

IN THE FEDERAL SHARIAT COURT  
(Appellate Jurisdiction)

PRESENT

MR.JUSTICE HAZIQAUL KHAIRI,  
CHIEF JUSTICE  
MR.JUSTICE SALAHUDDIN MIRZA  
MR.JUSTICE SYED AFZAL HAIDER

J.CRIMINAL APPEAL NO.17/L/2003

Saeed Ullah son of Abdul Minan, caste Syed Pathan, resident of Sawarrian.

.... Appellant

Versus

The State

..... Respondent

CRIMINAL APPEAL NO.128/L/2002

Muhammad Inayat son of Muhammad Hassan, caste Jat Bajwa, resident of  
Mohallah Sultanabad, District Gujrat.

..... Appellant

Versus

1. Mst.Feeza Bibi wife of Saeed Ullah Khan, daughter of Gulzar Shah, caste Syed, resident of Tara Garh Sultanabad, Gujrat.
2. State

..... Respondents

CRIMINAL APPEAL NO.129/L/2002

Muhammad Inayat son of Muhammad Hassan, caste Jat Bajwa, resident of  
Mohallah Sultanabad, District Gujrat.

..... Appellant

Versus

1. Shakil Abbas son of Niwazish Ali, caste Syed, resident of village Tara Garh/Mohallah Sultanabad, g.T.Road, Gujrat at present village Ratti Syedan, Tehsil and District Sialkot.
2. The State.

.....Respondents

(b)

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Muhammad Inayat son of Muhammad Hassan, caste Jat Bajwa, resident of Mohallah Sultanabad, District Gujrat.

.....Petitioner

Versus

1. Saeed Ullah son of Abdul Minan, caste Syed Pathan, resident of Sawarrian.
2. The State

.... Respondents

Counsel for the appellant/petitioner ... Mr.Said Ullah Khaid,  
Advocate  
(in J.Cr.Appeal No.17/L/2003).

Mr.Mehdi Khan Chohan,  
Advocate  
(in Cr.A.No.128, 129 and  
Cr.Rev.29/L/02,

For the State ... Mr.Asjad Javed Ghural,  
DPG

No.& Date of F.I.R ... No.72, dt. 27.01.2001

Police Station, district ... Civil Lines, Gujrat.

Date of judgment of trial Court ... 28.03.2002

Date of Institution ... 07.05.2002, 20.1.2003

Last date of hearing .... 17.09.2008

Date of announcement .... 14-11-2008

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## JUDGMENT

### SYED AFZAL HAIDER, J. -

Through this single Judgment, three appeals and one revision petition are being decided. These petitions are (i) Jail Criminal Appeal No.17/L/2003 filed by Saeed Ullah against his conviction and sentence, (ii) Criminal Appeal No.128/L/2002 filed by complainant Muhammad Inayat against acquittal of accused/respondent No.1 Mst.Feeza Bibi, (iii) Criminal Appeal No.129/L/2002 filed by complainant Muhammad Inayat against acquittal of accused/respondent No.1 Shakil Abbas, a minor, tried under the Juvenile Justice System Ordinance, 2000 and (iv) Criminal Revision No. 29/L/2002 seeking enhancement of sentence of appellant Saeed Ullah from life imprisonment to death sentence. All these petitions are directed against the judgment dated 28.03.2002 delivered by learned Additional Sessions Judge, Gujrat.

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2. The appellant Saeed Ullah has been convicted under section 302 (b) of the Pakistan Penal Code and sentenced to imprisonment for life and also directed to pay cash Rs.4,00,000/- as compensation under section 544-A of the Code of Criminal Procedure to legal heirs of the deceased, in default whereof to further undergo 6 months' simple imprisonment. He has also been convicted under section 377 of the Pakistan Penal Code and sentenced to imprisonment for life with a fine of Rs.4,00,000/-, in default whereof to further undergo simple imprisonment for six months whereas co-accused Mst.Feeza Bibi and Shakil Abbas have been acquitted of the charges by extending them benefit of doubt.

#### PROSECUTION VERSION

3. Brief facts of the prosecution story as culled from the crime report No.72/2001, dated 27.01.2001, registered under sections 302/377/201 of the Pakistan Penal Code read with section 12 of the

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Offence of Zina Ordinance, 1979 are that the complainant Muhammad

Inayat, PW.1 alleged that:-

“I am resident of Mohallah Sultanabad and the first floor has been rented out to Saeed Ullah accused who is residing there with his wife Mst.Feeza Bibi (co-accused).

