IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

MR. JUSTICE AGHA RAFIQ AHMED KHAN
MR. JUSTICE SYED AFZAL HAIDER
MR. JUSTICE SHAHZADO SHAIKH

CRIMINAL APPEAL NO.207/L OF 2007

Imran Ashraf son of Haji Muhammad Ashraf, resident of Usman Wala P.S. Khudian, Tehsil and District Qasur.

.... Appellant

Versus.

The State .... Respondent

CRIMINAL APPEAL NO.208/L OF 2007

Ali Hassan son of Bashir resident of Usman Wala P.S. Khudian Tehsil and District Qasur.

Appellant

Versus

The State Respondent

CRIMINAL APPEAL NO.209/L OF 2007

1. Muhammad Amjad son of Muhammad Ashraf
2. Qurban alias Mithu son of Muhammad Ramzan
   Both resident of Usman Wala P.S. Khudian Tehsil and District Qasur

Appellants

Versus

The State Respondent

MURDER REFERENCE NO.2/L OF 2008

The State Appellant

Versus

Muhammad Amjad
Qurban alias Mithu

Respondents

Counsel for appellant in Cr.A.No.207/L/2007 .... Mr.Shahid Qayyum Chaudhry, Advocate

Counsel for appellant in Cr.A.No.208/L/2007 .... Mr. Shahid Zaheer Syed Advocate

Counsel for appellants in Cr. A.No.209/L/2007 .... Mr. Shawar Khilji.
Mr. Mureed Ali S.M. Bhutta, Advocates

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Counsel for the complainant	....	Mr. Safdar Javed Chaudhry, Advocate
Counsel for State	.....	Ch. Muhammad Ishaque, Deputy Prosecutor General
FIR No. Date and Police Station	.....	465/04, 09.10.2004 Khudian, Qasur
Date of Judgment of trial court	.....	30.10.2007
Dates of Institutions of Criminal Appeals.	.....	19.12.2007 respectively
Date of hearing	.....	14.02.2011
Date of decision	.....	08.03.2011

JUDGMENT:

JUSTICE SYED AFZAL HAIDER, J: This single judgment will dispose of the four connected matters as they have arisen out of one and the same judgment.

PRELIMINARY

i. Appellant Imran Ashraf through Criminal Appeal No.207/L/2007, whereas

ii. Appellant Ali Hassan through Criminal Appeal No.208/L/2007, and

iii. Appellants Muhammad Amjad and Qurban alias Mithu vide Criminal Appeal No.209/L/2007 seek to challenge judgment dated 30.10.2007 delivered by learned Additional Sessions Judge, Kasur whereby they were convicted under section 365(B) of Protection of Women (Criminal Law Amendment) Act, 2006 and sentenced to life imprisonment each with fine of Rs.50,000/- each or in default thereof to further undergo six months simple imprisonment each. They were also *"convicted under section 376(2) of Protection of Women (Criminal Law Amendment) Act, 2006"*

and sentenced to life imprisonment each. Appellants Amjad and Qurban were further convicted under section 302(b)/34 of the Pakistan Penal Code and sentenced to death. They were also held liable to pay compensation of Rs.1,00,000/- each under section 544-A of the Code of Criminal Procedure to the legal heirs of the deceased and in case of non-realization of said compensation to further undergo six months simple imprisonment each. However the learned trial court acquitted appellants Ali Hassan and Imran Ashraf from the offence under section 302 of the Pakistan Penal Code while extending benefit of doubt.

iv. The learned Additional Sessions Judge, Kasur has also moved a murder reference, registered in this Court as Criminal Murder Reference No.12/L of 2008, which has been put up for confirmation of death sentence along with the appeal matters.

PROSECUTION STORY

3. The prosecution case has been narrated by Manzoor Ali complainant PW.2, in his application CW 4/2 submitted before the District Police Officer, Kasur on

09.10.2004 for registration of criminal case against accused Muhammad Amjad, Imran Ashraf, Ali Hassan and Qurban alias Mithu. According to this crime information, Mst. Inayat Bibi, sister of complainant, was married to one Mehboob Ahmad and was residing in Usman Wala. The said Mehboob Ahmad died about three years ago leaving a widow two sons and two daughters. Mst. Rabia Mehboob, aged 18/19 years, daughter of the said Mst. Inayat Bibi was a teacher in the second shift in the Government Girls Primary School, Kot Salamatpura. The complaint was that the accused persons would tease her while she commuted between her house and the school. The accused were cautioned many times by the complainant but to no avail. On 07.10.2004 at 4.30 p.m. while she had reached the Railway line on her way back from school, the accused armed with pistols alongwith two unknown persons forcibly abducted her and put her in a Dala (Toyota Hilux Van). Her hue and cry

attracted Malik Mazhar-ul-Haq and Zafar Iqbal to the place of occurrence. They tried to rescue Mst. Rabia Mehboob the abductee but the accused extended threats and forcibly abducted Mst. Rabia Mehboob on gun point with intention to commit zina-bil-jabr with her. The complainant further stated that due to family honour he did not report the matter and beseeched the parents of accused persons for restoration of Mst. Rabia Mehboob but they did not oblige. On 08.10.2004 the complainant received a telephonic information that Mst. Rabia Mehboob was lying in Kasur Hospital in an injured condition. The complainant alongwith his brother Muhammad Mansha reached the Hospital. The doctor referred the patient to Myo Hospital, Lahore. The complainant approached Police Chowki Usmanwala for registration of case but the police did not accomodate whereafter the complainant submitted an application Ex.CW.4/2 before the District Police Officer, Kasur

on 09.10.2004 for registration of crime report against the accused persons. FIR No.465/04 Ex.CW4/1 was consequently registered at police station Khudian on 09.10.2004 under section 11 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 read with section 324/34 of the Pakistan Penal Code.

4. Investigation ensued as a consequence of registration of crime report. Haji Qasim Ali Inspector CW.4 undertook the investigation. He visited the place of occurrence. On 10.10.2004 he received information that the victim had died, therefore, he converted the offence from section 324 to section 302 of the Pakistan Penal Code. He reached to the DHQ Hospital, Kasur, prepared documents for conducting post mortem examination. He also received post mortem report Ex.PB. He recorded statements of Manzoor Ahmad complainant, and Muhammad Ali under section 161 of the

Code of Criminal Procedure. On 15.10.2004 eye-witnesses Mazhar-ur-Haq, Ahmad Ali and Zafar Iqbal appeared and made statements before him. On 18.10.2004 accused Amjad, Imran Ashraf, Ali Hassan and Qurban appeared before him but he arrested the accused persons on 20.10.2004 under the direction of learned Additional Sessions Judge, Kasur which order was issued on a petition filed by the complainant. He sent the accused to judicial lock up on 03.11.2004. On 06.11.2004 he recorded statements of fifteen persons under section 161 of the Code of Criminal Procedure. On 02.02.2005 the Station House Officer and the Deputy Superintendent of Police probed into the matter and after deleting the offences under section 302 of the Pakistan Penal Code as well as section 11 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 charged the accused under section 10 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979. The Station House Officer then

submitted investigation completion report under section 173 before the Court on 18.02.2005 requiring the accused persons to face trail.

