

**IN THE FEDERAL SHARIAT COURT**  
(Appellate Jurisdiction)

**PRESENT**

**MR.JUSTICE DR. FIDA MUHAMMAD KHAN**  
**MR.JUSTICE SH. NAJAM-UL-HASAN**

**JAIL CRIMINAL APPEAL NO. 34-I -2013**  
**JAIL CRIMINAL APPEAL NO.07-I -2014**

Sahib Khan son of Muhammad Karim,  
Caste Akhezai, resident of Bridge Manzari

Behram Khan son of Muhammad Qabool,  
Caste Kakozei, resident of Killi Mangal Khan Arambi  
(Now confined in Central Prison Mach)

Versus ..... Appellants

The State ..... Respondent

Counsel for the appellant Mr. Arshad Zaman Kayani Advocate

Counsel for the complainant Nemo

For the State Mr. Tahir Iqbal Khattak,  
Additional Prosecutor General  
Baluchistan

No. and date of F.I.R 14 dated 22.5.2010

Police Station Levies Headquarter District  
Pishin

Date of judgment of trial court 26.12.2012

Date of institution of the appeal 13.12.2013 and 18.2.2014

Date of hearing and decision 23.9.2014

Date of judgment 29.10.2014

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J.Cr.Appeal No.34-I-2013

J.Cr.Appeal No.7-I-2014

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## **JUDGMENT**

**SH.NAJAM UL HASAN, J.-** Sahib Khan, appellant, filed appeal against his conviction and sentences challenging the impugned judgment dated 26.12.2012 of the learned Additional Sessions Judge Pishin in the High Court of Baluchistan. The appeal was admitted for regular hearing by the Division Bench of the High Court of Baluchistan on 21.11.2013. Later, on the request of the appellant and after hearing the learned D.P.G and after going through the relevant law the Division Bench of the High Court of Baluchistan vide order dated 21.11.2013 while considering the matter following in the jurisdiction of the Federal Shariat Court transmitted the appeal, paper book alongwith the record to this Court. Vide Order dated 10.1.2014 of this Court the appeal of Sahib Khan (J.Cr.Appeal No.34-I-2013) was admitted for regular hearing. Notice were also issued to the other two co-convicts Behram Khan and Jilani in jail whereupon appellant/convict Behram Khan sent his appeal from jail which was treated as J.Cr.Appeal No.7-I-2014. While condoning the delay his appeal was admitted for

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regular hearing vide order dated 19.2.2014. The 3<sup>rd</sup> convict Jilani son of Fazal Muhammad did not file appeal against his conviction and sentence.

2. Appellants Sahib Khan and /Behram Khan have challenged the judgment dated 26.12.2012 delivered by the learned Additional Sessions Judge, Pishin whereby both the appellants along with one Jilani were convicted under section 302-C PPC and sentenced to fourteen years R.I each along with fine of Rs.100,000/- each or in default thereof to further undergo S.I for three years. It was also ordered that they shall pay Diyat amount of Rs.300,000/- each to the legal heirs of deceased Faizullah. Benefit of section 382-B Cr.P.C was extended to them.

3. As both the appeals No.J.Cr.A.No.34-I-2013(Sahib Khan Vs.The State) and J.Cr.A.No.7-I-2014 (Behram Khan Vs.The State) have arisen out of the same judgment so they are disposed of through this single judgment.

4. During the proceedings of these appeals, vide this Court order dated 12.9.2014 a notice was issued to all the above mentioned three convicts/accused

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as to why their conviction, may not be altered to one under section 302(b) PPC and the sentence there-under be enhanced.

5. The prosecution case in brief is that complainant/Attaullah (P.W.1) submitted a written application/Ex.P/1-A before the Naib Tehsildar, Levies Thana Pishin wherein it was stated that on 22.5.2010 three persons came to him and hired his trolley rickshaw and all three persons boarded rickshaw. His father Faizullah who was unloading sack from a truck, joined them and drove the rickshaw whereas the complainant along with three passengers sat on the back of rickshaw. When they reached near Yaaseenzai road the above mentioned three persons took out pistols and attacked his father and in this process the rickshaw over turned and they alongwith luggage fell down on the ground his father cut one wire of rickshaw due to which rickshaw became out of order. The culprits made attempt to start Rickshaw but failed, as such they started firing. Behram Khan ,appellant, caused fire arm injury on head of his father who suffered grievous injuries Sahib Khan and Jilani also made fire shots and made good their escape towards nearby mountains, people gathered at the spot, the complainant



