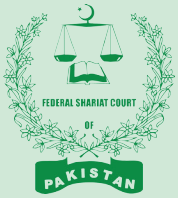
(سورہ النساء آیت نمبر:58)

بِسۡمِ اللّٰہِ الرَّحۡمٰنِ الرَّحِیۡمِ

وَإِذَا حَكَمْتُم بَيْنَ النَّاسِ
أَن تَحْكُمُواْ بِالْعَدْلِ

اور یہ کہ جب تم لوگوں کے درمیان فیصلہ کرو
تو انصاف کے ساتھ کرو



ANNUAL REPORT
FOR THE YEAR 2014 - 15

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FEDERAL SHARIAT COURT
OF
PAKISTAN

بِسۡمِ اللّٰہِ الرَّحۡمٰنِ الرَّحِیۡمِ

حدیثِ نبوی ﷺ

تم سچائی کو لازم پکڑو، اور ہمیشہ سچ بولو،
کیونکہ سچ بولنا نیکی کے راستے پر ڈال دیتا ہے
اور نیکی جنت تک پہنچا دیتی ہے۔ (صحیح مسلم:6639)

MR. JUSTICE RIAZ AHMAD KHAN

HON'BLE CHIEF JUSTICE

FEDERAL SHARIAT COURT OF PAKISTAN

FEDERAL SHARIAT COURT
OF
PAKISTAN

MR. JUSTICE SARDAR MUHAMMAD RAZA

HON'BLE CHIEF JUSTICE

FEDERAL SHARIAT COURT OF PAKISTAN

(05-06-2014 TO 06-12-2014)

FEDERAL SHARIAT COURT
OF
PAKISTAN

CONTENTS

FEDERAL SHARIAT COURT
OF
PAKISTAN

FOREWORD

بسم اللہ الرحمن الرحیم

Foreword

The Federal Shariat Court since the day of its inception in the year 1980, has remained a subject of discussion, debate and unfortunately misconceptions. There is no doubt that Pakistan is a Parliamentary Democracy but it is not similar to all Western Democracies in the world in all respects and manner. In this respect the scheme of our Constitution is required to be seen in its true perspective. The existence and performance of Federal Shariat Court can be appreciated only in the light of overall perspective of the scheme and intent of the Constitution.

2. Article 1 of the Constitution defines the Republic of Pakistan and Article 2 Provides that Islam shall be the State Religion of Pakistan. For the future guidance and performance of the Government, Principles of Policy were introduced in the Constitution. Article 31(1) of the Constitution, which is part of the Principles of Policy, was to the following effect:-

> 31(1) Steps shall be taken to enable the Muslims of Pakistan, individually or collectively, to order their lives in accordance with the fundamental principles and basic concepts of Islam and to provide facilities whereby they may be enabled to understand the meaning of life according to the Holy Quran and Sunnah.
>
> (2) ----------

Although in Article 31(1) certain guidelines were provided and Article 2 clearly stated that Islam shall be the State religion of Pakistan, but even then there was no clear restriction upon the Parliament and the Parliament could pass any law. By way of analogy and assumption it could be said that the Parliament cannot pass any law which is against the Injunctions of Holy Quran and Sunnah.

3. It was in 1980 that by virtue of Presidential Order No.1 of 1980 Chapter 3A was included in the Constitution, which was regarding the establishment of Federal Shariat Court. The newly inserted Article 203D was to the following effect:-

> ***203D.*** *(1) The Court may, either of its own motion or on the petition of a citizen of Pakistan or the Federal Government or a Provincial Government, examine and decide the question whether or not any law or provision of law is repugnant to the Injunctions of Islam, as laid down in the Holy Quran and the Sunnah of the Holy Prophet, hereinafter referred to as the Injunctions of Islam.*
>
> ***(1A)*** *Where the Court takes up the examination of any law or provision of law under clause (1) and such law or provision of law appears to it to be repugnant to the Injunctions of Islam, the Court shall cause to be given to the Federal*

Government in the case of a law with respect to a matter in the Federal Legislative List or to the Provincial Government in the case of a law with respect to a matter not enumerated in the Federal Legislative List, a notice specifying the particular provisions that appear to it to be so repugnant, and afford to such Government adequate opportunity to have its point of view placed before the Court.

(2) *If the Court decides that any law or provision of law is repugnant to the Injunctions of Islam, it shall set out in its decision:-*

(a) *the reasons for its holding that opinion; and*

(b) *the extent to which such law or provision is so repugnant; and specify the day on which the decision shall take effect:*

Provided that no such decision shall be deemed to take effect before the expiration of the period within which an appeal therefrom may be preferred to the Supreme Court or, where an appeal has been so preferred, before the disposal of such appeal.

(3) *If any law or provision of law is held by the Court to be repugnant to the Injunctions of Islam,-*

(a) *the President in the case of a law with respect to a matter in the Federal Legislative List or the Governor in the case of a law with respect to a matter not enumerated in said List shall take steps to amend the law so as to bring such law or provision into conformity with the Injunctions of Islam; and*

(b) *such law or provision shall, to the extent to which it is held to be so repugnant, cease to have effect on the day on which the decision of the Court takes effect.*

In such a way Federal Shariat Court was established and its jurisdiction was also defined.

4. However, by way of imposing certain restrictions upon the jurisdiction of the Federal Shariat Court, the word 'law' was defined in Article 203B(c), which was to the following effect:-

> *"law" includes any custom or usage having the force of law but does not include the Constitution, Muslim personal law, any law relating to the procedure of any court or tribunal or, until the expiration of ten years from the commencement of this Chapter, any fiscal law or any law relating to the levy and collection of taxes and fees or banking or insurance practice and procedure;*

In the above said manner, an indirect restriction was imposed upon the Parliament that it could not pass any law which was against the Injunctions of Holy Quran and Sunnah. In addition to that any law passed by the Parliament could be examined by

the Federal Shariat Court as to whether it was in accordance with the Injunctions of Holy Quran and Sunnah or not.

5. The above-said situation was further cemented in 1985 when Article 2A was made part of the Constitution and by virtue of Article 2A Objectives Resolution was made substantive part of the Constitution. The following passages of the Objectives Resolution are worth consideration:-

> This Constituent Assembly representing the people of Pakistan revolves to frame a Constitution for the sovereign independent State of Pakistan;
>
> Wherein the State shall exercise its powers and authority through the chosen representatives of the people;
>
> Wherein the principles of democracy, freedom, equality, tolerance and social justice as enunciated by Islam shall be fully observed;
>
> Wherein the Muslims shall be enabled to order their lives in the individual and collective spheres in accordance with the teachings and requirements of Islam as set-out in the Holy Quran and the Sunnah;
>
> ---
>
> ---
>
> ---

6. Keeping in view the above scheme of the Constitution, it becomes clear that in the Principles of Policy it was provided that efforts shall be made to enable the Muslims of Pakistan to order their lives in accordance with the basic concepts of Islam within the meaning of Holy Quran and Sunnah. In order to achieve this objective, Objectives Resolution was made substantive part of the Constitution. By making Objectives Resolution as substantive part a restriction was placed on the Parliament that the Parliament could not pass any law which was or is against the Injunctions of Holy Quran and Sunnah. Though in the direct words no restriction has been placed on the Parliament but the Objectives Resolution provides that the principles of democracy, freedom, equality, tolerance and social justice **as enunciated by Islam** shall be fully observed. In such a way, the terms democracy, freedom, equality, tolerance etc. have been made qualified with the Injunctions of Quran and Sunnah. As such the Parliament is empowered to pass any law but the same must not be against the Injunctions of Quran and Sunnah. The problem then is as to who would decide as to whether the law passed by the Parliament is in accordance with the Injunctions of Quran and Sunnah or not. It is because of this that some Institution is required to determine and decide that the law passed by the Parliament is in accordance with the Injunctions of Quran and Sunnah or otherwise. This requirement necessitates the establishment of Federal Shariat Court.

7. If the Federal Shariat Court is abolished then it would be open for all the people to interpret any law passed by the Parliament in their own way and to hold that

the law passed by the Parliament is or is not in accordance with the Injunctions of Holy Quran and Sunnah. Obviously that situation would create an unimaginable disturbance in the whole society. The Federal Shariat Court, as such, is infact a block in the flood of uncontrolled views and is a place where divergent views can be resolved amicably and peacefully.

8. The question as to whether there should be any restriction on the power and authority of the Parliament and whether it is right or not that the Parliament should not be allowed to pass any law as provided in Western Democracy, is something totally different. There may be many people who would be of the opinion that the Parliament should resemble any other Parliament of the Western Democracy and the Parliament should have unfettered powers to pass any law but the problem is that the wishes of certain people would not change the Constitution. Such people may make efforts to amend the Constitution and if it is provided in the Constitution that the Parliament can pass any law as provided in the Western Democracy then of course there would be no need for the existence of Federal Shariat Court. There is no doubt that the *Shariah* cases pending in the Federal Shariat Court are not high in number, nevertheless, the importance of those cases cannot be ignored in any manner. Furthermore, such cases are heard by the Full Bench and even for deciding one case quite a lot of time is required and spent.

9. Even presently some extremely important cases are pending adjudication in the Federal Shariat Court, which definitely would have a long lasting effect on the future course of events in Pakistan.

10. In addition to Shariah cases, Federal Shariat Court is also Appellate Court in cases pertaining to Harabah, Zina, Qazf and Prohibition. The Federal Shariat Court also had jurisdiction for certain other criminal cases as well but the jurisdiction has been taken away in an indirect manner particularly by introduction of Women Protection Act. As a result the number of cases in Federal Shariat Court reduced to a large extent. The requirement is that the services of the Judges in the Federal Shariat Court be fully utilized, in such a way the burden on other Courts would reduce on the one hand and the cases would be expeditiously decided on the other.

11. The Annual Report, if seen in the above-said background, would definitely be appreciated.

Justice Riaz Ahmad Khan
Chief Justice

PROFILE OF HONOURABLE CHIEF JUSTICE & HONOURABLE JUDGES

Mr. Justice Riaz Ahmad Khan
Hon'ble Chief Justice
Federal Shariat Court of Pakistan

Mr. Justice Riaz Ahmad khan was born on 15-05-1952 in Nowshera (Khyber Pakhtunkhwa). His father Mr. Abdul Rashid Khan was an educated business-man and an active social and political worker. He consistently remained Chairman Local Bodies in Nowshera, Member District Council Peshawar and a Jirga Member. Mr. Justice Riaz Ahmad Khan after matriculation got admission in Edwardes College, Peshawar. After graduation in 1973, he joined Political Science Department in Peshawar University and got Masters Degree in 1975. Mr. Riaz Ahmad Khan got LL.B Degree from Punjab University. He qualified C.S.S Examination in 1977 and joined Civil Services Academy Lahore, in the fourth common training. After completion of common course in the Civil Services Academy, Mr. Justice Riaz Ahmad Khan was allocated to Pakistan Railway Transportation and Commercial Group. He completed another course in Walton Training School, Lahore and thereafter was posted as Assistant Transportation /Assistant Commercial Officer, Pakistan Railways, Lahore Division. From Lahore, Mr. Justice Riaz Ahmad Khan was transferred and posted at Peshawar. During this period, P.C.S. Judicial Examination was announced in Khyber Pakhtunkhwa, then N.W.F.P. Mr. Justice Riaz Ahmad Khan, participated in the said examination and qualified the same. Consequently, the services of Mr. Justice Riaz Ahmad Khan, on his request were transferred from Federal Government to the Provincial Government of N.W.F.P. Mr. Justice Riaz Ahmad Khan, remained posted as Civil Judge Kohat, Haripur, and Peshawar and lastly posted as Senior Civil Judge at D. I. Khan. He resigned from the said post and started practicing law. During his legal practice, he conducted many well known cases on Civil, Criminal and Constitutional side. He was appointed as Assistant Advocate General (N.W.F.P) in 1997. Later on, he was appointed as Additional Deputy Prosecutor General Accountability, NAB (F), Peshawar and he remained on that post for three years. He was elected as Member Provincial Bar Council (N.W.F.P) in 1999.

In his student life, Mr. Justice Riaz Ahmad Khan used to participate in debates and won innumerable prizes, which includes Gold Medal in All Pakistan Declamation Contest. He remained President Political Science Department, University of Peshawar. He still takes keen interest in literature, political science and law and his only hobby is book reading. He was elevated as Judge Islamabad High Court on 21-12-2010 and retired on 14th May, 2014 on superannuation.

He was reappointed as Judge of the Federal Shariat Court on 08.08.2014 and elevated as Chief Justice, Federal Shariat Court of Pakistan on 07.03.2015.

Hon. Mr. Justice Allama Dr. Fida Muhammad Khan

ACADEMIC QUALIFICATION

* BA Ist class, Ist Position in the University of Peshawar(with distinction), was awarded gold Medal and Merit scholarship.
* M.A. (Islamiyat) Ist class (with distinction).
* B.Sc. (War Studies).
* M.A. (Arabic) Ist class (with distinction).
* B.T.
* M.A. (English) Ist position in the University (with distinction).
* Diploma Course in German Language.
* Ph.D. (Islamic Law and Jurisprudence).

PUBLICATIONS AND EXPERIENCE

* Translated the Holy Quran (into English) Compiled several books which for several years remained part of Syllabus, prescribed for Degree level in the University of Peshawar, (1962).
* Was appointed Judge and remained Senior Puisne Judge, Federal Shariat Court of Pakistan.(for twenty four years): From 2nd October, 1988 to 1st October, 2009.
* Remained Lecturer Islamiyat at Post-Graduate Level, University of Peshawar, from 1962 to 1968 (about six years).
* Was appointed and served as Ad hoc Member Shariah Appellate Bench Supreme Court of Pakistan (From 25 March, 2010 till 4 July 2011).
* Served as Deputy Director of Education/Director of Motivation, PAF from 16th April 1968 to Ist October 1988 (about twenty years).
* Reappointed as Judge Federal Shariat Court Islamabad (w.e.f. 5 July, 2011 till date).
* Appointed as Juris-consult on Honorary basis and assisted the Federal Shariat Court on several occasions, for about eight years (Prior to 1988).
* Appointed as Acting Chief Justice, Federal Shariat Court Islamabad (w.e.f. 12th December, 2014 to 7th March, 2015).

HONORARY MEMBERSHIP OF VARIOUS ACADEMIC/EDUCATIONAL/ WELFARE BODIES

* Former Chairman Shariah Board, State Bank of Pakistan (for about 4 years). Resigned in 2013 for some personal reasons.
* Chairman, Economic Reforms Commission KPK. (since 2004)
* President, Quran Asaan Tahreek, Pakistan since January, 2006 (for life)
* Member Advisory Board, World Jurists Council.
* Founder Member Board of Trustees International Islamic University, Islamabad
* Member Syndicate Mohyuddin Islamic University Azad Kashmir
* Member Board of Trustees International Islamic University (IIU) Islamabad. Ordinary
* Member Research Fund Supervisory Committee (IIU) Islamabad
* Member Board of Governors, (IIU), Islamabad.

* Member Academic Programme Committee, Dawa Academy, IIU Islamabad
* Member Council, Dawah Academy, (IIU), Islamabad (several terms)
* Patron-in-Chief Prevention of Blindness Society, Islamabad.
* Member Council, Islamic Research Institute, Islamabad till date (several terms)
* Former Member, Syndicate, Agriculture University, Faisalabad.
* Member Council, Shariah Academy, (IIU), Islamabad till date (several terms).
* Former Member Executive Council, Allama Iqbal Open University (AIOU), Islamabad.
* Member Council, Institute of Islamic Economics (IIU), Islamabad
* Former Chairman, Executive Council Committee, AIOU, Islamabad.

FEDERAL SHARIAT COURT
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Hon. Mr. Justice Sheikh Najam-ul-Hasan

Hon'ble Mr. Justice Sh. Najam ul Hasan was born on 15.03.1952 at Lahore. His father late Sh. Jan Hussain was a prominent lawyer of the West Pakistan High Court and the Supreme Court of Pakistan. The Hon'ble Judge after passing matriculation from Govt. Pilot High School, Lahore, graduated from F. C. College, Lahore and then passed his LL.B. Examination from Punjab University Lahore. He was enrolled as Advocate on 19.12.1977 and then Advocate of High Court on 21.1.1980. The Hon'ble Judge joined the Law Chamber of Khawaja Sultan Ahmad, Senior Advocate Supreme Court of Pakistan, conducted and assisted in many important legal matters and trials. The Hon'ble Judge started his own independent Law Chamber. He was enrolled as Advocate of the Supreme Court on 12.3.2003. He independently conducted hundreds of murder trials as well as other important Criminal Cases of heinous nature in different Districts, Murder References, Criminal Appeals and Constitutional matters in High Court and Supreme Court of Pakistan. He appeared as counsel in many cases of Federal Shariat Court.

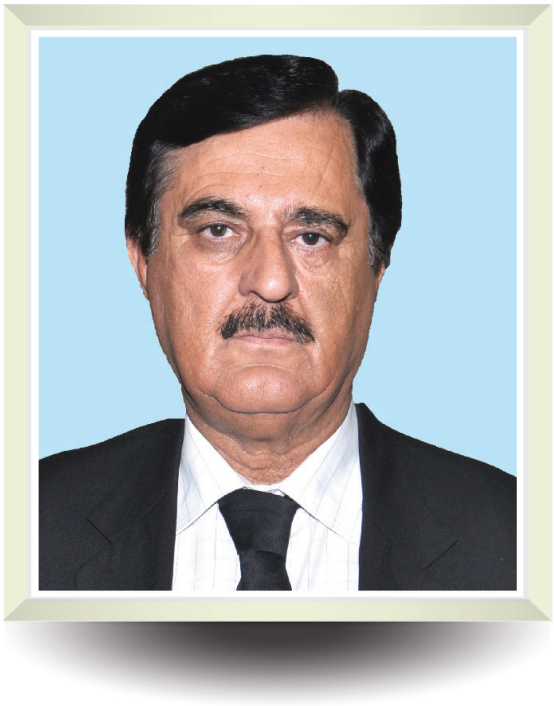
The Hon'ble Judge remained Standing Counsel for WAPDA for many years, provided legal advice to different noteable Companies like Philips Electrical Company, Kanor Industries Dawood Group of Industries, Kakasheen Industries, Best Fruit Juices and many others companies for many years.

Also conducted important cases as advocate in A.T.A. Courts, C.N.S.A. Courts, Accountability Courts, Tribunals and Appellate Tribunals.

His lordship was purely a professional lawyer having no affiliation with any Group or Party and has unblemished record of thirty five years in legal field. He was elevated as Judge of the Lahore High Court on 15.9.2009.

After elevation to the Bench of Lahore High Court, the Hon'ble Judge was appointed as Chairman of the Punjab Bar Council Tribunal, Lahore. He worked as Election Tribunal, Punjab and in this capacity decided a lot of important cases. His lordship remained Member of Board of Governor and Member Board of Trustees, National College of Arts Lahore for three years and has attended meetings of the Board and rendered legal opinions for betterment of the College. The Hon'ble Judge was nominated by the Government of Pakistan as Judge, Special Appellate Court for the Province of Punjab under the Prevention of Smuggling Act, 1977 and remained as Administrative Judge of the Accountability Courts of Punjab, Special Courts (Central), Anti Corruption Courts, Courts under the Control of Narcotics Substance Act, 1997 and the Courts under Customs Act, 1969. His lordship also remained Senior Judge at Bahawalpur and Multan Benches of Lahore High Court for more than a year. He remained Member of Administrative Committee of Lahore High Court for nearly three years and was nominated as Senior Puisne Judge and as such

handled important administrative matters. He was appointed Acting Chief Justice of the Lahore High Court. He remained as Member Administrative Committee of Punjab Judicial Academy. After retirement from the Lahore high Court Lahore on 14.3.2014 he was appointed as Chairperson of the Punjab Environmental Tribunal wherefrom his lordship resigned as he was appointed as Judge Federal Shariat Court. He assumed the office as Judge of Federal Shariat Court on 08.8.2014.



Hon. Mr. Justice Zahoor Ahmed Shahwani

PERSONAL

Name	Zahoor Ahmed Shahwani
Date of Birth	07.08.1954
Father's Name	Malik Noor Ahmed
C.N.I.C. Number	54400-9035090-9
Qualification	M.A. LLB.
Date of Enrollment as an Advocate	01.03.1987
Date of Enrolment in High Court	06.04.1989
and its Name	High Court of Baluchistan, Quetta
Date of Enrolment in	10.03.2006
Supreme Court of Pakistan	
Name of Provincial Bar Council where the applicant in rolled	Balochistan Bar Council

WORK EXPERIENCE

a). Applicant was appointed as Assistant Advocate General Balochistan in year 1997.

b). Applicant was appointed as Prosecutor General Balochistan from December, 2008 to December 2010

ACTIVITIES

i). Vice President Balochistan Bar Association 1994 to 1995.

ii). General Secretary Balochistan Bar Association 1998 -1999.

iii). Member Balochistan Bar Council 21 April 2000 to 2005.

iv). Chairman Legal Education Committee April 2000 to 2004 (Balochistan Bar Council).

v). Chairman Executive Committee Balochistan Bar Council.

vi). Vice Chairman Balochistan Bar Council.

vii). President Balochistan High Court Bar Association.

viii). Member Human Rights Commission of Pakistan.

ix). Elected as Council Member Human Rights Commission of Pakistan on 1999 till date.

x). Elected as Voice Chair Person Human Rights Commission of Pakistan Balochistan Chapter in 2002 to 2005 and 2005 to 2008.

xi). Applicant delivered lectures on Human Rights in Police Training College Quetta, District Bar Associations of Balochistan University, and Colleges of Balochistan.

Hon. Justice Mrs. Ashraf Jahan

Qualification

1983	**LLB** *Jinnah Law College, Hyderabad, Pakistan.*
1978	**B.S.W. (Hons.)** (First Class, 1st position) *University of Sindh Jamshoro, Pakistan.*
1974	**Intermediate** (First Division) *Khatoon-e-Pakistan College, Karachi, Pakistan.*
1972	**Matriculation** (with distinction) *Cantt. Board School, Rawalpindi, Pakistan.*

Service History

01.11.2014	Repatriated to **High Court of Sindh**.
30.12.2013	Appointed as **Judge** of the Federal Shariat Court of Pakistan.
31.08.2013	Elevated as **Additional Judge** of the High Court of Sindh, Pakistan.
07.04.2013	Posted as **Director Instructions** at the Federal Judicial Academy, Islamabad, Pakistan.
18.07.2012	Posted as **District & Sessions Judge** of Karachi, District East.
07.06.2009	Appointed as **Chairperson** of the Environmental Protection Tribunal, Sindh at Karachi (for a period of three years).
20.06.2006	Appointed as **Member Judicial** of the Customs, Excise and Sales Tax Appellate Tribunal, Karachi.
25.04.2003	Promoted as **District & Sessions Judge**
06.07.2000	Appointed as **Additional Secretary Law**, Government of Sindh.
09.02.2000	Posted as **Deputy Secretary Law**, Government of Sindh.
1996	Promoted as **Additional District & Sessions Judge.**
1992	Promoted as **Senior Civil Judge.**
12.05.1987	Joined Judicial Service as **Civil Judge and First Class Magistrate.**

Courses/Conferences Attended

2014	Attended 36th Annual Conference of National Association of Women Judges, "Protecting and Advancing Meaningful Access to Justice", San Diego, California.
2013	**National Judicial Conference** at Islamabad, Pakistan. **Conference on Environmental Justice**, organized by ADB at Manila, Philippines.
2012	**National Judicial Conference** at Islamabad, Pakistan.

	Conference on Environmental Justice, held at Bhurban, Pakistan.
	Federal Judicial Academy, Islamabad, Pakistan.
2010	**National Judicial Conference** at Islamabad, Pakistan.
	Conference on Environmental Justice, organized by ADB at Manila, Philippines.
2004	**Conference on Environmental Justice**, held at Khatmandu, Nepal.
1992	**Federal Judicial Academy**, Islamabad, Pakistan.
1988	**Federal Judicial Academy**, Islamabad, Pakistan.

COMPOSITION

FEDERAL SHARIAT COURT COMPOSITION

HONOURABLE CHIEF JUSTICE:

Name	Date of Assumption
Hon. Mr. Justice Riaz Ahmad Khan	08.08.2014

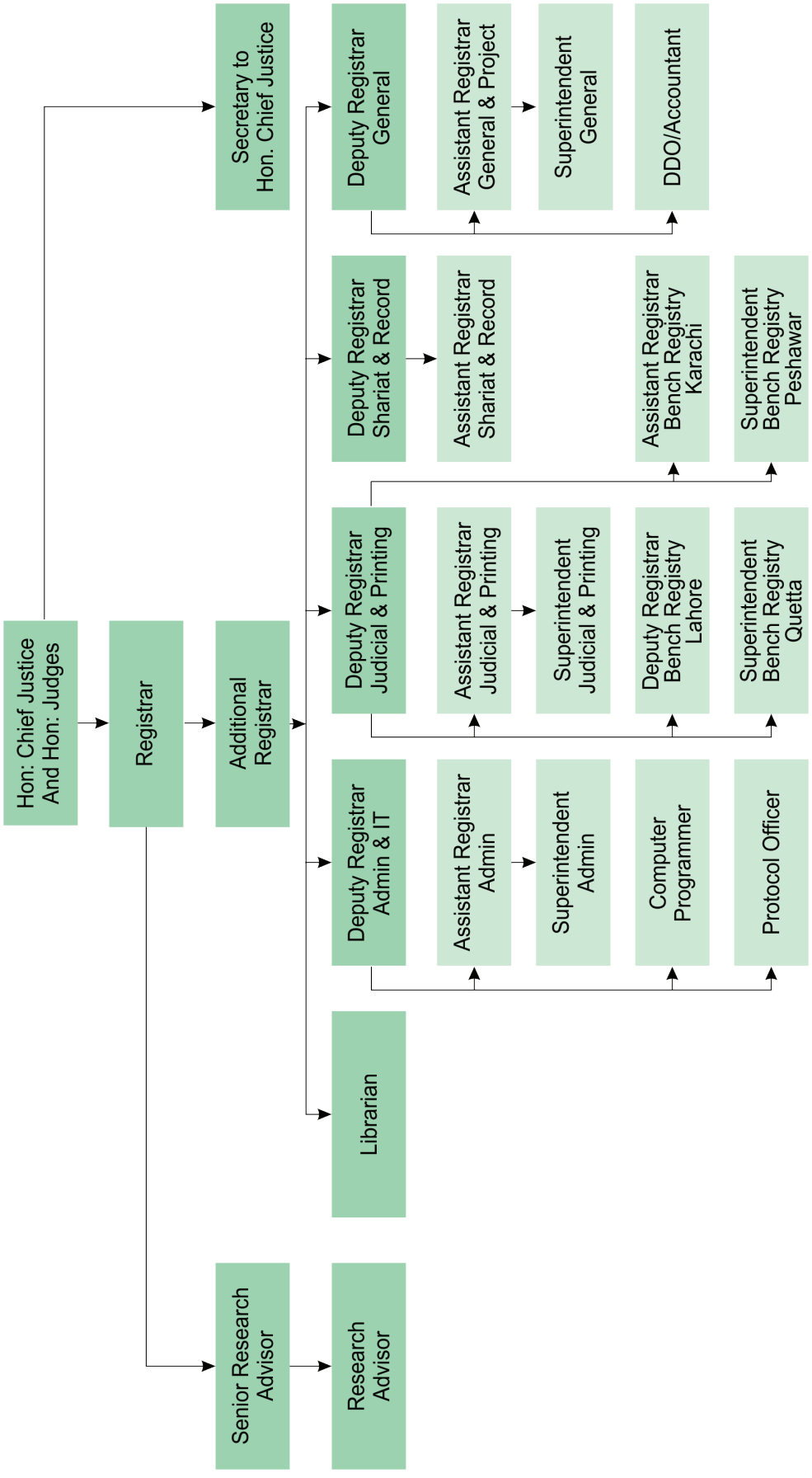
HONOURABLE JUDGES OF THE FEDERAL SHARIAT COURT:

Name	Date of Assumption
Hon. Mr. Justice Allama Dr. Fida Muhammad Khan	05.07.2011
Hon. Mr. Justice Sheikh Najam-ul-Hasan	08.08.2014
Hon. Mr. Justice Zahoor Ahmed Shahwani	08.08.2014
Hon. Justice Mrs. Ashraf Jahan	31.10.2015

ORGANIZATIONAL CHART

Organizational Chart

Federal Shariat Court of Pakistan



CEREMONIES, MEETINGS AND GROUP PHOTOS

Mr. Justice Nasir ul Mulk, Chief Justice of Pakistan administring oath of office to Mr. Justice Riaz Ahmad Khan as Chief Justice Federal Shariat Court of Pakistan on 7-3-2015.

Mr. Justice Riaz Ahmad Khan, Chief Justice Federal Shariat Court receiving Mr. Justice Nasir ul Mulk Chief Justice of Pakistan at farewell dinner at Islamabad.

Mr. Justice Riaz Ahmad Khan, Chief Justice Federal Shariat Court presenting bouquet to Mr. Justice Nasir ul Mulk, Chief Justice of Pakistan at Islamabad.

Mr. Justice Riaz Ahmad Khan, Chief Justice Federal Shariat Court with Mr. Justice Nasir ul Mulk, Chief Justice of Pakistan at Islamabad.

Mr. Justice Riaz Ahmad Khan, Chief Justice Federal Shariat Court receiving Mr. Justice Anwar Zaheer Jamali, Chief Justice of Pakistan at Islamabad.

Mr. Justice Riaz Ahmad Khan, Chief Justice Federal Shariat Court presenting bouquet to Mr. Justice Anwar Zaheer Jamali, Chief Justice of Pakistan at Islamabad.

Mr. Justice Riaz Ahmad Khan, Chief Justice Federal Shariat Court of Pakistan administring oath of office to Justice Mrs. Ashraf Jahan as Judge Federal Shariat Court on 31-10-2015.

Mr. Justice Riaz Ahmad Khan, Chief Justice Federal Shariat Court of Pakistan administring oath of office to Justice Mrs. Ashraf Jahan on 31-10-2015.

Mr. Justice Riaz Ahmed Khan, Chief Justice, Federal Shariat Court of Pakistan shaking hands with Mr. Justice Anwar Zaheer Jamali Chief Justice of Pakistan.

Group photograph of Mr. Justice Allama Dr. Fida Muhammad Khan, Alim Judge, Federal Shariat Court of Pakistan along with the Ulema of Dawah Academy taken at Federal Shariat Court, Islamabad.

Mr. Justice Anwar Zaheer Jamali, Chief Justice of Pakistan and Mr. Justice Riaz Ahmad Khan, Chief Justice Federal Shariat Court during a ceremony at Federal Judicial Academy, Islamabad.

Mr. Justice Riaz Ahmad Khan meeting with office barriers of Islamabad High Court Bar Association.

From Left to Right: Mr. Justice Muhammad Anwar Khan Kasi, Chief Justice, Islamabad High Court, Mr. Justice Riaz Ahmad Khan, Chief Justice, Federal Shariat Court of Pakistan and Mr. Justice Anwar Zaheer Jamali Chief Justice of Pakistan.

Mr. Justice Riaz Ahmad Khan meeting with Mr. Shoaib Shaheen, Vice President, Islamabad High Court Bar Association.

JUDICIAL ACTIVITY AND STATISTICAL TABLES

JUDICIAL ACTIVITY AND STATISTICS

COURT PERFORMANCE FROM 01-01-2014 TO 31-12-2014
CATEGORY WISE CONSOLIDATED POSITION DURING THE YEAR 2014

Sr.No.	CATEGORY OF CASES	PENDENCY ON 31-12-2013	INSTITUTION FROM 01.01.2014 TO 31.12.2014	TOTAL	DISPOSAL FROM 01.01.2014 TO 31.12.2014	BALANCE ON 31.12.2014
1.	Cr. Appeals	523	121	644	118	526
2.	Cr. Revisions	29	12	41	11	30
3.	Cr.PSLAs	48	06	54	03	51
4.	Cr.Murder/Hadd References	09	04	13	03	10
5.	Cr. SuoMotus	02	-	02	01	01
6.	Show Cause Notices	-	01	01	01	-
7.	Review Petitions	-	02	02	02	-
8.	Notices for Enhancement	-	01	01	01	-
9.	Cr.Misc.	160	170	330	166	164
10.	Shariat Matters	226	29	255	23	232
	Total	**997**	**346**	**1343**	**329**	**1014**

CONSOLIDATED POSITION

AT PRINCIPAL SEATAND BENCH REGISTRIES
FOR THE PERIOD FROM 01-01-2014 TO 31-12-2014

CRIMINAL MATTERS

Sr.No.	CATEGORY OF CASES	PENDENCY ON 31-12-2013	INSTITUTION FROM 01.01.2014 TO 31.12.2014	TOTAL	DISPOSAL FROM 01.01.2014 TO 31.12.2014	BALANCE ON 31.12.2014
1.	PRINCIPAL SEAT ISLAMABAD	62	113	175	92	83
2.	BENCH REGISTRY LAHORE	420	24	444	53	391
3.	BENCH REGISTRY KARACHI	81	38	119	42	77
4.	BENCH REGISTRY PESHAWAR	82	33	115	32	83
5.	BENCH REGISTRY QUETTA	126	109	235	87	148
	TOTAL	**771**	**317**	**1088**	**306**	**782**

SHARIAT MATTERS

Sr.No.	CATEGORY OF CASES	PENDENCY ON 31-12-2013	INSTITUTION FROM 01.01.2014 TO 31.12.2014	TOTAL	DISPOSAL FROM 01.01.2014 TO 31.12.2014	BALANCE ON 31.12.2014
Sr.No.	PRINCIPAL SEAT ISLAMABAD	189	25	214	15	199
1.	BENCH REGISTRY LAHORE	26	02	28	04	24
2.	BENCH REGISTRY KARACHI	08	-	08	04	04
3.	BENCH REGISTRY PESHAWAR	02	-	02	-	02
4.	BENCH REGISTRY QUETTA	01	02	03	-	03
	TOTAL	**226**	**29**	**255**	**23**	**232**

FEDERAL SHARIAT COURTISLAMABAD

CONSOLIDATED CATEGORYWISE STATEMENT OF INSTITUTION & DISPOSAL OF CRIMINAL/SHARIAT MATTERS FROM 01-01-2014 TO 31-12-2014.

CATEGORY OF CASES	PENDENCY ON 31.12.2013	INSTITUTION 01-01-2014 TO 31-12-2014	TOTAL	Disposal 01-01-2014 TO 31-12-2014	BALANCE ON 31-12-2014
Cr. Appeals	523	121	644	118	526
Cr. Revisions	29	12	41	11	30
Cr. PSLAs	48	06	54	03	51
Cr. Murder/ Hadd Refs	09	04	13	03	10
Cr. Suo.Motus	02	-	02	01	01
Show Cause Notices	-	01	01	01	-
Review Petitions	-	02	02	02	-
Notices for Enhancement	-	01	01	01	-
Cr.Misc Applications	160	170	330	166	164
Shariat Matters	226	29	255	23	232
Total	**997**	**346**	**1343**	**329**	**1014**

FEDERAL SHARIAT COURT
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Consolidated Statement Showing Category-wise Institution, Disposal and Balance of Cases in the Federal Shariat Court during the year 2015.

Sr.#	Category of Cases	Pendency on 01-01-2015	Institution During the Year	Disposal During the Year	Balance on 31-12-2015
1.	Cr. Appeals	526	65	184	407
2.	Cr. Revisions	30	09	16	23
3.	Cr. P.S.L.As	51	01	09	43
4.	Cr.Murders/ Hadd References	10	03	07	06
5.	Cr.Suo.Motus	01	-	-	01
6.	Show Cause Notices	-	-	-	-
7.	Review Petitions	-	-	-	-
8.	Notices for Enhancement	-	-	-	-
9.	Cr.Misc. applications	164	90	169	85
10.	Shariat Matters	232	36	60	208
Total		**1014**	**204**	**445**	**773**

Category-wise Institution, Disposal and Balance of Cases in the Federal Shariat Court, Principal seat and Bench Registries during the year 2015.

Principal Seat, Islamabad

Sr.#	Category of Cases	Pendency on 01-01-2015	Institution During the Year	Disposal During the Year	Balance on 31-12-2015
1.	Cr. Appeals	57	19	43	33
2.	Cr. Revisions	04	3	05	02
3.	Cr. P.S.L.As	-	-	-	-
4.	Cr. Murder/ Hadd References	08	01	05	04
5.	Cr. Suo.Motus	-	-	-	-
6.	Show Cause Notices	-	-	-	-
7.	Review Petitions	-	-	-	-
8.	Notices for Enhancement	-	-	-	-
9.	Cr. Misc. Applications	14	43	52	05
10.	Shariat Matters	199	30	45	184
Total		**282**	**96**	**150**	**228**

Branch Registry, Lahore

Sr.#	Category of Cases	Pendency on 01-01-2015	Institution During the Year	Disposal During the Year	Balance on 31-12-2015
1.	Cr. Appeals	243	00	44	199
2.	Cr. Revisions	14	01	02	13
3.	Cr. P.S.L.As	47	01	09	39
4.	Cr. Murder/ Hadd References	-	-	-	-
5.	Cr. Suo.Motus	-	-	-	-
6.	Show Cause Notices	-	-	-	-
7.	Review Petitions	-	-	-	-
8.	Notices for Enhancement	-	-	-	-
9.	Cr. Misc. Applications	87	06	40	53
10.	Shariat Matters	24	04	09	19
Total		**415**	**12**	**104**	**323**

Branch Registry, Karachi

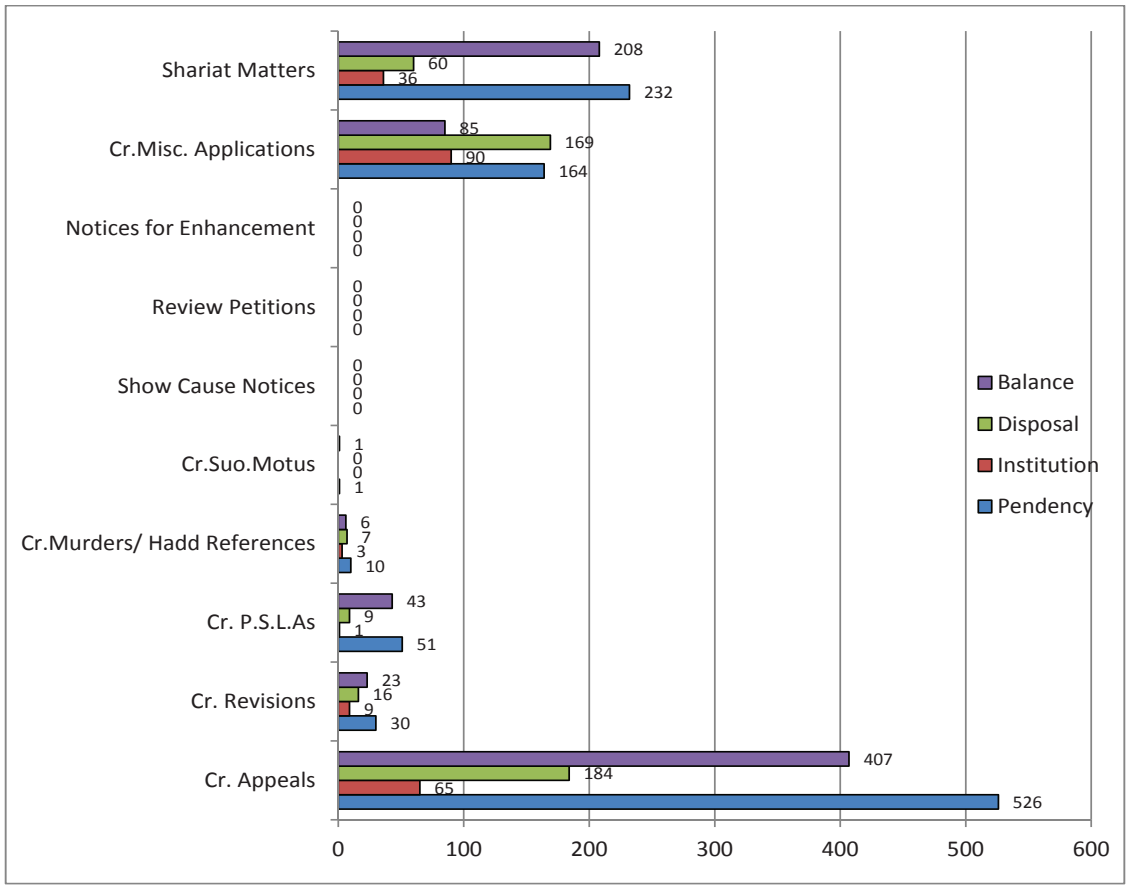
Sr.#	Category of Cases	Pendency on 01-01-2015	Institution During the Year	Disposal During the Year	Balance on 31-12-2015
1.	Cr. Appeals	51	27	21	57
2.	Cr. Revisions	02	02	01	03
3.	Cr. P.S.L.As	01	-	-	01
4.	Cr. Murder/ Hadd References	01	02	01	02
5.	Cr. Suo.Motus	-	-	-	-
6.	Show Cause Notices	-	-	-	-
7.	Review Petitions	-	-	-	-
8.	Notices for Enhancement	-	-	-	-
9.	Cr. Misc. Applications	22	21	29	14
10.	Shariat Matters	04	02	03	03
Total		**81**	**54**	**55**	**80**

Branch Registry, Peshawar

Sr.#	Category of Cases	Pendency on 01-01-2015	Institution During the Year	Disposal During the Year	Balance on 31-12-2015
1.	Cr. Appeals	67	08	13	62
2.	Cr. Revisions	04	01	02	03
3.	Cr. P.S.L.As	03	-	-	03
4.	Cr. Murder/ Hadd References	-	-	-	-
5.	Cr. Suo.Motus	-	-	-	-
6.	Show Cause Notices	-	-	-	-
7.	Review Petitions	-	-	-	-
8.	Notices for Enhancement	-	-	-	-
9.	Cr. Misc. Applications	09	06	08	07
10.	Shariat Matters	02	-	-	-
Total		**85**	**15**	**23**	**77**

Branch Registry, Quetta

Sr.#	Category of Cases	Pendency on 01-01-2015	Institution During the Year	Disposal During the Year	Balance on 31-12-2015
1.	Cr. Appeals	108	11	63	56
2.	Cr. Revisions	06	02	06	02
3.	Cr. P.S.L.As	-			-
4.	Cr. Murder/ Hadd References	01	-	01	-
5.	Cr. Suo.Motus	01	-	-	01
6.	Show Cause Notices	-	-	-	-
7.	Review Petitions	-	-	-	-
8.	Notices for Enhancement	-	-	-	-
9.	Cr. Misc. Applications	32	14	40	06
10.	Shariat Matters	03	-	03	-
Total		**151**	**27**	**113**	**65**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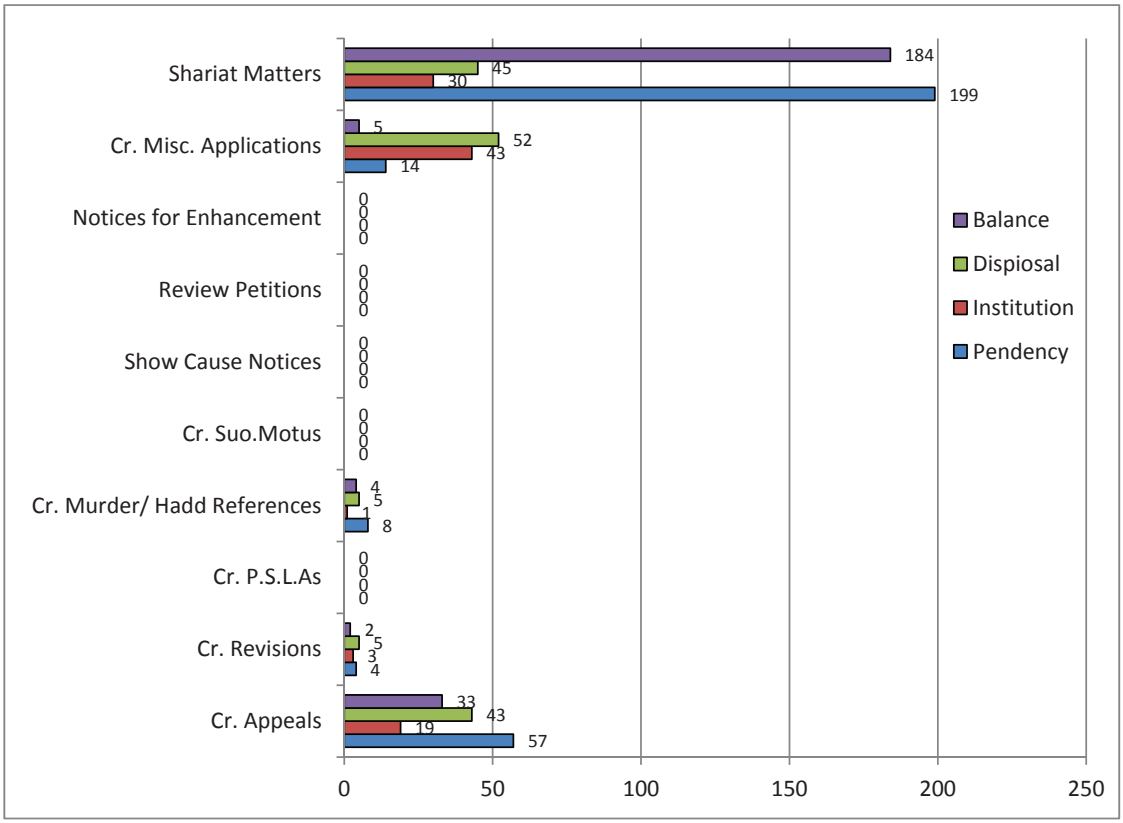
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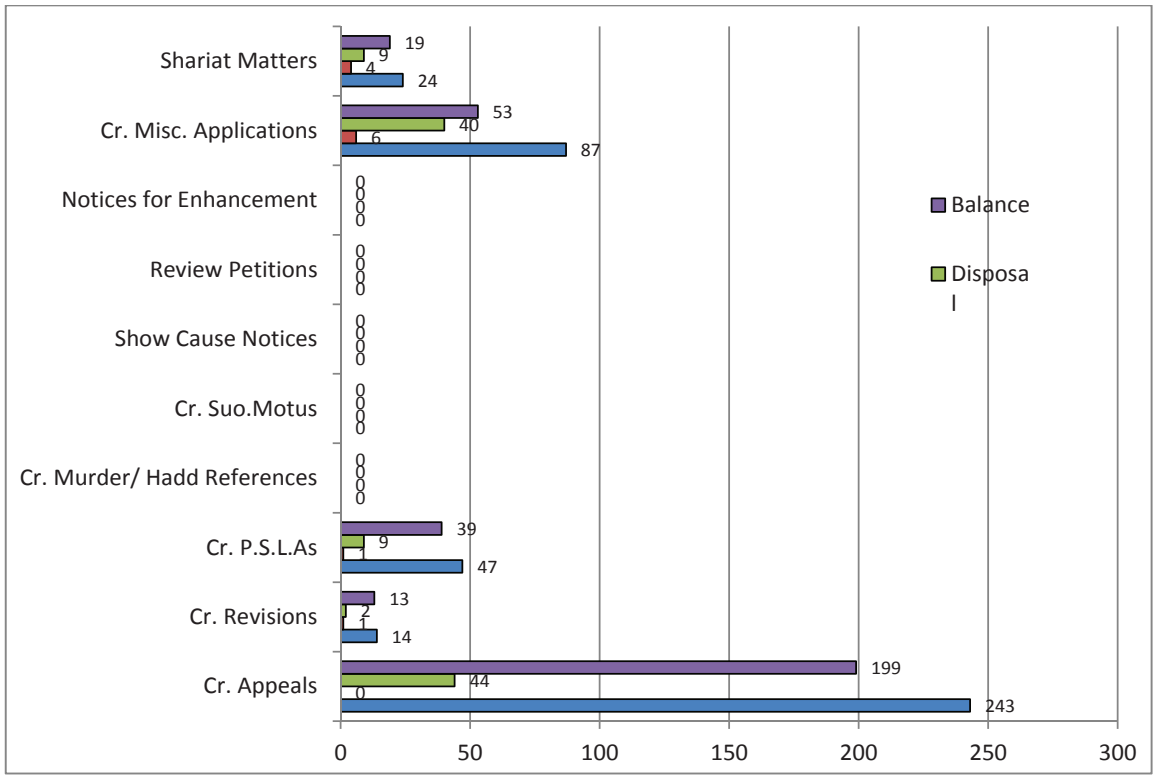
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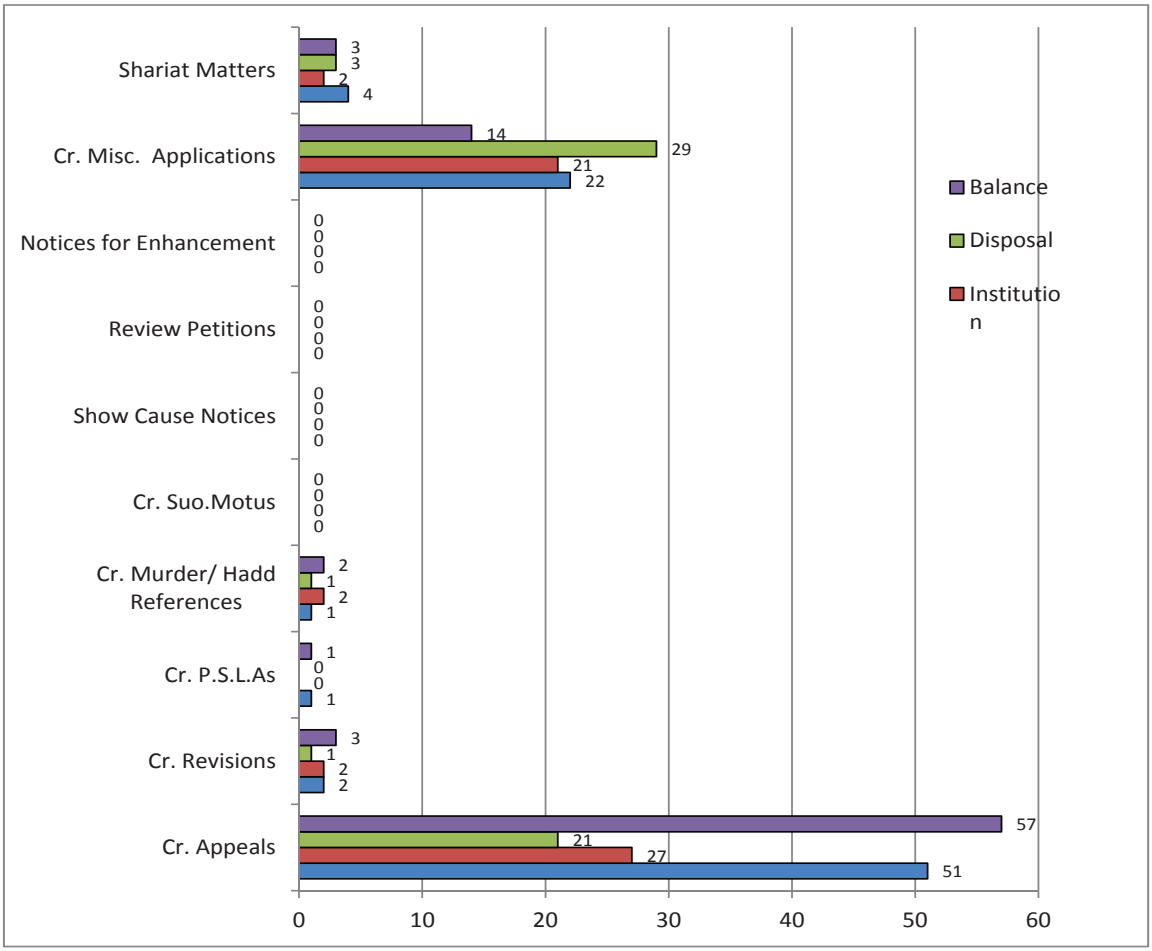
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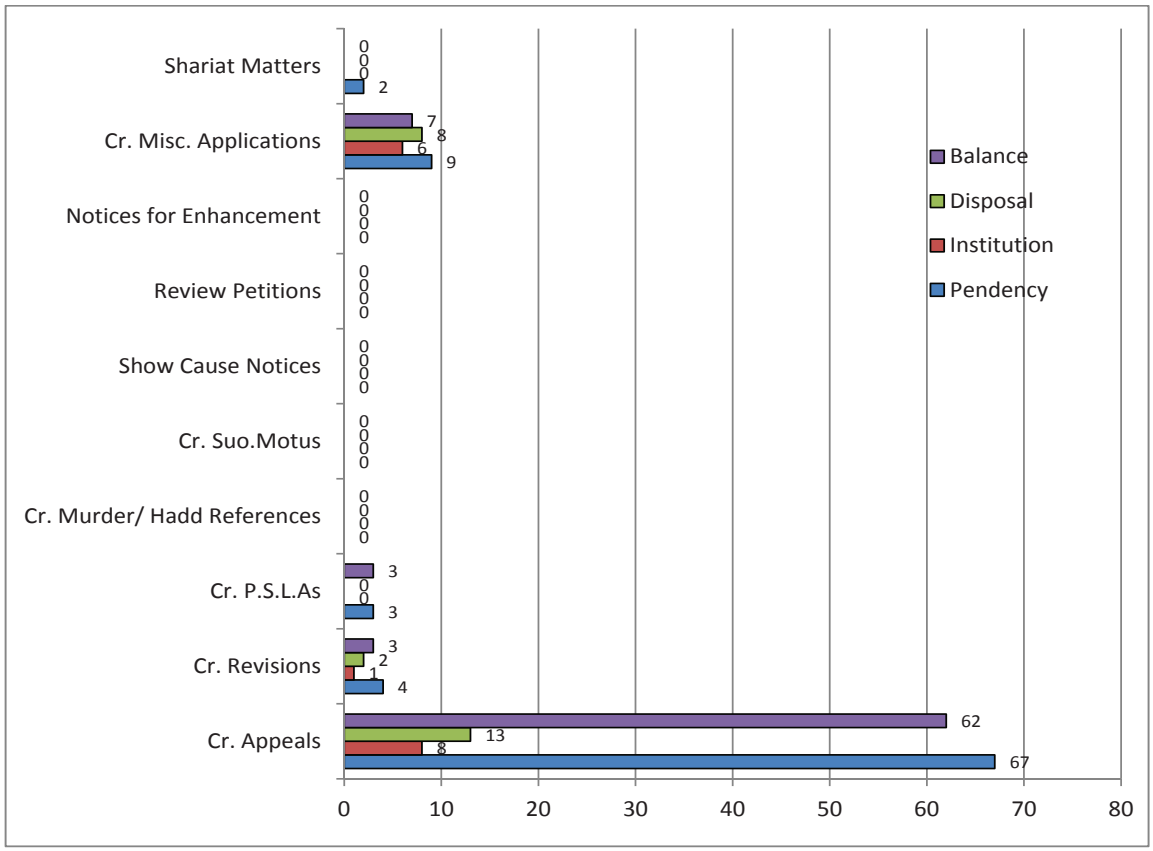
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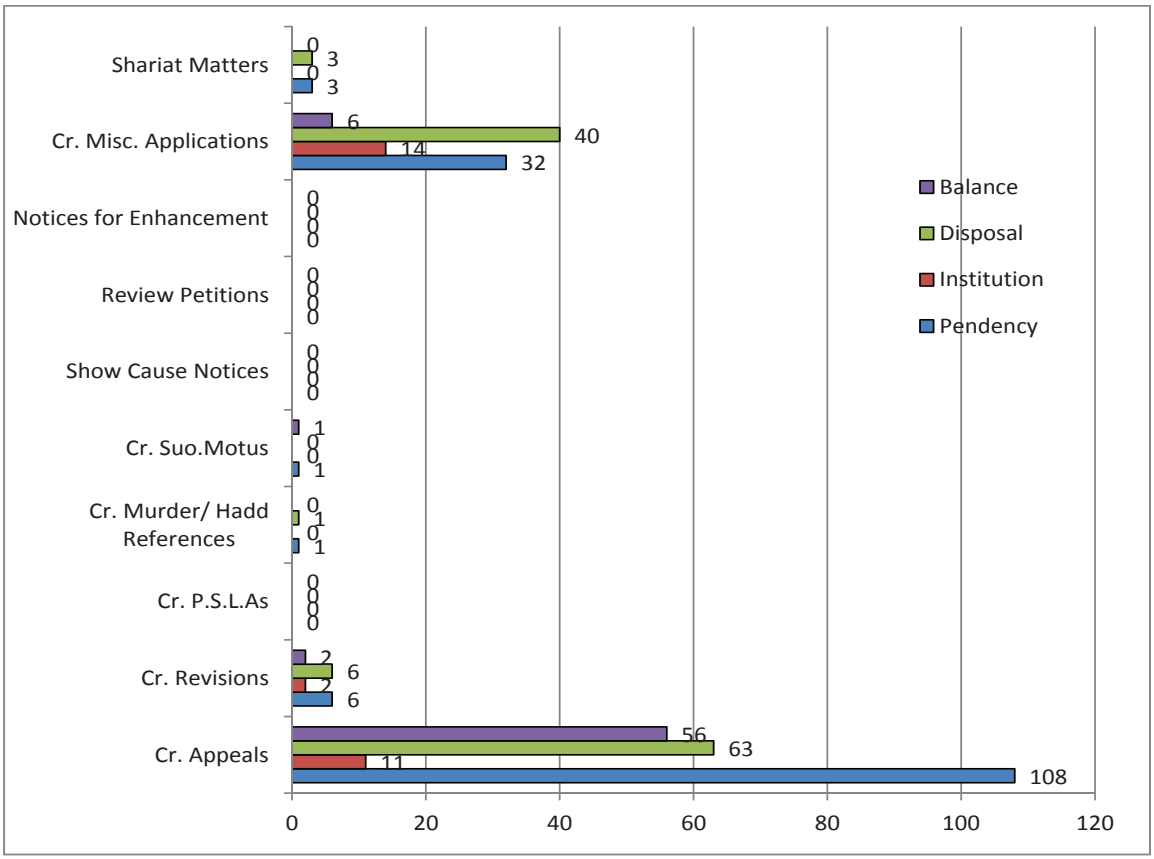
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COURT AUTOMATION

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 stream line our business processes but we are also able to get constant information in 'real time' that is up to 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 were done. Some of the features of these Systems are as under:-

CASE FLOW MANAGEMENT SYSTEM (CFMS)

- 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 year 2014 following tasks were performed regarding Case Flow Management System

(a) Record of cases for the year 20124 including more than 1200 cases have been computerized at Principal seat.
(b) Reported Judgment for the year 2014 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 year 2014 following tasks were performed

* Promotion History of the court staff
* ACRs of more than 70 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 consist 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.
* Profiles of present and former Chief Justices.
* Leading Judgments of the court (Shariat Petitions and Suo Moto Cases)
* Summary of Reported Criminal Cases from 1980 up to date.
* Tenders
* Notifications
* Photo Gallery
* Articles
* Case Status

PROJECTS UNDER PROGRESS

REPORTED JUDGMENTS

Scanning and uploading of reported judgments.

QURAN MOAJAM SOFWTARE

In this software a search Engine will provide details of each word user enters in the search engine and also display relevant verses from Holy Quran along with translation.

PRESS CLIPPINGS

Justice Riaz takes oath as Shariat Court CJ

ISLAMABAD: Chief Justice of Pakistan Nasir-ul-Mulk administered the oath of office to Justice Riaz Ahmad Khan as Chief Justice of the Federal Shariat Court at a ceremony held in the Supreme Court building on Saturday.

Supreme Court Registrar Syed Tahir Shahbaz conducted proceedings of the oath-taking ceremony, said a press release.

Judges of the Supreme Court, Shariat Court, officers of the Law and Justice Commission and the Federal Judicial Academy, representatives of the bar, senior lawyers and law officers attended the ceremony.

Published in Dawn, March 8th, 2015

FSC to hear Riba case on March 24

The Newspaper's Staff Reporter

ISLAMABAD: The Federal Shariat Court (FSC) will resume on March 24 hearing of a long-pending case on Riba.

The Shariat Court had held the interest or Riba as repugnant to Islam in 1992, but the Supreme Court in 2002 remanded the case back to it for reconsideration.

Some banks and financial institutions moved 67 appeals against the FSC judgement before the Shariat Appellate Bench of the Supreme Court. The appellate bench took years to hear the appeals and upheld the FSC verdict with a direction to the government to amend banking laws and statutes in the light of the judgement.

The banks filed a review petition before the Supreme Court which remanded the case back to the FSC in 2002. The Shariat Court commenced preliminary hearing in 2013.

According to an FSC announcement, the court has heard the points of view of jurist consultants Tahir Mansuri and Dr Ayub of the Ripha University.

The FSC prepared a questionnaire to reconsider the view of contemporary jurists of the Muslim word and sent it to Dr Wahba Zuhaili, Dr Sami Ibrahim Al Suwailum, Dr Muhauiddin Al Qarah Daghi and Dr Ajeel Jasim Al Nashmi, seeking their views in the light of the Holy Quran and Sunnah.

The FSC has received the views of Dr Zuhaili and Dr Ibrahim, but a response from Dr Daghi and Dr Al Nashmi is awaited.

Published Mar 01, 2014

Shariat court to take up 22-year-old Riba case on March 24

By Hasnaat Malik

Case was remanded back to the Shariat Court by the Supreme Court in 2002 to reconsider its judgment delivered in 1992. PHOTO: FILE

ISLAMABAD: The Federal Shariat Court (FSC) has decided to take up the long-pending case on Riba (usury) on March 24. The case was remanded back to the Shariat Court by the Supreme Court in 2002 to reconsider its judgment delivered in 1992, which declared interest or Riba repugnant to the injunctions of Islam.

Earlier, in 1999, hearing an appeal against the decision, the Supreme Court's Shariat Appellate Bench upheld the FSC decision and gave the then government two years to amend all the banking laws of the country and other statutes to prohibit Riba.

Later, however, the government and some banks had instituted a review petition before the Supreme Court bench, headed by Chief Justice Sheikh Riaz, against the anti-Riba ruling. The bench remanded the case in 2002 back to the FSC to reconsider the matter.

The apex court also directed the FSC to take input from contemporary jurists of the Muslim world. In its order, the bench had held: "We are of the considered view that the issues involved in these cases require to be determined after thorough and elaborate research and comparative study of the financial systems, which are prevalent in the contemporary Muslim countries."

The FSC had already commenced the preliminary proceedings of the hearing last year in 2013. It is learnt that the Shariat court has heard the point of view of two jurist consultants, Tahir Mansuri and Dr Ayub of Riphah International University, Islamabad.

In addition, the FSC had prepared a questionnaire and sent it to Dr Wahba Zuhaili (Syria), Dr Sami Ibrahim Suwailem (Saudi Arabia), Dr Ali Mohiuddin Al Qaradaghi (Qatar) and Dr Ajeel Jassem al Nashmi (Kuwait) seeking their views regarding the issue.

The FSC has already received the view of Dr Zuhaili and Dr Sami Ibrahim, but the court has not received the opinion of others as yet.

When the Shariat Court takes up the 22-year-old case on March 24, Attorney General Salman Aslam Butt will present the government's stance on the matter.

Published in The Express Tribune, March 2nd, 2014.

No alternative to interest-based economy, SBP tells FSC

Ansar Abbasi

ISLAMABAD: The State Bank of Pakistan (SBP) clearly told the Federal Shariat Court (FSC) on Thursday that no immediate alternative was available to replace the existing interest-based economic system and banking sector of the country.

Appearing on behalf of the SBP, Salman Akram Raja, advocate, told the court that interest had an important role in Pakistan's economy which, he insisted, couldn't survive in isolation from the outside world that followed the same system of interest-based economy.

He told the court that interest was a complicated issue having different aspects all of which couldn't be addressed at present. To a question, Raja said there was no alternative available to eliminate all aspects of interest.

On Thursday, the court was expecting the Attorney General for Pakistan to give his policy statement on the issue of Riba/interest but he did not turn up. The judges were told that the AG was busy in the apex court.

In the absence of the attorney general, the SBP counsel was allowed to open his arguments on the issue of Riba, which was declared un-Islamic by the FSC in 1992.

Since then, the case has been going through a long ordeal of judicial appeals, reviews and fresh hearing between the Supreme Court and the FSC.

Salman Raja, who will present his detailed arguments in the case after the winter vacations, conveyed to the FSC in his initial arguments that even if all forms of interest were considered un-Islamic, there was neither any alternative available for immediate change nor was there any state in the world that practised the Islamic system of economy.

Raja kept on urging the FSC judges that they should give a substitute if the present interest-based economic system was declared un-Islamic. He told the four-member bench that the government was not shy of Islam and had faith in what the religion says. But in the same breath, he urged upon the judges to decide the case keeping in view the ground realities and the global environment where we live.

He told the court that Pakistan's economy couldn't survive by introducing an economic system which was not compatible with the global system.

"Can our economic system survive behind an iron curtain with no connection with the outside world?" Raja asked while questioning the understanding of some judges, who had previously ruled against Riba/interest and sought its complete elimination.

"They (the judges) were far from reality while deciding the case," he said, adding that the decision was not implementable.

He said instead of looking for an immediate change in the present interest-based system, the court should look for a gradual change towards interest-free economy.

He rejected the contention that everything connected with interest was bad and told the court that interest had an important role in the world economy and there were countries, including China, which had made progress and changed the lives of their people by following the same system.

Raja also referred to the Sukuk Bonds and the banking system, which was presently being run in the country in the name of Islam.

Citing the examples of Saudi Arabia and Iran, Salman Raja said the former had the same interest-based economic and banking system that exists in the United States or in any other European country whereas the latter claims to have an Islamic economy but it was not accepted by Islamic scholars from most of the Muslim countries.

To a question from the court, Salman Raja said he believed there was a difference between Riba and interest and the same could be found in the Constitution that talked about elimination of usury but at the same time reflected on interest-based economic system. He, however, clarified that none of the two expressions had been defined by the Constitution.

Raja was not keen at this stage of his arguments to defend interest as being different from Riba.

He said even if there was no difference between the two, a decision can't be given by the court without considering the prevailing situations and complexities of the present economic system.

