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S. 302(G) Converted to S. 324
S. 302(G) reduced to life due to minor
discrepancy. 161

BY BAILIFF / FAX

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

Cr. Jail Appeal No. D - 147 of 2019

Conf Case No.33/2019

1. SHAHNAWAZ S/O MUHAMMAD SIDDIQUE MIRWANI KHOSO.
2. MUMTAZ S/O SHAHNAWAZ MIRWANI KHOSO.

CONFINED IN CENTRAL PRISON
HYDERABAD

APPELLANTS

V/S

THE STATE

RESPONDENT

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

Cr. Appeal No.D-147 of 2019
Confirmation Case No.33 of 2019

DATE ORDER WITH SIGNATURE OF JUDGE(s)

31.01.2023

Mr. Wazeer Hussain Khoso, Advocate for appellants.

Mr. Ghulamullah Chang, Advocate for complainant.

Mr. Shahzado Saleem Nahiyoan, Addl. Prosecutor General, Sindh.

We have heard the learned counsel for appellants and learned counsel
for complainant as well as learned Addl. P.G Sindh. Reserved for judgment.


JUDGE


JUDGE

Hafiz Fahad

S. 302 (b) Death to life due to minor discrepancy's
S. 302 (b) reduced to S. 324 - attempt to murder

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IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

Before:

Mr. Justice Mohammad Karim Khan Agha
Justice Mrs. Kausar Sultana Hussain

Cr. Jail Appeal No.D- 147 of 2019
[Confirmation Case No.33 of 2019]

Shahnawaz and another

Versus

The State

Appellants Shahnawaz S/o Muhammad Siddique and Mumtaz S/o Shahnawaz	through Mr. Wazeer Hussain Khoso Advocate
Respondent the State:	through Mr. Shahzad Saleem Nahiyoan, Additional Prosecutor General, Sindh
Complainant Allan Khan:	through Mr. Ghulamullah Chang, Advocate
Date of hearing:	31.01.2023
Date of judgment	08.02.2023

JUDGMENT

MOHAMMAD KARIM KHAN AGHA, J.-This criminal jail appeal is directed against the judgment dated 07.08.2019, passed by the learned Additional Sessions Judge/Model Criminal Trial Court Jamshoro at Kotri, in Sessions Case No.204 of 2017 (re: The State V Muhammad Siddique), emanating from Crime No.21 of 2017, registered at Police Station Manjhand, under sections 302, 504, 34 PPC, whereby the

accused / appellant Shahnawaz S/o Muhammad Siddique has been convicted u/s 302(b) PPC and sentenced to death subject to confirmation by this Court; whereas co-accused Mumtaz S/o Shahnawaz has been convicted and sentenced to suffer imprisonment for life for the offence punishable u/s 302(b) PPC. Both the accused/appellants were also directed to pay compensation of Rs.500,000/- each to the heirs of the deceased. Both the accused / appellants were also convicted u/s 504 P.P.C and sentenced to suffer Rigorous Imprisonment for 01 year and to pay fine of Rs.10,000/-, and in case of non-payment of fine, they shall suffer S.I for 03 months more. All the sentences were ordered to run concurrently. The benefit of section 382-B Cr.P.C was also extended to both the accused. As regard co-accused Muhammad Siddique and Dildar, they were acquitted of the charge.

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

“Complainant Allan Khan on 21-07-2017 at 2100 hours had appeared at Police Station Manjhand and lodged his FIR, stating therein that Shahnawaz Mirwani Khoso and his sons were not in good terms with him for some reasons. He had his own sheep cattle, which was grazing by his son Shaman aged about 18 years. As usual his son Shaman in the early morning on 16-07-2017 left the house along with sheep towards jungle for grazing. Later on he and his relatives Sher Khan S/o Hadi Bux, 2) Qaim S/o Ali Khan Khoso went from his house together to provide lunch to his son, when they reached at the land of Khuda Dino Soomro in Kacho Deh Lakha where his son was grazing cattle, at about 1530 hours, accused each one Shahnawaz S/o Muhammad Siddique having Iron rod in his hand, 2) Muhammad Siddique hatchet in his hand, 3) Mumtaz Ali Danda in his hand, 4) Dildar Ali hatchet in his hand all sons of Shahnawaz Mirwani Khoso R/o near Al-Shahbaz Hotel, came there by abusing them to whom, they restrained upon which, the accused Shahnawaz caused Iron rod blows to his son Shaman on the left side of his head on which he fell down on the land by oozing blood and accused Mumtaz Ali Khoso inflicted Danda blow to his son Shaman on his left shoulder. The complainant party intervened and in the name of “Almighty Allah” requested the accused to leave his son Shaman, then all above accused persons went away towards western side with their respective weapons, then he arranged transport and took his injured son to P.S and obtained letter for treatment from Taluka Hospital Manjhand where doctor provided first aid to his son and thereafter, referred his son to Civil Hospital Hyderabad, where his son Shaman expired on 20-07-2017 at 05:00 hours. Thereafter, he brought the dead body of his son at Taluka Hospital Manjhand and informed the police who made necessary proceedings and

