IN THE FEDERAL SHARIAT COURT
(Original Jurisdiction)

PRESENT:

HON.MR.JUSTICE DR.TANZIL-UR-RAHMAN - CHIEF JUSTICE
HON.MR.JUSTICE IBADAT YAR KHAN
HON.MR.JUSTICE DR.FIDA MUHAMMAD KHAN
HON.MR.JUSTICE ABDUL RAZZAQ A.THAHIM
HON.MR.JUSTICE ABAID ULLAH KHAN

1. SHARIAT PETITION NO.17/I of 1989.

Haider Hussain	...	Petitioner
	Versus	
Government of Pakistan & others	...	Respondents
For Petitioner	...	Petitioner in person.
For Respondents	...	Mr.Muhammad Nawaz Abbasi,AAG Punjab Mr.Abdul Ghafoor Mangi,AAG Sind. Mr.Shahabuddin Burq,Law Officer NWFP Raja Muhammad Afsar,AG Baluchistan
For Federal Government	...	Hafiz S.A. Rehman,Standing Counsel
Date of Institution	...	4.12.1989.
Dates of Hearing	...	5.3.1990, 25.3.1991, 20.5.1991, 23.5.1991.

2. SHARIAT PETITION NO.3/I OF 1990.

Syed Islam-ud-Din	...	Petitioner
	Versus	
Government of Pakistan	...	Respondents
For Petitioner	...	Petitioner in person.
For Respondents	...	Mr.Muhammad Nawaz Abbasi,AAG Punjab Mr.Abdul Ghafoor Mangi,AAG Sind. Mr.Shahabuddin Burq, Law Officer NWFP Raja Muhammad Afsar, AG Baluchistan
For Federal Government	...	Hafiz S.A.Rehman, Standing Counsel
Date of Institution	...	22-2-1990
Datesof Hearing	...	5.3.1990, 25.3.1991, 20.5.1991, 23.5.1991

3. SHARIAT PETITION NO.2/K OF 1991.

Muhammad Shafi Muhammadi	...	Petitioner
	Versus	
Federation of Pakistan and another	...	Respondents
For Petitioner	...	Petitioner in person.
For Respondents	...	Mr.Muhammad Nawaz Abbasi, AAG Punjab Mr.Abdul Ghafoor Mangi,AAG Sind. Mr.Shahabuddin Burq, Law Officer NWFP Raja Muhammad Afsar, AG Baluchistan
For Federal Government	...	Hafiz S.A.Rehman, Standing Counsel
Date of Institution	...	18.2.1991.
Datesof hearing	...	5.3.1990, 25.3.1991, 20.5.1991, 23.5.1991
Date of decision	...	23.5.1991.

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(75)

JUDGMENT:

DR.TANZIL-UR-RAHMAN, CHIEF JUSTICE.- By this judgment it is proposed to dispose of Shariat Petitions bearing Nos.17/I of 1989, 3/I of 1990, and 2/K of 1991 filed at Islamabad and Karachi, each challenging, in its own way, the specific provisions of the Qanun-e-Shahadat Order, 1984 and the Criminal Procedure Code, 1898, which were disposed of by us, on conclusion of hearing, by our short-order dated 23-5-1991 which reads as under:-

> "This Order will dispose of three Shariat Petitions bearing Nos.S.P.No.17/I of 1989, S.P.No.3/I of 1990 and S.P.No.2/K of 1991.
>
> In these Shariat Petitions the petitioners have, in their own way, challenged Articles 3 and 16 of Qanoon-e-Shahadat Order, 1984 and Sections 337, 338, 339 and 494 of Cr.P.C. on the ground that they are repugnant to the Injunctions of Islam.
>
> For reasons to be recorded later separately, it is declared that in our view-
> Article 3 of Qanoon-e-Shahadat Order, 1984 is not repugnant to the Injunctions of Islam as laid down in the Holy Quran and Sunnah of the Holy Prophet(S.A.W.).
>
> Article 16 of the Qanoon-e-Shahadat Order, 1984 is repugnant to the Injunctions of Islam as laid down in the Holy Quran and Sunnah of the Holy Prophet(S.A.W.) in so far as it provides that an accomplice is competent witness against an accused person in all matters other than Hadd, even if his evidence is uncorroborated. We are of the view that the offence punishable with Qisas, like Hadd, is also to be excepted. In so far as the uncorroborated testimony of an accomplice in an offence liable to ta'zir is concerned, the conviction solely based on his evidence would be illegal, unless there is corroborative evidence to support the conviction. Sections 337 and 338 of Cr.P.C. which relate to tendering of pardoning to an accomplice are against the Injunctions of Islam in respect of the offences punishable with Hadd.
>
> It is noticeable that Sections 337 and 338 of Cr.P.C. have already been amended by Criminal Law(Amendment)Act, 1991 wherein it has been provided that no person shall be tendered pardon who is involved in an offence relating to hurt or Qatal(قتل) without permission of the victim, as the case may be, or the heir of the victim.

So far as tendering pardon to an accomplice in case of Ta'zir is concerned, it is permissible only if it is based on public interest and does not involve haquq-ul-Ibad.

In so far as Section 494 of Cr.P.C. is concerned, since this point is already involved in two other Shariat Petitions Nos.7 and 8/I of 1991, we deem it proper to deal with the said sections while deciding the above two Shariat Petitions".

Herein below are given the reasons for the above Order.

2. In Shariat Petition No.17/I of 1989 it has been stated that an accomplice without granting pardon under section 337 or 338 of Criminal Procedure Code, 1898 cannot be a competent witness. It has, therefore, been prayed that Article 16 of the Qanun-e-Shahadat Order, 1984, in the present form, is against the principles laid down in the Qur'an and Sunnah and should be struck down and amended to bring it in conformity with the Injunctions of Islam.

In Shariat Petition No.3/I of 1990 it has been prayed to this Court to strike down Articles 3 and 16 of Qanoon-e-Shahadat Order, 1984, and sections 337, 338, 339, 494 and other similar sections of the Criminal Procedure Code, 1898 empowering the State and the Courts to pardon the criminals, as being against the Injunctions of the Holy Qur'an, Ahadees, Ijma' and Fiqh, as the approver is not an 'Adil' (Just) witness.

In Shariat Petition No.2/K of 1991 Article 16 read

with illustration(b) to Article 129 of the Qanun-e-Shahadat Order, 1984, except in the case of an offence punishable with hadd, and sections 337 to 339 Cr.P.C. have been challenged as not in conformity with the Injunctions of Islam laid down in the Holy Qur'an and Sunnah of the Holy Prophet (صلی اللہ علیہ وسلم).

3. The abovesaid three Shariat Petitions were disposed of by our short Order dated 23rd May, 1991 on conclusion of hearing for reasons to be recorded separately, and these are the reasons for the same.

4. This Court has got jurisdiction under Article 203D of the Constitution of the Islamic Republic of Pakistan, 1973, as incorporated in 1980 by the then President and Chief Martial Law Administrator and, subsequently, adopted by the National Assembly in 1985 (See Eighth constitutional Amendment) to examine a law or a provision of law as defined in Article 203-B(c) of the Constitution, 1973 and decide the question whether the law or provision of law is repugnant to the Injunctions of Islam laid down in the Holy Qur'an and Sunnah of the Holy Prophet(صلی اللہ علیہ وسلم). There is also a Constitutional obligation on the State under Article 227(I) which provides that all existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Qur'an and Sunnah of the Holy Prophet (صلی اللہ علیہ وسلم)

and that no law shall be enacted which is repugnant to the Injunctions of Islam.

5. As prayed for in the aforesaid three petitions, the following points are required to be determined in the light of the Injunctions of Islam as laid down in the Holy Qur'an and Sunnah of the Holy Prophet(صلى الله عليه وسلم).

I. Competency of witness(Article 3 of the Qanun-e-Shahadat Order, 1984).

II. Conviction on sole testimony of accomplice. (Article 16 of Qanun-e-Shahadat Order,1984).

III. Tender of pardon to accomplice(sections 337, 338, 339 and 339-A of the Cr.P.C.1898).

IV. Withdrawal from prosecution(section 494 Cr.P.C.)

We propose to deal with the first three points in this judgment. The fourth point will be dealt with alongwith other two Petitions bearing Nos.7/I and 8/I of 1991 involving the question of remission of sentence and withdrawal from prosecution which have been reserved for judgment on the same day.

I. COMPETENCY OF WITNESS (ARTICLE3 OF THE QANUN-E-SHAHADAT ORDER, 1984).

6. To deal with the competency of a witness in the Shari'ah it seems proper to mention first about his qualifications:

(a) Tahammul al-Shahadah (تحمل الشهادة); and

(b) Ada al-Shahadah (اداء الشهادة)

7. The following are the conditions of Tahammul Shahadah (تحمل الشهادة):-

(1) A witness must be a sane person.

(2) A witness must be a person who is not blind.

(3) A witness must be a person who has witnessed the Mashhud bihi (the matter in respect of which evidence is given) except such matters are proveable by hearsay evidence.

8. The following are the conditions of Ada al-Shahadah:- (اداء الشهادة).

(1) A witness must be a person who is -

(a) baligh (adult).

(b) 'aqil (sane)

(c) baseer (بصير having eye-sight);

(d) natiq (ناطق having the faculty of speech);

(e) 'adil (just); and

(f) Muslim .

9. In cases where a non-Muslim's evidence is according to Shariah, admissible, condition(f) will not apply.

10. Evidence of a minor shall, subject to the following conditions, be admissible in cases relating to fighting and altercation:-

(a) If it relates to a minor;

(b) If it relates to injury and murder, and not to property matters;

(c) If the minor witness is a Muslim, sensible and intelligent enough and not generally known as a liar.

11. In case of the Mashhud 'alaih (مشهود علیه) (the person against whom evidence is given) being a non-Muslim the condition of a minor witness to be a Muslim shall not apply:

(d) If evidence is given by more than one minor witnesses;

(e) If the witness or his parents have no enmity with Mash-hud 'alaih or with his parents;

12. For proof of lineage, death, nikah, dukhul,(دخول) (penetration) jurisdiction of a Qazi and actuality of a trust, and such matters as may be proved by Shahadat-e-Sima'i (شهادت سماعی) the condition for a witness to have eye-sight shall not apply.

13. Sima'i Shahadah (سماعی شهادت hearsay evidence) means evidence that is given on the basis of tawatur (تواتر) or information of two 'aqil, baligh, 'adil, male persons or one male and two female persons being 'aqil, baligh and 'adil.

14. Evidence by a dumb person shall be admissible, except in cases relating to"hudud," only when it is written by the witness himself in the presence of the presiding Officer of the Court.