I am a shopkeeper having two sons and three daughters.

On 27.01.2001 at about 7:10 p.m when I arrived after closing the shop, my brother-in-law Muhammad Ijaz PW was present in his house where he was busy talking with his sister (wife of the complainant), I inquired about my six years' son Dilawar Hussain deceased from my wife.

She informed that the son had gone upstairs. After having meal I again inquired and extended a call with no reply from upstairs. Then I went upstairs and observed that Saeed Ullah and his wife Mst.Feeza Bibi accused persons were washing the floor. On inquiry, they replied that my son Dilawar deceased had not come upstairs. I again inquired from my wife that the deceased had not gone upstairs when his wife Mst.Shahnaz Akhtar and brother-in-law Ijaz PWs also came upstairs. They confronted Saeed Ullah accused stating that the deceased had come upstairs in their sight on the signal of Shakil accused son

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of Saeed Ullah. Thereafter all the three persons started tracing out Dilawar Hussain deceased and enquired from the neighbourhood. It consumed sufficient time and for the same purpose went to the top storey as well. There on the roof of the house of Ahmad son of Sultan Mochi, resident of the same vicinity they observed that a Nylon sack was lying on the gravel. The sack was checked and the person of his son Dilawar, whose clothes were wet, was found. He was removed from the sack and it was found that he had expired. In enquiry it was found that Saeed Ullah accused had committed sodomy upon the deceased for which reason the blood started oozing out of the body and in order to conceal the offence both the accused washed the floor. The accused bathed the dead body in the bath tub and concealed the same in a sack and then threw it on the third roof the house belonging to Ahmad Mochi".

4. The learned trial Court on 24.11.2001 framed charge against accused Saeedullah Khan (appellant), Mst.Faeza Bibi, the acquitted accused and Shakil Abbas minor, acquitted accused for offences punishable under sections 12 of the Offence of Zina

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(Enforcement of Hudood) Ordinance VII of 1979, read with sections 302(a), 377 and 201 of the Pakistan Penal Code. The accused pleaded not guilty and claimed trial.

### PROSECUTION EVIDENCE

5. To prove its case, the prosecution produced as many as 13 witnesses. Summary of their depositions is being detailed below:-

a) PW-1 Muhammad Inayat, complainant of the case, made almost the same statement as narrated in his complaint Ex.PA. During cross-examination, he denied the suggestion that due to dispute over rent of the house he in collaboration with other PWs falsely roped the accused persons Mst.Feeza Bibi and Shakeel Abbas in the case. He also denied the suggestion that the accused were innocent and he had falsely deposed. He denied the suggestion that in connivance with the local police he got the investigation of this case conducted in a dishonest manner. He also denied the suggestion that he had made a false improvement to strengthen this case.

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b) PW-2 Mst.Shahnaz Akhtar, wife of the complainant

Muhammad Inayat, supported the complainant. During cross-examination, she stated that no witness was produced by them before the police who might have seen the sodomy being committed on the person of Dilawar deceased. She denied the suggestion that she had introduced herself as a false witness in this case being mother of the deceased.

c) PW-3 Constable Pervaiz Ahmad, posted at Police Station Lorri Adda, is a formal witness. He stated that on 27.01.2001, he escorted dead body of the deceased Dilawar Hussain for post-mortem examination to the mortuary of A.B.S Hospital, Gujrat. After post-mortem, the doctor handed over to him the post-mortem report and clothes of the deceased which he handed over to the Investigating Officer in presence of Ghulam Rasool and Hayat, both of them not produced at the trial. During cross-examination, he denied the suggestion that the crime sack P-4 was not handed over to him by the



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doctor and he in connivance with the Investigating Officer falsely mentioned sack P-4 in memo of recovery Ex.P-E. He also denied the suggestion that he was deposing falsely.