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after postmortem, they had taken the dead body to their village and after Burial of his son, the complainant went to P.S and lodged the FIR."

3. After usual investigation, police submitted formal challan of the case before the concerned court. After completing necessary formalities, learned trial court framed charge against accused Muhammad Siddique, Mumtaz Ali and Dildar, to which they pleaded not guilty; whereas accused Shahnawaz was absconder. After sometime, accused Shahnawaz surrendered; accordingly, amended charge was framed against all accused, to which they pleaded not guilty and claimed trial.
4. In order to prove its case the prosecution examined 09 witnesses and exhibited numerous documents and other items. The statements of the accused / appellants were recorded under Section 342 Cr.P.C. in which they denied the allegations leveled against them and claimed their false implication. Accused Shahnawaz and Muhammad Siddique have examined themselves on oath and raised the plea of alibi. However, co-accused Mumtaz and Dildar did not examine themselves on oath. Except accused Mumtaz, all accused led their defense evidence and examined DWs Akramuddin and Muhib respectively in support of their defence case.
5. On conclusion of the trial, learned trial court after hearing learned counsel for the parties and appraisal of prosecution evidence brought on record, convicted and sentenced the accused / appellants as well as acquitted co-accused Muhammad Siddique and Dildar, as set out earlier in this judgment, hence the appellants have preferred this appeal against their convictions.
6. The evidence produced before the trial court finds an elaborate mention in the impugned judgment, therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.
7. Learned counsel for the appellants has contended that they are innocent of any wrong doing and that they have been falsely implicated in this case by the complainant party due to enmity; that the FIR was lodged after an unexplained delay of 5 days which proved that the case against the appellants had been cooked up after consultation; that none of the eye witnesses was present at the scene of the incident and have

falsely implicated the appellants on account of such enmity; that the eye witnesses also behaved in an unnatural manner as the incident unfolded which fully proved that they were not present at the time of the incident; that there are material contradictions in the PW's evidence which renders their evidence unreliable; that PW's, even if they were present, are all related and interested as such their evidence cannot be safely relied upon; that the ocular evidence is contradicted by the medical evidence; that no incriminating article has been recovered from either of the appellants; that the two co-accused have been acquitted on the same set of evidence and as such the appellants were entitled to the same treatment of acquittal; that no motive had been proved for the murder and that for all or any of the above reasons the appellants should be acquitted of the charge by extending them the benefit of the doubt. In support of his contentions he has placed reliance on the cases of **Zafar V The State and others** (2018 SCMR 326), **Pathan V The State** (2015 SCMR 315), **Inayatullah V The State** (2019 P.Cr.L.J 1392), **Mst. Rukhsana Begum and others V Sajjad and others** (2017 SCMR 596) and **Muhammad Arif V The State** (2019 SCMR 631).

8. On the other hand, learned Additional Prosecutor General Sindh and learned counsel for the complainant have fully supported the impugned judgment and contended that the delay in lodging the FIR has been fully explained; that the evidence of the eye witnesses to the incident was reliable and confidence inspiring and they had fully implicated the appellants in the murder of the deceased in a brutal manner; that the eye witnesses were corroborated by the medical evidence; that police recovered crime weapons / hatchet; that the chemical report relating to the bloodstained earth secured from the place of incident, bloodstained clothes of the deceased and appellants' clothes were all positive; that the defence case was a complete fabrication and as such the prosecution had proved its case beyond a reasonable doubt against the appellants and as such their appeal should be dismissed and their conviction and sentence be maintained. In particular he stressed that due to the brutal and cold blooded murder of the deceased by the appellants the death sentence awarded to the appellant Shahnawaz and imprisonment for life awarded to co-appellant Mumtaz were fully attracted in this case. In support of their

