

IN THE HONOURABLE HIGH COURT OF SINDH AT KARACHI
(APPELLATE JURISDICTION)

Criminal Acquittal Appeal No. 80 of 2010

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PRESENTED

13-02-2010

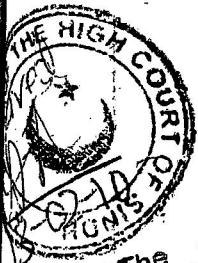
M. J. J. 13/2/2010
By: Registrar (C.A.)

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1. Naseema Lubano
Daughter of Humzu Lubano
Adult, Muslim,
permanent resident of Goth Habib Lubano,
Tehsil Ubaro, District Gothki,
Sindh
2. Humzu Lubano
Son of Gaman Khan
permanent resident of Goth Habib Lubano,
Tehsil Ubaro, District Gothki,
Sindh.....Appellants

Versus

1. The State
2. Shahzado
Son of Badho
Muslim, Adult,
permanent resident of Goth Habib Lubano,
Tehsil Ubaro, District Gothki,
Sindh
3. Abdul Jabbar
Son of Badho
Muslim, Adult,
permanent resident of Goth Habib Lubano,
Tehsil Ubaro, District Gothki,
Sindh
4. Khadim Hussain
Son of Loung Khan
Muslim, Adult,
Resident of Goth near Haq Chok Dharki
Tehsil Dharki, District Gothki,
Sindh
5. Ali Hasan
Son of Loung Khan
Muslim, Adult,
Resident of Goth near Haq Chok Dharki
Tehsil Dharki, District Gothki,
Sindh



Office Of The
Prosecutor General Sindh
Karachi

6. Shah Baig
Son of Loung Khan,
Muslim, Adult,
Resident of Goth near Haq Chok Dharki
Tehsil Dharki, District Gothki,
Sindhi

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7. Bashir Ahmed
Son of Jamal Din,
Muslim, Adult,
Resident of Goth near Haq Chok Dharki
Tehsil Dharki, District Gothki,
Sindhi

8. Anwar Hussain
Son of Loung Khan
Muslim, Adult,
Resident of Goth near Haq Chok Dharki
Tehsil Dharki, District Gothki,
Sindhi.....

Respondents

**CRIMINAL ACQUITTAL APPEAL UNDER SECTION 417(2-A), CRIMINAL
PROCEDURE CODE, 1898**

It is most respectfully and most humbly submitted that being partly aggrieved and partly dissatisfied by the Judgment dated: January 23rd, 2010 [herein after referred to as the 'Impugned Judgment'], passed by the District & Session Judge, Karachi (South), in Session Case No.472 of 2007 ['The State Versus Shahzado & Others'] under Sections 354-A, 452, 337-A(i), 376-B, 147, 148 & 149, P.P.C., 1860, to the extent that the Impugned Judgment acquits the Respondents No.2 to No.7 and to the extent that the Impugned Judgment acquits the Respondent No.8 from the offences under Sections 354-A, 452, 147, 148 & 149, P.P.C., 1860. Therefore, the Appellants above-named most respectfully and most humbly prefer this Appeal on the following, inter alia, facts and grounds:

A copy of the abovementioned Impugned Judgment dated: January 23rd, 2010, is annexed and marked as Annex 'A'.



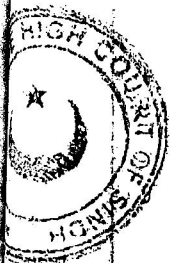
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FACTS

1. That the Appellant No.1 is the rape survivor/victim in the gang rape criminal case numbered as Session Case No.472 of 2007 and the Appellant No.2 is the father of the Appellant No.1 i.e. rape survivor/victim, and the complainant in Session Case No.472 of 2007. For the purpose of this Acquittal Appeal, it is important to state the following relevant facts.
2. That on 27-1-2007 in Ubaro, District Ghotki, Sindh, the Appellant No.1 ['rape survivor'] was abducted, beaten, raped and stripped naked in the public view by Abdul Sattar, Loung, Morezado, Munawar and the Respondents No.2 to No.8. It is submitted that a F.I.R. No.07/2007, Dated: 27-01-2007 [herein after referred to as the 'F.I.R.'], was initiated in relation to this incident of, inter alia, gang rape. It is further submitted that the Challan was submitted by the police officials confirming the aforementioned incident.

