

THE HIGH COURT OF SINDH AT KARACHI

Criminal Jail Appeal No.459 of 2016
Criminal Appeal No.46 of 2017
Confirmation Case No.14 of 2016

Present:

Mr. Justice Naimatullah Phulpoto

Mr. Justice Mohammad Karim Khan Agha

Appellant: Yousif Barmi son of Nabi Hussain through Syed Anwar Ali Shah, advocate

Respondent: The State through Mr. Muhammad Iqbal Awan, Deputy Prosecutor General Sindh

Date of hearing: 20.11.2018

Date of announcement: 27.11.2018

JUDGMENT

NAIMATULLAH PHULPOTO, J.- Through this judgment, we shall answer Murder Reference No.14 of 2016 and decide Criminal Jail Appeal No.459/2016 and Criminal Appeal No.46 of 2017 (Yousif Barmi v. The State). Appellant Yousif Barmi was tried by learned Additional Sessions Judge-I, Malir Karachi. Consequently, appellant, vide judgment dated 10.11.2016, was convicted under section 302, PPC and sentenced to death as Tazir. Trial court made Confirmation Reference No.14 of 2016 to this Court.

2. The prosecution case, shorn of unnecessary details, may be stated thus, Mukhtiar Ali (deceased) was fisherman, he used to reside alone in a rented quarter in Abu Katchi Quarters. According to the case of prosecution, accused Yousif Barmi had taken loan of Rs.200,000/- from the deceased, when he demanded the said amount, present incident took place. It is stated in FIR that deceased was paternal cousin of the complainant. There was a quarrel in between accused and deceased on 24.11.2011 but it was settled. Complainant was residing separately. He left his home as usual on 25.11.2011 for the work but he received telephonic information on the way that accused Yousif Barmi has committed murder of Mukhtiar Ali. After receipt of such information, complainant came to the house of Mukhtiar Ali and found him seriously injured. Thereafter, injured was shifted to the hospital but he succumbed to the injuries at 11:00 a.m. MLO, JPMC conveyed such information to the concerned police station. Complainant lodged such report against the accused at P.S. Ibrahim Hyderi on 25.11.2011 at 15:30 hours. It was recorded vide crime No.328/2011 under Section 302, PPC.

3. ASI Muhammad Juman proceeded to Jinnah Postgraduate Medical Center and prepared inquest report of deceased Mukhtiar Ali in presence of mashirs Muhammad Jalal and Muhammad Asghar. Thereafter, dead body was handed over to complainant Muhammad Jalal.

4. Akbar Hameed SIO inspected place of incident along with complainant Muhammad Jalal and Saeed Chohan, situated inside the house of deceased at Shahanshah Chowk, Ibhram Hyderi, Karachi. IO took photographs of place of occurrence. He collected bloodstained earth from the place of wardat and sealed it at the spot. Such mashirnama was prepared. IO had also secured one bloodstained shirt of accused from the place of incident and sealed it. Accused Yousif Barni was arrested on 25.11.2011 at 18:45 hours from D-29 Van Stop on the pointation of the complainant in presence of mashirs complainant and PC Abdul Ghaffar. IO conducted personal search of accused and recovered one mobile phone. Complainant identified said mobile phone set, owned by deceased. It was sealed at the spot. Accused was brought to the police station. On 26.11.2011 accused was interrogated by the IO. During interrogation, accused Yousif Barni disclosed that he had obtained Rs.200,000/- as loan from deceased, when deceased demanded return of the said amount, he committed his murder by means churri blows when he was sleeping in his room and made his escape good. During interrogation, accused voluntarily prepared to produce churri used by him in the commission of offence. IO took accused in his private car along with his subordinate staff on 26.11.2011 at 1920 hours. Accused led the police to Abu Hassan Mill, near PMT bushes and produced bloodstained churri in presence of mashirs, namely, PCs Qadir Bux and Abid Hussain. Churri was sealed at the spot. Such mashirnama was prepared. During further interrogation, IO found shirt and trouser of accused stained with blood. Accused admitted that his shirt was bloodstained during commission of murder of deceased. IO recovered/collected bloodstained T-Shirt and trouser in presence of PWs Muhammad Jalal and Sajjad, IO prepared such mashirnama and sealed the same. IO sent bloodstained clothes of the deceased, accused, bloodstained churri and earth to the chemical examiner for report. 164, Cr.PC statement of PW Muhammad Arif was recorded on 30.11.2011 by learned Judicial Magistrate-I, Malir Karachi. IO collected the reports of the chemical examiner. On the conclusion of the investigation, challan was submitted against the accused for offence under section 302, PPC.