contentions they placed reliance on the cases of **Rehmatullah and 2 others V The State** (2015 YLR 38), **Umar Hayat V The State** (2007 SCMR 1296), **Shaheen Ijaz alias Babu V The State** (2021 SCMR 500) and **Sajid Mehmood V The State** (2022 SCMR 1882), **Ghaffar Mahesar V The State through P.G Sindh and others** (2022 SCMR 1280), **Noor Zaman V The State** (2022 SCMR 1002), **Ashfaq alias Shaka V The State** (2022 SCMR 915), **Ijaz Ahmed V The State and others** (2022 SCMR 1577), **Muhammad Sadiq V The State** (2022 SCMR 690), **Nasir alias Nasiree and another V The State and another** (2021 SCMR 1614), **Zia Ullah and another V The State** (2021 SCMR 1507), **Muhammad Ashraf V The State** (2021 SCMR 758), **Gulshan Shah V The State** (2021 SCMR 1456) and **Munir Akhtar alias Munir Ahmed V The State** (2021 SCMR 298).

9. We have heard the arguments of the learned counsel for the parties, gone through the entire evidence which has been read out by the appellants' counsel, the impugned judgment with their able assistance and have considered the relevant law including that cited at the bar.

10. Based on our reassessment of the evidence of the PW's especially the medical evidence and blood at the crime scene we find that the prosecution has proved beyond a reasonable doubt that on 16.07.2017 at 1530 hours at the land of Khuda Dino Soomro Deh Lakha, Taluka Manjhand, Shaman (the deceased) was attacked and murdered with iron rods and danda which lead to his death on 20.07.2017 whilst receiving treatment at hospital.

11. The only question left before us therefore is whether it was the appellants who murdered the deceased by iron bar/danda blows at the said time, date and location?

12. After our reassessment of the evidence we find that the prosecution has proved beyond a reasonable doubt the charge against the appellant Shahnawaz (section 302 (b) PPC only) and only the offence under section 324 PPC against appellant Mumtaz keeping in view that each criminal case must be decided on its own particular facts and circumstances for the following reasons;

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(a) That it is true that the FIR was lodged after a delay of 5 days. Normally such delay might be fatal to the prosecution case however in this case the delay in lodging the FIR has been fully explained in that the main priority of the eye witnesses was to shift the seriously injured deceased to hospital which they did by taking the deceased to a local Taluka hospital who provided first aid to the deceased before referring him to a hospital in Hyderabad for better treatment due to the deceased serious injuries where he died a few days later. We must also consider that one of the main objects of the FIR being lodged without delay is to ensure that a false case is not cooked up by the complainant party by giving them time to consult with relatives/friends/police and cook up false cases against their enemies/rivals etc. **Importantly** in this case the eye witnesses took the injured deceased to a local PS to obtain a letter for medical treatment. This is evidenced by Ex.22 A which is a copy of entry No.2 signed by SHO PS Manjhand which was made on 16.07.2017 **about one hour after the incident** which reads as under;

*"At this time, I, namely Allan Khan S/o Jahan Khan by caste Mirwani Khoso R/o Al-Shahbaz Hotel, Taluka Manjhand appeared at PS alongwith his injured son namely Shaman aged about 18 years old **and disclosed that "namely Shahnawaz Mirwani Khoso and his sons have injured my son through iron rod and wooden stick (Danda).** Therefore, the letter for treatment may kindly be provided **and legal proceeding will be conducted later on.**" Thereafter, the memo of injuries to injured person namely Shaman Mirwani Khoso has been prepared and letter has been forwarded to respected MO, Taluka Hospital, Manjhand for the treatment of injured person. Such entry is recorded."*(bold added)

Thus, the bones of the later FIR can be found in the above entry which was made on the complaint of the complainant **almost immediately** after the incident which accused appellant Shahnawaz and his sons (including appellant Mumtaz) of injuring his deceased son by iron rod and danda. Nothing particularly material was added to the FIR which was lodged later and as such we find that the delay in lodging the FIR, on account of the already lodged entry reproduced above, gave the complainant no time to cook up a false case against the appellants. Thus, based on the particular facts and circumstances of this case we find the delay in lodging the FIR, for the reasons mentioned above, to be of no great significance especially as such delay has neither prejudiced the accused nor benefited the complainant.

(b) In the entry the appellant Shahnawaz has been given a specific role whereas the role of his sons including appellant Mumtaz is more vague although such roles are more fleshed out in the FIR with appellant Mumtaz being the son who was given the specific role of hitting the deceased with a danda.

