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Before Saiyed Saeed Ashhad, C.J., Sarmad Jalal Osmany and Wahid Bux Brohi, JJ

Mian MUHAMMAD NAWAZ SHARIF and others---Appellants

versus

THE STATE and others---Respondents

Special Criminal A.T. Appeals Nos.43 and 50 of 2000, Special Criminal Acquittal Appeal No.46 of 2000, decided on 30th October, 2000.

(a) Qanun-e-Shahadat (10 of 1984)---

----Art. 16---Criminal Procedure Code (V of 1898), S.337---Accomplice, evidence of---When admissible and can be made the basis of conviction--Corroboration---Discrepency---Principles---Doctrine of double test--Applicability.

The evidence of accomplice is not admissible at all in case of offences punishable as Hadd and Qisas but for an offence punishable as Ta'zir his testimony is admissible and furnishes the basis of conviction provided it is corroborated in material particulars; and in exceptional circumstances the conviction can be founded on the evidence of an accomplice without corroboration if Court is satisfied with truthfulness of his evidence.

The doctrine of double test with respect to evidence of accomplice/approver will be subject to rule laid down in Federation of Pakistan v. Muhammad Shafi Muhammadi, Advocate (1994 SCMR 932).

The evidence of accomplice is ordinarily regarded with suspicion but the degree of suspicion varies according to the extent and nature of complicity, as in certain cases he may not be a 'willing participant' for the offence but a victim of it and might have succumbed to pressure for want of firmness to resist the same.

As regards the extent and level of corroboration, no hard and fast rule could be laid down in that behalf and the evidence is to be assessed keeping in view the facts and circumstances of each case.

The corroborative evidence standing by itself might not be incriminating at all but considered with the story of approver it should produce on the mind of the Court a profound conviction that the accused must have acted in the manner alleged by the approver.

The evidence of approver may not cover each and every detail and in case of any discrepancy, the minor discrepancies may not make the entire testimony of the approver unreliable.

Federation of Pakistan v. Shafi Muhammad 1994 SCMR 932; Muhammad Ayub Khuhro v. Pakistan PLD 1960 SC 237; Srinivas Mall Bairoliya v. Emperor PLD 1947 PC 141; State v. Zulfiqar Ali Bhutto PLD 1978 Lah. 523; Ghtjam Qadir v. State PLD 1959 SC (Pak.) 377;, Nur, Ali Ghazi v. State PLD 1962 Dacca 249;, Abdul Majeed v. State PLD 1973 SC 595; Abdul Qadir v. State PLD 1956 SC (Pak.) 407; Alam Khan v. Ghauns Muhammad 1969 SCMR 269; Abdul Khalique v. State PLD 1970 SC 166; Juma v. Crown PLD 1954 Lah. 783; Munawar Hussain v. State 1993 SCMR 785; Kamal Khan v. Emperor AIR 1935 Born. 230; Ghulam Qadir v. State PLD 1959 SC (Pak.) 377; Fazal Dad v. Crown PLD 1955 FC 152; Ishaque v. Crown PLD 1954 FC 335; Abdul Qadit v. State PLD 1956 SC (Pak.) 407; Abdul Khalique v. State PLD 1970 SC 166; Muhamamd ;Yaqoob v. State 1992 SCMR 1983; Muhammad Bashir v.State PLD 1971 SC 447; Zultiqar Ali Bhutto v. State PLD 1979 SC 53; Swaran Singh Ratan Singh v. State of Punjab AIR 1957 SC 637; Jan Muhammad v. State 1968 PCr.LJ 1625; Haroon Haji v. State of Maharashtra AIR 1968 SC 832 and Bhola Nath v. Emperor AIR 1939 All. 567 ref.

(b) Qanun-e-Shahadat (10 of 1984)---

----Art. 16---Criminal Procedure Code (V of 1898), S.337---Accomplice, evidence of---Admissibility---Doctrine of double test---Applicability---Where the accomplice was a victim of circumstances; was not a willing participant; had no axe of his own to grind nor was he a direct beneficiary of the criminal act and he had explained the circumstances as to how his power of resistance was shattered because of the pressure of the happenings occurring spontaneously, he could not be termed as a wicked person nor his testimony could be discarded straightaway on the ground that he was an accomplice--Evidence of accomplice, in view of doctrine of double test, however, was to be scrutinized if his evidence was inherently worth reliance and he was also corroborated through independent evidence in material particulars---If on the whole for the purpose, of corroboration the evidence of other witnesses was reliable and enough it could be concluded that the testimony of approver had stood the double test and the facts stated by the accomplice had been established.

(c) Qanun-e-Shahadat (10 of 1984)---

----Art. 129---Presumption as to existence of certain facts---Non production and withholding of related evidence by prosecution---Drawing of adverse inference by the Court ---Principels---Words "evidence" and "person" occurring in Art-.129, Qanun-e-Shahadat, 1984---Connotation---Where both prosecution and the accused had failed to produce the related evidence, this by itself would not call for an adverse inference against the prosecution---Where, however, purely trustworthy and transparent oral testimonies had come on record against whom there could be no allegation of giving false evidence under any sort of motivation, it would not appeal to reason to dram, an adverse inference against the case of prosecution owing to non-production of the related evidence---Such testimonies, as such, were not open to question and consequently it would follow that the prosecution succeeded lit proving the existence of fact.

A plain reading of Article 129, Qanun-e-Shahadat, 1984 shows that when---(i) a person could produce a particular evidence, (ii) but he did not produce it, and (iii) withheld the same, the Court may presume that the production of such evidence was unfavourable to that person. The word 'person' used herein does not confine the applicability of this provision to any of the parties in the case and the word 'evidence' includes airy kind of evidence documentary, oral etc. In the present case the question related to the production of telephone bills against which the payment was made. No doubt the bills might be available in the accounts section of the Department but on the other hand computerized record thereof was also maintained in the relevant section of the billing department. The prosecution did not produce these bills therefore it could be said that they could produce it but did not produce the same. On the other hand such documentary evidence related to public record, the accused could get copies thereof and produce the same in defence but he, too did not make an attempt in this behalf.

It is not in every case that adverse inference must be drawn against the prosecution in terms of illustration (g) to Article 129 of the Qanun-e-Shahadat Order (section 114 of Evidence Act) owing to non production of certain., evidence and that it will depend upon facts and circumstances of each case but an adverse inference can only be drawn if it is shown that material witnesses have been withheld owing to some oblique motive and for considerations not supported on the record. Although the issue related to the production of witnesses the rule is equally applicable in relation to production of documentary evidence. In the present case if the accused could find favour from the telephone bills which according to him were to damage the case of prosecution, then nothing prevented him from calling for production of such evidence.

Indeed, both the parties were responsible for neglecting to produce or call for production, as the case may be, of such documentary evidence and no unrestricted presumption could, therefore, be drawn.. No doubt the prosecution had chosen to rely on oral evidence but this should not by itself call for an adverse inference against the prosecution.

When purely trustworthy and transparent oral testimonies had come on record through independent witnesses against whom there could be no allegation of giving false evidence under any sort of motivation, it would not appeal to reason to draw an adverse inference against the case of prosecution owing to non-production of the related entries. The testimonies were, as such, not open to question and consequently it would follow that the prosecution succeeded in proving the existence of fact.

Zulfiqar Ali Bhutto's case PLD 1979 SC 53 ref.

(d) Qanun-e-Shahadat (10 of 1984)---

----Arts. 121 & .122---Burden of proof---Plea of exception by the accused--Condition---Accused can take plea of exception even at appellate stage; at the most it would be required that in substance the plea should be germane to facts of the case and proximately relatable to the evidence placed on record by the prosecution or the defence as the case may be---If, however, any benefit derived from the plea was aimed at the upsetting the case of prosecution, then burden of proof would lie on the accused---Prosecution, however, was bound to prove its own case beyond reasonable doubt, regardless of the fact that the accused succeeds or not in substantiating and proving his plea at appellate stage.

