

Order Sheet
IN THE HIGH COURT OF SINDH,
CIRCUIT COURT, HYDERABAD

Cr. Appeal No. D- 146 of 2004
Cr. Acq. Appeal No. D- 181 of 2004

DATE	ORDER WITH SIGNATURE OF JUDGE
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26.01.2023

Mir Shakir Talpur, Advocate for appellant Ghulam Mustafa in Cr. Appeal No. D- 146 of 2004 & for respondents in Cr. Acq. Appeal No. D- 181 of 2004

Mr. Muhammad Muddasir, Advocate holds brief for Mr. Mehmood Alam Abbasi, Advocate for appellant in Cr. Acq. Appeal No. D- 181 of 2004 and for Complainant in Cr. Appeal No. D- 146 of 2004 is called absent.

Mr. Nazar Muhammad Memon, Addl. P.G.

In Cr. Appeal No. D- 146 of 2004 we have heard learned counsel for the appellant as well as learned Addl. P.G. and learned counsel for Complainant has submitted the written arguments. With regard to Cr. Acq. Appeal No. D- 181 of 2004 we have heard learned Asstt: Prosecutor General, the Complainant counsel has submitted written arguments and we have also heard learned counsel for the respondents. The Cr. Appeal No. D- 146 of 2004 filed against the conviction and Cr. Acq. Appeal No. D- 181 of 2004 filed against the acquittal are reserved for Judgment.

**IN THE HIGH COURT OF SINDH, CIRCUIT COURT
HYDERABAD**

Present:

Mr. Justice Mohammad Karim Khan Agha
Justice Mrs. Kausar Sultana Hussain

Cr. Appeal No.D-146 of 2004

Ghulam Mustafa

Versus

The State

Cr. Acq. A. No.D-181 of 2004.

Allahdino

Versus.

Shoukat Ali and others

Appellant Ghulam Mustafa (on bail) in Cr. Appeal No.D-146 of 2004 and private respondents No.1 to 4 namely; Shoukat, Sulleman, Mehar and Wali Muhammad (present in Court) in Cr. Acq. Appeal No.D- 181 of 2004	through Mr. Shakir Ali Talpur, Advocate
Appellant Allahdino in Cr. Acq. Appeal No.D-181 of 2004 and complainant Shoban in Cr. Appeal No.D-146 of 2004,	through Mr. Muhammad Mudabbir Abbasi Advocate and Associate of Mr. Mehmood Alam Abbasi, Advocate
Respondent The State	through Mr. Nazar Muhammad Memon, Addl. P.G Sindh
Date of hearing	26.01.2023
Date of judgment	02.02.2023

J U D G M E N T

MOHAMMAD KARIM KHAN AGHA, J.-Since both the appeals viz Cr. Appeal No.D-146 of 2004 and Cr. Acquittal Appeal No.D-181 of

2004 arise out of one and same crime as well as judgment, therefore, we propose to decide the same by this common judgment. The facts and prayers as made by the appellant/accused in the criminal appeal as well as the appellant in criminal acquittal appeal are that:-

i. In Cr. Appeal No.D-146 of 2004, appellant Ghulam Mustafa and other co-accused namely Shoukat, Sulleman, Mehar and Wali Muhammad were tried by the learned VIth Additional Sessions Judge, Hyderabad in Sessions Case No.451 of 2000, arising out of crime No.06 of 2000, registered at Police Station Khebrani for offence under sections 302, 34 PPC, and after full-fledged trial, appellant Ghulam Mustafa was found guilty vide judgment dated 09.08.2004 and was convicted and sentenced under section 302(b) PPC to suffer life imprisonment with fine of Rs.100,000/-. In default of payment of the fine, he was directed to further suffer R.I for 06 months. On realizing, half of the amount of fine was directed to be paid to the legal heirs of the deceased. Benefit of Section 382-B Cr.P.C. was also extended to the accused/appellant. Whereas, the other co-accused were acquitted by the same judgment by extending them benefit of doubt. The appellant Ghulam Mustafa has challenged his conviction and sentence through instant criminal appeal.

ii. The Criminal Acq. Appeal No.D-181 of 2004 has been filed by appellant Allahdino (father of the deceased), assailing the said judgment to the extent of acquitted accused/private respondents.