called his brother Hameedullah through mobile phone of one of the person who came at spot. His brother Hameedullah reached at spot and took his injured father to hospital. The culprits were followed and apprehended by the inhabitants of the village, however, his father expired on the way to hospital. Hence, he filed a written application on which FIR No.14/10/Ex.P/7-A was registered at Thana Levies Headquarter District Pishin on 22.5.2010 under section 17(4) of the Offences Against Property (Enforcement of Hudood) Ordinance,1979 read with section 34 PPC.

6. Investigation was conducted by Azizullah/Naib Tehsildar (P.W.7) as a consequence of registration of crime report. He on receiving information reached the place of occurrence and arrested the above mentioned three accused persons as they were apprehended by the inhabitants of the locality. Three crime empties of 30-bore pistol were taken in possession by the I.O from the place of occurrence and during personal search Behram Khan, appellant, produced 30 bore-pistol(weapon of offence) which was sealed in parcel and taken in possession through recovery memo. Separate case under Arms Ordinance was registered

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against Behram Khan accused. Blood stained chaddar, waskat along with rickshaw loaded with 10 sack of chakar were also taken into possession by the I.O. As all the three accused were found injured by the I.O, so they were got medically examined by the I.O from Dr.Muhammad Naeem. After completion of the investigation, the Naib Tehsildar, I.O, submitted report under section 173 Cr.P.C before the Court requiring the accused to face trial.

7. The learned trial court framed charge against the accused on 22.6.2010 under section 17(4) Offences Against Property(Enforcement of Hudood) Ordinance,1979. The accused did not plead guilty and claimed trial.

8. The prosecution produced seven witnesses to prove its case. The gist of the deposition of the witnesses is as follows:-

- i) P.W.1/Attaullah is the complainant and eye witness of the occurrence. He reiterated the version given in the FIR Ex.P/7-A.
- ii) P.W.2/Abdul Raziq is witness of the occurrence.
- iii) P.W.3/Hameedullah is the witness regarding circumstantial evidence of the occurrence.

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iv) P.W.4/Karam Khan Levies Khasadar is the witness of recovery memo Ex.P/4-A.

v) P.W.5/Dr.Muhammad Naeem is the witness, who had issued medical certificate Ex.P/5-A, Ex.P/5-B and Ex.P/5-C.

vi) P.W.6/Dr.Muhammad Jaffar, is the witness, who had issued death certificate of deceased Faizullah/Ex.P/6-A.

vii) P.W.7/Azizullah Naib Tehsildar,Pishin is the investigating officer of this case.

9. After completion of the prosecution evidence, the learned trial court recorded the statements of the accused under section 342 Cr.P.C on 17.10.2012.

The accused persons denied the allegations leveled against them. In reply to a crucial question "Do you want to say any thing else" All the accused persons individually stated as under:

"I have been falsely implicated in this case. I request for justice."

The accused persons neither opted to make their statements on oath under section 340(2) Cr.P.C nor produced any witness in their defence.

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10. Upon the conclusion of the trial, the learned trial court vide judgment dated 26.12.2012 has convicted accused persons as mentioned herein before in para-1 of this judgment.

11. At the very first day of argument while going through the judgment and the record it was observed that both the appellants and their 3<sup>rd</sup> co-convict were convicted for committing 'qatl-e-amd' but were sentenced under section 302(C) PPC to fourteen years R.I along with fine of Rs.100,000/- each or in default thereof to further undergo S.I for three years. They were also directed to pay 'diyat' of Rs.300,000/- each to the legal heirs of the deceased.

12. We have observed that there is no provision of imposing fine or payment of Diyat in section 302-C PPC. Similarly, in default of payment of compensation to the legal heirs of deceased under section 544-A Cr.P.C the accused can only be detained for six months S.I, we have also observed that no reason or circumstances have been mentioned by the learned trial court in the judgment to bring the case within the purview of section 302-C PPC. The learned counsel for appellant or even the law officer remained unable to pin point circumstances or reason available with the prosecution to bring the case within the purview of

section 302(C) PPC. In these circumstances show cause notice was issued to all the accused as to why their conviction and sentence be not converted from section 302(C) PPC to section 302(b) PPC and they be sentenced accordingly.

