

IN THE FEDERAL SHARIAT COURT

(Appellate Jurisdiction)

PRESENT

MR. JUSTICE SYED AFZAL HAIDER

Jail Criminal Appeal No. 210/I of 2006

Gulab Khan son of Ghulam Khan r/o Qila Shah Bag,
District Charsadda Appellant

Versus

The State Respondent

Counsel for appellant Miss. B.H. Shah,
Advocate

Counsel for State Mr. Muhammad Sharif Janjua,
Advocate

FIR. No. Date & 371, 31.3.2003
Police Station Shabqadar Charsadda

Date of judgment of 14.07.2006
trial court

Dates of Institution 08.08.2006

Date of hearing 14.5.2008

Date of decision 23.5.2008

JUDGMENT

SYED AFZAL HAIDER, Judge.- Through this appeal registered as Jail Criminal Appeal No. 210/I of 2006, Gulab Khan appellant has challenged the judgment dated 14.07.2006 delivered in Sessions Case No. 27 of 2004 by Sessions Judge, Charsadda whereby he has been convicted under section 396/34 of Pakistan Penal Code and sentenced to 10 years rigorous imprisonment with a fine of Rs. 100,000/- and in default of payment of fine to further undergo one year simple imprisonment. The $\frac{3}{4}$ share of the fine, if recovered, has been ordered to be paid to the legal heirs of the deceased Mir Wali. Benefit of section 382-B of Code of Criminal Procedure was also granted to the appellant. Taj-ud-Din was tried and convicted alongwith Gulab Khan but he has not preferred appeal against his conviction and sentence.

2. This appeal arises out of crime report FIR. No.371 Ex.PA, registered with Police Station Shabqadar on 31.03.2003 at 1800 hours on the basis of a marasala Ex.PA/1 drafted by Syed Akram Shah, ASI, P.W.6 who was on patrol duty when he received intelligence about the

occurrence. He went to the spot, and found the dead body of Mir Wali where Mian Jan, complainant was also present who gave the information which became basis of the crime report.

3. Syed Akram Shah, ASI initially investigated the case. He prepared injury sheet Ex.PM and inquest report of the dead body Ex.PM/1 as well. The dead body was sent for post-mortem through Muhammad Jan, constable. He inspected the spot, prepared site plan Ex.PB, took into possession blood stained earth vide memo Ex.PR. The ASI also recovered a spent bullet of 7.62 caliber vide memo Ex.P1 and also took into possession the car Ex.P2 bearing Registration No.B-9090-P alongwith its registration book Ex.P3 vide memo Ex.PR/2. He recorded statements of the witnesses under section 161 of Code of Criminal Procedure Code. Thereafter the investigation was conducted by Bahadar Khan, S.I. PW 10. He took into possession the shirt Ex.P4, shalwar Ex.P5 and banyan Ex.P6 of the deceased, all blood stained, and sealed the same into a parcel vide memo Ex.PR/3. These articles were sent to the Forensic Science Laboratory for analysis. Accused Taj-ud-Din was arrested by Gul Amir Khan, Inspector SHO on 03.07.2003 in a raid and a 30 bore pistol

alongwith 13 live rounds were also recovered from him. During the investigation Taj-ud-Din accused reportedly confessed his guilt and was therefore produced before Muhammad Azam Khan, Judicial Magistrate who recorded his confession on 08.07.2003. Final report under section 173 of the Code of Criminal Procedure was submitted by the Station House Officer on 09.06.2003 to the court against the accused for their trial.

4. The trial court framed charge against Taj-ud-Din accused on 02.07.2004 whereas charge against Gulab Khan accused was framed on 19.05.2005 under section 302 read with sections 148/149 of Pakistan Penal Code and also under section 17(4) of Offences Against Property (Enforcement of Hudood) Ordinance, 1979. The accused did not plead guilty and claimed trial.