2. The brief facts of the prosecution case as disclosed in the F.I.R, lodged by the complainant Shoban at Police Station Khebrani, are as under:-

“(Complainant) I reside at the above address and am Health Technician in Health Department. I and my brother Tooh Sahito reside in the same house and there is dispute over matrimonial affairs since long time between us and Ali Muhammad Sahito and Ghulam Mustafa Sahito used to ask my brother Tooh that the hand of girl be given as they are not of good character on which my brother Tooh used to reply in

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negative due to which Ghulam Mustafa Sahito who is relative of Ali Muhammad became annoyed. Today on 24.05.2000, I, my brother Tooh Rasool Bux Sahito, came together with our work at Khebar and from where, we were going towards Khebar town when at about 0715 hours in the morning reached public street near Government High School Khebar where we met with Ghulam Mustafa Sahito, Attaullah Sahito, Shoukat Ali, Mehar Sahito, Sulleman Sahito, who all were armed with hatchets and also met Wali Muhammad son of Ahmed Sahito who abused Tooh and asked that he is not giving the hand of the girl and today we will see you. During this, Wali Muhammad instigated them to catch hold of Tooh and do not spare him. On the instigation of Wali Muhammad, all the accused together caused sharp side hatchet blow to Tooh. During this, my brother after receiving hatchet injuries fell down on the ground. We challenged the accused that do not kill the man and on our hakals while leaving Tooh ran away along with hatchet. Thereafter, we went and found Tooh with hatchet injuries on the left side on his head and also hatchet injuries on the parts of body and blood was oozing and he was lying dead. Thereafter, we went and found Tooh that he has hatchet injuries on the left side on his head and also hatchet injuries on the parts of body and blood was oozing and he was lying dead. Thereafter, after leaving the above named witnesses at the dead body of my deceased brother Tooh. I have come to lodge the report that on the instigation of accused Wali Muhammad, Ghulam Mustafa, Attaullah, Shoukat Ali Mehar and Sulleman with common intention over the dispute of matrimonial affairs have given sharp side hatchet blow to my brother Tooh and murdered him. Complaint is lodged, investigation be made."

3. After completing the usual investigation, I.O submitted the challan against the appellant/private respondents.

4. Initially, case of the minor/juvenile co-accused Attaullah was separated and sent to juvenile Court for trial; whereas, the case against the aforementioned remaining accused persons was tried by the learned trial court. Formal charge against the accused was framed by trial court at Ex.16, to which vide their respective pleas Ex.17 to Ex.21 they have pleaded not guilty and claimed to be tried.

5. In order to prove its case the prosecution examined 08 witnesses and exhibited various documents and other items. The Statements of the accused/appellant/private respondents were recorded under section 342 Cr.P.C, in which they have denied the allegations of the prosecution while claiming their innocence and false implication. As regard the confessional statement,

accused/appellant Ghulam Mustafa retracted from the same stating that before recording the said statement he was maltreated by police. In order to disprove the charge, appellant/accused Ghulam Mustafa has also examined himself on oath as well as two D.Ws. namely Ali Muhammad and Ahmed. Whereas, the remaining accused/private respondents neither examined themselves on oath nor led any defense evidence.

6. The learned trial court after hearing the learned counsel for the parties and on the assessment of the entire evidence convicted and sentenced the accused/appellant Ghulam Mustafa and acquitted co-accused/private respondents Shoukat Ali, Sulleman, Mehar and Wali Muhammad, as set out earlier in this judgment. Hence the appeals against conviction and acquittal have been lodged.

7. The evidence produced before the trial court finds an elaborate mention in the impugned judgment passed by the learned trial court therefore the same needs not to be reproduced here so as to avoid duplication and unnecessary repetition.