15. Evidence by a non-Muslim against a Muslim shall be

admissible only when it relates to a wasiyyah(وصیہ will) made during the course of a journey when no Muslim Shahid is available.

16. If the Mashhud 'alaih (مشھود علیہ) is a non-Muslim the witness may be a non-Muslim. (For full discussion see my book 'Islami Qanun-e-Shahadat', 1988 printed Qanun-i-Kutub Khana, Lahore,pp 32 to 54 and 99 to 160).

17. As regards quantum of evidence (Nisab-e-Shahadat) the offence of Zina liable to hadd (حد) shall stand proved if four Muslim, 'aqil (عاقل) and baligh (بالغ adult), male witnesses, about whom the Court, having regard to the provisions of Tazkiah al-Shahud, contained in Ordinance VII of 1979 is satisfied that they are "Adil" persons, give evidence as eye-witnesses of the act of penetration (دخول) necessary for the offence of Zina liable to hadd: Provided that if the accused is a non-Muslim the eye-witness may be non-Muslims who are credible according to their own religion or faith.(Also see Rashida Patel's case, (PLD 1989 FSC 95).

18. The offence of Saràqah (سرقہ Theft) liable to hadd and the offence of Haraabah (حرابہ) liable to hadd shall stand proved if two Muslim, 'aqil (عاقل), baligh (adult) male witnesses, about whom the Court, having regard to the provisions of Tazkiah al-Shuhud, contained in Ordinance VI of 1979 is

satisfied that they are 'adil persons, give evidence, as eye-witnesses, of the offence of Saraqah or Harabah: Provided that if the accused is a non-Muslim the eye-witnesses may be non-Muslims who are credible according to their own religion or faith.

19. In case of Saraqah (theft) liable to hadd, the statement of Masrooq Minhu (مسروق منه the person whose property has been stolen) or of any person authorised by him shall be recorded before the statements of the eye-witnesses.

20. The offence of Qazf (قذف) false accusation of Zina) and the offence of Shurb-e-Khamr (شرب خمر drinking wine)liable to hadd shall stand proved by the evidence of two Muslim, 'aqil, baligh, male witnesses about whom the Court having regard to the provisions of tazkiyah al-Shuhud contained in Ordinance VIII of 1979 is satisfied that they are adil person: provided that if the accused is a non-Muslim, the witnesses may be non-Muslims who are credible according to their own religion or faith. In case of the offence of Qazf liable to hadd, the statement of the complainant or any person authorised by him shall be recorded before the statements of the witnesses.

21. An offence liable to Qisas (قصاص) shall stand proved by the evidence of two Muslim, 'aqil, baligh, male eye-witnesses, about whom the Court, subject to the provisions of tazkiyah al-Shuhud

contained in the law, is satisfied that they are 'adil (عادل) persons: Provided that if accused is a non-Muslim the eye-witnesses may be non-Muslim who are credible according to their own religion or faith.

22. Except for the offences liable to Hadd (حـد) and Qisas (قصاص) all other matters, including fiscal matters, shall be proved by the evidence of two 'aqil, baligh and 'adil male witnesses and in the absence of two such male witnesses by the evidence of one such male and two such female witnesses. If the defendant or accused is a non-Muslim the witnesses may be non-Muslims who are credible according to the faith or religion they profess.

23. Evidence of a single 'aqil, baligh, 'adil, Muslim female witness shall be admissible in cases relating to birth, virginity and such other matters concerning women as are not usually seen by men: Provided that if the defendant is a non-Muslim the female witness may be non-Muslim who is credible according to the faith or religion she professes. The condition of a female witness does not mean exclusion of the evidence of a male witness.

24. Evidence of a single 'aqil, baligh, 'adil , male witness shall be admissible in the following cases namely:-

(1) to determine the amount of compensation for the damage caused:

(2) to translate the statement or the evidence of a party or a witness in a court of law;

(3) to decide, when there is a difference of opinion regarding bai'-e-salam(بيع سلم a kind of commercial transaction), whether the article sold is useable or not;

(4) to determine, when the period specified for the payment of amount of a decree has expired, whether the debtor under custody has become insolvent:

(5) to decide whether an article, which is a subject of dispute between the seller and the buyer, is defective or not; and

(6) to determine the amount of compensation for the injuries caused.

25. In cases relating to property and the rights relating thereto, where a defendant, after having been served with summons, fails to appear before the Court; the plaintiff, may produce one witness and may take oath which will be deemed sufficient evidence for the proof of his claim. Where the plaintiff fails to produce a witness but produces documentary evidence the Court may, if it is of the opinion that the plaintiff's claim appears to be probably true, decide the matter by giving an oath to the plaintiff. (for fuller discussion on Quantum of witnesses (نصاب شہادت) see my book 'Islami Qanoon-e-Shahadat, 1988 printed at Qanuni Kutub Khana, Lahore, pp 55 to 98).

27. Now coming to Article 3 of the Qanun-e-Shahadat Order, 1984, relating to competency of witness, it reads as under:-

"3. Who may testify.-- All persons shall be competent to testify unless the Court considers that they are

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prevented from understanding the questions put to them, or from giving answers to those questions rationally by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind:

Provided that a person shall not be competent to testify if he has been convicted by a Court for perjury or giving false evidence:

Provided further that the provisions of the first proviso shall not apply to a person about whom the Court is satisfied that he has repented thereafter and mended his ways:

Provided further that the Court shall determine the competence of a witness in accordance with the qualifications prescribed by the Injunctions of Islam as laid down in the Holy Qur'an and Sunnah for a witness, and, where such witness is not forthcoming, the Court may take the evidence of a witness who may be available.

Explanation.- A lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the question put to him and giving rational answers to them."

27. The above Article lays down two requirements of compentency of a witness:-

i) to have capacity to understand and ability to answer the question put to him in a rational manner:

ii) to have requisite qualifications of a witness as prescribed by the Injunctions of Islam, laid down in the Holy Qur'an and the Sunnah of the Holy Prophet.

28. This section also provides that where a qualified witness is not forthcoming the Court may take evidence of a witness who may be available. However, the above section contains three proviso, namely;

i) A person shall not be a competent witness if he has been convicted by a Court for perjury or giving false evidence.

ii) This disqualification as to the competency of the witness will not be applicable to a person about whom the Court is satisfied that he has repented and mended his way.

iii) It has been left to the court to determine the competency of a witness in accordance with the qualifications prescribed by the Injunctions of Islam.

At the end of the section an explanation has been added that if a witness is a lunatic he may testify provided he is not prevented to answer the question put to him because of his lunancy. It, in fact, relates to period during lucid intervals.

29. The opening clause of the section mentions some of the rules as to the competency of a witness. A person is capable of bearing testimony who possesses the capacity to see a fact which is capable of being seen, of hearing a fact which is capable of being heard and of perceiving a fact which is capable of preception.

30. The first and second proviso are based on the verses 4 and 5 of Surah Al-nur, which read as under:-

" والذين يرمون المحصنات ثم لم ياتوا باربعة شهداء فاجلدوهم ثمانين جلدة ولا تقبلوا لهم شهادة ابدا واولئك هم الفاسقون ٠

الا الذين تابوا من بعد ذلك واصلحوا فان الله غفور رحيم ٠ "

(النور : ٤ ـ ٥)

(And those who launch a charge against chaste women, and produce not four witnesses, (to support their allegation), - Flog them with eighty stripes; and reject their evidence ever after: for such men are wicked transgressors:-)

(Unless they repent thereafter and mend (their conduct): for Allah is Oft-Forgiving, Most Merciful).

31. The third proviso specifically provides that a person should possess all the qualifications of a witness as laid down in the Holy Qur'an and Sunnah. This section itself does not prescribe the qualifications of a witness but makes it a pre-requisite that he should possess the qualifications of a witness as laid down in the Holy Qur'an and Sunnah.

32. At the end of the third proviso it has been provided that "where such witness is not forth-coming the Court may take evidence of a witness who may be available." This clause seems apparently to be in conflict with the accepted rules of a competent witness in Shariah; but it has been provided to meet a situation where a witness possessing the requisite qualifications or that the witness(es) in requisite number,is not available, so that the rights of the people(حقوق العباد) may not be lost and the offenders should not go unpunished. The clause seems to be based on the principle of necessity which is recognized by the Shari'ah.

33. For the discussion aforesaid on section 3 itself it cannot be said that the provisions of law as contained in Article 3 of the Qanun-e-Shahadat, as to

competency of witness, are repugnant to the Injunctions of Islam. The Council of Islamic Ideology has also expressed its opinion on the above Article 3 of the Qanun-e-Shahadat as not repugnant to the Injunctions of Islam. (vide Annual report for 1988-89).

II. CONVICTION ON SOLE TESTIMONY OF ACCOMPLICE(ARTICLE 16 OF QANUN-E-SHAHADAT ORDER, 1984).

34. Article 16 of the Qanun-e-Shahadat Order, 1984, as challenged, reads as under:-

"Article 16, Accomplice.- An accomplice shall be competent witness against an accused person, except in the case of an offence punishable with hadd, and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice."

This Article acknowledges the competency of an accomplice in all matters other than Hudood.

35. The provisions of evidence relating to an accomplice were contained previously in section 133 of the Evidence Act, 1872, since repealed, (hereinafter referred to as "the repealed Act"). These very provisions have now been re-enacted in Article 16 of the Qanun-e-Shahadat with the addition of an exception that in case of an offence punishable with hadd, an accomplice shall not be a competent witness i.e. for awarding hadd punishment as provided in Hudood Laws, namely, the Offences Against Property (Enforcement of Hudood) Ordinance (VI of 1979), the Offence of Zina(Enforcement of Hudood) Ordinance (VII of 1979) the Offence of Qazf (Enforcement of Hadd) Ordinance (VIII

of 1979), and the Prohibition (Enforcement of Hadd) Order (IV of 1979), an accomplice shall not be a competent witness. In result, the evidence of an accomplice has, thus, been excluded for the offences punishable with hadd. This exception may equally apply to any other future law making an offence punishable with hadd, as ordained by Allah or His apostle.

36. An accomplice in the commission of an offence, is a co-accused, an associate or partner who has such a relation to the criminal act that he can be jointly implicated with the other accused. The term 'accomplice' implies that the offenders are more than one who are participes criminis in respect of commission of the crime charged as principals or associates.

37. The present Article 16 must be read with illustration(b) to Article 129 of the Qanun-e-Shahadat as both co-relate to each other. Now, reading Article 16 and illustration (b) to Article 129 together, it would appear that the Courts, in the Sub-continent, while construing section 133 of the repealed Act, have held that whilst it is not illegal to act upon the uncorroborated evidence of an accomplice it is a rule of prudence so universally followed as to amount almost to a rule of law that it is unsafe to act upon the evidence of an accomplice unless it is corroborated.