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5. Case was sent up to the Court of Sessions for trial and it was made over to learned Additional Sessions Judge-I, Malir, Karachi for disposal according to law.
6. Learned trial Court framed charge against the accused at Ex.2. Accused pleaded not guilty and claimed to be tried.
7. At trial, prosecution examined PW-1 complainant Muhammad Jalal, who produced FIR No.328/2011 at Ex.3/A, statement under section 154, Cr.PC at Ex.3/B, memo of inspection of place of wardat at Ex.3/C, Memo of Arrest of accused at Ex.3/D, Memo of recovery of bloodstained clothes of accused at Ex.3/E, inquest report at Ex.3/F, PW-2 Muhammad Juman at Ex.5, PW-4 Qadir Bux at Ex.6, PW-5 Muhammad Arif at Ex.8, PW-6 Dr. Nasreen Qamer at Ex.9, PW-7 Akbar Hameed at Ex.10. Thereafter, prosecution side was closed vide statement at Ex.11.
8. Trial court recorded statement of accused under section 342, Cr.PC at Ex.12, in which accused claimed false implication in this case and denied the prosecution allegations. Accused did examine himself on oath in disproof of prosecution allegations. Accused did not lead any evidence in defence. In reply to question No.8, have you to say anything else? He replied as under:
- "Yes Sir, I am innocent and not committed the Qatl-i-Amd of deceased. Sir, police arrested me and other fishermen (1) Arif (2) Rafique and 2 others and released some of the persons by taking bribe and some of them which promise that they will depose against me. Sir, I have been falsely implicated due to nonpayment of bribe to police. I pray for justice."
9. Learned trial Judge, after hearing the learned counsel for the parties and assessment of the evidence, vide judgment dated 10.11.2016 convicted and sentenced to death as stated above. Hence, these appeals were filed. By this single judgment, we intend to decide aforesaid appeals as well as the Murder Reference for confirmation of death sentence.
10. Mr. Anwar Ali Shah, learned advocate for appellant, mainly contended that PW-5 Muhammad Arif was setup eye witness, in fact, incident was un-witnessed. It is further contended that eyewitness has failed to disclose probable cause of his presence in the house of the deceased at such odd hours of the night; that source of light has also not been disclosed by PW-5. It is further contended that evidence of PW Arif was also contradictory to the medical evidence with regard to age of injuries; that independent persons of the locality

were not examined by the prosecution at trial; that motive as alleged in the prosecution case has not been established at trial; that there was no evidence with regard to the safe custody of the churri and its safe transaction to the chemical examiner. It is argued that in absence of evidence of safe custody, positive report of the chemical examiner would not improve the case of prosecution. Lastly, argued that there was no evidence to connect the accused with the crime. In support of his contentions, learned counsel for the appellant relied upon the following cases:

1. 2003 PCr.LJ 1847 (Abdul Hussain Vs. The State)
2. PLD 2002 Supreme Court 1048 (Ayub Masih Vs. The State)

11. Mr. Muhammad Iqbal Awan, learned Deputy Prosecutor General Sindh, has argued that eyewitness Muhammad Arif has given obliging statement with regard to the time of incident but clearly stated that churri blows were caused to the deceased by the appellant. Learned D.P.G. further argued that churri used by accused in the commission of offence was produced by him during investigation and it was sent to the chemical examiner and report was positive. Learned D.P.G. argued that prosecution has proved its case against the appellant and prayed for dismissal of the appeal. In support of his contentions, he relied upon the following cases:

1. 2006 SCMR 1744 (Khan alias Khani and another vs. The State)
2. 2006 SCMR 1857 (Muhammad Ehsan vs. The State)

12. We have carefully heard the learned counsel for the parties at length and scanned the entire evidence available on record.

