

*Eyewitness not believed - charge, delay in
S 161, improvement*

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CERTIFICATE OF THE COURT IN REGARD TO REPORTING

CRIMINAL JAIL APPEAL No. S-25 OF 2007
[GHULAM HYDER & OTHERS VERSUS THE STATE]

SINDH HIGH COURT, CIRCUIT COURT HYDERABAD

COMPOSITION OF BENCH

HON'BLE MR. MOHAMMAD KARIM KHAN AGHA

(S.B.)

Date of last hearing (heard/reserved): 30-10-2023

Decided on: 06-11-2023

(a) Judgment approved for reporting

YES

Kyr

C E R T I F I C A T E

Certificate that the Judgment/Order is based upon or enunciates a principle of law/decide a question of law which is of first impression/distinguishes over-rules/explains a previous decision.

Strike-out whichever is not applicable.

NOTE: -

- (i) This slip is only to be used when some action is to be taken.
- (ii) If the slip is used, the Reader must attach it to the top of the first page of the Judgment.
- (iii) Court Associate must ask the Judge written the judgment whether the judgment is approved for reporting.
- (iv) Those directions which are not to be used should be deleted.

SGP, Kar-L (iii) 773-2000-4-2003-III

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

Criminal Jail Appeal No.S- 25 of 2007

DATE	ORDER WITH SIGNATURE OF JUDGE
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30.10.2023.

M/s Mir Shakir Ali Talpur and Amaar Ahmed, Advocates for appellants alongwith appellants (on bail).

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

Mr. G. M. Leghari, Advocate for complainant.

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

Tufail

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Evidences disbelieved - chance witness, delay
in S-161, improvement

IN THE HIGH COURT OF SINDH, CIRCUIT COURT
HYDERABAD

Cr. Jail Appeal No. S - 25 of 2007

Ghulam Hyder & others

Versus

The State

Appellants : Sikandar and Allah Bux @ Buxan (present on bail)	Through Mir Shakir Ali Talpur, Advocate
Respondent : The State	Through Ms. Sana Memon, Assistant Prosecutor General, Sindh
Complainant : Muhammad Khan	Through Mr. G.M Laghari, Advocate
Date of hearing	30.10.2023
Date of judgment	06.11.2023

J U D G M E N T

MOHAMMAD KARIM KHAN AGHA, J.- This Criminal Jail Appeal is directed against the judgment dated 08.01.2007, passed by the learned Vth Additional Sessions Judge, Hyderabad, in Sessions Case No.157 of 2000 (re: State V Ghulam Haider and others), emanating from Crime No.03 of 2000, registered at Police Station Bulri Shah Karim, under sections 302, 324, 34 PPC, whereby the appellant Ghulam Hyder alias Haider has been convicted u/s 302(b) PPC and sentenced to suffer imprisonment for life for committing murder of deceased Jan Muhammad. He was also directed to pay fine of Rs.50,000/-, in case of default thereof the appellant was also directed to undergo R.I for one year more. If the fine is recovered, the same shall

be paid to the legal heirs of deceased. As far as the appellants Sikandar and Allah Bux are concerned, they have been convicted under Sections 337-A(i), 337-A(ii) and 337-F(i) PPC and as such both of them were sentenced to suffer R.I for two years u/s 337-A(i) PPC each as "Ta'zir" and also pay Daman to the tune of Rs.5,000/- each to the complainant Muhammad Khan. They were also convicted u/s 337-A(ii) PPC and sentenced to suffer R.I for five (05) years each as "Ta'zir" and to pay arsh at the tune of Rs.10,000/- each to complainant Muhammad Khan. They were also convicted u/s 337-F(i) PPC and sentenced to suffer R.I for one (01) year each as "Ta'zir" and to pay Daman to the tune of Rs.2000/- each to the complainant Muhammad Khan. However, all the sentences were ordered to run concurrently. The appellants were awarded benefit of section 382-Cr.P.C.

