P L D 2009 Supreme Court 709

Present: Javed Iqbal, Sayed Zahid Hussain and Muhammad Sair Ali, JJ

MUHAMMAD SHARIF---Appellant

Versus

THE STATE---Respondent

Criminal Appeal No.598 of 2005, decided on 12th June, 2009.

(On appeal from the judgment dated 17-12-1998 of the High Court of Balochistan Quetta passed in Criminal Acquittal Appeal No.211 of 1998).

(a) Penal Code (XLV of 1860)---

----Ss. 302, 342 & 365---Constitution of Pakistan (1973), Art.185(2)(a)---High Court had set aside the judgment of acquittal passed by the Trial Court and awarded death sentence to the accused---Scope of appeal to Supreme Court---Principles.

From the perusal of the constitutional and legal provisions and pronouncements by the esteemed Judges, the developing trend is evident and some of the principles deducible therefrom are that:---

(i) Where the High Court has, on appeal, reversed an order of acquittal of an accused person and sentenced him to death or to transportation for life or imprisonment for life, the appeal lies before Supreme Court as of right under Article 185(2)(a) of the Constitution of Islamic Republic of Pakistan. Provision of a separate procedure for that purpose under Order XXII of the Supreme Court Rules, 1980, is a strong indicator in this regard. This itself is indicative of the importance and significance of acquittal which places the matter on different footing than others.

(ii) Supreme Court has every right of examining evidence in a criminal appeal if the interest of justice so demand for which purpose each case will have to be adjudged upon its on facts and circumstances and in case the court reaches the conclusion that the person has been dealt with in violation of the accepted principles of the administration of criminal justice then "no technical hurdles should be allowed to stand in its way of doing justice and seeing that injustice is not perpetuated or perpetrated by the decisions of the courts below".

(iii) As an ultimate court, Supreme Court must give due weight and consideration to the opinions of the courts below and normally the findings should not be interfered where the same "are reasonable and were not arrived at by the disregard of any accepted principle regarding the appreciation of evidence". But where defect is discovered about tenability of finding in that case it should be open to the court to

come to its own independent finding upon re-examination of the evidence untrammeled by the opinions of the courts below.

(iv) The position of the .trial Court being close to the scene of occurrence and familiar with ways and practices of the people involved having the benefit of recording evidence of witnesses, watching their demeanour, view formed by the said court should not be disregarded lightly.

(v) The benefit of any reasonable doubt must go to the accused person but where the conclusion about such a doubt leading to acquittal is wholly illogical or unreasonable, the same can be reversed by the higher court.

(vi) While giving the benefit of all doubts to the accused, the court has still to discharge the onerous function of not allowing an offender to escape justice.

(vii) The benefit of doubt if any cannot be given to the prosecution.

(viii) Mere suspicion howsoever strong or possible is not sufficient to justify conviction and all circumstances sought to be relied upon for basing conviction upon circumstantial evidence must be established beyond doubt.

(ix) Straining of evidence either in favour of the prosecution or in favour of the accused should neither be countenanced nor encouraged.

(x) While examining the views expressed by the Courts below it should be seen that the findings are not based on mere assumptions and conjectures.

(xi) The acquittal should not be interfered with, merely on the ground that another possible view of the evidence was available.

(xii) It is the fundamental duty of the prosecution to prove the guilt to the hilt and not of the accused to prove his plea of defence to the hilt and that the weakness or falseness of the defence plea is not to be taken into consideration while awarding punishment.

(xiii) That the court is to appraise evidence without being swayed away emotionally as accused is presumed to be innocent, until the guilt is proved against him by producing evidence of incriminating nature to connect him with the commission of crime beyond shadow of reasonable doubt.

(xiv) The principle that if a witness is not coming out with the whole truth his evidence is liable to be discarded as a whole is not that absolute and stand modified as his testimony will be acceptable against one set of accused, though rejected against the other subject to the rider that it must get independent corroboration on material particulars from credible, evidence based on the principle of "sifting chaff out of grain".

These are merely some of the known established principles being followed by the courts and certainly not exhaustive of situations arising from time to time and case to case.

(b) Penal Code (XLV of 1860)---

---Ss. 302, 342 & 365---Qanun-e-Shahadat (10 of 1984), Art.40---Constitution of Pakistan (1973), Art.185(2)(a)---Appeal to Supreme Court---High Court had set aside the judgment of acquittal passed by the Trial Court and awarded death sentence to the accused---Re-examination, reappraisal and appreciation of evidence on record by Supreme Court, keeping in view the comparative treatment of the evidence made by the Trial Court and the High Court---Evidence brought on record by the prosecution and the defence plea of the accused had been analyzed from angles to find out as to how far the incriminating material was available to bring home the guilt and his involvement in the commission of the offence---Incident was an unseen one, the charge against accused was of the demand of ransom and murder---Father of victim, as per the evidence, was an illiterate person, unable to read or write, it was but natural if was not the meticulous consistency in his stance---Visible and obvious lapses on the part of prosecution were not understandable---Foundation of the case was raised on the ground of friendly contacts between accused and deceased; the transaction of sale of land and the business between them---No investigation, however,- was conducted on such aspect---Even the letter which became the basis for ransom demand its receipt by the father of the deceased had also a question mark---No effort was made to reach those children who delivered the said letter to the Chowkidar of the Hotel, nor even the Chowkidar was investigated---Neither the Chowkidar nor the owner of the Hotel, who read out and explained the letter to the father of deceased were produced before the court which meant that the Investigators did not perform the duty as was warranted by law---Arrest of accused itself appeared to have unfolded the whole episode---Accused made disclosures and provided solid clues; he led the investigators to the place of occurrence wherefrom the dead body and other incriminating articles were recovered; he by making confessional statement before the Magistrate solved the mystery as to how and why all that happened---Altercation that took place between the two (accused and deceased) about the payment of money, the harsh language and abuses hurled by the deceased resulting in spontaneous ugly situation of provocation taking the names of mother, sister and wife, pushing the deceased by the accused from the mountain and stoning him---No valid justification existed to disbelieve the Assistant Commissioner/S.D.M., who was an official and had neither any enmity with the accused nor any reason to misstate the facts---Chain of events, which led the investigators to ultimately unearth the facts was pointation of the place of occurrence by the accused and statement of facts given by him before the Magistrate---Being conscious of the risk of use of retracted confession, it could not be used alone as evidence for conviction, the other evidence of linkage was necessarily to be considered---Recovery of the dead body on the lead provided and at pointation of the accused and disclosures of events as to how it so happened, the medical evidence, the report of Chemical/Serologist, the recovery of currency notes from his residence on his pointation from the box lying underneath the cot were all important pieces of corroborative evidence which could not be ignored---Later denial of every thing by the accused including the disclosures and even appearance before the Magistrate lost its

worth in the light of the hard facts---Accused's plea of torture by the investigators as per his statement under S.342, Cr.P.C. also was an afterthought; some doubt, if at all, that could be entertained, was about his intention to kill---Information of facts disclosed which led to the discovery of incriminating articles and material assumed relevance and significance---Held, there remained no doubt that the disclosures made and clue provided by the accused himself and unbroken chain of events furnished sound proof leading to the conclusion that the accused was the person who was responsible for the commission of the offence, whereby the deceased lost life---High Court, in circumstances, was justified in convicting the accused.

Principles and Digest of Qanun-e-Shahadat by Justice (Rtd.) Khalil-ur-Rehman Khan, Vol. I, Emporar v. Chokhey AIR 1937 All. 497; The State v. Mohinder Singh AIR 1953 Punjab 81; State of Uttar Pradesh v. Deoman Upadhyaya AIR 1960 SC 1125; Hakim Ali v. The State 1971 SCMR 412; Sh. Muhammad Amjad v. The State PLD 2003 SC 704 and Sher Zaman v. State and others PLJ 2006 SC 931 ref.

(c) Penal Code (XLV of 1860)---

----S. 302, 342 & 365---Qanun-e-Shahadat (10 of 1984), Art.121, Illus.(b)---Constitution of Pakistan (1973), Art.185(2)(a)---Appeal to Supreme Court---Grave and sudden provocation---Sentence, reduction -in---Discretion of Court---Scope---High Court had set aside the judgment of acquittal passed by the Trial Court and awarded death sentence to the accused---Re-examination, reappraisal and appreciation of evidence-on?-record by Supreme Court---Provocative conduct and attitude of deceased i.e. hurling of abuses and calling bad names addressing his mother, sister and wife before his death could not altogether be ignored---Such a situation, as stated by accused, led to the incident of pushing of the deceased by him from the mountain, stoning him and covering him with stones recovered from the site---All that tend to show the resultant death of the deceased under such peculiar provocative circumstances, which may be relevant for considering the quantum of the sentence in such a context---Conviction of accused by High Court was absolutely justified, however, the peculiar facts and circumstances including that he was acquitted by the Trial Court but was sentenced to death by the High Court persuaded to adopt a lenient view in the matter of infliction of sentence as there was no apparent planning, premeditation or intention to kill the deceased; there being no preparation by the accused in that regard nor he had any crime weapon with him; filthy and vulgar abuses hurled and cursing by the deceased and thus heated altercation infuriating and giving rise to provocation; action of a man was to be judged in the background of the society to which he belonged as he was creature of his environment; in any case a serious doubt prevailing as to what actually happened just before the incident remained shrouded in mystery---Death penalty, in the facts and circumstances, manifestly appeared out of all proportions to the offence---Law itself (clause (b) of S.302, P.P.C.) empowered the Court to inflict either death penalty or imprisonment for life for which purpose however while exercising the choice, a discretion was left with the court to be exercised keeping in mind the facts and circumstances of a case---Depending upon the circumstances, the background and the facts of a case, the court was obliged to exercise option of awarding penalty---Court could inflict death penalty without hesitation, if the victim had been done to death in a ghostly, cold blooded, brutal

manner or roasted alive etc.---Court, however, was expected to proceed very carefully and cautiously in the exercise of such discretion and not to ignore the gravity of the offence committed---Supreme Court found the present case, eminently a fit case in which awarding of life imprisonment would have met the ends of justice---While maintaining the conviction of accused, Supreme Court modified the sentence by converting the same from death to imprisonment for life; rest of the conviction was ordered to remain intact and benefit of S.382-B, Cr.P.C. was also made available to the accused.

Principles and Digest of Qanun-e-Shahadat Vol.II by Justice (R.) Khalil-ur-Rehman Khan; Abdul Haque v. The State PLD 1996 SC 1; Muhammad Imran alias Imrani v. The State PLD 2001 SC 956; Mst. Mumtaz Begum v. Ghulam Farid 2003 SCMR 647; Kora Ghasi v. State AIR 1983 SC 360; Iftikhar-ul-Hassan v. Israr Bashir and another PLD 2007 SC 111; Muhammad Riaz and another v. The State 2007 SCMR 1413; Muhammad Sharif v. Muhammad Javed alias Jeda Tedi PLD 1976 SC 452; Muhammad Sharif and others v. The State 1991 .SCMR 1622; Sh. Liaquat Hussain and others v. Federation of Pakistan PLD 1999 SC 504; Tarun Bora alias Alok Hazarika v. State of Assam AIR 2002 SC 2926; Bachan Singh v. State of Punjab AIR 1980 SC 898; Machhi Singh and others v. State of Punjab AIR 1983 SC 957 and Iftikhar Ahmed Khan v. Asghar Khan and another 2009 SCMR 502 ref.

