

Last Seen Evid
No S. 342 Qws.

03

IN THE HIGH COURT OF SINDH, KARACHI

Criminal Appeal No. 470 of 2019

Appellant;	Abdul Razzak through Dur Muhammad, Advocate
For State;	Mr. Abrar Ali Khichi, Additional Prosecutor General Sindh.
Complainant;	Learned counsel called absent without intimation despite being on notice.
Date of Hearing	17.01.2024
Date of Announcement	22.01.2024

JUDGMENT

Mohammad Karim Khan Agha, J:- The appellant Abdul Razzak S/o. Muhammad was proceeded against in the Court of Additional Sessions Judge-I/Model Criminal Trial Court, Thatta in respect of Crime No.16 of 2015 under section 302/34 PPC registered at P.S. Ghorabari whereby the appellant was convicted and sentenced vide judgment dated 20.07.2019 to undergo imprisonment for life along with fine of Rs.100,000/- as compensation in terms of section 544-A Cr.P.C. payable to the legal heirs of deceased Hussain Horai. Such compensation shall be recoverable as arrears of land revenue. However, in case of default in payment of such compensation the appellant shall undergo S.I. for six months. The appellant was also extended the benefit of section 382-B Cr.P.C.

2. The brief facts of the prosecution case as per FIR are that the complainant is residing in the above stated address with her sons Alladin, Hussain Sadeek, Ghani and Ahmed. On 01.05.2015 complainant went with son Hussain on motorcycle to meet with daughter Fatima W/o. Ahmed Horai at Village Muhammad Horai. That at sunset time Razzak S/o. Muhammad Horai came at the house of Ahmed Horai and he said my son Hussain that his brother Habib calling on phone to pick him, let us go to pick him as he is waiting at Sim Nali. On that the complainant replied that we are late, we will go home. On that Razzak said that he accompanying Hussain

going to pick Habib and will be back at the earliest. Thereafter, Razzak riding on motorcycle of complainant's son in presence of daughter Fatima W/o. Ahmed Horai and Safiat W/o. Jajo Horai went left. That at about 9 'O' Clock, at night we received information that my son Hussain was killed. I cried that my son Hussain has killed by Razzak with collusion of Habib S/o. Muhammad Horai, Moosa S/o. Ramzan Horai Ishaq S/o. Yaroo Horai, who has previous enmity with my son Hussain. On this information my sons Allahdino, Ghani and Mamoon Horai and other villagers rushed to Sim Nali, where my son Hussain was killed. My son Ghani saw that towel was rapped on neck and face of deceased Hussain and my son Ghani kept the said towel with him for identification. Thereafter the information was made to police and police reached at the place of incident and after legal usual action took dead body of my son Hussain at Civil Hospital, Makli and after post mortem, brought my son for funeral. I went unconscious when dead body brought at home. Thereafter the identification of towel was made and found that it was of Habib Horai. Now have come to lodge complaint that Razzak S/o. Muhammad Horai took my son Hussain on motorcycle went to Sim Nali and in collusion of Habib, Ishaq and Moosa Horai have killed him who have enmity with us.

3. After usual investigation the case was challaned and the case was sent up for trial. The appellant and his co-accused plead not guilty to the charge and claimed trial.

4. The prosecution in order to prove its case examined 11 witnesses and exhibited various documents and other items. The statement of the appellant and the co-accused was recorded under Section 342 Cr.P.C in which they denied all the allegations leveled against him and claimed false implication based on enmity.

5. After hearing the parties and appreciating the evidence on record, the trial court convicted the appellant and sentenced him as set out earlier in this judgment; hence, the appellant has filed these appeals against his conviction. The three other co-accused however were acquitted of the charge and no appeal has been filed against their acquittal

6. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the impugned judgment dated 20.07.2019

passed by the trial court and, therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

7. Learned counsel for the appellant has contended that the appellant is innocent and has been falsely implicated in this case by the complainant on account of enmity; that the FIR was lodged after an unexplained delay of 4 days which gave the complainant ample opportunity to consult and cook up a false case against him on account of their enmity; that there was no eye witness to the murder; that the pistol recovered from the appellant on his arrest a few days after the incident was foisted on him by the police; that the prosecution evidence does not meet the legal standards of last seen evidence; that the FSL report is in the negative in so far as 2 of the recovered empties are concerned; that there are material contradictions in the evidence of the prosecution witnesses which rendered their evidence unreliable; that the appellant had already served 9 years in jail and as such based on all or any of the above circumstances the appellant should be acquitted of the charge by being extended the benefit of the doubt. In support of his contentions he placed reliance on the record.

