

**0IN THE FEDERAL SHARIAT COURT  
(APPELLATE JURISDICTION)**

**PRESENT**

MR. JUSTICE RIAZ AHMAD KHAN, CHIEF JUSTICE.  
MR. JUSTICE ZAHOOR AHMED SHAHWANI.

**CRIMINAL APPEAL NO. 07/K/2013**

Zohaib S/o Muhammad Maqsood ..... Appellant  
r/o House No.D-580, Korangi  
No.51/2, Karachi

Versus

The State ..... Respondent

**LINKEDWITH**

**CRIMINAL APPEAL NO. 08/K/2013**

Jibrán s/o Khalil –ur- Rahman ..... Appellant  
r/o House No.227, Sector 51-L  
Korangi No.5, Karachi

Versus

The State ..... Respondent

Counsel for the appellants : Mr. Muhammad Akbar Awan,  
Advocate in Cr.A.No.7/K/2013&  
Mr. Hasan Sabir, Advocate  
in Cr.A.No.8/K/2013

Counsel for the complainant : Mr. Muhammad Shair Khan,  
Advocate

Counsel for the State : Mr. Zahoor Shah, Assistant  
Prosecutor General, Sindh.

Date of hearing : 09.12.2015

Date of Decision : 11.01.2016

## **JUDGMENT**

**JUSTICE ZAHOOR AHMED SHAHWANI, J:-** Both these appeals are arisen of the same judgment of the learned trial Court and also relate to the same criminal case, therefore we propose to decide both these appeals through single consolidated judgment.

Through this judgment we are deciding Criminal Appeal No.07/K of 2013 filed by appellant Zohaib son of Muhammad Maqsood and Criminal Appeal No.08/K of 2013 filed by appellant Jibran son of Khalil-ur-Rehman. Both these appeals have been filed against the single judgment of the learned II-Additional Sessions Judge Karachi East, dated 18.04.2013 passed in Sessions Case No. 323 of 2004, arising out of Criminal Case FIR No. 87/2004 registered under Sections 302, 364-A read with 34 PPC of P.S. Zaman Town, Karachi, whereby the learned trial Court through impugned judgment has convicted both the appellants, under Section 302 PPC, and sentenced them to undergo life imprisonment and to pay fine of Rs.50,000/- each under Section 544-A Cr.P.C., in case of failure they had to undergo R.I. for five months each. They were further convicted under section 12 Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and sentenced to undergo for 10 years with fine of Rs.25,000/- each in case of default thereof they had to undergo R.I. for three months. Benefit of Section 382-B Cr.P.C. was also extended to them. All the sentences to run concurrently.

2. Brief facts of the prosecution case are that on 11.06.2004 at 1510 hours complainant Haji Muhammad Akbar lodged FIR at P.S. Zaman Town, District Karachi East, stating therein that he along with his family is

residing at C-1/1 Eidgah Chowk Jinnah Road, Manzoor Colony, Karachi, and is running his own business of Cement Blocks. His brother namely Akhtar Ali is residing at House No.17 Sector-51-L Korangi No.5-1/2 Karachi along with his family. On the fateful day *i.e.* 10.06.2004, he received information that his nephew Ahsan Ali aged 13 years was missing since 11:00 a.m, therefore, he went to the house of his brother. They mounted search for Ahsan. Meanwhile one neighbour namely Rafique told them that he had seen accused Zohaib and Jibrán at 11:00 a.m. who called deceased Ahsan from his house and took him towards *100 quarters*. The complainant reported such information to the police and continued search but could not find any clue. On 11.06.2004 at about 9:00 a.m. while searching they found the dead body of Ahsan at Dawood Jetty in the bushes near the sea having marks of violence. They informed the police of Fishery Chowki from where police came and the dead body was taken to Jinnah Hospital Karachi, for postmortem where the complainant recorded his statement alleging that accused Zohaib and Jibrán deceitfully kidnapped the deceased and murdered him. He also suspected that the accused might had committed sodomy with the deceased. On such statement of the complainant the case was registered against the accused.

3. After the completion of investigation, the report under Section 173 of the Criminal Procedure Code was prepared and submitted in the Court. The charge was framed for the Offences 364-A/337/302/34 PPC read with Section 12 of Offence of Zina (Enforcement of Hudood) Ordinance, 1979 by the learned IIIrd Additional Sessions Judge, Karachi East, against the accused to which they denied and claimed trial.

