Date	Order with Signature of Judge
	1- For orders on MA# NO 13434/16(426) 2- For Regular Hearing
08.11.2016	Mr. Asif Ali Abbasi Razak Samo, Advocate for appellant. Mr Sarfaraz Ali Shah, AAG for the State. Mr. Habibullah G. Ghori, Advocate for Complainant. Heard arguments. Judgement reserved. Judge Judge

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(Khp.) D. No. 238—5-2005—2000 L' F.

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CERTIFICATE OF THE COURT IN REGARD TO REPORTNIG

Cr Jail Appeal NO D- 42 of 2011.
Nisar Depar V/s The State.

SINDH HIGH COURT

omposition of Bench — **Single/D.B.**

Before Mr Justice Zafar Ahmed Rajput
Mr Justice Muhammad Iqbal Kalhoro (Author)

Dates of hearing: 8-11-2016.

Decided on : 21-11-2016.

(a) Judgement approved for reporting. — **YES** / **No**

CERTIFICATE

Certified that the judgment • / Order is based upon or enunciates a princip le of law • / decides a question of law which is of first impression /distinguishes / over-rules / reverses / 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) Reader must ask the Judge writing the Judgment whether the Judgment is approved for reporting.

(iv) Those directions which are not to be used should be deleted.

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IN THE HIGH COURT OF SINDH, CIRCUIT COURT LARKANA
Cr. Jail Appeal No.D-42 of 2011.

Present:
Mr. Justice Zafar Ahmed Rajput.
Mr. Justice Muhammad Iqbal Kalhoro.

Nisar Depar. .....Appellant.

Versus

The State. .....Respondent.

Mr. Asif Ali Abdul Razzak Soomro, Advocate for appellant.
Mr. Habibullah G. Ghouri, Advocate for complainant.
Mr. Sardar Ali Rizvi, A.P.G.

Date of hearing: 08.11.2016.
Date of Judgment: 22.11.2016.

JUDGMENT

Muhammad Iqbal Kalhoro, J-. Appellant was tried by learned II-Additional Sessions/Special Judge for STA, Larkarna in special case No.15 of 2001 on the charge of committing murder of deceased Aurangzeb with K.K. in the house of Dr. Muhammad Saleh Depar situated in village Hakim Depar district Larkana at about 1:00 a.m. on 15.4.2001, and was convicted vide impugned judgment dated 26.03.2011 to suffer imprisonment for life under section 302 (b) PPC as "Tazir" and to pay fine of Rs.1,00000/- to the legal heirs of deceased, in default thereof to suffer R.I for 6 months more.

2. Record reflects that in order to prove its case, the prosecution has examined in all seven witnesses, the complainant Muhammad Uris Ex.4, PW Deedar Ali Ex.5, PW Zafar Ali Ex.6, PW Maqbool Ahmed Ex.7, PW Dr. Thakurdas Ex.9, PW Tapedar Sikander Ali Ex.10, PW Zamir Ex.11 and PW Shah Muhammad Ex.13. In their evidence, they have produced all the necessary documents from FRI to all the memos, sketch of place of incident, postmortem report etc. Thereafter, statement of the appellant under Section 342 Cr.P.C. has been recorded in which he has denied the allegations. However, he has neither examined himself on oath nor led any evidence in his defense. At the conclusion of the trial, the appellant has been convicted vide

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impugned judgment as stated above and being aggrieved by that he has preferred this appeal.

3. On 08.11.2016, this appeal was heard and reserved for judgment. During the course of hearing, Mr. Asif Ali Soomro, learned counsel for the appellant mainly contended that appellant was innocent and he was falsely implicated in the case; that entire case of the prosecution was full of contradictions and discrepancies; that although prosecution had alleged the motive i.e. refusal of complainant to allow the appellant to make friendship with his deceased son and making complaints against him, but it had completely failed to prove the same as there was no evidence in this connection on record; that medical evidence was in conflict with the oral account of the incident which had rendered the prosecution case doubtful; that there was no supporting evidence available as even the empty allegedly recovered from the spot did not wed with the K.K. shown to have been recovered from the appellant; that even in the case of recovery of said K.K., the appellant had been acquitted which was sufficient to create doubt over involvement of the appellant in the present case; that owner of the house, where the incident took place, namely Dr. Muhammad Saleh Depar was neither cited as a witness in the challan nor subsequently examined by the prosecution in the trial to support its case; that Tepedar's evidence had clearly established that account of eye witnesses in respect of details of the incident was not free from doubt, and; therefore their very presence at the relevant time at the spot was uncertain. He in support of his arguments relied upon the case laws reported in PLD 2002 SC 1048, 1987 P.Cr.L.J.2173, 2015 SCMR 840, PLD 1973 SC 321, PLD 1976 SC 300, 1993 SCMR 417 and PLD 2002 SC 643.

4. In opposition to above, learned counsel for the complainant argued that the evidence of the witnesses was trust-worthy and confidence-inspiring; that there was no material contradiction or anomaly in the evidence to give benefit thereof to the appellant; that presence of the witnesses at the spot being residents of the same village was natural. He supported his arguments with the case law reported in 2014 SCMR 348. Learned APG although supported the impugned judgment but at the same time contended that since motive part of the story was not established and apparently there was an unexplained anomaly (keeping in view the account of the incident) in the seat of injury sustained by the victim, the term of sentence be modified to the period already undergone by the appellant.

