

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

Cr. Appeal No.D-169 of 2012

DATE ORDER WITH SIGNATURE OF JUDGE(s)

07.03.2023

Mr. Ishrat Ali Lohar, Advocate for appellant.

Mr. Abdul Waheed Bejarani, Asst. Prosecutor General, Sindh.
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We have heard the learned counsel for appellant and learned A.P.G.

Reserved for judgment.

Hafiz Fahad

Convict for offence not charged

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**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- 169 of 2012

Appellant : Rustam S/o Umed Ali Shahani (present on bail)	through Mr. Ishrat Ali Lohar Advocate
Respondent : The State	through Mr. Abdul Waheed Bijarani, Assistant Prosecutor General, Sindh alongwith Jawad Ahmed son of the deceased Ashfaq Ahmed and Inspector Ashfaq SHO of P.S A- Section Dadu
Date of hearing	07.03.2023
Date of judgment	14.03.2023

J U D G M E N T

MOHAMMAD KARIM KHAN AGHA, J.-Appellant PC- Rustam along with other acquitted accused namely Irfan Ali alias Bholoo, Kashif, Farooque, Naveed Sultan, Younus, Abdul Rehman, Amanullah, Muhammad Saleh, Safar, Haji Ranjho, Mashooque, Ashique, Shoban, Kaloo alias Asif, Sikandar, Razi Khan, Abdul Rasheed and Chakar Khan as well as the absconding accused Arif and Rahib, whose case was kept on dormant file, was tried by the learned Judge, Anti-Terrorism Court, Naushehro Feroze, jointly in Special Case No.65 of 2012 (re: The State V Irfan Ali alias Bholoo and others), culminating from Crime No.290 of 2008, registered at Police Station Dadu, under section 302, 324, 353, 440, 147, 148, 149 PPC r/w sections 6/7 of Anti-Terrorism Act, 1997; and, vide judgment dated 29.05.2012 (the impugned Judgment), was

convicted under sections 316 PPC and sentenced to suffer R.I for 10 years and to pay an amount of Rs.700,000/-, as Diyat; and, in default whereof he was directed to suffer R.I. for 06 months more. It was ordered that the amount of Diyat shall be recoverable as an arrears of land revenue in view of section 544-A(2) Cr.P.C and would be paid to the legal heirs of the deceased. Benefit of section 382-B Cr.P.C was extended to him.

2. The facts of the prosecution case as stated in the FIR lodged by the complainant namely ASI Ghous Bux Abro, are as under:-

"That on the day of incident, he (complainant) received wireless message that people of Baramani and Shahani have blocked link road leading to Aminani. On such information he along with his staff in order to clear the road proceeded to the place of occurrence. When they reached at Bura minor Qazi Ashfaq SPO along with staff crossed the police party and on wireless asked them to follow him. When they reached on the link road leading to Aminani they saw that people had blocked the road and were beating ASI Abdul Majid of PP Khudabad, SPO Qazi Ashfaq Ahmed informed mob that Baramani has been arrested in crime No. 283/2008 and is remanded to judicial custody, therefore they should not take law in their hands and clear the road. The culprits were identified by ASI Abdul Majid as PC Rustam son of Umeed Ali, Saffar son of Umeed Ali, Irfan alias Bholoo son of Muhammad Khan, Chakar, Arab Baramani, Ranjho, Razi, Abdul Rasheed, Mashooque, Ashiq, Shoban, Kaloo, Kashif, Sikandar, Rahib alongwith other armed persons with Rifles, Pistol, Dandas and hatchets were protesting along with 15-16 ladies. The SPO tried to persuade them in the meantime Rustam Shahani gave Danda blow to Qazi Ashfaq as a result of which he fell on the ground, P.C Ali Akbar, PC Khadim Hussain and Mumtaz were also given Danda blows by other. SPO then ordered for dispersing the mob with tear gas. Accordingly, shells of tear gas were fired on mob and the mob dispersed. The culprits armed with weapons also fire and created terror. The police mobiles were also damaged. Qazi Ashfaq Ahmed was found lying unconscious. Therefore, injured were taken to Civil Hospital Dadu. Qazi Ashfaq was referred for treatment to Hyderabad. The case was registered."

3. The I.O conducted investigations and recorded the statements of the PWs, and after completing formal investigation prepared challan and submitted the same before the Court concerned.