5. It is pertinent to mention here that the complainant, being dissatisfied with the police investigation filed private complaint against all the four accused persons on 11.05.2005. The learned trial court in paragraph 5 of the impugned judgment has observed as under:-

> "In the challan case at serial No.2 I.O came to the conclusion that there were illicit relations between the accused Amjad and deceased Mst. Rabia Mehboob. She tried to convince the accused Amjad to conduct marriage with her through telephonic messages made on different telephone numbers as mentioned in the report under section 173 Cr.P.C. but the accused Amjad refused to get marriage with her she herself put her on fire. According to the report under section 173 Cr.P.C. all the accused are innocent in murder. However, accused Amjad is guilty for the offence under section 10/7/79 Islamic law."

PROSECUTION EVIDENCE

6. The learned trail court, however, proceeded with the complaint case alongwith the police report case. Charge was framed by the learned trial Court against accused persons on 29.10.2005 under sections 11 & 10(4) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 as well as sections 302, 34 of the Pakistan Penal Code. The accused did not plead guilty and claimed trial.

7. The complainant produced eight witnesses to prove his case whereas evidence of four witnesses was recorded by the learned trial court as Court Witnesses. The gist of the deposition of the witnesses is as follows:-

(i) PW.1 Mazhar-ul-Haq stated that on 07.10.2004 at about 3.30 p.m. he went to the workshop of Ahmad Ali in order to purchase a tractor. Zafar Iqbal Mistri was also present in the workshop. He alongwith Zafar Iqbal and Ahmad Ali left for Salamatpura and after crossing the Railway Station, they saw a Dala-wagon parked near water

tank of Railway. Six armed persons namely Amjad, Imran, Ali Hassan, Qurban alias Mithoo and two unknown persons were standing besides the Dala. Rabia Mehboob was coming from the opposite side. These armed persons forcibly put her in the Dala-wagon. On her hue and cry they ran towards the Dala but the accused threatened them and made good their escape towards Dhing Shah. The witness alongwith his companion went to the well of Manzoor and informed him.

(ii) Complainant Manzoor Ali appeared as PW.2 and endorsed the contents of his complaint Mark-A.

(iii) PW.3 Zafar Iqbal is an eye-witness of the alleged abduction of Rabia Mehboob near the Railway water tank. He supported the version of Mazhar-ul-Haq PW.1.

(iv) PW.4 Muhammad Arshad had identified the dead body of Mst. Rabia Mehboob at the time of post mortem examination and he also received the dead body from the Investigating Officer.

(v) Muhammad Ashraf appeared as PW.5 to state that he accompanied Ishaque up to the brick kiln of Abdul Ghafoor situated at village Bhallo as he had to purchase bricks. As they reached near the petrol

pump of Major Iftikhar situated at Ferozpur road near village Bhallo, they saw a girl who had caught fire on the back side of the petrol pump. They reached near the girl and in the meanwhile Akhtar also reached there on motorcycle. They tried to save her. Four armed boys were standing there alongwith a Dala. The girl was burnt and the boys ran away. The witness and his companions threw soil on the burning girl and extinguished the fire. Then they enquired about her name. She disclosed her identity as Mst. Rabia Mehboob resident of Mandi Usman Wala. She nominated Imran Ashraf, Ali Hassan, Amjad and Qurban alias Mithu and also stated that the aforementioned boys had abducted her on the previous day, took her to Lahore and committed zina-bil-jabr with her turn by turn. She further stated that when the boys were bringing her back, she protested against the treatment meted out to her upon which the said boys set her on fire near village Bhaloo. Many people gathered there and took her to hospital. The witness further sated that after six/seven days he came to know through newspapers about the death of the girl in the hospital. He alongwith Ishaque

went to Manzoor Ali complainant and informed him about the occurrence who took them to the police station but the police officer was not present on that day. However the police recorded his statement after 12/13 days.

(vi) PW.6 Akhter Hussain stated that since he was involved in some abduction case, so he did not want to give any evidence in this case.

(vii) PW.7 Dr. Farzana Shaheen had conducted post mortem examination of Mst. Rabia Mehboob and observed as under:-

"EXTERNAL APPEARANCE.

A dead body of young female about 18-19 years of age. She was almost 95% burnt. Grossly oedematous face, chest and whole four limbs but small part of face including upper lip, lower lip lower part of nose, small part of left cheek and right cheek were saved. Eyes and mouth were closed. Hair of frontal and parietal region were burnt. No clothes were present on the body. On PV examination hymen ruptured. Two vaginal swabs were taken and sent to chemical examiner, Lahore.

On dissection

Hyoid bone was intact. Brain oedematous. Chest cavity contained 2 litre blood stained fluid. Both lungs and heart were blackish in colour and oedimatious. All other organs were healthy.

Opinion

In my opinion the cause of death in this case was shock due to 95% of burning of body. Injury burning was ante mortem and sufficient to cause death in ordinary course of nature. Time between injury and death was about 2 to 3 days approximately and time between death and post mortem about 15 hours. After post mortem examination I handed over the stitched dead body, PMR, police papers and one sealed container which contained two vaginal swabs to Muhammad Akbar constable police station Khudian. Ex.PB is the correct carbon copy of post mortem report which is in my handwriting and bears my signatures. According to report of chemical examiner report No.2063-9 dated 13.10.2004, Ex.P.C, the result was that the swabs were stained with semen hence in my opinion she was subjected to sexual inter course. Ex.PB/1 is the diagram showing the location of injury is also in my handwriting and bears my signatures."

(viii) PW.8 Muhammad Akbar constable No.235 stated that the dead body was recovered from one PCO on 11.10.2004. He did not know the name of PCO. He carried the dead body to DHQ Hospital, Kasur and after medical examination the medical officer handed over to him one sealed parcel and a vial which he produced before the Investigating

Officer. This witness was declared hostile by the learned trial court on the request of learned DDA.

8. The learned trial Court also recorded statement of four Court Witnesses. The gist of their testimony is as under:-

(i) CW.1 Akbar Ali Assistant Sub Inspector stated that he was posted as Moharrar at police station Khudian. On 11.10.2004 Haji Qasim Ali Sub Inspector handed over to him one sealed phial for onward transmission to the office of Chemical Examiner, Lahore and on 13.10.2004 he handed over the same to Muhammad Amin constable for the said purpose.

(ii) CW.2 Mian Muhammad Rafique Sub Inspector stated that on 09.10.2004 Haji Qasim Ali Sub Inspector/Investigating Officer sent him to Lahore for recording statement of Rabia Mehboob victim. He reached at Mayo Hospital, Lahore and approached the Medical Officer, Gujranwala Ward, Mayo Hospital, Lahore and also moved an application Ex.CW.2/1 for recording statement of Rabia Mehboob victim. The Medical Officer refused the permission in writing, on the ground

that the patient was not able to make any statement. On 10.10.2004 he again went to Mayo Hospital, Lahore and repeated application Ex.CW.2/2 for recording statement of Rabia Mehboob which application was allowed by the Medical Officer as the patient was able to speak and understand. He went to the ward where Mst. Rabia Mehboob was admitted. Muhammad Mansha and her aunt were also present there in the ward. He recorded her statement CW.2/3.

(iii) CW.3 Muhammad Amin Constable No.163 deposited one sealed phial containing swabs in the office of Chemical Examiner, Lahore on 26.10.2004 which had been handed over to him by the Moharrar on the same day.

(iv) Cw.4 Haji Qasim Ali Inspector undertaken the investigation whose detail has already been mentioned in paragraph 4 of this judgment.

