

IN THE FEDERAL SHARIAT COURT

(Appellate Jurisdiction)

PRESENT

MR. JUSTICE SALAHUDDIN MIRZA
MR. JUSTICE SYED AFZAL HAIDER

Criminal Appeal No. 126/L of 2005.

Abdul Raof Khan son of Ghulam Qadir Khan, caste Pathi Pathanwali,
district Mianwali (Now confined in the Central Jail, Mianwali)

.... Appellant

Versus

1. Habib Ullah Khan son of Ayob Khan, caste Pathan, resident of Pathi
Pathanwali, Tehsil and District Mianwali.

2. The State Respondents

Counsel for appellant

Mr. Rab Nawaz Khan Niazi,
Advocate

Counsel for State ...

Mr. Asjad Javed Ghural,
Deputy Prosecutor General

FIR No. Date &
Police Station ...

dated
125/12.6.2003
Saddar Mianwali

Date of judgment of
trial court ...

4.4.2005

Date of Institution of Appeal ...

20.4.2005

Date of hearing of Appeal ...

22.09.2008

Date of decision by
Federal Shariat Court ...

22-09-2008

JUDGMENT**SYED AFZAL HAIDER, J. -**

This criminal appeal is directed against the judgment dated 04.04.2005 delivered by learned Additional Sessions Judge, Mianwali whereby the appellant Abdul Raof Khan son of Ghulam Qadir Khan has been convicted and sentenced as under:-

- i) Under section 324 of the Pakistan Penal Code to 10 years rigorous imprisonment with fine of Rs.20,000/-, in default whereof to further undergo 6 months simple imprisonment,
- ii) Under section 459 of the Pakistan Penal Code to imprisonment for life,
- iii) Under section 334 of the Pakistan Penal Code to 10 years rigorous imprisonment and liable for Ursh which would one half of Diyat,
- iv) Under sections 11/18 of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979 to 12 years and 6 months, being one half of imprisonment for life.

All the sentences have been ordered to run consecutively without benefit of section 382-B of the Code of Criminal Procedure.

PROSECUTION VERSION

2. Brief facts of the prosecution story as culled from the Private Complaint No.42/2004, filed by Habib Ullah Khan son of Ayub Khan,

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are that on 12.06.2003, the complainant got registered a crime report No.125/2003, stating therein that he earned his livelihood as a labourer. He had engaged her daughter Mst.Shagufta Ijaz (victim) with one Hayat Ullah Khan son of Dildar, caste Pathan, resident of Mudadawala and her Rukhsti was scheduled for 15.06.2003. On the night between 11/12-6-2003, he, his brother Inayat Ullah, son Rafi Ullah Khan, daughter Mst.Shagufta Ijaz (victim) and other inmates of the house were sleeping in the compound of the house. An electric bulb in the house was the source of light. At about 2.00 a.m (night), Shah Nawaz (acquitted accused) armed with shot gun, Abdul Raoof (appellant) armed with 30 bore pistol sons of Ghulam Qadir Khan, caste Pathan Sumbal, residents of the village entered the house of the complainant and after awakening Mst.Shagufta Ijaz (victim) forcibly asked her to go with them whereafter she started raising hue and cry. On hearing the noise, all the inmates of the house were awakened. Within their view, Abdul Raoof (appellant) shot a pistol fire targeting the daughter of the complainant which hit her right thigh as a

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result of which she fell down. The complainant party identified the accused in the light of the bulb and tried to apprehend them on which Shah Nawaz fired an aerial shot with his gun. The complainant party did not step forward for fear of life. The accused fled towards their homes waiving fire arms in the air. The motive behind the occurrence was that the accused party demanded the hand of Mst.Shagufta Ijaz (victim) for Abdul Raof (appellant) but the complainant refused and engaged her with one Hayat Ullah. Besides the complainant, the occurrence was also seen by his brother Inayat Ullah Khan and son Rafi Ullah. The injured lady Mst.Shagufta Ijaz was brought to Civil Hospital, Mianwali where she was admitted for medical treatment. The lady doctor handed over the medico-legal examination to the complainant to enable him to lodge crime report. Subsequently, the fractured leg of the victim was severed surgically by the doctor in order to save her life. The complainant further averred that Abdul Raof etc (accused) in furtherance of their common intention to kill his daughter, injured her by making straight fire shot. The complainant further reiterated that

