

1 **IN THE COURT OF MUHAMMAD AMIR MUNIR,**  
2 **ADDITIONAL SESSIONS JUDGE,**  
3 **JHELUM.**  
4

5 Sessions case No. 88 of 2014  
6 Sessions trial No.06 of 2015  
7

8  
9 State... Vs.... Sher Afzal son of Mushtaq Ahmad, aged  
10 32/ 33 years, caste Awan, resident of  
11 Khalaspur, Tehsil & District Jhelum..  
12 ...Accused.  
13

14  
15 Case FIR No. 16 dated 30.01.2010  
16 Offence u/s 302, 148/ 149 PPC,  
17 Police Station: Chotala, District Jhelum.  
18

19 **Raja Muhammad Nasrullah Waseem**, Advocate on behalf  
20 of the complainant.

21 **Muhammad Imran Gondal**, learned ADPP on behalf of the  
22 State.

23 **Ch. Adeel Faraz**, Advocate on behalf of the accused.  
24

25 **Summary:**<sup>1</sup>

26 Through this judgment, the charges against the accused u/s 302  
27 (b)/ 34 PPC have been proved. He is convicted accordingly. Keeping  
28 in view the mitigating circumstances, he is sentenced to undergo  
29 life imprisonment. He shall also pay Rs.2 lac to legal heirs of  
30 deceased and in case of default, he shall further undergo SI for 6  
31 months. The benefit of section 382-B of Cr.P.C is also extended to  
32 him.  
33

34 The objections of learned defence counsel on evidence of  
35 PW12/complainant recorded through Skype have been overruled.  
36

37 A copy of this judgment is directed to be sent, through proper  
38 channel, to the learned Law & Justice Commission of Pakistan for  
39 legislative proposals discussed in this judgment.  
40

41 **Judgment:**

42 03.05.2016  
43

44 **Facts:**<sup>2</sup>

45 The instant FIR (Ex.PB) under Section 302, 148/ 149 PPC  
46 was lodged on 29.01.2010 at Police Station Chotala District Jhelum  
47 on the statement of complainant Rashid Mahmood (PW12) that on

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<sup>1</sup> This is not a substantive part of the judgment and provides only a bird's eye view of the same.

<sup>2</sup> The facts narrated in the FIR are reproduced verbatim, except few grammatical changes and change of status of different accused, from the judgment dated 07.05.2012, passed earlier in this case with respect to co-accused, as they reflect the contents of the FIR.

1 29.01.2010, he alongwith his brother Rajjab Hussain and brother-in-  
2 law Abid Hussain were present in his house when Rajjab Hussain  
3 told that co-accused Mahzar Hussain (since acquitted) made a  
4 telephonic call to him and asked him to come to his house for  
5 effecting a compromise with Shahzad alias Shadu (now deceased).  
6 Therefore, the complainant alongwith Rajjab Hussain deceased and  
7 Abid Hussain PW13 went to the house of co-accused Mazhar  
8 Hussain (since acquitted) situated in village Dhoke Jammat; that  
9 they reached there at about 8:25 p.m. and saw that co-accused  
10 Mazhar Hussain (since acquitted) while armed with 30-bore pistol,  
11 Shehzad alias Shadu (now deceased) armed with Kalashnikov, **Sher**  
12 **Afzal (accused present in the Court)** armed with 244-bore riffle,  
13 Abdul Waheed (since convicted) armed with 244-bore riffle, Ibrar co-  
14 accused (since acquitted) armed with 30-bore pistol and Talib  
15 Hussain were sitting on cots. The co-accused Shazad alias Shadu  
16 (now deceased) asked his brother Abdul Waheed co-accused (since  
17 convicted) whether Rajjab was the same person who has stolen his  
18 motorcycle and caused fire arm injury to him and on his affirmative  
19 reply, Shahzad (P.O/nw deceased) abused Rajjab deceased who  
20 replied in the same tune. Then Shehzad alias Shadu (now deceased)  
21 made fire shot from his Kalashnikov which hit Rajjab on his back,  
22 the present accused Sher Afzal made fire shot from his 244-bore rifle  
23 which hit on the left leg of Rajjab who fell down. Abdul Waheed  
24 accused (since convicted) made fire shot from his 244-bore rifle  
25 which hit on leg and knee of Rajjab Hussain whereas the fire shot  
26 made by Ibrar Hussain co-accused (since acquitted) with his 30-bore  
27 pistol hit upon the left arm of Rajjab Hussain. Talib Hussain co-

1 accused (since acquitted) and Mazhar Hussain (since acquitted)  
2 stood on the complainant and Abid Hussain aiming their arms on  
3 them. Rajjab Hussain succumbed to his injuries at the spot and the  
4 accused persons fled away. Thereafter, the dead body of deceased  
5 was shifted to DHQ Hospital, Jhelum and police was informed. The  
6 occurrence was witnessed by the complainant alongwith Abid  
7 Hussain PW 13.

8 **2.** The motive behind the occurrence was that on  
9 24.11.2009, Abdul Waheed, co-accused (since convicted) got  
10 registered a case against Rajjab Hussain deceased u/s 394 PPC  
11 and for taking revenge of the same occurrence, the accused have  
12 committed the murder of deceased Rajjab Hussain.

13 **3.** The co-accused Abdul Waheed was convicted while co-  
14 accused Mazhar Hussain and Ibrar Hussain were acquitted vide the  
15 judgment dated 07.05.2012 passed by Ch. Muhammad Mumtaz  
16 Hussain, the then learned ASJ, Jhelum. Another accused Talib  
17 Hussain was acquitted vide order dated 26.10.2010 passed by Mr.  
18 Tahir Sabir, the then learned ASJ, Jhelum. One accused Omer  
19 Shezad alias Shado has been passed away in Khairpur in the year  
20 2012, as per report u/s 173 of Cr.P.C submitted in the instant trial.

21 **4.** The present accused Sher Afzal alias Sheri was arrested  
22 on 17.06.2014 and after recovery of riffle 44-bore, he was sent to  
23 judicial lock up on 26.06.2014. The incomplete Report u/s 173 of  
24 Cr.P.C of accused Sher Afzal submitted before the Court on  
25 02.09.2014. Thereafter, learned Illaqa Magistrate sent the Report  
26 u/s 173 of Cr.P.C., to the learned Sessions Judge, Jhelum on

1 13.09.2014 and the same was entrusted to my learned Predecessor  
2 by the learned Sessions Judge, Jhelum on 20.09.2014.

3 **5.** The copies of statements/documents as required u/s  
4 265-C were distributed to the accused on 20.09.2014.

5 **6.** After receiving of original record from the Hon'ble Lahore  
6 High Court, Rawalpindi Bench, Rawalpindi, the accused was  
7 formally charge-sheeted on 02.01.2015 as under:-

8 **Charge:**

9 "That on 29.01.2010 at about 8.25p.m in the area of  
10 village Nara within the jurisdiction of P.S. Chotala, Tehsil  
11 & Distt. Jhelum, you (above said accused) while armed  
12 with 244 bore rifle alongwith your co-accused Mazhar  
13 Hussain, Ibrar Hussain (since acquitted), Abdul Waheed  
14 (since convicted) and Umar Shahzad (since P.O.) in  
15 furtherance of your common object formed an unlawful  
16 assembly and thereby you have committed the offence  
17 punishable/s 148 of PPC which is within the cognizance  
18 of this Court.

19 **Secondly:**

20 That on same day, time and place, you while armed  
21 with 244 bore rifle alongwith your co-accused Mazhar  
22 Hussain, Ibrar Hussain (since acquitted), Abdul Waheed  
23 (since convicted) and Umar Shahzad (since P.O) in  
24 furtherance of your common object have committed Qatl-  
25 e-Amad of Rajjab Hussain and thereby you committed  
26 an offence punishable under section 302/149 of the  
27 Pakistan Penal code which is within the cognizable of  
28 this Court.

