IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

MR.JUSTICE DR.FIDA MUHAMMAD KHAN
MR.JUSTICE MUHAMMAD ZAFAR YASIN
MR. JUSTICE SYED AFZAL HAIDER

CRIMINAL APPEAL NO. 35-/L OF 2007

Abdul Razzaq alias Nanha son of Abdul Rasheed, caste Arain,, resident of Chak No.117/JB, Dhanola, District Faisalabad.

.... Appellant

VERSUS

The State

..... Respondent

L/W Cr.Murder Reference No.8/L/2007

The State Vs. Abdul Razzaq alias Nanha

Counsel for appellant	---	Mr.Shoaib Zafar, Advocate
Counsel for the State	---	Qazi Zafar Iqbal, Addl.Prosecutor-General
F.I.R No. date and Police Station District	---	789/05, 03.09.2005, P.S. Nishatabad, Faisalabad.
Date of Judgment of the Trial Court	---	27.01.2007
Date of Institution	---	22.02.2007
Last date of hearing	---	02.07.2009
Date of Decision	---	02.07.2009
" " Announcement	—	10.07.2009

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JUDGMENT

JUSTICE SYED AFZAL HAIDER, J: Through this appeal Abdul Razzaq appellant has challenged the judgment dated 27.01.2007 delivered by learned Additional Sessions Judge, Faisalabad in Sessions Case No. 6-7/2007 and Sessions Trial No.3-7 of 2007 whereby he has been convicted and sentenced as follow:-

a. under section 302(b) of Pakistan Penal Code and sentenced to death with a sum of Rs.100,000/ as compensation to be paid to the legal heirs of the deceased and in default whereof to further undergo six months rigorous imprisonment.

b. He has further been convicted under section 452 of Pakistan Penal Code and sentenced to five years rigorous imprisonment with a fine of Rs.5000/- and in default whereof to further suffer one month rigorous imprisonment.

c. The appellant has also been convicted under section 18 read with section 10 of Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and sentenced to five years rigorous imprisonment.

d. Sentences on both counts i.e. under section 452 of Pakistan Penal Code and sections 18 read with 10 of the said Ordinance have been directed to run concurrently.

e. Benefit of section 382-B of the Code of Criminal Procedure was also granted to the appellant by the trial court.

The learned Additional District & Sessions Judge, Faisalabad has also moved a murder reference, registered in this Court as Criminal Murder Reference No. 8/L of 2007, which has been put up for confirmation of death sentence along with the main appeal.

PROSECUTION CASE

2. The facts leading up to this appeal are mentioned in crime report Ex.PB/1 dated 03.09.2005 lodged by the complainant Muhammad Mushtaq Shaukat P.W.10 wherein it is stated that he, an employee of District Accounts Office, was residing with his sister Mst. Sumera in her house situated in Chak No. 117/JB Dhanola for the last two months. On 13.08.2005 he was talking to Azam Imran, husband of Mst. Sumera, and Sabir Ali on the outer door of the house while Mst. Sumera and her children were sleeping in the room of her mother-in-law. At about 1.00. p.m. (noon) Mst. Sumera went to the other room for a wash but before she could reach there, accused Abdul Razzaq alias Nanha sought entry in the house after jumping the wall. He caught hold

of Mst. Sumera and tried to commit zina-bil-jabr with her. Mst. Sumera resisted and was about to raise hue and cry when the accused put his hands on her mouth. Thereafter Mst. Sumera told him that she would inform her people about this incident whereupon the accused picked up the bottle of kerosene oil lying in the room and threw the same upon Sumera and ignited fire with match box. On her hue and cry the complainant, Azam Imran and Sabir Ali were attracted to the spot. The accused climbed over the wall on the approach of the witnesses. The victim was taken to Allied Hospital, Faisalabad in an injured condition. Hence this case.

POLICE INVESTIGATION

3. The report of the incident dated 13.08.2005 was formally lodged by the complainant on 03.09.2005. The crime report was consequently registered as F.I.R. No. 789 with Police Station Nishatabad Faisalabad. The investigation was entrusted to Muhammad Saleem, Sub Inspector P.W-13 on the same day. He started

investigation on 04.09.2005 when he proceeded to the place of occurrence. He inspected the spot, recorded statements of witnesses under section 161 of the Code of Criminal Procedure and prepared site plan Ex.PK. On 05.09.2005 he went to Allied Hospital Faisalabad where he recorded statement of Mst. Sumera victim. On 12.09.2005 it came to his knowledge that Mst. Sumera had succumbed to her injuries whereafter he prepared injury statement Ex.PD and inquest report Ex.PE and then handed over the dead body to Muhammad Nawaz Constable No.584 for autopsy. After post-mortem Muhammad Nawaz Constable PW-12, passed on the post-mortem report, one sealed phial containing swabs one sealed envelope and chaddar/Aorni Ex.P1 to the Investigating Officer who took into possession these articles vide memo Ex.PJ. The memo was attested by Muhammad Nawaz Constable. The Investigating Officer thereafter added section 302 of Pakistan Penal Code in the case diary and relevant papers. On 14.09.2005 the Draftsman Aurangzeb, P.W.4, on the asking of

