

IN THE FEDERAL SHARIAT COURT

(APPELLATE JURISDICTION)

PRESENT.

HON: MR. JUSTICE CH. IJAZ YOUSAF, CHIEF JUSTICE
HON: MR. JUSTICE DR. FIDA MUHAMMAD KHAN.
HON: MR. JUSTICE SAEED-UR-REHMAN FARRUKH.

Criminal Appeal No. 191-I of 2000
Murder Reference No.9/I of 2001

1. Muhammad Rizwan son of Qadir Bukhsh
2. Mst.Rukhsana Naz daughter of Qadir Bukhsh
R/o House No. 478/B, Johar Town,
Lahore. --- Appellants

Versus

The State.	---	Respondent.
Counsel for the appellants	---	Syed Riaz-ul-Hassan Gilani, Advocate.
Counsel for petitioner	---	Mr.Saliheen Mughal, Advocate
Counsel for State	---	Mr. Muhammad Sharif Janjua, Advocate
FIR No. & Date Police station	---	No.110, dated 21.9.1996. Doonga Gali, Abbottabad
Date of decision of trial Court	---	13.9.2000.
Date of Institution	---	8.11.2000.
Date of hearing	---	29.3.2006.
Date of decision	---	29-3-2006

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JUDGMENT:

SAEED-UR-REHMAN FARRUKH, J.-. By this judgment we propose to decide the following three matters as these arise out of the common judgment dated 13-9-2000 passed by learned Sessions Judge, Abbottabad:-

1. Cr. Appeal No.191/I of 2000,
(Muhammad Rizwan and another Vs. The State).
2. Cr. Revision No. 37/I of 2002
(Muhammad Rafiq Vs. Muhammad Rizwan and another).
3. Cr. Murder Reference No. 9/I of 2001.

Through the impugned judgment, the learned trial Judge convicted and sentenced the appellants as under:-

Muhammad Rizwan

- | | |
|-------------------|--|
| i) U/s 302/34 PPC | Death sentence and fine of Rs.one lac u/s 544-A Cr.P.C or in default six months R.I. |
| ii) U/s 379 PPC | Three years R.I. and fine of Rs. 5000/- |
| iii) U/s 411 PPC | three years R.I. with fine of Rs.5000/- |

Mst. Rukhsana Naz

- | | |
|-------------------|-------------------------------|
| i) U/s 302/34 PPC | Life imprisonment and fine of |
|-------------------|-------------------------------|

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	Rs. One lac u/s 544-A Cr.P.C or in default six Months R.I.
ii) U/s 379 PPC	Three years R.I and fine of Rs.5000/-
iii) U/s 411 PPC	Three years R.I. and fine of Rs.5000/-

Both the convicts have challenged their convictions / sentences by filing a joint appeal while the complainant Mian Muhammad Rafiq has filed revision petition seeking enhancement of the sentences awarded to them.

2. The genesis of the case may be narrated. On 21-9-1996 Munsif Khan I.H.C police station Doonga Gali (PW-11), who was on patrol duty on hearing rumour about the presence of dead body lying near Chathri Walla Mohr rushed there. He found the dead body of a person aged 40/45 years lying there in a pool of blood with a wound on the left side of the chest out of which blood was oozing. He searched the body of the deceased and recovered a sum of Rs.5229/- besides some visiting cards. After preparing spot inspection, the injury sheet (Ex-

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PW-11/1) and inquest report (Ex-PW.11/2) he sent the dead body for post mortem examination to the mortuary through Muhammad Ilyas constable. It was on the basis of his Murasila (Ex-PA/1) that FIR was registered at police station Doonga Gali on 21-9-1996.

3. Investigation was initiated and on completion thereof both the appellants Muhammad Rizwan and Mst. Rukhsana Naz were challaned to court to face trial under sections 302/34, section 379, and section 411 PPC.

Both the appellants denied the correctness of the allegations levelled against them in the charge sheet and claimed trial. In all, 20 witnesses were produced by the prosecution in support of its case besides tendering some documents in the evidence.

4. Mian Muhammad Rafiq PW-1 deposed that the deceased Mian Muhammad Riaz was his elder brother who was a contractor by profession. During the days of occurrence he was constructing District Headquarter Hospital of Haripur. He identified the dead body of the

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deceased before police and the doctor, who conducted the post mortem examination.

He went on to depose that the deceased was the owner of car bearing No. PRB-87 though it had not been transferred in his name officially. However, the said car was in his use. The witness was shown photographs of the car (seven in number as Ex-PW-1/2 to Ex-PW-1/8) and he identified the same. He deposed that both the accused were brother and sister inter-se and they lived in Lahore.

During cross-examination, he conceded that he did not charge anyone for the murder of his brother at the time of identification of the dead body. However, in his statement before the police (recorded on 24-9-1996) he charged the appellants with the crime. He contended that at the time of identification of the deceased he inquired from the police about the car and was told that it had not been recovered so far. He delivered photo copy of registration book of the car (to the police) which was "probably" purchased by his brother at Haripur

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about two / three years before the occurrence. A receipt about purchase of the car from Chaudhry Irshad was produced by him before the police. He admitted that the car was registered in the name of Gulistan Cinema Lahore and he was not sure as to whether it was shown to be owned by one Muhammad Arif or not.

5. Mehmood Akbar Kiyani PW-2 deposed that he knew deceased Muhammad Riaz. On 21-9-1996 he read the news about the murder of Mir Murtaza Bhutto . He immediately contacted Mian Muhammad Riaz at Islamabad to discuss about the murder. He stated that he was member of Central Executive of National Peoples Party, Rawalpindi while Mian Muhammad Riaz was President of N.P.P Islamabad. During the conversation the deceased informed him that he had received some guests from Lahore and he would ring him up afterwards. It was at midnight that he received a call from Aurangzeb, uncle of Muhammad Riaz, while he was asleep, who informed him about his murder. Aforesaid Aurangzeb gave him the telephone

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number of Mian Muhammad Rafiq, younger brother of the deceased at Abbottabad who talked to him to confirm the news about the murder of Muhammad Riaz.

