

IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Jail Appeal No. 844 of 2019

Criminal Jail Appeal No. 918 of 2019

Appellants : Kaneez Fatima & Rameez Hameed Khan
through M/s. Mahmood-ul-Hasan and Mumtaz
Chandio, Advocates

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

Date of hearing : 27th February, 2023

JUDGMENT

Omar Sial, J.: On 14.03.2017 when A.S.I. Mohammad Shoaib Ashraf was on duty at the New Karachi police station he received information that a young girl by the name of Wajiha had been brought in a burnt condition to the Civil Hospital. The police officer reached the hospital but was told by the Chief Medical Officer that the victim was not in a position to record a statement. He met with Rameez, the husband of the victim, who told him that the real name of the burnt girl was Saleha and that she was lovingly called Wajiha at home. He also told the policeman that it was a domestic accident and that the family was not interested in filing a report. Rameez in his statement recorded at the hospital the same day further recorded that he had married Saleha with their own free will on 13.12.2015 and that the couple had been living together for a period of nearly 2 years. On **13.03.2017**, while he was sleeping he was woken up because of commotion in the house. He saw that Saleha was on fire and that his mother, Kaneez Fatima and his 2 sisters Somiya and Sana were trying to extinguish the fire. Saleha was first taken to a Qadri Clinic where the family was told that she should be taken to Abbasi Shaheed Hospital. Rameez however opted to take her to a Anjum Clinic, where again he was told to take Saleha to Abbasi Shaheed Hospital. Rameez claimed that Saleha was not given proper treatment and therefore he shifted her to the Civil Hospital.

2. Saleha remained in the hospital from **14.03.2017 till 28.03.2017**, when she most sadly expired due to her burns. Meanwhile, on **19.03.2017** she recorded a statement under section 154 Cr.P.C., which then formed the basis of the registration of F.I.R. No. 74 of 2017 under sections 324 and 34 (section 302 P.P.C. was added after Saleha's death) on **20.03.2017**. Investigation of the case was handed over to A.S.I. Bin Yamin. In her section 154 Cr.P.C. statement, Saleha recorded that she was 3 months into her pregnancy and that her husband Rameez had started quarrelling with her 2 months after the marriage. On 13.03.2017 Ramiz had physically abused her and locked her up in a room. At night Rameez had come to the room along with his mother Kaneez Fatima and started to beat her again. Kaneez Fatima lit up a paper from which she put on fire Saleha's dupatta and clothes. Upon Saleha's shrieks, her 3 sisters-in-law and the husbands' of 2 of them also came to the room and encouraged Kaneez Fatima and her son to keep going with their abuse. Finally, she was taken to the bathroom and after throwing water over her burnt body, they left her in the room. The family declined to accept her plea to take her to hospital and only did so after she had promised them that she will tell no one about what had happened.

3. Kaneez Fatima, Danish Hameed Khan, Khalid Hameed Khan, Somia Hameed Khan, Sana Hameed Khan, Mehreen Afzaal and Rameez Hameed Khan were all charged with Saleha's murder. All pleaded not guilty and claimed trial. At trial the prosecution examined 10 witnesses. **PW-1 Kaneez Fatima** was the mother of the deceased; **PW-2 A.S.I. Mohammad Shoaib Ashraf** was the first responder to the news that a girl who was burnt had been brought to the Civil Hospital; **PW-3 Dr. Noor Ahmed** was the medico-legal officer who was first informed that Saleha had expired in the Burns Ward; **PW-4 S.I. Niaz Hussain** was a police officer posted at the Khawaja Ajmair Nagri police station and was the first responder from that police station. PW-2 A.S.I. Mohammad Shoaib Ashraf had determined after his visit to the hospital that the New Karachi police station did not have jurisdiction in the matter; **PW-5 Dr. Sunil Kumar** was the medico-legal

officer who had first examined Saleha when she was brought to the Civil Hospital. He was also the doctor in whose presence Saleha had recorded her section 154 Cr.P.C. statement; **PW-6 Shoaib Noor Khan** was Saleha's cousin to whose house Rameez had first taken a burnt Saleha instead of taking her to a hospital; **PW-7 Abdul Moeed** was Saleha's older brother and spent some time with her while she was admitted in hospital; **PW-8 A.S.I. Bin Yameen Ali** was the first investigating officer of the case; **PW-9 P.C. Riyasat Ali** served as witness to various steps taken in the investigation; **PW-10 S.I. Mohammad Nawaz Brohi** effected arrests of the accused.

