IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

MR. JUSTICE HAZIQUL KHAIRI, CHIEF JUSTICE
MR. JUSTISCE SYED AFZAL HAIDER

Criminal Appeal No.28/P of 2005.

The State ... Appellant/petitioner

Versus

1. Tanveer-ul-Hassan son of Tila Muhammad
   R/o Hameed Abad Kakshal, Peshawar
2. Fazal Mola son of Roohullah
   R/o Kangra Teshil Shabqadar, District Charsadda.
3. Mst. Baseerat d/o Ghulam Said
   R/o Pirpiai Mohallah Jan Abad, District Nowshera.
4. Shamshad son of Muhammad Yousaf
   R/o Kakshal, Peshawar.
5. Tila Muhammad son of Said Hassan,
   R/o Kakshal, Peshawar.
6. Mst. Hassan Ara w/o Tila Muhammad,
   R/o Kakshal, Peshawar ..... Respondents

Counsel for respondents	...	Mr.Fazal-ur-Rehman Rana and Mr. Aziz-ur-Rehman, Advocates
Counsel for Complainant	...	Mr. Ijaz Ahmed Malik, Advocate
Counsel for State	...	Mr. Muhammad Sharif Janjua, Advocate
FIR No. Date & Police Station	...	401, 2.9.2001 Azakhel, Nowshera
Date of judgment of trial court	...	8.12.2004
Date of Institution	...	30.7.2005
Date of hearing	...	28.4.2008
Date of decision	...	

JUDGMENT

SYED AFZAL HAIDER, Judge.- This appeal registered as Criminal Appeal No.28/P of 2005, barred by five months and eighteen days, has been filed by learned Advocate General, NWFP on 30.07.2005 and is directed against judgment dated 8.12.2004 of learned Sessions Judge, Nowshera passed in Hadd Case No. 74 of 2003 whereby Tanveer-ul-Hassan, Fazal Mola, Mst. Baseerat, Shamshad (since dead vide order of this Court dated 04-05-2006), Tila Muhammad and Mst. Hussan Ara were acquitted from various charges under sections 10, 11 and 16 of Offence of Zina (Enforcement of Hudood) Ordinance, 1979. An application for condonation of delay of (05) five months and (18) eighteen days, has also been moved which application is registered as C.M.No.15/P of 2005 in Criminal Appeal No.28/P of 2005.This miscellaneous application No.15/P of 2005 will be disposed of along with the appeal under consideration.

2. This controversy arose out of an FIR No.401 Ex.PA, registered with police station Aza Khel District Nowshera on 2.9.2001 at 5.30.p.m. under sections 10/11/16 of the Offence of Zina (Enforcement of

Hudood) Ordinance VII of 1979, regarding an incident whose date was mentioned as 02.07.2001 but its time was not disclosed. This information was recorded on the statement of P.W.1 Mst. Akhtar Jehan mother of Mst. Shabnam abductee. The informant disclosed that on 2.7.2001 her daughter Mst. Shabnam aged 16/17 years, left her house. After search and enquiry she was satisfied that one Tanveer-ul-Hassan son of Tila Muhammad resident of Kakshal, Peshawar, an operator employee of Telephone Department posted at Guluzai Telephone Exchange, had abducted her. It was claimed on behalf of the complainant that because of the search efforts the information could not be lodged earlier with the police.

3. After registration of the FIR the investigation of the incident was entrusted to Said Rehman, ASI. P.W.6 who visited the place of occurrence, prepared site plan Ex.PB and recorded statements of P.Ws under section 161 of Code of Criminal Procedure. The complainant, it is reported, moved an application to the President of Pakistan, copy of which is Ex.PW6/1, on the basis of which her supplementary statement was also recorded. She was also produced before the Judicial Magistrate, Nowshera where her statement Ex.PW.6/2 under section 164 of Code of Criminal

Procedure was recorded on 2.3.2002 wherein she charged one Fazal Mola and two other unknown employees as well as Tila Muhammad. Fazal Karim, Inspector P.W.5 partly investigated the case after its transfer from Said Rehman ASI, P.W.6. Inspector Fazal Karim during the course of investigation, visited Police Station Race Course Garden, Lahore where he was told by Lady Inspector Azra that she had recovered abductee Mst. Shabnam who was handed over to her father Abad Khan. Restoration of the abductee took place on 29.5.2005 at Lahore as per record available on file though the present case emanating from FIR No.401 Ex.P.A. was decided by learned Sessions Judge Nowshera on 8.12.2004 i.e. six months before she appeared on the scene. During interrogation Sheikh Naseer and Kamran Saeed told Fazal Karim, Inspector, PW 5 that Mst. Shabnam was not known to them so they were set free. The Inspector took into possession a cassette P1 vide Ex.P.C. on 11-10-2001 which was produced before him by Mst. Akhtar Jehan mother of abductee on his return to crime Branch Nowshera from Lahore. The Inspector then recorded her supplementary statement as well as the statement of Abbad Khan and thereafter the case was handed over to the local police. After

completion of investigation the charge sheet was submitted to court on 20.5.200.3 by S.H.O. Aza Khel for the trial of present respondents.

4. The trial court framed formal charge against the accused under sections 10/11 and 16 of Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979 on 28.10.2003 to which they did not plead guilty and claimed trial. The charge was framed at the time when Mst. Shabnam was still reported to be missing. This fact was mentioned in the charge.

5. To prove its case the prosecution produced as many as six witnesses. The evidence was recorded between 27.01.2004 and 05.06.2004. Prosecution evidence was closed on 4.10.2004. After close of the prosecution evidence, statements of the accused under section 342 of Code of Criminal Procedure were recorded on 18.11.2004 wherein they had taken the common plea that " no P.W. had deposed against them except the statement of Mst. Akhtar Jehan who was interested in their conviction". Tanveerul Hassan respondent, in his statement, categorically stated that Mst. Shabnam was "arrested by the police of Punjab Province at Lahore, where Mst. Akhtar Jehan, complainant, has given a statement that abductee Mst. Shabnam had left her house on some differences with the complainant

and she was never abducted by any one". He also stated that there was nothing on record to show that names of Mst. Shabnam or accused Mst. Baseerat were borne on the electoral roll of the village Pir Pai. The learned trial court after assessing the entire record, on coming to the conclusion that case was not proved by the prosecution, acquitted all the accused by giving them benefit of doubt. Hence this appeal against their acquittal by the State and not by the complainant herself.

6. That in response to the present appeal against acquittal filed by State, learned counsel for respondent moved an application in this Court on 11.01.2007 which was registered as Criminal Miscellaneous No. 2/I of 2007 and fixed before us alongwith the main Criminal Appeal No.28/P of 2005. Learned counsel has also placed on record certain documents relating to the controversy of this case but these papers pertain to a period after the conclusion of the trial court on 8.12.2004. The relevant portions of the story as narrated by respondent in different paragraphs of this miscellaneous application are reproduced below:-

Para 2. "That the number of accused in the case based on FIR No.

401 dated 2.9.2001 of the impugned order of acquittal is six as mentioned in Cr.A.No.28/P of 2005 i.e. (1) Tanveerul Hassan s/o Tila Muhammad (2) Tila Muhammad father of Tanveerul Hassan (3) Mst. Husan Ara mother of Tanveerul Hassan (4) Shamshad s/o Mohammad Yousaf (5) Fazal Mola s/o Roobullah and (6) Mst. Baseerat whereas in the daily diary report dated 24.6.2005, the abductee has also charged (7) Nasreen wife of Siraj-ud-Din (8) Zeenat d/o Siraj-ud-Din and (9) Safia d/o Siraj-ud-Din.