His assertion that it was Aurangzeb who informed him about the murder of the deceased was found missing in his statement before the police (Ex-PW-2/D-1). Same was the position about his assertion that it was Aurangzeb who gave him telephone number of Muhammad Rafiq to talk about the murder at Abbottabad. The witness volunteered, at that stage, that his statement was not recorded by the police in his presence.

6. Aurangzeb PW-3 deposed that the deceased was "connected with me in relation". They use to stroll together in the Park F-10 in the evening. A few days before the occurrence the deceased informed him that he had gone to Lahore to purchase furniture for the marriage of his daughter. He told him that he met there Muhammad Rizwan and Rukhsana N appellants who knew him earlier and they told him

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that they would be visiting Islamabad for getting visa for Muhammad Rizwan. The deceased informed him that he would "take them to Ayubia for visit." This portion of the statement of the witness regarding conversation between him and deceased was objected to by the learned defence counsel as being hearsay.

During cross-examination, he conceded that he did not state before the police that the deceased had told him about his visit to Lahore to purchase furniture for the marriage of his daughter. He also did not inform him about the day on which his guests Muhammad Rizwan and Rukhsana Naz i.e, appellants herein, were to visit him. The deceased had also not mentioned the name of the country for which Muhammad Rizwan wished to obtain visa. He conceded that the deceased was not operating any traveling agency.

7. Khalid Riaz PW-4 deposed that he was working with Amjad Khan at Shad Bagh jail road, Lahore, who was a car dealer. He and his friend Javed Iqbal went to Johar Town and met a police officer

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who requested them to witness the recovery of case property of this case. The police party entered the house alongwith him (the witness), Javed Iqbal and Mst. Rukhsana Naz appellant. She led them to a room in the upper story of the house and, in their presence, she produced revolver Ex-P1, four live rounds (Ex-P2), and a license (P-3) which were sealed into two parcels. The recovery memo qua these items (Ex-PW-4/1) bore his signature as a marginal witness. Javed Iqbal also signed it in his presence. The police officer also prepared site sketch of the house from where the pistol was recovered.

During cross-examination, he stated that no Councilor from Lahore was available at the spot "for pointing out the recovery." The witness gave the description of the location of the house. He, however, could not state as to whether the house was situated within the limits of Municipal Committee or Cantonment. He admitted that the place of recovery was at a distance of 8/9 kilometers from his house.

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8. Malik Riasat Ali PW-5 deposed that he was working as Property dealer in sector 1-10, Islamabad. On 21-9-1996 he had gone to the place known as "17 Meal" in connection with purchase of some land. At 11.00 a.m, while he was waiting for his companion' on the road side, motor car No. PRB-87 owned by Muhammad Riaz deceased reached there. It was being driven by him. Muhammad Riaz on spotting him stopped the car for a minute or two. One person was sitting with Muhammad Riaz on the front seat while a lady was seated in the rear seat. On inquiry the deceased stated that he was on his way to Murree. The person who was accompanied the deceased was a tall man and clean shaved while the lady was aged about 40 to 45 years and was a fashionable one. On the next morning he heard about the murder of Muhammad Riaz. He conveyed information (about his meeting the deceased) to Mian Muhammad Rafiq, after the funeral ceremony was over.

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During cross-examination, he admitted that he appeared before the police on the 3rd day of the occurrence. He denied the suggestion that his statement was anti-dated. He received the information about the occurrence on the "morning of next following day on which he met the deceased." He did not convey this information further to anybody. He met Mian Muhammad Rafiq and Miskeen PWs on the afternoon of the day next following the day of occurrence. He did not know whether Miskeen PW was brother of the widow of the deceased. He conceded that the deceased was not his friend. He talked to the deceased only for one or two minutes at the place called "17 Meal". He had not seen the companions of the deceased earlier. His assertion that the male companion of the deceased was tall statured was found missing in his statement before the police (Ex-DA). It was suggested to him that per prosecution version Mr. Wasti, Director C.D.A saw the deceased alongwith a woman at 2.00 p.m on the day of occurrence at Ayubia which was at a very short distance from the place of

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occurrence. The witness replied that he did not know Mr. Wasti and, therefore, he could not accept this suggestion.

9. Abdus Saeed Tehsildar PW-6 deposed that during the days of occurrence he was posted as Tehsildar, District Abbottabad. On 16-10-1996 SHO police station Doonga Gali brought an application Ex-PW-6/1 which was duly marked to him by the Senior Civil Judge Abbottabad on which he went to the District Jail Abbottabad. He arranged in the jail the identification parade of the accused. Mst. Rukhsana Naz appellant alongwith few other females was brought there and the witnesses were summoned to identify the accused. Muhammad Miskeen PW correctly identified Mst. Rukhsana Naz appellant. This process was repeated thrice by him. He prepared report Ex-PW-6/2 (in this behalf), in his handwriting which bore his signature. On the same day Muhammad Rizwan appellant was produced before him for identification parade. He was correctly

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identified by Muhammad Miskeen and Riasat Ali PWs vide report Ex-PW-6/3.

This witness was cross-examined at some length by the defence in an attempt to show that he did not take proper precautions to ensure that correct and proper identification parade was held. However, nothing materially beneficial for the defence came out on record in this behalf. He denied the suggestion that the accused objected that the witnesses had seen them. He did not ask the SHO the reason for the delay in applying for identification parade.

10. Abdur Rehman PW-7, ex-councilor of Union Council Seer was a marginal witness to the pointation memo (Ex-PW-7/1) through which both the appellants, while in police custody, led the I.O to the place of occurrence known as Chattar Wala Mohr and also the place where Muhammad Riaz deceased was done to death. They also pointed out the place from where the police took into possession car No. PRB-87. He signed the said memo as a marginal witness.

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During cross-examination, he explained that he had gone to police post Changla Gali to peruse a report which was lodged by him and the I.O asked him to join the investigation of the present case.