38. It may, therefore, be said that as provided in section 133 of the repealed Act and now Article 16 of the Qanun-e-Shahadat so provides (except in case of an offence punishable with hadd) that sole testimony of an accomplice, without independent corroboration will not render the conviciton illegal,if the rule of Islamic law of evidence is that the testimony of an accomplice alone is not sufficient to base conviction of a co-accused, unless corroborated by other piece of evidence, the provisions of Article 16, as framed, will come into conflict with the Injunctions of Islam. It may, however, be added that in view of the provisions of illustration(b) of Article 129, it has been almost the rule of law that without corroboration, the evidence of an accomplice is not to be acted upon.

39. Islamic law lays down certain qualifications for a competent witness to tender evidence in a Court of law. An accomplice (or approver) does not come up to the required standard of competency, because, firstly he is a criminal and, secondly, he on his own confession of the commission of the offence becomes undoubtedly a fasiq. Islam searches out the inner conscience of everyone because one has to act as in the presence of God to whom all things, acts and motives are known.

40. In Islam a witness must be 'adil (عـادل). 'Adalah' (justness) is a condition precedent. The evidence is to be given for the Almighty Allah. A detailed illustration of a competent witness is to be found in the various verses of the Holy Qur'an, quoted below, with translation and comments by Abdullah Yousaf Ali:-

" يا ايها الذين آمنوا كونوا قوامين بالقسط شهداء لله ولو على انفسكم أو الوالدين والاقربين ان يكن غنيـا أو فقيرا فالله أولى بهمـا فـلا تتبعـوا الهوى ان تعدلوا وان تلوا أو تعرضوا فان الله كان بما تعملون خبيـرا ٠ "

(النسآء ٤: ١٣٥)

(O ye who believe! stand out firmly for justice, as witness to Allah, even as against yourselves, or your parents, or your kin, and whether it be (against) rich or poor: For Allah can best protect both. Follow not the lusts (Of your hearts), lest ye swere, and if ye distort (justice) or decline to do justice, verily Allah is well-acquainted with all that ye do.)

"Justice is God's attribute, and to stand firm justice is to be a witness to God, even if it is detrimental to our own interests (as we conceive them) or the interests of those who are near and dear to us."

41. But, Islamic justice is something higher than the formal justice of Roman Law or any other human Law. It is even more penetrative than the subtler justice in the speculations of the Greek philosophers. It searches out the innermost motives, because we are to act as in the presence of God, to Whom nothing remains secret.

42. Some people may be inclined to favour the rich because they expect something from them. Some people may be inclined to favour the poor because they are generally helpless. Partiality in either case is wrong. Be just, without fear or favour. Both the rich and the poor are under God's protection as far as their legitimate interests are concerned, but they cannot expect to be favoured at the expense of others. And He can protect their interests far better than any man."

" واشهدوا ذوى عدل منكم واقيموا الشهادة لله ، (الطلاق ٦٥ : ٢)

(And take for witness two persons from among you endued with justice, And establish the evidence)

"Everything should be done fairly and squarely and all interests should be safeguarded. Publicity and the establishment of proper evidence ensure that no one will act unjustly or selfishly. All should remember that these are matters of serious import, affecting our most intimate lives, and therefore our position in the spiritual kingdom in the Hereafter."

" يا ايها الذين آمنوا ان جاءكم فاسق بنبأ فتبينوا ، (الحجرات ٤٩ : ٦)

(O'ye who believe! if a wicked person comes to you with any news ascertain the truth).

"All tittle-tattle or reports-especially if emanating from persons, you do not know are to be tested, and the truth ascertained. If they were believed and passed on, much harm

may be done of which you may have caused afterward to repent heartily. Scandal or slander of all kinds is here condemned. That about women is specially denounced."

43. As I understand, the word "Naba'" in the above verse if taken in its ordinary meaning as "tidings" or information, the Holy Qur'an directs that if it is received from a fasiq let it be checked, from other sources, lest the information may be untrue. Thus, it is all the more required in the matter of believing an accomplice, who has turned out to be fasiq on account of the commission of the offence, while giving evidence which is on a higher pedestal than mere a tiding (khabr, خبر) or information, as it affects the rights and liabilities of another person which are to be decided on the basis of his evidence. Thus, his evidence can only be relied on if it finds support from other corroborative evidence. So, this rule of evidence finds direct support from the verse of Surah quoted above. According to me it is a direct nass, (نص صريح) a textual manifestation against the conviction of an accused on the uncorroborated evidence of an accomplice.

" لقد ارسلنا رسلنا بالبينات وانزلنا معهم الكتاب و الميزان
ليقوم الناس بالقسط ، (الحديد ٥٧ : ٢٥)

(We sent aforetime our apostles with clear signs. And sent down with them the Book and the Balance (Of Right and Wrong), that men may stand forth in justice).

"Three things are mentioned as gifts of God. In concrete terms they are the Book, the Balance, and Iron, which stand as emblems of three things which hold society together, viz., Revelation, which commands Good and forbids Evil; Justice, which gives to each person his due; and the strong arm of the Law which maintains sanctions for evil-doers."

44. It shows that to do justice, Allah gave the "Book" (الكتاب) a symbol of Laws and the balance and Balance (ميزان) to the Prophets. The Book is actually /is a symbol of justice. The word " رسلنا " is plural which shows that all the apostles'(رسل) duty was to do justice among the people and they were not supposed to charge any fee for doing justice among the people. The Quran in the word of Prophet says:

"ما أسألكم عليه من أجر"

"I do not claim any charge/fee"

45. The above verse of the Holy Qur'an gets further support from the following verses:

ان الله يا مركم ان تودوا الا مانات الى اهلها وا اذا حكمتم بين الناس ان تحكموا بالعدل ، (النساء ٤ : ٥٨)

(Allah doth command you to render back your Trusts to those to whom they are due, and when ye judge between man and man, they ye judge with justice).

In this verse the word " الامانات ", as I understand it, has been used in general terms. It also includes 'evidence' as it has been made obligatory on a person who has received evidence in respect of a matter render the said evidence " اداء الشهادة". They shoud not refuse whenever they are called upon to give evidence(ولايأب الشهداء اذا ما دعوا) for the sake of Allah, and not for any

worldy benefit. The word " ادا" is common in the verse and in the law relating to evidence.

46. The word " عدل " has been used at many places in the Holy Qur'an in the same sense. It shows that the judgment should be based on justice.

" انا انزلنا اليك الكتاب بالحق لتحكم بين الناس بما اراك الله ولا تكن للخائنين خصيما ، (النسآء ٤ : ١٠٥)

(We have sent down to thee the Book in truth, that thou mightest judge between men, as guided by Allah: so be not (used) as an advocate by those who betray their trust).

47. The Commentators explain this passage with reference to the case of Ta'ma Ibn Ubairaq, who was nominally a Muslim but really a Hypocrite, and given to all sorts of wicked deeds. He was suspected of having stolen a set of armour, and when the trial was hot, he planted the stolen property into the house of a Jew, where it was found. The Jew denied the charge and accused Ta'ima, but the sympathies of the Muslim community were with Ta'ima on account of his nominal profession of Islam. The case was brought to the Apostle, who acquitted the Jew according to the strict principle of justice as "guided by Allah". Attempts were made to prejudice him and deceive him into using his authority to favour Ta'ima.

48. The word " الحق" is of great importance in the Holy

Qur'an as it throws light upon all prevailing concept of justice in Islam, which is the foundation of peace and prosperity. This word (حق) has been used in the Holy Qur'an at about 287 (two hundred and eighty seven) times, in its several derivatives forms out of which a few verses are given below:-

" الحق من ربك فلا تكن من الممترين ، (العمران ٣: ٦٠)

(The truth (comes) from Allah alone; so be not of those who doubt).

"The truth does not necessarily come from priests, or from the superstitions of whole peoples. It comes from Allah and where there is a direct revelation, there is no room for doubt."

" افغير الله ابتغي حكما وهو الذي انزل اليكم الكتاب مفصلا والذين اتيناهم الكتاب يعلمون انه منزل من ربك بالحق فلا تكونن من الممترين ، (الانعام ٦: ١١٤)

(Say: Shall I seek for judge other than Allah? When He it is who hath sent unto you the Book, explained in detail, they know full well, to whom We have given the Book, that it hath been sent down from thy Lord in truth. Never be then of those who doubt).

49. The righteous man seeks no other standard of judgment but Allah's Will. How can he when Allah in His Grace has explained His Will in the Qur'an with details which men of every capacity can understand? The humblest can learn lesson

on right conduct in daily life, and the most advanced can find the highest wisdom in its spiritual teaching, enriched as it is with all kinds of beautiful illustrations from nature and the story of man.

" لقد جآءك الحق من ربك فلا تكونن من الممترين ،(يونس١٠ : ٩٤)

(The Truth hath indeed come to thee from thy Lord:So be in no wise of those in doubt).

50. "Allah's Truth is all one, and even in different forms men sincere in Religion recognize the oneness. So sincere Jews like 'Abdullah ibn Salam, and sincere Christians like Waraqa or the Nestorian monk Buhaira, were ready to recognise the mission of Muhammad Mustafa(صلى الله عليه وسلم). "The Book" in this connection is Revelation generally, also referring to pre-Islamic revelation."

51. the above verses of the Holy Qur'an clearly show that " الحق " is "The Truth" devoid of all kinds of doubts, or falsehood.

" ولا تلبسوا الحق بالباطل وتكتموا الحق وانتم تعلمون ،(البقرة ٢ : ٤٢)

(And cover not Truth with falsehood, nor conceal the Truth when ye know(what it is)."

There is a commandment not to confuse truth with falsehood. This amounts to concealment of truth.

52. The word " تلبسوا " is derived from the word " لبس "

and the same is fully explained in the following verse of the Holy Qur'an:

" ولو جعلنا ملكا لجعلناه رجلا وللبسنا عليهم ما يلبسون ، (الانعام ٦ : ٩)

(If We had made it an angel, We should have sent him as a man, and We should certainly have caused them confusion in a matter which is already to them obscure and confused).

53. "Supposing an angel should appear to their grosser senses, he could do it only in human form. In that case their present confused notions about spiritual life would be still more confounded. They would say "We wanted to see an angel, and we have only seen a man!"

Both the above verses make it clear that " الحق " is always free from "confusion" and "doubt".

" ولا تجادل عن الذين يختانون انفسهم ان الله لا يحب من كان خوانا اثيما ، (النساء ٤ : ١٠٧)

(Contend not on behalf of such as betray their own souls: For Allah loveth not one given to perifidy and crime).