A copy of the abovementioned Challan is annexed and marked as Annex 'B'.

3. That in view of the grave threats from the accused persons and their supporters, the Appellants and their family was forced to shift from their village to the city of Karachi. In view of this forced shifting, the Appellant No.2 filed a Criminal Transfer Application No.56 of 2007 before the Honourable High Court of Sindh at Karachi. It is submitted that the Honourable High Court through Order dated: August 13th, 2008, disposed off the Criminal Transfer Application, by transferring the Session Case No.472 of 2007, to the District & Session Court (Karachi South).



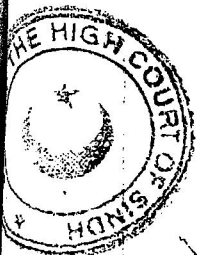
A copy of the abovementioned Order dated: 13-8-2007 in Criminal Transfer No.55 of 2007 is annexed and marked as Annex 'C'.

- 4. That as already stated above, the Criminal Transfer Application No.56 of 2007 filed by the Appellant No.2 had been disposed off. To the utter surprise and shock of the Appellants, a Learned Single Judge, Justice Muhammad Afzal Soomro, of this Honourable Court through Order dated: April 16th, 2008, re-transferred the case from the District & Session Court (Karachi South) to the Session Court, Dadu. It is submitted that in view of the applicability of the constitutional provisions of Article 209 to the abovementioned Order dated: April 16th, 2008, the Appellants filed a complaint before the Supreme Judicial Council against Justice Muhammad Afzal Soomro. It is important to note here that Justice Muhammad Afzal Soomro has since resigned from his judicial office.

A copy of the abovementioned Order dated: 16-4-2008 in Criminal Transfer No.55 of 2007 is annexed and marked as Annex 'D'.

- 5. That in view of the gross illegality of the abovementioned Order dated: April 16th, 2008, the Honourable High Court through Order dated: June 7th, 2008, recalled the abovementioned Order dated: April 16th, 2008, and re-transferred the case from IIIrd ADJ (District Dadu) to the District & Session Courts (Karachi South). It is submitted that the Session Case No.472 of 2007 was transferred to the District & Session Courts (Karachi).

A copy of the abovementioned Order dated: June 7th, 2008, in Criminal Transfer No.55 of 2007, is annexed and marked as Annex 'E'.



6. That it is submitted that three of the accused persons named in the abovementioned F.I.R. i.e. Abdul Sattar, Morezado and Munawar, absconded and have yet to be arrested. It may be noted that one of the accused person i.e. Loung, who was on bail, died during the pendency of this criminal case. It is further submitted that the Charge Dated: 28-3-2009 was framed against the remaining seven accused persons namely i.e. Shahzado, Abdul Jabbar, Anwar Hussain, Khadim Hussain, Ali Hasan, Shah Baig and Bashir Ahmed, under Sections 354-A, 452, 337-A(i), 376-B, 147, 148 & 149, P.P.C., 1860. 195

A copy of the Charge Dated: 28-3-2009 is annexed and marked as Annex 'F'.

7. That the prosecution examined seven witnesses i.e. Naseema [Ex. No.10], Humzu [Ex.No.11], Dr. Zaibunnisa [Ex.No.12], Asghar Ali [Ex.No.13], Jamaldin [Ex.No.14], Mehrab [Ex.No.17], Aftab Hussain [Ex.No.18] and Muhammad Islam-ul-Haque Arain [Ex.No.19]. It is submitted that the witness confirmed the allegations against the accused persons as stated in the abovementioned Charge.

A copy of the abovementioned evidence of the prosecution witnesses is annexed and marked as Annex 'G' to 'G-7'.

8. That all the seven accused persons recorded their statements under Section 342, Cr.P.C., 1898, before the trial court. It is submitted that no defence witnesses were called by the accused persons nor did any of the accused persons record their statements on oath.



A copy of the abovementioned statements under S.342, Cr.P.C., 1898, of the accused persons are annexed and marked as Annex 'H' to 'H-6' respectively.