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5. We have considered the submissions and perused the entire materia. including the citations relied upon by the learned counsel. This incident took place in the house of Dr. Muhammad Saleh Depar at about 1: a.m. on 15.4.2001 when the marriage ceremony of his brother and sister was going on. The appellant was present in the Kitchen of the said house duly armed with K.K. The complainant, witnesses and the deceased who was son of the complainant, were sitting in front of the kitchen, where the appellant came over and after showing his indignation over complainant's making complaints to his brothers against his friendship with the deceased, he directly fired at deceased which hit him on upper-lateral part of his right thigh. Complaint party rushed the injured to the hospital but on the way he succumbed to his injury. This account has been supported by the complainant and two eye witnesses namely Deedar Ali and Zaffar Ali, who all were present at the spot in the ongoing marriage ceremony. Their evidence is natural and trust-worthy, and although they have been subjected to a lengthy cross-examination, but no material contradiction rendering tale of the incident as doubtful has come on record. Their presence at the spot being residents of the same village and relatives of bride and bridegroom is also natural and cannot be doubted. Just because they are relatives of the complainant would not make their evidence unworthy of credence, unless of course it is shown that they have a motive to falsely implicate the appellant, but their cross-examination does not show that any such suggestion has been put to them. We have therefore no reason to disbelieve their evidence. As to the contention of learned defense counsel that Dr. Muhammad Saleh in whose house the incident took place has neither been cited as a witness nor subsequently examined in the trial, it may be mentioned that neither in the FIR nor in any other document or in the evidence of the witnesses, his presence at the spot is noted and it is not the case of the prosecution either that when the incident happened he was physically present there. In such circumstance, not citing him as a witness or not summoning him in the trial for evidence is inconsequential insofar as the merit of the case is concerned.

6. As for the motive part of the story, we have noted that complainant in his cross-examination in reply to a question while admitting that he had not made any complaint to the Nek-Mard of the village against the appellant has voluntarily stated that he had made such complaints to brother of the appellant and apparently his ascertain has not been shaken. In the villages, the episodes such as the one where an adult male trying and insisting on friendship with a boy of another family are considered below the honour and

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are not shared widely, therefore complainant's efforts to keep it confined within the two families was but natural, and it would not be read as his failure to prove the same. However, at the same time, it may be observed that weakness of the motive or failure of the prosecution to establish the same would not ipso facto render the oral account of the incident, which otherwise inspires confidence, as doubtful.

7. Learned defense counsel had heavily emphasized that if the evidence of Tepadar was looked at in conjunction with the doctor's evidence and oral account of the witnesses, it would be conspicuous that prosecution had failed to prove its case beyond reasonable doubt. While examining the same, we have noted that Tepedar in the sketch of the site has described the distance between point A, where the deceased was sitting on chair, and point B, the kitchen wherein the appellant was present, as 17 feet, whereas the doctor in his evidence has stated that the deceased sustained the injury from the distance of 6 inches to 3 feet. And it is this apparent discrepancy, which was referred to by the learned defense counsel in support of his contention. While having regard to the same, we must mention here that the Tepedar has described that the distance of 17 feet was between the kitchen (Point B) and where the deceased was sitting (Point A), however, it is not the case of the prosecution that from inside the kitchen the appellant had fired at the deceased. The evidence of the complainant and other witnesses clearly shows that the appellant from the kitchen had come over to where the complaint party was sitting and after talking to the complainant about his friendship with his son, he had fired on the deceased. In view of such fact, we do not find any contradiction in the evidences of Tepedar and the Doctor in respect of distance from where the fire was made upon the deceased. On the contrary, the evidence of Medico-legal officer is in consonance with the oral account furnished by the witnesses with reference to distance the deceased was fired at from. In regard to the acquittal of the appellant in the case of recovery of crime weapon, it may be observed that in the light of report of Forensic Expert to the effect that the empty recovered from the place of incident was not fired from the said rifle, such recovery has no relevancy and acquittal of the appellant in that case therefore cannot be construed a circumstance creating doubt on his involvement in the present case. We have not found any confidence-inspiring material establishing a reasonable doubt to give benefit whereof to the appellant and release him. The conviction awarded to the appellant therefore is unexceptionable.

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7. Notwithstanding the above, we have noted that seat of injury on the deceased is upper-lateral part of his right thigh (near buttock) which is entry-wound and the exit-wound is on his left lumber region of abdomen anterolaterally. The prosecution case is that the deceased was sitting (on the chair) at the time of incident, but it has not explained as to how in that position he sustained injury near his buttock from a bullet whose trajectory was almost vertical from down to upwards. And considering it a mitigating circumstance coupled with the fact that the offense was not premeditated as is evident from the prosecution story itself, we have decided to modify the conviction of the appellant from 302 (b) to 302 (c) PPC and reduce his sentence accordingly. And to the question whether the conviction of the appellant can be so altered in the given facts and circumstances, we rely on the dictum laid down in paras 28 and 29 of the case of Ali Muhammad versus Ali Muhammad and another (PLD 1996 SC 274), that is, the law-maker has left it to the courts to decide on a case to case basis the cases falling under clause (c) of section 302 PPC. The jail roll of the appellant shows that up-to 07.09.2016 he has remained in jail for 15 years, 03 months and 16 days without remission and during that period has earned remission of 05 years and 21 days, the total period, he has thus served is 20 years 4, months and 07 days, and unexpired portion of his sentence is 05 years, 01 month and 23 days. We, in view of above position, while dismissing the appeal in hand award the appellant conviction and sentence him for the period he has already undergone under section 302 (c) PPC.

JUDGE 22-11-2016.

JUDGE

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