Para 3. "That perusal of the application No.301/P/2005 by the Advocate General, NWFP Peshawar before the Federal Shariat Court for early hearing of the criminal Appeal No. 28/P of 2005 on the same subject, law and facts of the case would show that the Supreme Court of Pakistan is also seized of the case in a Suo Moto Reference No.8/2005 and the matter has also been impugned before the High Court, Peshawar in Writ Petition No.1139/2005.

Para 4. "That pending decision by the Supreme Court of Pakistan in Suo Moto Reference No.8/2005, writ petition No.1139/2005 was not tenable under the law. Yet another police diary report No.38 Roznamcha dated 19.9.2005 P.S. Aza Khel was registered U/Ss. 11, 15 16 of Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and section 452 PPC against Siraj-ud-Din and his wife Nasreen and three other un-known armed persons.

Para 5. "That a special Investigation Team comprising ten Police Officers of repute and experience was constituted to probe into matter. They thorough interrogated Mst. Nasreen, Tila Muhammad, Mst. Baseerat, Tanveeul Hassan etc and re-investigated the case FIR No.401 dated 2.9.2001 U/Ss. 10, 11 and 16 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979, P.S. Aza Khel, Sarfraz s/o Siraj-ud-Din and Mst. Safia d/o Siraj-ud-Din in the fresh case under FIR No.363 dated 19.9.2005 U/Ss. 11/15/16 of Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and Section 452 PPC P.S. Aza Khel and daily diary of Police Station Aza Khel dated 24.6.2005.

Para 6. "That in their order dated 8.12.2005 in Suo Moto Case No. 8 of 2005, a Division Bench of the Supreme Court of Pakistan comprising Hon. Mr.Justice Rana Bhagwandas and Hon. Mr. Justice Hamid Ali Mirza have held at page 2 of the first line of their order that " Mst. Shabnam is present in the Court and she owns the statement recorded by her before the Judicial Magistrate, which clearly indicates that she has knowingly created a scene implicating innocent and respectable persons of the locality with an ulterior motives". It has further been held by the aforesaid Hon. Division Bench of the Supreme Court of Pakistan in Para 2 line No.6 that " since the alleged abductee has been recovered, her statement recorded, Investigating Agency shall complete the process of

investigation and submit a final report through Deputy Registrar (Judicial) of this Court within seven days".

Para 7. "That the Superintendent of Police, Investigation, Nowshera in his detailed report of four pages addressed to the Deputy Registrar (Judicial), Supreme Court of Pakistan, Islamabad vide No.1877/P dated 13.12.2005 and copies thereof endorsed to Provincial Police Officer, NWFP, Peshawar under Endt. No.1878-80/P dated 13.12.2005 at page 4 line No.10, states that " on 9.12.2005 Mst. Shabnam, abductee was produced before the court and she was sent to Dar-ul-Aman, Peshawar. A false case was reported by the complainant Ibad Khan against accused Siraj-ud-Din and Mst. Nasreen, therefore, on 12.12.2005, Challan U/S. 173 Cr.P.C. was submitted before the court of District & Sessions Judge, Nowshera through proper channel for the cancellation of case and release of accused U/S. 169/63 Cr.P.C. On 12.12.2005, the District & Sessions Nowshera cancelled the case and released the accused U/S. 169 Cr.PC".

Para 8. "That the registration of fresh FIR No.363 dated 19.9.2005 U/S. 11, 15, 16 of Offence of zina (Enforcement of Hudood) Ordinance, 1979 read with section 452 PPC Police Station Aza Khel necessitated re-investigation of the case with particular reference to daily diary report dated 24.6.2005, police diary report No.38 Roznamcha dated 19.9.2005 P.S. Aza Khel and FIR No.401 dated 2.9.2001, Police Station, Aza

Khel and subsequently matter was quashed by District and Sessions Judge, Nowshera on 12.12.2005 U/S. 169 Cr. PC".

7. In order to arrive at a balanced conclusion of the present appeal in which retrial has been prayed for against the acquitted accused as also to appreciate the grounds taken for condonation of delay it is worthwhile reproducing the statement of Mst. Shabnum daughter of Ibad Khan recorded under section 164 Cr,P.C. on 05.12.2005 by Mr. Muhammad Arshad Khan SCJ/Judicial Magistrate, empowered under section 30 Cr.P.C. Nowshera and now forming part of Cr. Misc. Application No.2-I of 2007 moved in Cr. Appeal No.28/P of 2005:

"I was reading in the 6th class in Govt. Girls High School Pirpiai. In the year 2001 when I was coming back from my school, I saw that Mst. Nasreen W/o Siraj ud Din R/o Pirpiai alongwith another unknown person were present near my school and asked me to sit in the Motor Car. They told me that they would take me to my home. But they did not take me to my house and took me to Lahore and left me at a street used for immoral acts. After three days I got out from the house and tried to escape but I was arrested by the police and taken to the lady police station. My parents were informed by the police and as such they reached Lahore and I returned to my home with them. After some days during the days of Election, 2001.

I alongwith my friend Mst. Baseerat D/o Ghulam Said had gone to Girls High School Pirpiai i.e. on the day of election. Mst: Baseerat told me to meet her friend and as such we came out from the school. I saw that a black colour motor car was parking and Mst. Nasreen wife of Siraj ud Din her daughters Zeenat and Safia and another person his name later on disclosed as Tanveer ul Hassan were sitting in the Moror Car. Mst. Baseerat handed over me to Nasreen and went away. I was got up in the motor car by force by the said persons and Tanveer ul Hassan threatened me by pistol to be silent. Mst. Nasreen wore me a black colour burqa and motor car started. After some distance, Tanveer ul Hassan injected me and I became unconscious when I became conscious I found myself in the control of Punjabi people. On the next day a black and thin woman came and I was subjected to immoral business. Mst. Nasreen her daughters and Tanveer ul Hassain were present for three days and then returned. While I remained there for three years having busy in immoral business. Meanwhile, one Muhammad Rafi alias Juja son of Muhammad Shafi R/o Sukkar met me and I told him my story. He developed friendly relations with me but he did not committed Zina with me. One Abdul Hafeez Bhati R/o Sukkar (who was SDO Wapda) was also used to come and met me and used to commit immoral acts with me. Both the said persons willing to contract marriage with me. Then Mst. Nasreen came there and took me to Karachi. I was handed

over lady namely Robi Khan. After five or six months I was handed over to another lady namely Shamim and I was taken to Sukkar to a Qehba Khana. I spent some months in Sukkar. I was again handed over to Robi Khan and taken to Karachi. Then I was handed over to one Zafar Chaudhri in Karachi. Meanwhile, Mst. Nasreen again reached Karachi and I was brought to Rawalpindi. When we reached Pirwadhai Bus Stand Rawalpindi, I succeeded to escape, I also took away the purse of Nasreen alongwith Rs.1240/-. On 23/06/2005 I reached my home at Pirpiai and narrated the whole story to my parents. I spent about 2 ½ months with my parents and told them to marry me with Muhammad Rafi alias Juja, as I liked him. But my parents refused to do so. Therefore, at about 2 ½ months back at morning time, I came out of my house and went Sukkar to meet Muhammad Rafi. I also took away the mobile phone of my father bearing No.0321-8813508. At last time I have not been abducted by any one, however, I had gone to Sukkar with my own sweet will to contract marriage with Juja. But the local police of PS Azakhel reached there and I was brought to PS Azakhel District Nowshera.