11. Sultan F.C PW-8 was marginal witness to recovery memo (Ex-PW-8/1) regarding recovery of currency notes worth Rs.5229/- of different denominations (Ex-P4), seven cards (Ex-P5), and one Casio Watch (Ex-P6), during the search of the body of the deceased. He was also marginal witness of recovery memo of few pieces of wood Ex-P7 alongwith leaves and pebbles Ex-P8 which were blood stained (Ex-PW-8/2). His assertion that wood pieces were recovered was found missing in his statement before the police.

Statement of Raj Muhammad, Head constable PW-9 is of formal nature and need not be dilated upon.

12. Statement of Babar Javed, resident of House No.155, Street No.22, Sector F-10/2, Islamabad (PW-10) is to the effect that he was property dealer in F-10 Markaz Islamabad. Muhammad Riaz deceased

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was known to him for the last three/four years prior to the occurrence.

On 21-9-1996 he alongwith his family had gone to Murree. At about 5.00 / 6.00 p.m. while he was standing near Committee Bagh he saw the car of Muhammad Riaz (PRB-87) coming from Murree. He signaled the car to stop but the driver did not oblige. He noticed that some unknown person was driving it. A lady was sitting beside him in the front seat. He rang up Muhammad Riaz and his daughter who informed him that he had not returned home till then. On the following day Mian Muhammad Rafiq complainant informed him about the murder of his brother Muhammad Riaz in Nathiagali area.

During cross-examination, he stated that he did not know as to whether the car No. PRB-87 was owned by Muhammad Riaz or not. However, he had seen it being used by him while he was alive. He stated that the deceased was a political figure and well known to him. He met Mian Muhammad Rafiq PW on the day of funeral of the deceased. He insisted that he could recognize the car by its colour.

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13. Munsif Khan PW-11 posted as IHC police station, Doonga Gali at the relevant time, deposed that on receipt of information about the presence of a dead body at Chatri Mohr he reached the spot and searched the body of the deceased and recovered a sum of Rs.5229/- and few cards of different names. He prepared the Murasila, injury sheet and inquest report and sent the dead body to the mortuary at Civil Hospital, Abbottabad.
14. Muhammad Ilyas constable PW-12 escorted the dead body to the mortuary and after the post mortem handed it over to the relatives of the deceased.
15. Dr. Waqar Ahmad PW-13 deposed that during the days of occurrence he was posted in District Headquarter Hospital Abbottabad. On 22-9-1996, he conducted post mortem examination on the dead body of Muhammad Riaz. According to his observations, rigors mortis had started developing in the body. He noticed the following injuries:-

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INJURIES:

1. An entry wound on the chest on left side in the fifth intercostals space 3 to 4 inches to the left of sternal border. It measured about ½" X ½" in diameter inverted and there are no signs tattooing or blackening.
2. An exit wound on the back on left side below the tip of scapula, in the 8th intercostal space. The wound measures about 3" X 3" in diameter and edges are everted with large amount of blood found oozing from it.

ABDOMEN:

Stomach: Particle food digested found in the stomach .

THORAX:

1. Ribs and cartilages below wound No.1 found fractured.
2. Left both pleurae found ruptured and collapsed and left pleurae cavity was full of blood (about 500 ml) found inside it.
3. Left lung found lacerated in the lower lobe due to wound No.1.
4. Left ventricle of the heart found lacerated and penetrated through and through.

In the opinion of the doctor the death was due to fire arm injury resulting in serious damage to the heart and left lung. The time between injury and death was within 15 minutes and between death and postmortem was within 12 hours. He proved his post mortem report Ex-PW-13/1.

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During cross-examination, he stated that it was not possible for him to say whether the injuries were caused by a shot fired from a 32 bore revolver or a 30 bore pistol or a rifle because he was not fire arm expert. He also could not say with certainty that the injuries could be caused by a shot fire from a distance of 50 to 60 feet nor could be say that a stray bullet struck the deceased.

16. Ghulam Sarwar ASI PW-14 was a marginal witness of recovery memo (ExPW-14/1) regarding a Photostat copy of duplicate bill of telephone in the name of Mst. Rukhsana Naz appellant. It was produced by Mian Muhammad Rafiq complainant.

17. Statement of Safdar son of Allah Ditta PW-15 is stated to be quite significant for determination of the fate of this case. He deposed that he was working as a painter of Motor Cars on Link Tempel Road, Lahore. On 22-9-1996 the two appellants met him in a motor car of maroon colour and they asked him to change its colour into golden in such a way it should like original one. His labour charges were fixed

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as Rs.15000/- out of which they paid him Rs.5000/-. They left the vehicle bearing No.PRH-182 with him and he started the paintwork.

After one week Muhammad Rizwan again visited his shop and got one coating of paint done in his presence. The witness demanded from

him the remaining money but he did not oblige. He, however, gave his telephone number in writing to him. It was on 8-10-19

Muhammad Rizwan led the police party in handcuff to his w

He pointed out the car in question to the police which was taken in possession by it.

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 This witness was subjected to somewhat lengthy cross-examination and his assertion that the car was partly painted by him in the presence of Muhammad Rizwan appellant and he gave his telephone number in writing was found missing in his statement under section 161 Cr.P.C. He denied the suggestion that the police pressurized him to make statement before Magistrate in support of the prosecution case.

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18. Mehmood Irshad PW-16 deposed that the car in question which was Honda Accord, Model 1984-85 was purchased by him from Kayani Motor Rawalpindi but it had not yet been transferred in his name. He sold the same through Kayani Motor, Rawalpindi in 1991 to one Muhammad Riaz through a receipt. He produced photostat copy of the receipt (Ex-PW-16/1) for a sum of Rs.342000/-. He handed over open transfer letter alongwith three identity cards Ex-PW-16/3-6 and other papers regarding registration of the car besides the original registration book to the buyer.

