IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Appeal No. 27 of 2018
Criminal Appeal No. 624 of 2017

Appellants	:	Ghulam Haider & Muhammad Salah through M/s. Tariq Ali Jakhrani and Shoaib Siyal, Advocates
Respondent	:	The State through Mr. Talib Ali Memon, A.P.G.
Complainant	:	through Ms. Farida Moten, Advocate
Date of hearing	:	16th February, 2023

JUDGMENT

Omar Sial, J.: 5 year old Zaibunissa went out of her house to buy something at 7:00 p.m. on 31.10.2010. She did not come back home. The panicked parents looked for her everywhere and also had announcements made through the local mosques of the area but to no avail. On 03.11.2010, the father of the little girl, Mohammad Dawood, received a phone call from the Gulistan-e-Johar police station that a body of a little girl had been found in a pond. Dawood went to the place identified by the police and most sadly recognized the floating body as that of his daughter. The little girl's shalwar and slippers were lying close to the pond. F.I.R. No. 571 of 2010 under sections 302, 376 and 34 P.P.C. was registered at 11:00 p.m. on 04.11.2010 at the Gulistan-e-Johar police station against unknown persons.

2. On 06.11.2010, 2 residents of the neighborhood informed Dawood that at 7:30 p.m. on 31.10.2010 they had seen Mohammad Salah and Ghulam Haider taking Zaibunissa away by holding her arm. Dawood took both the witnesses, Oshaq Ali and Mulazim Hussain to the police station where they told the investigating officer what they had seen and had their statements recorded. Both, Ghulam Haider and Muhammad Salah, were arrested on 07.11.2010.

3. The accused pleaded not guilty and claimed trial. At trial the prosecution examined **PW-1 Mohammad Dawood** who was the complainant and the father of the deceased girl. **PW-2 Bashir Ahmed** was a friend of Dawood who was with Dawood when the news of the dead girl was received. He then witnessed some initial steps taken in the investigation. **PW-3 Oshaq Ali** was one of the two persons who had last seen Zaibunissa with the accused. **PW-4 Mulazim Hussain** was the second person who had seen Zaibunissa last in the company of the accused. **PW-5 Niaz Ali** was the person who had first seen the dead body floating in the pond and had informed the law enforcement agencies. **PW-6 Zabiha Khattak** was the learned magistrate who recorded statements made under section 164 Cr. P.C. by Oshaq Ali and Mulazim Hussain. **PW-7 Dr. Abdul Razzak** had medically examined the 2 accused. **PW-8 Dr. Rohina Hasan** was the doctor who conducted the post mortem of the deceased girl. **PW-9 S.I. Syed Zahid Hussain** registered the F.I.R. in the case on Dawood's complaint. **PW-10 Dr. Mubarak Ali** was the doctor who collected blood samples from the 2 accused for DNA analysis. **PW-11 S.I. Mohammad Ali** was one of the first police responders and took several initial steps in evidence collection. **PW-12 S.I. Mohammad Ashraf** was the investigating officer of the case.

4. The 2 accused in their respective section 342 Cr.P.C. statements professed innocence and said that they were beaten and tortured by the police while in custody and that it was because of their complaints to the Magistrate that they were sent to judicial custody. They further said that they were made to ejaculate in a handkerchief. They did not examine themselves on oath nor did they examine any witness in their support. At the end of the trial, the learned 6th Additional Sessions Judge, Karachi East on 17.11.2017 convicted both accused to a life in prison for offences punishable under section 302(b) and 376 P.P.C. They were also directed to pay Rs. 100,000 each to the legal heirs of the deceased or spend a further period of 6 months in prison.

5. I have heard the learned counsel for the appellants as well as the learned APG who was assisted by learned counsel for the complainant. The

individual arguments of counsel are not being reproduced for the sake of brevity but are reflected in my findings and observations below.

6. The evidence against the 2 appellants was in the shape of (i) the testimonies recorded by PW-3 Oshaq Ali and PW-4 Mulazim Hussain, both of whom claimed they had seen Zaibunissa in the company of the appellants, and (ii) a DNA match between the vaginal swab of the deceased and the blood of the 2 appellants.

Vaginal Swabs

7. Dr. Rohina Hasan who was the doctor examined at trial testified that she had taken 2 vaginal swabs from the deceased. She also dismissed the suggestion that a vaginal swab cannot be taken from a ruptured vagina. The Institute of Bio-Medical and Genetic Science opined that the there was a DNA match from the vaginal swab and the DNA in the blood samples of both the accused. I have kept in mind that the body of the little girl had been lying in a dirty pond for 3 days and that when it was sent for post mortem it was in an advanced stage of decomposition. I would have liked more assistance from the counsels on whether vaginal swabs could successfully be taken after a lapse of 3 days. Unfortunately, the assistance did not come. A little research shows that according to the Punjab Forensic Science Agency, DNA evidence can survive indefinitely if it is dried and protected from heat, moisture, microbes and chemicals. Further, generally, semen may be detectable on vaginal swab collected within 72 hours of sexual intercourse. The vaginal swabs were collected by the doctor on 3.11.2010 and given to the investigating officer the same day. It was not until 23.12.2010 i.e. 50 days later that it was sent for analysis. During this period the samples were lying at the police station. It would be reasonable to conclude that the samples would have been exposed to heat, moisture and other elements during this period. Further, in light of the Punjab Forensic Science Agency's estimate that semen may be detected in a sample up to 72 hours of intercourse deviates substantially from the time frame of 53 days between the intercourse and detection. In light of the

foregoing, it appears that the appellants' version given in their respective section 342 Cr.P.C. statements that they were made to ejaculate in a handkerchief in the police station does have weight. The police claim that the sperm stained handkerchief was found from close to the place of incident at the pointation of the accused. Doubt which had been created would have been resolved had the handkerchief also been sent for chemical analysis and DNA match. This was not done. The handkerchief that was produced at trial was of a different color than what the police claimed it had recovered. The manner in which the vaginal swabs were collected, preserved and transported for analysis left a lot to be desired. Contamination of the samples in its preservation and late dispatch for testing cannot conclusively be ruled out. Nor can the truth behind what the accused said in their defence.