XXXXXXXX Nil (Accused not present)

R.O & A.

Dated: 05.12.2005."

8. For a proper, fuller and judicious appreciation of the entire controversy agitated through this criminal appeal against acquittal it is

pertinent to reproduce here the text of the order dated 08.12.2005 of the Apex Court passed in Suo Moto Case No.08 of 2005 available on the file of Cr. Misc. A.No.2/I of 2007 in Criminal Appeal No.28/P of 2005:

> "Rana Bhagwandas,J- In response to the direction made on the last date of hearing i.e. 22.11.2005, Provincial Police Officer, NWFP has submitted a detailed report tending to show that alleged abductee Mst. Shabnam has been recovered from Sukkur (Sindh) by the investing team deputed by District Police Officer, Nowshera. She was brought to Nowshera and produced before Senior Civil Judge/Judicial Magistrate, Nowshera for recording her statement under section 164 Cr.P.C. In her statement before the Magistrate, she has falsified the version of her father who recorded FIR No.363, P.S. Azakhel registered on 19.2.2005. In the said FIR Mst. Nasreen, her husband Tanveer ul Hassan as well as many other person were nominated, some of whom have obtained bail while the others have been detained in custody without the submission of a charge sheet. Investigating Officer Muhammad Jan Khan, P.S. Azakhel states that in the absence of incriminating statement of Mst. Shabnam, he was not in a position to submit the charge sheet against the persons arrested and produced for remand. Mst. Shabnam is present in the Court and she owns the statement recorded by her before the Judicial Magistrate, which clearly indicates that she has

knowingly created a scene implicating innocent and respectable persons of the locality with an ulterior motive.

"In view of statement of Mst. Shabnam before a Judicial Officer exonerating the persons involved in the commission of crime alleged against them, there remains no justification for their further detention in jail. It further appears that her father Ibad Khan knowingly and deliberately lodged a false FIR against innocent persons and thereby rendered himself liable to penal action. Since the alleged abductee has been recovered, her statement recorded, investigating agency shall complete the process of investigation and submit a final report through Deputy Registrar (Judicial) of this Court within 7 days for our perusal. Likewise the Court, at whose orders the alleged accused persons are lodged in Jail custody shall decide their fate with utmost expedition strictly according to law and consider the question of necessary proceedings against the complainant for lodging a false and frivolous case with police.

"A report in this regard shall be submitted by the trial Court through Deputy Registrar (Judicial) of this Court within 7 days from today without fail. Subject to above directions, suo moto case is disposed of.

Sd. Rana Bhagwandas, J.

Sd. Hamid Ali Mirza, J."

9. That in pursuance of the above mentioned order dated 08-12-2005 passed by the Hon'ble Judges of the Supreme Court in Suo Moto

Case No.8 of 2005 a report from the Superintendent of Police Investigation, Nowshera was sent to the Apex Court through its Deputy Registrar Judicial on 13.12.2005, which is available on the record of Cr. Misc. No. 2/I of 2007 in Criminal Appeal No.28/P of 2005 and is being reproduced in extenso as it will help in clinching the issue under discussion:

"Memorandum:

"Kindly refer to the Order Sheet dated 8-12-2005 of the Supreme Court of Pakistan.(Copy attached).

A fresh case vide FIR No.363 dated 19.9.2005 under section 11/15/16 Offences of Zina (Enforcement of Hudood) Ordinance 1979/452 PPC Police Station Azakhel was registered on the report of complainant Ibad Khan son of Akbar Khan r/o Pirpiai Jan Abad. The complainant stated in his report that he alongwith his wife Mst. Akhtar Jehan and Mst. Shabnam (daughter) were asleep in the Veranda of their house. At about 0200 hrs they awoke on hue and cry of their daughter. They saw accused Mst. Nasreen w/o Sirajud Din and Sirajud Din with three unknown accused standing adjacent to their Charpies. Two of the accused took his daughter Mst. Shabnam from the Charpie. The complainant and his wife tried to rescue their daughter but both the accused pushed them back and threatened them with dire consequences. The

accused took his daughter out of the house and locked the door of the house from out side. The complainant charged accused Mst. Nasreen w/o Sirajud Din and Sirajud Din S/o Nazar Din r/o Pirpiai Station Koroona with three unknown accused for the commission of offence.

"The case was under investigation. Accused Sirajud Din was arrested and produced before the court in connection with Police remand. The court granted three days Police remand and the accused was interrogated. After the expiry of Police remand, the court remanded him to Judicial Lockup. Accused Mst. Nasreen got BBA from the court of Additional Sessions Judge, Nowshera, which was recalled by the court on 24-10-2005 and the Local Police of Police Station Azakhel tool her into custody.

"On the following day she was produced before the court of Shah Wali Ullah Hashmi, Civil Judge/Judicial Magistrate, Nowshera and request for Police remand was made but the court refused to grant Police remand in the light of Section 167 (V) Cr.P.C. wherein it is mentioned that when the accused forwarded to the Magistrate is female and is not involved in cases of Qatal or Dacoity, the Magistrate shall not authorize the detention of the accused in Police custody and the Police Officer making investigation shall interrogate the accused in the Prison in the presence of an Officer of Jail and a female Police Officer. Therefore, Mr. Khalid Naseem, Inspector Investigation, Nowshera was deputed to interrogate

Mst. Nasreen in the Prison. He interrogated the accused in the Prison and reported that the accused pleaded to be innocent.

"The Suo Moto case was fixed before the Supreme Court of Pakistan for hearing and adjourned from time to time.

On 22-11-2005, Mr. Awal Khan, Superintendent of Police, Investigation, Nowshera, Hidayat Shah, Inspector Legal, Nowshera and SI Muhammad Jan, Incharge investigation Nowshera attended the Honourable Supreme Court of Pakistan at Islamabad. The State was represented by Muhammad Saeed Khan Shangla, Additional Advocate General, NWFP, Peshawar. The case adjourned to 8-12-2005 and the Additional Advocate General was directed by the Court to ask the Inspector General of Police, NWFP, Peshawar as well as Dy. Inspector General of Police, Mardan Region, Mardan to make hectic efforts and recover the abductee within 15 days otherwise they shall appear before the court on the date fixed.

"A special team of professional Police Officers was constituted by the Deputy Inspector General of Police, Mardan Region, Mardan to investigate/ unearth the real facts of case vide FIR No.363 dated 19.9.2005 under section 11/15/16 Officers of Zina (Enforcement of Hudood) Ordinance 1979/452 PPC Police Station Azakhel.

The team interrogated the following persons:-

1. Tila Muhammad S/o Said Hassan r/o Shabqadar presently residing at Hameed Abad, Kakshal PS Yaka Tooth Peshawar.

2. Sarfaraz (aged about 21/22 years) son of Sirajud Din r/o Pirpiai.
3. Mst. Baseerat (aged about 18/19 years) d/o of Ghulam Said w/o Arshid Ali r/o Pirpiai presently residing at Chowki Drab.
4. Tanveerul Hassan S/o Tila Muhammad r/o Shabqadar presently residing at Hameed Abad, Kakshal PS Yaka Tooth Peshawar.
5. Mst. Safia d/o accused Sirajud Din.
6. Fazal Mula S/o Roohullah r/o Kangra Shabqadar, Charssadda.
7. Muhammad Fayaz S/o Muhammad Hamayun r/o Dagi Khel Nowshera Kalan.
8. Haji Muhammad Riaz S/o Juma Khan r/o Dheri Khel Nowshera Kalan.
9. Mst. Zeenat d/o accused Sirajud Din,
10. Farooq Shah S/o Tamber Shah r/o Pirpiai.
11. Miskeen Shah S/o Koodin r/o Mohallah Jan Abad, Pirpiai.