d) PW-4 Constable Muhammad Iqbal, Police Station Civil Lines, Gujrat is also a formal witness. He stated that on 01.02.2001, Muhammad Riaz Moharrir/Head Constable handed over to him one sealed packet and a sealed envelope for onward transmission to the office of Chemical Examiner, Lahore and one sealed packet and a sealed envelope for onward transmission to the office of Pathologist, Lahore. On 02.04.2001, Muhammad Akhtar Moharrir handed over to him a parcel, said to contain blood stained clothes, for onward transmission to the office of Chemical Examiner which he delivered in the concerned offices on the same day intact.

e) PW-5 Amjad Hussain son of Muhammad Shafi stated that on 27.01.2001, he and Ghulam Rasool PW, not produced, went to collect rent from Muhammad Aslam for the house of Fayyaz. He claims to be

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sitting in the house of said Fayyaz where he heard some noise. The sound of foot steps was heard by him and thus came out to see what was all about. He saw the accused carrying a nylon sack, (on the roof top of another house), going towards the adjacent house. On his enquiry, they said that it contained nothing. When he came outside of the house he saw the complainant Inayat present in the street who informed him that his son was missing. They went to "the house of Inayat P.W. that he went upstairs but the inmates of upper portion do not agree. Inayat P.W. and Shahnaz and I also went upstairs. Both Inayat and Shahnaz were stressing the accused that Dilawar had come upstairs and now why do you not accept. I informed to Inayat and Shahnaz Bibi P.W. that the accused present in Court were carrying a sack and were proceeding towards the east. I accompanied the Inayat and Shahnaz Bibi PWs. We found a sack lying on the roof of Haji Sultan. The sack contained dead body of the deceased. On 27.01.2001, police reached on the spot/place of occurrence. The

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police took into possession one stair P-5, cap P-6, Prouly (piece of cloth) P-7 and Tab P-8 which were taken into possession by Police through memo Ex.P-C and in my presence I signed the same and also Ghulam Rasool PW affixed his thumb impression." During cross-examination, he denied the suggestion that he had perjured himself and deposed falsely on account of relationship with the complainant party.

f) PW-6 Akhtar Naqqash Draftsman stated that on 29.01.2001 he took rough notes and prepared site plan. During cross-examination, he denied the suggestion that as no body instructed him about the place where the PWs were sitting on the ground floor so he had not mentioned their presence in the site plan and that in order to strengthen the prosecution case he had drafted a wrong site plan at the direction of the police.

g) PW-7 Dr.Muhammaf Rafique of A.B.S Hospital, Gujrat stated that on 27.01.2001 at about 8:05 p.m, he conducted post-mortem

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examination on the dead body of Dilawar Hussain deceased aged about 6 years who was wearing dark blue pant, blue shirt, vest white, Jarsi milky coloured. The doctor found multiple lacerations on lumbosacral region on the back. Excess bleeding was present around the anus and perineum. Scalp and skull were intact. Brain was congested. He further stated that examination of perineal and anal area showed that sodomy was committed upon the deceased. During cross-examination, he stated that in post-mortem report Ex.PE, he had not opined about commission of sodomy of the deceased. He denied the suggestion that no sodomy was committed upon the deceased.

h) PW-8 Amir Bashir son of Muhammad Bashir stated that on 18.04.2001 while he was posted as Foot Constable in Police Post Lorri Adda, warrants of arrest of appellant Saeed Ullah were handed over to him by the Investigating Officer but in spite of his hectic efforts, the appellant was not traceable. Thereafter, he affixed proclamation of appellant Saeed Ullah at his house. During cross-

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examination, he stated that on the day when he affixed the proclamation, the house was locked outside.

i) PW-9 Gulzar Ahmad, Sub Inspector, Police Station Civil lines, Gujrat stated that on 27.01.2001 on receiving complaint Ex.PA, he registered the F.I.R Ex.PA/1 without any addition or omission.

j) PW-10 Mehdi Khan Assistant Sub Inspector, Police Station Civil Lines, Gujrat stated that on 15.09.200, the appellant Saeed Ullah was arrested in District Jail Mardan where from he got him transferred to District Jail, Gujrat. On 16.07.2001, he took the physical remand of appellant Saeed Ullah. He investigated the case and forwarded him to stand trial. He admitted the suggestion that the complainant conceded before him that Saeed Ullah "is not the accused, has not committed the sodomy, nor commit to murder". He admitted that as per his finding accused was neither guilty of committing sodomy nor of murder.

