

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

Cr. Jail Appeal No.S-162 of 2010

DATE ORDER WITH SIGNATURE OF JUDGE

16.01.2023.

Ms. Nasira Shaikh, Advocate for appellant.

Ms. Sana Memon, Asst. Prosecutor General, Sindh.

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I have heard the learned counsel for appellant and learned A.P.G. The complainant was called absent without intimation despite the name of learned counsel for complainant appearing in the cause list and being a fixed date. Since the appellant has been in custody for over 10 years, this matter cannot be kept pending any longer simply because the counsel for complainant has preferred to remain absent without intimation. Reserved for judgment.

Hafiz Fahad

IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

Cr. Jail Appeal No.S-162 of 2010

Mustafa @ Ghulam Mustafa

Versus

The State

Appellant : Mustafa @ Ghulam Mustafa	Through Ms. Nasira Shaikh, Advocate
Respondent : The State	Through Ms. Sana Memon, A.P.G. Sindh
None present for complainant	Called Absent without intimation
Date of hearing	16.01.2023
Date of judgment	20.01.2023

J U D G M E N T

MOHAMMAD KARIM KHAN AGHA, J.-This criminal jail appeal is directed against the judgment dated 29.04.2010, passed by learned Sessions Judge, Tharparkar at Mithi, in Sessions Case No.40 of 2008 (re: State V Mustafa alias Ghulam Mustafa and another), emanating from Crime No.35 of 2008, registered at Police Station Diplo, under sections 302, 34 PPC, whereby the appellant has been convicted u/s 302(b) PPC and sentenced to suffer imprisonment for life. He was also directed to pay Rs.200,000/- as compensation to the legal heirs of the deceased Abdul Ghani as provided under section 544-A Cr.P.C; and, in case of non-payment of the compensation, the appellant shall further undergo S.I for

two years. He was given the benefit of section 382-Cr.P.C. Whereas the co-accused Qasim was acquitted of the charge.

2. The facts of the prosecution case as stated in the F.I.R, registered at P.S Diplo by complainant Muhammad Soomar are that, complainant's son Yousuf used to graze the cattle in Government land, who was being prevented by accused Mustafa and Qasim. On the day of incident i.e.19.08.2008 at about 1830 hours, complainant, his brother Abdul Ghani, Ibrahim, Shafi Lund and Gullan were sitting on the shop of Rabdino where they tried to persuade the accused Mustafa (appellant) and his brother Qasim for not restraining them from grazing their cattle on the government land, on which accused persons became annoyed; thereafter, the brother of the complainant Abdul Ghani proceeded towards his house. After sometime, accused Mustafa and Qasim who were armed with hatchets, chased his brother Abdul Ghani and within their sight inflicted hatchet blow on his head and as a result thereof, Abdul Ghani by raising cries fell down on the ground. The complainant party rushed there and found the hatchet pierced in the head of Abdul Ghani; whereas the accused left the scene. Thereafter, complainant party boarded the injured in a car to take him to hospital however, en route he succumbed to his injuries. Then the complainant went to police station and lodged report.

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

4. The prosecution in order to prove its case examined 11 witnesses and exhibited various documents and other items. The statement of accused was recorded under Section 342 Cr.P.C in which he denied the allegations leveled against him and claimed false implication by the police in collusion with the complainant. The appellant however did not examine himself on oath but did call one DW in support of his defence case.

5. After hearing the parties and appreciating the evidence on record, the trial court convicted the appellant and sentenced him as set out earlier

in this judgment; hence, the appellant has filed this appeal against his conviction.

6. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the impugned judgment passed by the trial court and, therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

7. Learned counsel for the appellant has contended that there was an unexplained delay in lodging the FIR which lead to the complainant and the police cooking up a false case against the appellant on account of land grabbing; that the alleged eye witnesses had made up the story on account of land grabbing and were all closely related to the deceased and as such their evidence could not be safely relied upon; that the medical evidence did not support the ocular evidence; that no recovery was made from the appellant and that for any or all of the above reasons he should be acquitted of the charge by being extended the benefit of the doubt.

8. Learned counsel for the complainant was called absent without intimation despite his name appearing in the cause list and this appeal being a date fixed by court. Since the appellant had been in jail for over 10 years we considered that it would not be in the interests of justice to continue to keep this appeal pending simply because the complainant's counsel preferred to remain absent without intimation.

9. Learned Additional Prosecutor General Sindh has contended that the evidence of the eye witnesses is reliable, truthful and confidence inspiring and is to be believed; that the medical evidence matched with the ocular evidence; that the appellants hatchet was recovered embedded in the head of the deceased and as such the impugned judgment should be upheld and the appeal be dismissed.

10. I have heard the arguments of the learned counsel for the appellant and learned Additional Prosecutor General Sindh and 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.

11. 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 Abdul Ghani (the deceased) received a hatchet/axe blow to his head which lead to his death on 19.08.2008 at about 1830 hours at the western/southern side of the house of the complainant Muhammed Soomar situated on the link road leading from the village Jar Jo Patan to Village Wadhri Taluka Diplo.

12. The only question left before me therefore is whether it was the appellant who murdered the deceased by hatchet/axe blow 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 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 promptitude after only 30 minutes of the incident and gave no time for the complainant party to cook up a false case against the appellant. The appellant is also named in the FIR with a specific role.

