IN THE SUPREME COURT OF PAKISTAN

(Appellate Jurisdiction)

Present:

Mr. Justice Mian Shakirullah Jan
Mr. Justice Nasir-ul-Mulk
Mr. Justice Mian Saqib Nisar

Criminal Appeals No.163 to 171 and S.M. Case No.5/2005

(On appeal from the judgment dated 3.3.2005, passed by Lahore High Court, Multan Bench in Cr.A. No.60, 61, 65, 66, 67, 60, 61, 62, 63, 60/2002 respectively)

The State	(in Crl.As.No.163 to166/05)
Mukhtar Mai	(in Crl.As.No.167 to170/05)
Abdul Khaliq	(in Crl.A.No.171/05)
Mst. Mukhtar Mai	(in S.M.Case No.5/2005)

Appellant (s)

Versus

Abdul Khaliq and others	(in Crl.As.No.163 to170/05)
The State	(in Crl.A.No.171/05)

Respondent (s)

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For the State (appellant): (in Cr.As.163 to 166/2005)	Ch. Zubair Ahmed Farooq, Addl.P.G. Pb. Mr. Ahmed Raza Gillani, Addl. P.G. Pb.
For the Respondent (s): (in Cr.As.163 to 166/2005)	Malik Muhammad Saleem, ASC. Mr. Faiz-ur-Rehman, AOR
For the Complainant (appellant): (in Cr.As.167 to 170/2005)	Mr. Aitzaz Ahsan, Sr. ASC Mr. Gohar Ali Khan, ASC
For the Respondent (s): (in Cr.As.167 to 170/2005)	Malik Muhammad Saleem, ASC Mr. Faiz-ur-Rehman, AOR
For the State: (in Cr.As.167 to 170/2005)	Ch. Zubair Ahmed Farooq, Addl.P.G. Pb. Mr. Ahmed Raza Gillani, Addl. P.G. Pb.
For the Accused (Abdul Khaliq): (in Cr.A.171/2005)	Malik Muhammad Saleem, ASC Mr. Faiz-ur-Rehman, AOR
For the State (respondent): (in Cr.A.171/2005)	Ch. Zubair Ahmed Farooq, Addl.P.G. Pb. Mr. Ahmed Raza Gillani, Addl. P.G. Pb.
For the Petitioner (Mukhtar Mai): (in S.M. Case 5/2005)	In person
Date of Hearing:	30/11, 01/12, 02/12, 07 to 09/12, 14/12 of 2010, 03 to 06/01, 10 to 12/01, 17/01 to 20/01 & 25 to 27/01 of 2011.

J U D G M E N T

Mian Saqib Nisar, J.- In all, these are ten matters arising out of the impugned judgment of the Lahore High Court dated 03.03.2005; eight are the appeals (four each) against the acquittal of the accused having been initiated by the complainant and the State; one appeal has been filed by the convict and the last is the suo moto action espoused by this Court.

2. These matters have genesis in a criminal case, which has emanated from an FIR (Ex.P1) dated 30.6.2002, got registered by Mst. Mukhtar Mai, the complainant, with the Police Station Jatoi, District Muzzafargarh initially under Section 10(4) of Offence of Zina (Enforcement of Hadood) Ordinance, 1979 (the Ordinance) read with Section 109 PPC, but thereafter offences under Section 19 of the Ordinance, Sections 354-A, 217, 119 & 342 PPC and Section 7 of Anti Terrorism Act, 1997 were also added thereto. It was reported by the complainant that on 22.6.2002, due to suspicion that her brother, Abdul Shakoor, has illicit relations with Mst. Naseem alias Salma, the girl, of Mastoi Baradari (accused party); the boy was confined by them in their house; in order to resolve the issue an 'Akhat' 'Panchayat' was held the same day, in which Faiz Mastoi, Ramzan Pachar and Ghulam Fareed (all accused) acted as the Arbitrators (Salis) for the Mastois, while Maulvi Abdul Razzak (PW-11) and Manzoor Hussain (not produced) were the arbitrators (Salis) for the complainant, besides Altaf Hussain (PW-12) and Ghulam Nabi (not produced) were also present. It was decided by the 'Panchayat' that by exchange marriages of the complainant with Abdul Khaliq, the accused (brother of Salma) and Abdul Shakoor with Salma the dispute be settled, but Ramzan Pachar and Ghulam Fareed did

not agree to this arrangement, therefore, the arbitrators for the complainant left the Panchayat. However, subsequently on the promise of the accused party, that if Mst. Mukhtar Mai came to the 'Panchayat' and sought forgiveness for her brother, he shall be pardoned according to Baloch customs and the issue stand resolved, Mst. Mukhtar Mai went to the 'Panchayat', 'Akhat' of the Mastois, which was outside the house of Abdul Khaliq (accused), but instead of upholding their word as promised, he caught hold of her when Faiz Mastoi said that Fareed (the father of complainant) be forgiven, but Abdul Khaliq, his brother Allah Ditta, Fayyaz, Ghulam Fareed S/o Mahmood, all dragged her into the room of Khaliq's house, where zina-bil-jabbar was committed with her by all of them. After one hour she was turned out of the room in a nude condition, with a torn shirt on her body, Fayyaz threw her shalwar and duppta towards her. It is specifically mentioned that due to fear/threats of the accused party and moral onslaught and retribution of the public, the case could not be initiated earlier. Mst. Mukhtar Mai at the time of the initiation of complaint was accompanied by her father Ghulam Fareed; Maulvi Abdul Razzak (PW-11), Altaf Hussain (PW-12), Sabir Hussain (PW-13), her maternal uncle, and one Ghulam Nabi (not produced), all of them were said to have either seen the occurrence or participated in the proceeding, or were present at the time of 'Panchayat'.

3. Before proceeding further, it may be pertinent to signify, that being a blatant, heinous and untoward incident it attracted the media, both electronic and the print, and on account of an atrocious, pernicious and shameful act, it generated both grief and rage in the public at large. The higher-ups of the Government including some Ministers at the Federal and Provincial levels condemned the deplorable act; they, as well as, the

Governor of Punjab visited the complainant to pacify her with promises and avowing that justice shall be provided to her forthwith. The Governor also announced some fiscal compensation for the aggrieved victim. The incident also drew the attention of the Apex Court and accordingly, a suo moto action was initiated, in which the progress of the investigation was monitored and directions were given for the submission of challan within a specific period. The Anti Terrorism Court was also directed to decide the matter within a time frame, by even proceeding on day-to-day basis.

4. On account of the investigation, in all 14 persons were indicted in the matter; they were arrested and challaned by the police and charged by the Anti Terrorism Court (the Court) with the offences under Sections 19 (4), 11 of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979 read with Section 149 PPC and under Section 354-A read with Section 109 PPC and under Sections 10 and 7 (c) of the Anti-Terrorism Act, 1997. During the course of trial, the prosecution examined 17 witnesses out of which the rather important ones are: Maulvi Abdul Razzak (PW-11) who stated to be one of the arbitrators for the complainant party, but left the Panchayat when Ramzan and Fareed declined the proposal of exchange marriages; Altaf Hussain (PW-12) the brother of PW-11, who states to be present during the 'Panchayat' confabulations and is also the witness of the alleged occurrence; Sabir Hussain (PW-13) who has also deposed in similar vein; Abdul Shakoor (PW-10), in whose context the issue triggered off; he denied of having any illicit relations with Salma, rather claimed that, in fact, he was sodomized by Manzoor, Jamil and Punno (the later is the brother of Salma). It is alleged that the said culprits after fulfilling their lust asked him not to disclose the incident to anyone, but on his refusal, he was locked up with Salma and with

an object to cover up their misdeed, a false allegory of an illicit relationship was concocted. PW-2, Dr. Shahida Safdar examined Mst. Mukhtar Mai and proved a positive report of sexual intercourse with her as Ex.P-E. PW-7 is the Magistrate, who recorded the statements of the prosecution witnesses under Section 164 Cr.P.C. and proved those as, Ghulam Fareed (Ex.P-L), Ghulam Nabi (Ex.P-M), Abdul Razzak (Ex.P-N) and Sabir Hussain (Ex.P-O). Six persons including the councilors of the area were examined as the court witnesses; while the Defence also produced six witnesses to support its version.

5. On the conclusion of the trial vide judgment dated 31.8.2002 eight out of the fourteen accused (originally) namely Aslam, Allah Ditta (S/o Jan Muhammad), Khalil Ahmed, Ghulam Hussain, Hazoor Bakhsh, Rasool Bakhsh, Qasim and Nazar Hussain were acquitted by the Court, while all others were found guilty of the following offences and sentenced as under:-

> "Taking into consideration all the aforesaid facts and the circumstances of the case, I find that Abdul Khaliq, Allah Ditta sons of Imam Bakhsh, Muhammad Fiaz, Ghulam Farid, Ramzan Pachar, Faiz Muhammad alias Faiza (accused of column No.3 of the challan) along with others, in prosecution of their common design, convened Panchayat, mostly of their Mastoi Baluch tribe of the area, on 22.6.2002 in Mauza Meerwala P.S. Jatoi and coerced, intimidated, overawed the complainant party, and the community; created a sense of fear and insecurity in society; and thereby committed the offences u/s 11, 10(4) of Ordinance VII of 1979 read with Section 149/109 PPC and 21-I ATA 1997, and Section 6(1) (a) & (b) and sub-section 2(b) ATA 1997, punishable u/s 7(c) read with 21-I ATA 1997 and Section 149/109 PPC; and are, therefore, convicted under all the aforesaid provisions of the law.
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> Actions of the aforesaid convicts were cruel which overawed and harassed the society at large and therefore, they are not entitled to any leniency. U/s 7(c) read with 21-I ATA 1997 and 149/109 PPC each of the six accused persons, namely Abdul Khaliq, Allah Ditta, Muhammad Fiaz, Ghulam Farid, Ramzan Pachar and Faiz Muhammad alias Faiza accused are sentenced to imprisonment for life, plus fine Rs.20,000/-, and in default to further undergo six months R.I.

> Under Section 11 Ordinance VII of 1979 read with 149 PPC, each of the four accused namely Abdul Khaliq, Allah Ditta, Ghulam Farid and Muhammad Fiaz convicts are sentenced to undergo imprisonment for life, plus thirty stripes each and fine Rs.20,000/- each, and in default to further undergo six months R.I each Under Section 10(4) Ord. VII 1979 (liable to Taazir) read with 149 PPC, each one of them is sentenced to death, subject to confirmation by the Hon'ble High Court.
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> Under Section 11 Ordinance VII 1979 read with section 21-I and section 109/149 PPC, Ramzan Pachar and Faiz Muhammad alias Faiza (convicts) are sentenced to undergo imprisonment for life, plus thirty stripes, and fine Rs.20,000/- and in default to further undergo six months R.I. Under Section 10(4) Ordinance VII 1979 read with section 21-I ATA 1997 and section 109/149 PPC, Muhammad Ramzan Pachar and Faiz Muhammad alias Faiza (both accused) are sentenced to death, (subject to confirmation by the Hon'ble Lahore High Court.

However, all the accused were acquitted of the charge under Section 354-A P.P.C.

6. Aggrieved, the complainant/State filed appeals against the acquittals, while the judgment was, accordingly, challenged by the convicts, before the Lahore High Court. On hearing, the acquittal appeals were dismissed and by accepting the appeals of all others in toto, they were exonerated from all the charges, except Abdul Khaliq, whose appeal was partly allowed, in that his conviction was converted from Section 10 (4) of the Ordinance to Section 10 (3) thereof and his capital punishment was reduced to imprisonment for life, while the fine imposed by the Trial Court was maintained. The benefit of Section 382-B Cr.P.C. was also extended to him. It seems significant to mention here, that while rendering its decision, the following (main) reasons/factors have prevailed with the Court: that the version of the prosecution is not proved beyond doubt, as its evidence is not confidence inspiring, thus, the benefit must go to the accused; delay in the lodging of the FIR has not been sufficiently and plausibly explained, the

complainant party was reluctant to initiate the case, but influence in this behalf was exerted by Maulvi Abdul Razzak (PW-11), who is the mastermind thereof; the FIR was registered after due consultations and deliberations; sole testimony of the prosecutrix to prove the occurrence, no one else had seen it and hence is insufficient to establish the guilt of the accused; the DNA and SEMEN tests were not conducted to prove the gang rape; there are contradictions and inconsistencies in the statements of the witnesses *inter se* and also with their previous statements; there are improvements in their statements made before the Court; the occurrence has not taken place in the manner as is stated by the PWs; there are no significant marks or injuries on the body of the prosecutrix, which is very unusual in such kind of a case; no duration of the heeled marks on the body of the victim has been given by PW-2, thus, it is not possible to ascertain, if those were sustained during the occurrence; adverse inferences have been drawn for the non-production of Ghulam Nabi and Ghulam Fareed in the witness box as they, in their statements under Section 164 Cr.P.C. recorded by the Magistrate, have not fully supported the version of the prosecution, the former's stance that on the given date/day he was not in the village and thus not a witness to the incident and/or modus operandi of the offence. The learned High Court has also considered the prosecution evidence regarding each of the accused, the individual role imputed to them and has found that the prosecution has failed to prove its case to their extent, except Abdul Khaliq for which reasons have been duly assigned in the impugned judgment.

7. This is how, the noted appeals have reached this Court, besides vide order dated 14.3.2005 this Court took suo moto cognizance of the matter, because soon after the impugned judgment, a learned Single

Member of the Federal Shariat Court, while exercising the suo moto jurisdiction suspended the impugned judgment, thus it was inevitable for the Court to interfere in order to avoid a ludicrous situation from arising and to prevent a conflict between two constitutional institutions of the State.

8. Anyhow, the leave, in these matters, was granted on 28.6.2005 and the important points in this behalf are: the jurisdiction of the Anti-Terrorism Court to try the case; effect of delay in lodging the FIR; whether the sole testimony of the victim in rape case is sufficient for the purpose of conviction; whether the marks of injuries on the body of the victim are superfluous to secure conviction; whether the High Court has passed the judgment on surmises and conjectures in violation of/or ignoring the mandate of law; with reference to the above, some case law has also been cited in the LGO. Simultaneously, this Court was also pleased to suspend the impugned judgment and non-bailable warrants of arrest were issued of all the accused who were acquitted, even those by the trial Court; since then they are all behind the bars *(emphasis supplied).*

9. Ch. Aitzaz Ahsan, learned Sr. ASC, has opened arguments in these cases and has divided his submissions into two main heads: THE LAW and THE EVIDENCE. Under the first, he has dilated upon the point of jurisdiction and it is submitted that rape is a **grievous bodily harm and injury to a person,** thus the offence is duly covered by Section 6(1) (a & b) read with Sections 6 (2) (b) and 7 (c) of the Anti Terrorism Act, 1997 (the Act). To elucidate the above, the learned counsel has cited the dictums reported as *Bhupinder Sharma vs. Himachal Pradesh* **(AIR 2003 SC 4684)**, *Hyam vs. DPP, HL* **[1974] 2 All ER 73**, *R vs. Miller* **[1954] 2 All ER 529** and *R vs. Robinson* **[1993] 1 WLR 168.** He has also relied upon the judgment

reported as *Shakil and 5 others vs. The State* (PLD 2010 SC 47) to argue, that in a gang rape case the conviction awarded by the Anti Terrorism Court was upheld by this Court, primarily on the reasoning that no prejudice was caused to either side and none (in that case) had objected to the jurisdiction at any stage of the proceeding. The case, according to the learned counsel, is apt for settling the jurisdictional question and should be followed in this matter. In order to show, that the incident (gang rape) created terror in the area, thus attracting the provision of the Act, on account of which the residents thereof even thought of migration, he has referred to the statements of the court witnesses.

10. Malik Muhammad Saleem, the learned counsel for the defence has not joined issue with Ch. Aitzaz Ahsan, learned Sr. ASC on jurisdiction, rather has supported him by adding certain facts; that vide order dated 24.7.2002, the trial Court before commencing the proceeding decided that it has the jurisdiction, none assailed it; the Supreme Court also, as mentioned above, in the first suo moto action required the challan to be submitted before the Anti-Terrorism Court, and set out a time frame for the decision of the case by that Court. Be that as it may, during the hearing of the case, learned Attorney General was personally summoned and was put to notice on the issue, but the Deputy Attorney General who from time to time has been attending the proceeding(s), has not controverted the jurisdictional aspect. The State counsel has also not questioned it.