(c) 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 Allan Khan. He is the complainant and father of the deceased.** According to his evidence;

*"The incident took place on 16.07.2017. I was present in my house. My son Shaman aged about 18 years was grazing sheep. In the morning he had taken away the sheep for grazing purpose. **Sher Khan and Qaim came to me in my house. We then took away the meal for my son Shaman.** Near about 3:30 PM we reached in the jhang situated in Katcha, deh Lakha, where my son was grazing the sheep. **He was grazing the sheep in the land of Khuda Dino Soomro. I saw Shahnawaz, Siddique, Dildar, Mumtaz were there. Shahnawaz was having iron rod in his hand, they abused us. We gave them name of ALMIGHTY ALLAH, then accused Shahnawaz caused iron rod blow on left side of the head of my son, the accused Mumtaz then caused danda blow on left shoulder of my son. My son had fallen down, thereafter, the accused persons ran away towards southern side of the land. We then arranged the vehicle, then we went to P.S and arrived at PS at 4:35 PM. Then we went to hospital at 4:50 PM, where injuries were stitched by the doctor of my son. Thereafter, my son was referred to Lal Bati Hyderabad and he was taken to hospital Hyderabad in Ambulance.**" (bold added)*

From the evidence it transpires that this witness is related to the deceased and is not on good terms with the appellants due to some marital despite/old enmity however since this was not proven at trial except for bald allegations 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) and **Dildar Hussain v Muhammad Afzaal alias Chala** (PLD 2004 SC 663). None the less we are put on caution regarding his evidence.

He was also related to the appellants and **knew them** before the incident which occurred at 3.30pm in July when there would have been sufficient light to identify the appellants especially as he and his relative PW Qaim were quite close to the appellants prior to the incident who abused him and his relatives Sher Ali and Qaim. As it was day light and the incident occurred quite close to him thus there is no case of mistaken identity and no need to hold an identification parade in order to determine the identity of the appellants. His presence at the scene of the incident is corroborated by PW 2 Qaim.

This eye witness is not a chance witness as he was the father of the deceased who lived nearby with his son who

had gone to graze his sheep and he had come with his son's lunch. Although their house was a few kilometres away and it must have been hot such conduct of walking such distances in rural areas in respect of farming in the summer months is not that uncommon and is certainly not unnatural. The fact that he did not intervene when his son was attacked is also understandable as the other side were all armed with iron rods, hatchets and danda's whereas he and PW Qaim had no weapon and would most likely being out numbered would have got the same treatment as his son. He was also about 30 feet way from the appellants when they attacked his son so he was not close enough to intervene but could only shout for mercy. His reaction in not chasing after the appellants was quite natural as his priority was to take his seriously injured son to hospital. He implicated the appellants almost immediately through the police entry discussed above and his evidence has not been materially improved from his FIR where both the appellants are named with a specific role.

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 appellants who hit the deceased over the head with an iron rod and danda respectively.

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 Qaim.** He is also related to the deceased. His evidence corroborates **PW 1 Allan Khan'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 Cr.PC statement which was given one day after the FIR was lodged and an IO was appointed. He lives in the locality and was visiting a relative (the complainant) and quite naturally accompanied his relative (the complainant) when he went to take lunch to his son and as such we do not consider him to be a chance witness. In this respect reliance is placed on the case of **Muhammed Sadiq** (Supra). The same considerations apply to his evidence as the evidence of PW 1 Allan Khan's which is to say we believe the same and rely on it.

Thus, based on our believing the evidence of the 2 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)

(d) That it does not appeal to logic, commonsense or reason that a father would let the real murderer of his real son get away scott free and falsely implicate an innocent person by way of substitution. In this respect reliance is placed on the cases of **Muhammed Ashraf V State** (2021 SCMR 758) and **Ghaffar Mahesar** (Supra)

(e) That the medical evidence and medical reports as discussed above fully support the eye-witness/ prosecution evidence. PW 4 Dr. Shoukat confirms that the deceased received three lacerated wounds to the scalp/head and one contusion injury over the left shoulder caused by hard and blunt substance which injuries fully accord with the evidence of the eye witnesses and the type of weapon used. **It is note worthy that the cause of death were the injuries to the scalp and not the contusion on the shoulder which was caused by appellant Mumtaz.**

(f) That it has not been proven through evidence that any particular police PW's had any enmity or ill will towards the appellants and had no reason to falsely implicate them 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 including that of the IO and the arrest of Mumtaz and the two acquitted co-accused. In this respect reliance is placed on the case of **Mushtaq Ahmed V The State** (2020 SCMR 474).

