

IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Appeal No. 630 of 2022

Appellant : Aqil Bashir
through M/s. Azhar Ali Channa, Muhammad
Mazan Buledi and Hussan Bano, Advocates

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

Date of hearing : 29th March, 2023

JUDGMENT

Omar Sial, J: Aqil Bashir (**Aqil**) is accused of stabbing 35 year old Shabbir (interchangeably referred to as “Shabbir”, “Shabana” and “the deceased”) sometime between 3:00 p.m. and 4:00 p.m. on 13.04.2019. F.I.R. No. 233 of 2019 was registered on the complaint of Allah Jiwaya (**Jiwaya**) on 14.04.2019 under section 302 P.P.C. at the Ferozabad police station. Aqil was arrested on 21.04.2019 and the charge framed against him on 19.09.2019. He pleaded not guilty and claimed trial.

2. At trial the prosecution examined **PW-1 Allah Jiwaya** who was the complainant. **PW-2 Iftikhar Hussain** who was a witness to the last seen together. **PW-3 Sheikh Saleem Iqbal** who was the landlord of the premises where Shabbir was killed. **PW-4 Rana Shahzaib** was a policeman who was one of the first responders to the news of a dead body having been found in a flat. **PW-5 Dr. Aijaz Ahmed** who conducted the post mortem on the deceased. **PW-6 S.I. Nizamullah Siddiqui** who, apart from being one of the first responders, also registered the F.I.R. **PW-7 Abdul Aziz alias Bindiya Rana** was a transgender and member of various human rights groups. **PW-8 Akeela Bibi** was an ex-wife of the deceased. **PW-9 Rana Saifullah Hassan** was the learned magistrate who recorded the section 164 Cr.P.C. statement of PW-2 Iftikhar Hussain. **PW-10 Aftab Ali** was a witness to the last seen together. **PW-11 S.I. Iftikhar Ahmed** was the investigating officer of the case.

3. In the section 342 Cr.P.C. statement that was recorded by Aqil he explained that he had been falsely implicated in this case because of a Rangers official who was friends with his father-in-law. The father-in-law was not happy with Aqil as his daughter, Sobia, had eloped with him. He further stated that he was arrested from Cantonment Station and the news of his arrest was also published in the national media. While he did not examine himself on oath or produce any witness, he did produce certain documents along with news reports in order to support his statement.

4. At the end of the trial, the learned 5th Additional Sessions Judge, Karachi East on 6-10-2022 convicted Aqil under section 302(b) P.P.C. and sentenced him to a life in prison as well as directed him to pay a fine of Rs. 300,000 to the legal heirs of the deceased and if he did not pay the fine he would have to remain in prison for a further period of 5 months. It is this judgment that has been challenged by Aqil through these proceedings.

5. I have heard the learned counsels for Aqil as well as the learned APG. The complainant did not effect an appearance despite notice and several opportunities given to appear and put forward his stance. The individual arguments of counsel are not being reproduced for the sake of brevity but are reflected in my findings and observations below.

6. Although a murder case, it is different in a manner that Shabbir was a transgender and said to be married to Aqil; whereas simultaneously it seems that Aqil had been married to Sobia and had five children from her. The main evidence in this case presented by the prosecution was (i) the last seen together theory evidenced through PW-2 Iftikhar Hussain and PW-10 Aftab Ali; both claiming that they had seen Aqil leaving the flat where the dead body was found, and (ii) recovery of the murder weapon.

The last seen together

7. PW-2 Iftikhar Hussain at trial stated that he was a tailor and had his workshop on the top floor of the building in which the murder occurred. At about 10:00 a.m., a tea boy came to his shop and told him that sounds of people quarrelling and crying were emanating from a flat on the 2nd Floor of

the building (which was the crime scene). Iftikhar said that he went to investigate and knocked at the door of the flat which was responded by Aqil from inside, who was the husband of Shabana (she was the deceased, also known as Shabbir), and who told him that it was their personal issue and that he should not interfere. Iftikhar repeatedly tried to intervene and enter the flat but repeatedly received the same response after which he went back to his workshop. After the maghraib prayers he found the door of Shabana's flat open and her dead body lying inside.

8. I find it quite strange that Iftikhar claimed to have a shop on the top floor of the building and had been there for at least a period of 2 years but in this 2 years the only resident he could identify in the entire building was only Shabana and also knew that she was married to Aqil but that he had not seen Aqil for 2 years while they had been living there. I do not believe this statement of his. The police never verified that he did indeed have a tailor shop on the top floor. None of the other residents of the building or the neighborhood gave statements that would support Iftikhar's assertion. In fact it is also strange that nobody from the entire locality, which was a densely populated area with a range of jewelry shops on the ground level recorded a statement. It also appears from what Iftikhar testified that he had only heard a voice from inside the flat when he had knocked at the door and according to him that was the voice of Aqil. One wonders how could he be so sure of whose voice he heard when he had not even seen Aqil for a period of 2 years and before that too there is nothing to show that he was even acquainted with Aqil. It was also admitted by this witness that a number of people used to visit Shabana and quarrelling sounds emanating from the flat were a common occurrence. Iftikhar's assertion at trial that Shabana and Aqil lived in the flat as husband and wife also became doubtful when PW-3 Sheikh Saleem Iqbal, who was the landlord of the flat, testified at trial that he had rented out the apartment to one Waqar Kiyani against a rent of Rs. 26,000 per month but that Kiyani had then let out 2 rooms in the flat to Shabana. The landlord did not even mention the name of Aqil, let alone that he was the husband of Shabana

and also lived in the flat. Kiyani disappeared soon after the incident, raising suspicion of his involvement in the case. The police however did not think it relevant to probe him.