9. That the learned trial court through Judgment Dated: January 23rd, 2010, in S.C. No.472 of 2007 passed the following order:

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“neither the offence of house trespass nor the outrage of the modesty of victim has been take place. I, therefore extending the benefit of doubt to accused Shahzado, Abdul Jabbar, Khadim Hussain, Ali Hasan, Shah Baig, and Bashir Ahmed and acquit them from the charge. The case of accused Anwar Hussain is different. The offence of rape by accused Anwar Hussain and absconding accused Abdul Sattar has been proved beyond reasonable doubt. I therefore, convict accused Anwar Hussain for an offence u/s 376(2) and sentence him to undergo R.I. for life. He also required to undergo R.I. for two years for an offence U/S.337 A(i) PPC and he is also liable to pay daman of Rs.50,000/- to victim as tazir” [Emphasis and underlying supplied].

A copy of the abovementioned Impugned Judgment dated: January 23rd, 2010, is already annexed and marked as Annex 'A'.

10. That it is most respectfully and most humbly submitted that the Appellants are aggrieved and partly dissatisfied by the Impugned Judgment to the extent that the Impugned Judgment acquits the Respondents No.2 to No.7 and to the extent that the Impugned Judgment acquits the Respondent No.8 from the offences under Sections 354-A, 452, 147, 148 & 149, P.P.C., 1860. Therefore, the Appellants challenges the abovementioned Impugned Judgment on the, inter alia, following grounds:



GROUNDS

- A. That it is respectfully submitted that the Impugned Judgment [i.e. to the extent challenged in this Appeal] is clearly contrary to the law and the facts of this case. It is further respectfully submitted that the Impugned Judgment [i.e.

the extent challenged in this Appeal] is clearly contrary to the settled law as laid down by the Honourable Supreme Court and the Honourable High Courts.

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B. That it is submitted that it is accepted in the Impugned Judgment that the Appellant No.1 has been subjected to gang rape and hurt and for this reason, the Respondent No.8 has been convicted for these offences. It is submitted that for this conviction, the learned trial court in the Impugned Judgment relies on the evidence of the Appellant No.1 i.e. rape survivor/victim [Ex.No.10], the doctor evidence [Ex.12], and other evidences. It is submitted that the Appellant No.1 i.e. rape survivor/victim, doctor evidence [Ex.12], and other witnesses have also given evidence against the Respondents No.2 to No.7 for the charged offences as well as have also given evidence against the Respondent No.8 for the offences under Sections 354-A, 452, 147, 148 & 149, P.P.C., 1860. In other words, there is evidence against the Respondents No.2 to No.7 for the charged offences as well as evidence against the Respondent No.8 for the offences under Sections 354-A, 452, 147, 148 & 149, P.P.C., 1860, which has not been considered or has been mis-read by the learned trial court. Therefore, the Impugned Judgment to the aforementioned extent is liable to be set aside.

C. That it is an admitted fact that the prosecution examined seven witnesses i.e. Naseema [Ex. No.10], Humzu [Ex.No.11], Dr. Zaibunnisa [Ex.No.12], Asghar Ali [Ex.No.13], Jamaldin [Ex.No.14], Mehrab [Ex.No.17], Aftab Hussain [Ex.No.18] and Muhammad Islam-ul-Haque Arain [Ex.No.19]. Among these witnesses, there are three eye witnesses to the various offences and there is also medical evidence. It is submitted that in the presence of the aforementioned evidence, the learned trial has acted erroneously and illegally by acquitting the Respondents No.2 to No.7 and acquitting the Respondent No.8 from the offences under Sections 354-A, 452, 147, 148 & 149, P.P.C.,