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the accused were close relatives of Mr.Muhammad Iqbal Khan, Deputy Inspector General of Police and under his influence, the local police declared Shah Nawaz accused innocent by conducting partial investigation. He also asserted that the local police fabricated a fake affidavit of one Malik Muhammad Ramzan to establish that he alongwith Shah Nawaz traveled on Isa Khel Transport. The complainant has referred to many other facts in the private complaint to establish police inclination towards the accused party.

3. The learned trial Court on 13.12.2004 framed charge against both the accused Shah Nawaz Khan and Abdul Raouf Khan sons of Ghulam Qadir Khan for offences punishable under section 459 of the Pakistan Penal Code as well as section 11 of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979 and 324/334 of the Pakistan Penal Code. The accused pleaded not guilty and claimed trial.

PROSECUTION EVIDENCE

4. To prove its case, the prosecution produced as many as four witnesses.
5. PW-1 Mst.Shagufta Ijaz is the victim. She narrated the version as stated by her father in the private complaint Ex.P-E. PW-2 Habib Ullah Khan is complainant of the case. He narrated the facts as indicated above in para 2. However, he added that he also produced the blood stained clothes of the injured PW before the police which included Qameez (P-1), Shalwar (P-2) and Chaddar (P-3) which were taken into possession vide memo Ex.P-B. PW-3 is Muhammad Nawaz Assistant Sub Inspector. He is a witness of arrest of Abdul Raof (appellant) and recovery of pistol and it's cartridges. He stated that on 18.6.2003, he was posted at Police Station Saddar, Mianwali. On the same day, he was present alongwith Rab Nawaz Investigating Officer and other police officers/officials namely Amir Abdullah Assistant Sub Inspector, Head Constable Muhammad Afzal No.658 and Constable Matti Ullah No.540 at Adda Zala where an informer told

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Rab Nawaz Sub Inspector about the presence of Abdul Raof (appellant) at Adda Azeem Wala. Thereupon all the police officials reached Adda Azeem Wala when Rab Nawaz Sub Inspector arrested Abdul Raof (appellant) and on his personal search, an unlicensed 30 bore pistol with live cartridges was recovered which were taken into possession vide recovery memo Ex.P-C. The recovery memo was attested by him (PW-3) and Amir Abdullah Assistant Sub Inspector. On 7.8.2003, he obtained final result of medico-legal report and as per the result thereof, offence under section 334 of the Pakistan Penal Code was added in the charge. On 17.7.2003, challan of the case was received with an objection from District Attorney and he added the offences under sections 11/18 of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979 and 459 of the Pakistan Penal Code in compliance with the objection. In cross examination, he stated that he had not conducted any investigation in the case. PW-4 is lady doctor Mst.Khalida Nusrat, Women Medical Officer, District Headquarters Hospital, Mianwali. She had medically examined

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Mst.Shagufta Ijaz (victim) on 12.06.2003 vide her report 4/2003 and

noted the following injuries:

- “1. A firearm wound of entry 1 x 1 c.m with blackening all around on right lateral surface of thigh, 10 c.m above knee joint.
2. A firearm exit wound 1 x 1 c.m on medical surface of right side, 15 c.m above the knee.

Advised X-ray.”

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The lady doctor opined that

“Probable duration of between injury and examination was one to two hours. The injury was caused by fire-arm. Radiologist report indicated fracture of right femur bone at the middle of the shaft with very small foreign body, metalish shadow dust partical. Surgeon notes, amputation of right leg at above knee level down on 12.7.2003. Both the injuries were declared Itlaf Udw.”

COURT WITNESSES

Deposition of two Court witnesses is also available on record of this case.

6. a) Rab Nawaz Khan, Investigating Officer of the case, appeared as CW-1. He stated that on 12.6.2003, he was posted as Sub Inspector at Police Station Saddar, Mianwali. On the same day at 8:05 A.M, Habib Ullah complainant lodged the FIR Ex.P-A. He recorded his statement and thumb marked the same in token of it's correctness.