As for the burden of proof, Article 121 of Qanun-e-Shahadat clearly spells out the condition that when an accused person claims general exceptions within the meaning of Pakistan Penal Code or in any law defining the offence, the burden of proving the existence of circumstances wholly lies upon him. On the same pattern Article 122, postulates that if such fact is specially within the knowledge of such person then burden of proving the same is again upon him. Entertaining/admitting of a plea at belated stage, say appellate stage, is remarkably distinct from acceptance of such plea. Provisions of Articles 121 and 122 of Qanun-e-Shahadat would not restrain the accused from taking a plea even at the appellate stage: at the most it would ht required that in substance it should be germane to facts of the case and proximately relatable to the evidence placed on record by the prosecution or the defence as the case may be.

But if any benefit derived therefrom is aimed at upsetting the case of prosecution, then burden of proof shall lie on the accused as under the settled norms of criminal jurisprudence the prosecution is bound to prove its own case beyond reasonable doubt, regardless of the fact that the accused succeeds or not in substantiating and proving his plea taken at appellate stage.

Motiram Chandiram v. Emperor AIR 1941 Sind 117; Noorul Haq v. The State 1992 SCMR 1451; Ch. Muhammad Yaqoob. v. The State 1992 SCMR 1983; Safdar Ali v. The Crown PLD 1953 FC 93; ILR 1985 AC 462; Subbago v. The State 1993 PCr.LJ 1934; The State v. Mukhtar PLD 1956 (W.P.) Lah. 704; Rehmat v. The State PLD 1977 SC 515 ref.

(e) Qanun-e-Shahadat (10 of 1984)---

----Art. 16---Criminal Procedure Code (V of 1898), S.337---Accomplice. evidence of corroboration---Principle---Not - necessary that each piece of evidence of other witnesses shall independently establish a particular fact and only then evidence of such witness m4y be accepted as corroborative piece of evidence for the words of accomplice.

(f) Criminal Procedure Code (V of 1898)---

----S. 154---First Information Report---Lodging of F.I.R. with delay or promptness---Effect---Delay or promptness in lodging the F.I.R. shall not in all cases lead to an inference about truth or otherwise of the case set up in the F.I.R.---Where the facts were remarkably peculiar and by delaying the F.I.R. prosecution had not gained anything and had produced enormous evidence which was trustworthy and believable, the delay in lodging of the F.I.R. was immaterial in circumstances.

Delay or promptness in lodging of F.I.R. shall not in all cases lead to an inference about truth or otherwise of the case set up in the F. I. R.

The F.I.R. is not a substantive piece evidence and no conviction can be based on the contents of a F.I.R. alone; its significance, however, for the purpose of seeking corroboration or contradictions cannot be denied. In the present case admittedly the facts were remarkably peculiar because of allegations against Prime Minister of the country, and other personalities holding top slots while the victim of offence was the Chief of Army Staff and during the incident a number of high officials had taken part in diversion of the plane from its scheduled course and closing of the runway while on the other hand Army Generals had promptly moved in and intercepted the action being taken by Civil Aviation Authority officials. Although the story came into picture in national press immediately, yet a fact-finding probe was carried out and only then the F.I.R. was lodged. Even after such probe the names of all the accused could not be

incorporated in the F.I.R. That aspect of the case, on the contrary, fortifies the argument that the prosecution did not gain anything from the delay in lodging the F.I.R. However, there was an explanation on the part of the prosecution in the F.I.R. itself which in the circumstances of the case could be treated as a reasonable explanation. Nevertheless, the settled principle is that the contents of F.I.R. could not be taken as thumb rule for genuineness or otherwise of the prosecution story and that the liability of an accused person shall be decided on the basis of the evidence) on record. The prosecution in the present case had produced enormous evidence which was trustworthy and believable as such the delay in lodging of the F.I.R. was immaterial.

Muhammad Gul v. The State 1970 SCMR 797; Riaz Ahmed v. The State PLD 1994 Leh. 485; Salar Khan v. Muhammad Ayub 1986 PCr.LJ 1482; Tahir Hussain v. The State 1992 PCr.LJ 478: Muhammad Gul's case 1970 SCMR 797; Riaz Ahmed's case PLD 1994 Lah. 485; Salar Khan's case 1986 PCr.LJ 1482; 1978 SCMR 135; PLD 1978 SC 1 and 1979 SCMR 230 ref.

(g) Appeal (criminal)---

---- Plea taken by the accused at the appellate stage could be considered in the light of evidence on record.

(h) Criminal trial--

----Evidence---Appraisal of evidence---Minor contradictions, omissions or improvements---Adverse inference, when could be drawn---Standard norms of appraisal of evidence would not call for rejecting a wholly trustworthy testimony on the score of some minor contradictions, omissions or improvements---Adverse inference could be drawn only when the improvements were made to alter the case at a later stage in order to bring same in line with the case of prosecution---Where the feeble effect of changed version with which the witnesses were confronted did not detract from the testimonies which on the whole fit in the circumstances of the case and were credible, reliance could be placed on such testimonies.

The standard norms of appraisal of evidence would not call for rejecting a wholly trustworthy testimony on the score of some minor contradictions, omissions or improvements. In principle the rule laid down in Saeed Muhammad Shah v. State (1993 SCMR 550) and Naseer Ahmed v. State (1994 SCMR 995) would call for an adverse inference to be drawn on such account only when the improvements are made to strengthen the case and additions are made to alter the case at a late stage in order to bring it inline with the case of prosecution. It is not so in the present case. The feeble effect of changed versions with which the witnesses were confronted does net detract from the testimonies which on the whole fit in the circumstances of the case and are credible. The trial Court had thus rightly placed reliance on these testimonies.

Saeed Muhammad Shah v. State 1993 SCMR 55() and Naseer Ahmad v. State 1994 SCMR 995 ref.

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

----S. 402-B----Hijacking---What constitutes---Essential ingredients to be established for making out the offence of hijacking---If the ingredients of the attendance of hijaking are made out the offence would be completed even without physical presence of the hijacker on board the aircraft.

Indeed, the case-law touching the offence of hijacking has not developed much for the obvious reason that, it has been introduced in the Pakistan Penal Code recently. In fact, incidence of this offence throughout the world reached alarming proportions and it was globally felt that besides applying other methods and devices to check the same, severe punishment be provided for this offence in the penal laws. Consequently, such amendments were introduced world over and in keeping with the same the Pakistan Penal Code was also amended by way of Ordinance XV(of 1981 inserting sections 402-A, 402-B and 402-C therein.

What constitutes offence of hijacking call be gathered from section 402-A, P.P.C. which, on a plain reading, envisage 's the following essential ingredients which if established would make out the offence---

(i) that the act itself should be unlawful,

(ii) there should be use or show of force, or

(iii) there should be use of threats of any kind, and

(iv) the above acts shall result in seizing or exercising control ,of an ,aircraft.

The offence of hijacking is completed if the above elements ate proved even without the physical presence of offender. The use of s. how of force or by threat of any kind including expression of words orally or in written form or any other visible sign showing the intention of the offender to seize or control an aircraft is enough to complete the offence of hijacking. The above-referred acts susceptible of being looked or to be observed as such would definitely be unlawful acts and would constitute the offence of hijacking. In the present time, the offences of hijacking, bomb blasting and such other offences of terrorism are committed through remote control and indirect methods. The artificial articles namely, the electric appliance, artificial machines and weapons in the form of plastic toys, guns, pens and watches, if are used as weapon with threats of commission of offence, the offence is completed and the offender cannot take the plea that the artificial weapon being not convertible to be used as actual weapon, he has committed no offence. The commission of offence not only depends on the result to be achieved, but if the element of mens rea to commit an offence is traceable and intention through visible sign is exposed even without any overt act, the offeence can be said to have been committed. Thus, that combination of the intention with the action exposing such intention would bring the act under the definition of an offence.

Legislature intentionally widened the scope of the defining clause of the offence of hijacking. The offence of hijacking is completed even if the physical presence of the offender is not proved. The consequential conclusion, in essence, would be that, if the ingredients of the offence of hijacking are made out the offence would be completed even without physical presence of the hijacker on board the aircraft.

Muhammad Ibrahim Halimi v. State 1999 YLR 533'; Abdul Mannan v. State 1991 MLD 2462 and Shahsawar v. State 2000 SCMR 1331 applied.

(j) Interpretation of statutes--

---- Pressing into service the provisions of laws of other countries for placing a construction on law ' of the land---Scope---Nothing can be reaid in a provision of law which has been expressly omitted, and provisions made in the statute of other countries cannot be pressed into service for placing a construction on a provision of law of our country Whereby the scope, extent and operational field of a provision would be curtailed or enhanced/enlarged.