(d) Penal Code (XLV of 1860)---

----S. 302(b)---Constitution of Pakistan (1973), Art.9---Murder---Sentence, quantum of---Contemporaneous trends to be kept in view---Article 9 of the Constitution attaches great value to the "life and liberty" of human being which is most precious human right regarded by the Constitution as a Fundamental Right, therefore, as far as possible and whenever permissible (depending upon the circumstances of a case), the court may exercise its discretion in favour of lesser punishment, which also will be strictly legal having the statutory backing of S.302(b), P.P.C.---Such an. approach, is likely to be regarded as liberal, but will advance the rationale and philosophy behind the mandate of Art.9 of the Constitution.

(e) Constitution of Pakistan (1973)---

----Art. 184---Interpretation of provisions of Constitution---Duty of court---Scope---Courts including the Supreme Court are creation of the Constitution or the law; they are neither representative/legislative bodies nor supposed to legislate---Of course, courts being the custodian of the rights of the people, especially the Supreme Court, a forum provided by the Constitution itself under Art.184, is obliged and called upon on occasions to interpret any provision of the Constitution and law in the discharge of its sacred and onerous duty, and ensure that specified spheres are not transgressed by the respective organs of the State---Supreme Court thus has a peculiar and a vital role under the Constitution.

Muhammad Zaman Bhatti, Advocate Supreme Court for Appellant.

. Muhammad Azam Khattak, Addl.A.-G. Balochistan for the State.

Date of hearing: 6th May, 2009.

JUDGMENT

SAYED ZAHID HUSSAIN, J.--This is appeal, as of right, in terms of Art. 185(2)(a) of the Constitution of Islamic Republic of Pakistan, 1973, as the appellant was convicted and sentenced to death by the Balochistan High Court, Quetta vide judgment dated 17-12-1998, setting aside the judgment of acquittal passed by the learned Sessions Judge, Quetta dated 1-7-1998. He had been charged for the commission of offence under section 302 read with section 342 and section 365, P.P.C.

2. The report (Exh.P/1-A) lodged by Noor Muhammad complainant against the appellant on 2-10-1995 with S.H.O., New Saryab Police Station Quetta, was that his son Abdul Ghafoor aged 19/20 years was missing from the house since 10-9-1995; and that his son had friendly terms with Muhammad Sharif appellant (sepoy in Custom Force) to whom he (Abdul Ghafoor) had sold the land but full payment had not been made by Muhammad Sharif and that he (Muhammad Sharif) had purchased the said land for one Muhammad Younis; and that few days back Abdul Ghafoor had brought some plastic material from Muhammad Sharif and wanted to start that business as Muhammad Sharif had told him that it was a profitable business. On 23rd September, 1995, a letter was received by him in Bloom Star Hotel, Quetta (where he was driver), demanding an amount of Rs.300,000 to be left near Saryab Mill High School at 6-00 p.m. on 26-9-1995 and in case of failure, his son would be murdered. He suspected the appellant to have kidnapped his son for ransom. It was reported that his son had a sum of Rs.70,000 with him when he left the house. Pursuant to this report the appellant was arrested on 2-10-1995 and after investigation he was sent up for trial. The charge framed by the Trial Court and read over to the appellant was as follows:-

> "It is alleged that on 10-9-1995 time un-known you abducted the son of complainant Noor Muhammad namely Abdul Ghafoor about aged 19/20 years and confined him with such intention to receive or compelled the father of deceased to pay ransom to you, thereafter you also committed the murder of deceased, thereby you have committed an offence punishable under section 302 Qisas and Diyat Ordinance read with 342/365, P. P. C. "

The appellant pleaded not guilty and faced the trial. He was acquitted by the Trial Court i.e. Session Judge, (Adhoc) Quetta vide judgment dated 1-7-1998, where against the complainant Noor Muhammad father of Abdul Ghafoor (deceased) filed appeal before the High Court of Baluchistan, Quetta, which was accepted vide judgment dated 17-12--1998. Finding him guilty of the offences, the appellant was sentenced as under:--

> "A. For offence under Section 302 PPC the respondent Muhammad Sharif son of Fazal Haque caste Babahi is awarded capital sentence of DEATH. He be hanged by neck till he be dead;

B. For offence under section 342 PPC, the respondent Muhammad Sharif is sentenced to one year's RI and to pay fine of Rs.1000 or in default in payment of fine to further suffer two and a half months' RI;

C. For offence under section 365 PPC, the respondent Mohammad Sharif is sentenced to seven years' RI and to pay fine of Rs.7000 or in default in payment of fine to further suffer RI for one year nine months."

This is appeal by the convict/appellant against the same.

3. Mr. Muhammad Zaman Bhatti, Advocate Supreme Court the learned counsel for the appellant, has with the support of the precedents drawn our attention as to the scope of appeal and duty of the Court in a matter of this kind where an accused person had been acquitted by the Trial Court but convicted by the High Court. It is contended by him that the Trial Court had the benefit of conducting the trial, recording the evidence, watching the demeanor of the witnesses, the findings recorded by the said court assume substantial significance which the Appellate Court could not have interfered merely because some other view was possible of the same evidence. It is contended that mere suspicion whatsoever strong was not enough for convicting a person and that it is not for the Court to hunt evidence for this purpose. It is also contended that an accused has the presumption of innocence unless proved guilty and where he is acquitted by the Court he gets double presumption of innocence, which should not be disregarded by the Appellate Court. He has cited number of rulings such as Abdul Majid v. Superintendent and Remembrancer of Legal Affairs, Government of East Pakistan (PLD 1964 SC 422), The State v. Manzoor Ahmad (PLD 1966 SC 664), Zaheer Din v. The State (1993 SCMR 1628), Ansar Ahmad Khan Barki v. The State and another (1993 SCMR 1660), Muhammad Ishaque Khan and others v. The State and others (PLD 1994 SC 259), Asadullah and another v. State and another (1999 SCMR 1034) and Sarfraz alias Sappi and two others v. State (2000 SCMR 1758). It is also contented by him that there was no convincing and confidence inspiring evidence, which could justify the involvement of the appellant in the killing of Abdul Ghafoor deceased and the High Court while passing the impugned judgment should have kept in view the evidence from all angles before recording the finding of guilt in the matter.

4. The learned Additional Advocate General Baluchistan has relied upon the circumstantial and medical evidence, which according to him was sufficient enough to prove the guilt of the appellant including the confessional statement made by him and the recovery of the dead body on his pointation from the place where the deceased had been buried. According to him, the letter demanding ransom was sent by the appellant which stands proved by the evidence of hand writing expert.

5. In order to assimilate the principles laid down by this Court from time to time in a matter of this kind reference to some of the past precedents may be made. In Abdul Majid v. Superintendent and Remembrancer of Legal Affairs, Govt. of East Pakistan (PLD 1964 SC 422), The late A.R. Cornelius, C.J., while dealing with a case where the Trial Court had acquitted the accused but on appeal the High Court had set aside the acquittal and sentenced him to imprisonment for life, laid down the guiding principles applicable to such like cases. I can do no better than making reference to few

paragraphs from that judgment, the relevant portions whereof are: "This being a case of reversal of an acquittal by the trial Judge, supported unanimously by the assessors, it is desirable that we should commence by stating a fundamental principle applicable to such cases. It is that the full facts and circumstances of a case are laid open before a trial court and thereby come within the comprehension of that Court including a jury or assessors, sitting as part of the Court, far more thoroughly and completely than is ever possible on the basis of a written record canvassed to advantage or disadvantage by learned counsel in a Court of appeal. The trial Court, being close to the scene of the occurrence and familiar with the ways and practices of the people involved, enjoys a marked advantage in the formation of a complete and balanced picture of the incident or incidents which go into the making of the prosecution case as presented by witnesses of the locality. It enjoys also another advantage of a principle character for such appreciation, namely that the witnesses do not merely appear before it to give that evidence, which through repetition before the Police authorities and the committing Court they may be thought to be well schooled in, but also that which they give under the probing stresses of cross-examination." And that "In setting aside an acquittal in a case which rested wholly on direct evidence of witnesses, as much importance must be given as in any other case, to the rule which runs through the criminal jurisprudence of our country as a golden thread that the benefit of every doubt must go to the accused person. In this case, the Judge of the trial Court had canvassed in his judgment a considerable number of features which went to create doubt regarding the testimony of each of the aforesaid witnesses, a doubt which was clearly shared and expressly declared by the assessors. As was remarked by the Judicial Committee in the case of Sheo Swarup and others, (1934 IA 398) the fact of the acquittal by the trial Court certainly does not operate to diminish the substantial nature of such doubts or of the benefit to the accused person which must necessarily follow." It was further observed that "Equally, a conclusion by a Judge may be reversed, even where it has led to an acquittal. But where he has read the evidence fairly, and has formulated grounds of doubt which are not perverse or wholly illogical or unreasonable, there is a clear risk of departure from the rule of the benefit of the doubt in reversing his findings."? (Portions underlined for emphasis). Keeping such principles in view and on reappraisal of the evidence, the Court came to the conclusion that "the doubts were so substantial that to overcome them by reasons to the contrary could only have the result of giving the benefit thereof to the prosecution." The appeal against conviction was accordingly allowed and he was acquitted. In The State v. Manzoor Ahmad (PLD 1966 SC 664), the conviction order of the Trial Court was set aside by the High Court acquitting him of the charge of murder. His acquittal had been challenged before this Court, leave was granted as the case depended wholly on circumstantial evidence. Hamoodur Rahman (late) (as he then was) speaking for'-the Court observed that "It is no doubt true that in a case resting wholly on circumstantial evidence the Court must, as observed by Wills in his Treatise on Circumstantial Evidence, remember that the "processes of inference and deduction are essentially involved frequently of a delicate and perplexing character-liable to numerous causes of fallacy." Mere suspicion will not be sufficient to justify conviction. Before the guilt of the accused can be inferred merely from inculpatory circumstances those circumstances must be found to be incompatible with the innocence of tote accused and "incapable of explanation upon any other reasonable hypothesis than that of his guilt." It is also equally well settled that the circumstances sought to be 'relied upon must have been established beyond all doubt. But this, only

means a reasonable doubt, i.e. a doubt such as would assail a reasonable mind and not any and every kind of doubt and much less a doubt conjured up by pre-conceived notions. But once the circumstances have been found to be so established they may well furnish a better basis for decision than any other kind of evidence. As Hewart, I.C:J. observed in the case of Percival Leonard Taylor, James Weaver & George Thomas Donovan (1) "it is no derogation of evidence to say that it is circumstantial. "It. was further observed that. "Straining of the evidence either in favour of the prosecution or in favour of the accused is a practice that I would deprecate but I would undoubtedly, in accordance with the established principles of administration of criminal justice in our Courts, be prepared to resolve all genuine and reasonable doubts, if any, arising in favour of the accused person. It is always dangerous to indulge in the straining of evidence, for, once the process of straining begins there is no knowing where it will end." And that "It is not sufficient in such a case to say that since there is no direct evidence to connect any one with' the felonious act the guilt cannot be fixed. It is precisely in such cases that I conceive it to be duty of the Court to examine the probabilities in the light of the indirect evidence of the injuries on the deceased, the nature and condition of the place where the incident took place the articles found there, the motive for the crime and the other surrounding circumstances proved". It was concluded that "Giving the benefit of all doubts, therefore, to the accused the Court has still to discharge the onerous function of not allowing an offender to escape justice and the meeting out just punishment to him. In the circumstances, taking the most lenient view in favour of the respondent I have come to the conclusion that a grave miscarriage of justice had been committed by the High Court by acquitting the respondent altogether. These appeals are, accordingly, allowed, the acquittal of the respondent Manzoor Ahmad is set aside and he is convicted under section 304, Part I of the Pakistan Penal Code and sentenced to rigorous imprisonment for seven years ".

