



وَإِذَا حَكَمْتُمْ بَيْنَ النَّاسِ أَنْ تَحْكُمُوا بِالْعَدْلِ

(النساء-٥٧) And, if ye Judge between mankind, that ye Judge Justly.



FEDERAL SHARIAT COURT



ANNUAL REPORT FOR THE YEAR – 2010

Tele: (051)-9203091, 9222525 Fax: 051-9203448

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MR. JUSTICE AGHA RAFIQ AHMED KHAN
Chief Justice
Federal Shariat Court of Pakistan

Mr. Justice Agha Rafiq Ahmed Khan, Chief Justice



Mr. Justice Agha Rafiq Ahmed Khan was born on 23rd August, 1949 in Garhi Yasin, District Shikarpur in Royal Barakzai Pathan family. He is son of Late Agha Mohammad Anwer Khan, prominent figure of the said area. He got early education from D.C. High School Garhi Yasin and Graduation from C&S Government College, Shikarpur. He got LL.B Degree from University of Sindh in the year 1971.

Justice Agha was enrolled as Member of Sindh Bar Council in 1972. He joined Sindh Judicial Services as Civil Judge and First Class Magistrate in 1973 through Competitive Examination of Public Service Commission. He was promoted as Senior Civil Judge & Assistant Sessions Judge in 1978 and as Additional District & Sessions Judge in 1983. He was appointed as Additional Secretary, Sindh Assembly in 1985 and promoted as Secretary, Sindh Assembly in 1985. He attended Shariah Training Course in International Islamic University in Islamabad in 1984. He was appointed as Director Legal Services and Director Administration in PIA on deputation in 1989. He was promoted as District & Sessions Judge in May, 1990 and was appointed as Additional Secretary (Regulations) in Services and General Administration Department, Government of Sindh. He was appointed as Judge Sindh Labour Court No.1 Karachi in 1991. He was posted as Law Secretary Sindh in 1994-95. He was appointed Additional Judge Sindh High Court in 1995, and confirmed as Judge of Sindh High Court in 1996. He was appointed as Federal Secretary, Law and Justice Division, Government of Pakistan in 2008 and appointed as Permanent Judge of Sindh High Court on 14.12.2008 alongwith original seniority from 1995. He was elevated as Chief Justice, Federal Shariat Court of Pakistan on 05.06.2009.

Mr. Justice Agha Rafiq Ahmed Khan participated in Training Course on Judicial Ethics organized by Royal Institute of Public Administration (RIPA), London in June, 2009.

Ex-officio: Member, National Judicial (Policy Making) Committee, Member, Law & Justice Commission of Pakistan, Member, Advisory Board of the Al-Mizan Foundation, Member, Administration Committee of Al-Mizan Foundation, Member, Board of Governors, Board of Trustees, Council of Trustees and Selection Board of the International Islamic University, Islamabad. Member Allama Iqbal Open University Executive Council.

Mr. Justice Syed Afzal Haider, Judge



Born on August 19th 1931

Received early education in Pakpattan-Joined Forman Christian College Lahore in 1946- Graduation from Government College Lahore in 1953-Graduation in law from Punjab University Law College Lahore in 1955-Started legal practice in January 1956 and also started teaching law in 1962-Professor Law in Punjab University Law College Lahore, Quaid-e-Azam Law College Lahore, Punjab Law College Lahore, Pakistan Navy War College Lahore, Pakistan College for Law Lahore, National Institute of Public Administration Lahore, Civil Services Academy Lahore & Federal Judicial Academy Islamabad.

Elected as President Lahore High Court Bar Association 1983-84-Co-Chairperson All Lawyer's Action Committee 1983-86-Member Pakistan Bar Council 1984-95-Vice Chairman Pakistan Bar Council 1988-90-Chairman Pakistan Bar Council Executive Committee 1990-91.

Member: Law & Justice Commission of Pakistan(2001-04); National Mudarba Board 1995-98; Evacuee Trust Property Board, Government of Pakistan 2004-07, Council of Islamic Ideology 1989-2003 and 2007-Minister Law and Parliamentary Affairs Government of Punjab 1996-97-Federal Minister for Law, Justice and Parliamentary Affairs Government of Pakistan 2007-08, appointed as Judge Federal Shariat Court of Pakistan on 26th March, 2008, with 52 years of Law Practice in the Superior Courts of Pakistan and 46 years of law teaching experience.

Author of Books: Prem Piala; Zikr-e-Hussain; Willayat-e-Faqih (English and Urdu); Syed Moin-ud-Chishty; Hussain Ibn Ali; Baba Nanak; Zikr-e-Farid; Wajood Zaat aur Sifaat; Zikr-e-Sakhian; Farid-Nanak-Bullah-Waris; Zindagi Nama Baba Farid, Zikr-e-Fatima; Baba Farid International Conference, Bhutto Trial in two volumes (English); Shariat Bill; Islami Nazriati Council; Rehmatilil Alemeen; F.I.R; Zikr-e-Darvish; Sukhmani Sahib; Supreme Judicial Council; Final Report under Article 230 of Constitution and The Constitution of the Islamic Republic of Pakistan.

Received Awards as Professor of the year in 1998, 1999, 2001 at Quaid-e-Azam law College, Lahore and also as King Scout in the Jambooree held in Sahiwal (1946), Bhai Vir Singh Award New Delhi (1992), Ambassador of Peace Award in 2001 by the International Federation for World Peace, New York, USA.

Attended (i) World Media Conference in the New Millennium 15-17 January 2001 Tokyo, Japan.(ii) International Conference on Interfaith Harmony, New York, U.S.A June, 2001.(iii) Loi Jirga, Kabul, Afghanistan as Member of the Presidium. (iv) War and Peace Conference, Tehran, Iran- August 1988. (v) Sikh Cultural Heritage, Singapore. Delivered 23 lectures on Inter Faith Harmony in USA, Canada and India (2008).

MR. JUSTICE SHAHZADO SHAIKH



**Registrar, Federal Shariat Court of Pakistan, Federal Secretary (Retired, August 31, 2007),
Lecturer, Rawalpindi Law College, Rawalpindi;**

- **Islamic Jurisprudence**
- **Muslim Personal Law**

Books/Publications:

- **The Gateway to the Qur'an--Al-Faatihah**
- **The Pure Truth--Al-Ikhlaas.**
- **Know Your God**
- **The Round Table-Issues & Perspectives**
- **Ad-duaa**
- **Quran aur Science (Urdu)**
- **Unto Light (Comparative study of Testaments and the Quran)**
- **The Divine Dynamics – Surah Al-Fil**
- **Hikmat-e-Quran (Compilation of Speeches from Radio Pakistan).**

Above books are available at:

*www.islamicbooks.com.pk for free download & search)

- Digest of Service Laws (1973-2010)
- The Women Protection Act, 2006 – A Critical Review (Under Printing)
- National Logistics Policy (Thesis for Masters)
- Socio-Economic Aspects of Education Policies in Pakistan (Thesis for Postgraduate Diploma)

In hand:

- **Islamic Jurisprudence**
- **The Index of the Quran**

Articles:

- Participatory Approaches to Poverty Alleviation
- Strengthening Supreme Audit Institution for Continued Accountability

- **Enforcement of Recovery Laws** against Defaulters
- Micro-Credit-Working for the Poverty Alleviation
- **Women Rights- Human Rights**
- Population and Environment
- Politics of Shortages
- **Moon Sighting (Quranic Scientific approach)**
- **The Word of God (Kalimatullaah)**
- **Human Rights in Islam and Tolerance in Society**

After Retirement: **Counsel/Legal Advisor:**

- **Capital Development Authority**, Islamabad
- **Water and Power Development Authority**,
- **Zarai Taraqati Bank of Pakistan (Agriculture Development Bank of Pakistan)**
- **Federal Board of Revenue**, Government of Pakistan

Awards: Two 'Lifetime Achievement' awards by two private sector institutions of Larkana.

EDUCATIONAL QUALIFICATIONS

Degree	Institute	Main Subject
M. Sc.	NDC/Quaid-e-Azam University Islamabad	Defence & Strategic Studies
M. Sc.	Sindh University	Chemistry
Post Graduate Diploma in Economic Planning	Central School of Planning & Statistics, Warsaw, Poland	Economic Planning {Socio-Economic Aspects of Education Policies in Pakistan (Thesis)}
L.L.B	Sindh University	Law
Certificate	Institute of Policy Development & Management, University of Manchester, UK.	Capacity Building for Poverty Alleviation

Mr. Justice Dr. Mahmood Ahmad Ghazi, Judge



Born on 18th September, 1950
(appointed as Judge of Federal Shariat Court on 26.03.2010)

EDUCATIONAL QUALIFICATIONS

- Completed memorization of the Holy Qur'an 1958.
- Certificate of Proficiency in Arabic 1962
- Honors in Arabic 1966
- Dars-i-Nizami (equal to M.A. Arabic and Islamic Studies) in 1966.
- Honors in Persian, First Position with Gold Medal 1968.
- M.A. Arabic, Punjab University, Lahore, 1972.
- Certificate in French Language from French Cultural Centre, Islamabad.

Ph.D. in Oriental Learning, Punjab University, 1988

ASSIGNMENTS

PROFESSOR, ASSOCIATE DEAN, Faculty of Islamic Studies, Qatar Foundation, Doha

- Professor of Shari'ah, Faculty of Shari'ah and Law, International Islamic University, Islamabad. (on long leave)
- Chairman, Shari'ah Board, State Bank of Pakistan
- Chairman Shariah Advisory Cell, International Islamic University, Islamabad

Chairman, Shariah Supervisory Committee, Takaful Pakistan, Karachi. (2005-2008)

POSITIONS HELD

- President, International Islamic University, Islamabad, 2004-2006
- Vice President (Academics), International Islamic University, Islamabad, November 1994-June 2004.
- Federal Minister for Religious Affairs, August 2000 to August 2002
- Member, National Security Council, Government of Pakistan, 1999-2000.

- Judge (Adhoc Member), Shariah Appellate Bench, Supreme Court of Pakistan, 1998-1999.
- Member, Council of Islamic Ideology, 1990-1993 and 1997-2000.
- Director General, Shariah Academy, International Islamic University, Islamabad, 1991-2000.
- Director General, Dawah Academy, International Islamic University, Islamabad, 1988-1994.
- Khatib, Faisal Mosque/Director, Islamic Centre, Faisal Mosque, 1987-1994.
- Editor, *Al-Dirasat al-Islamiyyah*, an Arabic quarterly journal of the Islamic Research Institute, Islamabad, 1981-87, 1991-93.
- Editor, *Fikr-o-Nazar*, an Urdu quarterly journal of the Islamic Research Institute, Islamabad, 1984-87.
- Associate Member, Constitution Commission appointed by the President of the Islamic Republic of Pakistan, 1983-85.
- Professor, Faculty of Shari'ah and Law, International Islamic University, Islamabad, 1987— till date.
- Associate Professor, Islamic Research Institute, 1981-87.
- Research Fellow/Assistant Professor, Islamic Research Institute, 1979-81.

Fellow/Lecturer, Islamic Research Institute, 1973-79.

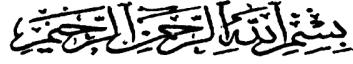
MEMBERSHIP

- Member, Working Committee, Al-Tajammu' al-Alami li Ulama al-Muslimin, Makkah, Saudi Arabia.
- Member, Al-Ittihad al-Alami li Ulama al-Muslimin (headed by Shaikh Yusuf al-Qardawi), Cairo, Egypt.
- Member, World Forum for the Proximity of Islamic Schools of Thought Tehran, Iran.
- Member, Arab Academy, Damascus, Syria.
- Member, Syndicate, Arid Agricultural University, Rawalpindi, Pakistan, 2006-2008..
- Member, Executive Council, Allama Iqbal Open University, Islamabad, 2004-2007.
- Member, Board of Advanced Studies and Research, Allama Iqbal Open University, Islamabad, 1991-1994
- Member, Religious Board, Modarabah Companies in Pakistan, Corporate Law Authority, 1990-1994.
- Jurisconsult, Federal Shariat Court of Pakistan, 1980-1998.
- Jurisconsult, Shariah Appellate Bench, Supreme Court of Pakistan, 1981-1998.
- Member, Board of Trustees, Ibn Rushd Islamic University, Cordova, Spain, 1992-1996.
- Member, Academic Council, International Islamic University, Islamabad.

FEDERAL SHARIAT COURT

Annual Report 2010

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FOREWORD

The right of Access to Justice is the fundamental human right and embraces all the other rights such as social, legal, religious and political which are meticulously guaranteed by the Constitution of Islamic Republic of Pakistan and other laws framed there-under.

Administration of justice in a smooth and transparent manner is the responsibility of the whole Islamic Ummah collectively. Islam preaches such a comprehensive and coherent judicial and legal system which is based completely on the principles of 'Adl and Ihsan and which may ensure peace and prosperity in the society.

The main function of this unique court is to examine and decide the question whether or not any law or provision of law is repugnant to the injunctions of Islam. Besides, exercising the revisional jurisdiction the court has powers to take suo-motu actions. The Holy Quran and the Sunnah of the Holy Prophet (PBUH) have provided rich treasure of dictates, principles, norms, traditions and precedents which need to be focused and channelized during the hearing of cases in the threefold jurisdiction of this court. By this way, the court has examined thousands of laws and thus given/provided a guideline for the citizen of Pakistan to lead their lives in the individual and collective spheres in accordance with the preaching of Islam.

As per Article 203 GG of the Constitution, the decision (s) of the Federal Shariat Court are binding on the High Courts and all courts subordinate to High Courts. If these decisions are not challenged in the Supreme Court, it attains the finality and if challenged, these are heard by the Shariat Appellate Bench of the Supreme Court of Pakistan.

During the year, we had given priority to the Shariat Petitions and delivered landmark judgments on various issues. While hearing these petitions, views (oral and written) of acclaimed Ulema, Specialists, eminent Lawyers and Jurists were invited. Further, the back-log of criminal cases have also been cleared mostly in the light of decisions taken by the National Judicial (Policy Making) Committee (NJPMC) and in this regard special benches were constituted at Islamabad and in four other Provinces.

After announcement of a recent judgment wherein the jurisdiction of the court has been determined in cases pertaining to Hudood with consequence that such cases would be transferred to Federal Shariat Court from the respective High Courts, it has been considered that Federal Shariat Court may setup its circuit bench registries at the various Divisional headquarters. I am cognizant of the fact that mere opening up of new circuit registries, even remotely, would certainly facilitate the lawyers' fraternity and the litigants.

An area which has been kept as part of the strategic planning in the context of promoting "Accessibility of Justice" has been induction of internet connectivity. Some progress has been made in this regard. Spade work is being done to ensure internet connectivity between the Principal seat and the Branch Registries.

In the end, I thank my learned brother Judges who enthusiastically worked as a team and efficiently performed their judicial responsibilities. I would also thank the members of the bar who devotedly made their appearance in the court and assisted us on various issues. Indeed the services rendered by the staff members cannot be overlooked.

(Justice Agha Rafiq Ahmed Khan)

Chief Justice

INTRODUCTION

Before embarking discussion on judicial activities during the judicial year 2010, it is pertinent to mention here some golden principles of Islamic justice system. According to the Holy Quran, doing justice is near to observance of duty i.e. Prayer, Fasting Zakat etc. Imam Sarkhasi describes that: Qaza, is the best form of Worship and after Faith, there is nothing more obligatory than a just decision.

2. Islam has not failed to give guidance in the administration of justice and like other religious matters, administration of justice, in all its aspects, has also been regarded as nothing short of a religious function. The incidents of oath, the competence of the witnesses, and the rules of conduct and liabilities of the Qazis have been elaborately dealt with in the Islamic law. These rules are not mere rules, as understood in common parlance, but religious injunctions, compliance whereof is strictly compulsory. Further, since these rules are based on natural and eternal justice and emanate from the Most High, they are not susceptible of any change with the change of circumstances or time and have to be implicitly observed in the manner of other religious duties or rites.

3. When we go through the Islamic Injunctions as appeared in the Holy Quran and Sunnah of the Holy Prophet, it reveals that the commandment pertaining to maintaining justice has not been addressed only to Muslim Judges but the whole Umma, individually as well as collectively, been ordered to maintain justice and equity in the society in their day to day affairs. Famous quoting of the Holy Prophet that: "Many of you come to me and I give decisions in the light of submission before the Court. It may happen that some times one party is more eloquent than the other party and thereby obtains a decision against his brother. In fact such a person obtains, instead of decision in his favour, a piece of hell fire" lays down the principle that not only the Qazis or judges of Islamic State should maintain justice while adjudicating cases between the parties but the litigants should also keep the lamp of justice alive by not involving in unnecessary litigations and the influential party should abstain from capturing the rights of others by hiring high paid lawyers and by using their influence in the society.

4. In the history of Islam, two letters bear great importance with specific reference to administration of justice. Many golden principles of Islamic legal system and important codes for Muslim Judges have been embedded in the letter sent by Hazrat 'Umar to Abu Musa Ash'ari and a letter sent to Malik Ashtar Nakh'i by the fourth Caliph, Hazrat 'Ali. The Caliph 'Umar, inter alia sent directives to Abu Musa Ash'ari, the Governor of Basra to maintain equality between the parties before the court of law. The fourth Caliph, Hazrat 'Ali when appeared before Qazi Shuraih as complainant, he stood by the side of the accused claiming no privileged treatment. Likewise, Hazrat 'Umer once appeared before Qazi Zaid bin Sabit as defendant, when he was requested to sit by the side of the Qazi, he declined the offer and remarked that it was unjust on the part of a Qazi at the very outset of the Court proceeding to care for the personalities while deciding cases between the parties. He sent directives to all Qazis of Islamic State to treat all the individuals equally, not to distinguish between them on the basis of rank and higher

status. It is the duty of the judiciary to ensure that even the humblest and the most unpopular citizen may not be the victim of any intolerance in terms of providing relief to aggrieved party under the law. The Judiciary can play an important role in imparting an enlightened spirit of tolerance and fairness in the society.

5. It is appeared in the tradition of the Holy Prophet that: Once the Prophet of God (Peace Be Upon Him) appointed Hazrat 'Ali, in his early youth, as a judge of Yemen. Hazrat 'Ali pointed to his youth and inexperience and confessed his lack of acquaintanceship with the intricacies and requirements of such a responsible undertaking. The Holy Prophet replied: 'God will guide you and give you strength till you decide a case in favor of one party without hearing the other side.' This is the very basis of justice. The doctrine of "audi alteram partem" is deeply contained in the Islamic law also; it is not a mere carbon-impressed copy from the Institutes of Justinian.

6. Interestingly, there is great coincidence between the principles of Islamic Justice System and the policy chalked out by the NJPMC in terms of prompt justice, independence of judiciary, giving a chance of being heard and equal treatment between the parties before the Court of Law etc. During the Judicial Year 2010, the Hon. Judges of the Federal Shariat Court in line with the NJPMC,s policy, heard Criminal Appeals as well as Shariat Petitions under Article 203-D of the Constitution of Islamic Republic of Pakistan in Provincial Headquarters of the country apart from the principal seat, Islamabad and reduced the backlog and pendency to a considerable extent. Likewise, by invoking the jurisdiction under Article 203-D of the Constitution, two important judgments were delivered by examining relevant laws in the light of Islamic Injunctions. In *Muhtarama Benazir Bhutto vs. Federation of Pakistan*, the Court inter alia held that: "Unilateral changing of the names of Zulfiqar Ali Bhutto Trust and Peoples Foundation Trust through the Martial Law Orders and President Orders on various dates and amending trust deed, changing Board of Trustees and Board of Directors are mala-fide and repugnant to the Injunctions of Islam and never to have been existed in the eyes of law. In this judgment, the Court relied on express commandments of the Holy Quran, traditions of the Holy Prophet and established principles of Islamic Jurisprudence. This important issue has also been settled by the August Supreme Court in *Qazalbash Waqf vs. Federation of Pakistan*. (PLD 1990 SC-99).

7. Another landmark judgment delivered during the Judicial Year 2010, is the examination of various sections of Protection of Women (Criminal law Amendment Act (VI of 2006) by invoking the jurisdiction under Article 203-D of the Constitution of Islamic Republic of Pakistan. The salient feature of this judgment is that the impugned provisions of the said Act would yet to be examined in the light of Islamic injunctions but the Court with the consent of counsels of the petitioners and those representing Federal Government and Provincial Governments, framed consensus issues with specific reference to jurisdiction of this Court under Article 203-DD of the Constitution and it was inter alia held that: "The omissions and insertions of various sections in the Hudood Ordinance 1979 and corresponding amendments are violative of Injunctions of Islam and the purpose achieved through these amendments, omissions. and insertions was to limit and curtail the jurisdiction of the Federal Shariat Court. All actions which are ancillary or auxiliary or related to or germane to or connected with the offences falling in the ambit of "Hudood"are also included in the term of "any law relating to the enforcement of Hudood" as

appeared under Article 203-DD of the Constitution. When a matter is dealt with by the Constitution and it conferred upon a Federal Shariat Court certain powers and it is not subject to any statute, then no statute can control or curtail the power of the Federal Shariat Court. The Court has pleased to establish bench registries in far flung area like Swat, Bahawalpur, Rahim yar Khan and other parts of the country to facilitate the lawyers to file appeals before the Federal Shariat Court against the decisions of trial courts in matters of Hudood under 203DD.

8. Last but not least, during the Judicial Year 2010, an acclaimed religious scholar of the Muslim World and a Judge of the Federal Shariat Court, Dr. Mehmood Ahmed Ghazi shifted to his heavenly abode. After his sad demise, the number of Judges in the Federal Shariat Court decreased to three only. After the retirement of Justice Syed Afzal Haider in February 2011, the required strength of the Hon. Judges of the Federal Shariat Court to hear the Shariat Petitions under Article 203-D of the Constitution is not complete. Under Article 203-C (2) of the Constitution, the Federal Shariat Court shall consist of not more than eight Muslim Judges including Chief Justice to be appointed following the procedure prescribed in 18th amendment of the Constitution. Not more than three judges shall be Ulema who fulfill the conditions prescribed in Article 203 C (3-A) and the conditions recently embedded in the 18th amendment of the constitution. Under Procedure Rules 1981, a petition, reference or revision against the judgment imposing a sentence of Hadd or death shall be heard by a bench consisting of not less than three judges one of whom shall be an Alim Judge. At present, only two judges including Hon. Chief Justice are performing their duties. However, it is heartening that the Judicial Commission as well as the Parliamentary Committee has recommended the appointment of two more Hon. Judges in the Federal Shariat Court.

To ensure smooth dispensation of justice and to establish a system of guidance, piety and justice in the country, it is inevitable to resolve the issues hindering the process of administration of justice in the country and implement the policy chalk out by the National Judicial Policy Making Committee.

COURT AUTOMATION

Our world today has changed a great deal with the aid of information technology. Things that were once done manually or by hand have now become computerized Operating systems, which simply require a single click of a mouse to get a task completed. With the aid of IT we are not only able to streamline our business processes but we are also able to get constant information in 'real time' that is upto the minute and up-to-date. Keeping in view the needs of modern world Federal Shariat Court has also started automation of all activities being carried out manually in 2008. In the first year Procurement of Hardware Infrastructure, LAN (Local Area Network) Establishments and Automation of some of business processes of FSC including Case Flow Management System and Human Resource Management System etc. have been completed within stipulated time period. Some of the features of these Systems are as under:-

CASE FLOW MANAGEMENT SYSTEM

- Computerized Case Institution
- Searching case record
- Bench Allocation
- Date Fixation
- Checking Case Status
- Case proceedings
- Finding Judgments
- Proposed Cause List
- Report generation regarding pendency, disposal, institution, and offence wise
- Statistics.

In the year 2010 following tasks were performed regarding Case Flow Management System:-

- (a) Record of cases for the year 2010 including more than 1500 cases have been computerized at Principal seat

- (b) Reported Judgments from the year 2004 to 2010 have made online.

HUMAN RESOURCE MANAGEMENT SYSTEM:

- ❑ Computerized Information of any employee of the Court
- ❑ Leave Record of the employee
- ❑ Seniority list of staff and officers

In the year 2010 following tasks were performed:-

- ❑ Promotion History of the Court staff
- ❑ ACRs of more than 100 personals were added.

The official website of FSC *federalshariatcourt.gov.pk*

Following information can be downloaded from FSC website.

- ❑ Brief history of establishment of Federal Shariat Court.
- ❑ Chapter 3-A of the constitution of Pakistan (This chapter consists of Articles of the Constitution pertaining to the establishment of the Federal Shariat Court, appointment and qualification of judges, jurisdiction etc.
- ❑ Procedure Rules of the Court.
- ❑ Profile of former and present judges.
- ❑ Profile of present and former Chief Justices.
- ❑ Leading Judgments of the Court (Shariat Petitions and suo moto cases)
- ❑ A summary of reported criminal cases from 1980 up to date.
- ❑ Tenders
- ❑ Notifications
- ❑ Photo Gallery
- ❑ Articles
- ❑ Case Status

NETWORKING

- Main registry of the FSC is interlinked internally through LAN system to connect, share and operate different automation software, hardware and data among the users/computers.
- A VPN Router and a Network Security Firewall have been purchased and installed in the Principal Seat that may be used for connectivity of remote locations in a secure way.
- To overcome the electric short-fall and to smoothly operate the server computers and other networking equipments, the electrical work of the server room to Generator using AMF panel has been completed successfully.

FEDERAL SHARIAT COURT COMPOSITION 2010

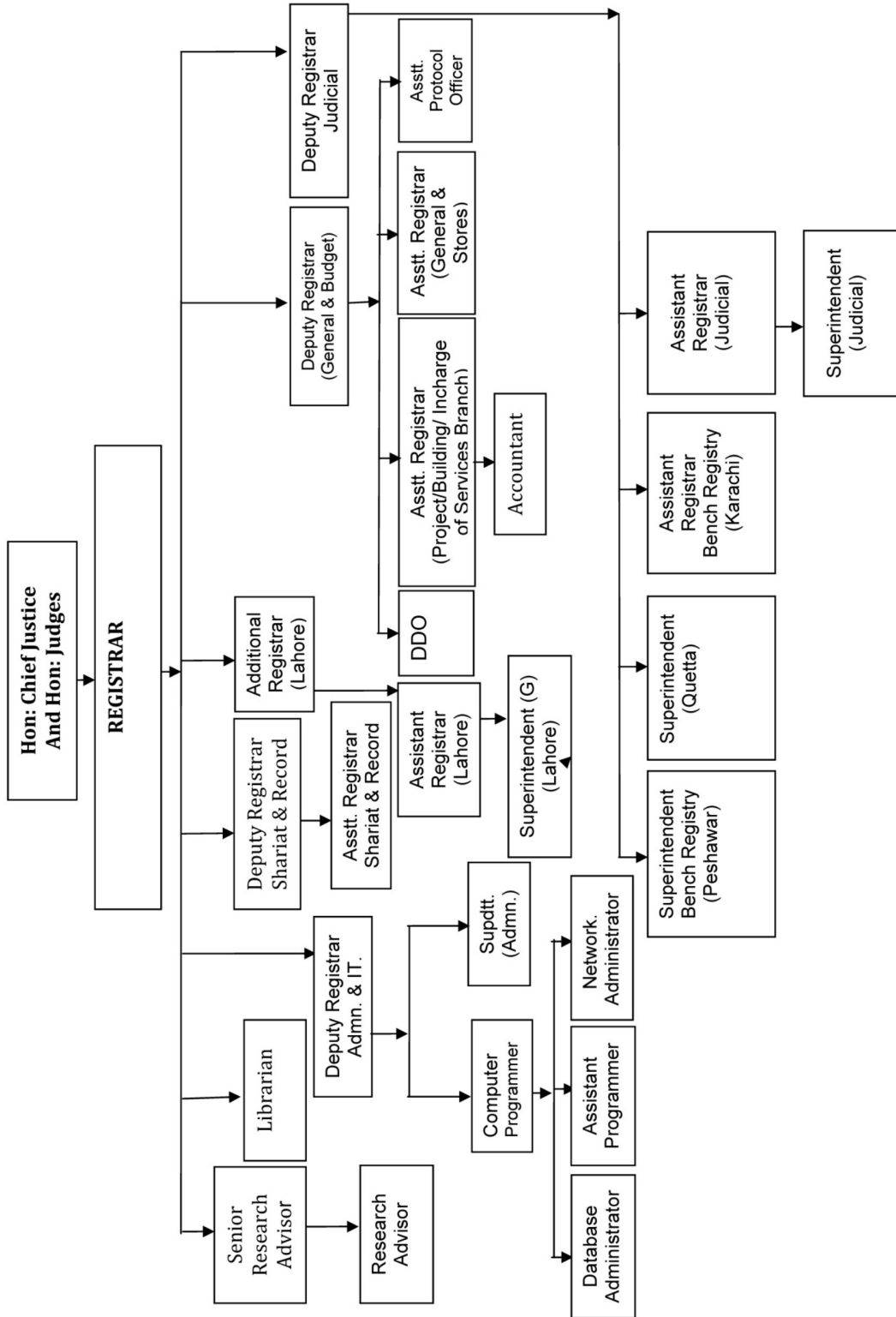
The Chief Justice:

Name	From	To
Mr. Justice Agha Rafiq Ahmed Khan	05-06-2009	

The Judges of the Federal Shariat Court:

Name	From	To
Mr. Justice Syed Afzal Haider	26-03-2008	25-03-2011
Mr. Justice Shahzado Shaikh	26-03-2010	
Mr. Justice Mahmood Ahmad Ghazi	26-03-2010	25-09-2010

Organisational Chart of the Court



**CEREMONIES, MEETINGS
& GROUP PHOTOS**



Mr. Justice Agha Rafiq Ahmed Khan presenting flowers to Hon'ble Mr. Justice Iftikhar Muhammad Chaudhry, Chief Justice of Pakistan at Federal Shariat Court, Islamabad.



Mr. Justice Agha Rafiq Ahmed Khan called on Hon'ble Chief Justice of Pakistan in his office at Islamabad.



Mr. Justice Agha Rafiq Ahmed Khan presenting Annual Report 2009 to Mr. Justice Iftikhar Muhammad Chaudhry Chief Justice of Pakistan at Supreme Court Islamabad.



Mr. Justice Agha Rafiq Ahmed Khan presenting souvenir to Mr. Justice (R) Khalil-ur-Rehman Ramday at Federal Shariat Court Mr. Justice Iftikhar Muhammad Chaudhry is also seen on right.



Mr. Justice Agha Rafiq Ahmed Khan presenting souvenir to Mr. Justice (R) Sardar Muhammad Raza Khan at Federal Shariat Court, Islamabad.



Mr. Justice Agha Rafiq Ahmed Khan, Chief Justice (M) administering oath of office to Mr. Justice Shahzado Shaikh (L) and Mr. Justice Dr. Mahmood Ahmad Ghazi (R).



From left to right Mr. Justice Shahzado Shaikh, Mr. Justice Agha Rafiq Ahmed Khan (Chief Justice), Mr. Justice Syed Afzal Haider and Mr. Justice Dr. Mahmood Ahmad Ghazi.



Mr. Justice Agha Rafiq Ahmed Khan offering prayers after tree plantation at Federal Shariat Court, Islamabad.



Mr. Justice Agha Rafiq Ahmed Khan meeting with Mr. Mustapha Fares, First President of Supreme Court of Morocco and Mr. Mustapha Middah, Attorney General of Supreme Court at Rabat, Morocco.



Mr. Muhammad Taieb Naciri, Minister of Justice, Kingdom of Morocco presenting souvenir to Mr. Justice Agha Rafiq Ahmed Khan, Chief Justice at Rabat, Morocco.



Mr. Justice Agha Rafiq Ahmed Khan recording views in the Visitor's Book at Supreme Court of Morocco. First President Mr. Mustapha Fares in seen on the right.



Mr. Abdullah Hussain Haroon, Ambassador & Pakistan's Permanent Representative in United Nations called on Mr. Justice Agha Rafiq Ahmed Khan, Chief Justice at Federal Shariat Court, Islamabad.

STATISTICAL TABLES AND COURT BUDGET

Judicial Activity And Statistics
Court Performance During The Year 2010
Category Wise Consolidated Position During the Year 2010

S.No.	Category of Cases	Pendency On 1-1-2010	Institution from 1-1-2010 to 31-12-2010	Total	Disposal from 1-1-2010 to 31-12-2010	Balance on 1-1-2011
1.	Cr.Appeals	968	351	1319	252	1067
2.	Cr.Revisions	100	47	147	23	124
3.	Cr.P.S.L.A.	48	27	75	08	67
4.	Cr.Murder /Hadd Reference	64	18	82	29	53
5.	Cr.Suo Moto	05	05	10	01	09
6.	Cr. Review	02	--	02	01	01
7.	Show Cause	--	03	03	02	01
8.	Cr.Misc:	258	330	588	319	269
9.	Shariat Matters	220	61	281	28	253
Total:		1665	842	2507	663	1844

Consolidated Position At Principal Seat and Bench Registries
During The Year 2010

CRIMINAL MATTERS

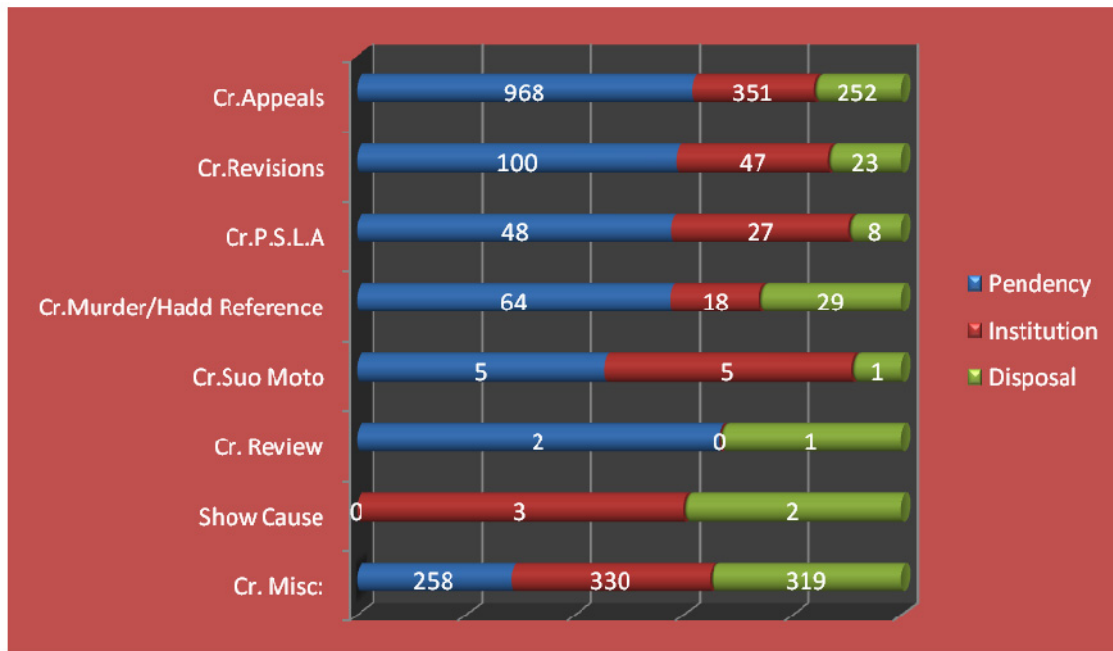
S.No.	Category of Cases	Pendency On 1-1-2010	Institution from 1-1-2010 to 31-12-2010	Total	Disposal from 1-1-2010 to 31-12-2010	Balance on 1-1-2011
1.	Principal Seat Islamabad	277	315	592	276	316
2.	Bench Registry Lahore	794	343	1137	201	936
3.	Bench Registry Karachi	78	30	108	33	75
4.	Bench Registry Peshawar	104	19	123	--	123
5.	Bench Registry Quetta	192	74	266	125	141
Total		1445	781	2226	635	1591

SHARIAT MATTERS

1.	Principal Seat Islamabad	198	50	248	25	223
2.	Bench Registry Lahore	12	11	23	01	22
3.	Bench Registry Karachi	09	--	09	02	07
4.	Bench Registry Peshawar	01	--	01	--	01
5.	Bench Registry Quetta	--	--	--	--	--
Total:		220	61	281	28	253

Category-wise Consolidated Position for Criminal Matters During the Year 2010

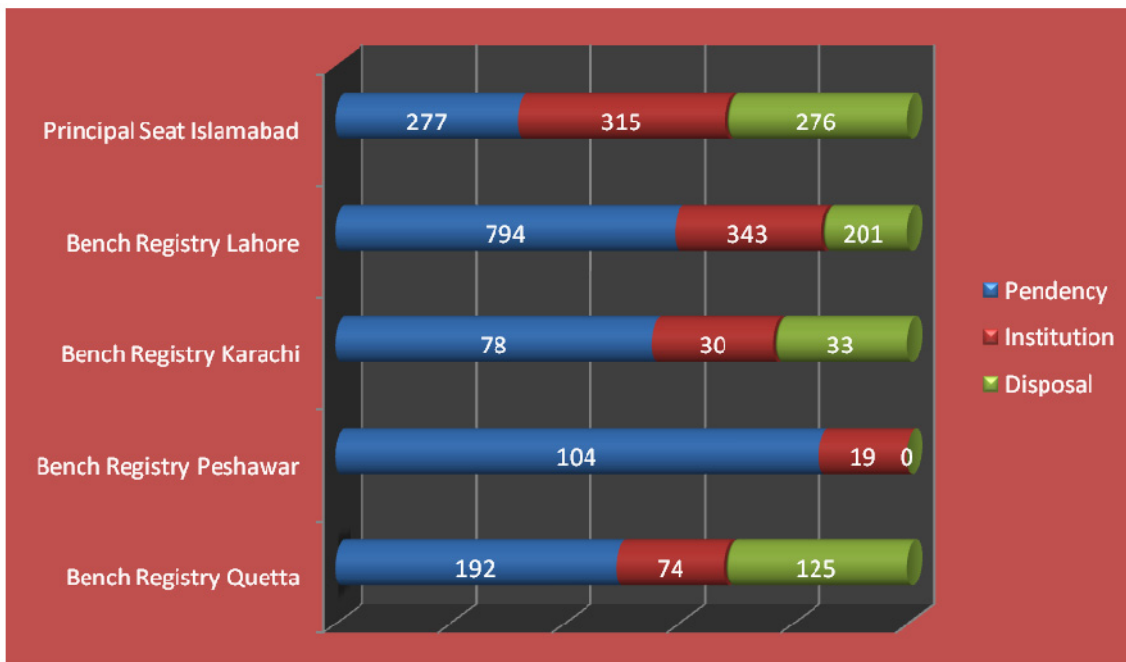
S.No.	Category of Cases	Pendency On 1-1-2010	Institution from 1-1-2010 to 31-12-2010	Total	Disposal from 1-1-2010 to 31-12-2010	Balance on 1-1-2011
1.	Cr.Appeals	968	351	1319	252	1067
2.	Cr.Revisions	100	47	147	23	124
3.	Cr.P.S.L.A.	48	27	75	08	67
4.	Cr.Murder /Hadd Reference	64	18	82	29	53
5.	Cr.Suo Moto	05	05	10	01	09
6.	Cr. Review	02	--	02	01	01
7.	Show Cause	--	03	03	02	01
8.	Cr.Misc:	258	330	588	319	269
9.	Shariat Matters	220	61	281	28	253
Total:		1665	842	2507	663	1844



**Number of Cases
Criminal Matters Category-wise**

Consolidated Position for Criminal Matters at the Principal Seat and Bench Registries During the Year 2010