During cross-examination, it came out that the fact that he sold the car through Kayani motors was not mentioned in his statement before the police under section 161 Cr.P.C. He denied the suggestion that the reason for not getting the car transferred in his name was to avoid the payment of tax.

19. Mr. Azhar Khan, Senior Civil Judge/ Judicial Magistrate, Peshawar entered the witness box as PW-17. He deposed that during

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the days of occurrence he was posted as Senior Civil Judge / Judicial Magistrate, Abbottabad. On 10-10-1996 Muhammad Rizwan appellant was produced before him for recording his confessional statement. After observing the requisite legal requirements in this behalf he proceeded to record his confessional statement (Ex-PW-17/2). He dictated the same to his steno verbatim. On completion of the statement it was read out to Muhammad Rizwan appellant and he appended his certificate vide section 364 Cr.P.C (Ex-PW-17/3).

During cross-examination, he admitted that it was not mentioned anywhere in the proceedings that handcuffs of Muhammad Rizwan were got removed before recording his statement. The application presented by the police for recording the confessional statement did not mention the date of arrest of Muhammad Rizwan. He went on to depose that after recording the confessional statement of Muhammad Rizwan was handed over to Karim Dad Head constable for taking him to judicial lock up. He stated that it was not

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in his knowledge that the S.H.● obtained a jail warrant from the Assistant Commissioner Abbottabad in connection with proceedings under section 107/151 Cr.P.C and that the counsel of the accused had filed a habeus corpus petition under section 491 on 3-10-1996. He, however, conceded that Muhammad Rizwan told him, on his query, that he was in police custody since 26-9-1996 and that he had been tortured "to some extent."

He went on to depose that he recorded the statements of Safdar and Taj-ud-Din PWs under section 164 Cr.P.C on 20-10-1996.

20. Zulfiqar constable attached to police station City Abbottabad, PW-18 deposed that he took articles mentioned in the receipts to F.S.L Peshawar.

21. Muhammad Rafique Khan SH● PW-19 deposed that during the days of occurrence he was posted as SH● police station Doonga Gali.

He carried out the investigation of the case which, inter-alia, included the recoveries of blood stained pieces of wood alongwith pebbles and

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stones from the spot. Last worn clothes of the deceased were produced before him by Muhammad Ilyas constable, after post mortem examination.

He deposed that Mst. Rukhsana Naz was arrested on 4-10-1996 and she led the police party to her house situated in Johar Town Lahore and from the cupboard she took out revolver No. A23260 (Ex-P1), Pak Made 32 bore, four live cartridges (Ex-P2) which were found in the chamber of the revolver, alongwith a license (Ex-P3). These items were taken into possession and sealed into parcel. He arrested Muhammad Rizwan appellant on 4-10-1996 who made disclosure and led to the recovery of car No. PRH-182 at the shop of S. Bros, Painting and Denting. He found the number plate of the car to be fictitious one. The vehicle had been earlier handed over to Muhammad Safdar Denter.

He further deposed that vide application Ex-PW-19/3 he sent revolver Ex-P1 to the Arm Expert through the Moharrar. He arranged

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the identification parade of the accused in the jail premises by Muhammad Miskeen and Malik Riasat Ali PW's. He also got recorded the statements of Safdar and Taj-ud-Din under section 164 Cr.P.C. The report of the Forensic Science Laboratory was produced by him as Ex-PW-19/4. He took into possession Photostat copy of telephone bills in the name of Mst. Rukhsana Naz which were produced before him by Mian Muhammad Rafiq. These copies pertained to dates i.e. 17-9-1996, 18-9-1996 and again 18-9-1996. After completion of investigation he submitted challan in court.

This witness was cross-examined at great length. He conceded that despite efforts for two days neither any eye-witness came forward nor any clue about the culprit could be traced. During this period the investigation was "done on different possible lines". It was on 23-9-1996 that he met Mian Muhammad Rafiq at his house and during conversation with him it transpired that his brother's wife had informed him that her husband received a telephone call from Lahore

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and after closing it he informed her that he was going to Islamabad to attend/receive his guests who were coming there to collect visa. He also told that they would visit Murree Ayubia. He took out his car and went away. It did not come to his notice that deceased was of immoral character and that he was running a guest house at Islamabad for immoral activities and black mailing. It was on 24-9-1996 that the two appellants were interrogated and ultimately arrested. The witness was shown a copy of habeus corpus petition filed by the counsel of the appellants against him under section 491 Cr.P.C alleging that they were detained by the police since 26-9-1996 (Ex-PW-19/D-1). Copy of the order passed on the said habeus corpus petition, Ex-PW-19/D-2 dated 9-10-1996 was also placed on record where by the said petition was dismissed as having become infructuous. This petition was filed in High Court on 3-10-1996 on which notice was issued to him and he attended the court with record. According to him the arrest of the accused was made on 4-10-1996 from Bus Stop, Haripur. He

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conceded that on the day when Muhammad Rizwan was produced before the Magistrate his co-accused i.e, sister was in police custody in connection with this case. He denied the suggestion the statement of Muhammad Rizwan under section 164 Cr.P.C was got extracted through 3rd degree methods.

He deposed that the registered owner of the car, as reported by the Registration Authority Peshawar, was Gulistan Cinema Lahore. He denied lack of knowledge that there was some dispute between the deceased and one Mian Abdul Khaliq regarding sale of some furniture to him.

22. Last witness produced by the prosecution was Muhammad Miskeen resident of Rawalpindi as PW-20. He deposed that he knew the deceased as well as Mian Muhammad Rafiq complainant. On 21-9-1996 at 10.00 or 10.30 a.m he was standing in the Chowk of Rawal Dam waiting for a taxi. In the meanwhile, he saw Muhammad Riaz (deceased) driving a car who stopped it near him and shook hand with

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him. He saw a young man sitting on the front seat with him, aged about 35 years or so and also a woman on the rear seat in the car. She was aged about 40 years or so. She was a fashionable woman.