13. In the arguments the learned counsel for the appellants has taken the stance that in fact it was an unseen occurrence. The complainant P.W.1 and other witnesses were not present at the time of occurrence. The FIR was later on fabricated. The time of registration of case as mentioned in the FIR (Ex.P/7-A) is not correct. He has pointed out that as per death certificate (Ex.P/6-A) deceased was brought at Quetta hospital from Pishin hospital at 6.05 p.m on 22.5.2010 and as per the statement of P.W.2 the deceased died while on the way to Quetta from Pishin hospital. As per record the FIR was steadily registered at 4.30 p.m i.e just after half an hour of the occurrence and in the FIR the deceased was shown dead at the time of registration of the FIR. It is stated that such circumstances clearly indicate that time of registration of FIR is not correct, so the FIR of the case has got no evidentiary value. The complainant P.W.1 is son of the deceased but the deceased was taken to Hospital at Quetta by P.W.2 Abdul Razaq who was a passerby and as per FIR he was un-known to the complainant. No reason for the

complainant for not accompanying his father for medical treatment is available in the prosecution case. In the FIR name of Abdul Razaq P.W.2 is not mentioned. Rather he was shown as unknown person. Later on the stance was changed and he was found to be close relative of the deceased and the complainant and ultimately he took the deceased to hospital at Qetta. Abdul Razaq P.W.2 while appearing in court has deposed that he heard the fire shots and later on found two persons injured at spot one of the injured informed that beside the driver even he has been fired upon. He did not see the accused firing at the deceased. Rather, the deceased informed his son about the description of accused who fired at him. So he cannot be termed as eye witness of occurrence. Learned counsel further states that the death certificate of the deceased indicate presence of two fire arms entry wounds on the fore-head and occipital region of the deceased and brain matter was oozing from the skull. It is stated that in such condition no one can be in position to speak, that the deceased was brought at Pishin hospital but there is no medical legal report and only death certificate issued by the doctor at Qetta has been produced. Possibility of deceased being death at spot cannot be ruled out.

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Three crime empties were recovered from the spot and after arrest and during



personal search Behram Khan accused was found in possession of pistol. These articles were taken in possession and sealed in parcel but there is no matching report of the FSL or to indicate that pistol was in working condition. The learned counsel strongly emphasized that such short coming in the investigation makes the case highly doubtful. The complainant did not receive any injury, his presence at the spot at the time of occurrence is highly doubtful. That in the FIR no specific motive of robbery has been mentioned. It was only mentioned that the accused attacked the complainant and fired at him. Nothing was taken by the accused so matter regarding robbery was not proved and as such no one was convicted for robbery. Further states that in the absence of the fire arm Expert report the recovery of pistol from Behram Khan appellent has no value, that, in the FIR it was mentioned that a fire was made by one of the accused which landed on the head of the deceased who later on died. The death certificate and statement of the doctor who prepared the death certificate P.W.6 clearly indicate the presence of two fire shot entry wounds on the head of deceased. Such circumstances indicate conflict of medical and ocular account. Further states that

27 P.W.3 Hameedullah was lateron called and is only the witness of circumstantial

evidence. He was not present at the time of occurrence. That after the occurrence all the three accused were apprehended by person of locality but none of them was produced in court. All the three accused were found having fresh blunt weapon injuries. One of accused Sabir Khan was also found having fire arm injuries. All the three accused were got medically examined by the I.O. The doctor P.W.5 has verified the injuries. The complainant has not explained in the FIR or while appearing in court as to how the accused sustained such injuries specially the fire arm injuries of Sabir accused. That circumstances indicate that complainant and the witnesses are suppressing the truth. They were not present at the place of occurrence and as such are unaware of facts.

14. The learned counsel while relying the case law reported as PLD 2002 SC-108 and 1995 SCMR 1345 states that when the prosecution case is doubtful then the accused is entitled to benefit of doubt as a matter of right.

15. On the other hand learned Additional Advocate General Baluchistan while supporting the impugned judgment of the learned trial court states that the matter was reported immediately and in FIR the name of the accused were mentioned.