5. At the commencement of the trial Taj-ud-Din and Gulab Khan were produced in custody whereas the remaining accused avoided appearance as they had absconded. The immediate prospects of their arrest and appearance before the court were gloomy. The court therefore proceeded under section 512 of the Code of Criminal Procedure and regular trial against the appellant commenced. The prosecution in all

produced 15 witnesses to prove its case. The learned trial court has, in its judgement, mentioned the salient feature of the witnesses for the prosecution which are being reproduced in extenso:-

“Noor Gul F.C. (P.W.3) is the marginal witness of the recovery memo Ex.PR/3, vide which the I.O. took into his possession a Shirt Ex.P4, Shalwar Ex.P5 and Banyan Ex.P6 all stained with blood belonging to the deceased in his presence. Ghulam Rabbani F.C. (P.W.5) has executed warrants U/S.204 Cr.P.C. and proclamation notices U/S.87 Cr.P.C. against the accused Nawaz alias Saith, Alif Khan, Baitullah, Taj-ud-Din and Gulab Khan, searched them in their villages and surrounding areas but they were not available; so he returned the same un-served alongwith his reports, which are Ex.PS/1 to Ex.PS/10 respectively.

Syed Akram Shah, S.I.(P.W.6) stated before trial court that on 31.03.2003, he was on gusht when received information about the present occurrence, so he went to the spot and found the dead body of Mir Wali deceased lying on the spot and Mian Jan complainant, reported the matter to him, which he reduced into writing in the shape of murasala Ex.PA/1 and sent the same to P.S. for registration of the case. Further stated that he prepared the injury sheet Ex.PM and inquest report Ex.PM/1 of the deceased and sent the dead body to the mortuary for PM examination. Further stated that he inspected the spot and prepared the site plan Ex.PB and during the spot inspection, he recovered blood stained earth from the spot and sealed the same into parcel, vide recovery memo Ex.PR. Similarly, he also

recovered a spent bullet of 7.62 bore Ex.P1 from the spot and took the same into his possession, vide recovery memo Ex.PR/1 in the presence of marginal witnesses. He also took into his possession motor car bearing registration No.B-9090-Peshawar Ex.P2 alongwith its registration copy Ex.P3 vide recovery memo Ex.PR/2. He recorded statements of P.Ws U/S 161 Cr.P.C.

Gul Amir Khan Inspector/SHO P.S. Serdheri examined as P.W.8, arrested the accused Taj-ud-Din on 03.07.2003 in a raid and recovered 30 bore pistol alongwith spare charger contained 13 live rounds of the same bore and a hand grenade from his possession. Thereafter on completion of investigation he submitted supplementary challan against accused Taj-ud-Din.

Dr.Abdul Khaliq Deputy Director Health FATA (PW-9) on 31/03/2003 at 5.30 PM conducted postmortem examination on the dead body of deceased Mir Wali and found the following.

External Appearance:

1. Firearm entry wound $\frac{1}{2}$ cm x cm at the junction of cervical and thoracic spine and corresponding exit wound right mandible cutting right upper lip and fracturing right upper canine and incisor deep.
2. Firearm entry wound in centre of thoracic spine 6th below the cervical and thoracic junction and exit wound on left side of the chest 2" lateral to sternum and 6th above left nipple 1" x 2" in size.
3. Firearm entry wound on right lumber region $\frac{1}{2}$ cm x $\frac{1}{2}$ cm in size, 3" lateral to lumber spine and 5" above to right iliac

crest, corresponding exit wound right hypochondrium just below the ribs and 8" lateral from mid-line.

4. Intestines and protruding through exit wound. Exit wound is 1 x 2 in size.

Internal Examination:-

Thorax

Thorax walls, ribs and cartilages on left side pleurae, on left side, larynx and trachea, left lung, pericardium, heart and blood vessels injured.

Abdomen:

Abdominal walls, peritoneum, mouth, pharynx diaphragm, small and large intestines and liver injured.

Remarks:

"In his opinion the cause of death is injury to the vital organs, like heart, liver, blood vessels leading to shock and death due to firearm.