It was on the night between 21/22-9-1996 that he learnt about the murder of Muhammad Riaz. He went to Abbottabad in the hospital and met Mian Muhammad Rafiq and informed him about his meeting with the deceased in the company of a man and woman in the car which was heading towards Murree.

He further deposed that he joined the identification parade in Abbottabad jail on 16-10-1996 and he identified both the appellants as the persons who were seen by him in the brief meeting with the deceased, referred to above.

During cross-examination, he stated that the deceased was his paternal cousin. He denied the suggestion that he was a bogus witness and that before the identification parade the accused had been shown

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to him and Malik Riasat Ali PW by the police and their photographs had also been supplied to them.

23. After closure of the prosecution evidence, the statements of the appellants were recorded under section 342 Cr.P.C. Muhammad Rizwan appellant, while denying the prosecution story in toto took up the plea that the identification parade, as held, was illegal. He had been shown to the PWs prior to the identification parade. He also specifically denied that the car belonging to deceased (PRB-87) was seen by Babar Javed PW-10 on 21.9.1996 at 5-6 p.m, being driven by him.

As regards the confessional statement dated 10-10-1996 (Ex-PW-17/2) he conceded that he did get the statement recorded but it was false and involuntary and was the out come of the torture by the police details whereof were mentioned by him in the application sent from jail as well as in his habeus corpus petition, filed before the Hon'ble High Court.

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As regards requestion about the report of forensic science expert vide Ex-PW-19/4. His answer was as under:-

As no crime empty was recovered from anywhere, this evidence was useless. Furthermore this evidence was contrary to alleged confession attributed to him, according to which the pistol used was a different one.”

He was asked to offer explanation about the calls made on 17-9-1996 once and twice on 18-9-1996 from the telephone of his sister to telephone No. 293950 at Islamabad, which belonged to the deceased. All that he could say that was the document was not duly proved and the evidence in this behalf was irrelevant and false.

In reply to the question as to why the PWs have deposed against him, he took up the plea that the relatives of the deceased, Mian Muhammad Rafiq and Miskeen PWs etc had falsely implicated him in the case due to their ill-founded suspicion.

He offered to lead defence evidence but refused to appear as his own witness in disproof of the prosecution allegations, as postulated under section 340(2) Cr.P.C. He produced copies of his bail

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He offered to lead defence evidence but refused to appear as his own witness in disproof of the prosecution allegations, as postulated under section 340(2) Cr.P.C. He produced copies of his bail application moved before trial court as well as before S.C.J / Magistrate, Abbottabad alongwith his written statement in terms of section 265-F(5) Criminal Procedure Code.

24. Mst. Rukhsana Naz appellant also denied the prosecution story in toto. She took up the plea of torture by the police after her apprehension. She neither offered to lead defence evidence nor entered the witness box to depose on oath in disproof of the prosecution allegations, vide section 340(2) Cr.P.C.:-

25. It is necessary, at this stage, to reproduce the confessional statement of Muhammad Rizwan in-extensio (pages 272 to 274 of the paper book):-

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بیان کیا کہ مورخہ ۱۹۹۶-۹-۲۱ کو میں اور میری بہن رخسانہ ناز بسلسلہ ویزا الاہور سے اسلام آباد کیلئے روانہ ہوئے اور ہم صبح ۹-۰۰ بجے فیض آباد چوک راولپنڈی پہنچے۔ اس دن چونکہ اردن کی سفارت خانہ میں چھٹی تھی۔ اس کے بعد میں نے فیض آباد چوک سے ہی میاں محمد ریاض کو فون کیا کہ اور اسے بتایا کہ ہم بسلسلہ ویزا اسلام آباد آئے ہیں اور سفارت خانہ میں آج چھٹی ہے اگر آپ کے پاس تھوڑا نام ہے تو ہمیں کچھ وقت دیدیں۔ انہوں نے کہا کہ میں فارغ ہوں اور میں ابھی آ جاتا ہوں وہ قریباً ۱۰-۰۰ بجے دن فیض آباد چوک پر اپنی کار میں آیا میں میاں محمد ریاض کے ساتھ اگلی سیٹ پر بیٹھ گیا اور میری بہن پچھلی سیٹ پر بیٹھ گئے۔ وہ ہمیں لیکر اسلام آباد سے ہوتے ہوئے مری ایوبیہ کے طرف لے گیا۔ راستہ میں ہی دینک کے قریب کچھ پھل لیا اور ایوبیہ روانہ ہو گئے ایوبیہ پہنچ کر ہم بذریعہ Chair lift ٹاپ پر چلے گئے۔ کچھ دیر تک ہم تینوں وہاں گھومتے رہے اور وہیں پر کھانا کھایا۔ واپسی پر میاں محمد ریاض نے کہا کہ میں تھک گیا ہوں۔ آپ گاڑی چلائیں۔ میں گاڑی کی سٹیئرنگ سیٹ پر بیٹھ گیا اور میاں محمد ریاض میرے ساتھ والی برابر کی سیٹ پر بیٹھ گیا ابھی ہم تھوڑی دور ہی گئے تھے کہ میاں محمد ریاض نے کہا کہ کسی جگہ گاڑی کھڑی روک لی اور ہم تینوں گاڑی سے نیچے اتر آئے اس کے بعد میری بہن کیونکہ میں نے پیشاب وغیرہ کرنا ہے۔ کچھ ہی فاصلہ پر ایک Picnic Spot تھا میں نے گاڑی وہاں روک لی۔ اور ہم تینوں گاڑی سے نیچے اتر آئے۔ اسکے بعد میری بہن مسماہ رخسانہ ناز پیشاب کیلئے جنگل کی طرف چلی گئی۔ پیشاب کرنے کے بعد واپسی پر اس کا پاؤں پھسلا اور اس نے مدد کیلئے پکارا میں اور میاں محمد ریاض دونوں نے اسکو سہارا دیکر Picnic Spot کے نیلے رنگ کے بیچ پر بیٹھایا۔ اس کے بعد میں پیشاب کرنے کیلئے گاڑی کے فرنٹ سائیڈ کے طرف چلا گیا ابھی میں پیشاب سے فارغ ہوا ہی تھا کہ میری بہن نے چیخ ماری اور کہا کہ مجھے بچاؤ۔ اس دوران میں بھاگ کر آیا تو میں نے دیکھا کہ میاں محمد ریاض میری بہن کو زبردستی اپنی باؤں میں کھینچا ہوا تھا مجھ سے یہ لمحہ برداشت نہ ہو سکا اور میں نے میاں ریاض کی گاڑی کے Dash Board میں ایک پستول ۳۰ بور جو کہ اس نے رکھا ہوا تھا اٹھایا اور میں اسکی طرف بھاگ کر قریب پہنچ کر میں نے اس کو گالی دی اور کہا کہ میں نے تمہیں ہمیشہ اپنا بھائی سمجھا ہے اور تم میری عزت کے قاتل نکلے۔ اس وقت میرا دماغ بالکل ماؤف ہو چکا تھا اور میں شدید غصے اور غیرت کے عالم میں اس پر چھوٹا۔ اس دوران کشمکش میں گولی چل گئی اور میاں محمد ریاض زخمی ہو کر گر پڑا اور میں بدحواسی کا عالم میں اپنی بہن کی عزت بچا کر اسی کی گاڑی میں وہاں سے فرار ہو گیا۔ اس دوران میں شدید خوف کے عالم میں وہاں سے سیدھا اپنے گھر لاہور کی طرف روانہ ہو گیا۔ تقریباً رات کو ۹-۰۰ بجے میں لاہور پہنچا اور گاڑی کو باہر سڑک پر ہی کھڑا کر دیا۔ رات میں نے گھر پر ہی گزار دی اور دوسرے دن میں نے گاڑی کو Tamper Road لاہور پر ورکشاپوں کے قریب کھڑا کر دیا اور خود وہاں گھر چلا گیا۔ اس دوران میں اپنے گھر کے کاموں میں مصروف رہا اور کہیں بھی گھر سے باہر نہیں گیا۔ پستول میں نے بھاگتے ہوئے گلیات کے علاقہ میں کہیں پھینک دیا تھا۔ مقتول میاں ریاض سے ہمارے کافی عرصہ کے پرانے تعلقات تھے اسکا ہمارے گھر آنا جانا تھا اور اس نے مجھے اپنا چھوٹا بھائی اور میری بہنوں کو اپنی بہنیں سمجھا تھا۔ ہم بھی اسے اپنے بھائی کے طرح بنا کر رکھا تھا۔ اس سارے واقعہ میں میری بہن کا کوئی ہاتھ نہیں ہے۔

