

ORDER SHEET
IN THE HIGH COURT OF SINDH,
CIRCUIT COURT, HYDERABAD.

Criminal Appeal No.S- 121 of 1999

DATE ORDER WITH SIGNATURE OF JUDGE

13.02.2023.

Mrs. Razia Ali Zaman Khan Patoli, Advocate for appellants.
Ms. Sana Memon, A.P.G for State.

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Appellants are present on bail. This is an old appeal of 1999. For the last two dates of hearing direct intimation has been issued to learned counsel for the complainant Mr. Kanya Lal who has preferred to remain absent without intimation on each and every date. Even today he is called absent without intimation. This is an old case of 1999 and as such the matter cannot be delayed any further only because of the reason that counsel for the complainant prefers to remain absent.

I have heard the learned counsel for appellants and learned A.P.G for State. Reserved for judgment.

Tufail

Hostile witness

IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

Cr. Appeal No.S-121 of 1999

Eidoo and others

Versus

The State

Appellants : Eidoo s/o Porho, Shado s/o Jeewan, Rajab Ali s/o Jeewan and Dhani Bux s/o Soomar (on bail).	through Mrs. Razia Ali Zaman Khan Patoli, Advocate
Respondent : The State	through Ms. Sana Memon, A.P.G. Sindh
Date of hearing	13.02.2023
Date of judgment	20.02.2023

JUDGMENT

MOHAMMAD KARIM KHAN AGHA, J.- This criminal appeal is directed against the judgment dated 04.08.1999, passed by the learned Ist Additional Sessions Judge, Badin, in Sessions Case No.150 of 1995 (re: The State V Eidoo and others), emanating from Crime No.58 of 1995, registered at Police Station Tando Bago, under sections 302, 324, 337-F(i), 337-F(ii), 427, 504, 34 PPC, whereby the appellants have been convicted u/s 302 r/w Section 34 PPC and sentenced to suffer imprisonment for life each. They were also directed to pay a compensation of Rs.50,000/- each to the legal heirs of deceased as provided u/s 544-A Cr.P.C recoverable as land revenue. In case of default thereof the appellants were directed to suffer imprisonment for a period of one year. The appellants were also convicted u/s 337-A(i) & 337-F(i) PPC and sentenced to suffer imprisonment for one year on each count with

direction to pay Rs.2,000/- each as Daman, payable to injured complainant Haji Muhammad Iqbal and until Daman is paid in full to the extent of their liability, the accused be kept in jail and dealt with in the same manner as if sentenced to simple imprisonment. They were also convicted u/s 427 PPC and sentenced to suffer imprisonment for one year. All the sentences were ordered to run concurrently. The appellants were however, extended the benefit of Section 382-B Cr.P.C.

2. Facts of the prosecution case as stated in the F.I.R, are as under:-

"On 29.07.1995 at 1215 hours complainant Haji Muhammad son of Iqbal Arain lodged FIR at P.S Tando Bago, alleging therein that complainant is Zamindar and his land is situated in Deh Dando. In his land there is a fish pond, paddy and sugarcane crops are standing there. Complainant resides in Tando Bago town and his lands being looked after by his Kamdar Mojan son of Muhammad Essa Mallah. It is alleged that about 4/5 days prior to lodging of the report, from the land of complainant, his paddy was cut / stolen away and such application was made by him against accused Dhani Bux and Shado Khaskheli. On the day of incident complainant early in the morning boarded in a Jeep and left towards his lands to look after the same, where complainant met his Kamdar Mojan Mallah and Hari Manjiz Mallah and then they were sitting at fish-pond. In the meantime, Eido son of Porho Khaskheli, Shado son of Jeewan Khaskheli, Rajab Ali son of Jeewan Khaskheli and Dhani Bux son of Soomar Khaskheli, duly armed with hatchets and lathies came there and started abusing and asked that who is the complainant side to file a case against them. After saying so, Shado Khaskheli who was armed with hatchet and Rajab Ali Khaskheli who was armed with lathi inflicted the handle of hatchet and lathi blows to complainant on the back and other parts of the body. Eido who had hatchet in his hand, inflicted back side of the hatchet blow on the head of Mojan Mallah, the Kamdar of the complainant and Dhani Bux inflicted lathi blows on the other parts of body of Kamdar. On the cries, Vikio Mallah, hari of complainant came running there. Thereafter, Vikio Mallah and Manjhi Mallah separated them. The accused also broke the glasses of the jeep of complainant and then left towards their house. Complainant then brought the injured Mojan Mallah at P.S and lodged the report. Subsequently, Mojan Mallah expired in Hospital at Hyderabad. "

3. After usual investigation police submitted the challan against accused named above before the Court concerned and after completing necessary formalities, learned trial Court framed charge against them, to which they pleaded not guilty and claimed trial.