11. In view of the above, we find that the issue of jurisdiction in these matters has lost efficacy; it emerged on account of the specific situation (indicated above) which has ceased; no one at the relevant time raised any objection thereto; all the concerned are in agreement that the

Anti-Terrorism Court had the jurisdiction; appeals before the learned High Court were, accordingly, filed by both the sides and decided without there being any such objection; more than eight years have elapsed since the incident took place and those who have been acquitted, obviously have acquired a right of defending their acquittal and the one who is convicted seeks his acquittal and the State and the complainant are pressing to set aside the acquittal(s) and are urging to maintain the conviction of Khaliq. It is not established if any prejudice has been caused to the parties in any manner whatsoever and therefore now, if at this stage any interference on the basis of jurisdiction is made, justice, rather than being promoted shall stand defeated, and serious prejudice shall be caused to either side. Therefore, keeping in view the peculiar circumstances of the case and by following the ratio of the judgment reported as Shakil and 5 others (supra), we would not like to hold against the jurisdiction of the Anti-Terrorism Court and leave it an open question to be decided in some appropriate case, in which it is a live issue.

12. Adverting to the other submissions of Ch. Aitzaz Ahsan, Sr. ASC/the learned counsel, under the first head (**The Law)**, he has argued that the impugned judgment is against the law and it cannot sustain; in this respect, he urged that previous statements of the PWs have been invalidly and illegally used by the learned High Court for impeaching their credibility, in particular, when the PWs had denied the making of certain statements, in the fact finding inquiry, conducted by the SP Crimes Range as per orders of the Government. Thus, without proving the statements in accordance with law, those could not be used for the purpose of confronting PWs in their cross examination. Besides, those were allegedly signed by the PWs, this is

prohibited by Section 162 Cr.P.C and therefore these statements were illegal and could not be used in terms of Article 140 of the **Qanun-e-Shahadat Order, 1984** (QSO, 1984). In this context, the learned counsel has also submitted that Section 161 Cr.P.C. and Article 140 of the QSO, 1984 are governed by Section 162 Cr.P.C which prohibits the signing of these statements. Likewise, serious criticism has been made that the learned High Court has used and relied upon the statements under Section 164 Cr.P.C. of those persons, who were not produced by the prosecution in evidence; in this respect, it is stated that such statements are not substantive piece of evidence and have a limited use of confronting a PW, who appears in the Court and for no other purpose whatsoever, reliance is placed on 1969 P.Cr.LJ 1580: Yaru alias Yar Muhammad vs. The State, 1995 MLD 515: Nasrullah vs. The State,1985 P.Cr.LJ 428: Amjad Ali alias Kaloo vs. The State , 1984 SCMR 979: Nadir Khan and another vs. The State, 1974 P.Cr.LJ 224: Salehon vs. The State, AIR (33) 1946 PC 38: Brij Bhushan Singh vs. Emperor; it is stated that holding the sole testimony of the prosecutrix insufficient to award conviction is against the law laid down in judgments reported as NLR 1991 SD 458: Mst. Nasreen vs. Fayyaz Khan and State, PLD 2003 SC 863: Muhammad Abbas vs. The State, 2002 SCMR 303: Rana Shahbaz Ahmad vs. The State, 1992 P.Cr.LJ 1944: Muhammad Amir Khan vs. The State, 2001 P.Cr.LJ 503(FSC): Saleem Khan and others vs. The State and others, NLR 1994 SD 242 (FSC): Muhammad Boota vs. The State, 1993 P.Cr. LJ 1839 (FSC): Muhammad Boota vs. The State. He has further argued that the victim in rape cases does not require corroboration and has drawn support from PLD 1989 SC 742: Muhammad Akram vs. The State, 2002 SCMR 1009: Shahzad alias Shaddu and others vs. The State, 1999

SCMR 1102 Mehbood Ahmad vs. The State, 1975 SCMR 69: Haji Ahmad vs. The State, PLD 1984 SC 218 (SAB): Ghulam Sarwar vs. The State. Reference in the above context is also made to the cases from the Indian jurisdiction: (1995) 5 SCC 518: Karnel Singh vs. M.P, AIR 1996 SC 1393:State of Punjab vs. Gurmit Singh , AIR 2003 SC 4684: Bhupinder Sharma vs. Himachel Pardesh, AIR 1988 SC 753: Bharwada Bhogiawal vs. Gujerat; the view of the Court that DNA etc. tests were not conducted due to any weakness of the prosecution case and the omission/lapse should effect the veracity of the prosecutrix is conjectural and is against the law declared by the superior Courts, even otherwise due to the lapse on part of the investigator, the prosecutrix should not suffer, besides, such omission is not fatal to the case of the prosecution, see 2002 SCMR 1009: Shahzad vs. The State ; he submits along similar lines vis-à-vis the view of the Court qua the absence of marks of violence or the inquiries on the body of the victim; learned counsel has referred to cases 1999 SCMR 1102: Mehboob Ahmed vs. The State, 1975 SCMR 69: Haji Ahmed vs. The State, PLD 1984 SC 218 (SAB): Ghulam Sarwar vs. The State; the learned counsel has further pointed out that in this case while making statements under Section 342 Cr.P.C., the accused have not propounded their defence, rather in this behalf have solely relied upon their cross examination; however, in the cross examination vital suggestions have been given through which the case of the prosecution in material aspect has been admitted. In this context, Ch. Aitzaz Ahsan, Sr. ASC has made reference to certain portions of the cross-examination, such as about sodomy with Abdul Shakoor, he mentioned that PW-14 stated “Incorrect to suggest that Abdul Khaliq accused stated that as his brother Punno had been accused of committing Sodomy with Abdul

Shakoor, therefore, he could not give Salma in marriage to Abdul Shakoor”…… Like-wise PW-11 while replying a suggestion, “it is false to suggest that in **BADLA** of Mst. Mukhtar Mai, Salma was proposed to be taken and for sodomy another woman plus land was demanded by the complainant”……. Again PW-14 responded “incorrect to suggest that upto 26.6.2002, Abdul Razzaq PW and my father tried to compound the matter in terms of their demands or for the same reasons the sodomy case was also not got registered”. On his contention that the incident of Zina with the prosecutrix and her nudity incident is also admitted, reference has been made by the learned counsel to the suggestions “I did not state to the Inspector/SP/RC on their query “whether after Zina-bil-jabr the accused persons turned me out in quite naked condition”? replied “no I had worn shirt and my private part was covered with duppta as the Azarband of my shalwar had been broked; shalwar was in my hand”……. “incorrect that she was handed over the shalwar inside the room after the rape”……. Further in response to a suggestion PW-13 stated “incorrect that as we went there, we saw Mst. Mukhtar Mai holding Shalwar in her hand”. Moreover in the cross-examination of Mst. Mukhtar Mai, the suggestions culminate into the following replies “I recorded in the complaint that I had come out of the room in nude condition”……. “I stated to the police that after the accused person committed Zina, I came out in nude condition and called out my father Ghulam Fareed. I had not put on the shalwar as it was without string, nor I covered the same on my body, and my father had arrived just then”. According to the learned counsel, this is a confession of the fact that she did come out of the room without shalwar on her body. The suggestion is only that the accused, (who had thus admittedly taken the shalwar off her body in

the first instance) were not responsible for her venturing out naked. But this is an admission that she did come out naked. It is also pointed out that responding to a suggestion in relation to Abdul Khaliq, PW-14 replied "incorrect to suggest that he performed conjugal duties as my husband in the said night", furthermore; "incorrect to suggest that upto 28.6.2002, Maulvi Abdul Razzak PW and my father tried to compound the matter in terms of their demands or for the same reason the sodomy case was, also not got registered". It is explained that the suggestions, in the cross-examination have the effect of **a defence plea,** is **an implied admission, an indirect admission** and to support his point of view, reliance has been placed on the cases reported as 2010 SCMR 1009: *Muhammad Shah vs. The State,* 2000 YLR 1406: *Khalid Pervaiz vs. The State,* 2003 CLD 80:*Mian Sajidur Rehman vs. Messrs Granulars (Private) limited through Manager Commercial Lahore,* 2005 P.Cr.L.J.729: *Ibrar Hussain vs. The State,* 2004 MLD 1062: *Muhammad Inayat alias Inayatoo vs. The State ,* 2006 SCMR 577: *Muhammad Tashfeen and others vs. The State.*

13. Under the caption of 'THE EVIDENCE' on the factual premise, it has been urged by the learned counsel that glaring and patent errors of misreading and non-reading of evidence have been committed by the learned High Court; erroneous conclusions of facts and law have been drawn; the findings of facts are based on conjectures and surmises; the view that the prosecutrix has not been corroborated, is incorrect, rather the PWs and the medical evidence has duly supported her version; the witnesses of the prosecution were credible and trustworthy, but to hold them otherwise is a serious factual error, which is apparently against the record; in this regard, special reference has been made that even according to DW-1, the

prosecutrix has declined the cash compensation given to her by the Governor, rather has used that money for an educational institution established by her after the incident and it is a publicly known fact that now hundreds of girls of humble background of a backward area are receiving education due to the noble efforts of the lady; moreover her credibility is also established from the fact that she has not implicated the sodomizers of Shakoor, who in case of a false claim were the obvious targets; the convening of the Panchayat with the 'common intention' to take **BADLA** and such a decision being made therein was duly proved on the record; the conclusion that the victim was not dragged, as there are no marks or injuries on her body, is a misconception, as it is not necessary that if such marks/injuries should always occur; besides; dragging has many shades which may not even sustain any injury at all; the learned High Court has gravely and seriously erred in drawing an adverse conclusion against the prosecution for the non-examination of Ghulam Nabi and Ghulam Fareed. It is also argued that the view set out by the Court that there are discrepancies and inconsistencies in the statements of the prosecution witnesses about the nude condition of the prosecutrix, again are the result of mis-reading and non-reading because the statements in this behalf are consistent; the Court has erred to hold that PW-11, Maulvi Abdul Razzak is the mastermind and has influenced the complainant party for the registration of the case. The gentleman had no ulterior motives to falsely implicate the accused, rather as a conscientious person performed his moral duty to help the oppressed and aggrieved persons. It is also submitted that sufficient explanation was provided by the prosecution for the delay in lodging the FIR and even otherwise on account of social, religious and cultural restraints, people are

hesitant to report such incidents and some time is taken to glean and gather the courage of going public. In this connection, he has referred to the judgments reported as: 1999 SCMR 1102: Mehboob Ahmed vs. The State, NLR 1994 SD 106: Maqsood Ahmad alias Mooda vs. The State, 1999 P.Cr.LJ 699 (FSC): Muhammad Umar vs. The State, 2001 P.Cr.LJ 503: Saleem Khan vs. The State, PLD 2003 SC 863: Muhammad Abbas and others vs. The State, PLD 1991 SC 412: Mst. Nasreen vs. Fayyaz Khan and another; Moreover, in this case, the complainant side was overawed/threatened and was in the state of both shock and fear, thus it could not approach the police immediately. As regards the view of the learned High Court that Mst. Mukhtar Mai was not abducted because of the short distance of a few paces, it is argued that distance is absolutely inconsequential for such an act/offence and reference is made to the case reported as *Nadeem Iqbal vs. The State (*1994 MLD 1405). On the question, as to what extent the acquittal judgment can be interfered with by this Court, it is argued that such is possible, where there is a misapplication of law *Barkat Ali vs. Shaukat Ali (2004 SCMR 249);* misreading and non-appraisal of evidence or is speculative, artificial and arbitrary *Amal Shirin vs. State* (*PLD 2004 SC 371);* non-reading and non-appraisal of evidence *Barkat Ali vs. Shaukat Ali* (*2004 SCMR 249); Abdul Mateen vs. Sahib Khan (PLD 2006 SC 538)*; the findings of acquittal recorded by the trial Court are not supported by the evidence on record and in fact are based on gross misreading and misconstruction of evidence *Amal Shirin vs. State (PLD 2004 SC 371); the* decision turned upon inadmissible evidence: *2006 SCMR 1550: Sana-ur-Rehman vs. Nayyar;* whether there is any piece of evidence which has not been considered or the evidence brought has been discarded for

reasons which are not recognized under the law *Barkat Ali vs. Shaukat Ali (2004 SCMR 249);* there is an error apparent on the face of record *Abdul Mateen vs. Sahib Khan (PLD 2006 SC 538); and* to reappraise the evidence in its true perspective *Gul Sabdar vs. Malikuddin* (*2007 SCMR 714).* He has also made reference to the case of *Muhammad Ashraf vs. Tahir* (2005 SCMR 383) in which, according to him, the Apex Court comprehensively reappraised the evidence and while taking into account the ocular testimonies, the medical evidence and other factors and also considering the explanation of the delay in lodging of FIR, the acquittal judgment was reversed. It is submitted that the instant case is squarely covered by this pronouncement.

14. Towards the conclusion, Mr. Aitzaz Ahsan, Sr. ASC has argued that the prosecution has proved its case against the accused beyond reasonable doubt and upto the hilt and specific roles performed by each of the accused which are duly established on the record through credible evidence; it is a clear and square case of 'common intention'. Anyhow, before leaving the rostrum, the learned counsel in very clear, unequivocal and unambiguous words stated that while accepting the appeals, instead of resort to the provisions of Section 10(4) of the Act, Section 10 (3) be invoked and all the accused must be sentenced thereunder. When specifically asked by the court for Abdul Khaliq, it is stated that he is not pressing for the enhancement of his sentence to death, but seeking to maintain the same. He states that though it is a gang rape case, but life imprisonments are permissible and reliance in this regard has been placed upon *Shakil and five others vs. The State* (**PLD 2010 SC 47).**

15. Malik Muhammad Saleem, Advocate appearing for all the acquitted accused and also for the convict, Abdul Khaliq (appellant in Crl.A.No.171/2005), has forcefully submitted that the High Court was justified in relying upon the statements of the prosecution witnesses recorded in the fact finding enquiry by the S.P Range Crimes, as those for all intents and purposes are the previous statements of such witnesses and, therefore, could validly be used for confronting them in their cross-examinations in terms of Article 140 of QSO, 1984. It is further argued that such statements were also relevant under Article 153(3) for impeaching the credibility of the prosecution witnesses. He has submitted that these are not the statements under Section 161 Cr.P.C. to be read subject to Section 162 Cr.P.C. and, therefore, for the reason that these have been signed by the witnesses, should not be a bar for using them independently for the object of confrontation and for impeaching the credibility as aforesaid. Learned counsel for the respondents/accused has vehemently defended the judgment of the trial court regarding the acquittal of the eight accused, which decision has been affirmed by the High Court. While supporting the impugned judgment of the High Court regarding acquittal of the accused, he has argued that the conclusions of facts drawn by the Court are based upon proper reading and appraisal of the evidence and it is not a case of surmises and conjectures; the contradictions in the testimonies pointed out by the High Court have been reiterated by the learned counsel to assert that on account of such weaknesses in the ocular deposition of the PWs, their evidence/testimonies cannot be believed. He however has argued that on the basis of such quality of evidence produced and the conclusions drawn by the High Court, the case of Abdul Khaliq accused was at par with the others and

thus he too was/is entitled to the acquittal. The learned counsel has forcefully argued that the parameters and the rules for interference in acquittal decisions are altogether different from those pertaining to appeals against conviction. In this respect, the learned counsel has relied upon *Syed Saeed Muhammad Shah and another vs. The State* **(1993 SCMR 550)** and *Ghulam Sikandar and another vs. Mamaraz Khan and others* (**PLD 1985 SC 11**).