سکر در دست تسلیم کرتا ہوں۔

العبد

محمد رضوان

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26. There is available on record the copy of habeus corpus petition moved by a learned advocate on behalf of the two appellants before Peshawar High Court alleging their apprehension by the police on 26-9-1996 without any warrants. It was claimed in the application that they were being detained illegally.

This petition came up for hearing before a learned Judge of Peshawar High Court on 17-6-1996 and was disposed of as having become infructuous, on the statement of M/s Muhammad Rafique SHO, Muhammad Khalid and Muhammad Farid SHO to the effect that both the petitioners in the habeus corpus petition had been charged and arrested in a murder case vide FIR No.110 dated 21-9-1996 registered at police station Doonga Gali. The assertion by the police that the alleged detainees had been arrested on 4-10-1996 was noticed in the order.

There are also available on record, duly exhibited (i). copy of receipt of Rs. 3,42,000/- in favour of Muhammad Riaz deceased in

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respect of motor car No. PRB-87 (Honda Accord-1985 Model) issued by one Muhammad Irshad; (ii). copy of receipt of advance money of Rs. 50,000/- qua the car; (iii). open transfer letter; (iv). Registration document of the car in the name of Gulistan Cinema; (v). Photo copy of bill for telephone No. 5320478 showing three calls being made from it qua telephone No.293950, one on 17.9.1996 and two on 18.9.1996.

Report of Forensic Science Laboratory (Ex.PW:18/5) showed that stains on pieces of wood, shirt, shalwar and banyan, sent to it, were of human blood and of the same group.

Second report of the Laboratory about one 32 bore revolver No.A23260 containing 5 live cartridges in its was as under:-

“The presence of the gun powder residue in the barrel of 32 bore revolver No.A23260 has revealed that fire has been made through it, however NO DEFINITE OPINION can be expressed as to when it was last fired. The revolver No.A23260 is in proper working order in its present condition.”

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27. We have heard the learned counsel for the parties and perused the bulky record of the case with their assistance.

28. It was argued by the learned counsel for the appellants that the retracted judicial confession of Muhammad Rizwan appellant was the outcome of torture by the police. The last seen evidence of Muhammad Miskeen PW.20 was suspect and same was the position of identification of the appellants by him in the identification parade. According to him, other corroborative pieces of evidence sought to be utilized by the prosecution were either irrelevant or concocted.

32
On the other hand, learned counsel appearing for State stoutly defended the impugned judgment and argued that the prosecution had succeeded in bringing home the guilt to the appellants and trial court had rightly convicted and sentenced them.

29. The prosecution has relied on the following items of evidence in support of its case:-

(i). Retracted judicial confession of Muhammad Rizwan appellant.

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- (ii). Evidence qua the deceased in the company of appellants furnished by Muhammad Miskeen PW.
- (iii). Identification of both the appellants in the identification parade by Muhammad Miskeen PW.
- (iv). Pointation of place of occurrence by both the appellants in the presence of Abdul Rehman PW.7.
- (v). Recoveries of blood stained pieces of wood / leaves and pebbles from the place of occurrence.
- (vi). Medical evidence.
- (vii). Recovery of car in question from Link Tempel Raod, Lahore from the possession of Safdar PW.15.
- (viii). Recovery of revolver P.1 on the pointation of Mst. Rukhsana Naz appellant.
- (ix). Sighting of car No.PRB-87 by Babar Javed PW.10 being driven by some unknown person other than the deceased.

