

Eye witness Disbelieved
Delay in S.161

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PRESENTED ON... 29/04/2011

Additional to 29/04/2011

1942
29.4.11

IN THE HIGH COURT OF SINDH
CIRCUIT COURT, HYDERABAD.

Cr. Appeal No.S- 149-of 2011.

Wazir son of Gul Muhammad Rindh,
Adult, Muslim, R/o village Gidoro Machi,
Taluka Sinjhero, District Sanghar,
at present confined in Central Jail,
Hyderabad, Sindh.....Appellant.

Vs.

The State.....Respondent.

Eye witness Disbelieved
Delay in S. 161

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IN THE HIGH COURT OF SINDH, CIRCUIT COURT
HYDERABAD

Criminal Appeal No. S- 149 of 2011

WAZIR RIND

Versus

THE STATE

Appellant : Wazir s/o Gul Muhammad Rind (present on bail).	Through Syed Tarique Ahmed Shah, Advocate.
Respondent : The State	Through Ms. Rameshan Oad, Assistant Prosecutor General, Sindh.
None present for complainant despite being on notice.	
Date of hearing	28.11.2023
Date of judgment	05 th 12.2023

J U D G M E N T

MOHAMMAD KARIM KHAN AGHA, J.- This criminal appeal is directed against the judgment dated 20.04.2011, passed by the learned Additional Sessions Judge, Shahdadpur, in Sessions Case No. 39 of 2011 (re: The State versus Abdul Sattar), emanating from Crime No.48 of 2008, registered at Police Station Sinjhor, under section 302, 34 PPC, whereby the appellant Wazir has been convicted u/s 302 PPC as Ta'zir and sentenced to suffer imprisonment for life for committing the murder of deceased Ghazi Khan. He was also directed to pay fine of Rs.200,000/- (Rupees Two Lac); and, in case of non-payment of fine, the appellant shall undergo SI for a period of 01 year more. The benefit

of Section 382-B Cr.P.C was extended to the appellant. Whereas co-accused Kamal and Ghulam Shabbir were acquitted of the charge by extending them benefit of doubt.

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

"On 04.07.2008, complainant Muhammad Sharif Rind lodged FIR, alleging therein that prior to one and half month, quarrel took place between the complainant and Kamal Khan Rind and others, such FIR bearing No.34 of 2008 was lodged at PS Sinjhoru against the complainant party and dispute was going on. On 03.07.2008, in the night his father Ghazi Khan, cousin Hakim along-with Muhammad after taking meals went to sleep in the courtyard of the Otaq on cots, he was sleeping in his house when at about 0130 hours his cousin Hakim came to him and disclosed that he along-with his cousin Muhammad and uncle Ghazi Khan were sleeping in the Otaq, where they heard the cries of Ghazi Khan on which they both woke up and identified that Kamal Khan Rind having Gun, Sattar and Wazeer having hatchets in their hands and Ghulam Shabir was having lathi in his hand were causing hatchet blows to uncle Ghazi Khan on his head and Kamal Rind gave hakals to them to keep quite lying on the cot. Thereafter, accused went away towards northern side. After that they saw his uncle Ghazi Khan was having two hatchet blows on his forehead and blood was oozing and died away. On such information the complainant along-with his relatives Karim Bux and Ghulam Rasool Rind went to Otaq where they saw his father Ghazi Khan was lying dead. Thereafter, complainant went to P.S and lodged report of the incident." (bold added)

3. After usual investigation police submitted the challan before the Court concerned and after completing necessary formalities, learned trial Court framed the charge against the appellant and the other 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 statement 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. None of the appellants examined themselves on Oath; however, in order to disprove the charge, the appellants examined one D.W. namely Allah Dito as a defense witness.

5. Learned trial Court after hearing the learned counsel for the parties and examining the evidence available on record convicted and sentenced the appellant as stated earlier in this judgment. Hence, the appellant has filed this appeal against his conviction. The trial court however acquitted his co-accused Kamal and Ghulam Shabir and no appeal against their conviction has been filed.

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. It is noted that on the last date of hearing, complainant Muhammad Sharif had appeared and stated that he and his family members have forgiven the appellant in the name of Almighty Allah; however, no such application has been filed in this regard. Today, complainant is called absent without intimation. Since, this is an old appeal of 2011, and the complainant has chosen to remain absent, therefore, his interest is being looked after by learned A.P.G.