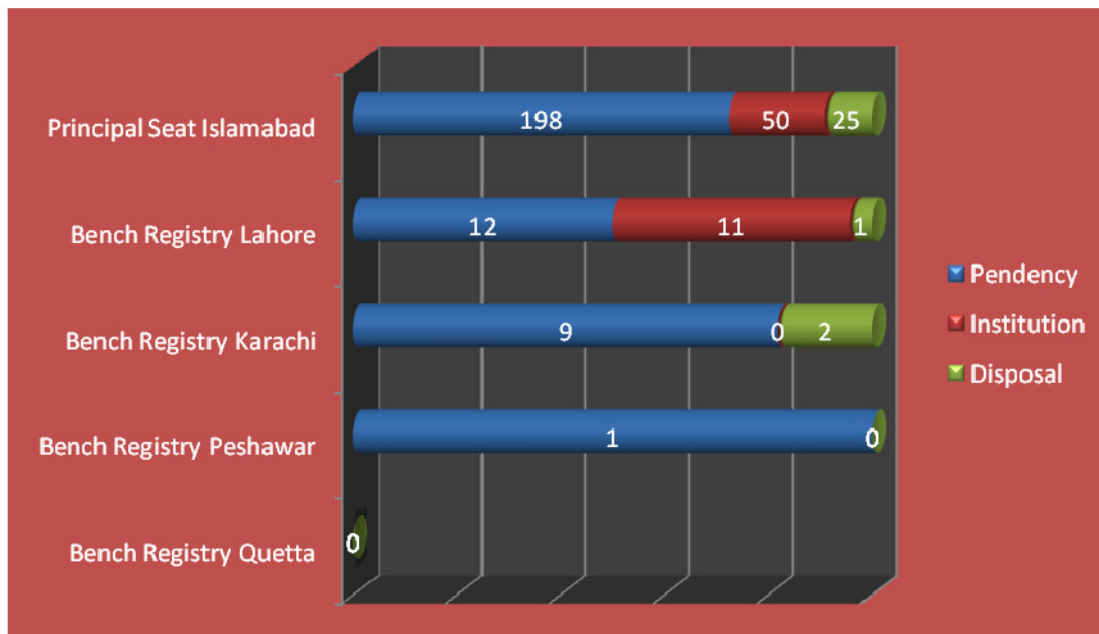
S.No.	Category of Cases	Pendency On 1-1-2010	Institution from 1-1-2010 to 31-12-2010	Total	Disposal from 1-1-2010 to 31-12-2010	Balance on 1-1-2011
1.	Principal Seat Islamabad	277	315	592	276	316
2.	Bench Registry Lahore	794	343	1137	201	936
3.	Bench Registry Karachi	78	30	108	33	75
4.	Bench Registry Peshawar	104	19	123	--	123
5.	Bench Registry Quetta	192	74	266	125	141
	Total	1445	781	2226	635	1591



**Number of Cases
Principal Seat and Registries: Criminal Matters**

**Consolidated Position for Shariat Matters at the Principal Seat
And Bench Registries During The Year 2010.**

S.No.	Category of Cases	Pendency On 1-1-2010	Institution from 1-1-2010 to 31-12-2010	Total	Disposal from 1-1-2010 to 31-12-2010	Balance on 1-1-2011
1.	Principal Seat Islamabad	198	50	248	25	223
2.	Bench Registry Lahore	12	11	23	01	22
3.	Bench Registry Karachi	09	--	09	02	07
4.	Bench Registry Peshawar	01	--	01	--	01
5.	Bench Registry Quetta	--	--	--	--	--
Total:		220	61	281	28	253



**Number of Cases
Principal Seat and Registries: Shariat Matters**

DETAIL OF BUDGET ALLOCATION AND ACTUAL EXPENDITURE.
INCURRED DURING THE FINANCIAL YEAR 2009-2010

HEAD OF ACCOUNT	BUDGET ALLOCATION	EXPENDITURE
A01-Employee Related Exp	91,874,000	91,513,831
A011-1-Pay of Officer	29,279,000	25,062,133
A011-2-Pay of other Staff	13,424,000	13,775,619
A012-1 Regular Allowance	43,552,000	47,061,206
A012-2 Other Allowances	5,619,000	5,614,873
A01271-Over time Allowance	175,000	173,996
A1273-Honoraria	788,000	787,735
A01274-Medical Charges	2,706,000	2,704,819
A01277-Contingent Paid Staff	1,950,000	1,948,323
A012778-Leave Salary	000	000
A03-Operating Expenses	25,380,000	25,295,643
A032-Communication	2,549,000	2,547,903
A03201-Postage & Stamp	330,000	330,000
A03202-Telephone & Trunk Calls	2,194,000	2,193,329
A03205-Courier and Pilot Service	25,000	24,574
A033-Utilities	12,000	11,365
A03301-Gas Charges	000	000
A03302-Water Charges	12,000	11,365
A03303-Electricity Charges	000	000
A03304-Hot & Cold Water Charges	000	000
A034-Occupancy Costs	10,311,000	10,299,631
A03402-Rent for Office Building	000	000
A03403-Rent of Residence Building	1,0250,000	10,240,544
A03407-Rate of Taxes	61,000	59,087
A036-Motor vehicles	215,000	213,370
A03603-Registration	215,000	213,370
A038-Travel & Transportation	8,825,000	8,779,164
A03805-Travelling Allowance	5,825,000	5,813,252
A03806-Tranpotation of Goods	70,000	48,736
A03807-P.O.L Charges	2,640,000	2,627,206
A03808-Conveyance Charges	290,000	289,970
A039-General	34,68,000	3,444,210
A03901-Office Stationery	617,000	614,431
A03902-Printing and Publication	385,000	384,720
A03905-News Papers Periodicals & Books	287,000	271,441
A-03906-Uniform/Liveries & Protective	130,000	127,405
A03907-Advertising & Publicity	173,000	172,029
A03912- Delegation Abroad	766,000	765,284
A03919-Payment to others for services	200,000	199,350
A03970-Others	910,000	909,550
A05 Grants Subsidies	000	000
A052- Grant Domestic	000	000
A05216- Family of Civil Servants	000	000

HEAD OF ACCOUNT	BUDGET ALLOCATION	EXPENDITURE
A06-Transfers	125,000	116,938
A06301-Entertainment & Gifts	125,000	116,938
A09-Physical Assets	13,168,000	13,163,559
A09501-Purchase of Transport	10,583,000	10,582,500
A09601-Purchase of Plant & Machinery	2,180,000	2,177,828
A09701-Purchase of Furniture & Fixture	405,000	403,231
A13-Repair & Maintenance	2,272,000	2,260,179
A13001-Repair of Transport	780,000	778,632
A13101- Repair of Machinery	468,000	466,404
A13201- Repair of Furniture & Fixture	110,000	104,775
A13301-Repair of Office Buildings	690,000	689,602
A137- computer Equipments	224,000	221,066
13701-Hardware	167,000	165,506
A13702-Software	57,000	55,560
GRAND TOTAL	132,819,000	132,350,150

**STATEMENT SHOWING THE BUDGET ALLOCATION FOR THE
FINANCIAL YEAR 2010-2011**

HEAD OF ACCOUNT	SANCTION BUDGET	SUPPLEMENTARY GRANT	TOTAL BUDGET ALLOCATION
A01-Employee Related Exp	107,572,000	77,691,000	185,263,000
A011-1-Pay of Officer	34,576,000		34,576,000
A011-2-Pay of other Staff	13,633,000		13,633,000
A012-1 Regular Allowance	54,423,000	72,236,000	126,659,000
A012-2 Other Allowances	4,940,000	5,455,000	10,395,000
A01271-Over time Allowance	300,000		300,000
A1273-Honoraria	800,000	2,855,000	3,655,000
A01274-Medical Charges	2,000,000		2,000,000
A01277-Contingent Paid Staff	1,800,000	2,600,000	4,400,000
A012778-Leave Salary	40,000		40,000
A03-Operating Expenses	23,680,000	800,000	24,480,000
A032-Communication	2,600,000		2,600,000
A03201-Postage & Stamp	350,000		350,000
A03202-Telephone & Trunk Calls	2,200,000		2,200,000
A03205-Courier and Pilot Service	50,000		50,000
A033-Utilities	380,000		380,000
A03301-Gas Charges	30,000		30,000
A03302-Water Charges	10,000		10,000
A03303-Electricity Charges	330,000		330,000
A03304-Hot & Cold Water Charges	10,000		10,000
A034-Occupancy Costs	9,100,000		9,100,000
A03402-Rent for Office Building	50,000		50,000
A03403-Rent of Residence Building	9,000,000		9,000,000
A03407-Rate of Taxes	50,000		50,000
A036-Motor vehicles	150,000		150,000
A03603-Registration	150,000		150,000
A038-Travel & Transportation	7,950,000		7,950,000
A03805-Travelling Allowance	4,200,000		4,200,000
A03806-Tranpotation of Goods	150,000		150,000
A03807-P.O.L Charges	3,200,000		3,200,000
A03808-Conveyance Charges	300,000		300,000
A03809-CNG chargers	100,000		100,000
A039-General	3,500,000	800,000	4,300,000
A03901-Office Stationery	700,000		700,000
A03902-Printing and Publication	450,000		450,000
A03905-News Papers Periodicals & Books	600,000		600,000
A-03906-Uniform/Liveries & Protective	150,000		150,000
A03907-Advertising & Publicity	250,000		250,000
A03912- Delegation Abroad	150,000	800,000	950,000
A03919-Payment to others for services	300,000		300,000
A03970-Others	900,000		900,000
A05 Grants Subsidies	400,000		400,000
A052- Grant Domestic	400,000		400,000

HEAD OF ACCOUNT	SANCTION BUDGET	SUPPLEMENTARY GRANT	TOTAL BUDGET ALLOCATION
A05216- Family of Civil Servants	400,000		400,000
A06-Transfers	250,000		250,000
A06301-Entertainment & Gifts	250,000		250,000
A09-Physical Assets	8,800,000		8,800,000
A09501-Purchase of Transport	7,000,000		7,000,000
A09601-Purchase of Plant & Machinery	800,000		800,000
A09701-Purchase of Furniture & Fixture	1,000,000		1,000,000
A13-Repair & Maintenance	3,170,000		3,170,000
A13001-Repair of Transport	700,000		700,000
A13101- Repair of Machinery	300,000		300,000
A13201- Repair of Furniture & Fixture	250,000		250,000
A13301-Repair of Office Buildings	1,120,000		1,120,000
A137- computer Equipments	800,000		800,000
13701-Hardware	400,000		400,000
A13702-Software	400,000		400,000
GRAND TOTAL	143,872,000	78,491,000	222,363,000

PRESS CLIPPINGS

روزنامہ جنگ راولپنڈی 16 اپریل 2010ء

وفاقی شرعی عدالت کا پیپلز ٹرسٹ فاؤنڈیشن اصل وارثوں کے حوالے کر نیا حکم

صدر زرداری، بینظیر بھٹو اور منشی بھٹو کے پیچھے اصل وارث ہیں، مارشل کے احکامات اسلام سے متصادم قرار
قائم کی گئی اور اس کے اغراض و مقاصد اور شرائط کا بھی وضع کی
تھیں سابق صدر جنرل ضیا الحق مرحوم نے اقتدار سنبھالا تو
مارشل لا آرڈر 22 اور 26 جاری کر کے پیپلز ٹرسٹ
فاؤنڈیشن کی شرائط و ضوابط میں تبدیلی کر دی تھی ان
احکامات کو منترم بینظیر بھٹو نے وفاقی شرعی عدالت میں چیلنج
کر دیا تھا جس کی جمعرات کے روزفل کورٹ کے روبرو
ساعت کی گئی پیپلز کی طرف سے ہر سڑک مال اظفر
ایڈووکیٹ پیش ہوئے جبکہ ڈاکٹر ساجد الرحمن صدیقی نے
شرعی بنیاد پر عدالت کی معاونت کی ہے۔

Daily Dawn

April 17, 2010

FSC judgment on People's Trust

KARACHI, April 16: A full Bench of the Federal Shariat Court headed by Chief Justice Agha Rafiq Ahmed Khan directed the Federation on Thursday to hand over property, assets and record of People's Foundation Trust to the petitioners. Barrister Kamal Azfar of the Supreme Court, who had filed the petition on Benazir Bhutto's instructions in 2003, appeared before the FSC for the heir- Mr. Asif Ali Zardari, Bilawal Bhutto Zardari, Bakhtawar Bhutto Zardari, Asifa Bhutto Zardari-- and co-petitioner Mrs. Gulzar Ahmed.--PPI

روزنامہ اسلام راولپنڈی 23 دسمبر 2010ء

تحفظ نسواں ایکٹ کی 3 دفعات خلاف شریعت قرار

وفاقی شرعی عدالت نے سیکشنز 11، 25 اور 28 کو آئین سے متصادم قرار دیا

وفاقی حکومت کو ہدایت کی ہے کہ 22 جون 2011ء تک
ان کو کا اعدادم قرار دے کر ترمیم کرے۔ بصورت دیگر یہ
عدالتی فیصلہ ترمیم سمجھا جائے گا۔ شرعی عدالت کے فیصلے میں
قرار دیا گیا کہ اسلامی دفعات کے حوالے سے کسی بھی فیصلے
کے خلاف اپیل سننے کا حق باقی کورٹ کی بجائے وفاقی شرعی
عدالت کو ہوگا۔ عدالت کے فیصلے کے بعد اب حدود سے
متعلق تمام اسلامی سزائیں بحال ہو گئی ہیں اور اسلامی
دفعات کے مطابق شادی شدہ افراد کو زنا کی سزا سنگسار کی
اور غیر شادی شدہ افراد کو زنا کی سزا سنائی جائے گی۔

اسلام آباد (ماہرنگ ڈیسک) وفاقی شرعی عدالت نے
حقوق خواتین کے تحفظ سے متعلق ایکٹ کی 3 دفعات کو
خلاف شریعت قرار دے دیا۔ 4 درخواست گزاروں نے
ویمن ریپریزنٹیشن ایکٹ 2006ء کو وفاقی شرعی عدالت
میں چیلنج کیا تھا، اس پر عدالت کے چیف جسٹس آغا رفیق
احمد خان کی سربراہی میں 3 رکنی بنچ نے فیصلہ سنایا، عدالت
نے اپنے حکم میں قرار دیا کہ اس ایکٹ کے سیکشنز 11، 25 اور
28 آئین کے آرٹیکل 203 سے متصادم ہیں۔ یہ تینوں
سیکشنز، شرعی حدود قوانین سے متعلق ہیں۔ عدالت نے

روزنامہ جنگ راولپنڈی 27 مارچ 2010ء

وفاقی شرعی عدالت کے دو نئے ججوں نے حلف اٹھایا

اسلام آباد (خصوصی رپورٹر، این این آئی) وفاقی شرعی
عدالت کے چیف جسٹس آغا رفیق احمد خان نے جسٹس شہزاد
شیخ اور جسٹس محمود احمد غازی سے حلف لے لیا ہے جس کی تقرری
گزشتہ ہفتہ صدر مملکت آصف علی زرداری نے کی تھی اس کے
علاوہ صدر مملکت نے تین آسامیوں پر 3 جج کی تقرری دو ہفتہ
قبل کی تھی ان سے جمعہ کے روز بھی حلف لیا گیا ہے۔ این
این آئی کے مطابق حلف برداری کی تقریب وفاقی شرعی
عدالت میں ہوئی جس میں شرعی عدالت کے جج صاحبان اور
وکلاء نے شرکت کی۔ حلف برداری کے بعد میڈیا سے بات
چیت کرتے ہوئے جسٹس آغا رفیق نے کہا کہ شریعت کورٹ
کے جج سے حلف صدر مملکت خود لیتے ہیں یا وہ خود کسی شخص کو اس
کے لئے نامزد کرتے ہیں۔

روزنامہ جنگ راولپنڈی 15 اگست 2010ء

وفاقی شرعی عدالت کے چیف جسٹس اور دیگر ججوں

کا دو دن کی تنخواہ فلڈ ریلیف فنڈ میں دینے کا اعلان

اسلام آباد (جنگ نیوز) وفاقی شرعی عدالت کے چیف
جسٹس آغا رفیق احمد خان اور جج صاحبان نے اپنی دو دن کی تنخواہ
وزیراعظم کے فلڈ ریلیف فنڈ میں جمع کرنے کا اعلان کیا ہے۔
اسی طرح عدالت ہذا کے تمام ملازمین نے بھی اپنی ایک دن کی
تنخواہ وزیراعظم کے فلڈ ریلیف فنڈ میں جمع کرنا فیصلہ کیا ہے۔

روزنامہ جنگ راولپنڈی 28 ستمبر 2010ء

جسٹس ڈاکٹر محمود احمد غازی نے گرانقدر خدمات انجام دیں، تعزیتی ریفرنس

خدمات کا مقصد ملک میں متوازن سیاسی و اقتصادی نظام رائج کرنا تھا، جسٹس آغا رفیق اور دیگر کا خطاب

انجام دیں۔ انہوں نے اسلام کے سیاسی اور معاشی نظام پر
کافی تحقیقی کام کیا۔ ان کے پیش نظر وطن عزیز میں متوازن
سیاسی اور اقتصادی نظام رائج کرنے کی ابتدا کرنا تھی۔
جسٹس سید افضل حیدر نے تعزیتی ریفرنس سے خطاب
کرتے ہوئے کہا ہے کہ ڈاکٹر محمود احمد غازی نے انٹرنیشنل
اسلامی یونیورسٹی، اسلامی نظریاتی کونسل اور وفاقی شرعی
عدالت میں بہترین خدمات انجام دیں۔ انہوں نے
قائداعظم محمد علی جناح اور علامہ محمد اقبال کے نام پر جج بدل
کئے تھے ان کو دونوں شخصیتوں اور ان کے فیض سے حاصل
ہونے والی اس مملکت پاکستان سے بہت پیارتھا۔

اسلام آباد (نمائندہ جنگ) وفاقی شریعت عدالت کے
چیف جسٹس آغا رفیق احمد خان نے کہا ہے کہ ڈاکٹر جسٹس
محمود احمد غازی نے تعلیمی، تحقیقی اور قانون کے شعبہ میں
گرانقدر خدمات انجام دیں۔ قرآن، حدیث، سنت، فقہ
سمیت اسلامی معیشت پر ان کی کتابیں اسلامی ادب میں
قابل قدر اضافہ ہیں۔ وفاقی شرعی عدالت میں مرحوم
جسٹس محمود احمد غازی کے لئے فل کورٹ تعزیتی ریفرنس ہوا
جس کی سربراہی چیف جسٹس آغا محمد رفیق احمد خان نے کی۔
چیف جسٹس آغا رفیق احمد خان نے کہا کہ جسٹس ڈاکٹر
محمود احمد غازی نے چھ ماہ تک شریعت عدالت میں خدمات

روزنامہ جنگ راولپنڈی

23 دسمبر 2010ء

حقوق خواتین سے متعلق ایکٹ کی مختلف دفعات شریعت کے خلاف ہیں: وفاقی شریعت عدالت

ویمن پروٹیکشن بل کی دفعات 11، 25، 28 آئین کے آرٹیکل 203 اور شریعت سے متصادم ہیں؛ عدالت نے فیصلہ سنایا

فیصلے کے بعد اسلامی سزائیں بحال؛ شادی شدہ کو زنا کی سزا سنسکاری اور غیر شادی شدہ افراد کو کوڑوں کی سزا دی جائیگی

روزنامہ ایکسپریس اسلام آباد

23 دسمبر 2010ء

شرعی عدالت نے تحفظ حقوق نسواں ایکٹ کی 5 دفعات غیر آئینی قرار دیدیں

حدود، منشیات مقدمات کے فیصلوں کیخلاف اپیلیں سننے کا اختیار ہمارا ہے، مختصر فیصلہ

ایکٹ میں حدود سے متعلق قرآن و سنت کے مطابق مقرر کردہ سزاؤں کو تبدیل کیا گیا ہے جو اسلامی احکامات کے منافی ہے، قومی اسمبلی کو قرآن و سنت کے تحت مقرر کردہ سزاؤں کو ختم کرنے کا اختیار نہیں ہے لہذا ایکٹ میں سزاؤں کو تبدیل کرنے سے متعلق دفعات کو آئین سے متصادم قرار دیتے ہوئے کالعدم قرار دیا جائے۔ درخواست گزار اسلم گھمن نے اس فیصلے کو سپریم کورٹ کے شریعت ایبلٹ بنچ میں چیلنج کرنے کا فیصلہ کیا ہے۔ انہوں نے مہڈیا سے گفتگو کرتے ہوئے کہا کہ میں نے جن دفعات کو چیلنج کیا تھا ان سے متعلق کوئی واضح فیصلہ سامنے نہیں آیا۔

اسلام آباد (وفاقی جگہ خصوصی) وفاقی شریعت عدالت نے تحفظ حقوق نسواں ایکٹ کی دفعات 11، 25، 28 اور 20 کو آئین سے متصادم قرار دیتے ہوئے کہا ہے کہ اسلامی دفعات سے متعلق مقدمات کے فیصلوں کیخلاف اپیلیں ہائیکورٹ کے بجائے وفاقی شریعت عدالت میں سنی جائیں گی۔ وفاقی شریعت عدالت کے چیف جسٹس آغا رفیق احمد خان کی سربراہی میں تین رکنی بنچ نے چار درخواستوں کی سماعت کے بعد مختصر فیصلہ سنایا، تفصیلی فیصلہ بعد میں جاری کیا جائے گا۔ تحفظ حقوق نسواں بل 2006 میں قومی اسمبلی نے منظور کیا تھا۔ شاہد اور کزنی، اسلم گھمن ایڈووکیٹ سمیت چار درخواست گزاروں نے موقف اختیار کیا کہ مذکورہ

اسلام آباد (خصوصی رپورٹر آن لائن) وفاقی شریعت عدالت نے ویمن پروٹیکشن بل سے متعلق کیس کا فیصلہ سناتے ہوئے حدود آرڈیننس کی تین شقوں کو کالعدم قرار دے دیا۔ عدالت نے فیصلہ سناتے ہوئے ویمن پروٹیکشن بل میں شامل حدود آرڈیننس کی شق نمبر 11، 25 اور 28 کو کالعدم قرار دیا اور کہا کہ یہ تینوں شقیں اسلامی دفعات کیخلاف ہیں۔ عدالت نے مرضی سے زنا کو بھی ناجائز اور حدود آرڈیننس کے مطابق غیر اسلامی فعل اور گناہ کبیرہ قرار دیا اور کہا کہ زنا کے بارے میں بل کے آرڈیننس کا اسلامی دفعات سے کوئی تعلق نہیں ہے۔ حدود آرڈیننس میں 2006ء میں ترمیم کی گئی تھی جسے عدالت میں چیلنج کیا گیا تھا۔ عدالت کے فیصلے کے بعد اب حدود سے متعلق تمام اسلامی سزائیں بحال ہو گئی ہیں اور اسلامی دفعات کے مطابق شادی شدہ افراد کو زنا کی سزا سنسکاری اور غیر شادی شدہ افراد کو کوڑوں کی سزا سنائی جائے گی۔

روزنامہ نوائے وقت راولپنڈی

23 دسمبر 2010ء

شریعت کورٹ نے تحفظ نسواں ایکٹ کی 3 شقوں کو آئین سے متصادم قرار دیدیا

اسلامی دفعات کے حوالے سے کسی بھی فیصلے کے خلاف اپیل سننے کا حق ہائی کورٹ کے بجائے شریعت کورٹ کو ہوگا؛ عدالت

ذکر ہے کہ مذکورہ ایکٹ کے تحت رضامندی سے زنا کی سزا پانچ سال قید جبکہ زنا بالجبر کی سزا 25 سال قید مقرر کی گئی ہے جبکہ قرآن و سنت کے تحت غیر شادی شدہ جوڑے کے زنا کرنے پر سزا کوڑوں اور شادی شدہ کے لئے سنسکارت مقرر ہے۔ اسلام گھمن کے مطابق عدالت نے ان شقوں کو خلاف اسلام قرار دینے کے متعلق فیصلہ نہیں کیا۔

مطابق ان شقوں میں قرآن و سنت کے مقرر کردہ سزاؤں کو تبدیل کر دیا گیا ہے تاہم عدالت نے ان تین شقوں پر فیصلہ نہیں دیا اس فیصلے کے خلاف اسلم گھمن نے سپریم کورٹ میں چیلنج کرنے کا فیصلہ کیا ہے فیڈرل شریعت کورٹ نے فیصلے میں مزید قرار دیا ہے کہ شق 48 اور 49 بھی خلاف آئین اور آئین کے آرٹیکل 203 DD سے متصادم ہیں اس سلسلے میں اپیلیں سننے کا اختیار بھی ہائیکورٹ کی بجائے فیڈرل شریعت کورٹ کو ہی حاصل ہوگا۔ یہاں یہ بات قابل

اسلام آباد (نمائندہ نوائے وقت) فیڈرل شریعت کورٹ نے تحفظ نسواں ایکٹ کی شق 11، 25، 28 اور 20 کو آئین سے متصادم قرار دے دیا ہے۔ اور قرار دیا ہے اسلامی دفعات کے حوالے سے کسی بھی فیصلے کے خلاف اپیل سننے کا حق ہائیکورٹ کی بجائے فیڈرل شریعت کورٹ کو ہوگا فیڈرل شریعت کورٹ میں چار درخواست گزاروں نے تحفظ حقوق نسواں ایکٹ کو چیلنج کیا تھا ایک درخواست اسلام گھمن نے ایکٹ کی سات آٹھ اور نو نمبر شقوں کو چیلنج کیا تھا ان کے

DAWN, ISLAMABAD.
December 23, 2010

Shariat Court knocks out 3 sections of women's protection act

By Iftikhar A. Khan

ISLAMABAD, Dec 22: The Federal Shariat Court has declared as unconstitutional and un-Islamic three sections of the Protection of Women Act 2006, holding that these take away the overriding effects of the Hudood Ordinance 1979.

A three-member FSC bench comprising Chief Justice Agha Rafiq Ahmed Khan, Justice Alzaal Haider and Justice Shahzad Sheikh announced its verdict on Wednesday on identical petitions challenging the act.

It declared that sections 11, 28 and 29 incorporated in the Hudood Ordinance during the Musharraf government were in violation of Article 203DD of the Constitution. The Court asked the government to take necessary steps to amend the impugned laws in conformity with the Holy Quran and Sunnah.

The FSC also held that Section 25 of the Anti-Terrorism Act 1997 was against Article 203DD of the Constitution. The Court directed its office to send copies of the judgment to the federal government and provincial and Islamabad High Court for information, necessary action and compliance.

The court ordered that the sections should cease to be effective from June 22 next year and the judgment should also stand operative from that day.

The court order said: "All those offences whose punishments are either prescribed or left undetermined, relating to acts forbidden or disapproved by the Holy Quran and Sunnah, including all such acts which are akin, auxiliary, analogous or supplementary to or germane with Hudood offences as well as preparation or abetment or attempt to commit such an offence and as such made culpable by legislative instruments would without fail be covered by the meaning and scope of the term Hudood."

"Its (FSC) jurisdiction in the matters relating to Hudood under Article 203DD of the Constitution is exclusive and pervades the entire spectrum of orders passed or decisions given by any criminal court under any law relating to the enforcement of Hudood and no other court is empowered to entertain appeal, revision or reference in such cases."

"No legislative instrument can control, regulate or amend its exclusive jurisdiction which was mandated in the Constitution. An order granting or refusing bail before conclusion of trial in all categories of offences within the ambit of Hudood is covered by the word 'proceeding' used in Article 203DD, is within its (FSC) exclusive jurisdiction and can only be impugned before it (FSC)."

"Ten offences, including Zina (adultery, fornication and rape),

Liwatat (sexual intercourse against the order of nature), Qazaf (imputation of zina), Shurb (alcoholic drinks, intoxications, narcotics etc), Sarqa (theft simpliciter), Haraba (robbery, highway robbery, dacoity and all property as mentioned in PPC), Irtidada (apostasy), Baghy (treason, waging war against state, all categories of offences mentioned in PPC) Qisas (right of retaliation in offences against human body) and human trafficking are covered by the terms Hudood for the purpose of Article 203DD.

"Sections 11 and 28 of the WPA 2006 are declared violative of Article 203DD of the Constitution because these provisions annul the overriding effect of Hudood Ordinances VII and VIII of 1979."

"Some portions of sections 48 and 49 of the Control of Narcotic Substances Act 1997 whereby the high courts have been empowered to entertain appeals against the order of a special court consisting of a sessions judge or an additional sessions judge, transfer within its territorial jurisdiction any case from one special court to another special court at any stage of the proceedings, were also violative of the provisions contained in Chapter 3A of Part VII of the Constitution because the offences envisaged by Act XV of 1997 are covered by the term Hudood."

The Court consequently declared

both the sections as violative of Article 203DD and held that the portion which contained the words high court should be deemed to be substituted by the words FSC in both the sections.

The order said: "Section 25 of the WPA 2006 is declared violative of Article 203DD as it omits subsections (3) and (4) of section 14 of the offence of Qazf (enforcement of Hadd) Ordinance 1979 with the result that it has adversely affected the operation of injunctions of Islam relating to Lian."

"Section 25 of the Anti-Terrorism Act 1997 does not make provision for filing an appeal before the FSC in cases where the Anti-Terrorism court decides a case relating to some of the Hudood offences included in the Schedule as from August 21, 1997, thus this omission is violative of Article 203DD."

The Court directed the federal government to rectify this error by June, 22 2011. Otherwise, the following rider shall be read at the end of clause (i) of section 25 of Act XXVII of 1997 after omitting the full stops.

The rider is, "but where a private complaint or a First Information Report or information, as stipulated in section 190 of the Code of Criminal Procedure, relating to an offence falling within the purview 10 mentioned categories of Hudood offences, is decided by any court exercising criminal jurisdiction under any law

of the land, the appeal therefrom shall lie to the FSC".

NCSW reaction

The FSC decision evoked an instant reaction, with the National Commission on the Status of Women (NCSW) claiming that the judgment sought to reverse the minimum gains the women had won through the act after a long struggle for justice.

In a statement the commission said that in fact the Hudood Ordinance which had tormented and caused hundreds of innocent women to languish in jails and destroyed their social and family lives was being resurrected by the judgment.

It said the verdict negated all positive initiatives taken by the government and took the nation back to square one.

The commission appeals to the government to take a firm stand against this "retrogressive judgment" which was only an attempt to use religion for political purposes.

**SELECTED CASES DECIDED BY THE
FEDERAL SHARIAT COURT
IN THE YEAR 2010**

IN THE FEDERAL SHARIAT COURT

(Appellate Jurisdiction)

PRESENT:

Mr. Justice Agha Rafiq Ahmed Khan, Chief Justice
Mr. Justice Syed Afzal Haider
Mr. Justice Shahzado Shaikh

CRIMINAL APPEAL NO. 245/L of 2004.

Mukhtar Ahmed son of Muhammad Nawas,
Caste Bhatti, resident of Shori Maneka,
Police Station Pindi Bhattian, District Hafizabad Appellant.

Versus

The State Respondent.

CRIMINAL APPEAL NO. 284/L of 2004.

Irfan Ali son of Fateh Sher, Caste Bhatti,
resident of Shori Manika, Police Station
Pindi Bhattian, District Hafizabad Appellant.

Versus

The State Respondent.

CRIMINAL REFERENCE NO. 2/L OF 2006.

The State Vs. Mukhtar Ahmed & Irfan Ali

Counsel for the appellants	---	Mr. Nazeer Ahmad Ghazi, Mr. Masood Sadiq Mirza, Mr. Muhammad Riaz Chaudhary & Mr. Zulfiqar Ali Noon, Advocates.
Counsel for the complainant	---	Mr. Muhammad Ashraf, Advocate
Counsel for the State	---	Ch. Abdul Razzaq, D.P.G.
FIR No. date and Police Station	---	10/03 dated 11-01-2003 Pindi Bhattian, District Hafizabad
Date of Judgement of the trial Court	---	28-07-2004
Date of Institution of appeals	---	04-08-2004 & 11-09-2004 respectively
Date of Hearing	---	29-09-2010
Date of Decision	---	29-09-2010

JUDGMENT

Justice Agha Rafiq Ahmed Khan, Chief Justice:- Criminal Appeal No.245/L of 2004 filed by Mukhtar Ahmad, Criminal Appeal No.284/L of 2004 filed by Irfan Ali against their conviction and sentence and Criminal Reference No.2/L of 2006 are being disposed of through this judgment as all the three matters arise out of the same judgment dated 28.07.2004 delivered by learned Additional Sessions Judge, Pindi Bhattian whereby both the appellants i.e. Mukhtar Ahmad and Irfan Ali were convicted under section 10(4) of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979 and sentenced to Death for committing Zina-bil-Jabr with Mst.Razia Bibi while Irfan Ali appellant was also convicted under Section 10(3) of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979 and sentenced to 25 years imprisonment with a punishment of whipping amounting to 30 stripes for committing Zina-bil-Jabr with Mst.Kalsoom Bibi. Benefit of Section 382-B of the Code of Criminal Procedure was also given to accused Irfan Ali.

2. Brief facts of the case as set out in the crime report registered as FIR No.10/2003 dated 11.01.2003 under sections 10(4) of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979 at Police Station Pindi Bhattian, District Hafizabad, regarding an incident that occurred on 04.01.2003 are that Khan Muhammad complainant moved a written complaint Ex.PD stating therein that he resides about five acres away from Mouza Shori Maneka alongwith his two daughters, Mst.Razia Bibi aged 20 years, Mst.Nabila Bibi aged 16 years and two sons Ghulam Murtaza aged 10 years, Ghulam Mustafa aged 8 years and his wife Mst.Kalsoom Bibi. About one month prior to the occurrence Mukhtar Ahmad accused demanded the hand of his daughter Mst.Razia Bibi which was refused on account of his bad habits. Mukhtar accused nourished a grudge on this score. On 04.01.2003, Mukhtar accused alongwith one unknown person, armed with rifles entered the house. The complainant and his wife were sleeping in courtyard under 'Tup' whereas his daughters and sons were sleeping in a room on the eastern side of the house. The accused awakened him and asked him to open the room as they want to teach him a lesson for refusing the hand of his daughter to Mukhtar accused. They made him sit in the kitchen and the unknown person committed Zina-bil-Jabr with the complainant's wife. After that the accused got the room opened on gun point. The unknown person entered the room and committed Zina-bil-Jabr with his daughter Mst.Razia Bibi while Mukhtar accused, armed with rifle, stood as guard. After half an hour, the unknown person came out of the room and stood guard while Mukhtar accused entered the room and committed rape with Mst.Razia Bibi, daughter of the complainant. The accused then threatened the complainant with dire consequences if he informed any one about the occurrence. The FIR was lodged after seven days because the accused made several attempts to settle the matter outside the Court.

3. Investigation ensued as a result of registration of crime report. During the investigation the local police found both the accused guilty of the offences.

4. The learned trial Court on receipt of the report under section 173 of the Code of Criminal Procedure framed charge against accused Mukhtar Ahmad and Irfan Ali on 25.10.2003 under sections 10(3) and 10(4) of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979. The accused denied the charges and claimed trial.

5. The prosecution in order to prove its case produced 15 witnesses at the trial. The gist of evidence of the witnesses is as under:-

- i) PW-1: Constable Jahangir Ahmad was entrusted with non bailable warrants of arrest Ex.PA against accused Irfan Ali. He visited the given address of the accused but the accused deliberately concealed himself. He made report Ex.PA/1. On 30.01.2003 he was entrusted with proclamation Ex.PB against Irfan Ali accused. He affixed one copy of the proclamation at the house of Irfan Ali accused, one copy at the thoroughfare and the third copy in the Kuchery. He made report Ex.PB/1 in this respect.
- ii) PW-2: Constable Mansab Ali is a witness of recovery of .12 bore gun P/1 alongwith cartridge P/2 which was recovered on the disclosure of accused Mukhtar Ahmad.
- iii) PW-3: Khan Muhammad is complainant of the case. He endorsed the contents of the crime report.
- iv) PW-4: Mst.Kalsum Bibi is wife of the complainant. She is a victim of Zina-bil-Jabr, committed by accused Irfan on gun point. She supported the occurrence and prosecution story.
- v) PW-5: Mst.Razia Bibi is the main victim with whom Zina-bil-Jabr was committed by both the accused one after the other on gun point. She supported and corroborated the prosecution story as narrated by the complainant.
- vi) PW-6: Mst.Nabila Bibi is younger sister of the victim Mst.Razia Bibi and is daughter of the complainant and his victim wife. At the time of occurrence she was present in the house. She also supported the occurrence as disclosed by her father in the FIR.
- vii) PW-7: Dr.Asghar Ali Hunjra conducted potency test of accused Mukhtar Ahmad and found him fit to perform sexual intercourse.
- viii) PW-8: Dr.Shagufta Shaheen medically examined both the victims Mst.Kalsum Bibi wife of the complainant and daughter Mst.Razia Bibi. The former is a married lady. Chemical Examiner's report as regards semen swabs is negative. As regards the examination of victim Mst.Razia Bibi is concerned, her hymen was torn, margins irregular and healed completely, vagina admitted two fingers easily, no marks of fresh injury on any part of the body. In the opinion of this doctor, the examinee was not virgin. Chemical Examiner's report with regard to her semen swabs was positive.

- ix) PW-9: Muhammad Asif ASI is the author of the FIR.
- x) PW-10: Head Constable Raj Muhammad received two sealed envelopes from Muhammad Yaqoob S.I which he handed over to Muhammad Yousaf Head Constable for onward submission in the office of Chemical Examiner, Lahore.
- xi) PW-11: Muhammad Yousaf Head Constable corroborated the statement of PW-10 Head Constable Raj Muhammad with regard to delivery of sealed parcels in the office of Chemical Examiner, Lahore.
- xii) PW-12: Constable Muhammad Sharif is a witness of recovery of .12 bore gun at the pointation of accused Irfan Ali.
- xiii) PW-13: Muhammad Yaqoob ASI visited the spot, prepared site plan without scale, recorded statements of four PWs under Section 161 of the Code of Criminal Procedure; got both the female victims medically examined, arrested the accused Mukhtar Ahmad, obtained nonailable warrants of arrest of accused Irfan Ali, recovered .12 bore gun on the pointation of accused Mukhtar Ahmad, got him medically examined and also prepared site plan of the place of recovery.
- xiv) PW-14: Dr. Muhammad Hussain Vaseer conducted potency test of accused Irfan Ali and found him potent.
- xv) PW-15: Khalid Mehmood ASI arrested the accused Irfan and recovered .30 bore pistol from his possession. He stated that accused Irfan during custody confessed the commission of Zina-bil-Jabr with the victim Mst.Razia Bibi on gun point. This witness also prepared unscaled site plan of the place of recovery and recorded statements of witnesses for prosecution under Section 161 of the Code of Criminal Procedure.

6. The learned trial court after close of the prosecution evidence recorded statements of the accused Mukhtar and Irfan. Both the accused pleaded innocence in the occurrence. In reply to question, "Why this case against you and why the P.Ws have deposed against you?" the accused Mukhtar stated as follows:-

"All the PWs are interested and inimical towards me. No alleged occurrence has taken place. I and my co-accused are falsely involved in this case after ordinate delay of seven days and after deliberation and consultation by the complainant party."

In reply to question, "Why this case against you and why the P.Ws have deposed against you?" the accused Irfan Ali stated as follows:-

"I was not nominated accused in the FIR. Complainant party with malafide intention subsequently with connivance of police involved me in this case. I am innocent."

7. We have perused the record. The relevant portions of the impugned judgment have been scanned. We have heard the learned counsel for the contending parties.

8. Learned Counsel for the appellants at the outset stated that a compromise has been effected between the parties and placed on record. It was, therefore, prayed that the compromise be accepted and acquittal of the appellants be ordered.

9. The complainant party was also present in Court. Both the victims appeared before us and stated that they have voluntarily forgiven the appellants in the name of Allah Almighty. The complainant's Counsel confirmed that neither undue influence nor force was employed by accused party upon the complainant group to secure forgiveness. Learned Counsel also confirmed that the appellants had repented genuinely and on Court question the learned Counsel further stated that the behaviour of appellants in the prison has been good. The jail authorities have not registered any complaint against the appellants.

10. The argument about the composition of offence, advanced by learned Counsel for the appellants, has no force. Section 345 of the Code of Criminal Procedure deals with compounding of offences. According to this provision only those offences which are punishable under various sections of the Pakistan Penal Code, specified in the first two columns of the table attached with this section, can be compounded. The offences under *Hudood* laws are not compoundable even with the permission of the Court. The effect of composition of offence, as stipulated in sub-section (6) *ibid* is acquittal. In this view of the matter we are unable to allow composition of offences as prayed for.

11. However we have taken notice of the fact that a compromise has been effected between the appellants and the complainant party. Both the victims were present in the Court and they also appeared before us. They were duly identified. Both of them verified the factum of compromise and stated that they had voluntarily forgiven the accused in the name of Almighty Allah. Though section 345 of the Code of Criminal Procedure enumerates the offences in which alone a compromise can be effected, yet this section does not debar the Court from considering the element of compromise *for the purpose of reduction of sentence provided the compromise is voluntarily and the accused have repented and expressed their willingness not to repeat the offence and they have been forgiven in the name of Allah. Moreover their conduct during* confinement in jail should also support the element of repentance expressed by the accused who have expressed firm resolve not to create social problems in future. In so far as the question of forgiveness is concerned this has been established by the statements of the two victims and the other aspect has been confirmed by Counsel for the parties.