روزنامہ ''جنگ''، راولپنڈی

27/جون 2014ء

شرعی عدالت میں 3 ججوں کی تقرری کی سفارش

اسلام آباد (جنگ رپورٹر) نیشنل جوڈیشل کمیشن کا اجلاس چیف جسٹس تصدق حسین جیلانی کے زیرصدارت منعقد ہوا جس میں وفاقی شرعی عدالت میں تین ججوں کی تقرری اور ایک موجود جج کی مدت ملازمت میں توسیع کی سفارش کی گئی ہے۔ جن فاضل ججوں کی تقرری کی سفارش کی گئی ہے ان میں اسلام آباد ہائی کورٹ کے سابق چیف جسٹس مسٹر جسٹس (ر) ریاض خان' لاہور ہائی کورٹ کے سابق جج' مسٹر جسٹس (ر) نجم الحسن اور بلوچستان ہائی کورٹ بار ایسوسی ایشن کے صدر ظہور احمد شہوانی ایڈووکیٹ شامل ہیں جبکہ وفاقی شرعی عدالت کے موجودہ جج' مسٹر جسٹس فدا محمد خان کی مدت ملازمت میں توسیع کی سفارش کی گئی ہے۔ اجلاس میں سپریم کورٹ کے سینئر ممبر ججز کے علاوہ پاکستان بار کونسل کے نمائندہ اور دیگر ممبرز نے بھی شرکت کی۔

روزنامہ ''جنگ''، راولپنڈی

03/مئی 2014ء

وزیراعظم قرضہ سکیم وفاقی شریعت عدالت میں چیلنج

لاہور (آن لائن) وزیراعظم میاں محمد نواز شریف کی قرضہ اسکیم کو وفاقی شریعت عدالت میں چیلنج کر دیا گیا۔ پاکستان تحریک انقلاب نے وزیراعظم میاں محمد نواز شریف کی قرضہ اسکیم کو وفاقی شریعت عدالت میں چیلنج کرتے ہوئے موقف اختیار کیا ہے کہ قرضہ اسکیم سود کی بنیاد پر شروع کی گئی ہے جو کہ اسلامی قوانین کے مطابق غیر آئینی و غیر قانونی ہے لہٰذا شریعت عدالت وزیراعظم قرضہ اسکیم پر پابندی عائد کرے۔

روزنامہ ''نوائے وقت''، راولپنڈی

11/جولائی 2014ء

پارلیمانی کمیٹی نے شریعت کورٹ کیلئے 4 ججوں کے تقرر کی منظوری دیدی

20 سال کے بعد وفاقی شرعی عدالت میں بلوچستان کو بھی نمائندگی دیدی گئی

اسلام آباد (وقائع نگار خصوصی) اعلیٰ عدلیہ کے ججوں کی تقرری کے لئے قائم کردہ پارلیمانی کمیٹی نے جوڈیشل کمیشن کی سفارشات پر شریعت کورٹ کے لئے چار ججوں کی تقرری کی منظوری دیدی۔ جمعرات کو پارلیمانی کمیٹی کا اجلاس سینیٹر راجہ ظفر الحق کی زیرصدارت پارلیمنٹ ہاؤس میں منعقد ہوا۔ جس میں جوڈیشل کمیشن کی شریعت کورٹ کے لئے چار ججوں کی تقرری کی سفارشات کو من وعن قبول کرلیا گیا جن ججوں کی تقرری کی منظوری دی ہے ان میں جسٹس (ر) ڈاکٹر فدا محمد خان' ریاض احمد' شیخ انجم الحسن' ظہور احمد شہوانی شامل ہیں۔ اعلیٰ عدلیہ میں ججز تقرریوں کے بارے میں قائم پارلیمانی کمیٹی نے تین سال کیلئے وفاقی شرعی عدالت میں چار ججز کو تعینات کرنے کی منظوری دیدی ہے۔ بیس سال کے بعد وفاقی شرعی عدالت میں بلوچستان کو بھی نمائندگی دی گئی ہے۔ ظہور احمد شاہوانی کا تعلق بلوچستان سے ہے۔ سفارشات صدر مملکت کو بھجوادی گئی ہیں۔ صدر کی باضابطہ توثیق پر وفاقی شرعی عدالت کے چاروں جج حلف اٹھائیں گے۔

روزنامہ ''نوائے وقت''، راولپنڈی

18/فروری 2014ء

وفاقی شرعی عدالت کے جج فدا محمد خان کا دورہ اسلامی یونیورسٹی

اسلام آباد (نامہ نگار) وفاقی شرعی عدالت کے جج جسٹس فدا محمد خان نے بین الاقوامی اسلامی یونیورسٹی کا دورہ کیا اور صدر جامعہ پروفیسر ڈاکٹر احمد یوسف الدریویش سے ملاقات کی جس میں جامعہ کے بورڈ آف گورنرز کے اجلاس کے حوالے سے تبادلہ خیال کیا گیا۔ پیر کے روز ہونے والی ملاقات میں جامعہ کے ڈائریکٹر جنرل انتظامی امور و مالیاتی امور گلزار احمد خواجہ اور لاہور اسلامی یونیورسٹی کے سربراہ ڈاکٹر حافظ عبدالرحمن مدنی بھی شریک تھے۔ دوران ملاقات یونیورسٹی کے بورڈ آف ٹرسٹیز کے ریاض میں ہونے والے اجلاس پر بھی تبادلہ خیال کیا گیا۔ اس موقع پر جسٹس فدا محمد خان نے تعلیم کے فروغ کے لیے جامعہ کی خدمات کو سراہا اور کہا کہ جامعہ ڈاکٹر الدریویش کی قیادت میں مزید ترقی کرے گی۔ صدر جامعہ نے جسٹس فدا محمد کو جامعہ کے مستقبل کے منصوبوں اور اعلیٰ تعلیم کی فراہمی کے لئے جامعہ کے تینوں کیمپس میں اٹھائے گئے اقدامات سے آگاہ کیا۔ انہوں نے جامعہ کے بورڈ آف ٹرسٹیز اور بورڈ آف گورنرز کے حوالے سے گفتگو کرتے ہوئے کہا کہ اجلاسوں کے دوران ممبران کی رہنمائی میں جامعہ کی ترقی کے لیے مزید ترقیاتی اقدامات کرنے میں بھی مدد ملے گی۔

روزنامہ ''جنگ''، راولپنڈی

03/جولائی 2014ء

ججز تقرر، پارلیمانی کمیٹی نے وفاقی شریعت عدالت کے 4 ججوں کی تقرری کی منظوری دیدی

اسلام آباد (نمائندہ خصوصی) ججز تقرری پارلیمانی کمیٹی نے وفاقی شریعت عدالت میں چار ججوں کی تقرری کی منظوری دے دی۔ پارلیمانی کمیٹی کا اجلاس بدھ کو سینیٹر راجہ محمد ظفر الحق کی صدارت میں ہوا۔ شاہ محمود قریشی' ارشد خان لغاری' چوہدری محمود بشیر ورک اور سیکرٹری سینٹ امجد پرویز ملک اجلاس میں موجود تھے۔ عدالتی کمیشن کی سفارشات پر پارلیمانی کمیٹی نے جسٹس ڈاکٹر فدا محمد خان کو مزید تین سال کیلئے وفاقی شرعی عدالت کا جج مقرر کرنے کی منظوری دی جبکہ جسٹس (ر) ریاض احمد خان' جسٹس (ر) شیخ انجم الحسن اور ظہور احمد شہوانی کو تین سال کیلئے وفاقی شرعی عدالت کا جج بنانے کی منظوری دی گئی ہے۔

روزنامہ ایکسپریس۔ اسلام آباد

12 فروری 2015ء

فاٹا میں بھی فوجی عدالتیں بنیں گی، صدر نے منظوری دیدی

جسٹس فیصل چیف جسٹس سندھ ہائیکورٹ، جسٹس ریاض چیف جسٹس شرعی عدالت مقرر

اسلام آباد (خصوصی رپورٹر، نمائندہ خصوصی) صدر ممنون حسین نے وزیراعظم کی سفارش پر آرمی (ترمیمی) ایکٹ 2015 کو فاٹا میں توسیع دینے کی منظوری دیدی، اس ایکٹ کے تحت فاٹا میں فوجی عدالتیں بنیں گی، صدر مملکت نے وزیراعظم کی سفارش پر آرمی (ترمیمی) ایکٹ 2015 کو فاٹا میں توسیع دینے کی منظوری دیدی۔ علاوہ ازیں صدر ممنون حسین نے وزارت امور کشمیر وگلگت بلتستان کی سمری پر گلگت بلتستان (امپاورمنٹ اینڈ سیلف گورننس) آرڈر 2009 میں ترمیم کیلئے وزیراعظم کی آرڈیننس کی منظوری دیدی جسکے تحت اس آرڈر کے آرٹیکل 20 کی شق (1) میں پیراگراف (aa) کا اضافہ کیا گیا جسکے تحت صدر مملکت وفاقی وزیر امور کشمیر وگلگت بلتستان کی عہدہ گورنر گلگت بلتستان کی تقرری کرسکیں گے۔ صدر ممنون حسین نے جسٹس فیصل عرب کو سندھ ہائیکورٹ کا چیف جسٹس، جسٹس ریاض احمد خان کو وفاقی شریعت کورٹ کا چیف جسٹس اور جسٹس مقبول باقر کو سپریم کورٹ میں جج مقرر کرنیکی منظوری دیدی۔ ایوان صدر سے جاری بیان کے مطابق صدر مملکت نے وزارت قانون کی سمری اور وزیراعظم کی سفارش پر جسٹس فیصل عرب کو سندھ ہائیکورٹ کا چیف جسٹس تعینات کی منظوری دی۔ صدر مملکت نے سندھ ہائیکورٹ کے چیف جسٹس جسٹس مقبول باقر کو سپریم کورٹ میں جج جبکہ جسٹس ریاض احمد خان کو وفاقی شریعت کورٹ کا چیف جسٹس مقرر کرنیکی منظوری دیدی۔ آذربائیجان کی خاتون اول کو ہلال پاکستان عطا کرنیکی منظوری بھی دی گئی۔ صدر مملکت نے دو ڈپٹی اٹارنی جنرل اور 14 سینئر لاء کونسلز کے طور پر 16 وکلاء کی تقرری کی منظوری دیدی۔ ادھر صدر نے این اے 137 ننکانہ صاحب 3 کے ضمنی انتخابات میں ریٹرننگ افسران کی جانب سے کاغذات نامزدگی قبول یا رد کرنے کے فیصلے کیخلاف اپیلیں سننے کیلئے لاہور ہائیکورٹ کے دو ججوں پر مشتمل ایپلٹ ٹریبونل تشکیل دینے کی منظوری دیدی۔

روزنامہ جنگ۔ راولپنڈی

8/ جنوری 2015ء

چند عناصر وسائل غلط استعمال کرکے اسلام کیخلاف پراپیگنڈہ کر رہے ہیں، جسٹس فدا

عالم اسلام کے اتحاد اور پرامن طریقے سے معاملات کا حل ڈھونڈنے میں کامیابی کا راز ہے

اسلام آباد (خصوصی نمائندہ) چیف جسٹس وفاقی شرعی عدالت جسٹس فدا محمد خان نے کہا ہے کہ دنیا میں فاصلے سمٹ گئے ہیں لیکن انسانوں کے درمیان فاصلے بڑھ گئے ہیں جبکہ کچھ عناصر وسائل کا غلط استعمال کرکے اسلام کے خلاف منفی پراپیگنڈہ کر رہے ہیں، اس مسئلے اور اس جیسے دیگر عصری مسائل کے حل میں مساجد، تعلیمی ادارے اور میڈیا کا مربوط کردار مثبت اور تعمیری نتائج مرتب کرسکتا ہے۔ ان خیالات کا اظہار انہوں نے بدھ کے روز بین الاقوامی اسلامی یونیورسٹی اسلام آباد کے فیصل مسجد کیمپس میں منعقدہ ''فہم دین، عصری مباحث و مسائل''، کے موضوع پر علماء کرام کے لیے منعقدہ دو روزہ تربیتی ورکشاپ کی اختتامی تقریب سے خطاب کرتے ہوئے کیا۔ اس موقع پر اسلامی یونیورسٹی کے نائب صدر ڈاکٹر طاہر منصوری، ڈاکٹر سہیل حسن سمیت اکیڈمی کے دیگر سکالرز اور شریک ورکشاپ علماء کی بڑی تعداد بھی موجود تھی۔ جسٹس فدا محمد خان نے عالم اسلام کے اتحاد پر زور دیتے ہوئے کہا کہ سب کے اکٹھے ہونے اور پرامن طریقے سے معاملات کے حل کو ڈھونڈنے میں کامیابی کا راز پنہاں ہے۔

روزنامہ جنگ۔ راولپنڈی

30/ اکتوبر 2015ء

ربا کے خاتمے کا مقدمہ، کیا محنت کے بغیر سرمایہ پر منافع لیا جاسکتا ہے؟ وفاقی شریعت عدالت

آئین میں رباء کی کوئی تشریح نہیں، پاکستان دنیا سے کٹ نہیں سکتا، سعودی عرب کا معاشی نظام بھی برطانیہ اور امریکہ ہی کی طرح کا ہے، وکیل اسٹیٹ بینک

دس عدالتی معاونین کو نوٹس جاری، کوئی شخص بھی فریق بننا چاہے تو وہ اپنی علمی قابلیت کا ثبوت پیش کرکے رجسٹرار کو درخواست دے سکتا ہے

اسلام آباد (جنگ رپورٹر) وفاقی شرعی عدالت نے آئین کے آرٹیکل 38 الیف کے تحت ملک سے رباء کے خاتمہ کے حوالہ سے مقدمہ کی سماعت کے دوران دس عدالتی معاونین کو نوٹس جاری کرتے ہوئے کیس کی سماعت موسم سرما کی تعطیلات کے بعد تک ملتوی کر دی ہے، جبکہ ہدایت کی ہے کہ اگر کوئی شخص بھی اس مقدمہ میں فریق بننا چاہے تو وہ اسلامی فقہ کے حوالہ سے اپنی علمی قابلیت کا ثبوت پیش کرکے رجسٹرار کو درخواست دے سکتا ہے، چیف جسٹس ریاض احمد خان کی سربراہی میں جسٹس فدا محمد خان، جسٹس شیخ انجم الحسن اور جسٹس ظہور احمد شہوانی پر مشتمل چار رکنی بنچ نے جمعرات کے روز کیس کی سماعت کی تو سٹیٹ بنک کے وکیل سلمان اکرم راجہ پیش ہوئے جبکہ عدالتی نوٹس کے باوجود اٹارنی جنرل موجود نہ تھے جس پر عدالت نے وقفہ کرتے ہوئے کہا کہ انہیں بلایا جائے، دوبارہ سماعت شروع ہوئی تو عدالت کو بتایا گیا کہ وہ سپریم کورٹ میں مصروفیت کی وجہ سے پیش نہیں ہوسکے ہیں، عدالت کی ہدایت پر سلمان اکرم راجہ نے دلائل دیتے ہوئے مؤقف اختیار کیا کہ آئین میں رباء (سود) اور Interest (منافع) کی کوئی تشریح نہیں کی گئی ہے، پاکستان دنیا سے کٹ نہیں سکتا ہے، ہم سوویت یونین کی طرح اپنی معیشت کو ایک کیبن میں بند نہیں کرسکتے، سعودی عرب کا معاشی نظام بھی برطانیہ اور امریکہ ہی کی طرح کا ہے، اگرچہ ایران میں اسلامی نظام ہے لیکن ان کا معاشی نظام بھی مکمل طور پر اسلامی نہیں ہے، فاضل چیف جسٹس نے ان سے استفسار کیا کہ ایک بینک ایک شخص کو 7 فیصد منافع دے رہا ہے اور کسی دوسرے شخص سے 17 فیصد لے رہا ہے، کیا محنت کئے بغیر سرمایہ پر منافع لیا جاسکتا ہے؟ انہوں نے مزید استفسار کیا کہ کیا سٹیٹ بنک ایک خودمختار ادارہ ہے یا حکومت کے ماتحت ہے؟ تو فاضل وکیل نے کہا کہ کسی حد تک خودمختار ادارہ ہے، انہوں نے اپنے دلائل جاری رکھتے ہوئے کہا کہ حکومتوں کو اپنے ملازمین کی تنخواہوں کی ادائیگی کے لئے ٹیکس یا قرضوں پر انحصار کرنا پڑتا ہے، اور پوری دنیا میں ہی ملکی معیشت چلانے کے لئے یہی دو طریقے ہیں، جس پر چیف جسٹس نے کہا کہ پھر عدالت کو یہ بھی دیکھنا پڑے گا کہ حکومت جو پیسہ بینکوں سے لیتی ہے، اس کا کیا کرتی ہے، سلمان راجہ نے کہا کہ پوری دنیا میں جب بھی کوئی ملک کسی دوسرے ملک کے ادارہ سے قرض لیتا ہے تو اس پر منافع بھی دینا پڑتا ہے، یہ ممکن نہیں ہے کہ ایک ادارہ یا شخص کسی سے ایک روپیہ لے اور دس سال بعد اسے ایک روپیہ ہی واپس کرے، ابھی سلمان راجہ کے دلائل جاری تھے کہ کیس کی مزید سماعت ملتوی کرتے ہوئے فاضل عدالت نے 10 عدالتی معاونین کو نوٹسز جاری کرتے ہوئے ہدایت کی کہ اگر کوئی شخص بھی اس مقدمہ میں فریق بننا چاہے تو وہ اسلامی فقہ کے حوالہ سے اپنی علمی قابلیت کا ثبوت پیش کرکے رجسٹرار کو درخواست دے سکتا ہے، کیس کی مزید سماعت موسم سرما کی تعطیلات کے بعد ہوگی۔

روزنامہ جنگ۔ راولپنڈی

7مارچ 2015ء

وفاقی شرعی عدالت کے نئے چیف جسٹس ریاض احمد خان آج حلف اٹھائیں گے

اسلام آباد (جنگ رپورٹر) وفاقی شرعی عدالت کے نئے چیف جسٹس ریاض احمد خان آج اپنے عہدہ کا حلف اٹھائینگے، چیف جسٹس ناصرالملک حلف لیں گے۔

روزنامہ نوائے وقت۔ راولپنڈی

8مارچ 2015ء

چیف جسٹس شرعی عدالت نے حلف اٹھالیا

اسلام آباد (نمائندہ نوائے وقت) وفاقی شرعی عدالت کے جج جسٹس ریاض احمد خان نے چیف جسٹس کے عہدے کا حلف اٹھالیا ہے۔ چیف جسٹس آف پاکستان جسٹس ناصرالملک نے جسٹس ریاض احمد خان سے ان کے عہدے کا حلف لیا۔ حلف برداری کی تقریب اسلام آباد میں سپریم کورٹ بلڈنگ میں منعقد ہوئی جس میں سپریم کورٹ کے جج صاحبان، رجسٹرار، اٹارنی جنرل اور سینئر وکلا نے شرکت کی۔

روزنامہ جنگ۔ راولپنڈی

18نومبر 2015ء

استغاثہ ٹیسٹ ٹیوب بچی کی پیدائش کا تمام ریکارڈ پیش کرے، وفاقی شریعت عدالت

عدالت کا ایڈیشنل ایڈووکیٹ جنرل پنجاب سے ٹیسٹ ٹیوب بے بی سے متعلق عالمی قوانین کی تفصیلات بھی طلب

اسلام آباد (جنگ رپورٹر) وفاقی شریعت عدالت نے ”ٹیسٹ ٹیوب بچی کی پیدائش“ سے متعلق تنازعہ سے متعلق ایک کیس کی سماعت کے دوران درخواست گزار خاتون کو آئندہ سماعت پر نکاح اور دیگر شہادتوں پر مشتمل اصلی ریکارڈ عدالت میں پیش کرنے اور ٹیسٹ ٹیوب بے بی کی پیدائش کے تمام عمل سے متعلق تحریری تفصیلات پیش کرنے کا حکم جاری کیا ہے جبکہ ایڈیشنل ایڈووکیٹ جنرل پنجاب سے ٹیسٹ ٹیوب کے ذریعے بچے کی پیدائش سے متعلق عالمی قوانین کی تفصیلات بھی طلب کرلی ہیں۔ چیف جسٹس ریاض احمد خان نے ریمارکس دیئے ہیں کہ اقوام متحدہ اور امریکی قوانین کے پابند نہیں ہیں، قرآن و سنت کے پابند ہیں اسی کے مطابق فیصلہ کریں گے کہ کیا ٹیسٹ ٹیوب بے بی کے ذریعے بچے کی پیدائش قرآن و سنت کے مطابق ہے یا نہیں ہے؟ چیف جسٹس، مسٹر جسٹس ریاض احمد خان کی سربراہی میں قائم 3 رکنی بنچ نے منگل کے روز کیس کی سماعت کی تو درخواست گزار فرزانہ ناہید نے مؤقف اختیار کیا کہ میری بچی ٹیسٹ ٹیوب بے بی نہیں ہے میرا ڈاکٹر فاروق صدیقی سے باقاعدہ نکاح ہوا تھا جوکہ بچی کے اخراجات اٹھانے سے بچنے کے لئے ٹیسٹ ٹیوب بے بی کا موقف اپنا رہے ہیں، جبکہ ڈاکٹر فاروق صدیقی نے موقف اختیار کیا کہ بچی کی پیدائش ٹیسٹ ٹیوب کے ذریعے ہوئی ہے۔ فاضل عدالت نے درخواست گزار کو ہدایت کی کہ وہ کسی عالم دین سے بھی مشورہ کرکے قرآن و سنت کے مطابق اپنے دلائل پیش کریں۔ بعدازاں عدالت نے کیس کی مزید سماعت غیرمعینہ مدت کے لئے ملتوی کر دی۔

روزنامہ نوائے وقت۔ راولپنڈی

29 ستمبر 2015ء

شرعی عدالت زنا کی سزا سے متعلق دائر پٹیشن کی باقاعدہ سماعت آج شروع کریگی

اسلام آباد (نمائندہ نوائے وقت) وفاقی شرعی عدالت آج بروز منگل سے حدود آرڈیننس میں زنا کی سزا کے خلاف دائر پٹیشن کی باقاعدہ سماعت شروع کرے گی۔ حدود آرڈیننس کو سابق فوجی آمر جنرل ضیاالحق کے دور میں متعارف کرایا گیا تھا جس کے خلاف فیڈرل شریعت کورٹ میں درخواست گزار شاہد اورکزئی نے پٹیشن دائر کی۔ فیڈرل شریعت کورٹ نے 14 ستمبر کو وفاق اور چاروں صوبوں کو ہدایت کی تھی کہ وہ زنا کو ثابت کرنے کے حوالے سے چار شہادتوں کے متعلق اپنے اپنے قانونی نکات کو پیش کریں۔ کیونکہ درخواست گزار شاہد اورکزئی نے موقف اپنایا تھا کہ آرڈیننس میں کہا گیا تھا کہ زنا کو ثابت کرنے کے لیے چار مسلم بالغ مردوں کی گواہی ہونی چاہیے۔ جبکہ درخواست گزار نے اس حوالے سے کہا ہے کہ گواہ مرد ہی نہیں بلکہ غیراخلاقی حرکت کے حوالے سے کوئی بھی خاتون زیادہ موثر گواہ بن سکتی ہے۔ عدالت نے درخواست گزار سے کہا ہے کہ اس کو قرآن سے اپنے دلائل کو ثابت کرنا ہوگا۔ اس حوالے سے فیڈرل شریعت کورٹ کا لارجر بنچ 29 ستمبر سے کیس کی سماعت کرے گا۔

روزنامہ نوائے وقت۔ راولپنڈی

30/ اکتوبر 2015ء

سود کے خاتمہ سے متعلق کیس، شرعی عدالت نے عدالتی معاونین کو نوٹس جاری کر دیئے

مقدمہ میں فریق بننے کا خواہشمند کوئی بھی شخص رجسٹرار کو درخواست دے سکتا ہے

اسلام آباد (نمائندہ نوائے وقت) وفاقی شرعی عدالت نے ''ملک سے رباء کے خاتمہ'' کے حوالہ سے مقدمہ کی سماعت کے دوران دس عدالتی معاونین کو نوٹسز کرتے ہوئے کیس کی سماعت موسم سرما کی تعطیلات کے بعد تک ملتوی کر دی ہے، جبکہ ہدایت کی ہے کہ اگر کوئی شخص بھی اس مقدمہ میں فریق بننا چاہے تو وہ اسلامی فقہ کے حوالہ سے اپنی علمی قابلیت کا ثبوت پیش کرکے رجسٹرار کو درخواست دے سکتا ہے، چیف جسٹس ریاض احمد خان کی سربراہی میں جسٹس فدا محمد خان، جسٹس شیخ عظمت حسن اور جسٹس ظہور احمد شہوانی پر مشتمل چار رکنی بنچ نے جمعرات کے روز آئین کے آرٹیکل 38 الیف کے تحت ملک سے سود کے خاتمہ کے لیے دائر درخواست کی سماعت کی تو سٹیٹ بنک کے وکیل سلمان اکرم راجہ پیش ہوئے جبکہ عدالتی نوٹس کے باوجود اٹارنی جنرل موجود نہ تھے جس پر عدالت نے وقفہ کرتے ہوئے کہا کہ انہیں بلایا جائے، دوبارہ سماعت شروع ہوئی تو عدالت کو بتایا گیا کہ وہ سپریم کورٹ میں مصروفیت کی وجہ سے پیش نہیں ہوسکے، عدالت کی ہدایت پر سلمان اکرم راجہ نے دلائل دیتے ہوئے موقف اختیار کیا کہ آئین میں رباء (سود) اور Interest (منافع) کی کوئی تشریح نہیں کی گئی ہے، پاکستان دنیا سے کٹ نہیں سکتا ہے، ہم سوویت یونین کی طرح اپنی معیشت کو ایک کیبن میں بند نہیں کرسکتے، سعودی عرب کا معاشی نظام بھی برطانیہ اور امریکہ ہی کی طرح کا ہے، اگرچہ ایران میں اسلامی نظام ہے لیکن ان کا معاشی نظام بھی مکمل طور پر اسلامی نہیں ہے، فاضل چیف جسٹس نے ان سے استفسار کیا کہ ایک بنک ایک شخص کو 7 فیصد منافع دے رہا ہے اور کسی دوسرے شخص سے 17 فیصد لے رہا ہے، کیا محنت کئے بغیر سرمایہ پر منافع لیا جاسکتا ہے؟ انہوں نے مزید استفسار کیا کہ کیا سٹیٹ بنک ایک خودمختار ادارہ ہے یا حکومت کے ماتحت ہے؟ تو فاضل وکیل نے کہا کہ کسی حد تک خودمختار ادارہ ہے، انہوں نے اپنے دلائل جاری رکھتے ہوئے کہا کہ حکومتوں کو اپنے ملازمین کی تنخواہوں کی ادائیگی کے لئے ٹیکس یا قرضوں پر انحصار کرنا پڑتا ہے، اور پوری دنیا میں ہی ملکی معیشت چلانے کے لئے یہی دو طریقے ہیں، جس پر چیف جسٹس نے کہا کہ پھر عدالت کو یہ بھی دیکھنا پڑے گا۔

روزنامہ جنگ۔ راولپنڈی

17نومبر 2015ء

زنا ثابت کرنے کیلئے شہادت ختم کرنیکی درخواست پر عدالتی معاون سے رائے طلب

وفاقی اور تین صوبائی حکومتوں کی اپنے اپنے جواب میں شرعی عدالت سے اس درخواست کو خارج کرنے کی استدعا

اسلام آباد (جنگ رپورٹر) وفاقی شرعی عدالت نے حدود آرڈیننس 1979 میں زنا ثابت کرنے کے لئے 4 بالغ و عاقل چشم دید گواہوں کی شہادت کے طریقہ کار کے خاتمہ کے حوالہ سے دائر درخواست کی سماعت کے دوران عدالتی معاون ڈاکٹر شفیق الرحمان سے اس حوالہ سے تحریری رائے طلب کرلی ہے جبکہ وفاقی اور تین صوبائی حکومتوں نے اپنے اپنے جوابات میں اس درخواست کو ناقابل سماعت قرار دیتے ہوئے خارج کرنے کی استدعا کی ہے، چیف جسٹس ریاض احمد خان کی سربراہی میں قائم 4 رکنی بنچ نے سوموار کے روز کیس کی سماعت کی تو وفاقی حکومت کے علاوہ صوبہ ہائے پنجاب، بلوچستان اور خیبرپختونخواہ کی حکومتوں کی جانب سے جوابات داخل کروائے گئے جن میں درخواست کو ناقابل سماعت قرار دیتے ہوئے اسے خارج کرنے کی استدعا کی گئی ہے، جبکہ صوبہ سندھ کی جانب سے تاحال جواب داخل نہیں کروایا گیا۔ یاد رہے کہ سال 2004 میں دائر کی گئی شریعت درخواست میں موقف اختیار کیا گیا ہے کہ حدود آرڈیننس کا اصول اسلامی اصولوں سے متصادم ہے۔ اس لئے گواہی کے اس طریقہ کار کو کالعدم قرار دیا جائے جس پر فاضل عدالت نے وفاقی و صوبائی حکومتوں سے جواب طلب کرتے ہوئے ماہر فقہ، ڈاکٹر شفیق الرحمان کو عدالت کا معاون مقرر کیا تھا، کیس کی مزید سماعت غیرمعینہ مدت تک ملتوی کر دی گئی ہے۔

SELECTED JUDGMENTS

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

Present.

MR. JUSTICE RIAZ AHMAD KHAN, CHIEF JUSTICE
MR. JUSTICE DR. FIDA MUHAMMAD KHAN

JAIL CRIMINAL APPEAL NO.10/P of 2013
Irfan s/o Malang Jan resident of Hassan Garhi, Peshawar.

….. Appellant

Versus.

The State. …... Respondent

CRIMINAL REVISION NO.1/P of 2011
Mohammad Sharif son of Shireen Khan,
Resident of Baloo Tharu Jabba, Tehsil
and District Peshawar. …... Petitioner

Versus

1. Irfan s/o Malang Jan resident of Hassan Garhi,
   Tehsil & District Peshawar.

2. The State. …... Respondents

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Counsel for the Appellant	….	Mr. Gul Daraz Khan, Advocate
Counsel for Complainant/Petitioner	….	Mr. Sohail Akhtar, Advocate
Counsel for the State	….	Mr. Muhammad Sohail, Assistant Advocate General KPK
FIR No. date & Police Station.	….	FIR No.524, dated 27.06.2009 P.S. Bhana Mari, Peshawar
Date of judgment of trial Court	….	10.02.2011
Date of receipt of Appeal	….	23.12.2011
Date of receipt of Revision	….	17.03.2013
Date of hearing	….	21.04.2015
Date of decision	….	28.04.2015

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JUDGMENT:

RIAZ AHMAD KHAN, C.J.— Accused/appellant Irfan son of Malang Jan resident of Hassan Garhi, Peshawar has called in question judgment dated 10.02.2011 passed by Additional Sessions Judge-XIV, Peshawar by virtue of which he was convicted and sentenced to life imprisonment under Section 302(b) PPC and also to pay Rs.50,000/- each under Section 544-A Cr.P.C. as compensation which was to be paid to the legal heirs of the each deceased. The convict/appellant was also convicted and sentenced under Section 382 read with Section 397 PPC to undergo ten years S.I. as well as to pay a fine of Rs.25,000/- or in default of payment of fine to further suffer S.I. for six months. Under Section 411 PPC he was convicted and sentenced to undergo three years S.I. All the sentences were to run concurrently. However, benefit of Section 382-B Cr.P.C. was given to the convict/appellant.

2. The learned Additional Sessions Judge, according to the impugned judgment, had taken a lenient view as the convict/appellant was a juvenile and as provided under Section 12(a) of the Juvenile Justice System Ordinance, 2000, he was not awarded death sentence.

3. The Complainant Muhammad Sharif has also filed Cr. Revision No.1/P/2011 wherein he has prayed for awarding and specifying the sentence on two counts under Section 302(b) PPC, and consecutively instead of concurrently, he had also prayed for enhancement of compensation amount under Section 544-A Cr.P.C.

4. The appeal as well as revision petition were clubbed together. This single judgment will dispose of both the above-mentioned connected matters as they arise out of one and the same judgment and FIR.

5. Brief facts of the case are that deceased Mst. Saeeda Begum had established a furniture factory in Industrial Estate, Kohat Road, Peshawar. In the portion of the said factory she had constructed a house where she used to live alongwith her son namely Kalim Ullah Jehangiri. Her second son namely Atta Ullah Jehangiri was employed in Pakistan Navy and posted as Lieutenant at Karachi. She being widow used to run the business herself. The whole factory including the house had one main gate. Mst. Saeeda Begum was widow of Javed Safdar Jehangiri and the business was known as Javed Enterprises. On 27.06.2009 one of the employees of the factory namely Haji Latif came to the factory but found the door closed and even after knocking the door for some time nobody opened the door so he sat outside the factory. During that time another employee namely Muhammad Sharif came there, he had keys of the lock so he opened the lock and when entered the house he as well as the other employee namely Haji Latif found the dead bodies of Mst. Saeeda Begum and her son Kalim Ullah. Muhammad Sharif, employee of the factory PW.8, informed the husband of the sister of Mst. Saeeda Begum namely Dr. Sajjad as well as her son Atta Ullah Jehangiri, who was at Karachi, through telephone. He also informed the police. The police came to the spot where the report was made by Muhammad Sharif who stated in the report that he was an employee in Javed Enterprises for last 25-years and was working as supervisor. On 26.06.2009 he had left deceased Mst. Saeeda Begum and her son Kalim Ullah alongwith one Irfan and Bashir in the house. Irfan's mother was maid servant in the past with deceased Saeeda Begum. The above stated four persons were with

the deceased Saeeda Begum and at evening time he begged leave and went to his house situated in a village. The next morning i.e. 27.06.2009 at 9:15 a.m. when he came to the factory he saw Haji Latif sitting in front of the main gate, who said that he had been sitting for last one hour and had been knocking at the door but nobody had come to open the door. Muhammad Sharif stated that he opened the door with his keys and entered the house alongwith Haji Latif. Inside the house they found the dead bodies of Mst. Saeeda Begum and her son Kalim Ullah whereas Irfan who was residing with them was not present. He informed husband of Mst. Saeeda Begum's sister namely Dr. Sajjad as well as son of Mst. Saeeda Begum namely Atta Ullah at Karachi. The report was reduced into writing in the shape of Marasala Ex.PA/1 at 11:15 wherein date and time of occurrence was shown as some time in the night between 26/27-06-2009. On the basis of said Marasala Ex.PA/1, FIR No.524 Ex.PA was registered on 27.06.2009 at 12:15. The police on the spot prepared injury sheets as well as inquest reports and sent the dead bodies of the deceased persons to KMC for autopsy. The dead bodies were accompanied by Constable Wilayat. On the same day i.e. 27.06.2009 at 1:05 p.m. Dr. Shazia PW.5 conducted autopsy of Mst. Saeeda Begum and found the following injuries on the body of Mst. Saeeda Begum:-

1. A chopped lacerated wound on right side of forehead 5x4.5 cm in size, 2.5 cm from midline, 3 cm above right eyebrow.

2. A chopped lacerated wound on right side of forehead 1.5 x 0.5 cm in size 0.5 cm from midline 4 cm above right eyebrow.

3. A chopped lacerated wound just on midline of forehead 2.5 x 0.5 cm in size, 2.5 cm above right eyebrow.

4. A chopped lacerated wound on left side of forehead involving midline 5 x 1.5 cm in size 2 cm above left eyebrow.

5. A chopped lacerated wound on the right side of forehead involving right eyebrow, 3 x 1 cm in size, 5.5 cm from midline.

6. A chopped lacerated wound on left side of skull measuring 5 x 1 cm in size, 9 cm above left ear, 4 cm from midline.

7. A chopped lacerated wound on left side of skull 4 x 1 cm in size, 8 cm above the left ear, 7 cm from midline.

8. Both eyes black.

9. Bleeding from nose.

According to her, the deceased died due to injury to the brain and skull with heavy sharp cutting object. Probable time between injury and death was immediate whereas between death and postmortem was 9 – 18 hours.

6. The autopsy of Kalim Ullah deceased was conducted by Dr. Anwarul Haq PW.7. He found the following injuries on the body of Kaleemullah deceased:-

1. A lacerated wound situated on the back of skull, in the midline, 5 x 1 cm in size, 2 cm below the top of skull and 7 cm above the base of skull.

2. A lacerated wound on the back of skull in the midline and left side, 7 x 2 cm in size, 2.5 cm above the base of skull and 3 cm from left ear.

3. A lacerated wound on the back of skull 4 x 2 cm in size, 3 cm above injury No.2.

4. A lacerated wound on the left side of skull 5 x 1 cm in size, 1 cm from midline and 8 cm above left ear.

5. A lacerated wound situated on the outer-side/back side of left forearm, 2 x 1 cm in size, 1 cm above the wrist joint.

6. Left black eye.

7. An abrasion on right side front of neck, 4 x 0.5 cm in size, 2 cm from midline and 5 cm above clavicle.

In his opinion the deceased died due to injury to the brain and skull with heavy sharp cutting object. Probable time between injury and death was immediate whereas between death and postmortem was 9 – 18 hours.

7. On 03.07.2009 accused Irfan was arrested from the General Bus Stand, G.T. Road, Peshawar. For three days he remained in custody of police and on 06.07.2009 his confessional statement Ex.PW.13/2 was recorded by Judicial Magistrate, Peshawar PW.13.

8. On completion of investigation, challan was submitted in the Court. Charge was framed on 03.11.2009 to which the accused did not plead guilty and claimed trial. The prosecution, in support of its contentions, examined 16 witnesses. Statement of the accused was recorded under Section 342 Cr.P.C. wherein he pleaded innocence and false implication.

9. On conclusion of the trial and after hearing the parties, the learned trial Court convicted the accused and awarded the aforementioned sentences. Feeling aggrieved of the same, the present appeal as well as revision petition were filed.

10. Learned Counsel for the appellant stated that the convict/appellant was innocent and falsely implicated in the case, he was a poor man and could not even engage a Counsel. The confessional statement was recorded after three days, he was illiterate and could not understand anything. His confessional statement was not in accordance with law which had also been retracted. On the basis of retracted confession major penalty could not be awarded. The learned Counsel for the appellant further submitted that the convict/appellant was minor and there was no direct evidence to connect him with the alleged offence. The case was based on circumstantial evidence and prosecution was required to connect all the chains from beginning to the end which were missing in the present case. In such a case conviction as well as sentence awarded were against the law and facts available

on the record. Learned Counsel for the appellant, in support of his contentions, referred to 2011 YLR 1207 Maqbool alias Booli Vs. Shaukat Ali and another, 2009 SCMR 166 Tahir Javed VS. The State, 2011 SCMR 932 Imran alias Manu Vs. The State, 2011 P Cr. L J 652 Shahid Hussain and another Vs. The State, 2011 P Cr. L J 1924 Fateh Khan Vs. The State and 3 others, 2014 P Cr. L J 323 Taj Wali Shah VS. The State, PLD 2015 Peshawar 1 Noor Shah Gul Vs. Asim Ullah and another.

11. On the other hand, learned Counsel for the complainant/petitioner submitted that though the appellant was a minor and that was the reason that the case was tried by the Additional Sessions Judge who was also Juvenile Judge. It was further submitted that it was because of the age of the accused that the learned Juvenile Court had taken a lenient view and had not awarded death sentence. The learned Counsel admitted that it was a case of circumstantial evidence. He further submitted that PW.8 Muhammad Sharif, PW.9 Muhammad Bashir and PW.12 Latif Ullah, who were natural witnesses had stated in their statements before the Court that they all had seen the accused in company of deceased on 26.06.2009. All of them left the deceased and the accused in the house. The consistent statements of all these witnesses proved the fact that the accused had been last seen in the company of the deceased. Next day in the morning he was found missing. After the arrest of the accused, articles belonging to the deceased were recovered from the possession of the accused and in addition to that the accused made a voluntary confession. As such the case was proved beyond any shadow of doubt and all the circumstances led to the conclusion that the accused/convict had committed the offence. The learned Counsel further submitted that the learned trial Court was required to convict the appellant on two counts but had erred to convict the appellant on one count. The learned Counsel prayed that even the compensation was not in accordance with law and the same was required to be enhanced.

12. We have heard the learned Counsel for the parties and have also perused the record.

13. In the present case initially no one was charged. It is a case of circumstantial evidence. In such like cases evidence should be consistent with the hypothesis of the guilt of the accused. Every chain should be linked with each other and if any chain link is missing then the benefit of the same has to be given to the accused. The accused in the instant case was formally charged by PW.6 Atta Ullah Jehangiri, who is the second son of Mst. Saeeda Begum deceased. There is nothing available on the record to show that he had charged the accused in writing prior to his arrest. However, in his statement before the Court he submitted as follows:-

> "After my due satisfaction and inquiry I came to know that my mother and brother have been murdered by our private servant Irfan son of Malang Jan presently r/o Hassan Ghari, Peshawar and he has also taken away amount of Rs.70,000/- in cash, golden ornaments of different kinds weighing 96 tolas, two laptops with CD players, mobile phone of my mother Nokia 1200, Digital Camera, flash light and purse of my deceased brother Kalim Ullah containing his NIC and other important documents by snatching the same. I charge the accused facing trial for the commission of the offence."

Infact, this witness was required to give a written statement showing the details of the articles lost, to the police prior to the arrest of the accused but nothing to that effect is available on the file.

14. The accused was arrested from a bus stop on 03.07.2009. On 29.06.2009 i.e. prior to the arrest of accused, the I.O. had submitted an application for recording statement of Atta Ullah Jehangiri PW.6 under Section 164 Cr.P.C. before the Magistrate. The application is available at file as Ex.PW.16/7 but the said statement was not brought before the Court and not exhibited. Now it is not known as to what was the statement recorded by Atta Ullah Jehangiri before the learned Magistrate. PW.6 Atta Ullah Jehangiri, second son of Mst. Saeeda Begum in his statement before the Court submitted that Irfan, the private servant had taken away amount of Rs.70,000/- in cash, golden ornaments of different kinds weighing 96-Tolas, two laptops with CD players, mobile phone of his mother Nokia 1200, digital camera, flash light and purse of his deceased brother Kalim Ullah containing his NIC and other important documents by snatching. It is not known as to what was his source of information and how he came to know that these articles had been taken away by accused/appellant.

15. The accused was arrested at bus stop, at the time of his arrest two laptops with bags and chargers, one tape-recorder small size Panasonic with four small cassette, one camera Kodak with charger, one flash light, one calculator, two mobile sets Nokia, one mobile set Sony Ericson in broken condition and 29000 rupees were recovered from him. However, from his personal possession Rs.1000/- was recovered.

16. The strange thing is that in respect of the recoveries from the accused recovery memo Ex.PW.16/2 was prepared which was attested by Muhammad Sajid and Riaz Ahmad PW.11. Now it is not known that if accused Irfan was arrested at a bus stand what were these two witnesses doing at the bus stand. According to the statement of the I.O. PW.16 the accused was arrested on spy information that he was present at bus stand. As such it cannot be believed that at that particular time these two witnesses were also present. If the accused was brought to the police station the two witnesses were called and then recovery memo Ex.PW.16/2 was prepared then this recovery memo cannot be believed.

17. There is absolutely nothing on record to show that actually deceased Saeeda Begum had Rs.70,000/- in her purse or 96-Tolas gold ornaments were already available in the house. No gold ornaments were recovered from the accused. PW.6 Atta Ullah Jehangiri in his statement before the Court submitted that he had produced the empty boxes of laptops to the police whereas the laptops were allegedly recovered in bags from the accused. The recovery as such has become doubtful.

18. As far as confessional statement is concerned, for the sake of convenience, the same is reproduced herein below:-

> "Prior to the occurrence I used to work in the house of Kalim Ullah. Now a days I am working in medical store. 3/4 days ago, I had a quarrel with my mother and brother so I left the job at medical store and came to the house of Kalim Ullah. Prior to the occurrence at afternoon I went to the medical store and stole 20-intoxicating tablets

and straight away went to the house of Kalim Ullah. At the night I prepared tea for them and in tea I mixed 10 intoxicating tablets. After taking tea they got unconscious and went to sleep. Then I tied hands and feet of Kalim Ullah and brought a knife from the kitchen. When I tried to hit them with knife my hands started trembling so I kept the knife under the foam and took the gun which was lying on the table. I gave a blow to Kalim Ullah with the butt of the gun and then took the knife and put the same on the throat of Kalim Ullah as a result of which he got injured. He called his mother and then I gave a blow to his mother with the butt of the gun 2/3 times as a result of which she also became speechless, then again I hit Kalim Ullah 4/5 times with the butt of the gun as a result of which he fell down and became speechless. Then I went to bath room to take a bath. After taking bath, I came back, again I heard the voice of Kalim Ullah's mother. I, at once, hit her 4/5 times so she also became speechless. Then I took two laptops lying in the room and got Rs.2500/- from the purse of Kalim Ullah and dollars from the purse of his mother. I also took two mobiles then locked the main gate and left the place."

This statement was thumb impressed by the accused which was recorded on 06.07.2009. On the first page of the statement the words RO & AC were printed but at the next page of the statement nothing was shown that the statement was read over to the accused and it was accepted as correct. This statement was produced before the Court by the Magistrate and exhibited as Ex.PW.13/2, Questionnaire was Ex.PW.13/1 and certificate was Ex.PW.13/3. The questionnaire as well as the certificate were in English and already in printed form. The questionnaire, however, was filled in English and thumb impressed by the accused. The same was the position with the certificate.

19. The confessional statement in the first instance was recorded after three days and for those three days the accused had remained in custody of the police. The statement itself is not confidence inspiring for the reason that it has not been proved that the accused had actually been working at some medical store. Secondly the accused was illiterate. It is not known as to how he recognized the tablets which caused intoxication and unconsciousness. Again the story that he went to medical store, stole the intoxicating tablets and easily came out is unbelievable. According to the confessional statement he had tied the hands and feet of the deceased Kalim Ullah but this statement is not proved by the medical evidence. Furthermore, in the confessional statement it has been stated that he had injured the throat of Kalim Ullah but according to the medical report no injury was available on the throat of Kalim Ullah deceased and he had not been killed with a knife. In addition to that the medical report shows that deceased Kalim Ullah had received all injuries at the back of his head. In the confessional statement there is nothing about the articles mentioned by PW.6 which were taken away by the accused. According to the confessional statement, the accused had killed the deceased with the butt of the gun whereas according to the medical report the deceased had been done to death with heavy sharp object. As such the confessional statement is not corroborated by the medical evidence. The learned Counsel for the complainant/petitioner submitted

that conviction can be recorded even on the basis of confessional statement alone if the confessional statement is voluntary and without duress. The contention is correct but in the present case the confessional statement was retracted and the Hon'ble Supreme Court in a judgment reported as 2008 SCMR 649 has held that retracted judicial confession should not be acted upon unless corroborated by some other reliable evidence. In the present case the confession is not confidence inspiring for the reason that the accused is a minor child of 15-years, illiterate, the statement itself is doubtful, the certificate is in English and it is not known as to whether it was actually read over to the accused or not. The same is the position with the questionnaire, which was in printed form, already available with the Magistrate. In such like circumstances, the confessional statement cannot be taken alone and corroboration of the same is required. Since the confessional statement is not corroborated by any other independent evidence, so we do not feel inclined to accept the confessional statement.

20. The contention of the learned Counsel for the complainant/petitioner that accused was last seen in the house of the deceased and three witnesses namely Muhammad Sharif PW.8, Muhammad Bashir PW.9 and Latif Ullah PW.12 have deposed in this respect, may be correct, but again one point has not been explained that if the door was locked from the outside then how PW.8 Muhammad Sharif was having the keys and how he could open the door. Learned Counsel for the complainant/petitioner in this respect submitted that in fact Muhammad Sharif was having additional key and with that key he had opened the door. The record does not support the contention of the learned Counsel as there is nothing on record to show that the witness had additional key. There is also nothing on record that the accused while leaving the house had locked the door. No key had been recovered from the possession of the accused, the site plan shows only one main gate and is totally silent about the nature of the lock.

21. In view of the above mentioned facts and circumstances, the case of prosecution is full of doubts. There is no consistency in the evidence and thus giving the benefit of doubt to the accused, we allow the instant Jail Criminal Appeal, set aside the judgment dated 10.02.2011 of the learned Additional Sessions Judge-XIV, Peshawar and acquit the appellant of the charges leveled against him. The accused be set free if not required in any other criminal case.

22. Resultantly, the revision petition filed by the complainant is also dismissed.

Mr. Justice Riaz Ahmad Khan,
Chief Justice

Mr. Justice Dr. Fida Muhammad Khan

Announced on **28.04.2015**
At Peshawar
Approved for reporting.

IN THE FEDERAL SHARIAT COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT.

MR. JUSTICE RIAZ AHMAD KHAN, CHIEF JUSTICE
MR. JUSTICE DR. FIDA MUHAMMAD KHAN.
MR. JUSTICE ZAHOOR AHMED SHAHWANI.

CRIMINAL APPEAL NO.37/Q OF 2014 linked with
CRIMINAL MURDER REF. NO.03/Q OF 2014.

1. Muhammad Abdullah son of Muhammad Suleman Caste Araeen, R/o Town Bagh, Jhang, Punjab.

2. Naimatullah son of Muhammad Ismail, caste Tareen, R/o Manzkai Pashin, present House No.G-282, Sector-I, Shah Faisal Colony, Karachi.

.... Appellants.

Versus

The State .... Respondent.

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Counsel for the appellant	....	Dr. Khalid Ranjah, Mr.Ali Zia Bajwa, Muhammad Abdullah & Malik Adeel Ahsan, Advocates.
Counsel for appellant	....	Qazi Nisar Ahmed, Advocate Naimatullah.
Counsel for the State.	....	Syed Parvez Akhtar Bokhari, Deputy Prosecutor General, Baluchistan.
Case FIR No. date & Police Station.	....	FIR # 17, dated 16.4.2010, P.S Winder, District Lasbela.
Date of judgment of trial Court.	....	25.11.2013.

Date of receipt of Appeal in F.S.C.	….	27.10.2014.
Date of hearing	….	22.10.2015.
Date of decision.	….	04.11.2015

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JUDGMENT:

JUSTICE RIAZ AHMAD KHAN, CHIEF JUSTICE: This judgment is directed to dispose of Cr. Appeal No.37/Q/2014 as well as Cr. Murder Reference No.3/Q/2014. Both these matters arise out of the judgment dated 25th November, 2013 passed by the learned Additional Sessions Judge, Lesbela at Hub in case FIR No.17 dated 16.04.2010, police Station Winder, by virtue of which accused/appellant Muhammad Abdullah son of Muhammad Suleman was convicted and sentenced to death on two counts under Section 302(b) PPC. He was also ordered to pay Rs.2,00,000/- as compensation to the legal heirs of both the deceased under Section 544-A Cr.P.C. or in default thereof to further suffer six months R.I. He as well as accused/appellant Naimatullah son of Muhammad Ismail were also convicted under Section 394 PPC and sentenced to suffer life imprisonment each with fine of Rs.50,000/- each or in default thereof to further suffer six months imprisonment. Benefit under Section 382(b) Cr.P.C. was however extended to both the accused/appellants.

2. Feeling aggrieved of the above said judgment, Muhammad Abdullah and Naimatullah appellants/accused filed Cr. Appeal No.37/Q/2014. In the same case Murder Reference No.3/Q/2014 was also sent by the learned Additional Sessions Judge, Lesbela at Hub for confirmation of death sentence.

3. Brief facts of the case are that on 15th April, 2010 one Muhammad Anwar alongwith his wife namely Mst. Ayesha Bibi, brother Muhammad Karim and his daughter Mst. Razia Bibi boarded Coach/Bus No.JA-9983 at Karachi for Quetta. Alongwith these persons there were other passengers and total number of passengers were 34. The Coach/Bus belonged to Gul Brothers' Company and had registration No.JA-9983. The driver of the bus was Noor Ahmed son of Atta Muhammad resident of Saryab Road, Quetta. The coach/bus left Karachi at 10:30 p.m. On the way to Quetta, after crossing police Check Post Kharari within the area of Winder, two persons, who were also passengers and sitting at Seats No.9 & 10, stood up having pistols in their hands. One person was wearing brown colour *Shalwar-Qameez* and the other black colour pent and lining shirt. Both the persons were having small beard. They threatened the passengers that if anyone raised noise or made any movement, he would be killed. It was 11:30 p.m. They started snatching everything from the passengers. In the process, the accused fired shot on temporal part of Muhammad Anwar son of Mula Ahmed, who died at the spot. Brother of Muhammad Anwar namely Muhammad Karim got up but the accused fired another shot at him and he received injury on the right side of his abdomen. The fires were shot by the person, who was wearing pent-shirt. The accused after snatching cash amount and mobile phones from the passengers de-boarded at RCD Road near Rind Petroleum and fled away. Out of the two accused one apparently seemed as Pathan and the other as Punjabi. After the incident the driver of the coach/bus namely Noor Ahmed took the coach/bus to police station Winder where the driver of coach/bus Noor Ahmed lodged written complaint, on the basis of which FIR No.17/2010 dated 16.04.2010 was registered.

4. Soon after the registration of the case, the police investigation ensued. Police party under the supervision of DSP and SHO went to main RCD Road near Adam Khand

at 3:45 a.m. where two persons were standing with an effort to stop vehicles going to Karachi. The police, on suspicion, searched them and one person was having one T.T.Pistol alongwith magazine having five live cartridges and one missed cartridge. The second person was having a bag containing cash amount of Rs.52,130/- and eight mobile phone sets. One person, who was having pistol, disclosed his name as Muhammad Abdullah son of Muhammad Suleman and the second person, who was having bag containing cash amount, disclosed his name as Naimatullah son of Muhammad Ismail. Both the persons were arrested and brought to the police station. At that time the driver of the coach/bus namely Noor Ahmed was present in the police station. He identified both the persons as accused who had committed the murder of Muhammad Anwar. The two ladies i.e. wife and niece of deceased had gone alongwith the dead body of Muhammad Anwar and the injured person Muhammad Karim to the hospital. The injured was referred to Civil Hospital, Karachi where he died in the night between 12/13th May, 2010. On 23.04.2010 identification parade was conducted under the supervision of Judicial Magistrate wherein the complainant alongwith Mst. Ayesha wife of Muhammad Anwer deceased and Mst. Razia Bibi daughter of Muhammad Karim identified the accused persons. On conclusion of investigation, challan was submitted on 26.04.2010. The learned trial Court framed charge against the accused on 12.05.2010 under Section 17(4) Harabah of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979 to which the accused did not plead guilty and claimed trial.

5. The prosecution produced fifteen witnesses to prove its case. Complainant Noor Ahmed appeared as PW.1, who stated the same facts as narrated in the FIR and submitted that he alongwith passengers was present in the police station where the police brought two dacoits and he alongwith 34/35 passengers had identified them as the same persons who committed dacoity in their coach. From the possession of accused persons cash amount, mobile and pistol were recovered. Ayesha Bibi wife of deceased Muhammad Anwer appeared as PW.2. In her statement before the Court she narrated the same facts as given in the FIR. She further stated that she alongwith Mst. Razia Bibi had identified the accused persons during identification parade. Regarding injuries she gave same version as was there in the FIR. Mst. Razia Bibi appeared as PW.3. In her statement before the Court she narrated the same facts as given by Mst. Ayesha Bibi PW.2. PW.4 Muhammad Riaz S.I. stated in his statement before the Court that on 16.04.2010 at about 12:20 night he alongwith SHO and other police officials was present in the police station. Noor Ahmed, Driver parked coach of Gul Brothers bearing Registration No.JA-9983 besides the police station and submitted a written complaint to the SHO. He alongwith SHO and DSP started search of the accused and at about 3:45 p.m. they found two persons present near Adam Khand who were trying to stop the vehicles going towards Karachi. They encircled the said persons and arrested them. On query of I.O. Khan Muhammad S.I. one person disclosed his name as Abdullah son of Suleman and the other disclosed his name as Naimatullah son of Ismail. On personal search of accused Abdullah one T.T.Pistol alongwith magazine containing five live cartridges and one missed cartridge was recovered which were taken into possession by the I.O. through recovery memo Ex.P/4-A. He (PW.4) and Mukhtar Hussain S.I. had

attested the said recovery memo as marginal witnesses. He attested his signatures on sketch of pistol Ex.P/4-B, on Parcel No.2 Art.P/1 containing T.T.Pistol Art.P/3, magazine Art.P/4, five live cartridges Art.P/5 to Art.P/9 and one missed cartridge Art.P/10. He further stated that one blue colour bag was recovered from accused Naimatuallah from which robbed amount of Rs.52,130/- and eight mobile phone sets were recovered. The I.O. took the cash amount into possession through recovery memo Ex.P/4-C and the mobile phone sets through recovery memo Ex.P/4-D. He admitted his signatures on the said recovery memos. PW.5 Mehrullah S.I. was the witness of identification parade. PW.6 Noor Hassan was an eye-witness of the occurrence, who stated that he was travelling in the coach which was robbed by the accused persons and during the course of dacoity the accused committed murder of one passenger and caused fire-arm injury to another passenger (brother of deceased passenger). He further stated that the accused also snatched Rs.6370/- and one Mobile Nokia-1202 from him. Further stated that at about 4/4:30 a.m. the police brought two accused persons at police station, who were identified by him, the driver and the other persons as the same persons who committed dacoity in their coach. PW.7 Abdullah Constable was the marginal witness of recovery memo of three empties Ex.P/7-A, parcel No.1 Art.P/28 containing three empties Art.P/30 to Art.P/32 and recovery memo of Coach bearing Registration No.JA-9983 Ex.P/7-B. Abdul Rehman appeared as PW.8. He stated in his statement before the Court that on 16.04.2010 at about 1:00 a.m. he received information at his home that his employee Muhammad Karim was injured by dacoits and his brother Muhammad Anwer was murdered. On this information he reached police station Winder where S.I. Khan Muhammad informed him that injured Muhammad Karim was referred to Karachi and dead body of Muhammad Anwer was lying in the hospital. He (PW.8) alongwith the relatives of the deceased put their signatures on the recovery memo of dead body Ex.P/8-A and memo of inspection of dead body Ex.P/8-B.

6. PW.9 Dr. Aziz Ahmad Roojha, Medical Officer, R.H.C. Winder had medically examined Muhammad Karim injured on 15.04.2010 at 11:50 p.m. and found a bullet wound noted on right side of abdomen, only entrance wound noted, no exit wound seen. Nature of injuries was very dangerous. Duration of injuries fresh, weapon used was Pistol (Revolver). Patient was urgently referred to Civil Hospital, Karachi for proper treatment. After examination the doctor issued MLC No.31/10 dated 16.06.2010 Ex.P/9-B whereupon he put his signatures.

PW.9 also medically examined the dead body of Muhammad Anwar deceased on 16.04.2010 at 12:30 a.m. and found the following injuries:-

(1) An entrance wound of Gun Shot noted on left side of face about 1" medially to left ear.

(2) severe bleeding from nose and mouth.

The doctor stated that probable cause of death was due to Cardio-Pulmonary Arrest secondary to Gun Shot. The weapon used was (Revolver) Pistol. After examination of dead body the doctor issued death certificate vide MLC No.32/10 dated 17.04.2010. He identified his signature on the MLC Ex.P/9-A.

7. PW.10 Muhammad Arif Constable was marginal witness of recovery memo Ex.P/10-A of last worn clothes of accused Abdullah and Naimatullah. He admitted his signatures on the said recovery memo. PW.11 Ahmad Khan was marginal witness of recovery memo Ex.P/11-A by which the I.O took into possession last worn clothes of deceased Muhammad Anwar.

8. Abdul Qadir Baloch, Judicial Magistrate appeared as PW.12. In his statement before the Court he stated that on 23.04.2010 he conducted identification parade of accused in police station Winder wherein witnesses Mst. Aysha, Mst. Razia Bibi and Noor Ahmed identified the accused persons. He produced memos of identification parade alongwith list of dummies and list of witnesses Ex.P/12-A to Ex.P/12-Y and admitted his signatures on the same. PW.13 Inayetullah Head Constable was marginal witness of recovery memo Ex.P/10-A whereby the I.O. took into possession last worn clothes of accused Abdullah and Naimatullah. Muhammad Akber appeared as PW.14. In his statement before the Court he stated that on 15/16th April, 2010 his brother Karim and Anwer were travelling in Gul Brothers' Coach from Karachi to Quetta. During journey, due to firing of dacoits his brother Anwar died while his other brother Muhammad Karim received injuries. Injured Karim was referred to Civil Hospital, Karachi, where he succumbed to his injuries in the night between 12/13th May, 2010. The doctor of Civil Hospital, Karachi issued death certificate which he handed over to the I.O.

9. PW.15 Khan Muhammad Inspector had conducted investigation of the case. In his statement before the Court he stated that on 16.04.2010 he alongwith Rehmatullah SHO and other police officials was present in the police station Winder, complainant Noor Ahmed, driver of Coach No.JA-9983 submitted written application to the SHO, on the basis of which FIR No.17/2010 under Section 17(4) of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979 was registered. The I.O. alongwith the police officials went to the Civil Dispensary, Winder near RCD Road where the Coach was parked, wherein dead body of Anwar and an injured person, whose name later on was disclosed as Muhammad Karim, were present. He prepared injury sheet of injured Muhammad Karim and sent him to Civil Dispensary for medical treatment. He took into possession the dead body of deceased Muhammad Anwer and on inspection found a fire-arm injury on the left side of temporal part. He sent the dead body to Civil Dispensary and took the Coach into possession and on inspection recovered three empties of pistol and took the same into possession through Parcel No.1 and recorded statements of the witnesses under section 161 Cr.P.C. In the meanwhile the heirs of the deceased submitted application to the DSP that they did not want to get postmortem examination of the dead body, therefore, the dead body was handed over to them without postmortem examination. Thereafter, the I.O alongwith other police officers and officials started search of the accused and arrested them from Adam Khand at RCD Road. One pistol .30 bore Pak Made alongwith magazine containing five live cartridges and one missed cartridge was recovered from accused Abdullah which were taken into possession through Parcel No.2. The accused did not produce any license/permit of the pistol, therefore, a separate case FIR No.18/2010 under Section 13-E Arms Ordinance was registered. From accused Naimatullah one blue colour bag containing

cash amount of Rs.52,130/- and eight mobile phone sets was recovered. Statements of witnesses under section 161 Cr.P.C. were recorded. He also took into possession last worn clothes of accused Abdullah and Naimatullah. On 19.04.2010 the relatives of deceased Muhammad Anwar produced last worn clothes of deceased Muhammad Anwar, which he took into possession through recovery memo. On 23.04.2010 Judicial Magistrate Abdul Qadir Baloch conducted identification parade of the accused wherein witnesses Noor Ahmed Driver, Mst. Aysha Bibi and Mst. Razia Bibi identified the accsued persons. He sent parcel No.1 and parcel No.2 containing T.T. Pistol and three empties to Forensic Science Laboratory, Karachi for analysis. On 16.05.2010 Muhammad Akber submitted written application alongwith death certificate of injured Muhammad Karim issued by Civil Hospital, Karachi and certificate issued by Union Council Kathor Bela, which he incorporated in challan. On 16.06.2010 he got refer certificate of Muhammad Karim from Medical Officer Dr. Abdul Aziz. On 04.07.2010 he received FSL report and submitted the case file to the SHO for submission of challan. He (PW.15) produced FIR, death certificate, incomplete challan alongwith list of witnesses and case property, second challan alongwith FSL report as Ex.P/15-A to Ex.P/15-H and he admitted his signatures on the said memos.

10. After close of the prosecution evidence, statements of the accused under Section 342 Cr.P.C. were recorded. The accused denied the allegations leveled against them and pleaded innocence. Both the accused recorded their statement under section 340(2) Cr.P.C. and also produced two witnesses in their defence. Accused Muhammad Abdullah in his statement before the Court stated that after one year and eleven months he returned from Saudia Arabia. On 13.04.2010 he was on Karachi Airport where his friend Naimatullah came and took him to his shop situated at Shah Faisal Colony, Karachi where they planned to go to Quetta. In the evening they got booked a room in Abaseen Hotel, Karachi. On the third day at about 9:00 p.m. he went to the shop of Naimatuallah, hired a car, and proceeded for Quetta. When they reached in the area of Winder, the police halted them at check post and on personal search the police took into possession Rs.40,000/- (Pak currency), 1270 Saudi Riyal and two mobile phone sets from him. On personal search of driver and his friend Naimatullah the police also took into possession cash amount and mobile phone sets. The police took them to police station where many people were present. The police tortured them and forced them to admit that they had committed dacoity and murder in the coach. He further submitted that they were falsely involved in the said case.

11. Accused Naimatullah in his statement before the Court narrated the same story as stated by accused Muhammad Abdullah. Muhammad Akram appeared as DW.1. In his statement before the Court he stated that accused Naimatullah was personally known to him whereas he did not know the other accused Abdullah. Accused Naimatullah asked him to take them to Quetta in his taxi. In the 3/4th month of year 2010 at about 11:00 p.m. he alongwith accused Naimatullah and Abdullah proceeded from Karachi to Quetta. The police stopped them near police station Winder and after alighting both the accused let him go. He returned back and on the next day when he found the shop of Naimatullah closed, he gave information to his

home and his brother. DW.2 Ashiq Ali in his statement before the Court stated that he was friend of elder brother of accused Naimatullah. He was sitting with elder brother of accused Naimatullah on the shop. On 15.04.2010 at about 11 O' Clock accused Naimatullah alongwith his friend left for Quetta. On the next day he came to know that the police had arrested accused Naimatullah. He further stated that being neighbour he knows accused Naimatullah who is a noble man.

12. After hearing the parties the impugned judgment was passed. Being aggrieved of the same, the present appeal was filed by the accused/appellants against their conviction and sentence.

13. Learned Counsel for the appellant Muhammad Abdullah submitted that physical descriptions of the accused were not given by the complainant or the eye-witnesses. The initial report (*Marasla*) was written by the police. PW.1 in his cross-examination submitted that he handed over the list of the passengers to the police. The list was not produced otherwise the names of the accused could be found in the list. The learned Counsel further submitted that the witnesses were chance witnesses. The main argument of the learned Counsel was that the identification parade was conducted in police station which was illegal. In support of his contention the learned Counsel referred to 2012 YLR 2481. The learned Counsel further submitted that the person, who had taken the recovered empties and pistol to FSL was not produced before the Court. Summing up his contentions the learned Counsel submitted that the accused could not be connected with the alleged offence. The accused had given a separate story in defence, though it was not proved yet a plausible story was given. As such there were two versions of the occurrence. In such a case the accused are entitled to benefit of doubt. In support of his contentions the learned Counsel referred to 1997 SCMR 971 Farman Ali Vs. The State, PLD 2008 Supreme Court 513 Muhammad Asghar Vs. The State, 2005 MLD 669 Shah Nawaz Vs. The State, 2007 SCMR 670 Muhammad Pervez and others Vs. The State and others, 2011 SCMR 683 Ghulam Shabbir Ahmed and another Vs. The State, 2011 SCMR 769 Muhammad Ayaz and others Vs. The State, 2011 SCMR 563 Sabir Ali alias Fauji Vs. The State, 2014 SCMR 749 Muhammad Zaman Vs. The State and others, PLD 2013 Supreme Court 793 Hassan and others Vs. The State and others, 2009 SCMR 230 Muhammad Akram Vs. The State, 2005 YLR 2805 Abdul Quddus Vs. The State, AIR 1965 Orrisa 38 State of Orissa Vs. Kaushalya Dei, 1999 P.Cr.L.J 1044 Zahid Hussain Vs. The State and 2003 SCMR 1419 Khalid Javed and another Vs. The State.

14. Learned Counsel for the appellant Naimatullah at the very outset prayed for reduction of sentence.

15. On the other hand, learned Deputy Prosecutor General Baluchistan submitted that the witnesses were natural witnesses as the wife of deceased Muhammad Anwar and daughter of injured Muhammad Karim were accompanying the deceased persons. The evidence produced by the prosecution was confidence inspiring. The second version given by the accused/appellants was totally un-plausible, which could not be believed. The prosecution had fully established the case against the accused/

appellants and the conviction and sentences awarded to the accused were lawful and did not require any interference.

16. We have heard the learned Counsel for the parties and have also perused the record.

17. The evidence available on the file establishes the following points:-

(i) Deceased Muhammad Anwar alongwith his brother Muhammad Karim, wife Mst. Ayesha Bibi and niece Mst. Razia Bibi were coming from Karachi to Quetta in bus/coach No.JA-9983.

(ii) The accused namely Muhammad Abdullah and Naimatullah were also in the same bus/coach.

(iii) Both the accused, at Kharari within the area of Winder, stood up from their seats, having pistols in their hands. Both of them started snatching money from the passengers.

(iv) When the accused Muhammad Abdullah reached the deceased Muhammad Anwar and his wife, he tried to take ear-rings from the ears of wife of Muhammad Anwar, they started requests not to take ear-rings, so he fired a shot with which the deceased Muhammad Anwar was hit on his head near left ear. There is a possibility that the deceased may have resisted the accused, on which he fired a shot.

(v) When deceased Muhammad Karim saw that his brother had been hit, he got up from the seat so the accused Muhammad Abdullah also fired at him with which he was injured and fell down. The accused got down at RCD Road near Rind Petroleum. The driver of the bus/coach took the bus/coach to the police station and made a report. He did not charge any one by name because he did not know the names of the two accused persons. The bus/coach was parked in the police station and the police went to the Adam Khund, RCD road and saw the two accused present over there. The accused were arrested, one accused namely Muhammad Abdullah was having pistol alongwith magazine containing five live cartridges and one missed bullet. Both the accused were arrested and brought to the police station.

(iv) The accused were identified by the driver who was present in the police station as the bus/coach was parked there. From the bus/coach three empties were recovered.

(v) The pistol used in the offence alongwith empties were sent to FSL and the report of the FSL was positive which meant that the empties were actually fired from the weapon of crime i.e. pistol.

(vi) The medical evidence supported the oral evidence as the seat of injuries according to the medical report as well as the oral evidence was the same and the deceased had received fire arm injuries.

(vii) In the natural course of circumstances, the two ladies had accompanied the deceased and the injured to the hospital. The injured Muhammad Karim was referred to Karachi and both the ladies accompanied him where Muhammad Karim died in the night between 12/13th May, 2010.

(viii) The two ladies went to Karachi alongwith injured Muhammad Karim and on 23.04.2010 they identified the two accused before the Judicial Magistrate. The statements of driver as well as the two ladies are so consistent that in cross-examination nothing could be brought out to disprove the facts narrated by these witnesses. There is no chance of false implication as the complainant party had no grudge against the accused.

18. As far as the objections raised by the learned Counsel for the accused/appellant Muhammad Abdullah are concerned, those are not correct for the reason that the witnesses were not chance witnesses. A chance witness is a person, who in ordinary set of events would not be available at the place of occurrence. In the present case the witnesses Mst. Ayesha Bibi and Mst. Razia Bibi were accompanying their own relatives i.e. husband/father/uncle and they were on their way to Quetta in a coach/bus, the driver was driving the bus/coach so none of these witnesses can be considered as chance witnesses.