THE DEFENCE PLEA

9. The complainant closed his evidence on 27.04.2007. Thereafter the learned trial Court recorded statements of the accused under section 342 of the Code of

Criminal Procedure on 23.07.2007. The accused denied the allegations leveled against them and in reply to question "Why this case has been registered against you and why the complainant, PWs and victim's statements Ex.CW.2/3 involved you in this case. What do you say about it?" all the accused gave the same reply to both the questions. The said answers are as under:-

Answer: "The mere moving of application is no proof unless the doctor concerned appeared in the court and proved the same in accordance with law. These applications Ex.C.W.2/1, Ex.C.W.2/2 have absolutely no connection with the prosecution case because no doctor appeared in the court to own the endorsement. Moreover, the statement of the victim Rabia Mehboob which the prosecution wants to treat as dying declaration is neither signed by any doctor nor by C.W.2. According to Muhammad Rafique S.I. the said statement was thumb marked by one Mansha and one Mst. Zahida who according to C.W.2 Muhammad Rafique S.I. is aunt of the deceased. Even otherwise, no private person has any authority to sign or thumb marked the dying declaration in this way. Moreover, neither Mst. Zahida nor

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Muhammad Mansha appeared as P.Ws. before the court. The matter does not end here in the challan i.e. report under section 173 Cr.P.C. it has been written at the end that two statements of the deceased under section 161 Cr.P.C. were recorded, one by Muhammad Arif S.I. and the other by Muhammad Rafique S.I. The I.O. i.e. Haji Qasim Ali who prepared the report under section 173 Cr.P.C. has deposed before the Honourable Court that these two statements were very contradictory, unsigned by the doctor hence, the same were not made the part and parcel of the judicial record and report under section 173 Cr.P.C. is silent about it i.e. none of the two statements were annexed with the same. How the statements Ex.C.W.2/3 was smuggled in the judicial file is a matter which should be noticed seriously by the Honourable Court. To conclude regarding C.W.2/3, it is not worth the paper on which it has been written."

Answer: "The case against me is false and fabricated. There is no legally admissible statement of the victim on the judicial file. The prosecution has terribly failed to prove the so called statements/dying declaration CW.2/3 of the victim. It was not annexed to the report under section 173 Cr.P.C. because first statement under section 161 Cr.P.C. was recorded by Muhammad Arif S.I. and second was recorded by Muhammad Rafique S.I. It is strange, surprising and most unfortunate that this statement CW.2/3 does not bear the signature of the scribe Muhammad Rafique S.I. nor of any doctor nor it

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was certified or attested by a Magistrate. Therefore, this statement cannot be relied upon by the prosecution. It is a mockery of dying declaration. The actual occurrence as alleged by the prosecution remains totally unproved and there is no evidence of any witness who himself saw the victim being set on fire by any of the accused. It is proved on record that no body abducted the victim from amongst the accused nor she met death at the hands of any of the accused. So far as I am concerned it is categorically stated by I.O. Haji Qasim Ali Inspector CW.4 that I am not least concerned with the occurrence either abduction of the victim or regarding the murder of deceased Rabia Mehboob. It is brought to the notice of Honourable court that CW.2 Mian Muhammad Rafique has deposed that the victim was unable to see as well as unable to sign. So much so that CW.2 stated that he had not written any where that the statement of victim was read over to her. I have been involved in this case because of local politics, friction and malafide of the complainant in order to back mail me. The entire case speak volume of malafide on the part of the complainant and his so called witnesses produced by him. The so called dying declaration is classic example of malafide of the complainant in connivance with Muhammad Rafique S.I. C.W.2 which is neither here nor there."

10. The accused produced two witnesses in their defence. The gist of their account is as under:-

(i) Nazir Hussain appeared in defence of accused as DW.1 and stated as under:

> "I and his friend Riasat Ali had made a Park in the Railway compound in front of the school. I and Riasat made a programme to go to Bazar. At the same time Rabia Mehboob deceased came out from the school and she went towards Railway Lines, and she stopped near the "Zakheera" after crossing the Railway Lines. The two children which were her students aged about 8 and 5/6 years from there the said girls went towards the residential area leading to Bazar. We stayed at Station. She was leading ahead of us. After coming back she boarded the train alone. After that I do not know about the occurrence what happened. On 07.10.04 victim Rabia was present at the Railway Station at about 4.00 P.M. After leaving the train we returned to the Bazar. About one month after the registration of the case police of the concerned police station called us and I recorded the statement as stated above to the I.O. I also submitted the affidavits to the I.O. in this regard. I also appeared before the different I.Os of this case."

(ii) Muhammad Riasat appeared at the trial as DW.2 to state as under:-

> "I have made a park in front of school. I am residing near the school. On 7.10.2004 I was sitting in the park, alongwith Nazeer Hussain son of Qamer Din. We aimed to go to Bazar. In second shift Rabia Mehboob, deceased was teaching in the school. She was crossing us alongwith two school girls, aged about 8 and 6 years. She was ahead about 10/19 feet. We were on the Eastern side from Railway Line and victim Rabia Bibi and other school girls to western side from Railway Lines. Both the girls went to the "Zakheera" and victim Rabia Mehboob went to Railway Station and she reached near the Kanteen. We also followed her. After few minutes train was arrived. She was boarded in the train Boggee which was in front of Kanteen. After that we went to Bazar. Second day it has come to our knowledge that she has set fire. In our presence she alone boarded in the train. I also stated to the police as narrated today before the court."

THE RATIONALE FOR CONVICTION

11. The learned trial Court after completing codal formalities of the trial returned a verdict of guilt. Conviction

and corresponding sentences were awarded as indicated in the opening paragraph of this judgment. Hence these appeals and the Murder Reference before us.

12. The reasons that prevailed upon the learned trial Court to record conviction and sentences may be summed up as follows:-

(i) The dying declaration Ex.CW.2/3 of Mst. Rabia Mehboob was "correct word by word" and stood proved by the evidence of complainant and the Investigating Officer;

(ii) The defence witnesses corroborate the fact of boarding the train by victim as disclosed in the dying declaration;

(iii) Qurban accused failed to prove alibi;

(iv) The role of burning the victim, attributed to Amjad and Qurban appellant has been corroborated by the evidence of Muhammad Ashraf PW.5;

(v) That the victim was abducted from Khudian Railway Station by appellants Qurban alias Mithu,

Muhammad Amjad, Ali Hassan and Imran Ashraf and subjected to rape;

A careful scrutiny of the impugned judgment shows that the learned trial court essentially relied upon the dying declaration alone. In paragraphs 61 and 62 of the impugned judgment it was held that the dying declaration was correct "word by word." Consequently the four appellants were convicted for abducting the victim from Railway Station Khudian as well as for committing Zina bil Jabr and two appellants were awarded death sentence. In other words the story of abduction and rape as narrated in the dying declaration alone was believed. Oral testimony was discarded as mentioned elsewhere in this judgment.

13. There are two points that we would like to mention in this respect. Learned trial court stated that he was not awarding death sentence "because the accused are being

convicted on the basis of dying declaration and this occurrence is not witnessed by the witnesses as per law and procedure." This is not a valid reason to avoid imposing death penalty because if the learned trial court was morally convinced about the veracity of the story which was tragic then death penalty could not have been avoided as the victim had been ravished and burnt in a brutal manner. To kill an unarmed and a trapped female in such a situation is something horrible. Such an incident causes terror in the society. The second point is that the learned trial court ought to have known that the Protection of Woman (Criminal Law Amendment) Act 2006 amended Ordinance VII of 1979 and by virtue of section 5 inserted a new section 376-B in the Pakistan Penal Code. The conviction would, therefore, be recorded not under Act of 2006 but under section 376-B of Pakistan Penal Code.