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He recorded the statement of Mst.Shagufta Ijaz (victim) at DHQ Hospital, Mianwali. Her clothes worn at the time of occurrence were also produced before him by Habib Ullah complainant which were taken into possession vide recovery memo Ex.P-B which is in his hand and bears his signatures. The same was attested by Habib Ullah (PW-2). The clothes are Shalwar (P-2), Shirt (P-1), Chadar (P-3). Then he proceeded to the place of occurrence. He inspected the site, prepared the unscaled site plan Ex.CW.1/1, took into possession blood stained earth from the place of occurrence and secured the same into a sealed parcel vide memo Ex.CW-1/2. He recorded statements of the PWs under section 161 of the Code of Criminal Procedure at the spot and he also interrogated the persons generally from the locality. On 18.3.2003, he arrested Abdul Raof (appellant) in this case from Adda Azeem Wala and on his disclosure during interrogation recovered pistol 30 bore in presence of the PWs Muhammad Nawaz and Amir Abdullah Assistant Sub Inspectors and was taken into possession through memo Ex.P-C. On finding the accused Abdul Raof guilty, he

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sent him to the judicial lock up on 19.6.2003. The accused Shah Nawaz obtained pre-arrest bail on 19.06.2003 and joined the investigation. He investigated the case for one day whereafter the investigation was transferred to Station House Officer by the District Police Officer on the request of the complainant. He also prepared site plan of the place of recovery of pistol Ex.CW-1/3 from Abdul Raof accused which is in his hand and bears his signatures. During cross examination, he stated that he investigated the case from 12.6.2003 to 26.6.2003.

b) CW-2 Badar Munir, Incharge Elite Force Mianwali, was then Station House Officer of Police Station Saddar, Mianwali. He also investigated the case. He stated that on 26.06.2003 when he was posted as Station House Officer at Police Station Saddar Mianwali, the investigation of the case was entrusted to him by the order of the District Police Officer. He interrogated both the parties and on 29.06.2003, he inspected the place of occurrence in presence of both the parties. On the same day, he interrogated both the parties in the

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police station. During his investigation, Shah Nawaz accused was found innocent. On 08.07.2003, he completed final report under section 173 of the Code of Criminal Procedure wherein Abdul Raof was to face the trial while accused Shah Nawaz was placed in column No.2. In cross examination, he stated that he received the affidavit of Muhammad Ramzan son of Alam Khan. He admitted that in the affidavit, there was cutting/over-writing on the name of transport company. He denied the suggestion that firstly word Esa was written under the cutting. He denied the suggestion that under the influence of one Iqbal Khan Sumbal Deputy Inspector General of Police, he wrongly declared Shah Nawaz accused as innocent with malafide intention. He admitted the suggestion that neither Tariq Mehmood nor Muhammad Ramzan appeared before him to join the investigation.

STATEMENT OF THE ACCUSED

7. After conclusion of the prosecution evidence, statements of both the accused were recorded under section 342 of the Code of Criminal Procedure on 21.02.2005. The accused inter-alia pleaded

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their innocence and asserted that they had been falsely implicated in the case. In reply to the question "why this case against you and why the P.Ws deposed against you", Abdul Raof (appellant) stated that:-

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"Actually one Abdullah Khan is Bhanja of father of the complainant Mst.Shagufta Ijaz (victim) who is son-in-law of one Sultan Khan Councillor to our U.C. Father of Mst.Shafufta Ijaz asked our family to vote for Sultan Khan but we refused and supported his rival. Due to this fact, father of the complainant became inimical to our family and for this reason, he has falsely implicated us in this case. Actually Mst.Shagufta Ijaz refused to marry Hayat Ullah with whom her father was marrying her and due to this refusal, her brother Rafi Ullah infuriated and fired at her leg. I had already engaged with Mst.Waziran Khatoon my Khalazad since 1993 and my Nikah was solemnized in that year and against my Nikah my real sister Mst.Parveen Akhtar was married with Abdul Raof Khalazad who is real brother of Mst.Waziran Khatoon. My sister Mst.Parveen Akhtar have three children. I never asked father of the complainant to marry her with me. This is totally false story."