13. Firstly, we discuss medical evidence. In order to prove unnatural death of deceased Mukhtiar Ali, prosecution has examined PW-6 Dr. Nasreen Qamer, Senior WMLO at JPMC, Karachi at Ex-9, she had worked with Dr. Jagdesh Kumar (whose whereabouts were not known after retirement) and she is well conversant with his handwriting and signatures. She deposed that as per record, on 25.11.2011 at 11:00 am, dead body of Mukhtiar Ali son of Saleemullah aged about 40 years was brought by one Muhammad Jalil at JPMC Karachi, such information was conveyed to Police Station Ibrahim Hyderi Control Room. She produced Medico Legal Certificate of Mukhtiar Ali at Ex.9/ A and deposed that it was in handwriting and signature of Dr. Jagdesh Kumar. Medical Officer had started postmortem examination of deceased at 12:00 p.m. on 25.11.2011 and finished at 01:00 p.m. Medical Officer found following injuries on the person of deceased Mukhtiar Ali:

Surface wounds and injuries

- 1) Lacerated wound 8 cm x 1.5 cm x bone exposed on occipital region.
- 2) Incised wound 4 cm x 2 cm muscle deepen lt. forearm medically middle 1/3 area.
- 3) Stab wound 3 cm x 1 cm x cavity deep below nipple lt. chest in front.
- 4) Stab wound 1.5 cm x 1 cm x cavity deep on below axil.
- 5) Stab wound 1.5 cm x 1 cm x cavity deep on lt. chest on sixth inter costal space laterally.
- 6) Stab wound 3 cm x 1 cm x cavity deep on lt. chest ster inter costal space laterally.
- 7) Stab wound 4 cm x 2 cm x cavity deep on lt. chest posteriorly below scapula.
- 8) Stab wound 4 cm x 2 cm x muscle deepen mid thoracic region.
- 9) Stab wound 6 cm x 2 cm x cavity deep on lt. chest posteriorly on 7th inter costal space.
- 10) Stab wound 5 cm x 1.5 cm cavity deep on 9th intercostal space lt. chest posteriorly.

GENERAL PARTICULARS

HEAD : Injury No.1 mentioned in Page No.2 vall-of stall intact. Meninges and sutures damaged at site of injury. Bran matter congested.

NECK : No mark of injury or violence seen on neck.

TORAX : Injuries No.3 to 10 mentioned in Page No.2 heard and lt. lung tears seen cavity full of blood. Lungs and heart congested.

ABDOMEN : No mark of injury or violence seen in abdomen. Liver, spleen, kidneys intact and congested.

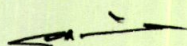
Time between death and postmortem as mentioned in the Medico Legal Certificate was 2 to 3 hours.

The medical officer, from the external as well as internal examination of the dead body of deceased, was of the opinion that death of deceased occurred due to cardiorespiratory failure, hemorrhage shocks, head and chest injuries resulting from injuries caused by sharp edged weapon.

14. From medical evidence, it is established that Mukhtiar Ali died by means of injuries caused with sharp edged weapon as described by the Medical Officer.