Investigating Officer, inspected the place of occurrence in the presence of the P.Ws. On 17.09.2005 he handed over to the Investigating Officer the site plan Ex.PF and Ex.PF/1 in duplicate. On 12.10.2005 accused Abdul Razzaq alongwith some other persons of the locality appeared before the Sub Inspector and participated in the investigation. His arrest was kept pending. Ex.PG is an application dated 03.09.2005, addressed to the Medical Officer Allied Hospital Faisalabad which was moved by the Investigating Officer to verify whether Mst. Sumera was in a fit condition to make a statement. The doctor stated as follows:-

> "I examined the patient at 8.35.p.m. on 3rd of September, 2005. She is not well oriented in time and space. *Her face and tongue cannot move normally due to burn. She is not fit for giving any statement. Furthermore she is unable to write her name or mark her finger prints*". (Emphasis added).

Strange enough, another application, Ex.PH was moved by the same Investigating Officer, not with the object of enquiring whether Mst.

Sumera had improved and was fit to make a statement but it was stated straight away in the application Ex.PH that permission be granted to record statement of Mst. Sumera. The doctor did neither refer without referring to his previous note of refusal on Ex.PG nor give new reasons as to how the patient, with third degree burn injuries and suffering consequential complications, had become able within 48 hours to understand queries and thereafter make a statement. The doctor surprisingly did not make himself available at the time the statement of the victim was supposed to be recorded. He allowed the Investigating Officer a free hand to write whatever he wanted without reference to the condition of victim. On 25.10.2005 Muhammad Saleem, Sub Inspector was transferred to the Police Lines *after having been suspended*. Further investigation was carried out by Khalid Mehmood Khan, Inspector/Station House Officer C.W.1. On 08.11.2005 Abdul Razzaq accused joined the Police investigation alongwith some other persons. On 13.11.2005 the complainant party also joined the investigation and

the investigation was conducted at the spot. On 17.11.2005 the accused was arrested and sent to judicial lock up. The Station House Officer again heard both the parties on 23.12.2005. After completion of the investigation a report under section 173 of the Code of Criminal Procedure was submitted in the court requiring the accused to face trial.

4. The learned trial court framed charges against the accused on 07.06.2006 under section 452 of Pakistan Penal Code as well as section 18 read with section 10 of Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and also under section 302 of Pakistan Penal Code. The accused did not plead guilty and claimed trial.

PROSECUTION EVIDENCE

5. The prosecution in order to prove its case produced thirteen witnesses. The gist of deposition of witnesses for the prosecution is as under:-

i. Dr. Bushra Tahir appeared as P.W.1 and deposed about initial medical examination of Mst.Sumera conducted by her on

13.08.2005 when Mst.Sumera was brought to the Allied Hospital in burnt/injured condition.

ii. Muhammad Pervaiz, Assistant Sub Inspector appeared at the trial as P.W.2. Nisar Ahmad Assistant Sub Inspector, P.W.7, had sent complaint Ex.PB on 03.09.2005 through Muhammad Saeed Constable No.184 to this witness who accordingly drafted formal F.I.R. Ex.PB/1 on the basis of the complaint without any addition or omission.

iii. Lady Dr. Kaneez Fatima Senior Demonstrator PMC Faisalabad appeared as P.W.3 to state that she performed the post mortem examination of deceased Sumera on 12.09.2005.

iv. Aurangzeb Draftsman appeared at the trial as P.W.4 to depose that on 14.09.2005 he visited the place of occurrence on the direction of police. On the pointation of witnesses he took rough notes at the spot and prepared site plan Ex.PF and Ex.PF/1 in the scale of one inch equal

to 16 feet and handed over the same to the Investigating Officer on 17.09.2005.

v. Abdul Ghaffar, Muharrir Head Constable appeared at the trial as P.W.5 and stated that on 23.09.2005 the Investigating Officer, Muhammad Saleem. P.W.13, handed over to him a sealed parcel said to contain swabs which were entrusted by him on 25.09.2005 to Zulfiqar Constable, No. 4121 P.W.6 for onward transmission to the Office of Chemical Examiner Lahore.

vi. Zulfiqar Ali, Constable No.4121 appeared as P.W.6 to state that on 25.09.2005 Abdul Ghaffar MHC P.W.5, handed over to him a sealed envelope and a sealed phial which was deposited intact in the Office of Chemical Examiner, Lahore on the same day.

vii. Nisar Ahmad, Sub Inspector appeared as P.W.7 to state that on 03.09.2005 he proceeded to Allied Hospital

Faisalabad on receipt of information and recorded the statement of Mushtaq Shaukat complainant, P.W.10. The complaint was sent to the police station for registration of F.I.R through Muhammad Saeed Constable No.184.