12. We are supported in our view by the deliberations in the judgment in the case of Muhammad Arif Vs. The State, 2002 YLR 3077, also reported as 2003 S.D 79 wherein Division Bench of this Court has, at page 3084 in paragraph No.15, held as under:-

“Although the compromise deed tendered by the prosecutrix/victim, duly placed on record, would legally be not a relevant document, as the case in hand is non-compoundable but keeping in view the fact that the accused, was repentant, and through the efforts of the elders of the family has successfully prevailed upon the complainant party and was forgiven by the victim in the name of Almighty Allah, we feel constrained to consider it a mitigating circumstance to reduce the sentence of the appellant appropriately, as it was so done in the case cited-supra.”

We endorse this view with the condition of repentance, forgiveness and a firm resolve to behave in future as stated above.

13. Learned Counsel for the appellants at the end submitted that he would not challenge the conviction and would urge that death sentence be not confirmed and alternate penalty may be awarded to them in the light of repentance on the part of appellants and consequent forgiveness accorded by the victims. It was also contended that forgiveness implies that the commission of offence is admitted.

14. In view of the peculiar facts and circumstances of the case and the position taken up by the parties before us as well as the situation that we have observed and we feel that the factum of compromise was effected between the parties voluntarily. It is being considered by us at judicial level as it will advance the purposes of social harmony and peace. Forgiveness in Divine and this attribute finds honourable mention in the sacred texts of Muslim.

15. In the light of what have stated above we are inclined to convert the death sentence awarded to both the appellants under section 10(4) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 into life imprisonment because the appellants have repented and have been forgiven by the victims themselves in the name of Allah. The sentence of Irfan appellant under section 10(3) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 is reduced from twenty five years to fourteen years and his sentence of whipping is set aside. The appellants shall be entitled for the benefit of section 382-B Cr.P.C. Both the sentences awarded to Irfan appellant shall run concurrently. Consequent upon what has been stated above Cr. Reference No.2/L/2006 is no more relevant and hence answered in negative.

16. These are the reasons for our short order passed on 29.09.2010.

Dated Lahore the

06-10-2010

M. Imran Bhatti/*

IN THE FEDERAL SHARIAT COURT

(Appellate Jurisdiction)

PRESENT:

Mr. Justice Agha Rafiq Ahmed Khan, Chief Justice
Mr. Justice Syed Afzal Haider
Mr. Justice Shahzado Shaikh

CRIMINAL APPEAL NO. 186/I of 2005.

Kyiyal-ur-Rheman alias Khair ur Rehman
son of Maman Khan, resident of Aza Khel,
Peer Bhai Noshera Kalan, District Noshera Appellants.

Versus

The State Respondent.

CRIMINAL MURDER REFERENCE NO. 8/I OF 2005.

The State

Versus

Kyiyal-ur-Rheman alias Khair ur Rehman --- Respondent

For the appellant	---	Malik Abdul Haq, Advocate
For the State	---	Mrs. Rukhsana Malik Additional Prosecutor General
FIR No. date and Police Station	---	220, 28-07-1992 City, Rawalpindi
Date of Judgement of the trial Court	---	25-09-2000
Date of Institution	---	20-06-2005
Date of Hearing	---	03-05-2010
Date of Decision	---	17-05-2010

JUDGMENT

AGHA RAFIQ AHMED KHAN, Chief Justice.- Appellant Khiyal-ur-Rehman has filed this appeal through Jail against the judgment dated 25.09.2000 delivered by learned Additional Sessions Judge, Rawalpindi whereby he was convicted under section 302(b) of Pakistan Penal Code and sentenced to death and also to pay a sum of Rs.100,000/- as compensation under section 544-A of the Code of Criminal Procedure payable to the legal heirs of deceased and in default of non payment of the same the appellant was directed to suffer another term of six months simple imprisonment.

2. The case has arisen out of FIR. No. 220 (Ex.PB/1) registered at Police Station City Rawalpindi on 28.07.1992 on the statement (Ex. PB) of Muhammad Maqsood, complainant/P.W.7 regarding an occurrence dated 09.06.1992 alleged to have taken place in the area of City Saddar Road, Rawalpindi.

3. Brief facts of the case as narrated by complainant in his statement before the police are that on 09.06.1992 he was sitting in his Estate Agency shop while his brother Haji Muhammad Yaqoob (deceased) was running a sanitaryware shop at City Saddar Road Rawalpindi. On 09.06.1992 at about 2.00.p.m. he was present in his shop when his servant Muhammad Asad informed him that his brother Muhammad Yaqoob was lying on the floor of his shop with blood was oozing from his head and that he was senseless. On this information he alongwith said servant Muhammad Asad reached the shop of Haji Muhammad Yaqoob and found his brother lying on the floor in an unconscious state. He thought that his brother might have sustained injury due to fall of some iron pipe etc. The injured was immediately shifted to Civil Hospital Rawalpindi. As the injury was serious the patient was taken to Complex Hospital Islamabad. The patient remained senseless and expired on 14.06.1992 due to the head injury. On 28.07.1992 the complainant, his brother Muhammad Iqbal and one Muhammad Jamil were sitting in their shop when a person, under police custody, appeared. He was introduced as Khiyal-ur-Rehman. He disclosed that one and half month ago he with the help of his co-accused Mumtaz Khan attacked a person aged about 40-45 years with a 'Gainti'. The said person became senseless whereafter they took out about Rs. 40,000/- to Rs.50,000/-. It was on this information that the complainant came to know that his brother Muhammad Yaqoob was attacked as robbery had to be committed. The weapon of offence was lying in the shop whose ownership was not known. In this background that criminal proceedings were initiated against Khiyal-ur-Rehman and his co-accused Mumtaz Khan (since P.O.).

4. The investigation of the case conducted firstly by Muhammad Ilyas Sub Inspector who interrogated accused Khiyal-ur-Rehman who was already in custody in Case FIR. No.378 dated 07.07.1992 under section 397/324/392 of Pakistan Penal Code read with section 17 Haraba. He had disclosed that he had also committed the crime of theft at City Saddar Road in an iron shop. He further disclosed that he could point out that shop. The accused made confession in the presence of Muhammad Iqbal, Muhammad Jamil and Muhammad Maqsood complainant at the shop of deceased Haji Muhammad Yaqoob and got recovered the Gainti P1 which was taken into possession by the Investigating Officer vide memo Ex.PC. The Investigating Officer

inspected the place of occurrence, took notes, prepared site plan Ex.PF. He recorded statements of witnesses under section 161 of the Code of Criminal Procedure. The formal arrest of accused Khiyal-ur-Rehman in the present case was kept pending as he was already under arrest in another case. On 08.08.1992 the accused, while on physical remand in this case, opted to get his confessional statement recorded under section 164 of the Code of Criminal Procedure. The Illaqa Magistrate Mr. Abdul Rehman Khalid recorded his confessional statement on the same day and the accused was then sent to judicial lock up. He moved an application Ex.PL to Deputy Commissioner Rawalpindi for the disinterment of deceased Muhammad Yaqoob. Post mortem of the dead body was conducted at Sialkot as a consequence thereof. On 09.01.1993 the Investigating Officer was transferred and the investigation was handed over to SHO Police Station Ganjmandi, Rawalpindi. The investigation of the case was further conducted by Mushtaq Ahmad, Sub Inspector.

5. The learned trial court framed charge against the accused Khiyal-ur-Rehman on 11.04.1994 under sections 302 read with 34 of Pakistan Penal Code and under section 17(4) of Offences Against Property (Enforcement of Hudood) Ordinance, 1979 read with section 34 of the Pakistan Penal Code. The accused did not plead guilty and claimed trial.

6. The prosecution in order to prove its case at the trial produced 13 witnesses. The gist of deposition of prosecution witnesses is as under:-

- i. Qamar-ud-Din Draftsman took rough notes of the place of occurrence. He appeared as P.W.1 and stated about the steps taken by him in the case;
- ii. Sajid Hussain Shah, ASI appeared as P.W.2 and deposed that on receipt of complaint Ex.PB sent by Muhammad Ilyas S.I, he recorded formal FIR. Ex.PB/1.
- iii. Muhammad Jamil P.W.3 deposed that on 14.06.1992 Muhammad Yaqoob deceased of this case died of injuries sustained by him. He further stated that accused Khiyal-ur-Rehman led the police to the place of occurrence in handcuffs and got recovered the weapon of offence i.e. Gainti;
- iv. Haji Muhammad Younas appeared as P.W.4 and stated that in his presence the dead body of deceased Muhammad Yaqoob was disinterred from graveyard at Sialkot. He identified the dead body of Haji Muhammad Yaqoob in the presence of Rana Farooq Ahmad, Magistrate and Dr. Zahid Ghani Dar. After the post-mortem the dead body was again buried in the same graveyard.
- v. Syed Muzamil Ali as P.W.5 deposed that on 28.07.1992 he and Arshad P.W.were sitting in Police Station Ganjmandi Rawalpindi when during investigation accused Khiyal-ur-Rehman disclosed that about one and half month back he alongwith Mumtaz Khan injured a person aged about 40-45 years in a shop with a "Gainti" and took out Rs. 40,000/- to Rs. 45,000/- from the draws.

- vi. Haji Arshad Iqbal appeared as P.W.6. He stated that on 28.07.1992 he was present in his shop situated at Bara Market Rawalpindi at about 8.00.a.m. when Muzamil Hussain Shah P.W. came to him and he requested Muzamil Shah to accompany him to Police Station Ganjmandi as a case of such like nature had happened with his maternal uncle about one and half month before. When they reached there accused Khiyal-ur-Rehman was called by Raja Ilyas S.I. and in their presence the accused disclosed that about one and half month ago he alongwith his co-accused Mumtaz Khan committed an offence at City Saddar Road Rawalpindi in PVC Market and attacked a person with "Gainti" who became senseless as a result of injury whereafter took Rs. 40,000/- to Rs. 45,000/- from drawer of the counter and ran away.
 - vii. Muhammad Maqsood, complainant appeared as P.W.7 and reiterated the facts recorded in crime report Ex.PB.
 - viii. Dr. Zahid Ghani Dar had conducted post-mortem on the dead body of deceased Haji Muhammad Yaqoob after disinterment. He appeared as P.W.8 and deposed about the postmortem in detail and also verified the issuance of postmortem report.
 - ix. Rana Farooq Ahmad Khan, Assistant Commissioner Tandlianwala District Faisalabad appeared as P.W.9 to state that on the direction of Deputy Commissioner Sialkot the dead body of deceased of Haji Muhammad Yaqoob was taken out of grave on 17.02.1993 whereafter postmortem of the corpse was undertaken by the doctor and then the dead body was buried again.
 - x. Mushtaq Ahmad, Sub Inspector appeared as P.W.10. He had investigated the case partially.
 - xi. Muhammad Ilyas, Sub Inspector appeared as P.W.11. The detail of his investigation has already been mentioned in an earlier paragraph of this Judgment.
 - xii. Malik Aftab Hussain, Reader to Assistant Commissioner Cantt. Rawalpindi appeared as P.W.12 and identified the hand writing and signatures of late Abdul Rehman Khalid, Magistrate.
 - xiii. Dr. Professor Muhammad Shafi as P.W.13 stated that on 09.06.1992 he, as head of Department of Neurosurgery at Pakistan Institute of Medical Sciences, Islamabad, treated Haji Muhammad Yaqoob aged about 42 years who was admitted in ICU with the history of head injury and loss of consciousness. The injured died due to the head injury. He also verified the ICU record at the trial court.
7. The learned trial court after close of the prosecution evidence recorded statement of accused Khiyal-ur-Rehman under section 342 of the Code of Criminal Procedure wherein he, in reply to Question No.8 retracted the confessional statement made by him and stated that the same was made due to police pressure. Neither he opted to make statement on oath under

section 340(2) of the Code of Criminal Procedure nor produced any evidence in his defence. The learned trial court after completing all legal formalities returned the verdict of guilt. The appellant was convicted and sentenced as noted in the opening paragraph of this Judgment. Hence the present Appeal through Jail.

8. We have gone through the file. The evidence of the witness for prosecution as well as the statement of appellant has been scrutinized. Arguments of the contending parties have also been heard.

9. It might as well be noted at the outset that though the report under section 173 of the Code of Criminal Procedure was sent against Mumtaz Khan and Khial-ur-Rehman, Mumtaz Khan accused was shown as an absconder and placed in column No.2 of the report. The conviction and sentence in this case was recorded only against Khial-ur-Rehman. A perpetual warrant of arrest of accused Mumtaz Khan (since proclaimed offender) was also issued by the learned trial court and sent to the District Magistrate Rawalpindi for compliance. In this view of the matter this appeal will dispose of the conviction and sentence of Khial-ur-Rehman appellant alone.

10. Our observations after hearing the arguments of the contending parties are as follows:-

- i. The instant case depends upon firstly on a confession recorded by later Mr. Abdul Rehman Khalid, Magistrate Rawalpindi on 08.08.1992. This confession has been retracted by the appellant who in response to Question No.8 of his statement under section 342 of the Code of Criminal Procedure stated that it was due to police pressure on him that he, while in police custody, was constrained to make confessional statement. Secondly the case rests upon extra judicial confession made during police custody and thirdly upon recovery of 'Ganti'.
- ii. P.W.3 Muhammad Jamil, P.W.5 Syed Muzammil Shah and P.W.6 Haji Arshad Iqbal have categorically stated that during investigation accused Khial-ur-Rehman, while in custody, had disclosed that he had killed Haji Muhammad Yaqoob. Needless to say that the confessional statement made to a police officer is inadmissible as such a confession is hit by Article 38 of Qanoon-e-Shahadat, 1984.
- iii. The confessional statement made by the appellant and recorded by learned Magistrate under section 164 of the Code of Criminal Procedure has been retracted. Moreover only the copy of the confessional statement has been placed on record without showing the reason why the original was not produced at the trial. The learned Magistrate had died and his Reader appeared in court to identify the signatures and the hand writing of the late Magistrate who had reportedly recorded the confessional statement of appellant.
- iv. It is also worth mentioning that the statement of Dr. Zahid Ghani Dar who appeared at the trial as P.W.8, got his statement recorded at the trial but at the end of his statement only nil cross-examination is written. The date of deposition has neither been written nor has the learned trial court verified that the statement

was read over and acknowledged correct. The signatures of the learned trial court are also missing. It was because of this omission that the doctor was summoned by the Federal Shariat Court. He put his appearance in this Court on 05.01.2006 in compliance with the Order of this Court dated 24.10.2005. In the cross-examination he stated that he was unable to mention the exact cause of death but in his opinion injury No.1 could be the cause of death. He also stated that he had not mentioned the cause of death in the statement recorded before the trial court.

- v. The incident is alleged to have taken place on 09.06.1992 when Haji Muhammad Yaqoob deceased was found in an injured and un-conscious condition in his shop. He died in the hospital in this state on 16.06.1992. Till then there was neither any suspicion about the assailant nor was any theft from the shop of deceased reported to police. It was on 17.02.1993 that the dead body was disinterred from the grave and the dead body was subjected to post-mortem.
- vi. P.W.11 Muhammad Ilyas, Sub Inspector stated that on 28.07.1992 i.e. almost six weeks after the occurrence Muhammad Maqsood complainant produced 'Ganti' P1 allegedly lying in the shop of the deceased. This 'Ganti' was allegedly left by the appellant in the shop. This 'Ganti' was neither blood stained nor was suspected by the complainant to be the crime weapon.

11. There is no eye witness in this case. The confession has been retracted. It has been held in the case of Arif Nawaz Khan and three others Versus State reported as PLD 1991 FSC 53 at page 64 paragraph 14-A that a retraction has to be accepted in which case the Hadd punishment cannot be imposed unless Hadd punishment is proved by evidence. The confession before the police officer by the appellant was made while in custody and hence not worthy of credence. The recovery of "Ganti" does not take the case of the prosecution any further. The original record of the confessional statement of appellant recorded by learned Magistrate has not been placed on record. We also find that the appellant is in jail for the last almost 18 years.

12. In view of what has been stated above the prosecution has not been able to establish its case against the appellant beyond reasonable doubt. In this view of the matter it is not safe to maintain conviction and sentence recorded by the learned trial court. As a consequence thereof the appeal is accepted. The conviction and sentence recorded by learned trial Court is set aside. The Murder Reference is answered in the negative. Appellant Khiyal-ur-Rehman alias Khair-ur-Rehman son of Maman Khan is directed to be released forthwith if not required in any other case.

Announced in open Court
at Islamabad on 17-05-2010.
UMAR DRAZ/

IN THE FEDERAL SHARIAT COURT

(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE AGHA RAFIQ AHMED KHAN, CHIEF JUSTICE

CRIMINAL APPEAL NO.26/Q of 2010.

1. Atta Muhammad S/o Ameer Jan,
R/o Mangocher, District Kalat.
2. Naimatullah S/o Haji Amanullah,
R/o Basham Kanak,
3. Mir Hazar son of Allah Bakhsh
R/o Degari Quetta Appellants.

Versus

The State. Respondent.

Counsel for appellant. Sardar Ahmed Haleemi,
Advocate.

Counsel for State Mr.Liaqat Ali,
Advocate.

FIR No. date and No.02, dated 20.01.2010.
Police Station. P.S,Kardgaab
District Mastung.

Date of impugned Judgment. 28.06.2010.

Date of Institution 07.08.2010.

Date of hearing 08.12.2010.

Date of decision 14.12.2010.

JUDGMENT

JUSTICE AGHA RAFIQ AHMED KHAN, Chief Justice.— This Criminal appeal is directed against the judgment dated 28.06.2010 delivered by learned Sessions Judge Kalat Division at Mastung whereby appellants Mir Hazar, Naimatullah, Atta Muhammad and co-accused Baig Muhammad have been convicted under section 392 PPC and sentenced each of them to five years' rigorous imprisonment and fine of Rs.10,000/-, or two months simple imprisonment in default of payment thereof. Benefit of section 382-B, Cr.P.C was extended to the appellants.

2. Prosecution story as narrated by complainant Muhammad Bakhsh son of Noor Muhammad in FIR No.02 dated 20.01.2010 lodged at Police Station Kardgaap is that he was resident of near Killi Khurasani Kardgaap and earn his livelihood by keeping cattle. In between the night of 15/16 January 2010 he was present in his house when someone knocked at the door of his house saying that they were government employees and wanted to search his house. As he opened the door he saw 5/6 armed persons standing there who pushed the complainant aside and forcibly entered into the house. They first searched the room of the complainant and locked him in the room and started to search the other rooms of the house. After departure of the said persons, they complainant with great difficulty opened the lock of the door and came out of the room and saw the locks of other rooms as well as the locks of the boxes lying therein broken. On checking he found Rs.300,000/- missing from the boxes which were allegedly taken away by the said persons. The complainant then appeared at police station and lodged his FIR as stated above.

3. After completion of usual investigation the appellants as well as co-accused Baig Muhammad were sent up for trial before the learned Sessions Judge Kalat who on 02.04.2010 framed charge against them under section 17 (3) Offences Against Property (Enforcement of Hudood) Ordinance, 1979, to which they pleaded not guilty.

4. In support of the case, the prosecution examined PW.1 Muhammad Bakhsh (complainant); PW.2 Imam Bakhsh; PW.3 Attaullah; PW.4 DSP Abdul Haq; PW.5 Muhammad Hassan; PW.6 SI Shah Muhammad and PW.7 SI/IO. Abdul Rahim.

5. On conclusion of the prosecution evidence, statements of the appellants and the accused under section 342 Cr.P.C. were recorded by the learned trial Court in which they denied the charges and claimed that they had been falsely implicated at the instance of DSP Abdul Haq who was nursing grudge against them. Neither they opted to be examined on oath nor produced any witness in their defence in terms of Section 340(2) Cr.P.C.

6. The learned Sessions Judge Kalat Division after hearing arguments of both parties and on appraisal of evidence convicted and sentenced the appellants and co-accused as stated above.

7. Learned counsel for the appellants contended that the entire prosecution case depend upon the identification parade of PWs Muhammad Bakhsh and Imam Bakhsh and the recovery. According to him, neither the identification parade was conducted in accordance with the law

and instruction as laid down by the superior Courts nor the alleged recoveries. He has also pointed out certain major contradictions in the FIR and in the statements of the PWs and unexplained delay of four days in lodging the FIR. He has relied on case law reported as;

- (i) PLD 1996 Supreme Court 574 (Mushtaq Ahmed..Vs..The State),
- (ii) PLD 2005 Quetta 86 (Abdul Salam and others..Vs..The State and others) and
- (iii) 1992 S.C.M.R page 2088 (Asghar Ali alias Sabah and another..Vs..The State and others.

8. Learned counsel for the State has supported the impugned judgment and has contended that all the witnesses have involved the present appellants in this case, thus prosecution has fully proved the same.

9. I have given full consideration to the arguments of learned counsel for the parties and gone through the entire material available with me.

10. The incident is said to have been committed at night between 15th & 16th January 2001 and FIR has been lodged on 20.1.2010 at 12.30 p.m. There is clearly unexplained delay of four days in lodging the FIR. Admittedly it was night time. Complainant has not mentioned any description of the accused persons in the FIR. The complainant and the witnesses have also not given any description of the culprits in their police statements, therefore, in absence of any description safe reliance cannot be placed on such identification parade. The identification parade was held in supervision of a DSP in the jail premises inspite of the fact that near jail court of Magistrate was available and they were present as admitted by the DSP before the trial Court. There is no explanation as to why identification parade was not got conducted from the Judicial Magistrate. There are major contradictions in the FIR as well as in the statements of witnesses. The complainant has stated in the FIR that the culprits had taken away rupees three lacs cash from his house but in his statement before the court he has stated that the culprits took rupees one lac. There are also improvements in the statements that accused had taken away golden and silver bangles () and Balochi silver neck-less but these facts have not been stated in the FIR. There are other major contradictions also in the statement of witnesses namely Attaullah, Imam Bakhsh and complainant Muhammad Bakhsh. DSP Abdul Haq in cross-examination has admitted that on 10.2.2010 the identification parade was held under his supervision in the jail premises; the courts were opened and that he did not approach Judicial Magistrate for the purpose of supervising the identification parade. As far as recoveries in the case are concerned, the same have been procured from the houses of the appellants. They were allegedly in custody of the police but at the time of alleged recoveries no private respectable person of the locality was called to act as Mashir and in that respect no explanation has been given. Section 103 Cr.P.C reads as under:

“Before making a search under this chapter, the officer or other person about to make it shall call upon two or more respectable inhabitants of the locality in

which the place to be searched is situated to attend and witness the search and may issue an order in writing to them or any of them so to do”.

“The search shall be made in their presence, and a list of all things seized in the course of such search and of the places in which they are respectively found shall be prepared by such officer or other person and signed by such witnesses; but no person witnessing a search under this section shall be required to attend the court as a witness of the search unless specially summoned by it”.

The police Officers have clearly violated the above provision of law by not associating two or more respectable inhabitants of the locality at the time of search of their houses.

11. For the above discussed reasons and in view of the legal position, I have come to this conclusion that the prosecution had failed to prove the charge against the appellants beyond any reasonable doubt, therefore, this appeal is allowed. The conviction and sentences passed by the learned Sessions Judge Kalat Division at Mastung are set-aside. The appellants be released forthwith if not required in any other case.

Announced on 14-12-2010
at Islamabad.
F.Taj/*

IN THE FEDERAL SHARIAT COURT

(Appellate /Revisional Jurisdiction)

PRESENT:

Mr. Justice Agha Rafiq Ahmed Khan, Chief Justice
Mr. Justice Syed Afzal Haider
Mr. Justice Shahzado Shaikh

CRIMINAL P.S.L.A. NO. 15/L OF 2007.

Mst. Salma Bibi wife of Khushi Muhammad,
Caste Muslim Sheikh, resident of Qasim Colony,
Chak No. 86/6-R, Tehsil & District Sahiwal --- Petitioner

1. Niaz alias Billa son of Shah Nawas,
2. Muhammad Shaukat alias Shoka,
son of unknown, Caste Qasab,

Both residents of Qasim Colony,
Chak No. 86/6-R, Tehsil & District Sahiwal

3. The State. Respondents.

Counsel for appellant.	....	Mr. M. A. Ghaffar-ul-Haq, Advocate.
Counsel for State	....	Ch. Abdul Razzaq, D.P.G.
Private Complaint No.	---	18-ASJ/19.03.2005
FIR No. date and Police Station.	....	472/04, dated 12.08.2004. Farid Town, District Sahiwal.
Date of Judgment of the trial Court	....	01.09.2007.
Date of Institution of PSLA	....	06.10.2007.
Date of hearing	....	05.10.2010.
Date of Judgement	....	11.10.2010.

JUDGMENT

Justice Agha Rafiq Ahmed Khan, Chief Justice:- Mst. Salma Bibi petitioner has through this petition for special leave to appeal challenged judgment dated 01.09.2007 delivered by learned Additional Sessions Judge, Sahiwal whereby he acquitted accused/respondents Niaz alias Billa and Muhammad Shaukat alias Shoka from the charge under section 10(4) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 by extending them benefit of doubt.

2. Brief facts of the case, as narrated by complainant Mst. Salma Bibi PW.1 in her private complaint Ex.PB filed before the learned Magistrate, Sahiwal, are that on 04.08.2004 her husband Khushi Muhammad had gone to Lahore for the purchase of grain. The complainant alongwith her three daughters was asleep in the courtyard of her house when at about 2.00 a.m. accused Niaz alias Billa and Muhammad Shaukat alias Shauka entered her house by scaling over the wall. Niaz alias Billa accused awakened her by holding her neck, put his hand on her mouth and committed zina-bil-jabr with her after removing her shalwar. She made efforts to rescue herself due to which her *shirt* was also torn. Then Shaukat alias Shauka committed zina-bil-jabr with her. In the meanwhile she lost her senses. Her daughter helped her revive after water was put in her mouth. On the return of her husband she narrated the whole incident to him who took her to police station Farid Town where the police after completing initial formalities, sent her to DHQ Hospital, Sahiwal for her medical examination alongwith Nazar Muhammad policeman. The lady doctor after conducting her medical examination handed over medico-legal report No.1446/AA/04 and the torn clothes to the police. The police registered FIR No.472/04 against the accused persons under section 10(3) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979. The complainant further stated that the police in connivance with the accused persons neither arrested them nor were they interrogated. She allegedly made requests to the DPO Sahiwal many times for conducting investigation of the case by some senior police officer but her requests were not acceded to while the accused were declared innocent by the police. Hence she filed the private complaint.

3. After recording cursory evidence of the complainant, the learned trial Court summoned both the accused and framed charge against them on 08.10.2005 under section 10(4) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979. The accused did not plead guilty and claimed trial.

4. The complainant in order to prove her case produced 3 witnesses at the trial. The gist of evidence of the witnesses is as under:-

- i) Complainant Mst. Salma Bibi appeared as PW.1 and stated that on 04.08.2004 she alongwith her daughters was sleeping in the courtyard of her house while her husband Khushi Muhammad had gone to Lahore for purchasing grains. At 2.00 a.m. Niaz and Shaukat accused entered into her house, awoke her and asked here where was her husband. Both the accused caught her neck and they had "duel with her". Then her husband came and she narrated the whole occurrence to him. She

alongwith her husband went to the police post and got recorded her statement. Nazar constable took her for medical examination. The police recorded her statement Ex.PA for registration of the case. During investigation the police connived with the accused persons and cancelled the FIR upon which she filed complaint Ex.PB.

- ii) PW.2 Khushi Muhammad husband of Mst. Salma Bibi complainant stated that on 08.04.2004 he had gone to Lahore to purchase grams leaving his three daughters and wife at home. He came back on 5th of August, 2004 and he was apprised by his wife about the occurrence upon which he accompanied his wife to the police post wherefrom she was taken for medical examination. After her medical examination he accompanied her for registration of case. The case was cancelled by the police because they were in league with the accused persons.
- iii) PW.3 Lady Doctor Afshan Akram had medically examined Mst. Salma Bibi complainant on 05.08.2004 and observed as under:-

“History of fight, and Zina-Bil-Jabr.

She was fully conscious, well oriented in time and space. She was married woman. Her LMP as she stated unsure. On examination no mark of violence all over the body at the time of examination were found. Clothes worn by her were Rashmi Kamiz, Yellow colour, Phooldar.

Per Abdomen. N.A.D. P/V. Pubic hairs were present. Vulva vagina were healthy. Vagina admitted two fingers easily. Uterus mobile and normal size.

Two vaginal swabs were taken, sealed and sent to the Chemical Examiner, Multan for detection of semen, if any. She was advised urine pregnancy test and Ultra-sound. Ex.PC is the attested copy of the medicolegal report, which is in my hand and bears my signatures.”

- iv) PW.4 Rehmat Ali Sub Inspector stated that on 12.08.2004 he was on patrol duty at Noor Shah Road where Mst. Salma Bibi met him and got recorded her statement Ex.PA.

5. The complainant, after tendering in evidence the report of the Chemical Examiner Ex.PD, closed the evidence.

6. The learned trial Court also recorded statements of three CWs. The gist of deposition of CWs is as under:-

- i) CW.1 Zakir Hussain Head Constable/Moharrir stated that on 12.08.2004 he received complaint through Muhammad Amjid constable sent by Rehmat Ali Sub Inspector whereupon he formally recorded FIR Ex.CW.1/A.
- ii) CW.2 Rehmat Ali Sub Inspector also appeared as PW.4. He recorded statement of Mst. Salma Bibi Ex.PA on 12.08.2004 at Noor Shah Road.
- iii) CW.3 Muhammad Ijaz Assistant Sub Inspector had undertaken the investigation. On 13.08.2004 he inspected the place of occurrence and recorded statements of two PWs under section 161 of the Code of Criminal Procedure. He arrested accused Niaz alias Billa on 15.08.2004, got him medically examined and sent to judicial lock up. On 21.08.2004 he summoned both the parties for investigation. The accused party alongwith several respectables came at police station but no one turned up from complainant side. He against summoned both the parties for investigation on 22.08.2004 and on that date also none appeared from the complainant side whereas 30 persons joined the investigation from the accused side. He recorded statements of said persons 'Ber Daryaft' in the relevant Zimni and concluded that the accused was innocent. Then he produced both the parties before the DSP Investigation Sahiwal on 26.08.2004 who verified his investigation.

7. The learned trial court recorded statements of the accused under section 342 of the Code of Criminal Procedure on 07.07.2007. The accused denied allegations leveled against them and pleaded innocence in the occurrence. In reply to question, "Why this case against you and why the PWs deposed against you?" accused Shaukat Ali stated as follows:-

"There is no independent PW in this case. I am a poor person aged about 50 years and labourer. The complainant is litigant minded lady who earns her living through litigation and her case was found false during investigation. My first plea of innocence before the police was found correct. Large number of dwellers of the vicinity joined the investigation independent and respectables of the locality supported my innocence. The case was also investigated by Ch. Bashir Ahmad, DSP Investigation who verified my innocence and the case was recommended for cancellation where-after I filed suit for damages in the Civil Court and to avoid the consequence of the said suit, this complaint Ex.PB was filed with an inordinate delay to defeat the justice. I am a married man and earlier to present false complaint, there is no such allegation against me. Mst. Salma Bibi is mother of six grown up children. None of the other inmates of the house out of her children has supported her on account of relationship between husband and wife. Being interested inter-se they have deposed falsely and implicated me dishonestly.

Niaz Ahmad accused made almost the similar reply to the above-mentioned question.

8. The accused did not opt to record their statements under section 340(2) of the Code of Criminal Procedure. However, they produced certified copy of application titled Khushi Muhammad Vs. SHO P.S. Farid Town, Sahiwal and others Ex.DA, order dated 16.12.2005 passed by Syed Hamid Hussain Shah, learned ASJ, Sahiwal Ex.DB and certified copy of civil suit for payment of Rs.24500/- as damages titled Mst. Manzooran Bibi Vs. Khushi Muhammad Ex.DC in their defence and closed their evidence.

9. The following points have been urged on behalf of the petitioner:-

- i) that both the accused were nominated in the complaint Ex.PB;
- ii) that the petitioner was subjected to rape on 04.08.2004 when her husband was not in the house;
- iii) that the petitioner was medically examined on 05.08.2004 and according to the report of the Chemical Examiner the swabs were found stained with semen;
- iv) that FIR No. 472/2004 was also registered by local police on 12.08.2004 on the statement of the petitioner but the police instead of supporting her favoured the accused with the result that the petitioner was forced to initiate criminal proceedings against the two respondents by way of private complainant, Ex.PB;
- v) that the learned trial Court awarded benefit of doubt to the respondents only because according to the lady doctor there were no marks of violence on the person of the petitioner.

10. The learned DPG supported the impugned judgment. He further submitted that the entire evidence on record had been duly appraised. The findings are neither capricious nor arbitrary.

11. We have seen the file. Evidence placed on record including statement of accused has been perused. Relevant portions of the impugned judgment have been scanned. Learned Counsel for the contending parties have also been heard.

12. The reasons that prevailed upon the learned trial Court to return a verdict of not guilty are mentioned in paragraphs 17 through 19 of the impugned judgment. The gist of the reasons is as follows:-

- i. that the allegation of rape was not leveled by the complainant in her statement recorded during the trial;
- ii. that the investigation of the case was transferred at the behest of complainant and the second Investigating Officer, a senior police officer, also found that the accused was not involved in the case;
- iii. that there is no eye-witness account to support her allegation;
- iv. that the lady doctor did not find sign of violence or use of criminal force on any part of the body of Mst. Salma Bibi; the clothes of the complainant were also not found stained by the lady doctor;
- v. Leaned trial Court while concluding discussion on the merits of the case, found (paragraph 19 of the impugned judgment) as follows:-

“Now it is well established from the above discussion that the alleged victim of this case is a grown up lady having six children out of whom are of her eldest issue was 12/13 years at the time of occurrence. She has failed to establish even absence of her husband from the night of occurrence. According to investigation as an outcome and result of some fight between the parties women, the complainant has got registered this case. So far as positive report of detection of semen on the swabs taken by the vagina of the victim is concerned, without group matching of the same with the semen of any or both the accused how it can be held whether the swabs were containing semen of any of the accused or both of the accused. I have already discussed above that there is only solitary statement of the complainant on the file in support of this private complaint whereas statement of PW-3 Lady Doctor who conducted examination of the victim also does not favour the prosecution version as according to Pw-3 no mark of violence or injury was found on the part of victim and this thing negates her allegation against both the accused that they had a duel with her during the

occurrence. The complainant as PW-1 by using the word duel regarding occurrence has minimized her allegation and even she has failed to prove the duel with her by both of the accused because there were no sign of violence or injury on her body which would have been a natural result of a duel by two male persons with a woman. It is also on the file that both the accused facing trial are married persons having 6/6 children and their ages are also more than 50 and 60 years respectively. During the investigation, the complainant could not justify her allegation and as such cancellation report was prepared in this case. As I have already discussed above that there is no corroboration of any eye witness, so in this scenario and by placing reliance upon the esteemed case law relied upon by the learned defence counsel I have no option but to adjudicate that the complainant has miserably failed to establish the guilt of any of the accused free of any doubt. On the other hand the defence plea taken by the accused is confidence inspiring.”

13. As a consequence thereof the learned trial Court acquitted both the accused. The judgment is well reasoned and all the important aspects have been considered.

14. The Federal Shariat Court, in the case of The State Vs. Tanveer-ul-Hassan & 5 others reported as 2009 P.Cr.L.J 199, has already identified the various factors which have been judicially considered while deciding appeals against acquittal. Relevant portion of the report is reproduced below:-

“Appellate Court while hearing arguments in an appeal against acquittal will ordinarily consider the following points:—

(i) Court will not normally interfere in the verdict of acquittal, (ii) Court will give due weight and consideration to the finding of the lower Court, particularly the Trial Court which had the occasion of not only recording the evidence but also watching the demeanor of the witnesses and attending to the plea of the person facing trial, (iii) what is the view of the trial Judge regarding the credibility of witnesses, (iv) verdict of acquittal affirms the initial plea that every person is presumed to be innocent unless proved guilty, (v) it is not a sufficient ground of interference that on re-appraisal of the evidence on record a different view might as well be formed, (vi) whether reappraisal of evidence shows any manifest wrong, perversity or uncalled for conclusion from facts

proved on record, (vii) whether the findings arrived at by Trial Court are wholly artificial, shocking and ridiculous, (viii) whether material evidence has been disregarded, (ix) whether material evidence has been misread blatantly to an extent that miscarriage of justice has been occasioned, (x) whether evidence has been brought on record illegally, (xi) there is, however, no bar upon the superior Courts to interfere in the acquittal judgment, but the Courts exercise extra caution while exercising jurisdiction in appeals against acquittal, (xii) the rights of accused to any benefit of doubt and (xiii) mere disregard of technicalities in a criminal trial without resulting injustice, is not enough for interference.”

15. We have considered the above mentioned principles which govern the disposal of appeals against acquittal. The reasoning adopted by the learned trial Court in acquitting the respondents in this case is not hit by any principle mentioned above. The mere assertion that the learned trial Court should have convicted the respondents has no force because the basic principle for administration of justice is that the prosecution has to stand on its own legs and prove the case beyond reasonable doubt. Benefit of doubt is always accorded to the accused and not the complainant. The acquittal order reinforces the initial presumption of innocence of accused. The petitioner has not been able to point out any legal defect in the impugned judgment. The conclusions arrived at by the learned trial Court are neither fanciful nor arbitrary. No material piece of evidence has been left without consideration. The impugned judgment is well reasoned and does not merit interference. It is consequently upheld.

16. In view of what has been stated above we are not inclined to grant special leave to appeal. Resultantly Cr. P.S.L.A No.15/L/2007 is dismissed.

17. These are the reasons for our short order passed on 05.10.2010.

Lahore the 11th October, 2010

*Imran/**

SHARIAT PETITION NO.1/1/2007
SHARIAT PETITION NO.3/1/2007
SHARIAT PETITION NO.1/1/2010

Mian Abdul Razzaq Aamir.
Ch. Muhammad Aslam Ghuman.
Abdul Latif Sufi Adv.

Versus

Federation of Pakistan through Secretary, Ministry of Law, Justice and Human Rights,
Government of Pakistan and others.

PLD FEBRUARY PART 2011 (FSC-1) DECIDED ON 22-12-2010

Present:

MR.JUSTICE AGHA RAFIQ AHMED KHAN, CHIEF JUSTICE
MR.JUSTICE SYED AFZAL HAIDER, JUDGE
MR.JUSTICE SHAHZADO SHAIKH, JUDGE

Mr. Justice Syed Afzal Haider, Judge

In these three Shariat Petitions under Article 203-D of the Constitution of Islamic Republic of Pakistan, the petitioners challenged entire Act VI of 2006 as well as Sections 5, 6 and 7 of Protection of Women (Criminal Law Amendment) Act, 2006 whereby Sections 376, 496-B and 496-C have been added in the Pakistan Penal Code (Act XLV of 1860) which are relating to rape and fornication inserted by Protection of Women (Criminal Law Amendment) Act, 2006 being repugnant to the Injunctions of Islam and liable to be removed from the statute books. It has been contended that the insertion of new Sections 5, 6 and 7 in the Protection of Women (Criminal Law Amendment) Act, 2006, including the omission of the first proviso to Section 20 of Ordinance VII of 1979 are not only repugnant to the Injunctions of Islam but is also violative of the constitutional provisions contained in Article 203-DD (i). It has been urged that Federal Shariat Court has exclusive jurisdiction in any case decided by any criminal court relating to the enforcement of Hudood. The bench was reconstituted due to sudden demise of Mr. Justice Dr. Mehmood Ahmad Ghazi, Judge and fresh notices were sent to the parties for rehearing and heard on 26.10.2010 and 23.11.2010.

CONTENTIONS

2. During the course of arguments, the counsel for petitioners raised the following contentions;-

- a) That the omission of sections 3,4,6,10,16,18 and 19 of Ordinance VII of 1979 and amendments effected in sections 8,9,17 and 20 Ibid as well as omissions of sections 10 through 13,15,16 and 19 of Ordinance VIII of 1979 and amendments in sections 2,4,6,8,9,14,16 and 17 Ibid as well as insertion of new sections in the Pakistan Penal

Code by virtue of sections 2 through 8 of Act VI of 2006 and corresponding amendments in Schedule II of the Code of Criminal Procedure is violative to the Injunctions of Islam.