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4. The charge against all the accused except absconding accused, was framed to which they pleaded not guilty and claimed to be tried vide their respective pleas.
5. In order to substantiate its case, the prosecution examined 8 witnesses and exhibited numerous documents and other items.
6. The statements of the accused were recorded u/s 342 Cr.P.C, wherein they have denied all the prosecution allegations and claimed their false implication in this case. None of the accused gave evidence on oath or called any DW in support of their defence case.
7. Learned trial Judge after hearing the learned counsel for the parties and evaluating the evidence available on record, convicted and sentenced the accused/appellant, acquitted the other co-accused as well as kept the case on dormant file against the absconding accused, as set out in the earlier para of this judgment.
8. 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.
9. Learned counsel for the appellant has contended that the appellant is innocent and has been falsely implicated in this case by the police; that he did not have notice of the offence for which he was convicted in the charge; that the Anti Terrorism Court had no jurisdiction to hear the case; that he was not present at the time of the incident; that the alleged danda blow to the head of the deceased did not cause his death as he died one month and 7 days after the blow; that no recovery was made from him and as such for all or any of the above reasons he should be acquitted of the charge by extending him the benefit of the doubt. In support of his contentions, learned counsel for the appellant placed reliance on the cases of **Shah Jahan V The State and another** (2005 PCr.LJ 489), **Ahmed Shah and another V The State** (2003 YLR 1977), **Nasir Masih V The State and another** (2008 PCr.LJ 713), **Jawed Ahmed Siddiqui V The State** (2000 PCr.LJ 1721), **Pir Imtiaz and another V The State** (2005 PCr.LJ 721), **Amir Khan V The State**

(PLD 2005 Karachi 344), **Mir Zaman V Zubair and another** (2003 PCr.LJ 1086) and two unreported orders dated 27.01.2023 and 02.03.2023 passed by this Court in **Criminal Revision Application No.D-35 of 2022** and **Criminal Revision Application No.D-33 of 2022** respectively.

10. On the other hand, learned A.P.G has fully supported the impugned judgment and contended that the appellant committed the alleged offence; that at the time of incident, the deceased was performing his official duties; that the appellant is fully involved in the commission of offence; that the prosecution witnesses have fully supported the case against the appellant; that if there was any contradiction in the evidence of the prosecution witnesses the same was only a result of passage of time and only of minor in nature hence cannot be taken as a ground for acquittal of the appellant and as such the prosecution had proved its case beyond a reasonable doubt and the appeal be dismissed. In support of his contentions, learned A.P.G has placed reliance on the cases of **Muhammad Sharif and others V The State and others** (2019 SCMR 1368) and **Shamsher Ahmad and another V The State and another** (2022 SCMR 1931).

11. We have considered the arguments of learned counsels, scanned the entire evidence available on record with their able assistance and considered the relevant law and authorities cited by the learned counsel for the appellant as well as the learned A.P.G at the bar.

12. Based on our reassessment of the evidence of the PW's especially the medical evidence and other medical reports and empties recovered at the crime scene we find that the prosecution has proved beyond a reasonable doubt that on 28/06/2008 at about 9am in the morning at Indus High way near Aminani Link Road Deh Khudabad District Dadu an unlawful assembly occurred which blocked the High way which lead to a clash between the police and the members of the unlawful assembly which lead to both the police side and the members of the unlawful assembly receiving injuries and at the said time, date and location SPO Kazi

Ashfaq (the deceased) received a danda blow to his head which lead to his death one month and 7 days later after hospitalization.

13. At the outset we find no defect in the charge. The learned counsel for the appellant has claimed that since he was not charged with section 316 PPC he had no notice of the charge which he had to defend himself against. We find this argument misconceived as the appellant was put on notice to face a charge of murdering the deceased under Section 302 PPC and yet he was only convicted of a **lesser offence** which would have encompassed the offence for murder and as such the appellant was not prejudiced in being convicted under Section 316 PPC as he was already on notice to defend himself against a similar but more serious charge at the said time, date and location. It is also well settled by now that under the Cr.PC if the court finds the accused not to have committed the offence for which he was charged he can still be convicted of a lesser offence as in this case provided that no prejudice is caused to him in his defence. We find based on the particular facts and circumstances of the case no prejudice was caused to the appellant by him being convicted under section 316 PPC. In this respect reference is made to section 237 Cr.PC which provides as under;

“237. When a person is charged with one offence, he can be convicted of another. (1) If in the case mentioned in section 236, the accused is charged with one offence, and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed, although he was not charged with it.”