Later on, as Chief Justice the same great Judge the late Hamoodur Rahman along with other brother members of the Bench whose erudite knowledge and comprehension of law begs no comments, decided one of the leading remarkable case i.e. Noora and another v. The State (PLD 1973 SC 469) laying down the. guiding principles followed in subsequent cases about the scope, extent and amplitude of power and jurisdiction of the Court in criminal matters, which can usefully be reproduced; "The conclusion, therefore, to which I am driven after the examination of the relevant decisions and the constitutional provisions relating to the jurisdiction of this Court, is that this Court has every' right to examine the evidence in a criminal appeal, if it is necessary in the interest of justice. In what circumstances it will do so is a matter on which it is neither possible nor desirable to lay down any hard-and-fast rule. Each case will 'have to be judged upon its own facts and circumstances but, at the same time, I must point out that although under the constitutional provisions the powers of this Court are in no way fettered, yet, from the very nature of things, there must be some difference in its approach towards the cases which come before it directly as an appeal and cases in which leave to appeal has first to be obtained. The limitations, which the Court imposes on its powers are, however, only such as are implicit in the nature and character of the power itself. They cannot be defined with any precision, because, it is not advisable to fetter the exercise of this discretionary power by any set rule. The Court will no doubt use its good sense in determining the circumstances in which it

will grant leave and will exercise its discretion on well established principles ; but where the Court reaches the conclusion that a person has been dealt with in violation of the established principles of the administration of criminal justice, then no technical hurdles should be allowed to stand in its way of doing justice and seeing that in justice is not perpetuated or perpetrated by the decisions of the Courts below. Now that we are no longer merely exercising a prerogative jurisdiction but are exercising powers conferred by the Constitution, there appears to me no valid reason for this Court to be inhibited by the limitations which the Judicial Committee of the Privy Council had imposed upon itself. I cannot, therefore, persuade myself to agree that we should go back again to the rule in Dillet's case and narrow down the scope and content of our own constitutional jurisdiction. We should have the fullest power to do full justice without fettering ourselves with any self-imposed restrictions which are no longer necessary in the context of the changed circumstances in which we now function." It was further observed that "I should not be understood to be laying down that the opinions of the Courts below, particularly of the Courts which had the advantage of listening to the witness giving evidence and watching his demeanour, should be disregarded or given no weight at all. As an ultimate Court, we must give due weight and consideration to the opinions of the Courts below, and normally we should not interfere with' their findings where we are satisfied that they are reasonable and were not arrived at by the disregard of any accepted principle regarding the appreciation of evidence. The mere fact that this Court might have taken a different view of the evidence should not be sufficient to overrule the findings of the Courts below ; but we should first satisfy ourselves that there is some serious defect in the process by which the finding has been arrived at. Where such defect is discovered and the finding is not considered tenable, then it should be open to the Court to come to its own independent finding upon a re-examination of the evidence untrammeled by the opinions of the Courts below."

In Ghulam Sikandar and another v. Mamraz Khan and another (PLD 1985 SC 11) Muhammad Afzal Zullah ACJ, (as he then was) after considering several cases cited before the learned Bench with regard to the principles to be followed by the Court regarding appreciation of evidence in an appeal against acquittal observed "However, notwithstanding the diversity of facts and circumstances of each case, amongst other, some of the important and consistently followed principles can be clearly visualized from the cited and other case law on the question of setting aside an acquittal by this Court. Some of these are as follows:--

> (1) In an appeal against acquittal the Supreme Court would not on principle ordinarily interfere and instead would give due weight and consideration to the findings of Court acquitting the accused. This approach is slightly different than that in an appeal against conviction when leave is granted only for re; appraisement of evidence which then is undertaken so as to see that benefit of every reasonable doubt should be extended to the accused. This difference of approach is mainly conditioned the fact that the acquittal carries with it the two well-accepted presumptions: One initial, that, till found guilty, the accuse is innocent; and two that again after the trial a Court below confirmed the assumption of innocence.

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> (4) The Court would not interfere with acquittal merely because on re-appraisal of the evidence it comes to the conclusion different from that of the Court acquitting the accused provided both the conclusions are reasonably possible. If however, the conclusion reached by that Court was such that no reasonable person would conceivably reach the same and was impossible then this Court would interfere in exceptional cases on overwhelming proof resulting in conclusion and irresistible conclusion; and that too with a view only to avoid grave miscarriage of justice and for no other purpose. The important test visualized in these cases, in this behalf was that the finding sought to be interfered with, after scrutiny under the foregoing searching light, should be found wholly as artificial, shocking and ridiculous."

In the case reported Zaheer Din v. The State (1993 SCMR 1628), the Trial Court had acquitted him of the charge of murder but on appeal the High Court convicted and sentenced him to life imprisonment. It was observed that "The conclusions drawn by the learned Judges of the High Court on the basis of the re-appraisal of the evidence in the case, while convicting the appellant, were merely another possible view of the evidence which was not sufficient for reversing the acquittal of the appellant into conviction. The learned Judges of the High Court did refer to the case of Ghulam Sikandar and another v. Mirza Khan and other (PLD 1985 SC 11) in the impugned judgment but unfortunately they failed to keep in sight the guiding principles laid down by this Court for deciding an acquittal appeal in a criminal case."

Accordingly the acquittal of the appellant was restored by observing that the High Court was not justified in interfering with the acquittal judgment of Trial Court simply because it could take another view of the evidence in the case. In Ansar Ahmad Khan Barki v. The State (1993 SCMR 1660) the appellant had been convicted and sentenced to life imprisonment by the Trial Court, which judgment was reversed by the High Court enhancing the sentence of life imprisonment to death. He had filed appeal before this Court. On reappraisal of the evidence the Court felt "not inclined to subscribe to the reasoning of the High Court. The appellant was not bound to prove to the hilt his plea of defence and had merely to show the circumstances suggestive of reasonable possibility that there might be some truth in his allegation."

It was found on examination and consideration of the evidence that he deserved lesser punishment. The appeal was accordingly accepted converting the death sentence into life imprisonment. In Muhammad Ishaque Khan v. The State (PLD 1994 SC 259) the appellant had been awarded life imprisonment by the Trial Court, which sentence was however enhanced to death by the High Court. One of the reason that prevailed with the High Court for enhancement of sentence was the false defence taken by the appellant before the Court. It was observed that "The punishment to be awarded to an accused person in a criminal case entirely depends on the strength' and circumstances established against him by the prosecution

in the case. The weakness or falseness of the defence plea is not to be taken into consideration while awarding punishment to the accused in a criminal trial."

In State v. Farman Hussain and others (PLD 1995 SC 1) it was highlighted that while trying a criminal case "it is the duty of the Court to appraise evidence strictly according to the legal requirements described by law without being swayed away emotionally for any other extraneous reasons, which fall outside the pale of legal jurisdiction of appraisement of evidence. In the criminal jurisprudence which we follow, it is invariably the duty of the prosecution to prove the case against accused beyond doubt and the accused is presumed to be innocent until the case is fully proved against him and in that process not only if there is room for doubt, benefit thereof is to go to the accused but if any legal provision, which is to be relied upon in the appraisement of evidence and is open to two interpretations, one beneficial to the accused is to be adopted." It was observed that "there is difference between appraisal of evidence in this Court in appeal arising from conviction and in the appeal arising from acquittal recorded by High Court. In appeal arising from acquittal, appraisal of evidence in this Court not so rigid as in the appeal arising from conviction and normally in the former case this Court hesitate to interfere unless it becomes necessary on the ground of gross misreading of evidence resulting into miscarriage of justice."

In Asadullah and another v. State and another (1999 SCMR 1034)' the appellant was found guilty and was sentenced to death by the Trial Court, which was confirmed by the High Court. The principle laid down in the case of The State v. Manzoor Ahmad (Supra) was followed that "in a case resting wholly on circumstantial evidence Court must remember that processes of inference and deduction are essentially involved frequently of a delicate and perplexing character-liable to numerous causes of fallacy. Mere suspicion will not be sufficient to justify conviction. "The appeal was accepted and conviction set aside.

In Sarfraz alias Sappi and two others v. State (2000 SCMR 1758) the appellant had been convicted by the Trial Court and sentenced to death where against his appeal was dismissed by the High Court. While deciding the appeal of the convict it was observed by his lordship Iftikhar Muhammad Chaudhry J., now the Hon'ble Chief Justice that `for safe administration of justice a condition has been imposed namely that the evidence which is going to be believed to be true must get independent corroboration on material particulars meaning thereby that to find out credible evidence principle of appreciation of evidence i.e. sifting chaff out of grain was introduced as it has been held in the cases of Syed Ali Bepari v. Nibaran Mollah and others (PLD 1962 SC 502) Tawaib Khan another v. The State (PLD 1970 SC 13), Bakka v. The State (1997 SCMR 150), Khairu and another v. The State (1981 SCMR 1136) Ziaullah v. The State (1993 SCMR 155) and Ghulam Sikandar v. Mamaraz Khan (PLD 1985 SC 11), Shahid Raza and another v. State (1992 SCMR 1647) Irshad Ahmad and others v. State and others (PLD 1996 SC 138). "On examination and consideration of the evidence the sentences awarded by the Courts below were altered.

6. From the perusal of the constitutional and legal provisions and above pronouncements by the esteemed Hon'ble Judges, the developing trend is evident

and some of the principles deducible therefrom are that:--

(i) Where the High Court has on appeal reversed an order of acquittal of an accused person and sentenced him to death or to transportation for life or imprisonment for life, the appeal lies before this Court as of right under Article 185(2) (a) of the Constitution of Islamic Republic of Pakistan. Provision of a separate procedure for that purpose under Order XXII of the Supreme Court Rules, 1980, is a strong indicator in this regard. This it self is indicative of the importance and significance of acquittal which places the matter on different footing than others.???????

(ii) This Court has every right of examining evidence in a criminal appeal if the interest of justice so demand for which purpose each case will have to be adjudged upon its on facts and circumstances and in case the Court reaches the conclusion that the person has been dealt with in violation of the accepted principles of the administration of criminal justice then "no technical hurdles should' be allowed to stand in its way of doing justice and seeing that injustice is not perpetuated or perpetrated by the decisions of the Courts below."