- b) That the purpose achieved by these amendments was to limit the jurisdiction of the Federal Shariat Court which decided appeals/revisions against conviction/acquittal recorded under Ordinance No.VII and VIII of 1979 in relation to the offences stipulated originally in the four Hudood Ordinances. These amendments it is urged, contravene Constitutional provision contained in Article 203DD apart from being mala-fide;
- c) That the words "The High Court" occurring in (i) sub-section (3) of Section 5, (ii) clause (9) of sub-section 1 of section 14 and the words "The High Court" occurring in (1) and the words "The Supreme Court" occurring in clause 2(b) of section 25(a) of the West Pakistan Family Courts Act, 1964 be substituted for the words "Federal Shariat Court". The provisions of Muslim Family Laws are covered by the meaning and scope of the term Hudood as is evident from various Ayaat of Holy Quran.
- d) That sub-section 5 may be added in section 14 of the West Pakistan Family Courts Act, 1964 to empower the Federal Shariat Court to exercise revisional jurisdiction within ninety days over the appellate orders passed by the District Court in any case as provided in clause (h) of sub-section (1) of section 14 (ibid). A provision be also added to transfer all the appeals, pending in the High Courts, to the Federal Shariat Court.
- e) That appeals against convictions recorded under the Control of Narcotic Substances Act, 1997 (Act No.XXV of 1997), should lie before the Federal Shariat Court as the sale, purchase, manufacture and use of narcotics was hit by the mischief of Prohibition as envisaged by Hudood Laws.
- f) That the practice of invoking the jurisdiction of High Courts in the event of grant or refusal of Pre-arrest and post-arrest bail application during investigation and trial stage was violative of Article 203DD of the Constitution;
- g) The scope of the term Hudood is very wide and covers not only all categories of offences relating to property, human body, human dignity and honour but also family matters of a civil nature. In this context it was urged that the categories of offences as well as civil matters relating to family life, be also identified which fall within the ambit of the term Hudood. It was asserted that the purpose of creating Federal Shariat Court be also examined, and lastly it was maintained;
- h) That the above mentioned points have been raised additionally for the reason that Article 203-DD of the Constitution stipulates that the Federal Shariat Court shall have such other jurisdiction as may be conferred on it by or under any law.

As stated above the Court made it clear to the learned counsel for petitioners as well as petitioner in Shariat Petition No. 9/I of 2004 that this judgment will dispose of

the questions enumerated in the consensus issues. Challenge to the other provisions will be taken up in appropriate proceedings at some other occasion if so required. The questions beyond the consensus issues are being left with the consent of parties for further date in appropriate proceedings as and when situation arises.

CONCLUSIONS

3. Based on detailed arguments advanced by the representatives of the parties as well as considering the points of juris-consults, the court arrived at the following **conclusions/Judgment.**

- i. That all those offences whose punishments are either prescribed or left undermined, relating to acts forbidden or disapproved by Holy Quran, Sunnah, including all such acts which are akin, auxiliary, analogous, or supplementary to or germane with Hudood offences as well as preparation or abetment or attempt to commit such an offence and as such made culpable by legislative instruments would without fail be covered by the meaning and scope of the term Hudood.
- ii. The extent of jurisdiction of Federal Shariat Court in matters relating to Hudood under Article 203-DD is exclusive and pervades the entire spectrum of orders passed or decisions given by any criminal court under any law relating to the enforcement of Hudood and no other Court is empowered to entertain appeal, revision or reference in such cases. No legislative instrument can control, regulate or amend this jurisdiction which was mandated in Chapter 3A of Part VII of the Constitution of Pakistan.
- iii. An order granting or refusing bail before conclusion of trial in all categories of offences within the ambit of Hudood is covered by the word proceedings, as used in Article 203-DD and hence within the exclusive jurisdiction of the Federal Shariat Court and can be impugned only in this Court.
- iv. The following ten offences are covered by the terms Hudood for the purpose of Article 203-DD of the Constitution.
 1. Zina= Adultery, Fornication and Rape.
 2. Liwatat= Sexual intercourse against the order of nature;
 3. Qazaf= Imputation of Zina;
 4. Shurb= Alcoholic drinks/Intoxicants/Narcotics etc;
 5. Sarqa= Theft simplicitor;-
 6. Haraba= Robbery, Highway Robbery, Dacoity. All categories of offences against property as mentioned in Chapter XVII of Pakistan Penal Code.

7. Irtdad= Apostacy.
8. Baghy= Treason, waging war against state; All categories of offences mentioned in Chapter VI of the Pakistan Penal Code.
9. Qisas= Right of retaliation in offences against human body. All these offences are covered by definition Hadd because penalty therein has been prescribed by Nass/Ijma. Abdul Qadir Audah, has discussed to some extent the scope of Hadd in his treatise Tashree ul janai al Islam, volume 1 at page 119.
10. Human Trafficking.

The declaration in the above four items shall take effect immediately because all the learned counsel representing the respondents, the jurisconsult as well as the amicus curiae have, as mentioned in paragraph, 17 of this judgment agreed on the four issues which are reflected in the above declaration. These conclusions having been consented to by the parties need nothing more to be done.

- v. That sections 11 and 28 of the Protection of Women (Criminal Laws Amendment) Act, 2006 (Act VI of 2006) are hereby declared violative of Article 203-DD of the Constitution because these provisions annul the overriding effect of Hudood Ordinances VII and VIII of 1979;
- vi. That the portions of Sections 48 and 49 of The Control of Narcotic Substances Act, 1997 (Act XXV of 1997) whereby the High Court has been empowered to:-
 - a) entertain appeals against the order of a Special Court consisting of a Sessions Judge or an Additional Sessions Judge.
 - b) transfer within its territorial jurisdiction any case from one Special Court to another Special Court at any stage of the proceedings, are violative of the Provisions contained in Chapter 3A of Part VII of the Constitution because the offences envisaged by Act XV of 1997 are covered by the term Hudood. Both the sections are consequently declared violative of Article 203DD of the Constitution. The portion which contains the words High Court should be deemed to be substituted by the words Federal Shariat Court in both the above mentioned sections.
- vii. Section 25 of the Protection of Women (Criminal Laws Amendment) Act, 2006 (Act VI of 2006) is declared violative of Article 203-DD of the Constitution as it omits sub-sections (3) and (4) of Section 14 of the Offence of Qazf (Enforcement of Hadd) Ordinance, 1979 with the result that it has adversely affected the operation of Injunction of Islam relating to Lian. Consequently section 29 of Act VI of 2006 is also declared violative of Article 203DD as it adds clause (vii a) Lian in section 2 of

the Dissolution of Muslim Marriages Act, 1939. This addition in the latter Act also becomes invalid on account of repugnancy with the Injunctions of Islam relating to Lian.

- viii. Section 25 of the Anti-Terrorism Act, 1997 (Act No.XXVII of 1997) does not make provision for filing an appeal before the Federal Shariat Court in cases where the Anti-Terrorism Court decides a case relating to some of the **Hudood** offence included in the schedule as from 21-08-1997. This omission is violative of Article 203-DD. The Federal Government should rectify this error by the target date fixed by this Court otherwise the following rider shall be read at the end of clause (i) of section 25 of Act XXVII of 1997 after omitting the full stops.

“but where a private complaint or a first information report or information, as stipulated in section 190 of the Code of Criminal Procedure, relating to an offence falling within the purview of above mentioned ten categories of Hudood Offences, is decided by any court exercising criminal jurisdiction under any law of the land, the appeal therefrom shall lie to the Federal Shariat Court”.

- ix. The declaration relating to Protection of Women (Criminal Laws Amendment) Act, 2006 (Act VI of 2006), The Control of Narcotic Substances Act, 1997 mentioned at serial No.vi as well as Anti-Terrorism Act, 1997 shall take effect as from 22nd June, 2011 by which date necessary steps be taken by the Federal Government to amend the impugned laws in conformity with this declaration whereafter the impugned provision shall cease to be effective and this judgment of the Federal Shariat Court will be operative as on 22-06-2011. The other items of the Declaration become operative forthwith.

Dated: 22nd December, 2010.

Shariat Petition No. 1/K of 2002 decided on 15.04.2010 (2010 SD 481), PLD2010FSC-229

1. MOHTARMA BENAZIR BHUTTO
2. MRS. GULZAR AHMED Petitioners

Versus

FEDERATION OF PAKISTAN THROUGH SECRETARY FINANCE ISLAMABAD
.... Respondent

Present: *Mr. Justice Agha Rafiq Ahmed Khan, C.J.*

Mr. Justice Syed Afzal Haider

Mr. Justice Shahzado Shaikh

SYED AFZAL HAIDER, Judge.-This Shariat Petition under Article 203-D filed by one of three trustees (deceased Mohtarma Benazir Bhutto) to challenge Islamic vires of Martial Law Order No.21 (1977), Zonal Martial Law Order No. 28 (1978), Zulfiqar Ali Bhutto Trust and Peoples Foundation Trust (Renaming and Administration) Order (President's Order No.4 of 1978) and Zulfiqar Ali Bhutto Trust and Peoples Foundation Trust (Renaming and Administration) (Amendment) Order (President's Order No.6 of 1979).

2. Begum Nusrat Bhutto, widow of late Prime Minister Zulfiqar Ali Bhutto alongwith her daughter Mohtarma Benazir Bhutto, the twice elected Prime Minister of Pakistan and her son Mir Murtaza Bhutto founded a Trust with the name and title of "Peoples Foundation" on 8th August, 1974. It was duly registered as required by law. The three founders were the trustees while petitioner No.1 was also Chairperson of the Trust. The said Trust was established with clear-cut objectives as indicated in the Deed attached to the petition. The affairs of the Trust were being managed smoothly by the trustees who were performing their stipulated rights and obligation in accordance with the procedure laid down in the Deed. The trustees in due course received donations including a contribution from the Head of State of United Arab Emirates to advance the purposes of the trust. The petitioners, in paragraphs 6 through 14 of the Shariat Petition have detailed the background of the misery that befell them and their Trust on account of promulgation of Martial Law Orders and the consequent efforts they undertook to seek redress from 1977 October onwards.

PETITIONERS' PLEA

3. The learned counsel for the petitioners *inter-alia* contended that:-
- (i) Martial Law Order No.21 issued by Chief Martial Law Administrator dated 17th October, 1977 (printed on page 453 PLD 1977 Volume 5 Statutes Part);
 - (ii) Martial Law Order issued by Martial Law Administrator Zone "C" (Province of Sindh) dated 28th September, 1977 (printed on page 122 of PLD 1977 Volume 6 Provincial Statutes);
 - (iii) President's Order No.4 of 1978 entitled Zulfiqar Ali Bhutto Trust and Peoples Foundation Trust (Renaming and Administration) Order, 1978, dated 26th March, 1978, (printed on pages 77-78 of Volume 5 Statutes Part PLD 1977; and
 - (iv) President's Order 6 of 1979 entitled Zulfiqar Ali Bhutto Trust and Peoples Foundation Trust (Renaming and Administration) (Amendment) Order, 1979 dated 28th February, 1979 (Printed on pages 69-70 of PLD 1979 Volume 5 Statutes Part).

are repugnant to the Injunctions of Islam and should resultantly be declared as such and consequently of no legal effect. It is also prayed that the respondents be directed to hand over the properties and assets of the Trust to the petitioners forthwith.

4. In support of his contention that the impugned Martial Law Orders are void and of no legal effect, Barrister Kamal Azfar learned counsel for the petitioners, proceeded to elaborate the points for consideration of this Court as under:-

(The contentions raised by learned counsel are mentioned in Part A while the points urged by the religious scholar on behalf of the petitioners are mentioned in Part B below).

PART A

- (i) That the four Martial Law Orders under examination are violative of the Injunctions of Islam and consequently of no legal effect;
- (ii) That the impugned Orders are contrary to the principles of law enunciated by the Shariat Appellate Bench of the Supreme Court of Pakistan in the case of *Qazalbash Waqf versus Chief Land Commissioner, Punjab*, reported as PLD 1990 Supreme Court 99;
- (iii) That the Orders under examination are colourable and motivated by personal malice of General Muhammad Zia-ul-Haq who having deposed Zulfiqar Ali Bhutto, the duly elected Prime Minister of Pakistan, confiscated the properties, assets and records of the Peoples Foundation Trust founded by his family members.
- (iv) That although the Trust Act, 1882 and section 92 of the Code of Civil Procedure, 1908 provide adequate remedies for inquiring into the affairs of any Trust; yet the Chief Martial Law Administrator in utter violation of the existing and operative laws on the subject circumscribed the legal provisions without lawful authority and suspended the Board of trustees and appropriated powers and functions of the Board. Hence his action under the impugned Orders was *ultra vires* of the Constitution and law.
- (v) That the procedure adopted by Chief Martial Law Administrator for taking over the Trust and its assets was violative of the principles of Natural justice.
- (vi) That the step taken by Chief Martial Law Administrator was motivated by a desire to harm, harass and ultimately exterminate the petitioners.
- (vii) That there was not a single complaint lodged by any one with any authority against the petitioners in relation to the affairs of the Trust.
- (viii) That the malice of Chief Martial Law Administrator was so intense that after the promulgation of MLO 21 in October, 1977 he caused even the name of the Trust to be altered through President's Order No.4 of 1978.
- (ix) That the actions of General Muhammad Zia-ul-Haq in removing the trustees and seizing the properties of the trust without due process of law was *ultra vires* of Articles 23 and 24 of the Constitution.
- (x) Relying on the time-honoured book *Muhammadan Law* by Syed Ameer Ali, Barrister Kamal Azfar urged that dedication of property was known in Islam and the law of Waqf had its origin with the Prophet PBUH himself who declared that all human actions come to an end with the death of an individual except such benefactions as are perpetual in their character. It was therefore submitted that

Trusts or Waqfs were frequent during and after the lifetime of the Prophet PBUH and consequently a Trust cannot be acquired without compensation. Reference was made to the Waqfs created by Hazrat Umar R.A., Zubair bin Awwam R.A., Hazrat Abu Bakr R.A. and Saad bin Abi Waqas R.A. It was stated that the doctrine of Waqf is interwoven with the entire religious life and social economy of the Muslims. Learned counsel for the petitioner, in support of his contentions stated that *Fidak* was returned to the Ahle-e-Bait ultimately by the Ummayah Caliph Umar bin Abdul Aziz. It was therefore urged that the suit trust has to be restored to the petitioners.

- (xi) Reference was also made to another oft-quoted book entitled Principles of Muhammadan Law by F.D. Mulla as well as Rule 890 of the *Mejelle* which states that “if the property taken without leave is corporeally existing, it must be returned, and delivered to its owner, at the place where it was taken”.

PART ‘B’

- (xii) Learned counsel for the petitioners then asked Maulana Sajid-ur-Rehman Siddiqui of Jamia Dar-ul-Uloom Karachi to address the Court on the question that the impugned Martial Law Orders are violative of the Injunctions of Islam. The following points were raised by the religious scholar:-

(a) Ayat No. 58 of Sura 4 of Holy Quran enjoins that trusts should be handed over to its owners;

(b) Ayat No.27 Sura 8 of Holy Quran proclaims:-

“O you who believe
do not be faithless to God
and His Apostle, nor
violate you trusts knowingly”

- (c) Ayat No.8 of Sura 23 is appreciative of those persons who fulfill their trusts and honour their promises;
- (d) Ayat 32 through 35 of Sura 70 of Holy Quran recounts the attributes of those persons who will be spared the torture in Hell and amongst them are the people who are faithful to their trusts and covenant.
- (e) Ayat No.29 of Sura 4, Al-Nisa, of Holy Quran enjoins not to devour the property of others by unlawful means. It was urged that except trade, inheritance and gift all other modes of acquisition of property are against the Injunctions of Islam.

Since the properties of the petitioners were misappropriated so the action was violative of this Injunction as well.

- (f) It was urged on the basis of Ayat 128 of Sura 7, of Holy Quran that the entire land belongs to Allah. He gives to when He pleases and hence it is unlawful to deprive the owner of the property.
- (g) Ayat No.8 of Sura 5 of Holy Quran was also relied upon to urge that Allah commands the believers to be upright for His sake and that the believers should be bearer of witness with justice and the *hatred of a party should not incite you to act inequitably. Be always just for such a course is nearer to piety. It is a duty imposed by Allah.* This duty, it was maintained, was not fulfilled.

5. Learned Standing Counsel for the Federal Government in a short reply to the points urged on behalf of the petitioners stated that he was unable to controvert the Injunctions of Holy Quran relied upon by the religious scholar on behalf of petitioner. On a Court question whether the impugned Martial Law Orders could be justified on the touchstone of any Injunctions of Islam, the learned counsel for Federal Government stated that he could neither quote any Ayat from Holy Quran nor any NASS from the plethora of tradition of the Holy Prophet PBUH.

6. The following Ministries/Divisions in response to notices issued by this Court submitted para-wise statements/comments which were duly verified and cleared by concerned authority:-

- (1) Finance Division;
- (2) Auditor General of Pakistan;
- (3) Ministry of Religious Affairs;
- (4) Ministry of Population Welfare;
- (5) Ministry of Social Welfare & Special Education;
- (6) Ministry of Health;
- (7) Ministry of Housing & Works;
- (8) Ministry of Information and Broadcasting.

All the above Ministries/Divisions, *inter alia*, stated that ever-since the promulgation of MLO 21 of 1997 by the CMLA, MLO 26 of Zone 'C' PO No. 1 of 1978 and PO No. 6 of 1979 the said trust is under the 7th schedule of the Constitution in terms of Article 270-A of the Constitution. However, this does not preclude the determination of the *lis* on the touchstone of Article 203-D of the Constitution to examine and decide the question whether or not the provisions under challenge are repugnant to the Injunctions of Islam as laid down in the Holy Quran and sunnah

of the Holy Prophet. Such a proposition is also ascertainable from the preamble of Constitution. It was also stated that Article 2-A of the Constitution makes the Objectives Resolution a substantive part of the Constitution. Reference in this context to Articles 3,4,5,6,20,23,24,31,37 and 38 was also made.

7. The above-mentioned Ministries/Divisions further submitted following grounds in support of their Statements:-

“The averments herein do infringe upon the provisions relating to “Trusts” as ordained under the Injunctions of Islam. The public welfare trust constituted by late Zulfiqar Ali Bhutto, Prime Minister of Pakistan was taken over by General Zia-ul-Haq who had removed the elected premier and embarked upon retracing the act and steps taken by him for motivations other than promoting the legal and Constitutional doctrines germane to the welfare of the people of Pakistan or Mohammadan law regulating trust properties stand violated. Reference to Qazilbash Trust case reported as PLD 1990 SC 99 which clearly states that taking over trust under MLO 21 of CMLA 1997 and rule 26 MLA Zone C and P.O. 4 of 1978 and P.O. 6 of 1979 are contrary to the Injunctions of Islam.”

8. The above-mentioned Ministries/Divisions unanimously supported the prayer of the petitioner, in following terms:-

“The claim of the Petitioner is manifestly just and proper and the declaration sought legally sustainable as MLO’s 21 of CMLA, 26 of MLA Zone ‘C P.O. 4 of 1978 and P.O. of 1979 are ostensibly repugnant to the Injunctions of Islam. Consequently, the Peoples Foundation Trust as originally registered with the substitution of legal heirs of the deceased trustees merits **to be restored along with properties and assets of the trust seize taken over and controlled under afore-referred instruments**. This Court has no objection to return assets/trust property etc. to the original/founder trustees or their legal heirs of the deceased trustees”.

STATUS OF IMPUGNED ORDERS

9. The impugned Martial Law Orders are consequently of no legal effect as these instruments suffer on account of following legal infirmities:-

- (i) The impugned Orders, when examined on the touchstone of above mentioned Injunctions of Islam are found utterly deficient. The Orders under survey are repugnant to a number of Injunctions of Islam.
- (ii) Action adverse to the interests of petitioners was taken against the petitioner trustees and they were penalized and forced to run from pillar to post when there was neither any irregularity nor any complaint nor breach of any legal provision whatsoever.
- (iii) Neither any show-cause notice was served upon the petitioner trustees nor were the petitioners asked to submit explanation to one or more specific charges before the action of confiscation of property by Chief Martial Law Administrator. A penalty can be imposed only if an action is covered by the mischief of an offence which has been declared an offence before the action complained of was committed.
- (vi) The petitioners were denied the right of appeal or representation before any independent Tribunal. The lawfully established Constitutional Courts were debarred, by naked force, from adjudicating upon petitions moved by petitioners against Martial Law Orders and Authorities, though the Courts continued functioning throughout the country and dispensed justice in accordance with law. The Martial Law Orders proceeded to usurp the lawful jurisdiction of courts in the case of a legal person.
- (v) During the pendency of Constitution petition No.501 of 1977 of the petitioner-trustees in the High Court of Sindh at Karachi, the Chief Martial Law Administrator through an arbitrary executive fiat issued Martial Law Order No.21 on 17.10.1977 against the fundamental principles of Islam. The lawfully constituted Court was stopped from calling in question the decree of the Martial Law Administrator. Clause 3 of the impugned Order proclaimed as under:

“This order shall have effect notwithstanding anything contained in the Peoples Foundation Trust Deed of 9th day of August, 1974

as amended from time to time, or in any law including a Martial Law Regulation or a Martial Law Order or other instrument having the force of law or in any contract or an agreement *and shall not be called in question in or before any court including the Supreme Court and a High Court.*”

- (vi). The four impugned Martial Law Regulations were neither promulgated by chosen representatives of the people nor were these instruments issued under the umbrella of the Constitution. The Constitution is the only legal document which determines the forum as well as the procedure for the promulgation of laws;
- (vii) There was consequently no debate, consultation, counsel or consensus by constitutionally recognized institutions before issuance of the Orders under examination;
- (viii) The impugned Martial Law Orders were promulgated without recourse to the provisions of section 92 of the Code of Civil Procedure, 1908 and Chapters 2 and 4 of the Trust Act, 1882 which were existing laws in terms of constitutional provisions. The Constitution and laws of land do not authorize an adventurer to override the provisions of the Code of Civil Procedure, 1908 and or Trust Act, 1982 and take punitive action against a legal entity over and above the prescribed course. These laws were in existence and fully operative in 1977 when the impugned Orders were promulgated;
- (ix) The impugned orders were promulgated only to punish one particular person and no other Trust, duly registered under the Trust Act, in Pakistan was either taken over or its nomenclature changed.
- (x) The element of Bias and bad faith cannot be ruled out in this case. The person issuing the impugned regulations was also the person responsible for the overthrow of the Government of Zulfiqar Ali Bhutto and order his immediate arrest. General Muhammad Zia-ul-Haq himself decided unilaterally to take over the trust property of the family of Zulfiqar Ali Bhutto. So long as General Zia-ul-Haq lived he saw to it that the petitioners are denied every possible remedy to challenge his arbitrary and unilateral action of take over of the trust. As a matter of last resort General Muhammad Zia-ul-Haq amended the Constitution and added 7th Schedule which declared that the Zulfiqar Ali Bhutto Trust and Peoples Foundation Trust (Renaming and Administration) Order, 1978 (P.O. No.4 of 1978) could be amended in the manner provided for the amendment of Constitution. There was thus an intentional act to create insurmountable hurdle in the way of petitioners. This is against the principle of *Taiseer* of Islamic Jurisprudence. It has also been urged that venom of General Muhammad Zia-ul-Haq was so intense that he did not permit the petitioners even to attend burial

ritual of Zulfiqar Ali Bhutto, whose dead-body was secretly flown to Larkana while the petitioners were kept in confinement elsewhere. In this view of the matter the only inference is that the Martial Law regulations were not motivated with fair intentions. Bias is the Paralysis, complete or partial, of judicious faculties and a person who is personally interested cannot be arbitrator according to Islamic provision. The law demands transparency Justice should not only be done but seen to be done. The aggrieved parties and people should be satisfied that the action taken did not lack bona fides. Justice and laws weld the broken ties. They do not cut asunder human freedoms. Justice is a Divine attribute. It is always pro-people. Laws and justice cannot be anti-people.

- (xi) The initial action of the Chief Martial Law Administrator in issuing Martial Law Order No.21, dated 17th October, 1977 whereby the Peoples Foundation Trust created by late Zulfiqar Ali Bhutto, the elected Prime Minister of Pakistan, was taken over after deposing him through a Military coup and the subsequent actions by way of issuance of three other impugned Orders to carry out the errand mentioned in MLA Order 21 whereby the lawful trustees, by show of naked force were debarred from exercising their rightful statutory and religious duties, obligations and functions, which were otherwise safeguard by The Trust Act, 1882 and the Code of Civil Procedure, 1908 and further the act of seizing all the assets, records and moneys of the Trust was taken in utter violation of the Injunctions of Islam.
- (xii) Section 92 of the Code of Civil Procedure, 1908 read with chapters 3 and 4 of The Trusts Act, 1882 provide a forum for enquiring into and taking action against the trustees. The Martial Law Order bye-passed these legal provisions which, under Article 227 of the Constitution, are presumed to be not violative of the Injunctions of Islam. Neither the Council of Islamic Ideology nor the Federal Shariat Court had ever held the said provisions of the Code of Civil Procedure or the Trusts Act, 1882 to be repugnant to the Injunctions of Islam. Unless these two institutions, created by the Constitution, declare any law or a provision of law to be averse to the Injunctions of Islam, the presumption is that all existing laws are in conformity with Islamic principles. The laws have to be obeyed, observed and implemented. No one is above law.
- (xiii) Article 24 of the Constitution of Islamic Republic of Pakistan mandates in unambiguous terms that no person shall be deprived of his property save in accordance with law. The property of the petitioners was not taken over for a limited period to exclude it from the protection contemplated by Article 24 *ibid*. The action of Chief Martial Law Administrator was clearly violative of Article 24 of the Constitution.
- (xiv) Promulgation of Martial Law Order No.21 dated 17.10.1977 by Chief Martial law Administrator targeted only one Trust out of innumerable Trusts operating in the Country. It therefore created a divide amongst the various Trusts functioning all

over Pakistan. Such an instrument which *discriminates* among the equals is void *ab initio* as it offends various provisions of Constitution and law. Hence it is *ultra vires* of various provisions of Constitution and law including Articles 4, 23 and 25 of the Constitution.

- (xv) The procedure of take over of the Trust adopted by General Muhammad Zia-ul-Haq was alien to the domain of law. One man cannot combine in himself the status of a complainant, a grabber as well as an arbitrator and an executor. Such an act has no sanction in Islamic teachings. No Jurisprudence from any Jurisdiction in this globe approves such a unilateral action. Ayat 115 of Sura 4, Al-Nisa, forbids following a path other than the path of believers. The path of believers is paved with consensus, mercy and accommodation. This aspect of the case is violative of the Injunctions of Islam which vouch-saves transparency in the administration of justice.
- (xvi) General Assembly of the United Nations had proclaimed Universal declaration of Human Rights which was accepted by the Member States. Article 8 of this declaration declares:-

“Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the Constitution or by law”.

Article 17 of the declaration declares as under:--

- (1) Everyone has the *right to own property* alone as well as in association with others.
- (2) No one shall be arbitrarily deprived of *his property*.

Article 19 of the declaration is in the following words:

“Everyone has the *right to freedom of opinion and expression*; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.” (Emphasis added)

These three above mentioned principles form part of Universal Jurisprudence and have to be kept in view by the Legislature, Executive and Judiciary of any State.

- (xvii). The following tradition of our Holy Prophet PBUH makes it incumbent upon every Judge must declare every wrong and illegal action as of no legal effect:

“It has been narrated on the authority of Umme Salma that the messenger of Allah (may peace be upon him) said: In the near future there will be Amirs and you will like their good deeds and dislike their bad deeds. One who sees through their bad deeds (and tries to prevent their repletion by his hand or through his speech), is absolved from blame, but one who hates their bad deeds (in the heart of his heart, being unable to prevent their recurrence by his hand or his tongue), is (also) safe (so far as God’s wrath is concerned). But one who approves of their bad deeds and imitates them is spiritually ruined. People asked (the Holy Prophet): Should not we fight against them? He replied: No, as long as they say their prayers. (Sahih Muslim (English Translation) Vol. III, Pages 1032-1033, Hadith No. 4569)”.

(xviii) In this view of the matter, the four impugned Martial Law Orders are void, ineffective, without lawful authority being repugnant to the above mentioned Injunctions of Islam.

10. The impugned Martial Law Orders are also repugnant to the five basic values of Islam which are commonly known as *Maqasid-e-Shariah* are as follows:- (Ref: Muhammad Aslam Khaki...Versus... State PLD 2010 FSC-1).

- (i) Preservation of Deen (Religion);
- (ii) Preservation of Intellect;
- (iii) Preservation of Life;
- (iv) Preservation of Property; and
- (v) Preservation of Progeny.

VERDICT OF COURT

11. As a result of examination of the four impugned Martial Law Orders we hereby declare that:

- (i) Martial Law Order No.21, dated 17th October, 1977;
- (ii) Martial Law Order No. 26, dated 28th September, 1977 issued by Martial Law Administrator Zone “C”;
- (iii) President’s Order No.4 of 1978, dated 26th March, 1978.
- (iv) President’s Order No. 6 of 1979, dated 28th February, 1979.

are in entirety repugnant to the above-mentioned Injunctions of Islam. The decision of this Court regarding the afore-mentioned impugned Martial Law Orders shall take effect from the date of announcement of this judgment/decision.

Shariat Petition Accepted.

Dated: 15.04.2010

Criminal Appeal No. 212/I of 2005 dismissed on 21.04.2009 (2010 SD 759)

Present: *Mr. Justice Muhammad Zafar Yasin*
Mr. Justice Syed Afzal Haider

MUHAMMAD FAHAD WAQAS Petitioners

Versus

THE STATE Respondent

JUDGMENT

SYED AFZAL HAIDER, J.— Appellant Muhammad Fahad Waqas has through this appeal challenged the judgment dated 15.6.2005, delivered by learned Additional Sessions Judge-I, with power of Juvenile Court, Jhelum, in Sessions Case No. 07/2004, Sessions Trial No.11 of 2004. by which he has been convicted for Qatle Shibh-i-Amd under section 316 of the Pakistan Penal Code and sentenced to “Diyat and imprisonment (Simple) for 14 years as Tazir” and also sentenced to pay a sum of Rs. 20,000/- as compensation to the legal heirs of the deceased or in default of payment to suffer additional term of 6 months simple imprisonment. The benefit of section 382-B of the Code of Criminal Procedure was extended to the appellant.

2. The facts of this case, as initially stated in “Ruppt” No. 11 dated 10.03.2004 recorded in the daily diary register at 11.00 p.m. maintained at police station Lillah, on the oral statement of complainant Muhammad Ehsan, PW.9 are that on his return home on 05.3.2004 at 2.30 p.m. from duty as pointsman at Railway Station Dhudithal, his wife Mst. Muniran Bibi informed him that their minor son Suleman had gone out and had not come back so far. The complainant alongwith his wife and relatives commenced a search for Muhammad Suleman. An announcement was also made on the loudspeaker to the same effect. A lot many people gathered and a joint comb through the village was undertaken. At about 3:30 p.m., on reaching the Baithak of Zafar Iqbal Councillor, the dead body of Muhammad Suleman was seen lying on a plastic “pallee” in the corner of the western room of his dera. The dead body was brought home. The head and the buttocks of the deceased were blood stained. Unaware of the real facts the complainant took customary steps for the burial of the child though he kept on ruminating as to why and how the unfortunate incident had taken place. The complainant proceeded to state further that Muhammad Yaseen son of Miran Bakhsh, grand father of the victim, PW.12, Dost Muhammad son of Lal Khan P.W.13 and Muhammad Javaid son of Bhai Khan, the given up witness, had informed him on that day that Muhammad Fahad Waqas accused, a man of ill repute, was seen by them with Muhammad Suleman victim in the baithak of Zafar Iqbal, Councillor on the fateful day. The witnesses claimed having interrogated Fahad Waqas the accused as well, who after making an extra-judicial confession, sought their help and

narrated the whole incident by admitting that he had committed un-natural offence with deceased Muhammad Suleman. It is further alleged that the accused stated that the child had cried and was making noise, so in order to silence the wailing victim, he suffocated him to death. It was further stated by the complainant that the accused apologized for his action and requested for a compromise, which was refused by the complainant. The complainant also stated that he visited the police station alongwith Zafar Iqbal Councillor for action against the accused in accordance with law and for exhumation of dead body. This information was recorded in the Daily Diary by PW.16 Gulzaman ASI who brought this incident to the notice of senior officers. However a formal FIR was registered on 10.04.2004 because according to "Karwai Police" the information related to the death of a human being and exhumation of dead body which called for enquiry under the law to seek corroboration of the statement of complainant as well as procuring result of the post-mortem examination. All the facts, according to the "Ruppt" were brought to the notice of Inspector S.H.O. and DSP/SDR who have directed necessary procedural action.

3. Gul Zaman P.W.16 after recording the information, initiated investigation even though formal FIR had not been registered. He proceeded to the place of occurrence, took into possession the plastic "pallee" P.1 vide memo Ex.P.G. and made it in "two sealed parcel of the blood stained portions of the said "pallee" after separating and cutting the same." He interrogated the case generally and on 11.3.2004 an application for exhumation of the dead body of Muhammad Suleman was moved by him and necessary witnesses were also produced before the Judicial Magistrate for his satisfaction before securing an order for exhumation. The dead body of Muhammad Suleman was exhumed under the supervision of Judicial Magistrate PW.17 on 17.03.2004. The post-mortem was conducted by PW.4 Dr. Zulfiqar Ali on the same day. The witness also prepared the inquest report Ex.PK. However the serial number of the FIR could not be written on top of the Inquest Report because no FIR had been registered by then. Reference was made only to the "ruppt" No.11 dated 10.03.2004 in the inquest report Ex.PK. The witness also received three phials, 09 small boxes of plastic and two sealed envelopes from the doctor whose possession was assumed vide memo Ex.PA. The said articles were handed over to Moharror of the police station the same day for onward transmission to the concerned quarters. The medical expert deferred giving his opinion as to the cause of death till he received the report of Chemical Examiner. The record shows that the samples taken from the dead body were dispatched to the Chemical Examiner on 17.03.2004 and the latter vide Ex.P.D. reported that Tranquilizer was detected in the viscera of dead body but its quantitative estimation was not possible. This report was prepared on 22.04.2004. However the police had already registered FIR No.20/2004 on 10.04.2004 formally on the basis of earlier "ruppt" No.11 dated 10.03.2004. The case was registered under section 302 of the Pakistan Penal Code 24 days after the information recorded in Ruppt and 30 days after the occurrence.

4. PW.15 Abdul Ghaffar SI, thereafter took up the investigation. After visiting the place of occurrence he recorded the statement of witnesses and took into possession pyjama P3, pair of plastic softee chappal P-2/1-2 of the deceased vide memo Ex.PG dated 10.04.2004. Search was made for the arrest of the accused. The draftsman Akhtar Naqash, Pw.6 was taken to the place of occurrence who took rough notes on the pointation of witnesses. Blood stained "pallee" was

sent for analysis. He investigated the case till 15.04.2004 when the file was handed over to Muhammad Riaz PW.7. The complainant and the witnesses nominated Muhammad Aslam and Muhammad Baqar as companions of accused Fahad Waqas in the supplementary statement. On 18.04.2004 Bahli Khan S.I. PW.14 arrested Fahad Waqas and added section 377 as well as section 201 of Pakistan Penal Code in the crime report. The accused was medically examined for potency. On 22.04.2004 the accused was sent to jail on judicial remand. Report under section 173 of the Code of Criminal Procedure was submitted in the Court on 27.04.2004 by local police requiring accused Muhammad Fahad Waqas alone to face trial.

5. The trial court originally framed charge against the accused Muhammad Fahad Waqas under section 12 of Offence of Zina (Enforcement of Hudood) Ordinance, 1979, as well as sections 377 and 302 of the Pakistan Penal Code on 31.8.2004. During his examination in chief, the complainant PW.9 on 27.11.2004 attributed the role of erasing the foot prints at the place of occurrence to Muhammad Baqar who had allegedly locked the door and Aslam accused was saddled with the responsibility of bringing "pallee" for removal of dead body at night time. On an application being moved in the trial court both the newly nominated accused were summoned. The trial court then framed amended charge against three accused on 04.1.2005 under section 377 read with section 511, section 302/34 and section 201/34 of the Pakistan Penal Code. The accused did not plead guilty and claimed trial.

6. The prosecution in order to prove its case produced nineteen witnesses at the trial. The gist of deposition of witnesses for the prosecution is as under:-

- i. P.W.1 Ghulam Rasool stated that in his presence the postmortem of dead body of Muhammad Suleman was conducted and he signed the recovery memo Ex.PA through which various articles were placed in sealed envelopes which were handed over to Gul Zaman ASI.
- ii. P.W.2 Ahmad Khan, constable No.413 stated that he received one Khakee envelope and two phials from Riaz Moharrar Head Constable on 19.03.2004 for onward transmission to the Chemical Examiner on the same day.
- iii. Dr. Muhammad Ali, Medical Officer Rural Health Centre appeared at the trial as P.W.3. He stated that on 18.4.2004 he medically examined accused Fahad Waqas to test his potency and found him fit to perform sexual intercourse.
- iv. Dr. Zulfiqar Sherazee appeared as P.W.4 to state that on the instructions and presence of Nazar Abbas Gondal, Judicial Magistrate Pind Dadan Khan, exhumation of the dead body of Muhammad Suleman deceased from his grave was effected on 17.3.2004. Thereafter he examined the dead body from all angles and took anal swabs and sent the same through police to the Chemical Examiner for analysis.
- v. Muhammad Aslam, Constable appeared as P.W.5 and stated that he was handed over nine sealed tins of plastic, one envelope and one sealed phial which items

were deposited by him intact in the office of the Chemical Examiner on 19.3.2004.

- vi. P.W.6 Akhtar Naqash, Draftsman visited the place of occurrence on the direction of the police and on pointation of the witnesses took rough notes at the crime site on 12.04.2004 for preparing the requisite site plan which was completed on 15.04.2004.
- vii. Muhammad Riaz Moharrir Head Constable appeared as P.W.7 and stated that on 10.03.2004 at about 3.30/4.00 p.m. Gul Zaman, ASI handed over to him two parcels said to contain blood stained pieces of Palli i.e. plastic bag for safe custody. He also received “ nine tins of plastic, three phials and two envelopes after the post-mortem” which he kept in safe custody in the malkhana. On 19.03.2004 he handed over “ nine tins, one phial and one envelope to Muhammad Aslam 665/C for its deposit in the Office of Chemical Examiner, Lahore”. On the said date he also “ delivered two phials and one envelope to Ahmad Khan 413/C, for its deposit in the Office of Chemical Examiner, Rawalpindi. These were said to contain swabs of semen”. He also formally drafted FIR Ex.PE on 10.04.2004.
- viii. Asif Khan 159/C appeared as P.W.8. He stated that on 14.04.2004 Muhammad Naeem Moharrir handed over to him a sealed parcel of palli for its onward transmission to the Office of Chemical Examiner, Lahore which was deposited on the same day.
- ix. Muhammad Ehsan PW. 9, the complainant, repeated the facts narrated by him in the crime report with certain improvements.
- x. Mst. Muniran Bibi wife of the complainant, appeared at the trial as PW.10 and supported the deposition of her husband. She also identified the clothes of her son on 4.10.2004.
- xi. Muhammad Naeem 33/HC appeared as P.W.11 and stated that on 14.04.2004 he handed over a sealed parcel said to contain palli for its deposit in the Office of Chemical Examiner, Lahore to Asif Khan P.W. intact.
- xii. P.W.12 Muhammad Yaseen grand father of the victim, a Wajtakar witness deposed a) that he had seen the victim with accused Fahad Waqas on the fateful day and b) that the accused had confessed having caused death of Muhammad Suleman.
- xiii. Dost Muhammad appeared as P.W.13 to state that he, along with Yaseen and Javed, had also seen Muhammad Suleman deceased in the company of accused at the dera of Zafar Iqbal on the fateful day. Both of them are Wajtakar witnesses of last seen as well as the extra judicial confession.

- xiv. PW.14 Bahli Khan, S.I. partly conducted Investigation of this case. He arrested the accused on 18.04.2004, got him medically examined, recorded statements of the prosecution witnesses under section 161 of the Code of Criminal Procedure and sent the accused to jail on judicial remand.
- xv. Abdul Ghaffar SI, PW.15 too investigated the case. He also visited the place of occurrence, prepared rough site plan, recorded statements of witnesses and took into possession the clothes and chappal worn by the deceased vide memo Ex.PH.
- xvi. Gul Zaman, ASI appeared as P.W.16. He had investigated the case. The role played by him in the case has already been discussed in para 3 of this Judgment.
- xvii. Mr. Nazar Abbas Gondal, Judicial Magistrate appeared as P.W.17. The dead body of Suleman deceased was exhumed in his presence.
- xviii. Muhammad Aslam appeared as P.W.18. He stated that on 05.03.2004 he was working with a "mistri" on the roof top of Muhammad Iqbal when at 10.15. a.m. he saw Fahad Waqas with Suleman deceased in the compound of Dera of Zafar. They were sitting together. Thereafter he states that at 10.45.a.m. he saw Fahad Waqas while coming down from stair case but Suleman was not with him at that time. He further states that at 2.00/2.30.p.m. an announcement was made on the loudspeaker about the non availability of Suleman the missing child.
- xix. Sardar Muhammad Ali, Inspector appeared as P.W.19. On 10.03.2004 Gul Zaman ASI had recorded the report in Roznamcha on the basis of the statement made before him by the complainant. The matter was reported to this witness and to the DSP and this witness had directed the registration of the case.