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

---S. 402-A JCivil Aviation Ordinance (XXXII of 1960), S.6(1)---Hijacking---Diversion of flight of National Airline ordered by the Prime Minister/ Defence Minister---Legality---"An unlawful act" generally includes an "illegal act" but in contradistinction, it, inter alia, implies an act not authorised or sanctioned by law but forbidden by law, while an illegal act is one which is done or performed not in accordance with the forms and usages of law or in particular manner directed by law in technical sense--- "Unlawful act" in some sense includes an illegal act and there is no substantial or material error in calling an unlawful act as an illegal act or implementation of an illegal order because in its ultimate object it is meant to assert that the accused had committed the act in an unlawful manner---An action which is not in accordance with law, therefore, shall be deemed to be an act committed unlawfully---Principles.

The term "unlawful" is in many respects distinct from the term "illegal", but not always.

The distinction demonstrates precisely that "an unlawful act" generally includes an illegal act but in contradistinction, it, inter alia, implies. an act not authorized or sanctioned by law but forbidden by law, while an illegal act is one which is done or performed not in accordance with the forms and usages of law or in a particular manner directed by law in technical sense. While interpreting a penal law it is, therefore, imperative that under the long accepted rules it is to be construed strictly with a view to promoting the object of statute and to give effect to its real

intent so as to effectuate its intention. But since it appears that word "unlawful" in some sense includes an illegal act it can safely be concluded that there is no substantial or material error in calling an unlawful act as an illegal act or implementation of an illegal order because in its ultimate object it is meant to assert , that the accused had committed the act in an unlawful manner.

An action which is not in accordance with law shall be deemed to an act committed unlawfully.

Wharton's Law Lexicon, th Edn.;Concise Oxford Dictionary, 9th Edn.; French Legal or Latin Legalis Lex Legis Law Black's Law Dictionary, 6th End.; Government of West Pakistan v. Begum Agha Abdul Karim Shorish Kashmiri PLD 1969 SC 14 and Sharaf Faridi v. Federation of Islamic Republic of Pakistan PLD 1989 Kar. 404 ref.

(l) Words and phrases---

----"Unlawful" and "illegal "---Distinction.

(m) Interpretation of statutes---

---- Penal law---Principle of interpretation---Penal law has to be construed strictly with a view to promoting the object of statute and to give effect to its real intent so as to effectuate its intention.

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

----S.402-A---Qanun-e-Shahadat (10 of 1984), Art.121---Civil Aviation% Ordinance (XXXII of 1960), S. 6---Hijacking---Ingredients---Diversion of flight of National Airline ordered by the Prime Minister/Defence Minister--Legality---Powers of Federal Government to make order in times of war or emergency under S.6, Civil Aviation Ordinance, 1960---Scope---Contention of the accused (Prime Minister) was that the diversion of the flight was not an unlawful act because it was within his competence within the meaning of S.6(1), Civil Aviation Ordinance, 1960; that there was grave danger of public safety as the Army was going to repel the action taken by the Prime Minister who had few moments earlier issued the notification of retirement of Chief of the Army Staff and appointment of another General in his place; that since he (the accused) was informed that certain sections of the Army were going to demonstrate their reaction and there was eminent danger of brutal combat between two factions of army, it was thought necessary that the plane carrying the COAS (who was retired) be diverted to some destination out of Pakistan so that in the meantime the accused who was the Prime Minister of the country and encountering a critical situation owing to struggle for power could consolidate his position and avert the imperilled infight between the Army; that once a trigger was pressed on either side and a fire was made it would result in endless firing between different groups of army that could result in intense bloodshed and even put the integrity of the country at stakes and that 'it was all in the interest of serving a legitimate Government and to maintain good order by a Constitutionally elected Government headed by the accused who was wielding a heavy mandate founded on great majority in the Parliament---Accused contended further as a second line argument that there was neither use or show of force nor threat of any kind and even the control of aircraft was not seized---Validity---Country. admittedly was not running through a state of war, therefore factor of war was not attracted---Powers conferred on the Federal Government undeF S.6(l) of the Civil Aviation Ordinance, 1960 could only be availed if the circumstances did manifestly exist, establishing undoubtedly, that either there was severe State of emergency or the public/tranquillity was seriously imperilled and, therefore, in the interest of public safety and tranquillity the powers were inevitably to be exercised---Merely an imaginative assumption or hypothetical consideration shall not always make it open to the Federal Government to exercise said drastic powers on the pretext of emergency in the name of saving public safety or tranquility---No action was taken which could be a threat to the public safety or tranquility on the part of few soldiers who had immediately withdrawn and surrendered and were effectively disarmed without making a single tire---Circumstances, on the whole did not exist warranting an action to be taken by the accused in exercise of the emergent and extraordinary powers within the compass of S.6(1) of the Civil Aviation Ordinance, 1960 or otherwise---Primarily burden lay on the accused to prove the facts that could substantiate his defence plea---Specially, in case of a plea related to existance of circumstances bringing the case within the fold of any of the general exceptions in the P.P.C. or in any law defining such circumstances as contemplated under Art. 121, Qanun-e-Shahadat, 1984, burden was upon the accused which he totally failed to discharge-

-Accused, at the most had enumerated the circumstances in his statement under S.342, Cr.P.C. intending to show that the Chief of Army Staff was posed to dislodge his Government because of dissention over a defence issue and his meeting with another General of the Army---Contentions of the accused, therefore, stood unsubstantiated and it could not be said that the diversion of the plane was lawfully ordered by the accused---Case of the accused was a case of an attempt to hijack the plane which attempt was foiled by the timely intervention of the Army as a result of which the plane landed safely at the scheduled Airport and contention that the ingredients of the offence of hijacking were not made out was repelled---Principles.

In the present case the main contention raised on behalf of the accused was that the diversion of the flight so ordered by the accused was not an unlawful act because it was within his competence within the meanings of subsection (1) of section 6 of the Civil Aviation Ordinance, 1960.

Out of the four different acts that could be ordered in exercise of powers under section 6, Civil Aviation Ordinance, 1960, clause (b) appears to be relevant for the purpose of present case. According to clause (b) of subsection (1) of section 6 of the said Ordinance the Federal Government was competent to prohibit either absolutely or subject to such condition as it may deem fit to specify in the order or regulate in such a manner as may be specified in the order the flight of all or any aircraft or class of aircraft over the whole or any part of Pakistan. On a plain reading it would appear that the above powers were available to Federal Government in three circumstances that is to say: (1) in the event of war, (2) in case of other emergency, or (3) in the interest of public safety, or tranquillity. Admittedly, in the present case, the country was not running through a state of war therefore, this factor was not attracted. It was however; contended by the accused that in fact, there was grave danger of public safety as the Army was going to repel the action taken by the accused (Prime Minister of Pakistan) who had few moments earlier issued the notification of retirement of COAS and appointment of another General in his place; that since he was informed that certain sections of the Army were going to demonstrate their reaction and there was eminent danger, of brutal combat between two factions of Army, it was thought necessary that the plane carrying COAS be diverted to some destination out of Pakistan so that in the meantime the accused who was the Prime Minister of the country and encountering a critical situation owing to struggle of power could consolidate his position and avert the imperilled insight between the Army; that once a trigger was pressed on either side and a fire was made it would result iii endless firing between different groups of Army that could result in intense bloodshed and even put the integrity of the country at stake and that it was all in the interest of saving a legitimate Government and to maintain good order by a Constitutionally , elected Government headed by the accused who was wielding a heavy mandate founded on great majority in the Parliament.