16. We have heard this case at a considerable length stretching on quite a number of dates, and with the able assistance of the learned counsel for the parties, have thoroughly scanned every material piece of evidence available on the record; an exercise primarily necessitated with reference to the conviction appeal, and also to ascertain if the conclusions of the Courts below are against the evidence on the record and/or in violation of the law. In any event, before embarking upon scrutiny of the various pleas of law and fact raised from both the sides, it may be mentioned that both the learned counsel agreed that the criteria of interference in the judgment against acquittal is not the same, as against cases involving a conviction. In this behalf, it shall be relevant to mention that the following precedents provide a fair, settled and consistent view of the superior Court about the rules which should be followed in such cases; the dicta are:-

> *Bashir Ahmad vs. Fida Hussain and 3 others* **(2010 SCMR 495),** *Noor Mali Khan vs. Mir shah Jehan and another* **(2005 P Cr. L J 352),** *Imtiaz Asad vs. Zain-ul-Abidin and another* **(2005 P Cr. L J 393),** *Rashid Ahmed vs. Muhammad Nawaz and others* **(2006 SCMR 1152),** *Barkat Ali vs. Shaukat Ali and others* (**2004 SCMR 249) ,** *Mulazim Hussain vs. the State and another* **(2010 P Cr. L J 926),** *Muhammad Tasweer vs. Hafiz Zulkarnain and 2 others* **(PLJ 2009 SC 164),** *Farhat Azeem vs. Asmat ullah and 6 others*

(2008 SCMR 1285), *Rehmat Shah and 2 others vs. Amir Gul and 3 others* **(1995 SCMR 139),** *The State vs. Muhammad Sharif and 3 others* **(1995 SCMR 635),** *Ayaz Ahmed and another vs. Dr. Nazir Ahmed and another* **(2003 P Cr. L J 1935),** *Muhammad Aslam vs Muhammad Zafar and 2 others* **(PLD 1992 SC 1),** *Allah Bakhsh and another vs. Ghulam Rasool and 4 others* **(1999 SCMR 223),** *Najaf Saleem vs Lady Dr. Tasneem and others* **(2004 YLR 407),** *Agha Wazir Abbas and others vs. The State and others (***2005 SCMR 1175),** *Muhammad Zafar Iqbal vs. Assistant Chief Ordnance and others (***1994 SCMR 2311),** *Rahimullah Jan vs. Kashif and another (***PLD 2008 SC 298), 2004 SCMR 249,** *Khan vs. Sajjad and 2 others (***2004 SCMR 215),** *Shafique Ahmad vs. Muhammad Ramzan and another* **(1995 SCMR 855),** *The State vs. Abdul Ghaffar* **(1996 SCMR 678)** & Mst. Saira Bibi vs. Muhammad Asif and others **(2009 SCMR 946)**.

From the ratio of all the above pronouncements and those cited by the learned counsel for the parties, it can be deduced that the scope of interference in appeal against acquittal is most narrow and limited, because in an acquittal the presumption of innocence is significantly added to the cardinal rule of criminal jurisprudence, that an accused shall be presumed to be innocent until proved guilty; in other words, the presumption of innocence is doubled. The courts shall be very slow in interfering with such an acquittal judgment, unless it is shown to be perverse, passed in gross violation of law, suffering from the errors of grave misreading or non-reading of the evidence; such judgments should not be lightly interfered and heavy burden lies on the prosecution to rebut the presumption of innocence which the accused has earned and attained on account of his acquittal. It has been categorically held in a plethora of judgments that interference in a judgment of acquittal is rare

and the prosecution must show that there are glaring errors of law and fact committed by the Court in arriving at the decision, which would result into grave miscarriage of justice; the acquittal judgment is perfunctory or wholly artificial or a shocking conclusion has been drawn. Moreover, in number of dictums of this Court, it has been categorically laid down that such judgment should not be interjected until the findings are **perverse**, **arbitrary**, **foolish**, **artificial**, **speculative** and **ridiculous** *(emphasis supplied)*. The Court of appeal should not interfere simply for the reason that on the re-appraisal of the evidence a different conclusion could possibly be arrived at, the factual conclusions should not be upset, except when palpably perverse, suffering from serious and material factual infirmities. It is averred in The State vs. Muhammad Sharif (1995 SCMR 635) and Muhammad Ijaz Ahmad vs. Raja Fahim Afzal and 2 others (1998 SCMR 1281) that the Supreme Court being the final forum would be chary and hesitant to interfere in the findings of the Courts below. It is, therefore, expedient and imperative that the above criteria and the guidelines should be followed in deciding these appeals.

17. Anyhow, before proceeding further with the matter, it may be observed with emphasis, that violating the sanctity and chastity of a woman is a sordid, despicable, squalid act, which is considered abhorrent in any civilized society; any language falls short of vocabulary to condemn such heinous act and cases of this taxonomy must be strictly construed and dealt with. However, at the same time under criminal jurisprudence for the safe administration of criminal justice, the courts are required to follow certain settled principles, such as the innocence of the accused must be presumed, till he is proved to be guilty; sifting “the grain out of the chaff”; the defence may take a number of pleas and even if all are shown to be false, yet it is the

duty of the prosecution to prove its case to the hilt; “better that ten guilty persons escape than that one innocent suffer” (William Black Stone – English Jurist). In this context it may be mentioned that the above principle is engraved and embedded in the American Constitution and Criminal Jurisprudence as has been put forth by Michael G. Trachtman in his Book The Supremes’ Greatest Hits in the following words:-

> “Our Founding Fathers were mindful of the penchant of monarchs to charge persons with false crimes as a means of political oppression and social control. Consequently, they built copious protections for those accused of criminal offences into the foundations of the Constitution. It was acknowledged that giving all benefits of the doubt to the accused would result in some guilty persons being set free, and yet they freely accepted this necessary evil as a price of freedom.
>
> The story is told of a Chinese law professor who was advised of our belief that it was better that a thousand guilty men go free than one innocent man be executed.
>
> The Chinese professor thought for a bit and asked, “Better for whom?”
>
> The Founding Fathers’ answer to that question was this: better for all, because as history has proven, if anyone can be unlawfully jailed, everyone can be unlawfully jailed”.

These are certain salutary principles of the criminal justice system which should be adhered to by the Courts, in letter and spirit and there is no exemption to these rules, even in gang rape cases for otherwise, due to departure therefrom, the innocent person may suffer. However, at the same time the Courts should keep in view that in such a class of cases, usually independent ocular evidence is not available, therefore due weight should be attributed to the statement of the victim buttressed by medical evidence, and strong attending circumstances, shall suffice to warrant the conviction.

18. Having referred to certain principles, we would now proceed to consider the merits of the case; and following the sequence we would first

deal with the (acquittal) appeals of the eight accused persons, who were acquitted by the trial court and the decision affirmed by the High Court as well. The important features in this behalf are: their names do not appear in the FIR; in the statements under Sections 161 and 164 of Cr.P.C of the PWs (except PW-14) and even in the statements of the prosecution witnesses in the court (except PW-14); no particular role has been assigned to them in the commission of the alleged offence, except their presence only in the 'Akath' 'Panchayat' which has been alleged by the prosecutrix alone. The accused, Khalil Ahmad is the **one,** who got married to Salma on 26th of June, 2002, where-after this case was ignited. In this group of the accused, Ghulam Hussain is the real father of Khalil Ahmad (bridegroom of Salma), Qasim, Rasool and Hazoor are his real paternal uncles, and Nazar Hussain is his maternal uncle. According to the trial Court, they are placed in column No. two of the challan. These facts have not been controverted by the complainant's learned counsel. It seems that they have been implicated in the matter, because the complainant side felt annoyed and unhappy on account of the above marriage, because till then there is a complete lull, but thereafter everything suddenly sparked visibly and there is an element of vengeance in their involvement, as all the close relatives of Khalil were booked in the case; it is not a mere incident or an honest implication. The decision of the trial Court as earlier stated has been affirmed by the appellate court, however, the learned counsel for the complainant by resorting to the rule of 'common intention' under Section 109 PPC has urged that their mere presence in the 'Akhat' 'Panchayat' where the decision for 'Badla' was taken and the object was achieved, is good enough to haul them up in the case. We are not impressed, if the rule of 'common intention' in this case can be

stretched to an extent that any person who was present at the time of the alleged occurrence should be involved in the matter and convicted. In her statement, PW-14 states that there were about 200/250 persons present at the place of occurrence, can all of them be held responsible for the alleged incident on the basis of the said rule, when no specific role has been assigned or performed by them in furtherance of any alleged common intention; they are not implicated by any PW at any stage in any manner whatsoever. Moreover, there is absolutely no evidence that Mastois' 'Akhat' as a whole decided to commit the offence, in fact there were two 'Akhat' of the Baradaris at distinct places and it is not established by any PW that he was present in the mastoi gathering where such an alleged decision was taken and shared by all those present. Besides, the village has no electricity, no PW has given the time of occurrence, but even if gathered by joining the scattered pieces of evidence, it was somewhere after midnight on 22.6.2002; the prosecutrix remained outside Khaliq's house for a short while, so how could she in the darkness identify these eight persons by name and parentage. By now, they have acquired a triple presumption of innocence, which cannot be dispelled by the complainant's counsel on any score whatsoever. In view of the foregoing, we do not find that a case has been made against them for interference, therefore, the appeals relating to these accused are liable to be dismissed. While parting with their subject, it may be relevant to point out that in order to constitute and apply 'common intention' rule it is necessary to prove that the intention of each one of the accused was known to the rest of them and accordingly shared, see PLD 2007 SC 93: Shaukat Ali vs. The State; however, this is not established from the evidence

of the prosecution. Therefore, the said rule for the aforesaid accused or for any other (accused) in this case cannot be pressed into service.

19. Before attending to the various pleas raised by Ch. Aitzaz Ahsan, learned Sr. ASC, we take up the prosecution's case regarding the incident as put forth by it, and endeavour to ascertain its veracity on the rules of common sense, ordinary prudence and logic; the chronological order of the incident, for the above is quite important; and it may be mentioned that the incident dated 22.6.2002 erupted from some obscure happening in a sugar field regarding which there is no direct and accurate evidence on the record; any how:-

a) Taking the prosecution version on its face value as correct, it does not appeal to reason that Salma's brother, who alongwith two others when committed sodomy with Shakoor, was so naïve to understand that Shakoor would not disclose their misdeed to anyone, and on his unexpected refusal they took the extreme measure of confining him in his own house alongwith Salma; risking, endangering and putting at stake, the virtue, the sanctity and respect of a young unmarried sister. It is incomprehensible that his other family members including the mother, other brothers, sister would allow this nefarious design to be carried out and would all become a party with him to do away with sacredness of their innocent daughter. This is absolutely not done or conceivable in our rural society, where people are very sensitive about the chastity of their womenfolk, especially young and virgin.

b) If the intention of the Mastois was to take BADLA, on learning about the confinement of Shakoor, Mst. Mukhtar Mai etc. had gone to the house of Khaliq, without the

company and protection of their menfolk, this was a good opportunity for Khaliq or for that matter any other male of the family to settle the score, but no harm was caused to anyone.

c) It is strange that when Maulvi Abdul Razzak (PW-11), Hazoor Bakhsh (brother of Shakoor) alongwith the police arrived and rescued the boy, he did not apprise them that he is not the culprit, rather is a victim of sodomy; the explanation of the prosecution that it was due to shame that he refrained from the disclosure, does not go with the earlier prosecution's version, when he had refused not to declare being sodomised and was thus confined with Salma. It is unbelievable that the boy for 'shame' would not tell the true story, lose the chance of liberty and the sympathies when Maulvi Razzak alongwith the police had reached the spot for rescuing him, rather would go to the police station instead of securing his liberation and exoneration from the charge of rape. Strangely even in the police station did not reveal his sodomy to any one.

d) Maulvi Abdul Razzak was a very important person to the complainant party, as he was the first one to be approached by them for rescuing Shakoor; he was the Salis for Gujjars (complainant) and had been to and fro for resolving the matter, he approached Faiz Mastoi the so-called head of the Mastoi Baradari, and persuaded him to agree to the proposal of exchange marriages, but on refusal of Ramzan Pachar and Ghulam Fareed Mastoi walked out of the 'Akhat', leaving behind the people who were depending upon him; trusted him the most at the mercy of the alleged mighty Mastois. It is improbable and unbelievable that he did not come to know of the subsequent event of ziadti (rape) with the complainant for

five days and during this period himself made no effort to find out as to what happened to such a burning issue after his return. Rather he discovered about it on 28.6.2002 from some individual whose name he does not remember, and that person too was not the witness of the incident himself, rather he learnt about the occurrence from the vagabonds of the Mastois in a hotel, that "BADLA" had been taken. It is strange and incomprehensible that being an Imam of the mosque, a mature, responsible, educated person, he would act in a way, that without even verifying the occurrence from any authentic source; not from the immediate relations of the complainant side as to whether the story is true or otherwise or they would like for it to be announced in the mosque or not, he disclosed it in his juma speech, without even the permission of the complainant side. It is afterward that he approached Ghulam Fareed (complainant's father), who according to him would not acknowledge the incident at all; the reason given for this, that it was due to fear of Mastois, might have been possible in respect of approaching the police, but what fear did Ghulam Fareed harbour in revealing the incident to a man, who he always looked upon, who was a friend, a confidant and who already knew about the incident and to whom the disclosure would not have caused any embarrassment .

e) There is another very important fact that PW-12 Altaf Hussain is the real brother of PW-11 and they admittedly live in the same house. PW-12 claims to be the witness of the 'Akhat' proceedings and also the incident, so how come can it be possible that till 30.6.2006, neither PW-11 inquired as to what happened after he had left nor PW-11 disclosed to his brother, for in his statement, PW-12 has categorically mentioned that the incident was not divulged

by him to his brother even till 28.6.2002 or 30.6.2002. This is one of the most ridiculous aspect of the prosecution's case which knock the bottom out of its version.

f) Anyhow, having failed in his first attempt to know from Ghulam Fareed on 28.6.2002 about the incident of which earlier he was not eager or bothered to know, after leaving the Akhat; now he became proactive and in utter exuberance, he again approached Ghulam Fareed on 29.6.2002, but this time with the power of media, as the 'pressmen' were with him; even then, it is not spelt out from the prosecution evidence that any disclosure was made to them. However, all of a sudden in the early hours of the day on 30.6.2002 the complainant, her father and Sabir (PW-13) approached PW-11 and thereafter he takes charge of the matter; he calls all the witnesses and usher them alongwith for reporting the matter to the police. Be that as it may, it is the categorical stance of the prosecution that the contact with the police for the first time with reference to the incident was made on 30.6.2002, but it is quite important to note that in his statement under Section 164 Cr.P.C. Maulvi Abdul Razzak has mentioned that the report was made on 29.6.2002. This was confronted to him, but he failed to offer any explanation. This man is not the witness of the incident, rather very conveniently drops out of the scene on the pretext of the refusal of Watta Satta marriage, but leaving behind his brother PW-12 to make up his deficiency who throughout remains attached to the events to witness those, till the drop scene thereof, however as a silent spectator only. It may be pertinent to mention here that in the FIR there is no mention of Shakoor's sodomy, surprisingly Maulvi Abdul Razzak says that he was not aware of it till reporting the matter, but PW-14 deposed

that the disclosure was made to the police officer, who advised that the matter shall be dealt with separately. However, this incident too perhaps later in the day was reported through the courtesy of Razzak; the man, who also collected the clothes of the prosecutrix for handing those over to the police. His role throughout remains conspicuous and of a vanguard.

g) It is also noticeable that a serious incident, allegedly has occurred in the area, it was almost known to about 300 people who were present in both the 'Akhats' and if their family members are added to whom they would ordinarily pass on or share the information, number of people who would be aware of the occurrence would be exponentially increased but neither the Lumberdar/Chowkidar of the village nor councilor of the area or any respectable got to know of it on the same/following day, or soon thereafter; the police from its own sources, which (sources) it has and is a publicly known fact, never got any clue about the occurrence till 30.6.2002 thus for the incident remained hidden from all and sundry.

h) Furthermore, in the context of Maulvi Abdul Razzak (PW-11)'s statement and his conduct, he has deposed in unequivocal terms that Faiz Mastoi agreed to the exchange marriages "Watta Satta" but Ramzan and Ghulam Fareed rejected the proposal and thus he and Manzoor left the 'Akhat'; Faiz Mastoi allegedly was the head of Mastoi people, now if he had agreed, the rejection of the proposal by Ramzan, who was not even a member of the accused family/tribe, rather was a friend of Hazoor Bakhsh, the brother of the complainant comes across as rather convoluted and a ridiculous excuse for the walkout. Likewise, Ghulam Fareed too is an unimportant character

in the scenario, he is not a close relative of Abdul Khaliq and even is not shown to have any influence in the Baradari, but obviously is the son-in-law of Karam Hussain, with whom Maulvi Abdul Razzak was in litigation and had to give up some land; Razzak for reasons best known to him in his cross examination has tried to be evasive when asked about such relationship; but his brother PW-12 has admitted that Ghulam Fareed was so related to Karam Hussain. Be that as it may, it is hard to believe and does not behove of a person who has been portrayed as a conscientious man; who was discharging his moral obligation by helping the oppressed against the Mastoi atrocity as argued throughout, on the alleged refusal of the two unconnected men would absquatulate and shed his above virtue at the hour of the need and would not yearn to learn from anyone of those present in the 'Akhat' (about 300 people of both sides) that when he came back what happened thereafter. He is the imam of the mosque and runs a madrasa, but surprisingly never came across someone who could reveal the deplorable incident of the beleaguered Mukhtar Mai; what an apathy on his part. To us, as put by Shakespeare, in Hamlet, the role of Maulvi Abdul Razzak (PW-11) is "like Hamlet without the Prince" (Hamlet).

i) It transpires from the record that the alleged recovery of the pistol from Abdul Khaliq was on the last date of his remand. According to the statement of PW-9, the I.O., throughout the remand period, Khaliq denied about the pistol, rather would not answer on the pretext that he does not remember, I.O. unequivocally stated that Khaliq was not tortured; it is indiscernible that why all of a sudden Khaliq would agree to get the pistol recovered from his house. Besides, in such a high profile case, no independent witness was associated with the recovery

process; neither the Lumberdar nor Chowkidar of village or any other respectable such as Councilors etc. were taken alongwith. We are not persuaded that Hazoor Bakhsh and Ghulam Hussain recovery witnesses, who are close relatives of the complainant would pass the test of independent witness in this respect.

j) PW-10 Shakoor stated, that when he reached home he discovered that Ziadati had been committed with his sister, it is then he disclosed the Ziadati was committed with him too. It is not plausible that neither at the police station, nor while coming alongwith PW-13, he mentioned about his Ziadati. PW-14 in her statement mentioned that PW-10 revealed about his Ziadati in the presence of PW-13 at (Fareed's) house when he returned from the police station, but from the statement of PW-13 it can be reasonably spelt out, that after leaving Shakoor (PW-10) at the house of Fareed, he immediately left, for his house and did not stay back. From the above, it can be concluded that the version of the prosecutrix in this respect is not correct.

k) According to the prosecution, Ramzan Pachar and Faiz Mastoi are responsible for the ziadati, it is unbelievable that after the incident, they still would accompany, Sabir Hussain (PW-13) for the release of Shakoor from the police station.

l) It is against the human conduct if a daughter is being raped a father and maternal uncles would stand dormant and would not strive to get help from the Baradari or the police; at that time even Khaliq had left for the alleged rape; if they were earlier scared of his pistol, but when he was gone, no other person is alleged to be carrying any weapon; this was the opportunity to call for the help, the house of Khaliq and Ghulam Fareed is not at much

> distance, even Hazoor Bakhsh, a young man, also never turned up to safe the honour of his sister. There is no material evidence even of threats on the record, none of the Mastois after the alleged incident is stated to have ever came in contact with the complainant side to extend any threat which could preclude the complainant from taking recourse to a legal action. The submission that threats were extended on the scene of occurrence to our understanding were nothing more than rhetoric and would not be the reason for their silence.