8. Learned Additional Prosecutor General Sindh on behalf of the State, after going through the entire evidence of the prosecution witnesses as well as other record of the case has supported the impugned judgment. He mainly contended that the delay in lodging the FIR has been explained; that although there is no eye witness in this case it is a case of last seen evidence which legal requirements have been fully met which has been corroborated/supported by the recovery of a pistol from the appellant which lead to a positive FSL report when matched with two empties recovered at the crime scene; that the medical evidence supported the prosecution case and as such the prosecution had proved its case against the appellant beyond a reasonable doubt and the appeal be dismissed. In support of his contentions, he placed reliance on the cases of *Ghulam Nabi v. The State* (2007 SCMR 808) and *Muhammad Nadeem alias Deemi v. The State* (2011 SCMR 872).

9. Based on my reassessment of the evidence of the PW's especially the medical evidence and other medical reports, recovery of blood and empties at the crime scene I find that the prosecution has proved beyond a reasonable doubt that Hussain (the deceased) was murdered by firearm on or about 01.04.2015 at about 8.30pm hours at the path of Wadi Sim Nali near Dargah Lal Sain Deh Jhalarandi Taluka Ghorabarj District Thatta.

10. The only question left before me is whether it was the appellant who murdered the deceased by firearm at the said time, date and location?

11. After my reassessment of the evidence I find that the prosecution has NOT proved beyond a reasonable doubt the charge against the appellant keeping in view that each criminal case must be decided on its own particular facts and circumstances and in accordance with the settled law for the following reasons;

- (a) The FIR was lodged after a delay of 4 days without any adequate explanation which gave the complainant the time to cook up a false case against the accused along with her relatives who also appeared as PW's who had enmity with the appellant. The reason for the delay was apparently because when the complainant heard about the death of the deceased she immediately remained unconscious for about 4 days in hospital. However despite immediately falling unconscious she was able to prohibit the other members of the family some of whom were not with her at the time to lodge the FIR as she would do so. It does not appeal to logic, reason or commonsense that the male members of her family who found the body of the deceased who was their relative would not have lodged the FIR under the prevailing circumstances. The complainant produced no evidence that she had been admitted in hospital for 4 days which casts further doubt on this aspect of the case. Admittedly the police were notified on the day of the incident but the murder was allegedly against unknown persons as per roznamcha entry. It is well settled by now that even less than a day unexplained delay in lodging the FIR can be fatal to the prosecution case. As such I find this 4 day inadequately explained delay in lodging the FIR to be highly damaging to the prosecution case.
- (b) Admittedly there is no eye witness to the murder.
- (c) The prosecutions case primarily revolves around the doctrine of last seen evidence i.e that according to a number of prosecution witnesses the deceased left the house with the appellant and was

found dead within an hour of last being seen with the appellant which leads to the only possible inference that the appellant was the person who murdered the deceased.

The law on last seen evidence is well set out in the case of *Fayyaz Ahmed V State* (2017 SCMR 2026) where it was held as under;

"The last seen evidence is one of such categories of evidence. In this category of cases some fundamental principles must be followed and the Prosecution is under-legal obligation to fulfill the same, some of which may be cited below:-

- (i) *There must be cogent reasons that the deceased in normal and ordinary course was supposed to accompany the accused and those reasons must be palpable and prima facie furnished by the Prosecution.*
- (ii) *The proximity of the crime seen plays a vital role because if within a short distance the deceased is done to death then, ordinarily the inference would be that he did not part ways or separated from the accused and onus in this regard would shift to the accused to furnish those circumstances under which, the deceased left him and parted ways in the course of transit.*
- (iii) *The timing of that the deceased was last seen with the accused and subsequently his murder, must be reasonably close to each other to exclude any possibility of the deceased getting away from the accused or the accused getting away from him.*
- (iv) *There must be some reasons and objects on account of which the deceased accompanied the accused for accomplishment of the same towards a particular destination, otherwise giving company by the deceased to the accused would become a question mark.*
- (v) *Additionally there must be some motive on the part of the accused to kill the deceased otherwise the Prosecution has to furnish evidence that it was during the transit that something happened abnormal or unpleasant which motivated the accused in killing the deceased.*
- (vi) *The quick reporting of the matter without any undue delay is essential, otherwise the prosecution story would become doubtful for the reason that the story of last seen was tailored or designed falsely, involving accused person.*

Beside the above, circumstantial evidence of last seen must be corroborated by independent evidence, coming from unimpeachable source because uncorroborated last seen evidence is a weak type of evidence in cases involving capital punishment.