4. At trial, the prosecution in order to prove its case examined 12 witnesses and exhibited numerous documents and other items. The statements of all the four accused were recorded under section 342 Cr.P.C

whereby they denied the allegations leveled against them and claimed their false implication by the complainant party; however, they did not examine themselves on oath nor led any defense evidence to disprove the prosecution case.

5. Learned trial Court after hearing the learned counsel for the parties and evaluating the evidence available on record convicted and sentenced the appellants, as set out earlier in this judgment.

6. Learned trial court in the impugned judgment has already discussed the evidence in detail and there is no need to repeat the same here, so as to avoid duplication and unnecessary repetition.

7. Learned counsel for the appellants has contended that the appellants are innocent and have been falsely implicated in this case by the complainant; that the evidence against the appellants is unreliable; that two PW's were declared as hostile with one mashir of arrest and recovery completely contradicting the other; that the ocular evidence is not supported by the medical evidence and as such for any or all of the above reasons the appellants should be acquitted of the charge. In support of her contentions she placed reliance on the cases of **Mehmood Ahmed and 3 others V The State and another** (1995 SCMR 127), **Imtiaz alias Taj V The State and others** (2018 SCMR 344) and **Muhammad Mansha V The State** (2018 SCMR 772).

8. Learned Assistant Prosecutor General Sindh appearing on behalf of the State, after going through the entire evidence of the prosecution witnesses as well as other record of the case has fully supported the impugned judgment. In particular she has contended that the eye witnesses are reliable, trust worthy and confidence inspiring and there evidence can be safely relied upon; that the ocular evidence is supported by the medical evidence; that the hatchets and lathi's were recovered on the pointation of the appellants; that just because a witness has been declared hostile this does not mean that atomically his entire evidence is discarded and for all the above reasons since the prosecution had proved its case beyond a reasonable doubt the appeals should be dismissed. In support of her contentions she has placed reliance on the cases of **Sarwar and another V The State and others** (2020 SCMR 1250),

Muhammad Sadiq V The State (2022 SCMR 690) **Sajid Mehmood V The State** (2022 SCMR 1882) and **Abdul Khalique V The State** (2020 SCMR 178).

9. I have heard the arguments of the learned counsel for the appellants and learned Additional Prosecutor General Sindh and gone through the entire evidence which has been read out by the learned counsel for the appellants, and the impugned judgment with their able assistance and have considered the relevant law. The counsel of the complainant's legal heirs whose name appears in the cause list and on the front of the file was given direct intimation notice on three separate occasions however he preferred to remain absent. Since this is an old case of 1999 and over nine years ago the Supreme Court expected this case to be decided within 60 days of 2014 I in the interests of justice I have proceeded to decide this case with the learned APG protecting the interests of the legal heirs of the complainant.

10. Before going further it is worth while mentioning the history of this case whereby the appellants were convicted and sentenced as per the impugned judgment. There after the appellants appealed their convictions before this court where they were acquitted vide judgment dated 31.05.2002. The State then filed an appeal before the Supreme Court which by Order date 06.05.2014 set aside the Judgment of this court and remanded the appeal to this court for a de novo hearing for the following reasons;

"We have heard the learned counsel for the parties and have considered that the learned Judge of the High Court at the time of disposal of the appeal has not discussed the arguments and the evidence as well and decided the matter in a slipshod manner. In such circumstances, both the learned counsel for the parties have agreed that the impugned judgment may be set-aside and the case may be remanded to the High Court of Sindh for a fresh decision on merits and it shall be deemed that Criminal Appeal No.121 of 1991, filed by the respondents is pending before the High Court of Sindh and it shall be appreciated, if the same may be decided within a period of 60 days from the date of receipt of this order."

11. Based on my reassessment of the evidence of the PW's especially the medical evidence and other medical reports, blood and glass at the crime scene I find that the prosecution has proved beyond a reasonable doubt that on 29.07.1995 at about 10.30 hours at the Fish farm of the complainant in deh Dando, Taluka Tando Bage the complainant was provoked in order to commit breach of the peace, that hatchet and lathi injuries were caused to the

complainant and hatchet and lathi injuries were caused to Majon Malah (the deceased) which lead to his death whilst receiving treatment in hospital two days after the attack and that damage was deliberately caused to the jeep of the complainant.