ARGUMENTS OF CONTENDING PARTIES

14. We have gone through the file. Evidence placed on record as well as statements of accused have been perused. The relevant portions of the impugned judgments have been scanned. We have also heard the learned Counsel for contending parties at length.

15. Learned Counsel for Amjad and Qurban appellants urged the following points for consideration of this Court:-

i. It is a case of no evidence;

ii. Witnesses for the prosecution are interested;

iii. It is not possible for three other accused to be present when mother of Amjad was also there;

iv. The report of the Chemical Examiner is forged;

v. The oral evidence was disbelieved by learned trial Court;

vi. That Akhtar Hussain PW.6 did not say any thing against the accused;

vii. Abduction has not been proved;

viii. CW.2 Mian Muhammad Rafique Sub Inspector did not know as to what is a dying declaration;

ix. That the eye witnesses had either resiled, or were given up or have not been believed;

x. That the witnesses mentioned in the dying declaration were not produced at the trial; and

xi. The dying declaration suffers from contradictions.

16. Learned Counsel representing Ali Hassan appellant put forward the following contentions for consideration:-

i. That there are two dying declarations on record and one is at a loss to know which one has to be relied upon;

ii. That the dying declaration starts with Amjad accused and then proceed to introduce Mithoo as another accused;

iii. That it is not possible to determine as to who ignited the fire;

iv. That the procedure laid down in section 174 A of the Code of Criminal Procedure was not followed;

v. That in the absence of medico-legal report as well as the duly proved statement of the Medical Officer and other connected matters the dying declaration cannot be relied upon and lastly;

vi. The words attributed to the victim were not uttered by her.

17. Learned Counsel for Imran appellant urged that the factum of dying declaration does not find mention in the private complaint filed almost a month after the incident. It is, therefore, correct to state that the dying declaration is a concoction.

18. Learned Counsel for the complainant, on the other hand, laid stress on the fact that signatures of the victim or witnesses were not required on the dying declaration and that conviction can be recorded on a dying declaration alone. It was further contended that law does not insist on corroboration of the dying declaration. Lastly it was urged that PW.5 has corroborated the dying declaration. Learned Counsel placed reliance on the following reports:-

i. Ejaz Hussain and 2 others Vs. The State
1971 SCMR 516
ii. Farmanullah Vs. Qadeem Khan and another
PLJ 2001 SC 722

iii. Majeed Vs. The State
2010 SCMR 55

19. Learned DPG, on the other hand, supported the impugned judgment and submitted that:

(i) The prosecution has succeeded in proving the charge against the appellants;

(ii) The dying declaration has clinched the issue and it is not the legal requirement that a dying declaration be signed by the maker; and

(iii) There is no evidence to support the suggestion advanced by accused that it was a case of suicide and not homicide;

THREE BASIC ISSUES

20. Before we proceed to give our findings after appreciating the evidence and the points urged before us by the contending parties, it would be appropriate to address three essential questions that have arisen in this case. The *first* question relates to the meaning and scope of a *dying declaration* and the *second* question pertains to the mode and

manner of investigation by police and the medical examination of victims by Medical Officers in the light of section 174 A of the Code of Criminal Procedure. The *third* question has relevance with the conduct of trial by learned Additional Sessions Judge Kasur.

A. DYING DECLARATION

21. Law relating to dying declaration is governed by Article 46 of the Qanun-e-Shahadat Order, 1984 which used to be section 32 of the Evidence Act, 1872. The very text of the article is quite explicit. It reads as follows:-

> **Cases in which statement of relevant fact by person who is dead or cannot be found, etc, is relevant.** Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the Court unreasonable, are themselves relevant facts in the following cases:

(1) **When it relates to cause of death.** When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.

(3) **Or against interest of maker.** When the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it would expose or would have exposed him to a criminal prosecution or to a suit for damages.

22. As a general rule the best possible evidence is relied upon by Court in matters which require proof and consequently hearsay evidence is excluded from judicial consideration. This article however enumerates eight exceptions to the said general rule in relation to a statement whose maker is since dead. A declaration made by a dead person whether made

orally or in a written form becomes admissible. The first question is to ascertain as to which category of statements are covered by the term *dying declarations* for the purpose of criminal trial. The answer to this question is available in the opening words and item number (1) of Article 46 Supra. A dying declaration, therefore, is a statement, written or verbal made by a person who is dead, as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of his death comes into question. It includes a statement recorded by a Medical Officer or a Magistrate to ascertain the circumstances and cause of burn injuries sustained by a victim.

23 Dying declaration has been held to be indirect evidence but the fact of the matter is that such a statement reflects upon the personal and direct knowledge and usually an eye-witness account of the maker of the declaration. However

the question of actual weight that should be attached to such a statement depends upon the facts and circumstances of each case. The trial court or the appellate court invariably exercises judicial discretion is accepting or rejecting such a statement. The question of accepting a dying declaration arises out of necessity because, in the given circumstances, no better evidence is available. It is also an assumption that a person, who is closing his account in this world, would not tell a blatant lie.

24. In order that a dying declaration is relied upon it must be established that: (i) the maker of the statement is dead; ii) that the dying declaration is relevant whether or not its maker was under expectation of death; (iii) that the maker of declaration was a competent witness; (iv) that the declaration may be oral or in writing or even by way of meaningful gestures; (v) if it is available in written form then the identity of

the scribe and the circumstances under which it was written or dictated may be proved. It may be true that a person under apprehension of death may not be mendacious because he has to meet his Creator soon but the witness who recorded or listened to those words may not be conscious of his legal or moral obligation. The testimony of a living person about the pronouncement made by a dead person have to be accepted with due case and caution in the given circumstances of the case. (vi) the declaration relates in fact to the cause of his death or any of the circumstances resulting in his death; vii) it is otherwise believable like the testimony of any other witness. The entire object of this exercise is to ascertain the whole truth possible under the prevailing circumstances and viii) that the statement was not made several days before the occurrence. The words "*or as to any of the circumstances* of the *transaction* which *resulted in his death*" occurring in clause (1) are wide

enough to cover matters beyond the actual cause of death. Attending circumstances such as abduction, detention, escape, refusal of the victim to submit to the lascivious demands may precede the actual act of causing death of the victim. However, such circumstances should have proximate connection with the actual occurrence. Any statement which makes a reference to all the circumstances which had a nexus with what ultimately led to the unfortunate incident would also become relevant. It may, therefore, be concluded that not only the cause of death by way of suicide or homicide but the circumstances leading up to that sort of death would be admissible subject of course to the general principles laid down for safe administration of justice.

25. The basic difference between *testimony* and a *dying declaration* is that the law does not make it obligatory for the latter that the statutory procedure prescribed for a formal deposition in a court of law be observed. The other point of

difference is that dying declaration is not tested on the touchstone of cross-examination and thus it belongs to a special category of evidence. In case of any intrinsic inconsistency in the text of the declaration or with attending circumstances, the courts would look for some corroboration because such a declaration is usually made in the absence of accused. The possibility of fadding has also to be ruled out. Like the statement of an interested witness it would require close scrutiny essentially for the reason that its acceptance can result in the award of capital punishment. The judge is aware that it is only by operation of law that such a piece of evidence is declared to be relevant.

26. A dying declaration may not only incriminate its maker but such a statement would be admissible against all those persons who are allegedly involved in the episode which ultimately resulted in the un-natural death of the maker. This

aspect is covered by the term "*in cases in which the cause of that person's death comes into question*" as mentioned in Clause (1) of Article 46 of Qanun-e-Shahadat Order, 1984. A dying declaration may not be refused on the sole ground that there was delay in recording the same. Was the injured person in a position to give a statement? What was his orientation to the time, place and persons at the time the statement was recorded? It has been held that even gestures, which convey the message clearly, can be acted upon in given circumstances. A dying declaration is proved, at the trial, by the evidence of a witness who heard it being made by the deceased or by the evidence of a person who recorded it. In case it is recorded the scribe must appear and be available for cross-examination.