14. With regard to an Anti-Terrorism Court (ATC) having jurisdiction to try a case under the Anti-Terrorism Act 1997 (ATA) but only handing down a conviction under the PPC it is settled by now that when a case is charged for offences under the ATA, as in this case, where initially prima facie it appears that the case falls within the purview of the ATA the case will be tried by the ATC however if at the end of the trial the ATC comes to the conclusion that there is a lack of mens rea to bring the case within the purview of the ATA but the offences under the PPC have been proven it still retains the jurisdiction to hand down convictions and sentences

under the PPC alone. In this respect reliance is placed on the case of **Amjad Ali V State** (PLD 2017 SC 661) and **Tariq Khan V State** (2022 P.CR.LJ 558)

15. The only question left before us therefore is whether it was the appellant who murdered the deceased by hitting him over the head by danda at the said time, date and location?

16. After our reassessment of the evidence we find that the prosecution has proved beyond a reasonable doubt the charge against the appellant for which he was convicted and sentenced (although we are astounded by the fact that based on the evidence and not with standing the fact that the appellant was charged with the offence under Section 302 (b) PPC for the murder of the deceased he was only convicted and sentenced under Section 316 PPC however no criminal revision or any other application was moved either by the State or the complainant in respect of this aspect of the case) 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 which gave no time for the police to cook up a false case against the appellant who was in fact a fellow police officer. That the appellant is named in the FIR with a specific role.

(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 in detail below;

(i) **Eye witness PW 1 Abdul Majeed.** According to his evidence on 28.06.2008 he received spy information that Birahmani and Shahani people had blocked the road and was directed by his DSP to reach the place of incident at Amanani link road, Khudabad along with a police party which included PC's Mumtaz Ali and Qurban. He saw that 60/70 persons had blocked the road and were raising slogans for the release of Arab who had been earlier arrested by the police. He asked the participants to unblock the road as it was illegal. In the meantime the deceased arrived and tried to calm down the people. He **saw** the appellant give a danda blow to the DSP over his head, where upon the DSP called for tear gassing and a clash then took place between the police and the people who had blocked the road. He received lathi blows on different parts of his

body. He also saw HC Ali Akbar, Mumtaz Ali and Qurban sustain injuries the latter two by lathi blows. He and the other injured proceeded to civil hospital Dadu along with the deceased for treatment and the deceased later expired.

This witness is not related to the deceased and had no enmity with the appellant which would lead him to falsely implicate the appellant in this case. This eye witness also **knew the appellant before** the incident as they were fellow police officers from the same locality. The incident occurred at about 10am in broad day light. The incident went on for at least 30 minutes and the eye witness was close to the incident and would have got a good look at the appellant who he already knew. 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 Ali Akbar and PW 3 Muhammed Ismail both of whom were police officers at the scene of the incident and PW 2 Ali Akbar like himself was injured at the scene as proven by medical evidence.

This eye witness was not a chance witness as he was a locally serving police officer who was called to the place of the incident and was injured on the spot as proven by medical evidence. He gave his Section 161 Cr.PC statement on the same day to which no material improvement was made during the course of his evidence. He is named in the promptly lodged FIR as an eye witness.

He gave his evidence in a natural manner and was not dented at all during a lengthy 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 murdered the deceased by hitting him over the head with a danda.

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 Ali Akbar.** He was also a police

man who was called to the scene of the sit in which was blocking the road. His evidence corroborates **PW 1 Abdul Majeed's** evidence in all material respects except he also states that the deceased was transferred to hospital in Hyderabad. He was injured at the time of the incident by lathi as proven by the medical evidence and also saw PW 1 Abdul Majeed and another policeman Khadim being injured by the mob and as such we do not doubt his presence at the scene especially as he is named in the promptly lodged FIR as an eye witness. His Section 161 Cr.PC statement was recorded on the same day and was not materially improved on in his evidence. He was also not a chance witness. The same considerations apply to his evidence as the evidence of **PW 1 Abdul Majeed**. We believe and rely upon his evidence especially in connection with the correct identification of the appellants.