8. Learned counsel for the appellant has contended that the appellant is innocent and has been falsely implicated in this case on account of enmity and hence the 17 hour delay in lodging the FIR which enabled the complainant to cook up a false case against the accused; that the evidence of the eye witnesses cannot be safely relied upon as it was dark and they could not have seen the appellant even if they were present which he contended they were not as it was an unwitnessed murder; that no recovery was made from the appellant and that there were material contradictions in the evidence of the witnesses which made their evidence unreliable and that for any or all of the above reasons the appellant should be acquitted of the charge by being extended the benefit of the doubt. In support of his contentions he placed reliance on the cases of **Muhammad Sharifan Bibi versus Muhammad Yasin and others** [2012 SCMR 82], **Azhar Mehmood and others versus The State** [2017 SCMR 135], **Sardar Bibi and another versus Munir Ahmed and others** [2017 SCMR 344], **Muhammad Asif versus The State** [2017 SCMR 486], **G.M Niaz versus The State** [2018

SCMR 506], *Muhammad Arif versus The State* [2019 SCMR 631], and *Sarfraz and another versus The State* [2023 SCMR 670].

9. Learned Assistant Prosecutor General Sindh on behalf of the State, after going through the entire evidence of the prosecution witnesses as well as other record of the case has supported the impugned judgment. In particular she has relied on the eye witness evidence which according to her can be safely relied upon. In support of her contentions, she placed reliance on the cases of *Farman Ali and another versus The State and another* [2020 SCMR 597], *Abbas Ali versus The State* [2021 SCMR 349] and, *Nasir Ahmed versus The State* [2023 SCMR 478].

10. I have considered the submissions of the parties, perused the material available on record and considered the relevant case law including that cited at the bar.

11. Based on my reassessment of the evidence of the PW's especially the medical evidence and other medical reports and recovery of blood at the crime scene I find that the prosecution has proved beyond a reasonable doubt that Ghazi Khan (the deceased) was murdered by a sharp cutting instrument to the head on 04.07.2008 at 0130 hours at the court yard of the Otaq of the complainant situated at village Gidro Machi, taluka Sinjhoru.

12. The only question left before me is whether it was the appellant who murdered the deceased by causing a blow to his head with a sharp instrument at the said time, date and location?

13. 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) The FIR was lodged after 15 hours of the incident. The complainant attempted to explain this delay by the fact that the FIR was lodged after he took the deceased to hospital, after the postmortem was carried out and after the body of his father was buried however according to

PW 5 Muhammed Javed who wrote down the FIR of the complainant verbatim the FIR was lodged **before** the post mortem was carried out which discrepancy tends to undermine the FIR. Thus, I am put to caution of the fact that the 17 hours delay in lodging the FIR has not been fully explained which unexplained delay can often be fatal to the prosecution case as it **left time for consultation and concoction of a false case which is more likely in this case where there is proven enmity between the complainant and the accused side as per evidence on record.**

(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 I believe their evidence whose evidence I shall consider in detail below;

(i) **Eye witness PW 2 Hakim. He is related to the complainant and the deceased.** According to his evidence on 04.07.2008 he and his cousin Muhammed were sleeping in their Otaq when at about 0130 hours they heard a noise and woke up and saw the co-accused along with the appellant under the light of an electric bulb. He saw co-accused Sattar and the appellant cause straight hatchet blows over the head of the deceased who was sleeping in the same Otaq. Another co-accused had a shot gun pointed on them so they could not intervene. He made hue and cries and rushed to towards the house of the complainant and informed the complainant who was the son of the deceased about the incident and then returned to the crime scene with the complainant and found the dead body of the deceased. The appellant and the co-accused had gone.

This witness was related to the deceased and also had **proven enmity** with the appellant's side who had lodged an FIR against him and the complainant. Thus, I am put to caution as to the reliability of his evidence.

No doubt the witness knew the appellant before the incident and he was named as a witness in the potentially delayed FIR however it was a night time incident and although he states that he saw and recognized the appellant under a light bulb no light bulb was ever seized by the police which brings into doubt his identification of the appellant. Furthermore, what was the witness doing sleeping in the Otaq instead of the house? It has come on record through DW 1 Allah Ditta whose shop was

next to the Otaq as confirmed by the tapedar's report and who had been sleeping in his shop for the last 10 years that only he and the deceased slept out in the open and on the night in question this witness was not present. In fact there were only two cots at the Otaq so if the deceased was sleeping in one where were the other two eye witnesses sleeping? This all casts doubt on the evidence of this witness. It is also significant that this eye witness gave his section 161 Cr.PC statement **52 days after the incident without any explanation.** It is well settled by now that such delayed Section 161 statements of eye witnesses are of no evidentiary value. This witness was a chance witness who according to DW 1 Allah Ditto always remained in the house with the complainant and other eye witness Muhammed and thus for the reasons above I disbelieve the evidence of this witness who had every reason to implicate the appellant in a false case and even if he was present at the time of the incident (which I do not believe) he would not have been able to correctly and safely identify the appellant. Thus, I disbelieve the evidence of this eye witness and place no reliance upon it.

- (ii) **Eye witness PW 3 Muhammed. He is related to the deceased.** He corroborates the evidence of PW 2 Hakim in all material respects. For the same reasons mentioned above in respect of PW 2 Hakim I also disbelieve his evidence.