19. The learned Counsel for appellant Muhammad Abdullah raised the objection that the driver may not have identified the accused in the bus/coach as there could be darkness at the time of occurrence. This contention cannot be accepted for the reason that there is nothing to that effect in his cross-examination and even in the natural course the driver would stop the bus/coach at the time of such incident and would definitely put on the lights and at that time he must have seen the accused. The fairness on the part of the driver was that in the report he did not charge any one by name and when the accused were brought before him he identified them. It is also to be kept in view that the accused were brought before the driver within three/four hours of the occurrence. On top of that the corroboratory evidence of matching of pistol with the crime empties supports the version of the prosecution.

20. Regarding the statements of the two ladies Mst. Ayesha Bibi and Mst. Razia Bibi, the only objection raised by the learned Counsel was that the identification parade was conducted at the police station.

21. The identification test basically is not a requirement of law but it is only one of the methods to test the veracity of evidence of an eye-witness who has had an occasion to see the accused at the time of occurrence. It is only a corroborative piece of evidence and not substantive evidence. Identification parade is conducted under Article 22 of the Qanun-e-Shahadat Order, 1984 read with Rule 26.32 of the Police Rules, 1934. Under Qanun-e-Shahadat Order or Police Rules it is not a requirement that the identification parade must not be conducted in police station. However, the requirement of law is that arrangements shall be made, whether the proceedings are being held inside a jail or elsewhere, to ensure that the identifying witnesses shall be kept separate from each other and at such a distance from the place of identification as shall render it impossible for them to see the suspects or any of

the persons concerned in the proceedings, until they are called up to make their identification. Regarding identification parade the precedents of Superior Courts are also taken into consideration and it has been held by the Superior Courts that ordinarily identification parade should not be conducted in police station. However, it is also to be kept in view that identification parade, if conducted in police station, should not be taken in isolation. If there is evidence available on record that the said identification parade suffers from doubts regarding identification or the witnesses had an occasion to see the suspects earlier, then in that case the said identification should not be given any credence. In the present case the only objection is that the identification parade was conducted in police station otherwise it was conducted by the Judicial Magistrate observing all the legal formalities and there is absolutely nothing on record to show that the identifying witnesses had earlier seen the suspects in the police station. In the present case the whole evidence is so natural that it cannot be denied that Mst. Ayesha Bibi and Mst. Razia Bibi had actually seen the occurrence. The two ladies cannot be disbelieved simply on the basis of technicality as there is nothing on record that recording their statements at police station had actually created any doubt regarding prosecution case.

22. The contention that the list of passengers was not produced before the Court is also not correct because ordinarily a list showing the numbers of passengers is given to the driver which does not include the names of the passengers. As such, it was immaterial as to whether the list was produced or not. As far as the defence version is concerned, that infact supports the prosecution case because according to the statements of the accused they were present at the place of occurrence so they were required to prove their own version. The statements given by the accused persons could not create a dent in the prosecution case. The judgments referred to by the learned Counsel for the appellant Abdullah are not relevant to the facts of the present case. In these circumstances, we hold that the trial Court had rightly convicted the accused/appellant Muhammad Abdullah and sentenced him to death. We, therefore, uphold his conviction and sentence under Section 302(b) PPC as well as under Section 394 PPC.

23. As far as accused/appellant Naimatullah is concerned, he was convicted only under Section 394 PPC. The learned Deputy Prosecutor General has no objection regarding reduction of his sentence provided conviction is maintained. Though he had an active role in the commission of offence of robbery during the course of which murder was committed but the trial Court did not convict him for murder in furtherance of common intention for robbery under Section 34 PPC and no appeal has been filed against those finding. He has only been convicted and sentenced under section 394 PPC for commission of robbery. In fact both the accused/appellants had been charged for robbery, the total amount recovered was Rs.52,130/- and it is not clear as to how much amount was snatched by each of the accused. No pistol or arm was recovered from him. So in these circumstances we hold that he is entitled to slight concession. Accordingly we maintain his conviction under section 394 PPC and alter his sentence to ten years R.I.

24. The upshot of the above discussion is that the appeal to the extent of accused/

appellant Muhammad Abdullah is dismissed, however, the impugned judgment is altered to the extent that sentence awarded to accused/appellant Naimatullah is reduced to ten years R.I. however the appeal is dismissed.

Murder reference is ***answered in affirmative***.

MR. JUSTICE RIAZ AHMAD KHAN CHIEF JUSTICE
MR. JUSTICE DR. FIDA MUHAMMAD KHAN
MR. JUSTICE ZAHOOR AHMED SHAHWANI

Dated, Islamabad the
04.11.2015

Approved for reporting.

MR. JUSTICE RIAZ AHMAD KHAN
CHIEF JUSTICE

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE RIAZ AHMAD KHAN, CHIEF JUSTICE
MR. JUSTICE DR. FIDA MUHAMMAD KHAN

CRIMINAL APPEAL NO.9/P of 2012

Mukamil Shah s/o Muhammad Karam ….. Appellant
r/o Khudaye Noor Kalay, Shankar,
District Mardan.

Versus

1. Sami Ullah s/o Saad Ullah r/o City Town,
   Tehsil & District Peshawar. Respondents
2. The State

CRIMINAL APPEAL NO.51/I of 2012

Mst. Aysha Jehangir d/o Pir Muhammad Jehangir
r/o Pirano Dag, Mardan. ….. Appellant

Versus

1. The State
2. Sami Ullah s/o Saad Ullah Khan
r/o City Town No.2, Peshawar. …... Respondents

CRIMINAL APPEAL NO.1/P of 2013

Bahadar Shah s/o Zahir Shah, ….. Appellant
r/o Ghari Baba Takhtbai, District Mardan

Versus

1. Sami Ullah s/o Saad Ullah r/o City Town,
   Tehsil & District Peshawar.
2. The State …... Respondents

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Counsel for Appellant Mukamil Shah …. Mr. Jalal-ud-Din Akbar-e-Azam Khan Gara, Advocate

Counsel for Appellant Aysha Jehangir …. Mr. Mohy-ud-Din Malik, Advocate

Counsel for Appellant Bahadar Shah …. Mr. Ishtiq Ahmad, Advocate

Counsel for Complainant …. Mr. Abdul Fayyaz, Advocate

Counsel for the State	….	Mr. Rahim Shah, Assistant A.G.KPK
FIR No. date & Police Station.	….	FIR No.254, dated 25.02.2010 P.S. Pharipura, Peshawar
Date of judgment of trial Court	……	17.11.2012
Date of receipt of Appeals	……	08.12.2012, 26.12.2012 & 16.01.2013 respectively
Date of hearing	……	28.04.2015
Date of decision	……	08.05.2015

JUDGMENT:

RIAZ AHMAD KHAN, C.J.— This judgment is directed to dispose of Criminal Appeal No.9/P/2012 Mukamil Shah Vs. Sami Ullah and the State, Criminal Appeal No.51/I/2012 Mst. Aysha Jehangir Vs. The State and Sami Ullah, and Criminal Appeal No.1/P/2013 Bahadar Shah Vs. Sami Ullah and the State. All the three appeals arise out of the same judgment dated 17.11.2012 passed by the learned Additional Sessions Judge-VII, Peshawar by virtue of which all the three appellants were convicted under Section 17(4) Haraabah of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979 in case FIR No.254 dated 25.02.2010 Police Station Pharipura (Peshawar) and sentenced to life imprisonment alongwith payment of fine of Rs.2,00,000/- each male accused which was to be paid to the legal heirs of the deceased under Section 544-A Cr.P.C. Appellant Mst. Aysha Jehangir however was not burdened with payment of fine. In default of payment of fine the two male accused were to further undergo six months S.I. each.

2. At the very outset it is important to mention that the judgment in this case was passed on 17.11.2012. However on 15.11.2012 Mst. Aysha, who was on bail in subject cited case, was travelling in a car and at main G.T. Road at Shaidu, Tehsil Nowshera was attacked by three persons who were travelling in another car. Those three persons fired at her, as a result of which she received injury on her right foot and her driver namely Muhammad Riaz received injury on his back. In that respect FIR No.897 was registered at Police Station Akora Khattak District Nowshera. The learned Additional Sessions Judge-VII, Peshawar while passing the impugned judgment, in paras 31 & 32 of the judgment made the following observations:-

> *"31. Accused Mst. Aysha is on bail, she is absent today and her exemption application is filed by her counsel on the ground that she has got injured in case FIR No.897 dated 15.11.2012 under sections 324/427/34 PPC PS Akora and admitted in DHQ Hospital Nowshera.*
>
> *32. The conviction warrant is sent to the SHO of PS concerned through Naib court of this court, with the direction to arrest the said accused Mst. Aysha Jehangir who is injured of case FIR No.897 dated 15-11-2012 under section 324/427/34 PPC PS Akora Khattak now admitted in DHQ Hospital Nowshera and in case she can be treated in Jail Hospital be shifted to serve the sentence, however, if her treatment is not possible in the jail hospital she be guarded as convicted prisoner/patient and on her recovery she be shifted to the Central Jail, Peshawar for above sentence. Benefit of section 382-B Cr.P.C are extended to accused Bahadur Shah, Mukamil Shah and Mst. Aysha. A copy of this judgment be delivered to the accused free of costs."*

3. Learned Counsel for appellant Mst. Aysha Jehangir submitted that conviction warrant was never served upon Mst. Aysha Jehangir and that he got power of attorney from her and he himself attested the same on the identification of another person.

4. Learned Counsel for the complainant in respect of appeal filed by Mst. Aysha Jehangir raised preliminary objection that the appeal was incompetent and convict/

appellant Mst. Aysha Jehangir was required to surrender before the Court and if she was injured, the Court could suspend her sentence under Section 426 Cr.P.C. but without surrendering before the Court or jail authorities the appellant had become fugitive from law and, thus could not file the appeal.

5. On the other hand learned Counsel for appellant Mst. Aysha Jehangir submitted that Mst. Aysha Jehangir had threats to her life and she was not in a position to appear before the Court. She had executed a power of attorney in his favour and, therefore, the appeal was competent. The appeal could not be dismissed as she was not fugitive from law. In this respect the learned Counsel for appellant Mst. Aysha Jehangir was asked if he could produce the appellant Mst. Aysha Jehangir before the Court but he expressed his inability and submitted that he had no contact with the appellant and even he himself did not know as to where she was. So in such like circumstances he could not produce the appellant before the Court. The learned Counsel, however, insisted that the appeal of Mst. Aysha Jehangir be heard on merits. Learned Counsel for appellant Mst. Aysha Jehangir further submitted that the appeal of Mst. Aysha Jehangir had already been admitted and once the appeal is admitted, it has to be decided on merits. Learned Counsel for appellant Mst. Aysha Jehangir in support of his contentions referred to NLR 2002 Criminal 271 Aftab Ahmad Khan Sherpao Vs. The State, PLD 1957 (W.P.) Peshawar 75 Awal Khan and another Vs. The State, PLD 1970 Supreme Court 177 Muhammad Ashiq Faqir Vs. The State and 1971 SCMR 35 Ghulam Hussain Vs. The State.

6. In order to resist the contention of learned Counsel for the appellant, learned Counsel for the complainant relied on PLD 2005 Supreme Court 270 The State through National Accountability Bureau, Islamabad Vs. Haji Nasim-ur-Rehman and 1982 SCMR 623 Hayat Bakhsh and others Vs. The State.

7. Before adverting to the facts of the main appeal, it is necessary to decide the issue regarding maintainability of the appeal filed by Mst. Aysha Jehangir. Section 410 of the Code of Criminal Procedure provides:

> ***410. Appeal from sentence of Court of Session.*** *Any person convicted on a trial held by a Sessions Judge, or an Additional Sessions Judge, may appeal to the High Court.*

The said section clearly provides that only convicted persons can file appeal. There is no doubt that the appeal can be filed through Counsel as well yet the fact is that the convict if on bail has to surrender before the Court. If the convicted person does not surrender before the Court the appeal cannot be filed. It is correct that in the present case the appeal had been admitted on 14.02.2013, but the order clearly shows that the learned Counsel for the appellant Mst. Aysha Jehangir had concealed the facts from the Court that the convict/appellant was neither in jail nor before the Court. The Court, as such, could not take this fact into consideration and in ordinary manner admitted the appeal for regular hearing as it was against conviction. As such, the order passed by the Court was due to concealment of facts and the said

order would not make the appeal maintainable. It was incumbent upon the learned Counsel for the appellant that he should have clarified the position before the Court that the appellant was not in a position to appear before the Court and the appellant was neither in jail nor available before the Court. The appeal, as such, was not filed by the convict/appellant.

8. It is also strange that even today the learned Counsel is not aware of the whereabouts of appellant Mst. Aysha and it is not known as to how he got instructions from his client.

9. The established principle of law and the consistent view of the superior Courts is that once the appeal is admitted for regular hearing then it cannot be dismissed for non-prosecution or disposed of summarily rather it has to be decided on merits. Reference in this respect may be made to PLD 1970 Supreme Court 177 Muhammad Ashiq Faqir Vs. The State.

However this principle has to be distinguished from filing the appeal. The appeal cannot be filed by fugitive from law. Mere filing power of attorney is not sufficient to file the appeal on behalf of a convicted person. It is incumbent upon the convicted person that he or she must surrender before the authority of the Court first. The judgment of the trial Court must be complied with and then appeal may be filed. The judgment "NLR 2002 Criminal 271 Aftab Ahmad Sherpao Vs. The State" referred to by the learned Counsel for the appellant also does not support the contention of the learned Counsel. In that case the appellant was only fined which had been paid by the appellant and thereafter the appeal was filed. In Para 4 of the judgment it was held:

> *"Before touching the merits, we may recall that after filing the appeal, Aftab Ahmed Khan Sherpao, due to some other cases, had made himself scare for this Court and thus a dispute arose as to whether he can be extended the right of audience through counsel."* (emphasis supplied)

It obviously means that the facts of the said case were totally different. In the first instance the accused in that case were not sentenced to imprisonment. The accused were only fined which was paid and thereafter appeal was filed. The appeal as such was properly filed and thereafter the appellant Aftab Ahmed Khan Sherpao absented. The Court then held that even in absence of the appellant, the Counsel for appellant could be extended the right of audience. Since in that case appeal had been properly filed, therefore, the Counsel of the appellant had rightly been extended the right of audience, but the present case is totally different because the appeal had not been filed by the convict/appellant. In these circumstances we hold that Cr. Appeal No.51/I/2012 filed by Mst. Aysha Jehangir is incompetent and is, therefore, dismissed.

10. Facts constituting the background of the remaining appeals i.e. Cr. Appeal No.9/P/2012 filed by appellant Mukamil Shah and Cr. Appeal No.1/P/2013 filed by appellant Bahadar Shah are that on 25.02.2010 ASI Haleem Gul PW.7 while on routine mobile gusht received information that near Nawi Kalay a dead body being wrapped in bag was lying in the fields. On receiving information he reached the spot where he found the dead body wrapped in the bag. He opened the bag. Other people attracted to the spot but nobody could recognize the dead body. According to Haleem Gul ASI the deceased had been done to death through strangulation. He put the dead body in the police vehicle and while on the way to the police station at check post at Dalazak road one Samiullah son of Sadullah Khan resident of Jalala, Mardan then residing at Sethi Town No.2, Peshawar identified the dead body and stated that the dead body was of Muhammad Riaz son of Firdous resident of Sherghar Kalan and that the deceased was his nephew (sister's son). The complainant further stated that the deceased had gone to the house of his friend Jamal Shah on 21.02.2010 and thereafter disappeared. Nobody was charged in the report. On the basis of the said report Murasila Ex.PA/1 was prepared and was sent to police station through constable Arab Khan. On the basis of said Murasila FIR No.254 Ex.PA was registered on the same day at 11.35 wherein the time of report was entered as 11.10. The FIR was registered under Section 302 PPC. Haleem Gul PW.7 also prepared injury sheet Ex.PW.7/1 and inquest report Ex.PW.7/2. The dead body was sent for autopsy under the escort of Altaf Khan to Khayber Medical College. The postmortem was conducted by Dr. Muhammad Asghar Khan PW.11. The postmortem report is Ex.PM. The observation and opinion of the Doctor was as follows:

Body of young man having average built wearing white colour Shalwar-Qameez and white Banayan blood stained.

Body is completely decomposed (putrefied). Whole body is swollen, face swollen, tongue bitten and out from mouth cavity. Bleeding from nose and oral cavity, skin scalp from different part of body.

1. A ligature mark present around the neck, 45 x 3 in size, 1 cm above the thyroid cartilage. Neck is free. Multiple colour piece of cloth present all around the neck.

2. Both hands are tied at wrist joint with Azarband.

3. All the organs are in advance stage of putrification.

The deceased died due to asphyxia due to ligature strangulation. Probable time between injury and death was immediate and between death and postmortem was 2-4 days.

11. After registration of the case investigation was entrusted to Maqbali Khan CIO Police Station Faqirabad, Peshawar PW.10. He prepared site plan Ex.PB at the instance of Haleem Gul ASI. From the spot he recovered and took into possession one rope (Rassi) of white colour measuring 2½ yards P-1, one Azarband P-2, one

electric red wire measuring 5 yards P-3 and plastic bag P-4 of yellow colour. From the bag dead body was recovered. All the articles were put into the parcel through recovery memo Ex.PW.4/1 in the presence of marginal witnesses.

12. Muhammad Ijaz, brother of the deceased charged the present accused i.e. Bahadar Shah, Mukamil Shah and Mst. Aysha on 03.03.2010. On 04.03.2010 his statement under Section 164 Cr.P.C. was recorded. The said statement was neither exhibited nor produced before the Court, however it was referred to by the I.O. in his statement before the Court. On 03.03.2010 all the three accused were arrested. On completion of investigation challan was submitted. Charge was framed on 29.06.2010 and the accused were charged under Section 17(4) Haraabah of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979, to which the accused/appellants did not plead guilty and claimed trial.

13. The prosecution examined Sami Ullah complainant as PW.1. He reproduced the version given in the FIR.

14. Muzamil Shah, real brother of accused Bahadar Shah was examined as PW.2. He is also brother-in-law of second accused Mukamil Shah as his sister is married to the accused. In his statement before the Court he submitted that convict/appellant Mst. Aysha was engaged with his brother Bahadar Shah. The deceased was known to him. On the day of occurrence, he alongwith accused Bahadar Shah and Mukamil Shah was present in his house situated in Shinwari Town Dalazak Road, Peshawar. In the meanwhile accused Aysha came alongwith deceased Riaz in a motorcar of white colour, which was being driven by deceased Riaz. After parking the motorcar they entered the house and accused Mukamil Shah gave a blow with some weapon to the deceased Riaz Khan on his head as a result of which deceased Riaz became unconscious and fell down on the ground. Mst. Aysha accused left the house. The convicts/appellants Bahadar Shah and Mukamil Shah took the deceased, then unconscious, to a room and tied his hands and legs with a rope in the room. Thereafter, accused Bahadar Shah and Mukamil Shah put a rope in the neck of Riaz deceased and committed his murder in the said room. Thereafter they put the dead body of the deceased on the upper storey of the house. On the next day Mst. Aysha accused again came there and she alongwith Bahadar Shah accused took the motorcar from there. The dead body of the deceased was lying inside the room of the house for three days and thereafter they put the dead body of the deceased in a bag and threw the same in the nearby fields. All the accused committed the murder of the deceased Riaz for snatching the cash amount and motorcar from the deceased. After about one week the police came to the said house alongwith accused Bahadar Shah and Mukamil Shah who were in their custody. He further submitted that the police inquired from him and he narrated the whole story. He further submitted that he was an eye-witness of the occurrence and out of the snatching amount Rs.15,000/- were paid to Mukamil Shah accused by accused Bahadar Shah. In cross-examination he admitted that accused Bahadar Shah was married. Accused Mst. Aysha was also married but her husband had been murdered. He himself was a driver and was resident of Takht Bahi, however on the day of occurrence he was present in the house of his brother Bahadar Shah alongwith him.

He also admitted that Bahadar Shah accused had been ousted by his father from his house and the accused was living in Peshawar. He also admitted that his statement was recorded by the police after one week of the occurrence. He had not informed the family members of the deceased Riaz after the occurrence. After the occurrence he had never gone to Police Station Pharipura. With the blow of Mukamil Shah the deceased had become unconscious but injury was such that blood had not come out. Accused Mst. Aysha was known to him. He further stated that he had been living in the said house with the accused for three days. However, it was his first visit to the house of Bahadar Shah.

15. Muhammad Ijaz, brother of deceased Riaz was examined as PW.3. In his statement before the Court he submitted that his brother Riaz Khan deceased had left the house on 21.02.2010 to attend the marriage of his friend in motorcar XLI bearing registration No.IOB-3613 white colour. At the time of departure from the house the deceased had an amount of Rs.1,10,000/- cash, ATM Cards and different cheaque books of different banks. Since the deceased did not come for long time so he alongwith other family members contacted his friend namely Jamal Shah but he also expressed ignorance. Jamal Shah then lodged the report at police Station Faqirabad about his missing brother. On 25.02.2010 the dead body of deceased was found in the area of Police Station Pharipura and in that respect his paternal uncle Sami Ullah had lodged the report after identifying the dead body. According to him during the course of investigation Bahadar Shah, Mukamil Shah and Mst. Aysha were identified and after his due satisfaction he charged the above-mentioned accused for the murder of his deceased brother. The motive for the offence was snatching of cash amount and motorcar from deceased Riaz.

16. Zahid Khan ASI PW.4 was marginal witness to different recovery memos. Amir Badshah SI PW.5 had arrested the accused on 03.03.2010. Asad Zia was examined as PW.6. In his statement before the Court he submitted that he was a car dealer at Takht Bhai. Accused Bahadar Shah was known to him being his co-villager. On 27.02.2010 Bahadar Shah accused brought a motorcar bearing registration No.IWB-3613 XLI white colour model 2006 to him for sale. He purchased the said car for sale consideration of Rs.2,35,000/- and paid an amount of Rs.1,90,000/- to accused Bahadar Shah. The remaining amount was to be paid at the time of production of registration book and other documents. After 2/3 days the police came to his bargain centre and took away the car. At the time of purchasing the car Bahadar Shah accused was accompanied by a female who was not known to him. In cross-examination he submitted that he was a car dealer but had left the business 5/6 months ago. He had not given any receipt to the I.O. regarding the purchase of the motorcar and had not received any receipt from the accused. The witness volunteered that the car was insurance bank vehicle. The deceased Riaz was his relative and nothing was reduced into writing regarding sale of the car as the writing pad had finished by that time and was not available with him. Haleem Gul ASI appeared as PW.7 who had scribed the Murasila. PW.8 Gul Sher Khan ASI had registered the FIR on the basis of Murasila. PW.9 Altaf Khan Head Constable had escorted the dead body from the spot to the mortuary. PW.10 Maqabali Khan CIO was the I.O, who had conducted the investigation. In his statement he submitted

that on the pointation of accused Bahadar Shah one Nokia mobile set P-10, which belonged to deceased Riaz, one receipt bearing No.75 P-11 and one CNIC P-12 were recovered from the spot in the presence of the marginal witnesses. In cross-examination he admitted that there was no sim in the mobile set. He also admitted that Muzamil Shah had come to the police station alongwith Ijaz and complainant. He also admitted that the motorcar was recovered from one Asad Zia in Takht Bhai Mardan but the fact regarding Takht Bhai was not mentioned in the recovery memo. He also admitted that in the house where the occurrence had taken place, there were no house-hold articles.

17. Dr. Muhammad Asghar Khan was examined as PW.11, who had conducted the autopsy on the dead body of the deceased. Thereafter statements of the accused were recorded under Section 342 Cr.P.C.

18. After hearing the parties, the learned Additional Sessions Judge-VII, Peshawar convicted all the three accused under Section 17(4) of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979 and sentenced them to life imprisonment each with a fine of Rs.2,00,000/- each which was to be paid to the legal heirs of the deceased under Section 544-A Cr.P.C. The fine however was not imposed on Mst. Aysha accused. In default of payment of fine the two accused were to further undergo six months S.I. each after completion of substantive sentence. Feeling aggrieved of the said judgment the aforementioned three appeals were filed. The appeal (Cr. Appeal No.51/I of 2012) of Mst. Aysha Jehangir has already been dismissed vide aforementioned portion of the present judgment.

19. Learned Counsel for appellant Mukamil Shah submitted that there was nothing on record to connect the accused Mukamil Shah with the alleged offence. The statement of so called eye-witness was recorded after one week of the occurrence, which could not be accepted. There is no eye-witness of the occurrence. The ocular version did not support the medical evidence. No recovery had been effected from accused Mukamil Shah and there was no motive, even alleged by the prosecution. The accused Mukamil Shah was charged after about 13-days, presence of PW.2 Muzamil Shah was doubtful and his statement could not be believed.

20. Learned Counsel for appellant Bahadar Shah submitted that the accused had been falsely implicated in the case. He had inimical terms with his brother and the real brother had falsely deposed against him. The whole case was fabricated as infact no recovery had been effected from the accused Bahadar Shah or on his pointation. The alleged car was recovered from Takht Bhai and there was nothing on record to show that accused Bahadar Shah had actually sold the car to Asad Zia PW.6. The statement of Asad Zia itself is doubtful and full of contradictions. The learned Counsel further submitted that the car, at the relevant time, was worth 12/14 lacs of rupees and it cannot be believed that it was sold only for 2,35,000/-., even in that respect there is nothing in writing. The conviction as such was based on surmises and conjectures and was, therefore, not sustainable in the eye of law.

21. On the other hand, learned Counsel for the complainant submitted that the

prosecution had fully established the case against Bahadar Shah accused. The real brother of Bahadar Shah accused had deposed against him and there was no reason for him to falsely depose against him. The learned Counsel further submitted that the statement of the eye-witness who is the real brother of the main accused was supported by medical evidence as well as the other corroboratory evidence in the shape of articles through which the murder had been committed. Learned Counsel also submitted that since at the time of recovery of the dead body, it was swollen, therefore, the mark of blow given by Mukamil Shah could not be seen on the dead body. The learned Counsel further submitted that the prosecution has proved the case beyond any shadow of doubt and, therefore, the accused were rightly convicted and sentenced.

22. The learned Assistant Advocate General, appearing for the State supported the arguments raised by the learned Counsel for the complainant and also supported the impugned judgment.

23. We have heard the learned Counsel for the parties and have also perused the record.

24. At the very outset we would observe that the conviction was legally not sustainable in the eye of law as the accused could not be convicted under Section 17(4) Haraabah of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979. Haraabah has been defined in Section 15 of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979, but punishment for the said offence could be awarded as Hadd under Section 17(4) of the Ordinance. For imposing Hadd the criteria of evidence has been provided in Section 7 of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979. Section 16 provides that the provisions of Section 7 shall apply mutatis mutandis for the proof of Haraabah. As such punishment as Hadd under Section 17(4) could be awarded only if evidence in accordance with Section 7 of Offences Against Property (Enforcement of Hudood) Ordinance, 1979 was available. The present case did not qualify the test given in Section 7 of the Ordinance and in absence of that evidence Hadd could not be imposed. Secondly under Section 17(4) of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979 the only penalty was death imposed as Hadd and no other penalty could be awarded. If the accused had pleaded guilty as provided in Sub section (a) of Section 7 or the evidence available in Section 7 was provided the only penalty which could be imposed was death and not life imprisonment. Since the accused had neither pleaded guilty nor the required evidence was available, so the conviction recorded under Section 17(4) and that too of life imprisonment is totally illegal. However, if evidence provided for imposition of Hadd was not available, the accused could be convicted under Tazir. The accused, under Section 237 Cr.P.C., could be convicted for another offence for which they were not charged provided offences are cognate and not distinct. The accused as such could be convicted under Section 392 read with Section 302/34 PPC as the two offences provided in Section 17(4) Haraabah of Offences Against Property (Enforcement of Hudood) Ordinance, 1979 and Section 392 read with Section 302 PPC were not distinct offences.

25. Coming to the facts of the present case, it is clear that the dead body was recovered from a lonely place. Nobody had been charged in the FIR. The dead body had been recovered on 25.02.2010 whereas the accused was charged on 03.03.2010 as such there was delay of about six days. The accused were firstly charged by Muhammad Ijaz, brother of the deceased. According to his statement the deceased had disappeared on 21.02.2010 and if that period is also included then for ten days nobody was charged. This delay has not been explained. There is also no evidence on record available to show that how the complainant party or the police came to know that the accused/appellants were involved in the case.

26. The main connecting evidence is the recovery of motorcar. The said motorcar was produced by PW.6 Asad Zia. According to his own statement he was related to deceased Riaz. It is strange that the car was brought by accused Bahadar Shah to Asad Zia and he did not know that the car belonged to his relative i.e. deceased Riaz. Again it is unbelievable that he paid an amount of Rs.1,90,000/- without giving even a receipt. The excuse put forward by the witness that the writing pad had finished is unbelievable. According to his own statement he had left the business of bargain and there is no evidence that the bargain centre actually existed at Takht Bhai. The registration book of the car was not produced before the Court and it is not known as to who was the actual owner of the said car. Even the car was not produced before the Court. In addition to that the alleged snatching or recovery of the car is with respect to accused Bahadar Shah only. PW.6 in his statement before the Court had stated that Bahadar Shah accused was accompanied by a lady but he had not mentioned her name. In cross-examination of his statement he submitted that at the time of handing over the vehicle to police only he was present. He also admitted that the value of the vehicle was much more than the sale consideration which was to be paid to the accused. In these circumstances the recovery of the car and snatching of the same becomes doubtful and cannot be believed. The second recovery is of mobile set. The prosecution story is that on the pointation of Bahadar Shah accused one Nokia Mobile was recovered from the place of occurrence. According to the available evidence the sim of the said mobile was not available and there is nothing on record to show that the Nokia Mobile actually belonged to the deceased. In addition to that there are two recovery memos Ex.PW.4/4 and Ex.PW.4/5. Ex. PW.4/4 shows that in presence of the witnesses one Nokia Mobile No. 1203.2 with receipt No.75 dated 23.01.2010 and CNIC No.16101-7063269-1 was recovered. The second recovery memo is Ex.PW.4/5 which shows that on the pointation of accused mobile alongwith a receipt of Peshawar Property Centre was recovered but this recovery memo does not show the number and make of mobile. There is nothing available on record to show that the mobile set actually belonged to the deceased Riaz. It is also strange that both the recovery memos were signed by ASI and Head Constable. ASI Zahid Khan appeared as PW.4 and in his statement stated that on the basis of Ex.PW.4/4 and Ex.PW.4/5 mobile was recovered on pointation of accused. If the mobile set was recovered on the pointation of the accused from the place of occurrence, the police was required to associate witnesses from the locality but it is strange that both the recovery memos were witnessed by police officials. As such even the recovery of mobile phone is doubtful and does not connect the accused with the alleged offence.

27. As far as statement of Muzamil Shah PW.2 is concerned, that cannot be believed as there is unexplained delay of about 6/7 days. The occurrence took place on 25.02.2010 whereas his statement was recorded on 03.03.2010 by the police. Admittedly he belonged to Takht Bhai so by all means he was a chance witness. If being a brother he tried to involve his brother in such a heinous offence, he cannot be considered as a truthful witness. He has not given any reason as to why he remained mum for such a long time.

28. In judgment titled Ghulam Qadir and 2 others Vs. The State reported as 2008 SCMR 1221 it was held that belated examination of a witness by police may not be fatal to prosecution but where delay is unexplained, accused has not been named in FIR and circumstances justify that open FIR and delay have purposely been manoeuvred to name accused later, such managed delay and gaps adversely affected the prosecution case.

29. In the present case the dead body had been recovered alongwith the articles allegedly used for committing the murder so in such a situation the belated statement of the alleged eye-witness cannot be believed.

30. The statement of Muzamil Shah PW.2 is also in contradiction with the medical evidence as according to him accused Mukamil Shah had given a blow to the deceased on his head but this version is not supported by the medical evidence. The contention of the learned Counsel for the complainant that since the dead body had been decomposed, therefore, the mark of blow could not be seen, cannot be accepted.

31. Again the statement of Muzamil Shah PW.2 that the dead body was lying in the house for three days, he knew this fact but did not inform the police and after three days the accused again came and thereafter they put it in a bag, cannot be believed. It is not known as to why the witness did not disclose this fact to the police or anybody else that the deceased had been done to death and dead body was lying in the house. It is also unbelievable that for three long days the dead body was lying in lonely house and nobody from the neighbourhood had come to know about that, because usually in three days the decomposition of the dead body starts. If it is believed that PW.2 Muzamil Shah knew about the death of the deceased and also knew of the fact that the dead body was lying in the house and he remained silent, then he was also involved in the offence. In judgment titled Muhammad Khurshid Khan Vs. Muhammad Basharat and another reported as PLD 2007 Supreme Court (AJ&K) 27 it was held that if the testimony of a chance witness finds corroboration from any other circumstance or from any other evidence in the form of recoveries and medical evidence, then that can be relied upon. If a chance witness reasonably explains his presence at the place of occurrence and states about the occurrence in such a way that inspires confidence and it is also corroborated by any other evidence or circumstances, then the same can be considered alongwith the other circumstantial evidence.

32. In the present case the witness had not explained his presence at the place of

occurrence, simply saying that he had come 2/3 days earlier to the house of his brother and now suddenly had given statement against his brother shows his strange attitude. His statement is not corroborated by any other evidence. The contention of the learned Counsel for the complainant that the corroboration is available in the form of recovery of rope and bag cannot be believed, for the reason that those articles had earlier been recovered and after unexplained delay of a week the statement of this witness was recorded so it cannot be said that the witness had corroborated the occurrence.

33. If the two recoveries of motor car and the Nokia Mobile are kept aside then there is no motive for the offence as to why the accused/appellants killed the deceased.

34. In the above circumstances, we are of the view that the conviction recorded and sentence awarded to the two accused/appellants namely Mukamil Shah and Bahadar Shah was illegal. Resultantly, we allow Cr. Appeal No.9/P/2012 filed by appellant Mukamil Shah and Cr. Appeal No.1/P/2013 filed by appellant Bahadar Shah, set aside the judgment dated 17.11.2012 of the learned Additional Sessions Judge-VII, Peshawar and acquit the appellants Mukamil Shah and Bahadar Shah of the charges leveled against them. The two appellants be set free if not required in any other criminal case.

MR. JUSTICE RIAZ AHMAD KHAN,
CHIEF JUSTICE

MR. JUSTICE DR. FIDA MUHAMMAD KHAN

Announced on 08.05.2015
At Islamabad

Approved for reporting.

MR. JUSTICE RIAZ AHMAD KHAN,
CHIEF JUSTICE

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE RIAZ AHMAD KHAN, CHIEF JUSTICE
MR. JUSTICE DR. FIDA MUHAMMAD KHAN
MR. JUSTICE ZAHOOR AHMED SHAHWANI

CRIMINAL APPEAL NO.56/I of 2011

Banaris Khan son of Muhammad Akram Khan, Caste Pathan,
r/o Khola Kehal, Tehsil & District Abbotabad. ….. **Appellant/Complainant**

Versus

1. The State
2. Shehzad alias Chirya son of Muhammad Saeed, Caste Abbasi,
3. Sajid Ali son of Sardad, Caste Pathan,

Both residents of Khola Kehal, Tehsil & District Abbotabad.
…… **Respondents/Accused**

CRIMINAL APPEAL NO.5/P of 2012

State through Advocate General, Khyber Pakhtunkhwa, Peshawar
….. **Appellant**

Versus

1. Shehzad alias Chirya son of Muhammad Saeed, Caste Abbasi,
2. Sajid Ali son of Sardad, Caste Pathan,

Both residents of Khola Kehal, Tehsil & District Abbotabad.
…... **Respondents/Accused**

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Counsel for Appellant/Complainant	….	Mr. Tehmas Khan Jadoon, Advocate
Counsel for State/Appellant	….	Mr. Arshad Ahmed, Assistant Advocate General, KPK
Counsel for Respondents/Accused Shehzad alias Chirya & Sajid Ali	….	Mr. Wajeeh-ur-Rehman Khan Swati, Advocate
Counsel for Respondent/Accused Sajid Ali	….	Mr. Abdul Rehman S. Alvi, Advocate
FIR No. date & Police Station.	….	FIR No.1420, dated 22.11.2008 P.S. Cantt., Abbotabad
Date of judgment of trial Court	….	27.10.2011

Date of receipt of Appeals	....	25.11.2011 & 25.04.2012 respectively
Date of hearing	....	10.06.2015
Date of decision	....	10.06.2015

JUDGMENT:

RIAZ AHMAD KHAN, C.J.— Banaris Khan son of Muhammad Akram Khan, appellant/complainant through Cr. Appeal No.56/I of 2011 has called in question judgment passed by learned Additional Sessions Judge-II, Abbottabad dated 27.10.2011 by virtue of which he acquitted accused/respondents namely Shehzad alias Chirya son of Muhammad Saeed and Sajid Ali son of Zardad. The State has also filed Cr. Appeal No.5/P of 2012 against acquittal of accused/respondents. Both these appeals are being disposed of by this single judgment as they arise out of one and the same judgment and crime report.

2. Brief facts of the case are that appellant/complainant Banaris Khan has got a grocery shop situated in Ward No.15, Khola Kehal, Tehsil and District Abbottabad. His deceased son namely Ejaz used to run the shop alongwith his father. Ejaz used to sleep in the shop. According to the complainant, on 21.11.2008 Ejaz came to the shop at 10:00 p.m. and slept in the shop. At morning time one Akbar son of Hassan Ali informed him that people were standing in front of his shop and Ejaz (son of the complainant) was not responding. According to the complainant, when he reached the shop, the door of the shop was open and inside the shop at back side his son was found dead. He found fire-arm injuries on right & left sides of the chest of the deceased. During this period the police got information and reached the spot. On the spot, report was lodged by the complainant Banaris Khan wherein he did not charge anyone as according to him he had no enmity with anyone. On his report, Marasila Ex.PA/1 was chalked out. On the basis of this Marasila FIR No.1420 Ex.PA was registered on the same date under Section 302 PPC. The time of occurrence was shown as some time in between 21/22.11.2008, the time of report was 8:45 and the time of registration of case in the shape of FIR was 9:30 on the same date i.e. 22.11.2008. The I.O prepared site plan Ex.PB as well as the injury sheet of the deceased Ex. PW.14/2 and recovered one spent bullet from the pillow of the deceased stained with blood and a piece of that pillow was cut and taken into possession through recovery memo Ex.PW.11/1. Alongwith that one blanket, one quilt, one coat containing cash Rs.18,000/- were taken into possession. The site plan was prepared on 22.11.2008. On 26.01.2009 certain additions were made at the instance of complainant in the site plan and points No. 2, 3, 4 and D were added to the site plan. The I.O. sent the dead body in the custody of one Qasim Constable (PW.22) to District Head Quarter Hospital, Abbotabad.

3. Dr. Usman Shah PW.22 conducted autopsy and found following injuries on the body of the deceased:-

   1. Entry wound on left sub scapular region (back) of 1/4 x 1/4 cm in size, 7 cm from left auxiliary pit in between 4 x 5th intercostals space.

   2. Exit wound 1/2 x 1/2 cm in size below right auxiliary pit in mid auxiliary line.

   3. Firearm injury 1/4 x 1/4 cm in size on right arm in its upper one 3rd (medial aspect) near the axilla on arm pit (entry point) of injury No.1.

   4. Firearm injury 1/2 x 1/2 cm in size on right medial posterior/lateral aspect of right arm (exit point).

Probable time between injury and death was 30 minutes whereas the time between death and postmortem was 8 to 12 hours. In the opinion of the doctor, the deceased had died due to firearm injury to the lungs of the chest cavity. The injury (firearm) caused circulatory shock which led to the death.

4. On 23.11.2008 i.e. next day of the occurrence brother of the deceased Asim Khan submitted an application before the I.O. wherein he stated that the accused after killing his brother in his shop had also taken away one mobile phone Nokia-1110 having SIM No. 0346-9572505 and a drawer from the shop. As a result the charge in the FIR was changed from Section 302 PPC to Section 17(4) Harabah of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979 and Section 411 PPC.

5. The accused were arrested on 24.01.2009. Allegedly on the pointation of both the accused drawer was recovered from a drain (Ganda Naala) on 24.01.2009 regarding which recovery memo Ex.PW.8/1 was prepared. Allegedly the money which was in the drawer in the shape of coins was concealed in a sock and dumped at a vacant place. The same was recovered and after counting all the coins the amount came to Rs.1294/-. On 27.01.2009 both the accused were produced before the Judicial Magistrate Muhammad Asim Khan PW.1 and their confessional statements were recorded on the same date.

6. On completion of investigation, the I.O submitted challan. Charge was framed on 29.05.2009 to which the accused did not plead guilty and claimed trial.

7. After commencement of trial, the prosecution examined 24 witnesses. The accused were then examined under Section 342 Cr.P.C. Initially they submitted that they would produce defence but afterwards accused Shehzad and Sajid only recorded their statements before the Court wherein they submitted that they neither wanted to produce defence evidence nor wished to be examined on oath. However, they submitted copies of newspapers Mark-A and Mark-B, in which the news regarding murder was published and the date of their arrest was shown. According to the said publication, the accused had been arrested on 22.01.2009 whereas the police showed their arrest on 24.01.2009. Both the newspapers were taken on record as Mark-A and Mark-B.

8. After hearing the parties, the learned Additional Sessions Judge-II, Abbotabad acquitted both the accused. Feeling aggrieved, the present appeals by the complainant as well as by the State were filed.

9. Learned Counsel for the appellant/complainant submitted that though it was an unseen occurrence, however, circumstantial evidence was available and that circumstantial evidence connected the accused with the alleged offence. According to the learned Counsel for the appellant/complainant, the deceased had no enmity with the accused and there was no reason to charge them falsely. Admittedly the deceased was asleep in his shop. The roof of the shop was made of tin (teen). There was a small hole in the roof which had earlier not been noticed by the complainant and that was the reason that it was not shown to the I.O, on the first day when the site plan was prepared. However, afterwards it was realized and it was shown to

the I.O. and accordingly the site plan was amended/corrected. The learned Counsel further submitted that the accused had fired from the roof through that hole. The learned Counsel further submitted that infact only one shot was fired and the two injuries were the result of one fire shot. The spent bullet had been recovered which was sent to the expert and the report Ex.PW.21/4 showed that the spent bullet had been fired with the crime pistol.

10. The learned Counsel further submitted that the accused Shehzad in his confessional statement had submitted that he had obtained the crime pistol from his friend Waqas, who had obtained it from Niaz. Waqas had admitted before the Court as PW.12 but since Niaz had died so he could not be produced before the Court. It was further submitted that on the pointation of both the accused the drawer as well as money lying in drawer were recovered. Last but not the least both the accused had made judicial confession which was duly supported by corroboratory evidence so in these circumstances the prosecution had proved its case beyond all shadows of doubts. The learned trial Court as such had erred in acquitting the accused.

11. The learned Assistant Advocate General supported the contentions of the learned Counsel for the appellant/complainant.

12. On the other hand, the learned Counsel for the respondents/accused submitted that it is a fabricated case with no evidence. It was further submitted that the press clippings though were not exhibited in the evidence yet were brought on file and the Court could take into consideration the same. The press clippings clearly showed that the accused had been arrested on 22.01.2009 but were shown to be arrested on 24.01.2009. Even if it is presumed that they were arrested on 24.01.2009, the confessional statements were recorded on 27.01.2009, which delay had not been explained. Furthermore, there are contradictions between the two confessional statements. Both the accused were produced on the same date and the learned Judicial Magistrate in cross-examination of his statement admitted that the confessional statement of one accused was recorded in presence of the other accused. The learned Counsel submitted that no reliance can be placed on such confessional statements and these statements are of no value. Furthermore, the confessional statement of Sajid Ali was infact exculpatory confession which did not support the statement of the co-accused Shehzad on material points.

13. The learned Counsel also submitted that the case of the prosecution is that accused Shehzad had no pistol of his own so he got the pistol from Waqas who also did not have a pistol, he got the pistol from Niaz who was police official and had been afterwards murdered. On the record neither there was any license of the pistol nor any number of the pistol nor there is any evidence that Niaz had actually given the pistol to Waqas and then Waqas had given the pistol to the accused Shehzad. No empty had been recovered from the spot. Allegedly the crime pistol was sent to Forensic Science Laboratory, Peshawar but the person who took the same to the Laboratory was not produced before the Court. The report does not show as to whether the pistol and the alleged crime bullet were actually sealed or not as no mark is present on the same. The SHO in his statement before the Court submitted that Muharrir had sent the two articles to the Laboratory whereas the report of the

Laboratory shows that those were received from the SHO. According to the SHO the crime pistol was produced before him by Niaz who was then alive but he could not be produced before the Court as during the trial he died.

14. The learned Counsel further submitted that another piece of evidence available with the prosecution was Nokia Mobile. Actually, neither the mobile phone of the deceased was produced before the Court nor the record regarding calls of the mobile produced before the Court was in respect of the mobile belonging to the deceased. The prosecution prepared a made-up story which cannot be believed. The learned Counsel further submitted that the last piece of evidence with the prosecution was the recovery of drawer but in the site plan no table was shown to show that actually there was a drawer in the table. Furthermore it cannot be believed that a small amount of Rs.1294/- would be placed in a sock which would be buried in the lonely place and then would be recovered. Last submission of the learned Counsel was that the medical evidence clearly showed that there were two injuries whereas the learned Counsel for the appellant/complainant wants the Court to presume that there was only one shot fired and in this way the prosecution wants to bring the case in line with the medical evidence. The case as such is a false case and the accused were rightly acquitted.

15. We have heard the learned Counsel for the parties and have also perused the record.

16. The prosecution story is that on 21.11.2008 at 11.00 p.m. accused Shehzad alias Chirya alongwith co-accused namely Sajid Ali went to the shop of deceased Ejaz. Sajid accused stopped at some distance. Shehzad accused climbed the roof top of the shop, where he found a hole. The bulb inside the shop was alight. At that time Ejaz deceased, then alive, said loudly as to who was there? So Shehzad accused fired a shot from the said hole. Shehzad accused then came down but by that time Sajid accused had already gone home. Shehzad accused went to the house of co-accused Sajid where they remained for some time and afterwards both of them again came to the shop of the deceased to see as to what had happened. They found the deceased dead. Shehzad accused brought out the drawer in which there were coins and a mobile phone. He gave the mobile phone to co-accused Sajid and kept the money himself. This whole story is based upon the confessional statement of Shehzad accused and there is no eye-witness of the said occurrence. The co-accused Sajid also made confession but that cannot be considered as inculpatory confession.

17. The case of the prosecution as such rests upon confessional statements of the accused, recovery of drawer, recovery of mobile phone allegedly belonging to the deceased and recovery of crime pistol alongwith crime bullet.

18. As far as the confessional statement of Shehzad accused is concerned, it cannot be believed for the reasons that the confessional statement was recorded on 27.01.2009 whereas the same confessional statement was published in newspaper namely 'Pine' Abbotabad on 23.01.2009 and newspaper 'Aaj' on 24.01.2009. The statement which was published in the newspapers was to the effect that accused Shehzad and Sajid were arrested and during the investigation they disclosed that crime weapon i.e. pistol was thrown in a link road canal (Nala), cash and mobile phone of deceased were recovered. In that news the aforementioned story of the

prosecution was also given. Both the statements were same in both the newspapers. The same statement was then recorded by the Judicial Magistrate on 27.01.2009. It is strange that how the reporters of the newspapers came to know about this confessional statement even prior to the arrest of the accused as the accused had been arrested on 24.01.2009 whereas the news was published on 23.01.2009. According to the said news, the accused had already been arrested.

19. There is no doubt that news item published in newspaper cannot be considered as evidence until and unless the concerned correspondent appears before the Court and faces cross-examination. Such newspaper report cannot be treated as proof of the facts reported therein. A statement of fact contained in a newspaper is merely hearsay evidence. Nevertheless, if in respect of the same fact the prosecution produces different evidence which is in total contradiction with the news item published in the newspaper then that news item becomes a relevant fact. The Hon'ble Supreme Court in judgment titled 'Wattan Party Vs. Federation of Pakistan' reported in PLD 2006 S.C. 697 held that judicial notice of news item can be taken by the Court.

20. The established principle of law is that no conclusive judgment can be passed on the basis of newspaper item, it cannot be considered as substantive piece of evidence but nevertheless, judicial notice of the news item can be taken in certain circumstances as given in the judgment of the Hon'ble Supreme Court of Pakistan.

21. In the present case it cannot be believed that the news item was not in the knowledge of the I.O. as both the newspapers were published in Abbotabad. The news item itself creates doubt in respect of the claim of the I.O. as according to the statement of the I.O. the accused were arrested on 24.01.2009 whereas the alleged confessional statement had already been published on 23.01.2009 and then on 24.01.2009. As such it creates doubt in respect of the statement of I.O. that he had actually arrested the accused on 24.01.2009.

22. The confessional statement of accused Shehzad alias Chirya is the ditto copy of the news item published in the newspaper. This accused also retracted from his confession. In his statement before the Court he also submitted that he was subjected to physical torture. The confessional statement is also open to many doubts, so in these circumstances it cannot be accepted as voluntary and no reliance can be placed on that statement.

23. As far as the confessional statement of Sajid Ali accused is concerned, that cannot be considered as inculpatory confession. In his statement he did not say that he had any plan to kill the deceased. According to his statement he had not participated in the act of killing. He had also not participated in the act of taking away the looted money or mobile. His statement is only to the effect that he was present at the time when second accused was committing the offence and second accused had given him the mobile and that he alongwith other accused had thrown the drawer into the drainage canal (Ganda Nala). The confessional statement of accused Shehzad alias Chirya had already been published in the same words in the newspapers.

24. This is also to be kept in view that I.O in cross-examination of his statement before the Court submitted that he took both the accused from the Police Station

on 27.01.2009 at 9:45 hours for recording their confessional statements before the Magistrate. Both the accused were produced before the Court together for recording confessional statements. The confessional statement of one accused was recorded in presence of other accused.

25. The above said statement of I.O. makes the confessional statements inadmissible for the reason that confessional statement is required to be voluntary, without inducement, threat or promise. In judgment titled 'Dhani Bakhsh Vs. The State' reported as PLD 1975 S.C. 187 it was held as under:-

> "The mode and method of recording the confession of one accused in presence of the other casts serious doubt on its voluntariness which is the basic requirement of law as also for its appeal to the judicial conscience. The whole object of legal and judicial insistence on the meticulous observance of all the necessary formalities and precautions laid down with minute particularity is to ensure that the confessional statement should be absolutely free from the slightest tinge or taint of extraneous influence such as threat, promise or inducement and the Courts are placed under an obligation to affirmatively satisfy themselves that it is free and voluntary."

In the instant case, the alleged confession was recorded after three days according to record whereas actual delay is more than three days if the statement published in the newspaper is taken into consideration. This delay has not been explained by the prosecution as to why the confession was recorded after such a long delay.

26. Apparently it seems that in order to prove the case of the prosecution one person was made the principal accused who had confessed the main guilt and the other accused was made a witness. In the above said circumstances we are not inclined to accept the confessional statements of the accused.

27. If the confessional statements are taken aside then there is nothing on record to connect the accused with the alleged offence. The reason is that corroboratory evidence is only to support the substantive evidence and if substantive evidence is not accepted then corroboratory evidence even if it is very strong, is of no use.

28. Nevertheless, the second piece of evidence on which the prosecution has relied is the recovery of crime pistol. The story of the prosecution is that the crime pistol belonged to one Niaz. The accused Shehzad alias Chirya asked his friend Waqas who did not have the pistol so he asked Niaz, the said Niaz gave the pistol to Waqas who then gave the pistol to accused Shehzad. During trial Niaz, who was a police official, was murdered in some other case. Waqas was produced as PW.12. He, in his statement before the Court, submitted that Shehzad accused had asked him to give him a pistol as he did not have the pistol so he called his friend Niaz on telephone and the said Niaz handed over pistol to Shehzad accused. On 25.11.2008 Shehzad accused handed over the said pistol to Waqas who returned it to Niaz. According to Waqas PW.12, Shehzad accused had asked in presence of Zubair,

however, the prosecution abandoned Zubair as un-necessary witness. The said Niaz had produced the pistol to the police on 24.01.2009.

29. The recovery of the said pistol becomes doubtful for the reason that according to Waqas PW.12 he had not handed over the pistol to Shehzad. His statement does not even show that in his presence the pistol was handed over to the accused. It is also not known that Niaz actually knew the accused and handed him over the pistol. The pistol was unlicensed and admittedly a case was registered against Niaz under Section 13 A.O. As such the recovery becomes doubtful.

30. The next piece of evidence is the spent bullet. The spent bullet, according to the prosecution case, was recovered on 22.11.2008. The crime bullet was sent to the Forensic Science Laboratory on 13.01.2009 but it is not known as to where the said bullet and with whom it was lying for such a long time. The alleged pistol was recovered on 24.01.2009. This crime pistol was sent to the Forensic Science Laboratory on 29.01.2009. Both the reports Ex.PW.21/4 and Ex.PW.21/13 of the Forensic Science Laboratory do not show as to who had taken the crime weapon and the bullet to the Laboratory. Both the reports do not show any seal or mark on the seal. As such the recoveries have also become doubtful.

31. Another piece of evidence on which the prosecution has relied is the Nokia Mobile phone of the deceased. According to the prosecution the deceased was having a mobile phone. Though it was not mentioned in the FIR, however, on the next day of the occurrence brother of the deceased namely Asim Khan PW.5 gave a statement that from the shop where the occurrence had taken place one Nokia Mobile 1110 having SIM No.0346-9572505 and a drawer were also missing. The I.O in his statement before the Court submitted that on 14.01.2009 he obtained data of mobile of deceased Ejaz from S.P. Investigation, Rawalpindi, according to which it was found that IEMEI number of mobile of deceased was 35457201413449 and in mobile of the deceased SIM No.0300-9117496 was being used since 02.12.2008. The strange thing is that neither the S.P. Investigation was produced before the Court nor the mobile data of the alleged mobile of the deceased pertaining to the time prior to the occurrence was produced before the Court to show that IEMEI as shown by I.O was actually of phone belonging to deceased. The IEMEI number of the phone of deceased was not given by the brother of deceased. The case of the prosecution is that Shehzad accused had given his mobile number 0300-9117496 to Sajid accused, who gave it in exchange to Tauqir-ur-Rehman, who had exchanged this mobile with Faisal, who had exchanged it with one Hamad-ur-Rehman and from the said Hamad-ur-Rehman the mobile was recovered. There is absolutely no evidence on record to show that the said mobile was ever used by accused Sajid. There is also no evidence on record to show that the said mobile actually belonged to the deceased. So in these circumstances the recovery of mobile phone also cannot be believed.

32. The prosecution story is that accused Shehzad alias Chirya after killing the deceased left the place of occurrence and alongwith co-accused came again to the place of occurrence. He opened the door forcibly and entered the shop, brought out the drawer in which there was money in the shape of coins. It cannot be believed that

the accused would come again to the shop but even if it was so the bolt of the door should have been in broken condition but neither the site plan shows the same nor the complainant or the I.O said anything to that effect in their statements before the Court.

33. Regarding medical evidence the case of the prosecution is that when the accused Shehzad fired at deceased, the bullet entered the body of the deceased on the left side of his back, inside the body the bullet deflected and travelled towards right side and went out below the right arm pit and again entered the right arm and then went out from the right arm on another point. The whole contention is based on presumption which is not supported by the medical evidence. According to the medical report, there were two entry wounds and two exit wounds. In order to accept the contention of the learned Counsel, we have to presume that the medical evidence is not correct but even otherwise the contention cannot be accepted because even if the bullet had gone out through injury No.2 below the right arm pit then it could not enter the arm through injury No.3 which was upper muscle of the hand. The medical evidence clearly shows that there were two entry wounds of the same size and two exit wounds of the same size. In presence of this evidence, the presumption of the learned Counsel cannot be accepted. It seems that the learned Counsel, in order to prove that only one shot was fired, had developed this story but the same was not supported by the medical evidence.

34. In the above said circumstances, we are of the opinion that the prosecution had failed to bring home guilt to the accused and thus the learned trial Court had rightly acquitted the accused. Finding no force in these appeals, both are accordingly dismissed.

MR. JUSTICE RIAZ AHMAD KHAN
CHIEF JUSTICE

MR. JUSTICE DR. FIDA MUHAMMAD KHAN

MR. JUSTICE ZAHOOR AHMED SHAHWANI

Announced on 10th June, 2015

At Islamabad

Approved for reporting.

MR. JUSTICE RIAZ AHMAD KHAN,
CHIEF JUSTICE

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

MR. JUSTICE SARDAR MUHAMMAD RAZA, CHIEF JUSTICE

CRIMINAL APPEAL NO.05/P of 2013.

Iqbal alias Malang son of Zameer Gul,
R/o Nowshera, presently Jagra,
Peshawar. .... Appellant.

Versus

The State .... Respondent.

JAIL CRIMINAL APPEAL NO.31/I of 2013.

Saadat Khan son of Daulat Khan,
R/o Khan Sahib Qila, Dheri Zardad,
Charsadda. ..... Appellant.

Versus

The State. .... Respondent.

JAIL CRIMINAL APPEAL NO.32/I of 2013

Sajjad son of Bashir resident of
Tehsil Bazar, District Charsadda. .... Appellant.

Versus

The State .... Respondent.

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Counsel for the Appellants.	....	M/s Khizar Hayat (Khanaza), M. Sharif Janjua & Qazi Nisar Ahmed, Advocates.
Counsel for the State.	....	Arshad Ahmed Khan, Assistant Advocate General, Khyber Pukhtunkhwa.
Case FIR No. date & Police Station.	....	FIR # 634 dated 03.05.2011, Police Station Charsadda.
Date of judgment of trial Court.	....	25.09.2013.
Date of receipt of Appeals	....	02.11.2013; 0 9.12.2013 & 12.12.2013 Respectively.
Date of hearing	....	03.07.2014.
Date of decision.	....	03.07.2014.

JUDGMENT

SARDAR MUHAMMAD RAZA, C.J. — Iqbal alias Malang, Saadat Khan and Sajjad have filed these appeals against the judgment dated 25.9.2013 of the learned Additional Sessions Judge-V, Charsadda whereby, on conviction under section 392 PPC, they were sentenced to rigorous imprisonment for five years and a fine of Rs.20,000/- thousands in default whereof they were to undergo imprisonment for three months. In addition to thereto Saadat and Iqbal alias Malang were also convicted under section 411 PPC as receiver of the stolen property and sentenced to imprisonment for two years and a fine of Rs.5000/- each in default whereof they were to suffer simple imprisonment for two months.

2. Brief background of the case as furnished by Altaf Hussain complainant of Muslim Abad Station Korona, Charsadda is that he and his family lives in the same house alongwith his brother Shah Hussain and two daughters namely Mst. Nazli and Noreen, of his sister. Shah Hussain is living in Punjab for one year prior to the occurrence whereas the nieces aforesaid are serving as nurses in the hospital at Peshawar.

3. On 3.5.2011at 2.30 a.m., he was present in his house when four persons scaled over the outer wall of the house and knocked at the door of his residential room. They pushed open the door and all the four entered in the room and started searching the house. They took gold ornaments weighing thirteen tolas and two wrist watches from the room and godown of Shah Hussain. A sum of Rs.1,50,000/-, ornaments weighing nine tolas were taken from the room of Mst. Nazli. Upon search from the complainant's room, the culprits took away ornaments weighing twelve tolas, a pistol of .32 bore, a cellular phone Nokia 1112 alongwith sim #0334-8389139 and a wrist watch citizen. The general description of the four persons was given in the FIR which was recorded the same day at 06.30 a.m. it was however not stated that he identified any of the culprits by face.

4. During trial Mst. Nazli appeared as PW.4, only to confirm the theft of Rs.1,50,000/- and gold ornaments weighing nine tolas from her room. Beyond that her statement is not relevant because at the time of occurrence she was not present.

5. Altaf Hussain appeared as PW.5. It may be stated at this juncture that some days after the occurrence, the local police had informed the complainant that an accused by the name of Saadat was arrested by the police. Complainant went to the police station where he saw accused Saadat in the lock-up. As stated earlier, the complainant had never given the facial description of the accused in the FIR and had never mentioned that he would be able to identify the culprits as and when brought face to face. When in court, the complainant, in order to justify the identification, coined an excuse that all the accused at the time of occurrence had muffled their faces but during occurrence the mask of one of them fell down and he happen to see his face. It is a glaring improvement for which an occasion arose or rather created to get the complainant examined under section 164 Cr.P.C. In the later statement he also made an improvement that he had heard about the dispute between Sajjad and Saadat over the distribution of stolen items.

6. Theft from the room of Shah Hussain, the complainant's brother is also unreasonable. It is admitted he is living in Punjab for more than one year prior to the occurrence. It does not appeal to common sense that residing away for such a long time, he would keep gold ornaments in his room which became so easily accessible to the robbers. The allegation of theft in this behalf seems to be fake and exaggerated.

7. Gold ornaments like necklace (P.1), *Tikka* (P.2), one ring (P.3) and one *Jhumer* (P.4) weighing four tolas are stated to have been produced before the police by one Ali Haider alleging that the said articles were entrusted to him by Sajjad accused for safe custody. That, lateron, when he came to know that it was a stolen property, he voluntarily produced the same before the police. In this behalf the most important witness constituted primary evidence was the said Ali Haider which was never produced before the court. I believe that by withholding the primary and the best evidence, the prosecution has not done any favour to its own case. The recovery hence, is not proved.

8. A sum of Rs.23000/- is alleged to have been recovered from accused Iqbal. The detail of such recovery is that while in police custody the accused Iqbal called Izzat Khan through a cell phone call who brought the amount to the police station on call of the accused. The defence version is that such call was made by the police officer who requisitioned the amount under threat. This defence version is proved by Haroon Shah (DW.1) in whose presence the amount was so brought to the police station. He is a marginal witness to the recovery memo (Ex.PW.11/3).

9. Coming to the recovery of Rs.68,000/- allegedly recovered by the police from his house. While in police custody, the amount was allegedly brought by the accused from his house stating that it was his share of the extorted amount/articles. If one takes it for granted that the number of accused was four then, keeping in view the stolen property, the share of one accused does not amount to what is alleged above. Some gold ornaments were also recovered wherefrom it transpires that it was not the share of Saadat but a lion's share. Regarding this recovery as well it is pleaded by the accused that the amount was procured by the police from the father of the accused under strong threat of third degree methods to be used against the accused. In these circumstances, I believe that the recovery was made at the alleged pointation of the accused from a place in Khan Saib Qilla. In the given circumstances, it was necessary for the Investigating Officer to have strictly and fairly complied with the provisions of section 103 Cr.P.C; which proceedings are avoided for no plausible reason. The case against the accused is not at all free from doubts.

10. Because of the recoveries aforesaid, the appellants have also been convicted under section411 PPC; which reads as under:

> "**Dishonestly receiving stolen property.** Whoever dishonestly receives or retains any stolen property, knowing or having reason to believe the same to be stolen property, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both"

11. A plain reading of section 411 PPC read with section 410 PPC would clearly indicated that the commission of robbery, extortion or theft is altogether different offence from the receiving of stolen property. If a person is charged for extortion, robbery or theft, any recovery of the articles from him, is a proof of the robbery, extortion or theft. It is a matter of common sense that the recovery of stolen property from a thief simply comes to prove that he is a thief guilty of the commission of theft and to be punished accordingly.

12. On the other hand, receiver of stolen property is the one who dishonestly receives or retains any property already stolen by someone else. In that case too, the necessary ingredient is that he should either have knowledge or have reason to believe that the property received by him is a stolen one. It is therefore clear that a person charged for the actual commission of robber, extortion or theft cannot be labeled as receiver of the stolen property if the stolen articles are subsequently recovered from him. It should always been somebody else, other than the one who stole or extort the articles, the conviction under section 411 PPC of the appellants is illegal.

13. Consequently the appeals are accepted and the appellants (i) Iqbal alias Malang son of Zameer Gul (ii) Saadat Khan son of Daulat Khan and (iii) Sajjad son of Bashir are hereby acquitted of the charges under sections 392/411 PPC. The impugned judgment dated 25.9.2013 of the learned Additional Sessions Judge-V, Charsadda is set-aside. If not required in any other cause, they are directed to be released forthwith.

MR. JUSTICE SARDAR MUHAMMAD RAZA,
CHIEF JUSTICE.

Announced at Islamabad
3rd July 2014
Approved for reporting

IN THE FEDERAL SHARIAT COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT.

MR. JUSTICE SARDAR MUHAMMAD RAZA, CHIEF JUSTICE
MR. JUSTICE ALLAMA DR. FIDA MUHAMMAD KHAN
MR. JUSTICE RIAZ AHMAD KHAN

CRIMINAL APPEAL NO.65/I of 2010.

Azad son of Muhammad Gul
R/o Banda Khatkan Slade,
Abbottabad. .... Appellant.

Versus

1. Akram son of Hasham
2. Azhar son of Muhammad Farid
3. Shadam Khan son of Sher Ghazi.
   All residents of Lower Malakpura Mera, Abbottabad

   &

4. The State .... Respondents.

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Counsel for the Appellant	....	Mr. Saliheen Mughal, Advocate
Counsel for Respondents	....	Mr. Wajio-ur-Rehman Khan Swati, Advocate
Counsel for the State	....	Mian Shujaat Shah, Assistant Advocate General, KPK.
Case FIR No. date & Police Station	....	FIR # 549 dated 26.05.2009, Cantt: District Abbottabad.
Date of judgment of trial Court	....	01.04.2010
Date of receipt of	....	11.06.2010.
Date of hearing	....	09.10.2014.
Date of decision.	....	09.10.2014.

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JUDGMENT

SARDAR MUHAMMAD RAZA, C.J. — Azad son of Muhammad Gul, complainant of FIR No.549 dated 26.05.2009 of Police Station Cantt; Abbottabad has filed this appeal against the judgment dated 01.04.2010 of the learned Additional Sessions Judge-IV, Abbottabad, whereby the accused Akram, Azhar and Shadam Khan, tried under sections 17 (4) of Ordinance VI of 1979, were acquitted of the charge.

2. In order to appreciate the facts of the case, one has to have a glance through the first information report. Azad complainant (62/63) alongwith his brother Sikandar (40/42) resided in the house of Babu Waheed in Lamian Barian Banda Khatkar village Salhad. On 26.5.2009 the complainant alongwith his family while his brother alongwith his two wives in the adjoining room, were asleep when at about 4.00 a.m. three/four persons entered the house and belaboured the ladies. On commotion Sikandar woke up and called from his room upon which the assailants reverting towards him started beating him in the door of the room. During altercation the assailants opened fire which hit Sikandar on his head. He fell down injured when in the meanwhile the assailants made good their escape.

3. The complainant called out the neighbour Khani Zaman. They carried the injured to the hospital. According to the complainant, he could identify the assailants, if confronted. He charged the assailants for attempting at the life of his brother Sikandar. The injured succumbed to his injury and subsequently the FIR was registered under section 17 (4) of Ordinance VI of 1979 read with sections 324/302/452/34 PPC.

4. From the plain reading of the FIR, even a layman would appreciate that the assailants are not charged at all for the commission of either theft or extortion so as to bring the offence within the ambit of Haraabah with murder or dacoity with murder. By all stretch of imagination it was a simple case of trespass and murder for which the charge should have been framed under sections 302/452/34 PPC. It is not known as to what persuaded the learned trial court for charging the accused under section 17 (4) of Ordinance VI of 1979 at all. The charge under section 17 (4) of Ordinance VI of 1979 was illegal and void.

5. The jurisdiction of this Court is invoked on the grounds which never exist and if so existed, it was void altogether. A court which assumes appellate jurisdiction, has the authority to hold, with the application of mind, that the charge has been framed either rightly or wrongly. If the court has the jurisdiction to hold that the charge is rightly framed, it also has the jurisdiction to hold that it has been wrongly framed.

6. The case having simply fallen under sections 302/452/34 PPC, the charge was wrongly framed under section 17 (4) of Ordinance VI of 1979 and thus the appeal could not lie before this Court. May be the appellants had the bonifide belief in resorting to this Court but the charge framed by the court was altogether against the basic facts of the case.

7. Consequently, for reasons above, the appeal is hereby dismissed for lack of jurisdiction.

MR. JUSTICE SARDAR MUHAMMAD RAZA, CHIEF JUSTICE.

MR. JUSTICE ALLAMA DR. FIDA MUHAMMAD KHAN

MR. JUSTICE RIAZ AHMAD KHAN

Announced at Islamabad
09th October 2014
Approved for reporting

IN THE FEDERAL SHARIAT COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT

MR. JUSTICE SARDAR MUHAMMAD RAZA, CHIEF JUSTICE
MR. JUSTICE ALLAMA DR. FIDA MUHAMMAD KHAN
MR. JUSTICE RIAZ AHMAD KHAN

CRIMINAL APPEAL NO.103/I of 2010.