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the I.O, that one of the appellant Behram Khan was found in possession of 30-Bore Pistol , three crime empties of 30-Bore pistol were recovered from the place of occurrence , so such recoveries produced corroborates to the ocular account of the complainant. Further states that P.W.2 is an independent witness and he has no reason to falsely implicate the appellant. His statement is fully corroborated by the statement of other witnesses. He is the one who took the deceased to the hospital and he was mentioned as such in the death certificate prepared and produced by the doctor P.W.6. His presence at the spot is fully proved. Further states that presence of injuries on the person of accused rather indicate their involvement in the crime. Fire arms injuries on the person of Sabir Khan appellant was duly explained to have been caused by Behram Khan co-accused but admits that nothing in respect of the fire arm injury of Sabir Khan is mentioned in FIR, the complainant while appearing as P.W.1 has completely denied the matter of fire arm injuries of Sabir Khan accused whereas P.W.2 has admitted of presence of fire arm injuries on two persons. So his statement cannot be ignored. Lastly states that the appellants committed brutal act of murder

which is fully proved, so they are not entitled to any concession and are liable to be convicted under section 302-B PPC and be sentenced to death.

16. We have heard the learned counsel for the parties and have also gone through the record.

17. The occurrence of this case took place on 22.5.2010 at 4.00 p.m on the road side when the complainant along with his father the deceased of this case and the three accused were going on the loader rickshaw. All the three accused took out their pistol and one of the accused fired at the father of the complainant on his head. The accused left the place and went in the mountains. At that time one passerby came. The complainant after taking mobile from him called his brother Hameedullah PW.3 who came at the spot. They took injured father to hospital along with the above said passerby (PW.2 Abdul Razzaq) the complainant came back to the place of occurrence after his father was shifted in a car on the main road. After reaching the hospital at Pishin, the doctor referred the injured to Quetta hospital as his condition was precarious. The other son of the deceased P.W.3 came back whereas the deceased was taken to Quetta

Hospital by Abdul Razzaq P.W.3 (who was mentioned as unknown passerby in



the FIR). It is the prosecution case the deceased died on the way to Quetta hospital, the doctor at Quetta hospital issued death certificate mentioning the name of Abdul Razzaq PW.2 as the person who identified the deceased. The complainant approached Tehsilar at Levies Headquarter, Pishin and got his statement recorded which was read over to him later on reduced into formal FIR (Ex.PW.1/A). In the FIR, the name of Abdul Razzaq was not mentioned, rather he was mentioned as unknown person. The names of all the three accused were mentioned in the FIR as statedly they were apprehended by the villagers later on and thereafter arrested and their names came to the knowledge of complainant. In the formal FIR the time of report is mentioned as 4.40 p.m. so it is clear, that at the time of registration of the FIR i.e. 4.30 p.m the deceased had already died and the accused were arrested and that is why their names were duly mentioned in the FIR. On the other hand, the death certificate of the deceased Ex.P/6-A issued by the doctor PW.6 indicates their arrival in hospital at Quetta 6.05 p.m. So it is clear that FIR in which the deceased was shown dead was registered much before the deceased reached the hospital at Quetta. The passerby who was mentioned as unknown in the FIR was later on found to be Abdul Razzaq P.W.2

and was relative of the complainant and the deceased. No reason for not mentioning his name in the FIR and declaring him as unknown passerby is available with the prosecution, although, till then the deceased had already died, and the accused were arrested. Such circumstance makes the FIR highly doubtful specially in respect of time of its registration. In the case reported as(1995 SCMR-599-601-(Ata Muhammad and another Vs. The State) the Hon'ble Supreme Court of Pakistan has observed as under:

“...Ss.302/34 & 307/34 PPC...Criminal Procedure Code (V of 1898), *S.154...F.I.R...Procedure to record...Malpractice...Statement of eye-witness...Time of recording of Fir, is not always genuine. The police, after learning about the commission of the crime keeps the space in the daily diary(Roznamcha) and a page in the F.I.R. Register blank for incorporating therein the gist of the information, the factum of registration of the case and the detailed report subsequently, in the light of preliminary investigation made by it.*

18. There is another circumstance that complainant got his statement recorded to the *Tehsildar* in the Levies Headquarter. Later on, the same was copied in formal FIR. No reason for not recording of FIR state away in the relevant register



of F.I.Rs, specially when the complainant was present there. After registration of the case Naib Tehsildar started investigation and prepared the inquest report Ex.P/7-D as required under Police Rules but such report does not carry the number of FIR, the name of the complainant, name of the witnesses even the time of occurrence and the brief facts of case are not mentioned in the inquest report.