(iii) **Eye witness PW 3 Muhammed Ismail**. He was also a police man who was called to the scene of the sit in which was blocking the road. His evidence corroborates **PW 1 Abdul Majeed's** and **PW 2 Ali Akbar's** evidence in all material respects. He saw PW 1 Abdul Majid and PW 2 Akbar being beaten by the mob. He was also mashir to the damaged police mobiles which were subject to the attack by the mob. The same considerations apply to his evidence as the evidence of **PW 1 Abdul Majeed and PW 2 Ali Akbar**. We believe and rely upon his evidence especially in connection with the correct identification of the appellants.

(iv) **Eye witness PW 4 Ghous Bux**. He is the complainant in the case who promptly lodged the FIR after the incident. He is not a chance witness as he was called to the scene of the sit in. His evidence corroborates **PW 1 Abdul Majeed's, PW 2 Ali Akbar's and PW 3 Muhammed Ismail's** evidence in all material respects. He named PW 2 and 3 in the promptly lodged FIR as eye witnesses. He knew the appellants as he was a serving police men in the same area and he confirmed that the deceased was taken to Hyderabad hospital for further treatment. No material improvements have been made from his FIR during the course of his evidence. The same considerations apply to his evidence as the evidence of **PW 1 Abdul Majeed, PW 2 Ali Akbar and PW 3 Muhammed Ismail's** evidence which we believe and rely upon especially in connection with the correct identification of the appellants.

Thus, based on our believing the evidence of the 4 eyewitnesses what other supportive/corroborative material is there against the appellants? 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 the medical evidence and medical reports fully support the eye-witness/ prosecution evidence that the cause of death was the injury to the head caused by a large blunt object which is consistent with the ocular evidence with the deceased being hit over the head by a danda. We find the fact that the deceased died one month and 7 days after receiving the initial injury after hospitalization of no great significance as the cause of death was the blow to his head as found by the medical evidence. It may be that an injured person can survive for some time after receiving his injury whether it be one day or two months but ultimately his cause of death will be determined by the medical evidence which in this case ties in with the prosecution ocular evidence.

(d) That empties were recovered at the scene which proves that a clash and police mobiles were damaged which supports/corroborates the prosecution case of the clash between the protesters and the police over the blockage of the road on account of the arrest of Arab.

(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 any 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 as mentioned in respect of the eye witnesses. 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 mob blocked the road demanding the release of the arrested Arab to the police arriving at the scene to clear the road to the appellant hitting the deceased over the head with a danda to the mob attacking the police which caused injuries to the police and members of the mob to the deceased being taken to hospital to his death one month and 7 days later due to the danda injuries which he sustained during the incident.

(g) That the co-accused were acquitted is of no assistance to the appellant as their case is on an entirely different footing in that only general allegations have been made against them of causing lath blows and fire shots where as the appellant has been specifically recognized as the person who hit the deceased over his head with a danda which led to his death.

(h) That the motive for the attack has been proven in that the appellant attacked the police and in particular the deceased because he along with the rest of the mob who were illegally blocking the high way were angered when the police refused to release the arrested Arab.

(i) The fact that no danda was recovered from the appellant at the time of his arrest we find to be of no relevance as quite naturally the appellant would have gotten rid of the murder weapon especially as he was a police officer and would have known all about police investigations and incriminating evidence.

(j) 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 that the appellant was not present at the time of the incident and that he was else where; namely on duty as a police official. However he did not examine himself on oath in this respect or call any DW to support his alibi defence or produce even a single document to show that he was on duty at the time of the incident. He also did not put this particular defence to any PW during cross examination. Thus, for the reasons mentioned above we disbelieve the defence case of false implication/alibi in the face of reliable, trust worthy and confidence inspiring eye witnesses and other corroborative /supportive evidence against the appellant which has not at all dented the prosecution case.

17. 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 he was convicted and sentenced and as such dismiss the appeal. The bail of the appellant is immediately recalled; NBW's are issued for his immediate arrest which shall be executed by SHO PS Dadu who shall return the appellant to Hyderabad Jail in order to serve out the remainder of his sentence. A copy of this order shall be sent by fax to SSP Dadu who shall file his compliance report before the Additional registrar of this court within 4 weeks of the date of this Judgment which shall then be put up forthwith before this court.

18. The Appeal is disposed of in the above terms.