Amjad Ali constable, Muhammad Aslam son of Siddique and Muhammad Javed P.Ws were given up by prosecution being un-necessary.

7. Learned trial court after close of the prosecution evidence examined Fahad Waqas accused under section 342 of the Code of Criminal Procedure wherein he made the following statement:-

"This case, infact, was registered against me and my co-accused on the instigation of Zafar Iqbal Councilor and one Muhammad Riaz s/o Muhammad Nawaz. My uncles namely Muhammad Aslam and Muhammad Baqar co-accused were having enmity with Muhammad Riaz s/o Nawaz. Real brother of said Muhammad Riaz, namely Muhammad Mumtaz registered a case against my co-accused Muhammad Aslam and my maternal grand-father namely Mehdi Khan for the murder of Ahmad Yar alias Bala who was personal employee of said Riaz. Muhammad Mumtaz was the complainant of that case u/s 302, 148/149 of PPC which was registered against Muhammad Aslam s/o Mehdi Khan, Mehdi Khan

s/o Ghulam Muhammad, Muhammad Bakhsh s/o Kamil Din, Khuda Bakhsh s/o Muhammad Bakhsh, Allah Bakhsh s/o Lal Khan, Muhammad Iqbal s/o Allah Bakhsh, Nazar Muhammads/o Muhammad Khan, Muhammad Safdar and Ehsan Ali sons of Muhammad Din, Muhammad Yaseen s/o Ghulam Muhammad, Muhammad Ziarat s/o Ghulam Muhammad, Gul Muhammad s/o Muzaffar Khan, Munawar Khan s/o Din Muhammad. Said Allah Bakhsh is maternal uncle of Muhammad Aslam, co-accused. Muhammad Iqbal is mamoonzad of my co-accused. Nazar Muhammad, Muhammad Safdar and Ehsan Ali are Khalazad of my co-accused. The story of last seen and extra judicial confession is false one. In fact the deceased was a patient of EPILEPSY as admitted by P.W.17 namely Abdul Ghaffar in his cross-examination. The complainant party administered some wrong medicine containing tranquilizer which resulted in his death. It is clear from the report of Chemical Examiner Ex.PL which found mentioning that tranquilizer is detected in the above viscera. However quantitative estimation is not possible. All the P.Ws are related inter-se. They have deposed against me and my co-accused due to enmity and relationship with the complainant party”.

The accused did not take the advantage contemplated under section 340(2) of the Code of Criminal Procedure. However Ahmad Yar second Headmaster, Govt. Elementary School Bhalwal Sargodha was produced in defence as DW1 who in his statement, took up the plea of alibi and stated that on the day of occurrence the accused Fahad Waqas remained in school from 8.45.a.m. to 2.45.p.m. and that the accused was innocent and not involved in the murder of Muhammad Suleman deceased.

8. The defence as well as the prosecution addressed the learned trial Court at the conclusion of the proceeding. Learned trial Court considered the arguments of the parties in the light of the record of the case and ultimately found the accused Muhammad Fahad Waqas guilty of the offence under section 316 of the Pakistan Penal Code alone and recorded the conviction and sentence as indicated in the opening paragraph of this judgment. Hence this appeal wherein the conviction and sentence recorded by learned Additional Sessions Judge, Jehlum on 15.06.2005 has been challenged.

9. The learned trial court while convicting the accused found that the prosecution a) “failed to prove the voluntary made by accused” and b) also found that the motive i.e the commission of sodomy attributed to the accused Fahad Waqas was not proved by the prosecution because the medical report about the commission of sodomy was negative and c) that the cause of death was respiratory arrest by the use of tranquillizer.

10. We have gone through the file and perused the evidence as well as the impugned judgment along with the statement of accused and the deposition of the defence witness. Learned counsel for the parties including the complainant were heard at length on two different dates.

11. Learned counsel for the appellant stated that it was a case in which there was no direct evidence available on record in proof of either the offence of sodomy or of killing the minor victim after being subjected to sodomy. The sodomy had not been found proved by the learned trial court. This case therefore according to him depended upon indirect evidence which consists of a) ocular account, b) medical examination, c) "Wajtakar" evidence of chance witnesses, d) last seen evidence, e) the chemical report, f) motive for the crime; g) the extra Judicial confession which was not believed, h) the probability of the story in the given facts and circumstances of the case and of course i) the recoveries. He also stated that the first information report was lodged with considerable delay.

12. The facts and situation in a case like this necessitates cautious handling because in assessing the culpability of an accused person in an unwitnessed but a grave offence, the parties tend to believe in every intriguing gossip. Under the circumstances the chains in the story have to be established to bring home the guilt to the accused without any reasonable doubt.

13. The learned trial court has already held that the Motive part of the story attributed by the complainant is shrouded in mystery because sodomy was not proved to have been committed with the minor. In the absence of sodomy there was no occasion for the victim to raise hue and cry to attract extraneous support. Therefore the contention of prosecution that killing of the minor was resorted to by the accused to silence the wailing victim is of no avail. The learned trial Court also found that the medical evidence and the report of the Chemical Examiner did not support the sodomy theory put forward by the prosecution party. However, according to the report of the Chemical Examiner Ex.PD, tranquilizer was detected in the viscera which element had occasioned respiratory arrest and this element became the cause of death. From this disclosure about the cause of death learned trial Court had inferred that "it is clear that the accused, under trial, administered tranquillizer to facilitate the commission of sodomy with the victim. Hence the medical evidence has supported the prosecution case." It is not at all possible to arrive at the conclusion that the appellant administered sedative to the minor to facilitate sodomy particularly when the learned trial judge has himself, very correctly, refused to accept the sodomy theory of the prosecution. The inference has therefore no basis.

14. Learned trial court has believed the last seen theory advanced by the prosecution party without of course considering the impact of the fact that the three persons in the same village who claimed having seen the accused sitting in the "baithak" of Zafar Iqbal Councilor on 05.03.2004, during the morning hours along with the deceased, intriguingly kept quiet till 10.03.2004 even though the gory dead body of the minor victim had been picked up from the same "baithak" on the same day at 2.30 p.m. During the search of the missing minor, his mother PW.10 tended to make others believe that on 05.03.2004 at 10.30 a.m. she saw accused "coming down from the stair case and on her asking about the missing child the accused in a "suspicious condition" claimed ignorance". PW.18 another chance witness, purports to support her but the question arises as to why the accused was not confronted with searching questions on 05.03.2004. Was the accused not present in the village? PW.18 and PW.10 strangely enough, made statements to the police *a month after the registration of the*

crime report to allege the fact that they had seen the accused emerging from the “baithak” i.e. the place of occurrence. It is therefore not clear from which material available on the record of the case the learned trial court arrived at the “irresistible conclusion” that the accused “caused the death of Muhammad Suleman by administering tranquillizer to him for the purpose of satisfying un-natural lust”. Learned trial court, it appears, was not persuaded by the principle of safe administration of criminal justice enunciated by the superior judiciary. The fundamental principle of universal application in cases, whose decision depends on circumstantial evidence, is that conviction can be recorded only if the incriminating fact is incompatible with the innocence of the accused and that the guilt is not capable of any other reasonable explanation. The circumstantial evidence, if this is the only piece of evidence, must be of sterling value without omitting any link in the chain of events. Judicial conscience abhors situations where the lacunas are capable of being filled by cooked up statements manipulated after the occurrence on account of substantial consultation. In order to cover such situations Allah Almighty, in His Wisdom, has guided human beings in verse 12 Chapter 49, Sura Al-Hujrat of Holy Quran in the following terms:-

“O you who believe! avoid most of suspicion, for suspicion in some cases is a sin, and do not spy nor let some of you backbite others”

In this view of the matter it must be kept in mind that efforts on the part of the trial court or the complainant party to stretch evidence in favour or against the accused person should be scrupulously eschewed in criminal trials.

15. This last seen evidence advanced by Wajtakar witnesses was sought to be supported by the evidence of decrepit and artificially secured extra judicial confession. Such an effort will not stand the complainant in good stead, particularly when in this case the learned trial court refused to believe the extra judicial confession made before Muhammad Yasin PW.12, Dost Muhammad PW.13 and Javed the given up witness for the prosecution.

16. PW.10 Mst Muniran Bibi, mother of the victim admitted in her cross-examination that it was within her knowledge that Muhammad Suleman was last seen by her with Fahad Waqas accused but despite this fact the complainant had accepted the first burial meal from the accused after the deceased was laid to rest, instead of confronting the accused with the last seen element. At that time she did not make a mention even to her husband regarding the coming down of Fahad Waqas from the stair case, on the day of occurrence. It is therefore difficult to accept that on the one hand she claims having seen the accused emerging from the bloody place of occurrence and on the other hand she accepted the first meal from the accused party after the burial.

17. The recovery of blood stained “pallee” on 10.03.2004 or the production of clothes of deceased before the Investigating Officer on 10.04.2004 do not by any stretch of imagination connect the accused with the offence for the simple reason that recovery of blood stained

“pallee” lends support only to that portion of the story which speaks of the dead body having been found lying on the “pallee” and further that it was stained with the blood of deceased who probably met an un-natural death. The fact that softi foot wear, belonging to deceased remained outside the “baithak” of Zafar Iqbal Councillor for a five weeks and was finally retrieved on 10.04.2004 and produced before police will not be considered material for fixing liability on any one. I am fortified in this view by decision of the Supreme Court of Pakistan given in the case of Bashir Ahmed alias Munno Vs. The State, reported as NLR 1996 criminal 234 where the recovery of blood stained Churri and clothes was effected five days after the occurrence and such recovery was not deemed a reliable piece of evidence for the purpose of conviction. It is therefore not at all safe to rely on such a recovery.

18. An incisive appraisal of the site plan Ex.P.D. prepared by Akhtar Naqash PW.6 on 15.04.2004, read with relevant portions of the prosecution evidence displays the following features:-

- i. That the place of occurrence is a room built on a four feet raised platform which is accessible from the open space adjoining the street through a stair case;
- ii. The Wajtakar witnesses were at points No.4,5 and 6 at ground level in the street from where it is well nigh impossible to casually see two human figures sitting side by side in the middle of a room constructed on a raised platform.
- iii. The persons sitting at point No.3 of the room cannot in fact be spotted from the street;
- iv. There is no reason advanced by the Wajtakar witnesses as to why, on their way, they side tracked about 20-30 feet only with the object of peeping in the “baithak” of Zafar Iqbal Councilor. Was it known to these witnesses that a bloody scene will occur shortly for which they must preserve whatever they had seen in this room so that they should be able to testify whatever they had seen? It is also difficult to believe that all the three witnesses would be converging their attention only one and the same object while going in the street without there being any thing in the room to attract their attention.
- v. The victim, aged four years, does not have that height which could be spotted by a passer by from outside the room while the observers were four feet lower than the floor of raised platform.

19. The last seen theory does not inspire confidence also for the following reasons:-

- i. PW 18 Muhammad Aslam, is a chance witness who strangely enough with minute precision of time deposed that he saw the deceased in the company of accused firstly in the compound of Zafar Iqbal at 10.15 a.m. and then secondly he saw the accused coming down the stair case alone at 10.45 a.m. and then at

the third occasion the same witness saw the accused standing for a while besides PW.10 Mst. Muniran Bibi, mother of the accused. This sort of time-precision coming from the mouth of a chance witness is certainly uncanny particularly when the witness admitted in his cross-examination that even though announcement about the missing child was made in the village on the loudspeaker yet he did not tell any body that he had seen the child with the accused only a short while ago. Even on 10.3.2004, when the police officer Gul Zaman ASI PW 16 came to the village, this chance witness admits that he did not tell him that he had last seen the child with accused on the fateful day.

- ii. PW.16 Gul Zaman ASI stated that “no mention was made in the said “Ruppt” for the deceased Suleman as having been last seen by Mst. Muniran with Fahad Waqas accused.”
- iii. The complainant PW.9 admitted in the cross-examination that he did not produce Muhammad Yasin, Javaid and Dost Muhammad before the S.P, D.S.P and SHO Pind Dadan Khan on 10.04.2004. There is no explanation for this lapse.
- iv. It is in the evidence of PW.10 herself that the parents of accused live in Sargodha and she did not know about the arrival of accused in village Kahana.
- v. It was for the first time on 12.04.2006 that the information was given to the draftsman PW6 *about the places from where the three Wajtakkar witnesses reportedly saw the deceased last sitting with accused on 05.03.2004.*
- vi. Out of three other witnesses of last seen Muhammad Javed has not been produced. Muhammad Yasin PW.12 is maternal grand father of the deceased. He is in fact a witness of extra judicial confession along with Dost Muhammad PW.13 and Javaid remains the given up witness. The extra-judicial confession theory has not been accepted by the learned trial court.
- vii. On 10.04.2004 PW.15 Abdul Ghaffar S.I. started investigation. On 15.04.2004 he obtained the copy of site plan Ex.PD and Ex.PD/1 prepared by the draftsman. He also recorded statements of police officials. He remained at the spot for five days. In cross examination he stated as under:-

“No one stated before me that Suleman deceased was last seen with Aslam and Baqar accused. No one recorded statement before me regarding extra judicial confession.”

This witness, at the trial, also deposed that it is correct that on 10.04.2004, SSP Range Crime, ASP City (acting DPO), Jhelum, DSP. P.D.Khan, visited the place of occurrence in his presence. He further stated that Muhammad Ehsan, Javaid, Dost Muhammad, Muniran Bibi, Yaseen and Muhammad Aslam son of Ashraf appeared before them. *In his presence, no one stated about the extra judicial confession of accused Fahad Waqas before them.* The witness expressed no opinion regarding the guilt or non-involvement of the accused in the case.

20. The following points also need consideration:

- i. The Wajtaker witnesses reportedly met Fahad accused on 08.03.2004 when the latter is said to have made the extra judicial confession. This was precisely the day when the accused was in Chak No.18 Shumali, Bhalwal, District Sargodha and had appeared in the examination as shown in Ex.DW1/C, copy of the Daily Attendance Register.
- ii. The complainant stated in the Ruppt dated 10.03.2004 that accused Fahad did not enjoy good reputation. In response to a pointed question about the reputation of Fahad accused, PW.13 the Wajtakar witness stated that he did not know whether any case involving moral turpitude of such like nature was registered against Fahad accused.
- iii. PW.13 admitted in his cross-examination that they had "guessed" about the involvement of accused in this case.

21. In this view of the matter the last seen occurrence has no intrinsic worth. Mere allegation, and that too made belatedly, that the deceased was last seen alive with the accused would not be sufficient to maintain conviction. The instant case rests entirely on circumstantial evidence but the chains in the story are not unbroken. The lack of motive, only the last seen alive together theory but disbelieved extra judicial confession not lead to the conclusion of guilt. The complainant himself admitted that no one had either seen Fahad Waqas accused committing sodomy or committing murder of the Child. Dead body was not discovered on the pointation of the accused. Nothing incriminating had been recovered from the accused. Medical evidence did not corroborate the theory of sodomy. The trial court had rightly not believed the extra-judicial confession because on the date the accused was alleged to have confessed before the PWs in the village, he was in fact else where in the school and had appeared in the examination. It means important links in the story, based upon circumstantial evidence were missing. The concatenation is not all complete. Such a deficiency is fatal for the prosecution. No conviction can be recorded on the contents of the crime report alone.

22. The question as to the cause of death is central in this case. Did the victim die as a result of suffocation caused by an unfriendly hand who attempted sex assault? Did the child die due to epilepsy attack? Was it caused by the use of excessive dose of intoxicant? Was the death of the child result of any injury found on the person of deceased? The first information conveyed to police was that there was blood on the head and buttocks of the victim but the complainant opted not to discover the cause of bleeding. In order to determine the cause of death in this case the following points deserve consideration:-

- i. The opinion of the medical officer after the post mortem report Ex.PC excludes the possibility of sodomy as the swabs were not found stained with semen and it was observed: "anal ring is round, no tear visible",

- ii. The tongue of dead body was found pressed between the teeth and it was protruding which obviously indicates a fit which constricted the muscles.
- iii. Chemical Examiner's report Ex.PD is specific: "Tranquillizer is detected in the above viscera. However quantitative estimation is not possible."
- iv. The deceased was stated to be suffering from epilepsy. The suggestion of epilepsy put on behalf of the accused was however denied a) by Pw.12 Muhammad Yasin, the grand father of the victim, b) Pw.13 Dost Muhammad claimed ignorance whether the father of victim and Zafar had informed the police that the deceased suffered ill-health due to epilepsy; c) PW.15 Abdul Ghaffar S.I., who had partly investigated the case, stated categorically that the complainant, Muhammad Iqbal and Zafar Councillor appeared before him and stated that *they had already informed the police on telephone that Suleman deceased was a patient of epilepsy and had died due to fits.* The witness further stated that on 10.04.2004 eleven persons, including PWs and complainant, had stated before him *"that the ruppt was not registered due to the reason that Suleman died due to epilepsy fits."*

23. The only inference that can be drawn is that the cause of death indeed was respiratory arrest due to the effect of tranquillizer. Whether it was an innocent over-dose administered by some family member or otherwise is not free from doubt. There is no evidence that any tranquillizer was recovered from accused or some shop keeper ever sold it to any one in the village. The tranquilizing theory however came to light only after 22.04.2004 when the report of the Chemical Examiner was sent by him but the knowledge of the victim suffering from epilepsy had become known by 10.04.2004 i.e., 12 days before the report of the chemical examiner became public. In this view of the matter what is apparent is that the child did not die a natural death but how it happened is not clear at all. Hence it is not safe to attribute the cause of death to the accused because the mode and manner of death under the circumstances is capable of alternate explanation.

24. The deposition of witnesses in this case has not inspired confidence. Confidence develops as a result of reliability. Reliability of a witness depends upon a number of factors. The following elements inter-alia may be considered by courts in assessing the intrinsic worth of a witness:

- i. who does not make calculated improvements,
- ii. who does not inflate the incident,
- iii. who does not un-necessarily involve innocent persons,
- iv. who appears natural in his deposition,
- v. whose testimony inspires confidence,

- vi. who is by and large consistent and does not contradict his previous statement at crucial points,
- vii. who does not suppress material facts,
- viii. who is steadfast in his statement and his deposition does not suffer from infirmities,
- ix. who is not a motivated witness,
- x. who appears to be independent and not under pecuniary influence of the party calling him,
- xi. who does not bear grudge against the accused,
- xii. who conducts himself in a balanced manner and his demeanour in court is not questionable,
- xiii. who is not a stock witness, and
- xiv. does not deliberately evade answering a question whose reply will be beneficial to the accused or detrimental to the case being supported by him.

25. The following chart will indicate the various steps taken by the complainant and the prosecution in this case from the date of occurrence upto the trial.

<u>SUBJECT</u>	<u>DATE</u>	<u>TIME</u>
- Death of child	05.03.2004	10.00 a.m.
- Recovery of blood stained dead body from the Baithak of Zafar Iqbal	05.03.2004	3.30 p.m.
- Burial	05.03.2004	night time
- Fahad accused nominated in the "Ruppt" No.11 P.S. Lilla: Ex.PE on the strength of information given to the complainant by Muhammad Yasin, Dost Muhammad and Muhammad Javed the three Wajtakkar Witnesses. They are persons before whom accused had allegedly confessed.	10.03.2004	1.00 p.m.
- Visit of PW16 ASI Gul Zaman to the Place of occurrence. Recovery of Blood stained plastic "pallee" Vide memo Ex. P.G.	10.03.2004	
- Exhumation of dead body and	17.03.2004	12.30 p.m.

- post mortem by PW.4.
- Formal FIR 20/2004 P.S. Lillah under Section 302 PPC registered on the strength of Ruppt No.11 dated 10.03.2004 10.04.2004 12.05. p.m.
 - Supplementary statement of PW.9, the complainant when he nominated additionally Muhammad Baqir and Muhammad Aslam alongwith Muhammad Fahad Waqas (Both brothers) as accused. 10.04.2004
 - Pyjama and softee of the deceased reportedly found from the place of occurrence lying near the dead body: produced before PW15. 10.04.2004
 - Draftsman PW.6 took notes for preparing site plan which was made on 15.04.2004. 12.04.2004
 - Report Ex.PM Chemical Examiner that plastic pallee was stained with blood which was found to be of human origin by Serologist vide Ex.PP dated 02.03.2005. 15.04.2004
 - Potency Test of accused after arrest 18.04.2004
 - Accused Fahad sent to Judicial lock up 22.04.2004
 - Report of Chemical Examiner that Tranquilizer was detected in the viscera 22.04.2004
 - Report under section 173 Code of Criminal Procedure only against Fahad accused 27.04.2004
 - Accused Fahad Waqas alone Charged u/s 12 of Zina Ordinance and 377 PPC and 302 PPC and 201 PPC 31.08.2004
 - Baqar and Muhammad Aslam

- | | |
|--------------------------------------------------------------------------------------------------------------------------------------|------------|
| introduced as accused by
Complainant PW.9 | 27.11.2004 |
| - Accused Baqar and Muhammad
Aslam were charged along-
with Fahad by learned trial court
under section 377/511 302 +201(34) | 4.1.2005 |
| - Report Ex.PM
that plastic "pallee" was stained
with blood. | 15.04.2004 |

This chart illustrates the following things:-

- i. Dead body of a child was found from a house other than his own. There was blood on the head and buttocks of the dead body.
- ii. Police investigation ensued before formal registration of FIR.
- iii. Police investigation commenced immediately after the recording of Ruppt No.11 dated 10.03.2004.
- iv. The date of unnatural death is 05.03.2004 whereas Ruppt No.11 was lodged on 10.03.2004 and FIR lodged still a month later i.e. on 10.04.2004.
- v. For all practical purposes the Ruppt No.11 dated 10.03.2004 was the First Information Report.
- vi. Cause of death was not known till 22.04.2004 when the report of chemical examiner was signed.
- vii. It was known that the deceased child suffered from fits of epilepsy.
- viii. The names of two additional accused did not find mention in the "Challan" dated 27.04.2004. These accused were nominated in the examination in chief of the complainant on 27.11.2004 where after these newly added accused were summoned by learned trial court and a fresh charge was framed against all the three accused on 04.01.2005.

26. This case, as is apparent from what has been discussed above, does not depend upon direct unimpeachable evidence. It rests upon disjointed circumstantial evidence. The broken claims in the story, as narrated by prosecution suggest chequered behavior which is indeed not the staff of a natural chronicle. The Motive theory and the extra-judicial confession relied upon by the prosecution, were not accepted by the learned trial court. The medical evidence did not support the allegation of sodomy. Nothing incriminating was recovered from the accused. The FIR, if we choose to call the second report dated 10.04.2004 an FIR, was lodged after considerable delay and deliberation and even after registration of crime report, the

improvements on the part of prosecution did not abate. The last seen evidence is not worthy of credence. The deposition of the witnesses does not inspire confidence. Under the circumstances the impugned judgment cannot be maintained. It is not possible for us to agree with the learned Deputy Prosecutor General that we should presume intoxicant was administered by the accused to facilitate the offence of sodomy. There is no evidence whatsoever on record in support of this contention. In fixing criminal liability conjectures cannot be employed. The prosecution has to stand on its own legs. The ingredients of the offences must be proved. Benefit of doubt accrues only to the accused. The complainant has never been considered a beneficiary of doubts or speculations. The half hearted assertion that police investigation was faulty also does not help the complainant party. No private complaint was filed by Pw.9, Muhammad Ehsan if he thought that the police was biased.

27. We are consequently not persuaded to maintain the conviction and sentence recorded by the learned trial court. By giving benefit of doubt we accept Criminal Appeal No.212/I of 2005 and set aside the judgment dated 15.6.2005 delivered in Sessions Case No.07 of 2004, Sessions Trial No.11 of 2004. The appellant is already on bail. His bail bonds are cancelled.

Announced in open Court
on 21st April, 2009 at Islamabad
Mujeeb ur Rehman/*

IN THE FEDERAL SHARIAT COURT

(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE SYED AFZAL HAIDER

CRIMINAL APPEAL NO. 101/I OF 2009

Muhammad Usman son of Rehmat Nazar
r/o Orghoch Tehsil and District Chitral Appellant

Versus

1. The State
2. Mrs . Shah Gul D/o Ali Akbar resident
of Orghoch Tehsil and District Chitral. Respondents

Counsel for appellant Mr. Amir Gulab Khan,
Advocate

Counsel for the State Mr. Muhammad Sharif
Janjua, Advocate,

FIR No. Date &
Police Station 363, 24.6.2008
Chitral

Date of Judgment of
trial court 14.7.2009

Date of Institution 08.08.2009

Date of hearing 22.01.2010

Date of decision 28.01.2010

Criminal Appeal No. 101/I of 2009 decided on 28.01.2010 (2010 SD 385)

JUDGMENT:

SYED AFZAL HAIDER, Judge.—Muhammad Usman has, through this appeal, challenged the judgment dated 14.07.2009 delivered by Additional Sessions Judge/Azafi Zila Qazi Chitral whereby he was convicted under section 10(2) of Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and sentenced to five years rigorous imprisonment and to a fine of Rs.10,000/- or in default thereof to further undergo one month's rigorous imprisonment. Benefit of section 382-B of the Code of Criminal Procedure was granted to the appellant.

2. Facts leading upto this appeal are that Mst. Shah Gul PW.15, lodged an information with Police Station Chitral on 24.06.2008 that 3/4 months back, while she was working in her field at about 10.00 a.m, when one person resident of Orghouch, whose name or parentage she did not know then though she could identify him, forcibly took her to his house where no other person was present. The accused committed Zina bil Jabr with her twice. However she did not narrate the incident to anybody due to shame. Later she became pregnant and reported the matter to local police. Consequently a report was registered on 24.06.2008 with Police Station Chitral under section 10(3) of Offence of Zina (Enforcement of Hudood) Ordinance, 1979 of serial No.363 after preliminary enquiry under section 157 of the Code of Criminal Procedure.

3. P.W.10 Muhammad Jan, Sub Inspector had partly investigated the case. He stated that Mst. Shah Gul had given birth to a dead daughter and a son. He obtained death certificate Ex.PW.5/2 of the dead child from DHQ Hospital vide application Ex.PW.10/1. He also obtained sample of the skin of dead child and blood sample of the living child. Both the samples were sent for DNA test to Lahore. He also got blood from the body of accused Muhammad Usman through laborartoy technician DHQ Hospital Chitral and sealed the same into a parcel and prepared recovery memo Ex.PW.7/1 and signed the same. He handed over the dead body to Hafeez-ur-Rehman and Shuja-ur-Rehman residents of Orghouch vide memo Ex.PW.10/3. After completion of investigation the Investigating Officer handed over the file to SHO for submitting report under section 173 of the Code of Criminal Procedure.

4. Thereafter the learned trial court on 03.09.2008 framed charge against the accused Muhammad Usman under section 10(3) of Offence of Zina (Enforcement of Hudood) Ordinance, 1979. The accused did not plead guilty and claimed trial.

5. The prosecution in order to prove its case at the trial produced 15 witnesses. The gist of statements of witnesses is as under:-

- i. Hafeez-ur-Rehman appeared as P.W.1. to depose that Mst. Shah Gul was his phoophizad.
- ii. Lady Dr. Sultana appeared as P.W.2. She had medically examined Mst. Shah Gul on 24.06.2008 and found that the victim had 14 weeks pregnancy.

- iii. Dr. Saeed Malook appeared as P.W.3 to state that on 27.06.2008 he had medically examined accused Muhammad Usman and found him fit to perform sexual intercourse.
- iv. Jehanzeb Khan Head Constable No.190 appeared as P.W.4. He stated that he and Ikram-ul-Haq, Foot Constable, were present when on 10.11.2008 lady doctor Sultana got skin sample of dead female baby and blood samples of male baby for DNA test report. He had attested recovery memo Ex.PW.4/1.
- v. Dr. Ali Murad appeared as P.W.5. He stated that while serving as medical officer of DHQ Hospital Chitral he received an application Ex.PW.5/1 on 02.12.2008 from the Investigating Officer, seeking permission to obtain blood of Mst. Shah Gul for DNA test. He marked the application to the Laboratory Assistant for the needful. He identified his signatures on the application. He also issued death certificate Ex.PW.5/2.
- vi. Muhammad Liaqat Ali Khan, Laboratory Assistant DHQ Hospital, Chitral appeared as P.W.6. He stated that Investigating Officer brought accused Muhammad Usman to obtain blood sample. He obtained blood of accused and handed over the same to I.O. for DNA test. He identified his signatures on recovery memo Ex.PW.6/1. He also took blood sample of Mst. Shah Gul and handed it over to Investigating Officer for DNA test report vide memo Ex.PW.6/2.
- vii. P.W.7 Maulai Shah Head constable is an attesting witness of recovery memo Ex.PW.7/1 whereby blood sample of Muhammad Usman accused was taken for DNA test.
- viii. Ijaz-ur-Rehman P.W.8, is a relative of the victim. He stated that it came to the knowledge of the family that Mst. Shah Gul had conceived. On enquiry the latter informed that accused Muhammad Usman had committed Zina-bil-Jabr with her.
- ix. Muhammad Khalid Khan, SHO Police Station Chitral appeared at the trial as P.W.9. He stated that on 24.06.2008 Mst. Shah Gul appeared before him along with her brother Yousaf Khan and complained that she was subjected to rape and had consequently conceived. In order to ascertain the factum of pregnancy, the witness got the complainant medically examined. The lady doctor confirmed pregnancy vide report Ex.PW.2/2 whereafter legal opinion was solicited by this witness from the prosecution department vide application Ex.PW.9/2. He was advised to register a case and proceed accordingly. The witness also submitted interim report under section 173 of the Code of Criminal Procedure whereas the complete report against Muhammad Usman accused was submitted by Inspector Inayat Ullah, S.H.O.
- x. Muhammad Jan, Sub Inspector appeared at the trial as P.W.10. He had partly investigated the case. The details of his investigation have already been mentioned in an earlier paragraph.

- xi. Sardar Wali ASI, appeared at the trial as PW.11. He stated that the victim gave birth to twins, a male and a dead female body on 09.11.2008 in D.H.Q Hospital Chitral. Having received this information the witness moved an application Ex.Pw.11/1 before the Medical Officer for DNA test. The blood sample of the living baby and skin sample of the dead child were obtained vide memo Ex.PW4/1. The dead body of the new born baby was handed over to Ijaz-ur-Rehman for burial.
- xii. P.W.12, Inayat Ullah SHO, had submitted complete report in the court requiring the accused to face trial.
- xiii. Abdul Qayyum, ASI appeared as P.W.13 and stated that he formally registered FIR Ex.PA on receipt of murasala Ex.PW.9/1 from Muhammad Khalid Khan, SHO.
- ix. P.W.14 Rehman Ali Shah stated at the trial that on receipt of case file from the SHO he partially investigated the case. He arrested the accused Muhammad Usman on 26.06.2008. He prepared site plan Ex. P.W.14/2 and got accused medically examined vide application Ex.PA.3/1 and also got conducted identification parade of the accused. He recorded statements of witnesses under section 161 of the Code of Criminal Procedure.
- xv. Mst. Shah Gul victim appeared as P.W.15. She endorsed the contents of the complaint recorded by police.

6. Learned trial court after close of the prosecution evidence recorded statement of accused under section 342 of the Code of Criminal Procedure. He also made a statement under section 340(2) *ibid*. The accused contended that the complainant party wanted to have a Hafiz-e-Quran in his place as Pesh Imam. It was further stated that litigation about property between him and complainant group was pending in the court. It was also contended that the victim was a deaf, dumb and insane woman who did not observe 'parda' and that she was instigated to file a false complaint against him. The learned trial court after completing all codal formalities recorded conviction as noted in the opening paragraph of this Judgment. Hence the present appeal.

7. I have gone through the file. The evidence adduced by prosecution as well as the statement of accused has been perused. Learned counsel appearing on behalf of the appellant and State have been heard. Learned counsel for the appellant has raised the following points for consideration:-

- i. DNA test alone is not sufficient to form basis for conviction. Reliance is placed on Muhammad Azhar Versus The State reported as PLD 2005-Lahore 589;
- ii. That the victim was not taken to the laboratory for medical test.
- iii. The complainant could not identify the accused during identification parade;

- iv. That in case the conviction is found to be correct then the complainant was also liable to be convicted;
- v. The complainant party is inimical to the accused because of pending civil disputes; and
- vi. Lastly the learned counsel requested for reduction of sentence on the ground of old age of the appellant.

8. Learned counsel representing the State on the other hand supported the Judgment and vehemently opposed the request for reduction of sentence on the ground that the appellant a Pesh Namaz, committing such a heinous offence, does not deserve leniency, particularly when the victim was partly deformed.

9. My observations after hearing the parties and scanning the record of the case are as follows:-

- i. That the impugned judgment is well reasoned and nothing objectionable has been pointed out by the learned counsel for the appellant.
- ii. The objection that DNA test alone is not sufficient to record conviction is not valid. In this case the victim categorically alleged rape at the trial and she had conceived as a consequence of the illegal sexual intercourse. She gave birth to twins. Her allegation was duly supported by DNA report which confirmed that victim and accused were the biological parents of the twins. In judicial history even the solitary statement of a victim has, in a number of cases, become the basis of conviction. In this case we have the corroborative evidence by way of DNA test as well. The statement of victim, on the question of rape and evidence regarding delivery of twins, was not challenged by the appellant in the cross-examination.
- iii. The case of Muhammad Azhar Versus The State relied upon by the learned counsel for the appellant does not advance his case. This case, decided by the learned Single Judge of the Lahore High Court on a bail application, dealt with a situation where the husband had lodged a complaint against his wife alleging that the child born out of the wedlock was the result of zina. The complainant had produced report from the laboratory in support of his contention. The accused was consequently admitted to post arrest bail. In this case the learned single Judge of the Lahore High Court found that:

“Offence of Zina is specific to the Islamic Jurisprudence and lays down the standard of proof, the rationale behind the standard of proof, and the punishment..... so, amongst the standard of proof, there is a requirement of four witnesses because of its nexus with the rationale and not otherwise”.

The learned Judge also found that:

“The DNA test may be an important piece of evidence for a husband to establish an allegation of Zina against his wife and use this as a support justifying the taking of the oath as ordained by Sura Al-Noor, which leads to the consequences of breaking the marriage. The DNA test may further help in establishing the legitimacy of a child for several other purposes. Therefore, its utility and evidentiary value is acceptable but not in a case falling under the penal provisions of Zina punishable under the Hudood Laws having its own standard of proof”.

It is stated with respect that the proof of Zina liable to Hadd is provided in Section 8 of Offence of Zina (Enforcement of Hudood) Ordinance, 1979 but section 10 *ibid* states that whoever commits Zina or Zina-bil-Jabar which is not *liable to Hadd, or for which proof in either of the forms mentioned in Section 8 is not available such an offence shall liable to Tazir*. It is therefore clear that in case of Tazir there is no prescribed standard of proof as stipulated in section 8 *ibid* either by way of a confession or proving the allegation through the statement of four Muslim adult male witnesses about whom the Court is satisfied, having regard to the requirement of Tazkiah-al-Shahood, that they are truthful persons and abstain from major sins. In this view of the matter evidence other than the proof prescribed by section 8 *ibid* can be brought on record and can legitimately become basis of conviction. Moreover the learned Single Judge was persuaded by the fact that the allegation in the case of Muhammad Azhar Versus The State was levelled by the husband against his wife and that was the reason that the learned Single Judge referred to Verse 6 through 9 of Sura Al-Noor of the Holy Quran. That is not the position in the appeal under consideration. Needless to add that under Article 164 of the Qanoon-e-Shahadat Order, 1984 the Court can always consider any evidence that may have become available because of modern devices or techniques. Learned Single Judge has very rightly stated that “Islam was not opposed to science and its achievements. In fact it encourages pursuit of knowledge and research and the DNA test, which forms an important basis for determining genetically about a biological paternity of the child and consequently it has a place in evidence.”

- iv. The objection that the victim was not taken to the laboratory for medical test has no force for the simple reason that only the paternity of the appellant qua the twins had to be established. The victim, the mother had already given birth to the twins. Her maternity was not in doubt at all nor was the birth of twins challenged. The blood samples of the victim were duly sent to the laboratory. It

was only the blood/skin samples of the new born babies that had to be matched with the DNA profile of appellant.

- v. The objection that victim was not able to identify the appellant is also without force because she did identify the appellant before the trial court. No question was put to the victim during cross-examination as regards her role in the identification parade of the appellant. It is in the evidence of PW.14 that the victim succeeded in identifying the appellant in the second round of the identification parade.
- vi. The objection that the victim should also have been prosecuted is no reason to annul the conviction recorded against the appellant. The case originally was recorded under section 10(3) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and not under section 10(2) *ibid*. The victim was therefore not prosecuted as the allegation was of Zina bil Jabr and not Zina bil Raza.
- vii. That the element of enmity as canvassed by learned counsel for the appellant is not available on file. Proof of alleged civil litigation between the parties has not been brought on record. The proof of pending litigation or even decided cases is not at all difficult to obtain. Attested copies can be obtained and produced at the trial in support of the contention regarding enmity. It was not done. The objection that there was enmity between parties is therefore baseless.
- viii. The appellant in his statement on oath on the one hand contended that the prosecutrix was an insane woman who would roam about in the village aimlessly but in the same breath the appellant stated that she was incited to lodge a false case against him. The prosecutrix did appear as P.W.15. Her statement was recorded and she was subjected to cross-examination as well. The learned trial court did not record any finding that the prosecutrix was insane. The appellant did not cross-examine her on the point of sanity. In fact, as stated above, the appellant had also not challenged the allegation of zina-bil-jabr or the consequent pregnancy and the birth of twin. It is by now established that facts deposed to in examination-in-chief but not questioned in cross-examination will be deemed to have been accepted by the parties against whom it was given. In other words unchallenged portion of the statement of a witness which is material to the controversy has to be given full credit particularly when it is not displaced by reliable evidence. In this connection reference may be made to the following cases:-
 - a. Syed Iqbal Hussain Versus Mst. Sarwari Begum PLD 1967 page 1138(at page 1146)B
 - b. Qamaruddin through his Legal Heirs Versus Hakim Mahmood Khan 1988 SCMR 819 (at page 823)B
 - c. Mst. Nur Jehan Begum through Legal Representatives Versus Syed Mujtaba Ali Naqvi 1991 SCMR 2300 (at page 2303) B

- d. Bashir Ahmad Versus Muhammad Luqman 2000 YLR 326 (at page 330)A
- e. Kabool Khan Versus Shamoan through represented and others PLJ 2002 Lahore 425 (at page 432)C.

ix. The last contention of the learned counsel for the appellant regarding reduction of sentence does not apply in the facts and circumstances of this case. The appellant is sexually potent. He is incharge of the village mosque. Such a person does not deserve leniency at all. A Persian complete reflects this situation:

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✂️ ⑩ 📖 🎯 🏠 † ⑤ ④

Lust grows stronger as males advance in age,
And an aging prostitute turns into a procurer.

10. The upshot of the above discussion is that this appeal fails. The conviction and sentence of the appellant as awarded by the learned trial court is maintained. Benefit of section 382-B of the Code of Criminal Procedure shall however remain intact.

Dated: 28.01.2010

IN THE FEDERAL SHARIAT COURT

(Appellate Jurisdiction)

PRESENT:

**MR. JUSTICE SYED AFZAL HAIDER
MR. JUSTICE SHAHZADO SHAIKH**

CRIMINAL APPEAL NO. 5/L OF 2009

1. Mansab Dar
 2. Zafar (both sons of Syed)
 3. Syed
 4. Sher
 5. Ayub (sons of Sohna)
 6. Muhammad Afzal
 7. Haq Nawaz alias Hakim (both sons of Sher)
- All accused Awan by Caste resident of Mauza
Panj Garain, Tehsil & District Jhang. Appellants

Versus

The State Respondents

For the appellants Mr. Mehran Ali Bali,
Advocate

For the State Miss. Shabnam Rasheed Abbasi

Private complaint No. 5/2006, 05.04.2006

Date of Judgment of
trial Court 20.12.2008

Date of Institution 20.01.2009

Date of hearing 31.03.2010

Date of decision 02.04.2010

Criminal Appeal No. 5/L of 2009 decided on 02.04.2010 (2010 P.Cr.L.J 879)

JUDGMENT :

SYED AFZAL HAIDER, Judge.— This appeal has been moved by appellants Mansab Dar, Zafar, Syed, Ayub, Afzal and Haq Nawaz alias Hakim to impugn the judgment dated 20.12.2008 delivered by learned Additional Sessions Judge, Jhang whereby they were convicted under section 11 of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979 and sentenced to 5 years R.I. with fine of Rs.5000/- each, in default whereof to further undergo one month simple imprisonment each. Accused Mansab Dar was also convicted under section 10(3) of Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979 and sentenced to 10 years rigorous imprisonment. However, all the convicts/appellants were granted benefit of section 382-B of the Code of Criminal Procedure.