(iii) As an ultimate Court, this Court must give due weight and consideration to the opinions of the Courts below and normally the findings should not be interfered where the same "are reasonable and were not arrived at by the disregard of any accepted principle regarding the appreciation of evidence. "But where defect is discovered about tenability of finding in that case it should be open to the Court to come to its own independent finding upon re-examination of the evidence untrammeled by the opinions of the Courts below.

(iv) The position of the Trial Court being close to the seen of occurrence and familiar with the ways and practices of the people involved having the benefit of recording evidence of witnesses, watching their demeanour, view formed by the said Court should not be disregarded lightly.

(v) The benefit of any reasonable doubt must go to the accused person but where the conclusion about such a doubt leading to acquittal is wholly illogical or unreasonable, the same can be reversed by the higher Court.

(vi) While giving the benefit of all doubts to the accused, the Court has still to discharge the onerous function of not allowing an offender to escape justice.

(vii) The benefit of doubt if any can not be given to the prosecution.

(viii) Mere suspicion howsoever strong or possible is not sufficient to justify conviction and all circumstances sought to be relied for basing conviction upon circumstantial evidence must be established beyond doubt.

(ix) Straining of evidence either in favour of the prosecution or in favour of the accused should neither be countenanced nor encouraged.

(x) While examining the views expressed by the courts below it should be seen that the findings are not based on mere assumptions and conjectures.

(xi) The acquittal should not be interfered with, merely on the ground that another possible view of the evidence was available.

(xii) It is the fundamental duty of the prosecution to prove the guilt to the hilt and not of the accused to prove his plea of defence to the hilt and that the weakness or falseness of the defence plea is not to be taken into consideration while awarding punishment.

(xiii) That the Court is to appraise evidence without being swayed away emotionally as accused is presumed to be innocent, until the guilt is proved against him by producing evidence of incriminating nature to connect him with the commission of crime beyond shadow of reasonable doubt.

(xiv) The principle that if a witness is not coming out with the whole truth his evidence is liable to be discarded as a whole is not that absolute and stand modified as his testimony will be acceptable against one set of accused, though rejected against the other subject to the rider that it must get independent corroboration on material particulars from credible evidence based on the principle of "sifting chaff out of grain ".

These are merely some of the known established principles being followed by the Courts and certainly not exhaustive of situations arising from time to time and case to case.

7. In the light of the above, it has been considered absolutely necessary to re-examine, reappraise and appreciate the evidence on record of this case as the appellant was acquitted by the Trial Court but awarded death sentence by the High Court. Now, it will be appropriate to keep in mind the comparative treatment of the evidence made by the learned Trial Court and, the learned High Court. The salient features of which are as under:-

	Trial Court	**High Court**
Belated FIR	"Admittedly the FIR is lodged after lapse of nearly 23 days. The delay in filing of FIR does not by itself fatal to a case nor washes away the reliable ocular and circumstantial evidence. But there must be some reasonable cause for filing of report at such delayed date. As per complainant he by himself was trying to search his son	"We may also observe that in the case of such like nature it is advisable not to express doubt on the prosecution case, merely taking into consideration independently different pieces of evidence the court must form its opinion on considering the accumulative effect of the over-all evidence i.e. circumstantial, ocular,

		that is why he did not report the matter uptill 23-9-1995 when he got the alleged letter wherein it was directed that money must be paid uptill 26-9-1995. Even then the complainant remained silent uptill 2-10-1995 and then filed the report. He had not disclosed any reason why he kept quite even after receiving the said letter. Rather during investigation it is disclosed that initially the complainant' Noor Muhammad tried to? find out his son by himself, thereafter he searched his son along with accused, who was asking him to arrange money and when he (the complainant) become suspicious that accused had abducted his son then he reported the matter. No cause is shown due to which delay is occurred.	documentary etc. in the interest of substantial justice instead of throatling the prosecution case, for a technical reason, which otherwise, is not of much importance in view of the peculiar circumstances of each case. Thus we are inclined to hold that in the given circumstances of instant case, delay in lodging the FIR is not fatal to the prosecution case."
	Letter demanding ransom	"While appearing before the court as P. W.1 he has deposed that the said letter was brought by two children in Bloom Star Hotel and the same was in the socks, while said children handed over the same to chowkidar of the Hotel. And after a while he reached there, while the chowkidar handed over the letter to him at 2.30 P.M. The complainant did not remember the name of said chowkidar as he was a refugee. Further as he is unable to read or write, therefore, the letter was read over to him by owner of the hotel namely Bashir Ahmed. The said chowkidar is the main witness who received the letter from the alleged	"Whether really respondent had written letter in his own handwriting which I. O. referred for the report of handwriting Expert, after obtaining specimen writing of respondent Exs. P/6-A, C&D. Accordingly PW-4 Farzand Ali being handwriting Expert, examined the letter as well as the specimen handwriting of respondent and gave positive Report Ex.P/4-A, along with specimen handwriting marked as 'A 'B '& 'C'. According to the contents of report, the questioned writing on the disputed paper tally in individual characteristics with the specimen writing. But learned trial court disbelieved the same, as no reasons were assigned by the handwriting

children. But the investigating officer has neither tried to get the name of the chowkidar from management of the hotel nor recorded his statement or made him witness in same respect. Further said children were also not traced out nor they were tried to be identified by the complainant. Even the alleged owner of the hotel Bashir Ahmed, who red the letter to the complainant, was not made witness of the same, nor produced before the court. Contrary to statement of the complainant the Investigating Officer, while recording his statement before court as P. W.12 has stated that Noor Muhammad, the complainant, has not disclosed that from whom he read out the letter, further he himself did not make any investigation. It is further his statement that Noor Muhammad himself is chowkidar of hotel, again said he is driver while letter was given to him and no one had seen delivery of letter. Further he had not made any investigation about presence and duty hours of chowkidar of Hotel. His statement is contrary to that of complainant, which creates doubt. From all these facts the negligence and incompetency of Investigating Officer is apparent.

Expert,* whereas according to him, in cross examination, reasons were assigned by the Handwriting Expert. Mr. M.S. Rukhshani, learned counsel, contended that the letter (Article P/1) allegedly written by respondent is not in his handwriting, as such, for this reason the Handwriting Expert did not mention reasons in the Report. Simultaneously, he submitted an application and requested that for the safe administration of justice, this court may also independently examine the writing on the letter (Article P/1), the specimen handwriting obtained by the I.O. from respondent vide Exs. A, C&D, for the purpose of sending the same to the Handwriting Expert, as well as the signatures of respondent on the letter and other documents, which he has signed during trial and according to him on basis of this material, the Court can conveniently from opinion, that the writing on the letter (Article P/1) is not in the handwriting of respondent.?? Mr. Noor Muhammad Achakzai, learned Addl. A.-G. stated that the Handwriting Expert has given positive report, after examining the contents of the letter (Article P/1) and the specimen handwriting of respondent Exh.P/6-A'C'&D. He further stated that the signatures of respondent on the letter as well as on his confessional statement and the statement recorded before trial court under section 342, Cr. P. C. are similar.? A close consideration of the above factors, for which the trial court

		had disbelieved the letter (Article P/1) suggest that these factors undoubtedly would have Attained considerable importance; provided defence had successfully proved that the letter was not written by respondent addressing to appellant and if except the incriminating letter (Article P/1) there would have been no other evidence, sufficient to involve the respondent in the commission of offence, then for safe administration of justice, while discarding this evidence, there could have been no violation of any of the principle laid down by Hon'ble Supreme Court, for examining an acquittal Appeal."
Disclosures	"As per record the accused has been arrested on the same day of lodging of FIR i.e. 2-10-1995 by thana New Sariab, while on same day investigation was handed over to C"I"A staff. The investigation started on same day. As per record the accused made several disclousers during investigation about commission of the offence and made pointation, whereby recoveries were effected. As per P. W.12, the Investigating Officer, the first disclouser was made by the accused on 2-10-1995 at 11-30-P.M. about writing of a letter to Noor Muhammad, father of the victim and demanded ransom. All these witnesses supported each other in same respect. But the perusal of Ex.P/7 reveals that the same has been prepared on 2-10-1995 while attested on 3-10-1995. No explanation in same respect has come on	"It is also to be seen that the respondent was arrested on 2nd October, 1995, on that very day, he made a disclosure (Ex.P/7-A produced by PW-Manzoor) in presence of DSP, CIA, Chaudhry Muhammad Sharif, which is admissible in view of Article 40 of the Qanoon-e-Shahadat Order, 1984, as it has been held in 1995 SCMR 614. Therefore, the disclosure by respondent being itself an independent evidence against him was bound to be accepted.? Although convincing Expert's evidence is available on record, but even if for sake of safe administration of justice, the letter (Article P/1) and specimens Ex.P/6-A'C'&'D' are examined with a naked eye, without any hesitation, one can safely conclude, that both the writings are similar.? Thus for the above discussion, it is concluded, that it was the

	record. This shows that attesting witness was not present at the, time of disclouser & attested the paper afterwards.	respondent Muhammad Sharif, who had written and sent the letter (Article P/1) to appellant.
Recovery of dead body and its identification	"Apart from recovery of dead body they have alleged recovery of a plastic jug, a silver glass, a Balochi Chappal and blood stained stone and hairs. As per Investigating Officer the mentioned articles were found near the dead body, which were taken into possession. P.W. 9 has also deposed that beside dead body a jug, glass and slipper were recovered. He did not support P. W.7 nor the memo. of recovery Ex.P/6-A, where it is mentioned that the accused himself climbed the mountain and produced the jug and glass to the authorities. The witnesses did not support each other in same respect.? The second point which requires consideration is condition of the dead body. As per disclouser made by the accused the death was occurred on the day when the victim disappeared i.e. 10-9-1995, while the recovery was effected on 3-10-1995 on pointation of the accused. P. W.9 has deposed that the recovered dead body was in decomposed condition but identifiable. Contrary to these witnesses the entries made in memo. of pointation of site and recovery of dead body it is noted that dead body being old and in shape of skeleton was recovered. The other piece of evidence in respect of condition of the dead body is report of post mortem present on record as Ex.P/8-A. The doctor who	"Subsequently on 4th October, 1995, PW-3 Muhammad Ilyas Patwari, visited the place of incident, for purpose of preparing the sketch and there he found one chappal and some hairs, besides? some facts which were in liquid shape. Therefore, in presence of Fard-e-Nishandai of the place, from where the dead body was recovered, the respondent is estopped to argue that the recovered dead body was not of Abdul Ghafoor. Learned Addl. - A.G. stated that this question being pivotal one, may be decided, keeping in view the confessional statement of respondent as well.? Although it has not come on record that now Noor Muhammad was in a position to identify the decomposed dead body to be of his son, but that fact remains that he being father must be having knowledge about the clothes which the deceased was wearing and he would also definitely be aware about the height of his structure etc. Even otherwise, as it has been discussed herein-above, it is not the case of defence that no dead body/skeleton was recovered at the pointation of respondent or the police had foisted the dead body of another person upon him."