No reason for such laps is available so an inference can be drawn that till then the name of person who was to be shown as complainant was not known. It is strange that the deceased who was father of the complainant and other witness PW.3 was taken to hospital at Quetta by Abdul Razzaq PW.2 who was mentioned as unknown passerby in the FIR and his name was not mentioned in FIR. Why the two sons did not take their injured father who was in precarious condition to Quetta Hospital and unknown person Abdul Razzaq took him to Quetta hospital.

All these things put together make the FIR the statement of complainant P.W.1 and the prosecution story highly doubtful. All the three accused were named in the FIR as they were apprehended lateron and arrested by the Tehsildar before registration of the case. All the three accused were found injured have blunt weapon injury and besides that one of the accused Sahib Khan was also found

having fire arm injuries. They were got medically examined by the I.O. The doctor PW.5 verified their medico legal report (Ex.P-5/A,B,C ) the medico legal examination of Sahib Khan accused indicates that bullet entered his body near hip made its exist again entered his body and came out from thigh. A person with such fire arm injuries is not expected to be in position to move but the complainant has not explained such fire arm injury of the accused , rather while appearing in court as P.W.1 the complainant has clearly denied the existence of any injury on the person of Sahib Khan accused. On the other hand PW.2 Abdul Razzaq while appearing in the court, has categorically stated that he heard fire shot and saw two persons having received fire arm injuries. Such contradictions in the statements of these two witnesses make the prosecution case further doubtful. The complainant has assigned only single fire arm injury to Behram Khan appellant/accused alone. The death certificates and statement of Dr.P.W.6 indicate the presence of two entry and one exit wounds on the body of deceased. The complainant is the only witness who saw the accused causing injury to the deceased and such contradiction in his statement and medical evidence make the

in prosecution case highly doubtful. If the complainant was present at the spot he

would have seen the deceased receiving two fire arm injuries and similarly he would have observed fire arm injuries on the person of sahib Khan accused.

It rather indicates that the complainant has not seen the occurrence or he is concealing the real facts. The FIR was later on prepared while showing that the same has been registered at 4.40 p.m.

19. The other witness PW.2 Abdul Razzaq was not named in the FIR, he was mentioned as unknown passerby who provided mobile phone to the complainant. Later on, the version was changed and he was shown as relative of complainant and deceased, who ultimately took the deceased to the hospital leaving behind the complainant and PW.3, who were sons of the deceased. Abdul Razzaq is not witness of firing he only heard the shot of fire arm and saw two persons having received fire arm injuries. He has not witnessed the actual occurrence of the firing and as such was not in a position to tell from his own knowledge as to who among the three accused fired at the deceased. It is the prosecution case that one the three accused fired at the deceased whereas remaining two were not responsible for causing any injury to the deceased. The third witness PW.3 is other son of the

deceased and as per prosecution he was called by the complainant after the occurrence and is not the eye witness and only narrated the circumstances which are not enough to indicate the accused responsible for killing the deceased. It is now well settled that when eye witness account is doubtful then no inference can be taken from the statements of the witness unless each part of the statements is corroborated with some other reliable material. *In case reported as 1995 SCMR (Ata Muhammad and another Vs. the State) the Hon'ble Supreme Court of Pakistan has observed that ...Ss...302/34 & 307/34 ---Murder...Ocular evidence...categories...The ocular evidence may be classified into three categories...Firstly, wholly reliable; secondly, whole unreliable; and thirdly, partly reliable and partly unreliable. In the first category conviction may safely be sustained on uncorroborated testimony. In the second category, even strongest corroborative evidence may not rehabilitate such evidence. In the third category, conviction cannot be recorded unless such evidence is corroborated by oral or circumstantial evidence coming from distinct source.....*