- (vii) *The recovery of the crime weapon from the accused and the opinion of the expert must be carried out in a transparent and fair manner to exclude all possible doubts, which may arise if it is not done in a proper and fair manner.*
- (viii) *The Court has also to seriously consider that whether the deceased was having any contributory role in the cause of his death inviting the trouble, if it was not a pre-planned and calculated murder.”(Bold added)*

In the later case of **Muhammed Abid V State** (PLD 2018 SC 813) which delved further into the doctrine of “last seen together” evidence it was held as under;

“The foundation of the “last seen together” theory is based on principles of probability and cause and connection and requires 1. cogent reasons that the deceased in normal and ordinary course was supposed to accompany the accused. 2. proximity of the crime scene. 3. small time gap between the sighting and crime. 4. no possibility of third person interference 5. motive 6. time of death of victim. The circumstance of last seen together does not by itself necessarily lead to the inference that it was the accused who committed the crime. There must be something more establishing connectivity between the accused and the crime” (bold added).

In this case the alleged corroborative/supportive evidence is the recovery of the pistol from the appellant on his arrest which lead to a positive FSL report in respect of 2 empties recovered at the crime scene and the medical evidence.

The value of this last seen evidence is however considerably undermined by two factors as set out below;

- (1) That the incident was reported in terms of last seen evidence through an FIR with an inadequately explained delay of 4 days which as per Fayyaz’s case (supra) tends to make *the prosecution case doubtful for the reason that the story of last seen was tailored or designed falsely, involving accused person.* This is more so in this case as the PW’s in respect of the last seen evidence were all related, there was enmity between the related witnesses and the appellant and his co-accused and the PW’s in respect of the last seen evidence all gave their Section 161 Cr.PC statements as to the appellant leaving the house with the accused 5 days after the incident. It is well settled that essential eye witness statements

regarding eye witness/last seen evidence are of little, if any, evidentiary value if they are given more than 2 days after the incident.

(2) More significantly, it is well settled by now that any piece of evidence which is used to convict the accused must be put to him so that he is given a chance to explain the same in his Section 342 Cr.PC statement failing which such evidence cannot be used to convict the appellant.

In this case Q.1 of the appellant's S.342 Cr.PC statement read as under;

Q.1 *You have heard the prosecution evidence and it has come in evidence that on 01.04.2015 at 2030 hours, at the path of Wadi Sim Nali near Dargah Lal Sain, deh Jharandi, Taluka Ghorabari, district Thatta you along with co-accused, Habibullah, Ishaque and Muhammad Moosa in furtherance of your common intention caused firearms injuries to deceased Hussain and caused his death. What do you have to say?*

Ans. *It is incorrect, Sir.*

No question to the effect of, "you were seen leaving the house with the deceased on 01.04.2015 at 8pm" was ever put to the appellant in his S.342 Cr.PC statement. As such he was never confronted with any last seen evidence and not given an opportunity to explain himself on this crucial aspect of the prosecution's case.

From a legal perspective the result of this omission is that the prosecution evidence in respect of the last seen evidence has to be excluded from consideration and this being the case the prosecution has failed to make out a case of murder against the accused based on the doctrine of last seen evidence.

As such the only piece of evidence against the appellant is the recovery of the pistol on his arrest a few days after the incident, which the appellant claims was foisted on him by the police, which matched with only 2 out of the 4 empties recovered at the crime scene which I find to be insufficient on its own to convict the appellant of murdering the deceased.

12. Thus, based on the above discussion, I find that the prosecution has NOT proved its case against the appellant beyond a reasonable doubt and by extending the appellant the benefit of the doubt for the reasons discussed above, which he is entitled to as a matter of right as opposed to concession, I hereby set aside the impugned judgment,

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allow the appeal and acquit the appellant of the charge. The appellant shall be released from prison unless he is wanted in any other custody case.

13. The appeal stands disposed of in the above terms.