The powers conferred on the Federal Government its subsection (1) of section 6-of the Civil Aviation Ordinance, 1960 could only be availed if the circumstances did manifestly exist, establishing undoubtedly, that either there was severe state of emergency or the public safety/tranquillity was seriously imperilled and, therefore, in the interest of public safety and tranquility the powers were inevitably to be exercised. Merely an imaginative assumption or hypothetical consideration shall not always make it open to the Federal Government to exercise these drastic powers on the pretext of emergency in the name of saving public safety or tranquillity. In the present case with regard to these factors it was pointed out that few army soldiers were present at Pakistan Television Station, Islamabad and some were found outside Prime Minister House which evidenced the existence of emergency. Barring appearance of few soldiers at Pakistan Television Station of Islamabad, there was no evidence of taking over of any other installation. Even those few soldiers were smoothly disarmed. It could, therefore, hardly be said that there was an action threatening the public safety or tranquillity, on the part of those few soldiers who had immediately withdrawn and surrendered and were effectively disarmed without making a single fire. Likewise few army persons outside Prime Minister House were not active. at that moment when the Prime Minister had ordered diversion of the plane. At a very late stage the Army entered the Prime Minister House and by that time the order had already been issued which was being obeyed and implemented in letter and spirit. The action as directed by the accused had already taken in .its onset and it was in consequence of those directions that the flight was first disallowed landing at Karachi and practically diverted towards Nawabshah and on the way it was called back with a view to getting it refuelled at Karachi and again pushed away out of Pakistan.

Primarily, burden lay on the accused to prove the facts that could substantiate his defence plea. Specially, in case of a plea related to existence of circumstances bringing the case within the fold of any of the general exceptions in the Pakistan Penal Code or in any law defining the offence, the burden of proving existence of such circumstances, as contemplated under Article 121 of the Qanun-e-Shahadat, is upon the accused but it would be noted that in this case absolutely no defence evidence has been led by the accused. At the most the accused has enumerated the circumstances in his statement under section 342, Cr.P.C. intending to show that the COAS was posed to dislodge his Government because of dissention over Kargil issue and the meeting of a General from Quetta with the accused.

In principle, an accused person is not precluded from taking benefit of the versions .. given by the prosecution witnesses either in their examination-in-chief or elicited from them by way of cross-examination, but then the entire material assembled together shall precisely make out the defence plea in favour of accused and nothing can be presumed at random. Instantly, in this context, the accused cited two instances of presence of soldiers, one at Pakistan Television Station, Islamabad and the other at the Prime Minister House, but no adverse conclusion could be drawn which could dismantle the entire case of the prosecution. The defence plea was strenuously advanced on the concept of struggle of power between the two that' is to sav COAS and the accused Prime Minister but whether such struggle of power really existed was to be proved by the accused by leading substantive evidence which was utterly lacking. If some of the facts. materially significant in this behalf were in the knowledge of the accused, then too, :within the contemplation of Article 122 of Qanun-e-Shahadat, it was the accused himself to shoulder the burden of proof in respect of such facts. Therefore, in the circumstances the defence plea taken by the accused in the statement of accused under section 342, Cr.P.C. could not withstand. On the whole, circumstances did not exist warranting an action to be taken by the accused in exercise of the emergent and extraordinary powers within the compass of subsection (1) of section 6 of the Civil Aviation Ordinance, 1960 or otherwise, the plea, therefore, stands unsubstantiated. Consequently, it cannot be said that the diversion of plane was lawfully ordered.

Reverting to the essential ingredients of the offence of hijacking as defined in section 402-A, P.P.C. accused contended that there was neither use or Tow of force nor threat of any kind and even the control of aircraft was not seized. This contention was raised as the second line of argument in case of failure of the plea that the diversion was ordered lawfully. This argument was also without force. The entire Civil Aviation Staff at the Airport was meticulously put into action and by exercising several operational activities each and every concerned person performed his role in disallowing landing of the plane. The Captain was crying hoarse and beseeching that the aircraft was running short of fuel and 198 souls on board were encountering the risk of their lives yet they were not allowed to land. In the airfield not only the Control Tower refused such permission verbally, but even fire tenders were placed on the runway and lights were switched off eliminating every possibility of landing to be made by the aircraft. The Control Tower, in clear terms, informed the Captain that Karachi Airport was closed for this flight. The Captain of the flight was also informed at the outset that even the alternate airport was closed and he had to proceed at his own risk. This was sufficient evidence of show. of force coupled with use of force and it was sheer chance that the Army interference proved effective and the aircraft was ultimately allowed to-land. If the control was not seized physically then evidently it would go without saying that such control was exercised by way of closing the scheduled places of landing and compelling it to proceed to a destination out of Pakistan. The remaining ingredients of the offence of hijacking defined under section 402-A, P.P.C. were, therefore, made out as soon as the plane was diverted and an attempt was made to push it out of Pakistan.

This was case of an attempt to hijack the plane and this attempt was foiled by timely intervention of the Army as a result of which it landed safely at the scheduled Airport. The contention that the remaining ingredients of the offence of hijacking were not made out was repelled.

An objective review of these provisions would indicate that predominantly the expression "good faith" is a common factor in all these provisions and ordinarily attaches to acts done in good faith. These exceptions would therefore help the appellant only if it is made out that the acts were done by him in good faith. For the purpose of good faith section 52, P.P.C. may be taken into consideration.

Whether the accused exercised due care and attention while ordering diversion of the plane was a fact to be proved by him for which do evidence was led. Even otherwise, an utmost emergent and inevitable necessity of ordering such diversion was not at all proved and it could never be made out that such an action was taken lawfully and in good faith. On the contrary the first diversion of the plane was manifestly a wreckless act plunging the plane and its inmates in a state of unforeseen hazard. These exceptions are on the whole not available to the accused and this 'line of argument also fails.

Elements of offence of hijacking defined under section 402-A. P.P.C. are made out and the only question to be distinctly clarified here is whether the criminal act committed by the accused be considered as an attempt to commit hijacking or hijacking absolute. Once the diversion of plane is effected the offence of hijacking takes place. In the present case one may aptly consider the peculiar features of the case that the hijackers were neither in the plane nor had physically seized control of the plane but such diversion was a remotely controlled diversion while the plane was in air and the hijackers were on the ground. This diversion was not completed finally and was being further perpetrated by way of a modified course of action in allowing the plane to land at the Scheduled Airport, refuel it and then compel it to proceed abroad but in the meantime the last phase of the action was intercepted by the Army, and the plan totally collapsed. Thus, it remained only an ° act of attempt to commit the offence of hijacking. Therefore, the accused committed the offence of attempt to hijack the flight.

PLD 2000 SC 869 and Shahswaz's case 2000 SCMR 13311 ref

(o) Qanun-e-Shahadat (10 of 1984)---

----Art. 121---Plea-relating to existence of circumstances bringing the case within the fold Wqte general exceptions in the P.P.C. or in any other law defining the offence---Burden of proof---Such burden is on the accused as contemplated by Art. 121 of Qanun-e-Shahadat, 1984.

(p) Criminal trial---

---- Defence plea---Presumption---Scope---Accused is not precluded from taking benefit of the versions given by the prosecution witnesses either in their examination-in-chief or elicited from them by way of crossexamination, but their entire material assembled together shall precisely make out the defence plea in favour of the accused and nothing can be presumed at random.

(q) Qanun-e-Shahadat (10 of 1984)---

----Art. 122---If some of the facts, materially significant for the issue in question were in the knowledge of the accused, it was accused himself to shoulder the burden of proof within the contemplation of Art.122 of the Qanun-e-Shahadat, 1984.

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

----Ss. 76, 79, 81 & 52---General exceptions---Good faith---Objective review of.Ss.76,79-&-81, P.P.C. would indicate that predominently the expression "good faith" is a common factor in all these sections and cardinalship attaches to acts done in good faith---Exceptions, would therefore, help the accused only if it is made out that the acts were done by him in good faith.

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

---Ss. 402-A & 402-B---Anti-Terrorism Act (XXVII of 1997), Ss.6, 7(ii) & 38---Hijacking---Act of terrorism---Word "likely" used in S.6(2) of the Anti-Terrorism Act, 1997---Significane and scope ---Sentence---Procedure--Contention of the prosecution was that offence of hijacking punishable under S.402-B though having not been included in the Schedule to Anti-Terrorism Act, 1997 at the time of its promulgation but was inserted at a later stage by way of an amendment after the commission of the offence in the present case constituted a "terrorist act" and was triable by Anti-Terrorism Act, 1997--Validity---Act of attempt of hijacking had been proved beyond doubt by the prosecution and was punishable under S 402-B, P. P.C. --Hijacking in the manner committed in the present case was by itself likely to create a sense of fear and insecurity not only in the inmates of the plane but also in the people generally---Word "likely" as used in S.6(b) of the Anti-Terrorism Act, 1997 in essence brought the act committed by the

accused within the fold of definition of "terrorist act"---Offence of committing terrorist act having been made out, separate sentence of such offence was not called for in view of S.7(ii) of the Anti-Terrorism Act, 1997---Principles.