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20. As discussed above, the FIR of this case is not worthy reliance. The motive is not proved. nothing was taken away by the accused during the occurrence. In the FIR robbery has not been mentioned in clear words even otherwise no one was convicted for committing robbery. Three crime empties were recovered from the place of occurrence sealed into parcel. Later on pistol was statedly recovered from Behram Khan. There is no report of fire arm expert to indicate that the empties recovered from the spot were fired from the pistol recovered from Behram Khan, accused/appellant or to indicate that pistol was in working condition. While appearing in the court one of the recovery witness has admitted that pistol was handed over to the I.O by one of the person present and not by the accused Behran Khan. In the circumstances the recovery of the pistol does not provide any strength to the prosecution case. As discussed above the medical evidence rather contradicts the ocular account in respect of number of fire arm injuries on the person of deceased and presence of fire arm injury on the person of Sahib Khan accused which has been denied by the complainant but proved by P.W.2 and the doctor who conducted his medico legal examination just after the occurrence.

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21. Three persons have been implicated and as per prosecution case one of them was responsible for the murder of the deceased. In absence of clear reliable evidence and material to indicate the common intention or motive of all the accused one of them cannot be held responsible for murder of deceased. The prosecution remained unable to single out the accused responsible for murder through reliable admissible evidence. In this situation all the accused are entitled to benefit of doubt even on this score. There is no reliable material available in the form of motive, recoveries, medical evidence to provide corroboration to the statement of witnesses or the prosecution case. It is well settled principle that benefit of any kind of doubt in prosecution case has to be extended to the accused. The Hon'ble Supreme Court of Pakistan in the case of **Tariq Pervez V The State** (1995 SCMR-1345) has held *that ....Art.4....Benefit of doubt, grant of ...For giving benefit of doubt to an accused it is not necessary that there should be many circumstances creating doubts...If a simple circumstance creates reasonable doubt in a prudent mind about the guilt of accused, then he will be entitled to such benefit not as a matter of grace and concession but as a matter of right.*

22. Consequently, it is clear that the witnesses produced by the prosecution are not worth reliance. The prosecution remained unable to establish guilt of the accused beyond reasonable doubt, so while extending the benefit of doubt the conviction and sentences awarded to the appellant namely Sahib Khan and Behram Khan are set aside. Their appeals are accepted. They are acquitted of the



charges. They are confined in jail. They shall be released forthwith if not wanted in any other case.

23. One of the co-accused namely Jilani has not filed any appeal against his conviction. His case is on similar footings then that of appellants he was convicted and sentenced by the same judgment so even he is entitled to the benefit of this judgment. Reliance is placed on case reported as 2011 SCMR-323 (Amin Ali and another Vs. The State) and 1972 SCMR-194 (Muhammad Aslam and 5 others Vs. The State) the Hon'ble Supreme Court of Pakistan has observed that *'...appeal (criminal)---Appeal to Supreme Court against conviction in a murder case...Supreme Court finding prosecution to have failed to prove its case beyond reasonable doubt...Conviction set aside and while acquitting all appellants conviction of one, absconding during pendency of appeal and remaining so throughout, also set aside and his acquittal recorded in absentia--Penal Code (XLV of 1860), S.302.....'*

24. In the given circumstances benefit of this order is also extended to the non-appellant/convict co-accused Jilani son of Fazal Muhammad. He is also acquitted of the charge in case F.I.R No.14/2010 of Levies Station Pishin, under section 17(4) of the Offences Against Property(Enforcement of Hudood) Ordinance, 1979 and was convicted under section 302 (c) PPC along with the appellants. His

conviction is set aside. He shall therefore, be released forthwith if not wanted in any other case.

25. The notice issued for enhancement of sentences is recalled.

We have announced the judgment through our short order dated 23.09.2014

and these are the detailed reasons of our aforementioned short order.

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~~Justice Sh. Najam-ul-Hasan~~

**JUSTICE SH. NAJAM-UL-HASAN**

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~~Justice Dr. Fida Muhammad Khan~~

**JUSTICE DR. FIDA MUHAMMAD KHAN**

Islamabad, 29.10.2014  
M.Akram/

Approved for reporting

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~~Justice Sh. Najam-ul-Hasan~~

**Justice Sh. Najam-ul-Hasan**