29 And I hereby direct that you be tried by this court for the  
30 above-said offence."

31 Accused has denied the charge and claimed trial.

32 **Prosecution evidence:**

1           **a) Oral evidence:**

2       **7.**           *The prosecution has produced the following evidence:*

3           **PW1**           *Muhammad Aslam 782/C, (Parcel witness of*  
4                           *empties of Kalashnikov and empties of rifle*  
5                           *44-bore),*

6           **PW2**           *Asad Sikandar 1074/C (witness of parcel of*  
7                           *44-bore rifle to PFL, Lahore),*

8           **PW3**           *Asim Muneer 32/C (witness of recovery of*  
9                           *rifle 44 bore Ex.P1 and five bullets),*

10          **PW4**           *Iftikhar Afzal, ASI (witness of Scribe of FIR*  
11                          *Ex. PB),*

12          **PW5**           *Asif Akhtar Draftsman (secondary witness of*  
13                          *scribe of scaled site plan and notes with*  
14                          *black ink Ex.PC),*

15          **PW6**           *Ameer Afzal 845/HC (witness of safe custody*  
16                          *of parcel of 44- bore gun)*

17          **PW7**           *Dr.Mian Mazhar Hayat, S.M.O (witness of*  
18                          *post-mortem)*

19          **PW8**           *Zameer Hussain, ASI (handed over parcels of*  
20                          *blood stained earth and empty to Muhammad*  
21                          *Aslam constable for transmission to PFSA,*  
22                          *lahore),*

23          **PW9**           *Zulfiqar Ali 503/C (witness of proclamation*  
24                          *Ex.PE)*

25          **PW10**          *Sarfraz Ahmad, SI (I.O. of the case, witness*  
26                          *to NBW and proclamations against present*  
27                          *accused),*

28          **PW11**          *Naqeeb Sultan 473/C (Executants of NBW of*  
29                          *accused Sher Afzal Ex.PG)*

30          **PW12**          *Rashid Mahmood (complainant and eye*  
31                          *witness of the case, who deposed from Saudi*  
32                          *Arabia through Skype on 01.04.2016),*

33          **PW13**          *Abid Hussain (eye witness of the occurrence),*

34          **PW14**          *Muhammad Iqbal (witness of post-mortem*  
35                          *and last worn cloth and marginal witness of*

1 recovery memo Ex. PQ. He is also marginal  
2 witness of recovery memo of riffle 44-bore  
3 and bullets, Ex.PA ),

4 **PW15** Muhammad Siddique, Retired SI (2<sup>nd</sup> last I.O.  
5 of the case),

6 **PW16** Zulfiqar Ali, SI (last I.O who submitted challan  
7 u/s 173 of Cr.P.C).

8

9 Learned ADPP given up PWs, Naqeeb Sultan 473/ and Ghulam  
10 Shabbir 855/C being unnecessary on 20.04.2015 while PW Liaqat  
11 Ali, Inspector was given on 02.02.2016. PWs Waqas Elahi 1032/C,  
12 Mobashar Mehmood 1046/C and Rafiq Sajjad, SI were given up  
13 being unnecessary on 20.04.2016. However, PW Naqeeb Sultan was  
14 summoned on an application dated 04.03.2016 by the learned  
15 counsel for the complainant, which was not objected to by the  
16 learned Defence Counsel, as per order dated 14.03.2016. The  
17 prosecution also tendered the Report of PFSA, Lahore Ex.PW,  
18 Serologist Report Ex.PX and Report of PFSA, Lahore regarding fire-  
19 arms examination Ex.PY and closed the prosecution evidence.

20 **b) Documentary evidence:**

21 Ex.PA Recovery of riffle 44-bore alongwith 5  
22 live bullets,

23 Ex. PB Copy of FIR No.16 ibid, (original seen)

24 Ex. PC Map with scale,

25 Ex. PD Copy of post-mortem report, (original  
26 seen)

27 Ex. PE Proclamation of accused Sher Afzal,  
28 (original seen)

29 Ex.PF Recovery memo of pistol 30-bore,  
30 (original seen)

1	Ex.PG	Non-bailable warrants of accused Sher
2		AFzal & other co-accused, (original seen)
3	Ex.PH	Proclamation of co-accused Mahzar
4		Hussain, (original seen)
5	Ex. PJ	Proclamation of co-accused Omer
6		Shehzad, (original seen)
7	Ex. PK	?
8	Ex. PL	Proclamation of co-accused Ibrar
9		Hussain, (original seen)
10	Ex. PM	Proclamation of co-accused Abdul
11		Waheed, (original seen)
12	Ex. PN	Copy of complaint, (original seen)
13	Ex. PO	Copy of recovery memo of Kalashnikov
14		alongwith empty of 244 bore riffle,
15		(original seen)
16	Ex. PP	Recovery memo of blood stained earth,
17		(original seen)
18	Ex. PQ	Recovery memos of last worn clothes of
19		deceased P1 to P9(original seen)
20	Ex. PR	Copy of application for post-mortem,
21		(original seen)
22	Ex.PS	Copy of Inquest report, (original seen)
23	Ex. PT	Copy of receipt of dead body, (original
24		seen)
25	Ex. PU	Copy of site plan without scale,
26		(original seen)
27	Ex.PV	Site plan of place of recovery of weapon
28		of offence,
29	Ex.PW	Report of PFSA, Lahore, (original seen)
30	Ex. PX	Report of Serologist, Punjab Lahore,
31		(original seen)
32	Ex.PY	Report of PFSA, Lahore about riffle 44-
33		bore.
34	<b>c) Case property:</b>	
35	P1	Riffle 44-bore,

1 P2/ 1-5 Live bullets,  
2 P3 Kalashnikov  
3 P4 Banyaan  
4 P5 Shalwar  
5 P6 Pajama  
6 P7 Qameez,  
7 P8 Vest  
8 P9 Pant  
9 P10 Shirt  
10 P11 Chadar  
11 P12 Cap  
12 P13 Shoes.

13

14 **Statement of accused u/s 342 of Cr.P.C:**

15 **8.** After the closure of prosecution's evidence on  
16 20.04.2016, the accused was asked to record his statement u/s 342  
17 of Cr.P.C, same was recorded on 25.04.2016.

18 **9.** The accused did not opt to appear in witness box u/s  
19 340(2) of Cr.P.C nor he opted to produce defence evidence.

20 **Arguments:**

21 **10.** Raja Muhammad Nasrullah Waseem, Advocate on behalf  
22 of the complainant has argued that the questions during evidence  
23 which were under objection have to be decided in favour of the  
24 prosecution as the Lahore High Court Rules and Orders Vol. 3,  
25 Chapter 12 Para No.5 and Article 140 of the QSO, 1984 prescribe the  
26 method of contradiction and thus any question answered in cross-  
27 examination cannot be used for contradiction with the statement of  
28 the PWs recorded u/s 161 of Cr.P.C; that the motive has been  
29 established by the prosecution as a previous FIR against the  
30 deceased was a factor for the alleged occurrence; that the co-



1 accused Abdul Waheed, who is now convicted in this case, was  
2 complainant of the previous FIR on the deceased; that specific  
3 questions have been asked in cross-examination about the  
4 compromise efforts while suggestions also were given and hence, the  
5 motive is clear; that the occurrence was committed in the house of co-  
6 accused Mazhar Hussain where the complainant and deceased were  
7 summoned through telephone and the maps with or without scale  
8 establish the venue which is not denied by the accused; that the  
9 accused has been attributed fire shot through 244 bore riffle P1  
10 which hit the deceased on his Pindli; that injury No.10 in the post-  
11 mortem report is attributed to the accused which establishes his  
12 guilt; that the medical officer PW7 has deposed that all the fire shots  
13 on the person of deceased were fatal; that ocular and medical  
14 account co-incide with each other; that PWs12 & 13 fully support the  
15 ocular account whereby not only the nomination of the accused is  
16 establish but also the specific role as well; that the delay is  
17 explained plausibly by PW12; that the travel between the village to  
18 Dhoke Jammata, then to DHQ and then to Police Station has taken the  
19 necessary time; that the police was not informed at police station on  
20 the hope that may be if the deceased is taken to hospital within time,  
21 his life may be saved; that minor contradictions in the statements of  
22 PWs have to be ignored as these statements have been recorded in  
23 this trial after 6 years of the occurrence; that the accused has been  
24 duly identified because the complainant was already knowing him;  
25 that substitution of an accused person is a rare phenomenon; that no  
26 previous enmity is against the accused; that PW13 has fully  
27 supported the statement of PW12/complainant; that he is

