

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

Criminal Appeal No.S- 202 of 2004

DATE	ORDER WITH SIGNATURE OF JUDGE
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20.02.2023.

Mr. Sajjad Hussain Chandio, Advocate for appellant.

Ms. Sana Memon, A.P.G for State.

Mr. Abdul Hameed Bajwa, Advocate for complainant.

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Appellant is present on bail. I have heard the learned counsel for appellant, learned A.P.G for State and learned counsel for the complainant. Reserved for judgment.

Tufail

IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

Cr. Appeal No.S-202 of 2004

Jan Muhammad

Versus

The State

Appellant : Jan Muhammad S/o Ghulam Muhammad (present on bail)	through Mr. Sajjad Ahmed Chandio Advocate
Respondent : The State	through Ms. Sana Memon, A.P.G. Sindh
Complainant : Muhammad Essa	through Mr. Abdul Hameed Bajwa Advocate
Date of hearing	20.02.2023
Date of judgment	27.02.2023

J U D G M E N T

MOHAMMAD KARIM KHAN AGHA, J.-This criminal appeal is directed against the judgment dated 26.10.2004, passed by the learned Ist. Additional Sessions Judge, Dadu, in Sessions Case No.80 of 2003 (re: The State V Jan Muhammad and others), emanating from Crime No.8 of 2003, registered at Police Station Bhan, under section 302 and 34 PPC, whereby the appellant has been convicted u/s 302 PPC and sentenced to suffer imprisonment for life. He was also directed to pay fine of Rs.50,000/-; and, in case of non-payment of the said fine, the appellant shall further undergo S.I for 06 months. The fine, if realized, was directed to be paid to the legal heirs of the deceased. He was extended benefit of section 382-Cr.P.C. Whereas the

co-accused Meenhon, Gul Hassan and Shah Muhammad were acquitted of the charge while extending them the benefit of the doubt.

2. The facts of the prosecution case are as under:-

"On 30.01.2003 at 1100 hours, Complainant Muhammad Essa Son of Mulla Muhammad by caste Jamali, Resident of village Khair Muhammad Jamali Taluka Sehwan appeared at Police Station Bhan and got his report lodged wherein he stated that they are three brothers amongst which Manzoor Ali is third number whose age is about 22/23 years and he resides with him and their survey land is adjacent to their houses near village Khair Muhammad Jamali. On 29.01.2003 the Complainant's brother Manzoor Ali had gone to water the land and after having meals they all were sleeping with family members. At about 5-00 am they heard cries from their land, on that, Complainant, his cousin Ali Murad Son of Chhatoo Khan and Muhammad Achar Son of Haji Pheri, who also reside near Complainant's house, came out and went towards their land. The Complainant had torch which he flashed towards the side where from the cries were heard, where they saw four persons running from water course towards Western side. The Complainant party gave them Hakals to stop but all the four persons started running fast. The Complainant party chased them when they reached near the trees of Babul at water course they saw on the light of Torch that one person was lying inside the water course. The Complainant party went near him and saw on the torch light and identified him to be Manzoor Ali, the brother of the Complainant, whose neck was cut below left ear and was dead. Then the Complainant Party became assured that the four persons who were seen on torch light and will be recognized on seeing them again, have killed Complainant's brother Manzoor Ali, who was taking turn of Water, with sharp edged weapon. Then Complainant leaving above named witnesses at the dead body of his brother Manzoor Ali, came home to inform his uncle Arz Muhammad, who had gone to Mela of Haji Shah. He came after some time and the Complainant told him all the above facts who advised the Complainant to lodge report at Police Station. Then Complainant proceeded to Police Station and got his report lodged against four unknown persons."

3. After usual investigation police submitted challan before the Court concerned and after completing necessary formalities, learned trial Court framed charge against the accused/appellant as well as the co-accused, to which they pleaded not guilty and claimed trial.

4. At trial, the prosecution in order to prove its case examined 09 witnesses and exhibited numerous documents and other items. The statements of the 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 on account of political victimization.

5. Learned trial Court after hearing the learned counsel for the parties and evaluating the evidence available on record convicted and sentenced the appellant Jan Muhammad, as stated above; however, acquitted co-accused Meenhon, Gul Hassan and Shah Muhammad. Hence the appellant has filed this appeal against conviction.