viii. Tahir Farooq appeared at the trial as P.W.8 and stated that on 12.09.2005 he identified the dead body of Mst. Sumera Azam at the time of her post mortem examination.

ix. Azam Imran husband of Mst. Sumera deceased appeared as P.W.9 to endorse the ocular account of the occurrence as narrated by the complainant.

x. P.W.10 Mushtaq Shaukat complainant appeared at the trial and reiterated the facts already narrated by him in the complaint Ex.PB.

xi. Dr.Muhammad Babar Riaz, the medical man, appeared as P.W.11.He had reported twice on the application moved by Investigating Officer for recording the statement of

Mst.Sumera.The reports are Ex.PG and Ex.PH/1 dated 03.09.2005 and 05.09.2005 respectively.

xii. Muhammad Nawaz constable No.584 appeared as P.W.12 and stated that on 12.09.2005 he escorted the dead body of Mst. Sumera for autopsy. The medical officer, after post mortem examination, handed over to him copy of post mortem report, police papers, sealed phial, one sealed envelope and chaddar which articles were handed over by him to Muhammad Saleem, Investigating Officer who took into possession the said material vide memo Ex.PJ. The memo was attested this witness.

xiii. Muhammad Saleem, P.W.13 is the Investigating Officer. The details of his investigation have already been mentioned in an earlier paragraph of this judgment.

STATEMENT OF ACCUSED

6. The learned trial court after close of the prosecution evidence recorded statement of accused Abdul Razzaq under section 342 of the Code of Criminal Procedure wherein he took the plea of innocence. In answer to question No.5: "Why this case against you and why the P.Ws have deposed against you" the accused stated as under:-

> "The case is false and the prosecution evidence is also false and fabricated. Mushtaq Shaukat complainant and Azam Imran P.W. prevailed upon the police and falsely implicated me in this case because of enmity. Mushtaq Shaukat complainant, Azam Imran and Sabir Ali P.Ws were not present at the alleged place of occurrence at the relevant time of occurrence. Mushtaq Shaukat complainant, Azam Imran and Sabir Ali P.Ws did not see the occurrence. Mushtaq Shaukat complainant and Azam Imran have made false statements being related to Mst. Sumera deceased and being inimical to me.
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> Actual facts of the case are that Mst.Sumera deceased was leading a miserable life and was unhappy with her husband Azam Imran P.W. She was fed up with Azam Imran because he had fallen into bad habits being a

spoiled child as he was only son of his father who had died prior to the instant occurrence. Azam Imran used to maltreat Sumera deceased prior to present occurrence and that whenever she demanded money for her maintenance and maintenance for the children, Azam Imran used to quarrel with her as he was leading the life as a vagabond and was a spendthrift and was not doing any substantial work to earn his livelihood and that he wasted the money which he had received as a result of the sale of the land. Azam Imran used to repeatedly quarrel with the deceased whenever she asked Azam Imran to mend his ways. Mst.Sumera was leading the life of a disappointed wife. She had tried to commit suicide earlier to the said occurrence. She was admitted in the hospital in the year 1996 for treatment because she tried to commit suicide by swallowing "NEELA THOTHA". She had also taken poisonous tablets to end her life and she had also drunk kerosene oil in order to commit suicide. Actually Azam Imran P.W. was responsible for the suicide committed by the deceased as she burnt herself by putting kerosene oil on her clothes and setting the same on fire and resultantly she died in the hospital. Azam Imran did not get proper treatment of the deceased as he himself wanted the deceased to die because of his conduct mentioned above.

Actually Mst. Sumera was got admitted in the Hospital by Imran s/o Kareem Bakhsh Caste Arain r/o Chak No.117/JB P.S. Nishatabad. I am innocent and was found so by the police in the investigation. The complainant and Azam Imran P.W. falsely got challaned me in this case and saved themselves by prevailing upon the police".

The accused neither made statement on oath under section 340(2) of the Code of Criminal Procedure nor produced any evidence in defence.

7. The learned trial court after examining the record and evidence produced by the prosecution found the accused guilty and recorded conviction and sentence as stated in the opening paragraph of this Judgment.

PROSECUTION CASE REVISITED

8. We have gone through the file. The oral testimony as well as the documentary evidence produced by the prosecution and the statement of accused recorded under section 342 of the Code of Criminal Procedurde has been perused. Relevant portions of the

impugned judgment have been scanned. The points urged by the contending parties have also been noted for consideration. Our observations are as follows:-

A. The first point that has attracted our attention is the inordinate delay in reporting the matter to the police. This is one of those case in which a conscious effort has been made to suppress information reaching the Police for a period extending to three weeks in an incident which from every standard was gruesome. Three week's time is more than sufficient for deliberation and consultation. A story of one's choice can be cooked up during the hiatus and supportive evidence can also be manipulated according as the circumstances of the case develop.

B. Still more unfortunate aspect of this case is the utter violation of the mandatory provisions contained in section 174-A of the Code of Criminal Procedure. This provision was incorporated in the

Code of Criminal Procedure through Ordinance LXIV of 2001 as from 17.11.2001. The provision reads as under:-

> **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 give 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 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.