DEFENCE EVIDENCE

8. Both the accused did not opt to make their statements under section 340(2) of the Code of Criminal Procedure. Only Shah Nawaz accused produced evidence in his defence comprising DWs namely Tariq Mehmood Khan Sumbal son of Muhammad Shaukat Khan and Muhammad Ramzan son of Alam Khan. Shah Nawaz accused has already been acquitted by the learned trial Court, therefore, there is no

need to narrate any thing about the evidence produced by appellant.

The appellant did not produce any witness in his defence.

POINTS RAISED FOR CONSIDERATION

9. We have heard learned counsel for the parties and the record has also been perused with their assistance. 

A. Learned counsel for the appellant has challenged the convictions and sentences on the following grounds:

i) That conviction under section 459 of the Pakistan Penal Code is not proper because not only the element of "lurking" is missing in the alleged house trespass but the place of occurrence being the courtyard of the house does not fall within the meaning of the word "building" as contemplated by section 459 of the Pakistan Penal Code. Reliance was placed on the case of "*Enayat Ali Vs. Emperor*" reported as AIR 1934 Calcutta 557.

ii) That conviction of the appellant under sections 11 and 18 of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979 is

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also not attracted because the element of attempt to abduct has not been proved against him by independent evidence.

iii) That the spirit of section 35 of the Code of Criminal Procedure has been violated because the learned trial Court has not stated as to which one sentence has to commence after the expiration of other sentences.

iv) That under section (2) of section 35 of the Code of Criminal Procedure, the maximum term of punishment in case of consecutive sentences cannot exceed 14 years.

v) That in view of the facts and circumstances of the case at best offences under sections 324 and 334 of the Pakistan Penal Code are made out against the appellant and

vi) Lastly it was urged that there has been a compromise between the parties and the complainant and the victim, present in Court, can testify to that effect. It was, therefore, argued that sentence already undergone by the appellant be deemed proper under the circumstances of the case.

B) Learned counsel for the State on the other hand while replying to the objections raised by learned counsel for the appellant submitted:-

i) That the Calcutta Authority relied upon by learned counsel for the appellant was not applicable because the courtyard where the occurrence took place was part of the house and in constant use by the respondents of the said house and further more, the defence had failed to establish that it was a place separate from the "building".

ii) That the crime report was lodged promptly. The incident took place at 2.00 a.m during the night between 11/12 June, 2003 whereas the report was made at 8:05 a.m on 12th June, 2003 notwithstanding the fact that the distance between place of occurrence and the Police Station is 12 Kilo Meters.

iii) That both the accused were nominated in the First Information Report.

iv) That the defence has failed to establish that the crime report was lodged due to enmity.

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v) That the crime weapon i.e pistol was recovered from the appellant.

vi) Mst.Shagufta Ijaz PW-1 had suffered permanent disability as her leg had been amputated.

vii) Learned counsel for the State frankly conceded that sections 11 and 18 of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979 are not attracted in the facts and circumstances of this case.

10. We have given anxious consideration to the facts and circumstances of the case and after hearing the arguments, a short order was dictated to the following effect:-

“For the reasons to be recorded later on, this appeal is dismissed. The conviction under section 459 of the Pakistan Penal Code is maintained but the sentence is reduced to 10 years’ rigorous imprisonment. The conviction and sentence under the other provisions of law as awarded by the learned trial Court are maintained with the exception of conviction under sections 11 & 18 of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979 under which the appellant is acquitted. All the sentences shall run concurrently. Benefit of section 382-B of the Code of Criminal Procedure shall not be given to the appellant.”