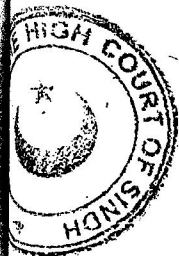


1860. Therefore, the Impugned Judgment to the aforementioned extent is liable to be set aside.

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D. That it is an admitted fact that the prosecution examined seven witnesses i.e. Naseema [Ex. No.10], Humzu [Ex.No.11], Dr. Zaibunnisa [Ex.No.12], Asghar Ali [Ex.No.13], Jamaldin [Ex.No.14], Mehrab [Ex.No.17], Aftab Hussain [Ex.No.18] and Muhammad Islam-ul-Haque Arain [Ex.No.19]. Among these witnesses, there are three eye witnesses to the various offences and there is also medical evidence. It is submitted that for the purposes of acquittal, the learned trial court has erroneously relied on the fact that one of the eyewitnesses i.e. Naziran [mother of the Appellant No.1], was not a witness in this case. It is further submitted that it is settled law that quality, and not quantity, of evidence is to be considered. It is an admitted fact that Asghar Ali [Ex.No.13] was also a witness to the incident of trespass and abduction and, therefore, the non-examination of Naziran [mother of the Appellant No.1] was not a flaw in the trial. Therefore, in the presence of the aforementioned evidence, the learned trial has acted, erroneously and illegally by acquitting the Respondents No.2 to No.7 and acquitting the Respondent No.8 from the offences under Sections 452, 147, 148 & 149, P.P.C., 1860. Therefore, the Impugned Judgment to the aforementioned extent is liable to be set aside.

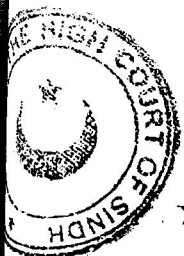
E. That it is an admitted fact that the prosecution examined seven witnesses i.e. Naseema [Ex. No.10], Humzu [Ex.No.11], Dr. Zaibunnisa [Ex.No.12], Asghar Ali [Ex.No.13], Jamaldin [Ex.No.14], Mehrab [Ex.No.17], Aftab Hussain [Ex.No.18] and Muhammad Islam-ul-Haque Arain [Ex.No.19]. Among these witnesses, there are three eye witnesses to the various offences and there is also medical evidence. It is submitted that for the purposes of acquittal, the learned trial court has erroneously relied on the fact that although there are houses between the house of the Appellants and Abdul Sattar, the inmates in



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these houses have not come forward. It is further submitted that it is settled law that quality, and not quantity, of evidence is to be considered. It is an admitted fact that Asghar Ali [Ex.No.13] was also a witness to the incident of trespass and abduction and, therefore, the quantity of witnesses is irrelevant. Therefore, in the presence of the aforementioned evidence, the learned trial has acted erroneously and illegally by acquitting the Respondents No.2 to No.7 and acquitting the Respondent No.8 from the offences under Sections 452, 147, 148 & 149, P.P.C., 1860. Therefore, the Impugned Judgment to the aforementioned extent is liable to be set aside.

F. That it is an admitted fact that the prosecution examined seven witnesses i.e. Naseema [Ex. No.10], Humzu [Ex.No.11], Dr. Zaibunnisa [Ex.No.12], Asghar Ali [Ex.No.13], Jamaldin [Ex.No.14], Mehrab [Ex.No.17], Aftab Hussain [Ex.No.18] and Muhammad Islam-ul-Haque Arain [Ex.No.19]. Among these witnesses, there are three eye witnesses to the various offences and there is also medical evidence. It is submitted that for the purposes of acquittal, the learned trial court has erroneously observed that there is no impartial witnesses. It is further submitted that it is settled law that mere fact that a witness is related to the victim doesnot make him an interested or bias/non-partial witness. The witnesses bias or partiality has to be proved, which has not been done during the trial by the defence nor have any such observation of partiality been observed in the Impugned Judgment. Therefore, in the presence of the aforementioned evidence, the learned trial has acted erroneously and illegally by acquitting the Respondents No.2 to No.7 and acquitting the Respondent No.8 from the offences under Sections 354-A, 452, 147, 148 & 149, P.P.C., 1860. Therefore, the Impugned Judgment to the aforementioned extent is liable to be set aside.