"During investigation, phone records of telephone No.0923-580414 was received wherein the number of mobile phones called on most occasions were checked. One of the mobile phone location turned out to be at Sukkar, wherein a Police party was dispatched to Sukkar.

"The said Police party reached Police Station "A" Section Sukkar on 3-12-2005 and reported their arrival in connection with the investigation of the case. The deputed police party alongwith SHO Police Station "A" Section Sukkar and Lady Police party were in search of the abductee in Sukkar Bazar when she came out of a beauty parlor and met the Police party in the main Bazar of Sukkar. She was handed over to Women Police Station where she spent night.

"On 4.12.2005, the Police party left Sukkar for Nowshera and on 5.12.2005 after reaching District Nowshera, the abducttee was produced before the court of Mr. Muhammad Arshid Khan, Senior Civil Judge, Nowshera for recording statement u/s 164 Cr.P.C. Her statement was recorded by the said Court (copy attached) wherein she charged the following accused for the previous case vide FIR No.401 dated 2.9.2001 u/s 10/11/16 offence of Zina

(Enforcement of Hudood) Ordinance 1979 Police Station Azakhel:-

1. Tanveer-ul-Hassan S/o Tila Muhammad r/o Hameed Abad Kakshal, PS Yaka tooth Peshawar.
2. Mst. Nasreen w/o Sirajud Din r/o Pirpiai.
3. Mst. Zeenat d/o Sirajud Din r/o Pirpiai.
4. Mst. Safia d/o Sirajud Din r/o Pirpiai.
5. Mst. Baseerat d/o Ghulam Said w/o Arshad Ali r/o Pirpiai.

"She further stated that she was subjected to immoral business. One Muhammad Rafi @ Jaja S/o Muhammad Shafi r/o Sukkar met her and she narrated the story of her abduction to him. The said Muhammad Rafi @ Jaja developed friendly relations with her but he did not commit Zina with her. However, one Abdul Hafeez Batti r/o Sukkar who was SDO WAPDA also used to come and met her and committed immoral act with her. During the said period she was handed over to a lady namely Robi Khan. After 5 or 6 months she was handed over to another lady namely Shamim and was taken to Sukkar to Qehba Khana. She spent some months in Sukkar and again handed over to Robi Khan and taken to Karachi. After that she was handed over to one Zafar Chowdary in Karachi.

"She also stated that on her return form Punjab she narrated the whole story to her parents at home. She spent about 2 ½ months with her parents and told them to marry her with Muhammad Rafi @ Jaja as he was liked by her but her parents refused to do so. Therefore, at about 2 ½ months back at morning time, she came out of her house and went Sukkar to meet Muhammad Rafi. She also took away the mobile phone of her father bearing No.0301-8813508. She further stated that she was not abducted by any one, however, she had gone to Sukkar with her own sweet will to contract marriage with Muhammad Rafi @ Jaja. Her parents were in the knowledge that she had not

been abducted, as she had as per her statement recorded under section 161 Cr.P.C. a very regular contract with her parents.

"On 8.12.2005 Mr. Awal Khan, Superintendent of Police, Investigation, Nowshera, Hidayat Shah Inspector Legal, Nowshera and SI Muhammad Jan attended the Honourable Supreme Court of Pakistan at Islamabad. They brought the facts of the case into the notice of the Honourable Judges. Mst Shabnam abductee was also produced before the court wherein she owned the statements recorded by her before the Judicial Magistrate, Nowshera.

"The Honourable Court directed that Investigation Agency shall complete the process of investigation and submit a final report through Deputy Registrar (Judicial) of the court within 7 days for perusal.

"On 9.12.2005, Mst Shabnam abductee was produced before the court and she was sent to Darul Aman Peshawar.

"A false case was reported by he complainant Ibad Khan against accused Sirajud Din & Mst. Nasreen. Therefore, on 12-12-2005 challan under section 173 Cr. P.C. was submitted before the court of District & Sessions Judge, Nowshera through proper channel for the cancellation of case and release of accused under section 169/63 Cr. P.C.

"On 12-12-2005, the District & Sessions Judge, Nowshera cancelled the case and released the accused u/s 169 Cr. P.C.

"A complaint u/s 182/211 PPC against the complainant of the case has already been instituted in the Court of Illaqa Magistrate, Nowshera.

"Submitted please.

(AWAL KHAN) PSP,
Superintendent of Police,
Investigation Nowshera.

No. 1878-80/P, Dated Nowshera the 13/12/2005.

Copy forwarded for information to:-

1. The Provincial Police Officer, NWFP, Peshawar.
2. The Advocate General, NWFP, Peshawar.
3. The Deputy Inspector General of Police, Mardan Region, Mardan.

10. It would be advantageous to recall at this stage that the father of Mst. Shabnum, the alleged abductee, moved an application addressed to Mr. Justice Bhagwan Das of the Supreme Court after Suo Moto notice had been taken by the Apex Court. This application bears an office note dated 13.07.2005 to the effect that the application be placed before Hon'ble Chief Justice along with case file and progress report. Available on record of the case is an order dated 08.07.2003 of the Deputy Inspector General of Police, Mardan Region-1 Mardan, apparently passed five days before the said application went to the Supreme Court, whereby an investigation team consisting of five police officers was constituted under the supervision of S.P. Investigation, Mardan "to dig out actual facts to solve the mystery surrounding the crime and to ensure that the offenders are brought to justice in the report of Mst. Shabnum daughter of Ibad Khan ....." It is

worthwhile mentioning that in paragraph 1 of the application addressed to Mr. Justice Bhagwan Das of the Supreme Court of Pakistan Tanveer ul Hassan respondent No.1 is not attributed the role of abduction or rape.

11. The issue now before us is the appeal against the acquittal whose judgment was recorded by learned trial court on 8.12.2004. The evidence of the prosecution has been elaborately discussed in a well reasoned adjudication. We asked the learned counsel for the State to formulate points in support of the contention that verdict of innocence be reversed. The learned counsel contended that the impugned judgment is in conflict with the settled law of the land and against the principles of natural justice. It was also contended that the trial was conducted in the absence of the abductee with the result that her statement could not be recorded and her medical examination was not available on file. It was further contended that a formal request was made to the trial court by the District Public Prosecutor for adjournment of the trial till the recovery of the abductee but the trial judge proceeded with the case which is absolutely illegal conduct. In this view of the matter the prosecution evidence was not supported by the abductee, the star witness of this case. It has also been urged that since

her recovery fresh material has been un-earthed which include names of those persons who have been charged by her vide her statement recorded in daily diary report dated 24.6.2005.

12. In order to disturb an order of acquittal it must be shown that the judgment was either perverse or was manifestly wrong with the result that miscarriage of justice has taken place. Sometimes even wrong assumption of facts becomes a ground for interference. The appellate court while examining evidence on record must be satisfied independently that prosecution evidence in quality and quantity adequately supports a verdict of conviction. It is not enough that on the given evidence a difference conclusion is possible. It is only when the conclusions arrived at by the trial court are such that no reasonable persons would agree that a case is made out for interference.

