the appellant had thrown a *heavy object*. The doctor opined that the appellant had been hit by a *hard and blunt substance* and that no injury had been caused by a sharp edged object. As a matter of fact I am not entirely convinced that the stone which was produced at trial as the crime "weapon" was indeed the stone used in the crime. Stones around a ghumti are found a dime a dozen. It

would be rather easy to pick up a stone and claim that this was the stone used to kill. Especially when the complainant in his testimony admitted that Laal Topi had not even pointed out the “bushes” where according to him and Syed Abdullah, the appellant had thrown the object he carried while coming from the ghumti. Further, more doubt is cast at the prosecution case of recovery of the crime “weapon” when the complainant in his testimony stated that the ghumti was inaccessible and that it took a substantially long time for him and the police to recover the body and take it to the hospital; however, H.C. Muhammad Asif, the police man who recovered the stone at trial said that the ghumti was a mere 20-25 steps away from the road where the police mobile was parked. Be that as it may, whether or not the stone produced at trial was the actual stone, in the circumstances of the case, has little impact. There is no dispute that Imtiaz was hit with a stone repeatedly. Even if the correct stone was recovered, the same would not identify who used it.

11. In conclusion, keeping in view the fact that:

- (i) It was a dark night in a deserted area frequented by drug addicts and petty criminals;
- (ii) The ghumti was in an inaccessible place;
- (iii) The 2 eye witnesses to the appellant leaving the scene of incident were themselves under the influence of heroin and when the commotion occurred were sitting in a bush;
- (iv) Though the 2 witnesses claim that they were sitting in a bush very close to the ghumti, it seems odd that they did not witness the appellant or the deceased go into the ghumti;
- (v) The 2 witnesses themselves were picked up and detained by the police for the same murder. They did therefore have a reason to possibly falsely implicate the appellant;
- (vi) The 2 witnesses’ testimony is not confidence inspiring nor trustworthy.
- (vii) There is doubt whether the stone recovered was actually the stone used for the murder;
- (viii) The appellant had absolutely no motive to kill the deceased;
- (ix) Misrepresentations made by the investigating officer;

makes me conclude that it will not be safe to convict in the circumstances of the case. This is a case where there could be 2 versions. In accordance with well

settled principles of law, the version which is beneficial to the accused should be given preference. 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