	conducted the post mortem appeared before the court as P. W.8 namely Dr. Muhammad Umer. As per his statement the dead body was of 20/25 years person, while facial features are unidentifiable. All soft tissues were decomposed. The dead body was in advance stage of putrefying condition. The skull was crushed. Further right foot, right and left hands were missing. During cross examination he has admitted it to be correct that due to decomposition and putrefication of dead body no one can identify it.? The complainant while appearing before the court has stated that he identified the dead body of his son. While as per record the dead body was received by one Muhammad Qasim. This Muhammad Qasim is not produced before the court nor his statement has been recorded. There is nothing on record that on basis of what signs the dead body was considered to be of Abdul Ghafoor. As the medical evidence is not, disputed by the prosecution due to this contradiction a reasonable doubt appeared as to correct identification of the victim Abdul Ghafoor."	
Sale Transaction and dispute about? balance	"As per prosecution case there was some sale transaction between the victim and the accused, while the accused has not paid the whole sale price, therefore, there was some dispute in respect of the same, between them. As per report the accused has allegedly purchased the land	"In this context, first of all, it may be seen that respondent confessed before PW-6 that he had purchased land from Appellant against consideration of Rs. 73,000 out of which, he paid Rs.40,000 to deceased Abdul Ghafoor, as advance money. After few days Abdul Ghafoor, started demanding

	for one Muhammad Younas. The prosecution tried to set up a Younis has not been traced out. Further, no evidence was tried to be collected that whether the victim was actually in possession of an amount of Rs.70,000. No investigation is made from residents of his home. Rather, another disclouser of accused is alleged that on 7-10-1995 the accused disclosed that when he murdered Abdul Ghafoor he took out an amount of Rs.24, 000 from his pocket, while he had spend four thousand and remaining amount can be recovered from his house. Memo. Of disclouser Exh.P./7-C is present on record. As per P.W.12 the Investigating Officer that the said amount was got recovered from house of the accused and he prepared site trap Ex.P/12-A, According to P. W.7 Manzoor Ahmed on identification of accused an amount of Rs.20, 000 was got recovered from an iron box lying under a cot from one room of the house of accused. Memo. of Recovery Ex.P/7-D was prepared at site. The perusal of the same reveals that the memo. Of disclouser Ex.P/7-C bears date.??	balance amount, out of which, he paid him rupees twenty thousand.? Thereafter Abdul Ghafoor use to pay visit daily to his house for demanding money, but after abusing him, he use to go back. On one day, he came to his house, where they net with each other, on which, respondent tried to make him understand that remaining amount will be returned very soon, on which, he got provoked and started abusing and used filthy language. On this, he told him that he should come to his house after one or two days in the morning time, at 10 O'clock when he will make the payment of money to him and will also go to attend an urgent work. On the next morning deceased was coming towards his house, with? whom he met in the way.' At that time, deceased had in his hand a Jug and a glass. On his enquiry he told him that since he had told him for going outside, therefore, he had brought these things with him. On this, they both started on foot. Deceased purchased lemons from the way and also filled the Jug with water. Then they went towards the western Bye-pass on foot. From near Akhtar Petrol Pump, they went towards the mountains, where they sat for some time and they drink Sherbat over there. Deceased again demanded amount and simultaneously started using filthy language for him and upon this, he again tried to make him to understand that he has taken a

		stamp per and further no construction work has been carried out over the land. On this he again abused him by taking the names of his sister and wife. On this, the respondent got furiated, due to which, he pushed the deceased, who fell down form the mountain. Then he also came down and picked a stone with which, he hit him. Thereafter he placed his legs and hands in straight position and placed stone over the dead a body. He also saw that some money is lying -in the pocket of deceased, which he picked up and on a counting they were Rs.24,000 out of this amount he spent Rs.4,000 as "Khairat" in his name and kept rupees twenty thousand in a box in his house."
Confessional Statement	The other piece of evidence produced against the accused is his confessional statement allegedly recorded on 8-10-1995 before EAC 2 Shoaib Gala appeared before the court as P.W.6. The confessional statement is present on record as Ex.P/6-G. though P. W.6 has asserted that he had observed all the formalities and then recorded his statement, while on the other hand the Accused disowned this confessional statement and denied presence of his signatures on it. Admittedly the accused is in custody since 2-10-1995, while he got recorded his confessional statement on 8-10-1995 despite the fact that on very day of his arrest he made disclouser about	"A careful perusal of the Fard-e-Nishandahi and recovery of dead body, suggest that in accordance with Article 40 of the Qanoon-e-Shandat Order, 1984, police recovered the dead body from the place, which was pointed out by respondent. On this version of the accused, when the stones were removed and a skeleton of the dead body was recovered. Near dead body, black coloured Balochi Chappal, were also recovered, which were filled with earth. The respondent also got recovered from the place of wardat, a blood stained cloth and disclosed to the police that with this stone. In cross examination the contents of Fard-e-Nishandahi and recovery of Dead body Ex.P/6-A, were not challenged. At this stage it is

	commission of the offence and thereafter on 3-10-1995 he got recovered the corpse, of Abdul Ghafoor from place of incident and on 7-10-1995 he got recovered the amount allegedly taken from possession of the victim from his house. Several disclousers are made during this period and also pointation of site was made. There is no logical explanation that when the accused has made, disclouser about commission of the offence on very day of his arrest, while he has not been produced before the Magistrate as soon as possible for Recording of his confessional statement. In present case the delay create reasonable doubt involuntariness of the same. Thus less reliance can be placed on the same. Further, such retracted confessional statement must be fully supported by ocular and circumstantial evidence and can not become sole basis for conviction of the accused."	to be noted that learned trial court had at all not considered this document and kept it out of consideration, without assigning any reasons. In the cases where prosecution is supposed to establish the guilt on basis of circumstantial evidence, such like documents, which have attained the status of evidence; because its contents have been duly proved by a Magistrate, are required to be given full effect, because this was the only document, on basis of which, the police was in a position to know about the place of wardat and also to effect the recovery of the dead body. At this stage, it is most important to note that no enmity of whatsoever nature has been expressed with the witness Shoaib Gola, EAC, who, supervised the recovery of dead body. In addition to this, it was the respondent himself who led the Magistrate, DSP and other Police party to a place, from where the dead body was recovered. Therefore, the reasons prevailed upon the learned trial court that the dead body was scattered or dismembered or it was in advance stage of putrefication as such, it was not possible to identify it, would not be the important considerations, when prosecution has successfully established in accordance with the provisions of? Article 40 of the Qanoon-e-Shandat Order 1984, that the recovery of dead body has been made, at his pointation. As far as the delay in recording confession is concerned, from the face of record, it stands fully explained

		in view of the fact that on the day of arrest i.e. 2nd October, 1995, respondent made disclosure with regard to writing of letter (Article P/1) to appellant demanding ransom from him. This disclosure was followed with the Nishandahi of place of wardat and recovery of dead body on 3rd October, 1995, vide Ex.P/6-A. Later on again on 7th October, 1995, respondent made a third disclosure in pursuance whereof, rupees twenty thousand vide Memo. Exh.P/7-D were recovered. It is now well settled principle of recording confessional statement, that there is no hard and fast rules for recording confession immediately after the arrest of accused, however, efforts should be made to do so, as early as could be possible, but if there is sufficient explanation and other evidence attending the confession then if there is a delay that is condoneable, thus depending on facts of each case.
Conclusions	Considering and dealing with the evidence on record on such a critical touch stone, the learned Sessions Judge, Quetta did not accept the prosecution version and ordered the acquittal of the accused.	In view of the above, the learned High Court found that "The recovery of dead body as well as the recovery of incriminating articles i.e. black coloured Balochi Chappal, Balochi Cap and the stone, found stained with human blood fully corroborates the confessional statement.? Moreover, there is yet another piece of evidence, namely the recovery of rupees twenty thousand, at the lead of respondent by the police vide Ex.P/7-D. In the confessional statement, the accused has

		mentioned that when he was concealing the dead body of deceased underneath the stones, at that time, he saw some money in his pocket, which he took out and on counting, found it to be Rs. 24, 000/- Out of the same, he spent Rs.4000/- as 'Khairat' in name of deceased whereas Rs.20,000 were kept by him in a box in his house."

In view of the variant approach to the matter by the Trial Court and the learned High Court, it is considered appropriate to reexamine the evidence by this Court.

8. The brief account of the incident of missing of Abdul Ghafoor w.e.f. 10-9-1995 and then his death has already been mentioned in the opening part of the judgment. It was Noor Muhammad, the father of the deceased who had lodged report about his missing and suspected the involvement of the appellant in this episode. He appeared as P. W.1, the import of his testimony is that he was working as driver in Bloom Star Hotel, Quetta and was residing in Killi Baloch Colony, Quetta. It was stated by him that on 10-9-1995, his son Abdul Ghafoor took Rs.70,000 with him in order to visit Muhammad Sharif appellant and to purchase plastic raw material and did not return. According to him, while he was making search for his son, he received a letter through the chowkidar of the Hotel demanding a sum of Rs.300,000 which was to be left near Saryab Mill High School, Quetta till 26-9-1995 at about 6-00 P.M., otherwise, his son was to be killed. He had suspicion about Muhammad Sharif appellant who allegedly had sent that letter and had abducted his son. He had thus lodged report dated 2-10-1995 with Police Station New Saryab Road, Quetta (Exh.P/1-A). It was stated by him that he had handed over the said letter to the Police when he lodged the report and Muhammad Sharif appellant was arrested on the same day, on whose pointation, the dead body of Abdul Ghafoor was recovered from Chiltan Valley on 3-10-1995, which was identified by him at the Civil Hospital, Quetta and was handed over to his relatives Muhamad Qasim and Jan Muhammad in his presence. In the cross examination, he disclosed the timing -of 10-00 A.M. when his son went missing on 10-9-1995. According to him, letter received by him in Bloom Star Hotel, Quetta was brought by two children, who had delivered the said letter to the Chowkidar of the Hotel, which was then delivered by the said Chowkidar to him. He however did not remember the name of the Chowkidar. Since he was unable to read and write, the contents of the letter were explained to him by the owner of the Hotel Bashir Ahmad. The suggestion that the letter was forged and prepared by him was denied. The next witness produced by the prosecution was Syed Abdul Jabbar P.W.2, Chemical Expert F.S.L., Quetta. He deposed about the contents of three parcels, which were received by him from C.I.A. Police Quetta. These were blood stained hair with earth, blood stained black color Baluchi Chapal and blood stained stones. After conducting chemical and serological examination he found human blood on the said articles and certificate to that effect was

