Mst. SHAMSHAD
versus
THE STATE
1998 SCMR 854

JUDGMENT

MAMOON KAZI, J.---Appellant Mst Shamshad was convicted under section 302, P.P.C., for causing the death of Muhammad Razzaq, her husband, and sentenced to suffer imprisonment for life and to pay a fine of Rs.20,000 and in default of the payment of fine, to undergo further R.1 for 2 years.

2. The case of the prosecution against the appellant was that she had developed illicit relations with one Jaffar Ali which was resented by her husband Muhammad Razzaq, deceased. This resulted in frequent quarrels between the appellant and the deceased. The deceased therefore shifted his family from Vehari to Faisalabad.

3. On the 1st June 1988, Nizamuddin (P.W.5) and his brother Walayat Ali (P.W.6) went to the house of the deceased to bring about a compromise between the husband and the wife, but their efforts did not succeed. Both of them therefore decided to spend the night in the house of the deceased. During the night, the appellant attacked the deceased with a hatchet as a result of which he died on the spot. The incident was witnessed by Nizamuddin and Walayat Ali.

4. F.I.R. in respect of the incident was lodged by P.W. Nizamuddin at Police Station Ghulam Muhammadabad on 2-6-1988 at about 2-00 a.m. The same was recorded by Muhammad Baqir, Inspector, who immediately thereafter started investigation. He went to the spot and prepared inquest report and took the blood-stained hatchet into his possession. He also secured blood-stained earth from the spot. The Police Officer also secured blood-stained clothes of the appellant and blood-stained Chaddar and madress of the deceased from the spot. He also recorded the statements of the prosecution witnesses. The appellant was then arrested by him on the spot and after completion of the investigation he submitted challan in the Court.

5. The appellant in her statement before the Court denied the allegation that she had committed the said murder. According to her, the murder had been committed by P.W. Nizamuddin and his three companions who had entered the house of the deceased with muffled faces. After commission of the crime they slipped away. Although, recovery of blood-stained clothes from her person was not denied by her but, according to her, even the clothes of her daughters Shagufta aged 12 years and Ruhi aged 9 years were stained with blood. However, the Investigating Officer

did not take the same into his possession. Such blood stains, according to the appellant, were caused as they had attended to the deceased after he had received injuries.

6. The case of the prosecution against the appellant was supported by the " evidence of the two eye-witnesses. In addition, the prosecution also relied upon the recovery of blood-stained clothes from the person of the appellant. Dr. Abdul Sattar, who conducted post-mortem on the body of the deceased found five incised wounds on his person. According to him, four of the injuries received by the deceased were sufficient to cause his death in the ordinary course of nature.

7. Relying upon such evidence, the trial Court convicted and sentenced the appellant as pointed out earlier. Both the conviction and the sentence have been upheld by the High Court, as it has been held that the two eye-witnesses were the natural witnesses of the incident who had fully supported the prosecution version. Although, the other natural witnesses of the occurrence were the children of the appellant but they could be examined as defence witnesses in case they were not examined by the prosecution. However, the same was not done, Another factor which weighed in favour of the prosecution was that the appellant had blood-stained clothes which fact was not denied by her and she was also caught red-handed alongwith the crime weapon which, according to the learned Judges, lent further corroboration to the evidence of the eye witnesses Although, the trial Court had not accepted evidence in regard to motive but according to the learned Judges, absence of motive in presence of 'ocular testimony could hardly be of any consequence. Consequently, the judgment of the trial Court was upheld.

8. Leave was granted to examine whether the judgment of the High Court was based on correct appraisement of evidence.

9. It has been contended in support of the appeal that, evidence of the eyewitnesses is not reliable as Nizamuddin (P.W.5) and Walayat Ali (P.W.6) were not the natural witnesses of the occurrence. The claim of the witnesses that they had stayed back in the house of the deceased after their efforts to bring about a compromise between the, appellant and the deceased failed, appears to be the least convincing. Admittedly the house of the witnesses was hardly at a distance of about 100 or 200 paces from that of the deceased. Therefore, it is not understandable why the two witnesses spent the night in the house of the deceased instead of their own house. As the incident took place during the night, possibility cannot be ruled out that besides the appellant and the deceased, only their children were present in the house. Therefore, under such circumstances, in absence of any grown-up person in the family to provide the ocular account in respect of the incident, close relatives of the deceased were called upon by the police to oblige.