2. Brief facts of the prosecution case are that complainant Mst. Kausar Bibi PW.7 initiated a crime report by way of private complaint on 05.04.2006 in the Court of Additional Sessions Judge, Jhang alleging that on 08.11.2005 at about 8/9:00 p.m. she had gone in the nearby field to answer the call of nature. Accused Mansab Dar, Syed, Zafar, Afzal, Hakim and Ayub came there on a tractor and boarded her on the tractor after putting a piece of cloth on her mouth. At that moment Zafar and Umar, who were passing nearby, identified the accused with the help of tractor light. The accused then took her hurriedly towards Ratta Adda at the Lalian Road where Ghulam Abbas was present. Accused Mansab Dar thereafter took her to some unknown place on a motor cycle where she was kept in a room for two nights. Accused Mansab Dar reportedly subjected her to Zina-bil-Jabr. The complaint proceeds further to disclose that as the complainant had not returned home so her father along with Shera, on the information given by Zafar etc, approached the accused and demanded restoration of the complainant. The accused consequently brought the complainant to the house of her *phupha* Sher Muhammad on 10.11.2005. Mansab Dar accused is also alleged to have admitted his guilt in the presence of Sher Muhammad and many others. The complainant alleged further that Ismail son of Saie and Shera son of Sohna had lent support to the accused in the commission of this offence. Accused Afzal, Syed and Mansab Dar were allegedly armed with guns at the time of occurrence. The complainant also stated that on her written application a case was registered whereafter her medical examination was also undertaken wherein the lady doctor confirmed the allegation of Zina-bil-Jabr. The complainant also alleged that the police, under the influence of the accused, declared them innocent and hence she moved a private complaint against nine accused including the appellants.

3. Charge was framed by the learned trial Court on 28.08.2006 against eight accused under section 11 while a charge under section 109 of the Pakistan Penal Code was framed against Ismail and Sher accused. However Mansab Dar accused was charged under section 10(3) of the

Offence of Zina (Enforcement of Hudood) Ordinance, VII of 1979 and 109 of the Pakistan Penal Code. The accused did not plead guilty and claimed trial.

4. The prosecution in order to prove its case produced 12 witnesses at the trial. The gist of the statements of the witnesses is as follows:-

- i) PW-1: Muhammad Iqbal MHC had handed over two sealed parcels of envelope and a phial to constable Ghulam Farid for onward submission to the office of Chemical Examiner, Lahore.
- ii) PW-2: Safia Sultana Lady constable had taken Mst. Kausar Bibi to DHQ Hospital, Jhang on 12.11.2005 for medical examination. She received from the medical officer the medico legal report, a phial and a sealed envelope alongwith a blood stained Shalwar which was handed over to Ashiq Hussain S.I. who recorded her statement under section 161 of the Code of Criminal Procedure and took the Shalwar into possession vide memo Ex.PA which was attested by her.
- iii) PW-3: Dr. Nasreen Ghauri medically examined Mst. Kausar Bibi and observed as under:-
 - “1. There were multiple scratches in an area 6 cm x 4 cm on lower side of chin (mental region).
 2. An abrasion 3 cm x 3 cm on medical and inner side of right lower limb.
 3. Hymen showed healed tears.
 4. Vaginal orifice admits two fingers easily.
 5. Three vaginal swabs taken, sealed and sent to Chemical Examiner for detection of semen and serological examination.

OPINION.

In my opinion she was subjected to sexual inter-course. Nature of Injuries was given under section 337-L(2)PPC. Probable duration of injury was not given. Certified copy of the original which is also before me. Ex.PB and is true copy of the original which is also before me. Ex.PB was prepared and signed by me. I examined the victim on the application given by the police which is Ex.PB/1. I also endorsed the same. After examination, I handed over certified copy of MLC, Sealed phial & sealed envelope to Lady Constable.”

- iv) PW-4: Dr. Muhammad Shafi Saleem conducted potency test of accused Mansab Dar and found him fit to perform sexual intercourse.

- v) PW-5: Constable Ghulam Farid deposited two sealed parcels and the envelope intact in the office of Chemical Examiner, Lahore on 16.11.2005.
- vi) PW-6: Hazoor is father of the victim/complainant Mst. Kausar Bibi and Mst. Kausar Bibi PW.7 is complainant/victim herself. Both of them supported the contents of private complaint.
- vii) PW-8: Umar Hayat is an eye witness of alleged abduction. He supported the contents of the crime report.
- viii) PW-9: Sher is the witness who along with PW.6 Hazoor, the father of abductee, allegedly received information from Umar Hayat PW.8 about the abduction of Mst. Kausar. He is also a witness of motive and search of abductee. He also supported the factum of return of abductee.
- ix) PW-10: Ahmed Ali deposed about the conspiracy to abduct Mst. Kausar Bibi. According to him Ismail and Sher came to the river bank to board a boat and there prompted Haqnawaz, Mansab Dar and Syed to abduct sister of Zafar son of Hazoor in order to equalize the score.
- x) CW-1: Mushtaq Ahmed S.I appeared at the trial to state that being on duty he recorded FIR.
- xi) CW-2: Ashiq Hussain Inspector appeared at the trial to state that he investigated the case FIR No.260 dated 12.11.2005 registered under sections 10/11 of Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979 and 109 of the Pakistan Penal Code, visited the place of occurrence; prepared rough site plan Ex.CW2/B, recorded statement of the PWs under section 161 of the Code of Criminal Procedure; got medically examined the abductee Mst. Kausar Bibi and took into possession Shalwar of the victim. On 21.11.2005, he arrested accused Mansabdar, Afzal, Haq Nawaz and Syed. On 24.11.2005, accused Mansab Dar got recovered .12 bore gun. He also prepared rough site plan of the place of recovery Ex.CW.2/C. He arrested accused Ayub on 24.11.2005. He also got accused Mansab Dar medically examined and recorded statements of the witnesses under section 161 of the Code of Criminal Procedure.

5. After closure of prosecution evidence, all the above mentioned accused were examined under section 342 of the Code of Criminal Procedure. In reply to the question "why this case against you and why the PWs have deposed against you?", the principal accused Mansab Dar stated as follows:-

"The PWs are related interse and they have deposed against me due to enmity. Ismail co-accused had purchased one Acre of land from Veriah tribe and Ismail etc. were cultivating the said land. The complainant party had forcibly taken possession of the said land. I was supporting my co-accused Ismail etc; and a quarrel had taken place prior to the registration of this FIR, in which I abused Hazoor Muhammad father of Mst. Kausar

Bibi, who got lodged this false FIR against me and my co-accused because of the land in dispute and above said grudge of quarrel.”

In reply to the question “why this case against you and why the PWs have deposed against you?, the accused Ismail, Ghulam Abbas, Haq Nawaz alias Hakim, Muhammad Afzal, Sher, Ayub, Syed and Zafar endorsed the statement of their co-accused Mansab Dar. None of the accused appeared as his own witness under section 340(2) of the Code of Criminal Procedure. No evidence was produced in defence.

6. We have examined the record of the case. Evidence of the witnesses for prosecution as well as the statement of the accused has been perused. Relevant portions of the judgment have been scanned. Learned counsel for the contending parties have also been heard.

7. Learned counsel for the appellants at the outset stated that it was a case where the conviction should have been recorded under section 10(2) of Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and not 10(3) *ibid*. He further contends that the conviction recorded under section 11 of Ordinance VII of 1979 is not called for in the facts and circumstances of the case. The learned counsel also urged reduction in sentence.

8. Learned Deputy Prosecutor General for the State is of the view that the facts of the case do not support conviction under section 10(3). Learned counsel is also of the view that conviction should have been recorded under section 10(2) *ibid*. It is also submitted that ingredients of section 11 of the Order have not been proved by the prosecution.

9. We have given anxious thought to the points urged by learned counsel for the appellants which have been duly supported by the learned Deputy Prosecutor General. The evidence placed on record does not establish the element of Zina-bil-jabr. However, consensual relationship between the complainant and Mansab Dar accused cannot be ruled out. On the other hand this relationship is admitted by learned counsel for the appellant. Medical evidence does not support prosecution version of Zina bil Jabr. The element of delay in reporting the matter is also not explained by the prosecution as the incident had taken place allegedly on 08.11.2005 whereas the FIR was recorded on 12.11.2005 and Mst. Kausar was reported to have been returned on 10.11.2005. During this period no complaint was lodged by the father of Mst. Kausar Bibi. It is an intriguing fact that the families of three brothers Said, Ayub and Afzal have been involved in this case. It is also significant to note that P.W.6 Hazoor Bakhsh, father of Mst. Kausar Bibi, admitted in cross-examination that on the night of occurrence no attempt was made by them to find out the whereabouts of Mst. Kausar Bibi. It was only on the next day of her disappearance that the father made efforts in that direction. The witness also admitted that the accused had suspicion that his son had illicit relations with the sister of accused. This suspicion had developed since one or two years before the occurrence. PW.9 Shera, the

Phupha of Mst. Kausar, stated that Umar and Zafar informed them about the incident in the evening but efforts to locate the missing girl was made only next morning. The house of accused is at a distance of one and a half acre from the place of occurrence. The names of accused were allegedly brought to their notice but strangely enough her family members did not deem it expedient to trace the missing youth. The search allegedly commenced next day. The abductee was admittedly not recovered from the accused. No raid was conducted by police in this respect. Shera PW.9 got his statement under section 161 of the Code of Criminal Procedure recorded a month after the alleged incident. It is an admitted position that the alleged place of abduction is only 8/10 karams from her house and she is reported to have raised cries but nobody was attracted from adjoining houses.

10. It is in the evidence of P.W.10 that the conspiracy theory had been found incorrect by the Investigating Officer. Ashiq Hussain, Inspector appeared as C.W.2 and stated that he recommended discharge report of accused Muhammad Ayub Zafar, Abbas, Sher and Ismail as they were not found involved in the occurrence. In cross-examination C.W.2 stated that during investigation the place of commission of zina was not shown to him. As far as recovery of gun from the house of Mansab Dar appellant is concerned the Investigating Officer admitted that the house was jointly owned by family members. He also admitted not having sent the alleged crime weapon .12 bore gun to the Forensic Science Laboratory to determine whether it was in working condition. He had also stated that at the time of recovery of .12 bore gun no one was present in the house. There was no boundary wall of the house from where the gun was recovered. The entire prosecution case is therefore not free from doubts. Zina-bil-Jabr is certainly not established.

11. PW.8: Umar Hayat is a chance witness. He lives in a different village across the river. He was successfully confronted by defence on a number of points with his previous statement. His deposition smacks of improvement. According to him the search for Mst. Kausar started immediately after he laid information of abduction but the father of abductee asserted that they pursued the girl only next morning. Apparently the prosecution has introduced this element to improve its case.

12. We have also not been able to discover any evidence to connect the appellants with the offence contemplated by section 11 of Offence of Zina (Enforcement of Hudood) Ordinance, 1979. Finding of guilt cannot be placed on high probabilities. The onus certainly rests upon the prosecution to prove the guilt of accused beyond reasonable doubt. The accused cannot be convicted merely because he has not stated the whole truth. In order to bring the action of the accused within the mischief of section 11 of Ordinance VII of 1979 it is essential in such like cases to establish that force was employed with the intention of subjecting the adult abductee to illicit intercourse. But if the court finds that the allegedly abducted party was a consenting

partner and nothing was done against her will then the case is not hit by section 11 *ibid*. The requisite ingredients of the offence have neither been proved by prosecution nor discussed in the impugned judgment. Reference Amanullah vs. The State 1993 SCMR 1806; State vs. Khuda Bux 2004 SCMR 425 (at pages 429-430). As far back as 1938 Mr. Justice Blacker of Lahore High court in the case of Mohammad Sadiq versus Emperor, reported as AIR 1938 Lahore 474, had held that in case of offences under section 366, the evidence of girl alleged to have been abducted must be taken with great amount of caution. It was also held that natural presumption in cases of abduction is that the girl is abducted with intention of having sexual intercourse with her forcibly or with her consent after seduction or after marrying her. If any other intention is alleged to exist, burden is on accused to prove it. The appellants resultantly are entitled to benefit of doubt. Six accused have suffered incarceration for almost two years each without solid proof of abduction.

13. In this case notices were issued to appellants Mansab Dar, Zafar, Syed, Ayub, Afzal and Haq Nawaz on 22.02.2010 to show cause why the sentence awarded under section 11 of Ordinance VII of 1979 be not enhanced because section 11 *ibid* contemplates life imprisonment only as the requisite punishment. Since we have come to the conclusion that ingredients of section 11 *ibid* are not established in this case, so we have decided to withdraw notices for enhancement of sentence against all the appellants. All of them are therefore acquitted under section 11 of Ordinance VII of 1979. We have already found that the prosecution has failed to prove allegations of Zina bil Jabr. Consequently in view of the statement of learned counsel for appellant Mansab Dar that the case is covered by 10(2) *ibid*, his conviction is altered to one under section 10(2) of Ordinance VII of 1979. Resultantly his sentence is reduced to the period already undergone with a fine of Rs. 5000/- and in default whereof he will suffer 10 days simple imprisonment. Benefit of section 382-B of the Code of Criminal Procedure is extended to him.

14. The appeal is partly accepted and disposed of in the above terms.

15. Before parting with this Judgment we consider it expedient in the interest of justice to take judicial notice of the fact that five accused, other than Mansab Dar, were involved in criminal proceedings under section 11 of Ordinance, 1979 without justification. They had to face the harrowing period of investigation, the travail of the trial and then suffer additional pain on account of appeal in the Federal Shariat Court. Each one of them has already been in jail for almost two years. It is an unfortunate trend to involve innocent persons alongwith the real culprit. We have found that it was not a case of abduction. Mst. Kausar Bibi ought to have been charged along with Mansab Dar as a consenting party. Mst. Kausar Bibi alone was not responsible for initiating the complaint. She was apparently supported by her father and other witnesses. In this view of the matter we direct the learned trial court to issue notices to the complainant P.W.7, her father Hazoor P.W.6, Umar Hayat, P.W.8 and Sher P.W.9. An enquiry should be held with the object of fixing liability. Learned trial court will send a comprehensive report in this Court through its Registrar by the end of May, 2010. The learned trial court will,

apart from considering the possibility of imposing fine upon the complainant and witnesses by way of compensation to be paid to all those who were charged and convicted under section 11 of Offence of Zina (Enforcement of Hudood) Ordinance, 1979, try to ascertain whether a case of perjury could be registered against the defaulters. It should be a speaking order passed after recording statements of the complainant and other witnesses. The learned trial court may, if it considers necessary, summon the acquitted accused in order to find out whether FIR. No. 260/2005 Police Station Qadir Pur District Jhang and the subsequent complaint lodged by Mst. Kausar Bibi was motivated or otherwise. It is the duty of the court to watch the interest of all the parties before it so that process of the court is not abused.

Dated: 02.04.2010.

IN THE FEDERAL SHARIAT COURT

(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE SHAHZADO SHAIKH

JAIL CRIMINAL APPEAL NO. 05/I OF 2010

1. Muhammad Ismail s/o Muhammad Gul
Caste Ahmedzai, r/o Muslim Bagh Bazar
2. Kareem s/o Muhammad Gul Caste
Sulemankhail r/o Sambaza Zhob Appellants

Versus

1. The State Respondent

Counsel for appellant Miss B. H. Shah,
Advocate

Counsel for the State Muhammad Sharif Janjua,
Advocate

FIR No. Date &
Police Station No. 12/2009, dated 8.6.2009
P.S. Bostan District Pishin

Date of trial court 31.10.2009

Date of Institution 22.01.2010

Date of hearing 06.12.2010

Date of decision 06.12.2010

JUDGMENT

SHAHZADO SHAIKH, J:- This jail appeal filed by appellants Muhammad Ismail son of Muhammad Gul and Muhammad Kareem son of Muhammad Gul are directed against judgment dated 31.10.2009 delivered by learned Additional Sessions Judge, Pishin, whereby they were convicted under Section 392/34 Pakistan Penal Code, and sentenced to three years Rigorous Imprisonment each and a fine of Rs.10,000/- or in default to further undergo two months Simple Imprisonment. Both the appellants were given benefit of section 382-B of the Code of Criminal Procedure.

2. Brief facts of the case are that complainant Muhammad Ayub alias Sardar got registered an FIR No.12/2009 with Police Station Bostan Pishin stating therein that on 08.06.2009 his friend invited him and he was going to Killi Poti Nasran, on his personal motor cycle bearing registration No.QAK-3623 when at about 6.30 p.m., he reached near Railway/rail track, four unknown person duly armed with weapon intercepted him and snatched his motorcycle bearing registration No.QAK 3623 on gunpoint. Two persons also tried to conduct his personal search but luckily, he succeeded to run away towards nearby houses. They also ran after him but could not catch him. The FIR was registered under section 17/3 Harrabah of the Offence Against Property (Enforcement of Hudood) Ordinance,1979.

3. After having completed legal formalities, challan was submitted against the accused before the learned Court of competent jurisdiction and thereafter the charge was framed against the appellants on 17-07-2009, which was denied by them and the appellants claimed to be tried.

4. The prosecution in order to prove the guilt of the appellants produced as many as 06 witnesses:-

- i. PW-1 Muhammad Ayub (Complainant) deposed that on 8.6.2009 at about 6.30 p.m. he was going to Killi Sahib Khan, when he reached near rail track at Killi Poti Nasaran, four persons intercepted him, out of them two persons were equipped with pistols while other two persons were empty handed and snatched his motorcycle. He raised hue and cry and ran towards his village. Two culprits out of them started running behind him but could not catch him. The accused persons started his motorcycle and took it away. He reported the matter at Bostan Thana vide Exh.P/1-A, upon which he identified his signature. He identified the accused Muhammad Ismail and Muhammad Kareem who were identified by him on 13.06.2009 during identification parade in presence of Judicial Magistrate, Pishin.
- ii. PW-2 Muhammad Anwar Ex-constable deposed that on 8-6-2009 at about 7.30 pm, he, SI Amir Muhammad, DSP Noor Muhammad Barrich and other officials had put a barricade that at about 8.00/8.30 p.m. a spy sent information through telephone that at Chowkak road near Killi Sahib Khan one suspicious vehicle had been parked in which suspicious persons were also present. On such information the police

party reached at the spot and found a black colour 2.D vehicle and a motorcycle. Three persons were sitting in 2.D vehicle No.ACV-442, who seeing them/police tried to escape but they were over powered by the police officials. During personal search of Muhammad Ismail one T.T. Pistol was recovered. On unloading the pistol, 3 live cartridges were found in its magazine, while during personal search of Muhammad Kareem one 30 bore T.T. Pistol was found. On unloading this pistol, 2 live cartridges were found in its magazine. But nothing else was recovered during the personal search of accused Asmatullah, Investigating Officer seized the said two pistols alongwith cartridges, motorcycle and 2.D vehicle through fard vide Exh.P/2-A, upon which he identified his signature as correct and produced the sealed parcel Article-P/1, which was also de-sealed on the request of ADA: the sealed parcel Article-P/2, one pistol Article –P/3, two live cartridges Article-P/4, one magazine Article –P/5. The sealed parcel Article-P/6, was also de-sealed on the request of ADA: sealed parcel Article-P/7, one pistol Article-P/8, three live cartridges Article-P/9, one magazine Article-P/10, motorcycle Article-P/11, vehicle No. ACV-442, Article-P/12 and identified the same as correct. He also identified the accused persons present in the Court.

- iii. PW-3 Jehanzaib Khan, Judicial Magistrate, Khanozai deposed that on 13.06.2009 he was posted as Judicial Magistrate, Karezat. On the same day on the request of Investigation Officer, Identification parade of accused Muhammad Ismail and Kareem in case FIR No.11/2009 under section 17/3 Harrabah by complainant Muhammad Ayub at Police Station, Pishin, was held. The complainant thrice identified the accused persons as correct. After completion of identification parade process he affixed his signature on the identification parade form and issued certificate. He produced identification parade form vide Exh.P/3-A and Exh.P/3-B and identified his signature as correct. He identified the accused persons present in the Court.
- iv. PW-4 Shabeer Ahmad, Constable deposed that on 08.06.2009 in his presence, DSP Noor Muhammad Barrich, Manzoor Ahmed SI, Amir Muhammad, and Abdul Ghani constable, during investigation accused Muhammad Ismail disclosed that he alongwith Asmatullah and Kareem were sitting at rail track near Killi Poti Nasaran, where the motorcycle Honda 125 CC came, which was snatched by them at gunpoint. They were taking the motorcycle to the house of Asmatullah, in the meanwhile police came and they were arrested with the motorcycle. Disclosure memo Exh.P/4-A was prepared upon which he and Abdul Ghani and DSP Noor Muhammad affixed signatures. He identified the accused persons as correct.
- v. PW-5 Niamat Khan, Constable deposed that on 08.06.2009 he was present in police station Bostan that complainant Muhammad Ayub came and in his presence he produced the photo copy of papers of Honda-125 No.3623, motorcycle to Investigation Officer, which were seized through fard Exh.P/5-A, upon which he identified his own and Nasibullah's, (not produced as P.W) signatures. He produced document Article-P/1 and identified the same.

- vi. PW-6 Manzoor Hussain, SI deposed that on 08.06.2009 on the written report of complainant, FIR Exh.P/6-A was registered upon which he identified the signature of SHO as correct. Investigation was entrusted to him. He recorded the statement of witnesses under section 161 Cr.P.C. prepared site plan Exh.P/6-B on the pointation of complainant. After completion of investigation challan Exh.P/6-C was handed over to SHO. He identified the signature of SHO on the challan.

5. On closing the prosecution evidence, both the appellants were examined under section 342 Code of Criminal Procedure wherein they denied all the allegations. The appellants Muhammad Ismail and Kareem produced in their defence one witness while accused Asmatullah in his defence did not opt to produce witness and all of them did not opt to be examined on oath. The learned trial court after examining evidence of the prosecution and hearing the learned counsel for the parties, held both the appellants guilty of commission of the offence and convicted both of them as mentioned in opening para of this judgment and both the appellants filed this appeal against their aforesaid conviction and sentence.

6. The learned counsel for the appellants has contended that there are contradictions in the statements of prosecution evidence. FIR was lodged against un-known persons and their features were not given in the said FIR; one of the accused has been acquitted on the same set of evidence while the appellants have been wrongly convicted; requirements of section 103 Code of Criminal Procedure have not been fulfilled at the time of alleged recovery of said motorcycle and the said motorcycle has not been recovered from the personal possession any one of the appellants; as in this regard appellants have also produced defence witness as DW-1 Naqibullah.

7. While on the contrary learned counsel for the State has submitted that the prosecution has proved its case against the appellants and they have rightly been convicted and sentenced by the trial Court and prayed for dismissal of the appeal.

8. I have heard the learned counsel for the parties and with their assistance; I have gone through the evidence adduced by the prosecution and the material available on record. It is very clear from the record that appellants/accused were neither named in the FIR nor description of features of the appellants were given. In the deposition, also no specific role has been assigned to each appellant. There is no clue about the alleged fourth accused person, to complete the prosecution story. Defence plea of scuffle with complainant party about money matters, that appellant Muhammad Ismail was demanding Rs. 40,000/- in connection with Buzgari, has not been refuted properly. There are some defects in the investigation and identification parade was held at police station Pishin where it is stated that as many as 9 identical persons were produced, which does not appear to be a possibility. The alleged recovery of incriminating articles from the accused was not witnessed by independent witnesses except the police official in disregard of mandatory provision of section 103 Code of Criminal Procedure. Such recovery thus did not advance the case of prosecution in the circumstances. Alleged motorcycle was also not recovered from the personal possession of any

one of the appellants and one accused has also been acquitted by the trial court on the same set of the evidence. There are many doubts and discrepancies in the prosecution case.

9. Recovered Vehicle No-ACV 442/ 2-D was also seized by the police through fard Exh.P.2/A but owner of the said vehicle was not produced by the prosecution and learned trial court mentioned in para 10 of the judgment that the said vehicle be handed over to its owner after lapse of appeal period but the name of owner and documents of said vehicle are not available in the record of the case.

10. Viewed from all angles, I have no doubt in my mind that the prosecution has failed to prove the case. The conviction and sentence of the appellants by the learned trial court is not justified in law. I therefore, set aside the judgment, dated 31.10.2009 of the trial Court awarding punishment two appellants Muhammad Ismail son of Muhammad Gul and Kareem son of Muhammad Gul under section 392/34 Pakistan Penal Code.

11. In view of the above, I accept this appeal and appellants shall be immediately released in case if they are not required by the police in any other case. Appeal is accepted. These are the reasons of my short order dated 06.12.2010. (final)

Islamabad, the
6th December, 2010
Abdul Majeed/*

IN THE FEDERAL SHARIAT COURT

(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE SYED AFZAL HAIDER

MR. JUSTICE SHAHZADO SHAIKH

JAIL CRIMINAL APPEAL NO. 141/I OF 2009

1. Muhammad Yousaf s/o Tajammal Hussain
2. Muhammad Ramzan s/o Habib Khan,
Caste Baloch
3. Muhammad Iqbal s/o Hafiz Allah Ditta
Caste Thahim
4. Muhammad Siddique s/o Jind Wada
All the residents of Chak No. 24/M
Tehsil Dunyapur, District Lodhran Appellants

Versus

The State Respondent

JAIL CRIMINAL APPEAL NO. 144/I OF 2009

Mureed Hussain s/o Muhammad Ramzan
Caste Sumra r/o Chak No. 24/M
Tehsil Dunyapur, District Lodhran Appellant

Versus

The State Respondent

Counsel for appellants in Cr. A. No. 141/I/2009	....	Mr. Nazir Ahmad Bhutta, Advocate
Counsel for appellants in J. Cr. A. No. 144/I/2009	....	Sardar Taj Muhammad Khan, Langha and Mehr Sardar Ahmad Abid Advocate
Counsel for Complainant	....	Mr. Muhammad Yousaf Zia, Advocate
Counsel for the State	....	Ch. Muhammad Sarwar Sindhu, Additional Prosecutor General
FIR No. Date and Police Station	....	No. 222/2003, dated 14.07.2003 P.S. Saddar Dunyapur District Lodhran
Date of trial court	....	29.10.2009
Date of Institution	....	25.11.2009 & 03.12.2009 respectively
Date of hearing	....	26.11.2010
Date of decision	....	26.11.2010

JUDGMENT

SHAHZADO SHAIKH, J.—The Judgment will dispose of Criminal Appeal No.141/I of 2009 filed by four appellants i.e., Muhammad Yousaf son of Tajmal Hussain, Muhammad Ramzan son of Habib Khan, Muhammad Iqbal son of Hafiz Allah Distta and Muhammad Siddiqui son of Jind wada and jail Criminal Appeal No.144/I of 2009 filed separately by Mureed Hussain son of Muhammad Ramzan, to impugn judgment dated 29.10.2009 delivered by learned Additional Sessions Judge, Dunyapur, District Lodhran, whereby they were convicted under Section 16 of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979 and sentenced to rigorous imprisonment for seven years and a fine of Rs.50,000/- each or in default of payment to further undergo simple imprisonment for six months each. Appellant Mureed Hussain was further convicted under section 10(3) of the Offence of Zina (Enforcement of Hudood) Ordinance, VII of 1979 and sentenced to rigorous imprisonment for twenty years with direction that the sentences awarded to the appellant Mureed Hussain shall run concurrently. Benefit of section 382-B of the Code of Criminal Procedure has been extended by the learned trial Court for all the accused.

2. Brief facts of the case are that on 13.07.2003, complainant namely Haji Muhammad son of Jind Wada, caste Pirhar lodged a report in the Police Station, Saddar Dunyapur alleging therein that on 13.2.2007, his daughter-in-law Mst. Kausar Parveen, on return from her parental house, was passing through the agricultural land of her father, Mureed Hussain when Muhammad Iqbal and Muhammad Yousaf came there on a Motor Cycle Honda-125/CC of Black colour without registration number, Mureed Hussain and Yousaf over powered her and put her on the Motor Cycle. She raised alarm whereupon Ibrahim and Aslam PWs were attracted. Mureed Hussain took out pistol and threatened the witnesses and thereafter took away Mst. Kausar Parveen on Motorcycle towards Chit Nehar.

3. After investigation, the SHO submitted in the Court a report under section 173 of the Code of Criminal Procedure on 21.08.2004 requiring the accused to face trial.

4. The learned trial Court framed charges against the accused persons on 22.12.2004 under sections 16, 10(3) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and under section 368 of Pakistan Penal Code. The accused did not plead guilty and claimed trial.

5. The prosecution thereafter in order to prove its case produced 15 witnesses. The gist of the evidence of prosecution witnesses is as follows:-

- (i) PW-1 Haji Muhammad (complainant) lodged complaint Exh.PA, and deposed almost on the same lines.
- (ii) PW-2 is victim Mst. Kausar Parveen who made similar statement about her abduction by accused Mureed Hussain, Muhammad Iqbal and Muhammad Yousaf, who were later on joined by accused Muhammad Siddique and Ramzan alias Phani, on the way, on another Motorcycle CD 70, and that the PWs Ibrahim

and Aslam were threatened by the accused at the place of abduction. She further deposed that accused person i.e. Mureed Hussain, Ramzan alias Phani, Muhammad Yousaf, Muhammad Iqbal and Muhammad Siddique drank liquor and committed Zina-bil-jabr with her and that they also got her thumb impressions on some blank papers as well. She further deposed that accused Muhammad Ramzan, Siddique, Muhammad Bakhsh and Allah Bakhsh abetted and facilitated the accused by providing shelter to the accused persons.

- (iii) PW-3 Muhammad Aslam son of Muhammad Bakhsh is an eye-witness regarding abduction of Mst. Kausr Praveen. He deposed that on 13.07.2003 at about 3/4 p.m., he alongwith Ibrahim PW was going towards East of Chak No.24/M when they reached outside the Chak Abadi they heard a noise, saw Yousaf, Iqbal and Mureed Hussain armed with Pistol, who were abducting his 'Bhanji' Mst. Kausar Parveen. At that time, they were at a distance of one 'acre' from the accused person. They moved ahead towards accused person on this Mureed Hussain aimed his pistol towards them and asked that if they tried to come near to them, they would be done to death. The accused persons put Kasuar Parveen on Honda Motorcycle 125/CC without Registration Number and took away her towards Chitee-Nehar. These witnesses came back and informed Haji Muhammad about the occurrence.
- (iv) PW-4 Muhammad Ibrahim has deposed about the occurrence and abduction of Mst. Kausar Parveen. He stated that about 21/22 months ago, he alongwith Muhammad Aslam PW was going from Chak No.24/M towards East/Chit Nahir at about 3/4.00 p.m. They heard noise of Kausar Parveen and saw the accused persons Yousaf, Iqbal and Mureed Hussain armed with Pistol who were abducting Kausar Parveen on motorcycle. They went behind them but Mureed Hussain extended threat of murder to them on Pistol point whereupon they stopped there and accused persons went away taking Mst. Kausar Parveen. They went to the house of Haji Muhammad and told him about the occurrence. Motorcycle was without number.
- (v) PW-5 Muhammad Ilyas is wajtakar witness of the case, he deposed that about one year and nine months ago at about 7/8.00 p.m. he alongwith Mukhtar Ahmad were present at Adda Dahnot. Two motorcycles passed on the road going towards Kehror Pacca. On one Motorcycle Honda 125/CC, Iqbal, Mst. Kasuar Parveen and Mureed Hussain appellants were sitting and on other motorcycle CD 70 Siddique, Yousaf and Ramzan alias Phani, appellants were sitting. They stopped them but they did not stop the motorcycles. Thereafter, they went to Bahawalpur and after two days he came to know that Mst. Kausar Parveen was abducted who was his relative in remote relation. They went to Haji Muhammad and informed him.
- (vi) PW-6 Mukhtar Ahmed is also wajtakar witness of this case, he deposed that on 13.07.2003, at about Maghrib time, he alongwith Muhammad Ilyas was present

at Dahnot. Two Motorcycles passed on the road, one was Honda 125-CC & other was 70/CD. On Honda 125/CC Iqbal, Kasuar Parveen and Mureed Hussain were sitting while on other motorcycle Siddique, Yousaf and Muhammad Ramzan alias Pahani were sitting. They stopped them but they did not stop their motorcycles. After two days, they informed to complainant when they came to know that Mst.Kausar Parveen was abducted.

- (vii) PW-7 Mohsin Raza 184/C deposed that on 25.07.2004, he was posted at P.S. Saddar Dunyapur. On the same day, Maqsood Ahmad 24/HC handed over him two sealed phails and a sealed envelope for their onward transmission to the office of Chemical Examiner, Multan. He deposited the same intact on 26.07.2004.
- (viii) PW-8 is Rahim Bakhsh. His statement relates to the conspiracy and abetment for commission of offence of abduction of Mst.Kausar Parveen, who deposed that accused Muhammad Ramzan is his cousin and Mureed is his son. Sabir Sahoo servant of Haji Muhammad complainant abducted daughter of Muhammad Ramzan accused namely Shameem Mai about one and half year prior to this occurrence. Shameem Mai remained in custody of Sabir accused for one night and thereafter was returned to Muhammad Ramzan through Panchayat. About 10/15 days prior, to this occurrence, Muhammad Ramzan accused came to his home and said that a Panchayat was called in which it was decided that revenge should be taken from Haji Muhammad etc for the abduction of Mst. Shameem Mai. Muhammad Ramzan asked him for help in cash and he refused to give contribution. The contribution was demanded by Ramzan to avenge the insult of the abduction of Shameem Mai. He also said that revenge should be taken from Haji Muhammad and Mumtaz. He told the above said facts to Mumtaz and asked him to be vigilant. When the accused could not get the revenge from Mumtaz then they abducted Bahoo of Haji Muhammad, namely Mst. Kausar Parveen at about 3/4 p.m about one year prior. After occurrence, complainant and Riaz Kanjoo came to him and asked to go alongwith them to accused persons for return of Kausar Mai abductee. They went to Ramzan and he admitted that his son had abducted Kausar Mai abductee and promised for return on following day. Ramzan got suspicious and they went to Dahnot to the house of Muhammad Bakhsh at about 10.00 p.m. at night. Mohammad Bakhsh met them on the Adda on a Motorcycle Honda 125/CC. On their inquiry, he told that accused had come to him but now they had gone, to Allah Bakhsh resident of Basti Ootwalan. They went to the house of Allah Bakhsh, no one met them in his home except a woman. They came back at the house of Haji Muhammad complainant on the same night and told him about the above said facts that Ramzan accused had promised to return of Mst.Kausar Parveen on the following day and then they went to the house of Muhammad Bakhsh at Dahnot who met them at Adda and told that accused had come but had gone to the house of Allah Bakhsh.

He further deposed that conspiracy of the abduction of Mst.Kausar Parveen was hatched by Muhammad Ramzan, Muhammad Siddique, Muhammad Iqbal, Muhammad Yousaf, and Muhammad Ramzan alias Phanni.

- (ix) PW-9 is Muhammad Yousaf. He deposed that on 14.07.2003, he was posted as Secretary, U.C.No. 46 Dunyapur. On the same day, Muhammad Iqbal son of Allah Ditta moved an application for obtaining attested copies of Nikahnama dated 02.01.2003 between Mst. Kausar Parveen and Ghulam Abbas. Application was allowed by Nazim and he issued attested copy of the Nikahnama to Muhammad Iqbal and he put his signatures on application.
- (x) PW-10 Dr. Muhammad Ikram has testified the potency of the appellant Mureed Hussain to perform sexual act. He deposed that on 01.09.2003 he was posted as Medical Officer, THQ, Hospital, Dunyapur. On the same day, the police of P.S. Saddar Dunyapur brought Mureed Hussain son of Muhammad Ramzan caste Sumra resident of Chak No.24/M for his medical examination regarding potency. He examined him and his findings are as under:-

He was a young man, healthy physically and mentally. There is no evidence of diabetes and hypertension. His sec. sex fracture and sexual organ were normal and well developed. Cremastric reflex intact both sides. There is nothing to suggest that Mureed Hussain is physically incapable of performing sexual act.

- (xi) PW-11 Dr.Tomana Khalid, who examined the victim on 18.07.2003, deposed that she was posted as W.M.O at THQ, Hospital Dunyapur. On the same day, Mst. Kausar Parveen wife of Ghulam Abbas aged 20/22 years caste Perhar household resident of Chak No.24/M, Tehsil Dunyapur, District Lodhran was brought through police for her medical examination. She obtained her consent and her thumb impressions and showed willingness to get herself medically examined. The doctor also put her identification marks on Medico-Legal Certificate.

“She was a young lady well oriented in time and place and person. Her B.P.was 110/70 M.M. H.g. Pulse was 80 per minute, a febrile.

No marks of violence was seen on her body.

ON PERVAGINUM EXAMINATION:-

The External Genitaria is normal. No mark of violence.

INTERNAL EXAMINATION OF VAGINA:-

Hymen was absent. Vagina admitting two fingers with difficulty. Uterus anteverted, mobile, in Normal in size. Cervix firm closed. There was tinge of blood on figures after examination of vagina.”

External and Internal vaginal swabs were taken & sent to Chemical Examiner. Report vide Exh.P.E. by the Chemical Examiner states that the swabs were stained with semen.

- (xii) PW-12 Muhammad Pervaiz 108/C-1 is marginal witness to the recovery memo Ex:P/N, under which I.O. took, into possession Nikahnama Ex.P.M.
- (xiii) Abdul Majeed, Inspector, “ the trial Court wrongly mentioned him as P.W-12, as the trial Court had already given this number to Muhammad Parvaz as mentioned above” who is I.O. of the case, he deposed that on 12.12.2003 he was posted as Inspector R.I.B, Multan. On the same day, the investigation of this case was entrusted to him by the order of S.S.P. R.I.B, Multan. On 08.01.2004, he called the parties in his office, heard both the parties and recorded their versions. On 14.01.2004, he visited the place of occurrence. On 12.04.2004, Allah Bakhsh son of Abdul Haq accused appeared before him and he recorded his version in the police file. On 16.04.2004, PWs Riaz and Rahim Bakhsh appeared before him and he recorded their statements under section 161 Code of Criminal Procedure. On 25.04.2004, he recorded the statements of PWs Fida Hussain and Khalid Hussain under Section 161 Code of Criminal Procedure. On 27.04.2004, he produced both the parties before the S.S.P., R.I.B., Multan. On 27.04.2004, he concluded his investigation. On 30.04.2004, D.I.G/Multan Range approved his investigation.
- (xiv) PW-13, Muhammad Khalid, S.I. has partly investigated the case. He deposed that on 06.08.2003, while he was posted as S.I. at P.S. Saddar Dunyapur, the SHO entrusted the investigation of this case to him. On 10.08.2003, he was present at P.S. Saddar Dunyapur. Haji Muhammad complainant produced “Pert Nikah” Exh.P.M. of Ghulam Abbas with Mst. Kasuar Parveen to him. That Nikahnama is Exh.P/M. He took the said document in custody vide recovery memo Ex.P/N. Sardar Muhammad and Pervaiz constables were also present there. They signed the said recovery memo. He also recorded the statements of both the above named constables under section 161 Code of Criminal procedure. On 28.08.2003, he, on secret information, arrested Mureed Hussain accused and interrogated the matter. On the next day, he obtained physical remand of accused. He again obtained physical remand of said accused on 30.08.2003. On 01.09.2003, the accused disclosed that he can get recovered motorcycle, which he used during the occurrence. The accused on the same day led the police party to the place of recovery and got recovered motorcycle bearing No. 4347/MNY in black colour. He took that motorcycle in custody vide recovery memo Ex.P-P. Mohsan Raza 184/C and Nasir Ali 303/C signed the said recovery memo. He also recorded the statements of both these constables under section 161 Code of Criminal Procedure. On 03.09.2003, he prepared incomplete challan and

presented the same to Rustam Ali Malik, the then SHO. Thereafter the challan of this case was called by Crime Branch, Multan.