On behalf of the accused in the present case it was argued that in the incident no act of terrorism, say a "terrorist act" within the meaning of section 2(h) and section 6 of the Anti-Terrorism Act, 1997 was committed by the accused, therefore, neither the Anti-Terrorism Court had jurisdiction to try the case nor there could be justification for convicting the accused under section 7(ii) of the Act and sentencing him thereunder. While the prosecution submitted that the accused had committed scheduled offence of hijacking which was likely to strike terror and create a sense of fear and insecurity in people including inmates of the plane hijacked, therefore; terrorist act was committed.

Section 6(b), Anti-Terrorism Act, 1997, inter alia, depends upon interpretation of scheduled offence also. The offence of hijacking punishable under section 402-B, P.P.C. was not included in the Schedule to the Act at the time of its promulgation but it was inserted at a later stage by way of an amendment introduced on 2-12-1999 that is to say after commission of the offence in the present case. However,, it was pointed out on behalf of the prosecution that by virtue of section 38 of the Anti-Terrorism Act the offence of hijacking would constitute a terrorist act and, therefore, was to be tried under the Act.

On a plain reading of section 38, Anti-Terrorism Act, 1997 it is quite clear that if an offence committed before the commencement of the Anti-Terrorism Act is of such nature that if committed after the date on which the said Act came into force, would constitute a "terrorist act", the Anti-Terrorism Court shall have jurisdiction to try the offence under the Anti-Terrorism Act.

As regards the act of terrorism, it would appear from the facts of the case that the act of hijacking, in the manner committed in this case, was by itself likely to create a sense of fear and insecurity not only in the inmates of the plane but also in the people generally. The word "likely" used in clause (b) of section 6 of Anti-Terrorism Act. in essence brings the act committed in this case within the fold of the definition of terrorist act.

From the definition and also generally in literal sense the word "likely" cannot be confined to an act which could have occurred only on its on-set that is to say at the time such act is said to be likely committed but it refers to a probable act that might happen or to be true simultaneously or consecutively with close proximity. Obviously, hijacking of the plane is always accompanied by sense of fear and insecurity but in certain cases it can be said that simultaneously it may strike terror also. In the present case the Chief of Army Staff was travelling in the plane along with his staff and it goes without saying that hijacking of such plane which in other words includes "abduction in air" of its inmates was under all probabilities to create a sense of terror generally. Ordinarily, if a Deputy Commissioner of a District or Commissioner of a Division is abducted by the criminals it would undoubtedly, the moment it is known to the public, create a state of horror and immense fear coupled with insecurity in general public. The abduction in the air of Chief of Army Staff would have certainly created a more horrible situation; this act on that analogy also would fall within the scope of terrorist act. Accused however, took advantage of the version given in the evidence that curtain was drawn when the Chief of Army Staff was in the cockpit and had a discourse with Captain. According to the accused, it was not known to other inmates of the plane if the plane had been hijacked. In the first instance, admittedly the situation was likely to strike terror that is why the curtain was drawn and- then it can also be said that a sense of insecurity had been created within the cockpit. Secondly, the meaning of term "likely" stretches the application of the act perpetrated to the time as soon as it is known to people or a section of people during or immediately after commission of the offence.

In the present case the accused cannot be said to have planned and committed this offence secretly nor was it likely to be unknown to the people as soon as the offence was completed. The curtain was drawn when the offence of abduction in air or say hijacking was still in continuation. Its horrible results were likely to strike the general public also as soon as it was known to them and this particular incident was such that it would have spread like wild fire in jungle no sooner than the last step of the offence was completed. On the whole there can be no doubt about the conclusion drawn that the act of "hijacking" or say "abduction in air" of Chief of Army Staff in the present case was likely to create terror coupled with fear and insecurity in people and as such

it was a terrorist act, had it been committed after commencement of the Anti-Terrorism Act (inclusive of the amendment in the Schedule).

Offence of committing terrorist act is also made out but as regards punishment for this offence section 7(ii) of the Act does not call for a separate sentence.

The terrorist act in the present case fell within contemplation of section 6(b) of the Anti-Terrorism Act as such it was liable to be punished as prescribed under the relevant law that is to say with the punishment prescribed for the offence punishable under section 402-B, P.P.C. Indeed in view of this legal position separate sentence, awarded by the trial Court for the offence of "terrorist act" could not approved.

Akhtar Awan v. State PLD 2000 Kar. 89 distinguished.

Black's Law Dictionary, VIth Edn.; Shahswar's case 2000 SCMR 1331; Jetharam v. Weram 1986 SCMR 1056; Nick Kajtazi v. State PLD 1977 Kar. 1049 and Mannan's case 1991 MLD 2462 ref.

(t) Criminal trial---

---- Admission by counsel---Effect---Plea taken by the counsel on behalf of the accused/convict was neither an admission of fact nor confession of his guilt---Admission made by a counsel would not bind the accused and if the plea is rejected the Court shall forget about the same while determining the innocence or otherwise of the accused on the basis of evidence.

(u) Appeal (criminal)---

----Jurisdiction---Appeal being continuation of the trial, all points including the point of jurisdiction can be re-opened.

Nawaz Sharif v. State 2000 MLD 946 ref.

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

----S. 402-B---Anti-Terrorism Act (XXVII of 1997, S.7(ii)---General Clauses Act (X of 1897), S.26---Hijacking---Act of terrorism---Contention of the accused was that the trial on two charges; one under S.402-B, P.P.C. and the other under S.7(ii), Anti-Terrorism Act, 1997 was not warranted in law--Validity---No bar existed to a trial or a conviction for the same act which was an offence under different enactments but there was a bar to punishment being awarded twice for the same offence---Principles.

The contention of accused in the present case was that the trial on two charges; one under section 402-B, P.P.C.; and the other under section 7(ii) of Act was not warranted in law.

Section 26 of the General Clauses Act provides a bar to double punishment for the same offence, although a person is liable to be prosecuted and punished for an act of omission constituting an offence acid falling under two or more enactments. In other words there is no bar to a trial or a conviction for the same act which is an offence under different enactments, but there is a bar to a punishment being awarded twice for the same offence. In such a case it would be quite in order to record the convictions separately and award concurrent sentences if they are of imprisonment, but in no case can an accused person be made to suffer any extra punishment by way .of duplication for the same offence

The contention that accused could not be tried for the offence on two different charges, therefore, could not be accepted as each enactment had defined the offence in its own terms and the prosecution on each charge was not barred.

Niaz Ali v. State PLD 1961 (W.P.) Lah. 269 ref.

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

----Ss. 402-A & 402-B---Hijacking---Sentence---Attempt of hijacking was foiled while the offence had not yet been completed in the manner same was desired by the accused---Sentence

of life imprisonment was sufficient to meet the ends of justice on this score---Fact that diversion of the plane was ordered at the spur of moment was no ground for awarding lesser sentence.

Jethazarn v. Weram 1986 SCMR 1056 ref.

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

----Ss. 402-A, 402-B & 402-C---Anti-Terrorism Act (XXVII of 1997), Ss.7(ii), 6(b) & 38---Constitution of Pakistan (1973), Art.12---Hijacking---Act of terrorism---Sentence --Quantum---Punishment of a person for an act or omission that was not punishable by law at the time of act or omission---Procedure---Sections 402-A, 402-B & 402-C, P.P.C. were added to the Schedule to Anti-Terrorism Act, 1997 on 2-12-1999 as such on 12-10-1999 when the incident, in the present case, took place said sections did not exist [n the Schedule to the Act, consequently, within the meaning of S.6(b), Anti-terrorism act, 1997 offences under Ss.402-A, 402-B & 402-C, P.P.C. were not scheduled offences on the day on which the incident took place but they became triable by virtue of S38, Anti-Terrorism Act, 1997--Effect---Provisions of S.38, Anti-Terrorism Act, 1997 provide in express terms that a person so tried shall be liable to punishment as authorised by law at the time the offence was committed---Punishment of the accused, in circumstances, would only be for the offence of hijacking as provided on the day on which the offence took place---Sentence to the accused therefore, could be awarded only for hijacking under S.402-B, P.P.C. and punishment for the offence of hijacking as provided under S.7(ii), Anti-Terrorism Act, 1997 could not be awarded.