27. The category of a dying declaration made consequent upon grievous injuries caused by burn through fire, kerosene oil, acid, chemical or by any other way, has, since

2001, assumed a peculiar significance. The law and judicial practice relating to dying declaration is almost settled in as much as that (i) it may be oral or in writing; (ii) it is made *after* injuries have been inflicted and before death of the victim; (iii) it is not necessary to administer oath before statement is offered by the declarant; (iv) the presence of accused is also not essential; (v) the declaration may be heard or recorded by any one present at the spot; (vi) no particular form of recording a dying declaration has been prescribed. However, reliability of such a declaration is dependent upon attending circumstances. In view of the amendment effected in the Code of Criminal Procedure by way of addition of section 174 A, a dying declaration within the circumstances mentioned therein has received a different dimension. Special obligation has been imposed upon the Police and Medical Officer to act in the

prescribed manner as and when a person injured by burns etc. is brought before them.

28. We are conscious of the fact that a police officer should not be encouraged to record dying declarations in a case which he is investigating himself. He could have been influenced by the course of events in favour of one or the other party but of course, there can be situations, when the medical officer is not readily available and the witnesses are either not present at the spot or if accessible around the victim yet they are unable to record the statement. In such an eventuality the police officer may, instead of relying upon mere memory, take down notes or may even record the actual spoken words or gestures of the victim. The document so prepared can then be proved by the scribe formally during the trial, subject to scrutiny in cross-examination.

29. In the background of the instant case dying declaration made by Mst. Rabia Mehboob as to the cause of her death and the circumstances leading to her death has become relevant for the reason that the cause of her death is subject of dispute. Was it a case of suicide or homicide?

30. The following reports may be perused for a detailed discussion:

i. Farman Ahmed Vs. Muhammad Inayat and others
2007 SCMR 1825 [Supreme Court of Pakistan]

ii. Abdul Sattar alias Muhammad Ilyas Vs. The State
2007 YLR 1138 [Lahore]

iii. Badar Shehzad and another Vs. The State and another
2007 P Cr.L.J 1036 [Supreme Court (AJ&K)]

iv. Murtaza and others Vs. The State
2007 P Cr.L.J 1192 [Lahore]

v. Ali Zar Vs. Shah Khalid and another
2008 P Cr.L.J 1655 [Peshawar]

vi. Noor Muhammad Vs. The State
2009 P Cr.L.J 797 [Peshawar]

vii. Majeed Vs. The State
2010 SCMR 55 [Supreme Court of Pakistan]

viii. Arbab Tasleem Vs. The State
PLD 2010 Supreme Court 642

ix. B. Shashikala Vs. State of Andhra Pradesh
AIR 2004 Supreme Court 1610 [Andhra Pradesh]

x. Ravikumar alias Kutti Ravi Vs. State of Tamil Nadu
AIR 2006 Supreme Court 1448 [Madras]

xi. Shakuntala Vs. State of Haryana
AIR 2007 Supreme Court 2709 [Punjab and Haryana]

xii. Nallapati Sivaiah Vs. Sub-Divisional Officer, Guntur, A.P.
AIR 2008 Supreme Court 19 [Andhra Pradesh]

xiii. Dashrath alias Champa & Ors. Vs. State of Madhya Pradesh
AIR 2008 Supreme Court 316 [Madhya Pradesh]

xiv. Antram Vs. State of Maharashtra
AIR 2008 Supreme Court 409 [Bombay]

B. DEFIANCE OF LEGAL PROVISIONS

31. The occurrence under consideration in this judgment is one of those unfortunate cases in which the officers posted in the local police station and the police contingent attached with hospitals to keep a watch on all medico-legal incidents as also the medical officers both in Kasur Hospital and the East Surgical Ward (Female) of the Mayo Hospital Lahore, acted in highly irresponsible manner and in utter disregard of the provisions contained in section 174 A of the Code of Criminal Procedure. This provision was incorporated by virtue of Ordinance LXIV of 2001 dated 17.11.2001 in order

to combat the rising graph of incidents caused by grievous injuries particularly to women by burns through fire, oil, acid or chemicals etc. but inspite of this growing scourge the Medical Officers and Officers-in-Charge of Police Station fail to perform their moral and legal duty with the result that it has become difficult, if not impossible, to apportion blame in this case. The gravity of the offence deserves exemplary punishment but the investigation in this case was shoddy and dishonest and the trial was certainly below standard which has made our task rather difficult.

32. In order to determine the role of an Investigating Officer and the Medical Officer in cases of grievous injuries by burns etc, it would be appropriate to examine the relevant provision of the Code of Criminal Procedure.

33. Section 174 A of the Code of Criminal Procedure visualizes the following stages in cases of grievous injury caused by fire or other corrosive material.

S.174 A: **Grievous injury by burns.** ---(1) Where a person, grievously injured by burns through fire, kerosene oil, acid, chemical or by any other way, is brought to a Medical Officer on duty designated by the Provincial Government for this purpose or, such incident is reported to the Officer-in-Charge of a Police Station, such Medical Officer on duty, or, as the case may be, Officer-in-Charge of a Police Station, shall immediately given intimation thereof to the nearest Magistrate. Simultaneously, the Medical Officer on duty shall record the statement of the injured person immediately on arrival so as to ascertain the circumstances and cause of the burn injuries. The statement shall also be recorded by the Magistrate in case the injured person is still in a position to make the statement.

(2) The Medical Officer on duty, or, as the case may be, the Magistrate, before recording the statement under sub-section (1), shall satisfy himself that the injured person is not under any threat or duress. The statement so recorded shall be forwarded to the Sessions Judge and also to the District Superintendent of Police and Officer-in-Charge of the Police

Station, for such action as may be necessary under this Code.

(3) If the injured person is unable, for any reason, to make the statement, before the Magistrate, his statement recorded by the Medical Officer on duty under sub-section (1) shall be sent in sealed cover to the Magistrate or the trial Court if it is other than the Magistrate and may be accepted in evidence as a dying declaration if the injured person expires.

The facts of this case raise an obstinate question: What was the purpose after all, of incorporating section 174-A in the Code of Criminal Procedure?