8. Learned counsel for the appellant/private respondents has contended that the appellant is innocent and has been falsely implicated by the complainant in collusion with the police on account of marital dispute and enmity; that none of the alleged eye witnesses were present at the time of the incident and have given false evidence; that the alleged confession made by the appellant was neither voluntary nor truthful and was made after maltreatment by the police and that the recovered hatchet was not made on his pointation but was foisted on him by the police and as such the appellant should be acquitted by being extended the benefit of the doubt. In support of his contentions he placed reliance on the cases of **Muhammad Arif V The State** (2019 SCMR 631), **Muhammad Azhar Hussain and another V The State and another** (PLD 2019 Supreme Court 595), **Azeem Khan and another V Mujahid Khan and others** (2016 SCMR 274), **Muhammad Asif V The State** (2017 SCMR 486), **Sardar Bibi and another V Munir Ahmed and others** (2017 SCMR 344), **Dost**

Muhammad V The State (PLD 1982 Karachi 1000), **Mst. Sughra Begum and another V Qaiser Pervez and others** (2015 SCMR 1142) and **Pathan V The State** (2015 SCMR 315). With regard to the appeal against acquittal of the respondents he contended that the only evidence against the respondents was that of the eye witnesses who were not even present and as such the appeal against acquittal should be dismissed.

9. Mr. Mudabbir Advocate/Associate of Mr. Mehmood Alam Abbasi, advocate for the appellant in criminal acquittal appeal as well as the complainant in criminal appeal has contended that evidence of eyewitnesses namely complainant Shoban, P.Ws Muhammad Bux and Rasool Bux is confidence inspiring and straight forward; there is no major contradiction in their evidence; that there is confessional statement of appellant Ghulam Mustafa, which proves the prosecution case against him as well as co-accused/private respondents and as such the appellants appeal against conviction be dismissed and the appeal against acquittal of the respondents be allowed. In support of his contentions he has placed reliance on the cases of **Muhammad Akram V The State and others** (2007 SCMR 1539) and **Abdul Rauf and others V Mehdi Hassan and others** (2006 SCMR 1106).

10. Learned A.P.G. appearing for the State while supporting the judgment passed by the learned trial Court, has contended that the impugned judgment has been passed after due appreciation of evidence on record; that the eye witness evidence of PW 1 the complainant is reliable, trust worthy and confidence inspiring and can be believed which is corroborated by two other eye witnesses and is corroborated by the appellants confession before the judicial magistrate and the recovery of the hatchet on his pointation and as such the appeal should be dismissed. He however did not support the appeal against acquittal of the respondents. In support of his contentions, he placed reliance on the cases of **Sajid Mehmood V The State** (2022 SCMR 1882), **Shaukat Ali V The State and others** (PLD 2019 Supreme Court 577), **Rashid Aslam V The State** (2017 YLR 2052) and **Gul Faraz V Muhammad Faraz and 2 others** (2017 YLR 2074).

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11. We have heard the arguments of the learned counsel for the appellant, learned Additional Prosecutor General Sindh and considered the complainants written arguments and have gone through the entire evidence which has been read out by the learned counsel for the appellant, and the impugned judgment with their able assistance and have considered the relevant law including the case law cited at the bar.

12. Based on our reassessment of the evidence especially that of the IO and the medical evidence and blood at the crime scene we find that the prosecution has proved beyond a reasonable doubt that Tooh Sahito (the deceased) was murdered by hatchet on 24.05.2000 at about 7.30 am in street near Government High School Khyber Deh Khybrani.

13. The only question left before us therefore is whether it was the appellant and the respondents who murdered the deceased by hatchet at the said time, date and location?

14. After our reassessment of the evidence we 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 for the following reasons;

(a) It is true that the FIR was lodged with promptitude (although it can be asked why the complainant did not lodge his complaint at the police picket only 10 minutes away especially as he knew the area) and named the appellants and the other co-accused as the persons who murdered his brother by hatchet blows however we find that when the evidence is examined in its totality the prosecution case as regards the identity of the murderers does not appear to ring true and contains many doubts as mentioned below.