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

"That, on 22.01.2000 at 2100 hours complainant Muhammad Khan lodged FIR stating therein that he is Zamindar. Today, on 22.01.2000, he along with his brother Jan Muhammad, Haji s/o Ahmed Laghari and Ghulam Hussain s/o Khuda Bux Laghari at about 6-00 p.m. had gone to attend the marriage of Hashim Khaskheli and when they were returning to their village at about 7-00 p.m. after attending the marriage and were going by their motorcycle when in front of the tents of the marriage, on Pucca road, they saw there Haji s/o Ahmed Laghari, Ashraf s/o Buxan Laghari were also going by foot and when at about calling distance was covered, they saw that Hyder s/o Jurio, Buxan s/o Siddk Jamari, Sikandar s/o Mehar Jamari who had also attended the above marriage were already standing there and they were previously threatening them and they started abusing. Thereafter, Sikandar and Buxan repeatedly gave lathi blows to complainant and his brother Jan Muhammad. In the meanwhile, Haji s/o Ahmed Laghari, Ghulam Hsusan s/o Haji Khuda Bux Laghari and Ashraf s/o Buxan Laghari also reached there and in their presence, Hyder Jamari fired from his country made pistol at the complainant party straightly with intention to commit their murder, as a result of which brother of complainant Jan Muhammad sustained injury on his chest as well as complainant also sustained pallet injuries. Thereafter, due to interoention of Ashraf, Ghulam Hussain and Haji, who reprimanded the accused, the accused made their escape good. Then complainant party took injured Jan Muhammad to hospital for treatment in the Datsun of Haji Ali Hassan Lund. But the brother of complainant succumbed to the injuries on the way so they have come along with his dead body and thereafter, complainant went to PS and report that accused namely Hyder s/o Jurio Jamari, Buxan s/o Siddik Jamari and Sikandar s/o Mehar,

Jamari in furtherance of their common intention have committed murder of his brother Jan Muhammad."

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 accused/appellants, to which they pleaded not guilty and claimed trial.
4. At trial, the prosecution in order to prove its case examined 9 witnesses and exhibited numerous documents and other items. The statements of accused were recorded under section 342 Cr.P.C whereby they each denied the allegations leveled against them and claimed their false implication by the complainant. However, neither they examined themselves on oath nor led any evidence in their defence.
5. Learned trial Court after hearing the learned counsel for the parties and examining the evidence available on record convicted and sentenced the appellants as stated earlier in this judgment.
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 advocate for the appellants has contended that the appellants are innocent and have been falsely implicated in this case by the complainant due to enmity; that there have been dishonest improvements in the eye witness evidence which renders it unreliable; that due to a lack of light the eye witnesses could not have reliably identified the appellants; that the recovered lathies were foisted on the appellants; that there was no evidence that any wedding even took place and thus for any or all of the above reasons the appellants be acquitted of the charge by extending them the benefit of the doubt. In support of his contentions he placed his reliance on the cases of **Sardar Bibi and another versus Munir Ahmed and others** [2017 SCMR 344], **Muhammad Mansha versus The State** [2018 SCMR 772], **Azhar**

Mehmood and others versus The State [2017 SCMR 135], Muhammad Asif versus The State [2017 SCMR 486], Muhammad Bilal and another versus The State and others [2021 SCMR 1039], Muhammad Imran versus The State [2020 SCMR 857], Tajamal Hussain Shah versus The State and another [2022 SCMR 1567], Mushtaq and 3 others versus The State [PLD 2008 Supreme Court 1], Akhtar Ali and others versus The State [2008 SCMR 6] and Ali Sher and others versus The State [2008 SCMR 707].

8. Learned Assistant Prosecutor General Sindh on behalf of the State along with learned counsel for the complainant, after going through the entire evidence of the prosecution witnesses as well as other record of the case have supported the impugned judgment and mainly relied on the eye witnesses whom they contended were reliable witnesses and the recoveries from the appellants on their pointation and as such the appeal be dismissed. In support of their contentions, they placed reliance on the case of **Jumma versus The State** [2010 SCMR 1530].

9. I have considered the submissions of the parties, perused the material available on record and considered the case laws cited at the bar.

10. At the outset it is significant to note that the main appellant/accused Ghulam Hyder who was sentenced to life imprisonment for the murder of Jan Muhammed expired during the pendency of the appeal and the case against him abated. The other appellants were convicted and sentenced for lesser offences are on bail.

11. After my reassessment of the evidence based on the witness evidence and especially the medical evidence, the blood and empty recovered at the crime scene I find that on 22.01.2000 at about 2100 hours near Khaskheli village Jan Muhammed (the deceased) was murdered by fire arm and the complainant received lathi blows.