OCULAR EVIDENCE

15. Ocular evidence has been furnished by PW-5 Muhammad Arif, he has deposed as under:



"I am eyewitness of this case. Deceased Mukhtiar Ali was known to me, who was fisherman by profession. I was also working as fisherman. I used to reside with Mukhtiar Ali. On 25.11.2011, I was sleeping in the room of Mukhtiar Ali, situated at his House at Shahensha Chowk, Ibrahim Hyderi. On the said night at about 11:00 p.m. I heard cries in the room and awaken and saw that accused Yousif Burmi who was previously known to me as he was also working as fisherman was having churri in his hand and he was causing injuries to Mukhtiar Ali on his body and blood was oozing on the ground. By seeing this incident, I became semi-unconscious. After few minutes when I became in a sense and saw the dead body of Mukhtiar Ali was lying on the ground and Mohalla peoples and brother of deceased were gathered. I disclosed the above facts to them. Police recorded my 161, Cr.PC statement on 25.11.2011. On 31.11.2011 accused Yousif was brought by police in the Court of Magistrate at Malir Court, Kaachi where I was also produced before the Magistrate and the concerned Magistrate where the concerned Magistrate recorded my 164 Cr.PC statement as per my verbatim with my own wish and will without any force. The contents of my 164, Cr.PC statement were read over to me by the concerned Magistrate and after admitting its contents, I put my signature. My statement was recorded in presence of accused Yousif Barmi."

16. We are unable to believe the ocular evidence for the reasons that eyewitness has stated that incident took place at 11:00 p.m. According to learned D.P.G., incident took place at 11:00 am on 25.11.2011, PW-5 eye-witness Muhammad Arif has deposed that incident took place on 25.11.2011 at 11:00 p.m. at night time, when he heard cries and saw that accused was causing churri blows to deceased. Present position is that there is significant ambiguity in the timings of incident, prosecution has failed to resolve it. While appreciating ocular evidence, we have found that eyewitness Muhammad Arif had not disclosed the source of light on which culprit was identified. Record reflects that PW-5 Muhammad Arif claims to be the sole eyewitness of the incident and friend of the deceased and he was living in the house of the deceased, but the conduct of the eye witness at the time of the incident appeared to be unnatural. His conduct is to be judged by this court at touch stone of Article 129 of the Qanun-e-Shahadat Order, 1984, which is reproduced as under:-

"129. Court may presume existence of certain facts.—The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."

The close scrutiny of the evidence of the eyewitness Muhammad Arif clearly shows that no effort was made by eyewitness to rescue the deceased. He

made no efforts to catch hold of the accused. In his evidence, he has not disclosed the names of the persons who had gathered immediately after the incident. He has not explained his presence in the house of the deceased at 11:00 p.m. It has come on record that his house is situated at a distance of 5 kilometers from the house of the deceased. Evidence of PW Muhammad Arif was also contradictory to the medical evidence with regard to the time of the incident. According to the medical certificate dated 25.11.2011, issued by doctor Jagdesh Kumar, injured (now deceased) arrived in hospital on 25.11.2011 at 10:50 a.m., whereas, above named eyewitness has clearly deposed that it was night time incident, which took place at 11:00 p.m. Ocular evidence is fully contradictory to the medical evidence. In our considered view, presence of eyewitness in the house of deceased at the time of incident has not been established. Complainant Muhammad Jalal has given another episode of incident, he deposed that the deceased was his paternal cousin, he was fisherman and used to reside alone in Abu Katchi in rented House. On 25.11.2011, complainant left home for preparing the grill, he was informed by his friend on phone that Yousif Barmi (present appellant) has committed murder of Mukhtiar Ali. On such information, he returned to the house of the deceased and saw that the deceased was being shifted to the hospital in Ambulance in injured condition. They reached in the hospital at 11:00 a.m. and injured succumbed to the injuries. Medical Officer in his certificate Ex.9/B has mentioned that Mukhtiar Ali (now deceased) was admitted in hospital on 25.11.2011 at 10:50 a.m. PW-5 Muhammad Arif, eyewitness of the incident, has deposed that he was sleeping in the house of Mukhtiar Ali on 25.11.2011 on the said night at 11:00 p.m. he heard the cries from the room of Mukhtiar Ali and saw that Yousif Barmi was causing him churri blows and he became semi-unconscious. Evidence of PW Arif, who claims to be the eyewitness is contradictory to the evidence of complainant and the timings given by the medical officer in the medical certificate.

17. We have already disbelieved the evidence of eyewitness Muhammad Arif on the ground that he could not explain his presence and reason to sleep in the house of the deceased on the relevant night, particularly, when his house is situated at a distance of 5 KM from the house of the deceased. Moreover, evidence of PW-5 Muhammad Arif was contradictory to the medical evidence.