This section stipulates complete charter of almost 16 steps that have to be taken whenever a person grievously injured by burns through fire, kerosene oil, acid, chemical or by any way is brought to a Medical Officer. In the instant case the Medical Officer neither recorded statement of the victim on 13.08.2005 nor did she carry out the legal obligation of informing the Police and Magistrate immediately after providing first aid to the victim nor was the Illaqa Magistrate informed about the incident by Police even on 03.09.2005 when a cognizable case was registered at the Police Station after 21 days of the occurrence. This is dereliction of duty. This is tantamount to impeding the course of justice. This attitude amounts to nullifying the execution of a very important legal provision added in the Code of Criminal Procedure on public demand. Within a span of three months we have come across two cases where the Medical and Police Officials have acted in complete disregard of section 174-A of the Code of Criminal Procedure. *A copy of this order must now be sent by the Office to the*

Inspectors General of Police and Provincial Ministers for Health in all the Provinces to issue strict instructions that violation of provisions of section 174-A of the Code of Criminal Procedure will henceforth not escape legal action.

C. The complainant Mushtaq Shaukat PW.10 was, on his own showing, an employee in District Accounts Office, Faisalabad at the time of incident. The incident took place in village 117-JB, Dhanowala, about 8 Kilo Meters away from Police Station Nishat Abad, Faisalabad and at about 12 kilometers distance from his office. August 13 was a working day and PW-10 was supposed to be in his office in Faisalabad till 3.00 p.m but the incident took place at 1.00 noon in the village. This was the time when he ought to have been in his office. However, the witness, in order to establish his presence at the time of occurrence took up the additional plea that he had put up his residence in the house of his deceased sister Mst. Sumera though in

cross-examination he admitted that he owned an Ihata and an independent residential house of his own in the same Chak No.117/JB. He also admitted that on account of traffic it takes time for a wagon to reach Chak No.117/JB from Millat Chowk. These facts convey a note of caution, while considering the credibility of his deposition and also his presence at the spot.

D. The site plan Ex.PF/prima-facie-1 reveals that point No.2 is a door not more than 3 feet wide around which three persons, including the complainant, saw the entire episode but it is extremely strange that neither the unarmed accused was challenged by any of the three witnesses nor any attempt was made by them to apprehend the culprit. Were these witnesses not present at the spot? The accused appears to have escaped from them with ease.

E. It is also a mystery as to how the accused spotted a bottle containing kerosene oil in the solitary room. Did he know that this inflammable item

would be used by him the moment the victim resisted his overtures. This episode should happen in a room where the children and mother of Azam were also present is all the more enigmatic particularly when this room was not a kitchen where the kerosene oil would be ordinarily available.

F. Could the piece of paper Ex.PH/2, said to be the statement of Mst. Sumera, recorded by Investigating Offier, PW.13 on 05.09.2005, be regarded as a dying declaration in view of the following facts?

i) That more than 90 percent of burns on her body made her condition "very serious" and a patient in this condition is not conscious for all practical purposes;

ii) Then on 03.09.2005 the doctor jotted down a 10 lines reasoned note to say very clearly that the patient was "not fit for giving any statement" and that she was "unable to write her name or mark her thumb impression"; and she could not move her face or tongue but on 05.09.2005 the same doctor,

without assigning any new reason whatsoever, took a U turn and stated simply that the patient was "medically fit for giving her statement". However the Doctor never said that she had improved considerably within a day or two as to move her face and tongue and also sign or thumb mark her statement.

iii) That the statement Ex.PH/2 recorded by PW.13 on 05.09.2005 when compared to Ex.PB dated 03.09.2005 reveals that the alleged statement of Mst. Sumera spread over 11 lines *relates the same 09 points in the same order as contained in the complaint Ex.PH/2 of her brother.* It is indeed a surprising coincidence, if not manipulated by prosecution. The incident took place on 13.08.2005 whereas the statement Ex.PH/2 was allegedly recorded on 05.09.2005, when the condition of the patient with more than ninety percent burns had deteriorated. The victim allegedly stated in

the dying declaration that she had become unconscious as a result of the burning episode but the witnesses, PW.9 and PW.10 deposed that the victim had disclosed the details of the incident. It is also worth noting that the dying declaration does not mention that she was brought to the hospital by her husband and brother nor does she disclose presence of any witness for the prosecution. A lurking doubt pervades the narrative.

iv) Dying declaration is an indirect form of evidence of the specie of a hearsay but it is capable of being treated as substantive piece of evidence. The question however remains as to the weight that can be attached to such a statement in the given circumstances of a case. Such a statement, made out of court without the endorsement of a Magistrate or a Medical man, at a belated stage is to be accepted with extreme caution.