12. From the impugned judgment it was found that Ghulam Hyder committed the murder of Jan Muhammed who has now expired. The

main role attributed to the appellants is that they hit the complainant with lathies and caused him serious injuries. The question before me therefore is whether the prosecution has proved its case against the appellants beyond a reasonable doubt. That is, was it the appellants who seriously injured the accused by causing him lathi blows.

13. After my reassessment of the evidence on record, I find that the prosecution has NOT proved beyond a reasonable doubt the charge against the appellants for which they were convicted for the following reasons;

(a) The prosecution case mainly rests on the evidence of the eye witnesses whose evidence I will examine in detail below;

(i) **PW 1 Muhammed Khan.** He is the complainant in this case. According to his evidence on 22.01.2000 after attending the marriage ceremony of Noor Muhammed at village Kashkheli he was returning home on a motor bike when the appellants armed with lathi's attacked him and the expired Ghulam Hyder fired a pistol shot at his brother Jan Muhammed which hit him in the chest and killed him before making their escape good.

We have noted that although the complainant lodged his FIR with promptitude he has made a number of dishonest improvements in his evidence. For example, he does not say that he received pellet injuries in his evidence which he stated in his FIR and in his FIR he does not state any source of light but in his evidence states that a source of light was from the wedding. In this respect reliance is placed on the case of **Muhammed Mansha** (Supra). Furthermore no evidence has actually been lead to prove that a wedding did in fact take place on that night. For example, no witness of the wedding party was called to give evidence and no wedding card was exhibited. The appellants in there Section 342 Cr.PC statements deny that they attended any wedding on the night in question. At the time of the attack it was dark yet no light bulb was recovered which castes doubt on the complainant's ability to identify with accuracy his attackers. In this respect reliance is placed on the cases of **Sardar Bibi** (Supra) and **Azhar Mhamood** (Supra). In his evidence this }

witness admits that he did not know appellant Allah Bux from before so this begs the question as to how he was able to identify him and name him in the FIR if he did not know who he was unless he had consulted with other witnesses before he lodged his FIR which possibility cannot be ruled out as according to the evidence the police told him to go and collect the witnesses which is hardly in line with a proper police investigation where the police find out the witnesses and record their Section 161 Cr.PC statements. According to the evidence there was also enmity between the parties and thus when all these factors are taken together we find that we cannot safely rely on the evidence of this eye witness especially in terms of the correct identification of the appellants.

- (ii) **Eye witness PW 2 Haji** is a chance witness who gave his eye witness Section 161 Cr.PC statement 7 days after the incident without any explanation for such delay. It is well settled by now that such delayed eye witness section 161 statements renders the evidence of the witness unreliable and as such we place no reliance on the evidence of this eye witness. In this respect reliance is placed on the case of **Muhammed Asif** (Supra). Additionally it was dark when the incident took place, there is no evidence that he knew the appellants from before, no source of light was recovered and as such we in any even cannot safely rely on his evidence as correctly identifying the appellants.

Thus we disbelieve the evidence of both eye witnesses especially in terms of correctly indentifying the appellants.

- (iii) We have doubts as to the recovery of the lathies on the pointation of the appellants. This is because before the appellants pointed out where the lathies were hidden in the bushes outside their house the police had already raided the houses of the appellants and searched both the houses of the appellants and bushes out side. This begs the question as to why they were not able to find the lathe's at this time but magically found them in the bushes outside the appellant's house on their pointation. Thus, based on this evidence it cannot be ruled out that the lathes were foisted on the appellants.

- (iv) That important eye witnesses Ghulam Hussain and Ashraf were dropped by the prosecution without

any explanation and thus the prosecution failed to produce some of its best evidence and the dropping of these two eye witnesses by the prosecution leads to the inference under Section 129 (g) Qanoon-e-Shahadat Ordinance 1984 that these witnesses would not have supported the prosecution case. In this respect reliance is placed on the case of **Muhammed Asif** (Supra).

- (v) It is true that the medical evidence supports the prosecution's case vis a vis the injuries suffered by the complainant. This evidence however can only point out the set of the injury and what type of weapon may have caused it. It cannot identify the culprits.

14. Thus, based on the above discussion, I find that there are doubts in the prosecution case and it is well settled by now that the accused is entitled to the benefit of the doubt by way of right as opposed to concession and as such based on extending the benefit of doubt to the appellants, the appellants are acquitted of the charge, their appeals are **allowed**, the impugned judgment is set aside with respect to them and their bail bonds stand discharged and they are free to go.