issued by him (Exh.P/2-A). He admitted that he had not mentioned the blood group of blood stained material, which according to him could not be done as the red cells were disintegrated. Muhammad Ilyas P.W.3, Patwari, Settlement Officer Quetta, had visited the place in order to prepare the sketch of the place of occurrence, where he saw one Chapal and some hair. He produced the sketch prepared by him as (Exh.P/3-A). In cross examination he admitted that the sketch was prepared on pointation of C.I.A. Police Officials but denied the suggestion that the same was done on the direction of C.I.A. Police. Farzand Ali P.W.4 who is a Hand Writing Expert, had examined letter with three specimen writing/signature brought by C.I.A. Police, who on examination came to the conclusion that "The questioned writing on the disputed paper tally in individual characteristics with the specimen writing." He produced the report (Exh.P/4-A). The other witness produced by the prosecution was Abdul Nabi P.W.5, who had gone with Noor Muhammad complainant to the Police Station for lodging report about his missing son. It was stated by him that at that time Noor Muhammad complainant handed over the letter to the Police authority which was taken into possession through a recovery memo. (Exh.P/5-A) which bears his signature. He saw the letter and produced as Art.P/1. Dr. Shohab Gola AC, S.D.M., Taftan, appeared as P.W.6, who stated that on 3-10-1995 he was posted as AC?II/MFC, Quetta and on the said date he accompanied D.S.P., C.I.A. Muhammad Sharif, S.D.M. City along with other C.I.A. Police Officials and Muhammad Sharif accused to the western bypass road. Quetta in whose presence Muhammad Sharif pointed out and led to the place where the dead body of Abdul Ghafoor was buried underneath the stones, which was in decomposed condition and was taken into possession through a recovery memo. where Tariq Mehmood, S.-I. prepared Fard?e-Neshandahi and as Magistrate he put his signature (Exh.P/6-A). He states that on 4-10-1995 the accused was produced by C.I.A. Police in his office, where three "writing specimen" on separate papers of the accused were taken (Exh.P/6-B, Exh.P/6-C & Exh.P/6-D). On 8-10-1995 Muhammad Sharif accused" was produced before him for his statement under section 164, Cr.P.C. According to him, firstly he removed his handcuff thereafter he sent out the police officials from Court room, introduced himself to the accused that he was a Magistrate 1st Class, whereupon he was informed that he was not bound to make any statement which could be used as piece of evidence against him. He was given time for reflection, thereafter, he was put questions which were answered and signed by him. The confessional statement, which he made was produced as Exh.P/6-G. Thereafter, he was shifted to judicial custody. He denied the suggestion that on 3-10-1995 the dead body was not recovered at the pointation of the accused. He denied that neither on 4-10-1995 the accused was produced before him nor any specimen of writing was obtained. He denied that he was not author of the confessional statement. Manzoor Ahmad, A.S.I., C.I.A. Staff, appeared as P.W.7. He stated that Muhammad Sharif appellant had disclosed before him in presence of Amanullah, Tariq Mehmood and Jaffar Ali, I.P. C.I.A. that letter regarding ransom amount to Rs.300,000 was written by him, which was delivered to the father of the deceased. The disclosure memo. (Exh. P/7-A) was prepared, which was produced by him and that on pointation of Muhammad Sharif in presence of EAC/SDM Quetta, D.S.P., C.I.A. and other Police officials, the dead body of Abdul Ghafoor was recovered, which was taken into possession and recovery memo. dated 3-10-1995 (Exh.P/7-A) was prepared and produced by him. He also was witness of the recovery memo vide (Ex.P/6-A) and (Exh.P/6.-E) bearing his signature. He was present there when Investigation Officer

took into possession "one Balochi Chapal black colour, earth stained hairs, some stones and out of the same one was blood stained", which were sealed in three separate parcels. He produced Art.P/1, Art.P/2, Art. P/3, Art. P/4, Art. P/5 & Art.P/6 to Art.P/8 and that on pointation of accused one Jug with one glass pink color plastic and silver respectively were also recovered, which were taken into possession through memo. vide Exh. P/6-A. Plastic jug was produced as Art. P/9 and silver glass as Art. P/ 10. It was disclosed by accused Muhammad Sharif to him that he could produce the amount, which was taken by him from the pocket of the deceased. According to him, he led them to his house Killi Hussainabad near Awami Petrol Pump, Saryab Road, Quetta and from a room of the house an amount of Rs.20,000 was recovered from iron box which was lying underneath a cot. Recovery memo. to this effect (Exh. P/7-C) was prepared. Fard-e-Nashandi (Exh.P/7-D) was also signed and produced by him. The money so recovered was ten notes of thousand and twenty of five hundred duly taken into possession. He also identified the accused present in Court. He was cross examined at length. Dr. Muhammad Umer Baloch, Medical Legal Civil Hospital appeared as P.W.8, conducted the medical examination of the dead body of the deceased, a male of about 20-25 years of age, whose facial features were un-identifiable. He had malasia colour qamiz and shalwar, whose soft tissues were decomposed and skull was crushed which had multiple fractures on skull. The ribs had also multiple fracture. His opinion was that the "cause of death was injury to vital organs in the cranial thorasic cavity. Injuries were caused by blunt means and probable time between death and post mortem was within 20 to 25 days." He produced the post-mortem report (Exh.P/8-A). Ch. Muhammad Sharif, D.S.P., Cantt Circle, Quetta appeared as P.W.9, who stated that during the night of 2nd and 3rd October, 1995 Muhammad Sharif accused disclosed in presence of Manzoor SI and Amanullah regarding his claim of ransom amount and letter written for that purpose to the father of deceased, who disclosed that he could lead to the place of the dead body of the deceased, which he did later on. He also endorsed the statement of other P.Ws. about recoveries made from that place. Nazir Jan S.H.O., P.S. Air Port appeared as P. W.10, who stated that on report of the complainant case was registered and Challan (Exh.P/10-A) was prepared. Bilal Ahmad, S.-I. appeared as P.W.11, he stated that in his presence on the' report of Noor Muhammad complainant the case was registered, who had produced a letter which had been written to him for ransom. Tariq Manzoor S.-I. appeared as P.W.12, who conducted investigation. According to him, the accused Muhammad Sharif had confessed in his presence the murder of Abdul Ghafoor and the place where from his dead body was recovered. He described the articles recovered from the place of occurrence. He admitted that during the course of investigation, he had not recorded the statement of any Chowkidar. He however in cross-examination gave complete description of the dead body and the place from where the same was recovered on pointation of the accused Muhammad Sharif. He denied the suggestion of having tortured the accused for extracting confession from him. After recording of the prosecution evidence, the statement of Muhammad Sharif u/s. 342, Cr.P.C. was recorded, who chose to adopt wholesale denial. He complained about torture by the Police. This was the substance of the evidence on the record.

9. As the old adage goes about the onerous duty of the Court to sift chaff from the grain, the evidence brought on record by the prosecution and the defence plea of the appellant/accused has been analyzed from all angles to find out as to how far the

incriminating material is available to bring home the guilt and his involvement in the commission of the offence. It has to be kept in mind that it is an unseen incident, the charge against him was of the demand of ransom and murder of Abdul Ghafoor. Noor Muhammad father of the victim as per the-evidence is an illiterate person, unable to read or write, it is but natural if there was not that meticulous consistency in his stance. But visible and obvious lapses on the part of prosecution are not understandable. The foundation of the case was raised on the ground of friendly contacts between Muhammad Sharif appellant and Abdul Ghafoor (deceased); the transaction of sale of land and the business of plastic material between them. No investigation however was conducted on this aspect. Even the letter which became the basis for ransom demand its receipt by the father of the victim was also a question mark. No effort was made to reach those children who delivered the said letter to the Chowkidar of the Hotel, nor even the Chowkidar was investigated. Neither the Chowkidar nor the owner of the Hotel Muhammad Bashir, who read out and explained the letter to Noor Muhammad were produced before the Court. It only means that Investigators did not perform the duty as was warranted by law.

10. However, the arrest of appellant itself appears to have unfolded the whole episode. He made disclosures and provided solid clues. He led, the investigators to the place of occurrence wherefrom the dead body and other incriminating articles were recovered. He, by making confessional statement before the Magistrate solved the mystery as to how and why this all happened. The altercation that took place between the two about the payment of money, the harsh language and abuses hurled by the deceased resulting in spontaneous ugly situation of provocation taking the names of mother, sister and wife, pushing of the deceased by the appellant from the mountain and stoning him. There appears no valid justification to disbelieve Dr. Shaoib Gola AC/SDM, (P.W.6) an official who had neither any enmity with the appellant nor any reason to misstate the facts.

11. The chain of events, which led the Investigators to ultimately unearth the facts was the pointation of the place of occurrence by the appellant and statement of facts given by him before the Magistrate. Being conscious of the risk of use of retracted confession, it is observed that it can not used alone as evidence for conviction, the other evidence of linkages is necessarily to be considered: The recovery of the dead body on the lead provided and at the pointation of the appellant and disclosures of events as to how it so happened, the medical evidence, the report of Chemical/Serologist, the recovery of currency notes Rs.20,000 from his residence on his pointation from the box lying underneath the cot are all important pieces of corroborative evidence which cannot be ignored. The later denial of every thing by the appellant including the disclosures and even appearance before the Magistrate looses its worth in the light of the above hard facts. His plea of torture by the investigators as per his statement u/s. 342, Cr.P.C. also was an after thought. Some doubt if at all that can be entertained is about his intention to kill, which will be examined in the later part of the judgment.?????????

12. It has carefully been noted, examined and analyzed that the prosecution itself has laid great reliance and emphasis upon the lead provided by the appellant to the place (the mountain) wherefrom the dead body of Abdul Ghafoor (deceased) was recovered

from underneath the stones on his pointation. Such an information of fact disclosed, which led to the discovery and recovery of incriminating articles and material assumes relevance and significance. For considering the import and effect of such disclosures, discoveries and consequential recoveries, the provisions of Art. 40 of the Qanun-e-Shahadat Order, 1984 get attracted. In the **Principles and Digest of the Qanun-e-Shahadat by Justice ? Khalil-ur-Rehman Khan, Vol.1,** while discussing the import of Article 40 of the Qanun-e-Shahadat Order, few instances with reference to the precedents have been mentioned at pages 549, 550 & 55.1 such as "The accused's statement to police led to discovery of dead body of victim from a disused well. No explanation was given as to how the accused carne to know of the dead body in the well. Presumption, it was held, arises that he threw the dead body in the well in dismembered state. Recovery of hatchets and dang stained with human blood, at instance of the accused was held to be ample corroboration of the direct evidence of murder. Pointing out the dead body of the girl raped, of buried weapon offence and of loin-cloth stained with semen coupled with the fact that injuries on person of the accused were unexplained, was held enough for conviction of rape and murder. Recovery was made of the remains of the dead body at instance of the accused from a "very lonely place" four miles away. In the absence of the other reason for police to go to such place it was held, that the accused himself led to the place of recovery." **It was further noted at page-551 that** "Statements of accused leading to recovery of incriminating article although admissible in evidence, such recovery at accused's instance it was held, itself was a good piece of evidence of corroboration. Contention that due to absence of evidence as to what was stated by accused which led to recovery of incriminating article, it could not be used as corroborative Piece of evidence was held, not acceptable in circumstances."