4. During trial, the prosecution examined as many as fourteen (14) PWs in all out of twenty-two (22) PWs cited in the challan. **P.W-1** Muhammad Akbar, the complainant at Ex.5, who produced memo of inspection of dead body, inquest report, memo of inspection of place of incident, receipt of handing over dead body and statement under Section 154 Cr.P.C. vide Ex.6 to Ex.10 respectively. **P.W-2** Arshad Ali at Ex.11, who produced copy of complaint to police station, memo of arrest of accused, memo of recovery on pointation of accused as Ex.12 to Ex.14 respectively, **P.W-3** Shahid Ali at Ex.16, **P.W-4** Muhammad Rafique at Ex.17, who produced memo of inspection of place of incident at Ex.18, **P.W-5** Yasin Ali at Ex.19, **P.W-6** Akhtar Ali at Ex.20, **P.W-7** Mahmood at Ex.21, **P.W-8** Muhammad Irshad at Ex.22, **P.W-9** MLO Dr. Abdul Razzaq at Ex.23, who produced Memorandum of Post Mortem No.338/04, PM No.4587, 1588/04, letters by police, cause of death at Ex.23/A to 23/F respectively, **P.W-10** Zulfiqar Ali, ASI at Ex.24, who produced copy of FIR, memo of arrest and three Roznamcha Entries at Ex.24/A to 24/F, **P.W-11** Muhammad Shahzad at Ex.25, **P.W-12** Syed Zahid Hussain ASI at Ex.26, who produced letter to Edhi and Road Certificate at Ex.26/A and 26/B, **P.W-13** Muhammad Rehan at Ex.27, **P.W-14** Aziz Muhammad, I.O. of the case at Ex.28, who produced Naqsha-c Nazri at Ex.28/A, application to JM for recording of 164 statement of witnesses, notice, letter to SSP, report from Chemical Examiner at Ex.28/B to Ex.28/E respectively and thereafter learned DDPP closed the prosecution side vide statement dated 07.04.2011 Ex.29.

5. After completion of the evidence, the statement of the accused persons under Section 342 of Criminal Procedure Code were recorded

wherein they denied the allegations of prosecution and pleaded to be innocent. The accused did not opt to record their statement on oath as provided under Section 340 (2) of the Criminal Procedure Code nor produced any defence witness.

6. On the conclusion of trial, learned III Additional District & Sessions Judge Karachi East vide judgment dated 23.07.2011, convicted and sentenced the appellants under Section 302-PPC and sentenced them imprisonment for life and fine of Rs.50,000/- (Fifty thousand) each. Being aggrieved from judgment passed by learned trial Court appellants filed appeal before this Hon'ble Court. This Court vide judgment dated 04.02.2013, set aside the impugned judgment dated 23.07.2011, passed by the learned trial Court and case was remanded for decision afresh. District & Sessions Judge Karachi East sent the case to the Court of II Additional District & Sessions Judge Karachi East for decision. The learned trial Court after hearing the learned counsel for the parties and learned Prosecutor for State convicted and sentenced the appellants vide impugned judgment dated 18.04.2013, in the manner as mentioned above.

7. Learned counsel for the convict/appellants contended that P.W-4 Muhammad Rafique is only eye witness of the last seen but his evidence does not say a single word as to whether the accused persons by force compelled or by any deceitful mean induced the deceased as such the Section 364-A PPC will not attract; the evidence of complainant and PWs being interested are un-trustworthy and their presence at *wardat* at the time of incident is not proved, therefore, their evidence could not be accepted without independent corroboration; the learned counsel further states that the witnesses examined by the prosecution are close relative to each other

and they malafidely made improvement in the case at the stage of recording their evidence, as such their evidence is not confidence inspiring and can not be relied upon; he states P.W-2 Arshad Ali and P.W-5 Yasin Ali are brothers of deceased; P.W-7 Mahmood s/o Shahabuddin, P.W-8 Muhammad Irshad, the uncle of deceased, P.W-11 Muhammad Shahzad and P.W13 Muhammad Rehan having no evidentiary value being witnesses of the last seen evidence as the statement of all the above said PWs and P.W-Muhammad Rafique were recorded by the police/Investigating Officer under Section 161 Cr.P.C. on 13.06.2004 with the delay of two days and there is no such explanation on the report of prosecution; lastly, argued it is important to note that incriminating pieces of evidence, available on the record, are required to be put to the accused as provided under Section 342 Cr.P.C. when the same was abandoned by him, then the same cannot be used against him for their conviction, it is reiterated that the prosecution has not come with clean hands and failed to prove the case beyond reasonable shadow of doubt; the appellants are entitled to clean acquittal.