18. The only piece of evidence relied upon by the prosecution was the recovery of bloodstained churri on the pointation of the appellant during investigation. We have found that safe custody of the recovered weapon and its

subsequent safe transmission to the chemical examiner had not been established by the prosecution at all. Moreover, statement of accused was not recorded by the investigation officer before leaving police station that accused was prepared to produce crime weapon used in commission of crime. Therefore, the recovery of churri would not connect the appellant with the commission of offence and positive report of chemical examiner would not improve the case of the prosecution as held by the Honourable Supreme Court in Criminal Petition No.953 of 2018 decided on 12.10.2018. Relevant portion is reproduced as under:-

“The only piece of evidence relied upon by the prosecution was regarding recovery of a bloodstained hatchet from the custody of respondent No.2 during the investigation but it had been noticed by the High Court that safe custody of the recovered weapon and subsequent safe transmission of that weapon to the Chemical Examiner had not been established by the prosecution at all. In these circumstances, the High Court had concluded that the prosecution had failed to prove its case against respondents No.2 to 4 beyond reasonable doubt and we have not been able to take any legitimate exception to the said conclusion reached by the High Court. This petition is, therefore, dismissed and leave to appeal is refused.”

MOTIVE

19. As regard to the motive, according to the case of prosecution, deceased had given Rs.200,000/- loan to accused, when the said amount was demanded by deceased, much annoyance was caused to the appellant and he committed murder of the deceased. We have carefully examined the entire prosecution evidence. Motive set up by the prosecution in the FIR has not been established at trial. There is no evidence that on which date, time and place loan was given by the deceased to the accused and there was no evidence that from where Rs.200,000/- were arranged by the deceased, who belonged to a labour class. We hold that motive alleged/set up in FIR has not been established at trial through convincing and cogent evidence.

20. Admittedly, there are two versions of incident, one given by eyewitness that incident took place at night at 11:00 p.m., other version by complainant and medical evidence that incident took place at 11:00 a.m. It is well settled that if two versions or interpretation of incident are equally possible, the one favourable to the accused should be preferred and accepted as held by the Honourable Supreme Court in the case of Abdul Majid vs. the State (1973 SCMR 108).

21. A judgment should be based strictly on the evidence available on record. It should also, above all things, be balanced not only in ideas, but also in

arrangement of the different pieces of evidence discussed therein. Findings cannot be based on conjectures only. The findings of the trial court in paras 14 and 15 of the judgment are based on mere surmises and not on any evidence. **Judgment of trial Court is also legally erroneous. Compensation to the heirs of deceased as required under Section 544-A, Cr.PC has not been ordered. Compensation is mandatory in nature.**

22. Needless to mention that while giving the benefit of doubt to an accused it is not necessary that there should be many circumstances creating doubt. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of such doubt, not as a matter of grace and concession, but as a matter of right. It is based on the maxim, "it is better that ten guilty persons be acquitted rather than one innocent person be convicted". Reliance in this behalf can be made upon the cases of Tariq Pervez v. The State (1995 SCMR 1345), Ghulam Qadir and 2 others v. The State (2008 SCMR 1221), Muhammad Akram v. The State (2009 SCMR 230), Muhammad Zaman v. The State (2014 SCMR 749) and Muhammad Mansha v. The State (2018 SCMR 772).

23. For the above stated reasons, we are clear in our mind that case against appellant is not free from doubt. The benefit of doubt is, therefore, extended to appellant and he is acquitted. The impugned judgment dated 10.11.2016 is set aside and appeals are accepted. Confirmation Reference is answered in negative. Appellant Yousif Burmi son of Nabi Hussain, who is in custody, be released forthwith, if not required in any other case.

24. Let copy of this judgment be sent to Mr. Shafi Muhammad Pirzada, Additional District and Sessions Judge, through learned Registrar of this Court, wherever he is posted for future guidance and record.

27-11-2018
JUDGE

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JUDGE