34. It is evident from the record that the Investigating Officer consciously and deliberately, avoided to collect requisite information and necessary pieces of evidence. The following omissions will illustrate the point:-

i. Statement of the Medical Superintendent of District Headquarters Hospital, Kasur who initially examined the victim in the Emergency ward was not recorded. The record of her arrival in the hospital and her

departure therefrom on the crucial date was not secured. The doctor could have not only indicated the source which brought the victim to the hospital but could possibly relate the conversation that passed between the patient and the doctor and the circumstances surrounding the incident alongwith his decision to refer the patient to Mayo Hospital Lahore. It could help the Court in determining if at all it was a case of homicide. The Police Officer and the Medical Officer were legally bound to follow the procedure prescribed by section 174-A of the Code of Criminal Procedure.

ii. The record of East Surgical Ward (Female) of Mayo Hospital Lahore is conspicuously missing from the file. When was the patient admitted and in what condition and where is her injury report? What entries were made in the history sheet attached with every bed in the hospital? What was the role of police officers who are constantly on duty in Mayo Hospital round the clock to monitor such cases? Why was the statement of Medical Officers not recorded who had given written opinion about the capacity of victim on the two application Ex.CW.2/1 dated 09.10.2004, and application Ex.CW.2/2 dated 10.10.2004, recorded at

2.25 p.m. in the East Surgical Ward of Mayo Hospital. She is reported to have died on 10.10.2004 but at what time? Could she make such a detailed statement in that condition when she was almost dead? Knowledge about the vocal capacity of a charred woman, who died in the after noon, could have been better understood if the prosecution had not suppressed the production of medical evidence at the trial;

iii. Under what conditions was the victim taken to Mayo Hospital Lahore and how did the dead body reach the premises of District Hospital Kasur from Mayo Hospital Lahore on 10.10.2004. The prosecution is silent on this point as well? The post-mortem report indicates that CW.4 Haji Qasim Ali Sub Inspector and Muhammad Rafique Sub Inspector CW.2 had taken the dead body to the hospital but both of them are surprisingly silent on this point.

iv. Data of the telephonic messages/conversation from six different numbers (mentioned by SHO in his report dated 18.02.2005 prepared under section 173 of the Code of Criminal Procedure) was not collected.

v. The police officers not only introduced the theory of two dying declarations but introduced the fact that it

was signed by the victim and Muhammad Mansha. Significant concessions were given to the accused by the police officers. What was the motive for giving a twist to the story?

vi. It is significant to note that PW.8 Muhammad Akbar Constable 235/C Police Station Saddar Kasur went to the extent of saying that the dead body was recovered "from one PCO". He was declared hostile. From constable onward every police officer has contributed towards destruction or disappearance of material evidence; and

vii. CW 4 Haji Qasim Ali Inspector Incharge conceded in cross-examination as follows:-

> "It is absolutely correct that the statements of the victim Mst. Rabia Mehboob as recorded by Muhammad Arif S.I. and thereafter by Muhammad Rafique S.I. were full of contradictions with each other, therefore, I did not annex any of the statements with the report under section 173 Cr. P.C. None of these statements of the victim were attested by the doctor. I have seen the list of documents annexed with the challan on the bottom of report under section 173 Cr.P.C. whereas no mention of placing on record the afore mentioned statements of the victim under

section 161 Cr.P.C. for treating the same as dying declaration. I have mentioned only about the application of the victim.

This state of affairs calls for an Enquiry. The Enquiry Officer will have to consider various aspects of the case including the fact that two statements of the victim were recorded by two different police officers and this fact was eventually suppressed or there was in fact only one dying declaration and the story of second declaration has been purposely introduced. The purpose of police investigation is to collect evidence for enabling the court to arrive at a just decision. It is for the court to accept or discard the evidence. The Investigating Officer has no right to suppress evidence. It is dereliction of duty.

35. It is painful to observe that dishonest investigation is undertaken in a case where Zina-bil-Jabr, abduction and killing the victim by causing extensive burn injuries is at issue.

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We cannot close our eyes to this sort of inhuman conduct. We hereby direct the Inspector General of Police and the Health Secretary of the Government of the Punjab to hold enquiries into the conduct of the investigating team of FIR 465/2004 police station Khudian, District Kasur as well as the conduct of the erstwhile Medical Superintendent of District Head Quarters Hospital Kasur and the Medical Officers of East Surgical Female Ward of Mayo Hospital Lahore on duty on 09 and 10 October 2004. The enquiry will cover those police officers who were on duty in the Hospitals on the said dates both in DHQ Hospital Kasur and Mayo Hospital Lahore. The conduct of PW.8 will also be probed. Dereliction of duty should be determined. The result of the inquiry should be submitted to this Court through its Registrar by 15.04.

DUTY OF TRIAL COURT

36. Under Article 161 of Qanun-e-Shahadat Order, 1984, the courts have the power to put questions or order production of necessary evidence. The learned trial Court in this case could have exercised power under section 540 of the Code of Criminal Procedure as well as under Article 161 of Qanun-e-Shahadat Order, 1984. It was indeed miscarriage of justice in not invoking these legal provisions in the demanding circumstances of this case.

37. It may also be mentioned that under clause 2 of Section 265 F of the Code of Criminal Procedure, the court is under an obligation to ascertain from the public prosecutor or the complainant the names of persons *likely to be acquainted* with the facts of the case and to be able to give evidence for the prosecution, and thereafter, summon such persons to give evidence before it. This provision is not simply a procedural step but it manifests a positive intent to advance the cause of

justice for meeting a situation when any material evidence is left out for whatever motive. The Court, with the assistance of the state counsel, is such cases, will admit relevant material in evidence at a later stage and summon concerned witnesses in this regard. It is an established principle of law, that a court will not do what the statute expressly forbids. Neither consent nor waiver can justify action which is legally forbidden but that does not mean that one should turn a blind eye or a deaf ear to the stipulated provisions which enable a court to exercise judicial discretion for the purpose of admitting evidence for safe administration of justice.

38. We may, with advantage, refer to the case of Muhammad Murad Abro versus The State through A.G. Baluchistan, 2004 SCMR 966 at pages 968-969, where the purpose of section 540 ibid was explained in paragraph of the report in following words:-

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> The purpose of section 540, Cr.P.C. is to enable the Court to go at the truth of the matter to come to a proper conclusion in the case under trial and in the peculiar circumstances, imposes a duty on the Court to summon a person in the witness-box, whose evidence is essential for just decision of the case. Under first part of the section, the Court may in its discretion summon or recall a person or a witness for examination or re-examination but under the second part, it is obligatory for the Court to summon and examine or recall and re-examine any person if his evidence appears essential for just decision of the case but the Court cannot use the power under section 540, Cr.P.C. to advance the case of prosecution or that of the defence. However, this discretionary power should liberally be used in a case in which the examination of a person is material and is essential to come to the proper conclusion."

39. In the case of Maqbool vs. The State 2006 PCr.LJ 110, it was held that the power to recall or summon any witness is wide enough to give free hand to court of law to see that justice did not slip out of hand or gets defeated due to legal technicalities. It is the duty of Courts to make maximum efforts to discover truth in order to arrive at a correct decision. In so doing the Court will be justified in separating the padding from the actual facts. Unnecessary additions are resorted by police

officers with different motives which any be ignored without of course prejudicing the defence of accused. See also Mehboob vs. The State and 3 others 1989 PCr.LJ 2050.

40. The learned trial court utterly failed to discover truth in this case. The benefit of observing the procedure prescribed in the Code is that the wisdom of ages which had accumulated over a long period of time has been preserved in one legal instrument is reading available to the judge. The purpose of codifying the procedure is to bring within the reach of every individual judge the collective profundity of generations of jurists because it is humanly impossible for an individual to encompass the scope and extent of different matters which affect human rights and obligations in the field of administration of justice. Learned trial court failed to appreciate the factum of dying declaration. No meaningful discussion on this aspect of the case is available in the impugned judgment even though the learned trial judge observed that the decision of the case depended upon acceptability or otherwise of the dying declaration. The fact, whether such a detailed and lengthy statement could have been made by victim in that precarious condition of shock and trauma was not attended to at the trial stage.

CHRONOLOGY OF EVENTS:

41. It is advisable at this stage to examine and analyse the chain of events in this tragic case in order to arrive at some conclusion. The chronology of events in this case is as under:-

(i) The Incident took place on 07.10.2004 at 4.30 p.m.

(ii) PW.3 Zafar Iqbal, brother of Complainant Manzoor Ali PW.2, stated that he intimated the abduction part of story to complainant at 5.30 p.m. at his residence. Police is not informed of the incident by any one.