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k) PW-11 Muhammad Arshad son of Muhammad Shafi identified the dead body of the deceased at the time of post-mortem examination.

l) PW-12 Mian Muhammad Javed Sub Inspector stated that on 27.01.2001 while he was posted at Police Station Civil Lines, Gujrat, he, after receiving information, reached at the place of occurrence.

Zeeshan Sub Inspector/PW Incharge Police Post was already present there. Fard Bian of the complainant Ex.PA, for registration of the case, had already been sent to Police Station Civil Lines Gujrat. He further stated that he inspected the place of occurrence and confirmed the spot inspection already carried out by Zeeshan Iqbal Sub Inspector. On 2.2.2001, he arrested Shakil Abbas accused from Factory area. On 04.02.2001, Akhtar Hussain Draftsman handed over to him site plans Ex.P-D and Ex.P-D/1 which he took into possession. He recorded the statement of draftsman. On 06.02.2001, he submitted the incomplete challan against Mst.Feeza Bibi and Shakil Abbas

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accused after finding them guilty. On 26.04.2001, he obtained proclamation with regard to Saeed Ullah appellant and entrusted the same to Constable Amar Bashir PW and recorded his statement. During cross-examination, he admitted the suggestion that the proclamation of appellant Saeed Ullah Ex.P-L contained the address of District Mardan. He further stated that he did not record any of the statement of eye witnesses in this regard and that there was no direct evidence of any eye witnesses on the file regarding sodomy or commission of murder by Mst.Feeza Bibi and Shakil accused nor there was any evidence of extra judicial confession. We have noticed that the names of Ghulam Rasool and Amjad P.Ws were not mentioned in the inquest report.

m) PW-13 Javed Iqbal Sub Inspector, Police Station Sodhra, district Gujranwala stated that Zeshan Iqbal Sub Inspector/Investigating Officer of the case had been serving under him and he was familiar with and could recognize his handwriting and

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signatures. He recorded the statement of the complainant Ex.P-A on 27.01.2001 for registration of case. On 27.01.2001, he inspected the spot, recorded the statements of the complainant, Shahnaz Akhtar and Muhammad Amjad. On 28.01.2001, he recorded the statements of Arshad, Constable Pervaiz Ahmad, Ghulam Rasool, Muhammad Hayat and Ijaz PWs under section 161 of the Code of Criminal Procedure. On 03.02.2001, Shakil Abbas were arrested by him and was sent to judicial lock up by Sub Inspector Zeshan Iqbal.

#### COURT WITNESS

6. There is also the deposition of one Court witness Constable Muhammad Iqbal, Police Station Civil Lines, Gujrat. He stated that he was entrusted with the summons of Zeshan Iqbal Sub Inspector, Police Post, Lari Adda, Police Station Civil Lines, Gujrat. He proceeded to the residence of said Sub Inspector and his mother informed him that the Sub Inspector had proceeded to America four months ago.



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### DEFENCE EVIDENCE

7. After conclusion of the prosecution evidence, statements of the accused Saeed Ullah and Mst.Feezan Bibi were recorded under section 342 of the Code of Criminal Procedure on 18.03.2002. Both the accused, inter-alia, pleaded their innocence and asserted that they had been falsely implicated in the case. In reply to the questions “why this case against you and why the P.Ws deposed against you”, accused

Saeed Ullah stated:-

“I have been falsely involved in this case due to enmity. I am retired army Subedar and I have served in the army for 28 years and have cleaned and unchallenged record. I am innocent. I produce defence evidence before the police and the police verified. The police also declared me innocent. I had rented disputed house of the complainant and so he implicated me falsely. The PWs are closely related with the deceased and the complainant.”

In reply to the questions “why this case against you and why the P.Ws deposed against you”, accused Mst. Feeza Bibi stated:-

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“Due to monetary dispute regarding the rent of house where I was living. The complainant got registered this case against us in order to fulfill the empty belly of prosecution. As a matter of fact by way of registration of this case wanted to get the rented house vacated from me and to receive money from us by way of blackmailing. I am innocent in this case. My son Shakil was also innocent and he has been roped in this case for blackmailing me. The PWs are closely related with the deceased and the complainant.”

In reply to the questions “why this case against you and why the P.Ws deposed against you”, accused Shakil Abbas stated:-

“I adopt the version taken by my co-accused Mst.Feeza Bibi. The PWs are closely related with the deceased and the complainant.”

