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**ORDER SHEET**

**THE HIGH COURT OF SINDH, CIRCUIT COURT LARKANA**

**Criminal Appeal No.S-02 of 2017 and**

**Criminal Revision Application No.D-14 of 2019**

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<b>DATE</b>	<b>ORDER WITH SIGNATURE OF JUDGE</b>
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1. For orders on office objection "A".
2. For orders on M.A.No.2198/2017 (E/A).
3. For hearing of main case.

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**22.09.2020**

Mr. Nisar Ahmed G. Abro, Advocate for the Appellant in Criminal Appeal No.S-02 of 2017 and for the respondent in Criminal Revision Application No.D-14 of 2019.

Mr. Habibullah G. Ghouri, Advocate for the Complainant in Criminal Appeal No.S-02 of 2017 and for the Applicant in Criminal Revision Application No.D-14 of 2019.

Mr. Ali Anwar Kandhro, Additional Advocate General, Sindh.

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For the reasons to be recorded later on, Criminal Appeal No.S-02 of 2017, directed against the Judgment dated 24.12.2016 in Sessions Case No.29 of 2007 is allowed, the impugned Judgment is set aside and the appellant shall be released forthwith if not required in any other case, whereas Criminal Revision Application No.D-14 of 2019 is dismissed.

**JUDGMENT SHEET**  
**IN THE HIGH COURT OF SINDH, CIRCUIT COURT LARKANA**  
 Criminal Appeal No.D-02 of 2017  
 Crl. Revision Appln.No.D-14 of 2019

Date of hearing	Order with signature of Judge
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For hearing of main case.

**Present:**

**Mr. Justice Muhammad Junaid Ghaffar**  
**Mr. Justice Irshad Ali Shah**

Date of hearing: 22.09.2020

Date of decision: 22.09.2020.

Mr.Nisar Ahmed Abro, Advocate for the appellant.  
 Mr.Habibullah Ghouri, Advocate for the complainant  
 Mr.Ali Anwar Kandhro, Addl. Prosecutor General.

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**IRSHAD ALI SHAH, J.-** The appellant by way of preferring the instant appeal has impugned judgment dated 24.12.2016, passed by learned 2<sup>nd</sup> Additional Sessions Judge, Dadu, whereby he (appellant) has been convicted and sentenced as under;

*"I convict the accused Ali Sher U/S.302 (b) PPC and sentenced him to suffer imprisonment for life as Tazir in terms of Section 265-(ii) Cr.PC. He is also directed to pay Rs.200,000/- (two lacs rupees) to the legal heir of deceased in terms of Section 544-A Cr.PC, in default of payment, he shall be imprisoned for one year more. Benefit of Section 382-B Cr.PC is extended to accused".*

2. The narration of the incident is well placed in FIR of the present case, which was lodged by complainant Aijaz Ali with P.S Mehar, District Dadu, it reads as under;

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*"Complaint is that I am a Hari. About 3/4 months back, one Yousif Khoso brother of Ali Sher s/o Sawan Khoso, r/o village Chaman near Kolachi Mori was killed during quarrel at Kolachi Mori, in such case my brothers Ali Gul s/o Bakhshal Khoso and others were challaned by them and they were found saying that they will take revenge of such murder. Today, i.e 29.12.2006, at early in the morning, I, my brother Deedar Ali, aged about 26/27 years, maternal uncle Nabi Jurio s/o Ghulammon Khoso, nephew Talib s/o Soomar and other family members were sitting at home and electric bulbs inside and outside the home were glowing, there at about 07.00 a.m, we saw and identified accused Ali Sher, 2. Gul Baig @ Gulban, both sons of Sawan Khoso, r/o Purano Naro, near Kolachi armed with pistols, 3. Faiz Muhammad @ Faizoo s/o Allah Warrayo Khoso armed with DBBL gun, 4. Mehar s/o Ramzan Khoso armed with 222 Rifle, 5. Soof s/o Dhani Bakhsh Khoso armed with pistol, all r/o Purano Naro, near Kolachi, Taluka Mehar, 6. Riaz s/o Sajjan Khoso r/o Bindo, Taluka Mehar, armed with pistol came and all the accused by insulting us said not to move as we have come to take revenge, then at the instigation of accused Mehar Ali, accused Ali Sher fired from his pistol at my brother Deedar Ali, which hit him over his left nipple, in the meantime, accused Gul Baig @ Gulban fired from his pistol at my brother Deedar Ali, which hit him near his right side nipple and my brother fell down. We remained silent due to fear of weapons then all the accused by making fires went away, thereafter, we found my brother Deedar Ali having sustaining firearm injuries on right and left side of his chest, was bleeding*

*and he was dead. Thereafter we took dead body of Deedar Ali to Taluka Hospital, Mehar, where leaving other witnesses over his dead body. I have come to lodge the report that accused Ali Sher and Gul Baig Khoso, at the instigation of accused Mehar Ali, have committed murder of my brother Deedar Ali and rest of the accused after keeping us under fear of death, have made aerial firing. I am complainant and the investigation be made."*

3. At trial, the appellant and co-accused Gul Baig, Riaz and Faiz Muhammad did not plead guilty to the charge and the prosecution to prove it, examined complainant Aijaz Ali Khoso and his witnesses and then closed its side.