With regard to sentence awarded for the offence of terrorist act under section 7(ii) of the Act view is based on the Constitutional provision of Article 12 which provides that no law shall authorize the punishment of a person for an act or omission that was not punishable by law at the time of act or omission. Sections 402-A, 402-B and 402-C of P.P.C. were added to Schedule of the A.T. Act, 1997 on 2-12-1999 as such on 12-10-1999 when the present incident took place these sections did not exist in the Schedule of Anti-Terrorism Act. Consequently, within the meaning of clause (b) of section 6 of the Act these offences were not scheduled offences on the day on which the incident in the present case took place but they became triable by virtue of section 38 of the Act, which provides in express terms that a person so tried shall be liable to punishment as authorized by law at the time the offence was committed. In this view of the matter, the punishment would only be for the offence of hijacking as provided on the day on which the offence took place. In a way the sentence can be awarded only for hijacking. Punishment for the offence of hijacking awarded by trial Court under section 7(ii) of the A.T. Act, therefore, was not approved and, as such, set aside.

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

----S. 402-B---Hijacking---Sentence of forfeiture of entire property of the offender---Validity---Word "property" alone has been used in S.402-B, P.P.C. which lays down the punishment for hijacking---Word 'property' in the said section is not preceded by the word "entire" nor it otherwise enjoins any express term that whole property of the offender be forfeited; intention of the law, therefore, was not to forfeit the entire property and the forfeiture, as such, shall not be stretched to the total property of the offender---High Court, modified the sentence of forfeiture of property and directed that the property of the offender be forfeited to the extent of Rs.50 crores only.

(z) Criminal Procedure Code (V of 1898)---

----S. 544-A---Penal Code (XLV of 1860), S.402-B---Hijacking---Order of payment of compensation to all the passengers. of the flight under S.544-A, Cr.P.C.---Validity---Term "anguish" used in 5.544-A, Cr.P.C. essentially refers, in literal sense, to extreme pain, distress of mind, severe misery or mental suffering but no evidence had been placed on record through the passengers on the point---Essential requirements of S.544-A, Cr.P.C. being lacking in -the case, such compensation to the passengers of the aircraft was t not justifiable---Principles.

The provision of section 544-A, Cr.P.C. shows that when hurt, injury or mental anguish or psychological damage to any person is caused the compensation shall be granted. However, the present case is not one where any death had occurred. In the present case even no hurt or injury was caused. There is also no evidence of psychological damage to the passengers. As far the

mental anguish is concerned none of the passengers was examined. Out of the passengers only there is the deposition of Secretary to Chief of Army Staff but he was also silent on this point. The term "anguish" used in section 544-A, Cr.P.C. essentially refers, in literal sense, to extreme pain, distress of mind, severe misery or mental suffering but no evidence has been placed on record through the passengers on this point. The essential requirements of the section are, therefore, lacking as such compensation in favour of the passengers of the aircraft was not Justifiable.

(aa) Criminal Procedure Code (V of 1898)---

----S. 417---Anti-Terrorism Act (XXVII of 1997), Ss.25(4) & 32---Penal Code (XLV of 1860), S.402-B---Appeal against acquittal---Principles--Golden rule of caution that imbues every statute dealing with adjudication on point of fact, to be given superseding effect and before reaching the conclusion on facts the High Court should and will always give weight and consideration to the matters enumerated---By and large the same principles are applicable to adjudication of a matter by a High Court in exercise of the powers under S.417, Cr.P.C. or S.25(4) read with S.32 of the Anti-Terrorism Act, 1997.

True that no limitation should be placed upon the power of High Court in deciding an acquittal appeal unless it be found expressly stated in the Code but simultaneously, the golden rule of caution that imbues every statute dealing with adjudication on point of fact, was to be given superseding effect, and before reaching its conclusion on facts the High Court should and will always give proper weight and consideration to such matters as---

(1)the views of the trial Judge as to the credibility of the witnesses;

(2)the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial;

(3) the right of the accused to the benefit of any doubt; and

(4) the slowness of an Appellate Court-in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses.

The High Court will, inter alia, pay due regard to the opinion formed by the acquitting Judge about the witnesses who gave evidence before him and the corresponding disadvantage from which the High Court itself suffers in not having them before it.

The State has under section 417 of the Code of Criminal Procedure the right to appeal from an order of acquittal both on facts and law. It is, therefore, not permissible to read into section 417 the words of limitation employed by the High Court. A practice has, however, grown that a Court of appeal will not interfere with an order of acquittal if the evidence is open to. the view formed by the trial Court. In other words the order of acquittal will not be set aside on grounds of appreciation of evidence alone. This view, however, is not correct. If the reasons given by the trial Judge or of speculative and artificial nature or the findings recorded by him are based on no evidence or misinterpretation of evidence or the conclusions drawn by him about the guilt or innocence of the accused person are perverse or foolish resulting in miscarriage of justice the Court of appeal will in such a case re-examine the evidence and draw its own conclusions from it.

Guiding 'principles are in the following terms:--

It is not necessary to state and comment upon the facts and circumstances of each of the afore-noted cases nor, it is necessary to make an attempt to deduce any one single rule from these judgments which would help to resolve the controversy involved in this case, without proper analysis of the material on record.

However, notwithstanding the diversity of facts and circumstances of each case, amongst others, some of the important and consistently followed principles can be clearly visualised from the cited and other caselaw on the question of setting asiae az acquittal by this Court. They are as follows:

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

(2) The acquittal will not carry the second presumption and will also thus loose the first one if on points having conclusive effect on the end result the Court below: (a) disregarded material evidence; (b) misread such `evidence; (c) received such evidence illegally.

(3) In either case the well-known principles of re-appraisement of evidence will have to be kept in view when examining the strength of the views expressed by the Court below. They will not be brushed aside lightly on mere assumptions keeping always in view that a departure from the normal principle must be necessitated by obligatory observances of some higher principle as noted above and for no other reason.

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

In exceptional circumstances showing overwhelming proof against any of the acquitted accused, disclosing glaring misreading and, indicating grave miscarriage of justice or showing perfunctory, wholly artificial or shocking conclusions which no reasonable person would perceive; the judgment can legitimately be interfered with.

By and large the same principles are applicable to adjudication of a matter by High Court in exercise of the powers under section 417, Cr.P.C. or section 25(4) read with section 32 of the Anti-Terrorism Act, 1997 in dealing with an acquittal appeal.

Zulfqar Ali Bhutto v. State PLD 1979 SC 53; State v. Bashir Ahmed PLD 1963 Kar. 242; Ghulam Muhammad v. Muhammad Sharif PLD 1969 SC 398; Kehar' Singh v. State 1989 PSC 533; Ch. Muhammad Yaqoob c. State 1992 SCMR 1983; State v. Zulfiqar Ali Bhutto PLD 1978 Lah. 523; Tribhuvan Nath v. State AIR 1973 SC 450; Asghar Hayat v. State 1985 PCr.LJ 2638; Chutto v. State PLD 1958 (W.P.) Kar. 18; Khurshid Ahmed ~. Kabool Ahmed PLD 1964 (W.P.) Kar. 356; Balmokand v. Emperor AIR 1915 Lah. 16; Sikandar v. State PLD 1963 SC 17, Muhammad Yasin v. State 1973 PCr.LJ 448; Empe;ior v. Manu Chik AIR 1938 Pat. 290; B.D. Cayford v. Masood Ahmed PLD 1964 Kar. 69; State v. Syed Mustafa Abbas 1986 PCr.LJ 1283; Yar Muhammad v. State 1992 SCMR 96; Niaz v. State PLD 1960 SC (Pak.) 387: Pramatha Nath Talukdar v. Saroj Ranjan AIR 1962 SC 876: Keltar Singh v. State AIR 1988 SC 1883; Muhammad Hussain v. State PLD 1995 Lah. 229; Abdul Khaliq v. State 1996 SCMR 1553; Muhammad Khan v. Maula B.akhsh 1998 SCMR 570; Muhammad Shafique Akhtar Shah 1997 SCMR 1964; Sheo Swarup v. King, Emperor AIR 1934 PC 227: Anwar v. Crown PLD 1955 FC 185; Ghulam Muhammad's case PL.D 1969 SC 398; Ghulam Sikandar v. Mamraz Khan PLD 1985 SC 11: State Muhammad Naseer 1993 SCMR 1822; Muhammad Asghar v. State PLD 1994 SC 301 and Allah Bux v. Ghulam Rasool 1999 SCMR 223 ref.