(b) I 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 I shall consider in detail below;

(i) **Eye witness PW 1 Muhammed Soomar. He is the complainant and brother of the deceased.** According to his evidence on 19.08.2008 at 6.30pm he was sitting at the parchune shop of Raddino along with the deceased, Ibrahim, Shafi Muhammed and Gulan Panher when the appellant and co-accused Qasim came there with hatchets who he directed not to touch his son Yousuf who was grazing cattle in the jungle which annoyed the appellant and his co-accused. His brother the deceased then proceeded home who was followed by the appellant and the co-accused. He **saw** the appellant cause hatchet injuries to the head of the deceased whilst being held by Qasim both of whom then ran away. The hatchet remained in the head of the deceased. His brother's Shafi, Ibrahim and Ghulam also arrived. He shifted his brother to hospital who died on the way.

From the evidence it transpires that this witness is related to the deceased however no enmity or dispute has been proven between the eye witness and the appellant except a bald allegation that the complainant wanted to acquire the land

43

of the appellant's grandfather who was not examined as a defence witness in this respect despite being alive and thus his mere relationship to the deceased is no reason to discard his evidence which has to be judged on its own worth. In this respect reliance is placed on the cases of **Amal Sherin v The State** (PLD 2004 SC 371), **Dildar Hussain v Muhammad Afzaal alias Chala** (PLD 2004 SC 663).

This eye witness was also related to the appellant and knew him before the incident which occurred at 6.30pm in August when there would have been sufficient light to identify the appellant especially as they had just spoken at the nearby shop. The incident occurred quite close to him and thus there is no case of mistaken identity and no need to hold an identification parade in order to determine the identity of the appellant. His presence at the scene of the incident is corroborated by PW 2 Shafi Muhammed, PW 3 Ibrahim and PW 4 Gulan.

This eye witness was not a chance witness as he lived in the area and had every reason to be with the deceased and his brothers at the time of the incident. He gave his S.154 Cr.PC statement within 30 minutes of the incident which was not significantly improved on during his evidence. He named the accused in his FIR along with the other eye witnesses. He gave his evidence in a natural manner and was not dented at all during cross examination and as such we find his evidence to be reliable, trust worthy and confidence inspiring and believe the same especially in respect of the identity of the appellant who hit the deceased over the head with a hatchet.

We 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 of **Muhammad Ehsan v. The State** (2006 SCMR 1857). As also found in the cases of **Farooq Khan v. The State** (2008 SCMR 917), **Niaz-ud-Din and another v. The State and another** (2011 SCMR 725) and **Muhammad Ismail vs. The State** (2017 SCMR 713). That what is of significance is the quality of the evidence and not its quantity and in this case we find the evidence of this eye witness to be of good quality and believe the same. In this case however there is more than one eye witness.

(ii) Eye witness PW 2 Shafi Muhammed. He is also a brother of the deceased. His evidence corroborates PW 1 Muhammed Soomar's evidence in all material respects. He is named in the FIR as an eye witness 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 Muhammed Soomar.

(iii) Eye witness PW 3 Ibrahim. He is also a brother of the deceased. His evidence corroborates PW 1 Muhammed

44

Soomar and PW 2 Shafi Muhammed's evidence in all material respects. He is named in the FIR as an eye witness and recorded his S.161 Cr.PC statement and S.164 Cr.PC statements promptly and no material improvements were made during his evidence. The same considerations apply to his evidence as the evidence of PW 1 Muhammed Soomar and PW 2 Shafi Muhammed

(iv) Eye witness PW 4. Ghulan. He is also the brother of the deceased. His evidence corroborates PW 1 Muhammed Soomar, PW 2 Shafi Muhammed and PW 3 Ibrahim's evidence in all material respects. He is named in the FIR as an eye witness and recorded his S.161 Cr.PC statement promptly and no material improvements were made during his evidence. The same considerations apply to his evidence as the evidence of PW 1 Muhammed Soomar, PW 2 Shafi Muhammed and PW 3 Ibrahim.

Thus, based on our believing the evidence of the 4 eyewitnesses what other supportive/corroborative material is there against the appellant? 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 it does not appeal to logic, commonsense or reason that a real brother would let the real murderer of real brother get away scott free and falsely implicate an innocent person by way of substitution. In this respect reliance is placed on the case of **Muhammed Ashraf V State** (2021 SCMR 758)

(d) That the medical evidence and medical reports as discussed above fully support the eye-witness/ prosecution evidence. It confirms that the deceased died from a blow to his head from a sharp cutting instrument which was actually removed from his head and given to the police after the post mortem of the deceased stained with human blood as per chemical report which murder weapon matches that which the eye witnesses saw the appellant kill the deceased with.

(e) That it has not been proven through evidence that any particular police PW's had any enmity or ill will towards the appellant and had no reason to falsely implicate him in this case and in such circumstances it has been held that the evidence of the police PW's can be fully relied upon and as such we rely on the police evidence. In this respect reliance is placed on the case of **Mushtaq Ahmed V The State** (2020 SCMR 474).

(f) 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 appellant. 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 appellant got annoyed with the eye

witnesses to him following the deceased and the appellant murdering the deceased by hitting him over the head with a hatchet to the arrest of the appellant to the chemical report finding the hatchet to be blood stained.

(g) The fact that the co-accused was acquitted is of no help to the appellant as the evidence against the appellant actually murdering the deceased was far stronger although the State seems to have been lethargic in not filing an appeal against acquittal in the case of the co-accused.

(h) 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 so that the complainant party can grab the land of the appellant's grand father. This was a bald allegation and the grandfather who was still alive at the time was not even called as a defence witness. The appellant did not give evidence on oath and the one DW he did call was in essence a character witness. Thus, for the reasons mentioned above we disbelieve the defence case in the face of reliable, trust worthy and confidence inspiring eye witness and other corroborative /supportive evidence against the appellant which has not at all dented the prosecution case.

14. Thus, based on the above discussion we have no doubt that the prosecution has proved its case against the appellant beyond a reasonable doubt for the offence for which he has been convicted and hereby maintain his conviction and sentence and dismiss the appeal.

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