v) It has been stated that the principle on which a dying declaration is admitted in evidence is contained in the legal maxim *Nemo moriturus praeumitur mentire* i.e. a person will not meet his Maker with a lie in his mouth. At the time of approaching death it is stated that all motivations to falsehood are silenced. This may be true but the fact remains that it must be established that such a statement was i) in fact made, ii) and was voluntary, iii) the circumstances under which it was made were transparent, iv) if the statement, for example was made in a hospital on the certification of a medical man, was it countersigned by the medical officer, v) could a Magistrate not have been called to attest to the fact of a dying declaration being made as is envisaged by the newly added provision, section 174-A of the Code of Criminal Procedure; and vi) whether the statement is free from infirmities and vii) that the statement was made at a time when there was no opportunity

to tutor the deceased or to make impassioned pleas to the victim in the name of family honour etc; viii) and of course it will also be seen if the medical evidence supported the fact that the victim was capable of making a statement. These factors would, in the circumstances of the case, be considered by the Court in forming an opinion about the value of a dying declaration. Since the dying declaration can become the sole factor for recording conviction and awarding extreme penalty so it is imperative to see that the statement amounting to a dying declaration is free from doubts and suspicions.

vi) Another curious feature of this case is the complete silence of the two alleged eye witnesses as to the mode and manner in which first aid was administered to the victim at the place of occurrence and how was the victim removed to the hospital. The burnt clothes were also not produced before the Police. These aspects are consequential because these factors help

establish whether the death, caused by thermal injuries, was a suicide or an accident or a case of homicide. These are the matters to be determined essentially by Police investigation, medical examination and disclosures by truthful witnesses, if there were any at the spot. This is crucial because injuries and consequent death by exposure to heat has medico-legal significance. The point of time when injuries from physical agents were caused upto the time the patient is entrusted to the medical care and is examined by medical persons in emergency, are all relevant facts and indicative of the possible course that the investigation might adopt. Surprisingly no clear cut clue is available on record of this case. The administrative failure jointly by Police and medical staff has added misery to this deplorable incident.

vii) The alleged statement of the victim dated 05.09.2005 Mark D recorded by PW.13, the Investigating Officer, in the

Zimnie is more detailed than Ex.PH/2. The latter is thumb marked and is briefer than the former written note. It appears that the statement was written at two different times or at least one after the other. The question is why should the two writings Mark D and Ex.PH/2 be not in the same handwriting although bearing signatures of the same person and why should one be briefer than the other?

viii) The MLR, Ex.PA, dated 13.08.2005 while giving the particulars of injures etc. does not nominate the appellant as the person who caused serious injuries to the victim. However, it records that the police was informed "through party" but it is axiomatic that the prosecution party consciously avoided approaching the police or even conveying information through third person. It is also recorded on the certificate that its copy was taken by Muhammad Azam only on 12.09.2005 i.e. on the date of her

death, one month after the incident which was about nine days after the crime report was registered. No one from her family was interested in obtaining a copy of the medical report to initiate proceedings against the culprit.

ix) The bottle containing kerosene oil, used in the crime, was not produced by the prosecution. The finger prints of the appellant on the bottle or the match box could have substantially advanced the case of prosecution in identifying the actual culprit but such an important piece of evidence was intentionally with-held. PW.13, the Investigating Officer stated that he did not find any bottle containing kerosene oil and matches at the spot. No burnt piece of cloth was found either.

x) CW.1 Khalid Mehmood Khan, Inspector Police, who had taken over investigation and had arrested the appellant on

17.11.2005 as well, stated that i) on 08.11.2005 and then on 18.11.2005 the complainant party did not appear before him though the appellant had appeared alongwith eight other persons; ii) that three women namely Mst. Rizwana, Mst. Sharifan and Mst. Yasmin, all neighbours, appeared before CW.1 on 13.11.2005 to attest to the innocence of accused; iii) that the appellant had been visiting Allied Hospital Faisalabad to inquire about her health and that (iv) according to his investigation the appellant was innocent because evidence disclosed that the deceased was fed up of her husband and that she *had on a previous occasion attempted suicide*. However the Inspector also stated that the appellant had developed illicit relations with accused.

xi) Muhammad Saleem, P.W.13, the Investigating Officer admitted that on 25.09.2005 one Muhammad Hanif, a relative of complainant party, appeared before him and stated that

Mst. Sumera had on a previous occasion attempted suicide. This Investigating Officer also complained that on 02.10.2005 and 17.10.2005 the complainant did not joint investigation. The complainant did not appear on 12.10.2005. Azam P.W.9, husband of Mst. Sumera appeared on 09.10.2005 whereas on different dates a number of persons appeared in defence of the appellant;

xii) Analysis of the deposition of P.W.9, Azam Imran husband of victim Mst. Sumera shows some significant omissions eg: a) He is not sure whether his statement was recorded at the place of occurrence or in the hospital, b) he did not state before police that he took the victim to the hospital, c) he stated that he took the Medico Legal Certificate of Mst. Sumera on 05.09.2005 but Ex.PA reveals that the certificate was taken on 12.09.2005 i.e. the date of death of Mst. Sumera, d) the bottle containing kerosene oil was not

produced before police and e) none of the three persons allegedly present at the spot attempted to catch hold of the un-armed accused and f) of course his conscious effort not to disclose the incident to the police.