13. There is a marked difference between the standards that the appellate Courts maintain while hearing appeals against acquittal and appeals against conviction. Since a number of appeals against acquittal are filed in this court it is deemed desirable to enunciate, in a consolidated form, the principles that the superior court, maintain while deciding appeals

against acquittal. The appellate court while hearing arguments in an appeal against acquittal will ordinarily consider the following points before proceeding with the case:

i). It will not normally interfere in the verdict of acquittal.

ii). It will give due weight and consideration to the finding of the court below particularly the trial court which had the occasion of not only recording the evidence but also watching demeanor of the witnesses and attending to the plea of the person facing trial.

iii). What is the view of the trial judge regarding the credibility of witnesses.

iv). Verdict of acquittal affirms the initial plea that every person is presumed to be innocent unless proved guilty.

v) It is not a sufficient ground of interference that on re-appraisal of the evidence on record a different view might as well be formed.

vi). Whether re-appraisal of evidence shows any manifest wrong, perversity or uncalled for conclusion from facts proved on record?

vii). Whether the findings arrived at by the trial court are wholly artificial, shocking and ridiculous?

viii. Whether material evidence has been orally disregarded?

ix). Whether material evidence has been misread blatantly to an extent that miscarriage of justice has been occasioned?

x). Whether evidence has been brought on record illegally?

xi). There is however no bar upon the superior Courts to interfere in the acquittal judgment but the court exercise extra caution while exercising jurisdiction in appeals against acquittal.

xii). The rights of accused to any benefit of doubt.

xiii). Mere disregard of technicalities, in a criminal trial, without resulting injustice is not enough for interference.

14. These points have been inferred from various reports including the following which are being reproduced below:-

A. The dictum of the Board in the case of Sheo Swarup and others Vs. King Emperor reported as AIR 1934 P.C. 227 at page 228 is to the effect:

"But in exercising the power conferred by the Code and before reaching its conclusions upon facts, the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial; (3) the right of the accused to the benefit of any doubt; and (4) the slowness of an appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses."

B. In the case of Muhammad Ashiq versus Allah Bukhsh and another reported as PLD 1957 Supreme Court (Pak) 293 the Apex Court held that the Supreme Court will not, in a proper case, hesitate to interfere where the circumstances indicate that there has been a grave miscarriage of justice, by

some disregard of the forms of legal process, or by some violation of the principles of natural justice.

C. Next we advert to the case of Siraj Din Versus Kala and another reported as PLD 1964 S.C. 26. Mr. Justice Fazale Akbar at pages 44 through 46 was pleased to observe as under:-

> "I only venture to state separately the principles on which this Court exercises its limited jurisdiction in criminal appeals against acquittal. In this connection reference may be usefully made to the practice of the Judicial Committee for indicating the area of interference in criminal matters because this Court has also adopted that practice.
>
> "Before abolition of jurisdiction of the Privy Council the law did not provide for appeals against judgment of the High Court in criminal matters. The Judicial Committee which entertained appeals in criminal cases in exercise of the prerogative of the Crown repeatedly laid down the limits with which it exercised that power in criminal cases.
>
> "In Dal Singh Vs. King Emperor (1) the Judicial Committee while dealing with a criminal appeal observed:
>
> "The general principle is established that the Sovereign in Council does not act, in the exercise of prerogative right to review the course of justice in criminal cases in the free fashion of a fully constituted Court of Criminal Appeal. The exercise of the prerogative takes place only where it is shown that injustice of a serious and substantial character has occurred. A mere mistake on the part of the Court below, as for example in the admission of improper evidence, will not suffice if it has not led to injustice of a grave character. Nor do the Judicial Committee advice interference merely because they themselves would have taken a different view of evidence admitted. Such questions are, as a general rule, treated as being for the final decision of the Courts below.

"From the above as well as the other pronouncement of the Judicial Committee it is clear that they "will not review or interfere with the course of criminal proceedings unless it is shown that by a disregard of the forms of legal process or by some violation of the principles of natural justice or otherwise, substantial and grave injustice has been done". See also in re: Bertrand's case (2); Abraham Mallory Dillett (3); Taba Singh v. Emperor (4); Otto Geroge Gfeller v. The King (5); Mohindar Singh v. Emperor (6) and Muhammad Nawaz v. Emperor(7).

"Now reference may be made to a few observations of this Court indicating the limits within which it will interfere in such cases.

"In the case of Muhammad Ashiq Vs. Allah Bakhsh and another (1) on a petition for special leave to appeal against acquittal, this Court observed:

"In a more general view of the Court's jurisdiction, which is still being exercised on the principles laid down by the Privy Council in a number of cases where the limits of their jurisdiction in Criminal matters came under consideration, we feel no doubt in saying that the Court will not, in a proper case, hesitate to interfere where the circumstances indicate that there has been a grave miscarriage of justice by some disregard of the forms of legal process, or by some violation of the principles of natural justice.

"In the above case the Court while refusing leave observed: "Every point of criticism raised before us goes to the appreciation of the evidence by the High Court, in relation to the general circumstances of the incident, and as to these matters, the consistent practice of the Court has been not to interfere with such findings in the absence of "something so irregular or outrageous as to shock the very basis of justice."

In Fateh Muhammad Vs. Bagoo and others (2) Cornelius, J. as he then was, observed:

"This Court on principle hesitates to interfere with conclusions of fact recorded by High Courts.

"That is a principle which will be departed from only in very exceptional cases, namely, in those cases in which some other equally important or more important principle has been violated. Thus if the decisions of a question of fact has turned upon inadmissible evidence or upon a faulty reading of evidence, or where has been a departure from due procedure, in the reception of evidence or otherwise, in the trial of the matter, which is calculated to interfere with the due or safe dispensation of justice, interference by this Court will become necessary.

"In Zafar Ali Vs. The State (3) observations of Kaikaus, J. were also to the same effect:

"If there be no violation of a principle by the Courts below in the assessment of the evidence before them, this Court would not interfere, for it is not the practice of this Court to enter into an appreciation of evidence in criminal appeals.

"From the above it is clear that this Court sees no reasons to depart from the principles which have been laid down by the Judicial Committee defining the limits within which interference with the course of criminal justice dispensed in the subordinate Courts is warranted.

"This position has also not changed under the present Constitution. This Court's jurisdiction in respect of criminal appeals may be classed under two categories namely, cases where right of appeal is expressly granted under clause 2 of Article 58 of the Constitution; and the cases where the Court is called upon to exercise its power by granting special leave under clause 3 Article 58. Now clause 2 of Article 58 does not provide for appeal against acquittal but Article 58 (3) corresponds substantially to Article 160 of the late Constitution. It is therefore clear that the principles laid down in cases which were admitted under Article 160 of the late

Constitution still hold the field. Hence the question is: Whether having regard to the principles on which this Court exercises its limited jurisdiction under Article 58 (3) of the Constitution there are good grounds for interference with the order of acquittal.