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G. That it is an admitted fact that the prosecution examined seven witnesses i.e. Naseema [Ex. No.10], Humzu [Ex.No.11], Dr. Zaibunnisa [Ex.No.12], Asghar Ali [Ex.No.13], Jamaldin [Ex.No.14], Mehrab [Ex.No.17], Aftab Hussain [Ex.No.18] and Muhammad Islam-ul-Haque Arain [Ex.No.19]. Among these witnesses, there are three eye witnesses to the various offences and there is also medical evidence. It is submitted that for the purposes of acquittal, the learned trial court has erroneously relied on the alleged fact that no weapons were recovered or footprints were noticed. It is further submitted that it is settled law that the sole evidence of the rape survivor/victim is enough for the conviction of the rapists and their abettors. Even otherwise, any defect in the investigation cannot prejudice the case of the rape survivor. The learned trial court has failed to give any findings on the issue of abetting the gang rape by the Respondents No.2 to No.7. Nor has the trial court explained as to how the rape survivor/victim was raped by the Respondent No.8 and Abdul Sattar at Sattar's house, because she could only have been raped at their house if there was trespass and abduction first by the Respondents No.2 to No.8 and the absconding accused. Therefore, in the presence of the aforementioned evidence, the learned trial has acted erroneously and illegally by acquitting the Respondents No.2 to No.7 and acquitting the Respondent No.8 from the offences under Sections 452, 147, 148 & 149, P.P.C., 1860. Therefore, the Impugned Judgment to the aforementioned extent is liable to be set aside.

H. That it is an admitted fact that the prosecution examined seven witnesses i.e. Naseema [Ex. No.10], Humzu [Ex.No.11], Dr. Zaibunnisa [Ex.No.12], Asghar Ali [Ex.No.13], Jamaldin [Ex.No.14], Mehrab [Ex.No.17], Aftab Hussain [Ex.No.18] and Muhammad Islam-ul-Haque Arain [Ex.No.19]. Among these witnesses, there are three eye witnesses to the various offences and there is also medical evidence. It is submitted that for the purposes of acquittal, the learned trial court has erroneously relied on the alleged fact that there was no



medical legal opinion of the hurt caused to the other family members. It is further submitted that this is an irrelevant issue because the hurt to the family members was never the issue in this criminal case. Therefore, in the presence of the aforementioned evidence, the learned trial has acted erroneously and illegally by acquitting the Respondents No.2 to No.7 and acquitting the Respondent No.8 from the offences under Sections 452, 147, 148 & 149, P.P.C., 1860. Therefore, the Impugned Judgment to the aforementioned extent is liable to be set aside.

I. That it is an admitted fact that the prosecution examined seven witnesses i.e. Naseema [Ex. No.10], Humzu [Ex.No.11], Dr. Zaibunnisa [Ex.No.12], Asghar Ali [Ex.No.13], Jamaldin [Ex.No.14], Mehrab [Ex.No.17], Aftab Hussain [Ex.No.18] and Muhammad Islam-ul-Haque Arain [Ex.No.19]. Among these witnesses, there are three eye witnesses to the various offences and there is also medical evidence. It is submitted that for the purposes of acquittal, the learned trial court has erroneously relied on the alleged fact that there were so-called contradictions and so-called improvements in the evidence of the witnesses. It is further submitted that it is settled law that the sole evidence of the rape survivor/victim is enough for the conviction of the rapists and their abettors and as a consequence, so-called minor contradictions and so-called improvements are irrelevant. Therefore, in the presence of the aforementioned evidence, the learned trial has acted erroneously and illegally by acquitting the Respondents No.2 to No.7 and acquitting the Respondent No.8 from the offences under Sections 354-A, 452, 147, 148 & 149, P.P.C., 1860. Therefore, the Impugned Judgment to the aforementioned extent is liable to be set aside.



J. That it is an admitted fact that the prosecution examined seven witnesses i.e. Naseema [Ex. No.10], Humzu [Ex.No.11], Dr. Zaibunnisa [Ex.No.12], Asghar Ali [Ex.No.13], Jamaldin [Ex.No.14], Mehrab [Ex.No.17], Aftab Hussain

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[Ex.No.18] and Muhammad Islam-ul-Haque Arain [Ex.No.19]. Among these witnesses, there are three eye witnesses to the offence under Section 354-A, P.P.C., 1860. It is submitted that it is admitted in the Impugned Judgment that the clothes of the rape survivor/victim were striped and she was gang raped. Three witnesses [i.e. Naseema (Ex. No.10), Asghar Ali (Ex.No.13), Jamaldin (Ex.No.14)] have testified that they saw the Respondents No.2 to No.8 and others playing with the naked body of the Appellant No.1 and as a consequence, of this actions, the naked body of the rape survivor/victim was exposed in the public view. It is further submitted that it is settled law that it is irrelevant whether some outsider had actually seen her in the naked condition or not but in this case atleast there are three persons who saw her in the naked condition in the public view. It is also settled law that if the public had access to the place, it is irrelevant whether the incident took place on a private land. It is also insignificant that the clothes were not recovered because any defect in the investigation cannot prejudice the case of the rape survivor. Therefore, in the presence of the aforementioned evidence, the learned trial has acted erroneously and illegally by acquitting the Respondents No.2 to No.8 from the offences under Section 354-A, P.P.C., 1860. Therefore, the Impugned Judgment to the aforementioned extent is liable to be set aside.