10. The prosecution has also failed to offer a plausible explanation as to why the children of the appellant, who were, admittedly, present in the house at the time of the incident, were not produced as witnesses in the case. In fact, the children of the appellant were the most natural witnesses of the occurrence, However, the Investigating Officer thought it fit not to examine them as witnesses. When confronted with this situation at the time of his cross-examination he explained that two daughters and the son of the appellant were less than? years of age. However, in the same breath it was admitted by him that Ruhi Bano was about 8 or 9 years of age. The other children were a few years younger. However, at least the older children under normal circumstances could have given evidence in the Court. The explanation given by the Investigating Officer, therefore, was not tenable.

11. Another factor that cannot be overlooked is that according to P.Ws. Nizamuddin and Walayat Ali, they were sleeping outside in the court yard of the house alongwith the appellant and her children, whereas the deceased was sleeping alone in the only room of the house on a cot. The evidence further indicates that only two cots were lying in the court yard and two beds and an equal number of cots were lying inside the room out of which one was occupied by the deceased. It is highly unnatural that the appellant chose to sleep in the courtyard alongwith Nizamuddin and Walayat Ali (P.Ws.) and not with the deceased inside the room when beds were lying unoccupied in the room. Furthermore, if the two cots said to be lying in the courtyard were occupied by P.Ws. Nizammuddin and Walayat Ali, it is not clear where did the appellant and her children sleep on the night of the occurrence. This material contradiction has been left unexplained by the prosecution. The only possible inference, therefore, can be that P.Ws Nizamuddin and Walayat Ali were not present in the house of the deceased on the night of the occurrence. Reliance, therefore, cannot he placed on the evidence of the said witnesses.

12. The case of the prosecution solely rests upon the evidence of the said witnesses, the circumstantial evidence regarding recovery of the blood-stained clothes from the person of the appellant and recovery of the crime-weapon from her house besides the medical evidence. So far as recovery of the crime-weapon is concerned, the same, according to the prosecution evidence, was produced before the Investigating Officer by P.W. Walayat Ali. The appellant also successfully explained the existence of blood stains on her clothes, as according to her, she had attended to her husband after receiving of the injuries by him. Under such circumstances getting of stains on her clothes was not unnatural, This evidence therefore, does not necessarily lead to an inference that the appellant is guilty of the said crime. This leaves us only with the evidence of the two eye-witnesses, which has already been found to be unreliable. There is, therefore, no reliable evidence produced by the prosecution against the appellant to bring home the guilt to her.

13. Learned State Counsel has, however, argued that in case the prosecution had failed to examine any of the appellant's children as a witness, they should have been examined as defense witnesses. It has been further argued that if there are two versions, one given by the prosecution and the other by the defense, then if the latter is not believed, the prosecution version must be believed as true. In our view, both the contentions are untenable. Burden to prove its case beyond a reasonable doubt squarely rests on the prosecution. Such burden cannot be discharged by weaknesses found in the case of the defense. The mere fact that the defense version is not believed by the Court cannot lend credence to the prosecution case if, otherwise, the prosecution has failed to discharge its burden. For the reason enumerated above, we have no hesitation in
coming to the conclusion that the prosecution has failed to establish its case against the appellant.

14. In the result, we accept this appeal and set aside the conviction and the sentence awarded to the appellant. The appellant shall be released forthwith if she is not required by the police in any other case.

15. Before parting with this case, we cannot help observing that investigation was conducted in this case by Mr. Muhammad Baqir, the then S.H.O., Police Station Ghulam Muhammadabad, in an improper manner. He has made omissions which require an inquiry to be conducted by his superior officers because only in that case his rear motive behind the same can be established. It is high time that such police officers are made accountable. Therefore a strong disciplinary action against him is called for.

N.H.Q./S-41/S

Appeal accepted