(bb) Criminal trial---

----Benefit of doubt---When there were two explanations possible, one favouring the accused is to be accepted and benefit of doubt is always to be extended to the accused.

Muhammad Khan v. Maula Bakhsh 1998 SCMR 570; Abdul Khaliq v. State 1996 SCMR 1553 and Muhammad Hussain v. State PLD 1995 Lah. 229 ref.

(cc) Criminal trial---

----Evidence---Appraisal of evidence ---Principle---Court has to sift chaff from grain and merely because of pertain contradictions, improvements or other factors adversely affecting credibility of a witness the testimonies shall not be rejected outright but shall be read as a whole and the evidence may be relied upon if independent corroboration through reliable evidence or circumstances is furnished beyond doubt.

Muhammad Yaqoob's case 1992 SCMR 1983 ref:

(dd) Criminal trial---

----Evidence---Appreciation of evidence---Principles---Mere fact of a prosecution witness being not inimical towards the accused does not make him a witness of truth, his evidence is to be tested under the normal rules of appreciation of evidence.

Muhammad Yasin's case 1993 PCr.LJ 448 ref.

(ee) Qanun-e-Shahadat (10 of 1984)---

----Art. 71---Oral evidence must be direct---If a witness deposed against an accused person on the strength of having heard so from two other persons (witnesses) that the said accused was responsible for a criminal act then if those two persons (witnesses) are not questioned whether they had, at all, met the first witness or even spoken to him, the evidence of such witness would be inadmissible.

Khurshid Ahmad's case PLD 1964 (W.P.) Kar. 356 and Chutto's case PLD 1958 (W.P.) Kar. 18 ref.

(ff) Criminal trial---

----Evidence---Appreciation of evidence---Exaggerated statement of witness---Assessment,--Principles---If there was exaggeration in the statement of witnesses and their veracity was also doubtful, then for safe administration of justice it would be proper to insist on independent corroborative evidence---View that if a witness was taken by police to a Magistrate for recording his statement under 5.164, Cr.P.C. or he was in custody, his evidence be looked with suspicion, was not approved as in fact it was the substance of the evidence given at the trial that was to be considered and his credibility was to be assessed after putting him to crossexamination and taking into consideration all the ambient circumstances of the case.

Yar Muhammad's case 1992 SCMR 96; PLD 1960 SC 387 and PLD 1962 SC 269 ref.

(gg) Criminal trial---

----Appreciation of evidence---Liability of an accused person is to be decided on the basis of entire evidence on record.

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

----S. 402-B, 109, 114, 120-A & 107, Secondly ---Qanun-e-Shahadat (10 of 1984), Art.23---Hijacking---Scope of conspiracy, nature of a conspiratorial agreement and the mode of proof of conspiracy---Principles.

Punishment for hijacking, as would be seen on a bare perusal of section 402, P.P.C., can be given to a person who, inter alia, conspires or abets the commission of hijacking. The word 'conspires' has not been defined in this section and ordinarily it could be taken in its literal sense since it relates to a criminal act. Reference can be made for aid and assistance to other provisions of law that provide essential material for interpretation of term 'conspiracy' or 'criminal conspiracy' such as section 120-A, P. P. C. and Article 23 of Qanun-e-Shahadat.

Likewise, the provisions of section 107, P.P.C. (secondly) are equally beneficial in understanding the incriminating act of abetment by conspiracy.

The law of criminal conspiracy is by and large founded on the concept of conspiracy as it had developed under the Common Law of England over the centuries.

A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect the very plot is an act in itself, and the act of each of the parties, promise against promise, actus contra actus, capable of being enforced, if lawful, punishable if for a criminal object or for the use of criminal means. And so far as proof goes, conspiracy, is generally 'matter of inference deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them'.

It is a mistake to say that conspiracy rests in intention only. It cannot exist without the consent of two or more persons, and their agreement is an act in advancement of the intention which each of them has conceived in his mind. The argument confounds the secret arrangement of the conspirators amongst themselves with the secret intention which each must have previously had in his own mind, and which did not issue in act until it displayed itself by mutual consultation and agreement.

Section 120-A, P.P.C. makes criminal conspiracy a substantive offence on the statute book like every other offence in the Penal Code. By its very definition criminal conspiracy consists in the mere agreement between two or more persons to do an illegal act, or an act which is not illegal by illegal means. However, a conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an illegal act, or to do act by illegal means. As long as the design rests in intention only it is not indictable. The proviso to this section, however, expressly lays down that no agreement, except an agreement to commit an offence, shall amount to a criminal conspiracy unless some overt act besides the agreement is done in pursuance thereof.

This in essence is the whole gist of the offence, of conspiracy and its characteristics. At the core, in a conspiracy, lies some sort of agreement, be it express, implied or implicit, or in any other form, between the parties thereto to do an illegal act or to do a legal act by unlawful, means.

It will be seen that the correct position appears to be that the term 'agreement', as used in relation to the offence of conspiracy is not to be construed in any technical sense, as understood in the law of contract; nor is there any requirement that it should be expressed in any formal manner, or words; all that is required is that the minds of the parties meet understandingly so as to bring - about an intelligent and deliberate agreement to do the acts and to commit the offence charged. There should, indeed, be a union of two or more minds in a thing done or to be done, or a mutual assent to do a thing. Agreement also connotes consent of two or more persons to contract a mutual obligation, and the word 'consent' tans a concurrence of wills, voluntarily yielding the will to the proposition of another; or acquiescence or compliance therewith. The agreement can be express or implied, or in part express and in part implied. It is also not essential that each conspirator should have knowledge of the details of the conspiracy, or of the exact part to be performed by the other conspirators in execution thereof; nor is it, in fact, necessary that the details be worked out in advance to bring a given act within the scope of the general plan. It is sufficient that there is a general plan to accomplish the result sought by such means as may from time to time-be found expedient. In other words, it is sufficient to constitute the offence, as far as the combination is concerned, if there is a meeting of the minds, a mutual implied understanding or tacit agreement, all the parties working together, with a single design, for the accomplishment of the common purpose.

The conspiracy arises and the offence is committed as soon as the agreement is made; and the offence continues to be committed so long as the combination persists, that is, until the conspiratorial agreement is terminated by completion of its performance or by abandonment or frustration, or due to some other cause.

Evidence should not be considered in isolation as so many bits of evidence, but the whole of it should be considered together and its cumulative effect must be weighed and given effect.

The facts in issue in a case under Article 23 of the Qanun-eShahadat are, whether there was an agreement for the alleged purpose and whether the accused was a party to it. Evidence in support of either may be given first. It may be that evidence is first allowed to go on the record about anything said, done or written by one of the accused in reference to their common intention during the continuance of the alleged conspiracy for use against the other accused of their participation in the offence, subject to the condition that there were reasonable grounds to believe about the very existence of the conspiracy and the partners in it. This course is thus provisionally admitting the evidence has a merit in it and is conducive to the expeditious disposal of the trial and, suited to the prevailing conditions where the delays in the administration of justice have become proverbial and more especially because, as iii the present case, the trial is not by jury.

Illustration to Article 23 of Qanun-e-Shahadat, 1984 is inconsistent with the Article and illustrations appended to sections of an Act of the Legislature are not to be taken as express provision of law or as binding on the Court.

In order, therefore, to decide in the present case whether any act done or statement made or thing written by an alleged co-conspirator is admissible in evidence against any of the accused persons, the test which the Court shall have to adopt is to see, in the first place, whether there is reasonable ground to believe that a conspiracy existed between him and any such person, and in the second place, whether such act, statement or writing had reference to their common intention.