20. Afore-noted are the foundational facts of the case which have a serious reflection on the version of the prosecution, which put together, make the prosecution version implausible, flimsy and un-canny as set forth, and if, on account of, inter alia, the above, the learned High Court has drawn certain conclusion such as, that the complainant side was reluctant to report the matter and was influenced by Maulvi Abdul Razzak or that he is the mastermind of the entire episode, or the prosecution evidence is not confidence inspiring and the delay in lodging the FIR has not been plausibly explained. Such a conclusion, in our view, cannot be said to be unjustified.

21. PW-12, Altaf Hussain, as stated earlier, is the real brother of Maulvi Abdul Razzak. His statement has not been given much credence by the learned High Court, inter alia, for the obvious reasons of the inconsistencies and improvements in his statement in the Court, when compared with his previous statements under Section 161 Cr.P.C. (leaving apart those allegedly compared with the fact finding inquiry). Besides, it emanates from the prosecution evidence that the case has been orchestrated by Maulvi Abdul Razzak, and he being his brother, has to support the prosecution version. As far as PW-13 is concerned, the learned High Court

has duly and extensively analyzed his evidence; he is the maternal uncle of the prosecutrix; the court has drawn certain factual conclusions from the reading of his statement. Our own reading thereof does not take us to form a view different from that of the High Court; this witness has tried to improve the version of the prosecution and also the statement admittedly made by him before the police under Section 161 Cr.P.C and that under Section 164 Cr.P.C. and such contradictions have been duly highlighted in the cross examination; particularly his statement before the Magistrate under Section 164 Cr.P.C. to the effect "I stated to the Magistrate that the decision of the panchayat re: Watta Satta was not agreed to by Faiz Mastoi, Ramzan Pachar and Ghulam Fareed accused (confronted with Ex-PO where not so recorded). Moreover, PW-13 stated that Faiz Mastoi at the time when the victim came before the panchayat commanded that ziadati be committed with her, but this is not so stated in his previous statements, recorded under Sections 161 & 164 Cr.P.C; even this portion of his statement, which is quite important, is against the contents of the FIR, where it is recorded that Ghulam Fareed (the complainant's father be forgiven). PW-14 in her statement has also not supported PW-13 in this context when she deposed that Faiz did assert for the pardon, but was it siasi dunyavi, besides he has stated that when Mst. Mukhtar Mai was pushed in the Panchayat she fell down on the ground and was dragged, this has not been so stated by PW-12 or even the prosecutrix herself; there are some more contradictions in his previous statement under Section 164 Cr.P.C. and that made before the Court, such as, who declined the "Watta Satta" proposal etc. In the previous statement, he stated the man was Khair Muhammad Mastoi, but in Court he named Faiz. As regards nudity incident, this PW has been confronted with

his statement before the Magistrate and his replies are that “I stated to the Magistrate that Fayyaz accused had thrown the clothes to Mst. Muthkar Mai as she came out of Kotha (confronted with PO where not so recorded) I stated to the Magistrate that clothes of Mst. Mukhtar Mai were torn as she came out. I stated to the Magistrate that shirt of Mukhtar Mai was torn from the front and sides (confronted with PO where not so recorded). I stated to the Magistrate that coming out Mukhtar Mai called out her father and the latter picked up those clothes and put on her (confronted with PO where not so recorded)”, therefore, if on the basis of appreciation of his statement the learned High Court has disbelieved him, it cannot be said to be the result of any improper reading of the evidence.

22. As far as PW-14, the prosecutrix herself is concerned, though she has stated about the facts pertaining to the holding of the ‘panchayat’, but she being not a witness to these proceedings herself therefore, all such evidence is hearsay thus, inadmissible. However, when she came to the ‘Panchayat’, it is categorically stated by her that, Faiz Mastoi stated that the girl be forgiven, but according to her it was “politically and wordily”. It is only an impression of the witness which has not been shared by any other PW; besides, this is not her version in the FIR or the statements given under Sections 161 & 164 Cr.P.C. In this regard, the relevant confronted portions of her statement are, “I stated to the Thanedar at Chowk Jhuggiwala that accused Faiz Mastoi proclaimed dunyavi (siasi) and to show to the people that girl has reached and be forgiven (confronted with Ex.P1 where not so recorded) except that Ghulam Fareed be forgiven . . . . . “Further I did not state to the Thanedar that Faiz Bakhsh Mastoi stated that Ghulam Fareed be forgiven (confronted with Ex-P1 where so recorded). . . . . “I stated to

the Magistrate that Faiz Mastoi stated dunyavi (siasi) that Ghulam Fareed be forgiven" (confronted with Ex.PK where words dunyavi (siasi) are not recorded), this clearly depict improvements and inconsistencies. There is another vital contradiction in her statement made before the Magistrate from that in the Court "I did not said to the Magistrate when we went back home, Ghulam Nabi and Altaf were present there (confronted with Ex.PK/6-7 where so recorded). She in her statement further admitted Allah Ditta accused lived in the house alongwith Abdul Khaliq, his wife and children, mother, six sisters and five brothers; in the situation it is improbable if such a despicable act was to be committed by the accused there, particularly by the two real brothers together, that too in the presence of the entire family living in the same house. If therefore, factual conclusions on that account have been drawn by the learned High Court, those cannot be held to be against the evidence on the record or perverse etc. About her nudity and clothes in reply to a question PW-14 stated, "I do not remember to have stated to the Thanedar that as I came out of room my shirt was torn from the front and the sides and Fayyaz threw clothes at her (confronted with Ex-P1 where not so recorded). I had come out of the room in nude condition I stated that Fayyaz had thrown duppta and shalwar at me (confronted with Ex.PK where not so recorded), but duppta and shalwar were in the hands of Fayyaz". About the nudity aspect and the clothes and how allegedly those were thrown, the learned High Court has pointed out the inconsistencies in the statements of the witnesses and has again arrived at a factual conclusion, which to our mind does not suffer from any factual or legal vice. The learned High Court on account of extensive reading of the evidence has given its findings, which are covered by the rules (about appeal against acquittal) laid down in the

aforementioned judgments and we are not convinced, that if any error of reading of the evidence or any misapplication or violation of law has been committed by the Court while delivering the impugned judgment. Only for the reason that on account of the re-appraisal of evidence a different conclusion can be arrived at by the court of appeal, in an acquittal case is not permissible under the law and this standard should not be resorted to at all. In view of the foregoing, we do not find it to be a fit case for interference. Before parting with this aspect of the case, it may be mentioned that prior to their examination in the Court, all the witnesses were taken by the police to a house in Muzzafargarh, there they were together for some good time, on account of which the learned High court has drawn the inference of tutoring the witnesses; however, the complainant's counsel states, it was for their safety; but we are not impressed because almost all the concerned were behind the bar, then from whom the witnesses had a threat, is a question mark.

23. Now attending to certain legal and factual pleas raised by the learned counsel for the complainant which according to him also have nexus to the law, such as, the inferences drawn against the prosecution regarding delay in lodging the FIR is against the settled law, because in cases pertaining to the present nature it is understandable that the victim or her family is/are hesitant to report the matter and in certain cases delay of even upto a month has not been considered fatal to the prosecution. In our view, the above is not an **absolute** or **universal** rule and the delay in each case has to be explained in a plausible manner and should be assessed by the Court on its own merits; in a case of an unmarried virgin victim of a young age, whose future may get stigmatized, if such a disclosure is made, if some

time is taken by the family to ponder over the matter that situation cannot be held at par with a grownup lady, who is a divorcee for the last many years; the element of delaying the matter to avoid Badnami may also be not relevant in this case because the incident according to the prosecution's own stance was known to a large number of people and there was no point in keeping it a secret from everyone. We are also not convinced if any threats were flung to the complainant side as has been alleged and to us it seems to be an abortive attempt to cover up the delay, otherwise there is no substantial cogent proof that after the incident, in between the 8 days anyone from the accused side threatened and/or harassed the complainant or her family; likewise the reason of fear is also self-assumed. It seems to be a case where, the delay is not on account of the facts mentioned by the prosecution, but for some other reasons, which may be those as has been propounded by the defence version i.e. the marriage of Salma and Khalil, because the marriage took place on 26.6.2002 soon thereafter the case was registered and it is not a mere co-incident, rather conspicuously strange, that whole family of Khalil has been roped into the matter. It seems that on account of this marriage the possibility of (Watta Satta) marriage extinguished and the complainant felt betrayed and deceived. The view of the learned High Court that the FIR was registered after due care and deliberation and all the witnesses of the prosecution were called and then under the leadership of Maulvi Abdul Razzak they all approached the police, therefore, the delay in the registration of the case is a factor which tilts against the prosecution, suffers from no vice and looks to be a proper perception and conclusion drawn by the Court from the record of the case.

24. As far as the argument that the alleged previous statements of the witnesses before the fact finding were illegally allowed to be used by the defence, for the purpose of confronting the prosecution witnesses, we hold that such statements should have been proved by the defence as those were denied by the PWs, when put to them; the SP Range Crime, DW-6 has categorically stated not to have recorded the statements and, therefore, it was expedient for the defence to have been proved by either examining the inspector or his reader, in whose handwriting these are alleged to be; though the defence made an application for summoning the inspector, but that was turned down by the trial Court, however no challenge was thrown to this order at the appropriate stage. In this context, it may be held that the prosecution while confronting a PW under Article 140 of QSO, 1984 with his previous statement may use any of his previous statement not necessarily those recorded under Sections 161 & 164 Cr.P.C. without the proof of those at that time. If the witnesses admits of having made such statement there is no need for the proof, but if it is denied, then though the process of confronting him and recording the inconsistency may be completed by the court, whereas such material cannot be used against the prosecution, until and unless the confronted statement is subsequently proved by the defence, as any disputed instrument. However, in this case even excluding the confronted portion of the PWs with such statements (fact finding inquiry), we are of the view that the factual conclusion arrived at by the learned High Court, does not suffer in any material aspect and can sustain independently.

25. About the argument that statements under Section 161 Cr.P.C. should be strictly construed in consonance with section 162 Cr.P.C. and if those are signed by the witnesses, such is an incurable defect and an

illegality which vitiates the statement and it shall not be that previous statement which is contemplated by the above provision, available for confrontation in terms of Article 140 of the Qanun-e-Shahadat Order, 1984 (QSO, 1984). To this extent, we agree with the learned counsel, however, we cannot subscribe to the submissions, that Article 140 of the QSO, 1984 in a criminal matter is totally and conclusively governed and regulated by the provisions of Section 162 Cr.P.C. It may be so, when the statement to be confronted has been recorded under Section 161 Cr.P.C. that the rider of Section 162 Cr.P.C shall apply, but Article 140 of QSO, 1984 being a part of general law of evidence, has its own independent legal efficacy and application and any previous statement of the witness, which may have been made by him in some other judicial, qusai judicial, administrative, executive proceedings or inquiries or before such of the forums or even privately made through some instrument i.e. agreement or an affidavit, can be confronted to him, if relevant, in any criminal case, however, subject to its proof as stated earlier. Such statements can always be used by the defence for impeaching the credibility of a witness under Article 153 (3) of the QSO, 1984 as well.

26. As regards the other submission of Ch. Aitzaz Ahsan, learned Sr. ASC, that the statement under Section 164 Cr.P.C. of those witnesses who have not been examined by the prosecution is not a substantive piece of evidence and cannot be used for any purpose in the case, including to support the plea of the defence, suffice it to say that admittedly in this case the Magistrate before whom the statements were recorded has appeared as a witness and has produced in evidence, inter alia, the statements of Ghulam Fareed, father of the complainant and Ghulam Nabi which were duly exhibited. In an answer to a question by the defence counsel, the Magistrate

in unequivocal terms stated that Ghulam Nabi appeared before him and stated that on the day of occurrence he was not in the village, rather had gone to meet the relatives at Dera Ismail Khan and returned after two days when he learnt about the incident; these statements have been produced by the prosecution in the evidence itself as aforestated, the contents are also proved by the Magistrate, who recorded it; though ordinarily the opposite side can use such a document to its advantage which has been produced by the other side and the party producing it in evidence is bound by the fall out thereof; however, when the statement is under Section 164 Cr.P.C. of a person, who is not produced, it cannot be considered as a substantive piece of evidence, but at the same time the criminal court in order to administer safe justice, in consonance and in letter and spirit of Section 172(2) Cr.P.C, may use such statement not as evidence, but to aid it; the said statement thus can be looked into, for drawing the presumption under Article 129 (g) of QSO, 1984, because Ghulam Nabi was the star witness of the prosecution, who throughout remained in touch with the alleged events; he was allegedly present at the time of Panchayat, the occurrence and even went alongwith the prosecutrix to register the case in which he is specifically named, as a witness, but was given up by the prosecution, not being won over, but as unnecessary. The Court, thus, for the purpose (s) of drawing a presumption for withholding the best evidence under the said Article could examine the statement and make up its mind in this context. Had Ghulam Nabi been examined by the prosecution, the defence would have validly confronted him with his statement to create a vital dent in the prosecution version; and it seems that in order to avoid the repercussions and consequences thereof, he

was given up. Adverse presumption of withholding the father of the prosecutrix could likewise be validly drawn.

27. As far as the question about the sole testimony of the prosecutrix and believing her without any corroboration is concerned, suffice it to say that this too, is not an absolute (*emphasis supplied)* rule. It depends upon the facts and circumstances of each case and has to be assessed by the Court on the basis of the entire evidence on the record whether the sole testimony of the victim should be believed or not, particularly in the light of her cross examination, and the other evidence produced by the prosecution; if on account of totality of facts the Court is of the view that such a statement should not be believed and for that good reasons are assigned it cannot be said that any illegality has been committed by the Court in this behalf. Thus, rule pressed into service by the learned counsel shall not apply to each and every case of rape, as a matter of routine and course, because it is not the command of any law/statute, that in deviation of the general principles of jurisprudence mentioned above, the accused must be put to the test of strict liability and should be asked to prove his innocence because the prosecutrix's version under all circumstances should be taken as correct; the sole testimony view, should be applied with due care and caution in the cases where there is backdrop of grudge, rift and tiff between the parties, as has emerged in instant case. The possibility in this matter cannot be ruled out that the complainant side was trapped by Khaliq; Mst. Mukhtar Mai deceptively in the garb of exchange marriage was subjected to sexual intercourse by him, who in this manner took revenge for Shakoor's act and, thereafter, Salma was secretly married to Khalil, which embittered and betrayed the complainant and provoked her to initiate the present case. Be

that as it may, if not the ocular evidence, the prosecutrix in the case should have been corroborated by medical evidence, which in the required quality is missing. What is the basis of the lady doctor's opinion that she was raped, yes-she was subjected to sexual intercourse, but the question is whether by one person or forcibly four as the prosecution has set out.