xiii) P.W.9 also admitted that the distance between the place of occurrence and the office where P.W.10, the complainant, was employed was 12 kilometers and the latter was on duty on the date of incident. The witness further stated that his house is surrounded by residential houses. No one, however, appeared during investigation or at the trial stage to support the prosecution version. Residents of houses are usually available in their abodes at noon time during summers. Why were the neighbours not supporting the complainant party?

xiv) Dr. Bushra Tahir, PW-1, had examined the victim on 13.08.2005 as a serious emergency case with more than 90 percent burns. She stated that with such extensive burns a

patient cannot remain conscious. She admitted that she had not specifically mentioned in the medico legal certificate that the victim was brought to the hospital by her husband. She stated that it was possible that the victim was brought by her husband. She stated that it was possible that the victim was brought to the hospital by a neighbour.

xv) In case of prompt reporting the chances of preserving evidence of homicidal burning are bright. The bottle containing Kerosene, the match sticks, oil stains on floor, bedding, charred pieces of clothes and the presence of soot on the face of victim can furnish a clue to the Investigating Officer. In case of thermal injuries involving young women, the first suspect is some member of the family living in the same house who can have an easy and unsuspected access to the victim. This aspect of the case has also not been considered by the learned trial Court. Of course this aspect

was conveniently avoided by the complainant party which did not let the Police take cognizance of the case at the proper and appropriate time.

xvi) Ex.DB is an application dated 03.09.2005 *signed by* Muhammad Azam Imran requesting for medico legal result with an endorsement by Medical officer of even date. P.W.1 states that she issued the Medico Legal Certificate on 05.09.2005 and *obtained signatures* of Azam but the fact of the matter is that Ex.PA was issued on 12.09.2005 and signed by Medical Officer on the same day and is not signed by Muhammad Azam but bears *his left thumb impression and not his signatures* . Moreover the date 13.08.2005 at two places on Ex.PA is overwritten. P.W.9 however states that he took the MLC on 05.09.2005. He does not admit having signed Ex.PA/1. These facts do not augur well for the prosecution.

THE IMPUGNED JUDGMENT

9. The reasons that prevailed upon the learned trial court to record a verdict of guilt are as follows:-

i. that the abnormal delay of 21 days in reporting the matter to the police is not material as the preference of the near relatives was to pay attention to the injured person; (Paragraph 27 of the impugned judgment).

ii. that the failure of witnesses to apprehend the accused at the spot does not render the presence of eye witnesses as "highly doubtful" because there was no animosity of witnesses towards the accused. (Paragraph 28 of the impugned judgment)

iii. that "substitution in murder cases is a rare phenomenon". (Paragraph 28 of the impugned judgment);

iv. That the element of "consultation and deliberation by the prosecution may be presumed when the P.Ws have some malice against the nominated accused". (Paragraph 28 of the impugned judgment).

v. It is natural for the P.Ws to be present outside the house and enter the premises is when the occurrence was taking place. The learned trial court also found that it was common experience that accused person "act at more

speed than a person who haphazardly on hearing hue and cry comes to the spot". (Paragraph 28 of the impugned judgment).

vi. The time selected by accused to commit rape was noon when "normally in summer season the people have some sleep or rest"; (Paragraph 28 of the impugned judgment).

vii. That there is no material contradiction in the evidence of prosecution witnesses; (Paragraph 28 of the impugned judgment).

viii. The ocular account finds support from the dying declaration duly recorded by the Investigating Officer. (Paragraph 31 of the impugned judgment).

10. The observations of this Court enumerated above in paragraph 9 of this Judgment are a complete answer to the points that prevailed upon the learned trial court to convict the accused. The prosecution evidence has not been appreciated in proper perspective. The prosecution must stand on its own legs. The matter was not only of inordinate delay but conscious effort was made to suppress correct information reaching the police. Twenty one day's delay is sufficient for deliberation to build up a story. Learned trial court has not adverted

to the fact as to how on a working day, could P.W.10 reach the spot at 1.00.p.m. (noon) from a distance of 10/12 kilometers from his office in Faisalabad when according to the schedule he was to be in his office till 3.00 p.m. Secondly this witness has his own house in village Chak No.117/JB and why was he staying at the house of his sister. The effect of violating provisions of section 174 A of the Code of Criminal Procedure has also not been considered at all by the learned trial court. The learned trial Court has, however, observed that "when a witness deposes before the Court on oath, the presumption should be that he has spoken the truth and burden must lie on him who challenges the veracity of that statement." There is no cavil with this legal proposition but the fact of the matter is that examination-in-chief alone is not evidence. The cross-examination and the attending circumstances have to be considered by the Court. There is lot of wisdom in the principle of Tazkiyatush Shahood. Holy Quran has specifically laid down the principle in a) Ayat 6 Sura 49 that whenever some information reaches

you it must be looked into carefully to avoid any possible harm to any one even when it is not intended; b) evidence should not be suppressed, Ayat 283 Sura 2; c) truth and falsehood should not be mixed up; d) one should not follow that of which one has no knowledge; e) the best evidence should not be withheld when it is required (or summoned) Ayat 282 Sura 2; f) the believers should be firm in the cause of Allah, bearer of witnesses with justice and enmity of a people should not incite you to act otherwise than doing equity. Act justly for it is nearer to piety, Reference: Ayat 8 Sura 5; and the g) believers are directed to be maintainer of justice and bearer of witness for Allah's sake even if it may be against one's own self: Reference Ayat 135 Chapter 4.