"He admitted PM report Ex PM/2 and pictorial Ex.PM/3 in his hand writing and bearing his signatures. He also endorsed injury sheet Ex.PM and inquest report Ex.PM/1.

"Bahadar Khan SI (r), who is investigating officer of the present case, when appeared before this Court was examined as PW-10. He stated that on 02/04/2003 Muhammad Jan FC brought the clothes of deceased, which he took into his possession vide recovery memo Ex.PR/3. That vide his application Ex.PL, he sent the blood stained earth and blood stained garments of the deceased to FSL, the result whereof is Ex.PL/1. He recorded the statements of PWs Bakht

Wali and Mian Jan under section 161 and 164 Cr.P.C., wherein they charged the accused facing trial, so they were arrayed as accused in the present case. That vide his applications Ex.PE and Ex.PF, he obtained warrants of arrest under section 204 Cr.P.C. and proclamation notices under section 87 Cr. P.C. against the accused, charged by the above named PWs . After the arrest of accused Taj-ud-Din, he obtained his police custody and produced him before Judicial Magistrate. That the accused Taj-ud-Din in police custody led the police party to the spot and pointed out various places to the I.O. and thereafter he made addition in the site plan Ex.P.B. He recorded statements of PWs under section 161 Cr.P.C. and admitted the above mentioned documents as correct and mostly signed by him.

“Muhammad Azam Khan, Judicial Magistrate, who has recorded the confession of the accused Taj-ud-Din, when appeared before the Court was examined as PW 11. He stated that accused Taj-ud-Din was produced before him for recording his confessional statement, whose hand cuffs were removed and the police officials including the Naib Court were directed to leave the Court room. Further stated that after fulfilling all the legal formalities and satisfying himself that the accused was making confession with his own consent, then he recorded the same. He admitted the questionnaire Ex.PC, confessional statement Ex.PC/1 and certificate Ex.PC/2 as correct and signed by him as well as the accused.

“Bakht Wali, who is cousin of deceased Mir Wali was examined as PW-13. He stated that he is Taxi driver by profession,

the deceased Mir Wali was also a Taxi driver and both used to park their Taxies at Taxi Stand Shabqadar. That on the day of occurrence at about 2.30/3.00 p.m., he alongwith deceased Mir Wali and other Taxi drivers were present in the Taxi Stand , when in the meanwhile two persons came and booked the Taxi of Mir Wali and left the stand, whereas his Taxi was booked for LRH, Peshawar, so he also left the stand. That in LRH, Peshawar, he was informed about the murder of Mir Wali. Further stated that after the occurrence, they came to know that the accused facing trial alongwith absconding co-accused had murdered the deceased, as he had resisted the snatching of Car from him by the accused.

‘Rabat Khan (PW-14) stated that on 07/07/2003 accused Taj-ud-Din, in his presence pointed out various places to the I.O. and in this respect, pointation memo Ex.PR/4 was prepared by the I.O, which is correct and signed by him. Muhammad Ayub (PW-15) is the marginal witness to the recovery memos Ex.PR/1 and Ex.Pr/2, the detail of which has already been given in the statement of PW 6. The prosecution after consultation with the complainant counsel abandoned PWs Farman and Mehraban being won over, whereas Mian Jan complainant being dead and closed the case for further evidence.’

6. After the close of the prosecution evidence the accused were examined under section 342 of the Code of Criminal Procedure. Both the accused pleaded innocence. Neither they opted to appear as witnesses under section 340(2) of the Code of Criminal Procedure nor produced any

defence. Gulab Khan however stated that he was not responsible for causing any injury and that the recovery memos have not been prepared in his presence and that he was not present at the time of alleged recoveries.

He also stated that Bakhat Ali P.W. is near relative of the deceased while Mian Jan P.W. has been abandoned. In response to the question as to "what was his statement and why was he charged" his reply was that:-

" I am innocent and falsely charged. As I have stated that I belong to defecteo area and the Government wants to curb the resistance from the local police of this area, therefore, I have been arrested in order to facilitate their mission in establishing their writ in the said area. In fact I am innocent and falsely charged".