1 independent witness who joined the complainant for compromise  
2 efforts which resulted in the alleged occurrence at the hands of the  
3 accused; that PW12 is brother and PW13 is Behnoi of deceased and  
4 thus, both are natural witnesses; that no ulterior motive is available;  
5 that witnesses are truthful; that recoveries have been established on  
6 pointation of the accused; that as per 2011 SCMR 872, if the case is  
7 otherwise established, even the recovery becomes irrelevant; that the  
8 I.O. has found the accused as guilty in his investigation; that report  
9 of PFSA proves that the riffle P1 is in working condition; that if the  
10 police/Investigators have not sent the empties for its match with P1,  
11 still there is no effect upon the prosecution's case; that the  
12 abscondence of the accused is established for the last 4 ½ years  
13 until he was arrested which also establishes his guilt as a  
14 corroboratory piece of evidence; that ocular account is fully  
15 corroborated by other evidence; that common object is established  
16 (2011 SCMR 1148); that Section 34 PPC is also applicable; that the  
17 role of the accused is to make a second fire shot immediately after  
18 the first fire shot made by co-accused Abdul Waheed (now convict)  
19 and thus, the fire shots collectively caused death of the deceased;  
20 that a solitary statement of a truthful witness is sufficient to convict  
21 a person (NLR 2015 Cr.C 312); that ocular account, if establishes the  
22 guilt, need no further corroboration and that the motive is double  
23 edged weapon which in itself is not to be proved (2014 YLR 2612);  
24 that when the role of the accused is proved through the testimony of  
25 the natural witnesses, the case is established against the accused  
26 (2010 SCMR 1020); that unnatural death is admitted; that it is a  
27 case of brutal murder where the accused is nominated with specific

1 role and thus, the prosecution has fully established its case and that  
2 the accused be convicted and punished accordingly.

3 **11.** Muhammad Imran Gondal, learned ADPP has adopted  
4 the arguments of learned counsel for the complainant.

5 **12.** Ch. Adeel Faraz, Advocate on behalf of the accused has  
6 argued that the occurrence is of night time and in winter, 8:25 p.m.  
7 is quite dark while there is no mention of any source of light for  
8 ensuring the mathematical attribution of specific role to the accused;  
9 that motive is not established; that witnesses are interested one; that  
10 presence of PWs is not established; that only one empty was  
11 recovered from the place of occurrence and thus, there is a doubt  
12 about the presence of the accused at the place of occurrence; that the  
13 PW1 has only taken the empty of Kalashnikov and not of riffle 244  
14 bore; that there is no ballistic expert report about the comparison of  
15 the weapon of offence with the empty recovered (2004 PCrLJ 788);  
16 that PW5 has not mentioned about any Charbai and Bulb in the map  
17 Ex.PC; that PW6 has not explained the delay of 19 days about  
18 sending of parcels to Forensic Laboratory; that PW7 has not  
19 explained that injury No.10 is the only injury which caused the death  
20 and there is a ambiguity about said claim of the prosecution and the  
21 benefit has to be extended to the accused; that there is 4 hours time  
22 between injury and death, as per PW7 while the complainant PW12  
23 has stated that the death was instant; that as per expert opinion of  
24 PW7, if only injury No.10 is inflicted upon the person of the  
25 deceased, the death cannot be caused in said circumstances; that  
26 the evidence of PW12 through Skype is against law of the land as  
27 the evidence of a witness can only be recorded while he is physically

1 present in the Court; that PW12 has recorded his examination in  
2 chief through Skype while reading his statement from the complaint;  
3 that he was having the complaint with him when he was deposing  
4 and for which video recording shows his demeanour; that the  
5 examination-in-chief recorded by him in Urdu language further  
6 corroborates this assertion; that suggestions cannot be used against  
7 the accused; that the evidence of PW12 is hearsay about telephone  
8 call; that no buses are plied on unpaved thoroughfare; that there is  
9 contradiction about the factum of presence of cots at the spot; that no  
10 other person was injured in the occurrence which is allegedly done  
11 by the accused where firing was said to continue for 5 minutes; that  
12 there is dishonest improvements in the statements of PWs; that non  
13 availability of source of light brings the matter into the domain of  
14 doubt; that why the police was not informed when the police station  
15 came in the way to hospital especially when the deceased was dead  
16 at the time of his transportation to hospital; that there are  
17 contradictions about presence of the relatives at hospital; that an  
18 unseen occurrence has been attributed to the accused; that PW12 &  
19 PW13 could not establish their place of occurrence as also their  
20 presence in the hospital; that the previous enmity is established; that  
21 statement of PW13 has established many contradictions in the  
22 prosecution case especially with respect to the number of cots; that  
23 the escape of the accused; that the duration of firing; that the making  
24 of call to the police by PW12 instantly; that the sitting on cots or on  
25 ground before the alleged compromise efforts; that the distance of  
26 different persons allegedly shown present at the place of occurrence  
27 from each other; that the factum of pointing of weapon and

1 summoning of vehicle to shift the dead body are dishonest  
2 improvements; that he is unable to explain the number of police  
3 officials who came to the spot; that there is contradictions about the  
4 first step taken by the I.O as deposed by PW12 & 13; that Section  
5 103 of Cr.P.C has been violated; that no motive has been shown in  
6 statement u/s 161 of Cr.P.C of PW13; that PW14 has also created  
7 doubt in the story of prosecution; that PW15 also deposed in  
8 contradictory terms; that why the empty was not sent for  
9 comparison; that the time of post-mortem is differently stated by him;  
10 that who was present at the hospital is differently stated by  
11 different PWs; that the case is a case of material contradictions; that  
12 presence of PWs is not established; that no source of light has been  
13 shown; that no injury has been inflicted on any other person in the  
14 alleged occurrence which is unbelievable to a prudent mind; that  
15 why the police was not informed instantly; that recoveries are  
16 inconsequential when the empties are not matched; that medical and  
17 ocular account does not tally with each other; that suggestions in  
18 cross-examination cannot be considered as admissions (PLD 2005  
19 SC 40 and 2010 PCrLJ 1226); that abscondence is no proof of guilt in  
20 itself (1997 PCrLJ 960); that improvements cannot be relied upon  
21 (2008 SCMR 6); that empties are not supporting evidence in  
22 themselves (2001 SCMR 51); that when there is no source of light  
23 benefit of doubt has to be given to the accused (2012 YLR 374 &  
24 2011 YLR 2338); that PWs are interested witnesses (2005 MLD 685;  
25 1994 PCrLJ 566) and that the benefit of doubt has to be extended to  
26 the accused (2011 SCMR 664) and for that matter accused be  
27 acquitted. He has also argued that the objections of the prosecution

1 on questions put in cross examination are not sustainable and thus,  
2 they be overruled as well.

3 **13.** Arguments heard and record perused.