"The points which the learned Judges had to decide was: Whether it was the appellant who murdered Abdur Rashid alias Sheeda? This was a pure question of fact turning on evidence. There were 3 eye witnesses whose evidence the High Court was not prepared to accept. There was certainly suspicious circumstances which demanded a most cautious approach. The High Court in appraising its reliability has given due weight to certain broad features of the case which throw doubt as to their presence at the time of occurrence. It will be impossible to say that the reasons given by the learned Judges of the High Court in rejecting their evidence were obviously untenable such as no prudent man could have based his decision on. It cannot therefore, be said that their findings of fact were such as were 'shocking to the judicial consciences'. Nor they have contravened any rule or legal principle in arriving at their conclusion. This being the position, I, in accordance with the normal practice of this Court in such matters, must dismiss this appeal"

The cases referred to above in this report at number 1 to 7 and then number 1 to 3 are as follows:-

(1) AIR 1917 PC 25

(2) (1867) 1 PC 520

(3) (1887) 12 A C 459

(4) AIR 1925 PC 59

(5) AIR 1943 PC 211

(6) AIR 1932 PC 234

(7) AIR 1941 PC 132

(1) PLD 1957 SC (Pak) 293 = (1957 SCR (Pak) 106

(2) PLD 1960 SC 286

(3) PLD (1962 SC 320

D. Next we will refer the case of Mian Said Baghdad versus Said Mian and two others reported as 1983 SCMR 117. In this case the Hon'ble Supreme Court was pleased to hold at page 121 as under:-

> "We find that in the ultimate analysis this case involves e-appraisement of the evidence and the learned Judges in the High Court have not, in appraising the evidence, either violated any principle of law or ignored any material fact. They have drawn conclusions which, on one view of the matter, could be drawn and the conclusions so drawn do not suffer from any patent error or exception. In the circumstances, even if we were to take different view on some of the matters, that would not justify interference with the order of acquittal which ensures, in the circumstances of the case, the safe administration of criminal justice. Both the appeals are, therefore, dismissed."

Reference was also made to the case of Fateh Muhammad Vs. Bagoo reported as PLD 1960 SC page 286, Zafar Ali's case reported as PLD 1963 SC 320 and the case of Muhammad Khursheed Vs. State reported as PLD 1963 SC 157.

E. Yet another authority on this point is the case of Muhammad Khan versus Maula Bukhsh and another reported as 1998 SCMR 570(575). In this case it was held that the standards to appraise the evidence in order of acquittal are quite different from those laid down for an appeal against conviction. In this case the police had recorded the statement of the witness after delay of 15 to 30 days which delay itself robbed the statement of its credibility. It is settled law that credibility of a witness is looked with serious suspicion if the statement under section 161 of the Code of Criminal Procedure was recorded with delay without offering any plausible

explanation. The Courts were reluctant to accept testimony which is not reliable and where the prosecution had tried to improve upon the case. The courts refuse to interfere in finding of acquittal unless it is perverse or fanciful.

F. The next report worthy of mention is the case State Versus Nazir Ahmed cited as 1999 SCMR 610. In this case the scope of appeal against acquittal was discussed on pages 628 and 630 as under:-

> "The Supreme Court would not, on principle ordinarily, interfere with an acquittal judgment and instead would give due weight and consideration to the finding of the Court acquitting the accused and that the mere fact that Supreme Court might have taken a different view on the reappraisal of the same evidence, would not be a ground for interference. If the conclusions reached by the acquitting Court were such that no reasonable person could conceivably reach and the same were impossible then Supreme Court would interfere in exceptional cases on overwhelming proof resulting in conclusive and irresistible conclusion.
>
> "No doubt ordinarily the acquittal judgment must be given due weight and mere possibility of recording different view on the reappraisal of the same evidence would not be sufficient for interference but where there is a blatant misreading of evidence leading to grave miscarriage of justice or make wholly artificial or shocking impressions which no reasonable person could perceive then under such exceptional circumstances, in the presence of overwhelming proof resulting in irresistible conclusion regarding involvement of accused, interference is justifiable."

G. In the case of Umar Hayat Vs. Jahangir reported as 2002 SCMR 629 leave was granted to the complainant for reappraisal of evidence and determining whether principles relating to fair administration of justice were followed by the High Court. It was found that the High

Court by ignoring the natural and reliable evidence coupled with elements of motive and recoveries had acquitted the accused on surmises and conjectures which had resulted in miscarriage of justice. The impugned judgment of the High Court was consequently set aside and the respondent was awarded life imprisonment.

H. Reference may also be made to the case of Mst. Roheeda Versus Khan Bahadur reported as 1992 SCMR 1036 at page 1044. It enumerates certain principles which should be kept in mind while deciding appeals against acquittal. The report proceeds to state as under:-

1. "In an appeal against the acquittal the Supreme Court would not on principle ordinarily interfere and instead would give due weight and consideration to the findings of Court acquitting the accused. This approach is slightly different than that in an appeal against conviction when leave is granted only for the re-appraisement of evidence which then is undertaken so as to see that benefit of every reasonable doubt should be extended to the accused. This difference of approach is mainly conditioned by the fact that the acquittal carries with it the two well-accepted presumptions: one initial, that, till found guilty, the accused is innocent; and two that again after the trial a Court below confirmed the assumption of innocence.

2. "The acquittal will not carry the second presumption and will also thus lose the first one if on points having conclusive effect on the end result the Court below: (a) disregarded material evidence; (2) misread such evidence; (c) received such evidence illegally.

3. "In either case the well-known principles of re-appraisement of evidence will have to be kept in view when examining the strength of the views expressed by the Court below. They will not be brushed aside lightly on mere assumption keeping always in view that a departure from the normal principle must be necessitated by obligatory

observance of some higher principle as noted above and for no other reason.

4. "The Court would not interfere with acquittal merely because on re-appraisal of the evidence it comes to the conclusion different from that of the Court acquitting the accused provided both the conclusions are reasonably possible. If however, the conclusion reached by that Court was such that no reasonable person would conceivably reach the same and was impossible then this Court would interfere in exceptional cases on overwhelming proof resulting in conclusion and irresistible conclusion; and that too with a view only to avoid grave miscarriage of justice and for no other purpose. The important test visualized in these cases, in this behalf was that the finding sought to be interfered with, after scrutiny under the foregoing searching light, should be found wholly as artificial, shocking and ridiculous." [p.1044]

The case of Ghulam Sikandar and another Versus Mamraz Khan and others reported as PLD 1985 SC 11 as well as the case of Lalu Versus the State reported as PLD 1959 Supreme Court (Pak) 258 were considered.

I. A Division Bench of the Lahore High Court in the case of the State Versus Muhammad Amin and others cited as 1985 P.Cr. L.J 472 at page 475 while adverting to the scope of powers of Superior Courts to exercise jurisdiction in appeals against acquittal observed:-

"In our view, in acquitting the accused, the learned trial court did not violate any principle of law or ignore any material fact in approaching the evidence on record nor we find that the conclusions drawn suffer from any patent error or exception. Even if different view on some of the matters is taken, that would not justify interference with order of acquittal, ensuring safe administration of criminal justice in circumstances of this case. Reliance for this view is placed on Said Baghdad v. Said Mina 1983 SCMR 117. In another case reported as Bakhat Baidar v. The State 1982 SCMR 420, it was held by the

Hon'ble Judges of the Supreme Court of Pakistan that no limitation although can be placed on power of Superior Courts to interfere in appeal against acquittal with findings recorded by trial Court, yet the conclusions arrived at by the trial Court upon such evidence merited proper weight and consideration before disturbing a finding of fact arrived at by the trial Judge who had the advantage of seeing witnesses and hearing accused."

J. Yet another case may be examined wherein after scanning fifteen authorities, the Hon'ble Supreme Court of Pakistan in the case of Ghulam Sikandar Versus Mamaraz Khan reported as PLD 1985 Supreme Court 11 at pages 18-19 (referred to above) observed as follows:-

"It is not necessary to state and comment upon the facts and circumstances of each of the afore-noted cases nor it is necessary to make an attempt to deduce any one single rule from these judgments which would help resolve the controversy involved in this case, without proper analysis of the material on record.