- (xv) PW-14 is Muhammad Nasir, 303/C. Police Station Saddar Dunyapur. He is marginal witness to the recovery memo, Exh.PF. He deposed that on 01.09.2003, he was posted at P.S. Saddar Dunyapur as constable. The accused Muhammad Ramzan got recovered motorcycle Honda 125 CC No.4347/MNY of black colour model 2001 in the presence of Mohsan Ali 184/C. He signed the recovery memo Ex.PF as a recovery witnesses.
- (xvi) PW-15 is Ghulam Mohi-ud-Din. He deposed that on 14.07.2003, he was posted at P.S. Saddar Dunyapur as Sub-Inspector. On the same day, at 11.15 p.m. he was on patrolling. The complainant recorded his statement. On 15.07.2003, he prepared site plan Exh.PD and recorded statements of two PWs under section 161 Code of Criminal Procedure. On 18.07.2003 abductee Mst. Kasusar Parveen alongwith Haji Muhammad, father-in-law of the abductee appeared before him and recorded her statement under section 161 Code of Criminal Procedure and statements of witnesses namely Muhammad Ilyas, Mukhtiar Ahmad were recorded. On 22.07.2003, he arrested accused Muhammad Yousaf and sent him to judicial lock up on 23.07.2003. On 27.07.2003, accused Muhammad Iqbal, Muhammad Ramzan and Mureed Hussain appeared before him after pre-arrest bail and joined the investigation. On 04.08.2003, Muhammad Siddique accused on pre-arrest bail joined the investigation and appeared before him. After that this witness was transferred from the P.S. Saddar Dunyapur. Maqsood Ahmed, ASI deposed that on 14.07.2003, he was posted at P.S. Saddar Multan as Moharer. On the same date he received complaint by Ghulam Muhammad without initial on the same. He registered the same as Ex.PA/1, which bears his signatures and handwriting. On 18.07.2004, two "Shishin" (bottles) and one parcel delivered to him by I.O. for keeping the same in custody. He further delivered the same to Muhammad Mohsin/C on 18.07.2003 to send to chemical examiner, Multan.

5. The learned trial Court after close of the prosecution evidence recorded statements of the accused under Section 432 Code of Criminal Procedure. All the accused pleaded innocence. In reply to question No.7 and 8.

"why this case made against you and why the PWs have deposed against you"?

The accused Muhammad Yousaf stated as follows:-

"There was a dispute regarding money and I was involved in this case falsely with the ulterior that I shall not claim the amount."

"All the PWs are inter-se related with each other. I have previous litigation with Rahim Bakhsh PW and Muhammad Aslam son of Muhammad Bakhsh, Ibrahim son of Allah Yar."

In reply to the question No.9 and 10, why this case made against you?

And why PWs deposed against you. Appellant Mureed Hussain stated as under :-

“There was litigation between accused Muhammad Siddique son of Jind Wada on a water course with Muhammad Shafi etc. A quarrel took place in this regard. I with Muhammad Ramzan son of Ghulam Qadir helped Muhammad Siddique etc due to this reason, I was involved in his case on the basis of previous enmity.

All the PWs are inter-se related. I have previous litigation with Rahim Bakhsh PW and Muhammad Aslam son of Muhammad Bakhsh, Ibrahim son of Allah Yar.”

Appellant Muhammad Ramzan replied in question No.7 and 8, why this case made against you? And why the PWs deposed against you?

His reply is reproduced as under:-

“There was a dispute between Siddique son of Jind Wada on a water course with Muhammad Shafi etc. The quarrel took place in this regard. I alongwith Murreed helped Muhammad Siddique etc. due to this reason, I was involved in this case on the basis of previous enmity.”

“All the PWs are inter-se related. I have previous litigation with Rahim Bakhsh PW and Muhammad Aslam son of Muhammad Bakhsh, Ibrahim son of Allah Yar.”

Appellant Muhammad Iqbal replied in question No.7 and 8, why this case made against you? And why the PWs deposed against you? His reply is also reproduced as under:-

“I was elected as Chairman User Zakat Committee by replacing Haji Muhammad complainant due to this reason; he developed enmity and roped into this false case.”

“All the PWs were inter-se related. I have previous litigation with Rahim Bakhsh PW and Muhammad Aslam son of Muhammad Bakhsh, Ibrahim son of Allah Yar.”

Similarly appellant Muhammad Siddique replied in question No.7 and 8, why this case made against you? And why the PWs deposed against you? His reply is reproduced as under:-

“There was a dispute and litigation with the relative of Haji Muhammad. Due to this reason and on the basis of previous enmity, I was involved in this case”.

“All the PWs are inter-se related. I have previous litigation with Rahim Bakhsh PW and Muhammad Aslam son of Muhammad Bakhsh, Ibrahim son of Allah Yar.”

6. The learned trial Court after hearing arguments of both the parties, delivered the impugned judgment of conviction and sentence against the appellants as detailed in para No.1 ante. Hence this matter before this Court.

7. Learned counsel appearing for Mureed Hussain appellant has contended that the evidence laid before the learned trial court was not sufficient to justify the commission of offence; it is established on the record that the complainant was not present at the spot when accused allegedly took away Mst. Kausar Parveen, abductee, and abductee was not recovered from the possession of appellants; there are contradictions in the statements of the witnesses regarding the details of the incident particularly at the point of abduction and recovery, even otherwise the complainant cannot be termed as truthful witness as he lodged the complainant as hear-say witness. It is further argued by learned counsel for the appellants that enmity is admitted fact between the parties. As per statement of PW-8 appellant Muhammad Ramzan allegedly asked for help for taking revenge from Haji Muhammad etc for abduction of his daughter Mst. Shameem Mai. He further argued that there was dispute of land between Mst. Kausar Parveen and complainant as Mst. Kausar Parveen owned land and she was married with a young boy of 14 years. Due to transfer of land by Mst. Kausar Parveen to her father, her father-in-laws was angry with her and she had been away for some time for residing with her parents. The complainant became angry with the abductee, who left the house and remained at some unknown place with her free will; medical evidence was of no importance since the alleged victim was a married lady.

8. Mr. Nazir Ahmed Bhutta, learned counsel for appellants Muhammad Yousaf, Muhammad Ramzan, Muhammad Iqbal and Muhammad Siddique argued that trial of this case has been concluded after enforcement of Women Protection Act (VI of 2006), therefore the trial of this case is not in accordance with the well settled principal's of law; and judgment of trial court is result of misreading and non reading of the evidence and learned Additional Sessions Judge, has illegally/unlawfully passed this judgment and convicted and sentenced the appellants. Lastly learned counsel prayed that this case may be remanded to the learned trial court for afresh trail. He also pleaded for bringing additional evidence on record regarding dissolution of marriage suit instituted by the alleged victim, at Family Court Mailsi on 14.7.2003.

9. Learned counsel for the State as well as learned counsel for the complainant, on the other hand opposed the appeals and supported the judgment under challenge.

10. We have heard learned counsel for the parties, have gone through the record with the able assistance of the learned counsel for the parties and have also given anxious consideration to the submissions made at the bar by the learned counsel for the parties. We hold that there was no sound evidence which could justify the Court below to convict the appellants, as there are material contradictions in the statements of prosecution witnesses about abduction. Except the solitary statement of the victim nothing was available on record to show that she was subjected to zina-bil-jabr by the accused; old enmity existed between the parties and allegations against accused were not based on truth. In rape cases testimony of the victim and her medical examination are important pieces of evidence and conviction can be based on the solitary statement of the victim, if the same is corroborated with other independent evidence, but in this case no independent witness and confidence inspiring evidence has been produced by the prosecution in-respect of zina-bil-Jabr and story set up by the victim is not appealing to reason. Medical report also does not indicate any signs of violence or resistance on the body of

victim. Testimony of prosecution witnesses is suffering from omissions, improvements, and exaggerations, which rendered prosecution case highly doubtful.

11. Forceful abduction on a motor cycle, with three persons sitting, the driver himself holding a pistol in his hand driving with one hand, while himself sitting on petrol tank, is inconceivable, particularly when two namely Muhammad Aslam and Muhammad Ibrahim, near relatives are cited to be the eye witnesses, themselves challenging the abductors and then retreating, and the alleged victim does not do anything at all in this part of the event. She is stated to have been moved at public places, openly, and she did nothing at all to raise any alarm. In her deposition and cross-examination, she alleged that she was intoxicated and was not in senses to know as to who did what and then also alleges that all the accused committed the offence of zina, whereas the learned trial court has acquitted some of those accused. The story of escape of Kausar Parveen PW-2, also does not inspire confidence. The absence of her parents in the entire process of search, police investigation and Court proceedings casts doubt on prosecution story.

12. In view of above clear position of the case, it will not be in the interest of justice to remand the case just for nothing, and let those suffer who have been involved in it due to other factors, including enmity.

13. So far question of jurisdiction is concerned, the FIR was lodged on 14.7.2003 under sections 16 Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979, charges were framed on 22.12.2004 under sections 16, 10(3) of the Offences of Zina (Enforcement of Hudood) Ordinance VII of 1979 and under section 368/109 of Pakistan Penal Code before coming into effect of the Protection of Women Act (VI of 2006). Even otherwise, these offences, obviously and inherently, fall under 'hudood' as described in the Quran and the Sunnah and also the relevant legal definitions and provisions. Hudood matters as such are within the jurisdiction of this Court, under Articles 203DD of the Constitution of Islamic Republic of Pakistan.

14. After having sifted grain from the chaff and after having applied independent judicial mind, this Court is of the considered view that the prosecution has failed to prove its case against the appellants beyond any shadow of doubt to sustain conviction. The prosecution case is full of doubts and on the basis of such a shaky evidence, the conviction and sentence awarded to the appellants cannot be maintained because the same has not come through unimpeachable sources, is untrustworthy, unreliable and cannot stand the test of judicial scrutiny. Resultantly, these appeals are allowed by setting aside the impugned judgment passed by the trial Court on 29-10-2009 and the appellants are acquitted from the case. These are the reasons of our Short Order dated 26-11-2010.

Islamabad the,
26th November, 2010
Abdul Majeed/-

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE AGHA RAFIQ AHMED KHAN CHIEF JUSTICE
MR. JUSTICE SHAHZADO SHAIKH

JAIL CRIMINAL APPEAL NO. 61/I OF 2009

Naveed Shah son of Ijaz Shah
Caste Syed resident of Jandanwala
Tehsil Kharian District Gujrat

.... Appellant

Versus

The State

.... Respondent

Counsel for appellant

....

Mr. Tariq Khushnood Qureshi,
Advocate

Counsel for the State

....

Ch. Muhammad Sarwar Sindhu,
Additional Prosecutor General
Punjab

FIR No. Date and
Police Station

....

No. 527, dated 27.09.2005
P.S. Saddar Kharian District
Gujrat.

Date of Judgement of
trial court

....

27.04.2009

Date of Institution

....

08.05.2009

Date of hearing

....

01.12.2010

Date of decision

....

01.12.2010

JUDGMENT:

SHAHZADO SHAIKH, J.—This jail appeal filed by appellant Naveed Shah is directed against judgment dated 27-04-2009 delivered by learned Additional Sessions Judge, Kharian, whereby he was convicted under Section 11 of the Offence of Zina (Enforcement of Haddood) Ordinance, 1979, and sentenced to Imprisonment for life and with a fine of Rs. 50,000/- or in default to further undergo six months Simple Imprisonment. He was further convicted under section 10(3) of the Offence of Zina (Enforcement of Haddood) Ordinance, 1979 with sentence to Rigorous Imprisonment for ten years. He was given benefit of section 382-B of the Code of Criminal Procedure.

2. Brief facts, narrated by the complainant Mst. Farah Naz in the FIR are that on 27.09.2005, when her daughter Nafisa Tariq aged 13 years was present in the house, and at about 'deggar wela' (evening time) M/s. Naveed son of Ijaz Shah, Budra Bibi wife of Abid Shah deceased, residents of Jandanwala, Tehsil Kharian, came to her house. Naveed being an agent had promised to send abroad her husband and in this way he was on visiting terms in her house. According to complainant Naveed Shah and Budran Bibi told them that there was a birth day of son of Javed Shah and on the said pretext they took Nafeesa Tariq, her daughter, alongwith them and that when Nafeesa Tariq did not return after some time, she along with Sajid Mehmood son of Muhammad Hussain, real brother of her husband, in order to bring back Nafeesa Tariq, went to village of Naveed Shah and Budran Bibi in Jandanwala and found that house of Javed Shah was locked. On interrogation, it appeared that there was no birth day in his house. She further alleged in the complaint that when they returned to Adda Kharian, they saw a white coloured vehicle, in which "Naveed Shah, Shah Safeer, Javed Shah sons of Ijaz Shah and Budran Bibi, wife of Abid Shah, caste Syed, residents of Jandanwala, Tehsil Kharian were forcibly taking away Nafeesa Tariq, daughter of the complainant while abducting her towards Lahore side. The complainant also alleged in the complaint that the accused abducted Nafeesa Tariq in order to commit Zina-bil-jabr with her and they also deceitfully abducted her. According to the complainant, she had been demanding return of her daughter, but the accused refused to deliver her back, hence she prayed for proceeding against them and for recovery of her daughter.

3. After having completed legal formalities, challan was submitted against the accused before the learned trial Court of competent jurisdiction and thereafter the charge was finally framed against the appellant on 24-10-2008, which was denied by him and he claimed to be tried.

4. The prosecution in order to prove the guilt of the appellant produced 07 witnesses. PW-1, Iftikhar Hussain, Head constable was handed over one sealed parcel containing swabs by the Investigation Officer of the case, who delivered the same to Kaleem Anjum constable for its delivery to the office of Chemical Examiner, Lahore. PW-2, Kaleem Anjum constable was handed over two sealed parcels pertaining to this case for onward transmission to the office of Chemical Examiner, Lahore, which he deposited in the said office in tact. This witness also

executed non-bailable warrants, as well as the proclamations issued against accused persons namely Imran Shah, Zahid Shah, Javed Shah and Safeer Shah involved in this case. The reports on the reverse of non-bailable warrants Exh.PC/1 to Exh.PF/1, as well as on the proclamations Exh.PG/1 to Exh.PJ/1 are in the hand of witness, bearing his signatures. PW-3, Mst.Saima Walayat constable escorted Mst.Nafeesa Tariq to Civil Hospital, Kharian, for her medical examination and after the said examination, the lady doctor handed over to her a copy of 'Fard' report, a sealed parcel and a sealed phial, which she presented before Muhammad Anwar ASI, who took the same into possession vide - recovery memo Exh.PC, attested by the witness, PW-4, Riaz Ahmad. ASI on receipt of written application from Mst. Farah Naz complainant Exh. PB, drafted formal FIR Exh.PB/1, which is in the hand of witness, bearing his signatures. PW-5 Lady Dr. Adeeba Farhat WMO medically examined Nafeesa Tariq brought before him by Muhammad Anwar ASI and according to her observations "there was no mark of violence present and that the hymen had been absent." Exh.PA is the correct carbon copy of the medico-legal report, which was in the hand of lady doctor, bearing her signatures.

5. PW-6 Mst. Nafeesa Tariq daughter of Tariq Mehmood is victim/abductee in this case, who while appearing in the Court stated on oath that on 21-09-2005 at about 'deggar wela', she alongwith her mother Farrah Naz and her uncle Sajid Mehmood were present in their house, while at that time Naveed Shah accused alongwith a lady came to their house and they stated to her mother that on that day was the birth day of son of Javed Shah which was to be celebrated and they asked her to send the children for participation in the same. She stated further that then her mother sent her alongwith them for participation in birth day, but the children were not present at home, at that time. She stated further that when they reached there in the house of Javed Shah in village Jandanwala, there was no programme of any birth day there. According to her Naveed Shah, Safeer Shah and Javed Shah were present there alongwith a white coloured car. She added further that all the three above named accused alongwith a woman forcibly boarded her in the car and took her to Dinga, where there were some other persons present and all of them then took her to Lahore in a hotel while they returned leaving her and Naveed Shah there. The witness further stated that Naveed Shah kept her in the said hotel for about four days and kept on committing rape with her forcibly. She further stated that then Naveed Shah took her to Multan and kept her there for four days and forcibly committed rape with her and then he took her to Dinga in a car and kept her there for about one month and 18/20 days. According to the witness, Shah Safeer, Naveed Shah and 2/3 other persons had been committing zina with her forcibly and that getting a chance she ran away from the house and met a person namely Qazi Ameen in the street and narrated him story of grievance to her, who brought her to the P.S.Kharian. According to her, she made statement under section 161 Cr.P.C. before the Investigation Officer, then Investigation Officer produced her in the court of Ilaqa Magistrate at Kharian, where her statement under section 164 Cr.P.C. was recorded. She further stated that with her consent she was got medically examined through the police by a lady doctor at Kharian.

6. Muhammad Anwar, SI, PW-7 is the investigating officer of this case, who while appearing in the court gave his detailed statement regarding his investigation in this case.

Thereafter, statement of the accused was recorded under section 342, Code of Criminal Procedure, in which he pleaded his innocence.

7. After taking into consideration all aspects of the case and hearing the arguments advanced by both the parties, learned trial court convicted and sentenced the appellant as mentioned above. Hence this appeal.

8. We have heard Mr. Tariq Khushnood Qureshi, Advocate, learned counsel for the appellant, Ch. Muhammad Sarwar Sindhu, Additional Prosecutor General for the State and perused the record of the case very carefully.

9. Learned counsel for the appellant submits that case against the appellant is totally false, that there is delay of 6 days in lodging of FIR. The abductee was not recovered directly from the accused and Qazi Ameen was not produced as witness by the prosecution who brought the abductee to police station. PW-2 Kaleem Anjum, constable has clearly stated in his deposition that he deposited two sealed parcels pertaining to this case to the office of Chemical Examiner, Lahore but report of Chemical Examiner in this respect is not available on the record. Lady Dr. Adeeba Farhat, medically examined Mst. Nafeesa Tariq and clearly mentioned in her observation that there were no marks of violence on the body of the victim. The complainant and the eye witness are close relative of the victim. The victim remained with the accused for more than one month at different places, and travelling through public places but she did not agitate and raise hue and cry at any place.

10. While on contrary the learned Additional Prosecutor General for the State submitted that the prosecution has proved its case against the accused and the appellant has rightly been convicted and sentenced by the trial Court and prayed for dismissal of the appeal.

11. We have thoroughly perused the evidence brought on the record in the light of submissions made by learned counsel for the appellant as well as learned Additional Prosecutor General for the State. It transpires that the case of prosecution mainly rested on the statement of victim PW-6 Mst. Nafeesa, victim, her deposition does not provide sufficient nexus of the appellant/accused with the commission of the offence as her statement has not been corroborated by any independent witness and does not inspire confidence. Muhammad Anwar, SI has not properly investigated the case as per police rules. MLR was prepared by PW-3 Lady Dr. Adeeba Farhat, who stated that there was no mark of violence present on body of the victim, she obtained three vaginal swabs for sending to the chemical examiner, Lahore, but, report of chemical examiner is not available on the record which would justify adverse inference against prosecution case. Mst. Farah Naz, complainant who reported the matter to the police after 06 days of occurrence with consultation/deliberation, was not produced by the prosecution as a PW. Qazi Amin who brought the victim to the police station was also not produced as witness by the prosecution. Moreover, it is to be appreciated that according to complainant that when they returned to Adda Kharian, a public place, they saw a white colour vehicle in which the accused forcibly was taking away Nafeesa Tariq but no one has been produced as a PW from the said Adda by the prosecution. Calculating time from evening when

the victim was taken from her house, and the whole process of reaching the villages/Javed's Shah's house, and coming back to the 'adda', it must be night time, but no details have been disclosed as to how they were able see and recognize all in a vehicle, suddenly. In the circumstance the case of the prosecution is not free from doubts and the appellant/accused is entitled to get the benefit of doubt thereof.

12. Consequently for the reasons stated above this appeal is allowed. Conviction and sentence of Naveed Shah son of Ijaz Shah are set aside and he is acquitted from the charge. He is in jail and he shall be released forthwith if not wanted in any other custody case. These are the reasons of our short order dated 01-12-2010.

Announced at Islamabad

on 02.12.2010

Abdul Majeed/-

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT:

**MR. JUSTICE SYED AFZAL HAIDER
MR. JUSTICE SHAHZADO SHAIKH
MR. JUSTICE DR. MAHMOOD AHMAD GHAZI**

JAIL CRIMINAL APPEAL NO. 121/I OF 2009 L.W.

Shah Rahman s/o Habib-ur-Rehman
resident of Baghicha Dheri Mardan Appellant

Versus

The State Respondent

CRIMINAL MURDER REFERENCE NO. 15/I OF 2009

The State Versus Shah Rahman

Counsel for appellant Mr. Arif Ali Zafar Chohan,
Advocate

Counsel for the State Muhammad Sharif Janjua,
Advocate

FIR No. Date and
Police Station No. 379, dated 16.04.2006
P.S. Shahbaz Ghari Mardan

Date of trial court 30.07.2009

Date of Institution 06.10.2009 & 20-11-2009

Date of hearing 18.05.2010

Date of decision 18.05.2010

JUDGMENT

SHAHZADO SHAIKH, J.— The learned Additional Sessions Judge-II. Mardan, vide her judgment dated 30th July, 2009, convicted the appellant namely Shah Rehman son of Habib-ur-Rehman in Hadd case No.4, under section 364-A and 376 Pakistan Penal Code and sentenced him to death and to pay an amount of Rs. 100.000/- as compensation to the victim under section 544-A Criminal Procedure Code recoverable as arrear of land revenue. The appellant has filed this appeal against the said judgment through Superintendent, Central Prison, Peshawar.

2. Reference for confirmation of death under section 374 Code of Criminal Procedure was sent by learned trial Court on 30th July, 2009 which was registered as Criminal Murder Reference No. 15-1 of 2009. The appeal as well as the Reference will be disposed of through this judgment.

3. Precisely, the case as unfolded in the FIR No 379 dated 16.04.2006, Police Station Shabazgarh Exh PA lodged by complainant Mst.Rubi aged about 8/9 years, is that on the day of occurrence early in the morning, she was going to bring the milk from Gujrano Koti while on the way the accused Shah Rehman son of Habib-ur-Rehman resident of Baghicha was standing there he started abusing her. She started running from him in the field of wheat crops, he also chased her and by getting hold of her the accused forced her on the ground and he turned out her shalwar and his own shalwar and raped her. On her hue and cry he put his hand on her mouth to silence her. So that she could not make a noise and thereafter he left her in the wheat crops. She turned to her house and told the story to her parents. She charged the accused for the above-mentioned offence. She alongwith her father went to the police station for the registration of the case.

4. The investigation of the case was carried out by the police and after having completed legal formalities, found the accused guilty and sent a report in the Court under section 173 of the Code of Criminal Procedure requiring the accused to face trial. As a consequence thereof the charge firstly under section 364-A of the Pakistan Penal Code and secondly under section 10 of Ordinance VII of 1979 was framed against the accused Shah Rehman on 13-12-2006. He denied the charge and claimed to be tried. The prosecution, in order to prove its case produced 12 witnesses whereas the accused in his statement recorded under section 342 Code of Criminal Procedure pleaded not guilty. The gist of evidence of witnesses for prosecution is as follows:-

- (i) PW-I Shafiq-ur-Rehman, Dispenser RHC Shabazgarhi deposed that the victim was brought by police to hospital at 12.30 P.m. but the doctor was not present therefore he referred her to Mardan Hospital vide Exh.PW.I/1.

- (ii) PW-2 Pervaiz Gul is marginal witness of two recoveries memos Exh. PW. 2/1 vide that four blood stained shalwars of victim complainant taken into possession by I.O. Exh.P1 to Exh.P4, as well as vide Exh. PW2/2 a white colour shalwar, having blood stained and semen was taken to possession by I.O.Exh.P5.
- (iii) PW-3 Alamzeb, he has taken the parcel No.1 containing clothes of victim and parcel NO.2 containing shalwar of the accused and produced the same to FSL before the concerned officials.
- (iv) PW-4 is Ibrahim, deposed that he was marginal witness of the pointation memo Exh.PC the same is in respect of places of occurrence.
- (v) PW-5 Hamsaid Ali deposed that in his presence as well as in presence of PW Afsar Khan the I.O. cut wheat crop from the place where the accused Shah Rehman committed offence and sealed the same into parcel and affixed his insignia "LQ". The recovery memo is Exh. PD.
- (vi) PW-6 Sher Hussain SHO/Inspector deposed that after completion of investigation he submitted complete challan against the accused on 21.4.2006.
- (vii) PW-7 Lady Dr. Seema Sharif deposed that she examined a 9 years old female child Mst. Rubi daughter of Afsar Khan a victim of rape on 16.4.2006. The patient was brought to OPD. After examining the above patient lady doctor made following observations:-

"The above mentioned female child aged 9 years is full conscious and is Criminal case of rape.
O/E, P/V bleeding P/V ++ Hymen absent.
Perinal tear and bruised."

She deposed that medio-legal report Exh.PW.7/2 was in her own hand writing and it bears her signature.

- (viii) PW-8 is Naeem Shah Khan, SI, deposed that he had recorded the complaint formally as FIR Exh.PA.
- (ix) PW-9 Mst. Rubi is complainant of this case. Keeping in view her tender age some rational questions were asked and she replied confidently therefore she was held a competent witness and allowed to record her detail of statement. She reiterated with necessary details of the occurrence which has already been discussed in second para of this judgment.
- (x) PW-10 is Liaq Mohammad, SI investigation officer of this case. He deposed that during the days of occurrence he was posted at P.S. Shabazgarh. He interrogated the accused, recorded his statement under section 161 Criminal Procedure Code, get two days physical remand of accused. Accused made pointation of place of occurrence. He prepared site plan Exh.PB on 17-4-2006. He chopped portion of

wheat crop from place of occurrence and prepared its recovery memo. He produced the accused before doctor for his potency test. He received FSL report and after completion of the investigation he handed over the case file to SHO for submission of challan

- (xi) PW-II Gohar Ali ASI is the first investigation officer of this case. He deposed that on entrustment of investigation in the instant case he proceeded to the spot. Constable Zahid produced the medical report of victim alongwith her blood stained clothes consist of 4 shalwar. He also took into possession one white color shalwar contained blood and semen and sealed into parcel. He prepared recovery memo and after arrest of accused handed him over to I.O. Liaq Muhammad, S.I. He sent the blood stained clothes of the victim and shalwar of accused for Chemical Examination vide application Exh.PW.II/I.
- (xii) PW-12 Afsar Khan is father of the victim (female child). He deposed that on the day of incident he was at home when his daughter Mst.Rubi went to milk seller's house to fetch milk, when she returned crying and bleeding badly from her sensitive part and she disclosed that Zina-bil-Jabr was committed with her by the accused. He took his daughter to police station where she lodged her report, from there she was taken to Balagarhi hospital and further she was referred to DHQ Hospital where she was admitted. The police prepared site plan and taken into possession few plants of wheat crop in his presence and sealed into parcel. Recovery memo was prepared in his presence, which correctly bears his signature and is Exh.PD.

5. The statement of the appellant was recorded under section 342 Code of Criminal Procedure wherein he stated that he was innocent and was involved in this case falsely. He stated:—

“No independent PWs have deposed against me”.

Niether appellant appeared as a witness in his defence under section 340(2) Code of Criminal Procedure nor did he produce any defence witness during trial.

6. After the conclusion of trial, learned trial Judge after appraising the case of the prosecution found the appellant guilty of the offence and thus convicted him and sentenced him as mentioned in detail above.

7. The learned counsel for the appellant Mr. Arif Ali Zafar Chohan raised an objection that the occurrence of instant case was took place before amendment in Criminal Law, Protection of Women Act 2006 and this Criminal Law was not in force at that time, hence trial Court wrongly convicted the accused under section 364-A and 376 Pakistan Penal Code and sentenced him to death. The trial Court should have framed the charges in this case under Hudood Law and not under Criminal Law

Amendment Protection of Women Act 2006. He further contended that as the conviction of accused was recorded under section 364-A and 376 Pakistan Penal Code, this Court has no jurisdiction to hear this case. It was than contended that investigation of the case had not conducted properly The lady doctor did not mention any marks of identification of the victim nor the name of victim girl in MLR . In the light of the opinion given by lady doctor it was strenuously argued by the learned counsel for the appellant that act of Zina-bil-Jabr, spelled out as per expert opinion, did not connect the appellant with the commission of offence as the same has no legal value. Report of Chemical Examiner was also defective as the date of receipt and issue of certificate was not properly mentioned and the name of person who deposited the samples in FSL was not incorporated in the report. The name of official who received these samples in FSL is also not mentioned in report. Hence this report is not in accordance with law. There are many contradictions in the statement of PWs. Recoveries of incriminating articles are fictitious. He further contended that the evidence produced by the prosecution has been substantially misconstrued and mis-applied by the learned trial Court in as much as; commission of alleged offence has not been proved beyond shadow of any reasonable doubt. He argued that the appellant, in view of the well settled principles of safe administration of Criminal Justice envisaged by the Islamic Law and Juris-prudence, is entitled to earn acquittal on account of inherent doubt of substantial nature in the prosecution case.

8. On the other hand learned counsel for the State argued that charge was framed against the appellant on 13-12-2006 under section 364-A Pakistan Penal Code as well as under section 10 of the offence of Zina (Enforcement of Hudood) Ordinance, IV of 1979, which has been omitted vide Protection of Women Act 2006 and section 375 and 376 have instead been inserted in the Protection of Worm Act 2006.therefore, the contention of learned counsel for the appellant in this regards has no value and is not worth consideration. The recovery of incriminating articles is fully proved in the light of evidence on record as the recovery witnesses have clearly proved the recovery in their statement. The FIR after the incident was promptly lodged on the same date. Mst. Rubi victim aged 8/9 years was produced by the police before the lady doctor for medical examination, who testified in the MLR that Mst. Rubi daughter of Afsar Khan aged about 8/9 years (female),was produced by the police for her medical examination and it has been noted after examination that there was bleeding P/V ++,hymen absent, pernia tear and bruised. On the basis of the above findings she opined that rape has been committed on the above mentioned girl. The Chemical Examiner's Report was produced, which shows that the packets with intact seals containing two samples one consisting of four shalwars, of different colors and another consisting shalwar of white color, were found to have been stained with semen and blood of human origin. Therefore as per opinion of the Chemical Examiner and the lady doctor it has successfully been proved that the victim girl was subjected to sexual intercourse as the lady doctor clearly stated in her cross-examination that it was a case of rape. Learned counsel for the State further contended that it was found by Lady Doctor that the hymen was absent; she also found that due to profuse bleeding the availability of swab

was not possible in addition to other observations of examining medical officer mentioned above. Therefore, it cannot be said that the victim girl was not subjected to intercourse. The findings recorded by lady medical officer of the victim coupled with the report of Chemical Examiner proved the fact upto the hilt that the girl subjected to sexual assault to which no exception can be taken. The evidence of lady medical officer could not be discredited or impeached on cross-examination and there was no material to rebut such evidence. All these facts abundantly lend support to the version of prosecution witnesses specially the father of the minor victim, who would not in any case prefer to put a permanent stigma upon his family honour by making a false allegation of such a nature against the very person of her minor daughter.

9. We have read the entire prosecution evidence, statement of appellant recorded under section 342 Code of Criminal Procedure and other relevant material available on the record. We have heard the learned counsel for the appellant and learned counsel for the State and have perused the record with their assistance. The contentions put forth by the learned counsel for the appellant and the learned counsel for the respondent (State) have been considered carefully in the light of the record and the impugned judgment passed by the learned trial Court. We have carefully examined evidence of actual witnesses which has been scrutinized and appraised in depth by the learned trial Court in its true perspective and no part of incriminating evidence has been misapplied by the learned trial Court. The evidence of the prosecution witnesses on all the material particulars is consistent, straightforward, convincing and fit in the circumstances of the case to which no exception can be taken.

10. The contention of the learned Counsel for the appellant about jurisdiction of this Court is untenable, as the charge was framed against the appellant on 13.12.2006, under section 364-A Pakistan Penal Code as well as under Section 10 of the Offence of Zina (Enforcement of Hudood Ordinance, IV of 1979).

11. We do not find any irregularity in the investigation, which may render it improper, as contended by the learned Counsel for the appellant. So far marks of identification of the victim girl in MLR are concerned, she has been fully identified during entire process of investigation and evidence. There is no any iota of doubt about her person and the accused/appellant was fully connected with the commission of the heinous crime against the victim minor girl. Trivial clerical and technical squabbles cannot be allowed to mar the entire process of justice.

12. Taking into consideration the evidence discussed herein above we are of the view that un-impeached statement of PW-9, Rubi the victim girl child, and all other PWs, particularly PW-10 Afsar Khan father of the victim, coupled with the medical evidence and report of FSL, leaves no room to doubt the commission of the crime under sections 364-A and 376 Pakistan Penal Code by accused/appellant. The trial Court while taking into consideration number of circumstances including FIR, which was recorded promptly, held that there was no mitigating circumstance for the award

of lesser punishment therefore, we are also not inclined to interfere with the same. Accordingly we find ourselves in agreement with the finding of the trial Court which is based upon incriminating evidence available on the record and does not suffer from any impropriety or illegality making any room for interference. The conviction and sentence awarded to the appellant is upheld and the appeal is dismissed.

The Murder Reference No. 15/1 of 2009 is accordingly answered in the affirmative.

Announced at Islamabad

On 18th May, 2010.

Abdul Majeed/**

IN THE FEDERAL SHARIAT COURT
(Appellate / Jurisdiction)

PRESENT

MR. JUSTICE DR. MAHMOOD AHMAD GHAZI

CRIMINAL APPEAL NO.109-I-2009

Muhammad Saleem S/o Muhammad Shamim,
R/o Dagia, Tehsil Totalai, District Buner. --- Appellant

Versus

The State --- Respondent

Counsel for the Appellant --- Mr. Muhammad Usman Khan
Turlandi, Advocate.

Counsel for the State --- Mr. Muhammad Sharif Janjua,
Advocate for the State.

No. & date of F.I.R. --- No.233, dt.14.05.2006
Police Station P.S Totalai District Buner

Date of judgment of --- 12.08.2009
the trial court

Date of institution of --- 27.08.2009
the appeal

Date of hearing of --- 21.05.2010
the appeal

Date of decision --- 7.6.2010

JUDGMENT

DR. MAHMOOD AHMAD GHAZI, J.—Through this criminal appeal Appellant Muhammad Saleem son of Muhammad Shamim has challenged the judgment dated 12.08.2009 passed by the learned Additional Sessions Judge/Additional Zila Qazi/Special Court Judge Buner, whereby he has convicted the Appellant under section 10(3) of Offence of *Zina* (Enforcement of Hudood) Ordinance, 1979 and sentenced him to ten years Rigorous Imprisonment.

2. Brief facts of the case are that on 14.5.2006 one Wali Khan lodged a complaint with police station Totai, District Buner, stating therein that his brother Sher Nawas divorced his wife Mst. Sardarah and expelled her from his house after she was blamed to have illicit relations with accused Muhammad Saleem. At the intervention of the respectables of locality, the matter was compromised and settled after receipt of payment of an amount of Rs.800,000/- by Sher Nawas as compensation. After this Sher Nawas desired to bring her back as his wife whereupon his brother, the complainant was annoyed with him. Wali Khan, the complainant reported the matter to the police on the basis of which a Report was lodged at Serial No.6 of *Roznamcha* dated 14.5.2006 and investigation was ensued under section 156(3) of Code of Criminal Procedure. During the enquiry statements under section 161/164 of the Code of Criminal Procedure were recorded. Thus, the statement of the victim/P.W-2, divorced woman namely Mst. Sardarah was recorded by the court wherein she made the allegation of *zina-bil-jabr* to Muhammad Saleem. She further stated that after being divorced by her husband and on account of the compromise, a sum of Rs.800,000/- was paid to her husband by the accused and the Nikah of a minor daughter of Noor-ul-Amin as *sawarah* (compensatory marriage) with one Tayyab, the nephew of Sher Nawas Khan was also solemnized as a part of the compromise. Mst. Sardarah has also lodged a complaint against her former husband namely Sher Nawas Khan as well as against Muhammad Saleem who had effected a compromise to the detriment of her interests. The statements of the respectables of the locality were recorded under section 161/164 of the Code of Criminal Procedure. The *Nikahkhwan* namely Molvi Umar Said verified the contents of *Nikah* performed between minor children. His statement under section 161/164 of the Code of Criminal Procedure was also recorded, hence this report.

3. After completion of investigation, challan was submitted to the court on 10.5.2008. Charge was framed by the learned trial court on 13.10.2008 against the accused to which the accused did not plead guilty and claimed trial.

4. The prosecution produced as many as 8 witnesses in all to prove its case. Thereafter statement of the accused Muhammad Saleem was recorded under section 342(2) of the Code of Criminal Procedure wherein he denied the allegation leveled against him. Neither he opted to make his statement under section 340(2) of the Code of Criminal Procedure nor produced any witness in his defence.

5. On the basis of evidence recorded by learned trial court the Accused/Appellant has been convicted and sentenced as mentioned above in para 1.

6. I have carefully perused the record of the case and heard the submissions made by the learned counsel for the Appellant. The case of the Appellant rests on following grounds:

- i. Delay in the lodging of FIR by more than two months.
- ii. The absence of medical evidence to establish the guilt of the Appellant.
- iii. The complaint was not filed by the victim, her father or her husband. It has been filed by the younger brother of the husband of the victim (*Dewar*).
- iv. The Appellant also claims alibi saying that he was serving abroad in U.A.E. and was not present in the country when the alleged crime took place.

7. It was contended on behalf of the appellant that in view of the fact that he was working in U.A.E. and earning good livelihood the party involving him in the case wanted to blackmail him in order to extract money from him. However, the Appellant denies the payment of any amount to the husband of the victim by way of compromise as contended in the FIR.

8. I have carefully examined these grounds. As to the delay in the FIR it has been contended that it was due to social pressure of the people of the locality. Notables of the areas tried to effect a compromise between the parties. The details of these efforts have been narrated in the impugned judgment on pages 15-17. It is significant to note that this delay was condoned by the learned Izafi Zilla Qazi.

9. It was contended by the Appellant that he was not examined by any medical doctor to establish his potency and ability to commit the crime of rape. This contention is however unfounded in view of the medical report placed at page 59(a) of the file in which it has been certified by the Medical Officer Civil Hospital Buner that the Accused Muhammad Saleem is adult, rustic and able for sexual attempt.

10. The learned counsel for the Appellant also contended that the Appellant was not present in the country on the date on which the occurrence of the crime has been claimed i.e. 10.3.2006 and has taken shelter under the principle of *alibi*. The Appellant present in this court at the time of hearing was asked to submit photo copies of his passport No.KD-275543 which has expired on 11th March, 2009. According to the entries on page 19 of the passport the Appellant left Dubai and reached Pakistan on 6th March, 2006. He was in Pakistan from March 6 to March 13, 2006 and there is stamp of exit dated 13th March, 2006. This simply means that the defence on the basis of *alibi* is ill-founded.

11. I should also mention that the Appellant/Accused Muhammad Saleem reportedly made an effort to compromise with the husband of the victim by paying an amount of Rs.800,000/- and giving her infant niece in marriage to the brother of the husband in pursuance of the local customs *sawarah*. The step of giving an infant female child of two months in marriage to the brother of the husband aroused uproar in the civil society. The news of this incident appeared in several newspapers in June, 2006, the clippings of which are on the file of the case. Several

people involved in this effort were arrested including Molvi Umar Said who had reportedly solemnized the marriage.

12. In the light of the above, there is no doubt that crime of Zina under section 10(3) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 has been committed and the conviction recorded by the learned trial court is justified. I therefore uphold the conviction as well the sentence. However, the accused may be given the benefit of section 382 (2) of the Code of Criminal Procedure. The Appellant was granted bail by this Court vide order dated 18.9.2009. His bail bonds shall stand cancelled. He shall be taken into custody to serve out the remaining portion of his sentence.

Announced on 7.6.2010

At Quetta

*M.Akram/**

IN THE FEDERAL SHARIAT COURT

(Appellate / Jurisdiction)

PRESENT

**MR. JUSTICE SYED AFZAL HAIDER
MR. JUSTICE SHAHZADO SHAIKH
MR. JUSTICE DR. MAHMOOD AHMAD GHAZI**

CRIMINAL APPEAL NO.08 -P-2008

CRIMINAL APPEAL NO.09 -P-2008

1. Zakir alias Tooti son of Saida Jan,
R/o Wahid Garhi, Peshawar.

2. Nawab Sher son of Awal Sher
R/o Wahid Ghari, Peshawar.

--- Appellants

Versus

The State

--- Respondent

CRIMINAL MURDER REFERENCE No.01-P OF 2008

The State

Appellant

Versus

Zakir alias Tooti and
Nawab Sher

--- Respondents.

Counsel for appellants

--- Mr. Arbab Shabbir Ahmed,
Advocate.

Counsel for the State

--- Mr. Muhammad Sharif Janjua,
Advocate.