54. Our souls are a sort of trust with us. We have to guard them against all temptation. Those who surrender to crime or evil betray that trust. We are warned against being deceived into taking their part, induced either by plausible appearances, or such incentives to partiality as that they belong to our own people or that some link connects them with us, whereas when we are out to do justice, we must not allow any

irrelevant considerations to sway us.

55. Verses 105 and 107 of Surah Al-Nisa S.IV contain the word Khawwan (خـــوان). Both these verses make it clear that Allah does not like 'Khain' (خـــائـــن) (who betrays His trust). Thus a witness should not be a person who betrays the trust of Allah reposed in human being. The above verse (IV:107) also shows that our souls are a sort of trust with us and those who surrender to crime or evil betray their trust and become Khain (خـــائـــن) and are sinners (Athema اثيمـــا) and do not have the characteristics of those who are loved by Allah.

" ومن يكسب خطيئـة أو اثمـا ثـم يـرم بـه بـريـأ فقـد احتمل بهتانا واثمـا مبينـا ، (النسآء ٤ : ١١٢)

(But if anyone earns a fault or a sin and throws it on to one that is innocent, He carries (on himself) (Both) a falsehood and a flagrant sin).

56. The above verse of the Holy Qur'an is about those persons who can be called the 'approvers'. Such persons are criminals and sinners themselves and they throw their fault or sin on those who may not be offenders in those crimes. About such persons Allah says that they carry falsehood and a flagrant sin. This is the reason that the evidence of the criminals and sinners who throw their fault and sin on others, is not considered to be a true evidence by itself. The study of the Holy Qur'an

from verses 105 to 112, S.IV reveals a number of things about justice and the evidence.

57. Besides the above Injunctions of Islam as laid down in the Holy Qur'an, the following traditions of the Holy Prophet (صلى الله عليه وسلم) are also relevant:-

" عن عمرو بن شعيب عن ابيه عن جده عن النبى صلى الله عليه وسلم قال لا يجوز شهادة خائن ولا خائنة ولا زان ولا زانية ولا ذى غمر على اخيه ورد شهادة القانع لاهل البيت "

(The Holy Prophet said, says Umar bin Shoaib, with reference to his father who with reference to his grand-father the Holy Prophet(صلى الله عليه وسلم) said "The evidence of Khain (man and Kha'inah (woman) (who betray their Trust) Zani-Zania and of enemy against brother and of those who live in the house (servant, family members etc.) is not admissible).

58. The evidence of an accomplice as an approver may bear some revenge or enmity towards his other accused/partners. The Holy Prophet has said that the evidence of a person having enmity with his brother is not acceptable.' ولا ذى غمر على اخيه ' (Mishkatul Masabih, vol.2 p.623 translation by Fazlul Karim).

59. There is also a tradition related from Hazrat Umar Ibn Abdul Aziz who is generally known in the Islamic history as fifth guided Khalifa. The tradition clearly supports the contention

that the evidence of an accomplice is not acceptable in Islamic law. The writing of the fifth Caliph is just like a commentary of the saying of the Holy Prophet.

60. These are the words of the tradition:-

" كتب عمر بن عبدالعزيز لا يجوز من الشهدآء الا ذوا العدل غير المتهم فانه بلغنا ان رسول الله صلى الله عليه وسلم قال لا تجوز شهادة خائن ولا خائنة ولا ذى غمر لاخيه ولا محدث فى الاسلام ولا محدثة

(المصنف للامام عبدالرزاق ج ٨ ص ٣١٩)

(Umar Bin Abdul Aziz wrote that evidence of only a reliable person who must not be an accused is acceptable. It is for the reason that a tradition from the Holy Prophet has reached us that the Holy Prophet(صلى الله عليه وسلم) said that deposition of a treacherous man or woman is not valid nor of a man having enmity with his brother. The evidence of an innovator is also not acceptable.)

61. Section 1705 of the Majallah Al-Ahkam Al-Adliyah, Turkey, states "A witness must be a person endued with justice(credibility)."

62. The Council of Islamic Ideology, then headed by me, in its Draft Ordinance on Islamic Law of Evidence, 1982 has defined credible (عادل) witness as under :-

> "Adil (عادل) means a Muslim who is known for performing prescribed religious duties (فرائض و واجبات) and abstains from major sins(گناہ کبیرہ)."

63. Now, with this background of the Qurahic commandments and sayings of the Holy Prophet(صلی اللہ علیہ وسلم), reverting to Article 16 of the Qanun-e-Shahadat, petitioner in Shariat Petition No.2/K of 1991 submitted that the offence punishable with Qisas (Retaliation) be also excluded from the general rules laid down under Article 16. He urged that there is similarity between the hadd and qisas. Reference was made by him to an extract from page 63 of Islami Qawaneen Hudood, Qisas Diyat and Ta'zirat (written by me) published by Qanun-i-Kutab Khana, Lahore 2nd Edition, which reads as under:-

حدود وقصاص میں مماثلت :

۱۔ حد کی طرح قصاص بھی شبہ سے ساقط ہوجاتاھے۔

۲۔ جس طرح حدثابت ہوتی ہے اسی طرح قصاص بھی ثابت ہوتاھے۔ یعنی اقرار وشہادت سے ۔

۳۔ حدود وقصاص دونوں میں کفالت بالنفس ممنوع ھے کیونکہ سزا میں قائم مقامی جائز نہیں ۔ ایک شخص کے عوض دوسرے کو سزا نہیں دی جاسکتی ھے۔

Reliance was also placed by Mr.Mohammadi on the following observation of Maulana Mohammad Taqi Usmani, J, in Federation of Pakistan vs. Gul Hassan Khan (PLD 1989 SC 633) appearing at pages 681-682 of the Report which reads as under:-

اب دوسرا سوال یہ رہ جاتا ھے کہ اگر وعدہ معاف گواہ بننے کے طریق کار میں یہ تبدیلی کر لی جائے کہ معافی حکومت یا عدالت

کے بجائے مقتول کے ورثاء دیا کریں تو اس معافی کے بعد اس کی گواھی کی قدروقیمت کیا ھوگی اور کیا اس بنیادپرکسی شخص کوسزا یاب کرنا درست ھوگا؟ اس مسئلہ کا تعلق شھادت ایکٹ (۱۸۷۲ء)کی ان دفعات سےھےجنھیں ھمارےسامنے چیلنج کیاگیاھے،لیکن ان دفعات کےبارےمیں کوئی حتمی فیصلہ اسوقت اسلئے نہیں دیاجاسکتا کہ جس شھادت ایکٹ کی دفعات کو ھمارے سامنے چیلنج کیاگیاھے وہ وفاقی شرعی عدالت کےفیصلےکےبعدمنسوخ ھوچکاھے اور اس کی جگہ قانون شھادت آرڈر ۱۹۸۴ء نافذ کردیاھے اس قانون کی دفعہ ۱۶میں وعدہ معاف گواہ کی گواھی کےبارے میں احکام واضح کئےگئےھیں،لیکن یہ دفعہ ھمارے سامنے زیرچیلنج نہیں،لہذا اس کے بارے میں کوئی حتمی فیصلہ فی الحال ھم نہیں دے سکتے ۔

البتہ کوئی حتمی فیصلہ دیئےبغیریہ سفارش ضرور کی جاسکتی ھے کہ قانون شھادت آرڈر کی دفعہ ۱۶ میں وعدہ معاف گواہ کی شھادت کو حدود کے اثبات کیلئے کافی نہیں سمجھا گیا ، جس کی وجہ یہی ھے کہ ایسی گواھی کو کسی قدر شک کی نگاہ سے دیکھاجاتاھے اور حدود شک سے ساقط ھوجاتی ھیں ۔ دوسری طرف "قصاص" کوبھی شریعت نے اس معاملے میں "حدود" کے قریب قریب برابر رکھاھے جس وقت قانون شھادت آرڈر ۱۹۸۴ء نافذ ھوا اسوقت ملک میں چونکہ قصاص کا قانون نافذ نہیں تھا اسلئےقانون شھادت کی دفعہ ۱۶، میں صرف حدود کو وعدہ معاف گواہ کی گواھی سے مستثنی کیاگیا ، قصاص کا ذکر نہیں کیاگیا۔ لیکن اب جبکہ قصاص کیلئے قانون سازی ضروری ھوگئی تو اس کے ساتھ اس دفعہ میں بھی اتنی ترمیم کرنی چاھئے جس سے حدود کے علاوہ قصاص کے اثبات کیلئے بھی وعدہ معاف گواھی کو کافی نہ سمجھا جائے ۔

64. The submission of Mr.Mohammadi seeking for the exception in Article 16 of the Qanun-e-Shahadat in respect of the offence punishable with Qisas, like that of hadd, is based on sound reasoning inasmuch-as according to the oft-quoted tradition of the Holy Prophet (صلى الله عليه وسلم) ادرؤ الحدود بالشبهات the punishment of Qisas, is also repulsed on account of doubt like that of hadd.

65. It may be worthwhile to mention here that section 133 of the repealed Evidence Act, 1872 was challenged before this Court by the petitioner through Shariat Petition No.1/K of 1979 and Shariat Petition No.20/K of 1979 wherein, inter-alia, section 133 of the Evidence Act was also challenged. The petitions were dismissed on the ground that the Evidence Act related to the procedure of Courts and was thus immune from the jurisdiction of this Court. On appeal before the Appellate Shariat Bench of the Supreme Court in Federation of Pakistan vs. Gul Hassan Khan alongwith several other connected petitions reported in PLD 1989 SC 633 the question of section 133 of the Evidence Act being procedural or otherwise or its examination on the anvil of the Qur'an and Sunnah was not considered as the said Act had already been repealed and the new law, Qanun-e-Shahadat Order, 1984 had come into force. The relevant observation of Maulana Mohammad Taqi Usmani,J, as quoted

above, was made in the appeal before the Shariat Appellate Bench filed earlier by Mr.Mohammadi against the dismissal of the petition No.1/K of 1979.

66. It may, however, be observed here that the provision of Article 16 (or for that matter section 133 of the repealed Act) does not relate to procedure but declares that a conviction merely because it is based on uncorroborated testimony of an accomplice is not illegal. It, in fact, imposes a liability on an accused of being convicted on certain piece of evidence in a certain situation which involves the question of conviction of an accused in a crime. It cannot, therefore, be said to be procedural in nature. In fact, this provision is invoked and works against the accused, and takes effect as a substantive provision of law.