Mst. Shamim Akhtar widow of Late Abdul Samad Khan, resident of Zafar Abad Colony, D.I.Khan .... Appellant.

Versus

1. Saifur Rehman alias Saifa son of Ellahi Bakhsh, R/o Bagera, Tehsil Kulachi, District D.I.Khan.
2. Elahi Bakhsh alias Illa son of Muhammad Bakhsh resident of Kurai, Tehsil & Distt; D.I.Khan.
3. The State .... Respondents.

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Counsel for the Appellant	....	Nemo.
Counsel for Respondents	....	Nemo.
Counsel for the State	....	Nemo.
Case FIR No. date & Police Station	....	FIR # 37 dated 22.02.1999, P.S Saddar D.I.Khan.
Date of judgment of trial Court	....	08.08.2005.
Date of receipt of	....	29.11.2010
Date of hearing	....	10.10.2014.
Date of decision.	....	10.10.2014.

JUDGMENT

SARDAR MUHAMMAD RAZA, C.J. — Mst. Shamim Akhtar has filed this appeal against the acquittal of accused/respondents Saifur Rehman alias Saifa and Ellahi Bakhsh alias Illa, who, vide judgment dated 8.8.2005 of the learned Additional Sessions Judge-V, Dera Ismail Khan, were acquitted of the charge under section 302/324/34 PPC holding that the charge of Haraabah under section 17 (4) of Ordinance VI of 1979 was not proved.

2. The Hon'ble Division Bench of Peshawar High Court Circuit Bench Dera Ismail Khan had earlier transferred the appeal to this Court with the observation that the accused/respondents having been charged for the offence of Haraabah under section 17 (4) of Ordinance VI of 1979, the appellate jurisdiction stood vested in Federal Shariat Court.

3. FIR No.37 dated 22.2.1999 of Police Station Saddar Dera Ismail Khan reveals that Fazlur Rehman complainant alongwith Abdul Samad Khan the deceased and another Bagga Khan, while riding one motor bike were going to the house of Bagga Khan in village Lakhra from the tube well of Allah Nawaz Khan Sadozai in Kot Batta. It was 9.15 p.m. that they reached Lakhra bridge of Pahar Pur Canal when suddenly three persons duly armed, one of them having klashnikov, appeared on the scene. The complainant stopped the motor bike. All the three alighted therefrom when the assailants opened fire at them with the intention to kill. Abdul Samad Khan got injured and succumbed to his injuries while on his way to the hospital; where the complainant lodged report before the police.

4. Not a single word is uttered by the complainant either in the FIR or in the statements etc that the assailants had come for the purpose of taking away the property of the party aggressed. There is no allegation that the assailants even showed a slight inclination of demanding either money or the motor bike of the complainant party. When such element is missing altogether, the accused could not be charged under section 17 (4) of Ordinance VI of 1979. The element of Haraabah as defined by section 15 of the Ordinance is completely missing. By no stretch of reasoning, the accused could ever be challaned or charged for the offence of Haraabah with murder. It is a plain offence of murder, as per charge, where the assailants had waylaid the victims and had killed one of them without the intention to rob or extort anything whatsoever.

5. Any Court, while exercising or assuming the jurisdiction of an appellate Court, has absolute authority to appreciate by judicial application of mind as to whether the trial court has charged the accused rightly or wrongly. We therefore, hold that this being a simple case of murder and attempted murder, the act of charging the accused under section 17 (4) of Ordinance VI of 1979 was void and illegal. We are therefore, of the view that the Hon'ble Peshawar High Court Circuit Bench Dera Ismail Khan had every jurisdiction to hear the case in appeal and that this Court, in view of law and facts, lacks jurisdiction.

   The record of appeal in original sent by the High Court may be transmitted back to the Hon'ble Court for decision at its own end. The parties are directed to appear there against the notices issued by the court itself.

MR. JUSTICE SARDAR MUHAMMAD RAZA,
CHIEF JUSTICE.

MR. JUSTICE ALLAMA DR. FIDA MUHAMMAD KHAN

MR. JUSTICE RIAZ AHMAD KHAN

Announced at Islamabad
10th October 2014
Approved for reporting.

IN THE FEDERAL SHARIAT COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT.

MR. JUSTICE SARDAR MUHAMMAD RAZA, CHIEF JUSTICE

JAIL CRIMINAL APPEAL NO.03/I OF 2014.

Muhammad Yousaf S/o Muhammad Ishaq, R/o,
Mauza Moraja Bhutta,Tehsil Jalalpur Pir Wala
District Multan. …. Appellant.

Versus

The State …. Respondent.

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Counsel for the Appellant	….	Khawaja Shahid Rasool Siddique, Advocate.
Counsel for Complainant	….	Mr.Altaf Hayat Khan Langra, Advocate.
Counsel for the State	….	Mr. Ahmed Raza Gillani, Addl; Prosecutor General Punjab.
Case FIR No. date & Police Station	….	FIR No.204 dated 05.10.2005, Police Station Jalal Pur Pirwala, District Multan.
Date of judgment of trial Court	….	29.03.2011.
Date of receipt of Appeal	….	26.12.2013
Date of hearing	….	21.07.2014.
Date of decision.	….	05.09.2014.

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JUDGMENT

SARDAR MUHAMMAD RAZA, C.J.— This appeal is filed by Muhammad Yousaf son of Muhammad Ishaq against the judgment dated 29.3.2011 rendered by the learned Additional Sessions Judge, Jalalpur Pirwala, District Multan, whereby he was convicted under section 10 (2) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and sentenced to rigorous imprisonment for 10 years in addition to a fine of Rs.100,000/- in default of payment whereof he was to undergo rigorous imprisonment for six months. Benefit of section 382-B, Cr.P.C was however given.

2. The brief background of the prosecution case is that one Mst. Shabana Mai daughter of Manzoor Ahmed aged 16 years of village Noraja Bhutta (within the limits of police station Jalalpur Pir Wala), on the night between 28th and 29th September 2005 was asleep in the courtyard of her house alongwith her other family members when, at about mid-night, Muhammad Yousaf and Muhammad Younas sons of Muhammad Ishaq armed with pistols and another Muhammad Ayub son of Rasool Bux entered the house and forcibly abducted Mst. Shabana Mai. Upon her commotion one Muhammad Javed son of Bashir Ahmed and another Muhammad Riaz son of Amir Bakhsh alongwith people of the village got attracted to the spot and witnessed the occurrence. They attempted to rescue Mst. Shabana Mai whereupon Muhammad Yousaf and Muhammad Younas posed armed threat of life to them. She was taken to and confined in the residential room of Muhammad Ayub aforesaid.

3. Muhammad Yousaf appellant, against the will and consent of Mst. Shabana Mai, committed Zina-bil-jabr with her while Muhammad Younas and Muhammad Ayub stood as guards outside the room. The witnesses aforesaid and Manzoor Ahmed, the father of the victim alongwith other persons of the village demanded the release of Mst. Shabana Mai whereupon Muhammad Yousaf and Muhammad Ayub released the victim on the morning of 29.9.2005 on the condition that she would not initiate any legal proceeding against the culprits.

4. Motive for the occurrence is alleged to the effect that Muhammad Yousaf convict was engaged to one Mst.Hafsa Mai daughter of Zulfiqar Bhutta but the latter gave her hand to Qari Nasrullah, the uncle of Mst.Shabana Mai. The present occurrence was committed to avenge the insult.

5. The prosecution, in order to prove its case examined Mst. Shabana Mai (PW.4); Muhammad Javed (PW.5); Manzoor Ahmed the father of the victim (PW.6); Safarash Ali SI (PW.8); Alamdar Hussain retired DSP (PW.11) and lady doctor Sadia Arshad (PW.2) in addition to other witnesses in routine. I would like to appreciate and discuss the case in the light of oral as well as circumstantial evidence. Having probed the matter through judicial appreciation of facts and circumstances, I feel confronted with certain matters unavoidable.

6. It is a matter of common knowledge and observation that people in this part of the area in summer season usually sleep in the courtyards of their houses without keeping the lights switched on because it provides a comfortable view of the location and of the people sleeping therein to any apprehended miscreant. In the instant case

the existence of light was never alleged either in the FIR or in the statements under section 161 Cr.P.C of the witnesses. It was brought on record during trial by clear improvement. I, therefore, observe that such improvement was made to prove the identification of the culprits at night. It is obviously an assertion after thought.

7. The next aspect of the case is that one Muhammad Javed and another Muhammad Riaz in addition to the other persons of the village got attracted to the spot due to the hue and cry of the victim and commotion on the spot. It may be clarified that no notable person of the village was examined. Muhammad Javed and Muhammad Riaz were cited as prosecution witnesses out of whom Muhammad Riaz was abandoned and only Muhammad Javed was examined. Mst. Shabana Mai and her father alleged that the house of Muhammad Javed is situated at a distance of 4/5 miles. Muhammad Javed himself admitted that his house was at a distance of one kilometer. I believe that the victim and her father are correct in giving the distance. Even if the distance admitted by Muhammad Javed is accepted to be correct, it is a long distance and one cannot reach the spot after hearing the commotion except the close neighbours. In the circumstances of the instant case, I believe that Muhammad Javed is a procured witness. The prosecution also sensed the weaknesses of this witness and that is why it thought appropriate to abandon Muhammad Riaz, the co-witness of the similar circumstance, in order to avoid further discrepancies.

8. The next circumstance is that Mst. Shabana Mai was abducted, kept for the whole night under wrongful confinement in the residential room of the house of Muhammad Ayub, forcible intercourse was committed with her by Muhammad Yousaf while more than 11/12 persons of the village including the witnesses aforesaid have been waiting outside the house throughout the night when Mst. Shabana Mai was released in the morning. If one appreciates judicially, it appears nothing beyond a cock and bull story. One witness says that while taking away Mst. Shabana Mai the accused had been holding her by arm while the other says that she was dragged up to the house of Muhammad Ayub. Both the families are related to each other and enjoy the same financial and social status. It does not appeal to reason and commonsense that the accused would keep a girl in their house and would commit zina when numerous persons of the village, all males are waiting outside. The situation becomes all the more alarming when Muhammad Ayub, an aged person of above 60 years and being the real uncle of the accused Muhammad Yousaf and Muhammad Younas, would facilitate the commission of offence of Zina in his house where his wife and four daughters are already present. The evidence produced in this behalf is highly unreasonable and far fetched.

9. Mst. Shabana Mai furnishes explanation regarding a fatal delay of 6/7 days in lodging the FIR by saying that she was released on the condition that she would not report the matter to the police. It is quite a frivolous reason for the delay involved because such agreement, if at all, was never a civil or moral contract. The moment she got released from the clutches of the accused, she and her father were free to lodge the FIR especially when, according to them numerous persons of the village supported them. Inspite of it no FIR was lodged for 6/7 days.

10. It is admitted by the witnesses including those of police that police had reached the spot early in the morning. It is still a mystery as to how and why the police reached there; it examined the witnesses including Mst. Shabana Mai but still they did not register an FIR and that too in a heinous and cognizable offence. I have, therefore, no two opinions about the fact that the FIR in the present case lodged after 6/7 days is without reasonable explanation and is completely deliberated concoction. The occurrence has not taken place in the manner in which it is alleged and that is why the senior police investigating officers had absolved the accused.

11. Last but not the least, is the medical report of Mst. Shabana Mai which showed vaginal swabs to be semen stained. This is also subject to serious objections. The medical examination was conducted seven days after the occurrence. The vagina of the examinee admitted two fingers easily and hence an unmarried girl of sixteen years of age appears to be not of a fair virtue. Strong corroborative evidence in this behalf was required to connect the accused with the commission of zina especially when the whole prosecution version appears to be a cock and bull story culminating from an FIR lodged with a dishonest and unexplained delay of not one but seven days.

12. When I mention about strong corroborative evince, I visualize the DNA test which was necessary to determine the semen grouping and matching of the swabs with the sperms of the accused. No DNA test was conducted in the instant case.

13. I agree that scientific evidence like one of semen grouping through DNA test is always required as a corroborative evidence. It is not considered necessary in the presence of overwhelming and irrefutable independent evidence. Superior Courts of the country have always maintained this view and DNA test is avoided only, like in Amanullah..Vs..The State (PLD 2009 SC 542), when overwhelming independent evidence is always available. In the instant case, as already observed, no independent and reliable evidence is available in support of the charges and hence DNA test in the instant case had become absolutely necessary. No such test was conducted and hence the appellant could not be squarely linked with the commission of the offence.

14. As a sequel to my above discussion and findings, I hold that the prosecution has failed to bring home charge against Muhammad Yousaf appellant. He is entitled to the benefit of doubt. Consequently the appeal is accepted and the appellant Muhammad Yousaf son of Muhammad Ishaq is acquitted of the charge under section 10 (2) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979. If not required to be detained in any other cause, he is directed to be released forthwith.

MR. JUSTICE SARDAR MUHAMMAD RAZA,
CHIEF JUSTICE.

Announced on 5th Sep: 2014
at Islamabad.
Approved for reporting.

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

MR. JUSTICE DR. AGHA RAFIQ AHMED KHAN, CHIEF JUSTICE
MR. JUSTICE DR. FIDA MUHAMMAD KHAN

CRIMINAL APPEAL NO.33/I OF 2013

Atlas Khan alias Attasi son of Dilawar Khan
R/o. Taj Takhti Khel, District Lakki Marwat ….. Appellant

Versus

1. The State
2. Mst. Ajmair Bibi D/o Misal Khan
   R/o Taj Takhti Khel District Lakki Marwat ….. Respondents

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Counsel for appellant	….	M/s. Zia-ur-Rehman & Mati Ullah Khan, Advocates
Counsel for State	....	Mr. Arshad Ahmed Khan, Deputy Advocate General, KPK
FIR, Date and Police Station	....	159, 08.08.2000 Haveed, Bannu
Date of judgment of trial court	….	03.12.2013
Date of Institution of appeal	....	20.12.2013
Date of hearing	....	24.02.2014
Date of decision	....	24.02.2014
Date of judgment	....	04.03.2014

JUDGMENT

DR. FIDA MUHAMMAD KHAN, J.- This appeal filed by Atlas Khan alias Attasi assails the judgment dated 3.12.2013 delivered by the learned Additional Sessions Judge-I, Bannu, whereby the appellant has been convicted under section 376 PPC and sentenced to suffer twenty five years rigorous imprisonment with a fine of Rs.3,00,000/- or in default thereof to undergo three years simple imprisonment. The benefit of section 382-B, Cr. P.C has been extended to the appellant.

2. Briefly stated the facts of the case are that on 08.08.2000 complainant Mst. Ajmair Bibi registered the instant case at police Station Haveed, Bannu, vide FIR (Ex.PA) wherein she stated that on the day of occurrence at morning time she left for field to graze sheep. She was present in the fields near Shagai Takhti Khel when at *dopehar* time accused/appellant Atlas Khan alias Attasi and his father Dilawar Khan, absconding co-accused, who were their relatives, came over there. She alleged that the accused Dilawar Khan stopped at some distance while accused facing trial Atlas Khan came near her and asked her for the friendship. According to her, she refused and told him that she will inform her parents. On this, the appellant/accused Atlas Khan dragged her towards a dry pool where he forcibly laid her down and removed her trouser. He also removed his own shalwar and started committing Zina-bil-jabar with her. Due to pain and fear she became unconscious. After lapse of sufficient time she regained her senses but she was unable to walk. In the meantime her step brother Gul Nasib Khan and Almar Jan who were searching her reached there and took her along to the house in injured condition. Her father who was not present at that time in the house was informed accordingly. Her father accompanied her to the police station where she lodged the report. The investigation ensued. However, the appellant/accused and his absconding co-accused Dilawar Khan evaded their arrest and absconded. After completion of the investigation challan was submitted in court under section 512 Cr.P.C.

3. After almost more than twelve years, however, the appellant/accused was arrested on 23.1.2013 and a supplementary challan against him was submitted to the court. The appellant/accused was charge sheeted on 9.3.2013 but he denied and claimed trial.

4. The prosecution in order to prove its case, produced as many as ten witnesses. The gist of their evidence is as under:-

* PW.1 Akhtar Khan SHO arrested the appellant/ accused and thereafter on completion of the investigation submitted supplementary challan against him on 26.1.2013.

* PW.2 Khan Bahadar DFC completed proceedings in pursuance of warrants and proclamation issued against the appellant/accused and the absconding co-accused Dilawar Khan.

* PW.3 is Attaullah Khan FC. In his presence the SHO searched the house of the accused but recovered nothing incriminating.

* PW.4 is Umar Khitab SHO. After cancellation of BBA of the appellant/accused, he arrested him. He produced him before the court for physical remand, however no custody was granted to him. Accordingly he was remanded to judicial lock up.

* PW.5 is Mst. Ajmair Bibi. She is the complainant. Her statement is reproduced hereunder:-

  "On the day of occurrence I had taken the cattles for grazing in the field of Shagayee, at dopaher vella, accused Atlas Khan alias Atlasi son of Dilawar Khan and Dilawar Khan son of Qadar Khan came there. Dilawar Khan stopped at some distance, whereas Atlas Khan accused came near to me and asked for friend ship, but I refused and also told him that I will complain the matter to my elder. On this Atlas Khan dragged me towards the Talab and committed cruelty with me. Again stated the accused had committed Zina with me. After that I became unconscious and was lying on the spot. When my brother Almar and Gul Nasib attracted there and taken away me from the spot but I do not know that when and where I was taken. My father was not present in the village and when he came to the village. We came to the Police Station for registration of the case, where I lodged the report (Ex.PW.5/1), admitting the same as correct. I thumb impressed my report as a token of its correctness. After report I was medically examined by the lady doctor. On discharge from the hospital, I was taken to the spot where I verified the site plan to the IC, already prepared by him. I charge the accused for the commission of offence."

* PW.6 Misal Khan is father of the complainant. He stated that on the day of occurrence he had gone to Mirali for labouring. When he came back to the house, he was informed about the occurrence, as stated above. He corroborated the statement of PW.5. According to him, she remained in the hospital till her recovery. His statement was recorded by the Investigation Officer under section 161 Cr.P.C.

* PW.7 is Mujib-ur-Rehman. He was posted as SHO Police Station Haveed, Bannu. He stated that on 8.8.2000, complainant Mst. Ajmair Bibi alongwith her father came to the police station and reported the matter to him. He registered the case and prepared injury sheet of complainant and sent her to hospital through Muhammad Ayub FC and Mir Sardar IHC. On the next day he alongwith police officials went to the spot and prepared the site plan on the pointation of the complainant as well as his father. He recovered and took into possession the blood stained earth from the spot and in this regard he prepared the recovery memo. He also searched the house of the accused but nothing incriminating was recovered from there. He also received blood stained shalwar of the victim sent by the Lady Doctor through Constable Mir Sardar Khan which he took into possession through recovery memo. According to him, as the accused were absconding, he applied for proceedings against the accused under section 204 and 87 Cr.P.C. He submitted complete challan under section 512 Cr.P.C against the accused.

* PW.8 is lady Doctor Robina Gul Tiaz. She made the following statement:-

"On 9.8.2000 at 12.30 (night) I medically examined Mst. Ajmair Bibi daughter of Misal Khan (aged about 8/10 years) found the following:

Breast not developed well.

External genetaria normal.

Whole clothes fully covered with blood and have been dried up. OE: Hymen absent. Laceration of her vagina wall tear. Packing done. No signs of violence seen because of blood.

It was a case of rape. The patient was admitted in the hospital. I handed over to the local police blood stained shalwar with MLR. I have seen Medicolegal report which is correctly prepared and signed by me. The same is Ex.PW-8/1. Observation recorded on back of IO's application, respond by me which is Ex.PW-8/2. The said victim was stitched and further managed by lady Dr. Parveen Shoib (now posted at D.I.Khan), vide her report Ex.PW-8/3)."

* PW9 Mir Sardar S.I escorted the victim Mst. Ajmair Bibi to the lady doctor and after her examination by the lady doctor he was handed over the MLR alongwith shalwar of the injured victim, which he handed over to the Investigation Office. His statement was also recorded by the I.O under section 161 Cr.P.C. The Investigation Officer vide recovery memo Ex.PW7/5 took into possession and sealed into a parcel the shalwar (Ex.P.1) of the victim.

* PW.10 Almar Jan stated that Mst. Ajmair Bibi was taking cattle to the fields for grazing in routine. On the day of occurrence at *Digar vela* the cattle came to the house but Mst. Ajmair Bibi had not returned to the house. On this, he and his brother Gul Nasib went out for searching her in the field and found her in the dry water pond but she was unable to move. On this he and Gul Nasib brought her to the house. As the father of the victim was not available in his house and had gone to Miranshah for labouring. On this the father of Mst. Ajmair Bibi was called upon through telephone and he came to his house and thereafter he went to the Police station for registration of the case. They did not accompany him to the police station. On the next morning police came to the spot and they pointed out the place of occurrence to the police. Vide recovery memo Ex.PW7/4 the I.O recovered and took into possession the blood stained earth from the spot in his presence. He verified his signature on the said recovery memo as its marginal witness.

5. After conclusion of the prosecution evidence, the appellant/accused was examined under section 342 Cr.P.C, wherein he denied the allegation of the prosecution. While replying to questions No.7 he replied as under:-

"I am innocent. The complainant falsely deposed against me under the pressure of her father. Similarly PW Misal Khan is highly inimical and interested

witness. The castle was built in the sky after due deliberation and consultation. The delay in the report by itself speaks about the false charge and deliberation.

The appellant/accused however declined to record his statement on oath as provided under section 340(2) Cr. P.C. He also declined to produce any evidence in his defence.

6. We have heard learned counsel for the appellant as well as learned Deputy Advocate General, KPK and also perused the record with their assistance.

7. Learned counsel appearing on behalf of the appellant contended that:-

* the order and judgment dated 03.12.2013 of learned trial court is totally against the law, facts and material available on record, hence, liable to be set aside;

* the order and judgment dated 03.12.2013 of learned Additional Sessions Judge-I, Bannu is liable to be set aside on the ground that the case was registered under sections 6/10/10(2) Zina Ordinance, 1979 and similarly charge was also framed against the appellant under the same sections of law, but after completion of prosecution evidence the learned trial court has convicted the appellant under section 376 PPC and sentenced him thereunder. He contended that on one side the learned trial court has mentioned in its judgment that the prosecution has been successful in proving the guilt against the appellant beyond any shadow of doubt, but on the other hand it has been mentioned in the judgment that standard of proof of evidence provided under the Hudood laws is not available. He submitted that when proof was not available as provided under the Hudood laws, the learned trial court was duty bound to acquit the appellant rather to convict him;

* the learned trial court has ignored this aspect of the case as the appellant and absconding co-accused are real father and son and it is natural phenomena and custom of the society that father and son can not commit zina together, specially Zina-bil-jabar. So, on this sole ground the impugned judgment was liable to be set aside;

* the learned trial court has not properly appreciated the prosecution evidence as there is contradiction between the prosecution evidence which creates doubt and even a single doubt is sufficient which should go in favour of accused/ appellant;

* the impugned order and judgment is based on presumptions, surmises and conjectures, hence, liable to be set aside;

* the learned trial court has made abscondence as a base for conviction of the appellant, but it is also a settled principle of law that the abscondence per se is no ground for conviction or to prove guilt, hence, on this ground also the impugned judgment is liable to be set aside;

* there is no independent eye witness of the occurrence;

* while delivering the impugned judgment and order, the learned trial Court has not exercised its judicial mind and thus passed the impugned order in a hasty manner;

* the prosecution has totally failed to prove its case against the appellant;

* the medico-legal report does not support the prosecution version.

* it is also pertinent to note that at the time of alleged occurrence the appellant was teenager when there could be no concept of Zina-bil-jabr as is evident from card of arrest;

8. Learned counsel appearing on behalf of the State, however, vehemently opposed the contentions raised by learned counsel for the appellant and submitted that the judgment of the learned trial court is based on cogent pieces of evidence. So far as the contention regarding age of the accused is concerned, he submitted that, this question was not at all raised at the initial stage nor any proof regarding the same was tendered in evidence. The learned counsel further submitted that a girl of 8/9 years has been subjected to zina-bil-jabar, the medical and circumstantial evidence coupled with the version of the complainant fully proves the case of prosecution. He also submitted that no question has been put to any witness about the malafide borne by the complainant party and in the background of the tribal conventions no one would ever like to subject the honour of a minor girl by false implication.

9. We have thoroughly considered the contentions of learned counsel for parties and perused the record. It transpires that the occurrence took place on 08.08.2000. However, the appellant had since then absconded, the necessary proceedings as required under the law were initiated and completed. He was subsequently arrested on 23.01.2013 and duly charged and tried. At the trial 10 witnesses were examined, out of whom P.W.5 Ajmair Bibi is the victim who directly charged the appellant/accused of commission of zina with her. Her statement has been reproduced hereinabove. She has been cross-examined at great length but nothing fruitful to the defence has been adduced from her statement. Though after the occurrence she became unconscious and regained senses in the hospital, she was fully conscious at the time of occurrence prior to that and has not only narrated the facts of the case but nominated the appellant/accused for commission of zina-bil-jabar with her. The appellant was quite known to her as he was her relative. This was a broad day occurrence and any misidentification was not possible. Her statement is fully corroborated by MLR submitted by P.W.8 Lady Dr. Robina Gul Tiaz who examined her on 09.08.2000 at 12.30.a.m. during night. It means that soon after the occurrence she had examined the victim and found that her clothes were fully blood stained. She observed that her hymen was absent and there was laceration on her vaginal wall tear. She handed over the blood stained shalwar and MLR to the local police. In cross-examination she clarified that it is not necessary in each and every intercourse that external genitalia should be abnormal. In her MLR she candidly conceded that no sign of violence was seen because of blood in the vaginal area. She also clarified that the vaginal wall had been teared and blood was oozing from

vagina and therefore treatment was given to her. She, however, did not take internal swabs from her vagina as the external affected area of the vagina was covered with blood. Besides these two significant witnesses, the statement of PW.10 Almar Jan who while searching found her near a dry pond, in pool of blood, and brought her to the house. This fully corroborates the statement of PW.5 Mst. Ajmair Bibi. Moreover testimony of P.W.7 Mujeeb-ur-Rehman, DSP, the then SHO is also very important. In his testimony he deposed that he took into possession blood stained earth from the place of occurrence. He packed and sealed that into a parcel in the presence of marginal witnesses. He also received blood stained shalwar of the said victim. He explained that no independent witness was ready to depose on account of fear of enmity. It is thus clear from the above that the appellant/accused has been directly charged in the FIR by the complainant for an occurrence that took place in a broad day light. No question of substitution has been put to any PW. As stated above, the appellant was already known to the complainant party and so there was no misidentification also. The testimony of complainant has been fully corroborated by the medico-legal report reproduced hereinabove. Recovery of the blood stained earth and the blood stained shalwar further lend full support to the case of prosecution. It is pertinent to mention that even a solitary statement of a victim is sufficient, for conviction under Taazir, if it inspires confidence and finds necessary corroboration from an independent source. In this case besides the unexplained extremely long abscondance, the independent corroboration of testimony of P.W.5, prosecutrix is abundantly available on record and there is nothing to doubt the veracity of depositions made by PWs. The contradictions referred to by the learned counsel are very minor in nature and do not affect the main case in any way. After lapse of thirteen years such small contradictions were quite normal. So far as the reference to tribal customs made by the learned counsel is concerned, that is really considerable otherwise. No sane person would ever like to put a stigma on the career of his minor daughter or would ever stake her future by making false allegations of such a heinous nature without any rhyme or reason.

10. We may however mention that the occurrence took place on 08.08.2000 and at that time section 376 PPC was not in existence. It had rather been repealed by the Offences of Zina (Enforcement of Hudood) Ordinance, 1979. However, after the promulgation of Women Protection Act in 2006, this section was revived and at the time of announcement of impugned judgment, this Section was very much in vogue and, as provided under Section 237 Cr.P.C., the trial court was empowered to convict and sentence the appellant thereunder even if he was not charged with it.

11. We may also mention that the appellant was arrested on 23.01.2013 and at that time his age was alleged to be 25 years. Giving slight benefit of doubt in respect of his age, though not substantiated by any cogent piece of evidence, his approximate age would be 11/12 years at the time of occurrence. In this view of the matter, we are inclined to take a lenient view. Therefore, we reduce the sentence of imprisonment to 10 years R.I. The sentence of fine of Rs. 3 Lacs or in default thereof 03 years S.I, is, however maintained. The benefit of section 382-B, Cr.P.C. already extended to the appellant/accused shall remain intact.

12. With above modification in the sentence, the appeal is dismissed.

13. These are the reasons for our short Order dated 24.02.2014.

JUSTICE DR. FIDA MUHAMMAD KHAN

JUSTICE DR. AGHA RAFIQ AHMED KHAN
CHIEF JUSTICE

Islamabad the 4th March, 2014

IN THE FEDERAL SHARIAT COURT
(Original Jurisdiction)

PRESENT

MR. JUSTICE DR. AGHA RAFIQ AHMED KHAN, CHIEF JUSTICE
MR. JUSTICE DR.FIDA MUHAMMAD KHAN
MRS. JUSTICE ASHRAF JAHAN

SHARIAT REVIEW PETITION NO.02/I OF 2000

Cap. (R) Mukhtiar Ahmed Shaikh 124-Hina Garden,
Gulistan-e-Jauhar, Block-19, Karachi-75290 .... Petitioner

Versus

Federation of Pakistan through
Secretary Ministry of Law, Islamabad. …. Respondent

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Counsel for petitioner	…..	In person
Counsel for Federal Govt.	…..	Mr. M. Aslam Butt, Deputy Attorney General
For Govt. of Punjab	.....	Ch. Saleem Murtaza Mughal, Assistant Advocate General
For Govt. of Sindh	…..	Mr. Abdul Majeed, Advocate
For Govt. of KPK	…..	Mr. Mujahid Ali Khan, Deputy Advocate General
For Govt. of Balochistan	.....	Mr. Naseer Ahmed Bangulzai, Additional Advocate General
Date of Institution as S.P.	.....	26.01.1999
Converted into Review S.P.	…..	25.01.2001
Date of hearing	…..	28 & 29.01.2014
Date of decision	…..	04.02.2014
Date of judgment	…..	05.03.2014

JUDGMENT

ALLAMA DR. FIDA MUHAMMAD KHAN, Judge- This Shariat Petition having been converted in Review Shariat Petition, filed by petitioner Capt.(R) Mukhtiar Ahmed, challenges section 3-A(2)(C), Section 4(1) with Proviso (A) and section 6 and 7 of Service Tribunal Act, 1973 (LXX of 1973), as amended from time to time, on the ground that these are against the Injunctions of Islam. The impugned sections read as mentioned herein under:-

"Section 3-(A)(2)(c).

3-A. The Powers and functions of a Tribunal may be exercised or performed by benches consisting of not less than two members of the Tribunal, including the Chairman, constituted by the Chairman.

(2) If the members of a bench differ in opinion as to the decision to be given on any point.

(c) If the members are equally divided and the Chairman of the Tribunal is himself a member of the Bench, the option of the Chairman shall prevail and the decision of the Tribunal shall be expressed in terms of the opinion of the Chairman."

"Section 4(1) with proviso (a) and Sections 6 & 7.

"Section 4-(1): Any civil servant aggrieved by any final order, whether original or appellate, made by departmental authority in respect of any of the terms and conditions of his service may, within thirty days of the communication of such order to him, [or within six months of the establishment of the appropriate Tribunal, whichever is later, prefer an appeal to the Tribunal]:

Provided that:

(a) Where an appeal, review or representation to a departmental authority is provided under the (Civil Servants Act 1973) or any rules against any such order, no appeal shall lie to a Tribunal unless the aggrieved civil servant has preferred an appeal or application for review or representation to such departmental authority and a period of ninety days has elapsed from the date on which such appeal, application or representation was so preferred."

"Section 6 and 7

"Abatement of suits and other proceedings. All suits, appeals or applications regarding any matter within the jurisdiction of a Tribunal pending in any court immediately before the commencement of this Act shall abate forth with:

Provided that any party to such a suit, appeal or application

may, within ninety days of the [establishment of the appropriate Tribunal, prefer an appeal to it] in respect of any such matter which is in issue in such suit, appeal or application.

Limitation The provisions of sections 5 and 12 of the Limitation Act, IX of 1908, shall apply to appeals under this Act."

2. We have heard the petitioner in person. He contended that in case the Members of the Service Tribunal are equally divided and the Chairman of the Tribunal himself is a Member of the Bench, the opinion of the Chairman should not prevail on the following grounds:-

* All human beings are equal and the Chairman cannot be equated with two Judges of the same Bench; and

* The Holy Prophet (صلی اللہ علیہ وآلہ وسلم) had declared on the occasion of his last Address of Hujjatul Wida that "All people are equal, just like the teeth of a comb. There could be no claim of superiority of an Arab over a non-Arab or of a white over a black person. Only God-fearing people merit preference with God". Thus the Chairman is not entitled to any preferential treatment over the other numbers. However, as head of the set up, he may enjoy more pay, perks and privileges.

3. According to the petitioner though the Procedural Law is outside the ambit of jurisdiction conferred on this Court by the Constitution of Islamic Republic of Pakistan vide its Article 203-B(c), nevertheless, falls within the jurisdiction as, according to him, a procedure which extinguishes a substantive right can be examined by this Court and the impugned Sections being related to substantive right are well within the purview of jurisdiction of Federal Shariat Court. He placed reliance on PLD-1989-84, PLJ-1989-FSC-82, NLR 1989 SD 820, PLD-SC 360, PLJ 1986 SC 576 and 1986 PSC 1241.

4. In this connection, referring to the impugned section 4(1) and proviso (a), the petitioner further submitted that fixation of time limit for filing of appeal is against the Injunctions of Islam on the following grounds:-

* Failure to file appeal within this period entails forfeiture of the right and in case he does not file appeal, he would lose his lawful right. This section and the proviso both negate the concept of Shariah;

* Shariah does not contemplate any time frame to extinguish the rights of Allah nor of human beings. He added that Qaza Salat (صلوۃ) is permissible and one has all the time to perform this religious obligation during his life time. Likewise late payment of Zakat has also been permitted and this is equally true about fasting. Thus it is desired that Courts may take inspiration from this practice and decide claims/rights without adhering to any time frame.

* The limitation of time hampers justice and is not in line with Islamic Injunctions.

To support his contentions, he relied upon the following Ahadith:-

"Prophet (PBUH) has been quoted in Muslim to have raid "You bring your disputes to me. It is possible that one of you be more eloquent than the other, and I decide according what I hear from him. But whom so ever I award a portion from the right of his brother, he should not take it, because what I gave him is but a portion of hell". Ch 251 b 1968 It implies, on the face of it that best of the judges can be led to the wrong decision. But one has to be accountable for omission/commission of usurping. He has to return the due right so usurped on the day of judgment. Thus in matter of rights Islam does not recognize the law of limitation. Islam does not impose the time-frame for redress of grievance. Even the judgment of Prophet (PBUH) does not help a usurper. In the Service Tribunal Act, the state has worked out the modality to extinguish the right of a person who does not go according to time-schedule. The time-scheduling is against the commandments of Islam.

He further submitted that there is another famous tradition quoted in Bukhari, "Help your Muslim brother whether he is 'Zalim' or 'Mazlum'. It was asked that help of 'Mazlum' is understandable but how 'Zalim' can be helped. The Prophet (صلى الله عليه وآله وسلم), replied that help him by stopping him from committing 'Zulm'." This time-frame of filing of appeal if not adhered will extinguish his right. This is perpetuation of 'Zulm' and Prophet (صلى الله عليه وآله وسلم) has ordered its cessation. It fully justifies that the time-frame set in the Act be done away with. When one has to answer even at D-Day, he be given chance to mend and rectify the mistake, be it Government department/State or an individual.

The technicality of limitation debars decision on merit and thus it is squarely opposed to principle of justice and fair play.

5. We have also heard Muhammad Aslam Butt, Deputy Attorney General Pakistan, Ch. Saleem Murtaza Mughal, Assistant Advocate General, Punjab, Naseer Ahmad Bangalzai, Additional Advocate General, Balochistan Mr. Mujahid Ali Khan, Deputy Advocate General, KPK and Abdul Majeed, Advocate on behalf of Government of Sindh.

6. Comments submitted on behalf of Federation read as under:-

"The Service Tribunal Act derives its authority from the Constitution of Islamic Republic of Pakistan, 1973 and the Rules of 1974 were issued in accordance with the Service Tribunal Act.

Section 3(A)(2)(C) is required to be read with Section 3A(2)(a) "the point shall be decided according to the opinion of the majority." Section 3(A)(1) clearly describe that "The powers and functions of the Tribunal may be exercised or performed by benches consisting of not less than two Members

of Tribunal, including the Chairman, constituted by the Chairman." Since, the Chairman of the Tribunal so appointed by the Government is always a sitting Judge or retired Judge of the High Courts and the points are decided according to the opinion of the majority and if the relief is allowed or refused by the Tribunal, as the case may be, it is available to the parties to move a CPSLA before the Supreme Court of Pakistan under Article 185 of the Constitution, therefore, there is noting against Injunctions of Islam.

Admitted that in accordance with Section 4(1) and proviso (a):

> "(1) any civil servant aggrieved by any order, whether original or appellate, made by a departmental authority in respect of any of the terms and conditions of his service may, within thirty days of the communication of such order to him, or within six months of the establishment of the appropriate Tribunal whichever is later, prefer an appeal to the Tribunal.
>
> (a) Where an appeal, review or representation to a departmental authority is provided under the Civil Servants Ordinance, 1973, or any rule against any such order, no appeal shall lie to a Tribunal unless the aggrieved civil servant has preferred an appeal or application for review of representation to such departmental authority and a period of ninety days has application or representation was so preferred."

The limit of 30 days of the communication of such order or prefer an appeal before the Service Tribunal after waiting for 90 days if competent authority does not respond by that period. However, it may be added that in accordance with Rule 8 of the Service Tribunal (Procedure) Rules, 1974, which is reproduced as under:-

> "8. Where an appeal is presented after the period of limitation prescribed in the Act, it shall be by an affidavit setting forth the cause of delay."

Law of limitation is ancient law an existing in all the civilised societies before and now. This branch of law is a specialized subject. The law of limitation in spiritual and mundane affairs is very particular in civilized society of Muslims like prayers and law of pre-emption and other laws. It cannot be brushed aside by saying from here and there. Muslim Jurists have declared law of limitation as "Law of peace and repose". The perspective opinion of a person should not prevail over the law of limitation as expanded by Muslim Jurists and Qazis from time to time for the last fourteen hundred years.

The procedure of hearing of appeals and decision thereupon is in buil on the aims and objects of the Service Tribunals Act, 1973 on the collective wisdom of supreme authority i.e. Parliament of this country. It cannot be tampered with by opinion of an individual for his own purposes under

the garb of religion and that also Islam, which religion is final and eternal religion for all the mankind.

Accordingly, limitation prescribed in the Act does not hamper the justice, delay in filling appeal can be condoned by the Tribunal rather it protects the rights of the appellant qua the private respondents or the respondent Government, as the case may be, as it operates equally in favour of both the parties. The aggrieved Civil Servants can prefer an appeal redress of grievance before the Service Tribunal supported by an affidavit setting forth cause of delay. Therefore, there is nothing against Quran and Sunnah because Section 7 Limitation shall apply to all appeals. Accordingly, the benefit is available to every body without any discrimination

The Federal Service Tribunal is an administrative Court set up under Article 212 of the Constitution of Islamic Republic of Pakistan 1973 to exercise exclusive jurisdiction in respect of matters relating to the terms and conditions of civil servants. The Tribunal has been providing in-expensive justice to the civil servants, ever since its establishment in 1974. The appellants are entitled to argue their cases themselves without spending any penny or hiring services of any Advocate. Due to progressive contribution of the Tribunal towards giving justice to the aggrieved civil servants and speedy disposal of cases, the Parliament has incorporated amendment in the Service Tribunals Act, 1973 by amending Act XVII of 1997 dated 10.6.1997, due to which jurisdiction of the Tribunal has extended to employees of any authority, corporation, body or organization Federal Law or which is owned or controlled or in which the Federal Government has a controlling share or interest.

The cases are decided in accordance with the provision of Service Tribunals Act and the rules.

7. Comments on behalf of Government of Punjab are as follow:-

"It transpires from para No.1 of the application dated 09.01.2001 regarding the original Shariat Petition No.03/1/1999 to be converted into Review Shariat Petition No.2/1/2000 is not maintainable as the original Petition No.3/I/1999 has already been converted into Review Petition No.2/I/2000 on 23/10/2000 as referred by the petitioner in his petition dated 09/01/2001 and Law and instances mentioned in Para 2 of the application dated 09/01/2001 are not helpful to the petitioner as these are in a different context. Thus the Petition being not maintainable is liable to be dismissed.

The case law cited by the petitioner is in a different context. The law of limitation is a Procedural Law and the provisions of Limitation Act 9 of 1908 i.e.S-5 & 12 of the Limitation Act are applicable to the appeals filed under the Service Tribunal Act 1973 vide S-7 of the Service Tribunal Act 1973 and the time period for filing the appeal is provided under section 4(1) (a) of the Act LXX of 1973.

The provisions which provide the limitation for filing the appeal are Procedural in nature. If by any reasons the time period of limitation has elapsed then S-7 of the Act comes to rescue the person whose appeal is time barred. Such appellant is provided with a remedy for condonation of delay under section 5 of Limitation Act 1908 so if the aggrieved person explains the delay for filing the appeal and his application for Condonation of Delay is based upon cogent/plausible reasons and any other sufficient cause such application would be accepted and his appeal will be decided on merits but if otherwise there are no cogent ground for Condonation of Delay then the Tribunal by exercising the discretion judicially, and turns down such petition, only then the appeal will not be entertained if time barred. The provisions of Service Tribunal Act as regards limitation are quite in conformity with the injunctions of Islam. Every case has its own merits and demerits and every case is decided in accordance with law enacted thereto.

The distinction between substantive law and procedural law have been determined by the Shariat Appellate Bench in a case reported as 1991 SCMR 2063 wherein the substantive law i.e. S-28 of Limitation Act 1908, which extinguished rights and barred the remedy, was declared repugnant to injunctions of Islam and the Procedural Law was never declared repugnant to injunctions of Islam. The Hon'ble Shariat Appellate Court (SC) held in 1991 SCMR 2063, relevant is at page 2072 and 2073 wherein it was held that Procedural Law does not fall in the ambit of article 203 G(b) of the Constitution of Islamic Republic of Pakistan 1973. Thus the August Court has no jurisdiction to decide as regard to Procedural law, (1991 SCMR 2063). So the petition is not maintainable and is liable to be dismissed.

S-3-A(2) (c) which reads as under is quite inconformity with the injunctions of Islam.

> The powers and functions of a Tribunal may be exercised or performed by benches consisting of not less than two members of the Tribunal, including the Chairman, constituted by Chairman.

2) If the members of a bench differ in opinion as to the decision to be given on any point:-

   a) The point shall be decided according to the opinion of the majority;

   b) If the members are equally divided and the Chairman of the Tribunal is not himself a member of the bench, the case shall be referred to the Chairman and the decision of the Tribunal shall be expressed in terms of the opinion of the Chairman; and

   c) If the members are equally divided and the Chairman of the Tribunal is himself a member of the Bench, the opinion of the Chairman shall prevail and the decision of the Tribunal

shall be expressed in terms of the opinion of the Chairman.

In all sub clauses i.e. a, b & c of Sub Section 2 of S3-A contain the word opinion and the word opinion imports only subjective satisfaction of the members and Chairman of the Tribunal and the subjective satisfaction is always helpfull for administration of justice. Thus Sub Section 2(c) of S3-A is not violative of injunctions of Islam.

S.4(1) and Proviso-A provides period of limitation for filing appeal and if appeal is barred by time then the aggrieved person has been given right to file application for Condonation of Delay under section 5 of Limitation Act 1908 vide S-7 of the Service Tribunal Act 1973.

S4 (1)(a) read with S-5 Limitation Act 1908 is a Procedural Law and does not extinguish any right of a party but these provisions are provided in aid to administration of justice.

As held by Shariat Appellate Bench of Supreme Court in 1991 SCMR 2063, The Federal Shariat Court has no jurisdiction under Article 203G(b) of the Constitution of Islamic Republic of Pakistan 1973, to pass any order, meaning thereby that the Hon'ble Shariat Court has no jurisdiction to strike down any Procedural Law.

The instances mentioned in para 5-7 herein are correct but in a different context. The Procedural Law of Limitation is quite inconformity with the Injunctions of Islam. Such provisions of Procedural Law of Limitation are enabling provisions for administration of justice and fair play.

S-7 of the Service Tribunal Act 1973 also provides protection to a litigant/ appellant whose appeal has become barred by time. These provisions of Limitation Act 1908 are also procedural in nature and these help for administration of justice so S-7 of the Service Tribunal Act 1973 is not against injunctions of Islam."

8. Comments of Government of KPK are summed up as under:-

The provision of Service Tribunal Act limiting the time for filing appeal is not against the injunction of law and Islam. Reference is made to 1991-SCMR, 2063.

Principle of estoppels through Conduct is accepted by Islam. Leaving matters undecided for indefinite period is against the public policy and State interest. Reference is made to PLD 1986 SC-360.

The provision of 3-A(2-C) of Service Tribunal Act are not opposed to provision of Islam. The appointment of Chairman among the Judges is in compliance with the provision of Islam. Islamic provision enjoins upon Islamic society to appoint Amir and follow him when he make orders not opposed to Quran and Sunnah. It also demands people obedience of those

in authority almighty Allah Verse 99 of Chapter-IV lays down as under:-

> "O you who believe, obey Allah, and obey Messenger and those of you in authority."

How a dispute can be resolved if there is difference of opinion between the members of bench. The principle of equality has wrongly been stretched. Islam accepts preference of those pious over the others while making appointment for public offices.

Provision of Section-4(1) and Section-6 are not against the provisions of Islam.

As stated above, provisions of Section-7 are not opposed to Islam, Qazi is not stopped to do complete justice, by condoning delay if reasons for delay are given.

No provision of Service Tribunal is opposed to the provision of Islam.

9. Comments of Government of Balochistan are as follow:-

"The application dated 09-01-2001 is not maintainable as the original Petition No. 3/1/1999 has already been converted into Review petition No.2/1/2000 on 23/10/2000 as referred by the petitioner in his petition dated 09/01/2001 and Law and instances mentioned in Para 2 of the application dated 09/01/2001 are not helpful to the petitioner as these are in a different context".

Thus the petition No.2/1/2000 is not maintainable and is liable to be dismissed.

The case law cited in this para by the petitioner is in a different context. The law of limitation is a Procedural Law and the proviso of Limitation Act 9 of 1908 i.e. S-5 & 12 the Limitation Act are applicable to the appeals filed under the Service Tribunal Act 1973 vide S-7 of the Service Tribunal Act 1973 and the time period for filing the appeal is provided U/S 4(1)(a) of the Act LXX of 1973 which reads as Under:-

"S-4(1)(a) Any civil servant aggrieved by any order, whether original or appellate, made by departmental authority in respect of any of the terms and conditions of his service may, within 30 days of the communication of such order to him (or with six months of the establishment of the appropriate Tribunal, whichever is later, prefer an appeal to the Tribunal)

(a) Where an appeal, review or representation to a departmental authority is provided under the Civil Servants Act, 1973 (LXXI of 1973), or any rules against any such order, no

> appeal lies to a Tribunal unless the aggrieved civil servant has preferred an appeal or application for review or representation to such departmental authority and a period of ninety days has elapsed from the date on which such appeal, application or representation was not preferred.

The proviso which provide the limitation for filing the appeal are procedural in nature. If by any reason the time period of limitation has elapsed then S-7 of the Act comes to rescue the person whose appeal is time barred. Such appellant is provided with a remedy for condition of delay U/S 5 of Limitation Act 1908 so that if the aggrieved person explains the delay for filing the appeal and his application for Condonation of Delay is based upon cogent/plausible reasons and any other sufficient cause such application would be accepted and his appeal will be decided on merits but if otherwise i.e. there are no cogent grounds for Condonation of Delay then the Tribunal by exercising the discretion judicially and turns down such petition and appeal will not be entertained if time barred. The provisions of Service Tribunal Act as regard limitation are quite inconformity with the Injunctions of Islam. Every case has its own merits and demerits and every case is decided in accordance with law enacted thereto.

The distinction between substantive law and procedural law have been determined by the Shariat Appellate Bench in a case reported as 1991 SCMR 2063 wherein the substantive law i.e. S-28 of Limitation Act 1908, which extinguished rights and barred the remedy, was declared repugnant to Injunctions of Islam and Procedural Law as never declared repugnant to Injunction of Islam. The Hon'ble Shariat Appellate Court (SC) held in 1991 SCMR 2063, relevant is at page 2072 and 2073 wherein it was held that Procedural law does not fall in the ambit of article 203 G(b) of the Constitution of Islamic Republic of Pakistan 1973. Thus the August Court has no jurisdiction to decide as regard to procedural law. (1991 SCMR 2063). So the petition is not maintainable and is liable to be dismissed.

S.3-A(2)(c) is quite inconformity with the Injunctions of Islam S.3-A reads as under:-

> "The Powers and functions of a Tribunal may be exercised or performed by benches consisting of not less than two members of the Tribunal, including the Chairman, constituted by the Chairman.
>
> If the members of a bench differ in opinion as to the decision to be given on any point.

a) The point shall be decided to the opinion of the majority;

b) If the members are equally divided and the Chairman of the Tribunal is not himself a member of the bench, the case shall be referred to the Chairman and the decision of the Tribunal shall be expressed in terms

of the opinion of the Chairman, and

c) If the members are equally divided and the Chairman of the Tribunal is himself a member of the Bench, the option of the Chairman shall prevail and the decision of the Tribunal shall be expressed in terms of the opinion of the Chairman.

In all sub clauses i.e. a, b and c of Sub Section 2 of S-3-A contain the word opinion and the word opinion imports only subjective satisfactions of the members and Chairman of the Tribunal and the subjective satisfaction is always helpful for administration of justice, thus Sub Section 2(c) of S.3-A is not violative of injunctions of Islam.

Reply to Para No.3 is that S.4(1) and Proviso-A provides period of limitation for filing appeals and if appeal is barred by time then the aggrieved person has been given right to file application for Condonation of delay U/S-5 of Limitation Act 1908 vide S-7 of the Service Tribunal Act 1973.

S4 (1) read with S-5 of Limitation Act 1908 is a Procedural Law and does not extinguish any right of a party but these provisions are provided in aid to administration of justice.

The Procedural Laws have been held by Shariat Appellate Bench Supreme Court in 1991 SCMR 2063 that the Federal Shariat Court has no jurisdiction under Article 203G(b) of the Constitution of Islamic Republic of Pakistan 1973, to pass any order, meaning thereby that the Hon'ble Shariat Court has no jurisdiction to strike down any Procedural law.

Paras - 5 to 7 (4.5.6 & 7) Reply to these paras is that instances mentioned herein are correct but in a different context. The Procedural Law of Limitation is quite inconformity with the Injunctions of Islam. Such provisions of Procedural Law of Limitation are enabling provisions for administration of justice and fair play.

S-7 of the Service Tribunal Act 1973 is a Procedural Law thus is not against the Injunction of Islam. S-7 of the Service Tribunal Act 1973 also provides protection to a litigant/appellant whose appeal has become barred by time. These provisions of Limitation Act 1908 are also procedural in nature and these help for administration of justice so S-7 of the Service Tribunal Act 1973 is not against the Injunctions of Islam".

10. Comments on behalf of Government of Sindh read as follow:-

"The original Shariat petition No.03/I/1999 was allowed on verbal request, to be converted into Review Shariat Petition No.2/I/2000.

The application dated 09/01/2001, is again filed with a prayer to convert the Shariat Petition into Shariat Review Petition. The application dated 09/01/2001 is not maintainable as the original Petition No.03/1/1999 has

already been converted into Review Petition No.2/1/2000 on 23/10/2000 as referred by the petitioner in his petition dated 09/01/2001 and Law and instances mentioned in Para 2 of the application dated 09/01/2001 are not helpful to the petitioner as these are in a different context.

Thus the Petition No.2/1/2000 is not maintainable thus is liable to be dismissed.

The case law cited in this para by the petitioner is in a different context. The law of limitation is a Procedural Law and the provisions of Limitation Act 9 of 1908 i.e. S-5 & 12 of the Limitation Act are applicable to the appeals filed under the Service Tribunal Act 1973 vide S-7 of the Service Tribunal Act 1973 and the time period for filing the appeal is provided U/s 4(1)(a) of the Act LXX of 1973 which reads as under:-

> "S-4(1)(a) Any civil servant aggrieved by any order, whether original or appellate, made by a departmental authority is respect of any of the terms and conditions of his service may, within thirty days of the communication of such order to him [or within six months of the establishment of the appropriate Tribunal, whichever is later, prefer an appeal to the Tribunal.]
>
> (a) Where an appeal, review or representations to a departmental authority is provided under the Civil Servants act, 1973 (LXXI of 1973), or any rules against any such order, no appeal that lie to a Tribunal unless the aggrieved civil servant has preferred an appeal or application for review for representation to such departmental authority and a period of ninety days has elapsed from the date on which such appeal, application or representation was not preferred.

The provisions which provide the limitation for filing the appeal are Procedural in nature. If by any reason the time period of limitation has elapsed then S-7 of the Act comes to rescue the person, whose appeal is time barred. Such appellant is provided with a remedy for Condonation of delay U/s 5 of Limitation Act 1908 so the aggrieved person if explains the delay for filing the appeal and his application for Condonation of delay is based upon cogent/plausible and any other sufficient cause such application would be accepted and his appeal will be decided on merits but if otherwise i.e. there are no cogent ground for Condonation of Delay then Tribunal by exercising the discretion judicially, and turns down such petition and appeal will not be entertained if it is time bared. The provisions of Service Tribunal Act as regards limitation are quite inconformity with the Injunctions of Islam. Every case has its own merits and demerits and every case is decided in accordance with law enacted thereto.

The distinction between substantive law and procedural law have been determined by the Shariat Appellate Bench in a case reported as 1991 SCMR 2063 wherein the substantive law i.e. S-28 of Limitation Act 1908,

which extinguished rights and barred the remedy, was declared repugnant to Injunctions of Islam and the Procedural Law was never declared repugnant to Injunctions of Islam. The Hon'ble Shariat Appellate Court (SC) held in 1991 SCMR 2003, relevant is at page 2072 and 2073 wherein it was held that Procedural law does not fall in the ambit of article 203-D of the Constitution of Islamic Republic of Pakistan 1973. Thus the August Court has no jurisdiction to decide as regard to procedural Law (1991 SCMR 2063). So the petition is not maintainable and is liable to be dismissed. As regards the contents of para 2 of the petition is that section 3-A(2)(c) is quite inconformity with the injunctions of Islam, S3-A reads as under:-

> "The powers and functions of a Tribunal may be exercised or performed by benches consisting of not less than two members of the Tribunal, including the Chairman, constituted by the Chairman."

2) If the members of a bench differ in opinion as to decision to be given on any point:-

a) The point shall be decided according to the opinion of the authority.

b) If the members are equally divided and the Chairman of the Tribunal is not himself a member of the bench, the case shall be referred to the Chairman and the decision of the Tribunal Shall be expressed in terms of the opinion of the Chairman; and

c) If the members are equally divided and the Chairman of the Tribunal is him self a member of the Bench, the opinion of the Chairman shall prevail and the decision of the Tribunal shall be expressed in terms of the opinion of the Chairman.

In all sub clauses i.e. a, b & c of Sub Section 2 of S.3 A contain the word Opinion and the word opinion imports only subjective satisfaction of the members and Chairman of the tribunal and the subjective satisfaction is always helpful for administration of justice. Thus Sub Section 2 (c) of S3-A is not violative of Injunction of Islam.

S.4 (1) and proviso-A Provides period of limitation for filing appeal and if appeal is barred by time than the aggrieved person has been given the right to file application for Condonation of delay U/s 5 of Limitation Act 1908 vide S-7 of the Service Tribunal Act 1973.

S.4(1) (a) read with S-5 Limitation Act 1908 is a Procedural

Law and does not extinguish any right of a party but these provisions are provided in aid to administration of justice.

The procedural Laws have been held by Shariat Appellate Bench Supreme Court in 1991 SCMR 2063 that The Federal Shariat court has no jurisdiction under Article 203G (b) of the Constitution of Islamic Republic of Pakistan 1973, to pass any order, meaning thereby that the Hon'ble Shariat Court has no jurisdiction to strike down any Procedural law.

As regards the contents of paras 5 to 7 (4,5,6&7) Reply to these paras, is that instances mentioned herein are correct but in a different context The procedural Law of Limitation is quite inconformity with the injunctions of Islam. Such provisions of Procedural Law of limitation are enabling provisions for administration of justice and fair play.

S-7 of the Service Tribunal Act 1973 is a Procedural Law thus is not against the Injunction of Islam. Reply to para No.9 is that S-7 of the Service Tribunal Act, 1973 also provides protection to a litigant/appellant whose appeal has become barred by time. These provisions of Limitation Act 1908 are also procedural in nature and these are to help the administration of justice. So S-7 of the Service Tribunal Act 1973 is not against injunctions of Islam.

11. We have thoroughly considered the contentions of the petitioner and have also taken into consideration the submissions of all the learned counsel representing The Federal Government and all the four respective Provinces and have duly perused the comments filed by the Federation and the four Provinces.

12. Regarding the impugned section 3-A(2)(c) of Service Tribunal Act, 1973, we agree with the petitioner that the Chairman Service Tribunal cannot enjoy any preferential authority in deciding a judicial matter. The Verses and Ahadith are correctly relied upon by him. Moreover, it seems beneficial to refer here to the concept of equality among human beings as enshrined in the Holy Quran and Sunnah of the Holy Prophet (صلى الله عليه وآله وسلم). The Holy Quran says:

يَا أَيُّهَا النَّاسُ إِنَّا خَلَقْنَاكُم مِّن ذَكَرٍ وَأُنثَى وَجَعَلْنَاكُمْ شُعُوبًا وَقَبَائِلَ لِتَعَارَفُوا إِنَّ أَكْرَمَكُمْ عِندَ اللَّهِ أَتْقَاكُمْ إِنَّ اللَّهَ عَلِيمٌ خَبِيرٌ

(O mankind: We created you from a single (pair) of a male and a female, and made you into nations and tribes, that ye may know each other. Verily the most honoured of you in the sight of God is (he who is) the most righteous of you. And God has full knowledge and is well acquainted (with all things). (49:13).

"يَا أَيُّهَا النَّاسُ اتَّقُوا رَبَّكُمُ الَّذِي خَلَقَكُم مِّن نَّفْسٍ وَاحِدَةٍ وَخَلَقَ مِنْهَا زَوْجَهَا وَبَثَّ مِنْهُمَا رِجَالاً كَثِيرًا"

(O mankind! reverence your Guardian-Lord, who created you from a single person, created of like nature, his mate, and from them twain scattered (like seeds) countless men and women. (4:1).

13. The Holy Prophet (صلى الله عليه وآله وسلم) has also emphasised the equality among the

human beings. The Holy Prophet (صلی اللہ علیہ وآلہ وسلم) in his sermon at the time of Hajj-al-Wada declared:

"یاایھا الناس الا ان ربکم واحد ان آباکم واحد الآ لا فضل لعربی علی عجمی ولا لعجمی علی عربی ولا لاحمر علی اسود ولا لاسود علی احمر الا بالتقوی-"

(O people! Your Allah is one and your father is one. No Arab has any superiority over a non-Arab nor a non-Arab over an Arab nor a black over a red nor a red over a black except in piety. (Al-Musnad, Ahmad Ibn Hunbal, Volume V, page 111, printed Beirut).

14. In fact it was Islam which strongly advocated the concept of equality among mankind irrespective of their colour, creed, gender or any other consideration. We believe in the superiority of a pious person as mentioned in the Holy Quran and Ahadith, but that is in the rank one holds with Allah Almighty in the Hereafter and not in this world as the yardstick for judging the piety of a person is only with Him because He sees the intention and all actions of a person in totality. As far as life in this world is concerned, all are considered equal and entitled to equal protection of law and the Chairman is no exception. Such a rule/law is even alien to the Chief Justice of a High Court, Federal Shariat Court and even Supreme Court where they enjoy equal judicial powers with all other members of a Bench. As such the impugned provision--i.e. Section 3-A(2)(C) of Service Tribunal Act, 1973 which grants double weight to the opinion of the Chairman and let the same to decide the fate of a judicial matter solely on its strength is held as repugnant to the Injunctions of Islam. To this extent we allow the instant Shariat Review Petition.

15. However, as far as submissions of the petitioner regarding limitation are concerned, they are mis-conceived and against the dictum laid by the verdicts of Superior Courts and consistently maintained by them. The question of limitation was considered by this Court in a Judgment titled as "Maqbool Ahmed Qureshi Versus Government of Pakistan" wherein a similar question pertaining to Limitation Act had been challenged on the ground that it deprived a person of his right of property which had remained in adverse possession of another. In this connection the Court held as follows:-

> "The law of limitation of time wherever applied does not always mean to usurp or help usurp a right. It rather operates on the principle that if a claimant does not press his claim in the time specified by law, through an authority appointed for the purpose by law, it will be presumed that either the claimant waived his right or was not serious and rather indolent so as to have acquiesced. The concept of law is only this that the authority created or appointed for helping a claimant in such a situation will not help if the claimant knowing the position of law did not ask for it within the prescribed period.
>
> It is quite clear from all that is said above that in cases of adverse possession of land even ownership could be extinguished and the adverse possessor

can be given the same rights and also preferences over the previous owner. Similarly, if a person takes possession of certain 'Mawat' land but does not develop it within three years he loses his right of possession.

It has been narrated by Abu Musa Asha'ri that Mu'aviyya bin Abu Sufian told that do you know that the Holy Prophet (PBUH) fixed the date for hearing when the parties came before him with their litigation and whereas one of them came on the fixed date and the other did not come the Holy Prophet (PBUH) decided the case in favour of the person who came and against the person who did not come"

"عن ابی موسی الاشعری بن معاویة بن ابی سفیان قال له اما علمت ان رسول الله صلی الله علیه وسلم کان اذا احتصم عنده الرجلان فاتعد الموعد فجاء احدهم ولم یات الآخر قضی رسول الله صلی الله علیه وسلم للذی جاء علی الذی یحیئی۔"

(Mahmood Ahmad Ghazi, Adabul Qazi, page 258, Print Islamic University, Islamabad).

The dicta given above was also followed by the Companions after the Holy Prophet. Hazrat Umar had directed Abu Musa Asha'ri in the time of his Caliphate that he should fix a date for hearing of the case. The Qadhi should also allow an opportunity to the party who wants to produce evidence in support of his plea but if he does not produce the same within the specified period, the case should be decided against him. (Adab-ul-Qadhi – Urdu – Islamic Research Institute, pp. 128, 248, 258, 352). Similar is the view given in Al-Ahkamus Sultaniyya, Urdu Translation, page 128, Print Lahore. Even Majallah contains a Chapter on limitation (فی مرورالزمان) sections 1660 to 1675 supporting the principle of limitation in various cases.

Ibne Hajar Asqalant, in his book "Al-Diraya-Fi-Takhreeje-Ahadith-il-Hidaya", Vol. II, p.244 quotes Hazrat Umar as saying that if a grantee of a land does not cultivate it for three years and another enters upon thereafter to do so; the latter gets a better title to it than the earlier grantee. The same view is by Yahya Ibne Adam in his book (Kitabul Khiraj, page 103).

The precedents given above clearly establish the principle that a time limit can be placed both in respect of extinguishment of right and for the purpose of proving a claim. In fact it will be seen that Islam does not permit usurpation of one's right and rather protects and preserve. However, Islam also recognizes that an owner or a holder of a right has the authority and discretion either to transfer the same by sale, gift etc. or acquiesce and ignore if someone takes that away without his express authority or consent. Thus if the facts of a case show that the owner or the holder having knowledge of the fact of time limit did not claim or challenge, it will be presumed that he waived his right.

> Thus emphasis in respect of such a matter is on the conduct of the person who seeks to press his claim. If the facts show that he knew the situation and he neglected or chose not to press it within the prescribed period, the machinery of law will refuse to help him. In fact he had already been forewarned by law that if he does not press his claim within the prescribed time he has to blame himself as the machinery of State is prohibited from helping him. The Islamic jurisprudence also embodies the principle known as "Tamadi".(PLD 1989 FSC, page 89)

The question of limitation again came under consideration by the Honourable Supreme Court in a Judgment reported as SCMR 1991 page 2075. The Hon'ble Shariat Appellate Bench Supreme Court held as follows:-

اب میں اصل مسئلے کی طرف آتا ھوں۔ واقعہ یہ ھے کہ اگر بات صرف اتنی ھوتی کہ مقدمات کی سماعت نیلئے قانون کی طرف سے کوئی مدت مقرر کردی گئی، جس کا مطلب یہ ھے کہ اس مدت کے بعد عدالتیں کسی مقدمے کو سننے سے انکار کر دیں گی، لیکن اس انکار کا اثر فریقین کے اصلی حقوق (Substantive Rights) پر کچھ اثر نہیں پڑے گا، تو محض یہ ایک ضابطے (PROCEDURE) کی بات ھونے کیوجہ سے اس عدالت کے دائرہ اختیار میں بھی نہیں تھی، اور خود شرعی اعتبار سے بھی اس پر کوئی بڑا اعتراض مشکل تھا، کیونکہ عدالتیں اس شخص کی مدد کر سکتی ھیں جو مناسب وقت پر چارہ کار حاصل کرنے کیلئے ان سے رجوع کرے، اگر لوگوں کو یہ چھٹی دے دی جائے کہ وہ سینکڑوں سال پرانے تنازعات کو جب چاھیں زندہ کر کے عدالت میں پھنچ جایا کریں، تو اس سے لامحدود مقدمہ بازی کا دروازہ کھل جائے گا اور عدالتوں کیلئے نہ صرف یہ کہ ایسے پرانے جھگڑوں کو نمٹانا تقریباً ممکن ھوگا بلکہ اس سے فوری اور حقیقی تنازعات کے تصفیے میں بھی سخت رکاوٹ پڑے گی، اسی لیے مختلف اسلامی حکومتوں میں بھی مقدمات کی سماعت کیلئے مختلف مدتیں مقرر کی جاتی رھی ھیں۔ علامہ شامی ﷺ نے شمس الامہ سرخسی کے حوالے سے لکھا ھے کہ اگر کوئی شخص تینتیس سال تک مقدمہ دائر نہ کرے تو اس مدت کے بعد اس کا دعوی قابل سماعت نہیں رھے گا۔ (ردالمختار، ص 422 جلد 5 مطبوعہ کراچی) شمس علامہ سرخسی خلافت عباسیہ کے زمانے کے ھیں لھذا اس سے معلوم ھوتا ھے کہ خلافت عباسیہ کے زمانے میں بھی میعاد سماعت کا تصور موجود تھا (ایس سی ایم آر 1991، صفحہ 2074 تا 2075)

16. We may add that as is clear from the above, the substantive right cannot be usurped nor get extinguished by limitation fixed for filing the appeal but in fact the claimant would not be able to knock at the door of a Court otherwise such a practice, if allowed without any limitation, will definitely open a flood gate of old matters piled up during the past years—may be for centuries - when evidence of the same would have been destroyed or lost and no record or evidence could be available for the Courts to decide the same. Moreover, the case belonging to rights of human beings to be adjudicated by other human being (i.e. Judges) and availability of the required evidence to them cannot be equated with the rights of Allah (i.e. Ibadaat), as in the later case the Omni Present and Omni Potent Allah (SWT) has granted the concession and He does not need any external evidence. In the former case, however, the rulers/judges always stand in need for the evidence which may not remain available indefinitely. The Ahadith relied upon by the petitioner do not discuss, nor even remotely refer to, the point of limitation raised by the petitioner. Both the Ahadith rather pertain to the responsibility of the litigants to observe due care and caution and never resort to contest undue frivolous matters for which they

will be accountable if they succeed in getting favourable judgments even from the Prophet (صلی اللہ علیہ وآلہ وسلم) Hence this petition to the extent of the point of limitation is mis-conceived.

17. In view of the above, this petition to the extent of section 4(1) with proviso (A) and sections 6 and 7 of Service Tribunal Act, 1973 on point of limitation being misconceived is dismissed accordingly. However, we allow this petition to the extent of Section 3-A(2)(c) of Service Tribunal Act, 1973. We direct the respondent Federation of Pakistan, through Secretary Law to take necessary steps to amend the said section so as to bring it in conformity with the Injunctions of Islam. The necessary action shall be taken for this purpose by 30th June, 2014 whereafter the said section shall become void and have no legal effect to the extent stated above.