8. On the other hand, the learned Assistant Prosecution General Sindh assisted by the learned counsel for the complainant has argued that the parties have got no enmity; the witnesses have no reasons to falsely implicate him, they cannot be treated as interested witnesses. Learned counsel states that the statement of witnesses are duly corroborated with each other on material points and no material contradiction exists in their statements. Learned counsel further states that dead body was recovered on pointation of appellants on 11.06.2004. The appellants would have led the police to the recovery of crime weapons i.e. Iron and stone on the same day effected from appellants supports the ocular account; the prosecution has

fully proved its case against appellants beyond shadow of doubt, the learned Assistant Prosecutor General Sindh representing the State adopted the arguments put forth by learned counsel for the complainant; in this respect reliance is placed on the reported case. (1990 SCMR 1272 Muhammad Younas etc Vs. The State)

9. It is the case of prosecution that on 10.06.2004 the deceased Ahsan Akhtar aged about thirteen years was seen accompanying by appellants, at about 10.00 to 11.00 AM and going towards *100 Quarters* but Ahsan Akhtar (deceased) did not return back home and on next day i.e., 11.06.2004 at about 9.00 AM his dead body was found at Dawood Jetty in bushes having marks of violence. It was alleged that appellants after kidnapping the deceased had committed sodomy with him. On report of complainant case was registered against the appellants.

10. Prosecution in order to establish its case against the appellants had relied upon the evidence of fourteen (14) witnesses. It is an admitted fact that it is an un-seen incident as none of the witnesses have seen the offence committed by appellants. However, five (5) witnesses namely Arshad Ali (PW-2), Muhammad Rafique (PW-4), Mehmood (PW-7), Muhammad Irshad (PW-8), and Muhammad Rehan (PW-13) have claimed to be the witnesses of last seen as they had seen the deceased Ahsan Akhtar accompanying appellants on 10.06.2004, at about 10.00 AM. but their evidence to the extent of last seen is highly doubtful as all the witnesses have not been found consistent with regard to timing as 10.00 or 10.30 AM while others stated 11:00 AM. None of them have confirmed each other's presence. Moreover PW-2 Arshad Ali, who is brother of deceased had deposed that on 10.06.2004 at about 10:00 AM, he had seen his brother

Ahsan Akhtar with appellants but he did not mention the same in his application filed with the police with regard to missing of his deceased brother. Even he did not inform PW-3 Shahid Ali who is cousin of PW-2 and he accompanied PW-2 to the police station, when PW-2 moved application with respect to missing of his deceased brother. Had the PW-2 seen his deceased brother with appellants in the morning at 10:00 AM, he would have mentioned the same in his application filed with the police regarding missing of his deceased brother as well as informed the PW-3 who accompanied him to the police station. The evidence of said PWs as last seen witnesses is also doubtful as their statements have been recorded with delay by investigating officer. Therefore, no sanctity can be attached with their evidence and possibility cannot be ruled out that their statements have been recorded after deliberation.

11. Apart from that, PW-4 Muhammad Rafique , who is witness of last seen had stated that he had seen deceased and Jibrán and one unknown person at about 10:30 or 11:00 AM, and in cross examination he admitted that he did not know the name of accused/appellant Zohaib. But his evidence is silent how he came to know about the name of appellant Zohaib. There is nothing in his evidence that he had informed other PWs including PW-3 that he had seen accused persons/appellants. Whereas PW-3 Shahid Ali stated that they were informed by PW-4 Muhammad Rafique that he had seen the deceased with appellants. The evidence of PW-3 Shahid Ali further stands doubtful as he deposed that PW-4 stated the name of both the accused to them who accompanied the deceased, but it has come on record in the deposition of PW-4 Muhammad Rafique, he did not know the name of accused/appellant Zohaib. And he did not utter a

single word that he had informed either to PW-3 or other witnesses that he had seen the deceased accompanying the appellants. The question arises as to how the PW-3 came to know about the name of appellants accompanied the deceased. The evidence of last seen witnesses being doubtful cannot be relied upon. Reliance is placed on judgment 2015 SCMR page 155 (Imran alias Dully and another Vs. The State) and SCMR 2012 page 327 (Khalid alias Khalid and three others Vs. The State).