30. As regards the evidentiary value of retracted judicial confession

of an accused we deem it necessary to cite the dictum of august

Supreme Court in following three cases:-

- (i). 1992 S.C.M.R 1983 at 2015
(Ch. Muhammad Yaqoob and others Vs. The State and others)
- (ii). 2000 S.C M R 785 at 805
(Haq Nawaz versus The State)
- (iii). 1991 S.C.M.R. 942
(Muhammad Gul versus The State)

In Ch. Muhammad Yaqoob's case it was ruled at page 2015 of

the report as under:-

“The legal position, which has emerged from the above reports, seems to be that in order to judge the evidentiary value of retracted confession, the Court is

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to advert to the question, whether the same appears to have been made voluntarily, without any inducement, duress or coercion with the object to state the truth. If the Court is satisfied on the above aspect, the mere fact that there were some irregularities in recording of a confession, would not warrant disregarding of the same."

In Haq Nawaz's case supra, it was laid down as under:-

"It is a settled law that the conviction of an accused can be based even on a retracted confession, if the Court is satisfied that the confession was made voluntarily. However, as a rule of caution and prudence, the Court looks for other evidence and material on record of the case to seek corroboration of the retracted confession, before convicting the accused (Muhammad Gul V. The State 1991 S.C.M.R 942).

To the same effect is the earlier judgment of august

Supreme Court of Pakistan in Muhammad Gul's case (1991 S.C.M.R.

942. At page 955 of the report it was held as under:-

"I may also observe that a retracted confession is sufficient to make the basis of recording conviction but the Court as a rule of prudence seeks corroboration of the same on all material particulars."

31. Muhammad Rizwan appellant was arrested by the police on

4.10.1996. He was produced before Mr. Azhar Khan, Senior Civil

Judge/ learned Judicial Magistrate, Peshawar on 10.10.1996 who

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recorded his confessional statement after completing the requisite legal formalities. Muhammad Rizwan appellant, in reply to court question, before his confessional statement was recorded stated that he was tortured by the police "to some extent." He neither mentioned the nature of torture inflicted upon him nor made any prayer for his medical examination in support of his plea of torture. Even in the habeus petition moved by the appellants there is not a single word about any torture / pressure by the police though they were, allegedly, in police custody for few days prior to their actual arrest. We have reached irresistible conclusion that judicial confession was made by Muhammad Rizwan voluntarily and without any pressure / coercion / torture by the police. It was at the stage of trial that on realizing the grave consequences, likely to flow from his confession, he retracted it by taking up the plea of torture.

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32. We find that sufficient evidence of unimpeachable character is available on record which provided corroboration to the confession of Muhammad Rizwan appellant, as discussed in the sequel.

The appellants were seen by Muhammad Miskeen (PW-20) in the company of the deceased in his car. He was related to him and had a little chat when the car was stopped by the deceased near Rawal Dam. During the identification parade he identified the appellants as the companions of the deceased who took them to Murree-Ayubia for a joy side/ excursion. Muhammad Miskeen had no motive whatsoever to falsely depose against the appellants.

33. It is in evidence that the dead body was removed from the place of murder by Munsif Khan L.H.C (PW-11) few days prior to the apprehension of the appellants. Some stained pieces of wood, leaves and pebbles with human blood of same group had also been picked up by the police from that spot. It was few days thereafter that the appellants were apprehended and interrogated. They correctly

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pointed out the place of occurrence to the police which was in their exclusive knowledge. This is yet another circumstance providing corroboration to the prosecution case.

34. The medical evidence showed that the deceased was killed by firearm. Only one shot was fired which proved fatal. To the same effect is the confessional statement of Muhammad Rizwan, though he alleged that the shot was fired by him during scuffle with the deceased. We are satisfied that, keeping in view the nature and extent of injuries on the dead body, the deceased was killed by a bullet fired from a pistol / revolver and as such the prosecution had rightly relied upon the medical evidence to connect Muhammad Rizwan with the murder, as confessed by him.

The recovery of car from Safdar PW at Lahore from his workshop at the pointation of the appellants is yet another piece of strong corroborative evidence connecting the appellants with the crime. After the murder the car was whisked away to Lahore by them

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and they tried to appropriate it to themselves by getting its colour changed. Had the police not reached the garage/workshop of Safdar PW in time it would have become well nigh impossible to trace it. The number plate was fictitious and their being an open transfer letter, picked up by the appellants from it, they would have managed its transfer either in their own name and sold it to someone else.

35. We, however, do not attach any importance to the deposition of Babar Javed PW-10 who on the fateful day, at about 6.00 p.m claimed to have seen the car of the deceased being driven by some one else. It must have become quite dark by that time and, in a fleeting glance, it was not possible that witness could have noticed that the deceased was not at the driving seat. Further, the car had no identifying marks/features so as to be recognized as that of the deceased.

The recovery of revolver P1 at the pointation of the lady appellant from her house is equally worthless. No crime empty was recovered from the spot nor any lead piece retrieved from the body of

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the deceased so as to be connected with revolver P1. The crime weapon, as per confession of Muhammad Rizwan, was thrown in the woods in the hilly area after the occurrence and this seems to be true. No reliance can be placed on the recovery of revolver P1 to hold that the fatal shot was fired from it.

36. We are fully convinced that the pieces of evidence, referred to in paras 32-35 supra, provided sufficient corroboration to the retracted judicial confession of Muhammad Rizwan, keeping in view the principles laid down by the apex court of the country in the three precedents cases, quoted hereinbefore.

37. For the above reasons/ discussion we are satisfied that Muhammad Rizwan was rightly convicted by the trial court for Qatl-E-Amd of the deceased Muhammad Riaz, within the purview of section 302(b) PPC.