18. These are the reasons for our short Order dated 04.02.2014.

JUSTICE ALLAMA DR.FIDA MUHAMMAD KHAN

JUSTICE DR. AGHA RAFIQ AHMED KHAN CHIEF JUSTICE

JUSTICE ASHRAF JAHAN

Islamabad the 5th March, 2014

IN THE FEDERAL SHARIAT COURT
(Appellate/Revisional Jurisdiction)

PRESENT

MR. JUSTICE RIAZ AHMAD KHAN, CHIEF JUSTICE

MR. JUSTICE DR. FIDA MUHAMMAD KHAN

CRIMINAL APPEAL NO. 06/P OF 2014 **Linked with**

1. Momin Khan son of Mukhtiar Ahmad
   R/o Serdheri District Charsadda.
2. Ajab Khan son of Mukhtiar Ahmad
   R/o Serdheri District Charsadda.
3. Muhammad Zaib son of Hamza Khan
   R/o Serdheri District Charsadda.
4. Shoukat Khan son of Akhoon Zada
   R/o Dargai District Mardan

…. Appellants

Versus

1. Umar Wahid son of Fazl-e-Rahim resident of Sher Ghar District Mardan.
2. The State

.... Respondents

CRIMINAL REVISION NO.03/P OF 2014

Umar Wahid … Petitioner

Versus

Momin Khan and others .... Respondents

Counsel for appellants	….	Mr. Hussain Ali, Advocate
Counsel for complainant/ Petitioner	….	Sahibzada Asadullah, Advocate
Counsel for State	….	Arshad Ahmad Khan, Assistant Advocate General
FIR, Date and Police Station Lahore, Swabi	....	81, 1.2.2013
Date of judgment of trial court	….	29.05.2014
Date of Institution of	….	12.06.2014, 02.08.2014
Appeal and Revision		respectively
Date of hearing	….	22.04.2015
Date of decision	…	28.04.2015
Date of judgment	....	05.05.2015

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JUDGMENT

DR. FIDA MUHAMMAD KHAN, Judge:- The appellants/accused Momin Khan, Ajab Khan, Muhammad Zaib and Shaukat Khan have called in question the judgment dated 29.05.2014 passed by learned Additional Sessions Judge Swabi, at Lahor, by virtue of which they have been convicted and sentenced as mentioned herein under:-

* Under Section 392-PPC

  10 years R.I. each with fine of Rs.200,000/- each and in default thereof to further undergo six months S.I. each

* Under Section 148/149-PPC

  02 years R.I. each with fine of Rs.5000/- each in default of non payment of fine to further suffer one month S.I. each

* Under Section 411-PPC

  02 years R.I. each and fine of Rs.8000/- each in default one month S.I. each

* Under Section 13 of Arms Ordinance

  03 years R.I. each with fine of Rs.2000/- each and in default thereof to further undergo one month S.I. each.

The sentences awarded to all the appellants/accused on all counts have been ordered to run concurrently. The benefit of section 382-B, Cr.P.C. has also been granted to all the appellants/accused.

2. Complainant Umar Wahid has also moved Criminal Revision No. 03/P of 2014 for enhancement of sentences awarded to all the appellant/accused vide the same judgment. Since the appeal and the revision arise out of one and same judgment, we are disposing both matters by this single Judgment.

3. Brief facts of the prosecution case as gathered from the murasala (Ex.PA/1) which makes basis of FIR (Ex.PA), are to the effect that on 01.02.2013 complainant Umar Wahid alongwith his servant Shahpur Khan was going to Islamabad via motorway and was carrying cash amount of Rs. 11.2 millions. When they reached near the village Jalsai, a jeep overtook them wherein five persons wearing police uniform were sitting. They started their search and looted the whole amount alongwith a licensed klashincove and a licensed 9MM pistol from the complainant and his companion. They told them that they would take them to Islamabad for further investigation. However, after some time the complainant and his companion were forced to deboard from their vehicle. Then the accused made their escape in their jeep. The complainant through his brother contacted the local police present nearby at the motorway. The police squad under the supervision of Gul Jamal, DSP chased the vehicle of the said accused and ultimately over powered the accused and arrested them alongwith the looted money and the weapons. Murasala (Ex.PA/1) was accordingly drafted and formal FIR was registered thereafter.

4. Investigation of the case was entrusted to Wafadar Khan, S.I. He visited the place of occurrence, prepared site plan (Ex.PB) on the pointation of complainant and eye witnesses. He recorded statements of witnesses under section 161 Cr.P.C., sent the weapons to the firearm expert vide application (Ex.PW.7/1) for opinion. He took into possession two number plates lying in the jeep vide memo (Ex.P1), one ID card (Ex.P2) of police department in the name of accused Momin Khan with designation of Sub Inspector, one ID card (Ex.P3) of head constable of police in the name of Ajab Khan, three photographs in police uniform (Ex.P4) and one CNIC (Ex. P5) lying in the jeep. All these items were taken into possession. He took custody of the accused from the court vide application (Ex.PW.7/2). He interrogated the accused and during investigation accused led the police party to the spot. On the pointation of accused Momin Khan, he recovered an amount of Rs. 300,000/- (Ex. P6) which was concealed in the bushes while the remaining three accused namely Ajab Khan, Muhammad Zaib and Shaukat Khan pointed out the place wherefrom he recovered klashincove (Ex.P7) loaded with 70 live rounds and one 9MM pistol alongwith 37 live rounds. The recovered amount, klashnicove and pistol were taken into possession vide recovery memo (Ex.PW.5/2). He recorded statements of accused under section 161 Cr.P.C., vide application (Ex.PW.7/3), produced them before the court for recording their confessional statements which they, however, refused. They were sent to judicial lock up. After completing all legal formalities, the I.O. handed over the file to the SHO for submission of challan to court.

5. The learned trial court framed charge against all the accused/appellants under sections 148/149, 171/149, 411/149 PPC as well as under section 17(3) of the Offences Against Property (Enforcement of Hudood Ordinance, 1979 and section 13 of Arms Ordinance. The accused did not plead guilty and claimed trial.

6. The prosecution produced 09 witnesses at the trial to prove its case. A gist of their evidence is as under:-

* PW.1 is Umar Wahid, complainant. He reiterated the same facts as were recorded in the FIR;

* PW.2 is Shahpur Khan, MHC. He corroborated the statement of complainant Umar Wahid.

* PW.3 is Raza Khan, MHC. On receipt of Marasala (Ex.PA/1), he drafted formal FIR (Ex.PA);

* PW.4 is Fazal Meraj, S.I. He deposed that on the day of occurrence he alongwith other police officials was on routine gasht and saw a white motor car parked near Yar Hussain "U Turn" while a Jeep was running in high speed. At some distance the said jeep stopped and its occupants started running towards Jalsai Mera. In the meanwhile he passed message on mobile that such an occurrence had taken place and that they had chased the culprits during which cross firing took place. In the meanwhile another police party in the supervision of DSP and SHO reached from the Jalsai side. Ultimately the accused were overpowered and he handed over the

accused Momin Khan alongwith Kalakove to the SHO;

* P.W.5 is Abdul Azeem, ASI. He is a marginal witness of recovery memos of the items recovered from the accused;

* PW.6 is Qamar Zaman Khan, ASI. Like PW.5, Abdul Azeem he is also a marginal witness of the recovered items;

* PW.7 is Wafadar Khan, SI. He conducted investigation in the case. The detail of his role in the investigation has been mentioned hereinabove;

* PW.8 is Dr. Asghar Ali Shah, DHQ Hospital, Swabi. He medically examined accused Momin Khan on 02.02.2013 and found the following:-

"Injured conscious with history of firearm.

On examination — A grazing firearm wound size about 3 cm in length skin deep on the Forehead with right side lateral Aspect of scalp.

Nature of Injuries Shajjah Khafifa.

The kind of weapon used firearm.

He issued medico legal report (Ex.PW.8/1).

On the same day he also medically examined injured accused Shaukat Khan and found the following:-

Injured conscious and well oriented in time and space and person.

H/O firearm injury right foot.

On examination — Firearm enterance wound on the right Foot lateral aspect size about ½ x ½ cm in length.

Referred to B.M.C. for X-Ray and surgical OPD.

Nature of injuries Jurh Ghyre Jaifah mutalahima.

Kind of weapon used firearm.

He issued medico legal report (Ex.PW.8/3)"; and

* PW.9 is Muhammad Fayyaz Khan, Inspector/SHO Police Station Lahor, Swabi. He deposed that on the day of occurrence he received information from Fazal Miraj S.I. that some unknown persons had snatched money from owner of the motor car on motorway. On receipt of said information he alongwith police party chased the accused and all the accused/appellants were overpowered and arrested. He recoverd kalakove 222 bore from accused Momin Khan. He recovered pistol and live bullets and cash amount

Rs. 20,00,000/- from accused Ajab Khan and a 30 bore pistol without number with fixed charger having three rounds from the possession of accused Muhammad Zaib. Similarly from accused Shaukat Khan a 30 bore pistol No.A4551 with 4 rounds and an amount of Rs.7050,000/- were recovered. He drafted murasala (Ex.PA/1) and then formal FIR (Ex.PA) was registered.

7. After closing the prosecution evidence the learned trial court recorded statements of all the accused/appellants under section 342 Cr.P.C. wherein they all denied the prosecution allegation and claimed innocence. They stated that the PWs had made false statements and had falsely involved them in this case. They did not opt to make statements on oath under section 340(2) Cr.P.C. nor produced any evidence in their defence. The learned trial court on conclusion of the proceeding and hearing counsel of the parties found them guilty and, therefore, convicted and sentenced them as mentioned hereinabove. Hence the present appeal.

8. We have heard learned counsel for the parties and perused the record with their assistance.

9. Learned counsel for the appellants submitted that the case of prosecution is highly doubtful in respect of place of report, place of recovery of jeep, recovery of the huge alleged amount, presence of complainant on motorway and presence of witnesses on the spot. He also submitted that neither 9MM pistol nor klishincove were recovered nor duly recorded at the time of arrest of accused. He further submitted that there is neither confession of any appellant/accused nor any identification parade was ever conducted. He further submitted that the injuries found per medical report have not been explained nor its duration has been mentioned. The learned counsel also made submission about the non recovery of empties from the place of occurrence. The learned counsel placed reliance on:-

* PLD 1960 (VV.P.) Karachi 753

Amir Ali Versus The State

* 1997 P.Cr.L.J. 225

Islam Gul Versus The State

* 1997 P.Cr.L.J. 1900

The State Versus Pirak

* 2012 MLD 1601

Sher Zaman and 4 others Vs. The State & another

10. Learned counsel for the complainant submitted that the appellants/accused were arrested from the spot and recoveries were effected. He submitted that despite some lapses by the police, the case of prosecution against the appellants/accused is established to the hilt. Explaining the contradictions found in the statements/ depositions of PWs he contended that the accused/appellants were arrested from different places spread over a long and wide area. Regarding the huge amount

allegedly recovered, he submitted that it was handed over to the complainant, though not strictly in accordance with the legal requirements. He also made submissions regarding registration of the car in-question at Islamabad and recovery of an amount of Rs.300,000/- etc. from the bushes on pointation of the appellants/ accused. He further submitted that Momin Khan was a proclaimed offender, though previously a police official. Regarding the identification parade he submitted that it was not required as the appellants/accused were arrested on the spot. He concluded that there was no malafide on the part of the complainant party.

11. Learned Assistant Advocate General for the State also supported the impugned judgment.

12. We have thoroughly considered each and every point agitated by learned counsel for the parties and have minutely gone through the evidence brought on record in the light of their submissions.

13. It transpires, as alleged by the prosecution, that on 01.02.2013 complainant Umar Wahid was going to Islamabad alongwith his servant Shahpur Khan (PW.2) via motorway. He was carrying cash amount of Rs.11.2 millions also. When they reached in the limits of Village Jalsai, a jeep carrying five persons, wearing police uniform, overtook their car and after stopping them, started their search and resultantly snatched the whole amount alongwith a licensed klashincove and 9MM pistol from the complainant and his companion/servant Shahpur Khan. The said uniformed persons told them that they were to take them to Islamabad for further investigation. After some time, however, they forced the complainant and his companion to deboard from the vehicle and themselves fled away from the spot in the jeep. The complainant through his brother contacted the local police, present nearby at the motorway, who chased the vehicle of the accused. Afterwards the police squad under the supervision of Gul Jamal, DSP over powered appellants/ accused and after their arrest recovered the said amount and weapons. A case was registered against the accused and their absconding co-accused Salman for the commission of the offence.

14. On minute perusal, the case of prosecution at the trial, however, suffers from material legal infirmities which has created dints in the whole case. To start with we may mention that no confession has been made by any one of the appellant/ accused. This murasala per report of the Incharge Officer Police Station Lahor was recorded on the statement of complainant Umar Wahid wherein he has alleged that he was carrying Rs. 11.2 millions cash and klashincove while his companion/ servant Shahpur Khan was having 9MM pistol. On the way they were over taken by a jeep carrying five persons who stopped them and recovered the whole amount and licensed klashincove and licensed pistol from both of them and also hand cuffed them. After sometime, however, they opened their hand cuffs and resultantly they made their good escape. The complainant contacted his brother Sajjad who informed the police mobile on motorway telling them that the accused had run away to Peshawar side in their jeep after looting the complainant on gun point. Police chased those persons who after deboarding from their jeep fled away but

were, however, subsequently over powered. The complainant identified four of the accused who had snatched klashincove, pistol and the whole amount from him.

15. This murasala was drafted on 01.02.2013 at 16.00 hours. On its basis the FIR was lodged at Police Station Lahor on the same date at 16.50 hours.

16. The case of prosecution is mainly based on the ocular account as well as on the recoveries. We may mention that there is no confessional statement by any one of the accused, though PW.7 produced them for this purpose before the court vide his application (Ex.PW.7/3). All the accused, however, refused to make confession and were sent to judicial lock up. We may also mention that the case was lodged, initially, according to murasala against "unknown accused" who had snatched some amount, klashnicove and pistol from the complainant and his companion. It was after their arrest that their names were mentioned by PW.9 Muhammad Fayyaz Khan, Inspector/SHO. The complainant, however, had not nominated any one of them. It is significant that the complainant who had initially informed his brother Sajjad on telephone had not told him about the names of the accused persons and his brother had responded that the accused must be dacoits. This reveals that the complainant was unaware of their identification. It was after their arrest, he stated that they were the same accused who had committed the offence. Regarding this, learned counsel for the complainant submitted that since they had been arrested on the spot there was no need for any formal identification parade. In the interest of justice, however, there should have been identification parade to attribute specific role to each one of them as was subsequently stated by the PWs. In this connection, the Judgment (Ex.DA/1) placed on file by the defence, however, reveals that the complainant had faced trial in case FIR. No.32 dated 28.04.2011 under section 9 of Control of Narcotics Substances Act, 1997 at Police Station Anti Narcotics Force Peshawar and had been convicted and sentenced thereunder. It was agitated by learned defence counsel that one of the close relatives of the accused who had been sent to Saudi Arabia by the complainant party on the pretext of providing him a job, had been arrested and sentenced to death over there and in order to settle the matter between the parties, the complainant had paid them ninety lacs rupees and, in the instant case, the complainant had fabricated a false story of robbery against the accused. In this back ground, he submitted, the parties were well known to each other and the allegation by the complainant does not appear truthful.

17. The subsequent recoveries of amount, klashincove and 9MM pistol also do not support the prosecution case. It is pertinent to note that the klashincove and pistol with live bullets allegedly recovered vide memo (Ex.PW.5/2) are shown to have been recovered on 03.02.2013 instead of 01.02.2013, when the accused had been overpowered and arrested. This contradiction belies the prosecution version. It becomes all the more important in the context of Question No.4, put to the accused/appellant Momin Khan, which mentions the "said date, time" and that was 01.02.2013 at 14.30 hours on motorway.

18. The presence of complainant on motorway, at that time and dated, in his vehicle bearing registration No.YE-599 which was issued on 01.02.2013 vide receipt No.8664371, is also highly doubtful. According to PW.1 the car in which he was

travelling on that day was not bearing Registration No. and instead had only a plate of "Applied for". Surprisingly on that date and time the car was at Islamabad before the Excise and Taxation Department (Islamabad Capital Territory), for inspection, checking and issuance of Registration No. He admitted that the registration No. is 599 and the same is mentioned in (Ex.PW.7/XI). PW.7 has placed on record the registration slip of the said motor car of the complainant but he did not remember as to when and where it was presented to him by the complainant as he had not noted the dated in his case-diary, though he admitted its date and time to be correct as shown on (Ex.PW.7/XI). PW.7 also expressed his ignorance about Rs.90,50,000/- which were recovered from the possession of the accused at the time of their arrest but conceded that there was nothing to show as to where that amount had gone. He has also conceded that recovery of the amount of Rs.3,00,000/- as well as the arms weapons were effected on 03.02.2013 i.e. on the third day of the occurrence and that no person from the public was taken to that place to witness the said recoveries. Surprisingly, he also admitted that the recovered items were not made into sealed parcels and were still in open condition. This type of conduct by an experienced official cannot be legally justified in a case which entails capital sentence.

19. The hand cuffs used by the accused/appellants have also not been recovered. It is very strange that PW.2 Shahpur Khan who was accompanying the complainant at the time of occurrence when allegedly they had been hand cuffed, does not make any reference to this very pertinent factor anywhere in his deposition. He also expressed lack of knowledge if that huge looted amount was ever returned to the complainant. His presence on the spot alongwith the complainant seems highly doubtful.

20. Moreover, it is also pertinent to refer to the site plan (Ex.PB), especially the places marked 'B' and 'D' where motor car of the complainant and Jeep of the accused have been shown in opposite directions---towards Islamabad and Peshawar respectively. We may also mention that though at some places which may be used for taking "U turn" on the motorway but these are usually blocked, with removable but heavy blocks, for use only in cases of emergencies. The story of prosecution in this respect, as alleged, is also questionable.

21. In addition to this, the medical examination of accused Momin Khan and Shaukat Khan is also worth consideration. PW.8 Dr. Asghar Ali Shah medically examined Momin Khan and Shaukat Khan. Appellants/accused on 02.02.2013 and found a grazing firearm wound on the forehead of Momin Khan and stated that the weapon used was firearm. He also examined the appellant/accused Shaukat Khan on the same day and found him injured having firearm entrance wound on the right foot. He has, however, not given duration of injuries in both the cases. How and who caused these injuries, has not been clarified by the prosecution and no empties have been recovered from the place of occurrence, as stated by PW.7. It is also shrouded in mystery to prove that when the motorway was fenced on both the sides, how could the appellants/accused make good their escape when according to PW.7 there is no mention in both the site plans that the fence near the spot was broken whereby pedestrians and vehicles could easily pass through. According to the prosecution cross firing had taken place. Since neither any empties were recovered, nor the

Forensic Science Laboratory Report (Ex.PK/1) makes any reference to the use of the recovered weapons in the cross firing, nothing could be inferred positively about veracity of the prosecution version.

22. It is also worth mentioning that two of the appellants/accused were police officials namely Momin Khan and Ajab Khan. Learned counsel for the complainant contended that Momin Khan was declared proclaimed offender. We have examined this point in the light of deposition made by PW.9 Muhammad Fayyaz Khan, SHO who in cross-examination stated that he had got knowledge about accused Momin Khan that he was a proclaimed offender in case FIR No.724 lodged on 08.09.2010 at Police Station Pabbi. The prosecution has, however, not placed on record any document which could show that till the day of occurrence, i.e. 1.2.2013, he had perpetually remained a proclaimed offender. Moreover, a question arises that if he was actually proclaimed offender why he did not arrest him then and there in the aforementioned case also.

23. It is also pertinent to note that, as alleged, the complainant Umar Wahid (PW.1) and Shahpur Khan (PW.2) had proceeded to Charsadda wherefrom they had entered the motorway for Islamabad but the complainant has placed no entry pass on record, nor any other proof worth the name, to prove that he had actually entered the motorway through that entrance. Likewise entry of the accused to the motorway in their jeep, or even their exit therefrom, has also remained un-established on record.

24. Moreover, it is highly pertinent to observe that, admittedly, the recovered amount was not deposited in safe custody anywhere. It has been stated by the PWs that the huge looted amount was returned to the complainant but strangely neither any original receipt was exhibited nor any amount was produced later in the court. The amount was so huge that it actually assumes pivotal role and forms basis of the whole case. Whether it was recovered, or thereafter ever returned to the complainant, is a big question which is not at all established on record beyond reasonable doubt. The receipt to this effect drafted in a hap hazard manner is marked as (Ex.PC dated 10.02.2014). It, interalia, reveals that the amount was received by the complainant, in presence of two witnesses. However, not to speak of their signatures, even names of such witnesses have not been mentioned. Even the date when the said amount was returned to the complainant has not been written over there and, strangely enough, it has not been signed even by the Investigating Officer. One really wonders why the experienced Investigating Officer ignored these pertinent aspects and why did he return the amount, which was the case property, in such an illegal manner. The amount was huge no doubt but its safe custody was much more important for establishing the case of prosecution to show that the story of robbery was not concocted. Once this type of handing/taking over is admitted by the court of law, every now and then cases will crop up in abundance and persons so nominated would be sent to the gallows. Besides all this, it is strikingly shocking to note that PW.9 Muhammad Fayyaz Khan, Inspector/SHO himself produced the copy of receipt regarding the return of recovered/snatched amount of Rs.90,50,000/-, which is (Ex.PC), vide which the said amount was allegedly returned to and received by complainant Umar Wahid. PW.9 himself produced the original receipt and added that the amount was available on that day in the court in the custody of the

complainant. This shatters the confidence that could be reposed in deposition made by PW.9. The receipt had not been earlier made part of the record and was thus inadmissible in evidence and could not be accepted as such. The said amount, if it had been actually recovered from the accused, as alleged, was the most important piece of evidence and being a case property, it had to be kept in the custody of the State and duly exhibited in the court. The above receipt thus obviously appears fake and fictitious.

25. In view of the above it cannot be said with judicial certainty that the huge amount in question was ever looted by the appellants/accused or that the complainant had actually entered the motorway in the said car which was being registered at the same time and date in Islamabad. Needless to say, that the burden of proving its case is always the duty of prosecution and it has to stand on its own legs but if there is any doubt about material aspects of the case, the benefit should go to the accused. We may add that for giving benefit of doubt to an accused it is not necessary that there should be many circumstances creating doubts. If there is a single circumstance which creates reasonable doubt in a prudent mind about the guilt of an accused then the accused will be entitled to get the benefit thereof and that too not as a matter of grace and concession but as a matter of right.

26. The upshot of the above discussion is that there being no satisfactory basis for upholding the conviction and sentences of the appellants/accused, this appeal is allowed. Conviction and sentences of the appellants/accused namely Momin Khan, Ajab Khan, Muhammad Zaib and Shaukat Khan are set aside and they are acquitted of the charges. They are confined in jail and, therefore, they shall be released forthwith if not required in any other case.

27. As a sequel to the above, Criminal Revision No.3/P of 2014 filed by the complainant for enhancement of sentences is dismissed.

28. These are the reasons of our Short Order dated 28.04.2015.

JUSTICE DR. FIDA MUHAMMAD KHAN

JUSTICE RIAZ AHMAD KHAN

CHIEF JUSTICE

Dated 5th May, 2015

IN THE FEDERAL SHARIAT COURT
(Original Jurisdiction)

PRESENT

MR. JUSTICE ALLAMA DR. FIDA MUHAMMAD KHAN

MR. JUSTICE SHEIKH NAJAM UL HASAN

MR. JUSTICE ZAHOOR AHMED SHAHWANI

SHARIAT PETITION NO.07/I OF 2005

The Pakistan Cotton Ginners Association (Regd) Pakistan through its Secretary PCGA House, M.D.A. Road, Multan.

….. Petitioner

Versus

1. Federation of Pakistan through Ministry of Commerce through its Secretary, Pak. Secretariat Islamabad.
2. Cabinet Division through its Secretary Cabinet Block, Islamabad.
3. The Karachi Cotton Association through its Chairman Cotton Exchange Building I.I. Chandrigarh Road, Karachi.
4. Ministry of Textile Industry Government of Pakistan through its Secretary G-5/2, FBC Building Attaturk Avenue, Islamabad.
5. Kisan Board through its President, 225-Metro Plaza, Multan Cantt: Multan.
6. All Pakistan Textile Mills Association (APTMA) through its Chairman, 97-A, Aziz Avenue, Canal Bank, Gulberg Road Lahore.

…. Respondents

Counsel for the Petitioner	….	Dr. Muhammad Aslam Khaki, Advocate
Counsel for the respondents	….	Mr. Muhammad Zakir Sheikh, Deputy Attorney General of Pakistan, Mr. Khurram Shahzad Baig, Standing Counsel, Syed Riaz ul Hasan Gillani, Senior Advocate for respondent No.3 and Mr. Muhammad Yousaf, Section Officer for respondent No.4.
Date of Institution	....	25.06.2005
Date of hearing	....	07.04.2015
Date of decision	....	16.04.2015

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JUDGMENT

DR. ALLAMA FIDA MUHAMMAD KHAN, Judge.- This petition has been filed by the Pakistan Cotton Ginners Association (Regd) through its Secretary. The petitioner has challenged by-laws Nos. 45, 83, 134, 142, 143, 144 and 147, alongwith other relevant by- laws, of the Karachi Cotton Association and prayed that the same may be declared repugnant to the Injunctions of Islam.

2. On 9.4.2008, the petitioner had requested that the Ministry of Textile Industry, Kisan Board and Textile Mills Association may be added as respondent parties to the petition. Accordingly the petitioner was allowed to add them with a direction to file amended petition. Accordingly, on 07.5.2008, the petitioner filed amended petition.

3. The petition was fixed on several dates but got adjourned for one reason or another. On 03.09.2008 Syed Riaz-ul-Hasan Gillani, Senior Advocate for respondent No.3 i.e. Karachi Cotton Association raised preliminary objection and questioned maintainability of this petition. On 22.10.2008, after hearing the learned counsel for the parties, the petition was dismissed vide a Short Order which reads as under:-

> "We have heard learned counsel for the parties. Prima-facie no case is made out by the petitioner against the respondents. We dismiss the petition."

4. The said short Order was challenged in Appeal before the Hon'ble Shariah Appellate Bench Supreme Court of Pakistan. On 21.04.2009, the said order was set aside and the case was remanded to the Federal Shariat Court for fresh decision, after hearing the parties.

5. In compliance with the said directions, issued by the Hon'ble Shariah Appellate Bench, the case was re-fixed for hearing on several dates. In this connection, it is however, pertinent to mention that on 30.03.2010, a Full Bench of this Court passed an Order which, interalia, contained the following sentence:-

> "We are inclined to admit this petition for regular hearing in the light of directions of the Hon'ble Supreme Court."

As is obvious, no specific directions for its admission were given by the Court. However, notices were accordingly issued to the respondents who were directed to submit their written statements/comments. Moreover, in view of the time constraint of six months period, fixed for decision of this Petition, by the Hon'ble Shariah Appellate Bench, the learned counsel for petitioner was advised to move an application for grant of extension in time before the Hon'ble Apex Court. The learned counsel made an application accordingly, but its ultimate outcome has not been communicated to this Court till date.

6. On 16.01.2013, a public notice was ordered to be published in the leading papers of all the Provinces of Pakistan. In addition, it was also ordered that notices be repeated to the Jurisconsults. Accordingly a public notice was published and Maulana Muhammad Hussain Akbar, a renowned Jurisconsult, accordingly submitted his research notes.

7. Thereafter, the petition finally came up for hearing on 7.4.2015. The parties were heard on the point of maintability of this petition, in the context of Constitutional jurisdiction of this Court. The Order was reserved. We are now disposing of the Shariat Petition vide this judgment. The following paras contain detailed reasons about the issue in question.

8. Dr. Muhammad Aslam Khaki, learned counsel for the petitioner submitted that this Court has the Jurisdiction to hear and decide this petition. After dwelling at large on the words "custom and usage" that occur in Article 203-B(c) of the Constitution, he contended that the impugned sections could be examined by this Court. In this connection, however, he submitted that both the words have to be interpreted in the light of their literal meanings, as given in the English Dictionaries. According to him any rule which infringes and affects the right of others can be include in its meaning. He, however, conceded to withdraw the petition if the impugned Rules were not covered in the definition of law, provided that respondents assured him in writing to this effect.

9. The respondent No.1 i.e. the Ministry of Commerce, in its comments specifically mentioned that by-laws of the K.C.A are related to hedge marketing allies Satta Business and under Rules of Business, the hedge marketing comes under the purview of Ministry of Textile & Industry (MOTI).

10. Ministry of Textile Industries has also submitted written comments prepared by Ministry of Religious Affairs wherein, placing reliance on a number of fiqhi references it has interalia, commented that hedge marketing is a kind of "Bai-u-Salam" which has been permitted by Shariah in the light of various traditions of the Holy Prophet (صلى الله عليه وآله وسلم), as mentioned. It has been added that the cotton hedge marketing is for the welfare of the cotton growers as it has facilitated them to sell their crop in time and it has promoted the export of cotton and so more profits for the growers. It has been further added that all the apprehensions as to gharar, irtikaz and harm etc as expressed in the petition are baseless. Therefore, in view of the above, the said Ministry has prayed that this petition may please be dismissed.

11. Syed Riaz-ul-Hassan Gillani, Senior Advocate for respondent No.3 (Karachi Cotton Association) made submissions in respect of the jurisdiction of this Court as defined in Article 203-B(c) of the Constitution. He submitted written notes also. He contended that Ministry of Commerce who has been impleaded in this petition has no statutory role. He also contended that by-laws are not laws/rules nor have any statutory status. He submitted that the Government does not figure in anywhere and neither Government Agency is involved nor it has any nexus with the impugned rules. He added that the respondent company is a limit company registered under the company Act and, vide Article 71 of its Articles of Association, its Board is fully competent to pass, alter, amend and give effect to its by-laws and no approval in this regard is required from the Government or legislature.

12. We have given our anxious consideration to the points raised in the petition but, as mentioned above, we are refraining to dwell upon merits of the instant petition

as, at the outset, all the learned counsel appearing on behalf of the respondents unanimously opposed the petition in respect of its maintainability before this Court. We may point out that this Court exercises its jurisdiction conferred by virtue of Article 203A of the Constitution of the Islamic Republic of Pakistan, 1973. This Court is empowered under Article 203D to examine and decide the question whether or not any law or provision of law is repugnant to the Injunctions of Islam, as laid down in the Holy Quran and the Sunnah of the Holy Prophet (صلی اللہ علیہ وآلہ وسلم). The word "law" has been defined in Article 203B(c) of the Constitution as follows:-

> "Law" includes any custom or usage having the force of law but does not include the Constitution, Muslim personal law, any law relating to the procedure of any Court or tribunal or,……"

Article 203E of the Constitution elaborates the power and procedure to be adopted by this Court for the performance of its functions.

13. Keeping in view the above discussion, it can be appreciated that any law or its provision can be examined by this Court on the touch stone of Injunctions of Islam as contained in the Holy Quran and Sunnah of the Holy Prophet. (صلی اللہ علیہ وآلہ وسلم) Likewise,"custom or usage"can also be examined if it has the force of law. Admittedly, the expressions "custom" and "usage" have not been defined in Article 260 of the Constitution. Therefore, instead of Dictionaries, we must search out their connotation as defined in the legal terms and phrases.

14. The words "custom" and "usage" have different shades of meaning which can be ascertained from the context wherein these are used. These expressions signify any rule or practice which having been continuously and uniformly observed for a long time, have obtained the force of law among different societies, tribes or communities. Normally such customs or usage is observed in connection with inheritance, maintenance, custody, adoption, marriage and other matters pertaining to personal/social practices. In "Words and Phrases", published by West Publishing Co. a reference to these terms has been given in the following words:

> "The essential elements of "custom" or usage" are that it must be ancient, certain, uniform, compulsory, consistent, general, continued, reasonable, not a contravention of law or public policy, and acquiesced in by persons acting within the scope of its operation. Geraeta Corporation v. Silk Ass'n of America, 222 N.Y.S. 11, 13, 220 App. Div. 293.
>
> "Custom" or usage" to be binding, must be definite, uniform and well known, and be established by clear and satisfactory evidence, and shown to be long-established, reasonable, and generally acquiesced in". (page 546)

In "Law-Terms and Expression", (Edition 2012) the expression "custom" has been defined in the following words:

> "A custom to be valid must have four essential attributes. First, it must be immemorial; secondly, it must be reasonable, thirdly, it must have

continued without interruption since its immemorial origin; and fourthly, it must be certain in respect of its nature generally, and the persons whom it is alleged to effect. These characteristics are the necessary corollaries of the definition of a custom as being local common law and they serve a practical purpose as rules of evidence when the existence of a custom is to be established or refuted. By immemorial is meant that the custom must have been in existence from time preceding the memory of man. The test of reasonableness is the artificial and legal reason warranted by authority of law for its enforcement. The test of continuity involves habitual usage. 1984 SCMR 1081; PLD 1981 SC 42" (page No.454-455)."

15. In this background, we may add that Parliament which is the law-making authority, passes Acts and empowers the Government under the relevant law to make necessary Rules for conducting its business, Enactment of a statuary law is in fact an expression of the collective will and wisdom of the legislature and, in case the Parliament is not in session, the laws are enforced through an Ordinance, issued by the competent authorities designated and authorized for this purpose in the Constitution. The said Act/Ordinance is then termed as the "statutory law". Subsequently, the Rules framed under the powers conferred by the "statuary law" make integral part of the same law and those Rules, if considered repugnant to the Injunctions of Islam, can be challenged in a Shariat Petition by any citizen of Pakistan and, if allowed, the same would be further proceeded with in accordance with the procedure referred to above.

16. So far the legal definitions of "custom or usage" given above are concerned they are self evident. We agree with the learned counsel for the respondents that the impugned by- laws framed under sub para (e) to para iii of the Memorandum & Articles of Association of the Karachi Cotton Association have not been framed by the Government but still require its approval, as mentioned by the learned counsel for the respondents.

17. In this connection it is highly pertinent to refer to the comments received from Federation (Government of Pakistan) read as mentioned hereinunder:

> "The Federal Shariat Court expresses its verdict by judgment which are to be implemented by the Federal Government or Provincial Government under Article 203D(3)(a) and (b). In this Shariat Petition there is no such law enacted by the Federal Government or Provincial Government.
>
> The by-laws challenged before this Court by one association against another Cotton Ginner Association are in the nature of domestic dispute of the association. These by-laws are meant for running of their own affairs and can be amended by the associations, themselves.
>
> The by-laws challenged are neither framed nor approved by the Federal Government or Provincial Government and cannot be

treated as "statutory rules" as these have not been framed under any specified legal requirement of any statutes.

It is, therefore, prayed that above noted preliminary objection with respect to jurisdiction may kindly be taken up first before going into the merits of the case".

In this view of the matter, we have no doubt in our minds that until and unless approved by the legislature, the impugned Rules which have been made by a Private Ltd. Company and which can always be changed, any time, only by the respondent Association, without the intervention of the Government, enjoy a non-statuary status and thus remain beyond the pale of jurisdiction of this Court, as determined by the Constitution.

18. Thus it is crystal clear that by no stretch of imagination the impugned Rules can be brought inside the scope of "usage or custom" as mentioned in the said definition of law. We consider it necessary to mention that the meaning and legal connotation of the expression "custom and usage" cannot be left to the discretion or notions of an individual but has to be clearly spelt out in the light of its legal import. Hence, it would not be permissible at all to exercise such free imagination to the extent that its nexus with the law is lost. Its meaning should always be consistent with ethos and spirit of legal tinge and must be properly spelled out very clearly to remain limited to only certain situations as and when they would emerge from time to time and should not be un-necessarily given un-limited expansion. If this principle is relaxed, every now and then minor "usage and custom", only local and insignificant in nature, having no legal import, would un-necessarily start coming to the Court for adjudication.

19. Learned counsel for the petitioner could not persuade us to believe that this court while exercising its Constitutional Jurisdiction could proceed to examine the Rules impugned by him in the instant petition. Considering the petition misconceived, we dismiss it accordingly.

JUSTICE ALLAMA DR.FIDA MUHAMMAD KHAN

JUSTICE SHEIKH NAJAM UL HASAN

JUSTICE ZAHOOR AHMED SHAHWANI

Announced in open Court
at Lahore on 16.04.2015

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

HON: MR. JUSTICE ALLAMA DR. FIDA MUHAMMAD KHAN
HON: MR. JUSTICE RIZWAN ALI DODANI
HON: MRS. JUSTICE ASHRAF JAHAN.

CRIMINAL APPEAL NO.4/I of 2014

Abdul Waheed son of Muhammad Ishaque,
Caste Magsi,Resident of Saifabad, Jhal Magsi,

Usta Muhammad. .... Appellant

Versus.

The State .... Respondent.

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MURDER REFERENCE NO.1/Q OF 2014

The State Versus. Abdul Waheed

Counsel for the appellant	…	Mr. Zahoor-ul-Haque Chishti, Advocate
Counsel for the State	…	Mr. Muhammad Tahir Iqbal Khattak, Additional Prosecutor General, Balochistan
FIR. Date & P.S.	…	No.40/2011 dated. 10.05.2011 P.S City Usta Muhammad.
Date of judgment of trial court	…	07.01.2014
Date of Institution of Appeal in this Court	…	20.01.2014
Date of hearing	…	04.04.2014
Date of Judgment	…	21.04.2014

JUDGMENT

ASHRAF JAHAN, J:- The present appeal alongwith murder reference was disposed off vide common short order dated 04.04.2014, which reads as under:-

> *"Arguments heard. For reasons to be recorded later in the detailed judgment, this appeal is allowed. Conviction and sentence of appellant Abdul Waheed son of Muhammad Ishaque, awarded under section 17(4) of Offences Against Property (Enforcement of Hudood) Ordinance, 1979 by learned Additional Sessions Judge, Usta Muhammad vide impugned judgment dated 07.01.2014 is set aside and he is acquitted of the charge. He is confined in jail. He shall be released forthwith, if not, required in any other case.*
>
> *Criminal Murder Reference No. 1/Q of 2014 preferred by the learned trial court is not confirmed and is answered in the negative.*
>
> *This appeal is disposed of in the above terms."*

Following are the reasons for the above order:-

2. Through this judgment we intend to decide the Criminal Appeal bearing No.4/I of 2014 and Murder Reference No.1/Q of 2014, arising out of common judgment, dated 07.01.2014 in Sessions Case No.5 of 2011 emanating out of FIR No.40 dated 10.05.2011, registered at Police Station City Usta Muhammad, under Sections 302, 324, 392 and 34 PPC passed by the learned Additional Sessions Judge, Usta Muhammad.

3. The present appellant Abdul Waheed was tried in the aforesaid case by the learned Additional Sessions Judge, Usta Muhammad. At the conclusion of the trial, vide judgment dated 07.01.2014, he was convicted under Section 17(4) of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979 (hereinafter referred to as the "Ordinance") and sentenced to death, subject to confirmation by this Court. Whereas the case against the absconding accused Noorullah son of Muhammad Ishaque and Hadi Bakhsh alias Hado son of Faqir Muhammad was kept on dormant file and their perpetual warrants of arrest were ordered to be issued.

   Simultaneously Murder Reference No.1/Q of 2014 was also received from the trial Court as required under Section 374 Cr.P.C. read with Section 338-D PPC.

4. The prosecution case as set out in the FIR lodged by complainant Sunil Kumar is that, on 10th May 2011 accused Abdul Waheed came to the complainant's Rice Mill in his Land Cruiser bearing Registration No.WAA-256. The complainant asked him to go to the shop of Rajesh Kumar to bring Ajeet Kumar, who had Rs.3,000,000/- (Rupees Thirty Lacs) cash with him. Accused Abdul Waheed did not return for more than half an hour's time, his mobile phone and that of Ajeet Kumar were also found switched off during this period. Thereafter, at about 10:45 a.m, Abdul Fatah Umrani came to the Rice Mill while driving the vehicle of the accused whereupon the complainant found that Abdul Waheed was in injured condition and Ajeet Kumar was lying dead on the front seat. On enquiry injured accused disclosed

that he and Ajeet Kumar after taking Rs.3,000,000/- (Rupees Thirty Lacs) from Rajesh Kumar were coming through WAPDA Grid Station bypass, when they reached near Rafique Rice Mill, three armed persons on motorcycle with muffled faces stopped them and tried to snatch the cash. The accused fired at them with his licensed pistol. But in the meanwhile, all the three persons who can be identified on seeing, also fired back, as a result of which Ajeet Kumar died at the spot, whereas, the present accused received bullet injuries on his chest and right leg. The culprits thereafter fled away on motorcycle after snatching all the money. On such report of the complainant, instant case was registered against the unknown accused persons.

5. After registration of the FIR, the investigation started. During which on 14th May 2011, the complainant got recorded his supplementary statement and nominated accused Abdul Waheed as well as his brother Noorullah and his friend Hadi Bakhsh alias Hado in this crime. On 15th May, 2011 present accused was arrested and his statement was recorded before police. At his pointation one 32-bore revolver with six live rounds, six empty rounds, mobile phone and Rs.1,000,000/- (Rupees Ten Lacs) were also recovered from his house, which were taken into possession through recovery memo dated 15.05.2011. After completing the investigation, challan was submitted against three accused showing accused Abdul Waheed in custody, whereas accused Noorullah and Hadi Bakhsh were shown absconding, who were later declared proclaimed offenders by the learned trial Court vide Order dated 13.08.2011.

6. The charge under Section 17(4) of the Ordinance read with Sections 302, 392, 34 PPC was framed against the accused on 04.08.2011 to which he pleaded not guilty and claimed trial.

7. The prosecution, in order to prove its case, in all examined eleven witnesses. For proper appreciation the gist of their evidence is reproduced as under:-

(i) First of all prosecution examined complainant Sunil Kumar, who produced the written complaint as Ex.P/1-A and FIR as Ex.P/1-B. He endorsed the contents of FIR but did not nominate the present accused with the commission of crime, therefore, he was declared hostile and was cross-examined by the learned District Attorney.

(ii) PW.2 Abdul Fatah, in his evidence, supported the case of prosecution on the point that he had taken the deceased Ajeet Kumar and injured Abdul Waheed (present accused) to Sapna Rice Mill in the vehicle of accused Abdul Waheed.

(iii) PW.3 Darya Bakhsh was examined on 29.12.2011. He supported the case of prosecution only to the extent that he was informed about the incident by his son. The above witness was also declared hostile by the prosecution and he was cross-examined by the learned District Attorney.

(iv) PW.4 Harpal Das was also declared hostile by the prosecution. He supported the case of prosecution only to the extent of murder of Ajeet Kumar.

However, he did not nominate the present accused with the commission of crime.

(v) PW.5 Dr. Mukhtiar Ahmed had conducted the postmortem of the deceased Ajeet Kumar, and also examined injured accused Abdul Waheed and issued medical certificate about his injuries.

As per postmortem report, he found following injuries on the person of deceased:-

"1. Three firearm wounds of entrance on right side of face. Blackening is present (1/2")

2. One firearm wound of entrance on left side face.

3. One firearm wound of entrance on right side of chest. Blackening is present.

4. One firearm wound of entrance on right forearm. Blackening is present. (1/2")

5. One firearm wound of exit on right forearm (3/4").

6. Lacerated wound on right upper arm on deltoid region.

ABDOMEN

All the organs of abdomen were healthy.

Cranium and Spinal Cord.

THORAX

Walls, ribs, and cartilages	Damaged 3rd rib from right side
Pleurae	Damaged from right side
Trachea	Healthy
Right lung	Damaged
Left lung	Healthy
Pericardium and heart	Healthy
Blood vessels	Damaged from right side of chest

REMARKS

By examination of the body, my opinion is that the cause of death is excessive blood loss and injury to vital organ like right lung and blood vessels."

The doctor as stated earlier, had examined the accused also and as per medical certificate, found following injuries on the body of accused Abdul Waheed:-

"1. Firearm wound of entrance on left side of chest. Blackening is present.

2. Firearm wound of exit from left side of chest below axilla.
3. Firearm wound of entrance on right thigh (upper side) Blackening is present.
4. Firearm wound of exit on right thigh (lower side).

Name of injuries:	Grievous
The kind of weapon used:	Firearm.
Duration of injuries:	Fresh"

(vi) PW.6 Rajesh Kumar, supported the case of the prosecution on the point that Ajeet Kumar had come to his shop and had taken away Rs.3,000,000/- (Rupees Thirty Lacs) alongwith the accused Abdul Waheed in his vehicle and thereafter at 11.00 a.m., he was informed about the incident.

(vii) PW.7 Rakesh Kumar supported the case of prosecution by deposing that on 9th May, 2011, he alongwith the complainant and deceased Ajeet Kumar were coming on motorcycle when witness Rajesh Kumar called the complainant and offered him Rs.5,000,000/- (Rupees Fifty Lacs), whereupon Sunil Kumar told him that he will take Rs.3,000,000/- (Rupees Thirty Lacs) and accordingly the next day Abdul Waheed and Ajeet Kumar went to the shop of Rajesh Kumar for obtaining the amount and thereafter the incident took place.

(viii) PW.8 Aneel Kumar deposed that on the day of incident he was at his home and after receiving information, he went to the hospital where he was informed about the incident. The above witness was declared hostile at the request of learned District Attorney and he was cross-examined.

(ix) PW.9 Constable Deedar Hussain is mushir of the following recovery memos:-

Ex.P/9-A	Recovery Memo of vehicle Land Cruiser.
Ex.P/9-B	Parcel No.1 piece of seat cover stained with blood of Ajeet Kumar deceased.
Ex.P/9-C	Parcel No.2 piece of seat cover stained with blood of Abdul Waheed.
Ex.P/9-D	Parcel No.3 Recovery Memo of one empty alongwith one bullet led.
Ex.P/9-E	Parcel No.4 Recovery Memo of T.T.Pistol alongwith Magazine.
Ex.P/9-F	Parcel No.5 Recovery memo of Arms Licence and Photostat copy of documents of vehicle.
Ex.P/9-G	Recovery memo of last worn clothes of Abdul Waheed, injured accused.

Ex.P/9-H Recovery memo of last worn clothes of Deceased Ajeet Kumar.

Ex.P/9-I Memo of inspection of place of occurrence.

(x) PW.10 ASI Muhammad Asif Qadri has produced disclosure memo Ex.P/10-A, memo of site inspection Ex.P/10-B, recovery memo of 32-bore revolver, six live rounds, six empty rounds and *charmae* Ex.P/10-C, recovery memo of mobile phone alongwith SIM Ex.P/10-D and lastly recovery memo of robbed amount Rs.1,000,000/- (Rupees Ten Lacs) Ex.P/10-E.

(xi) The last witness PW.11 SI Abdul Majeed, Investigating Officer of the case deposed that first the investigation of this case was conducted by the then SI Muhammad Ramzan and after his retirement the investigation of this case was entrusted to him. He produced the site plan, inquest report, challan, FSL report and firearm report as Ex.P/11-A to Ex.P/11-H.

8. After the completion of prosecution evidence, their side was closed on 05.12.2012. The statement of the accused under Section 342 Cr.P.C. was recorded on 12.12.2013, wherein he denied the case of the prosecution and took the plea that he has been falsely implicated in this case and has no link with the occurrence. He also stated that no private witness has deposed against him, therefore, he may be acquitted in the present case. However, he did not make any statement on Oath as provided under Section 340(2) Cr.P.C. nor did he produce any evidence in his defence.

9. After the conclusion of trial, learned Additional Sessions Judge, Usta Muhammad convicted and sentenced the appellant vide judgment dated 07.01.2014, which is impugned before this Court.

10. We have heard the learned Counsel for the appellant as well as the learned State Counsel and have perused the case record.

11. The learned Counsel for the appellant has submitted that:-

(i) The present accused has not been nominated in the FIR.

(ii) The accused himself has received injuries during the incident, which have been declared by the doctor as grievous in nature. Besides, the injury sustained by him on the left side of his chest cannot be self inflicted.

(iii) Mainly the case of the prosecution is based upon the confession of accused before the police, which is not admissible under the law, thus cannot be relied upon.

(iv) The accused was not produced before the Magistrate to record his confession under Section 164 Cr.P.C.

(v) The recoveries allegedly made on the pointation of accused are doubtful as the prosecution has failed to produce any independent witness in this regard

and there is clear violation of provisions of Section 103 Cr.P.C. as both the *mashirs* of recoveries belong to police.

(vi) The report of Forensic Expert is of no help for matching six empties with the 32-bore revolver as no empties were secured from the spot or from the vehicle and they were sent together to the FSL.

(vii) All the material independent witnesses have not deposed against the present accused, therefore, were declared hostile by the prosecution.

(viii) There is contradiction regarding the place and date of arrest of accused and otherwise also the case of the prosecution is full of contradictions. Therefore, the prosecution has bitterly failed to prove its case against the present accused.

12. Conversely, the learned State Counsel has supported the impugned judgment and submitted that the trial Court has rightly convicted the present accused as there is sufficient evidence to connect him with the commission of crime. In this regard, he has pointed out that the accused himself had disclosed about the commission of crime before police; there is recovery of Rs.1,000,000/- (Rupees Ten Lacs) as per share of the accused and of crime weapon alongwith empties on his pointation. Besides, the Forensic Laboratory report shows matching of empties with the crime weapon, therefore, the prosecution has succeeded to prove its case against the present accused.

13. We have considered the arguments advanced before us and have perused the case record.

14. Admittedly, it is a case of no ocular evidence as at the time of occurrence only the present appellant and the deceased were in the vehicle. PW.2 Abdul Fatah is the person who reached at the place of occurrence just after hearing the noise of firing and when he reached there he was informed by the present appellant that they had been robbed and requested him to take him to Sapna Rice Mill. This witness, in his evidence, has disclosed that at that time the appellant was in injured condition and he had taken the deceased and the injured appellant to the Sapna Rice Mill. Regarding injuries the evidence of the doctor is of material value. The perusal of postmortem report of deceased Ajeet Kumar shows that he had received six firearm wounds which proved fatal and consequently he died at the spot. At the same time the present appellant had also received two firearm shots, out of which one was on the left side of his chest which passed through left side of the chest below axilla. It is important to note that this injury, which is on the left side of chest, could be fatal, therefore, such injury on the vital part of the body does not appear to be self inflicted.

15. Another important aspect of the case which creates doubt in the prosecution story is that when as per the case of the prosecution the alleged confessional statement was made by the appellant before the police, in which he had disclosed about his involvement and that of his brother and one friend in the crime and had led the

police party to his house for the recovery of cash and crime weapon, then why has the police not associated some independent person from the locality to witness these recoveries, as required under Section 103 Cr.P.C. It was incumbent upon the police to have taken independent witnesses from the locality or to have furnished some reasonable explanation for not doing so which is lacking in the case. In the present case alleged recovery of crime weapon, looted money worth Rs.1,000,000/- and mobile phone is said to have been made at the pointation of appellant from his house. It has also come on record that house of appellant was located in Yaqoob Mohallah, Usta Muhammad, and at his request the police party got the street vacated at the relevant time. It is not understandable that instead of asking the respectables of area to witness the recoveries, the police got the street vacated and only police officials acted as mashirs. There is ample law laid down by the Hon'ble apex Court that in case of availability of independent witnesses, if the recovery is not attested through them, the same becomes doubtful. Reference in this regard may be made to the case of Muhammad Afzal Vs. The State 1983 SCMR 1, State through Advocate General Sindh Vs. Bashir and others PLD 1997 Supreme Court 408 and lastly upon the case of Muhammad Azam Vs. The State PLD 1996 Supreme Court 67. Further it has been held in plethora of cases by the Hon'ble Supreme Court that Section 103, Cr.P.C. applies with full force when search is to be made of place which is in an inhabited locality. The main object behind Section 103 Cr.P.C. is to guard against possible chicanery and concoction. Its application is mandatory in nature unless it is shown by the prosecution that in the circumstances of a particular case it was not possible to have mashirs from the locality. It will be relevant to mention that as per case of prosecution, PW.6 Rajesh Kumar had given the amount of Rs.3,000,000/- (Rupees Thirty Lacs) to the deceased, but during his evidence he had not disclosed the denomination of notes given to the deceased. Further, no identification test of recovered money and of mobile phone (belonging to deceased Ajeet Kumar) had been conducted through the concerned witnesses i.e. complainant and Rajesh Kumar to ascertain the same as actual robbed property. These lacunas are thus fatal to the case of prosecution and cannot be ignored specially in the circumstances when there is no ocular evidence against the present appellant.

16. It is important to note that the complainant in this case is the brother of deceased and the other PWs are also his close relatives. They, in FIR and during the evidence before the trial Court, have not nominated the present appellant with the commission of crime. Rather they have been declared hostile and cross-examined by the learned prosecutor, but they have categorically denied the suggestions made by the prosecutor regarding involvement of present appellant in the commission of crime or about any compromise between the parties before Nawab Tariq Khan Magsi. It will be relevant to mention here that as per case of prosecution complainant got recorded his further statement on 14.05.2011 implicating the present appellant but the complainant during his cross-examination has clearly denied to this version and replied that neither he had recorded any statement on 14.05.2011 nor implicated present appellant with commission of this crime.

17. In the present case, it is the case of the prosecution that there had been some compromise between the parties before Nawab Tariq Khan Magsi, but the

prosecution has not opted to examine him as it's witness, even none from the private prosecution witnesses have supported such compromise or *faisla* in their evidence. Further neither any faisla is produced on record nor any witness of such faisla is examined, therefore, this version of prosecution is not supported through any oral or documentary evidences.

18. In this context the perusal of record further reveals that the Investigating Officer of this case S.I. Muhammad Ramzan has not been examined. One DSP namely Khalid Zaman Marri, who is said to have attended proceedings of alleged compromise, has also not come forward to support this contention. With this background, it appears that such story, as set up by the prosecution, finds no support from the evidence brought on record during the trial.

19. Reverting to the evidence produced on record by the prosecution, it is found that there are contradictory versions of the police witnesses regarding arrest of appellant. As per evidence of ASI Muhammad Asif Qadri, appellant was hospitalized w.e.f. 10.05.2011 to 15.05.2011 in police custody, whereas PW.11 SI Abdul Majeed Investigating Officer, during his evidence, has deposed that appellant was produced by Nawab Tariq Khan Magsi for arrest and he was arrested formally in this case on 15.05.2011. Surprisingly, in the present case no hospital record is produced by the prosecution to show as to whether the appellant was admitted in the hospital. Likewise, no *mushirnama* of arrest of accused is produced on record to show when or from which place he was arrested in the present case.

20. It will be relevant to note that if the version of prosecution is accepted that the appellant was admitted in hospital under the custody of police with effect from 10.05.2011 to 15.05.2011 till the date of his arrest, then question arises as to how he was in knowledge about exact places where the looted money and crime weapon were concealed. All these facts create serious doubts about the truthfulness of the case of prosecution against the appellant.

21. In addition to the above discussion, in the present case, the appellant is convicted and sentenced to death under Section 17(4) of the Ordinance. Therefore, we have to see as to whether under the relevant law such conviction could be awarded or not, as there are certain legal requirements of law, which are to be fulfilled before awarding the sentence under the above referred provision of law. In this regard we will first revert to Section 16 of the Ordinance i.e. "proof of Haraabah", which clearly specifies that the provisions of Section 7 shall apply '*mutatis mutandis*' for the proof of "haraabah" and when we examine Section 7, it clearly provides certain standards of evidence which are required to be fulfilled to prove the theft liable to hadd. For the sake of convenience, Section 7 is hereby reproduced as under:-

Proof of theft liable to hadd. The proof of theft liable to 'hadd' shall be in one of the following forms namely:

(a) the accused pleads guilty of the commission of theft liable to 'hadd'; and

(b) at least two Muslim adult male witnesses, other than the victim of the theft, about whom the Court is satisfied, having regard to the requirements of *'tazkiyah-al-shuhood'*, that they are truthful persons and abstain from major sins *(kabir)*, give evidence as eye-witnesses of the occurrence:

Provided that, if the accused is non-Muslim, the eye-witnesses may be non-Muslim:

Provided further that the statement of the victim of theft or the person authorized by him shall be recorded before the statements of the eye-witnesses are recorded.

Explanation. In this Section, *'tazkiyah-al-shuhood'* means the mode of inquiry adopted by a Court to satisfy itself as to the credibility of a witness.

22. A bare perusal of above referred provisions of law amplifies that either the accused has to confess about his guilt or at least two Muslim adult male witnesses, other than the victim of the theft, about whom the Court is satisfied, having regard to the requirements of *tazkiyah-al-shuhood*, give evidence as eye-witness of the occurrence, then only punishment under Section 17(4) of the Ordinance can be awarded. Whereas in the present case, though as per case of prosecution, the accused/appellant had made confession before police but during the trial the accused/appellant did not own such statement and on the contrary taken the plea that he was falsely involved in this case. Further not a single person has come forward to depose against the present accused/appellant, let alone *tazkiyah-al-shuhood*. In such circumstances, in our humble view the trial Court has committed an error while awarding sentence of death under Section 17(4) of the Ordinance, in the situation when *tazkiyah-al-shuhood* is a mandatory requirement for imposition of *hadd* punishment under Section 17(4) and has to be conducted in all cases where sentence of *hadd* is awarded. Reference in this regard may be made to the case of Muhammad Saleem and others Vs. The State 2005 SCMR 849. Thus in the light of above discussion, we are of the considered view that in the circumstances of the present case punishment under Section 17(4) of the Ordinance could not be awarded. Therefore, on this count also the sentence cannot sustain.

23. Foregoing are the reasons for extending benefit of doubt to the appellant and ordering his acquittal in terms of short order dated 04.04.2014.

As a sequel of above, Murder Reference bearing No.1/Q of 2014 was answered in negative.

JUSTICE ASHRAF JAHAN

JUSTICE DR. FIDA MUHAMMAD KHAN

JUSTICE RIZWAN ALI DODANI

Islamabad
21st April, 2014

Regarding the disposal of the case property, we direct the I.O. of the crime to deposit the sum of Rs.1,000,000/- (Rupees Ten Lacs) allegedly recovered from the appellant but disowned by him, in the Government Treasury and submit its report before the Trial Court as there is no claimant of this sum. The licensed revolver and mobile phone Nokia Classic-2700 may be returned to its lawful owner. Whereas the unlicensed pistol may be deposited in the Government Armory.

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

JUSTICE MRS. ASHRAF JAHAN

CRIMINAL APPEAL NO.14/Q/2014

Muhammad Azeem S/o Muhammad Yousuf
By caste Parkani .... Appellant.

Versus

The State ....
Respondent.

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Counsel for the appellant	…	Mr. Muhammad Ayub, Advocate.
For the State	…	Dr. Muhammad Salah-ud-Din Mengal, Prosecutor General Balochistan
Date of hearing	...	13.05.2014
Date of decision	…	13.05.2014
Date of Judgment	…	26.05.2014

JUDGMENT

ASHRAF JAHAN, J: - This Criminal Appeal is directed against the judgment dated 26.02.2014 passed by the Court of learned Sessions Judge (Adhoc), Quetta, in Hudood Case No.41 of 2012, whereby the appellant Muhammad Azeem alongwith co-accused Amanullah were convicted under Section 392/34 PPC and sentenced to undergo rigorous imprisonment for five years and to pay fine of Rs.20,000/- each. In default thereof, to suffer simple imprisonment for two months more. However, the benefit of Section 382-B Cr.P.C, was extended to the appellant and the co-accused.

2. The concise relevant facts as recorded in the FIR are, that on 16.08.2010 the complainant Bismillah lodged report at P.S. Brewery, Quetta, stating therein that he is resident of Killi Deba Quetta and by profession a businessman. On the day of occurrence *i.e.* 15.08.2010 he went to offer Isha prayers. Meanwhile, his younger brother Ali Nawaz aged about 13 years, without informing him, took away his motorcycle bearing Registration No.QAG-5226 and Chassis No.3AH4-033210K for pleasure ride. After some time he came back to the house and disclosed that while riding on the motorcycle when he reached at the corner of street, four persons were found standing there, who by appearance, were Baloch or Pathan and can be identified on seeing. Two of the above persons were armed with pistols who snatched motorcycle from him on gun point. The persons who had pistols went away on foot, while the others went on motorcycle towards Killi Sherani.

3. Police started its investigation and challaned in all seven accused on 01-09.2010, out of whom four accused were shown in custody while three were absconding. Subsequently, one absconding accused namely Amanullah was also arrested and his challan was produced on 28.09.2010.

4. On 26.10.2010 the charge was framed against accused Muhammad Azeem, Juma Khan, Daro Khan, Abdul Khaliq and Amanullah under Section 17 (3) Harrabah and 392 PPC to which they pleaded not guilty and claimed trial. On 22.12.2010, the learned trial Court, on the basis of medical board's report, declared accused Daro Khan and Abdul Khaliq as juvenile offenders and bifurcated their case for proceeding under Juvenile Justice System Ordinance, 2000.

5. During the trial, prosecution in support of its case has examined in all seven witnesses. For the sake of appreciation, gist of their evidence is reproduced as under:

PW-1 Complainant Bismillah Khan supported the contents of F.I.R. and deposed that four persons out of whom two were armed with pistols had snatched motorcycle No.QAG-5226 from his brother Ali Nawaz aged about 13 years. He produced his written report as Ex.P/1-A.

PW-2 Ali Nawaz, eyewitness of the incident supported the contents of FIR but did not implicate the present appellant or any accused facing trial with the commission of the crime.

PW-3 Muhammad Rasheed, Inspector Police, deposed that on 17.08.2010 he was on duty at Brewery police station, when at about 9:00 P.M. accused Muhammad Azeem, in presence of DSP Sayed Zahid Hussain Shah confessed about his guilt, he produced such Fard-e-Inkshaf as Ex.P/3-A.

PW-4 ASI Amanat Khan was examined on 06.02.2013, he produced Roznamcha entry dated 15.08.2010 as Art.P/4, Fard-e-Maqboozgi/Enquiry as Ex:P/4.A, and Fard-e-Maqboozgi of Registration Book as Ex. P/4-B.

PW-5 PC Syed Raza has deposed that on 17.08.2010 he was on patrolling duty along with SHO and other police officials, when they reached Killi Tarkha near Haji Anwar chowk at about 5:00 P.M. they noticed three persons coming on a motorcycle. They signaled them to stop but they resisted, finally the police officials got them stopped. On inquiry, they disclosed their names as Muhammad Azeem, Juma Khan and Daro Khan. On personal search from accused Muhammad Azeem one 30 bore pistol was recovered along with bullets. Pistol and motorcycle were taken in custody as Ex. P/5-A, and Art. P/6 and pistol parcel as EX. P/7. He identified the appellant Muhammad Azeem, co-accused Juma Khan and Daro Khan to be the same culprits.

PW-6 ASI Mumtaz Ahmed deposed that on 21.09.2010 during investigation accused Amanullah confessed his guilt and such Fard-e-Inkshaf was produced on record as Ex.P/6-A.

The last witness examined by the prosecution is S.I. Maqbool Ahmed who investigated the present crime. He produced the FIR as Ex.P/7-A, Sketch of place of recovery as Ex.P/7-B, challan as Ex.P/7-C and subsequent challan in respect of accused Amanullah Khan as Ex.P/7-D.

6. After completion of evidence of prosecution witnesses, its side was closed. The statements of accused were recorded under Section 342 Cr.P.C. wherein they denied the allegations levelled against them and took the plea that they are innocent and falsely been implicated in the present case. However, they did not opt to record their statements on oath. At the conclusion of trial, the learned Sessions Judge (Adhoc) Quetta, vide judgment dated 26.02.2014, which is impugned before this Court, acquitted accused Juma Khan by extending benefit of doubt, whereas accused Muhammad Azeem and Amanullah were convicted and sentenced as stated earlier.

7. I have heard the learned counsel for the appellant and the learned State counsel at length and have perused the case record minutely with their assistance. It is contended by the learned counsel for the appellant that there are material contradictions in the evidence of prosecution witnesses, rather, it is a case of no evidence as PW-2 Ali Nawaz who is only eyewitness of this crime has not implicated the present accused with the commission of the crime. He has further contended that on same set of evidence accused Juma Khan had been acquitted. The learned Counsel pointed out that the present accused has been mainly convicted on the basis of 'Farad-e-Inkshaf' allegedly made by him before the police which has no evidentiary value in the eyes of law. Furthermore, non association of any independent witness at the

time of recovery of alleged motorcycle has made the whole case of the prosecution doubtful, therefore, the appeal may be allowed and the sentence may be set aside. On the other hand it has been contended by the learned counsel for the State that robbed motorcycle has been recovered from the possession of accused along with unlicensed revolver, therefore, the trial Court has rightly convicted the appellant.

8. I have given my anxious consideration to the points raised by the learned Counsel for the parties and have minutely gone through the evidence on record. The perusal of record reveals that PW Ali Nawaz is the star witness of the prosecution as the motorcycle had been snatched from him by the armed culprits. His evidence on record transpires that he did not implicate any accused facing trial with the commission of the crime and his evidence is totally silent in this regard. Though, in FIR it has been disclosed that the accused persons can be identified upon seeing, but neither any identification parade before the Magistrate had been held in this case nor the victim (PW-2 Ali Nawaz) identified the accused present before Court to be the culprits of this crime. Therefore, in such circumstances, the prosecution story as set up, seems to be doubtful.

9. In the present case, mainly, the prosecution has relied upon Farad-e-Inkshaf of accused Muhammad Azeem, which was recorded before the police. If the accused had volunteered to give his confessional statement then why he was not produced before the Magistrate. No explanation in this regard has come on record. Therefore, I am of the view that this Farad-e-Inkashaf before the police officials has no evidentiary value and cannot be used as evidence against the accused. Further, the accused during the statement recorded under section 342 Cr.P.C. has disowned such statement and categorically denied in reply to question No.3 put to him regarding recording of extra judicial confession before police. The perusal of record further reveals that it has come in evidence that complainant in his FIR disclosed the motorcycle No.QAG 5226 and produced its Registration Book but surprisingly no such Registration Book or any document of the robbed motorcycle is available on the record. As per evidence of PW-4 ASI Amanat Ali it seems that he had produced Registration Book of the robbed motorcycle during his examination-in-chief as Ex.P/4-B i.e. 'Fard-e-Maqboozgi of Registration Book', but no Registration Book or its copy is available on record. It is the case of the prosecution that the number of motorcycle was QAG-5226 but as per cross-examination of PW-4 ASI Amanat Ali it appears that he admitted that the Registration Book produced in Court was bearing No.MA-9874. However, he had voluntarily said that earlier number was QAG-5226. It has also come on record that the above Registration Book in the column of owner bears the name as Mujahid Hussain S/o Muhammad Nawaz and nowhere the name of the complainant Bismillah Khan was appearing. In view of above position it appears that the prosecution has failed to produce on record the Registration Book in respect of motorcycle QAG-5226 and such failure is another lacuna in the case of prosecution which cannot be ignored in the circumstances of the present case.

10. It is the prosecution case that the accused were arrested at about 5:00 P.M. at Killi Tarkha near Haji Anwar Chowk on 17.08.2010. PW-5 PC Syed Raza in his cross-examination has admitted that this place was a busy area and the private persons

were available but police party did not call any person to witness the recovery of robbed motorcycle and the 30 bore pistol. Non-association of private persons from the locality is another dent in the case of the prosecution.

11. In the light of discussion made above, I am of the view that the prosecution has failed to prove the charge against the present appellant, therefore, the appellant is entitled to the benefit of doubt which is accordingly extended to him. The conviction and sentence of the appellant is thus set aside and he is acquitted of the charge.

12. During the hearing of this appeal, it has been noticed that on same set of evidence the learned trial Court has acquitted one accused Juma Khan and convicted two accused, the present appellant and other accused Amanullah, who has not filed any appeal to challenge this judgment. As discussed earlier, the victim has not implicated any accused facing trial with the commission of crime and there is no iota of evidence available against accused Amanullah except his "Fard-e-Inkshaf" before the police, which has no legal value and he had also categorically disowned, during his statement under section 342 Cr.PC. in reply to question 3. In such situation, the canon of justice demands that like the present appellant he may also be extended the benefit of this judgment.

13. It is well settled law that the benefit granted to one accused/appellant is also to be extended to other non-appealing accused, as well. This view is supported from following judgments:

1. Muhabbat Ali and another Vs. The State (1985 SCMR 662)
2. Muhammad Imran Vs. The State (2006 P.Cr.L.J 954)
3. Muhammad Ayub Vs. The State (2002 SD 80)
4. Mukhtar Ahmad Vs. The State (NLR 1991 SD 691)
5. Bijoy Singh & Anr Vs. State of Bihar (2002 (4) Supreme 362)
6. Pawan Kumar Vs. State of Haryana (2003 (5) Supreme 196)
7. Chellappan Mohandas and others Vs. State of Kerala
   (AIR 1995 Supreme Court 90)
8. Akbar Hussain and another Vs. The State (1997P.Cr.L.J 543)
9. Muhammad Aslam and 5 others Vs. The State (1972 SCMR 194)
10. Talib Hussain and another Vs. The State (PLD 1958 W.P Karachi 383).

