

IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Jail Appeal No. 292 of 2020

Appellant : Abdul Rasheed @ Rashid
through Mr. Habib-ur-Rehman Jiskani, Advocate.

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

Date of hearing : 29th November, 2023

JUDGMENT

OMAR SIAL, J.: On 18.06.2016 at 10:30 a.m., Talib Hussain reported to the police that on 06.06.2016, he had gone to his native hometown, leaving his 45-year-old brother Abid Hussain home alone in Karachi. On 11.06.2016, Talib Hussain was informed over the phone that Abid's dead body had been found at the Edhi morgue. The dead body had been identified by another brother of Talib's who was in Karachi then. F.I.R. No. 107 of 2016 was registered at the Tipu Sultan police station under sections 302 and 34 P.P.C. on 18.06.2016 against unknown persons. The dead, when found, was naked with a condom on his penis and his throat slashed with a knife.

2. Abdul Rashid, the appellant, was arrested for this crime on 22.06.2016 when the police found that he had made five phone calls to the dead from 8:58 p.m. on 10.06.2016 till 12:51 a.m. on 11.06.16. When arrested, Abdul Rashid told the police that Abid Hussain would sodomise him, and therefore he had killed him. On 23.06.2016, he led the police to a garbage dump, from where the knife he used in the killing was recovered.

3. The appellant pleaded not guilty and claimed trial. At trial, **PW-1 Dr. Sheeraz Ali** was the doctor who did the post-mortem. **PW-2 Talib Hussain** was the complainant. **PW-3 Mohammad Amjad** was a person who claimed that he had seen someone leave the house of the deceased on the morning

of 11.06.2016. **PW-4 Syed Sibtain Shah** was the deceased's elder brother who identified the body in the morgue. **PW-5 P.C. Abdul Qayum** and **PW-6 S.I. Mohammad Saleem Zakarya** were the first responders to the news that a dead body had been found. **PW-7 A.S.I. Mehmood Afzal** was the first responder from the Tipu Sultan police station. **PW-8 Faima Nosheen** was the learned Magistrate who recorded some section 164 Cr.P.C. statements in this case. **PW-9 S.I. Mushtaq Ahmed** was the investigating officer of the case.

4. In his section 342 Cr.P.C. statement, the appellant denied all wrongdoing and professed his innocence. The learned 1st Additional Sessions Judge, Karachi South, on 22.02.2020, convicted the appellant for having committed a crime under section 302(b) P.P.C. and sentenced him to life in prison and compensation to be paid to the legal heirs of Rs. 500,000.

5. I have heard the learned counsel for the appellant and the learned Deputy Prosecutor General. The complainant made an appearance; however, he stated that he did not want to engage a counsel to represent him. The individual arguments of counsels are not being reproduced for brevity but are reflected in my observations below.

6. The evidence against the appellant was in the shape of a "last seen" call data record and recovery of the crime weapon upon his lead.

Last seen together

7. The only witness in this case who was of any substance was **PW-3 Mohammad Amjad**, the person who claimed that he had seen someone leave the house of the deceased on the morning of 11.06.2016. It does not require emphasis that this ground relied upon by the prosecution was not a "*last seen together*" but "*last seen leaving the premises alone*" evidence. I am sceptical about the accuracy and truth of Mohammad Amjad's statement. He said in his testimony that it was the morning of 11.06.2016 when he was coming back from his morning prayer at a mosque when he saw a person, whom he had not identified in any manner, be it his name or

description, locking the house of the deceased from the outside while holding a plastic shopping bag in his hand. It was in the evening of the next day, which would be 12.06.2016, that he saw a crowd of people outside the deceased's house, and that is when he came to know that Abid had been murdered. The record shows that the dead body had been deposited in the Edhi morgue on the evening of 11.06.2016. Thus, Mohammad Amjad said at trial that it was the evening of 12.06.2016 when the mob of people and police had gathered outside the crime scene, which appeared to be a misstatement that he made at trial. Speaking hypothetically, even if it was 11.06.2016 and not 12.06.2016 when Mohammad Amjad discovered the murder, the police were admittedly present when he learned about the murder. However, this witness did not inform anybody about what he had seen the previous morning. His statement was also not recorded by the police. Ten days later, on 22.06.2016, when the police brought the appellant to the crime scene, Mohammad Amjad recorded his statement that he implicated the appellant as the same man he had seen leaving the house. No identification parade was held for Mohammad Amjad to identify the appellant. This witness claimed that he lived in the same building as the deceased; however, at trial, he admitted that he did not know his address because the house was situated in a *katchi abadi*. This also appears to be a misstatement because the prosecution said that he lived in the same building as the deceased, yet a complete address of the property has been given by the police of the place where the dead body was discovered. I do not believe Mohammad Amjad when he said that he did not know the address of where he lived because his house did not have an address. Mohammad Amjad did not explain why he had not informed anybody of the sighting until the police arrested the appellant and brought him to the crime scene.

8. When not corroborated by other evidence, last-seen evidence is a weak type of circumstantial evidence. Further, in **Mohammad Abid vs The State (PLD 2018 SC 813)**, the Supreme Court explained that the last seen theory was where two people were seen together alive, and then after

some time, one was found dead while the other was alive. As mentioned above, this was not the situation in the present case, as nobody ever saw the dead and the appellant together, let alone Mohammad Amjad. There was no motive for the appellant to kill Abid. The prosecution claimed that the appellant had confessed before the police that he had killed Abid because Abid used to sodomize him. A doctor inspected the appellant to determine whether he had been sodomised, but the doctor was unable to give any opinion. The motive remained un-investigated and un-proved. There might have been proximity in space, but indeed not a tiny proximity in time between when Mohammad Amjad ostensibly saw a person leave (at about 5:30 a.m.) and the body being discovered (at 5:00 p.m.). The approximate time between death and the post-mortem (at 6:30 p.m. on 11.06.2016) was opined by the doctor to be 16-24 hours. This time frame also does not gel with the time Mohammad Amjad gave when he saw a person leave the crime scene. If the doctor was correct in his opinion, that would mean that Abid had died on the evening of 10.06.2016. The suspicious manner in which Mohammad Amjad conducted himself at trial by not giving his address and claiming that the appellant was the same person he had seen in the dark, had not known or seen before, not identifying the appellant in an identification parade, not telling anybody about what he had seen till well the arrest of the appellant, makes me believe that he was a stock witness introduced specially by the prosecution to strengthen its case.

Recovery of the crime weapon

9. A lot is desired from the city municipality. Still, I find it difficult to believe that the crime weapon lay intact, waiting to be discovered, in a garbage dump for twelve days without it being picked up by a trash collector. Talib Hussain acknowledged that only he was present when the recovery took place and that the police did not ask a private person present to be a witness. The recovered knife was not presented as case property in court, it being claimed that the same was burnt in a fire in the maalkhana. Not much credence can be given to such a recovery.

Call data record

10. More and more cases are being filed. in which the prosecution claims conviction based on call data records. While the record may be a helpful tool in the investigation process and could be used as supporting evidence in a certain case, only a little weight can be given to a record, showing a few entries displaying that two persons had talked to each other. A conviction can indeed not be based exclusively on the call data records.

11. Given the above, there was sufficient doubt created in the prosecution case, the benefit of which doubt should have gone to the appellant in accordance with well-settled principles. The appeal is allowed, and the appellant acquitted of the charge. He may be released forthwith if not required in any other custody case.

JUDGE