67 I may also refer to Muhammad Alam vs. State (SCMR 1983 Part II, P.1127) wherein Maulana Mohammad Taqi Usmani,J, referring to section 133 of the repealed Act (Evidence Act 1872) observed as under:-

لہذا اگر قانون شہادت ۱۸۷۲ء کی دفعہ ۱۳۳ کا تقاضا یہ ہے کہ صرف شریک جرم (accomplice) کی تنہاء شہادت کسی غیر جانبدار تائید (independent corroboration) کے بغیر بھی اثبات جرم کے لئے کافی ہے اور دوسری طرف اسلامی شریعت کا حکم یہ ہوکہ کسی شریک جرم کی تنہا شہادت کی بنا پر کسی شخص کو مجرم قرار نہیں دیاجاسکتا

تاوقتیکہ اسکی کوئی غیر جانبدار تائید نہ مل جائے ، تو ایسی صورت میں اس آرڈیننس کے تحت اسلامی شریعت کا حکم واجب العمل ہوگا نہ کہ قانون شہادت ۱۸۷۲ء کا۔

68. The rule that an accomplice is a competent witness and the judgment based solely on his evidence is not illegal does not find place in the Muslim Law of Evidence. The reason is obvious. Islam lays great stress on the conditions of competence and standard of probity and rectitude of a witness both qualitatively and quantitatively. An accomplice who partakes commission of an offence becomes fasiq (فاسق) and thus his testimony is not worthy of credence. It appears that the framer of the Qanun-e-Shahadat Order, 1984, though considered an accomplice as incompetent witness in an offence punishable with hadd, but considered him as competent witness in other matters, perhaps, on the ground of necessity, as it may, sometime be difficult to bring home the principal accused to guilt, without having recourse to the evidence of an accomplice.

69. It is also noticeable that the proposed Islami Qanun-e-Shahadat Ordinance, 1982, as drafted by the Council of Islamic Ideology (then headed by me) does not contain any such provision as to the admissibility or otherwise of the evidence of an accomplice.

70. Mr. Justice Khalil-ur-Rahman, Judge of the Lahore High Court in his book Principles and Digest of the Qanun-e-Shahadat, a commentary adapted from (late) Justice Monir's Principles and Digest of the Law of Evidence, vol.1 page 154, while discussing Article 16 of the Qanun-e-Shahadat has stated that "the principle and proposition of law that a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice contained in Article 16 is not in accord with principle of Muslim Law of Evidence."

71. Fathi Bahnasi (فتحى بهنسى) a modern Arab Scholar in his book Nazriyah al-Ithbat fil Fiq al Islami (نظرية الاثبات فى الفقه الاسلامى) on Islamic jurisprudence, published in 1962 page 84 writes that the evidence of an accused or a person, against whom a judgment has been passed, is not acceptable in Islamic Law. He cites Mulla Khusro to support his contention which reads as under:-

" اذا حدث بين اهل السجن حادثة فى السجن واراد بعضهم ان يشهدوا فى تلك الحادثة لم تقبل لكونهم متهمين كذا فى الجامع الكبير "

(An incident having taken place among the prisoners in the prison and some of them offer themselves for giving evidence regarding the incident, their evidence shall not be accepted (against the accused) for the reason that they all are accused persons, as mentioned in Al-Jam'al-Kabir (الجامع الكبير).

72. As would be clear that in Islamic law of Evidence, 'adil (عـــادل) is a condition for the admissibility of the evidence of a witness, but sometime the evidence of a ghair adil (غيـر عـــادل) is also accepted in necessity. Allama Tarablasi in his book Mu'in al-Hukkam(معين الحـكام) writes:

" ان اهل الباديـة اذا شهدوا فـي حق لامـرأة أوغيـرها ولـم يكن فيهم عـدل ان يستكـثرمنـهم ويقتضـي بشهـادتهـم ، (الباب الثانى و العشرون فى القضاء بشهادة غير العدول للضرورة ص ١٤٥)

(if the villagers gave evidence in favour the right of a woman or another person and none of them is adil (عـادل) the Qazi will decide the case on the basis of evidence of a large number of such witness (lacking 'adalah).

He further writes:

" اذا كان الناس فى البـاديـة فساقـا الا القليـل النادر قبلت شهـادة بعضهـم علـى بعضلئـلا تضيـع المصالـح وتهدر الاموال وتضيع الحقوق ،

(if the majority of the residents in a locality are evil-doers, the evidence of some of them will be accepted for and against the others so that their interests may not suffer and their properties and rights may not be destroyed)

He continues:

" اذا تبين للحـاكم ان الفـاسق عـدل فيمـا شهـد بـه قبلت شهادته ولـم يغيـره فسقـه فـى غيـره لان العـدالـة تتبعـض فيـكون الرجل عـدلا فى شئ وفـاسقـا فـى شئ ،

(if, in the opinion of a judge, an evil-doer gives true evidence, he should accept his evidence and his evil-doing in other matters

will not harm it, because a person may be evil-doer in one matter while he may not be evil-doer in another matter." (Al-Tarablasi, Alauddin Abul Hasan Ali Ibn Khalil; Mu'in al Hukkam (معين الحكام), printed Qandahar, Afghanistan, pages 145, 146).

73. Another contemporary scholar Abdul Fattah Muhammad Abu Al-Ainain writes, "the confession of co-accused will be restricted to his own offence and will not be extended to any body else even his co-accused. Thus if some persons jointly commit an offence and then one of them confesses the commission of the offence and gives evidence on his other co-accused, his confession will only be restricted to him and will not be taken as evidence against his co-accused." (Al-Qada Wa'l Ithbat (القضاء والاثبات) Cairo, p.493).

74. This fact has been partly incorporated in illustration(b) of section 129 of Qanoon-e-Shahadat 1984 wherein the Court has been authorised that under the circumstances of a particular case, it may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars.

75. It is pertinent to mention that non-admissibility of the evidence of an accomplice is not restricted to an offence liable to hadd but it is also extended to an offence liable to Qisas (قصاص). Thus in an offence, punishable with ta'zir (تعزير) i.e. the offences other than punishable with hadd and

Qisas may be used as circumstantial evidence(شہادت قرائنی) if it is corroborated by other independent evidence.

76. Section 16 of the Qanoon-e-Shahadat 1984 is, therefore, declared as repugnant to the Injunctions of Islam. An accomplice is not a competent witness in offences punishable with Qisas as well, besides Hadd. A conviction based on his uncorroborated testimony even in matters of ta'zir will be illegal.

III. TENDER OF PARDON TO ACCOMPLICE (SECTIONS 337, 338, 339 AND 339-A OF THE Cr.P.C.1898).

77. While considering sections 337, 338 and 339 of Cr.P.C. it may be stated that in the Pakistan Law of evidence Pakistan Criminal Procedure Code, we come across with two terms: One is accomplice and the other is approver. Sometimes these terms appear to have been used interchangeably. The distinction, however, remains that an approver is always an accomplice whereas an accomplice is not necessarily an approver, as an accomplice or co-accused becomes an approver after he has been tendered a pardon or granted concession on the condition that he will reveal the truth and will not hide anything in relation to the offence or offences which he and the other accused are alleged to have committed; Relevant sections 337, 338, 339 and 339-A of Cr.P.C. are reproduced:-

Section 337: "Tender of pardon to accomplice."

(1) In the case of any offence triable exclusively by the High Court or Court of Session, or any offence punishable with the imprisonment which may extend to ten years, or any offence punishable under section 211 of the Pakistan Penal Code with imprisonment which may extend to seven years, or any offence under any of the following sections of the Pakistan Penal Code, namely, sections 216A, 369, 401, 435 and 477A, (the District Magistrate or Sub-Divisional Magistrate) may, at any stage of the investigation or inquiry into, or the trial of the offence, with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to the offence, tender a pardon to such person on condition of his making a full and true disclosure of the whole of the circumstnaces within his knowledge relative to the offence and to every other person concerned, whether, as principal or abettor, in the commission thereof:

"Provided that no person shall be tendered pardon who is involved in an offence relating to hurt or qatl without permission of the victim or, as the case may be, of the heirs of the victim". (Amended by Presidential Ord:1 of 1991).

(2) Every person accepting a tender under this section shall be examined as a witness in the subsequent trial, if any.

(2A) In every case where a person has accepted a tender of pardon and has been examined under sub-section(2), the Magistrate before whom the proceedings are pending shall, if he is satisfied that there are reasonable grounds for believing that the accused is guilty of an offence, commit him for trial to the Court of Session or High Court, as the case may be.

(3) Such person, unless he is already on bail, shall be detained in custody until the termination of the trial".

338. Power to grant or tender pardon. At any time before the judgment is passed, the High Court or the Court of Session trying the case may, with the view of obtaining on the trial the evidence of any person supposed to have been directly or indirectly concerned in, or privy to, any such offence, tender, or order the District Magistrate to tender, a pardon on the same condition to such person.

"Provided that no person shall be tendered pardon who is involved in an offence relating to hurt or qatl without permission of the victim or as the case may be of the heirs of the victim."

(Amended by Presidential Ordinance No.1 of 1991).

339. Trial of person to whom pardon has been tendered.

(1) Where a pardon has been tendered under Section 337 or Section 338, and the Public Prosecutor certifies that in his opinion any person who has accepted such tender has,

either by willfully concealing anything essential or by giving false evidence, not complied with the condition on which the tender was made such person may be tried for the offence in respect of which the pardon was so tendered, or for any other offence of which he appears to have been guilty in connection with the same matter:

Provided that such person shall not be tried jointly with any of the other accused and that he shall be entitled to plead at such trial that he has complied with the conditions upon which such tender was made; in which case it shall be for the prosecution to prove that such conditions have not been complied with.

(2) The statement made by a person who has accepted a tender of pardon may be given in evidence against him at such trial.

(3) No prosecution for the offence of giving false evidence in respect of such statement shall be entertained without the sanction of the High Court.

339A Procedure in trial of person under Section 339.

(1) The Court trying under Section339 a person who has accepted a tender of pardon shall, before the evidence of the witnesses for the prosecution is taken, ask the accused whether he pleads that he has complied with the conditions on which the tender of the pardon was made.

(2) If the accused does so plead, the Court shall record the plea and proceed with the trial, and shall, before judgment is passed in the case find whether or not the accused has complied with the conditions of the pardon, and, if it is found that he has so complied, the Court shall, notwithstanding anything contained in this Code, pass judgment of acquittal.

78. Although the above provisions are contained in the Criminal Procedure Code but looking to their implications it cannot be said that they are simply procedural in nature. They relate to the privilege or right of the Ruler or the State and the rights of the heirs of the deceased or the victim which are of substantive nature.

79. An approver, on his own admission, is a criminal who implicates his erstwhile associates in crime in order to save his own skin under a promise of pardon that he discloses all that he knows against those with whom he associated criminally and this expectation would lead him to favour the prosecution. It has thus, been observed by Sir John Beaumount in Bhuboni Sahu. V. The King (PLD 1949 FC 90) that "the danger of acting upon accomplice evidence is not merely that the accomplice is on his own admission a man of bad character who took part in the offence and afterwards to save himself betrayed his former associates,

and who has placed himself in a position in which he can hardly fail to have a strong bias in favour of the prosecution".