Neither did the accused opt to produce evidence in their defence nor did any of them elect to depose under section 340(2) of the Code of Criminal Procedure.

#### CONCLUSIONS WITH REASONING

8. We have given careful consideration to the facts and circumstances of this case. The record has also been perused with the

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assistance of learned counsel for the parties. We are inclined to accept

the appeal. The reasons for recording acquittal are reproduced

hereunder:-

a) The complainant, both in the crime report and in his deposition before the Court mentioned that Muhammad Ijaz brother of his wife was present in the house when he inquired about his minor son Dilawar Hussain who was stated to be upstairs with the tenants.

Muhammad Ijaz is also reported to have accompanied complainant for search within and beyond the limits of the house and reportedly found the dead body in a sack on the roof top of one Ahmad son of Sultan Mochi. It is, however, strange that Muhammad Ijaz and Ahmad Mochi have not been produced in Court. PWs Ijaz Ahmed, Muhammad Hayat and Ghulam Rasool were given up as unnecessary on 13.03.2002 as per statement of Raja Nisar Ahmad, Assistant District Attorney.

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b) Amjad Hussain PW-5 resident of Kot Putu, a village three and a half miles away from the place of occurrence, was introduced in the narration of the story only after the registration of First Information Report. He asserts that he informed the complainant that accused was seen carrying a sack but neither any such disclosure was made in the Crime Report nor was his presence, as a member of search party, mentioned in the complaint.

c) Inquest Report is a very important document in the chain of investigation. It is recorded immediately on receipt of information about the death of a person as mandated in section 174 of the Code of Criminal Procedure read with Police Rules 25.35. It is of course correct that it is not incumbent upon police officer to give the names of the witnesses but this document being almost the earliest is the result of the investigation about the cause of death, manner in which death was caused and the weapon used in the commission of the

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offence. This part of the investigation is usually occasioned by the information imparted by the aggrieved party. In the instant case the complainant, the father of the victim, does not mention the presence of Amjad Hussain P.W.5 and Ghulam Rasool. The inquest report was duly signed by Muhammad Bashir and Akhtar Hussain as required by law. Had Amjad Hussain P.W.5 and Ghulam Rasool been present they would have signed the Inquest Report. The fact of their presence at the spot is not reflected in the inquest report. The non-mention of these witnesses in the Crime Report as well the Inquest Report is not free from suspicion. The statement of Amjad Hussain P.W.5 at the same time does not inspire confidence. His entry in the story at a later stage snacks of uncanny improvement by prosecution side. Fayyaz, the absentee landlord is brother of P.W.1 as disclosed by P.W.2 but how come that P.W.1 does not collect rent from his neighborhood on behalf of his brother.

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d) The site plan does not support the prosecution version and it is bereft of crucial details.

e) The recovery of dead body from the roof top of Ahmad Mochi is not proved nor has it been established beyond reasonable doubt that the appellant threw the dead body there. In fact there is improvement made by the complainant who at a later stage, relying upon the information given by Inayat Hussain P.Ws and Ghulam Rasool since given up, stated that the son and wife of appellant helped him in depositing the dead body on the roof top of Ahmad Mochi. Why was PW-5 present in the house of Muhammad Aslam tenant of Muhammad Fayyaz at 6.30/7.00 p.m during chilly January?. His presence there is neither endorsed by Muhammad Aslam nor Ghulam Rasool. He neither holds power of attorney on behalf of Muhammad Fayyaz, the absentee landlord, nor even a Rukka from the wife of the latter authorizing him to collect rent is before us. No receipt of

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payment of rent is available on record. The witness in order to fit in as a witness mentions 6.30/7.00 p.m. as the time of his arrival in the house adjoining the place of occurrence and he then prolongs his stay so that he could become a potential witness because the incident is alleged to have occurred at 7.10 p.m. There is no earthly prospect for a person, sitting on a cup of tea in a room in a cold evening, to witness in detail the movement of three persons carrying a sack on the roof top of another house when there is no source of light either.