No. & date of F.I.R.
Police Station

--- No.49, dt.26.01.2006
P.S Daud Zai, Peshawar

Date of judgment of
the trial court

--- 30.08.2008

Date of Institution of
both the appeals

--- 06.09.2008

Date of hearing of
both the appeals

--- 10.05.2010

Date of decision

--- 17.5.2010

JUDGMENT:

DR.MAHMOOD AHMAD GHAZI, J.—We intend to dispose of by this common judgment both these appeals and the Murder Reference No. 01-P of 2008. Criminal Appeal No.8-P-2008 filed by appellant Zakir son of Saida Jan and Criminal Appeal No.9-P-2008 filed by Nawab Sher son of Awal Sher against their convictions and sentences are being decided together, as both these matters have arisen from the judgment dated 30.8.2008 passed by learned Additional Sessions Judge-VIII, Peshawar, whereby both the appellants have been convicted and sentenced as under:

- i) Both the appellants have been convicted under section 5/10 Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and sentenced to death.
- ii) Both the appellants have also been convicted under section 17(3) Offences Against Property (Enforcement of Hudood) Ordinance, 1979 and sentenced to three years R.I each as Ta'zir.
- iii) Both the appellants have also been convicted under section 452 Pakistan Penal Code and sentenced to undergo R.I for five years. Similarly both the appellants have also been convicted under section 342 Pakistan Penal Code and sentenced to undergo R.I for one year.

2. It has also been ordered that all the substantive sentences of imprisonment shall run concurrently. Benefit of section 382-B of the Code of Criminal Procedure has been extended to both the appellants.

3. Learned Additional Sessions Judge-VIII Peshawar has also forwarded criminal murder reference bearing Cr. Murder Ref.No.1-P-2008.

4. Brief facts of the case are that complainant Hussain Khan, son of Amir Muhammad, lodged F.I.R. No.49 dated 26.1.2006 with Police Station Daudzai, wherein he stated that in between the night of 26/27th November, 2005 at about 11.20 p.m. the Complainant and his family members were present in their house when his door was knocked. The complainant inquired and a noise came from outside requiring him to open the door. The persons knocking the door claimed that they were police personnel and threatened that if he did not open the door, they all would be finished. The complainant opened the door; three persons clad in civil dress armed with Kalashnikovs entered the house and closed the door from inside. They confined inmates of the house in a room while his wife and daughter were confined in a separate room where they committed zina-bil-jabr with them. While leaving the house they took along licensed pistol of the complainant, two tolas of gold ornaments and cash amount of Rs.5,000/-. The complainant lodged an information with local police on 27.11.2005 but the police officer recorded the complaint as Rapt in daily dairy. The complainant ultimately submitted an application to the police Chief on 2.12.2005 on the basis of which his complaint was registered as FIR No.49 on 26.1.2006.

5. After completion of the investigation the police submitted the challan against both the accused before the trial Court. Both the accused were charge sheeted on 25.5.2007 under sections 454/34, 342/34 and 354 of Pakistan Penal Code read with section 10(4) Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and under section 17(3) Offences Against Property (Enforcement of Hudood) Ordinance, 1979 but both of them pleaded not guilty and claimed trial.

6. In order to prove its case, the prosecution produced eight witnesses. P.W-1 Liaqat Ali, ASI is a formal witness of registration of F.I.R Ex.PA. He is also a marginal witness of the recovery memo Ex.Pw-1/1 as well; vide which the Investigation Officer took into possession the license copy of the stolen pistol. P.W.2 Hussain Khan is the complainant. He reiterated the version given in the FIR. He, however, stated that the accused remained inside the house for three hours with open faces and he correctly identified them. His statement under section 164 of the Code of Criminal Procedure was firstly recorded on 31.1.2006 and then on 13.5.2006 wherein he charged the accused. He further deposed that he made application to the Inspector General of Police NWFP whereafter and his report was registered. P.W-3 Mst.Nekamla is the second wife of the complainant and is an eye witness of the occurrence and also one of the victim. She also deposed the story as narrated by her husband. She further deposed that three persons with Kalashnikovs in plane clothes entered forcibly in their house and confined them in one room. Thereafter, they took her to the other room and committed sexual intercourse with her. They also took away her daughter Mst.Nazria to a separate room and also subjected her to sexual intercourse. The accused remained in their house for three hours and while leaving they snatched gold ornaments, cash amount and one pistol 30 bore. She further deposed that she identified accused Nawab Sher and Zakir in the jail premises while the absconding accused was unknown to her. P.W.4 Mst.Nazria is the daughter of the complainant and is also another eye witness and also another victim of the occurrence. She also reiterated the versions given in the FIR and depositions of her father and mother. She further deposed that the accused persons have committed zina bil jabr with her on gun point.

7. During the identification parade conducted in the Central Jail Peshawar she correctly identified accused Nawab Sher and Zakir.

8. P.W.5 Lady Dr. Sabaha Amir, Demonstrator, KMC Peshawar had medically examined both the victims namely Mst. Naikamala, wife of complainant, and Mst. Nazria, daughter of the complainant, on 31.3.2007. The lady doctor has opined that both the ladies have been subjected to zina bil jabr.

9. P.W.6 Mir Hassan Khan SI. is the Investigation Officer in this case. He went to the spot, prepared site plan Ex.PH, recorded statements of the PWs under section 161 of the Code of Criminal Procedure, and arrested accused Zakir on 2.2.2006. He also arrested accused Nawab Sher on 14.5.2006, and prepared the pointation memo Ex.PW.6/4.

10. P.W.7 Zaki Ullah S.I the SHO of the Police Station Daudzai, is a formal witness and P.W.8 Muhammad Tahir DSP is also a formal witness of the occurrence, who had also conducted identification parade of the accused.

11. After completion of prosecution evidence the statements of both the accused under section 342 of the Code of Criminal Procedure were recorded wherein they denied the allegations leveled against them and claimed to be innocent. However they did not opt to make statements on oath under section 340(2) of the Code of Criminal Procedure. No evidence is produced in defence.

12. On the basis of prosecution evidence, the trial court convicted and sentenced both the appellants vide judgment dated 30.8.2008 as noted earlier. Hence both these criminal appeals against their convictions and sentences.

13. The learned counsel for the appellant has submitted following six grounds on the basis of which he supports his contention and prays for the acquittal of the case.

GROUND

- a) That the order and judgment of the learned trial court is against law and facts on file, hence untenable.
- b) That the order and judgment is the result of mis-reading and non-reading of evidence and without the application of judicial mind and is liable to be set aside.
- c) That the judgment is based on surmises and conjectures.
- d) That the prosecution case is pregnant of doubts and has badly failed in bringing home charge against the accused.
- e) That the judgment is not based on sound reasons and needs interference by this Court.
- f) That there is delay in conducting medical examination, lodging of FIR and identification parade.

14. The grounds submitted by the leaned counsel are too vague and too general to be taken into consideration. He has neither come out with any specific objection against the findings of the learned trial court nor advanced any convincing argument in support of any of the grounds reproduced above. In the first five grounds no sound basis has been mentioned. Under 'f' he has pointed out the delay in conducting the medical examination, lodging of FIR and the identification parade.

15. As to the contention of delay in the lodging of FIR, it is hardly tenable. The crime has occurred on the night between November 26-27, 2005. The complainant submitted an application to the Inspector General of Police on December 2, 2005, i.e. within one week after the occurrence. The title of the application clearly indicates that he is seeking the help and intervention of the Inspector General of Police for the registration of formal FIR. Moreover, he had 'informed' police station Daudzai about the occurrence of the incident next morning on

which the police recorded the details in its *Roznamcha* and assured him that the formal FIR would soon be registered.

16. In this view of the situation, it is not correct to say that there was a delay in lodging FIR. Any information provided to the police after the occurrence is FIR for the purposes of law irrespective of the title given by the police. Even otherwise any delay in registering formal FIR was the fault of the concerned police officials and not that of the complainant.

17. Likewise, the delay in the identification parade does not violate any law. The law does not require any timeframe for conducting the identification parade. This parade is meant only to facilitate the identification of the unidentified accused. In this case, the accused were already identified as the appellant and the victims seen them several times before the parade. It was on the basis of this identification that they were arrested and were put under custody.

18. As to the question of medical examination which was delayed by about 15 months, this does not seem to be a valid ground for the favourable consideration of the appeal. The report of the medical examination in respect of Mst. Nekamala does not provide any clue to the occurrence of the crime, something which does not affect the case of the prosecution, because medical report is not the sole basis on which prosecution has relied. However, medical report in respect of the daughter of the complainant/respondent Mst. Nazria establishes the fact that sexual intercourse had been established with her. To this extent the report corroborates the statement of the victim and other PWs.

19. It is significant to note that neither the appellant nor any other person on his behalf claimed any enmity between himself and the respondents. Neither at the stage of trial nor at the stage of appeal, Zakir and Nawab Sher claimed any kind of enmity between them and the respondents in this case. In the absence of any enmity between two parties it is unbelievable that a false or baseless case would have been concocted against the appellants.

20. In view of these considerations, we are satisfied that the judgment given by the learned Additional Sessions Judge VIII Peshawar and the sentences awarded by him are supported by evidence. There is no reason to interfere with the findings of the learned trial court. We uphold the judgment, maintain the convictions and the sentences and dismissed both the appeals.

21. Murder Reference bearing No.1/P/2008 is answered in the **AFFIRMATIVE**. Death sentence is confirmed.

Announced on 17.5.2010
At Islamabad
M. Akram/

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

**MR. JUSTICE SYED AFZAL HAIDER
MR. JUSTICE SHAHZADO SHAIKH
MR. JUSTICE DR. MAHMOOD AHMAD GHAZI**

CRIMINAL APPEAL NO.164-I-2007
CRIMINAL APPEAL NO.165-I-2007
CRIMINAL APPEAL NO.169-I-2007

1. Rafaqat Hayat son of Hayat Khan, caste Rajput
2. Asjid Nawaz son of Rab Nawaz, caste Rajput
3. Raja Riaz son of Raja Ismail, caste Rajput
4. Muhammad Iqbal son of Muhammad Afzal caste Rajput,
all presently confined in Central jail Rawalpindi --- Appellants

Versus

The State --- Respondent

CRIMINAL MURDER REF.NO.19-I-2007

The State	Versus	Appellant
Muhammad Iqbal etc.		Respondents
Counsel for the complainant	---	Mr.Muhammad Ilyas Siddiqui, Advocate
Counsel for the appellants	---	M/S Khawaja Sultan Ahmad, Raja Zaheer-ud-Din, Sardar Muhammad Hafeez and Muhammad Masood Ahmed Chishti, Advocates.
Counsel for the State	---	Mrs. Rukhsana Malik, Addl.Prosecutor General.
No.& date of FIR Police Station	---	No.291,dt.13.7.2005 P.S. Cantt: District Rawalpindi
Date of judgment of trial court	---	17.7.2007
Dates of institution of the appeals	---	25.7.2007 and 4.8.2007
Date of hearing of the appeals	---	17.5.2010
Date of decision	---	09.6.2010

JUDGMENT:

DR. MAHMOOD AHMAD GHAZI, J.—Through this judgment we propose to decide the three appeals i.e. Criminal Appeal No.164-I-2007 filed by appellant Rifaqat Hayat son of Hayat Khan, Criminal Appeal No. 165-I-2007 filed by Asjid Nawaz son of Rab Nawaz and Raja Riaz son of Raja Ismail and Criminal Appeal No.169-I-2007 filed by Muhammad Iqbal son of Muhammad Afzal, as all these appeals are directed against the same judgment dated 17.7.2007 passed by learned Additional Sessions Judge Rawalpindi whereby all the four appellants of these three appeals have been convicted and sentenced as under:

- a) Under section 337-J of the Pakistan Penal Code each of appellants has been sentenced to undergo seven years Rigorous Imprisonment.
- b) Under section 11 Offence of Zina (Enforcement of Hudood) Ordinance, 1979 all the appellants have been sentenced to life imprisonment and to pay a fine of Rs.25,000/- each.
- c) Under section 337-A of the Pakistan Penal Code, each of the appellants has been sentenced to two years Rigorous Imprisonment and Daman of Rs.5000/-. It has also been ordered that amount of Daman shall be recovered from the convicts and until Daman is paid in full to the extent of their liability, the convicts be kept in jail and dealt with in the same manner as if sentenced to simple imprisonment.
- d) Under section 337-F(i) of the Pakistan Penal Code each of the appellants has been sentenced to undergo Rigorous Imprisonment for one year and to pay Daman of Rs.5000/-. It has also been ordered that amount of Daman shall be recovered from the convicts and until Daman is paid in full to the extent of their liability, the convicts be kept in jail and dealt with in the same manner as if sentenced to simple imprisonment.
- e) Under section 394 of the Pakistan Penal Code all the appellants have been sentenced to undergo Rigorous Imprisonment for seven years and to pay a fine of Rs.10,000/- or in default thereof to further undergo Simple Imprisonment for six months.
- f) Under section 411 of the Pakistan Penal Code they have been sentenced to three years Rigorous Imprisonment.
- g) Under section 10(4) Offence of Zina (Enforcement of Hudood) Ordinance, 1979, each of the appellants has been sentenced to death. It has also been ordered that they shall be hanged by neck till declaring dead.

Learned Additional Sessions Judge Rawalpindi has also forwarded a Murder Reference No.19-I-2007, which is the fourth matter to be decided by this consolidated judgment.

2. Briefly stated the facts of the case as mentioned in the private complaint Ex.PH, lodged by complainant Mst. Abida Yasmin PW-2, are that she was employed in World Education Consultant Office located in room No.62 in the second floor of Nice Plaza in Saddar Rawalpindi. On 11.07.2005, when after the office hours, she reached Murree Road at about 6.30 p.m, a white colour car bearing registration No.RIP-2536 crossed her and stopped at some distance. Riaz accused was driving it. Razaqat Hayat accused, came out of the car. He was carrying handkerchief in his hand. He put the same on her face whereafter she became unconscious. She was taken to some unknown place. She was carrying Rs.7000/- in her purse for the purchase of ornaments. She was also carrying a mobile telephone set K-500 valuing Rs.8500/-. She was wearing three finger rings, as well as earring and there was also a wrist watch on her hand. These articles were removed by the accused forcibly. First, Muhammad Iqbal accused committed zina-bil-jabr with her, on pistol point and thereafter Asjid Nawaz, Raja Riaz and Razaqat Hayat committed zina-bil-jabr with her. She protested whereafter Raja Riaz accused told his co-accused to take her nude snaps. The accused then got themselves photographed with her nude turn by turn. The complainant also alleged that when she went to lodge the report the SHO himself got the application dictated which was done under pressure. Crime report dated 13.07.2005 was then registered as FIR 291/2005. The local police supported Razaqat Hayat accused and wanted to save him. After recovery of fake number plate of car and her ornaments from accused, the truth of her story has been established. Hence she filed this private complaint.

3. This private complaint was initially filed before the learned Magistrate and subsequently it was submitted before the court of Additional Sessions Judge who summoned the accused to face trial after holding the preliminary inquiry.

4. On 15.5.2006, charges under sections 10(4) and 11 Offence of *Zina* (Enforcement of Hudood) Ordinance, 1979 as well as under sections 394/337-J/392/412/337-A-1 and section 337-F-1 of the Pakistan Penal Code were framed to which the accused pleaded not guilty and claimed trial.

5. In order to prove its case, the complainant produced two witnesses and nine court witnesses. P.W-1 Nusrat Kausar No.2024/LC got Mst.Abida Yasmin, the complainant, medically examined through DHQ Hospital, Rawalpindi. After medical examination the lady doctor handed over to her one sealed envelope which she produced before the Investigation Officer who took it into his possession vide recovery memo Ex.PB. P.W-2 Mst. Abida Yasmin is the complainant. She reiterated the versions contained in her private complaint Ex.PH. C.W-1 Khurram Shahzad, Excise Inspector is a formal witness to verify the factum of registration of Alto car No. 2536-RIP. C.W-2 Asim Saleem is the person who developed a film roll. C.W.3 Dildar Hussain constable is a formal witness of recovery memo Ex.C.W-3/A regarding fake number plate. P.W-4 Dr. Talat Mahmooda had medically examined Mst. Abida Yasmin and opined that the victim/complainant was subjected to sexual intercourse. C.W-5 Muhammad Azam SI deposed that on 13.7.2005, Mst. Abida Yasmin d/o Muhammad Azad submitted a written application Ex.PC upon which, he drafted formal F.I.R Ex.CW-4/B which was in his hand and

bore his signatures. He drafted application for medical check up of Mst.Abida Yasmin who was sent to the DHQ, Hospital Rawalpindi under the escort of Nusrat Kausar lady constable. After the medical check-up, lady constable Nusrat Kausar handed over one sealed envelope to the Investigation Officer who took it into possession vide recovery memo Ex.PB. On 16.7.2005, complainant got her supplementary statement recorded. C.W-5, Muhammad Azam, S.I, visited the spot. After spot inspection he prepared rough site plan Ex.CW-5/D. On his return, he handed over case property to the *Moharrir* for being kept in safe custody. He further deposed that on 18.7.2005 Abdul Ghaffar/HC transmitted the parcel to the office of Chemical Examiner, and he recorded statements of *Moharrir* and constable in this respect. On 19.7.2005 he arrested Muhammad Iqbal, Asjid Nawaz and Muhammad Riaz. On 23.7.2005 the investigation of this case was entrusted to Masood Ahmad, Inspector/SHO P.S Cantt: C.W-6 Masood Ahmad, Inspector, also investigated the case.C.W-7 Abdul Ghaffar deposed that Muhammad Azam handed over to him one sealed parcel envelope, which he kept in the *malkhana* and on 18.7.2005, he deposited the same in the office of chemical Examiner. He deposed that during his custody, the parcel remained intact. C.W-8 Dr.Muhammad Ashraf had medically examined the accused Muhammad Iqbal, Asjid Nawaz and Raja Riaz on 24.7.2005 and C.W-9 Dr.Muhammad Qasim had medically examined accused Razaqat Hayat to determine their potency. C.W-10 Munsif Mahmood SI is another investigating officer of this case. He deposed that he summoned the complainant again on 14.12.2005 when witnesses in support of Razaqat Hayat also appeared before him. They contended that accused is innocent, but complainant insisted that Razaqat Hayat was the culprit. He arrested the accused and obtained his physical remand on 22.12.2005.

6. The trial court undertook the trial of the case. After completion of complainant's evidence, the statement of each of the accused under section 342 of the Code of Criminal Procedure was recorded wherein they denied the allegations leveled against them and claimed to be innocent. All of them did not opt to record their statements under section 340(2) of the Code of Criminal Procedure. Accused Muhammad Iqbal, Asjid Nawaz and Raja Riaz did not opt to produce any defence evidence. However, Razaqat Hayat alone produced four witnesses namely D.W-1 Zaigam Jalal, D.W-2 Ibrar Hussain, D.W-3 Ch. Muhammad Iqbal and D.W-4 Haji Ali Asghar in his defence.

7. The trial court after completing the legal formalities of the trial convicted and sentenced all the four accused/appellants vide judgment dated 17.7.2007 as noted in para one of this judgment. Hence these three criminal appeals against their convictions and sentences.

8. We have heard the learned counsel for the appellants. The evidence and the record of the case have been perused carefully. Khawaja Sultan Ahmed, Advocate appeared on behalf of Razaqat Hayat. He emphasized the fact that the complainant/victim did not disclose the names of the accused in her initial complaint. She on the other hand contended that she was abducted by an unknown person who had placed a handkerchief on her face on which she became unconscious whereafter she was taken to an unknown place. She was relieved of her belongings, the details of which mentioned above. In this complaint name of accused Muhammad Iqbal, son of Muhammad Afzal, R/o Sihala alone as an accused who committed rape with her at pistol point was mentioned. According to her statement she alleged that Muhammad Iqbal got indecent photograph prepared with her and threatened to kill her. The

learned counsel pointed out that the supplementary statement was given by the victim on 17th July 2005 four days after the initial complaint submitted on 13th July 2005. In this supplementary statement she claimed to have traced the other three persons who were identified as Asjid Nawaz, Razaqat Hayat and Raja Riaz who had driven the car.

9. The learned counsel proceeded to submit further that neither the name of Razaqat Hayat appeared in the FIR nor his facial descriptions were given. The appellant Razaqat Hayat has been involved in the case only on the basis of supplementary statement. The learned counsel relied upon several precedents in support of the contention that no conviction could be based on the basis of supplementary statement. Relying on these precedents he contended that involving a person in the case on the basis of subsequent statement amounted to false implication. In this context he referred to State versus Riaz PLD 2003 NHR, 249 at page 349. It was also contended that the complainant/victim stated that she did not know Razaqat Hayat before the incident. The learned counsel challenged this contention by submitting that Razaqat Hayat had been studying in the same school. On the basis of this contention the learned counsel submitted that the involvement of Razaqat Hayat was an after thought and malicious. At the end it was urged that nothing was recovered from Razaqat Hayat and no link has been established between Razaqat Hayat and any other accused.

10. Learned counsel for Muhammad Iqbal, Asjid Nawaz and Muhammad Riaz adopted the arguments of Khawaja Sultan Ahmed Advocate. It was contended on behalf of Muhammad Iqbal that he has been involved in this case on the basis of political rivalries. Additionally it was contended that the photographs which show Muhammad Iqbal with the victim in objectionable position do not indicate his involvement in the actual act of *Zina*. Therefore, according to the learned counsel the applicant Muhammad Iqbal deserves reduction in punishment particularly, in the absence of any semen on the person of victim and lack of semen grouping.

11. Learned counsel for the accused Asjid Nawaz also adopted the arguments advanced by Khawaja Sultan Ahmed Advocate, learned counsel for the appellant Razaqat Hayat, with the addition that the case of Asjid Nawaz was at par with that of Razaqat Hayat. Therefore, all the arguments advanced in the defence of Razaqat Hayat would also support the case of Asjid Nawaz. It was further submitted that the requirements of section 103 of the Code of Criminal Procedure were not observed in the case of Asjid Nawaz appellant. The stolen property belonging to victim, namely camera, an amount of Rs. one thousand and a pair of earrings was allegedly recovered from him. The learned counsel also pointed out that the Appellant did not appear in any of the photographs which show that he was not involved in the alleged offence of rape. His case was therefore fit for acquittal.

12. Learned counsel for appellant Raja Riaz son of Raja Ismail submitted that the case of Raja Riaz was stronger than the cases of other appellants. He also adopted the arguments advanced by the learned counsel appearing for Razaqat Hayat. The learned counsel claimed that Raja Riaz did not appear in the indecent photographs.

13. We have carefully considered these arguments and meticulously gone through the record. We have also heard Mr. Muhammad Ilyas Siddiqui Advocate, learned counsel for the prosecution. The learned counsel for the prosecution controverted the points urged on behalf

of the appellants. It was also submitted that supplementary statement was not an improvement on FIR. The FIR clearly referred to three unknown persons who were identified later on and their names were given to the police for proper investigation. The learned counsel for Razaqat Hayat did not bring on record any evidence to establish that appellant Razaqat Hayat was in fact admitted in a hospital in Peshawar. His plea of innocence on the basis of alibi was therefore unfounded. It was also contended that the claim of the defence about the previous acquaintance between the victim and the accused Razaqat Hayat was false. The accused and the victim could not be class fellows because the school in which the victim studied was a girls' school. It was submitted that the question of presence or absence of any accused in the indecent photographs does not carry much weight in view of other incriminating evidence. These photographs were taken to blackmail the victim for which purpose it is not necessary that all the accused should be seen and present in the photographs.

14. The case of the prosecution mainly rests upon the statement of the complainant/victim. She was subjected to rigorous cross examination which continued for several days, spread over seven sessions. Some scandalous questions were also put to her during the cross examination. No contradiction could be extracted from her statement. According to the learned Additional Prosecutor General the statement of the victim is corroborated with the medical report which certifies the presence of signs indicating the use of force against the victim. There were abrasions and contusions on various parts of the victim's body. The lady doctor after examining the victim stated that in view of clinical examination she seems to have been subjected to sexual intercourse. Injury mentioned as No.1 was Shajja-e-Khafifa and injuries No.2 and 3 were declared as Jarh Ghair Jaifah Damiah.

15. The contentions made on behalf of the appellants regarding prior enmity of the victim with Razaqat Hayat or Muhammad Iqbal could not be substantiated. The evidence on record has a substantial value which is sufficient to sustain the conviction recorded by learned trial court. The points raised on behalf of the appellants have not persuaded us to disturb the verdict of guilt pronounced by learned trial court. The appeals are, therefore, dismissed. The convictions are upheld and the sentences are maintained.

The criminal Murder Reference No.19-I of 2007 is answered in the **affirmative**.

Announced on 9.6.2010

At Quetta

M.Akram/*

IN THE FEDERAL SHARIAT COURT
(Appellate / Jurisdiction)

PRESENT

MR. JUSTICE SYED AFZAL HAIDER
MR. JUSTICE SHAHZADO SHAIKH
MR. JUSTICE DR. MAHMOOD AHMAD GHAZI

JAIL CRIMINAL APPEAL NO.148-I-2009

Ghulam Murtaza son of Muhammad Javed,
Caste Sudhan Rajput,
Presently confined in Central Jail,
Rawalpindi.

--- Appellant

Versus

The State

--- Respondent

CRIMINAL MURDER REFERENCE No.14-I-2009

The State

--- Appellant

Versus

Ghulam Murtaza,

--- Respondent.

Counsel for the appellant

--- Syed Razaqat Hussain Shah,
Advocate.

Counsel for the State

--- Mrs. Rukhsana Malik,
Additional Prosecutor General
for State.

No. & date of F.I.R.
Police Station

--- No.304, dt.30.06.2002
P.S Gujjar Khan, District Rawalpindi

Date of judgment of
the trial court

--- 12.11.2002

Date of Institution of
the appeal

--- 12.12.2009

Date of hearing of
the appeal

--- 18.05.2010

Date of decision

--- 8.6.2010

JUDGMENT:

DR. MAHMOOD AHMAD GHAZI,J.—Through this jail criminal appeal convict/appellant Ghulam Murtaza, son of Muhammad Javed, has challenged his conviction and sentence recorded by learned Sessions Judge, Rawalpindi, in his judgment dated 12.11.2009 whereby the Appellant has been convicted and sentenced as under:

- i) Under section 302 (B) Pakistan Penal Code for causing 'gatal-e-amd' of Mst. Riffat Zahida, the Appellant Ghulam Murtaza has been sentenced to death. He has also been directed to pay a sum of Rs. 100,000/- (one lac) to the heirs of the deceased as compensation under section 544-A of the Code of Criminal Procedure, In case of non-payment, this amount shall be recovered as arrears of land revenue. On non-payment or non-recovery as aforementioned, the appellant will undergo Simple Imprisonment for six months.
- ii) Under section 302 (B) Pakistan Penal Code for causing 'gatal-e-amd' of Danish Farooq, the Appellant Ghulam Murtaza has also been sentenced to death. He has also been directed to pay a sum of Rs. 100,000/- (one lac) to the heirs of the deceased as compensation under section 544-A of the Code of Criminal Procedure. In case of non-payment, it shall be recovered as arrears of land revenue. On non-payment or non-recovery as aforementioned, the appellant will undergo Simple Imprisonment for six months.
- iii) Under section 10(2) Offence of Zina (Enforcement of Hudood) Ordinance, 1979 he has been sentenced to undergo R.I for ten years and to pay a fine of Rs.100,000/- or in default to further undergo Simple Imprisonment for six months.

2. Along with this appeal we shall also decide the Murder Reference No.14-I-2009 sent by the learned Sessions Judge Rawalpindi for confirmation of the death sentence awarded to the Appellant Ghulam Murtaza on two counts.

3. Brief facts of the case emerge from FIR No.304/2002, Police Station Gujar Khan recorded at the instance of Aurganzeb, who made a written complaint to the SHO that they are three brothers and are residing in separate houses. Muhammad Javed, the complainant's brother, works in Air-Force Department at Kamra whose family is residing with him there. Another brother, Muhammad Basharat, is serving in Saudi Arabia. His wife Mst.Riffat Zahida and her son aged about one year Danish Farooq, who have both been murdered, were residing in the village in their house. Elder son of Mst.Riffat Zahida, namely, Umar Farooq is residing at village Sagri with his maternal grand mother and is studying there. Muhammad Javed and Muhammad Basharat have one house. His real nephew Ghulam Murtaza, son of Muhammad Javed, came from Kamra to Borgi about 8-10 days before. He stayed with Mst. Riffat Zahida. Yesterday at evening time Mst. Riffat Zahida, Danish Farooq, aged about one year and the Accused Ghulam Murtaza son of Muhammad Javed slept on the cots in the courtyard of the house; while the complainant went back to his house. Early in the morning, it was noticed that

Mst. Riffat Zahida did not go as usual to the house of Muhammad Banaras for fetching milk, upon which Muhammad Parvez son of Muhammad Banaras went to the house of the deceased Mst. Riffat Zahida at about 7.00 a.m. where he saw blood in the courtyard of Mst. Riffat Zahida. He returned and came to the complainant and told him about the said fact. Upon hearing this, the complainant went to the house of Mst. Riffat Zahida and saw that dead body of Danish Farooq was lying on a cot whereas the dead body of Mst. Riffat Zahida was lying in a room on the floor in a pool of blood. In the room, clothes of the accused Ghulam Murtaza i.e. shalwar, kameez, bunyan were lying. All these were blood stained. Ghulam Murtaza was missing from there. The complainant reported that Ghulam Murtaza murdered Mst. Riffat Zahida and Danish Farooq in the darkness of night.

4. The complainant further stated that Ghulam Murtaza was not of a good character, and that he committed zina-bil-jabr with Mst. Riffat Zahida while she was alone in her house and in order to suppress this reality and with fear that she will make it open to the family and society, he committed the murder of Mst. Riffat Zahida and her son Danish Farooq.

5. After registration of the case investigation was conducted, the dead bodies were sent for post mortem and site plan of the place of occurrence was prepared. The Investigation Officer recorded the statements of the witnesses under section 161 of Code of Criminal Procedure. During investigation the Accused was arrested on 29.7.2002 and got medically examined for potency test; thereafter he was produced before Illaqa Magistrate for recording his confessional statement under section 164 of Code of Criminal Procedure. Confessional statement of the Accused was recorded by the Magistrate under section 164 Code of Criminal Procedure on 31.7.2002. The Investigating Officer also recovered the hatchet (weapon of offence) at the instance of the Accused on 01.8.2002, after completion of the investigation, the case was submitted to the court for trial and the Accused was summoned to face the trial. After remand of the case to the learned trial court for its denovo trial, the charge was framed on 16.07.2009. The accused pleaded not guilty to the charges and made his statement which was also signed by him.

6. To prove its case the prosecution produced as many as 18 witnesses in all and also tendered in evidence the reports of the Chemical Examiner as Ex.PO, Ex.PP, Ex.PQ and PR. The prosecution also tendered in evidence the reports of Serologist Ex.PR/1, Ex.PQ/1 and Ex.PP/1. The gist of the prosecution witnesses is as follows:

P.W.1 Muhammad Jahangir deposed that on 30.6.2002 he had identified the dead body of Mst. Riffat Zahida before postmortem in the presence of the Women Medical Officer. P.W.2 Muhammad Banaras deposed that on 30.6.2002 he had identified the dead body of Danish Farooq in Civil Hospital before postmortem. P.W.3 Ghalib Hussain deposed that on 30.6.2002 he had joined the investigation of this case. In his presence the Investigating Officer collected the blood from the place of occurrence with cotton and packed it into a sealed parcel. He secured the same through memo of recovery Ex.PA. During cross-examination this witness stated that when he arrived at the place of occurrence, both the dead bodies were lying in the room on the floor. P.W.4 Malik

Hussain deposed that on the night between 29/30.6.2002 at about 3.00 a.m., when he was asleep on the roof top of his house, his pet dog barked for a long time and he woke up. He looked towards the road passing on back side of his house. Ghulam Murtaza accused was passing on the road while holding a hatchet in his hand. This witness asked him as to where he was going at that time. He replied that his father was sick in Kamra and he was going to see him. He further deposed that he asked the Accused to stop and listen to him but he went towards the east on a rapid pace. Early in the morning, he learnt that Danish and Mst.Riffat Zahida were murdered and many persons had gathered there. P.W.5 Muhammad Basharat is a witness of recovery of hatchet, weapon of offence, P-4, vide memo of recovery Ex.PC. P.W.6 Muhammad Javed is father of the Accused Ghulam Murtaza. He deposed that the Accused caused qatal-e-amd of Mst. Riffat Zahida and her son Danish. After the murder he remained absconder for one month. He further deposed that on 28.7.2002 at about 8.00 p.m he came to his house at Kamra. He made a confession before him (i.e. the father) that he had committed murder of Mst.Riffat Zahida and Danish. This witness asked him why did he do so. He replied that it was a blunder on his part, but he did not disclose the cause of murder. P.W-6 further deposed that on 30.7.2002 he produced the Accused before the police. During cross-examination this witness stated that the Accused had come to his house on 28.7.2002 and he had produced him before the police on 29.7.2002. P.W-7 Constable Safri Ahmad is a formal witness of three sealed parcels for delivery in the office of the Chemical Examiner, Rawalpindi, P.W-8 Altaf Hussain, the Head Constable is a formal witness of sealed parcel containing hatchet, the weapon of offence with six seals bearing MF abbreviations on it for its delivery in the office of the Chemical Examiner, Lahore. P.W-9 Aurangzaib is the complainant in this case. He reiterated the versions given in the FIR. He further deposed that Accused Ghulam Murtaza was son of his real brother, Muhammad Javed Akhtar. He had come from Kamra 8/10 days prior to occurrence. He used to live with the family of his father's brother Basharat. On the night between 29/30.6.2002 Ghulam Murtaza, the Accused, deceased Mst. Riffat Zahida and deceased Danish Farooq were sleeping in the house of Basharat. Mst.Riffat Zahida deceased used to go in the morning to the house of Muhammad Banaras, his sister's husband to fetch milk but on the said day she did not go. P.W-9, Aurangzeb sent his son Pervaiz to the house of Basharat at about 7.00 a.m., he came back to his *havaili* and told him that blood in a large quantity was lying in the house of Basharat. Aurangzeb immediately rushed to the house of Basharat. He further deposed that he saw that blood in a large quantity was lying in the courtyard. Dead body of Danish Farooq was lying on a cot in the courtyard. During cross-examination this witness deposed that he had gone to the house of deceased Mst.Riffat Zahida at about 8.00 p.m. on 29.6.2002. Accused Ghulam Murtaza was present in the house at that time. He remained there for 15 to 20 minutes approximately. During his stay Mst.Riffat Zahida was also there. At that time, no special conversation took place between him and the Accused. P.W-10, Lady Dr. Shahida Meer, had conducted the postmortem examination of Mst.Riffat Zahida. The lady doctor had opined that cause of death was injuries to the vital structure, brain and trachea. P.W-11. Riffat Hussain Constable, P.W.12 Muhammad Azam S.I and P.W-13 Muhammad Shahban Constable are formal witnesses.P.W-14 Dr. Mushtaq

Ahmad Sehar on 30.6.2002 had conducted the autopsy on the dead body of Danish Farooq. The doctor has opined that the child died due to asphyxia caused by strangulation which was sufficient to cause death in ordinary course of nature. P.W-15 Muhammad Faraz SI is the I.O in this case and deposed that he had recorded statement of the complainant Ex.PA/1, inspected the place of occurrence, collected the blood from the floor of the room where dead body of Mst.Riffat Zahida was lying with cotton and secured it through memo of recovery Ex.PA, prepared the inquest reports of Mst. Riffat Zahida and Danish Farooq, recorded the statements of the P.Ws under section 161 of the Code of Criminal Procedure. He further deposed that he continued his search for the Accused and also conducted investigation. On 29.7.2002, the Accused was produced by his father Muhammad Javed. He was arrested in this case. P.W-15 further deposed that the father of the accused Muhammad Javed stated before him that accused had made confession before him so he recorded his statement under section 161 of the Code of Criminal Procedure. P.W.16 Khuram Shahzad is also a formal witness, P.W.17 Mushtaq Ahmad Inspector/SHO. He deposed that on 30.6.2002 he had recorded formal FIR Ex.PF/1 registered on the basis of the complaint made by the Complainant Ex.PA/1 P.W.18 Syed Najaf Abbas Bokhari, Special Judicial Magistrate, recorded the confessional statement Ex.PN/3 of the Accused Ghulam Murtaza under section 164 of Code of Criminal Procedure. This witness deposed that he had observed all legal formalities in recording the statement of the accused.

7. After closing the evidence of prosecution, the statement of the accused was recorded under section 342 of the Code of Criminal Procedure wherein he denied the allegations leveled against him. However, he did not opt to make his statement on oath under section 340(2) of the Code of Criminal Procedure nor produced any witness in his defence.

8. On the basis of the evidence on record, and after remand of this case back to the learned Sessions Judge, the Sessions Judge has convicted and sentenced the accused as noted above. Hence this jail criminal appeal.

9. We have carefully examined the evidence and heard the elaborate submissions made on behalf of the Appellant. It has been submitted on behalf of the Appellant that the incidence took place between the night of June 29 and June 30, 2002. Initial report of the occurrence of the incidence was made next day i.e., June 30, 2002 at 10.00 a.m. This delay of a few hours is, according to learned counsel for the Appellant, is a serious delay which weakens the case of the prosecution. However, it is difficult to agree with the contention of the learned counsel. The facts of the case are that the complainant, who is the real paternal uncle of the accused, came to know about the occurrence of the crime after 7.00 a.m. in the morning when it was noticed that the victim Mst. Riffat Zahida did not come out of her house in the morning as usual to fetch milk. This means that as soon as they came to know about the occurrence sometime after 7.00 a.m., the complainant went to the police station to register his complaint on the basis of which FIR was registered. This cannot be considered to be a delay because this much time is naturally taken by the aggrieved relatives of the victim to come out of the shock and to proceed to the police station.

10. It has been pointed that, according to the statement of lady doctor Shahida Meer appearing as P.W-10, she could not say with certainty if the victim was subjected to sexual intercourse or not before murder. On the basis of this part of the statement made by the witness during the cross-examination, it was submitted that the claim of rape has not been proved. However, the report of medical examination clearly testifies that the vaginal swabs and *shalwar* of the victim were stained with semen. Moreover, the dead body of the victim Mst. Riffat Zahida was not wearing her cloths and her body was covered with those very clothes.

11. It has been submitted by learned counsel for the Appellant that there were some discrepancies in the statement of the witness. P.W-3 stated that the dead bodies of the victims Mst. Riffat Zahida and her son Danish Farooq were lying in a room on the floor. On the other hand P.W-15 had stated that the dead body of the Danish Farooq was lying on the cot in the courtyard. This is not any serious discrepancy because as far as the dead body of the victim Mst. Riffat Zahida is concerned it was found lying on the floor of the room. The only discrepancy pointed out by the learned counsel of the Appellant is about the place where the dead body of the Danish Farooq was found. Learned counsel has missed the important point that both the witnesses (P.W-3 and P.W-15) did not reach the place of occurrence at the same time. P.W-15 simply says that he arrived at the place of occurrence on the same day. P.W-3 clearly says that when he reached a large number of people had gathered there which shows that he reached the place of occurrence after several other peoples. It is quite possible that someone would have placed the dead body of the infant on the cot before the arrival of the P.W-15.

12. Likewise, the learned counsel of the Appellant tried to highlight the discrepancy in the statements of various witnesses about the number of cots present in the courtyard. This is also immaterial and does not affect the over all picture of the case.

13. It is important that the accused made a confession on two different occasions. He made confession before the Judicial Magistrate as well as before his own father, namely, Muhammad Javed son of Lal Hussain who appeared as P.W-6. He stated on oath that the accused came to his house on 28th July, 2002 at about 8.00 p.m. The accused made a confession before his father that he committed murder of Mst. Riffat Zahida and Danish Farooq. He confessed that it was blunder on his part, but the Accused did not disclose the cause of murder. It was the father who produced the accused before the police on 30th July, 2002. The extra judicial confession made by a son before his father carries much weight and cannot be simply ruled out. Similarly, a father's testimony against his own son is one of the strongest pieces of evidence which must be taken as true particularly in the absence of any counter and equally stronger evidence.

14. In the light of the above, we have come to the conclusion that the prosecution has been successful in establishing the guilt of the appellant beyond any shadow of doubt and the grounds advanced by the learned counsel for the Appellant are very weak and frivolous. We, therefore, uphold the judgment; maintain the conviction and the sentences.

Criminal Murder Reference is answered **in the affirmative**.

Announced in open Court on, 8.6.2010

At Quetta

M.Akram/