80. The Council of Islamic Ideology in its 9th Report on Islamization of Laws relating to the Code of Criminal Procedure in September, 1983 (then headed by me) regarding sections 337, 338 and 339 recommended as under:-

"وعدہ معاف گواہ کی شہادت کے سلسلہ میں دو امور قابل غور ہیں ایک یہ کہ حکومت کی جانب سے سزا معاف کرنے کا وعدہ درست ہے یا نہیں ۔ دوسرا یہ کہ ایسے گواہ کی شہادت ، جس نے حکومت کی وعدہ معافی پر جرم میں شرکت کا یا جرم کے ارتکاب کا خود اقرار کیا ہو ، دوسرے شرکاء کے متعلق قابل قبول ہوگی یا نہیں ۔

پھر اس امر کی مختلف صورتیں ہوسکتی ہیں ۔ یہ وعدہ معاف گواہ اگر کسی ایسے جرم کا اقرار کرے جو موجب حد یا موجب قصاص ہے تو اس صورت میں ، اگر اقرار بلاجبر و اکراہ محض معافی کے وعدے کی بنا پر ہے تو یہ اقرار صرف اس کی اپنی حد تک معتبر ہوگا ، یعنی اس اقرار کی رو سے وہ جرم کا مرتکب قرار دیا جائے گا ، ثبوت جرم موجب حد کے بعد کسی کو اجرائے حد سے معاف کرنے کا کوئی اختیار نہیں بنا بریں اگر اس سے وعدہ بھی کیا گیا تھا تو وہ وعدہ غیر شرعی تھا اور اس کا ایفاء کرنا درست نہیں کیونکہ ہر وعدہ جو صریح حکم شریعت کے خلاف ہو ، اس کا ایفاء شرعاً درست نہ ہوگا ۔ مزید برآں اگر وہ اقرار موجب قصاص ہو ، تو قصاص ولی مقتول یا مجروح کا حق ہے ۔ اگر ولی نے یا مجروح نے وعدہ کیا تھا کہ ہم معاف کردیں گے تو ان کو چاہئے کہ وہ وعدہ پورا کرتے ہوئے معاف کردیں اور اگر پہلے ولی یا مجروح نے تو وعدہ نہیں کیا تھا بلکہ وعدہ قاضی اور حاکم نے کیا تھا ، تو قاضی اور حاکم کا کیا ہوا

وعدہ معافی قابل ایفاء نہیں ، لیکن اقرار کے بعد بھی اگرولی مقتول ، یا مجروح شخص معاف کردے تو معاف ہوسکے گا ، اور قصاص جاری نہیں ہوگا اور اگر ایسا اقرار کسی ایسے جرم کے ارتکاب کا ہے جو موجب حد اور موجب قصاص نہیں بلکہ اس سے کسی دوسرے کا مالی حق ثابت ہوتا ہے مثلاً دیت ، ارش ،مال مسروقہ کا ضمان وغیرہ اور قضاء تعزیر لازم آتی ہو تو اگر صاحب حق پہلے سے وعدہ کر کے مالی حقوق کو معاف کردے تو معاف ہوجائیں گے اور اقرار کے بعد بھی معاف کردے تو بھی معاف ہوجائیں گے ، البتہ اگر وہ معاف نہ کرے تو حکومت یا قاضی کو از خود ان کے معاف کرنے کا حق نہیں پہنچتا البتہ حکومت یا قاضی یہ کرسکتے ہیں کہ حقداروں کی آزادرضامندی سے ان کے ساتھ ان مالی حقوق کے بدلے میں صلح کرکے ان کے مالی دعاوی کو ختم کردے البتہ تعزیر اگر اس اقرار کی بنا پر لازم آتی ہو تو کسی ذاتی غرض کی بنا پر تو نہیں ، مگر دینی اور قومی مصلحت کے پیش نظر حاکم کو ایسا کرنا سیاست شرعیہ کا تقاضا معلوم ہوتو یہ وعدہ پہلے سے بھی کرسکتا ہے کہ" یہ شخص اگر اقرار کر کے واقعہ کی صحیح نوعیت بتلا دیتا ہے تو میں تعزیر معاف کردوں گا" بنابریں موجب تعزیر جرم کے ارتکاب کے اقرار کے بعد حسب وعدہ وہ تعزیر معاف ہوگی اور اس شخص کو تعزیری نوعیت کی کوئی سزا نہیں دی جاسکے گی ۔

اس تفصیل کو سمجھنے کے لئے علامہ شامی کی مندرجہ ذیل عبارتیں پیش نظر رہیں :

الفرق بین الحد والتعزیر ان الحد لا تجوز الشفاعة فیه و انه لا یجوز للامام ترکه وانه یسقط بالتقادم بخلاف التعزیر (رد المحتار،ج ۳ ص ۱۹٤)

ترجمہ : حد اور تعزیر میں فرق یہ ہے کہ حد میں نہ تو شفاعت(سفارش)جائز

ھے نہ امام کے لئے اس کا ترک جائز ھے۔ اور تعزیر کے برعکس تقادم (میعاد سماعت گزرجانے) سے یہ ساقط بھی ھوجاتی ھے۔

وستذکر فی التعزیر الاختلاف فی ان الامام ھل لہ العفو والتوفیق لصاحب القنیۃ بان لہ ذلك فی الواجب حقا للّٰہ تعالی بخلاف ما کان لجنایۃ علی العبد فان العفو فیہ للمجنی علیہ

(رد المحتار ، جلد ۳ ص ۲۳۹)

ترجمہ: ھم عنقریب اس بارے میں اختلاف کا ذکر کریں گے کہ آیا امام کو تعزیر میں حق عفو حاصل ھوگا یا نہیں اور قنیہ کے مصنف کے نزدیک اس میں توفیق یوں ھوسکتی ھے کہ امام کو اس تعزیر میں حق عفو حاصل ھوتا ھے جو حقوق اللہ کی خلاف ورزی میں واجب ھوتی ھے، بخلاف اس تعزیر کے جو حقوق العباد کے خلاف جنایت کی صورت میں واجب ھوتی ھے، کیونکہ آخر الذکر میں حق عفو شخص متضرر کو حاصل ھوتا ھے۔

(ھو) ای التعزیر (حق العبد) غالب فیہ (فیجوز فیہ لا براء والعفو)

(ھامش رد المحتار ج ۳ ص ۲۵۷)

ترجمہ: اور وہ جرم جس میں حق العبد غالب ھوتا ھے تو اس میں مجرم کو بری یا معاف کیا جاسکتا ھے۔

وعدہ معاف گواہ کی دوسری حیثیت کسی دوسرے کے خلاف بطور شاھد پیش ھونے کی ھے اس سلسلہ میں فقہی قواعد کے مطابق یہ کہا جائے گا کہ چونکہ اس نے اپنے مجرم ھونے کا اقرار کیا تو "المرء یوخذ باقرارہ" مقولے کے مطابق یہ مجرم قرار پاتا ھے اور جس جرم کا مقر نے ارتکاب کیا ھے وہ فسق ھے اس لئے یہ شخص فاسق ھوا عادل نہیں رھا، اور چونکہ غیر عادل کی شھادت معتبر نہیں ھوتی، لہذا دوسروں کے خلاف اس شھادت قبول نہیں کی جائے گی ۔ البتہ اس کا اقرار "حجۃ قاصرہ" ھے جو صرف اس کی ذات تک محدود رھے گا

اقرار "حجة متعدية" نہیں کہ اس کا اقرار دوسرے کے خلاف بھی حجت ہو، لہذا دوسروں کے خلاف اس کا یہ اقرار نہ بطور اقرار معتبر ہے نہ بطور شہادت، البتہ اس کا اتنا فائیدہ ہوسکتا ہے کہ تفتیش وتحقیق میں ایک آسانی پیدا ہوجائے گی، مثلاً گزشتہ مثال میں سنار کے ہاں جاکر تحقیق کی جاسکے گی اور مال مسروقہ برآمد ہوسکے گا۔ سنار بتاسکے گا کہ یہ مال اس کے پاس کس نے فروخت کیا، ب کو اسکے سامنے پیش کرکے اس کی شناخت کی جائے گی، ہوسکتا ہے کہ اس کارروائی کے نتیجے میں ب خود اقرار کرے اور باقی ۲۰ہزار روپیہ نکل سکے۔ الف کے اس اقرار اور تفصیلی بیان کی روشنی میں ب متہم بالسرقہ تو ہوگیا، لہذا جرم ثابت ہوجانے پر سزا دی جاسکے گی۔

چنانچہ وعدہ معاف گواہ کو حدود وقصاص کے دعاوی میں معاف نہیں کیا جاسکتا، البتہ جرم موجب تعزیر میں حکومت یا قاضی کو بربنائے سیاست شرعی تعزیر معاف کرنے کا اختیار ہوگا ماسوائے ان جرائم موجب تعزیر کے جن کا تعلق حقوق اللہ سے ہو مثلاً اجنبی عورت کا بوسہ لینا۔

اور وعدہ معاف گواہ کے بیان کو محض قرینہ کی حیثیت دی جائے گی جسے تائیدی ثبوت کے ساتھ قبول کیا جائے گا، البتہ اس کے ذمہ عائد ہونے والی مالی ذمہ داری ساقط نہیں کی جائے گی الا یہ کہ خود اس مال کا مالک اس کو معاف کرنے پر رضامند ہوجائے۔

81. Dr. Abdul Malik Irfani has written in his book Islami Qanun-e-Shahadat Pub. 1989 Lahore that :

شہادت ایکٹ کی دفعہ ۱۳۳، سلطانی گواہ کو قابل قبول گواہ تصور کرتی ہے، لیکن اسلامی قانون سلطانی گواہ کے تصور سے ناآشنا ہے۔ البتہ کوئی دوسرا گواہ نہ ملے اور کسی جرم کے ملزموں میں سے کوئی ایک ملزم توبہ کرکے صحیح حالات بتادے تو فقہائے اسلام کو نظریہ ضرورت کے تحت اس کی شہادت قبول کرلینے پر

غور کرنا چاهئے"۔

82. Apart from the Qur'anic Injunctions, the rationale in Islam for discarding or not believing the evidence of an approver without corroboration is that an approver is likely to depose falsely in order to shift the blame. His evidence is open to suspicion and his credibility is doubtful. It has been held in Ramzan Ali Versus the State (PLD 1967 SC 545) that "where an accomplice is not made an approver but examines as witness, though he could have been made an approver, his evidence shall be viewed with great suspicion".