9. Yet another reason I doubt Iftikhar's statement is that he knew the very day that Shabana had been murdered and also claimed that he was the first person who saw the dead body and called the police to the scene and was present there when they came, yet, he did not record his section 161 statement until 3 days later. It seems that he remained silent and did not even tell the police what he had witnessed as the F.I.R. that was lodged subsequently has no mention of the entire story he narrated at trial. Let alone the police he also did not reveal anything to the landlord of the building. Towards the end of his cross examination he admitted that he had not seen any person outside the flat of the deceased when he had gone to investigate the sound of quarrelling and neither when he discovered the dead body. His suspicion was based solely on identifying a voice of a person who he had not seen or met for 2 years and perhaps had never met or seen in his entire life. No credence can be given to the utterances of such a witness.

10. PW-10 Aftab Ali Dahiri also claimed to be a witness of "last seen together". According to him he was a regular visitor to Shabana's home. Surprising, as PW-2 Iftikhar had said that Shabana and Aqil had been living in the apartment for 2 years as husband and wife. He claimed that at about 3:00 p.m. or 3:30 p.m. on the day of the murder i.e. 13.04.2019 he had seen Aqil in the flat with a blood stained dagger while Shabana lay dead inside the apartment. It is surprising in view of this assertion that the other witness PW-2 Iftikhar Hussain who claimed to be roaming around the crime scene at the same time did not notice Aftab Ali Dahiri also roaming around the flat. In fact Iftikhar said that he saw no one. Aftab Ali Dahiri was a chance witness at best as he admitted that he had given 3 different addresses of where he lived to the court at trial, in his identity card and the section 164 Cr.P.C. statement recorded by the learned magistrate. It appears to me that like Iftikhar Hussain, this witness was a stock witness

produced by the investigating officer to support the prosecution case. Like, PW-2 Iftikhar Hussain, this witness too did not tell the police what he saw till 15 days after the incident when he recorded his section 161 Cr.P.C. statement. No credence can be given to his testimony. In any case, both the alleged witnesses to the last seen together theory recorded belated section 161 Cr.P.C statements. The Supreme Court of Pakistan has held in a number of cases that belated section 161 Cr.P.C. statements without a plausible reason for delay reduces their value to zero.

Recovery of the murder weapon

11. Recovery of the alleged murder weapon is also shrouded in mystery and appears to have been foisted upon the appellant. My reason for so concluding is that that while PW-2 Iftikhar Hussain, who was the first person who discovered the body and called the police categorically confirmed that no dagger or knife was lying next to the dead body. In complete contradiction, PW-4 P.C. Rana Shazaib, the first police officer who came to the crime scene upon being informed by Iftikhar, testified that S.I. Nizamullah had recovered a cleaver and a knife that was lying next to the dead body.

Call data record

12. The call data record collected by the investigator did not reveal any contact between Aqil and his presumed "wife" Shabana. This too I find unnatural and strange as it would be reasonably expected that husband and wife would indeed speak to each other on the phone. The complete absence of any proof to the contrary casts suspicion on the entire prosecution story of Aqil and Shabana being married and living together for 2 years.

Marital status

13. There is ample evidence on record to show that Shabana was actually a male and was named Shabbir. His identity card and medical report reveals the same. It also came on record that Aqil was married to Sobia and that he

had 5 children from her. Sobia's statement that she had recorded in the court of the learned 12th Judicial Magistrate was brought on record and the said statement reflects that she had married Aqil with her own free will and that she had been confined at the Pannah Shelter and wanted to leave the Shelter with her husband. A nikahnama of her marriage with Aqil was also produced. As much as I can stretch my imagination, I am unable to concur that Aqil was married to Shabana, as has been claimed by the prosecution to justify his presence in Shabana's flat on the day of the incident. The marriage claim further becomes doubtful when the testimony of Bindiya (a transgender leader) is taken into account. She did not even mention in her testimony that Shabana was married to Aqil. It would be reasonably expected that keeping in view the very small and tight transgender community, Bindiya would have at least known that one of her colleagues was married to a man named Aqil.

14. When looked at in juxtaposition, it is the defence version that sounds more credible than the prosecution version. Some officials of the Rangers do appear to have taken an interest in the case and news reports that were published in the main stream media soon after the arrest of the appellant also support the version he gave in defence.

15. In view of the above, I conclude that the prosecution had completely failed to prove its case beyond reasonable doubt. The appeal is allowed and the appellant acquitted of the charge. He may be released forthwith if not required in any other case.

JUDGE