4 **Analysis and appraisal:**

5 **a) Ocular account:**

6 **14.** The complainant/PW12 has deposed that on 29.01.2010,  
7 he alongwith his Behnoi/PW13 was present in his house when the  
8 deceased Rajjab Hussain has informed them about an effort of  
9 compromise to be made in the house of co-accused Shehzad in Dhoke  
10 Jammatt, Dakhali Nara and thus, they both alongwith the deceased  
11 reached the house of co-accused Mazhar Hussain where they found  
12 that all the nominated accused armed with deadly weapons  
13 including accused Sher Afzal of Khalaspur (accused present in the  
14 Court) armed with 244 bore rifle were sitting on the cots and the  
15 complainant party also sat with them on the cots. The occurrence  
16 took place when co-accused Shehzad asked his brother Abdul  
17 Waheed about snatching of the motorcycle on 24.11.2009 as also  
18 injuring him and in affirmative response, said co-accused started  
19 abusing the deceased Rajjab Hussain who stood up from the cot and  
20 after a short scuffle, said co-accused made a fire shot from the back  
21 side using his Kalashnikov which hit the deceased at the back of his  
22 buttocks. Thereafter the present accused made a burst fire from rifle  
23 244 bore which hit Rajjab Hussain on his left lower limb (Pindli) and  
24 the deceased fell down facing towards earth. Co-accused Abdul  
25 Waheed made again a burst fire which hit him on left leg at thigh  
26 and knee from back side. Another co-accused Ibrar made a fire shot  
27 with 30-bore pistol which hit him on left arm at wrist. The deceased

1 passed away at the spot due to fire arm injury and all the accused  
2 escaped from the scene and the complainant with the help of PW13  
3 took the dead body of Rajjab Hussain to DHQ Hospital, Jhelum and  
4 informed the police from hospital. The motive was shown by him that  
5 on 24.11.2009, the co-accused Shehzad had lodged an FIR No.205  
6 dated 24.11.2009 u/s 394 PPC, P.S. Chotala with respect to  
7 snatching of his motorcycle and the deceased was nominated in the  
8 said FIR. To take revenge of said alleged occurrence, the accused  
9 party including the present accused have invited the complainant  
10 party in the garb of compromise efforts and then killed him. He  
11 informed the police through his statement/complaint Ex.PN.

12 **15.** PW13 has deposed in is examination-in-chief that he was  
13 present in the house of his in-law and that the deceased has  
14 informed him that the co-accused Mazhar has invited him in his  
15 house for compromise efforts and thus, he alongwith PW12 and the  
16 deceased reached at the house of co-accused Mazhar at 8:30 p.m.  
17 He named all the accused with their weapons. He further explained  
18 the occurrence as narrated by the complainant. He attributed the  
19 same role to the present accused as was done by PW12. He also  
20 deposed that co-accused Talib Hussain and Mazhar Hussain were  
21 pointing their weapons towards them and have threatened that if  
22 they will move, they will be killed. Thereafter, the complainant has  
23 an immediate telephone call to the police while he made a call to the  
24 village to bring a vehicle to shift the deceased to hospital. Another  
25 call was made to the police which reached the police station at 12:30  
26 a.m. The doctor has declared the deceased as dead. He also  
27 explained the motive of occurrence accordingly. Thereafter, he

1 accompanied the police for place of occurrence where recoveries were  
2 effected and he signed the recovery memo as well. He is also a  
3 witness to blood stained earth collected from the place of occurrence.

4 **16.** In cross-examination, both the PWs have stated that they  
5 reached by buss to Dhoke Jammat at around 8:25 p.m. Both have  
6 stated that the accused party was sitting on cots in said house  
7 where they also sat on the cots. PW13 was confronted with Ex.DA  
8 wherein he has mentioned in previous trial of co-accused Talib  
9 Hussain that they sat on the ground and not on the cots. This  
10 contradiction will be looked into a little later. PW12 has mentioned  
11 that firing kept on for 5 minutes and the occurrence took place within  
12 two minutes of their arrival while PW13 has mentioned that the  
13 occurrence took place within 10 minutes of their reaching at the place  
14 of occurrence. The PW12 has stated that the co-accused Mazhar and  
15 Talib have pointed weapons on them during the occurrence while he  
16 has mentioned this fact to the police but no such fact is available in  
17 Ex.PN. Both affirmed that no locals of the area came there and that  
18 the source of light was bulb. The accused then fled away.

19 **17.** PW12 has stated that a vehicle was summoned from the  
20 village by PW13 on telephone which reached at between 9:30 to  
21 10:00 p.m. PW13 also affirmed the factum of calling of vehicle from  
22 village.

23 **18.** From perusal of this part of evidence, it is found that the  
24 presence of the PWs with the deceased in the house of co-accused  
25 Mazhar (since acquitted) is established as there is no material  
26 contradiction in this part of evidence. The contradiction with respect  
27 to the sitting on cots or on ground is not material especially when the



1 statement is being recorded after 6 years of occurrence and even this  
2 part of the evidence is in line with the evidence recorded against co-  
3 accused Abdul Waheed (now convict).

4 **19.** Coming to the question of source of light, it is found that  
5 unless there is material contradiction about the presence or  
6 otherwise of any source of light, mere suggestions that there was no  
7 source of light mentioned in maps with or without scales is not  
8 enough to give any benefit of this information not available in  
9 complaint Ex.PN. It is not necessary for any complainant of an FIR to  
10 mention with minute details of each and every set of circumstance  
11 especially when the place of occurrence is a house and the  
12 presumption is that unless proved otherwise, the source of light is  
13 presumed. Both the PWs remained firm that there was bulb and  
14 electricity in the house at the time of occurrence.

15 **20.** Both the PWs have stated that they reached at the  
16 hospital at 12:30 a.m. alongwith dead body. Both admitted that they  
17 have not stopped at Police Station Chotala in the hope that may be  
18 the deceased can be saved for his life by the doctors. This is common  
19 and close to human nature when such is a position. PW12 has then  
20 stated that police was informed on reaching hospital and this is also  
21 stated by PW13. Police reached at hospital around 1:00 a.m.  
22 wherein the police recorded the statement of complainant. There is  
23 minor contradiction as to what the police did first as a human being  
24 can mix up this information if deposing after such a long delay. The  
25 defence cannot effectively challenge these facts in cross-examination.  
26 PWs have specifically denied that it was a blind murder.

1 **21.** Coming to the question of recoveries, it is found that the  
2 accused, after his arrest, has pin pointed the riffle 244 bore from his  
3 house in presence of PW3. It is an admitted fact that the recovered  
4 empty was not sent for comparison for report of ballistic expert by  
5 the prosecution. This lapse on part of the prosecution can only be  
6 looked into when the case of the prosecution has doubts in its story  
7 and then it becomes a further blow to its case. So far this is not the  
8 case.

9 **22.** Now coming to the specific role attributed to the accused,  
10 it is found that both the PWs have nominated him with a specific role  
11 of a fire shot immediately after the fire shot attributed to co-  
12 accused/convict Abdul Waheed. Both the PWs have mentioned the  
13 way of doing this thing and the seat of injury attributed to the  
14 present accused which is the Pindli of the deceased. Only one fire  
15 shot is attributed to this accused. No contradiction is available in  
16 ocular account in this regard.

17 **b) Medical evidence:**

18 **23.** Now, we will look into the medical evidence. It is  
19 pertinent to mention that it is injury No.10 in Ex.PD which is  
20 attributed to the present accused. The injury No.10 is explained by  
21 Ex.PD as under:

22 “10. 19 cm blow the left knee at the area of left  
23 shin around the leg, there were 11 wounds, five of  
24 them were entry and 6 of them were exit wounds.  
25 These were around the leg at posterior, anterior,  
26 medial and lateral aspect of the left shin. All were  
27 fire arm injuries.”

1 The opinion of the doctor/PW7 on the demise of the deceased with  
2 respect to all the injuries including injury No.10 is as under:

3 "After performing the internal and external post  
4 mortem of the deceased, I was of the opinion that  
5 multiple placed haemorrhage due to many bullets  
6 at the different places of the body was the cause of  
7 death, which was haemorrhage, shock and death.  
8 All the injuries were ante-mortem in nature and  
9 were sufficient to cause death in ordinary course of  
10 nature (major blood vessels radial, femoral and  
11 other mesentery in abdomen were ruptured, which  
12 caused the haemorrhage).

13 The probable time between injuries and  
14 death was within four hours and between death  
15 and post mortem was within 08 hours.

16 After post mortem examination, I handed over  
17 a well stitched dead body, last worn clothes and  
18 two sealed phials containing led bullets and police  
19 papers to the police. Exh.PC is correct carbon copy  
20 of post mortem report which is in my hand writing  
21 and bears my signatures Exh.PC/ 1 and Ex.h.P.C/2  
22 are the diagrams. I also signed the application for  
23 post mortem examination and inquest report."

24 **24.** In cross-examination, the Medical Officer is of the opinion  
25 that the lower part of thigh or shin where injury No.10 has been  
26 caused are non-vital parts of the body and usually, if these parts are  
27 wounded, then death would not occur.