- K. That it is an admitted fact that the prosecution examined seven witnesses i.e. Naseema [Ex. No.10]; Humzu [Ex.No.11], Dr. Zaibunnisa [Ex.No.12], Asghar Ali [Ex.No.13], Jamaldin [Ex.No.14], Mehrab [Ex.No.17], Aftab Hussain [Ex.No.18] and Muhammad Islam-ul-Haque Arain [Ex.No.19]. Among these witnesses, there are three eye witnesses to the various offences and there is also medical evidence. It is submitted that for the purposes of acquittal, the learned trial court has erroneously relied on a speculative theory that 'in the fit of rage and revenge, after commission of offence by one person, the whole family is roped in the offence'. It is further submitted that no evidence has



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been given for such speculation. Therefore, in the presence of the
aforementioned evidence, the learned trial has acted erroneously and illegally
by acquitting the Respondents No.2 to No.7 and acquitting the Respondent
No.8 from the offences under Sections 354-A, 452, 147, 148 & 149, P.P.C.,
1860. Therefore, the Impugned Judgment to the aforementioned extent is
liable to be set aside.

L. That it is an admitted fact that the prosecution examined seven witnesses i.e.
Naseema [Ex. No.10], Humzu [Ex.No.11], Dr. Zaibunnisa [Ex.No.12], Asghar
Ali [Ex.No.13], Jamaldin [Ex.No.14], Mehrab [Ex.No.17], Aftab Hussain
[Ex.No.18] and Muhammad Islam-ul-Haque Arain [Ex.No.19]. Among these
witnesses, there are three eye witnesses to the various offences and there is
also medical evidence. Therefore, in the presence of the aforementioned
evidence, the learned trial has acted erroneously and illegally by acquitting the
Respondents No.2 to No.7 and acquitting the Respondent No.8 from the
offences under Sections 354-A, 452, 147, 148 & 149, P.P.C., 1860, on alleged
benefit of doubt, whereas the case against them has been proved beyond
reasonable doubt. Therefore, the Impugned Judgment to the aforementioned
extent is liable to be set aside.



M. That it is most respectfully and most humbly submitted that the Appellants
seeks the permission of this Honourable Court to raise further facts and
grounds at the time of the hearing of this Appeal.

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PRAYER

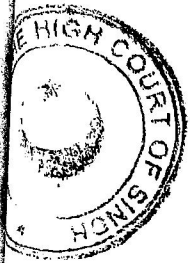
It is most respectfully and most humbly prayed that in view of the abovementioned, inter alia, facts and grounds, this Honourable Court may be pleased to graciously pass orders in the following terms:

- (i) Allow this Appeal by setting aside the Impugned Judgment dated: January 23rd, 2010 (Annex 'A'), passed in Session Case No.472 of 2007, only to the extent that the Impugned Judgment acquits the Respondents No.2 to No.7, and consequently, this Honourable Court may convict the Respondents No.2 to No.7.

- (ii) Allow this Appeal by setting aside the Impugned Judgment dated: January 23rd, 2010 (Annex 'A'), passed in Session Case No.472 of 2007, only to the extent that the Impugned Judgment acquits the Respondent No.8 from the offences under Sections 354-A, 452, 147, 148 & 149, P.P.C., 1860, and consequently, this Honourable Court may convict the Respondent No.8 for these offences.

- (iii) Pass any other Order, or further Order, as may be just and proper in the facts of this Appeal and case.

- (iv) Graciously grant the costs of this Appeal.



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APELLANT NO.1



APELLANT NO.2

A handwritten signature in black ink, appearing to be 'A. J. Khan' or similar, written in a cursive style.

ADVOCATE FOR THE APPELLANTS

Karachi:

Dated: 13-2-2010