Mst. Rukhsana Naz is proved to be his accomplice in the crime resulting in the murder of Muhammad Riaz. She escaped from the

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spot alongwith Muhammad Rizwan to Lahore and tried to grab his car in consultation with him. She is convicted under section 302(b) read with section 109 Pakistan Penal Code.

37. The question of sentences to be awarded to the appellants needs serious consideration. It is well settled that the confessional statement is to be either accepted or rejected as a whole while deciding a criminal case. Muhammad Rizwan appellant had given explanation for the murder of the deceased. According to him while he was away to urinate at some hidden place the deceased took his sister Mst. Rukhsana Naz into his clasp. When he returned he flew into rage on seeing this objectionable posture and temporarily lost control over his mind. He rushed towards the car, picked up the revolver from the dash board and fired the fatal shot killing the deceased.

The explanation offered by Muhammad Rizwan for committing murder appears to be plausible. The murder was neither pre-planned nor the outcome of some previous enmity. The parties were on

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friendly terms, as per prosecution itself. They had gone to the hills for excursion and there is a strong probability that taking benefit of absence of Muhammad Rizwan from the spot the deceased took liberty with Rukhsana Naz. His indecent act provoked Muhammad Rizwan to such an extent that he killed him there and then.

38. Since provocation, sudden and grave, was pleaded by Muhammad Rizwan as being the cause of murder of the deceased, we must seek guidance on the point from the dictum of Supreme Court in some of its reported judgments.

42
In Muhammad Saleem's case (PLD 2002 558), it has been laid down that the provocation in law means more than a provocative incident. The provocation must be to such an extent as to temporarily deprive the person provoked of the power of self control as a result of which he commits an unlawful act causing death.

In Abdul Haque's case (PLD 1996 page-1), while upholding the plea of loss of power and self control on the part of the accused

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due to grave and sudden provocation the death sentence of the convict was reduced to imprisonment for life.

Similar view was expressed by their lordships of Supreme Court of Pakistan in Muhammad Imran's case (PLD 2001 S.C 956) where the provocation due to hurt to family honour was considered to be a mitigating circumstances resulting in conversion of the death sentence to imprisonment for life.

In Ijaz Hussain's case (2002 S.C.M.R 1455 at 1460), it was held as under:-

“While visualizing the situation, an inference can be drawn from the circumstances of the case under which the occurrence had taken place that shortly before the occurrence something unpleasant happened as a result of which appellant was provoked and while losing self-control, he reacted and inflicted injuries on the sensitive part of the body of deceased.”

39. To sum up, we are of the considered view that ends of justice would be met if the conviction is altered from one under section 302/34-PPC to 302(b) PPC and the sentence of death awarded to the appellant Muhammad Rizwan is reduced to life imprisonment as Tazir, for committing of Qatl-e-Amd of deceased Muhammad Riaz. His conviction and sentences under

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sections 379 and 411 PPC are set aside and he is acquitted of the charges thereunder. However, instead he is convicted under section 392 PPC and sentenced to undergo fourteen years R.I. He shall also pay fine of Rs. 5,000/- or in default thereof further suffer six months S.I. Both the sentences to run concurrently.

So far as Mst. Rukhsana Naz, appellant / accused is concerned, her conviction and sentences under section 302/34, 379 and 411 PPC are set aside and she is acquitted after charges thereunder. Instead she is convicted under section 392 PPC and sentenced to fourteen years R.I with fine of Rs. 5,000/- or six months S.I in default thereof.

Order of the learned trial court passed in respect of payment of compensation under section 544-A Criminal Procedure Code to be paid by the each appellants to the legal heirs of the deceased or the sentences of imprisonment in default thereof shall remain intact.

40. Mst. Rukhsana Naz was released on bail vide order dated 30.4.2004.

Her bail bonds are cancelled and she is directed to be taken into custody and

sent to jail to serve out the remaining sentence, with benefit of section 382-B Cr.P.C.

Ali

Ali

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42. Consequently, the revision petition (Cr. Revision No.37/I of 2002) for enhancement of sentences of the appellants is dismissed.

43. Death sentence awarded to Muhammad Rizwan is not confirmed and murder reference is answered in negative.



(SAEED-UR-REHMAN FARRUKH)
Judge



(CH. EJAZ YOUSAF)
Chief Justice



(DR. FIDA MUHAMMAD KHAN)
Judge

Islamabad,
Dated the 29th March, 2006.

Fit for reporting.
Fleer

IN THE FEDERAL SHARIAT COURT

(APPELLATE JURISDICTION)

PRESENT.

HON: MR. JUSTICE CH. IJAZ YOUSAF, CHIEF JUSTICE
HON: MR. JUSTICE DR. FIDA MUHAMMAD KHAN.
HON: MR. JUSTICE SAEED-UR-REHMAN FARRUKH.

Cr. Revision No. 37/I of 2002

Muhammad Rafiq son of Ghulam Qadir,
Caste Arain, R/o of House No. 49-A, St. No.35,
Sector I-9, Islamabad. --- Petitioner

Versus

1. Muhammad Rizwan
2. Mst. Rukhsana Naz
3. The State. --- Respondents.

Counsel for petitioner	---	Mr.Saliheen Mughal, Advocate
Counsel for the respondents	---	Syed Riaz-ul-Hassan Gilani, Advocate.
Counsel for State	---	Mr. Muhammad Sharif Janjua, Advocate
FIR No. & Date Police station	---	No.110, dated 21.9.1996. Doonga Gali, Abbottabad
Date of decision of trial Court	---	13.9.2000.
Date of Institution	---	31.10.2002.
Date of hearing	---	29.3.2006.
Date of decision	---	29-3-2006

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JUDGMENT.

SAEED-UR-REHMAN FARRUKH, J:- Same judgment as in Criminal Appeal No. 191/I of - 2000 "Muhammad Rizwan & another Vs. The State".




(SAEED-UR-REHMAN FARRUKH)

Judge



(CH. EJAZ YOUSAF)
Chief Justice



(DR. FIDA MUHAMMAD KHAN)
Judge

Islamabad,
Dated the 29th March, 2006.