1 **25.** When such is a position, one can look into the position  
2 that the clear intention of the accused to kill the deceased was not  
3 apparent because he has made no second fire shot except the one  
4 mentioned above and which is established. The Medical Officer has  
5 already opined that all the injuries taken collectively have caused  
6 the death of the deceased. This means that the role of the present  
7 accused cannot be denied in the ultimate death of the deceased.  
8 Thus, we gather the intention of the accused from the fact that there  
9 were many fire shots on the deceased by other co-accused and the  
10 present accused has also participated in the commission of offence  
11 against the deceased and in such a situation, we cannot presume  
12 that the accused was not intending to kill the deceased. The accused  
13 is, thus unable to get any benefit of the seat of injury and its  
14 individual impact if there was no other injury on the part of the  
15 deceased. Even when one accused is injuring a person and the  
16 others are also injuring the same person with deadly weapons, we  
17 cannot say that there was no common object to do the same. Now, if  
18 there were only 3 or 4 persons allegedly making fire shots on the  
19 person of the deceased, the question of common intention can also  
20 not be ruled out and rather it is established.

21 **26.** Moving forward it is important to discuss that the death  
22 of the deceased was approximately occurred after 4 hours of the  
23 injuries. The deceased was taken to hospital at around 12:00 to  
24 12:30 a.m. where he was pronounced dead by the Medical Officer.  
25 This means that the death of the deceased was not earlier than 8:30  
26 p.m. This time clearly tallies with the time of the occurrence as  
27 reported in the FIR.

1 **27.** Now coming to the question of presence of some relatives  
2 at hospital or not is not material again for the reasons that 6 years  
3 have lapsed from the date of occurrence up till the recording of  
4 evidence.

5 **c) Recoveries:**

6 **28.** With respect to the recoveries from the present accused,  
7 the statement of PW15 is relevant who deposed that from the place  
8 of occurrence, an empty of 244 bore riffle was recovered from the  
9 place of occurrence while the accused, during investigation, has also  
10 got effected the riffle 244 bore P1 alongwith 5 live rounds P2. Nothing  
11 material was confronted on this part of evidence of the I.O. The  
12 marginal witness PW14 has also deposed accordingly to support  
13 that the recovery was effected from the accused on his own  
14 pointation from the place mentioned in recovery memo Ex.PA. The  
15 map without scale of the place of recovery is Ex.PV which is also in  
16 corroboratory nature. The place of recovery is a Haveli which was  
17 uninhabited. The cross-examination could not bore out anything  
18 against the statement of PW. Unless the credibility of a witness is  
19 challenged effectively, even police witnesses are trust worthy  
20 witnesses. In the instant case, the credibility of the PW15/I.O and  
21 PW14 as marginal witnesses have not been shaken.

22 **d) Absconsion:**

23 **29.** Another aspect of this case is the absconsion of the  
24 accused for a long period of 4 years. It is found that the (NBW)  
25 warrant of the accused Ex.PG were issued by the learned Area  
26 Magistrate which was served at its home but he absconded and  
27 thereafter, proclamation u/s 87 of Cr.P.C was also got issued which

1 is Ex.PE which was also served in accordance with law where-after  
2 he was declared a proclaimed offender on 09.07.2010. He was  
3 ultimately arrested in this case on 26.06.2014. The absconsion is  
4 long enough in this case which also brings a presumption against the  
5 accused of his involvement in the occurrence.

6 **e) Maps & Forensic Reports:**

7 **30.** With respect to the map with and without scales, it is  
8 found that these documents are in line with each other and the  
9 placement of the present accused at point No.5 is also corroborated  
10 in the evidence of PW12 and the I.O/PW15. These maps i.e., Ex.PC  
11 and Ex.PU are to establish as to what was the scene and who was  
12 present at what place. No material contradiction is available in the  
13 statements of PW12, PW15 and PW5 in this regard.

14 **31.** With respect to the Forensic reports about weapon of  
15 offence, it is found that the Ex.PY establishes that the riffle P1  
16 recovered from the accused is found in working condition. The blood  
17 stained earth has been to contain human blood as per Ex.PX.

18 **32.** After going through the evidence of the ocular account  
19 and other witnesses, let us look briefly at the status of other  
20 witnesses.

21 **f) Formal witnesses:**

22 **33.** PW1 has passed the empties of Kalashnikov as well as  
23 the riffle 44 bore FSL. In cross-examination, he mentioned that the  
24 parcel was only of empty of Kalashnikov. PW2 took the riffle P1 to  
25 FSL. He was not materially confronted. PW3 appeared initially to  
26 depose in examination-in-chief but later on he was not produced for  
27 cross-examination and hence, his evidence is of no value to the

1 prosecution. PW4 is scribe of the FIR and his evidence is firm on the  
2 point of recording of FIR No.16 as per complaint. FIR is Ex.PB. PW5 is  
3 secondary evidence to depose about the writing of his father on  
4 maps with scale Ex.PC. He was also not materially confronted on  
5 this map. However, he admitted that there were no cots mentioned in  
6 this map. I have already discussed above that the mention of cots by  
7 the two PWs i.e. PW12 & 13 is not to contradict the whole evidence  
8 about the scene of the occurrence and that when complaint Ex.PN is  
9 fully corroborated by the oral account of the two eye witnesses, the  
10 map with scales can only be taken as a corroboratory piece of  
11 evidence and any minor contradiction cannot be considered major  
12 when eye account is clear with respect to an alleged occurrence  
13 where the life of a person has been taken away unlawfully.

14 **34.** PW6 has sent the riffle 44-bore to PFSA after 19 days.  
15 Although delay is there but it is not per-se to damage the case of the  
16 prosecution when the report of the PFSA Ex.PY is positive and there  
17 is no proof that any tampering has been committed by the PW6.  
18 Ex.PY mentions that the riffle 44 bore was received in cloth bag while  
19 there is no mention of any tampering with said seal on Ex.PY. PW8 is  
20 a witness to blood stained earth which was handed over to  
21 Muhammad Aslam constable for PFSA. This evidence is again a  
22 corroboratory piece of evidence. PW9 is witnessed to proclamation of  
23 the accused and who has deposed that he served the proclamation  
24 Ex.PE as per law and that the report on the back of this exhibit was  
25 written by him. He identified his report as Ex.PE/ 1. Nothing material  
26 was confronted. PW10 has been the earlier the Investigation Officer,  
27 who obtained non-bailable warrants of accused (Ex.PG) and got the

1 proclamation Ex.PK issued against accused Sher Afzal. Nothing  
2 material was confronted. PW11 has served the non-bailable  
3 warrants on accused (Ex.PG) and produced his report Ex.PG/ 1 that  
4 the accused is intentionally avoiding to join the investigation of this  
5 case. He was also not materially confronted.

6 **35.** PW14 has escorted the dead body to DHQ Hospital,  
7 Jhelum for post-mortem and he received the last worn cloths etc. P5  
8 to P13 (blood stained), a sealed phial P14, post-mortem report and  
9 other relevant police papers. He has returned these items to the I.O.  
10 who has prepared the recovery memo Ex.PQ and signed the same as  
11 the marginal witness. He is also a recovery witness of riffle 44-bore  
12 with 5 live rounds through recovery memo Ex.PA while his  
13 signatures are Ex.PA/2. In cross-examination, the learned defence  
14 counsel could not shake the veracity of this witness with respect to  
15 any of the above mentioned recoveries or procedure.

16 **36.** PW15 as discussed above, has got the investigation  
17 completed and that he has also got prepared relevant documents. He  
18 has been cross-examined without material success to shake the  
19 proceedings taken by him and that he remained firm on all the  
20 important aspect of the investigation. PW16 is also the I.O of this  
21 case who finally prepared the Report u/s 173 of Cr.P.C against the  
22 present accused. There is no material confrontation.

