

Present: Asif Saeed Khan Khosa, Maqbool Baqar and Syed Mansoor Ali Shah, JJ

MUHAMMAD ABID---Appellant

Versus

THE STATE and another---Respondents

Criminal Appeal No.92-L of 2017, decided on 10th September, 2018.

(On Appeal from judgment of Lahore High Court, Lahore dated 18-11-2014, passed in Criminal Appeal No. 1133/2011 (CSR No.23-T/20111)).

(a) Penal Code (XLV of 1860)---

---S. 302---Qatl-i-amd---'Last seen evidence'---Meaning and principles---Theory of last seen together was one where two persons were 'seen together' alive and after an interval of time, one of them was found alive and the other dead---Where the period between the two was short, presumption could be drawn that the person alive was the author of the other's death---Time gap between the sighting and the occurrence should be such as to rule out possibility of somebody else committing the crime---Foundation of the "last seen together" theory was based on principles of probability and cause and connection and required cogent reasons that the deceased in normal and ordinary course was supposed to accompany the accused; proximity of the crime scene; small time gap between the sighting and crime; no possibility of third person interference; motive; and time of death of victim---Circumstance of the deceased being last seen in the company of the accused was not by itself sufficient to sustain the charge of murder, but there must be evidence to link the accused with the murder of his companion, such as incriminating facts as recovery, strong motive and the proximate time when they were last seen together and the time when the deceased was killed---Last seen evidence as circumstantial evidence must be incompatible with the innocence of the accused and should be accepted with great caution, and it must be scrutinized minutely so that no plausible conclusion should be drawn therefrom except guilt of the accused.

Rehmat v. State PLD 1977 SC 515; Muhammad Amjad v. State PLD 2003 SC 704; Deepak Chadha v. State 2012(1) JCC 540 and Fayyaz Ahmad v. State 2017 SCMR 2026 ref.

(b) Penal Code (XLV of 1860)---

---Ss. 302 & 365-A---Anti-Terrorism Act (XXVII of 1997), Ss. 7(a) & 7(e)--- Qatl-i-amd, kidnapping for ransom---Reappraisal of evidence---Benefit of doubt---'Last seen evidence'---According to the statement of witness who last saw the accused and victim together, the accused was last seen with the victim around 2:15 pm on 5-9-2010 while renting a motorcycle from his shop and then according to the same witness the accused returned the motorcycle at 3:30 pm the same day, but this time the victim was not with him---Said witness further stated that on the same day, the accused allegedly again rented the motorcycle at 5:00 pm to return it at 6:40 pm---Limited window from 2:15 pm to 3:30 pm on 5-9-2010 could be the probable time of crime in order to complete the continuous chain of events, but there was no evidence to establish the same---On the contrary, according to the FIR the call received by the complainant for ransom was at 7:15 pm on 5-9-2010 and as per statement of the complainant he received a similar call on 7-9- 2010---Both the calls implied that the victim was alive at the time---Facts and evidence on record did not draw up a chain of uninterrupted events connecting the accused with the alleged murder---Accused was, therefore, entitled to the benefit of doubt---Appeal was allowed, conviction and sentence of accused were set-aside and he was acquitted of the charge.

(c) Penal Code (XLV of 1860)---

---Ss. 302 & 365-A---Anti-Terrorism Act (XXVII of 1997), Ss. 7(a) & 7(e)--- Qatl-i-amd, kidnapping for ransom---Reappraisal of evidence---Benefit of doubt---Medical evidence---Post-mortem report---Stage of putrefaction---Exact time of death of victim was not fully certain---Dead body was recovered on 7-9-2010 and the Post Mortem Report conducted the same night described the external appearance of the dead body to be in advanced stage of putrefaction---Skin and soft tissues over the head, face and neck were completely decomposed---All viscera of skull, chest and abdomen were completely decomposed and soft tissues and muscles over the remaining body were in advanced stage of putrefaction---Advanced stage of putrefaction as described in the Post Mortem Report began five to ten days or more after death, therefore, the possibility of death of the victim prior to 5-9-2010, which was the date when the accused and victim were last seen together, could not be ruled out---Inquest Report was noticeably dated 7-8-2010, a month before the recovery of the dead body and nothing was on the record to show that the prosecution had moved the Trial Court or any Authority for the correction of the date---Said Report did not give any date or time of death--
-Accused was, therefore, entitled to the benefit of doubt---Appeal was allowed, conviction and sentence of accused were set-aside and he was acquitted of the charge.