"However, notwithstanding the diversity of facts and circumstances of each case, amongst others, some of the important and consistently followed principles can be clearly visualized from the cited and other cases law on the question of setting aside an acquittal by this Court. They are as follows:-

(1) In an appeal against acquittal the Supreme Court would not on principle ordinarily interfere and instead would give due weight and consideration to the findings of Court acquitting and accused. This approach is slightly different than that in a an appeal against conviction when leave is granted only for the re-appraisement of evidence which then is under taken so as to see that benefit of every reasonable doubt should be extended to the accused. This difference of approach is mainly conditioned by the fact that the acquittal caries with it the two well-accepted presumptions: One initial,

that, till found guilty, the accused is innocent; and Two that again after the trial a Court below confirmed the assumption of innocence.

(2) "The acquittal will not carry the second presumption and will also thus loose the first one if on points having conclusive effect on the end result the Court below: (a) disregarded material evidence; (b) mis-read such evidence; c) received such evidence illegally.

(3) "In either case the well-known principles of re-appraisement of evidence will have to be kept in view when examining the strength of the views expressed by the Court below. They will not be brushed aside lightly on mere assumptions keeping always in view that a departure from the normal principle must be necessitated by obligatory observances of some higher principle as noted above and for no other reason.

(4) "The Court would not interfere with acquittal merely because on re-appraisal of the evidence it comes to the conclusion different from that of the Court acquitting the accused provided both the conclusions are reasonably possible. If however, the conclusion reached by that Court was such that no reasonable person would conceivable reach the same and was impossible then this Court would interfere in exceptional cases on overwhelming proof resulting in conclusion and irresistible conclusion; and that too with a view only to avoid grave miscarriage of justice and for no other purpose. The important test visualized in these cases, in this behalf was that the finding sought to be interfered with, after scrutiny under the foregoing searching light, should be found wholly as artificial, shocking and ridiculous."

15. Section 428 of the Code of Criminal Procedure authorizes the Appellate Court to record additional evidence if deemed necessary. As regards the scope of this section is concerned a Division Bench of the

Lahore High Court in the case of Ghulam Muhammad verses The State reported as PLD 1957 Lahore 263 at page 267 held that despite the wide terms in which the power to call for further evidence is expressed in section 428, Criminal Procedure Code, it is only to be exercised where additional evidence was either not available at the trial, or the party concerned was prevented from producing it either by circumstances beyond its control, or by reason of misunderstanding or mistake. No doubt the alleged abductee was not available at the time the trial took place but we are made aware by the parties that she appeared before the Hon'ble Judges of the Apex Court and owned the statement made by her before the Judicial Magistrate wherein she stated that she had just created a scene by implicating innocent and respectable persons with ulterior motives.

16. We are also conscious of the fact that a special Investigation Team had re-investigated the F.I.R. involving the present respondents and a fresh case FIR 363/2005 was also registered but everything proved futile. In this view of the matter we are not inclined to exercise discretion by calling for additional evidence under section 428 of the Code of Criminal Procedure. A judge is an arbiter. He is neither an investigator nor a

prosecutor. He is not a party to the case. He is not expected to fill up the gaps left by any party. The power has not to be utilized to cure inherent infirmities. It should not be an invitation for perjured evidence. He has to keep the interest of justice in view and his actions should not cause annoyance to persons connected with the case.

17. The record of Cr.Misc.A.No.2/I of 2007 in Criminal Appeal No.28/P of 2005 Part II shows that Mst. Shabnum, the victim, moved a constitutional petition in the Peshawar High Court, Peshawar on which the Hon'ble Judges passed the following order on 20.10.2005:-

> "We cannot proceed with this petition firstly for the reason that Criminal Appeal No.28/P of 2005 against the acquitted accused has been filed and is pending before Hon'ble Federal Shariat Court of Pakistan and secondly for the reason that august Apex Court has also taken Suo Moto Notice of this case. Therefore, it is adjourned for the time being".

18. As stated above the Apex Court of Pakistan took Suo Moto Notice and the matter was registered in the Supreme Court office as Suo Moto Reference No.8 of 2005. The date of the registration of this Suo Moto Reference is however not available on the record but the fourth ground of appeal discloses the fact that "yet another police diary report

sections 11,15,16 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and section 452 PPC against Siraj-ud-Din and his wife Nasreen and three other unknown armed persons". It is however clear that the said Siraj ud Din and others are not respondents in the Criminal Appeal No.28/P of 2005 and hence the question of another F.I.R. having been registered is not relevant because we are not aware as to what are the facts recorded therein. If however another FIR has been registered then the appellant can persue his remedy by way of the fresh criminal proceedings initiated by him and consequently no action is called for in this case which arose out of FIR. No. 401 dated 02.09.2001 registered with Police Station, Aza Khel district Nowshera and which has already culminated in the acquittal order passed by learned trial court vide its judgment dated 08.12.2004 passed in Hadd Case No. 74 of 2003.

19. The crux of the matter therefore is that the appellant desires reversal of judgment dated 08-12-2004 recorded by Sessions Judge, Nowshera in F.I.R. No.401 dated 02.09.2001 under sections 10,11 and 16 of Ordinance VII of 1979, and a consequent remand of the case for a denovo trial because after the recovery of abductee some more evidence

has reportedly been made available. The nature of the evidence has however not been identified nor any material placed on record by the appellant to connect the respondents with the offences mentioned in F.I.R. 401 dated 02.09.2001 in which the acquittal as noted above, has already been recorded. In other words the appellant does not want to take the appellate court into confidence as regards the nature and extent of the evidence that has been made available to them. The prayer for remanding the case for a de novo trial is not sustainable also because a second trial on the same charges emanating from the same F.I.R. will be offending not only the express provisions of the Code of Criminal Procedure as contained in section 403 (persons once convicted or acquitted not to be tried for the same offence) but will be violative of the guarantee enshrined in article 13(a) of the Constitution of Islamic Republic of Pakistan. Even otherwise this case is not covered by the principles which regulate the process of remand.

20. At this point it is worthwhile considering the principles enunciated by superior judiciary governing the question of remand of case by the appellate Courts. In the case of Moonda and others Versus The

State reported as PLD 1958 S.C. (Pak) 275 at page 284 it was held that remand may be ordered with direction to the trial court to try and hear the remanded case from a particular stage.

21. On the question of remand again the apex court in the case of Muhammad Jee Vs. Muhammad Ibrahim Shauq reported as 1988 SCMR 1691 at pages 1694 and 1695 held that:-

> "The rule, while remanding a criminal case for retrial as enunciated in Anwar and another Vs. The Crown (PLD 1955 F.C. 185), is that the exercise of discretion must be in accordance with the dictates of justice and not arbitrary and fanciful, while holding at the same time that " the Legislature itself does not define the limits or the grounds for the exercise of a discretion", but that regard should be had to the " trial Court's view of the evidence, the nature of the error committed, the magnitude of apprehended miscarriage or failure of justice, the possibility and extent of prejudice to the accused, the chances of conviction, and the expenses of a retrial. In Abdur Rashid Vs. The State (PLD 1962 SC 249) this Court gave the guidelines in the following words".
>
> "Where the prosecution witnesses are affected by partisanship, or their evidence gives rise to doubts of a reasonable character, or there are circumstances which do not support the prosecution case, and may lend support to the defence case, so as to render the defence version a possible one, there to remand the case for a retrial may amount merely to presenting a doubtful prosecution case before a Court of first instance for another opinion."
>
> "In Abdur Rashid Khondkar Vs. Chandu Matbar etc. (PLD 1964 S.C. 795) the principle was again re-affirmed in the following words:-

> "The governing consideration must always be whether, in relation to the proved facts and circumstances, justice has been done in accordance with law. In particular, full weight must be given, (1) to the fact that the appreciation of evidence by the trial court is based upon the court having seen and heard the witnesses, and (2) that the fact of that court having given the accused the benefit of any doubt serves to emphasise the need of giving full weight to the principle in the re-appraisement of the evidence that is necessitated by the appeal."