23 **g) Objections and Rule of Confrontation:**

24 **37.** Coming to the objections of learned counsel for the  
25 complainant that the accused cannot confront a previous statement  
26 of a witness if anything is explained by a PW in cross-examination  
27 as the same does not amount to dishonest improvement, it is



1 observed that the rule of confrontation is for the accused in terms  
2 that whenever a witness goes beyond his statement recorded earlier,  
3 he can be confronted with any such document or statement. There is  
4 no specific bar in Article 140 of QSO, 1984 or Chapter 12 of the  
5 Lahore High Court Rules and Orders, as argued by the learned  
6 counsel for the complainant. The objection of learned counsel for the  
7 complainant is not sustainable in the eyes of law because otherwise  
8 a witness will start wandering in cross-examination to whatever  
9 direction he wants to take the Court. Hence, the objection is  
10 overruled.<sup>3</sup>

11 **h) Motive:**

12 **38.** With respect to motive, it is well established that it is a  
13 double edged weapon. Even if the same is not proved against the  
14 accused, it is not enough to consider acquittal on its own. The  
15 evidence of prosecution with respect to the previous FIR against the  
16 deceased at the hands of co-accused Abdul Waheed (now convict)  
17 establishes that the said convict was having some motive against  
18 the present deceased and the present accused, in common intention,  
19 has made fire shot on the person of the deceased which, in  
20 cumulative effect, has caused the death of the deceased (see  
21 statement of PW7). The presence of the accused at the place of  
22 occurrence, his active participation in the occurrence and resultant  
23 recoveries are enough to declare that the motive part is clearly  
24 against the accused.

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<sup>3</sup> On Rule of Confrontation, see generally, Rai Muhammad Khan, "Rule of Confrontation: Its Genesis and Development" (<http://ssrn.com/abstract=2415595>).

1 **i) Evidence of PW12 through Skype and objections:**

2 **39.** Coming to an objection of learned defence counsel that  
3 PW12 deposition through Skype is illegal procedure is not  
4 sustainable in the eyes of law for a number of reasons. First of all, it  
5 would be pertinent to mention that the said witness was taken on  
6 Skype to depose virtually on the application of the prosecution dated  
7 21.03.2016 which was allowed by a detailed order dated  
8 30.03.2016. The said order has highlighted that why this Court has  
9 opted to record the statement of complainant/eye witness from  
10 Saudi Arabia through use of Skype Software. The relevant parts of  
11 said order, for ready reference, are reproduced as under:

12 "...Article 164 of QSO, 1984 is also of great relevance in this regard  
13 which is re-produced as under:-

14 **"164. Production of evidence that has become available**  
15 **because of modern devices, etc.** In such cases as the  
16 Court may consider appropriate, the Court may allow to be  
17 produced any evidence that may have become available  
18 because of modern devices or techniques."  
19

20 **6.** These are enabling provisions to make the Courts and  
21 Judicial System relevant to the development in the society. The only  
22 need is to explore their potential and use in a way where not only  
23 the rights every party are secured but the benefit of the technology  
24 is also used to support the justice system. The instant application is  
25 found an effort to the same effect. In a judgment titled "Aijazur  
26 Rehman v. the State", **PLD 2006 Karachi 629**, the Hon'ble Sind  
27 High Court has observed as under:

28 "11. Because of modern devices and technologies, the trials  
29 through video conference are growing fast which are not only  
30 advancing the cause of justice but catering various problems  
31 such as production of accused in Court, recording of evidence  
32 of witnesses from far a place, so on and so forth. The  
33 evidence of witnesses can also be recorded through video  
34 conferences while the accused remains in jail"  
35

36 The Hon'ble Sindh High Court, in this very judgment, at para No.10,  
37 has elaborated that the use of video conferences for proceedings of  
38 cases is common in USA, U.K, Canada and even in India. Para  
39 No.17 of this judgment is of high importance in this regard which is  
40 re-produced as under:

1 “17. Thus the law permits the trial through video  
2 conferences. It is further pointed out that if any party wants  
3 to record evidence through video conference and if the  
4 Government has not provided such facility then the party  
5 after paying the expenses of such facility can request the  
6 court for such trial. It is emphasized that the Court should  
7 encourage such practice keeping in view the facts and  
8 circumstances of each case so that all the Courts of Pakistan  
9 should stand equal with the Courts of developed countries.  
10 This will also remove one of the causes of delay in disposal  
11 of cases....”  
12

13 Further, in said order, the use of modern technology for Court  
14 proceedings and the right to fair trial has been highlighted at para  
15 No.8, which is reproduced hereunder for ready reference:

16 “8. What are requirements of fair trial under Article 10-A  
17 of the Constitution of Pakistan, 1973 and other provisions in  
18 this regard if the evidence has to be recorded by use of any  
19 modern devices and software like Skype etc? The answer is  
20 very simple and is even available in the existing provisions of  
21 QSO 1984, as discussed above and in Section 353 of Cr.P.C  
22 1898 which states that the evidence of witness has to be  
23 recorded in presence of the accused so that he has all the  
24 rights to cross-examine the deposing witness. Skype or other  
25 softwares ensure that the witness is brought in court room,  
26 through an electronic/virtual mode, but the conversation is  
27 real time and even at no cost, or at a very little cost. In case  
28 of any apprehension by the accused, which at the moment,  
29 he has shown none, they may be dealt with at relevant time.  
30 If we have to consider any fair trial issue between using  
31 Article 47 of the QSO 1984, and using Article 164 QSO 1984,  
32 ibid, I am sure that use of Skype etc. to bring witness in court  
33 room is a better choice, both to protect the rights of the  
34 accused to cross-examine the witness and to provide an  
35 opportunity to the prosecution to produce its star witness in  
36 court through I.T. without any material cost and delay. I see  
37 lot of potential in I.T in such like situations so that cases are  
38 decided quickly, timely and with all witnesses. I must  
39 acknowledge that while writing this order, I have taken  
40 guidance from literature available online on this point. There  
41 are many good pieces of writing, but I would like to quote a  
42 beautifully written research paper by Riley A. Williams titled  
43 “Videoconferencing: Not a Foreign Language to International  
44 Courts”<sup>4</sup>, on the subject of use of video conferencing by the  
45 Courts. This paper has given lot of insight into this regime  
46 with references to case law from other jurisdictions like the  
47 United States.”  
48

49 The application of the prosecution was allowed in the following  
50 terms:

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<sup>4</sup> 7 OKLA.J.L.& Tech.54 (2011). Available online at  
[www.law.ou.edu/sites/default/files/files/faculty/2011okjoltrev54.pdf](http://www.law.ou.edu/sites/default/files/files/faculty/2011okjoltrev54.pdf). Accused on  
30.03.2016.

1                    **“9.**    Keeping in view the above discussion, I am of the firm  
2 view that the legal regime in this country supports the use of  
3 Information and Communication Technology (ICT) for court  
4 procedures unless they are against any express law. Hence,  
5 the instant application merits to be allowed because the  
6 witness is complainant as well as an eye witness and his  
7 evidence will definitely help the Court to reach at a just  
8 conclusion of this case. The mode, the required social media  
9 software and the timing of recording of the witness will be  
10 settled with the mutual consent of the parties.”

11  
12 Said order was never challenged by the accused at any higher  
13 forum. Further, the accused has taken the opportunity to cross-  
14 examine the witness who was deposing from Saudi Arabia through  
15 Skype. The whole session has been recorded in audio and video  
16 formats and even the photographs were taken which are part of this  
17 judicial file. This Court has given a detailed memo at the end of the  
18 evidence sheet dated 01.04.2016 to ensure that the fair trial rights  
19 (Article 10-A of the Constitution of Pakistan, 1973) of the accused are  
20 protected. The precautions were taken by this Court in terms that the  
21 identity of the accused was taken up by this Court initially and after  
22 satisfaction of learned defence counsel, the Oath was administered  
23 to the witness and even he was informed that in case he will tell a  
24 lie, proceedings against him can be initiated in Pakistan as he is a  
25 Pakistani Citizen. For ready reference, the opening part of the  
26 statement of PW12 is reproduced as under:

27                    **“P.W.12.** Rashid Mahmood son of Abdul Aziz, aged  
28 25/26 years, caste Jaat, profession, Labrour, resident  
29 of Gurah Jaatan, Tehsil, Dina, District Jhelum on Oath  
30 from Saudi Arabia through Skype, the address of my  
31 Saudi Arabia is, Tehreek Malik Abdullah Road No.10 Al-  
32 Maghrab, Riaz, Saudi Arabia, (Oath Administered at 9:30  
33 a.m.),  
34

35                    This establishes that the Court has asked the full details  
36 about the presence of PW and his address in Saudi Arabia and the

1 time the Oath was administered to him. The witness has deposed  
2 initially that he has received the complaint lodged by him through  
3 “Whatsapp” Software and that he has gone through it. It was  
4 compulsory for the witness to have the complaint gone through to  
5 refresh his memory and that he has to ultimately get it exhibited  
6 before the Court and for that purpose the complaint was sent to him  
7 through said Software and for that matter, his response to the first  
8 question about the complaint was that “ I am in receipt of copy of my  
9 complaint lodged against the accused through Whatsapp and I have  
10 gone through it.”