28. The absence of injures and marks on the body of a prosecutrix should not be the only factor to disbelieve her version in an ordinary rape case, but where a woman has been forcibly raped for full one hour, by four young individuals on the bare floor, it is not expected that she would not struggle and in the course would sustain no marks or injury. This, of course, is not a conclusive proof or disproof of rape and the learned High Court has rightly held it to be unusual; we have no reasons to differ with it. The omission of DNA and group semen test, which would have been strong supporting evidence to the testimony of the victim, has not been done. To the argument of the learned counsel for the complainant, that on account of the lapse of investigating authorities, the prosecutrix should not suffer; suffice it to say that it should also be true for the defence, rather with more vigour and force. The semen in the vagina were available till the date of her examination and we are at a loss to see what prevented the prosecution to seek the chemical examiner's opinion to confirm, whether the sexual intercourse was by one individual or more. It is especially required in gang rape cases, as it is a matter of life and death of a person and the life of an accused, who might be innocent in a such case and should not be put to danger, only because the prosecutrix has said so, and in any case he should not suffer for the omissions of the prosecution. If the view of the sole testimony of the prosecutrix as sufficient evidence, is accepted, as absolute without any

exception thereto, what shall be the outcome of a case, where a lady claims being raped or gang raped, but the medical evidence negates it, what/who should be believed then, the point is, that it is not in every gang rape case, that the sole testimony should be accepted and relied upon, but each case as earlier stated should be assessed and adjudged on its own facts. The DNA and/or group semen test in this case was of immense importance which could have scientifically determined as to whether the intercourse with the prosecutrix was committed only by Khaliq or by a group of person. Therefore, in our considered view, the benefit of this omission should go to the accused, rather the prosecution.

29. Responding to the argument about the credibility and trustworthiness of PW-14, it may be held that only for the reason, she declined the money awarded to her by the Governor and has established the school would not mean that whatever she stated should be accepted as true; in our view nothing much turns on it and the case of such a nature cannot be decided on these trivial factors, rather on the basis of tenable evidence, about the proof of the crime.

For, the non-involvement of Shakoor's sodomizers is concerned, in our view this is by design and quite a deliberate and clever move on part of the prosecution, these two incidents were kept aloof with an obvious object and we are told that convictions of the accused in that case have been achieved, the purpose seems to have been served.

30. Regarding the argument that the version of the prosecution has been admitted and proved through the suggestions put forth by the defence counsel to the prosecution witnesses, during the course of cross examination, particularly in view of the fact that the accused in their statements under Section 342 Cr.P.C. has relied for their defence on the

cross examination; it may be pointed out that the purpose and object of cross-examination is two fold; one to extract truth i.e. to unfold the truth, second to challenge the veracity of a witness. During the course of cross examination to achieve the aforesaid objectives or any one of the two, the defence counsel at time put questions to the witness in form of suggestions - suggestions not necessarily are always the defence plea or the admission. They can be so taken or assumed if through suggestion, any statutory plea is set up. Like for example, if a witness is suggested that the act or commission by an accused person had to be done in exercise of right of self defence by suggestion in a cross examination, the attempt is to take the case to fall within the mischief of Section 302 (e) instead of 302 (a) or (b)or where suggestion is made regarding plea of the accused as to his “alibi”. Other suggestions are intended to dislodge the witness statement made by him during his examination-in-chief, like in the instant case the complainant-lady was suggested to which she replied “incorrect to suggest after commission of zina, the shalwar was given to me in the room”. The suggestion that the Shalwar was not thrown upon her, rather was with her in the room does not mean that defence is accepting the occurrence of rape or accepting what the witness has stated in the examination-in-chief, but it is a challenge to a statement of fact as alleged. Secondly, it may be in the mind of the cross-examiner that he has already or at a later stage to come from some other witness has to extract that the Shalwar was not thrown outside the room, rather all this happened inside. For the suggestions to be construed as the admissions in any form (implied or otherwise) those should be unambiguous, clear, incapable of any other inference and where no two interpretations are possible. But from those to which reference has been made by the learned counsel, we do not find that these are adequate enough to be interpreted as

the admission of the alleged occurrence; these may at the most be said to be the result of an inarticulate, or inapt art of cross examination, which is not of much importance in this hotly contested case and cannot be given that much importance especially, when the case of the prosecution from its own evidence is not proved to the hilt, as it was put forth.

It may, however, be observed that in the case of Abdul Khaliq the suggestion of his intercourse with the prosecutrix obviously is very clear, definite and qualifies the test of being an admission as described by the learned counsel for the complainant, however, his case shall be discussed separately.

31. Now considering the cases of each accused who has been acquitted, but before that, it is expedient to mention even at the cost of repetition that there was not one Panchayat as the impression sometimes emerge from the prosecution evidence; in fact there were two 'Akhats' 'Panchayats' of the two Baradaris, the Gujjar gathered in the Mosque of Meeranwala (presumably in which Maulvi Abdul Razzak is the Imam) and that of the Mastois, was outside the house of Abdul Khaliq. It is not the case of the prosecution if any collective decision of all those who were present in such a 'Akhats' was ever made, however, the so-called Salis (the arbitrator) of one side have been commuting to the other. It is not spelt out through any independent evidence that the Mastois' 'Akhat' collectively took the decision of taking **BADLA** from Mst. Mukhtar Mai.

a) Be that as it may, firstly the role of Faiz Mastoi should be examined. In the FIR it is mentioned that Shakoor was liberated by Abdul Khaliq etc. on his intervention; he according to PW.11 proposed the exchange marriages, however, when again approached by (PW.11) he affirmed the proposal in this behalf. In the FIR the complainant stated that Faiz avowed that Fareed (father of the complainant) be forgiven. PW.11 while appearing has not

stated that Faiz had ever declared to take **BADLA**. This is not even the statement of PW-12. Only PW-13 (Sabir Hussain) at two occasions has imputed and insinuated that Faiz disagreed with the marriage proposal and also when Mst. Mukhtar Mai was brought to the 'Panchayat' he asked for committing Ziadati with her. But this is directly in contradiction with the statement of Mst. Mukhtar Mai when she appeared as PW.14 and stated, that Faiz said the girl has come and should be forgiven, however, she further stated that it was "politically" or "wordily" which may be only her perception, as what has been stated, is not reflected on account of his conduct or words that he was party to any decision or act of Zina; no other witnesses have said anything about Faiz Mastoi having played any part which could be held to be pursuant to any 'common intention'. He according to PW-13 also accompanied him to the police station for the release of Shakoor at about 3 a.m. on 23.6.2002.

b) As far as Ramzan Pachar is concerned, he admittedly is the friend of Hazoor Bakhsh, the brother of the complainant, he is not a Mastoi by caste, it transpires from the record that he accompanied Sabir (PW-13) for the release of Shakoor, but demanded some money for further payment to the police. Though it is alleged that he declined the proposal of exchange marriages, but it seems strange that why would a person who does not belong to Mastoi tribe and has relations only with the brother of the complainant would become hostile and would insist raping his friend's sister, even by overruling Faiz Muhammad Mastoi, who is projected by the prosecution as a 'Sarbrah' of Mastoi Baradari, and who had agreed to the proposal. To our mind, his status and capacity at the best was not more than a messenger.

c) About Ghulam Fareed, it is apparent from the record that his parentage was wrongly mentioned in the FIR. The FIR was duly read over to the lady, she signed it in token of its correctness and she at that time was accompanied by all the male witnesses, who knew well all the people in the area, her father as well as Mamoon were also present, but

no one pointed if the name of Fareed's father was wrong. The complainant does not mention in any of her statement under section 161 and 164 Cr.P.C. about this error, rather for the correction a supplementary statement was recorded, however, there are no police proceedings, in the context of the supplementary statement, as has been held by the learned High Court. He too is neither a stalwart of the Mastoi Baradari nor is a close relative of Salma and his role has been inflated in the matter because he is the son-in-law of Karam Hussain Mastoi with whom PW-11 as mentioned earlier had litigation and as a result whereof he lost some land.

d) As far as Fayyaz accused is concerned, he is not the resident of Meeranwala as was alleged by the prosecution, he has produced evidence to that effect; besides he was taken into custody from jail, because actual Fayyaz who was the first cousin of Khaliq and Salma, could not be apprehended, therefore, his name was put in the matter, because the investigators as stated earlier where under immense pressure to complete investigation and submit the challan. Moreover, he has produced DW-2 Nadeem Saeed correspondent "DAWN" who has stated that Hazoor Bakhsh the brother of the complainant told him that he is not the real culprit, in this regard the news item has also been brought on the record. He is an independent witness and no effective cross examination to his testimony to shatter the same has been conducted; the argument of the learned counsel for the complainant that he was duly identified by the witnesses, particularly by PW-14 in the Court; it may be held that such was unavoidable at that stage in order to safe the disastrous damage to the prosecution's case. The High Court in the impugned judgment has made comprehensive discussion about him and we do not find that any of the factual conclusions drawn by the said Court in this behalf being erroneous for any reason whatsoever.

e) Allah Ditta is the brother of Abdul Khaliq, he is married, living in the same house where the alleged incident took place, with his whole family including wife, mother, six

> sisters and five brothers and his children. It is improbable that he in the presence of all particularly his wife and children and young sisters would commit Zina alongwith his real brother. The High Court, in his case, too has given valid reasons, which calls for no interference on any account.

32. However the High Court has distinguished the case of Abdul Khaliq primarily for the reasons that he has remotely admitted the intercourse with the prosecutrix; he took up the defence of Nikkah, but has failed to prove it. It is argued by his counsel that it is available to the defence to take as many pleas as it wants, and even if all such pleas are found to be incorrect yet the prosecution is not absolved of its primary duty to prove its case and, therefore, when on account of the reasons given by the High Court it is found that the case as set out by the prosecution is not true, he should have also been exonerated by giving benefit of doubt alongwith other accused. We are afraid that his case is not at par with the other accused for additional reasons that the version of the complainant of sexual intercourse with her has been duly corroborated by the medical evidence, notwithstanding the omission of DNA/SEMEN test, which may in our view would have been relevant for gang rape, to determine if the act is by one person or more, but in the instant case the suggestion given by his counsel to the prosecutrix is very clear, unambiguous and leads to no other interpretation. When in reply thereto PW-14 stated as under:-

> “It is incorrect to suggest that pursuant to the decision of my family members my Shari Nikkah was performed in the house of Abdul Khaliq in the presence of Ramzan Pachar, my father and Sabir PWs. It is incorrect to suggest that compromise was reached and thereafter my maternal uncle Sabir Hussain PW, Ramzan Pachar and Abdul Khaliq accused went to the police station and brought Abdul Shakoor back with whom Nikkah of

> Salma was to be performed. Incorrect to suggest that at 3/4 a.m. Abdul Khaliq came to room where I was present as his bride. In correct to suggest that he performed conjugal duties as my husband in the said night."

In the light of the above, it was incumbent for the defence to prove the Nikkah and being conscience of this requirement, that some DWs were also examined by the defence, however through such evidence the Nikkah could not be proved, the obvious result, would be that he committed sexual intercourse with the prosecutrix, but without a valid NiKkah.

33. While concluding we share the view of the Courts that no case for abduction was made out by the prosecution, notwithstanding the distance; we are not convinced that prosecutrix was taken to the room as has been alleged by her.

34. In the light of the above, we do not find any merits in these appeals, which are hereby dismissed. The suo moto action, initiated by this Court in the matter is also discharged.

Sd/-
Judge

I have added my own note.

Sd/
Judge

Sd/-
Judge

Announced in open Court
on at

APPROVED FOR REPORTNG

Ghulam Raza/*

I have had the benefit of reading the lucid judgment authored by my Lord Mr. Justice Mian Saqib Nisar and concurred by my Lord Mr. Justice Mian Shakirullah Jan, upholding the final conclusions drawn by the High Court in the impugned judgment and its findings on various questions raised before it. While agreeing with some of the findings in the proposed judgment, with humility and utmost respect, I have formed a different opinion on other aspects of the case.

2. The prosecution case in a nutshell is that the complainant, Mukhtar Mai, was subjected to gang rape by four persons of Mastoi Tribe, including Abdul Khaliq and Allah Ditta, brothers of Mst. Salma, with the sanction of the *Panchayat* of the Tribe, as retaliation and in order to vindicate the honour of the Tribe and the family of Mst. Salma, who is alleged to have indulged in an affair with Abdul Shakoor, brother of the complaint.

3. The accused charged and tried for the crime can be conveniently divided into two groups. The four accused of rape are, Abdul Khaliq, Allah Ditta, Ghulam Fareed and Muhammad Fayyaz. The remaining eight were members of the *Panchayat* sanctioning the rape. Out of these, Faiz Muhammad (Faiza Mastoi) and Muhammad Ramzan (Ramzan Pachar) as well as Ghulam Fareed were stated to have represented the *Panchayat* and taking active part in its proceedings, while the rest were simply its members.

4. The Anti Terrorism Court, Dera Ghazi Khan trying the accused convicted and sentenced six of the accused, namely, Abdul Khaliq, Allah Ditta, Muhammad Fayyaz, Ghulam Fareed, Muhammad Ramzan Pachar and Faiz Muhammad alias Faiza Mastoi, awarding them various sentences under

Sections 10(4) and 11 of the Offence of Zina (Enforcement of Hadood) Ordinance, 1979 and 7(c) of the Anti Terrorism Act, 1997, including sentence of death. As details of the convictions and sentences of the convicts have been stated in Para 5 of the majority judgment, to avoid repetition, the same are not reproduced. The convicts were, however, acquitted on the charge under Section 354-A PPC. The remaining eight accused were acquitted of all the charges for lack of evidence. The High Court in its judgment dated 3.3.2005 acquitted all the convicts except Abdul Khaliq, whose conviction was recorded under Section 10(3) of Offence of Zina (Enforcement of Hadood) Ordinance, 1979, as the charge of gang rape under Section 10(4) of the Ordinance could not be maintained in view of the acquittal of other the three accused of rape.