The scope of Article 23 is: (1) There shall be a prima facie evidence affording a reasonable ground for a Court to believe that two or more persons are members of a conspiracy; (2) if the said condition is fulfilled, anything said, done or,written by any one of them in reference to their common intention will be evidence against the other; (3) anything said, done or written by him should have been said, done or written by him after the intention was formed by any one of them; (4) it would also. be relevant for the said purpose against another who entered the conspiracy whether it was said, done or written before he entered the conspiracy or after he left it; (5) it can only be used against a cu-conspirator and not in his favour.

Merely that a person was an associate of the persons who were party to criminal conspiracy, is not by itself sufficient for the foundation of the conviction of that person.

In such a case the Court shall satisfy itself if the two persons had met in the pursuit of the unlawful object or not.

Mere presence at a particular juncture would not form an element of conspiracy.

On the point of conspiracy or abetment by conspiracy and the pertinent rule/procedure appreciating the evidence the principles enunciated in Zulfiqar Ali Bhutto's case (PLD 1979 SC 53) will be followed extensively and the rule laid down in the other authorities would, of course, be given due weight if the exigencies called for as such.

Kehar Singh's case AIR 1998 SC 1883; Fazal Ellahi v. State 1985 PCr.LJ 268; Pramatha Nath Talukdar's case AIR 1962 SC 876; ZuIfiqar Ali Bhutto's case PLD 1979 SC 53; Corpus Juris Secundum, para. 373; Asadullah v. Muhammad Ali *PLD 1971 SC 541; Razia Begum v. Hijrayat Ali PLD 1976 SC 44; Balmokand's case AIR 1915 Lah. 16; Kehar Singh's case 1989 PSC 533 = AIR 1998 SC 1933; Mulcahy v. R. (1868) 3 HL 306 and Rakhal Chandra v. Emperor AIR 1930 Cal. 647 ref.

(ii) Criminal trial---

---- Appreciation of- evidence---Evidence not to be considered in isolation as so many bits of evidence, but the whole of it should be considered together and its cumulative effect must be weighed and given effect.

(jj) Criminal Procedure Code (V of 1898)---

----S. 417---Appeal against acquittal---Case being of lack of evidence, finding of acquittal of accused was maintained.

(kk) Criminal trial---

----Evidence---Corroboration---Principle---Prosecution witness had himself made improvements in his evidence and his testimony required corroboration, consequently a piece of evidence which was yet to be complemented by way of corroboration could not corroborate another testimony which itself required corroboration.

Yar Muhammad v. State. 1992 SCMR 96; Niaz v. State PLD 1960 SC 387 and Contempt against the Daily Frontier Post: in re PLD 1992 SC 69 ref.

(ll) Qanun-e-Shahadat (10 of 1984)---

----Art. 129(g)---Existence of certain facts---Presumption by the Court--Adverse inference when can be drawn---Adverse inference cannot be drawn against prosecution in every case in term of illustration (g), to Art. 129 of the Qanun-e-Shahadat, 1984 owing to non-production of certain evidence--Looking to facts and circumstances of each case an adverse inference can only be drawn if it is shown that a material witness or say, documentary evidence has been withheld owing to some oblique motive and for considerations not supported on the record.

Shah Ali v. The Crown PLD 1954 Sindh 136; Ghulam Muhammad v.' State 1976 PCr.LJ 258: Wazir v: State PLD 1960 (W.P.) Kar. 674 and Pir Bux v. State 1979 PCr.LJ 746 ref.

(mm) Qanun-e-Shahadat (10 of 1984)---

----Art. 140---Criminal Procedure Code (V of 1898), S.164--Contradiction---Concept---Witness. in his cross-examination had replied that he did not recall or he did not remember those facts and in view of such replies he had been confronted with his version given in his statement under S.164. Cr.P.C.---Such were not contradictions in broader sense within the meaning of Art.140, Qanun-e-Shahadat, 1984---Version that the witness did not remember a fact would not amount to denial or affirmance of a fact--Witness may omit to furnish details in his previous statement, or the previous statement may be absolutely devoid of details but the omission of details would not amount to contradiction---Witness in view of minor improvements could not be characterized as a dishonest witness merely for such versions although independent corroboration would ordinarily be required before relying on such evidence as the sole basis of conviction---Principles.

In the present case a portion of the deposition of witness lifted from his cross-examination had been quoted by the trial Court wherein the witness had replied that he did not recall or he did not remember those facts and in. view of such replies he had been confronted with his version given in his statement under section 164, Cr.P.C. These are not contradictions in broader sense within the meaning of Article 140 of Qanun-e-Shahadat. The version that the witness did not remember a fact would not amount to denial or affirmance of a fact, a witness may omit to furnish details in his previous statement, or the previous statement may be absolutely devoid of details but the omission of details would not amount to contradiction. Nevertheless, the versions which were not included in the previous statement recorded under section 164, Cr.P.C. may be viewed adversely if such improved statements were made with dishonesty and with a view to strengthening the case version of the witness reproduced by the trial Court mostly related to role of an accused with respect to typing of the notification of appointment. These were minor improvements and a witness could not be characterized as a, dishonest witness merely for these versions although independent corroboration would ordinarily be required before relying on such evidence as the sole basis of conviction.

If he fails to give a proper account and exorbitantly differs as regards the timings, those portions would certainly be excluded but his testimony cannot be brushed aside as a whole. Yet, because of deficiencies in his versions, his evidence alone will not serve as sole foundation of conviction and corroboration if it be required. The principle falsus in uno falsus in omnibus is not applicable in Pakistan and the testimony of a witness cannot be thrown overboard as a whole, but chaff is to be sifted from the grain. All the same, the slightest benefit of doubt should be resolved in favour of the accused.

PLD 1978 Lah. 523; Saeed Muhammad Shah v. State 1993 SCMR 550 and Zulfiqar Ali Bhutto's case PLD 1979 SC 53 ref.

(an) Criminal Procedure Code (V of 1898)---

----S. 417---Appeal against acquittal---Evidence in the case of accused was extremely weak to support the charge against him---Finding of acquittal, could not, at all be questioned in circumstances.

(oo) Criminal trial---

----Evidence---Corroboration---Solitary version of a witness is of no material significance in the absence of direct and independent corroboration.

Zulfiqar Ali Bhutto's case PLD 1979 SC 53 ref.

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

----Ss. 402-B, 109, 114, 120-A & 107, Secondly ---Qanun-e-Shahadat (10 of 1984), Art.23---Hijacking---Conspiracy---Proof---Proof of conspiracy needs evidence with regard to a particular design and then the Court has to look toward express, implied or tacit agreement between such participants and in that event even utterances would be relevant---Where the testimonies placed on record as against the accused persons had diverged in different dimensions, in such circumstances, the doubt obtaining from the. testimonies was to be resolved in favour of the accused persons.

Per Sarmad Jalal Osmany. J. [Minority view]--

Azizullah K. Sheikh, Khawaja Naveed Ahmad, Saadia Abbasi, Saleem Zia, Muhammad Nehal Hashmi, Arshad Khan Jadoon and Fahim Riaz Siddiquei for Appellant (in Sp1.Cr.A.T. Appeal No.43 of 2000).

Raja Qureshi, A.-G., Sindh, Barrister, Zahoorul Haq, Special Prosecutor, M.Ilyas Khan, Addl: Special Prosecutor for the State . (in Sp1.Cr.A.T. Appeal No.43 of 2000).

Raja Qureshi, A.-G. Sindh, Zahoorul Haq, Special Prosecutor, Ilyas Khan, Anjum Jawaid Khan and Abdul Latif Yousuf Zai, Addl. Prosecutors for the State (in Spl.Cr. A.T. Acq. Appeal No.46 of 2000).

Azizullah K. Shaikh, Aftab Farrukh, Khawaja Haris, Mir Muhammad Shaikh and Manzoor A. Malik for Respondents (in Spl.Cr. A.T. Acq. Appeal No.46 of 2000).

Shahid Khaqan Abbasi in person.

Raja Qureshi, A.-G., Sindh, Zahoorul Haq, Special Prosecutor, Muhammad .Ryas Khan and Anjum Jawed Khan, Addl. Prosecutor for the State (in Spl. Cr.A.T. Appeal No.50 of 2000).

Ejaz Hussain Batalvi for Respondent (in Spl. Cr.A.T. Appeal No.50 of 2000).