4. Co-accused Gul Bag and Faiz Muhammad on account of their absconsion were declared to be proclaimed offender by learned trial Court while the appellant and co-accused Riaz were examined under section 342 Cr.PC, wherein they denied the prosecution allegation by pleading innocence, by stating that they have been involved in this case falsely by the complainant party due to old enmity. Neither, they examined anyone in their defence nor themselves on oath.

5. The specific plea, which was taken by the appellant in his defence, was to the following effect;

*"there is old enmity which is admitted by the complainant in FIR. Prior to this incident, Mst.Saran wife of PW Nabi Jurio was murdered by nephews of PW Nabi Jurio namely Ali Raza alias Abdu Razzaq and Deedar*

*Khoso, after that Ali Raza and Deedar Khoso had demanded hand of daughter Mst.Rukhsana for Ali Raza, to which deceased Deedar and PW Nabi Jurio refused to give hand of Mst.Rukhsana to Ali Raza, therefore, said Deedar and Ali Raza alias Abdul Razzaq committed murder of Deedar. I am innocent and had not committed any offence and pray for justice”.*

6. On conclusion of the trial, learned trial Court acquitted co-accused Riaz while convicted and sentenced the appellant, as is detailed above by way of impugned judgment,

7. The complainant had also filed revision application, whereby he has sought for enhancement of conviction and sentence from imprisonment of life to death for the appellant.

8. The appellant and the revision application are now being disposed of through single judgment.

9. It is contended by learned counsel for the appellant that the appellant being innocent has been involved in this case falsely by the complainant party in order to satisfy its old enmity with him; the FIR of the incident has been lodged with delay of about 01 ½ hours; the medical evidence is in conflict with the ocular evidence; PWs Talib and Waheed Ali have not been examined by the prosecution; co-accused Riaz has been acquitted while the appellant has been convicted on the basis of same evidence which even otherwise was not transpiring confidence. By contending so, he sought for acquittal

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of the appellant. In support of his contention, he has relied upon cases of *Raees Ashfaq and another Vs. The State (2007 PCr.LJ-102)*, 2). *Qadir Bux Vs. The State (2007 MLD Karachi-31)*, 3). *Sharafuddin Khaskheli Vs. The State (2020 PCr,LJ-891)*, 4). *Muhammad Usman and another Vs. The State and others (2020 PCr.LJ-1048 (Lahore/Rawalpindi Bench))* and 5). *Abdul Kabeer Vs. The State (2020 MLD-1267 Balochistan (Sibi Bench))*.

10. Learned Addl.P.G for the State did not support the criminal revision application. However, by supporting the impugned judgment, he sought for dismissal of the instant criminal appeal.

11. Learned counsel for the complainant has sought for dismissal of the appeal and enhancement of the sentence to the appellant from life to *death* by contending that the appellant has actively participated in commission of the incident by causing fire shot injury to the deceased and on arrest from him has been secured the crime weapon which is matched similar with one of the empty secured from the place of incident. In support of his contention, he has relied upon cases of *Ahsan Shahzad and another Vs. The State and others (2019 SCMR-1165)*, 2). *Muhammad Bilal Vs. The State and others (2019 SCMR-1362)*, 3). *Akhmat Sher and others Vs. The State (2019 SCMR-1350)*, 4). *Muhammad Akram alias Akrai Vs. The State (2019 SCMR-610)* and 5). *Muhammad Afsar Vs. Malik Muhammad Farooq (2012 SCMR-274)*.

12. We have considered the above arguments and perused the record.

13. PW Talib has not been examined by the prosecution for no obvious reason. The presumption which could be drawn of his non examination would be that he was not going to support the case of prosecution. The evidence of PW Nabi Jurio could hardly be relied upon simply for the reason that his 161 Cr.PC statement as per SIO/DSP Ghulam Sarwar was recorded on 04.01.2007. It was on fifth day of the incident.