5. The judgment of the High Court was impugned before this Court by the complainant, Mukhtar Mai, the State as well as Abdul Khaliq, the latter challenging his conviction and sentence. Simultaneously, this Court also took suo motu notice of the case when an Hon'ble Judge of the Federal Shariat Court took suo motu of the judgment of the High Court and suspended the same. Leave to appeals was granted in all the matters on 28.6.2005 in the following terms:-

> "Listed petitions for leave to appeal have been filed against the judgment of Lahore High Court Multan Bench, Multan, dated 3.3.2005 passed in Criminal appeals Nos. 60 to 63, 65 and 66 of 2002.
>
> 2. Precisely stating facts of the case are that an occurrence took place on 22nd June 2002 in the area of Mauza Meerwala District Muzaffargarh, situated at a distance of 13 kilometers from the Police Station Jatoi towards South. Matter was reported to the SHO Police Station Jatoi on 30th June 2002 at 7.30 a.m. He

recorded statement of Mst. Mukhtar Mai on the basis of which formal FIR was recorded. Prosecution story as narrated by petitioner Mst. Mukhtar Mai in the complaint (Exb.P1) is that on 22nd June 2002 her brother Abdul Shakoor was suspected of having illicit liaison with Mst. Naseem daughter of Imam Bakhsh resident of the same village. To resolve the dispute a Panchayat (meeting) was convened on that very day. Muhammad Ramzan son of Karim Bakhsh, Ghulam farid son of Mahmood, faiz Bakhsh Khan son of Sher Muhammad were appointed as arbitrators on behalf of Abdul Khaliq (accused) whereas Maulvi Abdul Razzaq son of Bahadur, Manzoor Hussain son of Noor Muhammad were appointed as arbitrator on behalf of Ghulam Farid-father of complainant. The arbitrators of both the sides proposed that Mst. Naseem should be wedded to Abdul Shakoor son of Ghulam Farid and likewise Mukhtar Mai be married to the son of Imam Bakhsh. But Abdul Khaliq, Muhammad Ramzan and Ghulam Farid opposed the proposal and allegedly demanded that they would commit Zina with Mukhtar Mai with a view to equalize the incident and then they would compromise the matter. The demand was opposed by the members of the Panchayat. On this some of the respectable persons namely Maulvi Abdul Razzaq and Manzoor Hussain left the Punchayat. Thereafter on coercion and pressure of accused party complainant-Mukhtar Mai was brought to the Punchayat by her maternal uncle Sabir Hussain to pray for forgiveness according to the customs of Baloch. Later on she was caught hold by Abdul Khaliq from her right hand which she got released by force. Faiz Bakhsh also sought forgiveness for Ghulam Farid, but she was taken into a nearby Kotha forcibly by the accused persons namely Abdul Khaliq, being armed with 30 bore pistol, Allah Ditta (both sons of Imam Bakhsh), Fayyaz Hussain son of Karim Bakhsh and Ghulam Farid son of Mahmood and was subjected to Zina-bil-Jabr by all the four persons turn by turn during course of which complainant-Mukhtar Mai remained crying. Later on she came out of the said Kotha in a nude condition and called her father

Ghulam Farid. Statedly the incident was witnessed by Ghulam Nabi son of Bahar Khan and Altaf Hussain son of Bahadur Ali as well as her father. After recording of statement of complainant-Mukhtar Mai FIR was recorded at 8.00 a.m. on 30th June 2002 at Police Station Jatoi. On completion of investigations accused were arrested and sent up to face trial. As they did not plead guilty to the charge, thus, prosecution led evidence to substantiate accusation by producing as many as 17 PWs. On completion of trial learned Judge, Anti Terrorism Court, Dera Ghazi Khan convicted/sentenced them as follows:-

U/s 7© read with Sec.21(1) ATA 1997 and 149/109 PPC	Abdul Khaliq, Allah Ditta, Muhammad Fiaz, Ghulam Farid, Ramzan Pachar and Faiz Muhammad	Life Imprisonment with fine of Rs.20,000/- each and in default whereof to further undergo six months R.I. each.
Us 11 of Offence of Zina (Enforcement of Hudood) Ordinance, 1979 read with Sec.149 PPC	Abdul Khaliq, Allah Ditta, ghulam Farid and Muhammad Fiaz	Life imprisonment plus 30 stripes each with fine of Rs.20,000/- each and in default whereof to further undergo six months R.I. each.
U/s 10(4) of Zina (Enforcement of Hudood) Ordinance, 1979 read with Sec.149 PPC	Abdul Khaliq, Allah Ditta, Ghulam Farid and Muhammad Fiaz	Sentence of death
U/s 11 of Zina (Enforcement of Hudood) Ordinance, 1979 read with Sec. 21(1) of ATA and Ss. 109/149 PPC	Ramzan Pachar and Faiz Muhammad Muhammad ramzan Pachar and Faiz Muhammad.	Life imprisonment plus 30 stripes each with fine of Rs. 20,000/- each and in default whereof to further undergo six months R.I. each
U/s 10(4) of Zina (Enforcement of Hudood) Ordinance, 1979 read with Section 21(1) of ATA and Ss.109/149 PPC	Muhammad Ramzan Pachar and Faiz Muhammad	Sentence of death.

Above convicts, however, were acquitted from the charge under Section 354-A Cr. P. C., whereas, remaining accused namely Muhammad Aslam, Allah Ditta son of Jan Muhammad, Khalil Ahmed, Ghulam Hussain, Hazoor Bakhsh, Rasool Bakhsh, Qasim and Nazar Hussain were found not guilty for all the charges.

3. Learned High Court in appeal, vide impugned judgment dated 3rd March 2005 concluded as under:-

i) Sentence of Abdul Khaliq appellant is covered by Section 10(3) of the Offence of Zina (Enforcement of Hadood) Ordinance, 1979 {herein after referred to "Ordinance, 1979}, as gang rap is not proved under Section 10(4) of the Ordinance 1979. He is sentenced to 25 years R.I. The sentence of fine awarded by the learned Trial Court is maintained. Benefit of Section 382-B Cr. P.C. was also extended to him. However, he was acquitted of the charge under Section 11 of the Ordinance 1979 and 7(c) read with Section 21(1) of the Anti Terrorism Act, 1997 and 149/109 PPC.

ii) All other convicts were acquitted on setting aside the sentences awarded to them by the Trial Court.

iii) Appeal filed by the complainant and the State to challenge the acquittal of some of the accused mentioned above was also dismissed.

4. Learned Attorney General who was asked to assist the Court, during hearing of the petitions, particularly in view of question, which has arisen relating to jurisdiction of the High Court, and Federal Shariat Court, as appeals have arisen out of the judgment passed by the Anti Terrorism Court under Section 10(4) of the Ordinance, 1979.

It may be noted that State as well as complainant in memo of their respective petitions for leave to appeal had also highlighted the jurisdictional question of the learned High Court as well as learned Shariat Court.

5. Learned Attorney General categorically contended that as the original judgment was passed by the Anti Terrorism Court, therefore, appeal under Section 27-A of the Anti Terrorism Act, 1997 was competent before the High Court.

6. From the arguments so raised by him, following questions emerge for consideration:-

i) Was the case competently brought before the Anti Terrorism Court?

ii) Could Anti Terrorism Court try offences other than the scheduled offences, which may otherwise fall exclusively in the domain of other Courts?

iii) Were the appeals of the convicts before the High Court competent?

iv) Could the Federal Shariat Court under Article 203 (dd) of the Constitution interfere in the appellate order of the High Court?

7. When called upon to address arguments on merits he stated that impugned judgment is indefensible for the following reasons:-

(i) Delay in lodging FIR constitute no ground for acquittal of accused particularly in the cases pertaining to rape/gang rape, in view of the social conditions of society. [**Harpal Singh v. State of Himachal Pradesh** (AIR 1981 SC 361), **Mst. Nasreen v. Payyaz Khan** (PLD 1991 SC 412), **Muhammad Abbas v. State** (PLD 2003 SC 863)]

(ii) Sole testimony of a victim in rape/gang rape cases is sufficient for the purposes of conviction. [**Mst. Nasreen** (ibid), **Shahzad @ Shaddu v. State** (2002 SCMR 1009), **Muhammad Abbas** (ibid)

(iii) Marks of injuries on the person of prosecutrix are not necessary to secure conviction of an accused, where there is allegation of gang rape. [**Shahzad @ Shaddu** (ibid)].

(iv) Expert evidence is of confirmatory nature, therefore, non obtaining report of expert, to ascertain as to whether clothes of the victim were stained with semen, is not fatal to the prosecution's case. [**Muhammad Abbas** (ibid)].

(v) Impugned judgment has proceeded mainly on conjectural consideration as is evident from perusal of the impugned judgment.

8. He also pointed out that there are so many other questions, which are required to be examined in depth if leave is granted to the State. It was also prayed by him that in presence of overwhelming, direct and indirect incriminating evidence, the respondents have been acquitted of the charge, therefore, he prayed for suspension of their acquittal, in exercise of powers under Order XXXIII Rule 9 of the Supreme Court Rules, 1980.

9. Learned Advocate General (Punjab) adopted the arguments advanced by the Attorney General for Pakistan. However, he added that considerations prevailed upon the learned High Court are not sufficient to sustain the judgment.

10. Ch. Mushtaq Ahmed Khan, learned Sr. ASC also appeared on behalf of the State and contended that:-

i) Learned High Court had no jurisdiction to accept the appeal filed by respondents under Section 27-A of the Anti Terrorism Act, 1997, in view of the provisions of Article 203 DD of the Constitution read with Section 20 of the Ordinance, 1979.

ii) The evidence produced by the prosecution has not been appraised by the learned High Court, at the touchstone of the principles pronounced by this Court, from time to time, for the safe administration of justice in criminal cases, as the evidence of prosecutrix and other witnesses has been disbelieved on the basis of technicalities, rendering the impugned judgment not tenable in the ye of law.

11. Ch. Aitezaz Ahsan, learned Sr. ASC appearing for the complainant argued that:-

i) The evidence produced by the prosecution to establish guilt had not been appreciated by the learned High Court in its real perspective, due to which serious injustice has been caused to the compliant, who not only gang raped by four persons but she was also forced to parade without clothes in presence of her close relatives i.e. father, uncles and the members of the Punchayat.

On the role of Punchayat, he stated that they had also facilitated the commission of the offence.

ii) The conclusion drawn by the learned High Court is not tenable, thus cannot sustain in the eye of law.

iii) The prosecution had proved the act of terrorism/gang rape by the respondents i.e. Abdul Khaliq, etc. with the assistance of others, therefore, following observation from the judgment goes to show that the appeal has not been disposed of according to facts on record:-

“Hence we are satisfied that the allegation of committing sexual intercourse with the complainant (PW-14) is only proved against Abdul Khaliq appellant, which is covered by Section 10(3) Offence of Zina (Enforcement of Hudood) Ordinance, 1979. Since the allegation of gang rape is not proved, his conviction under Section 10(4) is converted to 10(3) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and he is sentenced to 25 years R.I. However, the sentence of fine awarded by the learned trial Court is maintained and he shall be given the benefit to Section 382-B Cr. P. C. So far as his conviction under Sections 11 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and 7(c) read with section 21(1), ATA 1997 and 149/109

PPC is concerned, it is admitted fact that there was no purpose of the said appellant to abduct the complainant, who according to the allegation itself, was taken to a few paces and then returned immediately after commission of sexual intercourse. Moreover, the act of Abdul Khaliq appellant was not to intimidate and overawe the community and to create a sense of fear and insecurity in society as in spite of commission of the said occurrence none had reported the matter to the police for about nine days. Therefore, Abdul Khaliq appellant is acquitted of the charges under sections 11 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and 7(c) read with Section 21(1), ATA, 1997 and 149/109 PPC. Cr. Appeal No. 60/2002 to his extent stands disposed of and impugned judgment of conviction and sentence is set aside."

12. Learned counsel appearing for accused contended that:-

i) Learned High Court had jurisdiction to dispose of appeal as the respondents were allegedly charged for the gang rape as well as for the offence under Section 7(c) read with 21(1) of the Anti Terrorism Act, 1997 and the Federal Shariat Court had no jurisdiction to entertain the appeals filed by the convicts.

ii) The petitioner Abdul Khaliq has been convicted contrary to evidence available on record. Story put forward by the prosecutrix Mst. Kukhtar Mai is full of improbabilities, therefore, he was entitled for the acquittal from the charge under Section 10(3) of the Ordinance, 1979 as well.

iii) Learned High Court had not believed the same set of evidence against the remaining accused persons but without seeking any corroboration, it has been believed against the petitioner, contrary to the

principles of consistency. Similarly, against the remaining respondents, no evidence is available, therefore, High Court on having evaluated the same rightly acquitted them of the charge.

iv) As now there is double presumption of innocence in their favour, as such acquittal order may not be interfered with, unless the case is made out in view of the principle laid down in **Ghulam Sikandar v. Mamaraz Khan** (PLD 1985 SC 11).

13. We have heard learned counsel for the parties and have also gone through the relevant record carefully. Leave to appeal is granted in all the petitions, inter alia, to examine contentions of parties' counsel noted above. Keeping in view the facts and circumstances of the case, operation of the impugned judgment of Lahore High Court, Multan Bench dated 3rd March 2005 is suspended. Non-bailable warrants of arrest of the respondents in Criminal Petition No. 96 to 99, 114 to 116 & 161 of 2005, except Abdul Khaliq, who is already in custody, be issued. Inspector General Police, Punjab is directed to cause their arrest and keep them in judicial custody pending final disposal of the appeals. They shall be treated as under trial prisoners."

6. One of the points formulated for determination in the leave granting order related to the assumption and exercise of jurisdiction by the Anti Terrorism Court. In the majority judgment, this question has been examined and without proceeding to determine whether or not the incident created terror justifying trial by the Judge Anti Terrorism Court, it has been considered appropriate not to undertake the exercise in the light of the concurrence of all the counsel before us not to reopen the issue at this stage, more so when the objection by the defence to the jurisdiction of the Court was given up during

the trial. I agree that it is too late in the day to reopen the question. I also find myself in agreement with the findings regarding the eight accused who allegedly were members of the *Panchayat* but were neither attributed any active role in its proceedings nor nominated in the First Information Report. They were acquitted by the Trial Court and that acquittal was upheld by the High Court. For the reasons mentioned in Para 18 of the majority judgment I agree that their acquittal is to be maintained.

7. Adverting to the impugned judgment, the High Court has disbelieved the prosecution version of the incident except to the extent of Abdul Khaliq, whose culpability was found of a far lesser degree than that alleged by the prosecution. The Court found a host of weaknesses in the prosecution case. It held that the delay of 8 days in reporting the incident to the police was inordinate and not sufficiently explained; that it was due to the persuasion and undue influence of Maulvi Abdul Razzaq (P.W.11) that the unwilling complainant and her father were made to make the report; that Maulvi Abdul Razzaq was the instigator and the mastermind of the entire plan; that the accused were nominated after deliberation and consultation with him. On merits of the prosecution evidence, the Court found contradictions in the statements of the witnesses. It found hard to believe that the complainant's father and maternal uncle present at the *Panchayat* of the Mastoies would make no effort to intervene while the complainant was being raped in the nearby house. The Court was doubtful if the complainant was at all raped as it found no supportive evidence of her testimony, holding that the healed bruises on her buttocks and back did not furnish any corroboration. On the defence plea that

on the evening of the incident *nikah*, followed by sexual intercourse, was performed between Abdul Khaliq and Mukhtar Mai, the learned Judges of the High Court, neither held the *nikah* proved, nor gave clear finding on the culpability of the said accused, though, convicted him under Section 10(3) of the Offence of Zina (Enforcement of Hadood) Ordinance, 1979.

8. Taking up first the question of delay in lodging the report. Admittedly, it was made after eight days of the incident. There are no hard and fast rules for assessing the effect on the prosecution case of delay in reporting the crime to the police. Every case is to be examined on its own facts and the nature of the crime committed. The Courts are generally inclined not to attach much importance to delay in reporting rape, considering that the victim and her family would take time to recover from shock and to be in a position to decide whether or not report the crime, in view of the social taboos and the stigma it attaches not only to the victim but the entire family. Mr. Aitzaz Ahsan, learned counsel for the complainant, provided us with a long list of case law from our own as well as Indian jurisdiction where delay in reporting rape was not considered fatal to the prosecution case. Reference may be made to some of them. In **Mehboob Ahmad** v **The State** (1999 SCMR 1102), the Court observed, "*We cannot be unmindful of the prevailing taboos in our society. Even in modern day advanced societies, for and on account of the prevalent predilections, many cases of rape go unreported. A victim of rape should not be penalized on account of ostensible delay in reporting what she has undergone. On the contrary, kindness, encouragement and understanding are the requirements to approbate a victim's difficult decision to purge the society*

of perpetrators of such heinous offences." Brushing aside the defence argument of the delay in lodging the F.I.R. two months after the rape, the Federal Shariat Court in **Muhammad Umar** v **The State** (1999 P Cr. L.J. 699) declared that "*delay in reporting occurrence of such nature to police was not uncommon, particularly in tribal society where people were normally hesitant to report to police matters concerning womenfolk and involving their honour*." In **Nasreen** v **Fayyaz Khan and the State** (PLD 1991 SC 412) this Court accepted the explanation furnished by the prosecutrix, victim of the rape, of delay of several months in lodging the F.I.R. In **Azhar Iqbal** v **The State** (1997 P.Cr.L.J. 1500), the Federal Shariat Court dealing with the delay in registration of a rape case observed that it was the natural result of the socio-ethnic situations coupled with painful mental condition of the victim and her close relatives; that such delay in rape cases is a universal phenomenon and can be brushed aside unless the very commission of offence itself is clearly dubious.

9. It follows that it is quite normal that crimes of rape are not reported promptly. The devastating effects of rape on the victim and her family itself furnish explanation for delay in its reporting. Delay *per se* would not cast any reflection on the truthfulness of the allegations made in the report. There is another compelling reason that discourages a rape victim to prosecute the accused. She is deterred by the embarrassment and humiliation she would have to suffer in narrating the incident to strangers, more so, to the police recording the F.I.R., followed by probes during investigation into matters personal to her. She would further have to bear the agony of narrating the story in the open

court in the presence of men and face searching and harassing questions from the cross-examiner. It is said that a rape victim relives the trauma every time she narrates the incident.

10. Furthermore, in our society rape victims, particularly, from rural areas, are not free agents. To bring the rapist to justice, they invariably require permission and approval of their men-folk. This is amply demonstrated by the facts of this case. P. W. Maulvi Abdul Razzaq claims that when he learnt about the incident, he approached the father of the complainant, Ghulam Fareed. It was only after he managed to persuade the father that the complainant was taken to lodge the report.