13. On laying hands on other precedents and their perusal, it becomes clear that the preponderant view of the Courts in the subcontinent is that such information given on disclosures made leading to the recovery of incriminatory articles is admissible. In Emporar v. Chokhey (AIR 1937 Allahabad 497) observed that "What he said was : "I have buried a gun a gun at such and such a place." In our opinion therefore the respondent's statement to the Sub-Inspector that he himself had buried a gun at a certain place is admissible in evidence. This statement and the fact of the respondent having taken the Sub-Inspector to the place indicated and having unearthed a gun establish his possession of and control over this weapon."

In The State v. Mohinder Singh (AIR 1953 Punjab 81) the evidence of various witnesses suggested that "the accused made a statement to the police and also pointed out the place where the pistol was and brought it out. This evidence, in my opinion, is sufficient to prove control. The argument which was raised by Mr. Kesar in this Court that such evidence is not admissible is, in my opinion, unsustainable."

In State of Uttar Pradesh v. Deoman Upadhyaya (AIR 1960 SC 1125) it was noted that "his statement that he had thrown the gandasa in the tank is information which distinctly relates to the discovery of the gandasa. Discovery from its place of hiding, at the instance of Deoman of the gandasa stained with human blood in the light of the admission by him that he had thrown it in the tank in which it was found therefore acquires significance."

The view of this Court has been as is summed up in the following precedents. In Hakim Ali v. The State (1971 SCMR 412) the statement of the accused leading to recovery of incriminating articles was held to be "a good piece of evidence of corroboration ". In the said case the accused petitioner had taken "the Investigating Officer to a field and brought out the decapitated head of the deceased, wrapped up in the loi."

In Sh. Muhammad Amjad v. The State (PLD 2003 SC 704), it was observed that "the Banglow in question was in possession of the appellant from where the dead body was recovered. It was also established by an unimpeachable evidence that recoveries of dead body, car or other articles were made on the lead, provided by the appellant. All above pieces of evidence under Article 40 ibid are admissible and were proved by conclusive evidence. It was accordingly held that all such pieces of circumstantial evidence when combined together provided strong chain of circumstances leading to the irresistible conclusion that it was the appellant who had killed the deceased."

In Sher Zaman v. State and others (PLJ 2006 SC 931) the disclosures made by Mst. Zarlashta, which led to the recovery of dead body and many incriminating articles including the crime weapon on her pointation were taken into consideration and it was observed that "recovery of dead body and several incriminating articles on pointation of accused Mst. Zarlashta were witnessed by PW5 Assistant Commissioner Abdul Hamid who had also attested/verified the mushir nama of seizure of such incriminating articles. Presence of PW5 and attestation by him of the mushirnamas lent credibility and sanctity to the recoveries as well as to the mashirnamas of recoveries. Thus non-association of public would in the instant case not be a circumstance adverse to the prosecution."

14. There thus remains no doubt that the disclosures made and the clues provided by the appellant himself and unbroken chain of events furnished sound proof leading to the irresistible conclusion that the appellant was the person who was responsible for the commission of the offence, whereby Abdul Ghafoor lost life. However the justification sought to be advanced for this is the provocation by the deceased, which may be examined now.

15. The provocative conduct and attitude of deceased i.e. hurling of abuses and calling bad names addressing his mother, sister and wife before his death cannot altogether be ignored. This, as stated by him, led to the incident of pushing of the deceased by him from the mountain, stoning him and covering him with the stones recovered from the site. All this tends to show the resultant death of Abdul Ghafoor under such peculiar provocative circumstances, which may be relevant for considering the quantum of the sentence in such a context.

16. Now, therefore, is the other important question of quantum of sentence, which has engaged our serious attention. As discussed above the complaint of Noor Muhammad father of the deceased was that his son had left his house on 10-9-1995 alone. The appellant had not gone to their residence, to take him along by force or otherwise. He was empty handed and had no crime weapon with him. There was apparently no

premeditation for killing of any one. The deceased was carrying a jug & glass for water with him. Who took water and bought some lemons also. He went to the appellant when both of them went to the mountains where the ugly altercation gave rise to the situation as the deceased abused him by taking the names of his mother, sister and wife. Due to this sudden eruption of hot words, attitude and conduct of deceased a flared up situation arose. This resulted in loss of control by the appellant who pushed the deceased, who thug lost life. Comments at page 1534 of **Principles and Digest of the Qanun-e-Shandat Vol.II** by Justice Khalil-ur-Rehman Khan may be of relevance "Whether the provocation was such, as would be likely to move a person of ordinary temper to violent passion. Not any person, it is to be understood, but a person of the same ha bits, manners and feelings as the accused ; and the fact of intoxication, where present, should be considered in estimating the probable effect on the mind of the words and actions of others, in determining whether the provocation was grave and sudden."

Article 121 of Qanun-e-Shahadat, 1984 deals with such a situation and as per illustration (b) when an accused of murder alleges that by grave and sudden provocation, he was deprived of the power of self control, the burden of proof is on him. His confessional statement relied upon by the learned High Court contains necessary particulars on this aspect.

17. At this juncture, reference to the case Abdul Haque v. The State (PLD 1996 SC 1) may be made, where the appellant therein had taken the plea of provocation, it was observed by Sajjad Ali Shah, C.J. (as he then was) that "In' this case Abdul Haque, who is accused of murder, claims the plea of grave and sudden provocation and states that he was deprived of power of self-control.. In criminal jurisprudence general principle is that prosecution is to prove the case against the accused beyond doubt and this burden does not shift from prosecution even if accused takes up any particular plea and fails in it. If there is any room for benefit of doubt in the case of prosecution, the same will go to accused and not to prosecution. Section 105 of the old Evidence Act came up for detailed examination in the case of Safdar Ali v. The Crown (PLD 1953 FC 93) and it was held that it is the duty of the Court to review entire evidence that has been produced by the prosecution and defence and after examination of the whole evidence if the Court is of the opinion that there is reasonable possibility that the defence put forward by the accused might be true, then such view would react on the whole prosecution case and accused would be entitled to benefit of doubt not as a matter of grace but as a right because prosecution has not proved its case beyond reasonable doubt." The provocation made basis for self defence was something said to him in Pushto by the deceased when he passed in front of Abdul Haque appellant, upon which he took out his pistol and fired shots set at the deceased. At page-34, it was noted and held that "True that there is admission of firing by the appellant at the deceased but that admission is to be read not in isolation of but in conjunction with his specific plea that he was provoked by abuses in respect of his wife and wives of his tribe uttered by the deceased which he could not tolerate." It was thus held that "in the circumstances, we consider that plea of grave and sudden provocation on account of abusive language can be treated as mitigating circumstance in awarding sentence under Ta'zir even if this plea as such is not available and does not get any protection in the new amended law. "(underlined by me for emphasis)

The appeal was dismissed with the modification of his sentence to imprisonment for life. Ajmal Mian, J, (as he then was) while recording a separate note observed that the facts of the case do not warrant imposition of death sentence under clause (b) of section 302 PPC but call for lesser sentence of imprisonment for life as proposed by the Hon'ble Chief Justice. The view of all five Hon'ble Judges was consistent on this aspect. In Muhammad Imran alias Imrani v. The State (PLD 2001 SC 956) while taking note of Abdul Haque's case, the Court took note of several other judgments on the subject and observed that "in view of the dictum in the cited case the benefit of provocation can be given in a matter of awarding sentence under section 302(b), P.P. C. and as such the cases decided before the amendment in the law involving family honour and provocation can be taken into consideration while determining the factum of sentence. It was held in "Ajun Shah v. The State" PLD 1967 SC 185: "That a man is after all a creature of his environment. His action therefore must be judged in the background of the society to which he belongs. Though he may not be entitled to rely on the doctrine of provocation, still the above circumstances may be taken into account for not imposing the extreme penalty. Rule laid down in "Muhammad Din alias Manna v. The State" 1976 SCMR 185 is to this effect:-- "Coming now to the question of sentence, we find that there is merit in the submission made by Ch. Fazal-i-Haq that the murder of Khushi Muhammad was motivated by a sense of family honour inasmuch as the sister of the appellant had repeatedly eloped with this man. In Fazal Khan v. State (PLD 1964 SC 54) Ghulam Rasul v. Ali Akbar (PLD 1965 SC 363), Muhammad Ramzan v. The State (PLD 1966 SC 129) as well as in Ajun Shah v. The State (PLD 1967 SC 185) it was observed that questions of family honour, touching the females of a family, were of almost overpowering importance to the agricultural tribes of the western regions and they feel, bound in duty to go to very great lengths to vindicate that honour. It was held that this was a circumstance of which notice could appropriately be taken by the Courts in the matter of awarding sentence. In all these cases, sentence of transportation for life was considered as being appropriate. Following these precedents we are inclined to the view that in regard to the murder of Khushi Muhammad, the sentence of death was not called for. We would accordingly set it aside and instead substitute the sentence of imprisonment for life." Accordingly appreciating that "the immoral act of vulgar and filthy abuses of the deceased resulted into his death, therefore, in such circumstances the accused in the light of the above decided cases would not be liable to maximum penalty of death." Thus `by maintaining the conviction his sentence was reduced to life imprisonment with the benefit of section 382-B Cr.P.C. In Mst. Mumtaz Begum v. Ghulam Farid (2003 SCMR 647) altercation between the deceased and the accused had taken place prior to the happening of the incident, relying upon the above Abdul Haque's case, Iftikhar Muhammad Chaudhry, J. (as he then was) now the Hon'ble Chief Justice, keeping such a prior happening of the incident in view observed that "it can be considered to be a factor for bringing his case under section 302(b), PPC in the light of the principle laid down by this Court in the case of Abdul Haque v. The State".

Thus, life imprisonment was awarded to the accused instead of death. In Kora Ghasi v. State (AIR 1983 SC 360) it was observed that "the main evidence against the appellant consists of the retracted confession made by the accused before the Magistrate where he admitted to have assaulted the deceased with a lathi as a result of some altercation

with the deceased. According to the prosecution the confession was clearly corroborated by the fact that the appellant pointed out the weapon. These are the two main pieces of evidence against the appellant." It was thus observed that "At any rate after going through the judgment of the High Court and Court below it cannot be said that the view taken by the Sessions Judge was not reasonably possible in the circumstances of this, case. It was not open to the High Court in the circumstances of this case to reverse the order of acquittal even if it was possible to take a different view."

18. The instances are not lacking for even this Court had been altering and converting the death sentence into a lesser penalty. It is so, as the law itself clause (b) of section 302, P.P.C. empowers the Court to inflict either death penalty or imprisonment for life for which purpose however while exercising the choice, a discretion is left with the Court to be exercised keeping in mind the facts and circumstances of a case. In the case of Iftikhar-ul-Hassan versus Israr Bashir and another, (PLD 2007 SC 111), it was held that "This is settled law that provisions of sections 306 to 308, P. P, C. attract only in the cases of Qatl-i-amd liable to qisas under section 302(A), P.P.C. and not in the cases in which sentence for Qatl-i-Amd has been awarded as tazir under section 302(b), P. P. C. The difference of punishment for Qatl-i-Amd as qisas and tazir provided under sections 302(a) and 302(6), P.P.C. respectively is that in a case of qisas, Court has no discretion in the matter of sentence whereas in case of tazir Court ma award either of the sentence provided under section 302(6), P.P. C. and exercise of this discretion in the case of sentence of tazir would depend upon the facts and circumstances of the case. There is no cavil to the proposition that an offender is absolved from sentence of death by way of qisas if he is minor at the time of occurrence but in a case in which qisas is not enforceable, the Court in a case of `Qatl-i-Amd', keeping in view the circumstances of the case, award the offender the punishment of death or imprisonment of life by way of tazir. The proposition has also been discussed in Ghulam Murtaza v. State 2004 SCMR 4, Faqir Ullah v. Khalil-uz-Zaman 1999 SCMR, 2203, Muhammad Akram v. State 2003 SCMR 855, and Abdus Salam v. State 2000 SCMR 338."