(b) We find that the prosecution's case primarily rests on the evidence of the eye witnesses to the murder of the deceased and whether we believe their evidence whose evidence we shall consider below;

(i) **Eye witness PW 1 Shouban. He is the complainant and brother of the deceased.** According to his evidence:

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"At the time of incident, I and my brother Tooh and Rasool Bux and Muhammad Bux had come to bus stand Khyber for government duty to the school. After Bus-stop Khyber, I and my brother Tooh were going to High School **while remaining witnesses went towards town with their own work.** When at about 7-15 a.m. we both brothers arrived near Government High School we saw accused Ghulam Mustafa S/o Faiz Muhammad, Attaullah S/o Wali Muhammad, Shoukat S/o Obhayo, Mehar S/o Haroon, Suleman S/o Umar and Wali Muhammad all Sahitas. All the accused were armed with hatchet. At the first instance accused started abusing my brother Tooh while saying that why he was not giving hand of woman to Ghulam Mustafa. **Thereafter, accused Wali Muhammad instigated remaining accused for killing Tooh. Thereafter, all the accused started giving sharp side hatchet blows to my brother Tooh, who after sustaining hatchet injuries fell down on the ground.** I gave hakals and started raising cries for not killing my brother. Rasool Bux and Muhammad Bux, who were behind us also gave hakals. Thereafter accused leaving Tooh alongwith hatchets went towards northern side. Tooh has sustained on the back side of head a big hatchet injury and also sharp side hatchet injuries on the right side of neck, on right arm, so also on the right shoulder. He has sustained injuries and there was bleeding from injuries. Due to injuries Tooh died at the spot. Then I left Muhammad Bux and Rasool Bux over the dead body and went to Police Station Khybrani and lodged FIR against the accused that on the instigation of accused Wali Muhammad remaining accused committed the murder of my brother while giving him hatchet injuries. I produce the FIR at Ex.23. It is same, correct & bears my signature. After the FIR I brought the police at the place of incident where police saw the dead body, referred the same to the hospital for post mortem. Accused present in Court are same"

From the evidence it transpires that this witness is related to the deceased and there is also enmity between the complainant's side and the appellant's side and thus we are put on caution as to the reliability of his evidence. The identification of the appellants is not in doubt as the complainant knew them, it was a day time incident and the incident happened in front of him. The question emerges what was he doing with his brother at 7.30am going to Khyber? Admittedly his brother was a school teacher in Khyber and had every reason to go there and indeed was murdered not far from his school but the complainant had no reason to go to Khyber at all as it was not his place of work and he had no reason to get off the bus and do some personal work as alleged by him which casts some doubt on his evidence. Furthermore, in his evidence he names the acquitted

four respondents as also attacking his brother with hatchets. The fact that the eye witness evidence was clearly not believed in the case of the acquitted co-accused also raises doubts as to why his eye witness evidence should be believed in respect of the appellant alone and only the appellant be convicted. It is noted that the trial Court has rightly rejected the evidence of the other eye witnesses PW 2 Rasool Bux and PW 3 Muhammed Bux who corroborate the eye witness evidence of the complainant as they were chance witnesses, they gave their eye witness Section 161 Cr.PC statements after an inexplicable and unexplained delay of **three days** and were also related to the complainant and their evidence did not accord with the medical evidence or the alleged confession of the appellant. According to the complainant's evidence they were also said to have gone towards town with their own work so how could they have been presence especially as no one else in the area reached the crime scene when the deceased cried out. We also find that it does not appeal to logic, reason or common sense that the complainant would leave his dead brother on the road whilst he went to lodge an FIR at a PS 2 and a half miles away. Natural human conduct would be for him to immediately send his dead brother to hospital and then lodge the FIR or send one of the other alleged eye witnesses the Bux brothers who were related to him to Lodge the FIR whilst he took the dead body to hospital. Interestingly, according to the evidence of the complainant and the Bux brothers when the complainant went to lodge the FIR the Bux brothers were left to look after the body and were apparently present when the police returned and took the dead body to the hospital however according to PW Muhammed Usman who was the IO of the case no one was with the dead body when he returned with the complainant which again undermines the prosecution case as deposed by the complainant and PW 2 and 3 being the Bux brothers. It is also notable that the dead body is brought to the hospital by the police and not by the complainant or the Bux brothers. Again this does not appeal to logic reason and common sense as surely the natural human conduct of the complainant when he returned to the dead body of his brother would have been to accompany it to the hospital rather than the police. It also casts doubt on the whole prosecution story that the body was not identified at the hospital by the complainant or by the Bux PW's but instead by one Allah Dino. Where did the complainant go during this period? It begs the question whether the complainant was present at all when his brother was attacked and murdered.