14. In view of above discussion and relying upon the case law, accused Amanullah (who has not filed any appeal) is also extended the benefit of present judgment. Consequently, for the same reasons he is also acquitted and directed to be released from jail, if not required in any custody case. His conviction shall be deemed to have been set aside.

A copy of this judgment be sent to the Superintendent, District Jail, Mach, for

information and compliance.

15. Foregoing are the reasons for the short order dated 13.05.2014.

JUSTICE ASHRAF JAHAN

Islamabad
26.05.2014

IN THE FEDERAL SHARIAT COURT

(Appellate Jurisdiction)

PRESENT

JUSTICE MRS. ASHRAF JAHAN

CRIMINAL APPEAL NO.29/Q OF 2011

Muhammad Essa son of Golai caste Abdullahzai Kakar, resident of Zhob, District Zhob. .... Appellant

Versus

The State .... Respondent

Learned counsel for the appellant	...	Naseebullah Kasi, Advocate
Complainant Gul Zaman	...	In person.
Learned counsel for the State	...	Syed Pervaiz Akhtar, DPG Baluchistan.
FIR No., date and Police Station.	...	No.144/2010 dated 07.12.2010, Police Station, Zhob, District Zhob.
Date of the judgment of Trial Court	...	23.08.2011
Date of Institution in FSC	...	22.10.2011
Date of Hearing in FSC	...	12.11.2015
Date of announcement of Judgment	...	11.12.2015

JUDGMENT

ASHRAF JAHAN, J:- The present criminal appeal is directed against the judgment dated 23.08.2011 passed by the learned Sessions Judge, Zhob in Hudood Case No.01/2011, arising out of F.I.R. No.144/2010 of Police Station Zhob, under section 17 (3) of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979 whereby the present appellant Muhammad Essa was convicted under section 392/34 PPC and sentenced to undergo rigorous imprisonment for seven years and to pay fine of Rs.20,000/-, or in default to further suffer simple imprisonment for three months. However, benefit of Section 382-B, Cr.P.C. was extended to the appellant.

2. The relevant facts as stated in the FIR giving rise to the present appeal are that on 07.12.2010 at about 09.30 a.m., the complainant Gul Zaman lodged a report at Police Station, Zhob stating therein that he deals in the business of flour. On 06.12.2010, he got loaded 32 tons of flour in truck No.TKG-680 from Shuaib Qasim Flour Mills, Kot Addo on telephone through Zhob Goods Company. The names of truck drivers were Muhammad Shafiq and Fakher-ru-Din and cleaner was Abdul Hameed. On 07.12.2010 in the morning, the driver Muhammad Shafiq informed him on phone that when at about 08.00 p.m., they reached near Gul Hassan petrol pump at Dera Road, Zhob, one black colour 2.D vehicle came, which obstructed their truck and the culprits on gun point took away the loaded truck at some unidentified place. After unloading the flour, the truck was left at Mandozai Cross Dera Road and both the drivers and cleaner were also released. Hence, FIR No.144/2010 was lodged at Police Station, Zhob.

3. After completion of investigation, challan was submitted against the appellant Muhammad Essa, whereas four other accused Pakar Khan, Azim Khan, Lal Muhammad and Malang Khan were shown absconders. Learned Sessions Judge, Zhob on 24.02.2011 framed the charge against the appellant under section 17 (3) of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979 to which he pleaded not guilty and claimed trial.

4. The prosecution in order to prove its case examined seven witnesses. For the sake of appreciation, a gist of their evidence is reproduced as under:-

(i). PW.1 Constable Noor-ul-Haq supported the case of prosecution on the point that the accused during investigation disclosed that he alongwith co-accused committed the present crime. Further, that at the pointation of accused 402 big bags and 48 small bags of flour were recovered from the house of Malang Khan situated at Shankai. He produced fard-e-inkeshaf as Ex.P/1-A and recovery memo of flour Ex.P/1-B.

(ii). PW.2 Muhammad Shafiq the driver of the truck, in his evidence deposed that their truck was loaded with 31 tons of flour valuing 8 lacs. He alongwith co-driver and conductor were on their way when one 2.D car intercepted their truck. Five armed dacoits at gun point, after tieing their hands took away the truck. They also took away Rs.3,000/- and two mobile phones from him. They were shifted in car and were kept on roaming and finally at about

03.30 a.m. were left far from road. They reached at petrol pump on foot, where they were informed about their truck. He also deposed that the dacoits also took away Rs.30,000/- lying in truck. But, at the same time he did not implicate the accused present in Court (appellant) with the commission of crime, on the pretext that the faces of culprits were muffled.

(iii). PW.3 Fakher-ru-Din co-driver adduced same version and stated that as the faces of culprits were muffled, therefore he cannot say as to whether accused present in Court was among the culprits or not.

(iv). PW.4 is the complainant Gul Zaman, he supported the case of prosecution as per contents of F.I.R. He produced written report as Ex.P/4-A and F.I.R. as Ex.P/4-B.

(v). PW.5 Head Constable Muhammad Sarfraz had taken into custody the truck and produced memo of recovery as Ex.P/5-A.

(vi). PW.6 S.I. Jaweed Iqbal partially conducted the investigation of this crime, prepared the sketch of the place of occurrence, recorded the statements of PWs under section 161 Cr.P.C. and on 30.12.2010 handed over further investigation to SHO.

(vii). PW.7 S.I. Muhammad Latif conducted the remaining investigation and deposed that on 31.12.2010 accused Muhammad Essa in presence of DSP and SHO confessed about the crime and at his pointation flour bags were recovered from the house of Malang Khan. He produced the sketch of recovery as Ex.P/7-A. According to him, the recovered flour was brought at Police Station in mazda truck and under the orders of Court was handed over to the complainant. He further deposed that the accused also confessed about the dacoity in Loralai, he produced photocopy of conviction slip in above crime as Ex.P/7-B and challan in present crime as Ex.P/7-C. He indentified the accused present in Court to be the same.

5. After completing the evidence of prosecution witnesses statement of accused under section 342 Cr.P.C. was recorded, wherein he denied to the case of prosecution. He opted not to give his statement on oath but examined two witnesses Rahim and Khan Mir in his defence.

(i). DW.1, Rahim deposed that at about 6, 7 months back he had loaded flour from the house of Jumma Khan and taken it to the Levis Police Station.

(ii). DW.2 Khan Mir deposed that on 06.12.2010, he alongwith accused Essa had gone to Loralai, he came back next day but accused Essa stayed there.

6. At the conclusion of trial, the learned Sessions Judge, Zhob vide judgment dated 23.08.2011, which is impugned before this Court, convicted and sentenced the present appellant as mentioned earlier.

7. I have heard learned counsel for the appellant and the learned counsel for the State at length and minutely perused the case record with their assistance.

8. It is contended by the learned counsel for the appellant that the present appellant is innocent and the judgment passed by the learned Sessions Judge, Zhob is contrary to the facts of the case and the law. That the learned trial Court has quoted previous conviction of the appellant awarded in some other crime by the learned Sessions Judge, Loralai but the above said conviction had already been set aside by the Hob'ble High Court of Balochistan and the appellant was acquitted of the charge. As such, the observation of the learned trial Court to this effect has no legal value. He further contended that the driver and the conductor/cleaner did not implicate the appellant with the commission of crime. Per learned counsel there is clear violation of section 103 Cr.P.C. as the prosecution has not taken any independent mashir to witness the alleged recovery. The appellant has examined two witnesses in his defence to prove his innocence, therefore, the judgment of the learned trial Court is liable to be set aside. In support of his contentions, learned counsel has relied upon the cases of ***Shabbir Ahmed Versus The State 2011 SCMR 1142*** and ***Muhammad Azeem Versus The State 2014 MLD 1712 (Federal Shariat Court).***

9. On the other hand, it is contended by the learned Deputy Prosecutor General Baluchistan for the State that robbed flour was recovered at the pointation of present accused, which is sufficient to connect him with the commission of crime. Though the appellant had examined two witnesses in his defence, but their evidence is not supportive to his case, therefore, the present appeal is liable to be dismissed.

10. Admittedly, the eye-witnesses of the incident i.e. the drivers of the truck Muhammad Shafiq and Fakher-ud-Din did not implicate the present accused with the commission of crime, on the pretext that the faces of the dacoits were muffled. As such, they were unable to identify the present appellant as one of the culprits. Therefore, under these circumstances, it is to be seen that what other evidence prosecution has brought on record to connect the appellant with the commission of crime. As per the case of prosecution, the evidence against the present appellant firstly is the fard-e-inkeshaf, which allegedly he had made before the police on 31.12.2010 and secondly that at his pointation huge quantity of robbed flour was recovered. So far as the legal sanctity of the fard-e-inkeshaf is concerned, there is sufficient law on the point that such type of fard-e-inkeshaf before the police is a weak type of evidence and without any supporting evidence cannot be made basis of conviction. There is nothing on record that when the appellant was willing to confess his guilt before police then why he was not produced before any Magistrate to record his confessional statement under section 164 Cr.P.C. As far as the facts of the present case are concerned, it is the case of prosecution that 402 big bags of flour and 48 small bags were recovered from the house of Malang Khan situated in Shankai at the pointation of present appellant. It is not understandable, when the present appellant made such fard-e-inkeshaf and police party proceeded for the purpose of recovery, why they had not taken any independent mashir to witness the recovery of robbed articles. It is also the case of prosecution that the house in which robbed flour was kept was without any lock and only the room where the robbed flour was kept was locked and the recovery process consumed 3 to 4 hours. The case of prosecution is silent as to whether at the time of alleged recovery police party made any efforts to call any respectable of the vicinity to witness this recovery. Even the

driver of mazda truck in which the alleged recovered flour was brought at Police Station was not examined. Not only this but there is nothing on record that the recovered flour bags had any specific marks of identification or the complainant and other eye-witnesses of the incident identified such bags to be the same, which were robbed during the dacoity.

11. It is also important to note that there is nothing on record that when appellant was arrested in this case. In this regard specific query was made by the Court from the State counsel but he conceded to the position that there is no mashirnama of arrest of the present accused in this crime. Further, he also conceded to the position that there is nothing on record to specify that there were any specific marks of identification on recovered flour when it was handed over to the complainant under the orders of the court. In the instant case, the learned trial Court in its judgment has mainly relied upon the alleged fard-e-inkeshaf before police, recovery of robbed flour and photocopy of conviction slip passed by the learned Sessions Judge, Loralai against the appellant. Learned counsel appearing for the appellant argued that above conviction has been set aside and produced one copy of the judgment passed by the Hon'ble High Court of Balochistan, in which the present appellant was acquitted in Crime No.42 of 2007 under section 17 (3) of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979 of Police Station, Muslim Bagh. In this regard, it will be relevant to mention here that the trial Judge has relied upon the photocopy of conviction slip in Crime No.10 of 2007 by the Court of learned Sessions Judge, Loralai and the copy of judgment produced by the learned counsel for the appellant bears different crime number, therefore, it is of no help to the case of appellant. Be that as it may, the requirement of law is that prosecution has to prove its case beyond the shadow of reasonable doubt and conviction in one case cannot be made basis for conviction in some other case. It may be clarified that the conviction in some earlier case can only be made basis of severe conviction in subsequent crime by observing the convict as habitual offender. But for awarding conviction in any crime the prosecution first has to prove the charge against the culprit.

12. As discussed earlier, in the present case neither the eye witnesses identified the present appellant to be one of the culprits nor the recovery of robbed flour has been made from the exclusive possession of the present accused in presence of independent witnesses.

13. For the foregoing reasons, I am of the view that prosecution has failed to prove the charge against the appellant beyond the shadow of reasonable doubt. Therefore, he is entitled to the benefit of doubt which is accordingly extended to him. Consequently, present appeal is allowed and the judgment of the learned trial Court is set aside. The appellant Muhammad Essa is on bail, his bail bonds are cancelled and sureties are discharged.

JUSTICE MRS. ASHRAF JAHAN

Announced at Islamabad
on 11.12.2015

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

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

JAIL CRIMINAL APPEAL NO.34-I -2013

JAIL CRIMINAL APPEAL NO.07-I -2014

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

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

……. Appellants

Versus

The State …….. Respondent

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Counsel for the appellant	....	Mr. Arshad Zaman Kayani Advocate
Counsel for the complainant	....	Nemo
For the State	....	Mr. Tahir Iqbal Khattak, Additional Prosecutor General Baluchistan
No. and date of F.I.R	....	14 dated 22.5.2010
Police Station	....	Levies Headquarter District Pishin
Date of judgment of trial court	....	26.12.2012
Date of institution of the appeal	....	13.12.2013
Date of hearing and decision	....	23.9.2014
Date of judgment	....	29.10.2014

JUDGMENT

SH.NAJAM UL HASAN, J.- Sahib Khan, appellant, filed appeal against his conviction and sentences challenging the impugned judgment dated 26.12.2012 of the learned Additional Sessions Judge Pishin in the High Court of Baluchistan. The appeal was admitted for regular hearing by the Division Bench of the High Court of Baluchistan on 21.11.2013. Later, on the request of the appellant and after hearing the learned D.P.G and after going through the relevant law the Division Bench of the High Court of Baluchistan vide order dated 21.11.2013 while considering the matter falling in the jurisdiction of the Federal Shariat Court transmitted the appeal, paper book alongwith the record to this Court. Vide Order dated 10.1.2014 of this Court the appeal of Sahib Khan (J.Cr.Appeal No.34-I-2013) was admitted for regular hearing. Notice were also issued to the other two co-convicts Behram Khan and Jilani in jail whereupon appellant/convict Behram Khan sent his appeal from jail which was treated as J.Cr.Appeal No.7-I-2014. While condoning the delay his appeal was admitted for regular hearing vide order dated 19.2.2014. The 3rd convict Jilani son of Fazal Muhammad did not file appeal against his conviction and sentence.

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

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

4. During the proceedings of these appeals, vide this Court order dated 12.9.2014 a notice was issued to all the above mentioned three convicts/accused as to why their conviction, may not be altered to one under section 302(b) PPC and the sentence there-under be enhanced.

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

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

6. Investigation was conducted by Azizulllah/Naib Tehsildar (P.W.7) as a consequence of registration of crime report. He on receiving information reached the place of occurrence and arrested the above mentioned three accused persons as they were apprehended by the inhabitants of the locality. Three crime empties of 30-bore pistol were taken in possession by the I.O from the place of occurrence and during personal search Behram Khan, appellant, produced 30 bore-pistol(weapon of offence) which was sealed in parcel and taken in possession through recovery memo. Separate case under Arms Ordinance was registered against Behram Khan accused. Blood stained chaddar, waskat along with rickshaw loaded with 10 sack of chakar were also taken into possession by the I.O. As all the three accused were found injured by the I.O, so they were got medically examined by the I.O from Dr.Muhammad Naeem. After completion of the investigation, the Naib Tehsildar, I.O, submitted report under section 173 Cr.P.C before the Court requiring the accused to face trial.

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

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

i) P.W.1/Attaullah is the complainant and eye witness of the occurrence. He reiterated the version given in the FIR Ex.P/7-A.

ii) P.W.2/Abdul Raziq is witness of the occurrence.

iii) P.W.3/Hameedullah is the witness regarding circumstantial evidence of the occurrence.

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

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

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

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

9. After completion of the prosecution evidence, the learned trial court recorded the statements of the accused under section 342 Cr.P.C on 17.10.2012. The accused persons denied the allegations leveled against them. In reply to a crucial question "Do you want to say any thing else" All the accused persons individually stated as under:

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

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

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

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

12. We have observed that there is no provision of imposing fine or payment of Diyat in section 302-C PPC. Similarly, in default of payment of compensation to the legal heirs of deceased under section 544-A Cr.P.C the accused can only be detained for six months S.I, we have also observed that no reason or circumstances have been mentioned by the learned trial court in the judgment to bring the case within the purview of section 302-C PPC. The learned counsel for appellant or even the law officer remained unable to pin point circumstances or reason available with the prosecution to bring the case within the purview of section 302(C) PPC. In these circumstances show cause notice was issued to all the accused as to why their conviction and sentence be not converted from section 302(C) PPC to section 302(b) PPC and they be sentenced accordingly.

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

medical treatment is available in the prosecution case. In the FIR name of Abdul Razaq P.W.2 is not mentioned. Rather he was shown as unknown person. Later on the stance was changed and he was found to be close relative of the deceased and the complainant and ultimately he took the deceased to hospital at Quetta. Abdul Razaq P.W.2 while appearing in court has deposed that he heard the fire shots and later on found two persons injured at spot one of the injured informed that beside the driver even he has been fired upon. He did not see the accused firing at the deceased. Rather, the deceased informed his son about the description of accused who fired at him. So he cannot be termed as eye witness of occurrence. Learned counsel further states that the death certificate of the deceased indicate presence of two fire arms entry wounds on the fore-head and occipital region of the deceased and brain matter was oozing from the skull. It is stated that in such condition no one can be in position to speak, that the deceased was brought at Pishin hospital but there is no medical legal report and only death certificate issued by the doctor at Quetta has been produced. Possibility of deceased being death at spot cannot be ruled out. Three crime empties were recovered from the spot and after arrest and during personal search Behram Khan accused was found in possession of pistol. These articles were taken in possession and sealed in parcel but there is no matching report of the FSL or to indicate that pistol was in working condition. The learned counsel strongly emphasized that such short coming in the investigation makes the case highly doubtful. The complainant did not receive any injury, his presence at the spot at the time of occurrence is highly doubtful. That in the FIR no specific motive of robbery has been mentioned. It was only mentioned that the accused attacked the complainant and fired at him. Nothing was taken by the accused so matter regarding robbery was not proved and as such no one was convicted for robbery. Further states that in the absence of the fire arm Expert report the recovery of pistol from Behram Khan appellant has no value, that, in the FIR it was mentioned that a fire was made by one of the accused which landed on the head of the deceased who later on died. The death certificate and statement of the doctor who prepared the death certificate P.W.6 clearly indicate the presence of two fire shot entry wounds on the head of deceased. Such circumstances indicate conflict of medical and ocular account. Further states that P.W.3 Hameedullah was lateron called and is only the witness of circumstantial evidence. He was not present at the time of occurrence. That after the occurrence all the three accused were apprehended by person of locality but none of them was produced in court. All the three accused were found having fresh blunt weapon injuries. One of accused Sabir Khan was also found having fire arm injuries. All the three accused were got medically examined by the I.O. The doctor P.W.5 has verified the injuries. The complainant has not explained in the FIR or while appearing in court as to how the accused sustained such injuries specially the fire arm injuries of Sabir accused. That circumstances indicate that complainant and the witnesses are suppressing the truth. They were not present at the place of occurrence and as such are unaware of facts.

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

15. On the other hand learned Additional Advocate General Baluchistan while supporting the impugned judgment of the learned trial court states that the matter was reported immediately and in FIR the name of the accused were mentioned. The accused were arrested by the inhabitants of the locality and handed over to the I.O, that one of the appellant Behram Khan was found in possession of 30-Bore Pistol , three crime empties of 30-Bore pistol were recovered from the place of occurrence , so such recoveries produced corroborates to the ocular account of the complainant. Further states that P.W.2 is an independent witness and he has no reason to falsely implicate the appellant. His statement is fully corroborated by the statement of other witnesses. He is the one who took the deceased to the hospital and he was mentioned as such in the death certificate prepared and produced by the doctor P.W.6. His presence at the spot is fully proved. Further states that presence of injuries on the person of accused rather indicate their involvement in the crime. Fire arms injuries on the person of Sabir Khan appellant was duly explained to have been caused by Behram Khan co-accused but admits that nothing in respect of the fire arm injury of Sabir Khan is mentioned in FIR, the complainant while appearing as P.W.1 has completely denied the matter of fire arm injuries of Sabir Khan accused whereas P.W.2 has admitted presence of fire arm injuries on two persons. So his statement cannot be ignored. Lastly states that the appellants committed brutal act of murder which is fully proved, so they are not entitled to any concession and are liable to be convicted under section 302-B PPC and be sentenced to death.

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

17. The occurrence of this case took place on 22.5.2010 at 4.00 p.m on the road side when the complainant along with his father the deceased of this case and the three accused were going on the loader rickshaw. All the three accused took out their pistol and one of the accused fired at the father of the complainant on his head. The accused left the place and went in the mountains. At that time one passerby came. The complainant after taking mobile from him called his brother Hameedullah PW.3 who came at the spot. They took injured father to hospital along with the above said passerby (PW.2 Abdul Razzaq) the complainant came back to the place of occurrence after his father was shifted in a car on the main road. After reaching the hospital at Pishin, the doctor referred the injured to Quetta hospital as his condition was precarious. The other son of the deceased P.W.3 came back whereas the deceased was taken to Quetta Hospital by Abdul Razzaq P.W.3 (who was mentioned as unknown passerby in the FIR). It is the prosecution case the deceased died on the way to Quetta hospital, the doctor at Quetta hospital issued death certificate mentioning the name of Abdul Razzaq PW.2 as the person who identified the deceased. The complainant approached Tehsilar at Levies Headquarter, Pishin and got his statement recorded which was read over to him later on reduced into formal FIR (Ex.PW.1/A). In the FIR, the name of Abdul Razzaq was not mentioned, rather he was mentioned as unknown person. The names of all the three accused were mentioned in the FIR as statedly they were apprehended by the villagers later on and thereafter arrested and their names came to the knowledge of complainant. In the formal FIR the time of report is mentioned as 4.40 p.m. so it is clear, that at the time of registration of the FIR i.e. 4.30 p.m

the deceased had already died and the accused were arrested and that is why their names were duly mentioned in the FIR. On the other hand, the death certificate of the deceased Ex.P/6-A issued by the doctor PW.6 indicates their arrival in hospital at Quetta 6.05 p.m. So it is clear that FIR in which the deceased was shown dead was registered much before the deceased reached the hospital at Quetta. The passerby who was mentioned as unknown in the FIR was later on found to be Abdul Razzaq P.W.2 and was relative of the complainant and the deceased. No reason for not mentioning his name in the FIR and declaring him as unknown passerby is available with the prosecution, although, till then the deceased had already died, and the accused were arrested. Such circumstance makes the FIR highly doubtful specially in respect of time of its registration. In the case reported as(1995 SCMR-599-601-(Ata Muhammad and another Vs. The State) the Hon'ble Supreme Court of Pakistan has observed as under:

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

18. There is another circumstance that complainant got his statement recorded to the *Tehsildar* in the Levies Headquarter. Later on, the same was copied in formal FIR. No reason for not recording of FIR straight away in the relevant register of F.I.Rs, specially when the complainant was present there. After registration of the case Naib Tehsildar started investigation and prepared the inquest report Ex.P/7-D as required under Police Rules but such report does not carry the number of FIR, the name of the complainant, name of the witnesses even the time of occurrence and the brief facts of case are not mentioned in the inquest report. No reason for such lapse is available so an inference can be drawn that till then the name of person who was to be shown as complainant was not known. It is strange that the deceased who was father of the complainant and other witness PW.3 was taken to hospital at Quetta by Abdul Razzaq PW.2 who was mentioned as unknown passerby in the FIR and his name was not mentioned in FIR. Why the two sons did not take their injured father who was in precarious condition to Quetta Hospital and unknown person Abdul Razzaq took him to Quetta hospital. All these things put together make the FIR the statement of complainant P.W.1 and the prosecution story highly doubtful. All the three accused were named in the FIR as they were apprehended lateron and arrested by the Tehsildar before registration of the case. All the three accused were found injured have blunt weapon injury and besides that one of the accused Sahib Khan was also found having fire arm injuries. They were got medically examined by the I.O. The doctor PW.5 verified their medico legal report (Ex.P-5/A,B,C) the medico legal examination of Sahib Khan accused indicates that bullet entered his body near hip made its exit again entered his body and came out from thigh. A person with such fire arm injuries is not expected to be in position to move but the complainant has not explained such fire arm injury of the accused , rather while appearing in

court as P.W.1 the complainant has clearly denied the existence of any injury on the person of Sahib Khan accused. On the other hand PW.2 Abdul Razzaq while appearing in the court, has categorically stated that he heard fire shot and saw two persons having received fire arm injuries. Such contradictions in the statements of these two witnesses makes the prosecution case further doubtful. The complainant has assigned only single fire arm injury to Behram Khan appellant/accused alone. The death certificates and statement of Dr.P.W.6 indicate the presence of two entry and one exit wounds on the body of deceased. The complainant is the only witness who saw the accused causing injury to the deceased and such contradiction in his statement and medical evidence make the prosecution case highly doubtful. If the complainant was present at the spot he would have seen the deceased receiving two fire arm injuries and similarly he would have observed fire arm injuries on the person of sahib Khan accused.

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

19. The other witness PW.2 Abdul Razzaq was not named in the FIR, he was mentioned as unknown passerby who provided mobile phone to the complainant. Later on, the version was changed and he was shown as relative of complainant and deceased, who ultimately took the deceased to the hospital leaving behind the complainant and PW.3, who were sons of the deceased. Abdul Razzaq is not witness of firing he only heard the shot of fire arm and saw two persons having received fire arm injuries. He has not witnessed the actual occurrence of the firing and as such was not in a position to tell from his own knowledge as to who among the three accused fired at the deceased. It is the prosecution case that one of the three accused fired at the deceased whereas remaining two were not responsible for causing any injury to the deceased. The third witness PW.3 is other son of the deceased and as per prosecution he was called by the complainant after the occurrence and is not the eye witness and only narrated the circumstances which are not enough to indicate the accused responsible for killing the deceased. It is now well settled that when eye witness account is doubtful then no inference can be taken from the statements of the witness unless each part of the statements is corroborated with some other reliable material. ***In case reported as 1995 SCMR (Ata Muhammad and another Vs. the State) the Hon'ble Supreme Court of Pakistan has observed that …Ss…302/34 & 307/34 ---Murder… Ocular evidence…categories…The ocular evidence may be classified into three categories…Firstly, wholly reliable; secondly, whole unreliable; and thirdly, partly reliable and partly unreliable. In the first category conviction may safely be sustained on uncorroborated testimony. In the second category, even strongest corroborative evidence may not rehabilitate such evidence. In the third category, conviction cannot be recorded unless such evidence is corroborated by oral or circumstantial evidence coming from distinct source…..***

20. As discussed above, the FIR of this case is not worthy reliance. The motive is not proved. Nothing was taken away by the accused during the occurrence. In the FIR

robbery has not been mentioned in clear words even otherwise no one was convicted for committing robbery. Three crime empties were recovered from the place of occurrence sealed into parcel. Later on pistol was statedly recovered from Behram Khan. There is no report of fire arm expert to indicate that the empties recovered from the spot were fired from the pistol recovered from Behram Khan, accused/ appellant or to indicate that pistol was in working condition. While appearing in the court one of the recovery witness has admitted that pistol was handed over to the I.O by one of the person present and not by the accused Behran Khan. In the circumstances the recovery of the pistol does not provide any strength to the prosecution case. As discussed above the medical evidence rather contradicts the ocular account in respect of number of fire arm injuries on the person of deceased and presence of fire arm injury on the person of Sahib Khan accused which has been denied by the complainant but proved by P.W.2 and the doctor who conducted his medico legal examination just after the occurrence.

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

22. Consequently, it is clear that the witnesses produced by the prosecution are not worth reliance. The prosecution remained unable to establish guilt of the accused beyond reasonable doubt, so while extending the benefit of doubt the conviction and sentences awarded to the appellant namely Sahib Khan and Behram Khan are set aside. Their appeals are accepted. They are acquitted of the charges. They are confined in jail. They shall be released forthwith if not wanted in any other case.

23. One of the co-accused namely Jilani has not filed any appeal against his conviction His case is on similar footings than that of appellants he was convicted and sentenced by the same judgment so even he is entitled to the benefit of this judgment. Reliance is placed on case reported as 2011 SCMR-323 (Amin Ali and another Vs. The State) and 1972 SCMR-194 (Muhammad Aslam and 5 others Vs. The State) the Hon'ble Supreme Court of Pakistan has observed that '…***appeal (criminal)---Appeal to Supreme Court against conviction in a murder case…Supreme Court finding prosecution to have failed to prove its case beyond reasonable doubt…Conviction***

set aside and while acquitting all appellants conviction of one, absconding during pendency of appeal and remaining so throughout, also set aside and his acquittal recorded in absentia---Penal Code (XLV of 1860), S.302…..

24. In the given circumstances benefit of this order is also extended to the non-appellant/ convict co-accused Jilani son of Fazal Muhammad. He is also acquitted of the charge in case F.I.R No.14/2010 of Levies Station Pishin, under section 17(4) of the Offences Against Property(Enforcement of Hudood) Ordinance, 1979 and was convicted under section 302 (c) PPC along with the appellants. His conviction is set aside. He shall therefore, be released forthwith if not wanted in any other case.

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

We have announced the judgment through our short order dated 23.09.2014 and these are the detailed reasons of our aforementioned short order.

JUSTICE SH. NAJAM-UL-HASAN

JUSTICE DR. FIDA MUHAMMAD KHAN

Islamabad, 29.10.2014
Approved for reporting
Justice Sh. Najam-ul-Hasan

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

MR.JUSTICE SH.NAJAM UL HASAN
MR.JUSTICE ZAHOOR AHMED SHAHWANI
JUSTICE MRS.ASHRAF JAHAN

CRIMINAL APPEAL NO.19-Q-2014

Ubaid son of Khudadad, Caste Baloch,

Resident of Peedark, Turbat.

(Now confined in Central Jail Mach)

… Appellant

Versus

The State. Respondent

For the appellant	…	Mr.Kamran Murtaza, Advocate.
For the State	…	Mr.Nauman Shafiq,D.P.G Baluchistan.
For the complainant	…	Nemo.
No.&Date of FIR	…	No.13/2010,dt.2.9.2010
Police Station		Levies Thana Turbat, Kech.
Date of judgment of trial court	…	21.7.2011
Date of Institution in this Court	…	16.6.2014
Date of hearing	…	4.1.2016
Date of decision	…	14.1.2016

CRIMINAL MURDER REFERENCE NO. 02/Q OF 2014

The State … Appellant

Versus

Ubaid son of Khudadad Respondent

JUDGMENT:

SH. NAJAM UL HASAN, J. - Through this judgment we shall dispose of Cr. Appeal No.l9-Q-2014 (Ubaid Vs. The State) and Cr. Murder Reference No.2-Q-2014 (The State Vs. Ubaid) as both these matters are out come of the same judgment dated 21.7.2011 passed by learned Sessions Judge, Turbat, in case FIR No.l3/2010, dated 2.9.2010, registered under Section 17(4) Offences Against Property (Enforcement of Hudood) Ordinance, 1979, at Levies Thana Turbat, District Kech, whereby the appellant was convicted and sentenced as under:-

i) Under section 302(b) PPC to **DEATH** on two counts and also to pay Rs.200,000/- which was to be paid to the legal heirs of the deceased as compensation under section 544-A Cr.P.C or in default thereof to further undergo S.I for six months.

ii) Under section 324 PPC to suffer R.I for seven years and to pay a fine of Rs.10,000/- or in default to further undergo S.I for two months.

iii) Under section 337-F (v) PPC to suffer four years R.I and to pay a fine of Rs.20,000/- as Daman payable to the victim Shambay, in default to further undergo simple imprisonment till payment of Daman.

iv) Under section 337-F (vi) PPC to suffer five years R.I and to pay an amount of Rs.30,000/- as Daman payable to the victim Jada, in default to further undergo simple imprisonment till payment of Daman.

v) Under section 337-A (v) PPC to suffer ten years R.I and to pay a fine of Rs.219774/45 as Arsh payable to the victim Naz Bibi D/o Brahim, in default to further undergo simple imprisonment till payment of Arsh.

vi) Under section 337-F (ii) PPC to suffer two years R.I and to pay an amount of Rs.10,000/- as Daman payable to the victim Zaheer Khan in default to further undergo simple imprisonment till payment of Daman.

vii) Under section 337-F(i) PPC to suffer one year R.I and to pay a fine of Rs.5000/- as Daman payable to the victim Zabad Son of Darya Khan, in default to further undergo simple imprisonment till payment of Daman.

It was also ordered that the sentences shall run concurrently.

2. The appellant Ubaid filed an appeal against his conviction and sentence before the Hon'ble High Court of Baluchistan on 26.07.2011. Murder Reference under section 374 Cr.P.C was also sent by the trial court to the High Court of Baluchistan. As charge was framed under section 17(4) read with section (2) of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979 so vide order dated 29.05.2014 both these matters were sent to this Court by the Hon'ble High Court of Baluchistan on 16.06.2014 even the appellant filed an appeal No.19/Q of 2014 in this Court against the impugned judgment whereby he was convicted and sentenced by the learned Sessions Judge Turbat. The murder reference sent by the Hon'ble High Court of Baluchistan was numbered as 2/Q of 2014 in this Court.

3. The brief prosecution case as narrated in FIR registered on the written application of Lal Bakhsh complainant (P.W.5) is that on 1.9.2010 he along with his family members, relatives and others were on their way on a bus to Turbat from Karachi for 'ziarat' of Koh-e-Murad in Baluchistan. On their way on 2.9.2010 at about 4.00 p.m they reached the mountainous area of Pasni-Turbat, when they were stopped by four armed culprits. Two of them armed with Kalashnikov were present on the nearby mountain while the other two with muffled faces were on the road. One of them was having a Kalashnikov with him whereas the other was empty handed. They entered the bus and on gun point tried to snatch the ornaments, cash and other valuable things from the complainant, his family members and other passengers. On resistance, the accused having Kalashnikov with him made firing which resulted in injuries to Wahag, Shambay,P.W.9,Jada, Allah Bakhsh, Abdul Rehman, Mst. Naz Bibi, Habib, Zabad, Zaheer Khan, Hani and Wahid Baksh. The passengers continued their struggle and were successful in apprehending both the accused along with his Kalashnikov. At this stage indiscriminate firing was made by the two accused who were present on nearby mountain. In result of their firing the accused who was empty handed and was present near the bus received serious injuries. On seeing this, the accused who were on the mountain escaped from the site of occurrence. The name of the accused apprehended with Kalashnikov was disclosed as Ubaidullah son of Khudadad (the appellant). The name of the other accused who received firearm injuries at the hand of his own co-accused was disclosed as Abdul Hameed son of Khudadad. The complainant, the injured along with both apprehended accused and the other passengers were on their way to hospital when the injured Mst.Hani, Wahid Bakhsh and accused Abdul Hameed succumbed to their injures and died.

4. After receiving information the Tehsildar Turbat along with other Levies officials came and met them on the way to hospital. The apprehended accused along with Kalashnikov and the dead body of the other accused was handed over to them. Later on the complainant Lal Bakhsh, P.W.5 submitted written application to Tehsildar which was sent to the police station on which the FIR No. 13/2010 was registered against the appellant and his co-accused under section 17(4) Offences Against Property (Enforcement of Hudood) Ordinance, 1979, at Levies Thana Turbat, District Kech.

Just after reaching hospital at 6.45 p.m Dr.Noor Zaman,P.W.7 medically examined injured Wahag, Shambay,P.W.9, Jada, Allah Bakhsh, Abdul Rehman, Naz Bibi, Zaheer Khan, Habibullah, Zabad and found fire arm injuries on their bodies. Their medico legal reports were prepared and later on handed over to the I.O. The doctor also examined the dead bodies of Mst.Hani and Wahid Bakhsh and found bullet wounds on their bodies which are declared as their cause of death. The doctor declared the duration of injuries as fresh and weapon used as fire arm. Even their medical reports were prepared and later on handed over to the I.O.

The I.O arrested Ubaid accused/appellant who was having some injuries on his body so he got him medically examined through Dr.Attaullah,P.W.6 on the same day i.e 2.9.2010 at 8.20 p.m. The doctor found lacerated wound on the left forearm

and there were multiple bruises on the whole back of chest with different size and red colour. According to the doctor the nature of injuries was simple. The dead body of co-accused Abdul Hameed who died on the way to the hospital was also examined. The doctor found an entrance bullet wound on the right side, just below the right eye orbit and exit wound was seen in the left frontal bone of skull. There was also a two centimeter open wound at the back of head, depth of wound was about two centimeter and bone was also broken. Medical report was prepared and handed over to the I.O.

5. After registration of FIR and during investigation the I.O took into possession Kalashnikov along with 11 live bullets statedly taken from the appellant Ubaid during the occurrence by the complainant vide recovery memo duly attested by the witnesses. The 1.0 inspected the place of occurrence in presence of witnesses and took into possession from nearby the place of occurrence 18 crime empties of 7.62 MM Rifle along with three missed cartridges and sealed them into parcel. He also took a black colour muffler used by the accused during the occurrence. A burnt motorcycle Irani made was found at the place of occurrence was taken into possession through the recovery memo duly attested by the witnesses. Site plan was prepared on the instruction of the witnesses. During investigation Ubaid accused/ appellant admitted the occurrence and rather named the two other accused who were present on the mountain as Shoukat and Salahuddin. The I.O. searched for them and ultimately they were declared proclaimed offenders. After completing the investigation challan was submitted in the court and after fulfilling the legal requirement charge was framed against the appellant who pleaded not guilty and faced the trial.

6. During the trial, the prosecution produced ten witnesses to prove the ocular account, the recoveries and the medical evidence. Positive report of Fire Arm Expert was also produced. The medical evidence was produced through P.W.6 and P.W.7. Dr. Attaullah M.O, D.H.Q Hospital, Turbat appeared as P.W.6. He at the instance of Tehsildar medically examined the accused/appellant Ubaid on the day of occurrence i.e on 2.9.2010 at 8.20 p.m and found three injuries caused by blunt mean on his person. The injuries were fresh. At the same time he examined the dead body of Abdul Hameed co-accused and found fire arm injury and a blunt weapon injury on his person. The injuries were found fresh and were the cause of death. He verified their medicolegal certificates prepared by him which were exhibited. Dr. Noor Zaman appeared as P.W.7. He was M.O of DHQ Hospital Turbat and on the day of occurrence at 6.45 p.m he medically examined nine injured persons of this case and also examined the two dead bodies of the victim and found fire arm injuries on their persons. The injuries were fresh. He verified the Medico-legal certificate prepared by him in this respect which were duly exhibited. P.Ws 2,3 and 4 are the recovery witnesses. P.W.2 was the witness of production of weapon by the complainant to the I.O which was taken from the accused Ubaid during the occurrence. P.W.3 is a recovery witness of clothes and other articles of the injured and deceased produced by the doctors. P.W.4 is the recovery witness of 18 crime empties, three missed cartridges, blood stained earth and the burnt motorcycle along with the black muffler used by the accused to cover his face during the occurrence. P.W.10 is the

I.O and he found the appellant fully involved in this case during the investigation and prepared the challan.

7. The ocular account has been produced through P.Ws 1,5,8 and 9. P.W.5 is the complainant whereas P.W.9 is the injured witness of this occurrence. P.W. 1 and P.W.5 have categorically stated that the appellant entered the bus and firing took place inside the bus in which the injured and the deceased received fire arm injury at the hand of the appellant Ubaid whereas the deceased accused received injuries with the firing made by their co-accused who were on the mountain. On the other hand P.W.8 and P.W.9 took a different stance and stated that the firing was made on the bus by the accused who were present on the mountain in result of which the injured and the deceased received fire arm injuries. The appellant Ubaid was assigned the role of causing firing arm injury to Jada injured, whereas the co-accused Hameed died because of the injuries caused by the firing of the two P.Os who were firing from the mountain. All these witnesses were consistent on the point that the appellant Ubaid was apprehended at the spot along the Kalashnikov whereas the co-accused Hameed died because of firing of their co-accused who were present on the mountain. All the witnesses are consistent in respect of time, date and place of occurrence. They are also consistent on the point that the occurrence was result of robbery committed by the four persons during which two persons from their side lost their lives whereas nine received fire arm injuries and one of the accused died in the occurrence because of firing of his co-accused. The report of Fire Arm Expert indicates that all the 18 empties recovered from the spot matched with the rifle statedly recovered from the appellant.

8. After conclusion of trial, the appellant made statement under section 342 Cr.P.C denying his involvement in this case. He did not opt to make statement on oath under section 340(2) Cr.P.C or produced any defence evidence. The learned trial court vide impugned judgment dated 21.7.2011while altering the charge from section 17(4) Offences Against Property (Enforcement of Hudood) Ordinance, 1979 to under section 302,324 and 337 PPC convicted and sentenced appellant Ubaid as mentioned in the opening para of this judgment.

9. Mr. Kamran Murtaza, Advocate, learned counsel for the appellant states that record indicates that FIR was registered after delay of more than 24 hours. It is stated in FIR that the complainant and others started their journey on 1.9.2010 and on their way at 4.00 p.m the occurrence took place, whereas the FIR was registered on 2.9.2010 at 4.00 p.m such a delay in FIR makes the prosecution case highly doubtful. Further states that in the charge framed by trial court, the date of occurrence is mentioned as 2.09.2010 and thereafter the prosecution has changed the whole concept of evidence and tried to bring the case to have taken place on 02.09.2010 and the same is evident from the fact that the date of occurrence is over-written in the FIR; that statedly nine persons were injured in this case, four eye witnesses have been produced by the prosecution which include only one injured witness i.e P.W.9 Shambay; no other injured witness was produced by the prosecution and in the presence of injured witnesses the production of other eye witnesses makes the prosecution case highly doubtful. Even otherwise, such lapse in not producing the natural and important

witnesses leads to an inference against the prosecution and in favour of the appellant. The learned counsel states that site plan was got exhibited by the prosecution through P.W.10,I.O who statedly prepared the same with the instruction and assistance of eyewitnesses, that the site plan indicates a different story. It shows that the bus was taken to a deserted place from the main road where the occurrence took place. Similarly, it describes the presence of a burnt motorcycle at the spot but the prosecution case does not speak a word as to how the motorcycle was burnt. Such change of place of occurrence and missing evidence about burning of motor cycle makes the prosecution case doubtful and clearly indicate that the prosecution has withheld some important facts and in such circumstances the appellant is entitled to benefit of doubt. The appellant was found injured by the IO just after the occurrence. He was medically examined and the doctor observed serious injuries caused by blunt means on his person which were fresh the prosecution has not explained the injuries on the person of the appellant. The recovery of Kalashnikov from the appellant was not made in presence of the I.O rather the Kalashnikov was produced by the complainant to the I.O stating that the same was snatched from the accused during the occurrence. Possibility of the Kalashnikov being used by the deceased co-accused cannot be ruled out. Even otherwise, the Kalashnikov and the empties were sent together to the Fire Arm Expert after an unexplained delay which makes the report of the Fire Arm Expert highly doubtful.

10. Learned counsel strongly emphasizes on the point that all the four eye witnesses are not consistent in respect of place of firing with which the deceased and injured received injuries in this occurrence, from inside or outside the bus. Similarly the witnesses are not consistent with each other on the point as to with whose firing the injured and the deceased received fire arm injuries. None of the injured has been produced to explain as to who caused his injury. Only P.W.9 Shambay the injured witness has been produced and while appearing in witness box he has clearly assigned the injury on his person to the accused who was firing from the mountain and not the appellant. Learned counsel further states that no crime empty was recovered from inside the bus, rather, the I.O, P.W.10 has stated that nothing was recovered from inside the bus and all the crime empties were lying outside the bus so the statements of P.Ws 1 and 5 that firing was made inside the bus, contradicts the circumstances and the evidence of P.W.8 and P.W.9 who said that the firing was made by the two co-accused who were present on the mountain in result of which the deceased and injured received fire arm injuries. Such a contradiction in the statement of eye witnesses makes the case doubtful calling for benefit of doubt in favour of appellant. Lastly, it is stated that as the injured witness produced as P.W.9 and the eye witness as P.W.8 have categorically stated that all the injured and the deceased received injuries at the hand of the two accused who were present on the mountain and the appellant was only responsible for causing injury to one Jada so in the circumstances the appellant is not entitled for conviction for murder under section 302 PPC and as Jada who statedly received injury at the hand of appellant has not been produced in court, therefore, his conviction and sentence for causing him injury or any one-else is also liable to be set aside.

11. On the other hand, Mr.Nouman Shafiq, Deputy Prosecutor General Baluchistan states that in the FIR it is clearly mentioned that the complainant and other witnesses started their journey on 1.9.2010 and on their way on the next day the occurrence took place at 4.00 p.m when they were crossing the mountain. Similarly, all the four eye witnesses while appearing in court have clearly stated that the occurrence took place on the next day of their journey on 2.9.2010 at 4.00 p.m. The FIR was registered at 6.00 p.m so this is a case of promptly lodged FIR in which the name and role of the accused/appellant is duly mentioned. This is an occurrence in which nine persons from complainant's side received fire arm injuries and two persons lost their lives whereas one of the co-accused of the appellant also died in this occurrence and two of the co-accused are still proclaimed offenders. The appellant was apprehended at the spot. The presence of certain injuries with blunt means on his person which were found fresh by the doctor in the prompt medical examination, rather indicates his involvement in this case. He was apprehended with the Kalashnikov which was later on found matched with the crime empties recovered from the spot. All the eye witnesses fully involved him in this occurrence. All the accused came together while armed with fire arms they were having common object and intention to commit robbery and as such all of them are jointly and severely liable and entitled to full doze of punishment. The learned Law Officer states that the presence of burnt motorcycle and the change of place of occurrence to a deserted place does not affect the conviction of the appellant in this case. The learned law officer states that in the judgment previous involvement of the appellant in another case is mentioned but admits that no record in this respect is available in the file and no question in this respect has been asked in statement under section 342 Cr.P.C. Lastly, stated that involvement of appellant in this case is fully established, he has committed a heinous offence and is not entitled to any concession.

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

13. Admittedly, the complainant and the others started their journey on 1.9.2010 and the occurrence took place on their way on the next day i.e 2.9.2010 at 4.00 p.m. The FIR was registered at 6.00 p.m-and the injured were examined by the doctor in the hospital at 6.45 p.m so this is a case of promptly lodged FIR. The time of occurrence is rather confirmed from the medical evidence. The name of the appellant is mentioned in the FIR. He was apprehended at the spot along with a weapon of offence. He was handed over to the Tehsildar before registration of case along with weapon of offence. He was medically examined and the doctor observed certain injuries caused by blunt means on his person. The injuries were fresh and rather corroborates the prosecution version, that a scuffle took place in which the appellant was apprehended along with weapon. Nine persons of complainant side received fire arm injuries in this occurrence. They were immediately medically examined at 6.45 p.m in hospital. The doctor observed the fire arm injuries to be fresh. Two persons lost their lives in this occurrence at the hand of the accused. Their dead bodies were examined just after few hours of the occurrence and the doctor found the injuries on their person to be fresh. One of the co-accused of the appellant statedly received fire arm injury at the hand of his co-accused. He died

on the way to hospital. His dead body was examined by the doctor who found his injuries to be fresh and caused by fire arm. All these things put together leads a clear inference that the appellant along with his deceased co-accused and two proclaimed offenders were involved in this occurrence of robbery and during the occurrence by their firing, nine persons were injured and two persons lost their lives and one of the accused died in the same process. The appellant was apprehended at the spot and was handed over to the Tehsildar alongwith his weapon which he used in the occurrence. Crime empties were recovered from the place of occurrence. Later on sent to the Fire Arms Expert and it was observed that they were fired from the Rifle used and recovered from the appellant. So in the facts and circumstances the involvement of the appellant under section 394 PPC is fully established. In section 394 PPC it is stated that;

> *"if any person, in committing or in attempting to commit robbery, voluntarily causes hurt,* ***such person,*** *and* ***any other person jointly concerned in committing or attempting to commit such robbery*** *shall be punished with imprisonment of life or with rigorous imprisonment for a term which shall not be less than four years nor more than ten years, and shall be liable to fine ".*

14. Charge was framed under section 17(4) Offences Against Property (Enforcement of Hudood) Ordinance, 1979 indicating that the appellant along with his deceased co-accused Hameed and two P.Os Shoukat and Salahuddin while armed with Kalashnikov stopped the bus after firing at it and attempted to loot the passengers and in the process killed two passengers and injured many others with their firing. The learned trial court after conclusion of the trial convicted the appellant only under sections 302,324,337 PPC.

15. Section 20 of Offences Against Property (Enforcement of Hudood) Ordinance, 1979 is that;

> *"whoever commits haraabah which is not liable to the punishment provided for in section 17, or for which proof in either of the forms mentioned in section 7, or for which punishment of amputation or death may not be imposed or enforced under this Ordinance, shall be awarded the punishment provided in the Pakistan Penal Code for the offence of dacoity, robbery of extortion, as the case may be."*

From the circumstance and in evidence produced during the trial it is established that appellant along with his deceased co-accused and two proclaimed offenders jointly attempted to commit robbery while armed with firearm weapon and in the process of this attempt they caused firing in result of which two persons died and nine received fire arm injuries. So, it is clear that offence under section 394 PPC is clearly made out and the learned trial court has erred in not convicting the appellant under section 394 PPC while relieving from section 17(4) Offences Against Property (Enforcement of Hudood) Ordinance, 1979.

16. The appellant along with the deceased/accused and two proclaimed offenders jointly with their common intention and for common object committed this occurrence in which

two persons were killed and others received fire arm injuries. So, every one of them is jointly and severely liable to some extent for the murder and causing injuries, to the innocent victim even if they are not responsible for causing any specific injury to anyone.

17. To establish the liability of appellant in this respect we have considered the statements of all the four eye witnesses to find out the role assigned to the appellant. In the FIR it is stated that the appellant entered the bus along with his co-accused and with his firing all the injured and the deceased received fire arm injuries. The appellant was apprehended along with his Kalashnikov and at that time the co-accused who were on the mountain started firing in result of which their own companion Hameed received fire arm injuries and later on died. While appearing in court as P.W.5 the complainant narrated the same story. P.W.1 Badal also took the same stance. P.W.9 Shambay the injured witness took a different stance. He stated that two armed persons were on the mountain whereas two were on the road with muffled faces. One (the appellant) was having Kalashnikov. Firing was made on the bus by the accused who were on the mountain in result of which all the injured and deceased received fire arm injury. The appellant was having a Kalashnikov. He was apprehended by Gul Muhammad P.W and Jada, the appellant fired at Jada but still he was not released, resultantly, the two accused present on the mountain started firing in result of which one of their own companion Hameed received fire arm injury and later on died. The appellant was apprehended along with Kalashnikov and was handed over to the Tehsildar. P.W.8 Gul Muhammad took the similar stance, so this is a case for which prosecution has taken two different stances.

In this situation, while taking guidance from case reported in 1976 SCMR 185 (Muhammad Din alias Manna Vs. The State). Relevant portion for this case is reproduced as under:

> **S.302- (Murder case)-Appreciation of evidence-Entire evidence of witness-Cannot be rejected simply on ground of his having exaggerated part played by some accused on falsely implicating some-Duty of Court-To sift grain from chaff…….,**

So we have to sift grain from chaff to ascertain the correct position. The injured witness Shambay PW-9 and the eye witness P.W.8 Gul Muhammad have taken the stance that the appellant caused firing on one Jada and the remaining injured and the deceased received fire arm injury at the hand of the co-accused who was standing in the mountain whereas the complainant PW-5 and P.W.I Badal has stated that the appellant entered the bus and because of his firing inside the bus the injured and the deceased received fire arm injury. Only the co-accused Hameed received the injuries at the hand of his co-accused who were present on the mountain. The I.O while appearing in court has stated that nothing was recovered from inside the bus and all the crime empties were lying outside the bus, so we think the version taken by the injured witnesses whose presence at the spot cannot be denied and whose statement is corroborated by recovery of crime empties from outside the bus is more reliable. So, the prosecution succeeded in establishing that the appellant was present along

with his co-accused with the common object and intention of committing robbery and in process of committing such offence, he caused injury to one of the injured Jada whereas his co-accused who were present on the mountain caused injury to the remaining injured and the deceased of this case. Even the co-accused received injury at the hand of those accused who were present on the mountain, the appellant was not assigned any injury to the deceased or the injured except Jada. So, in the given circumstances there is insufficient evidence to indicate clear involvement of the appellant in committing murder of both the deceased or killing their own co-accused. Jada has not been produced in court and Shambay P.W.9 the sole injured witness produced in court categorically assigned his injury to the other accused who were on the mountain.

18. The medical evidence does not indicate or confirm any thing that any of the injured or the deceased received injuries at the hand of the appellant. The positive report of the Fire Arm Expert is of no use, specially when the weapon and empties were sent together to Fire Arm Expert at much belated stage and while keeping in view that the Rifle was produced by the complainant to the I.O and was not recovered from the appellant in presence of I.O.

19. In the circumstances, the net result is that as discussed in paragraph-14, the appellant is clearly involved and liable under section 394 PPC. The appellant was having common intention and has acted for common object to commit robbery in the process of which two persons were killed and many were injured so the appellant is also vicariously liable under section 302(b) and 324 PPC.

20. There is no evidence to indicate or assigned any specific injury on any of the injured to the appellant. The injury on injured Jada was assigned to the appellant by the P.W-8 and PW-9 but Jada was not produced to verify the same, so conviction of the appellant for causing any injury to any of the injured is not proved or made out. Consequently, the conviction and sentence of the appellant in this respect under section 337-F (v), F(vi), A(v), F(ii), F(i) PPC for causing injury to any of the injured is set aside.

21. Considering the proved facts of the prosecution case the appellant is convicted under section 394 PPC and is sentenced to life imprisonment with fine of Rs. 10,000/- or in default to further undergo S.I for three months. He is also convicted under section 302(b) /34 PPC and is sentenced to life imprisonment on two counts with the compensation of Rs. 10,000/- on each count to be paid to the legal heirs of the two deceased Mst.Hani Kamalan and Wahid Bakhsh under section 544 -A Cr.P.C in default in payment to further undergo 3 months S.I on each count. His conviction and sentence of 7 years R.I with fine of Rs. 10,000/-and in default to further undergo two months S.I under section 324 PPC is upheld. Benefit of section 382-B Cr.P.C shall also be extended to the appellant. All the sentences shall run concurrently.

With this modification in the conviction and sentence, the appeal is disposed of.

The murder reference bearing No.2-Q-2014 is answered in the ***Negative.***

MR. JUSTICE SH. NAJAM UL HASAN

MR. JUSTICE ZAHOOR AHMED SHAHWANI

JUSTICE MRS. ASHRAF JAHAN

Announced on **14.1.2016.**

At Islamabad/ M.Akram/

APPROVED FOR REPORTING.

MR. JUSTICE SH. NAJAM UL HASAN

IN THE FEDERAL SHARIAT COURT
(Appellate /Revisional Jurisdiction)

PRESENT

MR.JUSTICE SH.NAJAM UL HASAN
MR.JUSTICE ZAHOOR AHMED SHAHWANI

CRIMINAL APPEAL NO.21-Q-2012

Aminullah son of Haq Dad,
Caste Meerzai, Resident of Babo Cheena Murgha,
Muslim Bagh District Killa Saifullah

… Appellant

Versus

The State

Respondent

For the appellant	…	Mr.Masoom Khan Kakar, Advocate
For the complainant/petitioner	…	Mr.Mehmood Sadiq Khokhar, Advocate.
For the State	…	Mr.Abdul Sattar Khan Durrani Addl.P.G Baluchistan
No.& Date of FIR	…	No.05/2011,dt.16.1.2011
Police Station	…	P.S Muslim Bagh,Distt;Killa Saifullah
Date of judgment of trial court	…	16.5.2012
Date of Institution in this Court	…	20.6.2012
Date of hearing	…	3.6.2015.
Date of decision	…	5.6.2015

CRIMINAL REVISION NO.01-Q-2012

Attaullah son of Kalo Khan,Caste Jaffar,

Resident of Duki Loralai … Petitioner

Versus

1. Aminullah son of Haq Dad
2. The State … Respondents

For the petitioner	…	Mr.Mehmood Sadiq Khokhar, Advocate.
Date of filing in this Court	…	18.7.2012.
Date of hearing	…	3.6.2015
Date of decision	…	5.6.2015

JUDGMENT

SH.NAJAM UL HASAN, J. - Through this judgment we are deciding Cr.Appeal No.21-Q-2012 filed by appellant Aminullah and Criminal Revision No.1-Q-2012 filed by the complainant Atta Ullah for enhancement of sentence of Aminullah from life to death. Appellant Aminullah was convicted under section 302-B PPC read with section 308 PPC and section 379 PPC. He was sentenced to life imprisonment under section 302 (b) and also to pay Diyat amount as prescribed by the Government for the year,2011-12 to the legal heirs of the deceased Zafarullah as provided under section 308 PPC. He was also sentenced to three years R.I under section 379 PPC and was to pay a fine of Rs.10,000/- or in default thereof to further undergo S.I for six months. Benefit of section 382-B Cr.P.C was also extended to him. While co-accused Bismillah was acquitted by learned Additional Sessions Judge Killa Saifullah vide judgment dated 16.5.2012 in case FIR No.05/2011, dated 16.1.2011 under section 17(4) Offences Against Property (Enforcement of Hudood) Ordinance, 1979 registered at police station Muslim Bagh District Killa Saifullah.

2. It is the prosecution case that on 16.1.2011 the complainant Atta Ullah got registered FIR No. 05/2011 of this case. It was stated that his brother Zafarullah was working in Public Health Department and he also used to drive Town Ace wagon on hire. He left for his house along with the wagon on 13.1.2011 and thereafter his mobile phone was found switched off. On 16.1.2011 dead body of his brother was found lying under the bridge and he was strangulated to death. The dead body was recovered on 15.1.2011 so proceedings under section 174 Cr.P.C were initiated in consequence thereof. On the written application of the complainant post mortem examination of the deceased was not conducted and only medico-legal examination of the deceased was conducted by the doctor P.W.10 who opined that the deceased died because of strangulation two three days ago. The dead body was handed over to the complainant and his relative. During investigation, on secret information the Town Ace wagon was recovered from a Star Show Room of Abdul Hakeem alias Gul Agha, P.W.2. The appellant was arrested on 28.1.2012 and during investigation got recovered the cash of sale price which he received after selling the wagon of deceased to Aminullah son of Abdul Salam, P.W.3. On 29.1.2011 the appellant was identified by Abdul Hakeem alias Gul Agha,P.W.2, the owner of the car show room and Aminullah son of Abdul Salam purchaser of the wagon P.W.3. In the identification parade got conducted by DSP the appellant made confessional statement before the Judicial Magistrate on 7.2.2011 in which he also implicated his brother Bismillah as his co-accused. Bismillah was arrested on 28.2.2011 and he also faced the trial along with Aminullah. Challan was submitted in the court. Charge was framed against both the accused who pleaded not guilty.

3. The prosecution produced 12 witnesses to prove its case. Thereafter the appellant and his co-accused made statement under section 342 Cr.P.C. The appellant appeared as his own witness under section 340(2) Cr.P.C and also produced two witnesses Sawab Khan and Ahmedullah as D.W.1 and D.W.2 to prove his version. That he was working in the show room of P.W.2 and there was dispute over payment of salary to appellant with P.W.2.

4. The learned trial court after concluding the trial, vide order/judgment dated 16.5.2012 convicted the appellant Aminullah under section 302-B PPC read with section 308 PPC and under section 379 PPC and sentenced him as mentioned above. The co-accused Bismillah brother of the appellant Aminullah was acquitted. No appeal against acquittal of Bismillah is before us.

5. The learned counsel for the appellant inter- alia contends that the FIR was lodged after un-explained delay of three days. That there is no eye witness of the occurrence in which the deceased lost his life. The stolen Wagon of the deceased was recovered from P.W.2 and P.W.3 Abdul Hakeem and Aminullah son of Abdul Salam and not from the appellant, that the recovery of Rs.103000/- statedly the amount which the appellant took after selling the wagon does not tally with the sale receipt or the statements of P.W.2 and P.W.3, that the vehicle was purchased by them for Rs.130,000/-. It is stated that picture of the appellant with the purchaser later-on found in the mobile of Najeebullah,P.W.4 does not connect the appellant with the commission of this offence. The appellant has taken a specific stance that such photographs in the mobile phone of Najeeb Ullah P.W.4 was taken when appellant was working with P.W.2 Abdul Hakeem in his car show room. The pointation of the place of murder by the accused is not admissible under Article 40 of the Qanun-e-Shahadat Ordinance, 1984. It is argued that some important witnesses such as the person in whose mine the appellant was statedly working. Qaisar Khan Tareen who statedly called P.W.2,the very next day and informed that a wagon was snatched and driver was missing. Even Mullah Waheed who was statedly relative of the deceased and who came to the car show room of P.W.2 along with the complainant and identified the wagon of deceased were not produced. The learned counsel strongly criticized the identification proceedings of appellant by the DSP and confessional statement of the appellant by the Magistrate, P.W.9. It is stated that the appellant was in police custody, so such identification of the appellant has no value. The confessional statement was made after 12 days of his arrest as he was tortured by the police. Lastly it is stated that in absence of any direct evidence the appellant was not entitled to conviction solely on his retracted judicial confessional statement which he made after considerable delay. The appellant was handed over to the same police after confessional statement was recorded in violation of rules, that the co-accused with the same role has been acquitted, so the appellant deserves the same relief.

6. On the other hand, learned counsel for the complainant has defended the prosecution case by submitting that the witnesses produced by the prosecution had no enmity to falsely implicate the appellant, that the chain of the circumstance is so linked with each other that it only leads to clear involvement of the appellant in the murder of the deceased. The appellant was duly identified by the independent witnesses as a person who sold the stolen vehicle of the deceased on the very next day, when the deceased was found missing with his wagon. The appellant impersonated himself and showed himself to be the brother of the deceased Zafarullah and produced identity card of deceased and the identity card of his mother and father and while showing himself to be brother of Zafarullah deceased sold the wagon of deceased to P.W.2 and P.W.3. The picture of the appellant was found available in the mobile

phone of Najeebullah who appeared as P.W.4 . He took the pictures of appellant secretly when he came to sell the stolen wagon of deceased. He identified the appellant as the same person who sold the vehicle of deceased to P.W.2 and P.W.3. The judicial confession of the appellant speaks lauds of truth as for the first time the appellant introduced his brother Bismillah as his accomplice. The confessional statement gets corroboration from the recovery of the sale amount of stolen wagon of deceased at the pointation of the appellant from a box in his house. In the medical evidence, presence of injuries on hand of deceased corroborates his confessional statement wherein he stated that firstly the hands of the deceased were tight and later-on he was murdered while strangulating him with cloth. The recovery of the wagon and the presence of the pictures of the appellant in the mobile phone of Zafarullah before the registration of case are the circumstances which clearly connect the appellant with the commission of the crime. The learned counsel states that the prosecution has proved its case beyond any reasonable shadow of doubt.

7. The learned Additional Prosecutor General Baluchistan has adopted the arguments of learned counsel for the complainant while defending the prosecution case. He added that the appellant was not entitled to any concession or leniency. He should have been sentenced to death. He has killed an innocent man. It was a cold blooded murder so his sentence of life imprisonment be converted to death.

8. We have heard learned counsel for the parties and have also gone through the record and evidence recorded by the learned trial court.

9. The deceased Zafarullah was found missing along with the Town Ace wagon on 13.1.2011. On 14.1.2011 the appellant came to the car show room of Abdul Hakeem alias Gul Agha P.W.2 to sell the vehicle. He showed himself to be brother of Zafarullah deceased and to prove it, he produced the identity card of Zafarullah, his mother Mst.Taj Bibi and his father Gul Khan further stated that he wanted to sell wagon in emergency as their close relative is in hospital. The wagon was purchased by Aminullah son of Abdul Salam, P.W.3 and he statedly paid Rs.130,000/- to the appellant and the transaction regarding the sale was duly written on the pad of the Show room signed by the parties. The van was kept in the show room when on the next day P.W.2 Abdul Hakeem of the show room received a phone call from one Qaisar Khan Tareen of Daki. He informed that a wagon Town Ace was snatched and its driver was missing. He was informed by P.W.2 Abdul Hakeem that a wagon has been sold through him to Aminullah P.W.3 and that the wagon is still lying in the show room. Later on one Mullah Waheed statedly relative of the deceased came to the show room along with the complainant Atta Ullah and they identified the wagon to be the same which Zafarullah deceased was driving. The complainant was shown the pictures of the appellant snapped by Najeebullah P.W.4 on his mobile phone the complainant identified the appellant as a worker of mine. The photo copy of identity card of Zafar Ullah the deceased and that of his mother and father were also identified by the complainant to be that of his deceased brother, mother and father. On 15.1.2011 the dead body of the deceased was found and was identified through the copy of the identity card found in his pocket. He was found strangulated to death. There was a piece of cloth and string around his

neck. His body was medically examined and he was found dead 2/3 days prior to the recovery. Later on the body was identified by the complainant on the next day to be that of his brother Zafarullah, and FIR was registered. During investigation the stolen vehicle was recovered from the show room of P.W.2 and was taken into possession by the police along with mobile phone having the photographs of the appellant and the identity card of the deceased, his mother and his father and his service card. The appellant was arrested on 28.1.2011. He was identified by both the witnesses Abdul Hakeem and Aminullah P.W.2 and P.W.3 the persons to whom the appellant sold wagon of the deceased on the next day when he was found missing, the mobile phone of Najeeb Ullah P.W.4 was also taken into possession which was having photograph of the appellant statedly snapped at the time when he was selling the vehicle to P.W.2 and P.W.3 as he was not having his identity card. During investigation the appellant got recovered an amount of Rs.103000/- from a box in his house statedly the amount which he received by selling the stolen wagon of the deceased. The investigation was in process when on 7.2.2011 the appellant made a request for making judicial confession. He was produced before the Magistrate who after fulfilling all the procedure and informing the appellant of the consequences of making such confessional statement and after informing that he would not be sent the police after making such statement and after being satisfied that the appellant was making statement voluntarily and without any fear and after providing appellant time to think the statement was recorded. The appellant in his judicial confessional statement before Magistrate Ist Class admitted his guilt and narrated each part of the story. He admitted of hiring the wagon of the deceased. Later-on he along with his brother tied the hands of the deceased with the rope, as they were identified by the deceased so they strangulated him with the cloth which was available in the wagon and threw him under the bridge and took away the wagon to the show-room and sold the same to P.W.2 and P.W.3. In his statement under section 340(2) Cr.P.C the appellant retracted his confession but admitted his picture available in the mobile phone of Najeeb Ullah by saying that the same was snapped when he was working in the show-room of Abdul Hakeem, P.W.2. He admitted of making the confessional statement before a Magistrate but stated that the same was made as he was earlier tortured by the police. No sign of torture was observed by the Magistrate who recorded the confessional statement of appellant. Even the appellant was asked by the Magistrate Ist Class if he was tortured by the police to which he answered in negative. This is a case which is based on circumstantial evidence coupled with the retracted judicial confessional statement of the appellant, and the recovery of sale amount received by the appellant after selling the wagon of the deceased to P.W.2 and P.W.3, the medical evidence is relevant as statedly the deceased died 2/3 days prior to the recovery of the dead body so the medical evidence fully corroborate the time of occurrence. The wagon was sold on the very next day through fake identity of the appellant. The presentation of identity card and service card of the deceased, the copy of identity card of the mother and father of the deceased to P.W.2 and P.W.3 on the very next day when the deceased was found missing even before registration of the case at the time of selling of the stolen vehicle of deceased indicates his clear involvement in this murder. Availability of such identity cards with him fully supports the prosecution

case. The circumstance and the medical evidence indicate that the appellant was killed on the very same day when the van was hired. After murder of the deceased the wagon was sold on the next day by the appellant while impersonating himself as brother of deceased Zafarullah. The sale amount was received by him and was kept in a box in his room by him which was later-on recovered on his pointation, is a circumstance which supports and corroborates the judicial confession of the appellant. The presence of photo of the appellant in the mobile phone of Najeeb Ullah P.W.4 an independent witness, which he snapped at the time when appellant came to sell the stolen vehicle of the deceased is a very strong evidence which connects the appellant with this crime.