14. In case of **Abdul Khaliq vs. The State (1996 SCMR-1553)**, it has been observed by Hon'ble Apex Court that;

*"---S.161---Late recording of statements of the prosecution witnesses under section 161 Cr.P.C. Reduces its value to nil unless delay is plausibly explained."*

15. Now there remains in field, of course on ocular premises, the evidence of complainant Aijaz Ali, it was stated by him during course of his examination that on 29.12.2006, when he, PWs Nabi Jurio, Talib Hussain, deceased Deedar Ali and other inmates were available in their house, the bulbs were glowing, there came the appellant and others. On instigation of accused Mehar, the appellant fired with pistol at the deceased, which hit on his left side chest (breast nipple). On sustaining fire shot injury, the deceased fell down on the ground and thereafter at instigation of accused Mehar, accused Gul Baig fired with pistol at the deceased, which hit on his

right side of his chest (breast nipple) and then all the accused went away by making aerial firing. It goes to suggest that the deceased sustained in all two fire shot injures. The complainant in this respect is belied by medical officer Dr. Bashir Ahmed, as per him, the deceased was found sustaining three injures, which are described as below;

- i). Fire arm lacerated wound 1 cm into deep middle to the mid of left clavicle (through and through).
- ii). Fire arm lacerated wound 1 cm into dia meter below the mid of left clavicle.
- iii). Fire arm lacerated wound 2 cm into deep to the right side of the nipple.

Apparently, No injury was found on left side chest (breast nipple) of the deceased, which has been attributed to the appellant. No doubt, the deceased was found sustaining an injury at mid of *clavicle* but it could hardly be termed as left side of the chest (breast nipple).

16. The place of incident as per FIR is situated at distance of one kilometer from Police Station, Mehar. The lodgment of FIR on the part of complainant with delay of about 01 ½ hours, therefore under the circumstances, could not be lost sight of.

17. In case of ***Mehmood Ahmed & others vs. the State & another (1995 SCMR-127)***, it has been held by Honourable Apex Court that;

*“Delay of two hours in lodging the FIR in the particular circumstances of the case had assumed great significance as the same could be attributed to consultation, taking instructions and calculatedly*

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*preparing the report keeping the names of the accused open for roping in such persons whom ultimately the prosecution might wish to implicate”.*

18. PW Waheed Ali the first mashir almost to every memo, prepared by the police in present case has not been examined by the prosecution. His non examination is not explained by the prosecution, therefore, no reliance could hardly be placed upon evidence of PW Ashiq Ali, being second mashir to almost every memo, prepared in the present case by the police. His evidence even otherwise is not enough to improve the case of prosecution.

19. The pistol allegedly used by the appellant in commission of the incident was secured from him on seventh day of his arrest and it has been subjected to Expert examination with more than two months of its recovery. In that situation, it would be hard to connect the appellant with such recovery.

20. Co-accused Riaz was involved in commission of the incident on point of vicarious liability, he on the basis of same evidence has been acquitted by learned trial Court and his acquittal as such could not be lost sight of.

21. The conclusion which could be drawn of the above discussion would be that the prosecution has not been able to prove its case against the appellant beyond shadow of doubt and he is entitled to such benefit.

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22. In case of **Faheem Ahmed Farooqui vs. The State (2008 SCMR-1572)**, it is held that;

*“single infirmity creating reasonable doubt regarding truth of the charge makes the whole case doubtful.*

23. The case law which is relied upon by learned counsel for the complainant is on distinguishable facts and circumstances. In case of **Ahsan Shahzad and another (supra)**, the conviction under section 302 (b) PPC was maintained by the Honourable Apex Court mainly for the reason that the ocular account was found fully supported by the medical evidence. In the instant case, there is inconsistency between medical and ocular account of evidence with regard to number of injuries sustained by the deceased. In case of **Muhammad Bilal (supra)**, the death sentence awarded to the appellant was maintained by the Honourable Apex Court mainly for the reason that the accused in order to satisfy his previous enmity with the deceased fired at him when he was brought in court in custody by police and accused was subdued at the spot. In the instant matter, neither the incident has taken place in Court premises, nor the accused was subdued at the spot. In case of **Akhmat Sher and others (supra)**, the main reason for dismissal of appeal of the accused by the Honourable Apex Court was that the witnesses were found in a comfortable unison on all the salient aspects of the occurrence. In the instant matter, PW Talib is not examined by the prosecution while the evidence of PW Nabi Jurio is

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not found to be reliable for the reason that his 161 Cr.PC statement was recorded on fifth day of the incident without any cogent reason. In case of **Muhammad Akram alias Akrai (supra)**, the main reason for maintaining the conviction against the accused by the Honourable Apex Court was that the witnesses produced by the prosecution were found consistent on all the material aspects of the case. In the instant matter, as said above, PW Talib was not examined by the prosecution while evidence of PW Nabi Jurio was not found to be reliable. In case of **Muhammad Afsar (supra)**, the issue of allotment of government quarter was involved. In the instant matter, no such issue is involved.

24. In view of the facts and reasons discussed above, the impugned judgment is set aside, the appellant is acquitted of the offence for which he was charged, tried and convicted by learned trial Court and he shall be released forthwith in present case, if not required in any other custody case.

25. Above are reasons of our short order dated 22.09.2020, whereby the instant appeal and revision application were disposed of.