Taj-ud-din in response to the question as regards his dis-appearance after the commission of offence till the date of his arrest and "how does he explain his abscondance" he stated as follows:-

"I am the resident of defected area and police having no access to that area as the DFC concerned himself has stated in his court statement that the said area is beyond the approach of local police, hence no service effected upon me".

In response to another question, he stated that recoveries were planted on him as was evident from the judgment dated 17.02.2005

delivered by the learned Sessions Judge, Charsadda whose attested copy he produced as Ex.DA/1 in reply to the question:-

“It is in the evidence that you were produced before the competent court of law where you made a voluntary confession. What do you say about it?

‘I was got arrested by the police in 8/9 different un-traced cases and my custody was sought by different police stations of district Charsadda. I was taken out from the Jail in this case and my physical custody was granted in which I was constantly tortured in un-human manner and compelled me to make this in-voluntary statement before the court in order to get redemption from the living hell made around me in these different police stations for several days, even otherwise the statement is in-culpatory in nature’.

7. Before proceeding to discuss the points in this controversy I cannot help mentioning the unfortunate fact of interpolation in the official record. There are repeated insertions in the various documents relied upon by the prosecution. In almost every document relied upon by the prosecution beginning with the first information report, the inquest report and the various exhibits, some unknown state functionary has made interpolations. The corrupter of these documents did neither disclose his identity nor did he narrate the reason as to why and how these insertions were occasioned in a case originally registered under section 302 of the

Pakistan Penal Code and later on converted into one under section 17(4) Haraba. In the inquest report in column No.3 even the time of death was altered and there is an over-writing 1600 hours and the case number has been altered in a different ink and pen with broad nib. This interpolation was made at the top where section 302 of Pakistan Penal Code was deleted and section 17(4) Haraba was instead inserted. This boldness can be attributed either to some one from the police or the prosecution agency who took liberty with the record of this case. The learned counsel for the State was unable to explain the reason for this impudence. He was naturally unable to identify the culprit. Office is therefore directed to send a copy of this Judgment to the Inspector General of Police, NWFP with a copy to the Secretary Home Department of the Province of NWFP so that some responsible officer is deputed to check the record in which interpolation has taken place and fix responsibility after holding an enquiry under intimation to the Registrar of this Court within a period of two months. The Inspector General of Police should issue instructions to all concerned that official record in general and judicial record in particulars should not be meddled with in future.

8. The crime report in this case was registered at 6.00.p.m. but the post-mortem report time dated 31.03.2003 is 5.30. p.m. and it is significant to note that the dead body of Mir Wali s/o Mian jan an Afghan aged 30-35 years was taken to the mortuary by constable Muhammad Jan bearing No.387. However this constable has not been produced in court. The port-mortem report does not mention number of the FIR. A comparison of both these documents shows that the post-mortem took place at-least half an hour before the registration of the crime report and it must have taken some time before the dead body was received in the mortuary. The last column of the Post Mortem Report indicates 02-04 hours as the time that elapsed between death and the post-mortem. This explains the reason why the time of death was altered in column 3 of the Inquest Report.

9. The complainant Mian Jan is reported to have died and could not therefore appear during the trial. It may also be mentioned here that Taj-ud-Din has not filed any appeal though on 23.10.2007 the Office was directed to provide legal assistance to Taj-ud-Din. There is however a letter on record written by Jail Authorities in response to the letter sent by this

Office in which it is stated that Taj-ud-Din does not want to file an appeal against his conviction. This letter has been duly attested by Assistant Superintendent, Central Prison, Peshawar and bears No. 6669/ASH dated 30.10.2007 and also bears the thumb impression of prisoner Taj-ud-Din.

10. I have gone through the evidence and I have also perused the record of this case. I asked the learned counsel for the appellant and the State to formulate their points in support of their contentions.