CONCLUSION

11. Reasons for the above mentioned short order are being detailed below for the purpose of concluding the hearing of Criminal appeal No.126-L/2005:

A) We agree that conviction and sentence under sections 11 and 18 of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979 recorded by the learned trial Court should be set aside because there is no independent corroboration of the element of abduction or preparation to commit the offence of abduction. The appellant was all alone. The other accused Shah Nawaz, brother of the appellant has been acquitted and the complainant has not filed any appeal against that acquittal. On the same evidence, one accused has already been acquitted. The prosecution had neither alleged dragging or attempt to take Mst.Shagufta Ijaz by force in furtherance of his object. No clothes were torn as there was no struggle between the appellant and Mst.Shagufta Ijaz PW-1. It appears that the appellant, in order to spoil the marriage of PW-1

entered the house and caused injuries to her. The part of story relating to abduction or attempt to abduct is, therefore, not convincing. Consequently the conviction and sentence recorded by the learned trial Court under section 11 as well as section 18 of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979 against the appellant is hereby set aside.

B. i) We do not agree with the objection raised by learned counsel for the appellant as regards the applicability of section 459 of the Pakistan Penal Code to the facts and circumstances of this case. PW-1 Mst.Shagufta Ijaz alongwith members of her family was asleep, during the hot summer month of June, in the courtyard. This courtyard served as entrance as well the place where members of the family assembled in the evening during summer season. As per practice, the residents of houses spend summer night in the courtyards wherever available. It is, therefore, not possible to agree with learned counsel that a courtyard is not part of the house. Learned counsel, however, laid stress on the word building

meaning thereby that there has to be a building and not a house to attract the mischief of section 459 of the Pakistan Penal Code.

ii. In order to strengthen his point, learned counsel for the appellant took us through the provisions of sections 443 and 459 of the Pakistan Penal Code where the word building occurs. The said two sections of the Pakistan Penal Code are being reproduced to understand the nature of objection raised by learned counsel for the appellant:

“Section 443 of the Pakistan Penal Code: Lurking house-trespass having taken precautions to conceal such house-trespass from some person who has a right to exclude or eject the trespasser from the building, tent or vessel which is the subject of the trespass, is said to commit “lurking house-trespass”.

Section 459 of the Pakistan Penal Code: Hurt caused whilst committing lurking house-trespass or house-breaking.-- Whoever, whilst committing lurking house-trespass or house-breaking, causes hurt to any person or attempts to commit qatl of, or hurt to, any person, shall be punished with imprisonment for life or imprisonment of either description for a term which may extend to ten years, and shall also be liable to the same punishment for committing qatl or causing hurt or attempting to cause Qatl or hurt as is specified in Chapter XVI of this Code.”

iii. It will be noticed that both the sections employ the term house-trespass and it is in this context that the word building has been used.

The dictionary meaning of the word building is “a structure such as a

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house or school that has a roof and walls." A cursory glance at the site plan Ex.CW-1/1 shows four room, compound wall and the courtyard which serves as main entrance of the house as well. The word building has been applied to houses as well as school and both these places consist of rooms, verandahs, open spaces and the boundary walls.

iv. The appellant, admittedly, violated the privacy of the home and entered the premises of the house and thus committed the offence of house-trespass at night which meant that he had taken precautions to conceal such house-trespass from the residents of the house who had a right to exclude or eject the trespasser from the "building" i.e the premises, being the subject matter of the trespass. Section 444 defines the parameters of "lurking house-trespass by night" by saying that commission of such an offence takes place when it happens after sunset and before sunrise. The incident under consideration took place at 2.00 a.m i.e dead of the night. The argument that since the offence

took place in the courtyard of the house so section 459 of the Pakistan Penal Code would not be applicable, is not valid in our view.

C) Now we will consider the objection raised on the strength of section 35 of the Code of Criminal Procedure about the length of sentences in case of a trial of two or more offences and also the sequence in which the sentences have to be served.

i. A perusal of section 35 of the Code of Criminal Procedure shows that where a person is convicted at one trial of two or more offences, the Court may award several prescribed punishments. When such punishment consists of imprisonments under different offences the Court may order commencement of one sentence after the expiration of the other in such order as it may think fit unless the Court directs that such punishments shall run concurrently. It, therefore, means that when a person is convicted for more than two offences at one trial the Court might as well ordinarily fix the order in which the convict has to undergo various sentences unless the Court directs that the punishments shall run concurrently.