83. It is to be noted that approver's evidence is not for the sake of Allah the Almighty as invariably ordained by Holy Qur'an. واقيموا الشهادة لله In fact an approver gives evidence in the hope of implied pardon with a motive to secure his liberty or to save his life. His evidence is likely to be biased in favour of prosecution thereby he loses the characteristic of being an independent 'Adil witness, in as much as he sells his testimony for his personal gain and cannot be termed as an independent witness. In all probability, he is likely to minimize his role and exaggerate the role of other accused as he being a co-accused is not legally discharged and continues to be an accused. There is every possibility in acting upon the testimony of an accomplice that in a desire to screen his partner in the crime he may substitute

for him a completely innocent person. The possibility of his exonerating the actual culprit cannot be ruled out; he may be the actual culprit and he may shift the blame to co-accused. Furthermore, the provision of law may be misused in as much as it provides an opportunity to persons in authority to involve their opponent in criminal cases who may be implicated falsely on the testimony of an approver. The conviction on the uncorroborated testimony of an accomplice stands no merit in Islamic law of evidence. He being a fasiq, his testimony is to be corroborated by other independent evidence, as already observed.

84. There are verses of the Holy Quran which make out the philosophy of crime and punishment in Islam that every person is responsible to his actions in this world and the world Hereafter, and everyone who earns sin and does wrong should be punished accordingly.

" من يعمل سوٓا يجـز بـه ، (النسآ٤ : ١٢٣)

(Whosoever worketh an evil, shall be requitted therewith).

" ومن جآ٤ بالسيئة فلا يجـزى الذى عملوا السيئات الا ما كانوا يعملون ، (القصص ٢٨ : ٨٤)

(Whosoever bringth evil, then those who do ill works shall be rewarded only for that which they have been working).

" هل تجزون الا ما كنتم تعملون ، (النمل : ٩٠)

(Are ye being required aught save that which ye have been working.).

" ان الذين يكسبون الاثم سيجزون بما كانوا يقترفون ، (الانعام : ١٢٠)

(Verily those who earn sin, anon will they be requited for that which they were wont to do).

" ليجزى الله كل نفس بما كسبت ان الله سريع الحساب ، (ابراهيم : ٥١)

(That Allah may requit each soul; according to that which he hath earned; verily Allah is swift in reckoning)

"ومن جآء بالسيئة فلا يجزى الا مثلها وهم لا يظلمون ، (آل عمران ٣ : ١٦٠)

(Whosoever will come with as vice shall not be requited save with the like thereof and they shall not be wronged)

" ولا تكسب كل نفس الا عليها ولا تزر وازرة وزر اخرى ، (الانعام : ١٦٤)

(Every soul draws the meed of its acts on none but itself: no bearer of burdens can bear the burden of another)

85. The doctrine of personal responsibility again. We are fully responsible for our acts ourselves: We cannot transfer the consequences to someone else. Nor can anyone vicariously atone for our sins. (Abdullah Yousaf Ali p.339). In Surah XXIX:13 we are told that the misleaders "will bear the burdens alongwith their own." Those are the burdens of misleading others with their falsehoods. So, both the sins are their own; vis, their original sin, and the sin of deluding the others. The responsibility of an approver who implicates falsely

a co-accused will, therefore, be doubled, both in this world and in the world Hereafter.

86. Tendering pardon to an accomplice and make him approver on the condition to disclose all the facts and parts played by his co-accused as provided in section 337, 338 and 339 of Criminal Procedure Code, according to Islamic Law, is not permissible in an offence liable to hadd as hadd cannot be waived, reduced, enhanced or altered in any case by anyone. But as far as tendering pardon to him in case of ta'zir is concerned, it is permissible if it is based on"public interest"because ta'zir can be waived by a ruler, legislature or Judge if he deems it necessary in the circumstances of a particular case. Allama Shami, as quoted earlier has written in his book Radd al-Muhtar (ردالمحتار) that "the difference between hadd and ta'zir is that contrary to ta'zir no recommendation can be accepted in Hadd and that a ruler cannot waive it and it is(also) dropped by the delay(تقادم). (Shami, Ibn Abidin, Radd Al-Muhtar, vol:III page 194). He further writes, "so far as pardoning of an accomplice in matter of ta'zir is concerned, it is only permissible when ta'zir relates to the right of Allah and thus it will not be permissible if ta'zir relates to the right of an individual unless

the victim himself pardons him." (ibid,page 239) like the offence of murder and hurt.

87. Therefore, in case of an approver, his evidence against his co-accused shall not be accepted unless it is corroborated with other evidence because in this case his evidence is not only unacceptable on the ground that he is accused but also on the ground that he gains benefit on his evidence which is not permissible in Islamic law.

88. An offence of murder and hurt punishable with Qisas cannot be waived by any one except the heirs of the victim in case of murder or the victim himself in case of hurt. It is noticeable that necessary amendment to this effect has been made in sections 337 and 338 of Cr.P.C., vide section 8 of the Criminal Law (Amendment) Ordinance, 1991, replaced subsequently by Criminal Law (Amendment) Act of 1991.

89. It now seems appropriate to quote from the observations of Shafi-ur-Rahman J., in Federation of Pakistan Vs. Gul Hassan Khan (PLD 1989 SC 633) appearing at page 684 which reads as under:-

> "Section 133 of the Evidence Act and Sections 337 to 339 of the Code of Criminal Procedure prescribe the conditions and the offences for which an offender can be made an approver and the extent and the manner in which his testimony may be utilized at the trial. The situations, the conditions, the offences and the requirements

justifying reception of approver's testimony are all exceptional, bordering on necessity and demands of public policy. The various provisions of the Evidence Act with which its section 133 is to be read establish that whilst it is not illegal to act upon the uncorroborated evidence of an accomplice, it is a rule of prudence so universally followed as to amount almost to a rule of law that it is unsafe to act upon an evidence of an accomplice unless it is corroborated in material respects so as to implicate the accused. The evidence of approver where alongwith other evidence is found to be satisfactory, it should be sufficient to convict and sentence an offender under Ta'zir,....."

90. As a step further to the above view, Mr.Justice Dr.Nasim Hasan Shah, the then Chairman, Shariat Appellate Bench of the Supreme Court in Federation of Pakistan Vs. Public at large (PLD 1991 SC 459 at 462) observed that:

"In Islam a person can be forgiven for his failure to perform Huquq-Ullah but with respect to Huquq-ul-Ibad a person must either perform it or obtain permission of the person whom he owes the rights so much so that even prayers can be interrupted for attending to Huquq-ul-Ibad."

91. In the light of the above discussion, sections 337 and 338 of Criminal Procedure Code (ضابطہ فوجداری) 1898 are declared repugnant to the Injunctions of Islam as laid down in the Holy Quran and Sunnah of the Holy Prophet(صلی اللہ علیہ وسلم) to the extent that no tendering of pardon to an accomplice can be made in case of hadd and offence punishable with ta'zir, which relates to Haq al-Abd (حق العبد)

the right of an individual.

92. To sum up, the provisions of Article 16 of the Qanun-e-Shahadat Order, 1984, is declared as repugnant to the Injunctions of Islam to the extent that an accomplice is not a competent witness in offences punishable with Qisas, and a conviction based on uncorroborated testimony of an accomplice even in the matter of ta'zir will be illegal.

93. Sections 337 and 338 of Criminal Procedure Code, are declared repugnant to the Injunctions of Islam as laid down in the Holy Quran and Sunnah of the Holy Prophet(صلی اللہ علیہ وسلم) to the extent that no tendering of pardon to an accomplice can be made in case of offence punishable with hadd and the offence punishable with ta'zir relating to Haq al-Abad (حق العبد) the right of an individual.

94. This decision will take effect on 31st December, 1991 whereafter the said provisions of law will become void and shall be of no effect to the extent stated above.

(Dr.Tanzil-ur-Rahman) 29.5.1991
Chief Justice

(Ibadat Yar Khan)
Judge

(Dr.Fida Muhammad Khan)
Judge

(Abdul Razzaq A. Thahim)
Judge

(Abaid Ullah Khan)
Judge

Approved for reporting.

Islamabad, the
23rd May, 1991.
Naseer

S.P.No.17/I/89
S.P.No.3/I/90
S.P.No.2/K/91

N O T E:

ABDUL RAZZAQ A. THAHIM, J.- I have the benefit of perusing the well considered judgment in these Shariat Petitions written by learned Chief Justice, Mr.Justice Dr.Tanzil-ur-Rahman. I agree but I would like to make a few observations:

The pre-condition for Approver is that he should be accomplice but every Accomplice is not approver. The words approver and accomplice are not defined in Pakistan Penal Code, Criminal Procedure Code or Qanoon-e-Shahadat Order, 1984 nor such definition was given in repealed evidence Act of 1872. I would therefore, examine the meaning of the words Accomplice and Approver. The Oxford Dictionary defined the Accomplice as "An Associate in crime or guilt, a partner in crime". Chamber's Dictionary defines the word as "an associate in crime".

In Law of Evidence by Munir, page-1448 (Pakistan Edition), the word Accomplice is defined as "An Accomplice means a guilty associate or partner in crime, a person who is believed to have participated in the offence, or who, in some way or other, is connected with the offence in question or who makes admissions of facts showing that he had concious hand in the offence.

The definition of approver in Oxford Dictionary is "One who proves or offers to

prove (another) guilty; hence, an informer. Now restricted to: One who confesses a felony and turns king's (queen's) or state's evidence. One who tests. One who confirms or commends.

In World Book Dictionary, approver is defined as "A person who approves or commends. A person who proves or offers to prove."

Therefore, it is necessary that approver, in the first instance should be accomplice and after granting pardon under section 337 Cr.P.C. he becomes approver and is to be examined as witness under section 337(2) Cr.P.C. in court.