11. Learned counsel for the appellant stated that no identification parade was held in this case and it could not have been held because there was no direct evidence on the record to connect the appellant with the unfortunate episode. The second point urged by the learned counsel was that at best it was a case of last seen for which the evidence is not so strong. It was further pointed out that the confession of the co-accused Taj-ud-Din was obtained under torture. Next it was pointed out that P.W.10, Bahadar Khan who was posted as S.I. Investigation, Police Station Shabqadar during the days of occurrence has stated firstly that he made additions with red ink in the site plan Ex.PB and according to the pointation made by the accused and consequently that he did not collect any direct evidence

against Gulab Khan appellant except the confessional statement of co-accused Taj-ud-Din. He also stated that the case remained un-traced till 22.04.2003. He also stated that the challan was submitted in this case under sections 302/148/149 of Pakistan Penal Code and due to the opinion of the prosecution branch the section of law was altered into 17(4) of Haraba Ordinance. The learned counsel further stated that it took quite some time for the witnesses of the prosecution to lay the blame on the appellant, hence it was a case of deep consultation and inordinate delay and it is not safe to convict the appellant on such evidence.

12. The learned counsel for the State, however, supported the impugned judgment and stated that the prosecution has succeeded in proving its charge against the appellant on account of the recovery of blood stained earth, the car, the clothes of the deceased which were found to be stained with blood, the proclamation notices, the confessional statement of Taj-ud-Din co-accused, the post-mortem report, the inquest report and the statement of P.W.13 Bakht Wali who is the witness of last seen. The statement of Bakht Wali was also recorded under section 164 of the Code of Criminal Procedure wherein he stated that he knew the two

persons who had picked the car of the deceased and during his search of the culprits he identified them as Nawaz alias Saith and Baitullah, the absconding co-accused. He also stated that the other absconding co-accused Alif Khan alongwith the appellants were involved in the commission of offence. This witness, of last seen, admitted in cross-examination that his statement was not recorded by the Investigating Officer and before the occurrence appellant and his co-accused Taj-ud-Din were not known to him. However it may be pointed out that the confessional statement of Taj-ud-Din, Ex.PC/1, contains the assertion that Mir Wali taxi driver had illicit relations with the wife of Alif Khan the absconding co-accused and this explains the reason that Mir Wali was murdered.

13. I am conscious of the fact that there is element of doubt as regards the number and identity of persons involved in this incident apart from the element of the uncertainty of the time of death of the taxi driver. The factor of consultation is also there as no person was nominated in the crime report, nor any identification parade ever held. It is not a case of direct evidence. The case therefore rests upon the sole testimony of

P.W.13 Bakht Wali whose evidence of last seen, unless corroborated, cannot be made basis of conviction. I have carefully gone through the evidence of P.W.13 recorded on 18.01.2006. Bakht Wali aged 38/40, taxi driver, states that he was a cousin of deceased Mir Wali who was also a taxi driver. On the day of occurrence at about 2.30/3.00 p.m. when he was present in the taxi stand at Shabqadar, two persons came there and hired the taxi of Mir Wali and left the taxi stand. After some time he came to know that Mir Wali was murdered at Nazar Gharri by two persons who had booked his taxi alongwith three other companions. According to his inquiry the two persons who had booked the taxi of Mir Wali were accused Nawaz alias Saith, Baitullah while the other three accused were Taj-ud-Din, Alif Khan and Gulab Muhajir. All the accused according to him murdered the deceased in order to snatch away his taxi. In the cross-examination he stated that before the present occurrence he did not know Gulab Khan and Taj-ud-Din accused and no identification parade was held and the two persons who had come to the taxi stand at Shabqadar to book the taxi of the deceased where was neither Gulab Khan appellat nor Taj-ud-Din.