4. In their respective section 342 Cr.P.C. statements the 2 accused denied all wrong doing and professed innocence. All the accused also stated that they had been implicated in this case due to malafide of Saleha's family as she and Rameez had married each other out of their own free will. They declined to examine themselves on oath or to produce any witnesses in support of their case. At the end of the trial on 29.11.2019, the learned 7th Additional Judge, Karachi Central, convicted Kaneez Fatima and Rameez to a life in prison whereas the rest of the accused were acquitted. The convicted accused were also directed to pay a fine of Rs. 100,000 each to the legal heirs of the deceased and in case they failed they would have to spend a further one year in prison.

5. Learned counsel for the appellants has argued extensively to show that what Saleha told her family members cannot be trusted. He referred to the testimony of PW-6 Shoaib Noor Khan in support of his argument to show that in his section 161 Cr.P.C. statement, this witness had recorded that Saleha had told him herself that she had set fire to herself. Learned counsel also supported his argument by referring to the testimony of PW-5 Dr. Sunil Kumar and was of the view that this doctor, who claimed that Saleha had recorded her statement to the police in his presence, was neither a medical legal officer and that the medical certificate issued by the Burns Ward was a fake and forged one. He also reiterated what the accused had said in their section 342 Cr.P.C. statements i.e. the reason for false implication was malafide on the part of Saleha's family as she had married

Rameez against their wishes. Learned counsel also filed written arguments in which he has listed certain contradictions between the witness statements. The arguments form part of the record thus are not being reproduced for the sake of brevity. I have however considered them all and addressed the one I was of the view might be material. To the contrary, the learned APG has argued that even if there was no there evidence, the dying declaration made by Saleha must be given weight as a dying person does not lie. He fully supported the impugned judgment. At the end of the hearing in this case, Mr. Ehtishamullah Khan, Advocate appeared saying that he was representing the complainant. 2 opportunities were given to him to argue his case but he did not appear. For the sake of justice, even after reserving this case for judgment, one week's time was given to him to file written arguments if he so pleased. None were filed. I have heard the learned counsels and re-appraised the evidence recorded at trial. My observations and findings are as follows.

6. The only evidence in the case is a statement made by Saleha ostensibly on 19.03.2017 under section 154 Cr.P.C., which was treated as a dying declaration by the learned trial court and further the learned trial court was satisfied that the dying declaration was of such a nature in which the appellants could be convicted solely on its basis. The prosecution claims that Saleha was set on fire by her in-laws whereas the accused claim that Saleha herself attempted suicide.

7. The incident happens on 13.03.2017, however it is not until 19.03.2017 that the details of what transpired were revealed, ostensibly by Saleha herself. Saleha died on 28.03.2017 thus she could not testify at trial. The question arises therefore is whether what Saleha said can be treated as a dying declaration. The prosecution, through its witness **A.S.I. Mohammad Shoaib Ashraf**, claims that Ashraf had gone to the hospital the very next day i.e. 14.03.2017 but he was told by the Chief Medical Officer, Dr. Ginesh, that Saleha was not in a condition to record a statement. Dr. Ginesh was not examined at trial and thus the question arises as to whether if he would have been examined would he have supported the prosecution case. As no