(iii) Telephoneic intimation is received by complainant PW.2 about presence of his niece, the victim in serious condition in District Hospital Kasur on 08.10.2004 at 5.30 p.m. He along with his brother Muhammad Mansha (not produced at the trial) went to the hospital.

(iv) The victim is referred to Mayo Hospital Lahore by Medical Superintendent, District Headquarter Hospital, Kasur on 08.10.2004. (Time not disclosed)

(v) Complainant went to Police Post on 06.10.2004 at 10.00 p.m. as stated in FIR Ex.CW.4/10 but according to his statement at the trial he went there at 10.00 a.m. (Time has been verified from the urdu version also);

(vi) PW.5 Muhammad Ashraf was one of those who tried to save a burning girl behind Petrol Pump around 11/12 noon. The victim apart from disclosing her identity nominated Imran Ashraf, Ali Hassan, Amjad and Qurban alias Mithoo as accused. The disclosure made by the victim would amount to her first dying declaration though the date of the statement made by victim is not mentioned by PW.5 whose statement was recorded by police after 12/13 days.

(vii) Application of complainant was addressed to DPO for registration of case on 09.10.2004 as local police was not taking necessary action;

(viii) Application Ex.CW.2/1 dated 09.10.2004 addressed to Medical Officer Female Gujranwala Ward Mayo Hospital Lahore was moved by Mian Muhammad Rafique CW.2 on which the Medical Officer reported that the "patient is not able to give

any statement as she is drowsy and not oriented to place, time and person". This report was made on 09.10.2004 at 2.40 p.m;

(ix) Second application was moved by CW.2 on 10.10.2004. The Medical Officer however recorded the following note on the same day at 02.25 p.m;

> She is able to speak and understand.
> Fit for statement.
>
> This document is exhibited as CW2/2.

(x) The dying declaration Ex.CW.2/3 of Mst. Rabia Mahboob victim was recorded by CW 2 Mian Muhammad Rafique on 10.10.2004. No time or date is mentioned on this document. This statement may be termed the second dying declaration. The investigation finalisation report prepared under section 173 of the Code of Criminal Procedure indicated the existence of yet another declaration recorded by Muhammad Arif S.I. This State of affairs is conceded by CW.2 in his cross-examination. This may be designated as the third dying declaration. The victim died the same evening.

Prosecution case was allowed to suffer not only on account of delay, slackness and dishonest investigation. The circumstances under which the victim was brought to Kasur Hospital are shrouded in mystery.

C. DUTY OF TRIAL COURT

42. The duty of a Court is to administer even handed justice. The Courts on the basis of judicial experience, legal expertise and knowledge make conscious effort to discover the truth whenever, they are called upon to decide a case. The courts are not required to act mechanically by confining themselves only to the evidence produced by the police officers alongwith the report prepared under section 173 of the Code of Criminal Procedure. The Code also empowers the Courts to summon *material witnesses and also examine such persons whose evidence appears to be essential to the just decision of a given case under section 540 ibid.* It is not proper exercise of jurisdiction to decide a case without availing of the opportunity

provided by section 540 ibid in given circumstances of a particular case. A perusal of section 540 ibid shows that *the trial Court is under an obligation to summon and examine such persons whose evidence appears to be essential to the just decision of the case.* Courts are not expected to be silent spectators or mute arbitrators. Reference may be made to the case of Rehmat Ali Versus The State and another 2005 YLR 742; Muhammad Niaz Khan Versus The State 2000 MLD 1419; The State Versus Iftikhar Hussain 2002 P.Cr.L.J 85; Maqbool Versus The State 2006 P.Cr.L.J 110; Muhammad Murad Abro Versus The State through A.G. Balochistan 2004 SCMR 966.

INJURIES FROM BURNS

43. The intensity of burns is calculated by medical experts on the basis of *Rule of Nine.* The element of shock and loss of protein rich fluid when about 30 percent of the body is affected by burns, is

sufficient to result into capilliary permeability which causes inter alia feeble pulse and death within 24 to 48 hours. In the case of 95 percent burns on the body the consequence is indeed frightening.

44. The Post Mortem report of the burnt female furnished by lady doctor. PW.7 is as under:-

> "A dead body of a young female about 18-19 years of age, she is almost 95% burned, grossly oedematous face, chest and whole four limbs but small part of face including upper lip, lower lip, lower part of nose, small part of left cheek and right cheek is saved. Eyes and mouth closed. Hair of frontal and parietal rigion are burned. No clothes are present on body."

45. This report does not disclose whether the burns fell in the category of Epidermal or Dermo-epidermal or Deep burns. The colour of the affected part or the posture of corpse was also not indicated. However, the medical report confirmed 95 percent burns. The Face was grossly edematous. The skiogram revealed that the entire body, front and back, was burnt except upper and lower lip and lower part of nose and small part of left and right cheek. There were no clothes on the dead body. The extent and severity of the burns is therefore, evident. Death in such cases is sure to occur within twenty four to forty eight hours, while

the victim is in shock and consequential stupor. In 95 percent burns, body is exposed to enormous heat with the result that it assumes a posture known as pugalistic or defence posture. In this state of affairs, it is not possible to believe that the victim was able to narrate a vivid and a detailed account of her abduction and rape by nominated individuals when her eyes were sealed on account of liquefaction of eye lids and surrounding flesh.

OBSERVATIONS AND CONCLUSIONS

46. Our observations and conclusion in view of what has been stated above are as follows:-

i. It is true that the FIR in this case could not have possibly indicated the misfortune that struck the victims after their abduction but the complaint in this case was lodged quite some time after the return of Mst. Rabia Mehboob. The complainant by then would have become aware of the entire episode. It is indeed surprising that the behind time complaint did allege abduction but it was intriguingly silent about the commission of Zina bil Jabr by a number of persons. This secretiveness adds to the magnitude of suspicion;

ii. We are clear in our mind that it is a case of elopement but in order to hold a person guilty there must be reliable evidence to establish the ingredients of the offence with which an accused is charged. In case, where more than one persons are charged to face trial in a case involving capital punishment and imprisonment for life, it is essential to establish the active and specific role of each participant. Sweeping statement about the guilt of an accused is not a substitute for conclusive proof.

iii. Even a single doubt in a prudent mind is sufficient to empower an accused to claim its benefit. Such a benefit is his right. It is not a matter of grace on the part of the trial or an appellate court. Reference Tariq Parvez vs. The State, 1995 SCMR 1345 considered in 2002 PCr.LJ 34 as also 2002 PCr.LJ 1312. See also Khuda Bux vs. The State 2002 YLR 2160; Muhammad Mahboob vs. The State PLD 2002 Lahore 587 refers to Islamic jurisprudence. Safeer vs. The State 2003 YLR 1861; Shah Maisar vs. State PLD 2003 Peshawar 84.

iv. It was held, in the case of Queen vs. Nabokisto that the golden rule of criminal jurisprudence is that an accused is presumed to be innocent till he is proved to be guilty. The law and judicial

conscience therefore, demands that the prosecution prove all facts which are compatible with the guilt of accused and incompatible with his innocence.

v. Guilt of an accused "must rest surely and firmly on the evidence produced in the case and plain inferences of the guilt may irresistably be drawn from the evidence". Reference Amrood Khan vs. The State 2002 SCMR 1568.

vi. The duty of court is certainly to administer justice but the courts will be loath to legalize injustice on technical grounds.