12. The depositions of PW-2, PW-3, Zulfiqar Ali ASI (PW-10), and Zahid Hussain ASI (PW-12), further stand highly doubtful because PW-2 Irshad Ali who is brother of deceased, in his examination in chief had categorically stated that on 11.06.2004, early in the morning the police arrested the accused in their presence and on their pointation dead body of deceased was recovered from bushes but the depositions of PW-3, PW-10 and PW-12 are silent in this regard. The very story stated by PW-2, PW-3 stands highly doubtful and un-believable because the PW-2, PW-3 and PW-10 have concealed the facts. As PW-10 Zulfiqar Ali ASI, Police Station Zaman Town has deposed that on 11.06.2004, he alongwith complainant and other police officials started search of the dead body but could not find it. Then they received information from Zahid Hussain ASI, police station Ibrahim Haidry regarding proceeding under Section 174 Cr.P.C. and recovery of dead body of deceased. Whereas PW-12 Syed Zahid Hussain ASI, contradicted the PW-10 by stating that he came to know about recovery of dead body of deceased through relatives of deceased. He while replying a question stated that dead body was already lying in the mobile of police of police station *Zaman* Town. Meaning thereby, that dead body was recovered in presence of PW-12 but the said

witnesses have concealed the facts. Whereas the complainant has introduced a different story by stating that he alongwith other 150 people of the *Mohalla* started search of the deceased but could not succeed. On next morning they went to police station and started search of the deceased on their own and found the dead body in the bushes and they informed the Incharge of police post Dawood Jatti and at that moment Inspector Syed Zahid Hussain along with his staff came over there. But Syed Zahid Hussain ASI (PW-12), had stated different story. It is astonishing to note that PW-2 Arshad Ali had reported the matter that deceased was missing but he has not lodged FIR. As it has come on record in the evidence of prosecution witnesses including PW-2 that dead body was recovered in presence of PW-2 but he did not lodge FIR for the reason best known to him, while PW-1 has lodged F.I.R. which makes the whole case of prosecution highly doubtful.

13. So far as the recovery of crime weapons i.e. Iron rod and stone on the pointation of accused/appellant by police is concerned, the same too are doubtful and can not improve the case of prosecution. Because it has come in the evidence of prosecution witnesses particularly PW-2, that dead body was recovered on pointation of accused/appellants. Had the dead body been recovered on pointation of appellants on 11.06.2004, the appellants would have led the police to the recovery of crime weapons i.e. Iron rod and stone on the same day. The place of occurrence was already in the knowledge of police and recovery of Iron rod and stone on 15.06.2004 with delay of four days stands highly doubtful. Because none of the last seen witnesses have seen the appellants carrying any such article with them. Moreover, the PW-10 categorically stated that accused had made disclosure but appellants

have not utter a single word about iron rod and stone in their alleged disclosure. Even otherwise both the alleged recovered crime weapons are easily available and the possibility cannot be ruled out that same were arranged by prosecution from their own sources.

14. Moreover, the recording of statements of the some witnesses before concerned Magistrate in presence of the appellants is concerned, the same are also not helpful and cannot improve the case of the prosecution because the same have been denied and disputed by defence and secondly it has come on record in the depositions of prosecution witnesses, i.e. PW-2 and PW-3, that prior reporting the matter to police the accused appellants were called and inquired about the deceased but they had shown their ignorance. It is settled principle of criminal justice that there is no need of so many doubts in the prosecution case rather a single circumstance is enough to create doubt in the prosecution evidence/case. Reliance is placed on “Tariq Pervaiz Vs. The State” (1995SCMR 1345). The same principle has been reiterated by Hon’ble Supreme Court in “Muhammad Akram’s case” (2009 SCMR 230). Besides, accused is always considered as the most favourite child of law and every benefit of doubt goes to him regardless of fact whether he has taken any such plea or not. Reference in this regard can be made to “Faryad Ali’s case” (2008 SCMR 1086).

15. Careful perusal of the record reveals that the evidence collected and led by prosecution against appellants is highly doubtful, un-believable and not confidence inspiring, but the learned trial Court without proper appreciation of evidence convicted and sentenced the appellants vide impugned judgment dated 18.04.2013, which is not sustainable in the eye of law. As such both the appeals bearing number Criminal Appeal No.7/K

of 2013 and Criminal Appeal No.8/K of 2013 filed by convict/appellants are allowed and impugned judgment dated 18.04.2013, whereby the appellants have been convicted and sentenced is set aside. Resultantly both the appellants namely Zohaib son of Muhammad Maqsood and Jibran son of Khalil-ur Rehman are acquitted of the charge. The appellants be set at liberty forthwith if not required in any other case.

MR. JUSTICE ZAHOR AHMED SHAHWANI

MR. JUSTICE RIAZ AHMAD KHAN  
CHIEF JUSTICE

**Announced on 11.01.2016**  
**at Islamabad.**  
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Approved for reporting