2. Accomplice is to be tried alongwith co-accused while approver is not to be tried jointly with accomplice but examined as witness and during investigation he is interrogated. Both can make confession. Statement as accused of accomplice is recorded under section 342 Cr.P.C. and under section 340(2) Cr.P.C. and can give evidence under section 340(2) Cr.P.C. on oath in disproof of the charges or allegations made against him and under Article 44 of Qanoon-e-Shahadat Order, 1984 as such all accused persons, including an accomplice are liable to cross-examination and under Article 43 of Qanoon-e-Shahadat Order, 1984 when more persons than one are being tried jointly for the same offence, and a confession is made by one of such persons and is proved, the court may take into consideration such confession as circumstantial evidence against such other person. Therefore, confession of accomplice before taking into consideration

must be proved for which I refer to Articles 37, 38 and 39 of Oanoon-e-Shahadat Order, 1984 that confession should be true, voluntary and without inducement, threat or promise and not before Police Officer. Therefore, if confession of accomplice is not proved in light of above provisions of Oanoon-e-Shahadat Order, 1984 it cannot be treated as circumstantial evidence even in cases of TAZIR. The evidence of confession of co-accused (Accomplice) cannot come under the category of direct evidence in light of Article 71 of Oanoon-e-Shahadat Orfer, 1984. I also Like to refer to illustrations(b) of Article 129 of Oanoon-e-Shahadat Order, 1984 whereby the evidence of accomplice is unworthy of credit unless he is corroborated in material particulars. In Islam the accomplice is not trust-worthy and in this judgment it has unanimously been decided that evidence of such witness is not admissible in cases of Tazir and Qisas. In my humble view even in cases of Tazir the evidence of accomplice should be subjected to test of Tazkiyah-al-Shahood. The burden of proof under Article 117 lies on a person who desires any court to give judgment. The proof of evidence to be such which is admissible. The position of approver is different. He is to be examined as witness in the court having taken cognizance of offence. His evidence is to be recorded as a witness when he is tendered pardon and we in this judgment decided that evidence of approver in cases of Hadd as well as Tazir is not admissible and is against the Injunctions of Islam as laid down in Holy Quran and Sunnah of Holy Prohoet (صلی اللہ علیہ وسلم) (P.B.U.H). As such the evidence of approver and accomplice though both are accused in the crime is on different footing. In Qanoon-e-Shahadat

Order, 1984 there is nothing about the approver being a competent witness. The evidence of accomplice is not to be recorded as a witness in the court in accordance with Articles 133, 134 and 136 of Qanoon-e-Shahadat Order, 1984. He is accused and is jointly tried with others for the same offence and his evidence is admissible to the extent of Article 43 and Article 129 of Qanoon-e-Shahadat Order, 1984. The approver could be a competent witness because he a witness and examined under section 337(2) Cr.P.C. In my humble view an accomplice is not a competent witness under Article 16 of Qanoon-e-Shahadat Order, 1984 as his examination as accused does not fulfil the requirement of witness. Therefore, accomplice without being examined as witness in accordance with provisions of Qanoon-e-Shahadat Order, 1984 as in the case of approver, the accomplice can hardly be considered as competent witness. An approver is to be examined as a witness under section 337(2) Cr.P.C. which reads as under:-

> "337(2)(A).- Every person accepting a tender under this section shall be examined as a witness in the subsequent trial if any."

Approver is not be jointly tried if his evidence does not satisfy the requirement. I refer to section 339(1) Cr.P.C.

3. There is no provision in Criminal Procedure Code that accomplice being jointly tried to be examined as witness against co-accused when approver is granted pardon he is taken out of category of accused for the time being and to be examined as witness and could be a competent witness under Article 16 of Qanoon-e-Shahadat Order, 1984. The statement of witnesses is to be recorded

under section 161 Cr.P.C. and he is supposed to be acquainted with the facts and circumstances of the case and such witness is bound to answer all questions other than the questions which expose him to a criminal charge or to a penalty or forfeiture. Even confession before Police Officer is not admissible. Accomplice is accused and is required to be arrested under section 54 Cr.P.C. and taken to Magistrate under section 60 Cr.P.C. subject to provision of bail and case is to be sent to Magistrate under section 170 Cr. P.C. when evidence is sufficient alongwith a report under section 173 Cr.P.C. and cognizance is taken under section 190 Cr.P.C. or under section 193 Cr.P.C. as the case may be or process is issued on direct complaint or joined as accused by court when name is given in Column No.2 or otherwise. When in case of approver the District Magistrate, a Sub-Division Magistrate or ~~xx~~ Magistrate of First Class may under section 337 Cr. P.C. at any stage of the investigation or enquiry or trial of offence tender a pardon and such person after accepting pardon is to be ~~treated~~ tendered as witness for all purposes subject to conditions laid down under sections 338/339 Cr.P.C. The mode of recording evidence of witness has already been discussed by me. Therefore, accomplice could only be competent witness in terms of section 16 of Qanoon-e-Shahadat Order, 1984 when he is tendered pardon and examined as witness otherwise his evidence as accomplice is only admissible in light to the extent of Article 43 of Qanoon-e-Shahadat Order,1984 when accomplice has given confession is subject to Article 129 of Qanoon-e-Shahadat Order, 1984. The admissibility of evidence of accomplice is independently given in Articles 43 and 129 of Qanoon-e-Shahadat Order, 1984 when there is no specific provision for

consideration of evidence of approver.

4. In the leading judgment written by learned Chief Justice, Mr.Justice Dr.Tanzil-ur-Rahman, and concurred by all of us it is decided that a conviction based on uncorroborated testimony of accomplice even in matter of Tazir will be illegal but in Tazir evidence of accomplice could be considered. In case of (Enforcement of Hudood) Ordinances, 1979 specially in cases of TAZIR severe punishmenta are provided. Under section 10(2) of the Ordinance accused could be punished with R.I. for a term which may extend to ten years and 30 stripes, under section 10(3) of the Ordinance upto 25 (Twenty-five) years with thirty stripes and under section 11 of the Ordinance, the punishment is imprisonment of life with whipping and fine, like-wise in Prohibition Hadd Order, 1979, the Offences Against Property (Enforcement of Hudood) Ordinance, 1979 severe punishments upto imprisonment of life are provided. Moreover, according to Hanafis and Malikis a Legislator/ Qazi is authorised to give punishment in Tazir more than Hadd if he deems it necessary in the circumstances of a particular case. (Sharah Fath Al-Qadir by Ibn -Humam, Vol.V, pages 115 to 116). Therefore, while considering evidence of accomplice in cases of Tazir the conditions of competency and standard with regard to such person is the same and while participating in crime he is not 'Adil' (Just) but is Fasiq (فاسق). I like to refer following Hadith:-

> "It has been related that a man came to Holy Prophet (P.B.U.H) and stated that he has committed adultery with a woman and he named her. The Prophet (P.B.U.H) called the woman and she denied to have committed adultery with that man. The Prophet (P.B.U.H)

imposed Hadd on the man and released the woman (Abdu Daud, Vol.II, page 282, printed Beirut)."

From this Hadith it is clear that Hadd was imposed on man on his own confession but woman was released and confession of Accomplice (co-accused) was not found sufficient to impose Hadd on woman and even punishment for Tazir was not awarded. A number of Verses from Holy Quran have been referred in leading judgment with regard to the standard, quality, the competency of witness in Islam, therefore, the evidence of accomplice in cases of Tazir be also considered in light of Injunctions of Islam as laid down in Holy Quran and Hadith and Judge while considering evidence of accomplice in cases of Tazir should seek guidance from the Verses of Holy Quran and Hadith. The evidence of accomplice to the extent of circumstantial evidence corroborated in material particulars should also be subjected to verification for which I refer the following Verse of Holy Quran:-

"O ye who believe!
If a wicked person comes
To you with any news,
ascertain the truth, lest
Ye harm people unwittinglv,
And afterwards become
Full of repentance for
What ye have done." (49:6)

Moreover, the Holy Quran has conditioned Adalat (probity) for the witness. Quran says:-

"And take for witness
Two persons from among you
Endued with justice." (65:2)

(ABDUL RAZZAQ A. THAHIM)
Judge

Approved for reporting.

REGISTERED

Ph:9220581

Civil.Shariat Review Petition .No.2-4/1994-SCJ.
SUPREME COURT OF PAKISTAN.
Islamabad, the 21/2/2005.

386
17/2/05

From

The Registrar,
Supreme Court of Pakistan,
Islamabad.

To

The Registrar,
Federal Shariat Court
Islamabad.

Subject: Civil Shariat Review Petition Nos. 02-04 of 1994.
IN
Civil Shariat Appeal Nos. 14-16 of 1991.

1.Federation of Pakistan through Secretary M/O Law, (in Sh.R.P.2 & 4/94)
Justice & Parliamentary Affairs, Islamabad.

2.Federation of Pakistan through Secretary M/O Law, (in Sh.R.P.03/1994)
Justice & Parliamentary Affairs, Islamabad & another.

Versus.

1.Muhammad Shafi Muhammad and another.(Res.in Sh.R.P.02/94)
2.Haider Hussain. (Res.in Sh.R.P.03/94)
3.Syed Islam-ud-Din. (Res.in Sh.R.P.04/94)

On review of the Judgment and order of this Court dt.22-06-1993 in Shariat.A. Nos.14-16/1991 filed against the judgment and order of the Federal Shariat Court , Islamabad dt.23-05-1991 in Sh.P.No.2-K/89, Sh.P.17/I/89 Sh.P.3-I/90.

Dear Sir,

In continuation of this Court's letter No. Sh. ~~Review Petition~~ Appeal No. 14-16/1991-SCJ dt.04.08.1993, I am directed to enclose a certified copy of the order of the Supreme Court dated 04-10-2004 dismissing for non-prosecution as barred by time the above cited Sh. review petitions.

Please acknowledge the receipt of this letter alongwith its enclosure within 10 days.

Yours Faithfully

(MUHAMMAD ASLAM)
ASSISTANT REGISTRAR(IMP.)
FOR REGISTRAR

Encl: Order:

IN THE SUPREME COURT OF PAKISTAN
(Shariat Appellate Jurisdiction)

PRESENT:

Mr.Justice Abdul Hameed Dogar
Mr.Justice Muhammad Nawaz Abbasi
Mr.Justice Mian Shakirullah Jan
Mr.Justice Dr.Allama Khalid Mahmood
Mr.Justice Dr.Rashid Ahmed Jullundhari

Shariat Review Petition Nos.2 to 4 of 1994
(On review from the judgment dated 22.6.1993 of this Court passed in Shariat Appeal Nos.14-16 of 1991)

Federation of Pakistan ... Petitioner

Versus

Muhammad Shafi Muhammadi
Haider Hussain
Syed Islam ud Din ... Respondents

For the petitioner : Nemo

For the respondent : No represented

Date of hearing : 04.10.2004

ORDER

None has entered appearance on behalf of petitioner. Moreover, these petitions are barred by 412 days and no convincing explanation has been furnished for condonation of delay. Accordingly, these petitions are dismissed for non-prosecution as well as being barred by time.

Sd/ Abdul Hameed Dogar, J
Sd/ Muhammad Nawaz Abbasi, J
Sd/ Mian Shakirullah Jan, J
Sd/ Dr. Allama Khalid Mahmood, J
Sd/ Dr. Rashid Ahmed Jullundhari, J

Islamabad:
04.10.2004

Certified to be true Copy
Superintendent
Supreme Court of Pakistan
ISLAMABAD
12.2.08