10. While appearing as his own witness and by producing his brother and an other witness in his defence the appellant has tried to make the case of his false involvement due to enmity with P.W.2 Abdul Hakeem as he was working in his show-room and he was not paid his salary. The appellant did not take this stance in his statement before Magistrate or thereafter when he was produced before Magistrate on different dates for remand or even before the trial court when he was produced on different dates. It was only after the trial was concluded and while making statement under section 342 Cr.P.C that he has been involved because of enmity. In this case the complainant remained associated with the investigation and accepted the appellant to be the main culprit. He has filed revision petition for enhancement of appellant's sentence bearing Cr.Rev.No.1-Q-2012 he is pursuing the case till date against the appellant. No reason for him to leave real culprit who killed his brother and involved the appellant who has no enmity with him has been brought on record. The appellant made a confessional statement on 7.2.2011 at the time of making such statement a specific question was asked by the Magistrate, in respect of any torture or threat by the police the appellant answered in negative. Even the Magistrate himself did not observe any sign or symptom of torture , he after satisfying himself and after giving reasonable time and warning to the appellant regarding consequence of recording the confessional statement recorded his confessional statement when appellant was alone in the court in accordance with law after fulfilling all legal requirements. There is another aspect that in the confessional statement and after informing him that he will be sent to jail after his statement. The appellant has associated his brother Bismillah for the first time in this crime. There was no reason for him to have involved his brother in this matter at that stage. The doctor observed marks of ropes on the neck and hands of the deceased which corroborate the confessional statement made by the appellant during his statement he stated that before strangulating deceased his both hands were tied with the rope. Presence of marks on both the wrists of deceased corroborate this part of confessional statement.

11. Recovery of such a huge amount from the house of appellant on his pointation without any plausible explanation is another circumstance which corroborates the confessional statement. The difference of amount mentioned in the statement of P.W.2 and P.W.3 and writing of pad of car show-room does not affect the prosecution case keeping in view huge amount. The amount of commission may have been deducted.

12. The accumulative effect of all the circumstances leads to only one conclusion that appellant made true judicial confession voluntarily and without any pressure and he is fully involved in this matter. It is now well settled that retracted judicial confession voluntarily made which gets some kind of corroboration from other circumstance is itself sufficient for the conviction of the appellant. The explanation of the appellant that he was tortured and as such he made a confessional statement, in absence of any material does not appeal to mind. Specially when he was given ample time and chance by the Magistrate before making confessional statement. He made statement when he was alone with the Magistrate in court after the statement he was sent to judicial remand and challan was immediately submitted in court. After recording his confessional statement the appellant had ample opportunity to retract from his confession but he remained mum till the conclusion of the trial. The chain of circumstance brought on record by the prosecution fully corroborate the confessional statement of the appellant, the appellant remained unable to give plausible explanation for his false involvement by the complainant and the witnesses. The Hon'ble Supreme Court of Pakistan has observed in the case reported as **2015 SCMR 856 (Dadullah and another Vs. The State) as follows**:

S.164----Confession of guilt before the Judicial Magistrate----Conviction---- Scope---- Conviction could not be recorded on the sole basis of confessional statement and the prosecution had to prove its case beyond any shadow of doubt.---Notwithstanding the procedural defect in the confessional statement, if any, a judicial confession if it was found true, voluntary and confidence inspiring could safely be made basis for conviction----When the confessional statement of the accused was not the result of maltreatment and coercive measures, and the Judicial magistrate had provided the accused with relaxation of time and informed him that he was not bound to record his statement, then such confession could be made basis for conviction.

Similarly in the case of Wazir Khan Vs. The State, 1989 SCMR-446, the Hon'ble Supreme Court of Pakistan upheld the conviction made on the sole basis of retracted judicial confession. It was observed

" ***----S.302—Case of no evidence---Retracted confession, whether sufficient in law to maintain conviction---Appeal against conviction---No eye-witness of occurrence---Prosecution based on retracted confession of accused---Plea that retracted confession was not sufficient in law to maintain conviction, not entertained---No legal bar exists for recording a conviction on a confession which is subsequently retracted if it is voluntary and true---No infirmity having been found in confessional statement of accused to render it unacceptable and accused having told truth, he was rightly found guilty."***

In the case of Muhammad Amin Vs. The State reported as PLD 2006 S.C.219 wherein it was held that

---S.164---Qanun-e-Shahadat (10 of 1984), Art.39--- Confessional statement, when to form sole basis for conviction---Confession, judicial or extra judicial, whether retracted or not retracted, can in law validly form the sole basis of

conviction of its maker, if the Court is satisfied and believes that it was true and voluntary and was not obtained by torture, coercion or inducement."

Even in the case of Ahmad Hassan another Vs. The State reported as PLJ 2001 SC 584 it was observed by the Hon'ble Supreme Court of Pakistan that

Confessional statements were not shown to have been recorded under any inducement, threat or promise and, thus, they were admissible in evidence in view of Art.37 of Qanun-e-Shahadat, 1984".

13. The delay in recording of retracted judicial confessional statement does not reduce its value . It has been observed by the Hon'ble Supreme Court of Pakistan in the case of Ahmed Hassan and another Vs.the State reported as PLJ 2001 SC 584 that "**Delay in recording of confession by it self cannot render confession nugatory if otherwise it is proved on record to have been made voluntarily---** It was further observed by the Hon'ble Supreme Court of Pakistan in the case of Muhammad Ismail and another Vs.The State reported as 1995 SCMR- 1615 that

"Delay in recording confession per se is no ground to discard it unless it is proved or emerges from the circumstances to have been obtained by coercion, threat, pressure etc.---

14. While taking guidance from the above mentioned cases it is clear that conviction can be based on retracted confessional statement of an accused if it is proved that such statement was made without any inducement, threat or promise. It is based on true, natural, plausible and logical version of accused that before recording such statement the accused was informed of consequence of such confession and he was informed that he will not be handed over to the same police i.e I.O, even if he does not make confessional statement, he is provided time to think before making such confessional statement, his statement is not recorded in presence of the police. After his statement he is not handed over to the same police i.e I.O rather sent to judicial lock up. As at that time, he is still accused of heinous offence so the court may use the services of police official to send him to jail, but he should not be handed over to the same I.O.

15. The net result is that in this case the prosecution has proved the case against the appellant beyond any reasonable doubt so the conviction and sentence of the appellant under section 302-B and 379 PPC is upheld. His appeal to this extent is dismissed.

16. The case of appellant does not fall under any provisions of section 306 or 307 PPC and as such, he cannot be convicted under section 308 PPC. His conviction and sentence under section 308 PPC for payment of 'diyat' to the legal heirs of the deceased is not maintainable and as such, is set aside.

17 While considering the revision filed by the complainant for enhancement of sentence of appellant from life imprisonment to death, we have observed that in this case there is no eye witness. The co-accused of the appellant whose name was

introduced in the judicial confession of the appellant has been acquitted by the learned trial court while extending him benefit of doubt. There is no appeal against his acquittal. There are two sentences provided under section 302-B PPC so in the circumstances we think that sentence of imprisonment for life to the appellant will meet the ends of justice. The revision petition is accordingly dismissed. The sentence of the appellant shall run concurrently and he shall also be given the benefit of section 382-B Cr.P.C. Both the matters are accordingly disposed of.

MR.JUSTICE SH.NAJAM UL HASAN

MR.JUSTICE ZAHOOR AHMED SHAHWANI

Quetta, 5.6.2015.

(APPROVED FOR REPORTING)

MR.JUSTICE SH.NAJAM UL HASAN

IN THE FEDERAL SHARIAT COURT
(Appellate /Revisional Jurisdiction)

PRESENT

MR. JUSTICE RIAZ AHMED KHAN, CHIEF JUSTICE
MR.JUSTICE SH.NAJAM UL HASAN
MR.JUSTICE ZAHOOR AHMED SHAHWANI

CRIMINAL APPEAL NO.22-I of 2013

1. Sajid S/o Khan Afsar, Caste Pathan, Resident of Giah Bagnotar, Tehsil and District Abbottabad.
2. Khan Afsar S/o Samundar Khan, Caste Pathan, Resident of Giah Bagnotar, Tehsil and District Abbottabad.
3. Sajid S/o Mian Khan Resident of Adda Rahy Bazar, Rawalpindi.

Appellants

V E R S U S

The State :
Khurshid s/o Faqir Muhammad R/o Khola Kehal, Teh. & Distt, Abbottabad.

Respondents

Shaheen Ashraf s/o Raja Muhammad Ashraf, Caste Karlal, R/o Khola Kehal, Abbottabad.

Counsel for the appellants	:	Mr. Masood Azhar, Advocate
Counsel for the respondents	:	Syed Yasir Shabeer, Advocate
Counsel for the State	:	Mr. Arshad Ahmed, AAG, KPK
No. Date of F.I.R	:	No.95/2013, dt.15-06-13, Bagnotar, Abbottabad.
Police Station		
Date of Judgment of trial Court	:	09-03-2010
Date of institution of the appeal	:	09-07-2013
Date of hearing	:	01-04-2015
Date of decision	:	05.05.2015

CRIMINAL REVISION NO.03-I-2013.

Khurshid s/o Faqir Muhammad R/o Khola Kehal, Teh. & Distt, Abbottabad.

Petitioner

V E R S U S

1. Khan Afsar S/o Samundar Khan
2. Sajid S/o Khan Afsar
3. Sajid S/o Mian Khan
4. The State

Respondents

For the petitioner	:	Syed Yasir Shabeer, Advocate
Date of institution	:	09-07-2013
Date of hearing	:	01-04-2015
Date of decision	:	05.05.2015

CRIMINAL MURDER REF. NO.02-I OF 2013.

The State

V E R S U S

1. Sajid S/o Khan Afsar
2. Sajid S/o Mian Khan

JUDGMENT

SH.NAJAM UL HASAN, J.- Appellants Sajid son of Khan Afsar, Sajid son of Mian Khan and Khan Afsar son of Samandar Khan filed appeal against their convictions and sentences and challenged the impugned judgment dated 9.3.2010 of the learned Additional Sessions Judge-III, Abbottabad in the Peshawar High Court, Abbottabad Bench. The appeal was heard by the Division Bench of the Peshawar High Court and after going through the relevant law vide order dated 12.6.2013 while considering the matter falling within the jurisdiction of Federal Shariat Court transmitted the appeal alongwith connected murder reference and criminal revision petition to this Court. Vide Order dated 9.9.2013 of this Court the appeal of the appellants, (Cr.Appeal No.22-I-2013) was admitted for regular hearing, while condoning the delay in filing the appeal. Through the impugned judgment dated 09-03-2010, the appellants Sajid son of Khan Afsar, Sajid son of Mian Khan and Khan Afsar son of Sumandar Khan were convicted and sentenced in case FIR No.95, dated 15-06-2006, P.S Baghnotar, District Abbottabad by the learned Additional Sessions Judge-III, Abbottabad. Details of conviction and sentence are as follows:

> "Appellants Sajid son of Khan Afsar and Sajid son of Mian Khan, both are convicted under section 302-B, PPC and sentenced to death (on two counts) as ta'zir, they both be hanged by neck till their death. Both the appellants Sajid son of Khan Afsar and Sajid son of Mian Khan are also convicted under section 324 PPC and both are sentenced to undergo five years R.I and both were also convicted under section 337-A-IV PPC and convicted and sentenced to undergo four (04) years R.I and both were equally liable to pay Arsh to the injured P.W Shaheen Ashraf 15% of the Diyat amounting to Rs.100,000/- (one hundred thousand) equally which be recovered from the accused equally and be paid to the injured P.W Shaheen Ashraf and they be not released from jail till the payment of Arsh amount. Accused Khan Afsar son of Samundar Khan is convicted and sentenced for life imprisonment (on two counts) as Ta'zir. The execution of the death sentence will be subject to the confirmation of the Honourable Peshawar High Court Peshawar. The death reference be prepared and sent to the Honourable Peshawar High Court for confirmation. The compensation within the meaning of Section 544-A Cr.PC was imposed upon all the above mentioned convicted accused Rs.300,000/- (three hundred thousand). On the recovery of the same it shall be paid to the legal heirs of the deceased Haji Rafique as per their Shari shares. In default they further undergo 06 months S.I under Section 544-A (2) Cr.PC. All the sentences of imprisonment are concurrent. The benefit of Section 382-B, Cr.PC extended to all the convicted accused named.

2. As all the matters i.e Cr. Appeal No.22-I of 2013 (Sajid son of Khan Afsar, Sajid son of Mian Khan and Khan Afsar son of Samundar Khan Vs. the State), Cr. Revision No.33-I of 2013 (Khursheed Vs. Khan Afsar etc) for enhancement of sentences of the respondents and Murder Ref. No.2-I of 2013 (State Vs. Sajid son of Khan Afsar and Sajid Son of Mian Khan) have arisen out of the same judgment, so they are disposed of through this single judgment.

3. The prosecution case in brief is that Syed Mukhtiar Hussain Shah (PW-9) SHO, P.S Bagnotar District Abbottabad received information on 15-06-2006 by wireless from SHO Bakot that near Giah Morr, he saw a Suzuki Jeep Potohar bearing No.7508-OKA with two seriously injured persons who were being brought on official police mobile to Ayub Teaching Hospital Abbottabad. On this information, the SHO, P.S Bagnotar Syed Mukhtiar Hussain Shah PW-9 reached the hospital and found the dead body of Haji Rafique son of Faqir Muhammad, lying there while one Shaheen son of Raja Muhammad Ashraf was seriously injured having fire arm injury on his right side of mouth. It was informed that a third person namely Khurshid son of Azad Khan was also with them at the time of occurrence in the said jeep, but he was found missing from the emergency ward of the Ayub Teaching hospital Abbottabad. Injured Shaheen was not in a position to talk due to injury on his mouth as he was unconscious. Haji Rafique was murdered while Shaheen was injured by fire arm weapon by some unknown persons or person, their injury statements were prepared and murasila Ex.PA/1 for registration of the case was drafted and on its basis instant case was registered under section 302, 324, 34 PPC against unknown accused.

4. After registration of case, investigation was conducted by Muhammad Javed Khan, Inspector (P.W.17). During investigation section 17(4) Offences Against Property (Enforcement of Hudood) Ordinance, 1979 was added in place of 302, 324, 34 PPC. The accused Sajid s/o Khan Afsar was arrested and on his pointation dead body of Tariq their co-accused was recovered. The I.O collected different kind of evidence and material recorded statement of witnesses. The accused Sajid S/o Khan Afsar made confessional statement before learned Magistrate, he alongwith his co-accused Sajid S/o Mian Khan were identified by PW Khurshid Ahmed in identification parade got conducted by learned Magistrate in Jail. After completion of investigation, the I.O prepared report which was submitted by the SHO under section 173 Cr.P.C before the court requiring the accused to face trial.

5. The learned trial court after fulfilling usual legal formalities framed charge against the accused on 29.11.2006 under section 17(4) Offences Against Property (Enforcement of Hudood) Ordinance, 1979. The accused did not plead guilty and claimed trial.

6. The prosecution produced 18 witnesses to prove its case. The gist of the deposition of the witnesses is as follows:-

    1. P.W-1/Muhammad Nawaz Constable was a witness of recovery memo of shalwar and qameez of deceased/accused Tariq and accused Sajid son of Mian Khan for sending the same to the Chemical Examiner for analysis.

    2. PW-2 Rifat Aamir, Senior Civil Judge/Judicial Magistrate is a witness who recorded confessional statement of accused Sajid Khan son of Khan Afsar after fulfilling all legal formalities on 26-06-2006.

3. PW-3 Dr. Syed Farooq Shah, CMO, Ayub Teaching Hospital Abbottad examined injured Shaheen son of Muhammad Ashraf brought by Gul Abbas # 1181 on 15-06-2006 at 1:15 a.m and found following injuries on his body:

   i. A split wound large size on the starting from upper Jaw with severely bleeding upto right eye. All the organs i.e. upper Jaw with zygomatic nasal bone plus right orbital bone were fractured. Bullet pieces were seen in the X-Ray of skull. Lower jawbone, mandible bone was also observed as fractured with dental injury. Patient was referred to PIMS Islamabad for further treatment and expert opinion/management of eye plus ENT plus Dental and Nero Surgeon.

   Weapon used was fire arm.

   Nature of Injury was highly dangerous

   Probable duration of injury was 2 hours.

   P.W-3 has also conducted post mortem examination of Haji M. Rafique deceased on 15-06-2015 at 2:00 a.m and observed following on his body:-

Thorax: 2nd and 3rd ribs fractured, Pleura buried. Left lung ruptured. Pericardium and heart vessel ruptured.

Stomach: Contains semi digested fluid; small and large intestine contains fluid and gases. Bladder contained urine.

Remarks: The cause of death was observed to be fire arm injury on chest, bullet cross the heart and left side lungs which caused massive bleeding due to which death was occurred on the spot. The dead body was received at 1:12 a.m dated 15-06-2006.

Time between injury and death was no time meaning thereby death was instantaneous. The probable time between death PM was 2 hours approximately.

4. P.W-4/ Dr. Tahir Habib CMO, ATH Abbottabad conducted PM examination of Tariq Son of Khan Afsar caste Pathan aged about 20-25 years resident of Bagnoter brought by Constable Khursheed No.62 of PS Bagnoter. PW-4 said that the dead body was brought by brother of deceased Sajid.

External Examination:

A well-built man wearing shalwar qameez with blood on clothes chest on clothes chest and abdomen, immaculate with rotten smell and maggots all over the body, specially chest, back and pelvis, face head OK fractured right arm lying on PM table.

Injuries:

1. Four entries wound on right side on chest right hypocondrium and right mid auxiliary line maggots coming out wounds.
2. Exit from the right side back 6 inches from mid claviclar line back also emaciated and maggots coming out of wounds.
3. Whole chest and back was ecchymosed and blackened.
4. Left side of chest and abdomen OK, right side opened and right lungs base full of bloods liver injured at, portahepaties, Diaphragm also injured chest and right side of abdomen, i-e right hypocordium full of maggots.
5. Fractured right humorous in the mid shaft protem.

Granium and spinal Card.

No cranium and Spinal card or vertebral.

Ghorax:

Four entry wounds on right side of chest with maggots coming out, ribs OK, right lung plurae injured, larynx and trachea is OK, right lungs base of lungs full of blood and injured, Right lower lobe injured. Left lungs and heat OK. Main vessels/aorta inferior vaincava OK, right lungs vessels injured. Abdomen, two entry wounds on right hypocordium otherwise abdominal wound intact, Two holes in peritoneum at right hyporodium. Two holes in diaphragm at right hypocordium. Live injured at the side of pot hepatices and right lobe of liver injured at two sides, left lobe OK, at right hyporocorism; external generation and perineum full of maggots.

Fracture on right Humorous at mid shoft only.

Opinion:

In my opinion, the death of deceased was due to firearm injury to the vital organs (i.e porta hepatis of liver and right lobe of liver) and right lower lobe of right lungs leading from the vital structure was the main cause of death. Probable Time between injury and death was instantaneous and death to PM is 05 to 07 days.

5. PW-5/Muhammad Aslam, ASI is marginal witness of various recovery memos.

6. PW-6/Jhanger Khan, SHO, P.S Bagnoter who after completion of the investigation, submitted complete challan Ex.PW-6/1 against present accused before the Court.

7. PW-7/Muhammad Nawaz, IHC who on receipt of Murasala Ex-PA/1 registered formal FIR No.95 dated 15-06-2006 under section 302/324 PPC.

8. PW-8/Muhammad Ayub Khan, ASI is member of the investigation team. On 21-06-2006 in his presence accused Sajid Khan son of Khan Afsar while in Police Custody, led the police party to the place where the dead body of Muhammad Tariq (deceased) was concealed on pointation dead body was recovered and taken into possession.

9. PW-9/Mukhtiar Hussain Shah, Inspector is the complainant of this case. He reiterated the version given in the FIR Ex-PA.

10. PW-10/Afzal Ahmed Khan, Civil Judge/Judicial Magistrate, Abbottabad. On 04-07-2006, he visited District Jail, Abbottabad for conducting the identification parade of Sajid S/o Mian Khan by PW Khurshid Ahmed. The accused was correctly identified by the PW.

11. PW-11/Muhammad Faisal Khan, Civil Judge/Judicial Magistrate, Abbottabad. On 29-06-2006 at 1:30 pm visited District jail for conducting the identification parade of accused Sajid S/o Khan Afsar in judicial lockup. The accused was correctly identified by PW Khurshid Ahmed.

12. Muhammad Sheraz appeared as PW-12 and deposed that he alongwith Abid on pointation and recovery proceedings by accused Khan Afsar who was at that time in hand cuff and he led the police party to his house and from his house, he took out and produced clothes consisting of Shalwar Qameez and jacket and cloth sheet stating that same were worn by him at the time of commission of offence.

13. Zaheer Ahmed, appeared as PW-13 and reiterated the version given by PW-12.

14. PW-14/Atif Shah is marginal witness of recovery memo Ex-PW-14/1 through which accused Sajid son of Khan Afsar while in police custody led the police party to the slope place in Dhaka Rakh situated below his house and produced a repeater shot gun-12 bore without number (Ex-P/24 alongwith bandolier containing 17 live cartages).

15. Khursheed appeared as PW-15 and deposed that after due satisfaction by the investigation and witnesses, he charged Sajid and Tariq (deceased) sons of Khan Afsar, Khan Afsar son of Samundar Khan and Sajid of son of Mian Khan for murder of his brother Haji Rafique and causing injuries to the Shaheen Ashraf PW.

15.A Shaheen Ashraf is an injured eye witness PW-15-A he was with the deceased Haji Muhammad Rafique and Khurshid Ahmed PW on the day and time of occurrence, they had gone to Ayubia in the Potohar Jeep.

15.B Khursheed son of Azad appeared as PW-15-B he accompanied the deceased and the injured Shaheen on the date and time of occurrence in the Pothhohar Jeep and witnessed the occurrence.

16. Malik Aman, IHC appeared as PW-16 who deposed that on 28-06-2006, he was entrusted with the case property of the present case which he handed over in the laboratory after obtaining the receipt.

17. PW-17/Muhammad Javed Khan, Inspector is the I.O of this case. He conducted the investigation of the case.

18. Abdul Aziz Khan Afridi, DSP who during the days of occurrence was posted as Inspector/Incharge Investigation, Abbottabad. He partly investigated the case.

7. After completion of prosecution evidence, the learned trial court recorded the statements of the accused under section 342 Cr.PC on 12-12-2009. The accused persons denied the allegations leveled against them. In reply to a crucial questions, why the PWs have deposed against you, all the accused persons individually stated as under:-

> PWs produced by the prosecution were not consistent in their evidence and they have created contradictions and ambiguity in their evidence. Moreover, prosecution with ulterior motive charged us and there was no direct evidence against us. In fact, my brother Tariq was murdered in the instant case by the complainant party who have suppressed this fact and when we came to know about the missing of my son and went to P.S for making the report we were booked in the instant case.

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

8. Upon the conclusion of the trial, the learned trial court vide judgment dated 09-03-2010 has convicted accused persons as mentioned herein before in para-1 of this judgment.

9. Mr. Masood Azhar, Advocate, learned counsel for the appellants at the very outset states that at the first instance the injured were seen in the Jeep by the SHO Bakot (Saeed Khan) and he informed the SHO Bagnotar (Mukhtiar Hussain Shah, complainant) who got the FIR registered on the information which was provided by SHO Bakot. The SHO Bakot was not produced in court. So the FIR is of no value as the same is based on hearsay information. The learned counsel has strongly argued that the main star witness Shaheen Ashraf injured was examined by the Police on 25-06-2006 i.e. after ten days of the occurrence. In his statement, he has not named anyone as an accused, no specific weapon of offence was mentioned and no description of assailants was given in his statement. He was the star witnesss, but he was not associated in identification parade of accused such lapse in the prosecution case makes the whole case doubtful.

10. It is further argued that Khurshid Ahmed (PW 15-B), the other eye witness was statedly present with the injured and the deceased in the Hospital on the day of occurrence but his statement was not recorded at that stage, rather, his statement was recorded after a delay of four days on 19-06-2006. No reason for his appearance before police after such delay has been brought on record. Even otherwise, in his statement, he has not named anyone as an accused he has not given the description of the assailants. He has not specified the weapon used in the crime, rather used the general word fire arm weapon. It was a night occurrence, no source of light was described but witness Khurshid Ahmed identified the accused Sajid S/o Khan Afsar and Sajid S/o Mian Khan in the identification parade. In fact the accused were in police custody and were shown to this witness before identification parade. Even otherwise, as no specific roll was assigned to any of the accused in the identification parade, so such identification parade has got no legal value. The belated statement of witness makes the whole case doubtful. While describing the judicial confession made by Sajid S/o Khan Afsar, the learned counsel states that such confession was not recorded in accordance with law. In the said confession Sajid S/o Khan Afsar has not stated any thing as to who was responsible for killing the deceased or causing injury to Shaheen PW or firing on the other deceased Tariq. He only stated that at the time of occurrence he made two fire and similarly the other accused Sajid S/o Mian Khan also made two fires and they heard a voice of fire from the side of Tariq accused. He has not mentioned of any fire hitting anyone. Before making such confessional statement he was in Police custody and there was no reason for him to make judicial confession, specially when his own brother Tariq was also killed in the same occurrence. All the three weapons were statedly recovered on the pointation of Sajid s/o Khan Afsar accused/appellant. The crime empties were collected from the place of crime on the day of occurrence on 15-06-2006 but they were sent to Fire Arms Expert on 28.6.2006 i.e after recovery of weapons. No reason for sending the crime empties and the weapons together at such a belated stage for comparison has been brought on record. Possibility of empties being prepared after firing from the weapon already recovered and sending them together with the weapon and getting a positive report cannot be ruled out. Lastly, it is argued that in the FIR, the statement of the injured, even statement of other eye witness, there is nothing mentioned as to how Tariq accused received injury in the

occurrence and later on died thereof. Such lapse in the prosecution story makes the whole case highly doubtful. It rather, indicates that the prosecution is suppressing the truth to save their own skin in the matter of murder of Tariq accused in the same occurrence. The learned counsel states that as per first inspection notes and the site plan prepared by the I.O one crime empty of 12-Bore gun was recovered from the distance of 20 'qadam' away from the place of occurrence and thereafter there was a trail of blood. Such circumstance rather indicates that deceased Tariq was shot when he was nearly sixty feet away from the Jeep and the place of occurrence. It is reiterated that the prosecution has not come with clean hands and has failed to prove the case beyond reasonable shadow of doubt. The appellants are entitled to clean acquittal.

11. On the other hand, the learned Assistant Advocate General, KPK assisted by the learned counsel by the complainant has argued that the parties have got no enmity. It was an attempt to commit robbery during which the deceased and the injured received injuries at the hand of accused/appellants. The matter was initially reported by an unconcerned police officer and later on after the statement of eye witness Khurshid Ahmed PW was recorded by the police, the whole occurrence came to light. In the FIR which was promptly recorded within an hour, the name of Khurshid P.W is duly mentioned and he was statedly present in the Jeep alongwith the deceased and injured when the occurrence took place. Khurshid Ahmed P.W.15 in his statement, has clearly described the whole occurrence, the number of accused, the place where they were standing and used their weapons in which the deceased lost his life and PW Shaheen Ashraf received serious injuries as a result of which, he lost his eye and face was disfigured. It was night occurrence and as such the fire received by Tariq deceased at the hand of his co-accused was not observed by the witnesses. The time of death of Tariq as mentioned in the post mortem report coordinates with the time of occurrence. One 'chappal' of deceased Tariq was recovered from the place of occurrence whereas the other was later on found alongwith his dead body after six days which indicate that he was present and participated in the crime. All the five crime empties recovered from the spot were later on found to be wedded with weapons recovered on the pointation of the accused . It is strongly argued that the confessional statement of accused Sajid s/o Khan Afsar cannot be ignored because the same finds corroboration from other material and the evidence which was earlier or later on collected. The recovery of dead body of Tariq on his pointation from a place which was at the distance from the place of occurrence is circumstance which implicates all the accused in this case. The identification of the accused by the eye witness Khurshid Ahmed whose name was found mentioned in the FIR is a circumstance which fully implicates the accused/appellants in this case. The involvement of the accused/appellants in this case is fully established, so they are not entitled to exception and deserve sentence of death.

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

13. In this case, the FIR was got registered on the written statement of SHO, PS Bagnotar, District Abbottabad when he was informed by the SHO Bakot, that two injured persons found in a jeep were taken to hospital. The complainant reached the Hospital, one person Haji Muhammad Rafique was found dead having two gun shot injuries on his chest whereas the other Shaheen Ashraf was having one fire arm injury on his face and he was seriously injured. The name of eye witness Khurhid Ahmed was mentioned in FIR and he was statedly present at the time of occurrence but he was not found at the Hospital when the SHO complainant came there and as such his statement was not recorded at that stage. Later on, he appeared before the Police on 19-06-2006 and narrated the whole story and thereafter section 17(4) Offences Against Property (Enforcement of Hudood) Ordinance, 1979 was added in place of sections 324, and 302(b) PPC. As mentioned in the FIR, Shaheen Ashraf, the injured PW after medical examination was immediately shifted to Islamabad for treatment. It has been brought on record, that he was not in a position to talk, he remained in Hospital for almost a month, so that may be the reason for not associating him in the identification parade which was statedly conducted in the jail. The other eye witness whose name was mentioned in the promptly lodged FIR later on correctly identified accused Sajid s/o Khan Afsar and Sajid s/o Mian Khan in the identification parade conducted by the learned judicial Magistrate. Sajid S/o Khan Afsar was arrested on 21-06-2006 he got recovered the dead body of his brother, co-accused Tariq who statedly received firm arm injury in the same occurrence. As per his post mortem report he received the fire arm injury nearly at the same time of occurrence. As per confessional statement of accused Sajid son of Khan Afsar Tariq died while he was running away from the spot after receiving fire arm injury. The appellant Sajid son of Khan Afsar got recovered all the three weapons of offence used in the occurrence. As per confessional statement of Sajid son of Khan Afsar before the Magistrate, at the time of occurrence he (Sajid s/o Khan Afsar) was armed with the repeater 12-Bore gun and he fired two shots similarly his co-accused Sajid s/o Mian Khan fired two shots with the double barrel shot gun. Tariq deceased accused was statedly armed with 30-Bore pistol and at the time of occurrence he heard a fire shot from the direction where Tariq was standing. In his whole statement he has not mentioned as to who caused the injury to the deceased, the injured or the accused/decease Tariq, general allegation of firing at the spot by all the three persons is mentioned in the confessional statement. Two crime empties of 12-Bore gun were recovered from the right side of the jeep where the deceased Haji Muhammad Rafiq was sitting on the driving seat, one crime empty of 30-Bore pistol was recovered on the other side of the jeep where statedly Tariq was standing with the 30-Bore pistol. The deceased Haji Rafique received two fire shots with the 12-Bore gun on his chest and died at the spot whereas Shaheen Ashraf received one bullet injury on his face there was no exit wound and broken pieces of bullet were observed by the doctor in his X-ray report. The second dead body of deceased Tariq was recovered after six days on the pointation of his brother Sajid son of Khan Afsar his co-accused. In his post mortem examination the doctor observed multiple pellets injuries on his chest while making exit from the back of his body so it is clear that he received fire shot of 12-Bore Gun from a distance. Injured Shaheen Ashraf P.W.15-A received a bullet injury as discussed above and as per prosecution version

only Tariq deceased accused was armed with 30-Bore pistol. He was standing on the side of Jeep where Shaheen injured was present. 30-Bore crime empty was recovered from that place and the same was found wedded with the pistol statedly used by Tariq deceased, the accused. So it is clear that Shaheen injured received fire arm injury at the hand of Tariq deceased. Similarly as per doctor, deceased Haji Rafique received 12-Bore gun shot injuries and at the time of occurrence Sajid son of Khan Afsar and Sajid son of Mian Khan were having 12-bore guns so they can be held responsible for causing these injuries to Haji Rafique.

14. The prosecution has based its case on the statement of two eye witnesses, the confessional statement of the accused, the identification of the accused by one of the eye witness, the recoveries of crime weapons on the pointation of appellant Sajid son of Khan Afsar and positive report of Fire Arm Expert. In the FIR the occurrence was not mentioned, only presence of injured P.W Shaheen the deceased Haji Muhammad Rafique and one Khurshid Ahmad P.W was mentioned. Khurshid Ahmed was not seen in the hospital by the SHO or the I.O. Lateron Khurshid appeared on his own after five days and narrated the whole story. While appearing in court he gave certain explanation for making his statement at such a belated stage. The thing remains that he was mentioned in the FIR which was recorded just after one hour of the occurrence on the statement of independent person, the SHO. Later on, the presence of Khurshid at the time of occurrence was also admitted by the injured P.W Shaheen Ashraf whose presence at the spot cannot be denied. Khurshid P.W.15-B identified both the accused Sajid son of Khan Afsar, Sajid son of Mian Khan in identification parade duly conducted by the learned magistrates in jail. As Shaheen Ashraf injured P.W was unable to talk because of injury on his face he remained in hospital and as such his statement was recorded after ten days of the occurrence in Islamabad hospital when the doctor found him fit for making statement . Both these witnesses while appearing in court have stated the presence of four assailants at the spot who participated in the occurrence, two of the accused fired with their fire arms weapon resulted in death of Haji Muhammad Rafique and injury on the person of Shaheen Ashraf P.W. No specific weapon or specific injury to any one was mentioned in their statements in court. It is no where mentioned in their statements that they identified the accused in the court. They admitted that Sajid son of Khan Afsar and Sajid son of Mian Khan fired at the time of occurrence so they are jointly and severely responsible for the occurrence in which one person Haji Rafique was murdered and murderous assault was made on the other i. e Shaheen possibility of receiving fire arm injury by Shaheen with 30-Bore pistol at the hand of Tariq deceased accused cannot be ruled out. But thing remains that Sajid son of Khan Afsar and Sajid son of Mian Khan attempted murderous assault on Shaheen as both of them fired two shots each on them at the time of occurrence. So both of them are jointly and severely responsible in this crime.

15. Initially the charge was framed for the offence of 'Harabah' but robbery was not proved so the appellants were only convicted for murder, attempt to commit murder and causing injuries to the P.Ws and were not convicted for robbery, no appeal in respect of their acquittal for Harabah or robbery has been filed by the complainant side or the State.

16. As far as Tariq deceased is concerned, there is no evidence at all in the whole prosecution case, in the statement of the witnesses even in the confessional statement or anywhere else to indicate how and by whom he was killed. His dead body was recovered after a delay of six days and presence of injuries on his body including presence of fracture on upper Arm has not been explained in any way by the prosecution. In absence of evidence in this respect no one can be held responsible for his murder and the conviction of the appellant in respect of his murder is not sustainable. **Resultantly, all the accused/appellants are acquitted for the offence of murder of Tariq one of the deceased of this case.**

17. As for as injuries on the person of Shaheen Ashraf is concerned, he appeared in court and did not point out specific person/accused responsible for causing him such injury. Even the other witness Khurshid has not nominated any specific accused for causing injury to Shaheen Ashraf. In absence of any kind of evidence specifying the accused responsible for causing injury to Shaheen Ashraf. In absence of direct evidence no one can be convicted for causing such injury to Shaheen P.W. **So the conviction of appellants under section 337-A-IV for causing injury to Shaheen P.W is set aside while extending benefit of doubt.**

18. As no role in respect of murder and murderous assault has been assigned to Khan Afsar by the witnesses. As per confessional statement of co-accused he was empty handed at the time of occurrence. It cannot be assumed that he was having common intention with co-accused in respect of murder of Haji Muhammad Rafique and murderous assault on Shaheen P.W. **The prosecution remained unable to prove any charge against him beyond reasonable doubt, so Khan Afsar is accordingly acquitted while extending him benefit of doubt. His appeal is accepted. He shall be released in this case forthwith if not wanted in any other case.**

20. Presence of both the witnesses i.e P.W.15-A and P.W. 15-B at the time of occurrence is established beyond reasonable doubt, they had no reason to falsely implicate these appellants, their statement is worth reliance. The identification parade in respect of involvement and participation of these two appellants is reliable. The in-culpatory judicial confession of accused Sajid son of Khan Afsar provides sufficient support to prosecution case, so in the circumstance, Sajid son of Khan Afsar and Sajid son of Mian Khan are found jointly responsible for causing murder of Haji Muhammad Rafique and causing murderous assault on Shaheen Ashraf beyond any doubt so we think that they were rightly convicted under sections 302-B, 324-34 PPC, their conviction in this respect are upheld.

21. As far as their sentence is concerned, as in the whole prosecution case it is not established as to who amongst these appellants caused fatal injury to the deceased. As such while extending benefit in this respect their death sentence under section 302-B is converted into life imprisonment. The compensation under section 544-A Cr.P.C and the imprisonment in default of non-payment of compensation shall remain in tact. As the accused responsible for causing injury to Shaheen could not be established so as discussed above none of the appellants is entitled to conviction and sentence under section 337-A-IV PPC. Their conviction and sentence under section

337-A-IV PPC is accordingly set aside. Admittedly, with their common intention Sajid son of Khan Afsar and Sajid son of Mian Khan committed murder of Haji Muhammad Rafique and committed murderous assault on Shaheen P.W as both of them fired on these persons during the occurrence so their conviction and sentence under section 324 PPC shall remain intact. All the sentences of imprisonment shall run concurrently. Benefit of section 382-B Cr.P.C shall be extended to them.

22. Consequently the appeal to the extent of Khan Afsar is allowed. He shall be released forthwith if not wanted in any other case and regarding remaining appellants it is dismissed with above mentioned modifications in conviction and sentence.

23. Murder Reference No.02-I-2013 is answered in the ***negative***.

24. As the sentence of death is converted into life imprisonment in the main appeal, the criminal revision bearing No.03-I-2013 for enhancement of sentences of the accused/respondents having no merit is dismissed in ***limine.***

MR. JUSTICE SH. NAJAM UL HASAN

MR. JUSTICE RIAZ AHMAD KHAN
CHIEF JUSTICE.

MR. JUSTICE ZAHOOR AHMED SHAHWANI

Announced on 05-05-2015

At Islamabad.

Approved for reporting

MR. JUSTICE SH.NAJAM UL HASAN

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT:
MR. JUSTICE ZAHOOR AHMED SHAHWANI

CRIMINAL APPEAL NO.31/Q OF 2011

Sikandar Ali son of Din Muhammad, Caste Qalandrani, resident of Judair Shakh, District Jafarabad.	....	Appellant

VERSUS

The State	....	Respondent

-,-,-,-,-,-,-,-,-,-,-,-,-,-

Counsel for the appellant	:	Mr. Tariq Mehmood Butt, Advocate
Counsel for the State	:	Mr. Ameer Hamza Mengal, Deputy Prosecutor General
FIR No. and date	:	22/2011, dated 23.06.2011, P.S Levies Station, Kalat, District Kalat.
Date of impugned Judgment of learned trial Court	:	26.10.2011
Date of Institution of appeal in FSC	:	18.11.2011
Date of hearing	:	03.09.2014
Date of judgment	:	05.09.2014

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JUDGMENT

ZAHOOR AHMED SHAHWANI, J. – Through Cr. Appeal No.31/Q/2011 appellant Sikandar Ali has challenged the judgment dated 26.10.2011, passed by the learned Additional Sessions Judge, Kalat, whereby he was convicted under Section 392 PPC and sentenced to seven years rigorous imprisonment in addition to payment of Rs.20,000/- as fine or in default thereof to further undergo six months S.I. Benefit of Section 382-B Cr.P.C. has been extended to the appellant.

2. The allegations against the appellant are that on 23.06.2011 complainant Ghulam Rasool lodged the instant FIR alleging therein that he drives his Mazda Truck No.MNO-6333. He alongwith his relative Abdul Waheed and cleaner Muhammad Yaqoob loaded 450 tin Ghee and 30 sacks of Chips from Paracha Textile Mill Karachi for Queta. On 23rd June, 2011 at about 3.30 p.m. when they reached near Abdul Rahman Cross at Kalat, a yellow cab taxi car No.CJ-0677 in which six persons were boarded and were armed. Out of which three had muffled their faces intercepted them and forcibly got off him and Abdul Waheed from the vehicle. They took out cash amount Rs.4000/- from their pockets, two mobile phones worth of Rs.5000/- and Rs.72,000/- from the cabin of the vehicle. They tied their hands and eyes and put them in their car. His cleaner Muhammad Yaqoob was sleeping in the cabin of the truck. The accused took them to some unknown place, dropped them at a deserted place and fled away. The complainant further stated that they with some efforts succeeded in untying their hands and eyes. He alleged that the accused persons forcibly snatched away his truck loaded with 450 tin Ghee and 30 sacks of Chips. Hence, FIR No.22/2011 was registered at Police Station Kalat, District Kalat under Section 17(3) of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979.

3. Investigation ensued as a consequence of registration of crime report and the present appellant was arrested on the same day alongwith robbed truck and loaded articles. After completion of investigation, challan was submitted before the Court for trial of the appellant. The learned trial Court framed charge against appellant Sikandar Ali on 28.07.2011 under Section 17(3) of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979. The appellant did not plead guilty and claimed trial.

4. The prosecution produced six witnesses in order to prove its case. The gist of the statements of prosecution witnesses is as under:-

   i) PW.1 Muhammad Ramzan Constable stated that on 23.06.2011 he alongwith SI Abdul Razzaq was on duty at Singandass Check Post, when they received wireless message about robbery of vehicle upon which they conducted blockade. The robbed vehicle came from Khuzdar, the said vehicle did not stop at blockade and they started chasing the same and at some distance the accused alighted from the vehicle and ran towards mountains, however, one accused was overpowered while the other two accused by making firing succeeded in fleeing away. The arrested accused disclosed his name as Sikandar Ali. The truck alongwith 30 sacks of chips and 450 tins of

Ghee and copies of documents of the vehicle were taken into possession by SI Abdul Wahab through recovery memo Ex.P/1-A, which was attested by him. He produced copy of registration book Ex.P/1-B of Mazda Truck No.MNO-6333.

ii) Complainant Ghulam Rasool appeared as PW.2 and endorsed the contents of his complaint Ex.P/1.

iii) PW.3 Muhammad Yaqoob was cleaner of the robbed truck and he gave details of the occurrence.

iv) PW.4 Hassan Khan Constable is the witness of recovery memo of yellow cab taxi Ex.P/4-A.

iv) PW.5 Abdul Waheed was present in the truck alongwith the complainant. He also gave details of the occurrence. However, he did not identify the accused before the learned trial Court therefore, he was declared hostile and subjected to cross-examination by the learned DDA.

v) PW.6 Khuda Bakhsh Tehsildar had undertaken the investigation. He chalked out FIR Ex.P/6-A on the basis of written complaint submitted by the complainant. He recorded statements of the witnesses under section 161 Cr.P.C, took into possession photocopy of FIR No.30/2011 through recovery memo Ex.P/6-B and a yellow cab taxi through recovery memo Ex.P/6-C and produced site plan of the place of occurrence as Ex.P/6-D. He took custody of the accused who was detained in police station City in another case. After completion of investigation, he submitted incomplete challan Ex.P/6-E. On 28.07.2011 he took into possession photocopies of statements under section 161 Cr.P.C. Ex.P/6-F and recovery memo of truck bearing registration No.MNO-6333. He produced supplementary challan Ex.P/6-G. On 25.06.2011 the complainant submitted an application Ex.P/6-H before him for correction of name of his cleaner.

5. After conclusion of the prosecution evidence, the appellant was examined under Section 342 Cr.P.C. He denied allegations leveled against him and claimed innocence. He also recorded statement under Section 340 (2) Cr.P.C. and stated that he alongwith Abdul Wahab, Nazar Muhammad and other labourers were preparing road shoulders. At about 7.00 P.M. after finishing work they were going when they saw a vehicle which collided with mountain. They rushed towards the vehicle, in the meanwhile police party also reached there and arrested them. Later on, the police set free Abdul Wahab and Nazar Muhammad while booked him in the instant case. He further stated that during investigation also he informed the police that he is labourer and innocent.

6. The appellant also produced Nazar Muhammad DW.1 in his defence, who supported the statement of appellant recorded under section 340(2) Cr.P.C.

7. At the conclusion of the trial, learned trial Court vide impugned judgment convicted and sentenced the appellant in the manner as mentioned above.

8. Being aggrieved and dissatisfied from the impugned judgment dated 26.10.2011 passed by learned trial Court, the appellant has preferred the above mentioned appeal.

9. Learned Counsel for the appellant has argued that the case is of no evidence, the appellant is a labourer and he was working at the road when the police arrested him; he has falsely been implicated in this case; no recovery has been effected from the appellant. He further stated that initially two other persons were also arrested by the police but later on set free by the police. The prosecution has failed to prove its case against the appellant, therefore, the impugned judgment is liable to be set aside and the appellant is entitled for acquittal.

10. Conversely, the learned DPG stated that the appellant was arrested at the spot alongwith the robbed truck and loaded articles; the complainant has identified the accused and the cleaner of the truck has fully supported the statement of the complainant. The Yellow cab taxi, which was used in the occurrence was also recovered by the police. He further stated that the prosecution has fully proved its case beyond any shadow of reasonable doubt and the learned trial Court has rightly convicted and sentenced the appellant.

11. The prosecution case is that the appellant Sikandar Ali alongwith his companions committed robbery of truck, which was loaded with 450 tins of Ghee and 30 sacks of chips. The police signaled the alleged truck at blockade but the accused did not stop the truck and after chasing them to some distance the present appellant was arrested by the police while the other accused succeeded in fleeing away. Later on, yellow cab taxi was also recovered by the police, which was used by the accused in the commission of the crime.

12. PW.2 Ghulam Rasool is complainant and victim of the case, he gave full details of the occurrence in his written complaint and remained firm while recording his statement before the learned trial Court. His testimony was further corroborated by his cleaner Muhammad Yaqoob PW.3 and Abdul Waheed PW.5, who were also present in the truck when the appellant alongwith his companion committed robbery.

13. In his statement under section 340(2) Cr.P.C. appellant has taken a specific plea that he was labourer and on seeing the truck having clashed with mountain, he went near the truck where the police arrested him in the instant case. He produced DW.1 Nazar Muhammad in support of his plea. However, this plea of appellant does not appeal to a prudent mind that without having any grudge or ill-will why the police has specifically arrested the present appellant whereas he himself stated that many other labourer were also rushed towards the truck but the police had only picked him as accused. Furthermore, if his plea is correct that he was labourer and was making road shoulder at the road, he could have easily produced his employer/Thekedar or other documentary evidence in his defence. In his cross-examination he stated that the Thekedar used to make entry of payment of daily wages in a register.

14. In view of what has been discussed above, I am of the view that the prosecution has fully proved its case against appellant Sikandar Ali son of Din Muhammad and the learned trial Court has rightly convicted and sentenced him. However, the learned trial Court committed error/omission while determining the correct Section at the time of convicting the appellant.

15. In view of the evidence available on record, the Section 395 PPC is attracted as the number of accused persons were six at the time of commission of crime. Therefore, the Section 392 PPC is altered to 395 PPC and no prejudice would be caused to the appellant as he fully availed the opportunity of defence by cross-examining the prosecution witnesses, which is cureable under Section 535 Cr.P.C.

16. Therefore, the conviction awarded to the appellant under Section is converted/ altered from 392 PPC to 395 PPC. Resultantly, with the above alteration of Section, the judgment dated 26.10.2011 is upheld and the conviction and sentence is sustained. The appellant is on bail. He is taken into custody and sent to jail to serve out his sentence.

MR. JUSTICE ZAHOOR AHMED SHAHWANI

Quetta

IN THE FEDERAL SHARIAT COURT
(Appellate/Revisional Jurisdiction)

PRESENT

MR. JUSTICE RIAZ AHMAD KHAN, CHIEF JUSTICE
MR. JUSTICE ZAHOOR AHMED SHAHWANI

CRIMINAL APPEAL NO.2/Q OF 2013
Ghulam Haider s/ o Khair Jan… Appellant
r/o Khadkoocha, Distt: Mastung

Versus

The State … Respondent

LINKED WITH

CRIMINAL APPEAL NO.3/Q OF 2013
Muhammad Ishaque s/o Fazal Khan … Appellant
r/o Khadkoocha, Distt: Mastung

Versus

The State … Respondent

LINKED WITH

CRIMINAL APPEAL NO.15/Q OF 2014
Muhammad Shafa s/ o Bahar Shah … Appellant
r/o Khadkoocha, Distt: Mastung

Versus

The State …… Respondent

LINKED WITH

CRIMINAL REVISION NO.1/Q OF 2013
Takri Abdul Rehman s/ o Madad Khan … Petitioner
r/o Khadkoocha, Distt: Mastung

Versus

The State … Respondent

Counsel for the appellant in Cr.A.No.2 /Q of 2013 … Mr. Ali Ahmed Lehri, Advocate

Counsel for the appellant in Cr.A.No.3/Q of 2013 … Mr. Abdul Ghani Mashwani, Advocate

Counsel for the appellant in Cr.A.No.15/Q of 2014 … Malik Sikandar Khan, Advocate

Counsel for the complainant/ … Mr. Liaqat Ali, Advocate

Petitioner in Cr.Rev.No.1/Q of 2013

Counsel for the State	…	Mr. Abdul Sattar Khan Durrani, Addl: Prosecutor General, Balochistan
FIR No. Date and Police Station	…	No.5/2010, dated 13.04.2010 P.S. Khadkoocha
Date of Judgment of trial Court in Crl.A.No.2/Q/2013 and Crl. Rev. No.1/Q/2013	…	28.10.2010
Date of Judgment of trial Court in Crl.A.No.3/Q/2013	…	10.10.2011
Date of Judgment of trial Court in Crl.A.No.15/Q/2014	…	10.04.2014
Date of Institution in FSC of Cr.A.No.2 & 3/Q/13 and Cr.Rev.No.1/Q/13	…	11.02.2013
Date of Institution in FSC of Cr.A.No.15/Q/2014	…	10.05.2014
Date of hearing	…	12.10.2015
Date of decision	…	10.2015

JUDGMENT:

ZAHOOR AHMED SHAHWANI, J: Through this single judgment we are going to dispose of four connected matters i.e. Criminal Appeal No.2/Q of 2013 filed by appellant Ghulam Haider son of Khair Jan, Criminal Appeal No.3/Q of 2013 filed by appellant Muhammad Ishaque son of Fazal Khan, Criminal Appeal No.15/Q of 2015 filed by appellant Muhammad Shafa son of Bahar Shah and Criminal Revision No.1/Q of 2013 filed by complainant Abdul Rehman s/o Madad Khan, as they arise out of one and the same FIR.

Initially the convicts/appellants Ghulam Haider and Muhammad Ishaque filed their appeals against their conviction as well as the complainant filed revision petition for enhancement in the Hon'ble High Court of Balochistan, Quetta, which were later on transmitted to this Court by High Court of Balochistan due to lack of jurisdiction.

It is pertinent to mention here that initially one accused namely Ghulam Haider was arrested on 13.04.2010 and he was tried by the learned trial Court and on conclusion of trial, the learned Sessions Judge Kalat Division at Mastung, vide judgment dated 28.10.2010 convicted him under section 302 (b) PPC and sentenced to suffer R.I. for life imprisonment with fine of Rs:200,000/- (Rupees two lac) as compensation under section 544-A Cr.P.C. or in default thereof to further suffer six months S.I. Benefit of section 382-B Cr.P.C. was also extended in his favour. However, the other accused namely Ghulam Fareed, Muhammad Ishaque, Abdul Qayyum, Abdul Manan and Muhammad Shafa were absconder at that time, therefore, it was ordered by the learned trial Court to keep the case file on dormant till their arrest. Ghulam Haider, convict/appellant preferred appeal against his conviction and sentence before the High Court of Balochistan, Quetta. During pendency of said appeal, the absconding accused namely Muhammad Ishaque was arrested on 27.04.2011. He faced trial and on conclusion of trial vide judgment dated 10.10.2011 he was convicted under section 302 (b) Qisas & Diyat Ordinance read with Section 148/149 PPC and sentenced to suffer R.I. for life as Ta'zir with fine of Rs.100,000/- (rupees one lac) as compensation or in default thereof to suffer S.I. for one year. He was further convicted under section 392 PPC to suffer R.I. for 07 (seven) years with fine of Rs.50,000/- (fifty thousand) or in default thereof to further suffer S.I. for six months. Both the sentences were ordered to run concurrently with benefit of section 382-B Cr.P.C. Later on, another absconding accused namely Muhammad Shafa was arrested on 07.11.2012. He also faced trial and at the end vide judgment dated 10.04.2014 he was convicted under section 302 (b) PPC as Ta'zir read with section 149 PPC and sentenced to life imprisonment i.e. 25 years R.I. in addition to pay Rs.200,000/- (rupees two lac) as compensation under section 544-A Cr.P.C. The amount of compensation, if recovered, was ordered to be paid to the legal heirs of deceased Abdul Rahim or in default thereof to further undergo one year S.I. Benefit under section 382-B Cr.P.C was also extended in favour of convict/appellant w.e.f. 07.11.2012.

Complainant Abdul Rehman also filed Criminal Revision No.1/Q of 2013 against appellant Ghulam Haider wherein he prayed that judgment dated 28.10.2010 passed by the Sessions Judge, Kalat at Mastung may be modified and the life imprisonment awarded to the respondent/convict may be converted to death penalty.

2. Brief facts of the prosecution case are that an FIR No. 05/2010 was lodged on the instance of complainant namely Abdul Rehman on 13.04.2010 in police station Khadkoocha through *Murasila* alleging therein that his son Abdul Rahim went to

his lands on motorcycle CD-70, bearing registration No.MA-0772 and at about 7-30 p.m complainant received information through telephone that his son Abdul Rahim has received bullet injuries by dacoits. On this information he alongwith one Muhammad Hanif immediately reached at the spot and saw that his son was lying in injured condition on the road, on asking his son said that he was coming to home on his motor cycle, in the way two Honda motor cycles crossed him, accused Ghulam Haider, Ghulam Fareed both sons of Khair Jan and Muhammad Ishaque riding on one of these motor cycles while accused Abdul Qayyum, Abdul Manan and Muhammad Shafa were riding on another motorcycle. They stopped motorcycles in front of him and signaled him to stop, but he did not stop. On this accused Ghulam Haider fired upon him with kalashnikov, due to firing he received injuries and fell down from motor cycle. On hearing of firing the people were gathered and accused persons escaped away. He further averted that accused Ghulam Haider and his other companions with intention of snatching motor cycle caused injuries to his son. On the basis of the report of complainant FIR No.05/2010 Offence under sections 302/34 P.P.C. registered against Ghulam Haider alongwith absconding accused persons Ghulam Fareed, Muhammad Ishaque, Abdul Qayyum, Abdul Manan and Muhammad Shafa.

3. After registration of the case, accused Ghulam Haider was arrested and complete challan was submitted in the trial Court while the remaining co-accused could not be arrested, therefore, proceedings under section 87/88 Cr.P.C. were initiated against them and they were declared proclaimed offenders. The learned trial Court framed charge against the accused Ghulam Haider on 04.06.2010 under Sections 302/34 PPC to which the accused did not plead guilty and claimed trial.

4. To prove its case the prosecution produced seven witnesses in the case of appellant Ghulam Haider namely **P.W-1** Abdul Rehman, the complainant, who narrated the same facts as mentioned in his report Ex. P/1-A**. P.W-2** Jan Muhammad stated that on 13.04.2010 he, Abdul Rahim and Abdul Khaliq were working at the lands of Abdul Rehman. After offering *maghrib* prayer they left for home on motor cycles, Abdul Rahim was going ahead on his motorcycle, while he and Abdul Khaliq riding on his motor cycle and were following him, when they reached at Dack area, two motor cycles crossed them on one of these motor cycle Ghulam Haider, Ghulam Fareed and Muhammad Ishaque were boarded, while Abdul Qayyum, Muhammad Shafa and Abdul Manan were riding on other motor cycle , mean while they heard gun shots, when they reached near Abdul Rahim they saw Abdul Rahim in injured condition, who told them that Ghulam Haider and his companions signaled him to stop, but he did not stop, Ghulam Haider fired upon him and he receives injuries, further deceased Abdul Rahim told them to chase the culprits and catch them, they chased the accused persons. Accused Ghulam Haider fell down from the motorcycle near *Jamiah Masjid*, while accused Abdul Manan escaped along with Kalashnikov. Accused Ghulam Haider was caught and handed over to police. **P.W-3** Niaz Muhammad stated that on 14.04.2010, Muhammad Hanif produced blood stained clothes and blood stained *chadar* of deceased to SHO. The SHO took the same through *Fard*. He produced the *Fard* of blood stained clothes and *chadar* of deceased as Ex.P/3-A. He identified his thumb impression as well as thumb impression of Abdul Ghani over it. He produced blood stained clothes and blood stained *chadar* of deceased as Art/1. He produced sample of seal as Art/2. He

produced blood stained clothes brown in colour of deceases as Art/3. He produced blood stained *chadar* of deceased as Ar/4. **P.W-4** Dr. Malik Safdar Hussain MLO, who deposed that on 13.04.2010 at about 11.30 p.m. the dead body of Abdul Rahim was brought by Abdul Baqi (neighbour). On examination of the dead body he found following injuries on his body:-

Entrance wound right lateral lumber region.

Exit wound umbilical region.

Intestines and paritonium out.

Radiology according to X-Ray report No.9098 dated 14.4.2010 (A) fracture of right radious seen (B) Dilated bowl loops seen.

Further deposed that due to blood loss, damaged to vital organs of abdomen by shots from fire arm. **P.W-5** Taj Muhammad, deposed that on 13.04.2010 he was deputed as constable at Tehsil Khadkoocha, on same day he alongwith SHO Shah Nawaz went to the spot at Dock Khadkoocha, where CD motor cycle, and an empty shot and dead body of Abdul Rahim was lying. The SHO took into possession motor cycle and empties through *Fard*. He produced recovery memo of motor cycle and empty as Ex.P/5-A. He identified his signature as well signature of Muhammad Azam over it. He produced CD 70 motor cycle No.MA-0772 as Article-5. He produced parcel of empty as Article-6, sample of seal as Article-7, and one empty shot as Article-8. Thereafter the SHO took into possession motor cycle of deceased through *Fard*. He and *Ustad* Murad Ali signed the same. He produced recovery memo of Honda Motor Cycle as Ex.P/5-B and identified his signature as well as signature of Murad Ali over it. He produced Honda motor cycle as Article-9. **P.W-6** Muhammad Hanif, who narrated the facts of this case on the same line as narrated by the complainant in his deposition. **P.W-7** Shahnawaz Station House Officer **(SHO)** is the Investigating Officer, who investigated the case and narrated the facts regarding investigation, on written/report of complainant Abdul Rehman registered FIR No.5/2010 under section 17/4 of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979, he himself started investigation of the case, he alongwith police officials went at the spot, when deceased Abdul Rahim was lying in injured condition. He prepared map of occurrence. He produced map of occurrence as Ex.P/7-A and identified his signature over it, thereafter, injured Abdul Rahim was taken to Civil Hospital Mastung and subsequently the injured was referred to Quetta, for further treatment, accused Ghulam Haider was arrested near Masjid by police station Khadkoocha, thereafter he again went at the spot and took in possession motor cycle of injured Abdul Rahim and a empty through *Fard.* He recorded statement of witnesses u/s 161 Cr.P.C. and motor cycle of the accused took into possession and recorded statement. Thereafter, the heirs of deceased Abdul Rahim produced blood stained clothes he took the same into possession through *Fard* and recorded statement of witnesses u/s 161 Cr.P.C. prepared inquest report of deceased and produced same as Ex.P/7-B. During investigation he obtained arrest warrants of absconding accused persons and tried to arrest them but they could not be arrested, on completion of investigation accused Ghulam Haider was shifted to judicial custody on 28.04.2010 and prepared challan and sent to the court for trial. He produced challan as Ex.P/7-C., and identified his signature over it. He obtained medical certificate of deceased Abdul Rahim and prepared challan and sent to the Court. He produced challan about medical certificate of deceased Abdul Rahim as Ex.P/7-D.

5. In the case of appellant Muhammad Ishaque the prosecution produced eight witnesses, **P.W-1** Abdul Rehman, the complainant, **P.W-2** Jan Muhammad is the witness of last seen, **P.W-3** Muhammad Hanif stated same story as stated by complainant, **P.W-4** Niaz Muhammad is the recovery witness of blood stained cloths and chadar Ex.P/4-A , **P.W-5** Taj Muhammad, Constable witness of recovery memo **P.W-6** Shah Nawaz is the Investigating Officer, **P.W-7** is Ghulam Haider, Naib Tehsildar, the 2nd Investigating Officer stated that on 27.04.2011 he arrested accused Muhammad Ishaque, who was absconder and named in the case. On 28.04.2011 he obtained physical remand of accused. He conducted personal search of the accused and on 09.05.2011 remanded him to judicial custody and submitted challan Ex.P/7-A against the accused in the competent Court. **P.W-8** is Dr. Malik Safdar Hussain MLO, who examined the dead body of deceased Abdul Rahim.

6. In the case of appellant Muhammad Shafa , to prove its case prosecution produced nine witnesses **P.W-1** Abdul Rehman, the complainant, **P.W-2** Abdul Khaliq , who is witness of the occurrence, **P.W-3** Taj Muhammad, Constable witness of recovery memo, **P.W-4** Muhammad Hanif, **P.W-5** Niaz Muhammad is the recovery witness of blood stained cloths and *chadar* Ex.P/5-A, **P.W-6** is Dr. Malik Safdar Hussain MLO, who examined the dead body of deceased Abdul Rahim, **P.W-7** Shah Nawaz is the Investigating Officer, **P.W-8** is Abdul Saeed Naib Tehsildar is the 2nd Investigating Officer of case who brought on record incomplete challan Ex.P/8-A and **P.W-9** is Ghulam Haider, Naib Tehsildar who is the 3rd I.O. of the case, who brought on record incomplete challan to the extent of convicted accused Mohammad Ishaque as Ex.P/9-A.

7. It may be pertinent to mention here that most of the witnesses are same in all the above-mentioned three cases, but the statements of the witnesses were recorded with different number. However, they gave almost the same statements during the separate trial of each accused.

8. On close of prosecution evidence the statement of convicts/appellants were recorded under section 342 Cr.P.C. wherein they denied the allegation leveled against them by prosecution. All the convict/appellants neither got recorded statements on oath as envisaged under section 340(2) Cr.P.C. nor produced any witness in their defence. At the close of trial learned trial Court vide impugned judgment convicted and sentenced the convict/appellants in the manner as mentioned above. Being aggrieved and dissatisfied from the judgment passed by the learned trial Court dated 28.10.2010, 10.10.2011 and 10.04.2014. The appellants filed the instant appeals separately.

9. Learned counsel for convict/appellants contended that convicts/appellants are innocent and have committed no offence but they have involved falsely; the prosecution failed to produce any independent witness and all the witnesses examined by prosecution are close relatives, therefore their evidence cannot be relied upon being interested ones; the prosecution evidence suffers from material contradictions and discrepancies and witnesses have not confirmed each other presence at the place of incident; the statement of deceased is not a dying declaration as it was not recorded by police nor before the doctor; neither anything has been

robbed nor any crime weapon has been recovered from possession/pointation of appellants; and prosecution has been unable to prove its case against appellants beyond shadow of doubt, but the learned trial Court without proper appreciation of evidence convicted and sentenced the appellants which are not sustainable in the eye of law.

10. On the other hand learned counsel for complainant assisted by learned Additional Prosecutor General argued that prosecution witnesses in their evidence have fully implicated the appellants and corroborated each other with regard to material points; no material contradiction/discrepancy appeared in the deposition of prosecution witnesses as to be fatal to the case of prosecution; one of the appellant namely Ghulam Haider was apprehended after chase, while the remaining appellants remained fugitive of law for a long time; the ocular account is corroborated by medical and circumstantial evidence and prosecution has fully established its case against appellants and the trial Court has rightly convicted and sentenced the appellants.

11. We have heard the learned counsel for appellants, as well as learned Additional Prosecutor General assisted by learned counsel for complainant and have gone through the record.

12. Perusal of the record reveals that none of the witnesses including the complainant has seen the appellants committing the offence, however, complainant Abdul Rehman, P.W Jan Muhammad, P.W. Muhammad Hanif and P.W Abdul Khaliq have claimed that when they reached at the place of incident they found Abdul Rahim in injured condition and injured told them that appellants and absconding accused who were on two (2) motor cycles signaled him to stop but when he did not stop, the appellants Ghulam Haider fired at Abdul Rahim with kalashnikov and caused him injuries. According to evidence of P.W Jan Muhammad and P.W Abdul Khaliq that on 13.04.2010, they alongwith Abdul Rahim (deceased) were working at lands of injured Abdul Rahim. After finishing work, after *maghrib* Abdul Rahim on his motorcycle while PWs on another motorcycle left for their homes. Abdul Rahim was going ahead to them on his motor cycle while PWs Jan Muhammad and Abdul Khaliq riding on other motorcycle were behind him. When they reached at Dock area, two (2) motorcycles crossed them. On one motorcycle Ghulam Haider, Ghulam Fareed and Muhammad Ishaque were riding while on other motorcycle Abdul Qayyum, Abdul Manan and Muhammad Shafa were riding. According to said PWs they heard a fire report and when reached near Abdul Rahim he was lying in injured condition, who told them that appellants alongwith absconding accused persons signaled him to stop, but on his non stopping he was fired at by Ghulam Haider with kalashnikov as a result of which he sustained injuries. Both the PWs stated that they chased the culprits. The appellant Ghulam Haider lost control over the motorcycle and fell down near *Jamiah Masjid* and was over powered while accused/appellant Abdul Manan made his escape good. The remaining accused persons also fled away from the place of occurrence.

13. While the complainant Abdul Rehman and P.W Muhammad Hanif have deposed that they came to know about the incident and reached at the spot where found Abdul Rahim in injured condition and Abdul Rahim told that he was on his way

to home on motorcycle when appellants and absconding accused persons riding on two (2) motorcycles came in front of him and signaled him to stop, the accused Ghulam Haider fired at him with kalashnikov and caused him injuries. According to complainant that accused persons had attempted to rob motorcycle from his son Abdul Rahim. According to witnesses that injured Abdul Rahim later on succumbed to his injuries at hospital. It is crystal clear from the evidence available on record rather an admitted fact that none of the witnesses is the eye witness of the incident who have seen the accused persons while firing at Abdul Rahim (deceased) and causing him injuries with kalashnikov or attempting to robe motorcycle from deceased, however it has already been stated here in above that the private PWs including complainant have stated that Abdul Rahim who was lying in injured condition at the place of incident informed them that the accused persons signaled him to stop but on his non stopping one of the accused Ghulam Haider (appellant) fired at him and caused him injuries with kalashnikov. The learned trial Court considering the statement of injured Abdul Rahim a dying declaration and made it a base for conviction of the appellants. Now it is to be seen whether the injured made any statement before complainant and other witnesses and the statement of injured can be termed as dying declaration or otherwise. Careful perusal of the depositions of complainant Abdul Rehman and P.W Muhammad Hanif shows that material discrepancies exist in their depositions. As complainant deposed that he received information through telephone about the incident. While replying a question he stated that P.W Muhammad Hanif was present in his house as a guest whom he took to place of incident; he further replied that when he and P.W Muhammad Hanif reached at the place of occurrence, the police and other people were already present. Whereas P.W. Mohammad Hanif stated that he was present his house when he was informed about the incident. In cross-examination he replied that Abdul Rehman (complainant) came to his house wherefrom they both left for place of occurrence. P.W, answering one of the questions replied that after ten (10) minutes of their arrival at place of incident police had reached there. Both the complainant and P.W Muhammad Hanif during the course of cross-examination were unable to tell name of any other person who were present at the place of incident. From the above material discrepancies appeared in the depositions of complainant and PW Muhammad Hanif, the presence of complainant and P.W Muhammad Hanif at the place of occurrence stands highly doubtful. According to complainant and other private witnesses that injured Abdul Rahim had told them that accused persons had signaled him to stop but when he did not stop one of the accused Ghulam Haider (appellant) caused him injuries with kalashnikov.

14. The learned trial Court in view of the depositions of witnesses declared the statement of injured/deceased Abdul Rahim a dying declaration. From the depositions of afore mentioned PWs the injured Abdul Rahim was able to make a statement about the incident. It is not disputed that the deceased was rushed to hospital in injured condition and later on he succumbed to his injuries there. If injured was in a condition to make statement before other persons regarding incident at the place of occurrence, and police was also present at the spot, then the question arises why the police did not record the statement (Dying declaration) of injured Abdul Rahim. Even the police could register a case on statement of injured against the accused persons. But nothing in the depositions of police witnesses has come on record that

injured Abdul Rahim made any such statement at the spot. As P.W-6 Shahnawaz , *Risaldar* levies 1st investigation officer in his deposition stated that when he arrived at the place of occurrence he found Abdul Rahim in injured condition. The witnesses i.e. complainant, P.W-Muhammad Hanif, Jan Muhammad and Abdul Khaliq have not confirmed/corroborated each other's presence at the place of occurrence . In such circumstances any such statement (Dying declaration) by deceased before the said P.Ws is highly doubtful and not established. Though there is no bar on oral dying declaration before a private person but in the case in hand the very statement by deceased before afore-mentioned P.Ws is highly doubtful and cannot be believed and relied upon. Reliance is place on authorities reported as Mst. Zahida Bibi Vs. The State (2006 PLD 255) , Tahir Khan Vs. The State 2011 (SCMR 646) and Hameed Gul Vs. Tahir and 2 others (2006 SCMR 1628).