This was a case in which the trial court had acquitted the accused and the Hon'ble High Court was pleased to remand the case for retrial in its revisional jurisdiction. Leave was granted to the accused by the Hon'ble Supreme Court to consider "whether on the grounds aforesaid, the High Court has exercised its discretion on correct principles to remand the case for retrial." The Supreme Court was pleased ultimately to set aside the order of the High Court and accept appeal of the acquitted accused.

22. It has however to be kept in mind that retrial may be resorted to; a) where the accused did not get proper opportunity to cross-examine witnesses; b) or the court lacked jurisdiction or c) where the accused did not get proper opportunity to produce defence.

23. Before parting with the present appeal we will take up Criminal Miscellaneous Application No.15/P of 2005 moved along with

the Criminal Appeal No.28/P of 2005. We have perused the contents of this application and find that the date of knowledge of passing of the judgment dated 08.12.2004, the date of making application to procure attested copy of the said judgment and the date of receipt thereof were not mentioned though in an application for condonation of delay each and every day has to be explained. In particular the period that elapsed between the receipt of the impugned judgment and the date of filing of the present appeal has neither been indicated nor explained. In other words no material has been placed by the appellant for the consideration as to why the delay in filing of the criminal appeal be condoned. It appears that the applicant has taken it for granted that a simple application, un-supported by relevant material, was sufficient to secure condonation.

24. However three reasons have been advanced to seek condonation of the inordinate delay in filing this appeal; i) that the trial proceeded in the absence of the abductee; ii) that the certified copy of the judgment was not provided to the District Public Prosecutor by the court as required by section 373 of the Code of Criminal Procedure; and iii) that after recovery of abductee fresh material was available on file which

required further probe into the matter. It is significant to note, as stated above, that notwithstanding all these things the date of knowledge of the conclusion of the trial has not been mentioned nor has it been stated that application to obtain certified copy of the judgment was made on a particular date or what was even the date of the receipt of the judgment. These points were crucial before the application could be considered judicially. Gap between the date of the receipt of the judgment of the filing of the present appeal is also not explained. In this view of the matter it will be advantageous to examine the law relating to condonation and a few reports to consider the question of condonation of delay:

25 According to the Federal Shariat Court (Procedure) Rules, 1981 every appeal shall be presented to the Court within 60 days from the date of the order or decision appealed from. The proviso to Rule 18(1) however shows that the Court may for sufficient cause extend the period. As indicated above no sufficient cause has been shown by the applicant.

26. In the case of State versus Muhammad Akram and 5 others reported as PLD 1985 FSC 416 the Court after considering a few cases

came to the conclusion that the Federal Shariat Court (Procedure) Rules, 1981 were framed under Article 203J of the Constitution and therefore they are statutory rules and are of the category of a special law under section 29 of the limitation Act. and consequently the limitation prescribed under rule 18(1)(a) of these rules would apply to all appeals;

27. In the case of M/S Watan Woolen Mills versus Province of the Punjab reported as 1999 SCMR 249 it was held that the limitation for filing petition for leave to appeal started from the date the judgment was announced by the High Court and the fact that the petitioner allegedly came to know about the judgment five months after the announcement of judgment by the High Court clearly establishes negligence on his part and the Supreme Court declined to condone the delay in the circumstances;

28. In the case of Fakhr-ud-Din versus Fazal Karim reported as 1999 SCMR 795, another criminal matter, the Supreme Court was pleased to hold that in a petition for leave to appeal against acquittal, the element of laps of time is sufficient to provide protection to a person who has been acquitted, against further judicial process by way of a formal petition for

leave to appeal. In order to arrive at this conclusion the Honourable Supreme Court referred to the following cases:-

i. Mst.Rabia versus Rasool Bakhsh reported as PLD 1966 SC 531;

ii. Abdul Qayyum versus Ghulam Yasin reported as PLD 1963 SC 151;

iii. Nabi Bakhsh versus Ghulam Sarwar and others reported as 1968 SCMR 780;

iv. Piran Ditta versus the State and others reported as 1970 SCMR 282; and

v. Mst. Zeenat Sultan versus Mumtaz Khan reported as PLD 1994 SC 667.

29. In the case of Dr. Ghulam Farid Malik versus Ikram Saqlain Haider reported as 2003 YLR 1041 a learned Judge of the Lahore High Court relying on the case of Hussain Bakhsh versus Allah Bakhsh and others reported as PLJ 1981 SC 619 came to the conclusion that delay cannot be condoned unless it is shown that the delay was caused by an act of the acquitted accused or by circumstances of compelling nature. It was further held that the delay in filing the appeal can be condoned upto the announcement of the judgment or upto the supply of the copy of the order but in a case where the delay is not explained from the date the copy was obtained and the appeal was filed the condonation was not possible.

30. In yet another case of Mureed and 2 others versus State reported as 2003 SCMR 64 the element of delay of 145 days in filing the petition for leave to appeal, having not been explained with valid and cogent reasons, the delay was not condoned.

31. In the case of The State versus Nazir Ahmed and others reported as 1999 SCMR 610, already referred to above, the Hon'ble Supreme Court was pleased to condone delay of 63 days in a case whereby material evidence had been discredited contrary to principles laid down by the Supreme Court.

32. The contentions raised by the petitioner in his application for condonation of delay that the copy of the judgment was not sent by the trial court as required by section 373 of the Code of Criminal Procedure, and that the trial had proceeded in the absence of the abductee and further that fresh evidence was made available after recovery of the abductee are not sufficient causes in our view for the following reasons:-

a) Learned counsel has not relied upon any precedent to show that failure to send copy of the judgment would be a sufficient ground to seek condonation. Moreover the presumption is that the official acts have

been performed as required by law. No evidence has been brought on record to show that the learned trial Court failed to send a copy of the judgment to the prosecutor.

b) The prosecution opted to proceed with the case without awaiting recovery of the alleged abductee. Moreover the conduct of the alleged abductee, after she decided to make her presence known, has already been discussed above. The order of the Hon'ble Judges of the Supreme Court and the Police report are an appropriate rejoinder to the two contentions raised by learned counsel for the petitioner.

c) The application for stay of criminal proceedings was rejected by the trial court. That order was not challenged by prosecution and hence it attained finality. It cannot be urged now at this late stage.

33. In view of what has been stated above the Criminal Miscellaneous Application No.15/P of 2005 does neither disclose sufficient cause nor place on record relevant material on file particularly from the date of receiving the certified copy and the filing of the appeal. The delay has at all not been explained. The application does not make out a case for interference. However we have considered this appeal on merits as well because the controversy related to a sensitive issue in which the Hon'ble Supreme Court was persuaded to take Suo Moto notice though the actual facts were different.

34. In this view of the matter we are not inclined to interfere in the findings and conclusions arrived at by learned trial court, Nowshera in Hadd Case No.74 of 2003 through its judgment dated 08.12.2004 whereby the respondents were acquitted. Prayer for remand and retrial would not advance the cause of justice as it will only cause additional and uncalled for hardship to the accused. In order to administer justice the court has to maintain balance and thereby watch the interest of both the parties and not the prosecution party alone. Resultantly Criminal Appeal No. 28-P of 2005 is dismissed.

JUSTICE SYED AFZAL HAIDER

JUSTICE HAZIQUL KHAIRI
Chief Justice

Announced in Open Court
on 15-7-08 at
MUJEEB-UR-REHMAN

Fit for Reporting