Modi's Medical Jurisprudence and Toxicology ref.

(d) Penal Code (XLV of 1860)---

---Ss. 302 & 365-A---Anti-Terrorism Act (XXVII of 1997), Ss. 7(a) & 7(e)---Qatl-i-amd, kidnapping for ransom---Reappraisal of evidence---Benefit of doubt---Record of telephone calls---Crime report, as well as, the statement of the complainant referred to telephone calls received on two separate dates by an unknown person---No evidence on the record established that said calls were received by the complainant and were linked to the accused---Recovery memo of the mobile of the accused carried a SIM different from the number of the unknown caller mentioned in the FIR---In the absence of any such evidence, the alleged meeting of the complainant and the appellant for payment of ransom and the pointing out of the victim by the accused seemed improbable---Accused was, therefore, entitled to the benefit of doubt---Appeal was allowed, conviction and sentence of accused were set-aside and he was acquitted of the charge.

(e) Penal Code (XLV of 1860)---

---Ss. 302 & 365-A---Anti-Terrorism Act (XXVII of 1997), Ss. 7(a) & 7(e)---Qatl-i-amd, kidnapping for ransom---Reappraisal of evidence---Benefit of doubt---Recovery of ransom amount --- Bank notes of the ransom amount were not marked or signed by any Magistrate, hence its alleged recovery by the police becomes suspect---Accused was, therefore, entitled to the benefit of doubt---Appeal was allowed, conviction and sentence of accused were set-aside and he was acquitted of the charge.

Shahid Azeem, Advocate Supreme Court for Appellant.

Muhammad Jaffar, DPG, Punjab for the State.

Date of hearing: 10th September, 2018.

JUDGMENT

SYED MANSOOR ALI SHAH, J.--This is a case of an un-witnessed murder, where one Muhammad Azhar alias Mithoo ("victim"), nine years of age, was done to death and his body, in advanced stage of putrefaction, was recovered by the Police on 07.9.2010.

2. The Crime Report (FIR No.400, Police Station B-Division, District Okara, registered on 05.9.2010 under sections 365-A and 302, P.P.C.) states that the deceased, son of the complainant, left the house around 2:30 pm on 5-9-2010 and did not return till evening. The complainant along with two others started searching for the victim but could not find him. The same evening, complainant received a call at 7:15 pm, on his mobile, from an unknown person saying that his son has been kidnapped and demanded ransom of

Rs.100,000/- against the return of his son. Subsequently, on 7-9-2010 the dead body of victim was recovered from the 'jaware' fields near Darbar Baba Jaddi Satti, Okara, whereupon the offence under section 302 was added.

3. The appellant after undergoing trial was convicted and sentenced to death under sections 365-A, 302(b), P.P.C. and 7(a),(e) Anti-Terrorism Act, 1997 by the trial court and the said conviction and sentence were upheld by the High Court through impugned judgment dated 18.11.2014.

4. Leave was granted in this case on 16.2.2017 to reappraise the evidence. With the assistance of learned counsel for the parties, we have examined the record of the case. Being an unseen occurrence, the case set out by the prosecution is based on circumstantial evidence in the form of last seen evidence, corroborated by the recovery of the ransom amount in the sum of Rs.100,000/- from the appellant and finally by the recovery of the body of the deceased.

5. Ocular account forming the last seen evidence is that the appellant was seen by PW-6 (Muhammed Naeem) at his shop with the victim at 2:15 pm on 05.9.2010 where he had come to rent a motorcycle and by PW-7 (Dildar Ahmed) at 2:20 pm on the same day when the appellant purchased petrol from his shop. The theory of last seen together is one where two persons are 'seen together' alive and after an interval of time, one of them is found alive and the other dead. If the period between the two is short, presumption can be drawn that the person alive is the author of the other's death. Time gap between the sighting and the occurrence should be such as to rule out possibility of somebody else committing the crime. The circumstance of the deceased being last seen in the company of the accused is not by itself sufficient to sustain the charge of murder. There must be evidence to link the accused with the murder of his companion, such as incriminating facts as recovery, strong motive and the proximate time when they were last seen together and the time when the deceased was killed. Last seen evidence as circumstantial evidence must be incompatible with the innocence of the accused and should be accepted with great caution. It must be scrutinized minutely so that no plausible conclusion should be drawn therefrom except guilt of the accused.