11 The memo given at the end of the statement of the witness is  
12 reproduced as under for ready reference:

13 **“Memo:** The above evidence has been  
14 recorded through use of Skype software in presence of  
15 the counsel from both sides, learned ADPP, the accused  
16 in custody and the witness in Saudi Arabia on Skype  
17 with Skype account **rashid mehmoed**. This Court has  
18 used Skype id **dsj.jhelum**, which account was created  
19 by the I.T. Department of District Judiciary Jhelum on  
20 direction of this Court for the above mentioned purpose.  
21 Mr. Muhammad Asghar, from IT. Department assisted  
22 the Court to successfully run the above Skype Session  
23 in the Court Room. The official laptop of this Court has  
24 been used for the purpose while the Internet connection  
25 was used from my personal Evo Wingle with MDN  
26 No.92614001934. To ensure that the whole session is  
27 saved electronically, the software Ewear has been used  
28 whereby the sound track has been recorded in full  
29 which will be made part of the judicial file in a CD Ram  
30 or any other proper device. Likewise, the video  
31 recording through Handy Camera has also been made  
32 and said recording will also remain part of the judicial  
33 file. Some of the photographs taken by the mobile phone  
34 camera.

35 When the witness came on the Skype  
36 Session in the morning, in presence of all above, he was  
37 introduced with myself as a Trial Judge alongwith all  
38 the learned counsel, the accused and brother of the  
39 complainant Arshad Hussain. After satisfaction of  
40 everyone about the identity of the witness, the above  
41 evidence has been recorded. The Court appreciates  
42 everyone associated with this Skype Session to record  
43 evidence of an eye witness in a murder case being an

1 innovative step. The Court was conscious about the fair  
2 trial rights of the parties and for that matter has given  
3 full opportunity to the parties about any objection over  
4 the Skype Session. They have shown full cooperation  
5 with and confidence on the Court to conduct this  
6 session in this Court. The witness was informed that  
7 although he is presently beyond the territorial  
8 jurisdiction of this Court but that being a Pakistani  
9 citizen, he is bound by all the laws of this land and  
10 especially with respect to the recording of evidence in a  
11 Court of law and in that case he will violated any said  
12 law, he will be responsible for such an act or omission.  
13 He is stated that he understands this position.

14 It is made clear that the parties have all the  
15 rights to challenge any process in this regard and the  
16 appropriate forum may decide any such objection if so  
17 raised.  
18

19 **40.** This memo suggests the full procedure taken by the Court  
20 to record the statement of the witness using Skype Software. As  
21 neither the order dated 30.03.2016 was challenged by the accused  
22 nor the procedure of recording of the statement of PW12, therefore,  
23 the accused cannot take a plea that the whole procedure was illegal  
24 in this regard. To ensure that all the evidence is put to the accused,  
25 this Court has also asked a specific question to the accused while  
26 recording his statement u/s 342 of Cr.P.C about PW12 and recording  
27 of evidence through Skype. The question No.2 and its answer is as  
28 under:

29 “Q.No.2. The statement of complainant/PW12/Rashid  
30 Mahmood has been recorded through Skype  
31 session on 01.04.2016 conducted in this Court  
32 Room in your presence and hearing. The  
33 complainant was virtually present in the Court  
34 Room through Skype from Saudi Arabia while he  
35 used his Skype i.d. **rashid mehmoood** and this  
36 Court used Skype i.d. **dsj.jhelum**. What do you  
37 say about the use of Skype for recording of the  
38 evidence of the complainant?  
39

40 Ans. The witness has recorded his statement-in-  
41 chief by reading from the complaint.”  
42

1 **41.** Now, dealing with the point that whether the witness  
2 was reading the statement in verbatim, it is to be observed that no  
3 such demeanour was noted by this Court and even the witness was  
4 stated it incorrect that he was reading his statement from the  
5 complaint. Learned defence counsel, during recording of  
6 examination-in-chief of PW12 has not raised any such objection.  
7 Hence, the objection of learned defence counsel is not sustainable on  
8 this aspect of the matter and that this Court has given full  
9 evidentiary value to the statement of PW12.

10 **42.** It would also be pertinent to mention that the use of video  
11 link or video conference technology by the courts in Pakistan has  
12 been recognized wherein the evidence in memogate scandal and  
13 Benazir Bhutto cases have been recorded by using this technology.  
14 In India, the case cited as the State of Maharashtra v. Dr. Praful B.  
15 Desai, AIR 2003 SC 2053 provides the recognition of recording of  
16 evidence through video conferencing in its legal regime and the  
17 provision of Section 273 of Cr.P.C.,<sup>5</sup> was held not a bar for a witness  
18 to appear in the Court physically for deposition and it has been held  
19 that the Code of Criminal Procedure is an “ongoing statute” and the  
20 principles of the doctrine “contemporanea exposition est optima et  
21 fortissimm” has no application when interpreting a provision of an  
22 ongoing statute like the Cr.P.C (Para No.18). It would be appropriate  
23 to court some part of Para No.19 of this judgment. It reads as under:

24 “Recording of evidence by Video Conferencing also satisfies  
25 the object of providing, in Section 273, that evidence be  
26 recorded in the presence of the accused. The accused and his  
27 pleader can see the witness as clearly as if the witness was  
28 actually sitting before them. In fact, the accused may be able  
29 to see the witness better than he may have been able to if he

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<sup>5</sup> The parallel provision in Pakistani Code of Criminal Procedure 1898 is Section 353.

1 was sitting in the dock in a crowded court room. They can  
2 observe his or her demeanour. In fact, the facility to play  
3 back would enable better observation of demeanour. They  
4 can hear and rehear the deposition of the witness. The  
5 accused would be able to instruct his pleader immediately  
6 and thus, cross-examination of the witness is as effective, if  
7 not better. The facility of play back would give an added  
8 advantage whilst cross-examining the witness. The witness  
9 can be confronted with documents or other material or  
10 statement in the same manner as if he/she was in court. All  
11 these objects would be fully met when evidence is recorded  
12 by video conferencing. Thus, no prejudice of whatsoever  
13 nature, if caused to the accused...”.

14  
15 Even internationally, there are many cases decided by different  
16 International Tribunal using the video conferencing technology (VCT).  
17 I would give reference to three important cases decided by  
18 International Criminal Tribunal for the former Yugoslavia (ICTY). The  
19 first case is famously known as Tadic case, the other is Mucic case  
20 and the third is Gotovina case. These cases can be read online at the  
21 website [www.icty.org](http://www.icty.org). The thrust of these cases is that the evidence  
22 of a witness through use of VCT is need of the time and the following  
23 three criteria are prescribed by these judgments for considering a  
24 witness to be taken on VCT for evidence:

- 25 a) The witness must be unable, or have good  
26 reasons to be unwilling, to come to the tribunal;  
27 b) The testimony of the witness must be sufficiently  
28 important to make it unfair to the requesting  
29 party to proceed without it, and  
30 c) The accused must not be prejudiced in the  
31 exercise of his or her right to confront the witness.

32  
33 The whole discussion above shows that recording of evidence  
34 through Skype cannot be said to be an illegal act, as is argued by the  
35 learned defence counsel. This Court, while permitting the prosecution  
36 to bring its witness virtually in the Court Room for deposition, has in  
37 fact adopted the approach of interpreting Section 353 of Cr.P.C in an  
38 organic way to make the technology relevant to the justice system.