15. The prosecution witnesses Jan Muhammad and Abdul Khaliq have tried /attempted to substantiate that they saw the accused persons riding on two (2) motorcycles and after receiving information from injured they chased the accused/persons and over powered one of the accused Ghulam Haider appellant, who had lost control over the motorcycle and fell down, while accused Abdul Manan made his escape good with kalashnikov. According to PWs other accused had fled away from the place of occurrence. It is evident from the evidence of PW Jan Muhammad and Abdul Khaliq that three accused/persons were riding on each motorcycle. The chasing of accused Ghulam Haider by PWs also stands highly doubtful as both the PWs at one place stated that three (3) accused persons were riding on each motorcycle, while at the same breath stated that accused Ghulam Haider fell down, who was over powered, while accused Abdul Manan fled away with kalashnikov. The depositions of both the P.Ws is silent about the third accused who was riding on motorcycle with Ghulam Haider and Abdul Manan. If the third accused namely Muhammad Ishaque was not riding motorcycle with accused Ghulam Haider and Abdul Manan, then what happened with the third accused and how he made his escape good. It has also come in the depositions of PWs Jan Muhammad and Abdul Khaliq that they were chasing the accused when reached near *Jamiah Masjid*; the people had gathered and accused Ghulam Haider (appellant) was over powered and his motorcycle was also taken into possession. While accused Abdul Manan made his escape good alongwith kalashnikov. The said PWs were on motorcycle while accused Abdul Manan was on foot and witnesses with the help of people of *Muhallah* could easily overpowered the accused Abdul Manan but no efforts has been made. Both the PWs were also not consistent about name of accused riding on each motorcycle. As at one place both the PWs said that Ghulam Haider, Ghulam Fareed and Muhammad Ishaque were riding on one motorcycle, while remaining accused were on second motorcycle, whereas at other place stated that Ghulam Haider and Abdul Manan were on one motorcycle and Ghulam Haider fell down and over powered near *Masjid* while accused Abdul Manan fled away with Kalashnikov, which creates doubt with respect to the story narrated by said witnesses. Even no other witness has been examined in this connection to support the story introduced by PWs. The presence of PWs Jan Muhammad and Abdul Khaliq at the place of occurrence as last seen witnesses is also doubtful. (Reliance is placed on Judgment reported as Imran alias Dully and another Vs. The State (2015 SCMR 155) and Khalid alias Khalidi and 3 others Vs. The State (SCMR 2012 327).

16. Apart from that none of the PWs except complainant has stated/deposed that accused had attempted to rob the motorcycle from deceased. Keeping in view the number of accused persons and also having Kalashnikov they could easily snatch motorcycle from deceased and other PWs but not robbing/snatching motorcycle from deceased by accused also creates doubt to the case of prosecution.

17. So far as the recovery of crime empty from the place of occurrence and blood stained clothes of deceased are concerned, the same too cannot prove the case of prosecution because neither any crime weapon has been recovered from possession of appellant nor any Chemical Expert Report in respect of blood stained clothes obtained/ produced. The investigating officer could have collected/secured blood stained earth from the place of occurrence when he could secure blood stained clothes and etc. As far as the ocular account is concerned the same is full of material contradiction/ discrepancies besides getting no corroboration by independent evidence. As all the private witnesses produced by prosecution are interested witnesses besides being close relatives and no independent witness has been associated to corroborate the case of prosecution despite availability. Reliance is place on judgment 2010 SCMR page 1772 (Sher Khan Vs. The State.) The evidence collected and led by prosecution against appellants suffers from material contradictions/discrepancies besides getting no independent corroboration which cannot be relied upon and not safe to make it a base for conviction of appellants. The benefit of doubt could have been extended in favour of the appellants but the learned trial Court convicted and sentenced the appellants, which are not tenable in the eye of law.

18. In view of what has been stated here in above, the Criminal Appeal No.2/Q of 2013 filed by appellant Ghulam Haider son of Khair Jan, Criminal Appeal No.3/Q of 2013 filed by appellant Muhammad Ishaque son of Fazal Khan, Criminal Appeal No.15/Q of 2015 filed by appellant Muhammad Shafa son of Bahar Shah are accepted and the impugned judgments dated 28.10.2010, 10.10.2011 and 10.04.2014, whereby the appellants have been convicted and sentenced are set aside, resultantly the appellants are acquitted of the charge. They be set at liberty if not required in any other case.

Therefore, the Criminal Revision No.1/Q of 2013 filed by petitioner Abdul Rehman having no merits is dismissed.

MR. JUSTICE ZAHOOR AHMED SHAHWANI

MR. JUSTICE RIAZ AHMAD KHAN
CHIEF JUSTICE

Dated, Islamabad the
21 -October, 2015

Approved for reporting.

JUSTICE ZAHOOR AHMED SHAHWANI

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

MR. JUSTICE SHEIKH NAJAM UL HASAN
MR. JUSTICE RIAZ AHMAD KHAN
MR. JUSTICE ZAHOOR AHMED SHAHWANI

JAIL CRIMINAL APPEAL NO.15/I OF 2014

Nadeem Ahmed s/o Qutab-ud-Din Caste Joia, r/o new Karachi … Appellant

Versus

The State … Respondent

LINKEDWITH

JAIL CRIMINAL APPEAL NO.16/I OF 2014

Muhammad Siddique s/o Qabil Caste Marri Baloch, resident of Nowshero Feroz. … Appellant

Versus

The State … Respondent

LINKEDWITH

JAIL CRIMINAL APPEAL NO.17/I OF 2014

Saifullah s/o Ghulam Mustafa Caste Gorraige Baloch, r/o Trenda Muhammad Panah, Tehsil Liaqatpur, District Raheemyar Khan … Appellant

Versus

The State … Respondent

LINKEDWITH

JAIL CRIMINAL APPEAL NO.18/I OF 2014

Jamshaid s/o Muhammad Afzal Caste Jatt, r/o Trenda Muhammad Panah, Tehsil Liaqatpur, District Raheemyar Khan … Appellant

Versus

The State … Respondent

LINKEDWITH

JAIL CRIMINAL APPEAL NO.19/I OF 2014

Atta Muhammad s/o Muhammad Hayat Caste Shar r/o Tehsil and District Sanghar … Appellant

Versus

The State … Respondent

LINKEDWITH

CRIMINAL REVISION NO.02/Q OF 2014

Akhtar Zaib s/o Haji Malang By caste Yousafzai r/o Tehsil Sonmiani (Winder) Lasbela … Petitioner/Complainant

Versus

1. Saifullah … Respondents
2. Jamshaid
3. Atta Muhammad
4. Nadeem Ahmed
5. Muhammad Siddique
6. Jamshaid
7. Ali Bhai
8. Habib
9. Salah-ud-Din
10. The State …

Counsel for the appellants in all Jail Criminal Appeals	…	Mr. Javed Aziz Sindhu, Advocate
Counsel for Petitioner/complainant in Cr. Revision No.02/Q of 2014	…	Mr. Mazullah Barkandi, Advocate
Counsel for the State	…	Miss. Robina Butt, Advocate on behalf of A.G. Baluchistan
FIR No. Date and Police Station	…	No.31/2011 dated 07.04.2011 P.S. Winder District Lasbela
Date of Judgment of trial Court	…	13.11.2013
Date of Institution of all Jail Criminal Appeals	…	15.04.2014
Date of Institution of Criminal Revision	…	03.07.2014

Date of hearing	…	15.01.2015
Date of decision	…	15.01.2015
Date of Announcement	…	17.02.2015

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JUDGMENT:

ZAHOOR AHMED SHAHWANI, J :- Appellants/accused namely Saifullah son of Ghulam Mustafa, Muhammad Siddique son of Muhammad Qabil, Atta Muhammad son of Muhammad Hayat, Nadeem Ahmed son of Qutub-ud-Din and Jamshaid son of Muhammad Afzal filed appeals against their conviction and sentences challenging the impugned Judgment dated 13.11.2013 of the learned Additional Sessions Judge, Lasbela at Hub in the High Court of Balochistan. The appeals were admitted for regular hearing by the Division Bench of the High Court of Balochistan on 25.03.2014. Later, on the written application of counsel for appellants after hearing the learned Deputy Prosecutor General, Balochistan and after going through the relevant law, the Division Bench of the High Court of Balochistan vide order dated 03.04.2014 while considering the matter falling in the jurisdiction of the Federal Shariat Court transmitted the appeals, paper books alongwith record to this Court. Vide order dated 20.05.2014 of this Court, the appeal of Nadeem Ahmed (Jail Criminal Appeal No.15/I of 2014), appeal of Muhammad Siddique Jail Criminal Appeal No.16/I of 2014), appeal of (Jail Criminal Appeal No.17 /I of 2014), appeal of Jamshaid (Jail Criminal Appeal No.18/I of 2014) and appeal of Atta Muhammad (Jail Criminal Appeal No.19/I of 2014) while condoning the delay, their appeal were admitted for regular hearing, Notices were also issued to the State.

2. Appellants/accused persons Saifullah, Muhammad Siddique, Atta Muhammad, Nadeem Ahmed and Jamshaid have challenged the judgment dated 13.11.2013 delivered by the learned Additional Sessions Judge, Lasbela at Hub, whereby appellants/accused namely Saifullah and Muhammad Siddique were convicted under section 396-PPC and sentenced rigorous imprisonment for life with a fine of Rs:50,000/- each or in default thereof to further undergo rigorous imprisonment for 06 months each, they were also ordered to pay a sum of Rs:1,00,000/- (one lac) each to the legal heirs of deceased U/S 544-A Cr.P.C. as compensation while convict appellants namely Atta Muhammad, Nadeem Ahmed and Jamshaid were convicted under section 396-PPC and sentenced to rigorous imprisonment for a term of 10 (ten) years with a fine of Rs:50,000/- (rupees fifty thousand) each or in default thereof to further undergo rigorous imprisonment for six (06) months each. They were also ordered to pay a sum of Rs:1,00,000/- (one lac)each to the legal heirs of deceased U/S 544-A Cr.P.C. as compensation. Benefit of section 382-B Cr.P.C. was extended to them.

3. Complainant Akhtar Zaib has also filed Criminal Revision Petition No.02/Q of 2014 for enhancement of sentences of the accused/appellants.

4. All the five Jail Criminal Appeals No.15/I of 2014 (Nadeem Ahmed Vs. The State), Jail Criminal Appeal No.16/I of 2014 (Muhammad Siddique Vs. The State), Jail Criminal Appeal No.17/I of 2014(Saifullah Vs. The State), Jail Criminal Appeal No.18/I of 2014 (Jamshaid Vs. The State), Jail Criminal Appeal No.19/I of 2014 (Atta Muhammad Vs. The State) and Criminal Revision Petition No.02/Q of 2014(Akhtar Zaib Vs. The State etc) have arisen out of the same judgment, they are disposed off through this single judgment.

5. During the proceeding of these appeals vide this Court order dated 20.11.2014 Cr. Revision No.2/Q/2014 filed by complainant Akhtar Zaib was admitted to full hearing and a notice was issued to all the above mentioned five convicts/appellants to show-cause as to why their sentence may be not enhanced.

6. Brief facts of the prosecution case as narrated by complainant Akhtar Zaib (P.W-1) in his complaint Ex.P/1-A are that they possessed a poultry farm near Haji Abdullah Burrah stop, main RCD road Winder where, in view of protection as the chickens were ready to be delivered to market, his brother namely Bakht Bahadur used to sleep. Last night at about 10.00 p.m. his brother Bakht Bahadur went to poultry farm and on next day i.e. 07.04.2011 at about 12.30 p.m. he tried to contact his brother but in vain as his mobile phone was not responding. At about 01.50 p.m. he himself went to poultry farm where upon inquiry, it came into his knowledge that 5000 chickens and labours namely Saifullah and Jamshaid alongwith his brother Bakht Bahadur were missing. Upon search he found dead body of his brother in the north-west side of poultry farm, wrapped in sheets. Lastly he requested for taking legal action against Saifullah, Jamsheed and other unknown accused persons who committed murder of his brother and robbed 5000 chickens worth of Rs.12,00,000/- (Rupees twelve hundred thousand). Therefore, on the basis of complaint, FIR No.31/2011(Ex.P/10-A) dated 07.04.2011 was registered at police station Winder and the accused were arrested on 08.04.2011during course of investigation.

7. After completion of investigation challan was submitted before the trial Court on 22.04.2011 for further judicial proceedings.

8. The learned trial court framed charge against the accused on 09.05.2011 under section 17(4) Offences Against Property (Enforcement of Hudood) Ordinance, 1979 read with sections 302/392 PPC to which accused persons pleaded not guilty and claimed trial.

9. During trial, the prosecution examined ten witnesses including complainant namely Akhtar Zaib (**P.W-1**), who produced his written application Ex.P/1-A on the basis of which FIR Ex. P/10-A, was lodged by the police. **P.W.2** Imdad Ali produced seizure memo Ex.P/2-A of mobile phones, seizure memo Ex:P/2-B of cash amount Rs:13,73, 514/-. He also produced two China mobile phones and one Nokia 6300 mobile phone as Art:P/4, Art: P/5 and Art:P/7 respectively. **P.W-3** Razi Malik produced memo of dead body as Ex.P/3-A. **P.W-4** Akbar Azam produced seizure memo Ex.P/4-B of articles seized from the place of occurrence and also produced water pipe, blood stained kameez (shirt) towel, four blankets and pieces of rope as Art:P/9 to Art:P/17. **P.W-5** Dr. Aziz Ahmed Roonjho, medical officer produced death certificate as Ex.P/5-A. **P.W-6** Abdul Wahid produced recovery memo of *Danda* as Ex.P/6-A and also produced Danda/wooden stick as Art:P/2. **P.W-7** Abdul Aziz constable produced memo Ex.P/7-A of three computerized weighbridge receipts and computerized bill as Art:P/22 to Art:P/25. **P.W-8** Inayatullah, Judicial Magistrate produced confessional statement of accused Jamshaid s/o Muhammad Afzal u/s 164 Cr.P.C. as Ex.P/8-A to Ex.P/8-K. **P.W-9** Malkt Khan is a circumstantial witness. **P.W-10** Khan Muhammad is the Investigating Officer of the case. He produced FIR,

two site sketches, receipt of handing over dead body, inquest report, lists of case property and witnesses and two challans as Ex:P/10-A to Ex.P/10-J respectively.

10. After close of the prosecution evidence, statements of the accused were recorded under section 342 Cr.P.C. wherein they denied the allegations of the prosecution. Accused/appellants Nadeem Ahmed, Muhammad Siddique, Saifullah and Jamshaid neither opted to record their statement on Oath under section 340(2) Cr.P.C. nor did they produce evidence in their defence. However, accused/appellant Atta Muhammad recorded his statement under section 340(2) Cr.P.C. and produced Ali Asghar as D.W-1, Dr. Ali Asghar D.W-2 and Shams-ud-Din D.W-3 in his defence. The learned trial Court concluded the proceeding by means of judgment dated 13.11.2013 whereby the appellants were convicted and sentenced in the afore mentioned terms. The appellants being aggrieved by the impugned judgment preferred these appeals.

11. The learned counsel for the appellants contended that in fact it is case of no evidence. Appellants, Nadeem Ahmed, Muhammad Siddique and Atta Muhammad are not nominated in the FIR, no identification parade was conducted, PW-1 is brother, Imdad Ali P.W-2 is partner in Poultry Farm, Razi Malik P.W-3 and Akbar Azam P.W-4 are close relative of deceased person and being interested witnesses are not worthy of reliance, while remaining witnesses are police officials. It was also submitted that confessional statement has been recorded after inordinate delay of three days, which had been retracted and was not corroborated by any independent evidence and no recovery of stolen property (chickens). Learned counsel further stated that only recovery of computerized bill and receipt of weigh- bridge and computerized bill containing amount to Rs.13,73,514/- (Thirteen lac seventy three thousands five hundred fourteen only) does not connect the appellants/accused. Concluding the arguments, the learned counsel submitted that the prosecution has not been able to prove its case beyond reasonable shadow of doubt against the appellants as material contradiction exists in the prosecution evidence.

12. On the other hand, learned counsel for complainant has argued that the statements of witnesses are duly corroborated with each other on material points and no material contradiction has appeared in their statements, the medical evidence supports the ocular account and recoveries were effected on the pointation of appellants/accused persons. Further Saifullah accused made disclosure and on his pointation the stick/ *danda* (crime weapon) was recovered from the place of occurrence with the help of which he attacked the deceased Bakht Bahadur, and prosecution has fully proved its case against accused/appellants beyond any shadow of doubt.

13. Whereas learned Additional Prosecution General Balochistan representing the State adopted the arguments put forth by learned counsel for the complainant.

14. We have heard the learned counsel for appellants as well as learned counsel for the complainant and the learned Assistant Prosecutor General Balochistan for the State and have gone through the evidence available on the record and have also scrutinized the impugned judgment.

15. The allegation against the convict/appellants is that in the night between 6th/7th April, they committed dacoity by taking away about 5000 chicken from the Poultry Farm of complainant Akhtar Zaib (PW-1) besides committing murder of his brother namely Bakht Bahadur (deceased).

16. Prosecution in order to bring home the charge against convict/appellants had relied upon the evidence of 10 witnesses. It is evident from the record rather an admitted fact that there is no direct ocular evidence of the occurrence and the case of prosecution is based on circumstantial evidence which has been collected in the shape of confessional statement of appellant Jamshaid, disclosure and recoveries.

17. From the evidence available on the record it is clear that after arrest appellant Jamshaid has recorded his confessional statement before concerned Judicial Magistrate (P.W-8) wherein he confessed that deceased was tied up with rope and chickens were taken away from poultry farm. The appellant further confessed that he alongwith accused/appellants Saifullah, Siddique and absconding accused Jamshaid had thrown the Bakht Bahadur (deceased) in bushes. The appellant Jamshaid in confession has specified the role of his companions (co-accused persons). It is evident from the confession that lastly the robbed chickens were sold out/disposed off by co-accused/appellant Nadeem, while the appellant Atta Muhammad had arranged the vehicles for transportation of chickens. The confession was recorded by the concerned Judicial Magistrate (P.W-8). He (P.W-8) produced the confessional statement as Ex.P/8-A which containing his required certificates to the extent that the confession was true and voluntary made. Though the confessional statement has been retracted and to some extent is exculpatory but the confession is corroborated on all material particulars.

18. The learned counsel for the appellants has contended that confessional statement has been recorded in delay of three days and appellant has retracted his judicial confession, but the contentions have no substance, because the retracted confession is sufficient for conviction when it is corroborated on material particulars by strong circumstantial piece of evidence such as recovery of crime weapon stick/*danda*, mobile phone of deceased, computerized weighbridge receipts/bills from appellants and recovery of ropes, plastic pipe, blood stained shirt, blankets and towel from the place of occurrence. Reliance is placed on the authorities reported as Wazir Khan Vs. The State (1989 SCMR.446), The State Vs. Minhun alias Gul Hassan (PLD 1964 SC 813) and Muslim Shah Vs. The State (PLD 2005 SC 168). In these cases the Hon'ble Supreme Court held "that retracted confessions, whether judicial or extra judicial, could legally be taken into consideration against the maker of those confession himself and if the confessions were found to be true and voluntary, then there was no need at all to look for further corroboration". So far as the delay of three days in the recording of confessional statement is concerned, reference is invited to the cases of Khuda Bakhsh Vs. The State (2004 SCMR 331) and Muslim Shah Vs. The State (PLD 2005 SC-168) wherein the Hon'ble Shariat Appellate Bench even did not consider the delay of 15 days in recording the confessional statement because it was found true and voluntary and not an out come of duress and coercion. In view of the evidence of Judicial Magistrate (P.W-8) ,the confessional statement

was true and voluntary and not obtained under pressure or coercion. Moreover, the confession is corroborated by strong circumstantial evidence on material particulars. Though the confession has been retracted but being true and voluntary one and corroborated by strong circumstantial evidence on material points is sufficient for conviction and learned trial Court has rightly believed the same and took it into consideration against the appellants.

19. Moreover, the confessional statement of appellant, Jamshaid can also, be taken into consideration against the remaining accused/appellants as circumstantial evidence under Article 43 of Qanun-e-Shahadat Order, 1984. As the Article 43 of Qanun-e-Shahadat Order, 1984 contains that when more than one persons are being tried jointly for the same offence and confession made by one of such persons affecting himself and some other may be taken into consideration against such other persons as well as against the persons who made the confession.

20. It is evident from the evidence available on the record that prosecution besides confession of appellant Jamshaid had also collected other circumstantial evidence in the shape of recovery of crime weapon stick/*danda* and mobile of deceased from possession of appellant Saifullah. It has come in the evidence of Imdad Ali (P.W-2) and Abdul Wahid (P.W-6) that accused appellant/Saifullah made disclosure and led the police to the recovery of crime weapon stick/*danda* lying on the place of occurrence as well as the mobile of deceased recovered from possession of said appellant. The recovery of crime weapon stick/*danda* and mobile phone of the deceased from appellant Saifullah gets corroboration from the confession of appellant Jamshaid as he in his confession had stated that appellant Saifullah hit the deceased on his head with stick/danda. The disclosure made by appellant Saifullah is admissible under Article 40 of the Qanoon-e-Shahadat Order, 1984. As in pursuance of disclosure of appellant Saifullah the crime weapon stick was recovered on his pointation from the place of occurrence. Reliance is placed on the judgment passed by this Court in the case of Sher Dil and others Vs. The State and others. (2003 YLR-110)

21. It is also evident from the evidence collected by prosecution that mobile phone of the deceased was recovered from possession of appellant Saifullah and was made article through Imdad Ali (P.W-2). The recovery of mobile of the deceased from said appellant further corroborates the confessional statement and connects the appellant with the commission of offence and fortifies the prosecution version.

22. Perusal of the evidence available on the record further reveals that computerized weighbridge receipts and computerized bill Art.P/22 to Art.P/25 had been recovered from appellant Nadeem as he was deputed to sell out/dispose off the robbed chickens. The recovery of receipts and computerized bill gets corroboration from confession of appellant Jamshaid as he stated that appellant Nadeem was assigned the task to dispose off/sell out the robbed chickens.

23. It has also come in the evidence of prosecution witnesses that it was the appellant Atta Muhammad who had arranged the vehicle for transportation of the robbed

chickens and had cleared the vehicles before and after the commission of crime at Weighbridge. In this regard besides the confession, the deposition of P.W-9 Malkat Khan is of much importance. As P.W-9 stated that appellant Atta Muhammad had appeared at the weigh- bridge and cleared the vehicles loaded with and earlier without chickens. P.W-9 also identified the appellant Atta Muhammad in the Court. The conducting of identification parade by witness was not necessary when eye witness identified accused in the Court. Even otherwise nothing came on record to suggest that P.W-9 had deposed falsely against appellant on account of any enmity or animosity. The statement of P.W-9 is corroborated by confession as appellant Jamshaid had confessed that it was appellant Atta Muhammad who had arranged the vehicles and cleared them at weighbridge.

24. It is evident from the record that appellant Jamshaid in confessional statement has stated that Bakht Bahadur (deceased) was tied by co-accused persons/appellants Saifullah, Siddique, and Jamshaid (absconding accused) and then they including (appellant Jamshaid) had thrown him in near by bushes. The confession of said appellant further gets corroboration by the recovery of ropes, pipe etc from the place of incident as well as the evidence of Dr. Abdul Aziz who produced the death certificate. The P.W-5 has opined that the deceased died of "Asphyxia" and the weapon which was used was "Rope" (Rassi).

25. Careful perusal of the evidence collected and led by prosecution against the appellants shows that prosecution has been able to substantiate the charge against the appellants beyond reasonable doubt by means of connecting all the links of the chain, in the shape of strong circumstantial evidence. On the other hand, the defence plea adopted by the appellants seems to be after thought and can not be relied upon.

26. It was also contention of the appellants counsel that some of the appellants are not nominated in the FIR, but this contention has no force because the strong circumstantial evidence available on record fully connects the appellants with the commission of offence and leaves no room to doubt that appellants have not been involved.

27. After considering the material available on the record, we are of the considered view that the appellants have committed the offence punishable under section 396 PPC as the number of accused was more than four. It may be mentioned here that appellant Jamshaid s/o Mohammad Afzal remained present alongwith appellants Saifullah and Muhammad Siddique at the place of occurrence from the beginning to the end and also helped the said appellants in throwing away/disposing off Bakht Bahadur (deceased) after tying in bushes. He also accompanied the said appellants to Karachi, and remained with them till his arrest; therefore, he is not entitled for any leniency/lesser punishment, while learned trial Court has taken lenient view to his extent for which he was not entitled. Keeping in view, his role played towards the commission of offence. As such the sentence of appellant Jamshaid s/o Muhammad Afzal is enhanced from ten (10) years R.I. to imprisonment for life. The sentence of fine or quantum of imprisonment in default thereof shall remain intact. The order

of payment of Rs.100000/- (one lac) to the legal heirs of the deceased under section 544-A Cr.P.C. by accused/appellant is also maintained. The benefit of section 382-B Cr.P.C. extended to the appellant is also maintained.

28. Consequently, with the above modification in the judgment to the extent of sentence of appellant Jamshaid, the impugned judgment dated 13.11.2013 passed by learned trial Court is upheld and sentences and conviction is maintained, while the jail criminal appeals filed by the appellants are dismissed, where the Criminal Revision No.02/Q of 2014 filed by complainant for enhancement of sentences of appellants is partly accepted.

MR. JUSTICE ZAHOOR AHMED SHAHWANI
MR. JUSTICE SHEIKH NAJAM UL HASAN
MR. JUSTICE RIAZ AHMAD KHAN

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

MR. JUSTICE DR. FIDA MUHAMMAD KHAN
MR. JUSTICE SHEIKH NAJAM-UL-HASSAN
MR. JUSTICE ZAHOOR AHMED SHAHWANI

CRIMINAL APPEAL NO.8/Q OF 2013

1. Muhammad Hayat
2. Wakeel … Appellants
   Both sons of Muhammad Arif
3. Ghous Bakhsh alias Shahdad @ Ahsan
   s/o Mir Hassan, All by caste Hajja,
   r/o Mandu Khan Bhag, Tehsil
   Bhag, District Kachi

Versus

The State … Respondent

Counsel for the appellants	…	Syed Muhammad Tayyab and Mr. Ahsan Rafiq Rana, Advs.
Counsel for the complainant		Mr. Shah Muhammad Jatoi, Advocate
Counsel for the State	…	Mr. Tahir Iqbal Khattak, Addl: Prosecutor General, Balochistan
FIR No. Date and Police Station	…	No.38/2010, dated 23.12.2010 P.S. Bhag, District t Kachi
Date of trial Court	…	28.02.2013
Date of Institution	…	29.04.2013
Date of hearing and Decision	…	11.11.2014
Date of Judgment	…	22.11.2014

JUDGMENT

JUSTICE ZAHOOR AHMED SHAHWANI:- This Criminal Appeal under section 24 of Offences Against Property (Enforcement of Hudood) Ordinance VI, 1979 has been directed against the judgment dated 28.02.2013, passed by learned Additional Sessions Judge-I, Sibi whereby appellants namely Muhammad Hayat, Wakeel and Ghous Bakhsh alias Shahdad have been found guilty and convicted under section 302(b) of the Pakistan Penal Code 1860 as Tazir and death sentence has been awarded to the all appellants on three counts each for causing murder of deceased Abdul Jabbar, Liaqat Ali and Muhammad Siddique with a fine of Rs.6,00,000/- (rupees six lac) each payable to the legal heirs of deceased and in default have to undergo one year simple imprisonment each. The appellants were further convicted under section 392 of the Pakistan Penal Code and sentenced to 10 years rigorous imprisonment each with fine of Rs.50,000/- in default to undergo six months simple imprisonment each. All sentences of all the three appellants shall run concurrently whereas benefit of section 382-B Cr.P.C. was not extended to the appellants due to committing inhumanity crime.

2. Criminal Murder Reference No.1/I of 2013 has been duly submitted for confirmation of death sentence.

3. Since both the matters rise out of one and the same judgment, we are disposing them of by this single judgment.

4. Briefly stated , the facts of the prosecution case are that Muhammad Salah PW-1, complainant on 23.12.2010 lodged the report Ex.P/1-A at police station, Bhag which was recorded as FIR No.38/2010, wherein it was stated that he was resident of Goth Fatwani and is cultivator by profession, however, on fateful day of incident he came to Bhag city for shopping of household articles and from Bhag city his son Muhammad Siddique levies sepoy, grandson Liaqat Ali, police constable and Abdul Jabbar proceeded on one motorcycle, while complainant alongwith Hasad Khan and Abdul Razzaq on the other motorcycle left for their village and when at about 8.30 p.m. when they reached at Pir Tayar Ghazi Road near Goth Attai, suddenly three culprits armed with Kalashnikovs riding on a motorcycle intercepted them and starting firing, as a result whereof complainant's son Muhammad Siddique, grandson Liaqat Ali and Abdul Jabbar became serious injured and culprits snatched away official Kalashnikovs, CD-70 motorcycle of Muhammad Siddique while culprits also threatened complainant and his companion not to interfere, otherwise they will be killed. Complainant further alleged that he as well as his companions had identified the culprits in light of motorcycle and can recognize them, if be brought in front of them. However, complainant's grandson Liaqat Ali and Abdul Jabbar succumbed to their injuries at the spot while complainant's son Muhammad Siddique was injured seriously. The un-known accused were charged for commission of offence, hence this case was registered.

The case was duly investigated; the accused were taken into custody on 28.12.2010 and statements of PWs were recorded under section 161 Cr.P.C. After investigation challan was sent to the trial Court under section 173 Cr.P.C. against the appellants to face their trial. The learned trial Court framed the charge against the accused persons on 25.02.2011 Under section 17(4) of the Offences Against Property

(Enforcement of Hudood) Ordinance, 1979. All the appellants did not plead guilty and claimed trial.

5. At the trial prosecution examined **PW-1** Muhammad Salah, complainant of the case who narrated the same facts as mentioned in his report Ex.P/1-A. **PW-2** Muhammad Yousaf constable No.184/C, is the witness of disclosures memos of accused persons whereby different recoveries effected, who brought on record Disclosure Memo Ex.P/2-A of accused Wakeel, Disclosure Memo Ex-P/2-B of accused/appellant Muhammad Hayat, Disclosure Memo Ex-P/2-C of accused/appellant Ghous Bakhsh, Memo Ex-P/2-D of recovery of Kalashnikov No.56-35069992 of deceased Muhammad Siddique, Memo Ex.P/2-E of recovery of Kalashnikov No. 19720028 of accused Muhammad Hayat, Memo Ex.P/2-F of recovery of Kalashnikov No.1975AH7011 of accused Ghous Bakhsh, Memo Ex.P/2-G of recovery of Kalashnikov No. 56x5740769 of accused Wakeel and Memo Ex.P/2-H of pointation of place of incident. He also produced above articles as Art-P/1, Art-P/3, Art-P/5 and Art-P/7 respectively. **PW-3** Abdul Razzaq is an eye witness of the incident and also witness of certain recoveries who narrated the facts of this case on the same line as narrated by the complainant in his deposition and brought on record Memo of site inspection Ex.P/3-A, Memo Ex.P/3-B of recovery of blood stained earth of deceased Abdul Jabbar Memo Ex.P/3-C of the recovery of blood stained earth of deceased Liaqat Ali, Memo Ex.P/3-D of recovery of blood stained earth of deceased Muhammad Siddique and Memo Ex.P/3-E of recovery of 20 empty shells of Kalashnikov from place of incident. He also produced the above articles as Art-P/10, Art-P/13, Art-P/16 and Art-P/19 respectively. **PW-4** Hasad Khan is also an eye witness of the incident who narrated more or less the same facts as narrated by the other eye witnesses in their depositions. **PW-5** Abdul Kareem Foot Tracker levies. **PW-6** Nawab Khan, Constable is recovery witness in whose presence Investigating Officer made different recoveries. He brought on record Memo Ex.P/6-A of recovery of CD-70 red colour motorcycle of deceased Muhammad Saddique, Memo Ex.P/6-B of CD-70 black colour motorcycle of accused persons. Memo Ex.P/6-C of blood stained clothes of deceased Abdul Jabbar, Memo Ex.P/6-D of blood stained clothes of Muhammad Siddique and Memo Ex.P/6-E of blood stained clothes of deceased Liaqat Ali. He also produced the above articles as Art-P/20, Art-P/21 Art-P/23, Art-P/26 and Art-P/29. **PW-7** Dr. Ayaz Ahmed, Medical Officer of Civil Hospital, Bhag deposed that injured Muhammad Siddique (later on died) was brought for treatment. He examined the injured and found some injuries on his person. After giving first-aid to the injured he referred him for further treatment to Civil Hospital, Quetta, however, the injured was very serious, hence expired in the way, he again examined the body and confirmed his death. He also conducted external Post-mortem on of corpse of deceased Abdul Jabbar and Liaqat Ali and brought on record MLC/Death Certificates as Ex.P/7-A to Ex.P/7-C respectively. **PW-8** Inayatullah, Judicial Magistrate Bhag in whose supervision identification parade of accused/appellants through eye witnesses was held. He brought on record Memo Ex.P/8-A of identification of accused Muhammad Hayat by witness Hasad Khan, Memo Ex.P/8-B of identification of accused/appellant Muhammad Hayat by witness Abdul Razzaq, memo Ex.P/8-C of identification of accused/appellant Wakeel by witness Hasad Khan, Memo Ex.P/8-D identification of accused/appellant Wakeel by witness

Abdul Razzaq , Memo Ex.P/8-E of identification of accused /appellant Ghous Bakhsh by witness Hasad Khan and Memo Ex.P/8-F of identification of accused/ appellant Ghous Bakhsh by witness Abdul Razzaq. **PW-9** Amanullah SI, he is the Investigating Officer, who investigated the case and narrated the facts regarding investigation, recovery of incriminatry articles, disclosure memos in respect of this case and brought on record FIR Ex.P/9-A, site inspection note Ex.P/9-B, incomplete challan Ex.P/9-C, report of Arms Expert, Ex.P/9-D, FSL report, Ex.P/9-E of blood stained earth and clothes and supplementary challan Ex.P/9-F.

6. After close of prosecution evidence, said statement of the appellants were recorded under section 342 Cr.P.C. wherein they denied the allegation leveled against them by prosecution. They did not opt to record their statements on oath as envisaged by section 340(2) Cr.P.C. nor to produce witness in their defence. The learned trial Court concluded the proceedings by means of judgment dated 28.02.2013 whereby the appellants were convicted and sentenced in the aforementioned terms. The appellants being aggrieved by the impugned judgment preferred this appeal.

7. The learned counsel for the appellants contended that appellants are not nominated in the FIR and alleged incident took place at night and there was no source of light, therefore, identification of appellants by witnesses has not safe and reliable particularly when no feature were given; that eye witnesses are close relative of the deceased persons and being interested witnesses are not worthy of reliance while the remaining witnesses are police officials; the identification parade is also doubtful as the accused were already in police custody and possibility can not be ruled out that witnesses had seen the accused persons prior to identification parade; that disclosure being a joint one also has no evidentiary value; that medical evidence is not in consistent with the ocular account and there is a delay in dispatch of recovered articles to the expert; that prosecution has not been able to prove its case beyond reasonable shadow of doubt against the appellants as material contradiction exist in the prosecution evidence.

8. On the other hand, learned counsel for the complainant has argued that the statements of eye witnesses are duly corroborated with each other on material points and no material contradiction exist in their statements ; the medical evidence supported the ocular account and recoveries were effected on the pointation of accused persons/ appellants; the crime weapon, were matched with the crime empties which were secured from the place of occurrence and prosecution has fully proved its case against appellants beyond any shadow of doubt.

9. Whereas Learned Additional Prosecutor General Balochistan representing the State adopted the arguments put forth by learned counsel for the complainant.

10. We have heard learned counsel for the parties and have gone through the record with their assistance.

11. It is case of prosecution that on 23.12.2010, complainant PW-1 (Muhammad Salah) alongwith eye witnesses and both the deceased were returning home from Bhag city on two motorcycles when at about 8.30 p.m. they reached at Pir Tayar Ghazi Road near Goth Attai, suddenly three persons riding on motorcycle and equipped with

Kalashnikovs intercepted them and made firing as a result whereof complainant's son Muhammad Siddique, grandson Liaqat Ali and Abdul Jabbar became serious injured. The complainant's grandson Liaqat Ali and Abdul Jabbar died at the spot while injured Muhammad Siddique succumbed to his injuries while shifting to Quetta for treatment. It was the claim of the complainant that they identify accused persons in the light of motorcycle and could identify them on seeing later on. Accused persons who were arrested in an other case were also interrogated in the instant case and during identification parade the eye witnesses identified the accused persons/appellants. They were finally arrested and investigated. The learned counsel for the appellants has tried to point out that complainant has falsely implicated the appellants but no plausible reason could be shown by the learned counsel for the appellants because of which complainant should have falsely implicated the appellants, although the complainant was lengthy crossed examined. The complainant has identified the appellants during identification parade and categorically narrated the sequence of evidence. The defence could not demolish his evidence despite of lengthy cross-examination.

12. The accused persons during the investigation made disclosure and led police to the recovery of crime weapon. The recovered crime weapons and empties recovered from the place of occurrence and sent to Forensic Division Sindh, Karachi for chemical analysis and the expert in his report, had confirmed that the same matched with each other.

13. Though the accused persons/appellants are not nominated in the FIR but the record reveals that accused were taken into custody in the instant case after conducting of identification parade if the complainant and eye witnesses had no motive to falsely implicate the appellants if any, they would have nominated them while reporting to the matter to the police.

14. It was the contention of the learned counsel for the appellants that incident took place at night time and there was no source of light and even no features were mentioned, besides appellants were already in police custody and possibility could not be ruled out, that eye witnesses had seen them prior identification parade. But the contentions raised by learned counsels have no force. Firstly the complainant in the FIR had clearly mentioned that they identified the accused persons in the light of the motorcycle and also could identify them on seeing, secondly the eye witnesses as well as the Judicial Magistrate under whom supervision identification parade was held, denied that witnesses had seen the accused persons prior to conducting of identification parade. It is evident from the evidence of the eye witnesses that they had identified the accused persons/appellants thrice correctly during identification parade as the appellants were mingled with the other nine dummies but eye witnesses had correctly picked them out, even otherwise the identification parade was supervised by the concerned Judicial Magistrate and at the end of process he had attested the identification parade forms. It is evident from the statement of complainant that they were at a distance of about 8 to 10 paces from deceased persons when they were attacked at by appellants therefore, identification of the appellants was not difficult for the eye witnesses. The learned counsel for the appellants also contended that at the time of identification parade

the Magistrate has not fulfilled the legal requirements, but could not shown any illegality in the proceedings of identification parade. Although it is settle principle of law as laid down in PLD 2003 Karachi, Page 470. "*That identification parade is not the requirement of any law but it is the rule of propriety in order to secure authenticity of the identification of real culprits."*

15. So far as the contentions of the learned counsel that eye witnesses are close relatives of the deceased persons and remaining witnesses are police officials are concerned, the same has no substance. Because the eye witnesses are natural witnesses of the incident as they alongwith deceased persons were on their way home from Bhag city on motorcycles when come under attack and murdered by the appellants by means of firing with fire arms and mere relationship is no ground/ reason to discard the evidence of eye witnesses when there was not motive to falsely depose against the accused or falsely implicate them on account of animosity or enmity. It is also a settle principle of law laid down in PLD 2001 Quetta Page 47 "*that mere relationship of the witnesses is no ground to discard the testimony of witnesses.* It is also held in SCMR 1973 Page 69 "*that prosecution witnesses related to deceased but otherwise having no motive to implicate the accused in commission of crime under section 302 PPC*." are reliable. The police officials are also as good witnesses as remaining/private witnesses are It is held in 2009 YLR 1557 that "*When an accused under interrogation leads to discovery of the fact which is within his special knowledge, section 103 Cr.P.C. would have no relevance. The recovery got made by accused would be admissible under Article 40 of the Qanoon-e Shahahat*." The prosecution witnesses have corroborated each other on material points and no material contradictions exist in their deposition to be fatal to the case of prosecution.

16. It was also the contention of learned counsel for the appellants that disclosure being joint one has no evidentiary value. It is a settle principle of law laid down in 2009 SCMR 1440 that "*plurality of information received before discovery shall not necessarily take any of these information out of Article 40, Qanoon-e Shahadat. In a suitable case it is possible to ascribe to more than one accused the information will leads to discovery.*" Recovered articles were dispatched with delay to the expert. It is clear from the record that though the accused were interrogated/investigated jointly when they allegedly made disclosure but the disclosure of the each accused was compiled separately and signed by witnesses. Though simple disclosure has no evidentiary value unless and until new fact and discovery is made in pursuance of such disclosure. But in the instant case the appellants had made disclosure and then led the police to the recovery of crime weapons hidden in the reaped crop of ( ). So such disclosure is admissible according to Article 40 of Qanoon-e-Shahadat Order, 1984. Further the disclosure and recoveries effected in pursuance thereof, is corroborated by positive matching report issued by the Fire Arm Expert, Karachi and the recovery of these incriminatory articles on information supplied by the appellants, under Article 40 of Qanoon-e-Shahadat Order, 1984 is also admissible in the light of settle principle of law. The learned trial Court had rightly believed and relied upon the disclosure and recoveries. There is also nothing on record to show that the expert have issued false report on account of any motive to strengthen the prosecution case.

17. Adverting to the last contention of the learned counsel that medical evidence is not in consistent with ocular account and prosecution has not been able to prove its case beyond shadow of doubt against the appellants, but learned counsel for the appellants could not point out any reason that as to how the medical evidence is not corroborated by ocular evidence. It is evident from the testimony of prosecution eye witnesses that after receiving fire arm injuries the deceased persons had succumbed to their injuries and lost their lives. The medical evidence also confirmed that deceased persons had received bullet injuries and as a result whereof breathed their last. The Medical evidence is fully corroborated by ocular account. As the medical officer namely Dr. Ayaz Ahmed appeared before the trial Court and categorically deposed regarding each and every injury of the deceased Abdul Jabbar and Liaqat Ali. The doctor also deposed regarding cause of death of deceased Abdul Jabbar and Liaqat Ali were excessive bleeding and injuries to thoracic region and fire arm weapon was used in this regard. The perusal of record reveals that prosecution had succeeded to establish its case against appellants by leading ocular evidence, medical evidence, disclosure and recoveries of crime weapon coupled with the positive report of the Forensic and Chemical Experts, leaving no to doubt that the appellants had committed the crime by the causing the death of deceased persons and they are responsible for the same. The learned trial Court has properly appreciated the evidence collected and led by the prosecution against the appellants and they had rightly convicted and sentenced the appellants by means of impugned judgment. The learned counsel for the appellants could not point out any illegality or irregularity in the impugned judgment, which call for interference on part of this court.

18. In view of what has been discussed above, we are of the considered view that prosecution has proved its case against the appellants beyond reasonable doubt, therefore, the appeal filed by the appellants is dismissed and conviction and sentences including death sentence awarded to the appellants namely Muhammad Hayat, Wakeel and Ghous Bakhsh @ Shahdad @ Ahsan by trial Court are maintained as recorded by learned trial Court.

19. Resultantly, Criminal Murder Reference No.01/I of 2013 is answered in affirmative and confirmed. These are the reasons of our short order dated 11.11.2014.

MR. JUSTICE ZAHOOR AHMED SHAHWANI
MR. JUSTICE DR. FIDA MUHAMMAD KHAN
(MR. JUSTICE SHEIKH NAJAM-UL HASSAN)

Islamabad, the
22nd November, 2014

Approved for reporting

JUDGE

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

MR. JUSTICE RIZWAN ALI DODANI
MRS.JUSTICE ASHRAF JAHAN

CRIMINAL APPEAL NO. 06/P OF 2013 L.W

Zakirullah son of Abdul Mastan r/o Aman Dara, Batkhela, Malakand Agency Khyber Pakhtunkha	....	Appellant

VERSUS

1.	Mst.Safia Bibi w/o Falak Naz r/o Mohallah Akbar Abad, Bathela, Malakand Agency Khyber Pakhtunkhwa.		
2.	The State	....	Respondents

JAIL CRIMINAL APPEAL No.29/I of 2013

Fazal Aziz s/o Asmatullah r/o Thana District Malakand.	....	Appellant

VERSUS

The State	....	Respondent

Counsel for the appellants	....	Mr. Muhammad Riaz and Mr. Anees Muhammad Shahzad, Advocates
Counsel for the State	....	Mr. Arshad Ahmad, Deputy Advocate General, KPK.
FIR No. Date and Police Station	....	No.43 dated 22-04-2012 P.S. Batkhela
Date of Judgment of trial Court	....	09-10-2013
Date of Institution of Cr.Appeals in FSC	...	31-10-2013 and 26-11-2013
Date of hearing	...	13-02-2014
Date of decision	...	13-02-2014
Date of Judgment	...	06-03-2014

JUDGMENT

RIZWAN ALI DODANI, JUDGE: - We intend to dispose of both the Criminal Appeal No.6/P of 2013 and Jail Criminal Appeal No.29/I of 2013 filed by the appellants Zakirullah and Fazal Aziz respectively against one and the same judgment dated 09-10-2013 passed by Sessions Judge/Zillah Qazi Malakand at Batkhela in Hadd case No.9/2012, whereby both the appellants have been convicted and sentenced as under:-

i. Under section 395 PPC sentenced to life imprisonment each, fine of Rs.100000/- each or indefault to further undergo 06 months imprisonment each.

ii. Under section 376 PPC life imprisonment each, fine of Rs.100000/- each or in default to further undergo 06 months imprisonment each.

iii. Under section 457 PPC 05 years imprisonment each, fine of Rs.20000/- each or indefault to further undergo 02 months imprisonment.

iv. Under section 337-A (i) one year imprisonment each and to pay of Rs.20000/- each as Daman. The amount of Daman if recovered to be distributed equally among Mst. Safia and Mst. Neelam victims.

All the sentences were ordered to run consecutively. Benefit under section 382-B Cr.P.C has been extended to both the appellants only in the first punishment i.e. under section 395 PPC.

2. Brief facts of the case as contained in the crime report are that on 22-04-2012 complainant Mst. Safia Bibi and her Family members were sleeping in their house when at about 3.00 a.m. some one knocked at the door and they woke up. They saw that accused Zakir alias Zakoory son of Abdul Mastan, Fazal Aziz son of Asmatullah alongwith four unknown persons armed with weapons were standing in the courtyard of her home. The accused persons tied the hands of complainant and her brothers namely Iftikhar and Dilawar and forced them to sit in a room and were guarded by two persons and the other two accused had started searching the rooms of the house. After that accused persons forcibly took her niece Mst. Neelam to another room and committed zina with her. During search they took from her possession jewellery i.e. two pairs of earring, one locket weighing three tolas and from box lying in the room seven (7) tolas jewellery of different kinds, cash amount of Rs.3,50000/-, snatched one mobile set from her, her mother and brothers Iftikhar and Dilawar. During search the accused beated them on their resistance due to which she and her niece were injured. At 4.30 the accused persons made their escape good with all the said articles and cash amount.

3. After registration of the case and completion of investigation, challan under section 173 Cr.P.C. was submitted against the appellants/accused for trial. The learned trial Court formally charge sheeted the appellants/accused under sections 376, 457 PPC and under section 17(3) of the Offences Against Property Ordinance, 1979 to which the appellants/accused pleaded not guilty and claimed trial.

4. During trial, the prosecution in order to prove its case examined Faridullah, Naib Subedar/post commander as (PW-1), who has submitted supplementary challan.

Gul Nawaz Khan Moharrir (PW-4) registered the FIR Ex.PW-4/1.Zia-ur-Rehman, Moharrir (PW-5) witness of recovery memo Ex.PW-5/1. Azam Khan, Moharrir (PW-6) witness of recovery memoes Ex.PW-6/1 to Ex.PW-6/5. Mst. Safia Bibi (PW-7) complainant of the case who inter alia narrated the story of FIR. Mst. Neelam (PW-8) she is the victim of the occurrence of zina and eye witness of dacoity. She was forcibly raped by the appellants/accused. Iftikhar (PW-9), he is another eye witness of the occurrence and brother of complainant (PW-7). Lady Dr. Raishma Jamal, Medical Officer (PW-10). She medically examined Mst. Neelam on 22-04-2012. Saif-ur-Rehman, IHC appeared as (PW-11). He is the investigating Officer of the case, and arrested the accused Zakirullah and Fazal Aziz on 15-07-2012 and 18-07-2012 respectively. Umar Ali, Moharrir (PW-12) is the witness of recovery memoes Ex.PW-11/14 and Ex.PW-5/1. Thereafter, the prosecution closed its side on 09-07-2013.

5. After conclusion of the trial, the appellants/accused were examined under section 342 Cr.P.C. They denied all the charges of the prosecution leveled against them in the evidence; however, they neither opted to record their statement on oath under section 340 (2) Cr.P.C nor produced any evidence in their defence.

6. The learned trial Court after concluding the formalities of trial returned a verdict of guilty. Conviction was recorded and awarded as mentioned in the opening part of this judgment.

7. Heard learned counsel for the appellants and the State and perused the impugned judgment and relevant record.

8. It has been observed that the FIR was promptly lodged within an hour of the incident. The names of the appellants/convicts have categorically mentioned in the FIR by the complainant out of the alleged six culprits who stormed in the house of the complainant in late hours of the fateful night. The statements of three star witnesses i.e. the complainant Mst. Safia Bibi, PW-7, Iftikhar, PW-9 and Mst. Neelam, PW-8 have also remained consistent in material particulars with regard to the alleged offences of dacoity and rape of Mst. Neelam, PW-8. That all the said three eye witnesses have been subjected to cross-examination but they could not be shaken in any manner in respect of what they have stated before the Court in their examination-in-Chiefs. That the suggestions made by the counsel for the appellants/convicts in their defence are not worthwhile to be considered being general in nature and as such, could not put any dent on the prosecution story. As regards the offence of Zina, the statement of Mst. Neelam who is the victim of the said offence has categorically named both of the appellants for commission of Zina with her and the said statement remained consistent for all material aspects. The defence side tried to allege the victim as married woman but they failed to prove said claim as she unequivocally denied the said suggestion and finally the defence side could not materialize the same. The defence side also tried to put an element of enmity between the complainant and the culprits especially the appellants but also could not have been able to make it substantive as no any serious nature of enmity was alleged that could have prompted the complainant side to involve the

appellants and other culprits into such heinous offences of dacoity and especially of zina to put their honor at stake. That the medical examination which was conducted on the same day of the occurrence is also supportive of the fact that the virginity of victim Mst. Neelam was not intact at the time of medical examination and the redness was seen at the lower volva and trouser was also showing multiple stains on it. However, it was stated by the doctor that no fresh laceration or bruises or other signs of violence were seen. This piece of evidence was vehemently emphasized by the defence counsel. But on the other hand the chemical examiner report in respect of vaginal swabs came with the positive results as being stained with semen. The said report, which has not been made disputed anywhere on the record, showing fresh semen, renders such statement of lady doctor immaterial which says no fresh bruises/injuries or mark of violence found on her person. Above all the statement of prosecutrix alone is sufficient to prove the commission of offence of zina by the appellants.

9. That as observed the promptly lodged FIR and medical examination of victim which has also been carried out immediately after the occurrence and the statement of victim Mst. Neelam in respect of offence of zina committed with her by the appellants, which has been corroborated by the medical and chemical examiner's report, leave no room for any doubt and deliberation for false implication of appellants in commission of Zina.

10. As regards the arguments advanced by the counsel for the appellants such as, no identification parade was conducted by the prosecution, is devoid of any force under the circumstances when the appellants have been named in the FIR which was lodged within the hour after the incident for inter alia commission of offences of dacoity and zina, therefore it was not imperative for the prosecution to get conducted identification parade as far as appellants are concerned. The other argument that since no specific role was assigned to each of the culprits renders the prosecution case doubtful. We are of the view that this argument has no legs to stand as the appellants/convicts before us alongwith other four persons have categorically been assigned with the role of commission of dacoity and zina as well in the house of complainant in the FIR and subsequently by the prosecution witnesses in their respective testimonies. Another argument which was taken by the defence counsel was that since the three accused have been acquitted vide impugned judgment, therefore, the appellants could not be convicted under the offence of dacoity inasmuch as requisite number of culprits to constitute an offence of dacoity has not been fulfilled. This argument of the defence counsel is devoid of any force because the fact as to number of culprits alleged to have participated in the offence has to be proved and determined from the evidence available on record in this regard and not by the number of persons having been convicted by the Court. The case law PLD 1967 Dacca 528 referred to by the counsel also does not in any way supportive of his contention, in fact it is other way around and goes against it. The number of persons alleged to have participated in offence have sufficiently been proved in the instant case by the evidence brought on record therefore, the conviction for dacoity has rightly been recorded by the trail Court. Likewise the arguments regarding no identification of the recovered gold ornaments and no matching of semen are not

material under the circumstances of the case as discussed above when the names of appellants have been mentioned promptly with the specific roles for all the offences they have been charged with, however, these arguments at the most could be termed as inefficiency on part of the prosecution, but these deficiencies are not of that nature which could damage the prosecution case in the given circumstances. It was also argued that no recovery of stolen articles was effected from appellant/convict Fazal Aziz except from appellant/convict Zakirullah and that too only Rs.10,000/-(Rupees ten thousand) out of alleged stolen amount of Rs.3,50,000/-(Rupees three lac fifty thousand only). That record has been perused which revealed that both the appellants have been arrested after the considerable period of three (3) months, which is a sufficient time to have disposed of the stolen articles.

11. That what has been discussed above we are of the view that prosecution has adequately and beyond reasonable doubt proved the charges against the appellants. Consequently, the Criminal Appeal No.6/P of 2013 and Jail Criminal Appeal No.29/I of 2013 are dismissed. The convictions recorded and sentences awarded by the trial Court are maintained except alteration in the sentence awarded under section 457 PPC, which is hereby enhanced to ten (10) years from five (5) years inasmuch as the house trespass has been committed by night in order to commit heinous Offences. Moreover, all the punishments as awarded to both the appellants are ordered to run concurrently. The benefit of section 382-B Cr.P.C is also extended to both the appellants in respect of all the sentences.

These are the reasons of short order dated 13-02-2014.

JUSTICE RIZWAN ALI DODANI

JUSTICE ASHRAF JAHAN

Islamabad, the
06th March, 2014
Approved for reporting.

IN THE FEDERAL SHARIAT COURT
(Appellate/Revisional Jurisdiction)

PRESENT

MR. JUSTICE DR. AGHA RAFIQ AHMED KHAN, CHIEF JUSTICE
MR. JUSTICE DR. FIDA MUHAMMAD KHAN
MR. JUSTICE RIZWAN ALI DODANI

JAIL CRIMINAL APPEAL NO.58/I OF 2006

Sajjad Masih son of Amanat Masih, caste Christian, resident of Jhangeerpura, Tehsil and District Sheikhpura. …… Appellant

Versus

The State ……. Respondent

CRIMINAL APPEAL NO.22/L OF 2008

Zulfiqar Ahmed son of Habibullah caste Rahmani, resident of Saleh Pur, Tehsil Kamoke, District Gujranwala. ….. Appellant

Versus

1. The State, …… Respondents
2. Tanveer Ahmed alias Mitthu son of Jamal Din, caste Arain,
3. Qaiser son of Muhammad Abbas caste Dindar, Both residents of Village, Salehpur, Tehsil Kamoke, District Gujranwala.

Counsel for the appellant	….	Mr. Bilal Ahmad Soraya, in J.Cr.A.No.58/I/2006 Advocate
Counsel for the complainant	….	Mr. Khalid Mian, in Cr.A.Advocate No.22/L/2008
Counsel for the Respondents	….	Mr. Arif Chaudhry Advocate,
Counsel for the State	…	Dr. Muhammad Anwar Khan Gondal, Additional Prosecutor General Punjab.
Private Sessions Complaint	….	No.59/2005, dated 27.05.2005,

No. Date and Police Station	….	P.S. Saddar Kamoke, District Gujranwala.
Date of Judgment of the trial Court	….	03.01.2006
Date of Institution of J. Cr.	….	18.03.2006 A. No.58/I/2006 in FSC
Date of Institution of Cr.	….	06.03.2006 A. No.22/L/2008 in FSC
Date of hearing	….	28.04.2014
Date of decision	….	28.04.2014
Date of judgment	….	09.05.2014

JUDGMENT

RIZWAN ALI DODANI, JUDGE:- Appellant Sajjad Masih son of Amanat Masih through Jail Criminal Appeal No.58/I of 2006 has assailed the judgment dated 03.01.2006 delivered by learned Additional Sessions Judge/Judge Juvenile Court, Gujranwala, under Juvenile Justice System Ordinance, 2000 in Private Sessions Complaint No.59/2005, Trial No.42 of 2005 whereby accused/appellant Sajjad Masih was convicted under section 364-A PPC and sentenced to 7 years R.I. He was further convicted under section 302 (B) PPC and sentenced to life imprisonment and to pay Rs.1,00,000/- (Rupees one lac) as compensation to the legal heirs of the deceased Atif Zulfiqar under section 544-ACr.P.C. or in default of payment of compensation he shall further undergo S.I. for six months. Both the sentences of the appellant Sajjad Masih were ordered to run concurrently, and benefit of section 382-B Cr.P.C. also extended to the appellant as well.

2. Aggrieved, the complainant Zulfiqar Ahmed has also filed Criminal Appeal No.22/L of 2008 against the acquittal of respondents Tanveer Ahmed alias Mitthu son of Jamal Din and Qaiser son of Abbas from the charges under section 12 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and sections 302/377/34 PPC impugning the judgment dated 03.01.2006 delivered by learned Additional Sessions Judge, Gujranwala, in Private Sessions Complaint No.59/2005, Trial No.43 of 2005. It may be mentioned here that the complainant and his wife being the only legal heirs of the deceased has compound of the matter in respect of murder of their deceased son and received Budl-e-Sulah from Qaiser accused just before passing of impugned judgment.

3. We intend to deal with both the above mentioned appeals against two separate judgments i.e. Jail Criminal Appeal No.58/I of 2006 and Criminal Appeal No.22/L of 2008 through this single judgment as these matters have genesis in a criminal case, which has emanated from one and the same FIR (Ex.DA/1), dated 07.10.2004 as well as Private Sessions Complaint No.59/2005 got registered by the complainant (PW.8) Zulfiqar Ahmed.

4. It was reported by the complainant that on 07.10.2004 at 09.00 a.m. Zulfiqar Ahmed complainant was present in his house when Sajjad Masih (Juvenile) came there and took away complainant's son Atif zulfiqar aged 07 years. Tanveer alias Mitthu and Qaiser accused have thereafter also joined them and went in "Till" (تل) crop near graveyard where Tanveer alias Mitthu committed sodomy with Atif and then brought him to graveyard for washing the injury and the blood. Due to the precarious condition of the child they consulted with each other to commit the murder of Atif Zulfiqar. Tanveer and Sajjad (Juvenile) hit club blows on Atif's head while Qaiser pressed his throat. The complainant Zulfiqar Ahmed, Aqeel Ahmad and Saif-ur-Rehman (not produced) residents of Salehpur witnessed the occurrence. The accused fled away when the complainant Zulfiqar Ahmed, Aqeel Ahmed and Saif-ur-Rehman challenged them. The complainant was taking away Atif injured to hospital, who succumbed to the injuries in its way. The complainant was disturbed and he got the FIR No.411/04, dated 07.10.2004 lodged at Police Station, Sadar Kamonke, District Gujranwala against Sajjad Masih (Juvenile) and

Qaiser only due to mistake. He requested for addition of name of the 3rd accused Tanveer alias Mitthu upon which I.O. arrested him but let him off collusively later on. The complainant tried time and again to get the investigation changed. Later on he had to file a private complaint No.59/2005 to bring Tanveer Ahmed to justice.

5. After recording of preliminary evidence, case of Sajjad Masih (Juvenile) accused was separated. Charge against Sajjad Masih (Juvenile), Tanveer alias Mitthu and Qaiser accused was framed on 17.11.2005 under section 12 of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979 read with sections 302/377/34 PPC to which they all pleaded not guilty and claimed justice through trial.

6. During the course of trial, the prosecution in order to prove its case produced as many as ten witnesses, gist of which is given herein below for the sake of convenience:-

7. PW.3 is Dr. Muhammad Munir Hussain, Additional Principal/Medical Officer, who conducted the postmortem of deceased Atif Zulfiqar at Lahore. The doctor issued postmortem report Ex.PB. Ex.PB/1 and Ex.PB/2 the sketches of injuries of Atif Zulfiqar. Injury No.7 was opined as a possible fact of sodomy and No.3 and No.4 as cause of death i.e. by brain damage. PW.6 Habib Ullah is the witness of recovery memos Ex.PC of Blood stained earth and sota Ex.PD. PW.7 Aqeel Ahmad, is the witness of occurrence. Zilfiqar Ahmad PW.8 is the complainant of this case, who narrated the story as mentioned in private complaint. PW.9 Muhammad Riaz is the witness of confession made by accused Tanveer Ahmed before him. PW.10 is Gulzar Ahmed, S.I. was the investigating officer of this case in FIR. CW.1 is Muhammad Aslam, who stated that he knows nothing about this occurrence and that 'Sota' was not recovered in my presence. The prosecution gave up PWs Dr. Nawazish Ali, Saif-ur-Rehman and Ali Raza being unnecessary. Submitted report of chemical examiner Ex.PL and serologist Ex.PM, which suggest that semen grouping, is not possible.

8. The complainant has closed its evidence on 10.12.2005.

9. After close of prosecution evidence the learned trial Court recorded statements of the accused Sajjad Masih (Juvenile), Tanvir Ahmed and Qaiser under section 342 Cr.P.C. on 15.12.2005. They denied the allegations leveled against them and claimed their innocence. The accused did not opt to record their statements under section 340(2) Cr.P.C. nor did they produce any evidence in their defense except Qaiser, who produced Bashir Ahmad as DW.1, Muhammad Idrees DW.2 in his defence. He himself appeared on Oath under section 340 (2) Cr.P.C. as DW.3.

10. The learned trial Court on conclusion of the trial, convicted and sentenced the appellant Sajjad Masih as mentioned in first para of this judgment. Accused/ respondents Tanvir Ahmed and Qaiser were acquitted by the learned trial Court from charges under section 12 of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979 and sections 302/34/377 PPC as mentioned in second para of this judgment.

11. We have heard the learned counsel for the parties, examined the evidence and

scanned the impugned judgment with their able assistance.

12. Mr. Bilal Ahmad Soraya, learned counsel for the appellant Sajjad Masih in Jail Criminal Appeal No.58/I of 2006 has argued that the presence of complainant in the house at 09.00 a.m. when allegedly the appellant/convict Sajjad Masih took the deceased Atif Zulfiqar with him, is doubtful being nagetion of his own statement inasmuch as the complainant Zulfiqar Ahmed adduced in his evidence that he is out of his house from 06.00 a.m. to 01.30 p.m. in connection with his job to pick and drop the students of school and colleges. The counsel further submitted that the ocular account is also under heavy clouds as the witnesses including complainant allegedly saw the appellant Sajjad Masih alongwith Tanveer Ahmed and Qaiser, while they were allegedly strangulating the neck of deceased Atif and hitting the sota blows on his head but it is impossible that they did not even attempt to rescue him. He further argued that the recovery of sota does not have any worth because it was not blood stained, moreover it is a common thing to be available and moreover CW.1 has denied to have been musheer of its recovery. He next argued that according to medical report the death was caused due to brain damage, while in cross-examination Doctor expressed that it could not be caused by a person of tender age, therefore, the involvement of appellant/convict Sajjad Masih has become doubtful in the regard too. He lastly argued that ocular account is not trustworthy as it contained material contradictions and variations inasmuch as the name of one of the accused Tanveer Ahmed was not mentioned in promptly lodged FIR and he was involved after the lapse of a period of one year which exposes the prosecution case at its worst.

13. Mr. Arif Chaudhry, learned counsel for the respondents Tanveer Ahmed and Qaiser in Criminal Appeal No.22/L of 2008 has argued that the learned trial Court has rightly acquitted the respondents inasmuch as there is no trustworthy ocular account. The statements of PWs are full of contradictions and improbabilities. The recovery of sota is also doubtful. The presence of complainant in his house at 09.00 a.m. is also doubtful and as it is contrary to the statement of complainant himself. He further argued that the acquittal order is justified and well reasoned and there is no point to interfere with the impugned order.

14. After hearing the arguments of Mr. Arif Chaudhry, learned counsel for the respondents, Mr. Khalid Mian, learned counsel for the complainant/Zulfiqar Ahmed in Criminal Appeal No.22/L of 2008 has candidly submitted that he has no arguments to rebut the submissions made by the learned counsel for the respondents and that he conceded to the arguments of learned counsel for the respondents.

15. Learned Additional Prosecutor General Punjab for State has argued that the learned trial Court did not make any mistake in convicting the appellant/convict Sajjad Masih, however, he submitted that it has committed gross illegality, while acquitting respondents. The trial Court misread the evidence available on record which led it to draw incorrect conclusion in terms of verdict of acquittal. He lastly argued that the record contained ocular evidence which is probable and trustworthy, therefore, he submitted that the acquittal order may be set aside and the respondents may be convicted.

16. In the instant case, the trial Court convicted the appellant/convict Sajjad Masih under section 364-A PPC and under section 302 (b) PPC, while, the respondents Tanveer Ahmed and Qaiser have been acquitted of the charges. We have gone through the evidence and it has been observed that so far as the charge of abduction is concerned, the evidence of PW.7 Aqeel Ahmed as well as of PW.8 Zulfiqar Ahmed were found consistent and trustworthy in material particulars at every stage such as in their statements under section 161 Cr.P.C. and before the Court and have also been unshaken in the course of cross-examination in terms of the deceased lastly seen with appellant/Sajjad Masih by PW.7 Aqeel Ahmad, thereafter he was found dead after having been sodomized as evident from postmortem report and testimony of Dr. Muhammad Munir Hussain PW.3.

17. The important feature which puts vital dent on the prosecution case viz-a-viz ocular evidence, is the name of respondent Tanveer Ahmed was not mentioned in the promptly lodged FIR, dated 07.10.2004 nor in the statement of PWs recorded under section 161 Cr.P.C. and he was only introduced by the complainant in his private complaint dated 21.10.2005 i.e. after a year of the incident. Above all, when the direct evidence/eye witness account is involved in the case, such above said factor is a fatal blow to the veracity of witnesses let alone the recovery and medical account. In this regard, the learned trial Court has also rightly observed such material contradictions, variations and novation in the testimonies of PWs and acquitted the respondents Tanveer Ahmed and Qaiser. However, we are of the view that the trial Court has committed illegality when on one hand it acquitted above said respondents from the charges under sections 377 and 302 (b) PPC on the basis of available evidence in this regard being untrustworthy and impossible but at the same time convicted the appellant Sajjad Masih under section 302 (b) PPC on the basis of same evidence, therefore, in our view the said benefit of doubt ought to have been extended by the trial Court to the appellant Sajjad Masih as extended to the respondents Tanveer Ahmed and Qaiser in respect of the charges of sodomy and murder, which is also supported by testimony of Doctor, who in cross-examination expressed that the injury of brain, which mainly caused the death of deceased child could not be done by a person of a tender age.

18. It may be specify here with regard to the recovery of sota that the testimony of CW.1 is very much important as he said therein that the said recovery was not effected in his presence.

19. As far as the contention of learned counsel as to the presence of complainant Zulfiqar Ahmed in his house at 09.00 a.m. being doubtful, suffice to say that according to the complainant Zulfiqar Ahmed he is doing a job of pick and drop of school children, therefore, it cannot be said that it is impossible that he could present in his house at 09.00 a.m. inasmuch as the job as described by the complainant was of the nature that after having dropped the children early in the morning he could come to his home, and as such in this regard higher margin of possibility of the complainant being present at home cannot be ruled out .

20. In view of the above discussion, we are inclined to extend benefit of doubt to

appellant/convict Sajjad Masih in respect of the charge of Qatl-e-amd and therefore, acquit him from the charge under section 302 (b) PPC, as such, the conviction and sentence awarded to appellant Sajjad Masih under section 302 (b) PPC is set aside. However, we maintain the conviction and sentence awarded to the said appellant Sajjad Masih under section 364-A PPC.

21. Consequently, Jail Criminal Appeal No.58/I of 2006 filed by the appellant Sajjad Masih is dismissed with partial modification and the acquittal Criminal Appeal No.22/L of 2008 is also dismissed.

22. These are the reasons of our short order dated 28.04.2014.

JUSTICE RIZWAN ALI DODANI
JUSTICE DR. AGHA RAFIQ AHMED KHAN CHIEF JUSTICE
JUSTICE DR. FIDA MUHAMMAD KHAN

Lahore, the
Dated 09.05.2014