Thus, for the reasons mentioned above we disbelieve the evidence of eye witnesses PW 2 and 3 the Bux's and

discard the same. At this point, for the reasons mentioned above, we give very little weight to the evidence of the complainant which now stands uncorroborated by any other eye witness.

(c) In fact once the appellants confession is considered which was recorded before the judicial magistrate and is reproduced below for ease of reference we give absolutely no weight to the complainants evidence as the confession (if it is to be believed) **completely undermines the entire credibility and reliability of the complainants evidence as well as his FIR which was allegedly lodged shortly after the incident as the confession is completely at odds with the complainant's eye witness account of events.**

The appellant's alleged confession before the judicial magistrate reads as under;

"Sir, our matrimonial issue is on going and the case also under adjudication/pending before Mukhtiarkar Matari, prior to this, Teacher Tooh also assaulted me two times, on the day of incident, I along with accused Attaullah jointly picked hatchets from house on the pretext of collecting the wooden sticks, boarded on the Bus and came at Khyber Bus Stand, where sat on hotel and drank the tea. Afterwards, we were going ahead by taking common street of Government High School, meanwhile, Teacher Ghulam Muhammad Sahito, Teacher Tooh Sahito and his brother Shouban Sahito were coming from behind us, as soon as they saw us, they were twisting moustaches and were laughing loudly, we restrained them but Tooh Sahito engaged in beating with us, in response we both caused hatchet blows upon Tooh to save ourselves, resultantly who fell down and then we decamped. This is statement.

Sd/- (In Sindhi)

Sd/- (in English)

Ghulam Mustafa

2-6-2000

Judicial Magistrate

Matari"

As such we find that we can neither believe the evidence of the confession which appears to have been coerced out of the appellant by police maltreatment nor the evidence of the complainant which is completely at odds with the confession. For example, there is no mention of either the alleged PW eye witnesses Bux's or the other acquitted co-accused who according to the complainant also attacked the deceased with hatchets.

(d) The medical evidence also does not support the ocular evidence as according to the eye witness evidence

the deceased was attacked by about 5 men wielding hatches but quite incredibly there are only 3 lacerated wounds.

(e) Since we have already disbelieved the eye witness evidence and the confession there is every chance that the hatchet allegedly recovered on the pointation of the appellant was foisted on him. Even if it was not this single piece of supportive/corroborative evidence is not sufficient to prove the case against the appellant beyond a reasonable doubt.

(f) The DW's produced by the appellant can also not be ignored as although they did not give him an alibi they gave evidence that the deceased was killed by two persons who they saw from behind and had muffled faces as opposed to a group of 5 or 6 as alleged by the prosecution. The appellant also gave evidence on oath to disprove the charge against him

15. Thus for the reasons mentioned above by extending the benefit of the doubt to the appellant the impugned judgment is set aside, the appellant is acquitted of the charge, his appeal is allowed and his bail bonds stand canceled and he is free to go.

16. **With regard to the appeal against acquittal** in respect of the respondents it is well settled by now that an appeal against acquittal has a very narrow scope and the respondents acquire a double presumption of innocence. The respondents were originally acquitted because the eye witnesses were disbelieved in respect of them and there was no other piece of evidence to link them to the crime. As such since we have now disbelieved all the eye witnesses including the evidence of the complainant and discarded the appellants confession there is absolutely no evidence against the respondents and as such the appeal against acquittal is dismissed.

17. **In summary.**

- (a) The appeal against conviction is allowed and
- (b) The appeal against acquittal is dismissed.

18. Both of the appeals stand disposed of in the above terms.