14. Analysis of this witness shows that he does not even allege that the appellant was last seen with the deceased. The last seen evidence is relatable only to accused Nawaz alias Saith and Baitullah and no one else. He only came to know that three other accused i.e. Taj-ud-Din, Alif Khan and Gulab Muhajir were involved in this murder case. He does not disclose the source of his information. No one comes forward to own the intelligence having been transmitted to this witness. This is therefore not direct evidence at all. It is hear-say evidence. The charge leveled against the accused originally was under section 302 of the Pakistan Penal Code which was later altered into section 17(4) of Haraba Ordinance VI of 1979. The punishment for Haraba under sub-section 4(a) is death when imposed as Hadd. This means that in order to arrive at the verdict of guilt there has to be not only sufficient evidence but evidence of a nature which convinces the judicial mind that no other interference except guilt can be derived out of that narration.

15. In the case of Muhammad Amir Versus the State, reported as 2000-SCMR 1784 the Supreme Court had held that last seen evidence in itself was not sufficient to sustain the charge of murder. Such evidence

must connect the accused with the murder either through incriminating recoveries at the instance of the accused or a very strong motive or proximity of time and last seen and the time of murder. It is only then that the accused is called upon to explain the unnatural death of another person. Of-course every case depends on its own facts and circumstances but in the case of last seen there should be sufficient weight available on the record to corroborate the evidence of last seen. In the instant case it appears that even the evidence of last seen is lacking in crucial point. The principle established by the Superior Judiciary is that the circumstantial evidence must be incompatible with the innocence of the accused. The circumstantial evidence particularly the last seen evidence, must be accepted with great care and caution and should be subject to scrutiny in order to reach a conclusion that no other plausible inference could be drawn from the facts of the case except the guilt of the accused. The circumstances should be of such a nature as to reasonably exclude other hypothesis except the one sought to be proved. In other words the chain of evidence must be complete so as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused. In circumstantial

18

evidence each and every chain has to be established by dependable evidence. I am fully conscious of the fact that last seen evidence alone is not at all a strong piece of weak evidence, therefore, a piece of weak evidence cannot corroborate the suspicion expressed by some one at later stage to sustain conviction. The evidence to be relied upon must be un-impeachable. I am afraid the prosecution has not been able to bring forward best possible evidence to connect the appellant with the murder of Mir Wali. At the risk of repetition I would reiterate the principles which have to be kept in mind in order to prove the charge on the basis of circumstantial evidence. The four essentials are that (i) the circumstances from which a conclusion of guilt is to be drawn should be established beyond doubt; (ii) all the facts should be consistent with the hypothesis of guilt; (iii) the circumstances brought on record should be of a conclusive nature; and (iv) the circumstances should convince the judicial mind, with moral certainty that all other hypothesis stand excluded except the one sought to be proved.

16. In the light of what has been stated above it is not possible to agree with the verdict of guilt returned by the learned trial court in

Sessions Case No. 27/2004 whereby learned Sessions Judge, Charsadda convicted the appellant Gulab Khan and his co-accused Taj-ud-Din under sections 396/34 of the Pakistan Penal Code and sentenced them to imprisonment of 10 years rigorous imprisonment each with a fine of Rs. 100,000/- each or in default to further undergo one year simple imprisonment each as also indicated above in para 01 of this Judgment.

The learned trial court in the concluding para had stated that for reasons recorded earlier viz-a-viz the quality of evidence produced before him, the capital punishment was not awarded to the accused. Similarly the charge under section 17(4) of Haraba Ordinance VI of 1979 was held to be not applicable. I am therefore inclined to accept the appeal.

17. In so far as the case against the absconding accused Nawaz alias Saith, Baitullah and Alif Khan is concerned the learned trial court came to the conclusion that they are involved in the commission of the case arising out of Crime No.371/2003 Police Station, Shabqadar. They have already been declared proclaimed offenders and as such perpetual non-bailable warrants have already been issued against them for execution and they would be tried as and when they are arrested.