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 advocate for the appellant has contended that the appellant is innocent and has been falsely implicated in this case due to political enmity; that there was an unexplained delay in lodging the FIR; that all the material prosecution witnesses are interested; that the evidence against the appellant is shaky and full of contradictions and cannot be safely relied upon; that there are no eye witnesses and the so called eye witnesses cannot be safely relied and at best it is a case of last seen evidence; that the dagger was foisted on the appellant by the police and for all or any of the above reasons the appellant should be acquitted by extending him the benefit of the doubt. In support of his contentions he placed his reliance on the cases of **Muhammad Mansha V The State** (2018 SCMR 772), **Mian Sohail Ahmed and others V The State and others** (2019 SCMR 956), **Kamal Din alias Kamala V The State** (2018 SCMR 577), **Muhammad Afzal alias Abdullah and others V The State and others** (2009 SCMR 436), **Tariq Pervez V The State** (1995 SCMR 1345), **Sardar Bibi and another V Munir Ahmed and others** (2017 SCMR 344), **Khalil V The State** (2017 SCMR 960), **Abdul Rahim V Ali Bux and 4 others** (2017 PCr.LJ 228), **Shabbir Ahmad and others V The State and others** (2020 PCr.LJ 45), **Noor Muhammad V The State and another** (2020 SCMR 1049), **Muhammad Ashraf V The State** (2012 SCMR 419), **Muhammad Adnan and another V The State and others** (2021 SCMR 16), **Muhammad Asif V The State** (2017 SCMR 486), **Noor Muhammad V The State and another** (2020 SCMR 1049), **Mst. Tasleem Bibi V The State** (2011 SCMR 1215) and **Muhammad Asif V The State** (2017 SCMR 486).

8. Learned Assistant Prosecutor General Sindh as well as the learned counsel for the complainant have half heartedly supported the impugned judgment.
9. I have heard the arguments of the learned counsel for the appellant learned Additional Prosecutor General Sindh and the complainant 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.
10. Based on my reassessment of the evidence of the PW's especially the medical evidence and other medical reports and blood at the crime scene I find that the prosecution has proved beyond a reasonable doubt that Manzoor Ali (the deceased) received blows from a sharp instrument which led to his death on or about 30.01.2003 at about 0500am on the lands of Muhammed Issa village Khair Muhammed Jamali, Taluka Johi.
11. The only question left before me therefore is whether it was the appellant who murdered the deceased by a sharp cutting instrument at the said time, date and location?
12. After my reassessment of the evidence I 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) That the FIR was lodged with a delay of 6 hours. Although this delay is not that long based on the particular facts and circumstances of the case it puts me on caution. This is because after the murder of the deceased the complainant instead of going to lodge the FIR went to his house and waited for the return of his uncle Arz Muhammed before lodging the FIR. The complainant was 25 years of age and there is no logical reason why he had to return to his home and discuss the matter with his uncle Arz Muhammed before he lodged the FIR as such this delay in lodging the FIR has not been adequately explained.
- (b) That the conduct of the complainant does not seem to appeal to logic, reason or common sense as instead of taking his dead brother straight away to hospital he returned home

allegedly leaving two PW's looking after it to discuss the matter with Arz Muhammed.

(c) That there are actually no eye witnesses to the murder of the deceased. Instead there are three alleged eye witnesses the complainant, PW 4 Muhammed Archer and PW 5 Ali Murad who only state that they saw three persons running away after they heard cries and then found the dead body of the deceased. So at best it is a case of last seen evidence.

(d) I find that the prosecution case primarily depends on whether I believe the evidence of the so called eye witnesses and more importantly whether they have correctly identified the appellant as one of the person's they saw running away with a dagger. As such I will consider the evidence of each eye witness in turn.

- (i) **PW 1 Muhammed Issa. He is the complainant in the case and the deceased is his brother.** According to his evidence his brother had gone to irrigate his lands when he was awoken from his house at 0500am when he heard cries. PW Archer and Ali Murad who were his relatives also woke up and came with him. He went outside and in the torch light saw the accused running away with his unarmed co-accused. He saw on the torch light that his brother had sustained knife injury on his neck and was dead. He left the aforesaid PW's over the dead body whilst he returned home where he waited for his uncle Arz Muhammed to come home before he lodged the FIR.