explanation seems to be on record to clarify as to why Dr. Ginesh, being the very first doctor to have treated Saleha, as well as the doctor who confirmed her death and issued the death certificate was not examined at trial, seems to suggest that the presumption contained in Article 129 illustration g of the Qanun-e-Shahadat Order will come into play. It is also an admitted fact that A.S.I. Mohammad Shoaib Ashraf, the police officer who claimed that Dr. Ginesh did not give him permission to record the statement, himself did not record a section 161 Cr.P.C. statement in the investigation and it was for the first time at trial on 12.09.2018 that he recorded the occurrence. These lapses on the part of the prosecution has the impact of creating doubt in its case regarding whether what was recorded in the F.I.R. on 19.03.2017 was actually what was said by Saleha or whether it was incorporated on the desire of Saleha's family as the evidence reveals that Saleha's in-laws were not very well liked by Saleha's family.

8. Further doubt is cast when one goes through the testimony recorded by **PW-6 Shoaib Noor Khan** who was Saleha's cousin. He admitted at trial that the story he narrated at trial (which was in line with the prosecution case) was not what he had told the police when he had recorded his section 161 Cr.P.C. statement. In his initial statement he recorded, which he categorically admitted at trial was made without any pressure or duress, was read out to him and he confirmed the contents of the same, he had told the police that Saleha, when she came to him had told him that she herself had tried to set herself on fire because she was unhappy with Rameez. From his testimony it seems that Saleha was in a fit enough condition to accompany her in-laws to Shoaib's house soon after the incident and similarly was in a fit enough condition to speak to him. This witness further confirmed that his section 161 Cr.P.C. statement was recorded by the police after the registration of the F.I.R. PW-Bin Yamin Ali confirming that it was 25.03.2017 (6 days after the registration of the F.I.R.) that Shoaib's statement was recorded. This would mean that Shoaib knew on 13.03.2017 that Saleha had been burnt by her in-laws but did not tell

anyone and even when he did tell the police 6 days later, his first version of what had transpired was completely different to what he narrated at trial and it was on 25.03.2017 that he changed it. This witness was Saleha's cousin; he was the first person to whom Saleha was taken to by her in-laws after the incident and before she went to the hospital. If Saleha was afraid to tell the truth at that time, there was nothing stopping him from informing the police as to the real facts of the case. There was no reason for him to wait for another 6 days and then too he recorded that it was Saleha herself who had attempted to commit suicide.

9. Another witness who claimed that he was privy to Saleha's disclosure was PW-7 Abdul Moeed. This witness claimed that though he worked in Hyderabad he had come to Karachi on 14.03.2017 after hearing about the incident. According to him the same day, Saleha told him what had transpired (which was in line with the prosecution case). Once again, this witness stayed quite for 5 days before he told the police what Saleha had told him. The reason he gave as to why the F.I.R. was not registered earlier as it seems that all and sundry knew who had set Saleha on fire as early as 14.03.2017 was not satisfactory. He said that he stayed with Saleha till 17.03.2017 at the hospital only and that he had then gone to Thatta to bring his mother-in-law to see Saleha on 18.03.2017. According to him, he had gone to the police to register an F.I.R. but the police declined to do so as the accused had given the police the wrong address of the hospital where Saleha was admitted. His version is unbelievable as the prosecution itself admitted that PW-2 A.S.I. Mohammad Shoaib Ashraf had visited the Civil Hospital on 14.03.2017 to try and record Saleha's statement and that soon after visiting the hospital on the same day he had handed over papers connected with the case to S.I. Niaz Shaikh of the Khawaja Ajmer Nagri police station. Entries of the Daily Diary produced by this witness at trial also supported his version. Saleha's family also knew exactly where Saleha was admitted hence PW-7 Abdul Moeed appears to have misrepresented at trial and his testimony cannot be relied upon safely to uphold a conviction.