11. Appreciation of evidence is an important chapter of administration of justice. A Judge has to be mindful of the inferences and deductions that can be reasonably drawn from the deposition of witnesses on material aspects of the case. The Court has to be all the more careful when an accused is facing the gallows. Judicial mind must

be thoroughly satisfied. Benefit of doubt on even one significant point is the entitlement of an accused. The facts and circumstances attending the dying declaration and the effect of long delay has not at all been considered in proper perspective and has not been judicially analyzed by the learned trial court. The ultimate decision to believe or not to believe in the evidence brought on record and the weight that should be given to it lies with the Court.

PRINCIPLES GOVERNING APPRECIATION OF EVIDENCE

12. It will be useful at this stage to recount some of the basic principles attending the weight or appreciation of evidence which have been established in the realm of administration of justice in our temporal Courts:

i) The definition of the words Evidence, Proved, Disproved and Not proved, in Article 2 of Qanun-e-Shahadat must be kept in mind while considering the evidence brought on record;

ii) In criminal trial the degree of proof is far more strict than in civil proceedings. The charge against the accused must be proved beyond all reasonable doubts which means that the ingredients of the offence with which the accused is charged must be proved by legal evidence. The requirement of proof in criminal matters cannot be in the realm of surmises, conjectures or suspicions;

iii) It must be ensured that the evidence brought on record is legally admissible;

iv) In order to judge credibility of a witness the surrounding circumstances as well as probabilities of the case have to be considered alongwith the demeanour of the witnesses;

v) The principles *falsus in uno falsus in omnibus* does not apply in criminal trials. The Court ought to disengage falsehood from truth in order to establish whether a piece of evidence has to be

believed and if so what weight should be attached to it in the ultimate analysis;

vi) Cases resting on circumstantial evidence must satisfy three tests; namely a) circumstances from which the inference of guilt is sought to be drawn, must be firmly established, b) such circumstances should, without fail point towards guilt of accused and c) the circumstances, taken as a whole, should form a chain so complete that there is no escape from the conclusion that the accused committed the crime;

vii) Appeal is continuation of the trial. The verdict of the trial Court is worthy of respect but the appellate Court revisits the entire case and is entitled to arrive at a conclusion independent of the findings of the trial Court.

viii) The observations of the trial Court regarding the conduct of witnesses at the trial deserves consideration but if the trial Court

does not record its findings and the reasons for such observation then the appellate Court is free to come to its own conclusion.

ix) The appellate Court does not have the initial advantage of observing the demeanour of the witnesses.

x) The trend of cross-examination coupled with the statement of accused to explain the crucial points appearing in evidence against him as well the defence evidence including his own statement on oath under section 340(2) of the Code of Criminal Procedure would constitute proper defence which has to be put in juxtaposition for proper appreciation. Appreciation of evidence does not mean appreciation of evidence of prosecution party alone.

xi) There is a material difference between appraisement of evidence in appeals against conviction and appeals against a verdict of acquittal.

xii) Since an appeal lies on (i) a question of fact (ii) a matter of law as well as (iii) the quantum of sentence so the accused has a very wide canvas to argue his case and the evidence will be given weight according to the points raised by defence.

xiii) A conviction cannot be sustained even if the prosecution story considered as a whole "may be true" until it is found that it "must be true"; but between "may be true" and "must be true" is inevitably a long distance to travel and the whole of this distance must be covered by legal reliable and unimpeachable evidence. Sarwan Vs. State AIR1957 SC 637, 545. See also 1991 Cr.L.J 1809, 1815 (SC). Reference Sarkar on Evidence.

xiv) It must be borne in mind that a) the onus of proving every thing essential to the establishment of the charge against the accused, lies upon the prosecution, b) the evidence must be such as to exclude to a moral certainty every reasonable doubt of the guilt of accused, c) it is always safe to acquit in matters of doubt, d) there must be clear and

unequivocal proof of corpus delicti, e) the hypothesis of delinquency should be consistent with all the facts proved, f) the more heinous the offence the more care and caution should be exercised. (Sarker on Evidence).

xv) It might as well be stated the Qanun-e-Shahadat Order, 1984 does not down any rule as to the weight to be attached to evidence when admitted nor is such a rule "possible for proper appreciation". It is a matter of experience, common sense and knowledge of human affairs. The question of appreciation depends on so many circumstances that it is impossible to lay down hard and false rules. "The law has left it to the Court to decide whether the evidence has to be believed or not, and if believed what weight should be given to it."

xvi) In an appeal against conviction the view point of appellate Court is not whether the decision is faulty but whether the conviction recorded by the trial Court is justified.