1 Further, the accused was given full right not only to cross-examine  
2 the witness but he was having an opportunity to challenge the order  
3 of this Court dated 30.03.2016, the option not used by the accused.  
4 Hence, the objections of learned defence counsel are overruled on  
5 this point.

6 The whole discussion above shows that the prosecution has  
7 succeeded in establishing its case against the present accused.

8 **j) Statement of accused u/s 342 of Cr.P.C:**

9 **43.** Now coming to the statement of the accused U/s 342 of  
10 Cr.P.C, it is found that the material questions No.18 and 19 that why  
11 this case against the accused and why the PWs have deposed  
12 against him, he has responded as under:

13 **“Ans. No.18.**

14 “I was falsely implicated in this case. In fact, my co-  
15 accused Abdul Waheed got registered the case FIR  
16 No.205/2009 u/s 394 PPC, P.S. Chotala against Rajjab  
17 Ali deceased. I have no nexus with the co-accused  
18 (complainant of the case above mentioned). The  
19 deceased and complainant forced me to get effect  
20 compromise in the above said case but I refused to do it.  
21 Due to this grudge, the complainant falsely involved me  
22 in this case. Deceased Rajjab Ali and his family had  
23 enmity of murder in his village and he was murdered by  
24 some unknown persons and it was the unseen  
25 occurrence. I have been falsely implicated in this case  
26 due to refusal of my mediator between deceased and  
27 Abdul Waheed. I have no motive at all against the  
28 deceased to commit his murder. I am innocent.”

29 **Ans. No.19.**

30 “The PWs are inter-se related and they have deposed  
31 falsely against me just to strengthen the prosecution  
32 case on the asking of the complainant. Other witnesses

1                                   are police officials and they deposed falsely against me  
2                                   being a police officials.”

3    These answers are not sufficient to rebut the prosecution evidence,  
4    which has been appreciated above. There is no defence evidence or  
5    the statement of the accused u/s 340(2) of Cr.P.C.

6                                   **k) Case Law:**

7    **44.**           After going through the whole discussion above, it is  
8    found that the arguments and the case law relied upon by the  
9    prosecution is applicable to the facts and circumstances of this case  
10   while the case law and the arguments of learned defence counsel  
11   are distinguishable from said facts and circumstances.

12                                  **Conclusion:**

13   **45.**           For the reasons discussed above, the charges against the  
14   accused **Sher Afzal alias Sheri** u/s 302 PPC is established beyond  
15   any reasonable doubt. **He is convicted accordingly.** However, the  
16   offences u/s 148/149 PPC are not established as the prosecution  
17   could not establish that an unlawful assembly of 5 or more persons  
18   was constituted by the accused and co-accused. Hence, the charges  
19   u/s 148/149 PPC are not proved against him. The common intention  
20   u/s 34 PPC, however, is established to commit the alleged offence  
21   u/s 302 PPC against the deceased.

22                                  **Sentence:**

23   **46.**           As this Court has convicted the accused u/s 302 PPC,  
24   now, the question comes that what should be the sentence. It is  
25   unfortunate in this country that the Cr.P.C does not suggest that the  
26   Court will also hear the accused on his quantum of sentence when  
27   convicted. Hence, when a criminal case is argued, there are always

1 two arguments, i.e., the prosecution argues that the accused be  
2 punished for maximum sentence and the accused argues that he be  
3 acquitted. Thus, it remains a hard job for the Trial Judge to find out a  
4 reasonable sentence when a person is convicted by it. We already  
5 know that in other jurisdictions, including India and the United  
6 States etc., after conviction of an accused the adjournment is granted  
7 to hear the parties on the quantum of the sentence. This is in line  
8 with Article 10-A of the Constitution of Pakistan 1973 whereby the  
9 right to fair trial has become a fundamental right and thus, the  
10 absence of a hearing clause in Cr.P.C. to give opportunity to the  
11 accused to argue as to the sentence and its quantum is in a way a  
12 denial to him about said fundamental right to the extent of the  
13 quantum of sentence to be awarded to him. However, unless this  
14 aspect of the matter is not taken up by the legislature, the Courts  
15 have to bear the burden to find out the quantum of sentence without  
16 hearing the views of the two parties.

17 **47.** Hence, I have given due consideration to all the aspects  
18 of this case in minute detail and found that the prosecution has not  
19 produced any evidence to punish the accused u/s 302(a) PPC for  
20 death as Qisas. Next comes Section 302(b) PPC which provides that  
21 a convict of Qatl-e-Amd can be punished with death or imprisonment  
22 for life as Tazir having regard to the facts and circumstances of the  
23 case, if the proof in either of the forms specified in Section 304 PPC is  
24 not available. Here the case of the convict falls.

25 **48.** Now, keeping in view the above discussion, this Court  
26 has to consider the sentence of the accused u/s 302(b) PPC. There  
27 are two punishments, i.e., death or life imprisonment. When we

1 considered the proven fact that the convict has not inflicted a fire  
2 shot on any vital part of the body of the deceased and when we have  
3 seen that there is only one fire shot attributed to the convict, his case  
4 is not that of death penalty. Even this Court has found that the  
5 prosecution could not establish the unlawful assembly or common  
6 object of the convict with other co-accused but that he has  
7 contributed in a way towards the death of the deceased not by  
8 inflicting a fire shot on his vital part of the body but on the very lower  
9 part of the body, i.e., Pindli, the view of PW7 about which is that said  
10 type of injury in itself and when inflicted once cannot cause death of  
11 the victim, the Court has considered this situation as the mitigating  
12 circumstance to bring the quantum of the sentence from death to that  
13 of life imprisonment. Therefore, **the convict Sher Afzal is**  
14 **sentenced to life imprisonment u/s 302(b) PPC as Tazir.**  
15 Further, u/s **544-A of Cr.P.C**, the convict is also to pay a  
16 **compensation of Rs.2,00,000/-** to the legal heirs of deceased, if  
17 this amount is recovered. In case of **default** of this payment, the  
18 convict, Sher Afzal alias Sheri shall further **undergo 6 months SI.**  
19 The benefit of Section 382-B of Cr.P.C be also extended to the  
20 convict.

21 **Case property:**

22 **49.** Case property be dealt with in accordance with law.

23 **Free copy to the convict and Learned ADPP**

24 **50.** In accordance with law, a free copy of this judgment is  
25 hereby handed over to the convict. Likewise, a copy is also handed  
26 over, free of costs to the learned ADPP for the State.

1 **Copy to the Law & Justice Commission of Pakistan:**

2 **51.** *It would be appropriate if a copy of this judgment is*  
3 *forwarded, through proper channel, to the Law & Justice*  
4 *Commission of Pakistan with a request to consider legislative*  
5 *proposals for Parliament on (1) giving a right of hearing to the*  
6 *parties on the quantum of sentence after conviction; (2) prescribing*  
7 *new rules for recording of evidence through use of Skype and other*  
8 *available electronic and social media where witness is unable to*  
9 *appear in the Court for being abroad or for any other lawful reason;*  
10 *and (3) defining the safeguards/guidelines for the use of VCT in*  
11 *Courts to ensure the fair trial rights of the parties.*

12 **Online Accessibility:**

13 **52.** *Copy of this judgment be uploaded on the official website*  
14 *of District Judiciary Jhelum (<http://jhelum.dc.lhc.gov.pk>).<sup>6</sup>*

15 **Consignment of record:**

16 **53.** *File be consigned to record room after its due completion.*

17 Announced.  
18 03.05.2016.

**Muhammad Amir Munir,**  
Additional Sessions Judge,  
Jhelum.

20  
21 **CERTIFICATE.**

22  
23 *It is certified that this judgment consists of 37 pages. Each page has*  
24 *been dictated, read, corrected and signed by me.*

25  
26 **Muhammad Amir Munir,**  
27 Additional Sessions Judge,  
28 Jhelum.

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<sup>6</sup>This is to make the Information Technology (IT) resources beneficial to the litigants, advocates, general public, media and other learned Courts including Hon'ble Superior Courts in terms that this judgment may be read online or downloaded or saved or printed anywhere, anytime and round the clock.

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