10. Another witness claiming that she was privy to Saleha's disclosure was PW-1 Kaneez Fatima, her mother. Kaneez Fatima's credibility is impacted from the fact that she admitted at trial that though she was present with Saleha when Saleha made the disclosure and that she was also present when Saleha recorded her section 154 Cr.P.C. statement, the police did not record her section 161 Cr.P.C., not then, not ever. It was at trial first time that Saleha's version of events as recorded in the section 154 Cr.P.C. statement was given by this witness. The date of arrival of this witness is also marred in mystery, as she claimed that she had come to the hospital the very next day of the incident i.e. on 14.03.2017 whereas PW-7 Abdul Moeed testified that the first time Kaneez Fatima came to the hospital was on 18.03.2017. If Kaneez Fatima's version is to be accepted then it seems odd that she too did not inform the police that Saleha was burnt by her in-laws.

11. PW-5 Dr. Sunil Kumar is a witness who said that he was present when Saleha had recorded her section 154 Cr.P.C. statement. Learned counsel has argued extensively to show that Kumar cannot be trusted. His argument is based on the fact that Kumar admitted that he was not a medico-legal officer but a medical officer posted at the Civil Hospital on 19.03.2017 (the date when Saleha is said to have recorded her section 154 Cr.P.C. statement). He claimed that it was the very day when Saleha had arrived at the Civil Hospital. This was completely incorrect as according to the prosecution case, Saleha had come to the Hospital on 14.03.2017 and had been admitted there till her death. Dr. Kumar was also wrong when he testified at trial that Saleha had told the police that she had been admitted to various hospitals before coming to the Civil Hospital that day. The prosecution case was that she had been admitted at the Civil Hospital on 14.03.2017. There is no explanation on record to show as to why Saleha, who was already admitted in the Burns Ward had to come to the Emergency Ward when she had to record a statement. His narration of how Saleha had come to him does not gel in with the prosecution case. Kumar claiming that he had attended to Saleha as there was no female doctor

available at that time. This statement of his also seemed incorrect if one is to believe PW-4 S.I. Niaz Hussain (the police officer who recorded the statement) who testified that when he had reached the Hospital there were 4 to 5 doctors on duty and 2 of them were women doctors. In contradiction to what Kumar testified, Niaz Hussain said that not only were the 2 lady doctors present there but that the parents, brother and other relatives were also present. Keeping in view the conservative set-up the victim families were from, it seems odd that it was Kumar who attended to Saleha and none of the relatives of Saleha even recorded a section 161 statement that day. In fact they never did till the trial. During the course of hearing in this case the learned counsel for the appellants strongly submitted that the Death Certificate on record is a fake one and that there was no doctor by the name of Sunil Kumar who was ever a medico-legal officer in fact he was not even a doctor. In order to do justice, the Medical Superintendent of the Civil Hospital was asked to confirm both aspects. She confirmed that the Certificate was in the record of the Hospital but no record of a Dr. Sunil Kumar working as a medico-legal officer during the period was found. She conveyed her inability to confirm whether it was possible that a doctor by the name of Sunil Kumar worked at the Hospital as a doctor. Dr. Sunil Kumar's testimony recorded at trial was not convincing, trust worthy or confidence inspiring.

12. It is an admitted fact that Saleha and Rameez had eloped when she was 15 years old and he 16 years. Saleha's family was against the marriage and for a long time did not even meet their daughter. It seems all of them emerged after this incident. The marriage was a love marriage and nothing on record was brought to show that Saleha had ever complained about Rameez's attitude towards her. The fact that all family members, men and women, of Rameez's family were implicated in the crime also suggests malafide and spite of the deceased's family. I cannot conclusively rule out in light of the evidence that the statement under section 154 Cr.P.C. was a consequence of what Saleha told the police and that it was free and devoid of all prompting by her enraged family. I am therefore not convinced that

what the prosecution terms as a dying declaration was indeed a dying declaration nor that it was a true version of events that Saleha herself disclosed.

13. In view of the above, it is my opinion that the prosecution did not prove its case beyond reasonable doubt. The appeals are therefore allowed and the appellants acquitted of the charge. They may be released forthwith if not required in any other custody case.

JUDGE