11. The record of the present case however reveals that there were a number of other factors that prevented the complainant party to make the report to the police. The complainant party was under a continuous threat from the accused not to disclose the incident. The threat was real in view of the social disparity between the two parties, as will be discussed latter. Without the moral support of P.W. Maulvi Abdul Razzaq and the publicity given to the incident, perhaps, it may never have seen light of the day.

12. Despite such odds, the complainant, an illiterate woman of rural humble background, mustered tremendous courage to stand up against powerful influential culprits to bring them to justice. Thus, in my view, the delay of eight days in reporting the incident to the police by the complainant in the afore-mentioned circumstances will not be fatal to the prosecution case.

13. The High Court, it appears, has placed the entire blame on P.W. Maulvi Abdul Razzaq for planning to prosecute the accused and in the words

of the High Court he was *"the mastermind who got this case registered. He appears to have involved them by influencing and pressurizing the complainant and her father Ghulam Fareed who were playing in his hands, according to his own statement."* Maulvi Abdul Razzaq was Imam of a local mosque, who was one of the two arbitrators *(salis)* selected by the *Panchayat* of the Gujjars (complainant party) to negotiate with the representatives of the *Panchayat* of the Mastoi Tribe for a settlement of the dispute arising out of the affair between Abdul Shakoor and Mst. Salma. According to him, when the proposal of the Gujjars, that Abdul Shakoor be married to Salma and a girl from the Gujjars to a man from Mastoies, was not accepted by the latter, who insisted upon revenge (*badla*), he withdrew from the negotiations. That when he learnt about the rape, he made it public in the congregation of the *Juma* prayer and that is how the incident received wide publicity in the national and international media. Maulvi Abdul Razzaq, being an 'Imam' had some social standing and influence in the society and it was on account of his intervention and moral support that encouraged the complainant's father to take the accused to task. The witness is not, in any way, related to the complainant party. It is hard to believe that the complainant, or her father would, in order to please Maulvi Abdul Razzaq, make out a false case of rape against the accused and face and endure its serious repercussions. The High Court had misconstrued the role of this witness, which in my opinion was positive and well intentioned, rather than mala-fide. His civil litigation with Karam Hussain, father-in-law of the accused Ghulam Fareed would not render him un-credible. Had he been ill motivated on that account he would have implicated Karam Hussain, or

member of his immediate family, rather than son-in-law. No ill will of this witness against the other accused has been shown by the defence.

14. In order to examine and appreciate the prosecution evidence in its proper perspective one has to keep in mind the disparity in the levels of the social status of the complainant and the accused party and the influence of the latter. The accused belonged to influential Mastoi Tribe and the complainant to a humble family of Gujjars. The influence of the Mastoi Tribe was vividly portrayed in a news report published in the Daily Dawn by a journalist, Nadeem Saeed, who was produced by the defence as D. W. 2 in support of the report (Ex.DK), to prove that the complainant had implicated the wrong Fayyaz as accused. Whether his reference to the statement of P.W. Abdul Shakoor about the error is admissible evidence is another issue, his personal observations reported in the news item titled "POLICE, FEUDALS TRYING TO SAVE CHIEF JUROR", demonstrating the influence of Faiz Mastoi is admissible. The Correspondent visited the police station where the accused were detained. He observed that Faiz Mastoi was being treated by the officer in charge of the police station as a special guest and was trying to help out the accused by giving a different twist to the incident. The record further shows that due to influence of the Mastoi Tribe, without the intervention of its head (*sarbara)* Faiz Mastoi, the police did not dare release of Abdul Shakoor when he was detained by Abdul Khaliq in his house. It was on account of this clout that the police had refused to register the case of sodomy committed upon Abdul Shakoor. The very act of bringing the complainant to the *Panchayat* of the Mastoies to seek forgiveness for her brother but instead subjected to rape

while her near and dear ones stood by helpless, demonstrates the power of Mastoies as against the complainant. For further evidence of the Mastoies arrogance, aggression and highhandedness, one may refer to the statement of some of the witnesses. Altaf Hussain (P.W.12), who was one of the persons present at the *Panchayat* of the Mastoies, disclosed that after the complainant was raped the accused threatened the complainant party to teach them a lesson in case the matter was disclosed (*Hashar Kar dengey*). Sabir Hussain, P.W., the maternal uncle of the complainant, who had taken her to the *Panchayat* to seek forgiveness, when questioned in cross-examination about his failure to intervene to save the complainant from being raped, responded *"I saved my life not respect"* Mukhtar Mai, responding to a question volunteered, "*after the rape we were not in our senses and everybody was weeping*". Sabir Hussain and Mukhtar Mai, during their testimonies had referred to the threats held out to the complainant party after the incident to prevent them from reporting to the police. The accused party not only raped the complainant but sodomized her brother, who out of fear and shame desisted from reporting both the incidents.

15. The episode culminating into the complainant's rape began with the detention of Abdul Shakoor by Abdul Khaliq, brother of Mst. Salma, in his house on the allegation that he was having an affair with his sister. The members of Abdul Shakoor's family made abortive efforts to get him released. Even the police initially failed and it was only when Faiz Mastoi gave clearance, Abdul Shakoor was handed over to the police, who took him to the police station. Abdul Shakoor's family realizing that he would not be freed by

the police without the approval of the Mastoies, started making efforts to have the matter settled through compromise. On the other hand, the Mastoies were reluctant to any term of compromise without vindicating the honour of Mst. Salma's family and for that matter, the Mastoi Tribe as a whole. To resolve the issue two separate *Panchayats/Akaths* were held, one by the Mastoies, comprising 200/250 members and the other by the Gujjars, each proposing its own terms of settlement. These were not the customary *Panchayats* convened to resolve disputes between two parties; each *Panchayat* was convened to decide its own terms for settlement. For the Gujjars, Maulvi Abdul Razzaq and one, Mansoor Jatoi, neither of them Gujjars, were nominated to negotiate with the Mastoies, who were represented by Faiz Mastoi, Ramzan Pachar and Ghulam Fareed. The Gujjars proposed that the hand of Mst. Salma be given to Abdul Shakoor and in return the complainant be wedded to Abdul Khaliq. The Mastoies rejected this proposal and demanded that a compromise could not be reached without *badla* (revenge), demanding that a woman of the complainant's family be allowed to be subjected to zina. This demand was not acceptable to the Gujjars and as the negotiations failed they dispersed and their *salis* withdrew. Later on, Ramzan Pachar and Ghulam Fareed came with a fresh proposal from Faiz Mastoi that the complainant family would be forgiven and the matter compromised if Mukhtar Mai would seek pardon from the Mastoies. It was in these circumstances that Sabir Hussain P.W.13, maternal uncle of the complainant, accompanied by Haji Altaf P.W., Ghulam Nabi and Ghulam Fareed, father of the complainant took Mukhtar Mai to the *Mastoi*

Panchayat. However, according to the prosecution, instead of being forgiven, she was subjected to multiple rape.

16. There are two phases of the proceedings of the *Panchayats* and the negotiations between them through their representatives. The first is up to the stage of failure of negotiations and the second is the happenings thereafter. To prove the first, the prosecution has produced P. W. Maulvi Abdul Razzaq and P. W. Sabir Hussain; the former being one of the *salis* and the latter maternal uncle of the complainant, was part of the Gujjars *akath* assembled in the mosque. Besides the complainant, Sabir Hussain and Haji Altaf Hussain are witnesses of the second phase. The prosecution did not produce Ghulam Fareed, father of the complainant and Ghulam Nabi, who were also stated to be present when Mukhtar Mai was taken to the *Panchayat*. The prosecution is not obliged to produce all its witnesses, so long as it can bring on record sufficient credible evidence to sustain conviction of the accused on trial. In any event non appearance of the complainant's father in the witness box is understandable. He was a timid and broken man who was neither able to prevent the rape of his daughter nor had the courage and nerves to go to the police. Perhaps, he was in no position to further endure the pain and embarrassment that he would suffer narrating the episode in open Court. The High Court, while disbelieving the prosecution case as a whole, found weaknesses in the testimony of these witnesses. However, due weight was not given to the testimony of the complainant, the victim of the crime and mainstay of the prosecution case. Her testimony provided foundation, while, the testimony of other witnesses furnished corroboration.

17. Both the Courts, the Trial as well as the High Court found that the *Panchayats* were held. Though, the High Court was suspicious of Maulvi Abdul Razzaq's role in getting the case registered, his role in the negotiations between the two tribes was not seriously doubted. According to his testimony, he was associated by the Gujjars from the stage Abdul Shakoor was taken to the police station. Being Imam of the local mosque, his involvement by the Gujjars was quite natural. The Gujjars were of a lower social status and at the receiving end. They needed the intervention and support of men of some influence as they were not in a position to have the issue settled on their own. P. W. Sabir Hussain, being maternal uncle of Abdul Shakoor, no exception can be taken to his presence in the Gujjars' *akath* and, thus, was well aware of all the negotiations that were going on. In fact, he is the witness of both the phases. Even the defence in their confirmatory suggestions to the prosecution witnesses, conceded the holding of *Panchayats*. For example, P.W. Maulvi Abdul Razzaq, in cross examination, admitted correct that Haji Altaf Hussain and Ghulam Nabi were present in the *akath*. It was argued by the defence counsel, Malik Muhammad Saleem, that suggestion by the defence to a prosecution witness in cross examination, does not amount to admission on behalf of the accused. Mr. Aitzaz Ahsan, however, referred to a number of judgments including two of this Court "**Shehzad** v **The State** (2002 SCMR 1009) and **Muhammad Tashfeen** v **the State** (2006 SCMR 577)" in support of his contention that such suggestion can be considered by the Courts. In the present case, suggestions by the defence to the witnesses have assumed greater importance as all the accused in their statements recorded under Section 342

Cr. P. C., instead of taking any specific defence plea, stated "*their defence is the same as taken in the cross-examination by the counsel"*. Thus it stands proved that each camp held its own *Panchayat/Akath*, and entered into negotiations for a settlement, that eventually failed.

18. About the second phase of which the complainant was a witness, she had alleged that when she was taken to the Mastoies *Panchayat*, she was handed over to Abdul Khaliq accused. That inspite her hue and cry for help, no one came forward to her rescue. Abdul Khaliq armed with a pistol caught her by the arm, Fayyaz, Ghulam Fareed and Allah Ditta pushed and dragged her into the room of the house of Abdul Khaliq where the four subjected her to rape.

19. The roles of Faiza Mastoi, Ramzan Pachar and allegations made against each of the four accused of rape will be discussed later. The primary question is whether the complainant was subjected to rape. The fundamental and crucial testimony in any rape case is always that of the victim. Being victim of the crime she is the most informed and credible witness of the incident. The High Court found that the testimony of the complainant lacked corroboration. On the question as to whether in the absence of corroboration, conviction on a charge of rape can be based on the sole testimony of the victim, Mr. Aitzaz Ahsan cited a number of judgments where the Courts in Pakistan as well as in India have held that no corroboration was required. Reference may be made to "**Muhammad Abbas** v **The State** (PLD 2003 SC 863), **Rana Shahbaz Ahmad** v **the State** (2002 SCMR 303, 306), **Shahzad** v **The State** (2002 SCMR 1009), **Mehboob Ahmad** v **The State** (1999 SCMR 1102, 1103), **Haji ahmad** v **The State** (1975

SCMR 69), In the last two cases it was held that absence of marks of violation on the body of the prosecutrix does not imply non-commission of rape. **Ghulam Sarwar** v **The state** (PLD 1984 SC 218 [SAB]) and **Bhupinder Sharma** v **Himachal Pradesh** (AIR 2003 SC 4684)". In **Bhupinder Sharma's** (ibid) case it was observed "*when Indian woman in tradition bound society makes a complaint of rape there is an inbuilt assurance that the charge is genuine. To insist on corroboration is to add insult to injury."*

20. In most of the reported cases where conviction was based on the sole testimony of the victim, there was absence of corroboration. That is not so in the present case. When medically examined eight days after the incident, the doctor found healed bruises on the complainant's buttocks and back. The locale of the bruises indicates physical struggle by the complainant and there healed condition coincide roughly with the timing of the incident. Unlike most other cases of reported rape, the present one was not committed in complete privacy and not for the satisfaction of the lust of the rapist. In the presence and within the view of the members of *Panchayat* and the witnesses the complainant was forcibly taken away by the accused to the house of Abdul Khaliq and freed with clothes in her hand and body half naked.

21. The complainant's allegation of rape receives some support from the defence plea, admitting sexual intercourse between Abdul Khaliq and the complainant, *albeit* after performance of *nikah*. The defence in this respect made positive suggestion to P. W. Maulvi Abdul Razzaq and the complainant that *nikah* between the two was performed by the former. The suggestion was rejected by both the witnesses. The defence also produced Ghulam Hussain

(D.W.5) in support of the plea. This witness is father of one of the accused, Jamil. His testimony was not believed by either of the Courts. No other witness was produced to prove *nikah*. Maulvi Abdul Razzaq was conveniently introduced by the defence as *nikah khawn* in order to preempt any objection by the prosecution for not producing *nikah khawn* in support of the *nikah.* Had the *nikah* been performed between the two and Abdul Khaliq and the complainant pronounced husband and wife it does not stand to reason that the complainant would straightway leave the husband's house for her own, for it is nobody's case that they ever lived together. Whereas the Trial Court did not accept the plea of *nikah*, the High Court neither held the same proved, nor ruled out the possibility of its truth. With respect, the burden was on the accused to prove the *nikah*, though a lighter one. Once the burden was not discharged the plea had to be excluded from consideration for all purposes. Perhaps it was on account of some confusion in the mind of the learned Judges on the issue that led them to give inconsistent findings on the plea as the following passage of the impugned judgment would show.

> "*The possibility cannot be ruled out that since Abdul Shakoor brother of the complainant was in police custody on the allegation of committing ziyadti with Salma sister of Abdul Khaliq to save him from the legal action she had agreed to perform marriage with Abdul Khaliq and was sent with him immediately as was suggested to the PWS during cross-examination, who performed sexual intercourse with her and at about 2.00 a.m. the same night Abdul Shakoor was taken back from the Police Station. But the intention of Abdul Khaliq is borne out from the record that he only*

> *wanted to take revenge of ziyadti committed with his sister Salma and, therefore, on 27.6.2002 the marriage of Salma sister of Abdul Khaliq appellant was performed with Khalil co-accused thereby backing out from their commitment of marrying Salma with Abdul Shakoor. The complainant was also taken back to the house of her parents but no case was got registered till 30.6.2002. An inference can be drawn that if marriage of Salma was performed with Abdul Shakoor, then this case might have not been got registered in such circumstances, Abdul Khaliq in so many words has admitted the commission of sexual intercourse with the complainant and even otherwise to the extent of Abdul Khaliq there is consistent stand of the PWs that he was active to take revenge for the disrespect of his sister Salma."*

22. If the plea of *nikah* is accepted, the complainant would still be the lawful wedded wife of Abdul Khaliq, as it is not the case of the defence that the complainant was divorced. One wonders why would she bring a charge of rape against her husband even if the accused party had backed out of their commitment of marrying Mst. Salma with Abdul Shakoor.

23. Mr. Malik Muhammad Saleem, learned counsel for the defence referred to a number of aspects of the prosecution case in order to persuade us that the entire story set up was concocted. The learned counsel argued that it is unbelievable that PW Sabir Hussain, maternal uncle of the complainant would take her to the Mastoies *Panchayat* who had already vowed to take *badla* (revenge). This argument fails to take note that when the Mastoies rejected the Gujjars' proposal for settlement, the negotiations failed and the Gujjars *aktah* dispersed. It was thereafter that Muhammad Ramzan Pachar and Ghulam

Fareed approached the complainant's family with a new proposal from the Mastoies that led the complainant party to seek pardon from the Mastoies. The complainant's family, hard pressed for the release of Abdul Shakoor from the police custody, took their chance and presented the complainant to the *Panchayat*. Reference may be made to the statements of P.Ws. Altaf Hussain, Sabir Hussain and the complainant. They were unaware of the actual decision and design of the *Panchayat*. The dispersal of the Gujjars' Akath also furnishes answer to the defence argument as to why the Gujjars did not intervene to save the complainant. Additionally the Gujjars' Akath, even otherwise was weak, comprised of 15/20 members as against the 200/250 members of the powerful Mastoi Tribe. The learned defence counsel had further argued that it was not possible that rape would be committed in the house of Abdul Khaliq when the complainant admitted that the accused Allah Ditta lived in that house along with his wife and children. This argument fails in the absence of any evidence, or even suggestion by the defence, that Allah Ditta's family was present in the house at the time of the occurrence. The learned defence counsel next contended that had the complainant been subjected to rape, members of her family would never have accompanied Faiza Mastoi and Ramzan Pachar to the police station to obtain the release of Abdul Shakoor. This argument loses sight of the fact that the negotiations between the two parties were held with the object of the Gujjars to get Abdul Shakoor's release. The Mastoies forced their own terms on the Gujjars. The Mastoies were thereafter no more desirous of Abdul Shakoor's detention. For the release, the Gujjars were compelled to take Faiza Mastoie to the police station, without whose permission, as noted above,

the police would not release Abdul Shakoor. It made sense for the complainant's family to get Abdul shakoor released even with the help of their tormentors when they had already suffered in the process.