13. It should also be borne in mind that recording of a dying declaration by a police officer who is also investigating the case should not be encouraged particularly when a Magistrate and a Medical Officer are readily available and there is time and facility to secure their attendance at the time the dying declaration is to be recorded. It is always safe to get a supportive statement from an independent person. Transparency and impartiality in judicial matters must be visible on the face of it. In this case the doctor never certified that the statement was made by the victim in his presence or that the victim in fact thumb marked the statement in his presence. There is no endorsement any where that the statement was in fact made by the victim or it was read over to her and she had accepted it as true and signed it in token of its correctness. Moreover Ex.PH/2 and Mark D do not agree with each other either in details or in the handwriting. *No question was put to the victim by the police officer to ascertain whether she was in proper*

frame of mind and was in fact in a position to listen and speak in response to the question to be posed to her..

14. It is not so easy to accept, under the circumstances, that the victim was in fact in a position to make a statement on 05.09.2005 particularly when on 13.08.2005 it was admittedly a case of more than 90 % burns as deposed by PW-1 and on 03.09.2005 the doctor after thorough examination had *declared that the victim was not capable of making statement or moving her neck a tongue or signing or thumb marking the statement..* Moreover the doctor P.W.11 who gave certificate of fitness to the Investigating Officer *was not on duty on 05.09.2005 as admitted by him in cross-examination*. Serious doubts are, therefore, raised on the capacity of the victim to speak, understand, respond and sign in such a deplorable physical and mental state. Particularly when PW-1, while examining the victim had found "area burnt front of neck, chest and back of chest, front of abdomen, back of abdomen, front of lower limbs upto lower leg middle, front of upper limb in upper or

proximal part of both limbs i.e upper fore-arm whole .....". Post mortem report dated 12.09.2005, a week after the alleged dying declaration was made, revealed curling ulcer and infected bed sores on both buttocks and back of left chest and infected burns all around. This state of affairs does not support the opinion that the victim was capable of making statement. *There was no certification by the doctor that the patient was well oriented in time and space and could recall a 03 weeks' old incident.* The medical man while permitting the Investigating Officer to record her statement on 05.09.2005 did not even bother to affirm that he had satisfied himself after putting questions to the victim that she was mentally fit to make a statement as to the cause of her death. The result is that this statement is not a dying declaration and does not corroborate the prosecution version. The trial Court did not address these questions and their consequences.

15. The learned Deputy Prosecutor General was asked to explain the points relating to dying declaration as well as the attitude of the two

related witnesses and the inordinate delay. No satisfactory answer was given by the learned counsel. The assertion of the learned State counsel that the complainant group preferred treatment over initiating criminal proceedings is not a normal course of action. Misery had not visited the house of complainant for the first time in human history nor was it the last occasion for any tragedy to baffle a complainant group. Tragic incidents are part of human life. Moreover, the medical treatment had to be given by medical men and the attendants waiting in the verandas had all the time to report the matter to Police promptly if they really wanted justice. As regards the element of dying declaration it has not been established on record that the victim uttered specific words involving the appellant. Presentation of a written statement simplicitor by a Police officer does not prove that the contents of the document are the subject matter of the dying declaration.

16. In view of what has been stated above we are not convinced that the incident as alleged by the prosecution took place in

the manner disclosed by the prosecution. It is a case where information relating to the cause of death had been suppressed intentionally. Mystery surrounds the initial as well as the latter stages of this miserable story. The presence of the two eye witnesses is doubtful. The natural witnesses i.e the mother in law and children of the victim have not been allowed to narrate the incident the way they had seen it particularly when, according to the PW-9 and PW-10 the mother in law and children of the victim were inside the room. There is only one living room adjacent to Baithak as shown in the site plan. The recording of dying declaration is not free from doubt either. Benefit of doubt has been earned by the appellant under the circumstances of the case. It is, therefore, not safe to hold the accused guilty.

17. Accordingly it is not possible for us to maintain conviction and sentence recorded by learned Additional Sessions Judge in the impugned judgment dated 27.01.2007 as detailed in the opening paragraph of this Judgment. Consequently Criminal Reference No.8/L

of 2007 sent by learned trial Court is being answered in the negative and Criminal Appeal No.35/L of 2007 is hereby accepted. The appellant is directed to be set at liberty unless required in any other case.

Sd/-

JUSTICE SYED AFZAL HAIDER

JUSTICE DR.FIDA MUHAMMAD KHAN

M. Z. Yasin

JUSTICE MUHAMMAD ZAFAR YASIN

Announced on 10.7.2009
At ISLAMABAD

*Amjad/**

Fit for Reporting

Sd/-