12. The only question left before me therefore is whether it was the appellants who abused and provoked the complainant, injured the complainant, murdered the deceased by hatchet/lathi blows and damaged the complainant's jeep at the said time, date and location?

13. After my reassessment of the evidence I find that the prosecution has proved beyond a reasonable doubt the charge against the appellants keeping in view that each criminal case must be decided on its own particular facts and circumstances for the following reasons;

(a) That the FIR was lodged with promptitude after 1 hour and 45 minutes of the incident. Any slight delay in lodging the FIR is explained by the complainant taking the injured deceased to hospital as his first priority was to save his life and then returning to the PS to lodge the FIR. In fact the complainant had stopped at the PS en route to the hospital in order to obtain a medico legal letter for the treatment of the seriously injured later deceased and as such the police knew of the incident within 30 minutes as the complainant had initially come directly to the PS with the injured before immediately returning to the PS to lodge his FIR once he had dropped off the seriously injured Jumadar at hospital. Such slight delay gave no time for the complainant party to cook up a false case against the appellants. The appellants are all named in the FIR with specific roles along with the reason why the appellants attacked the complainant and the deceased.

(b) I find that the prosecution's case primarily rests on the evidence of the eye witnesses to incident and whether I believe their evidence whose evidence I shall consider in detail below;

(i) Eye witness PW 1 Haji Muhammed Iqbal. He is the complainant. He is not related to the deceased who was his Jamadar. According to his evidence in chief;

"I own agricultural land in deh Dando, taluka Tando Bago. I sow agricultural crops in my said land as well as I have kept a fish pond over the portion of said land. Present incident took place on 29.7.1995 at about 10-0 AM. On that day, I went to my land in a Jeep. Deceased Mojoo Mallah was my kamdar on my lands. When I reached at my land my Kamdar Mojoo Mallah and Hari Manjhi Mallah met me there. We all the three then sat on the side of fish pond, at that time accused Eidoo Khaskheli, armed hatchet, accused Dhani Bux Khaskheli armed with lathis, Accused Shadoo armed with hatchet, and Rajab Ali having lathi came there. The accused on arrival started abusing me and my kamdar Mojoo Mallah. Then

accused Eidoo Khaskheli gave blunt side of hatchet's blow on the head of deceased Mojoo Mallah. The said blow fell on the head of deceased Mojoo. Accused Shadoo gave me hatchet's blunt side blows which I sustained on my back, hands and arms. Accused Rajab Ali caused me lathi injuries, which I sustained on my back, as well as on my hands. Accused Dhani Bux gave lathi blows to deceased which he sustained on various parts of his body. We raised cries on which PWs came there and rescued us. Accused then went away from the place of incident, but before their departure they gave blows of lathis and hatchets on my jeep, as a result all the glasses were broken. Thereafter, we put Mojoo Mallah in my vehicle and I brought him to P.S Tando Bago, where police asked me to take him to the Hospital as condition of Mojoo was serious. I then went and left Mojoo Mallah at hospital T.Bago, and came back to P.S Tando Bago, where I lodged the F.I.R. I produce my FIR as Ex.11. It is same, correct and bears my signature. I then went with police to the place of incident, which was shown by me. As Majoo was in serious condition, therefore, from T. Bago hospital he was referred to LMCH Hyderabad as his condition was serious. Police also referred me to Taluka hospital Tando Bago for treatment and certificate. After two days of the incident, Majoo Mallah expired at LMCH Hyderabad. A few days prior to this incident, I had made complaint against accused to SP Badin as they were causing damage to my paddy crop and were also harassing us. After my complaint one accused was arrested by the police, whereas other three could not be arrested. Because of my said application accused were harboring grudge against me and Majoo Mallah, thereafter they attacked upon us and caused me injures and also caused death of deceased Mojoo Mallah. Again says that accused Shafi was arrested by police on my application. He is brother of present accused Rajab Ali and Shadoo. Accused present in Court are the same." (bold added)

This eye witness is not related to the deceased and no enmity or ill will has been proven between him and the appellants. In fact the opposite is the case as the appellants were annoyed with him for making a complaint to the police against them which lead to them attacking him. Thus, the appellant had no reason to implicate the appellants in a false case.