Other evidence and considerations

- (c) That no recovery of any hatchet or any other weapon was made from the appellant on his arrest.
- (d) That according to PW 4 Palio Khan (who is related to the complainant and called by the complainant to be mashir) who was the mashir of arrest at the time of arresting the appellant a hatchet and lathi was recovered from the appellant however such recovery is not recorded in the memo and no such recovery was made according to PW7 Ghulam Rasool who was the arresting officer and IO of the case. No recovered items were thus exhibited as it appears that none were in fact recovered. According to the mashir the arrest was made on 05.07.08 but according to the arresting officer the arrest of the appellant was made on 13.08.13 which accords with the memo. This mashir is therefore found to be a dishonest witness and no memo signed by him can be safely relied upon which again creates doubts in the prosecution case.

- (e) That the evidence of the IO PW 7 Ghulam Rasool which is set out in material part below also creates doubt on the case of the prosecution.

"It is fact that as per mashirnama place of incident there was a cot at the distances of 6/7 feet from dead body over which Allah Dito was said to have been sleeping at the time of incident. Such fact was stated by the complainant to me at the time of inspection of place of incident. I have not mentioned in the mashirnama that the complainant disclosed such facts to me. Cots were not lying inside the room of Otaq. There was no cot lying in the Otaq except the cot of the deceased and a cot at the distance of 6/7 feet. PW Hakim had stated in his statement U/s: 161 Cr. P.C that accused Abdul Sattar was holding lathi and accused ran-away towards North. He has also stated that accused Kamal Rind and Ghulam Shabbir had not committed the above offence and were not seen on the spot. I have shown accused Kamal Rind and Ghulam Shabbir in Column No.2 as the complainant himself stated before me that they took Holly Quran in presence of Murshid Pir Hassan Shah that they had not committed the above offence, therefore, I have kept their names in column No.2. I did not record such further statement of complainant during investigation. I have also observed and opined at the time of submission of challan that father of complainant Ghazi Khan was murdered by unknown culprits and the complainant due to personal enmity involved the accused, but there was no proof against accused. In spite of above report mentioned on the back side of challan/charge sheet I have arrested accused Wazeer and Abdul Sattar and submitted such chailan on 01-9-2008. I have not submitted the report before the Magistrate for release of all accused U/s: 497 Cr.P.C, as provided Under Section 169 Cr.P.C. It is fact that One Syed Hussain Shan, Sachal and Ghulam Mustafa s/o Allah Dito Rind have voluntarily sworn their affidavits on stamp papers about the accused Wazeer, Abdul Sattar and others being innocent. It is fact that complainant and P.W Ghulam Rasool were accused in Crime No.34/2008 of P.S Sinjhor, wherein accused Kamal was complainant. I have also recorded the statements of defense witnesses Ghulam Rasool and Karim Bux Rind who also stated about the accused being innocent. I have not recorded the statements U/s: 161 Cr.P.C of both mathis. No private person except both mashirs and complainant was present at the time of inspection of place of incident. It is fact that mashir Palio is relative of deceased and P.Ws Hakim and Muhammad are nephews of deceased Ghazi Khan".(Bold added)

- (f) That although the medical evidence supports the prosecution case it can only identify the nature of the injury, the seat of the injury and type of weapon used but is of no assistance in identifying the perpetrator.
- (g) That on the basis of nearly the same set of evidence co-accused Ghulam Shabbir was acquitted and as such the appellant is entitled to equal treatment under the law. Notably no appeal against acquittal was filed in the case of appellant Ghulam Shabbir.

- (h) This court has also recently acquitted appellant Sattar who was tried as a juvenile separately on the same set of evidence and as such the appellant is entitled to equal treatment under the law.
- (i) The evidence of DW 1 Allah Ditto completely undermines the prosecution case. He was an independent witness who had every reason to be sleeping in the cot close to the deceased and according to his evidence both eye witnesses were not present at the time of the incident and it was an unseen murder. Even if only a little weight is given to his evidence it casts doubt on the prosecution case as he was not a chance witness who had been sleeping by his shop opposite the Otaq where the deceased was murdered for the last 10 years.

14. Thus, based on the above discussion, I find that the prosecution has NOT proved its case against the appellant beyond a reasonable doubt and by extending the appellant the benefit of the doubt for the reasons discussed above, which he is entitled to as a matter of right as opposed to concession, I hereby set aside the impugned judgment, **allow** the appeal and acquit the appellant of the charge. The appellant on bail shall have his bail bonds discharged and he is free to go.

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

Hafiz Fahad

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

Criminal Appeal No.S- 149 of 2011

DATE	ORDER WITH SIGNATURE OF JUDGE
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28.11.2023.

Syed Tarique Ahmed Shah, Advocate for appellant alongwith
appellant (on bail).

Ms. Rameshan Oad, A.P.G for State.

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I have heard learned counsel for the appellant and learned
A.P.G for State. Reserved for Judgment.

JUDGE

Tufail