6. 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.

7. In the instant case we have observed that according to the statement of PW-6, the appellant is last seen with the victim around 2:15 pm on 5-9-2010 while renting a motorcycle from his shop and then according to the same witness the appellant returns the motorcycle at 3:30 pm the same day, this time the victim is not with him. On the same day, he again rents the motorcycle at 5:00 pm to return it at 6:40 pm. The limited window from 2:15 pm to 3:30 pm on 5-9-2010 could be the probable time of crime in order to complete the continuous chain of events, but there is no evidence to establish this. On the contrary, according to the FIR the call received by the complainant was at 7:15 pm on 5-9-2010 demanding ransom in return for the victim and as per statement of the complainant (PW-8) he received a similar call on 7-9-2010, both the calls imply that the victim was alive at the time.

8. The exact time of death is not fully certain. The dead body was recovered on 7-9-2010 and the Post Mortem Report conducted the same night described the external appearance of the dead body to be in "advanced stage of putrefaction. Skin and soft tissues over the head, face, neck completely decomposed (Only skeleton remains) .All viscera of skull, chest and abdomen completely autolysis (decomposed) soft

tissues, muscles over the remaining body are in advanced stage of putrefaction." This was also supported by the doctor in his statement as PW-1. According to Modi's Medical Jurisprudence and Toxicology, the process of putrefaction and its time frame is described as:

In three to five days or more, the sutures of the skull, especially of children and young persons, are separated, the bones are loosened, and the liquefied brain runs out. The teeth become loose in their sockets and may fall off.

The next stage of putrefaction is known as colliquative putrefaction, which begins from five to ten days or more after death. During this stage, the walls of the abdomen becomes softened, and burst open, protruding the stomach and intestine. The thorax, especially in children burst. The diaphragm is pushed upwards.

If the putrefactive processes still go on, the tissues become soft, loose and are converted into a thick, semi-fluid, black mass. They ultimately separate from the bones, and fall off. The bones are consequently exposed, and the orbits are empty. The cartilages and ligaments are similarly softened, and ultimately the bones are destroyed, so that after some years no trace of body is left. The time taken up by these changes varies considerably with temperature and the medium in which the body lies.

(emphasis supplied)

The advanced stage of putrefaction as described in the Post Mortem Report begins five to ten days or more after death, therefore, the possibility of death of the victim prior to 5-9-2010 cannot be ruled out. The Inquest Report (Ex. PM) is noticeably dated 7-8-2010, a month before the recovery of the dead body. Column 3 of the said Report does not give any date or time of death. Nothing is on the record to show that the prosecution had moved the trial court or any authority for the correction of this date.

9. The Crime Report, as well as, the Statement of the complainant (PW-8) refers to telephone calls received on 5-9-2010 and 7-9-2010 by an unknown person. There is no evidence on the record to establish that these calls were received by the complainant and were linked to the appellant. The recovery memo of the mobile of the accused (Ex. PK) carries a SIM different from the number of the unknown caller mentioned in the FIR. In the absence of any such evidence, the alleged meeting of the complainant and the appellant for payment of ransom at Chak 49-2-L Dhayas and the pointing out of the victim by the accused seem improbable. It is, however, unimaginable that a person repeatedly demanding ransom has actually already murdered the victim. This also demolishes the motive of kidnapping for ransom. The bank notes of the ransom amount were not marked or signed by any Magistrate, hence its alleged recovery by the Police becomes suspect.

10. The above facts do not draw up a chain of uninterrupted events connecting the accused with the alleged murder. Last seen evidence and its constituents i.e., probability, cause and connection seem to be missing in this case. Appellant is, therefore, entitled to the benefit of doubt. We, therefore, allow this appeal and set aside the conviction and the sentence of the appellant. **He is acquitted of the charge in this case and ordered to be released forthwith,** if not required to be detained in any other case.

MWA/M-20/S Appeal allowed.