He is not a chance witness as he was going to his lands to speak to his Jamadar and had every reason to be where he was at the time of the incident. This eye witness **knew the appellants** before the incident which occurred at 10.30 in the morning in day light hours where he would have got a good look at all the accused and would have been able to recognize all the accused as he saw them from close range whilst they were beating him with lathi's which beating is proved by the medical evidence of PW 3 Dr.Aijaz Hammed MLO who confirms that his injuries were of bruises and one lacerated wound. Such injuries are consistent with the type of weapon he states he was attacked with and confirm his presence at the scene of the incident. Since he knew and saw the appellants from close range in broad day light there can be no case of mistaken identity and as such there is no

requirement for an identification parade in order to determine the identity of the appellants. PW 12 Loung who was the tapedar in his sketch also confirms that the complainant and the other eye witness were close enough to easily see the appellants. His presence at the scene of the incident is corroborated by PW 2 Manghi who was also an eye witness. PW 10 Din Muhammed who was the IO of the case also corroborates the complaint which the complainant had made against the accused.

He gave his S.154 Cr.PC statement with promptitude which was not significantly improved on during his evidence. He named the accused in his FIR along with their role and the other eye witness. He gave his evidence in a straight forward and natural manner and his evidence was not dented during a lengthy cross examination and as such I find his evidence to be reliable, trust worthy and confidence inspiring and believe the same especially in respect of the identity of the appellants who attacked both him and the deceased with hatchets and latthi's.

I can convict on the evidence of this eye witness alone though it would be of assistance by way of caution if there is some corroborative/ supportive evidence. In this respect reliance is placed on the case **Niaz-ud-Din and another v. The State and another** (2011 SCMR 725) and **Muhammad Ismail vs. The State** (2017 SCMR 713). In this case however there is more than one eye witness.

(ii) Eye witness PW 2 Manghi. He is a hari of the complainant and was present with the deceased by the fish pond when the attack occurred. He is not related to the complainant, deceased or any of the appellants and had no reason to falsely implicate them in this case. He was not a chance witness as he worked on the land of the complainant and was waiting for him along with the deceased Jamadar in order to ask him about fertilizer. His evidence corroborates PW 1 Haji Muhammed Iqbal's evidence in all material respects. He is named in the FIR as an eye witness and he gave his S.161 Cr.PC statement with promptitude and his evidence is not materially improved from his S.161 and S.164 Cr.PC statements. The same considerations apply to his evidence as the evidence of PW 1 Haji Muhammed Iqbal.

Thus, based on our believing the evidence of the eyewitnesses what other supportive/corroborative material is there against the appellants? It being noted that corroboration is only a rule of caution and not a rule of law. In this respect reliance is placed on the case of **Muhammad Waris v The State** (2008 SCMR 784)

(c) That the appellants counsel have made much of the fact that the third eye witness PW Vikio was declared hostile. I am however of the view that this is of little, if any, significance. This is because as per the FIR and eye witness evidence of the complainant and PW 2 Manghi PW

8 Vickio was **not** an eye witness to the attack on the complainant and the deceased by the appellants and arrived at the crime scene later.

(d) That the medical evidence and medical reports as mentioned above fully support the eye-witness/ prosecution evidence. It confirms that the deceased died from a blow to his head from a hard and blunt instrument. Such weapon I find could easily be a hatchet or a lathi as per the evidence of the two eye witnesses which were later recovered on the pointation of the appellants.

(e) That according to the evidence of PW 9 Muhmmmed Saleem who was one of the mashirs of the case the police secured blood stained earth and broken glass from the jeep which was parked there from the vardat. They also secured the clothes of the deceased. He was also mashir of arrest of all 4 accused and mashir when each of the accused lead the police to the hatchets and lathi's on their pointation. In this regard his evidence corroborates PW 10 Din Muhammed who was the IO who made such arrest and recoveries. The co-mashir PW 5 Farman Ali who was the co-mashir with PW 9 Muhammed Saleem corroborated all the recoveries **except** he claims that he was not present at the arrest of the accused and was not present when the accused produced the hatches and lathi's on their pointation. This lead to him being declared hostile by the prosecution. However during cross examination by the prosecution he admitted that the hatchets and lathi's were produced from the house of the accused by their father. This I find tends to show that he was present with the police when the hatchets and lathi's were recovered from the house of the appellants. When his evidence is put in juxtaposition with the evidence of PW 10 Din Muhammed who was the IO and PW 9 Muhammed Saleem who was the other mashir neither of whom were related to the complainant or had any ill will or enmity with the appellants I tend to believe the evidence of PW 10 Din Muhammed and PW 9 Muhammed Saleem regarding the arrest and the recoveries of the hatchets and lathi's especially as PW 5 Farman in his cross examination despite being declared hostile admitted that the recoveries were made at the house of the appellants albeit from their father and PW 10 Muhammed Din and PW 9 Saleem Muhammed fully corroborate each other whilst the evidence of PW 5 Farman in respect of the non arrest of the appellants is **not** corroborated by any other independent evidence. Thus, I believe the evidence of PW 10 Muhammed Din and PW 9 Muhammed Saleem in respect of the arrest and recoveries and discard the evidence of the co-mashir PW 5 Farman in respect of the arrest who appears to have been won over. In this respect reliance is placed on the case of **Abdul Khalique v. The State** (2020 SCMR 178) which found as under:-