ii. However, omission of the sequence in which the sentences have to run consecutively is not a failing on the part of the Court. The general rule is that sentences of imprisonment are to run consecutively whereas the concurrent running of sentences is an exception. The object of section 35 of the Code of Criminal Procedure is to increase the period of punishment that the Court is competent to inflict. If, however, the trial Court does not specify that the sentences have to run concurrently then the sentences will certainly run consecutively in the order in which the sentences are recorded in the judgment.

iii. The omission, in so many words, as regards the sequence of commencement of such sentence would not render the conviction illegal. It is at best an irregularity and as stated above the sequence has to be read in the judgment in accordance with the order in which convictions and sentences are recorded.

iv. Section 530 of the Code of Criminal Procedure contemplates seventeen actions which render the proceedings void. Non mention of the order in which the sentences have to be served does not render the

proceedings void. No failure of justice is caused by specific mention of the sequence in which the sentence has to be served. Even otherwise the Court awarding sentences under different offence at one trial had the jurisdiction to hold the trial. In this view of the matter, we are unable to agree with the contention of the learned counsel that the judgment should specifically spell out the order in which the sentences recorded under different sections have to commence. It is enough compliance if the judgment indicates the various sentences for different offences that are being awarded to the convict.

v. In so far as proviso (a) to sub-section (2) of section 35 of the Code of Criminal Procedure is concerned, it prohibits the giving of consecutive sentence in one trial beyond the period of fourteen years.

vi. In the instant case, the appellant has been convicted for four distinct offences and awarded separate sentences thereunder. The Court did not order the sentences to run concurrently. It held that "*all the sentences shall run consecutively.*" It obviously meant that the order in which the sentences have been recorded shall be the order in

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which the sentences of various imprisonments shall commence. In other words, the appellant will first serve sentence under section 324 of the Pakistan Penal Code and then suffer imprisonment under section 459 of the Pakistan Penal Code whereafter he will serve the sentence awarded under section 334 of the Pakistan Penal Code and lastly he will undergo the sentence awarded under the Hudood Law.

This is certainly violative of the provision contained in sub section (2) of section 35 of the Code of Criminal Procedure. The way out under the circumstances was to make the sentences run concurrently to avoid repugnancy to the provision of said sub section (2). To this extent the objection of the learned counsel for the appellant is valid.

D. Reference may be made to the case of "*Bashir and three others Vs. The State*" reported as PLD 1991 Supreme Court 1145 in which the following cases were reviewed:

- a) Javed Shaikh Vs. The State reported as 1985 SCMR 153,
- b) Juma Khan and another Vs. The State reported as 1986 SCMR 1573

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- c) Muhammad Ittefaq Vs. The State reported as 1986 SCMR 1627 and
- d) Khan Zaman and others Vs. The State reported as 1987 SCMR 1382

The apex Court in the above mentioned case of "*Bashir Vs. State*"

by majority opinion held as follows:-

B.
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(i) The sentence of life imprisonment, unless ordered to run concurrently under sub section (9) of section 35 of the Code of Criminal Procedure will run consecutively in view of its qualification in terms of years under section 57 of the Pakistan Penal Code;

and

(ii) the executive order of commutation of sentence of death into life imprisonment takes effect forthwith making such sentence to run concurrently with any other sentence ordered by the Court."

E. In view of what has been stated above the appeal is dismissed

with the following modification:-

i) Conviction under section 459 of the Pakistan Penal Code is maintained but the sentence is reduced to 10 years' rigorous imprisonment;

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- ii) Conviction under section 324 of the Pakistan Penal Code and the sentence imposed thereunder by the learned trial Court is maintained;
- iii) Conviction under section 334 of the Pakistan Penal Code and the sentence thereunder proposed by the learned trial Court is maintained;
- iv) Conviction under sections 11 and 18 of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979, as already announced is set aside;
- v) All the sentences shall run concurrently but the benefit of section 382-B of the Code of Criminal Procedure shall not be given to the appellant.
12. The appeal is disposed of in the above terms.

Sruaidar

JUSTICE SYED AFZAL HAIDER

[Signature]

JUSTICE SALAHUDDIN MIRZA

Announced on 22.09 2008
At Lahore
Amjad/*

Sruaidar
(Fit for reporting)