The Court while maintaining the conviction under section 302(b), P.P.C. awarded him sentence of life imprisonment under the same provision and also granted him the benefit of section 382-B, Cr.P.C. In Muhammad Riaz and another v. The State (2007 SCMR 1413) while considering the penalty for an act of commission of Qatl-iAmd it was observed that "No doubt, normal penalty for an act of commission of Qatl-i-Amd provided under law is death, but since life imprisonment also being a legal sentence for such offence must be kept in mind wherever the facts and circumstances warrant mitigation of sentence, because no hard and fast rule can be applied in each and every case."

19. It has been seen and observed from the perusal of the various precedents in relation to section 302 of P.P.C. in particular its clause (b), that there is a choice and discretion left with the Court to inflict punishment "with death or imprisonment for life as tazir having regard to the facts and circumstances of the case." The infliction of death sentence would necessarily mean the "deprivation of life" of the individual i.e. a human being. Life as we know in common parlance is the blessing of God. It is

considered to be "the immediate gift of God and a right inherited by nature in every individual"[1] It means the period during which life lasts or the period from birth to death. Our Constitution bestows a fundamental right under Article 9 that "No person shall be deprived of life or liberty save in accordance with law." It starts with "no" which means "not any, not at all.[2] It clearly signifies a prohibition and forbids the deprivation of life of any person. The exception being that such a deprivation can take place in accordance with "law". It is thus the "law", which can' provide for depriving a person of his life. Imposition of death penalty is provided by certain laws, Pakistan Penal Code, is one such law. In the context of clause (b) of section 302, P.P.C. a very heavy duty is assigned to the Courts and the Judges to weigh and analyze the facts and circumstances of the particular case, before exercising discretion of awarding penalty. There are observations in Muhammad Sharif v. Muhammad Javed alias Jeda Tedi (PLD 1976 SC 452) with regard to the duties and responsibilities of the Court, it was observed that "It has come to the notice of this Court that in increasing number of convictions on charge of murder there is a kind of inhibition or hesitancy on the part of the trial Courts in awarding the normal penalty of death. I cannot also avoid an impression that there is often a marked tendency in the High Courts to and a laboured pretext to alter the sentence of death to life imprisonment. No doubt having regard to the sanctity of human life and liberty, the law has taken all conceivable precautions to safeguard it. The Law of Evidence and in particular the Rules of admissibility excluding confessions made before a person in authority, the Rule of placing the onus on the prosecution, conceding to the accused the liberty of a privileged liar, the Court's responsibility to spell out reasonable existence of an unpleaded defence, if warranted by the facts and circumstances of the case and above all the golden rule of giving the benefit of doubt to the implication and undeserved punishment. " In the same case it was observed that "there may be a host of extenuating and mitigating circumstances such as extreme youth, sudden provocation, influence of an elder, question of family honour etc. justifying the award o the lesser penalty of life imprisonment based on a chain of judicial pronouncements offering useful guidelines." On the similar lines is Muhammad Sharif and others v. The State (1991 SCMR 1622).

1. Words and Phrases, Permanent Edition Volume 25 (page 410)

2. The Oxford English Dictionary, Vol. VII, N-Poy, (page 167)

Some observations of Ajmal Mian, C J (as he then was) in Sh: Liaquat Hussain and others v. Federation of Pakistan (PLD 1999 SC 504) made in the context of Article 9 of the Constitution may here be of use i.e. "It will not be out of context to mention that clause (1) of Article 4 provides that to enjoy the protection of law and to be treated in accordance with law is the inalienable right to every citizen, wherever he may be, and of every other person for the time being within Pakistan. Whereas clause (2) thereof lays down that in particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law. The above Article is to be read with Article 9 of the Constitution which postulates that no person shall be deprived of life or liberty save in accordance with law. If a person is to be deprived of his life on account of execution of death sentence awarded by a Tribunal which does not fit in within the framework of the constitution, it will be violative of above

Fundamental Right contained in Article 9. However, the learned Attorney-General contended that in fact terrorists who kill innocent persons violate the above Article 9 by depriving them of their lives and not the Federal Government which caused the promulgation of the impugned Ordinance with the object to punish terrorist. No patriotic Pakistani can have any sympathy with terrorists who deserve severe punishment, but the only question at issue is, which forum is to award punishment, i.e. whether a forum as envisaged by the Constitution or by a Military Court which does not fit in within the framework of the Constitution. No doubt, that when a terrorist takes the life of an innocent person, he is violating Article 9 of the Constitution, but if the terrorist, as a retaliation, is deprived of his life by a mechanism other than through due process of law within the framework of the Constitution, it will also be violative of above. Article 9." Some apt observations from Tarun Bora alias Alok Hazarika v. State of Assam (AIR 2002 SC 2926) may be borrowed in this context "Human consideration is no ground for showing leniency to the perpetrator of the crime against organized civilized society, which is abhorrent to the concept of rule of law. In fact this prayer has already been considered by the designated Court and lenient punishment of 5 years R.I. has been awarded. We may say that offence of kidnapping in any form impinge upon human rights and right to life enshrined in Article 21 of the Constitution. Such acts not only strike a terror in the mind of the people but have deleterious effects on the civilized society and have to be condemned by imposing deterrent punishment." A part from the precedents, the reason appearing quite obvious and natural is that one who takes the life of the other unjustifiably, or deprives the other of his life deserves no strained or extended leniency on cooked up pretexts. He must suffer for that and to be punished in accordance with law.

20. It has been observed by the Supreme Court of India in Bachan Singh v. State of Punjab (AIR 1980 SC 898) that the Court is expected to have regard for the "aggravating" or "mitigating" circumstances of a case and that in making choice of the sentence in addition to the circumstances, in which the offence was committed due "regard must be paid to the circumstances of the offender also ". It was observed that "it is not desirable to consider the circumstances of the crime and the circumstances of the criminal in two separate water-tight compartments. In a sense, to kill is to be cruel and therefore all murders are cruel. But such cruelty may vary in its degree of culpability. And it is only when the culpability assumes the proportion of extreme depravity that "special reasons" can legitimately be said to exist." Some instances were noted where the penalty of death should be imposed by the Court such as where the murder has been committed after previous planning involving extreme brutality. Moving forward with the approach adopted in the above case the Supreme Court of India in Machhi Singh and others v. State of Punjab (AIR 1983 SC 957) culled out the guidelines and observed that:- (i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability; (ii) Before opting for the death penalty the circumstances of the `offender' also require to be taken into consideration along with the circumstances of the `crime'. (iii) Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to bean altogether inadequate punishment having regard to the relevant circumstances of the crime. (iv) A balance-sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances has to be accorded full weightage and a just balance has to be struck

between the aggravating and the mitigating circumstances before the option is exercised." It further noted few instances where the infliction of death penalty will be justified such as when the murder is committed in an extremely brutal, grotesque, diabolical, revolting, or dastardly manner, so as to arouse intense and extreme indignation of the community.

21. There can be no cavil that depending upon the circumstances, the background and the facts of a case, the Court is obliged to exercise option of awarding penalty. Without hesitation it may inflict death penalty if the victim had been done to death in a ghastly, cold blooded, brutal manner or roasted alive etc. In a recent pronouncement in Iftikhar Ahmed Khan v. Asghar Khan and another (2009 SCMR 502) it has been noted that:- " In other words, the law has conferred discretion upon the Court to withhold the penalty of death and to award the punishment of imprisonment for life, if the outlook of a particular case requires that course. Question arises, as to what could be those facts and circumstances in which penalty of death must be imposed and lesser penalty of life imprisonment should not be awarded. The analysis of all the cases has led us to a conclusion that from the facts and circumstances of the case, if the Court finds the manner and method of incident, to be in the nature of brutality, horrific, heinous, shocking, involving terrorist nature, creating panic to the society as a whole or in part, callous and cold blooded, in such cases (which list is not exhaustive), the penalty of death must not be withheld. In other words, grave inhuman attitude, acts, manners, method and the criminality of actions are the constituents, elements and the instances, where punishment of death must be awarded." The Court is therefore, expected to proceed very carefully and cautiously in the exercise of such a discretion and not to ignore the gravity of the offence committed.

22. This is the time that the contemporaneous trends should also be kept in view. Article 9 of the Constitution attaches great value to the "life and liberty" of human being. It is a most precious human right regarded by the Constitution as a Fundamental Right; therefore, as far as possible and whenever permissible (depending upon the circumstances of a case), the Court may exercise its discretion in favour of lesser punishment, which also will be strictly legal having the statutory backing of section 302 (b) PPC. Such an approach, is likely to be regarded as liberal, but will advance the rationale and philosophy behind the mandate of Article 9 of the Constitution.

23. It need to be mentioned as a note of caution and clarification that the Courts including this Court are creation of the Constitution or the law. They are neither representative/legislative bodies nor supposed to legislate. But of course being custodian of the rights of the people especially the Supreme Court, a forum provided by the Constitution itself under Article 184, is obliged and called upon on occasions to interpret any provision of the Constitution and law in the discharge of its sacred and onerous duty, and ensure that specified spheres are not transgressed by the respective organs of the State. It has thus a peculiar and a vital role under the Constitution.

24. Adverting now to the facts of the instant case, on re-appraisal of the entire evidence in this case, we find that the conviction of the appellant by the learned High Court was absolutely justified. However, the peculiar facts and circumstances noted above including that he was acquitted by the Trial court but was sentenced to death by the

learned High Court persuade us to adopt a lenient view in the matter of infliction of sentence as; (a) there was no apparent planning, premeditation or intention to kill the deceased; there being no preparation by the appellant in this regard nor he had any crime weapon with him. (b) filthy and vulgar abuses hurled and cursing by the deceased and thus heated altercation infuriating and giving rise to provocation. (c) that the action of a man is to be judged-in the background of the society to which he belongs as he is creature of his environment. (d) in any case a serious doubt prevailing as to what actually happened just before the incident and remaining shrouded, in mystery. Thus the death penalty, in the facts and circumstances, manifestly appears out of all proportions to the offence. We, therefore, find it eminently a fit case in which the awarding of life imprisonment would have met the ends of justice.

25. Therefore, while deciding this appeal and maintaining conviction, we modify the sentence by converting the same from death to imprisonment for' life. The rest of the conviction will remain intact. Benefit of section 382-B Cr.P.C. will be available to him. The appeal is partly accepted to the extent of modification of sentence as per above.

M.B.A./M-
70/S??
Appeal partly accepted.

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