vii. The submission of charge sheet i.e, the report under section 173 of Code of Criminal Procedure in a police case before the trial court is indicative of the view point whether an offence has been committed. The final investigation report suggests that the inculpatory material has been collected during the investigation which led the investigation agency to the conclusion that the necessary probe has been completed and it has borne fruit, and the entire material has been disclosed in this basic charging document. Strangely enough the statement of the victim recorded by C.W.2 Muhammad Rafique SI

under section 161 of the Code of Criminal Procedure was neither annexed with the report under section 173 ibid nor was its copy supplied to the accused as required by clause (d) of section 265C ibid. This is a mandatory provision. It is not at all essential that such a person has been cited as witness in the calendar. The accused has a right to receive it and this right cannot be denied. It will be presumed that non compliance with this provision has caused prejudice to the accused. The object of this section was to fill the vacaum created by the abolition of commitment proceedings. The accused has, under this provision, the right to know the basis of case against him.

viii. C.W. Mian Muhammad Rafique S.I. on the question of recording the dying declaration stated as under:

> "I was ordered orally by C.W.4 Qasim Ali, the then SHO and DSP Bajwa to go the hospital and record the statement of the victim. I myself did not mention in any proceedings that I am going to record the statement of the victim on the verbal direction of C.W.4, the then DSP Bajwa. However, this proceeding has been motioned by C.W.4 Qasim Ali in daily report. I told the I.O. C.W.4 on 9.10.2004 that the victim was not in a position to record his statement. I did not depose while recording the examination in chief that the

victim also produced her signature on her statement, because she was not in a position to do so. Voluntarily stated that the Khala of the victim Zahida Bibi produced his signature while Muhammad Mansha produced thumb impression. As a matter of misunderstanding, I deposed in examination in chief that Muhammad Mansha produced signature. In fact, he produced thumb impression. It is correct that my chief examination was recorded in the open court as the Presiding Officer was dictating the same. Verbally I got myself introduced to the victim prior to recording the statement. However, this fact could not be reduced into writing. My general observation was that the victim could not see. I have not written any where that I read over the statement of the victim to the victim. It is incorrect to suggest that I never visited the hospital and recorded the statement of the victim."

ix. C.W. 4 Haji Qasim Ali Inspector stated that "on 18.2.2004, I prepared the challan and submitted to the Court." He also concedes that statement of victim recorded by CW.2 was handed over to him. This statement was not attested by Medical Officer. He does not say that dying declaration Ex.CW.2/3 was the same which was produced before him by Muhammad Rafique C.W.2.

x. Appellants have maintained that there were two separate dying declarations; one recorded by CW.2 Muhammad Rafique S.I. and the second recorded by Muhammad Arif S.I. The latter has neither appeared as a PW or as a CW at the trial. No police officer stated that the second dying declaration is available on record.

xi. We have gone through the contents of Ex.CW 2/3. Evidence of C.W.2 shows that it was the third dying declaration. It was neither signed by any scribe nor bore date and time when it was recorded. This statement is spread over two foolscap pages. Its text is not only longer than the FIR Ex.CW.4/1, but minute details about abduction and rape by appellants have been incorporated in this document. Questions and answers are also recorded on the second page. The victim was shown to be speaking but her eyes were closed. This statement cannot be relied upon for the short reasons that it was a case of 95% burns. Such a patient is in state of severe shock and is not able to speak even short coherent sentences. The dying declaration in question is a detailed account which may be possibly from a witness in normal circumstances.

xii. Learned trial court, while agreeing with the argument of learned counsel for the appellants in paragraph 53 of the impugned judgment found that:

> "I do agree with the learned counsel for the accused that the *oral evidence is not of such value that the accused be convicted. There are some contradictions between the oral and documentary evidence.* PW.1 and PW.3 deposed that they saw the Dalla near the Railway Station at six persons abducting the deceased Mst. Rabia Mehboob. This evidence is contradictory to the statement of the deceased. Because she stated that she set in the train alone. However, *the four accused were already in the compartment. As such oral evidence of PW.1 and PW.3 is not worth-relying.* PW.5 is the witness who saw the deceased burning and the accused there, where the deceased was being burnt. *He deposed in chief examination that he saw the deceased in burning position from the distance of 8/10 kilo meters.* The learned counsel for the accused tried to take the benefit from the distance between him and the place where the deceased was burning. He argued that it is not possible that one can see some thing from the distance of 8/10 kilo meters. No doubt, the learned counsel for the complainant has not given any reason as to why PW.5 stated such distance, but it might be definitely mistake of tongue, mistake in hearing or, mistake of typing, because in coming lines such impression is not developed. He is not witness

> when the deceased was set on fire. He saw the deceased in burning position alongwith P.W. Akhtar. He deposed that he can identify only the accused Amjad and Qurban."(Emphasis added)

xiii. The chain of events pertaining to the contaminated swabs has been miserably broken by the prosecution party itself. PW.7, the lady doctor, stated that she handed over one sealed container which contained two vaginal swabs to Muhammad Akbar Constable Police Station Khudian. She had conducted post mortem on *11.10.2004* at 8.45 A.M. Muhammad Ali ASI, CW.1 stated that on 11.10.2004, Haji Qasim Ali S.I. gave him one sealed phile for onward transmission to the office concerned which was handed over to Muhammad Amin Constable on *13.10.2004* for depositing the same in the office of Chemical Examiner Lahore. Muhammad Amin C.W.3 on the other hand stated that he received "one sealed phile" on *26.10.2004* from Muharrar Head Constable which was deposited by him on the same day intact in the office of Chemical Examiner, Lahore. The report of the Chemical Examiner Ex.PC reveals that it was received in his office on *11.10.2004.* It is thus clear that the police agency has consciously placed an umbrella of doubt as regards the factum of swabs. The corroborative value that this important link could have provided has been demolished because we do not know on which date the swabs were actually sent between 11.10.2004 and 26.10.2004.

47. The office is directed to send copies of this judgment to the Provincial Health Minister and Home Minister for circulation of relevant portion to all medico-legal teaching institutions including medical colleges and Police Establishment. The office is further directed to send a copy each to the Inspector General Police, the Punjab and the Health Secretary, the Punjab to hold enquiries. The result of the enquiry will be communicated to this court through its Registrar by the end of May 2011. The disciplinary action taken against the delinquents will also be communicated.

48. Before parting with this judgment, we would like to place on record our appreciation for the able assistance provided in this case by the learned counsel for the contending parties.

49. As a result of the discussion noted above, we are left with no option, but to accept the appeals as the suspicions are so compelling that we are constrained to grant benefit of doubt to the appellants. Resultantly Criminal Murder Reference No.12/L of 2008 is answered in the negative. Criminal Appeals No.207, 208 and 209/L of 2007 are accepted. The convictions and sentences recorded against the four appellants by learned trial court vide the impugned common judgment

dated 30-10-2007 delivered in complaint case No.24 of 2005 Sessions Trial No.14 of 2005 and Hudood case No.03 of 2005 Hudood Trial No.04 of 2005 are set aside. The four appellants mentioned in the opening paragraph of this judgment are acquitted of the charges levelled against them in the above mentioned trial and they shall be released forthwith unless required in any other case.

JUSTICE SYED AFZAL HAIDER

JUSTICE AGHA RAFIQ AHMED KHAN
Chief Justice

JUSTICE SHAHZADO SHAIKH

Announced in open Court
on 08.03.2011 at Islamabad
Mujeeb-ur-Rehman/-

Fit for reporting

JUSTICE SYED AFZAL HAIDER