24. There is another aspect of the case. Upon receipt of certain complaints regarding negligence and corruption by the police during investigation of the case, the Deputy Inspector General of Police, Dera Ghazi Khan Range ordered a fact finding inquiry to be conducted by Mr. Mirza Muhammad Abbas, Superintendent of Police, Crimes Range. During this inquiry certain statements were recorded, apparently also of all the prosecution witnesses. After the prosecution closed its evidence the defence examined the said Mirza Muhammad Abbas as D.W.6 and on the basis of his statement the prosecution witnesses, Mukhtar Mai and others were recalled and subjected to another round of cross-examination in order to confront them with their statements recorded in the said inquiry. For the purpose of highlighting the contradictions in the prosecution evidence, the High Court had extensively referred to these statements. Mr. Ch. Aitzaz Ehsan, objected to reference to such statements, as according to him they carried the signatures of the witnesses and thus could not be treated as statements under Section 161 and therefore, the witnesses could not have been confronted with them under Section 162 Cr. P. C. It was argued that admittedly these statements were not part of the investigation but recorded during the fact finding inquiry into the allegation of corruption and negligence of the local police investigating the case. On the factual aspect, the learned counsel submitted that the statements of the main prosecution witnesses were not even proved, in that Mirza

Muhammad Abbas (D.W.6) admitted that the statements of Mukhtar Mai, Maulvi Abdul Razzaq and Ghulam Fareed were not recorded by Inspector Riaz in his presence; that Inspector Riaz was not produced to prove the statements. Responding to this contention Malik Muhammad Saleem, learned ASC, argued that the witness gave concessions to the prosecution due to pressures of the Government and the Media on those involved with the investigation and that is why the Court declared the witness hostile. That in any case, photo copies of the statements recorded by him were brought on record. He pointed out that the witness admitted that the statement of P. W. Sabir Hussain was recorded in his presence.

25. Leaving aside the controversy about the status of the statements recorded during the fact finding inquiry, those of Mukhtar Mai, Maulvi Abdul Razzaq and Ghulam Fareed do not stand proved. They had denied making them. Inspector Riaz, who is alleged to have recorded the statements, was not produced to prove the same. As for the statement of P.W. Sabir Hussain (Ex.DR/2), D. W. 6, admits that it was recorded in his presence. Even if the same could be legally used for confronting the witness I found that the statement supports the prosecution case on all material aspects and that the cross-examiner confronting him with such statement was unable to elicit any material contradiction with his previous statement in Court or the prosecution case as a whole. The High Court had even taken into account the statement of Ghulam Fareed, father of the complainant, made during the said fact finding inquiry, even though he was not produced as a prosecution witness. The

previous statement made by a person can only be referred to when he testifies in court.

26. There is some controversy between prosecution and the defence about the cause of detention of Abdul Shakoor by Abdul Khaliq in his house leading to the holding of the two Panchayats. The prosecution alleges that Abdul Shakoor was sodomised by Punoo, another brother of Mst. Salma, and his two accomplices, in the sugarcane field of the village and to save themselves from criminal prosecution, locked up him on the false allegation of intimacy with Mst. Salma. The defence version, on the other hand, as gathered from the trend of cross examination and the statement of their witness, Ghulam Hussain D. W. 5, is that Abdul Shakoor was detained after he was caught with Mst. Salma in the sugarcane field. There is no direct evidence of any sexual intercourse between the two except for the verbal assertion by D.W.5. Whether or not such intimacy did exist is not material here so long as the accused party believed in it, which they did. The sodomy on Abdul Shakoor has been denied by the defence but the same stands proved not only by the statement of Dr. Fazal Hussain, P. W. 17, who upon his medical examination on 13.7.2002, confirmed that he was subjected to sodomy, but the matter has now been judicially determined as all the three accused were convicted under Section 377 PPC and their appeal was dismissed by the Federal Shariat Court. Copy of the judgment of the Shariat Court was produced by the learned counsel for the complainant.

27. The prosecution version does not appeal to reason. In any society, much less rural or tribal, would brothers falsely scandalize their unmarried

sister to save their own skin from a criminal charge of sodomy. The facts of the present case show that the accused party did not need any protection as according to the testimony of Abdul Shakoor, because of fear and shame he had refrained from reporting the sodomy to the police. Considering the complainant being a weaker party the accused did not had to worry about any criminal charge of sodomy. As stated earlier, they almost managed to keep the complainant family silent about the rape.

28. Though the sodomy on Abdul Shakoor stands proved but the reason advanced by the prosecution for his detention by Abdul Khaliq is found preposterous. Though it may sound speculative, it seems that Abdul Shakoor and Mst. Salma were found together in the sugarcane field; taking this as an insult, her brother, Punoo, and his two accomplices first sodomized Abdul Shakoor and thereafter locked him up, leading to the present incident. Having said that, the incident of sodomy only provides a background to the present occurrence but does not have any substantial bearing on the merits of the case.

29. The second phase of the episode, in the Mastoies *Panchayat*, is proved by the testimony of the complainant, P.W. Sabir Hussain and Haji Altaf Hussain. The complainant had successfully withstood the test long cross examination, twice, spreading over sixteen pages. At one point, she broke down, which was noted by the Trial Court. Her testimony supported by the healed bruises on her body was sufficient to prove the charge of rape. Nevertheless her testimony receives further corroboration from the statement of her maternal uncle P.W. Sabir Hussain, whose presence in both the *panchayats* cannot be doubted. As earlier observed, the defence had failed to

make any dent in his testimony. The High Court, with respect, was not right in discarding his testimony on the ground that he was not witness to the actual rape. He had taken the complainant to the Mastoies *Panchayat* and had witnessed her being dragged to the house and then saw her half naked after the rape. It is a rare phenomena to find a eyewitness of the very act of rape. As far as the presence of P.W. Altaf Hussain is concerned, the High Court has disbelieved his testimony on the ground that he being the brother of Maulvi Abdul Razzaq, labeled as 'mastermind' of the case, was interested in the prosecution of the accused. I have already disagreed with the High Court's observations regarding P.W. Maulvi Abdul Razzaq, but even if the testimony of Altaf Hussain is excluded, the testimonies of the complainant and P.W. Sabir Hussain, together with the circumstances of the case, sufficiently prove the prosecution case. The contradictions of the prosecution case mentioned in the impugned judgment and also highlighted by the learned defence counsel are not so significant as to render the entire prosecution case false. Some of the contradictions between statements of the prosecution witnesses about minute details of the various stages of the episode, from the detention of Abdul Shakoor right up to the commission of rape, spreading over several hours can be attributed to the hectic activities and tension between the two groups, particularly in the complainant's camp. Even otherwise the contradictions taken into consideration by the High Court were mainly with reference to the statements made by the witnesses to the fact finding enquiry, which were never proved.

30. In the light of the foregoing appraisal of the prosecution evidence, it stands established that Abdul Shakoor was detained by Abdul Khaliq, accused, on the accusation that he had developed an illicit liaison with his sister and that eventually he was taken into custody by the police; that two *Panchayats*, one of the Mastoies and the other of the Gujjars, were separately held; that when the negotiations between them failed for the release of Abdul Shakoor, Mukhtar Mai was taken to the Mastoies' *Panchayat* for seeking pardon but was instead subjected to zina-bil-jabr. To this extent, the prosecution has succeeded in proving its case.

31. The next question to be determined is whether the rape was committed with sanction of the Mastoies *Panchayat*. The High Court had answered this question in negative on the ground that there was no direct evidence that the Panchayat had taken decision to take revenge by zina for zina. No one from the *Panchayat* would have been ready to come forward and testify for the prosecution. Its stand can only be gathered from the circumstances. The two prosecution witnesses, Maulvi Abdul Razzaq and Sabir Hussain, testified that the Gujjars' proposal of swap marriages between members of the two groups was not accepted by the Mastoies *Panchayat*, who insisted upon revenge. This assertion is corroborated by the *Panchayat's* conduct when the complainant was brought before it. Its sanction was evident when its 200/250 members remained unmoved when the complainant begged for help while she was being dragged by Abdul Khaliq and others to the house. The presence of such a large number of members of *Panchayat* also scared the

persons accompanying the complainant from making any attempt to save her. The *Panchayat* thus approved and facilitated the commission of zina-bil-jabr.

32. I have already agreed with the majority view that eight accused members of the *Panchayat,* not named in the F.I.R., were entitled to acquittal. The role of Faiz Mastoi, Ramzan Pachar and Ghulam Fareed, however, stands on a different footing. They were nominated in the F.I.R. and also by the witnesses in their testimony as representative of the Mastoies and taking active part in the negotiations. The complainant had stated that when she was brought to the *Panchayat*, Faiz Mastoi addressed Abdul Khaliq, accused, that as the complainant had been brought her family be forgiven. She however added that this was said in a *Siasi/Dunyavi* (politically/worldly) manner. The learned defence counsel, taking advantage of the statement, contended that the same shall be taken on its face value that Faiz Mastoi did not approve of the revenge and was rather inclined to forgive the complainant party. The statement has to be seen in its context. Faiz Mastoi was the *sarbrah* (head) of the Mastoie Tribe. In that capacity he headed the *Panchayat* deciding the terms of settlement. His statement of forgiveness may have been his personal view but he felt bound by the decision of the *Panchayat* and allowed its implementation when despite being in a position of influence did not intervene when Abdul Khaliq took the complainant to his house. The other two, Ramzan Pachar and Ghulam Fareed, actively participated in the *Panchayat*'s proceedings and represented it. According to Maulvi Abdul Razzaq and Sabir Hussain these two had out rightly rejected the Gujjars terms for settlement and insisted upon *zina for zina.* Ghulam Fareed is additionally charged for participating in gang rape. His that

role would be discussed later. Faiz Mastoi, Ramzan Pachar and Ghulam Fareed, thus facilitated, aided and abetted the commission of zina-bil-jabr.

33. The complainant had charged four accused for gang rape; Abdul Khaliq, his brother, Allah Ditta, Faiz Muhammad and Ghulam Fareed. All the four were convicted by the Trial Court under Section 10(4) of Offence of Zina (Enforcement of Hadood) Ordinance, 1979 and each of them sentenced to death. For the reasons afore-stated, rape by Abdul Khaliq stands proved beyond shadow of doubt. He was the main figure in the entire episode, playing the lead role from locking up of Abdul Shakoor to dragging the complainant to his house. As regards Fayyaz accused, undisputedly a resident of Rampur, and not a mastoi, the defence case has been that he was mistaken for another Muhammad Fayyaz, resident of Mirwali, a mastoi and cousin of Abdul Khaliq. To prove the error, the defence produced Nadeem Saeed, D.W.2 of the Daily Dawn, whose testimony has been discussed earlier in a different context. He had quoted Hazoor Baksh, brother of the complainant, that the police got hold of the wrong Fayyaz. This may amount to hearsay evidence but similar complaints about the error were made to the Governor as well as other police officer. The question of identity of Muhammad Fayyaz has been discussed in the majority judgment and on a charge of serious offence of gang rape, I would agree with the findings that he would be entitled to the benefit of doubt on the ground of mistaken identity. This leaves us with Allah Ditta and Ghulam Fareed. The complainant was subjected to rape in a room in the house of Abdul Khaliq at around mid night. The prosecution evidence is completely silent about the source of light in the room. The site plan carries a note by the

investigating officer that he was informed that it was a moon lit night, thereby tacitly confirming the absence of electric light in the room. The complainant had charged four accused for the rape. The only sentence for gang rape under Section 10(4) of Offence of Zina (Enforcement of Hadood) Ordinance, 1979 is death. The complainant's allegation of being gang raped may not be false but in such a situation where one of the accused, Fayyaz, is being given benefit of doubt and acquitted of the charge of rape, and there was no light in the room where the incident took place, it may be unsafe to convict the other two accused of offence under Section 10(4) of Offence of Zina (Enforcement of Hadood) Ordinance, 1979. Having said that, Ghulam Fareed and Allah Ditta were the ones who had physically helped Abdul Khaliq in forcibly taking the complainant to the room. Ghulam Fareed had already been found guilty for facilitating and abetting the commission of rape. Allah Ditta is held similarly guilty.

34. The learned defence counsel opposed the appeals against acquittal on the legal plane that a verdict of acquittal is not liable to be converted into that of conviction unless the appellants (complainant and the State) could show that the judgment of acquittal suffers from some material irregularities or has resulted in grave miscarriage of justice. He contended that all the points now being taken up by the prosecution were examined and adjudicated upon by the High Court. That though the High Court had drawn correct conclusions from the evidence, but such findings cannot be reversed even if this Court comes to different conclusions on the same evidence. He placed relied upon Relied upon, **Ghulam Sikandar** v **Mamaraz Khan** (PLD 1985 SC 11), Ch. Aitzaz

Ahsan, on the other hand, referred to certain aspects of the case and the impugned judgment, which according to him, warrants interference by this Court. With the help of case law, he argued that the judgment of acquittal based on misapplication of law, conclusion drawn by taking into consideration inadmissible evidence the reversal of the findings of acquittal. In support, he cited "**Barkat Ali** v **Shaukat Ali** (2004 SCMR 249), **Amal Shirin** v **The State** (PLD 2004 SC 371) and **Mohammad Ashraf** v **Tahir** (2005 SCMR 383)". In the latter case, a full bench of this Court convicted the accused whose acquittal by the Trial Court was upheld by the High Court, after the entire evidence was comprehensively reappraised.

35. The following errors pointed out by the learned counsel for the complainant, in my view, call for interference with the impugned judgment. The High Court, as observed above, erred in holding that the delay in lodging of F.I.R. is fatal to the prosecution case; that the testimony of a rape victim requires corroboration. The Court had overlooked that there was corroboration of the complainant's testimony. The Court failed to give due attention and weight to the testimony of the victim of the rape and its findings were considerably influenced by its erroneous view about the role of P.W. Maulvi Abdul Razzaq. The High Court was not entitled to use, and that too extensively, for the purpose of highlighting inconsistencies in the prosecution case, the statements recorded by Mirza Muhammad Abbas (P.W.6), during the facts finding inquiry, more so, treating such a statement of Ghulam Fareed, father of the complainant, as substantive evidence without his appearance in

the witness box. The High Court had failed to give any clear finding on the culpability of Abdul Khaliq.

36. For the foregoing reasons Criminal Appeal No. 171 of 2005, filed by Abdul Khaliq, is dismissed, Criminal Appeal Nos. 163 to 166 of 2005, filed by the State and 167 to 170 of 2005, filed by Mst. Mukhtar Mai are partially allowed. The impugned judgment to the extent of acquittal of Allah Ditta, Ghulam Fareed, Faiz Mastoi and Muhammad Ramzan Pachar, is set aside and they are convicted under Section 10(3) of Offence of Zina (Enforcement of Hadood) Ordinance, 1979 read with Section 19 of the Ordinance and Section 109 PPC for abetment of zina-bil-jabr and under Section 7(c) of the Anti Terrorism Act, 1997 and on each count sentenced to imprisonment for ten years. The sentences shall run concurrently.

Sd/-
NASIR-UL-MULK
JUDGE
19.4.2011

Order of the Court

In view of the majority decision, all the noted appeals are hereby dismissed. The suo moto action initiated by this Court vide order dated 14.3.2005 in the matter is also discharged. Therefore, all those who were arrested pursuant to the order of this Court dated 28.6.2005 if not required in any other case be released forthwith. Abdul Khaliq, however shall be released after serving his sentence as awarded to him by the learned High Court, the benefit of Section 382 Criminal Procedure Code extended to him by that Court is also maintained.

Sd/-
Judge

Sd/
Judge

Sd/-
Judge

Announced in open Court
on 21.4.2011 at Islamabad

APPROVED FOR REPORTNG