PW-3 Oshaq Ali

8. This man on 31.10.2010 at 7:30 p.m., while travelling from the village where the little girl went missing to his village, saw the little girl in the company of the 2 appellants. He did not think too much of what he saw as the accused Mohammad Salah was an employee of the complainant Dawood. Oshaq went to his village and the next day he left for Larkana. He was not aware that the little girl had been missing since. When he returned on 06.11.2010 he got to know that the little girl had been killed and it was then that he narrated to Dawood what he had seen. He explained in his cross examination that he too was in the cattle business and thus had done business with Dawood previously and that is how he knew Dawood and Mohammad Salah.

PW-4 Mulazim Hussain

9. This man was a neighbor of the complainant Dawood. He was at a barber shop when at about 7:30 p.m. he had seen Zaibunissa in the company of the 2 accused. He also did not see anything odd as the accused according to him were both employees of Dawood. Coincidently, he too left for Larkana soon thereafter and it was upon his return on 06.11.2010 that

he learned about Zaibunissa's death and hence informed her father what he had seen.

10. It seems to be a coincidence that both the eye witnesses had seen the deceased in the company of the 2 accused and that both had then gone to Larkana soon thereafter and also returned the same day and informed the complainant the same day as to what they had seen. Both the witnesses were not normal residents of the village where the incident occurred. One claimed he was going to his own village when he had seen the deceased and the accused while the other said that though he lives and works in Larkana, he was standing at a barber's shop when he saw the little girl and the 2 accused, as he was in Karachi for his day off. Both witnesses do not sound credible. What is also unusual is that while the complainant claimed that between 7:30 p.m. and 12:30 a.m. he had also had announcements made at the local mosque regarding his missing daughter. Neither of the 2 witnesses got wind of the girl who they had seen a little while earlier had gone missing and instead both decided to go to Larkana. They were both chance witnesses and the absence of any witness from the neighborhood who might have seen the deceased and the accused together means that the testimony of the 2 witnesses needs to be treated with great care and caution.

11. I also notice that both these witnesses said at trial that a sperm stained handkerchief was also found from near the place where the girl was found. PW-4 Mulazim Hussain however admitted that while the handkerchief recovered in front of him was black and red, the one produced as case property was yellow with black dots.

Medical Evidence

12. The police had initially recorded that death was a consequence of drowning. It was not explained at trial as to how it was determined that the deceased had been raped and murdered when the body was brought to the doctor. The doctor noticed that the body was in an advanced state of decomposition but that there were no obvious marks of injury on the body.

She found no abnormalities in the head, neck, thorax or abdomen. In particular she noted that “nothing abnormal noted in the neck region”. This finding was completely in contradiction to the prosecution case, which alleged that the 2 accused had told the police that they had strangled to death the little girl. The doctor also opined that she was not in a position to ascertain the cause of death. She also did not conclude that the deceased had been raped prior to death. I am at a loss to understand as to how it was concluded that the deceased had been murdered when there was absolutely no evidence to support the finding. To the contrary, the evidence recorded at trial showed a complete disconnect between what the prosecution alleged and what the medical evidence revealed. She acknowledged that even in her final report she could not ascertain the cause of death. It appears that the doctor was unable to also conclude whether the deceased girl had been raped prior to her death. She seems to have based her findings on the DNA report that showed that the DNA in the vaginal swab had matched the DNA of the accused. As mentioned above, that finding in itself does not appear clear of doubt. I notice however that there is a noting on the post mortem report which observes that “there is rupture of uterus along with tear in the vagina wall.” This would indicate trauma to the uterus as the uterus perhaps would not rupture on its own. Be that as it may, in spite of this finding the doctor did not conclude that rape was a possibility. It is not for me in appeal to make conjectures regarding the various reasons due to which the uterus may have ruptured, though it does seem that uterus was subjected to trauma. I will add however that the findings of the doctor regarding the uterus appear to have been made at an odd place on the post mortem report. In essence, the medical report did not conclusively support the prosecution case.

13. In view of the above observations it cannot be said that the prosecution proved its case beyond reasonable doubt. I am not convinced that the 2 witnesses did not record their statements as an afterthought; the cause of death was not ascertained; whether rape occurred or not was also doubtful; collection, preservation and transport of samples for DNA

purposes left plenty of room for contamination as well as doubt as to whether 53 days after the incident, semen could be detected in a vaginal swab taken from a thoroughly decomposed body that had been lying in a pond of dirty water for some days.

14. It is well settled that if doubt rises in a prosecution case the benefit of such doubt must go to the accused. The appeal is therefore allowed and the appellants acquitted of the charge. They may be released forthwith if not required in any other case.

JUDGE