f) PW-2 introduced a new dimension to the story when she stated that the dead body was taken to Pak Fan Industry after the police had taken hold of the dead body. The reason of this, as narrated by the mother of deceased P.W.2, was that the boy was taken to the Industry for being checked up where it transpired that the patient was dead. This aspect does not fit in with the story of the child being packed in a sack and thrown on roof top with wet clothes in cold evening. The

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police was not accompanying the boy/his family members when he was taken to the Pak Fan Industry for check up. If this part of the story, as narrated by the real mother is to be believed, then the very basis of crime report as regards the time, place and culprit is smashed. The child was brought back home after covering a distance of three miles and it was then, the mother states that the police arrived. In this state of affairs the very basis of the Inquest Report is demolished. Afterwards the complainant party reportedly accompanied the child to the hospital. Even this statement needs careful consideration. If the child was dead, as confirmed by Pak Fan doctor, then there was no need to take the child to A.B.S. Hospital.

g) The sack containing the dead body was not identified in Court by complainant and, therefore, there is no evidence to show that there was a sack which was said to contain the dead body and was found



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lying on the roof top of a neighbour who was neither associated with investigation nor produced as a witness.

h) There is no convincing evidence available on record to establish the time and the manner in which the victim died. The incident is admittedly an unseen occurrence and the only evidence on record to connect the appellant is the deposition of PW-5 who allegedly saw him carrying a sack alongwith two other persons. The presence of P.W.5 at the spot is doubtful. He is a chance witness. His statement does not inspire confidence. His presence at the spot is not established even in police file.

i) There is no evidence whatsoever that the deceased was last seen with the appellant. It is not even alleged by P.W.2, mother of the deceased, that appellant even called the child upstairs.

j). It is in the evidence of PW.10 Mehdi Khan that the complainant conceded before him that Saeed Ullah "is not the accused, has not

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committed the sodomy nor commit to murder.” The witness observed that according to his findings the appellant was neither guilty of sodomy nor of murder.

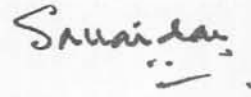
9. The co-accused Mst. Feeza Bibi, wife of appellant has already been acquitted of the charge of disappearance of evidence as contemplated by section 201 of the Penal Code, by the learned trial court on the same set of evidence as is available against the appellant. The learned trial court observed: “hence even a slightest doubt arising in her favour must be extended to her.” The case of accused Shakil Abbas was separated as he was a juvenile. He has also been acquitted vide judgment delivered on 28.03.2002 because the only role attributed to him was that he called the deceased upstairs and there was no evidence that he acted in concert with his step father, the appellant in this case. He was also given benefit of doubt.

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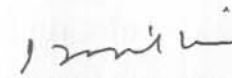
10. In this view of the matter it is not possible to sustain the conviction recorded by learned trial Court. In order to fix liability the prosecution must prove its case beyond all reasonable doubt. It is all the more necessary when the offence alleged by prosecution entails capital punishment. The liberty and other rights cannot be jeopardized on account of conjectures or surmises or deposition of chance witnesses who give a twist to the story. Moreover improvement made by complainant on crucial points reflects adversely on the veracity of prosecution version. In this view of the matter the prosecution story, as alleged, is not free from doubts. Consequently, giving benefit of doubt to the appellant, his appeal, Jail Criminal Appeal No.17-L of 2003 is hereby accepted and the judgment dated 28.03.2002, whereby he was convicted a) under section 302-b of the Pakistan Penal Code and sentenced to life imprisonment apart from the penalty of compensation to the tune of Rs. 4,00,000/-, and also b) under section 377 of the Pakistan Penal Code and sentenced to imprisonment for life

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with a fine of Rs.4,00,000/- are hereby set aside. Criminal Appeal No.128-L of 2002 and Criminal Appeal No.129-L of 2002, both appeals against the acquittal of Mst. Feeza Bibi and Shakil Abbas minor are hereby dismissed for the reasons which have become the basis of acceptance of Jail Criminal Appeal No.17-L of 2003. Criminal Revision No.29-L of 2002 seeking enhancement is consequently dismissed. Appellant Saeedullah son of Abdul Minan shall be set at liberty forthwith unless he is required in some other case.



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JUSTICE HAZIQUL KHAIRI  
 Chief Justice



JUSTICE SALAHUDDIN MIRZA

Announced in Open Court  
 on 14.11.2018 at Islamabad  
Mujeeb/\*



Fit for Reporting