4. *The ocular account in this case has been furnished by complainant Muhammad Sadiq (PW1), Rasheed Ahmad (PW2) and Abdul Rehman (PW3). All the three eye-witnesses remained consistent on all the material aspects so far as role of petitioner of causing dagger blows on the person of Khalil Ahmad (deceased) is concerned. Though complainant Muhammad Sadiq,*

(PW1) was declared hostile, but to the extent of petitioner, his testimony endorses the statements of other two eye-witnesses. The medical evidence adduced by Dr. Nizamuddin (PW6) who medically examined Khalil Ahmad in injured condition and Dr. Salahuddin (PW7) who conducted autopsy on the dead body of Khalil Ahmad supports the ocular account. During the course of investigation, a dagger was recovered on the pointation of the petitioner, which was blood stained".

Furthermore, the case of **Sher Muhammad v. The State** (1968 P.Cr.L.J 221) held as under in respect of hostile witnesses:-

"It may be mentioned that Sultan Khan (P.W.) had been declared hostile to the prosecution in the trial Court and was cross-examined by the learned Public Prosecutor. It was then established that he had made a statement in the committing Court favouring the prosecution story and his statement made, before that Court was transferred as evidence under section 228 of the Code of Criminal Procedure. His refusal to support the prosecution, therefore, at the trial stage, cannot be pressed into service to belie the prosecution allegation in the circumstances of this case."

In yet another case of **Muhammad Suleman and 4 others v. The State** (PLD 2007 SC 223) it was held as under with respect to hostile witnesses:-

"12. There is no cavil to the proposition that the testimony of a hostile witness or a witness, who was not examined being won over was either produced by the defence or was examined as Court witness, must not be left out of consideration for mere reason that he did not support the prosecution rather the evidence of such a witness must be considered with utmost care and caution. The testimony of a witness who speaks in the different tune at different times is certainly not reliable unless strong confirmatory evidence of independent character is available on record."

(f) That it has not been proven through evidence that any particular police witness had any enmity or ill will towards the appellants and had no reason to falsely implicate them in this case, for instance by foisting hatchets and lathi's on them, and in such circumstances it has been held that the evidence of the police witnesses can be fully relied upon and as such I rely on the police evidence. In this respect reliance is placed on the case of **Mushtaq Ahmed V The State** (2020 SCMR 474).

(g) That all the PW's are consistent in their evidence and even if there are some contradictions in their evidence we consider these contradictions as minor in nature and not material and certainly not of such materiality so as to effect the prosecution case and the conviction of the appellants. In this respect

reliance is placed on the cases of **Zakir Khan V State** (1995 SCMR 1793) and **Khadim Hussain v. The State** (PLD 2010 Supreme Court 669). The evidence of the PW's provides a believable corroborated unbroken chain of events from the time the complainant complained to the police against the appellants to the complainant going to his agricultural land for work to the appellants attacking the complainant and the deceased to the complainant taking the deceased to hospital where he died a few days later from his injuries to the arrest of the appellant to the recovery of the hatchets and lathi's on their pointation.

(h) The prosecution has proved the motive for the attack which was because the complainant had reported the appellants to the police which lead to the arrest of one of their relatives and they wanted to take revenge on this score. This complaint against the appellants is corroborated by PW 10 Muhammed Din the IO in his evidence.

(i) Undoubtedly it is for the prosecution to prove its case against the accused beyond a reasonable doubt but we have also considered the defence case to see if it at all can cast doubt on or dent the prosecution case. The defence case is simply one of false implication by the complainant party in collusion with the police. The appellants did not give evidence on oath and did not call any DW in support of their defence case. Thus, for the reasons mentioned above I disbelieve the defence case in the face of reliable, trust worthy and confidence inspiring eye witness and other corroborative /supportive evidence against the appellants which has not at all dented the prosecution case.

14. Thus, based on the above discussion I have no doubt that the prosecution has proved its case against the appellants beyond a reasonable doubt for the offence for which they have been convicted and hereby maintain their convictions and sentence and **dismiss** the appeals. The bail of the appellants is recalled with immediate effect and they shall be arrested and returned to Central Prison Hyderabad in order to serve out the remainder of their sentences. A copy of this Judgment shall be sent to SSP Badin for compliance.

15. The appeal is disposed of in the above terms.