18. In so far as the question of confession of Taj-ud-din is concerned, learned counsel for the State relied upon it and asserted that this is sufficient to connect the appellant Taj-ud-Din with the murder of Mir Wali. Not only that the confession was retracted and Taj-ud-Din gave explanation in his statement, recorded under section 342 of the Code of Criminal Procedure, but the element of corroboration is absolutely lacking in this case. It would not in the fitness of things that conviction is based upon a retracted confession particularly when the confessional statement in itself is not confidence inspiring. It is well settled that a retracted confession can be accepted only if it is corroborated by clear, cogent and independent evidence. This is a rule of prudence in the administration of criminal justice which has been followed by jurists and judicial authorities.

19. I am not convinced that the confession of Taj-ur-Din was made after a delay of three months of lodging the FIR was free particularly in the background that the case remained untraced for quite some time as noted above.

20. In so far as the question of extending the benefit of acquittal to Taj-ud-Din who had not appealed, I would be placing reliance on the case

of B.N.Agrawal Versus The State of Haryana reported as 2003(5)Supreme 196. It is a case reported from the Supreme Court of India, wherein it was held that when the Court finds conviction against appealing accused unsustainable in the case of non-appealing accused the benefit of decision must be extended to non-appealing accused inspite the fact that he had not challenged the conviction judgment which had attained finality. In the case of Mohinder Singh & Another Versus The State of Punjab & others reported as 2003(6)Supreme 836, benefit of acquittal was given to the non-appealing accused whose petition had also been dismissed in default. In the Case of Bijoy Singh & Another Versus The State of Bihar reported as 2002(7)SBR 417, the Supreme Court of India held that the Appellate Court finding that the conviction of a co-accused is not possible due to doubtful circumstantial evidence, the benefit of the decision must be extended to the co-accused similarly situated though he has not challenged his conviction by way of an appeal. A number of cases were also referred to in this decision. In the case of Manzoor Hussain Versus The State reported as 1992 P.Cr.L.J. 155 the Federal Shariat Court held that the case of co-accused being identical with the case of the appellant, the benefit of

acquittal may be extended to the non-appealing accused. Similarly in the case of Muhammad Ayub Versus the State reported as 2002-SC 80 the concession of acquittal was extended to the convict who had not filed an appeal. Again in the case of Mukhtar Ahmad Versus The State linked with the case of Muhammad Latif Versus The State reported as NLR-1991 SD 691 a Division Bench of the Federal Shariat Court while reducing the sentence of the appellant/convict proceeded to reduce the sentence of the accused who had not filed an appeal against his conviction. In the case of Mohabbat Ali & another Versus The State reported as 1985 SCMR 662 the Honourable Supreme Court while setting aside the conviction of the appellant also set aside the conviction and sentence of the accused who had not preferred an appeal. Lastly the case of Muhammad Aslam & 5 others Versus The State reported as 1972 SCMR 194 may be referred to where the Honourable Apex Court while setting aside the conviction of the appellants also set aside the conviction recorded against one of the accused who had absconded during the pendency of the appeal and remained absent throughout.

21. In the end I would set aside the order of conviction and sentence recorded in the judgment dated 14.07.2006 by Sessions Judge Charsadda, as noted in para 01 of this judgment, and thereby acquit not only the appellant Gulab Khan but also extend the benefit of acquittal to his co-accused Taj-ud-Din who had stated that because of his financial position he did not want to file appeal against his conviction and sentence. He was under the impression that legal assistance afforded to him would entail expenses which he was not in a position to afford.

22. Resultantly the appeal of Gulab Khan son of Ghulam Khan succeeds and he alongwith his co-accused Taj-ud-Din son of Mass Khan resident of Aqrab Dag, District Charsadda, both confined last in Central Prison Peshawar, shall be released forthwith and set at liberty unless they are required in any other case.

Sauaidan

JUSTICE SYED AFZAL HAIDER

Sauaidan

Announced in open Court
On 23.5.2008 at Islamabad

UMAR DRAZI

Sauaidan

Fit for reporting