The first point to note is that it was 5am in the morning in January when it was dark and hence the need for the torch. The complainant states that he saw the appellant and the acquitted co-accused running away and that the appellant had a knife from about 25 feet by torch light. This would therefore have been only a fleeting glance. What is of **significance** however is that the complainant **knew** the appellant and co-accused from before however he **inexplicably** does not name the appellant or any of the acquitted co-accused in the FIR which he lodges against 4 unknown persons and simply says that he could recognize them if he saw them again. He obviously gives no specific role to any of the accused as he does not name them or even mention that the appellant had a knife. The torch was never recovered and as such there is no proof of any source of light during this fleeting night time incident. He gave no hulia of any of the four unknown persons in his FIR. The importance of giving an advance hulia/description for the purposes of an identification parade to ensure that it is not a case of

mistaken identity has been stressed in the case of **Javed Khan V State** (2017 SCMR 524).

It is true that he later picked out the appellant at an identification parade however without a prior hulia the correctness of the identification cannot be safely relied upon keeping in view that the he saw the appellant only fleetingly via a torch light in darkness. Even other wise he gave the appellant no specific role when he identified him at the identification parade and it is well settled by now that under these circumstances the identification cannot be safely relied upon. In this respect reliance is placed on the case of **Kamal Din alias Kamala** (Supra). It was also a joint identification parade which has been deprecated by the Supreme Court. In this respect reliance is placed on the case of **Sohail Ahmed** (Supra). It would also appear that the complainant has made dishonest improvements from his FIR and actual evidence in terms of who committed the offence especially as he **knew** the appellant from before and names other PW's who I find were not even with hi as discussed later which also leads me to the find the evidence of this eye witness unreliable especially in connection with the correct identification of the appellant as one of the persons whom he saw running away from the crime scene. In this respect reliance is placed on the case of **Muhammed Mansha** (Supra)

As such since I find that the complainant has not been able to correctly identify the appellant as one of the person's he saw running away and as such the doctrine of last seen evidence is of no relevance to this case.

- (ii) **PW 4 Muhammed Achar and PW 5 Ali Murad are both related to the complainant and the deceased.** Both corroborate the evidence of the complainant. Once again despite **knowing** the appellant **astonishingly** neither of them name him in their Section 161 Cr.PC statements which according to them were given on the next day whilst according to IO PW 8 Gul Muhammed were recorded 6 weeks after the incident. No hulia is given in their Section 161 Cr.PC statements of the accused nor the fact that he was carrying a knife. During the identification parade held by magistrate PW 9 Mehmood Ahmed he states that PW Muhammed Achar informed him that that he was not present at the time of the incident and had come to know about the incident on telephone whilst PW Ali Murad sated that he heard about the incident from the complainant on the telephone at 9am from

Hyderabad. This is recorded in the memo of identification. Neither of these PW's was able to recognize the appellant in court. As such I find that these witnesses were not even present at the time of the incident and discard their evidence and place no reliance on it. The fact that the complainant stated before the magistrate that no witness was with him at the time of the incident further casts doubt on his evidence.

Having come to the conclusion that the identification of the appellant is in doubt the matter ends here however I would also like to point out a few other doubts which I have observed.

(e) That the medical evidence does not fully support the prosecution case as according to the MLO PW 3 Dr. Abdul Hammed the accused was allegedly in sleeping condition when his throat was cut which is not the case of the prosecution.

(f) That the recovery on pointation of the dagger by the appellant is doubtful as it was according to the IO placed outside his house where anyone could have put it.

(g) No torch was ever recovered to prove that there was any light available during this incident which occurred under cover of darkness.

13. It is a golden principle of criminal jurisprudence that the prosecution must prove its case against the accused beyond a reasonable doubt and that the benefit of doubt must go to the accused by way of right as opposed to concession. In this respect reliance is placed on the case of **Tariq Pervez V/s. The State** (1995 SCMR 1345).

14. Thus, for the reasons discussed above, I find many doubts in the prosecution case and by extending the benefit of the doubt to the appellant the appellant is acquitted of the charge, the impugned judgment is set aside, the appeal is allowed and appellant who is on bail bonds stand discharged and he is free to go.

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