(g) That must of the relevant police entries have been duly exhibited

(h) 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 appellants. For example, according to the evidence of PW 4 Dr. Shoukat the deceased was in his senses when he was examined whilst according to other PW's he was unconscious from the attack until his death. On account of his injuries it may be that the deceased drifted in and out of consciousness but we do not find this to be a material contradiction. Even other wise it is well settled that ocular evidence will take preference over medical evidence if in conflict. 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 deceased went to graze his sheep to the eye witnesses coming to give him lunch to the eye witnesses seeing the appellants attack the deceased with an iron rod and danda to the deceased being taken to hospital where he died a few days later from his injuries.

(i) That we do not consider it of relevance that no recovery was made from either of the appellants as they were arrested well after the incident and as such would have disposed of the murder weapons.

(j) That the main accused Shahnawaz remained an absconder or a considerable period of time also goes against him.

(k) The fact that the co-accused were acquitted is of no help to the appellants as the evidence against the appellants was that they attacked the deceased with an iron bar and danda respectively which lead to the death of the deceased whereas the acquitted co-accused did not attack the deceased and were merely present and as such the evidence against the acquitted co-accused is on a much lesser footing to that of the appellants regarding the murder of the deceased. We do note however that neither of the appellants have been convicted under Section 34 PPC so they were treated similarly to the acquitted co-accused in this regard. However, since on the same evidence the acquitted co-accused were also acquitted under Section 512 PPC we also acquit the appellants of that offence especially as neither the State nor the complainant filed any appeal against acquittal in respect of any of the offences for which the co-accused were acquitted (including under Section 34 and 512 PPC). In this respect reliance is placed on the cases of **Shaheen Ijaz alias Babu** (Supra) and **Umer Hayat** (Supra)

(l) 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 one of false implication as they claim an alibi whereby both the appellants were at a hospital on the day of the incident as the appellant Shahnawaz's grandson allegedly fell ill and was taken to hospital where he died and there after the appellants were receiving condolences in their village. Appellant Shahnawaz gave evidence on oath to this effect and called two DW's in support of his alibi as well as medical documents. We have examined the medical documents which have no link to appellant Shahnawaz which appear to be managed as the name given is only Imtiaz and the address is Nawabshah which is over 200 Km's from where the appellant Shahnawaz was residing. No death certificate of Imtiaz was produced. Both the DW's are related to the appellant and most significantly the father of deceased Imtiaz did not give evidence as a DW who would have been the most important witness in this respect. 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 appellants which has not at all dented the prosecution case.

13. Thus, based on the above discussion we have no doubt that the prosecution has proved its case against the appellant Shahnawaz under Section 302 (b) PPC and only maintain his conviction in respect of this offence. With regard to appellant Mumtaz he is acquitted of an offence under S.302 (b) PPC and instead is convicted only for an offence under S.324 PPC for attempt to murder the deceased. This is because so far as appellant Mumtaz is concerned it has been proven through the evidence that he only struck the deceased only once with a danda on his shoulder which only caused a very minor injury which injury as per the medical evidence discussed above did **not** led to the death of the deceased rather it was the blows to the scalp by appellant Shahnawaz with the iron bar which lead to the death of the deceased. Since the acquitted co-accused were also acquitted under Section 34 we find the case of the appellants on the same footing as mentioned above as the acquitted co-accused so we are not inclined to convict appellant Mumtaz under 302 (b)/34 PPC especially as no appeal against conviction was filed against the co-accused.

14. With regard to sentencing we find that the prosecution has not proven through evidence the motive for the murder of the deceased by appellant Shahnawaz which is generally accepted by the superior courts as sufficient reason to reduce the death sentence to one of life imprisonment (as in the case of Muhammed Akram V State (2019 SCMR 610) and also keeping in view of the principles enunciated in the case of **Ghulam Mohy-Ud-Din alias Haji Babu and others** (2014 SCMR 1034) we hereby reduce the sentence of appellant Shahnawaz whilst maintaining his conviction from the death penalty to life imprisonment with the same fine in the impugned judgment remaining in tact. The confirmation reference against appellant Shahnawaz is answered in the negative.

15. Although we have acquitted the appellant Mumtaz for an offence under Section 302 (b) PPC we have convicted him of the offence under

Section 324 PPC of which he had sufficient notice of in the charge and hereby sentence him under Section 324 PPC to seven (7) years RI and maintain his fine in the impugned judgment.

16. The appeal and confirmation reference stands disposed of in the above terms.


JUDGE


JUDGE 08/02/23